1957-05

Depositions in courts-martial.

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The Judge Advocate General's School, 1957.

https://hdl.handle.net/10945/24650

DEPOSITIONS IN COURTS-MARTIAL

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THE JUDGE ADVOCATE GENERAL'S SCHOOL

Charlottesville, Virginia 6 May 1957

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DEPOSITIONS IN COURTS-MARTIAL

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SCOPE

A study of the constitutional and statutory basis for the use of depositions in courts-martial; and a review and examination of the leading military cases in which depositions have been properly or improperly employed by the prosecution.

"Another principle of the law of evidence embodied in the constitutional limitations is that the defendant must be confronted with the witnesses who testify against him".

William Howard Taft

"...I should be afraid to lay down a rule which would deprive a prisoner of the advantage of having a witness for the prosecution against him examined and cross-examined before the jury, upon every matter that may be material to his defense".

Mr. Justice Harlan

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CHAPTER I

DEPOSITIONS

INTRODUCTION

In the opening paragraph of an article comparing federal and military criminal procedure, Judge George W. Latimer of the United States Court of Military Appeals wrote:[1]

> "Because many members of the legal profession have a mistaken belief that the representation of clients before military courts requires specialized knowledge of military law and appellate proceedings, and the employment of courtroom tactics and techniques different from those employed in civilian courts, they hesitate to represent servicemen and servicewomen."

While it may be literally correct to say that counsel defending cases before courts-martial require no specialized knowledge of military law, it must be conceded that such knowledge---particularly of the law governing the use of depositions in courts-martial ---could prove very useful to either civilian or military counsel appearing before military tribunals.

Although Congress, in enacting the Uniform Code of

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[1]Latimer, A Comparative Analysis of Federal and Military Procedure, 29 Temple L. Q. 1 (1955).

Military Justice,[2] added certain civilian characteristics to military procedure, there are still many dissimilarities between military and federal practice and procedure. Article 49, UCMJ[3], permits depositions to be used in military procedure differently than they may be used in criminal trials in federal court. Because of this difference, it may prove worthwhile to examine the law and case holdings on the subject.

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[2]The Uniform Code of Military Justice has been revised, codified, and enacted into law as Chapter 47, Title 10, United States Code, secs. 801-940. Although certain articles of the Uniform Code of Military Justice have been restated in Title 10, they have not been substantively changed. Hereinafter, the Uniform Code of Military Justice will be referred to in the text as the Code, and will be cited by article as UCMJ. When statutory provisions are quoted, the language will be that of the Code.

[3]UCMJ, Art. 49 provides: "(a) At any time after charges have been signed as provided in article 30, any party may take oral or written depositions unless an authority competent to convene a court-martial for the trial of such charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate officers to represent the prosecution and the defense and may authorize such officers to take the deposition of any witness.

(b) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

(c) Depositions may be taken before and authenicated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

(d) A duly authenicated deposition taken upon reasonable notice to the other party, so far as otherwise admissible under the rules of evidence, may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears--

(1) that the witness resides or is beyond the State,

Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing; or

(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(3) that the present whereabouts of the witness is unknown.

(e) Subject to the requirements of subdivision (d) of this article, testimony by deposition may be adduced by the defense in capital cases.

(f) Subject to the requirements of subdivision (d) of this article, a deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the convening authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial."

CHAPTER II

CONSTITUTIONAL AND STATUTORY BASIS FOR THE USE OF DEPOSITIONS IN COURTS-MARTIAL

It is well settled that the sixth amendment to the United States Constitution guarantees to persons prosecuted in federal courts the right to be confronted with the witness against him.[4] It is also generally agreed that the right of confrontation is essentially the right of cross-examination[5], and that cross-examination "cannot be had except by the direct and personal putting of questions and obtaining immediate answers".[6] The sixth amendment, which came into force December 15, 1791, did not originate the right of confrontation, but it preserved to every individual the right of confrontation he possessed at the time it was adopted, that is, it preserved the right of seeing the witness against him face to face, and of subjecting him to the ordeal of cross-examination[7].

Military authorities, however, historically have

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[4]Orfield, Criminal Procedure from Arrest to Appeal, (1947) p. 325. "This guarantee serves a real purpose. Witnesses are more disposed to talk freely and untruthfully in the absence of the defendent."

[5]Wigmore, Evidence (3d Ed., 1940), sec. 1395.

[6]Ibid.

[7]Mattox V. United States, 156 U.S. 237 (1895); Salinger v. United States, 272 U.S. 542 (1926).

maintained that military persons do not have the right of personal confrontation when tried before military courts-martial.[8] This position finds support in Ex parte Milligan,[9] a case in which the Supreme Court said that neither the fifth or sixth amendments abridged the power of Congress to provide for trial and punishment by military courts, and "that the power of Congress in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment."

In the past, depositions were not permitted to be read in evidence by the prosecution in criminal cases in federal courts on the grounds that such practice would violate a defendant's constitutional right to confront the witness against him[10]. Today, the use of depositions by the prosecution is excluded by Rule 15, Federal Rules of Criminal Procedure, which permits depositions to be taken only upon the motion of the defendant and then only for good cause when the court determines that a failure of justice will result if permission

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[8]Winthrop, Military Law and Precedents (2d Ed., 1920 reprint) 287 n. 27 where it is said that the right to be confronted by the witness against him has reference only to criminal cases in federal civil courts and has no application to trial by court-martial.

[9]Ex parte Milligan, 4 Wall (71 U.S.) 123 (1867).

[10]In Motes v. United States, 178 U.S. 458 (1900) the Court said, "We are of the opinion that the admission of Tayler's statement or deposition taken at the examining trial was in violation of the constitutional rights of the defendants to be confronted with the witnesses against them..."

to take the deposition is not granted.

In military procedure, however, depositions were and are commonly used by both the defense and the prosecution. Based on military necessity, early legislation permitted depositions to be used by the prosecution in trials by courts-martial, provided the accused was present when the deposition was taken. As far back as 1786, before the adoption of the sixth amendment to the Constitution, an article of war[11] permitted deposition testimony to be read in evidence if the accused was present when it was taken. Later legislation[12], enacted after the adoption of the sixth amendment, continued this safe-guard, and none of the more recent enactments of Congress in this field, including Article 49 of the present Uniform Code of Military Justice, denied an accused the right to be present at the taking of a deposition and to question the prosecution's witnesses against him. Neither, however, did legislation after 1806 specifically provide that an accused person should be present at the taking of a deposition.

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[11]Article 10, Articles of War of 1786 provided: "On the trials of cases not capital, before courts-martial, the depositions of witnesses, not in the line or staff of the army, may be taken before some justice of the peace, and read in evidence, provided the prosecutor and person accused are present at the taking of the same.

[12]Article 74, Articles of War of 1806 provided: "On the trial of cases not capital, before courts-martial, the depositions of witnesses, not in the line or staff of the army, may be taken before some justice of the peace, and read in evidence, provided the prosecutor and person accused are present at the taking of the same, or are duly notified thereof."

Because of the omission of words specifically requiring the presence of an accused, military authorities limited the right of confrontation to propounding written interrogatories, and rarely permitted military persons to appear and personally cross-examine the deponent.[13]

It has been contended that Congress was cognizant of the military view and practice regarding the taking of depositions, and that it impliedly approved and adopted both when it enacted Article 49 without specifically providing for personal confrontation and direct cross-examination. Additionally, it has been argued that Congress was aware of the unusual difficulties encountered in trying military offenses, particularly under wartime conditions when transportation of military witnesses over long distances might seriously affect military missions.[14] And that Congress intended that depositions would be taken without the accused being present, provided notice was given to him, his defense counsel, or a designated officer he consents to have represent him at the

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[13]Winthrop, Military Law and Precedents (2d Ed., 1920 reprint) 255-257. Also see CM 329496, Deligero, 78 BR 43 holding that a deposition taken out of the presence of the accused on written interrogatories was properly received in evidence even though defense counsel objected at the taking and at trial that the accused was entitled to confront the witness against him.

[14]Hearings before the House Sub-Committee of the Committee on Armed Services on H. R. 2498, 81st. Cong., 1st. Sess., p. 696 (1949).

taking.

On the other side of the coin, there are indications---in view of its historical concern in earlier Articles of War for an accused's right to be present at the taking of a deposition---that Congress did not intend Article 49 to deprive an accused person of his right to be present. Indeed, in hearings before the House Sub-Committee considering then proposed Article 49, there were verbal exchanges[15] which point in the opposite direction and indicate that while it was intended that the prosecution should have the right to take depositions, it was understood that the accused would have the right to be present.

> "Mr. Finn/speaking on behalf of the American Legion/. Well as I understand the present Federal program, the accused or defendant can have depositions introduced in his behalf but the prosecution cannot. This /Article 49/ as drawn, sir, is contrary to every concept of Anglo-Saxon[16]

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[15] Ibid, pp. 696-697.

[16] Depositions may be used in British court-martial trials but only if taken in the presence of the accused. Manual of Military Law 1951, Part I, Chapter IV, Sec. 64, p. 84. See also Phipson, Evidence (8th Ed. 1942) page 492 where it is stated that depositions are admissable against an accused in criminal proceedings in Great Britain under the Criminal Justice Act, 1925 when the witness is dead, insane, or so ill as not to be able to travel, but the deposition must be taken in the presence and hearing of the accused. The omission of this requisite cannot be cured by reading over and reswearing witnesses in his presence, for such a method obviously allows a very imperfect opportunity for cross-examination and a full opportunity for cross-examination is imperative.

and American[17] justice as to the right of the person accused to the confrontation of witnesses against him.

"Mr. Elston. Well, we have a law in the State of Ohio, for example, that permits the State to take depositions, but means and the opportunity must be afforded to the defendant and his counsel to be present at the taking of these depositions.[18]

"Mr. Brooks. This is what we call depositions bene esse."

From these statements, it would seem that both Representatives Elston and Brooks understood Article 49 to afford military persons the same right afforded defendants by Ohio law, and that their understanding was possibly shared by other members of the House Sub-Committee.

Be this as it may, Congress, empowered by Article I, section 8, clause 14 of the Constitution "To make rules for

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[17]Conrad, Modern Trial Evidence (1956) sec. 1205, citing United States v. Barracoba et al., 45 F. Supp. 38 (S.D.N.Y., 1942). The accused in a criminal case has the constitutional right to be confronted by the witnesses against him, so that he may have the right to cross-examine them and so that the jury may observe their demeanor. The right to confrontation by witnesses in a criminal case was a common law right which was carried into the United States Constitution by the sixth amendment. This requirement must be observed where depositions are authorized in criminal cases.

[18]Where depositions are taken by the State of Ohio for use in a criminal case, the court by proper order must provide and secure to the accused the means and opportunity to be present in person and with counsel at the taking of such depositions, and to examine the witnesses against him face to face, as fully and in the same manner as if in court. See Hanna, Ohio Trial Evidence (1931) sec. 611.

the Government and Regulations of the land and naval forces", enacted the Code and, as a result, Article 49, which permits as free a use of depositions in military criminal trials as Rule 26, Federal Rules of Civil Procedure permits in federal civil cases, became effective in law on May 31, 1951.

On the same date, pursuant to an Executive Order,[19] the Manual for Courts-Martial, United States, 1951 (hereinafter referred to as the Manual and cited as MCM) came into force and effect in the armed forces of the United States. Certain paragraphs thereof---particularly paragraphs 117 and 145a---supplement Article 49 by prescribing regulations for the taking and using of depositions in courts-martial. For more than five years these paragraphs and Article 49 have constituted the authority for the use of written and oral depositions in military criminal trials.

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[19]Executive Order No 10214, Prescribing the Manual for Courts-Martial, United States, 1951, 8 February 1951, 16 Fed Reg. 1301-1419 (1951).

CHAPTER III

PROCEDURE FOR TAKING DEPOSITIONS

Article 36 of the Code authorizes the President to prescribe rules of procedure, including methods of proof in cases before courts-martial, providing such rules are not contrary or inconsistent with the provisions of the Code. As we have seen, the President by Executive Order No 10214 prescribed the Manual, and therein, by paragraphs 117 and 145 a , set out the procedural rules and requirements for taking written and oral depositions.

Paragraph 117 a defines a deposition as "the testimony of a witness, reduced to writing, under oath or affirmation, before a person empowered to administer oaths, in answer to interrogatories (questions) and cross-interrogatories submitted by the party desiring the deposition and the opposite party." A deposition taken on oral examination is an oral deposition; one taken on written interrogatories is a written deposition. Either may be taken at any time after charges alleging a violation of one of the punitive articles of the Code have been signed against a person subject to the Code, and only an officer competent to convene a court-martial for the trial of such charges may forbid the taking of depositions, and then only for good cause. Otherwise, if taken on reasonable notice to the accused, his counsel, or an

officer he consents to have represent him at the taking, prosecution depositions may be read in evidence in any military criminal case not capital if it appears that the witness resides or is beyond the state, territory, or district in which the court is ordered to sit. They may be received in evidence also if the witness because of death, age, illness, bodily infirmity, imprisonment, non-amenability to process of courts-martial, or other reasonable cause, is unable or refuses to appear and testify in person at the trial; or if the present whereabouts of the witness are unknown and cannot be determined after reasonably diligent efforts.

In a capital case the defense may introduce deposition testimony but the prosecution may not, unless the defense, in open court, expressly consents to its admission. However, a deposition offered by the prosecution may be admitted without the consent of the defense in a case not capital being tried together with a capital offense, if the testimony contained in the deposition is not material to the capital offense. Such testimony is also admissible even though material, if the capital offense and the non-capital offense involved separate criminal transactions, but in such a case the court must be instructed that the deposition testimony must not be considered as material to the capital offense. In addition, a deposition may be received and read

in evidence in any case in which the death penalty is authorized but is not mandatory, whenever the convening authority directs that the case be tried as not capital. In that event, a death sentence may not be adjudged.

If, after charges have been signed but before they have been referred to trial, it appears that a witness may not be available to testify at trial, the convening authority may order his testimony be taken by either oral or written deposition. Counsel for the Government and defense counsel, acceptable to the accused, must be appointed to represent the parties at the taking of deposition testimony.

After charges have been referred to trial and counsel has been appointed to represent the Government and the accused either may find it advisable to take the deposition of a witness. If a written deposition is desired, a list of interrogatories to be propounded to the witness should be prepared and subsequently submitted to the opposing counsel. After receiving and examining these interrogatories, opposing counsel may prepare his own written questions for cross-examination, and at the same time may enter specific objections to any particular interrogatory, or he may protest the propriety or need of taking the deposition.

The request to take a deposition, the lists of interrogatories and cross-interrogatories, and any objections should be submitted to the officer competent to convene the

court-martial, or to the law officer or president of a special court-martial, if a court has already been convened and is in session. If the request to take the deposition is approved, counsel for the government should send evidence of such approval, along with the written interrogatories and cross-interrogatories to the commanding officer of the military or naval installation nearest to the prospective deponent, with the request that he designate someone authorized by law to administer oaths to take the witness's deposition.

Both counsel for the prosecution and defense counsel are also authorized to take oral depositions, if statutory grounds exist, unless forbidden by a competent convening authority for good cause. Like written depositions, they must be taken before a person with authority to swear the witness, but unlike written depositions, the questions and cross-questions are not in writing, but are propounded directly to the witness by counsel present at the hearing. The examination and cross-examination of counsel and the testimony of the witness is recorded verbatim, preferably by a duly appointed and sworn reporter. Whenever possible and practicable the accused person should be afforded the opportunity to be present to personally face and hear any witness testifying against him. Duly qualified representatives of the Government and the defense will, of course,

be present to examine and cross-examine the witness. Whenever depositions, oral or written, are to be used in the course of a trial by general court-martial, counsel for the Government and the defense must be qualified lawyers in the sense of Article 27(b)(1) and (2) of the Code, although they need not be sworn pursuant to Article 42.

If the witness whose testimony is to be taken by oral deposition resides or is far distant from the place of trial, counsel wanting the deposition may prepare a letter to the convening authority stating why the deposition is needed and what testimony he hopes to gain from the absent witness. Opposing counsel shall have the right to protest and oppose the taking of the deposition, and to show good cause why it is unnecessary. If, however, the taking of the deposition is approved, counsel for the Government must forward evidence of such approval, along with information concerning the points to be covered by the oral deposition, to the commanding officer of the military or naval installation nearest the witness. This officer is required to designate a civil or military person authorized to administer oaths to take the deposition, and in addition, if the trial and defense counsel are not to be present, appoint officers of his command to represent both the Government and the defense at the deposition hearing. Any officer appointed to represent the accused at such hearing must be accepted by the accused before he can

legally and properly act as his counsel. As stated before, unless both representatives of the Government and the defense are certified as competent to perform duties of counsel before general courts-martial, depositions taken when they acted as counsel will not be admissible in general courts-martial.

All questions propounded to and all testimony given by the witness at the hearing must be accurately and fully reduced to writing. After being transcribed, the witness should examine the deposition and if any changes or corrections in his testimony are necessary they should be made by the hearing officer in the presence of both counsel and the witness, while the witness is still under oath and subject to further cross-examination. The witness then should sign the deposition, and it then is the duty of the hearing officer to execute a certificate, stating that the witness, after being duly sworn, gave the testimony transcribed in the deposition in his presence. The signed deposition and duplicate copies are then made available to both the prosecution and the defense for use in the forthcoming trial.

CHAPTER IV

THE USE OF PROSECUTION DEPOSITIONS APPROVED BY DIVIDED COURT

The attack on the legality and constitutionality of those provisions of the Code and Manual which authorized the prosecution to use depositions taken out of the presence of the accused or counsel of his selection was not long in coming.

In United States v. Sutton[20] the accused was convicted by a general court-martial largely on the strength of a deposition taken by the prosecution on written interrogatories. Neither the accused, nor the defense counsel who represented him at trial and objected to the admission of the deposition, were present when the witness against the accused gave his deposition testimony. However, an officer-lawyer who was one of four appointed assistant defense counsel had previously had an opportunity to file cross-interrogatories but had not seen fit to do so.

Relying on United States v. Clay[21] wherein the Court

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[20]United States v. Sutton (No. 1718) 3 USCMA 220, 11 CMR 220.

[21]United States v. Clay (No. 49) 3 USCMA 74, 1 CMR 74.

of Military Appeals[22] had enumerated the rights and priveleges of persons subject to military law, including the right of confrontation, a Navy board of review[23] reversed the conviction on the grounds that the admission of the deposition violated this right. The Judge Advocate General of the Navy certified[24] the board's opinion to the Court and asked that it finally decide this point.

In a two to one decision the Court reversed the board of review and decided that the accused had received "military due process" under the Uniform Code of Military Justice; that he had been afforded the kind of confrontation he was entitled to under the Code, scilicet, the right to propound written cross-interrogatories to an absent witness; and that he had no right to "face to face" confrontation as is guaranteed by the sixth amendment to the Constitution.

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[22]UCMJ, Art. 67 established the Court of Military Appeals composed of three civilian judges. It reviews (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 of the accused and on good cause shown, the Court of Military Appeals has granted a review.

[23]UCMJ, Art 66. Boards of review review every trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of an officer, cadet or midshipman dishonorable or bad-conduct discharge, or confinement for one year or more.

[24]UCMJ, Art. 67(b)(2).

Noting that no legislation since Articles of War of 1806 had provided for an accused person to be present at the taking of a deposition, the majority concluded that Congress did not intend his presence under Article 49.

Writing for the majority, Judge Latimer said:

> "It seems crystal clear that Congress had no intention of limiting the use of a deposition to those cases where an accused could be present at the time of its taking[25]. The Code specifically provides for written depositions and implicit in this procedure is the contemplation that an accused will not be present. Congress was familiar with the difficulties encountered in trying military offenses, particularly under wartime conditions... It is reasonable to conclude that because of these inherent difficulties Congress permitted the taking of a deposition by the prosecution, if notice thereof was given to the accused, his counsel, or an officer designated to represent him in the taking of the depositions."

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[25]But see Hearings before the House Sub-Committee of the Committee on Armed Services on H. R. 2498, 81st. Cong., 1st. Sess., page 1069, where Representative Elston said "When you take a deposition the accused has the right to be present and with counsel. If it is taken orally and not by way of interrogatories both sides can examine the witness."

Also, in determining Congressional intent, it appears the Court failed to consider the sense of the Senate announced in the July 15, 1953 Resolution of Ratification, with Reservations, of the Status of Forces Agreement (Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 19 June 1951 (T. I. A. S. 2846) wherein the Senate recognized and sought to preserve for members of American armed forces tried by receiving State tribunals those basic "constitutional rights he would enjoy in the United States". Neither did the Court's decision refer to Article VII, Status of Forces Agreement nor to Amendment of Article XVII of the Administrative Agreement Under Article III of the Security Treaty Between the United States and Japan (T. I. A. S. 2848) both of which entitle American military persons "to be confronted with the witness against him" when prosecuted in the courts of a foreign signatory.

In a concurring opinion, Judge Brosman approved the results reached in the principal opinion, and in addition expressed doubt that the Court of Military Appeals possesses the power to hold an act of Congress unconstitutional--even in part.

Chief Judge Quinn dissented from the majority opinion. In his opinion the sixth amendment guaranteed accused persons in the military the right, at some stage in the proceedings against him, to cross-examine a witness against him by direct and personal questioning in the same manner as in court. Although military courts have the same responsibility as do federal courts to protect a person from a violation of his Constitutional rights, Judge Quinn felt that the majority lightly deprived the accused of the basic constitutional right of confrontation for reasons of expediency.[26]

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[26]Federal civil courts have jurisdiction and the responsibility in habeas corpus proceedings to determine whether a military accused's basic constitutional rights have been denied him in a court-martial trial, and to protect him from a violation of his constitutional rights. Burns v. Wilson, 346 U. S. 137 (1953). See also the dissent in this case where Mr. Justice Douglas said: "Of course the military tribunals are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments. That is the meaning of Ex parte Quirin, 317 US 1, 87 L ed. 3, 63 S CT 2, holding that indictment by grand jury and trial by jury are not constitutional requirements for trials before military commissions. Nor do the courts sit in review of the weight of the evidence before the military tribunal. Welchel v. McDonald, supra, p 124. But never have we held that all the rights covered by the Fifth and Sixth Amendments were abrogated by Art. 1, s. 8, cl 14 of the Constitution, empowering Congress to make rules for the armed

The intent of Congress which the majority found "crystal clear" in one direction was clear in another to the chief judge. To him, Congress, in enacting Article 49, intended only that depositions could be taken and introduced into evidence by the Government as well as by the accused. He did not believe that Congress intended that the accused's right to personal and direct cross-examination--"the greatest legal engine ever invented for the discovery of truth"[27] --- should be reduced and limited to the mere submission of written cross-questions to an unseen witness whose testimony had not been heard. In Judge Quinn's view it would impose no undue or uncommon burden upon the prosecution to require the presence of the accused, or counsel of his choice at the taking of the deposition of a witness, so that he could face his accuser and test the accuracy of the testimony against him.

A little more than two years after the decision in

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forces. I think it is plain from the text of the Fifth Amendment that that position is untenable."

Federal courts in habeas corpus proceedings have recognized that some of the rights specifically enumerated in the fifth and sixth amendments are applicable to the military. Wade v. Hunter, 336 U. S. 684 (1949), Powers v. Hunter, 178 F. 2d 141 (10th Cir., 1949), Richardson v. Zupp, 81 F. Supp. 809 (M. D. Pa., 1949). They will consider whether a trial by court-martial violated a military person's basic constitutional right to due process. United States v. Hiatt, 141 F. 2d 664 (3d Cir., 1944).

[27]Wigmore, Evidence (3d Ed., 1940) sec. 1367.

Sutton, Judge Brosman, the concurring judge, died and Judge Homer Ferguson, a former Michigan jurist and ex-United States Senator, was appointed to the bench of the Court of Military Appeals. As a result of this change in the composition of the Court, and in view of the vigor and rationale of Judge Quinn's dissent, there was speculation on the part of some military and naval lawyers that the Sutton decision would be overruled in the future. This speculation was dispelled, however, by the Court's recent decision in United States v. Parrish.[28] With Judge Quinn again dissenting, Judge Ferguson joined with Judge Latimer to reaffirm the principle announced by the majority in the Sutton case.

It is interesting to note that the majority in both Sutton and Parrish carefully avoided mention of Article 10 of the Articles of War of 1786. It also avoided the fact that Article 10, which was in effect when the sixth amendment was adopted in 1791, specifically provided that a military person had the right to be present when a deposition against him was taken. Having closed its eyes to Article 10, the majority spared itself the task of explaining why the right of confrontation granted to military persons by the article was not continued and preserved by the sixth amendment. It spared itself the task of explaining what the

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[28] United States v. Parrish (No. 8181), 7 USCMA 337, 22 CMR 127.

Supreme Court meant in Mattox v. United States and Salinger v. United States when it held that the sixth amendment secured to every individual the right of confrontation he possessed at the time it was adopted.

CHAPTER V.

THE EFFECT OF PROCEDURAL ERRORS IN TAKING DEPOSITIONS

With the key question in Sutton now definitely settled as far as the Court of Military Appeals is concerned, we may turn to other points involved in the employment of depositions in military procedure. An examination of the first twenty bound volumes of the Court-Martial Reports (CMR) reveals that they contain more than forty reported cases in which Army, Navy, Air Force, and Coast Guard boards of review have considered and dealt with deposition problems. The Court of Military Appeals has decided some fourteen cases in which the issue of the admissibility of prosecution depositions was directly involved. Procedural errors, committed by representatives of the Government, in taking depositions are reflected in most of these cases. What were the effect of these errors? Did they require that findings of guilty be set aside? What determined in a particular case if a deposition taken improperly or admitted erroneously prejudiced substantial rights of an accused person? These answers, of course, must be found in the decisions of the Court of Military Appeals, and in the opinions of the boards of review.

The Court has applied Article 59 of the Code[29] in

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[29] UCMJ, Art. 59 provides that a finding or sentence of a Court-Martial shall not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

determining whether evidence improperly admitted by means of irregular or incompetent depositions required reversal of a case. Such evidence has been held harmless when the accused judicially admitted his guilt; when there was no dispute in the testimony and the evidence of guilt was compelling;[30] when defense testimony was inherently improbable and unworthy of belief;[31] and when the testimony was merely cumulative and too unimportant to affect the findings of guilt.[32]

However, the fact that the Court has not reversed certain cases in which depositions have been improperly taken and subsequently erroneously received in evidence, cannot be construed as an invitation to ignore procedural requirements of the Code and Manual. On the contrary, the court has generally demanded strict compliance with these requirements.[33]

Let us consider some cases in which procedural error was in issue.

In United States v. Drain[34] a prosecution deposition

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[30]United States v. Horner (No. 1031) 2 USCMA 478, 9 CMR 108.

[31]United States v. Drain (No. 4510) 4 USCMA 646, 16 CMR 220.

[32]Ibid.

[33]United States v. Valli (No. 7860) 7 USCMA 60, 21 CMR 186.

[34]United States v. Drain (No. 4510) 4 USCMA 646, 16 CMR 220.

was held inadmissible in a general court-martial where neither the Government nor the accused were represented at its taking by counsel certified in accordance with Article 27(b).[35] The Court conceded that Article 49 doesn't require any particular qualifications for such representatives, and recognized that the Manual specifically states that they need not be qualified lawyers. Nevertheless, it held that it was the intent of Congress that an accused person be afforded representation during the course of a general court-martial by counsel qualified in accordance with Article 27(b), and also during the taking of depositions which are to be used against him in a general court.

The Court stressed that the skill with which the examination and cross-examination of the deposition witness is conducted is highly important---so important, in fact, that unless those designated to represent the parties in the taking of oral or written depositions are legally trained, the fruits of their questioning may be worthless to counsel at

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[35]UCMJ, Art. 27(b) provides: "Any person who is appointed as trial or defense counsel in a case of a general court-martial---(1) shall be a judge advocate of the Army or Air Force, or a law specialist of the Navy or Coast Guard, who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or shall be a person who is a member of the bar of a Federal court or of the highest court of a State; and (2) shall be certified as competent to perform such duties by The Judge Advocate General of the armed force of which he is a member."

trial level. Stating that the broad use of depositions against defendants in criminal cases was exceptional to military procedure, the Court refused "to extend the exception in a manner adverse to the interests of accused persons by holding that depositions may be taken without the provision of certified attorneys to represent both the Government and the accused."

Thus it was error to admit a deposition taken without compliance with the requirements of the Code, but inasmuch as the information contained in it was collateral, cumulative and so incidental that it could have had no reasonable impact on the members of the court-martial, the error was harmless.

Citing and following the principle of law announced in Drain, the board of review in Kennedy, (ACM 9347, 17 CMR 767) found prejudicial error where a deposition in which certified lawyers played no part was received in evidence in a trial by general court-martial, notwithstanding the fact that the law officer subsequently ordered the deposition withdrawn, and instructed the members of the court to disregard its testimony.

Recognizing the general rule that it may be presumed that the members of a court follow the law officer's instructions, and disregard evidence which they are told to disregard, the board of review, nevertheless, held that the impact

of the impressive but incompetent deposition was probably too great to be erased from the minds of the members by instruction. Hence, it was held that the law officer's admonition could not prevent the admission of the deposition from prejudicing the accused.

United States v. Valli[36] presented a classic example of how depositions should not be taken or used. Almost every procedural error that is possible to make, was made in the taking of depositions in this case. After charges had been referred to trial, the trial counsel, defense counsel, and a reporter traveled beyond the state to take oral depositions of certain prosecution witnesses. Questions apparently were propounded to the witnesses by counsel, and presumably the reporter recorded their testimony. Thereafter, at trial by general court-martial, certain exhibits containing typewritten questions and answers were produced by the trial counsel who stated that he desired to read the testimony of the witnesses to the members of the court. There being no objection from the defense counsel, the depositions were read into the record.

Labeling most depositions "tools for the prosecution which cut deeply into the priveleges of an accused," the Court refused to condone halfway measures in taking

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[36]United States v. Valli (No. 7630) 7 USCMA 30, 21 CMR 186.

depositions by the prosecution, and on the contrary, demanded strict compliance with the procedural requirements of the Code and Manual. Then, perhaps noting a growing proneness on the part of the Government to turn courts-martial into trials by paper, the Court warned that depositions should only be used when it is unreasonable to have live witnesses present. Furthermore, the Court admonished, whenever the costs of having a witness testify in court are substantially the same as, or less than, the expense of taking depositions, and the witness is amenable to process, the witness should be presented at trial.

Finding that almost every procedural requirement and condition imposed by the Code and Manual had been violated, the Court listed the following errors: There was no order or commission issued to take the depositions; the identity of the officer or officers before whom the depositions were taken is not shown; the form of the oath used, if any, was not revealed;[37] if an oath was given, the identity of the person administering it, or his authority to do so, was not established;[38] the reporter was not shown to have been

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[37]par. 114, MCM requires all persons whose testimony is taken by deposition to be sworn in the following form: "You swear (or affirm) that the evidence you are about to give shall be the truth, the whole truth, and nothing but the truth. So help you God."

[38]par. 113, MCM.

sworn;[39] the time or place of the hearing was not shown; the transcribed testimony was not read by the witnesses, and no opportunity was afforded them to make any changes or corrections;[40] the purported depositions were not signed by the deponents, or sworn to as being true and correct;[41] the reason for the lack of signatures was not shown, except, possibly, haste;[42] there was no certificate by the reporter concerning the accuracy and completeness of his transcription; and there was no verification of the fact that the testimony received in evidence was the testimony given by the witnesses.

Additionally, there was a failure to submit separate memorandum to the convening authority, stating the reasons why depositions were needed and outlining the matters to be covered in the oral examination of the witness. Submission of these papers to the convening authority is an important step in the process of obtaining approval to take depositions, for it is at this stage that counsel for the accused may protest the taking of the deposition to the convening authority. At this stage, counsel may request that the witness be served with process and be required to testify in person at trial, and if

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[39]par. 117e, MCM.

[40]Ibid.

[41]Ibid.

[42]Ibid.

the convening authority concurs the deposition can not be taken. Convening authorities have discretion in ordering or approving the taking of depositions, and counsel for the accused is entitled to a chance to oppose the Government's request for depositions, and to show good cause why they should not be taken.

In its most recent decision[43] involving depositions the Court seems to have altered its view regarding the importance of submitting to the convening authority memorandum indicating the reasons for the depositions and the matters to be covered by them. Now the important thing is that counsel for the accused be afforded the chance to oppose the taking of the deposition. If he is notified of the proposed time, place and reason for taking the deposition, and thus is able to protest the taking to the convening authority, the requirements of the law are satisfied. Although he may forbid the taking for good cause, it is not necessary that the request to take the deposition be first referred to the convening authority for his consideration and approval. Nor is it essential to the validity of the deposition that his authorization be obtained in advance. His action in this matter is negative rather than positive.

Boards of review of both the Navy and the Coast Guard

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[43] United States v. Ciarletta (8899) 7 USCMA 603, 23 CMR 70.

had the occasion to consider the effects of procedural aberrations in the taking of prosecution depositions. In almost identical cases,[44] purported depositions were taken after charges had been served on the accused. Apparently, in both cases, trial and defense counsel short-cut the procedural requirements of the Manual, and took the depositions of witnesses without someone designated to take the depositions or authorized to administer oaths being present. Trial counsel simply assumed this role and then resumed their own, examining the witnesses as prosecutors.

Deciding that trial and defense counsel cannot get together and informally hold portions of the trial at such times and places as suit their convenience, the boards held that oral depositions must be taken in accordance with the standards of 117g. They must be taken in the presence of officers authorized by law to administer oaths. Such officers must swear the witnesses, and the testimony must be given in their presence. Trial counsel may not act beyond their authority and assume two roles---that of the prosecutor and that of an impartial hearing officer.

The authority of trial counsel to administer oaths necessary to the proper performance of his duty does not authorize him to administer oaths to witnesses in deposition

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[44]NCM 114, Johnson, 3 CMR 448; CGCM 19442, Johnson, 4 CMR 496.

proceedings, nor does it constitute him a proper officer before whom a deposition may be taken when he has been detailed as trial counsel in the proceedings.

It is improper for one officer to take a deposition when another had been designated to take it, although a failure on the part of the accused to object would constitute a waiver of the error if the person who took the deposition was, in fact, authorized by law to administer oaths.[45] However, a failure to object does not waive error where a warrant officer of the United States Air Force designated himself a "summary-court officer" and took a deposition. A warrant officer of the Air Force is not eligible for appointment as a summary court-martial officer, and, possessing no other authority, he could not administer a valid oath to a deponent. Thus the purported deposition in this latter case amounted to no more than an unsworn statement which was incompetent evidence.[46]

Prejudicial error was found in United States v. Miller[47] and the Court upset a conviction by general court-martial because a prosecution deposition was improperly taken and

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[45]ACM 6532, Kelly, 11 CMR 721.

[46]ACM 5161, Butcher, 5 CMR 654.

[47]United States v. Miller, (No. 7563) 7 USCMA 23, 21 CMR 149.

received in evidence. The facts disclose that after charges had been referred to trial the Government suddenly realized that its principal witness against the accused was about to be discharged from service and would not be available to testify at the time of trial.[48]

Permission was promptly obtained from the convening authority to take the witness's oral deposition. Without consulting the accused, who was on authorized leave and had no notice that a deposition was to be taken, the convening authority appointed a defense counsel who appeared at the taking of the deposition as the representative of the accused.[49] It was not discovered until later that the accused had already retained civilian counsel, who like the accused had no notice of the taking of the deposition.

At trial the deposition was received in evidence over

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[48]The court did not intimate or suggest that the witness should have been retained in the service so as to be available to testify in person at trial. This, plus the fact that it denied a petition to review ACM 9439, Rogers, 18 CMR 515 seems tacit approval of that case's holding that an officer due for rotation need not be retained in the command for the purpose of testifying, and that a deposition taken from him before his departure was properly admitted in evidence. See also United States v. Ciarletta (No. 8899) 7 USCMA 606, 23 CMR 70 to the effect that the government's discharge of a prospective witness does not deprive the prosecution of the right to use his deposition, particularly when the defense fails to request the retention of the witness.

[49]JAGJ 1953/6088, 6 August 1953 approving such procedure may have been responsible for this error.

the defense's objection, after the Government's foundation evidence had satisfied the law officer that the whereabouts of the witness (now discharged from the service) were unknown.

On appeal the Court reiterated the principle of Sutton that a military person's right to confrontation is satisfied if his qualified counsel is present at the taking of a deposition, and he is accorded the right of cross-examining the deponent. The Court made it clear, however, that this does not mean the right of confrontation can be satisfied by merely appointing and sending some military lawyer to a deposition hearing without the knowledge of, acceptance by, or consultation with, an accused.[50] To bind an accused there must be acceptance and consent on his part.[51] It is a matter in which he has an important vote. There is more to creating the relationship of attorney and client than the mere publication of an order of appointment. The

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[50]An accused's right to counsel of his own choice, and the necessity of finding that he consented to representation by appointed defense counsel was recognized in United States v. Goodman, 1 USCMA 298, 3 CMR 32, where it was said: "He is entitled to select counsel of his choice, and may object to being defended by the person appointed if he desired to do so."

[51]The Court noted that the accused in this case was on authorized leave, but did not indicate that its holding would have been different if he had been on unauthorized absence. It would seem that the language of the decision is as applicable to the one situation as to the other.

relationship contemplates acceptance, confidence, trust, and cooperation. Representation by strangers who do not even know the theory of an accused's defense can be representation in name only and will not satisfy the letter or the spirit of the Code.

In yet another case,[52] the Court was called upon to determine the effect of procedural irregularities upon the admissibility in evidence of a written deposition. Counsel for the Government and the defense had prepared written interrogatories and cross-interrogatories in order to obtain testimony regarding certain laboratory tests. Correctly foreseeing that the expert witness might not recall the results of the particular tests and might have to use memorandum of past recollection recorded, it was requested that such memorandum, if used, be sealed and returned with the completed deposition.

The witness was unable to recall the results of the laboratory test, and was able to testify concerning them only by relying on memorandum. However, he refused to furnish the memorandum so that it could be included with the deposition because he believed that he was unauthorized to do so. At trial the deposition was received over objection, and the accused was subsequently found guilty.

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[52] United States v. Bergen (6642) 6 USCMA 601, 20 CMR 317.

On review, the Court held that the deponent's testimony contained in the written deposition was nothing more than a mere reading of the memorandum. Since the memorandum was not included with the deposition, or made available to the members of the court for examination, the deposition was improperly admitted. However, inasmuch, as the deposition only corroborated that which the defense itself had established, there was no prejudicial error.

CHAPTER VI

THE NECESSITY OF PROPER FOUNDATIONS FOR DEPOSITIONS

Article 49(d) makes it clear that a deposition may not properly be admitted in evidence unless it appears that the witnesses resides or is beyond the state, territory or district in which the court is ordered to sit, or is more than one hundred miles from the place of trial. Additionally, if the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person, or if the witness's whereabouts are unknown, it is proper to receive his deposition.

Some federal courts in civil cases have permitted foundations for the admissibility of depositions to be established by scanty and meager proof. However, because the use of depositions in criminal trials is exceptional to military law, the Court of Military Appeals has required that one of the conditions of Article 49(d) be established by clear, substantial, and competent evidence before a deposition may be properly received. The prosecution, in particular, must bring itself within the statute before it will be permitted to use depositions. Illustrative of this is

the case of United States v. Barcomb,[53] where the accused was tried for unlawfully procuring a young woman to engage in acts of prostitution. At trial the factual situation was strongly contested, prosecution witnesses incriminating the accused and defense witnesses denying his guilt. The woman involved was the prosecution's principal witness, and because of the posture of the evidence, her testimony was of first importance. Prior to trial, on the assumption that she would not be available for trial, a deposition of her testimony was taken.[54] However, she appeared at trial and was called and sworn as a prosecution witness. On the stand she showed considerable emotional strain and refused to answer questions put to her by the trial counsel. After repeated and unsuccessful efforts to induce her to testify, the law officer held her in contempt of court, excused her as a witness, and over defense counsel's objection, admitted her deposition in evidence.

On review, the Court turned to the provisions of Article 49(d) and, finding that the factual situation fit

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[53]United States v. Barcomb (No. 726), 6 CMR 92. See also the civil case of Whitford v. Clark County, 119 U. S. 522 (1886) where it was held error to receive the deposition of a witness who resided more than a hundred miles from the place of trial but who was present in court and available to testify in person at trial.

[54]par. 30e and par. 34d, MCM, 1951 permits this procedure.

none of the exceptions and conditions set forth, held that the admission of the deposition was error--and in view of the conflicting evidence---error of a degree to require reversal.

A different, but understandably different, result was reached in ACM 7165, Duff,[55] 12 CMR 802. A deposition of a witness who resided beyond the state where the court sat was introduced in evidence by the prosecution. The defense neither objected nor suggested that the witness might be available to testify in person. Shortly after the prosecution rested its case, the deponent---to the surprise of the prosecution---appeared and testified for the defense. On review the defense urged that it was error to receive in evidence the deposition of a witness who was available and who, in fact, was present and testified at trial.

In affirming the conviction, the board rejected this claim of error, and held that the defense counsel had effectively waived any error which might have existed. It said:

> "A strong argument in support of the foregoing view comes from the realization that in a trial, and particularly in a long trial, the orderly processes of justice might be seriously hampered were either side permitted to sit idly by and permit depositions of numerous witnesses to be properly received into evidence and then,

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[55]Petition for review by USCMA denied, 13 CMR 142.

[56]United States v. Stringer, (No. 4071) 5 USCMA 122, 17 CMR 122.

> by producing the witnesses in person require that the case be virtually re-tried. Further support of that view is found in the rule that the burden is on the side opposing the acceptance of a deposition into evidence on the ground of availability of the witness to interpose objection at the time of its offer into evidence and to come forward with some evidence of availability to offset any prima facie showing of unavailability. (Seiden v. Concordia Fire Ins. Co. of Milwaukee, 49 F2d 484; Patapsco Insurance Co. v. Southgate, Supra)".

Aside from the fact of waiver, the board indicated that the deposition was properly in evidence, for although the deponent may have actually been within the state and within one hundred miles of the trial at the time her deposition was received, her whereabouts were unknown to the prosecution and the law officer, and this was a sufficient foundation for admission.

As we have seen, depositions may be employed only under certain statutory conditions, and they may be received in evidence only after at least one of the foundations for admissibility set out in Article 49 has been established at trial. Failure to erect a proper foundation caused the collapse of United States v. Stringer.[56] In this particular court-martial tried in France, the accused was found guilty of theft on the basis of a confession corroborated by a deposition. The admission of the deposition was objected to at trial by the defense on the ground that the deponent, a

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[56]United States v. Stringer, (No. 4071) 5 USCMA 122, 17 CMR 122.

French national, met none of the criteria which would permit the use of her deposition. Nevertheless, it was received in evidence for the reason that the deponent, being a French national, was not amenable to court-martial process.

In considering whether any of the conditions permitting the use of depositions had been met, the Court noted that the words "State, Territory, or District" appearing in Article 49(d)(1) refer to areas within the United States and its territorial possessions, and since this court was sitting in France this portion of the article had no application. Additionally, inasmuch as the deponent did not reside or wasn't beyond a hundred miles of the place of trial, the deposition wasn't admissible for that reason. There was no pretension that the whereabouts of the witness were unknown, consequently the deposition was not admissible under Article 49(d)(3). The Court conceded that the French witness was not amenable to court-martial process, but decided that this fact alone didn't permit the use of her deposition. In order for a deposition to be admissible under Article 49 (d) (2), nonamenability to process must be shown, and in addition it must be established that the witness was unable or refused to appear in person and testify. There being no such proof, the deposition was improperly admitted in evidence, and since it constituted the only corroboration for the confession, the competent evidence was insufficient to support the findings.

Although it reversed for another reason in United States v. Miller, supra, the Court stressed the importance of establishing a firm foundation for the admission of a deposition. In that particular case, the law officer admitted the deposition over defense objection, although there was no affirmative showing which would establish any of the statutory grounds such as illness, infirmity, military necessity or the like, and nothing more than hearsay evidence was presented to show that the witness was more than a hundred miles from the place of trial. Trial counsel sought to show that the deponent's whereabouts were unknown, but he failed to establish that diligent, timely, and thorough efforts were made to locate the witness and have him present at trial. Failure to locate the witness after two telephone calls to his former home did not constitute diligent effort, although the law officer did not require more in this case. The search must be more than desulatory and indifferent.

Criticising the Government's use of depositions, the Court said:

> "Such meager efforts seem to suggest that some Government prosecutors assume a careless and indifferent attitude toward the taking and use of depositions. It is to be remembered that they are a substitute method for presenting facts to the detriment of the accused, and we are not willing to permit halfway measures immediately before trial to be made the basis for the use of that type of evidence."

In a general court-martial it is for the law officer

to decide whether a requisite statutory foundation has been established so as to permit a deposition to be received in evidence. His ruling cannot be overturned if there was sufficient evidence for him to come to that conclusion. Thus, where as in United States v. Ciarletta there was evidence before the law officer that the deponent was discharged from the active Marine Corps in California some two weeks prior to trial; that his original entry into the service was on the east coast of the United States; that he represented that he resided on the east coast; and that he had been given funds to reach his claimed residence in New York, the law officer was entitled to find that a proper foundation had been laid for the admission of the deposition.

A navy board of review in reviewing a case[57] pursuant to Article 66(c) of the Code was called upon to decide whether a foundation which established that a witness resided beyond the State, but only thirty-five miles from the place of trial was sufficient to permit the witness's deposition to be read in evidence on behalf of the Government. The defense argued that Article 49(d)(1) reasonably could be construed to mean beyond the State or beyond one hundred miles, whichever is greater. The board refused to read this qualification into the statute and decided that a deposition is admissible if

[57]NCM 231, Chapman, 11 CMR 659.

either condition is established. Thus, the deposition of a witness who lived across the street from where the court sat could be read in evidence if he lived in a different state.[58]

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[58]What prompted Congress to include the "beyond the State" provision in Article 49(d)(1), and thus pave the way for the ridiculous results of Chapman and similar cases? Since process of courts-martial like process of courts of the United States having criminal jurisdiction, runs to any part of the United States, its territories, and possessions, why is the fact that a witness resides or is beyond a state grounds for using depositions?

CHAPTER VII

USE OF DEPOSITIONS IN CAPITAL CASES

The admissibility of depositions in capital cases is controlled by Article 49(d), (e), and (f) of the Code which provides:

> "(d) A duly authenticated deposition taken upon reasonable notice to the other party, so far as otherwise admissible under the rules of evidence, may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears---/requirements conceded/".
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> * * * * * * * *
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> "(e) Subject to the requirements of subdivision (d) of this article, testimony by deposition may be aduced by the defense in capital cases."
>
> "(f)...a deposition may be used in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the convening authority shall have directed that the case be treated as not capital, and in such case a sentence of death may not be adjudged by the court-martial".

Paragraph 145a of the Manual states:

> "...With the express consent of the defense made or presented in open court, but not otherwise, the court may admit competent deposition testimony not for the defense in a capital case...".

Thus, the prosecution may introduce evidence by deposition in a capital case only if the convening authority prior to trial directs that the case be treated as non-capital, in which case the death penalty may not be imposed;

or if the defense in open court consents to its admission.[59]

In United States v. Young,[60] the accused was tried by general court-martial for willful disobedience of a superior officer, and desertion, both capital offenses since they were alleged to have been committed in time of war. The convening authority took no action prior to trial to treat the case as not capital.

Nevertheless, the prosecution introduced depositions in evidence, and the defense counsel stated that he had no objections to their admission. The accused was found guilty and subsequently he appealed to the Court of Military Appeals. There he urged that the depositions were improperly received in a capital case to his prejudice. Appellate counsel for the Government sought to justify the admissions on the theory that the defense expressly consented to the use of the depositions because at trial level he said he had no objection to their admission.

The Court agreed that under certain circumstances the statement of the defense counsel could be considered a waiver, but could not agree, that the statement was the "express

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[59]That Article 49 permits depositions offered by the prosecutions to be used in not capital cases but excludes them in capital cases seems an irrational distinction to Wigmore. See Wigmore, Evidence, (3d. Ed., 1940), sec. 1398 n. 4.

[60]United States v. Young (No. 1015) 2 USCMA 470, 9 CMR 100.

consent of the defense made or presented in open court" required by the Manual. Having held the admission erroneous, the Court weighed its effect and found it harmless, particularly as other evidence of record was such that "any fair-minded and reasonable person would have been compelled to find against the accused with or without the evidence contained in the depositions".

Substantially the same issue presented in Young was involved in United States v. Horner.[61] Again the Court found that the deposition should not have been admitted, but found that its admission did not materially prejudice substantial rights of the accused.[62] It found that the deposition contained only an inconsequential bit of evidence, while the other competent evidence of record was reasonable, undisputed and unattacked.

Again in United States v. Aldridge[63] the Government introduced depositions in a capital case which the convening authority had not directed be treated as not capital. Again the defense counsel neither objected nor consented to the

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[61]United States v. Horner (1031), 2 USCMA 478, 9 CMR 108.

[62]UCMJ, Art. 59(a) provides that a finding shall not be set aside unless the error of law materially prejudices substantial rights of the accused.

[63]United States v. Aldridge (No. 2886), 4 USCMA 107, 15 CMR 107.

admission of the depositions. The court-martial found the accused guilty, but on review the convening authority, noting that depositions had been illegally used, approved only the lesser included offense which was not capital.

On appeal the Court of Military Appeals reversed the conviction, holding that the case had been tried on the theory that a capital offense was in issue, and the law officer had so instructed the court prior to its deliberations on the sentence. Because the trial proceeded on that basis, the accused had the right to have the depositions excluded from the evidence. The "no objection" reply of the defense counsel did not constitute the affirmative and express consent to use the depositions that is required by the Manual.

The admission of the depositions were prejudicial in this case because the evidential posture was such that they were essential to the Government's case, furnishing as they did an essential fact to both the capital and the lesser included not capital offense. Without the deposition there was insufficient evidence to permit either the capital or the included not capital case to go to the triers of fact for a finding of guilty. Whereas, in Horner the deposition was inconsequential and added little, if any, weight to the Government's case, here the depositions proved an important part of even the lesser offense approved by the convening authority.

A somewhat different problem was presented by a common trial in which prosecution depositions were used, and the accused was subsequently found guilty of both a capital offense and of a not capital one. Following affirmance of the conviction by a board of review, the Court of Military Appeals granted further review on the question of whether the prosecution depositions were properly admitted into evidence.

Paragraph 145a of the Manual provides that when otherwise admissible, depositions not for the defense may be admitted without consent of the defense in a case not capital tried with a capital case if such testimony is not material to the capital case. Here the specifications alleged separate offenses or cases, that is they alleged a capital offense and a not capital offense. Since the testimony contained in the disputed depositions was related and material only to the not capital case, and was immaterial as to the capital case, the depositions were properly received in evidence.[64]

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[64] United States v. Gann & Sommer (1425), 3 USCMA 12, 11 CMR 12; accord, Easley v. Hunter, Warden, 209 F. 2d 483 (10th. Cir., 1953), an appeal from dismissal of a petition for habeas corpus, wherein it was held that the use of a prosecution deposition in a court-martial trial for a capital case and several not capital cases did not deny the petitioner confrontation, inasmuch as he consented in open court to the use of the deposition which was material only to the not capital cases.

CHAPTER VIII

OTHER HOLDINGS AFFECTING THE USE OF DEPOSITIONS

An Air Force and a Navy board of review and the Court of Military Appeals all have been confronted with the question of whether the law officer or the president of a special court must personally observe and pass upon the competency of a deponent before his deposition may be received in evidence.

In Shade,[65] an oral deposition of a thirteen year old boy who resided more than one hundred miles from the place of trial was admitted in evidence over the defense's objection that the child's competency to be a witness had not been determined[66] in open court by the law officer.[67]

On review, an Air Force board held that the competency of a child witness may be established by means other than personal appearance before the law officer; and that where,

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[65] ACM 9442, Shade, 18 CMR 536 where a petition for review was denied by the Court of Military Appeals.

[66] par. 148b, MCM, provides that the competency of a person below the age of fourteen years to be a witness in a court-martial cannot be presumed.

[67] United States v. Marshall & Shelton (No. 548), 2 USCMA 54, 6 CMR 54, holding that the decision whether a child is competent to testify in a general court-martial rests with the law officer.

as in the instant case, the deposition shows on its face the competency of the deponent, it may be properly admitted in evidence.

In a very similar case, with the same problem presented, a Navy board of review reached a contrary conclusion.[68] It held that the admission of a six year old child's deposition was erroroneous for the reason that the law officer had received her deposition in evidence without first personally observing her and qualifying her as a competent witness.

The Court of Military Appeals in Parrish[69] resolved this conflict of board opinions by adopting the view of the law announced in Shade. The issue in Parrish concerned the admission in evidence of a written deposition taken by the prosecution from its principle witness, H. As in most cases, neither the accused nor his counsel were present when the deponent gave his testimony, although the accused's counsel had prepared and propounded written cross-interrogatories.

Deposition testimony of three expert medical witnesses introduced by the Government, tended to show that H was psycotic from July 11 to August 20, 1954, a period prior to the date on which his deposition was taken; that H was sane and capable of remembering facts, understanding questions,

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[68]NCM 211, Tyson, 10 CMR 562.

[69]United States v. Parrish (No. 8181), 7 USCMA 337, 22 CMR 127.

and appreciating the moral obligation of telling the truth under oath on December 3, 1954, the day his deposition was taken; but that shortly thereafter he showed signs of insanity and was insane both on December 28, 1954 and on the date his deposition was received in evidence at trial.

Relying on United States v. Slozes,[70] the defense protested the use of the deposition not only because it denied the accused the right of confrontation---the argument in Sutton---but also because the law officer did not personally observe H before qualifying him and admitting his deposition in evidence. The defense also contended that the members of the court by being denied an opportunity of personally observing and hearing the deponent were unable to perform their duties of judging the credibility of the witness.

The Court nevertheless held that the deposition was admissible, and, in doing so, said that of necessity the law officer must rule on a deponent's competency, and the members of the court-martial must judge and determine his credibility without ever seeing or hearing him. Any other rule would deny the use of depositions.

The important question is whether the law officer and

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[70] United States v. Slozes (No. 12), 1 USCMA 47, 1 CMR 47 quoted from Oliver v. United States, 267 Fed. 544 (4th Cir., 1920) "...In determining the competency, and intelligence of a witness, the court may and should take into consideration the general appearance and manner of the witness, as well as the statements made by him."

the court members were furnished with enough evidence, other than by personal observation, to permit a fair determination of competency and credibility. The Court concluded that in this case the deposition testimony of three expert medical witnesses, plus the evidence of competency supplied by the deposition itself, permitted a fair determination of this question, and formed a sufficient predicate or foundation to allow the deposition to be received in evidence and to be considered by the triers of fact.

The same result was reached in United States v. Ciarletta. Although it conceded that the demeanor of a witness is important in assaying his credibility, and his credibility is important to the court when the testimony is disputed, the Court of Military Appeals, nevertheless rejected the contention that an accused could be prejudiced because the prosecution employed a deposition and thus denied members of the court of an opportunity to observe the witness's demeanor on the stand. If the deposition is admissible under Article 49, the court members must determine what weight to give it without observing or questioning its maker.

A general court-martial[71] recently tried in Germany presented an unusual deposition problem. A fifteen year old victim of a mass rape appeared and testified at trial against

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[71] CM 392899, Carter, 1 April 1957; compare United States v. Barcomb (No. 726) 6 CMR 92.

her seven assailants. She testified on direct examination for approximately one hour, and was then subjected to vigorous cross-examination for the remainder of the day---a period of approximately five hours. On the following day, she was unable to appear in court. Three days later she resumed the witness stand, but after being asked three questions began to cry and stated she could not continue. A recess and then a continuance was granted so that the witness might regain her composure and health. Ten days later, after several medical examinations, an army doctor reported that the witness could undergo further cross-examination in court only at the "extreme risk of breaking down and having some deep emotional upset as a permanent factor". In his opinion, her cross-examination could be completed by oral deposition in the presence of counsel for the prosecution and the defense, a reporter, and a hearing officer, but not in the presence of the seven accused.

On the basis of the doctor's opinion, the convening authority ordered the case be treated as not capital, and, over defense objection, the law officer permitted the remainder of the girl's testimony on cross-examination to be taken by oral deposition without the accused being present.

While there is some danger that the procedure followed here might permit a witness to lightly claim inability and thus escape confronting in open court the person accused,

nevertheless the ruling of the law officer under the particular circumstances seems proper. The objections of Parrish and Ciarletta that the members of the court-martial, being denied an opportunity of personally observing the witness, could not intelligently judge the credibility of the witness, is not applicable here. The court members had ample opportunity to observe her demeanor during a full day on the witness stand at which time she gave seventy-five percent of her testimony.

In assaying the correctness of the law officer's ruling, it must be remembered that in military law there is no right to the physical presence of the witness at trial, where good cause under Article 49 for his absence exists. Neither has the accused the right to be present when the witness against him testifies at an oral deposition hearing. Cross-examination by counsel of his choice satisfies the right of confrontation.

In CM 12845, Dyche, decided 24 October 1956, the Government at trial level once again resorted to the use of its favorite "tool". The law officer admitted the deposition of an official of the State of Illinois. The deposition reflected the deponent's testimony regarding certain official records filed in the State's sub-office in Chicago. The record of trial revealed that the deponent resided permanently in Bloomington, Illinois, but performed his official duties

for the State of Illinois in the State's Chicago sub-office and in its principal office in the capitol city of Springfield. Bloomington is within one hundred miles of the place where the court-martial was held, whereas Chicago and Springfield are slightly more than one hundred miles away. The deposition was taken in Chicago.

On review an Air Force board of review approved the conviction and held that the deposition was admissible under Article 49(d)(1).[72] It further determined that the deponent was in Chicago and more than the required distance from the place of trial when his deposition was taken. Finding no proof to the contrary, the board said it could be presumed that the deponent remained at his part-time office in Chicago, and thus was more than a hundred miles from the place of trial when his deposition was received in evidence.[73]

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[72]Thus again on the shakey basis of "military necessity" and the "unavailability" of a witness the prosecution was permitted to use a deposition to prove its case, although the deponent was readily amenable to court-martial process and the Government could have reasonably had him present at trial.

[73]It is true, as was said in Whitford v. Clark County, 119 U.S. 522 (1886) that where a witness lived more than one hundred miles from the place of trial when his deposition was taken, it will be presumed that he continued to live there at the time of trial, and no further proof on that score need be furnished by the offering party, unless this presumption shall be overcome. However, such a presumption, or more correctly, such a justifiable inference is more properly indulged in when the condition which permits the use of the deposition is probably permanent and not temporary as in this case. See Wigmore, Evidence, (3d., Ed., 1940) sec. 1414. United States v. Dyche (No. 9430) granted review on the question of whether the deposition was properly admitted in evidence.

In De Wald,[74] certain depositions were offered by the prosecution, were objected to by the defense, and were received in evidence by the court. A number of typed answers in the deposition either had been stricken or elaborated upon, or both, by inked handwriting. Each change or correction bore initials corresponding to the names of the respective deponents. However, no evidence was adduced to show that the deponents had, in fact, made the alterations. The trial counsel testified that prior to trial, after initially receiving the depositions and noting apparent inconsistencies, he had returned the depositions for "clarification" to the military organization which had taken them.

Although, as has been previously noted, the Manual provides that a deposition may be changed or corrected if it does not correctly reflect the testimony of a witness,[75] the procedure followed in this case was improper. Here there was no evidence that the "clarification" was made by the respective deponents, or if made by them that they were still under oath and subject to cross-examination by the defense. Neither was there any evidence that the officer authorized

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[74]ACM 7604, De Wald, 13 CMR 851.

[75]par. 117e, MCM states that when the testimony is fully transcribed, the deposition will be submitted to the witness for examination, and any changes which the witness desires to make shall be entered by the person taking the deposition.

to take the depositions made the corrections for and with the consent of the deponents, in the presence of counsel for the prosecution and the accused. As a result, the alleged corrections were nothing more than hearsay, and the altered depositions were incompetent evidence.

Finally, in examining the case of United States v. Graalum[76] we discover that before an accused may have compulsory process for obtaining either military or civilian witnesses in his favor, as is guaranteed by both the sixth amendment and Article 46 of the Code[77], he must not only establish to the satisfaction of the convening authority or the court, if in session, that the witness' expected testimony is material and necessary, but he must also show that the witness' presence at trial is essential and that a deposition will not enable him to fully present his defense.[78]

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[76]ACM 10050 Graalum, 19 CMR 667. Petition for review by USCMA denied, see 19 CMR 413.

[77]UCMJ. Art. 46 provides that the trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence by means of process issued in court-martial cases. Such process shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, its territories, and possessions.

[78]par. 115, MCM, 1951 provides, "... A request for the personal appearance of a witness referred to the convening authority or to the court for decision will be submitted in writing, together with a statement, signed by the counsel requesting the witness, cortaining (1) a synopsis of the

This latter task is most difficult, since in military law, in instances where the Code authorizes the use of deposition evidence, the presentation of testimony in deposition form to a court-martial is considered a reasonable and adequate method of presenting testimony. Thus, if the convening authority or the court decides that a deposition will serve the defense as well as the in-court testimony of the live witness, and if the witness is one whose deposition may be taken under Article 49, the convening authority or the court may refuse to issue compulsory process to obtain the presence of the witness, and the accused must defend with deposition testimony or nothing.

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testimony that it is expected the witness will give, (2) full reasons which necessitate the personal appearance of the witness, and (3) any other matter showing that such expected testimony is necessary to the ends of justice." It is to be noted that there is no specific provision in par. 115, MCM, 1951, as there was in par. 105a, MCM, 1949, requiring the accused, before he is entitled to compulsory process, to show that a deposition would not fully answer the purpose. However, the board of review in Graalum has read this requirement into par. 115, MCM, 1951.

CHAPTER IX

CONCLUSION

The primary object of the sixth amendment was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, from being used by the Government against persons charged with crime. The purpose of the amendment was to guarantee to an accused person the right of a personal examination and cross-examination of the witness testifying against him. It contemplated that the accused would have an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling the witness to stand face to face with those who would decide the accused's guilt in order that they may look at him, and judge by his demeanor upon the witness stand and the manner in which he gives his testimony whether he is worthy of belief.

Although military courts have the same responsibility as federal courts to protect a person from a violation of his constitutional rights, and although the Constitution does not withhold the right of confrontation from a military person because he is, at the time, serving with the armed forces of his country, the majority of the Court of Military Appeals, nevertheless, has concluded that the sixth amendment does not prevent the use of depositions against a military accused in

a trial by court-martial.

As a result, prosecution depositions, inadmissible in federal criminal trials, are commonly used against defendants in courts-martial; and the accused is afforded no right of confrontation other than the doubtful one of propounding written cross-interrogatories to an accusing witness whom he may never have seen and whose testimentary assertions he probably never has heard. Admittedly, depositions taken on written interrogatories and cross-interrogatories possess some trustworthiness, but trustworthiness can best be assured by testing the witness's assertions by face-to-face cross-examination. Much of the effectiveness and value of cross-examination is lost when it must be done by written cross-interrogatories and the accused must guess at what the witness may reveal or conceal.

Although there has been sporadic criticism of the use of prosecution depositions within the military itself, there has been little serious civilian or Congressional opposition to their use. It will be recalled that in the legislative hearings on the Code only the American Legion protested the use of depositions as denying an accused person the face to face confrontation contemplated by the Constitution. Thus, with no demand for a change, there seems no likelihood that Congress will amend the present law to limit the use of depositions in courts-martial to that permitted in federal

criminal proceedings. Neither is there any reason to believe that Congress will change the law to provide for an accused's presence when depositions against him are taken. The difficulty of trying military offenses under wartime conditions will be sufficient argument for continuing the law which prevents an accused in peace time from personally confronting the deposition witness against him.

Although the Court of Military Appeals has decided that a military accused has no right to personally face and cross-examine the deposition witness against him, but has only the right to propound written cross-interrogatories, this question has not been directly ruled on by a federal court. And while it may not be open to a federal court simply to re-evaluate evidence already dealt fully and fairly with by a military decision, a federal court on habeas corpus may consider a decision of the Court of Military Appeals where the constitutionality of a part of Article 49 is involved. This is particularly true since it is open to question whether the Court of Military Appeals possesses the authority to test the constitutionality of an act of Congress.

It is very possible that if a case factually similar to Sutton was brought before a federal court on a proper application for a writ of habeas corpus, such court would not agree with the Sutton holding but would agree with Judge Quinn that the majority's application of Article 49 had

denied the accused his basic constitutional right to confront the witness against him.

However, until such a time, depositions will continue to be taken and used by the prosecution in much the same manner as they presently are.

Although many errors in the taking and use of depositions result from the careless and indifferent attitude assumed by some Government counsel, other errors in taking and using depositions may be attributed to the fact that the Manual provisions dealing with depositions lack clarity and coherence. In order to correctly take and use depositions, not only must the procedural requirements of the Manual be closely followed, but also the rulings of law announced in numerous opinions and decisions must be carefully considered.

It is well to remember that although the Court has upheld the right of Congress to authorize the use of prosecution depositions in trials by courts-martial, it has also appreciated that depositions for the most part are tools of the prosecution which deny to an accused the privilege of personal confrontation at trial. Therefore, the Court has and will continue to demand reasonably strict compliance with the procedural and substantive requirements of the Code and Manual, and will not permit halfway measures to be made the basis for the use of a substitute method for presenting facts to the detriment of an accused.

Prosecution depositions are taken and used in many cases for the convenience of trial prosecutors rather than for any real necessity of the armed services. They are received in evidence because the witness is beyond the state or beyond one hundred miles from the place of trial. In this day of modern transportation, the horse-and buggy concept which permits a deposition to be used for either of these reasons is unnecessary---particularly in peace time. As long as the Government has the power of process to compell a witness to appear at trial to testify, it is difficult to understand why depositions need to be taken from witnesses who live only thirty-five miles away but in another state, or who work part-time in Chicago, one hundred and thirteen miles distant from the place of trial. The Court of Military Appeals, noting the great use of depositions by the prosecution, has advised that they should be used, even when permitted by statute, only when the Government cannot reasonably have the witness present at the time of trial.

To avoid the unrealistic results of cases such as Chapman and Dyche, and to prevent the unreasonable use of depositions complained of by the Court of Military Appeals, it is submitted that Congress should amend Article 49(d)(1) by deleting its present language, and substituting the following: "(1) that the witness resides or is beyond the distance of five hundred miles from the place of trial or hearing, or

that in time of war the witness resides or is beyond one hundred miles from the place of trial or hearing; or."

It is also concluded that paragraph 117a of the Manual should be changed so as to reflect the decisions of Drain and Miller. This is necessary so that the errors committed in those cases are not repeated in others. The necessary changes may be made by simply deleting the third sentence of the third paragraph of 117a, and substituting the following language:

> If a deposition is to be used before a general court-martial, however, the officers representing both the prosecution and the defense must be certified as provided in Article 27b. If the deposition is to be used before a special court-martial and the officer designated to represent the prosecution is qualified in the sense of Article 27, the officer designated to represent the defense must have at least equivalent qualifications under that article. If a deposition is to be used before either a general or special court-martial, the officer designated to represent the accused at its taking may do so only with the knowledge and consent of the accused."

CONTRIBUTION

Writers of military law texts from the time of Winthrop to the present have given little space or attention to the use of depositions in courts-martial.

Winthrop in Military Law and Precedents devotes seven pages to the procedure for taking and using depositions under early Articles of War. Snedeker in Military Justice Under the Uniform Code writes about four pages on the subject. Aycock and Wurfel in Military Law Under the Uniform Code of Military Justice treat depositions in less than three pages, while Walker in Military Law deals with depositions by including in his book a single navy board of review opinion on the subject. Edwards and Decker in The Serviceman and the Law devote less than a page to depositions.

The value of my paper lies in the fact that it brings under one cover current case law relative to the use of depositions under Article 49 of the Code. It is submitted that this contribution will be of value to both the civilian lawyer who occasionally appears as counsel before courts-martial, and to the military lawyer who, day in and day out, prepares, tries, reviews, and appeals court-martial cases.

Thesis
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Depositions in courts-martial.
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