

such discharge when a sentence to confinement is in excess of a stated period of time.¹⁵⁸

In *United States v. Brasher* the Court of Military Appeals held the present Manual provision operated as an "absolute limitation" against any sentence to confinement in excess of 6 months in the absence of a punitive discharge and that any such sentence was "illegal."¹⁵⁹ Six years later the Court decided *United States v. Varnadore*, expressly overruling the *Brasher* decision.¹⁶⁰ The Court held that the law officer erred to the prejudice of the accused when, in response to a specific question by the president of the court on whether the court could adjudge a sentence to confinement for 1 year without also adjudging a punitive discharge, he read paragraph 127b of the Manual. Judge Quinn, speaking for the majority, reasoned that the Code contained no proscription of sentences to prolonged confinement which did not also contain a punitive discharge and that this Manual provision could not be rationalized as an authorized presidential limitation since it was, rather, an extension. That is, it did not limit the court from imposing a punishment permitted by the Code, but rather it required the court to add the punishment of punitive discharge when the Code would have allowed it to impose only the punishment of confinement. Thus it constituted a policy directive of the Executive which was calculated to influence the court members in their fixing of a punishment

less severe than the maximum one the Code permitted them to assess. Therefore, the Manual provision was without sanction of law and must fall. This reasoning was bolstered by an argument from statutory construction. Judge Quinn reasoned that Congress must have contemplated sentences to confinement in excess of 1 year without a punitive discharge, else it would not have provided for review by a board of review in cases involving punitive discharge "or" confinement for 1 year or more.¹⁶¹ It would have been superfluous to provide for review of sentences to confinement for 1 year or more since they would necessarily be coupled with a punitive discharge and be reviewed under the provision for review of all punitive discharges.

Judge Latimer responded to this reasoning through his dissenting opinion in *United States v. Holt*.¹⁶² He reasoned that the paragraph 127b provision was a true limitation upon the court's sentencing power since it directed a court which had decided not to impose a punitive discharge not to impose confinement beyond 6 months either. He refuted the argument from statutory construction by pointing out that some civilians, prisoners of war, and previously discharged military prisoners are subject to the Code and entitled to the appellate safeguards it provides. Since these persons cannot be sentenced to punitive discharge but may be sentenced to confinement in excess of 1 year, they are entitled to have their cases reviewed by a board of

review. In the *Holt* case, prejudicial error was found as a result of the court's exposure to the erroneous Manual provision even though it adjudged a dishonorable discharge, rather than merely a bad-conduct discharge, in addition to confinement for 5 years. This holding on these facts strongly suggested that the Court was deciding that the reading of the Manual pro-

¹⁵⁸ MCM, 1917, para. 349 (requiring dishonorable discharge if confinement exceeded 6 months); MCM, 1928, para. 104b (confinement at hard labor not to exceed six months unless dishonorable discharge also adjudged); MCM, 1940, para. 117b (requiring either dishonorable discharge or bad-conduct discharge if confinement exceeded 12 months); MCM, 1951, para. 127b (the present provision).
¹⁵⁹ 2 USMA 50, 2 CMR 50 (1952). The precise issue was whether a board of review could mitigate the portion of the sentence extending to bad-conduct discharge while affirming that portion extending to confinement for 10 months. Judge Latimer dissented stating that the limitation of para. 127b was binding on the court-martial but not on the board of review.

¹⁶⁰ *United States v. Varnadore*, 9 USMA 471, 20 CMR 251 (1958).

¹⁶¹ See UCMJ, Art. 86(b).

¹⁶² 9 USMA 478, 20 CMR 256, 257 (1958).

vision constituted *general* prejudice. A rash of irreconcilable board of review opinions appeared attempting to interpret this aspect of the *Varnadore-Holt* holdings.¹⁵⁵ In *United States v. Horowitz*,¹⁵⁶ the Court held that an instruction prohibiting the imposition of more than 6 months' confinement without a punitive discharge constituted reversible error only if *specific* prejudice is found.

The *Varnadore-Holt* decision jeopardized other provisions of the Manual. Paragraph 127b provides that forfeitures in excess of two-thirds pay per month for 6 months may not be adjudged unless a punitive discharge is also adjudged. After the *Varnadore* decision, boards of review split on the question whether *Varnadore* applied to these limitations on forfeitures.¹⁶⁰

The Court has stated, in *United States v. Jobe*,¹⁶¹ that the *Varnadore* holding did apply to invalidate the provision of paragraph 127b requiring a punitive discharge if forfeitures exceed two-thirds pay per month for 6 months. An instruction in the language of the Manual provision was erroneous. However, the error was not prejudicial since there was no rea-

sonable possibility that the court-martial would not have given punitive discharge in addition to the total forfeitures, even had it not been told it must.

In *Jobe*, Judge Quinn stated in dictum that while it was error to instruct the court that it *must* adjudge a punitive discharge if it wished to adjudge total forfeitures; nevertheless, a sentence to total forfeitures for an extended time in the absence of a punitive discharge might be considered cruel and unusual punishment in violation of Article 55 of the Code. Thus, "some cautioning instruction on the imposition of total forfeitures might be legally desirable."¹⁶² The importance of the *Jobe* case would seem to be that error can be created by reading the words of paragraph 127b and perhaps also by saying nothing with reference to imposition of total forfeitures.¹⁶³

Paragraph 126d provides that no officer may be sentenced to confinement unless he is also dismissed. The court has stated that the *Varnadore-Holt* reasoning also applies to invalidate this provision.¹⁶⁴ Paragraph 126 (2) prevents adjudication of a sentence to life imprisonment unless dishonorable discharge and total forfeitures are also adjudged. In *United States v. Jones*,¹⁶⁵ the defense attempted to bring this manual provision under the *Varnadore* decision. The Court said, "Even if we were to determine that *Holt* and *Varnadore* compel a finding of error [when this instruction is given], . . . a question we need not decide — we conclude there was no prejudice to the accused."¹⁶⁶

The *Varnadore* rule extends to invalidate the Manual provision requiring dismissal of an officer sentenced to confinement, and may extend to the provision requiring dishonorable discharge of an accused sentenced to life imprisonment. It is at least arguable that it might be extended to invalidate

¹⁵⁵ Compare CM 899682, Miller and Kline (7 Aug 58) CM 899643, Insani (16 Aug 58), and NCM 5800996, Sedberry (5 Aug 58) (holding general prejudice) with NCM 5800620, Hobbs (28 Aug 58) and NCM 4408025, All (16 Sep 58) (requiring but not finding specific prejudice).

¹⁵⁶ 10 USCMA 420, 27 CMR 194 (1959). It is interesting to note that the sentence in *Horowitz* was identical to that in *Holt*. The significant difference would seem to be that the Court in *Horowitz* made no express inquiry as to whether *Varnadore* and *Holt* had done. Perhaps the Court of Military Appeals was using the doctrine of "general prejudice" as it was originally intended by Judge Brozman. See *United States v. Allbee*, 5 USCMA 448, 19 CMR 72 (1955).

¹⁵⁷ Compare NCM 58002200, Thomas, 25 Nov 1958 (holding that *Varnadore-Holt* does not apply) with NCM 4260022, Cound, 21 Jan 1959 (holding that *Varnadore-Holt* applies and permits a sentence to total forfeitures for 9 months although no punitive discharge is adjudged).

¹⁵⁸ 10 USCMA 276, 27 CMR 350 (1959).

¹⁵⁹ 10 USCMA 276, 27 CMR 350, 353.

¹⁶⁰ See CM 408385, Podmajerski, 29 CMR 538 (1959).

¹⁶¹ *United States v. Smith*, 10 USCMA 152, 27 CMR 227 (1959). But specific prejudices must be shown for a reversal. Here the erroneous instruction was given, and both confinement and dismissal were adjudged, but the court concluded that there was not a "reasonable possibility" that the court was influenced to impose dismissal when it otherwise would not have.

¹⁶² 10 USCMA 122, 27 CMR 196 (1959).

¹⁶³ 10 USCMA 122, 130, 27 CMR 196, 204.

the provision that a fine may be adjudged only when a punitive discharge also has been adjudged, or that the Table of Equivalent Punishments may not be used if a punitive discharge has been adjudged or that forfeitures may be imposed as an additional punishment only if confinement also is adjudged for a similar period.

- (5) *Hard labor without confinement and restriction to limits.* These punishments are the least severe of the punishments involving deprivation of personal liberty, and are similar in that both may be imposed while the sentenced accused performs his normal military duties. The distinction between them is that the man sentenced to hard labor without confinement is restricted to specified areas during his off-duty hours, to engage in work details there, while the man sentenced to restriction is merely required to be in the area to which he was re-

stricted. The Code imposes no limits upon these punishments beyond the jurisdictional limit upon the summary court-martial—45 days in the case of restriction.¹⁶⁷ The Manual limits all courts from imposing hard labor without confinement beyond 8 months¹⁶⁸ and restriction beyond 2 months.¹⁶⁹ Since confinement at hard labor and restriction are both forms of deprivation of liberty, the Manual provides that there must be an apportionment when both are adjudged in a single sentence.¹⁷⁰ The time period representing the difference between the period of confinement actually adjudged and the period which legally could have been adjudged may be converted into a period of restriction, and adjudged in addition to the confinement.¹⁷¹ Since this rule does not apply to hard labor without confinement and restriction, a sentence may legally include both of these forms of punishment in a maximum amount. They must, however, be served concurrently rather than consecutively.¹⁷²

An Army Board of Review has held that hard labor without confinement for 6 months is a legal sentence.¹⁷³ The Board said the Manual provision limiting the imposition of hard labor without confinement to 3 months was invalid under the rationale of the *Jobe* case.¹⁷⁴ Although not expressly stated in the opinion the Board apparently regarded the punishment as composed of two elements, (1) "hard labor" and (2) "confinement." Thus, if the court-martial desired to impose hard labor in excess of 3 months, it must also adjudge confinement.

- (6) *Fines, forfeitures and detention of pay and allowances.* A fine signifies a pecuniary liability to the United States,¹⁷⁵ and is usually adjudged to prevent unjust enrichment.¹⁷⁶ In the case of enlisted persons it may be adjudged only in lieu of forfeitures and not in addition to them.¹⁷⁷ In an off-

¹⁶⁷ UCMJ, Art. 20.

¹⁶⁸ MCM, 1951, para. 126b. In a case where the law officer's instructions failed to mention the possibility of imposing as a punishment hard labor without confinement but the sentence included "three years of hard labor," the convening authority was correct in adding the word "confinement" to the sentence. The Court noted the 8-month limit imposed by para. 126b, and assumed that the court members could not have intended to impose hard labor for 8 years. *United States v. Hollis*, 11 USOMA 285, 29 OMR 51 (1960).

¹⁶⁹ Para. 126g, MCM, 1951.

¹⁷⁰ Para. 16b, 127c, MCM, 1951.

¹⁷¹ The conversion is accomplished through use of the Table of Equivalent Punishments, para. 127c, MCM, 1951. The ratio is 2 days of restriction to 1 day of confinement.

¹⁷² NCM 347, Brooks, 17 OMR 487 (1954).

¹⁷³ *CM Burke*, 25 October 1962 (unpublished).

¹⁷⁴ *United States v. Jobe*, n. 161, *supra*.

¹⁷⁵ Para. 126h(1), MCM, 1951.

¹⁷⁶ CM 349204, Galvan, 9 OMR 186 (1958). The case holds that a fine may be imposed upon an officer although there is no unjust enrichment and implies that the same result may occur in the case of enlisted persons; cf. *United States v. Cuen*, 9 USOMA 382, 26 OMR 112 (1958).

¹⁷⁷ *United States v. Hounshell*, 7 USOMA 3, 21 OMR 129 (1956). MCM, 1951, para. 127c, sec. B, provides that: "A fine may be adjudged against any enlisted person, in lieu of forfeitures, provided a punitive discharge is also adjudged." (Emphasis supplied.) An instruction incorporating this Manual provision has been held erroneous under the *Varnadores-Holt* rationale. *United States v. Landry*, 14 USOMA (No. 17, 495; 22 May 1964). The Court of Military Appeals has held that forfeiture of pay is not a different form of punishment from a fine. Rather, forfeiture is a less severe degree of the same form of punishment. Thus a reviewing authority may mitigate a sentence to a fine to a sentence to forfeiture of pay. Therefore, that portion of para. 88c of MCM, 1951, which prohibits changing a fine to a forfeiture, is invalid. *United States v. Cuen*, 9 USOMA 382, 26 OMR 112 (1958).

cer case, both fine and forfeitures may be included in the sentence.¹⁷⁹

Detention of pay is similar to forfeiture with the exception that the pay detained is returned to the accused when he is separated from the service. Generally, the same rules apply as with respect to forfeitures, except that only the pay of enlisted persons may be detained.¹⁷⁹

Computation of maximum partial forfeitures of the pay of enlisted persons can be accomplished through use of the Table of Maximum Forfeitures. Prior to the decision in the *Jobe* case,¹⁸⁰ the maximum permissible forfeitures was two-thirds of the monthly basic pay unless a punitive discharge were adjudged. If a punitive discharge were adjudged, then forfeitures in excess of two-thirds per month or in excess of 6 months, or both, could be imposed. Now these greater forfeitures may be adjudged whether or not a punitive discharge is adjudged so long as the Table of Maximum Punishments authorizes them, although they

might be construed as cruel and unusual punishment.¹⁸¹

Sentences to forfeitures should be stated with preciseness, both in duration and in dollars and cents per month.¹⁸² If they are not, they will be construed in the manner most favorable to the accused.¹⁸³

c. The Table of Maximum Punishments.

(1) *General.* The President has prescribed specific limitations as to the maximum punishment which may be adjudged against an accused convicted of a particular offense under the Code. These limitations as to the amounts of confinements and forfeitures, and the type of discharge which may be imposed for particular offenses are set forth in the Manual's Table of Maximum Punishments. The Table, by its terms, applies to enlisted personnel rather than officers,¹⁸⁴ although paragraph 126(d) of the Manual directs that a sentence to confinement for an officer shall not exceed the maximum stated in the Table. The primary significance of this distinction in the scope of the Table of Maximum Punishments is that an officer may be dismissed upon conviction by a general court-martial of any offense rather than only those for which the Table authorizes a dishonorable discharge. Also, forfeitures adjudged against an officer may exceed the Table's limitations.

While the punishments listed in the Table of Maximum Punishments may not be exceeded they may be varied through use of the Table of Equivalent Punishments. The purpose of the Table of Equivalent Punishments is to provide a procedure by which minor offenses may be returned to full-duty status while also serving their sentences.¹⁸⁵ The Table may not be used to increase the amount of a particular type of punishment beyond the maximum permitted by the Manual limitations relating to jurisdiction and types of punishment. The Table of Equi-

¹⁷⁹ United States v. DeAngellis, 8 USCMA 298, 12 CMR 54 (1953).

¹⁸⁰ See MCM, 1951, para. 126h, 127b. Further pay may not be detained in an amount greater than two-thirds pay per month for 3 months, rather than 6 months as in the case of forfeitures.

¹⁸¹ United States v. Jobe, *supra* note 181.

¹⁸² *Ibid.*

¹⁸³ MCM, 1951, para. 126h. Forfeitures stated in fractions and not in dollars and cents is harmless error. United States v. Gilgallon, 10 USCMA 283, 29 CMR 476 (1960). The convening authority or the board of review may compute the amount and by approving the amount, remove any "imaginary uncertainty." United States v. Gilgallon, *supra*.

¹⁸⁴ United States v. Johnson, 13 USCMA 127, 32 CMR 127 (1952). A sentence which included "\$70.00 for forfeiture of pay for six months" was construed as a lump sum forfeiture of \$70 to be collected over 6 months even though \$70 constituted exactly two-thirds of the accused's monthly base pay. *United States v. Johnson*, 13 USCMA 127, 32 CMR 127 (1952). The Board of Review found no error in the convening authority's action on the court-martial sentence, but reduced the sentence to confinement at hard labor for 6 months and forfeitures of forty-three dollars (\$43.00) of his pay per month for twelve (12) months. The Board found no error in the convening authority's action on the court-martial sentence, but reduced the sentence to confinement at hard labor for 6 months and forfeitures of \$43 pay per month for 6 months. *United States v. Johnson*, 13 USCMA 127, 32 CMR 127 (1952).

¹⁸⁵ MCM, 1951, para. 127c.

¹⁸⁶ MCM, 1951, para. 127c, p. 216.

¹⁸⁷ Legal and Legislative Basis for MCM, 1951, p. 191.

¹⁸⁸ MCM, 1951, para. 127c. "In making substitutes the court must observe the limitations on its jurisdiction and on particular types of punishment." [Emphasis supplied.]

valent Punishments may not be applied to officers or to enlisted accused sentenced to punitive discharges. The latter limitation would appear to be based upon the purpose of the Table generally. That is, the purpose of providing alternative punishment is to restore the accused to a useful duty status earlier than would otherwise be done.

The limitations of the Table of Maximum Punishments are controlling except when the President suspends one or another of them, which has been done in time of war and national emergency. The limitations so suspended relate to offenses against military discipline, security, and full utilization of manpower. Suspension of the President's limitations upon maximum punishments has no effect upon the Congressional limitations found in the Code. Therefore, the punishments adjudged for offenses as to which the Table has been suspended still must be within the jurisdictional limits placed upon inferior courts. An offense not specifically designated by the Code as capital does not become capital as a result of suspension of the Table as to the offense.

- (2) *Offenses not listed in the Table of Maximum Punishments.* Maximum punishments are listed for offenses under each of the punitive articles of the Code. These maximum punishments also apply to offenses lesser included in the primary offenses listed and to offenses closely related to the primary offenses. Occasionally, an accused may be convicted of an offense for which no maximum punishment is expressly

prescribed but which is lesser included in one offense and closely related to another offense, with a maximum punishment expressly prescribed for both. The situation is most likely to arise under Article 134. In such a case the lesser of the two maximums limits the punishment which may be adjudged.¹⁸⁸

In other instances an offense under Article 134 may be neither lesser included in nor closely related to any of the listed offenses. Then the maximum legal punishment is the same as that prescribed for similar civilian offenses under the United States Code or the Code for the District of Columbia, whichever is lesser.¹⁸⁹ Questions of degree are certain to arise in applying these rules. It is almost inevitable that some offenses not listed will be related to several others, which are listed and provide widely varying maximum punishments. If this is the case, a value judgment must be made as to whether the unlisted offense is as closely related to one as to the other. To do so, the lesser of the maximum punishments controls. If not, the maximum of the one to which the instant offense is most clearly related controls. Similarly, a value judgment must be made as to whether the instant offense is "closely" related to one or more offenses listed in the Table of Maximum Punishments or whether it is necessary to resort to the United States Code or to the District of Columbia Code to fix the maximum punishment. The question, then, is not whether the instant offense is more closely related to any listed offense. The maximum punishment for the instant offense then controls even though there is a much closer relationship between the instant offense and the one set forth in the civilian statute.

¹⁸⁸ MCM, 1951, para. 1270, c.p., *United States v. Beach*, 2 USOMA 172, 7 CMR 48 (1958). The offense of failure to deliver mail is lesser included in the offense of "obstructing the mail" (Dishonorable Discharge, total forfeitures, and confinement at hard labor for 5 years) and is closely related to "being derelict in the performance of duties" (partial forfeitures and confinement at hard labor for 3 months). The lesser punishment is the legal maximum.

¹⁸⁹ MCM, 1951, para. 1270, c.p., OM 383644, Butler, 11 CMR 445 (1953). *United States v. Long*, 2 USOMA 60, 6 CMR 60 (1952).

¹⁹⁰ *United States v. Alexander*, 3 USOMA 346, 12 CMR 102 (1953).

¹⁹¹ *United States v. DeAngeli*, 3 USOMA 298, 12 CMR 54 (1953).

The Court of Military Appeals has held that the Manual reference to the United States Code and the District of Columbia Code were intended only to

prescribe a maximum with respect to the amount of confinement and fine. Still the court-martial may impose a punitive discharge as it is not a punishment forbidden by the Uniform Code of Military Justice. All other classes or forms of punishments are unlimited unless specifically proscribed by the Code or by constitutional considerations.¹⁰²

(3) "*Footnote Five*" to the *Table of Maximum Punishments*. The Table prescribes the maximum legal punishments for failing to obey any lawful general order or regulation and for knowingly failing to obey any other lawful order. They are respectively, dishonorable discharge, total forfeitures and confinement at hard labor for 2 years, and bad conduct discharge, total forfeitures and confinement at hard labor for 6 months. Footnote five to the Table qualifies these maximum punishments by providing that the punishments for these offenses do not apply in cases where the accused is found guilty of an offense which, although involving a failure to obey a lawful order, is specifically listed elsewhere in the Table. During the early period of the administration of the Code, this provision was applied to such offenses as failure to report as ordered to perform extra duty,¹⁰³ or appearing not in the prescribed uniform.¹⁰⁴ Although these acts of omission were charged under Article 92 it was held that the maximum imposable punishments were controlled by the Table's limitations upon punishments for violation of Articles 86(1) and 134. The less severe punishments of partial forfeitures and confinement, each not to exceed 1 month.

Later, in the case of *United States v. Buckmiller*,¹⁰⁵ the Court of Military Appeals was confronted with a fact situation quite similar to that in the *Wiley* case. It held that failure to report for duty as ordered constituted a violation of Article 92, regardless of "footnote five."

Judge Quinn, speaking for the Court, said:

The language of the footnote, even as amplified in the discussion of the drafters of the Manual, is exceedingly ambiguous. . . . The footnote becomes much more sensible if interpreted to require a comparison of the gravamen of the offense set out in the specification with the charge it is laid under and other articles under which it might have been laid.

. . . We have no doubt that the facts alleged in the specification would support a charge under Article 86(1). That, however, is not the test. The gravamen of the offense as spelled out in the specification is the disrespect for authority as evidenced by the disobedience of the direct order of a superior. This is obviously an offense of a more serious character than that condemned by Article 86(1).¹⁰⁶

The Court continued to find footnote five inapplicable in some of the cases presented to it. In doing so, the Court commented:

[T]he controlling element to be looked for in determining the punishment to be assessed is whether the failure to obey a direct personal order of a superior to perform some duty [was involved] rather than failure to conform such duty ordinarily considered routine. If there is found to be a failure which indicates disrespect for authority by the flaunting of a direct order of a superior, the footnote is inapplicable.

¹⁰² *United States v. White*, 12 USCMA 802, 31 CMR 188 (1962).

¹⁰³ SPOM 8748, *Wiley*, 1 CMR 420 (1951).

¹⁰⁴ CM 844988, *Carpenter*, 11 BR-JC 369 (1951).

¹⁰⁵ 1 USCMA 504, 4 CMR 98 (1962).

¹⁰⁶ 1 USCMA 504, 505-506, 4 CMR 98, 97-98. Judge Quinn expressly approved the *Wiley* and *Carpenter* holdings, confined to their facts.

able and the greater punishment may be imposed.¹⁹⁷

On the other hand, the Court has used the comparison of the "gravamen test" to hold that "footnote five" is applicable.¹⁹⁸

(4) *Permissible additional punishments.*

Permissible additional punishments based upon prior convictions. First, it should be noted that it is only the limitations set forth in the Table of Maximum Punishments which may be exceeded in imposing any of the additional punishments. Jurisdictional limits and limits as to types of punishment may not be exceeded.

After an accused is found guilty, the prosecution is permitted to introduce evidence of the accused's previous conviction by courts-martial.¹⁹⁹ The general purpose of admitting evidence of previous convictions is merely that the court should consider this information in determining an appropriate sentence. Under certain circumstances, however, once such previous convictions have been admitted into evidence they may operate to increase the maximum authorized punishment.

Section B of the Table provides that if the maximum punishment for the offense for which the accused stands convicted does not extend to punitive

discharge, proof of two previous convictions of offenses will authorize a bad-conduct discharge, total forfeitures for the period of confinement, and confinement at hard labor for 3 months.²⁰⁰ Executive Order No. 10565, amending section B, provides that if the maximum punishment for the offense of which the accused is convicted does not extend to dishonorable discharge, proof of three previous convictions during the year next preceding the commission of the instant offense will authorize dishonorable discharge, total forfeitures and confinement at hard labor for 1 year.²⁰¹

The various additional punishments which paragraph 127(c), section B, authorizes upon proof of two prior convictions are severable, except that forfeitures may not be imposed as an additional punishment in the absence of a sentence to additional punishment of confinement for an equal period.²⁰²

d. *Reduction in enlisted pay grade.*

- (1) *General.* Reduction in grade is an appropriate punishment for an enlisted accused in addition to the maximum punishments set forth in the Table of Maximum Punishments.²⁰³ The court-martial may reduce the enlisted accused's pay grade to the lowest or any intermediate grade. The court members, however, must have been specifically instructed that reduction could be included in the sentence before the reduction would be a valid penalty.²⁰⁴

- (2) *Automatic reduction to lowest pay grade.* The Manual provides that reduction to the lowest enlisted pay grade is automatic if the sentence as finally approved includes either a dishonorable discharge, or confinement, or hard labor without confinement.²⁰⁵ The Court of Military Appeals, however, declared this provision invalid because, as a judicial act, it operated improperly to increase the severity of the sentence.²⁰⁶ Congress later made the provision for automatic reduction,

¹⁹⁷ United States v. Larney, 2 USCMA 283, 80 CMR 208 (1961), 66-67 (1958).

¹⁹⁸ United States v. Loos, 4 USCA 478, 16 CMR 52 (1954).

¹⁹⁹ See section I, *supra*, for general discussion of admissibility and effect of previous convictions.

²⁰⁰ MCM, 1951, para. 127(c), sec. B, as qualified by MCM, 1951, para. 75c(2).

²⁰¹ E.O. No. 10565, 28 Sep 54, 19 Fed Reg. 8290, Addendum to the Manual for Courts-Martial, 1951 (Jan 53), para. 127(c), as qualified by MCM, 1951, para. 75c(2).

²⁰² United States v. Watkins, 2 USCA 287, 8 CMR 97 (1958), stating that this general rule may be contrary to prior service custom, and also stating that the qualification thereto does not prevent imposition of forfeitures without confinement when such forfeitures are authorized as regular rather than additional punishment. United States v. Prescott, 2 USCA 122, 6 CMR 122 (1952).

²⁰³ MCM, 1951, para. 127(c), sec. B.

²⁰⁴ United States v. Crawford, 12 USCA 203, 80 CMR 208 (1961).

²⁰⁵ United States v. Powell, 12 USCA 288, 80 CMR 288 (1961).

²⁰⁶ MCM, 1951, para. 128e.

²⁰⁷ United States v. Simpson, 10 USCA 229, 27 CMR 309 (1959).

part of the Uniform Code.²⁰⁷ Article 58a gave the Secretary of the department concerned authority to modify the automatic reduction provision.²⁰⁸

- (8) *Sentences including reduction to intermediate grades.* If a sentence includes a reduction to an intermediate grade, that is, one above the lowest enlisted pay grade, but also includes a punitive discharge, confinement or hard labor without confinement, which if approved would mean that the accused would be automatically reduced to the lowest pay grade by operation of Article 58a, the various elements of the sentence are considered to be inconsistent. Suppose the sentence includes confinement at hard labor for 6 months and reduction to E-3. Once the sentence is approved the accused is automatically reduced to E-1; this reduction is more severe than the one intended by the court. The Court of Military Appeals said that the inconsistency must be resolved to the benefit of the accused, because to allow the automatic reduction amounts to illegally increasing the severity of the sentence. Consequently any element of the sentence, which, if approved,

would result in greater reduction in grade than that originally imposed by the court-martial, must be disproved.²⁰⁹

- (4) *Punishments assessable upon rehearing or new trial.* In a rehearing or new trial, no sentence in excess of or more severe than the sentence adjudged by the original court-martial may be assessed.²¹⁰ Furthermore, paragraph 109g (2) of the Manual provides that the sentence on new trial shall not exceed the original sentence "as approved or affirmed." There is no such Manual provision as to the sentence on rehearing. The holding in *United States v. Dean*,²¹¹ however, has imposed the requirement that the sentence upon rehearing shall not exceed the original sentence as approved by the convening authority. The Court of Military Appeals later held that the punishment on rehearing was "limited to the lowest quantum of punishment approved by a convening authority, board of review or other authorized officer under the Code . . . unless the reduction is expressly and solely predicated on an erroneous conclusion of law."²¹²

Section VIII. PARAGRAPH 77, MCM, 1951, CONCLUSION OF TRIAL

1. *Recommendation for clemency.* After the conclusion of the trial the defense counsel may submit, for the signature of willing court members, a written statement of mitigating matters he wishes to be considered by the convening

authority, as well as these members' recommendations for clemency.²¹³ These mitigating matters should not be those which could have been considered by the members during the sentencing proceedings. Further, the recommendation for clemency should not impeach the sentence itself.²¹⁴ It has been held that where an inconsistent recommendation was instituted by a court member (instead of defense counsel), and the recommendation coincided in point of time

²⁰⁷ UCMJ, Art. 58a. A period of confusion existed between the Simpson decision and the enactment of Article 58a because the Comptroller General adopted the view expressed by Judge Lefkowitz in his Simpson dissenting opinion. See *Ms. Comp. Gen. B-139988*, 19 Aug 59; *United States v. Armbruster*, 11 USCMA 596, 28 CMR 412 (1960); *Johnson v. United States*, 280 F.2d 366 (Ct. Cl. 1960).

²⁰⁸ See AR 624-200, 8 Jul 52.

²⁰⁹ *United States v. Flood*, 2 USCMA 114, 6 CMR 114 (1952). This case was decided before para. 120e, MCM, 1951, was declared invalid. After the congressional enactment of Article 58a, the question arose as to whether the *Flood* decision was still controlling law. An Army Board of Review held that *Flood* still applied. CM 405188 Shumate, 30 CMR 559 (1961). See JAGJ 1962/8678. But see JAG Manual sec. 0112a, which makes Art. 58a "inoperative in the naval service."

²¹⁰ UCMJ, Art. 68b, (rehearing); MCM, 1951, para. 109g (2) (new trial).

²¹¹ USCMA 21-23 CMR 138 (1957).

²¹² *United States v. Dean*, 16 USCMA 582, 28 CMR 95 (1959).

²¹³ MCM, 1951, para. 77a. This paragraph of the Manual is undoubtedly an anachronistic holdover from the paternalistic days of courts-martial when no independent, thorough sentencing proceedings were provided, and especially when it was the practice to adjudge maximum sentences relying on the convening authority to reduce them. Today the most practical recommendation of a clemency petition is one to suspend the sentence, a form of clemency beyond the power of the court members.

²¹⁴ MCM, 1951, para. 77a.

with the announcement of the sentence, that the clemency recommendation raised a doubt that the members knew of their powers to give a proper sentence. Such actions, in effect, would impeach the sentence. On the other hand, if either of these two factors were not present, it would seem that the sentence would not be impeached.²¹⁵

2. Appellate brief. The Court of Military Appeals has expressed its concern that defense counsel frequently do not file appellate briefs to urge matters in amelioration of the sentence.²¹⁶

Such briefs, according to the Court, become part of the record of trial in view of the wording of Article 38 of the Code. Thus matters not raised as trial can, in an appropriate case, be considered by appellate bodies because they are in an appellate brief.²¹⁷

3. Authentication of record of trial. The authentication of the record of trial, as well as subsequent events in the legal review of courts-martial, is discussed in a separate text "Military Justice, Review of Courts-Martial, Part I, Initial Review."²¹⁸

²¹⁵ See *United States v. Groch*, 10 USMA 495, 28 CMR 61 (1959), and cases cited therein. Compare *United States v. Huber*, 12 USMA 208, 30 CMR 208 (1961). The court said: "Two circumstances bear strongly upon this matter. The first is whether the recommendation originates with the court or with defense counsel; and the second is whether the recommendation is made at the same time as the imposition of sentence or so close to that time as to indicate reasonably that the two acts are substantially part of the same event."

²¹⁶ *United States v. Fagnan*, 12 USMA 192, 30 CMR 192 (1961); see also ch. VII, sec. VII, *supra*.

²¹⁷ *Ibid.*

²¹⁸ DA Pam 27-175-1 (1962).

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By Order of the Secretary of the Army:

EARLE G. WHEELER,
General, United States Army,
Chief of Staff.

Official:

J. C. LAMBERT,
Major General, United States Army,
The Adjutant General.

Distribution:

Active Army:

CNGB (2)
TJAG (50)
USCONARC (15)
ARADCOM (15)
OS Maj Comd (50)
OS Base Comd (15)
LOGCOMD (10)
MDW (25)
Armies (25)
Corps (15)
USA Corps (1)
Div (5)
Svc Colleges (5)
Br Svc Sch (5) except
TJAGSA (4500)
PMS Sr Div Units (1)
Instls (5)
AH (2)

WRAMC (2)
BAMC (2)
USARPERS (1)
POE (5)
Trans Trnl Comd (5)
Army Tmls (2)
OSA (1)
PG (1)
GENDEP (OS) (2)
Sup Sec GENDEP (2)
Army Dep (2)
Arsenals (2)
Army Plants (1)
DB (2)
FAOUSA (2)
Engr Comd (2)
Proc Dist (1)

NG: State AG (3); Div (1).

USAR: None.

For explanation of abbreviations used, see AR 320-50.