DEPARTMENT OF THE ARMY PAMPHLET 27-100-9

MILITARY LAW REVIEW

HEADQUARTERS, DEPARTMENT OF THE ARMY JULY 1960

AGO 10049B

PREFACE

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This Review may be cited as Mil. L. Rev., July 1960 (DA Pam 27–100–9, 1 Jul 60), p. 1.

PAMPHLET
No. 27-100-9

HEADQUARTERS,
DEPARTMENT OF THE ARMY
WASHINGTON 25, D. C., *1 July 1960*

MILITARY LAW REVIEW

GAS WARFARE IN INTERNATIONAL LAW*

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I. INTRODUCTION

This study will deal with one aspect of the larger problem of the legal control of weapons in warfare. The twentieth century has witnessed a revolution in weapons. The plane, the submarine, and gas all appeared in World War I. The plane and the submarine are now standard equipment. Gas was banished from the stage. However, it lingers in the wings along with the atom and the germ leading a virile life of its own, refusing to join barbed spears, glass-filled shells, and dumdum bullets in the museum of history.

A. *The Problem*

The United States does not consider itself bound by any treaty that would forbid it from resorting to the use of toxic chemical agents in the event of war. The problem is whether or not the United States is nevertheless restricted in regard to gas warfare by a customary rule of international law, by a general principle, or by a law-making treaty. To answer this problem customary and conventional international law will be critically examined in order to ascertain if there exist positive rules that would prohibit any state from the use of toxic chemical agents as weapons of war.

Such an examination is important at the present time because of the continued research and development of chemical agents by the United States Armed Services, and because of the prospects of a possible nuclear disarmament.

B. *The Unsolved Portions of the Problem*

The problem of the use of gas has been discussed by many writers. However, five principal facets require further study. These may be grouped as follows:

* This article is a reproduction of the author's dissertation submitted to the Faculty of the Graduate School of Georgetown University, June 1960, in partial fulfillment of the requirements for the degree of Master of Arts. The author is grateful to the Georgetown Graduate School for permission to print this dissertation. The opinions and conclusions presented herein 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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1. Writers who rely upon "unnecessary suffering" as the key to the problem have not, in their writings, analyzed either the concept of this general principle or the actual effect of gas in World War I. Both need be explored further before this general principle can be invoked.

2. Writers who rely upon "practice" as the answer to the problem have not critically analyzed the practice of the United States.

3. No one has studied from a legal standpoint the gases developed since World War II.

4. Training manuals of the United States Army have not been studied to determine if the type of gas warfare being conducted is in accord with the international law of war.

5. Few have attempted to treat the legal problems of gas warfare comprehensively. The treatments by various text writers amount, partially because of space limitations, to statements of conclusions. The factual bases and legal reasoning back of the conclusions have not been fully set forth.

C. The Procedure Adopted to Solve the Problem

The following procedure will be adopted in an attempt to throw some light on these unsolved or partially solved areas:

First: The actual use of gases in warfare will be studied in order to discover (1) why they were used, (2) their effect upon their victims, and (3) their tactical effect.

Second: The characteristics of new gases will be analyzed in order to determine their possible effect upon their victims, their probable tactical use, and their legal implications in international law.

Third: With a knowledge of the use and characteristics of gases in mind, an analysis will be undertaken of the various international efforts to limit gas in order to see (1) why gas was sought to be limited, (2) the position of the various states at the conferences, and (3) the legal effect of such efforts at limitation.

Fourth: The practice of states during wartime in regard to their use or non-use of gas will be investigated in order to see if such practice has created a custom of international law.

Fifth: Treaties, custom, general principles of law, judicial decisions, and the views of international law text writers will be studied in order to determine the present state of the law.

Sixth: The present state of the law will be critically evaluated.

II. THE HISTORICAL DEVELOPMENT OF GAS WARFARE [1]

At 5 p.m. on 22 April 1915 a thick yellow smoke was seen to bellow up from the German trenches between Langemarck and Bixschoute near Ypres, Belgium. Soon a gas wall of chlorine two miles long and a hundred feet high began to drift toward the French positions at Langemarck. Chemical warfare had begun.[2]

The seed of chemical warfare had always been present in military thought. Only a proper combination of conditions was required to bring it to a vigorous life. The required conditions did not exist until the latter part of the nineteenth century, and the proper combination was not reached until the First World War.

A. *Early History of the Use of Gas*

The earliest recorded use of gas in military operations was at the seige of Plataea, 428 B.C., during the Peloponnesian Wars. The Spartans saturated wood with pitch and sulphur, placed it under the city walls, and set fire to it. A choking, poisonous fume arose. However, a sudden rainstorm put out the fire.[3] Five years later the same tactics were a complete success at the siege of Delium.[4] There the poisonous fumes kept the defenders from putting out the fire. It was the fire and not the fumes that was intended to do the damage. More specific uses of poisonous gases as such were recorded in the Middle Ages. In 1456 Belgrade was saved from the attacking Turks by a poison gas cloud, prepared by an alchemist. Rags were dipped into a chemical and, when dry, burnt.[5] The resulting smoke wrought such death among the Turks that the Christian commander ordered that such a weapon should be reserved for use only against infidels. In this unique incident gas had demonstrated its effectiveness. However, the practical use of gas was not feasible until science could intelligently unlock the secrets of nature. Alchemy was yet at the threshhold of chemistry.

B. *Forewarnings in the Nineteenth Century*

The nineteenth century witnessed the sudden flowering of the

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[1] "Gas warfare" is a popular misnomer sanctioned by long usage. It includes not only true gases but also finely powdered solids and liquids. Great Britain, War Office, *Medical Manual of Chemical Warfare* (1st Am. Ed., Brooklyn; Chemical Publishing Co., 1941), p. 7; TM 3-215, *Military Chemistry and Chemical Agents* (Washington: U.S. Gov. Printing Office, 1956), p. 6.

[2] Great Britain, *Official History of the Great War, Operations France and Belgium, 1915*, compiled by James E. Edmonds and G. C. Wynne (2 vol.; London: Macmillan and Co., 1927–1936), I, p. 176.

[3] Thucydides, *History of the Peloponnesian Wars*. Translated by Sir R. W. Livingstone, (London: Oxford Univ. Press, 1943), p. 137.

[4] *The Complete Writings of Thucydides, The Peloponnesian War*. Translated by R. Crawley, (N. Y.: Random House, 1934), p. 262.

[5] Heinz Leipmann, *Poison in the Air* (Philadelphia: J. B. Lippincott, 1937), pp. 31, 32.

science of chemistry. The mind of man immediately turned to its practical use in war.

In July 1811, British naval officers observed that fumes from sulphur kilns in Sicily destroyed all vegetation and animal life for a considerable distance around the kilns. Based on this observation a memorial was presented to the Prince Regent on 12 April 1812 by the Admiralty recommending the adaptation of sulphur fumes to warfare. The Prince referred the recommendation to three commissioners. After studying the idea they rendered a favorable report.

It was not until the siege of Sebastopol, during the Crimean War, that the immediate use of sulphur was contemplated. Admiral Lord Dundonald, with knowledge of the favorable report of 1812, produced a concrete plan to capture the Russian forts by suffocating the Russian garrison with sulphur fumes. However, a new committee, appointed by the English Government to examine Admiral Dundonald's scheme, concluded that the effects of sulphur fumes were so horrible that no honorable combatant would use the means required to produce them. The committee, therefore, recommended that the scheme should not be adopted and that Lord Dundonald's account of it should be destroyed.[6]

The use of sulphur was suggested again in connection with the siege of Petersburg in the American Civil War.[7]

The Civil War saw two other serious poison gas suggestions. On April 5, 1862, a Mr. John W. Doughty, of New York City, submitted a letter with drawings to Edwin M. Stanton, the Secretary of War.[8] He suggested the manufacture of a shell containing a chamber for liquid chlorine immediately behind the normal explosive compartment. Its purpose was to rout an entrenched enemy, protected from normal explosives, by enveloping him in gas heavier than air. Mr. Doughty, in the closing paragraph of his letter, discussed the moral question involved. He thought that such a gas, after the experience he gained from observing the first eight months of the Civil War, would lessen, not increase the sanguinary character of the battlefield and at the same time render conflicts more decisive in their results.

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[6] The details of Admiral Lord Dundonald's plan together with correspondence between Lord Palmerston and Lord Panmure concerning it are set out in A.A. Fries and C.J. West, *Chemical Warfare* (N.Y.: McGraw-Hill, 1921), pp. 2–4.

[7] General Horace Porter, *Campaigning With Grant* (N.Y.: Century, 1906), p. 372.

[8] Reported in F. Stansbury Haydon, "A Proposed Gas Shell, 1862," *The Journal of the American Military History Foundation*, Vol. II, No. 1, (Spring, 1938), p. 52. This article also relates a suggestion made by Brigadier General Pendleton, Chief of the Confederate Artillery in Lee's Army, that "stink-shells" be prepared. The Confederate Ordnance Dept. replied, "stink-balls, none on hand; will make if ordered."

In 1864 the use of poison gas in shells was discussed again. E. W. Richardson, writing in the *Popular Science Review* suggested a type of poison shell:

> "Globes could distribute lethal agents, within the breath of which no man could stand. . . . The question is shall these things be? I think they must be. By what compact can they be stopped? It was improbable that any congress of nations could agree on any code regulating means of destruction. But if it did [the code] would be useless. . . ." [9]

The author doubted that either England or France would honor such an agreement if their very existence depended upon the utilization of gas.

Though suggested in the Crimean and Civil Wars, poison gas was not used. However, with the rapid advance of science the feasibility of its use soon became obvious to all. For example the military value of an eye irritant was referred to in lectures in Munich as far back as 1887.[10]

The Boer War offered the first debate among belligerents as to the use of gas. During the Boer War Great Britain employed picric acid in its shells. The result was that the shell, upon impact, would not only explode but would let off a gas called lyddite. The Boer soldiers protected themselves against lyddite by breathing through rags soaked in vinegar. General Joubert protested to Sir George White. The British replied that as the picric acid was not put in the shell solely to produce the gas, its use was not considered objectionable.[11] The negligible tactical effect of lyddite prevented it from becoming a *cause celèbre*. It was left to the combatants of World War I to employ gas effectively for its own sake.

C. *World War I*

Many factors led to the adoption of poison gas as a weapon in World War I. First, Germany could make it. Germany not only led the world in chemical development but practically controlled the chemical industry of the world. Second, Germany needed it. The German advance had been stopped in September 1914, resulting in trench warfare. Machine guns denied attackers access to entrenched positions. High explosives failed to dislodge the dug-in defenders. Germany faced a solid line of trenches from Belgium to the Swiss border. The conventional weapons of war could not break it.

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[9] "Greek Fire," *Popular Science Review* 176 (1864), quoted in Fries and West, *op. cit.* p. 4.

[10] Arthur Guy Enock, *This War Business* (London: The Bodley Head, 1951), p. 94.

[11] Reported in J.M. Spaight, *War Rights on Land* (London: Macmillan and Co., 1911), p. 102; A.A. Roberts, *The Poison War* (London: William Heinemann, 1915), p. 17; and in *Official History of the Great War, . . ., op. cit.*, I, p. 194, n. 1.

1. *1914—Research*

To overcome the predicament in which Germany found herself she looked for new methods of warfare. Being a scientific nation and leading the world in chemistry, Germany logically turned to the chemists.

Professor Fritz Haber of the Kaiser Wilhelm Physical Institute at Berlin had been experimenting with poison gases two months before the stalemate actually occurred at the front. He first tried phosgene. However, an explosion in his laboratory killed his assistant, Professor Sochur. After that the testing was switched to chlorine and its compounds.[12] By April 1915, Haber was ready for the first tactical experiment. Ypres was chosen.

2. *1915—Chlorine and phosgene*

On 20 April a German deserter was captured near Langemarck and told of the impending gas attack.[13] He was not believed. When, two days later, the yellow cloud began to drift slowly toward the French line no one knew what it meant. However, once it struck, confusion was created among 15,000 men. The Allies were entirely unprepared. Five thousand died. Discipline and organization broke down as soldiers fled to the rear.[14] A four-mile hole was torn in the front and the road to the channel ports lay open.[15] However, the Germans hesitated, the British closed the line, and never again throughout the war was it opened to such an extent.[16]

Improvised gas masks were rushed to the Allied front, just in time for the second successful German gas attack on the morning of 24 April in the same vicinity.[17] On May 1 the British, for the first time, stopped a German infantry attack which was preceded by a chlorine cloud.[18] After May 5th the Allies had available fairly efficient gas protection.

After May 1915, a long period elapsed during which the Germans confined themselves solely to gas shells. The Germans had

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[12] Victor Lefebure, *The Riddle of the Rhine* (N.Y.: The Chemical Foundation, Inc., 1923), p. 35.

[13] His name was August Jaeger. In Germany he became infamously known as "the traitor of Ypres." Dr. Rudolph Hanslian, *The Gas Attack at Ypres* (Edgewood Arsenal, Md: Chemical Warfare School, 1940), p. 10. The author originally published his book in Germany and later gave the U.S. Army permission to republish it for training purposes. A much more exhaustive text on chemical warfare was published by Dr. Hanslian in 1937 entitled *Der Chemische Krieg*, [Berlin: Verlag Von E.S. Mittler and Sohn, 1937].

[14] *Official History of the Great War, . . ., op. cit.*, I, pp. 177, 178.

[15] Captain B.H. Liddell-Hart, *The Real War, 1914–1918* (Boston: Little Brown, 1930), pp. 129, 130.

[16] *Official History of the Great War, . . ., op. cit.*, I, pp. 178–187.

[17] *Ibid.*, I, pp. 215–220.

[18] *Ibid.*, I, p. 288.

a gas shell immediately available because they had previously redesigned their shells to carry an eye irritant similar to lyddite used in the Boer War. The gas shell used in 1915, therefore, evolved from an earlier model which was first used in October 1914. At that time double salts of dionialine was added to the powder of the projectile. The irritant would hover as dust in the air after the shell burst. It was not very intense.[19] Nevertheless, an unnoticed important first step had been taken toward gas warfare.

Liquid irritants were shortly substituted for the salts. These liquids were xylyl bromide and xylylene dibromide (T stuff), and bromoacetone and bromated methyl ethyl ketone (B stuff). When atomized they were so much more intense than the salts that German shells were ballistically redesigned to accommodate this liquid. These substances caused great inconvenience through temporary blindness, but were not highly toxic. By January 1915, Germany had a shell which could carry a liquefied gas as easily as the liquid irritant for which it was originally designed.[20]

Beginning in June 1915, these shells, filled now with lethal brominated and chlorinated organic compounds, were used extensively. They had the advantage over the gas clouds first used because they were not entirely dependent on the wind. However, these gas shells did not achieve the results which the Germans expected. A satisfactory protection against chlorine was easily obtained. Germany had to find some other gas.[21]

In mid-summer 1915 British intelligence had been informed that the Germans were planning to switch from chlorine to phosgene.[22] The report was correct. The work, which Germany suspended after the laboratory explosion the autumn before, was resumed. Phosgene was remarkable for its peculiar "delayed" effect when only small quantities were breathed. After an attack no one was sure if he had been affected or not.[23] Therefore, men merely suspected of exposure to phosgene were compelled to report as serious casualties and carried as such, even from the front lines.[24]

On December 19, 1915 the Germans at Ypres launched a gas cloud using a mixture of phosgene and chlorine.[25] Unfortunately

[19] Liddell-Hart, *op. cit.*, pp. 129, 130.
[20] Lefebure, *op. cit.*, p. 40.
[21] Alden H. Waitt, *Gas Warfare* (Rev. ed., N.Y.: Duell, Sloan and Pearce, 1944), p. 19.
[22] Waitt, *op. cit.*, p. 40.
[23] *Official History of the Great War, Military Operations France and Belgium*, 1916 (2 vols., London: Macmillan and Co., 1932–1938), I, p. 79. Compiled by Brig. Gen. James E. Edmonds and Captain Wilfred Miles.
[24] Lefebure, *op. cit.*, p. 45.
[25] *Official History of the Great War, . . ., 1916, op. cit.* I, p. 159.

for the Germans the Allies, having learned of it in mid-summer, had four months to prepare for it. New gas masks were ready. In addition, a prisoner captured just three days prior to the phosgene attack had given the date and place the cloud was to strike.[26] As a result no hole in the line opened as happened the previous April.

Gas was used on the Eastern front also. However, the nature of the Russian campaign, with its wide area and lack of critical objectives to the front of attack robbed gas of its chief tactical use.[27]

Overcoming whatever moral or legal objections she may have had, Germany realized the advantage which gas would give a chemical nation in the attack, seized the opportunity, and very nearly succeeded.[28]

The Allies naturally reacted to the German use of gas. France was the first to counter with gas attacks in July and August of 1915. However, her attacks were small and did little more than boost the morale of her own troops.[29] The British launched the first heavy allied gas attack on September 25 at Loos.[30] Oddly, this chlorine attack took the Germans by surprise and met with considerable success.[31] The British used the chlorine cloud again in October and December.[32]

The year 1915 introduced gas warfare. However, it was confined to a relatively few instances at small sectors of the front. 1916 was to tell a different story.

3. *1916—Effective shell and cloud techniques*

The British opened their Somme offensive in June 1916. Ninety-eight phosgene clouds were discharged, some as a prelude to an attack, others as a feint.[33] A German soldier's letter home reveals its effect: "Since the beginning of July an unparalleled

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[26] *Ibid.*, I, p. 158.

[27] Lefebure, *op. cit.*, p. 47; *Official History of the Great War, . . ., 1915, op. cit.*, I, p. 194, n. 2.

[28] The Germans had scruples about using gas. In order to establish some justification for her action, Germany, prior to April 22, circulated false reports of the use of gas by the Allies. Her use would then appear to the world as retaliation in kind. John Buchan, *A History of the Great War*, (4 vols.; Boston: Houghton Mifflin, 1922), II, p. 43. The Germans also were slow in revealing the gas attack on 22 April to the German people. Their first reports of the attack made no mention of gas. *Official History of the Great War, . . ., 1915, op. cit.*, I, p. 194. See note 181 below wherein Germany's reasons for initiating gas warfare are further analyzed.

[29] F.A. Hassel, M.S. Hassel, J. S. Martin, *Chemistry in Warfare* (N.Y.: Hastings House, 1942), p. 88.

[30] *Official History of the Great War, . . ., 1915, op. cit.*, II, p. 172.

[31] *Ibid.*, II, p. 179.

[32] *Official History of the Great War, . . ., 1915, op. cit.*, II, p. 384.

[33] *Official History of the Great War, . . ., 1916, op. cit.*, I, p. 79.

slaughter has been going on. Not a day passes but the English let off their gas waves at one place or another."[34]

Gas shells supplied by the French were also used as interdiction fire on all accesses to the front. A German correspondent wrote: "This invisible and perilous spectre of the air threatens and lies in wait on all roads leading to the front."[35]

So great was the British success with gas in 1916 that on December 23, 1916, Field Marshal Sir Douglas Haig, G.C.B., could state " . . . the enemy has suffered heavy casualties from our gas attacks, while the means of protection adopted by us have proved thoroughly effective."[36]

The British had much greater success with clouds than the Germans for several reasons. First, because the shock of having been hit first resulted in severe gas discipline among their troops. Second, the Livens Projector, introduced by the British, did away with some of the enormous preparation required for a cloud attack.[37] Third, this same projector made possible the formation of a cloud one mile from the site from which the gas was launched, decreasing considerably the dependence on wind direction. Last, German tactical policy tended to utilize gas clouds primarily as a means of injuring the enemy. Its possibilities as a means for large scale ground gains were not fully appreciated.[38]

While the British were concentrating on gas clouds, the Germans and French went ahead with further gas shell development. Phosgene was placed in trench mortar bombs. Then a stronger chemical, diphosgene, was placed in shells under the name "Green Cross."[39] It was also a choking gas. However, the gas masks had no difficulty filtering it by chemical absorption.

1916 closed with the perfection of the gas shell by the Germans and the gas cloud by the British. Phosgene, diphosgene, and chlorine were the chemicals in use. Another was to join their ranks shortly which would overshadow them all.

4. *1917—Penetrating and by-passing the mask; Blue Cross, chloropicrin, and mustard*

In order to penetrate the Allied gas masks the Germans fired shells filled with various powdered arsenic compounds called Blue Cross, and a liquid called chloropicrin. The object was to penetrate mechanically the chemical filter in the gas mask, cause nausea

[34] Lefebure, *op. cit.*, p. 19.
[35] *Ibid.*, p. 54.
[36] Lefebure, *op. cit.*, p. 55.
[37] Lefebure, *op cit.*, pp. 57-62; Waitt, *op. cit.*, p. 19; Fries and West, *op. cit.*, p. 18.
[38] Buchan, *op. cit.*, III, p. 583
[39] Lefebure, *op. cit.*, p. 57.

which would force the mask off, and thereby expose the lungs to the lethal Green Cross which the mask filter could absorb.[40] The Germans were moderately successful. However, another German method, not to penetrate but to by-pass the mask, was the most successful.

July 12, 1917 ranks alongside April 22, 1915 (chlorine) and December 19, 1915 (phosgene) as milestones in gas warfare. Mustard gas was then first used in battle by the Germans.[41] It became the war gas *par excellence.*[42] It produced eight times as many Allied casualties as all the other gases utilized. Its effectiveness was due in part to its persistence and in part to the fact that it attacked a man's whole body, creating huge, but relatively painless blisters on skin areas it touched. It could remain on the ground for days after an attack with little odor.[43] Effective gas discipline would have required an almost continuous wearing of the mask and protective clothing.

Its advantages limited its tactical use. It could only be used several days before an attack on an objective. During the actual attack it could be employed only on localities and objects with which the attackers would have no contact.[44] However, nothing could match it in causing casualties, breaking morale, producing delay, and in neutralizing strong points.

The Germans were not the only innovators in 1917. The French tried hydrogen cyanide, the first of the blood gases. They met with little success.[45]

5. *1918—Widespread use of mustard; invention of lewisite*

Mustard gas continued to dominate the scene. Neutralization of strong points became its chief tactical use in the attack.[46] During the German offensive of March–April 1918, Armentières fell after being neutralized by mustard shelling.[47] When the German retreat began in August 1918, areas were flooded with the gas to act as a barrier to the Allied advance.[48]

The Allies had not been slow in recognizing the value of mustard. The French first used it in June 1918 and the British the

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[40] Buchan, *loc. cit.*, Enock, *op. cit.*, p. 90, Fries and West, *op. cit.*, p. 144.
[41] Buchan *loc. cit.*, Liddell-Hart, *op. cit.*, p. 340.
[42] Waitt, *op. cit.*, pp. 19, 20, 63, 64.
[43] Buchan, *loc. cit.*, Lefebure, *op. cit.*, p. 68.
[44] Lefebure, *op. cit.*, pp. 68, 69.
[45] Waitt, *op. cit.*, p. 66.
[46] *Official History of the Great War, Operations France and Belgium, 1918,* compiled by Brig. Gen. James E. Edmonds, (3 vols., London: Macmillan and Co., 1935–1939), I, pp. 218, 304.
[47] *Ibid.*, II, pp. 164, 200–204; Waitt, *op. cit.*, p. 21; Lefebure, *op. cit.*, p. 77.
[48] *Official History of the Great War, . . ., 1918, op. cit.*, III, pp. 285, 297. Lefebure, *op. cit.*, pp. 78, 79.

following September.[49] Its use by the Allies created feelings allied to panic in the German ranks.[50]

The war ended while a new type blister gas, lewisite, was being loaded in New York. It was perfected by Captain W.L. Lewis of the United States Army. Mustard caused many casualties but few deaths.[51] Lewisite would be more lethal. Not only would it blister the skin, but could, if the dosage were large enough, penetrate the pores and poison the body.[52]

6. *Observations*

World War I closed with five types of gases in use:

(1) Choking gases—Chlorine and phosgene.

(2) Vomiting gases—Blue Cross and chloropicrin.

(3) Blister gases—mustard, and to a lesser extent phenyldichloroarsine (PD) and ethyldichloroarsine (ED) which were also vomiting gases.[53]

(4) Blood gas—hydrogen cyanide.

(5) Tear gases.[54]

Three observations may be made as a result of the use of these gases: (1) as to their effect on military personnel; (2) as to their advantage for one side or the other; and (3) as to their effect on noncombatants. As for military personnel, phosgene was the killer, causing 80% of all gas deaths.[55] However, mustard gas was much more effective in placing the enemy soldier *hors de combat.* When the war ended the value of gas as an anti-personnel weapon had been proven.[56] For example, there were only 17,170 gas

[49] Buchan, *op. cit.*, IV, p. 584.

[50] Lefebure, *op. cit.*, p. 82.

[51] This characteristic led to its premature rejection in 1915 by the British (Waitt, *op. cit.*, 50). Such rejection cost the British dearly. Two-thirds of their gas casualties were from mustard. Gen. A.M. Prentiss, *Chemicals in War* (N.Y.: McGraw-Hill Book Co., 1937), p. 679.

[52] Fries and West, *op. cit.*, p. 380, give a rather exaggerated description of lewisite in action. A much more sober analysis of the pros and cons of the gas is contained in *Medical Manual of Chemical Warfare, op. cit.*, pp. 40–43.

[53] In its limited use PD displayed no marked superiority over other vomiting gases. ED was introduced by the Germans in March 1918 in an effort to produce a gas that would be quicker acting than diphosgene or mustard and more lasting in its effects than PD. *Military Chemistry and Chemical Agents, op. cit.*, pp. 43, 44.

[54] The legal significance in municipal law of the use of such gases as tear gas will be discussed in Chapter V. C.

[55] *Military Chemistry and Chemical Agents, op. cit.*, p. 18.

[56] "Indeed, gas has a good claim to the title of the most successful weapon of the 1914 War." Philip Noel Baker, *The Arms Race* (N.Y.: Oceana Publications, 1958), p. 322. "The experiences of World War I indicate that gas is a useful strategic and tactical weapon." *Medical Manual of Chemical Warfare, op. cit.*, p. 12. See also Elvira K. Frodkin, *The Air Menace and the Answer* (N.Y.: Macmillan, 1934), p. 20; Fries and West, *op. cit.*, p. 371; and Brig. Gen. Haig Shekerjian, *Why Gas Troops?* (Edgewood Arsenal, Md., Chem. Warfare School, Feb. 1940), p. 138, for further statements on the value of gas as an anti-personnel weapon.

troops in the armies of both sides. More than a million and a quarter casualties resulted from their efforts. But if these casualty figures are examined an odd factor is immediately apparent: there were few deaths. The experience of the American Army is illustrative of this fact. American troops were first gassed on February 25, 1918. By the following November, 27 out of every 100 U.S. battle casualties were caused by gas. Less than 2½% of these were fatal[57] as compared with a 28% fatality from other weapons. Such figures must be known for an intelligent understanding of the humanity or inhumanity of gas warfare as practiced in World War I.

The second important item that must be noted is that gas gave the side first using it a temporary advantage only. A new development by one side was in time matched by the other. Gas could inflict casualties, but to no greater extent than those inflicted in turn by an enemy who was prepared to retaliate.

Lastly, it must be noted that its victims were confined to troops in the field. It was not directed against nor did it affect the civilian population. This fortunate result was aided by the fact that the airplane was not used as a means of disseminating gases. Despite the escape of the civilian population in World War I it was fear for their safety from gas that preoccupied the states in the interwar period.

D. *Interwar Developments*

1. *The theories*

Cities were not gassed from the air during World War I. However, with the advancement in aviation, military planners were considering seriously the effect of such use in any future war. Some of them made the most alarming predictions. General Frey conceived of aircraft spraying large industrial cities with lewisite.[58] General P.R.C. Groves predicted millions of deaths if

[57] E.S. Farrow, *Gas Warfare* (N.Y.: E.P. Dutton, 1920), p. 224, gives a concise breakdown of the American casualties as follows:

Total all casualties	273,869
Total gas casualties	75,767 of which 1,194 died.
% of casualties due to gas	27.6.
% of battle deaths due to gas	2.4.
% of battle deaths due to wounds	28.7.

These statistics are confirmed with slight variations in Waitt, *op. cit.*, pp. 19, 20; Lefebure, *op. cit.*, p. 182; Noel Baker, *loc. cit.*; Fries and West, *op. cit.*, p. 13; H. L. Gilchrist, *A Comparative Study of World War Casualties from Gas and Other Weapons* (Washington: U.S. Gov. Printing Office, 1928), p. 7; and in *The Congressional Record*, 69th Cong., 2d Sess., 1926, LXVIII, pp. 143–151. See also notes 210 and 211 below for further references to gas casualty statistics.

[58] Fries and West, *op. cit.*, p. 380.

London or Paris were subjected to gas bombings.[59] Indeed both soldiers and statesmen seemed obsessed with the idea of gas attacks on cities. However correct or incorrect these views may have been they indicated that gas had come to be thought of as a weapon that would be so used, and they made their plans and treaties on that assumption.[60]

2. *The practice*

In the Italian-Ethiopian War in 1936 Mussolini ordered General Bodoglio to use mustard gas from the air. It was highly successful.[61] However, the most extensive use of chemicals since 1918 was reported to have occurred in October 1941 when the Japanese were accused of loosing tremendous quantities of mustard and lewisite on the Chinese at Ichang.[62] There were no new gases used and no large cities as targets. Both incidents involved victims who could not retaliate. It was left to World War II to demonstrate that the use of gas could be avoided. One limit was placed on an otherwise unlimited war.

E. *World War II and the Korean War*

Both sides started the war prepared for and expecting gas warfare. Churchill said: "We must expect gas warfare on a tremendous scale. It may break out at any moment."[63] But it did not. Why? There are many reasons, not one of which answers the question completely. First, from the tactical point of view Germany would be hindered if she used such persistent gases as lewisite and mustard when she advanced early in the war. Later, when Germany was on the defensive, she lacked control of the skies and her cities lay open.[64] A second reason is the lack of decisiveness of the weapon as demonstrated in World War I.[65] A third explanation is the fear of retaliation. In most cases with most weapons each side can retaliate. But with gas massive re-

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[59] League of Nations, Document C.T.A. 210 (1923).

[60] Noel Baker, *loc. cit.*

[61] P. A. Reynolds, *British Foreign Policy in the Inter-War Years* (London, New York, Toronto: Longmans, Green and Co., 1954), pp. 117, 118; Charles Cheny Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (3 vols., Boston: Little Brown & Co., 1945), III, p. 1822.

[62] Waitt, *op. cit.*, p. 24. This charge by the Chinese was never definitely established. Brophy and Fisher, *The Chemical Warfare Service: Organizing for War* (Washington, Office of the Chief of Military History, Dept. of Army, 1959), p. 63, n. 3.

[63] Winston Churchill, *The Hinge of Fate* (Boston: Houghton, Mifflin, 1950), p. 642.

[64] Vannevar Bush, *Modern Arms and Free Men* (N.Y.: Simon and Shuster, 1949), p. 156.

[65] Buchan, *op. cit.*, II, p. 43; Liddell-Hart, *op. cit.*, p. 130; Brophy and Fisher, *op. cit.*, p. 87, cite a study, dated 4 June 1945, prepared by the Operations Division of the War Department General Staff which concluded that gas was helpful but not decisive.

taliation was an expressed threat aimed at the German civilian population.[66] Such a threat was effective in preventing Germany from employing her new nerve gases.[67] A fourth reason may be attributed to the legal force of the Geneva Gas Protocol of 1925.[68] Public opinion, as interpreted by the War Department, was partly responsible for the decision in 1945 not to use gas against Japan.[69] A sixth and last reason, closely related to the indecisive nature of the weapon, is the fact that gas is an inconvenient means of waging war. The gains from using it would not compensate for the inconveniences to both sides arising in a "gas war."[70]

No gas was used in the Korean War even though the situation was somewhat similar to World War I. The front was relatively narrow and the positions well defended. In addition, one belligerent possessed a highly developed chemical industry. However, the political objectives in regard to Red China were limited. The military situation favored gas. The political situation did not.[71]

III. THE PRESENT CHARACTERISTICS OF GAS WARFARE

A. *Types of Gases*

New categories have been added to the five classifications of gases used in World War I, and new gases substituted in the old categories.[72] The result is a breakthrough in the types of gas available. The effects they may have on personnel range all the way from sudden death to temporary incapacity quickly followed by complete recovery. Each group is classified according to the bodily effect it produces.

1. *Choking gases*

Chlorine, the originator of gas warfare, is no longer used except for training and riot control. Phosgene and diphosgene

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[66] Churchill, *op. cit.*, pp. 203, 329–330.

[67] See the testimony of Albert Speer at Nuremberg. *Trial of Major War Criminals* (43 vols., Nuremberg: International Military Tribunal, 1947), XVI, pp. 527–528.

[68] Enock, *op. cit.*, pp. 95, 96, gives the Geneva Protocol full credit for preventing the use of gas in World War II.

[69] Brophy and Fisher, *loc. cit.*

[70] These six reasons are all developed in greater detail in Chapter V on the practice of belligerents.

[71] See Brig. Gen. J. H. Rothschild, "Germs and Gas: The Weapons Nobody Dares Talk About," *Harper's Magazine*, CCXVIII, No. 1309 (June 1959) 30, for a discussion of efforts by United States commanders in Korea to obtain permission to use gas. These efforts are also discussed in greater detail in Chapter V.

[72] See U.S., Congress, House, Committee on Science and Astronautics, *Report, Research in Chemical, Biological, and Radiological Warfare*, Report No. 815, 86th Congress, 1st Sess., 1959, pp. 5–7, 9–11.

are the standard choking gases today.[73] The former is a true gas, the latter a liquid. Neither attacks the exposed skin. They must be inhaled. The experiences of 1915–18 are valuable in analyzing their effect.

2. *Vomiting gases*

Blue Cross and chloropicrin have been replaced by more effective compounds. Adamsite (DM), diphenylchloroarsine (DA), and diphenylcyanorsine (DC) are now the three principal vomiting gases.[74] In peace time they are useful in riot and mob control. In wartime they have a dual purpose, to incapacitate temporarily the victim and to expose his lungs to the choking gases by preventing the wearing of the gas mask.

3. *Blister gases*

To the familiar mustard (H) of World War I have been added lewisite (L) and the two nitrogen mustards (H N–1 and H N–3).[75] In addition, the two combination blister and vomiting gases of World War I are still in the chemical arsenals, phenyldichloroarsine (PD) and ethyldichloroarsine (ED). While mustard gas can be recognized by a distinctive odor, the new gases are odorless. All affect the eyes and lungs, and blister the skin. Lewisite does not have the delayed effect of the mustard gases, but is felt immediately. The difficulty with lewisite is that it hydrolyzes so rapidly that it is difficult to maintain a concentration sufficient to blister the bare skin. This difficulty is further increased by the high vapor pressure and low persistency of lewisite.[76]

4. *Blood gases*

Cyanogen chloride (CK) and arsine (SA) have been added to this group which already contained hydrogen cyanide (AC), the gas with which the French experimented in World War I.[77] These gases are absorbed into the body primarily by breathing. They affect body functions by preventing the normal transfer of oxygen from the blood to the body tissue. All three are true gases. Hydrogen cyanide and cyanogen are quick-acting casualty gases. How-

[73] *Military Chemistry and Chemical Agents, op. cit.*, pp. 18–21, 56, 57; *Soldiers Handbook for Nuclear, Biological and Chemical Warfare*, FM 21–41 (Washington: U.S. Gov. Printing Office, 1956), pp. 98, 136; *Treatment of Chemical Warfare Casualties*, TM 8–285 (Washington: Gov. Printing Office, 1956) Ch. 5.

[74] *Military Chemistry and Chemical Agents, op. cit.*, pp. 46–50; *Soldiers Handbook, . . ., op. cit.*, pp. 98, 99, 135; *Treatment of Chemical Warfare Casualties, op. cit.*, Ch. 7.

[75] *Military Chemistry and Chemical Agents, op. cit.*, pp. 30–46; *Soldiers Handbook, . . ., op. cit.*, pp. 96–98, 131–133; *Treatment of Chemical Warfare Casualties, op. cit.*, Ch. 3.

[76] *Military Chemistry and Chemical Agents, op. cit.*, p. 39.

[77] *Military Chemistry and Chemical Agents, op. cit.*, pp. 26–30; *Soldiers Handbook, . . ., op. cit.*, pp. 94, 95, 130; *Treatment of Chemical Warfare Casualties, op. cit.*, Ch. 6.

ever, the mask provides adequate protection. Arsine, because of its high vapor pressure and low stability, is incapable of being disseminated by any means presently available.

5. *Tear gases*

Five types are in use. Since there is small likelihood of tear gases producing casualties, they are used primarily for training and riot control.[78]

6. *Nerve gases*

Tabun (GA), sarin (GB), and soman (GD), all invented by the Germans during World War II, are the nerve gases.[79] The three cause the same physiological symptoms. A lethal dosage may be inhaled or absorbed through the skin. Death may occur in one to ten minutes, or be delayed for one or two hours, depending on the concentration of the gas.

7. *Psychochemicals*

Of all the new gases developed, this type is the most revolutionary. For example, in one experiment using LSD–25 (lysergic acid diethylomide derivative), a cat became afraid of a mouse.[80] Tests using a psychochemical on squad-sized units of soldier volunteers indicated that the men became confused, irresponsible, and were unable to carry out their missions.[81] Illogical orders were given, work became sloppy, and discipline nonexistent. The irrational behavior produced varied according to the individual. None of the victims realized that they had been affected.[82] The effects on both animals and men were temporary. There has been complete recovery in all cases.

8. *Incapacitating agents*

The purpose of these gases is temporarily to incapacitate an individual either by making him ill or by putting him to sleep.

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[78] *Military Chemistry and Chemical Agents, op. cit.*, pp. 50–56; *Soldiers Handbook, . . ., op. cit.*, pp. 100, 135; *Treatment of Chemical Warfare Casualties, op. cit.*, Chapter 8.

[79] *Military Chemistry and Chemical Agents, op. cit.*, pp. 21–23; *Soldiers Handbook, . . . , op. cit.*, pp. 92–94, 125–130; *Treatment of Chemical Warfare Casualties, op. cit.*, Chapter 2.

[80] Reported in Rothschild, *op. cit.*, p. 32; Maj. Gen. M. Stubbs, "Soldier Volunteers Confirm Psychochemical Spell," *Army Navy Air Force Journal*, XCVII, No. 9 (31 Oct. 59), pp. 1, 27; repeated by the same author with photographs in "Invisible Weapons for the CBW Arsenal," *Army Information Digest* (Jan. 60), p. 33, at p. 35.

[81] Stubbs, *Army Navy Air Force Journal, op. cit.*, p. 27, *and Army Information Digest, op. cit.*, pp. 34, 36.

[82] Rothschild, *loc. cit.* See also similar statements of Maj. Gen. William M. Cresey, former chief of the Army Chemical Corps, before the House Committee on Science and Astronautics, June 16, 1959, U.S., Congress, House, Committee on Science and Astronautics, *Hearings, Chemicals, Biological, and Radiological Agents*, 86th Congress, 1st Session, 1959, pp. 2–5

The gases have two characteristics: (1) the person is in pain or asleep, and (2) he does recover completely.[83] A gas that would painlessly put a city to sleep for a day or two, permitting its capture with no loss of life or damage to property, would make war a *Kriegsspiel* indeed.[84] Other gases that would cause temporary blindness, paralysis, or loss of equilibrium would also add a new humane chapter to the book of war.[85] Both these incapacitating agents and the psychochemicals are still mostly in the experimental stage. The reasons back of their current publicity will be discussed further in Chapter V, A, dealing with the practice of the United States in regard to gas warfare.

B. *Tactical Employment of Gases*

As gas warfare was only encountered in one major conflict which took place forty-one years ago, its present tactical uses can only be visualized by examining the current instructional manuals of troops trained to wage it.

Authority to employ toxic gas in the United States Army does not rest with the local military commander. He must be authorized to do so through command channels.[86]

If authorization is given the gases have six missions.[87] The first is to soften a strongly defended position by inflicting casualties among troops. Its mission would be no different from that of

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[83] Surprisingly, but unintentionally, gases used in World War I, became in most cases incapacitating agents.

[84] See Meirel K. Salamon, "The Select Weapon," *Army*, IX, No. 7 (Feb. 1959), p. 80, at p. 82; and Stubbs, *Army Navy Air Force Journal, loc. cit.*, for an account of such a gas.

[85] Described in Rothschild, *loc. cit.*

[86] *Tactics and Techniques of Chemical, Biological and Radiological Warfare*, FM 3-5 (Washington: U.S. Gov. Printing Office, 1958), p. 4; *Law of Naval Warfare* (Washington: U.S. Gov. Printing Office, 1955), par. 612, n. 8, states that the authorization rests with the President. Army publications are silent on the person who has specific authority.

[87] *Tactics and Techniques . . . , op. cit.*, pp. 72-74; The British *Medical Manual of Chemical Warfare, op. cit.*, p. 9, gives a seventh object to be achieved by the use of gas. It contains a little of the element of terror as an objective which is characteristic of the *Kriegsraison* theory of warfare. "Gas may be used . . . to lower the morale of the civil population and induce a will to compromise or surrender by causing widespread discomfort, anxiety and disablement." The same object of a gas attack was repeated in Dr. Morris B. Jacobs, *War Gases* (N.Y.: Interscience Publishers, Inc., 1942), p. 1. It is also relevant to note that the very first sentence of Dr. Jacobs' book is: "In the war of today there is little distinction between combatants and non-combatants." As far as saturation bombings and submarine warfare are concerned this may be true. But it is not true as a general proposition. *At the beginning of World War II the Russian manual listed four objectives* of gas. First, to inflict mass losses on the enemy; second, to hamper the fire and maneuver of the enemy; third, to break up the normal work of the rear; lastly, to destroy morale (reported in Waitt, *op. cit.*, p. 230). The third and fourth objectives could easily involve the civilian population as does the British *Medical Manual* and Dr. Jacobs.

shelling except that dug-in positions would be reached more easily. The second is to contaminate wooded areas in front or on exposed flanks with persistent gases in order to prevent access by the enemy. This is basically no different than laying of mine fields. The third is to isolate enemy positions by contaminating routes of supply and reinforcement. This is similar to interdiction fire of artillery and air bombardment. The fourth is to hinder support of enemy operations by striking with gas at assembly and supply installations, and by contamination of damaged vital transportation facilities to prevent needed repair. The fifth is to slow general operations by making the enemy wear masks for long periods. The last is to produce casualties with a minimum of destruction, thereby minimizing the need for later reconstruction of public utilities and other necessary public structures by friendly forces.

The first, second, third, and fifth missions are directed primarily at the enemy troops. However, the fourth and sixth could easily involve the contamination of enemy cities. The fact that gas can kill or incapacitate without destruction of property would naturally make the task of the occupying army and the conditions of the surviving population less difficult. Instead of a smoking rubble the town and its facilities would be intact to serve both the victor and the vanquished.

The persistent and penetrating nature of some of the modern gases would require the need for protection from head to foot and the carrying of a personal supply of oxygen, a fact that would greatly facilitate it in its missions against enemy cities or troops.

Major General Stubbs, the Chief Chemical Officer, United States Army, has summed up the tactical flexibility of chemical weapons as follows:

> They can be "tailored" to fit the exact requirements of the changing combat situation. They can effect any necessary type of casualty, from temporary mild incapacitation to death in minutes. They can be delivered on target either overtly or covertly, over large areas or small, in either persistent or nonpersistent form.
>
> Chemical and biological weapons can reach troops whether they are concentrated or widely dispersed; out in the open or in concealment or cover; above ground or in "hardened" underground installations.[88]

C. *Instruments for the Dissemination of Gases*[89]

New methods for disseminating gas have naturally been developed since 1918.

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[88] Stubbs, *Army Navy Air Force Journal, loc. cit.* General Stubbs gave similar statements to a committee of the House of Representatives on June 22, 1959. U.S. Congress, House, Committee on Science and Astronautics, *Hearings, . . . , op. cit.*, p. 30.

[89] *Tactics and Techniques, op. cit.*, pp. 23–27, lists the modern instruments available for dissemination.

1. The airplane has exposed the entire state to poison gases.[90] During World War I gas was used only in ground weapons, not from airplanes. Consequently, most injuries were confined to troops in the field. Now cities, dockyards, and factories are easy targets. Therefore the nature and severity of casualties in World War I provide little clue to what may be expected if gas is used against metropolitan areas.[91] It is difficult enough to maintain gas discipline among soldiers, impossible among civilians in crowded cities. Air raid shelters could become traps for gases.[92] The gas mask would offer only partial protection against nerve and blister gases which can attack the skin. Life in cities was uninterrupted in World War I. Life managed surprisingly well in World War II under intense direct bombings. Neither war presents a picture of a city under periodic gas bombings or sprayings with persistent lethal gases. Normal life could not be carried on to any degree. The real problem here centers around the legality of an industrial city as a legitimate military target. If an industrial city can be attacked with atom bombs and fire, may it not also be gassed?

2. Land mines have improved since the first World War. A one-gallon chemical land mine filled with blister gas is now standard equipment.[93] It may be exploded either electrically or by pressure. The use of such mines by retreating troops exposes civilians to risks long after the fighting in the area has ceased.

3. Missiles, rockets, and artillery shells are now more highly developed instruments for disseminating gas in the rear areas as well as the front lines.[94] Near misses of fortifications are as effective as a direct hit.[95]

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[90] The use of aircraft is classified under the term "spray-type equipment," in *FM 3–5*. It has certain limitations due to the heavy amount of evaporation whenever a liquid agent is shattered into fine droplets.

[91] *Medical Manual of Chemical Warfare* (4th ed., London: His Majesty's Stationery Office, 1955), p. 2. Fear of what aircraft combined with gas could do was raised immediately after World War I. Victor Lefebure, after reading a paper on chemical warfare control before the Grotius Society in 1921, was questioned about the potentials of a gas attack on large urban areas. He replied that the airplane was the most effective instrument for such a gas attack and that one-half million casualties could be inflicted in London alone. *Transaction of the Grotius Society* (London: Sweet and Maxwel, 1922), VII, p. 66. Hassel, Martin and Hassel, *Chemistry in Warfare*, *op. cit.*, pp. 120, 121, give a nightmarish hypothetical gas and HE attack on a large city. These three publications are typical of the dread that the mind feels when contemplating the possibility of airborne gas attacks on large metropolitan areas.

[92] Gas-proof dugouts in World War I proved to be gas traps and were responsible for many gas casualties. Gilchrist, *op. cit.*, pp. 24, 26. See also Leipmann, *op. cit.*, p. 247.

[93] *Ground Chemical Munitions*, TM 3-300 (Washington: U.S. Gov. Printing Office, 1956), p. 64.

[94] See Marvin L. Worley, Jr., *New Developments in Army Weapons, Tactics, Organization, and Equipment* (Harrisburg, Penn.: The Stackpole Company, 1959), pp. 17–45, for discussion of the present state of these weapons.

[95] *FM 3–5*, *op. cit.*, pp. 38, 90.

4. Modern smoke pots have made the preparation for gas cloud formation extremely simple compared to any method used in World War I.[96]

D. *Problems Which the Present Characteristics of Gas Warfare Raise for the Laws of War*

There are many legal problems raised by the modern development of gas warfare. They may be listed as follows:

1. Has gas warfare been prohibited by any treaties which could be considered law-making, such as the Hague Conferences of 1899 and 1907, or the Geneva Protocol of 1925?

2. Has gas warfare been prohibited by analogy to any positive rules of international law contained in Hague Convention No. IV of 1907, particularly those which forbid the use of poisons or poisonous weapons, the use of materiel calculated to cause unnecessary suffering, and the treacherous wounding or killing of individuals?[97]

a. Is the use of gas any more inhuman than the use of bullets, fire, knives, and high explosives?

b. If gas kills without pain would it be permitted?

c. If gas causes pain but does not kill would it be permitted?

d. If gas causes pain but leaves few after effects would it be permitted?

3. If one particular gas is not objectionable, would it nevertheless be outlawed for fear that its use would open the door to the employment of every type of gas available?

4. Has gas warfare been prohibited by the custom that non-combatants should not be directly attacked?

a. If gas were restricted to use only against troops in the field would it be permitted?

b. Have non-combatants lost much of their protection under international law because of their active participation in the war effort and because of the nature of the weapons employed in modern warfare?

5. Has gas warfare been prohibited by the familiar de Martens clause which binds all nations to fulfill the principles of the law of nations, as they result from the laws of humanity and the dictates of the public conscience?

a. Is the public conscience an infallible or consistent gage for measuring the conduct of states?

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[96] *Ground Chemical Munitions, op. cit.*, pp. 3–21. U.S., War Dept., Chemical Warfare Service, *Report of Activities of Technical Division During World II* (Washington: U.S. Gov. Printing Office, 1946), pp. 164–166.

[97] Arts. 23(a), (b), and (c) and Art. 25, *Annex to Hague Convention No. IV Respecting the Laws and Customs of War on Land*, 18 Oct. 1907 (36 Stat. 2277; Treaty Series No. 539).

b. Does the use of gas shock the public conscience any more than fire bombing of cities?

c. If one of the most civilized states in the world is not a party to any treaty prohibiting gas warfare has the public conscience dictated anything really binding upon such state in the absence of a treaty?

6. Are there any general principles of law which would forbid or limit gas warfare?

7. In World War I and the Ethiopian War poison gas was an effective instrument when properly employed.[98] Can international law prevent the use of an effective weapon, or must international law content itself with the prohibition of glass-filled shells, dum-dum bullets, and barbed arrows, instruments whose effectiveness has long ago disappeared?[99]

These problems were all encountered in the efforts which states made to limit or prohibit the employment of gas warfare. They will be discussed in Chapter IV dealing with these efforts, and in Chapters VI and VII on the present state of the law in regard to chemical warfare.

IV. HISTORY OF EFFORTS TO LIMIT GAS WARFARE

Beginning with the Hague Conference of 1899 and continuing down to the present day, states have made efforts to limit gas warfare. These attempts must be analyzed in order to understand three facets of the problem; why gas warfare was of concern to states, what the objections and positions of the various states were, and the legal effect of such efforts at limitation.

A. *Hague Conference of 1899*

This conference had for one of its purposes the definition or limitation of customs of war as they had developed up to that time.[100] Gas, except in isolated instances, had not been used in warfare up to that time. Therefore, it could not be said that a positive rule of customary law had developed which would have specifically prohibited its use. Nevertheless, a resolution was submitted to a committee at the conference which sought to prohibit the use of shells containing asphyxiating gases.[101] This resolution

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[98] See citations listed under note 56 *supra*.

[99] "History proves that an effective implement of war has never been discarded until it becomes obsolete" (Maj. Gen. Wm. L. Sibert in the foreword to Fries and West, *Chemical Warfare*, *op. cit.*, p. x). Gas, though not used, is very evident in the arsenals of every major power.

[100] Preamble to *Hague Convention (II) With Respect to the Law and Customs of War on Land*, 1899.

[101] James B. Scott, *Reports to the Hague Conferences of 1899 and 1907* (Oxford: The Clarendon Press, 1917), p. 172.

was proposed by Captain Schieve of Russia and adopted by the committee for three reasons. First, they considered that any new weapon should be prohibited if it has a barbarous character or partakes of treachery and cruelty similar to the poisoning of drinking water. The committee thought gas had such characteristics. Secondly, if gas were directed against cities they thought more non-combatants would die than from normal bombings. Lastly, death from asphyxiation was, to them, more cruel than death from bullets.

The United States was not ready to agree with the reasoning of the committee. John Hay, then United States Secretary of State, counselled the American representatives at the Peace Conference to oppose the resolution. Secretary Hay's reasons were as follows:

(1) The United States did not wish to deny itself prematurely a means of defense.

(2) It is doubtful if an international agreement would overcome the temptations of a nation at war.

(3) The resolution was premature because the real effects of such a weapon were unknown.[102]

Captain Mahon, one of the United States delegates, carried out the wishes of Secretary Hay. He argued before the convention that:

(1) As no such shell had ever been used before no one could say if it would cause unnecessary injury.

(2) Similar cries of cruelty were uttered formerly against the crossbow, shells, firearms, and torpedoes.[103]

(3) It is illogical to be tender about asphyxiating men with gas when troop ships can be torpedoed at midnight resulting in the drowning of thousands.

(4) Therefore the United States will not deprive itself prematurely of a means of defense of which it might later avail itself with good results.

Captain Mahon was answered by the argument that asphyxiating bombs might be used against towns for the destruction of vast numbers of non-combatants, including women and children, while torpedoes at sea are used only against the military and naval forces of the enemy.[104]

The American delegation did not present a united front in answering the argument. Ambassador Andrew D. White, the

[102] "Instructions to the United States Delegates to the Hague Conference, April 18, 1899," *Foreign Relations*, 1899, pp. 511, 512.

[103] For instance, Pope Innocent II had once proposed the barring of explosive shells. Paul Fauchille, *Droit International*, ed. M. Henry Bonfile (2 vols., 8th ed., Paris: Rousseau and Cie, 1921), II, Sec. 1082.

[104] True at the time, but certainly not true in World War I and World War II with the spread of economic warfare at sea.

leader of the American delegation, agreed with the committee. But he deferred from opposing Captain Mahon saying, "What can a layman do when he has against him the foremost contemporary military and naval experts?"[105]

The resolution passed over the United States objections. It provided that:

> The contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases.[106]

Twenty-six states either ratified or adhered to the resolution without reservation. The United States and Great Britain were the only major powers who did not sign.[107]

The arguments preceding the passage of this resolution on asphyxiating gases are important because they touch upon the general customary rules of international law which may govern the legality of chemical agents in the absence of a specific positive rule of international law.

B. *The Hague Conference of 1907*

No time limit had been placed on the prohibition of the use of shells containing asphyxiating gases. Therefore it was not necessary for the second Hague Conference to reconsider the matter.[108] However, at the 1907 Conference, Great Britain's first delegate, Sir Edward Frey, announced that his government, "desirous of promoting the utmost possible unanimity among the nations," had instructed him to accept the declaration of 1899 against the use of asphyxiating gases. Several Latin American Republics did the same.[109] The United States, alone of the world's major powers, remained in opposition to the prohibition.[110]

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[105] Both Captain (later Admiral) Mahon's and Ambassador White's views are set out verbatim in William I. Hull, *The Two Hague Conferences* (Boston: Ginn and Co., 1908), pp. 88–90.

[106] *The Hague Declaration (IV) Concerning Asphyxiating Gases*, 1899, Art. 2. Gen. A. M. Prentiss in his *Chemicals in War*, *op. cit.*, pp. 686, observed that the conference steadily defeated proposals to eliminate weapons which had reached the stage of military utility. The chemical shell, he reasoned, was prohibited because it had not reached that state.

[107] See "Memorandum from Sir John Fisher to Marquess of Salisbury, July 20, 1899, Upon the Question of Asphyxiating Gases," for a resume of the British position, contained in A. A. Roberts, *op. cit.*, Appendix VI.

[108] John Westlake, *International Law* (2 vols., Cambridge: University Press, 1913), II, p. 78.

[109] Hull, *op. cit.*, pp. 90, 466.

[110] The statement in Spaight, *War Rights on Land*, *op. cit.*, p. 100, fn. 2, that the United States adhered along with Great Britain in 1907 is not in conformity with the views of most writers, or with the most recent U.S. Army publication on the law of war which states: "The United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or nontoxic gases." Department of Army Field Manual 27–10, *The Law of Land Warfare* (Washington: U.S. Gov. Printing Office, 1956), p. 18.

This conference codified three customary rules. Article 23 of the Hague Regulations prohibited the use of poisons, treacherous woundings and killings, and weapons that cause unnecessary suffering. No mention was made of poison gas in connection with them. However, they were later to be used as one basis for the proposition that gas warfare was outlawed.

C. *Versailles Treaty, 1919*

The Versailles Treaty touched directly upon the use of poison gas:

Article 171: "The use of asphyxiating, poisonous, or other gases and of analogous liquids, materials, or devices being prohibited, their manufacture and importation are strictly forbidden in Germany. . . ."[111]

Article 171 is important in a search for rules governing the conduct of the United States. The United States incorporated by reference the entire section of the Versailles Treaty of which Article 171 is a part in the "Treaty Restoring Friendly Relations between the United States and Germany," of August 25, 1921.[112] It has been stated that by so doing the United States became a party to a treaty prohibiting gas warfare.[113]

Article 171 combines two elements. The first is a general statement that the use of poison gases is prohibited. The second element is an attempt at one-way disarmament by prohibiting their manufacture in Germany. It should be noted that this declaration of the prohibition is not limited to gas-filled shells. It is much broader than the literal wording of the Hague Declaration of 1899. However, the history of the Hague Declaration would support a wider interpretation, though possibly not as wide as Article 171. Captain Scheive had substituted the adopted declaration for an earlier defeated resolution of his that would have prohibited "new explosives."[114] He had thereby limited his original resolution to one particular item in a shell. However, the use of gas itself is what invoked the arguments, not the instrument used in spreading it. The shell, to the other members, was merely the manner of

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[111] *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Parties* (4 vols., Washington: U.S. Gov. Printing Office, 1923), III, p. 3402. A somewhat similar article was inserted in the Treaty of Trianon with Hungary (Art. 119), and in the Treaty of St. Germaine with Austria (Art. 135).

[112] Art. II, *Treaties, ibid.*, III, p. 2598.

[113] Hyde, *op. cit.*, III, p. 1821 at fn. 3, lays stress upon this incorporation in contending that FM 27–10 is incorrect where it says that the United States is not a party to a treaty outlawing gas warfare. However, the wording of Article 171, plus the manner in which it was incorporated favor the interpretation of FM 27–10.

[114] Hull, *op. cit.*, p. 81.

delivery. Nevertheless, the restrictive wording of the declaration viewed in the light of Captain Scheive's original resolution caused arguments over its applicability to the German cloud attacks in April 1915.[115]

D. *Washington Conference of 1921–1922*

The United States, France, Italy, Great Britain, and Japan on February 6, 1922 signed a treaty at the conclusion of the conference.[116] Article V of the treaty contained the following provision:

> The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties;
>
> The Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto.[117]

At the time, this treaty provision had three important purposes to fulfill:

(1) To obtain the acceptance by the United States to the prohibition of gas warfare;

(2) To improve the expression of such prohibition over the narrow description contained in the Hague Declaration;

(3) To reaffirm the validity of the existing law (as of 1914)

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[115] "Whatever complicated arguments may turn upon the strict reading of a phrase in the records of the Hague Convention, we have no doubt whatever as to the desires and intentions of the assembly." (Lefebure, *op. cit.*, p. 34). "At this distance of time (1948) the distinction between gases spread by the use of projectiles and gases emitted from cylinders and blown towards the enemy by the wind, seems somewhat subtle." (Charles Fenwick, *International Law*, [3rd ed., N.Y.: Appleton-Century-Crofts, 1948], p. 558, n. 45.) The views of Fenwick and Lefebure are not universally shared by other writers. *Contra,* Prenties, *op. cit.*, p. 688, "No court today would judge Germany guilty in violating the letter of the law in 1915." Cyrus Berstein, "Law of Chemical Warfare," *Geo. Wash. L. Rev.*, Vol. 10, (June 1940), at p. 889, reasons that Germany did not violate international law in April 1915 because the Hague Declarations of 1899 must be strictly construed. James Garner, *Recent Developments in International Law* (Calcutta: University of Calcutta Press, 1925), p. 55, remarks that the use of the word "sole" in the Hague Declaration has considerably diminished its effectiveness. Julius Stone, *Legal Controls of International Conflicts* (N.Y.: Rinehart, 1954), p. 554, reasons that the Allies denounced the German gas attack of April 22, 1915 as a violation of Arts. 23(a) and (e) of the Hague Regulations because a cloud attack was not forbidden by the Hague Declaration of 1899.

[116] "Treaty Between the United States, the British Empire, France, Italy and Japan Relative to the Protection of the Lives of Neutrals and Noncombatants at Sea in Time of War and to Prevent the Use in War of Noxious Gases and Chemicals," (*Treaties, . . . , op. cit.*), III, p. 3116.

[117] *Ibid.*, III, p. 3118; Manley O. Hudson, *International Legislation* (Washington: Carnegie Endowment for International Peace, 1931), II, p. 794, No. 66.

with respect to the use of noxious gases.[118] The actual conduct of states in World War I not only jeopardized the Hague Declaration itself, but strained the hypothesis that it rested on any general customary rules of international law.

The Secretary of State, as Chairman of the Conference, called attention to a report of the General Board of the United States Navy which declared that gas warfare as practiced in World War I violated two principles of warfare which had been accepted by the civilized world for more than one hundred years. They were:

(1) Unnecessary suffering should be avoided.

(2) Innocent non-combatants should not be destroyed.[119]

The Advisory Board of the American Delegation at the Washington Conference submitted a report that poison gases should be prohibited because they are similar to such condemned practices as poisoning wells and introducing germs of disease.[120]

The Advisory Board did not choose to rely upon a contrary report of a special subcommittee which recommended that poison gas be only prohibited against non-combatants in the same manner as explosives.[121]

The Senate gave its advice and consent to ratification on March 29, 1922 and the President ratified it on June 9, 1923. However, the treaty was expressly conditioned to become effective only upon ratification by all of the Signatory Powers. France failed to ratify.[122] Therefore the treaty never came into force. Not a single ratification was ever deposited. It is important, however, for its declaration that the use of poison gases had been condemned

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[118] Charles G. Fenwick, writing in 1924, considered that the treaty had reaffirmed the validity of such a rule of international law. At the time he could not have known of the final disposition of the treaty. Charles G. Fenwick, *International Law* (New York: The Century Co., 1924), p. 439, n. 1.

[119] Reported in Hyde, *op. cit.*, III, p. 1820, n. 1.

[120] *Conference on the Limitation of Armament*, Washington, November 12, 1921–February 6, 1922 (Washington: U.S. Gov. Printing Office, 1922), p. 732.

[121] *Ibid.*, p. 730. In addition the American, British, and French members of this subcommittee were emphatic that chemical warfare gases form a method of waging war similar to other older methods such as shrapnel, rifle, hand grenades, etc.; however, the Advisory Board chose to regard it differently and to place it in the category of poisoning wells.

[122] Primary reason for the failure was not the gas provision of the treaty but that portion dealing with submarine warfare. L. Oppenheim, *International Law*, ed. H. Lauterpacht (2 vols. 7th ed., London, New York: Longmans, Green, 1952), II, p. 432.

by the general opinion of the civilized world.[123] Such condemnation, if true, would base the prohibition not upon a specific treaty, but upon analogies, and upon such general principles as the dictates of the public conscience, familiar to every de Martens clause.

The "general opinion of the civilized world" did not prevent the proponents of gas from stating their case. General Amos A. Fries, writing in 1921, restated the same views expressed by Captain Mahon in 1899 and Mr. Doughty in 1862:

> Why should the United States or any civilized country consider giving up Chemical Warfare? . . . It is just as sportsmanlike to fight with chemical warfare as it is to fight with machine guns. . . . He (the American) is unwilling to agree not to use a powerful weapon of war when he knows that an outlaw nation would use it against him if that outlaw nation could achieve success by doing so.[124]

The first part of General Fries' statement is relevant to the question. The second can be answered by the provisions in international law concerning reprisals and self-defense.[125]

Another writer 30 years later was to say:

> To me there is something inconsistent in singling out gases, chemicals, bacteria and atoms and putting them outside the pale of international law, while other means of destruction accounted for some 40,000,000 dead and wounded in 1939–45. . . .[126]

Despite the argument that gas is no worse than other weapons of war its use did shock many who had become accustomed to injuries inflicted by the more conventional instruments of warfare. The descriptions of eye-witnesses to the first attack clearly show the reaction to the use of this novel weapon:

> This horror was too monstrous to believe at first . . . the sight of men choking to death with yellow froth, lying on the floor and out in the fields, made me rage with anger. . . . for then we still thought all men were human. . . .[127]
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> Then there staggered into our midst French soldiers, blinded, coughing,

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[123] J. B. S. Haldane terms this decision as to gas warfare made at Washington "curious." He concludes that it was the result of shameful ignorance. "Their ideas of gas warfare were apparently drawn from the descriptions of the great German cloud-gas attacks of 1915, which killed at least 1 in 4 of their casualties and were written up on a large scale for recruiting and political purposes." *Callinicus, A Defense of Chemical Warfare* (N.Y.: E. P. Dutton, 1925), pp. 27–28. "[O]ur fear springs originally from our own American propaganda during the first World War when the Germans caught us unaware . . . our propagandists sold the general public on the horrors of the chemical weapon . . . and they have believed it ever since." Rothschild, *op. cit.*, p. 30.

[124] Fries and West, *op. cit.*, p. 438.

[125] See Dr. William V. O'Brien, "The Meaning of 'Military Necessity' in International Law," I *World Polity* 109 (1958), at p. 112, for a discussion of the terms.

[126] Enock, *op. cit.*, p. 96.

[127] Baker, *op. cit.*, p. 320, quoting G. Winthrop Young, *The Grace of Forgetting*, p. 233.

chests heaving, faces an ugly purple color, lips speechless with agony. . . . It was the most fiendish, wicked thing I have ever seen.[128]

With the failure of the Washington Conference other attempts were made to clarify the legal position of nations in regard to gas warfare.

E. *Central American Republics, 1923*

On February 7, 1923 the Central American Republics signed a convention which declared that asphyxiating gases, poison, or similar substances are contrary to international law and to humanitarian principles.[129] This convention, though of regional application only, is indicative of the general attitude concerning poison gas which prevailed during the years immediately following World War I.

F. *The Geneva Protocol, 1925*

An attempt of greater significance in international law was made in 1925 to place clearly the stamp of illegality upon all types of gas.

The Geneva Protocol was open for signature at Geneva on June 17, 1925 and came into force on February 8, 1928. It stated that "the use in war of asphyxiating, poisonous or other gases and all analogous liquids, materials, or devices had been justly condemned by the general opinion of the civilized world." Therefore, "to the end that this prohibition shall be universally accepted as a part of international law, binding alike the conscience *and* practice of nations, declare that the High Contracting Parties so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition. . . ."[130] (Emphasis supplied.)

Forty states either adhered to or ratified it,[131] including Italy which was to break it under the pretext of reprisal in the Ethiopian War. The United States Senate refrained from giving its advice and consent.[132] However, as it did not require unanimous ratification, it became binding on those who had accepted it.[133]

The wording of the protocol is frustrating when an attempt is

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[128] Fries and West, *op. cit.*, p. 12, quoting Rev. O. S. Watkins in the *Methodist Recorder* (London).

[129] H. Hackworth, *Digest of International Law* (8 vols., Washington: U.S. Gov. Printing Office, 1943), VI, p. 270; Manley O. Hudson, *International Legislation* (Washington: Carnegie Endowment for International Peace, 1931), II, pp. 942, 945.

[130] 94 *League of Nations Treaty Series* 65; Hudson, *op. cit.*, III, p. 1670, No. 143.

[131] Oppenheim, *op. cit.*, II, p. 343, n. 3.

[132] See Chapter V, A–2, for a discussion of the circumstances surrounding the refusal of the Senate to give its advice and consent.

[133] United States and Japan were the only major powers who failed to deposit ratifications. Czechoslovakia, Argentina, and Brazil also failed to ratify the protocol.

made to determine what the rule of law was considered to be in regard to those states who did not accept the protocol. It appears to say that a practice which has already been justly condemned by the general opinion of the civilized world must be accepted by the states before it is binding upon them as a rule of international law.

The United States came very close to being bound by the alleged general opinion of the civilized world by its incorporation by reference of Article 171 of the Versailles Treaty into its own treaty with Germany, and by joining in the general statement preceding the attempt to prohibit gas warfare at the Washington Conference. However, the United States did not become a party to any agreement that could be said to prohibit it from utilizing gas.[134]

G. *League of Nations Disarmament Efforts*

League of National Council, on May 9, 1920, authorized the appointment of a commission to study the effects of chemical warfare. In 1924 a moderate report was made by the Temporary Mixed Commission for the Reduction of Armaments to the effect that poison gas effects are mitigated by adequate protective measures. However, the commission cautioned that a surprise attack on unprotected civilians would be very harmful. Therefore all nations should be aware of the danger which threatens them.[135]

Despite the opinion expressed by states that gas warfare should not be used nations continued to arm themselves with such weapons. Therefore some attempt at disarmament had to be undertaken by the League to insure compliance with treaties then in effect.

A Preparatory Commission on Disarmament proposed a Draft Convention in 1930, Article 39 of which stated that gas warfare is prohibited. The sixty governments represented at the conference itself in 1932 decided that poison gases were "specifically offensive," "especially efficacious against national defense," and "most threatening to civilians."[136] Therefore all preparations were to be prohibited in time of peace as in time of war. The instruction or training of armed forces in the use of chemical weapons and means of warfare was also to be prohibited. The British Government prepared a draft convention in March 1933, incorporating the

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[134] Article 121 of the Versailles Treaty, Article 119 of the Treaty of Trianon, and Article 135 of the Treaty of St. Germain certainly prohibited Germany, Hungary, and Austria. However, the United States never considered that the prohibition imposed was mutual. The latter two articles also prohibited flame throwers, a prohibition which no one sought to enforce against the United States.

[135] Quoted in appendix to Frodkin, *op. cit.*, pp. 288–301.

[136] League of Nations, *The League Year-Book*, (1932) (London: Ivor Nickolson & Watson, 1932), p. 359.

decisions of the conference.[137] The convention was never put into force.[138]

H. *United Nations Disarmament Efforts*

All members of the United Nations made a solemn pledge at the first session of the General Assembly on January 25, 1946, to eliminate all weapons of mass destruction.[139] In July 1948, Trygvie Lie called the members' attention to this pledge and noted that the debate on the control of atomic weapons had distracted attention from bacteriological and chemical weapons development. He urged action against all three types.[140]

In August 1948 the Security Council of the United Nations endorsed the following definition submitted by the UN Commission on Conventional Armaments:

> Weapons of mass-destruction should be defined to include atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons. . . .[141]

On January 11, 1952 the General Assembly set up the Disarmament Commission and instructed it to prepare treaty clauses providing for the elimination of all major weapons adaptable to mass destruction.

Again on November 28, 1953 the Assembly instructed the Disarmament Commission to prepare a coordinated plan for the elimination and prohibition of atomic, hydrogen, bacteriological, chemical, and all other such weapons of war and mass destruction. In 1954 the General Assembly reaffirmed that the Disarmament Commission should prepare a draft international disarmament convention which would include the total prohibition of the use and manufacture of weapons of mass destruction of every type.

Despite these resolutions and instructions the Commission has not yet been able to come up with a plan. There are two main stumbling blocks. The first and principal difficulty involves the matter of supervision of such disarmaments.[142] The second lesser difficulty involves the actual definition of mass destruction weapons. The definition endorsed by the Security Council in 1948 applies only to *lethal* chemical weapons. The Geneva Protocol of 1925 had sought prohibition of *all* gases. Some attempts have

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[137] League of Nations, *League of Nations Disarmament Conference Documents*, Vol. I, p. 135.

[138] Prentiss, *op. cit.*, pp. 694–695.

[139] For text of resolution see *The International Control of Atomic Energy*, Department of State publication No. 2702, 1947, p. 132.

[140] United Nations, Secretariat, *Annual Report of the Secretary-General on the Work of the Organization, July, 1947–June 30, 1948* (Lake Success, 1948).

[141] United Nations, Security Council, *Official Records, 2nd Year*, (Lake Success, 1949) Document S/c 3, dated August 13, 1948.

[142] *United Nations Bulletin*, XII (1952), p. 2.

been made to exclude gas from mass destruction weapons because it affects only life and not property.[143] Such a distinction does not appear wholly valid from both a legal and a moral standpoint. The value of an undestroyed city to the occupier is without question. Used as an argument for gas warfare it fails to meet the serious objections to this type of weapon. The problems in gas warfare arise primarily from the effects of gas on people, not property. If, by the non-destruction of property, the sufferings of the survivors can be decreased, then this characteristic of gas is relevant.

How successful were the efforts since the first Hague Conference in 1899 to limit gas warfare by means of treaty or convention? Not too good if in 1956 the United States Army could still state in its official military publication on the law of land warfare that "The United States is not a party to any treaty now in force, that prohibits or restricts the use in warfare of toxic or nontoxic gases."[144]

V. THE PRACTICE OF BELLIGERENTS

The practice of states in preparing and in waging war is indicative not only of the efficacy of the law but also of the extent of the law. Some states may act as if they are bound by a prohibition against gas but resort to it only in reprisal or in self-defense. Others may consider that no rule exists, but bind themselves by policy decisions. Still others may act as if bound by no rule and no policy. It is the purpose of Chapter V to examine these attitudes of the various major powers in order to determine if any positive rule of international law is in the process of formation, or if an unsettled rule is actually on the decline.

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[143] John R. Jarvis, "Take the Mystery out of CBR." *Army* VIII, No. 3 (Oct. 1957), p. 44 at p. 46. The author refused to classify poison gas under the term "mass destruction" because it affected only life and not property. A portion of the article took issue with General Zhukov who had referred to nuclear, chemical, and biological weapons as means of mass destruction. This same "favorable" distinction was made in two other issues of *Army*, where lack of property destruction was listed as one of the advantages of gas warfare. John L. Miles, "Could it Happen to You?" *Army*, VIII, No. 1 (Aug. 1957), p. 41 at p. 45; Salamon, *op. cit.*, p. 80.

[144] *The Law of Land Warfare*, FM 27–10, *op. cit.*, pp. 18–19. There is a question of the weight to be given such a statement in a military manual. The manual itself, at p. 2, states that such statements are of evidentiary value insofar as they bear upon questions of customs and practice. The court in *U.S. v. List, Trials of War Criminals* (15 vols.; Washington: U.S. Gov. Printing Office, 1950), XI, p. 1237, concluded that "In determining whether a custom or practice exists military regulations may play an important role . . . ." In this particular case it bears great weight as to the position of the United States because it is dealing not with customs of many nations but specifically with the treaty obligations of one nation. It is a statement in an official publication of the United States that the United States does not feel itself obligated by treaty. Such an attitude by one signatory to the Hague Regulations of 1907 is very relevant to the question of whether those regulations can be interpreted as forbidding gas because of the prohibition of poisons and weapons which cause unnecessary suffering.

A. *The United States of America*

The practice of the United States may be analyzed from three different standpoints: from actual use, from official policy statements, and from preparation.

1. *Actual use*

Immediately prior to the United States' entry into World War I the War Department was not seriously concerned about gas warfare in Europe despite the fact that it had been waged there for two years. The reason was that by the Spring of 1917 its effectiveness was waning because of the efficiency of anti-gas protection.[145] It was not until the German army in July 1917 began the use of mustard gas that the scope of chemical warfare was correctly perceived.[146] The United States Army then began to prepare in earnest for gas warfare. It did not limit itself to the gases then employed. The Chemical Center at Edgewood, Maryland, developed lewisite which would attack the skin as well as the lungs, and in addition, would prove fatal to its victims if sufficiently concentrated. Only the early termination of the war prevented its use.

Therefore in World War I the United States showed no hesitancy in using existing gases and in developing better ones. However, World War I is not a completely satisfactory test of the United States' attitude in war. That war was a gas war long before the United States entered it. World War II and the Korean War are better tests.

On April 25, 1942 General George Marshall cabled all theater commanders, warning them not to use gas without the prior approval of the War Department.[147] Such approval was never given despite repeated requests from commanders in the Pacific where gas by the attacker could have been effectively employed.[148] The American casualties at Tarawa, Iwo Jima, and Okinawa alarmed the War Department and caused it to re-examine its arsenals for new weapons.[149] At Tarawa three-thousand tons of high explosives were dumped on four-thousand Japanese huddled on an island less than one square mile in area. After such a bombardment the United States still suffered 4,000 casualties, including 1,026 deaths. At Iwo Jima 21,000 Japanese wounded 18,000 Americans and killed 7,000 more before dying almost to a man.[150]

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145 Brophy and Fisher, *op. cit.*, p. 4.

146 John J. Pershing, *My Experiences in the World War* (N.Y.: Fredrick A. Stokes, 1931), I, pp. 166–167.

147 Brophy and Fisher, *op. cit.*, p. 54, n. 13.

148 Rothschild, *op. cit.*, p. 80, col. 2. Brophy and Fisher, *op. cit.*, p. 86.

149 Brophy and Fisher, *loc. cit.*

150 Iwo Jima was given as an example of a result of the misplaced conception of humanity which denied the use of gas in the Pacific. U.S., Congress, House, Committee on Science and Astronautics, *Report. . . .*, *op. cit.*, p. 12.

The Korean War again placed the United States in a tactical position where gas could be effectively employed. Still, the field commanders were refused permission to use chemical weapons for attack on deeply-entrenched enemy fortifications which were claiming very heavy American casualties. Even permission to use tear and vomiting gases was refused.[151] Paradoxically, permission was granted to use tear and vomiting gases against rioting Communist prisoners of war.

From an observation of actual use alone it would appear that the United States, since World War I, has deliberately refrained from the use of any sort of gas as a weapon of war. When the actual policy statements of various officials of the United States are considered the reasons for such statements appear to be one of policy rather than law. However, the matter is far from clear, and the reasoning for and against the formation of such a policy is not always logical.

2. *Official policy statements*

In 1899 both Secretary Hay and Captain Mahon declared that the United States would not deny itself the right to use such a weapon, which, in its own defense America might avail itself with good results. Both qualified their remarks by stating that the full consequences of gas were not yet known. However, when the full consequences of the gases developed in World War I were capable of being evaluated public opinion was so aroused by anti-gas propaganda that a dispassionate analysis was impossible.[152] Whether such propaganda was accurate or not, it was a powerful force. It almost succeeded in making the United States a party to two treaties outlawing gas and did succeed in shaping the United States' policy of using gas only in retaliation.

So stilled were the proponents of gas that the Senate overwhelmingly gave its advice and consent to the Treaty of Washington in 1922. It was through no fault of the United States that the treaty never became effective. The executive branch of the Government still thought that the opinion of the United States was unchanged when the American delegates were dispatched to the Geneva Conference in 1925. It is interesting to contrast the instructions of Secretary Hay to the American delegates to the Hague Conference in 1899 with those of Secretary Kellogg in 1925. The latter instructed the American delegation to support the prohibition of gas

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151 Rothschild, *loc. cit.*

152 *Ibid.*, p. 30, col. 1, and Brophy and Fisher, *op. cit.*, p. 19. For details on gas propaganda see James M. Read, *Atrocity Propaganda: 1914–1919* (New Haven: Yale University Press, 1941), pp. 6, 95–99; and Horace C. Peterson, *Propaganda for War* (Norman, Okla.; University of Oklahoma Press, 1939), p. 63.

warfare because the United States was "clearly committed to the principle that poison gases should not be used."[153]

When the Geneva Protocol was sent to the Senate the resulting debate and letters to congressmen indicated that the United States was not as clearly committed as Secretary Kellogg had assumed.[154]

The proponents of the treaty opened the debate with a letter from General John Pershing denouncing gas warfare in unmistakable terms.[155] The General reiterated his stand at the Washington Conference in 1922 when he characterized chemical warfare as "abhorrent to civilization," "cruel," "unfair," and "an improper use of science." He then added:

> To sanction the use of gas in any form would be to open the way for the use of the most deadly gases and possible poisoning of whole populations of noncombatant men and women.

Such words were not to deter the opponents of the treaty, now more outspoken than they had been in 1922. Senator Wadsworth led the attack against the treaty. He considered it to be the singular good fortune of the United States that France had failed to ratify the Treaty of Washington three years earlier. Senator Wadsworth went on to say:

> I cannot understand why gas warfare should be picked out as the thing to be abolished, when it was the least cruel of any indulged in in the last war, as the figures prove.[156]

His argument was backed up by telegrams from the American Legion, Veterans of Foreign Wars, and the Association of Medical Surgeons, all pleading for a defeat of the Geneva Protocol.[157]

Sensing that the opponents of the treaty would carry the day, Senator Heflin rose to denounce those who had volunteered to testify "how delightful gas is."[158] By so doing, he meant to place those who favor gas warfare in a seemingly naive or bloodthirsty position. It could be asked why any group should arise in a civilized country to oppose the outlawing of any weapon. However, the opposition position can be logically defended if gas is in fact more humane and more effective than the weapon that would necessarily be used in its place.

The Senate referred the treaty without approval back to the Committee on Foreign Relations on December 13, 1926.[159]

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[153] *Foreign Relations of the United States, 1925* (Washington: U.S. Gov. Printing Office, 1926), pp. 35–36.

[154] The Senate debate is contained in the U.S. *Congressional Record*, 69th Cong., 2d Sess., 1926, LCVIII, pp. 141–154, 226–229, 363–368. The House comment on the final Senate action is set out in the same volume at pp. 1969 and 2090.

[155] *Ibid.*, p. 142.

[156] *Congressional Record, op. cit.*, p. 148.

[157] *Ibid.*, pp. 153, 226.

[158] *Congressional Record, op. cit.*, p. 367.

[159] *Ibid.*, p. 368.

In 1932 an outspoken foe of gas warfare took the presidential office in the United States. Franklin D. Roosevelt needed no Senate approval to wage a one-man war against poison gas. For example in 1937 Congress passed a bill to change the name of the Chemical Warfare Service to the Chemical Corps. President Roosevelt promptly vetoed the bill stating:

> I am doing everything in my power to discourage the use of gases and other chemicals in any war between nations.
> To dignify this Service by calling it the "Chemical Corps" is, in my judgment, contrary to a sound public policy.[160]

At the entrance of the United States into World War II, Secretary Hull requested the opinion of the Secretary of War, Mr. Stimson, on the advisability of a unilateral declaration by the United States of its intentions to observe the 1925 Geneva Protocol. Mr. Stimson advised against it and the declaration was never made.[161] It was not until May of 1942 that President Roosevelt announced the United States' policy of using gas only in retaliation. To Japan he stated that if the Japanese used gas anywhere "retaliation in kind and in full measure will be meted out."[162] Later on June 8, 1943 he told the press that "we shall under no circumstances resort to the use of such weapons [poisonous or noxious gases] unless they are first used by our enemies."[163]

Upon the death of Roosevelt and the ending of the war in Europe an effort was made by the War Department to approach President Truman on a possible reversal of the "retaliation only" policy of his predecessor. Admiral Leahy discouraged General Marshall in such efforts.[164] With the atom bomb and the sudden ending of the war in the Pacific the gas question became, for a time, moot.

The gas question did not remain dead long. In 1952 during the Korean War the United States again declined to become a party to the Geneva Protocol.[165] This continued absence of the United States from any treaty outlawing gas has been specifically men-

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[160] Quoted in Brophy and Fisher, *op. cit.*, p. 22. It was not until August 2, 1946 that the name was changed by Public Law 607, 79th Congress.

[161] *Ibid.*, pp. 49, 50. Regardless of treaty obligations the War Department considered the only effective deterrent to gas warfare to be enemy fear of American retaliation. American adherence to the Geneva Protocol might impede preparation of gases by the United States Army. Therefore it would seem that Enock's statement that the Geneva Protocoy was responsible for the non-use of poison gas in World War II would not apply to the United States which was moved by other motives. *This War Business*, *op. cit.*, pp. 95, 96.

[162] Quoted in Brophy and Fisher, *op. cit.*, p. 63.

[163] *Ibid.*, p. 88. Also reported in U.S. Naval War College, *International Law Documents*, 1942 (Washington: U.S. Gov. Printing Office, 1943), p. 85.

[164] Brophy and Fisher, *op. cit.*, p. 88.

[165] Reported in Stone, *op. cit.*, p. 535, n. 48.

tioned in the Army manuals for the law of war in 1940 and 1956. The Navy 1955 manual notes the same fact.[166]

It appears to this writer that the policy of retaliation enunciated by Roosevelt is yet with the United States. However, such a policy requires preparedness. Preparedness itself demands constant research and development. It is this progressive preparedness that is now giving birth to new gases which are changing the character of the weapon, and are challenging not only the United States policy, but also any norms of international law that may govern in the absence of such a policy.

3. *Preparedness*

To be prepared for large scale retaliation means to be prepared to wage any kind of chemical warfare. As far as preparation is concerned, there is no difference. However, to get its share of the annual budget the Chemical Corps has to work under the psychological handicap of asking for money for "unpopular" weapons that the United States might never use. To overcome this handicap the Army must counter public aversion by publicity campaigns and awaken congressional interest by reporting every chemical advance made by the U.S.S.R.

On Aug. 6, 1955, a civilian committee, appointed by the Chief Chemical Officer to study the mission and structure of the Chemical Corps, submitted their report recommending the development of chemical agents for their deterrent effect in possible wars, and for their actual use as concepts and policies may change.[167] If adopted by the United States such a recommendation would have modified the "retaliation only" policy to the extent that the policy would admit of possible revision in the future.[168]

It may be concluded from these three approaches that the United States' policy of not using gas is not regarded by it as dictated by international law. Considerations of public opinion and the fear of retaliation by the enemy upon the United States or upon its more exposed allies have been the chief factors. Public opinion is being changed. Allies may not always be ex-

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[166] *The Law of Land Warfare*, *op. cit.*, pp. 18–19; U.S. Navy Manual, *Law of Naval Warfare* (Washington: U.S. Gov. Printing Office, 1955), par. 612. This latter publication further states that "Although the use of such weapons frequently has been condemned by states, including the United States, it remains doubtful that, in the absence of a specific restriction established by treaty, a state is legally prohibited at present from resorting to their use. . . ." In addition, the Hague Declaration of 1899 and the Geneva Protocol are conspicuous by their absence from *Treaties Governing Land Warfare*, Department of Army Pam 27–1 (Washington: U.S. Printing Office, 1956).

[167] Report of the Ad Hoc Advisory Committee on Chemical Corps Mission and Structure, Aug. 6, 1955, p. 2.

[168] See *New York Times*, November 10, 1959, p. 1, col. 1, for further comments on the effect of new chemical weapons on this policy of retaliation.

posed. Then the full extent of any law applicable to gas will have to be measured. The policy of "retaliation only" now precludes the necessity of such investigation.

B. *Great Britain*

Great Britain has adhered to the Hague Declaration of 1899 and has signed the Geneva Protocol with reservations.[169] Therefore she is committed by treaty to refrain from its use.

Since 1854 Great Britain has always looked upon gas warfare as a type of unlawful combat. The plan for the use of gas in the Crimean War was disapproved because of the revulsion to it. She abstained from signing the Hague Declaration originally because the United States had not agreed to it. Great Britain was seeking unanimous acceptance before she would agree.

In World War I she used gas initially as a matter of self-defense. Field Marshall French, in his dispatch of October 15, 1915, stated:

> Owing to the repeated use of asphyxiating gas in their attacks on our positions, I have been compelled to resort to similar methods. . . .[170]

However, Great Britain did not limit herself to defensive uses but employed gas more effectively than the Germans in her offensive operations.[171]

Between World Wars I and II Great Britain was one of the leading nations in seeking the banning of all types of gas warfare. She took an active part in the Washington and Geneva Disarmament Conferences, and in formulating the Geneva Protocol.

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[169] Both Great Britain and France signed subject to the reservation that it is binding only in relation to states effectively bound by it, and that it shall cease to be binding if the enemy or his allies fail to respect the prohibition laid down therein. Oppenheim, *op. cit.* (6th ed., 1940), p. 275, n. 1.

[170] Quoted in Lefebure, *op. cit.*, p. 48. Leipmann, *op. cit.*, p. 97, observes that Great Britain, though professing to be shocked at its use, displayed great initiative in devising new methods of employment.

[171] Neither France nor England protested to the Germans over its use. Professor Haber wrote later: "Since our enemies made no protest, we must suppose that the enemy governments were unanimously agreed it would be better to spread the adoption of the new chemical warfare and hit back with it, rather than inveigh against its use." (Quoted in Leipmann, *op. cit.*, p. 65.) Hyde also notes that at first the Allies intended gas warfare as a retaliation. However, the employment of gases proved of so great offensive value that military opinion was convinced that it was a desirable weapon for use in land warfare. (Hyde, *op. cit.*, *III*, p. 1819, n. 4.) The only protest made on the use of gas was that by the Red Cross on February 6, 1918. This protest was directed to both sides. The Allies answered that if the German Government agreed to abandon gas they would "be inclined to examine the proposition" (G. H. Hackworth, *Digest of International Law*, 8 Vols. (Washington: U.S. Gov. Printing Office, 1943), VI, p. 269.) The Germans replied to the Red Cross that the Allies started it. However, since the Allies had declared their war objective was the destruction of the German State, Germany could not renounce this method of warfare in defending her very existence (Garner, *op. cit.*, p. 327, n. 2).

In World War II the British policy could be termed one of disproportional reprisal. On May 10, 1942 Churchill declared that if Hitler used gas anywhere, particularly against the U.S.S.R., "we will use our great and growing air superiority in the west to carry gas warfare on the largest possible scale far and wide upon the towns and cities of Germany."[172]

C. *Union of Soviet Socialist Republics*

During World War I, Russia had a poor industrial base but waged surprisingly efficient gas warfare.[173] The Soviet Union, though industrialized, did not employ gas in the Russo-Finnish War or in World War II. Her practice, therefore, is similar to that of the United States. However, she has been more active in her attempts to control chemical warfare through treaties.

It was Czarist Russia which proposed the prohibition of gas in shells at the first Hague Conference. It was Communist Russia which signed the Geneva Gas Protocol in 1925.[174] In March 1928 the U.S.S.R. suggested that all types of chemical warfare weapons be abolished.[175]

During the conference preceding the adoption of the Geneva Conventions of 1949, the Soviet Union introduced a resolution banning all weapons of mass destruction. It was not adopted. The U.S.S.R. and her satellites made reservations protesting the rejection of the resolution.[176]

Soviet military men expect chemicals to be used in the next war. Marshal Zhukov declared in 1957 that any new war would see the use of the means of mass destruction like nuclear, chemical, and biological weapons.[177] Major General Pokrovsky, in 1959, stated that the U.S.S.R. must be prepared against a surprise chemical attack. He further observed that "The effectiveness and variety of chemical warfare are constantly increasing and, if there is an

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[172] Churchill, *op. cit.*, pp. 203, 329–330.

[173] Curt Wachtel, *Chemical Warfare* (Brooklyn, N.Y.: Chemical Publishing Co. 1941), p. 35.

[174] When signing the Protocol the U.S.S.R. reserved the right to employ gas in wars with states which did not ratify it or with the allies of any such states. The United States is such a state. This reservation had been noted as one reason the United States should be prepared with chemical weapons. U.S., Congress, House, Committee on Science and Astronautics, *Hearings*, . . . , *op. cit.*, p. 3; Salamon, *op. cit.*, p. 81.

[175] Noted in Henry Wheaton, *International Law*, ed., A.B. Keith (2 vols.; 7th ed., London: Stevens and Sons, 1944), II, p. 206.

[176] Declarations by the Delegations of the Byelorussian, Ukrainian, and Union of Soviet Socialist Republics when signing the Final Act of the Diplomatic Conference of Geneva, 1949. *Geneva Conventions of 12 August 1949 For the Protection of War Victims*, Dept. of Army Pam 20–150 (Washington: U.S. Gov. Printing Office, 1950), pp. 16, 17.

[177] Dinerstein, *op. cit.*, p. 216; also referred to in Jarvis, *op. cit.*, p. 46, quoting *Pravda*, February 20, 1956.

element of surprise in its use, it could have great significance in combat. . . ."[178]

In dealing with the international law of war as it affects the Soviet Union the analyst must always remember that a rule of law is only binding if it helps the Soviet Union.[179] This is the *Kriegsraison* theory applied to the dialectical march of communism. Whether the Soviet Union considers the prohibition of gas warfare to be a part of international law or not, her use of poison gas will be controlled by policy reasons.[180] Therefore she is in a position similar to that of the United States in policy as well as in practice.

D. *Germany*

Germany was a party to the Hague Declaration of 1899. Why then did she use gas in World War I and open the Pandora's box?

Her reasoning is not altoegther convincing. Two principal reasons are usually given, either of which leaves her blameless in her own eyes:

(1) The French started it by using bromethylacetate and chloracetone in 1914.[181]

(2) No fundamental scruples, based on international law, existed at this time.

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[178] Quoted in the *Richmond Times Dispatch*, November 29, 1959, p. 18A.

[179] Walter H.E. Jaeger and William V. O'Brien, *International Law* (Washington: Georgetown University Press, 1958), p. 32; Stone, *op. cit.*, pp. 60–63; Hans Kelsen, *The Communist Theory of Law* (N.Y.: Frederick A. Praeger, Inc., 1955), pp. 164–172.

[180] "The conclusion is inescapable that the Soviet Union and other Communist countries plan to use CBR if they find it to their advantage." U.S., Congress, House, Committee on Science and Astronautics, *Report . . .*, *op. cit.*, p. 13.

[181] The official apologia issued by the German War Ministry and Supreme Command in 1917, entitled "The German Conduct of War and International Law," claimed that the French Army, even before 1914, developed a rifle-grenade and hand grenade filled with tear gas. Prentiss, *op. cit.*, p. 689, contends that both Germany and France used non-lethal gas before April 1915. No protest was made by either side because the gases selected had almost no effect. The most serious charge against the French was leveled by Dr. Rudolf Hanslian in an article published in 1924. He charged that the French employed in 1914 a new explosive called turpinite, which, upon impact, gave off a deadly dust. This charge was repeated in his book *Der Chemische Krieg*, *op. cit.*, p. 13, wherein he displayed a photograph of unmarked German soldiers who died after breathing the dust. His authority for the actual existence of the gas was an article in the Pall Mall Gazette and in the Daily Express of September 17, 1914, where a new powerful explosive is described. However, nowhere in the article was it stated that the explosive gave off any kind of gas, the damage being done entirely by the explosion. See *Official History of the War, . . . , 1915*, *op. cit.*, I, pp. 193, 194, for a comment both on turpinite and Dr. Hanslian's account of it. This same volume at p. 164 in note 1 dismisses as propaganda the Wolff wireless communique of 17 April 1915 which accused the British of using gas at Ypres on 16 April, six days before the Germans actually used it at the same place.

Both of these reasons were advanced by General von Falkenhoyn, the Chief of the German General Staff.[182] The second reason is based on a practical adaptation of *Kriegsraison*. It was stated beautifully by General von Deimling, commanding general of the 15th Army Corps, who actually used the gas:

> I must confess that the commission for poisoning the enemy, just as one poisons rats, struck me as it must any straightforward soldier; it was repulsive to me. *If, however*, these poison gases would lead to the fall of Ypres, we would perhaps win a victory which might decide the entire war. In view of such a high goal personal susceptibilities had to be silent.[183] (Emphasis supplied.)

In regard to the first reason alleging that the French used gas first, Charles Cheny Hyde's condemnation of such reasoning is convincing:

> To the impartial mind belligerent excuses for recourse to conduct definitely forbidden by convention are not impressive or convincing. . . . It is a profitless task to weigh allegation against allegation, and to attempt by such path to reach a conclusion that excuses disregard of the convention prohibition.[184]

The real reason the Germans used gas is concisely stated in Dr. Rudolf Hanslian's *The Gas Attack at Ypres*, previously referred to. This book was written as an answer to Victor Lefebure's anti-German *The Riddle of the Rhine*. Dr. Hanslian wrote

> The German advance was held up by the battle of the Marne, the fronts froze fast. . . . Thus was suddenly revealed the surprising fact of the failure of high explosive ammunition. The Chemical arm appeared to be the most suitable means of attack, since gas could overcome earth fortifications. . . .[185]

The next war in which Germany was a party demanded a different approach on her part. She had signed the Geneva Protocol in 1925 and in answer to a British inquiry made it known in September 1939 that she would observe it subject to reciprocity.[186] She nevertheless advanced her preparations for gas warfare, even discovering the new nerve gases, sarin and tabun. Both could penetrate clothing. Protective masks and ointment were ineffective. Sixteen-thousand such bombs, some of them weighing 550 pounds, were found at one depot by advancing Allied soldiers. Germany had her factories working at full speed to manufacture the new

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182 Quoted in Hanslian, *The Gas Attack at Ypres, op. cit.*, p. 3.

183 Gen. von Deimling, *Erinnerungen aus Meinen Leben* (Paris: Montaigne, 1931), quoted in Hanslian, *The Gas Attack at Ypres, op. cit.*, p. 4.

184 Hyde, *op. cit.*, III, p. 1822, n. 8.

185 Hanslian, *The Gas Attack at Ypres, op. cit.*, pp. 2, 3. This deadlock in the west caused Germany to shift her troop concentration to the east. Liddell-Hart, *op. cit.*, pp. 130–131. Therefore when gas opened the hole in the west German reserves were not immediately available to exploit it. Winston Churchill, *The Unknown War, The Eastern Front* (N. Y.: Charles Scribner's Sons, 1931), p. 311.

186 Oppenheim, *op. cit.* (7th ed., 1952), II, p. 343, n. 3.

gases.[187] But she did not use these or any other gases. Why? If the first Hague Conference did not stop the Kaiser it would hardly follow that the Geneva Protocol would stop Hitler. The answer for the latter phases of the war lies both in military vulnerability and in matters of policy. They were disclosed by Albert Speer at the Nuremburg War Crimes Trial. He gave two reasons why Germany did not resort to gas warfare in 1944 and 1945:

(1) Military men were opposed to its use because Allied air superiority would expose Germany cities to retaliation.

(2) When the war seemed lost Germany wanted to do no act that could be held against her after she *lost* the war.[188]

Both of these utilitarian reasons illustrate the soundness of the American position taken in 1899 by Secretary Hay that "considering the temptations to which men and nations are exposed in time of conflict, it is doubtful if an international agreement to this end would prove effective."[189]

E. *Italy*

When Italy resorted to gas warfare in Ethiopia in 1936 she was a major power. She was also a party to the Geneva Protocol. Why, then, did she employ mustard gas against a backward nation like Ethiopia? The immediate reason was because of its effectiveness. The fact that Ethiopia could not retaliate in kind no doubt had a bearing on the initial decision to use it.

Italy justified her action in a communication to the League of Nations on April 30, 1936. She mentioned she would use gas as reprisal for other gross violations of international law committed by Ethiopia, there being nothing in the Geneva Protocol that required gas be employed only as retaliation in kind.[190] Italy, therefore did not expressly repudiate her international treaty obligations concerning poison gas. Rather she sought to evade them by the oft-used excuse of reprisal.

F. *Japan*

Japan was a party to the Hague Gas Declaration of 1899.[191] Therefore when the Russo-Japanese War broke out she was restricted by treaty from using the weapon. However, a British chemist in Japan nevertheless suggested to the Japanese Govern-

[187] The Russians captured intact the German tabun plant, moved it home, and made tabun their standard nerve gas. U.S., Congress, House, Committee on Science and Astronautics, *Report . . . , op. cit.*, p. 6.

[188] *Trial of the Major War Criminals, op. cit.*, XVI, pp. 527–528.

[189] "Instruction from Secretary of State Hay to the American delegates at the first Hague Conference." *Foreign Relations of the United States*, 1899, (Washington: U.S. Gov. Printing Office, 1901), pp. 511–512.

[190] League of Nations, *Official Journal*, 17th Assembly, 1936, p. 580.

[191] Scott, *The Hague Peace Conferences of 1899 and 1907, op. cit.*, p. 231.

ment that it employ gas against the Russian forces.[192] However, it did not do so.

In World War I the type of war waged against Germany in the Pacific did not present the same situation as the trench war in Europe. There were no reports of gas in that theater of operations.

Japan, although a party to the defunct Washington Treaty of 1922, was one of the five powers which declined to ratify the Geneva Protocol in 1925. Therefore Japan was in a better position than Italy in that regard when she commenced her war in China. However, the reports are conflicting as to whether Japan used gas in the Sino-Japanese War.[193] Nevertheless a 1959 report of the House Committee on Science and Astronautics contains the statement that a large number of small gas attacks were made by the Japanese against Chinese forces from 1937 at least until 1943.[194] When World War II erupted in the Pacific Japan was non-committal to a British request, made in December 1941, that she declare her intentions to abide by the Geneva Protocol.[195]

Japan, since World War I, has remained free of binding gas treaties, relying on her own policy considerations to determine her actions in the event of war.

Conclusion

The practice of states has been to prepare for gas warfare and to let policy considerations determine its actual employment. Chief among the policy considerations have been the fear of retaliation and the fear of public opinion. The very indecisive nature of the instrument, rather than a precise rule of international law, has permitted these two considerations to shape policy.[196] Gas was an extremely useful weapon but it had not, in the past, been a decisive weapon. Therefore states considered their own vulnerability

[192] Reported in Buchan, *op. cit.*, II, p. 43.

[193] Brophy and Fisher, *op. cit.*, p. 63, n. 1, remarks that the repeated Chinese charges were never definitely established.

[194] U.S., Congress, House, Committee on Science and Astronautics, *Report . . . , op. cit.*, p. 4.

[195] Brophy and Fisher, *op. cit.*, p. 49, n. 1.

[196] As previously noted a study prepared by the Operations Division of the War Department General Staff, dated June 4, 1945, concluded that gas was helpful but not decisive. Therefore for that and for reasons of public opinion the United States should not initiate gas warfare. Brophy and Fisher, *op. cit.*, p. 87. Before 1941 this public opinion was evident in the preambles to the Washington Treaty, the Central American Convention and Geneva Protocol. All described gas as having been justly condemned by mankind. Today the fear of public opinion still shapes U.S. policy. After agreeing that gas was more humane than some weapons now in use a House Committee did not recommend that the United States now change its "retaliation only" rule because "the natural revulsion against the bizarre effects of both old and new CBR agents makes them ready targets for international propaganda campaigns." U.S., Congress, House, Committee on Science and Astronautics, *Report . . . op. cit.*, p. 11.

before employing it, the vulnerability of their allies, public opinion, the tactical situation, and the political objectives of the war.

VI. THE INTERNATIONAL LAW OF GAS WARFARE

Article 38 (1) of the Statute of the International Court of Justice provides that the court shall apply international conventions, international custom, general principles of law, judicial decisions, and the teachings of the most highly qualified text writers in arriving at its decisions. These five categories, traditionally classified as sources and evidences of international law, will be utilized in analyzing the four preceding parts of this study, that is, the history of gas warfare, its present characteristics, the international efforts to control it, and the practice of belligerants.

A. *International Conventions*

1. *Hague Declaration IV of 1899 and the Geneva Protocol of 1925*

Two treaties, now in force, specifically prohibit certain aspects of gas warfare; the Hague Declaration IV of 1899 and the Geneva Protocol of 1925. The former was not signed by a sufficient number of states to give it general validity.[197] The latter would appear to be a law-making treaty despite the absence of the United States and Japan. However, even a law-making treaty does not bind states which are not parties to it.[198] If such treaty is declaratory of an existing customary rule then it is that custom and not the treaty declaratory of it that will govern the actions of the United States.

One of the attributes of statehood is the ability to participate in the making of international law.[199] However, states are not equal to their ability to make law. What the United States does or does not do in certain fields may determine, to a great extent, what international law is, as England so determined in the 18th and 19th centuries.[200] A state whose interests are most affected should

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[197] Charles Fenwick, *International Law* (3rd ed., N.Y.: Appleton-Century-Crofts, 1948), p. 557.

[198] J.L. Brierly, *The Law of Nations* (5th ed., Oxford: The Clarendon Press, 1955), p. 59.

[199] Jaeger and O'Brien, *op. cit.*, p. 34; Oppenheim, *op. cit.*, 7th ed., I, p. 20.

[200] J.B. Scott made the following pertinent comment in regard to the two Hague Conferences: "While therefore the conference admits the equality of nations and while each nation thus responds to the roll call, Montenegro and Luxemburg influencing the vote as profoundly as Russia and Germany, the support of the larger nations is necessary in order to give international force and effect to a proposition before it. For example, the attitude of Great Britain in maritime law is controlling." J.B. Scott, *The Hague Peace Conferences of 1899 and 1907* (2 vols., Baltimore: Johns Hopkins Press, 1909), I, p. 37.

have an equivalent voice in determining what rules are applicable, or what old rules no longer apply.[201]

2. *Annex to Hague Convention IV of 1907*

No general rule laid down in the annex to Hague Convention IV of 1907 can be said to prohibit, by analogy, gas warfare. Articles 23(a), (b), and (e) are held by some writers to apply to gas.

a. *The Prohibiting of Poisons*

Article 23(a) certainly seems to be capable of application from its wording: "It is especially forbidden to employ poison or poisoned weapons." If a shell containing blood or nerve gas, whose purpose is to poison the human system, is not a poisoned weapon then the term has a restrictive meaning. Practice has borne out such a restrictive interpretation of Article 23(a). It has not been applied generally by states in connection with poison gas.[202] One reason is that Article 23(a) was formulated when the experience of mankind did not encompass poison in terms of gas but in terms of poisoned water or food, or poisoned arrows. This codification of custom reflected the past, not the unknown future.

b. *Unnecessary suffering*

Article 23(e) presents one of the most frequent objections raised against gas warfare. ". . . it is especially forbidden to employ arms, projectiles, or material calculated to cause unnecessary suffering." The question is not whether poison gas causes suffering, but whether it causes *unnecessary* suffering. In answering this question, the emotional reaction to gas warfare must be set aside. This emotional reaction was based in part on the original helplessness of man to protect himself, and in part on the lurking, invisible nature of this instrument.[203] Therefore man had good reason to fear it. But fear and an honorable repugnance are not

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[201] See Brierly, *op. cit.*, pp. 134, 135, for a defense of the traditional political and legal primacy of the great powers.

[202] *The Law of Land Warfare*, FM 27–10 (1956), *op. cit.*, in par. 37 sets out Article 23(a) as a rule binding upon the United States. However, in the very next paragraph the statement is made that the United States is not a party to a treaty that prohibits or restricts the use in warfare of toxic or non-toxic gases. The earlier 1940 edition of FM 27–10 at page 7, was even more specific: "The practice of recent years has been to regard the prohibition against the use of poison as not applicable to the use of toxic gases."

[203] Fries and West, *op. cit.*, p. 387, give three reasons for the emotional reaction of horror: (a) The first gas was a suffocating gas. People were used to seeing others bleeding to death, but not choking to death; (b) The first soldiers hit by it were unprepared and helpless; (c) War propaganda. See also Bernstein, *op. cit.*, p. 889, who remarks that the newness of chemical warfare in World War I gave it a more sinister aspect than other conventional means. For similar statements see Liddle-Hart, *op. cit.*, p. 130, and Buchan, *op. cit.*, II, p. 43.

germane to the matter of suffering as such.[204] It is necessary to use other, more direct approaches in analyzing the application of Article 23(e).

(1) The first direct approach usually taken is that of comparing the suffering caused by gas with the suffering caused by other recognized weapons of war. Does the soldier who has been gassed suffer any more than the soldier who has been torn by a bullet or shell fragment, or who has been drenched in flame? Can the suffering gases cause be compared to the torture that comes to the man who has been bayonetted, before death releases him?[205]

A United States Army officer once answered these questions by stating: "It is impossible to humanize the act of killing and maiming the enemy's soldiers, and there is no logical grounds on which to condemn the appliance so long as its application can be so confined."[206] The wounded in war suffer from all weapons.[207] The correct norm for measuring Article 23(e) cannot be found in this nightmare realm of suffering. Another approach must be taken.

(2) A better approach would be an analysis of its permanent effects on individuals.[208]

(*a*) Are gases which kill quickly and cause little suffering forbidden by Article 23(e)? The answer must be "no," because Article 23(e) is concerned with suffering. If a weapon produces little or no suffering then it cannot be said to cause unnecessary suffering. The St. Petersburg Declaration concerning weapons which make death inevitable would be more relevant in answering

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[204] There is certainly a popular revulsion to the use of gas. It has stemmed from many factors, not the least of which is a feeling of dishonorableness connected with it. For that reason countries do not like to be the first to use it. For instance, Salamon in her article, "The Select Weapon," in *Army, op. cit.*, p. 80, after arguing that poison gas does not cause unnecessary suffering, and in addition is an excellent tactical weapon, concludes her article with the statement that faith in her country leads her to believe that the United States will not use gas first.

[205] Waitt, *op. cit.*, p. 6.

[206] Sibert in the foreword to Fries and West, *op. cit.*, p. ix.

[207] "I would not preach the 'humaneness' of chemical warfare for there is nothing 'humane' in war." (Lt. Col. S.A. White, "Some Medical Aspects of Chemical Warfare," *Chemical Warfare Bulletin*, XXIV (1938), p. 144.) "War and humanity are incompatible conceptions," (Russel H. Ewing, "The Legality of Chemical Warfare," *American Law Review*, LXI (January–February 1927), p. 58). "The committee cannot bring itself to describe any weapon of war as 'humane' and it makes no moral judgment on the possible use of CBR in warfare." U.S., Congress, House, Committee on Science and Astronautics, *Report . . . , op. cit.*, p. 15.

[208] Both Prentiss, *op. cit.*, p. 679, and James Kendall, *Breathe Freely, The Truth About Poison Gas* (N.Y., London: D. Appleton-Century Co., 1938), Chapter 12, discuss the humanity of gas warfare by way of three comparisons; first degree of suffering; second, percentage of deaths; third, permanent aftereffects. Both found that on all three counts gas in World War I was relatively less hideous than shells and bullets.

such a question than would Article 23(e). One writer poetically phrased his answer in the following manner: "Who that had to die from a blow would not rather place his head under Nasmyth's hammer than to submit it to a drummer boy armed with a ferrule?"[209]

(*b*) Are gases which cause suffering but which do not generally kill or produce permanent injury forbidden by Article 23(e)? In World War I over 27 per cent of United States casualties were gas casualties. Two per cent resulted in death, while approximately 25 per cent of the casualties from bullets and high explosives resulted in death.[210] The figures on the lack of after-affects from gas are also revealing.[211] For instance 33 Americans were blinded in at least one eye from gas; 779 were blinded by the conventional weapons.[212] If death or permanent injury do not usually result from gases, then such gases do not assume as horrible an appearance as do many of the more conventional weapons.

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[209] B.W. Richardson, "Greek Fire," *Popular Science Review*, III, (1864), 176.

[210] U.S., War Department, *The Medical Department of the United States Army in the World War*, Vol. XV, Part II; *Statistics* (15 vols., Washington: U.S. Gov. Printing Office, 1921–1927), p. 1023. Fries and West, *op. cit.*, p. 388, cite similar figures. Frodkin takes issue with such statistics. She cautions that figures on gas warfare are not accurate because gas cases are often concealed in other casualty reports. For example, a soldier who is shot and then gassed may be listed as only being shot. *The Air Menace and the Answer*, *op. cit.*, p. 24. However, the weight of authority seems to uphold the validity of the Government report. For example, Ault refers to mustard gas as a dangerous but not a deadly pest. S.J. Ault, *Gas and Flame* (N.Y.: George Doran Co., 1918), p. 169. Jacobs, *op. cit.*, p. 2, makes the following observation: "For years before the Second World War the general public was given an oversupply of nonsense on the dangers of poison gas. Poison gas is dangerous, that is why it is used as a weapon of war. It is not so dangerous, however, that we cannot protect ourselves against it. It took one ton of mustard to produce 30 casualties in World War I and only one of these was fatal."

[211] A comprehensive study was prepared by the Medical Department of the U.S. Army on the after effects of gas warfare. See U.S. War Department, *The Medical Department of the United States Army in the World War*, Vol. XIV: *Medical Aspects of Gas Warfare*, *op. cit.*, particularly pp. 280–293. Later a further research was done on the after effects of two particular gases, chlorine and mustard. See H.L. Gilchrist and P.B. Matz, *The Residual Effects of Warfare Gases, Chlorine and Mustard*, U.S. War Department (Washington: U.S. Gov. Printing Office, 1933). Both of these publications illustrate the relative lack of permanent after or side effects on American casualties from the gases employed in World War I. British commentators have reached the same conclusion after studying their own casualty reports. For instance, Faukes relates that not only was mortality low from mustard, but permanent after-effects were very rare. C.H. Faukes, *Gas, The Story of the Special Brigade* (London: W. Blackwood and Sons, 1934). Haldene, *op. cit.*, pp. 26–27, notes that out of 150,000 British mustard casualties less than 4,000 died, while only 700 out of the remainder were permanently unfit. Fuller concludes that "Gas seldom leaves the victims seared or disfigured or maimed." Col. J.F.C. Fuller, *The Reformation of War* (London: Hutchinson and Co., 1923), p. 110.

[212] Gilchrist, *op. cit.*, p. 27.

(*c*) Are gases which cause suffering and which kill forbidden by Article 23 (e) ? Only if they cause unnecessary suffering. Unnecessary to what, is the very center of the problem. To solve it the mission of weapons must be examined. The mission of all weapons is to subdue the enemy soldiers.[213] If a soldier is well dug in and cannot be dislodged by shell fire then the use of such a gas would not be unnecessary to subdue him. This was the situation when Germany first used chlorine. She had no other weapon capable of overcoming the French fortified line. However, if the soldier can be subdued by a gas which does not kill, then it would seem that such a gas must be employed.

Questions (*b*) and (*c*) above, can be better explained by comparing poison gas with poisoned bullets. The bullet alone is capable of putting the soldier *hors-de-combat*. The suffering caused by the poison was not necessary in accomplishing this mission.

From an analysis of these two approaches the conclusion is drawn that gas, as such, is not prohibited by Article 23 (e), though a particular gas used in a particular way might be. This conclusion is in agreement with the position of the United States as disclosed in its military manuals. Nevertheless, this conclusion is not in agreement with many legal and non-legal texts on the subject and with the statements made by officials of the United States before the Washington and Geneva Conferences in 1922 and 1925. Roberts and Frodkin are representative of the non-legal writers who oppose the use of gas. A. A. Roberts, writing in 1915, called poison gas a TORTURE clearly infringing Article 23 (e).[214] He quoted both Grotius and DeVattel as supporting the view that torture is forbidden. But torture is a conclusion. Roberts gave no reasons why gas was a torture and other forms of wounding were not a torture. Frodkin in 1934 concluded that poison gas was not humane because it killed or wounded a tremendous num-

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[213] The Declaration of St. Petersburg, November, December, 1868, declared that the object of the use of weapons in war is "to disable the greatest possible number of men, and this object would be exceeded by the employment of arms which needlessly aggravate the suffering of disabled men, or render their deaths inevitable, and that the employment of such arms would therefore be contrary to the laws of humanity." (Quoted in W.E. Hall, *A Treatise on International law*, ed., A. Pearce Higgins (8th ed., Oxford: Clarendon Press, 1924), p. 636). Higgins added the general principle of proportionality to this concept of unnecessary suffering. He stated that: "On the whole it may be said generally that weapons are illegitimate which render death inevitable or inflict *distinctly* more suffering than others *without* proportionately crippling the enemy. . . . On the other hand the amount of destruction or of suffering which may be caused is immaterial if the result obtained is conceived to be proportionate." (Emphasis supplied.)

[214] Roberts, *op cit.*, p. 21.

ber of soldiers in World War I.[215] Such reasoning goes to the effectiveness of the weapon and is not relevant to Article 23(e).

c. *Treacherous killing or wounding*

Article 23(b) forbids the treacherous killing or wounding of individuals belonging to the hostile nation or army. The idea of treachery would encompass hidden, dishonorable types of warfare. Tucker concludes that a colorless, odorless gas which would give no prior warning might easily constitute a form of treachery.[216] However, it is difficult to see how the lack of prior warning would be sufficient to constitute treachery. Snipers, land mines, booby traps, and long range artillery give no warning. Treachery is closer akin to a violation of confidence and to deceit rather than to surprise.[217] Therefore gas cannot be considered a treacherous instrument *per se*. It would depend upon its use in a particular case. Almost any weapon can be used treacherously if the user so desires.

Hague Convention IV, which did so well in codifying the then existing custom, did not codify a rule that would forbid any type of gas. It remains to be seen if a custom not mentioned in the Hague Convention would be applicable.

B. *International Custom*

The custom of distinguishing between combatants and noncombatants may be applicable to gas if its use cannot make such a distinction. This custom has its roots deep in history.[218] However, it is associated with the concept of limited war where armies fought armies and civilians minded their own business. With the advent of total war and the economic aspects such a war displayed in World Wars I and II this distinction has been subjected

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[215] Frokin, *op. cit.*, Chapter IX.

[216] Robert Tucker, *The Law of War and Neutrality at Sea* (Washington: U.S. Gov. Printing Office, 1957), p. 52, n. 15. The author uses the concept of treachery behind the use of poison as an analogy.

[217] *Webster's New Collegiate Dictionary* (Springfield, Mass.: G. & C. Merriam Co., 1956), p. 905.

[218] W.E. Hall, *International Law*, ed., J.B. Atlay (5th ed., Oxford: Clarendon Press, 1904), p. 397, n. 1, contains an interesting history of the development of the distinction between combatants and noncombatants. Robert Tucker in his *The Law of War and Neutrality at Sea, op. cit.*, p. 46, refers to distinction as a general principle of international law. However, it appears to be better classified as a custom. It is more apt to be modified by practice than is a general principle as the term is used in Article 38(1)(c) of the Statute of the International Court of Justice, and as defined by the War Crimes Tribunal in United States v. List, *Trials of War Criminals, op. cit.*, XI, pp. 1230–1319.

to severe strain.[219] It was thought by some to have vanished after World War I. John Bassett Moore countered such thinking, pointing specifically to the concern in the 1920's for noncombatants if gas warfare were used in a future war.[220] Indeed, between World Wars I and II there was deep fear of gas delivered on cities by aircraft. A Navy board in 1921 recommended to the American delegation at the Washington Conference that gas be outlawed, partially because it could not be controlled sufficiently to insure the safety of noncombatants.

This inter-war concern for noncombatants in gas attacks is paradoxical because civilians were little affected by gas during three-and-one-half years of intensive gas use in World War I.

In World War II the distinction received no support in practice in regard to submarine warfare and aerial bombings.[221] However, it cannot be said that the distinction has vanished completely. It was still much in evidence in the Geneva Conventions of 1949 where the distinction between helpless combatants and helpless noncombatants is clear.

But this custom, conceding that it still exists in some form, does not forbid gas warfare. It only forbids its use against noncombatants to the same extent that other kinds of attack are forbidden against noncombatants. Noncombatants are now only protected

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[219] Stone, *op. cit.*, pp. 628, 629, advocates a direct attack upon civilians engaged in war industries because of the importance of such workers in the economics of war. A word of caution is necessary here. The inference of such a statement is that modern warfare will remain closely related to economic production. Although this was true in World War II, neither the United States nor the U.S.S.R. are assuming that economic potentials will necessarily play a similar role in future wars. Both believe that forces-in-being may be decisive. See H.S. Dinerstein, *War and the Soviet Union* (N.Y.: Fredrick A. Praeger, 1959), Chapter 7, and Raymond L. Garthoff, *Soviet Strategy in the Nuclear Age* (N.Y.: Fredrick A. Praeger, 1958), pp. 71–76. If forces-in-being become the objective of both sides the result may be the sparing of civilian populations.

[220] John Bassett Moore, *International Law and Some Current Illusions and Other Essays* (N.Y.: Macmillan Co., 1924), p. ix. Mr. Moore cites the concern for civilian safety which prompted the Washington Conference as proof that the distinction did not die in the inferno of World War I.

[221] For instance a fire raid on a Japanese city can offer little protection to combatants and noncombatants alike. The nature of the weapon and the nature of the target prevent the observation of the protection that customarily surrounded the noncombatant. See *Fire and Air War* (Boston; National Fire Protection Association, 1946), for graphic Japanese illustrations of their cities after fire attacks. See also, F.J.P. Veale, *Advance to Barbarism* (Appleton, Wis., C.C. Nelson, 1953), plate 1, for a photograph of the pyre of Dresden, Germany, where bodies of civilians were burned in batches of about 500 each over a period of several weeks, following a three-day raid by Allied planes.

from attacks directed *exclusively* against them.[222] In a modern complex industrial city few attacks would come within such an exclusionary rule.

Gas, together with long range artillery, atom bombs, rockets and air bombings, are modern weapons, modern in the sense that the gunner is not sighting over the gun barrel when he fires them. It is these types of weapons, plus the ever-increasing variety of military targets, that are breaking down, not the distinction, but the protection that noncombatants previously enjoyed.[223]

This custom cannot be said to prohibit gas warfare as such, any more than it prohibits other modern arms.

The reservations of many signatory states, particularly the U.S.S.R., to the Geneva Protocol of 1925 indicate that no custom was recognized at that time that would bind the states independently of the obligation they were assuming under the convention itself. Since 1925 no specific custom appears to have arisen. Gas was not used in World War II because of the Geneva Protocol and the self-imposed policy of the states not parties to it. It would be difficult to argue that the practice of states resulting from a convention they have signed has independently created a custom that binds other states who have deliberately refrained from adhering to the convention.

C. *General Principles of Law*

The Statute of the International Court of Justice lists "general principles of law recognized by civilized nations" as one source of international law.[224] This is a fairly recent departure from the two familiar sources, custom and law making treaty.[225] There appears now to be a hierarchy of sources with custom and treaties in the first category and general principles of law, judicial decisions, opinions of text writers, and equitable principles in the second category.[226]

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[222] *Law of Land Warfare*, FM 27–10, *op. cit.*, p. 16, states that "it is a generally recognized rule of international law that civilians must not be made the object of attack directed *exclusively against* them." (Emphasis supplied.) On p. 20, this same manual, adds that "there is no prohibition of general application against bombardment from the air of combatant troops, defended places, or *other legitimate military objectives*." (Emphasis supplied.)

[223] See Paul Guggenheim, *Traite de Drot International Public* (2 vols., Geneva: Librairie de L'Universite, 1954), II, p. 429, for a discussion of these military reasons for the lack of civilian protection in aerial warfare.

[224] Article 38(1)(c), Statute of the International Court of Justice.

[225] Alf Ross, *A Textbook of International Law* (London Longmans, Green, 1947), p. 79. *Contra*, Brierly, *op. cit.*, pp. 63, 64, who concludes that it is no novelty in the international law system because courts have instinctively referred to them in the past. Its specific inclusion, he continues, amounts to a rejection of the positivist doctrine according to which international law consisted solely of rules to which states have given their consent.

[226] Jaeger and O'Brien, *op. cit.*, p. 13.

These general rules and principles become important when the special rule does not exist or has become obsolete, or is of doubtful existence.[227] General principles, therefore, are of prime importance in the search for an answer to the legality of gas warfare.

What then are these general principles? They are generally principles, based on equitable or natural law principles, from which much of the content of public international law proper has been developed.[228] They range from concepts on self-preservation, good faith,[229] and respect for acquired rights[230] to unjust enrichment,[231] prescription, and estoppel.[232]

The general principle applicable to gas warfare, as well as to any kind of warfare, is proportionality.[233] The ends to be gained must be proportional to the means employed to secure them.[234] Therefore even if gas warfare is permitted, such permission does not amount to a license. It would be highly questionable if a city could be sprayed with lethal gas merely to "shake up" the civilian population in the hope that the state would be inclined toward surrender. The application of this principle transfers the problem of chemical warfare from the black and white formula of legal or illegal weapons to particular situations and objectives where some positive norm is always applicable.

Municipal law, being in general more developed than international law, has always constituted a sort of reserve store of principles upon which the latter has been in the habit of drawing.[235] An example of such drawing occurred at Nuremburg in the trial of von List.[236] There the court turned to municipal law to find acceptance or rejection of the principle of *ex post facto* and the defense of "superior orders." Municipal law appears to have accepted the use of gas by law-enforcement agencies within

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[227] Ernst H. Feilchenfeld, *Public Debts and State Succession* (N.Y.: Macmillan, 1931), Chapter 37, sec. 1.

[228] H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 67–71, commenting upon Article 38, par. 1(c), of the Statute of the Permanent Court of International Justice.

[229] Bin Cheng, *General Principles of Law* (London: Stevens and Sons, 1953), Parts One and Two.

[230] Lord McNair, "The General Principles of Law Recognized by Civilized Nations," *The British Year Book of International Law*, XXXIII (1957), p. 1, at p. 15.

[231] D.P. O'Connell applies this principle as the basis for his *The Law of State Succession* (Cambridge: University Press, 1956), p. 273.

[232] Brierly, *op. cit.*, p. 68.

[233] William V. O'Brien, "The Meaning of 'Military Necessity' in International Law," *Institute of World Polity Yearbook* 109 (1957) for an application of the principle of proportionality to military necessity.

[234] *The Law of Land Warfare*, FM 27–10, p. 19, recognizes this principle when it states that "loss of life and damage to property must not be out of proportion to the military advantage to be gained."

[235] Brierly, *op. cit.*, p. 63.

[236] United States v. List, *Trials of War Criminals*, *op. cit.*, XI, p. 1230.

the state. Non-lethal gases which have no permanent disability are used as a basic weapon in riot control and in dislodging barricaded criminals. The more "progressive" states are using the gas chambers instead of the electric chair or hangman's noose for executions.[237]

The gases used are selected gases for a particular objective. Whether the use of gas in war can be as selective is another problem. However, their use within a state indicates that municipal law has no aversion to gas as such.

D. *Judicial Decisions*

The courts offer little aid in determining the existence of any international law relative to gas warfare. Trials at the end of World War I would be expected to yield some evidence, particularly in view of the fact that the use of deleterious and asphyxiating gases was listed as one of 33 war crimes by the Commission on Responsibilities in 1919. However, the war crimes trials held at Leipzig after the termination of the war principally concerned ill-treatment of prisoners of war and unlawful submarine warfare activity.[238] The German-Greek Mixed Arbitral Tribunal in *Kiriadolou* v. *Germany* (1930) condemned, by way of dicta, use of gas from airplanes against the civilian population.[239] The facts before the court concerned conventional air bombing.

World War II War Crimes Trials dealt with everything from forced prostitution in the South Seas to illegal wearing of the uniform.[240] However, except for the questioning of Albert Speer by Mr. Justice Jackson on Germany's poison gas preparations, the records are silent on gas warfare.

E. *International Law Text Writers*

Publicists on international law are naturally in a lesser position to influence the practice of states than are courts. However, they do exercise much greater influence on determining what this law

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[237] "The most humane way known to put a condemned criminal out of action is through the lethal gas chamber. Yet when we even mention the use of gas in warfare our people are terrified and completely fail to evaluate the situation." Statement by Lt. Gen. Arthur G. Trudeau, the Army's Chief of Research and Development, made in testifying before a subcommittee of the House of Representatives on June 18, 1959. U.S., Congress, House, Committee on Science and Astronautics, *Hearings on Basic Scientific and Astronautic Research in the Dept. of Defense*, June 18, 1959, 86th Congress, 1st Sess., 1959, p. 230.

[238] Hackworth, *op. cit.*, VI, pp. 279, 280, 462, 463.

[239] *Mixed Arbitral Tribunal*, X (1931), p. 100, reported in Singh, *op. cit.*, p. 186.

[240] A digest of 89 cases illustrating the wide variety of war crimes charged has been prepared by the United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (15 vols., London: His Majesty's Stationery Office, 1949).

is than do writers on municipal law. They, as courts, are not a primary source of international law. They nevertheless come very close to making law when their opinions on the law applicable to new situations are carefully considered by states and by courts.[241]

1. *British writers*

Writers in England tend to regard the use of any type of poison gas, except as a reprisal in kind, to be prohibited by international law. The following six writers are representative of British thinking on the subject.

H. Lauterpacht reasons that the Hague Declaration of 1899, forbidding the use of shells to diffuse asphyxiating gases, gave expression to the customary rules prohibiting the use of poison and materials causing unnecessary suffering. Both of these customary rules were formally codified in Article 23(a) and 23(e) of the 1907 Hague Regulations. He further considers that the cumulative effect of custom, practice, and pronouncements in ratified and unratified treaties make such prohibition of gas warfare legally binding upon all states.[242]

A. B. Keith is of the opinion that there can be no doubt that the Hague Declaration of 1899 now possesses binding force generally and that the German use of gas exposed combatants to unnecessary suffering thereby inflicting death and agony on many men.[243]

Georg Schwarzenberger associates gas with other methods of warfare long denounced. He reasons that in the interest of humanity it is prohibited to employ arms or projectiles calculated to cause unnecessary suffering, to use poison gas against the enemy, or to refuse quarter to an enemy willing to surrender.[244] In addition the provisions of the Geneva Protocol of 1925 were treated in the post 1919 period as declaratory of existing international law.[245]

A. Pearce Higgins is also of the opinion that gas caused needless suffering to men who inhaled it in World War I. Therefore he concludes its use was contra to the Declaration of St. Petersburg

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[241] Article 38(1)(d) of the Statute of the International Court of Justice requires the Court to apply "the teachings of the most highly qualified publicists of the various nations as a subsidiary means for the determination of rules of law."

[242] Oppenheim, 7th ed., *op. cit.*, pp. 342, 344.

[243] Henry Wheaton *International Law*, *op. cit.*, 7th ed., II, p. 205.

[244] Georg Schwarzenberger, *A Manual of International Law* (London: Stevens and Sons, 1947), p. 83.

[245] Georg Schwarzenberger, *The Legality of Nuclear Weapons* (London: Stevens and Sons, 1958), pp. 38, 48. In this book the author reasons to the illegality of nuclear weapons from the prior illegality of poison gas. He considers both to be analogous species of the genus "poison."

of 1868 and to Article 23(a) and 23(e) of the Hague Regulations of 1907.[246]

R. F. Roxburgh, when editing the 3rd edition of Oppenheim, was more cautious. He thought that the Hague Regulations might not be applicable to gas warfare because all contestants in World War I had neither signed nor ratified them.[247] However, with the general acceptance of the Hague Regulations as declaratory of customary law such a technical objection is no longer entertained.

Julius Stone agrees with Lauterpacht that international law forbids gas warfare and cites Lauterpacht's reasoning as the correct interpretation of the law. However, he then observes that the compulsion back of this prohibition is fear of retaliation, because international law forbids neither retaliation by gas nor preparation for gas warfare. He thinks that practical reasons, rather than the Geneva Protocol, stopped Germany from using gas in World War II.[248]

The use of the phrases "humanity" and "unnecessary suffering" run through the thinking of these British writers. Such phrases may apply to some gases. But they cannot apply without qualification to all gases, or to gas as such any more than to other weapons of war.

2. *American writers*

Writers in the United States are divided on the legality of gas warfare.

James W. Garner thinks that the employment of poison gases does uselessly aggravate the suffering of its victims, a type of suffering which the St. Petersburg and Hague Declarations clearly intended to prohibit. He cautions against the cynical denunciation of agreements to ban gas because an agreement is better than no agreement. He then concludes that this method of warfare may serve to deter belligerents from resorting to it from fear of retaliation by the enemy.[249] This practical observation is repeated by other American writers.

Robert W. Tucker is of the opinion that poison gas warfare is prohibited by international law. However, he does not think that it causes unnecessary suffering, or that its use will necessarily involve noncombatants. He cites both Lauterpacht and Stone and indorses their reasoning that the *practice* of nations has been

[246] Hall, *op. cit.*, 8th ed., p. 637, n. 2.

[247] Oppenheim, *International Law,* ed., R.F. Roxburgh (2 vols., 3rd ed., London: Longmans, Green, 1920), II, p. 89.

[248] Stone, *op. cit.*, pp. 553–557. Paul Guggenheim, a Swiss writer, is in agreement with the general English view that gas warfare is prohibited by customary international law. Guggenheim, *op. cit.*, II, pp. 390, 433.

[249] Garner, *op. cit.*, pp. 329–331.

to view gas warfare as violative of the principle of humanity.[250] He sees no merit in the contention that the motive for obeying the law, fear of retaliation, is an argument against the legal validity of the prohibition. It strengthens the validity of the law rather than weakens it.[251]

Charles Fenwick is reluctant to say that gas warfare is prohibited. He points to the conduct in World War I of both sides, the absence of many states from the Hague Declaration of 1899, and the failure of the United States and Japan to ratify the Geneva Protocol.[252]

George Wilson looks to any prohibition, if one exists, to be liberally interpreted if the enemy is small or passive. He observes that the leading nations of the world continue to prepare for gas warfare and sometimes even argue for its humane character.[253]

Charles Cheney Hyde sees little efficacy in treaties prohibiting gas warfare. He thinks that there is small likelihood of the United States entering into such a treaty because of the contrary advice from its military chiefs. He concludes that if gas is to be eliminated from future wars it will be because of fear of retaliation.[254]

Ellery C. Stowell, writing in 1930, commented on the popular outcry against gas warfare as follows:

> The unprepared and backward states are inclined to regard modification of the means or instruments of warfare as in the nature of unfair tactics, not to say treachery. This has been the attitude towards every invention; towards the crossbow, musket, aerial warfare, and war gas or chemical warfare . . . at the present moment when popular prejudice exercises such an influence, the governments of even the most civilized states are obligated to respond to the popular outcry and to propose to restrict the use of certain means, like poison gas, particularly abhorrent from a popular point of view. When the test comes those restrictions which are contrary to the trend of the development of civilization and of the conduct of warfare will be soon swept away. Let us hope that they will not involve well-intentioned states in accusations of bad faith when they perceive the error of their ways and attempt to extricate themselves so as not to be submerged by the mass of mere numbers, which the less developed and less civilized nations hurl against them.[255]

Two law review articles, previously cited, throw additional light upon the American view. One was written in 1927, the other

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250 Tucker, *op. cit.*, pp. 51–53.

251 *Such reasoning would be correct if it is first acknowledged that the* prohibition exists. If such acknowledgment is not made then it is doubtful if a usage of states based solely upon a fear of retaliation could become a binding custom.

252 Fenwick, *op. cit.*, 3rd ed., pp. 557, 558.

253 George G. Wilson, *Handbook of International Law* (3rd ed., St. Paul: West Publishing Co., 1939), p. 275.

254 Hyde, *op. cit.*, III, pp. 1820–1823.

255 Ellery C. Stowell, *International Law, A Restatement of Principles in Conformity with Actual Practice* (N.Y.: Henry Holt and Co., 1931), p. 518.

fifteen years later.[256] Both examined the legal aspects of chemical warfare and concluded that the United States was not prevented either by custom or by treaty from using gas in warfare.

The customs developed from state practice, conventional law, and general principles have all contributed to making the law what it is today. Conclusions of international law writers to what this law is have been set forth. A critical re-evaluation of these sources of the law is now necessary not only to discover what the law is supposed to be, but also what it is today,[257] and what it ought to be.

VII. CRITICAL EVALUATION

A. *What the Customary Law is Supposed to Be*

A consideration of Chapter VI and the reasons therein advanced by the framers of the conventions and by the majority of the international law writers would lead the reader to suppose that all types of gas warfare are prohibited except as retaliation in kind. This supposition could be drawn from the following:

1. Germany's attempt to justify her use of gas in World War I as a reprisal in kind.

2. The appeal of the Red Cross in February 1918 to both sides to stop using gas.

3. The listing of the use of noxious gas as a war crime by the Committee on Responsibilities in 1919.

4. The statement in Article 171 of the Versailles Treaty that all types of gas warfare is prohibited.

5. The wording in the Washington Treaty of 1922 that the use of gas had been justly condemned by the general opinion of the civilized world.

6. The repetition of this same wording in the Geneva Protocol of 1925.

7. The large number of states who have signed treaties agreeing to refrain from using gas.

8. Italy's attempt to justify her use of gas in the Ethiopian War on the grounds of reprisal.

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[256] Bernstein, *op. cit.*, (June 1942), p. 889; Ewing, "The Legality of Chemical Warfare," *op. cit.*, (Jan–Feb 1927), p. 58.

[257] The testimony of Major Gen. Creasy before a House Committee on 16 June 1959 illustrates the need for an examination of the state of the law today, not what it was in the 1920's. "Russia, however, in ratifying it [Geneva Protocol], made it quite clear that their ratification was not binding against any country which in turn had not ratified it or the allies of any such country, *so for pratical purposes there is no legal barrier* to the use of any of these materials [gas and germs]." (Emphasis supplied.) U.S., Congress, House, Committee on Science and Astronautics, *Hearings . . .*, 16 June 1959, *op. cit.*, p. 3.

9. The pronouncements of the Council of the League of Nations when informed by China in May, 1938, that the Japanese were using gas.[258]

10. The absence of gas in World War II and in the Korean War.

Such authorities as Schwarzenberger, Lauterpacht, Tucker, and Stone have considered the above evidence and have concluded that not only is gas warfare supposed to be outlawed but by the custom of states it actually is. This is so whether a state is party to any particular treaty or not. However, both Stone and Tucker relegate the statements in the United States Army and Navy manuals to a footnote.[259] Lauterpacht does not even mention them. This indicates a defect in emphasis because it is primarily the United States which is affected by the customary rule which these authors are inducing. The position of the United States poses the main problem, that of the law applicable in the absence of a treaty on the subject.[260] A serious consideration of the United States Government viewpoint is required before any conclusion on the customary illegality of gas warfare can be drawn. This is not to say that every denial of a rule by a major power proves the nonexistence of the rule. Yet it is difficult to conclude that the United States is bound by a specific prohibition to which it has never consented. It is equally as difficult to prove such a custom by citing the compliance of other states to treaties which they have signed, or by noting the sense of guilt of defecting nations from these treaties.

The majority of the writers discussed have concluded that the conventional law and the customary law here are the same, that those who have not signed the Geneva Protocol are as bound by its gas provisions as are those who have signed it. If this conclusion is correct the refusal of the Senate in 1926 to give its advice and consent was a useless exercise of its constitutional authority. Equally as useless were the reservations made by some parties to the Protocol to the effect that it would not be applicable in wars with those states who have not ratified or adhered to it. Likewise the abstention of Japan and the United States from the Geneva Protocol in World War II availed them nothing.

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[258] League of Nations, *Official Journal*, 19th Assembly, 1938, p. 378.

[259] Stone, *op. cit.*, p. 557, n. 59; Tucker, *op. cit.*, p. 52, p. 16.

[260] The position of the United States is simply that it is not a party to any treaty which prohibits or restricts chemical warfare. Such a declaration would be obvious if only the Hague Declaration of 1899 and the Geneva Protocol of 1925 were involved. However, the United States is a party to Articles 23a (poison), 23b (treachery), and 23e (unnecessary suffering) of the Hague Regulations of 1907. The Army manual on the law of land warfare is correct if these provisions of the Hague Regulations are not equivalent to those of the Geneva Protocol.

If such a conclusion as to the customary law is not correct, then the present customary law applicable to gas warfare must be determined. It is this customary law which will apply in the event of an armed conflict between East and West, not the Geneva Protocol.

B. *What the Customary Law is*

In order to determine what the law is today it will be necessary to answer the legal questions raised by the present characteristics of gas warfare. These questions were formulated under seven major headings at the conclusion of Chapter III. Their answer involves an application of the information gained from a study of (1) World War I, (2) gases now in the arsenals of states, (3) the diplomatic efforts to limit gas warfare, and (4) the considerations which have governed the actual practice of states. The seven headings will be discussed individually.

1. *Specific customs*

Many states have signed or adhered to the Geneva Protocol of 1925 and the Hague Declaration of 1899. Therefore gas is specifically restricted by treaty to a greater extent than are other conventional weapons. These conventions give little difficulty in themselves. It is only when they are said to be declaratory of customary law that they become the object of controversy. New gases discovered years after they were drafted might not be within the scope of a custom which was based upon the then known gases. The custom here under discussion is not a custom based upon a general principle but a custom not to use familiar gases for their known or supposed effect. For example a custom not to use gas when the only known gas was a choking gas would not necessarily apply to a later gas whose only effect is a psychological one.

Gas research during and since World War I has proven that gas is not one weapon. It is many weapons with many different effects. A customary rule which would outlaw any type of gas even before it is introduced would have to be general in nature. Prior to World War I a codification of such a general rule would be found, if at all, in the St. Petersburg Declaration of 1868 or in the Annex to Hague Convention IV of 1907 because it is in these documents that general customary rules as to weapon employment are found.

2. *General customs—the inevitability of death and unnecessary suffering*

The St. Petersburg Declaration forbids weapons that make death inevitable. It seems strange that such a rule would still be called upon today as a guide to measuring the acceptability of new instruments of destruction after the invention of so many lethal weapons since 1868. Nevertheless, Spaight, reasoning from the

St. Petersburg Declaration, concludes that the atom bomb is unlawful because it makes death inevitable for many of those affected by it.[261]

Applying the inevitability-of-death standard to gases of World War I they fared a lot better than did the conventional weapons. However, the aspect of death is now associated with gases discovered since World War I, particularly the new nerve, blood, and blister gases. The fatality figures of World War I, valid for criticizing the popular beliefs of the 1920's, may not prove a correct guide for the future. Still death is not inevitable with any new gas. It can be prevented if proper steps are taken after exposure.

Closely connected with the aspect of death is that of suffering. Article 23(e) of the Annex to Hague Convention IV prohibits weapons which cause unnecessary suffering. The question of suffering has been analyzed in some detail earlier in Chapter VI. It is sufficient to note here that it is too subjective and fluid a concept to be applied automatically to a new weapon. The Army manual on the law of land warfare points to this subjective basis as follows:

> What weapons cause "unnecessary injury" can only be determined in the light of the practice of states in refraining from the use of a given weapon because it is believed to have that effect.[262]

Spaight considers such a norm to have little or no value in practice. He observes that:

> The rule that unnecessary suffering must not be caused by one's choice of the instruments of destruction means today [1947], in practice, that explosive and expanding small arms ammunition is banned. Attempts to enlarge the scope of the rule have been made without success.[263]

Success is remote for the very fact that the concept is not concerned primarily with the degree of suffering but with the reason for the suffering.

3. *The selectivity of gases*

It may be shown that many gases cause little or no pain, that others rarely cause death. However such a demonstration would not answer an objection that is paramount in the minds of many. It is the fear that the use of any type of gas will inevitably lead to the use of all types. Therefore an argument that criminals are executed by gas does not infer that municipal authorities would permit their execution by any sort of gas. Selectivity of gases is possible in municipal law, they would agree, but not possible in the

[261] J. M. Spaight, *Air Power and War Rights* (London: Longmans, Green, 1947), p. 275.
[262] *The Law of Land Warfare, op. cit.*, (1956), p. 18.
[263] Spaight, *op. cit.*, p. 197.

stress of war. There may be many types of gas but they are all in one weapons system. It is this reasoning that led General Pershing to denounce all types of gas warfare in 1922. Similar arguments were used by the British in November 1930 when they proposed to the Preparatory Commission for the League Disarmament Conference that all types of research in chemical weapons be suspended because the dangers of *recognizing any categories* of permitted gases would sanction the manufacture of the necessary equipment for using all categories. The right policy is to endeavor to extirpate this mode of warfare in toto.[264] Stone has observed that the British argument has been destroyed by the facts because since 1925 states have continued to arm themselves with all types of gases even though they have signed a convention prohibiting innocuous as well as the more noxious gases.[265]

There are two assumptions upon which this "all or none" objection is based. The first assumption is that there is a gas which, because of its very nature and regardless of the circumstances of its use or the weapon that will necessarily be used in its place, should not be allowed. The second assumption, based upon an acceptance of the first, is that the types of gases employed cannot be limited. However, there appears to be no overriding reason why gases cannot be selective in war. The different gases are recognizable. The new development of effective non-lethal gases increases rather than decreases the chances of selectivity. The first assumption can only be answered by recourse again to the applicability of such rules as unnecessary suffering, the inevitability of death, the protection of noncombatants, and the general *principle of proportionality.*

4. *The protection of noncombatants*

Those who sought the prohibition of gas in the 1920's had primarily in mind the protection of noncombatants, not soldiers. Such concern was based upon the custom, still valid today, that noncombatants should not be directly attacked. This custom applies to the act of attacking and not necessarily to the weapon used. It is relevant to gas if the nature of gas would prevent any sort of control over it after its release. Such is not the case. The manner of dispersing gas is now as varied as the gases themselves. It can be confined to a relatively narrow front or dispersed over wide areas, depending on the nature of the target. It is the nature of the target that presents the real problem. The wide dispersal of troops in modern war, and the appearance of legitimate targets

[264] Noted in Oppenheim, *op. cit.*, 7th ed., II, p. 344, n. 1, and in Stone, *op. cit.*, p. 554.

[265] Stone, *op. cit.*, pp. 556, 557.

in interior cities as well as in the actual fighting zone has called at times for methods of attack, particularly by aircraft, that under some circumstances cannot be used with precision. If gas were to be selected the fact that noncombatants would be incidentally affected is not enough to condemn it. The inquiry must be directed rather to the legitimacy or illegitimacy of the target, and to the military value of this target compared to the deaths or injuries sustained. This latter consideration, one essentially of proportionality, will be discussed in more detail in subsection 6, below.

The U.S. Navy manual on the law of naval warfare applies both the rule prohibiting unnecessary suffering and the rule forbidding the attack upon noncombatants to gases in the correct manner, that is in the same way that those two rules are applicable to any weapon.

> It is difficult to hold that the use of these weapons [gases] is prohibited to all states according to customary law. At the same time, it does seem correct to emphasize that to the extent that such weapons are used either directly upon the noncombatant population or in such circumstances as to cause unnecessary suffering their employment must be considered as unlawful.[266]

5. *The public conscience*

The phrase "dictates of the public conscience," common to the familiar de Martens clause appearing in the Hague and Geneva Conventions, is relevant to a discussion of chemical warfare. Both the preambles to the Washington Treaty of 1922 and to the Geneva Protocol of 1925 describe gas as having been "justly condemned by the general opinion of the civilized world." The "public conscience" or "general opinion of the civilized world" is difficult to determine. The public conscience, to be a guide, must be formed on the basis of correct information, uncolored by transitory emotions. Such a conscience is becoming more, not less, difficult to form. Objective truth has, to some extent, become nationalized. Stone has characterized this trend as follows:

> Indeed, increasingly in our century human judgment is being reduced, within the insulated chambers of state societies, from the free exercise of the intellectual and moral faculties to the acceptance of the authoritatively promulgated version of the state society.[267]

It is possible now for this public conscience, under modern methods of propaganda, to be channeled into the changing currents of public opinion. In such a case it could not then become a logical or consistent, let alone an infallible light by which statesmen could guide the future actions of their nations. For example, the same public conscience which tried to protect civilians from gas in the

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[266] *Law of Naval Warfare, op. cit.*, par. 612 n. 7.
[267] See Stone, *op. cit.*, p. 328.

1920's and 30's was relatively unmoved by massive fire and high explosive attacks directed principally at crowded civilian communities in World War II.

Another interesting example of a change in the public conscience is that of submarine warfare. In 1922 at the Washington Conference unrestricted submarine warfare was termed "piracy" by the representative from Great Britain and the United States. Both practiced it in World War II.[268]

The public conscience, though it may shape state policy, is too unreliable to bind states legally to a pattern of conduct for the future. Such poll-taking will be deceiving unless the results are carefully analyzed and checked against some norm. Therefore a deductive rather than a purely inductive approach to the question of weapon legality is necessary today.

6. *General principles of law*

A general principle of law applicable to the use of force in war is that of proportionality.[269] This general principle applies even though the target, the weapon, and the method of attack may be legitimate. Therefore it governs the use of gas regardless of the type of gas or the manner of dispersion.

Its applicability to the laws of war may be illustrated by three passages from the Army publication on the laws of land warfare. The first states the basic rule of military necessity.

> The law of war . . . requires that belligerents refrain from employing any kind or degree of violence which [1] is not actually necessary for military purposes. . . and [2] not forbidden by international law.[270]

It is proportionality which underlies this rule of military necessity in situations where there is no specific prohibitive law. This conclusion is demonstrated in the second passage where the Army

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[268] In 1946 the following justification for the United States action was reported: "Pointing out that it took moral courage of the highest order to release the dispatch 'execute unrestricted air and submarine warfare against Japan' the Navy said that the conditions under which Japan employed her so-called merchant shipping were such that it would be impossible to distinguish between merchant ships and Japanese Army and Navy auxiliaries." *Washington Sunday Star*, Feb. 4, 1946, p. A7, quoted in William W. Bishop, Jr., *International Law, Cases and Materials* (Boston, Toronto: Little, Brown and Company, 1953), p. 608.

[269] The principle of proportionality is not only a general principle of international law, it is also fundamental to moral law. Stone has aptly described this relationship between individual morality and the law of war as follows: "In the famous words of the United States Instructions to the Armies in the Field in 1863, 'men who take up arms against one another in public do not cease on this account to be moral beings,' and wantonness and cruelty which would hinder a return to peace unpoisoned by vengeance should be avoided. The application of this principle requires the line between the precepts of humanity and of effective military operations to be constantly reviewed as the conditions and objectives of warfare change." Stone, *op. cit.*, p. 351, n. 16.

[270] *The Law of Land Warfare, op. cit.*, pp. 3, 4.

manual, in dealing with attacks on legitimate targets (defended places, troops, munition factories and communication facilities) by a legitimate method (bombardment), requires that "the loss of life and damage to property must not be out of proportion to the military advantage to be gained."[271] Later the principle is again stated in the requirement that "The measure of permissible devastation is found in the strict necessities of war."[272]

Another illustration of the rule of proportionality in the absence of a positive rule of law appeared in the war crimes trial of U.S. v. List. There the court concluded that there was no rule of international law that prevented the German Army from taking and shooting innocent hostages in World War II. Nevertheless the court added that "Excessive reprisals are in themselves criminal and guilt attaches to the persons responsible for their commission."[273]

The above examples all concern the lower considerations of *raison de guerre*. It is in the higher considerations of *raison de'etat* that the Germans actually defended their use of gas in a reply to the Red Cross in February 1918. They argued that since the announced intention of the Allies was the extinction of the German state they had no alternative but to continue with poison gas because their very existence as a state was threatened. Such an answer assumes that there is nothing more proportional than the existence of a state. Such reasoning is not necessarily true. Proportionality is correctly measured against the *consequences* of the existence or nonexistence of the state. For example, the South in the American Civil War would not have been justified in employing a weapon that would have killed every man, woman, and child in the North in order that the South could survive as a state. The rights of the state cannot be erroneously set above those who compose it, or above the international society of which it is but a part.

Proportionality governs whether it be a reason of state or a reason of war.

7. *The legal control of effective weapons*

Whether international law can prevent or control the use of effective weapons is a problem which is relevant to what the law ought to be rather than to what it actually is. Therefore a discussion of this problem will be reserved for section C of the present chapter. Here it is sufficient to note briefly that states have tried to prevent the use of gas by treaty. Others, the United States for example, have placed the responsibilities for its employment at

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271 *Ibid.*, p. 19.
272 *The Law of Land Warfare, op. cit.*, p. 23.
273 U.S. v. List, *Trials of War Criminals . . . , op. cit.*, p. 1252.

the highest governmental level. Whether such efforts and measures will be successful will depend partly upon the types of gases developed and partly upon the items at stake in a war.

The present customary international law of gas warfare can be summarized as follows:

1. It is forbidden to employ gas directly against noncombatants.

2. It is forbidden to employ gas against a legitimate target if the military benefit to be obtained is not proportional to the suffering caused or to the lives or property destroyed.

C. *What the Law Should Be*

The interpretation of existing law, a task for which the lawyer is trained, will not solve all the problems created by the use of modern weapons. Once the law is found the question must be asked whether this law is adequate, and if not, what new law should be formulated. This is a task for the law maker, not the lawyer. To formulate a law that is to govern states in their conduct of war requires a much higher faculty for law making than that needed on the municipal level. The forces at work between states in a system of independent sovereign nations are extremely powerful and complex. For example, the Hague Regulations cannot be compared to the Uniform Partnership Act. A failure to appreciate the difference in the subject matter of these two laws will give the international law formulated an aspect of unreality.

The problems confronting the law maker are exemplified by the atomic weapons. These devices naturally present one of the more serious challenges to the present law because the accumulative effects of their use may quickly become disproportionate to their value. For instance, Brodie uses Milton's narrative of the war between the angels in *Paradise Lost* as an apt description of the perplexing predicament which confronts states in the nuclear age.[274] In *Paradise Lost* the very hills of heaven were torn from their foundations and hurled as weapons upon the foe. Raphael remarked that "War seemed a civil game to this uproar."

Dhar, commenting in the same vein upon modern war, observed that "Man has now in his grasp the primal energy that causes the stars to glow."[275]

Stone concludes that if any of the existing law is applicable to atomic weapons it is inadequate without a new specific prohibi-

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[274] Bernard Brodie, *Strategy in the Missile Age* (Princeton: University Press, 1959).

[275] Sailendra North Dhar, *Atomic Weapons in World Politics* (Calcutta: Das Gupta and Co., 1957), at p. 222.

tion.[276] Royse had reached the same conclusion a quarter of a century earlier after searching for an existing law that would control the use of aircraft in war.[277] Lauterpacht, taking a broader view of the conduct of hostilities in general, observes that the law is adequate when dealing with such matters as prisoners of war and the sick and wounded, but is almost at the vanishing point in controlling the means of infliction of injury by one side upon the other.[278]

The picture presented by the atomic weapons cannot be applied entirely to chemical warfare. Few, if any, gases approach the peril to civilization presented by the cobalt or hydrogen bomb. This does not mean that they are not powerful. It does mean that the general principle of proportionality can be applied more easily to them. The law maker in chemical warfare has three possible alternatives: (1) outlaw all gases; (2) outlaw no gases, but strengthen the law as to supervision of their use; (3) outlaw some gases, and strengthen the law as to the supervision of the use of the remainder.

(1) As for the first alternative an absolute prohibition of all gases ought not be attempted, not only because of the applicability of this general principle of proportionality but also because of the existence of certain facts which the lawmaker ought not ignore. These facts may be summarized as follows:

a. Gas is a useful weapon and may even be decisive against another power which is surprised or which is unable to retaliate.

b. Because of the existence of the chemical industry a variety of gases are always potentially at hand.

c. Knowing the weaknesses of states in wartime no state can afford to rely upon a prohibition and leave itself unprepared to retaliate.[279]

d. Gas is not one weapon, it is many weapons, all with different effects and tactical uses.

The legal reasoning that had sought a complete prohibition of all gases was deficient in several respects. *First,* it did not adequately take into account the fourth fact listed above. This fact is dynamic and ever-changing. *Second,* it applied the general principle of "unnecessary suffering" to gas warfare in such a way that it assumed the relative fact upon which the principle is based. The principle brooks of no argument, but the facts do. The facts

[276] Stone, *op. cit.*, p. 344.

[277] M.W. Royse, *Aerial Bombardment* (New York: Harold Vinal, 1928).

[278] H. Lauterpacht, "The Problem of the Revision of the Law of War," *British Year Book of International Law,* (1952), p. 360 at p. 364.

[279] "The confidence in international treaties was below zero at all times. All prepared (1938) for gas attack and defense as well." (Wachtel, *op. cit.*, p. 251.)

of gas warfare do not, per se, call into application this principle. *Third*, the "general opinion of the civilized world" had been used as a basis for proving the existence of the rule of international law. Such an inductive approach will not go beyond the poll-taking stage unless the reasons for the opinions expressed are carefully measured and evaluated. For example, the U.S.S.R. has consistently urged the abolition of all weapons of mass destruction. Her opinion alone is meaningless unless the reason for it is uncovered.

What this inductive method is seeking is the natural law norm to govern the use of weapons. To be successful such an approach must be complemented by the deductive method. Some first principle must be agreed upon which places a ceiling on human behavior and gives such behavior an oughtness. Such a norm will add to the law a stronger fiber than a mere pattern of behavior. Before Hiroshima the pattern was saturation bombings of cities. But did that pattern make Hiroshima lawful?

(2) The natural law principle of proportionality is the norm sought. Its application presents the lawmaker with his second alternative to the control of gas. It is here in the application of this general principle that more law is necessary. To apply it to a given situation a multi-disciplined approach is necessary. Positive law alone may prove to be inadequate or outmoded. The decision-maker must use the social sciences, the law, and ethics to reach his decision. That decision must be subject to review. The use of this general principle, adequately supervised by some kind of judicial review of the decision-maker's actions, will tend to prevent abuse of the gas weapon if its use ever becomes imperative.

At the present time such a judicial review *outside* of municipal or court-martial law presents a problem for three reasons. *First*, the precedent set at Nuremburg and Tokyo has been subjected to some criticism because the judicial review was that of the victor. Justice was done, but no one could know who the next victor would be.[250] *Second*, in a limited war where there is no "victor" such war crimes trials are not feasible. *Third*, there has been little concrete progress in the formation of an international criminal court. It is advisable, therefore, that war crimes, including disproportionate use of weapons, be conducted by a state against its own soldiers. Such trials will aid the law and prevent a future war from degenerating into a mutual exchange of unlimited reprisals.

Some strides in municipal judicial review *prior* to any action of the commander has been made in regard to enemy individuals

[250] See Stone, *op. cit.*, p. 326, for a discussion of this criticism. Some of the war crimes tribunals themselves were aware of the danger of such a precedent and sought to be conservative in deducing rules of law. For example see the opinion of the court in U.S. v. List, *Trials of War Criminals . . . , op. cit.*, XI, p. 1230 at p. 1254.

in his power. The 1949 Geneva Conventions contain three such judicial reviews. *GPW*, Article 5, requires that a doubt as to the status of a "guerrilla" shall be determined "by a competent tribunal." If he is denied the status of a prisoner of war he is then protected by the judicial safeguards contained in Articles 66–75 of the Civilians Convention. Prisoners of war are protected by the judicial requirements of *GPW*, Articles 99–108. Spies have long been protected by judicial process prior to punishment under Article 30 of the Hague Regulations.

(3) The third alternative of the lawmaker must always be kept in mind. It is possible that the norm of proportionality will require the absolute prohibition of a certain gas as yet unknown or even some known gases if more effective non-lethal types are developed. In such a case conventional law should be made expressly barring such a gas. However, it will be the nature of the gas itself, not the convention, that prohibits its use. The convention would serve the purpose of acknowledging and defining the fact of illegality, not of creating that illegality.

By way of summary it may be said that the lawmakers ought now to develop that portion of the law which seeks to place a commander's action under some sort of municipal judicial review. Such review will emphasize the sometimes overlooked fact that there are no areas of war without law. The doctrine of military necessity with its proportional basis is a positive ever present rule. Review is needed to prevent this necessity from losing its force in the subjective interpretation of each commander.

THE FICTION OF LEGISLATIVE INTENT: A RATIONALE OF CONGRESSIONAL PRE-EMPTION IN COURTS-MARTIAL OFFENSES

BY CAPT. THOMAS F. MEAGHER, JR.*

We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.[1]

I. INTRODUCTION

In this sweeping statement of policy, the United States Court of Military Appeals, at a time when the Uniform Code of Military Justice[2] was yet in its formative years, proclaimed the applicability to courts-martial proceedings of the rule of Congressional pre-emption. While its pertinence to the case in which it was first announced is open to serious challenge, the principles on which the rule is premised are sound. Like most rules, the rule of pre-emption has grown beyond the relatively narrow limits which its initial formulation seemed to indicate, and appears to be applied today without a proper regard for its humble beginnings. It is proposed to examine in detail the circumstances which gave birth to the rule, the underlying factors which justify its existence and the expansion of the rule to encompass specific areas of conduct, to the end that the present scope of this rule can be reduced to specific terms.

Just prior to enactment of the Uniform Code of Military Justice, the Articles of War had been revised, with some innovations having been wrought. Earlier Articles of War denounced larceny and embezzlement,[3] together with other common law crimes, but did not define these crimes. Further, the crime of larceny by false pretense was treated as prejudicial or discrediting conduct violative of the catch-all provision, Article of War 96.[4] In the 1949 revision, embezzlement was merged with larceny, but no definition was added;[5] larceny by false pretense, however, remained a viola-

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[1] U.S. v. Norris, 2 USCMA 236, 239, 8 CMR 36, 39 (1953).

[2] 10 U.S.C. § 801–934 (1958 ed), Arts 1–134, UCMJ. (Citation to U.S.C. will be omitted hereafter).

[3] E.g. AW 93 of the 1928 Articles.

[4] Form 150, Appendix 4, Manual for Courts-Martial, U.S. Army, 1928.

[5] A.W. 93.

tion of the general Article.[6] Additionally joy-riding[7] and wrongful taking[8] were thought to be offenses under the general Article, the latter offense requiring no *mens rea*.

In the 1951 Code, Congress attempted to consolidate larceny by trespass, embezzlement, and larceny by false pretense in a single provision, Article 121. However, the initial version of the Article proposed[9] was radically different from the version ultimately enacted as Article 121.

In *United States* v. *Norris*,[10] a trial for larceny, the accused pleaded guilty to what he believed to be the lesser included offense of wrongful taking, in violation of Article 134, i.e., taking the property of another without authority, but the court-martial convicted him, not of larceny, as charged, nor of wrongful taking, in accordance with his plea, but of wrongful appropriation, which was the only other offense in issue, according to the instructions of the law officer. In order to ascertain whether the law officer had erred, the Court found it necessary to determine whether there existed an offense of wrongful taking. In reaching a conclusion that wrongful taking was not a military offense, the Court announced that Congress had, in the enactment of Article 121, intended to consolidate not only larceny by trespass, embezzlement, and larceny by false pretense, but all other forms of criminal conversion. Authority for this deduction was found primarily in a colloquy which occurred during hearings on the Code, which is as follows:

> "MR. ELSTON: But you are including three offenses in one: Larceny, embezzlement and obtaining property by false pretenses?

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[6] Form 148, Appendix 4, Manual for Courts-Martial, U.S. Army, 1949.

[7] *Id.*, Form 159.

[8] *Id.*, Form 189.

[9] "Any person subject to this code who, with intent to deprive or defraud another of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner, wrongfully takes, obtains, or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, or article of value of any kind, steals such property and is guilty of larceny, and shall be punished as a court-martial may direct "*Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 591 (1949). One criticism directed against this version, which undoubtedly indicated a need for re-drafting of the Article, was that made by the Judge Advocate General of the Army, that because there was no distinction between an intent to deprive permanently, or temporarily, it would damage morale to stamp as larceny the act of one who intended a temporary deprivation only. *Hearings on S. 857 and HR 4080 Before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong., 1st Sess. 276 (1949).

[10] N. 1, *supra*.

"MR. LARKIN: That is right.

"MR. ELSTON: And perhaps conversion also?

"MR. LARKIN: Yes.

"MR. SMART: This includes joy-riding?

"MR. LARKIN: Yes, under this section a person who would drive the automobile of another, and not intend to steal it at all but just drive it, without consent of the owner, would be guilty under Article 121."[11]

This may well have been the intent of the legislators in considering enactment of the original version of Article 121, which included the term "wrongfully takes,"[12] but it is quite a different matter to label this a declaration of Congressional intent, in relation to the substantially altered version of the Article which was enacted into law. But while the basis for an inference of Congressional intent to pre-empt may be questionable, so far as the offense in *Norris* is concerned, there is no doubt that the rule itself is a sound one, and it is obviously too late in the day to challenge the influence of the pre-emption rule in the area of conduct circumscribed by Article 121.

It should now be obvious that two possible inquiries are suggested by the implications of *Norris*. The first would be designed to discover the scope of Article 134 in terms of "military offenses," in view of the strictures imposed by pre-emption. Such an Augean task does not tempt the writer, and would far exceed the limits of this Article.[13] The other would be to ascertain the present limitations on, or exceptions to, the rule of pre-emption, by examination of its application, in order to deduce from present practice, in more specific terms, a restatement of the rule. For the sake of order, examination will proceed in four distinct steps. Cases in which application of the rule is clearly warranted are considered first. By way of contrast, those cases in which it is obvious that the *Norris* doctrine was correctly distinguished and held inapplicable, will be considered second. Third, will be a survey of cases in which the doctrine is arguable, or indicates expansion. Final

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[11] *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 1245 (1949) cited in U.S. v. Norris, *supra*, at 239, 8 CMR 39.

[12] N. 9, *supra*. If the Court was in error in ascribing to the present Article, the intent expressed in relation to the initial draft of Article 121, the government cannot complain as the identical colloquy, in support of the same proposition, is found in the government's brief. See Brief on Behalf of United States, pp. 5–6, U.S. v. Norris, *supra*.

[13] See, however, Hagan, *"The General Article—Elemental Confusion,"* May 1960, (unpublished thesis in The Judge Advocate General's School Library) pointing out certain limitations imposed upon the scope of Article 134 by appellate interpretation.

consideration is left to those opinions rejecting the exclusionary rule of *Norris*, in which the premises may be open to question.

II. AREAS PRE-EMPTED

In a trial for larceny in which the law officer has failed to instruct on intoxication, *Norris* precludes the affirmance of any lesser "offense" not requiring a *mens rea*.[14]. When an accused is charged with larceny, but the court, by exceptions and substitutions, finds him guilty only of the "wrongful taking" of the property alleged, in violation of Article 134, there remains no offense for which a conviction can be affirmed, because of the pre-emption theory.[15] To hold that stealing the "use of a rental automobile" is larceny, would be to add a new offense in the field of larceny, a result in conflict with the principles of the *Norris* decision, and in any event the accused could properly have been charged and convicted under Article 121.[16] It is not clear, however, that Congress intended in enacting Article 121, to exclude from punishment as an offense, acts in regard to intangibles, in the nature of larceny. However in the case in point, the accused could, on proper pleadings, have been convicted of misappropriating the rental vehicle; thus, the result of the opinion is certainly in consonance with the holding in *Norris*.

In *United States* v. *Geppert*,[17] the specification purported to plead a violation of Article 121 by alleging that the accused did "wrongfully withhold" an automobile. Citing *Norris*, the Court held that, as the pleading was insufficient to allege larceny, "withholding" carrying no implication of intent, no offense under the Code was pleaded, because Article 121 covered the field of criminal conversion. A board of review reached the same conclusion on identical grounds, in relation to a specification purporting to describe a larceny, which averred that the accused, "by means of false pretenses" relied on by the victim, "wrongfully obtained" articles of a specified value owned by the victim.[18] In this instance, as in *United States* v. *Geppert*, it appears that the drafter of the charges was not trying to create a new offense (as in both cases the accused was charged with violating Article 121) but was merely unskilled in the art of pleading a larceny. Thus, results in these cases are partially based on the rule that an offense must be fairly pleaded, although *Norris* does preclude a holding that such a defective specification alleges a violation of Article 134.

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[14] CM 354514, Ferry, 9 CMR 493 (1953).

[15] ACM 5229, Walsh, 10 CMR 694 (1953).

[16] ACM 10510, McCracken, 19 CMR 876 (1955).

[17] 7 USCMA 741, 23 CMR 205 (1957).

[18] ACM S–14470, Dudley, 24 CMR 607 (1957).

A somewhat similar situation prevails in connection with Articles 108 and 109. In the *Ferguson* case,[19] the accused was convicted of the willful destruction of non-military property in violation of Article 109. The convening authority, in his action approving this conviction, substituted "recklessly" for "willfully and wrongfully," in the pleadings. Because the specification did not allege any facts indicative of a high degree of recklessness, i.e., willfulness, the board of review was of the belief that the convening authority had not approved the same offense as that for which the accused had been convicted,[20] and maintained that *Norris* precluded recognition of a violation of Article 134, based on a negligent destruction of property. In a similar situation the board of review in *Haver*[21] declined to affirm a conviction for negligent destruction, as a violation of either Article 109 or 134. In the *Davis* case,[22] however, the board of review was confronted with a "double" pre-emption problem. Arraigned for violating Article 108 by destroying military property, the accused pleaded guilty to so much of the specification as alleged that he removed, without authority two fuses from a fuse box, and that such act was ". . . prejudicial to good order and discipline in the Armed Forces."[23] Thus the board was presented with a larceny-type offense cast under Article 134, as well as an attempted departure from the concepts encompassed within Article 108. The analogy to *Norris* being clear, the board held that no offense under the Code was embodied in the accused's plea.

Article 123(1) defines the crime of forgery, and while the usual document will be one on which a suit can be maintained, the Court of Military Appeals has construed this Article to cover documents lacking this prerequisite, if the document is one which is ". . . evidence of the satisfaction of a legal condition . . . which 'perfects' the accused's legal right. . . ."[24] In considering whether a case of forgery was made out, and deciding that it was not, not because the government form was incapable of being forged, but because it had not been sufficiently filled in to have apparent efficacy, a board of review, in *Puckett*,[25] considered and rejected the possibility of affirming a violation of Article 134, because it was of the

[19] ACM 11633, Ferguson, 21 CMR 714 (1956).

[20] *Id.*, at 717, n. 1.

[21] ACM 12593, Haver, 22 CMR 808 (1956).

[22] CGCMS 20871, Davis, 27 CMR 908 (1958).

[23] *Id.*, at 909.

[24] U.S. v. Addye, 7 USCMA 643, 645, 23 CMR 107, 109 (1957), holding a falsely made letter purporting to request an advance of pay to be a forgery.; U.S. v. Taylor, 9 USCMA 596, 26 CMR 376 (1958), holding a ration book capable of being forged.

[25] ACM 13656, Puckett, 24 CMR 720 (1957).

belief that ". . . to do so would violate the principle enunciated . . ." in the *Norris* case.[26] The board suggested, however, that had the military form been one which, even if completed, would not sustain a conviction for forgery, it would be permissible to affirm a conviction for falsification of such a document as a disorder violative of Article 134.

In *United States* v. *Johnson*,[27] the accused was convicted of missing a movement in violation of Article 87. Because the allegation did not specify whether the movement related to the accused's unit, or make some reference to a mode of travel, a board of review considered the allegation insufficient for Article 87, and affirmed a violation of Article 134. The Court of Military Appeals concluded that the pleading was sufficiently adequate to allege a violation of Article 87, but expressed the belief that ". . . all specific instances 'in which any member of the armed forces is through his own fault not at the place where he is required to be at a prescribed time' are punishable under the provisions of Articles 85, 86, and 87, . . ., the sole specific provisions relating to such instances."[28] Buttressing this parallel to Article 121, the Court iterated the same conclusion in *United States* v. *Deller*.[29] In this instance the accused was convicted of "absence without leave with intent to avoid basic training," in violation of Article 134, apparently to preclude his being assigned to duty outside the United States, e.g., Korea.[30] Citing *United States* v. *Johnson, supra,* and the *Norris* case, the Court held that a violation of Article 134 could not be approved.[31]

Article 115, which makes punishable deliberate self-injury or the feigning of illness, when done to avoid work, duty, or service, precludes affirmance of a conviction for intentionally stabbing one's self, as a violation of Article 134, no intent have been averred.[32] The same conclusion obtained in a case in which the accused was charged with violating the general Article in willfully attempting suicide by swallowing sleeping pills, and thus losing consciousness.[33] The board of review concluded that Article 80 covered the field of criminal attempts, to the exclusion of Article 134, and rejected a contention that attempted suicide was a violation of the general Article. Additionally the board observed that

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[26] *Id.*, n. at 725.

[27] 3 USCMA 174, 11 CMR 174 (1953).

[28] *Id.*, at 178, 11 CMR 178. But see Art. 99(6).

[29] 3 USCMA 409, 12 CMR 165 (1953).

[30] See 10 USC § 671 (1958 ed.) which precludes such duty until completion of 4 months of basic training.

[31] The Court did decide, however, that the pleading alleged a violation of Art. 85(a)(2).

[32] CM 385249, Jacobs, 20 CMR 458 (1955).

[33] ACM S-11668, Walker, 20 CMR 931 (1955).

Article 115 prevented affirmance of the conviction on any other theory.

Conspiracy, denounced by Article 81, requires allegation and proof, *inter alia*, of an overt act. In *Chapman*,[34] the accused was charged with conspiring to effect the armed robbery of an Army payroll, in violation of Article 134, no overt act being specified. The board of review concluded, particularly in the light of evidence establishing the commission of an overt act, that *Norris* precluded affirmance of the conviction.[35] By no means does this mean that all conspiracy counts must aver an overt act, nor plead a violation of Article 81. It is perfectly proper to plead a conspiracy in violation of federal law[36] which does not require allegation or proof of an overt act, as an offense under the third clause of Article 134, without violating the rule of *Norris*.[37]

At least one service board of review is of the opinion that Article 107 occupies the field of false statements not under oath, and has held that where the specification does not aver an intent to deceive, a conviction on the remaining averments as a military disorder cannot be affirmed in view of the *Norris* rule.[38] This view is not, however, common to all services.[39] It has been held that, just as Congress has pre-empted the field of criminal conversion in enacting Article 121, the same result must obtain, by virtue of Article 122, as to the offense of "larceny from the person."[40] Thus if a purported averment of robbery fails to allege the presence of the victim, the specification is fatally defective, and it does not plead a violation of Article 134.[41]

Of striking similarity to *Norris* is *United States* v. *Hallett*,[42] which concerned the scope of Article 99.[43] The accused was arraigned for cowardly conduct in violation of Article 99, by wrongfully failing to accompany his unit on a combat patrol. The court-martial members eliminated all words alleging cowardice and designated the remaining allegations a violation of the general Article. The Court of Military Appeals concluded that Congress had intended to encompass within the ambit of Article 99 all acts

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[34] CM 362057, Chapman, 10 CMR 306 (1953).

[35] *Id.*, at 308.

[36] E.g. 18 U.S.C. § 372 (1958 ed.)

[37] See Chapman, *supra*, n. 34 at 309.

[38] CGCM 9790, Burlarley, 10 CMR 582 (1953).

[39] See Part V, *infra*.

[40] U.S. v. Rios, 4 USCMA 203, 15 CMR 203 (1954).

[41] The Court did, however, conclude that the specification adequately alleged the offense of larceny.

[42] 4 USCMA 378, 15 CMR 378 (1954).

[43] Entitled "Misbehavior before the enemy."

which formerly had been covered by Article of War 75,[44] and thus, that there was no basis for the utilization of Article 134 in relation to combat-connected acts.

In summary, then, the following observations appear warranted:

1. If, in a particular Article, Congress has spelled out the elements of an offense, a specification alleging some, but not all, of these elements does not plead a violation of the Code, as a less serious offense.[45]

2. Where the pleadings or evidence establish violation of a specific Article, misconduct violative of Article 134 cannot be affirmed.[46]

3. Article 134 is not a curative device, to be employed as a remedy for errors committed by the law officer or convening authority.[47]

III. AREAS UNAFFECTED

A case in which the Court of Military Appeals saw fit to reject a defense argument that the strictures of *Norris* were applicable is *United States* v. *Fuller*.[48] The accused was charged with having violated the general Article by willfully and maliciously burning a dwelling with intent to defraud the insurer of such dwelling. The facts indicate that he aided and abetted the owner, thus precluding a conviction for simple arson.[49] In view of the concession by all parties that the acts alleged did not fall with the provisions of either subdivision of Article 126,[50] which defines both aggravated and simple arson, no analysis of the accused's amenability to a charge of aggravated arson is set forth.[51] It is advantageous to examine the language employed by the Court in articulating its

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[44] This conclusion is premised on a Congressional Committee's rejection of the proposal of The Judge Advocate General of the Army that proposed Article 99 include in addition to the 9 specified forms of violation, the generic term "misbehaves himself" which then appeared in AW 75. See U.S. v. Hallett, *supra*, at 381, 15 CMR 381.

[45] *E.g.*, U.S. v. Norris, *supra;* U.S. v. Rios, *supra;* U.S. v. Hallett, *supra.*

[46] *E.g.*, U.S. v. Geppert, *supra;* ACM S-14470 Dudley, *supra.*

[47] *E.g.*, CM 354514 Ferry, *supra;* ACM 11633 Ferguson, *supra;* ACM 12593 Haver, *supra.*

[48] 9 USCMA 143, 25 CMR 405 (1958).

[49] Article 126(b) requires the property burned to be that of another. Thus the perpetrator, if subject to the *Uniform Code, would not have committed* this crime, and one is not an aider and abettor, if the principal's acts do not amount to a crime.

[50] 9 USCMA at 144, 25 CMR at 406.

[51] The author suggests that the concession may be justified on the theory that the owner's determination to fire the house indicated abandonment of it as a dwelling; in such case, conviction for aggravated arson could be premised only on proof that, to the knowledge of the accused, the building contained a human being.

bases for rejecting the theory of pre-emption. The opinion, which was unanimous, states:

> An examination of the legislative background of the Uniform Code shows nothing significant in regard to the Congressional intention. The Judge Advocate General . . . and Senator Tobey . . . offered certain amendments to the Article . . . . The proposals relate to the kind of property to be included within the scope of the Article and are not germane to the point in issue. The background material thus sheds little light on Congressional intention. *Other factors support the view that Congress did not preclude prosecution for the kind of misconduct charged* [emphasis added]. The board of review noted, and we agree, that although arson and a fraudulent burning are commonly considered together, the two have different purposes . . . . Moreover, *the offense of fraudulent burning is not made up of elements remaining from those of arson after one or more of the essentials of the latter are eliminated* [emphasis added]. Cf. *United States* v. *Norris*, supra [emphasis in original]. We conclude, therefore, that Article 126 does not preclude prosecution under Article 134 of the misconduct alleged . . . .[52]

It is unfortunate that the Court did not specify the "other factors" on which it relied to support a view that Congress did not intend to occupy the area of burnings by enacting Article 126. Further, it appears, from the language immediately preceding reference to *Norris*, that that case will be construed narrowly where its applicability is to be rejected. The holding in *United States* v. *Fuller*, *supra*, was foreseen by a board of review in *Freeman*,[53] in which a conviction for arson in violation of Article 134 was set aside. The evidence disclosed that the accused had burned his own dwelling. The board reversed on the basis of Article 126(b) but rejected a contention that the holding of *Norris* was applicable. Because the evidence disclosed that the accused had burned his house to destroy incriminating evidence, the board of review was of the opinion that if this purpose, or any criminal intent such as intent to defraud, had been alleged, a violation of Article 134, distinct from and independent of Article 126, would have been pleaded.[54]

Offenses against the mails[55] are not committed by military personnel assigned to handle mail matter, because the mail matter loses its character when it passes into military channels, and does not achieve such character until it passes from military into postal channels. Consequently, the services have developed a "postal offense," which, as a disorder under Article 134 makes punishable the taking of mail matter before it is delivered or received,[56] and the opening, secreting, destroying, or stealing of such matter, prior

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[52] 9 USCMA at 144–45, 25 CMR at 406–07.

[53] ACM 8037, Freeman, 15 CMR 639 (1954) *pet. denied* 16 CMR 292.

[54] *Id.*, at 644 (dictum).

[55] *E.g.*, 18 U.S.C. § 1701–1708, 1709 (1958 ed.)

[56] MCM, 492, Form 151.

to delivery to or receipt of the addressee.[57] Immediately after the Court of Military Appeals' proclamation of the rule of pre-emption in the *Norris* case, an attack was made on military mail offenses as being in contravention of the *Norris* doctrine. In *Bair,*[58] it was alleged that the accused did "wrongfully and unlawfully take certain letters . . . out of the United States Air Force Post Office, Building 10, Wright-Patterson Air Force Base, Ohio, before they were delivered to the persons to whom they were directed."[59] The defense contended that the accused had been convicted of a mere "wrongful taking" under Article 134, that this was a class of criminal conversion not encompassed within Article 121, and that affirmance of such a conviction would be inconsistent with the *Norris* doctrine. The board of review, in simple but forceful logic, distinguished *Norris* on the ground that while *Norris* announced for the proposition put forth by appellate defense counsel, the gist of the instant case was not a criminal conversion, but rather a breach of the sanctity of military mail matter. The same conclusion was reached by a board of review in the case of *Benson,*[60] who was convicted, under the general Article, of the theft of 9 letters, before they were received by the addressees.[61] (The reader must remember, however, that if *stealing* of mail matter is alleged as the mode of violation, "steal" must be defined for the court members in the same manner as if the accused had been charged with larceny under Article 121.[62]) The *Benson* case contains an excellent study of the origin, development, and scope of the military mail offenses.[63]

These few decisions seem to suggest that if the conduct deemed violative of the general Article is made punishable on a basis distinct from that which motivated Congressional sanction of similar conduct in a specific article, the rule of *Norris is inapposite.*[64] It is also suggested that if the Article 134 offense, while not containing all the elements of an offense under a specific Article of the Code, contains one or more elements not found in the latter, again the rule of *Norris* does not apply.[65]

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[57] *Ibid.* Form 152.

[58] ACM 6422, Bair, 9 CMR 830 (1953).

[59] *Id.*, at 831.

[60] CM 364188, Benson, 11 CMR 568 (1953).

[61] One member of the board, in a dissent, maintained that the allegation "letters" was insufficient to plead a "mail" offense.

[62] U.S. v. Thurman, 10 USCMA 377, 27 CMR 451 (1959).

[63] It would seem that the Court of Military Appeals indorses the rationale of *Bair* and *Benson supra*, that there is a distinction between the wrongful taking involved in *Norris*, and the military mail offense. Any other view would render inexplicable their failure to apply *Norris* in United States v. Thurman, *supra.*

[64] *E.g., Benson* and *Bair, supra.*

[65] U.S. v. Fuller, *supra.*

IV. EXPANSION OF THE RULE

Before examination of cases in which the exclusionary effect of *Norris* is not so apparent as in cases considered in Part II, a reiteration of the rule may be of assistance. The rule, it will be recalled, excludes resort to Article 134 if the conduct deemed punishable has received Congressional attention in a prior Article of the Code, particularly where the purported offense resulted from the deletion of one or more elements of a specifically defined offense. In *United States* v. *Strand*,[66] the accused was charged with forgery, in violation of Article 123(1),[67] and causing, without authority, a letter to be typed on an official letter form, and mailed under the guise of an authentic communication. The Court concluded that, because of the nature of the letter, (it purported to inform the accused's wife of his death, and denied her any governmental benefits) which had no apparent legal efficacy, a forgery was not pleaded.[68] After the court-martial had convicted the accused of all counts, the law officer dismissed the count alleging a forgery-type violation of Article 134 on the ground that it duplicated a preceding count which alleged a fraud through use of the mails.[69] Citing *Norris*, the Court of Military Appeals posed the question of whether the specification alleging fabrication of an official letter amounted to misconduct under Article 134, or was excluded by Congressional pre-emption evidenced by the enactment of Article 123. Although the Court felt it unnecessary to answer the question at this time, a partial answer may be gleaned from other opinions interpreting the Article. In *United States* v. *Addye*,[70] the Court held that an accused who falsely made, with the required intent, a letter entitled "Request for Partial Pay," and forged an officer's signature to it, was properly charged with a violation of Article 123, although the legal efficacy of the document was by no means apparent. The Court's decision was premised on the theory that a document may be a fit subject of forgery if it ". . . is not a mere request for a courtesy, but evidence of the satisfaction of a legal condition . . . . which 'perfects' the accused's legal right . . . ."[71] And in *United States* v. *Taylor*,[72] the Court finally clarified earlier doubts[73] about

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[66] 6 USCMA 297, 20 CMR 13 (1955).

[67] Which makes punishable the act of falsely making or altering. Art. 123(2) makes punishable the knowing uttering of such an instrument.

[68] 6 USCMA at 304, 20 CMR at 20.

[69] See 18 U.S.C. § 1341 (1958 ed.)

[70] 7 USCMA 643, 23 CMR 107 (1957). The conviction was reversed for instructional errors by the law officer.

[71] *Id.*, at 645, 23 CMR 109.

[72] 9 USCMA 596, 26 CMR 376 (1958).

[73] See U.S. v. Dozier, 9 USCMA 443, 26 CMR 223 (1958).

whether a ration book was a suitable subject for forgery by holding, on the basis of the language quoted from *United States* v. *Addye*, *supra*, that a ration book may be the subject matter of forgery. As earlier indicated,[74] at least one board of review has voiced the opinion that if the document is one which, because of its nature, could never be the basis for a charge of forgery, then the act of false execution or alteration might well constitute a disorder within the purview of Article 134.

The sufficiency of a pleading thought to aver a military mail-offense[75] was posed for the Court in *United States* v. *Lorenzen*.[76] The accused was arraigned on a violation of Article 134, which specified that he ". . . did . . . wrongfully and unlawfully open a certain package . . . before said package was actually received by the person to whom it was directed."[77] The real issue to be resolved was whether any offense was stated. The Court concluded that the specification failed to allege any act contemplated by the military mail offenses identified in the Manual for Courts-Martial,[78] because there was no allegation that the package was "mail matter." In rejecting an argument that a disorder in violation of the general Article was pleaded, the Court replied:

> This argument is grounded on the notion that the mere act of opening a package belonging to another is per se a disorder to the prejudice of good order and discipline. However, we are unable to accept this reasoning which is so vigorously advanced. To the extent that such an act amounts to wrongful appropriation or larceny, Article 134 has been pre-empted by Article 121 of the Code. United States v. Norris . . . . If neither of these possible violations is bound up in the charge, it is difficult to imagine what act which had any impact on good order and discipline would remain.[79]

This conclusion causes a serious doubt as to the sweep of the pre-emption rule. Assuming that the package opened had not attained the status of mail matter, an opening by a stranger would constitute a trespass, even if no conversion resulted. Certainly a soldier who has prepared a package for mailing, or has purchased an item at a store or post exchange and had it packed for mailing, has a right to be protected against the act of a fellow-soldier's prying into the package for any reason. It takes but little imagination to envision that a breach of the peace may well follow on the heels of the soldier's discovery of the trespass. Especially might this be true were the object opened a letter to the soldier's wife or

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[74] ACM 13656, Puckett, 24 CMR 720 (1957) and text at n. 25, 26.
[75] See Part III, *supra*.
[76] 6 USCMA 512, 20 CMR 228 (1955).
[77] *Id.*, at 514, 20 CMR 230.
[78] See forms 151 and 152, Appendix 6c.
[79] U.S. v. Lorenzen, 6 USCMA 512, 517, 20 CMR 228, 233.

sweetheart. Further, a rereading of *Norris* does not suggest any basis for its application to a case in which both the offense charged and the offense constituting a disorder are both violations of Article 134. The theory that Congress has pre-empted the field simply cannot be applied here, because Congress did not enact a military mail offense. It was devised by the military themselves, but the fact that there is no pleading form embodying the conduct in question does not in any way indicate that such conduct is not violative of Article 134.[80] Nevertheless it appears, as to military mail offenses, that no lesser offense will be permitted, apparently because the *Norris* rule is applicable by analogy, i.e., the President has pre-empted the area in promulgating the Manual for Courts-Martial.

The unsatisfactory result in this case may be due to the facts, if one looks behind the report of the case. The record and briefs indicate that the package was mail matter. The accused, as section mail orderly, went to battery headquarters and obtained the mail for his section. He opened the victim's package, a box of candy, and ate some, after depositing the wrappers in a refuse pile. The victim, noting that the candy box on the accused's bed was of a brand sent him at periodic intervals by a relative, managed to find the discarded outer wrapping, and complained to the authorities. Thus it is abundantly clear that the accused could readily have been tried for and convicted of the mail offense provided for in the Manual for Courts-Martial.

A reiteration of the effect of *Norris* upon the two Article 134 offenses is found in *United States* v. *Downard*,[81] a bad check case. Downard was charged with passing a bad check, and dishonorably failing to maintain a bank balance sufficient to cover such check.[82] Downard's defense was that at the time he honestly thought his balance sufficient to cover the checks in question. The court-martial convicted him of the conduct charged, after changing its characterization from dishonorable to discreditable. The question posed for the Court was whether the altered finding described an offense. Articulating, in greater detail, the basis on which *Norris* is deemed to apply as between two purported violations of Article 134, the Court discovered that prior to 1944, records did not indicate any convictions for such an offense, but that, between 1944 and 1945, several boards of review concluded that such behavior was service-discrediting. The Court then noted the major overhaul

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[80] Legal and Legislative Basis, MCM, 1951, p. 296.

[81] 6 USCMA 538, 20 CMR 254 (1955).

[82] As pleaded in form 129, App. 6*c*, MCM 489, the words in brackets being omitted.

of military criminal law which resulted in the Uniform Code and stated:

> Not the least of the innovations spawned by the adoption of the Code was the attempt by military draftsmen to delineate more carefully certain crimes theretofore defined solely at the whim of boards of review . . . . We must, therefore, determine whether the framers of the 1951 Manual sought to recognize any sort of new offense based on a merely *discreditable* failure to maintain sufficient funds—not a *dishonorable* one—and if not, whether such a crime has become firmly established in that which might roughly be called the common law of the military establishment by board of review decisions.[83]

As to the first phase of the inquiry the Court concluded that the drafters of the Manual did not intend to establish a bad check offense premised on negligence. Of course this conclusion did not dispose of the question, and nowhere in its reasoning did the Court indicate awareness of the declared intent of the drafters that the inclusion of form specifications in the Manual, pertaining to Article 134 did not preclude recognition of other acts as violative of the Article. Indeed the drafters expressly rejected a rule of pre-emption premised on Appendix 6*c*.[84] The Court next noted that since the effective date of the Code the services had expressed divergent views on the validity of a bad check offense based on negligence, the Army approving, and the Air Force disapproving, such convictions. The Court finally announced that because of the court-martial's substitution of the word "discreditably" in the allegation, no offense remained, observing:

> It is now proposed that we should recognize by judicial fiat that which Congress and the executive draftsmen have ignored. Thus, we are urged to seize upon the framework thrown together by certain isolated and dubious military decisions, and to construct therefrom a new and full-fledged member of the family of worthless check crimes. We need express no view concerning either the need within the military establishment, or the defensibility, of such an offense based on simple negligence. It is enough to say that we are unwilling—and, in a strict sense, powerless—to create one . . . . Our function then is not to invent or devise, but to interpret—not only the Code, but its junior relative, the Manual, as well. This we have essayed to do with respect to the problem before us—with the result that we find in these sources of authority no sort of purpose to provide that a worthless check offense

[83] U.S. v. Downard, *supra*, at 541, 20 CMR 257.

[84] In regard to Article 134, and the form specifications, however, the drafters of the MCM stated: "Appendix 6*c*, in Specifications 118 through 176, sets forth some of these, but the mere fact of inclusion of a specification for a particular act in Appendix 6*c*, is not what makes the act an offense . . . . and there are necessarily many other acts which may constitute disorders or neglects, or conduct discreditable to the armed forces, which are not discussed or covered by any sample specification." Legal and Legislative Bases, MCM, 1951, p. 296.

> grounded on nothing more than simple negligence should take its place beside crimes of similar mode. See United States v. Norris . . . .[85]

This decision indisputably expands the rule of pre-emption to encompass not only exclusion by Congressional enactment but, in some instances, at least, by the act of providing sample pleadings of disorders, pre-emption by the drafters of the Manual for Courts-Martial. Consequently an inquiry into the operative effect of *Norris* can no longer be limited to cases in which a specific Article of the Code is involved, but must be extended to cases involving the general Article alone. To some extent, *Norris* will be limited by the Court's interpretation of Article 134's sphere of proper activity, e.g., *United States* v. *Snyder*.[86]

The applicability of *Norris* to Article 134, in the absence of Congressional action in specific terms, was confirmed in *United States* v. *Manos*.[87] The accused was arraigned on a charge of willful indecent exposure, but convicted of negligent indecent exposure, each allegation treated as a violation of the general Article. In a holding noteworthy for brevity, the Court rejected the theory that negligent exposure was an offense, and stated:

> In the *Norris* case, . . . , we held that we would not permit the services to eliminate indiscriminately vital elements of recognized offenses and 'permit the remaining elements to be punished as an offense under Article 134.' That statement is applicable here.[88]

A glance at the quotation introducing this Article should raise a serious doubt, in view of the fragmented quotation above, that the *Norris* case furnishes any basis for the result reached in *United States* v. *Manos*. Indecent exposure is not among those "common law crimes and offenses expressly defined by Congress" but it certainly was a crime at common law, and is presently a crime by statute in all states,[89] although in a few it is characterized as lewd behavior.[90] While the result in *United States* v. *Manos* is not premised solely on *ipse dixit*, its similarity to *Norris* is not rendered less obscure by the meager reasoning offered.

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[85] U.S. v. Downard, *supra*, at 544, 20 CMR 260. But *cf.* U.S. v. Kirchner, 1 USCMA 477, 4 CMR 69 (1952) recognizing as a violation of Article 134 the offense of negligent homicide which enjoyed no longer antecedent recognition by boards of review than the negligent bad check offense. For a brief study of the origin of negligent homicide see Munster and Larkin, *Negligent Homicide in Military Law*, 46 Calif. L. Rev. 782 (1958).

[86] 1 USCMA 423, 4 CMR 15 (1952).

[87] 8 USCMA 734, 25 CMR 238 (1958).

[88] *Id.*, at 736, 25 CMR 240. Latimer, J. dissented, quoting from dictum in the unanimous opinion written by Chief Judge Quinn in U.S. v. Brown, 3 USCMA 454, 13 CMR 10 (1953), a statement that the offense of indecent exposure may be willful or negligent.

[89] Sherwin, *Sex and the Statutory Law* 25 (1949).

[90] *Ibid.*

Service boards of review, in many instances, seem to have seized upon the *Norris* case as a solution to almost all problems, without fully grasping the theory and extent of its rules. In *Garrett*,[91] the accused was convicted on a duplicitous count alleging a simple failure to obey[92] caused by an unauthorized absence of seventy days. After quoting the *Norris* maxim, the board maintained that it was "unable to conceive any supportable theory which would permit the services to *combine* all the vital elements of two distinct offenses, specifically delineated and provided for in the Uniform Code . . . in order to create a third offense under the General Article 134)."[93] It seems evident that the board completely misconceived the *Norris* rule. Here nothing was deleted, both offenses were fully pleaded, but they were not set forth separately. In holding that no offense was alleged, the board appeared unaware of the rule that an objection directed to duplicity, if not made at the trial level, is deemed waived,[94] the rule that the existence of an offense depends not on the statute under which it is laid but rather on the facts which are alleged,[95] and note 5 to the Table of Maximum Punishments.[96] It is clear beyond argument that the board could have approved at least a finding of unauthorized absence. It is suggested that this case illustrates an unwarranted extension of the *Norris* rule into an area not justified by the underlying principles of the pre-emption theory.

A problem most difficult of solution is determination of the limits of Article 91(3), which requires the protected person to be in the execution of his office. In the *Brown* case,[97] the accused was charged under this Article, with the use of disrespectful language, but the specification failed to aver that the victim was, at the time, in the execution of his office. By analogy to the *Norris* case, the board of review concluded that the specification did not plead a violation of Article 134, and, as it failed to include an essential allegation could not be approved as a violation of Article 91(3). The board did however, affirm a violation of Article 117 (which makes provoking or reproachful speech or gestures punishable), concluding that the language was of a provoking nature. A possible flaw in the board's reasoning in holding pre-emption controlling is that the Court in *Norris* specifically exempted purely military offenses from the pre-emption theory, and there is author-

[91] NCM 193 Garrett, 9 CMR 551 (1953).

[92] Article 92(2).

[93] NCM 193 Garrett, 9 CMR 551, 552.

[94] U.S. v. Parker, 3 USCMA 541, 13 CMR 97 (1953).

[95] U.S. v. Deller, 3 USCMA 409, 12 CMR 165 (1953) involving an unauthorized absence to avoid basic training alleged to be violative of Article 134.

[96] MCM, 221.

[97] CM 366483 Brown, 13 CMR 161 (1953).

ity for the conclusion that disrespect to a person senior in rank is a disorder prejudicial to discipline, within the ambit of Article 134.[98]

Articles 108 and 111 were construed to cover the field of conduct premised in the operation of an automobile in the *Stinson* opinion.[99] The accused had been convicted of a violation of Article 134, which alleged that he operated a military vehicle "in a wrongful abusive manner by using excessive speed in all gears."[100] The opinion concludes that Congress intended to cover offenses involving an automobile by providing punishment for damage or loss through willfulness or negligence,[101] and for drunken or reckless driving.[102] It can be argued that in enacting Article 108, Congress was intent upon protecting military property against the acts specified in the Article, and no others, and that other acts against military property not meeting in gravity those specified in the Article, would be covered by Article 134. The theory that Article 111 is applicable here is difficult to follow. This Article was enacted for the preservation of life and limb, not for the protection of military property.[103]

A more serious problem is posed in the *Jones* case.[104] The specification alleged that the accused violated Article 121 by stealing long distance phone service of a specified value. The board of review concluded that what was really alleged was the "illegal use" of the facilities of a telephone company for a period of time represented by the sum of money alleged, and concluded, of course, that as larceny is limited to tangible property, a violation of Article 121 was not pleaded. With *this* conclusion there can, of course, be no quarrel. Because the board concluded that the act pleaded was in the nature of a wrongful conversion, it reasoned that *Norris* precluded affirmance of *any* offense. Had this been a case in which a violation of Article 121 could have been correctly pleaded and proven, the opinion would be acceptable without comment. But this is a rather summary disposition of an issue posed for the first time in a military appellate form. The conclusion that Congress pre-empted the field of conversions of corporeal

[98] ACM 12320 Hunt, 22 CMR 814 (1956) *pet. denied* 22 CMR 831, holding that enactment of Article 91 does not exclude disrespect towards an N.C.O. by a discharged military prisoner as a violation of Article 134; ACM S-9083 Spigner, 16 CMR 604 (1954), holding that disrespect to an airman first class is misconduct under Article 134, despite the existence of Article 91(3).

[99] CGCM 20538 Stinson, 23 CMR 691 (1957—opinion by General Counsel, Treasury Dept.).

[100] *Id.*, at 692.

[101] Art. 108.

[102] Art. 111.

[103] U.S. v. Beene, 4 USCMA 177, 15 CMR 177 (1954).

[104] ACM S-13839 Jones, 23 CMR 818 (1956).

things cannot be denied. But whether it intended to cover the field of intangibles has never before been considered, although no apparent significance was attached to this factor by the board of review.

In all conversion cases previously reviewed, the reader cannot have failed to note that in each instance the prosecution could have demonstrated that a larceny occurred. *Norris* was applied because (1) the pleadings were bad, (2) the law officer's charge was insufficient, or (3) the court members, convening authority, or board of review, attempted to affirm a lesser degree of conversion under Article 134. But in each case the possibility that there had not been a violation of Article 121 did not appear. In the instant case, there was no way in which a violation of Article 121 could have been pleaded correctly. There was no way in which the law officer or convening authority could have acted differently to effect a valid conviction of larceny. The argument is advanced that Congress, while intending to pre-empt the field of criminal conversions, limited itself to acts affecting tangible property. There is nothing in the legislative hearings, committee reports, or floor debate inconsistent with such an argument. In the *McCracken* case,[105] it will be recalled, a board of review refused to recognize as an offense the act of "stealing" the use of a rental auto. In this connection, it was pointed out that the accused could properly have been charged with larceny. Thus, that case is distinguishable from *Jones*. As a result it is suggested that the application of *Norris* to the specification in the *Jones* case is an extension of the pre-emption doctrine unwarranted by opinions of the Court of Military Appeals, and the legislative history of Article 121, and that the wrongful use or acquisition of intangibles should be recognized as a violation of Article 134.

The foregoing cases suggest that the service boards of review are groping in darkness, trying to locate the extreme limits of the pre-emptive theory, and because they are overlooking the underlying principles involved, are exceeding announced limits. What must be kept in mind at all times is that the rule of pre-emption owes its origin to a consideration of Article 121, a consolidating Article. In one enactment, Congress gathered common law larceny, embezzlement, and larceny by false pretense into one Article, thus creating the simple offense of larceny, albeit evidenced by different acts.[106] This result does not obtain for any other single offense. In some few instances, however, Congress

[105] ACM 10510 McCracken, 19 CMR 876 (1955). See text relating to n. 16, *supra*.

[106] U.S. v. Aldridge, 2 USCMA 330, 8 CMR 130 (1953).

has enacted a group of Articles,[107] the interrelation of which suggests that Congress was attempting to cover the field. In this instance, also, application of the pre-emptive doctrine is warranted. In other instances, Congress has enacted a fairly comprehensive series of Articles, which appear to cover all aspects of a particular type of behavior. The question remains, must all conduct of this general nature conform to the elements of one of these specific Articles, in order to be punishable? For instance, take the case of a uniformed soldier who acts in a most disrespectful manner, in a public place, towards an admiral. There can be no resort to Article 89, because, although the admiral holds a higher service rank than our soldier, as to the latter, the admiral is not ". . . *his* superior officer . . ."[108] (emphasis added) but merely a senior officer. As noted in connection with *Brown*,[109] disrespectful behavior by one service member towards another who is senior in rank, even in the absence of a superior-subordinate relationship, is detrimental to morale, prejudicial to discipline, and obviously has the capability of reflecting discredit on the services. As such it is clearly behavior cognizable by a court-martial as a violation of Article 134, as a purely military offense, i.e., not designed to protect life, property, or the normal functioning of the government. In this area, it does not seem that proper consideration has been given to the purpose and scope of the general Article.

V. EXCEPTIONS TO THE RULE

There are a goodly number of opinions which purport to distinguish *Norris* and reject its applicability. Many of these concern the issue of whether the making of a false official statement is an offense under Article 134, in view of the specific provisions of Article 107.[110] In most of these cases, the boards of review have announced that the mere making of a false official statement is misconduct under Article 134,[111] and in those decisions which follow the *Norris* case in time, the boards appear to be in total ignorance of the rule of pre-emption. It should be noted that in one

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[107] *E.g.*, Art. 85, 86, and 87 all pertaining to unauthorized absence, in one degree or another.

[108] Art. 89.

[109] N. 97, *supra*, and related text.

[110] Which makes punishable a false official statement made with intent to deceive.

[111] Cases so holding, which antedate U.S. v. Norris are ACM S–2753 Watson, 5 CMR 476 (1952); ACM 5538 Perdue, 6 CMR 696 (1952) *pet. denied* 7 CMR 84. Cases so holding postdating Norris are ACM 6485 Johnson, 10 CMR 895 (1953) *pet. denied* 12 CMR 204; CM 370004 Hutchins, 14 CMR 425 (1954); ACM S–8392 Lloyd, 14 CMR 790 (1954) Contra, CGCM 9790 Burlarley, 10 CMR 582 (1953) cited in n. 38, *supra*.

case, *Johnson*,[112] in which the accused was convicted of a violation of Article 107, but the convening authority affirmed a violation of Article 134 by approving all of the specifications except the averment of an intent to deceive, the Court of Military Appeals denied the accused's petition for review.[113]

Recently, the Court did grant review of a case in which the accused was convicted of violations of Article 107 and in each instance, the specification failed to allege the necessary intent. This is the case of *United States* v. *Young*.[114] Chief Judge Quinn was of the opinion that, in view of the accused's plea of guilty, the allegations were sufficient to include, by fair inference, the necessary intent. In support of his opinion, he stated:

> An official statement provides the basis upon which official decisions are made. It is perhaps conceivable, but highly improbable, that a person who makes an official statement intends that it be regarded as a joke or some other officially meaningless act. On the contrary, the natural inference from the fact of officiality is that the statement is intended to be relied upon by others. And if the statement is known to be false at the time it is made, it can fairly be implied that the person who makes the statement has an 'intent to deceive.' *We conclude*, therefore, that despite the absence of the specific works from the specification, the allegations are sufficient to include an intent to deceive . . . .[115] (emphasis added).

The criticism which can be leveled at the Chief Judge's reasoning is that rules of evidence apply to proof, not pleadings, and the trial court was never apprised, nor was the accused, of the necessity of a *mens rea*. Additionally, it is suggested that the Chief Judge was perhaps taking liberties with the editorial "we" in stating what is in reality, solely his own conclusion. It is true that Judge Latimer agreed with the Chief Judge's *disposition* of the case, *i.e.*, affirming the conviction, but by no means did the concurring judge join in the conclusion that the specification adequately alleged a violation of Article 107. He was for affirmance because:

> A plea of guilty admits all the facts well pleaded and, if an offense is stated, it matters not which section of the Code is mentioned in the charge . . . . In the case at bar, an offense prohibited by Title 18, United States Code, § 1001, was in fact alleged . . . . Neither party disputes the proposition that the allegations of the specifications are sufficient to allege an offense under Section 1001, supra, if the agency of the United States is identified . . . . I have no doubt that . . . it is readily ascertainable that the Department of the Army was the agency defrauded.

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[112] N. 111, *supra*.

[113] 12 CMR 204.

[114] 9 USCMA 452, 26 CMR 232 (1958).

[115] *Id.*, at 453, 26 CMR 233.

> . . . . I do not believe my views are at variance with those expounded in . . . Norris . . . and I find no justification for a belief that Congress, when it enacted Article 107 of the Code, intended to exempt military personnel from the offenses prohibited by Section 1001.
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> . . . . *For the foregoing reasons*, I concur with the Chief Judge in affirming the findings and sentence.[116] (Emphasis added.)

The remaining member of the Court dissented, citing *Norris*. And it must surely be confessed that in Judge Ferguson's dissent alone does one find true recognition of the underlying principles of the *Norris* case.

It is most odd that the Chief Judge, as author of the *Norris* opinion, did not see fit to mention it even by way of denying its relevance, while the other judges indicated awareness of its possible effect on the case considered. Judge Latimer raised, for the first time, the question of whether, when Congress has enacted a specific Code provision, it has thereby excluded resort to a substantially similar statute in the United States Code, via the "crimes and offenses not capital" provisions of Article 134. It will be recalled that the introductory language of Article 134 is "Though not specifically mentioned in this chapter, ..." While Norris has been applied to the exclusion of the general Article in numerous cases, it is apparent that the Court and the boards of review have always had in mind the question—is this conduct essentially a "*military* offense," capable of affecting order and discipline, or of bringing the armed forces into disrepute?[117] It has never seriously been proposed that the dogma of pre-emption effected an exclusion of crimes and offenses not capital. Not of course, that such a contention may not hold a good deal of logic and merit. To take issue with Judge Latimer, for a moment, why is there any need by the services for resort to Title 18, United States Code, Section 1001, insofar as statements of interest to the military services are concerned? A comparison of the two enactments does not indicate that Section 1001 covers a greater area of behavior than Article 107, insofar as the subject matter of the statement is within the interest of the armed forces. If the subject matter is not, the accused can be prosecuted in the appropriate federal court. It may well be that the belief so readily voiced by Judge Latimer that there is no justification for applying the *Norris* rule to "crimes and offenses not capital" is not well grounded, and merits careful consideration by defense counsel in an appropriate case. The most

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[116] N. 114, *supra* at 454, 26 CMR 234 (concurring opinion).

[117] One of these capabilities must appear as an element in every offense premised on the first two clauses of Article 134. U.S. v. Grosso, 7 USCMA 566, 23 CMR 30 (1957); U.S. v. Williams, 8 USCMA 325, 24 CMR 135 (1957); U.S. v. Gittens, 8 USCMA 673, 25 CMR 177 (1958).

[118] See nn. 27–31, *supra*, and related text.

that can be said in summary, as to Article 107, is that while almost all boards of review appear to reject the *Norris* theory in this area, the Court of Military Appeals has not made its position clear, and it may well be doubted that, at this date, the Court can be persuaded to adopt the views voiced by the boards of review, should the Court be presented with a case in which the accused has not pleaded guilty.

To repeat for a moment, Congress, in legislating Articles 85, 86, and 87, so covered the area of unauthorized absence that conduct of such a nature cannot be charged as a violation of the general Article. Likewise, Congress enacted Articles 89, 91, 127, and 128 which concern disrespect towards a superior, (Arts. 89 and 91), extortion (Art. 127), and assault (128). In a case of first impression, a board of review in *Nicolas*[119] was unable to find evidence of a Congressional design to blanket the area of conduct included within these Articles. The violation of Article 134 affirmed was communication of a threat,[120] affirmation being premised on the theory that as to all specific Articles considered, none included all the elements of communicating a threat. In *United States* v. *Holiday*,[121] the Court of Military Appeals reached the same conclusion. As a basis for its holding, however, the Court turned to the civilian scheme, observing that while such conduct was not a crime at common law, one who made such declarations could be required to furnish surety conditioned on his future good behavior. The Court asserted that, because no such disposition was available to the services, the only course open to a commander would be the sanctions of Article 134. As to this assertion, there is some ground for doubt. It takes little imagination to find available a substitute for the surety.[122] And it is not at all clear from a reading of Articles 89, 90, 91, 117, 127, and 128 that Congress intended to leave communication of a threat to the aegis of Article 134. The legislative history would seem to suggest a contrary conclusion.[123] Altough the result in *United States* v. *Holiday* must be accepted, the Court's failure to provide definite and compre-

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[119] ACM 7678 Nicolas, 14 CMR 683 (1954).

[120] It is significant to note that the board made no effort to distinguish between the offense approved and Article 117, which makes punishable use of provoking language. The threat is reported as: "If I don't rotate home by October 18th, I'll blow your . . . head off." Does the reader think such a statement would *not* provoke the addressee? Also see U.S. v. Richardson, 2 USCMA 88, 6 CMR 88 (1952).

[121] 4 USCMA 454, 16 CMR 28 (1954).

[122] See suggestion by Brosman J., at 4 USCMA 460, 16 CMR 34 (dissenting opinion).

[123] *Ibid.*

hensive rules for the limitations of the pre-emption theory leave for future resolution the uncertainty now pervading this area.[124]

The *Brown* case[125] illustrates a violent distortion of the *Norris* rule. The accused was charged, in violation of Article 134, with selling a vehicle to a second dealer, without disclosing that, pursuant to a conditional sales contract between the accused and a first dealer, there was a substantial unpaid balance, the accused having full knowledge of these facts. The board concluded that the specifications did not plead a larceny by withholding because the relationship of a conditional vendee towards his vendor is not fiduciary in nature.[126] It further contended that the specification did not allege a larceny by false pretense because there was no averment that the accused had obtained anything of value by the sale,[127] nor did it allege that the purchaser relied on the false pretense made to him.[128] As suggested in Part II, *supra*,[129] *Norris* does not require simply a testing of the specification's adequacy to allege larceny. Its exclusionary force is also premised on the possibility of a valid charge of larceny. In the instant case, reasoning that the conduct alleged was not in the nature of a criminal conversion is purely specious, and giving the conduct another label does not change its nature.[130] It must therefore be concluded that the

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[124] Pre-emption results from enactment of Article 91: CM 366483 Brown, 13 CMR 161 (1953), cited at n. 97, *supra*. *Contra:* ACM S–9083 Spigner, 16 CMR 604 (1954). ACM 12320 Hunt, 22 CMR 814 (1956) *pet. denied* 22 CMR 331 cannot be considered *contra* because violation of Article 91 is limited by its terms to a warrant officer or enlisted person; Hunt, at the time of his misconduct, was a discharged military prisoner and not among those persons who could violate the article.

[125] ACM 9763 Brown, 18 CMR 709 (1955).

[126] What position the Court of Military Appeals would take cannot be stated with any assurance. See the language in U.S. v. Sicley, 6 USCMA 402 at 408–09, 20 CMR 118 at 124–25 (1955). *But see* the exposition on "withholding" in U.S. v. McFarland, 8 USCMA 42, 23 CMR 266 (1957).

[127] Both lay and legal dictionaries define a "sale" as the transfer of an article for money.

[128] This criticism of the specification must be rejected out of hand. All forms of larceny are pleaded to describe the act as "did steal," and the false representation is *never* pleaded, only proven and made the subject of a charge to the jury. See Specification Form 89, App. 6*c*, MCM, 484, which suffices for all forms of larceny.

[129] Part II, p. 76

[130] The board purports to draw some support from CM 356028 Henkel, 9 CMR 172 (1952), *pet. denied* 9 CMR 140. In this case, the accused was charged with conduct unbecoming an officer and gentleman (Art. 133, not Art. 134) by pledging his car as security for a loan, and representing it to be free of encumbrances, when to his knowledge such car secured an earlier loan from another bank. While it is conceivable that a case of larceny by false pretense could have been made out, the board of review in Brown failed to see the one distinguishing factor in Henkel—his conduct was cast as a violation of Article 133. The Court of Military Appeals has not yet extended the rule of pre-emption to the officer Article, in view of its unique history and background.

Brown case is a maverick, and does not demonstrate a correct resolution of the application of the doctrine of pre-emption. There appears to be no legal distinction between the *Dudley* case and the *Brown* case, yet opposite conclusions are reached. The former opinion would seem to be more persuasive in its reasoning.

An ingenious "get-rich-quick" scheme focussed the Court's attention on the pre-emption problem once more in *United States* v. *Holt*.[132] As a bingo caller at an airmen's mess, Holt converted a game of chance into a game of certainty by memorizing the numbers on the cards of certain players, some of whom actually played cards that Holt had purchased for himself. Instead of calling the numbers appearing on the pellets fed from the "basket," Holt, in several instances, simply called off numbers he had memorized, thus arranging for the player of a given card to win. Naturally the winner shared his prize money with Holt. The accused was convicted, under Article 134, of unlawfully awarding bingo prizes by resort to the scheme just described. It was contended by the defense that the accused's acts sounded in larceny, and were outside the scope of Article 134 because Article 121 covered all conduct in criminal conversion. In rejecting this contention the Court stated:

> The specifications . . . pertain not to larceny but to the layman's understanding of cheating or dishonesty . . . . What the accused did was not a common law crime, nor one covered by one of the specific Articles . . . . It was, however, clearly conduct prejudicial to good order and discipline or the type reflecting discredit on the Armed forces . . . In . . . [United States v. Welch, 1 USCMA 402, 3 CMR 136], the accused was convicted of cheating on an examination. Although this case was reversed . . . , there was no contention by counsel or holding by the Court that cheating was not an offense under the general Article.[133]

Once again it is necessary to refer to the opening quotation of this article. By any rule of construction the sentence quoted seems to say that if Congress has categorized certain conduct an offense, even though such conduct was not a crime at common law, and also where Congress has categorized a recognized common law crime as a military offense, a violation of Article 134 cannot be composed from remnants of the offense defined by Congress. This restatement of the rule must logically follow from the quotation introducing this article. It will be remembered that this language was taken from the *Norris* opinion, in which the Court announced

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[131] ACM S-14470 Dudley, 24 CMR 607 (1957), cited at n. 18, *supra*.

[132] 7 USCMA 617, 23 CMR 81 (1957).

[133] *Id.*, at 619–20, 25 CMR 83–84. Perhaps it is possible that the absence of the suggested contention or holding is due to the fact that in Welch, conviction was for violating the officer Article, AW 95, not the general Article, AW 96.

the rule of pre-emption in relation to Article 134. Pre-emption is occasioned by Congressional denomination of certain conduct as an offense, as evidenced by a specific Code provision. One might say that the quotation is being misread, that what it really means is this: the services cannot delete an element or elements from an offense expressly defined by Congress, or from a common law crime (*not expressly defined by Congress*) and label the remaining elements an offense under Article 134.

Such a suggested restatement ignores two key factors. With few exceptions, all common law crimes have been defined in specific Articles of the Code,[184] thus there are no common law crimes which necessitate resort to Article 134. Consequently, a proposal that the Court was speaking of common law crimes, in addition to those covered by Code provisions, and that the Court was insisting that all the elements of a common law crime be pleaded in an allegation under the general Article, is premised on an assumption that the Court was referring to a nonexistent problem in laying down the rule. This should suffice to establish the absurdity of contending for such a meaningless result. Additionally the quoted statement must be read and interpreted in its proper context. The Court, in the opinion from which the statement was excerpted, was discussing the deletion of an element from a recognized common law crime, *i.e.*, larceny, which Congress had labeled a military offense through the medium of Article 121. It would be difficult to predicate a theory of legislative pre-emption on the existence of a common law crime, if Congress has not defined the crime by legislative enactment. It follows ineluctably, then, that the exclusionary effect of the pre-emption doctrine upon Article 134 must owe its existence to a Congressional intent evinced by enactment of one or more of the punitive Articles of the Code, excluding, of course, Articles 133 and 134.

Returning to the *Holt* case[185] then, the key premise must be re-examined. This premise was expressed as "What the accused did was not a common law crime, nor one covered by one of the specific Articles of the . . . Code. . . ."[186] It is not possible, from the reported facts, to state whether the accused could have been charged with larceny by "withholding" as an actual or constructive trustee. There is, however, sufficient information reported to

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[184] Criminal Attempts (Art. 80), Conspiracy (Art. 81), Riot (Art. 116), Murder (Art. 118), Manslaughter (Art. 119), Rape (Art. 120), Larceny (Art. 121), Robbery (Art. 122), Forgery (Art. 123), Maiming (Art. 124), Sodomy (Art. 125), Arson (Art. 126), Assault (Art. 128), Burglary (Art. 129), Housebreaking (Art. 130), and Perjury (Art. 131).

[185] N. 132, *supra*.

[186] U.S. v. Holt, *supra*, at 619, 25 CMR 83.

support a conclusion that the accused could have been charged with violating Article 121 by obtaining, *i.e.*, larceny by false pretense. Analyzing the facts and pleadings element by element, it is clear that the accused (1) obtained money, (2) by false representation, in miscalling numbers previously memorized, (3) that the obtaining was wrongful, (4) that the money did not belong rightfully to the accused, (5) that the money belonged to some other person, *e.g.*, the airmen's mess, (6) that the accused's intent was to defraud the entity putting up the prize money, amply evidenced by the fradulent scheme, and that the fraudulent representation, *i.e.*, calling numbers, was an effective cause of the accused's obtaining. It may be observed, then, that the *Holt* case rests upon a premise which is seriously questionable. An explanation of the result in *Holt* can be balanced on one of two propositions: (1) the author judge failed to grasp all the implications of *Norris*, or (2) the opinion represents a modification of *Norris*. The latter proposition seems to be a more logical rationalization of the holding, and amounts to this. If the conduct of the accused, even though it falls in an area encompassed by specific Articles of the Code, is by ancient military usage an established disorder under the general Article,[137] or a recognized crime or misdemeanor, in civil jurisdictions, then the pre-emption doctrine does not require that the accused be charged with the most serious offense that can be proven. He may be charged with the lesser offense, as a violation of Article 134, consistently with the basic reasoning of *Norris*.

The reader will demur, citing wrongful taking as an offense established by ancient usage, which was swept out of existence with the proclamation of the pre-emption rule. This can be explained by the Court's interpretation of Congress' intent in enacting Article 121, as reflected in legislative hearings,[138] and the fact that wrongful taking was not traced far enough back in earlier Manuals to warrant a claim of ancient usage. In consonance with the rule that ancient usage establishes an exception to *Norris*, consider the case of *United States* v. *Smith*,[139] in which the accused was arraigned for perjury,[140] but convicted of false swearing,[141] which was cast under Article 134, and does not require allegation or proof of materiality. The Court determined that false swearing was not a lesser offense included in judicial perjury, finding a Congressional intent to pre-empt the field of false oaths in a *judicial* proceeding in the enactment of Article 131. No reference

[137] See U.S. v. Downard, 6 USCMA 538, 20 CMR 54 (1955), especially Part III thereof; U.S. v. Greenwood, 6 USCMA 209, 19 CMR 335 (1955).

[138] See n. 9, *supra*, and text relating to n. 11.

[139] 9 USCMA 236, 26 CMR 16 (1958).

[140] Art. 131.

was made to *Norris* or the pre-emption rule. Subsequently, the Court held, in *United States* v. *Claypool*,[142] that false swearing is a recognized violation of the general Article.

VI. SUMMARY

In enacting the Uniform Code of Military Justice, Congress supplanted the 41 specific Articles of War with 56 specific Articles of the Code. Whereas the Articles of War made certain common law crimes military offenses by reference, the Uniform Code enacted these common law crimes into positive law, furnishing, in most cases detailed definitions of such crimes, or articulating the acts necessary to establish the crime concerned. In many instances, Congress consolidated former separate military offenses into a single offense under a particular Article of the Code. *e.g.*, Article 107.[143] Additionally, many acts formerly treated as violations of the general Article became the subject of specific Articles of the Code. Because of such close attention to detailing of offenses by the Congress, the Court of Military Appeals has, with ample warrant, concluded that in areas where the Congress has legislated, no conduct is left within the aegis of Article 134. Thus the general rule is that a specification purporting to plead a violation of the general Article does not state an offense if the conduct pleaded falls within an area specifically affected by Congressional attention, as evidenced by enactment of one or more of the punitive Articles.

Additionally, the same doctrine is applicable as to offenses in violation of Article 134. Thus if the specification, but for a single element, avers a recognized violation of the general Article, in a less serious degree, and is not dignified by recognition in the Manual for Courts-Martial, absent the missing allegation, the specification does not state an offense, because in completing an Appendix of sample pleadings describing conduct violative of Article 134, the drafters of the Manual have pre-empted the area of conduct identified in that Appendix.[144]

Like all general rules, the rule of pre-emption admits of some exceptions. As to Congressional pre-emption, by way of specific Articles, if the purported violation of Article 134 is not composed of remnants of an offense defined in a specific Article, *i.e.*, has an element not found in the specific Article concerned, then the pre-emption rule is inapplicable.[145] Or, if the conduct put

[141] Subpar. 213*d*(4), and Form 139 of App. 6*c*, MCM.
[142] 10 USCMA 302, 27 CMR 376 (1959).
[143] *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 1230 (1949).
[144] U.S. v. Downard, 6 USCMA 538, 20 CMR 254 (1955).
[145] U.S. v. Fuller, 9 USCMA 143, 25 CMR 405 (1958).

forth as violative of Article 134, while of the same general nature as conduct prescribed in a specific Article, is deemed punishable because it has a distinctly different gravamen, again the pre-emption rule is inapplicable.[146] The final exception occurs when the conduct considered a violation of the general Article consists of behavior recognized by ancient military usage as prejudicial or discrediting conduct under the general Article.[147]

In Executive pre-emption, the presence of one or more forms in the Appendix of form specifications, or a sentence provision in the Table of Maximum Punishments, in the Manual for Courts-Martial, will generally militate against approval, as a violation of Article 134, of any specification purporting to allege a lesser degree of criminal conduct in the same area. Presumably these would be an exception to this rule, if the purported violation had the support of ancient military usage; an omission of a form pleading, or provision for punishment, from the Manual, is not dispositive of the issue.

To the alert judge advocate, certain clues will indicate the necessity for applying the rule of pre-emption. The first step necessary is a determination of whether or not the specification consists of the remnants of a violation of a specific Article, after one or more elements has been selected. Second, has the specification been formulated in order to remedy a defect in the proof of a specific Code violation? Third, does the specification result from an attempt to cure instructional error? If none of these indicia are present, in almost all cases, the specification will escape the nullifying effect of the *Norris* holding. If one of these factors is present, then the exceptions to the pre-emption rule must be checked to ascertain whether one of them can be resorted to as a saving device.

The future of the pre-emption doctrine is uncertain. It may be that the Court has sufficiently defined the terms of the rule and that eventually boards of review will iron out conflicting views among themselves. Additionally, it should be noted that the pre-emption theory owes its existence not to Congressional enactments covering given areas of conduct alone, but to a declared Congressional intent to restrict Article 134 generally to military offenses as well. Thus there is an inverse relationship between these two premises. As the scope of Article 134 expands, the influence of

[147] U.S. v. Holt, 7 USCMA 617, 23 CMR 81 (1957).
[146] *Ibid.*

the pre-emption rule will wane. As a result, close attention to the Court's interpretation of Article 134, which varies from time to time,[148] will probably prove to be a most effective means of sensing an increase or decrease in the exclusionary effect of the rule, as first announced in *United States* v. *Norris*.

[148] See, *e.g.*, U.S. v. Sanchez, 11 USCMA 216, 29 CMR 32, particularly so much of the opinion as deals with the specification describing conduct closely related to sodomy. The Norris case was not mentioned. Indeed, there is a dearth of citations in the entire opinion, exclusive of the issue of self-incrimination.

GOVERNMENT ASSISTANCE AND PRIVATE ECONOMIC ORGANIZATION FOR DEFENSE

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I. INTRODUCTION

The voluminous defense requirements of the United States,[1] while beneficial to the economy as a whole, severely strain the capacity and ingenuity of private producers who undertake to satisfy them. The complexity of military technology and its dependence upon specialized property, know-how and continuing research and development necessarily reduce the number of producers who are able to perform. Further, the unusual business risks which inhere in the inconstancy of defense procurement make otherwise capable producers unwilling to perform Government contracts unless these risks can be reduced and a fair profit assured. This is paradoxical since an underlying procurement goal is maximum competition and a broad distribution of Government work.[2] To the extent that private producers are unable or unwilling to perform defense contracts the benefits in price and quality which the Government obtains from maximum competition are decreased. The net effect of this may be a few contractors performing a large percentage of defense contracts with a minimum distribution of

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[1] Spending for national security is between $40 and $45 billion a year, or approximately 10% of the gross national product. The largest part of the $25 billion spent by the Department of Defense in fiscal year 1959 was used for research and development and the production of complex military weapons and equipment which had no commercial counterpart. DEPARTMENT OF DEFENSE, PROCUREMENT PRESENTATION TO THE PROCUREMENT SUBCOMMITTEE OF THE COMMITTEE ON ARMED SERVICES, UNITED STATES SENATE 1–2 (1960). See also, Weidenbaum, *The Timing of the Economic Impact of Government Spending*, 12 NAT'L TAX J. 79 (1959); Novick & Springer, *Economics of Defense Procurement and Small Business*, 24 LAW & CONTEMP. PROB. 118 (1959).

[2] See e.g., Armed Services Procurement Act, 10 *U.S.C.* §2305 (1958) (formal advertising requirement); Small Business Act, 72 STAT. 384 (1958), 15 *U.S.C.* §631(a) (1958): "The essence of the American economic system of of private enterprise is free competition . . . The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation . . . ."

work to small business.[3] But of equal importance, the capacity of industry to develop, manufacture and deliver superior weapons in the event of World War III may be jeopardized.[4] A basic purpose of Government assistance, therefore, is to facilitate defense production by increasing the number of prime contractors and subcontractors who are willing and able to satisfy the Government's needs. The nature and effectiveness of this assistance is the subject of this article.

II. TYPE OF CONTRACT: PROFIT AND RISK

Standardized or well defined products with predictable costs are procured by the Government through formal advertising. Competition among qualified bidders insures realistic pricing and the nature of the item purchased minimizes business risks.[5] Since no special incentives are needed to attract bidders, the Government is more concerned with whether the successful contractor receives an excessive profit than with whether the profit margin is fair.[6] In much defense procurement, however, changing requirements mitigate against standardization and cost certainty. The Government is actually buying services and techniques rather than well defined products. These needs both limit the pool of

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[3] The general trend toward business concentration is clearly reflected in defense procurement. In fiscal year 1959, 73.8% of the total dollar volume of defense prime contracts over $10,000 was shared by 100 contractors and 21% of the total dollar volume was awarded to but 4 contractors. See Wall Street Journal, January 14, 1960, p. 15, col. 6. This situation has been severely criticized. See *HAMILTON, THE POLITICS OF INDUSTRY* 21-22 (1957):

> "The military has exhibited a preference to deal with the few rather than the many; it has shown reluctance to break down a large order which can be filled only by a giant concern into a series of smaller orders which will invite independents to bid. Thus the military, with an eye solely to defense, gives impact to the trend toward concentration. . . ."

See also, Rosebluth, *The Trend in Concentration and its Implications for Small Business*, 24 *LAW & CONTEMP. PROB.* 192 (1959).

[4] The difficulties encountered in mobilizing for World War II are discussed in *SMITH, U.S. ARMY IN WORLD WAR II; THE ARMY AND ECONOMIC MOBILIZATION* (Office of the Chief of Military History, Department of the Army, 1959).

[5] In the interest of lower prices, the Government will absorb certain risks in the performance of advertised fixed-price contracts. See ASPS 8-707(c) (5 Sep 1958) (contractor excused from excess costs of repurchase if default due to causes beyond control and without fault or negligence); ASPR 3-403.2 (30 Jun 1959) (price escalation protects against labor or market instability). The values of wide spread competition and equal treatment to all bidders are thought to justify formal advertising despite administrative complexity and expense. See *DEPARTMENT OF DEFENSE, PROCUREMENT PRESENTATION*, *op. cit. supra* note 1, at 18.

[6] The termination date of the Renegotiation Act, (65 *STAT.* 7 (1951), as amended, 70 *STAT.* 786 (1956), 50 *U.S.C.* App. §§ 1211-1233 (1958), has been extended to 30 June 1962. P.L. 86-89, 50 *U.S.C.A.* App. § 1212(c)(1) (Supp., 1959).

available contractors and increase the business risks of those to whom contracts are awarded. Consequently, the Government must maintain the attractiveness of defense procurement by insuring a fair profit to contractors. This can be accomplished by minimizing or eliminating certain business risks through the use of a proper type of contract[7] or appropriate contract clauses.

A few illustrations are appropriate. If a negotiated fixed-price contract is used where production costs are uncertain, price flexibility is maintained by price redetermination provisions.[8] By this technique, the contractor's profit margin is protected from a cost overrun. If the contractor is required to develop a new product, a termination for default in the event that a definite delivery date is not met is unrealistic.[9] Accordingly, the contractor may be awarded a special incentive contract which rewards success by higher profits but does not unduly penalize failure[10] or may be required to use "best efforts" rather than deliver within a specified time.[11] Finally, the Government will, in certain cases,

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[7] Type of contract in this context refers to the method by which the contractor is compensated rather than the contract form or end purpose. The head of a procurement agency may award any type of negotiated contract "that he considers will promote the best interests of the United States." 10 *U.S.C.* § 2306(a) (1958). While the Government's interest is protected by flexible and realistic pricing, the contractor also benefits when the type of contract used reduces pricing risks which affect profit. *Cf.* COHEN, *LAW AND THE SOCIAL ORDER* 110–111 (1935) (primary purpose of contracts and contract law is to distribute risks in complicated transactions).

[8] ASPR 3–403.3 (4 Apr 1955); ASPR 7–109 (20 Apr 1959). Where a new product is required and production costs are uncertain, the parties will negotiate an initial fixed price based upon estimates of cost. This will be subject to redetermination at a future date in light of actual production costs.

[9] For an illustration of the problems which might arise when research and development work is done under a fixed-price contract requiring delivery of an acceptable product within a specified period of time, see *Aerosonic Instrument Corp.*, ASBCA No. 4129, 12 March 1959, DA Pam 715–50–45, par. 5. See also, 37 Comp. Gen. 239 (1957). If a termination for default is proper, the contractor receives neither profit nor costs for unfinished work and may be liable for the excess costs of a repurchase.

[10] The Government awards both performance and cost type incentive contracts. In the former, the contractor earns more profit if standards of performance exceed minimum contract requirements, ASPR 3–406 (20 Apr 1959), and in the latter a higher profit is paid if production costs are kept below estimates, ASPR 3–403.3 (iii) (b) (14 May 1958). In both instances, a failure to meet desired cost or performance standards results only in a profit reduction. See *DEPARTMENT OF DEFENSE, PROCUREMENT PRESENTATION*, *op. cit. supra* note 1, at 26 (discussion of special performance incentive).

[11] ASPR 7–402.2(a) (30 Jun 1959); ASPR 7–402.4 (1 Oct 1959).

indemnify contractors against extra-hazardous risks.[12] Thus, flexible pricing, realistic standards of work and indemnification, particularly in negotiated fixed-price contracts, protect the contractor's profit margin and reduce the chance of sustaining a loss.

The cost-plus-fixed-fee type contract, which is used primarily for research and development, provides maximum insulation against business risks.[13] Consequently, profit has been arbitrarily limited to fixed percentages of estimated costs at the time of contracting.[14] It has been suggested that higher fees would attract better research and development and encourage more small business participation.[15] Further, since the fee is based upon estimated costs at the time of contracting and does not accelerate in the event of an overrun, it may be unrealistic. Yet in evaluating the adequacy of the cost-plus-fixed-fee profit allowance, it is important to recognize that profit incentive in research and development varies with the type of project and the contractor involved. Non-

[12] The Government will indemnify contractors with the Atomic Energy Commission, 71 STAT. 576 (1957) as amended, 72 STAT. 525, 837 (1958), 42 *U.S.C.* § 2210 (1958), and research and development contractors with military departments (with secretarial approval), 10 *U.S.C.* § 2354 (1958), from damage to others arising out of unusually hazardous activities. In both cases, commercial insurance must not be available. See Lyons, *Government Indemnification Against Unusually Hazardous Risks for Military Research and Development Contractors*, 17 FED. B.J. 314 (1957). In cost type contracts, the Government agrees to indemnify the contractor for liability to third persons from extraordinary claims not insured. See ASPR 7-203.22(c) (4 Jan 1960). The Army position is that this potential liability does not violate the anti-deficiency act. JAGT 1957/7982, 25 October 1957, DA Pam 715-50-19, par. 1.

[13] The contractor is insulated in at least two ways. First, a cost reimbursable research and development contract will not be defaulted for failure to deliver an acceptable product on time. See *supra*, note 11. *But see* ASPR 8-710 (30 Jun 1959) (default clause for fixed-price research and development). Second, if a cost overrun occurs, the contractor may stop work until the Government either terminates the contract for convenience, ASPR 8-701 (5 Sep 1958) (contractor entitled to costs plus profit on work done), or provides additional funds. If the work stoppage is caused by the overrun, the contractor cannot be required to continue work or be terminated for default until additional funds are provided. See *Sterling Precision Corporation*, ASBCA No. 4646, 12 October 1959, DA Pam 715-50-58, par. 7.

[14] By statute, the fee is limited to 15% for experimental, research and development work and 10% for any other work (with exceptions). 10 *U.S.C.* § 2306(d) (1958). The limitations have been reduced to 10 and 7 percent respectively by regulations, ASPR 3-404.3(c) (14 May 1958), but the Secretary of the Department concerned may, in appropriate cases, raise fees to the statutory maximum. Profit or fee in negotiated contracts is determined in dollar amounts based upon evaluation of specified pricing factors. See ASPR 3-808 (1 Oct 1959).

[15] See Livingston, *Decision Making in Weapons Development*, 36 HARV. BUS. REV. 127 (1958); Cordiner, *Introduction*, 17 FED. B.J. 186, 187 (1957). In the first 11 months of 1958, small business received only 3.2% of the total value of all military research and development prime contracts awarded. See EIGHTH ANNUAL REPORT OF THE ACTIVITIES OF THE JOINT COMMITTEE ON DEFENSE PRODUCTION, 86th Cong., 1st Sess. 457 (1959).

profit institutions, for example, receive no fee. On the other hand, profit making firms may not demand a large fee if the project involves basic research which must be done to maintain business standing or will afford valuable experience in future Government supply contracts.[16] Finally, the Secretary of Defense has power to approve fixed fees up to 15% of estimated costs.[17] This provides flexibility where extra incentive is required in particular cases.

The risk of doing business with the Government cannot be completely eliminated by the type of contract or contract clause used.[18] Yet a steady flow of qualified producers can be maintained by a choice of contract which minimizes risks and insures a fair profit. While this is a form of assistance to the contractor, it also contributes to realistic pricing and is in the Government's best interest.

III. ORGANIZING A PRODUCTION BASE

A contractor must possess specialized and expensive capital equipment and maintain a continuous program of expansion and replacement to perform defense contracts. This section will examine the methods whereby the Government assists business in attaining the necessary capacity for defense production: tax assistance, small business loans and investment, loans under the Defense Production Act of 1950 and Government furnished property.

A. *Assistance Under the Tax Laws*

Under section 167 of the Internal Revenue Code of 1954, any business may deduct from gross income a reasonable allowance for the exhaustion, wear and tear and obsolescence of property used in a trade or business or held for the production of income.[19] These yearly depreciation deductions reduce both taxable income

[16] It has been asserted that the primary inducement for firms to undertake research and development work in the increased ability to obtain more profitable production contracts growing out of the research. *Memo for the Assistant Secretary of Defense* (Supply and Logistics), AFMPP-PR (30 Jun 1958). This increased ability constitutes adequate consideration to support a Government contract, *Pennsylvania Exchange Bank* v. *United States*, 170 F. Supp. 629 (Ct. Cl. 1959), but is inadequate to make the contractor subject to state possessory interest taxes. *United States* v. *Livingston*, 179 F. Supp. 9 (E.D.S.C. 1959).

[17] See *supra*, note 14.

[18] See Novick & Springer, *Economics of Defense Procurement and Small Business*, 24 LAW. & CONTEMP. PROB. 118 (1959).

[19] INT. REV. CODE of 1954, § 167(a).

and the price of the capital acquisition.[20] Despite language which permits a deduction for obsolesence, depreciation procedures under section 167 focus on durability rather than useful life. In a period of rapid technological advance and increased business efficiency, machine tools are being written off for tax purposes in 15 to 20 years when the useful life in terms of technical obsolesence is between 6 and 10 years.[21] Further, depreciation allowances are not realistically keyed to an inflationary economy. Distorted income and higher taxes result when machinery which has been depreciated at the value of the 1950 dollar is replaced at the cost of the 1960 dollar.[22] The net effect is a tax climate which is unfavorable to capital expansion and replacement.

Prior to 1 January 1960, section 168 of the Internal Revenue Code of 1954 offered the benefits of accelerated amortization to a limited number of businesses engaged in specialized defense contracting.[23] Under this section, a business which owned or was willing to purchase facilities required to produce new or specialized defense items could have all or a portion of them certified as "Emergency Facilities" necessary for national defense.[24] The taxpayer was then entitled to fully amortize (depreciate) the certified facilities for tax purposes over a five year period.[25] While accelerated amortization clearly made allowance for extraordinary

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[20] Since property normally depreciates disproportionately during the first year of use, a taxpayer may accelerate depreciation in the early years by adopting certain procedures. *INT. REV. CODE* of 1954, § 167(b). See also, *INT. REV. CODE* of 1954, § 179 (20% depreciation deduction in first year for small business).

[21] Select Committee on Small Business, United States Senate, *The Effects of Current Federal Tax Depreciation Policies on Small Business*, S. Rep. No. 1017, 86th Cong., 2d Sess. 3–4 (1960). See Barlow, *The Depreciation Impasse: A Measuring of the Pressure for Change and Strength of the Resistance*, 10 *J. TAXATION* 66 (1959).

[22] S. Rep. No. 1017, *op. cit. supra* note 21, at 4.

[23] *INT. REV. CODE* of 1954, § 168. The termination date of this emergency legislation was 31 December 1959. *INT. REV. CODE* of 1954, § 168(i).

[24] The certificates are issued by the Office of Civilian Defense Mobilization (OCDM). See Exec. Order No. 10480, 18 *FED. REG.* 4939 (1953), as amended, 23 *FED. REG.* 4991 (1958). The act applies to contracts with the Atomic Energy Commission and the Department of Defense.

[25] Emergency facility is defined as any "facility, land, building, machinery, or equipment or any part thereof, the construction, reconstruction, erection, installation or acquisition of which was completed after December 31, 1949, and with respect to which a certificate . . . ." has been issued. *INT. REV. CODE* of 1954, § 168(d)(1). After 22 August 1957, a facility would be certified if used to produce a "new or specialized" defense item. *INT. REV. CODE* of 1954, § 168(e)(2)(A). Previously a certificate was issued for an essential defense use.

obsolesence in defense procurement, its primary purpose was to induce private producers to acquire and use facilities for new and specialized defense production.[26] The benefit of a quick investment recovery coupled with the allowance of the facility's "true depreciation" as a cost of contract performance[27] afforded a substantial inducement to those who qualified. But section 168 was criticized for giving unneeded tax advantages to large corporations at the expense of small business.[28] Further, there is a growing realization that accelerated amortization of defense facilities is an inadequate substitute for a fair, realistic, long-run depreciation policy.[29] In view of this, legislation is now being recommended which liberalizes depreciation tax deductions for all business in both normal and emergency periods.[30] This is an equitable approach which should contribute to increased industrial preparedness and defense capacity.

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[26] S. Rep. No. 1017, *op. cit. supra* note 3, at 4. See Schlaifer, Butter & Hunt, *Accelerated Amortization*, 29 HARV. BUS. REV. 113 (1951). Since depreciation is arbitrarily taken over a five year period, the facility may actually have either a longer or shorter useful life. In the former case, there will be nothing to deduct for tax purposes in later years. In the latter case, the Government is authorized to compensate the contractor if the contract is terminated before five years have passed. INT. REV. CODE of 1954, § 168(g).

[27] Normal depreciation on a contractor's plant, equipment, and other capital facilities is an allowable element of contract cost. ASPR 15-205.9(b) (2 Nov 1959). If the facility is covered by a certificate of necessity, the contractor may elect to use the concept of "true depreciation" as determined by the Emergency Facilities Depreciation Board. See DOD Instr. 4105.34 (1 Jul 1954); Army Procurement Procedures, section 30, part 13 (1 Nov 1957). This Board subtracts from the facility's cost its estimated value at the end of five years. The resulting figure is estimated "true depreciation" which is allocated to the period of contract performance. See ASPR 15-205.9(d) (2 Nov 1959). It has been held that this determination guarantees to the contractor the full amount of "true depreciation" even though the contract is terminated in less than five years. *Merck, Sharp & Dohme*, ASBCA Nos. 4058, 4068-4071, 12 June 1958, DA Pam 715-50-40, par. 4, motion for reconsideration denied, 22 January 1959, DA Pam 715-50-44, par. 3.

[28] Small business is adversely affected in two respects. First, the restriction in section 168 which limits eligibility to facilities used for "new and specialized" defense items has reduced the number of small businesses who are entitled to tax assistance. See EIGHTH ANNUAL REPORT OF THE ACTIVITIES OF THE JOINT COMMITTEE ON DEFENSE PRODUCTION, 86th Cong., 1st Sess. 83-85, 462 (1959). Second, the current tax depreciation policies foster a trend toward economic concentration and create a barrier to small business growth through capital expansion. *Hearings Before the Select Committee on Small Business, Tax Depreciation Allowances on Capital Equipment*, 86th Cong., 1st Sess. 34-35 (1959).

[29] See S. Rep. No. 1017, *op. cit. supra* note 21, at 10 (encourages cyclical rather than orderly growth of industrial capacity).

[30] *Id.* at 11.

B. *Loans to Small Business*

Small business concerns[31] have difficulty obtaining adequate financing at reasonable rates. Either private lending institutions are unwilling, for reasons of profit or administration, to lend smaller amounts of money over a long period of time or the small business is unable to provide collateral or pay the interest rate. And even if the business is sound, the risks which inhere in being small[32] cause many banks to prefer large, well established clients, particularly in periods of "tight" money.[33] In view of these difficulties, the Government offers two methods of assisting small business to obtain cash for the expansion of productive facilities. The first is a system of financial assistance administered under the Small Business Act[34] and the second is a method of private investment under the Small Business Investment Act of 1958.[35]

1. *Loans under the Small Business Act*

$575 million of the $975 million revolving fund established for use by the Small Business Administration (SBA) is to be used for loans to small business concerns. A qualifying small business may obtain up to $350,000 at no more than 5½% interest per annum for renewable periods up to 10 years.[36] Loans are available for the expansion of productive facilities, working capital for both commercial and defense production and to insure a well balanced economy, but shall be of "such sound value or so secured as rea-

[31] Essentially, a small business concern must be independently owned and operated and not dominant in its field of operation. 72 STAT. 384 (1958), 15 *U.S.C.* §632 (1958). Business dollar volume and the number of employees are relevant to this definition. See ASPR 1-701.1(a)(1) (4 Jan 1960) (employs fewer than 500 employees or has been certified as a small business concern by the SBA). The criteria vary with the type of industry involved, ASPR 1-701.1 (2) (4 Jan 1960) (special industry), and the purpose for which the definition is required.

[32] The disadvantages of being small include lack of financial experience, inadequate management and capacity, limited market coverage and poor research and development. See Cahn, *Capital for Small Business: Sources and Methods*, 24 LAW & CONTEMP. PROB. 27 (1959). Small business concerns were a large percentage of the 14,000 business failures in 1959.

[33] See *REPORT TO THE COMMITTEES ON BANKING AND CURRENCY AND THE SELECT COMMITTEES ON SMALL BUSINESS, UNITED STATES CONGRESS BY THE FEDERAL RESERVE SYSTEM*, 85th Cong., 2d Sess. 12–19 (1958) (Garvey, *Observations Based on the Background Studies*).

[34] 72 STAT. 384–387 (1958), 15 *U.S.C.* §§ 631–636 (1958).

[35] 72 STAT. 689–697 (1958), 15 *U.S.C.* §§ 661–696 (1958).

[36] Each member of a qualified production pool of small business concerns, see *infra* at p. 108, may receive a maximum loan of $250,000 at between 3 and 5% interest. If the pool is to construct facilities, the loan duration may exceed 20 years. See 72 STAT. 698 (1958), 15 *U.S.C.* § 636(a)(5) (1958).

sonably to assure repayment."[37] If a small business concern cannot obtain adequate financing from private sources at reasonable terms, the SBA may pledge its credit to stimulate private financing or, as a last resort, make a direct loan of appropriated funds. The preferred method of inducing private financing is the deferred participation, where the SBA agrees, upon call, to assume up to 90% of a loan made to small business by a bank on its own terms. The bank may "call" whenever it feels that the money could be more profitably employed elsewhere. When a "call" is made, the deferred participation is assumed by the SBA and the 5½% interest limitation becomes effective. Where the loan amount is high a bank may insist that the SBA assume a specified portion of the loan from the outset. This is an immediate participation. The bank, however, prescribes legal and reasonable terms on its portion of the loan and is not bound by the 5½% interest limitation. If neither form of participation is available, the SBA is authorized to make a direct loan to the applicant at no more than 5½%.[38]

The basic policy which underlies financial assistance to small business is to stimulate maximum private financing with a minimum involvement of appropriated funds. Between 1953 and 1957, the SBA, with a revolving fund of $305 million, approved loans in excess of $400 million.[39] Each appropriated dollar, therefore, generated 1.3 dollars in loans to small business.[40] Despite this low ratio and an annual net loss of $5 million,[41] most commentators feel that the Act supplies vital assistance to the economy and has

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[37] 72 STAT. 698 (1958), 15 *U.S.C.* § 636(a)(7) (1958). The SBA demands collateral for its loans. See *REPORT TO THE COMMITTEES AND BANKING AND CURRENCY*, *op. cit. supra* note 33, at 264–265 (Arlt, *Government Loan Programs to Small Business*). This has been criticized as too restrictive and as not intended by Congress. H. R. Rep. No. 1252, 86th Cong., 2d Sess. 45–47 (1960). The SBA furnishes financial counseling to applicants but will not lend to prolong the life of a shaky business or to aid creditors.

[38] For the mechanics of lending, see 72 STAT. 387 (1958), 15 *U.S.C.* § 636 (a) (1958); 23 *FED. REG.* 10513 (1958); 23 *FED. REG.* 10520–23 (1958).

[39] See *REPORT TO THE COMMITTEES ON BANKING AND CURRENCY*, *op. cit. supra* note 33, at 253–281 (Arlt, *Government Loan Programs to Small Business*).

[40] From the inception of the program until 30 June 1959, 14,609 loans representing $690,053,872 have been made. The SBA's share of this total is $582,394,919. Despite a 45% rejection rate, the number of loans approved and the total amount of funds disbursed has increased each fiscal year since the program began. H.R. Rep. No. 1252, 86th Cong., 2d Sess. 36–40 (1960).

[41] The primary source of these losses is the administrative cost of processing applications. *REPORT TO THE COMMITTEES ON BANKING AND CURRENCY*, *op. cit. supra* note 33, at 276. Losses from failure to repay, through 30 June 1959, amounted to slightly less than two-tenths of 1 percent of the SBA's share of loans disbursed. *Id.* at 38.

adequately satisfied the short and intermediate term borrowing needs of small business.[42]

2. *The Small Business Investment Act of 1958*

Because of greater risks and larger amounts involved, the SBA and private lending institutions have been unable or unwilling to furnish new or rapidly growing small business concerns with long term growth capital.[43] The Small Business Investment Act of 1958[44] was enacted to remedy this situation. Under the act, the SBA is authorized to license state or federally chartered private companies to provide small business concerns with long term financing of a debt or equity type.[45] The investment company must have a stated capital of $300,000 in cash to begin operations. If this requirement cannot be met from private investment the SBA may provide up to $150,000 at 5%.[46] These funds are withdrawn, however, once adequate private capital is obtained.

In exchange for loans to small business for a term of five years or more, the investment company receives interest bearing debentures which are convertible into the borrower's stock at book value when the debenture was issued.[47] The borrower may call in the debenture subject to the investment company's right to convert up to the last day that the debenture is outstanding. The Act, by giving both debt security and an option to obtain stock in a successful business, affords the investor a good opportunity

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[42] H.R. Rep. No. 1252, *op. cit. supra* note 40, at 32.

[43] This has placed pressure on small business concerns which must expand productive facilities to compete in defense procurement. See *Hearings Before Senate Committee on Banking and Currency on Financing Small Business*, 85th Cong., 2d Sess. 247–248 (1958).

[44] 72 STAT. 689–697 (1958), 15 *U.S.C.* §§ 661–696 (1958). Implementing regulations were published in 23 FED. REG. 9383 (1958). See Barnes, *What Government Efforts are Being Made to Assist Small Business*, 24 LAW. & COMTEMP. PROB. 3, 18 (1959).

[45] The investment company may be chartered by the state under normal incorporation procedure or by the United States if no state authority exists. A state chartered company must be licensed by the SBA to enjoy the privileges of the act. An investment company will exist for 30 years unless sooner dissolved by act of Congress, a two-thirds vote of shareholders if federally incorporated, state action if state chartered, or court action by the United States upon cause.

[46] The SBA has no direct financial relationship with the small business borrower under the Act. Financial aid by the SBA to the investment company is secured by debentures which pay 5% interest. The source of these funds is $250 million which has been added to the SBA revolving fund for use under the Act. See 72 STAT. 690 (1958), 15 *U.S.C.* § 633 (c) (1958).

[47] If debentures are impractical, the investment company may make a direct loan to the borrower for not less than 5 years at legally permissible interest rates. See 23 FED. REG. 9389 (1958). The investment company may not directly purchase stock of the small business borrower.

for profit.[48] And if properly administered, the benefit to small business concerns could be substantial. Yet the Act is an experiment which needs refining and until a backlog of experience is obtained its effectiveness cannot be properly assessed.[49]

C. *Loans Under the Defense Production Act*

Among the provisions of the Defense Production Act of 1950 which aim at building up available stocks of essential minerals, machines and materials, there is authority for the Government to make loans for the purpose of increasing the capabilities of business to produce and to develop technological processes for defense. The assistance must be certified as essential to national defense and is restricted to firms which cannot obtain financing elsewhere. As with small business, direct loans, participations or guarantees may be used. A $2.1 billion revolving treasury fund supports the loans and other activities under the Act.[50]

D. *Government Furnished Property*

Normally, a contractor is responsible for furnishing all property necessary to perform a Government contract. As a consumer, however, the Government may derive substantial benefits by assuming some of this responsibility. If the Government furnishes specialized tooling, critical materials or expensive facilities, the contractor's scope of work and costs will be reduced and, if the property is retaken after completion, the risk of excess capacity reduced. In addition to reducing risks and promoting economy, the Government's control of who uses what property contributes to

[48] If a debenture is converted into the stock of a growing and prosperous small business concern an appreciation in investment will normally occur. The investment company may be unable to realize this appreciation if the share has no market, but can protect itself by obtaining voting rights with the conversion (particularly if the corporation is closely held) or by requiring the borrower to redeem the stock at its appreciated value upon conversion. If the investment company qualifies as a regulated investment company for tax purposes, a favorable tax treatment is afforded the sale or redemption of stock. See *INT. REV. CODE* of 1954, § 1201. See also, *INT. REV. CODE* of 1954, § 852 (tax on 15% of income); *INT. REV. CODE* of 1954, §§ 1242, 1243 (loss from conversion of debenture or sale of stock treated as ordinary loss).

[49] Current difficulties primarily concern the organization of investment companies rather than their operation. As of 15 January 1960, 67 of the 146 companies submitting proposals have been licensed by the SBA. This low figure has been attributed to delays in processing applications and complying with the Investment Company Act of 1940, lack of coordination between the SBA and SEC and the restrictive regulations passed to implement the Act. It is also felt that organized investment companies would function more efficiently if permitted to make more direct loans to small business and given more flexibility in furnishing equity capital. See H.R. Rep. No. 1252, 86th Cong., 2d Sess. 27–29 (1960).

[50] 64 *STAT.* 800 (1950), as amended, 66 *STAT.* 298 (1952), 50 *U.S.C.* App. § 2092 (1958); *EXEC. ORDER* No. 10480, 18 *FED. REG.* 4939 (1953).

consistent quality and exact timing in contract performance. This control also permits a more effective implementation of collateral policies and the allocation of scarce property to essential contractors during emergency periods. Yet if the property is readily obtainable on the open market or is not retaken after the contract is completed, a competitive advantage may be conferred upon the producer to whom the property was furnished. This section will examine the types of Government property, how and when furnished and the methods employed to equalize competitive advantages.

1. *Types of Government property; when furnished*

Government property[51] consists of three types: special tooling,[52] industrial facilities[53] and materials.[54] Since industrial facilities are broadly defined and easily adapted to both commercial and Government contracts, they will not be furnished unless necessary to meet essential production schedules and availability through subcontracting has been fully considered.[55] Similarly, materials will be furnished only if the Government's interest is served in a particular case by reason of standardization, economy

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[51] Property includes "all physical property, both real and personal." ASPR 13-101.1 (3 Nov 1958). Government property includes "all property owned by or leased to the Government, or acquired by the Government under the terms of a contract." ASPR 13-101.2 (3 Nov 1958). This definition includes Government furnished property, which is provided out of available stock, and contractor acquired property, which is required by the contractor with title vesting in the Government, but not contractor furnished property, where title remains in the contractor. ASPR 13-101.3 (3 Nov 1958). Because title to Government furnished property remains in the Government, ASPR 13-502(c) (14 May 1958), providing it to producers is a permissive utilization rather than a disposal. See *infra*, n. 68 & 69.

[52] Special tooling means all jigs, dies, fixtures, molds, patterns, special guages and test equipment and other special equipment and manufacturing aids "acquired or manufactured by the contractor for use in the performance of a contract, which are of such a specialized nature that, without substantial modification or alteration, their use is limited to the production of such supplies or parts thereof, or the performance of such services, as are peculiar to the needs of the Government." ASPR 13-101.5 (9 Jan 1959). The definition excludes tools acquired by the contractor prior to the contract, consumable small tools and general or special machine tools or similar capital items.

[53] Industrial facilities are "property, other than material and special tooling, of use for the performance of a contract or subcontract, including real property and rights therein, buildings, structures, improvements, and plant equipment." ASPR 13-101.6 (9 Jan 1959). Plant equipment is personal property of a capital nature other than special tooling. ASPR 13-101.9 (9 Jan 1959).

[54] Materials are "property which may be incorporated into or attached to an end item to be delivered under a contract or which may be consumed or expended in the performance of a contact." The definition includes but is not limited to raw and processed material, parts, components, assemblies, and small tools and supplies which may be consumed in normal use in the performance of the contract. ASPR 13-101.4 (9 Jan 1959).

[55] ASPR 13-102.3 (18 Sep 1958).

or expediting production.[56] On the other hand, a special tool, by definition, is limited in use to the production of supplies or the performance of services which are peculiar to the needs of the Government. This limitation reduces the availability of special tooling from commercial sources and increases the importance of maximum availability for Government contracts. Special tooling, therefore, will be furnished to contractors in all cases when it is under the Government's control and is determined to be available.[57]

2. *How furnished; use; disposition after performance*

The contractor obtains Government property in two ways. Either the contractor personally acquires or manufactures property with title vesting in the Government at the earliest practical time or the property is directly furnished by the Government.[58] If the latter method is used, special tooling, materials and facilities valued at $50,000[59] or less will be furnished as an integral part of the contract and administered under the Government Furnished Property Clause.[60] No separate consideration is required if the property is used exclusively for contract performance and the contract price is appropriately reduced.[61] The contractor is obligated to maintain and repair the property but the standards of liability for loss or damage will depend upon the type of contract involved.[62] After performance is completed, the con-

[56] ASPR 13-102.1 (8 Nov 1958).

[57] ASPR 13-102.2 (8 Nov 1958). Special tooling will not be provided if interfering with essential production schedules and the cost is more than the cost to the Government or the contractor of acquiring or furnishing new special tooling.

[58] ASPR 13-101.2 (8 Nov 1958).

[59] When the cumulative total acquisition cost of industrial facilities furnished a contractor at one location exceeds $50,000, a separate facilities contract will be used. ASPR 13-402(i) (18 Sep 1958). See *infra*, note 64.

[60] ASPR 13-502 (1 Oct 1959).

[61] See JAGT 1958/4576, 26 June 1958, DA Pam 715-50-53, par. 1. *Cf.* ASPR 13-502(d) (14 May 1958). If the contract is amended to increase the amount of property furnished, the Government must receive adequate consideration. ASPR 13-201 (18 Sep 1958) & ASPR 13-301 (3 Nov 1958). This is normally accomplished by reducing the contract price. *Cf. United States* v. *Lennox Metal Co.*, 225 F.2d 303 (2d Cir. 1955). If the contract is amended to decrease the amount of property furnished, the Government is obligated to effect an equitable adjustment in the contract delivery date or price under the Changes clause. See ASPR 13-502(b) (14 May 1958). A similar adjustment is required if the Government delays the delivery of property or provides defective property which prevents the contractor from meeting contract delivery schedules. ASPR 13-502(a) (1 Oct 1959).

[62] In advertised fixed-price contracts where the price can provide for contingencies, the contractor assumes the risk of and shall be reponsible for any loss or damage to Government property except for reasonable wear and tear and to the extent consumed in performance. ASPR 13-502(f) (14 May 1958). The contractor is apparently an insurer. See *Seabord Machinery Corp.* v. *United States*, 270 F.2d 817 (5th Cir. 1959). *But see Pacific Grape Products Co.*, ASBCA No. 2527, 21 July 1958, DA Pam 715-50-33, par. 6 (proof of negligence required). In negotiated contracts, where initial pricing or cost

tractor will inventory and deliver unconsumed property to the Government.[63]

Facilities valued at more than $50,000 are acquired by or furnished to the contractor by a separate license agreement or facilities contract.[64] This device permits a variety of facilities to be concentrated at one location to serve one or more supply contracts which the contractor is performing.[65] Since the need for facilities is subject to change, the contract is terminable at the will of the parties.[66] Despite this, a relatively continuous arrangement is established which generally survives until the Government contracts being served are performed. At that time the facilities will either be returned to the Government or, at the Government's option, sold to the contractor at a predetermined price.[67] The Government may also lease facilities for commercial use at an

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estimates cannot provide for contingencies, the contractor is not liable for loss or damage to Government property unless caused by willful misconduct or bad faith, ASPR 13-503(f) (14 May 1958), or a peril not specifically excepted. Similar standards apply to facilities contracts. ASPR 13-411 (1 Oct 1959). A prime contractor is required to hold subcontractors liable for loss or damage to Government property in the subcontractor's possession. ASPR 13-104.2 (18 Sep 1958).

[63] ASPR 13-502(h) (1 Oct 1959). A similar requirement exists for severable facilities provided under a facilities contract. ASPR 13-415 (1 Oct 1959). Where special tooling is to be furnished or acquired by the contractor rather than furnished by the Government, the Special Tooling clause, ASPR 13-504 (1 Aug 1957) is inserted in the contract to insure that the tools are delivered by the contractor to the Government after the contract is completed. ASPR 13-302(ii) (3 Nov 1958).

[64] A facilities contract is a contract under which industrial facilities are provided by the Government for use in connection with the performance of a separate contract or contracts for supplies and services, ASPR 13-101.16 (3 Nov 1958), and is required when the cumulative total acquisition cost of facilities to be furnished a contract at one plant exceeds $50,000. ASPR 13-402(i) (18 Sep 1958). The contract is normally a cost reimbursement type, and may either require the contractor to acquire facilities with title vesting in the Government at the earliest practicable time, ASPR 13-405 (18 Sep 1958), see *Avco Mfg. Corp.* v. *Connelly*, 140 A.2d 479 (Conn. 1958), or obligate the Government to furnish facilities on a license basis. See *United States* v. *Muskegon*, 355 U.S. 484 (1958).

[65] Each facilities contract shall limit the contractor's right to use industrial facilities to the performance of specified Government contracts and subcontracts. A cash rental shall be paid if the facilities contract serves supply contracts entered into by formal advertising. Otherwise, no charge is made unless the user is placed in a favored competitive position or the Government has not received adequate consideration through a reduction in contract price. ASPR 13-407 (1 Oct 1959).

[66] ASPR 13-413 (1 Oct 1959).

[67] Nondisposable, nonseverable facilities are those which cannot be removed from the land without substantial loss of value or damage. See ASPR 13-101.8 (3 Nov 1958). If these facilities are located on other than Government land, the contractor must agree to purchase them at the expiration of the facilities contract at a price equal to the cost of acquisition less depreciation. ASPR 13-406.1 (18 Sep 1958). See 10 *U.S.C.* § 2353(b) (1958). For several facilities, the contractor will follow the contracting officer's disposal instructions. ASPR 13-415 (1 Oct 1959).

annual rent.[68] Despite the importance of the facilities contract as a procurement device, there is neither express statutory authority for its use[69] nor uniform clauses prescribed for inclusion by all military departments.[70]

3. *Competitive advantage*

The advantages from the maximum utilization of Government property in defense contracts must be weighed against possible adverse effects on competition. If the property can be obtained from commercial sources, the recipient of Government property may gain a price advantage over other builders who are furnishing the same property. If the property has limited commercial availability and is retained by the contractor after performance, an important strategic advantage is secured in future procurements.[71] Current regulations employ several methods to equalize competitive advantage. The definition of special tooling and the nature of materials tend to limit their effective use to Government contracts. In addition, commercial availability will be restricted. Consequently, competition will normally be stimulated rather than reduced if the Government furnishes special tooling and materials to contractors. The production base will be broadened by increas-

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[68] 10 *U.S.C.* § 2667 (1958) (Military Leasing Act). If property is leased in excess of military department needs, the Federal Property and Administrative Services Act will apply and the lease will be administered by the General Services Administration. 68 *STAT.* 1126 (1954), 40 *U.S.C.* §§ 471–486 (1958). See also, ASPR Section 13, part 6.

[69] There is no single statute which authorizes all military departments to acquire, furnish or sell facilities. The authority is implied from several permanent statutes read in conjunction with the annual Department of Defense Appropriation Act. See 10 *U.S.C.* § 2353 (1958) (military departments, upon secretarial approval, may acquire, furnish or lease facilities for research and development); 10 *U.S.C.* § 2667 (1958) (secretary of each military department may lease property under his control); 10 *U.S.C.* § 4531 (1958) (Secretary of the Army may procure facilities necessary to maintain and support army; 72 *STAT.* 711, 715–716 (1959) (authorizes expenditures necessary to acquire or furnish facilities for production of equipment and supplies for national defense during fiscal year 1959). For an opinion that the Secretary of the Army has inherent power to furnish facilities under his control if use is limited to Government contracts, see JAGT 1958/4576, 26 June 1958, DA Pam 715–50–53, par. 1.

[70] ASPR Section 13, Part 4 establishes general policy to guide the military departments.

[71] Where contractor acquired or furnished special tooling is involved, the Government may benefit in future procurements through reduced costs and administrative convenience if the contractor is permitted to purchase after the contract is performed. See ASPR 13–303 (3 Nov 1958). Even if the Government retains ownership, special tooling may be stored with the contractor for convenience and to save transportation costs. This gives the first user an advantage in subsequent procurements. The same advantage could arise from the possession of non-severable facilities, see *supra* note 67, but is minimized because the Government will not provide them if estimated useful life exceeds the duration of the facilities contract. ASPR 13–406 (ii) (18 Sep 1958).

ing the property's availability and permitting competition with the sole source supplier. This desirable effect can be maintained if the definition of special tooling is not broadened and the contractor is required to deliver special tooling and unconsumed materials to the Government when the contract is completed.

Facilities present a more complicated problem. They are easily adaptable to both Government and commercial contracts and are often available from private sources. Further, it is often practical for the Government to sell facilities to the contractors after performance. While administrators are required to consider the availability of facilities through subcontracting, a contractor will not be denied assistance on this ground.[72] Rather, the Government tries to equalize advantages by charging a special rental at commercially reasonable rates.[73] This is not completely satisfactory since the rent charge may raise the price above the bid of a competitor who is furnishing his own facilities and deprive the Government of the benefit of its own property. The conclusion is that while continued efforts should be made to equalize competitive advantage, the immediate and long range benefits from full use of Government facilities in defense contracts may outweigh the value of equal competitive opportunity in a particular case.

IV. DISTRIBUTING DEFENSE CONTRACTS THROUGH SUBCONTRACTING AND POOLING

The larger and more complex military procurements create two basic problems. First, the Government must obtain qualified producers who are willing to assume the responsibility and risks of defense contracts. Previous sections have examined the role of Government assistance in this area. Second, the Government, in the interest of price and quality competition and a broad production base, must encourage maximum distribution of defense work throughout the economy. Since small business concerns seldom possess the capacity to perform complex and expensive defense

[72] See ASPR 13-102.3 (18 Sep 1958). The tendency to favor larger concerns is illustrated by the fact that 90% of all Air Force production equipment is concentrated with the top 100 defense contractors. See Senate Select Committee on Small Business, *Role of Small Business in Defense Missile Procurement*, 85th Cong., 2d Sess. 222-23 (1958). If larger firms have increased productive capacity and ability to perform, they will be less willing to subcontract facilities to other producers competing for Government contracts.

[73] ASPR 13-407 (1 Oct 1959); ASPR 13-601 (18 Sep 1958). See *supra* note 65. In lieu of a rental charge, the contracting officer may add an evaluation factor to competing proposals which equals an estimated rental charge for the facilities. ASPR 13-407(a)(3) (1 Oct 1959).

prime contracts, effective distribution must be accomplished by subcontracting[74] and pooling.

The development and production of a modern weapons system[75] in a period of rapid technical growth is a tremendous responsibility. And in striving to keep abreast of a potential enemy, free competition and a wide distribution of the procurement dollar may be difficult to achieve. The Government could develop the system and award contracts for well defined components to separate prime contractors, who then would subcontract where necessary. While this would achieve some distribution of work, several practical limitations exist. The inter-related elements and minute tolerances of a weapons system are not easily broken into components. Further, the Government's administrative responsibility is magnified by the need to supervise prime contracts and the burden of assembling and testing the final product. The delays and lack of coordination which inhere in this approach could prejudice national security.

To achieve coordination and delivery within a minimum of time, the weapons system concept of procurement has been developed within the Department of Defense. Under this approach, full responsibility for the development, production and delivery of a weapons system is concentrated in a single prime contractor or a team of associated prime contractors.[76] The theory is that concentrated responsibility under efficient Government management will telescope normal production time and minimize costs.[77] Viewed

[74] A subcontract is "any contract . . . other than a prime contract, entered into by a prime or subcontractor, calling for supplies or services required for the performance of any one or more prime contracts." ASPR 8–101.23 (5 Sep 1958). The Government has no direct contractual relationship with subcontractors, but, through the prime contractor, exercises indirect control over subcontract selection, performance and costs. See, e.g., ASPR 3–900 et seq. (1 Oct 1959). See also, Symposium, *Subcontract Problems*, 16 FED. *B.J.* 171–323 (1956).

[75] A weapons system consists of an instrument of combat, such as an aircraft or a missile, together with all related equipment and supporting facilities required to perform the function for which it was built. *DEPARTMENT OF DEFENSE, PROCUREMENT PRESENTATION*, *op. cit. supra* note 1, at 28. The intercontinental ballistic missile system, for example, consists of three firing stages, a reentry device or nose cone, and coordinated guidance systems, flight control and ground support.

[76] See Homan, *Weapons System Concepts and Their Pattern in Procurement*, 17 *FED. B.J.* 402 (1957); Livingston, *Decision Making in Weapons Development*, 36 *HARV. BUS. REV.* 127 (1958). See also, *DEPARTMENT OF DEFENSE, PROCUREMENT PRESENTATION*, *op. cit. supra* note 1, at 28; Ordnance Procurement Instructions, (OPI) §§ 1–2200 et seq. (10 Nov 1959).

[77] *DEPARTMENT OF DEFENSE, PROCUREMENT PRESENTATION*, *op. cit. supra* note 1, at 28–32. The Government's early practice of hiring private corporations as systems managers and advisors has been criticized for dividing responsibility and authority. See Livingston, *op. cit. supra* note 76. The current trend is to designate the Government as systems manager with overall supervision over progress and tests. The prime contractor retains responsbility for development and production. OPI § 1–2204 (10 Nov 1959).

solely from the immediate interest of national defense the concept is both effective and essential. But from the standpoint of the value which inheres in a broad production base, serious objections exist. The concentration of responsibility in expensive procurements necessarily involves the concentration of economic power in the hands of large contractors. And as these contractors gain experience it is both logical and economical for the Government to favor them in future procurements.[78] There are also good business reasons which prompt these contractors to minimize subcontracting or to neglect small business. If a team of associate contractors has well defined work it may be more economical and efficient to perform that work in-plant rather than by subcontracting. Or if work is specialized, the contractor, thinking of future procurements, may be unwilling to share experience and know-how with potential competitors. Finally, many contractors prefer to subcontract with suppliers with whom they have satisfactory dealings or with specialized divisions within their own corporation. These factors are counterbalanced to some extent by capacity limitations which require prime contractors to subcontract in many cases.

The current approach focuses on distribution of the defense dollar through subcontracting rather than the award of more prime contracts. Yet the Government cannot compel subcontracting; the decision to make or buy is the prime contractor's alone.[79] But if the prime contractor decides to buy, the Government exercises an increasing amount of control over the method of selecting subcontractors. In prime contracts in excess of $1,000,000 which offer substantial subcontracting opportunities, the prime is required to afford small businesses an opportunity to compete, within their

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[78] The weapons system concept has been criticized for stimulating the establishment of a weapons cartel in which effective competition is eliminated and as incompatible with the free enterprise system. Livingston, *op. cit. supra* note 76. On the other hand, it is asserted that maximum competition is obtained in source selection among producers capable of assuming the responsibility. See DEPARTMENT OF DEFENSE, PROCUREMENT PRESENTATION, *op. cit. supra* note 1, at 29. *Cf.* Novick & Springer, *Economics of Defense Procurement and Small Business*, 24 LAW & CONTEMP. PROB. 118, 126 (1959) (recognizes lack of competition but justifies in interest of national defense).

[79] The prime alone is responsible for efficient contract performance and the Government cannot substitute its judgment for that of the prime when subcontracting is involved. *Cf.* ASPR 7-104.14 (1 Aug 1959). On the other hand, the Government may require the prime to personally perform a specified percentage of the work, 27 Comp. Gen. 81 (1947); Ms. Comp. Gen. B-139108, (15 May 1959), submit a list of proposed subcontractors, 39 Comp. Gen. 247 (1959), require an estimated percentage of intended subcontracting, *Keco Industries Inc.*, ASBCA No. 5340, 5 August 1959, and generally supervise the selection of subcontractors in negotiated contracts. ASPR 3-900 et seq. (1 Oct 1959).

capabilities, for subcontracts.[80] This requirement may be enforced in negotiated contracts by refusing to approve the prime contractor's "make or buy" program or purchasing system if small business has not received an equitable opportunity to compete.[81] The ultimate sanction would seem to be a termination for default.[82] In addition, the contracting officer may refuse to approve an otherwise capable subcontractor who has been selected after inadequate competition.[83]

While these regulations increase the opportunity for smaller concerns to compete for defense subcontracts they do nothing to increase the capacity for satisfactory performance. One solution to this latter problem is the SBA program of financial assistance and set-asides. Another method of increasing productive capacity is the small business production pool.[84] Here a group of small business concerns is authorized to pool resources and facilities to bid more competitively for defense prime contracts and subcontracts. These specialists combine as either a corporation, partnership or joint venture after approval by the SBA, the Federal Trade Commission and the Department of Justice. This approval is based upon a determination that the pool is in the public interest as contributing to national defense and entitles it to immunity from anti-trust laws and the regular dealer requirements of the Walsh-Healy Act.[85] While production pools have potential, common de-

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[80] ASPR 7-104.22 (4 Jan 1960); ASPR 1-707.3 (4 Jan 1960). The prime contractor is required to establish a program to afford small business an equitable opportunity to compete for subcontracts within their capabilities. The program is supervised by a small business liaison officer, and subcontract solicitations, specifications and quantities must be arranged to facilitate small business participation. Specified records must be kept. The prime is urged to establish this program where prime contracts do not exceed $1,000,000 if substantial subcontracting opportunities are available. Previously, this program was not mandatory. See ASPR 1-707 (18 Sep 1958).

[81] See ASPR 3-902(c)(iv) (1 Oct 1959) (make or buy program); ASPR 3-903.3(a)(iv) (1 Oct 1959) (purchasing system).

[82] A failure to establish the small business program could be considered a failure to perform "any of the other provisions of this contract" and justify a termination for default. ASPR 8-707(a)(ii) (5 Sep 1958).

[83] ASPR 3-903.4(a)(iv) (1 Oct 1959).

[84] Defense Production Act of 1950, 64 STAT. 818, as amended, 69 STAT. 581 (1955), 50 *U.S.C.* App. § 2158 (1958). For a discussion of pooling and other forms of inter-business cooperation, see Cary, *Thinking Ahead*, 36 HARV. BUS. REV. 139 (1958).

[85] 49 STAT. 2036-2039 (1936), as amended, 56 STAT. 277 (1952), 41 *U.S.C.* §§ 35-45 (1958).

fects have made them singularly unsuccessful in obtaining defense work.[86]

The weapons system concept of procurement tends to reduce the number and increase the size of prime contractors performing defense work.[87] Yet the complexity and volume of work insures that a substantial dollar amount will flow to the economy through subcontracting. The Government's role, therefore, is to encourage maximum subcontracting consistent with efficient performance and to insure that procurement dollars are channeled to capable small business concerns. At the same time, the Government strives to build up productive capacity in the interest of effective competition for subcontracts. The success of these efforts is limited in part by the complex and fluctuating requirements of national defense. In addition, the Government is extending its interest to an area of business responsibility normally reserved to the prime contractor.

V. WORKING CAPITAL THROUGH FINANCIAL ASSISTANCE

A contractor is responsible for obtaining adequate working capital to successfully perform Government contracts.[88] Normally this is secured from internal operations, retained earnings or private lending institutions.[89] In the interest of national defense and efficient, timely performance, however, the Government pro-

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[86] Decisional lines are confused, costs and prices are out of line, substandard quality exists and the pool is not prepared to back products. See *REPORT BY THE ATTORNEY GENERAL TO THE PRESIDENT AND CONGRESS* 4–5, 5–9 (1954); *EIGHTH ANNUAL REPORT OF THE ACTIVITIES OF THE JOINT COMMITTEE ON DEFENSE PRODUCTION*, 86th Cong., 1st Sess. 462 (1959); Schilz, *Voluntary Industry Agreements and Their Exemption from the Antitrust Laws*, 40 *VA. L. REV.* 1 (1954). See also *Peoria Consolidated Manufacturers, Inc.*, ASBCA No. 2409, 29 February 1960 (pool default caused by lack of know-how and managerial ability).

[87] Of the more than $22 billion in prime contract awards made by the military services in fiscal year 1959, small business received only 16.6%. Of the more than $2 billion spent on research and development contracts during the first five months of fiscal year 1960, small business received only 2.3%. *TEN-YEAR RECORD OF THE SELECT COMMITTEE ON SMALL BUSINESS UNITED STATES SENATE, 1950–1960*, 86th Cong., 2d Sess. 6 (Comm. Print 1960).

[88] This contractual responsibility stems from the Government's rights under the Default clause for fixed-price supply contracts. ASPR 8–707 (5 Sep 1958). A termination for default is proper if the contractor has failed to perform because of inadequate financing. *Security Signals Co.*, ASBCA No. 4634, 22 December 1958, DA Pam 715–50–42, par. 5. The question then is whether the financial inadequacy was within the control or due to the fault or negligence of the contractor. See *Typo Machine Co.*, ASBCA No. 3214, 13 May 1957; *Paromel Electronics Corp.*, ASBCA No. 4025, 4123, 28 October 1958, DA Pam 715–50–22, par. 4.

[89] See generally, Symposium, *Survey of Current Methods of Corporate Financing*, 14 *BUS. LAW.* 883–924 (1959).

vides various forms of working capital financing to otherwise responsible contractors. One method of assistance previously considered is the small business loan program. Other forms include the policy which favors the assignment of contract receivables as security for private loans and guaranteed loans, progress payments and advance payments under the new Defense Contract Finance Regulations.[90]

A. *Assignment of Receivables*

Generally, a contractor may not assign claims against the United States or interests in Government contracts to third parties.[91] An exception exists, however, where money in excess of $1,000 due or to become due under a Government contract is assigned by the contractor to a bank, trust company or other financial institution, including a federal lending institution, as security for a working capital loan. This enables a contractor to obtain financing on the security of successful contract performance rather than a mortgage on capital assets or inventory. The assignee bank's interest is protected from setoff by the Government of other claims against the assignor contractor arising out of or independently of the contract.[92] If the assignor defaults in performance, however, the Government's claim for the excess costs of repurchase takes precedence over the assignee's rights.[93] The

[90] The new Defense Contract Finance Regulations (DCFR) were issued 25 May 1959 and supersede the joint finance regulations of 17 December 1956, issued as AR 715–6, NAVEXOS P–1006 (NPD 31–001) and AFR 173–133. They are contained in the Armed Services Procurement Regulations, Appendix E.

[91] 65 STAT. 41 (1951), 31 *U.S.C.* §203 (1958) (assignment of claims); 65 STAT. 41 (1951), 41 *U.S.C.* § 15 (1958) (interest in contracts). Claims may be assigned after the amount due has been determined and allowed by the Government. See *United States* v. *Shannon*, 342 U.S. 288, 291–292 (1952) (discusses reasons for prohibition).

[92] Prior to 1951 the Government was permitted to setoff claims for the contractor's failure to perform collateral promises. See 30 Comp, Gen. 98 (1950) (withholding payroll deductions). Since the amendment prohibiting setoffs of independent and dependent claims, the assignee bank is entitled to the full amount of its loan from sums owed by the Government to the assignor for successful performance. See 37 Comp. Gen. 817 (1958); 37 Comp. Gen. 318 (1957). The Government cannot regain possession of money paid to the assignee unless fraud can be proved, *American Fidelity Co.* v. *National City Bank of Evansville*, 266 F.2d 911 (D.C. Cir. 1959), or the payments were improperly made under the contract between the assignor and the Government. *Newark Insurance Co.* v. *United* States, _____ F. Supp. _____ (Ct. Cl. 1960).

[93] *Southside Bank & Trust Co.* v. *United States*, 221 F.2d 813 (7th Cir. 1955); 35 Comp. Gen. 149 (1955); 4 CORBIN, CONTRACTS §§895–97 (1951). An assignee has no more right to contract proceeds than the assignor. If the assignor has failed to perform the contract and is contractually obligated to pay any excess costs in repurchase, the assignee's claim is also subject to this limitation. *Cf. Prairie State Bank* v. *United States*, 164 U.S. 227 (1896); *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947).

Government is obligated to pay contract proceeds to the assignee as either partial payments or progress payments.

In construction contracts the prime contractor must provide a Miller Act payment bond for the benefit of materialmen and suppliers.[94] If required to satisfy the prime contractor's obligation, the bond surety as well as the assignee bank will have an interest in contract proceeds retained by the Government for the prime. The surety's interest arises through subrogation to whatever rights the materialmen and suppliers had against the Government, but is limited by the Government's right to setoff the excess costs of repurchase if the prime contractor is in default.[95] But even if the Government holds contract proceeds as a stakeholder, the surety obtains no legal right to sue the Government by virtue of the Miller Act.[96] On the basis of this analysis, at least one federal court has concluded that the assignee bank has a better right to retained proceeds than the surety.[97] Yet the Government, traditionally, has had an equitable obligation to construction subcontractors because no security lien on construction work for the United States is available.[98] The Court of Claims, therefore, has held that subrogation to the construction subcontractor's equitable right entitles the surety to preference in order of payment over the assignee bank provided that the Government still holds the contract proceeds as a stakeholder.[99]

B. *The Defense Contract Finance Regulations*

The Defense Contract Finance Regulations are applicable to all types of contracts for all types of work, supplies and services entered into by the military departments. Financial assistance includes guaranteed or "V" loans, progress payments and advance payments necessary for both contract performance and termina-

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[94] 49 STAT. 793 (1953), as amended, 61 STAT. 501 (1952), 40 *U.S.C.* §270a (1958).

[95] *United States* v. *Munsey Trust Co.*, 332 U.S.C. 234 (1947).

[96] *Ibid.* The Court recognized that if the surety, under a performance bond, had elected to complete the performance of a defaulting construction contractor, the surety would have first priority to funds retained by the United States.

[97] *American Surety Co.* v. *Hinds*, 260 F.2d 366 (10th Cir. 1958).

[98] See *United States* v. *Ansonia Brass & Copper Co.*, 218 U.S. 452 (1910) (no lien on public construction). The Government's equitable obligation to construction materialmen and suppliers has been noted in the following cases; *United States* v. *Munsey Trust Co.*, 332 U.S. 234 (1947); *Henningsen* v. *United States Fidelity & Guaranty Co.*, 208 U.S. 404 (1907).

[99] See e.g., *National Surety Corp.* v. *United States*, 133 F. Supp. 381 (Ct. Cl. 1955) (equitable preference enforced). *But see American Fidelity Co.* v. *National City Bank of Evansville*, 266 F.2d 911 (D.C. Cir. 1959); *Bank of Arizona* v. *National Surety Corp.*, 237 F.2d 90 (9th Cir. 1956) (equitable preference not enforceable when proceeds not in hands of Government at time of litigation).

tion but not partial payments made when completed items are delivered under the contract. A flexible order of preference is observed. The first preference is private financing at reasonable rates. If this is unavailable, the Government will consider the availability of customary progress payments, guaranteed loans, unusual progress payments and advance payments in that order.

1. *Guaranteed loans*

If a commercial lending institution is unwilling to provide working capital on the security of the contractor's credit or an assignment of receivables, the Government may be willing, for a fee, to guarantee the loan under section 301(a) of the Defense Production Act of 1950.[100] A commercial bank which requires a guarantee may apply to the district Federal Reserve Bank. The Federal Reserve Bank, or fiscal agent, makes a preliminary credit examination and forwards the application to the interested guaranteeing agency.[101] If the loan will provide working capital for an essential defense contractor[102] and no other sources of financing are available,[103] the guaranteeing agent issues a certificate of eligibility to the fiscal agent. The fiscal agent executes a guarantee contract with the commercial lending institution which then disburses funds to the contractor and administers the loan agreement. Under the guarantee contract, the guaranteeing agency is obligated upon demand of the lender to purchase a stated percentage of the loan and to share losses in the amount of the guaranteed percentage. This percentage normally will not exceed 90% of the borrower's investment in defense production contracts but

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[100] 64 STAT. 800, as amended, 67 STAT. 129 (1953), 50 *U.S.C.* App. §2091 (1958). See *EXEC. ORDER* No. 10480, 18 *FED. REG.* 4939 (1953). Implementing regulations are contained in DCFR §§101, 102 & Part 3 (25 May 1959). The Defense Production Act expires on 30 June 1960. 72 *STAT.* 241 (1958), 50 *U.S.C.* App. §2166(a) (1958).

[101] Authorized guaranteeing agencies are the departments of the Army, Navy, Air Force, Agriculture, Commerce and Interior and the General Services Administration and Atomic Energy Commission. If more than one agency is interested in a group of prime or subcontracts being financed, the agency with the preponderance of interest on the basis of dollar amount of the prospective borrower's unfilled and unpaid balances is the responsible agency. DCFR §306 (25 May 1959).

[102] While guaranteed loans are limited to working capital purposes, DCFR §208 (25 May 1959), the Defense Production Act of 1950 contains authority for facilities expansion and capital improvement loans. See *supra* p. 123. In both cases, however, the loan must serve a program for military and atomic energy production or construction, military assistance to any foreign nation, stockpiling or directly related activities.

[103] The ready, available source requirement does not apply to small business concerns. DCFR §314 (25 May 1959).

may reach 100% in exceptional cases.[104] Both the maximum amount of guaranteed credit and the loan's maturity date should reasonably conform to the contractor's financing requirements for defense contracts on hand at the time of application. One guaranteed loan may serve several contractors performing contracts with different guaranteeing agencies. As security in the event that the guarantee is called, the Government requires an assignment of receivables from the contractor and, where essential, a mortgage of fixed assets.

2. *Progress payments based on costs*

Progress payments are payments made to fixed-price contractors as work progresses and are based either on total costs incurred or a specified percentage or stage of completion.[105] The Defense Contract Finance Regulations apply only to progress payments based upon costs. Progress payments are not available unless a period of six months or more exists between the contract date and first scheduled delivery and the contractor's working capital will be materially impaired by high predelivery expenses. If the contractor agrees to payments not to exceed 70% of total costs incurred or 85% of direct labor and material costs,[106] customary progress payments will be made to responsible contractors without regard to need or the availability of private financing. If the contractor requires higher percentages, unusual progress payments are involved and must be specifically approved by the head of the procuring authority. In addition to the basic requirements

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[104] The asset formula upon which the guarantee percentage is based includes all items for which the borrower would be entitled to payment on performance or termination of defense contracts, but not amounts to become due as the result of later performance or cash collateral or bank deposits. DCFR §308 (25 May 1959). The Government guarantees either 90% or less or 100% of the contractor's investment as determined by the asset formula. This formula may be relaxed for limited periods when the contractor's credit and working capital are inadequate. For the practical application of this formula, see Cary, *Government Financing of Essential Contractors: The Reorganization of the Glen L. Martin Company*, 66 HARV. L. REV. 834 (1953).

[105] Advances of public money are prohibited unless authorized by the appropriation concerned or other law. 31 *U.S.C.* 529 (1958). The Armed Services Procurement Act of 1947, 10 *U.S.C.* §2307 (1958), authorizes the head of any agency to make "advance, partial, progress or other payments under contracts for property or services made by the agency" provided that such payments do not exceed the unpaid contract price, are adequately secured and in the public interest. Implementing regulations are contained in DCFR §§104, 105 & Part 5 (25 May 1960). For progress payment clauses, see DCFR §510 (25 May 1959). See also, Whelan, *Government Supply Contracts: Progress Payments Based on Costs; The New Defense Regulations*, 26 FORDHAM L. REV. 224 (1957).

[106] Customary progress payment percentages for small business concerns are increased to 75 and 90 respectively. DCFR §504.2 (25 May 1959). Progress payments may also be exclusively reserved for small business concerns. 10 *U.S.C.* §2307(a)(2) (1958); DCFR 504.3 (25 May 1959).

for customary progress payments, the contractor must show an actual need for financing which cannot be satisfied from commercial sources. The exact percentage paid is limited by actual need or the contract price, whichever is lower.

Progress payments are self liquidating. The Government adjusts the contract price due when deliveries are made by deducting the amount of unliquidated progress payments or 70% of the gross amount invoiced, whichever is less. As security for unliquidated payments, the Government takes title to all materials, inventory, work in progress, tools and data which are acquired by the contractor for contract performance.[107] No interest is charged nor is a separate consideration required.[108] Progress payments may also be made to subcontractors through the prime contractor.[109]

3. *Advance payments*

Advance payments are advances of money made by the Government to a contractor prior to, in anticipation of and for the purpose of completing contract performance[110] and may supplement progress payments. Since the Government is actually making direct loans of public funds without regard to contract progress or costs incurred, advance payments are the least preferred form of financial assistance. Accordingly, except for experimental and research and development contracts with non-profit concerns and contracts solely for the management and operation of Government owned facilities, the contractor must show an actual need for financing which cannot be satisfied from other commercial or Governmental sources. The contractor must also pay interest at the rate of 5% per annum on the unliquidated balance and is

[107] DCFR §§510.1(b), 512 (25 May 1959). Progress payment property is not Government property for the purposes of ASPR Section 13. See *supra* note 51; ASPR 13-101.2 (3 Nov 1958). Title in this context apparently is a security device to protect the Government in the event of bankruptcy. See *American Boiler Works, Inc.* v. *Schlesinger*, 220 F.2d 319 (3d Cir. 1955). While the contractor retains the risk of loss, the Government's interest in progress payment property was assumed to be adequate to support an assertion of federal immunity from state and local taxation. See *Detroit* v. *Murray Corporation of America*, 355 U.S. 489 (1958) (tax validated on other grounds). For a critical analysis, see Whelan, *Government Contract Privileges: A Fertile Ground for State Taxation*, 44 VA. L. REV. 1009, 1107 (1958).

[108] Separate consideration is required if the contract is amended to provide for or increase progress payments. DCFR §527 (25 May 1959). See *United States* v. *Lennox Metal Co.*, 225 F.2d 303 (2d Cir. 1955) (1% reduction in contract price is adequate consideration).

[109] DCFR §§510.3, 513 (1 Apr 1960). Prime contractors are required to provide progress payments to small business subcontractors. An option exists with larger subcontractors.

[110] The statutory authority for both advance and progress payments is derived from the same source. See *supra* note 105. Implementing regulations are contained in DCFR §§103, 104 & Part 4 (25 May 1959).

subjected to greater fiscal control than in other forms of assistance. Advance payments are deposited in special bank accounts, withdrawals from which are supervised and approved by the Government to the extent of actual need. The Government's interest is secured by a lien on either the supplies contracted for, the credit balance in the special account or the property acquired for contract performance. An advance payment bond may also be required.[111] Adequate security is the combination of devices which at the minimum protects the Government's interest. As with progress payments, advance payments are self liquidating.

Advance payments are designed for use in particular situations, such as non-profit research and development contracts and contracts for the operation of Government owned facilities. Other approved situations are where the contractor acquires facilities at cost for the Government, the contractor is essential but has become financially overextended and needs close supervision, the terms of private lending are unreasonable or in exceptional cases where their utilization would be more beneficial than other available means. Advance payments may also be pooled to serve more than one approved contract and made to prime contractors for advances to subcontractors.

4. *Concluding remarks*

Adequate working capital is the life blood of satisfactory contract performance and is essential to defense production. It is logical, therefore, that the Government should provide continuing assistance where commercial financing is unavailable or unexpected difficulties arise.[112] The Defense Contract Finance Regulations present a scheme of financial assistance which can be adapted to meet emergencies or changed conditions. This approach is sound, but in the final analysis depends upon prompt, coordinated action by interested Government agencies.

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[111] See ASPR 10-105 (3 Nov 1958).

[112] The lengths to which the Government will go to save performance where the contractor's finances are shaky or bankruptcy is imminent are illustrated by *Coy C. Goodrich*, ASBCA Nos. 2760, 2761, 11 February 1958, and *Security Signals Inc.*, ASBCA No. 4634, 22 December 1958, DA Pam 715-50-42, par. 5. Every available method of financial assistance was considered before the contractor was terminated for default. See also, Cary, *Government Financing of Essential Contractors: The Reorganization of the Glen L. Martin Co.*, 66 HARV. L. REV. 834 (1953). In limited situations, extraordinary financial relief may be provided to essential defense contractors. See 72 STAT. 972, 50 *U.S.C.* §§ 1431-1435 (1958), EXEC. ORDER No. 10789, 23 FED. REG. 8897 (1958) (amending Title II of First War Powers Act). The relief involves amending contracts without regard to the Government's interest to provide additional advance payments, or increase the contract price.

VI. CONCLUSION: THE PURPOSE AND LIMITATIONS OF GOVERNMENT ASSISTANCE

Government assistance facilitates defense procurement by attracting a broader base of capable producers, fostering the growth of industrial capacity and financing contract performance. Despite this, only a limited number of producers are effectively competing for defense prime contracts and subcontracts. Several factors contribute to this trend toward concentration. Military requirements are complex, voluminous, expensive and subject to rapid obsolesence. Many potential contractors are unwilling to assume the risk of defense work, or if willing, lack the capacity to perform. The emphasis on specialization and expensive research and development also reduces the number of small producers who can effectively compete for subcontracts. Finally, the time factor in weapons development has precipitated the weapons system concept of procurement to keep pace with advancing technology and a potential enemy. Again, the result is great responsibility concentrated with a few prime contractors.

While the Government assistance program is essential to defense procurement, it is not designed to effectively combat concentration. Most forms of assistance are temporary supplements to a contractor's existing productive capacity given in the interest of economical and efficient performance. Except for the small business program and the temporary Defense Production Act of 1950, assistance is available only in conjunction with specific defense contracts to responsible contractors. Little effort is made to build up potential contractor's productive capacity. Assistance is given to those prime contractors and subcontractors who already possess sufficient capacity to submit a competitive proposal. This result cannot be criticized if the goals of defense procurement are achieved and capable producers are given an equitable opportunity to compete. While Government contracts are instruments by which political and social policies collateral to performance may be implemented, a line of demarcation must be drawn. The theory of free enterprise does not obligate the Government to aid every producer who desires to share a part of the defense dollar. Rather, the Government's responsibility to free enterprise and national defense would seem to be fulfilled if quality products are obtained in a minimum of time at a reasonable price through a full utilization of assistance techniques.

PRESENTENCING PROCEDURE IN COURTS-MARTIAL*

BY MAJOR WILLIAM J. CHILCOAT**

I. INTRODUCTION

"[He] . . . shall be punished as a court-martial may direct."[1] Despite the apparent *carte blanche* given a court-martial by Congress, actually a convicted soldier stands before such a court cloaked with many protections, privileges, and immunities. Of direct importance to him is the presentencing portion of the court-martial. For the accused it is his opportunity to have a sentence set by a court *vis a vis* which may never be increased. For the Government it is an adversary proceeding in which it must insure an adequate sentence well knowing that if not done, such failure can never be corrected.

Under earlier codes, the convening authority was permitted to return the case to the court-martial for reassessment of the sentence. In *Swaim* v. *United States*,[2] the case was twice returned to the court which had been convened by the President of the United States for reassessment of the sentence accompanied by instructions of the Attorney General to increase the punishment.

Winthrop,[3] in his *Military Law and Precedents*, states that the court may not "trench" upon the mitigating authority of the commander and that it does so when, because of the previous good record of the accused, or other extenuating circumstances foreign to the merits, it is induced to adjudge a mild sentence quite out of proportion to the gravity of the offense. The present code strictly forbids the return of the record for increasing the severity of the sentence.[4] The Manual provides that the court-martial will

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* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Seventh Advanced Class. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School nor any other governmental agency.

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[1] Arts. 78–134, UCMJ. With few exceptions, this phrase appears at the close of each Article of the Uniform Code of Military Justice which defines an offense.

[2] 165 U.S. 553 (1897); *accord*, *Ex parte* Reed, 100 *U.S.* 13 (1879).

[3] Winthrop, Military Law and Precedents 402 (2d ed., 1920 reprint).

[4] Art. 62(b)(3), UCMJ. *But cf.* U.S. v. Robinson, 4 USCMA 12, 15 CMR 12 (1954). The court may "re-announce" a sentence if an error was made in the announcement and such re-announcement is the sentence actually adjudged by the court.

consider matter in mitigation and extenuation and will not adjudge a sentence they believe excessive in reliance upon the mitigating action of the convening or higher authority.[5] If it appears that they have done so, a rehearing on the sentence is necessary.[6]

II. INFORMATION TO BE PRESENTED BY THE PROSECUTION

After conviction and findings are announced, the Government is permitted to present certain data from the first page of the charge sheet. This includes the accused's age, pay, service, and the duration and nature of any restraint imposed prior to trial. Even though this is a minimal amount of information, much can be deduced from it to aid sentencing. The accused's age standing alone generally signifies little according to jurists;[7] but coupled with his past criminal record it means much. The first offender at any age is deemed a better risk for rehabilitation than one with a previous pattern of criminal activity. The older first offender is more likely to return to his law-abiding ways than a youthful offender whose previous convictions indicate that past efforts at punishment have been to no avail and more stringent action is called for. The pay data concerning an accused reveals to the military court member whether others are dependent upon him, which, depending on the offenses of which he has been found guilty, may aggravate or mitigate them. His prior service and sometimes the dates and units in which he served will, to the experienced court member, reveal combat service. The fact as to whether he has or has not been placed in confinement awaiting trial will indicate the degree of trust which his unit commander places in him.

A. *Previous Convictions*

After this personal data has been presented to the court, the trial counsel will then present evidence of previous convictions by courts-martial.[8] Previous convictions which are admissible are not limited to offenses similar to the one or ones of which the accused stands convicted. They must relate to offenses committed during a "current enlistment, voluntary extension of enlistment,

[5] Par. 76, MCM, 1951.

[6] U.S. v. Kaylor, 10 USCMA 139, 27 CMR 213 (1959).

[7] National Probation and Parole Association, Guides for Sentencing 37 (1957).

[8] Par. 75*b*, MCM, 1951. The defense counsel should ascertain prior to the proffer of previous convictions by trial counsel whether he has any objections thereto in order to request a sidebar hearing to prevent possible prejudice to his accused arising from the announcement of the proffer in open court.

appointment, or other engagement or obligation for service of the accused, and during the three years next preceding the commission of any offense of which the accused stands convicted."[9] Proof of two or more previous convictions permits an increase of the maximum punishment, if not otherwise authorized, to include a bad conduct discharge and confinement and forfeiture of all pay and allowances not to exceed three months[10] or any part thereof.[11]

By executive order, in September 1954, the maximum permissible punishment was increased to include dishonorable discharge, forfeiture of all pay and allowances and confinement for one year upon the proof of three or more previous convictions during the year next preceding the commission of an offense of which the accused was convicted.[12] As it appears that the purpose of introducing previous convictions is to form the basis for increasing the authorized punishment, it could be asked what is their relevancy if only one is introduced or if the punishment already authorized exceeds that authorized by virtue of them? The first answer would be that the Manual specifically requires the prosecution to introduce "evidence of *any* previous convictions of the accused by courts-martial."[13] Secondly, in matters concerning sentence prior misconduct is recognized as relevant in determining its severity. No longer is there a fear of a wrongful conviction based on an inference from prior acts of misconduct that the accused did the act charged.[14] Further, the accused is protected in the court-martial sentencing procedure from having to defend against all the misdeeds of his life by limiting convictions which can be considered to those which have been finally and *judicially* determined.[15] Any objection to remoteness is countered by the three-year limitation.

In *United States* v. *Carter*,[16] it was early decided that "proof" of the previous convictions required legal and competent evidence. The Court of Military Appeals reversed eight cases[17] where the

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[9] *Ibid.*

[10] Section B, Ch. 25, MCM, 1951.

[11] U.S. v. Prescott, 2 USCMA 122, 6 CMR 122 (1952).

[12] Exec. Order No. 10565, Fed. Reg. 6299 (1954); par. 127*c* MCM (U.S. Army Supp. 1956).

[13] Par. 75*b* (2), MCM, 1951.

[14] ACM 5811, Flanagan, 7 CMR 751 (1953); language on this point quoted with approval, U.S. v. Blau, 5 USCMA 232, 243, 17 CMR 232, 243 (1954).

[15] Par. 75*b* (2), MCM, 1951.

[16] 1 USCMA 108, 2 CMR 14 (1952).

[17] *Id.*; U.S. v. Trimiar, 1 USCMA 262, 2 CMR 69 (1952); U.S. v. Schahel, 1 USCMA 275, 3 CMR 9 (1952); U.S. v. Hand, 1 USCMA 301, 3 CMR 35 (1952); U.S. v. Pruchniewski, 1 USCMA 328, 3 CMR 62 (1952); U.S. v. Deweese, 1 USCMA 400, 3 CMR 134 (1952); U.S. v. Townsend, 1 USCMA 441, 4 CMR 33 (1952).

trial counsel read from a document reciting the convictions in accordance with the trial guide procedure of the Manual.[18] Even in a case where there was "no objection" by the defense counsel to the hearsay evidence of previous convictions and where the sentence imposed could have been adjudged in the absence of such convictions, the Court refused to apply a doctrine of waiver or harmless error.[19] But where the trial counsel read from the service record of the accused which had been marked and identified as "Prosecution Exhibit I," although neither offered nor received in evidence but was attached to the record, the Court relaxed the standard of proof required in the *Carter* case and concluded that even though the document was not in fact admitted in evidence ". . . its contents reached the court through the considered and thoughtful action of defense counsel in waiving technical and definitive proffer on the part of the Government."[20] Another minimal standard for "proof" of previous convictions was set by the Court of Military Appeals in *United States* v. *Lowry*,[21] where the trial counsel who had earlier been sworn as a witness and was the custodian of the accused's records recited the previous convictions from a "memorandum"; such was held to be competent evidence in the absence of objection. This procedure did not receive the blessing of the Court and it recommended that prior convictions be established by introduction in evidence of competent documentary proof.[22]

Before a previous conviction is admissible, it must be final in the sense of Article 44(*b*), Uniform Code of Military Justice, which provides:

> No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.

In cases where the accused may petition the Court of Military Appeals, a conviction is not final until the time for such petition has expired.[23] The Court of Military Appeals early adopted the civilian rule that a *prima facie* showing of finality was made by proof of the order promulgating the result of trial and ordering the sentence executed.[24] When the time interval between the

[18] App. 8a, MCM, 1951.
[19] U.S. v. Zimmerman, 1 USCMA 160, 2 CMR 60 (1952).
[20] U.S. v. Walker, 1 USCMA 580, 583, 5 CMR 8, 11 (1952).
[21] 2 USCMA 315, 8 CMR 115 (1953).
[22] See also U.S. v. Castillo, 1 USCMA 352, 3 CMR 86 (1952).
[23] ACM 5243, Drummond, 5 CMR 400 (1952). Even though the accused waives his right to petition and requests "final" action in his case and such "final" action is not taken, the time for petition must expire before the conviction is admissible. See ACM 5197, Dorce, 5 CMR 766 (1952).
[24] U.S. v. Tiedemann, 1 USCMA 595, 5 CMR 23 (1952).

order promulgating the prior conviction and the subsequent trial "shows the improbability of a final conviction" this, in and of itself, overcomes the *prima facie* showing of finality.[25] Also it is equally true when the order promulgating the results of trial fails to order the sentence executed.[26] The *prima facie* showing is also rebutted by the exhibit itself if it has a blank space requiring an entry when final review is complete and such entry has not been made.[27]

Paragraph 75*b*(2) of the Manual for Courts-Martial provides:

> The evidence [of previous convictions] must . . . relate to offenses *committed* . . . during the three years next *preceding* the commission of *any* offense of which the accused stands convicted. (Emphasis supplied.)

This provision pertains to the initial admissibility of previous convictions.

When interpreted in connection with paragraph 127*c* of the Manual permitting additional punishment, the necessary timing of the previous convictions has led to difficulty. The Army Boards of Review have ruled on the admissibility of previous convictions under paragraph 75 of the Manual and require only that the commission of the offense which forms the basis of the prior conviction precede in time the commission of the subsequent offense.[28] The Air Force Boards of Review interpret paragraph 127*c* permitting additional punishment to be likeunto a "chronic or habitual" offender statute. By looking to civilian cases interpreting such statutes, the Air Force Board concludes that in order for the previous convictions to authorize additional punishment the offense must be followed by a conviction which *must* precede the commission of the next offense. Thus, they reason, the punishment affords an opportunity for rehabilitation and reformation and unless this opportunity is exercised before an accused commits a second offense the purpose of the provision is circumvented.[29] The Board ruled, however, that even though the conviction did not precede the second offense, it was admissible in evidence in accordance with paragraph 75*b*(2),[30] and if otherwise admissible could be considered by the court in adjudging a sentence within the maximum provided for the offense for which he was found guilty though not capable of supporting additional punishment.

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[25] U.S. v. Anderson, 2 USCMA 606, 10 CMR 104 (1953); see also U.S. v. Reed, 2 USCMA 622, 10 CMR 120 (1953).

[26] Dorce, *supra* note 23.

[27] U.S. v. Engle, 3 USCMA 41, 11 CMR 41 (1953); U.S. v. Pope, 5 USCMA 29, 17 CMR 29 (1955).

[28] CM 350963, Brody, 5 CMR 264 (1952); *accord*, U.S. v. Geib, 9 USCMA 392, 26 CMR 172 (1958).

[29] ACM-S-2859, O'Shana, 6 CMR 816 (1952); followed, ACM S-6725, Henson and Lavinder, 11 CMR 832 (1953); ACM S-7370, Faulkner, 13 CMR 929 (1953).

[30] MCM, 1951.

The divergent views on timing of the offense and conviction thereof in order to authorize additional punishment has not been presented to the Court of Military Appeals. The Court *has* decided that the Manual provision permitting additional punishments upon the proof of previous convictions was not the equivalent of an habitual criminal statute and thereby was not an illegal delegation of legislative authority.[81]

Thus, one basis for the rationale in the Air Force cases has disappeared.

A further criticism of the Air Force view is that it requires the Armed Forces to become a rehabilitation agency rather than eliminating the adjudged chronic offender so that the military may proceed, unhampered, with their primary mission. It would appear that the requirement that previous conviction be final at the time presented to the court without regard to its time of commission or conviction serves adequately to protect an accused and would not place a premium on his ability to avoid detection. Where, however, known offenses are tried in two separate trials, they should not, under authority of the pertinent Executive Order, be permitted to form the basis for additional punishment.[82]

The Executive Order of 1954[83] permits additional punishment upon ". . . proof of three or more previous *convictions* during the year next preceding the *commission* of any offense . . ." of which convicted. This requires all three *convictions* to precede the *commission* of the offense and is likeunto the view followed by the Air Force Boards, and has been so interpreted.[84]

A previous conviction will be admissible even though the offenses to which it relates occurred subsequent to some of the offenses of which the accused was found guilty, provided, it is prior to any *one* of the offenses of which he is found guilty.[85]

B. *Matter in Aggravation if Guilty Plea*

Where the accused has pleaded guilty and thereby eliminated the necessity for the presentation of evidence on the merits, the

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[81] U.S. v. Prescott, 2 USCMA 122, 6 CMR 122 (1952). See U.S. v. Geib, 9 USCMA 392, 26 CMR 172 (1958). The Court specifically reserved the question on whether evidence of previous convictions could support additional punishment under the provision of par. 127*c*, MCM.

[82] ACM S–2159, Stockpole, 3 CMR 529 (1952). See also par. 25 (prescribing the saving up of charges) and 33*h*, MCM, 1951, (providing that charges against the accused should be tried at a single trial).

[83] No. 10565, 19 Fed. Reg. 6299 (1954); par. 127*c*, MCM (U.S. Army Supp. 1956). (Emphasis added.)

[84] CM 383134, Eckert, 19 CMR 434 (1955).

[85] U.S. v. Geib, 9 USCMA 392, 26 CMR 172 (1958). See U.S. v. Green, 9 USCMA 585, 26 CMR 315 (1958). If the previous conviction offense is not prior to all the offenses of which the accused is convicted, an instruction may be required.

Government, in the presentencing procedure, may present "evidence" of any "aggravating circumstances."[36] These "circumstances" have been limited to include only those matters which would have been admissible on the merits of the case and do not include acts of misconduct, reputation, or character.[37]

C. *Other Acts of Misconduct*

The question as to whether acts of misconduct or other offenses which were properly admissible on the merits of the case can be considered by the court on the sentence has not been decided by the Court of Military Appeals. At least one state jurisdiction has decided not.[38] In *Commonwealth* v. *Turner*,[39] the Pennsylvania court was faced with this problem in a murder case where on the merits "no coherent narrative" could be told of the killing without mentioning a second killing by the defendant occurring at the same time. The trial judge refused to instruct the jury that they could not consider this second killing of which they were fully aware in adjudging their sentence. On appeal this was held error. This view appears rather artificial and technical. If by necessity, in proving beyond a reasonable doubt that the defendant committed the crime charged, it is permissible and proper under recognized rules of evidence to place before the jury other misdeeds of the accused which they may consider in determining his guilt, why should they be asked to ignore them in adjudging a sentence? At least on the merits other misdeeds of the accused interwoven with the offense charged do not have to be shunned in argument even though they cast the accused in an unfavorable light.[40] The Court of Military Appeals has recognized, however, that, upon disapproval by a Board of Review of several specifications, a rehearing is required on the sentence as to the remaining specifications to remove prejudice arising from the consideration of what the trial court thought to be offenses in adjudging the sentence.[41]

Also, the Court has held that the Government must avoid the

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[36] Par. 75*b* (3), MCM, 1951.

[37] ACM S–11927, Billingsley, 20 CMR 917 (1955); CGCMS 30240, Allen, 21 CMR 609 (1956); see also Op. GCT, CGCMS 19241, Turner, 20 Dec 1951 (1 Dig. Ops., Sent and Pun § 3.9), ("aggravating circumstances" clearly means circumstances relative to the specific offense charged, not some other disassociated circumstances). For a comprehensive discussion of "aggravating circumstances" which may be presented on Guilty Pleas, see Bethany, The Guilty Plea Program (1959), a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

[38] Commonwealth v. Turner, 371 Pa. 417, 88 A.2d 915 (1952).

[39] *Ibid.*

[40] U.S. v. Day, 2 USCMA 416, 9 CMR 46 (1953).

[41] U.S. v. Voorhees, 4 USCMA 509, 16 CMR 83 (1954); but *cf.* U.S. v. Stene, 7 USCMA 277, 22 CMR 67 (1956).

reference to other offenses in its proof of the offense[42] unless they are relevant in showing knowledge, intent, or design,[43] and then upon request, the accused is entitled to instructions limiting their use by the jury.[44]

The purpose of limiting the use of prior acts of misconduct on the question of guilt has as its basis: (a) the involvement of collateral issues; (b) the fear that the court might find that the accused had an evil disposition, or criminal propensity and then infer from that that he committed the acts charged.[45] Although the question of whether the Manual in prescribing what offenses may be considered in setting a sentence by implication prohibits the court-martial from considering other acts of misconduct which have been presented to them for other purposes is unanswered, it has been shown in the chapter on Punishment that the fact of an evil disposition is a *relevant* and *material* matter in setting sentence. It is submitted, therefore, that other acts of misconduct no longer remain a *collateral* issue and thereby *both* evidentiary considerations for prohibiting their consideration at sentence time no longer remain.

III. INFORMATION WHICH MAY BE PRESENTED BY DEFENSE

After the Government has presented the meager information permitted, the accused is offered the opportunity to present "evidence" in mitigation or extenuation of the offenses of which he stands convicted or he may testify under oath as to such matters or remain silent. Also in addition he may make an unsworn statement upon which he may not be cross-examined, with the understanding that the prosecution may offer "evidence" to rebut it. The unsworn statement may be made by the accused or his counsel or both of them.[46]

The Manual provides:

> With respect to matter in extenuation and mitigation offered by the defense, the court may relax the rules of evidence to the extent of receiving affidavits, certificates of military and civil officers, and other writings of similar apparent authenticity and reliability.[47]

A. *A Right*

The right of an accused to present matters in extenuation and mitigation has been held to be an integral part of military due process, and the denial of such right is prejudicial to his sub-

[42] U.S. v. Yerger, 1 USCMA 288, 3 CMR 22 (1952).
[43] U.S. v. Jones, 2 USCMA 80, 6 CMR 80 (1952).
[44] U.S. v. Hamison, 5 USCMA 208, 17 CMR 208 (1954).
[45] *Ibid.*
[46] Par. 75*c*, App. 8*a*, MCM, 1951.
[47] *Id.* at par. 75*c*(1).

stantial rights.[48] Further, any matter he presents can neither be considered by a reviewing authority to determine the legal sufficiency of the findings of guilt[49] nor used at a rehearing against him.[50] There is no logical, evidentiary rule for the latter exclusion, but it may be said to be based on the desire of the framers of the Manual provision to encourage the accused to present whatever information to the court to enable it to set an appropriate sentence and retain inviolate his right not to be a witness against himself as to his guilt or innocence.

This indicates the separateness of the sentencing procedure from the trial on guilt or innocence where other considerations are paramount. The accused is foreclosed from attacking the findings in the presentencing procedure by labeling his testimony or evidence as mitigation.[51] He may, however, present evidence of circumstances surrounding the offense which would tend to minimize his degree of criminality.[52] These matters may be presented by direct or circumstantial [53] evidence or by his unsworn statement.[54] The test of their admissibility is materiality and relevancy in tending to reduce the punishment which may be adjudged.[55]

B. *Defense Counsel's Duty*

The selection of what these matters will be is left entirely to the accused and his counsel,[56] but a failure of his counsel to do so can under some circumstance amount to inadequate representation;[57] however, it will not be so considered if the court can determine from the whole record that the choice of silence was not unwise and it is within the "realm of reason to conclude that had the whole area of extenuation and mitigation been opened up, a more severe sentence would have been imposed."[58] But the mere fact that an agreement has been made with the convening authority for what appears to be a light sentence does not relieve the

[48] CM 390869, Callahan, 22 CMR 443 (1956).
[49] Par. 75*a*, MCM, 1951.
[50] CM 389689, Riggs, 22 CMR 598 (1956).
[51] U.S. v. Tobita, 3 USCMA 267, 12 CMR 23 (1953).
[52] ACM S–11208, Allen, 20 CMR 676 (1958).
[53] *Ibid.*
[54] U.S. v. Wright, 6 USCMA 186, 19 CMR 312 (1955).
[55] Allen, *supra* note 54; U.S. v. Blau, 5 USCMA 232, 17 CMR 232 (1954); Winthrop, *op. cit. supra* note 3, at 351.
[56] JAGN 1951/31, 10 Sep 1951 (1 Dig. Ops., Sent & Pun, § 3.11).
[57] U.S. v. Allen, 8 USCMA 504, 25 CMR 8 (1957); U.S. v. Ormell, 8 USCMA 513, 25 CMR 17 (1957); U.S. v. McFarlane, 8 USCMA 96, 23 CMR 320 (1957).
[58] U.S. v. Williams, 8 USCMA 552, 25 CMR 57 (1957); *accord*, U.S. v. Friborg, 8 USCMA 515, 25 CMR 19 (1957), U.S. v. Sarlonis, 9 USCMA 148, 25 CMR 410 (1958).

defense counsel of his substantial duty to the accused of appealing to the conscience of the court on the sentence.[59]

The defense counsel who decides not to present matters in mitigation or extenuation should be prepared to justify his decision if it is attacked by appellate defense counsel, being ever mindful that even in the most depraved there is some good.

C. *Extenuation and Mitigation*

What is mitigating and what is extenuating? The Manual defines matter in extenuation of an offense as:

> . . . [that which] serves to explain the circumstances surrounding the commission of the offense, including the reasons that actuated the accused but not extending to a legal justification.[60]

Matter in extenuation of an offense is more closely associated with the offense itself and is the opposite of matter in aggravation. Matter in extenuation could more likely be those matters which would be properly admissible on the merits of the case while those in mitigation involve in many instances issues collateral to the offense.

The Manual states that matter in mitigation has for its purposes the lessening of the punishment to be assigned by the court or the furnishing of grounds for a recommendation for clemency.[61] No real legal significance can be attached to this dichotomy unless it can be said that the prosecution is permitted to present matter in aggravation—the opposite to extenuation—while proving the guilt of the accused—but is prohibited to interject non-mitigating factors because of the danger of litigating collateral matters and the fear of prejudice to the accused during the trial on the merits.

The Manual permits the accused to show specific acts of good conduct in mitigation, and the Court of Military Appeals has ruled that if the accused elects to utilize this method of attempting to reduce his punishment, then the door is open to the Government to show specific acts of misconduct.[62]

The language of the unanimous decision on this point is particularly significant because it indicates the court's attitude toward the relaxation of the rules of evidence in the presentencing procedure in favor of the prosecution. After setting forth the basis of the rule of exclusion of specific acts of misconduct or good conduct on the issue of guilt and noting that the rules of evidence were relaxed after findings for the Government, as well as the

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[59] U.S. v. Walker, 8 USCMA 647, 25 CMR 151 (1958), and cases cited note 59 *supra*.

[60] Par. 75*c*(3), MCM, 1951.

[61] *Id.* at par 75*c*(4).

[62] U.S. v. Blau, 5 USCMA 232, 17 CMR 232 (1954).

accused, by permitting it to introduce certain previous convictions, it said:

> . . . Manifestly, the leniency accorded both parties in the presentation of evidence *after verdict* was intended to permit the court-martial to take into consideration all information, which is relevant and reasonably reliable, as an aid in fixing an appropriate sentence. Although heavier restrictions *are* in certain instances imposed on the government in presenting evidence prior to verdict, we find nothing on which to base a belief that its personnel should labor under a like restraint after an accused has been found guilty. . . . Certainly such a practice would not be as conducive to furthering the policy of presenting as full a factual picture as possible to the court-martial to assist its members in imposing a sentence.[63]

Though this appears to be quite a concession to the Government on the relaxation of the "rules of evidence," upon close examination it will be noted that the evidence of prior misconduct was relevant and competent on the issue of punishment. The Court is merely refusing to apply an exclusionary rule to material and relevant evidence because the basis for the exclusion no longer exists after guilt has been judicially established.

This case has a two-pronged effect. It should be a warning to the defense counsel in mapping his course for the presentation of presentence material, as well as an imposition of a duty on the trial counsel to marshall whatever evidence is available to rebut specific acts of good conduct.

Under present court-martial sentencing procedure, until the defendant takes the initiative, the prosecution's hands are tied in presenting non-mitigating matter unless specifically authorized by the Manual. The defense on the other hand has distinct advantages in limiting the matter which can be presented and thereby attempt to picture his client as a person deserving a minimum sentence. He can present documents, letters, fitness reports, affidavits,[64] and an unsworn statement by counsel learned in the fine art of advocacy. It appears that his only limitation is the discretion of the law officer. In one case,[65] the law officer denied the accused the right to introduce three documents which were true copies of commendations he had received. The Board held that the law officer did not abuse his discretion because the commendations were cumulative of the evidence already before the court. In another case, the Court of Military Appeals has further upheld the law officer's discretion when he denied a continuance for a

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[63] *Id.* at 243–44, 17 CMR at 243–44.

[64] U.S. v. Rinehart, 8 USCMA 402, 24 CMR 212 (1957). Forty-six documents which included fitness reports, letters from prominent citizens in various committees and affidavits from commanding officer attesting to the accused's good character were admitted.

[65] CM 366923, Robitaille, 13 CMR 439 (1953).

psychiatric examination because it "could only be cumulative and . . . influence the severity of the sentence."[66]

D. *Other Relevant Matters*

Not only are matters strictly in mitigation and extenuation admissible but the Manual has listed other factors which may be considered by the court in adjudging a sentence.[67] These include penalties adjudged for similar offenses,[68] whether a light sentence would bring the armed forces in disrepute,[69] and whether the offense is recognized as a felony by civil law.[70]

Where the defense attempted to prove sentences adjudged for similar offenses, the law officer was sustained in denying the accused this method to reduce his sentence. The Board, in the case of *Simmons*,[71] pointed out that:

> Evidence of the penalties adjudged in other cases for similar offenses would have little relevance unless the proof were extended to cover sufficient facts to demonstrate that the cases referred to were actually similar to the case at bar.

In *United States* v. *Rinehart* where the members of the court, after some deliberation on the sentence, opened and asked the law officer for information concerning similar sentences in other cases, the Court of Military Appeals sustained the law officer when he refused to furnish such information to the court.[72] Conversely, it seems, Boards of Review use such a yardstick in determining whether a sentence in a particular case is appropriate in law and fact.[73] But at the trial level this is taboo. The reasons advanced for this prohibition are (1) it would involve too many collateral issues; (2) accused should not be sentenced as robots but are entitled to individualized treatment; (3) the difficulty in establishing a case or cases as "similar" because of the many variables not susceptible of proof.[74]

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[66] U.S. v. Nichols, 2 USCMA 27, 35, 6 CMR 27, 35 (1952). *But see* U.S. v. Parker, 6 USCMA 75, 19 CMR 201 (1955); U.S. v. McMahan, 6 USCMA 709, 21 CMR 31 (1956) (defense counsel criticized for failure to ask for *continuance to obtain matter in mitigation*). Also see CGCMS 19286, Dalton, 3 CMR 496 (1952) (refusal to grant continuance to obtain mitigating matter held error).

[67] Par. 76, MCM, 1951.

[68] *Id.* at par. 76*a*(4).

[69] *Id.* at par. 76*a*(5).

[70] *Id.* at par. 76*a*(6).

[71] CM 400786, Simmons, 27 CMR 654 (1959). See also ACM 9515, Dowling, 18 CMR 670 (1954).

[72] 8 USCMA 402, 24 CMR (1957).

[73] ACM 14606, Herron, 25 CMR 888 (1958) (Board considered what co-actor received); ACM 13462, Supp, 24 CMS 565 (1957) (Board considered sentences given by Federal courts in conscientious objector cases during World War II).

[74] U.S. v. Mamaluy, 10 USCMA 102, 27 CMR 176 (1959); *accord*, U.S. v. Fischer, 10 USCMA 111, 27 CMR 185 (1959).

The Board in the *Simmons*[75] case, however, left the door ajar where a co-accused or co-actor has been sentenced for the same offense. It would appear that in such a case the three bases above for excluding this information would not exist. There is authority in Federal decisions for permitting and even encouraging the sentencing judge to consider the sentences of co-actors in adjudging the sentence.[76] And in Scotland the prosecutor furnishes to the Court a list of sentences imposed by other courts for similar offenses.[77]

It can be concluded, however, that in court-martial proceedings sentences adjudged in "similar" cases are not admissible, with the possible exception of the case wherein a co-actor has been sentenced. Neither can the court be told that in "special circumstances" to meet the needs of local conditions, sentences more severe than those normally adjudged should be adjudged, nor that inadequate or lenient sentences will bring the armed forces in disrepute,[78] even though these factors are considered relevant for sentencing purposes by the Manual. The enunciation of these common sense principles from the bench seems to strike fear of "judge" influences over the sentencing body, in the minds of the Court of Military Appeals.

Not only has the accused the right to present matters in mitigation or extenuation of the offense of which he stands convicted, but he may also do likewise as to any previous conviction which has been introduced.[79] Such matter should not be in the nature of a defense[80] or an attempt to relitigate the case.[81] An accused should be able to attack collaterally a previous conviction by a court-martial which was void for lack of jurisdiction.

There are some limitations. The defense counsel cannot ask the court to adjudge a punitive discharge because such is obviously contrary to the best interest of the accused.[82] And when a defense counsel representing two accused has to make a distinction between the relative criminality of his clients, to the detriment of one, such is reversible error.[83] The accused is entitled to the undivided

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[75] See note 73 *supra*.
[76] U.S. v. Mann, 108 F.2d 354 (7th Cir. 1939).
[77] See Keedy, Criminal Procedure in Scotland, 3 J. Crim. L., C. & P.S. 834, 844 (1912–13).
[78] U.S. v. Mamaluy, 10 USCMA 102, 27 CMR 176 (1959); U.S. v. Brennan, 10 USCMA 109, 27 CMR 183 (1959).
[79] ACM S–9760, Cranmore, 17 CMR 749 (1954).
[80] See U.S. v. Tobita, 3 USCMA 267, 12 CMR 23 (1953).
[81] See Art. 76, UCMJ.
[82] ACM S–9680, Lam, 17 CMR 697 (1954).
[83] U.S. v. Taylor, 9 USCMA 547, 26 CMR 327 (1958).

loyalty of his counsel during the sentencing procedure as well as on the merits.[84]

IV. REBUTTAL BY THE PROSECUTION

One writer has advanced the proposition that the prosecution should be permitted to rebut matter in mitigation and extenuation under the same relaxed rules of evidence accorded the accused subject only to the discretion of the law officer.[85] This would certainly be in furtherance of the ". . . policy of presenting as full a factual picture as possible to the court-martial to assist its members in imposing a sentence."[86] The Manual provides:

> After matter in . . . extenuation, or mitigation has been introduced the prosecution . . . has the right to cross-examine any *witness* and to offer *evidence* in rebuttal. (Emphasis supplied.)[87]

The accused is told that he cannot be cross-examined on his unsworn statement but that the prosecution may offer *evidence* to rebut anything contained in it.[88]

We find no provision in the present Code or Manual which would accord the prosecution the right to present other than *evidence* in rebuttal. In fact, on occasions where the trial counsel has presented matter contrary to strict evidentiary rules such has been held error.[89] In one case, however, where the defense introduced a portion of a document which was hearsay, the prosecution was permitted to introduce the remainder even though it was detrimental to the accused.[90] This decision can be justified on the well established evidentiary rule of "completeness."[91]

A. *Scope of Rebuttal*

The scope of rebuttal is limited to that which explains, repels, counteracts, or disproves the matters presented by the opposing party.[92] As we have discussed previously, matters in "aggravation" are those which surround the circumstances of the offense and do not extend to character evidence, reputation, or other misconduct of the accused.[93]

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[84] *Ibid.*

[85] Deegan, Methods of Establishing and Rebutting Character Evidence 76 (1957), a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

[86] U.S. v. Blau, 5 USCMA 232, 244, 17 CMR 232, 244 (1954).

[87] Par. 75*d*, MCM, 1951.

[88] App. 8*a*, MCM, 1951.

[89] U.S. v. Anderson, 8 USCMA 603, 25 CMR 107 (1958); CGCM 9747, Graham, 2 CMR 629 (1952); NCM 59, Kimler, 2 CMR 573 (1951); CGCM 9748, Leslie, 2 CMR 622 (1951).

[90] NCM 50, Duncan, 22 CMR 696 (1956).

[91] Wigmore, Evidence §2102 (1940).

[92] U.S. v. Shaw, 9 USCMA 267, 271, 26 CMR 47, 51 (1958). (Brosman, J., in his dissent defines rebuttal evidence citing Shepard v. U.S., 64 F.2d 641 (10th Cir. 1933); Somish v. U.S., 233 F.2d 358 (9th Cir. 1955); and U.S. v. Crowe, 188 F.2d 209 (7th Cir. 1951).

[93] See text at note 32 *supra.*

B. *Rebuttal of Character Evidence*

Accordingly, the accused, after findings, may still keep from the court's attention his character and reputation; only he may open the door; however, if he chooses to do so, the prosecution may then attack his character or reputation by many methods. If the accused places before the court by his unsworn statement, or otherwise, specific acts of good conduct, the prosecution may rebut by specific acts of misconduct and these are not limited to convictions and may even include punishments under the provisions of Article 15 of the Uniform Code of Military Justice.[94] A mere statement that the accused is "good Marine Corps material" would open the door for the prosecution to present "evidence" which in any way would tend to rebut this conclusion.[95]

It is well settled in military law that a person may testify as to his opinion of an accused's character.[96] The trial counsel then should interview witnesses in preparation for trial to determine their opinion as to his character, for if the accused places before the court "information" alluding to his good character, the trial counsel is armed with good rebuttal evidence.

It behooves the trial counsel to pay particular attention to the testimony of witnesses, the content of the unsworn statement, and documents presented by the defense in mitigation and extenuation. He must keep in mind that the defense is putting only the accused's "best foot forward." Military records should be closely scrutinized because they show time lost because of misconduct, punishments received under Article 15 of the Code, character of previous service, and the like. This is good rebuttal "evidence" which is readily available and admissible.[97]

It has been held that juvenile misconduct is inadmissible on the merits for impeachment purposes.[98] A different rule should apply if the accused asserted that he had never been in trouble before whether on the merits or during sentencing procedure.[99] It is imperative that the accused open the door before juvenile con-

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[94] U.S. v. Blau, 5 USCMA 232, 17 CMR 232 (1954); ACM 13444, Zimmek, 23 CMR 714 (1956).

[95] See U.S. v. Anderson, 8 USCMA 603, 25 CMR 107 (1958).

[96] U.S. v. Haimson, 5 USCMA 208, 17 CMR 208 (1955); U.S. v. Gagnon, 5 USCMA 619, 18 CMR 243 (1955); par. 138*f*(1), MCM (1951).

[97] U.S. v. Gagnon, 5 USCMA 619, 18 CMR 243 (1955); CM 363216, Scott, 10 CMR 498 (1953); NCM 322, Charlton, 16 CMR 384 (1954).

[98] U.S. v. Roark, 8 USCMA 279, 24 CMR 89 (1957).

[99] ACM 134444, Zimmek, 23 CMR 714 (1956); ACM 5811, Flanagan, 7 CMR 751 (1953). See also U.S. v. Blau, *supra* note 96. *But see* ACM S-14773, Wood, 24 CMR 611 (1957) (Where evidence of a juvenile record is not proper rebuttal to statement accused has "clean" *military* record).

victions be used against him because of the underlying policy to prohibit the indiscretions of youth to brand a person for life.[100]

C. *Responsibility of Prosecution to Insure Appropriate Sentence*

The Manual provides that:

> . . . the sentence should provide a legal, appropriate and adequate punishment.[101]

Although this provision is not directed at the trial counsel, his duty in representing the Government does not cease after findings of guilty have been obtained. He is entitled to present aggravating circumstances in the case of a guilty plea.[102] Further, the Manual directs that he will present evidence of previous convictions by courts-martial,[103] and read the data concerning the accused shown on the charge sheet.

After this is done, there is nothing more he is permitted to do except argue for an appropriate sentence, unless the accused presents matter in mitigation and extenuation. In such event, he must be prepared for the unknown. Upon conviction, the Government is entitled to an appropriate and adequate sentence. The accused is entitled to take the initiative and lessen the rigors of his expected punishment. Unless the trial counsel has previously prepared rebuttal evidence, a false picture can be painted for the court. Knowing that the accused has his right to present evidence in mitigation and extenuation, the trial counsel should be prepared to prevent a miscarriage of justice which would result from an inadequate sentence under the particular circumstances of the case or the record of the accused.

It is submitted that a minimal requirement for a trial counsel in preparation for the presentencing portion of the trial is:

(1) Interview the accused's unit commander concerning his worth to the service and his character, and previous misconduct, if any.

2. Request a Federal Bureau of Investigation report as to previous arrests and convictions, if it is at all indicated.

3. Interview all known character witnesses likely to be called by the accused.

Armed with this information, he is then prepared for cross-examination of any witnesses called by the accused. Further, if it appears necessary, because of surprise, or to disprove assertions of the accused, the trial counsel is able to present to the law officer actual expected testimony in order to support a motion for

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[100] U.S. v. Cary, 9 USCMA 348, 26 CMR 128 (1958).
[101] Par. 76*a*(1), MCM, 1951.
[102] *Id.* at Pars. 70*a*, 75*b*(3).
[103] *Id.* at par. 75*b*(1).

continuance. Otherwise, it would appear doubtful if the Government would be entitled to a continuance to go on a fishing expedition to obtain rebuttal material.

V. ARGUMENT ON SENTENCE

It is now well established that either or both counsel may present argument on the sentence[104] so long as it is based on matters properly before the court and doesn't go beyond the bounds of fair argument.[105] The problem areas lie in the content of such arguments.

A. *Argument by Prosecution*

The injection of command influence into the sentencing procedure by argument of trial counsel has led to reversal.[106] In *United States* v. *Lackey*,[107] the trial counsel argued that it was the court's duty to discharge the accused because the "people" who brought and referred the charges to trial thought he should be punitively discharged. Although this was not an outright assertion that the convening authority desired a punitive discharge, the Court said, ". . . the insinuation might lead the court members to conclude otherwise and the law officer was obliged to do something drastic to clear up what was, at the very least, an unfair tactic."[108] This indicates that whenever there appears any improper argument, it is the duty, *sua sponte*, of the law officer to take drastic measures to insure that the court is not influenced thereby. In *United States* v. *Fowle*,[109] the court found command influence in trial counsel's argument when he referred to and requested implementation of a Navy Instruction announcing a policy to separate persons convicted of offenses involving moral turpitude. The accused had just pled guilty to larceny. This was too much for the Court to bear and they said, ". . . that once the Secretary of a Service enters into the restricted arena of the courtroom, . . . he is bound to exercise some influence over them [court members]."[110] The error was recognized by the convening authority and he attempted to purge it by reducing the length of sentence, but the Court said the error went to the punitive discharge and returned the case for reconsideration by a Board of Review.

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[104] U.S. v. Olson, 7 USCMA 242, 22 CMR 32 (1956).

[105] *Ibid.*, see also U.S. v. Day, 2 USCMA 416, 9 CMR 46 (1953) (as to the bounds of "fair argument").

[106] U.S. v. Lackey, 8 USCMA 718, 25 CMR 222 (1958); U.S. v. Towle, 7 USCMA 349, 22 CMR 139 (1956); U.S. v. Estrada, 7 USCMA 635, 23 CMR 99 (1957).

[107] 8 USCMA 718, 23 CMR 22 (1958).

[108] *Id.* at 720, 23 CMR at 24.

[109] 7 USCMA 349, 22 CMR 139 (1956).

[110] *Id.* at 352, 22 CMR at 142.

The President of the United States entered the "restricted arena" of the courtroom via the trial counsel's argument in *United States* v. *Rinehart*.[111] In this case, trial counsel referred to the Manual which states that thieves should not be retained in the service.[112] This required reversal.[113]

Relief may be in sight in this field of command influence argument for in *United States* v. *Cummins*[114] the Court refused to reverse where trial counsel referred to paragraph 76 of the Manual which provides that dishonorable discharges should be imposed for felonies and that inadequate sentences bring the armed forces in disrepute. The accused had been convicted *inter alia* of sixteen larcenies.

The Court said:

> There is no doubt that when considered in the context of trial counsel's argument they are no more than admonitions to impose a sentence appropriate to the accused's case. Trial counsel's argument makes crystal clear that within the limits of the legal maximum the court-martial was free to adjudge any sentence that it desired. We find no prejudice in the reference to the Manual.[115]

A trial counsel will do well to consider and study this case in preparing for argument on the sentence. The mere mention by trial counsel that he represents the sovereignty of the United States is permissible; and he may be severely critical or denunciatory of an accused, where such remarks are based on the evidence and are reasonable inferences therefrom.[116] The trial counsel must refrain in guilty plea cases, where such plea is entered with a pre-trial agreement as to the maximum which the convening authority will approve, from mentioning such fact.[117]

Another error which has caused reversal or reduction of the sentence is when trial counsel includes in his argument matter not already in the record.[118]

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[111] 8 USCMA 402, 24 CMR 212 (1957).

[112] Par. 33*h*, MCM, 1951.

[113] *Accord*, ACM 13813, Haynes, 24 CMR 881 (1957) (where trial counsel referred to par. 76*a*, MCM, 1951, to the effect that inadequate sentences bring the armed forces into disrepute).

[114] 9 USCMA 669, 26 CMR 449 (1958).

[115] *Id.* at 675, 26 CMR at 455; *accord*, ACM 14102, Smith, 24 CMR 812 (1957).

[116] ACM 14102, Smith, 24 CMR 812 (1957), citing U.S. v. Doctor, 7 USCMA 126, 21 CMR 252 (1956).

[117] CM 398157, Withey, 25 CMR 593 (1958); *accord*, Jones v. Commonwealth, 194 Va. 273, 72 S.E.2d 693 (1952) (jury should not know effect of parole and pardon possibilities); Dingus v. Commonwealth, 153 Va. 846, 149 S.E. 414 (1929).

[118] U.S. v. Anderson, 8 USCMA 603, 25 CMR 107 (1958); CGCM 9748, Leslie, 2 CMR 622 (1951); CGCM 9747, Graham, 2 CMR 629 (1952); NCM 59, Kimler, 2 CMR 573 (1951).

B. *Argument by Defense*

The defense counsel is charged ". . . with the substantial responsibility of appealing on his [the accused's] behalf to the conscience of the court," on the sentence.[119] Failure to make an argument may indicate inadequate or improper representation. The Court of Military Appeals has stressed the importance of vigorous representation by defense counsel in the presentence portion of the trial because the sentence affects the accused's ". . . liberty, property, social standing—in fact, his whole future."[120] Where, however, it can be shown that such omission was advisedly made, no error is committed.[121]

Also the defense counsel cannot invite error by mentioning in his argument command policies; but in answer thereto the trial counsel cannot go further and mention others.[122]

In summation, it can be said that either counsel may argue on the sentence so long as it is confined to the information adduced during the trial or in presentence procedure; and they may make reasonable deductions therefrom as they may affect the sentence. Further, they may answer opposing counsel's argument. The trial counsel may not inject command policies into his argument or comment on matters outside the record.

C. *Who May Close on Sentence Argument*

Not until *United States* v. *Olson*[123] was there a clear enunciation of the right of both counsel to argue on the sentence. The Manual does, though not specifically, provide for it, saying:

> "Both sides are entitled to an opportunity properly to present and support their respective contentions upon any question or matter presented to the court for decision." [124]

The Law Officer Pamphlet[125] recognizes this right and provides that the defense and prosecution may argue on the sentence. Who has the right to close such argument before the court-martial?

Normally the side which has the burden of proof is accorded this right.[126] Or in other language, "he who asserts" must prove. The test to determine upon whom the burden lies is: which party would be successful if no evidence at all or no more evidence were presented?[127] Applying this test after the findings to the sen-

[119] U.S. v. Allen, 8 USCMA 504, 25 CMR 8, 11 (1957).
[120] *Ibid.*
[121] U.S. v. Friborg, 8 USCMA 515, 25 CMR 19 (1957).
[122] U.S. v. Davis, 8 USCMA 425, 24 CMR 235 (1957).
[123] 7 USCMA 242, 22 CMR 32 (1956).
[124] Par. 53*g*, MCM, 1951.
[125] Par. 88, DA Pam 27-9, Military Justice Handbook—The Law Officer (1958) (not legal authority—a guide for law officers).
[126] Bell, Principles of Argument 32 (1910).
[127] *Ibid.* See also 53 AM. Jur., Trial §§69–73.

tencing procedure in court-martial, we see that the Code provides, except where a specific punishment is mandatory, that upon being found guilty the accused ". . . *shall* be punished . . ."; the Manual states, ". . . the sentence should provide a legal, appropriate, and adequate punishment."[128] Although the punishment to be adjudged is discretionary with the court within certain maximum limits, it can be concluded that at this stage of the trial the accused *is* to be punished, and unless he comes forward such punishment will be based on that evidence which is before the court. Accordingly, if he presents matter in mitigation on extenuation he should be permitted to interpret and urge its effect upon the sentence he is to receive; and because he is asserting this new matter in an effort to lessen the effect of his conviction, he should be permitted to close.

VI. INSTRUCTIONS BY THE LAW OFFICER ON THE SENTENCE

The Manual sets forth several matters which the court "should" consider in determining the kind and amount of punishment it should impose;[129] but outright reference to them by the law officer in instructing the court has led to error.[130]

In *United States* v. *Mamaluy*,[131] the law officer instructed the court members they could consider penalties adjudged in other cases for similar offenses. There was no evidence of similar cases before the court and Judge Latimer states, "Moreover, it has long been the rule of law that the sentence in other cases cannot be given to court-martial members for comparative purposes."[132] He further points out the impracticality of such a yardstick because of the impossibility of finding a "similar" case. Unlike a Federal judge who has years of experience and knowledge of previous cases, a court-martial lacks such continuity.

The Court in the same case was likewise critical of the law officer's instruction that if the members found "special circumstances" to meet the needs of local conditions, sentences more severe than those normally adjudged for similar offenses might be necessary. It was further pointed out that it was error for the law officer to admonish the members, that inadequate sentences upon military persons convicted of crimes which are punishable by civilian courts tend to bring the military into disrepute. This,

[128] Par. 76*a*(1), MCM, 1951. *But cf.* U.S. v. Speller, 8 USCMA 363, 24 CMR 173 (1957), where the convening authority approved no part of the sentence yet permitted a finding to stand; and U.S. v. Atkins, 8 USCMA 77, 23 CMR 301 (1957) where a board of review did likewise.

[129] Par. 76, MCM, 1951.

[130] U.S. v. Mamaluy, 10 USCMA 102, 27 CMR 176 (1959); U.S. v. Brennan, 10 USCMA 109, 27 CMR 183 (1959).

[131] U.S. v. Mamaluy, *supra* note 182.

[132] *Id.* at 106, 27 CMR at 187.

the court said, was nothing but a generality and instructions should operate on facts and be tailored to fit the particular record. They pose theories not supported by evidence and have an overtone of severity against the accused which he cannot possibly rebut by any reasonable means. The court condemned the "instructional pattern" provided in paragraph 76 of the Manual.

The Court did approve the law officer's instructions that the maximum was to be reserved for an offense which was aggravated by the circumstances; that they could consider the value of the property stolen and any aggravating circumstances shown by the record, and the mitigating and extenuating evidence produced by the accused including his background, education, his early training, the character of his service, and the fact that he had entered a plea of guilty which saved the Government considerable time and expense.[133]

Because of the more liberalized rule in favor of the accused to the effect that offenses are not separate for sentence purposes if the same evidence necessary to prove one offense of necessity proves another,[134] the Court now requires that the law officer instruct in open court on the maximum sentence imposable.[135]

The law officer should not inform the court that a plea of guilty has been entered upon agreement with the convening authority as to the maximum sentence which will be approved.[136] Nor should he refer to a policy directive.[137]

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[133] *Id.* at 105, 27 CMR at 186. See Comment, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 Yale L.J. 204 (1956), which advances the theory that a guilty plea entered to achieve a lesser sentence shouldn't be considered a mitigating factor.

[134] See U.S. v. Wooley, 8 USCMA 655, 25 CMR 159 (1958) (AWOL and missing movement held not separate for sentencing purposes where both involve the same period of absence); U.S. v. Welsh, 9 USCMA 255, 26 CMR 35 (1958) (AWOL and breach of restriction or escape from confinement held not separate for sentencing purposes when it involved same period); U.S. v. Granger, 9 USCMA 719, 26 CMR 499 (1958) (failure to report and AWOL from same place held multiplicatious for sentencing). *But cf.* U.S. v. White, 9 USCMA 692, 26 CMR 472 (1958) (escape and desertion held separate); U.S. v. Williams, 9 USCMA 400, 26 CMR 180 (1958) (breach of arrest and AWOL from place of duty held separate because two different places involved). The Federal rule is not so favorable to a defendant. Berg v. U.S. 176 F.2d 122 (1949), *cert. denied*, 338 U.S. 876 (held where plea of guilty entered to several counts court will assume they are separate for sentencing purposes); Blockburger v. U.S. 284 U.S. 299 (1932). See also Youngblood, Multiplicious Pleading—A Comprehensive Study of Military Practice, Mil. L. Rev., January 1960 (DA Pam 27-100-8, 1 Jan 60), p. .

[135] U.S. v. Turner, 9 USCMA 124, 25 CMR 386 (1958).

[136] CM 398157, Withey, 25 CMR 593 (1958).

[137] U.S. v. McGirk, 8 USCMA 429, 24 CMR 239 (1957) (held error for law officer to refer to a policy directive requiring discharge of accused guilty of offenses involving moral turpitude). See also U.S. v. Starnes, 8 USCMA 427, 24 CMR 237 (1957) (mere reference to par. 76, MCM, 1951, where court members had a copy held error).

Examination of the guide for law officers to use in instruction on the sentence as promulgated by the Department of the Army shows that it is not in conflict with any presently decided cases.[138] Caution should prevail in its use and it should be tailored to fit the information which is properly before the court.

In a recent case where the previous convictions which were admitted were not prior to all of the offenses of which the accused was found guilty, the Court recommended an instruction that such previous convictions be considered only in determining the sentence as to those offenses occurring subsequently.[139]

VII. CONCLUSIONS

One may ask why should an accused before a court-martial be legally entitled to keep from the sentencing body information which penologist and jurist deem appropriate and necessary in adjudging a punishment? True, if the mistake is in favor of the accused, it may never be corrected but may always be adjusted if the sentence is too harsh. But is not "justice" due society as well as the accused?

The members on the court-martial are "shooting blind" or using the "hunch" system. Such haphazard administration of justice should be improved.

An amendment to the Manual permitting the Government to present a background history of the accused, including his civilian as well as his military reputation and character would be desirable. A special psychiatric report designed for sentencing purposes would provide the court with valuable relevant sentencing information. Even though the accused is not, by "constitutional" due process, entitled to see such a presentence report, a procedure whereby the accused would be served with a copy prior to trial in order that he may be afforded an opportunity to rebut anything contained therein, would be in keeping with the trend of Federal decisions in this respect. Precedent is abundant for such a procedure, and its acceptance would further the concept of ". . . modern philosophy of penology . . . that the punishment should fit both the offender and the crime."[140]

Such a procedure would afford the accused more protection from adverse assertions now permitted in the Staff Judge Advocate's review concerning his background and other acts of misconduct. Where it is his desire to rebut such derogatory information, if

[138] App. XXXIII, DA Pam 27-9, Military Justice Handbook—The Law Officer (1958).

[139] U.S. v. Green, 9 USCMA 585, 26 CMR 365 (1958).

[140] Judge Latimer in U.S. v. Barrow, 9 USCMA 343, 345, 26 CMR 123, 125 (1958).

presented at sentence time, he would still have the power of subpoena and cross-examination whereas such vital tools are not available to him to rebut matter contained in an *ex parte* review.

Although in most combat situations and in some overseas garrisons such an expanded procedure would have to give way to the exigencies of the service, no valid objection to its use, whenever practicable, could be advanced.

To permit the Government to present as full and accurate picture of the accused to the sentencing body is in accord with modern day thought. The sentence portion of the trial should receive from the Government as detailed and thorough presentation as the presentation of its case on the merits. Under the present Manual provisions, the Government is hobbled in this respect. Removal of this impediment would advance the cause of justice in the court-martial system and would do much to keep it abreast of present day sentencing procedure.

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COMMENTS

UNCERTAINTIES IN THE PAY AND ALLOWANCE LAWS

Pay After a Fixed Term of Active Service has Expired

It sometimes has been said that the pay of members of the Armed Forces is incident to their status, rather than to the performance of work, and may be forfeited only pursuant to law.[1] One might argue that this statement is corroborated to some extent by the wording of subsection 201(d) of the Career Compensation Act of 1949, which, without mentioning any exceptions, provides that "all members of the uniformed services when on the active list or when on active duty . . . shall be entitled to receive the basic pay of the pay grade to which assigned."[2] There are, however, circumstances when a member does not accrue pay, notwithstanding that no statute deprives him of it expressly or by clear implication.[3] One of those situations pertains to certain members whose terms of active service have expired, but who have not been separated from active status. Which members, and under what circumstances, are the subjects of this inquiry.

The mere expiration of the term for which a member enlisted in the Army does not operate to discharge him from the service. Discharge is effected only by affirmative administrative action.[4] A member generally is entitled to be discharged when the period of his enlistment has expired, but there are several reasons why he need not and might not be discharged at that time.[5] The view

[1] 15 Ops. Att'y Gen. 175 (1876); 13 Ops. Att'y Gen. 103 (1869), Mil.Juris., p. 391; 13 Decs. Comp. Gen. 150 (1933), Mil Juris., p. 391.

[2] 63 Stat. 805, as amended, 37 U.S.C. §232(d) (1958). The section obviously is more concerned with rates of pay than with questions of fundamental entitlement. Statutes have been enacted imposing loss of pay during certain absences from duty. See Armed Forces Leave Act of 1946 §4(b), 60 Stat. 964, as amended, 37 U.S.C. §33(b) (1958); 10 U.S.C. §3632 (1958); 10 U.S.C. §3636 (1958). There are also statutes which expressly confer entitlement to pay during some absences from duty. See Armed Forces Leave Act §4(b), *supra;* Missing Persons Act §2(a), 56 Stat. 144 (1942), as amended, 50 U.S.C. App. §1002(a) (1958); Rev. Stat. §1288 (1875), 37 U.S.C. §242 (1958); 10 U.S.C. §3262 (1958).

[3] For a general discussion, see U.S. Army Special Text 27-157, Military Affairs (1955), pp. 1605-12.

[4] U.S. *ex rel* Parsley v. Moses, 138 F. Supp. 799 (D.C. N.J. 1956); *cf.* Dickenson v. Davis, 245 F.2d 317 (10th Cir. 1957), *cert. denied,* 355 U.S. 918 (1958).

[5] See, *e.g.,* paras. 14, 15, 17, AR 635-200, 8 April 1959, as changed by C1, 23 December 1959.

of the Comptroller General with respect to a member's entitlement to pay after his enlistment term has ended was once expressed in these terms:[6]

> Any doubt as to the necessity for specific statutory authority as a condition precedent to the receipt of pay after expiration of the term of service would appear to have been removed since shortly after the beginning of the Government. For example, even where officers and seamen of ships of the United States were taken by the enemy, the Congress recognized the necessity for legislation to continue their pay and allowances beyond the normal term of service [referring to Rev. Stat. §1575 (1875), 37 U.S.C. §244 (1958)] . . . Legislation of a similar character with reference to pay notwithstanding expiration of term of service of officers and enlisted men of the Army when captured by the enemy is found in section 1288 of the Revised Statutes [37 U.S.C. §242 (1958)] . . . .

The doctrine so expressed was not always followed literally. For example, specific statutory authority has not been required for a member to accrue pay and allowances while in a duty status after the term of his enlistment has expired. Even some of those rules that were based on it have fallen into disuse. Two such instances will be disclosed by the discussion which follows.[7] Still, the attitude must be reckoned with in solving questions yet to arise.

There seems never to have been much question as to an enlisted member's entitlement to pay when in a duty status after his term of enlistment expired,[8] but when he is in a *nonduty* status, he is sometimes not entitled to pay despite the fact that he has not been separated from active military service and would be entitled to pay had the term not expired. In a decision rendered in 1957, the Comptroller General stated:[9]

> It long has been the rule that, regardless of whether the enlistment contract expired when an enlisted member was absent in a status of absence without leave or in desertion, or when in confinement awaiting trial by court-martial, pay and allowances do not accrue to the enlisted member while subject to military control after the expiration of his enlistment unless he is acquitted and therefore considered to have been

[6] 17 Decs. Comp. Gen. 103, 104 (1937). See 19 Decs. Comp. Gen. 290 (1939); 19 Decs. Comp. Gen. 288 (1939); 18 Decs. Comp. Gen. 781 (1939). Legislation similar to that mentioned in the quoted decision also was enacted in 1942. Missing Persons Act §2(a), 56 Stat. 144 (1942), as amended, 50 U.S.C. App. §1002(a) (1958).

[7] See notes 14, 19 *infra*.

[8] See MS. Dec. Comp. Gen. B–124809, 30 November 1955, 5 Dig Ops, EM §29.1 (member in Japan retained after ETS in duty status, pending appeal from conviction by Japanese court, entitled to pay); 7 Decs. Comp. Treas. 391 (1901); 2 Decs. Comp. Treas. 94 (1895); Dig. Dec. Second Comp., 1817–1865 (2d ed.), sec 886. In all of these cases there was an element of convenience to, or negligence on the part of, the Government in not discharging the member. See also decisions cited note 25 *infra*. *But see* 35 Decs. Comp. Gen. 666, 667 (1956), *infra* note 33.

[9] 37 Decs. Comp. Gen. 380, 381 (1957), 7 Dig. Ops., Pay §18.1.

held for the convenience of the Government, or he is held to make good time lost, or he is restored to duty. . . .

In that decision, the Comptroller General answered the questions set forth below, which had been presented in Committee Action No. 193 of the Department of Defense Military Pay and Allowance Committee. Italics have been added for emphasis, and the answers given are shown in brackets:[10]

1. Is an enlisted member of the Armed Forces whose term of *enlistment or induction terminates while in a status of absence without leave or in desertion,* entitled to pay and allowances upon his return to military control while confined awaiting trial and disposition of his case;

(a) if his conviction becomes final, and his return to full duty throughout the period of entitlement here in question has never been effected? [No]

(b) if his trial results in an *acquittal,* and his return to full duty throughout the period of entitlement here in question *has never been effected?* [Yes]

(c) if his *conviction* becomes final, and his *return to full duty was effected* upon his return to military control? [Yes]

(d) if his trial results in an *acquittal,* and his *return to full duty was effected* upon his return to military control? [Yes]

2. Is an enlisted member of the Armed Forces, whose term of *enlistment or induction terminates while he is confined* awaiting trial and disposition of his case, entitled, subsequent to such termination, to pay and allowances;

(a) if such trial results in a conviction which becomes final, and if his return to full duty throughout the period of entitlement here in question is never effected? [No]

(b) if such trial results in an *acquittal,* and if his return to full duty throughout the period of entitlement here in question *is never effected?* [Yes]

In view of the conflicting generalizations previously mentioned, it always has been somewhat of a gamble to predict the ruling of the Comptroller General on a *de novo* pay question. Although most of the rules that can be developed from the decision quoted above have been relatively well-established, some are either new or starkly clearer than before. An adequate supply of uncertain-

[10] *Ibid.* The decision contains no detailed discussion of the rules considered herein. Instead, it seems principally concerned with refuting a suggestion advanced in connection with question 1(a) of the Committee Action to the effect that the "time lost" statute (now 10 U.S.C. § 972 (1958)) could be construed as entitling an enlisted member to pay as soon after his ETS as he is available for "full duty," even though not actually performing such duty. *But cf.* JAGA 1960/3627, 24 February 1960, expressing the opinion that an EM (in pretrial confinement at ETS) who served 7 months' confinement under sentence, was restored to duty for 1 month pending completion of appellate review, then was confined 2 more months, should be considered as having been restored to duty to make good time lost after the first 6 months' confinement because the sentence to confinement as ultimately approved after a rehearing was only for 6 months. Compare 37 Decs. Comp. Gen. 488 (1958), quoted *infra* note 22.

ties remains however. The rules are best analyzed by discussing question 2 of the Committee Action first.

That a member of the Army is in military confinement does not alone deprive him of entitlement to basic pay.[11] When, however, his term of enlistment expires while he is confined, his entitlement to pay for the remaining period of confinement depends on the outcome of his trial. It has been the rule that if the member is convicted, he is entitled to no pay or allowances for the post-term-of-service period of confinement.[12] This rule is reaffirmed by the answer to question 2(a) of the quoted Committee Action. Despite the broad implications of the doctrine underlying the rule just mentioned, Army regulations for a number of years have provided that if the member is acquitted he is considered to have been retained in the service for the convenience of the Government and is entitled to pay and allowances for the period of confinement.[13] It has been only comparatively recently that the Comptroller General approved such regulations.[14] This, too, is confirmed in the decision quoted above, by the answer to question 2(b), albeit without mention of specific Army, Navy, or Air Force regulations. There remains some doubt as to what constitutes the "acquittal" that restores the member's right to pay. In a decision involving an improperly absent member of the Air Force who was apprehended after his term of enlistment had expired, the Comptroller General held that the dropping of the charges against him (dropped because it had been determined that the member was mentally unsound during his absence without leave) did not amount to an acquittal so as to entitle the member to pay for his

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[11] 37 Decs. Comp. Gen. 488 (1958), 7 Dig Ops, Pay §21.1; 15 Ops. Att'y Gen. 175 (1876); *cf.* 33 Decs. Comp. Gen. 195 (1953), 4 Dig Ops, Sent & Pun §28.1; see 36 Decs. Comp. Gen. 173, 175 (1956), 6 Dig Ops, Pay §18.1. The rule has not been uniformly observed, however. See 27 Decs. Comp. Treas. 1081 (1921) (enlisted member sentenced to DD with confinement held not entitled to pay while confined). The fact of confinement may adversely affect a member's entitlement to certain special pays, incentive pays, or allowances, usually depending on whether he is convicted of an offense. See generally AR 37–104, 2 December 1957.

[12] Moses v. U.S., 137 Ct. Cls. 374, 380 (1957); 30 Decs. Comp. Gen. 449 (1951), 1 Dig Ops, Pay §18.1; 11 Decs. Comp. Gen. 342 (1932); 12 Decs. Comp. Treas. 549 (1906); 12 Decs. Comp. Treas. 339 (1905); 9 Decs. Comp. Treas. 228 (1902). As to the Coast Guard, this rule was statutory from 1941 until 1956. Act of 11 July 1941 §8, 55 Stat. 586; reenacted as 14 U.S.C. §367 (1952); repealed by act of 24 July 1956 §2(4), 70 Stat. 361. Little significance can be attached either to the existence of the statute, or to its repeal. The rule would appear not to apply to an enlistment or reenlistment for an indefinite period, as formerly permitted by Army regulations. See, *e.g.*, paras. 11c, 12b–c, AR 601–210, 12 April 1956, superseded by C2, 9 April 1957.

[13] The current provisions are para. 1–95*b*(2), AR 37–104, 2 December 1957.

[14] 30 Decs. Comp. Gen. 449 (1951), 1 Dig Ops, Pay §18.1, modifying 17 Decs. Comp. Gen. 103 (1937) quoted *supra* (see note 6).

period of pretrial confinement.[15] Perhaps it was the nature of the offense that controlled the result in this case.[16] It is difficult to believe that the same result will be reached if the charges are dropped for lack of evidence or some other reason going directly to the merits of an offense. Also, if the term "acquitted" is to be so strictly construed, what of a conviction reversed on appeal? Will the grounds for reversal control the member's right to pay for the confinement served? Should pay regulations be amended so as to resolve these problems, or will only future decisions of the Comptroller General, passively awaited, provide the answers piecemeal?

The rules discussed in the preceding paragraph now apply to questions 1(a) and 1(b) of the quoted Committee Action, but until those questions were answered the pay rights of a member who was absent without leave when the term of his enlistment expired were the subject of a partly different analysis. It has been sufficiently clear that such a member who is confined when he returns to military control, and is tried and convicted, is not entitled to pay and allowances for the period of confinement, either pretrial or under sentence.[17] The answer to question 1(a) of the quoted Committee Action leaves that rule unchanged. When, on the other hand, the member was acquitted, the rule formerly was that he nevertheless was not entitled to pay or allowances for the period of confinement, as he had been restored to full duty for

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[15] MS. Dec. Comp. Gen. B–131446, 26 June 1957. An analogous problem arises in connection with excusing as unavoidable a member's absence without leave in the hands of civil authorities. The fundamental question in such cases is whether his absence was due to his own misconduct. See 38 Decs. Comp. Gen. 320, 323 (1958), 8 Dig Ops, Mil Pers §37.1; OpJAGAF 1957/18, 7 November 1956, 7 Dig Ops, Pay §21.3. Compare 21 Decs. Comp. Gen. 845 (1942), 1 Bul JAG 79.

[16] The Comptroller General's position on the matter of dropping charges of AWOL because of insanity may be related to the fact that it was once held that the insanity of an absent member did not relieve the member from forfeiting pay and allowances during his absence without leave 4 Decs. Comp. Gen. 750 (1925); *cf.* 27 Decs. Comp. Gen. 269 (1947); 7 Decs. Comp. Gen. 812 (1928). See also 21 Decs. Comp. Gen. 845 (1942), 1 Bul JAG 79. However, in two recent decisions that seemed to raise that issue, pay for the absence was denied on other grounds. MS. Dec. Comp. Gen. B–140250, 21 August 1959 (pay denied because absence was not formally excused); MS. Dec. Comp. Gen. B–131446, *supra* note 15 (because the member was at home and could have been apprehended, absence should not be excused; also, an excuse would not in any event restore pay for a long absence). TJAG, USA, has expressed the opinion that absence without leave may be excused for pay purposes because of mental unsoundness. JAGA 1959/5086, 7 July 1959; JAGA 1960/3637, 10 March 1960.

[17] 9 Decs. Comp. Gen. 323 (1930); 12 Decs. Comp. Treas. 592 (1906).

the purpose of making good time lost.[18] Now, the rule is that the "acquittal" restores his entitlement to pay and allowances for the period of confinement, just as in the case of a member retained in the service in confinement initially. The rule thus announced by the answer to question 1(b) of the Committee Action is now reflected in Army regulations, and the distinction between members confined and those absent without leave on the magic date has been eliminated.[19] It is well; the difference was never quite apparent.

Accordingly, whether an enlisted member is in confinement when his enlistment term ends, or is absent without leave then immediately confined, his entitlement to pay and allowances for the post-term-of-service confinement hinges upon the outcome of the disciplinary proceedings against him. Whether, at present, anything less than an unequivocal exoneration of guilt will restore his entitlement is unresolved.

The next two problems to be discussed have to do with enlisted members who are in a duty status making good time lost before being confined, or who are restored to duty after trial to await completion of appellate review. As will be observed, entitlement to pay under these circumstances does not depend on the outcome of the proceedings.

The pay rights of an enlisted member who, before being confined, is in a full duty status making good "time lost" are said to be the same as during the normal term of his enlistment. The Comptroller General has stated that the act of 24 July 1956[20] "has the effect of authorizing pay and allowances to an enlisted member while he is being held in the service to make good time lost during

[18] MS. Dec. Comp. Gen. B-113109, 30 January 1953 (cited with apparent approval in 33 Decs. Comp. Gen. 281 (1953), 3 Dig Ops, Sent & Pun §57.9); *cf.* JAGA 1954/6949, 26 August 1954, 4 Dig Ops, Pay §83.5; CSJAGA 1949/7341, 8 December 1949, 9 Bul JAG 50. The pay status of an absentee whose term of service has expired has been different in other respects, too, from that of one AWOL within his normal term of service. See 31 Decs. Comp. Gen. 645 (1952), 2 Dig Ops, Mil Pers §65.3 (no payment of gratuity when death occurs during AWOL after ETS); MS. Dec. Comp. Gen. B-105587, 19 November 1951 (same); 38 Decs. Comp. Gen. 47 (1958), 8 Dig Ops, Pay §35.5 (effect of AWOL after ETS on "saved pay"). The distinction suggests that administratively excusing AWOL as unavoidable would not entitle the member to pay and allowances for any period of the absence after his term of enlistment expired. *But see* Armed Forces Leave Act of 1946 §4(b), 60 Stat. 964, as amended, 37 U.S.C. §33(b) (1958).

[19] Para. 1-95*a*(1), AR 37-104, 2 December 1957, as changed by C11, 9 February 1959. Acquittal, of course, would not of itself restore the right to pay and allowances for the period of AWOL, and does not always warrant excusing the absence as unavoidable for pay purposes. Paras. 1-91, 1-94, AR 37-104, 2 December 1957; MS. Dec. Comp. Gen. B-136430, 9 July 1958; *cf.* MS. Dec. Comp. Gen. B-140250, 21 August 1959.

[20] 70 Stat. 631. The statute replaced prior "time lost" statutes, and has since been reenacted as 10 U.S.C. §972 (1958).

his enlistment period, beginning with his inital return to full duty after the expiration of his enlistment.[21] While he is confined, the soldier obviously is not making good any of the time lost, but he is entitled to pay regardless of the outcome of his trial (subject to any forfeitures imposed by a sentence).[22] It does not make any logical difference that the member was not in a full duty status immediately on the expiration of his term of enlistment or that the offense for which tried was committed during the normal enlistment term,[23] but it undoubtedly is significant that the Marine involved in the decision quoted had not made good all of his time lost before he was confined. He still would have more than three months to make good after serving his sentence, and the Marine Corps proposed to hold him to it.[24] Therefore, while he was confined he was, in a sense, also being retained to make good time lost on his return to full duty.

Although a member may have been confined under circumstances not entitling him to pay after his term of service expired, he is entitled to pay and allowances for any period of restoration to normal duty pending completion of appellate review.[25] This is true even though he may have been sentenced to total forfeitures. One decision to that effect apparently was based on the fact that the order restoring the member to duty recited that the "portion of the sentence adjudging forfeitures shall not apply to pay and allowances becoming due on and after the date of this order."[26] A more recent decision reached the same result where there was no such provision in the order, holding that the restoration to duty impliedly suspended the forfeitures.[27]

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[21] 37 Decs. Comp. Gen. 488 (1958), 7 Dig Ops, Pay §21.1. For opinions discussing the elements of "full duty," see 37 Decs. Comp. Gen. 380 (1957), 7 Dig Ops, Pay §18.1; JAGA 1954/6949, 26 August 1954, 4 Dig Ops, Pay §83.5; JAGA 1952/9608, 2 January 1953, 2 Dig Ops, Pay §18.1; CSJAGA 1949/7341, 8 December 1949, 9 Bul JAG 50. An analogous question is present in some of the decisions cited *infra* note 25.

[22] 37 Decs. Comp. Gen. 488, *supra* note 21.

> An enlisted man contracts for faithful service, but is entitled to pay while in confinement during his regular enlistment period except as forfeited by court-martial sentence, and there appears no basis to conclude that Congress intended to apply a different and more harsh rule to an enlisted man held in service after the expiration of his enlistment to make good time lost. *Ibid.*

[23] *But see* 37 Decs. Comp. Gen. 380 (1957) (answer to question 1(c) of the DOD Military Pay & Allowance Committee Action); para. 1–97*b*, AR 37–104, 2 December 1957.

[24] 37 Decs. Comp. Gen. 488 (1958); *cf.* MS. Dec. Comp. Gen. B–6856, 9 November 1939 (payment during hospitalization while held to make good time lost); see 37 Decs. Comp. Gen. 228 (1957).

[25] 39 Decs. Comp. Gen. 42 (1959); 37 Decs. Comp. Gen. 591 (1958), 8 Dig Ops, Sent & Pun §35.7; 37 Decs. Comp. Gen. 228 (1957); 36 Decs. Comp. Gen. 564 (1957); 33 Decs. Comp. Gen. 281 (1953), 3 Dig Ops Sent & Pun §57.9.

[26] 33 Decs. Comp. Gen. 281, *supra* note 25.

[27] 37 Decs. Comp. Gen. 591 (1958), 8 Dig Ops, Sent & Pun §35.7.

The rules previously discussed quite obviously originated in certain conceptions as to the nature of a contract of enlistment and the obligations thereby created.[28] However, enlisted members of the Regular services are not the only members who do not accrue pay and allowances during confinement after a term of service unless acquitted or unless previously making good time lost. It has been said that "no basis is perceived for a different holding simply because the duration of the expired term of active service was fixed by means other than a contract of enlistment in a regular or reserve component."[29] The wording of the questions presented by the Committee Action and discussed in the 1957 decision previously mentioned indicates that the rules apply to enlisted members inducted for a fixed term.[30] What of enlisted reservists ordered to active duty under orders which prescribe a definite term, and which are not self-executing as to release from active duty? Despite the dubious effect of one statute, and some confusing language in a related decision, it can be said with certainty if not logic that the rules apply to them, too.

The statute in question is subsection 683(b) of title 10, United States Code, which provides:

> A Reserve who is kept on active duty after his term of service expires is entitled to pay and allowances while on that duty, except as they may be forfeited under the approved sentence of a court-martial or by nonjudicial punishment by a commanding officer or when he is *otherwise in a non-pay status.* [Italics added.]

That subsection is a reenactment of section 241 of the Armed Forces Reserve Act of 1952,[31] which section was "designed to remove any doubt as to the regularity of payments to reservists whose enlistments [*sic*] have expired but whose presence is required for

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[28] See, *e.g.*, 11 Decs. Comp. Gen. 342, 343 (1932).

[29] MS. Dec. Comp. Gen. B–117743, 23 April 1954. The decision held that enlisted members with dependents, including Regular enlisted members, enlisted reservists "on active duty," enlisted reservists on active duty "for a specified period of time," and persons inducted "for a specified period of time," were not entitled to a basic allowance for quarters subsequent to expiration of their terms of service while confined pursuant to a court-martial sentence (because not then entitled to basic pay). It was also held that regulations entitling them to that allowance could be promulgated pursuant to authority contained in the Dependents Assistance Act of 1950 §5, 64 Stat. 796, 50 U.S.C. App. §2205 (1958). To date, no such Army regulations have been promulgated, either as to members confined under sentence or pretrial. Compare paras. 5–43*b*(2), 5–56, 5–58, 5–91, 5–92, 5–94, AR 37–104, 2 December 1957. The decision did not, however, specifically consider the possible effect of 10 U.S.C. §683(b) (1958), the Armed Forces Reserve Act of 1952 §241, 66 Stat. 492, discussed *infra*.

[30] 37 Decs. Comp. Gen. 380 (1957), 7 Dig Ops, Pay §18.1.

[31] 66 Stat. 492; S. Rep. No. 2484, 84th Cong., 2d Sess. 59 (1956).

court-martial proceedings, investigation, or other purposes."[32] The effect of that status on the problem here being considered depends on the meaning of the phrase "otherwise in a nonpay status," or, as originally enacted, "otherwise in a nonpay status pursuant to law." The one decision in which the issue seems to have been raised, but only indirectly, involved an enlisted Naval reservist whose term of "obligated service" terminated on 30 August 1955. In October 1955, he was sentenced to reduction in grade and to confinement at hard labor for four months, for absence without leave. In January 1956, he was released from confinement, and from active duty on the same day. The question presented was whether he had any actual rate of pay when released, so that he could be paid for his unused leave. Holding that the payment could be made, the Comptroller General stated at one point:[33]

> An enlisted man retained in the service beyond the term of his enlistment awaiting trial is not entitled to pay and allowances after expiration of enlistment where the trial results in conviction. . . . On the basis that under such rule this reservist had no rate of pay when released to inactive duty, you express doubt that he may be paid for his unused leave.
>
> This case, however, appears to involve a retention after the expiration of a fixed tour of ordered active duty rather than a retention after expiration of enlistment. Since the reserve enlistment contract continued in full force and effect and the individual's Naval Reserve status was not affected, the rule relating to the payment of pay and allowances during confinement after expiration of the contract of enlistment is not for application.

Section 241 of the Armed Forces Reserve Act of 1952[34] was next quoted, without comment. Then the decision concludes:[35]

> Under the provisions of section 4 of the Armed Forces Leave Act of 1946, 60 Stat. 964, as amended, 37 U.S.C. 33, ... unquestionably there is a rate of pay applicable to the grade held by an enlisted reservist even though the reservist may be in a nonpay status. Thus, even though

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[32] H.R. Rep. No. 2445, 82d Cong., 2d Sess. 30 (1952), 1952 U.S. Code, Cong. & Ad. News 2005, 2037. The Armed Forces Reserve Act of 1952 §241, 66 Stat. 492, was worded as follows:

> Members of the reserve components retained or continued on active duty . . . pursuant to law after the expiration of their term of service are entitled to pay and allowances while on such duty except to the extent that forfeiture thereof is adjudged by an approved sentence of a court-martial or nonjudicial punishment by a commanding officer, or unless otherwise in a non-pay status pursuant to law.

In this connection, there should be noted the number of decisions to the effect that laws conferring pay on reservists ordered to active duty contemplate that the reservist will be ordered to active duty only for the purpose of actually performing duty, and that if on active duty for other purposes he is not entitled to pay. 35 Decs. Comp. Gen. 626 (1956); 33 Decs. Comp. Gen. 339 (1954); 27 Decs. Comp. Gen. 490 (1948); 26 Decs. Comp. Gen. 107 (1946); 21 Decs. Comp. Gen. 781 (1942).

[33] 35 Decs. Comp. Gen. 666, 667 (1956). The member's duty status from 30 August 1955 until sentenced was not mentioned.

[34] 66 Stat. 492, quoted *supra* note 32.

[35] 35 Decs. Comp. Gen. 666, 667–8 (1956).

> this reservist was not retained after the expiration of his ordered tour of active duty for the performance of duty but to await the completion of criminal proceedings against him for a violation of an article of the Uniform Code of Military Justice *and apparently is to be regarded as being in a 'nonpay status pursuant to law'* after August 30, 1955 (compare 17 Comp. Gen. 103), he is entitled to be compensated for his unused leave as authorized by the statute. [Italics added.]

In view of the earlier holding that an enlisted reservist whose term of active duty had expired was not entitled to a quarters allowance because not entitled to basic pay while confined under sentence,[36] and the second of the two quotations immediately above, it seems most likely that when confronted squarely with the issue the Comptroller General will hold that a reservist is not entitled to pay and allowances while confined after his term of active duty, unless he is acquitted or was first restored to full duty to make good time lost. That is, such a member apparently will be viewed as "otherwise in a nonpay status" within the meaning of title 10, United States Code, subsection 683(b), and so not entitled to pay by that statute. If that seems possibly at variance with the wording and purpose of the statute—neither of which, however, is abundantly clear—it at least has the virtue of bringing enlisted Reserves and Regulars under the same rule. With what definiteness, and by what administrative documentary means, the term of active duty must be specified remains to be seen.

Unlike enlistments, the appointments of Regular and Reserve officers are not for fixed terms, but Reserve officers frequently are ordered to active duty for a specified period. It has been said that the active duty "category" of an Army reserve officer does "not represent any definite tenure of active service which would affect an officer's right to pay and allowances if held beyond the period in which he had agreed to or was required to be on active duty."[37] This ruling at least avoids one further question: Would the fact that a Reserve officer was performing full duty before being confined after his term of service entitle him to pay if he were convicted? Possibly not. He could not have been making good "time lost," because the "time lost" statute does not apply to officers.[38] The door may have been left open, however, for a

[36] MS. Dec. Comp. Gen. B–117748, 23 April 1954, discussed at note 29 *supra*.

[37] MS. Dec. Comp. Gen. B–138586, 19 March 1959. The officer's "category" term expired 28 February 1957. He had been AWOL since August 1956 and continued so until May 1958. In October 1958 he was sentenced to dismissal and total forfeitures. The decision holds that pay accrued from the date of his return to military control, but does not disclose whether he ever was confined. The system of classifying Army Reserve officers according to obligated service has undergone some change, but the present system involves no more definiteness. See AR 135–215, 27 May 1955; AR 330–301, 12 August 1955.

[38] 10 U.S.C. §972 (1958). See note 24 *supra*.

holding that after the end of a more definitely specified term of active duty a Reserve officer's pay rights may be substantially different than before. When the issue arises, a distinction will have to be made between Reserve officers and Reserve enlisted men ordered to active duty under like procedures, or between Reserve officers and Regular officers. Neither distinction seems wholly justifiable.

A member of the Army who is subject to the criminal jurisdiction of a foreign civilian court (*i.e.*, under investigation, awaiting trial or appeal, or serving sentence) normally is not discharged at the expiration of his term of service.[39] Such a member who is retained in the service performing duty is entitled to pay,[40] but if he is confined by or for the civilian authorities he is absent without leave and is not entitled to pay for that period unless the absence is excused as unavoidable.[41] The absence may be excused as unavoidable if from the outcome of the proceedings it is evident that his own misconduct did not cause the absence.[42] When the member is thereafter returned to military control, his pay status is subject to the rules previously discussed.

Still another reason why a member of the Armed Forces may not be separated at the time normally scheduled is that he is hospitalized. The Comptroller General has held that an enlisted member retained for treatment in the hospital when his term of service expires is retained in the service for his own convenience, not that of the Government, and is not entitled to pay and allowances.[43] Now, however, subsection 3262(a) of title 10, United States Code, provides:

> An enlisted member of the Army on active duty whose term of enlistment expires while he is suffering from disease or injury incident to service and not due to his misconduct, and who needs medical care or hospitalization, may be retained on active duty, with his consent, until he recovers to the extent that he is able to meet the physical requirements for reenlistment, or it is determined that recovery to that extent is impossible.

Similar provisions apply to sailors, marines, and airmen.[44] Those

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[39] Para. 15, AR 635–200, 8 April 1959 (EM); paras. 3, 4, AR 635–135, 5 December 1958 (officers). See also paras. 22–25, 27, AR 635–200, *supra*; AR 635–140, 5 December 1958.

[40] MS. Dec. Comp. Gen. B–124309, 30 November 1955, 5 Dig Ops, EM §29.1.

[41] 36 Decs. Comp. Gen. 173 (1956), 6 Dig Ops, Pay §18.1; para. 1–98*a* AR 37–104, 2 December 1957, as changed by C7, 31 October 1958.

[42] 36 Decs. Comp. Gen. 173, *supra* note 41; paras. 1–98*a*(2), *f*, AR 37–104, *supra* note 41. Excusing the absence as unavoidable apparently would restore the member's entitlement to pay and allowances even for that portion of the absence which was after his term of service expired. See note 18 *supra*.

[43] 19 Decs. Comp. Gen. 290 (1939); MS. Dec. Comp. Gen. B–1749, 8 March 1940. *Contra*, Peiffer v. U.S., 96 Ct. Cls. 344 (1942), Mil. Juris., p. 392.

[44] 10 U.S.C. §5537 (1958) (Navy); 10 U.S.C. §8262(a) (1958) (Air Force).

sections are reenactments of the act of 12 December 1941, which was enacted to overcome the effect of the decision of the Comptroller General.[45] The wording of the 1941 enactment was substantially the same as that quoted above, except that it contained the clause "and any such enlisted man shall be entitled to receive . . . his pay and allowances."[46] In the present reenactment, the provision relating to pay and allowances was "omitted as unnecessary, since all members on active duty are entitled to them."[47] If that remark seems unduly complacent in the light of the previous discussion, it was even more so in view of the checkered history of the particular situation involved. Before 1919, an enlisted member retained for hospitalization—at least in the Navy—was not entitled to pay and allowances after his enlistment term expired.[48] Then, Navy regulations were amended so as to entitle such members to pay and allowances, and the Comptroller of the Treasury approved the change.[49] There, despite occasional indications to the contrary, the matter rested until 1939, when the Comptroller General decided that the retention was only for the convenience of the member himself.[50]

Army regulations contain detailed instructions implementing section 3262 of title 10, United States Code.[51] An enlisted member may be retained for hospitalization and receive pay and allowances only if he consents to being retained and if his injury or disease was incurred "incident to service."[52] If it is finally determined after his term of service already has expired that the

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[45] 55 Stat. 797; 1941 U.S. Code Cong. Serv. 902–3. That the statute applies only to enlisted members suggests a contemporary view that no such authority was *needed in order to entitle officers to pay.*

[46] 55 Stat. 797.

[47] S. Rep. No. 2484, 84th Cong., 2d Sess. 204, 587 (1956); *Id.* at 383.

[48] 26 Decs. Comp. Treas. 128 (1919); 23 Decs. Comp. Treas. 370 (1917); 18 Decs. Comp. Treas. 436 (1911); 12 Decs. Comp. Treas. 620 (1906); 3 Decs. Comp. Treas. 4 (1896); 2 Decs. Comp. Treas. 11 (1895).

[49] 26 Decs. Comp. Treas. 447 (1919).

[50] 19 Decs. Comp. Gen. 290 (1939); see 19 Decs. Comp. Gen. 288 (1939); 18 Decs. Comp. Gen. 781 (1939); 17 Decs. Comp. Gen. 103, 104 (1937). The contrary holding in *Peiffer* v. *U.S.*, 96 Ct. Cls. 344 (1942), apparently has been ignored. Army regulations provide that an enlisted member may not credit as service in computing basic pay a period of post–ETS hospitalization prior to 12 December 1941. Para. 1–52, AR 37–104, 2 December 1957.

[51] Paras. 14*d–f*, AR 635–200, 8 April 1959.

[52] Paras. 14*d*(2), 14*d*(5), 14*e*(3), AR 635–200, *supra* note 51. Those provisions require that the consent be in writing. However, it has been held that, for pay purposes, the consent may be implied. MS. Dec. Comp. Gen. B–131232, 24 April 1957 (before AF member's ETS he was in custody of civil authorities and was committed to State hospital; after ETS was transferred to VA hospital, then to AF hospital, absence excused as unavoidable, and discharged with severance pay for disability; held entitled to pay and allowances during medical treatment in all three hospitals after ETS); 35 Decs. Comp. Gen. 366 (1955), 5 Dig Ops, Pay §83.5. The phrase "incident to service" means "in line of duty." JAGA 1956/2951, 2 April 1956.

disease or injury was not incurred incident to service, his medical care up to the date of separation will be at Government expense, but he will receive no pay and allowances.[53] If, when his term of service expires, a member is retained in the service in a nonpay status—such as when serving a sentence to confinement imposed by a court-martial—he is not precluded from being retained thereafter pursuant to the authority of section 3262 of title 10.[54] Once released from confinement and retained for hospitalization, he becomes entitled to pay and allowances. It also has been said that once a member is being retained for hospitalization within the purview of section 3262, then becomes involved in court-martial proceedings, his entitlement to pay and allowances remains the same as during the contractual term of his service.[55] This result seems reasonable so long as the member is actually receiving medical treatment.[56] The generalization should not be taken too literally, however, for the two members involved in the decision that announced it do not seem to have been actually confined at any time.[57]

Finally, members of the Army or Air Force may be surprised and a bit envious to learn that under certain circumstances an enlisted member of the Navy or Marine Corps who is not discharged at the expiration of his term of enlistment is entitled to *more* pay than before. Section 5540 of title 10, United States Code provides:

> (a) The senior officer present afloat in foreign waters shall send to the United States . . . as soon as possible each enlisted member of the naval service who is serving on a naval vessel, whose term of enlistment has expired, and who desires to return to the United States. However, when the senior officer present afloat considers it essential to the public interest he may retain such a member on active duty until the vessel returns to the United States.
>
> (b) Each member retained under this section— . . .
>
> (2) except in time of war is entitled to an increase in basic pay of **25 percent.**
>
> (c) The substance of this section shall be included in the enlistment contract of each person enlisting in the naval service.[58]

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[53] See paras. 14*e*(2), (3), AR 635–200, 8 April 1959; para. 1–95*c*, AR 37–104, 2 December 1957. The latter regulations erroneously use the phrase "due to his own misconduct," instead of "not in line of duty."

[54] 35 Decs. Comp. Gen. 366 (1955), 5 Dig Ops, Pay §83.5; para. 1–95*d*, AR 37–104, 2 December 1957.

[55] 35 Decs. Comp. Gen. 110 (1955).

[56] Compare 37 Decs. Comp. Gen. 488 (1958), 7 Dig Ops, Pay §21.1 (member held to make good time lost).

[57] 35 Decs. Comp. Gen. 110 (1955).

[58] Similar legislation has been in effect since 1837. For a history of such enactments, see 21 Decs. Comp. Gen. 425 (1941); 5 Decs. Comp. Gen. 97 (1925); 5 Decs. Comp. Treas. 524 (1899). Similar provisions apply to the Coast Guard. 14 U.S.C. 367(a) (1958).

One who enlists in the Regular Navy or Naval Reserve and whose term of enlistment expires may become entitled to pay pursuant to the above statute.[59] On the other hand, a Naval Reservist whose term of obligated active service as distinguished from enlistment, has expired is ineligible for the increase of pay.[60] Possibly the ending of a reservist's term of active duty entitles him to penalties,[61] but not to benefits.

The main purpose of this excursion into one of the more unsightly areas of the laws relating to pay and allowances has been to map the present rules. It is obvious, however, that the area suffers from the effects of piecemeal legislation, and decisions based on no uniform principles.

Whether soldiers—or officers—who because of their own wrongdoing are not performing duty should receive pay and allowances is a legitimate consideration, but it isn't the one that has guided the decisions discussed here. Perhaps a more fundamental question is this one: Can the system of compensation for military service, over which the Hook Commission, the Cordiner Committee, the Armed Forces, and Congress have labored so long, achieve maximum effect in the face of unsettled qualifications for entitlement even to basic pay? Lack of uniform principles leads either to delays in payment or to mistakes. Mistakes in payment, whether in favor of the member (overpayments must be recouped) or of the Government, raise the cost of administration and lower morale. Delays have the same effect. How long will be the delay in proposing legislation designed to create rational conditions of entitlement to basic pay?

[59] 37 Decs. Comp. Gen. 178 (1957); 36 Decs. Comp. Gen. 709 (1957).
[60] 36 Decs. Comp. Gen. 709, *supra* note 59.
[61] MS. Dec. Comp. Gen. B-117743, 23 April 1954, discussed *supra* note 29; see 35 Decs. Comp. Gen. 666, 667 (1956).

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Distribution:

Active Army: To be distributed in accordance with DA Form 12–4 requirements for DA Pam 27–100-series, Military Law Review.

NG: None.

USAR: None.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1960—554199