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On 2 June 1969, a majority of the Supreme Court of the United States in *O'Callahan v. Parker*[1] decided that, in order to preserve to military personnel the benefits of indictment by grand jury and a trial by a jury of his peers, U. S. Courts-Martial did not have jurisdiction of off-post, non-service connected offenses. There is no doubt that a majority of the Justices of the Supreme Court felt that this decision was essential to preserve these important civil rights for accused servicemen. There is equally no doubt that, as a result of this decision, great numbers of servicemen who would have otherwise been tried by courts-martial, will be tried in a variety of state and federal courts. This decision, therefore, makes timely and urgent a consideration of the practical benefits to an accused of trial in the military and civilian systems. Such a comparison is difficult because the civilian system is not unitary. Rules of evidence and procedure vary between the states, between state and federal practice, and in the latter, between various federal circuits. No attempt can or will be made here to set forth any civilian rule as representing the totality of civilian practice. Rather, the civilian rules cited are merely given as examples of the systems to which servicemen are being increasingly subjected as a result of the decision in the *O'Callahan* case. To avoid accusation that the civilian rules cited are examples of archaic, obsolete procedures, most of the civilian authorities cited have been deliberately taken from decisions rendered since the date of the Supreme Court's decision. Conversely, in order to avoid an allegation that the military might have reformed its rules because of the impact of *O'Callahan v. Parker*, most of the military authorities cited ante-date that decision. In a few instances, examples have been taken from military cases and authorities which have

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1. 395 U.S. 258 (1969).

come since *O'Callahan, but in no case* do these examples represent a change in the rules as they existed at the time of the Court's decision. In no case has a military rule been cited which has since been changed adversely to an accused person.

Rather than attempting extensive editorial comment, which might be considered as biased, this article will simply present quotations from military and civilian sources. The quotations are set in juxtaposition to each other in order that the reader may decide for himself which system offers the greater practical benefits to an accused; or to put the question in another way, how much of a price must the accused serviceman pay for the "benefits" of indictment by a grand jury and trial by a jury of his peers?

In the words of Mr. Justice Douglas: "Substantially different rules of evidence and procedure apply in military trials."[2] There is no question of the truth of this statement. There is a very real question, however, as to which set of rules provide greater practical benefits to an accused. This discussion will be broken down into four categories: pretrial, trial on the merits of the case, sentencing procedures, and post-trial matters. Emphasis has been placed upon these areas of the law where the differences appear to the writer to be meaningful. The differences in the areas not covered by this article are, in the opinion of this writer, not very consequential.

I. Pretrial

A. *Police Interrogation*

An appropriate place to start would be the arrival of the police at the scene of a crime, and the interrogation by the police of potential suspects.

Civilian Example: Washington v. Nuckols[3]

> Robert Nuckols and his companions telephoned the police and an ambulance. When the officer of the Seattle Police Department arrived, the two companions told him that Nuckols had shot Miss Cantu and gave the officer an explicit description of Nuckols. The officer went to the back door to check out the premises and there he saw a man with long blonde hair, wearing cowboy boots who met the description given to him for Nuckols. *"Are you the one*

2. *Id.*
3. 1 Wash. App. 133, 459 P.2d 971, 980 (1969).

who shot the girl?" the officer asked. "Yes," Nuckols responded. . . . (Emphasis supplied.)

Defendant's first assignment of error attacks the admission of the statement "yes" in response to the inquiry by the arresting officer. He argues that the officer intended to arrest him and therefore could not begin interrogation without first apprising him of his constitutional rights . . .

The record indicates that the defendant was not in custody at the time he answered the officer's inquiry. Nor can it be said that he was deprived of his freedom of action in any significant way. He had not been placed under arrest nor was there any indication, at the time of the query, that he was not free to leave. As the trial court correctly stated, *the officer was still investigating and was not interrogating the defendant* in the sense of the decisions referred to. *The question and answer were properly admitted.* (Emphasis supplied.)

Military Rule: United States v. Wilson[4]

The next assignment of error is that certain admissions of the accused should have been excluded as involuntary. The operative facts are these. A military police sergeant named Wang, while on patrol duty, received notice of a shooting in the 503d Battalion area. He went to the area and there observed a group of soldiers standing about a fire. A military policeman pointed out appellants as the persons identified to him by a group of Koreans as the men who had shot their countryman. *The sergeant approached the group and, without addressing any member by name—but looking directly at appellants—asked who had done the shooting.* He made no preliminary reference to the privilege against self-incrimination secured at that time by Article of War 24, 10 USC § 1495. Appellants responded to the question with the statement that they had "shot at the man." This was the substance of Sergeant Wang's testimony at the trial. The joint oral admission, which is said to have been involuntary, is, of course, that made by appellants that they had "shot at the man . . ."

We turn to the problem of whether the erroneous admission of these statements requires that the convictions be reversed, entertaining no doubt that an affirmative answer is required. Where—as here—an element of officiality attended the questioning which produced the admissions, there is more than a violation of the naked rule of Article 31(b), supra; there is an abridgement of the policy underlying the Article which must—we think—be regarded as "so overwhelmingly important in the scheme of military justice as to elevate it to the level of a 'creative and indwelling principle'."

4. 2 U.S.C.M.A. 248, 8 C.M.R. 48, 54, 55 (1953).

United States v. Lee (No. 200), 2 CMR 118. To put the matter otherwise, we must and do regard a departure from the clear mandate of the Article as generally and inherently prejudicial. *United States v. Berry* (No. 69), 2 CMR 114, decided March 18, 1952. We might also observe that even under the old service view of an error of this nature reversal would be required. (Emphasis supplied.)

B. *Pretrial Restraint*

Much is made of the fact that the military system does not provide for pretrial bail. Commanding officers of accused persons awaiting trial do, however, have very broad discretion in determining the necessity for and type of any pretrial restraint. One important factor should be remembered. An accused in the military service awaiting trial by court martial normally remains on a status of full pay and allowances whereas a civilian accused, who is incarcerated pending trial, normally sees his income drop to zero.

Civilian Examples: Hodge v. United States[5]

Appellant contends that refusal to release him on his own recognizance pending trial was an abuse of discretion and prejudiced him in preparation for trial. Abuse of discretion does not appear. Appellant had counsel for five weeks prior to the request, which was made on the scheduled date of trial. Appellant was from out of state, with no local contacts, family or otherwise, willing to vouch for him. On these facts, the judge could properly conclude that it was not reasonably certain that the defendant would appear.

United States ex rel. Shakur v. Commissioner of Corrections[6]

The traditional bail standards applied in New York are entirely consistent with the principles enunciated by the Supreme Court in Stack v. Boyle, 342 U.S. 1, 8, (1951) and have been set forth in People ex rel. Lobell v. McDonnell, 296 N.Y. 109, 111, 71 N.E.2d 423 (1947), recently approved by the New York Court of Appeals in People ex rel. Gonzalez v. Warden, 21 N.Y.2d 18, 25, 286 N.Y.S.2d 240, 233 N.E.2d 265 (1967). A New York judge is required to take the following factors into account when exercising his discretion in setting bail:

The nature of the offense, the penalty which may be imposed, the probability of of the willing appearance of the defendant or his flight to avoid punishment, the pecuniary and social con-

5. 414 F.2d 1040, 1044 (9th Cir. 1969).
6. 303 F. Supp. 303, 305 (S.D.N.Y. 1969).

dition of defendant and his general reputation and character, and the apparent nature and strength of the proof as bearing on the probability of his conviction.

Military Rule: Paragraph 20a thru c, Manual for Courts-Martial, United States, 1969 (Rev.).

20. RESTRAINT a. Status of a person in arrest. As used in this chapter, arrest is moral restraint imposed upon a person by oral or written orders of competent authority limiting the person's personal liberty pending disposition of charges. The restraint imposed is binding upon the person arrested, not by physical force, but by virtue of his moral and legal obligation to obey the order of arrest. He is subject to the restrictions incident to arrest prescribed in regulations of the Secretary concerned. A person in the status of arrest cannot be required to perform his full military duty, and if he is placed—by the authority who placed him in arrest or by superior authority—on duty inconsistent with this status his arrest is thereby terminated. This, however, does not prevent his being required to do ordinary cleaning or policing, or to take part in routine training and duties not involving the exercise of command or the bearing of arms. But see 131c(3) with respect to arrest in quarters imposed as a punishment under Article 15.

b. *Restriction in lieu of arrest.* An officer authorized to arrest (21a) may, within his discretion and without imposing arrest, restrict an accused person of his command, or subject to his authority, to specified areas of a military command with the further provision that he will participate in all military duties and activities of his organization while under the restriction. Thus, an accused person may be required to remain within a specified area at specified times either because his continued presence pending investigation may be necessary or because it may be considered a wise precaution to restrict him to such an area in order that he may not again be exposed to the temptation of misconduct similar to that for which he is already under charges. Violations of these restrictions are punishable as violations of Article 134, as are breaches of punitive restrictions.

c. *Confinement before trial.* As used in this chapter, confinement is physical restraint, imposed by either oral or written orders of competent authority, depriving a person of freedom pending the disposition of charges. Confinement will not be imposed pending trial unless deemed necessary to insure the presence of the accused at the trial or because of the seriousness of the offense charged.

Post-trial confinement can be set aside to compensate for the improperly imposed pretrial confinement.[7]

7. United States v. Jennings — U.S.C.M.A. —, — C.M.R. — (1969).

C. *Voice Identification*

Frequently, in order to assist witnesses in making identification of suspects, the police will ask the suspects to speak certain words without warning the suspect of his rights against self-incrimination.

Civilian Example: United States v. Wade[8]

> We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. It is no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse, and, as in those instances, is not within the cover of the privilege. Similarly, compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a "testimonial" nature; *he was required to use his voice as an identifying physical characteristic, not to speak his guilt.* (Emphasis supplied.)

Military Rule: United States v. Mewborn[9]

> Also, we put aside the holding in *Wade* that requiring an individual suspected of an offense to utter words or phrases for the purpose of voice identification does not violate his constitutional right against self-incrimination. *Id.*, 388 U.S. 218, at page 222. We examined that matter in United States v. Greer, supra, and determined that, under the broader protections accorded an accused by Article 31 of the Uniform Code, he could not be compelled to speak for voice identification. We are not persuaded this construction of Article 31 was erroneous; and we adhere to the view that, *under Article 31, before an accused is asked to speak for voice identification he must first be informed he has the right to say nothing.* (Emphasis supplied.)

D. *Handwriting Exemplars*

A similar problem arises with regard to the taking of handwriting exemplars from a person suspected or accused of an offense.

Civilian Example: Gilbert v. State of California[10]

> Petitioner was arrested in Philadelphia by an FBI agent and refused to answer questions about the Alhambra robbery without

8. 388 U.S. 218 (1967).
9. 17 U.S.C.M.A. 431, 38 C.M.R. 229, 232 (1968).
10. 338 U.S. 266 (1953).

> the advice of counsel. He later did answer questions of another agent about some Philadelphia robberies in which the robber used a handwritten note demanding that money be handed over to him, and during that interrogation gave the agent the handwriting exemplers. They were admitted in evidence at trial over objection that they were obtained in violation of petitioner's Fifth and Sixth Amendment rights . . .
>
> First. The taking of the exemplers did not violate petitioner's Fifth Amendment privilege against self-incrimination. The privilege reaches only compulsion of "an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpeona to produce one's papers", and not "compulsion which makes a suspect or accused the source of 'real or physical evidence' * * *". Schmerber v. State of California 384 U.S. 757, 763-764, 86 S. Ct. 1826, 1833, 16 L.Ed.2d 908. One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. *A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection.* (Emphasis supplied.)

This rule is still being applied by our federal courts; e.g., *United States v. King.*[11]

Military Rule: United States v. White[12]

> In United States v. Musguire, 9 USMCA 67, 68, 25 CMR 329, we pointed out that "Article 31 is wider in scope than the Fifth Amendment." We are not, therefore, dealing with a constitutional right. To our knowledge, the Supreme Court has never construed Article 31 contrary to the interpretation we accorded it in *Minnifield.* Consequently, we adhere to *Minnifield,* and *reaffirm the rule that an accused must be apprised of his rights under Article 31, before he can be asked for samples of his handwriting.* (Emphasis supplied.)

E. *Search and Seizure*

Generally speaking, in civilian life a magistrate must be asked for a search warrant, and in the military, a commanding officer has similar powers. Both must have probable cause for their actions. There is, however, at least one area where there would appear to be a gross difference

11. 415 F.2d 737, 739 (6th Cir. 1969).
12. 17 U.S.C.M.A. 211, 38 C.M.R. 9, 14 (1967).

between civilian and military rules and these stem from the existence of supervisory duty to maintain order and discipline and which, *in the civilian community,* has been held to either reduce or eliminate the need for probable cause for a search. Two cases, one civilian and one military, dealing with a search for narcotics upon return to a civilian job corps camp and to a military installation are cited.

Civilian Example: *United States v. Coles*[13]

On the morning of March 24, 1969, defendant, a student or "corpsman" at the Acadia Civilian Conservation Center was returning to the Center by bus from Boston, somewhat overdue on a leave he had been granted. In response to defendant's telephoned request, Gordon L. Stanley, an Administrative Assistant at the Center, met defendant's bus when it arrived in Ellsworth, Maine at around 9:45 a.m. Defendant had a small suitcase with him, which he placed on the floor in the rear of Stanley's automobile. Stanley and defendant then drove to a garage in Ellsworth where they met Anderson. After several local stops, the three drove to the Acadia Center, Anderson following Stanley and defendant in his own car. Upon their arrival at around noon, defendant started to walk to the mess hall for lunch, but Stanley told him that Anderson wanted to see him in his office. Defendant removed his suitcase from the automobile and followed Stanley to the door of Anderson's office. Anderson met him there and said, "Come into my office," or words to that effect. Defendant testified that he did not want to enter Anderson's office but did so because be believed that Anderson had the authority to punish or expel corpsmen for misconduct or disobedience. Stanley followed defendant into the office. To this point, there had been no conversation regarding the suitcase, nor had there been any mention of marijuana. Once inside the office, however, Anderson said to defendant, "I would like to look at the contents of your suitcase," or words to that effect. Defendant testified that he did not want to allow Anderson to inspect its contents but did so, involuntarily, because he felt he had no choice. In any event, defendant remained silent, opened his suitcase, and started to remove the contents . . .

Defendant challenges the search as a violation of the right, secured to him by the Fourth Amendment to the Constitution, to be free from unreasonable searches and seizures. The Government concedes that the search was conducted without a search warrant and, quite properly, does not atempt to support the search as incident to a lawful arrest. But the Government defends the search as legally justified because defendant consented to it. The Court,

13. 302 F. Supp. 99, 100 (ND Maine 1969).

however, does not find it necessary to pass upon this issue, since it has concluded, upon a broader ground, that the search and seizure was reasonable and did not infringe defendant's Fourth Amendment rights. The Court has no doubt that the search of defendant's suitcase was a constitutional exercise of Anderson's authority, as the Administrative Officer of the Acadia Center, to maintain proper standards of conduct and discipline at the Center . . .

It seems clear that the object of the search of defendant's suitcase was to determine whether contraband was being brought to the Center. Quite plainly, the investigation was conducted solely for the purpose of ensuring proper moral and disciplinary conditions at the Center, an obligation mandated by federal statute. Although no case precisely in point has been found, the present case is closely analogous to Moore v. Student Affairs Committee of Troy State University, 284 F.Supp. 725 (M.D.Ala.1968), where a search by the Dean of Men and two narcotics agents of a University student's dormitory room was held to be constitutionally permissible as a reasonable exercise of the University's supervisory duty to maintain order and discipline on the campus; . . . .

As the Court observed in Moore v. Student Affairs Committee of Troy State University, *supra* at 730-731:

> It is settled law that the Fourth Amendment does not prohibit reasonable searches when the search is conducted by a superior charged with a responsibility of maintaining discipline and order or of maintaining security.

Military Rule: *United States v. Brown*[14]

The circumstances under which the search took place were briefly as follows: On June 14, 1958, the accused and nine other soldiers, all of whom were on pass, were transported to Community Center 1 on an Army truck. Six or seven of the ten had been suspected for the past four months of using narcotics. The accused's commanding officer, Lieutenant Clark, received information that one of the ten had borrowed $10.00 before going on pass. Included in the group was one individual, not the accused, who reputedly had been "caught" with narcotics but never tried because of a defect in the chain of custody. Acting upon his suspicions, Lieutenant Clark arranged for a search of all ten of the men upon their return. When they returned on the truck, all ten were "apprehended," searched, stripped, and searched again. Sergeant First Class Templeton testified that he found two bottles of heroin (Prosecution Exhibit 1) on the accused . . .

The record shows no basis for any such belief by Lieutenant Clark. He merely suspected several men. This suspicion had con-

14. 10 U.S.C.M.A. 482, 28 C.M.R. 48, 52 (1959).

tinued for a period of four months with some surveillance during that period, yielding no results. The only circumstance which apparently differentiates the evening chosen for the search from any other evening was the information that one of the ten men had borrowed $10.00. As appellate defense counsel contends, if possession of money was to be the deciding factor, the search might better have been held immediately after payday. An apprehension may not be used as a pretext to search for evidence of crime. Nor can an apprehension be validated by what it uncovers.

While there is substantial discretion vested in the commanding officer to order a search of persons and property under his command, consideration of all the circumstances herein make it clear beyond cavil that Lieutenant Clark acted on nothing more than mere suspicion. Reasonable or probable cause was clearly lacking for both the apprehension and the search and, although the military permits certain deviations from civilian practice in the procedures for initiating a search, the substantive rights of the individual and the necessity that probable cause exist therefor remain the same. Unreasonable searches and seizures will not be tolerated. The great importance attached to the fundamental protection of the Constitution against unreasonable searches and seizures requires no elaboration. While we recognize the commanding officer's traditional authority to conduct a search in order to safeguard the security of his command, that issue is not presented here.

The action of Lieutenant Clark here was with utter disregard for the rights of the accused and the others. He acted upon mere suspicion with no factual basis for his action. He ordered a wholesale search of all those in the truck, those "suspected" and those regarded as completely innocent. He ordered that any suspicious objects be seized and turned over to him. The search was general and exploratory in nature and wholly lacking in reasonable cause. Without the evidence obtained as a result of the illegal search, i.e., the bottles of heroin, the prosecution's case must fall.

F. *Pretrial Disclosure*

As every experienced defense counsel knows, few things are more important to an accused person than knowing what evidence the Government has for use against him; who the Government's witnesses will be; and what they have previously said. Prior to June 1, 1957, this area undoubtedly provided the biggest single difference in favor of an accused, between the military and the civilian systems.[15] Despite the

15. *See*, Kent, *The Jencks Case: The Viewpoint of a Military Lawyer*, 45 A.B.A.J. 819 (1959).

decision in *United States v. Jencks*,[16] and the so-called Jencks Act[17] there still remains some considerable difference between the military and civilian rules in this area.

Civilian Examples: *Posey v. United States*[18]

> The appellant did not make any showing of "particularized need" for disclosure of the grand jury minutes and the record clearly indicates the contrary. The trial court did not abuse its discretion in refusing to order the grand jury minutes produced for inspection by the defense.

United States v. Withers[19]

> Three contested requests remain. In request 3, the defendant asks that he be permitted to inspect and copy all written statements concerning himself made by any of his codefendants to the Government. Such statements are not discoverable under Rule 16 of the Federal Rules of Criminal Procedure, United States v. Westmoreland, 41 F.R.D. 419, 427 (S.D. Ind. 1967), or on any other basis, Morgan v. United States, 380 F.2d 686, 698-699 (9th Cir. 1967). Request 3 is therefore denied.
>
> In request 5, defendant Rattet asks for a list of witnesses whom the Government expects to call at trial, and in request 6, for copies of any F.B.I. arrest and conviction records of these witnesses. Neither request is permitted under Rule 16 or [*sic*] on any other basis except by statute in capital cases . . .
>
> Defendant Rattet has moved for an order upon the Government to produce any favorable evidence pursuant to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963), including the criminal records of certain witnesses who may testify against him. As to the latter request, *the Government need not disclose its witnesses prior to trial,* United States v. Manhattan Brush Co., 38 F.D.R. 4, 7 (S.D.N.Y. 1965), and the criminal records of such witnesses are likewise free from pretrial discovery under *Brady* or on any other ground. (Emphasis supplied.)

Military Rule: *Paragraph 45b, Manual for Courts-Martial, United States, 1969, (Rev.), in discussing the duties of the trial counsel (prosecutor),* states:

> Immediately upon receipt of charges referred to him for trial, he will serve a copy of the charge sheet, as received and corrected by him, on the accused and will inform the defense counsel that

16. 353 U.S. 667 (1957).
17. 18 U.S.C. 3500.
18. 416 F.2d 545, 557 (5th Cir. 1969).
19. 303 F. Supp. 641, 645 (N.D. Ill. 1969).

> the copy has been so served. Except as otherwise directed by the convening authority (see, for example, 151b(1) and (3)), *he will permit the defense to examine from time to time any paper accompanying the charges, including the report of investigation* and papers sent with the charges on a rehearing. He will also permit the defense to examine from time to time the order convening the court and all amending orders. *Before trial, he should advise the defense of the probable witnesses to be called by the prosecution,* and the fact that the defense has not been so advised with respect to a witness who appears at the trial may be a ground for a continuance. (Emphasis supplied.)

An interesting illustration of the application of the rule set forth above and that enunciated in United States v. Jencks,[20] may be found in *United States v. Heinel.*[21] The "report of investigation" includes the pretrial hearing conducted under Article 32, Uniform Code of Military Justice[22] which is the military equivalent of the grand jury proceeding.[23] *United States v. Nichols*[24] illustrates this importance.

G. *Speedy Trial*

All accused persons in the United States are entitled to a speedy trial by virtue of either the Sixth and Fourteenth Amendments to the Constitution (civilian) or by Articles 10 and 33, Uniform Code of Military Justice[25] (military). Nevertheless, certain substantial differences remain in terms of the practical approach of the civilian and the military courts.

Civilian Examples: Urquidi v. United States[26]

> Urquidi's sole point is that the court erred in denying his motion to dismiss the indictment because he had been denied a speedy trial . . .
>
> The motion to dismiss was made on the opening day of trial. Counsel claimed that during the six months that had elapsed, Urquidi, who was in jail, was pressured by government agents to assist them by implicating others dealing in narcotics. *No claim was made that the fairness of Urquidi's trial would be affected,*

20. *Supra* note 16.
21. 9 U.S.C.M.A. 259, 26 C.M.R. 39, 41 (1958).
22. 10 U.S.C. 832.
23. *Hearings Before the House Committee on Armed Services,* 81st Cong., 1st Sess. on H.R. 2498, at 997.
24. 8 U.S.C.M.A. 119, 23 C.M.R. 343, 348 (1957).
25. 10 U.S.C. 810, 833.
26. 271 F.2d 654, 655 (6th Cir. 1967).

that counsel's preparation for trial was hampered, that the testimony of any witness was lost, or that anything else prejudicial occurred by reason of the delay. The trial judge pointed out that during the period in question the court was moving to new quarters, that for part of the time the U.S. Attorney was ill, and that the continuances were almost all for the convenience of the court. He also noted that there had been no prior objection. The motion to dismiss was denied.

We find here no deprivation of the constitutional right to a speedy trial in violation of the Sixth Amendment. (Emphasis supplied.)

Falgout v. Colorado[27]

Where the issue of speedy trial has involved the requirement of Article II, Section 16 of the Colorado Constitution, this Court has made it very clear that a speedy public trial is a relative concept depending upon the circumstances of each case and consistent with the court's business, *and the burden is upon the defendant to prove that he has been denied an expeditious trial to his prejudice.* (Emphasis supplied.)

Military Rule: United States v. Brown[28]

Of course, an accused is not automatically entitled to a dismissal of all charges against him. Rather, *the law officer must decide, from all the circumstances, whether the prosecution has proceeded with "reasonable dispatch".* United States v. Callahan, 10 USMCA 156, 27 CMR 230.

In the instant case, the law officer was aware of the date the accused was originally confined, when charges were preferred, referred for trial and served upon the accused. One hundred and eight days had elapsed before the accused was produced before a court-martial for arraignment. Obviously, each successive step was taken only after substantial delay. But, rather than explain these deficiencies, trial counsel, after conceding that the required pretrial steps had taken "a little longer than is desirable," lightly dismissed them with the assertion that he had no knowledge of the circumstances thereof. *The law officer* reflected a similar approach to the problem for he immediately *called upon the accused to establish specific prejudice.* When no further evidence was advanced by the defense, he denied the motion before him. *By these pronouncements he demonstrated his misconception of the effects of Articles 10 and 33. Rather than require the prosecution affirmatively to justify the delays, he called upon the accused to establish*

27. 459 P.2d 572, 577 (Colo. 1959).
28. 10 U.S.C.M.A. 498, 28 C.M.R. 64, 69 (1959).

specific prejudice. This shifting of the burden of proof, or explanation, prevented the establishment of the circumstances of the delays at the trial level—the only satisfactory forum for conducting truly adversary proceedings, and for testing the validity of evidence in the time-honored process of cross-examination. *By this action the law officer curtailed the development of all the circumstances essential to a proper determination of whether or not the lapse of time was due to purposeful or oppressive design on the part of the prosecution or to a lack of reasonable diligence.* (Emphasis supplied.)

II. Trial on the Merits

While the rules of evidence and the requirements for instruction on the law to the triers of fact by the judge are generally similar, there are significant differences between the military and the civilian systems. For one thing, in the military system an accused person is somewhat less dependent upon the skill of his counsel in making appropriate and timely objections to the introduction of evidence and in requests for instructions on special defenses and the defense's theory of the case.

One of the major differences between military and civilian practice, which is difficult to document by case quotations, is that when a case is referred for trial in the military, it is referred to a specific court-martial. The accused is thus put on notice of the name of the military judge, and of the names of the members of the court-martial. Therefore, in making a decision as to whether to ask for trial by a military judge alone, or by the full court-martial, the accused and his counsel have advanced knowledge of the personalities concerned and can make appropriate research into their backgrounds for an informed decision. In civilian practice, however, while the accused normally knows the name of the judge who will preside at his trial, if he were to waive trial by jury, he does not know who would have served on the jury had he demanded trial by jury. Indeed, in some states, even the list of veniremen is kept a closely guarded secret until the time of trial, and is not made known to an accused until after he has made his decision as to whether to ask for trial by judge alone or demand trial by jury. Further, as a practical matter, it is much more difficult for the defense to obtain all of the background of the potential jury members than it is for the defense counsel in the military to obtain information about the background of the named members of the court. In the mili-

tary; therefore, an accused has a much better basis for his decisions with regard to challenges, both peremptory and for cause.

A. *Admission of Hearsay Evidence against an Accused*

Civilian Example: United States v. Shiver[29]

(2) The statement made by Columbus, Georgia, Detective Featherstone that his investigation revealed that the car was stolen out of Miami Beach, Florida, was admitted without objection, though it is pure hearsay, since he could not have known the facts of his own knowledge. *This testimony presents the problem of considering the weight to be given to hearsay evidence admitted without objection.*

"The general rule is that such hearsay evidence may properly be considered in determining the facts, but the authorities are in disagreement as to the weight to be given it. *The rule followed in this circuit is that such evidence is to be given its natural probative effect as if it were in law admissible.* Daniel v. United States, 234 F.2d 102 (5 Cir. 1956). (Emphasis supplied.)

*Military Rule: Paragraph 139*a, *Manual for Courts-Martial, United States, 1969 (Rev.).*

Hearsay may not be recited or otherwise introduced in evidence, and it *does not become competent evidence by reason of a mere failure to object to its reception in evidence.* (Emphasis supplied)

B. *Inquiry by the Court into Voluntariness of a Pretrial Confesssion*

Civilian Example: Moreno v. Beto[30]

A trial court is not in error for failing to inquire *sua sponte* into voluntariness, where that issue is not raised.

Military Rules: Paragraph 140a, Manual for Courts-Martial, United States, 1969 (Rev.).

The admissibility of a confession or admission of the accused must be established by an affirmative showing that it was voluntary, unless the defense expressly contests to the omission of such a showing.

Paragraphs 5-1 and 5-2, DA Pam 27-9, Military Judges Guide, dated 19 May 1969.

5-1. General. This section applies to any pretrial statement made by an accused regardless of whether the statement is inculpatory, exculpatory, an admission, or confession. To be admissible against

29. 414 F.2d 461, 463 (5th Cir. 1969).
30. 415 F.2d 154, 158 (5th Cir. 1969).

the accused, a pretrial statement must be voluntary. A statement is not voluntary if it has been obtained or induced by use of a threat, promise, inducement, duress, or physical or mental abuse amounting to coercion, unlawful influence, or unlawful inducement. Furthermore, a statement is not voluntary unless, where applicable, it has been obtained in accordance with the procedural requirements set forth in Article 31(b), UCMJ, Miranda v. Arizona, 384 US 436, 86 S.Ct. 1602 (1966), United States v. Tempia, 16 USCMA 629, 37 CMR 249 (1967), and subsequent cases. When an accused or suspect is deprived of his freedom of action in any significant way (e.g., questioned after being ordered to report), during the course of an investigation conducted with some color of officiality, all warning and waiver requirements apply to statements made by him in response to any interrogation. In this regard, Title II of the "Omnibus Crime Control and Safe Streets Act of 1968" purporting to prescribe rules for admissibility in Federal courts, has no applicability to trials by courts-martial.

5-2. Admissibility. *A pretrial statement offered by the prosecution cannot be admitted into evidence unless the military judge is convinced that the statement, if shown to have been made by the accused, was made voluntarily.* Although court members are apprised of admissibility, the military judge's specific factual findings should be announced only during an out-of-court hearing or side bar conference. Except when the defense expressly consents to the omission of such a showing, and to admissibility of the statement, *the burden is on the prosecution to prove the voluntariness of such a statement. Failure to object does not constitute consent.* (Emphasis supplied)

C. *Impact of Character Evidence Introduced on Behalf of an Accused*

Civilian Example:

Extract from lecture by Judge John J. Dunn, Trial Judge, Denver County Court. Sample instruction distributed at lecture, 24 November 1969 at University of Denver Law School.

If you believe from the evidence that at the time this charge was made against the defendant he was a man of good character, you should take such good character into consideration in passing upon the question of his guilt or innocence.

This evidence is as proper for your consideration as any other evidence in the case; but the rule of law is, that if the jury, upon consideration of all the evidence in the case, are [*sic*] satisfied beyond a reasonable doubt of the guilt of the defendant, they must so find, notwithstanding his good character.

Military Rule: Paragraph 9-20, DA Pam 27-9, Military Judges Guide, dated 1 May 1969.

9-20. Character Evidence. a. Evidence of Accused's Good Character Adduced to Show Probability of Innocence. If evidence of the accused's good character has been introduced as bearing on the general issue of guilt or innocence, the court should ordinarily be instructed on its effect, and must be so instructed upon request (except in the rare case when an accused has judicially admitted guilt). Each instruction should be carefully tailored with due regard to the particular facts of a case and any specific proposed instructions. The court may be instructed substantially as follows:

"To show the probability of his innocence, the defense in this case has introduced evidence of the accused's good character including but not limited to (evidence of his military record and standing as shown by efficiency reports) (evidence of his general character as a moral, well-conducted person and law-abiding citizen). In rebuttal, the prosecution has introduced evidence of his bad character including but not limited to (specify rebuttal evidence within the general scope of the defense character evidence)). The law recognizes that a person of good character is not as likely to commit an offense as is a person of bad character. Evidence of the accused's good character, therefore, is admissible as tending to show that it is improbable that the accused committed the offense(s) charged. *Considered and weighed alone, or in connection with the presumption of innocence and all the other evidence in the case, this evidence of the accused's good character may be sufficient to cause a reasonable doubt to remain as to his guilt, thereby warranting an acquittal.* On the other hand, the inference of innocence to be drawn from such evidence may be more than offset (by the prosecution's evidence of the accused's bad character, and) by the other evidence in the case tending to establish the accused's guilt. As members of the court, the final determination as to the weight to be accorded this and all other evidence in the case rests solely with you." (Emphasis supplied.)

D. *Impact of Accomplice Testimony and Evidence of Uncharged Misconduct*

Civilian Examples: United States v. Johnson[31]

The record is clear that appellant made no request of the trial judge to instruct the jury as to the manner in which it should treat the testimony of an accomplice, or for what purpose it should con-

31. 415 F.2d 653, 655 (9th Cir. 1969).

sider evidence of prior uncharged offenses. No objection was made by appellant to the failure of the district court to instruct the jury on either one of said subjects as required by Rule 30 of the Federal Rules of Criminal Procedure. In these circumstances, appellant must establish that the trial judge's failure to instruct on such subjects, *sua sponte*, constitutes plain error. Federal Rules of Criminal Procedure, Rule 52(b).

State v. Oland[32]

Defendant assigns as error the court's failure to instruct the jury that the testimony of accomplices should be viewed with caution. *We need not consider whether such an instruction should have been given, because there was no request for it.* (Emphasis supplied.)

Military Rules: Paragraph 9-22, DA Pam 27-9, Military Judges Guide, dated 19 May 1969.

Instructions on accomplice testimony should be given whenever the evidence tends to indicate that a witness adverse to the accused was culpably involved in a crime with which the accused is charged. In an appropriate case, when such instructions are requested, *or* when the accomplice is a principal witness for the proscution, *such instructions must be given.* (Emphasis supplied.)[33]

Paragraph 9-31 of the above.

When evidence of other offenses or acts of misconduct of the accused is properly admissible as an exception to the general rule excluding such evidence, the following limiting instruction *must be given sua sponte.* (Emphasis supplied.)

E. *The Defense of Entrapment*

Civilian Example: New Mexico v. Carrillo[34]

The jury was instructed that the State had the burden of proving, beyond a reasonable doubt, that the sale had occurred. Defendant asserts the instruction is incomplete. He claims the instruction should also have told the jury that the State must prove beyond a reasonable doubt that entrapment did not occur. Defendant neither submitted any requested instruction nor objected to the instruction given. The asserted error has not been preserved for review.

32. Or. App., 461 P.2d 277, 280 (1969).
33. *See also*, United States v. Lell, 16 U.S.C.M.A. 161, 36 C.M.R. 317 (1966); United States v. Stephen, 15 U.S.C.M.A. 314, 35 C.M.R. 286 (1965).
34. 80 N.M. 697, 460 P.2d 62, 64 (1969).

Military Rule: Paragraph 6-8, DA Pam 27-9, Military Judges Guide, dated 19 May 1969.

Entrapment. When an issue of entrapment is raised, the military judge must instruct, *sua sponte,* on this defense. Each instruction should be carefully tailored with due regard to the particular facts of a case and any specific proposed instructions submitted by counsel.

F. *Mental Condition of the Accused—Irresistible Impulse*[35]

Civilian Example: State v. Wahrlich[36]

If we assume that which the jury was not required to believe, that the appellant's self-control was overpowered, this would not constitute a defense to the charge. Irresistible impulse is not a legal defense to a criminal charge in Arizona.

Military Rule: United States v. Trede[37]

[W]e are concerned here only with the type of insanity which is described by the witnesses as "irresistible impulse." There are a good many jurisdictions which have refused to recognize that mental condition as a defense to a crime. . . Were this a case of first impression we might be inclined to follow those authorities. However, it is not, and this particular type of mental disease has long been a defense to a crime under military law provided it is a result of a diseased or deranged mind. Winthrop's Military Law and Precedents, 2d ed., Reprint 1920, page 294.

G. *Voluntary Intoxication (by Drugs or Alcohol)*

Civilian Example: State v. Roisland[38]

The defendant argues that the trial judge should not have given the following instruction:

Voluntary consumption of drugs is not an excuse for a crime. No act of a defendant in a voluntary drugged state is less criminal because of his condition if it merely makes him do things he would not do otherwise. You may consider consumption of drugs in determining the purpose, motive or intent with which the defendant may have acted, but a voluntary drugged state is not a defense if it does not interfere with the defendant's ability to form the intent to commit the crime. *To be available as a defense a voluntary drugged*

35. See PERKINS, CRIMINAL LAW 868-875 (2d ed. 1969) for an excellent discussion.
36. 105 Ariz. 102, 459 P.2d 727, 729 (1969).
37. 2 U.S.C.M.A. 581, 10 C.M.R. 79, 83 (1953).
38. Or. App., 459 P.2d 555, 558 (1969).

state must result in a diseased mind, or some other form of insanity. The burden is on the defendant to prove that defense by a preponderance of the evidence . . . (Emphasis supplied.) The instruction was entirely proper.

Military Rules: Paragraph 6-12, DA Pam 27-9, Military Judges Guide, dated 19 May 1969.

6-12. Voluntary Intoxication. Because of the complex problems that may arise in cases involving the effect of voluntary drunkenness, great care should be exercised in drafting proper instructions. The military judge must instruct, *sua sponte,* whenever voluntary drunkenness is an issue in a case involving premeditation, specific intent, or knowledge. Each instruction should be carefully tailored with due regard to the particular facts of a case and any specific proposed instructions submitted by counsel.

Note 1. The following instruction is designed for situations where due to voluntary drunkenness, an accused may not have premeditated, entertained specific intent, or possessed knowledge requisite to the perpetration of an alleged offense:

The court is advised that an issue concerning voluntary drunkenness has been raised by the evidence with respect to the offense(s) of (specify the relevant offense(s)). With reference to the evidence tending to show that the accused was intoxicated at the time of the alleged offense(s) of (specify the relevant offense(s)), you are advised that you may consider evidence of voluntary drunkenness in determining whether the accused had sufficient mental capacity to and did in fact entertain the (premeditated design to kill) (specific intent) (knowledge) involved in the offense of (premeditated murder) (willful disobedience) (larceny) (attempted _____) (_____). (The specific intent involved in the offense of willful disobedience is a specific intent to defy authority.) (The (specific intent) (knowledge) involved in the offense of (specify the offense) is (a specific intent to _____) (knowledge that _____).) In determining this issue, you must consider all relevant facts and circumstance including but not limited to (specify significant evidentiary factors bearing upon the issue and indicate the respective contentions of counsel for both sides).

A person is drunk who is under the influence of an intoxicant so that the use of his faculties is materially impaired. The fact that a person was drunk at the time he allegedly committed an offense does not necessarily show that he was deprived of his reasoning ability, for a person may be drunk and at the same time be aware of his acts and their probable consequences. The basic question raised by the evidence of voluntary drunkenness and presented for your determination is whether the accused's intoxication affected

his mental faculties to such a degree as to raise a reasonable doubt that he (entertained a (premeditated design to kill) (specific intent to _____)) (knew that _____.)

The burden of proof is upon the Government to establish the guilt of the accused by legal and competent evidence beyond a reasonable doubt. Consequently, unless you are satisfied beyond reasonable doubt that the accused was mentally capable of (entertaining the (premeditated design to kill) (specific intent)) (having the knowledge) involved in the offense of (premeditated murder) (_____), and did in fact have such state of mind at the time of the alleged offense, you must find him not guilty of that offense. (Emphasis supplied.)

United States v. Miller[39]

Furthermore, the possible effect of intoxication with regard even to the crime of failure to obey, and certainly as to disrespect toward a superior officer should have been spelled out. In each of these offenses it is essential that the accused have *known* that the individual whom he disobeyed, or toward whom he evidenced disrespect, was in fact a superior officer. Manual for Courts-Martial, supra paragraphs 168, 169b. If he was intoxicated to the point of ambulatory stupefaction, it might well be that he did not possess this requisite knowledge. We have not all overlooked the failure of defense counsel at the trial to request such instructions. However, *where affirmative defenses of this character are so closely related to the elements of the offense or offenses charged, and are fairly raised by the evidence, the law officer is under an independent duty to give necessary and appropriate instructions, and a defense failure to request will not be held to constitute waiver.* (Emphasis supplied.)

H. *The Theory of the Case*

Civilian Example: Oregon v. Evans[40]

(2) When a defendant seeks to have the court instruct the jury concerning the defendant's theory of the case, it is his duty to request an instruction which is well founded in law. State v. Zusman, Or. App., 460 P.2d 872 (1969); State v. Patterson, supra. Since the requested instruction did not accurately state the law, it was not error for the trial court to refuse to give it.

39. 2 U.S.C.M.A. 194, 7 C.M.R. 70, 71 (1953).
40. Or. App., 460 P.2d 1021, 1022 (1969).

Military Rules: United States v. Smith[41]

> Thus it is required, inter alia, that instructions be given at trial not only on the elements of the offense but, in addition, on all issues, defenses, and lesser offenses raised reasonably by the evidence. The court members must be furnished with the law pertinent to the facts developed in order that they may resolve the issues before them. And, of course, an abstract statement of law may not suffice to insure intelligent determination of the questions posed.
>
> Lest there be room for any uncertainty in the mind of anyone, therefore, we deem it appropriate to elaborate on the sense in which this Court has used the terms "tailor," and "tailoring." What is contemplated is the affirmative submission of the respective theories, both of the Government and of the accused on trial, to the triers of fact, with lucid guideposts, to the end that they may knowledgeably apply the law to the facts as they find them.

United States v. Condron[42]

> In the absence of a clear and unquestioned showing of waiver, we are governed by the proposition that the basic responsibility for giving proper instructions rests upon the law officer.

I. *The Requirement for Jury Unanimity*

Much has been made of the fact that in a civilian jury a unanimous vote is required to produce a verdict of guilty. This is correct, but what is frequently forgotten is the fact that it also requires a unanimous vote to produce an acquittal. One hold-out on the jury can prevent a verdict in either direction.[43] This rule is so well known as not to require a citation of a civilian example.

Military Rule: Paragraph 74d(3), Manual for Courts-Martial, United States, 1969 (Rev.).

> *No* person may be convicted of an offense for which the death penalty is made mandatory by law (see, for example, Art. 106), except by the concurrence of all the members of the court-martial present at the time the vote is taken. No person may be convicted of any other offense, when voting is required (74d(1)), except by the concurrence of two thirds of the members present at the time the vote is taken (Art. 52). If, in computing the number of votes

41. 13 U.S.C.M.A. 471, 33 C.M.R. 3, 6 (1963).
42. 17 U.S.C.M.A. 367, 38 C.M.R. 165, 167 (1968).
43. For an example of the problems this has caused to civilian trial judges, see, e.g., United States v. Winn, 415 F.2d. 135 (10th Cir. 1969).

required, a fraction results, the fraction will 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 session. The court may also reconsider any finding of guilty on its own motion at any time before it has first announced the sentence in the case. Any member of a court may propose that a finding be reconsidered. If a reballot is proposed by any member as to a finding of guilty of an offense for which the death penalty is mandatory by law, an additional ballot shall be taken immediately. Otherwise, the question shall be determined on secret written ballot, and a reballot shall be taken on a prior not guilty finding when a majority of the members vote in favor thereof or on a prior guilty finding if more than one-third of the members favor reballoting. (Emphasis supplied.)

III. The Sentencing Process

The major difference between the military and the civilian tribunal in the sentencing process is that in the military, this process is always a result of an adversary proceeding in which every bit of evidence to be considered by the court in imposing sentence is made known to the accused and his counsel, and is subject to their objection, rebuttal or explanation. This is much less likely to be true in the civilian community.[44]

A. *Impact of a Guilty Plea on Sentence Procedures*

Civilian Examples: Parish v. Beto[45]

Second, there is no federal constitutional necessity for a jury to set punishment on a guilty plea. A jury was empaneled only because one was required at the time by Texas law in all capital cases. In essence, *the facts of this case disclose that appellant entered a plea of guilty and received the sentence agreed upon as a result of plea bargaining.* We have held that this is constitutionally permissible. (Emphasis supplied.)

New Mexico v. Maimona[46]

As to the first three of his claims, this court has held that a *voluntary plea of guilty waives the right to preliminary hearing, right to counsel and the right to aid with defense.* (Emphasis supplied.)

44. Steele, *Counsel Can Count in Federal Sentencing*, 56 A.B.A.J. 37 (1970).
45. 414 F.2d 767, 772 (5th Cir. 1969).
46. 80 N.M. 562, 458 P.2d 814, 815 (1969).

Military Rule: United States v. Allen[47]

> Under the Uniform Code of Military Justice the accused's guilt and sentence must be determined by the court-martial. To avoid the strain and the problems of a trial on the merits, the accused can plead guilty. *If he enters into a pretrial agreement in regard to his plea with the convening authority, the agreement cannot transform the trial into an empty ritual . . . .* True, the plea disposes of the necessity for the presentation of evidence of guilt and it eliminates the requirement of formal instructions to the court-martial . . . But there is still the vital question of sentence. Speaking of the importance of this question, we said in United States v. Brasher, 2 USCMA 50, 52, 6 CMR 50: "In a special and peculiar sense the sentence of the law for adjudged misconduct . . . is the product of a trial court. It alone, of all agencies of the law, is authorized to 'adjudge' the law's penalty."
>
> The sentence proceeding is an integral part of the court-martial trial. United States v. Strand, 6 USCMA 297, 306, 20 CMR 13. *Plainly, therefore, counsel's duty to represent the accused does not end with the findings. Remaining for determination is the question of the accused's liberty, property, social standing—in fact, his whole future. And his lawyer is charged with the substantial responsibility of appealing on his behalf to the conscience of the court.* (Emphasis supplied.)

B. *One-Step v. Two-Step Procedures*

In certain civilian tribunals, the jury also determines the sentence. Hence, it may hear evidence which is relevant only to sentencing and which, indeed, may be very prejudicial to the accused on the merits of the case, before the jury has decided the question of guilt or innocence. The military's is a two-step process.

Civilian Example: Cook v. Smith[48]

> As Georgia courts construe this statute, *it authorizes submission to a jury of proof of a prior conviction during the trial and before determination of a defendant's guilt.* The appellate courts of Georgia have held that this procedure is not a violation of the constitutional rights of the accused. (Emphasis supplied.)

Military Rule: Paragraph 75b(2), Manual for Courts-Martial, United States, 1969 (Rev.).

This paragraph provides for the pre-sentencing procedure, *after a court-martial has reached findings of guilty.* At this point:

47. 8 U.S.C.M.A. 504, 25 C.M.R. 8, 11 (1957).
48. 303 F. Supp. 90, 92 (S.D. Ga. 1969).

The trial counsel will next introduce evidence of any previous convictions of the accused by courts-martial. This evidence is not limited to offenses similar to the one of which the accused stands convicted. The evidence must, however, relate to offenses committed during the six years next preceding the commission of any offense of which the accused stands convicted.

C. *Consideration by the Court of Ex Parte Investigations into the Background of the Accused*

Civilian Examples: Williams v. New York[49]

A recent manifestation of the historical latitude allowed sentencing judges appears in Rule 32 of the Federal Rules of Criminal Procedure, 18 U.S.C.A. That rule provides for consideration by federal judges of reports made by probation officers containing information about a convicted defendant, including such information "as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant . . ."

We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues. (Emphasis supplied.)

William M. Calvert's article in *The Free Press*[50]

The judge's first consideration is that the public be protected. The 18-year-old boy who pled guilty to disorderly person was shown in the pre-sentence investigation report to have been involved rather extensively with dangerous drugs, and there was strong indication that the boy had progressed from the usage to the selling of drugs to other younger people, and there had been numerous reports to the Sheriff's Office that the defendant was a supplier. Under these circumstances, probation would not protect the public, and while the alternative of a sentence in the county jail was available to the judge, the county jail has no program for young offenders.

49. 337 U.S. 241 (1949).

50. Calvert, *Voice of the People*, THE FREE PRESS, Colorado Springs, p. 4, November 5, 1969.

Lantz v. United States[51]

(5) The court below stated that it did have the benefit of full and complete pre-sentence report. However, even if the district court had proceeded without the report, that would not be such error which would necessitate the vacation of the sentence. United States v. Deas, 5th Cir. 1969, 413 F.2d 1371 (June 13, 1969).

State of Utah v. Kelbach[52]

(1,2) The failure of the trial court to ask a defendant, represented by an attorney, whether he has anything to say before sentence is imposed (allocution), does not in itself constitute constitutional error. *The Due Process Clause of the Fourteenth Amendment does not require a judge to have hearings and to give a convicted person an opportunity to participate therein prior to the determination of the sentence to be imposed.* (Emphasis supplied.)

State v. Scott[53]

The trial court's wide discretion to sentence a defendant is not subject to interference by an appellate court unless it is clearly demonstrated that the power has been abused . . . . It is not inappropriate for the trial court to impose a punishment justified by the general character of both the offense and of the party convicted . . . It would appear that the major thrust of *defendant's complaint about the sentences imposed is the fact that he was not apprised, prior to sentencing, of his brother's admissions.* In Arizona, we have adopted a "middle position" as to defendant's right to inspect a pre-sentence report, leaving it to the discretion of the trial court. Our Supreme Court therein stated:

"And there is a middle ground in which the court may give defendant's lawyer some facts concerning prior crimes, in order that he might have an opportunity to rebut or explain them . . ."

However, if the information is such that the court, in its discretion, feels that the defendant should have the right to rebut or explain it the information should be revealed. (Emphasis supplied.)

Military Rule:

The military rule, as set forth in Paragraph 75, Manual for Courts-Martial, United States, 1969 (Rev.), makes it clear that only very limited types of evidence may be presented to the court by the prosecu-

51. 417 F.2d 329, 330 (5th Cir. 1969).
52. 23 Utah 2d 231, 461 P.2d 297, 299 (1969).
53. 11 Ariz. App. 68, 461 P.2d 712, 715 (1969).

tion for its consideration on sentencing, and sets forth the absolute right of the defense to be present to submit evidence and argument and to object, explain, or rebut anything presented by the prosecution. An excellent example of the enforcement of these provisions may be found in *United States v. Manos*:[54]

> We are, however, concerned with impressing on all concerned the undoubted right of the accused to secure the attendance of witnesses in his own behalf; the need for seriously considering the request; and taking necessary measures to comply therewith if such can be done without manifest injury to the service. That is what we meant in *Sweeney,* supra, in speaking of weighing the relative responsibilities of the parties against the equities of the situation.
>
> These considerations apply equally to witnesses in extenuation and mitigation. In many cases, as here, the Government can expect an easy conviction either through pleas of guilty or presence of incontestable proof. The accused's only hope in the trial is to mitigate his punishment by reference to his former good record and service. This may be done most effectively, as defense counsel noted, by the appearance and testimony of his superiors. The situation is aggravated from his standpoint when he is tried as a transient and is separated from those familiar with his background and abilities. That is what occurred here, and it epitomized the need for due attention to obtaining the presence of the witnesses he requested or taking their depositions.

IV. Post-Trial

The greatest of practical differences between the military and the civilian systems, which are of benefit to an accused, are in the post-trial phases with regard to review for sufficiency of the evidence, appellate review of sentences, and sentence limitations upon a rehearing.

A. *Release Pending Appeal*

The Bail Reform Act of 1966[55] has no applicability to the military.[56] Nor was it intended by the Congress that this act should apply to the military.[57] The military does, however, have a rule similar to that set forth in Rule 46(a)(2), FRCP, which provides for release on personal

54. 17 U.S.C.M.A. 10, 37 C.M.R. 274, 279 (1967).
55. 18 U.S.C. 3146, et seq.
56. Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399, 403 (1967).
57. *See,* S. Rep. No. 750, September 16, 1965, and H. R. No. 1541, May 18, 1966 on S. 1357 and H.R. 10915, respectively.

recognizance, but provides that each case will be decided upon its own merits.[58] Indeed, post-trial bail has not been considered a matter of right under the common law and is primarily a creature of statute where it exists.

Military Rule: Paragraph 21d, Manual for Courts-Martial, United States, 1969 (Rev.).

> 21. ARREST AND CONFINEMENT . . . d. Responsibility for restraint after trial. Upon notification from a trial counsel of the result of a trial (44e), a commanding officer will take prompt and appropriate action with respect to the restraint of the person tried. This action, depending on the circumstances, may involve the immediate release of the person from any restraint pending final action on the case. See 20d(1) and 88f.

B. *Appellate Consideration of the Sufficiency of the Evidence to Sustain a Conviction*

Civilian Examples: James v. United States[59]

> The evidence is to be viewed in the light most favorable to the jury verdict.

State v. O'Neal[60]

> The function of this court, when considering the sufficiency of circumstantial evidence to sustain a criminal conviction, is limited to ascertaining whether there was a basis in the evidence for a reasonable inference of guilt.

Military Rules: 10 USC 864, Art. 64, Approval by the Convening Authority.

> In acting on the findings and sentence of a court-martial, the convening authority may approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved. Unless he indicates otherwise, approval of the sentence is approval of the findings and sentence.

Paragraph 87a(3), Manual for Courts-Martial, United States, 1969 (Rev.).

> Sufficiency of the evidence. In the course of taking action upon a record of trial, the convening authority is empowered to weigh

58. *See*, United States v. Williams, 253 F.2d 144, 148 (7th Cir. 1958).
59. 416 F.2d 467, 470 (5th Cir. 1969).
60. 204 Kan. 226, 461 P.2d 801, 803 (1969).

evidence, judge the credibility of witnesses, and determine controverted questions of fact. In considering the evidence he should recognize that the trial court saw and heard the witnesses, and he will be guided by the principles stated in 74a and chapter XXVII. *Unless he determines that a finding of guilty was established beyond a reasonable doubt by the competent evidence of record, he must disapprove the finding.* (Emphasis supplied.)

10 USC 866, Art. 66, Review by Court of Military Review.

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, *it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.* (Emphasis supplied.)

C. *Sentence Review*

Civilian Example: United States v. Coffey[61]

In the federal courts, authority once existed by statute for sentence review as part of the appellate process. But revision of the authorizing statute without mention of the subject led courts subsequently to hold that they lack power to review the merits of a sentence.

Military Rules: Paragraph 88, Manual for Courts-Martial, United States, 1969 (Rev.).

POWERS OF THE CONVENING AUTHORITY WITH RESPECT TO THE SENTENCE. a. General. The convening authority has the power to disapprove a legal sentence in whole or in part, as well as the power to reduce the sentence in quality and quantity and to change a punishment to one of a different nature, so long as its severity is not increased. However, neither the convening authority nor any other authority is authorized to increase the punishment imposed by a court-martial. . . .

The disapproval of a sentence nullifies it as a basis for punishment; . . .

The sentence approved should be that which is warranted by the circumstances of the offense and the previous record of the accused. Appropriate action should be taken to approve a less severe

61. 415 F.2d 119, 120 (10th Cir. 1969).

sentence when the sentence, though legal, appears unnecessarily severe. In approving sentences, consideration should be given to all factors, including the possibility of rehabilitation as well as the possible deterrent effect.

Paragraph 100, Manual for Courts-Martial, United States, 1969 (Rev.).

100. REVIEW BY THE COURT OF MILITARY REVIEW. . . . In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by proper authority. It may affirm only such findings of guilty or such part of a finding of guilty as includes an included offense, and the sentence or such part of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. *It has generally the same powers with respect to modification of a sentence as does the convening authority.* (Emphasis supplied.)

10 USC 874. Art. 74. Remission and suspension.

(a) The Secretary concerned and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the President. (b) The Secretary concerned may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

D. *Permissible Sentences on Retrial*[62]

Civilian Examples: United States v. Kienlen[63]

In North Carolina v. Pearce, 395 U.S. 711 (1969), *the Court held that a more severe sentence on retrial was constitutionally permissible* provided that, "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." 395 U.S. at 726.

On his original guilty plea, Kienlen was sentenced to 12 years imprisonment subject to parole under 18 U.S.C. § 4208(a)(2). On the jury verdict, the judge imposed a sentence of 18 years. In imposing this sentence the trial judge, as if anticipating Pearce, observed:

I certainly gained the impression (at the trial) and came to believe and now believe, and largely this is from the testimony of the defendant's witnesses, his mother and his former wife, that this

62. For an in-depth discussion of this problem, see, Ashman, *The Prisoner's Dilemma: Harsher Punishment Upon Retrial,* 55 A.B.A.J. 928 (1969).
63. 415 F.2d 557, 559 (10th Cir. 1969).

defendant is a brutal, assaultive type, that this information, if I had known it—I don't want to say that there wasn't any indication of that in the earlier pre-sentence report, but to read something in a cold pre-sentence report and to hear the witness, one by deposition and the other testifying from the stand, together with all of the other information that has come to me since the original sentence was imposed, I have come to the conclusion that the sentence imposed on May 27, 1966 . . . was a lesser sentence than this defendant deserved, so the sentence to be imposed today will be a greater sentence. (Emphasis supplied.)

Lemieux v. Robbins[64]

We realize that if a defendant chooses a district court trial he may thereafter be reluctant to seek correction of any errors committed therein if to do so he must risk a sentence he considers favorable. In this sense the state has "chilled" his exercise of appeal. However, the "right" to appeal is by no means an absolute one. Indeed, the Supreme Court has never held that a state must establish channels of appellate review, only that once established, the state must refrain from placing unreasonable restrictions on access. But even assuming that there is a constitutional right to some sort of post-conviction review, see Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L.J. 606, 613 & n.25 (1965), procedures which merely "chill" this right must be tolerated if they support legitimate state objectives and are fair and reasonable.

Military Rules: Paragraph 81d, Manual for Courts-Martial, United States, 1969 (Rev.).

Offenses on which a rehearing or new trial is held shall not be the basis for punishment in excess of or more severe than the legal sentence upon a previous hearing or trial, as ultimately reduced by the convening or other proper authority when any such action has been taken. Thus, if the sentence in the previous proceeding to dishonorable discharge, confinement at hard labor for three years, and total forfeitures was modified by a convening or other proper authority to bad-conduct discharge, confinement at hard labor for two years, and total forfeitures, based upon considerations of appropriateness or clemency, the sentence as modified is the most severe which can be predicated on findings of guilty of the reheard offenses. (Emphasis supplied.)

64. 414 F.2d 353, 355 (1st Cir. 1969).

United States v. Zimmerman[65]

> In military judicial procedure automatic considerations by a board of review is provided. Uniform Code of Military Justice, Article 66; Manual for Courts-Martial, United States, 1951, paragraph 100. ***(A)ction by a board of review is always taken on behalf of an accused and in his interest. Literally he can never be prejudiced by this appellate review—for on retrial, if any, he cannot be tried for an offense greater than that charged at the first trial, nor can he receive a sentence greater than that adjudged at the first trial. Uniform Code, supra, Article 63, 50 USC § 650; Manual for Courts-Martial, United States, 1951, paragraph 92; cf. United States v. Padilla and Jacobs (No. 400), _____ USCMA _____, 5 CMR 31, decided August 19, 1952 . . .
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> The provision for automatic review simply constitutes the device adopted by Congress for insuring that no man may stand convicted on an inadequate record.

V. Conclusion

Let us consider the words of Mr. Justice Douglas, speaking for the Supreme Court in *O'Callahan v. Parker*.[66] "A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while the military trial is marked by the age-old manifest destiny of retributive justice."

The reader may best judge for himself the accuracy of this statement.

65. 2 U.S.C.M.A. 12, 6 C.M.R. 12, 20 (1952).
66. *Supra* note 1.