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JUDGE ADVOCATE LEGAL SERVICE*

This issue contains opinions and other material in the following categories:

I. OPINIONS OF THE U. S. COURT OF MILITARY APPEALS.

1. (120, MCM; UCMJ art. 31) **Accused Has No Right To Have Counsel Present At Government Psychiatric Examination, Instruction On Expert Opinion Testimony Was Proper.** *United States v. Wilson,* No. 21,302, 27 Jun. 1969. Accused was tried by a general court-martial for the premeditated murder of his wife. He was found not guilty of premeditated murder but guilty of the lesser offense of unpremeditated murder. He was sentenced to a dishonorable discharge, total forfeitures, confinement at hard labor for twenty-five years, and reduction to the lowest enlisted grade. Because of errors not material here, intermediate appellate authorities reduced the confinement to three years.

After the article 32 investigation, accused was taken to an Army hospital for psychiatric evaluation. Hospital officials did not inform him that he had the right to have counsel present. Accused refused to have X-rays, he refused psychological testing, he refused parts of his physical examination, and he stopped the questioning at various points in the examination. He gave no information concerning the alleged offense or his relationship with his wife. Apparently, the interviews consisted entirely of subjects such as accused's background, his work, and current events. A three-man medical board, after considering these interviews, accused's records, and the article 32 investigation file, concluded that accused was fit to stand trial and was legally sane at the time of the offense.

At trial, two psychiatrists testified for the defense and agreed that acused, at the time of the offense, experienced a total inability to adhere to the right. In rebuttal, the Government called Lieutenant Colonel *H* of the medical board, referred to above, as an expert witness. He was asked for an opinion based solely on the health and files of accused and the statements of witnesses. In addition, he expressed an opinion based on a reading of the transcript and the testimony of the psychiatrists retained by accused. The law officer instructed Dr. *H* not to mention what accused said during the interviews or even that he had interviewed him. Dr. *H* testified that he found accused to be legally sane at all times. In this appeal, accused contended that the doctors who interviewed him had a duty to warn him of his right to counsel and his right to have counsel present during the interviews.

In rejecting accused's argument, the Court cited its recent decision in *United States v. Babbidge,* 18 U.S.C.M.A. ——, 39 C.M.R. —— (1969, digested 69-12 JALS 1), wherein the Court held that an accused who was required to submit to psychiatric evaluation by the Government as a condition precedent to his presenting psychiatric testimony that would raise an issue as to his mental responsibility had not been denied the protection of article

*Communications relating to the contents should be addressed to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901. Copies of the materials digested in this pamphlet are not available from the School. This pamphlet may be cited as 69-18 JALS [page number] (DA Pam 27-69-18).

31. It was held that when an accused opened his mind to a psychiatrist in an attempt to prove temporary insanity, his mind was opened for a sanity examination by the Government and his action constituted a qualified waiver of his right to silence under article 31. The Court's decision in *Babbidge* was heavily influenced by the reasoning found in *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968). In *Albright*, the court rejected accused's argument that his right to counsel had been abridged with these words:

> State v. Whitlow . . . [45 N.J. 3, 210 A.2d 763 (1965)] holds that a defendant has no federal or state constitutional right to have his attorney present during a psychiatric examination conducted at the instance of the prosecutor. In this conclusion we agree. From the intimate and personal nature of the examination, we are satisfied that, except in the unusual case, the presence of a third party, in a legal and non-medical capacity, would severely limit the efficacy of the examination, and that if defendant's privilege against self-incrimination is given full effect with regard to his inculpatory statements to his examiner, the need for the presence of an attorney is obviated. We find no error in the failure to permit defendant's counsel to be present during his examination by Dr. Rossman.

The Court rejected accused's contention that Dr. *H*'s conclusion, based in part on interviews with accused, was inadmissible because of the "fruit of the poisonous tree doctrine." The Court stated:

> The fallacy of the "fruit of the poisonous tree" reasoning . . . is that it misconceives, in our opinion, the nature of the tree. The metaphor can be applied only if one equates professional psychiatric examination in a Government hospital with breaking down doors, surreptitiously tapping telephones, or forcing the way into the bedroom of an accused. We reject the contention that the examination was unconstitutional, unlawful, or improper. Consequently, we must hold that conclusions based on such an examination are untainted.

The Court next considered whether the law officer erred in his instruction on expert opinion testimony. In pertinent part, the law officer stated:

> Weight or credence should not be given to the opinion of experts insofar as it clashes with common knowledge and ordinary observations.

Accused complained that the instruction caused the court to give undue weight to lay testimony and that it constituted a substantial restriction on the exclusive right of the court members to judge the testimony of the expert witnesses.

Expert testimony is not binding on a jury merely because it is expert testimony. Credibility and weight to be given to the expert testimony are jury issues. *Mims v. United States*, 375 F.2d 135 (5th Cir. 1967). The Court, in finding accused's contention unmeritorious, stated that "although the instruction could have been phrased more felicitously" it believed that the instruction conveyed the thought that the court members were not bound by the opinions of experts when the experts' conclusion clashed with common knowledge and ordinary observations. On the other hand, the court was not required to subordinate the opinion of expert witnesses to the testimony of lay witnesses. The decision of the board of review was affirmed. (Opinion by Judge Darden in which Chief Judge Quinn concurred. Judge Ferguson concurred in the result.)

2. (120, MCM; UCMJ art. 31) **Testimony Of Government Psychiatrist Admissible Even Though He Did Not Warn Accused Of His Right To Remain Silent Or His Right To Counsel. No Error In Admitting Stipulations Of Expected Testimony.** *United States v. Schell*, No. 21,770, 27 Jun. 1969. Accused was tried by general court-martial on charges of larceny, desertion, and unauthorized absence (arts. 121, 85, and 86, respectively). One of the principal issues at accused's trial was whether his mental condition prevented him from conforming his conduct to the requirements of law.

A psychiatrist testified for accused and stated that, in his opinion, accused was unable to adhere to the right. To rebut this testimony, the Government called Dr. *B*, a military

psychiatrist, who had examined accused before trial. Over defense counsel's objection, Dr. *B* was permitted to testify that, in his opinion, accused was free from mental disease or defect and was mentally competent to know right from wrong and to adhere to the right.

The court-martial decided the issue of mental competency against accused. On review, a board of review held that the Government's rebuttal evidence was inadmissible because Dr. *B* had not first advised him "of his right to remain silent or of his right to counsel." The question certified to the Court of Military Appeals was whether or not the board was correct in holding that the testimony of Dr. *B* was inadmissible.

The Court noted that after the board of review had acted in this case, it decided *United States v. Babbidge*, 18 U.S.C.M.A. ——, 39 C.M.R. —— (1969, digested 69-12 JALS 1) and *United States v. Wilson*, 18 U.S.C.M.A. ——, 40 C.M.R. —— (1969, digested *supra*). In *Babbidge*, the Court held accused's introduction of the results of a psychiatric evaluation based on statements he made to a psychiatrist constituted "a qualified waiver of his right to silence under Article 31" of the Uniform Code and gave the Government the right to request a sanity examination by other doctors. In *Wilson*, the Court held that the Government could properly introduce evidence of the results of a pretrial psychiatric evaluation of accused to rebut testimony given by a defense psychiatrist without first establishing that accused had been advised of his rights under article 31. Based on these cases, the board of review erred in holding that Dr. *B*'s testimony was inadmissible.

The Court next addressed itself to accused's contention that he was prejudiced by the admission in evidence of statements contained in two stipulations of expected testimony. The statements were made by accused during two pretrial interrogations and the Government conceded that the warning given accused of his right to counsel was inadequate in each instance. The Court held, however, that the record reflected that accused affirmatively and intentionally waived this deficiency. The Court stated:

> Had the accused not consented to stipulate to be expected testimony, his statements might never have come before the court members because the law officer could, and we must assume he probably would, on his own initiative, have ruled them inadmissible. Defense counsel's opening statement further supports the conclusion that the defense affirmatively desired that the statements be admitted. Counsel informed the court members he intended to introduce some of the statements by testimony from another police officer, and this testimony, he maintained, would cast "grave doubt" upon the accused's "mental responsibility." Such other testimony was in fact introduced. In addition, the defense psychiatrist testified that certain of the accused's pretrial remarks illustrated "another feature of . . . [his] schizoid makeup." Thus, the record of trial demonstrates that the accused's pretrial remarks were in evidence not because defense counsel merely neglected to interpose an objection, but because the defense wanted the remarks considered by the court members. We are satisfied, therefore, that the accused affirmatively "consent[ed] to receipt of the evidence." United States v. Gustafson, 17 USCMA 150, 152, 37 CMR 414 [1967].

The decision of the board of review was reversed and the record of trial returned to The Judge Advocate General for resubmission to the board of review for further proceedings consistent with this opinion. (Opinion by Chief Judge Quinn in which Judge Darden concurred. Judge Ferguson concurred in the result.)

3. (73, 216*f*, MCM) Court Must Be *Sua Sponte* Instructed On Defense Of Duress When Reasonably Raised By The Evidence. *United States v. Simmelkjaer*, No. 21,696, 27 Jun. 1969. Accused was convicted of assault with a deadly weapon, willful disobedience of a lawful order, and violation of a lawful general regulation (arts. 128, 90, and 92, respectively). He was sentenced to a dishonorable discharge, confinement at hard labor for 36 months, forfeiture of $95 per month for a like period, and reduction to the grade of E-1. The convening authority reduced the period

of confinement and forfeitures to 30 months each. A board of review affirmed.

Accused was charged with: "having received a lawful command from First Lieutenant . . . *B*, his superior officer, to accompany him to the company orderly room, did . . . willfully disobey the same." Accused testified that he did not obey the order because he was in fear of being shot in the back by one of the armed guards who accompanied Lieutenant *B*. His fear was premised on the fact that there was unrest in his company, his arrest, which was unexpected, occurred in the dark of night, and was accomplished by the use of three battle-dressed, armed soldiers. One of the guards, who stood directly in front of him, "leveled his rifle and his hands were shaking." Accused asked that the military police be called and he surrendered to them.

Accused contended that he refrained from obeying the order out of a genuine fear for his personal well-being and that consequently his disobedience of Lieutenant *B*'s order was not *willful*, an essential element of the charged offense. Accused's fear, it was argued, was such as to raise the issue of duress as a defense to the element of willfulness and required the law officer, *sua sponte*, to instruct thereon.

In *United States v. Pinkston*, 18 U.S.C.M.A. 261, 39 C.M.R. 261 (1969, digested 69-10 JALS 2), the Court was faced with the question whether the defense of duress was raised by the evidence. In that case the Court stated:

> The defense of duress is available to an accused who was acting under a well-grounded apprehension of immediate death or serious bodily harm. See United States v. Fleming, 7 USCMA 543, 23 CMR 7. See also 21 Am Jur 2d, Criminal Law, § 100, Coercion or duress, page 180; Annotation: Coercion, compulsion, or duress as defense to criminal prosecution, § 2, Nature and elements of duress or coercion, page 910, and § 5, Fear based on threats or injury to others, page 917, 40 ALR 2d.

Since, in the instant case, accused testified that he feared death or serious bodily harm, the issue to be resolved by the court members was whether his fear was "well-grounded," *i.e.*, reasonable. *United States v. Pinkston*, *supra*. The test of whether a defense is reasonably raised is whether the record contains some evidence to which the court may attach credit if it so desires. When an affirmative defense is reasonably raised by the evidence, the law officer is required, *sua sponte*, to instruct thereon. *United States v. Meador*, 18 U.S.C.M.A. 91, 39 C.M.R. 91 (1969, digested 69-2 JALS 4).

In this case, because of the lack of appropriate instructions, the court members were unaware of accused's possible defense and were "without 'lucid guideposts' by which they could 'knowledgeably apply the law to the facts as they find them.' " (Citation omitted.) Accordingly, the decision of the board of review with reference to the willful disobedience charge was reversed. The board may reassess the sentence on the remaining findings of guilty or order a rehearing. (Opinion by Judge Ferguson in which Chief Judge Quinn concurred.)

Judge Darden (dissenting) believed that the defense of duress should not be available to accused since he received a lawful order from a lawful authority.

II. FEDERAL DECISIONS.

1. On 16 June 1969 the Supreme Court of the United States announced its decision in the case of *Noyd v. Bond*, holding that a federal district court does not have jurisdiction over the habeas corpus petition of a military prisoner who alleges unlawful confinement pending appeal, and who has not petitioned the Court of Military Appeals for habeas corpus relief. The full text of the opinion is reprinted below.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner is a career officer in the Air Force who has come to believe that this country's participation in the Vietnamese conflict is unjust and immoral. Having decided that he would do nothing to further the Na-

tion's military effort in Southeast Asia, Captain Noyd refused to obey an order, issued December 5, 1967, requiring him to teach one of the junior officers at the Cannon Air Force Base, New Mexico, to fly a military airplane.[1]

In response, Major General Charles Bond, Jr., the Commander of the Twelfth Air Force, convened a general court-martial at the Cannon Base. On March 8, 1968, the court-martial found Noyd guilty of wilfully disobeying a lawful order; on the following day petitioner was sentenced to one year's confinement at hard labor, forfeiture of all pay and allowances, and dismissal from the Air Force. As soon as the court-martial announced its sentence, Captain Noyd was ordered confined to his quarters. The court-martial's judgment was then forwarded to General Bond for the review required by 10 U. S. C. § 864 (1964), and on May 10, 1968, the General approved the sentence, ordering that "Pending completion of appellate review, the accused will be confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas."

At this point, petitioner's attorneys undertook two courses of action. On the one hand, they appealed the merits of petitioner's conviction to the Air Force Board of Review, which is the appellate military tribunal Congress has established to oversee the administration of criminal justice in petitioner's branch of the Armed Forces. On the other hand, they sought habeas corpus relief from the civilian courts, arguing that the Uniform Code of Military Justice required that petitioner be released from confinement pending the outcome of his military appeal.

At the present time, petitioner's appeal from his conviction is still pending in the higher reaches of the military court system. While the Air Force Board of Review has now affirmed the judgment of the court-martial, the Court of Military Appeals, the highest military tribunal, has agreed to review Captain Noyd's case. Petitioner does not suggest that we may properly interfere with the orderly process of military review by considering the merits of his conviction at this juncture. Rather, we are now only asked to vindicate his asserted right to remain free from confinement while the validity of his conviction is still being litigated in the appellate military courts.

I.

Captain Noyd's effort to invoke the assistance of the civilian courts was precipitated by General Bond's order transferring petitioner to the disciplinary barracks at Fort Leavenworth. Shortly after the order was issued, and before it was carried out, petitioner sought a writ of habeas corpus from the United States District Court for the District of New Mexico, arguing that both his confinement at the Cannon Air Force Base and his proposed transfer to Fort Leavenworth were in violation of two provisions of the Uniform Code of Military Justice. First, petitioner contended that his confinement constituted an attempt to "execute" his sentence in violation of § 71(c) of the Code, which provides:

"No sentence which includes, unsuspended, a dismissal or bad-conduct discharge, or confinement for one year or more, may be executed until affirmed by a board of review and, in cases reviewed by it, the Court

[1] Before this incident took place, Captain Noyd sought to invoke the jurisdiction of the civilian federal courts in an effort to require the Air Force either to assign him to duties consistent with his beliefs or to dismiss him. The United States District Court for the District of Colorado denied relief because petitioner had not yet been court-martialed for refusing to obey orders and so had not fully exhausted his remedies within the military system. *Noyd* v. *McNamara*, 267 F. Supp. 701 (1967). The Court of Appeals for the Tenth Circuit affirmed, 378 F. 2d 538 (1967), and this Court denied certiorari, 389 U. S. 1022 (1967). The Courts of Appeals for the Second and Fifth Circuits have however subsequently decided that the exhaustion doctrine did not necessarily require a serviceman to await the military's decision to convene a court-martial before seeking relief in the civilian courts. *Hammond* v. *Lenfest*, 398 F. 2d 705 (C. A. 2d Cir. 1968); *In re Kelly*, 401 F. 2d 211 (C. A. 5th Cir. 1968). Cf. *Brown* v. *McNamara*, 387 F. 2d 150 (C. A. 3d Cir. 1967). We have not found it necessary to resolve this conflict among the circuits in order to decide the narrow issue in this case.

of Military Appeals." 10 U. S. C. § 871(c) (1964). (Emphasis supplied.)

Second, petitioner argued that Article 13 of the Code[2] only authorized confinement of a convicted serviceman pending his appeal after the military has found that restraint is necessary to prevent the serviceman's flight from the jurisdiction. Since no such finding has been made in this case, petitioner argued that the civilian court should require his complete release.

The Government, in addition to opposing Captain Noyd's claims on the merits, argued that petitioner should be required to exhaust his military remedies before seeking habeas corpus relief from the civilian courts. The District Court, however, refused to apply the exhaustion principle in the present case, finding that the military court system did not provide petitioner with an adequate remedy by which he could test the validity of his confinement, pending appeal, in an expedited manner. Turning to the merits, the District Judge granted petitioner part of the relief he requested. While the court refused to review the legality of Noyd's confinement at the Cannon Air Force Base, the court did find that petitioner's incarceration at Fort Leavenworth would constitute an "execution" of his sentence in violation of Article 71(c), and so declared General Bond's order invalid.[3]

Both sides appealed to the Court of Appeals for the Tenth Circuit, which reversed the District Court's grant of partial relief. Relying on this Court's decision in *Gusik* v. *Schilder*, 340 U. S. 128 (1950), a unanimous panel held that the District Court could not properly grant petitioner any form of relief until he had first challenged the validity of his confinement before the appellate tribunals within the military system. The court emphasized that "the Court of Military Appeals has recently held that it possesses the power to issue a habeas corpus writ" if a serviceman could demonstrate that he was illegally restrained pending appeal, and it could preceive no justification for petitioner's failure to seek the military court's assistance. — F. 2d —, —. We granted certiorari to consider the propriety of the application of the rule of *Gusik* v. *Schilder* in the circumstances of this case. — U.S. — (1969).

II.

Shortly after the Court of Appeals announced its decision, petitioner recognized that since his sentence was scheduled to expire on December 26, 1968,[4] he might well be released from custody before this Court would have an opportunity to pass upon his claims for relief pending his appeal to the military courts. In order to avoid the possibility of mootness, petitioner promptly requested the Court of Appeals to stay its mandate and order his release pending this Court's decision on his petition for certiorari. On December 6, the Court of Appeals agreed to stay its mandate, thereby keeping the District Court's order in effect, but refused to require the military to release Captain Noyd from custody at the Cannon Air Force Base.

Petitioner then applied to MR. JUSTICE WHITE, Circuit Justice for the Tenth Circuit, for temporary release from all confinement

[2] This provision of the Code reads:

"Art. 13. Punishment prohibited before trial.

"Subject to section 857 of this title [Article 57 of the Code], no person, while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during such period for infractions of discipline."

[3] After the District Court held that petitioner could not be lawfully transferred to Fort Leavenworth, the military significantly increased the degree of restraint that was imposed upon Captain Noyd at the Cannon Air Force Base. Petitioner was permitted to see his family only twice each week and was forbidden to leave his quarters except for narrowly limited purposes. See Letter Regarding Arrest in Quarters from Col. George R. Doerr, Joint Appendix, pp. 32-34.

[4] While petitioner's one-year sentence began to run on March 9, 1968, when it was announced by the court-martial, the Air Force awarded him sentence credits for good behavior, thereby permitting him to obtain his release from custody after a period of some nine and one-half months.

pending this Court's action on his certiorari petition. When the Circuit Justice denied this application on December 18, 1968, a second motion of the same tenor was made to MR. JUSTICE DOUGLAS on the following day. Noting that the Court was then in recess and would not meet again until January 10, 1969, MR. JUSTICE DOUGLAS ordered that "petitioner . . . be placed in a non-incarcerated status" until the full Court could have an opportunity to pass on the issues raised in a considered manner. Pursuant to MR. JUSTICE DOUGLAS' order, petitioner was released from confinement on Christmas Eve, two days before his sentence was scheduled to expire.[5]

Despite MR. JUSTICE DOUGLAS' order of release, the Government now suggests that this case has become moot. It claims that under the applicable military law, a judicial order that petitioner be placed in a "non-incarcerated status" was insufficient to toll petitioner's sentence, which continued to run until it expired of its own force on December 26. The Government bases this claim upon its reading of Article 57 (b) of the Uniform Code of Military Justice:

> "Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial but periods during which the sentence is suspended shall be excluded in computing the service of the term of confinement." 10 U. S. C. § 857 (b) (1964).

Citing interpretive military regulations, the Government understands the statute to establish the general rule that "the date the sentence of a court-martial is adjudged will mark the beginning of the sentence to confinement *whether or not the accused had been placed in confinement*." Apprehension and Confinement: Military Sentences to Confinement, AR 633-30; AFR 125-30. (Emphasis supplied.)

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[5] When this Court granted certiorari on January 20, 1969, we also ordered that "[t]he stay heretofore granted by MR. JUSTICE DOUGLAS shall remain in effect pending the issuance of the judgment of this Court or further order of this Court." ___ U. S. ___ (1969).

Petitioner does not disagree with the Government's understanding of the general rule, but relies on that part of the statute which expressly provides that a sentence may be tolled if it is "suspended" and the serviceman is placed on probation. Petitioner argues that since MR. JUSTICE DOUGLAS' order, and this Court's confirmance of it, had the obvious purpose to preserve the *status quo* pending the full Court's consideration of the merits of his certiorari petition, the order should be understood to have "suspended" petitioner's sentence within the meaning of the statutory exception to the general rule. In response, the Government emphasizes that MR. JUSTICE DOUGLAS' order did not expressly "suspend" petitioner's sentence and so contends that the statutory exception is not applicable in this instance.

We find it unnecessary to decide this question. For even if MR. JUSTICE DOUGLAS' order did not satisfy the statutory exception, we hold that it was sufficient to interrupt the running of petitioner's sentence. Like the Court of Military Appeals, we do not believe that Congress intended that the general rule stated in Article 57 (b) be inexorably applied in all situations which do not fall within the "suspension of sentence" exception:

> "Congress did not mention all contingencies which would prevent an accused from being credited with time served. Common sense suggests that if an accused escaped from confinement, his period of service would be interrupted and he would be required to make up the time at the end of the period." *United States* v. *Bryant*, 21 U. S. C. M. A. 133, 137; 80 C. M. R. 138, 137 (1961).

We think it equally clear that Article 57 (b) was not intended to give a litigious serviceman a bonus when he obtains temporary release from confinement the military was seeking to impose. Rather, the statute serves to protect a convicted serviceman who the military wishes to release from confinement before his term has run. If a serviceman's commanding officer simply releases him from confinement without suspending his sentence, the Code does not demand that the serviceman

be given a hearing before he is reincarcerated. In contrast, the Code demands that once a sentence is "suspended," it may not be reinstated unless the accused is given a hearing, at which he is represented by counsel, in order to determine whether he has violated the conditions of his probation. 10 U. S. C. § 872(a). Article 57(b), then, represents Congress' decision that even though a man is temporarily set at liberty, he should be given sentence credit unless he is sure that his freedom will not be curtailed at a later date without a plenary hearing. Obviously, the statute's purpose will not be served in the present case, where Captain Noyd's liberty will only be limited once again after a full argument before the judiciary.

In recognition of this fact, the Manual for Courts-Martial has, since its promulgation in 1951, required that a serviceman not be given credit for the time during which he has obtained release from confinement in cases like the present one. The Manual, which has the force of law unless it is "contrary to or inconsistent with" the Uniform Code Congress has enacted, 10 U. S. C. § 836(a) (1964), provides:

> "A sentence to confinement is continuous until the term expires, with certain exceptions. These exceptions include the following:
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> . . . .
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> "Periods during which the person undergoing such a sentence is absent without authority . . . or is erroneously released from confinement through misrepresentation or fraud on the part of a prisoner, or is *erroneously released from confinement upon his petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal* . . . § 97(c), Manual for Courts-Martial (1951)." (Emphasis supplied.)

Thus, the Manual requires that a serviceman receive no sentence credit for the period he has avoided confinement if the judicial decision granting him freedom is reversed on appeal. It follows *a fortiori* that the principles established in the Manual require that Captain Noyd be denied sentence credit as well. For in the present litigation, petitioner has not convinced *any* court that he may properly be relieved from all confinement. Petitioner obtained his release from MR. JUSTICE DOUGLAS simply by showing that his chances of success on the merits were sufficiently great to warrant the grant of interlocutory relief. Surely, he is not entitled to more favorable sentencing treatment than the serviceman who has at least convinced one court that his claim to release is legally sound but whose arguments have not been upheld on appeal.

We hold that the principles of the Manual for Courts-Martial operated to interrupt the running of Captain Noyd's sentence at the time of his release on December 24, 1968, and hence that the case before us is not moot.

We now turn to consider whether petitioner could properly seek his release in civilian courts without making any effort to invoke the assistance of the courts within the military system. *Gusik* v. *Schilder*, 340 U. S. 128 (1950), established the general rule that habeas corpus petitions from military prisoners should not be entertained by federal civilian courts until all available remedies within the military court system have been invoked in vain. MR. JUSTICE DOUGLAS, for a unanimous Court, explained some of the important reasons which require civilian courts to respect the integrity of the military court system that Congress has established.

> "An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not intervene. The policy underlying that rule is pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. . . .

> Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective measures are shown to be futile." *Id.*, at 131-132.

It is true, of course, that the principles of federalism which enlighten the law of federal habeas corpus for state prisoners are not relevant to the problem before us. Nevertheless other considerations require a substantial degree of civilian deference to military tribunals. In reviewing military decisions, we must accommodate the demands of individual rights and the social order in a context which is far removed from those which we encounter in the ordinary run of civilian litigation, whether state or federal. In doing so, we must interpret a legal tradition which is radically different from that which is common in civil courts.

It is for these reasons that Congress, in the exercise of its power to "make rules for the Government and Regulation of the land and naval forces," has never given this Court appellate jurisdiction to supervise the administration of criminal justice in the military. When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.

Almost one year before petitioner sought habeas corpus relief from the Federal District Court sitting in New Mexico, the Court of Military Appeals had indicated it would, in appropriate cases, grant the relief petitioner now demands from us. *Levy* v. *Corcoran*, 17 U. S. C. M. A. 135, 37 C. M. R. 399 (1967). Petitioner, however, has made no effort to invoke the jurisdiction of the Court of Military Appeals. Nevertheless, he would have civilian courts intervene precipitously into military life without the guidance of the court to which Congress has confided primary responsibility for the supervision of military justice in this country and abroad.

Petitioner emphasizes that in the present case we are not called upon to review prematurely the merits of the court-martial proceeding itself. Instead, we are merely asked to determine the legality of petitioner's confinement while he is exercising his right of appeal to the higher military courts. It is said that there is less justification for deference to military tribunals in ancillary matters of this sort. We cannot agree. All of the reasons supporting this Court's decision in *Gusik* v. *Schilder*, *supra*, are applicable here. If the military courts do vindicate petitioner's claim, there will be no need for civilian judicial intervention. Needless friction will result if civilian courts throughout the land are obliged to review comparable decisions of military commanders in the first instance. Moreover, if we were to reach the merits of petitioner's claim for relief pending his military appeal,

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[6] Constitution of the United States, Art. I, § 8, cl. 14.

The Government does not renew the arguments it has on occasion advanced before the Court of Military Appeals. See Brief in Support of Motion to Strike and Dismiss Petition, *United States* v. *Frischholz*, Docket No. 14,270 (1965), to the effect that the Court of Military Appeals lacks the power to grant emergency writs. In its decision in the *Frischholz* case, 16 U. S. C. M. A. 150, 36 C. M. R. 306 (1966), the Court of Military Appeals properly rejected the Government's argument, holding that the All Writs Act, 28 U. S. C. § 1651 (a) (1964), permitted it to issue all "writs necessary or appropriate in aid of [its] . . . jurisdiction." Since the All Writs Act applies by its terms to any "court established by Act of Congress," and since the Revisers of 1948 expressly noted that "The revised section extends the power to issue writs in aid of jurisdiction to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts," we do not believe that there can be any doubt as to the power of the Court of Military Appeals to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court. A different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes. Cf. *United States* v. *Bevilacqua*, 18 U. S. C. M. A. 10 (1968).

we would be obliged to interpret extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence, and which have not even been fully explored by the Court of Military Appeals itself. There seems little reason to blaze a trail on unfamiliar ground when the highest military court stands ready to consider petitioner's arguments.[8]

Petitioner contends, however, that the Court of Military Appeals cannot be expected to protect his rights in a fully effective way. His principal argument is based on the simple fact that the Court of Military Appeals sits exclusively in Washington, D. C. Thus, before a serviceman may invoke its habeas corpus jurisdiction, he must somehow obtain a lawyer willing and able to conduct a lawsuit in the Nation's capital. It is said that this practical difficulty makes it clear that the Court of Military Appeals cannot provide petitioner with adequate relief.

This argument seems to us far too sweeping to be acceptable. Individuals convicted of crime in the civil judicial system are often obliged to appeal to state courts which are far distant from the place at which they are incarcerated. Nevertheless, this fact alone has never been considered sufficient to permit a federal district court to consider a petition for habeas corpus without demanding that the prisoner exhaust all of the presently available remedies offered by the State's appellate courts. Similarly, the fact that Captain Noyd is confined far from Washington, D. C., is not enough, standing alone, to permit him to circumvent the military court system.

Noyd argues, however, that the great distance of the Court of Military Appeals is of special significance in cases like the present one, where speed is essential if relief is to be at all effective. But petitioner concedes that the Court of Military Appeals has thus far acted speedily when confronted with an application for an emergency writ,[9] and there is no reason to believe that the court would not have responded rapidly if Captain Noyd had sought its assistance.[10] Nor has petitioner ever suggested that it was impossible for him to obtain a lawyer who was willing to present an appropriate application before the Court of Military Appeals with the requisite dispatch.

Instead, petitioner simply argues that other servicemen in other situations could conceivably have great difficulty in obtaining a lawyer who was able to move quickly before the military court sitting in Washington. Moreover, it is said that the Court of Military Appeals would be inundated with applications for emergency writs if all service men in petitioner's position were required to seek relief within the military system. It will be time enough, however, to consider these problems when and if they arise. It may be that situations like the present one are unusual or that the Court of Military Appeals will be able to announce clear rules as to the proper treatment of convicted prisoners pending appeal, or that Congress will act to facilitate the hearing

[8] Petitioner contends that our decisions in *Toth* v. *Quarles*, 350 U. S. 11 (1955); *Reid* v. *Covert*, 354 U. S. 1 (1957); and *McElroy* v. *Guagliardo*, 361 U. S. 281 (1960), justify his position that exhaustion of military remedies is not required in this case. The cited cases held that the Constitution barred the assertion of court-martial jurisdiction over various classes of civilians connected with the military, and it is true that this Court there vindicated petitioners' claims without requiring exhaustion of military remedies. We did so, however, because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the petitioners raised substantial arguments denying the right of the military to try them at all. Neither of these factors is present in the case before us.

[9] In *Levy* v. *Resor*, *supra*, a petition for emergency relief was filed on June 20, 1967. The Court of Military Appeals promptly ordered oral argument and filed a full opinion on July 7, 1967. Although petitioner and the Government indicate that subsequent habeas corpus (application filed by Captain Levy) was ruled on by the Court of Military Appeals within five days after its submission.

[10] Consequently, we need not decide how long a serviceman must wait for a decision on his application by the Court of Military Appeals before he may petition for a writ of habeas corpus from the appropriate civilian court.

ing of applications for emergency writs within the military system. Since petitioner has at no time attempted to show that prompt and effective relief was unavailable from the Court of Military Appeals in his case, we hold that petitioner's failure to exhaust this remedy before seeking the assistance of the civilian courts is not excused.[11]

Accordingly, the judgment of the Court of Appeals is affirmed. In light of the substantial questions raised by petitioner, however, we think it plain that petitioner in no sense acted in bad faith when he failed to exhaust his military remedies before invoking the jurisdiction of the District Court. Consequently, we consider it appropriate for us to continue MR. JUSTICE DOUGLAS' order in effect until our mandate issues, in order to give petitioner an opportunity to present his arguments to the Court of Military Appeals. See 28 U. S. C. § 1651(a); cf. *Phillips* v. *United States*, 312 U. S. 246, 254 (Mr. Justice Frankfurter). While it is true that Captain Noyd has only two days yet to serve on his sentence, he should not be required to surrender his freedom for even this short time unless it is found that the law so requires.

It is so ordered.

2. On 30 June 1969 the United States Court of Appeals for the District of Columbia decided the case of *Latney* v. *Ignatius*. The Court held that accused, a civilian merchant seaman convicted of an offense committed in Vietnam, be released from prison since the court-martial that convicted him had no jurisdiction over his case. The full text of the opinion is reprinted below.

Before DANAHER,* LEVENTHAL and ROBINSON, *Circuit Judges*.

PER CURIAM: This appellant here challenges the District Court's dismissal of his petition for a writ of habeas corpus under circumstances and with respect to issues which we will set forth in some detail.

On August 11, 1967, appellant was arrested by military police in DaNang, South Vietnam, and was subsequently charged with premeditated murder [1] in connection with the fatal stabbing of one Trimm in Mamasan's Beach Bar, DaNang East. Both men were American merchant seamen serving aboard the S.S. Amtank,[2] an American-owned oil tanker under time charter to the Navy's Military Sea Transportation Service. On the critical date, the ship was in DaNang harbor off-loading to the Navy's Petroleum Office oil, gasoline and aviation fuel which had been transported from Japan for use by our Armed Forces in South Vietnam.

Having been formally charged, appellant filed a petition for a writ of habeas corpus

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[11] The Government suggests that petitioner should also be required to exhaust a second remedy allegedly afforded him within the military system. It is said that Captain Noyd should have requested the Air Force Board of Review to release him pending the exhaustion of his rights of appeal. The Government, however, cites no decision of a Board of Review which asserts the power to grant emergency interlocutory relief prior to the Board's consideration of a case on the merits; nor are we referred to any staute which unequivocally grants this authority. In the absence of any attempt by the Boards of Review to assert such a power, we do not believe that petitioner may properly be required to exhaust a remedy which may not exist. Cf. *Union Pacific R. R.* v. *Weld County*, 247 U. S. 282 (1918); *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620 (1946).

* Circuit Judge Danaher became Senior Circuit Judge on January 23, 1969.

[1] Article 118, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 918 (1964), provides:

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (2) he shall suffer death or imprisonment for life as a court-martial may direct.

[2] On July 5, 1967, appellant had signed articles of employment with the [illegible] in Japan, to serve as an Able-Bodied Seaman for a period of 12 months.

in the United States Court of Military Appeals, asserting that appellees lacked jurisdiction [3] to try him by court-martial.[4] That court denied the petition. Appellant next sought habeas corpus in the District Court, which on January 16, 1968, dismissed his petition in the order now under review which embodied the following conclusions:

(1) "On August 11, 1967, there existed in Vietnam and its offshore waters a 'time of war' within the meaning of Article 2(10), Uniform Code of Military Justice;"

(2) "On August 11, 1967, petitioner was a person 'serving with or accompanying an armed force in the field' within the meaning of Article 2(10);"

(3) "Article 2(10) is not in violation of the Constitution of the United States."

We deem it unnecessary to explore further the claims which had here been addressed to us respecting the District Court's conclusions, set forth above. The Supreme Court had before it in *O'Callahan* v. *Parker* [5] a situation where the petitioner's crimes were not service-connected and accordingly the Court decided that O'Callahan could not be tried by court martial. Mr. Justice Douglas there undertook an interpretation of the Supreme Court's decisions, observing:

> *We have held in a series of decisions that court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the times of both the offense and the trial.* Thus discharged soldiers cannot be court-martialed for offenses committed while in service. . . . Similarly, neither civilian employees of the Armed Forces overseas . . . nor civilian dependents of military personnel accompanying them overseas . . ., may be tried by court-martial.
>
> *These cases decide that courts-martial have no jurisdiction to try those who are not members of the Armed Forces, no matter how intimate the connection between their offense and the concerns of military discipline* . . . [Citations omitted.] (Emphasis supplied.) [6]

We are aware that the *O'Callahan* opinion notes that the Court there was dealing with peacetime offenses, and with offenses committed within our territorial limits (slip op. 15). But the precedents discussed by Mr. Justice Douglas were relied on by our appellant, and were so analyzed by the Court as to sharpen the principle that a system of specialized military courts and discipline may be maintained consistently with our constitutional liberty only if restricted to its proper domain, one that "rests on the special needs of the military." (Slip op. 6.) It is fair to conclude that the spirit of *O'Callahan*, and of the other Supreme Court precedents there reviewed, precludes an expansive view of Article 2(10) of the Uniform Code of Military Justice, 10 U.S.C. § 802(10), even assuming as we do that this is a time of undeclared war which permits some invocation of the war power under which Article 2(10) was enacted. We think Article 2(10) may not be read so expansively as to reach this civilian seaman, employed by a private shipping company, and in no closer physical proximity or duration to the armed forces than a seaman in port for a short period, living on his ship and under the discipline of his civilian captain while waiting for it to turn around, not assimilated to any military personnel in terms of living quarters or conditions, who had been arrested for a crime committed in a bar frequented by civilians in port.

We think the Supreme Court precedents cut against any approach that would so apply the statute, which must in turn be construed unfavorably to constitutional principles as to deprive him of the right of trial by jury on

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[3] Article 2, UCMJ, 10 U.S.C. § 802 (1964), upon which the military based its jurisdiction, provides in pertinent part:

> The following persons are subject to this chapter:
>
> * * * * * *
>
> (10) In time of war, persons serving with or accompanying an armed force in the field.

[4] Thereafter this court on February 23, 1968, denied appellant's motion to enjoin the court-martial proceedings pending resolution of the jurisdictional issues. Two days later, Latney was convicted by general court-martial of unpremeditated murder and was sentenced to confinement at hard labor for fifteen years.

[5] __ U.S. __ (June 2, 1969).

[6] *Id.*, slip op. 8.

the ground that his crime was committed while he was in the status of one accompanying the armed forces in the field.

Under the circumstances we deem ourselves bound here to conclude that there was error in the denial of the writ.

The judgment of the District Court is reversed, and the case is remanded with directions that the writ be allowed and that Latney be released.

So Ordered.

III. BOARD OF REVIEW DECISIONS

1. (64, 67(f), 66(e), MCM; UCMJ arts. 22-29) **On Remand Case To Be Referred To Original Convening Authority.** *United States v. Martin*, CM 416961, 16 May 1969. Accused was originally tried on 23 and 24 May 1967 by a general court-martial convened by the Commanding General of the Seventh Army Support Command, Boeblingen, Germany. He was convicted of rape despite his plea, and sentenced to a DD, TF, 15 yrs CHL, and red E-1. The convening authority approved the sentence and forwarded the record of trial to The Judge Advocate General for appellate review, ordering accused confined in the Disciplinary Barracks, Fort Leavenworth, Kansas, pending completion of such review.

On 9 July 1968, the Board of Review, finding prejudicial error in the original trial, set aside the 23-24 May 1967 conviction and ordered a rehearing. On 30 July 1968, The Judge Advocate General forwarded the record of trial and the Board's opinion to the Commanding General, Fort Leavenworth, Kansas, and requested that convening authority take action in accordance with the Board's opinion. Subsequently, a rehearing was ordered and was held on 7 October 1968. At the rehearing, in accord with his plea, accused was convicted of attempted rape and sentenced to a DD, TF, 6 yrs CHL, and red E-1. The convening authority reduced the period of confinement to three years and nine months, but otherwise approved.

Whether The Judge Advocate General had the authority to refer this case to a convening authority other than the original convening authority for action pursuant to the Board's original opinion, and thus whether the Commanding General, Fort Leavenworth, Kansas, had jurisdiction in this case, were the joined issues presented to the Board.

United States v. Robbins, 18 U.S.C.M.A. 86, 39 C.M.R. 86 (1969, digested 69-2 JALS 3) is dispositive. The Board rejected the distinction drawn by the Government between Board of Review mandates and those emanating from the Court of Military Appeals. While it is true that much was said in *Robbins* about the Court's mandates, the Board was of the opinion that the decision was not grounded on the mandate theory, for the central theme in *Robbins* was that The Judge Advocate General's referral of the case for rehearing to the Fort Leavenworth commander was in direct conflict with the Code. Thus, the Court in *Robbins* stated:

> When the Congress, in enacting Article 67(f), referred to the convening authority, we believe it meant the one who originally referred the matter to trial. We are buttressed in this belief by the references in the House Hearings, . . . to the testimony of Generals Eisenhower and Collins, which formed the basis for the Congressional understanding that by enacting Article 64 it was empowering *the original* [italics] convening authority to disapprove the findings and sentence of a court-martial "for any or for no reason." . . . We disagree with trial counsel's assertion that the implementing regulations of the Judge Advocate General, which are substantially in accord with those of the Air Force as quoted in United States v. Smith, 16 USCMA 274, [36 C.M.R. 430 (1966)], and Article 67(f), supra, were superseded by the letter to the commanding officer, Fort Leavenworth, in this case. Congressional enactments cannot be repealed in that manner.

The Board noted that since article 66(e), UCMJ, pertaining to rehearings ordered by a Board of Review employs language identical to that found in article 67(f), no valid argument can be made that the same words carry a different meaning. Accordingly, as in *Rob-*

bins these proceedings were 'without authority and hence a nullity,' notwithstanding appellant's failure to object in the trial forum to the rehearing by the new convening authority."

The findings of guilty and sentence were set aside. The Board's original mandate ordering a rehearing remained in effect and a rehearing is still authorized. (Chalk, C.J.; Collins and Frazier, JJ., concurring.)

2. (73*a*, 75, MCM) **Instruction Which Fails To Include Essential Element Of Offense Is Prejudicial, Army Policy Concerning Forfeitures Not Applicable To Fines, Comment On Pretrial Confinement And On Uncharged Misconduct.** *United States v. Mack*, CM 420026, 2 May 1969. After pleading not guilty to one specification alleging larceny and to two specifications alleging the sale without proper authority of military property, accused was found guilty only on the wrongful sale specifications. Sentence: BCD. The convening authority took the following action:

> . . . the sentence to bad conduct discharge is changed to reduction to the grade of Private (E-1) and payment to the United States of a fine of $200.00. The sentence as changed is approved and will be duly executed.

The Judge Advocate General referred the record of trial to the Board of Review.

During the law officer's pretrial instructions to the court he stated, in pertinent part, ". . . [t]hat the sale was suffered by the accused without proper authority. . . . 'Suffer' means to allow, to permit, to tolerate, to put up with, to fail, [sic] to forbid, [sic] or to hinder." Defense counsel indicated he neither desired additional instructions nor objected to those given. As noted by the Board, the essential deficiency in the law officer's instruction was the failure to include an essential element of the offense, *i.e.*, that the accused sold military property. The failure of the law officer to instruct on the elements of an offense, following a not guilty plea, is fundamental, prejudicial error, *United States v. Clay*, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951). Moreover, because of its fundamental nature, the omission of an instruction as to an element of an offense is not waived by failure to object thereto at trial. *United States v. Cromartie*, 1 U.S.C.M.A. 551, 4 C.M.R. 143 (1952). The affirmative error of including in the instruction the totally irrelevant element that the sale *was suffered* by the accused, followed by a definition of the verb "suffer," did not cure the error.

Because, under the disposition of this case, a rehearing may be held, the Board adverted to the second assigned error that the staff judge advocate failed to inform the convening authority of the policy set forth in paragraph 88, Army Regulation 633-10, 21 May 1968. This regulation provides:

> As a matter of policy, any forfeiture imposed on an enlisted person that exceeds forfeiture of two-thirds of pay per month for 6 months should be remitted by the convening authority unless the sentence includes, and the convening authority approved, a bad conduct discharge or dishonorable discharge or confinement unsuspended for the period of such forfeitures.

The Board stated that there was no requirement to inform the convening authority of this policy inasmuch as forfeiture was in no way involved in this case. Accused was originally sentenced to a BCD and this sentence was commuted to reduction to E-1 and payment of a $200 fine. The regulatory policy would have been relevant only had accused's sentence, either as adjudged or commuted, involved a forfeiture. The distinction between a forfeiture and a fine makes the policy inapplicable to this case.

Following findings, trial counsel announced that appellant had been under administrative restriction commencing 25 September 1968 . . . and in pretrial confinement since 30 October 1968." Defense counsel confirmed the correctness of this information, and no explanation as to the change in the nature of accused's pretrial restraint was offered. The Board noted that in *United States v. Millican*, CM 41881, — C.M.R. — (1968, digested 68-

26 JALS 6) it held that the law officer's failure, *sua sponte*, to limit the purpose for which the court might properly consider appellant's pretrial confinement was error, in view of the danger that the court would infer that the elevation of his pretrial restraint was occasioned by uncharged misconduct on his part.

The Board held that the finding of guilty and the sentence, as commuted, were incorrect in law. Accordingly, they were set aside and a rehearing was ordered. (Stevens, C.J.; Nemrow, J., concurring; Kelso, J., did not participate.)

3. (54*b*, MCM) Law Officer Abused His Discretion In Not Granting Court Member's Request To Call Additional Witnesses. *United States v. Willett*, CM 419437, 20 May 1969. Accused was tried by general court-martial for three specifications of larceny and three specifications of housebreaking (arts. 121 and 130, respectively). He was found guilty of the larceny offenses, but not guilty of the housebreaking charge and its specifications. Sentence: DD, TF, 5 yrs CHL. The convening authority approved only so much of the sentence as provided for DD, 18 mos CHL, and F $105.00 pay per mo for 18 mos.

CID Agent *B*, while on a routine check of pawn shops, discovered items of stereo equipment which had been reported missing. Records of the pawn shop indicated that the property was pawned under accused's name. Accused's company commander granted authorization to conduct a search. When searched, accused had in his possession several pawn tickets which led to the recovery of other items of property involved in the charges brought against him. The tickets also reflected that the property was pawned under accused's name.

Trial counsel elected to call only two witnesses in addition to the victims of the several larcenies. The pawn brokers involved in the loan transactions were not called. Rather, trial counsel elected to cause the pawn tickets to be placed in evidence on the basis of Agent *B*'s testimony, and although the pawn tickets were received in evidence while *B* was still on the stand, they evidently were not given to the members of the court-martial until trial counsel's closing argument. No witness testified who could identify accused as the culprit, nor was evidence produced to establish that the handwriting on the pawn ticket was that of accused.

After defense counsel rested his case, members of the court-martial responded in the negative when the law officer asked if the court desired to have any witnesses called or recalled. The record of trial, however, revealed that at the close of the law officer's instructions, one member of the court gave the following written question to the law officer:

> Can the court hear testimony from the pawn shop clerks who received the property from PVT Willet [sic]. Perhaps their testimony can clear up the different signatures appearing on the pawn tickets.

The law officer denied the request, stating:

> Major *F*. . . , it is a little late for this now. If that was necessary, it should have been requested at an earlier time in the case.
>
> This [written question] will be marked as an appellate exhibit.

Accused contended that he may have been prejudiced by the law officer's ruling which, in effect, foreclosed the court-martial's right to call additional witnesses. The Board was required to inquire as to whether the law officer abused his discretion in denying the court member's request. *United States v. Rogers*, 14 U.S.C.M.A. 570, 34 C.M.R. 350 (1964). The Board first noted that when the law officer made the formal inquiry as to whether the court desired to call or recall any witnesses, the pawn tickets had not, at that time, been examined by the court members. This fact was significant in light of the reason given by the law officer for denying

of the case. The record merely reflected that he thought the request came too late.

Furthermore, the Board was not persuaded that defense counsel waived any possible error by failing to object to the law officer's ruling, since the record did not reflect that he was afforded an opportunity to examine the question.

In light of the foregoing considerations, the Board concluded that the law officer demonstrated a lack of proper regard for the coexistence of the right of the court-martial to call witnesses and the law officer to rule on the request and consequently abused his discretion. The findings of guilty and the sentence were set aside and a rehearing could be ordered. (Bailey, J.; Hagopian, J., concurring; Porcella, C.J., did not participate.)

4. (147*a*, MCM; UCMJ art. 66(c)) **On Rehearing, Board Of Review Is Limited To Matters In The "Entire Record."** *United States v. Pinkston*, CM 418402, 22 May 1969. Pursuant to the opinion of the Court of Military Appeals (digested 69-10 JALS 2), affirming in part and reversing in part the decision of this Board of Review, the record of trial was returned to the Board for further review. The Court's mandate authorized the Board to order a rehearing on the affected specifications, or in the alternative, to reassess the sentence on the remaining offenses.

Defense counsel, in their pleading for further review, stated that accused has served the confinement portion of his sentence, has been restored to active duty, and has been promoted from private (E-2) to specialist four. Government counsel filed a Motion to Strike that portion of the defense pleading relating to accused's promotion on the ground that this matter was outside the "entire record" of trial and consequently could not properly be considered by the Boards.

The Board cited the decision of *United States v. Fagnan*, 12 U.S.C.M.A. 192, 30 C.M.R. 192 (1961), wherein the Court of Military Appeals held that a Board of Review, in its consideration of information relating to the appropriateness of sentence, is limited to matters included in "the entire record." The Court defined the quoted phrase as follows:

> . . . That phrase encompasses the transcript and the allied papers, as well as any appellate brief prepared pursuant to the terms of Code, . . . Article 138. [Citation omitted.] Beyond these limits, the board of review may not go. Accordingly, the board here properly refused to consider, on the question of the appropriateness of the sentence, the psychiatric report and letters regarding [the accused's] good conduct in post-trial confinement. (12 USCMA at 195, 30 CMR at 195).

The Board further noted that the fact that paragraph 147*a*, *Manual for Courts-Martial, United States, 1969*, provides that judicial notice may be taken of the contents of written military orders, such as one effecting a military promotion, it "does not infuse them with the relevance and acceptability, as part of 'the entire record,' requisite to permit their consideration by a board of review in determining what sentence should be approved." Accordingly, the Board granted the Government's motion to strike.

In accordance with the mandate of the Court of Military Appeals, the Board reassessed the sentence and approved so much of the sentence as provided for 6 mos CHL and F $90 per mo for 6 mos. (Stevens, C.J.; Kelso and Nemrow, JJ., concurring.)

5. (89*a*, MCM; UCMJ art. 38(b)) **Court Which Convicted Accused Was Legally Constituted; Accused Was Represented By Qualified Counsel.** *United States v. Foster*, CM 419048, 9 May 1969. Accused was tried by general court-martial for offenses alleging that he had unlawfully entered various German commercial establishments and that, having entered, he had stolen sundry items from each one (arts. 130 and 121, respectively). He was acquitted of these charges. In addition, accused was charged and convicted of attempted housebreaking and larceny of "certain items of a value less than $20.00" from

"three motor vehicles" (arts. 80 and 121, respectively). The convening authority approved the sentence of BCD, 3 mos CHL, and red E-1.

The Board first rejected accused's contention that the court which tried him was illegally constituted. The record reflected that during the last of several continuances, the originally appointed law officer was hospitalized. The record further reflected that the successor to the original law officer was appointed for good cause by the appropriate official three days prior to the reconvening of the court. Consequently, there was sufficient evidence to establish the court's jurisdiction.

Accused next contended that he "was not represented at trial by qualified counsel." Article 38(b), UCMJ, provides that an accused may retain his own civilian defense counsel. In *United States v. Kraskouskas*, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958), the Court of Military Appeals held that civilian counsel so selected by an accused "must be a lawyer who is a member in good standing of a recognized bar." In this case, accused's defense counsel was a member in good standing of the bar of the Federal Republic of Germany and was licensed "to practice before all courts in . . . matters other than civil" throughout West Germany. The Board concluded that accused was represented at trial by qualified civilian counsel as that term was interpreted in the *Kraskouskas* decision.

The Board next found unmeritorious accused's contention that the Government had an "affirmative duty" to show that he elected to proceed without appointed military counsel. Article 38(b), UCMJ, makes it clear that absent a request by an accused for appointed defense counsel to act as associate counsel to the individual counsel of accused's own selection, appointed counsel shall be excused. The record reflected that at trial accused expressed his consent to his appointed defense counsels being excused from further participation in the case.

The Government conceded that the specification charging larceny failed to state an offense. Accused then was left convicted only of attempted unlawful entry of a specified German clothing store.

The finding of guilty on the larceny specification was set aside and the charge dismissed. The finding of guilty of the unlawful entry was correct in law and fact. The sentence, as approved by the convening authority, was appropriate and was approved. (Rouillard, C.J.; Thomas, J., concurring; Booth, J., did not participate.)

6. (120*b*, 122, MCM) **Issue Of Accused's Mental Responsibility Properly Considered. Record Did Not Disclose Government's Witness' Testimony Was Restricted By Army Guidelines. No Error In Instructions.** *United States v. Enzor*, CM 418523, 5 May 1969. Conviction: attempted sodomy, sodomy, and indecent assault (arts. 80, 125, and 134, respectively), despite plea. Sentence: 5 yrs CHL.

During the trial the mental responsibility of accused was placed in issue. The Government presented the testimony of Captain *J*, a psychiatrist; the defense called Dr. *G*, also a psychiatrist. Both agreed that accused could distinguish right from wrong but disagreed as to whether he could adhere to the right. Captain *J*'s diagnosis was "sexual psychopathy" whereas Dr. *G*'s diagnosis was "personality disorder, psychopathic personality, sexual deviate."

A person is not mentally responsible, in a criminal sense, for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right (para. 120*b*, MCM, 1951). The Board, in the instant case, after a thorough analysis of mental disorders as categorized by the American Psychiatric Association, authors of various psychiatric treatises, and the American Law Institute, concluded that the evidence in this case was sufficient to show

that accused could adhere to the right. The Board stated:

> Thus, we have a psychopath, or if you prefer — "sociopathic" or "antisocial" offender, who is not responsive to medical or psychiatric treatment, who profits from neither confinement nor experience, who must be prevented from preying on society. Dr. Davidson [author of *Forensic Psychiatry*] is of the opinion that "Psychopathic personality under whatever name designated, does not impair a defendant's accountability." . . . The ALI also has concluded that the psychopath must be held criminally responsible for his acts if the public is to be protected. We agree. We are unwilling to grant him access to his unsuspecting victim, absolution from his criminal act, or continued freedom to practice his reprehensible malefaction.

The Board was convinced that the issue of mental responsibility was raised by the evidence, properly presented to the court for its consideration under appropriate instructions, and was resolved against accused.

Accused, citing *United States v. Jansen*, 14 U.S.C.M.A. 358, 34 C.M.R. 133 (1964), next contended that the record reflected that the Government's psychiatrists' testimony was restricted by "Army guidelines" and consequently the law officer erred in admitting his testimony. The Board disagreed, stating:

> It does not require a close reading of the examination of this witness by the individual defense counsel to arrive at the conclusion that he was attempting to bring his client within the protective ambit of *Jensen* but refused to ask the crucial question: i.e., Did you use the criteria set forth in TM 8-240 *Psychiatry in Military Law*, dated May 1953, in arriving at your opinion? Did you adhere to the guidance in paragraph 5 that before testifying that the accused did the act because of an "irresistible psychoneurotic compulsion," the medical officer should be satisfied that the compulsion generated by the illness was so strong that the act would have been committed even though your opinion be different if you were released from this restrictive "immediate detection and apprehension" test?
>
> . . .
>
> We conclude that Captain [*J*] properly applied the Manual for Courts-Martial insanity rule, even though he admitted on cross-examination that he did not agree with the M'Naghten rule or the "adhere to the right" theory, which he, as a psychiatrist, did not feel utilized psychiatric opinion and evaluation very well; but which we, as lawyers and judges, must apply because it is the law by which we are bound.
>
> . . .
>
> In summation, any dissatisfaction evinced by Captain [*J*] related to the use of the M'Naghten formula and the continuing refusal of the law to utilize current psychiatric knowledge, and did not refer to any "fetter" contained in TM 8-240. . . .

Accused, citing *United States v. Griffin*, 17 U.S.C.M.A. 387, 38 C.M.R. 185 (1968), further contended that the following instruction given by the law officer was prejudicial:

> . . . Now a member may properly believe one witness and disbelieve other witnesses whose testimony is in conflict with that other one. You should then reconcile the evidence in this case upon the theory that each and every witness is telling the truth, if it can reasonably be done.

In *Griffin*, the Court held that it was prejudicial error for the law officer to instruct that there is a "presumption that the witness speaks the truth" because it derogates from the presumption of innocence of a defendant. The instruction complained of in this case, however, did not use the term "presumption" but referred to the "theory" that every witness was telling the truth. Furthermore, in *Griffin*, the Court's decision was concerned with two principal witnesses whose versions of the incident giving rise to the charge were in direct conflict. The critical distinction between *Griffin* and this case lies in the basic difference of the disagreement between the two witnesses referred to by the law officer. In this case, the only conflict in testimony was the difference of professional opinion between two psychiatrists on the effect of the mental

disorder of the accused. The Board noted that this is not the type of conflict envisioned by *Griffin* which related to differing versions of the facts surrounding the charged offense. Accordingly, as there was no conflict of testimony on the facts of this case, the cited instruction, even if error, was not prejudicial. Findings and sentence were affirmed. (Thomas, J.; Rouillard, C.J., concurring; Booth, J., did not participate.)

7. (138*g*, MCM) **Court Did Not Improperly Consider Uncharged Misconduct.** *United States v. Robents*, CM 420247, 12 May 1969. Conviction: wrongful appropriation of a government truck, negligent homicide, and wrongfully leaving the scene of an accident (arts. 121 and 134, respectively), consistent with plea. Sentence: BCD, TF, 2 yrs CHL. Convening authority approved, save for his reduction of the confinement term to one year.

Accused's single assignment of error was that the law officer prejudiced him by failing "to limit the court's consideration of uncharged misconduct in a defense exhibit (appellant's qualification record)—reduction in grade by SPCMO #9—, the record of prior convictions revealing no such special court-martial order number." As pointed out by government counsel, the reference in accused's qualification record was

"GRADE DATE OF RANK AUTHORITY
Pvt E-1 20 Aug 68 SPCMO #9"

was to a previous conviction and evidence of this conviction had been properly submitted to the members of the court for their consideration. The Board agreed that since this evidence demonstrated that the accused was reduced to private E-1 on 20 August 1968 as the result of Special Court-Martial Order No. 8, and since accused could not have been reduced to the same grade twice in one day, the court members would not have speculated as to a possible other act of misconduct. Accordingly, the findings and sentence were affirmed. (Stevens, C.J.; Kelso, J., concurring; Nemrow, J., absent.)

IV. GRANTS AND CERTIFICATIONS OF REVIEW.

1. *United States v. Presley*, CM 418702, petition granted 5 May 1969. Accused was convicted of four specifications of willful disobedience of a superior officer and two of cowardice before the enemy (arts. 90 and 99). He pleaded guilty to Specifications 3 and 4 of Charge I and otherwise innocent. On 19 February 1968, Company D suffered a number of casualties in an encounter with a heavy concentration of Viet Cong. On 20 February 1968, Company C, accused's company, was ordered to conduct a search and destroy mission on a nearby ridge line. Accused complained of being sick the evening of the 19th and the morning of the 20th and refused to go on the mission. The platoon leader, LT *B*, and Specialist *J*, a medic, made a visual examination of accused. The medic felt accused's forehead. He found he was nervous but did not appear to be sick. LT *B* ordered accused to board a truck. He refused. *B* sought out Captain *B*, the company commander, and returned to the truck with him. Accused, who was sitting on the wheel base of the truck, looked pale, mumbled in a low voice, waived his head back and forth and said he was sick and would not go. He had not, however, shown any signs of sickness earlier that morning. *B* ordered accused to mount the truck and move out with his platoon. Accused refused, saying he was sick. He was then sent to the battalion surgeon and his company moved out without him. The surgeon thought he was nervous and apprehensive but "didn't appear to be acutely ill." He found nothing seriously wrong with accused, although he complained of abdominal pains, and told him to return to duty.

On 28 February, mortar and rocket rounds struck the south end of Song Be airstrip. A C-130 and two helicopter gunships were shot down almost immediately after takeoff. Accused's company was ordered to move out to the Southeast into a blocking position while an ARVN Ranger Battalion cleared the village from the West. The troops were lined up on the road when accused dropped out of forma-

tion and said he was not going. *B* asked him why, and he replied his reasons were personal and refused to disclose them. *B* ordered him back to his platoon but he refused to go. He was taken to the company commander who ordered him to accompany his platoon. Again he refused. When asked if he were ill, he replied that he wasn't. The company once more moved out without him. The company commander testified accused looked calm and had complete control of himself. The platoon sergeant testified that "he looked pretty ill and he had a glassy look in his eyes like he appeared scared." On two occasions prior to 20 February accused had told one of his friends that he intended to get into trouble so he would be sent to jail. He would then see a chaplain and arrange to go home to marry a girl whom he had "gotten in trouble." He had previously gone out on a number of missions with his unit and had been under fire. The Court will consider whether the evidence is legally sufficient to establish accused's guilt of cowardice before the enemy on 20 and 28 February 1968 and his willful disobedience of Lieutenant *B* and Captain *B* on 20 February 1968.

2. *United States v. Johnson,* NCM 69-0829, petition granted 21 May 1969. Accused, pursuant to his pleas, was found guilty of three offenses of assault with a dangerous weapon, three offenses of assault consummated by a battery, and three offenses of threatening another with a dangerous weapon. During the presentencing part of the trial accused testified under oath, in part, "I drank about a quart of beer. . . . I could tell what I was doing, but I couldn't explain it. I knew it wasn't right, and I could tell it was wrong. I just didn't have energy to stop it. At the time I just thought it was the thing to do."

During his pretrial confinement from 5 September 1968 to 21 September 1968, accused was required to eat, sleep, and work with sentenced prisoners in III MAF Brig, DaNang, Vietnam. The Court will determine if the circumstances of accused's pretrial confinement resulted in a denial of due process of law and whether accused's pleas of guilty were provident, particularly in view of the law officer's failure to delineate the essential elements of the offenses and to determine the factual basis of the pleas.

3. *United States v. Calpito,* NCM 69-0369, petition granted 29 May 1969. Accused was found guilty, in consonance with his plea, of an unauthorized absence from 24 April 1968 to 11 November 1968 from his unit, located at Whidebey Island, Washington. Just prior to this period he had been on emergency leave at his home in Baguio, Republic of the Philippines. In a sworn statement during the presentencing phase of the trial he testified he had made several attempts at Clark Air Base to obtain a military flight back to the United States but was refused passage because he didn't have a passport. His attempt to obtain a passport proved futile because a "certification" was required of his commanding officer. Inasmuch as his commanding officer was in the United States, he felt this impossible to accomplish. He sent his commander a telegram explaining his predicament. On 20 April his commander wired back informing him he did not need a passport because of his emergency leave status. The TWX ordered him to report to Clark Air Base as soon as possible and requested the authorities at Clark to assist him in returning. On 23 April he reported in at Clark Air Base, and showed the TWX to Air Force personnel there. They refused him passage once again, insisting he needed a passport. He became "upset" and returned to his home in Baguio. Financial difficulties, marital conflict, and damaged roads were presented in explanation of the prolonged absence. Issue granted: Did the accused compromise his plea of guilty to unauthorized absence from 24 April 1968 until 11 November 1968?

4. *United States v. Riddle,* NCM 68-3210, petition granted 3 June 1969. Accused was convicted by special court-martial of larceny of an automobile (Art. 121). The offense occurred off-base in the United States during the evening hours while accused was in an off-

duty status and was cognizable in civilian court. The Court will consider whether, in the circumstances of this case, the court-martial had jurisdiction of the offense charged.

5. *United States v. Tackett,* NCM 69-0741, petition granted 11 Jun. 1969. The Court will consider whether the president erred to the prejudice of accused by including in his sentence instructions, ". . . the reputation or the background and character of the accused; the reputation or record of the accused in the service for good conduct, efficiency, fidelity, courage, bravery, or other traits which characterize a good marine. . .", none of which was in evidence in this case.

6. *United States v. Wilson,* CM 419469, petition granted 6 Jun. 1969. The Court will consider whether the law officer erred in charging that personal beliefs based upon religious scruples are no defense to refusing to obey a lawful order. *Cf. United States v. Sisson,* ——— F. Supp. ———, 37 U.S. Law Week 2554 (D. Mass. April 1, 1969).

7. *United States v. Hayes,* CM 419577, petition granted 18 Jun. 1969. The Court will consider whether the law officer denied accused a right to a fair trial by allowing a psychiatrist to testify as to the results of his examination of accused at a sanity board requested by individual defense counsel, a critical stage of the proceedings which settled the fate of accused, without requiring the prosecution to show notice to the accused's counsel, an intelligent waiver of counsel or other procedural safeguards to guarantee accused's right to a fair trial, *e.g.*, a transcript or video tape.

8. *United States v. Marshold,* NCM 69-0275, petition granted 16 Jun. 1969; *United States v. Feely,* NCM 68-1981, petition granted 18 Jun. 1969; *United States v. Orr,* NCM 69-0501, petition granted 28 May 1969; *United States v. Gremillion,* NCM 68-3660, petition granted 3 Jun. 1969; *United States v. Carter,* NCM 69-0189, petition granted 15 May 1969; *United States v. Care,* NCM 69-0408, petition granted 14 May, 1969; *United States v. Romero,* NCM 68-3638, petition granted 18 Jun. 1969; *United States v. Henryes,* NCM 69-0681, petition granted 24 Jun. 1969; and *United States v. Brooks,* NCM 68-3557, petition granted 30 Jun. 1969. The Court will consider whether accused's pleas were provident, particularly in view of the law officer's failure to delineate the essential elements of the offense and to determine the factual basis of the pleas.

V. TJAG ACTIONS UNDER ARTICLE 69, UCMJ.

1. Denial of a necessary and material, requested defense witness (who could have testified concerning the incident which resulted in court-martial charges) required vacation of accused's conviction of wrongful appropriation of a government vehicle, absence without proper authority, and failure to obey a lawful off-limits order. JAGVJ SUMCM 1968/30.

2. Failure of special court-martial president to instruct court that it could not adjudge a suspended sentence was, under circumstances of this case, error prejudicial to the substantial rights of the accused (accused was acquitted of 2 of 3 charges, and evidence indicated remaining charge was not serious infraction). There was a fair risk that, in the context of this case, a properly instructed court would have adjudged a sentence different from that actually adjudged. That portion of the sentence adjudged which was within the power of the court was a legally adjudged and valid sentence. Valid portion of sentence reassessed to cure possible prejudice. JAGVJ SPCM 1969/147.

3. Accused, a bona fide member of an orthodox Hebrew sect which requires all adult males to wear beards, was inducted into military service. Established Department of the Army policy provides "that an inductee may retain a beard if it is required as a tenet of religious faith," if permission is obtained from Headquarters, DA, upon an adequate showing of necessity. AR 600-20 affords commanders discretion to handle most personnel problems, but requires that they assure that all men are clean shaven, with the exception

that the wearing of a neatly trimmed mustache is permitted. Although accused's commander granted accused some special dispensations to allow him to comply with religious law, AR 600-20 forbade adjustment on this point. Following conviction for disobedience of superior officer's order to shave, accused's case came to the attention of higher headquarters, and DA granted accused permission to wear a beard. Failure of Department of the Army to provide a mechanism for exercising this established but unpromulgated exception to an apparently peremptory administrative regulation, under the circumstances of this case, denied the accused due process of law. Findings and sentence set aside. JAGVJ SPCM 1969/169.

4. Wrongfully occupying the same bed during the night-time with a woman not his wife, conduct of a nature to bring discredit upon the armed forces, is not a lesser included offense to adultery, the offense charged. The focus of the latter is wrongful sexual intercourse; the situs of the coupling is irrelevant (to the charge). None of the elments of the supposed lesser included offense are elements of adultery. Conviction set aside. JAGVJ SPCM 1969/188.

5. Accused's convictions of absence without leave and failure to repair set aside. Although accused (who suffers from a schizophrenic reaction, paranoid type, chronic, severe) was able to distinguish right from wrong at the time of the offenses, he was unable to adhere to the right and to cooperate intelligently in his own defense, The Surgeon General concluded. JAGVJ SPCM 1969/201/209.

6. Failure of prosecution to prove existence of regulation allegedly violated and accused's knowledge of the regulation, two essential elements of an Article 92(2) offense, resulted in setting aside of conviction. JAGVJ SPCM 1969/219.

7. Insufficient evidence was introduced to show accused's failure to repair to his place of duty. An apparently solicited letter from commander of accused's unit that a search had failed to disclose his presence was hearsay, not admissible as an exception to the hearsay rule. AWOL conviction set aside. JAGVJ SPCM 1969/223.

VI. RESERVE AFFAIRS.

1. Unit And Mobilization Designee Assignments. JAGC Majors completing tours of extended active duty should write to the Assistant for Reserve Affairs, Office of The Judge Advocate General, Department of the Army, Washington, D. C. 20310, for assistance in obtaining unit and mobilization designee assignments. Letters should state, when possible, the area in which the officer expects to settle and any assignment preferences. It is suggested that the letters be written approximately 45 days before terminating active duty. JAGH, 26 Mar. 1969.

2. POI For 1969-1970 USAR School New Developments Course. The Nonresident Training Department plans distribution of the POI for the USAR School New Developments Course in July. This POI is designed for the 1969-1970 and 1971-1972 USAR school presentation of graduate level training in military legal subjects. As in its prior offerings, this is a one-year program which consists of 48 hours of material for the reserve duty training period and one two-week resident course at The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia.

The subject course, which will be available to USAR school classes of 5 or more students, is designed to provide the Reserve Component Judge Advocate General's Corps officer with an understanding of the significant new developments of both substance and procedure in each of four principal areas of military legal jurisprudence (Procurement Law, International Law, Military Affairs, and Military Justice). As offered, this training in new developments is designed to perpetuate a high level of branch training and thereby accelerate the student Judge Advocate's ability to assume his duties in the event of his mobilization.

Qualifications necessary for participation in program. The enrollee must be a Reserve Component commissioned officer assigned to the Judge Advocate General's Corps who has received actual or constructive credit for a Judge Advocate Branch Officer Advanced (Career) Course.

Student and Instructor Material. In accordance with enrollment notices which The Judge Advocate General's School receives from USAR schools, the necessary course materials for RDT will be forwarded to USAR schools participating in the New Developments Program. JAGS/N, 2 Jul. 1969.

VII. MISCELLANEOUS.

Articles Of Interest To Judge Advocates.

Comment, *Due Process Challenge to the Korean Status of Forces Agreement,* 57 Geo. L.J. 1097 (1969). Copies are available from the Georgetown Law Journal, 506 E Street, N. W., Washington, D. C. 20001.

Comment, *S & E Contractors and the GAO Role in Government Contract Disputes. A Funny Thing Happened on the Way to Finality,* 55 Va. L. Rev. 762 (1969). Copies are available from Fred B. Rothman and Co., 57 Leuning Street, South Hackensack, New Jersey 07606.

By Order of the Secretary of the Army:

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General, United States Army,
Chief of Staff

Official:

KENNETH G. WICKHAM
Major General, United States Army
The Adjutant General

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