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JUDGE ADVOCATE LEGAL SERVICE*

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VI. Miscellaneous.

I. ANNIVERSARY MESSAGES

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

It is a pleasure for me to extend on behalf of all the men and women of the Army congratulations and best wishes to each member of the Judge Advocate General's Corps on the one hundred and ninety-fifth anniversary of the Corps.

The experiences of the past year have again demonstrated that the Army, its members, and their dependents, must continue to have the services of a skilled and professional Corps of lawyers. Despite the shortage of available members of the Judge Advocate General's Corps, your initiative in implementing the Military Justice Act of 1968, and in performing timely and effective legal services in Vietnam, as well as the rest of the world, was most impressive.

Take pride in your accomplishments. I wish you continued success as you perform your vital contribution to the Army team.

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

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

It is a pleasure to extend to each of you my best wishes on the 195th anniversary of the Corps.

This past year has been one of which we can be particularly proud. The Military Justice Act of 1968 was implemented smoothly, effectively, and efficiently throughout the Army. The size of the Corps was increased greatly to meet the demands of the Act, without a dilution of the quality of our legal services. These services were provided to the Army in many cases under conditions of armed conflict.

Looking to the future, social and political changes are certain to continue. To meet these challenges we must continue to improve our system of military justice, which has already been acknowledged as the finest in the world. Our practice of law within the military must remain consonant with the highest standards of professionalism. In short, we must continue to improve the quality of our service and advice to the Army, both as judge and advocate. If we respond with the dedication and pride that we have shown in the past, the legal profession, the Army, and the United States will be well served.

Congratulations, and keep up the fine work.

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

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

1. (18 U.S.C. §2387; UCMJ art. 134) **Instructional Error Required Reversal; Accused Found Guilty Of Lesser Included Offense.** *United States v. Daniels,* No. 22,252, 10 Jul. 1970. A general court-martial at Camp Pendleton, California, convicted accused of eight specifications, laid under article 134, alleging that, with the intent to interfere with the loyalty morale, and discipline of named members of the Marine Corps, he urged and attempted to cause insubordination, disloyalty, and refusal of duty on the part of said members contrary to 18 U.S.C. §2387. The findings of guilty were affirmed by a board of review, but the sentence was modified by reducing the period of confinement from

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***Communications relating to the contents and address changes 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 70-9 JALS [page number] (DA Pam 27-70-9).**

ten years to four years.

Accused first contended that the court-martial had no power to try him for conduct violative of 18 U.S.C. §2387, because that offense is cognizable in a Federal court and is not specially service-connected. *O'Callahan v. Parker,* 395 U.S. 258 (1969, digested 69-13 JALS 1). Citing *United States v. Harris,* 18 U.S.C.M.A. 596, 40 C.M.R. 308 (1969, digested 69-24 JALS 6), the Court held that in this case the wrongful acts were committed on a military base with the intent and for the purpose of affecting members of the military service, thus imparting sufficient military significance to the wrongful conduct to justify trial by court-martial.

In the second assignment of error, accused challenged the sufficiency of the evidence to support the findings of guilty. His central contention was that the statements attributed to him were merely "expressions of grievances and private opinions" for which he could not be prosecuted without violating his constitutional right to free speech and to the exercise of his religion. The Court noted that "the right to believe in a particular faith or philosophy and the right to express one's opinions or to complain about real or imaginary wrongs are legitimate activities in the military community as much as they are in the civilian community." See *United States v. Schmidt,* 16 U.S.C.M.A. 57, 36 C.M.R. 213 (1966); *United States v. Wolfson,* 36 C.M.R. 722 (1966). However, it was further stated that "if competent evidence reveals conduct not protected by the Constitution and condemned by statute, the findings [of guilty] are proper." *Hartzel v. United States,* 322 U.S. 680 (1944); *United States v. Howe,* 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

Accordingly, the Court turned to a consideration of the requirements of the statute. Title 18, U.S.C. §2387, has its roots in the Espionage Act of 1917, and contains substantially the same language. In *Hartzel v. United States, supra,* the Supreme Court of the United States considered the predecessor statute. The Supreme Court determined that the statute required not only proof of prohibited acts, but also two other "elements." One, which the Court described as the "subjective" element, was that at the time of the commission of a prohibited act the defendent possessed the specific intent proscribed by the statute. The other element, which the Court characterized as an "objective" element, consisted of a requirement that there be "a clear and present danger that the activities in question will bring about the substantive evils" delineated in the statute.

The accused in the present case claimed membership in the Black Muslim Sect. On frequent occasions he talked about the tenets of his faith to black members of his unit. He also talked about the involvement of the United States in the Vietnam war and the participation of black troopers of the Marine Corps in that war. Accused often declared that blacks did not have a country; that the Vietnam war was a "white man's war" and the blacks did not "belong over there." Private *J,* who was named in specification 1 of the charge, when asked if accused had ever "directly" told him not to go to Vietnam, replied: "Yes, sir, he did. Not—In a way he did. He said I shouldn't go. He told me I shouldn't go to Vietnam."

On 27 Jul. 1967, Private *J* and other members of the company were at the rifle range. On notification by accused and a Corporal Harvey, the black troopers assembled at two different meetings. At these meetings accused addressed the assembled black troopers, and told them that there was no need for them to go to Vietnam because Vietnam was a white man's war and he "didn't see . . . [any] sense in going overseas and fighting the white man's war." He told them that he would prepare a list of names of the "people that want to request mast," and that they would go to talk to the Captain.

The next morning when the call was issued for the persons who had requested mast, Private *J* joined the formation, which was made up of persons who had attended the meetings the previous day. At the company office, Private *J* indicated that he had requested the mast because he was going to refuse to go to Vietnam. However, when informed of the nature and consequences of a refusal to obey orders, he decided not to go through with his mast request. At trial, he maintained that he would not have requested the mast on his own initiative, and that he had done so because of the meeting he had attended the previous day.

The Court first considered whether the evidence was sufficient to support the findings by

the court-martial that accused had made the declarations attributed to him with the "intent to interfere with, impair, and influence the loyalty morale, and discipline," of Private *J*, as alleged in the specification. The Court stated that "the intention of a speaker may be determined from surrounding circumstances as well as from the language in which his declarations are framed." Accused's declarations propounded a racial doctrine that contemplated not merely separation and lack of cooperation between the races, but violent confrontation. His declarations were addressed directly and specifically to members of accused's race who were members of the Marine Corps. Blacks were enjoined to remain in this country and to fight whites for black causes. To that end, accused proposed to his listeners that they join in a mass mast as a means of effecting their discharge from the Marine Corps.

A request for a mast is unquestionably lawful, but the Court stated that the court-martial could "reasonable conclude that the accused's call was not a call for the exercise of a lawful right for a lawful purpose." There was no evidence that accused knew or honestly believed that Private *J*, or his other listeners, had independent reasons to request mast. Considering the totality of accused's declarations and the circumstances in which they were uttered, the Court was satisfied that the members could find beyond a reasonable doubt that accused's declarations were intended to interfere with or impair the loyalty, morale, and discipline of Private *J*.

The Court then turned to the question of whether accused's activities presented a clear and present danger which could bring about insubordination and disloyalty. The evidence demonstrated that accused's activities occurred at a time when the blacks in the company were undergoing training to prepare them for duty in Vietnam. Accused had been informed by the company commander that many persons in the company did not want to be there, and that they were a particularly "susceptible" group. He also knew that the blacks in the company were aware of race riots in some of the large cities and were sensitive to the racial tensions. The means proposed by accused for avoidance of service in Vietnam did not rely upon the ordinary and usual reasons for separation from the service or excuse from duty but "depended upon the implied force of the number of blacks who availed themselves of it." The Court held that "the aggregate of the accused's activities was not a trivial hazard but a clear and present danger to impairment of the loyalty and obedience of [*J*] and other blacks in the company." It was concluded, therefore, that the evidence satisfied the objective requirements of 18 U.S.C. §2387, and amply supported the findings of guilty of specification 1 of the charge.

The remaining seven specifications involved other statements and other persons exhorted by accused not to go to Vietnam. The Court stated that "in appropriate circumstances, insult, derision, or coarse epithet can be as effective a cause of insubordination, disloyalty and refusal of duty as direct indictment."

On consideration of the record, the Court held that it was satisfied that the evidence was "legally sufficient to support a conclusion that the accused's conduct was intended to impair the loyalty, morale, and discipline of the persons mentioned in the specifications, and that there was a clear and present danger that disloyalty and insubordination would result from his activities."

The Court then considered the instructions that were given to the court members. It was concluded that

> the instructions in a prosecution of this kind must advise the court members, as triers of the facts, that they must find beyond a reasonable doubt that the language and the circumstances of the accused's declarations presented a clear and present danger that those declarations would cause insubordination, disloyalty, or refusal of duty.

The instructions in this case made no mention of the tendency of accused's activities to produce the prohibited results as an element of the offense. This instructional deficiency required reversal of the findings of guilty of a violation of §2387.

A final assignment of error involved the law officer's comment in an out-of-court hearing that he was "profoundly shocked" at parts of a defense witness's statement. In addition to a waiver of the right to object to the law officer's remarks, the Court found no reasonable risk of prejudice to accused from the incident. The law officer's concern was with the witness's veracity, not with accused's guilt or innocence. His re-

marks were not known to the court members, and the witness was never examined in open court on the contents of the statement.

Turning to the nature of relief to be accorded accused because of the instructional error, the Court noted that in the companion case of *United States v. Harvey,* 19 U.S.C.M.A.——, 42 C.M.R.—— (1970, digested *infra*), it had dealt with the same issue. In that case they determined that some of the findings of guilty were not affected by the error and could properly be affirmed as a lesser included offense. The Court held in this case that the findings indicated, as a minimum, "that the accused solicited a member of the Marine Corps to commit a military offense." It was deemed appropriate to affirm those findings rather than continue the proceedings by ordering a rehearing on the charges on which accused was arraigned. Accordingly, the decision of the board of review was reversed (Opinion by Chief Judge Quinn, in which Judge Darden concurred. Judge Ferguson concurred in the result.)

2. (18 U.S.C. §2387; UCMJ art. 134) **Instructional Error Required Reversal; Accused Found Guilty Of Lesser Included Offense.** *United States v. Harvey,* No. 22,383, 10 Jul. 1970. This was a companion case to *United States v. Daniels,* 19 U.S.C.——, 42 C.M.R.—— (1970, digested *supra),* decided this date. For the reasons set forth in their opinion in *Daniels,* the Court held that the offenses on which accused was arraigned were triable by court-martial. Accused was found guilty of four specifications of making disloyal statements in violation of article 134, which it had been instructed were lesser included in the offense charged.

Accused contended that the offenses of which he was convicted were not lesser included within the original charge. First, it was maintained that 18 U.S.C. §2387 preempted the entire field of subversive declarations so that no charge could be laid and no conviction had for related conduct to the prejudice of good order and discipline, in violation of article 134. The preemption doctrine prohibits the armed services from eliminating one or more vital elements of a particular offense in order to charge the remaining elements as conduct to the prejudice of good order and discipline. The Court was not presuaded that §2387 was intended by Congress to preclude prosecution under article 134 of other kinds of conduct involving disloyalty to the United States. *United States v. Levy,* 39 C.M.R. 672 (1968).

Accused also contended that as a matter of law the offense found was not a lesser offense included within that charged. The general test, as delineated by the Court, is "whether the specification of the offense on which the accused is arraigned 'alleges fairly, and the proof raises reasonably, all elements of both crimes'." *United States v. Duggan,* 4 U.S.C.M.A. 396, 15 C.M.R. 396 (1954). At trial, the parties agreed that the disloyal statement offense was included within the offense charged. In so far as trial agreements of this kind are reasonable, the Court has been inclined to accept them. *United States v. Duggan, supra* at 411.

The Court then turned to consider the allegations and reasonable inferences that could be drawn from them. The Court noted a difference in the kind of conduct each offense prohibits. The conduct alleged in the specification was an effort to "inculcate insubordination, disloyalty, or refusal of duty in Private First Class *J,* whereas the disloyal statement offense is concerned with disloyalty to the United States." The Court stated that the specification indicated that accused's conduct consisted of declarations to Private *J.* The substance of the declarations was alleged. If the declarations could reasonably be construed as importing disloyalty to the United States, they were of the kind proscribed by the article 134 offense. The remaining question was whether an allegation of conduct to the prejudice of good order and discipline is clearly included within the allegations and proof of the specification. The Court felt that it was. Since all the elements of the disloyal statement offense were reasonably included within the allegations of the offense charged, the Court held that it was proper to submit that offense to the court members.

The Court then turned to the unresolved question of whether the statements alleged in the specifications were disloyal to the United States. They noted that they and the trier of fact might differ as to what constitutes a disloyal statement. However, "assuming, without deciding, that they are reasonably susceptible of description as statements disloyal to the United States and incorporate the lesser offense within the charge, the instructions as to the lesser offense are too de-

ficient to allow us to uphold the court-martial finding."

The Court stated that the offense found required a disloyalty to the United States in regard to two elements. The accused's state of mind must have been "directed toward promoting among the troops disloyalty to the United States," and the statements themselves must have been disloyal to the United States. In the present case after enumerating the elements of the offense, the law officer defined the word disloyalty. He instructed the court members that the word "imports not being true to, or being unfaithful toward, an authority to whom respect, obedience, or allegiance is due." It was noted that there was "no instruction that the authority to whom allegiance was due was the United States, not the Marine Corps or other department of Government; nor was there an instruction to indicate that disobedience of orders is not per se equivalent to disloyalty to the United States." Under the law officer's definition of disloyalty the court members could have concluded that the evidence of prospective disobedience to orders demonstrated unfaithfulness to the obligation of obedience to orders of the Marine Corps, as the representative of the United States. A board of review concurred with the Government's contention that, by his conduct, accused was "seeking to organize a group into collective action to coerce the Marine Corps to do his will." The disavowal by accused and his listeners of particular orders was not the equivalent of a disavowal of the allegiance owed to the United States as a political entity. The Court believed that the risk that the court members mistakenly equated the two by a reasonable construction of the definition of disloyalty, was too great to be disregarded.

Reversal of the findings of guilty for instructional error required the Court to consider whether any findings of guilt were unaffected by the error. It was found that as a minimum, accused solicited a member of the Marine Corps to commit a military offense, specifically to refuse the performance of a military obligation from which he could not be excused because of personal scruples. These findings were consistent with the instructions as to the second lesser included offense. The Court concluded, therefore, that "excluding the findings of guilty relating to the accused's state of mind and the nature of his declarations as disloyal to the United States, the remaining findings of guilty should be affirmed." Accordingly, the decision of the board of review was reversed. (Opinion by Chief Judge Quinn, in which Judge Darden concurred. Judge Ferguson concurred in the result.)

3. (UCMJ art 57(d)) **Decision To Defer Service Of Sentence To Confinement May Not Be Unilaterally Countermanded By Another Commanding Officer.** *Collier v. United States and Ryan,* Misc. Doc. No. 70-33, 2 Jul. 1970. Accused was convicted, by general court-martial, of one specification alleging the wrongful sale of heroin, in violation of article 134. He was sentenced to a dishonorable discharge, total forfeitures, confinement at hard labor for eight years, and reduction to E-1. The convening authority reduced the confinement portion of the sentence to two years and ordered accused to be confined at the U.S. Naval Disciplinary Command, Portsmouth, New Hampshire. The United States Navy Court of Military Review, on 18 Mar. 1970, affirmed the findings and sentence as approved below.

On 29 Jan. 1970, the Acting Commandant, First Naval District, Boston, Massachusetts, under the authority of article 57(d), granted accused's request for deferral of sentence pending completion of appellate review, released him from confinement, and ordered him to report to the 2d Marine Division on 25 Feb. 1970. Two days later, the Commander of the 2d Marine Division issued an order rescinding the deferral of confinement and directed that accused be reconfined at Portsmouth.

Accused then requested that the Court of Military Appeals declare the order of the Commanding General, 2d Marine Division, to be invalid and inoperable under law, on the ground that it was arbitrary, capricious, and violative of the basic elements of due process. The Court directed the Government to show cause in writing why the relief sought should not be granted.

The Court noted that article 57(d), was added to the Code by the Military Justice Act of 1968. Prior to that time there was no statutory provision for release from confinement for a convicted accused pending completion of appellate review. *Levy v. Resor,* 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967). The legality of post-trial restraint pending appellate review of a court-

martial conviction is well established. *United States v. Howard,* 2 U.S.C.M.A. 519, 10 C.M.R. 17 (1953); *Levy v. Resor, supra; Reed v. Ohman,* 19 U.S.C.M.A. 110, 41 C.M.R. 110 (1969, digested 70-1 JALS 22). In the present case, it was the action of the Commanding General, 2d Marine Division, ordering that accused be reconfined that was in dispute. Since his original decision to restrain accused was reviewable for abuse of descretion, clearly his order to reconfine accused was subject to the same review. *Reed v. Ohman, supra.* An affidavit of the Commanding General reflected that his decision was based solely on the state of affairs which existed at the time of accused's original confinement. However, in the interim, the officer exercising general court-martial jurisdiction over the U.S. Naval Disciplinary Command, determined that accused's service of a sentence to confinement should be deferred. Since the latter's action was also based on article 57(d), the Court assumed that he took "into consideration all relevant factors" in the case and granted the deferment "based upon the best interest of the individual and the service." This necessarily included his knowledge of accused during his incarceration at Portsmouth, a factor which apparently was not included by the 2d Marine Division's Commanding General in his determination to rescind the order of deferment.

The Court also stated that Congress did not intend, by the enactment of article 57(d), "to create an impasse between commands simply because of a disagreement on the same facts." In the Court's opinion, "something more is needed before a validly issued order to defer service of sentence may be rescinded." Were they to hold otherwise, "the chilling effect of one commander's discretionary consideration of an application to defer service of sentence, where that decision could be unilaterally countermanded by another commander, is apparent."

Accordingly, the petition for appropriate relief was granted. The order of the Commanding General of the 2d Marine Division, was declared invalid and thus inoperative to rescind accused's deferment of service of sentence to confinement. His release from custody was ordered. (Opinion by Judge Ferguson, in which Chief Judge Quinn concurred.)

Judge Darden dissented, stating that the consideration of extra-ordinary relief in these circumstances was not in aid of its jurisdiction. He would have dismissed the petition for lack of jurisdiction to order the relief.

4. (UCMJ art. 57(d)) **Decision To Rescind Deferment Of Service Of Sentence To Confinement Not An Abuse Of Discretion.** *United States v. Daniels,* No. 22,252, 2 Jul. 1970. Following his conviction by general court-martial, accused was transferred to the United States Naval Disciplinary Command, Portsmouth, New Hampshire, for temporary custody pending appellate review. On 28 Aug. 1969, the Commandant, First Naval District, deferred service of the sentence to confinement and forfeitures pursuant to the provisions of article 57(d). Accused was then transferred to the Service Battalion, Marine Corps Base, Quantico, Virginia, for duty. On 27 Apr. 1970 the officer exercising general court-martial jurisdiction in the latter command rescinded the deferment and directed that accused be returned to the custody of the United States Naval Disciplinary Command, pending completion of appellate review. Counsel for accused protested that accused had received no notice of the intent to rescind and had no opportunity to submit favorable matter or to oppose unfavorable material. The officer exercising general court-martial jurisdiction over accused granted counsel until 5 May 1970 to submit any matter he desired in writing. A further delay until 6 May 1970 was granted. Counsel for accused then sought from the Court of Military Appeals a temporary restraining order against the transfer of accused to the Disciplinary Command. The Court ordered that accused be retained at Quantico until further order of the Court, and that the Commandant of the Marine Corps Base at Quantico show cause why the order directing revocation of deferment of service of sentence and incarceration of accused should not be vacated and the deferment of sentence reinstated.

The briefs and accompanying affidavits submitted by accused and the Government revealed that during the time accused was stationed at Quantico, he had five periods of unauthorized absence for which he received non-judicial punishment on three occasions. The Commanding General asserted that his recision of the deferment was based on the three periods of unauthorized absence. Accused contended that the real reasons for the recision were that accused's battalion commander resented accused's having filed an

official complaint against the commander for language he used in an interview, and that superior officers of accused resented activities he considered as constituting the exercise of his privilege of free speech. An affidavit of the Commanding General stated that as a result of his considering the unauthorized absences he concluded that there was a fair risk that the absences might continue and that accused might flee to avoid service of his sentence. The Court stated that the requirements of *Reed v. Ohman,* 19 U.S.C.M.A. 110, 41 C.M.R. 110 (1969, digested 70-1 JALS 22), that accused should have the opportunity to submit matter favorable to himself or to oppose unfavorable material before the decision making authority, were met when accused's counsel was given an opportunity to submit such material. The Court further stated that reasonable men might differ in their judgment of whether five unauthorized absences, all of them for fairly brief periods, were enough basis for rescinding a deferment or on whether such absences indicated a likelihood that accused might flee to avoid service of the sentence. The Court could not say, however, "that a reasonable person could not find that either or both of these considerations were sufficient to rescind the deferment." Accordingly, the decision to rescind the deferment did not constitute an abuse of descretion. The petition was denied, and the temporary restraining order of the Court dated 6 May 1970 was vacated. (Opinion by Judge Darden, in which Chief Judge Quinn and Judge Ferguson concurred.)

5. PM (152, MCM) **Evidence Acquired From Interrogation Not Admissible Without Showing Of Article 31 Warning.** *United States v. Rehm,* No. 22,814, 10 Jul. 1970. Accused pled guilty to absence without leave, but not guilty to the unlawful possession of marihuana. He was convicted by a special court-martial of both offenses and sentenced to a bad-conduct discharge, confinement at hard labor for four months, forfeiture of $75 per month for the same period, and reduction to E-1. A Court of Military Review set aside the finding of guilty as to the marihuana offense and reduced the period of confinement and forfeitures to one month. The sole issue before the Court was the correctness of the Court of Military Review's decision as to the admissibility in evidence of the marihuana.

The marihuana that formed the basis for the possession charge was found in an envelope taken from accused by Sergeant *M.* The Sergeant testified that on the morning in question he entered a squad bay for the sole purpose of "bringing the troops into the classroom." As he walked down the bay, he noted accused sitting on his bed and that accused "made a movement with his hands pulling quickly to the side as thought [sic] he was trying to hide something from me." At the same time, accused commented "you have caught me now." At this time the Sergeant raised his arm and said "give me the envelope." Accused responded by handing the envelope to the Sergeant. The Sergeant did not give accused an article 31 warning. Counsel for accused regarded the passing of the envelope as an incriminating statement that was inadmissible in evidence without a showing of an earlier article 31 warning.

The Court stated that "evidence obtained as the consequence of a lawful search is admissible as evidence even though an accused is not first advised of his Article 31 rights." *United States v. Coakley,* 18 U.S.C.M.A. 511, 40 C.M.R. 223 (1969, digested 69-21 JALS 9); *United States v. Rushing,* 17 U.S.C.M.A. 298, 38 C.M.R. 96 (1967); *United States v. Cuthbert,* 11 U.S.C.M.A. 272, 29 C.M.R. 88 (1960). Further, "[R]easonableness of a seizure, like that of a search, depends on the existence or nonexistence of probable cause." The Court noted the statement of counsel for the Government that the "line of cleavage between actions and statements is one that must be drawn in the light of substance rather than form." In the present case, after accused's conduct made the Sergeant suspicious, the Sergeant "became an inquisitor, asking questions to substantiate his belief that the envelope held by accused contained marihuana." His acquisition of the marihuana "resulted from what was essentially an interrogation, not a seizure." Therefore, the Court found that article 31 requirements are essential. *United States v. Corson,* 18 U.S.C.M.A. 34, 39 C.M.R. 34 (1968). The decision of the Court of Military Review was affirmed. (Opinion by Judge Darden, in which Judge Ferguson concurred. Chief Judge Quinn concurred in the result.)

6. (70, MCM) **Issue Of Insanity Raised During Sentencing Rendered Guilty Plea Improvident.** *United States v. Batts,* No. 22,678, 2 Jul. 1970. Accused pled guilty to three specifications of

absence without leave occuring between August 1967 and April 1967. An out-of-court hearing preceded acceptance of the plea. At the time accused acknowledged guilt of the offenses. However, at the same out-of-court hearing, two exhibits were read to the Court. One was a letter from the clinical director of the Northeast Florida State Hospital, dated 23 May 1969, which indicated that accused had been committed as incompetent in 1967 and admitted to the hospital 12 days later. Accused escaped twice from the hospital, and was discharged in 1968 having been absent one year on escape status. During his stay at the hospital, accused had been taking medication and was considered "actively psychotic." The second exhibit was a military psychiatrist's evaluation of accused dated 6 June 1969. The psychiatrist stated that it was his opinion that during the AWOL's accused was able to distinguish and adhere to the right. He concluded that accused was competent.

The Court cited *United States v. Trede*, 2 U.S.C.M.A. 581, 10 C.M.R. 79 (1953), as containing the procedure to be followed when insanity initially arises in mitigation. While insanity was not placed in issue in the *Trede* case, the opinion nevertheless held that insanity, "if established, would be inconsistent with a plea of guilty." Further, "if evidence suggesting that mental condition is introduced after finding, the matter of setting aside the plea becomes of importance." In that event, the law officer should set aside the plea of guilty or permit its withdrawal "and hear evidence on an interlocutory basis." If accused is found insane with no court member objecting, the case should be dismissed. If the law officer finds accused sane and there is no objection by any member of the court, he may then permit the case to proceed. In the present case, the Court found that the two defense exhibits did raise the issue of insanity. The report of the military psychiatrist merely made insanity a controverted question of fact. It did not negate the report of the Florida medical authorities. It was the court-martial's "sole responsibility *finally* to decide the issue." Since the determination was not made, the Court set aside the findings of guilty and the sentence. (Opinion by Judge Darden, in which Judge Ferguson concurred.)

Chief Judge Quinn dissented, stating that failure of the judge to interlude the sanity defense on . . . [his] own initiative" was not reversal error in that accused and his counsel were affirmatively opposed to the inquiry and desired to enter a plea of guilty, and the evidence of insanity was equivocal. *Cross v. United States*, 389 F. 2d 957, 960 (D.C. Cir. 1968).

7. (6, MCM; UCMJ art. 27(a)) **Appointing Order Correctly Designating Role Of Counsel Necessary To Comply With Article 27(a).** *United States v. Coleman*, No. 22,718, 2 Jul. 1970. Accused was convicted, in accord with his plea, of unauthorized absence, desertion, and breach of restriction. After action by intermediate appellate authorities, his sentence was a dishonorable discharge, total forfeitures, confinement at hard labor for 22 months, and reduction to E-1.

In the order appointing the general court-martial, Captain *B* was named as a member of the prosecution. An affidavit by the deputy staff judge advocate averred that trial counsel and defense counsel were rotated every six to eight months. Captain *B* had been assigned as defense counsel in cases beginning in February 1969, but the convening authority had not signed new appointing orders at the time the present case was tried. Thus, while Captain *B* was named as a member of the prosecution, in fact, he acted as defense counsel. Paragraph 6*a*, MCM provides that "[I]n the absence of evidence to the contrary, a person who, between the time the case has been referred for trial and the trial, has been a detailed counsel or assistant counsel of the court to which the case has been referred, shall be deemed to have acted as a member of the prosecution or the defense, as the case may be." Both trial counsel and Captain *B* made statements that the latter had not acted for the prosecution. These statements were regarded as "evidence to the contrary" to negate the Manual provision. The Court agreed that Captain *B* was not disqualified under article 27 as defense counsel. However, it held that "an appointing order correctly designating the role of the counsel who function in a case is necessary to comply with the requirement of article 27(a), Uniform Code of Military Justice, that the convening authority detail the defense counsel for the particular case involved."

The Court further held that "the continued listing of the defense counsel as a trial counsel in the appointing order effective at the time of

the trial is an unacceptable deviation from regularity. A potential for abuse inheres in this practice and excusing such defects invites slipshod extensions into other critical areas of procedure." Accordingly, the decision of the Court of Military Review was reversed and the charges were ordered dismissed. (Opinion by Judge Darden, in which Judge Ferguson concurred.)

Chief Judge Quinn, dissenting, stated that in his opinion, the majority elevated form over substance. The record of trial demonstrated accused's affirmative acceptance of Captain *B* as his counsel. Further, in a submission of an offer to plead guilty to the convening authority, accused indicated that he was satisfied with his "defense counsel." There was no question of the fact that accused was represented at all critical stages of the proceedings against him by qualified counsel. The purpose of naming a defense counsel in the order appointing the court-martial was thus served. "When the purpose of a required procedure is fully satisfied, technical defects are not prejudicial." *United States v. Tibbs,* 15 U.S.C.M.A. 350, 35 C.M.R. 322 (1965). Accordingly, Judge Quinn would have affirmed the decision of the United States Navy Court of Military Review.

8. (115, MCM) **Accused Not Prejudiced By Denial Of Opportunity To Cross-Examine Government Psychiatrist.** *United States v. Howard,* No. 22,647, 10 Jul. 1970. Accused was convicted of unauthorized absence and disobedience of a superior officer. His sentence, following action by intermediate appellate authorities, was confinement at hard labor for 6 months, forfeiture of $50 per month for 6 months, and reduction to E-1.

At trial, after the defense introduced testimony from a civilian psychiatrist that, in his opinion, accused was legally insane at the time of his alleged offenses, the prosecution sought and obtained, over the objections of trial defense counsel, a recess for the purpose of securing a mental examination of accused. Accused was observed and his mental condition evaluated by a board of psychiatrists. The board's conclusion was that accused was legally sane. The board report itself was not brought to the attention of the court. Instead, the senior member of the board testified.

Defense counsel argued that because one of the board members conducted some of the interviewing and examined accused, the senior member who testified could not be effectively challenged on his testimony unless the other board member also testified and was subject to cross-examination. The board member that accused sought to cross-examine had been transferred to a hospital ship in the Western Pacific and was determined not to be available to testify.

Paragraph 115, MCM, provides that the trial counsel, defense counsel, and court-martial shall have equal opportunity to obtain witnesses and other evidence, and sets forth the procedures to be followed when there is a disagreement between counsel on whether the testimony of a witness requested by the defense is necessary. The record reflected that on 12 Dec. 1968 trial defense counsel wrote to the trial counsel to request that several doctors, including the one in issue in this case, be available at the time of the court-martial. The written request did not include a synopsis of expected testimony and reasons necessitating the personal appearance of the witnesses. On 19 Feb. 1969 the trial counsel informed the convening authority in writing of defense counsel's request. On 27 Feb. 1969 the convening authority denied the request of defense counsel for the attendance of the doctor. When the trial resumed on 3 Mar. 1969, and after trial defense counsel cross-examined the senior board member on his opinion as to the mental condition of accused, the trial defense counsel reiterated his request that the other board member be produced for "cross-examination at this court-martial." Nothing in the record suggested that there was a disagreement between the senior board member who testified, and the board member sought to be produced by the defense. The law officer denied the request.

The United States Navy Court of Military Review agreed that the defense was entitled to the presence of the board member, but that "military necessity" excused the failure to produce him. The Court believed that "the Court of Military Review was mistaken in viewing the request as one for a defense witness instead of one for cross-examination of a witness the defense thought the Government was obligated to call." The report of the sanity board was not introduced into evidence before the Court. Hence, there was no sound basis for contending that

the doctor was a witness before the Court and that the defense had a right to cross-examine him. All of the other participants in the board's examination except the one that the defense requested be available were available at trial and none of them were called by the defense. Nothing in the record reflected a defense request that the doctor was desired as a defense witness. The Court stated that the crucial point in the case was "that the defense is complaining not that it was denied the right to call a witness but that the Government did not call a witness the defense wanted to cross-examine. To us this is a new departure in the law in this area." Accordingly, the decision of the Court of Military Review was affirmed. (Opinion by Judge Darden, in which Chief Judge Quinn concurred.)

Judge Ferguson, dissented, stating that it was error to deprive accused of his right to cross-examine the doctor. Judge Ferguson stated that since the doctor was assigned to duty aboard a vessel operating in the Western Pacific area, there was no military necessity which would excuse the failure to produce the witness. Further, since the testimony of the senior board member was admittedly based not only on his own observations of accused but on the work of the other members of the medical board, it could not be denied that the doctor sought to be called was properly classified as a witness against accused. The absent doctor's findings were utilized by the senior board member in arriving at his opinion. Before the evidence could be considered against accused, he should have been afforded the opportunity to cross-examine the doctor. Judge Ferguson finally stated that "the Government may not, by the simple expedient of not introducing the medical board report into evidence, deprive an accused of his constitutionally protected right." The doctor was personally selected by the Government and was directed to gather evidence to be used by the prosecution in rebuttal of the defense testimony that accused was insane. His absence from the area of the trial was also at the direction of the Government. The failure of the Government to honor a timely request for this adverse witness was, in Judge Ferguson's opinion, reversible error.

9. (62, MCM) Grounds For Challenge Of Military Judge Waived By Accused. *United States v. Wismann,* No. 22,727, 10 Jul. 1970. Accused pled guilty to two specifications alleging wrongful appropriation of the property of another, in violation of article 121. The trial was before a military judge alone. On appeal, accused contended that the military judge was disqualified from hearing the case because of his involvement in the pretrial proceedings.

Originally, accused was charged with larceny. In due course, the charges came before the Chief of Military Justice of the command exercising general court-martial jurisdiction over accused. He reviewed the charges and the article 32 report of investigation. He also discussed some aspects of the case with defense counsel, and with the staff judge advocate of the special court-martial command. He then recommended reduction of each larceny charge to the lesser included offense of wrongful appropriation and trial by special court-martial, rather than general court-martial. The Chief of Military Justice subsequently acted as military judge in the case.

At trial, the military judge informed trial counsel, accused and his counsel, of his previous connection with the case. Defense counsel asked the military judge whether he felt that he could act fairly and impartially in regard to both the findings and the sentence, to which the military judge replied in the affirmative. Defense counsel and trial counsel noted that they had no desire to challenge the military judge for cause. Accused then entered his plea of guilty, which he adhered to after the judge explained the elements of the offense and the obligation of the Government to prove the charge beyond a reasonable doubt. Accused was sentenced to a bad-conduct discharge, confinement at hard labor for 4 months, and forfeiture of $100 per month for the same period. The military judge recommended transfer of accused to a retraining command, and this recommendation was accepted by the general court-martial convening authority.

The Court cited *United States v. Turner,* 9 U.S.C.M.A 124, 25 C.M.R. 386 (1958), which held that an accused may waive grounds for challenge of the military judge. Further, no risk of prejudice as to the findings of guilty appeared in the case, since the original charges were reduced, as recommended by the military judge, and the accused pled guilty to those charges. Nor was there any fair risk as to the sentence, in that the military judge indicated that he would disregard any information he had learned

about accused from outside the courtroom. Further, the military judge's recommendation for retraining demonstrated to the Court that whatever he knew about accused from his pretrial participation was not so adverse as to as influence his judgement to the detriment of accused. Accordingly, the decision of the United States Air Force Court of Military Review was affirmed. (Opinion by Chief Judge Quinn, in which Judges Ferguson and Darden concurred.)

10. (70, MCM; MACV Directives 37-6, 65-5) **MACV Directive 65-5 Punitive In Nature; Guilty Pleas Provident.** *United States v. McEnany,* No. 22,737, 10 Jul. 1970. In this case the Court was asked to set aside certain of the pleas of guilty of accused on the ground that the pleas were improvidently entered.

The first charge and specification in issue was one alleging a violation of article 92, in that accused, while action as postal officer, conspired with enlisted postal clerks to engage in conduct prohibited by paragraph 5b, MACV Directive 65-5, 9 Mar. 1968. Accused contended that the regulation was advisory, not compulsory, in nature, and therefore could not be the subject of a violation of article 92. *United States v. Baker,* 18 U.S.C.M.A. 504, 40 C.M.R. 216 (1969, digested 69-21 JALS 9), was cited as support for this contention. However, the *Baker* case involved MACV Directive 65-50, which was superseded by MACV Directive 65-5, the one in issue in this case. Like its predecessor, the new regulation is titled "Postal Service Money Orders Service," but unlike the earlier regulation that stated purpose of the directive is not merely to "establish procedures," but also to "prescribe rules." Also, the restrictions on the dollar value of money orders that may be purchased each month, rather than being under a caption titled "Policies" are now under a caption titled "Prohibitions." The Court stated that "the language of the new directive leaves no doubt that the conduct it specified for postal personnel was mandatory." The prohibited conduct was described clearly, and reasonable persons would have no difficulty in understanding what could not be done.

The other charge and specification in issue dealt with MACV Directive 37-6, 17 Apr. 1968, as amended. Specification five alleged a violation of paragraph 8 of that directive, and specification six alleged a violation of paragraph 13*a* of that directive. The Court considered both provisions in *United States v. Benway,* 19 U.S.C.M.A. 345, 41 C.M.R. 345 (1970, digested 70-3 JALS 5). In *Benway,* the Court concluded that the Directive was "basically regulatory," and that each of the provisions in issue was "intended as a sanction."

Accordingly, accused's attack upon the providency of his pleas of guilty lacked merit, and the decision of the United States Army Court of Military Review was affirmed. (Opinion by Chief Judge Quinn, in which Judges Ferguson and Darden concurred.)

11. (75d, MCM; UCMJ art. 15) **Court's Consideration Of Article 15 Punishments Erroneous.** *United States v. Haney,* No. 22,947, 2 Jul. 1970; *United States v. Holder,* No. 22,962, 2 Jul. 1970; *United States v. Duron,* No. 23,014, 10 Jul. 1970. In the *Haney* and *Holder* cases the introduction of evidence showing prior convictions by courts-martial rendered harmless the erroneous introduction of instances of non-judicial punishment. The decisions of the Court of Military Review were affirmed. In the *Duron* case the erroneous introduction of evidence of prior non-judicial punishment constituted the whole of the prosecution's evidence against accused during sentencing. Under these circumstances, the Court could not be certain that the court members were uninfluenced in assessing the sentence. Accordingly, the decision of the Court of Military Review was reversed as to sentence. (Opinions by Judge Darden, in which Chief Judge Quinn concurred.)

Judge Ferguson dissented in the *Haney* and *Holder* cases for the reasons set forth in his opinion in *United States v. Johnson,* 19 U.S.C.M.A.——, 41 C.M.R.——(1970, digested 70-7 JALS 5), but concurred in the opinion in the *Duron* case.

12. (125, MCM; UCMJ art. 13) **Law Officer's Ruling As To Admissibility Of Evidence Of Legality Of Accused's Pretrial Confinement Erroneous.** *United States v. Drown,* No. 22,900, 10 Jul. 1970. At trial, accused offered evidence which raised a question as to the legality of the conditions of his pretrial confinement. The law officer ruled that the evidence was not "pertinent." Citing *United States v. Nelson,* 18 U.S.C.M.A. 177, 39 C.M.R. 177 (1969), the Court held that this ruling was erroneous. Accordingly,

the decision of the United States Navy Court of Military Review as to the sentence was reversed, and the record of trial returned to The Judge Advocate General of the Navy. (Opinion by Chief Judge Quinn, in which Judges Ferguson and Darden concurred.)

III. COURT OF MILITARY REVIEW DECISIONS.

1. (UCMJ art. 94) **Instructional Deficiencies And Insufficiency Of Evidence Required Reversal.** *United States v. Sood,* CM 420276, 16 Jan. 1970. Conviction: mutiny (art. 94), contrary to his plea. Sentence: DD, 15 yrs CHL, and accessory punishments. The convening authority reduced the sentence to a DD, 7 yrs CHL, and accessory punishments. The Judge Advocate General then invoked his statutory authority under article 74, and reduced the term of confinement to a period of 2 yrs.

Accused was one of 26 charged with the offense of mutiny which allegedly occurred on 14 Oct. 1968 at the Presidio Stockade, Presidio of San Francisco, California. The record revealed that tension in the stockade was very high on the days preceeding the date of the alleged mutiny. A prisoner had been shot and killed by a guard in an attempt to escape from a work detail, and many complaints of abuse had been previously lodged against the guards alleging racial abuse, inadequate rations, overcrowding and unsanitary conditions. On 14 Oct. 1968, a formation was held at the stockade for the purpose of assigning the prisoners to work details and for sick call. When the first name for sick call was called, approximately 25 to 30 prisoners left the formation en mass, and proceeded to a grassy area within the stockage walls where they sat in a circle singing and chanting. Accused was one of this group of prisoners. Captain *L,* the confinement officer, arrived at the stockade shortly thereafter and was informed as to what had taken place. Additional military policemen were called. Captain *L* attempted to read the discussion of mutiny from the Uniform Code of Military Justice to the demonstrators. In return, one of the demonstrators read a list of grievances to Captain *L,* and thereafter the group frustrated additional attempts by Captain *L* to address them by chanting. At this point, Captain *L* gave the group a direct order to return to a building. This order was given through a loud speaker, and was heard by a Captain *M,* who was standing about 10 feet from the group of prisoners. None of the prisoners complied with the order to return to the building. Military policemen then began taking the prisoners into the stockade building. None of the members of the group physically resisted the military police and some began walking back to the building when it was indicated that they were to go there. Accused was one of those prisoners who entered the building on his own power. Other members of the group had to be dragged or carried into the building.

The first issue considered by the court concerned the military judge's prefinding instructions on the essential elements of mutiny. Citing *United States v. Duggan,* 4 U.S.C.M.A. 396, 15 C.M.R. 396 (1954), the court stated that there are two distinct types of mutiny;

> one involves the creation of violance or disturbance with intent to override or usurp authority. This form of mutiny may be committed by a single person and in that case the specific intent mentioned need be only a singular one. The other form of mutiny with which we are here concerned, embraced by the article may by committed by the persistent refusal to obey lawful orders or otherwise do one's duty with a shared intent to override or usurp lawful military authority. This latter form of mutiny require both collective action and a collective intent to override military authority. *United States v. Woolbright,* 12 U.S.C.M.A. 450, 31 C.M.R. 36, 38 (1961).

The court found that the military judge failed to instruct that the offense of mutiny in this case required a concert of intent as well as a concert of action. His instructions, read as a whole, erroneously put the emphasis on the collective intent to disobey the orders rather than the concerted intent to override military authority. The court noted that, measured by the instructions, the court-martial could have erroneously convicted accused of mutiny if they found: a) that accused disobeyed the order in question, b) that he disobeyed in concert with another, and c)that accused alone had the requisite intent. Absent an instruction on the essential element of a concerted intent, the court held that a finding of guilty of mutiny was not permissible. Further, the court stated that since no instruction was given as to the requisite concerted intent, the statements of any one actor would not be admissible against any other for the purpose of imputing a concerted intent. See 140*b,* MCM.

The military judge also gave an agency instruction which created a fair risk of misleading the fact finders to believe that the requisite intent to override military authority could be imputable. Although reversal was required because of the mentioned instructional deficiencies, the court held that the interests of justice would not be served by ordering a rehearing on the charge of mutiny.

The decision not to order a rehearing was made by the court following its consideration of the sufficiency of the evidence on which the Government relied to support the findings of guilty. The court held that the requisite concerted intent was not shown by the facts of the record. Rather, "the common thread of evidence" demonstrated an intention "to implore and invoke the very military authority which they are charged with seeking to override." Captain *L* had absolute and unfettered control over the incidents of his command although his specific orders to the prisoners were disobeyed. The demonstration was nonviolent and the inmates did not cast aside all control.

Accordingly, the court held that reversal of the charge was required "as a matter of law by reason of the trial judge error," and "as a matter of fact." However, the evidence was sufficient to support, as a lesser included offense, wilful disobedience of the lawful command of a superior commissioned officer. So much of the findings of guilty of the charge and specification as found that accused, at the time and place alleged, having received a lawful command from Captain *L*, his superior commissioned officer, did, willfully disobey his order, in violation of article 90, UCMJ, was affirmed. The sentence was reassessed to provide for a BCD, TF, and 1 yr CHL. (Opinion by Judge Hagopian, in which Porcella, S.J., and Bailey, J., concurred.)

2. (UCMJ art. 38(b)) **Failure To Make Determination As To Availability Of Requested Counsel Prior To Taking Of Deposition By Appointed Counsel Erroneous.** *United States v. Johnson*, CM 421789, 10 Jun 1970. Conviction: wilful disobedience of an order of a superior commissioned officer, lifting a weapon against a superior commissioned officer in the execution of his office, violation of a general regulation by possession of a privately owned fire arm (arts. 90, 92), contrary to his plea. Sentence: BCD, F of $50 per mo for 60 mos, and 5 yrs CHL.

Captain *M* served as appointed military defense counsel for accused at the article 32 investigation of the charges. Another captain was accused's appointed trial defense counsel. On 11 May 1969 accused submitted a written request that he be represented at his trial by Captain *M*. On 12 May 1969 the deposition of a service member scheduled to depart for Vietnam was taken by appointed counsel. Accused objected to the taking of the deposition on the grounds that representation by the other Captain was not acceptable to him, and Captain *M* was not present at the proceedings. A determination had not been made at that time as to Captain *M*'s availability to serve as accused's defense counsel. On 17 May 1969 it was determined that Captain *M* was not reasonably available to defend accused at his trial. Accused did not appeal this decision. There was no indication that accused raised any objection to the other Captain serving as his counsel at the later proceedings. At trial, accused objected to the introduction of the deposition into evidence. In support of the objection he reiterated the same arguments as those advanced by him at its taking.

The court was satisfied that accused was afforded effective representation by military counsel at all stages of the proceedings against him. It was apparent that accused did cooperate with the other Captain in the taking of the deposition in dispute. Accused's action fell far short of a showing of hostility or incompetence on the part of appointed defense counsel so as to justify a conclusion that representation by appointed defense counsel was a nulity. However, the court held that requiring accused, over his objection, to participate in the taking of the deposition, without the services of requested military counsel or a determination that requested counsel was not reasonably available was erroneous. A determination that requested counsel was not available was made subsequent to the taking of the deposition. Had the deposition hearing been delayed pending the determination of Captain *M*'s availability, appointed defense counsel would have served as accused's counsel, and the result achieved would have been the same as reflected in the record of trial. The error did not materially prejudice the substantial rights of the accused so as to render the deposition inadmissible as evidence. Accordingly, the findings of guilty were affirmed. (Opinion by Krieger, J., in which

Judge Rouillard, concurred.)

IV. TJAG ACTIONS UNDER ARTICLE 69, UCMJ.

1. Conviction of AWOL set aside since the accused was punished prior to his court-martial in the form of extra duty, and since a minor offense was involved the defense motion to dismiss because of prior punishment was improperly denied. JAGVJ SPCM 1959/311.

2. Conviction set aside since the record of trial does not reflect that defense counsel, a qualified attorney, was excused with the consent of the accused; additionally, the following finding of the court: "Of the Specification, Charge II: Not Guilty. Of Charge II: Not guilty, but guilty of a violation of Article 128," resulted in an acquittal of the offense charged or of any lesser included offense, as the finding is not a permissible one under paragraph 74*b*(1), MCM 1969. JAGVJ SPCM 1969/323.

3. Conviction of wrongfully possessing marihuana and two specifications of violating a lawful general regulation by possessing Doriden and Seconal, respectively set aside for the following reasons:

a. The evidence is insufficient to support the marihuana charge since evidence was introduced that marihuana was found in a tire casing, additional marihuana was found either on accused's person, his car or quarters, six separate examinations were made by a chemist of over fifteen exhibits for marihuana; and several oral ambiguous stipulations were entered into by trial counsel and defense counsel as to the chain of custody and the admission of a Laboratory Report in evidence.

b. An oral stipulation was entered into between trial counsel and defense counsel "that the pills were unlawful. That the accused being in possession of the pills was unlawful and violated Title 21, Chapter I, Federal Regulations, Part I, 66, Depressant and Stimulant Drugs." This stipulation is contrary to the provisions of para 154*b*, MCM, 1969, which provides that if accused pleads not guilty and the plea still stands, a stipulation which practically amounts to a confession should not be received in evidence. Furthermore, the defense introduced during the presentencing procedure prescriptions for the pills. JAGVJ SPCM 1969/468.

4. The accused's plea of guilty to a specification alleging wrongful possession of "a habit forming narcotic drug, to wit: amobarbital and secobarbital" in violation of Article 134 held to be improvident and conviction set aside since the named drugs are barbituates but not narcotic drugs. JAGVJ SPCM 1969/496.

5. Conviction of wrongful possession of marihuana and opium set aside since the incriminating evidence was found by MP's before apprehension or arrest and thus were products of an illegal search and seizure; additionally the president of the court acted with hostility and bias towards the defense counsel thereby depriving accused of a fair trial. JAGVJ SPCM 1969/532.

6. Conviction of wrongful possession of marihuana set aside since there was insufficient evidence to prove that the substance in question was marihuana; additionally, the accused's pretrial statement was imporperly admitted in evidence as the accused indicated that he desired counsel during interrogation, but the interrogation continued after accused stated "I let the lawyer answer that." JAGVJ SPCM 1969/670.

7. Sentence reassessed by TJAG since the accused was tried as a Private E-1 when in fact he was a Sergeant E-5, as a result of a reduction in sentence of a prior court-martial. JAGVJ SPCM 1970/787.

8. Conviction set aside since the president of the court announced that his previous announcement as to guilty findings was mistakenly based on a vote of three members for Guilty and two for Not Guilty as constituting the required two-thirds majority and the trial counsel erroneously advised the court that it could revote on the findings and did not inform the court as to the rules for reballoting. JAGVJ SPCM 1970/799.

9. Conviction of willfully disobeying superior officer's order not to wear his peace symbol so as to display it visibly set aside since the specification did not allege "while in uniform" (see: para 1-5, AR 670-5, which proscribes the exposed warning of civilian decorations and jewelry on the uniform); and conviction of failing to obey order of 1st Sgt to report to Mess Hall for KP set aside since the evidence is insufficient to support the conviction, as the alleged order to report for KP was contained in an alleged posted "Battery Duties" which is dated "19 Dec 1969" and purports to detail unit individuals for duties to be performed on "15 Dec 1969." JAGVJ SPCM 1970/802.

V. MISCELLANEOUS MILITARY JUSTICE.

Article 32 Investigations May Be Either Open Or Closed To The Public. Publication of DA Pam 27-17, Procedural Guide for Article 32 Investigating Officers, is expected within the near future.

A question has been raised concerning the issue of whether the Article 32 investigation should be open or closed to the general public. Paragraph 10c of Section III of DA Pam 27-17 (Draft) provides in pertinent part:

> "The authority who directed the investigation may provide that the investigation be closed to the public. The investigating officer may also decide not to permit spectators, including members of the news media, to attend all or part of the proceedings. In this connection, the investigating officer must follow the guidelines established in AR 345-60, which prohibit the release of certain information to the public concerning disciplinary actions prior to trial."

Consequently, unless otherwise instructed by the officer who directed the Article 32 investigation, the question of whether the proceedings shall be open or closed is within the discretion of the investigating officer, subject to the limitations of AR 345-60. JAGJ, 7 Jul. 1970.

VI. MISCELLANEOUS

1. Personnel Policy Announcement: Advanced Course Attendance

a. *General.* The Judge Advocate General considers attendance at the JAGC Advanced Course essential for the full professional development of a career judge advocate. The course provides in-depth training and exposure in each major functional area of military law, and affords an officer the opportunity to exchange ideas and experiences with his colleagues in an atmosphere free from operational requirements. Upon successful completion of the course, each officer is considered fully qualified to perform all types of legal duties at all levels of command. The Advanced Course is also a prerequisite for higher level military schooling, such as Command and General Staff College and Armed Forces Staff College.

The JAGC follows Department of the Army policy that *all qualified* officers *will* attend their branch Advanced Course between the fourth and eighth year of service. Because of the professional nature of the JAGC mission and the level of instruction provided at TJAGSA, officers with longer service will occasionally be selected. Judge advocate officers should seek Advanced Course attendance at the earliest possible time in their careers. A declination of attendance could adversely affect both an officer's professional development and his future career opportunities.

As a matter of policy, TJAG does not grant constructive credit for *resident instruction* at the Advanced Class. The Commandant, TJAGSA, is authorized to grant constructive credit to officers no longer being considered for resident attendance where equivalent knowledge is clearly demonstrated. Generally, constructive credit will be granted only after successful completion of specified nonresident (correspondence) subcourses.

b. *Specialty Areas of the Law.* The Judge Advocate General recognizes the importance of developing officers with specialized abilities to enable the Corps to provide legal services in areas requiring technical expertise. The Corps needs both "generalists" and "specialists." However, legal specialists are most valuable after they have become thoroughly grounded, through experience, schooling, and training, in all the principal areas of the law. The Advanced Course provides schooling and much of the training and fills in voids in an officer's professional background. For these reasons, officers who desire to specialize in a particular area of the law should normally do so following attendance at the Advanced Course.

c. *Advanced Civil Schooling.* JAGC officers are encouraged to pursue graduate legal studies at civilian educational institutions, either in their individual capacity, or as a participant in the JAGC civil schools program. It is important to realize, however, that while a graduate legal degree complements a diploma from TJAGSA, it is not a substitute for actual attendance at the Advanced Course. Past statements to the effect that participation in the civil schools program would normally be considered "in lieu of" Advanced Course attendance are no longer in effect. Henceforth, preference will be given to Advanced Course graduates in selecting officers to attend civil schools at Government expense.

The policies set forth above are effective as of

the date of this publication. Questions or inquiries concerning these policies should be addressed to the Chief, Personnel, Plans and Training Office, Office of the Judge Advocate General, Headquarters, Department of the Army, Washington, D. C. 20310. JAGX, 2 Jul. 1970.

2. Procurement Law Courses Offered By TJAGSA. The Judge Advocate General's School has restructured and redesigned its Procurement Law Courses. The objectives of these courses are (1) to correlate the programs of instruction in procurement law to the Legal Logistics Officer Program as defined in JAGOR 614-132; and (2) to relate the programs of instruction in procurement law to the position and experience levels of the students.

The 49th and 50th Procurement Courses previously scheduled for 14 September 1970 and 4 January 1971 respectively are cancelled and the following courses are scheduled for Fiscal Year 1971.

LEGAL LOGISTICS OFFICER COURSE

LENGTH: 2 weeks

COURSE DATES: 30 November-11 December 1970

25 January-5 February 1971

SCOPE: The purpose of this course is to provide basic instruction and training in the legal aspects of Government procurement, including general principles of Government contract law and the policies and procedures relating to contract formation, performance, claims and litigation arising at the post, camp and station level.

PREREQUISITE: This course is limited to military lawyers who are members of an active military service or a Reserve component, and civilian lawyers employed by the United States whose assignment, present or prospective, is to duties connected with Government procurement. Active duty military students must have a minimum of one year active duty remaining upon completion of this course.

LEGAL LOGISTICS OFFICER ADVANCED COURSE

LENGTH: 2 weeks

COURSE DATE: 1-12 March 1971

SCOPE: The purpose of this course is to provide advanced instruction and training in the legal aspects of Government procurement, including general principles of Government contract law and policies and procedures relating to contract formation, performance, claims and litigation and techniques of weapon systems acquisition. This course is limited to military lawyers who are members of an active military service or Reserve component, and civilian lawyers employed by the United States whose present assignment is to duties connected with Government procurement.

PREREQUISITE: Prerequisites for attending this course are (1) completion of the Legal Logistics Officer Course or other Procurement Law Course, and a minimum of one year's experience in Government Procurement; or (2) a minimum of two years experience in Government Procurement. Active duty military students must have a minimum of one year active duty remaining upon completion of this course.

Application for attendance at the above courses is through normal channels.

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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