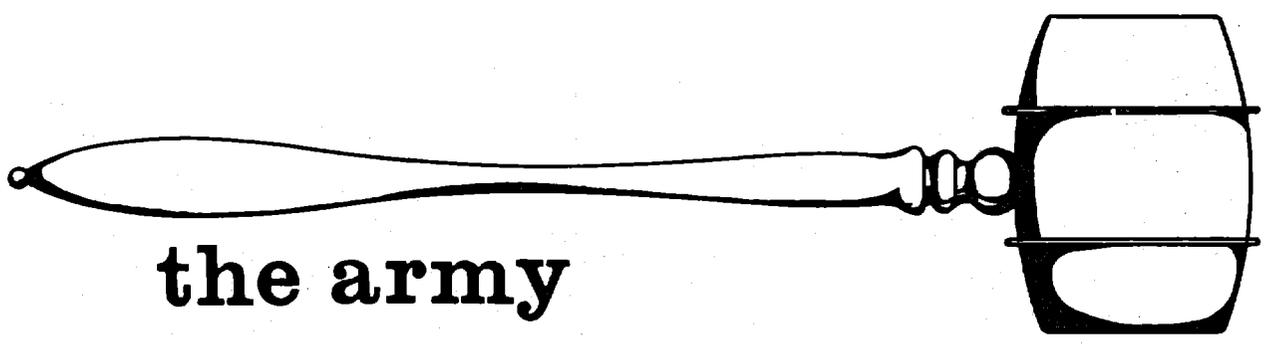


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**The Deliberative Privilege  
under M.R.E. 509 \***

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**I. Introduction**

Do you swear (or affirm) that you will faithfully perform all the duties incumbent upon you as a member of this court: that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by courts-martial, the case of the accused now before this court: and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so in due course of law, so help you God?<sup>1</sup>

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\*The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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<sup>1</sup> U.S. Dep't of Army, Pamphlet 27-15, Military Justice Handbook, Trial Guide 26 (1980); Manual for Courts-

This oath, administered to the court members at the beginning of each trial, emphasizes the weighty task being undertaken and mandates that members may breach the secrecy of their deliberations only when required to do so in "due course of law."<sup>2</sup> This latter aspect of the oath is an embodiment of a segment of law that has long recognized the inviolability of the deliberations of court members. Only in limited circumstances may the sanctity of the deliberative process be breached.

## II. Extent of the Privilege

Military Rule of Evidence 509 (hereinafter referred to as M.R.E. 509) preserves the sanctity of the deliberative process and, concomitantly, recognizes the court member's oath by establishing a "privilege" for "... the deliberations of courts ..."<sup>3</sup> The most impor-

Martial, United States, 1969 (Rev. ed.), para. 114b (hereinafter cited as MCM, 1969).

<sup>2</sup> According to MCM, note 1, *supra*, para. 77a, a court member violates the oath by divulging the vote or opinion of any member.

<sup>3</sup> Rule 509, M.R.E., provides that:

[e]xcept as provided in Rule 606, the deliberations of courts and grand and petit juries are

privileged to the extent that such matters are privileged in trial of criminal cases in the United States courts, but the results of the deliberations are not privileged.

tant aspect of M.R.E. 509 is that the members are precluded from impeaching their own verdict.<sup>4</sup> This goal is achieved by prohibiting, except under limited circumstances, testimony or affidavits by a court member alleging an impropriety in the deliberative process. These limited circumstances, exceptions to the privilege, are set forth in Military Rule of Evidence 606(b) (hereinafter referred to as M.R.E. 606(b)). Under these exceptions, a court member can ignore the confidential relationship and

privileged to the extent that such matters are privileged in trial of criminal cases in the United States courts, but the results of the deliberations are not privileged.

The text of the Military Rules of Evidence may be found in the new Appendix 18 to the Manual for Courts-Martial, added by Change 3, dated 1 September 1980; and also in West's Military Justice Reporter at 8 M.J. LXVII through CCXXXIX (1980). The Military Rules of Evidence became law effective on September 1, 1980, as a result of Exec. Order No. 12,198, published at 45 Fed. Reg. 16,932 (1980).

Readers of the present article may be interested in *Privileges Under the Military Rules of Evidence*, by Captain Joseph A. Woodruff, published at 92 Mil. L. Rev. 5 (spring 1981).

<sup>4</sup> MCM, note 1, *supra*, para. 151a accomplished the same result.

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become a witness or offer an affidavit on the following issues:

... Whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon the members, or whether there was unlawful command influence.<sup>5</sup>

While this rule may operate to subject the accused to a finding or sentence that was not reached in accordance with law, this potentially harsh situation is the result of a policy decision which encourages members to have open discussions during deliberations without fear of reprisal, and which promotes the finality of verdicts. The examination of the case law in this article explains the rule, its exceptions, and the harshness of the rule to the accused.

The privilege is clearly defined by *United States v. Perez-Pagan*.<sup>6</sup> In *Perez-Pagan*, an affidavit by a court member established that the members ignored one of the judge's instructions and used an improper voting procedure.

<sup>5</sup> Mil. R. Evid. 606(b) provides that:

[u]pon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

<sup>6</sup> 47 C.M.R. 719 (A.C.M.R. 1973).

The Army Court of Military Review held that the sanctity of the deliberations must be preserved and refused to consider the affidavit as impeaching the verdict. The same court considered the impeachment issue again in *United States v. Higdon*,<sup>7</sup> and reached a similar result. In *Higdon*, affidavits established that the members in reaching their findings took into account the consequences of the acquittal, the expense of bringing the accused to trial, and the probability that other evidence existed which was not presented. The court refused to allow the findings to be impeached and rejected the affidavits. In *United States v. Harris*,<sup>8</sup> the alleged impropriety was that the sentence had been reached by the "flip of a coin." The court noted the desire for unhampered jury discussions and the desirability of finality of verdicts, and held the privilege applicable. The sentence could not be impeached.

When the privilege applies, it prohibits not only testimony or affidavits by court members but also by third parties. The *Harris* court refused to accept an affidavit by the accused who overheard the members in the deliberation room. *Perez-Pagan* rejected statements and evidence presented by a court reporter. In refusing to consider voting documents removed from the deliberation room by the reporter after trial, the court characterized the documents collected by the reporter as "purloined".<sup>9</sup> In another case, the court rejected statements by the defense counsel who attempted to impeach the verdict.<sup>10</sup> Fairly stated, the privilege extends to all third parties. Thus, in *United States v. Bourchier*,<sup>11</sup> the Court of Military Appeals refused to allow the verdict to be impeached by a third party who overheard a conversation about an impropriety that occurred during deliberations. If the rule did not apply to third parties, these individuals could virtually vitiate

<sup>7</sup> 2 M.J. 445 (A.C.M.R. 1975).

<sup>8</sup> 32 C.M.R. 878 (A.F.B.R. 1962).

<sup>9</sup> 47 C.M.R. at 720.

<sup>10</sup> *United States v. Rogers*, CM 436957 (A.C.M.R. 18 Sep. 1978) (unpublished).

<sup>11</sup> 17 C.M.R. 15 (C.M.A. 1954).

the privilege and its desired objective of deliberation room sanctity by becoming uninvited eavesdroppers.

### III. Exceptions to the Privilege

Prior to the adoption of the Military Rules of Evidence, there was only one recognized exception to the privilege; if "extraneous prejudicial information"<sup>12</sup> was brought to the court's attention, testimony and affidavits were permitted in order to reveal the nature of the matter involved. Now three grounds are recognized as exceptions. The exceptions are expanded by M.R.E. 606(b) to include not only extraneous prejudicial information but also improper outside influence on a member and unlawful command influence.<sup>13</sup>

"Extraneous prejudicial information" is just what the phrase indicates—prejudicial information improperly brought to the court's attention. In *United States v. Thompson*,<sup>14</sup> certain court members observed a bulletin board during a recess which indicated the sentence of a co-accused. That sentence was later discussed in the deliberation room in the presence of other members. The Court determined that this improper consideration of the conviction and sentence of a co-accused during deliberations on the sentence amounted to extraneous prejudicial information. Consequently, the Court accepted the affidavits of the members offered to impeach the sentence. Similarly, prejudicial newspaper accounts taken into the deliberation room,<sup>15</sup> and prejudicial remarks by a bailiff to a court member,<sup>16</sup> have been considered to be extraneous prejudicial information.

Under M.R.E. 606(b), unlawful command influence, whether exerted from inside or outside the deliberation room, is not privileged and can be attacked. Pre-rule cases were in disagree-

ment as to whether in-court command influence was privileged. In *United States v. Lill*,<sup>17</sup> the Army Board of Review held in 1954 that certain actions by a senior member were not a basis for impeaching the verdict. The member, a general officer, told some junior members that they were "stupid as hell" when they talked about acquittal, was loud and domineering, and used rank over the junior members during the deliberations. *Lill* is probably contrary to the 1957 case of *United States v. Connors*.<sup>18</sup> In *Connors*, the senior member of the court suggested that an excessive sentence be adjudged so the convening authority could exercise clemency. The court acknowledged that, traditionally, extraneous influence was the only exception to the privilege, but noted that the exception may be broadened if there is "good cause."<sup>16</sup> The court held that command control within the deliberation room was "good cause."

While the drafters of the Military Rules of Evidence intended to include in-court command control as an exception to the privilege,<sup>20</sup> their intent to include command control exerted from outside the deliberation room is not clearly expressed. Not only does M.R.E. 606(b) not specifically include command control exerted from outside the deliberation room as an exception, but the primary pre-rule case rejected attacks on such conduct. *Bourchier* involved conviction of a Navy lieutenant for rape.<sup>21</sup> Affidavits offered by the defense indicated that various court members had been pressured by the convening authority to vote for conviction.<sup>22</sup> While the government countered with affidavits to refute these allegations, the court stated that consideration of the government's affidavits was unnecessary because command influence could not be used as a basis for attacking a finding.<sup>23</sup>

<sup>12</sup> *United States v. Perez-Pagan*, 47 C.M.R. 719 (A.C.M.R. 1973).

<sup>13</sup> Mil. R. Evid. 606, MCM, note 1, *supra*, App. 18.

<sup>14</sup> 32 C.M.R. 776 (A.B.R. 1962).

<sup>15</sup> *United States v. Mattox*, 146 U.S. 140 (1892).

<sup>16</sup> *Id. Cf. Parker v. Gladden*, 385 U.S. 363 (1966)

<sup>17</sup> 15 C.M.R. 472 (A.B.R. 1954).

<sup>18</sup> 23 C.M.R. 636 (A.B.R. 1957).

<sup>19</sup> *Id.* at 640.

<sup>20</sup> Mil. R. Evid. 606(b), MCM, note 1, *supra*, App. 18.

<sup>21</sup> 17 C.M.R. at 19.

<sup>22</sup> 17 C.M.R. at 26.

<sup>23</sup> 17 C.M.R. at 27.

While the command influence exception of the Military Rules of Evidence and its Analysis do not specifically overrule the *Bourchier* rationale, the better view is that it does so by implication. Obviously, the drafters were aware of the *Bouchier* constraints, but were also mindful of the Article 37<sup>24</sup> prohibitions on command control. The use of the general term "command influence"<sup>25</sup> should be interpreted to include command influence exerted from outside the deliberation room as an exception to the deliberative privilege.

The addition of the "improper outside influence" exception will have little significant impact on military practice. Under federal practice, this exception generally includes attempts to tamper with the jury, "e.g., a threat to the safety of a member of [a juror's] family,"<sup>26</sup> and bias of a member developed outside the courtroom.<sup>27</sup> In pre-rule military practice, outside influences were often included under the heading of extraneous prejudicial information.<sup>28</sup> Therefore, this exception creates a different category, but the same kind of information will be allowed to impeach a finding or sentence. The primary thrust of this exception is to prevent jury tampering and to insure that cases are decided based on the evidence presented in court.

Early indications are that M.R.E. 509 and M.R.E. 606(b) will not substantially change pre-rule law. For example, in *United States v.*

*Hance*,<sup>29</sup> the Army Court of Military Review declined to allow impeachment of the verdict based on post-trial statements by court members that five of the nine members were not convinced of guilt beyond a reasonable doubt and that four members were not convinced that the accused was mentally competent to premeditate murder. In rejecting the statements as privileged, the court noted the absence of extraneous influence and cited M.R.E. 606(b).

In the more recent case of *United States v. Bishop*,<sup>30</sup> the Court of Military Appeals specifically noted the consonance of M.R.E. 606(b) with pre-rule practice. The court determined that extraneous information was before the members because some members conducted an unauthorized viewing of the crime scene. The court determined that even though this was extraneous information, the information was not prejudicial because the viewing was a "fortuitous and casual" occurrence.<sup>31</sup>

#### IV. Procedural Questions

Litigation of the privilege's applicability may present a procedural dilemma. The problem centers around the lack of a prescribed method for determining whether an exception applies. While M.R.E. 606(b) would appear to prevent all testimony or affidavits by court members with regard to privileged information, a limited waiver must apply. Stated differently, "the court may sometimes find it necessary to breach the privilege slightly in order to determine if it exists."<sup>32</sup> While this will place the court in the position of hearing evidence and then rejecting the evidence, "nothing else is available."<sup>33</sup>

<sup>24</sup> Uniform Code of Military Justice, Art. 37, 10 U.S.C. §837 (1976).

<sup>25</sup> Mil. R. Evid. 606(b).

<sup>26</sup> J. Weinstein and M. Berger, *Weinstein's Evidence*, p. 606-3 (1978).

<sup>27</sup> *Ryan v. United States*, 191 F.2d 779 (D.C. Cir. 1951), cert. denied, 342 U.S. 928 (1952). In federal practice, an unauthorized view of the crime scene may be treated as an outside influence. *United States ex rel. DeLucia v. McMann*, 373 F.2d 759 (2nd Cir. 1967).

<sup>28</sup> While *Perez-Pagan* states that "extraneous information" is the only exception to the privilege, the court also notes that "outside influence ... improperly brought to bear on a juror ..." is an exception, and lumps the two categories. 47 C.M.R. at 722.

<sup>29</sup> 10 M.J. 622 (A.C.M.R. 1980).

<sup>30</sup> 11 M.J. 7 (C.M.R. 1981).

<sup>31</sup> *Id.* at 10. Under federal practice, this would have been treated as an outside influence. See note 27, *supra*.

<sup>32</sup> J. Weinstein and M. Berger, *supra* note 26, at para. 104(04).

<sup>33</sup> *Id.*, citing *United States v. Weisman*, 111 F.2d 260, 261-262 (2nd Cir. 1940).

The mechanics of the disclosure could vary based on the time at which the impropriety is discovered. If the allegation of misconduct is covered and raised during trial, the military judge could subject the members to voir dire,<sup>34</sup> after initially determining that an impropriety fitting an exception is involved. This should be an individual voir dire conducted out of the presence of other members to avoid possible disqualification of the unaffected members.<sup>35</sup> Alternatively, an in-chamber inquiry has been suggested as a procedural device for disclosure.<sup>36</sup> One federal case supports inquiry solely by the judge,<sup>37</sup> but another suggests that cross-examination by an attorney is required for the inquiry to be meaningful.<sup>38</sup>

While the military judge has no apparent authority to exclude the accused and counsel from hearing the inquiry, there is authority for the military judge to exclude the spectators and conduct an in camera inquiry.<sup>39</sup> This method of determining the applicability of the privilege is preferable because the right of the accused to a fair trial and the right of the government to the deliberative privilege are served.

A post-trial allegation of misconduct during deliberations could be resolved by the convening authority. First, the convening authority could decide that the information is privileged and therefore that the accused is entitled to no relief. Second, the convening authority could require affidavits by the members if the information does not fit within the privilege. Alternatively, the convening authority could refer the matter to the military judge for a

*DuBay*-type hearing.<sup>40</sup> The judge could then adopt one of the methods suggested earlier for determining whether the finding or sentence was impeached.

An inquiry at or near the time of the verdict appears necessary to prevent waiver. The preference of appellate courts for preserving the finality of verdicts is extremely strong, and generally verdicts are not subject to attack. In this light, post-trial statements about the deliberations are viewed with skepticism, because of the inability to recreate the conditions that existed at the time of the verdict or sentence. Indicative of this preference for finality is a federal case in which the court refused to consider the post-trial affidavit of a juror who indicated he voted not guilty, even though he stated to the contrary in a jury poll.<sup>41</sup> Military authority is in accord. A military accused has "no standing" to assert an impropriety in the deliberations when he delays six weeks in bringing the allegation of impropriety to the attention of the convening authority.<sup>42</sup> Likewise, an impropriety raised for the first time during a motion for a new trial has been viewed as an eleventh hour defense contention and rejected.<sup>43</sup>

Ethical issues may also be involved.<sup>44</sup> Counsel must be sensitive to the ethical problem of contacting court members, even when the contact is post-trial. Federal cases indicate that, while some courts may not discipline attorneys for the improper conduct of interviewing jurors after trial through an investigator,<sup>45</sup> other

<sup>34</sup> MCM, note 1, *supra*, para 62h. Under MCM, para. 62d, challenges for cause are allowed at any stage of the proceeding.

<sup>35</sup> MCM, para 62b.

<sup>36</sup> J. Weinstein and M. Berger, *supra* note 32, at para. 104(04).

<sup>37</sup> *United States v. Spinella*, 506 F.2d 426 (5th Cir. 1975).

<sup>38</sup> *Ryan v. United States*, 191 F.2d 779 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 928 (1952).

<sup>39</sup> M.R.E. 505 and 506. *United States v. Bennett*, 3 M.J. 903 (A.C.M.R. 1977).

<sup>40</sup> *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). See *United States v. Lanzer*, 3 M.J. 60 (C.M.A. 1977).

<sup>41</sup> *United States v. Schroeder*, 433 F.2d 846 (8th Cir. 1970), *cert. denied*, 401 U.S. 943 (1971).

<sup>42</sup> *United States v. Harris*, 32 C.M.R. 878 (A.F.B.R. 1962).

<sup>43</sup> *United States v. Bouchier*, 17 C.M.R. 15 (C.M.A. 1954).

<sup>44</sup> This is noted as a potential ethical issue in the Commentary on Standard 15-4.7, ABA Standards for Criminal Justice, Trial by Jury.

<sup>45</sup> *United States v. Driscoll*, 276 F. Supp. 333 (S.D.N.Y. 1967).

courts have viewed similar conduct by an attorney as "reprehensible".<sup>46</sup> Commentary on military practice suggests that questions of court-member misconduct be taken directly to the judge or to the convening authority, rather than to the court member, to avoid ethical pitfalls.<sup>47</sup> If the attorney questions the members out of court, allegations of jury tampering or violation of members' oath might be raised.

When matter fitting an exception is before the members, military courts consider the evidence and determine the likely effect the matter had on the members. Once a prima facie case of non-privileged misconduct has been presented, the government can salvage the findings or sentence by a "*clear and positive* showing that the . . . [impropriety] *did not* and *could not* operate in any way to influence the court's decision."<sup>48</sup>

<sup>46</sup> United States v. Brasco, 516 F.2d 816 (2nd Cir. 1975), cert. denied, 423 U.S. 860 (1975).

<sup>47</sup> Cook, *Ethics of Trial Advocates*, The Army Lawyer, Dec. 1977, at 1.

<sup>48</sup> United States v. Gaston, 45 C.M.R. 837, 838

## V. Conclusion

This privilege is not intended to be a boon for either the prosecution or the defense. In theory, the members may err in favor of the accused or the government. The policy consideration favoring sanctity of the deliberation room applies in either event. In practice, the defense will normally raise the allegation of misconduct. In that case, the privilege requires the judge to conduct a delicate balancing of interests. On one side of the scale is the accused's interest in a fair trial. On the other side of the scale is the privilege protecting the sanctity of the deliberations. If an exception to the privilege is raised, the scale tips in favor of the accused, and the judge uses a scalpel to disclose only that misconduct. If an exception is not raised, the scale is not moved. The judge then uses a cleaver to cut off further inquiry. In all instances, the rule favors the sanctity of the deliberative process.

(A.C.M.R. 1972); United States v. Adamiak, 4 C.M.A. 412, 15 C.M.R. 412 (1954).

## Present but Unarticulated Probable Cause To Apprehend\*

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### I. Introduction

In a recent unpublished decision, the Army Court of Military Review set aside a finding of guilty of wrongful possession of 519 tablets of phencyclidine (PCP). Appellant moved to suppress the drugs, which had been seized during a search of his person incident to his apprehension. Appellant claimed that the apprehension was supported by probable cause.

The facts of the case are as follows: Appellant was observed by two military policemen

sitting in his car in an on-post parking lot apparently reading. A punitive local regulation made it an offense so to loiter in a parking lot. Hence, appellant was subject to apprehension on that basis. The military police did not intend to apprehend appellant for a violation of the loitering regulation but did approach him to advise him of the rule. Upon reaching the car, the police saw a shovel which appeared to be mili-

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