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JUDGE ADVOCATE LEGAL SERVICE*

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

I. Anniversary Messages.

II. Opinions of the U. S. Court of Military Appeals.

III. Federal Decisions

IV. Board of Review Decisions.

V. TJAG Actions Under Article 69, UCMJ.

VI. Miscellaneous Military Justice.

VII. Military Affairs Opinions.

VIII. Miscellaneous.

I. ANNIVERSARY MESSAGES.

ANNIVERSARY MESSAGE FROM CHIEF OF STAFF TO THE MEMBERS OF THE JUDGE ADVOCATE GENERAL'S CORPS

To each member of the Judge Advocate General's Corps, I extend the United States Army's warm congratulations on the one hundred ninety-fourth anniversary of the Corps.

The Army's need for competent, intelligent legal advice and command legal support has never been greater; the guidance your Corps provides is vital to the well-being of Army personnel and their dependents. Commanders at all levels and at all stations need your counsel and support to deal effectively with new and unprecedented problems which impact not only on the Army and its mission, but also on the Nation and the very fabric of our society.

The Military Justice Act of 1968 which provides Army personnel with an exceptionally fine system of justice, is the most significant recent development in the Army's legal services program. While its implementation will place a heavy burden on all judge advocates, I am confident that the traditional dedication and zeal with which your Corps has accepted the challenge will assure its success.

The men and women of the United States Army join me in saluting the Corps and in expressing best wishes for the future.

W. C. WESTMORELAND
General, United States Army
Chief of Staff

ANNIVERSARY MESSAGE FROM GENERAL HODSON TO THE JUDGE ADVOCATE GENERAL'S CORPS

It is my pleasure to extend best wishes to each of you on this, the 194th anniversary of the Judge Advocate General's Corps.

I am proud, indeed, to be privileged to serve as senior partner in the law firm which furnishes such timely and effective legal services to the Army—wherever it serves. Now, as never before, you are called to rise to the challenge of rapid social and political change on a worldwide scale. The solution to the issues and problems raised by this challenge affects not only the Army but all of America.

This year marks the implementation of the Military Justice Act of 1968, certainly the most significant development in military justice since the enactment of the Uniform Code of Military Justice. Breathing life into this Act presents a challenge that will test the ability of all of us. If we respond to this challenge with the dedication and professional pride that we have shown in the past, the

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***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 69-19 JALS [page number] (DA Pam 27-69-19).**

legal profession, the Army, and the United States will be well served.

KENNETH J. HODSON
Major General, USA
The Judge Advocate General

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

1. (73*d*, 216*c*, MCM) **Law Officer Correct In Ruling That Self-Defense Was Not An Issue.** *United States v. Rine*, No. 21,684, 3 Jul. 1969. Accused was charged with murder and was convicted of the lesser offense of voluntary manslaughter (art. 119). He was sentenced to a dishonorable discharge and confinement at hard labor for five years. In this appeal, accused contended that he was prejudiced by the law officer's denial of a defense request to instruct on self-defense.

Three persons testified at accused's trial. Two of these, *P* and *H*, were Thai nationals, and the third was accused. All agreed that accused was standing on the side of a road when he was approached by *G*, his victim. As *G* came to where accused stood, he either "bumped into" accused, as accused testified, or he "brushed shoulders" with accused, as the Thais testified. What followed this contact is not clear. Accused testified that, while he was talking with *G*, he was suddenly struck on the side of his head. Both Thais testified that they saw nothing in *G*'s hands at this moment, but *P* testified that he saw *G* with a beer bottle just before he saw him with accused. *H* also testified that he saw *G* throw a beer bottle at accused when accused finally ran away from the scene.

All agreed that accused fell backward into a pond. As noted by the Court, there was some difference in the testimony between *H* and *P* as to what happened next. The most direct evidence bearing on the issue of self-defense, however, came from *P*.

> The accused testified that he was dazed from the blow he received. As he "attempted to get . . . back up" he saw "an image of a man . . . in front" of him. He got up and *went "back to this man."* (Emphasis supplied.) [*P*] . . . testified that when the accused "got himself to his feet" he "rushed to" [*G*] . . . . The accused admitted that as he got "back up," he withdrew the knife from his pocket. Asked whether he had opened the knife, he answered: "No, sir, I didn't." Asked further whether he had stabbed "anybody with that knife" on the day of the incident he replied: "No, sir, I never stabbed anybody at any time." Later, under questioning by a court member, he reiterated that as far as he knew he "didn't stab anybody."

A plea of self-defense is "in the nature of the admission of an assault and an avoidance of guilt because of the excuse . . . that such assault was in . . . [the accused's] own necessary defense." *United States v. Duckworth*, 13 U.S.C.M.A. 515, 520, 33 C.M.R. 47 (1963). In this case, however, accused expressly and categorically denied that he was in any way responsible for, or connected with, the injury to *G*. The Court therefore held that the law officer correctly ruled that self-defense was not in issue in this case. Accused insisted that he did not stab *G* and therefore, by his own admission, was not motivated by a desire to protect his person.

The Court further rejected accused's argument that the severe injuries he sustained when he was struck on the head constituted adequate provocation for self-defense. The difficulty with this argument was that it disregarded the requirement that "one must in fact . . . fear imminent death or serious injury before he is entitled to resort to a dangerous weapon." *United States v. Regalado*, 13 U.S.C.M.A. 480, 33 C.M.R. 12 (1963). In this case there was no evidence that accused stabbed *G* to protect himself from death or serious injury. Accordingly, the decision of the board of review was affirmed. (Opinion by Chief Judge Quinn in which Judge Darden concurred.)

Judge Ferguson (dissenting) stated that the circumstances in this case were of such a nature as to raise an issue of fact as to whether accused acted in self-defense. This

question should have been resolved by the court members under proper instructions.

2. (70*a*, *b*, 79*d*(2), MCM) **Providency Of Guilty Plea. Accused's Guilty Plea Should Not Have Been Accepted Since There Was Evidence Inconsistent With His Plea.** *United States v. Calpito,* No. 22,001, 11 Jul. 1969. Consistent with his plea, accused was convicted of being absent without leave (art. 86), and sentenced to a bad-conduct discharge, confinement at hard labor for six months, forfeiture of $97.00 per month for a like period, and reduction. Intermediate appellate authorities affirmed the findings and sentence without change. The Court of Military Appeals granted review to determine whether accused, by his testimony in extenuation and mitigation, compromised his plea.

Evidence in the record established that accused went to the Philippines on an emergency 30-day leave from the United States. This leave was extended for 20 more days. The record further established that following the expiration of this additional leave, accused, on three separate occasions, reported to Clark Air Force Base for transportation back to his command. On each of these occasions he was told that he needed a passport and was sent to the receiving station at Subic Bay to get one. At Subic Bay accused was informed that no passport was needed and that he should return to Clark. When accused attempted to obtain a passport from civilian authorities in Manila he was advised that a certificate of attachment to a particular unit, signed by his commanding officer, was required. This he could not get without returning to the United States—the very thing that he was trying to accomplish.

Accused also introduced in evidence a telegram from his commanding officer which instructed him to report to Clark. Despite the statement in the telegram that accused did not need a passport, and the direction therein that Clark Air Force Base was to assist him in returning to the United States, accused was nevertheless refused transportation. The basis for the refusal was always that accused lacked a passport.

The Court agreed that accused's extensive efforts to return to the United States were frustrated by official error and inaction. The Court could find no reason to explain the failure of the Air Force personnel at Clark to comply with the request of accused's commanding officer that they facilitate his return. The Court noted that the record contained more than enough evidence to raise an issue as to whether accused had a defense to the charge. At the very least, accused's testimony and the supporting evidence was inconsistent with his plea, and the plea should not have been accepted. *United States v. Vance,* 17 U.S.C.M.A. 444, 38 C.M.R. 242 (1968). Accordingly, the decision of the board of review was reversed and the record returned to The Judge Advocate General of the Navy. A rehearing may be ordered. (Per curiam opinion.)

3. (76*b*(2), MCM) **Law Officer's Failure To Instruct On Procedure To Be Followed In Voting On Sentence Constituted Reversible Error.** *United States v. Johnson,* No. 21,835, 3 Jul. 1969. In accord with his plea, accused was convicted of three specifications of being absent without leave (art. 86), and was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for two years. Intermediate appellate authorities affirmed the findings and sentence.

The law officer, in his instruction on the procedure to be followed in voting upon proposed sentences, failed to instruct the court that it should begin with the lightest proposal and continue in this manner until a sentence was adopted by the concurrence of the required number of members. MCM, para. 76*b*(2). The Court noted that this Manual procedure has the force of law and is binding on courts-martial since it was promulgated by the President under power specifically delegated to him. UCMJ, art. 36(a). Moreover, the voting procedure is more than a mere technicality; "[i]t is, essentially, a part of military due process."

Because the court, which was not properly instructed on the voting procedure, could commence its deliberation with the most severe proposed sentence, the Court invoked the doctrine of plain error and reversed as to sentence. A rehearing on sentence may be ordered. (Opinion by Judge Ferguson in which Judge Darden concurred.)

Chief Judge Quinn (dissenting) could not accept the Court's determination that the voting procedure established in the Manual "is, essentially, a part of military due process" and required a reversal of the board of review, without considering whether accused was prejudiced by the error.

Accord: *United States v. Strachan,* No. 21,966, 8 Jul. 1969.

4. (UCMJ arts. 133, 134). **Evidence Insufficient To Establish Accused "Knowingly" Exposed Himself.** *United States v. Ardell,* No. 21,724, 11 Jul. 1969. Accused was convicted of willful and wrongful indecent exposure and conduct unbecoming an officer (arts. 134 and 133, respectively). His sentence, as finally approved, consisted of dismissal from the service and total forfeitures.

The alleged victim, a six-year-old female, identified accused as a man who lived in a house in the same neighborhood where she lived. She testified, in reply to direct examination, that accused "show me his thing, what he goes to the bathroom with." She did not testify as to the manner in which this alleged showing occurred. The girl answered in the negative when asked if accused had said anything to her. She claimed that the incident occurred in a garage; the large garage door was open; it was daytime; and, no one else was around.

In his defense, accused categorically denied the accusation. He did admit that there were occasions when he walked about his house in the nude when he was alone. Furthermore, he recalled specifically one incident when neighborhood children were in the garage, without his knowledge, and saw him in the nude when he went into the kitchen to fix a drink. The evidence showed that a door led directly from the garage into the kitchen. Accused, on another occasion, claimed that he was in his bedroom when he heard a disturbance in the hall. Upon opening the door he found children standing in the hall. At that time he also was in the nude. He immediately shut the door, put on a robe, and then ran the children out of the house.

The Court in this case held that the evidence was sufficiently similar to that found in *United States v. Stackhouse,* 16 U.S.C.M.A. 479, 37 C.M.R. 99 (1967), to dictate a similar result. In *Stackhouse* the accused was also charged with willful and wrongful indecent exposure based on the allegation that he was observed in the nude in his apartment. In each instance his apartment door was open and the observer was passing in the hall. At no time did it appear that Stackhouse made any motions, gestures, spoke, or otherwise indicated that he was aware of the passersby in the hallway. He also denied any intent to expose himself, although he admitted that he had been occasionally nude in his apartment and that he might have been observed by a passerby. In reversing for insufficient evidence, the Court stated:

> We think the foregoing clearly insufficient to establish a willful indecent exposure on the accused's part. Undoubtedly, he may have been heedless in walking about his quarters in the nude without first assuring the door was fully closed and the sensitivity of his neighbors protected. But negligence is not a sufficient basis for a conviction of the depraved misconduct here charged. As the Chief Judge declared, in United States v. Manos, 8 USCMA 734, 25 CMR 283, at page 736:
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> "... In our opinion, negligent exposure is not punishable as a violation of the Uniform Code."

In the case at bar, while the six-year-old testified that accused *showed* her his thing, there was no explanation of her understanding of the word "show." She did not testify as to whether accused was in the nude at the time or whether he was clothed and opened

his trousers. Likewise, it was not clear whether accused was in the garage when she entered, came in after she arrived, or whether she was in the garage and accused in the kitchen at the time of the *showing*. The Court went on to note, however, that even assuming *arguendo* that both were in the garage at the time of the incident, there was no evidence that he was even aware of her presence since he said nothing to her and made no gestures. The Court, citing *United States v. Stackhouse, supra,* held that "absent some evidence that the accused *knowingly* exposed himself while in his own house, we are constrained to hold the evidence [of accused's conviction] insufficient."

Inasmuch as accused's conviction for conduct unbecoming an officer was based on the same evidence, it was also set aside. The decision of the board of review was reversed and the record of trial returned to The Judge Advocate General. The charges were ordered dismissed. (Opinion by Judge Ferguson in which Chief Judge Quinn and Judge Darden concurred.)

5. (UCMJ art. 39) Conference Between The President Of A Special Court-Martial And The Staff Judge Advocate Prejudiced Accused. *United States v. Aguilera,* No. 22,060, 18 Jul. 1969. Accused pleaded guilty to possession of, with intent to deceive, a military identification card, a liberty pass, and an overnight pass of another serviceman; breach of arrest; and absence without leave (arts. 134, 95, and 86, respectively). He was sentenced to a bad-conduct discharge and intermediate appellate authorities approved the findings and sentence without change. The Court of Military Appeals granted review to determine whether accused was prejudiced by a conference between the president and the staff judge advocate.

The record reflected that when the court reopened to announce the results of its consideration on the matter of sentence, trial counsel, in pertinent part, made the following announcement:

> Mr. President, before announcing sentence, I would like the record to reflect that yourself and the Staff Judge Advocate, . . . had a conference and the Staff Judge Advocate did ask me to make it a matter of record and that there is nothing improper in your conferring, it is just that it should be a matter of record.
>
> Let the record relfect [sic] that the president conferred with the Staff Judge Advocate . . . and inquired whether an administrative discharge could be awarded by this court. The Staff Judge Advocate informed me that he told the president that, in the event discharge was felt appropriate by the members of the court, a punitive discharge or BCD, was the only type of discharge that could be awarded by the court.

After trial counsel made this announcement, the president immediately announced the sentence.

Intermediate appellate authorities, while noting the irregularity of the conference, did not believe accused was prejudiced thereby since the substance of the conference was later set forth in open court; the advice was correct; and there was no objection by defense counsel.

The Court of Military Appeals disagreed and held that the conference between the president of the special court-martial and the staff judge advocate was patently erroneous (*United States v. Guest,* 3 U.S.C.M.A. 147, 11 C.M.R. 147 (1953)), and in this case prejudicial to accused. *United States v. Lander,* 6 U.S.C.M.A. 669, 20 C.M.R. 385 (1956); *United States v. Smith,* 12 U.S.C.M.A. 127, 30 C.M.R. 127 (1961); and *United States v. Norwood,* 16 U.S.C.M.A. 310, 36 C.M.R. 466 (1966).

The Court noted that a court-martial is a judicial body rather than an instrument of command. To allow a representative of the convening authority to invade a court's proceedings simply divests the court of its judicial character. As was stated in *United States v. Selby,* 8 U.S.C.M.A. 568, 13 C.M.R. 124 (1953), "[t]he legal officer of a command should not take part in the discussion on any

matter affecting the proceedings." And in *United States v. Smith, supra,* the Court stated that, "[i]ndeed, the proper rule is that such meddling is presumptively prejudicial. . . ." This presumption was not rebutted by trial counsel's "*secondhand* explanation . . . of the subject matter of the conference, as *reported to him by the staff judge advocate.*" The Court stated that:

> The participation of *any* unauthorized person in the closed session deliberations of a court-martial is forbidden. United States v Smith, [*supra*]; United States v. Jakaitis, [10 U.S.C.M.A. 41, 27 C.M.R. 115 (1958)]. . . . When the president requires additional instructions he should not seek outside help but should reopen the court or state his request in a proper manner, where all parties concerned can participate and the matter can be recorded. Article 39, Code, . . . 10 USC § 839. . . . In this manner, defense counsel will be accorded the opportunity to object or to present additional instructions. Prejudice as to sentence in this case is apparent.

The decision of the board of review was reversed and a rehearing may be ordered on the sentence. (Per curiam opinion.)

6. (138*a*(2), MCM) **Law Officer Erred In Instructing That The Evidence Supported An Inference Of Accused's Intent To Defraud.** *United States v. Shenefield,* No. 21,777, 18 Jul. 1969. Accused was convicted of three specifications of larceny of government property (art. 121), and sentenced to a dishonorable discharge, total forfeitures, and confinement at hard labor for two years. The convening authority disapproved one of the specifications, reduced the period of confinement to 16 months, and approved the remainder of the findings and sentence. The board of review affirmed without change.

Accused was essentially charged with the receipt of payments of money to which he was not entitled. Accused acknowledged receipt of the monies but stated that he believed that he was entitled to them as back pay. The vouchers relative to these payments were introduced into evidence. The evidence reflected that when pay vouchers are manually prepared, as in this case, five copies are made. Existing regulations provide that either the number 2 or the number 5 copy should be located in the serviceman's financial records for a period of two years. In this case accused's folder contained no such evidence of the questioned payments.

The law officer, in his instructions, informed the court that the copies of pay vouchers missing from accused's financial records could be considered as supporting an inference of accused's intent to permanently defraud the United States. The Court of Military Appeals noted that accused's financial data records folder was at all times in the possession of the government and that under the existing regulations accused did not have personal access to it. Since there is a rebuttable presumption that military authorities perform their administrative affairs in accordance with regulations, and since in this case the presumption was unrebutted, it could be presumed that accused did not personally remove the missing documents. *United States v. Taylor,* 2 U.S.C.M.A. 389, 9 C.M.R. 19 (1953). Furthermore, there was no evidence, nor would the Court accept as valid a presumption, that accused secured the removal of his pay records through the services of someone in the pay section. The Court noted that there was no evidence of collusion and "[t]here is and can be no presumption that public officers have violated their legal duties." *United States v. Tobita,* 3 U.S.C.M.A. 267, 270, 12 C.M.R. 23 (1953).

The Court found the situation not unlike that in *United States v. Spain,* 17 U.S.C.M.A. 347, 38 C.M.R. 145 (1968), wherein it was held that it was not unreasonable to conclude that similar duplicate pay forms, also missing, were either not prepared, prepared and concealed or destroyed, or that the forms were lost in handling. The Court, therefore, held that the law officer in this case erred by instructing the court that it could consider the fact of the missing vouchers as supporting an inference that accused intended to defraud the government. Because the issue of misin-

tent in accepting the money was vital to the case and because the inference was not justified on the basis of the evidence, the Court held that prejudice was apparent. Accordingly, the decision of the board of review was reversed and the record of trial was returned to The Judge Advocate General. A rehearing may be ordered. (Opinion by Judge Ferguson in which Chief Judge Quinn and Judge Darden concurred.)

7. (152, MCM) ***Chimel v. California* Considered.** *United States v. Goldman,* No. 21,732, 3 Jul. 1969. (Amendment to concurring in result opinion published June 13, 1969) (1969, digested 69-16 JALS 3). Ten days after the publication of the Court's opinion in this case, the Supreme Court of the United States, in *Chimel v. California* (1969, digested *infra*), decided that in the absence of a search warrant, a search conducted incident to an arrest may not extend beyond the person of the individual and the area from within which he might obtain either a weapon or something that could be used as evidence against him. Since in this case the issue was search incident to an arrest, Judge Ferguson was of the opinion that the search of room 6 was "'unreasonable' under the Fourth . . . Amendment" to the Constitution. *Chimel v. California, supra.*

Judge Ferguson was also of the opinion that in light of the Supreme Court's opinion in *O'Callahan v. Parker* (2 June 1969, reported 69-13 JALS), accused should have been returned to the United States and tried in a federal district court for the two specifications under article 134.

Judge Ferguson believed that good cause exists for reconsideration of the Court's opinion and that counsel should be given the opportunity to present briefs and arguments on the applicability of these issues. (Opinion by Judge Ferguson.)

8. (143a, App. 6c, MCM, UCMJ arts. 80, 88) **Misdescription Of Offense Does Not Require Reversal In Absence Of Prejudice. Attempt Under Article 80 May Be Pleaded By Short Form. Corrected Copy Is An Original. Signature By Duplicating Process Is An Original.** *United States v. Marshall,* No. 21,708, 3 Jul. 1969. Convicted of two violations of the Uniform Code, accused was sentenced to a dishonorable discharge, total forfeitures, and reduction to E-1. At trial the specification of Charge I was described as "bribery," which accused contended was incorrect. Accused also argued that the specification was insufficient since it did not allege that he had sought to influence an official decision or action. In pertinent part the specification charged that accused unlawfully and wrongfully offered PFC *G*, the expiration of term of service clerk of the division, $50.00 "as compensation for services to be rendered by . . . [him] in relation to an official matter in which the United States was and is interested," namely, the finance records regarding accused's leave. There was no allegation of a specific intent improperly to influence official action.

The Court noted that the difference between bribery and graft is that in the latter the intent improperly to influence official action need not be alleged nor proved. The specification in the present case conformed to the model specification set out in the Manual and covered all the elements of graft. *United States v. Wiley,* 16 U.S.C.M.A. 449, 37 C.M.R. 69 (1966).

Misdescription of an offense does not require reversal if an offense is actually described and the accused is not prejudiced. *United States v. Bey,* 4 U.S.C.M.A. 665, 16 C.M.R. 239 (1954). In the instant case, even assuming that defense counsel believed that the offense charged was bribery, the record disclosed only that counsel worked harder to defend the accused. Further, the law officer had instructed on all of the allegations of the specification and that the maximum punishment for graft was identical to that for bribery. The Court therefore found no prejudice.

The specification of Charge II under article 80 in pertinent part alleged that accused

"did . . . fraudulently attempt to procure himself to be separated from the United States Army." Accused contended that the specification was defective in that it did not allege an overt act. Congress has prescribed no special forms of specification, leaving the matter in the sound discretion of the President, who accordingly has authorized certain short forms of specification. App. 6*c*, MCM. These forms are legally sufficient if they satisfy the general requirement that the accused be apprised of the precise offense charged and contain sufficient allegations of fact to protect him against a second prosecution for the same misconduct. The Manual approaches the problem of charging an attempt in three ways, depending upon whether the offense is charged under article 80, which deals with attempts in general, or under a specific article which, in defining a particular offense, includes an attempt to commit the offense as a violation of the article. In the latter instances, the model specifications provide either for an allegation as to an overt act or one spelling out the attempted offense with the same detail as the offense itself. However, the form of specification applicable to article 80 is simpler than the other forms and is truly a "short form," requiring neither directly nor indirectly an allegation of an overt act. The short form is an allowable procedure, *Caldwell v. State of Texas*, 137 U.S. 692 (1891), and satisfies the general requirements of fairness. General allegations which express a legal conclusion, but which also convey factual information as to the identity of the wrongful act, may properly be used as substitutes for purely factual averments. However, where there is no statutory description of the attempted offense, greater particularization than that contained in the short form may perhaps be required. In the present case, however, fraudulent separation from the service is defined in article 85, and the specification in issue referred to the attempted offense in the language of that article. Allegations utilizing the language of pertinent statutes defining the offense are generally sufficient. If an accused desires more particularity, he can obtain it by appropriate preliminary motion or through inquiry in the article 32 investigation.

To prove the attempted fraudulent separation, trial counsel introduced evidence indicating that the accused's original date of separation had been extended to make up for a period during which accused was confined under sentence by summary court-martial. Counsel introduced a corrected copy of a summary court-martial order vacating suspension of the period of confinement. The defense objected on grounds that the order was a corrected copy and there was no evidence of the original; that the document bore the facsimile, not the original, signature of the adjutant; and that the exhibit was immaterial. The objection was overruled and the exhibit admitted in evidence with instructions that any inference of misconduct that might be drawn from the document could not be considered by the court. The Court held that a corrected copy of an official document is itself an original which may be admitted into evidence without preliminary proof of the content of the superseded order. 143*a*, MCM. Likewise, the form of authentication comported with the service regulations on the subject (AR 310-10) and with the Manual, which provides that signatures made by a duplicating process are considered to be a duplicate original. 143*a*, MCM. The exhibit in the instant case was reproduced by mimeograph. Defense counsel had argued that the exhibit was immaterial first because it was cumulative, but the Court held that, on such reasoning, the admission in evidence was not prejudicial. Alternatively, the Court held that the exhibit was not entirely cumulative, for it clarified testimony as to the meaning of certain symbols used in other records in the accused's file and tended to verify the length of the period of confinement.

In his final instructions on the merits, the law officer reminded the court of his previous admonition and reiterated that evidence had been introduced only to establish the meaning of a "bad time" entry in accused's records.

The Court was satisfied that this instruction fully protected accused against any adverse inference of misconduct. However, no instruction to disregard evidence of uncharged misconduct was given the court before it retired to deliberate on sentence. As a result, when the case was before the board of review, the board reassessed by mitigating the dishonorable discharge to a bad-conduct discharge, and the Court was convinced that the board's corrective action cured the deficiency. Affirmed. (Opinion by Chief Judge Quinn in which Judge Darden concurred.)

Judge Ferguson (concurring in part and dissenting in part) disagreed with the majority's ruling that the specification of Charge II was sufficient to allege an offense, asking, "How can it then be said that a specification alleging an *attempt* to commit a violation of this Article [article 83] is sufficient when it does no more than plead a legal conclusion and does not convey any factual information to identify the alleged wrongful act?" With reference to article 83, Judge Ferguson noted that the sample specification follows the wording of the Code with reference to false representation and provides that, to allege this offense, the facts material to eligibility for separation which are represented as contrasting with the true facts must be set forth. App. 6c, MCM.

9. (216c, MCM) Law Officer Must Instruct On Self-Defense When There Is Some Evidence In The Record. *United States v. Holly*, No. 21,582, 8 July 1969. Despite his plea, accused was convicted of assault with a knife, thereby inflicting grievous bodily harm (art. 128). He was sentenced to a dishonorable discharge, confinement at hard labor for two years, and forfeiture of $40 per month for a like period.

The assault occurred in a German bar. Accused had argued with his victim, and the evidence indicated that the victim lunged at him. When separated, the victim had blood on his clothes and subsequent hospital examination revealed a two-inch cut with part of the small intestine protruding.

At trial alternative defense were raised. First, that accused did not inflict the injuries and, second, if he did, his actions were in self-defense. The law officer refused to give an instruction on self-defense, asserting that "there was no justification or excuse for the assault." He also instructed the court that the injury sustained by the victim amounted in law to grievous bodily harm.

In this case there was some evidence that accused may have acted in self-defense. The Court cited the "any foundation in the evidence requirement" of *United States v. Roberson*, 12 U.S.C.M.A. 719, 31 C.M.R. 305 (1962) in finding that accused was entitled to an instruction on this issue and held that the law officer's refusal to give an instruction was error because, by so doing, he was as a matter of law rejecting accused's defense and thereby foreclosed the court from considering a factual issue. The Court found that the law officer's act in specifically informing the court that the claimed defense was not available to accused was an improper removal of the decision from the triere of fact.

With regard to the injury sustained by the victim, the Court relied on its decision in *United States v. Leech*, 18 U.S.C.M.A. 129, 39 C.M.R. 129 (1969, digested 69-6 JALS 7) to find that to instruct that the injury amounted in law to grievous bodily harm was error. The issue of whether an injury constitutes grievous bodily harm is to be left to the triers of fact.

Accused also alleged that seizure of his knife by his commanding officer was an illegal seizure. Judge Ferguson, citing the officer's testimony, agreed that the seizure was illegal because of the lack of probable cause.

The decision of the board of review was reversed and the record of trial returned to the Judge Advocate General. A rehearing may be ordered. (Opinion by Judge Ferguson. Judge Darden concurred in part, but dissented on the issue of probable cause for the seizure of the knife.)

Chief Judge Quinn (dissenting) would affirm because accused used a deadly weapon and the evidence did not indicate a reasonable ground for apprehension of serious harm. He would also uphold the instruction on grievous bodily harm as it was not prejudicial to the accused He concurred with Judge Darden on the issue of probable cause for the seizure of the knife.

10. (73, MCM; UCMJ art. 31) **Deliberate Selection Of Non-Lawyer As Counsel By Accused Is A Waiver Of The Right To Lawyer-Counsel. Law Officer Properly Tailored Instructions To The Issues Presented.** *United States v. Adams,* No. 21,574, 11 Jul. 1969. Accused was found guilty, contrary to his pleas, of absence without leave (art. 86) and indecent assault (art. 134). He was sentenced to a dishonorable discharge, confinement at hard labor for one year, partial forfeitures for one year, and reduction in grade. The findings and sentence were approved by the board of review.

Accused was apprehended shortly after a German girl reported that she had been assaulted. He was given the required article 31 and *Miranda v. Arizona,* 384 U.S. 436 (1966) warnings prior to his appearance in a lineup, and accused specifically requested Major *M,* a non-lawyer, to represent him at the lineup. At the lineup he was tentatively identified by the victim and other witnesses. He was given the warnings again prior to interrogation and they were repeated a third time when accused stated his desire to make a statement.

The Court upheld the admission of his statement into evidence. Having been given the warnings, accused's choice of *M* was a deliberate selection and was a free choice. The Court found that by his selection of non-lawyer counsel he was knowingly, consciously, and intelligently waiving his right to qualified counsel. The Court found no collusion as existed in *Escobedo v. Illinois,* 378 U.S. 478 (1964). Admission of his pretrial statement was not erroneous as a matter of law and the statement was "not tainted by procedural error."

Accused's contention that the law officer failed to tailor his instruction to the issues presented was rejected by the Court. The Court, after carefully examining the law officer's instructions, found that the instructions correctly pronounced the law and properly correlated the facts to the paramount issues. In their opinion, the instructions were more than an abstract statement of the law and were sufficient to satisfy the standards imposed on the law officer. *United States v. Nickoson,* 15 U.S.C.M.A. 340, 35 C.M.R. 312 (1965).

The Court did find error in the law officer's instruction on the deposition testimony of an unavailable witness. The law officer had instructed the court that deposition testimony was entitled to "the same rebuttable presumption that the witness speaks the truth [as oral testimony]." This instruction had been held to be erroneous in *United States v. Griffin,* 17 U.S.C.M.A. 387, 38 C.M.R. 185 (1968). However, in this case, as there were other witnesses who testified as to accused's presence at the crime scene and additional evidence existed as to identification of accused's clothing, the erroneous instruction was not influential in the court-martial findings and, therefore, was of a non-prejudicial nature.

The decision of the board of review was affirmed. (Opinion by Judge Darden in which Chief Judge Quinn concurred.)

Judge Ferguson (dissenting) cited the law officer's failure to properly tailor his instruction to the evidence and to the issues presented. The law officer, he believed, did not go far enough in instructions on the contested confession when accused had non-lawyer counsel. Judge Ferguson would also grant counsel an opportunity to brief the issue of applicability of *O'Callahan v. Parker* (1969, digested 69-13 JALS) to the facts of this case.

III. FEDERAL DECISIONS.

RM. (152, MCM) U. S. Supreme Court Limits Areas That Can Be Searched When Search Is Made Incident To Valid Arrest.

Chimel v. California, 37 U.S.L.W. 4613 (U.S. 23 Jun. 1969). On 13 September 1965, three police officers arrived at the home of accused with a warrant authorizing his arrest for the burglary of a coin shop. They were admitted into the house by accused's wife and waited until he returned home from work. When accused entered, he was handed the arrest warrant and was asked for permission to "look around." He objected, but was advised that "on the basis of the lawful arrest," the officers would nonetheless conduct a search. A search warrant had not been issued.

The police officers, accompanied by accused's wife, conducted a thorough search of the three-bedroom home. In some of the rooms accused's wife was directed to open drawers and to physically move contents of the drawers from side to side so that [they] might view any items that would have come from [the] burglary." Numerous items were seized in the search which lasted between 45 minutes and an hour.

Over accused's objection, the items taken from his house were admitted into evidence. He was convicted and his conviction was affirmed by the California state courts, holding that the search of accused's home was justified, despite the lack of a search warrant, on the ground that it was incident to a valid arrest.

The Supreme Court of the United States, assuming *arguendo* that accused's arrest was valid, was faced with the question of whether the warrantless search of accused's entire home was constitutionally justified as incident to that arrest.

Beginning with the decision in *Weeks v. United States*, 232 U.S. 383 (1914), which in dicta approved the warrantless search of a person incident to a lawful arrest, the majority opinion traced the Court's many decisions dealing with the Fourth Amendment and search and seizure. In *Harris v. United States*, 331 U.S. 145 (1947), police officers obtained a warrant for Harris' arrest and arrested him in his four-room apartment. In an attempt to recover two canceled checks, thought to have been used in effecting a forgery, the law officers searched the entire apartment. Inside a desk drawer a sealed envelope was found which was marked "George Harris, personal papers." When the officers opened this envelope, it was found to contain altered selective service documents, and the documents were used to secure Harris' conviction for violation of the Selective Service Act of 1940. The Court rejected Harris' Fourth Amendment claim and sustained the search as "incident to arrest."

In 1950, the Court decided the case of *United States v. Rabinowitz*, 339 U.S. 56, the decision upon which California primarily relied in this case. In *Rabinowitz*, federal authorities secured an arrest warrant which they executed at accused's one-room office. At the time of the arrest, the officers "searched the desk, safe, and file cabinets in the office for about an hour and a half" and found stamps with forged overprints. At accused's trial, the stamps were admitted into evidence and the Supreme Court, in affirming his conviction, rejected accused's contention that the warrantless search was unlawful. It was stated that the search fell within the principle of law that law officers have "[t]he right 'to search the place where the arrest is made in order to find and seize things connected with the crime. . . .'"

In the instant case, the majority, commenting on the *Rabinowitz* decision, stated:

> *Rabinowitz* has come to stand for the proposition, *inter alia*, that a warrantless search "incident to a lawful arrest" may generally extend to the area that is considered to be in the "possession" or under the "control" of the person arrested. And it was on the basis of that proposition that the California court upheld the search of petitioner's entire house in this case. That doctrine, however, at least in the broad sense in which it was applied in the California courts in this case, can withstand neither historical nor rational analysis.

The Court noted that the rationale by which California sought to uphold accused's

conviction was not supported by a view of the purpose and background of the Fourth Amendment. Only last term, the Court in *Terry v. Ohio*, 392 U.S. 1 (1968), emphasized that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure" and that "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."

The Court next reiterated the rule that when an arrest is made it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that could later be used to resist arrest or escape. Furthermore, it is entirely reasonable for an arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. The Court then went on to give specific meaning to the rule that a search incident to an arrest can extend to areas "within the immediate control" of the arrestee. *United States v. Rabinowitz, supra.* The Court stated:

> There is ample justification . . . for a search of the arrestee's person and the area "within his immediate control"—*construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence.*
>
> There is no comparable justification, however, for routinely searching rooms other than that which an arrest occurs—or for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The 'adherence to judicial processes' mandated by the Fourth Amendment requires no less. (Emphasis added by the Court.)

The Court noted that the case at bar could be distinguished from *Rabinowitz* and *Harris, supra,* but to do so would be highly artificial. The rationale which allowed the searches and seizures in those cases would allow the search and seizure in this case. Finally, the Court stated:

> *Rabinowitz* and *Harris* have been the subject of critical commentaries for many years, and have been relied upon less and less in our own decisions. It is time, for the reasons we have stated, to hold that on their own facts, and insofar as the principles they stand for are inconsistent with those we have endorsed today, they are no longer to be followed.
>
> Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, "unreasonable" under the Fourth and Fourteenth Amendments, and the petitioner's conviction cannot stand. (Citations omitted.)

Accordingly, the accused's conviction was reversed. (Mr. Justice Stewart delivered the opinion of the Court. Mr. Justice Harlan concurred in a separate opinion.)

Mr. Justice White, with whom Mr. Justice Black joined, dissented, stating that the old decisions of the Court should not be abandoned. Where, as in this case, there is probable cause both for the arrest and for the search, past cases should be followed which would allow a broader search to be made without a warrant. Since the fact of arrest supplies an exigent circumstance justifying police action before the evidence can be removed, and also alerts the suspect to the fact of the search so that he can immediately seek judicial determination of probable cause in an adversary proceeding, and appropriate redress."

IV. BOARD OF REVIEW DECISIONS.

1. PM (152, MCM; UCMJ art. 69) Record Disclosed Investigators Had Probable Cause To Search Accused Law Officer Did Not Err In Admitting Evidence Of Accused's Prior Conviction. *United States v. Thompson,* CM

419435, 16 May 1969. Conviction: wrongful possession of marijuana (art. 134), contrary to plea. Sentence: BCD, red E-1, 18 mos CHL, and TF. The evidence established that at about midnight two military policemen, while cruising on a range road of a very remote area of a military reservation, noticed three men standing near a parked automobile. The automobile was recognized as one that had been banned from the post. The military policemen stopped and requested each of the men to produce his identification card. Apparently accused attracted the attention of the officers when he "fumbled" around trying to get his wallet and ID card out by using just one hand. Sergeant *S*, thinking it unusual that accused only used one hand, walked around accused and found a corn-cob pipe between accused's legs. Based upon these facts and upon his knowledge of the prevalence of the use of marijuana on post, *S* came to suspect accused of smoking marijuana. The pipe was seized, accused was searched, and a packet, later determined to contain marijuana, was confiscated. Thereafter accused stated to the military police that he had been in trouble before and that the packet just seized contained marijuana.

The Board first held that based upon the facts and circumstances of this incident, *i.e.*, the midnight hour, the remote area, the "fumbling" of accused, and the knowledge of the prevalent use of marijuana, the policemen had probable cause to search accused and seize his property. Accordingly, the trial judge did not err in denying accused's motion to suppress the evidence of marijuana seized from him. The Board also held that the trial judge properly admitted in evidence, over objection, accused's admission that the packet discovered on his person contained marijuana. Furthermore, the Board was convinced that the record established that accused's admissions to Sergeant *S* were completely voluntary and therefore the law officer did not err in not instructing the court on the voluntariness of the admissions. *United States v. Ledlow*, 11 U.S.C.M.A. 659, 29 C.M.R. 843 (1958).

At the trial, trial counsel announced that accused's pretrial restraint had been changed from a status of restriction to that of confinement without any limiting instruction by the trial judge on the point. The Board stated that "[t]he evil is obvious—without guidance the court members are left free to speculate on the reasons for escalating the pretrial restraint of an accused (*e.g.*, uncharged misconduct. . .)," and consequently purged the error by reassessing the sentence.

Accused next contended that admission into evidence of a prior special court-martial conviction was erroneous in that review of the conviction had not been completed. Accused referred to the recent amendment of article 69, UCMJ, which provides that:

> "notwithstanding Article 76" of the Code (providing for finality of proceedings, findings and sentences), the findings or sentence in a special court-martial case which has been "finally reviewed," but has not been reviewed by a Court of Military Review may be vacated or modified by the Judge Advocate General on the ground, *inter alia*, of error prejudicial to the substantial rights of an accused.

The Board, in rejecting accused's argument, held "that an application for relief under amended article 9 . . . does not affect the admissibility of the special court-martial involved as a previous conviction where review pursuant to article 65(c) . . . has been completed (Art. 76, UCMJ). (See JAGVJ, 6 Feb. 1969, 69-4 JALS 9 . . .)" Accordingly, the law officer did not err in admitting evidence of accused's prior conviction. The Board, however, noted that it would take remedial action inasmuch as the Judge Advocate General had set aside the special court-martial conviction to which accused referred.

Finally, the Board found no merit in accused's speedy trial issue since the Government had used reasonable diligence in bringing accused to trial.

The findings were correct in law and fact and the sentence was reassessed. (Rouillard, C.J., Boothand Thomas JJ., concurring.)

2. (UCMJ art. 32) **Lack Of Adequate Article 32 Investigation Required Reversal Of Accused's Conviction.** *United States v. Garner,* CM 419976, 26 May 1969. Conviction: desertion (art. 85), contrary to plea. Sentence: DD, F $50 per mo for 18 mos, 18 mos CHL, and red E-1. Accused was initially arraigned on 27 September 1968 at which time he moved to dismiss the charges based on the fact that he was denied a speedy trial. The law officer sustained accused's motion; but the convening authority, following the advice of his staff judge advocate, reversed the law officer's decision and directed the court to reconvene and proceed with the trial. Subsequently accused was convicted of desertion.

The Board, in finding accused's speedy trial issue unmeritorious, held that the convening authority acted within the scope of the authority conferred upon him (art. 62, UCMJ; para. 67*f*, MCM, 1951) and was satisfied that his action "was justified as a matter of law and fact." *United States v. Boehm,* 17 U.S.C.M.A. 530, 38 C.M.R. 328 (1968).

During the trial proceedings, conducted on 27 September 1968, the defense moved for dismissal of the charges because there was no "thorough and adequate Article 32 investigation." Not only did the record disclose the lack of signed much less sworn statements or testimony under oath, but it was clear that a morning report extract, supposedly introduced into evidence at the investigation, was not even prepared until long after the date of the investigation. The Board noted that an article 32 investigation "is not a mere formality, but is an integral part of the court-martial proceedings" and that inordinate failure to comply with its requirements can require appropriate relief, or even reversal of a conviction." *United States v. Parker,* 6 U.S.C.M.A. 75, 19 C.M.R. 201 (1955). In this case, the Board held that the law officer's summary denial of the defense motion was erroneous and prejudicial as a matter of law.

The Board next considered the convening authority's action in excusing certain court members. The record reflected that when the court reconvened on 25 November 1968, a member of the court who had been present at the 27 September 1968 session had been excused and had departed the post on a routine transfer to Europe with leave enroute. The Board, relying on *United States v. Boysen,* 11 U.S.C.M.A. 331, 29 C.M.R. 147 (1960), wherein it was held that a routine transfer of a law officer after arraignment did not constitute a valid reason for excusing him and substituting a new law officer over a defense objection, held that the convening authority's action was erroneous and required reversal of the conviction.

The findings of guilty and sentence were set aside and a rehearing was ordered. (Chalk, C.J.; Frazier, J., concurring; Collins, J., absent from hearing.)

V. TJAG ACTIONS UNDER ARTICLE 69, UCMJ.

1. Exclusion of evidence of the victim's bad reputation for peacefulness on self-defense issue and violation of the accused's rights when investigating officer elicited a statement from the accused in the absence of appointed defense counsel required vacation of accused's conviction of aggravated assault. Conviction set aside. JAGVJ SPCM 1969/35.

2. An attempted withdrawal by a successor in command of the original convening authority's ambiguous, in part, and illegal, in part, action, held to be a nullity requiring modification of the originally approved sentence. JAGVJ SPCM 1969/48.

3. Newly discovered evidence established the accused was returned to military control 15 days prior to [illegible] as the termination of [illegible] which he was convicted. Upon reassessment the approved sentence to confinement at hard labor for six months held appropriate. JAGVJ SPCM 1969/240. (Art. 69, MCM [illegible]

4. [illegible] special court-martial president to give limiting instruction on the effect of unchanged misconduct (accused attempted to

bribe a military policeman) on a charge of wrongful possession of marihuana required reassessment of the approved sentence. JAGVJ SPCM 1969/224.

5. Specification which fails to allege that alleged destruction of Government property, in violation of Article 108, UCMJ, was either "willful" or "through neglect," fails to allege an offense. Conviction set aside. JAGVJ SPCM 1969/227.

6. Conviction of wrongful disposition of military property set aside because of reasonable doubt that the alleged disposition was without proper authority. JAGVJ SPCM 1969/233.

7. Accused, following lawful apprehension by MP's, resisted search which MP's attempted to conduct. Conviction of resisting apprehension set aside; apprehension (imposition of restraint) was accomplished prior to accused's assault, the record clearly showed the evidence did not support the findings. JAGVJ SPCM 1969/133.

8. Conviction of treating superior noncommissioned officer with contempt by saying to him "I'll get out of bed when I am good and ready," in violation of Article 91 of the UCMJ, set aside. Senior NCO testified that accused, a cadreman sleeping in trainee barracks, was under blanket and did not see him when the NCO told him to get up, thinking he was a trainee avoiding duty. Accused was not disrespectful once he saw who had addressed him, and NCO opined that accused had not known that a senior was speaking. Knowledge that the person to whom disrespect or contempt is directed is an element of the offense charged. The evidence did not support the finding. JAGVJ SUMCM 1969/172.

9. Facts of record (including allied papers) indicated that accused's failure to return directly from sick call did not rise to the gravity of an intentional defiance of authority required for conviction of willful disobedience under Article 90; accused's plea of guilty was improvident. Conviction of willful disobedience set aside; lesser included offense, failure to obey lawful order, substituted therefor and approved sentence deemed appropriate upon reassessment by TJAG. JAGVJ SPCM 1969/199.

10. Conviction of willful disobedience of order to remove loop of string from hole in earlobe set aside. Government did not establish beyond a reasonable doubt that accused failed to remove the string within the time limitations established in the order. JAGVJ SPCM 1969/241.

11. A court-martial does not have the power to laterally reduce a non-commissioned officer to a specialist grade; only so much of the adjudged sentence as provided for reduction from Staff Sergeant E-6 to the grade of E-4 was approved. JAGVJ SPCM 1969/242.

12. Omission of the word "general" in specification purporting to allege violation of lawful general regulation prohibiting possession of alcoholic beverages in certain areas required vacation of conviction under Article 92(1), **United States v. Koepke,** 18 USCMA 100, 39 CMR 100 (1969). Violation of Article 92(2) could not be substituted since knowledge of the regulation was not alleged and proved. JAGVJ SPCM 1969/245.

13. Evidence offered in extenuation and mitigation that accused was very drunk at the time of the charged aggravated assault and willful damage of private property indicated that accused's guilty plea to these charges was improvident. Special court-martial president failed to inquire into providency of the pleas. Charge of willful damage of private property set aside; Charge of assault (Article 128(a)) approved, and approved sentence deemed appropriate upon reassessment by TJAG. JAGVJ SPCM 1969/247.

VI. MISCELLANEOUS MILITARY JUSTICE

Manual For Courts-Martial, 1969 (Revised). Both the Federal Register text and the Government Printing Office text of the

Manual for Courts-Martial, United States, 1969 (Revised), erroneously omitted article 42*b* from the Uniform Code of Military Justice appendix. Judge advocates are advised that an appropriate notation should be made in their Manuals as follows:

"(b) Each witness before a court-martial shall be examined on oath." A formal correction of this printing error is pending. JAGJ, 22 Jul. 1969.

VII. MILITARY AFFAIRS OPINIONS.*

1. (Contracts 5, 29; Officers 147) "Executing Or Approving The Award Of Contracts" Defined. Conflict Of Interest Considered. Proper Channeling Of Elimination Proceedings. The question arose whether numerous persons who make a variety of work contributions toward the assembly of a procurement "package" or requirement which is forwarded to a subordinate command for procurement or through a subordinate command for actual letting of a contract by another command would be required to file DD Form 1555, Paragraph 21, AR 600-50, 29 Jun. 1969, as changed by C2, 15 May 1968, and C3, 9 Dec. 1968, requires certain personnel to submit statements of employment and financial interest (including DD Form 1555) in order to avoid conflicts of interest. Among the affected personnel are those whose duties and responsibilities require them to exercise judgment in making a government decision or in taking a government action in regard to "contracting or procurement," which is defined as "executing or approving the award of contracts." The inquirer requested guidance as to the proper interpretation of the latter phrase. He also posed a series of situations and asked whether they involved conflicts of interest on the part of individuals involved in "putting together of a certain procurement package." Finally, the inquirer sought an opinion respecting the authority of commanders of subordinate STRATCOM units satellited on other non-STRATCOM units to initiate elimination proceedings under AR 635-105, 17 Jun. 1968, as changed by C1, 25 Oct. 1968.

The Judge Advocate General concluded that the word "executing" means "signing," and is applicable only to contracting officers. The phrase "approving the award of contracts" be concluded involves any of the following functions: (1) execution of a contract, (2) approval of the execution of a contract at a higher level in the chain of command than the contracting officer, in those instances where the Armed Services Procurement Regulations provide that the contract does not becoming binding until such approval (see ASPR 7-105.2), and (3) the decision, and the approval of such decision, to award a contract in the future after those necessary preliminary phases have progressed to the point that a contract may be awarded (*e.g.*, approval of a procurement program of making determination and findings).

With respect to the conflict of interest queries, The Judge Advocate General opined that anyone, who assembles a procurement package while owning stock in a company which is capable of being awarded the contract involved, encounters a conflict of interest. The same conflict would likewise occur upon the subsequent award of the contract to that company. A conflict of interest would also be present where an individual not owning stock in a company at the time he assembles a procurement package later purchases stock in the company after it is awarded the contract involved, if the individual (1) retains a continuing interest in the administration of the contract, (2) formed his intention to purchase the stock

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*** Frequently military affairs opinions hinge on the particular facts of the case at hand, and because of space limitations it is not always possible to restate all of the operative facts in a digest. Accordingly, judge advocates should exercise caution in applying decisions digested herein to other factual situations. As a general rule, copies of JAGA opinions will be furnished judge advocate offices by the Military Affairs Division, JAGO, upon request. JAGA 1963/5156, 16 Dec. 1963.**

at the time he was assembling the procurement package, or (3) would not have purchased the stock but for knowledge he gained while in the process of assembling the procurement package. It was noted that in a memorandum, dated 7 October 1966, the Department of Defense General Counsel expressed his view that, although each case must be judged upon its own merits as to whether a conflict of interest is present, where an individual owns not more than $2000 worth of stock in a widely held, listed corporation, there would appear to be no such conflict.

Respecting the query about administrative elimination of officers, The Judge Advocate General stated that the authority for the procedures mentioned in the inquiry is subparagraphs 2-5*a* and *b*, AR 635-105, *supra*. Under these provisions, the Commanding General of STRATCOM is authorized to originate a recommendation for elimination and forward it directly to The Adjutant General with an information copy to the Commanding General of the appropriate army area. These provisions also permit a local servicing general court-martial convening authority to receive recommendations for elimination from attached USASTRATCOM unit commanders. If that convening authority concurs in the recommendation, he can forward the case directly to the Department of the Army. The Judge Advocate General also made several other observations. First, while subparagraph 2-5*b*, AR 635-105, *supra*, speaks in terms of the commander "exercising general court-martial jurisdiction," a commander, who has had his military justice requirements handled by another commander as a matter of administrative convenience and who thus does not routinely "exercise" general court-martial jurisdiction, nonetheless meets the criterion of the above subparagraph. The opinion further noted that subparagraph 2-*b*, AR 635-105, *supra*, provides that recommendations for the elimination be forwarded by the originating commander "through channels" to the first general court-martial convening authority, who may forward the case directly to the Department of the Army if he concurs in the recommendation. There would be no objection to having subordinate USASTRATCOM commanders forward elimination cases through the STRATCOM Headquarters, but only in those instances where there is no administrative support agreement pertaining to administrative discharge matters with a local servicing general court-martial convening authority. JAGA 1969/3469, 25 Mar. 1969.

2. (Courts Of Inquiry 7) **Request To Be Represented By A "Full Colonel" Does Not Comport With AR 635-105.** A lieutenant colonel, who elected to appear before a show-cause board, requested to have appointed as his counsel military counsel in the grade of full colonel. The Judge Advocate General's opinion was requested as to whether a full colonel must be assigned as counsel for the lieutenant colonel. The Judge Advocate General advised that subpara. 3-5*j*(1), AR 635-105, 17 Jun. 1968, does not so require. In his opinion, the phrase "military counsel of his choice will be provided if reasonably available" as used in the regulation, envisions a request by a respondent for a specific, named individual to act as his counsel. A *carte blanche* request for any "military counsel who holds the rank of full colonel" does not comport with this interpretation. JAGA 1969/3950, 9 Jun. 1969.

VIII. MISCELLANEOUS.

Articles Of Interest To Judge Advocates.

Loeb, *The Courts and Vietnam,* 18 Am. U. L. Rev. 376 (1969). Copies are available from American University Law Review, Massachusetts and Nebraska Avenues, N.W., Washington, D. C. 20016.

Ning, *Due Process and the Sino-American Status of Forces Agreement,* 17 Am. J. Comp. L. 94 (1969). Copies may be obtained from Fred Rothman & Co., 57 Leuning Street, South Hackensack, New Jersey 07606.

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Phillips, *Defense Contract Financing Under the Assignment of Claims Act*, 10 Wm. & Mary L. Rev. 912 (1969). Copies are available from Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Virginia 23185.

Note, *Executive Order 11246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U. L. Rev. 590 (1969). Copies may be obtained from Fred Rothman & Co., 57 Leuning Street, South Hackensack, New Jersey 07606.

By Order of the Secretary of the Army:

W. C. WESTMORELAND
General, United States Army,
Chief of Staff

Official:

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

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