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A. Introduction

The designation of Fort Jackson as a permanent installation of the Department of the Army, and the existence of the other important military installations in the state, insures South Carolina a military population of many thousands. The transient nature of life in the military service results in a constant turnover of this military population, bringing into South Carolina new people with new legal problems. Many of these legal problems are directly related to their military service, particularly those concerned with military criminal law.

In general, a serviceman is subject to two jurisdictions. As a member of the civilian community he enters into contracts and leases, buys and sells real estate, executes wills and powers-of-attorney, files tax returns (state and federal), injures and is injured, and, on occasion, commits criminal offenses. Except for the limited protection afforded him by the Soldiers' and Sailors' Civil Relief Act of 1940[1] in certain civil matters, the civilian aspects of the serviceman's life are governed by the law of the jurisdiction in which he resides. In these matters his legal needs are ably served by the civilian bar.

In his status as a member of a military service, the serviceman is subject to a body of law referred to generically as "military law." The administrative aspects of his military service are governed by federal statutes and implementing departmental regulations. For purposes of criminal jurisdiction, he is subject to the Uniform Code of Military Justice (hereafter referred to as Code),[2] and may be tried by courts-martial for offenses against that Code.

Further, a serviceman who, within the territorial jurisdiction of a state, commits an offense denounced by state law and by

† The views expressed herein are those of the writer and do not purport to reflect the policy of the Department of the Army.

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1. 54 Stat. 1178 (1940), 50 U.S.C. §§ 501-48, 560-90 (1958).

2. 10 U.S.C. §§ 801-940 (1964). (The Uniform Code of Military Justice will be cited hereafter as the UCMJ, and referred to in textual material as the Code.)

the Uniform Code of Military Justice, is subject to the concurrent jurisdiction of both state and military authorities.[3]

During fiscal year 1964, there were 76,057 trials by courts-martial.[4] The Army's share of this total was 43,118, or 42.25 trials per thousand strength.[5] While statistics in this regard are not available, a substantial number of the accused in these cases retained civilian counsel. The existence of this potential criminal practice in South Carolina would seem to justify an examination of the court-martial system.

Although military criminal law contains much that is familiar to the civilian practitioner, sufficient differences exist that one's lack of expertise in the field is readily apparent, and, in the cold unsympathetic eye of the court, he is made to look the fool, thereby doing himself and his client no service.

It is the purpose of this article to acquaint the civilian practitioner with the types of military courts, their jurisdictional limitations, and some of the more important procedural and substantive rules of military criminal law. Although all the services are governed by the Uniform Code of Military Justice, differences in matters of procedure exist. Throughout this article, Army procedure will be used as the basis for discussion and minor differences among the services will be ignored.

B. The Present System of Courts-Martial

The Uniform Code of Military Justice has been the basic law governing the administration of military justice in the Armed Forces since 31 May 1951. The Code provides, in article 16,[6] for three kinds of courts-martial, namely:

1. General courts-martial, consisting of a law officer and not less than five members;

2. Special courts-martial, consisting of not less than three members; and

3. Summary courts-martial, consisting of one officer.

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3. A trial in a state court does not bar a subsequent trial by court-martial. MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 68*d* (hereafter cited as MCM, 1951). As a practical matter, however, military authorities exercise jurisdiction in such cases only under the most compelling circumstances. See Army Reg. 22-12, 24 April 1958.

4. ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF THE TREASURY FOR THE PERIOD JANUARY 1, 1964 TO DECEMBER 31, 1964, United States Government Printing Office, p. 43.

5. *Id.* at 57.

For each general court-martial, the commander convening the court must appoint as trial and defense counsel qualified lawyers who have been certified by the appropriate Judge Advocate General as competent to perform such duties.[7] General courts-martial may adjudge any penalty (including the death sentence) not forbidden by the Code.[8]

For each special court-martial, the convening authority must appoint a trial and defense counsel. Persons appointed as trial and defense counsel of special courts-martial need not be lawyers. However, if the trial counsel of a special court-martial is a lawyer, the appointed defense counsel must be similarly qualified.[9] Special courts-martial may adjudge any punishment not forbidden by the Code except death, dishonorable discharge, dismissal, confinement in excess of six months, hard labor without confinement in excess of three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for a period exceeding six months.[10] A further limitation on the powers of a special court-martial is that it may not adjudge a bad conduct discharge "unless a complete record of the proceedings and testimony before the court has been made."[11]

The Code does not provide for the appointment of counsel for summary courts-martial. Summary courts-martial may adjudge any punishment not forbidden by the Code except death, dismissal, dishonorable or bad conduct discharge, confinement in excess of one month, hard labor without confinement in excess of forty-five days, or forfeiture of pay in excess of two-thirds of one month's pay.[12]

C. Pretrial Procedure

A complaint of wrongdoing on the part of a serviceman usually is referred to the individual's immediate commanding officer for action. If, after investigation, that officer determines that an offense has been committed and that trial by court-martial is

6. 10 U.S.C. § 816 (1964).
7. UCMJ, art. 27(b), 10 U.S.C. § 827(b) (1964).
8. UCMJ, art. 18, 10 U.S.C. § 818 (1964).
9. UCMJ, art. 27(c), 10 U.S.C. § 827(c) (1964).
10. UCMJ, art. 19, 10 U.S.C. § 819 (1964).
11. *Ibid.* Reporters may not be appointed for Army special courts-martial without special authorization in each instance by The Judge Advocate General acting on behalf of the Secretary of the Army. Army Reg. 22-145, para. 1, 17 August 1964.
12. UCMJ, art. 20, 10 U.S.C. § 820 (1964).

warranted, he will prefer charges.[13] The charges are then forwarded, with recommendation as to their disposition, to the commander who is authorized to convene summary courts-martial for the trial of cases in the command.[14]

The summary court-martial convening authority is empowered to dismiss charges, refer them to a summary court-martial, or forward them with his recommendation for trial by a special or general court-martial. Should trial by a general court-martial appear appropriate, the officer exercising summary court-martial jurisdiction must refer the charges to a disinterested officer for a thorough and impartial investigation and recommendation as to disposition. The report of this "article 32" investigation must accompany all charges that are forwarded with a recommendation for trial by a general court-martial.[15]

Charges received by the general court-martial convening authority are referred routinely to the staff judge advocate for consideration and advice. The general court-martial convening authority is empowered to dismiss the charges, return them to the subordinate commander for disposition, refer them to a summary or special court-martial for trial, or refer them to a general court-martial for trial.[16] The advice of the staff judge advocate is a prerequisite to reference for trial by a general court-martial.[17]

A military accused has a right to be represented by military counsel when charges against him are referred for a formal pretrial investigation pursuant to Article 32, Uniform Code of Military Justice, and when his case is referred for trial by a special or general court-martial. Neither the Uniform Code of Military

13. Charges are preferred when the accuser signs a charge sheet containing the allegation of an offense. The "Charge" is the article of the UCMJ that is alleged to have been violated. The "Specification of the Charge" contains the specific allegations that constitute the offense.

14. Summary courts-martial may be convened by the commanding officer of a detached company or other detachment of the Army, and by any person who may convene a special or general court-martial. UCMJ, art. 24, 10 U.S.C. § 824 (1964).

15. UCMJ, art. 32, 10 U.S.C. § 832 (1964). If the summary court-martial convening authority also has special court-martial jurisdiction, he may refer the charges to a special court-martial for trial. Army commanding officers who have summary court-martial jurisdiction almost invariably have special court-martial jurisdiction.

16. MCM, 1951, para. 35. The general court-martial convening authority rarely refers cases to summary or special courts-martial. If trial by a general court-martial is not deemed warranted, the charges normally are dismissed or returned to the subordinate commander "for such other action as may be deemed appropriate."

17. UCMJ, art. 34, 10 U.S.C. § 834 (1964).

Justice nor the Manual for Courts-Martial makes any reference to defense counsel in connection with summary courts-martial. However, the Judge Advocate General of the Army has expressed the opinion that an accused should be permitted to be represented by counsel at a trial by summary court-martial when he has obtained one for that purpose.[18] Further, an accused or suspect may, at any stage of an investigation, request that he be permitted to consult with counsel of his own selection or with a judge advocate. If his request is denied, any statement subsequently made by him during the investigation will be excluded as evidence at his trial by court-martial.[19] There is, however, no requirement that the accused or suspect be advised of his right to consult with counsel.[20]

The civilian attorney who is retained at an early stage in the pretrial process may be assisted by certain predispositions on the part of military commanders which are the inherent result of the court-martial system. The military commander is responsible for the efficiency, discipline, morale, and welfare of his unit. In short, he is responsible for everything that takes place, and for everything that fails to take place, in his command. It follows that the administration of military justice at the unit or trial level is a function of command. Although the staff judge advocate of a command supervises the administration of military justice in that command, he functions in an advisory capacity. In the final analysis the decision of the commander determines whether an accused is to be tried by a court-martial, and, if so, by what type of court.

Foremost in the mind of every military commander is the accomplishment of the mission assigned his command. Anything that tends to hinder the accomplishment of that mission is viewed with varying degrees of disfavor.

There are few occurrences which can disrupt the normal transaction of military business to the same extent as does a trial by court-martial. The members of general courts-martial, and all personnel of inferior courts-martial, perform their court duties

18. Letter From Headquarters, Department of the Army, Office of The Judge Advocate General, subject: "Problem Areas in the Administration of Military Justice," 14 February 1964.

19. United States v. Gunnels, 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957). If the accused or suspect requests consultation with a judge advocate, the requirements of due process will be met if the judge advocate advises the suspect of his right to retain civilian counsel. United States v. Gunnels, *supra.*

20. CM 404320, Watkins, 30 C.M.R. 513 (1960), *petition denied,* 30 C.M.R., 417 (1961).

in addition to their regular duties. Further, the administrative burden created by a high court-martial rate may become almost intolerable. Witnesses must be interviewed and frequently detained beyond scheduled departure dates; charge sheets and statements of expected testimony prepared; psychiatric examinations accomplished; records of trial prepared and reviewed; and court-martial orders published.

By no means the least of the basic concepts which commanders must consider when an offense has been committed is the emphasis placed on the conservation of manpower.

> Conservation of manpower is of vital concern to our nation and the Army. Unnecessary resort to courts-martial and the indiscriminate discharge and confinement of offenders result not only in decreased efficiency and lowered discipline, but in an unjustified loss of manpower as well. A commander should not decide upon trial by court-martial until he has determined that other means of disposing of the offense, including administrative action and the imposition of punishment under Article 15, UCMJ, will not meet the ends of justice and discipline.[21]

Reams of paper have been printed on the subject of "leadership." There are "leadership courses" and "leadership schools." The Army's Command and General Staff College teaches a subject which is a leadership course called by another name. Famous military commanders are called "great leaders of men." Although this important quality may be defined satisfactorily, its presence or absence in an individual can be detected only by the observation of performance and the measurement of results. Accordingly, military commanders are judged largely by the results they attain. Of some importance in this regard is the state of discipline in a command as reflected in the court-martial rate, article 15 rate, absence without leave rate, and other indicia.

> To accomplish its mission this command must be well-disciplined. Its members must work as a team, with each member performing his or her duties willingly. Good discipline is best obtained by good leadership. Exemplary leadership, proper training, efficient use of personnel, and appro-

21. Fort Jackson Reg. 22-1, 22 July 1964, para. 4a. Administrative action may include admonition, reprimand, criticism, etc., written or oral. Punishment imposed pursuant to art. 15, UCMJ, is nonjudicial in nature and is imposed by commanders with the consent of the individual punished. See MCM, 1951, ch. XXVI.

priate recreational programs tend to reduce breaches of discipline. *The excessive use of courts-martial, generally, is a reflection on the quality of leadership of the commander concerned.*[22]

In summary, commanders resort to trial by court-martial only where the nature of the offense or the past record of the offender demands such action. Where trial by court-martial is deemed necessary, the charges are referred to the lowest court which, in the opinion of the convening authority, can impose an adequate sentence. Frequently, mitigating and extenuating circumstances exist which, if brought to the attention of the commander concerned, can assist him in reaching his decision. The attorney can render a valuable service to his client, and to the military, by insuring that all information favorable to his client is brought to the attention of the convening authority prior to his action on the charges.

The attorney who is retained at the outset of an Article 32 investigation has a unique opportunity to ascertain the nature and extent of all evidence against his client without disclosing his theory of defense.

> At the outset of the investigation the accused will be informed of the following; the offense charged against him; the name of the accuser and of the witnesses against him as far as then known by the investigating officer; the fact that charges are about to be investigated; his right to have counsel represent him at the investigation if he so desires, as provided in Article 32 [of the UCMJ]; his right to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense, extenuation, or mitigation; his right to have the investigating officer examine available witnesses requested by him; his right to make a statement in any form, but that he is not required to make any statement regarding the offense of which he is accused or being investigated, and that any statement he may make may be used as evidence against him in a trial by courtmartial.[23]

22. *Id.* para. 4b. (Emphasis added.)

23. MCM, 1951, para. 34b. The article 32 investigation is treated in depth by Lieutenant Colonel William A. Murphy, USMC, in his excellent article *The Formal Pretrial Investigation,* MIL. L. REV., April 1961 (DA PAM 27-100-12, 1 April 1961), p. 1.

The rights of the accused to be represented by counsel at the article 32 investigation are extensive. He may; (1) request military counsel by name; (2) request that counsel be appointed by the officer exercising general court-martial jurisdiction; or (3) be represented by civilian counsel provided by him.[24] Counsel provided by the general court-martial convening authority must be a qualified lawyer.[25] If the counsel requested by name is not a lawyer, the accused must execute a waiver of his right to be represented by a lawyer.[26] Civilian counsel retained by an accused usually is in addition to military counsel, and is in complete charge of his client's case. It is not unusual in serious cases for an accused to be represented by counsel requested by name, counsel provided by the general court-martial convening authority, and civilian counsel retained by the accused.

Despite the extensive rights granted an accused at the pretrial investigation, neither the Code nor the Manual for Courts-Martial contain any provisions concerning the Government's right to be represented at the investigation. It seems clear however, that the Government as well as the accused has the right to be represented by counsel at the article 32 investigation.

> The Article 32 investigation is an important part of court-martial procedure. Mainifestly, the Government as well as the accused has an immediate and material interest in the proceedings. Although no provision of the Uniform Code of Military Justice or the Manual requires the Government to be present, its appearance may be desirable and helpful. * * * Suffice it for our purposes to say, as did the board of review, below, that 'we can find no fault' with the practice, which has the legitimate effect of making the investigation 'an adversary proceeding, presided over by the investigating officer.'[27]

Civilian attorneys may find it strange indeed that although the importance of the pretrial investigation is emphasized by statute and court decision, Congress has not seen fit to grant the investigating officer the power of subpoena. However, the absence of the subpoena power rarely becomes a matter of concern

24. UCMJ, art. 34(b), 10 U.S.C. § 834 (b) (1964).

25. United States v. Tomaszewski, 8 U.S.C.M.A. 266, 24 C.M.R. 76 (1957).

26. *Ibid.* The certificate of waiver is included on the printed form for the investigating officer's report. DD Form 457, 1 June 1959.

27. United States v. Weaver, 13 U.S.C.M.A. 147, 32 C.M.R. 147 (1962). Cases cited by the court are omitted.

to the defense. Military witnesses are compelled to attend by official orders, and depositions of civilian witnesses may be obtained if they refuse to appear at the investigation.[28]

When a case is referred to a general or special court-martial for trial the charges are served on the accused and the appointed defense counsel is furnishd a file containing, as a minimum, a copy of the charge sheet on which the offense is alleged, and copies of all statements of expected testimony. Thus the defense is completely apprised of the nature and extent of the Government's case.

An accused may not be brought to trial, over his objection, by special court-martial within three days from the service of the charges,[29] or by general court-martial within five days from the service of the charges.[30] Requests for continuances, if made before the court convenes, should be directed to the convening authority. After the court has convened, requests for continuances are made to the law officer of a general court-martial or to the president of a special court-martial as may be appropriate. Although the granting of a continuance is a discretionary matter, the denial of such a request based upon good cause may be an abuse of discretion and require reversal in case of conviction.[31] Accordingly, counsel for the defense have ample opportunity to interview witnesses and prepare the defense of the case. Further in this regard, military authorities cooperate fully in making military personnel and civilian employees available for interview.

Defense counsel should, in an appropriate case, give careful consideration to the advisability of entering into a guilty plea agreement with the convening authority. These pretrial agreements are usually of three types or combinations thereof, as follows:

1. The accused agrees to plead guilty and the convening authority agrees not to approve a sentence greater than that set forth in the agreement;

2. The accused agrees to plead guilty to a lesser offense and the convening authority agrees to withdraw and dismiss the greater offense; and

28. Murphy, *supra* note 23, at 26-28.
29. UCMJ, art. 35, 10 U.S.C. § 835 (1964).
30. *Ibid.*
31. United States v. Daniels, 11 U.S.C.M.A. 52, 28 C.M.R. 276 (1959).

3. The accused agrees to plead guilty to one or more offenses and the convening authority agrees to withdraw and dismiss the remaining offenses.

The policies of the Judge Advocate General of the Army concerning pretrial agreements are summarized as follows:[32]

1. The offer to plead guilty must originate with the accused and the sentence agreed upon must be appropriate for the offense;

2. The offer to plead guilty may be accepted only if the available evidence of guilt is convincing;

3. Unreasonable multiplication of charges which might tend to induce an offer to plead guilty will be avoided;

4. The agreement must be in writing, unambiguous, and contain no provision circumscribing the rights of the accused;

5. The agreement must be scrupulously carried out by the Government;

6. The court-martial must be made sufficiently aware of the circumstances of the offense and the accused must be allowed to present matters in mitigation and extenuation so that the court-martial may determine an appropriate sentence;

7. The law officer should determine, at an out-of-court hearing, that the accused is fully aware of his rights and understands the meaning and effect of his plea of guilty. The law officer should further ascertain whether the accused is satisfied with appointed counsel, and determine from the accused personally whether he is pleading guilty because he is guilty;

8. The pretrial agreement is made an appellate exhibit to the record of trial, and the out-of-court hearing is recorded and transcribed verbatim.

9. The court-martial should not be made aware of the existence of a prertial agreement.

In order that the court may be made aware of the circumstances of the case, the pretrial agreement normally is conditioned upon the prosecution and defense being able to agree to a written stipulation of fact to be presented to the court. Failure to agree to the content of the stipulation will vitiate the agree-

32. MCM, 1951, United States Army 1959 Cumulative Pocket Part, p. 39.

ment. The civilian attorney is well-advised to utilize the experience of the appointed defense counsel in determining the terms of an offer to plead guilty and the content of the stipulation of fact.

D. Trial Procedure

The power "to make Rules for the Government and Regulation of the land and naval Forces" is vested in the Congress by the United States Constitution.[33] In the exercise of this constitutional authority, Congress has delegated the power to make rules of procedure for trials by courts-martial to the President.

> (a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far, as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this code.
>
> (b) All rules and regulations made in pursuance of this article shall be uniform insofar as practicable and shall be reported to the Congress.[34]

Pursuant to this delegated authority, the President has promulgated the Manual for Courts-Martial, United States, 1951.[35]

A trial by court-martial is a criminal trial wherein the United States is the sovereign party. Although military trials are open to the public and to press coverage,[36] spectators are rarely very numerous. Witnesses are excluded from the courtroom except when they are testifying.[37]

The civilian attorney who is accustomed to the normal day in a term of criminal court of general jurisdiction will find it difficult to imagine the degree of formality with which military trials are usually conducted. The formality of a trial by court-

33. U.S. CONST. art. I, § 8.

34. UCMJ, art. 36, 10 U.S.C. § 836 (1964).

35. Exec. Order No. 10214, 15 Fed. Reg. 1303 (1951). Numerous amendments to the manual have been made by subsequent Executive Orders. These amendments were published, in January 1963, as an addendum to the manual.

36. For special circumstances under which spectators may be limited see United States v. Brown, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956).

37. MCM, 1951, para. 53f.

martial is the direct result of military custom and the rules of military trial procedure.

From the time a court-martial is called to order by the president of the court until court is adjourned, the sole business before that court is the trial of one or more accused at a single trial. The few spectators who may be present from time to time enter and leave almost noiselessly; there are no bailiffs or other officials entering and leaving with defendants who have been tried or who are awaiting trial; there are no decrees, orders, or warrants being presented to the presiding judge for signature. Should some matter of importance require the immediate attention of a party to a military trial the court is recessed until the matter is concluded. While superiority in military rank has no place in a military trial,[38] the normal dictates of military courtesy contribute substantially to the formality of military trials. Finally, as all parties to the trial are keenly aware that each record of trial is reviewed for legal sufficiency by the convening authority and by higher reviewing authorities, they tend to exercise extreme care in their choice of words and actions.

Detailed procedural guides for trials by general and special courts-martial are set forth in the Manual for Courts-Martial.[39] These guides are actually scripts that the parties to the trial recite almost verbatim. The use of the procedural guides is invaluable in establishing affirmatively that the court has jurisdiction over the accused and the offense charged and that all procedural prerequisites to a trial on the merits of the case have been met.

Preliminarily, the following matters are recited into the record:

1. The order appointing the court and all amendments thereto;

2. The names of all persons named in the appointing orders—each such person being accounted for as present or absent;

3. The name, rank, and organization of the accused and the fact that he is present in court;

4. The name of the appointed reporter and the oath administered to the reporter by the trial counsel;

38. MCM, 1951, para. 41b. The senior member of the court is the president. MCM, 1951, para. 40a. The junior member collects and counts the votes. MCM, 1951, paras. 74d (2), 76b (2).

39. MCM, 1951, app. 8.

5. The qualifications and lack of disqualifications of counsel for both sides;[40]

6. That the accused, if an enlisted member, has or has not requested that the membership of the court include enlisted personnel.[41]

After these preliminary matters have been covered to the satisfaction of all concerned, the parties to the trial are sworn—the court members and the law officer by the trial counsel, and the trial and defense counsel (including individual counsel) by the president of the court. This completes the convening of the court.

Challenges at military trials may be peremptory or for cause. The prosecution has a right to one peremptory challenge against any member of the court and each accused has a right to one such peremptory challenge.[42]

The law officer of a general court-martial may only be challenged for cause.[43]

The law officer, court members, and the trial counsel have an affirmative duty to disclose any facts known to them that may be grounds for challenge for cause.[44] If the undisputed facts

40. No person who has acted as investigating officer, law officer, or court member in any case shall subsequently act as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant defense counsel in the same case. No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case for the prosecution.
UCMJ, art. 27 (a), 10 U.S.C. § 827 (a) (1964).

41. If, prior to the convening of a court-martial, an enlisted accused requests in writing that the membership of the court include enlisted personnel, at least one-third of the court members must be enlisted personnel. UCMJ, art. 25(c), 10 U.S.C. § 825 (c) (1964).

42. UCMJ, art. 41(b), 10 U.S.C. § 841 (b) (1964).

43. *Ibid.*

44. MCM, 1951, para. 62b. Among the grounds for challenge are:

(1) That the challenged law officer or member is not eligible to serve as law officer or member, respectively, on courts-martial.

(2) That he is not a member or law officer of the court.

(3) That he is the accuser as to any offense charged. See [UCMJ] Article 1 (11) for definition of accuser.

(4) That he will be a witness for the prosecution. See [MCM, 1951, para.] 63 for definition of witness for the prosecution.

(5) That he was the investigating officer as to any offense charged. See [MCM, 1951, para.] 64 for definition of investigating officer.

(6) That he has acted as counsel for the prosecution or the accused as to any offense charged.

(7) That (upon a rehearing or a new trial) he was a member of the court which first heard the case.

show the existence of any of the first eight grounds for challenge listed in the manual,[45] the member or law officer is absolutely disqualified and must be excused forthwith.[46]

Voir dire examination of the court members or the law officer is conducted by counsel, who may, at his option, require the individual being questioned to answer under oath.[47]

The Code provides that the law officer of a general court-martial may not rule upon a challenge for cause.[48] Challenges for cause are determined singly[49] by a majority vote of the court members, with a tie vote operating to disqualify the challenged member.[50] "Deliberation and voting upon a challenge will be in closed session, and the law officer and the challenged member,

(8) That he is an enlisted member who is assigned to the same unit as the accused. See [MCM, 1951, para.] 4a and [UCMJ] Article 25(c) (2) for definitions of the word "unit".

(9) That he has forwarded the charges in the case with his personal recommendation concerning trial by court-martial.

(10) That he has formed or expressed a positive and definite opinion as to the guilt or innocence of the accused as to any offense charged.

(11) That he has acted in the same case as the convening authority or as the legal officer or staff judge advocate to the convening authority.

(12) That he will act in the same case as the reviewing authority [MCM, 1951, para.] (84) or staff judge advocate to the reviewing authority [MCM, 1951, para.] (85a).

(13) Any other facts indicating that he should not sit as a member or law officer in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality. Examples of other facts constituting grounds for challenge are: That (upon a rehearing or new trial) he was the law officer of the court which first heard the case; that he will be a witness for the defense; that he testified or submitted a written statement in connection with the investigation of the charges (unless at the request of the accused); that he has officially expressed an opinion as to the mental condition of the accused; that, when it can be avoided, a member is junior in rank or grade to the accused; that he has a direct personal interest in the result of the trial; that he is in any way closely related to the accused; that he participated in the trial of a closely related case; that he is decidedly hostile or friendly to the accused; that (in a case involving an offense punishable by death) a member of the court has conscientious scruples against imposing the death penalty; that, not having been present as a member when testimony on the merits was heard, or other important proceedings were had in the case, his sitting as a member will involve an appreciable risk of injury to the substantial rights of an accused, which risk will not be avoided by a reading of the record. In connection with this last example, see [MCM, 1951, paras.] 41e and f, and 62h (1).

MCM, 1951, para. 62f.

45. See *ibid.*

46. MCM, 1951, para. 62h (2).

47. *Ibid.*

48. UCMJ, art. 41(a), 10 U.S.C. §841(a) (1964); UCMJ, art. 51(b), 10 U.S.C. §851(b) (1964).

49. UCMJ, art. 41(a), 10 U.S.C. §841(a) (1964).

50. UCMJ, art. 52(c), 10 U.S.C. §852(c) (1964).

if any, will be excluded."[51] As a matter of practice, however, when it is disclosed, in general terms, that a ground for challenge may exist, the particulars of the challenge may be heard at an out-of-court hearing. If the evidence received at the out-of-court hearing convinces the law officer that denial of the challenge would be error, he will excuse the challenged member without submitting the matter to the court. This practice, though erroneous, does not violate any substantial rights of the accused,[52] and has the salutory effect of avoiding the possibility of prejudicial error resulting from the erroneous denial of the challenge by the court. Further, in this regard, receiving the particulars of the challenge at an out-of-court hearing avoids contaminating the other court members with information that would subject them to challenge on the same grounds asserted against the challenged member.

The arraignment proceeding at a trial by court-martial consists of the reading of the charges and specifications and calling upon the accused to plead thereto.[53] The pleas of the accused are not a part of the arraignment.[54] After an accused has been arraigned, his subsequent voluntary and unauthorized absence will not terminate the jurisdiction of the court and the trial may continue to findings and sentence.[55]

With the single exception of challenges, as discussed above, all rulings upon interlocutory questions arising during court-martial proceedings are ruled upon by the law officer of a general court-martial and by the president of a special court-martial.[56]

> Any such ruling made by the law officer of a general court-martial upon any interlocutory question other than a motion for a finding of not guilty or the question of the accused's sanity shall be final and constitute the ruling of the court. . . . The president of a special court-martial will rule in open court upon all interlocutory questions other

51. MCM, 1951, para. 62h (3). As a result of the application of the rules for deciding challenges, court members may be called upon to decide challenges made on grounds on which they themselves may be subject to challenge.

52. United States v. Jones, 7 U.S.C.M.A. 283, 22 C.M.R. 73 (1956).

53. MCM, 1951, para. 65a.

54. *Ibid.* CM 347614, Houghtaling, 2 C.M.R. 229 (1951); ACM 4742, Wahl, 4 C.M.R. 767 (1952).

55. MCM, 1951, para. 11c. A similar provision of the Manual for Courts-Martial, U. S. Army, 1949, was upheld by the Court of Military Appeals in United States v. Houghtaling, 2 U.S.C.M.A. 230, 8 C.M.R. 30 (1953), a capital case in which the death sentence was not adjudged.

56. UCMJ, art. 51(b), 10 U.S.C. § 851(b) (1964); MCM, 1951, para. 57a.

> than challenges arising during the trial. . . . If a member objects to a ruling of the president upon a question, the court shall be closed and the question voted on as stated in [MCM, 1951, Para.] 57f. . . . Rulings by the law officer on a motion for a finding of not guilty ([MCM, 1951, Para.] 71a) and on the question of the sanity of an accused ([MCM, 1951, para.] 122b) are final unless objected to by a member of the court. When proper objection is made to a ruling of the law officer on these two matters, he may give the court such instructions as will better enable the members to understand the question they are to determine and the manner in which it is to be determined. Thereafter the court will be closed and the question decided by a vote of the members of the court.[57]

At a trial by special court-martial the presentation of evidence and argument on interlocutory questions must, of course, be had in open court. Law officers of general courts-martial, however, make full use of the out-of-court hearing.

> When the law officer hears evidence or extensive argument on a matter subject to his exclusive determination, the "preferred practice is for the argument to be held out of the presence of the court-martial members." United States v. Bouie, 9 USCMA 228, 233, 26 CMR 8. The practice is particularly important in proceeding on a defense objection to the admissibility of a pretrial statement by the accused because substantial evidence bearing on the admissibility question, but immaterial to the merits, is frequently introduced. See United States v. Dicario, 8 USCMA 353, 24 CMR 163. *Generally, therefore, on request, an accused is entitled to an out-of-court hearing on an objection to the admissibility of a pretrial statement made by him.*[58]

The trial of a court-martial case on its merits—the presentation of evidence, instructions by the law officer (or president of a special court-martial), and arguments of counsel—follows

57. MCM, 1951, para. 57. When, upon proper objection, an interlocutory question is to be decided by the court, it shall be determined by majority vote. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the sanity of an accused is a determination against the accused. A tie vote on any other interlocutory question is a determination in favor of the accused. UCMJ, art. 52(c), 10 U.S.C. § 852(c) (1964).

58. United States v. Lock, 13 U.S.C.M.A. 611, 33 C.M.R. 143 (1963). (Emphasis supplied.) The denial of a defense request for an out-of-court hearing is grounds for reversal if the accused is prejudiced thereby. United States v. Lock, *supra.*

generally accepted rules of criminal procedure, and should present no problems not encountered in civilian criminal courts of record. However, as the findings (verdict of guilt or innocence) and the sentence are both determined by the court, but separately, certain rules that apply prior to findings are relaxed during the post-findings proceedings.

As a result of the military rule that all known offenses should be disposed of at a single trial,[59] totally unrelated offenses are frequently disposed of at one trial. An accused at such a trial has the right, before findings, not only to testify or to remain silent, but to limit his testimony to less than all of the offenses charged.[60] If an accused does so limit his testimony he cannot be cross-examined about these offenses concerning which he does not testify.[61]

If findings of guilty as to any offense charged are announced by the court, the trial then enters into presentencing proceedings. During these proceedings the prosecution presents to the court the personal data concerning the accused as shown on the charge sheet,[62] and admissible evidence of previous convictions.[63]

With respect to matters in mitigation and extenuation, the rules of evidence may be relaxed in favor of the accused to the extent that certificates, affidavits, letters and other writings may be received in evidence.[64] Further, the testimonial rights of the accused at the presentencing proceedings are somewhat broader than those he enjoys prior to findings. In addition to the right to testify or remain silent, the accused may make an unsworn statement orally or in writing, either personally, through counsel or both.[65] This unsworn statement is not evidence, and the accused cannot be cross-examined upon it[66] or interrogated by court members on the substance of it.[67]

59. MCM, 1951, para. 30f.
60. MCM, 1951, para. 149b(1).
61. *Ibid.*
62. MCM, 1951, para. 75b(1). These data are the age, pay and service of the accused, and the nature and duration of any pretrial restraint.
63. MCM, 1951, para. 75b(2). Such evidence must relate to offenses committed during the accused's current enlistment, or other service obligation, and during the three years prior to the commission of any offense charged.
64. MCM, 1951, para. 75c(1).
65. MCM, 1951, para. 75c(2).
66. *Ibid.*
67. United States v. King, 12 U.S.C.M.A. 71, 30 C.M.R. 71 (1961). The unsworn statement is, therefore, offered for such weight as the court may care to give it. The fact that the accused may not be cross-examined on the statement does not prevent the prosecution from rebutting anything contained therein. MCM, 1951, para. 75c(2).

A unanimous verdict is not required at a military trial unless the death sentence is mandatory.[68] In all other cases, two-thirds of the members present must concur in a finding of guilty.[69]

> If, in computing the number of votes required, a fraction results, such fraction shall be counted as one; thus, if five members are to vote, a requirement that two-thirds concur is not met unless four concur. A finding of not guilty results as to any specification or charge if no other valid finding is reached thereon; however, a court may reconsider any finding before the same is formally announced in open court. The court may reconsider any finding of guilty on its own motion at any time before it has first announced the sentence in the case.[70]

A sentence of death requires the concurrence of all the members present,[71] and a sentence to imprisonment in excess of ten years requires the concurrence of three-fourths of the members present.[72] All other sentences require the concurrence of two-thirds of the members present.[73] Although the court may reconsider its sentence at any time before the record of trial has been authenticated and transmitted to the convening authority, it may not increase the severity of the sentence adjudged unless the sentence prescribed for the offense of which the accused has been convicted is mandatory.[74]

E. Post-Trial Procedure

The duties of the trial defense counsel are not concluded with the announcement of the sentence by the president of the court-martial.[75] It is considered part of the defense counsel's duties to represent the accused in all matters directly related to the trial which arise prior to the time the record of trial is forwarded for

68. UCMJ, art. 52(a)(1), 10 U.S.C. § 852(a)(1) (1964).
69. UCMJ, art. 52(a)(2), 10 U.S.C. § 852(a)(2) (1964).
70. MCM, 1951, para. 74d(3).
71. UCMJ, art. 52(b)(1), 10 U.S.C. § 852(b)(1) (1964).
72. UCMJ, art. 52(b)(2), 10 U.S.C. § 852(b)(2) (1964).
73. UCMJ, art. 52(b)(3), 10 U.S.C. § 852(b)(3) (1964). As in the case of voting on the findings (see text above note 70), if in computing the number of votes required a fraction results, such fraction is counted as one. MCM, 1951, para. 76b(3).
74. UCMJ, art. 62(b), 10 U.S.C. § 862(b) (1964); MCM, 1951, para. 76c.
75. United States v. Darring, 9 U.S.C.M.A. 651, 26 C.M.R. 431 (1958).

appellate review,[76] and to cooperate with appellate counsel until the appellate process is completed.

After the sentence has been announced, the defense counsel may contact the members of the court and ascertain their views concerning the submission of a clemency petition to the convening authority.

> Mitigating circumstances which could not be taken into consideration in determining the sentence may be the basis of a recommendation for clemency by individual members of the court. The recommendation should represent the free and voluntary expression of the individuals who join therein. It should be specific as to the amount and character of the clemency recommended and as to the reasons for the recommendation.[77]

The type of clemency most often recommended by the members of a court-martial is the suspension of all or part of the

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76. The term "appellate review" does not include the initial review and action by the convening authority as discussed in this section, but refers to the subsequent review as provided by the UCMJ. The Code provides, in substance, that after action on the findings and sentence is taken by the convening authority, records of trial are further reviewed as follows:

a. Summary courts-martial, and special courts-martial not involving an approved sentence of bad conduct discharge (see note 11) are finally reviewed by a judge advocate on the staff of the officer exercising general court-martial jurisdiction (UCMJ, art. 65(c), 10 U.S.C. § 865(c) (1964); MCM, 1951, para. 94a);

b. Special courts-martial involving approved sentences of bad conduct discharge are forwarded to the officer exercising general court-martial jurisdiction and thereafter reviewed in the same manner as general courts-martial [UCMJ, art. 65(b), 10 U.S.C. § 865(b) (1964); MCM, 1951, para. 94a(3)];

c. General courts-martial involving approved sentences affecting general or flag officers or extending to death, dismissal, dishonorable or bad conduct discharges, or confinement for one year or more, are reviewed by a board of review in the Office of The Judge Advocate General (UCMJ, art. 66(a), 10 U.S.C. § 866(a) (1964); MCM, 1951, para. 100);

d. Other general courts-martial are examined in the Office of The Judge Advocate General. If error is found to be present, or if The Judge Advocate General so directs, the case is referred to a board of review (UCMJ, art. 69, 10 U.S.C. § 869 (1964); MCM, 1951, para. 103);

e. The Court of Military Appeals shall review the record in the following cases:

(1) All cases in which the sentence, as affirmed by a board of review, affects a general or flag officer or extends to death;

(2) All cases reviewed by a board of review which The Judge Advocate General orders forwarded to the Court of Military Appeals for review; and

(3) All cases reviewed by a board of review in which, upon petition and on good cause shown, the Court of Military Appeals has granted a review.

UCMJ, art. 69, 10 U.S.C. § 869 (1964). However, in cases reviewed by a board of review pursuant to UCMJ art. 69 (see d, above) the accused may not petition the Court of Military Appeals.

77. MCM, 1951, para. 77a. See also MCM, 1951, para. 48j(1).

sentence imposed. This form of clemency recommendation is singularly appropriate in a court-martial case as the court does not have the power to adjudge a suspended sentence.[78] Nothing contained in a clemency recommendation can operate to impeach the findings or the sentence of the court.[79]

The record of trial in a general or special court-martial case is prepared under the supervision of the trial counsel.[80] It is authenticated by the president and trial counsel, if a special court-martial,[81] or by the president and law officer, if a general court-martial.[82] The authenticating officers are responsible for its accuracy.[83] Prior to the record of trial being forwarded to the convening authority for review and action, it is examined by the defense counsel. The defense counsel should bring errors or omissions to the attention of the trial counsel or the officers required to authenticate the record.[84] If the defense counsel is not satisfied that an authenticated record of trial is accurately transcribed, he should first seek to obtain a certificate of correction.[85] Should his attempt to obtain such a certificate fail, he may make his complaint to the convening authority and higher appellate reviewing authority, and may present such evidence as may be available to sustain his position.

Although the matters to be urged on appellate review are determined by the accused's appellate defense counsel, if he has one, the trial defense counsel may in any case prepare and submit for attachment to the record of trial an appellate brief of such matters as he feels should be considered in behalf of the accused

78. United States v. Kaylor, 10 U.S.C.M.A. 139, 27 C.M.R. 213 (1959).

79. MCM, 1951, para. 70a. However, a recommendation made by the court substantially contemporaneously with the pronouncement of the sentence may operate to render the sentence inconsistent or ambiguous. See United States v. Kaylor, *supra,* note 78.

80. MCM, 1951, para. 82a, 83.

81. MCM, 1951, para. 83c.

82. MCM, 1951, para. 82f.

83. MCM, 1951, para. 82a.

84. MCM, 1951, para. 82e.

85. United States v. Walters, 4 U.S.C.M.A. 617, 16 C.M.R. 191 (1954). A certificate of correction is authenticated in the same manner as the original record of trial. See MCM, 1951, para. 86c.

86. United States v. Walters, *supra,* note 85. As indicated in the *Walters* case, the Court of Military Appeals will give little or no weight to affidavits of defense counsel as against a properly authenticated record of trial or certificate of correction. In fact the court stated that a properly executed certificate of correction would be regarded as conclusive in the absence of a claim of fraud. The same should be true where the authenticators refuse to execute a certificate of correction and stand on the original authentication. However, the court stated further:

on review.[87] Such a brief would necessarily be considered by the convening authority and may be of assistance to appellate defense counsel.

An additional post-trial duty of the trial defense counsel is that of advising the accused concerning his appellate rights.[88] The accused should be advised as to the extent of the automatic review that his case will receive,[89] and as to his rights in regard to appellate representation.[90] The trial defense counsel should also advise the accused as to the circumstances under which he may petition the Court of Military Appeals.[91] It should be emphasized that this advice should normally be given, and the accused's election made, after the review of the staff judge advocate,[92] if any, and the action of the convening authority.

Generally, of course, a party complaining of omissions in a record of trial should be urged to seek a certificate of correction—and an inability to obtain such a document would bear on the weight to be attached to the complaint. Further, we have no intention of permitting the accused or his counsel to delay indefinitely in presenting a challenge to completeness of the record [citations omitted]. If such a contention is raised promptly—as will certainly be required—false allegations can ordinarily be refuted, and true complaints can usually be verified. It is obvious that, in such instances, substantial weight must and will be given to determinations by the convening authority and his staff judge advocate concerning the existence or nonexistence of 'proceedings' unreported in the record of trial.

United States v. Walters, 4 U.S.M.C.A. 617, 16 C.M.R. 191, 200 (1954).

87. MCM, 1951, para. 48j(2).

88. MCM, 1951, para. 48j(3).

89. See note *76 supra.*

90. UCMJ, art. 70, 10 U.S.C. § 870 (1964), provides, in pertinent part:

(a) The Judge Advocate General shall appoint in his office one or more officers as Appellate Government Counsel, and one or more officers as appellate defense counsel who shall be qualified under the provisions of article 27(b)(1).

(b) It shall be the duty of appellate Government counsel to represent the United States before the board of review or the Court of Military Appeals when directed to do so by The Judge Advocate General.

(c) It shall be the duty of appellate defense counsel to represent the accused before the board of review or the Court of Military Appeals—

(1) When he is requested to do so by the accused; or

(2) When the United States is represented by counsel; or

(3) When The Judge Advocate General has transmitted a case to the Court of Military Appeals.

(d) The accused shall have the right to be represented before the Court of Military Appeals or the board of review by civilian counsel if provided by him.

91. See note *76 supra.*

92. The staff judge advocate of a command is required by law to submit a written opinion to the convening authority on every record of trial by general court-martial. UCMJ, art. 61, 10 U.S.C. § 861 (1964). He prepares a similar opinion in reviewing a record of trial by special court-martial in which a bad conduct discharge was adjudged and approved. UCMJ, art. 65(b), 10 U.S.C. § 865(b) (1964).

> Clearly, a defense counsel's duty does not end with the court-martial findings. United States v. Allen, 8 USCMA 504, 25 CMR 8. Here, defense counsel admits he merely advised the accused "there was little" that an appellate defense counsel could do in his behalf. In that advice, he misplaced the emphasis. The point is not what the accused had to *lose* but what he had to *gain* by appellate representation.
>
> Not only was the emphasis misplaced but the advice was premature. It was given before the staff judge advocate had reviewed the case and before the convening authority had acted upon the findings and sentence.[93]

Finally, should it be brought to the attention of the defense counsel that the convening authority in taking action on the sentence has considered or will consider matters not contained in the record of trial, the defense counsel should submit such rebuttal as may be appropriate.

> It is a well-settled principle of military law that a convening authority, in approving a court-martial's finding of guilt, is limited to the evidence adduced in the record of trial. United States v. Duffy, 3 USCMA 20, 11 CMR 20. It is equally well settled that a convening authority is not limited to the record in acting to disapprove either findings or sentence or any part thereof. United States v. Massey, 5 USCMA 514, 18 CMR 138. . . . While acting to approve an appropriate sentence, a convening authority may not consider matters which are derogatory or unfavorable to an accused derived from sources outside the record without first affording him an opportunity of rebuttal.[94]

To insure compliance with the foregoing rule, the defense counsel of a general court-martial is furnished a copy of the review of the staff judge advocate on which he states that he has read the review and does or does not desire to present matters in rebuttal.

F. Conclusion

Since the enactment of the Uniform Code of Military Justice and the establishment of the United States Court of Military

93. United States v. Darring, 9 U.S.C.M.A. 651, 26 C.M.R. 431 (1958).
94. United States v. Wilson, 9 U.S.C.M.A. 233, 26 C.M.R. 3, 6 (1958).

Appeals, military criminal law has developed rapidly into a highly specialized body of law with many rules of procedure that are unfamiliar to the civilian practitioner. The military rules of procedure should be interpreted with the single thought in mind that "it is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."[95] The emphasis placed on protecting the rights of the accused, as manifested by the rules of procedure—pretrial, trial, and post-trial—make the practice of military criminal law a professionally rewarding experience.

95. United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244, 246 (1960).