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PREFACE

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MILITARY LAW REVIEW

THE ADMINISTRATION OF JUSTICE WITHIN THE ARMED FORCES OF THE GERMAN FEDERAL REPUBLIC*

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I. GENERAL INTRODUCTION

After the surrender of the German Forces, the Wehrmacht, on May 8th, 1945, and the occupation of Germany by the Allied Forces, it was the object of the occupation powers to dissolve the German Forces that were left and by all means to prevent the restoration of German Forces for the foreseeable future. In order to achieve this object not only were all military units disarmed and their installations rendered useless, but also all legal background for the existence of German Forces was repealed by article III of the Allied Control Council Law 34.

Not only with the occupation powers, but also within occupied Germany itself, the opinion was widely held that there would be no German armed forces for decades to come. It was therefore no surprise that during the course of the progressive restoration of German sovereignty within the area of the later German Federal Republic by the three western occupational powers, the United States, Great Britain, and France, the question of the military sovereignty of Germany was hardly discussed at all.

It was for these reasons that the problems of the armed forces and the defense of Germany were rarely mentioned during the elaboration of the German constitution, the so-called Grundgesetz (basic law), in 1948 and 1949. When the Grundgesetz was proclaimed on May 23rd, 1949, only a few provisions indicated the remaining importance of armed forces, especially for reasons of defense, within a nation. Thus, the Grundgesetz in article 4 merely included the right of the conscientious objector as basic right of the German citizen, in article 26 declared the war of aggression illegal, and in the same article made trade and traffic with arms and war material subject to the approval of the Government of the German Federal Republic.

The political development in the following years—mainly the steadily increasing threat against the free countries of the world by the aggressive policy of the Soviet Union and her satellites—

* This article represents the state of law as it was in June 1959; however, minor changes are in process and may be put into effect early in 1960.

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made it necessary for the three western occupation powers to renounce their disarmament policy and to allow the German Federal Republic to take part in the military defense of the free world. This contribution was asked for the first time in a joint declaration of the foreign ministers of the United States, Great Britain, and France on September 14th, 1951, and was to materialize within the framework of NATO. At first, the preparatory measures intended the German Federal Republic to pay her defense contribution within a European Defense Community and therefore within integrated European forces. This plan failed because of rejection by the French National Assembly on August 30th, 1954; thus, the defense contribution could only be realized by the formation of national forces of the German Federal Republic.

According to international law the way for the formation of these forces was made practicable with the full restoration of German sovereignty by the former western occupation powers on May 5th, 1955. According to German national law, however, the necessary legal foundations were still required for the formation of Forces of the German Federal Republic, the so-called Bundeswehr.

As of March 26th, 1954, by amendment of article 73 of the Grundgesetz the Federal Republic was already conceded by her parliament exclusive legislation in the field of defense and conscription, but it was only as late as March 19th, 1956, that the constitutional background for military law and military organization could be created by another amendment of the Grundgesetz. In this amendment a number of articles were inserted, which comprised the constitutional background of military law, as well as the stipulation as to which place these forces were to take within the political life of the German Federal Republic. Moreover, this amendment hinted at the strict distribution of functions between the military and the civil sectors within the Bundeswehr, a distribution, which was to become decisive for the solution of all legal matters within the Bundeswehr. In substance, this distribution rules that only typically military functions will be dealt with by soldiers, whilst all administrative and juridical functions are preserved for the civil sector.

Since the formation of the Bundeswehr could not be delayed until the creation of a complete catalog of military law, a limited number of volunteers were called up on November 1st, 1955, according to a special law, the so-called Volunteers' Law (Freiwilligengesetz) proclaimed on July 23rd, 1955. Because of the lack of special provisions for rights and duties of the soldiers, these volunteers were placed under the provision of the existing

law for the civil service. This could only be a temporary measure as the completely different duties of soldiers and civil servants require different rights and therefore a different legal foundation.

In the following period, these necessary legal foundations were prepared and proclaimed as law during 1956 and 1957. For the subsequent discussion of military law and especially the administration of justice within the Bundewehr the undermentioned laws are of the main interest:

Soldiers' Law (Soldatengesetz) proclaimed on March 19th, 1956

Military Regulation on Complaints Procedure (Wehrbeschwerdeordnung) proclaimed on December 23rd, 1956

Military Disciplinary Regulation (Wehrdisziplinarordnung) proclaimed on March 15th, 1957

Military Penal Law (Wehrstrafgesetz) proclaimed on March 30th, 1957

A survey of these laws of the German national defense legislation will be given later in this study.

There were different and partly very contradictory opinions on the basic question of military law and especially on the administration of justice before the respective amendment of the Grundgesetz on March 19th, 1956. In spite of the fact that there were many supporters of the cause of military justice, especially as a federal and military criminal jurisdiction, in the final decision the existing civil jurisdiction was given precedence. Jurisdiction in Germany, however, is not a federal matter but rests under the authority of the German states, the Lander, which form the German Federal Republic. According to the Grundgesetz these Lander have the sovereignty in the judicature. With this decision, the "citizen in uniform," as the German soldier was now called, in general remained subject to the existing civil courts, as a sign of clear dissociation from the abuse of militarism and from the—however widely exaggerated—negative effects of the former German military jurisdiction. This fact is only to be understood, if one considers that the new German Bundeswehr, which was built up only a few years after the disarmament of the former Wehrmacht, and had so much reminiscent of the war and dictatorship, was at first met with a certain distrust, and that even after this distrust faded away, it was not possible to change or amend the once created legal foundations correspondingly.

The present solution to the question of the administration of justice, however, did not leave all jurisdiction over members of the Bundeswehr to the existing civil courts. As an exception military criminal courts are in peacetime allowed to be established

according to article 96a of the Grundgesetz (1) in case of stationing German Forces in a foreign country and (2) for German Forces embarked on naval units. Without any limitation, the military courts will be established in case a state of defense has been declared, i.e., in times of an armed conflict. This authorization so far has not been used.

For the procedure of disciplinary action as well as for the procedure of dealing with complaints it has further been stipulated in article 96 of the Grundgesetz—corresponding with the regulation for civil servants—that the Federal Republic has the authority to establish Federal Service Courts (Bundesdienstgerichte) for the Bundeswehr. This authorization has been made use of in the Military Disciplinary Regulation (Wehrdisziplinarordnung) proclaimed on March 15th, 1957.

It may be judged as a clear indication of the primacy of civil institutions, however, that all those jurists who are employed in legal functions within the Bundeswehr, i.e., the judges of the service courts (Truppengerichte) and of the military service senates (Wehrdienstsenate), the legal advisers (Rechtsberater), and legal teachers (Rechtslehrer), are civil judges and civil servants respectively and not military jurists. Moreover, all legal matters are under the supervision of a civil subdivision within the Federal Ministry of Defense. This supervision comprises all legal matters in all services (Army, Air Force, Navy) as all legal matters are subject to the same legal provisions and are dealt with uniformly.

In the following parts, the military law of the Bundeswehr shall be discussed in so far as it pertains to the judicial decisions of legal questions, legal advice, and legal indoctrination. In particular, this means the discussion of the following sectors: punishment of neglect of duties, judicial decisions on complaints, legal advice, and legal indoctrination. In this study, only those legal foundations will be discussed in detail which have been created exclusively for the Bundeswehr. As far as other existing laws which are applicable to the Bundeswehr, or as far as other existing jurisdiction over members of the Bundeswehr, as for instance in criminal procedure, it must be referred to general publications on German law and German jurisdiction.

II. PUNISHMENT OF NEGLECT OF DUTIES

In its widest sense, neglect of duties by a soldier of the Bundeswehr is to be punished by criminal courts, if the offense constitutes a violation of German criminal law. If there is no such violation in the neglect of duty, the offense is to be punished by

disciplinary action. Disciplinary action may only be taken in addition to criminal punishment in case a disciplinary decision has to be made concerning the delinquent's career. The commanding officer (Disziplinarvorgesetzter) is therefore compelled to hand over every case of neglect of duty to the competent public prosecutor's office, if this neglect constitutes a criminal offense or if this is in question.

A. *Criminal Punishment*

As already mentioned, criminal punishment of soldiers of the Bundeswehr for violation of the German criminal law is at present exclusively a matter of civil courts, irrelevant of the fact that these offenses may have been committed on duty or otherwise are of a typically military nature. With the above mentioned exception, military criminal courts are provided only in case of an armed conflict.

So far, therefore, it has not been necessary to stipulate a code of military criminal procedure. But withal, there is the necessity even in peacetime to punish with criminal penalty a number of offenses which do not happen within the civil sector or which are to be judged differently within this sector.

It was therefore decided to create a special penal law for the military service, in addition to the German penal code, which as a whole remained applicable for the soldier as well. In accordance with the importance of these military offenses, they have not been merely added to the German penal code but were comprised in a special law, the military penal code (Wehrstrafgesetz), proclaimed on March 30th, 1957. It may be stressed, however, that the general German criminal law remains applicable, unless the military penal code rules otherwise.

1. *Military penal law*

In the military penal code all major neglect of duties are made subject to criminal punishment in so far as they are not already punishable according to the general criminal law. Major neglects may be considered those which cannot sufficiently be dealt with by disciplinary action. The military penal code does not comprise the punishment of acts which are only committed in times of an armed conflict, such as cowardice, pillage, etc. A special military law for the punishment of these offenses is in preparation.

The military penal code is divided into the following parts: general provisions and military crimes and offenses. The part "military crimes and offenses" is subdivided into the following four sections: Criminal offenses against the duty of performing

military service, criminal offenses against the duties of subordinates, criminal offenses against the duties of the superior, and criminal offenses against other military duties.

In order to give a survey of this code, the more important provisions shall be discussed briefly. The more interesting parts of the code are those which comprise the military crimes and offenses.

Criminal offenses against the duty of performing military service which are subject to punishment include "arbitrary absence" from the unit for a period of more than three days (sec. 1, par. 15) and "desertion" (par. 16), i.e., absence from the unit "in order to evade the duty of performing military service permanently or for the period of an armed commitment or in order to achieve the termination of the service status." Arbitrary absence from the unit for less than three days will be dealt with by disciplinary action only, if the offense is not subject to punishment as desertion. Furthermore, "self-mutilation," i.e., disabling one's self for military service by inflicting an injury to body or health, constitutes a criminal offense according to paragraph 17 of this section. Also, this section makes it criminal for a person to permanently or for a limited time evade the duty of military service by deception (par. 18).

The "criminal offenses against the duties of the subordinates" (sec. 2) are mainly those of "disobedience" and "insubordination." "Disobedience" (par. 19) means non-compliance with an order of a superior, if the non-compliance results in a "grave consequence", i.e., "a danger to the security of the German Federal Republic, to the striking power of the forces, to the body and life of a human being, or to objects of greater value which are not owned by the delinquent" (Part I, par. 2, No. 3). "Insubordination" (par. 20) is non-compliance with an order of a superior by resisting with word and deed, or non-compliance in spite of the repetition of the order. This means that the non-compliance with an order which has not been repeated, and which has not resulted in a grave consequence, may as a rule only be punished by disciplinary action.

Not every order of a superior has to be obeyed, however. Mainly, the order is not binding "in case it has not been given for official purposes, or constitutes a violation of the dignity of man, or in case the compliance would result in a crime or a criminal offense" (par. 22). If the order were unlawful and there was compliance resulting in such a crime or criminal offense, this would render the subordinate (as well as the superior) subject to punishment.

If the subordinate erroneously assumes the order not to be binding, he will not be punished in case of non-compliance, if he acted under the impression that he otherwise would have committed a crime or criminal offense. If he erroneously assumes the order not to be binding for other reasons, the verdict may only be mitigated. If, however, the subordinate could have avoided the error, i.e., could have recognized the order to be binding after careful examination, he is liable for maximum punishment.

Further included in this section as criminal offenses are "threatening a superior," "compulsion of a superior," as well as "assault against a superior." The criminal offense of "threatening a superior" (par. 23) is the threat of the delinquent against his superior who is on duty or in execution of an act of duty, while "compulsion of a superior" (par. 24) means the act of a subordinate to compel the superior by means of force or compulsion to commit a certain act within his duties. The criminal offense "assault against a superior" (par. 25) needs no further explanation. The last mentioned criminal offenses are already liable to punishment according to the general criminal law but have been inserted in the military penal code as a special amount of punishment had to be provided owing to the importance of these offenses in the military sector. Another important criminal offense included in this section is "mutiny" (par. 27). Mutiny will be punished "in case soldiers conspire collectively and commit with joint force the criminal offenses of insubordination (par. 20), threatening a superior (par. 23), compulsion of a superior (par. 24) or assault against a superior (par. 25)." Criminal offenses by superiors in the execution of their office are included in section 3 of part 2 of the military penal code for the protection of subordinates against "ill-treatment" (par. 30), "degrading treatment" (par. 31) and the "abuse of authority for inadmissible purposes" (par. 32), i.e., for non-official purposes, as well as "inducing to commit a crime or criminal offense" (par. 33). In these cases, too, the legislative body did not consider the existing maximum penalties of the general criminal law sufficient to punish these offenses with the necessary severity, as these acts are rather dangerous in the relationship between subordinates and superiors.

Also illegal and subject to punishment according to this section are the following acts of the superior: "Suppression of complaints" (par. 35) in order to protect the legal right of the subordinate to complain, "command influence" (par. 37), i.e., the abuse of authority to influence soldiers who have functions in the jurisdiction (for instance, military jurors of the military service courts), and "abuse of disciplinary power" (par. 39).

The latter is a rather important offense. According to paragraph 39 a commanding officer will be punished if he—against better knowledge—

"1. inflicts a disciplinary penalty against a guiltless soldier

"2. inflicts a disciplinary penalty, although the disciplinary action is not permissible

"3. inflicts a disciplinary penalty to the disadvantage of the subordinate which is illegal in kind and amount of punishment

"4. punishes a neglect of duty with illegal means."

This provision is to protect subordinates from encroachments of the commanding officer, which the latter commits in abuse of his disciplinary power. Details of the extent of his disciplinary power will be given later in this study.

In the fourth section of part 2 of the military penal code are finally included "criminal offenses against other military duties." These are neglect of duties such as giving a "false report" (par. 42) and "neglect of duty while on guard" (par. 44), if these neglects have resulted in a "grave consequence." The meaning of the term "grave consequence" has already been outlined in the discussion of the offense of "disobedience." "Illegal use of arms" is also punishable, according to the provisions of this section (par. 46). This provision is meant—in addition to the provisions of the general penal law—to lessen the considerable danger of handling arms within the forces. The military penal code moreover provides an increase in the amount of punishment for some criminal offenses within the military service which are already punishable according to the provisions of the general penal law. For example, the offense of manslaughter is such an offense if "the act has been committed by negligent handling of arms, munitions or other war materials" (par. 47).

For other typical offenses in office (as for instance bribery, abetment in office) the soldiers were equalized in status with civil servants, according to paragraph 48, and, therefore, have to meet other penal consequences than the ordinary citizen.

According to the general provisions of the military penal code, the following kinds of punishment may be inflicted on a soldier (par. 8): Detention, custody, imprisonment, and penal servitude.

The death penalty has been abrogated in the German Federal Republic by article 102 of the Grundgesetz and is not expected to reappear even for those crimes which will be made punishable in the criminal law in preparation which deals with crimes in times of an armed conflict.

The punishments laid down in the military penal code in peacetime fulfill the requirements of just retaliation for the committed

wrongdoing. That these punishments are less severe than those of the former German military penal law takes into account the change towards a constitutional and legal state which the German Federal Republic underwent. For example, in "desertion" a maximum penalty of 5 years' imprisonment may be inflicted on the delinquent; in "disobedience," detention and imprisonment, in extreme cases up to 10 years of penal servitude, and in "mutiny" up to 15 years of penal servitude for the ringleader.

If the guilt of the delinquent is insignificant or the consequences of the offense immaterial, a stay of the criminal proceeding may be ruled according to paragraph 153 of the German code of criminal procedure (Strafprozessordnung) and, if necessary at all, a punishment by disciplinary action will be considered sufficient.

The execution of a sentence of detention and imprisonment of not more than a period of one month, as well as confinement (the latter being a kind of punishment which may be inflicted by the provision of the general penal law) will be carried out in centralized penal institutions of the Bundeswehr in order not to hamper the training of the soldier during its execution. Since at present there is no such penal institution of the Bundeswehr available, all the sentences are executed in civilian penal institutions. The establishment of such an institution is, however, under way.

2. *Military Criminal Courts (Wehrstrafgerichte)*

While at present all crimes and criminal offenses of soldiers of the Bundeswehr—including those punishable according to the provisions of the military penal code—are tried before civil courts, article 96a of the Grundgesetz authorizes the establishment of military criminal courts, i.e., criminal courts which have exclusive jurisdiction over members of the forces of the German Federal Republic, in case a state of defense has been declared, i.e., in case of an armed conflict. As already mentioned at the beginning, as a rule the establishment of such a jurisdiction is excluded in peacetime. But there are two exceptions to this rule. According to article 96a of the Grundgesetz, the establishment of military criminal courts is authorized in peacetime (1) for members of the forces who have been sent into a foreign country and (2) for members of the forces who have been embarked on naval units. Such courts, however, have not as yet been established. Should the necessity arise to station larger contingents of the Bundeswehr within other NATO countries, these contingents will have their own military jurisdiction according to

article VII of the NATO Status of Forces Agreement. Such military jurisdiction will also become necessary in case larger units or formations of the German Navy stay for a longer period outside home waters. There are, however, at present no larger units or formations which would necessitate the establishment of military criminal courts. It remains to be hoped for, however, that the authorization of the Grundgesetz will be made use of as soon as possible, as it would seem advisable to gather experience within this field in peacetime.

In case of an armed conflict, military criminal courts are indispensable. Even the former German constitution, the so-called "Weimarer Verfassung" of August 11, 1919, established after the first world war left military jurisdiction untouched for times of war. Military jurisdiction, moreover, is required by the international law of war in times of an armed conflict. Thus, article 84 of the Third Geneva Convention of August 12th, 1949, relating to the treatment of prisoners of war assumes the existence of military courts in order to punish crimes and criminal offenses of prisoners of war. The Fourth Geneva Convention of August 12th, 1949, relating to the protection of civilians in time of war in article 66 stipulates that a violation of the criminal laws enacted by the occupant is to be punished by "non-political military courts sitting in the occupied territory."

But even this intended German military criminal jurisdiction will have a certain civil character. According to article 96a of the Grundgesetz even in case of an armed conflict the military criminal courts will function under the authority of the Federal Ministry of Justice and not that of the Federal Ministry of Defense and their decisions will be subject to revision before the Bundesgerichtshof, the equivalent of the United States Supreme Court.

Nothing can be said of the implementation of the military criminal jurisdiction and of the future code of criminal procedure for this jurisdiction, as legislation pertaining to this is still in preparation.

B. *Disciplinary Punishment*

The disciplinary punishment for neglect of duties committed by soldiers of the Bundeswehr is dealt with by the "military disciplinary regulation" (Wehrdisziplinarordnung), proclaimed on March 15th, 1954. All neglects of duties by soldiers are subject to disciplinary punishment (par. 6 of the regulation):

> "1. in case they do not fall within the provisions of the criminal law or
> "2. in case they do fall within the provisions of the criminal law, but have not resulted in criminal punishment of any kind."

The term neglect of duty within the field of disciplinary law—called "official misdemeanor" according to paragraph 23 of the soldiers' law—is not as clearly defined as the crimes and criminal offenses of the penal law but consists of many a violation committed by a soldier. According to paragraph 23 of the soldiers' law a soldier commits an official misdemeanor "in case he deliberately or negligently neglects his duty."

There shall be mentioned only a few of the many duties of the soldier, the selection being taken from the soldiers' law itself: The duty of faithful service (par. 7), the duty to support the democratic foundation of the German Federal Republic (par. 8), the duty of obedience (par. 11), the duty of comradeship (par. 12), the duty of maintaining discipline (par. 17), etc.

Punishments for "official misdemeanor" are provided in paragraph 6, section 2, of the regulation by: Normal disciplinary punishment; and career punishment. The main difference between normal disciplinary and career punishment is that, in addition to their resulting in different kinds of retribution, normal disciplinary punishment is to be inflicted by the commanding officer and career punishment by military service courts. Another difference is that career punishment may even be inflicted in case the offense has resulted in criminal punishment, while normally criminal punishment excludes a disciplinary punishment (par. 6, military disciplinary regulation). The reason for this lies in the fact that as a rule criminal punishment results in serious consequences for the career of a soldier, such as reduction in rank or dishonorable discharge.

1. *Normal Disciplinary Punishment*

As normal disciplinary punishment, there may be inflicted by the commanding officer (par. 10, military disciplinary regulation): (1) reprimand, (2) severe reprimand, (3) control of pay, (4) fine, (5) confinement to barracks, and (6) arrest.

"Reprimand" is a formal censure, which in the case of a "severe reprimand" will be announced before the unit (par. 11, military disciplinary regulation). "Control of pay" means to distribute pay to the soldier in partial amounts over a period not exceeding three months. This kind of punishment is only permissible against unmarried soldiers under 25 years of age (par. 12, military disciplinary regulation). A "fine" is not to exceed one month's pay (par. 13, military disciplinary regulation). "Confinement to barracks" is only to be inflicted for the period of three days up to three weeks. This kind of punishment may be increased in severity by the prohibition to visit public rooms

within the barracks, or to have visitors (par. 14, military disciplinary regulation). "Arrest," as the most severe disciplinary punishment to be inflicted by the commanding officer, is the deprivation of freedom of at least three days and at most three weeks. In order to prevent the delinquent from evading duty with this kind of punishment, it may be ruled in the verdict that he will be subject to perform duties during this period (par. 15, military disciplinary regulation).

All these above mentioned kinds of disciplinary punishment are inflicted by those superior officers who possess disciplinary powers by legal provisions. Disciplinary power in its extent, however, is arranged in degrees. Thus, for example, a company commander may only inflict a "reprimand" against an officer in his command and is not allowed to inflict arrest against non-commissioned officers and enlisted men. Arrest and other disciplinary punishment, except the above mentioned reprimand against an officer, may only be inflicted by the battalion commander. However, only the regimental commander or a higher rank is authorized to inflict arrest against an officer (par. 17, military disciplinary regulation).

In the application of disciplinary power, the authorized commanding officer is not subject to command influence but will decide freely and independently on the disciplinary punishment of an official misdemeanor, within the limits of the legal provisions. Only in the case of a deliberate breach of a confinement to barracks does the commanding officer have the legal duty to punish this act with arrest (par. 23, military disciplinary regulation).

In order to prevent disciplinary punishment from being inflicted precipitately or prematurely, it is only to be imposed by the commanding officer at the end of the night after the day he received knowledge of the offense. The disciplinary punishment is to be inflicted by official announcement of the written verdict (par. 25, military disciplinary regulation).

There is an important particularity in punishment with arrest. According to article 104, section 2, of the Grundgesetz, "the admissibility or the continuance of a deprivation of fredom . . . is only to be decided upon by a judge." Also because of the fact that this kind of punishment shall only be inflicted in exceptional cases, paragraph 28 of the military disciplinary regulation states that the punishment with arrest may only be inflicted "after the judge has declared it legal in kind and duration. The legality of arrest is to be decided upon by a judicial member of the competent or, in case of emergency, by the nearest service court."

This legal arrangement caused considerable difficulties shortly after the enactment of the military disciplinary regulations, since the service courts were not established at that time and even later on were so few in number. Thus, the necessary declaration often came with considerable delay, with the consequence that the purpose of the punishment could not always be accomplished because of the inevitable postponement. In the interim, the number of the service courts has increased and the procedure is well established.

A complaint is admissible against all disciplinary punishment imposed by the commanding officer. The complaint will be decided upon by the commanding officer of that officer who inflicted the punishment. This is the disciplinary complaint. Only the service court, however, is competent to decide complaints against punishment with arrest. A further complaint, i.e., a complaint against the decision of the commanding officer on the first complaint, will always be decided upon by a service court (par. 30, military disciplinary regulation). The decision of the service court as regards the legal remedy for normal disciplinary punishment is final.

2. *Career Punishment*

As career punishment, there may be inflicted by the service court (par. 43, military disciplinary regulation): (1) reduction of pay, (2) denial of increase of pay, (3) transfer to a lower grade of seniority, (4) reduction in rank, (5) dishonorable discharge, (6) reduction of pension, and (7) deprivation of pension.

Career punishment mentioned under (6) and (7) is only to be inflicted against retired soldiers.

"Reduction of pay" is not to exceed one-fifth of the pay and is not to last longer than five years (par. 44, military disciplinary regulation). "Denial of increase of pay" has the consequence of barring promotion for the time in question (par. 45, military disciplinary regulation); "transfer to a lower grade of seniority" reduces the pay (par. 46, military disciplinary regulation). In case of a "reduction in rank," the pay is reduced according to the new and reduced rank (par. 47, military disciplinary regulation). "Dishonorable discharge"—the most severe punishment for an official misdemeanor—as a rule results in a deprivation of all rights relating to rank and pay (par. 48, military disciplinary regulation).

The arrangement that career punishment is only to be inflicted by military service courts is completely novel, since according to former German military law a soldier could always be

discharged or deprived of his career rights by way of an administrative order without any judicial procedure. Now the legal protection within this field granted to the soldier is the same as that granted to the civil servant.

Career punishment—as already mentioned—may be inflicted in addition to criminal punishment; as a rule, however, this is delayed until the results of the criminal procedure are completed. The ascertainment of the facts by the criminal courts is binding upon the military service courts (par. 62, military disciplinary regulation).

Details as to procedure of the military service courts will be discussed in the following part.

3. *Military Service Courts*

It has already been pointed out that career punishment is only to be inflicted by sentence of a service court. It has also been mentioned that the punishment with arrest has to be confirmed by a judicial member of a service court. Furthermore, as stated previously, the service court functions as an instance of appeal in cases where normal disciplinary punishment has been unsuccessfully protested. As the chief importance of the functions of the military service courts is in the field of disciplinary punishment of official misdemeanors, and since the legal foundation of this jurisdiction is inserted in the military disciplinary regulation, the military service jurisdiction will be discussed in this part of the study.

The military service jurisdiction consists of service courts at the lowest level and military service senates of the Bundesdisziplinarhof as instances of appeal.

a. *Service Courts*

The service courts were established as military service courts at the lowest level by ordinance of the Federal Minister of Defense on April 29th, 1957. The courts are under the authority of the Federal Minister of Defense and are stationed with the corps headquarters of the Army or with military district headquarters.

The service courts are divided into so-called service panels (Truppendienstkammern), which may be placed outside the station of the service courts. As a rule, the jurisdiction of a service panel comprises the area of command of a military district headquarter, a division of the Army, or of a respective formation of the Air Force or the Navy. After the completion of the estab-

lishment of this jurisdiction, each of the six military district headquarters, as well as each division of the Army, or a respective formation of the Air Force or the Navy, will have its own service panel. The competence of the service courts does not follow local jurisdiction such as the place of residence of the delinquent or the place of the offense but follows the unit or establishment of the Bundeswehr in which the accused serves, (par. 52, military disciplinary regulation).

The service panels act with one judge as president and two military jurors (par. 55, military disciplinary regulation). The president must have the qualification for holding judicial office and has to be at least 35 years of age. He will be appointed for life (par. 53, military disciplinary regulation). In cases of special importance, or if it appears to be necessary because of the scope of the case, the presiding judge may order the assistance of another judge until the beginning of the trial. This is called the "great session" (par. 56, military disciplinary regulation).

The military jurors are drawn by lot, according to a specific procedure, and are called up to the sessions of the courts in the sequence of a year list. One of the jurors has to be of the same rank as the accused, the other has to be of higher rank—at least the rank of a staff officer (par. 55, military disciplinary regulation).

The decision of the service panel as a rule is preceded by an extensive procedure, which, before the trial, is directed by the so-called instituting authority. The competence of the instituting authority for officers, enlisted men, and retired soldiers is laid down legally in paragraph 72 of the military disciplinary regulation. There is, as a rule, a military disciplinary prosecutor who initiates the investigations as a representative of the instituting authority in the disciplinary judicial procedure. As military disciplinary prosecutors were appointed, by order of the Federal Minister of Defense of May 6th, 1957, the military legal advisers, to whom this duty was transferred, have this as an additional duty for the duration of their tour. The functions of the legal advisers will be discussed in detail in part IV of this study.

After finishing the investigations, a stay of the procedure is ordered if there are no substantial reasons for its continuance. If there are substantial reasons, however, the military disciplinary prosecutor presents a bill of indictment to the service court and hands over all the records to the court. The presiding judge fixes the date for the trial and serves a notice for trial on

the military disciplinary prosecutor, the accused, the defense counsel, and on other necessary persons, such as witnesses and experts (par. 83, military disciplinary regulation). The hearing of evidence is concentrated on in the trial and is controlled by the court (par. 86, military disciplinary regulation). This concentration on the hearing of evidence at the trial is—unlike the law of the civil service—of great importance in the military field, as the soldier, more accustomed to handling men than records, better attains understanding from the actual hearing of evidence than from the contents of a written paper read before him at the trial.

The trial—unlike the criminal procedure—is held in camera, since in the disciplinary procedure internal facts of the Bundeswehr as well as personal matters of the accused are discussed (par. 85, military disciplinary regulation). The procedure of the trial in its broad sense mainly follows the provisions for the criminal procedure, i.e., the German code of criminal procedure (par. 70, military disciplinary regulation).

The judgment is announced at the end of the trial; a copy of the decision with reasons is served the delinquent and the military disciplinary prosecutor (par. 89, military disciplinary regulation).

A legal remedy (complaint, appeal) is admissible against all decisions and judgments—but not against the decision on complaints—of the service courts. This remedy is dealt with by the military service senates of the Bundesdisziplinarhof (par. 91, military disciplinary regulation). This guarantees a review of the legal and factual matters pertaining to sentences imposed by the service court.

b. *Military Service Senates* (*Wehrdienstsenate*)

As instance of appeal from decisions of the disciplinary jurisdiction special senates, so-called military service senates, are established within the Bundesdisziplinarhof, the highest level for decisions on disciplinary jurisdiction for civil servants of the Federal Republic. While the Bundesdisziplinarhof is in Berlin, the military service senates are established in Munich by ordinance of August 30th, 1957. The authority over these senates rests jointly with the Federal Minister of the Interior, to whom the Bundesdisziplinarhof is subordinated, and the Federal Minister of Defense. But there are other distinctions between the hitherto existing senates of the Bundesdisziplinarhof and the military service senates. A judge of a military service senate is

not allowed to be a member of a civil service senate and vice versa.

The military service senates decide in session with three judges and two military jurors (par. 58, military disciplinary regulation). As a representative of the Government, there has been appointed a "Federal Forces Disciplinary Prosecutor" (Bundeswehrdisziplinaranwalt) at the military service senates at Munich. The federal forces disciplinary prosecutor is subordinated to the Federal Minister of Defense and is to carry out his directives. In case of an appeal the representation of the instituting authority, which rested with the military disciplinary prosecutor at the level of the military service courts, changes to the federal forces disciplinary prosecutor. He is also the chief of the military disciplinary prosecutors (par. 59, military disciplinary regulation).

III. JUDICIAL DECISION ON COMPLAINTS

Apart from their main function, the punishment of official misdemeanors, the military service courts, according to article 96, section 3, of the Grundgesetz, have been assigned the task of participating in the procedures pertaining to complaints of soldiers. This is not the already mentioned competence of deciding complaints against normal disciplinary punishment (disciplinary complaint), but the legal protection against encroachments outside the field of disciplinary punishment. This legal protection is granted by the "Military Regulation on Complaint Procedure" (Wehrbeschwerdeordnung, WBO) of December 23rd, 1956. According to paragraph 1 of this regulation, every soldier is entitled to complain "in case he feels himself being treated incorrectly by a superior or an agency of the Bundeswehr or violated by disloyal conduct of comrades." The complaint is also admissible in case an application of a soldier is not answered within a period of two weeks.

In former German military law, also, every soldier was entitled to complain; however, the complaint was always decided by senior officers only. According to article 19, section 4, of the Grundgesetz, every person whose rights are violated by public authority has legal recourse. Consequently, the soldier also had to be granted the privilege to obtain this recourse.

An essential preliminary for obtaining the aid of the military service jurisdiction in a case of complaint is that the complainant first lodged a complaint with his commanding officer whose decision was unsuccessfully appealed against by a further complaint to the next higher ranking commanding officer, or that

the further complaint was not decided upon within a period of one month. Another preliminary for obtaining the aid of the military service jurisdiction by a soldier is that (par. 17, military regulation on complaint procedure) "his complaint concerns a violation of his rights or a violation of the duties of a superior with regard to the complainant."

In particular, all these rights and duties are established in the legal structure of the Federal Republic, but the majority of them have especially been laid down in the soldier's law. Such rights and duties are, for example: the civic rights of a soldier within the legal limits necessitated by the military service; the right of religious welfare and unhampered religious worship; his protection from abuse or excessive use of authority; the right of the soldier to have a yearly leave; his right to examine his complete record sheet; and his right to obtain a service record. The soldier is also protected in that his superiors are obliged to give orders for official purposes only and in observance of the law and regulations and in accord with international law. Also, the superiors have the duty not to influence subordinates in favor of or against a certain political opinion.

Not within the competence of the military service jurisdiction is the enforcement of claims concerning service status, as for example claims for damages of the Federal Republic against soldiers, as well as claims of the soldiers for pay and other provisions. According to paragraph 59, soldiers' law, these claims are dealt with by the normal administrative jurisdiction in accordance with the legal provisions for the civil service.

In the above mentioned essential preliminaries for engaging the aid of the military service courts in matters of complaint, the case is, as a rule, decided by a service court. The court may hear evidence but, as a rule, decides without trial by decision, which has to be furnished with reasons (par. 18, military regulation on complaint procedure).

The decision may cancel the order or measure, or rule that the order was illegal. In case of a failure to act, the court may rule that action has to be taken under observance of the court. The service court, however, is not allowed to give orders itself, nor to amend orders, but has only the authority to impose the obligation on the competent agency to proceed under observance of the court (par. 19, military regulation on complaint procedure). Decisions and measures of the Federal Minister of Defense are to be dealt with in lieu of the service court by the military service senates (par. 21, military regulation on complaint procedure).

The decisions of the military service courts in matters of complaints are final and may not be disputed by the complainant. The service court is privileged, however, to pass over a legal question of fundamental importance to the military service senates, if, in the opinion of the court, this is required by the development and improvement of the law, or in order to secure a uniform jurisdiction. The decision of the military service senates then is binding for the service court (par. 18, military regulation on complaint procedure).

It shall be mentioned in this connection that after an unsuccessful further complaint, in lieu of the application for a court decision, an appeal to the Federal Minister of Defense is admissible, and his decision on the complaint is final (par. 20, military regulation on complaint procedure).

The privilege of involving the aid of the military service courts does not infringe, however, on the soldier's right of petition, i.e., his right to directly contact the Defense Commissioner, the supporting organ of Parliament in executing parliamentary control over the Bundeswehr and the custodian of the basic rights within the military field (article 45b of the Grundgesetz).

IV. LEGAL ADVICE WITHIN THE BUNDESWEHR

Handling and deciding the numerous legal questions within the Bundeswehr, the criminal and disciplinary punishment of neglect of duties, as well as the difficult complaint procedure, often requires accurate knowledge of the legal provisions on the subject and detailed knowledge of the application of the law. Even entrusting the military service jurisdiction with many of the necessary decisions—a subject that has already been discussed—does not prevent many a decision or preliminary decision, especially in the field of disciplinary action, from being passed on by a military superior. The necessary accurate judicial knowledge, however, within the military field cannot be taken for granted. Therefore, each division commander or a commander of a respective formation if the Air Force or Navy, as well as each commander of a military district, is supported in handling legal questions by a so-called "legal adviser." The commanders of higher headquarters, such as a corps commander, are supported by a so-called "chief legal adviser," to whom the legal advisers of the corps area or respective area of command are subordinated in legal questions. According to former German military law, legal advice was the task of the judge advocate of the military jurisdiction. This could not be repeated, as there is no such military jurisdiction any more. Moreover, there is now

a clear cut distribution of functions between the instituting authority and the deciding authority, the courts, a fact that requires a separation of the authorities taking part in the administration of justice. For these reasons, it was impossible to order the judges of the service courts to give legal advice.

The legal adviser is a civil servant and must have the qualification of holding judicial office. He is the personal adviser of the commander to whom he is subordinated, with the exception of legal questions, in which he receives order from the chief legal adviser. If there is no chief legal adviser, he is subordinated in legal questions to the Federal Minister of Defense directly who also is the head of the chief legal advisers in legal matters.

In particular, the legal adviser has the following duties:

1. To give legal advice to the commander in legal matters of the Bundeswehr, especially in questions of military law, international law, and in criminal or disciplinary matters, as well as in cases of complaint.

2. To examine orders and measures relating to legal operations.

3. To advise and support the commander in indoctrinating the forces in the legal field, especially in the field of international law and military law, and furthermore to give legal indoctrination to officers himself.

4. To assist in all disciplinary matters, to institute investigations, and to function as military disciplinary prosecutor within the military service jurisdiction.

5. To assist in the criminal procedure, especially in cooperating with the public prosecution.

6. To deal with requests for legal assistance from other authorities.

It is not, however, the duty of the legal adviser to give legal aid to soldiers in non-official matters.

The functions of the legal adviser are, at present, laid down only in a special instruction. The only function based expressly on legal authority (par. 59, military disciplinary regulation) is that of the "military disciplinary prosecutor" as a second office, according to the order of the Federal Minster of Defense of May 6th, 1957.

In order to do his duties and achieve his purpose, the legal adviser is entitled to report directly to his commander, and he has to be notified of all matters, measures, and plans within the scope of his duties. All the material necessary for the execution of his duties has to be pased over to him on demand.

V. LEGAL INDOCTRINATION WITHIN THE BUNDESWEHR

The discussion of the administration of justice within the Bundeswehr would not be complete if there were no reference to the legal indoctrination of the soldiers in this connection. Only from the extent of this indoctrination may conclusions be drawn as to the efficiency with which the judicial system works with superiors and subordinates, for only those who know the law are able to apply its provisions.

According to paragraph 10 of the soldiers' law, every superior is to give orders only in observance of the laws and regulations and in accord with international law. This presumes that the superior knows the limits set by the legal provisions and regulations. On the other hand, a subordinate is not to obey an order, if in doing so he would commit a crime or criminal offense (par. 11, soldiers' law). Furthermore, the subordinate may complain, if his rights are infringed on by orders. Therefore, the subordinate also must know the limits of authority of command, as well as his own rights.

The legal indoctrination within the Bundeswehr, therefore, serves the purpose of imparting the necessary legal knowledge to all superiors and subordinates, in order to enable them to adhere to the law in times of peace or of armed conflict.

Because of its importance, the legal indoctrination has its foundation in law. For the field of public and international law, paragraph 33, soldiers' law, expressly stipulates: "The soldiers are to be indoctrinated on their rights and duties in times of peace and war, in the field of civil and international law."

The inclusion of international law was in no small manner caused by the bad experience during the second world war, as well as by the special emphasis laid on this field after the second world war. According to article 25 of the Grundgesetz, "The general rules of the international law are an integral part of the Federal Law. They have priority over the laws and create direct rights and duties for the inhabitants of the area of the Federal Republic of Germany."

Other ranks and noncommissioned officers are instructed in legal questions by their military superiors. The latter receive their legal indoctrination by the legal advisers and the legal teachers.

While the indoctrination of the officers serving in the military units almost exclusively is in the hands of the legal advisers, law teachers impart the necessary legal knowledge at all officers'

training schools and command and staff colleges, within the scope of legal indoctrination imperatively provided by the training schedule. According to the capacity of the officers' school, one or more law teachers are attached to each school.

The law teachers, the same as the legal advisers, are civil servants and must have the qualification for holding judicial office. Before taking up their functions, they receive special instruction on their scope of duties.

The arrangement of the training schedule for the legal indoctrination follows the requirements and purposes of the school in question and is, therefore, not uniformly laid down. There is provided, however, for indoctrination in the field of international law, because of its importance, about half of the time at the teacher's disposal for legal indoctrination. The stress within this field clearly rests on the international law of war.

Besides international law, public and military law is taught, military law being mainly soldiers' law, military criminal law, disciplinary law, and the law of complaint procedure, in other words, mainly those legal fields that have been discussed in this study.

VI. FINAL REMARK

The discussion of the administration of justice within the Bundeswehr of the German Federal Republic was intended to point out the endeavor to confer the constitutional and legal principles of the law of the Federal Republic in their full extent to the forces of the Federal Republic. This endeavor gains special importance by the fact that the German Forces, the Wehrmacht, were reproached with violation of the law by many a foreign country, as well as within Germany itself, reproaches that meant a great incrimination and, therefore, a burden in the course of the establishment of the new Bundeswehr.

The application of constitutional and legal principles within the Bundeswehr is based on the perception that an armed force can protect law and order against an adversary denying such principles only if within its own ranks it observes and applies the law to the full extent.

CONFLICTING SOVEREIGNTY INTERESTS IN OUTER SPACE: PROPOSED SOLUTIONS REMAIN IN ORBIT!*

BY LIEUTENANT COLONEL HAL H. BOOKOUT**

I. INTRODUCTION***

"Space is infinite. Man's knowledge of space is finite. The sum of our understanding is not sufficient for us to comprehend how vast are the dimensions of our ignorance. We delude ourselves—at considerable peril—when, with small fragments of fact and fancy, we attempt to construct an image of the future after the pattern of our own past

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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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*** As the content of this article will reveal, the author has relied to a very great extent upon the activities which have transpired in the Congress of the United States since the advent of man's probe into outer space. When, during the 85th Congress, Senate Majority Leader Lyndon B. Johnson and House Majority Leader John W. McCormack assumed chairmanship of special and select committees to insure necessary action to keep this nation abreast of the new space era, the professional staff members of the respective committees were faced with the immediate task of collecting, for the committees' use, the best available material pertaining to the legal problems involved in the exploration of outer space. An inspection of the congressional material listed in the bibliography of this thesis will reveal the outstanding manner in which this task was accomplished.

Grateful acknowledgement is extended for the benefits which this writer has received from the diligent work of the following staffs:

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Appreciation is also expressed to Mr. Andrew G. Haley, President of the International Astronautical Federation, for the generous manner in which he furnished, from his personal library, abundant research material to the author of this thesis.

experience. We have no frame of reference by which to visualize the design of tomorrow." [1]

It was with this official expression of humility—made after receiving the testimony and advice of the nation's leading experts in the scientific, military, industrial, governmental and legal fields—that the 85th Congress of the United States enacted the National Aeronautics and Space Act of 1958 [2] to create the necessary administrative machinery to facilitate research and exploration activities in this new space era. Perhaps some may characterize the quoted passage as a mere dramatic statement, made by our law-makers to lend color to the pages of history being written. Yet, we in the legal profession are confronted with the same infiniteness of space and the same finiteness of man's knowledge when undertaking the development of a body of law to control relationships of men and nations on this great frontier of challenge.

To the average practicing attorney, whether military or civilian, "space" is a very nebulous term.[3] Regardless of his research facilities, it is doubtful that he can discover a definition more definitive or meaningful to him than that set forth in any recognized dictionary which describes it as that characterized by extension in all directions, boundless, and of indefinite divisibility. At this point—before reading further—the legal mind is probably prepared to take the writer on voir dire, so to speak, to establish the fact that the niceties of a definition of "space" are immaterial. Further the interrogation would establish that the necessary definitions to be sought since the advent of the orbiting satellites and lunar-probing rockets, are those of the areas often referred to as "air space" or "national space" and

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[1] Sen. Rep. No. 1701, 85th Cong., 2d Sess., p. 1 (1958).

[2] 72 Stat. 427 (1958), hereinafter referred to as the 1958 Space Act. For an excellent article setting forth an explanation and the full text of the act, together with the statement made by the President at the time the act was signed into law, see Ludwig Teller, *Peace and National Security in the New Space Age: The National Aeronautics and Space Act of 1958*, 4 New York Law Forum 275 (1958).

[3] As a matter of interest, the Interim Glossary of Aero-Space Terms, Air University, March, 1958 (not to be construed as carrying official sanction of the Department of the Air Force or the Air University), sets forth the following definition: "*space*, n. 1. That which extends in all directions, and has no outward bounds nor limits of divisibility, as in 'the sun and its planets move in space.' 2. Restrictive. A part of this extension marked off or bounded in some way, as by the outer limits of the earth's atmosphere; specif., the extent between the earth's atmosphere, or effective atmosphere, and an outer indefinite boundary, in which extent earth satellites may be put in orbit, ballistic missiles made to follow a plotted trajectory, or vehicles (manned or unmanned) moved about relative to spatial bodies."

"outer space" or "international space," or other proposed terms of similar connotation.[4]

Conceded that this has been asserted as the paramount immediate problem confronting the legal profession—as will be developed in this thesis—the compounding of the noun "space" into such other terms of specific delineation also compounds immeasurably the difficulty of defining for legal acceptation. Suffice it to say at this point that the Congress, in enacting the 1958 Space Act, conducted extensive hearings in the field of astronautics and space—which in printed form approximate two thousand pages [5]—yet with the assistance of seventy-one expert witnesses, the conferees on the bill were forced to conclude: "There is no sharp dividing line between the atmosphere and outer space, and this act does not attempt to define one." [6]

While our law-making bodies, quite appropriately, left to others the task of defining such areas of space for universal acceptance, we find that there certainly has been no such lack of boldness on the part of publicists. Since commencement of the venture into upper areas of space—marked by the blast-off of Sputnik I on October 4, 1957—the pages of law reviews and political journals have been drenched with writings concerning the problem of the extent of national sovereignty into space.[7] Able advocates have attempted to answer the "what space is whose" question by—on the one extreme—declaring that there is no limit to national sovereignty in upper space—to the other extreme—implying that there is no relationship between any particular area of space and an area of the earth's surface, thereby making no space the proper subject of national sovereignty.

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[4] The Interim Glossary of Aero-Space Terms, note 3, *supra*, also contains the following definitions of "air" and "outer space":

"*air*, n. 1. The mixture of gases in the atmosphere. 2. The element that gives lift to aircraft, or offers resistance to objects that move through it. 3. a. The region above and around the earth, including the atmosphere and the space beyond, subject to control by air or space vehicles, in contradistinction to land and sea. b. Restrictive. That part of this region that includes the atmosphere up to its effective upper limits, but not outer space."

"*outer space*. 1. In contexts of currently developing practical aero-space activities, the space above the earth's atmosphere, or above its effective atmosphere. 2. Space beyond the limits of the solar system, as in 'an intruding meteor from outer space.'"

[5] *Hearings before the Senate Special Committee on Space and Astronautics on S. 3609*, 85th Cong., 2d Sess., (1958); and *Hearings before the House Select Committee on Astronautics and Space Exploration on H.R. 11881*, 85th Cong., 2d Sess., (1958).

[6] 118 Cong. Rec. 12646 (15 July 1958).

[7] See for example, John C. Hogan, *A Guide to the Study of Space Law*, 5 Saint Louis University Law Journal 79 (Spring, 1958).

Of course, between these two widely divergent views, there are various hypothetical lines drawn by well reasoning legal and scientific scholars. However, to add to the list of repetitious articles, which in many instances merely parrot the original ideas of the recognized leaders in this field of law, is not the purpose of this thesis. On the contrary, this writing is designed to give the reader the opportunity to analyze and scrutinize the principal theoretical solutions which have thus far been advanced as to what line, if any, should be drawn between national and international space. Also recognizing that there can be no separation of the underlying political interests and military implications involved in arriving at a workable solution of dividing space among nations, these matters will of necessity be discussed as collateral issues.

The analysis of the underlying political interests of the United States will be through an attempt to correlate the theoretical approaches of the scholars, who foresee the necessity for legal order among nations attempting to utilize the newly accessible areas of outer space,[8] and the operational approaches of our governmental officials whom we hold responsible for adopting and implementing the proper approach to insure such desired results. From this writer's research, it appears that the neglect of this aspect of the problem has contributed to the development of an approach toward resolving conflicting sovereignty interests in outer space which unfortunately, though understandably, may presently be characterized as one of over prescribing by the physicians and no partaking of the medication by the patient ..... thus the secondary title of this thesis: "Proposed Solutions Remain In Orbit!"

With this frame of reference, let us begin with the basic problem, the solution to which—whether ill or well-founded—will form the necessary foundation upon which to build the great bodies of domestic and international law to govern the complicated space age of tomorrow.

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[8] Myres S. McDougal and Leon Lipson in *Perspectives for a Law of Outer Space*, 52 American Journal of International Law 407 (1958), present a thought provoking insight into the possible pattern and conditions of the use of outer space. The authors foresee the development of the law of outer space on the basis of "gradually arrived at" international agreements on particular subjects, depending on "the order of experience in space as well as the changing political context." While the article does not lend support, it does recognize and discuss the fact that "most legal writers discussing the legal regime of outer space have proceeded from absolute notions of airspace sovereignty and have felt it necessary to establish a boundary between outer space and airspace."

II. THE BASIC PROBLEM: SPACE—NATIONAL OR INTERNATIONAL?

A. *Existing Claims And Definitions*

On first impression, from a perusal of existing international agreements and the domestic laws of all civilized nations, that which has been posed as the basic problem would appear to be in fact a moot question. It is very clear that Article 1 of the Convention On International Civil Aviation, commonly referred to as the Chicago Convention of 1944,[9] explicitly recognizes that every state has complete and exclusive sovereignty over the air space above its territory. It will be noted that not only does the recognition of complete and exclusive sovereignty extend to the United States and the majority of other Western countries which have ratified the Convention, but to "every state" [10]—which would also include such nonparty states as the Soviet Union and Communist China. It is even more illuminating to learn that a comprehensive study conducted by Mr. Andrew G. Haley, President of the International Astronautical Federation, reveals further that "every state," i.e., each nation of the earth, asserts such recognized sovereignty over its air space through domestic, municipal statutes.[11] None claims more and none claims less. Yet, the Chicago Convention contains no definition of the term "air space" whatsoever.

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[9] Convention on International Civil Aviation, 61 Stat. 1180 (1944). This is the only generally accepted international flight agreement in existence today referring to sovereignty in airspace over national territory. For a listing of the sixty-six nation-states which have ratified the Convention, see note 20, p. 9 of *Survey of Space Law*, A Staff Report of the Select Committee on Astronautics and Space Exploration, House of Representatives, 85th Congress, 2d Session, (1958). For detailed treatment, see Roland W. Fixel, *The Law of Aviation* (1948); and Shawcross and Beaumont, *Air Law* (1951). For a discussion of the historical background of the sovereignty concept expressed in Article 1 of the Convention, see Stephen Latchford, *Freedom of the Air—Early Theories; Freedom; Zone; Sovereignty*, Documents and State Papers 303–22, Department of State No. 5, 1948.

[10] Article 1 of the Convention, 61 Stat. 1180 (1944). As stated by John Cobb Cooper in *Legal Problems of Upper Space*, Proceedings of the American Society of International Law, 1956, p. 86; "The Chicago Convention of 1944, to which most states engaged in international aviation are parties, except the U.S.S.R., restated in article I the provisions of the Paris Convention as to airspace sovereignty in this manner: 'The contracting states recognize that every state has complete and exclusive sovereignty of the airspace above its territory.' Again, as in the Paris Convention, this is a statement of customary international law and not an exchange of privileges between the states concerned."

[11] Mr. Haley presented what he termed the first such compilation during the *Hearings before the House Select Committee on Astronautics and Space Exploration on H.R. 11881*, 85th Cong., 2nd Sess., (May 8, 1958). The compilation is reproduced in full with citations to civil aviation laws on pp. 1447–1454 of subject hearings.

To explore briefly into the possible intent of the drafters of the Chicago Convention concerning the use of the term, the distinguished Professor John Cobb Cooper [12] meets all of the qualifications of both an expert witness and also one who might be called a participating eyewitness to the adoption of this international term of art. Actually, Professor Cooper served as the chairman of the drafting committee which reported the first half of the Chicago Convention and states [13] unequivocally that the term was carried forward without question from the Paris Convention of 1919 where the words "air space" and "atmosphere" and "air" were used synonymously. An interesting observation which he makes to illustrate this point is that an early draft of the convention submitted by Great Britain used the word "air"; that the legal subcommittee in its report to the Commission referred to the area above the earth's surface as characterized by the presence of "the column of air"; and that when the formal Paris Convention was signed, the English version used the term "air space" while the French and Italian productions used the proper terms for "atmospheric space." It can be stated, however, that it was not until the orbiting satellites began to appear in the "space" above "every state"—each of which has an internationally recognized claim to complete and exclusive sovereignty over the "air space" above its territory—that significance attached to these latent ambiguities and lack of positive definitions.

B. *Need For Refinement Of Terms Resulting From The International Geophysical Year*

Contrary to a popular misconception, the International Geophysical Year which officially terminated on January 1, 1959,[14] was not conducted on an intergovernmental basis. While it is true that the governments of the United States and the Soviet Union did announce in advance that during the year they intended to place objects into orbit around the earth, the actual arrangements and agreements for the conduct of such scientific investigations were made between international scientific bodies in their private capacities.[15] The question which logically follows is: "What legal effect did these activities have on the pre-

[12] Professor (Emeritus) International Air Law, McGill University.

[13] Panel Discussion on Space Law, held 29 September 1958, during the Army Judge Advocates Conference at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

[14] Provisional Record of Action, Eighth General Assembly, International Council of Scientific Unions, National Academy of Sciences, pp. 1, 2.

[15] See material for the record submitted by Dr. Alan T. Waterman, Director, National Science Foundation, *Hearings before the House Select Committee on Astronautics and Space Exploration on H.R. 11881*, 85th Cong., 2d Sess., (1958), pp. 1018–1022.

viously recognized complete and exclusive sovereignty of each state over the air space above its territory?"

In attempting to answer this question it is again necessary to return to the Chicago Convention of 1944 to examine the other provisions which surround the recognition of state sovereignty over the undefined area labeled air space. There is no dispute concerning the purpose of the Convention, i.e., to agree on principles and arrangements for the orderly development of international civil aviation and the regulated use of such aircraft.[16] However, in searching for their meaning of the term "aircraft," in an attempt to ascertain the contemplated area of operation known as "air space," we again find that the Convention contains no definition. The original intent is only later reflected in annexes to the Convention which again carry forward parts of the Paris Convention of 1919 and define aircraft as "any machine which can derive support in the atmosphere from the reaction of air." [17]

This definition would certainly indicate that the Chicago Convention was not intended to apply to satellites and spacecraft, and it would follow that the area of state sovereignty over air space was not contemplated to include those areas where machines could not derive support in the atmosphere from the reaction of air. This position is fortified by the provisions of the Convention which limit its application to civil aircraft [18] and exclude pilotless aircraft from its general provisions.[19] Further, the leading authorities in the field of air law have agreed in general that the Chicago Convention is limited in its application to the atmosphere or so-called area of conventional aircraft flight.[20]

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[16] Preamble to the Convention, 61 Stat. 1180 (1944).

[17] See John Cobb Cooper, *Legal Problems of Upper Space*, Proceedings of the American Society of International Law, 1956, pp. 85–93 (reprinted in the Journal of Air and Commerce, Vol. 23, Summer 1956, No. 3). The author explains therein that under the Chicago Convention the technical standards, called annexes, do not become part of the convention. They are prepared by the International Civil Aviation Organization, and are then submitted to the member states for acceptance. When annex 7, containing the quoted definition of aircraft, was submitted, no objection was apparently raised by any member state.

[18] Article 3 of the Convention, 61 Stat. 1180 (1944).

[19] Article 8 of the Convention, 61 Stat. 1180 (1944).

[20] See for example, John Cobb Cooper, *High Altitude Flight and National Sovereignty*, 4 International Law Quarterly 411 (July, 1951); Andrew G. Haley, *Space Law—Basic Concepts*, 24 Tennessee Law Review 643 (Fall 1956); Oscar Schachter, *Who Owns the Universe?* in the book *Across the Space Frontier* (edited by Cornelius Ryan) (Viking Press, 1952); C. Wilfred Jenks, *International Law and Activities in Space*, 5 International and Comparative Law Quarterly 99 (1956); and Eugéne Pépin, *The Legal Status of the Airspace in the Light of Progress in Aviation and Astronautics*, 3 McGill Law Journal 70 (1957).

While the foregoing discussion has purposely reflected on some very complicated international air-law agreements in a most abbreviated fashion, the sole purpose is merely to lead the reader to the obvious and simple conclusion that there is in existence no definitive international law by which to resolve the conflicting sovereignty interests in outer space and no legal answer to the "what space is whose" question—a question which has become more than academic since the advent and particularly since the termination of the International Geophysical Year.

Are all satellites now orbiting in an area of space which may be called international and free to all states, or are the launching states causing unlawful trespass into that area of sovereign air space which all underlying states claim by municipal law and which is recognized by the Chicago Convention? Should a line be drawn between national and international space, and if so, where should it properly mark the boundary?

These questions have been answered in varied and diverse fashion by many legal commentators. Therefore, let us now separate into four general categories the numerous proposals which attempt to fix the hypothetical line between air space *(national) and outer space (international) and—without deciding* at this time whether or not any line at all is necessary—analyze and consider each proposed boundary for national sovereignty,[21] together with the resulting implications.

[21] This grouping is designed to discuss the most prevalent general concepts upon which hypothetical lines have been proposed, rather than on the basis of each individual commentator's views. A combination of four relatively short articles will provide the reader with a summary of the individual views of numerous American and foreign commentators concerning sovereignty in space above national territory: Andrew G. Haley, *Current International Situation and the Legal Involvements With Respect to Long Range Missiles and Earth-Circling Objects*, Pergamon Press, 1958; Philip B. Yeager and John R. Stark, *Decatur's "Doctrine"—A Code For Outer Space?*, United States Naval Institute Proceedings, September 1957, pp. 931–37; Richard T. Murphy, Jr., *Air Sovereignty Considerations in Terms of Outer Space*, The Alabama Lawyer, January 1958, pp. 11–35; William Strauss, *Digest of Selected Foreign Sources on Space Law*, printed in Symposium on Space Law, prepared by Eilene Galloway, Special Consultant, Special Committee on Space and Astronautics, United States Senate, at the request of Senator Lyndon B. Johnson, Chairman, December 31, 1958, pp. 519–22. For the reader who also desires to make a detailed study of the writings of some of the outstanding experts in this field of law, the forty-three selected articles contained in the Senate Committee Space Law Symposium, referred to above, will afford a most comprehensive coverage with a minimum of duplication.

III. THEORETICAL APPROACHES: DIVERSE ADVOCACY OF THE LINE-DRAWING EXPERTS—ANALYZED

A. *"National Sovereignty In Space Is Unlimited"*

This theory would appear to extend to international law the age-old private law maximum that "he who owns the land owns it up to the sky." [22] In the view of some writers,[23] this is the logical extension of the intent of the framers of the Chicago and all preceding Conventions. The historical basis for this contention may be expressed very simply as follows. From the early Roman days each landowner claimed all air space above his land. With the increase of state activity this claim of ownership became vested in the sovereign state and finally culminated in the expression of the Chicago Convention that each state has complete and exclusive sovereignty over the air space above its territory—the concept of air space being, of course, height without limit. There is serious contention that this was the actual meaning which the framers of both the Paris and Chicago Conventions had in mind when they used the term "air space." [24]

The advocates of this theory would consider air space to be all space above a state's territory where flight instrumentalities can navigate—including rockets, guided missiles, satellites and spaceships—and make them the subject of existing rules and regulations of the subajacent state, regardless of the height to which they may ascend. In short, there would be no real need for new international agreements nor the development of a new basis for defining the upward limit of state sovereignty. The answer to the "what space is whose" question would thus have its obvious answer, to wit: "Each state owns all space above—without limit."

What a nice neat legal package this would make if it could only be wrapped: but what is "all space above"? The proponents would answer that it is all space above the underlying state; but again comes a question of what space is "above" the underlying state. A popular illustration used by some legal commentators [25] to explain the impossibility of applying the existing

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[22] For history of the maxim, see John Cobb Cooper, *Roman Law and the Maxim Cujus Est Solum in International Law*, 1 McGill Law Journal 23 (1952).

[23] See for example, R. C. Hingorani, *An Attempt to Determine Sovereignty in Upper Space*, 26 Kansas City Law Review 5 (December, 1957).

[24] *Ibid*, p. 11.

[25] See for example, *The Legal Horizons of Space Use and Exploration*, an address by Charles S. Rhyne, at Annual Law Day Dinner, University of South Dakota, Vermillion, South Dakota, April 19, 1958; 104 Cong. Rec. 6152 (22 April 1958).

air space ownership to outer space, is the theory of the inverted cones.

This theory, expressed in perhaps an over-simplified manner, is—that because of the curved face of the earth—if we attempt to extend the air space ownership upward and outward indefinitely, the extension would give us an inverted cone which would grow bigger and bigger in relation to the earth as it extends further into space. It is true that the earthly base of each inverted cone would be limited to the size of the land-mass and territorial waters of the underlying state; but because of the earth's curvature at this base, the sides would lean outward and the other end of the cone would grow increasingly wider as the boundaries of the state below are projected upward into space. Accordingly, there would naturally come a point when these cones would overlap. From this point, upward and outward, more than one nation would be claiming ownership to the same air space. So again we are back to the unanswered question of what space is above "which" state.

The problem is further complicated by the fact that the foregoing theory of overlapping cones is not generally accepted. Other commentators[26] contend that there are two possible methods of segmenting space according to territorial boundaries of states. One is by projection upward of the geographic boundaries on parallel to a vertical halfway between them. Under this method, the cross-section area of a nation's air space would remain the same to infinity, leaving wedges of unowned space between that claimed by contiguous nations. The other method is by radial verticals from the earth's center through the geographic borders to infinity. Under this second method, it is contended that each nation's air space would expand congruently as the radial boundary lines flare, leaving unowned space only above the open sea. Since these lines would be projected from the same point, the center of the earth, there would be no overlap.

Regardless of which theory is found to be correct, once the true shape of the earth has been determined, its constant rotation presents another vexing problem in attempting to determine what space is above which state. Visualize a rocketing satellite orbiting at 17,000 miles per hour, with the earth—some 500 miles below—revolving at about 1,000 miles per hour. Simultaneously, the earth is traveling in space, in orbit around the sun, at the rate of 66,000 miles per hour. At the same time, the

[26] See for example, Colonel Martin B. Schofield, *Control of Outer Space,* Air University Quarterly Review, Spring 1958, pp. 93–104. This article includes a pictorial graph of the suggested divisions of air space.

sun itself is moving at the rate of 630,000 miles per hour within the galaxy of the Milky Way.[27]

Now again ask the questions: What space is above which state? Through whose sovereign territory is the rocket passing? Which states have the right to forbid such flight? At what point of flight does each state have the right to protest?

These questions can exceed academic bounds when we project our scientific developments a few short years into the future. It is by no means a far stretch of the imagination to visualize the same rocketing satellites complete with reconnaissance photographic equipment or subject to directional control which would permit the pin-pointing by the launching state of a devastating blow to any predetermined portion of the earth. There appears to be no dispute but that time and experience will bring the complete answer to the present re-entry problems.

Under the theory that sovereignty reaches to all space above any state, without limit, a shorthand answer to the questions posed would be that such a flight instrument would be trespassing in the sovereign territory of each state which—because of the rotation of the earth or the path of the instrument—could at any time be determined to be an underlying territory. A true recognition of such a theory would result in any underlying state having the right to protest and disallow such flight, if the protests were honored, and thus effectively block the exploration of outer space for all purposes.

Even though it would be impossible in this writing to discuss all of the ramifications of each proposal surveyed, there is one more very important political aspect of this issue which warrants mention. It is noted that the proponents of this theory assert that such an extension of the alleged intent of the framers of the Chicago Convention would negate the necessity for further international agreements concerning state sovereignty in outer space. However, we must take firm recognition of the fact that the Soviet Union—the first state to penetrate the bounds of outer space—is not a party to even the original precepts of the Convention and therefore is in no way bound by an extension

[27] For a vivid description of the complexities of such movements, see testimony of Dr. Hugh L. Dryden, Director, National Advisory Committee for Aeronautics, *Hearings before the Senate Special Committee on Space and Astronautics on S. 3609*, 85th Cong., 2d Sess., p. 248 (1958).

of its implied meaning, regardless of the plausibility which may be attached to the reasoning.[28]

B. *"National Control Fixes National Space"*

While we are speaking of the Soviet Union, let us briefly dispose of the so-called "effective control" theory,[29] the adoption of which could launch us headlong into a never ending outer-space armaments race with the communist elements of our international society. This theory would fix a temporary upward boundary to each state's sovereignty which would fluctuate periodically like the Dow-Jones average, dependent upon the then existing power of the underlying state to coerce recognition of its claim by effectively controlling that area.

In short form—its adoption would be a voluntary submission to a legal order based on the maxim that with the might goes the right. In shorter form—it would provide the necessary thrust to rocket a civilized world toward its own destruction.

This writer does not overrule the possibility that lack of international cooperation could result in such a legal order; in fact, if the nations of the world are unable to formulate a workable agreement for the peaceful exploration of outer space, effective "military" control may be the only alternative. More will be said on that subject later. However, at this point we are discussing those proposals which might be worthy of voluntary adoption as a means of designating the areas of state sovereignty for all nations—the weak as well as the strong.

Consequently, it is submitted that the effective control theory previously has been mislabeled by some writers as a proposed solution. In essence, it is only an undesirable consequence which could befall us through the lack of international understanding.

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[28] See note 10, *supra*. It is also interesting to note that even though the Soviet Government has not made known its official views concerning the extent of its sovereignty into space, a Staff Report of the House of Representatives Space Committee, note 9, *supra*, after consideration of the available works of Soviet commentators, states at p. 32: "The most recent expressions on the subject indicate that the Soviets are prepared to assert their national rights into the heavens just about as far as it is necessary to further whatever interests they feel are important."

[29] As a legal historian, Professor John Cobb Cooper attributes the first formal proposal of this theory to Hans Kelson in 1944. See for example his recent discussion of the theory in *The Problem of a Definition of "Airspace,"* A Memorandum For the IXth Annual Congress of the International Astronautical Federation; Reprinted in Extension of Remarks of James G. Fulton, Congressional Record daily edition, August 25, 1958, pp. A 7843–45.

C. *"Divide Space Into Zones"*

The zone theory of dividing the area above the earth's surface into layers, each having a different legal status, finds its historical basis in maritime law.[30] Just as the legal regime of the seas is divided into territorial, contiguous and high seas, a suggested international agreement by Professor Cooper would so subdivide space as follows:

> "(a) Reaffirm article I of the Chicago Convention, giving the subjacent state full sovereignty in the areas of atmospheric space above it, up to the height where 'aircraft' as now defined, may be operated, such areas to be designated 'territorial space.'
>
> (b) Extend the sovereignty of the subjacent state upward to 300 miles above the earth's surface, designating this second area as 'contiguous space,' and provide for a right of transit through this zone for all non-military flight instrumentalities when ascending or descending.
>
> (c) Accept the principle that all space above 'contiguous space' is free for the passage of all instrumentalities." [31]

In fairness to Professor Cooper it must be stated that he is not at this time seriously contending that such a proposal be adopted.[32] It was merely set forth by him as a tentative suggestion, and it is accordingly included in this thesis—with a view toward completeness—so that the reader may be informed and have the opportunity to consider the hypothetical lines previously suggested as proper boundaries for state sovereignty.

It is interesting to note that similar proposals, based on different distances but on almost identical principles, were rejected very early in the history of modern air law. The basis for such former rejection was generally that it would be impossible to determine such arbitrary boundaries, with speed and accuracy, when needed.[33]

Naturally, with this historic background, the critics were quick to seize on Professor Cooper's attempt to breathe new life into the zone theory and there will be no attempt made here to add

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[30] See Welf Heinrich, Prince of Hanover, *Air Law and Space*, 5 Saint Louis University Law Journal 11 (Spring, 1958).

[31] Full address of Professor Cooper on *Legal Problems of Upper Space*, made during the proceedings of the American Society of International Law at its fiftieth annual meeting in Washington, D. C., April 25–28, 1956, is reprinted in the Journal of Air and Commerce, Vol. 23, Summer 1956, No. 3. Also see Professor Cooper's letter to the Times (London), September 2, 1957, published under the title "Who Owns the Upper Air?," whereby he modified the proposal to extend the "contiguous zone" to a height of 600 miles.

[32] See for example, Cooper's *Flight-Space and the Satellites*, 7 International and Comparative Law Quarterly 82 (1958); also *Missiles and Satellites: The Law and our National Policy*, 44 American Bar Association Journal 317 (1958).

[33] See Heinrich, note 30, *supra* at 23.

to the beating of a proverbial 'dead horse'. The most commonly asserted reasons for the modern-day rejection have been that there is no proper analogy between the sea which lies at the end of a state's territory and space which lies over its head;[34] it is premature in view of the limited scientific knowledge pertaining to areas of space extending six hundred miles above the earth;[35] the zone theory violates the intent of the Chicago Convention and other international flight agreements;[36] the proposal does not define the extent of "territorial space";[37] it is not susceptible of implementation;[38] and, the "contiguous space" is actually part of the atmosphere which is already governed by precise rules.[39]

While the author does not profess to be a proponent of the zone theory, it does seem that many of the objections which have been voiced are not particularly unique to this theory alone. What proposed line could not be characterized as somewhat "premature" in our current day's status of infancy in outer-space scientific knowledge? Why should a stigma attach to a new international "agreement" which would change the intent of yesterday's agreements, which not only did not provide for, but also did not foresee today's problems? Is not the definition of "territorial space" more helpful than the Chicago Convention's complete lack of an "air space" definition? Further, since we have no definition of "air space" to enlighten us as to the areas in which our present agreements are operative, can it definitely be said that we have "precise rules" already governing the area included in Professor Cooper's "contiguous space"?

The foregoing questions are not designed to support the proponents nor second-guess the critics. The sole purpose is to encourage the reader to probe thoroughly into both sides of each proposal as it is discussed. Even the recognized leaders in the field of air law do not claim to have all of the answers to such perplexing questions. If such a situation did exist, this "what space is whose" question would not have become such a popular international quiz game for legal commentators. This will become even more apparent when we look to the proposed lines based on physical and scientific facts.

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[34] See Higorani, note 23, *supra* at 9.
[35] Eugene Pepin, *Legal Problems Created By the Sputnik*, McGill University, 4 Institute of International Air Law 5 (1957).
[36] See Schachter's remarks, Proceedings of the American Society of International Law, Fiftieth Annual Meeting, 1956, p. 105.
[37] See for example, Stephen Gorove, *On the Threshold of Space: Toward A Cosmic Law*, 4 New York Law Forum 305 (1958) at pp. 321 and 322.
[38] *Ibid.*
[39] *Ibid.*

D. *"Physical and Scientific Factors Properly Mark The Line"*

By looking to the physical and scientific factors which affect man's use of air space and outer space, those seeking to fix the upward boundary of state sovereignty have drawn four other different lines which are very worthy of consideration. Since the discussion of these proposals will involve some aspects common to all, let us first look to the general location of each proffered line and then discuss them collectively. The upward extent of state sovereignty, under the four proposals, may be described as follows:

To Upward Extent Of The Atmosphere: The sovereignty of a state should extend upward to include all areas of space above the underlying territory where any air particles are found to exist.[40]

To Lowest Possible Orbit Of A Satellite: At that lowest point where the physical elements will allow a satellite to be placed in orbit and thereafter circle the earth at least once, state sovereignty will end.[41]

To Aircraft Height Limit: That height to which any aircraft does actually ascend while deriving its support from reactions of the air will mark the upward limit for all states.[42]

To Point Where Centrifugal Force Takes Over: At that point of flight where all support from the reaction of the air ceases and the flight is completely taken over by centrifugal force, the boundary between state sovereignty and outer space is then being crossed.[43]

While the average attorney may have a tendency to become lost in the scientific maze which surrounds the more technical discussions of these proposals—as has the author on many occasions while making the necessary background study—there is a resulting unescapable conclusion that each of these hypothetical lines is derived from very logical legal reasoning. Each

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[40] For a discussion of the possibility of defining the upper limits of air space on the basis of the scientific use of the term atmosphere, see John C. Hogan, *Legal Terminology for the Upper Regions of the Atmosphere and for the Space Beyond the Atmosphere*, The American Journal of International Law 362 (April, 1957).

[41] See Cooper's support of this theory, note 29, *supra*.

[42] This theory of "usable" atmospheric space is attributed to a Nationalist Chinese Scholar, Ming-Min Peng, and is discussed in Andrew G. Haley's *Current International Situation and the Legal Involvements with Respect to Long-Range Missiles and Earth-Circling Objects*, (Pergamon Press) (1958); also see Cooper's discussion, note 29, *supra*.

[43] Andrew G. Haley, *Space Law and Metalaw—Jurisdiction Defined*, 24 Journal of Air Law and Commerce 286 (1957).

proponent claims to carry forward the intent of the framers of the Chicago Convention and thus supply the missing definition of the term air space. All states are recognized by the Convention to have complete and exclusive sovereignty in the air space above their territories; therefore, by looking to physical and scientific facts to find what air space actually is, the boundaries of state sovereignty are then most properly determined.

As was discussed previously, the term air space as used in the Chicago Convention was carried forward from the Paris Convention where "air space" and "atmosphere" and "air" were used synonymously. It would follow from this that the first of the four foregoing lines which fixes the upper limit of state sovereignty at the upward extent of the "atmosphere" would also correctly fix the limit of the area termed "air space" in the Chicago Convention. However, in attempting to determine how far the atmosphere extends, we find that its outer limit is determined by the presence of air particles, as reflected in the definition which follows:

> "*Atmosphere*—The body of air which surrounds the earth, defined at its outer limits by the actual presence of air particles*****."[44]

Here again we become confronted with another unknown factor and find that we have no fixed line at all. It is presently unknown to the scientific community how far the presence of air particles extends into the atmosphere. Without reporting all of the beliefs that exist on this subject, let it be sufficient for our purposes to conclude that when suggested distances range upward from 1,000 [45] to 200,000 [46] miles away from the earth's surface, the legal profession cannot be expected to make an arbitrary choice from the array.

Even if the proper choice could be made, could it be said that a discernible line would mark the border between state sovereignty and outer space? Since all presently orbiting satellites are revolving in this area of space, can the launching states be expected to honor the protests of other states whose "complete and exclusive" sovereignties are the subject of impingement? Is not this proposal also subject to the favorite probe of the

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[44] Interim Glossary of Aero-Space Terms, Air University, March, 1958.

[45] *Ibid.* In a note to the definition of the term "atmosphere" it is stated that "the atmosphere is usually considered to consist of different stratums of spheres, the last extending to 1,000 miles or more above the earth." It should be noted, however, that the personal views or opinions expressed or implied in the publication are not to be construed as carrying official sanction of the Department of the Air Force or the Air University.

[46] See testimony of Loftus E. Becker, *Hearings before the House Select Committee on Astronautics and Space Exploration on H.R. 11881*, 85th Cong., 2d Sess., (1958) at p. 1272.

critics that it is "premature" because of the lack of scientific knowledge? Finally, can this proposal seriously bear the label that it carries forward the intent of the framers of the Chicago Convention? Was this their meaning of the operational area known as "air space" in view of the definition of "aircraft" set forth in the Convention annexes?

The answers to these questions are very obvious and require no amplification here. So we find that the first of our proposed solutions, based on physical and scientific facts, is found apparently wanting—ironically enough—because of the lack of scientific knowledge as to the extent of the physical presence of air particles in the atmosphere.

The other three proposed lines, based on physical and scientific factors, are not as diverse as would appear on first inspection. All are based on one common factor, to wit; the effect of the gaseous atmosphere on flight. To speak of the lowest point where a satellite may be placed in orbit is merely a simplified manner of describing that lowest area of space where the friction of the earth's atmosphere will not retard a satellite sufficiently to take it out of free orbit.

While the proposal is actually an attempt to define "orbiting space" rather than "air space," it could result in leaving everything below the orbiting line to the underlying state's sovereignty. Even though this may be considered a left-handed approach to the problem, the proposed line would dispel any question of whether or not the orbiting satellites are trespassing in the sovereign air space of the underlying states.

The available scientific data are not sufficient to fix such a line, yet we do know that the lowest orbit at the time of this writing is the one hundred and seventeen miles of Explorer III.[47] There is also an astronomical theory, based on the study of falling meteors, that it may be possible to place a satellite in orbit at the approximate height of seventy miles.[48] However, for the time being we are compelled to place the "orbit line" theory in the "premature" category, also, while awaiting development of the necessary physical and scientific data.

There is also the political question of whether or not the sovereign "air space" recognized by the Chicago and preceding Conventions can with legal logic be extended upward to include

[47] For an excellent chart setting forth a collection of data on U.S. and Soviet satellites, see Lawrence Newman, *Air Space in Perspective*, 4 New York Law Forum 329 (1958) at p. 340. See also a more recently prepared chronology of space events in Sen. Rep. No. 100, 86th Cong., 1st Sess., (1959), pp. 63–64.

[48] See Cooper, note 29, *supra*.

all areas of space in between the earth's surface and this point of atmospheric derailment of the lowest possible satellite. At most, the framers of the conventions used the term "air space" to denote the possible area of operation of aircraft—not the impossible area of operation of an orbiting satellite. There has been no contention that the two areas are physically the same.

It is true that the area below this orbiting line can be termed the "effective atmosphere" [49] because the friction of the atmosphere is there sufficient to retard the free orbit of a satellite. However, the effect of the atmosphere is being applied to satellites—not to aircraft which were the subject matter of the Chicago Convention. Therefore, it does not necessarily follow that, just because the Conventions used the terms "atmosphere" and "air space" synonymously, the framers of the term must have meant the effective atmosphere when viewed from the effect on a satellite. This writer would conclude that if the effect of the atmosphere is to mark the upward limit of air space as that term is used in the Chicago Convention, the effect must be that resulting to the "aircraft" which were the subject of the Convention, i.e., "any machine which can derive support in the atmosphere from the reaction of the air."

Just such a theory finds its application in either of the remaining two proposed lines based on physical and scientific factors. To mark the upward limit of state sovereignty by the height to which any aircraft does actually ascend while deriving its support from the reaction of the air is to mark the line according to the effect of the atmosphere on the aircraft. The major difficulty in this proposal, however, is that such a line would be temporary in nature and would move upward each time an improved model of aircraft could set a new height limit. Only when the most extreme possible height has been attained by an aircraft while deriving any support from the atmosphere, could it be said that the line has become fixed. This is another way of describing our last proposed line, drawn where all support from the reaction of the air ceases and flight is completely taken over by centrifugal force.

In advocating this theory, the International Astronautical Federation's president, Mr. Andrew G. Haley, has labeled the proposed boundary for state sovereignty as the "Karman Primary Jurisdiction Line." The name itself connotes the combination of Mr. Haley's legal approach to the problem with the scientific

[49] Note 44, *supra*.

approach of Dr. Theodore von Karman.[50] The legal approach, as viewed by this writer, is an attempt to give full effect to the Chicago Convention's recognition of each state's complete and exclusive sovereignty over the air space above its territory. Under this concept, the area of air space would extend to the height where an aircraft can derive "any" support from the reaction of the air. Coupled with this legal approach is the scientific determination of the point where "all" aerodynamic lift ceases, and flight is completely taken over by centrifugal force.

The X–2 rocket plane flight whereby Captain Ivan C. Kincheloe attained the altitude of 126,000 feet is cited by the proponent to illustrate the separate parts played by aerodynamic lift and centrifugal force. The flight is characterized as strictly an aeronautical adventure and not partaking of space flight. It is contended that at the altitude indicated, aerodynamic lift carries ninety-eight percent of the weight while only two percent is attributed to centrifugal force. In carrying forward this concept of measuring the separate contributions made to aerial flight by aerodynamic lift and centrifugal force, the Karman line is drawn at approximately 275,000 feet or 52 miles—where an object traveling in a so-called corridor of continuous flight at 25,000 feet per second is completely taken over by centrifugal force. At this point where "all" aerodynamic lift is said to be gone, the sovereignty of the underlying state would find a boundary "capable of physical and mathematical demonstration at a reasonably stable height." [51]

While it has been stated that this proposal would mark the upward boundary at a "reasonably stable height," even the proponents acknowledge that new design of aircraft can cause the line to be pushed higher. Perhaps, if a line is to be drawn, it is a desirable feature to provide an element of flexibility to allow for future development of the aircraft that can derive any support in the atmosphere from the reaction of the air. This would at least insure to each state that its complete and exclusive sovereignty over the air space above its territory would be recognized to a height sufficient to encompass all of the possible area of operation of the "aircraft" as defined in the annexes to the Chicago Convention. It does not appear reasonable to con-

[50] Director of the Advisory Group for Aeronautical Research and Development of the North Atlantic Treaty Organization.

[51] John Cobb Cooper, *National Airspace Upper Boundary—An Unsolved Air Power Problem*, a memorandum prepared in connection with the Panel Discussion on Space Law, held 29 September 1958, during the Army Judge Advocates Conference at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

tend that the framers of the Convention could have intended to include more within their undefined term of "air space."

It is interesting to note that even though this proposal is based upon an alleged extension of the intent of the Chicago Convention, its advocate would insure participation of non-ratifying states to the Convention by having the definition of air space promulgated through the United Nations. This brings us to the point where the official position of our government would of course have to be voiced to the other states of the international community.

Naturally the question arises as to what correlation, if any, exists between the previously considered theoretical approaches of the legal commentators and the operational approach being taken by the representatives of our sovereign state—which at this time extends upward through "some" undefined area of space. Accordingly, let us now switch our view to the active arena and attempt to ascertain our sovereign's position concerning the extent of state sovereignty in the space age.

IV. OPERATIONAL APPROACH: CAUTIOUS (?) DEVELOPMENT OF NATIONAL POLICY

Let it be clearly stated at the outset of this discussion that, as of the time of this writing, the United States government has announced no official policy regarding the extent of its national sovereignty in either air space or outer space. Accordingly, in an attempt to analyze the underlying political interests and military implications involved in the question of fixing national and international boundaries in the areas above the earth's surface, this writer has resorted to a study of official actions of our Executive and Legislative branches to determine what national policy appears to be in the process of development. The governmental actions which will be discussed are evinced by public records; however, the analysis of such actions merely reflects the personal observations of the author.

While there has been no declaration of national policy concerning sovereignty in outer space, the question of its peaceful use has been the subject of an adopted resolution in both the United Nations and the Congress of the United States. The net result of all international diplomacy, to date, in the realm of outer space is contained in the resolution on the "Question of the Peaceful Use of Outer Space," approved by the General Assem-

bly of the United Nations on 13 December 1958.[52] The final resolution as adopted is basically the original proposal of the United States; however, one should not misconstrue our government's support of a "peaceful use" resolution as an act of disclaiming national sovereignty or of recognizing international sovereignty in any of the area concerned.

A careful study of the preamble and the body of the resolution will indicate that, in spite of all of the general but highly inspiring language recognizing the common aim of all mankind that outer space should be used exclusively for peaceful purposes, the only effect that the resolution has on the legal aspects of outer space is to provide that an ad hoc committee [53] created to consider the entire problem shall include within its report to the General Assembly—"The nature of the legal problems which may arise in the carrying out of the programs to explore outer space." [54] Further, that is the only intent which can be attributed to United States sponsorship; at least, as far as the subject of state sovereignty is concerned.[55]

This is very apparent from the debates on the resolution. United States Representative to the General Assembly, Mr. Henry Cabot Lodge, expressed the cautious approach to the problem by emphasizing that not until knowledge of outer space is expanded by progress in space exploration can the law of outer space be developed—and then, only at a gradual pace as actual situations and concrete problems call for legal answers.[56] These expressions give us insight into the development of national policy within the Executive branch of the government.

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[52] U.N. doc. C.1/L.220/Rev. 1. For a most authoritative summary of governmental activities leading to the adoption of the resolution see, Sen. Rep. No. 100, 86th Cong., 1st Sess., pp. 15–21 (1959). This final report of the Special Committee on Space and Astronautics, United States Senate, 85th Congress (ordered printed March 11, 1959) also contains at pp. 65–76, a most comprehensive chronology of legislative action on outer space.

[53] Even though the Soviet Union is a member of the ad hoc committee, at the time of this writing there has been no announced withdrawal of the Soviet threat of boycott. This threat was made after the Soviet Union's United Nations' Delegation failed to effect a compromise in the membership of the committee to afford greater representation of the Soviet-bloc nations. See New York Times, November 25, 1958, p. 1.

[54] Note 52, *supra*.

[55] It should be mentioned, however, that one Congressional subcommittee has spoken in terms of possible agreement by all nations not to make any national claims to any extra-terrestrial body or area of outer space. See, "Control and Reduction of Armaments," final report of the Committee on Foreign Relations, Subcommittee on Disarmament, Sen. Rep. No. 2501, 85th Cong., 2d Sess., pp. 14–15 (1958).

[56] Department of State Bulletin, December 15, 1958, pp. 972–981.

The sentiment of the Legislative branch was also expressed in the Political and Security Committee of the United Nations when Senator Lyndon B. Johnson, Senate Majority Leader and Chairman of the Special Committee on Space and Astronautics, appeared at the request of the Secretary of State to show the unanimity of our government's support of the resolution. The portion of the Senator's remarks which could possibly be construed as reflecting on sovereignty, is as set forth below:

> "Today outer space is free. It is unscarred by conflict. No nation holds a concession there. It must remain this way.
>
> "We of the United States do not acknowledge that there are landlords of outer space who can presume to bargain with the nations of the Earth on the price of access to this new domain." [57]

This language should be considered in light of Senator Johnson's preliminary remarks emphasizing the current day's primitive status with regard to knowledge of outer space. He vividly depicted this by stating: "At this moment the nations of the earth are explorers in space, not colonizers." [58] Is not this another way of saying that the question of sovereignty in outer space is currently "premature"?

It is difficult to glean the true meaning of these statements without exploring the activities which preceded the United States' sponsorship of the resolution to foster the peaceful use of outer space. As previously mentioned, the same subject matter had been the subject of a resolution of the 85th Congress in June, 1958.[59] The resolution is brief and self-explanatory. Since the congressional committee hearings and reports on the resolution, which will be discussed, reflect the real intent of both the Executive and Legislative branches, the following sense of the Congress as expressed in the resolution, is worthy of close inspection.

> "That it is the sense of the Congress:
>
> "That the United States should strive, through the United Nations or such other means as may be most appropriate, for an international agreement banning the use of outer space for military purposes;
>
> "That the United States should seek through the United Nations or such other means as may be most appropriate an international agreement providing for joint exploration of outer space and establishing a method by which disputes which arise in the future in relation to outer space will be solved by legal, peaceful methods, rather than by resort to violence;
>
> "That the United States should press for an international agreement providing for joint cooperation in the advancement of scientific developments which can be expected to flow from the exploration of outer space, ****." [60] (underscoring supplied)

[57] *Ibid.*
[58] *Ibid.*
[59] H. Con. Res. 332, 85th Cong.
[60] *Ibid.*

The primary purpose of the resolution was to give congressional support to the proposal made by President Eisenhower on January 12, 1958, in a letter to former Premier Nikolai Bulganin, that the United States and Russia agree that outer space should be used only for peaceful purposes.[61] The entire text of the resolution is devoid of language concerning sovereignty in outer space. However, let us look to the hearings conducted on the resolution and examine the frank discussions between official Executive department witnesses and the congressional committee members—with regard to the question of sovereignty.

When Mr. Loftus Becker, Legal Advisor to the Department of State, appeared before the congressional committee [62] to voice the official endorsement of that department of the Executive branch, he was queried in part, as follows, by Congressman Curtis of Massachusetts:

> "Mr. Curtis. I would like to repeat my question, Mr. Chairman. If it is a fact that no national claims to outer space have yet been made, is not this a very appropriate time to face the question whether we believe that national claims to outer space should not be made?
>
> "Mr. Becker. I am not sure. I am aware that a number of people have said that outer space should be like the open sea, free to all. I am not sure that national claims in outer space are unmitigated evil. For example, if today, to follow up my answer to the last question, the United States were able to assert and maintain complete sovereignty over outer space, I would have the assurance that outer space would never be devoted to warlike purposes.
>
> "I am not sure that would happen if it were open to all, because there are other nations that do not quite feel the way the United States does.
>
> "I think our primary objective is to see that outer space is devoted to peaceful purposes. If for that purpose it is necessary for us to assert claims of sovereignty or a right in outer space, I think we should do so." [63] (underscoring supplied)

In an attempt to ascertain what national policy is being developed within the Department of State as to sovereignty in outer space, we should not give excessive weight to such extemporaneous remarks made by an Executive department witness during the course of probing cross-examination by a congressional committee. However, it is learned that the same official witness presented a written prepared statement to another congressional committee [64] which clearly removes any doubt as to

[61] Sen. Rep. No. 1728, 85th Cong., 2d Sess., p. 2 (1958).

[62] Subcommittee On National Security and Scientific Developments Affecting Foreign Policy of the Committee On Foreign Affairs of the House of Representatives.

[63] *Hearings before the Subcommittee on National Security and Scientific Developments Affecting Foreign Policy of the Committee on Foreign Affairs of the House of Representatives on H. Con. Res. 326*, 85th Cong., 2d Sess., p. 81 (1958).

the official position of the Department of State. The pertinent part of the statement which corroborates the foregoing testimony is as follows:

> "Now, let me speak for a moment on the significance of a definition of the airspace. It has many times been suggested that it is imperative that at the earliest possible moment we shall have an internationally agreed upon definition of airspace. This is related to the suggestion that such definition is requisite in order to delimit areas of national sovereignty. I believe that from what I have already stated it will be apparent to you that I do not share in this view, nor has the United States Government ever conceded that its sovereignty upward was restricted to the airspace above its territory." [85] (underscoring supplied)

To the reader who would ask whether or not an official witness of an Executive department appearing before a congressional committee is declaring national policy by making such statements, the most informative and authoritative answer can be found in an official congressional committee report [86]—commenting on the testimony of the witness concerned. The following extract of the report also gives us our government's policy concerning the question of what legal effect the activities of the International Geophysical Year had upon the previously recognized complete and exclusive sovereignty of each state over the air space above its territory.

> "Existing international agreements refer to sovereignty only in the airspace over national territory and territorial waters, and hence do not apply, in terms, to outer space. As Mr. Becker testified, the United States has never agreed to an upper limit to its own sovereignty. In addition, he argued that satellite flights up to now are sanctioned only by an implied international agreement. This is based on the tacit acquiescence of all governments in the announcements of the United States and the Soviet Union that satellites would be launched in connection with the International Geophysical Year. It is therefore limited to the types of satellites contemplated in those announcements and to the duration of the International Geophysical Year. Mr. Becker's statement to this effect constitutes a major declaration of national policy." [87] (underscoring supplied)

The committee advisedly used the word "declaration" of national policy. However, just as stated at the beginning of this discussion, there has been no "announcement" of any national policy on the subject other than the desire to insure the peaceful use of outer space. This writer can only ask, but not answer, the question as to what is the national policy of the United States concerning satellites which have been launched since the termination of the International Geophysical Year.

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[85] Note 46, *supra*, at pp. 1273 & 1274.
[86] *Ibid.*
[86] H.R. Rep. No. 1758, 85th Cong., 2d Sess., (1958).
[87] *Ibid*, at p. 22.

Perhaps the Soviet Union had the same question in mind when, on January 2, 1959, it launched into orbit around the sun—satellite "Lunik," complete with Russian flag—just one day after the termination of the International Geophysical Year.[68]

The military implications of such national policy, in its development stage, are molded by the necessities of adequate self defense. Article 51 of the United Nations Charter reserves to its members the "inherent right" of individual or collective self-defense against armed attack. Accordingly, the Executive branch of the government has so advised the Congress that the United States is prepared to defend itself against an armed attack originating in territory which is unquestionably subject to the sovereignty of another state or on the high seas; and a fortiori would be prepared to defend against an attack originating in, or passing through, space outside of the earth's atmosphere.[69] Further, it is well recognized that today's rocket that boosts a satellite into outer space can be tomorrow's warhead-carrying vehicle, and that the current earth-circling scientific satellites can be the forerunners of even more effective earth-destructive weapons. Accordingly, the Department of Defense transmitted to Congress its endorsement of the resolution on the peaceful exploration of outer space—qualified as follows:

> "Further, we must condition our concurrence upon the need to continue to develop military weapons systems for outer space until such time as adequate safeguards can be established to make absolutely certain that others cannot do what we relinquish the right to do."[70] (underscoring supplied)

So stands the development of the national policy of the United States concerning sovereignty in space. It appears that it is indeed one of caution. However, it has awarded to the United States the role of world leadership in the cause to devote outer space to exclusively peaceful purposes, and has thus far cul-

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[68] New York Times, January 4, 1959, p. 1, Section 4. It appears that both the Soviet Union and the United States have continued space exploration since the termination of the IGY, without the consent of the underlying states. See Andrew G. Haley, *Law and the Age of Space*, 5 Saint Louis University Law Journal 1 (Spring 1958), wherein it is contended that a valid and binding world pact emerged from the acts of agreement and cooperation during the IGY. According to Mr. Haley, "On the basis of sound principles of international law, the nations of the world may not protest the flight of a non-military artificial satellite over their territories when the purpose of such flight is the accumulation and dissemination of scientific data which shall be made available without restriction to all the nations of the world." (However, how much of the post–IGY scientific data will be made available to all nations of the world is not known at this time.)

[69] Note 46, *supra*, at p. 1270.

[70] Note 63, *supra*, at p. 33.

minated in the first stride toward that goal by the United Nations' adoption of the resolution which:

"Establishes an ad hoc committee on the peaceful uses of outer space consisting of representatives of Argentina, Australia, Belgium, Brazil, Canada, Czechoslovakia, France, India, Iran, Italy, Japan, Mexico, Poland, Sweden, the Union of Soviet Socialist Republics, the United Arab Republic, the United Kingdom of Great Britain and Northern Ireland, the United States of America and requests it to report to the General Assembly at its fourteenth session on the following:

(a) The activities and resources of the United Nations, of its specialized agencies and of other international bodies relating to the peaceful uses of outer space;

(b) The area of international cooperation and programs in the peaceful uses of outer space which could appropriately be undertaken under the United Nations auspices to the benefit of States irrespective of the state of their economic or scientific development, taking into account the following proposals, among others;

(i) Continuation on a permanent basis of the outer space research now being carried on within the framework of the International Geophysical Year;

(ii) Organization of mutual exchange and dissemination of information on outer space research; and

(iii) Coordination of national research programs for the study of outer space, and the rendering of all possible assistance and help towards their realization;

(c) The future organizational arrangements to facilitate international cooperation in this field within the framework of the United Nations;

(d) The nature of legal problems which may arise in the carrying out of programs to explore outer space; *****." [71] (underscoring supplied)

V. CONCLUSION

In contrast with this position, we have analyzed the proposals which would immediately mark the bounds of state sovereignty. The theme has been that law must precede man into space. This cannot be disputed, for there must be legal order among nations utilizing that area. However, this is the crux of the entire matter. How does man intend to utilize outer space and how far ahead must the law precede?

At the present time only two nations—the United States and the Soviet Union—have exhibited the capability to put forward a groping hand in an effort to explore the unknown area. True, law must control our actions and all to follow us there; but first must be determined what activities are to be subject thereto. Laws cannot mark the way where the roads to be traveled are yet unknown. Military aggrandizement could render sovereign boundaries meaningless—peaceful use could make them needless.

[71] Note 52, *supra*.

"Peaceful use" has been announced to the world as our goal. Military strength must escort us there. However, neither claim or disclaim to sovereignty in these upper areas has been made. The height of this nation's present sovereignty has not been declared. Further, the need for such a declaration has not found its place at this stage of policy formulation. No present restriction on the upward limit of sovereignty is recognized. Only the unknown results of our efforts to devote outer space to peaceful purposes can mark the limit of sovereignty needs. Such needs will control.

The conclusion of this writing can thus be stated by a slight modification of its title.

"CONFLICTING SOVEREIGNTY INTERESTS IN OUTER SPACE: PROPOSED SOLUTIONS JUSTIFIABLY REMAIN IN ORBIT!"

THE ROLE OF THE PSYCHIATRIST IN MILITARY JUSTICE

By Major James J. Gibbs*

I. AS AN EXPERT IN THE FIELD OF MENTAL DISEASE

The rumbles and eruptions of discontent heard in recent years about forensic psychiatry have come to the attention of those individuals interested in and responsible for military justice. However, before voicing new ideas and possible changes to the military code pertaining to insanity, it would first be wise to look critically at the psychiatrist's role in military justice under the present system to determine if an alteration in our way of doing things is really necessary. Change in and of itself has no virtue unless it corrects errors and would in this instance enhance the value of the psychiatrist to the court.

The test for mental responsibility most widely used in the United States is the right and wrong test imbodied in the M'Naghten Rules formulated in England over one hundred years ago. For an accused to be absolved of responsibility for his act, it is necessary to prove that the accused "was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."[1]

In 1886, in the case of Parsons v. State,[2] Judge Somerville of Alabama wrote the decision which established the "irresistible impulse" defense in which it was recognized that though a person knew he was committing an act which was wrong, he nevertheless was not criminally responsible if he lacked the power to resist the impulse.[3]

From a review of Winthrop it is indicated that the M'Naghten Rules and irresistible impulse defense were adopted by military law soon after their inception.[4] Thus, the psychiatrist today in a military court of law is asked, "Was the accused at the time of the offense so far free from mental disease, defect and derangement as to be able to distinguish right from wrong, and adhere to the

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[1] Mac Donald, Psychiatry and the Criminal 26 (1958).

[2] Parsons v. State, 81 Ala. 577, 2 So. 854 (1886).

[3] Weihofen, Insanity as a Defense in Criminal Law 44 (1933).

[4] Winthrop, Military Law and Precedents 294–296 (2d Ed., 1920 reprint).

right? If so, is he now so far free from mental disease, defect or derangement as to be able to cooperate intelligently in his own defense?" Furthermore, according to the present military code the psychiatrist must testify that *the mental disorder completely impaired the accused's ability to distinguish right from wrong or adhere to the right.*[5]

TM 8–240 "Psychiatry in Military Law" was written in September 1950, and later revised in May 1953, to assist the psychiatrist. It enables him to more properly understand military justice and to effectively discharge his responsibilities as a psychiatric examiner and expert witness before a court-martial. The psychiatrist must realize that his function in forensic matters is to offer advice as an expert in the field of mental disease. He first must determine the presence or absence of mental disease. If he determines that no mental disease exists, any further opinions that he might express regarding matters of intent, premeditation and the like cannot be regarded as those of an expert. The psychiatrist would then in effect invade the domain where others are the experts, or unknowingly set himself up as the judge and jury.[6] TM 8–240 has enjoyed more prestige than its writers ever imagined, and for a time was given the status of a legal document comparable to the MCM, 1951.[7,8] However, in the COMA ruling in U. S. v. Schick, it was stated that TM 8–240 could not be introduced in evidence but merely occupies the same place in law as a text or treatise.[9] It has also been attacked as the responsible agent for structuring and restricting psychiatric testimony in a court-martial to the detriment of the accused and the miscarriage of justice.[10]

In actual practice the military psychiatrist appears infrequently as an expert witness in a court-martial, and when he does appear, he is usually called by the prosecution. As a rule when the defendant as the result of pretrial psychiatric examination is found to have a mental disease, defect or derangement that renders him unable to distinguish right from wrong, adhere to the right, or to cooperate in his own defense, he is not brought to trial, and he is released to the medical authorities for treatment and ultimate disposition. The illness in question is invariably of psychotic proportions and not the result of misconduct, such as alcoholic overindulgence.

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[5] Par. 120b, MCM, 1951.
[6] TM 8–240, May 1953, p. 8–8.
[7] United States v. Smith, 5 USCMA 314, 17 CMR 314 (1954).
[8] United States v. Kunak, 5 USCMA 346, 17 CMR 346 (1954).
[9] United States v. Schick, 7 USCMA 419, 22 CMR 209 (1956).
[10] Rosner, *Forensic Psychiatry in the Armed Forces*, 8 U. S. Armed Forces M. J. 1737–1744 (1957).

THE ROLE OF PSYCHIATRIST IN MILITARY JUSTICE

Most of the criticisms of military forensic psychiatry have come from our civilian colleagues in the legal and medical professions and are based on their dissatisfaction with the M'Naghten Rules. The point of view adhered to by these individuals is best illustrated by the praise they have given to the "Durham Decision" rendered in 1954 by the United States Court of Appeals for the District of Columbia.[11] This decision in effect adopted the New Hampshire rule of 1870, which states that an accused is not criminally responsible if his unlawful act was the "product" of mental disease or mental defect.[12] It was anticipated that this rule would soon be adopted by other jurisdictions. This has not come about, however, even though the rule was based on enlightened psychiatric concepts.

In order to understand the current unrest among many psychiatrists about criminal responsibility and why they would enthusiastically support the Durham Decision and oppose the M'Naghten Rules, we must first go back to the time of Freud. He gave psychiatry a dynamic theory of psychopathology of everyday life and emphasized and clarified the importance of unconscious processes in the development of mental illness and deviant behavior. Although psychoanalytic theory has changed through the years, it still stresses the importance of a child's instinctual drives and his relationships with the significant people in his environment during the developmental years as the major determinants of adult behavior. In this day and age the psychiatrist need not adhere to psychoanalysis, but he must at least be able to discuss psychoanalytic theory intelligently if he hopes to achieve certification in his specialty. Furthermore, even though he may forcefully claim to be anti-psychoanalytic, he does in all probability utilize psychoanalytic theory in his therapeutic management of patients. Through the years psychiatrists have gained greater understanding about their patients and human behavior in general, and psychiatry has become a potent social force in our society. Psychoanalysis has contributed significantly to this advancement in psychiatry.[13]

The relevant issue is that psychiatrists who are dissatisfied with the M'Naghten Rules by and large view behavior as predetermined by past life experiences and by the manner in which individuals cope with their instinctual drives. Furthermore, they do not give sufficient import to the influence of the group and current interpersonal relationships on behavior. Such thinking cannot be reconciled with any concept based on freedom of choice. So-called

[11] Durham v. United States, 214 Fed. 2nd 862 (D.C. Cir., 1954).
[12] Mac Donald, *op. cit.*
[13] Thompson, Psychoanalysis: Evolution and Development (1950).

psychic determinism and freedom of choice are not compatible concepts, and improved communication and relationships between the members of the legal profession and psychiatry will not alter this fact. Psychiatry, then, views criminal behavior as a manifestation of some type of psychopathology. It then follows that it should be possible to restore the individual concerned as a useful, harmless member of society through psychiatric treatment rather than by isolation and punishment.[14,15]

Another point worthy of mention is that many psychiatrists violently dislike testifying in court as expert witnesses and flatly refuse to do so. They object to not being able to speak freely about their evaluation and opinions in regard to the accused and abhor the necessity of making positive statements in answer to questions that defy such categorical responses. Although this complaint is rarely voiced, they also do not relish the idea of being subjected to cross-examination and becoming involved in the courtroom drama where opposing attorneys do everything legally permissible to win a case including attempts to discredit the testimony of an expert witness. To the uninitiated psychiatrist this is often taken as a personal affront and an assault on his professional competency. It is no wonder than that many psychiatrists would support any change in the judicial system that might obviate this eventuality.[16]

Few military psychiatrists are advocates of the Durham Decision. For the most part we have not experienced any limitation on our testimony before a court-martial and have been spared the frustration that comes from only answering a few specific legal questions. The military psychiatrist also writes many certificates of psychiatric evaluation. Many of these are subsequently introduced in court by stipulation. There are no regulations curtailing what the psychiatrist incorporates in such a certificate. He is free to include any pertinent information he so desires. Apparently, many civilian psychiatrists have not been so fortunate and looked upon the Durham Decision as a legal principle which would allow them to testify freely as to their findings and recommendations regarding the accused.[17]

Another reason why military psychiatrists have not been staunch supporters of the Durham Decision can perhaps be explained by the nature of psychiatric practice in the military. Patients with the so-called character and behavior disorders comprise a large percentage of this practice. Civilian psychiatrists see rela-

[14] Group for the Advancement of Psychiatry Report No. 26, Criminal Responsibility and Psychiatric Expert Testimony (1954).
[15] Guttmacher & Weihofen, Psychiatry and the Law 3–12 (1952).
[16] Group for the Advancement of Psychiatry, *op. cit.*
[17] TM 8–240, Aug 57, pp. 91–103.

tively few of these individuals particularly when in private practice. These disorders are not considered to be mental diseases or defects by the military. They do not form the basis for a plea of insanity and an individual who is unable to perform effective military service because of such a disorder is not entitled to disability compensation. His separation from the service, when necessary, is through administrative rather than medical channels. Character and behavior disorders appear in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association[18] and are listed under the broad heading of "Personality Disorders." There are 12 different diagnostic entities included in this broad category. Similar diagnostic categories can be found in SR 40–1025–2.[19] In recent years cases of sociopathic personality, which is one of the character and behavior disorders, have been called mental diseases by some psychiatrists for forensic purposes.[20] In general, personality disorders are manifested by lifelong patterns of action or behavior rather than by mental or emotional symptoms. Individuals with these disorders are less able to maintain their emotional equilibrium under stress and frequently come to the attention of law enforcement officials and the court. Many of these people externalize their problems and do not operate within the conventions of society. Their behavior is clearly anti-social. Therapeutic intervention with them is most difficult, and in some cases impossible with our present state of psychiatric knowledge. As far as the needs of society are concerned, it is necessary that the law not consider these conditions to be mental diseases or defects. Psychiatry has not advanced to the degree that it can reasonably guarantee any remedial assistance and in many cases confinement is the only answer.[21,22] In this area psychiatrists are not the experts, and the problem must be dealt with by judicial authorities and penologists. Psychiatry, therefore, cannot assume the function of law in maintaining order in human relations. It is believed that the Durham Decision in its consequences was a step in that direction and, as such, it was premature. It is understandable why society would not feel secure if it relied upon such a legal principle. In the future perhaps the psychiatrist and the penologist may develop a therapeutic milieu within a confinement facility that will be effective in reaching people with personality disorders, such as the sociopathic personality, to the degree that they can be

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[18] American Psychiatric Association Mental Hospital Service, Diagnostic and Statistical Manual Mental Disorders 34–39 (1952).

[19] Par. 6, SR 40–1025–2, June 1949.

[20] *In re* Rosenfield, 157 F. Supp. 18 (D.C.D.C. 1957).

[21] Cumming, *Role of the Psychiatrist in Criminal Trials*, 15 Am. J. Psychiat. 491–497 (1958).

[22] Guttmacher & Weihofen, *op. cit.*

returned to society with assurance that they will not be a menace to their fellow man.[23]

There is, however, one aspect of the Uniform Code of Military Justice pertaining to mental responsibility that requires revision. Except with respect to the ability to premeditate, form a specific intent, or have knowledge of a certain act, complete impairment is required to absolve an accused of responsibility for his act. The psychiatrist can rarely state that the accused had a mental disease, defect or derangement that *completely* impaired the accused's ability to distinguish right from wrong or to adhere to the right. This concept is contrary to current medical knowledge. Our daily management and observation of psychiatric patients with major mental illnesses such as Schizophrenia clearly show that the mental functioning of these patients is not completely impaired. They care for many of their own basic needs and obey hospital rules and regulations. In fact, they are often more aware of their surroundings than we give them credit for, and they respond to group pressures and staff attitudes. While these patients have delusional thoughts and auditory hallucinations, they simultaneously may comprehend that if they do not discuss such matters with the hospital staff, they might possibly be given additional privileges and even discharged from the hospital. They know what others consider to be "crazy" thinking and can be extremely clever in withholding this information. The psychiatrist, therefore, cannot in all honesty state that even an accused with an acute, severe schizophrenic reaction is completely impaired. This is a subject about which there is general agreement among psychiatrists.[24]

In order to correct this so-called one hundred per cent concept, The Surgeon General and The Judge Advocate General had considered the adoption of a tentative American Law Institute Code pertaining to mental disease or defect which would exclude criminal responsibility.[25] This Code was:

a. A person is not responsible for criminal conduct if, at the time of such conduct as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

b. The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

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[23] Weihofen, Mental Disorder as a Criminal Defense 27 (1954).

[24] ALI Model Penal Code, § 4.01 (April 1955 Draft).

[25] Annual Report of The Judge Advocate General of the Army for the Period January 1, 1957 to December 31, 1957.

Opposition to the adoption of this Code was based on the following:

a. The term "substantial" is too indefinite.

b. The introduction of such terminology as "to appreciate the criminality of his conduct" was viewed with alarm since it was felt that a court-martial or jury would have difficulty in understanding these terms whereas right and wrong are terms that have more meaning for a lay person.[26] In order to overcome objections to the ALI Code, the following revision has been suggested:[27]

> "A person is not responsible for criminal conduct at the time of such conduct if as a result of mental disease or defect he *predominantly* lacks capacity either to distinguish right from wrong or to adhere to the right as to the particular act charged. The terms "mental disease or defect" do not include an abnormality manifested only by criminal or otherwise anti-*social conduct. Although there need not be complete impairment* of the accused's mental capacity in order to constitute lack of mental responsibility, there must be *predominant* impairment. This degree of impairment cannot be identified with precision, other than to say that capacity must be greatly impaired. *The measure of predominant impairment is determined by the court.* The court weighs the evidence on the issue of the accused's capacity to distinguish right from wrong and to adhere to the right.

The above-proposed change to paragraph 120*b*, MCM, 1951, has many merits. In addition to conforming to current medical knowledge, it will *eliminate the need to subtly circumvent* the MCM. As things are now, the psychiatrist when asked if an accused's mental capacity was completely impaired at the time of the offense can take three courses of action when his evaluation has shown the accused to have a mental disease or defect which severely impaired his mental capacity. First, the psychiatrist can give an affirmative response in which case he really means predominant impairment. Secondly, he can give a negative response which could then result in conviction and incarceration which would truly be a miscarriage of justice. *Thirdly, he could beg the issue and attempt to qualify* his opinion to the court if given the opportunity. What is a court-martial to do with such an opinion as this when it is followed by the law officer's instructions that impairment of mental capacity must be complete to absolve the accused of criminal responsibility? The adoption of the proposed change would eliminate this dilemma.

If the one hundred per cent concept were eliminated as suggested, the conflicting psychiatric opinion that is generated in some cases would still occur, but it would be more reasonable and would

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[26] Briefing on 9 July 1958, Office of The Judge Advocate General, U. S. Army, attended by The Judge Advocate Generals of the three Armed Services and members of their staffs.

[27] Meeting on 27 May 1959, Office Chief Psychiatry and Neurology Consultant, OTSG, attended by Colonel Harvey J. Tompkins, MC, Captain Julian B. *Carrick, JAGC, and the author.*

give the court-martial testimony to weigh that was less contaminated by a psychiatrist's prejudice against the legal system.

II. AS AN EXPONENT OF PREVENTIVE PSYCHIATRY

The contributions of the psychiatrist to military justice go beyond the confines of the courtroom and involve his associations with the chain of command and other key figures in the military community. Military preventive psychiatry has evolved into a definitive program with recognized objectives and methods of operation which by their very nature focus the psychiatrist's attention and interest on the non-effective member and the military offender.[28,29]

The methods employed in preventive psychiatry are:

a. A staff advisory relationship with command.

b. The early detection and elimination of potential non-effective personnel.

c. Mental health education of groups by a variety of methods.

d. Individual case assessment for the purpose of classification, assignment and utilization of problem personnel.

e. Professional visits and inspections by senior psychiatrists and civilian consultants.

f. Program analysis in order to produce indices of effectiveness.

g. An operational research program to improve methods of preventing non-effectiveness.[30]

Primary emphasis is placed on the early identification of the member whose method of solving a problem is detrimental to the military organization and to the individual. Enlightened management of such a person before his behavior patterns and attitudes become fixed has a reasonable chance of preventing a sickbook rider, psychiatric patient, or a military offender.

The Stockade Screening Program which was established jointly by The Provost Marshal General and The Surgeon General is an excellent example of the benefits that can be derived from the psychiatrist's staff advisory relationship with command and the important figures in the military environment. This program was developed to eliminate the recidivist from the stockade and to come up with a meaningful retraining program. The psychiatrist and his staff act as members of the confinement officers' advisory staff.[31] The results of the Stockade Screening Program have been gratify-

[28] Par. 3, 4, 15, AR 40-216, 18 June 1959.

[29] TM 8-244, Aug 57, p. 24-39.

[30] Group for the Advancement of Psychiatry, Preventive Psychiatry in the Armed Forces (in preparation).

[31] Par. 2, 4, 11, AR 210-181, 24 September 1957.

ing.[32,33] However, experience with this program has shown that by the time a soldier reaches the stockade he may have already been rejected by the military community and that he has lost all motivation to be an effective person in the military organization. This set of circumstances often results in the soldier's elimination from the service. It seemed logical then to devise a method whereby such an individual could be evaluated at a time when he still had some potential for effective service or could be eliminated from the service before his actions necessitated his being given a less than honorable discharge and/or a sentence to a long period of confinement.

A number of commands have established a first court-martial screening program as a method of earlier identification of the problem soldier. This program is now in effect on many posts within CONUS and involves all offenders who are facing an initial Special, Summary or General court-martial. The objective is to provide command with a psychiatric evaluation of each offender at the time of his first court-martial. Such an evaluation is not intended to interfere with the court-martial or usurp command authority. It does, however, provide the commander with additional information at a time that it will have some positive value.[34,35,36]

Psychiatric efforts such as those described above are believed to be one of the significant factors responsible for the reduction in court-martial rates, stockade rates and the admission rates to hospitals for psychiatric reasons.

III. SUMMARY

The role of the psychiatrist in military justice, both as an expert in the field of mental disease, and as an exponent of preventive psychiatry, is discussed with particular emphasis on the rationale behind the dissatisfaction of many psychiatrists with the current military code for criminal responsibility. A change to the military test for insanity is presented which it is believed will enhance the psychiatrist's value to the court.

The psychiatrist's indirect influence on military justice through his associations with the chain of command and other key figures in the military community is commented upon and illustrated with definitive examples of preventive psychiatric programs.

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[32] Bushard & Dahlgren, *A Technic for Military Delinquency Management*, 8 U. S. Armed Forces M. J. 1616–1631, 1745–1760 (1957).

[33] Cooke, *Soldiers, Stockades, and Psychiatry*, 10 U. S. Armed Forces M. J. 553–569 (1959).

[34] Circular Number 40–1, Headquarters U. S. Army Air Defense Center, Fort Bliss, Texas, 21 April 1959.

[35] Circular Number 40–3, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, 28 May 1959.

[36] Fort Gordon Regulations Number 40–4, Headquarters Fort Gordon, Fort Gordon, Georgia, 23 Dec 1958.

COURT-MARTIAL JURISDICTION OF CIVILIANS—A GLIMPSE AT SOME CONSTITUTIONAL ISSUES

By Marion Edwyn Harrison*

I. INTRODUCTION

Sir Walter Scott once wrote: "The sun never sets on the immense empire of Charles V."[1] What Sir Walter wrote of the Holy Roman Empire in the Sixteenth Century could also be said of the United States in the Sixth Decade of the Twentieth Century, for whether or not one desires to admit it, the resources, influence and power of the United States appear everywhere outside the Iron and Bamboo Curtains. In particular, the American military arm is ubiquitous. Called a communications zone, a military assistance group, a special task force, a mutual defense army, or whatever, American soldiers, sailors and airmen, together with civilian employees and dependents, are scattered across the face of the globe. It is axiomatic that wherever there are people, there must be either law or anarchy. The question with respect to these several hundred thousand Americans who are abroad serving "in" or "with" the armed forces is simply: What law? Specifically, absent applicable diplomatic agreements, of which there are many,[2] the precise question is: Are those persons who are not uniformed military personnel subject to court-martial jurisdiction? And that, in turn, is essentially a constitutional question, for Congress has already clearly indicated an affirmative policy answer.

On May 5, 1950, the Uniform Code of Military Justice[3] became law.[4] It was effective on May 31, 1951, together with the accompanying Manual for Courts-Martial,[5] an explanatory and procedural set of regulations. The Code introduced new concepts of

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[1] Scott, *Life of Napoleon*, 1807.

[2] E.g., The North Atlantic Theatre of Operations Status of Forces Agreement, and specifically Art. VII thereof, known as NATO-SOFA, TIAS 2846 (7/19/51), ratified 99 Cong. Rec. 8837-8838 (7/15/53).

[3] "An Act to unify, consolidate, revise, and codify the articles of war, the articles for the government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a uniform code of military justice."

[4] 10 USC §§ 801-940 (1952 ed. Supp V).

[5] EO No. 10214, 8 Feb 1951, 16 FR 1303.

military justice.[6] It also reaffirmed a tradition, namely, that certain persons not actually serving as uniformed personnel of the armed forces would be subject under given conditions to military jurisdiction. Thus, Article 2(11)[7] provides that: "All persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" shall be subject to military jurisdiction.[8] Because of the uncertainty generated by the Supreme Court's decision in the combined cases of *Kinsella* v. *Krueger* and *Reid* v. *Covert*,[9] holding that the civilian wives of military personnel who murdered their spouses overseas were not constitutionally amenable to court-martial jurisdiction, and cases now on appeal relating to variations of the same issue, it is the purpose of this paper to discuss the history and constitutional questions implicit in the problem of military jurisdiction over civilians located overseas. Minimum consideration will be given to questions of policy.[10]

II. THE PRESENT STATE OF UNCERTAINTY IN THE LAW, A PLETHORA OF PENDING APPEALS

In the cases of *Kinsella* v. *Krueger* and *Reid* v. *Covert*, after a tortuous appellate history,[11] the Supreme Court decided that the civilian wives of uniformed military personnel who committed the capital offense of murdering their spouses while "without the continental limits"[12] were not constitutionally amenable to court-martial jurisdiction.[13] In so deciding, the Court, acting upon a 4–1–1–2 split, failed to adjudicate other issues which it now appears likely will be heard at the October 1959 Term.[14] In the *Krueger* and *Covert* cases, the Supreme Court was confronted with the problem whether a wife who was charged with a capital crime

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[6] See U. S. v. Clay, 1 USCMA 74, 1 CMR 74 (1951).

[7] 10 USC § 802(11) (1952 ed. Supp V).

[8] Complete relevant text reads as follows: "Article 2. Persons subject to the code. The following persons are subject to this code: . . . (11) subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: that part of Alaska east of longitude 172° west, the Canal Zone, the main group of the Hawaiian Islands, Pureto Rico, and the Virgin Islands."

[9] 354 US 1 (1957).

[10] Policy is a congressional prerogative. In the face of conflicting court decisions, Congress—confused perhaps—has not elected to change its policy. Military officials still feel the military must have criminal jurisdiction over those civilians enumerated in Art. 2(11), for reasons of sound military administration.

[11] 351 US 470 (1955), 352 US 901 (1956).

[12] See fn. 8, supra.

[13] 354 US 1 (1957).

[14] Infra, Part VI.

and who was not an employee of the United States but merely a dependent of her military spouse could be prosecuted by court-martial. Four justices held that she could not. Two others concurred in the decision for special reasons. The remaining two dissented.

Mr. Justice Frankfurter, concurring, stated that he did not understand the Opinion of the Court to hold that a civilian overseas could not be prosecuted by court-martial. Rather, he felt that the question of the trial of a civilian dependent in a capital case in peacetime was the sole issue.[15] Mr. Justice Harlan, the other concurring jurist, similarly limited the scope of his opinion.[16]

From the language of the two concurring opinions and from some of Mr. Justice Black's own language,[17] it appears obvious that the Supreme Court opened a Pandora's box of questions when it finally resolved the *Covert* and *Krueger* cases. If one thinks otherwise, he should note that the interpretation of Mr. Justice Black's ruling has already been disputed by eminent judicial minds.[18]

It appears that the Supreme Court will have to consider a minimum of five cases presenting in one form or another a constitu-

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[15] ". . . In making this adjudication, I must emphasize that it is only the trial of civilian dependents in a capital case in time of peace that is in question. The Court has not before it, and therefore I need not intimate any opinion on, situations involving civilians, in the sense of persons not having a military status, other than dependents. Nor do we have before us a case involving a noncapital crime. This narrow delineation of the issue is merely to respect the important restrictions binding on the Court when passing on the constitutionality of an act of Congress." 354 US 1, 45 (1957).

[16] ". . . . Again, I need not go into details, beyond stating that except for capital offenses, such as we have here, to which, in my opinion, special considerations apply, I am by no means ready to say that Congress' power to provide for trial by court-martial of civilian dependents overseas is limited by Article III and the Fifth and Sixth Amendments. Where, if at all, the dividing line should be drawn among cases not capital, need not now be decided. We are confronted here with capital offenses alone; and it seems to me particularly unwise now to decide more than we have to. Our far-flung foreign military establishments are a new phenomenon in our national life, and I think it would be unfortunate were we unnecessarily to foreclose, as my four brothers would do, our future consideration of the broad questions involved in maintaining the effectiveness of these national outposts, in the light of continuing experience with these problems. "So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority. I do not conceive that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case." 354 US 1, 76–77 (1957). Query: Are these distinctions as to procedure or substance?

[17] 354 US 1, 33–35 (1957).

[18] But *cf* In the Matter of William K. Yokoyama, 170 F. Supp. 467 (S.D. Cal. 1959); and U. S. *ex rel* Guagliardo v. McElroy, 259 F. 2d 927 (1958).

tional question concerning overseas court-martial jurisdiction over civilians. These cases are *Grisham* v. *Taylor*,[19] *U.S. ex rel Guagliardo* v. *McElroy*,[20] *U. S. ex rel Wilson* v. *Bohlander*,[21] *In re Yokoyama*,[22] and *Kinsella* v. *U.S. ex rel Singleton*.[23] In another case,[24] the Government decided not to contest petition. Thus, the petitioner was released in Germany to the German authorities, who have prosecuted. All the other cases involve the filing of writs of habeas corpus after the clients had been transported to the United States, so that, if freed, they could not, as a practical matter, be tried by an alternative jurisdiction.

III. SOME PRELIMINARY CONSTITUTIONAL CONCEPTS

Before discussing either specific cases upon appeal or the history of court-martial jurisdiction, it seems appropriate to consider briefly several aspects of constitutional interpretation as they relate to court-martial jurisdiction.

At the outset, one should note that the principle of stare decisis has been severely limited and progressively weakened in constitutional adjudications since the Supreme Court proceeded to correct "a century of error" in the case of *Pollock* v. *Farmers' Loan and Trust Company*.[25] History has shown the difficulty in amending the Constitution and perhaps for this reason the Supreme Court has long taken the position that it will reverse its previous decisions on constitutional issues when convinced thy are erroneous more speedily than it might in other types of cases.[26] There has undoubtedly been a considerable loosening of past precedents by the Supreme Court since 1937.[27] Indeed, after tracing the history of the *Krueger* and *Covert* cases, one wonders if the late Mr. Justice Roberts were not correct when he wrote that too frequent reversals of earlier decisions tended to bring Supreme Court constitutional adjudications "*** into the same class as a restricted railroad ticket, good for this day and train only."[28] What effect the liberalization of the concept of stare decisis will have on the future for miltary jurisdiction cases remains to be seen; at least, that

[19] 261 F. 2d 204 (1958), *cert. granted.*
[20] 259 F. 2d 927 (1958), *cert. granted.*
[21] 167 F. Supp. 791 (1958), *appeal docketed.*
[22] See fn. 18, supra.
[23] 164 F. Supp. 707 (S.D. W.Va. 1958).
[24] Cheaves v. Brucker, USDC, DC, unreported (1958).
[25] 157 US 429, 574–579 (1895).
[26] *E.g.*, Burnet v. Coronado Oil and Gas Company, 285 US 393, 405–411 (1932); Helvering v. Griffiths, 318 US 371, 401 (1943); Smith v. Allwright, 321 US 649 (1944).
[27] Schwartz, *The Supreme Court* 102 (1957).
[28] Smith v. Allwright, op. cit., at 669.

liberality opens the door to divergent arguments as to constitutionality based upon varying facts.[29]

It is well settled that indictment by grand jury and trial by petit jury, neither of which have ever been a part of an Anglo-Saxon court-martial system, may be waived by the individual.[30]

"Cases arising in the land and naval forces" are exempt from indictment by grand jury directly, and by implication and history from trial by petit jury.[31]

In all these discussions, one should note that jurisdiction over cases arising "in the land and naval forces"[32] is independent of Article III of the Constitution.[33] This is true whether or not one feels a court-martial may be considered analogous to a legislative court.[34]

The only basis for review of a court-martial action in the federal courts is by writ of habeas corpus, and the jurisdiction of the court-martial is fundamentally the only issue then.[35] Such devices as a writ of prohibition will not lie.[36]

Venue for habeas corpus lies in the judicial district in which the subject of the petition is present.[37] If he is outside the judicial system, venue generally lies in the District of Columbia.[38] The

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[29] From the military viewpoint the facts are only insignificantly dissimilar, for either the post commander of a far-flung installation has complete control over all Americans connected with his post or he does not. If located in a NATO–SOFA country, he is either able to comply fully with NATO–SOFA or he is not. See Part VII, infra.

[30] Rule 23(c), FRCrimP; Schick v. U. S., 195 US 65 (1904); Adams v. U. S., 317 US 269 (1942); Echert v. U. S., 188 F. 2d 336 (1951). See also, as to juries of less than 12 jurors, Rule 23(b), FRCrimP; Patton v. U. S., 281 US 276 (1930).

[31] *Ex parte* Milligan, 4 Wall 2 (1866); Kahn v. Anderson, 255 US 1 (1921); *Ex parte* Quirin, 317 US 1 (1942); Whelchell v. McDonald, 340 US 122 (1950); Kinsella v. Krueger, 354 US 1 (1957).

[32] U. S. Const. art. I, §8, cl. 14.

[33] Dynes v. Hoover, 61 US (20 How.) 65 (1858).

[34] The original holdings in the Covert and Krueger cases (351 US 470, 474) was bottomed upon the concept that Congress had power to establish legislative tribunals to try Americans outside the continental limits.

[35] Swaim v. U. S., 165 US 553 (1897); Carter v. Roberts, 177 US 496 (1900); Hiatt v. Brown, 339 US 103 (1950). Actually it would appear that since 1950 review has become somewhat broader and the scope of inquiry is now limited to the traditional test of jurisdiction plus the test of whether or not the accused's contention were given adequate consideration by the military. Burns v. Wilson, 346 US 137 (1953); Thomas v. Davis, 249 F. 2d 232 (1957); Dickinson v. Davis, 245 F. 2d 317 (1957).

[36] Mullan v. U. S., 212 US 516 (1909); Smith v. Whitney, 116 US 167 (1886); Hiatt v. Brown, op. cit., fn. 35 supra.

[37] Kaminer v. Clark, 177 F. 2d 51 (1949); Bustos-Ovalle v. Landon, 225 F. 2d 878 (1955).

[38] Cheaves v. Brucker; see p. 7 and fn. 24, supra. Could Mr. Cheaves' attorney have gotten him into the United States by writ of habeas corpus for the purpose of the hearing? It appears to be discretionary with the judge.

person against whom the writ is directed must produce the person upon whose behalf the petition was filed unless the issue raised is solely one of law or unless the court directs otherwise.[39]

With these preliminary concepts in mind, it may be easier to consider the constitutional problems which *are* involved in the basic question of court-martial jurisdiction over civilians, beginning with some military history.

IV. BRITISH AND AMERICAN COURT-MARTIAL JURISDICTION

In our ordered contemporary society, everything and everyone is categorized.[40] Whether it would be so in event of another war is problematical. But it was not always so.

"The military court arose in the days of feudalism, when the line separating civilians from soldiers was not well marked, and when any subject, when under arms serving the King, might be tried by martial law."[41]

It is common knowledge that military jurisdiction was widely and somewhat indiscriminately utilized by the Tudors[42] for swift and effective[43] justice. Courts-martial were effective in keeping order among the mob by methods evidently considered even surer than those employed by the iniquitous Councils of the North and of the Star Chamber. When the Stuarts succeeded the Tudors,[44] they did not hesitate to employ courts-martial on a wide scale to maintain order in the realm. But James I and Charles I lacked the popular support of some of their Tudor cousins, and so by 1628 the latter sovereign was forced to accept the Petition of Right,[45] a document touted by many historians as a noble link between Magna Carta[46] and our American Constitution. Just what the Petition of Right forbade is unclear, although presumably its supporters wanted less indiscriminate use of martial law over civilians. And

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[39] 28 USC §2243.

[40] Some might say regimented. But whether we drive down the street (in a traffic lane), or serve in the Army (with an ID card), or belong to an Army reserve unit (with a pink ID card), or work for the Army overseas (with an AGO card), we are usually categorized.

[41] Fairman, *The Law of Martial Rule*, 2d ed. (1943).

[42] Henry VII, Henry VIII, Edward VI, Mary I, Elizabeth I (1485–1603).

[43] Probably nobody knows for certain that the percentage of convictions was higher in courts-martial than in other types of courts. However, the public distaste for courts-martial presumably had some factual bases, and this was doubtless one.

[44] James I and Charles I (1603–1649); the Cromwell Commonwealth (1649–1660); Charles II and James II (1660–1688).

[45] 3 Car. I, c 1.

[46] 1215. Magna Carta had nothing to do with military jurisdiction either.

they apparently got a relaxation under the Restoration,[47] (although they had to live through the Commonwealth[48] to get it).

Finally, in 1689, came the Glorious Revolution and the Bill of Rights. William and Mary did not promise a thing of immediate pertinence to this subject; however, it is generally thought the Bill of Rights and the subsequent political climate compelled the Crown to drastically reduce the use of courts-martial for punishment of civilians. One would be missing a most significant point in English history, however, if he did not carefully note that Englishmen's grievances about extraordinary types of judicial jurisdiction were almost invariably directed against the Crown and not against Parliament. When extraordinary steps were taken, they were taken by the executive, and not, as with the enactment of the Uniform Code, by the legislative. The same may be said of the remonstrances in the Declaration of Independence, which were directed primarily against George III[49] and his executive agents.

The history of court-martial authority—British and American—is a repeated recitation of broad jurisdiction. Thus, James II's Articles of War of 1688 provided that victuallers and sellers of spirits were subject to court-martial jurisdiction.[50] According to George III's Articles of War of 1765 sutlers and camp retainers were similarly liable.[51] The attitude of our colonial forefathers was no different from that of their English kin. Articles of War of the Continental Congress included "All sutlers and retailers to a camp and all persons whatsoever, serving with the continental army in the field . . ." as long ago as 1775.[52] That provision was re-enacted in 1776.[53] Similar language was re-enacted in 1806.[54] It has been retained in substance ever since.[55] So, too, the British have kept such inclusive language.[56]

Many of the older statutes have used phraseology similar to or including "in the field" when defining jurisdiction. Some advocates have contended that "in the field" is a term of art, having a pecu-

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[47] 1660–1689.

[48] 1649–1660.

[49] 1760–1820.

[50] Winthrop, *Military Law and Precedents*, 926 (2d ed. 1920).

[51] *Id.* at 941.

[52] *Id.* at 956.

[53] *Id.* at 967. The language "continental army" was changed to read "armies of the United States."

[54] *Id.* at 967, 981.

[55] Art. 63, AW of 1874, 2 Rev. Stat. 286 (2d ed., 1878); AW of 1916 (39 Stat. 651); AW of 1920 (41 Stat. 787); and the Code, op. cit., fn. 4, supra.

[56] E.g., the Army Act of 1955 (3 & 4 Eliz. II, ch. 18, Fifth Schedule); The Air Force Act of 1955 (3 & 4 Eliz. II, ch. 19, Fifth Schedule). These statutes provide detail to include virtually every civilian having any connection with the military outside the realm.

liarly limiting definition.[57] To them, "in the field" inevitably connotes either wartime, operations in areas where there are no courts, or maneuvers leading to or from war operations. This contention cannot be quickly brushed aside. However, two facts tend to overcome it. Firstly, some of the statutes have specifically applied to, and civilians have been tried in, places where there were no war, civil courts, and no war maneuvers.[58] Secondly, are Americans stationed in Berlin or on Taiwan or in northern South Korea in a place where there is neither war nor war maneuvers? The nature of warfare has changed; its ubiquity has not.[59]

Phraseology has changed. We no longer speak of "camp followers" and if we do, we tend to disparage those to whom we apply the phrase. It was not always so. "Camp followers" and "retainers" included everybody in the train of an army, from wives and mistresses[60] to drivers of wagons and caissons and even to expert artillerymen.[61] Civilian employees performing one chore or another have long accompanied our armies—and equally long been subject to court-martial jurisdiction. On at least one occasion the Supreme Court has given recognition—if under unusual circumstances—to the concept that a civilian can be "in the land and naval forces."[62]

If we knew for a certainty what the Framers intended when they incorporated clauses 14[64] and 18[65] into Article I, Section 8 of the Constitution, we should have less trouble determining the extent

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[57] E.g., petitioners' briefs on appeal in the Covert and Krueger cases, October 1955 Term, nos. 701, 713.

[58] Gibraltar has rarely been a war zone, but British civilians connected with the military there have been—and are—subject to courts-martial. The same was true in India. Reply Brief for Appellant and Petitioner on Rehearing, October 1955 Term, nos. 701, 713, p. 47.

[59] If anything, it seems there are more wars and maneuvers for wars in more places now than ever before in western history.

[60] Brief, op. cit., fn. 58, supra, pp. 25–37; Blumenthal, *Women Camp Followers of the American Revolution* (1952). Mr. Blumenthal quoted one Hessian general in the Revolution as complaining that "the fact is that this corps has more women and children than men. . . ."

[61] 8 Encyclopedia Britannica 448 (1958); 2 Encyclopedia Americana 364.

[62] Brief, op. cit., fn. 58, supra, pp. 37–40; see also cases from National Archives files cited in Respondent-Appellee's Brief, Grisham v. Taylor, No. 12,630, USCA, 3d Cir. (1958), at 25.

[63] Johnson v. Sayre, 158 US 109 (1895). Mr. Sayre was a paymaster's clerk aboard a Navy receiving ship. For other paymaster cases, see fn. 129, infra.

[64] U. S. Const. art. I, §8, cl. 14: "The Congress shall have Power to make Rules for the Government and Regulation of the land and naval Forces."

[65] U. S. Const. art. I, §8, cl. 18: "The Congress shall have Power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

to which they considered themselves to be following historical precedent. The best evidence available is tangential.

Firstly, it is reasonable to assume the Framers were conversant with contemporary colonial practices. Those practices were not restrictive of military jurisdiction. Thus, the language of the Fifth Amendment[66] is relevant. It has been written that:

> ". . . evidence that the drafters . . . did not intend court-martial jurisdiction to be limited by the Constitution to those persons actually in the armed services is contained in the Fifth Amendment's language that the requirements of a grand jury should not apply to *cases* arising in the land or naval forces. State constitutions adopted about the same time used similarly broad language . . . [citing Pennsylvania, Delaware and New Hampshire constitutional provisions] . . . That under the general scheme which was adopted both by the States and by the United States the legislatures were to have power to expand court-martial jurisdiction to the extent necessary for the government of the forces is made clear in the Massachusetts Constitution of 1780:
>
> ". . . .
>
> "XXVIII. No person can in any case be subjected to law-martial . . . except those employed in the army and navy, and except the militia in actual service, *but by the authority of the legislature.* [Emphasis added.]" [67]

Secondly, repeated efforts were made in the Constitutional Convention to restrict drastically the military, one way or another. Each effort to do anything more than put the military under congressional control was overwhelmingly rebuffed.[68] It seems clear, therefore, that the Framers knew what was going on and that they did not object to it, so long as the military was under congressional control.[69]

The late Judge Augustus N. Hand has supported this view, and carried it further, contending that the Framers also intended a

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[66] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

[67] Supplemental Brief for Appellant and Petitioner on Rehearing, October 1955 Term, nos. 701, 713, pp. 78–79. See fn. 57, supra.

[68] *Id.* at 66–67.

[69] *Id.* at 68: ". . . the basic decision made by the constitutional convention, repeatedly, was to obtain protection from the sort of military abuses suffered in the past at the hands of the British crown, not by tying the hands of the military, but by making the military subject to control by the popularly elected [sic] legislature ***."

liberal interpretation to be placed upon the language of Article I, section 8.

> "Section 8 of Article I of the Constitution is the source of authority for the Articles of War. Congress is thereby given power to raise and support armies, to make rules for the government of the land and naval forces, and to make all laws which shall be necessary for carrying into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States. The Articles were enacted in pursuance of the general war power, and ought to be given a broad scope in order to afford the fullest protection to the nation." [70]

V. THE BEGINNING OF THE CONSTITUTIONAL CHALLENGE, THE WORLD WAR I LITIGATION

Nothwithstanding the fact that provisions for jurisdiction similar to the present Article 2(11)[71] have been in our law antedating the Constitution, their "constitutionality seems never to have been questioned prior to [World War I]."[72]

These cases were few, arose upon varying fact patterns, and none is genuinely relevant in considering the cases now on appeal. Thus, *Ex parte Gerlach*[73] involved a civilian employee of the now-defunct Shipping Board who signed aboard a vessel and then resigned his position. While being sent home—and being somewhat in the status of a passenger—aboard an Army vessel, he volunteered to stand watch. Subsequently, he refused to continue. An officer ordered him to continue. For steadfastly refusing, he was tried by court-martial pursuant to the Articles of War.[74] Judge Augustus N. Hand dismissed his writ of habeas corpus, using some broad language in so doing.[75] Because Mr. Gerlach committed his offense in time of war, most of Judge Hand's comments may be only dicta. However, proponents of widely circumscribed jurisdiction over civilians usually cite the holding. *Ex parte Falls*[76] involved a civilian who signed aboard an Army transport as chief cook. While still in port, he jumped ship, was apprehended in New Jersey, and tried by court-martial. The Court discharged the writ. The Judge held that Mr. Falls was "in the field". He also distinguished be-

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[70] *Ex parte* Gerlach, 247 F. 616, 618 (1917). For further discussion of this and related cases, see Part V, infra.

[71] 10 USC §802(11) (1952 ed. Supp. V).

[72] Morgan, *Court-Martial Jurisdiction*, 4 Minn. LR 79, 96 (1920).

[73] 247 F. 616 (1917).

[74] AW 2 (RS §1342, as amended by 39 Stat. 651).

[75] See Part IV and fn. 70, supra.

[76] 251 F. 415 (1918).

tween service "in" and service "with" the Army,[77] a distinction which is still at issue 41 years later. Because Mr. Falls jumped ship during World War I, it is again questionable what authority the case may be. *Ex parte Jochen*[78] is of interest not because it provides any more clear authority than the others but for two different reasons: (1) The Judge discussed some valuable judicial history;[79] (2) The Judge held, that even if Mr. Jochen's service was not really "in the field", it was under conditions akin to wartime—a very interesting holding if one were to compare the scene at Brownsville, Texas in 1917–1918 to that in many places where American civilians now accompany the military.[80]

Other World War I cases are similarly limited.[81] That is natural, for when the hostilities ceased, Americans returned home. Only after World War II have our forces remained abroad.

And so we come to the cases now on appeal.

VI. THE PENDING CASES

Professor Morgan wrote:[82]

> "The clause making these persons [civilians] amenable to military law when without the territorial jurisdiction of the United States is, where the offense occurs and the trial is had either in the territory of a foreign sovereign or upon the high seas, unquestionably constitutional. The constitutional guaranties with reference to indictment, presentment, and trial by jury have no extra-territorial effect.[83] They are operative only in territory incorporated into the United States." [84]

Professor Morgan may have been right. But in the wake of the *Covert* and *Krueger* decisions, nobody could now be that certain. An analysis of the cases which the Supreme Court may consider later this year or next may not restore certainty but next to a long wait it offers the best alternative.

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[77] ". . . A distinction is made between 'the officers and soldiers' belonging to the Regular Army of the United States—§(a)—and serving 'in' the Army and 'persons' accompanying or serving with the armies of the United States in the field. The former includes officers and soldiers, both volunteers and draftees, serving 'in' the Regular Army; the latter includes all 'retainers to the camp,' and, in time of war, all 'persons,' including civilians, as distinguished from 'officers and soldiers,' 'accompanying or serving with the armies of the United States in the field.' The former class refers to those 'in' the service of the 'Regular Army'; the latter to those serving 'with' the armies of the United States 'in the field,' and not 'in' the 'Regular Army' . . ." 251 F. 415, 416 (1918).

[78] 257 F. 200 (1919).

[79] *Id.* at 203–207 (1919).

[80] E.g., the Autobahn into Berlin; Morocco; Lebanon. Of course, any distinction—e.g., "in the field," "time of war"—can become technical. See discussion in Lee v. Madigan, 358 US 228, 230 (1959).

[81] Other World War I cases include Hines v. Mikell, 259 F. 28 (1919); *Ex parte* Weitz, 256 F. 58 (1919).

[82] Morgan, *Court-Martial Jurisdiction*, 4 Minn. LR 79, 96 (1920).

[83] [Professor Morgan's fn. 73] In re Ross, 140 US 453 (1891).

[84] [Professor Morgan's fn. 74] Hawaii v. Mankichi, 190 US 197 (1903); Dorr v. United States, 195 US 138 (1904).

The factual situation presented in each case must be considered in the various lights of the spectrum underlying the *Covert* and *Krueger* opinions.

In the original Supreme Court holding,[85] Mr. Justice Clark wrote for a majority of five justices. Citing the cases of *American Insurance Company* v. *Canter*,[86] *Hawaii* v. *Mankichi*,[87] *Dorr* v. *U. S.*,[88] and *Balzac* v. *Porto Rico*,[89] Mr. Justice Clark concluded that Congress may establish legislative courts outside its Article III authority and that this proposition is "clearly settled". In greater detail he discussed the case of *Ross* v. *McIntyre*,[90] which had similar facts in dissimilar surroundings.[91] The Opinion of the Court rested not upon congressional power under Article I, §8 but upon an analogy to the former system of consular courts.[92] Thus, there was no clear constitutional holding.[93]

Following a rehearing, the Supreme Court approached the combined cases from a different viewpoint in an opinion by Mr. Justice Black.[94] With the startling though clear introduction, "At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights,"[95] Mr. Justice Black discussed the inclusive nature of the Fifth and Sixth Amendments. He also opined that the language of Article III, §2 made its applicability world-wide and quite clear. He extolled the jury system,[96] distinguished but stopped short of disapproving the case of

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[85] 351 US 470 (1956), a 5–1–3 split.

[86] 26 US (1 Pet.) 511 (1828).

[87] 190 US 197 (1903).

[88] 195 US 138 (1904).

[89] 258 US 298 (1922).

[90] 140 US 453 (1891).

[91] Mr. Ross was an American civilian seaman who committed murder "without the continental limits of the United States." He was convicted by a consular court in Yokohama over his claim that his constitutional rights to grand jury indictment and petit jury trial were violated. The Yokohama court was one of a number in a scattered system. As Mr. Justice Frankfurter strongly observed in his reservation in the Covert and Krueger cases, mid-20th Century diplomatic conditions have drastically changed, and the United States would not today be permitted to impose its jurisdiction unwillingly upon foreign sovereignties. Whether the changed diplomatic scene colors the legal interpretation may be another matter.

[92] Mr. Justice Frankfurter pointed this out in his analysis of the Opinion of the Court.

[93] Perhaps it is well that an appellate court *not* rule on a constitutional question unless it must. This tradition still asserts itself from time to time—perhaps when judges need to rely upon it! See discussion of the majority holding in US *ex rel* Guagliardo v. McElroy, infra.

[94] 354 US 1 (1957).

[95] Mr. Justice Black's "steadfast bulwark" theory has been criticized as recently as March 1959. McLaren, *Constitutional Law: Military Trials of Civilians*, 45 ABA Jour. 255, 308–309 (1959).

[96] Which has *never* applied to courts-martial and which, this writer learned in several visits to its homeland, is fading into disuse in England.

In re Ross,[97] and then pointed out that treaties must be constitutional, citing *Geofroy* v. *Riggs.*[98] Mr. Justice Black then held that Article I, §8, clause 14 does not encompass wives of military personnel within the United States and cannot include them when they are abroad.[99] His holding was predicated upon the Fifth Amendment. In so holding, he specifically avoided passing upon the rights of a civilian employee in the same set of facts. The cases cited are interesting because of what they stand for and because of what they do *not* stand for. Thus, every case appears to involve (1) soldiers, (2) persons within the King's realm, (3) wartime, or (4) persons clearly not in the military "forces."[100] The learned Justice also relied upon some colonial cases and attitudes.[101] Before concluding, he held distinguishable the cases of *Ex parte Milligan,*[102] *Duncan* v. *Kahanamoku,*[103] and *U. S. ex rel Toth* v.

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[97] 140 US 453 (1891).

[98] 133 US 258 (1890). NATO–SOFA seems on the safe side of constitutionality. See Note, 70 Harv. LR 1043, 1053–1055 (1957).

[99] However, foreign governments consider wives to be a part of the military force. E.g., established practices under Art. VII, NATO–SOFA.

[100] I.e., tradesmen merely following the British Army to Gibraltar.

[101] His opinion did not attempt to distinguish colonial antipathy to Crown-originated delegations of authority to the military from legislatively originated delegations. Nor did it really get into the activities of the roundly hated Vice-Admiralty courts, which blended admiralty procedure with common law subject matter.

[102] 71 US (4 Wall) 2 (1866). The case involved Mr. Milligan who was tried by a military commission in Indiana in 1864, when no warfare was going on in Indiana and the civil courts were open, for a military offense. The writ was granted and the Supreme Court sustained. Thus, the case is popularly considered to stand for the "open court" doctrine, although it is questionable how far beyond its facts it ought to be construed. In his concurring opinion Mr. Chief Justice Chase opined that the civil guaranties of the Constitution were inapplicable to the military. *Id.* at 137.

[103] 327 US 304 (1946). The case involved two civilians living in Hawaii. Both were arrested and tried by the military, one in February 1942 and the other in 1944. Neither man had any connection with the military; neither crime was a military offense. By statute Congress had authorized the Governor of Hawaii to suspend the writ of habeas corpus under certain circumstances; he had intended the military to try civilians for civilian crimes. Mr. Justice Murphy, concurring, took particularly strenuous exception to use of a military tribunal on the ground that the civilian courts were open. Referring to the Milligan case, fn. 102, supra, he opined that the "open court" rule was sound and that the Government's argument (that it should be but one factor for consideration) was "an untenable today as it was when cast in the language of the Plantagenets, the Tudors and the Stuarts." *Id.* at p. 329. Mr Justice Burton's dissent took note of the warfare then raging in the Pacific, of expert testimony as to Hawaii's proximity thereto, and posed the question: ". . . with what authority has the Constitution and laws of this country vested the official representatives of the people upon whom are placed the responsibilities of leadership under those extraordinary circumstances?" *Id.* at 343. The case, one might note, was decided February 25, 1946—long after the last Kamikazi pilot had crashed to his fiery doom.

Quarles.[104] His conclusion is reserved for a mild assault upon what he has characterized as the "harsh law" of the military and a quotation from Colonel Winthrop:

> *"A statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."* [105]

Justices Frankfurter and Harlan concurred in the result on the ground the case was capital. The former strictly limited his opinion to the precise facts at bar.[106]

Assuming arguendo that one may examine Article I in isolation, Mr. Justice Harlan held that one cannot say military jurisdiction over petitioners would involve an arbitrary extension of congressional power. To him, history and the "necessary and proper" clause[107] buttress the view.

> "It seems to me clear on such a basis that these dependents, when sent overseas by the Government, become pro tanto a part of the military community." [108]

Mr. Justice Harlan felt that a due process question was involved and that one could not say, as Mr. Justice Black had said, that the Bill of Rights always has extraterritorial effect—or that it never does. Because capital cases are few, and for other somewhat esoteric reasons, he concluded by concurring in the holding.[109]

Justices Clark and Burton maintained their earlier position. Again discussing some history[110] Mr. Justice Clark cited *Madsen* v. *Kinsella*,[111] and asserted it was relevant to the case at bar.[112] He also opined that the Supreme Court had already recognized the "well established power of the military *** to exercise jurisdiction

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[104] 350 US 11 (1955). See fn. 158, infra.

[105] Winthrop, op. cit., at 107. Query: Was Colonel Winthrop writing about civilians accompanying the military overseas? It seems not. See U. S. v. Burney, 6 USCMA 776, 797, 21 CMR 98 (1956).

[106] Mr. Justice Frankfurter also produced a scholarly historical glimpse into In re Ross, the Insular Cases, and the story of the extraterritorial jurisdiction our country, in common with others, once exercised.

[107] U. S. Const. art. I, §8, cl. 18.

[108] 354 US 1, 73 (1957).

[109] See fn. 16, supra.

[110] In this opinion Mr. Justice Clark kept principally to court-martial history, relying more by reference on his previous analogy to consular courts particularly and to legislative courts generally.

[111] 343 US 341 (1952).

[112] In Madsen v. Kinsella, the Supreme Court sustained the jurisdiction of a military *commission* to try a civilian wife for the murder of her husband in *occupied* Germany in 1949. Mr. Justice Clark observed that there might have been more need to sustain military jurisdiction in Japan in 1952 (the Krueger case) than in Germany in 1949. He then reminded of Congress' tremendous war powers, citing Ashwander v. T.V.A., 297 US 288 (1936); Silesian-American Corp. v. Clark, 332 US 469 (1947).

over persons directly connected with the Armed Forces ***."[113] His discussion of possible alternatives to court-martial jurisdiction is provocative but too remote for the purpose of this paper.[114]

The case of *Kinsella* v. *U. S. ex rel Singleton*[115] involved facts substantially similar to those in the *Covert* and *Krueger* cases except that the prisoner involved, Mrs. Joanna S. Dial, was convicted of a non-capital offense, manslaughter.[116] The late Chief Judge Ben Moore granted that writ of habeas corpus brought on Mrs. Dial's behalf on the ground he was bound by the *Covert* and *Krueger* decision to do so, "much as [he] may disagree with it." He was unable to fathom the legal—much less constitutional—principle which separates the non-capital from the capital offense.

> "Moreover, I can think of no logical distinction, insofar as the constitutional power of Congress is concerned, between its asserted power, denied by the Supreme Court, to subject dependents of members of the armed forces overseas to the jurisdiction of courts-martial for capital offenses, and the like questioned power in cases of non-capital offenses. Of course, where matters of life or death are involved, the facts must be scrutinized closely and the decision carefully weighed, but when arrived at, the applicable principle applies alike in all similar cases."[117]

If Mr. Justice Black and those who joined in his opinion are consistent, it would appear that those four justices would not distinguish a non-capital from a capital offense. Whether one of the new justices[118] will join them to comprise a majority for petitioner in the premises is left to the Delphic[119] oracle.

There is a second type of dependent pertaining to whom no litigation is pending—a dependent of a civilian employee who is accompanying him abroad. It is possible to apply the rationale applicable to a dependent to these people; it is also possible, though

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[113] U. S. *ex rel* Mobley v. Handy, 176 F. 2d 491 (1949); Pearlstein v. U. S., 151 US F. 2d 167 (1945); Grew v. France, 75 F. Supp. 433 (E.D. Wis. 1948); *In re Beru*, 54 F. Supp. 252 (S.D. Ohio 1944); Hines v. Mikell, 259 F. 28 (1919); *Ex parte* Jochen, 257 F. 200 (1919); *Ex parte* Falls, 251 F. 415 (1918); *Ex parte* Gerlach, 247 F. 616 (1917); U. S. v. Burney, 6 USCMA 776, 21 CMR 98 (1956).

[114] For a thoughtful study of the possible alternatives, see Note, 71 Harv. LR 712 (1958). Neither Congress nor the Defense Department seems to wish to anticipate Supreme Court action on the pending cases.

[115] 164 F. Supp. 707 (S.D. W.Va. 1958).

[116] Like Mrs. Covert and Mrs. Dorothy Krueger Smith, Mrs. Dial had traveled abroad at government expense on military orders and was living with her husband who was on duty as a uniformed member of the military. Mrs. Dial and her husband, one James W. Dial, were convicted of beating their one-year-old son to death. Each pleaded guilty and was sentenced to three years confinement. Mrs. Dial's conviction was sustained upon appeal upon the precise issue of the court-martial's jurisdiction. U. S. v. Joanna S. Dial, 9 USCMA 541, 26 CMR 321 (1958).

[117] 164 F. Supp. 707, 709 (S.D. W.Va. 1958).

[118] Justice Whitaker and Stewart.

[119] Or any other oracle who would volunteer.

perhaps less facilely, to content that they hold the same status as their civilian employee spouses. Whatever rationale would be applicable, the issue will not be raised soon.[120]

In the Matter of William K. Yokoyama[121] involved a civilian employee of the armed forces at Camp Zama, Honshu, Japan, who was convicted by court-martial of larceny.[122] His petition for a writ of habeas corpus was denied. Judge Yankwich reviewed historical authorities, dissected the *Covert* and *Krueger* opinions, noted the Supreme Court's tendency to construe strictly military jurisdiction, and concluded with these words:

> "The Supreme Court . . . by declaring unconstitutional the application of the 'dependents' clause to the wife of an officer charged with a capital offense *did not* intend to declare the clause as to civilian employees unconstitutional.
>
> "Absent a *binding* contrary ruling, I am of the view that the 'civilian' clause in the statute under discussion is a proper exercise of Congressional power under the constitutional grant to make rules or regulations for the government of the Armed Forces, or under the 'necessary and proper' clause, or both.
>
> "Invalidation of Congressional enactments by judicial fiat should be the rare exception. For this reason, Mr. Justice Frankfurter's concurrence was based on the assumption that the court was not determining the validity of the 'civilian' clause. So the situation calls for the application of the principle, already alluded to, that if a statute covers several enumerated groups and is declared invalid as applied to *one group only*, the remainder survives, *provided it relates to different categories*." [123]

Thus, Judge Yankwich predicated his decision upon his interpretation of the Supreme Court's *Covert* and *Krueger* ruling (as specifically defined by the concurring justices) and upon his belief that the law is firmly settled that when a statute has a severability clause that portion of it which applies to one category of people must be severed and sustained if it is per se constitutional.[124]

The case of *U. S. ex rel Wilson* v. *Bohlander*[125] involved an Army civilian employee living and working in the American Zone of West Berlin in 1956. Following the usual pretrial investigation and one day before his trial was scheduled to begin, Mr. Wilson tend-

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[120] Not only are there no cases yet in which an employee's dependent has been sentenced to confinement and petitiond for a writ of habeas corpus, but, furthermore, there may never be any, for many civilian employees overseas either are without accompanying dependents or else are married to persons who are not American citizens.

[121] 170 F. Supp. 467 (S.D. Cal. 1959).

[122] Specifically, Mr. Yokoyama was convicted of appropriating eight military payment certificates worth $50.00 apiece. He was sentenced to 4 years confinement and fined $3,000.00.

[123] Slip opinion, pp. 17–18. Footnotes omitted. Underscoring is the Judge's.

[124] *Dorchy v. Kansas*, 264 US 286, 288–290 (1924); Lynch v. U. S., 292 US 571, 586–587 (1934); U. S. v. Harriss, 347 US 612, 627 (1954). See also further discussion concerning the Grisham case, infra.

[125] 167 F. Supp. 791 (D. Colo. 1958).

ered his resignation as an Army employee. It was not accepted. The next day he pleaded guilty before a court-martial to several lewd acts.[126] His conviction was affirmed upon appeal.[127] In its opinion, the Court of Military Appeals declined to consider the argument of the Army counsel that Berlin constituted an occupied area in 1956 but rather grounded its opinion upon the provisions of Article 2(11).[128]

Upon petition for a writ of habeas corpus the matter went before Judge Arraj, who dismissed it. He concluded that the Frankfurter-Harlan interpretation of the Opinion of the Court in the *Covert* and *Krueger* decision was correct, and he then analyzed some precedents for court-martial jurisdiction. Lumping the cases involving paymaster personnel together for reference purposes,[129] he opined that these people *** appear, on the facts, to have been comparable to the present class of Department of Army civilians, with the exception that they wore uniforms."[130] He then cited the World War I[131] and World War II[132] cases although those cases, as he noted, dealt with crimes committed in wartime or during a clear-cut military occupation.[133] After citing a few cases in which military jurisdiction was denied,[134] he referred to several of the cases now on appeal. Before concluding with some practical considerations, he quoted three pertinent statements by Mr. Justice Black:

> From *Duncan* v. *Kahanamoku:* "Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, *those directly connected with such forces,* or enemy belligerents, prisoners of war, or others charged with violating the laws of war." [135]

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[126] Specifically, three acts of sodomy, two lewd acts with persons under the age of 16 years, two acts of displaying lewd pictures to minors with intent to arouse their sexual desires. He was sentenced to 10 years confinement; the convening authority reduced the sentence to 5 years.

[127] 9 USCMA 60, 25 CMR 322 (1958).

[128] See fn. 1 of the Opinion of the Court of Military Appeals.

[129] *In re* Thomas, 23 Fed. Cas. No. 13,888 at 931 (N.D. Miss. 1869); U. S. v. Bogart, 24 Fed. Cas. No. 14,616 at 1184 (E.D. N.Y. 1869); *In re* Bogart, 3 Fed. Cas. No. 1,596 at 796 (C.C.D. Cal. 1873); *In re* Reed, 20 Fed. Cas. No. 11,636 at 409 (C.C.C.D. Mass. 1879). See also fn. 63, supra.

[130] 167 F. Supp. 791, 794 (D. Colo. 1958).

[131] Hines v. Mikell, 259 F. 28 (1919); *Ex parte* Gerlach, 247 F. 616 (1917); *Ex parte* Falls, 251 F. 415 (1918); *Ex parte* Hochen, 257 F. 200 (1919).

[132] Pearlstein v. U. S., 151 F. 2d 167 (1945); *In re* Di Bartolo, 50 F. Supp. 929 (S.D. N.Y. 1943); McCune v. Kilpatrick, 53 F. Supp. 80 (E. D. Va. 1943); *In re* Berue, 54 F. Supp 252 (S.D. Ohio 1948); Grewe v. France, 75 F. Supp. 433 (E.D. Wis. 1948).

[133] It is submitted that West Berlin in 1956 was not a truly occupied area since diplomatically, the situation was—and is—more closely related to that of West Germany.

[134] All readily distinguishable upon the facts.

[135] 327 US 304, 313 (1946). Judge Arraj's underscoring.

From *U. S. ex rel Toth* v. *Quarles:* "For given its natural meaning, the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would see to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." [136]

From *Reid* v. *Covert:* "Even if it were possible, we need not attempt here to precisely define the boundary between 'civilians' and members of the 'land and naval forces.' We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform." [137]

"Presuming that this language has some meaning,"[138] Judge Arraj concluded that a civilian employee such as Mr. Bohlander was not within the scope of the *Covert* and *Krueger* decision, and, therefore, in view of the historical precedents and the needs of the military community, he dismissed his petition. In so doing, the Judge did not specifically mention the problem of the severability of Article 2(11), so ably discussed by Judge Yankwich, apparently tacitly assuming it to be severable.

The case of *Grisham* v. *Taylor*[139] involved an Army Engineers civilian employee at Orléans, France. He was charged with the capital offense of premeditated murder, and, after arguing before a court-martial that he was amenable only to French jurisdiction, he was convicted of the non-capital offense of unpremediated murder.[140]

Mr. Grisham filed for a writ of habeas corpus and Judge Follmer denied the writ. After reviewing the opinions in the *Covert* and *Krueger* decision, Judge Holtzoff's opinion in *U. S. ex rel Guagliardo* v. *McElroy,*[141] and Judge Latimer's opinion in *U. S.* v. *Burney,*[142] Judge Follmer ruled that:

"In the light of the divergent opinions in *Covert* and the self-defeating alternatives,[143] enumerated and evaluated by Mr. Justice Harlan in *Covert*

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[136] 350 US 11, 15 (1955).

[137] 354 US 1, 22 (1957).

[138] U. S. v. Bohlander, 167 F. Supp. 791, 797 (D. Colo. 1958).

[139] 161 F. Supp. 112 (M.D. Pa. 1958).

[140] Mr. Grisham was charged with killing his wife, one Dolly Dimples Grisham, following a cocktail party, at their French residence. Mr. Grisham was sentenced to life imprisonment; the sentence was subsequently reduced to 35 years imprisonment. The conviction was affirmed by the Court of Military Appeals. U. S. v. Grisham, 4 USCMA 694, 16 CMR 268 (1954). Mr. Grisham, like the other civilian employees involved in these cases, traveled to his duty post under government orders and received various military benefits (e.g., commissary, post exchange) while employed abroad.

[141] 158 F. Supp. 171 (D.C. 1958); see infra.

[142] 6 USCMA 776, 21 CMR 98 (1956). This opinion contains perhaps the best recitation available of the history of court-martial jurisdiction over civilians.

[143] Whether the alternatives are "self-defeating" has not yet been empirically proved. Military authorities think they would be. See appendices to Government Briefs in Nos. 701 and 713, October 1955 Term.

. . . I conclude, paraphrasing Mr. Justice Black . . . that this is a circumstance where petitioner was in the armed services for purposes of Clause 14 [of Article I, § 8] even though he had not been formally inducted into military and did not wear a uniform.

"I further conclude, in the light of the above observations, that civilian employees attached to the armed forces of the United States abroad may be subjected to trial by court-martial, *even in capital cases*, and that Article 2 [11] . . . in so far as it relates to the facts of the instant case is constitutional . . ."[144]

Judge Follmer's decision was appealed to the Court of Appeals for the 3d Circuit.[145] For a unanimous panel Judge Goodrich affirmed the judgment.

The appellate opinion began with reference to the *Covert* and *Krueger* opinions,[146] noted Judge Holtzoff's opinion and the 2–1 District of Columbia Circuit decision by which it was overruled on nonconstitutional grounds,[147] and then discussed the matter of severability. Concluding on the basis of the severability clause[148] that sub § (11) was severable, Judge Goodrich then looked to the distinction between an employee and a dependent, believing that the language of the Supreme Court permitted him to do so.[149] He then concluded, on grounds of reasonableness and practicality, and taking due note of the military benefits afforded Mr. Grisham,[150] that:

"Grisham was in the position of the person described by Mr. Justice Black and quoted above [see footnote 149, supra]. He had not been formally inducted, he did not wear a uniform, but he was as closely connected with the Army as though he had." [151]

The final case to be analyzed, and in a sense the most important because of Judge Holtzoff's ruling followed by a split reversal on

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[144] Underscoring supplied. Judge Follmer obviously felt that whatever line of demarcation existed separating capital from noncapital offenses for dependents did not exist as to civilian employee. Query: If it exists as to one, why would it not apply as to the other?

[145] 261 F. 2d 204 (1958). The Reporter refers to the District Court Judge as having been John W. Murphy. This is erroneous. He was Frederick V. Follmer.

[146] "Our difficulty in this case [Grisham] is to make up our minds how far Reid v. Covert takes us." *Id.* at 205.

[147] 259 F. 2d 927 (1958); see infra.

[148] "If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications." Query: Should not severability be presumed in any statute absent legislation history contra?

[149] Specifically, Mr. Justice Black's language quoted from the Covert and Krueger opinion, supra.

[150] Judge Goodrick enumerated Mr. Grisham's military-type benefits, viz., "He could buy goods at the commissary; he could get medical and dental care; he had the benefit of the special armed services postal facilities, special customs privileges, etc." 261 F. 2d 204, 206 (1958).

[151] *Id.* at 206–207 (1958).

appeal, is that of *U. S. ex rel Guagliardo* v. *McElroy*.[152] Mr. Guagliardo was an Air Force civilian employee at Nouasseur Air Depot, Morocco. He was convicted by a court-martial of larceny.[153] The conviction was approved upon appeal by a board of review in the Office of the Judge Advocate General, Department of the Air Force.[154]

Prior to affirmance by the Board of Review, Mr. Guagliardo had filed for a writ of habeas corpus and Judge Holtzoff denied the application.[155] Before discussing the substantial merits of the case, the Judge disposed of the Government's objection that Mr. Guagliardo had not exhausted his administrative remedy. He conceded that the case of *Gusik* v. *Schilder*,[156] standing alone, would completely sustain[157] the contention. However, he pointed out that the Supreme Court in both the *Toth*[158] and *Covert* and *Krueger* decisions failed to require exhaustion of administrative remedies.[159] On that basis, he stated:

> "This court cannot reasonably reach any conclusion other than that the *Gusik* case has been overruled *sub silentio* by the Toth and Reid cases, insofar as it applies to the necessity of exhausting other available remedies in a case in which the jurisdiction of a court-martial is challenged on constitutional grounds . . . ." [160]

Proceeding to the merits, he first reviewed some preliminary constitutional concepts.[161] He then summarized the state of the law

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[152] 158 F. Supp. 171 (D.C. D.C. 1958).

[153] Specifically, he was convicted of stealing leatherette goods and olive drab material worth $4,690.00 and with conspiring to commit larceny. He was fined $1,000.00 and sentenced to 3 years confinement. The convening authority, upon review, disapproved the guilty finding as to the larceny but approved it otherwise and also approved the sentence. An Air Force board of review reduced the sentence to confinement for 2 years.

[154] Thereby terminating the review within military channels.

[155] Op. cit., fn. 152, supra.

[156] 340 US 128 (1950).

[157] 158 F. Supp. 171, 173 (D.C. D.C. 1958).

[158] U. S. ex rel Toth v. Quarles, 350 US 11 (1955). The District Court had freed Mr. Toth. Toth v. Talbott, 114 F. Supp. 468 (D.C. D.C. 1953). The Court of Appeals for the District of Columbia Circuit reversed. Talbott v. U. S. ex rel Toth, 215 F. 2d 22 (1954). The Toth case is also of interest substantively in that the Supreme Court extended the narrow holding of the District Court that a civilian could not be removed to a distant point for trial for an offense allegedly committed while he was in the service—to hold that on constitutional grounds a civilian veteran could not be tried by court-martial. One who is interested in the Toth holding would also be interested in Wheeler v. Reynolds, 164 F. Supp. 951 (N.D. Fla. 1958), involving a Reservist no longer on active duty when apprehended.

[159] Perhaps the word "administrative" is a misnomer in these circumstances. Court-martial jurisdiction is *judicial*. Appeal to a board of review and to the Court of Military Appeals is a *judicial* process.

[160] 158 F. Supp. 171, 173 (D.C. D.C. 1958).

[161] See Part III, infra.

on the general subject of civilians.[162] Observing that "The use of civilian employees is necessary and sometimes indispensable for the operations of the armed forces" and that "To the extent they may be deemed part of the armed forces", Judge Holtzoff reviewed the *Covert* and *Krueger* decision. He continued with a discussion of the fact that the need for general language in the Constitution had long been established. He opined that Article 2(11) was the progeny of pre-Constitution articles of war, all of which the Framers doubtless had in mind when they wrote the Constitution.[163] Judge Holtzoff concluded by holding that Article 2(11) was a "necessary and proper" method for governing the military forces abroad.

The District Court's denial of the petition was, however, successfully appealed.[164] Judge Fahy, after disposing of the matter of exhaustion of remedies, turned to the *Covert* and *Krueger* opinion. He held that:

> "The basis for the decision was that the wife was entitled to a jury trial as provided by Article III, § 2 of the Constitution and to the safeguards of the Fifth and Sixth Amendments." [165]

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[162] "The state of the Supreme Court's decisions on this question may, therefore, be summarized as follows:

> "A former member of the armed forces, who has been discharged and is no longer within the control of the military, is not subject to trial by court-martial for an offense committed during his term of service.
>
> "A wife, a child, or other dependent of a member of the armed forces is not subject to trial by court-martial in a capital case.
>
> "The Supreme Court has not determined whether a dependent accompanying a service man is subject to trial by court-martial in a case other than capital.
>
> "Similarly, the Supreme Court has never had occasion to decide whether a civilian employee attached to the armed forces in a foreign country is subject to trial by court-martial." 158 F. Supp. 171, 175 (D.C. D. C. 1958).

[163] "It was against this background [of extant articles of war] that the members of the Constitutional Convention of 1787 formulated the provision empowering the Congress to make rules and regulations for the government of the land and naval forces of the United States. It is reasonable to infer that the framers of the Constitution were familiar with previous English and American usage in the matter and, therefore, employed the term 'land and Naval Forces' in a broad sense. Such has also been the continuous construction of this phrase by the Congress from the early days of the Republic. Early congressional interpretation of a constitutional provision at a time when some of the Founding Fathers were still living and active is particularly significant. Great weight must be attached to such contemporaneous construction. Cohens v. Virginia, 19 US (6 Wheat.) 264, 418 (1821); Cooley v. Board of Wardens of Port of Philadelphia, 53 US (12 How.) 299, 315 (1822); Burrow-Giles Lithographic Co. v. Sarony, 111 US 53, 57 (1884); McPherson v. Blacker, 146 US 1, 27 (1892); Knowlton v. Moore, 178 US 41, 56 (1900)." 158 F. Supp. 171, 177 (D.C. D.C. 1958). (Dates supplied).

[164] 259 F. 2d 927 (1958).

[165] *Id.* at 929.

Proceeding from that interpretation of the decision,[166] he opined "*** that legislation bringing some civilian employees within court-martial jurisdiction for some offenses would [not] necessarily be unconstitutional" because of the "necessary and proper" clause.[167] Just what legislation, or what category of civilians, he did not say.[168] Indicating "the wisdom of refraining from unavoidable constitutional pronouncements",[169] Judge Fahy concluded that inasmuch as it was impossible to determine just how the Supreme Court would have wanted to sever sub § (11), the preferred course was to invalidate the entire subsection.[170] Accordingly, the Court reversed and remanded, graciously leaving Congress free to legislate in more specific terms.[171]

Judge Burger dissented essentially upon four points. Firstly, he reviewed the *Covert* and *Krueger* opinions, noting that they were limited to dependents and that Mr. Justice Black had alluded to the concept of being "in" the armed services. He then looked to court-martial history, concluding that it justified court-martial jurisdiction over civilian employees. Thirdly, he held that clauses 14 and 18 of Article I, § 8 were sufficient foundation upon which Congress could have enacted the code.[172] Finally, he considered the nonconstitutional problem of alternatives.[173] He summarized his position vis-a-vis that of the majority thusly:

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[166] It is suggested that is a semantic oversimplification. If the wives were entitled to those constitutional privileges, why were they? Presumably because the language of Art. I, § 8, cl. 14 and 18 in the light of court-martial history was inadequate to overcome the weight of Art. III, § 2 and the Fifth and Sixth Amendments.

[167] 259 F. 2d 927, 930 (1958). Vague standards are enumerated at 933. Just what the constitutional difference between jurisdiction over *all* civilian employees abroad and jurisdiction over *some* would be was left in doubt.

[168] The key words about which Congress might be specific were "security", "discipline", and "effectiveness".

[169] Query: Was it less a "constitutional pronouncement" to invalidate all of sub §(11) as being unconstitutional than it would have been to declare it severable and sustain on constitutional grounds that portion which applies only to civilian employees?

[170] Judge Fahy did not feel the severability clause made severability mandatory.

[171] 259 F. 2d 927, 933 (1958).

[172] He quoted at some length from The Federalist No. 23, thought to have been written by Alexander Hamilton. This paper supports the contention that the Framers intended to give Congress virtually unlimited control over the military and that this control extended beyond the "army" to all "forces". The paper is persuasive dicta because it was written in explanation of the newly penned Constitution to attempt to induce state legistures to ratify it. For further pertinent quotations excerpted from it, see pp. 17–19, the Government Brief cited in fn. 143, supra.

[173] See fn. 115, supra.

"I am unable to join this kind of judicial negativism which strikes down sound, historically supported legal action and leaves a vacuum which cannot be filled." [174]

VII. THE FOREIGN SOVEREIGN

The purpose of this paper has been achieved. The reader may now join the speculation as to what the Supreme Court will do with the pending cases.[175]

However, without speculating upon what alternatives Congress might provide were the Supreme Court to strike down Article 2(11) en toto,[176] it is interesting to note that notwithstanding the treaties the United States has entered with foreign sovereignties, by general international law, an American civilian abroad would not be afforded *any* constitutional rights if tried by a foreign power for commission of a crime within its jurisdiction.

It now seems quite clear, if indeed it was ever seriously in doubt, that an American citizen abroad has no rights unless the foreign sovereign—by treaty or by individual election—chooses to accord them.[177] For "each nation has jurisdiction of the offenses committed within its own territory." [178]

Because all the cases now pending involve American citizens who committed crimes on foreign soil, it has been suggested that their constitutional rights, if any, be considered in relation to the alternative of foreign jurisdiction.

". . . While, in dealing with an American citizen in the United States—who normally has a constitutional right to trial by an Article III court—any military exception to that Article III jurisdiction may have to be strictly limited to military necessity, a wholly different question is presented when the person . . . is on foreign soil and has no constitutional right to be tried by American law at all. He is tried by American law on foreign soil only because the United States . . . obtains the consent of another nation *** by agreement 'foreign nations have relinquished jurisdiction to American *military* authorities' (351 US at 479, emphasis added)."[179]

If the military authorities are judicially restrained from acting, and the only cessions of jurisdictions are to the military, it appears obvious that, absent the successful negotiation of new diplomatic agreements, American civilians abroad would be tried by foreign courts.[180]

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[174] 259 F. 2d 927, 940 (1958).

[175] E.g., Notes, 27 Geo. Wash. L. Rev. 345 (1958); 15 Wash. & Lee L. Rev. 318 (1958).

[176] See fn. 114, supra.

[177] The Schooner Exchange v. McFaddon, 11 US (7 Cranch) 116 (1812); Wildenhus' Case, 120 US 1 (1887); Wilson v. Girard, 354 US 524 (1957).

[178] Kinsella v. Krueger, 351 US 470, 479 (1956).

[179] Memorandum in Reply to Petition for Rehearing, Covert and Krueger cases, October 1955 Term, Nos. 701, 713, at 5.

[180] Which might improve our diplomatic relations anyway.

RESTRICTIONS UPON USE OF THE ARMY IMPOSED BY THE POSSE COMITATUS ACT *

BY MAJOR H. W. C. FURMAN**

I. INTRODUCTION

A. *General*

As a result of a protracted struggle between a Republician President and a Democratic Congress over federal interference in elections in the South, the only legislation attempting to restrict the power of the President in the use of the national forces was passed.[1] Congress limited the employment of the Army as a means of law enforcement in the Army Appropriation Act for the fiscal year 1879, providing:

> "Sec. 15. From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a *posse comitatus*, or otherwise, for the purpose of executing the laws, except in such cases and under circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment." [2]

In 1956, incident to the enactment of title 10, United States Code, as positive law, the so-called "Posse Comitatus Act" was repealed and its substance reenacted as section 1385 of title 18, United States Code.

The enactment of the Posse Comitatus Act was the occasion for lively debate and much political wrangling but in the intervening years it has seldom been construed by the courts or the Attorney General. Nevertheless, it has produced many trouble-

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[1] Corwin, *The President: Office and Powers, 1787-1957* 137 (1957).

[2] Sec. 15, Army Appropriation Act of Jun 18, 1878, 20 Stat. 152; codified until 1956, with amendments, as 10 U.S.C. 15.

some questions to be resolved by The Judge Advocate General of the Army and the judge advocates of Army posts and units.[3]

As a means of protecting the nation from that hardy spectre "the evils of a large standing army"—as was claimed by some of its proponents—the act has been largely unnecessary and ineffectual. As a means of limiting the powers of the President to employ armed forces to execute the laws, the two exceptions contained in the statute have been its own undoing, though (in the author's opinion) it would have been unconstitutional otherwise.[3a] The act has succeeded in preventing the misuse of troops by commanders who might have performed some law enforcement functions viewable as an unwarranted invasion of civilian affairs. It has sheltered the Army from odious duties foreign to its normal training or operational mission. Unfortunately, the act has inhibited commanding officers in their responsibility for maintaining favorable community relations and for taking all necessary measures for the welfare and discipline of the command. While no person appears to have been prosecuted for a violation of the Posse Comitatus Act, this should not be taken as evidence that the conduct which it prohibits is well defined or understood. The variety of interpretations it has received suggest that the act is so vague and indefinite that, as a criminal statute, it might be unconstitutional.

The Posse Comitatus Act, in its present form, provides:

> "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined not more than $10,000. or imprisoned not more than two years, or both. This section does not apply in Alaska." [4]

Merely reading the statute serves to indicate some of the issues with which this thesis is concerned. What constitutes a "part of the Army or the Air Force"? Is it the individuals, the organizations, the reserve components, only the regulars? Why are naval forces omitted? To whom does "whoever" apply? How broad is the term "or otherwise" and what does it mean to "execute the laws"? Purportedly, the statute does not apply in Alaska but what is the impact of Alaskan statehood? Does it apply in Hawaii or the overseas commands? What are the exceptions

[3] This thesis topic was suggested in letters to the Commandant, The Judge Advocate General's School, U. S. Army, from the Staff Judge Advocate, U. S. Army Engineer Center, Fort Belvoir, Virginia, 10 Jul 1958; The Staff Judge Advocate, Headquarters Third U. S. Army, Fort McPherson, Georgia, 15 Jul 1958; The Staff Judge Advocate, U. S. Army Signal Center, Fort Monmouth, New Jersey, 11 Aug 1958.

[3a] Discussed in detail in fn 40a and Section V.

[4] 18 U.S.C. 1385 (1952 Ed., Supp. V).

"expressly authorized by the Constitution or Act of Congress"? Finally, can the requirement that the constitutional and statutory exceptions be express limit the power of the President in fulfilling his duties to "take care that the Laws be faithfully executed"? [5]

B. *Posse Comitatus Defined*

The *posse comitatus* derives its name from the entourage or retainers which accompanied early Rome's proconsuls to their places of duty and from the *comte* or *counte* courts of England. It was a summons to every male in the country, over the age of fifteen, to be ready and appareled, to come to the aid of the sheriff for the purpose of preserving the public peace or for the pursuit of felons.[6]

In the United States, a sheriff may call on the posse for aid and those persons called are required to assist or be punished.[7] Those states having statutes delineating the use of the *posse comitatus* have merely affirmed the common law.[8]

From section 27 of the Judiciary Act of 1789,[9] the United States marshal derived implied authority to summon the military forces of the United States as a *posse comitatus*. Although sanctioned by long practice and thought to be fairly inferred from the provisions of the Judiciary Act, no such authority was expressly conferred by statute,[10] and now such summons are forbidden by the Posse Comitatus Act.[11]

C. *Chief Executives' Use of Army in Enforcing Laws*

The President, as Chief Executive, swears that he will faithfully execute his office and that he will preserve, protect and defend the Constitution.[12] In executing his office he is required

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[5] U.S. Const. art. II, sec. 3.

[6] 15 C.J.S. 245 (1939); Black, *Law Dictionary*, 4th ed. 1324 (1951); Encyclopedia Britannica, 1957 ed., Vol. XVIII, 302. For details of the early English origin of the *posse comitatus* see Lorence, *The Constitutionality of the Posse Comitatus Act*, 8 Kansas City L. Rev. 164 (1940).

[7] Coyles v. Hurtin, 10 Johns. 85 (N.Y. 1813); Sutton v. Allison, 47 N.C. 339 (1855); Worth v. Craven County, 118 N. C. 112, 24 S.E. 778 (1896); Commonwealth v. Martin, 7 Pa. Dist. 219 (1898); Person v. Northampton County, 19 Pa. Dist. 691 (1910); McCarthy v. Anaconda Copper Mining Co., 70 Mont. 309, 225 Pac. 391 (1924); 57 C.J. 773 (1932).

[8] Comonwealth v. Martin, *supra* note 7.

[9] Act. of Sep 24, 1789, sec. 27, 1 Stat. 73, 28 U.S.C. 547(b).

[10] President Pierce's Attorney General, Caleb Cushing, expressed an opinion that a Federal marshal's authority to summon the *posse comitatus* included authority to summon officers, soldiers, sailors and marines. 6 Op. Atty. Gen. 466 (1854); 16 Op. Atty. Gen. 162 (1878).

[11] 17 Op. Atty. Gen. 71 (1881); 17 Op. Atty. Gen. 242 (1881).

[12] U. S. Const. art. II, sec. 1, cl. 8.

to "take care that the laws be faithfully executed." [13] Since the Debs decision,[14] it is clear that it is the Chief Executive who must enforce the provisions of Article IV, section 4, of the Constitution, guaranteeing to the several states protection against "domestic violence." [15]

The Chief Executive's power to employ the Army in enforcing laws has evolved through a combination of statutory provisions, administrative and judicial determinations and vigorous action on the part of the office holder.

President Washington overcame an anti-Army Congress sufficiently to get legislation, in 1792, permitting him to call forth the militia [16] "whenever the laws of the United States shall be opposed or the execution thereof obstructed, in any state by combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the power vested in the marshals." [17] The President had to be "notified" by an associate justice or district judge of the United States and he had to issue a proclamation to disperse, before using the troops.[18]

The Third Congress, by the Act of February 28, 1795,[19] revised the earlier measures by eliminating the judicial notification and made the President "the sole and exclusive judge" of the facts.

The provisions of the Act of 1795 were extended to the national forces by a bill which provided;

> "That in all cases of insurrection or obstruction to the laws, either of the United States or of any individual State or Territory, where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States as shall be judged necessary, having first observed all the prerequisites of the law in that respect." [20]

When called upon to issue a proclamation to insurgents who refused to obey certain Embargo Acts, President Jefferson ex-

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[13] U. S. Const. art. II, sec. 3.

[14] In re Debs, 158 U.S. 564 (1895).

[15] The so-called "guarantee clause."

[16] Milton, *The Use of Presidential Power* 40 (1944).

[17] Act of May 2, 1792, 1 Stat. 264.

[18] Although this act referred to militia only, Corwin says that this is without interpretative significance because of the small Regular Army of that day. Corwin, *supra* note 1, at 131. Washington acted under the authority of this statute to personally put down the Whiskey Rebellion. See Findlay, *History of the Insurrection in the Four Western Counties of Pennsylvania* (1796); Brackenridge, *History of the Western Insurrection* (1859); Office of The Judge Advocate General, *Federal Aid in Domestic Disturbances*, S. Doc. Vol. 19, 67th Cong., 2d Sess. 26-34 (1922) (hereinafter cited as *Federal Aid*).

[19] Act of Feb 28, 1795, 1 Stat. 424.

[20] Act of Mar 8, 1807, 2 Stat. 443.

tended the Act of March 8, 1807, by ordering "all officers having authority, civil or military, and all other persons, civil or militry, who shall be found in the vicinty" to aid and assist "by all means in their power" in putting down the insurrection.[21] Such all encompassing language implies that the Chief Executive could and was calling on the entire populace to serve as a *posse comitatus*. This line of reasoning was affirmed by President Fillmore in 1851,[22] Attorney General Cushing in 1854,[23] and President Pierce, when he permitted soldiers to aid the marshal during the Kansas disorders.[24]

During Andrew Jackson's term as President, in 1832, South Carolina threatened to secede. Realizing that the Governor would not request Federal aid in this instance, Jackson prepared to seek legislation that would permit him to use force against the insurgent state. Until such legislation was forthcoming, he began to act on the *posse comitatus* theory, alerting military forces and sending warships to Charleston. "Old Hickory's" prompt, strong action temporarily preserved the Union.[25]

Twenty-eight years later, when faced with a similar situation and armed with the same legislation [25a] plus Jackson's precedent, James Buchanan failed to exercise his powers. A weak President, attempting to play both sides against the middle in the impending rebellion, he took no effective step to nip it.[26]

Although he acknowledged that the law permitted him to utilize militia or the Army whenever the laws "shall be opposed, or the execution thereof obstructed," he noted that the Federal judge, the United States District Attorney and the United States marshal in South Carolina had resigned. He reasoned, therefore, that there had not in fact been any opposition to the laws nor any obstruction to the execution thereof because there was no one present to execute the laws and therefore there could be no opposition to them.[27]

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[21] *Federal Aid, supra*, note 18, at 41.

[22] Richardson, *Messages and Papers of the Presidents*, 104–5 (1896) (hereinafter cited as Richardson).

[23] 6 Op. Atty. Gen. 466 (1854).

[24] 5 Richardson, *supra*, note 22, at 358. One writer says it is erroneous to class soldiers with civilians as *posse* members because the soldier has value only when armed and under his superior's orders. Birkhimer, *Military Government and Martial Law* (3rd. Ed.) 412 (1914). Present Army Regulations do not permit relinquishment of control to civilians when the Army is required to intervene in domestic disturbances. Army Regulations 500–50, 22 Mar 1956.

[25] Milton, *supra*, note 16, at 90–94.

[25a] Act of Feb 28, 1795, 1 Stat. 424; Act of Mar 8, 1807, 2 Stat. 443.

[26] *Id.* at 102–106.

[27] Cong. Globe, 36th Cong., 2d Sess., app. 3 (1860).

Lincoln took office from Buchanan with no greater authority but, as Chief of State, he did not hesitate to embrace the Jacksonian concept of his independent power and duty, under his oath, directly to represent and protect the people, irrespective of States, Congress or Courts.[28] He appealed for 75,000 volunteers to help put down the Southern insurrection. Congress ratified this posse-calling concept with the Act of July 29, 1861.[29] The Buchanan interpretation was no longer possible, for without the necessity of proclamations, the President was empowered to employ national military forces whenever he determined that unlawful obstructions, combinations and so forth made it impracticable "to enforce, by the ordinary course of judicial proceedings, the laws of the United States." [30]

Although it had always been assumed that "United States" in the "guarantee clause" of the Constitution was referring to Congress,[31] President Hayes laid the cornerstone for the concept that the Chief Executive was included in the term by furnishing arms and transferring troops to danger areas without prior congressional approval.[32] Grover Cleveland, in 1894, overriding the objections of Governor Altgeld of Illinois, dispatched troops to Chicago to prevent rioting Pullman strikers from destroying Federal property and to "remove obstructions to the United States mails." [33] The Supreme Court approved of Cleveland's use of national troops without Congressional authority when they held in the *Debs* case:

> ". . . the entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care." [34]

Woodrow Wilson completely ignored the formalities required by Article IV, section 4 of the Constitution [35] by making troops

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[28] Milton, *supra*, note 16, at 107.

[29] 12 Stat. 282; since reenacted at 10 U.S.C. 332 (1952 Ed., Supp V).

[30] Attorney General Cushing had already effectively evaded the proclamation requirement by holding that United States marshals could include militiamen and regular soldiers in their *posses*. 6 Op. Atty. Gen. 466 (1854).

[31] A theory ratified by Chief Justice Taney in Luther v. Borden, 48 US (7 How.) 581 (1849).

[32] "The influence of their presence" contributed "to preserve the peace and restore order." *Federal Aid, supra* note 18, at 175. Corwin, *supra* note 1, at 134.

[33] *Federal Aid, supra* note 18, at 195–203; Wiener, *A Practical Manual of Martial Law* 54 (1940); McDowell, Military Aid to the Civil Power 193 (1925) (caveat: McDowell's book was rejected as a text for West Point because "some of its parts are unsound and misleading in important particulars." JAG 351.051, 15 Aug 1929).

[34] In re Debs, *supra* note 14.

[35] I.e., application of the Legislature, or of the Executive (when the Legislature cannot be convened).

available for settling domestic disturbances directly on the requests by state authorities to local commanders.[36]

The opening phrase of the Posse Comitatus Act permits an exception to its imposition "in cases and under circumstances *expressly* authorized by the Constitution or Act of Congress". (Emphasis supplied.) The events recited in the foregoing paragraphs establish that the President has, by implication, the power to guarantee every State protection from domestic violence. He has an implied duty to enforce not only those laws resulting from acts of Congress but those that are included in the so-called "law of the land." Treaties are in this category,[37] as are obligations inferred from the Constitution and those derived from the general code of duties of the President.[38] There are many other situations in which action is neither expressly authorized by the Constitution nor by any statute of Congress. It would be absurd to require express authority in case of sudden invasion, atomic attack, earthquake, fire, flood, or other public calamity before Federal forces could be employed.[39] It is clear that the word *expressly* cannot be construed as placing a restriction on the Constitutional power of the President, because even though not expressly named, such power cannot be taken away by legislation.[40] It is the author's opinion that the Posse Comitatus Act could not, and does not, limit the constitutional authority of the

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[36] Troops were furnished on more than 30 occasions, between 1917 and 1922, when several of the States were stripped of their National Guard units as a result of World War I. Corwin, *supra* note 1, at 135–6.

[37] U. S. Const. art. VI, sec. 1, cl. 2.

[38] In re Neagle, 135 U. S. 1 (1890); Logan v. United States, 144 U. S. 263 (1891).

[39] The Department of the Army recognizes the absurdity of a prohibition against use of troops to execute the laws in such an emergency situation. Army Regulations 500–50, *supra* note 24.

[40] An opinion shared by President Taft who said:

> "The President is made Commander-in-Chief of the Army and Navy by the Constitution evidently for the purpose of enabling him to defend the country against invasion, to suppress insurrection and to take care that the laws be faithfully executed. If Congress were to attempt to prevent his use of the Army for any of these purposes, the action would be void . . . he is to maintain peace of the United States. I think he would have this power under the Constitution even if Congress had not given him express authority to this end. . . ."

Taft, *Our Chief Magistrate and His Bowers* 128–9 (1916).

Chief Executive, whether that authority is expressed or is implied.[40a]

Because the Posse Comitatus Act would be unconstitutional if applied to the Commander in Chief, it does not follow that this would be so with his subordinates. There is little doubt that the statute restricts everyone else.[40b] It is important that the legal advisors to troop commanders be thoroughly familiar with the history, terms and interpretations accorded the Act by The Judge Advocate General of the Army, the Attorney General and the Federal Courts.

II. EVENTS LEADING TO ENACTMENT OF THE POSSE COMITATUS ACT

A. *Use of the Army, 1789-1879*

The United States Army was reluctantly sanctioned by a populace overly familiar with despotism and thoroughly afraid of "standing armies." [41] Congress preferred to rely on an undepend-

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[40a] In one recent study of Presidential powers the statute does not appear to be mentioned at all. See, Schaffter and Mathews, *The Powers of the President as Commander in Chief of the Army and Navy of the United States*, H. Doc. No. 448, 84th Cong., 2d Sess. (1956). Still more recently, it was (in the language of the Posse Comitatus Act itself) "under circumstances expressly authorized . . . Act of Congress" that Federal military forces were used to enforce a Federal court decree relating to desegregating public schools in Little Rock, Arkansas. 41 Op. Atty. Gen. No. 67 (7 Nov 1957), p. 20; Schweppe, *Enforcement of Federal Court Decrees; A "Recurrence to Fundamental Principles,"* 44 A.B.A.J. 113, 190–191 (1958). Schweppe is rebutted and the author's proposition supported by Prof. Daniel H. Pollitt of the University of North Carolina. See Pollitt, *A Dissenting View: The Executive Enforcement of Judicial Decrees*, 45 A.B.A.J. 600, 606 (1959).

[40b] Colonel William Winthrop succinctly set forth the restrictions:

> "Except as and when employed and ordered under the statutes and authority above specified, the U.S. military are not empowered to intervene or act *as such* on any occasion of violation of local law or civil disorder, or in the arrest of civil criminals. While officers or soldiers of the Army may individually, in their capacity of citizens, use force to prevent a breach of the peace or the commission of a crime in their presence, they cannot, (except as above), legally take part in their military capacity, in the administration of civil justice or law." Winthrop, Military Law and Precedents (2d Ed., 1920 Reprint), p. 877.

[41] The Declaration of Independence protested that the King had "kept among us in times of peace standing armies." Most of the Constitutions of the original colonies say that standing armies are dangerous and ought not be kept up and the question of a regular army was hotly debated at the Constitutional Convention. When the Posse Comitatus Act was being debated, Hon. William Kimmel (Maryland), a supporter of the Act, attacked the standing army and eloquently traced the familiar story of America's traditional opposition to such armies, for the record. 7 Cong. Rec. 3579 (1878).

able militia system,[42] not recognizing the Army until 1789, when they authorized it a force of 700 men and two companies of artillery. Indeed, until recent years, the Army remained small and weak.[43] Surprisingly, it was required to take part in some seventy wars and campaigns between 1775 and September 1878,[44] and it was involved in an additional seventy domestic disturbances,[45] including labor disputes, racial disorders, lynchings, natural disasters and reconstruction elections.[46]

B. *Incidents That Led to Proposal of the Act*

Probably no two incidents directly influenced the passage of the Posse Comitatus Act as much as did the "Kansas disorders" and the supervision of post civil war elections in the South. Kansas was split on the question of slavery and its first election as a new territory resulted in the seating of a pro-slavery legislature with an appointed anti-slavery governor. By August, 1855, the anti-slavers were demanding statehood and pro-slavers had taken up small arms and artillery. Federal troops were instrumental in restoring order, acting as a *posse comitatus* in aid of the civil authorities, until Kansas was admitted to the Union.[47]

When the War Between the States had been concluded and the southern states sought reentry into the Union, they were sub-

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[42] Riker, *Soldiers of the States*, 21 (1957); *Wiener, The Militia Clause of the Constitution*, 54 Harvard Law Review 181–220 (1940).

[43] Legislation authorized, but the Army did not have, 886 officers and men in 1789; 1,273 in 1790; 2,232 in 1791. By 1796 it was authorized and had 5,414 but was reduced to 3,359. Threats of war with France created a paper army of 52,000 but no one enlisted and it was reduced to 3,287 by 1802 but increased to 10,000 in 1808. *Federal Aid, supra* note 18, at 40.

[44] *The Army Almanac* 409–10 (1950). Tabulated are eighty-two campaigns, but twelve should be treated as domestic disturbances.

[45] See Appendix A for chronology of events. (This appendix was contained in the original thesis but has not been reproduced in this article.) A table of incidents by basic causes is set forth in Wagner, John H., Lt. Col. USA, *Martial Law—Its Use in Case of Atomic Attack*, a term paper presented to the Industrial College of the Armed Forces, 1956, citing Reichley, *Federal Military Intervention in Civil Disturbances* 196 (1939). The Confederate States had a constitutional government in the South from 15 Apr 1861 until 26 May 1865. Because of the common origin, heritage and training of both sides engaged in the War Between the States, it is interesting to note that the Confederate marshal had the power to call the *posse comitatus*. Confederate soldiers were ordered by President Jefferson Davis to keep order in Norfolk, and Richmond, when Grant's forces were threatening those cities. Robinson, *Justice in Grey*, 65, 383–419 (1941).

[46] Congressman Knott, supporting the Posse Comitatus Act noted that it was "designed to put a stop to the practice, which has become fearfully common, of military officers of every grade answering the call of every marshal and deputy marshal to aid in the enforcement of the laws." 7 Cong. Rec. 3849 (1878).

[47] *Federal Aid, supra* note 18, at 66–71.

jected to an humiliating period of reconstruction. During this period they were divided into military districts under the command of general officers of the Army whose duties including registering the voters, supervising the election of delegates to constitutional conventions, supervising the conventions and supervising the ratification of the Fourteenth Amendment to the Constitution.[48]

After the ex-Confederate states had submitted to ratification of the Fourteenth as the price for readmission, Congress continued to interfere with their internal affairs. Into the race-conscious districts came "carpet-baggers" in the highest governmental positions and "scalawags" and negroes in the lower.[49] Not until the General Amnesty Act of 1872 were the ablest southern citizens permitted to take part in politics,[50] and, with no relief expected from Congress and the Supreme Court, the aristocracy was forced to form secret societies, and to terrorize and coerce their oppressors, to free themselves.[51] Drastic legislation, enforced with Army troops, repressed the whites and secured civil rights for the freedmen.[52] The passage of the General Amnesty Act permitted a Democratic recovery in the South. Republicans lost nationally despite reconstruction laws, amendments to the Constitution, federal election laws and party patronage. By 1874 Democrats had control of the House.[53]

Despite a "deal" made between the managers of Republican Presidential candidate Hayes and southern Democrats,[54] the election of 1876 was an exciting race with Hayes' victory depending, finally, on the single vote of a pro-Republican Justice of the Supreme Court.[55] The outcome was so unsure that 4,863 supervisors and 11,610 deputy-marshals were appointed to oversee the race [56] and troops were ordered into Florida, South Carolina and Louisiana, to guard the canvassers and prevent fraud.[57] This

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[48] *Federal Aid*, *supra* note 18, at 90.

[49] Schlesinger, *Political and Social History of the United States* 244, 248 (1925).

[50] *Id.* at 252; General Amnesty Act of 1872, Act of May 22, 1872, c. 193, 17 Stat. 142.

[51] *Id.* at 248.

[52] Sparks, *National Development, 1877–1885*, 23 The American Nation 120 (1907).

[53] *Id.* at 119.

[54] Milton, *supra* note 16, at 151.

[55] For a detailed account of the electoral vote dispute settlement, see Schlesinger, *supra* note 49, at 301.

[56] 7,000 of the deputies were stationed at polls in the South. Sparks, *supra* note 52, at 124.

[57] President Grant ordered the soldiers to the polls. 7 Richardson, *supra* note 22, at 422–24.

outrageous meddling in elections was the moving cause of the Posse Comitatus Act's proposal and passage.

C. *Legislative History of the Act*

Democrats were so exasperated with the machinations of the Republicans and with Grant's use of troops in the Hayes election that the House of Representatives sought a detailed report from the President of Army activities in the three southern states where the "crime of 76" took place. Grant denied that soldiers were made available as a *posse* except where it was necessary to preserve peace and prevent intimidation of voters.[58]

The President contended that soldiers were utilized only sparingly, but the Democrats ignored him and debated ways and means of preventing further abuses.[59] Their attempts to reduce the strength of the standing army by adding restrictive "riders" to the annual appropriation bill were not acceptable to the Republican Senate.[60] The resulting stalemate left the Army temporarily without any appropriation.[61]

When the annual "Army Bill" [62] came up for consideration by the 45th Congress, Honorable William Kimmel (Maryland) sought to amend it, providing:

> "That from and after the passage of this act it shall not be lawful to use any part of the land or naval forces of the United States to execute the laws either as a *posse comitatus* or otherwise, except in such case as may be expressly authorized by act of Congress." [63]

An amendment offered by Honorable J. Proctor Knott (Kentucky) was the first to have a punitive clause and it referred to

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[58] Grant, *Use of the Army in Certain of the Southern States*, H.R. Exec. Doc. No. 30, 44th Cong., 1st Sess. (1877).

[59] 5 Cong. Rec. 2111–20, 2151–2. (1877).

[60] *Id.* at 2151–2, 2156–62, 2171, 2213, 2215, 2217, 2241, 2247–50. Justice David Dudley Field, in letters to the Editor, was critical of the 44th Cong. for its handling of the "Army Bill." It is of interest to note that he declared the President to be only an executing arm of Congress. 16 Albany Law Journal 181 (1877). *Ibid*, 198.

[61] 5 Cong. Rec. 2251–53 (1877). Hayes had to call a special Congressional session to get salaries for soldiers who had gone unpaid since the previous June. On Nov 21, the Democrats, having flexed their muscles, bowed to necessity and passed an appropriation bill with no reduction in force or *posse comitatus* rider. Sparks, *supra* note 51, at 125–6.

[62] H.R. 4867, 45th Cong. (1878).

[63] Note the reference to "naval" forces, even though the proposed amendment was to an army appropriation. 7 Cong. Rec. 3586 (1878). During the Kansas disorders, Republicans attempted to amend the Army Appropriation Act to prevent the use of any "part of the military force of the United States" as a *posse comitatus*. Cong. Globe, 34th Cong., 2d Sess. 59 (1856).

the "Army of the United States" instead of "land or naval forces": [64]

> "From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States as a *posse comitatus* or otherwise under the pretext or for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by act of Congress; and no money appropriated by this shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section; and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $10,000. or imprisonment not exceeding two years, or by both such fine and imprisonment."

Changes were made by the Senate but, after a joint committee conference, a version suitable to both parties was evolved [65] and passed. The Posse Comitatus Act was approved by the President on 18 June 1878.[66]

The Posse Comitatus Act has been amended twice. The first expressly provided that the act shall not be construed to apply to Alaska.[67] The second occurred when the Army Air Corps was granted autonomy and became the United States Air Force.[68] The laws pertaining to the Army and suitable to the new service were made applicable to the Air Force *en masse* at the time of the transfer of appropriate functions, powers, duties, personnel, property and records.[69] The Air Force was included within the prohibitions of the Posse Comitatus Act when the statute was reenacted in 1956.[70]

D. *Using the Army in Law Enforcement Since 1878*

Before the Posse Comitatus Act was finally passed, the Senate inserted the "exception" phrase, thus opening a way to keep the

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[64] 7 Cong. Rec. 3845 (1878). There is no clue in the record as to why there was a provision for such an enormous fine. (The Vice-President's salary that year was only $8,000.).

[65] *Id.* at 4239, 4248, 4295–4307, 4358, 4647–48, 4685–86, 4719.

[66] *Id.* at 4876.

[67] Act of Jun 6, 1900, c. 786, sec. 29, 31 Stat. 330. An attempt was made, prior to its original passage, to except the application of the act "on the Mexican border or in the execution of the neutrality laws elsewhere on the national boundary line." Hon. Gustave Schleicher (Tex) had rustler trouble in his district and he also worried over the ability to maintain neutrality laws on the Canadian border (England and Russia were at war with each other). 7 Cong. Rec. 3848 (1878). The Alaskan exception is included in the Code of Criminal Procedure for Alaska, sec. 66–22–46 Alaska Compiled Laws Annotated 1949 (formerly Charlton Code 363 or Carter Code, sec. 363).

[68] The National Security Act of 1947, sec. 207-208, 61 Stat. 502.

[69] S. Rep. No. 2484, 84th Cong. 2d Sess. 1151-1156, FN 5 (1956); *Id* sec. 305(a).

[70] Act. of Aug 10, 1956, sec. 18, 70A Stat. 626, 18 U.S.C. 1385 (1952 ed., Supp. V).

Chief Executive from becoming embarrassed by the Act's prohibitions.[71] This phrase has never been needed by a strong Executive, in the opinion of the author, an opinion evidently concurred in by one of the Senators, who said that the bill "contains nothing but truisms." [72] Certainly, vigorous Presidents and others (presumably acting under the "exception" phrase also) have employed the Army on numerous occasions to execute the laws.[73] President Hayes considered the Posse Comitatus Act to be little more than a restraint on the power of the United States marshals and not applicable to the Chief Executive, because less than four months after he had signed the bill he sent the Army to enforce judicial process in New Mexico.[74] Subsequently, troops have been used in dozens of labor disorders; to keep order after the San Francisco earthquake; to guard Federal property, and to protect dignitaries. Because the passage of the Posse Comitatus Act did not halt all operations of the Army in law enforcement, but merely erected a maze to be threaded by each Commander at each request for troops, it behooves his legal counsel to become familiar with its ins and outs.

III. INTERPRETATION OF THE POSSE COMITATUS ACT

A. *General*

Analysis of the Posse Comitatus Act involves the same five elements employed by newspapermen and military message writers. *Who* is precluded from using the Army (or Air Force) to execute the laws? *What* part of the Army (or Air Force) may not be so used? *When* does the Act apply—in all cases, or are there emergency exceptions? *Where* does the Act apply (i.e., is it extraterritorial)? Do the reasons *why* such restrictions were imposed indicate how the Act should be construed?

B. *To Whom Does The Act Apply?*

When Congressman Knott argued in support of the Posse Comitatus Act, he made it clear that he intended that the word "whoever" include everyone who successfully ordered the Army to execute the laws. He said that the Act's restrictions reach

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[71] 7 Cong. Rec. 4648 (1878).

[72] *Id.* at 4296.

[73] See Appendix B. (This appendix was contained in the original thesis but has not been reproduced in this article.) Corwin suggests that the existence of prohibitions such as those contained in the Posse Comitatus Act simply tends to encourage resort to martial law when employment of military force to aid civilian authorities is desired. Corwin, *supra* note 1, at 169. As evidenced by the incidents herein listed, this proposition has not yet proved correct.

[74] 7 Richardson, *supra* note 22 at 489.

"from the Commander-in-Chief down to the lowest officer in the Army who may presume to take upon himself to decide when he shall use the military force in violation of the law of the land." [75] In the author's opinion, this is not accurate, for the Act cannot restrict the President's Constitutional powers and, as to others, it need not be confined to members of the military. Certainly, if a marshal or other civilian willfully took command of troops in the execution of the laws, he could be punished. A very real problem occurs when an apparently responsible civilian requests military aid and the senior military commander orders the troops to execute laws. Who has "used" the military force? Probably both parties. The civilian has initiated the action and the soldier has carried it out. While the defense of "superior orders" [76] would prevent prosecutions of all the subordinate commanders, the senior officer would have to rely on "military necessity" [77] as a defense.

C. *What Do "Army" And "Air Force" Mean?*

The Posse Comitatus Act imposes no restrictions on the Navy, the Marine Corps or the Coast Guard.[78] Basically, this is because the Act was proposed as a result of misuse of the Army and as an amendment to an Army Appropriation Act.[79] The Air Force has subsequently been included.[80]

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[75] 7 Cong. Rec. 3847 (1878).

[76] "The defense of 'superior orders' is ordinarily available to all military personnel who act under the order of a military superior. Under emergent circumstances, the military commander cooperates with the civil authorities, but is subject to no authority but that of his military superiors. The defense of superior orders is absolute, unless an order is so obviously illegal that any person of ordinary understanding would instantly perceive it to be so. If the commands are illegal, but not obviously so to the ordinary understanding, the inferior will not be held liable if he obeys." Par. 506.14 b, Air Force Manual 110–3, 1 Jul 1955. Also see ch. 3, par. 24, FM 19–15, Civil Disturbances and Disasters, 8 Sep 1958.

[77] "The emergency gives the right, and if hindsight rather than foresight shows that better methods available to the officer would have sufficed, nonetheless the officer will still be held innocent of legal responsibility." *Id.* at par. 506.14a.

[78] The Judge Advocate General of the Navy has expressed the opinion that the Posse Comitatus Act does not restrict Marines from associating themselves with civilian police reserves, "as the act is relative to the Army" and "does not apply to Naval personnel." JAGN 1954/213, 6 Apr 1954, 4 Dig. Ops., LOD, sec. 15.1. The same result might have been reached (and to soldiers or airmen, too) on the ground that the Act doesn't apply to off-duty employment. See FN 248, *infra*.

[79] Note 63, *supra*. A unique theory has been advanced that "actually the force and effect of the act ceased with the exhaustion of the supplies that it appropriated." If this theory ever had any validity, it has lost it now that the reenactment of the Posse Comitatus Act reaffirms the Congressional intention that it is still effective. See Corwin, *supra* note 1, at 138.

[80] Note 70, *supra*.

The following table sets forth the components [81] of the affected services and notes whether the Act is applicable:

Army	Air Force	Applies †
1. Regular Army *	Regular Air Force	
Active	Active	Yes
Retired	Retired	No**
2. Army Reserve	Air Force Reserve	
Active Duty	Active Duty	Yes
Not on Active Duty	Not on Active Duty	No
3. Militia ***	Militia	
National Guard	Air National Guard	No
Unorganized Militia		No
State Guards		No
4. Army National Guard	Air National Guard	
In Federal Service	In Federal Service	Yes
In State Service	In State Service	No
5. Army National Guard of U. S.	Air National Guard of U. S.	
Active Duty	Active Duty	Yes
Not on Active Duty	Not on Active Duty	No
6. Army of U.S. without Component	Air Force of U.S. without Component	
Active Duty	Active Duty	Yes
Not on Active Duty	Not on Active Duty	No
7. Others ****	Others	
Cadets, U.S.M.A.	Cadets, U.S.A.F.	Yes
Cadets, R.O.T.C.	Cadets, Air R.O.T.C.	No
Auxiliary Military Police		No
8. Civilian Employees	Civilian Employees	No

* Includes Philippine Scouts.
** Except retired officers called to active duty.
*** Not applicable to Naval Militia.
**** No attempt is made to determine applicability to such outdated military or quasi-military organizations as WAAC, CMTC, CCC, or ASTP.

The Army consists of the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserve; and all persons appointed or enlisted in, or conscripted into, the Army without component.[82]

The Regular Army consists of persons whose continuous service on active duty in both peace and war is contemplated by

[81] For a chart depicting the composition of the Army, see Appendix C. (This appendix was contained in the original thesis but has not been reproduced in this article.)

[82] 10 U.S.C. 3062 (1952 Ed., Supp. V). An almost identically worded section substitutes "Air Force" for "Army" in 10 U.S.C. 8062 (1952 Ed., Supp. V).

law, and of retired members of the Regular Army. It includes the professors and cadets of the United States Military Academy,[83] the Women's Army Corps of the Regular Army,[84] and those Phillipine Scouts still remaining in service.[85] In the original words of the Posse Comitatus Act it was not lawful to "employ any part of the Army of the United States, as a *posse*," [86] a phrase that would appear to refer to all members of the Regular Army, active or retired. Considering the statute as a whole, it is seen that the appropriation forfeiture clause referred to the "employment of any troops" in violation of the Act.[87] Strictly construing this criminal statute, it is clear that the prohibitions were meant to apply only to those individuals who use troops on active duty for the purpose of executing the laws.[88] Buttressing this interpretation are the debates of the House of Representatives at the time the bill was presented.[89] Retired Regular Army personnel not on active duty appear to be exempt.

Regular Army officers may be detailed as Chiefs of Staff of National Guard Divisions [90] and are authorized to accept commissions in the Guard without prejudicing their commissions as Regulars.[91] If the National Guard unit is ordered out on strike duty, for instance, it may not be accompanied by the Regular Army instructors assigned to it,[92] but a Regular, commissioned in the Guard,[93] is considered to be a Guardsman, his Regular status being held in abeyance for the time being, so that he is not within the statutory restriction.[94]

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[83] *Ibid.*

[84] 10 U.S.C. 3071 (1952 Ed., Supp. V). As to Air Force see 10 U.S.C. 8071 (1952 Ed., Supp. V).

[85] JAGA 1955/4781, 31 May 1955.

[86] Note 63, *supra.*

[87] *Ibid.*

[88] Such a conclusion was reached by the Judge Advocate General of the Army in opinions to the effect that there is no objection to retired Regular Army enlisted men taking municipal law enforcement jobs. JAGA 1947/7744, 6 Oct 1947; *id.* 1947/8393, 21 Nov 1947. This was a reversal of an earlier opinion which had advised a retired Regular Army major that he should invite the attention of a sheriff to the Posse Comitatus Act in order to avoid being deputized to climb mountains as a member of a *posse* aiding in the location of illicit whiskey stills. JAG 210.851, 11 Oct 1926, Dig. Op. JAG 1912–40, sec. 480. (The major had been retired for a heart ailment.)

[89] See Appendix D.

[90] 32 U.S.C. 104 (1952 Ed., Supp V).

[91] 32 U.S.C. 315 (1952 Ed., Supp V).

[92] Dig. Op. JAG 1912–30, sec. 21.

[93] 32 U.S.C. 315 (1952 Ed., Supp V).

[94] Dig. Op. JAG 1912–30, sec. 21.

Members of the Army Reserve;[95] those persons in the Army of the United States without component;[96] the Army National Guard of the United States;[97] and the Army National Guard[98] are all subject to the same tests applied to retired Regular Army personnel. In other words, they are not to be considered as "troops" unless they are on active duty in the service of the United States. Consequently, they are not a part of the Army for purposes of the Posse Comitatus Act.[99]

When the Army National Guard is in the service of the United States it is a component of the Army.[100] At other times, it is a part of the militia,[101] subject to the commands of the Governor and the normal law enforcement agency for quelling domestic disturbances. When serving as a state force, it is not a part of the Army and is not within the purview of the Posse Comitatus Act.[102]

From time to time, States have been permitted to keep troops, for internal security, when their National Guards were in active

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[95] The Army Reserve includes all Reserves of the Army who are not members of the Army National Guard of the United States. 10 U.S.C. 3076 (1952 Ed., Supp. V). As to Air Force, see 10 U.S.C. 8076 (1952 Ed., Supp. V).

[96] War time enlistees and draftees are in this category. 10 U.S.C. 3062 (1952 Ed., Supp. V). As to Air Force, see 10 U.S.C. 8076 (1952 Ed., Supp. V).

[97] The reserve component of the Army consisting of Federally recognized units and organizations of the Army National Guard and members of the Army National Guard who are also Reserves of the Army. 10 U.S.C. 3077 (1952 Ed., Supp. V). As to Air Force, see 10 U.S.C. 8077 (1952 Ed., Supp. V).

[98] The Army National Guard is a component of the Army while in the service of the United States. 10 U.S.C. 3078 (1952 Ed., Supp. V). As to Air Force, see 10 U.S.C. 8078 (1952 Ed., Supp. V).

[99] The same conclusion applies to the Air Force components. Caveat: "Active duty" includes "active duty for training." 10 U.S.C. 101 (22); S. Rept. 2484, *supra* note 69 at 34; *cf.* 37 Comp. Gen. 264 (1957); as amplified by 38 Comp. Gen. 251 (1958). Accordingly, the Posse Comitatus Act would apply to units and individuals of the USAR during such periods as the two-week annual ACDUTRA in which they customarily engage. On the other hand, units of the National Guard usually train in their status as State forces (rather than as NGUS or Federalized NG). See ch. 5, Title 32, U.S.C. At such times, they are considered to be performing service in a Federal status only for the purpose of certain laws providing benefits for members, and their dependents and beneficiaries. 10 U.S.C. 3686.

[100] Note 98, *supra*.

[101] 10 U.S.C. 311 (1952 Ed., Supp. V). The militia consists of the National Guard, the Naval Militia and the unorganized militia, consisting of the members of the militia who are not in the National Guard or Naval Militia. (These are the able-bodied males of at least 17 years of age, under 45 years of age and who are, or who have made a declaration of intention to become, citizens of the United States.

[102] Exempt from militia duty are Members of the armed forces, except members who are not on active duty. 10 U.S.C. 312 (1952 Ed., Supp. V).

Federal service. These State forces cannot as such be called into Federal service and are not a part of the Army.[103]

Cadets of the United States Military Academy or of the United States Air Force Academy are members of their respective Regular services and are affected by the Posse Comitatus Act.[104] Reserve Officers Training Corps cadets, on the other hand, are not yet a part of the Army or Air Force and the Act does not apply to them.[105]

During World War II, industrial plants were protected by privately employed Auxiliary Military Police. In many cases they were armed and uniformed with Army equipment. Early opinions regarded these men as persons serving with the Army in the field,[106] but the Attorney General has subsequently denied them this status.[107]

Until recently, it has not been clear as to whether the civilian employees of the Army are subject to the Posse Comitatus Act. In both war and peace, the Army has had "civilian guards," some of whom have been legally authorized to carry guns.[108] When the legality of having these guards direct traffic on an off-post public roadway arose, the question was apparently settled. The Judge Advocate General of the Army noted that the original version of the Act had referred to the "Army of the United States" and then turned to the Revised Statutes for the precise technical definition given that term. The definition referred only to various

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[103] A typical authority for a state guard was 32 U.S.C. 194 which authorized any State to maintain military forces other than units of the National Guard, until Sep 27, 1952, while that State's National Guard was in Federal service. It is now executed, of course.

[104] Note 83, *supra*.

[105] JAGA 1956/8555, 26 Nov 1956. Cadets from Culver Academy (it is immaterial whether they were in the R.O.T.C. or merely in a private military organization) were used as guards by the Governor of Indiana when Terre Haute and other cities were flooded. New York Times, Mar 25–6, 1913, p. 1. Nor are members of the Civil Air Patrol a part of the United States Air Force. A letter of instructions subject: "Civil Air Patrol Participation in Law Enforcement" dated 15 July 1954, citing CAP Reg. 900–3, and stating that formal participation in law enforcement by CAP or its members is a direct violation of the Posse Comitatus Act is erroneous. Op. JAGAF 102–40.1, 5 Aug 1954.

[106] SPJGA 1942/6113, 24 Dec 1942 citing Circular 52, Headquarters Services of Supply, 28 Aug 1942; SPJGA 1943/6489, 25 May 1943.

[107] Had these men been in the Army but accepting industry's pay, the receipt of the salary would have been illegal. See JAGA 1957/7037, 30 Aug 1957. A bill was introduced in the 76th Cong. to amend the Nat. Def. Act to provide for a National Industrial Defense Corps, a limited service component with the mission of guarding industrial plants. JAG 381, 20 Jun 1940.

[108] JAGA 1956/2356, 13 Mar 1956; CSJAGA 1950/1375, 7 Feb 1950. But their authority to arrest civilians who live on post is no greater than any other citizen's. JAGA 1952/8326, 3 Dec 1952. And they had less authority than military pickets. SPJGA 1945/7167, 25 Aug 1945.

classes of military personnel, leading to a conclusion that civilian employees are not a part of the Army.[109]

D. *When Does The Posse Comitatus Act Apply?*

The Posse Comitatus Act is applicable whenever anyone, unless he be within a Constitutional or statutory exception, uses "any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws." What is the meaning of "part"? What does "otherwise" connote? Of what does "execute the laws" consist? Are there never any times of emergency that permit exception to the Act?

There are a number of statutory exceptions to the Posse Comitatus Act, but the most important ones are designed to supplement the President's constitutional powers. He may use the armed forces to suppress insurrections when requested to do so by the legislature of a State (or the governor, if the legislature canot be convened).[110] He may suppress rebellions and enforce Federal laws when unlawful obstructions, combinations, or assemblages, or rebellion make it impractical to do so by ordinary course of judicial proceedings.[111] He can prevent civil rights from being denied the people by insurrection, domestic violence, unlawful combination, or conspiracy when the State is unable, fails or refuses to do so.[112]

Other statutory exceptions include such diverse objects as ousting unauthorized persons from Indian lands; preservation of natural curiosities in certain national parks; enforcement of customs and quarantine laws; and protecting the rights of discoverers of guano islands.[113]

Any "part" of the Army means not only that the entire Army or Air Force may not be used for the prohibited purpose but also

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[109] JAGA 1956/6462, 11 Sep 1956. The opinion notes, however, that the Army's civilian guards directing traffic outside the post would have no greater powers of arrest than an ordinary citizen. It appears that the guards could be deputized, however. See Op JAGAF 14–51.3. 29 Dec 1958 (AFAG Bul No. 209, 12 Jan 1959) citing a construction (by the Civil Service Commission) of sec. 5.103 (m), part 5, ch. ZI–236.01 Federal Personnel Manual, as authorizing Federal employees to accept appointments or commissions as deputy sheriffs if such service did not interfere with their Federal duties.

[110] 10 U.S.C. 331 (1952 Ed., Supp. V).

[111] 10 U.S.C. 332 (1952 Ed., Supp. V). This was the express authority used by President Eisenhower to remove the obstructions of justice in the State of Arkansas with respect to matters relating to enrollment and attendance at public schools in the Little Rock (Ark) School District. Ex. Ord. No. 10730, Sep 24, 1957, 22 F.R. 7628; 41 Op. Atty. Gen. No. 67, Nov 7, 1957, released Dec 29, 1958; 27 U.S.L. Week 1117 (1959).

[112] 10 U.S.C. 333 (1952 Ed., Supp. V).

[113] AR 500–50, 22 Mar 1956; Military Laws of the United States, sec. 480–505 (1949).

that specific organizations, such as regiments, battalions, companies and individual members, such as individual military policemen may not so used.[114] The Washington Herald Post of 7 May 1930 reported a probable violation in an account concerning 100 mounted troops and 2 officers from Fort Myer, Virginia, who aided civil authorities in a fruitless search for a murder suspect reported to be in the vicinity of Arlington and defying arrest.[115]

While the above mentioned incident would fall into the classical concept of the *posse*, and it is clear that the Army and its members may not be considered a part of the emergency power of the community in the ordinary signification of that phrase, the Act goes further. "Or otherwise" signifies that the Army and its members may not be considered a part of the ordinary law enforcement apparatus of the community either.[116] The prohibition extends to assisting the police in investigating a crime committed by a civilian, notwithstanding the fact that any resulting arrests would be made by civilian police accompanying the military.[117]

In practice, "to execute the laws" has been construed to mean the execution of the civil laws, that is, the laws enacted by the Federal, State, or local governments for the governments of the community as a whole, without regard to the military or civilian status of the individual members thereof. This principle has been sometimes stated in terms of enforcement of the laws against civilians. This is believed to be inaccurate, however; the Act makes no mention of the persons against whom the laws are executed but merely prohibits the employment of the Army to execute the laws. Thus it is the character of the laws executed and not the person against whom they are enforced which is important.[118] The Uniform Code of Military Justice[119] is a statutory exception to the Posse Comitatus Act, making possible the enforcement by military personnel of the laws required for discipline.

In the event of national calamity or extreme emergency—such as an A-bomb attack, invasion, insurrection, earthquake, a fire, or flood, the interruption of the U.S. mail, or any calamity disrupting the normal process of Government—which is so imminent as to render dangerous the awaiting of instructions

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[114] JAGA 1956/8555, 26 Nov 1956.

[115] TJAG declined to render an opinion as to the legality of such use on only the newspaper's statement of facts. JAG 370.6, 17 May 1930.

[116] JAGA 1956/8555, 26 Nov 1956.

[117] JAG 370.6, 8 May 1930, 2 Dig. Op. Army sec. 81.5; *id.* 370.6, 15 Jun 1926.

[118] JAGA 1956/8555, 26 Nov 1956. See Section IV and fn 230, *infra*.

[119] 10 U.S.C. 801–940 (1952 Ed., Supp. V).

from the proper military Department, an officer may take whatever action the circumstances reasonably justify.[120]

The best example of prompt action and good judgment is the universally commended activity of Federal troops in the San Francisco earthquake and fire in April, 1906.[121] Soldiers moved promptly and captured President McKinley's assassin in 1901,[122] and, in 1920, the commanding officer of Governor's Island rushed a battalion of infantry to the scene of the Wall Street bombing.[123] On Sunday, March 18, 1928, 150 Chinese, detained by immigration authorities on Angel Island in San Francisco Bay, assaulted a matron and started a mutiny. The commanding officer of nearby Fort McDowell properly sent troops and restored order.[124]

While the Angel Island incident may be justified on an emergency basis it could have been sustained as an action necessary to protect government property. The right of the United States to protect its property by intervention with Federal troops is an accepted principle of our Government. The exercise of this right is an executive function and extends to all Government property of whatever nature and wherever located, including premises possessed, though not necessarily owned, by the Federal Government. Intervention is warranted where the need for protection of Federal property exists and the local authorities cannot or will not give adequate protection.[125]

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[120] AR 500–50, 22 Mar 1956; 24 Op. Atty. Cen. 549 (1902); 33 Op. Atty. Gen. 562 (1923); par. 50609, AFM 110–3, 1 Jul 1955. The Air Force sponsored National Search and Rescue plan completed 129 rescue, relief and disaster missions between 1 Jun 1957 and 14 Aug 1957. New York Times, 15 Aug 1957, p. 21. For a partial list of Army aid in disasters see Appendix B. As a general rule, if a calamity is designated as a "national disaster" the Army will have tendered aid. Although AR 500–50 permits emergency use of troops when the "circumstances reasonably justify", a sounder test is that of "necessity." Currently the doctrine taught at the Judge Advocate General's School, U. S. Army, this concept is based on the forerunner of AR 500–50, General Order Number 26, Headquarters, Army, 1894, as cited in Winthrop, *Military Law and Precedents* 868 (2 Ed, 1920 Reprint). Certainly it would be much safer to use "necessity" as criteria because there is danger of having to justify past actions in order to avoid criminal or civil liability.

[121] "In a desperate situation Gen. Funston saw clearly the thing that was necessary to be done and did it." Rept. of Sec. War, 19 (1906), cited in *Federal Aid*, *supra* note 18 at 309–10. Wiener, *supra* note 33 at 52.

[122] New York Times, Sep. 7, 1901, p. 1.

[123] Dupuy, *Governor's Island, Its History and Development*, 1637–1937, 36 (1937), cited in Wiener, *supra* note 33, at 55–6. The troops were accompanied by the Staff Judge Advocate, Major Allen W. Gullian, who later became The Judge Advocate General of the Army.

[124] JAG 370.6, 13 Apr. 1928; Dig. Op. JAG 1912–30, par. 13; Wiener, *supra* note 33 at 56; par. 506.09, AFM 110–3, 1 Jul. 1955.

[125] AR 500–50, 22 Mar 1956.

Intervention must be restricted to temporary needs and should not be on a permanent basis. Thus, in 1933, there was no objection to furnishing troops to guard the United States mint as a matter of emergency but their permanent assignment for that purpose was deemed to be inadvisable and contrary to the established policy of the Government.[126] This rule has now been extended to prohibit detailing Army personnel to answer emergency calls to various Government buildings in the District of Columbia.[127] Because the need was temporary, soldiers have been properly furnished to guard the residence and office of the United States High Commissioner to the Philippine Islands;[128] to protect the last resting place of the late President Franklin D. Roosevelt;[129] to protect funds used to pay Chanute Field soldiers while such monies were in Post Office Department hands between the train and the bank;[130] and to guard gold in transit if on an emergency basis.[131]

By Executive Order 8972, 12 December 1941, the President directed the Secretary of War to maintain military guards and to take other appropriate measures to protect from injury national defense material, premises, and utilities. While this au-

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126 JAG 370.61, 27 Dec 1933.

127 JAGA 1955/5613, 15 Jun 1955.

128 The Commanding General of the Philippine Islands Department determined that the number of civilian guards was inadequate to protect public property due to unusual conditions and that the need was temporary. JAG 093.7, 21 May 1940. The provisions of the Posse Comitatus Act were applicable to the Philippine Islands at that time. JAG 370.6, 15 Jan 1924; *id.* 13 May 1931; *id.* 321.4, 11 Jun 1923.

129 The Hyde Park, N.Y., gravesite had been presented to the United States, and the Department of Interior had had no chance to arrange for permanent protection. SPJGA 1945/10728, 19 Oct 1945, citing opns. JAG 093.7, 21 May 1940; *id.* 370.61, 19 Jan 1934; *id.* 370.61, 27 Dec 1933; *id.* 370.6, 14 Sep 1925.

130 JAG 370.6, 28 Jun 1924.

131 JAG 370.61, 19 Jan 1924; but see JAG 370.6, 14 Sep 1925, where a permanent detail of three soldiers was requested to guard shipments of money, by registered mail, through uninhabited New Mexican country. There being no actual or threatened robbery, the request was denied. The Army's position was set out in 1926, in a letter to the Provost Marshal General:

> "The dictum of Justice Miller in the case of *In re Neagle*, 135 U.S. 65, declaring the power of the President to provide a sufficient guard of soldiers to insure the protection of the mail, has not been overlooked . . . such authority . . . does not extend to the general policing of all mail trains by United States troops, but only to the protection of the mail following advice to the Federal authorities of a particular and imminent danger . . ."

thority is still cited in Army Regulations, it is doubtful if its validity can be extended into periods of peace.[132]

The Posse Comitatus Act, it may be concluded, is normally applicable to military organizations or individuals operating as a part of the emergency power of the community or of the ordinary law enforcement facilities executing any laws against anyone (unless excepted by statute or the Constitution). Nevertheless, emergency circumstances may justify the employment of troops even though not normally permitted.

E. *Act Limited To Certain Geographical Locations*

So far as territoriality is concerned, the Posse Comitatus Act applies in the continental United States, its territories and its possessions (subject to express exceptions discussed below). It does not apply in foreign countries, where military forces of the United States are frequently stationed.

Until a Federal court decided to the contrary in *Chandler* v. *United States*, [133] The Judge Advocate General of the Army was of the opinion that the Act did restrict Army activities in foreign countries.[134] Accordingly, he disapproved requests that the Army hold a civilian prisoner pending trial before the United States Court in China at Tientsin [135] and to transport to the United States, in Army vessels, those Americans whom the court convicted.[136] Troops were not permitted to execute the laws in the

JAG 370.6, 1B Oct 1926; 6 Comp Gen. 741 (1927).

[132] AR 500–50, 22 Mar 1956. President Roosevelt promulgated his Executive Order 5 days after the bombing of Pearl Harbor and under the authority of the Act of 20 Apr 1918, 40 Stat. 533, (now 18 U.S.C. 2155), the World War I anti-sabotage act. The President relied on this Act to permit him to post guards on private property, during war time, when civilians were unable to guard the property themselves. In the author's opinion, the normal peacetime situation would not justify such intervention, but the authority is tacitly still there. A more thorough discussion of this point is beyond the scope of this thesis.

[133] 171 F. 2d 921 (1948), cert. denied 336 U. S. 918 (1949), reh. denied 336 U.S. 947 (1949).

[134] Some of these earlier opinions were cited to sustain an opinion that the Posse Comitatus Act forbade use of military police in regulating traffic in the *Territory* of Hawaii. JAGA 1956/1192, 16 Jan 1956. The same conclusion might well have been reached without resorting to authorities which have been so definitely weakened. See fn 139, *infra*.

[135] In two cases the Consul General asked and was refused anything more than a cell in the guardhouse or some other secure room for the prisoner. He was told that he would have to have the marshal or such other civilian guard as the Court might designate retain custody of the prisoners. JAG 014.5, 27 Oct 1923; *id.* 014.5, 20 Dec 1923.

[136] JAG 541.1, 5 Mar 1924.

Philippine Islands [137] and they were restricted in the field of law enforcement in Puerto Rico.[138]

The *Chandler* case arose shortly after World War II had ended when Chandler, an American citizen, was charged with treason and arrested in Germany by Army authorities acting for the Department of Justice. Presented with the issue of applicability of the Posse Comitatus Act, the court said:

> ". . . this is the type of criminal statute which is properly presumed to have no extra-territorial application in the absence of statutory language indicating a contrary intent. * * * Particularly, it would be unwarranted to assume such a statute was intended to be applicable to occupied enemy territory, where the military power is in control and Congress has not set up a civil regime." [139]

Accordingly, it seems reasonably well-established that the Posse Comitatus Act imposes no restriction on employing the military services to enforce the law in foreign nations. In recent years the Army has been requested to (and The Judge Advocate General of the Army has approved) take such actions in overseas areas as making identification of persons suspected of committing, in the United States, certain civil offenses, giving lie detector examinations and interviewing suspects.[140]

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[137] Despite the provisions of Sec. 5 of the Act of Aug 29, 1916, Philippine Organic Act, (39 Stat. 545) that the statutory laws of the United States should not apply to the Philippine Islands except when they specifically so provide. The Governor General was denied 500 Philippine Scouts (a part of the United States Army) needed to enforce quarantine regulations. The opinion differentiated between land and ship quarantine (the latter is expressly provided for by Congress). JAG 370.6, 16 Jan 1924.

[138] The Army considered borrowing convict labor, to be guarded by soldiers, in Puerto Rico to fill holes on the rifle range. The Posse Comitatus Act problem was never fully resolved (although it was recognized), because the land was to be soon transferred and the opinion suggested waiting on the transfer. JAG 684, 1 Apr 1925.

[139] Chandler v. United States, *supra* note 133 at 936. In similar cases, convictions of "Axis Sally" and "Tokyo Rose" were sustained. See Gillars v. United States, 182 F. 2d 962 at 972, 973 (D.C. Cir., 1950), and Iva Ikuko Toguri D'Aquino v. United States, 192 F. 2d 338 at 350 (9th Cir., 1951), cert. denied 343 U.S. 935 (1952), reh. denied 343 U.S. 958 (1952). Using the Chandler case as authority, Army guards and military transportation were approved for deporting an undesirable alien, provided that agents of the Naturalization and Immigration Service retained custody until the ship left the territorial limits of the United States. JAGA 1952/9649, 5 Feb 1953. Land or naval forces may be employed for the safekeeping and protection of an accused extradicted from a foreign country to the United States. 18 U.S.C. 3192.

[140] JAG 014.13, 1 Apr 1919 (comparison of photo of forgery suspect with a soldier in France); JAGA 1954/5140, 10 Jun 1954 (identification of soldier stationed in Korea); *id.* 1954/6516, 29 Jul 1954 (performing lie detector test on soldier stationed in Europe and accused of violation of a State law); *id.* 1957/2176, 6 Mar 1957 (taking statement of soldier stationed in Germany for State police).

The applicability of the Posse Comitatus Act in Territories must be differentiated from that in foreign areas. A number of earlier opinions of The Judge Advocate General of the Army to the effect that the Posse Comitatus Act applies in United States Territories and Possessions are based on the overruled concept that the Act was applicable worldwide.[141] There is abundant authority for the proposition, though it would be difficult to attempt to generalize as to all of the areas concerned. With the exception of the Alaskan exclusion, the Posse Comitatus Act is not restrictive within its own terms. In the *Chandler* case there is dicta that the Act should apply in those areas where the military power is not in control or where Congress has set up a civil regime,[142] and there is an implication of applicability in certain Federal legislation.

Such legislation permits the Governors of Hawaii, the Virgin Islands and Guam to receive aid from the military or naval forces of the United States to prevent or suppress lawless violence, invasion, insurrection, or rebellion.[143] Formerly, the Governor of the Canal Zone was responsible for control there[144] and permitted to call on the military for aid similar to that accorded

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[141] JAGA 1956/1192, 16 Jan 1956; *id.* 1956/5291, 5 Jul 1956 (Army traffic patrols on off-post highways are forbidden); JAG 370.16, 24 Feb 1921 (an inference that it was unlawful for soldiers to have gone aboard a Russian ship (quarantined in Honolulu harbor) to quell a mutiny among Chinese passengers. No protest was made by Russia or China so the incident was considered closed without directly answering the question). One opinion expressed the view that Army personnel should be used to aid the Department of Justice in determining the whereabouts of a fugitive believed to be in Puerto Rico. The decision was based on comity rather than inapplicability of the Act. JAG 370.6, 15 Jun 1926. Subsequent opinions overrule, by implication, any conception that the Act is not applicable. JAG 370.6, 8 May 1930; JAGA 1952/4810, 26 May 1952; *id.* 1953/6465. 25 Aug 1953; *id.* 1956/6723, 27 Aug 1956. But as recently as 1956, The Judge Advocate General of the Air Force apparently overlooked the Chandler case and sustained the opinion of a subordinate SJA to the effect that it would be a violation of the Posse Comitatus Act to serve an out of state notice of citation in a divorce suit against an airman stationed in the Ryukyus Islands. Op. JAGAF 57–3.5, 27 Aug 1956.

[142] *Supra* note 139.

[143] Act of Apr 30, 1900, sec. 67, 31 Stat. 153, 48 U.S.C. 532 (Hawaii); Act of Jun 22, 1936, sec. 20, as amended, 49 Stat. 1812, 48 U.S.C. 1405s (Virgin Islands); Act of Aug 1, 1950, c. 512, sec. 6, 64 Stat. 386, 48 U.S.C. 1422 (b) (Guam). The Judge Advocate General of the Air Force is of the opinion that the Posse Comitatus Act was applicable to Guam, thus preventing the OSI from conducting an investigation (with a view toward civilian prosecution) into an allegation that two Guam policemen wrongfully assaulted an airman stationed there. The opinion notes that should a legitimate military purpose be served by the investigation there would be no objection even though civilian law enforcement agencies derived an incidental benefit. Op. JAGAF 6–81.1, 16 Dec 1955. This is also the Army view. See fn 164, *infra.*

[144] 2 Canal Zone Code, 5, 7, 8.

those governors mentioned above.[145] Now, because of a proclamation of national emergency,[146] the Commander-in-Chief, Caribbean is superior to the Governor and charged with protection of the canal and enforcement of the laws.[147] Statutes which specifically approved the use of military forces in aid to civil authorities in Puerto Rico were repealed as of the date the Constitution of the Commonwealth of Puerto Rico became effective. Puerto Rico comes within the purview of the Act and military commanders should be guided by the same policies governing intervention with Federal troops as are applicable within the States and Territories of the United States.[148] American Samoa was governed, under the President, by the Navy until 1951 [149] when the Chief Executive transferred this responsibility to the Department of the Interior.[150] Neither the Constitution nor the laws of the United States applied when the Naval "Commandant-Governor" was in power [151] and the Posse Comitatus Act was inapplicable. The transfer from one executive branch to another should cause no change. The Pacific Trust Territories are governed by the Navy and the Posse Comitatus Act is inapplicable.[152]

At the time of writing, legislation has been enacted to make States of two former territories. One, Hawaii, has already been mentioned as being one of those places where the governor, in some instances, could apply directly to the military commander for aid. Nevertheless, Hawaii is also a place where the Posse Comitatus Act was made expressly applicable by legislation.[153] Certainly the Act will continue to apply when Hawaii is a State.

The only state where the Posse Comitatus Act does not apply is Alaska. In the gold rush days of the then "District of Alaska" a statute was needed to strengthen the authority of the law enforcement officials and to protect them from mobs. Such authority was granted in a bill that exempted them from punishment if a rioter was killed and made all of the rioters equally guilty if one of them killed or wounded any magistrate, officer

145 E.O. 2382, May 17, 1916.

146 Proc. 2914, Dec 16, 1950, 64 Stat. A 454.

147 E.O. 10398, 17 Fed. Reg. 8647, Sep 30, 1952.

148 AR 500–50, 22 Mar 1956; JAG 684, 1 Apr 1925.

149 48 U.S.C. 1431a.

150 E.O. 10264, Jun 29, 1951, 16 Fed. Reg. 6419.

151 Reid, *Overseas America* 54 (1942); Emerson *et al., America's Pacific Dependencies* 95, 127 (1949).

152 Emerson *et al.*, note 151 *supra* at 109.

153 The Act was made applicable to Hawaii by subsection 5 (a), Act of Apr 30, 1900, Hawaiian Organic Act, 31 Stat. 141, 48 U.S.C. 495 which provided that the Constitution and all laws of the United States not locally inapplicable shall have the same force and effect in the Territory as they have elsewhere in the United States.

or persons who were acting in their aid.[154] An act was passed in 1900 to permit easier enforcement of the anti-riot statute by making the Posse Comitatus Act inapplicable.[155] The admission of Alaska to the Union has not, in the author's opinion, changed the law.[156] The pertinent provisions of the Act permitting Alaska to become the forty-ninth state are as follows:

> ". . . All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. * * * and the term 'laws of the United States' includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not 'Territorial laws' as defined in this paargraph, and (3) are not in conflict with any other provisions of this Act." [157]

In drafting the Alaskan Statehood Act,[158] the framers realized that some provision would have to be made to preserve all laws in effect that were applicable to the territory of Alaska. The above-quoted provision was included to prevent legal chaos and was expressly included in the act in order that all laws applicable to Alaska would be continued in effect until such time as they should be changed by Congressional enactment. That this was the intent of Congress is apparent from the statement in the Committee report [159] that:

> "Subsection 8(d) is an amendment providing for the continuation of laws which are in effect at the date of admission."

The Departments of the Army, Justice, Interior and the Comptroller concur in the author's view that all laws (and regulations implementing these laws) that were applicable to Alaska at the time of the passage of the Alaskan Statehood Act, will continue to be applied in the same manner that they had been applied previously. This situation has to do, primarily, with those laws (and regulations) which are applied according to the definition of Alaska as being included in or excluded from the United States. Alaska should be considered to be within or without the United States depending on how it was considered in the application of

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[154] Act of Mar 3, 1899, c. 429, sec. 363, 30 Stat. 1325.

[155] Act of Jun 6, 1900, c. 786, sec. 29, 31 Stat. 330, The anti-riot act is to be found in Sec. 66–22–46, Alaska Compiled Laws Annotated 1949. Even though the Posse Comitatus Act was clearly made inapplicable to Alaska, an inquiry was made as to the propriety of using troops to protect the Alaskan Railway (then wholly owned by the United States) during strikes. The opinion approved the use of troops, not on a basis of suppressing a disorder but because they would be guarding Federal property, for which no further proclamation or special formality would be required. JAG 370.61, 5 Nov 1924.

[156] The reason "continental United States" was used in the opening sentence of this section.

[157] Alaskan Statehood Act, Act of Jul 7, 1958, sec. 8(d), 72 Stat. 339.

[158] *Ibid.*

[159] JAGA 1959/1338, 21 Jan 1959.

the statute in question before the passage of the Alaskan Statehood Act. Consequently, the Posse Comitatus Act continues to have no application in Alaska.[160]

IV. APPLICATION OF THE POSSE COMITATUS ACT

A. *General*

Some aspects of the application of the Posse Comitatus Act have already been discussed but the day to day problems can be more easily anticipated or solved by comparing cases, their functions, and the reasons why the restrictions were imposed. Most problems arise because of the "or otherwise execute the laws" clause and not the *"posse"* provision of the Act. Consequently, this chapter will be devoted to exploring such issues as Army criminal detection, guarding of criminals, service of process, and the private employment of soldiers in law enforcement positions.

B. *Criminal Investigations*

Congress has enacted a set of military disciplinary laws—obviously best administered by military personnel[161]—and it has expressly consented to enforcing civil law to the extent of assisting in the criminal investigation and apprehension of military personnel who are offenders.[162]

The modern military post is populated by both soldiers and civilians and entertains many civilian visitors, all of whom pose a potential regulatory problem to a commander charged with security, safety, public health and crime prevention or detection.[163] How far can he go in investigating crimes, without violating the Posse Comitatus Act, where civilians are involved?

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[160] *Ibid.* See also 38 Comp. Gen. 447 (1958); JAGA 1959/1200, 22 Jan 1959; 38 Comp. Gen. 458 (1958); contra, 38 Comp. Gen. 261 (1958).

[161] Uniform Code of Military Justice, 10 U.S.C. 801–940 (1952 Ed., Supp. V). Military criminal investigators may instigate valid searches by state or civilian officials of the off-base dwelling of a person subject to the Uniform Code of Military Justice. They may participate in the searches, when requested, and may request assistance from civilian law enforcement agencies in obtaining evidence or information from civilian sources. Op. JAGAF 1957/11, 7 Feb 1957.

[162] *Id.*, at sec. 814 (Art. 14, UCMJ). The Ar Force expressed a willingness to cooperate, where so requested, in matters relating to violations, by airmen, of state liquor laws, "subject to limitations of the Posse Comitatus Act." Op. JAGAF 57–81.4, 20 Apr 1954.

[163] For a full discussion of the subject see, Oliver, *The Administration of Military Installations: Some Aspects of the Commander's Regulatory Authority With Regard to the Conduct and Property of Civilians and Military Personnel* (unpublished thesis, TJAGSA, Charlottesville, Va., 1958).

The criteria is whether the circumstances surrounding the crime are such as to cause an investigation of the offense to be made by the military authorities for military purposes. For instance, if military personnel are under suspicion, the employment of a lie detector on military or civilian witnesses, for the purpose of determining the proper disposition as to the military personnel involved, would not constitute a violation of the Posse Comitatus Act.[164]

Military police may interrogate civilians, subject to their consent, when investigating unlawful acts committed by members of the Army,[165] and they may give oaths to the civilians in connection with the interrogation.[166] A military purpose is served in investigating selective service registrants [167] and Department of Defense employees who are not normally subject to military jurisdiction.[168] Soldiers were not permitted to assist the Department of Justice in investigating charges of bribery against exchange employees [169] but, if a more recent opinion [170] is correct, a military purpose should have been found to permit the assistance. The Judge Advocate General has expressed the view that it would be permissible to give a blood alcohol test to a consenting civilian suspected of intoxication arising on a military reservation even though the sole purpose was in connection with investigations prior to bringing charges in a civilian court. The rationale is that since any such intoxication is intimately connected with good order and discipline, the investigation is in fact in connection with a military purpose and not precluded by the Act.[171]

The Posse Comitatus Act prohibitions extend to assisting the civilian police in investigating a crime committed by a civilian, notwithstanding the fact that any resulting arrests would be made by civilian police accompanying the military.[172] Thus, there

[164] JAGA 1953/6465, 25 Aug 53. And "the Provost Marshal will inform the appropriate civilian police agency, if in the course of a criminal investigation it is determined that persons not subject to the Uniform Code of Military Justice are involved . . .," Par. 9, AR 195–10, 19 Nov 1957.

[165] JAGA 1955/7606, 20 Sep 1955; *id.* 1952/4810, 26 May 1952.

[166] JAGA 1953/8153, 28 Oct 1953. See also, UCMJ, Art. 136.

[167] JAGA 1956/1517, 28 Feb 1956.

[168] JAGA 1950/3770, 19 Jun 1950.

[169] JAGA 1956/6723, 27 Aug 1956.

[170] JAGA 1959/1745, 16 Feb 1959.

[171] *Ibid.* But the practice of military medical personnel drawing blood samples from members of the military establishment suspected of off-post drunk driving is condemned when the *sole* purpose of the extraction is to furnish blood for use in civil courts in prosecuting violations of state statutes. JAGA 1959/4534, 5 Jun 1959.

[172] JAG 370.6, 8 May 1930; *id.* 370.6, 15 Jun 1926.

would be no violation of the Act to lend an army mine detector to a civilian law enforcement agency to aid them in searching for a criminal's gun but not proper if the detector operator were also furnished.[173]

When imaginative prohibition agents sought the use of an Army observation plan and pilot to fly over Maryland woods, to make a trial survey as to the feasibility of detecting illicit whiskey stills from the air, the request was denied. The Air Corps (so named as a part of the Army at that time) was considered to be so efficient that stills would be found, the prohibition laws would be executed and there would be a violation of the Posse Comitatus Act.[174] In the narcotics field, the law is no less relaxed. Military police may interrogate, investigate and aid civilians only when investigating the suspected narcotics violations of military personnel.[175]

Congress has passed legislation intended to combat prostitution near military posts[176] but in doing so they made clear that the investigation and execution of the anti-vice laws were to be left to the civil authorities:

> "Nothing . . . shall be construed as conferring on the personnel of the War or Navy Departments . . . any authority to make criminal investiga-

[173] JAGA 1957/5586, 25 Jun 1957. But as to the legality of lending military property, see FN 238, *infra*.

[174] JAG 370.6, 8 May 1930; *id.* 370.6, 28 Apr 1930, noted that while it may be possible for Air Corps officers to gain information of assistance to the "border patrol" in the performance of their military duties, and it no doubt would be their duty to give information respecting the location of offenders to the law enforcement officers in situations where Air Corps officers observe palpable violations of the laws of the United States, existing law does not expressly authorize or permit the use of the Air Corps, or any other part of the Army in assisting the border patrol. A suggestion to use the Air Corps as the enforcement agency of a proposed "United States Aerial Police" was negated because of possible conflict with the Posse Comitatus Act. JAG 370.6, 26 Apr 1934.

[175] JAGA 1952/4810, 26 May 1952.

[176] The May Act of Jul 11, 1941, 18 U.S.C. 1384. One provost marshal failed to head May's intent that the Army not investigate vice, writing as follows:

> "Where local officials are unwilling to take the lead in eliminating vice conditions, the commanding officer, acting through his Provost Marshal and the Military Police, must take the initiative. . . . Military Police have no power of arrest. . . . However, they assist the Provost Marshal of the post and interested social groups in the procurement of evidence. The evidence is turned over to the local authorities, who are requested to take action."

Dillon, *Military Police Functions*, 33 J. Crim. L., C. and P. S. 372 (1943). It is the author's opinion that this procurement of evidence would violate both the May Act and the Posse Comitatus Act. In the same article, Colonel Dillon, described a May Act raid in the vicinity of Camp Forrest, Tennessee, where:

> "A squad of 158 F.B.I. agents went in to work with the local officials and the *Military Police* (emphasis supplied)."

The raid is mentioned in SPJGC 1942/1863, 7 May 1942.

tions, searches, seizures, or arrests of civilians charged with violation of the law."

There would be a military purpose in aiding in vice investigation but Congressman May pointed out that he did not intend for the Army to enforce the bill: [177]

"It is obviously contrary to our best traditions that military and naval personnel should be endowed with such authority." [178]

C. *Arrest and Apprehension*

An individual soldier or military policeman has no more power to arrest than a peace officer,[179] but persons belonging to the military service are not, by reason of their military character, relieved of their duties and liabilities or deprived of their rights as citizens.[180] Consequently, soldiers may make the so-called citizen's arrests.[181]

The normal operational agent in military law enforcement is the military policeman. In 1919, regulations of the Army provided:

"A military policeman, as such, has no authority to arrest a civilian outside the boundary of a place subject to military jurisdiction for the commission of a non-military offense, except when called upon to do so by officers or agents of the Department of Justice, in aid of the Federal civil power." [182]

This infers, improperly, that a military policeman has unlimited authority to arrest civilians for non-military offenses committed within the boundaries of a place subject to military jurisdiction.[183] Of course, they have the same rights and duties as any other soldier or civilian to assist in the maintenance of peace [184] and they may eject offenders from military reservations, reporting the incident to the local United States Attorney.[185] In those rare situations where apprehension and detention become necessary, the offender may be detained only long enough to effect

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[177] Discussed in JAGA 1942/1132, 27 Mar 1942. Also, see 87 Cong. Rec. 3207 (1941).

[178] H.R. 899, 77th Congress (1941).

[179] SPJGA 1945/7167, 25 Aug 1945, citing Hawley v. Butler, 54 Barb. (N.Y.) 490 (1868).

[180] JAGA 1953/8132, 20 Oct 1953, citing Allen v. Gardner, 182 N.C. 425, 109 S.E. 260 (1921); 6 C.J.S. 419; 36 Am. Jur. 265. See also JAG 004.6, 1 May 1941; JAGA 1950/6252, 31 Oct 1950; *id.* 1945/7167, 25 Aug 1945.

[181] Note 108, *supra.*

[182] Par. 485, Army Regulations as cited in JAG 370.093, 25 Mar 1919.

[183] JAG 014.13, 7 Apr 1919 announces the Army stand that military police, as such have no authority over civilians and that it is unlawful, with exceptions, to permit them to assist the civil authorites, Federal or State, in the execution of the laws.

[184] Par. 5*a*, AR 600–820, 17 May 1951; JAG 014.14, 8 Sep 1919.

[185] Par. 5*c*, AR 600–320, 17 May 1951.

his delivery to the appropriate civil authorities or to dispose of his case before the United States Commissioner as prescribed in applicable Federal statutes.[186] This must be done immediately.[187] Civilians may not be detained in the stockade or other detention facility, even if awaiting trial.[188]

National security is weakened by the Posse Comitatus Act for military guards are not justified in using force to prevent a civilian from photographing military equipment, either on or off a military reservation[189] though they would be permitted to arrest for the offense if it were forbidden by competent authority.[190] The restrictions impede the imposition of anti-sabotage laws,[191] as it would be improper for Army military police to form water patrols for the apprehension of persons not subject to military jurisdiction.[192]

It is illogical, perhaps, that one part of the federal authority should not be permitted to come to the aid of another, but almost from the passage of the Posse Comitatus Act this has been the interpretation. The Attorney General, in 1881, ruled that troops could not be sent to aid the United States marshal in arresting certain persons charged with robbing an officer of the Federal government, the clerk of the engineer officer superintending the government works on the Tennessee river.[193] Soldiers could not be used to apprehend the "Cow Boys", a group of Arizona badmen,[194] nor could they aid the Indian Territory marshals in arresting bandits whose depredations were so extensive as to cause

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[186] 18 U.S.C. 1, 3401, 3402.

[187] Par. 5*b*, AR 600–320, 17 May 1951.

[188] JAGA 1953/8634, 12 Nov 1953.

[189] JAGA 1954/3685, 26 Apr 1954; *id.* 1953/7830, 21 Oct 1953. But see Op. JAGAF 58–11.1, 7 Dec 1951, citing 18 U.S.C. 795 as giving the power of censorship to the commanding officer of military and Naval aircraft and citing 18 U.S.C. 793(e) as authorizing the confiscation of photo negatives by the officer in charge of the aircraft and making it a felony for a person to refuse to surrender them. As a citizen, the demanding officer could make an arrest for such refusal but he could not be ordered to make the arrest as his right of arrest is not connected with his military status.

[190] JAGA 1954/9901, 6 Jan 1955, confirming the right to make citizen's arrests. Post regulations are not competent authority but the various security and anti-sabotage statutes would be.

[191] Act of Sep 23, 1950, Internal Security Act of 1950, sec. 21, 64 Stat. 1005, 50 U.S. C. 797.

[192] JAGA 1954/6902, 20 Aug 1954.

[193] 17 Op. Atty. Gen. 71, (1881), citing 16 Op. Atty. Gen. 162, (1878) denying aid to a collector of Internal Revenue who was faced with armed resistance in Arkansas.

[194] 17 Op. Atty. Gen. 242, (1881).

express companies to cease shipping on the Missouri Pacific Rail Road.[195]

An Army or Air Force commander, responsible for the conduct, morals and morale of his soldiers, or airmen is limited by the Posse Comitatus Act, and is prevented from making prophylactic arrests or in assisting civil authorities in so doing, although there would be an indirect benefit to the military. During World War I, troops could not be utilized to suppress vice and bootlegging in the Federally established five mile prostitution and liquor control zone which surrounded training camps.[196] Naturally, they could not be employed in towns beyond the zone either independently or in aid of civil authorities, in apprehending prostitutes, whiskey sellers or proprietors of bawdy houses,[197] nor could military police search automobiles for liquor when the cars were outside the territory within their jurisdiction and control.[198]

The Army policeman cannot "get their man" until after his induction because military jurisdiction (exempt from the limitations of the Act) begins only then. As a consequence, soldiers were condemned by the Attorney General for their participation in "slacker raids" in New York City and elsewhere in 1918. Wholesale arrests of suspected draft dodgers were made by civil and military police without Presidential authority and were termed "unlawful" and "ill-judged." [199] Military police do not have extra-ordinary authority over selectees when they are en route from the draft board assembly point to the induction

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[195] 21 Op. Atty. Gen. 72, (1894); 19 Op. Atty. Gen. 293, (1889). Even prior to the passage of the Posse Comitatus Act, the Attorney General had decided that a military officer, unless he was an Indian agent, or had been called upon to act by such an agent, had no power to arrest a fugitive from justice who had escaped from a state into Indiana territory. (The Texas Attorney General had requested Gen. Sheridan's aid in capturing a fugitive who was hiding in the Indian territory near Fort Sill). 15 Op. Atty. Gen. 601, (1877). The President could call on troops to suppress unlawful organizations under Sec. 202, 204 of Title 50 (War), United States Code (now 10 U.S.C. 331, 333 (1952 Ed., Supp. V)) 16 Op. Atty. Gen. 162, (1878); 17 Op. Atty. Gen. 242, (1881); 17 Op. Atty. Gen. 333, (1882). He could send soldiers 50 U.S.C. 202 (now 10 U.S.C. 331 (1952 Ed. Supp. V)) to aid the marshals in Indian territory; but the marshals couldn't summon troops themselves. 19 Op. Atty. Gen. 293, (1889).

[196] Letter from TJAG to JA, 88th Div., Camp Dodge, Iowa, dated 21 Mar 1918, Dig. Op. JAG, 1912–30, par. 14. McKinley v. United States, 249 U.S. 397 (1919).

[197] JAG 370.093, 25 Mar 1918.

[198] JAG 250.1, 5 Jul 1918. When two soldiers, on M.P. duty, fired on and killed an occupant of an auto whom they believed was violating certain liquor laws, they could be tried for the killing. Dig. Op. JAG, 1919, p. 160; Castle v. Lewis, 254 Fed. 917 (1918).

[199] New Work Times, 6 and 12 Sep 1918.

center,[200] and they cannot detain civilians in uniform, even until they can be surrendered to civil authorities.[201]

More than once, Army aid in apprehending civilian law violators has been sought. Police in North Carolina wanted to empower the military police at a certain airfield to arrest civilians.[202] Because of the Posse Comitatus Act, they were turned down. A deputy marshal in Brooklyn asked the Army to arrest and confine several civilians indicted for receiving stolen government property. He, too, was necessarily disappointed.[203] Also more than once, seemingly, the Posse Comitatus Act has been violated. Now and then a service news journal points with apparent pride to occasions such as the chase of escaped civilian convicts by an Army officer dispatched in a helicopter,[204] or the use of a bomb disposal squad to help civilian police search for a hidden weapon.[205]

There is, of course, an understandable temptation to help the local authorities, born of morality and the desire for good public relations, but temptation may lead to subterfuge. Troops are, and ought to be, trained in small unit tactics—marching in a

[200] SPJGA 1942/5148, 4 Nov 1942. But they do have, the opinion says, when they are en route from the induction center to the reception center. Once inducted, the individual is more amenable to criminal action through the military service. Thus, the Army was sustained in transfering a soldier from Florida to New York so that he would be found by agents of the Department of Justice in the place where he was "first brought" from overseas into the United States. The soldier (already convicted and punished for stealing an airplane to go absent without leave) was wanted for having made treasonable radio broadcasts for Germany during World War II. The court refused to set aside the defendant's sentence, affirming that the move was for the inherent good of the service. United States v. Monti, 168 F. Supp. 671 (E.D.N.Y. 1958).

[201] SPJGA 1943/17080, 29 Nov 1943. (Even though it is unlawful for persons other than members of the Army to wear the Army uniform. For opinions dealing with the soldier, ex-soldier or civilian in uniform and participating in strikes, picketing, riots or other disorders see JAGA 1949/3576, 20 May 1949; *id.* 1948/4131, 20 May 1948; SPJGA 1945/7167, 25 Aug 1945; JAG 680.2, 5 Sep 1941. In the author's opinion, it is better policy to leave the arrest of these persons to civil authorities.

[202] JAG 680.2, 5 Sep 1941. A proposed Air Force Regulation permitting enforcement of state game laws by Air Police was deemed legally objectionable. Op. JAGAF 75-25.5, 8 Nov 1950.

[203] JAG 370.6, 30 Dec 1924.

[204] JAGA 1957/1209, 8 Jan 1957 quoting Army Times, 6 Jan 1957:

> "* * * The trooper flying with Adams spotted the automoble passing another at a high rate of speed along Lock C. Road toward Highway 79. Adams immediately buzzed the automobile repeatedly, flying to within five to 10 feet above it to force it to a halt, and rising again so that state troopers giving chase in automobiles could not the car's position. * * * Lautenschlager and Moore surrendered at the road block."

[205] Army Times, 7 Mar 1959. A photo and feature story depicted disposal experts from Fort Devens' 55th Ordnance Det. helping civilian police of Nashua, N. H. search for a weapon believed hidden under ice and snow.

skirmish line, etc. Accordingly, what does it matter that the site chosen for the exercise is a woods nearby the post, where a suspected criminal is believed to hide? Especially, if the civilian police have promised to be there to make the actual arrest if he is flushed? Such subterfuge must be condemned as violative of both the letter and the spirit of the law.[206]

D. *Service of Process and Commissioner's Proceedings*

Although United States Commissioners have jurisdiction to try civilians for certain offenses committed on military reservations and military police may issue traffic violation reports, they are not permitted to serve process for the Commissioners.[207] The service of "bench warrants" or process is not only not a function of the military authorities [208] but it would also be an execution of the laws, in violation of the Posse Comitatus Act.

Authority was granted in 1941 to permit Army officers to conduct proceedings (as prosecutors) before United States Commissioners for petty offenses committed on military reservations.[209] While never tested, such assistance appears to the author, to be as much in conflict with the Posse Comitatus Act as is the service of process.[210]

E. *Guarding Civilian Prisoners*

The prohibitions against using military personnel of the Army

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[206] Dig. Op. JAG 1912–30, sec. 14. In the author's opinion, there would be no legal objection to an Army commander who might have Navy or Marine forces assigned to his command using them as a posse. It would not be advisable, as a matter of policy, however. For instructions on joint operations in domestic emergencies see FM 110–5, c. 4, sec. 6, Joint Action Armed Forces, 1 May 1954.

[207] JAGA 1955/8172, 24 Oct 1955; *id.* 1955/5523, 30 Jun 1955 (which also said that a violation of a post traffic regulation by a civilian would not be in contravention of a Federal statute so as to make him triable by a Commissioner.)

[208] JAGA 1955/2305, 25 Feb 1955; Op. JAGAF 57–3.5, 1 May 1956.

[209] JAG 000.51, 8 Nov 1941. Currently authorized in AR 632–380, 15 Mar 1955.

[210] This suggestion has been made. See JAGA 1955/8172 (FN 207, *supra*), which was *contra* to JAGA 1955/5523 (FN 207, *supra*). The opinion sustained the restriction on process serving by contending that merely because the practice of conducting proceedings had never been condemned it didn't mean that the practice was legitimate. The author believes that there should be consistency on this point and that the better policy would be to cease both practices, particularly in view of a recent resolution of the Committee on Military Justice of the American Bar Assn. (44 ABA J. 1120–21 (1958)), that process issued in courts-martial cases to compel witnesses to appear and testify be served only by a United States marshal or deputy marshal (instead of by military personnel). Service of Courts-Martial process, presently, "will ordinarily be made by persons subject to military law" (par. 115*d*, MCM, 1951).

or Air Force in guarding civilians prior to trial and conviction have already been mentioned.[211] Would it be executing the law to permit soldiers or airmen to guard or supervise the labor of convicts? The cases conflict, but as a general matter, to do so would be in violation of the Posse Comitatus Act.

There would be an illegal transfer of the duty of one governmental branch to another to permit soldiers permanently to guard civil prisoners who are serving sentences to confinement under the supervision and in the custody of civil authorities.[212] To do so would be an unlawful supplementation of the appropriations of the civil authorities,[213] violate the Posse Comitatus Act,[214] and be against policy: [215]

> "To withdraw permanently Army personnel from strictly military duties and to impose upon them the work of a civilian watchman is contrary to the spirit and intent, if not the letter, of numerous statutes with reference to the Army."

Temporary guarding has been distinguished when on a basis of unforseeable or unusual necessity [216] and, in a doubtful decision,[217] tentative approval was given to the use of convict labor in Puerto Rico, where custody of the prisoners was to remain in the Insular authorities but soldiers were to do the guarding. Army authorities sought to borrow Federal prisoners from Leavenworth prison to build roads at Fort Leavenworth. It was thought that such use would be legal if the work was temporary and the military had exclusive control over them.[218] The request was debated over a five year period but never solved because of a reluctance of the Department of Justice to give up supervision and custody.[219]

The Department of Justice was refused the privilege of putting Federal prisoners in the Disciplinary Barracks at Fort Leavenworth.[220] In the opinion of the Judge Advocate General military guards could supervise only those prisoners serving sentences under military authority. Another reason for the disapproval was that the Disciplinary Barracks was a rehabilitation center rather than a penitentiary. The fact that some of the Federal

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[211] Note 139, *supra*, guarding deportee; note 135, *supra*, guarding prisoners in China; note 188, *supra*, guarding civilians held for Commissioner's court; note 201, *supra*, guarding persons caught wearing uniform.

[212] JAG 093.7, 21 May 1940.

[213] 33 Op. Atty. Gen. 562, (1923).

[214] JAG 014.5, 27 Oct 1923; *id.* 20 Dec 1923; *id.* 541.1, 5 Mar 1924.

[215] JAG 093.7, 21 May 1940.

[216] Angel Island uprising, note 124, *supra*.

[217] JAG 684, 1 Apr 1925.

[218] JAG 253.5, 14 Jun 1922.

[219] JAG 253.5, 4 Jun 1927.

[220] JAG 253, 15 Aug 1929.

penitentiary prisoners previously had been military persons was immaterial. In an opinion that is hard to justify, however, no objection was made to allowing the United States marshal to either deputize soldiers or designate them as "guards" in order to utilize Army personnel, who were moving Army prisoners from San Antonio to Leavenworth, in shipping civilian prisoners to the Federal penitentiary in the same location.[221]

The pendulum swung back in an opinion, based on the Posse Comitatus Act, advising against permitting soldiers to guard prisoners in the Illinois State penitentiary.[222] Statutes of the state of Illinois would have clothed the soldiers with civil authority and the prisoners were to be restricted to a group of volunteers who had agreed to participate in a research program sponsored by The Surgeon General of the Army.

It is apparent, to the author, that the vacillation in this area is a result of policy, rather than law.

F. *Traffic Law Enforcement, Parades, Control Of Crowds*

The operation of military vehicles on the public highways is regulated by military regulations as well as civil traffic laws. Military police may enforce military regulations governing their operation but may only enforce civil traffic laws when violations of such laws constitute a violation of military laws and regulations. Of course, the military police are authorized to apprehend, if necessary, any person subject to the Uniform Code of Military Justice [223] who has committeed any offense (including certain traffic violations) if the offense reflects discredit upon the service. The cases are so proportionately few in which violations of civil traffic laws actually constitute offenses under the Uniform Code of Military Justice, that such cases could not be relied upon as an authorization to establish military police traffic patrols in off-post civilian areas.[224]

Off-post traffic regulation became a problem as soon as the automobile became popular [225] and it is particularly vexing on such installations as White Sands Proving Grounds where a state highway bisects the reservation and where safety demands that

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221 JAG 253, 21 Jun 1923. The Posse Comitatus Act was not mentioned.

222 JAGA 1953/8755, 12 Nov 1953.

223 Uniform Code of Military Justice, Articles 7(1) & 134.

224 JAGA 1956/5291, 5 Jul 1956; *id.* 1956/8555, 28 Nov 1956. But the First Army Commander put 11 safety vehicles on the highways of his area to "cooperate on law enforcement and highway safety." New York Times, 20 Aug 1955, p. 18.

225 Soldiers were not permitted to patrol the roads near Arlington cemetery, on the outskirts of Washington, D.C., JAG 687.5, 7 Jun 1924.

traffic be halted when guided missiles are fired.[226] Rush hour driving makes life nightmarish at posts located near metropolitan areas,[227] but an enterprising commander in one congested zone has partially solved his dilemma by detailing Department of the Army civilians to aid the civilian police in giving traffic directions at the main gate of his installation.[228]

The problem is more acute when there is a civil defense emergency but, when civilian governmental authorities are able to maintain effective order, Army or Air Force personnel may not be used for general traffic control.[229] When there is no emergency it would even be objectionable to permit them to patrol jointly with civilian police for traffic control purposes [230] although a number of administrative procedures might be ordered to insure that only military offenders would be apprehended.[231]

The prohibitions of the Posse Comitatus Act have provided an escape from traffic and crowd control problems arising from fairs, carnivals, rodeos and other civic events, but they have prevented the Army and Air Force from enhancing their public relations when their missions would have otherwise permitted assistance. The direction of traffic, parking of cars, or control of spectators necessarily involves the enforcement of law, despite the fact that no arrests would be made.[232] Thus, troops could not be used at fairs and rodeos in several western communities,[233] nor could they be used to supplement city police in controlling

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[226] JAGA 1955/8171, 27 Oct 1955.

[227] Fort Meade, Md., JAGA 1955/5523, 30 Jun 1955, note 207, *supra*. Fort Monmouth, N.J. The SJA there particularly mentioned the regulation of traffic when he suggested this thesis topic, note 3, *supra*.

[228] Note a violation of the Posse Comitatus Act, JAGA 1956/6462, 11 Sep 1956, note 109, *supra*.

[229] JAGA 1955/9192, 1 Dec 1955.

[230] JAGA 1956/1192, 16 Jan 1956. The Posse Comitatus Act prohibits execution of laws, with certain exceptions. Thus, it is the character of the laws executed and not the type person (civilian or military) against whom they are enforced which is important. Thus, a joint traffic patrol to execute civilian traffic laws would violate the Act while a joint patrol, to enforce military discipline among military personnel would not. Air Force concurs. See Op. JAGAF 26–27.9, 24 Jan 1956.

[231] JAGA 1956/5291, 5 Jul 1956. Suggested was the affixing of a post decal on civilian vehicles. The decal cannot be presumed to reflect the status or identity of the operator and to halt it would involve the exercising of "police powers" which the military policeman would not have unless the operator was a member of the military service and committing an offense punishable under the UCMJ. From a claims and public relations standpoint the proposed plan was condemned.

[232] JAGA 1956/8555, 26 Nov 1956; AR 190–8, 12 Jun 1958.

[233] JAGA 1956/7271, 20 Sep 1956.

crowds at a convention parade of a prominent veterans' organization.[234]

Shortly after a comprehensive opinion on the subject of the Posse Comitatus Act was published,[235] a policy reversal was announced in carefully couched language which permits mature military policemen to accompany civilian police patrols for the sole purpose of enforcement of military discipline among military personnel.[236] While this represents a major change, the problem of off-post traffic is still primarily a civilian one.[237]

G. *The Use of Military Property and Facilities to Execute Laws*

A person may violate the Posse Comitatus Act only through the use of troops in executing the laws and not because he has made military property or facilities available to law enforcement agencies. This does not mean that he has *carte blanche* to lend government equipment for there are other restrictions normally prohibiting such gestures.[238] Nevertheless, requests have been

[234] JAGA 1954/6426, 16 Jul 1954. But the President can use soldiers to augment the Capitol Guard on ceremonial occasions such as when he or a similar dignitary appears before Congress. Soldiers were used on 8 such occasions between Jan 1951 and Jun 1952. JAG 1952/5400, 26 Jun 1952.

[235] JAGA 1956/8555, 26 Nov 1956, citing the draft of a letter from the Provost Marshal General acknowleging that military police have frequently been used in handling traffic on specific occasions and another letter from the Fourth Army Provost Marshal complaining of restrictions against aiding at air shows, parades, joint patrols and peak traffic regulation.

[236] JAGA 1956/8430, 3 Dec 1956. The draft of a proposed joint regulation implementing the new policy was in JAGA 1957/6568, 14 Aug 1957. Military Police receive special instructions on this ticklish topic. See Lesson Plan MP 3406, Posse Comitatus Act, Course MPA: NCOR, The Provost Marshal General's School (Military Police Dept, Patrol Section) Fort Gordon, Ga., Oct 1958.

[237] JAGA 1957/7227, 9 Sep 1957. Some states use National Guardsmen to supplement State Police on weekend highway patrols. Such use does not violate the Posse Comitatus Act. See note 99, *supra*. As to traffic direction within a Girl Scout Camp Area, see fn 238, *infra*.

[238] The use of government property is governed by a number of statutes and regulations. See 36 Comp. Gen. 561, 563–564 (1957); JAGT 1957/9185, 13 Jan 1958, 8 Dig. Op. (No. 1), Supplies, sec. 93.2; AR 360–55, 23 Jan 1957; JAGA 1954/8381, 20 Oct 1954; AR 500–60, 1 Oct 1952; AR 735–5, 20 Dec 1954. As to the propriety of lending uniforms see JAGA 1958/4361, 9 Jun 1958 which cites 10 U.S.C. 771 (1952 Ed., Supp. V) and 18 U.S.C. 702 (1952 Ed., Supp. V) as prohibiting unauthorized wearing of uniforms, even by civilian law enforcement agencies. Congress has recently authorized the lending of military equipment to the Girl Scouts of the United States of America for use at their 1959 Senior Roundup Encampment (PL 85–543, 72 Stat. 399) and The Judge Advocate General of the Army has given his opinion that there would be no legal objection to furnishing Military Police for safeguarding the property, directing traffic within the encampment and patrolling the camp perimeter, provided such duties will in no way involve civilian law enforcement duties properly the function of the state and local governments. JAGA 1959/3861, 12 May 1959.

made and opinions rendered in a variety of instances such as the incident resulting in approval of the assignment of space on a military transport to deport an undesirable alien [239] and of the lending of a building to the United States marshal in China, knowing that he would convert it into a prison.[240] A common request is for such a peculiarly military item as a mine detector [241] (for searching for criminal guns) and occasionally there are requests for weapons. When such requests are approved, it should be with a proper explanation that in no case may the personnel to operate the equipment be furnished. One such request resulted in the lending of a tank to a Texas sheriff who needed it to shield him from the rifle fire of an insane killer while he rescued a fatally wounded deputy. Delivery of the tank was made by a sergeant who had specific instructions from the Staff Judge Advocate to the effect that he was not permitted to operate the tank. He disobeyed when he found that (quite naturally) no one in the sheriff's *posse* knew how to operate the behemoth. The tank operator attempted to legitimatize his act by removing his chevron-bearing jacket and declaring that he was "acting in his citizen's capacity." [242] There has been no recorded criticism of his emergency-prompted legal reasoning.

Army laboratories are maintained in support of Military Police criminal investigation operations,[243] a purpose which has been cited to discourage the lending of such facilities to civilian law enforcers.[244] This purpose has no bearing on the application of the Posse Comitatus Act and is a policy matter only. From a practical view, however, laboratory facilities and lie detectors require trained technicians for proper utilization and if personnel become involved there may be a conflict with the Act. To determine the legality of using the facility and the technician it is necessary to determine if the use is an execution of the laws and if so, does the military have a legitimate and substantial interest in the matter. For instance, a polygraph could be legally employed to determine if an employee of the Veterans' Administration was telling the truth concerning alleged improper treatment of patients if the investigation was to decide if he should be discharged. There would be no "execution of the laws" in a purely administrative matter of this kind. If a crime has been committed in a nearby community, the polygraph and operator

[239] JAGA 1952/9649, 5 Feb 1953, note 139, *supra*.
[240] JAG 014.5, 20 Dec 1923, note 135, *supra*.
[241] JAGA 1957/5586, 25 Jun 1957, note 173, *supra*.
[242] Related to author by the officer who recommended approval of lending the tank but not the operator.
[243] Par. 19, AR 195–10, 19 Nov 1957 (formerly par. 17, SR 190–30–1).
[244] JAGA 1953/6465, 25 Aug 1953.

could be utilized to weed out suspects if the circumstances of the crime are such as to cause an investigation of the offense to be made by the military authorities for military purposes, i.e., should military personnel be under suspicion. If a soldier is taken into custody by civil authorities on suspicion of having murdered his wife in off-post quarters, the Army would have sufficient interest to permit use of laboratory facilities and polygraph as the situation potentially involves an offense against the Uniform Code of Military Justice. Were the facts reversed, with the wife charged with killing her husband, it would be a violation of the Posse Comitatus Act to make the assistance available.[245]

A retired member of the Regular Army could operate the equipment for civilian police, although the Army had no legitimate interest in the investigation. Despite an earlier opinion to the contrary,[246] and acknowledging that retired persons (officers or enlisted men) are still a part of the Army of the United States, the Act means only those "troops" on active duty. More recent opinions perceive no illegality in retired enlisted men taking employment as police officers.[247]

This realistic reasoning has been extended to sanction the off-duty employment of an enlisted military police lie-detector examiner in voluntarily operating a civilian-owned polygraph in his individual and wholly unofficial capacity for a State or municipal law enforcement agency.[248]

H. *Miscellaneous Situations*

Attempts have been made to secure the assistance of the Army on a grand scale and for noteworthy purposes, including occasions when the benefits would outweigh any disadvantages, but the Posse Comitatus Act has prevented them. The question of guarding the southern border of the United States against infiltrating Mexicans provoked a difference of opinion between The Judge Advocate General of the Army and the Attorney General of the United States. It was the Army's contention that there

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[245] *Ibid.* But see note 170, *supra.*

[246] JAG 210.851, 11 Oct 1926, note 88, *supra.*

[247] SPJGA 1947/7744, 6 Oct 1947; JAGA 1947/8393, 21 Nov 1947, note 88, *supra.* Retired members of the army generally are not exempt from jury duty by reason of their military status. JAGA 1950/5715, 26 Sep 1950. Whether military personnel are exempt from jury duty depends upon the laws of the particular jurisdiction. SPJGA 1942/1793, 4 May 1942; JAGA 1959/1941, 24 Feb 1959. In the author's opinion, the Posse Comitatus Act would not prohibit jury duty for retired military personnel.

[248] JAGA 1957/6608, 9 Sep 1957. But there are some other prohibitions against off-duty employment of military personnel. See, for example, 10 U.S.C. 3544, 3635 (1952 Ed., Supp. V).

was no authority for border guarding by troops[249] but the Attorney General's office contended that the President's broad Constitutional powers were sufficient to override the Posse Comitatus Act.[250] Another broad area received Congressional blessings in the specific authorization of assistance in enforcing quarantines.[251] "Quarantines", though, has twice been narrowly interpreted to apply only to ships and not to quarantines on land.[252]

President Cleveland may not have hesitated to send troops to settle strikes but, today, soldiers may be employed in labor disputes only to stop imminent damage or destruction of property unless the Secretary of the Army has given his approval.[253] His authority would be needed for the proper maneuvering of soldiers in necessarily forcing a picket line even to get food through for Army maintenance.[254]

One isolated incident resulted in an implied disapproval when three soldiers assisted a local War Production Board official requisition property.[255] While this was not a typical case, it is indicative of the variety of problems created by the Posse Comitatus Act and confronting the troop commander and his Staff Judge Advocate.

V. CONCLUSIONS AND RECOMMENDATIONS

The Posse Comitatus Act has been with us for over eighty years but there is a paucity of judicial decisions concerning it. Fortunately, the past forty years have produced sufficient administrative opinions, generally based on sound legal reasoning, to justify certain conclusions and to establish practical rules for interpretation.

Some of the conclusions are rather patent, but worth reiterating, if for no other reason than logical summarization. For instance, the Act prohibits the execution of laws through the use of the Army or Air Force or any part thereof, including organi-

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249 JAGA 1953/5992, 15 Jul 1953.

250 JAGA 1953/6661, 2 Sep 1953.

251 AR 500–50, 22 Mar 1956.

252 JAG 370.6, 16 Jan 1924, where Philippine Scouts, part of the Army, were not permitted to enforce quarantine regulations for the Governor General. JAG 370.6, 18 Apr 1924, where Arizona sought to ease its hoof and mouth quarantine to permit Yuma indians, whose reservation lay in California, but whose markets were in Arizona, to trade. Soldiers were not allowed to guard the reservation's western border.

253 SPJGA 1946/1932, 14 Feb 1946.

254 SPJGA 1946/1478, 25 Jan 1946. The decision to withhold troops and trucks requested for strikebound maritime personnel confined to a ship was approved. JAG 370.61, 21 Jul 1939.

255 SPJGA 1942/2673, 24 Jun 1942.

zations or individuals, but always pertaining to "troops", a term connoting certain service members on active duty. The drafters of the Act wished to prevent abuse of the populace by misuse of the soldiery and did not intend, in the author's opinion, to limit the personal activities of the individual soldiers or airmen, active or retired.

When the serviceman acts on his own initiative, as an individual, in an unofficial capacity, with or without remuneration, he is beyond the restrictions of the Act. Hence, he could be employed as a desk sergeant or guard; as an instructor in a police school; as a polygraph operator; or in purely clerical police duties.

The Army may be used to execute the laws in many ways despite the provisions of the Posse Comitatus Act. It may be summoned by the Governors (through the President) or it may be sent into a State without summons when necessity demands. Statutory authority has been provided to permit the employment of troops in quelling disturbances and in upholding the laws but strong Presidents, realizing that Congress is powerless to abridge their Constitutional rights,[256] would consider themselves excepted from the Act even without this express authority. Troops may be dispatched to protect Federal property, to respond to disasters, and to execute the laws when they are incidental to one of the military's own functions.

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[256] Ex-Attorney General Miller never did think it would be a hindrance to the President. In a letter dated 11 Jul 1895 to Attorney General Olney (cited in JAGA 1952/9649, 5 Feb 1953) he said,

> "I have always been of the opinion, and so advised President Harrison, that the *posse comitatus* statute, in so far as it attempted to restrict the President in using the Army for the enforcement of the laws, was invalid, because beyond the power of Congress; that it was no more competent by a statute to limit the power of the President, as Commander-in-Chief, to use the Army for the enforcement of the laws than it is competent to limit by statute the exercise of the pardoning or appointing power."

Professor Crowin contends that the effect of the prohibition was largely nullified by a ruling of the Attorney General (16 Op. Atty. Gen. 162 (1878) that "by R.S. 5298 and 5300, the military forces, under the direction of the President, could be used to assist a marshal." Crowin, *Constitution of the United States of America*, S. Doc. No. 170, 82d Cong., 2d Sess. (1952) 483, a conclusion sustained by the Little Rock incident. Note 111, *supra*. The Constitutional question is discussed in Crowin, *supra* note 1, at 130–139; Pollitt, *Presidential Use of Troops to Execute the Laws: A Brief History*, 36 N.C.L. Rev. 117, 131–135 (1958); Lorence, *supra* note 6, at 169–179. Arguments of the opponents of the use of Federal troops in Little Rock run counter to the author's opinions regarding the constitutionality of Congressional attempts to limit the President's power to employ the armed forces. See Schweppe, *supra* note 40a at 190–191. In support of the author, see Pollitt, *supra* note 40a at 606.

It is in this latter area that the impact of the Posse Comitatus Act is more likely to be felt by the commander of troops and his Staff Judge Advocate. The pattern of interpretation of the Act has, in the author's opinion, been unnecessarily restrictive. By using the Act as an excuse, the Army has succeeded in avoiding many time-, man- and equipment-consuming tasks. Doubtless, some of the proposed missions would have greatly detracted from the mission of national defense but they should have been rejected as a matter of policy and not of law, for many of the negative answers to queries on the use of the Army are legally unsound. On the other hand, the officials charged with the administration of a statute will not generally argue that it is unconstitutional and The Judge Advocate General (like other lawyers) will only as a last resort advise his client to pursue a course of conduct which may run afoul of criminal statutes. In this there is a further lesson, the greater the advantage to be achieved, the narrower becomes the lawyer's construction of the statute. This will probably be true of the Supreme Court, too, if and when it has the opportunity to review a conviction of violating 18 U.S.C. 1385.[257] Nevertheless, it is refreshing to see a trend toward more liberal construction. The sanctioning of joint traffic patrols is a beginning step.

When the Army is utilized for authorized purposes, there may be some incidental assistance given to civil law enforcement agencies. Cases in this area must be treated on an *ad hoc* basis, with an attitude of practicality tempered by a concern for good public relations. From a strictly legal viewpoint, it is the author's conclusion that the statute is limited to deliberate use of armed force for the primary purpose of executing civilian laws more effectively than possible through civilian law enforcement channels, and that those situations where an act performed primarily for the purpose of insuring the accomplishment of the mission of the armed forces incidentally enhances the enforcement of civilian law do not violate the statute.

Many requests for troops are of such a nature that time is not of the essence in rendering a decision as to legality or policy. In those cases it is recommended that correspondence be initiated to the next higher command and eventually to the Judge Advocate General, if necessary, for a rendition of the current policy. In emergency situations it would be tragic not to take immediate action and concurrently notify higher authorities. It is advisable, in any case, for the commander to keep a detailed log or

[257] Even though there were some obvious violations of the Posse Comitatus Act, the author could find no record of prosecutions, indictments or punishments.

record of events, maintained on an incident by incident basis, with the Provost Marshal, the Staff Judge Advocate and those persons of his intelligence staff who are skilled in this form of operation, working on it as a joint venture. Such a record will permit a full explanation of his actions and will substantiate the need for any operation in which the troops are involved. It would be particularly valuable if the commander has to take steps that are unpopular and subject to later criticism.

In some respects the Act is archaic and a hindrance to a commander who wishes to control the off-post conduct of his soldiers; to safeguard their entrance and egress to and from his post; to promote good public relations in the communities and to respond to the inner urgings of the good citizen in putting down or preventing crime. The military community is now more closely tied to the civilian community and a high crime rate in one has a direct impact on the crime rate of the other but the possibility of repealing the statute is remote. When Regular Army paratroopers were sent to Little Rock [*supra*. note 111] the action was condemned by a number of Representatives, Senators and Governors and the Florida Legislature resolved to urge that there be additional legislation withholding the pay of troops sent into a state without the Governor's request.[258]

The Posse Comitatus Act does not restrict the use of troops in those desperate situations when necessity requires it but it does act as a deterrent to prevent an irresponsible commander from misusing his soldiers and it prevents similar abuses by civilians. It should not be raised as a shield from noxious assignment. These should be refused on a policy basis and not by a distortion of the law.[259]

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[258] New York Times, Oct 2, 1957, p. 16. Two bills have been proposed: H.R. 416, 86th Cong., a bill "To amend section 332 of title 10 of the United States Code to limit the use of the Armed Forces to enforce Federal laws or the orders of Federal Courts," and H.R. 1204, 86th Cong., a bill "To amend title 10 of the United States Code to prohibit the calling of the National Guard into Federal service except in time of war or invasion or upon the request of a State." The Department of Defense has been requested to state its opinion on the effect of this proposd legislation. JAGA 1959/1999, 20 Feb 1959.

[259] Though it must be admitted that as a practical standpoint it may be difficult, at times, to maintain the best public relations on a negative "policy" rather than "legal" (however distorted) approach.

THE ROLE OF THE DEPOSITION IN MILITARY JUSTICE

BY ROBINSON O. EVERETT*

I. INTRODUCTION

An attorney receiving his first introduction to courts-martial is often surprised by the role allotted to the deposition. Instead of being used in military justice chiefly for discovery or as a basis for possible later impeachment of a witness, the deposition is frequently itself offered in evidence—sometimes by the defense but more often by the prosecution.

Many exigencies peculiar to the Armed Services undoubtedly led Congress to authorize in Article 49[1] of the Uniform Code of Military Justice—and in previous parallel legislation—a use of depositions unparalleled elsewhere in American criminal law administration. "For instance, when the Armed Services are operating in foreign countries where there is no American subpoena power, it might be impossible to compel a foreign civilian witness to come to the place where the trial is held, and yet he may be quite willing to give a deposition. Furthermore, military life is marked by transfers of personnel—the military community being much more transient than most groups of civilians. To retain military personnel in one spot so that they will be available for a forthcoming trial, or to bring them back from a locale to which they have been transferred, might involve considerable disruption of military operations. Likewise, in combat areas there is often considerable risk that a witness may be dead before trial date, in which event, were civilian rules to be followed, his testimony would be lost."[2]

Because of such "necessities of the services", the Court of Military Appeals has upheld the fundamental legality of military depositions,[3] but at the same time has emphasized in regard thereto

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[1] 10 USC § 849 (1952 ed., Supp. V).

[2] Everett, Military Justice in the Armed Forces of the United States 221–2 (1956).

[3] U.S. v. Sutton, 3 USCMA 220, 11 CMR 220 (1953); U.S. v. Parrish, 7 USCMA 337, 22 CMR 127 (1956).

"that for the most part they are tools for the prosecution which cut deeply into the privileges of an accused, and we have, therefore, demanded strict compliance with the procedural requirements before permitting their use."[4] It is the purpose of this paper to explore some aspects of this "strict compliance", and to determine whether, under the Court's interpretation thereof, much basis remains for the oft-expressed fear that prosecution use of depositions in a court-martial deprives an accused of his right to confront and cross-examine the witnesses against him and to have the full benefit of counsel.

A. *Oral versus Written*

Contrary to previous Navy and Coast Guard practice,[5] the Uniform Code specifically authorizes the taking of either "oral or written" depositions. The former are taken by counsel on oral examination of the deponent; the latter on the basis of written interrogatories and cross-interrogatories submitted to a witness to be answered by him under oath. *United States v. Sutton*[6] concerned the legality of the written deposition.

One of Sutton's appointed assistant defense counsel, to whom written interrogatories had been submitted, indicated in writing on the deposition form that he did not care to tender any cross-interrogatories; apparently he made no objection whatsoever either to the taking of the deposition or to the taking of a written, rather than an oral deposition. At the trial the accused had a different attorney, who objected to admission of the deposition on the ground that it violated the right of confrontation guaranteed by the Sixth Amendment.

Judges Latimer and Brosman rejected the defense contention, but Chief Judge Quinn embraced it enthusiastically. At first glance the Chief Judge's dissent there might be taken to mean that, under his view, neither a written or oral deposition can be admissible over defense objection, and that an accused always is entitled to require that any witness testify personally in the courtroom. Obviously, from the accused's standpoint, maximum protection is provided under these circumstances; any trial lawyer will verify that some witnesses testify quite differently—and more conservatively—when they are in court and in the presence of the person against whom their testimony is being offered. Moreover, as the Uniform Code itself recognizes,[7] the demeanor of a witness

[4] U.S. v. Valli, 7 USCMA 60, 64, 21 CMR 186, 190 (1956).

[5] See U.S. v. Sutton, *supra* note 3; U.S. v. Gomes, 3 USCMA 232, 11 CMR 232 (1953).

[6] *Supra* note 3.

[7] Compare Article 66(c) UCMJ.

can be all-important in the evaluation of his credibility; yet it cannot be reflected in the cold pages of a deposition.

Upon more detailed analysis of Chief Judge Quinn's opinion, it seems, however, that, although he recognizes the undeniable advantages of a witness' presence before the court-martial, his chief concern is with the preservation of the accused's right of cross-examination. Indeed, he accedes to Judge Latimer's conclusion—which, in turn, draws heavy support from Dean Wigmore[8]—that cross-examination is the essence of confrontation. Under this approach the witness' presence could, in some instances, be dispensed with if he had previously been subjected to effective cross-examination—just as testimony offered at a former trial[9] or at a pretrial Article 32 investigation[10] is sometimes admissible in evidence because the defense's right to cross-examination has been preserved.

Whether Chief Judge Quinn would consider the presence of the accused himself at the taking of a deposition to be a prerequisite for effective cross-examination is not made clear in his *Sutton* dissent. Certainly there is nothing therein which would be irreconciliable with a view that effective cross-examination could be achieved by a qualified lawyer without the presence of the accused, if there had been ample opportunity for communication between them before the taking of the deposition.

After Judge Ferguson had joined the Court of Military Appeals, an unsuccessful attempt was made in *United States v. Parrish*[11] to have the Court overrule the *Sutton* decision. The depositions in question had been taken on written interrogatories, and Colonel Parrish's counsel—one of them a civilian attorney—had drafted extensive cross-interrogatories. Apparently no request was made that oral depositions be taken. Due to the nature of some of the answers given to the cross-interrogatories—answers which they contended were evasive—the defense counsel requested the law officer for a continuance to allow submission of further cross-interrogatories, and denial of this continuance was one ground for their objection to reception of the depositions in evidence.

In upholding the admission of the depositions, the Court's opinion remarked concerning the "determined bid" to have *Sutton* overruled:[12]

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[8] Wigmore, Evidence, § 1396 (1940 3d ed.); U.S. v. Miller, 7 USCMA 23, 21 CMR 149 (1956).

[9] Par. 145*b*, MCM, 1951; U.S. v. Niolu, 4 USCMA 18, 15 CMR 18 (1954).

[10] U.S. v. Eggers, 3 USCMA 191, 11 CMR 191 (1953).

[11] *Supra* note 3.

[12] 7 USCMA 337, 342, 22 CMR 127, 132 (1956).

"The views of the three Judges sitting at the time the Sutton decision was rendered are fully stated in that opinion. Judge Ferguson has chosen to follow the principle announced by the majority and no good purpose would be served by repeating what was there said. Accordingly, this issue is resolved against the accused without further comment."

In the interests of completeness, one should note Judge Ferguson's observation in his concurring opinion in *United States v. Brady*[13] that "A convening authority may 'for good cause' forbid the taking of an oral deposition and provide instead that written interrogations be submitted. Article 49(a), Uniform Code of Military Justice, 10 USC S 849". Neither Judge Ferguson, the Code, nor the Manual explains what is meant by "good cause" in this context. His comment seems, however, to assume that sometimes a written deposition will be taken, by direction of the convening authority, even though one of the parties has given notice that he wishes to take an oral deposition. Nonetheless, Judge Ferguson can hardly be said to have ruled that a convening authority is completely free to reject a defense request that a proposed deposition be taken on oral examination instead of on written interrogatories.

Actually the specific problem presented by a timely defense request that a written deposition be forbidden and an oral deposition ordered in its place was not before the Court in either *Sutton* or *Parrish*—where there was no objection at the time of its taking to the written deposition *as such*. It is clear that in any such situation Chief Judge Quinn would hold that the convening authority was under a compulsion to forbid the written deposition in order to protect the accused's right to effective cross-examination. And, as has been noted, Judge Ferguson could take the same position without squarely overruling the holdings of *Sutton* and *Parrish*. Or else he could reason that a request for taking an oral deposition must be granted, unless there is "good cause" to insist on written interrogatories. In this event the existence of "good cause" would presumably involve a legal issue to be considered during appellate review of the case. Relevant considerations might include amenability of the witness to subpoena and availability of certified counsel to represent the parties for the taking of the oral deposition.

Another possible approach would involve consideration of whether in the particular case there was some special desirability of an oral, instead of a written, deposition. Under this approach the burden would rest on the defense counsel to show some special

[13] 8 USCMA 456, 461, 24 CMR 266, 271 (1957).

reason why the oral deposition should be taken, rather than on the Government to sustain the use of a written deposition.

The recent decision of a Board of Review bears on this problem.[14] There the accused had been charged with sodomy, proof of which hinged on a prosecution witness who resided far from the place of trial. When the Government proposed to take the written deposition of this witness, the accused's civilian defense counsel requested either that the witness be subpoenaed to appear before the court-martial or, alternatively, that an oral deposition be taken from the witness. This request was not granted, and apparently was not even brought to the convening authority's attention in its original form. Because of an extraordinary conglomeration of defects and irregularities, the Board held that the deposition was inadmissible in any event, but it did state specifically that the defense request for the taking of a deposition on oral examination had been reasonable and should have been granted. Implicitly the decision recognizes that, under some circumstances, error exists in denying a defense request for oral, instead of written, depositions.

Neither Article 49(a) nor the Manual provides specific standards for choice between uses of oral and written depositions. Nonetheless, this omission was probably not intended to give either to the party desiring the deposition or to the convening authority a completely unfettered power of selection. Certainly the possibility exists that denial of a defense request for an oral deposition will, in some circumstances lead to reversible error. In fact, this possibility becomes almost a certainty since Chief Judge Quinn has emphasized his view that it is unconstitutional in any event to admit written depositions in evidence against an accused over objection and Judge Ferguson has consistently demonstrated great solicitude for the rights of accused persons.

As matters now stand, it seems likely that, except as to purely formal matters, defense counsel will increasingly request the convening authorities to order the taking of oral depositions. Rather than risk reversal of a conviction, quite a few convening authorities will undoubtedly either accede to the defense request, or will have the witness subpoenaed to testify before the court-martial. In the long run there may occur a substantial diminution, or even the virtual abolition, of the written deposition in courts-martial—the very result so fervently advocated by Chief Judge Quinn in the *Sutton* case.

[14] NCM 56-01270 (SF), Turman, 25 CMR 710 (1957).

B. *Subpoena versus Deposition*

In several cases a defense counsel has requested that subpoenas be issued for certain witnesses and the denial thereof has later been considered on review by the Court of Military Appeals. When viewed in proper perspective, these cases have considerable relevance to the role of the deposition.

If the defense counsel had had his way in *United States v. DeAngelis*,[15] the courtroom would have teemed with witnesses—Italian nationals and American civilians and military personnel. In rejecting the accused's contention on appeal that he had been denied compulsory process, the Court emphasized that the compulsory process need not be invoked unless the testimony of the defense witness would be "material and necessary". The Court in this connection quoted from a passage of the 1949 Manual for Courts-Martial[16]—under which the accused was tried—to the general effect that a subpoena need not be issued "where a deposition would fully answer the purpose and protect the rights of the parties," or unless "a deposition will, for any reason, not properly answer the purpose." At a later point in its opinion, the Court observed concerning the defense request for the presence of certain American witnesses: "Each witness was shown to be over one hundred miles from the place of trial. Consequently, if the accused *in fact* desired their presence as witnesses, his failure to establish the materiality of their testimony, to submit a request for obtaining their testimony by deposition, or to show that depositions would not answer the purpose, precludes any claim of error at this stage of the case."[17] Clearly the Court seems to be saying that a defense counsel who wishes a witness subpoenaed bears the burden of showing that the witness' testimony cannot as well be taken by deposition. Especially when oral depositions are to be used, this burden would be a heavy one.

Paragraph 115*a* of the 1951 Manual is less explicit than the corresponding section of its 1949 predecessor with respect to the issuance of a subpoena where a deposition would "answer the purpose"; in fact, it contents itself with the reference "See Article 49*d* concerning the conditions under which a deposition, to be admissible, may be taken." However, later in the same Manual paragraph there is a provision to the general effect that a witness need not be subpoenaed at the defense's request if the trial counsel will stipulate to his expected testimony. Presumably, then, the draftsmen of the Manual did not feel that it was all-important for

[15] 3 USCMA 298, 12 CMR 54 (1953).
[16] Par. 124, MCM, 1949.
[17] 3 USCMA at 303–4, 12 CMR at 59.

the court-martial to observe the demeanor of the witness, instead of being presented merely with his stipulated testimony or his deposition.

However, in *United States v. Thornton*,[18] the Court of Military Appeals took a different view. The accused officer was attempting to negate a charge of larceny by showing an absence of felonious intent, and in support thereof he requested that a civilian witness be subpoenaed. Although it did not appear whether the convening authority personally acted on the request, it was denied by the Acting Staff Judge Advocate. When the request was renewed at the trial, the law officer again denied it, whereupon trial and defense counsel entered into a stipulation of expected testimony.

In holding that the accused was entitled to the direct testimony of the desired witness and that it was prejudicial error to deny him the requested subpoena, the Court remarked:[19]

> "An accused cannot be forced to present the testimony of a material witness on his behalf by way of stipulation or deposition. On the contrary, he is entitled to have the witness testify directly from the witness stand in the courtroom. To insure that right, Congress has provided that he 'shall have equal opportunity [with the prosecution and the court-martial] to obtain witnesses . . . in accordance with such regulations as the President may prescribe.'"

Two weeks later in *United States v. Harvey*,[20] the Court seems to recede somewhat from the rule of the *Thornton* case. Harvey was charged with assault and his defense counsel requested that trial counsel subpoena four civilian witnesses, who would testify concerning the "character and reputation of the chief prosecution witness." The request was denied by the convening authority,—and later at the trial by the law officer, after the prosecution had announced its willingness to stipulate to the expected testimony "subject only to the admissibility of the evidence." However, no stipulation was offered in evidence.

The Court sought to distinguish *Thornton* on several grounds. First, "and most important," the expected testimony of the witness in that case had gone to "the core of the accused's defense," but not so here. Secondly, the acting staff judge advocate had denied Thornton's request for the subpoena, "whereas here, it was the convening authority." Thirdly, defense counsel had not complied with the Manual's formal requirements that he submit a written statement containing (1) a synopsis of expected testimony, (2) "full reasons which necessitate the personal appearance of the

[18] 8 USCMA 446, 24 CMR 256 (1957); see also CM 394087, Slaughter, 23 CMR 478 (1957).

[19] 8 USCMA at 449, 24 CMR at 259.

[20] 8 USCMA 538, 25 CMR 42 (1957).

witness, and (3) any other matter showing that such expected testimony is necessary to the ends of justice."[21] Fourthly, the accused could not have been prejudiced by failure to subpoena the witnesses for their expected testimony would not have been competent, since the accused presented no evidence of self-defense—the only issue as to which the expected testimony could have any relevancy.

The two final distinctions seem quite valid. However, since the Court did not explain what constitutes the "core" of a defense, it is unclear whether the fourth is simply a reiteration of the first distinction. The second distinction overlooks the fact that in *Thornton* the law officer also ruled on the issuance of the subpoena and, in addition, that there the Court had stated that it would not halt to determine "whether or not the decision was made by the convening authority."

As *Harvey* makes no express retreat from the general principle announced in *Thornton,* a trial counsel or convening authority cannot safely assume that he may reject a defense counsel's written request that a defense witness be subpoenaed and then force the defense counsel to settle for the witness' deposition or a stipulation of his expected testimony. Of course, if the witness' testimony would not be "material and necessary," there may be no need to call him. However, simply on the basis of the defense request—which usually will be worded in a way best calculated by counsel to induce issuance of a subpoena—it may be very difficult to determine correctly whether the requisite materiality does exist. Especially is this so since, even during the Article 32 investigation, the accused's lawyers will often not have unveiled their theory of defense in its entirety[22] and the expected testimony might have some unforeseen relevance to the defense case as presented at the trial. Rather than risk a reversal, the convening authority may well decide to dispense with any deposition and subpoena the witness to attend at the trial.

The Manual speaks of subpoenaing a "material and necessary" witness.[23] Who, however, qualifies as a "necessary" witness? From the trial counsel's standpoint it is clear that the calling of certain witnesses may be necessary if he is to prove all elements of his case beyond a reasonable doubt. On the other hand, since the accused is presumed innocent and bears no burden of proof, he is under no true "necessity" to call any witnesses; no finding of guilt can be directed against him even though he presents no

[21] See par. 115, MCM, 1951.
[22] Everett, *op. cit. supra* note 2, p. 171.
[23] Par. 115*a*, MCM, 1951.

evidence whatsoever. As to certain defenses, the accused must at least present some evidence in order to raise an issue that will merit the attention of the law officer and the court members.[24] Perhaps a witness who could testify as to one of these defenses might sometimes be deemed a "necessary" defense witness. Federal Rule 17 of Criminal Procedure authorizes the issuance of a subpoena upon the request of an indigent defendant whose evidence will be material and without whom "the defendant cannot safely go to trial."[25] Arguably, the Manual's draftsmen were seeking to establish the same criterion for subpoenaing requested defense witnesses. Or else they may only have been seeking to prevent wholesale subpoenaing of witness who would merely give cumulative testimony for an accused.

In instances where a defense request is made for the presence before the court-martial of a "material and necessary" witness, how far must the prosecution go before it can properly insist that the defense counsel resort to depositions to secure the desired testimony? The Manual for Courts-Martial authorizes subpoenaing "at government expense, any civilian who is to be a material witness and who is within any part of the United States, its Territories, and possessions."[26] There is no restriction to prosecution witnesses. Thus, as to any civilian within the United States, the trial counsel should seldom have difficulty in obtaining the defense witness' presence if he makes a good faith effort to that end and if the witness' whereabouts are known.[27] Military witnesses are also readily obtainable with the government's cooperation. However, where the defense desires foreign witnesses the problem is more difficult. Certainly under the *Thornton* approach witness fees and travel expenses should be payable by the Government for foreign defense witnesses to the same extent as for prosecution witnesses. In the event of a treaty or agreement with a foreign nation for securing the attendance of its nationals as witnesses in American courts-martial, the Government would also seem obligated to make the same effort in behalf of the accused to secure the presence of such a person as if he were a prosecution witness.[28] Only thus would the defense counsel receive the "equal opportunity to obtain

[24] Everett, *op. cit.* note 2, p. 193.

[25] This Rule was quoted by the Court in U.S. v. DeAngelis, *supra* note 15, at p. 802.

[26] Par. 115*d*(1), MCM, 1951.

[27] Of course, unless the witness can be located, no one can take his deposition. For a general discussion of subpoenas in courts-martial see Everett, *op. cit.* note 2, at pp. 217–9.

[28] Compare the discussion in U.S. v. Stringer, 5 USCMA 122, 17 CMR 122 (1954) of what is required to show unavailability of a foreign witness.

witnesses and other evidence" assured him by Article 46[29] of the Uniform Code.

Several features of military justice may lead to numerous defense requests to subpoena witnesses. For one thing, unlike a defendant in civilian courts, who, if he loses, will be paying the court costs, an accused convicted by a court-martial labors under no such liability. In State courts, too, the subpoena power is effectively limited by State lines; in courts-martial it is not. Moreover, a very few unscrupulous defense counsel appearing before courts-martial may seek to harass and exhaust the prosecution—and perhaps obtain a voluntary dismissal of charges—by excessive requests for the attendance of witnesses before a court-martial, especially military witnesses whose time cannot readily be spared from their duties.[30]

Even where prosecution witnesses are involved, the *Thornton* decision may result in some limitation on the use of depositions. A brief illustration will clarify this point. Assume that a trial counsel prosecuting an assault case requests authority from the convening authority to take the deposition of a supposed eye witness. In support of his request, and in accord with the procedure required by the Manual,[31] the trial counsel submits a memorandum stating that the witness will probably testify that the accused committed an assault. As soon as he learns of the trial counsel's request, the defense counsel himself submits a request that this witness be subpoenaed as a defense witness, and indicates that the witness will testify that there was no assault and that the accused was simply defending himself.

Obviously, if the witness must ultimately be subpoenaed, there will be little point in expending time and money to take his depositions. Under the assumed facts, how can the convening authority feel safe in rejecting the defense request for a subpoena? The witness' testimony is probably material; otherwise the Government would not have wished to take his deposition in the first place. Even with the assistance of any pretrial statements made by the witness to investigators, the convening authority cannot be sure that, in some respect and as to some issue, the witness' testimony may not ultimately prove favorable to the accused. In that event the failure to subpoena the witness may well mean reversal of any conviction obtained. Under these circumstances, the convening authority may decide to go ahead and subpoena the

[29] 10 USC § 846 (1952 ed., Supp. V).

[30] Compare U.S. v. DeAngelis, *supra* note 15.

[31] Par. 117*g*, MCM, 1951; see also U.S. v. Brady, 8 USCMA 456, 24 CMR 266 (1957).

witness in the first place, rather than take his deposition, or else to dispense entirely with the proposed witness if the defense counsel will voluntarily withdraw his request for a subpoena.

C. *Counsel*

As has been pointed out previously, the use of written depositions may be dangerous if the accused has made a timely request for the taking of an oral deposition. However, if the request is acceded to, the Government may be saddled with a heavy burden. In the first place, the accused must be provided with certified counsel to represent him during the taking of the deposition, if the deposition is to be admissible later in a general court-martial.[32]

Secondly, as *United States v. Brady*[33] made clear, the Government's responsibility is not satisfied merely by providing certified counsel if the charges have already been referred to a court for trial. Instead the accused must be represented at the taking of the deposition by the same counsel appointed to defend him at the trial or by other qualified counsel acceptable to the accused. The Court of Military Appeals noted that anything intimated to the contrary in the Manual for Courts-Martial conflicts with Article 49 of the Code and so is void.

Obviously the transporting of defense counsel hither and yon to take depositions can involve considerable expense to the Government and tie up valuable legal personnel. The alternative of written interrogatories—an alternative which, as heretofore mentioned, was referred to by Judge Ferguson in his *Brady* concurrence—produces a deposition which often is relatively uninformative and the taking of which, over defense protests and despite requests for an oral deposition, may lead down the road of reversible error. Perhaps the only remaining course for the convening authority is to direct the taking of depositions from all prospective witnesses before reference of the charges for trial. Until the charges are referred, the convening authority does have freedom to designate counsel to represent both the accused and the Government in the taking of oral depositions,[34] although even then he probably must allow the accused ample opportunity to communicate with his designated counsel concerning the deponent's probable testimony.

Prior to reference of charges, however, several difficulties may be encountered that would not exist if the deposition were taken

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[32] U.S. v. Drain, 4 USCMA 646, 16 CMR 220 (1954).

[33] *Supra* note 31.

[34] Article 49, 10 USC § 849 (1952 ed., Supp. V); U.S. v. Brady, *supra* note 31.

at a later stage of the proceedings. In the first place, the power to subpoena does not seem to exist until the charges are referred —a circumstance which would, of course, relate to seeking a deposition from a civilian witness.[85] Secondly, it is often impossible to anticipate so early in the proceedings all the issues as to which the witness may possess information; and consequently another deposition may have to be obtained from him after the charges are referred. Thirdly, until the charges are referred, it cannot be stated definitely what type of court will try them; the convening authority may find that he has wasted certified counsel in taking depositions that will not ever be used in a general court-martial. Finally, in postponing reference of the charges until extensive depositions have been taken, a convening authority may be criticized for "unnecessary delay in the disposition of any case."[86]

II. EVALUATION

Today it is quite uncertain whether written depositions can be admitted in evidence against an accused who has requested that the witnesses either give oral depositions or be subpoenaed to appear personally before the court-martial. This uncertainty portends that, although written depositions will often be used by the defense to obtain favorable evidence, they will decline in importance as "tools for the prosecution".

Undoubtedly attacks will continue on the use against accused persons either of written or oral depositions. If such an attack were made in a case where written depositions had been used, it is at least conceivable that some undiscriminating court might simply proclaim that no deposition of any sort could be admitted in evidence over an accused's objection. On the other hand, if such an attack were made in a case where oral depositions had been used, the Government's position would be considerably stronger. With such depositions—and especially in light of the position taken by the Court of Military Appeals in *United States v. Brady*—the accused is well-protected in his right to cross-examine the witnesses against him and to have the effective aid of counsel. To the extent that cross-examination is the core of confrontation, he is also well-protected in his right of confrontation—or, at least, about as much as when former testimony is admitted in evidence against him at a second trial. Actually, the decline of the written deposition may eliminate one temptation for Federal civil courts to interfere with courts-martial.

[85] See Everett, *supra* note 27.

[86] See Article 98, 10 USC § 898 (1952 ed., Supp. V).

As for oral depositions, it must be said in all candor that their utility—at least for the prosecution—may have been greatly diminished by the decisions of the Court of Military Appeals concerning issuance of subpoenas and representation by counsel. Resourceful defense counsel will probably now be much more successful in obtaining the attendance in court of key prosecution or defense witnesses in place of their depositions; and the task of trial counsel and even of court members may become more burdensome. Although the importance of depositions should not be exaggerated, it does seem fair to say that the role of the deposition should now be carefully re-evaluated by those concerned with military justice.

DAMNOSA HEREDITAS—SPECIAL COURTS-MARTIAL

By Major Henry B. Cabell*

I. INTRODUCTION

The sweeping changes in the concepts of warfare which have resulted from the development of nuclear weapons, missiles, electronic devices, and mobility on an unprecedented scale have required the discarding or modification of many fundamental and long accepted methods of waging war. In recognition of the magnitude of these changes, new organizations and tactics are being devised, not only to take full advantage of the increased combat power available to the military commander, but also to minimize the impact of the employment of nuclear weapons by an enemy.

If these new military techniques and the battle formations designed to employ them are to achieve maximum effectiveness, current administrative procedures must be adapted to fit their requirements. Included in these administrative procedures is the Uniform Code of Military Justice[1] which provides the commander with coercive powers and courts-martial for the maintenance of that high degree of discipline which is a prerequisite to the successful conduct of military operations.

One of the types of courts-martial authorized by the code is the special court-martial.[2] In this article the practical and administrative difficulties incident to the use of special courts-martial by battle groups and separate battalions will be examined. This examination will be performed with a view toward supporting recommendations for changes in the present classification of courts-martial which appear to be necessary to adapt them to the needs of the modern Army.

II. ORIGIN OF SPECIAL COURTS-MARTIAL

Inferior courts-martial, composed of three or more line officers and designed primarily for the trial of the soldier-misdemeanant, have been a part of the judicial system of the Army since 1775. Originally these courts were called regimental and garrison courts-

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[1] 10 U.S.C. 801–940 (1952 ed., Supp. V). Citations to the Uniform Code of Military Justice are hereafter designated by the article number and the initials "UCMJ."

[2] Art. 16, UCMJ.

martial.[3] Although they were required to adhere generally to the procedures of general courts-martial, they were forbidden to impose a fine exceeding one month's pay or imprisonment at hard labor for a period in excess of one month.[4]

Regimental and garrison courts-martial were the only inferior courts-martial used by the Army for nearly 90 years. Then in 1862, Congress required regimental commanders to detail a field grade officer of the regiment as a field officer's court to try soldiers of the regiment for crimes or offenses not capital.[5] The first summary court-martial was created in 1890 and it assumed the functions of the field officer's court in 1898.[6] Significantly, the powers with respect to punishment of all types of inferior courts-martial were substantially the same. The principal distinction in their respective jurisdictions was that summary courts were to be used in preference to regimental or garrison courts-martial unless the accused demanded trial by a multi-member court.[7] As a result, regimental and garrison courts-martial were gradually falling into disuse.

Special courts-martial were authorized in 1913, primarily for the purpose of providing an effective and active court to replace regimental and garrison courts-martial which were abolished in the enabling act.[8] The new special court-martial was to consist of three to five officers and have the power to try any person subject to military law for any crime or offense not capital. It might adjudge punishment not to exceed confinement at hard labor for six months and the forfeiture of six months' pay and, in addition thereto, reduction to the ranks in the case of noncommissioned officers.[9] It was an intermediate tribunal for the trial of offenders

[3] American Articles of War of 1775, Arts. XXXVII, XXXIX, Winthrop, Military Law and Precedents 956 (2d ed., 1920 reprint).

[4] American Articles of War of 1786, Art. 4; Winthrop, Op. Cit., *supra*, at 972.

[5] Act of 17 Jul 1862, 12 Stat. 598. The act also provided that no soldier serving with his regiment should be tried by a regimental or garrison court-martial when it was possible to convene a field officer's court. In the revision of the articles of war in 1874, the operation of field officer's courts was restricted to time of war (Revised Statutes, section 1342, Article 80).

[6] Act of 1 Oct 1890, 26 Stat. 648; Act of 18 Jun 1898, 30 Stat. 483. The first summary court was designed to complement the field officer's court and thus could be convened only in time of peace. The 1898 act was intended to simplify the appointment of these single officer courts and to group their functions into a new summary court-martial which was substantially similar to the one we have today.

[7] Act of 2 Mar 1901, section 4, 31 Stat. 951. Under the terms of this act all inferior courts-martial were authorized to impose confinement at hard labor for three months and the forfeiture of three months' pay.

[8] Act of 3 Mar 1913, 37 Stat. 722.

[9] *Ibid.*

who were deemed worthy of retention in the command but in need of punishment greater than that which could be accorded them by summary court-martial.[10]

Aside from its enlarged jurisdiction and greater punitive power, the special court-martial has the attributes of both garrison and regimental courts-martial. As in the case of those courts, its trial procedure is, so far as practicable, identical with that of general courts-martial.[11]

The authority to appoint regimental, garrison, and special courts-martial has always been vested in the commanders of brigades, regiments, separate battalions, or comparable commands. These commanders have the power to disapprove or approve in whole or in part the findings and sentences adjudged by courts of their appointment, and to issue promulgating orders.[12]

It is reasonable to assume that there is still a need for some type of inferior court-martial. On the other hand whether the continued existence of the special court-martial is justified can be determined only by a critical scrutiny of its processes in the light of the burdens it imposes upon those who resort to its use.

III. PRETRIAL PROCEDURES

If the battle group and company commander are to have a voice in the ultimate disposition of a case and the punishment to be imposed upon an offender of their respective commands, pretrial procedures such as the preliminary inquiry, preference of charges, and a decision as to their disposition must be made by themselves or their representatives, no matter what type of court tries the case. However, at the battle group level, one is immediately struck by the formidable nature of the additional duties pertaining to inferior courts-martial which have been imposed upon both officers and enlisted clerks. These duties include the selection and appointment of courts, the preliminary examination of the charges and their reference to trial, the review of the record of trial, the action on the findings and sentence, and finally the promulgation of the

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[10] War Department, *A Manual for Courts-Martial, U. S. Army* (1917), pp. XI–XII. Various editions of the "Manual for Courts-Martial" are hereafter cited "MCM" followed by the year of publication.

[11] Winthrop, Op. Cit., *supra*, at 487; Davis, A Treatise on the Military Law of the United States 218 (2d ed., 1906); par. 78, MCM, 1951.

[12] American Articles of War of 1775, Arts. XXXVII–XXXIX, Winthrop, Op. Cit., *supra*, at 956; Arts. 60, 64, 71*d*, UCMJ; pars. 86, 89, 90, MCM 1951; Winthrop, Op. Cit., *supra*, at 489.

results of trial.[13] The fact that these officers and clerks have always carried this burden, more often than not with the assistance of an unauthorized courts and boards sections,[14] justifies neither the continuance of the practice nor the failure to provide the necessary additional personnel. Substandard performance of both the principal and the additional duties is the result of this false economy measure.

IV. TRIAL PROCEDURES

An Army court-martial is a temporary court convened for the trial of one or more cases.[15] Although the orders appointing it are not revoked, the court, as originally constituted, rarely hears more than a few cases.[16] Because the proceedings and record must be complete without reference to another case,[17] a number of otherwise unnecessary preliminary procedures such as the examination of counsel with respect to qualification, the reading or announcement of the orders appointing the court, and the swearing of the court and counsel must be completed before consideration of any challenges and the arraignment.[18] It follows that if there were a permanent court-martial these proceedings would ordinarily not be required.

Turning to the trial proper, the difficulties are due almost entirely to the lack of legal training and experience of the members and counsel. Formerly, courts-martial were not bound to a strict adherence to the rules of evidence and procedures of the type generally used in civilian criminal courts.[19] Courts-martial proceedings were paternal rather than adversary, and until about 1890 counsel for the accused did not often appear before the court.[20] However, since 1916, when Congress first delegated to the President of the United States the power to prescribe rules of procedure,

[13] United States Army Infantry School, Report of a Seminar Conducted on the Administrative Capabilities of the ROCID Organization (1957), Tab A, par. 4. Department of the Army, Military Justice Handbook, *The Special Court-Martial Convening Authority* (DA Pam. 27–8, 1957); MCM, 1951, Chaps. VII, VIII, XVII–XIX.

[14] United States Army Infantry School, Op. Cit., *supra*, at par. 4.1.

[15] Winthrop, Op. Cit., *supra*, at 49–50; par. 36*b*, MCM, 1951.

[16] Par. 37*c*(1), MCM, 1951.

[17] Art. 54, UCMJ; par. 82, MCM, 1951. Although Appendix 8*a* of the Manual for Courts-Martial, United States, 1951, authorizes the swearing of the court before a number of accused who are to be tried separately, the practice is rarely followed because of the risk of error.

[18] Appendix 8*a*, MCM, 1951.

[19] ". . . . Courts-martial should in general follow, so far as apposite, the rules of evidence to be found in the common law. They are not, however, bound by any statute in this particular, and it is thus open to them, in the interests of justice, to apply those rules with more indulgence than the civil courts . . . ." MCM, 1895, p. 41; Winthrop, Op. Cit., *supra*, at 313.

[20] Winthrop, Op. Cit., *supra*, at 165.

including modes of proof, in cases before courts-martial,[21] there has been a steady and sure progression toward the adoption of the complex rules and standards of civilian criminal courts.[22]

Of necessity the major portion of the responsibility for the conduct of the trial in accord with the new criteria rests upon the president of the court and the counsel.[23] It is fallacious to expect officers who are not lawyers to perform these functions adequately. Recognition of the inability of typical line officers to attain the standards of civilian judges and attorneys was acknowledged by The Judge Advocates General of the Army and Air Force when they joined in a recommendation made by the judges of the United States Court of Military Appeals to the Congress that legislation be enacted prohibiting special courts-martial from adjudging bad conduct discharges.[24] The principal reason advanced in support of this recommendation was that the lack of a requirement in the Code for legally trained personnel as court members or counsel had resulted in a high percentage of records replete with error, requiring reversals, rehearings, and other corrective actions. This recommendation was based upon the examination of a number of verbatim records of trial.[25] Nevertheless, if the present special court-martial is incapable, albeit through no fault or dereliction on the part of its members or counsel, to perform its duties in the prescribed manner, it should be replaced. The fact that its errors are often concealed by a summarized record is hardly a legitimate reason for allowing it to hear cases in which that type of record is permitted.

Recent decisions of the Court of Military Appeals have further complicated the already difficult role of the president and members of the court. For example, in the case of *United States v. Rinehart*,[26] the Court of Military Appeals prohibited the use of the Manual for Courts-Martial by the members of the court-martial other than the president. In other cases, long standing customs of the service which permitted the court to be informed of the general sentencing policies desired by the convening or higher authorities have been struck down.[27]

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[21] Article 38, Act of 29 Aug 1916 (39 Stat. 650–670); p. 314, MCM, 1917.

[22] Pp. vii-xi, MCM, 1921; Everett, Military Justice in the Armed Forces of the United States 15–16 (1st ed., 1956).

[23] Arts. 38, 51, UCMJ; pars. 40*b*(2), 44–48, MCM, 1951.

[24] United States Court of Military Appeals and The Judge Advocates General of the Armed Forces and The General Counsel of the Department of the Treasury, Annual Report (1952), p. 4.

[25] *Ibid.*

[26] 8 USCMA 402, 24 CMR 12 (1957).

[27] U.S. v. Varnadore, 9 USCMA 471, 26 CMR 251 (1958); U.S. v. Fowle, 7 USCMA 349, 22 CMR 139 (1956).

There is a continuing requirement that the president and counsel of special courts-martial be familiar with the opinions of the highest military court. Many of those opinions have abrogated or materially modified many of the provisions of the Manual for Courts-Martial. Failure to observe the new rules thereby established has provided a fertile source of error.[28] Since there is no medium for disseminating the substance of these opinions to the Army as a whole, further errors of this nature are bound to occur.

V. POST TRIAL PROCEDURES

After the trial, the summarized record of the proceedings is prepared and authenticated and forwarded to the convening authority for initial review and action.[29] This initial review includes a clerical examination of the record for completeness and procedural regularity. It also includes an examination of the findings of guilty to insure that they are legally correct and that the evidence is legally sufficient to sustain them.[30] The sentence is also considered to determine if it should be approved in whole or in part, and if so, whether it should be ordered executed, or all or a portion of it suspended.[31]

Unpalatable as the fact may be, the convening authority and his staff are not qualified to accomplish the legal aspects of this review. The magnitude of their other and more important responsibilities precludes their having the time, assuming the source materials are available to them—which they are not, to acquire the requisite knowledge. As a consequence such reviews are relatively worthless to both the accused and to the government.

With regard to the action of the convening authority, there now appears to be no logical reason for requiring him to take affirmative action to approve a sentence adjudged by a court, even though this has been required since 1775.[32] Prior to the enactment of the Code of 1916, the action of the convening authority upon an inferior court-martial record was exclusive and final and not subject to review by superior authority. Under such circumstances it marked the final adjudication of the case.[33] Now, the findings and

[28] An incomplete and somewhat out of date list of the provisions of the Manual for Courts-Martial, so changed may be found in Feld, *A Manual of Courts-Martial Practice and Appeal* 164 (1957).

[29] Art. 60, UCMJ; par. 84*a*, MCM, 1951.

[30] Par. 86*b*, MCM, 1951.

[31] Par. 88, MCM, 1951.

[32] American Articles of War of 1775, Arts. XXXVII–XXXIX, Winthrop, Op. Cit., *supra*, at 956.

[33] Winthrop, Op. Cit., *supra*, at 489; Act of 29 Aug 1916, Article 50; p. 316, MCM, 1917.

sentence are not final until a duplicative review has been performed by a judge advocate.[34]

This does not mean that the convening authority should not have the power to remit, mitigate, or suspend all or a portion of the sentence immediately after it has been adjudged. Such power is properly his and should be utilized in appropriate cases. Nevertheless, there is no necessity for embroiling his exercise of it with a useless, time consuming review which he is not qualified to make in the first place.

If one looks at special courts-martial procedures in their entirety and considers that these courts, in the Army at least, can adjudge no more than a six months' sentence, it becomes evident that the final result does not justify the time and effort expended. If the risk of error and the possibility of corrective action are added to the scale, the imbalance becomes more striking. Clearly, these courts are no longer a tool of the commander; they are a millstone around his neck.

VI. A SOLUTION

Several bills designed to change the structure and procedures of inferior courts-martial are now pending before Congress. Although these bills are not compatible with each other, each would require substantial amendments to the Manual for Courts-Martial, or more probably the publication of an entirely new Manual. Because of this and the uncertainties inherent in the legislative processes, it is impossible to predict the practical effect of the proposed changes. Therefore, the bills have not been considered in this treatise. An effort has been made to provide a basis for an informed and objective evaluation of them.

Initially it must be recognized that the adversary concept together with the usual rules of criminal procedure have been permanently engrafted upon the military code.[35] Secondly, the impact of the elaborate and cumbersome procedures of the past upon this concept must be appreciated. As the paternalistic and adversary system are fundamentally different and in opposition, the attempt to combine them has resulted in a staggering duplication of effort and inefficiency on a grand scale. If a reasonably effective system of inferior courts-martial is to be established, the incongruous vestiges of the paternalistic system must be ruthlessly abolished. These vestiges include the multi-member court, and the historic

[34] Arts. 65*c*, 76, UCMJ; par. 94*a*, MCM, 1951.

[35] See United States Court of Military Appeals and The Judge Advocates General of the Armed Forces and The General Counsel of the Department of the Treasury, Annual Report (1957), p. 33.

responsibilities of the convening authority which were aimed at protecting the accused from the vagaries of the court-martial.

The entire Code and the implementing Manual for Courts-Martial must be redrafted to provide courts-martial capable of adhering to the ordinary rules of criminal procedure and making a rapid and efficient disposition of cases brought before them. Further patchwork upon the Articles of War of 1775 will lead only to additional complexity, if that be possible.

Specifically, permanent tribunals consisting of a legally qualified officer-judge with an adequate clerical staff must be created. Trained counsel must be provided to conduct trials before these tribunals. Cases involving petty offenses, misdemeanors,[36] or those cases tried upon a plea of guilty, should be heard by the officer-judge without regard to the desires of the accused. In other cases the accused should, if he so requests, be accorded the right to be tried before the officer-judge and a jury of at least three members.[37] However, the jury should be charged only with determining the guilt or innocence of the accused.[38]

The findings and sentences of the new courts should be final when adjudged and subject only to review by a designated judge advocate. The battle group commander or his counterpart should have no responsibility for the functioning of these courts or be required to take action on their findings or sentences.

VII. CONCLUSION

Admittedly, the proposed changes in the structure and procedures of courts-martial are revolutionary. To be deprived of the power to convene courts-martial is repugnant to many experienced commanders. These commanders will be supported by those

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[36] "Notwithstanding any Act of Congress to the contrary:
(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
(2) Any other offense is a misdemeanor.
(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."
18 U.S.C. 1.
The right of trial by jury does not apply to petty offenses. District of Columbia v. Clawans, 300 U.S. 617, 58 S. Ct. 660; Shick v. U. S., 195 U.S. 65, 24 S. Ct. 826.

[37] This is in accord with the Federal Rules of Criminal Procedure: ". . . . Columbia v. Clawans, 300 U.S. 617, 58 S. Ct. 660; Shick v. U. S. 195 U.S. waives a jury trial . . . ." (Rule 23.)

[38] Only a very few of the states of the United States now permit a jury to determine the sentence. In those states the practice is gnerally restricted to the more serious offenses.

who urge a return to the traditional processes of self-administered discipline.[39] However, the proponents of the latter view fail to recognize that a code and system of courts-martial designed for the armies of the past will not fulfill the needs of the Army of today.

Any body of laws which fails to keep pace with the advances in human knowledge and the growth of technology will eventually be supplanted. Although their abolition may be delayed by piecemeal modernizing amendments, it will not be prevented.

Further, history has demonstrated that measures for the control, discipline, and leadership of the soldier are based not only upon the needs of the army, but also upon the contemporary culture of the civilian community which supports that army. The more sophisticated the society, the more sophisticated will be its army, as well as the statutes and regulations for the government of that army. If a military code does not attain these standards it will be changed. Moreover, in the absence of informed leadership the nature of these changes may well be determined by persons completely unfamiliar with the needs of the service.

The U. S. Army has never had a really efficient inferior courts-martial structure. Nevertheless such courts are essential to the administration of military justice. It is now time to admit this deficiency and to develop a workable arrangement of inferior courts which will accord due recognition to the judicial concepts of the civilian community and at the same time make a significant contribution to the maintenance of discipline and economy of manpower within the Army.

[39] Winston, *Punitive Powers of Commanders in the United States Army* (A Student Individual Study submitted to the Army War College, 1957, AWC LOG 57-2-197); Wiener, *Soldiers Versus Lawyers*, Army, Nov 1958, p. 58.

BOOK REVIEW

EVIDENCE—*Special Text of The Judge Advocate General's School, U. S. Army, 1959.**

This treatise on the law of evidence, written by Major Robert F. Maguire[1] of the faculty of the Judge Advocate General's School of the United States Army, is published by the School and constitutes a unique and valuable contribution to the literature in this branch of the law. To evaluate fully the role played by this publication, it is desirable to bear in mind the status of the School by which the book has been issued. The Judge Advocate General's Corps of the Army, at Charlottesville, Virginia, is a law school for Army judge advocates. It is a graduate law school, perhaps the only law school in this country that has no undergraduate department, since all of its students are army officers who were admitted to the bar prior to the time at which they were commissioned. The curriculum of the School covers an amazingly wide range since in our contemporary world, with Army personnel being widely scattered, the ramifications of the legal problems with which they are confronted from time to time, both in domestic and foreign law, have been multiplied *ad infinitum*.

The present work is the first of a series of special texts planned for preparation and publication by the School to deal with the various facets of military justice. Since under the Uniform Code of Military Justice, the law officer of a General Court-Martial is practically clothed with the powers of a Federal judge, the law of evidence assumes an importance greater than it has had heretofore in military law, both for the law officer as well as for the prosecuting attorney and counsel for the defense. It is understood that the subject of Evidence as applied in courts-martial is taught as a separate course at the School. Many members of the bar who do not do litigated work have very little contact with the law of evidence after graduating from law school and yet when they enter military service in a legal capacity, it is essential that they acquire a thorough grasp of this topic if they are to be assigned to court-martial work.

Major Maguire's treatise is unique in its character and novel in its conception. It is a combination textbook and case book. It is planned and aranged in an exceedingly logical manner. It is sub-

* This book may be purchased by authorized personnel at the Bookstore of The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia.

[1] Subsequent to the time this article was written, Major Robert F. Maguire was promoted to the rank of Lieutenant Colonel, United States Army.

divided into chapters, each dealing with a special topic. The order of the topics unfolds the subject, step by step, in a clear lucid manner. The discussion of each topic is commenced by definitions, which may be said to constitute the textbook feature of this work. They are immediately followed by summaries of pertinent cases. In each instance, the salient facts and the rulings of the court are summarized, and, at times when it appears desirable, quotations from opinions are included. This may be said to form the case book aspect of the publication. In addition each chapter concludes with a series of practical hypothetical problems, that are a challenge to the student.

Each topic receives very thorough consideration. Two may be taken at random as illustrative. The troublesome subjects of confessions and of searches and seizures, that are all too frequently confronted in criminal trials, receive exhaustive treatment that will be exceedingly helpful both to counsel and to the law officer. Generally the law of evidence as applied in military tribunals is the same as that prevailing in the Federal courts. On some points, however, there are important differences. For example, the so-called McNabb and Mallory rules do not prevail in courts-martial. These differences are well pointed out by the author, as for instance on page 102.

While the book is intended primarily as a text to be used in connection with instruction given both to resident and extension students by the Judge Advocate General's School, its usefulness extends far beyond this modest scope. Without a doubt it will also prove valuable as a book of reference for law officers and counsel participating in trials, as well as the increasing number of lawyers whose activities bring them in contact with military law. It is to be hoped that copies will be distributed accordingly.

Since the book is intended primarily for the use of Army officers, of necessity decisions of the Court of Military Appeals preponderate among the cases that are digested in the book. Numerous decisions of the Supreme Court are likewise included, however, as well as some cases decided by United States Courts of Appeals. The book is preceded by an excellently detailed analytical table of contents, which is especially useful when the book is used for reference purposes. Its value from that standpoint might be still further enhanced if an exhaustive alphabetical index were added. Also, if another edition is to be issued at some future time, the insertion of more decisions of Federal courts may be desirable.

The book is multilithed and has a paper back. Its circulation would undoubtedly be increased if the School were in a position to issue it in a printed form with a hard binding. It is to be hoped

that this will be done because the publication is too valuable not to be distributed in a permanent form. Both Major Maguire and the School are to be highly commended for this valuable constructive contribution to the field of the law of evidence. Similar publications dealing with other aspects of military justice will be anticipated with pleasure.

Alexander Holtzoff**

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SUPPLEMENTARY NOTE TO PUNISHMENT OF THE GUILTY: THE RULES AND SOME OF THE PROBLEMS

Reference is made to the article, "Punishment of the Guilty: The Rules and some of the Problems" which appeared at p. 83, Military Law Review, DA Pamphlet 27–100–6; October 1959.

1. Footnotes 134 and 135 should read as follows:

134. United States v. Watkins, 2 USCMA 287, 8 CMR 87 (1953) (stating that this general rule may be contrary to prior service custom, and also stating that the qualification thereto does not prevent imposition forfeitures without confinement when such forfeitures are authorized as regular rather than additional punishment); United States v. Prescott, 2 USCMA 122, 6 CMR 122 (1952).

135. Par. 127*c*, Sec. B, MCM, 1951.

2. Footnote 155 and related text: Since publication of the original article the Comptroller General has decided the question whether an accused sentenced to one of the punishments as to which par. 126*e*, MCM, 1951, would effect reduction to the lowest enlisted grade is entitled by the ruling in the *Simpson* case to the pay for his present grade if he was not expressly reduced by the court-martial. The Comptroller General held that par. 126*e*, in spite of the *Simpson* holding, effects valid administrative reduction of the accused and he is entitled to no pay beyond that for the lowest enlisted grade. Thus, the Comptroller General flatly disagreed with the Court of Military Appeals. Ms. Comp. Gen. B–139988, 19 Aug 1959. The Comptroller General was influenced by the fact that the question also is before the Court of Claims in *Johnson* v. *United States*, C. Cls. Vo. 234–59, filed 28 May 1959. It was felt that the Manual provision should be observed pending the outcome of that case.

3. Section III, D, 5, p. 123–24, *Punishments Assessable upon Rehearing or New Trial:* The original article stated that there was an apparent intent by the Court of Military Appeals to limit the sentence upon rehearing to that to which it is reduced on *any* level of appellate review, although the Court had so held only as to reduction by the convening authority. Recent dicta strengthens this conclusion and diminishes logical arguments to the contrary. In *United States* v. *Jones*, 10 USCMA 532, 533, 28 CMR 98, 99, (1959), the Court stated:

> "In order that there be no further misunderstanding, we reassert the conclusion implicit in the holding in *Dean*, supra, that the maximum sentence which may be adjudged on any rehearing is limited to the lowest

> quantum of punishment approved by a convening authority, *board of review, or other authorized officer under the Code,* prior to the second trial, unless the reduction is expressly and solely predicated on an erroneous conclusion of law. . . . (Emphasis added.)

The emphasized statement, as in *Dean,* in dictum because the only issue was whether the sentence upon rehearing must be limited to that to which reduced by the convening authority. However, the dictum is a contribution to clarity since it expressly mentions that the rule is to apply to reductions by a board of review. No previous statement has been so explicit. *Accord, United States* v. *Skelton,* 10 USCMA 622, 28 CMR 188 (1959) (dictum).

By Order of *Wilber M. Brucker,* Secretary of the Army:

L. L. LEMNITZER,
General, United States Army,
Chief of Staff.

Official:

R. V. LEE,
Major General, United States Army,
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