PAMPHLET
No. 27-69-24

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, D. C. 20310, *2 October 1969*

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.

II. Court of Military Review Decisons.

III. Grants and Certifications of Review.

IV. Military Affairs Opinions.

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

1. (8, MCM) ***O'Callahan v. Parker*** **Considered. Court-Martial Lacked Jurisdiction To Try Accused For Offense Of Carnal Knowledge When The Crime Was Committed Off Base, Even Though The Victim Was The Daughter Of Another Serviceman.** *United States v. Henderson*, No. 22,128, 26 Sep. 1969. Accused was convicted of two specifications of carnal knowledge of a female under the age of sixteen (art. 120). The Court granted review to determine the validity of his conviction in light of *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported in 69-13 JALS 1).

The evidence reflected the facts that accused met the fourteen-year-old daughter of another serviceman at a cafeteria located on an Air Force base. They talked and he walked her home. They met the next day and on that evening she went to his off-base apartment where they engaged in sexual intercourse. On the following evening, they engaged in sexual intercourse at the same place.

In holding that the court-martial lacked jurisdiction over these offenses the Court stated:

> The jurisdictional aspects of this case are sufficiently similar to those pertaining in O'Callahan v Parker, supra, to dictate the same result. Only the status of the victim as a military dependent and the fact of their meeting on-base, differentiate the two cases. While these factors might, in a proper case, provide the necessary "service connection" to invest a court-martial with jurisdiction over a particular offense, we do not believe they are controlling here.
>
> It was not essential to their initial meeting that the victim shall have been a military dependent for, in the main, military posts are open to the public. We know of no reason to believe that the rules at Ramey Air Force Base are to the contrary. In addition, her service connection was natal and not legal and, as such, insufficient to bring her personally within the ambit of the Uniform Code. Reid v Covert, 354 US 1 . . . (1957). In her testimony at trial, the victim did not indicate that her activities with the accused were in any manner premised on his status as a serviceman. She fully consented to both acts of intercourse, willingly cooperated therein, and replied in the affirmative when asked by defense counsel if she knew "it was going to occur before it did occur." The incidents came to light during an investigation to locate her when she ran away from home. Her act of running away had no connection with the accused or their activities together.
>
> Since the offensss of which the accused was convicted were not "service connected," the court-martial was without jurisdiction to proceed thereon. O'Callahan v Parker, supra. See also United States v Borys, 18 USCMA —, 40 CMR — [1969, digested 69-22 JALS 8].

Accordingly, the decision of the board of review was reversed and the charge and its specifications were ordered dismissed. (Opinion by Judge Ferguson in which Judge Darden concurred.)

***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 69-24 JALS [page number] (DA Pam 27-69-24)**

Chief Judge Quinn (dissenting) would have upheld the exercise of court-martial jurisdiction over these offenses for the reasons set out in his dissent in *United States v. Borys, supra,* as well as for the reason that he felt that the offenses had military significance.

2. (8, MCM) *O'Callahan v. Parker* Considered. Court-Martial Has Jurisdiction Over Offense Of Carnal Knowledge When The Crime Is Committed On Base. *United States v. Smith,* No. 22,180, 26 Sep. 1969. Accused was convicted of one specification of carnal knowledge of a female under sixteen, at diverse times between 5 October and 14 December 1968 (art. 120). The Court granted review to determine the validity of accused's conviction in light of *O'Callahan v. Parker,* 395 U.S. 258 (1969, reported in 69-13 JALS 1).

The Court noted that this case differed from *United States v. Henderson,* 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested *supra*), inasmuch as accused, in this case, had sexual intercourse with his victim at various locations in *on-base* housing. Henderson's offenses, on the other hand, occurred off base. The Court stated that "[t]his difference is a vital one for, as we have noted in other cases . . ., the need to maintain 'the security of a military post' (O'Callahan v Parker, supra, 395 US, at page 274) is sufficient to vest in the court-martial jurisdiction to try this offense." (Citations omitted.)

Accordingly, the decision of the board of review was affirmed. (Opinion by Judge Ferguson in which Chief Judge Quinn and Judge Darden concurred.)

3. (8, MCM) *O'Callahan v. Parker* Considered. Court-Martial Lacked Jurisdiction Over Accused Who Stole An Automobile From An Off-Base Automobile Lot. *United States v. Riehle,* No. 22,040, 26 Sep. 1969. Accused was convicted of the theft of an automobile, the property of Colonial Motor Sales, Oceanside, California (art. 121). The Court granted review to determine the validity of his conviction in light of *O'Callahan v. Parker,* 395 U.S. 258 (1969, reported in 69-13 JALS 1).

The only information concerning the offense was contained in the action of the convening authority. This report indicated that accused took the automobile from an off-base automobile lot, drove the car for about one day, and then parked the automobile on base.

In holding that the court-martial lacked jurisdiction to try this offense, the Court stated:

> It is apparent that the offense of larceny was committed against the civilian community and, as a consequence, the matter was triable in the courts of the State of California. O'Callahan v Parker, supra. See also United States v Borys, 18 USCMA —, 40 CMR — [1969, digested 69-22 JALS 3]. The only possible "service connection," as reflected by the convening authority's summary, that might be found is the subsequent action of the accused in bringing the stolen property on base. While it might be contended that his action compromised "the security of a military post" (O'Callahan v Parker, supra, 395 US, at page 274), we do not believe that in this case it is sufficient to clothe the court-martial with jurisdiction to try the accused for the offense of larceny.
>
> When the automobile was taken from the used car lot, the crime of larceny was complete and jurisdiction was thereupon vested in the local courts. There is simply no evidence that the larceny was "service connected" as the subsequent use of the vehicle was irrelevant to the proof of the charged offense. We take no view on whether the bringing of stolen property upon a military base is an offense triable by court-martial. That determination will have to be left for resolution in a proper case. We do hold that under the circumstances of this case, it is insufficient to vest this special court-martial with jurisdiction. O'Callahan v Parker and United States v Borys, both supra.

Accordingly, the decision of the board of review was reversed and the charge and its specification dismissed. (Opinion by Judge Ferguson in which Judge Darden concurred.)

Chief Judge Quinn (dissenting) would have affirmed the decision of the board of review for the reasons set out in his dissent in *United States v. Borys, supra,* and *United States v. Henderson,* 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested *supra*).

4. (8, MCM) ***O'Callahan v. Parker* Considered. Court Lacked Jurisdiction Over Attempted Robbery Committed Off Base. Where The Force And Violence Of A Robbery Charge Were Committed On-Base The Court-Martial Had Jurisdiction.** *United States v. Crapo,* No. 21,866, 26 Sep. 1969. Accused plead guilty to one specification each of being absent without leave, robbery, and attempted robbery (arts. 86, 122, and 80, respectively). In this appeal, the Court was presented with the issue of whether accused could be tried by court-martial for the crimes of robbery and attempted robbery committed against civilians when the local courts were open and functioning.

The Court first considered the attempted robbery of a cab driver committed in Seattle, Washington. In holding that the court-martial lacked jurisdiction over this charge the Court stated:

> There is no evidence in this record that the offense had any military significance other than the status of the accused as a member of the armed forces of the United States. Since the courts of the State of Washington have cognizance of this offense, it is apparent that the court-martial was without jurisdiction to proceed thereon. O'Callahan v Parker . . . [395 US 258 (1969), reported in 69-13 JALS 1]. See also United States v Borys . . . [18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-22 JALS 3)].

The Court next found, however, that the facts surrounding the robbery of another cab driver, *L*, dictated a different result. As noted by the Court, although the actual taking of *L*'s money occurred in the civilian community, the assault and force and violence directed against the cab driver, and elements of the robbery, took place on a military reservation. This, in the Court's opinion, was a sufficient basis to sustain military jurisdiction. *O'Callahan v. Parker, supra.*

Accordingly, the finding of guilty of attempted robbery was reversed and the charge dismissed. The Court of Military Review may reassess the sentence on the remaining findings of guilty or a rehearing on sentence may be ordered. (Opinion by Judge Ferguson in which Judge Darden concurred.)

Chief Judge Quinn (dissenting) would have affirmed the decision of the board of review for the reasons set out in his dissent in *United States v. Borys, supra.*

5. (8, MCM) ***O'Callahan v. Parker* Considered. Court-Martial Has Jurisdiction Over The Offense Of Wrongfully Appropriating A Civilian-Owned Truck When The Offense Is Committed On-Base.** *United States v. Paxiao,* No. 22,280, 26 Sep. 1969. Accused, in accord with his pleas, was convicted of being absent without leave, desertion, and wrongful appropriation of a truck (arts. 86, 85, and 121, respectively). The Court granted review to determine the validity of his conviction of the wrongful appropriation of the truck, in light of *O'Callahan v. Parker,* 395 U.S. 258 (1969, reported in 69-13 JALS 1).

In holding that the court-martial had jurisdiction over this offense, the Court stated:

> While it is apparent that the crime was committed against a civilian and that civilian property was involved, the offense occurred on the Presidio of San Francisco, a military reservation. Under these circumstances, we are constrained to hold that since the crime directly affected "the security of a military post" (O'Callahan v Parker, supra, 395 US, at page 274), there is a sufficient basis to sustain military jurisdiction. O'Callahan v Parker, supra. See also United States v Crapo, 18 USCMA —, 40 CMR — [1969, digested *supra*].

Accordingly, the decision of the board of review was affirmed. (Opinion by Judge Ferguson in which Chief Judge Quinn and Judge Darden concurred.)

6. (8, MCM) ***O'Callahan v. Parker* Considered. Court-Martial Lacked Jurisdiction**

Over Sodomy Offense Committed Off-Base. Court-Martial Had Jurisdiction Over Offense Of Sodomy Committed On-Base. *United States v. Shockley*, No. 21,667, 26 Sep. 1969. Accused was convicted of one specification each of sodomy and committing a lewd and lascivious act (arts. 125 and 134, respectively). The convening authority disapproved and dismissed the conviction under article 134. The Court granted review to consider the validity of accused's conviction for the offense of sodomy in light of *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported in 69-13 JALS 1).

The record contained the testimony of accused's stepson to the effect that he and accused engaged in acts of anal and oral copulation on diverse occasions between June 1965 and August 1967. The incidents took place in their off-base residence and continued after the family moved into government quarters at Camp Allen.

The Court first concluded that the offense of sodomy committed off-base was not "service connected" within the meaning of *O'Callahan v. Parker, supra*.

The Court, however, reached a different conclusion with reference to the offense committed at Camp Allen. The Court stated:

> Camp Allen is a Government housing area located within the confines of the Naval Base at Norfolk, Virginia. As such, the military are charged with maintaining the security of that area. This factor is sufficient to vest in the court-martial jurisdiction to try this portion of the offense. United States v Smith, 18 USCMA —, 40 CMR —; United States v Crapo, 18 USCMA —, 40 CMR —; United States v Paxton, 18 USCMA —, 40 CMR — [1969, all digested *supra*].

The findings of guilty of sodomy committed off-base was reversed. The Court of Military Review may reassess the sentence on the basis of the finding of guilty of sodomy at Camp Allen, or a rehearing on sentence may be ordered. (Opinion by Judge Ferguson in which Judge Darden concurred.)

Chief Judge Quinn (dissenting) would have affirmed the decision of the board of review on the basis of his dissent in *United States v. Borys*, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-22 JALS 3).

7. (8, MCM) *O'Callahan v. Parker* Considered. Possession And Use Of Dangerous Drugs Is "Service Connected." Court-Martial Lacked Jurisdiction Over Charge Of Unlawfully Carrying A Concealed Weapon. *United States v. Castro*, No. 22,046, 26 Sep. 1969. Accused was convicted of four specifications of being absent without leave, two specifications of violation of a lawful general regulation by unlawful possession of barbiturates, and one specification of unlawfully carrying a concealed weapon (arts. 86, 92, and 134, respectively). The Court granted review to determine the validity of accused's conviction in light of *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported in 69-13 JALS 1).

Initially, the Court stated that the offense of being absent without leave was unquestionably "service connected" and consequently not within its grant of review.

Next, the Court considered accused's conviction for violating the general regulation found in par. 18.1, AR 600-50, 29 Jun. 1966, amended 15 May 1968. This regulation forbids the unlawful possession of certain drugs, specifically barbiturates and amphetamines, both of which were found on accused at the time he was taken into military custody for being absent without leave. As noted by the Court, the existence of a general regulation declaring specified conduct as punishable, does not, standing alone, *per se* confer jurisdiction on a court-martial to try the accused of its violation. The conduct proscribed therein must be "service connected" within the meaning of *O'Callahan v. Parker, supra*. As was noted in *United States v. Williams*, 8 U.S.C.M.A. 325, 24 C.M.R. 135 (1957), however, the Court is of the opinion that possession and use of drugs is detrimental to the "health, morale and fitness for duty of persons in the armed forces." In that case,

the Court cited *United States v. Beeker*, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-23 JALS 1), for the proposition that "the regulation proscribing such conduct, whether on or off base, relates to a matter that is clearly 'service connected.'" Consequently, the offenses were properly triable by court-martial.

Finally, the Court considered the charge of unlawfully carrying a concealed weapon. The Court first stated that while it was true that accused's possession of the weapon only became known after he had entered a United States Army hospital, his presence there was not voluntary. The facts indicated that after accused had been involved in an automobile accident in Seattle, Washington, the Seattle Police Department turned him over to the Armed Forces Police who took him to the Army hospital. In holding that the court-martial did not have jurisdiction over this offense, the Court stated:

> We have no doubt that the need to maintain the security of a military post" (O'Callahan v. Parker, supra, 395 US, at page 274) gives to the Congress of the United States the right to proscribe the charged misconduct when it occurs within the confines of a military establishment. Under the circumstances of this case, however, we do not believe that the offense is properly chargeable under the Uniform Code. Since it is an offense cognizable in the courts of the State of Washington, it should be tried there, O'Callahan v Parker, supra; United States v Borys, 18 USCMA —, 40 CMR — [1969, digested 69-22 JALS 3].

Accordingly, accused's conviction under the Additional Charge was reversed and the charge and its specification were ordered dismissed. The Court of Military Review may reassess the sentence on the basis of the remaining findings of guilty. (Opinion by Judge Ferguson in which Judge Darden concurred.)

Chief Judge Quinn (concurring in part and dissenting in part) would have affirmed the concealed weapons charge as well as the dangerous drug charges on the basis of *United States v. Tobin*, 17 U.S.C.M.A. 625, 38 C.M.R. 423 (1968) and *United States v. Beeker, supra.*

8. (8, MCM; UCMJ art. 123) ***O'Callahan v. Parker*** **Considered. Court-Martial Had Jurisdiction Over Bad Check Offenses Where The Checks Were Cashed On-Base. However, Court-Martial Lacked Jurisdiction Over Bad Check Offense Where The Check Was Cashed Off-Base.** *United States v. Williams,* No. 22,176, 26 Sep. 1969. Accused was convicted of one specification of willful disobedience of an order of his superior officer and three specifications of uttering checks with intent to defraud, then knowing that he did not or would not have sufficient funds in or credit with the bank for the payment thereof in full presentment (arts. 90 and 123, respectively). The Court granted review to determine the validity of accused's conviction under article 123 in light of *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported in 69-13 JALS 1).

The evidence reflected that two of the checks were cashed at the Fort Bragg Consolidated Exchange located *on base*. These checks were returned to the Exchange, unpaid, with the notation "account closed." In holding that the court-martial had jurisdiction over these offenses, the Court stated:

> Inasmuch as the uttering of these particular checks took place on base, and cashed at the Fort Bragg Consolidated Exchange, a governmental agency on the base, we believe that the offenses were "service connected" within the meaning of O'Callahan v Parker, supra, and that the court-martial had jurisdiction to try the accused.

A third check, however, presented the Court with a different problem. According to the evidence, accused wrote this third check to a grocer to satisfy his account. The Court, in holding that the court-marital lacked jurisdiction over this offense, stated:

> The offense of uttering . . . took place in the civilian community and a civilian was victimized thereby. The offense was triable in the courts of North Carolina. Under the rationale of O'Callahan v Parker, supra, this offense was not "service connected"

and, hence, the court-martial was without jurisdiction to proceed.

Accused's conviction relating to the third check was reversed and the specification ordered dismissed. The Court of Military Review may reassess the sentence on the basis of the remaining findings of guilty. (Opinion by Judge Ferguson in which Judge Darden concurred.)

Chief Judge Quinn (dissenting) would have affirmed the decision of the board of review on the basis of his dissent in *United States v. Borys*, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-22 JALS 3).

9. (8, MCM) *O'Callahan v. Parker* Considered. Court-Martial Lacked Jurisdiction Over Burglary And Larceny Committed Off-Post. *United States v. Chandler*, No. 21,685, 26 Sep. 1969. Accused, while in an absent without leave status, allegedly committed the offenses of burglary and larceny (Additional Charges IV and V) for which he was convicted by a general court-martial, along with charges of absence without leave and escape from lawful confinement. The Court of Military Appeals granted review to determine the validity of his conviction for burglary and larceny in light of *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported in 69-18 JALS 1).

A stipulation of fact disclosed the following information concerning Additional Charges IV and V: On 18 April 1968 accused and Private *B* broke into the home of *V*, located in Belleville, Michigan, and stole property worth more than $50.00. Two days later, accused and *B* stole an automobile in Ypsilanti, Michigan, belonging to *C*. Subsequently that same day accused and *B* stole property of a value of about $250.00 from another individual. Accused and his companion were arrested by an officer of the Saline Police Department, Saline, Michigan, while riding in the stolen automobile.

In holding that the court-martial lacked jurisdiction over the burglary and larceny charges, the Court stated:

> Since the offenses designated Additional Charges IV and V were cognizable in the courts of the State of Michigan and the circumstances surrounding the commission of these offenses were in no way specifically related to the military, these offenses were not triable by court martial. O'Callahan v Parker, supra; United States v. Borys, 18 USCMA —, 40 CMR — [1969, digested 69-22 JALS 3].

Accordingly, the findings of guilty of Additional Charges IV and V were set aside and the charges and their specifications were ordered dismissed. The Court of Military Review may reassess the sentence on the basis of the remaining findings of guilty or a rehearing may be ordered. (Opinion by Judge Ferguson in which Judge Darden concurred.)

Chief Judge Quinn (dissenting) would have affirmed the decision of the board of review for the reasons set out in his dissent in *United States v. Borys*, 18 U.S.C.M.A. —, 40 C.M.R. — (1969, digested 69-22 JALS 3).

10. (8, MCM) *O'Callahan v. Parker* Considered. Court-Martial Had Jurisdiction Over Conspiracy Charge. *United States v. Harris*, No. 22,028, 26 Sep. 1969. Accused was convicted of one specification of conspiracy to violate sections 798(c) and (g), Title 18, United States Code. The charge was laid under article 134, UCMJ. The Court granted review to determine the validity of his conviction in light of *O'Callahan v. Parker*, 395 U.S. 258 (1969, reported in 69-18 JALS 1).

Accused was charged with conspiring with another serviceman and with two foreign nationals to obtain information connected with the national defense of the United States. Accused allegedly placed certain documents relating to the national defense in a location where they would be picked up by one of the foreign nationals.

As the Court noted, jurisdiction to try offenses within the purview of § 798, *supra*, is cognizable in the federal district courts and ordinarily the matter would be tried there. In finding that the court-martial had

jurisdiction in this case, however, the Court stated:

> In this case . . . the documents involved were inner-working papers of the military establishment and, while not containing a security classification, one was marked for official use only. They were not generally available to the civilian populace. The security and integrity of these documents rests exclusively within the military establishment.
>
> . . . .
>
> According to the testimony of a prosecution witness, the appellant's *military duties* played a major role in his participation in the conspiracy. The military members of the conspiracy, *S* and the accused, were acquainted with each other from prior military assignment. The accused had been previously assigned to SHAPE Headquarters in Europe and at the beginning of the conspiracy he was attending a microwave supervisor course at the United States Army Signal School . . . . Before including him in the conspiracy, the Soviet representatives inquired into the location and type of his duties. Throughout the conspiracy, the accused, according to the witness, sought to recruit others from within the Army who might be sources for obtaining classified information. When reassigned to Korea, he told the witness that he would attempt to develop contacts there.

Under the circumstances of this case, the Court found the charged offense to be "service connected" within the meaning of *O'Callahan v. Parker, supra*. Accordingly, the decision of the board of review was affirmed. (Opinion by Judge Ferguson in which Chief Judge Quinn and Judge Darden concurred.)

11. (UCMJ art. 92) **Variation Between Allegation And Proof Was Fatal And Necessitated Reversal Of Accused's Conviction.** *United States v. Smith*, No. 22,138, 26 Sep. 1969. Accused was convicted for dereliction of duty (art. 92). Intermediate appellate authorities affirmed his conviction.

The specification under the charge alleged that accused "willfully failed to properly walk his post . . . by sitting down upon said post." The Court, however, found the record devoid of evidence that would sustain such an allegation. The prosecution established that after accused was posted as a sentinel he was found off his post, by the Officer of the Day, and apparently asleep in a building. As the Court noted, in essence a violation of article 92 was alleged and charged and yet an entirely separate violation showing the misbehavior of a sentinel leaving his post before being properly relieved was proved (art. 113). The Court held that this variation between allegation and proof was fatal and necessitated reversal of accused's conviction. *United States v. Ellsey*, 16 U.S.C.M.A. 455, 37 C.M.R. 75 (1966); *United States v. Dotson*, 17 U.S.C.M.A. 352, 38 C.M.R. 150 (1962).

Accordingly, the decision of the board of review was reversed and the charge and its specification dismissed. (Opinion by Judge Darden in which Chief Judge Quinn and Judge Ferguson concurred.)

12. (76*b*(2), MCM) **President's Failure To Instruct On Procedure To Be Followed In Voting On Sentence Constituted Reversible Error.** *United States v. Smith*, No. 22,196, 26 Sep. 1969. When instructing the court on the sentence to be imposed, the president of the special court-martial which convicted accused failed to give the court members any guidance on the mechanics of voting, as prescribed in paragraph 76*b*(2), Manual for Courts-Martial, United States, 1951.

Relying on *United States v. Johnson*, 18 U.S.C.M.A. 436, 40 C.M.R. 148 (1969, digested 69-19 JALS 3), the Court held that it was prejudicial error to fail to instruct the court that it should begin by voting on the lightest proposed sentence. In *Johnson*, the Court stated:

> A court, uninstructed as to this procedure, may well believe that the voting could properly commence with consideration of the most severe proposed sentence. Since we have no way of ascertaining what took place, the voting having been conducted in secret, and inasmuch as, in our opinion, the matter concerned a substantial right of the accused, the doctrine of plain error may be properly invoked. United States v

Stephen, 15 USCMA 314, 35 CMR 286. Reversal as to sentence is required.

Accordingly, the decision of the board of review was reversed. A rehearing on sentence may be ordered. (Per curiam.)

13. (127*c*, MCM) Board Of Review Erred In Approving A Bad-Conduct Discharge As Additional Punishment. *United States v. Gordon,* No. 22,270, 26 Sep. 1969. Accused was convicted of failing to obey a superior commissioned officer, willful disobedience of a noncommissioned officer, sitting down on post, and violation of a ship's order by wearing tennis shoes instead of black shoes while standing bow sentry. He was sentenced to six months' confinement at hard labor, reduction to pay grade E-1, and a bad-conduct discharge. All of the offenses, except the last, were set aside by the supervisory authority; he modified the sentence by reducing the confinement to one month.

On further review, a Navy board of review noted that under the Table of Maximum Punishments, Manual for Courts-Martial, United States, 1969, section A, paragraph 127*c*, the maximum punishment for the approved sentence did not include a punitive discharge. However, a majority of the board concluded that under section B, *Manual, supra,* it could approve the bad-conduct discharge as additional punishment because accused had two previous convictions. In reversing the board of review as to the sentence, the Court agreed with the board member who dissented. In his opinion, dismissal of the "three most serious offenses constituted [a] radical surgery" as to the findings of guilty and "the pettiness" of the remaining offenses presented a fair risk that the court-martial might not have added a bad-conduct discharge to the sentence on the basis of accused's previous misconduct. Agreeing with these views, the Court cited *United States v. Voorhees,* 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954) and *United States v. Kowert,* 7 U.S.C.M.A. 678, 23 C.M.R. 142 (1957).

Accordingly, the decision of the board of review was reversed as to the sentence. A rehearing thereof may be ordered. (Per curiam.)

II. COURT OF MILITARY REVIEW DECISIONS.

1. (70, MCM) Court-Martial Retains Jurisdiction Over Officer Whose Resignation Has Been Accepted But Who Has Not Been Notified. Guilty Plea Provident. *United States v. Schneider,* CM 420035, 11 Aug. 1969. Conviction: AWOL (art. 86), in accord with pleas. Sentence: dismissal from the service, TF, and six mos CHL. Convening authority approved.

Accused claimed that he was not subject to court-martial jurisdiction because his resignation for the good of the service had become effective before trial. In fact, the order accepting accused's resignation was issued while accused was on his second AWOL. When accused was apprehended, he was placed in the stockade; and the commanding general ordered that notification of the acceptance be held in abeyance, so that accused could be tried on the charges.

In holding accused subject to military law, the Court of Military Review reiterated the principle that the resignation of an officer does not become effective until the time when he receives due notice of its acceptance. Winthrop, *Military Law and Precedents* (2d ed. 1920 reprint); SPJGA 1945/10844, 12 Oct. 1945; JAGA 1946/9809, 13 Nov. 1946. Furthermore, noted the Court, accused's pleas of guilty amounted to a judicial confession of guilt and relieved the prosecution of the burden of introducing evidence of guilt. *United States v. Lucas,* 1 U.S.C.M.A. 19, 1 C.M.R. 19 (1951).

Considering accused's record on extenuation and mitigation, however, the court, though affirming findings, affirmed only so much of the sentence as included dismissal from the service. (Per curiam opinion.) (Before Porcella, C.J., and Bailey, J. Hago-plan, J., absent.)

2. (85, MCM) SJA Erred By Failing To Advise Convening Authority In Post-Trial Review That He Must Be Convinced Of Guilt Beyond Reasonable Doubt And That The Commander Of The Disciplinary Barracks Is Not Authorized To Mitigate Sentences Of GCM Prisoners. Both Errors Nonprejudicial. *United States v. Elmore*, CM 420396, 27 Jul. 1969. Conviction: desertion (art. 85), contrary to plea of guilty to lesser included offense of AWOL (art. 86). Sentence: DD, TF, two yrs CHL, and red E-1.

Accused claimed that the staff judge advocate erred in failing to advise the convening authority that he must be convinced beyond a reasonable doubt as to accused's guilt. The Board of Review agreed. *United States v. Jenkins*, 8 U.S.C.M.A. 274, 24 C.M.R. 84 (1957); *United States v. Grice*, 8 U.S.C.M.A. 166, 23 C.M.R. 390 (1957). Holding that the advice was sufficient as to the lesser included offense of AWOL (art. 86), to which accused pleaded guilty, however, the Board determined to cure the error by approving findings of AWOL. *United States v. Westrich*, 19 U.S.C.M.A. 82, 25 C.M.R. 344 (1958); *United States v. Howes*, 9 U.S.C.M.A. 78, 25 C.M.R. 340 (1958).

The Court also noted the following error in the staff judge advocate's review:

> *Although the accused requests to be returned to duty I believe he must demonstrate his true rehabilitation by successfully completing rehabilitation training on confinement. If after an appropriate period of confinement the accused has demonstrated that he should be restored to duty under a suspended sentence, this action could be taken by the commander exercising general court-martial jurisdiction over the United States Disciplinary Barracks or the officer empowered to take such action after transfer.* (Emphasis supplied by the Board.)

Although this was in conformity with AR 638-10, 21 May 1968, which limits such authority to the Secretary of the Army and The Judge Advocate General, the Board held that it was nonprejudicial in that the convening authority was not misled as to his powers in extenuation and mitigation. In reaching this decision, the Board refused to follow the holding in *United States v. Lewis*, CM 420520 (11 Jul. 1969, digested 69-22 JALS 9), wherein it was held that a similar misstatement required remand of the record to the convening authority for a new review and action.

Accordingly, the findings were approved as to the lesser included offense of AWOL. Reassessing the sentence on the basis of the entire record, the Board reduced the period of confinement to one year. (Kelso, J.; Nemrow, J., concurring.)

Stevens, C.J. (dissenting), maintained, in accordance with the opinion in *United States v. Lewis, supra*, that the errors were prejudicial and necessitated a new review.

III. GRANTS AND CERTIFICATIONS OF REVIEW.

United States v. Everson, ACM S-22769, petition granted 16 Sep. 1969. Accused was stationed at Nellis Air Force Base, Nevada, and living off-base in Las Vegas. On Saturday, 18 January 1969, A1C *B*, also stationed at Nellis AFB, visited accused at his quarters. Later, accused and *B* were out on the street in front of accused's quarters assisting a third individual who had car trouble. Accused, for no apparent reason, took a .32 caliber pistol from his pocket and shot *B* in the neck. He was charged with assault with a dangerous weapon in violation of article 128 and wrongful and willful discharge of a firearm under circumstances such as to endanger human life in violation of article 134.

Accused was convicted of the assault specification as alleged and of the lesser offense of discharge of a firearm through carelessness under circumstances such as to endanger human life. He was sentenced to three months' confinement at hard labor and a bad-conduct discharge. The Court will consider whether the court-martial lacked jurisdiction to try accused on the charges and the specifications thereunder.

IV. MILITARY AFFAIRS OPINIONS.*

1. (Reserve Officers 43, 45) **Assignment Of Certain Reserve Officers To Positions For Officers Of Next Lower Grade May Preclude Unit Vacancy Promotions For Qualified Officer Of Lower Grade.** Paragraphs 2-4*a*(10) and (16), AR 140-10, 12 Jun 1968, authorize the Secretary of the Army to assign Medical, Dental, Nurse, Medical Specialist, and Chaplain Reserve officers to positions provided in their unit's TOE or TDA for the next lower grade. This may result in an authorized overstrength in the unit.

In response to an inquiry from the Chief, Office of Reserve Components, as to the effect of such assignment on unit vacancy promotions, The Judge Advocate General responded that an officer of lower grade, though qualified to fill the position of the higher grade, could not be promoted to fill a unit vacancy if the unit's authorized strength of officers in the higher grade is filled. 10 U.S.C. § 3219, 3220, 3383(a). For example, if a unit is authorized six colonels and has four colonels and two lieutenant colonels filling the colonel positions and, in addition, two colonels are filling lieutenant colonel positions pursuant to the above cited provisions of AR 140-10, the lieutenant colonels can neither be promoted to fill unit vacancies nor be recommended for such a promotion. However, if the Secretary revises the unit's TOE or TDA to include additional positions for colonels, a unit vacancy promotion may be accomplished. JAGA 1969/4150, 14 Aug 1969.

***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 1968/5156, 16 Dec 1968.**

2. (Enlisted Men 31.5) **Regulation Authorizing Government To Waive Enlisted Man's Obligation To Make Up Time Lost Does Not Apply To Inductee.** In response to an inquiry from The Adjutant General as to whether par. 2-3*b*, AR 635-200, would authorize a waiver of time lost by Specialist *P*, an inductee who spent 33 days in pretrial confinement and who subsequently compiled a favorable record of service, The Judge Advocate General answered that it would not, as the regulation, as presently written, applies only to those who voluntarily enlist and not to inductees. It was stated, however, that 10 U.S.C. § 972, which authorizes such waiver, would not prevent AR 635-200 from being changed to cover inductees. The opinion also noted that the waiver, if granted, does not change the time lost to "good time." JAGA 1969/4161, 4 Aug 1969.

3. (Reserve Forces 69.11) **Reservist's Active Duty Orders For Unsatisfactory Participation Proper.** 10 U.S.C. 673a Retroactively Applicable. Private *B* refused to continue to participate as a member of a Ready Reserve unit following the denial of his application for discharge as a conscientious objector. Under the provisions of 10 U.S.C. 673a, he was ordered to active duty for eighteen months as an unsatisfactory participant. In addition to filing suit for a stay of his order to active duty, Private *B* petitioned the Army Board for the Correction of Military Records to have his records changed to reflect that he had the status of a conscientious objector.

In answer to a question from the ABCMR whether the orders to active duty were proper, The Judge Advocate General affirmed his opinion in JAGA 1969/3804, 29 Apr 1969, stating that an unsatisfactory participant in a unit of the Ready Reserve may be ordered to active duty under 10 U.S.C. 673a even though the statute had not been enacted when he enlisted and even though his enlistment contract did not provide for the applicability of subsequently enacted legislation. The Judge Advocate General cited *Pfile v. Corcoran*, 287 F. Supp. 554 (D. Colo., 1968),

noting that a contra holding in another district court had been reversed by the Ninth Circuit, and viewing a second district court decision as incorrectly decided to the extent that it conflicted with *Pfile.* JAGA 1969/4178, 18 Aug 1969.

4. (Claims 13) **Depreciation Allowance Provided For In COMMAND Regulation Violated Provisions Of AR 735-11.** On 15 December 1967, a report of survey recommended that Member X be held pecuniarily liable for the loss of silver flatware and some curtains used by him in quarters assigned to him. While not contesting liability, Member X appealed the amount of loss assessed against him, contending that the allowance for depreciation provided for in the COMMAND Regulation was in violation of paragraphs 5-19 and 5-20, AR 735-11, 11 July 1967, and that the depreciation allowance should have been greater than the percentage used.

The COMMAND Regulation provided that all items in quarters would be considered in new or like new condition when the occupant received them. Silverware was to be depreciated at a percentage of 5% per six months' period of use. The period of depreciation began upon the user's entrance into quarters. In contrast, paragraphs 5-19 and 5-20, AR 735-11, *supra,* provide that in determining the amount of pecuniary liability, only the actual loss to the Government will be assessed. Actual loss is defined as the difference between the value of the item immediately before its loss or destruction and the value immediately thereafter. In determining this actual loss, an allowance for depreciation is to be set off against the standard (or cost when new) value. Depreciation is based on the normal life expectancy or period of normal usefulness.

In advising that Member X's appeal to the Secretary of the Army from pecuniary liability should be granted, The Judge Advocate General expressed the opinion that the COMMAND Regulation was in violation of the provisions of AR 735-11, *supra,* insofar as it determined the base value from which depreciation began to run. When the COMMAND Regulation provided that all items were to be considered in new or like new condition, and revalued and redepreciated an item of property every time it acquired a new user, it failed to reflect the actual loss to the Government as provided by AR 735-11, *supra.* The COMMAND Regulation, by assuming that all objects are like new, did not recognize the true value of the object at the time of the loss and consequently failed to comply with the provision that liability is directly proportionate to the actual loss. The COMMAND Regulation further violated the Army regulation provision that the depreciation allowance will be based on the normal life expectancy inasmuch as it gave an object many useful lives based on a totally irrelevant factor, change of possession. This did not reflect the actual value and consequently could not reflect actual loss.

Inasmuch as the method used to calculate the value of the property was erroneous, Member X was entitled to a calculation based on the provisions of AR 735-11, *supra.* There was no evidence in the file concerning the age of the property upon which a proper calculation could be made. However, in an indorsement to Member X's request for reconsideration, it was presumed that the silverware had been in use for 20 years. Consequently, the doctrine of *de minimis non curat lex* was applied and the calculation of Member X accepted. JAGA 1969/4195, 17 Jul 1969.

5. (Posts, Bases, and Other Installations 11.7, 25) **State Or Local Authority Not Permitted To Sell Unpackaged Intoxicants On Easement Over Military Reservation, Even Though Federal Government Has Retroceded Legislative Jurisdiction.** In 1930, *G,* an agent of the State of *C,* was granted a permit to erect and maintain toll booths and approaches on either end of a bridge connecting two military reservations. In 1936, Congress retroceded legislative jurisdiction over this easement; and in 1938, *G* was granted a permit

to operate a restaurant on the easement, so long as intoxicating beverages were not served. On 1 May 1969, *G* requested permission to serve intoxicating beverages in a new restaurant to be constructed.

In response to a request by DCSPER, The Judge Advocate General replied that the Army could not grant such permission, as par. 2-7*b*, AR 210-65, 14 Aug 1968, precludes the sale of non-packaged intoxicating alcoholic beverages on a post by anyone other than an authorized open mess. The Judge Advocate General stated that this paragraph applies to the land in question even though the United States has retroceded legislative jurisdiction to *G*. Moreover, the regulation is indicative of Army policy regarding the sale of alcoholic beverages on Military installations, and thus restricts Army officials in prescribing rules and regulations under the terms of the permit. As AR 210-65 implements the Universal Military Training and Service Act, 50 U.S.C. App. § 473, subsection 6, as amended (1951), its provisions may not be waived nor exceptions granted thereto. Accordingly, AR 210-65 would have to be changed in order to permit the Army to allow *G* to sell alcoholic beverages in its restaurant. JAGA 1969/4294, 12 Aug 1969.

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

The digest topic and section number system employed herein in keying other than military justice matters is part of the copyrighted digest system used by the Lawyers Co-operative Publishing Company in Dig. Ops. JAG, CMR, and USCMA volumes and is used with that company's permission.

★ UNITED STATES GOVERNMENT PRINTING OFFICE 1969—42639