

**MILITARY  
LAW  
REVIEW**



## PREFACE

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**MILITARY LAW REVIEW**

Page

**Articles:**

Some Problems of the Law of War in Limited Nuclear Warfare William V. O'Brien.....	1
A Survey of Worthless Check Offenses Major James E. Simon.....	29
The Hiss Act and Its Application to the Military Captain Lee M. McHughes.....	67
Recent Developments—Instructions on the Sentence Lieutenant Allan B. Adkins.....	109
The Measure of Equitable Adjustments for Change Orders under Fixed-Price Contracts Captain Gilbert J. Ginsburg.....	123

**Comments:**

Non-Discrimination in Employment: Executive Order 10925 (Captain Gilbert J. Ginsburg).....	141
---	-----

**Foreign Military Law Notes:**

The Military Legal Systems of Southeast Asia.....	151
I. Legal Organization in the Armed Forces of the Philippines Colonel Claro C. Gloria.....	151
II. The Military Legal System of the Republic of China Major General Lee Ping-chai.....	160
III. The Military Judicial System of Thailand Major General Samran Kantaprapha.....	171

**1961 Cumulative Index:**

Table of Leading Articles and Comments—Authors.....	183
Table of Leading Articles and Comments—Titles.....	184
Book Reviews.....	185
Subject Word Index.....	186

## SOME PROBLEMS OF THE LAW OF WAR IN LIMITED NUCLEAR WARFARE\*

BY WILLIAM V. O'BRIEN\*\*

### I. INTRODUCTION

For some years now the United States Army has been transforming itself into what it calls a "pentomic" army. Rejecting the notions that the atomic age has out-moded land armies and that all-out nuclear war must inevitably rank as our primary defense strategy, the Army has sought to develop fighting forces capable of operating under conditions of limited warfare, both nuclear and conventional. Thus, the Army has taken the lead in developing some of the limited war concepts which have been attracting attention in the fast-developing discipline of politico-military studies and in the emerging field of ethical-military studies.<sup>1</sup>

Students of the law of war, particularly those who are interested in investigating the possibilities for a realistic *jus in bellum*, have naturally been following these developments with great interest. The key to legal limitations of warfare would appear to lie in the concept of rational, controlled warfare. All-out nuclear war, particularly since the appearance of the H-bomb, does not seem to be either a rational or a controlled means of war. Yet for some years it appeared that this kind of warfare was virtually the only kind which we could expect in a major conflict. The reaction that set in against the dominance of massive retaliation theories has been profound, as it has come from many sources—

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<sup>1</sup> The literature on defense doctrine is so enormous that any selective listing is necessarily unfair. Among the most prominent products of this literature are: Kissinger, *Nuclear Weapons and Foreign Policy* (1957); Osgood, *Limited War: The Challenge to American Strategy* (1957); Brodie, *Strategy in the Missile Age* (1959). See U. S. Dep't of Army, Pamphlet No. 20-60, *Bibliography on Limited War* (1958); Baldwin, *Limited War*, in *American Strategy for the Nuclear Age* 249 (Hahn and Neff eds. 1960), hereinafter cited as Hahn & Neff, *American Strategy*. For a select bibliography on ethical aspects of modern war, see Brown, *Morality and Nuclear Warfare*, in *Morality and Modern Warfare—The State of the Question* (Nagle ed. 1960).

## MILITARY LAW REVIEW

from intellectuals, moralists, and from professional military men. As a result of this reaction there has been a continuing debate over the feasibility of various alternatives to all-out nuclear war, ranging from graduated deterrent through limited nuclear war to limited conventional war. Recently the prevailing trend has been towards stabilization of deterrents, arms control, and limited war with each being an indispensable part of a system of controlled warfare. This study will not concern itself with strategic use of nuclear weapons. Naturally, the presence of those weapons and their deterrent effect must be kept in mind at all times when one is considering limited war, whether conventional or nuclear.<sup>2</sup>

It is fair to say that no-one feels particularly secure in his own favorite defense philosophy. There are serious weaknesses and flaws in all of them. But, caught in the supposed "fearful choice" between unlimited nuclear war and submission to Communist imperialism, reflective men have been driven to the task of finding alternative defense policies limited by morality and common sense yet sufficient to our defense needs. It is not putting the matter too strongly to say with Father John Courtney Murray, S. J. that the need for an efficacious limited war concept is a "moral imperative."<sup>3</sup> While the international lawyer may retain some doubts as to the validity of these alternative defense theories he can hardly avoid the feeling that his hopes for a revival of the laws of war hinge very largely on their success or failure in practice. With the development of the pentomic concept in the Army important steps have been taken to transfer the focus of discussion from pure theory to practice. Theories of limited war are translated into new organizations, strategies, tactics, logistics and, as will be shown, new problems as well as new hopes for a revived law of war.<sup>4</sup>

### II. THE LIMITED WARFARE CONCEPT

The pentomic concept, reduced to its essentials, merely reiterates classical principles in the context of strikingly new technical

<sup>2</sup> Cf. Daedalus—Special Issue, Arms Control, Fall, 1960 (Holton ed.). For a good short survey of the subject, see Hadley, *The Nation's Safety and Arms Control* (1949). The book contains a good working bibliography, *id.* at 143-160, and a helpful glossary of technical terms, *id.* at 137-141.

<sup>3</sup> Murray, *Morality and Modern War* 18 (1959).

<sup>4</sup> See the thoughtful article by Captain Gordon B. Baldwin, *A New Look at the Law of War: Limited War and Field Manual 27-10*, Mil. L. Rev., April 1959, p. 1. An interesting discussion of the interrelationships between limited war and Civil Affairs problems is presented in King, *Civil Affairs: The Future Prospects of a Military Responsibility*, in Judge Adv. Gen. School, U. S. Dep't of Army, *Civil Law, Selected Cases and Materials on the Legal Aspects of Civil Affairs* 139, 148-149 (1960). Cf. Jessup, *Political and Humanitarian Approaches to Limitation of Warfare*, 51 Am. J. Int'l L. 457 (1957).

## LIMITED NUCLEAR WARFARE

capabilities. These principles are summed up in the words: firepower, movement, and communications. "The development of atomic power has changed forever many of the techniques of war. In the field of firepower alone since World War II, changes have been dramatic and far-reaching."<sup>5</sup> Advances in aerial, ground and water transportation, as well as in communications techniques, promise rapid and controlled movement. This is fortunate since nuclear firepower imposes an extraordinary need for mobility and dispersion.<sup>6</sup>

The organizational and tactical result of the pentomic concept is the new basic fighting unit, the battle group. Pentomic warfare is summed up in this official description of the battle group in action:

The battle group is organized to fight under fluid conditions. This lean, powerful fighting machine is constantly moving, grouping, and fighting . . . .<sup>7</sup>

It should be noted that the structural characteristics of pentomic warfare are presently under scrutiny and will soon be altered. The principal change is likely to be the replacement of the pentomic division and battle group concepts with a more flexible division, which will resemble the present armored division with the three combat command headquarters. It is contemplated that brigades will be formed, these to vary in size according to the mission of the formation. The important point

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<sup>5</sup> U. S. Dep't of Army, Pamphlet No. 355-200-7, *A Sharper Sword and a Stronger Shield* 4 (1959).

<sup>6</sup> *Ibid*; *Fast Moving! Hard Hitting!*, Army Reservist, August 1957, p. 8; White, *An Interview with General Gavin*, Army Combat Forces Journal, March 1955, p. 20; Reinhardt & Kitner, *Atomic Weapons in Land Combat* (1953).

### "6. Scale of Atomic Warfare

"a. Atomic warfare may involve wide ranges of conditions dependent upon the number and yields of weapons employed. The employment of large numbers of weapons of all yields presents one set of conditions; whereas, small-yield weapons employed at infrequent intervals presents another set of conditions.

"b. Atomic warfare conditions are assumed to be the normal battlefield environment for armored division operations. Operations on the atomic battlefield, as contrasted with operations in the past, will be characterized by fewer troops within the forward portions of the combat zone in relation to the land area involved. This will result in greater fluidity of operations, less clearly defined lines of contact, and the necessity for increased reliance on the initiative and ability of subordinate commanders to react to unforeseeable situations. These conditions will be in direct relation to the number of atomic weapons available, the capability for their delivery, and their pattern of employment, with respect to both sides." U. S. Dep't of Army, *Field Manual No. 17-100, The Armored Division and Combat Command 4* (1958).

See Stewart, *Interaction of Firepower, Mobility, and Dispersion*, Military Review, March, 1960, pp. 26-33.

<sup>7</sup> U. S. Dep't of Army, Pamphlet No. 355-200-7, *op. cit. supra* note 5, at 5.

## MILITARY LAW REVIEW

is, however, that this reorganization will not alter the operational characteristics of the so-called pentomic warfare. Indeed, with the adoption of an armored organization, infantry tactics will probably tend increasingly to resemble armored tactics.<sup>8</sup>

Now certainly this concept opens up possibilities for a kind of warfare which would be eminently more desirable than the hydrogen slug-fest which we all dread. Whether it will work, whether it will be enough, we do not know. But to the extent that pentomic warfare does prove itself, the prospects improve for penetration into the anarchic areas of modern total war by the lawyer, the moralist, and the professional military exponent of rational warfare. It is the object of this study, therefore, to indicate some of the implications of pentomic operations for the law of war, both as it stands today and as it may develop in the future.

### III. SOME PROBLEMS OF THE LAW OF WAR IN LIMITED NUCLEAR OPERATIONS

Of the many questions relevant to the laws of war raised by analysis of pentomic operations, two broad areas appear to be particularly interesting and will be surveyed briefly here:

(1) Use of tactical nuclear weapons.

(2) Fulfillment of the requirements of the humanitarian laws of war under conditions of pentomic warfare against a totalitarian aggressor.

*Use of Tactical Nuclear Weapons*—FM 27-10 states that:

The use of explosive 'atomic weapons,' whether by air, sea, or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment.<sup>9</sup>

This statement has remained valid despite all of the agitation for the "outlawry" of nuclear weapons of recent years. It is supported by the views of most authorities, although, admittedly, the authorities have been very reluctant to face the question

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<sup>8</sup> 98 Army Navy Air Force Journal 733, 804 (1961).

<sup>9</sup> U. S. Dep't of Army, Field Manual No. 27-10, The Law of Land Warfare, para. 35 (1956).



squarely.<sup>10</sup> Indeed, even the rules purporting to regulate the use of gas are not beyond question, as has been shown, and the application by analogy of such rules to the revolutionary new nuclear means is as dubious in the realm of legal logic as it is in common sense.<sup>11</sup>

This does not mean, however, that in the absence of a rule prohibiting the use of nuclear weapons, belligerents are free to utilize nuclear means without restriction. The principle of legitimate military necessity, the basic principle of the law of war as well as the basis for the American concept of permissible violence, limits the use of nuclear weapons—as it does all means of warfare.<sup>12</sup>

Most studies of military necessity have emphasized the point that the legitimate, legally valid version of the concept requires that military exigencies be subordinated to the rules of the positive law

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<sup>10</sup> For a detailed analysis and a review of the authorities, see O'Brien, *Legitimate Military Necessity in Nuclear War*, 2 Institute of World Polity Yearbook 85, 82-100 (1960) (hereinafter cited as O'Brien, *Military Necessity in Nuclear War*).

Draper states: "As these Conventions have been framed after taking into account military requirements, there can be little excuse for disregarding their provisions or for being deterred from applying them in the actual conditions of war." Draper, *The Red Cross Conventions* 92 (1958).

Yet clearly the "military requirements" envisaged are those of the pre-atomic era, for he later states: "If the use of nuclear weapons be prohibited *per se*, or if they cannot be used without violating the customary rules of war or the Geneva Conventions, e.g., because their use means attacking the civilian population, or not protecting and respecting the sick and wounded, medical installations, and the aged and children placed in agreed safety zones, any proposal to use these weapons in the first resort against an aggressor who has not used them, stands condemned as an illegality as serious as, if not more serious than, the aggression. To suggest that the initial resort to nuclear weapons may be a valid exercise of reprisal against the admitted illegality of aggression is a wholly unwarranted extension of the meaning of the term 'reprisal,' and in any event admits the illegality of the use of nuclear weapons" *Id.* at 98-99.

If this view were accepted we have no problems of international law in nuclear pentomic warfare because such a mode of warfare is prohibited *per se*. This is not a view to which the writer can subscribe. Neither is it a view which can be substantiated by authoritative contemporary analyses of the legal status of nuclear weapons.

<sup>11</sup> Kelly, *Gas Warfare in International Law*, *Mil. L. Rev.*, July, 1960, p. 4.

<sup>12</sup> See O'Brien, *The Meaning of 'Military Necessity' in International Law*, 1 Institute of World Polity Yearbook 61 (1957) (hereinafter cited as O'Brien, *Military Necessity*); O'Brien, *Military Necessity in Nuclear War* 43-68; McDougal & Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 *Yale L.J.* 771, 778, 826-827 (1958); Tucker, *The Law of War and Neutrality at Sea* 33, 364, 368-369 (1957), in 50 *International Law Studies*, U. S. Naval War College (1957).

For the evolution of the concept in American doctrine, see U. S. War

## MILITARY LAW REVIEW

of war.<sup>13</sup> As the better contemporary analyses of the concept have recognized, however, this emphasis is misplaced in an age when the principal decisive means and institutions of war are utterly uncontrolled by effective positive law rules.<sup>14</sup> Thus it is misleading if not hypocritical to boast that the "American" definition of military necessity is superior to the badly mauled "German" concept of *Kriegsraison* because the former honors the legal rules which the latter would flaunt. If the preferred definition of military necessity means only that a belligerent is bound to observe all clear-cut rules of positive international law there is relatively little limitation involved. We are free to engage in everything from unrestricted submarine warfare to obliteration bombing, "conventional" or nuclear, without breaking any

Dep't, Instructions for the Government of Armies of the United States in the Field, Gen. Orders No. 100, art. 14-16 (April 24, 1863), in U. S. Naval War College, *International Law Discussions* 18 (1904), and in 7 Moore, *Digest of International Law* 177 (1906); 3 Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 1801 (1945); and discussion in O'Brien, *Military Necessity* 128-131 and *Military Necessity in Nuclear War* 43-46. See also Civil Law, *Selected Cases and Materials on the Legal Aspects of Civil Affairs*, *op. cit. supra* note 4, at 72-80.

<sup>13</sup> *E.g.*, Downey, *The Law of War and Military Necessity*, 47 *Am. J. Int'l L.* 251 (1953). See O'Brien, *Military Necessity*, and *Military Necessity in Nuclear War* at 58.

<sup>14</sup> McDougal & Feliciano, *op. cit. supra* note 12, are the most positive on this point which is also seen by Tucker, *op. cit. supra* note 12, and Dunbar, *Military Necessity in War Crimes*, 29 *Brit. Yb. Int'l L.* 442, 443-444 (1952), and, *The Significance of Military Necessity in the Law of War*, 67 *Jurid. Rev.* 201 (1955).

"laws."<sup>15</sup> But the true concept of legitimate military necessity goes deeper than this. Underlying the whole concept of permissible violence, of legally and morally limited war, and underlying those rules which do exist in the law of war, is the fundamental idea of proportionality between military means and legitimate military ends.<sup>16</sup> The rules of war are but concrete formulations of the principle of proportionality with respect to a particular weapon, institution, or situation. But the failure of the law of war to produce such a rule does not mean that the principle is inoperative. It means, rather, that the conscientious belligerent is going to have to seek the answer to the question, "Is this proportionate, is this permitted by the principle of legitimate military necessity?" without the benefit of a pre-existing norm in the form of a rule of positive law.<sup>17</sup>

If, therefore, we have no specific legal rules governing the use of nuclear weapons, the relevant question is not, "Is the use of this weapon 'against the law'?" but, rather, "Is the use of this weapon in a particular situation in consonance with the principle of legitimate military necessity?" Reduced to its essence this question may be phrased, "In this situation, is this particular means proportionate to a legitimate military end?"

Consequently, the great need in the development of the law of war is for concrete case studies of belligerent actions. These studies can take the form of normative critiques of historic military actions, of war crimes proceedings, or of hypothetical situations. With respect to the latter hypothetical situations, the armed services can make a real contribution to the law of war

<sup>15</sup> See Barnes, *Submarine Warfare and International Law*, 2 Institute of World Polity Yearbook 121 (1960); Greenspan, *The Modern Law of Land Warfare* 351-353 (1959); Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision*, 45 Am. J. Int'l L. 37 (1951); O'Brien, *Military Necessity in Nuclear War* 82-99.

<sup>16</sup> See Huber, *Quelques considerations sur une revision eventuelle des Conventions de la Haye relatives a la guerre*, 37 Rev. int. de la Croix-Rouge 417, 422 (1955); McDougal & Feliciano, *op. cit. supra* note 12; Weiden, *Necessity in International Law*, 24 Transact. Grot. Soc'y 113 (1959); O'Brien, *Military Necessity* 138-149 and *Military Necessity in Nuclear War* 48-57.

<sup>17</sup> This is recognized in Article 22 of the Fourth Hague Convention of 1907, Convention Respecting the Laws and Customs of War on Land, and Annex, October 18, 1907, 86 Stat. 2277, T. S. No. 539; and, in a somewhat vague and controversial fashion [see Schwarzenberger, *Legality of Nuclear Weapons* 12 (1958)] by the De Martens clauses in the Preambles to the Hague Conventions on the laws of war on land of 1899 and 1907 and to the Geneva Conventions of 1949. Even in the absence of specific rules of positive law, the parties are not to engage in acts contrary to the "usages of civilized peoples . . . the laws of humanity, and the dictates of the public conscience." See O'Brien, *Military Necessity in Nuclear War* 59-61.

## MILITARY LAW REVIEW

by interjecting legal and moral elements into the play of maneuvers and command post exercises. Through such exercises responsible commanders can begin to see the patterns of proportionality unfold. They can begin to get a concrete idea of the kinds of things which are permitted by legitimate military necessity and the kinds of things which a consensus of reasonable men would hold to be forbidden.

Such discussions may be directed to two kinds of problems, one strategic and the other tactical. In the first place, the overall strategic decision to employ pentomic, limited nuclear warfare in a given situation is subject to scrutiny on grounds of proportionality. Critics of some recent exercises and maneuvers have taken the view that the very idea of conducting limited nuclear war in a populated area is wrong. Conceding that such a strategy might be permissible and feasible in a desert or relatively unpopulated steppe, it is urged that the destruction wrought in any nuclear defense of a populated area would be *inherently* disproportionate. In any event, it is urged, the local populations and their governments would not permit such a strategy for long.

Now there are many serious arguments against any kind of strategy involving nuclear weapons. The strongest is probably that which questions the feasibility of holding the line between limited and unlimited nuclear warfare, the problem of escalation. Another telling argument is that which points out that there is no assurance that the enemy would be able to conduct a better "pentomic" war than we, that there need not necessarily be any advantage in preparing for limited nuclear war. These are questions which, obviously cannot be resolved here, any more than they have been resolved in authoritative defense literature.<sup>15</sup>

Moreover, it is no doubt unrealistic to discuss pentomic strategies in a major conflict without reference to the operations of the Strategic Air Command and the Navy. But the problem remains, nevertheless, of forming some impressions as to the feasibility and proportionality of limited nuclear warfare in areas which the United States is called upon to defend. And beyond this there rests the deeper question whether it is ever possible to "limit" the conduct of operations in a major war,

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<sup>15</sup> See Brodie, *op. cit. supra* note 1, at 261-262, 308, 310, 312, 321-329, 341, 349; Aron, *On War* (1948); Noel-Baker, *The Arms Race* (1958); Osgood, *NATO: Problems of Security and Collaboration*, 54 *Am. Pol. Sci. Rev.* 106, 107, 188, *et seq.* (1960); Collins, *The Other Side of the Atom*, *Army*, Nov. 1959, p. 18; O'Brien, *Military Necessity in Nuclear War* 82, and literature cited in n. 40 *infra*. See also Hahn & Neff, *American Strategy* 249-50, 258-67.

## LIMITED NUCLEAR WARFARE

whether the whole concept of rational, controlled war has some chance of realization.

Without attempting a definitive analysis of this highly controversial question we may outline two factors that will enter into its resolutions: (1) the material characteristics of nuclear weapons and the technical possibility of limiting them; (2) the human factor; can we expect men to exercise the kind of discipline and control necessary for an effective limitation of nuclear war?

The decisive point to be made in regard to the characteristics of nuclear weapons is that there is a very broad spectrum of such weapons. It is fatally inaccurate to lump them all together generically, ascribing, in the process, the characteristics of the most potent to all. There are many distinctions that must be made, but the most fundamental is that between kiloton and megaton weapons. Aside from the great difference between these categories insofar as initial explosion is concerned, there is the crucial difference with respect to radioactive fall-out. Kiloton weapons produce at the worst a fall-out which embraces a city such as Hiroshima and which does not persist indefinitely. Megaton devices produce fall-out that embraces to varying degrees the whole globe and which persists for many years. Kiloton weapons, then, threaten only the general localities in which they are used and for a restricted period of time. (Even so, they are terribly destructive weapons.) Megaton weapons threaten to some extent the whole world and to a considerable extent areas as large as continents. Moreover, the persistence of megaton fall-out is infinitely greater. Finally, this persistence produces the central problem of cumulative fall-out, so that the effect of a megaton weapon must be calculated in the context of the number of other megaton devices being used.

Now limited warfare involves the use of relatively "clean," low-yield kiloton weapons which, while infinitely more effective than conventional means, do not raise as serious a fall-out problem as do the high-yield "dirty" nuclear weapons. At worst tactical nuclear weapons produce radioactive contamination for a limited period within a relatively small area. They do not threaten anything like the wide-spread, indiscriminate destruction that may be expected from megaton explosions.<sup>19</sup>

But, granting that a reasonably proportionate pentomic, limited nuclear war is technically possible, is it *humanly* possible? Critics

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<sup>19</sup> On the characteristics of nuclear weapons, see U. S. Dep't of Defense, *The Effects of Nuclear Weapons* (1957); U. S. Dep't of Army, Pamphlet No. 39-1, *Nuclear Weapons Employment* (1959); U. S. Dep't of Army, *Field Manual No. 20-41, Soldier's Handbook for Nuclear Biological and Chemical Warfare* (1958).

## MILITARY LAW REVIEW

of limited war theories in general and limited nuclear war theories in particular have contended that the delicate limited war theories of theorists such as Kissinger will not hold up under the conditions of battle with all of its human and organizational limitations. In the confusion of combat, it is asserted, fine-drawn distinctions will vanish, and the commander will use all available means without restraint in order to achieve the most complete "victory" possible.

It need hardly be observed that this argument poses a most serious threat to the whole idea of legal limitation of warfare. In its pessimism it virtually repeats the extreme *Kriegsraison* doctrine of potentially unlimited military necessity, the very doctrine which is supposed to have been buried several times over—politically, legally, and militarily.

As the United States Army has experimented in pentomic tactics, it has become more and more evident that this problem of human control can be solved. The reason for this is that nuclear weapons, particularly the more potent devices, are not distributed like hand grenades to be used at will. Their use is rather closely controlled. Military and technical considerations do not permit tactical commanders to use nuclear devices as they please. Through the use of institutions such as the Field Army Tactical Operations Center (FATOC) a considerable control may be exercised over the use of tactical nuclear weapons. Scientific selection of nuclear targets and the utmost in rational control over nuclear attacks are objectives which the Army has pursued from the beginning of its experiments in pentomic theory and practice. It may well be that this element of control will provide the starting part for normal limitations on tactical nuclear warfare.<sup>20</sup>

The decision-makers in a FATOC control center consider many factors before they authorize a nuclear attack. The tactical commander is not simply given whatever he wants, when he wants it. He is permitted to utilize nuclear means when the overall picture justifies it.

<sup>20</sup> The FATOC is discussed briefly in *Second Army Reservists in Trapline III*, Army Reservist, October 1959, p. 10; and, by General George W. Read, Jr., U.S. Army, Commander, 2d United States Army, quoted in *Second Army Sentinel*, September 10, 1959, p. 3, cols. 3-5. Some indication of the growth of the complex techniques of nuclear target selection may be seen in U.S. Dep't of Army, Pamphlet No. 39-1, *op. cit. supra* note 19; Hemingway, *A Battalion Commander's Viewpoint of a Suitable Atomic Target, A Further Discussion of Mobile Defense*, Army Reservist, February 1957, p. 12; Mataxis, *Target Analysis With the ADT*, Army, February 1959, p. 74; Kirkpatrick, *Command Aspects in the Tactical Employment of Atomic Weapons*, Military Review, November 1956, p. 15; Hubbard, *The Staff and Modern War*, Military Review, February 1960, pp. 53-69.

## LIMITED NUCLEAR WARFARE

Now there is no reason whatever why those who weigh the conflicting factors involved in a decision to detonate a nuclear device may not consider factors of a moral, political or legal nature. To be concrete, it has been the practice in some recent exercises to include a Civil Affairs, G-5 representative in FATOC and other similar control centers. The skeptical would be surprised how rapidly the whole psychology of the target selection process can change when there is a man present representing civilian interests. Moreover, an effective G-5 can bring strong pressure to bear on a commanding general when he demonstrates that target selection policies are having a ruinous effect on the civilian situation. On the purely practical level there is increasing recognition of the fact that normally friendly or passive civilians can become a serious military problem when they are exposed to reckless policies that destroy their lives, their property and their morale. What is even more serious, the same problem can arise even when the military decisions are comparatively conservative and defensible. In either case, it seems that the civil affairs personnel are placed in a position where they will have the best understanding of this "factor" of "target selection." Incidentally, it does not appear that civil affairs has been formally or consciously given the function of limiting pentomic war. Rather this function has developed spontaneously.

There is another important limiting factor which would presumably operate in most conflicts in which the United States Army is likely to participate. Most modern wars and foreseeable future wars are coalition wars, fought either under the control of an alliance or an international organization. In such wars pure military utility must often bow to political and legal requirements. We seem finally to be learning the lesson that wars are not fought for the sake of destruction nor even, necessarily, for "victory" but for the important political objectives which are frequently shared with other nations. As in Korea, the purely military estimates of the field commanders must be tempered by the requirements of higher politico-military policy. Is it not evident that there is an unparalleled opportunity to interject normative limitations on the conduct of war through higher policy with the result that even the decisions of the battlefield, where martial emotions and ephemeral military utility are supposed to reign supreme, may be influenced? <sup>21</sup>

<sup>21</sup> See Craig, *Germany and NATO: The Rearmament Debates, 1950-1958*, in *NATO and American Security* 240 (Knorr ed. 1959); Gale, *The Art of Command in the Nuclear Age*, *Journal of the Royal United Service Institute* (Great Britain), August 1956, digested in *Military Review*, July 1957, pp. 73-78.

## MILITARY LAW REVIEW

There exist, then, national and international organizational devices which may be able to control the human side of the otherwise technical problem of limiting nuclear war. But, the task is extremely difficult. Let us consider an example which, while hypothetical, would seem to be typical of the kind of dilemmas which will face pentomic commanders.

As we have said, the essence of pentomic warfare is heavy fire (presumably including nuclear fire), rapid movement, controlled by superior communications. It resembles but far surpasses the Panzer tactics of World War II. In such operations the risks are greater and the stakes in an individual engagement tend to be higher than is the case in the more plodding type of warfare that characterized World War II and the Korean War in the intervals between "breakthroughs." A single example of a typical situation in a limited nuclear war presents the potential problems in all of their complexity.

*A Pentomic Legal and Moral Dilemma*—American forces are conducting a fighting withdrawal; maneuvering so as to draw the advancing aggressor forces into a position where his concentration coupled with the terrain features of the area will make him vulnerable to a tactical nuclear attack. Needless to say, the aggressor is striving to avoid placing himself in such a position, just as are the Americans. Moreover, there is a particular urgency in the American efforts to place the aggressor's forces in positions of nuclear vulnerability since this tactic is the principal means of countering the aggressor's overall superiority in resources and initiative.

At a critical moment, when the aggressor's offensive momentum is at its zenith, American forces find a sizeable enemy troop concentration in a position which offers an excellent target for a tactical nuclear device. It is decided to launch the device in fifteen minutes. In recognition of the serious politico-military interests already called to their attention by the civil affairs representative, FATOC asks whether there would be any serious objection to a nuclear attack. A check of the civil affairs situation map reveals that there are 15,000 refugees concentrated immediately within the proposed target area. These refugees are following the evacuation instructions and the civilian evacuation routes prescribed by military planning in conjunction with the civil authorities.

Should the nuclear device be launched, thus capitalizing on the enemy's predicament and bringing to fruition the arduous and dangerous process whereby the American forces have maneuvered him into it? On the other hand, should the opportunity for this tactically and perhaps strategically decisive nuclear blow be



## LIMITED NUCLEAR WARFARE

voluntarily renounced in order to save fifteen thousand civilians? It is in the face of such questions that high-flown theory is compelled to come down to earth!

The nuclear device is launched. From the military point of view and, in the writer's opinion, from the standpoint of legitimate military necessity and proportionality, the decision is correct, albeit unpleasant. On the other hand, the implications of this act for civilian morale and for the attitude of civilian governmental leaders obviously are considerable. Indeed, the civilian government will probably react with strenuous protests against this and other less extreme decisions of "military necessity." The result is a kind of dialectic between arguments of a purely military character and arguments of a purely civilian, humanitarian nature. The result is this: The military view prevails in this instance, but there is the further result that a somewhat altered military view emerges. In that altered military attitude there is an increased awareness of the political, humanitarian and normative considerations limiting pure military utility. These considerations could still be overcome by sufficiently convincing military needs but only if the military argument meets the test of real "necessity."

Thus, if we altered some of the elements of the situation just described, were the enemy forces sufficiently dispersed so that nuclear attack would not be seriously crippling, it would seem that a decision to inflict only moderate injury upon them at the expense of 15,000 civilians would not be proportionate and hence not in consonance with the principle of legitimate military necessity. Moreover, the question of proportionality may be carried beyond the immediate tactical context. It may well be that the decision described is justified by military necessity. But suppose that there were fifty or a hundred such decisions with similar consequences for civilian lives and morale. The pressures brought to bear on a commander by the civilian government might well be such as to threaten a situation wherein a purely military decision might provide the straw which broke the camel's back and drove an ally out of the war one way or another. Thus it is clear that military measures which might be perfectly legitimate in themselves would have to be forbidden because of their ultimate implications.

It is submitted, however, that this would not be an unprecedented development. Tactical commanders have seldom been able to do what they wanted to do, when they wanted to do it. Whatever the equities in the situations, a Patton may be stopped because of logistical difficulties. A Clark may have key units

## MILITARY LAW REVIEW

taken from his command just at the moment when he thinks that he needs them for a decisive victory. A MacArthur may be denied the right to attack enemies beyond an arbitrary line.

Indeed, it is worth emphasizing that the whole idea of the supremacy of a utilitarian reading of "military necessity" is a myth that is discredited by military history. Wars have always been limited by capabilities and policies. The problem of legal limitation of means of warfare must be viewed in this light. The key to such limitation is the chain of command. One cannot expect the battle group or other tactical commander, directing the rapidly moving pentomic unit, to weigh carefully the decision to drop a nuclear device in an area filled with civilians, although he has a duty not to ignore their presence.<sup>22</sup> We can, however, expect that corps, army and higher headquarters will, first, have given some thought to these problems before operations began and, second, be constantly alert to the legal, moral, and political ramifications of the policies carried out within their commands.

This is a staggering responsibility. It is a responsibility so great that it may be said that limited nuclear war cannot be successfully waged unless it is met. The commander needs a great deal of help in meeting this responsibility, and the experience of recent maneuvers and exercises would seem to show that, without any particular antecedent intention on anyone's part, it has fallen to the civil affairs personnel, and particularly to the G-5 at all levels, to take the lead in giving the commander that help. The challenge to the Civil Affairs Branch is tremendous. The prevailing idea that the primary function of civil affairs is to help keep irritating civilians out from under foot during combat and to set up minimal governmental facilities after combat is decidedly incomplete. To those functions must be added another: advising the commander as to the civilian implications of military decisions. This involves friendly and unfriendly civilian populations and governments, as well as neutral populations and governments. Thus it is perfectly possible that the G-5 of a theater headquarters may have to warn his commander that a given military decision may badly prejudice the continued support of an allied government and people. He may even have to brief the commander on the possible repercussions of military decisions on a wavering neutral.

In any event, the experience of recent exercises encourages the belief that the United States Army can adapt itself to the concept of limited war, including limited nuclear war. If this

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<sup>22</sup> See Baldwin, *op. cit. supra* note 4, at 21-25.

judgment is valid there is no reason why the normative test of reasonable proportionality cannot be met by limited warfare. We now turn to the implications of limited war for the considerable corpus of humanitarian laws of war.

#### IV. HUMANITARIAN LAWS OF WAR IN LIMITED NUCLEAR OPERATIONS

Presumably the most comprehensive and up-to-date part of the law of war is that found in the Geneva Conventions of 1949.<sup>23</sup> Whereas limitation of means of injuring the enemy must largely be deduced from general principles, the rules governing the treatment of sick and wounded, prisoners of war, and civilians in occupied areas are specific and detailed. However, it is submitted, implementation of the Geneva rules, as well as of earlier conventional and customary humanitarian rules, may prove to be quite difficult in pentomic operations. This is so because the Geneva Conventions and their predecessors appear to have been drafted on the tacit assumption that future wars would share the general characteristics of past wars.

More than once in recent years we have suffered from the fact that the conventional laws of war assumed material circumstances which no longer existed. For example, as the late Professor Feilchenfeld pointed out early in the Second World War, the Hague Rules of 1907 relating to belligerent occupation<sup>24</sup> were based upon the political, economic, social, and legal concepts of 19th century liberalism, concepts which had largely lost their influence by 1939.<sup>25</sup> In the Korean Conflict it was discovered that the centuries-old assumption that prisoners of war are "out of the fight" and that all prisoners of war want to be repatriated can no longer be counted upon in wars with Communist powers.

<sup>23</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 [1956], 6 U.S.T. & O.I.A. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (hereinafter cited as GWS); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 [1956], 6 U.S.T. & O.I.A. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (hereinafter cited as GWS Sea); Convention Relative to the Treatment of Prisoners of War, August 12, 1949 [1956], 6 U.S.T. & O.I.A. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (hereinafter cited as GPW); Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 [1956], 6 U.S.T. & O.I.A. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (hereinafter cited as GC).

<sup>24</sup> Convention Respecting the Laws and Customs of War on Land, and Annex, October 18, 1907, 36 Stat. 2277, T.S. No. 539.

<sup>25</sup> Feilchenfeld, *The International Economic Law of Belligerent Occupation* 17-29 (1942).

## MILITARY LAW REVIEW

A somewhat similar difficulty is encountered in attempting to apply the Geneva Conventions of 1949 and earlier conventional and customary rules to pentomic operations. The whole idea of responsibility for humanitarian activities seems to be based implicitly on the assumption that, in most situations, there will be a "front" and a "rear" in the traditional sense. For example, the International Committee of the Red Cross commentary on the conventions talks about the duty of a besieging power to "permit the passage *between the lines* of enemy personnel of the same nationality as the wounded requiring attention."<sup>26</sup> (Emphasis added.)

It is further assumed that there will be a party to the conventions in actual control of any given area. While the earlier Hague Rules on belligerent occupation acknowledged the possibility of a situation wherein there would be no firm control by any responsible belligerent,<sup>27</sup> it seems to have been the feeling that such situations would be the exception and that a fluid military situation would be regularized before long as a result of one belligerent's achievement of effective control. But it should be evident that there is little prospect in modern warfare of anything approaching a linear "front", even in the sense of the word as employed in the more fluid situations of World War II. The experiences of Montgomery in the desert or of Patton breaking out across France are relevant but not identical. These commanders were not faced with a type of warfare in which any protracted concentration would probably produce the crushing blows of tactical nuclear attack.<sup>28</sup>

Moreover, the framers of the Geneva Convention appear to have avoided almost entirely the question of nuclear warfare and its impact upon the law of war. There is considerable concern about bringing the law of war up to date, to make it realistic so as to meet the challenge of modern total war. But it is quite

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<sup>26</sup> International Committee of the Red Cross, Commentary, I Geneva Convention 157 (Pictet ed. 1952) (hereinafter cited "*Pictet, Commentary*").

<sup>27</sup> Convention Respecting the Laws and Customs of War on Land, *supra* note 24, art. 42.

<sup>28</sup> "The battlefield is no longer on a front a few miles in depth. The front may extend backwards 200 miles or more." Address by Col. Charles H. Kraus, 12th Annual Conference of the Military Government Association, June 13, 1958. See Howze, *Combat Tactics for Tomorrow's Army*, Army, October 1957, p. 24.

clear that the "total war" envisaged is World War II.<sup>29</sup> There is, therefore, no anticipation of nuclear pentomic warfare and it is questionable whether there was adequate anticipation of non-nuclear pentomic warfare.<sup>30</sup>

If the pentomic army follows the latest Army doctrine, it will be constantly shifting position, constantly on the move, forever maneuvering to land the nuclear "knock-out" blow while at the same time seeking to avoid the presentation of a nuclear target to the enemy. There is good reason to believe that this kind of rapid movement will also be characteristic of non-nuclear tactics. Obviously it will be difficult under these conditions to carry out the legal duties imposed upon a belligerent by the humanitarian laws of war. Let us consider three parts of the humanitarian law of war which will be affected by pentomic practices: treatment of the sick and wounded, the prisoner of war *regime*, and protection of civilians in occupied areas.

*Sick and Wounded*—Article 12 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in

<sup>29</sup> Pictet, *Commentary I* at 16, 151, 196, 198; *Commentary III* at 10; *Commentary IV* at 147. Typically, we find this statement in the proceedings of the Geneva Conference of 1949: "Those methods and conditions [of transferring POW's] have been defined in the light of the experience acquired during the late war." Remarks of Mr. Baistrocchi (Italy), 15th Plenary Meeting, Prisoners of War, July 27, 1949, Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, § B. There is a clear tendency at international conferences of this kind to define "modern war" in terms of the last great war, without too much regard to the potential problems of future wars. The following comment of a State Department official prior to the Geneva Convention of 1929 is revealing:

"With the World War methods of warfare changed considerably and the changed conditions resulting therefrom have considerably altered the problems which faced the framers of the Geneva and Hague Conventions, consequently though these conventions were helpful during the World War, their deficiencies and faults were apparent. . . ." Memorandum by Rollin R. Winslow, "What is the Conference," Dossier for the Members of the American Delegation to the Conference to be held at Geneva, July 1, 1929, for the purpose of Revising the Geneva Convention of July 6, 1906, and to Frame a Code for Prisoners of War. U.S. Dep't of State, June 14, 1929 (Mimeographed).

<sup>30</sup> ". . . [T]he four conventions deal almost exclusively with those aspects of warfare in which conditions are somewhat *stabilized*—with hospitals, with POW camps, with internment camps, with occupied territory. The conventions impose no limitations on the types of weapons used. They speak but little of combat and when they do, their injunctions are such obvious ones as not to make civilian hospitals the object of attack." (Emphasis added.) Remarks by Wilber M. Brucker, Gen. Counsel, Dep't of Defense, June 3, 1955, in *Hearings Before the Senate Committee on Foreign Relations on the Geneva Convention for the Protection of War Victims*, 82d Cong., 1st Sess. (1955).

"It may be suggested that the 1949 Convention is too elaborate, and that many of its detailed requirements will prove impossible of execution in modern war." Opinion of State Department Legal Advisor, on file in State Dept. Library (undated).

## MILITARY LAW REVIEW

Armed Forces in the Field of 12 August 1949<sup>31</sup> requires that the wounded and sick members of an enemy force "shall be respected and protected in all circumstances. . . . They shall be treated humanely and cared for by the Party to the conflict in whose power they may be . . . they shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created."

Article 15 of the same convention requires that, "At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled." The article goes on to suggest local armistices and other arrangements to permit alleviation of the sufferings of the sick and wounded.

Article 17 places upon belligerents the duty of burying or cremating the dead.

Clearly the conditions of pentomic warfare render these duties difficult to perform. The comparative absence of "lulls" in the pentomic battle, the lack of periods of protracted disposition of troops in fixed linear positions, and the contaminated condition of nuclear battle fields will complicate the problems of collecting and caring for the sick and wounded and of burying the dead. Even more serious, the need for rapid and frequent movement may necessitate abandonment of sick and wounded personnel of both sides. The remarkable advances in evacuation techniques may, of course, alleviate this problem somewhat. But the absence of secure, fixed fronts will surely affect the whole organization and administration of medical operations in combat.<sup>32</sup>

<sup>31</sup> Note 23 *supra*.

<sup>32</sup> U.S. Dep't of Army, Pamphlet No. 8-11, Handbook of Atomic Weapons for Medical Officers (1951) states: "At the present time, there is no specific therapy medication to be given to patients suffering from exposure to lethal or near lethal doses of ionizing radiation." The pamphlet also discusses the use of "film badges" as a "method of detection and measurement" of ionizing radiation. *Id.* at p. 250. Medical personnel would presumably be able to detect those suffering from "lethal or near lethal doses" by checking their film badges. See Office of The Adj. Gen., U.S. Dep't of Army, Technical Bulletin Medical 246—Early Medical Management of Mass Casualties in Nuclear Warfare (1955).

Col. Henry S. Parker says that "The remaining patients, those with burns and ionizing radiation effects, do not pose the immediate requirement for aid that the wounded do." *The Medical Service of the Field Army and Atomic Warfare*, Military Review, Oct. 1956, at p. 20.

See the penetrating analysis of this problem by Lt. Col. Caplehorn (Australian Army) in *The Effects of Atomic Weapons on Military Operations*, Military Review, Jan. 1956, pp. 82-91; by Lt. Col. Fridgen, *Radiological Monitoring*, Military Review, Aug. 1960, pp. 26-35; and by Major Storm, *Psychological Effects of Mass Casualties*, Military Review, Sept. 1960, pp. 54-58.

## LIMITED NUCLEAR WARFARE

Fortunately; potential solutions to these problems are contained in the law itself, both customary and conventional. Drawing on earlier practice, the Geneva Convention provides three possible solutions:

(1) Leave your own medical and other personnel behind with the sick and wounded.<sup>83</sup>

"The following articles provide for leaving medical personnel behind with the sick and wounded:

GWS, art. 12: ". . . The Party to the conflict which is compelled to abandon wounded or sick to the enemy shall, as far as military considerations permit, leave with them a part of its medical personnel and material to assist in their care."

GWS, art. 19: "Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict. Should they fall into the hands of the adverse Party, their personnel shall be free to pursue their duties, as long as the capturing Power has not itself ensured the necessary care of the wounded and sick found in such establishments and units.

"The responsible authorities shall ensure that the said medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety."

GWS, art. 24: "Medical personnel exclusively engaged in the search for, or the collection, transportation or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances."

GWS, art. 25: "Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick shall likewise be respected and protected if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands."

GWS, art. 28: "Personnel designated in Articles 24 and 26 who fall into the hands of the adverse Party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require.

"Personnel thus retained shall not be deemed prisoners of war. Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949. Within the framework of the military laws and regulations of the Detaining Power, and under the authority of its competent service, they shall continue to carry out, in accordance with their professional ethics, their medical and spiritual duties on behalf of prisoners of war, preferably those of the armed forces to which they themselves belong. They shall further enjoy the following facilities for carrying out their medical or spiritual duties.

"[Their facilities include: right to visit POW's in units outside of their camp, right to administer themselves under the overall supervision of camp authorities, right not to be employed in any capacity except their medical or religious capacity.]

"During hostilities the Parties to the conflict shall make arrangements for relieving where possible retained personnel, and shall settle the procedure of such relief.

"None of the preceding provisions shall relieve the Detaining Power of the obligations imposed upon it with regard to the medical and spiritual

## MILITARY LAW REVIEW

(2) Enlist the aid of independent humanitarian organizations, such as the International Committee of the Red Cross, or of the organizations of neutral powers.<sup>84</sup>

(3) Enlist the aid of local civilians.<sup>85</sup>

It would seem that these provisions would be frequently applied in the ebb and flow of limited nuclear warfare. However, there is little reason for optimism with respect to an even graver problem. Medical Corps doctrine on battlefield treatment of victims of radiation has tended strongly in the direction of segregation and minimal, if any, care for "hopelessly" contaminated members of friendly forces. It can hardly be expected that the rights of enemy victims of radiation will merit greater consideration in such circumstances. Thus two problems are combined to produce a potentially overwhelming obstacle to execution of the Geneva regime. Radiation cases may well be so numerous among all contending formations as to make effective treatment impossible. But the slim chances of adequate medical assistance will be further reduced by the fact that medical personnel may be widely dispersed as a result of the pace and character of pentomic tactics and be themselves subject to heavy losses from nuclear strikes.<sup>86</sup>

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welfare of the prisoners of war."

GWS, art. 29: "Members of the personnel designated in Article 25 who have fallen into the hands of the enemy, shall be prisoners of war, but shall be employed on their medical duties in so far as the need arises."

Article 30 provides for the return of the personnel mentioned in Article 28 where their retention "is not indispensable," "as soon as a road is open for their return and military requirements permit." The article provides that although they "shall not be deemed prisoners of war" they shall have "at least" the benefits of POW's.

"GWS, arts. 3, 9, and 10 re independent humanitarian organizations; arts. 27 and 35 re neutral powers.

GWS, art. 18 provides: "The military authorities may appeal to the charity of the inhabitants voluntarily to collect and care for, under their direction, the wounded and sick, granting persons who have responded to this appeal the necessary protection and facilities. *Should the adverse Party take or retake control of the area, he shall likewise grant these persons the same protection and the same facilities.*" (Emphasis added.)

"GWS, art. 18 further provides: "The military authorities shall permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of whatever nationality. The civilian population shall respect these wounded and sick, and in particular abstain from offering them violence.

"No one may ever be molested or convicted for having nursed the wounded or sick.

"The provisions of the present Article do not relieve the occupying Power of its obligation to give both physical and moral care to the wounded and sick" (Emphasis added.)

Note, in the passages where emphasis has been added, the reliance upon the idea of responsibility resulting from control.

<sup>84</sup> See Caplehorn, *op. cit. supra* note 32; Milberg, *Atomic War Questions for Battle Commanders*, Army, Jan. 1959, p. 28.



## LIMITED NUCLEAR WARFARE

*Prisoners of War*—The Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949<sup>37</sup> places a number of legal duties upon the enemy Power which captures them. Among the duties which will become more difficult to perform in pentomic war the following are of particular interest:

(1) Article 13 states:

Prisoners of war must at all times be humanely treated. An unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention . . .

Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

(2) Article 15 says that, "The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health."

(3) Article 19, reflecting long-established customary law, provides:

Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger. (Emphasis added.)

Only those prisoners of war, who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone. (Emphasis added.)

Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone.

Article 20 then specifies the kind of care and security which the detaining power must provide during the evacuation of POW's. The Convention then goes on, as we know, to specify requirements for the maintenance of POW's once they are "out of danger."<sup>38</sup>

All of this proceeds, again, from the assumption that there is such a thing as a relatively clearly defined "combat zone" of "danger," beyond which are to be found areas which are "out of danger." But given the restless shifting of pentomic units, not to mention the problems of air-borne attacks and guerilla activity, it would seem necessary to move POW's very far to the "rear" to be "out of danger." Even then, of course, there is the possibility of strategic nuclear attack. Now it is clear that

<sup>37</sup> Note 23 *supra*.

<sup>38</sup> See the instructions implementing these rules in U.S. Dep't of Army, Pamphlet No. 20-151, Lectures on the Geneva Conventions of 1949, 4-7 (1958); U.S. Dep't of Army, Field Manual No. 19-40, Handling Prisoners of War 22 *et seq.* (1952).

## MILITARY LAW REVIEW

the spirit and the letter of the conventional rules leave ample room for exceptions when military conditions do not permit their implementation. But the problem persists and the prisoner of war may find that rendering oneself "*hors de combat*" may not be so simple a matter as raising one's hands. To complicate matters further, there is the problem of evacuating POW's through areas contaminated with radioactive fall-out.<sup>39</sup>

*Protection of Civilians in Occupied Zones*—The law of war, as well as civil affairs doctrine, has gone through a number of trying phases as a result of the fact that positive international law has addressed itself almost exclusively to belligerent occupation, whereas in practice military occupations take a great number of different forms. Professor Feilchenfeld probably touched the core of the matter, however, when he employed the *a fortiori* argument that civilians in occupied zones should not receive less legal protection after fighting has stopped than they had when

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<sup>39</sup> A sober estimate of these problems by the Provost Marshal General is of interest. Gen. Butchers says:

"At the outset I would like to say that the potentiality of nuclear weapons tend to cast a shadow over the value of historical analogy for the analysis of future warfare. However, regardless of this factor, in my judgment certain military fundamentals will continue to hold true. Firepower, mobility, communications, and well-trained men, employed in the proper combination at the decisive point of combat, remain the keys to success in battle. Further, these ingredients of victory must always be combined in proper proportion by professional judgment and with imaginative foresight.

" . . .

"From the foregoing, I hope that versatility will become one of our watchwords. Moreover, in considering how greater versatility is to be achieved, I trust that we will apply ourselves to the problem of overcoming obstacles to its attainment and of discarding methods and procedures which are no longer useful. We cannot hesitate to reject concepts which may have been valid in the past but which are no longer suitable on the modern battlefield—locating a straggler line behind the light artillery might be an example of this.

" . . .

"These considerations of the mobility essential to the combat soldier resolve themselves into four distinct but related components; the mobility of the individual; the mobility of the vehicles in which he is transported into combat; the mobility of the organization containing man and vehicle; and finally the over-all mobility of those major elements of the Army which must be responsive to the needs of strategic and tactical operations. We fit directly into three of these and have foreseeable missions in the other. What are we going to do about getting new missions?" Butchers, *The Keys to Success*, Military Police Journal, April, 1961, pp. 10-13.

A beginning at the development of doctrine adequate to the problems of handling POW's in pentomic warfare is to be found in the passages of U.S. Dept of Army, Field Manual No. 14-40, Handling Prisoners of War 31-35 (1952), dealing with armored operations.

combat was going on.<sup>40</sup> In other words, no matter what the nature of the occupation, the rules governing belligerent occupation provide the basic minimal legal standards, while at the same time suggesting the principal practical problem areas. In any event, there should be no question that friendly people in areas liberated or being defended by an ally should receive treatment comparable to that required for enemy populations.

A good deal has also been made of the distinction between the direct rule of "military government" and the indirect influence on public affairs connotated by the term "civil affairs."<sup>41</sup> There is an increasing recognition, however, that even military government means appointing civilians to operate a government under military supervision. The further, deeper point is that there is more to the art of government, military or otherwise, than giving direct orders. Respect for the governed and understanding of their basic economic and societal needs, as well as mastery of the techniques of governmental control, are the key to effective civil affairs operations. It must be emphasized that in these operations considerations of legal obligation merge with considerations of a moral and political, as well as a military nature. All in all, then, the technical legal status of an occupied area is probably not so important as the need to deal with problems which are common to all civilian populations in time of war.

As already noted, the humanitarian laws of war turn on the concept of control of the subject matter by a belligerent who thereby acquires a legal responsibility. This concept has been particularly vital in the law of belligerent occupation where the starting point is "effective occupation." Thus, Article 42 of the Hague Rules<sup>42</sup> states:

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

From the concept of effective occupation there developed the theory that, since the displaced sovereign was incapable of insuring the continuance of minimal governmental functions, the occupying power was obligated to provide a substitute government to the extent permitted by the military situation and the occupant's capabilities. The resultant law and military doctrine, as

<sup>40</sup> Feilchenfeld, *Status of Germany*, 1 *Institute of World Polity Yearbook* 224 (1957).

<sup>41</sup> See *Civil Law, Selected Cases and Materials on the Legal Aspects of Civil Affairs*, *op. cit. supra* note 4, ch. 2; Greenspan, *op. cit. supra* note 15, at 211-213.

<sup>42</sup> Note 24 *supra*.

## MILITARY LAW REVIEW

summarized in FM 27-10, acknowledged that "effective occupation" might not always be a matter of black and white but the prevailing assumption seems to be that an area will not usually remain outside of the effective control of some belligerent for a protracted period of time.<sup>43</sup>

This concept has already been somewhat upset by the development of guerilla and other irregular forms of warfare. FM 27-10 requires only that the occupying force be able to "make its authority felt" within a "reasonable time," and this is probably as good a general formula as can be devised.<sup>44</sup> But the ever-increasing effectiveness of irregular warfare has gnawed away at this doctrine, based as it is on the normal situation wherein attacking force A replaces displaced sovereign B. In situations such as that which existed in Yugoslavia in World War II, B (the displaced sovereign) was out and A (Germany) should have been in effective control of the whole country. In fact, the extensive activities of Tito and other partisan leaders, as well as various categories of would-be German allies resulted in a situation wherein "A's" effective control was disputed by C, D, E, and by dissident groups which could be called C', D', and E'. To the "question of fact" as to who controls an area from which the original sovereign has been driven, one must often answer that it depended upon what part of the country you are discussing and what month, day, or hour you are talking about.<sup>45</sup>

Of course, there have always been "no man's lands," but in modern irregular war some such terms as "areas of anarchy" would appear to be more appropriate. Shifting to the problem of applying the laws of belligerent occupation in pentomic warfare, a problem of comparable magnitude presents itself.

The concept of seeking to destroy the enemy forces without

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<sup>43</sup> See U.S. Dep't of Army, Field Manual No. 27-10, *op. cit. supra* note 9, paras. 352-353, 355-356, 360-361; 8 Hyde, *op. cit. supra* note 12, at 1876-82; Von Glahn, *Occupation of Enemy Territory* 29 (1957); Stone, *Legal Controls of International Conflict* 694 (1954); Greenspan, *op. cit. supra* note 15, at 213-19; Civil Law, *Selected Cases and Materials on the Legal Aspects of Civil Affairs*, *op. cit. supra* note 4, at 218-20; Judge Adv. Gen. School, U.S. Dep't of Army, *Civil Affairs Military Government, Selected Cases and Materials* 30-31 (1958).

<sup>44</sup> U.S. Dep't of Army, Field Manual No. 27-10, *op. cit. supra* note 9, para. 356 at p. 139.

<sup>45</sup> In *United States v. List et al. (The Hostage Case)*, however, the Nuernberg Military Tribunal ruled that the German forces "were able to maintain control of Greece and Yugoslavia" whenever they wanted to, hence there was deemed to be an effective occupation. *Cf. 11 Trials of War Criminals Before the Nuernberg Military Tribunals 1242-1244 (1950)*. This ruling is open to serious questioning. See *Civil Law, Selected Cases and Materials on the Legal Aspects of Civil Affairs*, *op. cit. supra* note 4.

## LIMITED NUCLEAR WARFARE

regard to capturing territory or "place names" for their own sake is an ancient, albeit immemorially disregarded one. The realities of modern warfare bring an urgency to this concept that is particularly acute. Presentation of a nuclear target in such a war is fatal. Hence, the one thing which the pentomic army will not normally do is to "occupy territory." It will move and maneuver and seek to defeat the enemy forces without reference to occupying territory. Effective occupation requires two things: (1) the power to control the area; (2) the intention to control it. But in pentomic warfare the element of intent will seemingly not be present in most cases. Where does this leave the existing laws designed to protect civilians in occupied areas? Law as well as good policy have required that the occupying force maintain:

(1) Minimal governmental functions, including institutions necessary to preserve law and order, public health, public welfare, public works, and public education, if possible.

(2) Relief activities for the peoples in occupied areas, refugees and DP's. If necessary, the occupying power is supposed to arrange for the importation of critical relief supplies.<sup>46</sup>

Now clearly these responsibilities require considerable civil affairs and other military personnel on the spot, directing and supervising these activities. A tremendous amount of logistical support is required. Finally, time and degree of security are needed. One cannot carry out these functions without the kind of comparative stability which has been traditionally derived from the fact of effective control.

It is quite clear, unfortunately, that effective control will be a rarity in the considerable areas over which pentomic armies will move. Large areas may be without any really permanent effective occupation for protracted periods. But civil affairs personnel engaged in planning for the command post exercises have been acutely aware that their functions, difficult enough to perform in conventional war, will be infinitely more difficult in nuclear war.

What should be the policy of the United States toward adherence to the humanitarian laws of war in a pentomic operation? A narrow legal view might hold that legal responsibility for sick and wounded, prisoners of war, and for civilians in occupied areas is contingent upon effective control. Without such

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<sup>46</sup> See U.S. Dep't of Army, Field Manual No. 27-10, *op. cit. supra* note 9, ch. 6, particularly paras. 362-392, for the conventional law provisions and for commentary; Greenspan, *op. cit. supra* note 15, at 154-312.

## MILITARY LAW REVIEW

control there would be no legal obligation to undertake the activities required by the Hague and Geneva Conventions and by the customary law of war.

Such a view might not necessarily mean the complete collapse of humanitarian efforts if an organization such as the Red Cross intervened to protect the sick and wounded. If the situation required it, it is conceivable that the problem of caring for POW's could be solved by freeing them (not a good military solution, but alternatives involving violation of the protected status of POW's are obviously out of the question for legal and moral reasons). But what happens to the civilians in an area not under "effective occupation" by a belligerent?

Some of the functions necessary for their survival could perhaps be carried out by the local populations themselves under the direction of whatever officials remain. But the implications of the Geneva Convention and of modern occupation practice seem to be that local resources will not be enough to sustain the civilian victims of modern warfare. Where can we turn if the normal civil affairs operation is deemed to be legally unnecessary and practically impossible?

One possibility which may merit serious investigation may be to expand the work of organizations such as the Red Cross to include some of the functions normally assumed by a belligerent occupant, particularly those of a welfare and emergency relief nature. Another is suggested by analogy from the laws regulating care of the sick and wounded. It may be necessary to leave some civil affairs personnel behind to fill the gap between the departure of our forces and the arrival of the enemy. Admittedly, in a war with a totalitarian enemy this would be a very hard thing to do. Indeed, in order to be considered at all the idea would probably have to be developed in terms of some kind of special status analogous to that which medical personnel are supposed to possess. Unfortunately experience forces us to say "supposed" despite the seemingly clear-cut character of the conventional rules on the subject. Experience also obliges us to be highly skeptical about the possibilities of realizing such a humanitarian goal, given the recent performance of Communist belligerents with regard to prisoners of war, the International Red Cross and many other questions. All in all, a very hard problem is raised without much prospect for an early satisfactory solution.

And yet this and related problems of the laws of war in limited nuclear warfare cannot be ignored or dismissed as hopeless. Even if there is no strict legal duty to care for civilians who are victims of this new mode of warfare there would appear to be a

## LIMITED NUCLEAR WARFARE

moral duty to exhaust every possible approach to some kind of a solution. In any event, there certainly is a serious problem for United States military and foreign policy. It is commonplace knowledge that wars are increasingly fought for men's minds and that functions such as civil affairs and psychological warfare may play as important a role in attaining ultimate policy objectives as do the traditional fighting branches.<sup>47</sup> What kind of impression is it going to make on the people in a theater of operations—whether they start out being friendly, hostile, or uncommitted—if they see civil affairs personnel who profess to be greatly concerned with their welfare rushing off with the tactical troops each time the pentomic campaign takes another turn? The answer is fairly obvious.

Whatever the solution, if there is any, to their dilemma, it would appear that the constantly expanding responsibilities of civil affairs personnel will be further extended by the problems of meeting humanitarian needs in pentomic operations. The traditional "chairborne" occupant of the best hotel in town will have to resign himself to the prospects of living "in the field" a good bit of the time. But, beyond this, the civil affairs officer may someday be obliged to make the decision whether he wants to be a part of a branch whose obligations may require men with the courage of medical personnel and chaplains who stay behind to succor the helpless in the face of the enemy.

It appears, then, that pentomic warfare as a concept in the growing tradition of modern limited war offers encouragement to those who seek a revival of the law of war. But at the same time it raises some very serious questions as to the practicality and relevance of the existing concepts and rules of the very part of the law which is supposedly the most secure, the humanitarian laws of war.

For whatever it is worth, this writer's feeling is that current maneuvers, command post exercises, and war games present an unusual opportunity to those who are willing to take up the challenge of developing normative controls of pentomic war. These opportunities should be exploited, for if the answers of judge advocate and civil affairs officers to the questions raised briefly in this study are to be limited to statements that "There is no law against it," or "It isn't in the manual," the prospects for an improvement in the present "chaotic status" of the law of war will not be very bright.

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<sup>47</sup> See King, *op. cit. supra* note 4, at 139-140.





# A SURVEY OF WORTHLESS CHECK OFFENSES\*

BY MAJOR JAMES E. SIMON\*\*

## I. INTRODUCTION

### RETURNED UNPAID FOR REASON INDICATED:

- Insufficient Funds
- Endorsement
  - Missing
  - Not As Drawn
- Wrong Bank
- Signature
- Uncollected Funds
- Other Reason  
(Specify)

The bank clerk placing this notice on a check uttered by a service member is probably more concerned with protecting the interests of her employer, the bank, than with the legal consequences which she may set in motion by her act. She would not be concerned with the reason why there are insufficient funds in the maker's account. For her purposes, it is immaterial whether the shortage in the account was caused by a mathematical error on the part of the maker in maintaining his check stubs, by his mistake as to the bank on which it was drawn, or by an irresponsible wife who overdrew her share of a joint account. Nor would she be concerned with the fact that he may have been drunk or insane at the time he made and uttered this check.

While these matters may be of no concern to her, they are of vital concern to the commanding officer of the maker specifically, and to the military establishment generally. The commanding officer is concerned because a member of his command has probably committed a criminal offense and he faces the unpleasant

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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 Ninth Career Course. 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 or any other governmental agency. [EDITOR'S NOTE: The reader should carefully note that this article was written prior to the passage of H.R. 7657 in the first session of the 87th Congress. For a discussion of this new legislation (Pub. L. 87-385, 75 Stat. 814) see the text accompanying note 138 *infra*.]

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## MILITARY LAW REVIEW

task of taking disciplinary action against him and answering the hysterical letters of the defrauded payee who will undoubtedly expect the Army to make him whole. The military community as a whole is interested because this dereliction reflects unfavorably on it and may hinder future attempts of military personnel to cash checks in communities where they are not well known.

But what action can a commander take in this situation? If he decides to draft charges against the serviceman, what are the appropriate charges and how does he draft them? What evidence is necessary to prove these charges? If the charges are eventually referred to trial, what problems will the trial counsel encounter in proving his case, and what happens if the commanding officer has mistakenly omitted part of the specification? What action should the law officer take if, during the course of the trial, there is evidence of intoxication, or mistake of fact, and how should he instruct the court with respect to these matters?

It is the purpose of this article to examine these and other problems connected with prosecuting worthless check offenses under Articles 121 and 134 of the Uniform Code of Military Justice. Particular attention will be devoted to analyzing the criminal intents required under these articles and to the false pretense theory of Article 121. Proposals for new legislation in this field will also be examined with a view to determining their adequacy to meet the needs of the military services.

## II. LARCENY BY CHECK

### A. SOURCE

All persons who knowingly and designedly, by false pretense or pretenses, shall obtain from any person or persons, money, goods, wares or merchandizes, with intent to cheat or defraud any person or persons of the same . . . shall be . . . fined and imprisoned, or . . . be put to pillory, or publicly whipped or . . . transported . . . for the term of seven years . . .<sup>1</sup>

This 1757 statute served as a model for the false pretense statutes in most states and for the offense of obtaining property by false pretenses as prohibited by Article 121, Uniform Code of Military Justice.<sup>2</sup> This statute was enacted to fill a gap left in the

<sup>1</sup> An Act for the More Effectual Punishment of Persons Who Shall Attain, or Attempt to Attain Possession of Goods or Money By False or Untrue Pretenses, 1757, 30 Geo. 2, c. 24, § 1.

<sup>2</sup> 10 U.S.C. § 921 (1960). The Uniform Code of Military Justice was originally enacted as Public Law 506, 81st Cong., ch. 169, § 1, 64 Stat. 108, 50 U.S.C. §§ 551-736. It has also been referred to as "The Act of 5 May 1960." It was recodified as 10 U.S.C. §§ 801-940 in 1956 (Public Law 1028, 84th Cong., ch. 1041, 70A Stat. 36-78). The U.S.C. citation will be hereinafter omitted but may be determined by adding 800 to the number of the Uniform Code cited.

## WORTHLESS CHECK OFFENSES

law of larceny, as it was generally held that larceny was essentially a crime against possession involving a trespass to property, with no transfer of title resulting. As obtaining property by false pretense did not involve a trespass but did result in a transfer of title, a new statute to prohibit this conduct was required.<sup>3</sup>

This crime has long been recognized, in one form or another, in military justice. It was violative of the American Article of War 62, 1874 (the general article) to "obtain money on false pretenses from other soldiers."<sup>4</sup> Subsequent Manuals for Courts-Martial had model specifications for this offense as violations of the general articles then in effect.<sup>5</sup>

Congress, in enacting the UCMJ, consolidated into one offense (larceny) the crimes formerly known as larceny, embezzlement, and obtaining property by false pretenses.<sup>6</sup> Larceny by check is the false pretense which will be the subject of this section.

### B. PLEADING PROBLEMS

#### 1. *Variances Between Pleading and Proof*

Only one model specification is used to allege a larceny, whether the larceny involves a taking, obtaining or withholding.<sup>7</sup> In alleging a larceny by check, *i.e.*, obtaining money or goods by uttering a worthless check, it is sufficient if the specification alleges that the accused "... did steal . . ." and it is unnecessary to allege the false pretenses used to effect the larceny.<sup>8</sup> However, several problems have arisen where variations develop between pleading and proof and where the same act is alleged as violations of Articles 121, 133 and 134, UCMJ.

Variations between allegations and proof as to the property obtained as a result of a worthless check are rather numerous. Checks are frequently negotiated to commercial establishments for cash, or merchandise, or both, and when a check is subsequently dishonored the payee's records will not usually establish

<sup>3</sup> 22 Am. Jur. *False Pretenses* § 3 (1939); Perkins, *Criminal Law* 249, 272 (1957).

<sup>4</sup> Winthrop, *Military Law and Precedents* 732 (2d ed. reprint 1920).

<sup>5</sup> U.S. Dep't of Army, *Manual for Courts-Martial*, 1928, App. 4, No. 120; U.S. Dep't of Army, *Manual for Courts-Martial*, 1949, App. 4, No. 148 (hereinafter referred to as "MCM 1928" or "MCM 1949").

<sup>6</sup> *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 1232 (1949).

<sup>7</sup> U.S. Dep't of Defense, *Manual for Courts-Martial, United States*, 1951, para. 200a(1) and App. 6c, No. 89. The *Manual for Courts-Martial* was originally prescribed by the President by Executive Order 10214, February 8, 1951, and will be referred to subsequently as "The Manual" and cited as "para....., MCM, 1951."

<sup>8</sup> *United States v. Beasley*, 3 USCMA 111, 11 CMR 111 (1953).

## MILITARY LAW REVIEW

whether cash or merchandise was the consideration for the check. A common example of this is where a check is used to purchase groceries in a supermarket. In alleging a violation of Article 121, UCMJ, however, the property stolen must be specifically identified.<sup>9</sup> An Army board of review found a fatal variance where the specification alleged a larceny of money via a worthless check, and the evidence merely established that merchandise or money was received therefor.<sup>10</sup> Air Force boards of review, however, are in conflict on this matter.<sup>11</sup>

The law is quite settled, however, that in a larceny case an accused is entitled to know specifically what property he is charged with stealing, and it is idle to contend that an accused is not prejudiced in his defense when he is called on to defend against a charge of stealing keys and is convicted of a larceny of a car.<sup>12</sup> However, there may be immaterial variations which will permit findings of a lesser amount. For example, where an accused is charged with a larceny of \$50.00 cash, and the evidence shows a larceny of \$30.00 in cash and \$20.00 in merchandise, a substituted finding of a larceny of \$30.00 in cash would not be a fatal variance, as this is included within the offense charged, but a substituted finding of a larceny of \$20.00 merchandise would not be proper.<sup>13</sup>

If it is uncertain what the accused received in return for the check, it is better to allege the matter as a violation of Article 134, UCMJ, where, as will be noted in the following sections, variations of this type are immaterial.

### 2. *Multiplicity*

Another pleading problem is that of multiplicity, where the same act or transaction is alleged as violations of Articles 121, 133 and 134, UCMJ. The Manual admonishes against an undue multiplication of charges and states that one transaction, or what is substantially one transaction, shall not be made the basis

<sup>9</sup> United States v. Grimes, 8 USCMA 568, 25 CMR 72 (1958).

<sup>10</sup> CM 354119, Huffman, 6 CMR 244 (1952).

<sup>11</sup> In ACM 5350, Lettieri, 5 CMR 729 (1952), the specification alleged a larceny of \$56 in cash but the evidence established that about \$39 in cash and the balance in liquor had been stolen. The Board held this variance immaterial. In ACMS 3677, Parker, 5 CMR 804 (1952), the accused was charged with larceny of \$15 in cash, but the evidence established a larceny of cash and merchandise in this amount. This variation was held immaterial, as the maximum punishment was identical. However, in ACM 11768, Gibson, 21 CMR 765 (1956), a fatal variance was found where the specification alleged a larceny of \$150 cash, but the evidence showed that the check was issued to redeem several smaller checks previously uttered by the accused and which were being held by the payee.

<sup>12</sup> United States v. Nedeau, 7 USCMA 718, 23 CMR 182 (1957).

<sup>13</sup> Para. 74b(2) and (3), MCM, 1951.

## WORTHLESS CHECK OFFENSES

for an unreasonable multiplication of charges. However, when sufficient doubt as to the facts or law exists, this may warrant one transaction being the basis for two or more charges.<sup>14</sup>

Army boards of review have arrived at conflicting decisions as to whether the offenses are separately punishable where the same worthless check was used as a basis for alleging violations of Articles 121 and 134, UCMJ (issuing a check and thereafter wrongfully and dishonorably failing to maintain a sufficient balance).<sup>15</sup> The Court of Military Appeals<sup>16</sup> finally settled this matter in *United States v. Littlepage*,<sup>17</sup> where the Court recognized that situations may arise where worthless check offenses could be alleged as violations of both articles, and that each charge requires proof of an element not required to prove the other. The Court reiterated, however, a fundamental rule previously enunciated, *i.e.*, that an accused shall not be punished twice for the same offense, and when evidence sufficient for a conviction of one offense will also support conviction of another, the two offenses are not separately punishable. The Court concluded that the offenses were not separately punishable where they arose out of the same transaction, or check.

There is no legal objection to alleging a larceny by check offense as a violation of Articles 121 and 133, UCMJ (conduct unbecoming an officer).<sup>18</sup>

### C. MENS REA

Cheating by check has long been recognized as a swindle which is cognizable as a false pretense offense, the false pretense being the implied representation of the maker that the check will be honored on presentment when in fact he does not intend to have sufficient funds available in the bank for this purpose.<sup>19</sup>

<sup>14</sup> Para. 26b, MCM, 1951. For punishment purposes, however, para. 76a(8) provides that offenses are separately punishable if each offense requires proof of an element not required to prove the other.

<sup>15</sup> CM 353958, St. Ours, 6 CMR 154 (1952), which held that they were separately punishable; CM 395298, Bittinger, 23 CMR 611 (1957), which held that they were not.

<sup>16</sup> The United States Court of Military Appeals (hereinafter referred to as the Court) was created by The Act of 5 May 1950, Article 67 (see statutes cited note 7 *supra*). The original members of the Court were Chief Judge Robert E. Quinn, and Associate Judges George W. Latimer and Paul W. Brosman. Judge Brosman died on December 21, 1955. Judge Homer Ferguson was appointed to fill the unexpired term of Judge Brosman's office and was appointed to a 15-year term on May 1, 1956. Judge Latimer's term expired on May 1, 1961. He will be succeeded by Rep. Paul D. Kilday (D-La.), who will assume his position upon adjournment of the first session of the 87th Congress.

<sup>17</sup> 10 USCMA 245, 27 CMR 319 (1959).

<sup>18</sup> ACM 6499, Danilson, 11 CMR 692 (1953); para. 212, MCM, 1951.

<sup>19</sup> Para. 200a(5), MCM, 1951; Perkins, Criminal Law 269 (1957).

## MILITARY LAW REVIEW

At common law, the false pretense had to relate to a past or existing fact, as ". . . only what exists now or has existed in the past is a fact . . . any statement which refers solely to the future is not a representation of a fact."<sup>20</sup> The Manual has adopted this rule but has further declared that a person's present intention is also a fact which may be falsely represented, even if that intention refers to a future act.<sup>21</sup>

Larceny, of course, is a crime requiring a specific intent to steal. When Congress consolidated, under one larceny statute, the offense of obtaining by false pretenses with embezzlement, some problems arose as to the state of mind required when the larceny was committed by the issuance of a worthless check. This confusion first manifested itself in the *Maxwell* case,<sup>22</sup> where it was held that two intents were involved: (1) the intent as to the payment of the check on presentment and (2) the intent permanently to deprive the owner of his property. As to the first intent, the court must find that the accused falsely represented his intent to have sufficient funds in the bank to cover the check when presented for payment. If this intent did not exist, the board held, there was no "wrongful obtaining" and an acquittal must follow. If it did exist, however, the court could then consider the existence or nonexistence of the intent to permanently deprive the owner of his property.

Although this reasoning appealed to Judge Ferguson, it did not persuade Chief Judge Quinn and Judge Latimer, as they refused to distinguish between the two intents, stating:

. . . if from all the circumstances it finds beyond a reasonable doubt the accused knew no funds were available for payment and, in fact, none would be . . . the court martial is justified in concluding the accused intended permanently to deprive the victim of the proceeds of the check.<sup>23</sup>

The majority opinion is, it is submitted, a sounder approach to this issue. To permit a segregation of intents, as suggested by Judge Ferguson, would be a step backward from the efforts of Congress to obliterate the distinctions between the three types of larcenies; it would require separate instructions on intent which would do nothing more than becloud the issue for the court. If an accused intends to steal by uttering a worthless

<sup>20</sup> Perkins, *Criminal Law* 255 (1957).

<sup>21</sup> *United States v. Cummins*, 9 USCMA 669, 26 CMR 449 (1958) (Opinion of Quinn, C.J.); para. 200a(5), MCM, 1951; U.S. Dep't of Defense, *Legal and Legislative Basis*, MCM, 1951, p. 276.

<sup>22</sup> ACM 5128, 7 CMR 692 (1952); see also ACM 11442, Stewart, 21 CMR 689 (1956), *petition for review denied*, 7 USCMA 764, 21 CMR 340 (1956).

<sup>23</sup> *United States v. Cummins*, 9 USCMA 669, 672, 26 CMR 449, 452 (1958) (Opinion of Quinn, C.J.) (Latimer, J. concurred in the result).

check, a larceny is committed regardless of the fact that it is a "false pretense" larceny. It is sufficient if the court finds, from all the evidence, an intent to permanently deprive as required by Article 121, UCMJ, and this intent can be justifiably inferred from the issuance of a check, and its dishonor.<sup>24</sup>

#### D. THE POSTDATED CHECK

The requirement that a false pretense relate to a past or existing fact has created problems in the worthless check area where the check is postdated. Most state courts have held that a postdated check cannot support a false pretense offense as it is considered either a promise to do an act in the future or is merely evidence of indebtedness, the check failing as a negotiable instrument because it is not payable on demand.<sup>25</sup>

The Court reached this issue in *United States v. Cummins*.<sup>26</sup> In a decision written by Chief Judge Quinn, with Judge Latimer concurring in the result and Judge Ferguson dissenting, the Court held that if the offense is otherwise established, the fact that the check used was postdated was not a ground for reversal. The Court reasoned that if, from all the facts, there was evidence that the accused knew no funds were, or would be, available when the check was presented, the court-martial is justified in concluding that the accused intended to permanently deprive the owner of the property. Chief Judge Quinn said: "What we are considering here is a misrepresentation of an existing intention . . . present intent may be regarded as a fact."<sup>27</sup>

Once it is accepted that a person's state of mind is a fact, even though that fact may relate to a future event, as the Manual has done,<sup>28</sup> it is logical and reasonable that this fiction be applied to a postdated check situation. The real problem, however, is in proving that the intent to steal existed at the time he issued the check, and not some time after issuance and before the due date, but this does not affect the validity of the conclusion of

<sup>24</sup> CM 363992, Privitt, 10 CMR 502 (1953); para. 138a, MCM, 1951; 22 Am. Jur. *False Pretenses* § 58 (1939).

<sup>25</sup> C.J.S. *False Pretenses* § 21 (1955); 2 Burdick, *The Law of Crime* § 645h (1946); Perkins, *Criminal Law* 271 (1957); Annot., 35 A.L.R. 375 (1925); Annot., 95 A.L.R. 476 (1935). Problems in this area arise only where the payee was made aware of the date on the check. Where the postdated check is given with the well-founded expectation that it would not be noticed by the payee, a false representation is clearly established.

<sup>26</sup> 9 USCMA 669, 26 CMR 449 (1958) (Opinion of Quinn, C.J.).

<sup>27</sup> *Id.* at 672, 26 CMR at 452. While this is a minority view, there is a modern trend toward this conclusion and at least four states have adopted this view: California, Rhode Island, Massachusetts and Ohio. 43 Calif. L. Rev. 719 (1955).

<sup>28</sup> Para. 200a(5), MCM, 1951.

## MILITARY LAW REVIEW

the Court. This decision could be a major step "in effecting the demise of the pernicious practices of the promissory swindler."<sup>29</sup>

### E. INTENT TO RETURN OR REPLACE STOLEN MONEY

In *United States v. Hayes*,<sup>30</sup> the Court was confronted with a conviction of wrongful appropriation as a lesser included offense to a charge of larceny arising from the following facts: the accused was a finance clerk and, in violation of regulations, he arranged for an advance pay for a soldier named Grier. The advance was to be made up by deductions from Grier's regular monthly pay. After two deductions, Grier learned that the advance was questionable and requested that he receive no further pay until his indebtedness was liquidated. On this evidence, the law officer instructed only on the elements of the offense charged, but the accused was convicted of the lesser included offense of wrongful appropriation. The government argued that since he could not return the identical money, only the offense of larceny was in issue.

Finding the instructions inadequate, the Court reversed, reasoning that not every wrongful taking constitutes a violation of Article 121, UCMJ. The Court said:

The intent to deprive the owner of his property, either permanently or temporarily, must include a *mens rea*. Therefore, the mere "borrowing" of an article of property without the prior consent of the owner does not make out either of the offenses defined in Article 121. Something more is required, and that something is a criminal intention. Thus, if one visits the office of a friend, and, finding him absent, takes a book which he has come to borrow, leaves a note to that effect, and returns the book the next day, there is no intent to steal or misappropriate the book and, necessarily, no violation of Article 121.<sup>31</sup>

This decision, while establishing new military law, is deeply rooted in the common law which requires an *animus furandi*, an intent to steal, in addition to the wrongful taking, before a larceny was committed. Minus the criminal intent, the taking was nothing more than a civil trespass. "If we were to hold . . . that wrongfully borrowing a thing for a time, with an intention to return it would constitute a larceny, many very venial offenses would be larcenies."<sup>32</sup>

While this rule is generally accepted, its application to the facts of this case is certainly questionable. Chief Judge Quinn buttresses his opinion by comparing this situation to a case where a

<sup>29</sup> 43 Calif. L. Rev. 719 (1955).

<sup>30</sup> 8 USCMA 627, 25 CMR 131 (1958). For an earlier contrary view, see *United States v. Krawczyk*, 4 USCMA 255, 15 CMR 255 (1954).

<sup>31</sup> *Id.* at 629-30, 25 CMR at 133-34.

<sup>32</sup> 2 Wharton, Criminal Law § 1125 (12th ed. 1932); see also Am. Jur. *Larceny* §§ 36 and 37 (1941); Annot., 36 A.L.R. 372 (1925).



## WORTHLESS CHECK OFFENSES

book is borrowed by a friend without the owner's knowledge. However, the facts of this case showed that Hayes wrongfully caused government money to be paid to a third person who obviously was going to spend it, and who, for at least two months, had the use of this money. Further, there is no indication in the reported opinion that Hayes intended to return the money or its equivalent; it was clearly contemplated that Grier, if anyone, was to make reimbursement. Certainly there was no implied permission from any authorized government agent for this transaction, as would probably be the case where the friend borrowed the book. For these reasons, it is difficult to understand the application of the rule to the facts of this case. The rule itself, however, is sound, if properly applied.

The rationale of *United States v. Hayes* was applied to a larceny by check case in *United States v. Boudreau*.<sup>33</sup> Here, the accused stole \$400 from a safe in the noncommissioned officers' club. A few days later he cashed two checks, each for \$20, at the club. A third check in the same amount was cashed at the club the next day. The following day, the accused advised the club stewards that the checks would possibly be returned and deposited \$60 with the steward to take care of them. According to a pretrial statement, the accused's purpose in issuing these checks was to prevent anyone from becoming suspicious about the money he was spending.

The law officer denied a requested instruction by the defense counsel to the effect that if they found the accused intended to make good the checks prior to or at the time of their presentment, he should be acquitted. Instead he instructed that unless the accused intended to return the identical money, the court could not return a finding of guilty of the lesser included offense of wrongful appropriation.

The Court reversed the convictions of larceny by check on the theory that the requested instruction, as applied to the facts of the case, should have been given—that all the accused intended here, if he is believed, was to effect an exchange of money, citing *United States v. Hayes, supra*.

If the evidence in this case indicated that at the time the accused cashed the check he intended to return the funds, the rule of *United States v. Hayes* would have been applicable, but, as noted by Judge Latimer in his dissent, there was no evidence of this. If the intent to return the funds did not exist at the time the checks were uttered, the offense would have been complete and a subsequent change of mind and redemption of the

<sup>33</sup> 9 USCMA 286, 26 CMR 66 (1958).

## MILITARY LAW REVIEW

checks would be no defense, but a matter to be considered only in mitigation.

From these cases it can be concluded, however, that the mere fact that the maker of a "rubber" check cannot return the identical money he received for the check will not preclude an acquittal or a finding of a lesser included offense. Nor will every obtaining of money by worthless check be an offense under Article 121, UCMJ, but the evidence must also establish a criminal intent to deprive, either permanently or temporarily.<sup>34</sup>

### F. IMPLIED REPRESENTATIONS; PROOF OF KNOWLEDGE AND INTENT

When a person utters a check, he impliedly represents that the check will be honored when presented for payment. In connection with this representation, a person is charged with the knowledge of the status of his checking account and an intent not to have funds on deposit to meet payment of a check when presented for payment may be inferred from the inadequacy of the account.<sup>35</sup> These are, in effect, justifiable inferences which tend, circumstantially, to prove the false pretense.

If a person utters a check without any knowledge or belief as to the adequacy of his account, a specific intent to steal may be inferred from his conduct because a person is guilty of a fraud if he asserts something to be true—the adequacy of his account—which he does not know or believe to be true.<sup>36</sup>

There are no implied representations, however, when the maker of the check notifies the payee at the time of the utterance that there are insufficient funds on deposit to cover the check and this disclosure converts the transaction into an extension of credit.<sup>37</sup>

<sup>34</sup> A person who issues a check to a payee in order to obtain funds due him from the payee, and intending at the time not to make good on the check, has not committed a larceny as there is no criminal intent. This is true even though the maker is mistaken as to his right to the property, provided his mistake is honest. *United States v. Sicley*, 6 USCMA 402, 20 CMR 118 (1955); *United States v. Rowan*, 4 USCMA 430, 16 CMR 4 (1954) (concurring opinion); 22 Am. Jur. *False Pretenses* § 33 (1939). Nor would it appear to be a worthless check offense under Article 134, UCMJ, as there would not be a "dishonorable" failure to maintain a sufficient balance.

<sup>35</sup> ACM 8942, *Steenberg*, 16 CMR 775 (1954); CM 356768, *Deyo*, 8 CMR 219 (1953); ACM 5128, *Maxwell*, 7 CMR 632 (1952); U.S. Dept. of Defense, *Legal and Legislative Basis, MCM, U.S., 1951*, p. 211; 2 *Burdick, The Law of Crime* § 645h (1946). (But see Part IV *infra*, for further discussion of this inference.)

<sup>36</sup> *United States v. Bethas*, 11 USCMA 389, 29 CMR 205 (1960); *United States v. Rowan*, 4 USCMA 430, 16 CMR 4 (1954) (concurring opinion).

<sup>37</sup> ACM 11442, *Stewart*, 21 CMR 689 (1956), *petition for review denied*, 7 USCMA 764, 21 CMR 340 (1956); Annot., 95 A.L.R. 476 (1935). *But see United States v. Cummins*, 9 USCMA 669, 26 CMR 449 (1958).

## WORTHLESS CHECK OFFENSES

The intent to steal must be co-existent with the making and the uttering of the check.<sup>38</sup> If the maker believes he does not have sufficient funds in the bank to cover a check, and issues the check believing he is stealing, a false pretense does not exist where, in fact, there were sufficient funds on deposit to cover the check.<sup>39</sup> In other words, the misrepresentation must, in fact, be true.

### G. JOINT ACCOUNTS

The *Deyo* case<sup>40</sup> is the principal reported and cited case which discusses the responsibility of joint account holders. This case held that:

With respect to joint accounts . . . when a person opens such an account subject to withdrawals of another as well as his own, he is responsible for making reasonable and practicable arrangements to prevent his checks from being returned unpaid because of such withdrawals by the other person or persons participating in the account . . . . The burden is on the accused whose check is returned by reason of insufficient funds . . . to show that such action was the result of an honest mistake not caused by his *carelessness* or *neglect*.<sup>41</sup>

While the Court has not passed on this issue, it is apparent that there are three principal objections to this rule: (1) it permits a conviction on a careless, but honest, mistake, which is contrary to present law; (2) it indicates that a conviction for a larceny may be based on unreasonable or impracticable arrangements with the joint account holder resulting in a deficient balance, and (3) it improperly shifts to the accused the burden of showing that his action was the result of an honest mistake not caused by his carelessness or neglect when the burden is on the government to show he was not laboring under a mistake of fact, once the issue is properly raised. The elements of proof of a larceny remain the same, however, whether the account is joint or sole, and the government must establish the intent to steal beyond a reasonable doubt. Although some other offense may be committed by failing to make proper arrangements, certainly a larceny is not committed without this subjective state of mind. For this reason, it is submitted, no special rule is required for a joint account holder—if he has the required intent, he is guilty; if not, he is innocent, and the ordinary larceny instructions should suffice.

<sup>38</sup> See *United States v. Sicley*, 6 USCMA 402, 20 CMR 118 (1955); para. 200a (6), MCM, 1951.

<sup>39</sup> Para 200a(5), MCM, 1951; 22 Am. Jur. *False Pretenses* § 21 (1939).

<sup>40</sup> CM 356768, *Deyo*, 8 CMR 219 (1953).

<sup>41</sup> *Id.* at 224 (emphasis added).

## MILITARY LAW REVIEW

### H. THE RES

Only money, personal property, or an article of value, can be the subject of a larceny. It would not, therefore, be a larceny if a worthless check were given in payment of a past due obligation.<sup>42</sup> Although there are no reported cases in point, it would appear that the giving of a worthless check as a gift or a donation to charity would not be a larceny as no item of value would have been received therefor. Such a check would probably be a violation of the Article 134, UCMJ, worthless check offenses, however, as there would clearly be an intent to deceive the payee as to the sufficiency of the checking account, and the failure of the maker to maintain an adequate balance could be considered "dishonorable" despite the fact that nothing of value was received for the check.

The fact that an ordinarily prudent man would not have been deceived by the false pretense, as where the check is manifestly inadequate as a negotiable instrument, is immaterial if the payee is in fact deceived, for the false pretense offense is designed to protect the "unwary and the credulous as well as the able and the vigilant."<sup>43</sup>

### I. DEFENSES

#### 1. *Mistake of Fact*

This defense is raised in the great majority of reported cases of larceny by check. The maker may base his claim of mistake on a misunderstanding as to the status of his account, an honest error in keeping his check stubs, a failure on the part of a spouse or parent to make a promised deposit, a mistake as to the effective date of an allotment to the bank, etc.

Prior to *United States v. Rowan*,<sup>44</sup> some boards of review held that a mistake, to be a valid defense to this charge, had to be both honest and reasonable, *i.e.*, judged by what a reasonably prudent man would have believed or done under the circumstances,<sup>45</sup> while others held that the mistake needed only to be honest.<sup>46</sup> The Court finally settled this conflict in *United States v. Rowan, supra*, in which it held that a mistake of fact, to be a defense, need only be honest.

<sup>42</sup> See para. 200a(1), MCM, 1951; U.S. Dep't of Defense, Legal and Legislative Basis, MCM, 1951, p. 276. *Cf.* *United States v. Amie*, 7 USCMA 514, 22 CMR 304 (1957).

<sup>43</sup> ACM 9370, Rogers, 17 CMR 883 (1954); 22 Am. Jur. *False Pretenses* § 27 (1939).

<sup>44</sup> 4 USCMA 430, 16 CMR 4 (1954) (concurring opinion).

<sup>45</sup> ACM 6510, Anderson, 10 CMR 763 (1953).

<sup>46</sup> ACM 8913, Torbett, 17 CMR 650 (1954).

## WORTHLESS CHECK OFFENSES

### 2. Intoxication and Partial Mental Responsibility

Voluntary intoxication may be legally considered as affecting mental capacity to entertain a specific intent, and the law in this area regarding larceny generally<sup>47</sup> is applicable with equal force to larceny by check.<sup>48</sup> Character and behavior disorders falling short of legal insanity may be a good defense to this charge, provided they render an accused incapable of entertaining the specific intent required.<sup>49</sup> If the accused lacked the mental capacity to entertain the specific intent required, he cannot be convicted of this offense.<sup>50</sup>

### 3. Checks Used in Gambling Games

In *United States v. Walters*,<sup>51</sup> the accused was charged with larceny by check. The evidence established that the checks were made and uttered by the accused while he was engaged in a poker game, the checks either being put directly in the "pot" or the proceeds of them, after being cashed by a co-participant in the game, being used in the game. The checks were subsequently dishonored. The Court dismissed the charges on the theory that gambling was illegal and therefore the checks were void *ab initio* so they could not be the basis of a larceny by check.

The Court later extended this rule to the worthless check offenses alleged under Article 134, holding it immaterial that the check had subsequently passed through commercial channels.<sup>52</sup>

In dictum, however, the Court indicated that the same rule would not apply if the accused, then engaged in a poker game, asked a fellow player to cash a check for him, and then pocketed the proceeds without using any of it in the game. If an accused, while engaged in a gambling game, asked a bystander to cash a check for him so he could use the proceeds in the game, it would not appear that the *Walters* rule would apply as this transaction would not be between parties to the game, the instrument would not be void *ab initio*, and it would be based on a valid consideration. It would, therefore, be a lawful transaction, and a dis-

<sup>47</sup> Voluntary drunkenness may be considered as affecting the mental capacity necessary to form the specific intent involved as an element of the offense of larceny. *United States v. Norris*, 2 USCMA 236, 8 CMR 36 (1953); para. 154a(2), MCM, 1951.

<sup>48</sup> *United States v. Ferry*, 2 USCMA 326, 8 CMR 126 (1953).

<sup>49</sup> See *United States v. Dunnahoe*, 6 USCMA 745, 21 CMR 67 (1956).

<sup>50</sup> See *United States v. Burns*, 5 USCMA 707, 19 CMR 3 (1955) (which involved a robbery offense).

<sup>51</sup> 8 USCMA 50, 23 CMR 274 (1957).

<sup>52</sup> *United States v. Lenton*, 8 USCMA 690, 25 CMR 194 (1958).

## MILITARY LAW REVIEW

honored check could be grounds for a criminal charge.<sup>53</sup>

### 4. Restitution

Once a larceny has been committed, a return of the property, or payment for it, is no defense.<sup>54</sup> However, evidence of prompt restitution is admissible as evidence of a lack of intent to steal.<sup>55</sup> To be of probative value, however, the evidence must show that the intent to make restitution existed at the time of taking and not as an afterthought, for if it did not exist at that time, the offense would have been completed, *i.e.*, the taking with the requisite intent to steal completing the crime. However, even if there is immediate restitution, if the accused had the criminal intent to temporarily deprive the payee of his money at the time the check was issued, a finding of a wrongful appropriation, a lesser included offense, would be permissible.<sup>56</sup>

## J. INSTRUCTIONAL PROBLEMS

The use, as an instruction, of the definition of a false pretense in the language of paragraph 200a(5) of the Manual has created problems. The second sentence of this subparagraph provides that:

. . . The pretense must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without an honest belief in its truth.

In *United States v. Dinsmore*<sup>57</sup> and *United States v. Shaible*,<sup>58</sup> this portion of the instruction was attacked as having the effect of shifting the burden to the accused to prove his innocence. In both cases, however, the Court found it unnecessary to decide this issue. However, in *United States v. Bethas*,<sup>59</sup> the Court approved this instruction, saying:

. . . if an accused makes a representation knowing it is false or makes it without an honest belief that it is true, and the owner is deceived

<sup>53</sup> Am. Jur. *Bills and Notes* § 271 (1937). The situation might be different if the bystander knew or should have known that the game was illegal.

<sup>54</sup> Para. 200a(6), MCM, 1951. *But see* *United States v. Boudreau*, 9 USCMA 286, 28 CMR 66 (1958), where Chief Judge Quinn either ignored or overlooked this principle.

<sup>55</sup> CM 356028, Henkel, 9 CMR 172 (1952), where a board of review found, as a fact, that the evidence was insufficient to establish a larceny where the accused had issued the check on March 3, 1952, and a deposit sufficient to cover the check was made on March 19, 1952; Annot. 95 A.L.R. 486, 501 (1935). 2 Wharton, *Criminal Law* § 1127 (12th ed. 1932).

<sup>56</sup> *United States v. Epperson*, 10 USCMA 582, 28 CMR 148 (1959). See text accompanying note 30 *supra*.

<sup>57</sup> 11 USCMA 28, 28 CMR 252 (1959).

<sup>58</sup> 11 USCMA 107, 28 CMR 331 (1960).

<sup>59</sup> 11 USCMA 389, 29 CMR 205 (1960).

## WORTHLESS CHECK OFFENSES

thereby and parts with his property in reliance on the statement, the property has been wrongfully obtained . . . [A] person is guilty of a fraud—wrongfully obtaining property—if he asserts something to be true which he does not know to be true.<sup>57</sup>

In *United States v. Beasley*,<sup>61</sup> the Court approved an instruction on false pretenses substantially in the language of paragraph 200a(5) of the Manual, but reserved judgment on the requirement that law officers give this advice. However, in *United States v. Lane*,<sup>62</sup> in passing on a similar instruction, the Court said:

The consolidation of the crimes of larceny, embezzlement and taking under false pretenses was accomplished primarily to eliminate confusing distinctions which needlessly encumbered the administration of military justice . . . Under these provisions, a law officer's use of language having its roots in earlier decisions may very well be inartful, but does not result in error.<sup>63</sup>

The clear implication of this language is that a general instruction on larceny<sup>64</sup> may suffice even where a larceny by check is involved. In the usual case, the regular larceny instruction will convey to the court members the elements they must find to convict. To further define the false pretense theory will, it is submitted, tend to confuse the members of the court and, inasmuch as it is not required, it would probably be wiser to omit this additional instruction in the ordinary case.<sup>65</sup> It is also well settled that the law officer commits no error when he instructs that the "accused wrongfully took, obtained or withheld from the true owner . . .," even though the offense is one of obtaining by false pretenses. The particular means of acquisition of the property is unimportant since these offenses were consolidated under the UCMJ.<sup>66</sup>

An instruction to the effect that an accused is charged with the knowledge of the status of his bank account has generally

<sup>57</sup> *Id.* at 393, 29 CMR at 209.

<sup>58</sup> 3 USCMA 111, 11 CMR 111 (1953).

<sup>59</sup> 9 USCMA 369, 26 CMR 149 (1958).

<sup>60</sup> *Id.* at 372, 26 CMR at 152.

<sup>61</sup> U.S. Dep't of Army, Pamphlet No. 27-9, *Military Justice Handbook—The Law Officer*, Instruction No. 89 (1958) (hereinafter referred to as the *Law Officer Handbook*).

<sup>62</sup> This is not to say that, where the defense has a particular theory of defense which has been raised involving one of the common law principles of false pretense, the law officer should not instruct thereon, upon submission by the defense counsel of proper instructions.

<sup>63</sup> *United States v. Aldridge*, 2 USCMA 330, 8 CMR 130 (1953); see also *United States v. Lane*, 9 USCMA 369, 26 CMR 149 (1958).

## MILITARY LAW REVIEW

been approved.<sup>67</sup> However, the following instruction, a paraphrase of the presumption appearing on page 240 of the Manual, has created difficulties:

The Court is further advised that when it is shown that as a result of his own acts, a person did not have sufficient funds in the bank available to meet payment upon presentment in due course of a check drawn against the bank by him, it may be presumed that at the time he uttered the check, and thereafter, he did not intend to have sufficient funds in the bank available to meet payment of the check upon presentment in due course.

In *United States v. Wells*,<sup>68</sup> this instruction was criticized as possibly permitting a conviction based on simple negligence. Chief Judge Quinn, writing for the majority, found the instruction ambiguous but held that other instructions which were given advised the court that they could not convict if the failure to maintain a sufficient account was the result of simple negligence. In dissenting, Judge Ferguson arrived at a contrary conclusion, and also found fault with the use of the word "presumption" instead of "justifiable inference." Judge Latimer concurred in the result.

It is apparent that the future use of this presumption, as an instruction, in the form set out is dangerous. However, if the instruction uses the phrase "justifiable inference," instead of "presumption," and an additional sentence, as follows, is added, it should meet with even Judge Ferguson's approval:

However, this inference may not be drawn unless you are convinced beyond a reasonable doubt that the accused's failure to maintain sufficient funds was not the result of his negligence.

There are three lesser included offenses to larceny, whether it be of the false pretense type or otherwise. They are wrongful appropriation, also in violation of Article 121, UCMJ,<sup>69</sup> attempting to steal, and attempting to wrongfully appropriate in violation of Article 80, UCMJ.<sup>70</sup> The worthless check offenses alleged under Article 134, UCMJ, to be discussed in subsequent sections, are not lesser included offenses to larceny by check offenses under Article 121, UCMJ.<sup>71</sup>

<sup>67</sup> ACM 8942, Steenberg, 16 CMR 775 (1954); see CM 356768, Deyo, 8 CMR 219 (1953) and CM 353958, St. Ours, 6 CMR 154 (1952).

<sup>68</sup> 9 USCMA 509, 28 CMR 289 (1958). *But see* discussion of *United States v. Groom*, Part IV *infra*, where the Court gave little, if any, weight to this presumption where it was requested to do so in support of a conviction for the minor worthless check offense (making and uttering a worthless check without intent to deceive) under Art. 134, UCMJ.

<sup>69</sup> *United States v. Norris*, 2 USCMA 296, 8 CMR 36 (1953); ACMS 2708, Clements, 5 CMR 716 (1952).

<sup>70</sup> See ACM 13262, Weise, 23 CMR 857 (1957).

<sup>71</sup> See ACM 4890, Tomlinson, 4 CMR 591 (1952); ACM 7604, DeWald, 12 CMR 851 (1953).



K. EVIDENTIARY PROBLEMS

1. *Proof of Uttering*

Direct proof of the uttering of the check by the accused is often not available as many checks are issued to commercial establishments, where store clerks are not able to later identify the maker. However, uttering may be established by circumstantial evidence, such as comparing the signature on the check with a known exemplar of the accused.<sup>72</sup>

2. *Proof of Nonexistence of Bank*

When a check is drawn on a fictitious bank, a problem often arises in proving that the bank does not exist. Wigmore, in his work on evidence, cites, as an exception to the hearsay rule, certain commercial and professional lists and registers.<sup>73</sup> Under this exception, a court-martial is permitted to admit as evidence the Rand McNally Bankers Directory, which contains a listing of all banks, to establish the nonexistence of the drawee bank.<sup>74</sup> A city directory can also be used to establish this fact.<sup>75</sup>

3. *Presentment; Proof of Status of Account*

To prove this offense, it is not necessary that there be evidence of presentment of the check and dishonor. If the status of the accused's account is such that the checks would have been dishonored had they been presented to the bank, this is all that is required.<sup>76</sup> There must, however, be proof of the status of the account.<sup>77</sup>

4. *Proof of Other Worthless Check Offenses*

Evidence that the accused has uttered worthless checks other than those with which he is charged, during the same approximate period of time, is admissible to show his intent in issuing the checks in question.<sup>78</sup>

<sup>72</sup> United States v. Marrelli, 4 USCMA 276, 15 CMR 276 (1954); CM 350963, Brody, 5 CMR 265 (1952); ACM 4234, O'Connor, 3 CMR 541 (1952).

<sup>73</sup> Wigmore, Evidence § 1702 (3d ed. 1940).

<sup>74</sup> ACM 4234, O'Connor, 3 CMR 541 (1952).

<sup>75</sup> People v. McWilliams, 117 Cal. App. 732, 4 P. 2d 601 (1931); Wigmore, Evidence § 1706 (3d ed. 1940).

<sup>76</sup> ACM 6927, Tracy, 12 CMR 759 (1953). In this case, the board of review held that, as a general proposition, in the absence of evidence to the contrary, that it is presumed that the checks involved were not presented and dishonored. However, the board then went on to state that direct evidence of presentment and dishonor is unnecessary where it is shown that accused had insufficient funds. However, the evidence in this case showed that the drawee bank had honored a series of overdrafts by the accused previously, and, accordingly, the board refused to permit an inference that the drawee bank would have dishonored the checks involved.

<sup>77</sup> ACM 6547, Thompson, 11 CMR 712 (1953).

<sup>78</sup> See ACM 8262, Pearson, 15 CMR 761 (1954) (which permitted proof of two worthless checks issued shortly after the one charged); ACM 5128, Maxwell, 7 CMR 632 (1952); para. 138g(3), MCM, 1951; Annot., 80 A.L.R. 1306 (1932).

III. WORTHLESS CHECKS WITH INTENT TO DECEIVE  
(ARTICLE 134)

A. SOURCE

Most state jurisdictions have enacted statutes directed specifically against the use of worthless checks. The purpose of these statutes is ". . . to discourage and avert the mischief to trade, commerce and banking which a worthless check inflicts" and to discourage overdrafts and "check kiting."<sup>70</sup>

Although not specifically created by statutes, the Manuals for Courts-Martial, at least since 1928, have contained model specifications for worthless check offenses alleged as violations of either the "officer" article or the general article. These offenses could be committed "with intent to defraud," as where something of value was received therefor, or "with intent to deceive," where the check was given in payment of a pre-existing debt.<sup>80</sup>

The Uniform Code of Military Justice likewise failed to specifically mention worthless check offenses. However, the drafters of the Manual included a form specification for this offense.<sup>81</sup> The specification and the Table of Maximum Punishments<sup>82</sup> indicate that but two types of worthless check offenses were being created: (1) making and uttering a worthless check with intent to deceive, in payment of a pre-existing debt and therefore wrongfully and dishonorably failing to maintain a sufficient balance, punishable with a dishonorable discharge, total forfeitures and confinement at hard labor for six months (hereafter referred to as the major check offense); and (2) making and uttering a worthless check without intent to deceive and thereafter wrongfully and dishonorably failing to maintain a sufficient balance, punishable with confinement and partial forfeitures for four months (hereafter referred to as the minor check offense). This section will deal only with the major check offense.

B. PLEADING PROBLEMS

Except for a note appearing immediately following the form specification for worthless check offenses, there is no other discussion of worthless check offenses in the current Manual and this, it is submitted, is unfortunate, as much of the confusion in alleging and trying these offenses could have been avoided had they been more fully defined. According to the note, afore-

<sup>70</sup> 22 Am. Jur. *False Pretenses* § 62 (1939); Annot., 35 A.L.R. 375 (1925).

<sup>80</sup> No. 114, App. 4, MCM, 1928; No. 110, App. 4, MCM, 1949.

<sup>81</sup> No. 129, App. 6c, MCM, 1951.

<sup>82</sup> Para. 127c, MCM, 1951.

## WORTHLESS CHECK OFFENSES

mentioned, the proper manner of alleging a violation of the major check offense is as follows:

In that.....did at.....on or about....., 19....., with intent to deceive, wrongfully and unlawfully make and utter to .....a certain check in words and figures as follows, to wit: ....., in payment of a debt in the amount of \$....., he, the said.....then not intending to have sufficient funds in the.....bank available to meet payment of said check upon its presentment for payment in due course, and did thereafter wrongfully and dishonorably fail to (place) (maintain) sufficient funds in the.....bank for payment of such check upon its presentment for payment.

It is obvious from the wording of this specification, from the note following it, and from the wording in the Table of Maximum Punishments that this specification was to be used where the check was given in purported payment of a pre-existing debt and not where money or goods were received in return for the check. Where an article of value was received in return for the check, it was contemplated that the offense would be alleged as a larceny by check (see Part II, *supra*), or, where the intent to steal could not be established, as a minor check offense, *i.e.*, without intent to deceive. Yet a great majority of the reported cases alleging this offense are cases where money or goods have been received in return for the check. The Court has not insisted on this distinction and, in fact, Judge Ferguson refers to this offense as being similar to that of obtaining property with intent to defraud.<sup>53</sup> Apparently this offense is preferred over the minor check offense because of the greater maximum punishment which may be imposed.

One of the major pleading problems is that of variations between allegations and proof as to what was obtained in return for the check. Unlike the strict rules pertaining to larceny by check,<sup>54</sup> the cases have unanimously held that variations in this area are immaterial, as the gravamen of the offense is the issuing of the worthless check with intent to deceive. Thus, in the *Linacre*<sup>55</sup> and *Kessinger*<sup>56</sup> cases, a specification which failed to allege what, if anything, was obtained in return for the check was approved, and in another case, an immaterial variation was found where the specification alleged the receipt of military payment certificates and the proof showed the receipt of poker

<sup>53</sup> *United States v. Clay*, 11 USCMA 422, 29 CMR 238 (1960) (dissent).

<sup>54</sup> See text accompanying note 9 *supra*.

<sup>55</sup> CM 358416, *Linacre*, 6 CMR 417 (1952), *petition for review denied*, 2 USCMA 666, 6 CMR 130 (1952).

<sup>56</sup> CM 358137, *Kessinger*, 9 CMR 261 (1952).

## MILITARY LAW REVIEW

chips.<sup>87</sup>

While these cases were approved, the specifications were considered defective and inartfully drawn, but the errors were not considered prejudicial.

Another pleading problem arose in connection with the allegation of the words "wrongfully and dishonorably fail to place." In the *Brewer* case,<sup>88</sup> an Air Force board of review held it duplicitous to allege in one specification an intent to deceive and dishonorably failing to maintain a sufficient balance, as the latter was a distinct and separate offense. However, the Court, in passing on this issue,<sup>89</sup> found a specification which alleged an intent to deceive, but omitted the words "wrongfully and dishonorably," fatally defective. In a concurring opinion, Judge Latimer held that if these words were omitted, an accused could be found guilty of a crime merely because he uttered a check with a criminal intent, even if the check was paid according to its terms.

The model specification indicates that either the word "place" or "maintain" could be used in alleging the wrongful failure to have sufficient funds in the bank when the check was presented for payment. An attack was made on a specification which alleged the failure to "place" sufficient funds in the bank, as, it was argued, adequate funds could have been on deposit already. This argument was rejected by an Air Force board<sup>90</sup> which held that the word "dishonorably" eliminated the possibility of a conviction for an innocent act. The board noted that the word "place" should be used where a check was drafted on a bank in which no account was maintained, and the word "maintain" where there is an account in existence, but the balance is inadequate.

Where this offense is committed by an officer, it may be alleged as a violation of Article 133,<sup>91</sup> Article 134,<sup>92</sup> or both.<sup>93</sup> However, on at least two occasions, the Court has indicated its preference for charging worthless check offenses against officers as violations of Article 134, UCMJ.<sup>94</sup> There does not, however, appear

<sup>87</sup> CM 359463, Gaitwood, 8 CMR 281 (1952), *petition for review denied*, 2 USCMA 699, 9 CMR 139 (1953) (decided prior to *United States v. Walters*, 8 USCMA 50, 23 CMR 274 (1957)).

<sup>88</sup> ACMS 1768, 1 CMR 872 (1951).

<sup>89</sup> *United States v. Lightfoot*, 7 USCMA 686, 23 CMR 150 (1957).

<sup>90</sup> ACM 4821, Friend, 5 CMR 638 (1952); see also CM 395293, Bittinger, 23 CMR 611 (1957).

<sup>91</sup> ACM 6499, Danilson, 11 CMR 692 (1953).

<sup>92</sup> *United States v. Underwood*, 10 USCMA 413, 27 CMR 487 (1959).

<sup>93</sup> CM 353443, Blount, 5 CMR 297 (1952).

<sup>94</sup> *United States v. Underwood*, 10 USCMA 413, 27 CMR 487 (1959); *United States v. Kirksey*, 6 USCMA 556, 20 CMR 272 (1955).

## WORTHLESS CHECK OFFENSES

to be any sound legal objection to alleging this conduct as violative of Article 133, UCMJ, as this offense is certainly unbecoming an officer and has traditionally been dealt with under the "officer" article.

### C. MENS REA

#### 1. *Criminal Intent*

This offense requires two criminal states of mind: (1) The specific intent to deceive and (2) bad faith or gross indifference, which amounts to dishonorable conduct. Although the specification alleges another intent—" . . . then not intending to have sufficient funds in the . . . bank available to meet payment of said check upon its presentment for payment in due course . . .," this has not been given separate treatment by the boards of review or by the Court as being another specific intent, apparently because it should be considered in connection with the intent to deceive. As will be seen hereafter, the intent to deceive refers to the accused's intent with regard to the adequacy of his checking account, so the two types of intent are, in effect, part of the same criminal state of mind. And proof of the intent to deceive will invariably prove the other element aforementioned.<sup>95</sup>

The "dishonorable failure to maintain" element will be discussed in the next part in connection with the minor check offense.

#### 2. *The Intent to Deceive*

The words "intent to deceive," as used in this specification, have been defined as a "fraudulent and cheating representation, artifice or device, used . . . to deceive or trick another who is ignorant of the true facts to the prejudice and damage of the party imposed upon."<sup>96</sup> The deceit involved in this offense consists of a present implied representation, at the time the check is issued, that, when the check is presented for payment, it will be paid in accordance with its terms, from funds which are on deposit with the drawee bank, when, in fact, the maker has no

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<sup>95</sup> In the *Law Office Handbook*, note 64 *supra*, Instruction 129a, this is listed as a separate element of proof with no attempt to combine it with the "intent to deceive." In *United States v. Downard*, 6 USCMA 538, 20 CMR 254 (1955), the Court held that the only difference between this offense, and the minor check offense is the intent to deceive, and no mention is made of this additional element. From this it can reasonably be concluded that the "intent to deceive" and the intent not to have sufficient funds to meet the check should be read together and are one and the same state of mind.

<sup>96</sup> CM 353443, Blount, 5 CMR 297 (1952).

## MILITARY LAW REVIEW

such intent.<sup>97</sup> The word "deceit" does not carry the same connotation as the word "defraud," which, in military law at least, refers to the depriving of a person of something of value.<sup>98</sup>

The intent to deceive must exist at the time the check is uttered but, as will be seen later, the dishonorable conduct relates to the accused's post-issuance conduct.<sup>99</sup> Of course, if there is full disclosure to the payee of the inadequacy of the account at the time of utterance, there is no intent to deceive.<sup>100</sup> Although the Court has not passed on the issue, it would appear that the mere fact that a postdated check was involved would not preclude a conviction of this offense if the court is satisfied, beyond a reasonable doubt, that at the time he issued the check the accused knew that no funds were, or would be, available for its payment when presented.<sup>101</sup>

The intent to deceive requires a subjective state of mind. It cannot be established by proof of gross negligence or indifference, i.e., the failure to meet the objective norms of a reasonable

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<sup>97</sup> SFNCM 5600504, Mansfield, 22 CMR 667 (1956); ACM 11442, Stewart, 21 CMR 689 (1956), *petition for review denied*, 7 USCMA 764, 21 CMR 340 (1956).

<sup>98</sup> *United States v. Leach*, 7 USCMA 388, 22 CMR 178 (1956). As noted at text accompanying note 83 *supra*, however, Judge Ferguson equates the intent to deceive with an intent to defraud and would require a showing of an intent to peculiarly defraud the payee. Chief Judge Quinn and Judge Latimer, however, do not share this view, for in *United States v. Clay*, 11 USCMA 422, 29 CMR 238 (1960), they found sufficient evidence of an intent to deceive where an accused issued a check on a nonexistent account for the purpose of obtaining an administrative discharge, intending all along to make good on the checks, and having the funds to do so. The intent to deceive, they held, existed when he issued the check drawn on a nonexistent account and his intent to reimburse the payee after the dishonor of the checks was no defense, as the crime by then had already been committed.

<sup>99</sup> *United States v. Stratton*, 11 USCMA 152, 28 CMR 376 (1960).

<sup>100</sup> SFNCM 5600504, Mansfield, 22 CMR 667 (1956); ACM 11442, Stewart, 21 CMR 689 (1956), *petition for review denied*, 7 USCMA 464, 21 CMR 340 (1956).

<sup>101</sup> ACM 11442, Stewart, *supra* note 100; see *United States v. Cummins*, 9 USCMA 669, 26 CMR 449 (1958), which applied this reasoning to a larceny by check offense; CM 352775, Arnovits, 8 CMR 313 (1952), *aff'd and rev'd in part*, 3 USCMA 538, 13 CMR 94 (1953).

person.<sup>102</sup>

D. *COMPARISON WITH LARCENY BY CHECK OFFENSES*

When money or an article of value is obtained in return for the check, it is difficult to distinguish this offense from a larceny or wrongful appropriation by check. In both offenses, there is a false pretense, namely, the implied representation that the check will be honored in accordance with its terms, when in fact the maker has no intention of having sufficient funds in the bank for this purpose. An Article 121 offense requires, in addition, a specific intent to permanently or temporarily deprive or defraud another of his property, which is not a requirement of the major check offense. It is, however, difficult to conceive of a case where property is obtained in return for a "bogus" check, issued with the intent to deceive indicated previously, where there is no intent to deprive or defraud a person of his property. This confusion is probably a natural result of using the major check offense specification to allege a crime for which it was not designed.

There is no harm to the accused by alleging the offense as a major check offense, however, as it is a less serious offense than a larceny by check and facts which would prove the latter would invariably prove the former.<sup>103</sup>

E. *DEFENSES TO INTENT TO DECEIVE ELEMENT*

As this element requires a specific intent, a mistake of fact need only be honest in order to be a defense.<sup>104</sup>

With respect to intoxication and partial mental responsibility as defenses to this element, see Part II, *supra*, as the rules and cases discussed therein apply equally to this element.

<sup>102</sup> United States v. Stratton, 11 USCMA 152, 28 CMR 376 (1960); United States v. Muckelrath, 11 USCMA 179, 28 CMR 403 (1960). In explaining the difference between the state of mind required to establish a specific intent to deceive and dishonorable conduct, the Court, in *Stratton*, said: "In most cases, both elements of the principal offense, intent to deceive and dishonor, are established by evidence of falsity, fraud or deceit. However, a significant difference exists in a situation in which there is gross indifference. Negligence, simple or gross, is the absence of conscious thought in regard to a particular act, and is measured in terms of what a reasonable person would do in like circumstances. It is altogether different from the subjective state of mind required for an intent to deceive. . . . [D]ishonor in failing to provide for payment of a check on presentment, may be established not merely by some sort of bad faith, but also by "gross indifference" . . . his failure to meet the objective norms of a reasonable person. . . . However honest the accused may be in his belief in the existence of a fact, he is nonetheless guilty of dishonor if his belief is the result of gross indifference which results in nonpayment." 11 USCMA at 155, 28 CMR at 379.

<sup>103</sup> *Cf.* ACM 11442, Stewart, *supra* note 100.

<sup>104</sup> United States v. Stratton, 11 USCMA 152, 28 CMR 376 (1960); United States v. Rowan, 4 USCMA 430, 18 CMR 4 (1954).

## MILITARY LAW REVIEW

Once this offense has been committed, restitution is no defense.<sup>105</sup>

### F. INSTRUCTIONAL PROBLEMS

The principal instructional problem is in the mistake of fact area and the failure of law officers to recognize the two states of mind involved in this offense, the specific intent to deceive and the dishonorable failure to maintain, which, as will be noted in the following section, require a state of mind characterized by bad faith or gross indifference. A mistake of fact as to the former need only be honest; a mistake of fact as to the lesser element must be honest and not the result of bad faith or gross indifference.<sup>106</sup>

It is submitted that the best method of handling this problem where a mistake of fact is raised as to both elements is, as suggested by Judge Ferguson in his dissent in *United States v. Stratton*,<sup>107</sup> to instruct separately on these elements. The following instruction, depending on the factual situation, would probably be adequate for this purpose:

The defense has introduced evidence to show that, at the time the accused uttered the check, he was under the mistaken belief that there was, or would be, sufficient funds in his checking account to cover the check. With respect to this evidence, the court is advised that it is essential to a conviction for this offense that the prosecution prove beyond a reasonable doubt that the accused, at the time he uttered the check, had the specific intent to deceive the payee as to the sufficiency of his checking account and that if the accused is found to be laboring under a honest mistake, he cannot be found guilty of this offense. The burden is on the prosecution to establish the accused's guilt by legal and competent evidence beyond a reasonable doubt. Consequently, unless you are satisfied beyond a reasonable doubt that the accused was not honestly under the mistaken belief that he had, or would have, sufficient funds in said bank to cover the payment of the check, you must acquit the accused of the offense charged. In such an event, you may consider whether or not the lesser included offense of making and uttering a worthless check and thereafter wrongfully and dishonorably failing to maintain sufficient funds, which I will hereafter describe, has been committed.

Following this advice, the court should be instructed on the effect of mistake on the element of dishonor, substantially as contained in the *Law Officer Handbook*.<sup>108</sup>

The instructional problems concerning the "dishonorable" element will be discussed in the Part IV, *infra*.

<sup>105</sup> *United States v. Clay*, 11 USCMA 422, 29 CMR 238 (1960).

<sup>106</sup> *United States v. Underwood*, 10 USCMA 413, 27 CMR 487 (1959); this defense will be discussed in the following part.

<sup>107</sup> 11 USCMA 152, 28 CMR 376 (1960).

<sup>108</sup> U.S. Dep't of Army, Pamphlet No. 27-9, *Military Justice Handbook—The Law Officer*, App. XIII (1958).



## WORTHLESS CHECK OFFENSES

### G. LESSER INCLUDED OFFENSES

The only lesser included offense to this offense is the minor check offense of issuing a check, without an intent to deceive, and thereafter wrongfully and dishonorably failing to maintain a sufficient balance. The only difference between these offenses is the additional element in the major offense of an intent to deceive. Negligent failure to maintain a sufficient balance is not an offense under the Code.<sup>110</sup>

### H. EVIDENTIARY PROBLEMS

As in the case of larceny by check, proof of the uttering of a check may be established by circumstantial evidence,<sup>110</sup> and proof of presentment of the check and its dishonor is not required where evidence of the status of the account establishes that the check would have been dishonored had it been presented for payment.<sup>111</sup> However, there must be proof of the status of the checking account.<sup>112</sup>

## IV. WORTHLESS CHECKS WITHOUT INTENT TO DECEIVE

### A. SOURCE AND PLEADING PROBLEMS

The authority for this offense is explained in the previous section. According to the Manual,<sup>113</sup> this offense is properly pleaded as follows:

In that.....did at.....on or about.....  
make and utter to.....a certain check in words and figures  
as follows, to wit: .....for.....and did there-  
after wrongfully and dishonorably fail to (place) (maintain) sufficient  
funds in the.....bank for payment of such check upon its  
presentment for payment.

The pleading problems pertaining to the major check offense (Part III, *supra*) generally apply to this offense. As with the major check offense, the Court has indicated that when this offense has been committed by an officer, it should be alleged as a violation of Article 134 and not Article 133.<sup>114</sup>

### B. MENS REA

The only criminal state of mind involved in this offense is the bad faith or gross indifference in failing to maintain a sufficient balance to satisfy the check. Prior to *United States v. Down-*

<sup>110</sup> *United States v. Downard*, 6 USCMA 538, 20 CMR 254 (1955).

<sup>110</sup> CM 354119, Huffman, 6 CMR 244 (1952).

<sup>111</sup> ACM 13487, Clark, 24 CMR 630 (1957).

<sup>112</sup> *Ibid.* (See text accompanying note 72 *supra*, for other evidentiary problems which apply generally to the Article 134 check offenses.)

<sup>113</sup> No. 129, App. 6c, MCM, 1951.

<sup>114</sup> *United States v. Kirksey*, 6 USCMA 556, 20 CMR 272 (1955).

## MILITARY LAW REVIEW

ard,<sup>115</sup> Army and Air Force boards of review had divergent views as to the meaning of the word "dishonorable" as used in the specification.<sup>116</sup> In *Downard*, the Court adopted the Air Force view and held that mere negligence in failing to maintain an adequate balance is not sufficient to establish dishonorable conduct, but gross indifference or bad faith is required. In seeking a definition for this word, the Court examined its prior usage in connection with the offense of dishonorably failing to pay a debt, and noted that it was a term of art connoting a state of mind short of a specific intent, characterized by deceit, evasion, false promises, denial of indebtedness or other distinctly culpable circumstances. The Court thereupon reversed a conviction based on a discreditable or negligent failure to maintain an adequate balance. In *United States v. Groom*,<sup>117</sup> the Court said this term involved a state of mind "closely allied to that of a specific criminal intent."

As previously indicated, this state of mind pertains to the acts of the maker after the checks have been issued and, according to the model specification indicated above, refers to his failure to maintain a sufficient balance to satisfy the check when it is presented for payment.<sup>118</sup> Thus it would appear that the dishonorable conduct must exist, if at all, between the time of issuance and the time of presentment and dishonor, and a subsequent redemption of the check would be immaterial. Earlier boards of review so held.<sup>119</sup> However, it will be seen, the Court has considered restitution or redemption of the check after dishonor as material on the issue of whether "dishonorable" conduct existed.

In determining what evidence is required to establish this offense, two cases are of particular significance. In *United States*

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<sup>115</sup> 6 USCMA 598, 20 CMR 254 (1955).

<sup>116</sup> *United States v. Norren*, 3 BR 95 (1944), and *United States v. Hebb*, 32 BR 397 (1944), holding it to mean the mere failure to exercise due care with respect to maintaining a proper balance; ACM 4821, *Friend*, 5 CMR 638 (1952), and ACMS 4621, *Reitman*, 7 CMR 685 (1952), holding it to require a showing of bad faith or gross indifference.

<sup>117</sup> 12 USCMA 11, 30 CMR 11 (1960).

<sup>118</sup> *United States v. Stratton*, 11 USCMA 162, 28 CMR 376 (1960); ACM 8913, *Torbett*, 17 CMR 650 (1954).

<sup>119</sup> CM 352775, *Arnovits*, 8 CMR 313 (1952), *aff'd and rev'd in part*, 8 USCMA 538, 13 CMR 94 (1953); CM 358137, *Kessinger*, 9 CMR 261 (1952).

## WORTHLESS CHECK OFFENSES

*v. Brand*,<sup>120</sup> the accused attempted to make good on the checks after he had issued them and prior to their dishonor, but the offer was refused by the payee—an open mess steward—with the assurance that when they were returned, he could then redeem them. The installation commander had previously permitted this practice. He was not given this opportunity, however, because a new commander with different ideas entered the scene. The Court found no dishonorable conduct here, as a matter of law. In a concurring opinion, Judge Latimer indicated that the court should concern itself not only with the accused's conduct between issuance and dishonor, but also his actions *after* the checks had been dishonored and, inasmuch as only ten days had elapsed between the dishonor of the checks and the preferring of charges, and there was no other evidence of culpability, no dishonor was present.

In *United States v. Groom*,<sup>121</sup> the accused was charged with issuing worthless checks on 12, 15 and 19 November 1959. His checking account was quite active from about October 1, 1959 through the date of his trial and, except for the three checks that "bounced," all other checks written by him were honored. However, although the published opinion is silent on the matter, the appellate briefs indicate that each deposit made by the accused was invariably met by a check of the same approximate amount, which would indicate an awareness on Groom's part of his exact balance. During the trial, the appellate briefs indicate, the trial counsel referred to the presumption permitted from the issuance

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<sup>120</sup> 10 USCMA 437, 28 CMR 3 (1959). Judge Latimer, concurring in the result: ". . . I take the position that the tender of the money to redeem the checks is a factor favorable to accused, but it does not bar culpable failures thereafter. To me it offers a starting point for appraising his criminality but it neither satisfied the debt nor permitted the accused to use devious and dishonorable means to avoid paying the obligation. . . . I consider that when he tendered the money and payment was refused he did not free himself from the military requirement proscribing dishonorable failure to satisfy his obligations . . . [T]he Government, having relied on dishonorable failure after the fraud, was required to prove some criminality of the sort mentioned above . . . [i.e., willful evasion, bad faith, false promises, or some similar type of culpable motivation] . . . If I use the time of notice of dishonor [to the preferring of charges], there is but ten days. There is no showing of any other fact subsequent to these times from which culpability might be inferred and, standing alone, failure to satisfy the obligations within a given time, unless the period is unconscionable, is not sufficient for that purpose. . . . The only items upon which the Government can rely to sustain the findings are the failure to forward the money or redeem the checks within the above-mentioned periods and those are not sufficient to support a finding of dishonorable conduct." 10 USCMA at 439-40, 28 CMR at 5-6.

<sup>121</sup> 12 USCMA 11, 30 CMR 11 (1960).

## MILITARY LAW REVIEW

and subsequent dishonor of a check<sup>122</sup> and the presumption that a person is charged with knowledge of the status of his account. The 12 November check was dishonored on 18 November and the accused redeemed it on 30 November. The record was silent as to the dates the other two checks were dishonored but, according to the government appellate brief, they must have been dishonored prior to December 2, 1959. They were redeemed on December 15, 1959 by the accused. No evidence on the merits was offered by the defense.

The government sought to limit Judge Latimer's concurring opinion in the *Brand* case to the facts of that case, and argued that the prompt redemption of the checks was immaterial—that the offense was complete when the checks were dishonored.

The Court unanimously held, however, that, as a matter of law, the evidence failed to establish dishonorable conduct, citing the prompt redemption of the checks and the failure of the government to show when the checks were returned to the payee or what period of time or effort was required in order to have the accused redeem them.

In the *Brand* and *Groom* decisions, the Court has indicated at least two things: (1) it will not give much, if any, weight to the presumption arising from the dishonor of a check in determining dishonorable conduct in maintaining an adequate balance, especially where there is no other evidence of dishonorable conduct and (2) the crime is not necessarily committed between the issuance of the check and its dishonor, but the total post-dishonor conduct of the accused must also be considered. If, in *Groom*, the Court was merely saying that subsequent redemption of a dishonored check is admissible to show lack of bad faith or gross indifference, the Court's decision is, it is submitted, sound and consistent with prior law on this subject. However, the accused presented no evidence of innocent conduct here, other than the evidence which indicated that all the other checks written by him in the month of October had been honored. For all that appears from the opinion, the accused may have intended to issue these worthless checks for the purpose of satisfying his immediate financial needs but intending to reimburse the payee later, when the checks were dishonored and he was in a better position financially to redeem them. If this were the case, the offense would clearly be established.

It is significant that the Court failed to find any dishonorable conduct here even though the accused had the use of the money

<sup>122</sup> See text accompanying note 85 *supra*.

## WORTHLESS CHECK OFFENSES

he received in return for the checks for a period of from 18 to 30 days, had placed the payee through the trouble of readjusting his account records and seeking reimbursement from him, had inconvenienced the several banks through which the check had passed, and contrary to the original intent of the payee, had converted a supposedly cash transaction into a credit transaction. It would appear that these facts, in and of themselves, amount to dishonorable conduct, absent a claim of mistake. Yet the Court found no dishonorable conduct as a matter of law.

If, as the opinion indicates, the time and effort required by the payee to obtain reimbursement is a material fact in determining whether the maker had dishonorably failed to maintain his checking account, many of these cases could just as well be tried as "bad" debt offenses in violation of Article 134.<sup>123</sup> Once a check is dishonored, a debtor-creditor relationship is established between the maker and payee,<sup>124</sup> and if the maker dishonorably fails to pay his debt thereafter, a "bad" debt offense has been committed. This may be significant when considering the effect of *United States v. Jacoby*<sup>125</sup> on the trial of worthless check offenses, to be discussed in the next part.

These cases should be a caveat to trial counsel prosecuting worthless check offenses to introduce evidence of all efforts made to effect recovery from the maker after the dishonored checks have been returned and to show the date the checks were dishonored, when the maker was notified and what his reaction to the notification was, and what inconvenience the payee experienced as a result of the dishonored check. If there is evidence of a stop payment order, or actual knowledge on the part of the maker as to the insufficiency of his account as evidenced by other checks made by him being dishonored, this evidence should also be introduced.

It is interesting to compare the decision in *Groom* with the reported decision in *United States v. Cummins*,<sup>126</sup> where the Court found sufficient evidence of an intent to steal from evidence of the issuance of a postdated check, the receipt of money therefor and a failure to have sufficient funds on deposit when the check was presented. The decision in *Cummins* is silent as to whether Cummins redeemed the dishonored check. If he did not, this factor could account for the different results.

As with the other worthless check offenses, if the elements of

<sup>123</sup> See *United States v. Kirksey*, 6 USCMA 556, 20 CMR 272 (1955).

<sup>124</sup> *United States v. Brand*, 10 USCMA 437, 28 CMR 3 (1959).

<sup>125</sup> 11 USCMA 428, 29 CMR 244 (1960).

<sup>126</sup> 9 USCMA 669, 26 CMR 449 (1958).

## MILITARY LAW REVIEW

the offense are otherwise established, the fact that the check is postdated will not prevent a conviction of this offense.<sup>127</sup>

### C. DEFENSES

#### 1. *Mistake of Fact*

As indicated, the "dishonorable" element has been referred to by the Court as being closely allied to a specific intent. It requires a state of mind characterized by bad faith or gross indifference and it serves no useful purpose, in discussing mistake of fact problems, to determine whether this makes it a specific or general intent crime, or something in between. The mistake of fact, in order to be a defense, must negate the state of mind required to prove the offense, thus it must be honest, and not the result of bad faith or gross indifference.<sup>125</sup> An instruction that the mistake must be honest and reasonable is erroneous.<sup>129</sup>

#### 2. *Intoxication and Partial Mental Responsibility*

There are no reported cases on the legal effect of these matters on this offense. However, inasmuch as the offense requires a particular state of mind, *i.e.*, bad faith or gross indifference, the offense is not proven unless the government can establish this state of mind. If alcohol or some mental aberration deprives the accused of the capacity to entertain this state of mind, it should be a good defense to this charge.

### D. INSTRUCTIONAL PROBLEMS

The word "dishonorable," as used in the specification, is a word of art and must be defined for the court.<sup>130</sup> The definition of this term in the *Law Officer Handbook*<sup>131</sup> has been specifically ap-

<sup>127</sup> See cases cited at note 101 *supra*.

<sup>128</sup> See *United States v. Stratton*, 11 USCMA 152, 28 CMR 376 (1960); *Manson, Mistake as a Defense*, *Mil. L. Rev.*, October 1959, p. 68. This is the gist of the mistake of fact instruction contained in App. XIII, the *Law Officer Handbook*, *supra* note 108.

<sup>129</sup> *United States v. Connell*, 7 USCMA 228, 22 CMR 18 (1956). In *United States v. Bullock*, 12 USCMA 142, 30 CMR 142 (1961), the Court was confronted with an instruction that the mistake must be honest and reasonable, but other instructions given clarified the standard of reasonableness as requiring gross indifference. The Court held that it was misleading to give an "honest and reasonable" test, but since it was clarified properly, no prejudicial error resulted.

<sup>130</sup> *United States v. Downard*, 6 USCMA 538, 20 CMR 254 (1955); *ACMS 2958, Barnwell*, 5 CMR 773 (1952).

<sup>131</sup> Instruction 129b, the *Law Officer Handbook*, *supra* note 108. There is a slight variation between the definition of this term in this instruction and that contained in Instruction 129a, pertaining to the major worthless check offense. There is no explanation for this either in the pamphlet or in the reported cases. However, the variation does not appear significant.

## WORTHLESS CHECK OFFENSES

proved by the Court,<sup>132</sup> and although general in terms, the definition sufficiently conveys the historic meaning of this word.

Once the issue of mistake of fact is raised, it must be instructed on *sua sponte*.<sup>133</sup>

### E. LESSER INCLUDED OFFENSES; EVIDENTIARY PROBLEMS

There are no lesser included offenses to this offense. As previously noted, negligent or discreditable failure to maintain a sufficient balance is not an offense under the Code. The evidentiary problems discussed in Part III apply equally to this offense.<sup>134</sup>

## V. SUMMARY

### A. NEED FOR WORTHLESS CHECK OFFENSES

Aside from the arguments given in support of state worthless check statutes (Part III, *supra*), there is a special requirement for these offenses in the Armed Forces. Unlike most civilian endeavors, military personnel are frequently in a transient status, nearly always live at or near communities other than their "home," and, when cashing checks, they rely, either expressly or by implication, on their status as members of the Armed Forces to convince others of their financial integrity. Further, once a serviceman's check has been dishonored, it is difficult, and at times impossible, for the payee to effect collection because the maker may then be overseas or in another state. To prevent the adverse reflection on the services resulting from dishonored checks, to protect the credit of servicemen and thereby facilitate cashing of checks by them in strange communities, and to maintain the integrity of the checking system, effective disciplinary tools should be available to a commander when a member of his command has issued a worthless check.

Because of the absence of sufficiently detailed instructions in the Manual regarding worthless check offenses, the law with respect to them has developed mostly by judicial fiat. This has resulted in confusion in the selection of charges and trial of the presently available check offenses—the reported cases indicating

<sup>132</sup> United States v. Stratton, 11 USCMA 152, 28 CMR 376 (1960).

<sup>133</sup> See United States v. Ginn, 1 USCMA 453, 4 CMR 45 (1952) (which involved a murder charge, but the opinion discusses instructional requirements, generally).

<sup>134</sup> As with the major worthless check offense, proof of presentment and dishonor is not required where the evidence otherwise established that the check would have been dishonored had it been presented—ACM 6919, Wilson, 12 CMR 667 (1953); and uttering can be established by circumstantial evidence—CM 354450, Harris, 7 CMR 251 (1952).

## MILITARY LAW REVIEW

that the same facts, *viz.*, the issuance of a check, obtaining articles of value therefor, and its subsequent dishonor, are sometimes alleged as larceny by check, and other times as violations of either of the two Article 134 check offenses. The result, in many cases, is that the severity of the offense charged will depend on the whim of the accuser, the same facts resulting in great variations in punishment. For these reasons, legislation in this field is desirable.

### B. UNITED STATES v. JACOBY AND THE OMNIBUS BILL

The holding in *United States v. Jacoby*<sup>135</sup> will have far reaching effects on the trial of "bad" check cases. This decision requires that an accused be afforded an opportunity to be present with his counsel at the taking of written prosecution depositions. In the usual worthless check case, there are at least two essential witnesses, the payee and a bank official to prove the status of the account. More often than not, either or both of these persons will not be in the area where the accused is stationed and where the trial would ordinarily be held. Although there have been many suggestions for meeting the requirements of *Jacoby*,<sup>136</sup> as a practical matter most of these cases will probably not be tried, because of the time and expense involved. This is especially true when the discharge of the offender can usually be accomplished expeditiously, and economically, without depositions, through administrative proceedings.<sup>137</sup>

To remedy the confusion that exists in the "bad" check area, The Judge Advocates General have, for several years prior to the *Jacoby* decision, recommended to Congress an adoption of a "bad" check statute, modeled after the Codes of the District of Columbia and Missouri.<sup>138</sup> The proposed amendment is as follows:

Sec. 923a. Art. 123a. Making, drawing, or uttering check, draft or order without sufficient funds.

a. Any person subject to this chapter who

- (1) for the procurement of any article or thing of value, with intent to defraud; or
- (2) for the payment of any past due obligation, or for any other purpose, with intent to deceive; makes,

<sup>135</sup> 11 USCMA 428, 29 CMR 244 (1960).

<sup>136</sup> Such as sending the accused and his counsel by plane to the deponent's locale; bringing the witness in prior to trial for the taking of the deposition or for the trial; taking depositions of local witnesses, then assigning the accused to a military installation close to the absent witness, etc.

<sup>137</sup> Army Regs. No. 635-208 (April 8, 1959).

<sup>138</sup> U.S. Dep't of Defense, Annual Report of the U.S. Court of Military Appeals and The Judge Advocates General of The Armed Forces and The General Counsel of the Department of the Treasury pursuant to the Uniform Code of Military Justice for the period Jan. 1, 1959 to Dec. 31, 1959.



## WORTHLESS CHECK OFFENSES

draws, utters, or delivers any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment, shall be punished as a court-martial may direct.

- b. The making, drawing, uttering or delivering by a maker or drawer of a check, draft or order, payment of which is refused by the drawee bank because of insufficient funds of the maker or drawer in the drawee's possession or control, is *prima facie* evidence of his intent to defraud or deceive and of his knowledge of insufficient funds in, or credit with, that bank or depository, unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft or order was not paid on presentment.
- c. In this section the word credit means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft or order.

The Powell Committee Report<sup>139</sup> also recommends passage of this bill.

The announced purpose of this amendment<sup>140</sup> is to correct the confusing situation arising from the present law in this field where the offense may be alleged as a violation of Articles 121, 133 or 134, and, because of technical difficulties which may arise as a result of pleading the wrong article, guilty persons sometimes escape punishment. Another purpose was to create a presumption relative to the intent to defraud.

In view of these purposes, it is clear that, if enacted, this new article will pre-empt at least the Article 134 "bad" check offenses under the *Norris* doctrine.<sup>141</sup> The "intent to defraud" portion of the proposed article could be used in all cases where

<sup>139</sup> U.S. Dep't of Army, Report of The Committee on The Uniform Code of Military Justice Good Order and Discipline in the Army 190 (1960).

<sup>140</sup> H.R. 7657, 87th Cong., 1st Sess. (1961), a bill to amend the Uniform Code of Military Justice to provide a specific statutory authority for prosecution of bad check offenses, was introduced by Rep. Carl Vinson. The bill was passed by the House of Representatives without amendment on July 10, 1961, and was passed by the Senate without amendment on September 20, 1961. 107 Cong. Rec. 11816-17, D546 (daily ed. July 10, 1961); 107 Cong. Rec. 19195, D879 (daily ed. September 20, 1961). The bill was signed into law by the President on October 4, 1961. Pub. L. 87-385, 75 Stat. 814. It will become effective on March 1, 1962.

<sup>141</sup> *United States v. Norris*, 2 USCMA 236, 8 CMR 36 (1963), which holds in effect that once Congress has expressly defined an offense, the services cannot eliminate an element of the defined offense and try the matter as a violation of Art. 134. *Accord*, *United States v. McCormick*, 12 USCMA 26, 30 CMR 26 (1960). See also Meagher, *The Fiction of Legislative Intent: A Rationale of Congressional Pre-emption In Courts-Martial Offenses*, Mil. L. Rev., July 1960, p. 69.

## MILITARY LAW REVIEW

larceny by check is now being alleged, although either could probably be used in most cases. The proposed Article 123a(2) would at least include what is now alleged as the major check offense under Article 134, but is broader in that, in addition to using this article when a check is given for a past due debt, it can also be used when a check is given ". . . for any other purpose . . ." It would, probably, be proper to allege this offense where a worthless check is given as a donation to charity. However, there would be no lesser offense, as presently exists, of issuing a check without intent to deceive or defraud and dishonorably failing to maintain a sufficient balance. In this respect, it is submitted, the proposed legislation is deficient. For reasons previously indicated, servicemen should be punished where they issue a check and dishonorably fail to maintain a sufficient balance, even if the check was not issued with an intent to defraud or deceive. Under the proposed amendment, it would not be an offense, for example, if the serviceman issued a check without an intent to deceive or defraud, but thereafter decided to put a "stop payment" order on the check because of an unforeseen financial difficulty which arose, or because of some animosity which has developed between him and the payee. Conceivably, an accused could deny that he had an intent to deceive or defraud at the time he issued the check and claim that he was merely indifferent to the status of his account, yet, even though the evidence might show gross indifference, no offense under the proposed statute would have been committed. It is submitted that this conduct should be proscribed. Consistent with the presumption as to intent to defraud or deceive, a presumption as to "dishonorable failure to maintain" should be established so that, once a check is dishonored, the burden of going forward with the evidence and showing that the dishonor of the check was the result of an innocent act, and not the result of bad faith or gross indifference, would be on the accused unless the accused wanted to run the risk of the court finding in accordance with the presumption.<sup>142</sup>

The proposed legislation is also deficient in that it fails to remedy the situation created by *United States v. Jacoby*. There is no reason, in fact or law, why a notice of dishonor should not be admissible as proof of the inadequacy of the account instead of requiring the testimony of a bank official for this purpose.

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<sup>142</sup> Nearly all state statutes require either an intent to defraud or deceive. Kansas, however, does not. Its statute makes one issuing a "rubber" check with knowledge that his account is deficient liable and no intent to defraud need be shown. Annot., 35 A.L.R. 375 (1925).

## WORTHLESS CHECK OFFENSES

This can be accomplished by legislation making the notice of dishonor *prima facie* evidence of the insufficiency of the account. California has a statute which accomplishes this and is relied on when the bank is located at a place distant from the jurisdiction of the court.<sup>143</sup> Such a law would eliminate the necessity for calling the bank official and would facilitate the trial of these cases under the Code. This could not result in harm to the accused because he is, or should be, aware of the status of his account and, if the notice of dishonor were issued by the bank in error, the defense could take a written deposition of the bank custodian to establish this fact and cause a dismissal of the charges against him. The *Jacoby* case would not preclude the defense from taking written interrogatories without his presence. In most cases, the offense could then be established by the testimony of the payee alone, who could authenticate the dishonored check.

### C. SUMMARY AND RECOMMENDATIONS

Under present law, when a bank clerk affixes a notice of dishonor for insufficient funds on a check issued by a serviceman, the maker may have committed a larceny by check (Article 121, UCMJ) or one of the two worthless check offenses under Article 134 of the Code.

To establish a larceny by check, or obtaining of property under false pretenses, an intent to steal must be established, and no other intent is involved. The offense should be alleged simply as any larceny offense, it being unnecessary to allege the false pretenses by which the property was obtained. The ordinary instructions on larceny are sufficient and there is usually no requirement that there be a false pretense theory instruction.

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<sup>143</sup> Cal. Penal Code, § 476(a): "Where such check, draft or order is protested on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissible as proof of presentation, non-payment and protest and shall be presumptive evidence of knowledge of insufficiency of funds or credit with such bank or depository. . . ." Information that this presumption is relied on to establish the insufficiency of the account has been obtained from the office of the District Attorney, County of Los Angeles. The notice of protest is, under California law, signed by a Notary Public and recites that the check was presented to the bank by the Notary and was dishonored for insufficient funds or no account. This statute has been attacked as unconstitutional in that it deprived the accused of his right to confrontation, but, in *People v. Bullock*, 123 Cal. App. 299, 11 P.2d 441 (1932), this contention was rejected on the ground that the status of the account was a matter peculiarly within his knowledge. See also Annot., 51 A.L.R. 1139 (1927); *Yee Hem v. United States*, 268 U.S. 178 (1925), which discuss statutory presumptions. In Annot., 86 A.L.R. 179 (1933), it is concluded that ". . . it is competent for a legislative body to provide by statute . . . that certain facts shall be *prima facie* or presumptive evidence of other facts, if there is a natural and rational evidentiary relation between the facts proved and those presumed. . . ."

## MILITARY LAW REVIEW

The intent to steal is usually established by circumstantial evidence and has, in the past, ordinarily been inferred from the utterance of the check and its dishonor. While restitution is no defense once the offense has been committed, prompt redemption of the check after its dishonor is admissible as bearing on the intent to steal. A variation between allegations and proof as to the property obtained as a result of the worthless check is usually fatal. If there is some doubt as to what property was obtained in return for the worthless check, the offense should be alleged as a violation of the Article 134 worthless check offenses where variations between allegations and proof as to the property obtained are immaterial.

If an officer has committed this offense, it may, in addition, be alleged as a violation of Article 133. Where there is a doubt as to the facts or law involved, the offense may be alleged as a violation of Articles 121 and 134, but the offender may not be punished as to both.

The lesser included offenses to larceny by check are wrongful appropriation and attempted larceny or wrongful appropriation.

The major check offense under Article 134—issuing a check, with intent to deceive, and thereafter wrongfully and dishonorably failing to maintain a sufficient balance—was originally designed for use where a worthless check was given in purported payment of a pre-existing debt, but this offense has also been used where property is obtained in return for the check. There are two criminal states of mind involved in this offense—the specific intent to deceive with respect to the sufficiency of the account to satisfy the check, which must be found to exist at the time the check was issued and the bad faith or gross indifference with respect to failing to maintain a sufficient balance after the check has been issued. A mistake of fact as to the “intent to deceive” need only be honest. As to the “dishonorable” element, it need be honest and not the result of bad faith or gross indifference. Where a mistake of fact is raised as to both elements, the instructions on mistake of fact should clearly differentiate between the two.

The minor worthless check offense is the same as the major offense except that it requires no intent to deceive. Both offenses require a showing of a dishonorable failure to maintain a sufficient balance. By “dishonorably” is meant bad faith or gross indifference, which connotes that the failure to maintain a proper balance was characterized by fraud, deceit, evasion, dishonesty or false or fraudulent promises. This offense presupposes or disregards the propriety of the issuance of the check; it is only

## WORTHLESS CHECK OFFENSES

concerned with dishonor in regard to the nonpayment of the check.

Previously, it was generally believed that the dishonorable conduct related to the maker's conduct during the period between the issuance of the check and its dishonor, but the Court has recently held that conduct subsequent to dishonor, such as prompt redemption of the check, can show a lack of bad faith or gross indifference and be a defense. The Court has further held that the time and effort required by the payee to obtain reimbursement is material in determining whether the maker had dishonorably failed to maintain his checking account. In view of this, many of these offenses can and should, hereafter, be alleged as "bad" debt offenses, because what will establish a minor check offense will nearly always establish a bad debt offense, and inasmuch as the "bad" debt offense will not usually require proof of the status of the checking account, the problem created by *Jacoby* with regard to bank officials will be avoided.

A check issued to a co-participant in a gambling game as part of the "pot" or to obtain proceeds with which to continue the game cannot be the basis of a worthless check offense under Article 134 or larceny by check even if the check is subsequently dishonored.

Intoxication and partial mental responsibility may affect the capacity of the accused to entertain the specific intents required in larceny by check and the major check offense and may possibly affect an accused's capacity to entertain the state of mind required in the minor check offense, although the Court has not reached this issue yet.

If the elements of the offense are otherwise established, the fact that the check is postdated will not prevent a conviction of any of the check offenses under Articles 121 or 134.

The proposed amendment to the Code, the so-called Omnibus Bill, will eliminate much of the confusion presently existing in the trial of check offenses. However, in its present form, the amendment will not re-enact an offense equivalent to the present minor check offense. For reasons previously indicated, this offense should be retained. To accomplish this, and to remedy one of the difficulties created by *United States v. Jacoby*, the Omnibus Bill should be amended as follows:

Add a new subsection (c) as follows:

- c. (1) Any person subject to this chapter who makes, draws, utters or delivers any check, draft or order for the payment of money upon any bank or other depository and thereafter wrongfully and dishonorably fails to place or maintain sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full

## MILITARY LAW REVIEW

upon its presentment shall be punished as a court-martial may direct.

(2) The making, drawing, uttering or delivering by a maker or drawer of a check, draft or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control is *prima facie* evidence of his wrongful and dishonorable failure to place or maintain a sufficient balance or credit.

Add a new subsection (d) as follows:

d. Where such check, draft or order is dishonored on the ground of insufficiency of funds or credit, the notice of dishonor thereof shall be admissible as *prima facie* evidence of presentation, non-payment, dishonor and insufficiency of funds or credit with such bank or other depository.

The present subsection (c) will become subsection (e).

This amendment would serve a three-fold purpose: (1) it would retain the present minor check offense, (2) it would shift the burden to the accused of going forward with the evidence to explain his failure to maintain a sufficient balance and failing in this, the court could base a conviction on subsection (c) (2) of the bill, as amended, and (3) it would permit use of the notice of dishonor to establish the inadequacy of the checking account and eliminate the need of calling a bank official for this purpose.

The proposed statute, as amended, would, it is submitted, satisfy the present needs of the services in this area and should facilitate the trial of worthless check offenses.

# THE HISS ACT AND ITS APPLICATION TO THE MILITARY\*

BY CAPTAIN LEE M. MCHUGHES\*\*

## I. INTRODUCTION, BACKGROUND AND PURPOSE

Public Law 769 of the Eighty-third Congress was enacted on September 1, 1954.<sup>1</sup> It was a direct outgrowth of the famous Alger Hiss case,<sup>2</sup> and thereby became known as the Hiss Act.

Alger Hiss was convicted in federal court on January 21, 1950, on two counts of perjury.<sup>3</sup> He previously had testified before a federal grand jury in December of 1948 that he had not seen the former Communist Whittaker Chambers after July 1, 1937, and that neither he nor his wife had turned over any documents of the federal government to Chambers or any other unauthorized person.<sup>4</sup> When that testimony, which related to a period during which he was in the service of the federal government, was proved false, his conviction for perjury resulted.

If it were not for the Hiss Act, Alger Hiss would have eventually become eligible for an annuity based upon his past federal service.<sup>5</sup> It was this possibility that seems to have triggered the congressional activity which resulted in enactment of the act. A majority of Congress was apparently united in the belief that it was intolerable to grant retirement benefits to federal officers and employees who broke faith with the Government. This senti-

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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 Ninth Career Course. 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 or any other governmental agency. [Editor's Note: The reader should carefully note that this article was written prior to the passage of the amendments to the Hiss Act in the first session of the 87th Congress. Pub. L. 87-299, 87th Cong., 1st Sess. (Sept. 26, 1961).]

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<sup>1</sup> 68 Stat. 1142 (1954), as amended, 5 U.S.C. §§ 2281-2288 (1958).

<sup>2</sup> Cook, *The Unfinished Story of Alger Hiss* (1958).

<sup>3</sup> Hiss was tried in the United States District Court for the Southern District of New York. The conviction was affirmed on appeal. *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950). A motion for a new trial was denied in *United States v. Hiss*, 107 F. Supp. 128 (S.D. N.Y. 1952), *aff'd*, 201 F.2d 372 (2d Cir. 1953).

<sup>4</sup> Cook, *op. cit. supra* note 2, at 1-20.

<sup>5</sup> *Hearings on H.R. 1259, 3901, 5299, 6940, 7001, 7381, 7476, 8091, 8547, and 8712 Before the House Committee on Post Office and Civil Service*, 83d Cong., 2d Sess. 28 (1954).

## MILITARY LAW REVIEW

ment is clearly set forth in the report on the bill which became the Hiss Act:

The purpose of this legislation is to prohibit Federal annuities or retired pay to persons who commit offenses which in effect constitute breaches of faith in matters involving (1) the improper use of their authority, power, influence, or privileges as officers or employees of the United States or of the municipal government of the District of Columbia, or (2) the violation of criminal statutes relating to treason, sabotage, subversive activities, and perjury and other offenses related to their official duties.

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In general, this legislation will prohibit the award or grant, after date of enactment, of any Federal annuity or retired pay to any individual convicted of specified crimes as set forth in the Criminal Code of the United States or the District of Columbia Code. It will also prohibit such annuity or retired pay for any person who refuses on the grounds of self-incrimination to appear, testify, or produce any document in a proceeding before a Federal grand jury or court or before any congressional committee with respect to his present or former duties as an officer or employee of the United States.

In a broader sense, this legislation will exercise the greatest power and influence to clear the moral climate in which the business of the United States is transacted and to improve the ethical conduct of those individuals, both in and outside of the Government, who transact such business . . . .<sup>6</sup>

The legislative history of the Hiss Act indicates that Congress was thinking principally in terms of civilian officers and employees. However, the act also was made specifically applicable to members of the Armed Forces.

Many problems have arisen concerning the circumstances under which the Hiss Act will operate to preclude payment of retired pay to military personnel, particularly those convicted by courts-martial. In addition, news articles concerning the act have brought its existence and possible ramifications to the attention of most military personnel, as a result of which, local judge advocates are beginning to receive numerous inquiries about the act.<sup>7</sup> However, most of the material concerning the act is not readily available to judge advocates; and there is no exhaustive study of the act to which reference can be made.<sup>8</sup>

It is the purpose of this article, therefore, to provide an analysis of the Hiss Act as it relates to military personnel who are con-

<sup>6</sup> H.R. Rep. No. 2488, 83d Cong., 2d Sess. 4 (1954).

<sup>7</sup> Examples of such articles may be found in the Army Navy Air Force Journal, June 18, 1960, p. 5, cols. 1-4; Army Navy Air Force Journal, Oct. 22, 1960, p. 1, cols. 3 and 4.

<sup>8</sup> For a brief discussion of the act, see Kratochvil, *The Applicability of the Hiss Act to Persons Convicted by Courts-Martial*, United States Air Force JAG Bulletin, July 1959, Vol. 1, No. 3, p. 3.



victed by courts-martial; and, also, to consider its validity as a public policy.

## II. PROVISIONS AND SOURCES FOR INTERPRETATION

### A. THE PROVISIONS OF THE HISS ACT

Only five of the ten sections of the Hiss Act are pertinent to this paper and will be discussed herein.<sup>9</sup> The verbatim text of these sections are set forth in an appendix at the conclusion of the article.

Sections 1 and 2 of the Hiss Act specifically provide the circumstances under which federal annuities or retired pay will be denied. The basis for denial under section 1 is the conviction of any one of the various offenses enumerated in each of four subsections. The basis for denial under section 2 is commission or omission of any one of several acts (not necessarily amounting to criminal offenses) specified therein. Each section provides, with one exception contained in section 2, that if the conviction of the offense or commission or omission of the act occurred "prior to, on, or after" the date of enactment of the Hiss Act, neither the person concerned nor his survivor or beneficiary shall receive any annuity or retired pay for the period subsequent to the conviction or the commission or omission of the act, or the date of enactment of the act, whichever is later.

Section 4 provides that a person who is denied his annuity or retired pay under section 1 or 2 will again become entitled to receive such benefits upon the date the President grants a pardon for such offense or act.

Section 6 defines the terms "officer or employee of the Government," "annuity" and "retired pay" as used in the Hiss Act.<sup>10</sup>

Section 8 provides that a member of the military who is deprived of retired pay pursuant to the Hiss Act may be dropped

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<sup>9</sup> Sections not discussed are: section 3 (monies paid by persons towards their retirement benefits shall be returned if the act is found to apply); section 5 (accountable officers of the federal government are not responsible for payments made contrary to the act, if they were made in due course and without negligence); section 7 (the act does not restrict authority under other laws to deny or withhold benefits); section 9 (standard separability provision); and section 10 (amends the federal criminal statute of limitations, 18 U.S.C. § 3282 (1958)).

<sup>10</sup> For our purposes, it is sufficient to note that "officer or employee of the Government" is defined to include "a member or former member of the Armed Forces of the United States, including the Regular and Reserve components thereof, the Fleet Reserve, the Fleet Marine Corps Reserve, the Coast and Geodetic Survey, and the Public Health Service."

## MILITARY LAW REVIEW

from the rolls by the President.<sup>11</sup>

### B. SOURCES FOR INTERPRETATION

Several decisions of the Comptroller General of the United States and numerous opinions of The Judge Advocates General of the Armed Forces (particularly the opinions of The Judge Advocate General of the Army) are the principal sources of information concerning the Hiss Act as it relates to military personnel who are convicted by courts-martial. The Attorney General has, to date, written no opinions on the act. There has been, however, one federal court decision which involved section 2 of the act.<sup>12</sup>

The Hiss Act prohibits the expenditure of appropriated funds under certain circumstances. Accordingly, under the provisions of the Budget and Accounting Act of 1921, the decisions of the Comptroller General are binding on the executive branch of the federal government.<sup>13</sup>

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The term "annuity" is so defined as to relate only to civilian officers and employees.

However, the term "retired pay" is defined as including "retired pay, retirement pay, retainer pay, or equivalent pay (other than any benefits provided under laws administered by the Veterans Administration), payable under the laws of the United States" to any of the persons set forth in the quoted part of the definition of "officer or employee of the United States;" but that "the term 'retired pay' does not include the retired pay, retirement pay, retainer pay, or equivalent pay of any person to whom any such pay has been awarded or granted" prior to enactment of the act, insofar as it concerns the conviction of an offense or commission of an act set forth in sections 1 and 2 which occurred prior to the enactment of the act.

The definition of "retired pay" does not include severance pay authorized by 10 U.S.C. § 1212 (1958). 35 Decs. Comp. Gen. 293 (1955).

The provision concerning "retired pay" is the only provision of the Hiss Act which specifically exempts certain persons from having the act apply to them. It contemplates, for example, a person who was awarded or granted a federal annuity or retired pay prior to September 1, 1954, and who, also prior to that date, committed an offense set forth in section 1 of the act. The legislative history of the act indicates this exception was made because such persons might be considered to have a vested right in their annuity or retired pay and could not legally be deprived of it. *Hearings on H.R. 1238, 3301, 5299, 6940, 7001, 7381, 7476, 8091, 8547, and 8712 Before the House Committee on Post Office and Civil Service, 83d Cong., 2d Sess. 2-10 (1954).*

<sup>11</sup> The effect of a member of the military being dropped from the rolls is to terminate any connection he may have with the military, even though he does not receive a discharge. Authority for such action may also be found in 10 U.S.C. §§ 1161 and 1163(b) (1958).

<sup>12</sup> *Steinberg v. United States*, 143 Ct. Cl. 1, 163 F. Supp. 590 (1958). Research has failed to disclose any application for a writ of certiorari to the Supreme Court of the United States in this case.

<sup>13</sup> 42 Stat. 20 (1921), as amended, 51 U.S.C. §§ 1-60, 71, 471, 551 and 581a (1958).

## III. MAJOR PROBLEMS IN INTERPRETATION

## A. INTRODUCTION

The problems that have arisen in connection with the Hiss Act as it relates to military personnel convicted by courts-martial have, for the most part, involved that part of subsection 1(2) of the act which provides that a person shall not receive a federal annuity or retired pay if he is, or has been, convicted of an offense which is a felony under the laws of the United States or the District of Columbia, provided the offense involved the exercise of his "authority, influence, power, or privileges as an officer or employee of the Government." Of the other operative provisions of sections 1 and 2, some are inapplicable; others have not raised any problems.

Subsection 1(1) of the Hiss Act, which specifies certain offenses defined under the provisions of title 18, United States Code, and the Atomic Energy Act, has been held to be inapplicable to military personnel tried by courts-martial for offenses under the Uniform Code of Military Justice by the Comptroller General.<sup>14</sup>

Subsections 1(3) and (4), the last part of subsection 1(2), and section 2 of the act, with one exception, have not raised any peculiar problems for the military. The one exception involved subsection 1(3), which is concerned with perjury and subornation of perjury; the problem being whether perjury before a court-martial is perjury before a "court of the United States" as that language is used in the subsection. It was determined that

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<sup>14</sup> In 35 Decs. Comp. Gen. 302, 303 (1955), it was stated that "the first part of section 1 of the Act refers to convictions of the 'following offenses described in this section' and clause '(1)' mentions offenses 'defined' in the sections of the United States Code specified in that clause. It seems reasonably clear that in using such language, the Congress intended that so far as clause '(1)' is concerned, the penalty provided in the Act is to be applied only when the person concerned has been convicted in a United States court of one of the specific offenses covered by the enumerated sections of the United States Code. A court-martial would not have jurisdiction to try a person charged with one of such offenses. . . . The fact that the Uniform Code of Military Justice may include one or more offenses defined in Title 18 of the United States Code and enumerated in clause (1) is considered to be immaterial. It is stated on page 4 of the House Report No. 2488, to accompany H.R. 9909 (later enacted into law as the act of September 1, 1954), that the act applied to 'any individual convicted of specified crimes as set forth in the Criminal Code of the United States or the District of Columbia Code.' No mention was made of the Uniform Code of Military Justice."

## MILITARY LAW REVIEW

this was not the case.<sup>16</sup>

The constitutionality of the Hiss Act has not raised any problems for the military so far, although some difficulties may yet be encountered. The one federal court case concerning the act<sup>16</sup> involved the constitutionality of that part of subsection 2(a) of the act which provides that no federal annuity or retired pay will be paid to any person who refuses to testify before a federal grand jury "with respect to his service as an officer or employee of the Government" on the grounds of self-incrimination.

Steinberg was a retired employee of the Internal Revenue Service. He refused, on the grounds of self-incrimination, to testify before a federal grand jury which was investigating the operations of the Internal Revenue Service. Pursuant to subsection 2(a) of the act, the payment of his federal annuity was permanently suspended. He claimed that this action violated "his rights as a citizen under the Constitution."

A majority of the court concluded that Steinberg was entitled to recovery. Three of the four majority judges concluded that subsection 2(a) was unconstitutional, although one of the three rested his conclusion on different grounds than the other two. The fourth majority judge felt that it was unnecessary to reach the constitutional issue. One judge dissented, stating, in effect, that subsection 2(a) was constitutional.

Two of the majority judges considered subsection 2(a) unconstitutional because it applies to the innocent and the guilty alike and, accordingly, was an assertion of arbitrary power. They also stated that subsection 2(a) constituted a bill of attainder (*i.e.*, "a legislative act which inflicts punishment without a

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<sup>16</sup> The Comptroller General stated that "courts of the United States are those established under the article of the Constitution which relates to the judicial power. . . . Courts-martial form no part of the judicial system of the United States. . . . The congressional power to provide for trial and punishment for military and naval offenses under the fourteenth clause of Article 1, section 8 of the United States Constitution, has no connection between it and the third article in the Constitution defining the judicial power of the United States. . . . In view of the foregoing, it appears improper to regard a court-martial or a military court of inquiry as a 'court of the United States' as that term is used in the statute here involved." 35 Decs. Comp. Gen. 302 at 305.

<sup>16</sup> Steinberg v. United States, 143 Ct. Cl. 1, 163 F. Supp. 590 (1958).

judicial trial") which is prohibited by the Constitution.<sup>17</sup> In this respect, they cited as precedent the decision of the Supreme Court of the United States in *United States v. Lovett*,<sup>18</sup> which involved a somewhat analogous situation. The other judge who considered subsection 2(a) unconstitutional, reasoned that, as Steinberg was retired, he had a vested right in his annuity, and action to divest him of that right pursuant to subsection 2(a) was without due process of law. The fourth majority judge also concluded that, upon retirement, a federal employee has a vested right in his retirement benefits. However, he considered that subsection 2(a) was nothing more than a restriction on the use of appropriated funds, which, under the Constitution, was within the sole discretion of Congress. He concluded, nevertheless, that as Steinberg had a vested right in his annuity, the Court of Claims, pursuant to its powers, was authorized to grant Steinberg relief without raising any constitutional issues.

The one dissenting judge felt that a federal employee has no vested right in his retirement benefits and that Congress may place uniform restrictions on the right to receive such benefits. He concluded that subsection 2(a) was such a restriction and it could not, therefore, be considered so arbitrary as to be unconstitutional.

The separate opinions are not so abundantly clear in their rationale or exhaustive in their consideration of the problem to permit a ready acceptance of any one of the views advanced. Nevertheless, in view of the result in the case, it is likely that other persons who have been denied their retirement benefits pursuant to the Hiss Act will seek judicial relief. A more exhaustive consideration of this matter is outside the scope of this article, because the purpose here is to examine extensively how the act applies and is administered with respect to military personnel convicted by courts-martial.<sup>19</sup>

<sup>17</sup> U.S. Const., art. I, § 9, cl. 8.

<sup>18</sup> 328 U.S. 303 (1946). A provision in an appropriation act, which provided that no salary or other compensation would be paid to Lovett and others (because of alleged Communist tendencies) was held to be a bill of attainder, and, therefore, unconstitutional.

<sup>19</sup> Cf. *Thompson v. Whittier*, 185 F. Supp. 306 (D.D.C. 1960), appeal dismissed, 365 U.S. 465 (1961), involving the constitutionality of an analogous statute. In issue was the constitutionality of 38 U.S.C. § 3504 (1958), a statute which then provided for the forfeiture of veterans' benefits by any person shown by evidence satisfactory to the Administrator of Veterans' Affairs to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States. Judge Alexander Holtzoff, who wrote the majority opinion sustaining the constitutionality of that statute, concluded that its provisions did not impose punishment but merely prescribed an additional qualification for eligibility to receive a gratuity.

## MILITARY LAW REVIEW

### B. SUBSECTION 1(2) OF THE ACT

The principal problems that have concerned the military in connection with subsections 1(2) of the Hiss Act have involved military personnel convicted by courts-martial while in active service.<sup>20</sup>

The principal problems have been: (1) whether any offenses under the Uniform Code of Military Justice are felonies under the laws of the United States or the District of Columbia; (2) what do the words "committed in the exercise of his authority, influence, power or privileges" mean; and (3) what evidence may be used and the weight of evidence required to determine whether the offense was so committed. One incidental problem will also be considered, namely, whether military personnel working for nonappropriated fund activities can, while so employed, commit an offense in the exercise of their "authority, influence, power or privileges as an officer or employee of the Government."

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<sup>20</sup> The military departments have not as yet had to consider whether members of the reserve components, not on active duty, can commit offenses while in such status which come within the purview of subsection 1(2). It appears that subsection 1(2) may apply in such situations depending upon the circumstances. It is true that the phrase "officer or employee" is defined in the act to include "a member or former member of the Armed Forces of the United States, including the Regular and Reserve components thereof." However, that language is not sufficiently clear to warrant its use as an authoritative answer to the problem.

The same problem arises with respect to retired members, although it has been ruled that a retired member did commit an offense while retired which came within the purview of subsection 1(2). The offense was directly connected with his active service. MS. Dec. Comp. Gen. B-143525 (Sept. 20, 1960). The decision involved a Marine Corps master sergeant who submitted two false claims for travel pay after retirement which were submitted in connection with "travel performed by him and his dependents incident to his selection of a home following" his retirement. It was stated that the sergeant committed an offense covered by subsection 1(2) as the offense was directly connected with active service. "A right to a transportation allowance accruing incident to active service is a privilege directly related to active service even though it accrues only incident to termination of active service." Although the decision might so indicate, it does not appear to hold that retired members of the military come within the purview of subsection 1(2) *only* if they commit offenses directly related to their active service.

A discussion of the typical situations in which subsection 1(2) applies is also included.

The various problems must be considered in light of the nature of the Hiss Act. The Comptroller General has correctly stated that the act is penal in nature and should, therefore, be construed strictly.<sup>21</sup> However, the Comptroller General has not adhered consistently to this proposition.<sup>22</sup>

1. *Are Any Offenses Under the Uniform Code of Military Justice Felonies?*

In a series of decisions, the Comptroller General has ruled that an offense under the Uniform Code of Military Justice<sup>23</sup> that is analogous to an offense of a civil nature under the laws of the United States or the District of Columbia and which is punishable under the Table of Maximum Punishments by death or confinement in excess of one year is a felony for purposes of subsection 1(2). The first decision states:

The "laws of the United States" include the act of May 5, 1950, 50 U.S.C. 551-736, and the Uniform Code of Military Justice was enacted into law as a part of that act. While none of the offenses mentioned in the Uniform Code of Military Justice are defined in that code as felonies, the term "felony" is defined in paragraph 213d(6) of the Manual for Courts-Martial, 1951, and that definition is substantially the same as the general definition of felony (under the laws of the United States) contained in 18 U.S.C. 1. It is concluded that a conviction by a court-martial of an offense which is a felony within such definition would be a conviction of an offense which is a felony "under the laws of the United States," within the meaning of the act of September 1, 1954 . . . .<sup>24</sup>

<sup>21</sup> 35 Decs. Comp. Gen. 302, 303 (1955).

<sup>22</sup> The inconsistency is made abundantly clear in 39 Decs. Comp. Gen. 741 (1960). The question involved the effective date of a "conviction" (i.e., when a verdict of guilty is returned by a jury or when final judgment of court is announced) for purposes of determining when retired pay should be discontinued. An inconsistency among authorities on the problem was noted. It was concluded that a person was "convicted" when the jury announced its verdict, because, in the absence of "an authoritative judicial decision to the contrary, it is believed proper to adopt that interpretation of the [Hiss Act] which will result in the least expenditure of public funds."

<sup>23</sup> 10 U.S.C. §§ 801-840 (1958) (hereinafter referred to as the Code and cited as UCMJ, art. —).

<sup>24</sup> 35 Decs. Comp. Gen. 302, 305 (1955).

## MILITARY LAW REVIEW

The provision of the Manual for Courts-Martial<sup>25</sup> referred to is a discussion of the offense of misprision of a felony, and, in that connection, states that "any offense of a civil nature punishable under the authority of the code by death or confinement for a term exceeding one year is a felony." Title 18, United States Code, section 1, provides that "notwithstanding any Act of Congress to the contrary . . . any offense punishable by death or imprisonment for a term exceeding one year is a felony."

The second decision states:

Although military regulations when consistent with existing statutory enactments have the force of law, they cannot abrogate or derogate from the Federal statutes which remain in full force and virtue as the law of the land. 6 C.J.S. 348. Therefore, "felony" as defined in the Federal statutes would also constitute the definition of "felony" applicable to military offenses, notwithstanding that the distinction between felonies and misdemeanors has not been recognized in military law. . . . Thus, a determination whether any military offense is a felony involves (1) whether the offense is punishable by death or confinement exceeding one year, and (2) whether the offense is of a civil nature.

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In cases where the sentence imposed for the offense for which the applicant was convicted, exceeds one year, reference should be made to the United States Code or the Code of the District of Columbia to ascertain whether the particular offense is analogous to one of a civil nature. . . . If the above two requirements are met, the military offense properly may be considered a felony for purposes of the act of September 1, 1954.<sup>26</sup>

In the third and latest decision on the matter, the Comptroller General adhered to his prior decisions without offering any new rationale.<sup>27</sup>

The rationale of the Comptroller General is somewhat circuitous. He uses a provision of law *and* a provision of the Manual for Courts-Martial, which is a Presidential Executive Order,<sup>28</sup> to support his conclusion. Why was the problem approached in that manner? Had he applied the literal language of the quoted portion of title 18, United States Code, section 1, he likely would

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<sup>25</sup> U.S. Dep't of Defense, Manual for Courts-Martial, United States 1951 (hereinafter referred to as the Manual and cited as MCM, 1951, para. —).

<sup>26</sup> MS. Dec. Comp. Gen. B-127022 (May 11, 1956).

<sup>27</sup> MS. Dec. Comp. Gen. B-125744 (July 30, 1959).

<sup>28</sup> Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951).



have had to conclude that every offense under the Uniform Code of Military Justice punishable by death or confinement in excess of one year was a felony under the laws of the United States. This would have meant that many offenses which are unique with the military, such as desertion and willful disobedience of orders, would come within the purview of subsection 1(2). Apparently, in order to avoid this result, it appears he decided to read title 18, United States Code, section 1, together with the definition of "felony" as it appears in the Manual for Courts-Martial in order to reach a result which was not inconsistent with traditional concepts of military type offenses; namely, that an offense under the Uniform Code of Military Justice is a "felony" for purposes of subsection 1(2) of the Hiss Act only if it is analogous to an offense of a civil nature and is punishable by death or confinement in excess of one year. The rationale is not necessarily logical, but the conclusion appears sound, at least to the extent that it makes subsection 1(2) inapplicable to purely military type offenses.<sup>29</sup>

In addition, it appears that offenses under the Uniform Code of Military Justice that are analogous to any of the offenses specifically enumerated in subsection 1(1) of the Hiss Act and punishable by death or confinement in excess of one year are felonies for purposes of subsection 1(2), even though it has been held that subsection 1(1), as such, does not apply to military personnel convicted by courts-martial.<sup>30</sup> This conclusion does not appear to do violence to the first decision, as it was stated then that "*as far as clause (1) is concerned, it is conviction of a civil crime which involves the penalty of the statute.*"<sup>31</sup> Furthermore, nothing in the Hiss Act or its legislative history militates against the conclusion.

Three ancillary problems arose as a result of the decisions

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<sup>29</sup> Research has failed to disclose any offenses punishable by confinement in excess of a year under the Table of Maximum Punishments which are analogous to offenses under the "United States Code or the Code of the District of Columbia" not punishable by confinement in excess of a year.

<sup>30</sup> Although the problem was not specifically considered, in MS. Dec. Comp. Gen. B-143314 (July 22, 1960), it was ruled that a soldier who stole mail from his unit's mail room in violation of Article 134, UCMJ (10 U.S.C. § 934 (1958)), came within the purview of subsection 1(2), the offense being considered analogous to 18 U.S.C. § 1708 (1958), which is specifically listed in subsection 1(1). A similar result, again without benefit of a discussion of the problem, was reached in JAGA 1959/2320 (Mar. 16, 1959), involving wrongful secretion of mail in violation of Article 134, which was considered analogous to 18 U.S.C. § 1702 (1958), which is also enumerated in subsection 1(1).

<sup>31</sup> 35 Decs. Comp. Gen. 302, 303 (1955). See note 13 *supra*. (Emphasis supplied.)

## MILITARY LAW REVIEW

discussed above. They involved: (1) the use of the word "analogous" by the Comptroller General; (2) the limitations on the confinement that special and summary courts-martial may impose; and (3) whether offenses under Article 134, Uniform Code of Military Justice, may be considered felonies.

The Comptroller General has not defined "analogous." However, the view has been expressed that an offense is "analogous" if the specification alleging an offense under the Uniform Code of Military Justice sets forth the essential elements of an offense under the "United States Code or the Code of the District of Columbia" either by express language or by necessary implication.<sup>32</sup> A corollary to this view is that those offenses which are "purely military in nature" cannot be "analogous" to offenses under the "United States Code or the Code of the District of Columbia."<sup>33</sup> Examples of the latter are absence without leave and disobedience of orders.<sup>34</sup> The theory is that offenses which are unique with the military are not comparable to any offenses of a civil nature, and, therefore, cannot be considered analogous to offenses under the "United States Code or the Code of the District of Columbia."

A special court-martial cannot impose confinement in excess of six months.<sup>35</sup> A summary court-martial cannot impose confinement in excess of one month.<sup>36</sup> This raises the question whether an offense punishable by more than one year under the Table of Maximum Punishments, but which is tried by a special or summary court-martial, may be considered a felony for purposes of subsection 1(2). In two decisions, the Comptroller General concluded that "what constitutes a felony is not based upon the actual punishment imposed but upon the test of what punishment is imposable;" that "paragraph 127c of the Manual for Courts-Martial, 1951, which sets out a table of maximum punishments for offenses under the code, provides an adequate method for determining whether an offense is punishable by confinement exceeding 1 year;" and that "it is immaterial whether the court-martial before which the accused is brought to trial has jurisdiction to impose the maximum authorized punishment."<sup>37</sup>

<sup>32</sup> JAGA 1960/4402 (July 27, 1960).

<sup>33</sup> JAGA 1960/3887 (April 4, 1960).

<sup>34</sup> *Ibid.* (AWOL); JAGA 1958/6444 (Sept. 4, 1958) (disobedience of orders).

<sup>35</sup> UCMJ, art. 19.

<sup>36</sup> UCMJ, art. 20.

<sup>37</sup> 38 Decs. Comp. Gen. 310, 311 (1958); MS. Dec. Comp. Gen. B-127022 (May 11, 1956).

Although the ruling of the Comptroller General does not appear to do violence to any congressional intent, it appears to be unsound. His basic proposition that "what constitutes a felony is not based upon the actual punishment imposed but upon the test of what punishment is impossible" is valid, but only when considered within the context from which it was derived. The proposition comes from a federal court case involving the issue whether a person had been convicted of a felony if he was sentenced to confinement for a year or less, although the court actually had authority to impose confinement in excess of one year.<sup>38</sup> This situation is considerably different from the situation where a court can only adjudge confinement for less than a year.

In addition, it is not entirely clear whether the Comptroller General considered that the Table of Maximum Punishments is part of a Presidential Executive Order, and, therefore, is subject to those limitations imposed by the Uniform Code of Military Justice. Articles 19 and 20 of the Code, in pertinent part, specifically limit the confinement that special and summary courts-martial may adjudge to six months and one month, respectively. Based upon these provisions of law, it appears that the "maximum punishment" for an offense tried before a special or summary courts-martial is six months and one month, respectively, unless otherwise limited, regardless of the fact that the Table of Maximum Punishments may authorize confinement in excess of one year for the offense. Support for the submitted rationale appears in a decision of the Court of Military Appeals in which it was ruled that it was error for the president of a special court-martial to advise the members of the court of the maximum punishment authorized by the Table of Maximum Punishments when it exceeds the statutory maximum for a special court-martial.<sup>39</sup> The court stated that, under such circumstances, "the Table of Maximum Punishments was 'no longer relevant, and the court members should not have been informed of it.' The . . . *maximum punishment* that can be imposed by a special court-martial is by law limited to no more than partial forfeitures, a bad-conduct discharge, and confinement at hard labor for six months . . . ."<sup>40</sup>

The last problem with respect to felonies and the Uniform Code of Military Justice concerns Article 134, which provides:

Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the armed

<sup>38</sup> Cartwright v. United States, 146 F.2d 133, 135 (5th Cir. 1944).

<sup>39</sup> United States v. Green, 11 USCMA 478, 29 CMR 294 (1960).

<sup>40</sup> *Id.* at 479, 29 CMR at 295.

## MILITARY LAW REVIEW

forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense and punished at the discretion of such court.<sup>41</sup>

The basic problem involved is whether offenses under Article 134 are analogous to offenses under subsection 1(2). The Comptroller General ruled in one case, but without elaboration, that subsection 1(2) applied to a soldier who stole mail from his unit's mail room in violation of Article 134.<sup>42</sup> However, in one opinion The Judge Advocate General of the Army did elaborate on the problem. The case involved a soldier convicted of accepting graft in violation of Article 134. It was found that the offense, as alleged in the specification, was analogous to that offense stated in title 18, United States Code, section 202. It was concluded that the offense not only involved conduct to the prejudice of good order and discipline and service discrediting conduct, but also a crime not capital;<sup>43</sup> therefore, it could not be considered a purely military offense so as to preclude consideration under subsection 1(2), if otherwise applicable.<sup>44</sup>

The rule seems to be, then, that if a violation of Article 134 involves only conduct to the prejudice of good order and discipline or service discrediting conduct, it is a purely military offense; but if it also involves a crime not capital and is analogous to an offense under the "United States Code or the Code of the District of Columbia," the rule concerning purely military type offenses does not apply. In other words, if the specification alleged under Article 134 contains the essential elements of an offense under the "United States Code or the Code of the District of Columbia," and the offense is punishable by more than a year's confinement, it is a felony within the purview of subsection 1(2).

2. *The Meaning of the Words "committed in the exercise of his authority, influence, power, or privileges."*

The broad scope of the language is undeniable. It may certainly be argued that its apparent scope is consistent with the congressional purpose, namely, to deny retirement benefits to officers and employees who break faith with the federal government. It appears that the language contemplates any abuse of

<sup>41</sup> UCMJ, art. 134.

<sup>42</sup> MS. Dec. Comp. Gen. B-143314 (July 22, 1960). See note 30 *supra*.

<sup>43</sup> Crimes and offenses not capital include those acts or omissions, not made punishable under another act of the UCMJ, which are crimes or offenses under acts of Congress and which are made triable in the federal civil courts. See para. 213c, MCM, 1951.

<sup>44</sup> JAGA 1960/3408 (Jan. 19, 1960).

office or position. This conclusion is perhaps more general than the statutory language. However, it is difficult to be more specific when considering language which requires essentially a factual situation for interpretation.

Little help is found in the decisions of the Comptroller General or the opinions of The Judge Advocates General. In only one decision has the Comptroller General attempted an analysis of the statutory language, that being with respect to the word "privileges."<sup>45</sup> For the most part, the opinions of The Judge Advocates General have stated merely that a particular offense was or was not committed in the exercise of a military member's "authority, influence, power, or privileges" without also considering which of those four key words applied to the case.

A review of the opinions of The Judge Advocate General of the Army discloses that certain offenses are committed more often than others in the exercise of the "authority, influence, power, or privileges" by military personnel. The offenses are larceny, bribery, wrongful disposition of Government property, and wrongful appropriation of motor vehicles. As a result of the decision of the Comptroller General previously mentioned, there may be added to the list of offenses false claims against the Government. The larceny cases have involved such situations as supply personnel who steal Government property in connection with their duties;<sup>46</sup> postal clerks who steal from the mail;<sup>47</sup> and personnel assigned to duty with nonappropriated fund activities, such as open messes, who steal funds or property of the activities.<sup>48</sup> The bribery cases have involved military personnel who accepted bribes to keep other military personnel off various duty rosters.<sup>49</sup> The wrongful disposition cases have involved situations such as the sale of government property by military personnel having control over the property.<sup>50</sup> The wrongful appropriation cases have usually involved military personnel assigned to motor pools who

<sup>45</sup> MS. Dec. Comp. Gen. B-148525 (Sept. 20, 1960). See note 20 *supra*.

<sup>46</sup> JAGA 1960/3613 (Feb. 18, 1960). (Enlisted member was in charge of supply and subsistence for Army hospital. In this capacity he stole coffee from the hospital.)

<sup>47</sup> JAGA 1959/6693 (Sept. 30, 1959). (Enlisted member was a postal supervisor. While so engaged, he stole money from mail in his custody.)

<sup>48</sup> JAGA 1958/7230 (Oct. 20, 1958). (Enlisted member was purchasing agent for non-commissioned officers' club. He stole liquor which he had purchased.)

<sup>49</sup> JAGA 1960/3408 (Jan. 19, 1960). (Enlisted member was authorized to excuse members of his unit from KP. Accepted money to excuse certain members from KP.)

<sup>50</sup> JAGA 1959/7335 (Oct. 27, 1959). (Enlisted member was a supply sergeant. He sold government binoculars in his custody.)

## MILITARY LAW REVIEW

used vehicles from the motor pool for "joy rides" or deviated from assigned routes for personal reasons.<sup>51</sup> The false claims cases have usually involved false claims for travel pay.<sup>52</sup>

Some idea of the scope of the language may be gathered from considering the offenses of wrongful appropriation of a motor vehicle, which have been considered by The Judge Advocate General of the Army. In one opinion, the facts involved a soldier who was assigned duties as a mechanic and who, as such, road-tested vehicles.<sup>53</sup> On one occasion he departed from the prescribed road-test route by several miles to visit a friend. In a second opinion, the facts involved an enlisted member who was assigned to duty as a jeep driver.<sup>54</sup> On one occasion, he was properly dispatched, but later was involved in an accident approximately two miles from the route to which he properly should have confined his travel. Both men were tried by special courts-martial and found guilty of wrongful appropriation of a motor vehicle in violation of Article 121 of the Uniform Code of Military Justice. After concluding that the offense was analogous to a felony under the Code of the District of Columbia, the view was expressed in both opinions that the enlisted members committed the offenses in the exercise of their "authority, influence, power, or privilege."<sup>55</sup> Considering how far down the ladder

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<sup>51</sup> JAGA 1959/7342 (Oct. 28, 1959). (Enlisted member was a mechanic who road-tested government vehicles. While testing a vehicle, he left the test route and drove several miles to visit a friend.)

<sup>52</sup> JAGA 1960/4968 (Nov. 30, 1960). (Enlisted member submitted false claim for travel allowances for his dependents.) This opinion, based upon MS. Dec. Comp. Gen. B-143525 (Sept. 20, 1960) (see notes 56 and 57 *infra*), overruled some 18 prior opinions in which it had been stated that mere presentment of a false claim did not come within the purview of subsection 1(2).

<sup>53</sup> JAGA 1959/7342 (Oct. 28, 1959).

<sup>54</sup> JAGA 1960/3661 (Feb. 19, 1960).

<sup>55</sup> It is not entirely clear, however, whether wrongful appropriation of a vehicle is analogous to an offense under the Code of the District of Columbia. Cf. MS. Dec. Comp. Gen. B-143495 (Aug. 10, 1960), where it was determined that a soldier who had been convicted by court-martial of wrongful appropriation of a motor vehicle by deviating from a prescribed route had not committed an offense analogous to 22 D.C. Code, § 2204 (1951), as that section states the taking must be "without the consent of the owner," and the soldier had permission of the Government to use the vehicle. But see also MS. Dec. Comp. Gen. B-144279 (Dec. 13, 1960), where it was determined that an officer who used a government vehicle over which he exercised control for personal pursuits, had committed an offense analogous to the cited law of the District of Columbia. The decision states that the control exercised by the officer over the vehicle "did not permit its use for personal purposes" and that the taking was unlawful and "without the actual or implied consent of the owner." The earlier opinion was not mentioned. A similar conclusion was reached in MS. Dec. Comp. Gen. B-144910 (Mar. 3, 1961). The decisions appear inconsistent, which fact is noted in JAGA 1961/3476 (Jan. 30, 1961).

of authority and responsibility in the military scheme of things the two enlisted members were, it appears that an offense under the Uniform Code of Military Justice is committed in the exercise of "authority, influence, power, or privileges," if it is committed by a military member in the exercise of some duty, or if the commission of it is made possible by the position he holds or the duties to which he is assigned.

The Comptroller General has only commented once on the words "exercise of his . . . privileges."<sup>50</sup> The case involved a Marine Corps master sergeant who was tried and convicted by a federal district court for a violation of title 18, United States Code, section 1001, involving the presentment for payment by the sergeant of false travel vouchers for himself and his dependents. After concluding that such a violation was a felony for purposes of subsection 1(2), the Comptroller General stated:

You state that it is questionable whether the offense properly could be considered as having been committed in the exercise of a privilege . . . , the issue being whether the word "privileges" as used in section 1, clause 2, of the statute includes the right given to the sergeant by law and regulations to submit a claim for travel performed by him and his dependents . . . , or whether it is restricted in its application to privileges primarily associated with or directly relating to the official functions of the office or assigned duties of a member.

While the legislative history contains statements that the act is directed against persons who break faith with the Government in carrying out their official duties, or while acting in an official capacity, the act is not restricted to offenses committed while carrying out an official duty, but by its terms it is directed against acts performed after termination of Government service.

. . . .

The legislative history of the statute indicates a legislative intent to cover false claims against the Government incident to Government employment and under the circumstances it would seem that the word 'privileges' would be subject to that concept. See in that connection B-23845, March 20, 1942. Though laws, penal in nature, are to be strictly construed, it has been held that they are not to be construed so strictly as to deny the obvious intent of Congress. *Arroyo v. United States*, 359 U.S. 419, 424. Since the offenses of which the sergeant was convicted are shown by the criminal information filed against him to have been committed incident to the exercise of his rights as an officer or employee of the Government, his case appears to be one within the prohibition of the 1954 act. Therefore, he is not entitled to receive any retired pay.<sup>51</sup>

At first glance, it appears that the Comptroller General's decision opens wide vistas for consideration, as so many activities of military life are traditionally associated with the idea of

<sup>50</sup> MS. Dec. Comp. Gen. B-143525 (Sept. 20, 1960). See note 20 *supra*.

<sup>51</sup> *Ibid*.

## MILITARY LAW REVIEW

privilege. However, it appears that the decision should be limited to cases involving false claims, at least until further amplified. The real thrust of the decision is that the offense of submitting a false claim is one of the offenses that Congress specifically had in mind when it passed the Hiss Act. The use of the decision for other purposes does not appear warranted in light of the foregoing.

### *3. What Evidence May Be Used and the Weight of Evidence Required*

In determining whether an offense under the Uniform Code of Military Justice is a felony for purposes of subsection 1(2), under present rules, it is necessary only to look to the specification alleging the offense, ascertain if it is analogous to an offense under the "laws of the United States or the District of Columbia," and determine whether the offense is punishable by more than a year's confinement. However, this determination having been made, there remains the question of where to look in order to determine whether the member committed the offense in the exercise of his "authority, influence, power, or privileges as an officer or employee of the Government."<sup>58</sup> Neither the Hiss Act nor its legislative history offers any enlightenment on this point. A review of the opinions of The Judge Advocate General of the Army concerning this problem discloses that, with few exceptions, the charges and specifications considered did not disclose sufficient information to permit such a determination.<sup>59</sup>

Based upon several decisions of the Comptroller General, the rule presently applied is that any evidence received by a court-martial prior to the findings of guilty,<sup>60</sup> and any stipulations introduced by the defense or prosecution during sentencing procedures before a court-martial, may be used in determining whether an offense was committed in the exercise of the accused's

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<sup>58</sup> It is possible that evidence may be contained in criminal investigation reports, in the pretrial investigation reports pursuant to Article 32, UCMJ, 10 U.S.C. § 832 (1958), or in a number of other places outside the actual record of trial. Also, in summary courts-martial, there is no transcript of the testimony of witnesses. In special courts-martial, at least in the Army, the testimony is summarized.

<sup>59</sup> An example of one of the few exceptions is JAGA 1960/3408 (Jan. 19, 1960), which involved a soldier who had accepted graft to keep other soldiers off of a duty roster. The specification not only stated an offense analogous to 18 U.S.C. § 202 (1958), but also clearly showed the soldier was in a position of authority with respect to the duty roster.

<sup>60</sup> 38 Decs. Comp. Gen. 817 (1959); 38 Decs. Comp. Gen. 310 (1958). In the first cited decision, the Comptroller General sidestepped the question whether papers not a part of the actual record of trial (allied papers) could be used. He stated, in effect, he would rule on the matter on a case by case basis.



"authority, influence, power, or privileges as an officer or employee of the Government."<sup>61</sup>

With respect to the matter of stipulations, the Comptroller General concluded that, as stipulations are, in effect, admissions, "where the record [of trial] includes an admission voluntarily made by the accused establishing that the offense was committed in the exercise of his authority, influence, power, or privileges as an officer or employee of the Government, there can be no question of violation of any right of refutation the accused may have."<sup>62</sup>

However, with respect to situations where the service member has pleaded guilty and no evidence was introduced at the trial to indicate the manner in which the offense was committed, the Comptroller General recently ruled that Hiss Act determinations must be confined to "official records made in connection with the court-martial trial and to which information the accused has been afforded an opportunity of rebuttal."<sup>63</sup> Allied papers, records, or reports are not to be consulted where they were "compiled under circumstances where the member was not shown the whole record and given an opportunity to cross-examine adverse witnesses and present witnesses in his own behalf . . ."<sup>64</sup>

The reasoning in these decisions seems to indicate that the Comptroller General believes that any evidence which the accused has had a fair opportunity to rebut may be used. However, he has not stated such a broad conclusion, and it appears he prefers to rule on such matters on an *ad hoc* basis.

There remains the question of the weight of evidence required to permit a determination that an offense was committed by a member of the military in the exercise of his "authority, influence, power, or privileges." The Comptroller General has not spoken in this respect.

The opinions of The Judge Advocate General of the Army disclose that shortly after numerous inquiries began to be re-

<sup>61</sup> MS. Dec. Comp. Gen. B-144279 (Dec. 13, 1960) (stipulation offered by prosecution); MS. Dec. Comp. Gen. B-144314 (July 22, 1960) (stipulation offered by defense).

<sup>62</sup> MS. Dec. Comp. Gen. B-144314 (July 22, 1960). See note 61 *supra*.

<sup>63</sup> MS. Comp. Gen. B-145448 (May 22, 1961). This case involved a service member who was convicted of wrongful appropriation of a government motor vehicle by a summary court-martial. The member pleaded guilty, and the only evidence available to determine whether the Hiss Act was applicable were the allied court-martial records, consisting of the pretrial investigation reports and statements in mitigation, and certain other extraneous records, such as motor vehicle theft damage reports. It was held that the evidence which could be considered did not clearly establish that the member committed the offense "in the exercise of his authority, influence, power, or privileges."

<sup>64</sup> *Ibid.*

## MILITARY LAW REVIEW

ceived concerning the Hiss Act, the view was adopted that there must be "clear and convincing evidence" that a member of the military had committed an offense in "the exercise of his authority, influence, power or privileges."<sup>65</sup> However, this is only mentioned in a few opinions rendered in 1958. Later opinions do not offer any explanation of why reference to the view was discontinued. An examination of the later opinions discloses, however, that despite the lack of reference to the "clear and convincing evidence" test, it has apparently been applied.

### *4. Military Personnel Working for Nonappropriated Fund Activities*

No grave problems have arisen as yet in connection with whether military personnel who work for nonappropriated fund activities may commit an offense, while so employed, in the exercise of their "authority, influence, power, or privileges" as officers and employees of the federal government. Nevertheless, such situations do present problems which should be considered.

There are two categories of military personnel who work for nonappropriated fund activities: those who are assigned to work for the activities as part of their military duties, and those who work for the activities on their own initiative during their off-duty time. With respect to the first category, the Comptroller General has, at least by necessary implication, concluded that personnel within that category may commit an offense while working for a nonappropriated fund activity in the exercise of their "authority, influence, power or privileges" as officers or employees of the Government.<sup>66</sup> This conclusion has been expressly stated by The Judge Advocate General of the Army in one opinion<sup>67</sup> and necessarily implied in certain other opinions.<sup>68</sup>

The problem that has not yet arisen in an actual case involves the second category, namely, military personnel who work for nonappropriated fund activities on their own initiative during off-duty hours. The Judge Advocate General of the Army, in answer to a general question, in one opinion, stated that it was "questionable" whether subsection 1(2) would apply to such

<sup>65</sup> E.g., JAGA 1958/4261 (May 23, 1958); JAGA 1958/3828 (May 12, 1958); JAGA 1958/3748 (May 12, 1958).

<sup>66</sup> MS. Dec. Comp. Gen. B-144649 (Jan. 4, 1961).

<sup>67</sup> JAGA 1959/3857 (April 30, 1959).

<sup>68</sup> JAGA 1960/4022 (April 28, 1960) (enlisted member was manager and custodian of a noncommissioned officers' club); JAGA 1959/8316 (Dec. 29, 1959) (enlisted member was custodian and bookkeeper of post golf club); JAGA 1959/4334 (May 26, 1959) (enlisted member was secretary of a non-commissioned officer's mess); JAGA 1958/7230 (Oct. 20, 1958) (enlisted member was a purchasing agent for noncommissioned officers' club).

personnel, if they committed an offense while so employed.<sup>69</sup> However, no rationale was offered in support of this statement.

It does not appear that military personnel working for a non-appropriated fund activity on their own initiative during off-duty hours occupy a status, while so employed, which involves their status as members of the military. This necessitates the conclusion that they occupy a status no different from any other civilian employee of a nonappropriated fund activity.

That conclusion next raises the question whether subsection 1(2) of the Hiss Act applies to civilian employees of nonappropriated fund activities. Although the act, when applied, imposes a penalty, that penalty also involves a prohibition by Congress of the expenditure of appropriated funds for the payment of federal retirement benefits. Research has failed to disclose whether civilian employees of nonappropriated fund activities receive payment of retirement benefits from appropriated funds. In fact, civilian employees of the major nonappropriated fund activity, the Post Exchange Service, receive retirement benefits by participating in a self-contributing plan administered by a commercial life insurance company.<sup>70</sup> Apparently there is no penalty against civilian officers and employees of nonappropriated fund activities, even if subsection 1(2) of the act otherwise applies to them, except in the case of an employee who might also receive federal retirement benefits from appropriated funds for some other employment.

However, subsection 1(2) of the Hiss Act may, in fact, apply to civilian officers and employees of nonappropriated fund activities, if they are officers or employees of the federal government as contemplated by the act. Nonappropriated fund activities are considered instrumentalities of the federal government.<sup>71</sup> In at least one major area, involving the liability of the federal government for the torts of its officers and employees, it has been concluded that civilian officers and employees of nonappropriated fund activities are officers and employees of the federal government.<sup>72</sup>

If that is the case, the argument may be made that military personnel who occupy the same status as civilian officers and employees of nonappropriated fund activities by working for such activities on their own initiative during off-duty hours, are likewise officers or employees of the federal government for pur-

<sup>69</sup> JAGA 1959/3857 (April 30, 1959). See note 67 *supra*.

<sup>70</sup> Army Regs. No. 60-26, § V (June 3, 1959).

<sup>71</sup> *Standard Oil Company of California v. Johnson*, 316 U.S. 481 (1942).

<sup>72</sup> *United States v. Holcombe*, 277 F.2d 143 (4th Cir. 1960).

## MILITARY LAW REVIEW

poses of subsection 1(2) of the act. Since military personnel do receive payment of retirement benefits (for military service) from appropriated funds, it may be argued that such personnel who are considered officers or employees of nonappropriated fund activities may commit an offense while so employed which would involve the exercise of their "authority, influence, power, or privileges as an employee of the Government" and against whom the penalty of the act may be invoked. As the act does not provide otherwise, it appears immaterial that the status from which such personnel derive their right to retirement benefits is different from the status in which they committed the offense.

The foregoing rationale is unquestionably complex; but it is believed that the end result would be reached by the Comptroller General; namely, that subsection 1(2) may apply to military personnel who commit offenses while employed by nonappropriated fund activities on their own initiative during off-duty hours. If he chose, the Comptroller General might reach a different conclusion by applying the standard of strict construction of the Hiss Act because of its penal nature. However, this is not considered likely.

### IV. ANCILLARY PROBLEMS RELATING TO THE HISS ACT

#### A. RELIEF FROM THE APPLICATION OF THE ACT

There are only two means by which a person may obtain relief from the application of the Hiss Act. Section 4 of the act provides that a person who has been denied retirement benefits under the act will again be entitled to the benefits on the date he receives a presidential pardon. The other method involves the several Boards for Correction of Military Records.

Research has disclosed only two cases in which a presidential pardon has served to restore a person's entitlement to retirement benefits.<sup>73</sup> One curious fact might be noted. Section 4 speaks of a presidential pardon in connection not only with section 1 of the act which enumerates specific offenses, but also with regard to section 2 which is concerned not with offenses but with certain acts not necessarily involving criminality or a conviction. The possibility of a presidential "pardon" in connection with an act for which a person is not tried and convicted is quite obviously rather odd. It can only be surmised that Congress was somewhat at a loss to choose an appropriate label in this connection.

<sup>73</sup> JAGA 1961/3879 (Mar. 16, 1961); JAGA 1961/3765 (Mar. 16, 1961).

Just what form such a presidential pardon, if issued, would take is, at best, a matter of conjecture.

Pursuant to law, each service Secretary, acting through his Board for the Correction of Military Records, "may correct any military record of that department when he considers it necessary to correct an error or remove an injustice."<sup>74</sup>

The question whether a service Secretary, acting through his Board for the Correction of Military Records, can authorize such relief as would relieve a person from the disabilities imposed upon him by the Hiss Act has been considered by the Comptroller General, who stated:

The correction of a person's military record to remove a record of his conviction of an offense under the Uniform Code of Military Justice is within the authority of a board convened under section 207(a) of the Legislative Reorganization Act of 1946, as amended, 5 U.S.C. 191a, and if appropriate action is taken to that effect with the approval of the Secretary concerned, the person concerned could not be regarded as having been "convicted" of an offense within the meaning of section 1 of the act of September 1, 1954 . . . .<sup>75</sup>

This rather summary answer to the question presented would indicate that no real problem was involved. However, quite the contrary is true. The Attorney General has stated that a service Secretary, acting through his Board for the Correction of Military Records, may not disturb the finality of a court-martial conviction, but may only take action such as to recharacterize a dishonorable discharge as honorable.<sup>76</sup> Action pursuant to such authority would leave a conviction intact; and it is submitted that, if otherwise applicable, the Hiss Act would still apply.

Efforts are apparently being made to have the Attorney General reconsider his decision.<sup>77</sup> However, unless and until the Attorney General changes his views, it appears to be unsettled whether a service Secretary, acting through his Board for the Correction of Military Records, can take action that will afford relief from the disabilities of the Hiss Act.

<sup>74</sup> 10 U.S.C. § 1552 (1958). For a general discussion of the powers of the Army Board, see Williams, *The Army Board for Correction of Military Records*, Mil. L. Rev., October 1959, p. 41.

<sup>75</sup> 35 Decs. Comp. Gen. 302, 306 (1955).

<sup>76</sup> 40 Ops. Att'y Gen. 504 (1947).

<sup>77</sup> JAGA 1960/4190 (June 1, 1960). This case involves a proposed letter to the Attorney General, for the signature of the Secretary of the Army, in effect requesting a reconsideration of his opinion cited in note 76 *supra*; but more specifically posing the question "whether the conviction by court-martial . . . may be set aside by me [the Secretary of the Army], acting through the Army Board for the Correction of Military Records. If your answer to this question is in the negative, may all references to . . . [a] conviction, including the record of trial, be expunged by me, acting through the same Board."

## MILITARY LAW REVIEW

### B. MILITARY POLICIES

Army regulations now provide that, before approval of a reenlistment, if the records of the military member disclose a conviction, the appropriate commander will request a determination of the applicability of the Hiss Act in the matter through the Adjutant General.<sup>78</sup> If it is determined that the Hiss Act applies, a member who reenlists must sign a statement that he understands that he is ineligible to receive retired pay because of the act but nevertheless desires to reenlist. A similar statement, but not a new determination, is required on each subsequent reenlistment.

The Department of the Navy policy is, in effect, to ignore the existence of the Hiss Act.<sup>79</sup> The Department of the Air Force has apparently made no official pronouncements concerning the act.

The policy of the Department of the Army appears to be more realistic. However, provision should be made that a member may, with the approval of the local judge advocate, request a determination at Department of the Army level at any time; and, if the Hiss Act appears to apply, the member should be discharged, if he desires, unless he is an inductee, a reservist serving an obligated tour, or an original enlistee.

### C. DEFENSE COUNSEL AND THE STAFF JUDGE ADVOCATE

It should be readily apparent that, unless the Hiss Act is substantially amended, it will become an important factor in trials by courts-martial. There are already signs that counsel for accused have become aware of the significance of the act and are evaluating its possible relevance to the preparation of their cases, both at the trial and appellate level.<sup>80</sup> It also seems that those officials, in particular staff judge advocates, who must consider the type of court-martial to which charges should be referred, can hardly avoid consideration of the possible applicability of the act in their deliberations.

Consider, for example, a case in which the facts, if proved, would make the Hiss Act applicable to the accused who is a career

<sup>78</sup> Army Regs. No. 601-210, Changes No. 1, para. 10 (Nov. 17, 1959).

<sup>79</sup> Army Navy Air Force Journal, Oct. 22, 1960, p. 1, cols. 3 and 4.

<sup>80</sup> United States v. Pajak, 11 USCMA 686, 29 CMR 502 (1960); CM 398074, Oakley, 28 CMR 451, 457 (1959). Also see JAGA 1959/5243 (July 10, 1959) (indicates that an accused received a light sentence as a result of defense counsel's statement that, as a result of the Hiss Act, the accused would lose \$80,000 in retirement benefits).

soldier. Assume that it has been recommended that the charges be submitted to a general court-martial. It is now the duty of the staff judge advocate to render his pretrial advice to the convening authority. Should he give any weight to the possible application of the act in his determination as to whether charges should be submitted to a general court-martial? Would he be justified in concluding that, because of the possible application of the act, the charges should be referred to a lesser type court-martial which could adjudge only limited punishment, thereby reducing the total sum of the ill effects on the accused in the event he is convicted; or should he disregard this aspect of the case until after the trial and then perhaps make appropriate recommendations with respect to the sentence adjudged?

Assume that the staff judge advocate adopts the latter view; what consideration should the defense counsel give to the possible application of the Hiss Act? Should he offer to have the accused plead guilty in return for which the government would agree not to introduce any facts that indicate possible application of the Hiss Act? Should the defense counsel raise the possible application of the Hiss Act during sentencing procedures? Here the possibility arises that evidence adduced at trial may not be sufficient to warrant a determination that the Hiss Act applies to the accused and that raising the issue may provide the additional evidence necessary to make such a determination. Also, the possibility exists that, although the evidence is sufficient to warrant a determination that the Hiss Act is applicable, raising the matter might persuade the members of the court-martial, who may have been inclined towards leniency, that leniency will serve no useful purpose and, accordingly, adjudge a more severe sentence than might otherwise have adjudged.

The foregoing represents only possible areas for consideration. But they appear to be ones that must and will be considered by counsel for accused and staff judge advocates.

#### V. AMENDMENT OF THE HISS ACT

A serious but unsuccessful effort was made in the 86th Congress last year to amend the Hiss Act substantially. Identical bills revising the act in its entirety were introduced in the House and Senate.<sup>51</sup> The main purpose of the amendments was to limit denial of retirement benefits to matters which, for the most part, directly affect national security.<sup>52</sup> It was apparently the belief

<sup>51</sup> H.R. 4601, 86th Cong., 1st Sess. (1959); S. 91, 86th Cong., 1st Sess. (1959).

<sup>52</sup> H.R. Rep. No. 258, 86th Cong., 1st Sess. (1959).

## MILITARY LAW REVIEW

of many members of Congress that the act in its present form is far too broad in its application, reaching persons whom Congress had not considered at the time the act was passed and to whom it was considered unnecessarily harsh to have the act apply.<sup>83</sup>

The proposed amendments were more explicit in their reference to the military. For example, it was proposed that section 1 of the act be amended to provide that retired pay would be denied those members who were convicted of violations of Articles 104 (aiding the enemy) or 106 (spying) of the Uniform Code of Military Justice, or predecessor articles, or convicted of violations of the Code, or predecessor provisions, on the basis of charges and specifications describing a violation of any provision of law specified in other provisions of section 1 (all of which relate to offenses affecting national security), if "the executed sentence includes death, dishonorable discharge, or dismissal from the service, or if the defendant dies before execution of such sentence as finally approved."

The bill introduced in the House passed that body and reached the floor of the Senate. At this point, the bill met strong opposition, primarily from Senator Williams of Delaware, who apparently succeeded in preventing passage of the bill.<sup>84</sup>

Two bills, identical to the two introduced in the 86th Congress, were introduced in the first session of the 87th Congress this year.<sup>85</sup> It appears that the present administration supports the proposed amendments.<sup>86</sup> The text of the amending bill given the best chance of passage this year is set forth in the Appendix to this article.

### VI. THE HISS ACT AS PUBLIC POLICY

The Hiss Act is an excellent example of what happens when Congress, giving vent to its collective righteous indignation, passes legislation couched in broad, general language without having fully considered the implications of that legislation. The legislative history of the act makes it quite clear that Congress

<sup>83</sup> *Id.* at pp. 3-5.

<sup>84</sup> 106 Cong. Rec. 9428 (daily ed. May 12, 1960).

<sup>85</sup> H.R. 112, 87th Cong., 1st Sess. (1961); H.R. 6141, 87th Cong., 1st Sess. (1961). The latter bill, introduced by Rep. Tom Murray of Tennessee, was passed by the House of Representatives on July 12, 1961, and was passed by the Senate on September 12, 1961. 107 Cong. Rec. 11527 (daily ed. July 12, 1961); 107 Cong. Rec. 17945, D838 (daily ed. September 12, 1961). The bill was signed into law by the President on September 26, 1961. Pub. L. 87-299, 75 Stat. 640.

<sup>86</sup> The *Evening Star* (Washington, D. C.), Mar. 29, 1961, § A, p. 2, col. 3.



passed the act having in mind only the broad proposition that public policy, whatever that vague term means, demanded action to prevent the likes of Alger Hiss from receiving retirement benefits from the federal government. Stated in such sweeping fashion, the proposition is undoubtedly appealing. However, it loses much of its appeal when viewed as a proposition which, when spelled out in broad legislative language, applies, in the extreme case, to a member of the military who takes a "joy ride" in a government vehicle.

Certainly, no one likes the idea of an officer or employee of the federal government breaking faith with his government and still receiving benefits from that government. On the other hand, most people oppose meting out unnecessarily harsh punishment; and no matter what label is placed on the idea, the hard fact remains that the Hiss Act imposes a punishment on those to whom it applies, and that punishment, in many cases, is unquestionably harsh. Some middle ground should be found to balance the two ideas. This Congress did not do when it considered the act as a legislative proposal. It dealt with only the first concept.

With respect to the military, the legislative history of the Hiss Act does not indicate that Congress considered the impact of the act on the military, either with respect to the persons to whom it would apply or the morale of military personnel and the system of military justice. From personal experience, observations, and discussions with members of the military, it has become apparent that, at least, in the enlisted ranks, considerable concern with respect to their security has been generated by the knowledge that the Hiss Act may deprive them of their retirement benefits. Most enlisted personnel understand fully that if they violate military law they will be disciplined. By tradition and training, however, they believe that once they have been disciplined and returned to duty, they begin afresh their military service and may look forward to those advantages military service offers. This belief has been undermined by the act. The soldier who may have committed an offense some years ago, served his punishment, and thereafter performed his duties honorably, may now learn that all his honorable service is valueless insofar as it relates to the major benefit conferred on military personnel for long and faithful service, namely, retired pay.

In a broader sense, the Hiss Act undermines the system of military justice itself. By means of the Uniform Code of Military Justice, Congress empowered and directed the military to discipline its own. By means of this Code, the Armed Forces do

## MILITARY LAW REVIEW

discipline their members, meting out fair punishment that is warranted in light of military needs. Those members who commit serious offenses are subject to punitive discharge from the service, which serves to sever any ties between members so discharged and the military, including any benefits which the members might otherwise have become entitled to receive from the military.

The Hiss Act, in effect, superimposes a second, and certainly injudicious, system of punishment. It permits no discretion or consideration of extenuating factors. In other words, it is inflexible. Such a measure of punishment is difficult, if not impossible, to accept as proper. In application, it thwarts a fair and impartial administration of the established system of military justice.

It is not maintained that a member of the military who commits a serious breach of faith with the government should receive retired pay. It is maintained that the present system of military justice is adequate to cope with these situations and does cope with them, but without resorting to broad, inflexible standards which cannot produce fair and discriminating results.

This discussion has been limited, for the most part, to a consideration of the Hiss Act as public policy insofar as it affects the military. However, many of the underlying concepts apply to the act as it relates to civilian officers and employees of the federal government. If the system by which civilian officers and employees are disciplined is inadequate to prevent undeserving persons from receiving retirement benefits, then the specific laws which relate to such matters should be amended to authorize intelligent and fair methods for dealing with such situations. Certainly, broadside type legislation, such as the Hiss Act, is not the answer.

It is concluded, therefore, that the Hiss Act should be repealed.

## VII. SUMMARY AND RECOMMENDATIONS

### A. SUMMARY

The portion of the Hiss Act which has primarily concerned the military is that portion of subsection 1(2) which provides that a person shall not be paid federal annuities or retired pay if he is, or ever was, convicted of an offense which is "a felony under the laws of the United States or the District of Columbia," and committed the offense "in the exercise of his authority, influence, power, or privileges as an officer or employee of the Government." The following is a summary of the most important de-

cisions of the Comptroller General and the opinions of The Judge Advocate General of the Army concerning subsection 1(2) as it relates to military personnel tried by court-martial while in active service.

An offense under the Uniform Code of Military Justice is "a felony under the laws of the United States or the District of Columbia" if it is analogous to an offense of a civil nature under the laws of the United States or the District of Columbia and is punishable by death or confinement in excess of one year pursuant to the Table of Maximum Punishments. An offense is analogous if the specification which alleges the offense sets forth in express language, or by necessary implication, the essential elements of an offense under the laws of the United States or the District of Columbia. Purely military type offenses are not analogous. It is immaterial what confinement is imposed or that the offense is tried before a special or summary court-martial which cannot impose confinement in excess of six months and one month, respectively. The Table of Maximum Punishments governs in all cases.

An offense under the Uniform Code of Military Justice that is considered a felony for purposes of subsection 1(2) of the Hiss Act is committed by a member of the military "in the exercise of his authority, influence, power, or privileges as an officer or employee of the Government," if the offense is committed in the exercise of some duty, or the commission of which is made possible by the position he holds or the duties to which he is assigned. This test does not apply in the case of false claims for such items as travel pay. The mere presentment of the false claim is considered the exercise of a privilege.

Any evidence received by a court-martial before findings of guilty and stipulations introduced by the prosecution or defense during sentencing procedures may be used to determine whether an offense was committed by a member of the military "in the exercise of his authority, influence, power, or privileges as an officer or employee of the Government." It has not yet been determined whether other evidence may be so used. However, it appears that the rule may develop that any evidence may be used which the person concerned has had a fair opportunity to rebut. The evidence must be "clear and convincing."

#### B. RECOMMENDATIONS

(1) Any judge advocate called upon to render advice concerning the application of the Hiss Act to a specific case should carefully weigh the various factors involved. Advice that the act

## MILITARY LAW REVIEW

applies or does not apply may cause the person concerned to act to his detriment, if the advice is later discovered to be erroneous. Advice that the act does apply may cause a service member to end his career. If the advice is wrong, a worthwhile career may have been needlessly ended. If the service member is eligible for retirement, and it is erroneously determined that the act applies to him, the error may not be discovered, and the member will never receive the retired pay he is rightfully due. Advice that the Hiss Act does not apply may cause a service member to continue his military career. If the advice is wrong, it may also have caused the member to pass up other opportunities which may no longer be available when the error is discovered. Judge advocates should not render specific advice without reading the record of trial for the court-martial involved, except in cases where the offense is not punishable by death or confinement in excess of one year or it is abundantly clear that the offense is one which is purely military in nature.

(2) Each Armed Force should provide administrative methods similar to those presently used by Department of the Army for screening service members' records upon reenlistment to determine whether they may have committed an offense within the purview of the Hiss Act. In addition, any service member should be authorized to request, at any time, with the approval of the local judge advocate, a determination at departmental level whether the act applies to him. If it does, he should be discharged, at his request, unless he is an inductee, a reservist serving an obligated tour or an original enlistee.

(3) For the reasons stated in Section VI, *supra*, the Hiss Act should be repealed, and in such a manner as to restore retired pay to those persons who have been denied such pay pursuant to the act.

### VIII. APPENDIX

#### A. PERTINENT PROVISIONS OF THE HISS ACT

##### Title 5, United States Code

Section 2281. Prohibition against payment of annuities or retirement benefits to persons convicted of certain crimes or refusing to testify, etc., definitions.

As used in this chapter and section 3282 of Title 18—

(1) The term "officer or employee of the Government" includes an officer or employee in or under the legislative, executive, or judicial branch of the Government of the United States, a Member of or Delegate to Congress, a Resident Commissioner, an officer or employee of the government of the District of Columbia, and a member or former member of the Armed Forces of the United States, including the Regular and

## THE HISS ACT

Reserve components thereof, the Fleet Reserve, the Fleet Marine Corps Reserve, the Coast and Geodetic Survey, and the Public Health Service.

(2) The term "annuity" means any retirement benefit (other than any benefit provided under laws administered by the Veterans' Administration) payable by any department or agency of the Government of the United States or the government of the District of Columbia upon the basis of service as a civilian officer or employee, except that such term does not include salary or compensation which may not be diminished under section 1 of article III of the Constitution or, in the case of a benefit payable under the Social Security Act, as amended, any portion of such benefit not based upon service as an officer or employee of the Government of the United States or the government of the District of Columbia. The term "annuity" does not include any retirement benefit of any person to whom such benefit has been awarded or granted prior to September 1, 1954, insofar as concerns the conviction of such person, prior to such date, of any offense specified in section 2282 of this title, or the commission by such person, prior to such date, of any violation of section 2283 of this title.

(3) The term "retired pay" means retired pay, retirement pay, retainer pay, or equivalent pay (other than any benefit provided under laws administered by the Veterans' Administration, payable under any law of the United States to members or former members of the Armed Forces of the United States, including the Regular and Reserve components thereof and the Fleet Reserve and the Fleet Marine Corps Reserve, the Coast and Geodetic Survey, and the Public Health Service. The term "retired pay" does not include the retired pay, retirement pay, retainer pay, or equivalent pay of any person to whom any such pay has been awarded or granted prior to September 1, 1954, insofar as concerns the conviction of such persons, prior to such date, of any offense specified in section 2282 of this title, or the commission by such person, prior to such date, of any violation of section 740d of this title.

(Sept. 1, 1954, ch. 1214, § 6, 68 Stat. 1144).

Section 2282. Convictions as barring payment of annuities or retired pay; specification of penal statutes.

There shall not be paid to any person convicted prior to, on, or after September 1, 1954, of any of the following offenses described in this section, or to the survivor or beneficiary of such person so convicted, for any period subsequent to the date of such conviction or September 1, 1954, whichever is later, any annuity or retired pay on the basis of the service of such person as an officer or employee of the Government:

(1) Any offense defined in section 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 216, 217, 218, 219, 220, 221, 222, or 223 of chapter 11 (relating to bribery and graft), section 281, 282, 283, 284, 285, 286, or 287 of chapter 15 (relating to claims and services in matters affecting government), section 434, 435, 436, 441, 442, or 443 of chapter 23 (relating to contracts), chapter 37 (relating to espionage and censorship), section 1700, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1711, or 1712 of chapter 83 (relating to offenses involving the postal service), chapter 105 (relating to sabotage), or chapter 115 (relating to treason, sedition, and subversive activities) of Title 18 or in section 1810 or 1816 of Title 42;

(2) Any offense (not including any offense within the purview of section 13 of Title 18) which is a felony under the laws of the United States or

## MILITARY LAW REVIEW

of the District of Columbia (A) committed in the exercise of his authority, influence, power, or privileges as an officer or employee of the Government, or (B) committed after the termination of his service as an officer or employee of the Government but directly involving, directly resulting from, or directly relating to, the improper exercise of his authority, influence, power, or privileges during any period of his service as such an officer or employee;

(3) Perjury committed under the laws of the United States or of the District of Columbia (A) in falsely denying the commission of an act which constitutes any of the offenses described in paragraph (1) or (2) of this section, (B) in falsely testifying before any Federal grand jury or court of the United States with respect to his service as an officer or employee of the Government, or (C) in falsely testifying before any congressional committee in connection with any matter under inquiry before such congressional committee; or subornation of perjury committed in connection with the false denial or false testimony of another person as specified in this paragraph;

(4) Any offense defined in section 22-701, 22-702, 22-703, or 22-1201 of the District of Columbia Code.

(Sept. 1, 1954, ch. 1214, § 1, 68 Stat. 1142.)

Section 2283. Refusal to testify or produce records; false statements or concealment of facts in employment applications; persons remaining outside United States, its Territories or possessions to avoid prosecution.

(a) There shall not be paid to any person who has failed or refused, or fails or refuses, prior to, on, or after September 1, 1954, upon the ground of self-incrimination, to appear, testify or produce any book, paper, record, or other document, with respect to his service as an officer or employee of the Government or with respect to any relationship which he has had or has with a foreign government, in any proceeding before a Federal grand jury, court of the United States, or congressional committee, or to the survivor or beneficiary of such person, for any period subsequent to the date of such failure or refusal of such person or September 1, 1954, whichever is later, any annuity or retired pay on the basis of the service of such person as an officer or employee of the Government.

(b) There shall not be paid to any person who, prior to, on, or after September 1, 1954, knowingly and willfully has made or makes any false, fictitious or fraudulent statement or representation, or who, prior to, on, or after such date, has concealed or conceals any material fact, with respect to his—

(1) past or present membership in, affiliation or association with, or support of the Communist Party, or any chapter, branch, or subdivision thereof, in or outside the United States, or any other organization, party, or group advocating (A) the overthrow, by force, violence, or other unconstitutional means, of the Government of the United States, (B) the establishment in the United States of a Communist totalitarian dictatorship, or (C) the right to strike against the Government of the United States;

(2) conviction of any offense described in section 2283 of this title; or

(3) failure or refusal to appear, testify, or produce any book, paper, record, or other document as specified in subsection (a) of this section, for any period subsequent to September 1, 1954, or the date on which any such statement, representation, or concealment of fact is made or occurs,

## THE HISS ACT

whichever is later, in connection with his application for an office or position in or under the executive, legislative, or judicial branch of the Government of the United States or the government of the District of Columbia, or to the survivor or beneficiary of such person, any annuity or retired pay on the basis of the service of such person as an officer or employee of the Government.

(c) In any case in which, after the date of enactment of this subsection, any person under indictment for any offense within the purview of section 2282 of this title willfully remains outside the United States, its Territories, and possessions, for a period in excess of one year with knowledge of such indictment, no annuity or retired pay shall be paid, for any period subsequent to the end of such one-year period to such person or to the survivor or beneficiary of such person, on the basis of the service of such person, as an officer or employee of the Government unless and until a nolle prosequi to the entire indictment is entered upon the record or such person returns and thereafter the indictment is dismissed or after trial by court the accused is found not guilty of the offense or offenses charged in the indictment. (Sept. 1, 1954, ch. 1214, § 2, 68 Stat. 1142; July 31, 1956, ch. 804, title IV, § 405, 70 Stat. 761.)

Section 2285. Restoration of annuity or retired pay upon pardon.

The right to receive an annuity or retired pay shall be deemed restored to any person convicted, prior to, on, or after September 1, 1954, of an offense which is specified in section 2282 of this title or which constitutes a violation of section 2283 of this title, for which he is denied an annuity or retired pay, to whom a pardon of such offense is granted by the President of the United States, prior to, on, or after September 1, 1954, and to the survivor or beneficiary of such person. Such restoration of the right to receive an annuity or retired pay shall be effective as of the date on which such pardon is granted. Any amounts refunded to such person under section 2284 of this title shall be redeposited before credit is allowed for the period or periods of service covered by the refund. No payment of annuity or retired pay shall be made for any period prior to the date on which such pardon is granted. (Sept. 1, 1954, ch. 1214, § 4, 68 Stat. 1143.)

Section 2287. Removal of members of the Armed Forces from the rolls.

The President may drop from the rolls any member of the Armed Forces, including the Regular and Reserve components thereof, the Fleet Reserve, and the Fleet Marine Corps Reserve, and any member of the Coast and Geodetic Survey or of the Public Health Service, who is deprived of retired pay under the provisions of this chapter and section 3282 of Title 18. (Sept. 1, 1954, ch. 1214, § 8, 68 Stat. 1145.)

### B. AMENDMENTS PASSED IN THE 87TH CONGRESS REGARDING THE HISS ACT

Pertinent Provisions of Pub. L. 87-299, 75 Stat. 640

#### An Act

To amend the Act of September 1, 1954, in order to limit to cases involving the national security the prohibition on payment of annuities and retired pay to officers and employees of the United States, to clarify the application and operation of such Act, and for other purposes,

*Be it enacted by the Senate and House of Representatives of the United*

## MILITARY LAW REVIEW

*States of America in Congress assembled*, That the Act entitled "An Act to prohibit payment of annuities to officers and employees of the United States convicted of certain offenses, and for other purposes", approved September 1, 1954, as amended (68 Stat. 1142, 70 Stat. 761; 5 U.S.C. 2281-2288), is amended to read as follows:

"That (a) there shall not be paid to any person convicted, prior to, on or after September 1, 1954, under any article or provision of law specified or described in this subsection, of any offense within the purview of such article or provision to the extent provided in this subsection, or to any survivor or beneficiary of such person so convicted, for any period subsequent to the date of such conviction or subsequent to September 1, 1954, whichever date is later, any annuity or retired pay on the basis of the service of such person (subject to the exceptions contained in section 10(2) and (3) of this Act) which is creditable toward such annuity or retired pay—

"(1) any offense within the purview of—

"(A) section 792 (harboring or concealing persons), 793 (gathering, transmitting, or losing defense information), 794 (gathering or delivering defense information to aid foreign government), or 798 (disclosure of classified information), of chapter 37 (relating to espionage and censorship) of title 18 of the United States Code,

"(B) chapter 105 (relating to sabotage) of title 18 of the United States Code,

"(C) section 2381 (treason), 2382 (misprision of treason), 2383 (rebellion or insurrection), 2384 (seditious conspiracy), 2385 (advocating overthrow of government), 2387 (activities affecting armed forces generally), 2388 (activities affecting armed forces during war), 2389 (recruiting for service against United States), or 2390 (enlistment to serve against United States), of chapter 115 (relating to treason, sedition, and subversive activities) of title 18 of the United States Code,

"(D) section 10(b)(2), 10(b)(3), or 10(b)(4) of the Atomic Energy Act of 1946 (60 Stat. 766, 767; 42 U.S.C., 1952 edition, sec. 1810 (b)(2), (3) and (4), as in effect prior to the enactment of the Atomic Energy Act of 1954 by the Act of August 30, 1954 (68 Stat. 919; Public Law 703, Eighty-third Congress; 42 U.S.C. 2011-2281),

"(E) section 16(a) or 16(b) of the Atomic Energy Act of 1946 (60 Stat. 773; 42 U.S.C., 1952 edition, sec. 1816 (a) and (b), as in effect prior to the enactment of the Atomic Energy Act of 1954 by the Act of August 30, 1954, insofar as such offense under such section 16(a) or 16(b) is committed with intent to injure the United States or with intent to secure an advantage to any foreign nation, or

"(F) any prior provision of law on which any provision of law specified in subparagraph (A), (B), or (C), of this paragraph is based;

"(2) any offense within the purview of—

"(A) article 104 (aiding the enemy) or article 106 (spies) of the Uniform Code of Military Justice (chapter 47 of title 10 of the United States Code) or any prior article on which such article 104 or article 106, as the case may be, is based, or

"(B) any current article of the Uniform Code of Military Justice (or any prior article on which such current article is based) not specified or described in subparagraph (A) of this paragraph on the basis of charges and specifications describing a violation of any provision of



## THE HISS ACT

law specified or described in paragraph (1), (3), or (4) of this subsection if the executed sentence includes death, dishonorable discharge, or dismissal from the service, or if the defendant dies before execution of such sentence as finally approved;

"(3) perjury committed under the laws of the United States or of the District of Columbia—

"(A) in falsely denying the commission of an act which constitutes any of the offenses—

"(i) within the purview of any provision of law specified or described in paragraph (1) of this subsection, or

"(ii) within the purview of any article or provision of law specified or described in paragraph (2) of this subsection insofar as such offense is within the purview of any article or provision of law specified or described in paragraph (1) or paragraph (2) (A) of this subsection,

"(B) in falsely testifying before any Federal grand jury, court of the United States, or court-martial with respect to his service as an officer or employee of the Government in connection with any matter involving or relating to any interference with or endangerment of, or involving or relating to any plan or attempt to interfere with or endanger, the national security or defense of the United States, or

"(C) in falsely testifying before any congressional committee in connection with any matter under inquiry before such congressional committee involving or relating to any interference with or endangerment of, or involving or relating to any plan or attempt to interfere with or endanger, the national security or defense of the United States; and

"(4) subornation of perjury committed in connection with the false denial or false testimony of another person as specified in paragraph (3) of this subsection.

"(b) There shall not be paid to any person convicted, prior to, on, or after the date of enactment of this amendment, under any article or provision of law specified or described in this subsection, of any offense within the purview of such article or provision to the extent provided in this subsection, or to any survivor or beneficiary of such person so convicted, for any period subsequent to the date of such conviction or subsequent to the date of enactment of this amendment, whichever date is later, any annuity or retired pay on the basis of the service of such person (subject to the exceptions contained in section 10(2) and (3) of this Act) which is creditable toward such annuity or retired pay—

"(1) any offense within the purview of—

"(A) section 222 (violation of specific sections) or section 223 (violation of sections generally of the Atomic Energy Act of 1954 (68 Stat. 958; 42 U.S.C. 2272 and 2273 insofar as such offense under such section 222 or 223 is committed with intent to injure the United States or with intent to secure an advantage to any foreign nation,

"(B) section 224 (communication of restricted data), section 225 (receipt of restricted data), or section 226 (tampering with restricted data) of the Atomic Energy Act of 1954 (68 Stat. 958 and 959; 42 U.S.C. 2274, 2275, and 2276), or

"(C) section 4 (conspiracy and communication or receipt of classified information), section 112 (conspiracy or evasion of apprehension during internal security emergency), or section 113 (aiding evasion of appre-

## MILITARY LAW REVIEW

hension during internal security emergency) of the Internal Security Act of 1950 (64 Stat. 991, 1029, and 1030; 50 U.S.C. 783, 822, and 823);

"(2) any offense within the purview of any current article of the Uniform Code of Military Justice (chapter 47 of title 10 of the United States Code), or any prior article on which such current article is based, on the basis of charges and specifications describing a violation of any provision of law specified or described in paragraph (1), (3), or (4) of this subsection, if the executed sentence includes death, dishonorable discharge, or dismissal from the service, or if the defendant dies before execution of such sentence as finally approved;

"(3) perjury committed under the laws of the United States or the District of Columbia in falsely denying the commission of an act which constitutes any of the offenses within the purview of any provision of law specified or described in paragraph (1) of this subsection; and

"(4) subornation of perjury committed in connection with the false denial of another person as specified in paragraph (3) of this subsection.

"Sec. 2. (a) There shall not be paid to any person who, prior to, on, or after September 1, 1954, has refused or refuses, or knowingly and willfully has failed or fails, to appear, testify, or produce any book, paper, record, or other document, relating to his service as an officer or employee of the Government, before a Federal grand jury, court of the United States, court-martial, or congressional committee, in any proceeding with respect to—

"(1) any relationship which he has had or has with a foreign government, or

"(2) any matter involving or relating to any interference with or endangerment of, or involving or relating to any plan or attempt to interfere with or endanger, the national security or defense of the United States, or to the survivor or beneficiary of such person, for any period subsequent to September 1, 1954, or subsequent to the date of such failure or refusal of such person, whichever date is later, any annuity or retired pay on the basis of the service of such person (subject to the exceptions contained in section 10(2) and (3) of this Act) which is creditable toward such annuity or retired pay.

"(b) There shall not be paid to any person who, prior to, on, or after September 1, 1954, knowingly and willfully, has made or makes any false, fictitious, or fraudulent statement or representation, or who, prior to, on, or after such date, knowingly and willfully, has concealed or conceals any material fact, with respect to his—

"(1) past or present membership in, affiliation or association with, or support of the Communist Party, or any chapter, branch, or subdivision thereof, in or outside the United States, or any other organization, party, or group advocating (A) the overthrow, by force, violence, or other unconstitutional means, of the Government of the United States, (B) the establishment, by force, violence, or other unconstitutional means, of a Communist totalitarian dictatorship in the United States, or (C) the right to strike against the Government of the United States,

"(2) conviction, under any article or provision of law specified or described in subsection (a) of the first section of this Act, of any offense within the purview of such subsection (a) to the extent provided in such subsection, or

"(3) failure or refusal to appear, and testify, or produce any book,

## THE HISS ACT

paper, record, or other document, as specified in subsection (a) of this section,

for any period subsequent to September 1, 1954, or subsequent to the date on which any such statement, representation, or concealment of fact is made or occurs, whichever date is later, in any document executed by such person in connection with his employment in, or application for, a civilian or military office or position in or under the legislative, executive, or judicial branch of the Government of the United States or the government of the District of Columbia, or to the survivor or beneficiary of such person, any annuity or retired pay on the basis of the service of such person (subject to the exceptions contained in section 10(2) and (3) of this Act) which is creditable toward such annuity or retired pay.

"(c) There shall not be paid to any person who, prior to, on, or after the date of enactment of this amendment, knowingly and willfully, has made or makes any false, fictitious, or fraudulent statement or representation, or who, prior to, on, or after such date, knowingly and willfully, has concealed or conceals any material fact, with respect to his conviction, under any article or provision of law specified or described in subsection (b) of the first section of this Act, of any offense within the purview of such subsection (b) to the extent provided in such subsection, for any period subsequent to the date of enactment of this amendment or subsequent to the date on which any such statement, representation, or concealment of fact is made or occurs, whichever date is later, in any document executed by such person in connection with his employment in, or application for, a civilian or military office or position in or under the legislative, executive, or judicial branch of the Government of the United States or the government of the District of Columbia, or to the survivor or beneficiary of such person, any annuity or retired pay on the basis of the service of such person (subject to the exceptions contained in section 10(2) and (3) of this Act) which is creditable toward such annuity or retired pay.

"Sec. 3. There shall not be paid to any person—

"(1) who (A) after July 31, 1956, is under indictment, or has outstanding against him charges preferred under the Uniform Code of Military Justice, for any offense within the purview of subsection (a) of the first section of this Act, or (B) after the date of enactment of this amendment, is under indictment, or has outstanding against him charges preferred under the Uniform Code of Military Justice, for any offense within the purview of subsection (b) of such first section, and

"(2) who willfully remains outside the United States, its Territories and possessions, and the Commonwealth of Puerto Rico for a period in excess of one year with knowledge of such indictment or charges, as the case may be,

for any period subsequent to the end of such one-year period, or to the survivor or beneficiary of such person, any annuity or retired pay on the basis of the service of such person (subject to the exceptions contained in section 10(2) and (3) of this Act) which is creditable toward such annuity or retired pay, unless and until—

"(i) a nolle prosequi to the entire indictment is entered upon the record, or such charges have been dismissed by competent authority, as the case may be,

"(ii) Such person returns and thereafter the indictment, or charges, is or are dismissed, or

## MILITARY LAW REVIEW

"(iii) after trial by court or court-martial, as applicable, the accused is found not guilty of the offense or offenses referred to in paragraph (1) of this section.

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"Sec. 6. (a) The right to receive an annuity or retired pay shall be deemed restored to any person convicted, prior to, on, or after September 1, 1954, of an offense which is within the purview of the first section of this Act or which constitutes a violation of section 2 of this Act, for which he is denied under this Act an annuity or retired pay, to whom a pardon of such offense is granted by the President of the United States, prior to, on, or after September 1, 1954, and to the survivor or beneficiary of such person. Such restoration of the right to receive an annuity or retired pay shall be effective as of the date on which such pardon is granted. Any amounts refunded to such person under section 4 or section 5(b) of this Act shall be redeposited before credit is allowed for the period or periods of service covered by the refund. No payment of annuity or retired pay shall be made, by virtue of such pardon, for any period prior to the date on which such pardon is granted.

"(b) The President is authorized to restore, effective as of such date as he may prescribe, the right to receive an annuity or retired pay to any person who is denied, prior to, on, or after September 1, 1954, an annuity or retired pay under section 2 of this Act, and to the survivor or beneficiary of such person. Any amounts refunded to such person under section 4 or section 5(b) of this Act shall be redeposited before credit is allowed for the period or periods of service covered by the refund. No payment of annuity or retired pay shall be made, by virtue of such restoration of annuity or retired pay by the President under this subsection, for any period prior to the effective date of such restoration of annuity or retired pay.

"(c) The right to receive an annuity or retired pay shall not be denied because of any conviction of an offense which is within the purview of the first section of this Act or which constitutes a violation of section 2 of this Act, in any case in which it is established by satisfactory evidence that such conviction or violation resulted from proper compliance with orders issued, in a confidential relationship, by a department, agency, establishment, or other authority of any branch of the Government of the United States or of the government of the District of Columbia.

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"Sec. 8. (a) The President may—

"(1) drop from the rolls any member of the armed forces, and any member of the Coast and Geodetic Survey or of the Public Health Service, who is deprived of retired pay under the provisions of this Act, and

"(2) (A) restore to any person so dropped from the rolls to whom retired pay is restored by reason of any provision of or change in this Act (including the provisions of section 2 of the Act which enacts this clause), his military status, and (B) restore to him and his beneficiaries all rights and privileges of which he or they were deprived by reason of his name having been dropped from the rolls.

"(b) If the person restored was a commissioned officer he may be reappointed by the President alone to the grade and position on the retired list which he held at the time his name was dropped from the rolls.

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"Sec. 10. As used in this Act—

"(1) the term 'officer or employee of the Government' includes—

"(A) an officer or employee in or under the legislative, executive, or judicial branch of the Government of the United States;

"(B) a Member of, Delegate to, or Resident Commissioner in, the Congress of the United States;

"(C) an officer or employee of the government of the District of Columbia; and

"(D) a member or former member of the armed forces, the Coast and Geodetic Survey, or the Public Health Service.

"(2) the term 'annuity' means any retirement benefit (including any disability insurance benefit and any dependent's or survivor's benefit under title II of the Social Security Act and any monthly annuity under section 2 or section 5 of the Railroad Retirement Act of 1937) payable by any department or agency of the Government of the United States or the government of the District of Columbia upon the basis of service as a civilian officer or employee of the Government and any other service which is creditable to an officer or employee of the Government toward such benefit under the law, regulation, or agreement providing such benefit, except that—

"(A) the term 'annuity' does not include any benefit provided under laws administered by the Veterans' Administration;

"(B) the term 'annuity' does not include salary or compensation which may not be diminished under section 1 of Article III of the Constitution of the United States;

"(C) the term 'annuity' does not include, in the case of a benefit payable under title II of the Social Security Act, so much of such benefit as would be payable without taking into account (for any of the purposes of such title II, including determinations of periods of disability under section 216(i)) any remuneration for service as an officer or employee of the Government;

"(D) the term 'annuity' does not include any monthly annuity awarded under section 2 or section 5 of the Railroad Retirement Act of 1937 prior to the date of enactment of this amendment (whether or not computed under section 3(e) of such Act) and, in the case of any annuity awarded under such section 2 or 5 on or subsequent to the date of enactment of this amendment, does not include so much of such annuity as would be payable without taking into account any military service creditable under section 4 of such Act;

"(E) the term 'annuity' does not include any retirement benefit (including any disability insurance benefit and any dependent's or survivor's benefit under title II of the Social Security Act) of any person to whom such benefit has been awarded or granted prior to September 1, 1954, or of the survivor or beneficiary of such person, insofar as concerns the conviction of such person, prior to such date, under any article or provision of law specified or described in subsection (a) of the first section of this Act, of any offense within the purview of such subsection (a) to the extent provided in such subsection, or the commission by such person, prior to such date, of any violation of subsection (a) or (b) of section 2 of this Act; and

"(F) the term 'annuity' does not include any retirement benefit (including any disability insurance benefit and any dependent's or survivor's benefit under title II of the Social Security Act) of any

## MILITARY LAW REVIEW

person to whom such benefit has been awarded or granted prior to the date of enactment of this amendment, or of the survivor or beneficiary of such person, insofar as concerns the conviction of such person, prior to such date, under any article or provision of law specified or described in subsection (b) of the first section of this Act, of any offense within the purview of such subsection (b) to the extent provided in such subsection, or the commission by such person, prior to such date, of any violation of subsection (c) of section 2 of this Act.

"(3) the term 'retired pay' means retired pay, retirement pay, retainer pay, or equivalent pay, payable under any law of the United States to members or former members of the armed forces, the Coast and Geodetic Survey, and the Public Health Service, and any annuity payable to an eligible beneficiary of any such member or former member under chapter 73 (annuities based on retired or retainer pay) of title 10 of the United States Code, or under section 5 of the Uniformed Services Contingency Option Act of 1953 (67 Stat. 504; 37 U.S.C., 1952 edition, Supp. III, sec. 374), except that—

"(A) the term 'retired pay' does not include any benefit provided under laws administered by the Veterans' Administration;

"(B) the term 'retired pay', as applicable to retired pay, retirement pay, retainer pay, and equivalent pay, does not include any such pay of any person to whom such pay has been awarded or granted prior to September 1, 1954, insofar as concerns the conviction of such person, prior to such date, under any article or provision of law specified or described in subsection (a) of the first section of this Act, of any offense within the purview of such subsection (a) to the extent provided in such subsection, or the commission by such person, prior to such date, of any violation of subsection (a) or (b) of section 2 of this Act;

"(C) the term 'retired pay', as applicable to retired pay, retirement pay, retainer pay, or equivalent pay, does not include any such pay of any person to whom such pay has been awarded or granted prior to the date of enactment of this amendment insofar as concerns the conviction of such person, prior to such date, under any article or provision of law specified or described in subsection (b) of the first section of this Act, of any offense within the purview of such subsection (b) to the extent provided in such subsection, or the commission by such person, prior to such date, of any violation of subsection (c) of section 2 of this Act; and

"(D) the term 'retired pay', as applicable to an annuity payable to the eligible beneficiary of any person under chapter 73 of title 10 of the United States Code, or under section 5 of the Uniformed Services Contingency Option Act of 1953 (67 Stat. 504; 37 U.S.C. 1952 edition, Supp. III, sec. 374), does not include any such annuity of any such beneficiary if such annuity has been awarded or granted to such beneficiary, or if retired pay has been awarded or granted to such person, prior to the date of enactment of this amendment insofar as concerns—

"(i) the conviction, prior to such date, of the person on the basis of whose service such annuity is awarded or granted, under any article or provision of law specified or described in the first section of this Act, of any offense within the purview of such first section to the extent specified in such section, or

## THE HISS ACT

"(ii) the commission by such person, prior to such date, of any violation of section 2 of this Act.

"(4) the term 'armed forces' shall have the meaning provided for such term by title 10 of the United States Code.

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Sec. 2. (a) Subject to subsection (b) of this section, any person, including his survivor or beneficiary, to whom annuity or retired pay is not payable under the Act of September 1, 1954, as in effect at any time prior to the date of enactment of this Act, by reason of any conviction of an offense, any commission of a violation, any refusal to answer, or any absence under indictment, or under charges, for any offense, shall be restored the right to receive such annuity or retired pay for any and all periods for which he would have had the right to receive such annuity or retired pay if the Act of September 1, 1954, had not been enacted, unless, under the amendment made by the first section of this Act, such annuity or retired pay remains nonpayable to such person, including his survivor or beneficiary.

(b) No annuity accrued or accruing, prior to, on, or after the date of enactment of this Act, on account of the restoration, by reason of the amendment made by the first section of this Act and by reason of subsection (a) of this section, of the right to receive such annuity, shall be paid until any sum refunded under section 3 of the Act of September 1, 1954, as in effect prior to the date of enactment of such amendment, is deposited or is collected by offset against the annuity.





# RECENT DEVELOPMENTS—INSTRUCTIONS ON THE SENTENCE\*

BY FIRST LIEUTENANT ALLAN B. ADKINS\*\*

## I. INTRODUCTION

Chapter XXV of the Manual for Courts-Martial<sup>1</sup> is entitled "Punishments." It contains, within its twenty-four pages, descriptions of no less than twenty-one distinct types of permissible punishment and prescribes maximum limits for their imposition pursuant to the authority vested in the President by Article 56 of the Uniform Code of Military Justice.<sup>2</sup> Several of the forms of punishment are reserved to particular services,<sup>3</sup> some are deemed lesser forms of other punishments named,<sup>4</sup> and many are purportedly limited by provisions describing the manner in which they may be imposed in conjunction with other types.<sup>5</sup> The sum total of these provisions is a comprehensive scheme of punishment covering almost all of the principles necessary for consideration in arriving at the permissible punishment in any case. The chapter also represents a considerable backlog of military custom and tradition with respect to both civilian-type and peculiarly military forms of punishment.

Article 51(c) of the Code<sup>6</sup> requires the law officer or president of a special court-martial to instruct the court members on the law applicable to the case prior to their vote on the findings. There is no such codal requirement with respect to the presentencing portion of the trial. The Manual does contain a loosely worded statement that the law officer or president "may" instruct the

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\* 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 or any other governmental agency.

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<sup>1</sup> Chap. XXV, U.S. Dep't of Defense, Manual for Courts-Martial, United States, 1951 (specific references hereinafter cited Para. \_\_\_\_\_, MCM, 1951).

<sup>2</sup> Uniform Code of Military Justice, art. 56, 10 U.S.C. § 856 (1958) (specific references hereinafter cited Art. \_\_\_\_\_, UCMJ).

<sup>3</sup> For example, loss of numbers is reserved to the Navy. Para. 126i, MCM, 1951.

<sup>4</sup> For example, detention of pay is a lesser form within forfeiture. Para. 126h(4), MCM, 1951.

<sup>5</sup> For example, para. 127b, MCM, 1951, provides that confinement may not exceed six months if there is no punitive discharge. This provision was declared void in *United States v. Varnadore*, 9 USCMA 471, 26 CMR 251 (1958).

<sup>6</sup> Art. 51(c), UCMJ.

## MILITARY LAW REVIEW

court on the maximum permissible punishment.<sup>7</sup> This requirement was almost universally interpreted to encompass the three "basic" elements of the normal general court-martial maximum sentence, *i.e.*, punitive discharge or dismissal, confinement, and forfeitures. Despite the fact that there appeared to be no absolute requirement for instructions on the sentence, it was established early in operations under the Code that if erroneous instructions on the maximum sentence were actually given, prejudicial error could result.<sup>8</sup> Instructions on the many less severe forms of punishment available as substitutes for the basic elements of the maximum were never required *sua sponte*. Two justifications for this are apparent: first, an extensive narration of these forms of punishment would be very time consuming and tedious; second, the court members were allowed to use the Manual in their deliberations and, if they felt that a less severe form of punishment were appropriate, they could shuffle through Chapter XXV and arrive at a proper sentence. The validity of this second justification could be argued at length because of the complicated nature of the Manual provisions, but later decisions of the Court of Military Appeals have made such a discussion unnecessary. In *United States v. Rinehart*,<sup>9</sup> the Court ruled that court-martial members were not permitted to use the Manual in their deliberations. This left the court wholly without guidance on the sentence if the law officer or president decided not to invoke the permissive Manual authorization for instructions. The Court of Military Appeals filled this gap with its decision in *United States v. Turner*<sup>10</sup> in which it held that the law officer or president is required to instruct on the maximum permissible punishment *sua sponte*. This decision was generally interpreted, in accordance with the earlier practice, to require instructions only on the maximum limits of discharge, confinement, and forfeitures.

In *United States v. Crawford*<sup>11</sup> the Court was called upon to interpret the *Turner* requirement and the extent to which the usual three-element instruction meets its demands. *Crawford* involved a Navy special court-martial in which the president instructed the court correctly as to the three normal portions of the sentence. He made no mention of reduction. When the president announced the sentence, he included reduction to the lowest enlisted grade in addition to punitive discharge, confinement, and forfeitures. Reduction is not automatic in the Navy despite

<sup>7</sup> Para. 76b, MCM, 1951. In defining the duties of the law officer, para. 39b, MCM, 1951, states that he "should" inform the court of the maximum punishment.

<sup>8</sup> *United States v. Murgaw*, 2 USCMA 369, 8 CMR 169 (1953).

<sup>9</sup> 8 USCMA 402, 24 CMR 212 (1957).

<sup>10</sup> 9 USCMA 124, 25 CMR 396 (1956).

<sup>11</sup> 12 USCMA 203, 30 CMR 203 (1961).

## INSTRUCTIONS ON THE SENTENCE

Article 58(a) of the Code.<sup>12</sup> A divided board of review affirmed the sentence against the challenge that the reduction portion exceeded the instructions and thereby violated the *Turner* rule.<sup>13</sup> The Judge Advocate General of the Navy certified the question of the legality of the reduction, possibly because another Navy board had reached exactly the opposite conclusion.<sup>14</sup> Chief Judge Quinn, with Judge Ferguson concurring, wrote the majority opinion in the Court of Military Appeals and held that the president's instructions marked the limits of the sentence and that therefore the reduction was invalid. The effect of the error was cured by disapproving the reduction. Judge Latimer dissented. The majority opinion is very brief, although undoubtedly sufficient to answer the narrow question certified.

The Air Force presented a similar case to the Court in *United States v. Powell*.<sup>15</sup> A special court-martial imposed a reduction not supported by instructions in conjunction with a bad conduct discharge, forfeiture and confinement at hard labor. The convening authority approved this sentence. Unlike the Navy case, the accused here was reduced to the lowest enlisted grade by operation of law under Article 58(a) of the Code upon the convening authority's approval of the sentence. Thus, the additional problem of the effect of the statute on this sentence was presented to the Court. The result was the same and the Court set aside the portion of the sentence calling for reduction. Here, Judge Ferguson wrote the majority opinion and found that the statute did not present any reason for departing from the Crawford decision. The Chief Judge concurred. Judge Latimer dissented, pointing out that this accused was nevertheless reduced by operation of the statute and that the Court's action in setting aside the special court-martial's reduction was an "abortive act."

These cases present many questions for the law officer or president who wishes to phrase his instructions to prevent a similar result. What types of punishment must be instructed upon? Must lesser "included" types be instructed upon? Assuming that a failure to instruct is error, is there prejudice to an

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<sup>12</sup> Article 58(a) of the Code, P.L. 86-633, effective 12 July 1960, provides for automatic reduction to the lowest enlisted grade of an accused whose sentence, as approved, includes punitive discharge, confinement, or hard labor without confinement. The language of this article is comparable to para. 126e, MCM, 1951, as amended by Exec. Order No. 10652, January 10, 1956, which was overruled by *United States v. Simpson*, 10 USCMA 229, 27 CMR 308 (1959). A service Secretary may provide otherwise and the Navy rule is that any reduction in a sentence must be specifically adjudged at trial. See para. 0109, Naval Supplement, MCM, 1951.

<sup>13</sup> SPCM NCM 60-01534, Crawford (September 30, 1960).

<sup>14</sup> NCM 58-00704, Brown, 26 CMR 758 (1958).

<sup>15</sup> 12 USCMA 288, 30 CMR 288 (1961).

## MILITARY LAW REVIEW

accused where a court adjudges a lesser form of punishment not instructed upon but within legal limits? Is there more, or less, possibility of prejudice where the court does not adjudge such a punishment but no instructions were given on it?

Underlying all of these questions is the more important problem of the extent to which court members will be permitted to roam uninstructed through the maze of permissible types of punishment available in a given case. Can an assumption be made that officers serving as court members are aware, by virtue of periodic instruction in military justice matters, of all of these forms and the limitations attached to each? The *Crawford* result must be studied in attempt to answer some of these questions and to determine the extent to which it may be the opening shot in a campaign to raise the *Turner* requirement to a place of equal dignity with the codal requirement for instructions on the findings.

### II. FAILURE TO INSTRUCT

While *Turner* dealt with a problem created by multiplicity and closed session instructions by the law officer, it was clearly implicit in the holding of the case that a failure to give correct instructions on the maximum sentence was error. It has been cited for that proposition many times.<sup>16</sup> Thus, a failure to instruct at all is clearly erroneous.

But what is the *maximum* punishment? The prior practice assumed that it was discharge, confinement, and forfeitures. The punishment involved in *Crawford* and *Powell*, reduction, is termed a "permissible additional punishment."<sup>17</sup> It may properly be adjudged in any case in addition to the maximum amount of the three basic elements. Thus, the court in *Crawford* could, if properly instructed, have added reduction to its sentence. This form of punishment is, then, quite logically a part of the maximum sentence that can be adjudged. The opinions in *Crawford* and *Powell* do not so state, but such a conclusion is implicit in both results. A law officer or president must now instruct on reduction in every case if that portion of the announced sentence is to be free from error.

This conclusion is necessary even though the Army or Air Force accused will be administratively reduced by Article 58(a) in most cases, as in *Powell*. And if such a court-martial fails to include discharge, confinement, or hard labor without confinement in its sentence, the statute would not be effective and any

<sup>16</sup> *E.g.*, United States v. Fannin, 10 USCMA 135, 27 CMR 209 (1959); United States v. Reid, 10 USCMA 71, 27 CMR 145 (1959).

<sup>17</sup> Section B, para. 127c, MCM, 1951.

## INSTRUCTIONS ON THE SENTENCE

reduction adjudged would be invalid unless supported by instructions.

This requirement will undoubtedly produce the question raised in *United States v. Flood*,<sup>18</sup> where a court-martial awarded an intermediate reduction in conjunction with confinement at hard labor. The Court found the sentence inconsistent and cured the inconsistency by remitting the confinement portion of the sentence. Before *Powell*, it appeared that the result in this situation would have been similar today, although the curative action on appeal may have varied because the Court in *Flood* did not agree on any general guides for curing the inconsistency. The fact that the automatic reduction is now statutory would have appeared to be immaterial because the Court in *Flood* assumed the validity of the Executive Order<sup>19</sup> which was the statute's predecessor. An Army board of review recently held that the result would be the same.<sup>20</sup> In *Powell*, however, Judge Ferguson so clearly labelled Article 58(a) as an "administrative," post trial penalty that it probably would not be considered as creating an inconsistent sentence at the trial level. In support of his opinion, Judge Ferguson cites *United States v. Cleckley*,<sup>21</sup> which held that a statute<sup>22</sup> preventing the accrual of pay and allowances to an accused sentenced to a suspended dishonorable discharge did not make a sentence to dishonorable discharge and partial forfeitures inconsistent. It is difficult to see how the reduction is any more "administrative" now that it is statutory, because the wording of the two provisions is exactly the same with respect to how and when it is imposed. Nevertheless, it appears that *Flood* is no longer the law and that instructions on reduction may be given without fear of creating an inconsistent sentence. A judicially imposed intermediate reduction would simply be overridden by the administrative one following approval by the convening authority.

There are other permissible additional punishments spelled out in the Manual.<sup>23</sup> One of these is the fine. As far as enlisted accused are concerned, a fine may be imposed only in lieu of forfeitures.<sup>24</sup> Thus, in a sense it is not adjudged in addition to one

<sup>18</sup> 2 USCMA 114, 6 CMR 114 (1952).

<sup>19</sup> Exec. Order No. 10652, January 10, 1956, amending para. 126e, MCM, 1951.

<sup>20</sup> CM 405188, Shumate (March 7, 1961).

<sup>21</sup> 8 USCMA 83, 23 CMR 307 (1957). It is noted that Chief Judge Quinn dissented in this case, arguing strongly that this kind of statute should be considered at the trial level and that an inconsistency did exist. Why, then, does he concur outright in *Powell* with Judge Ferguson's branding of Article 58(a) as "administrative" only?

<sup>22</sup> 10 U.S.C. § 3636 (1958).

<sup>23</sup> Section B, para. 127c, MCM, 1951.

<sup>24</sup> Para. 126A(3), MCM, 1951; Section B, para. 127c, MCM, 1951. *United States v. Hounshell*, 7 USCMA 3, 21 CMR 129 (1956).

## MILITARY LAW REVIEW

of the three basic sentence elements. The difficulty with fines comes from the judicial interpretation that they are more serious than forfeitures and that the latter is actually included in the former in the same manner that a bad conduct discharge is included in a dishonorable discharge.<sup>25</sup> This makes inescapable the conclusion that fine, and not forfeiture, is the approximate element to be instructed upon under the *Turner* rule. It is true that the Manual states that fines are reserved for those cases in which unjust enrichment of the accused is involved,<sup>26</sup> but this provision has been declared to be "directory" only.<sup>27</sup> This argument has apparently never been presented to the Court of Military Appeals.

In an officer case, the reasoning as regards fines is somewhat different. The Manual limitation is inapplicable and fines and forfeitures may be adjudged in the same sentence.<sup>28</sup> But since a fine is the more serious of the two and their nature is the same, the strict interpretation of *Turner* would again seem to require only instructions on fine as the maximum permissible element of the sentence.

While the conclusions with respect to fine seem logically inescapable, they present a considerable departure from current practice. The interpretation that a fine includes forfeitures was made in order to allow reviewing authorities to change the former to the latter as mitigation rather than commutation. Such a result is no longer necessary,<sup>29</sup> and perhaps the case can be forgotten as far as *Turner* is concerned. At any rate, instructions on forfeitures should always be given because they are the more appropriate and customary punishment in almost all cases and the court needs guidance in this area.

Another listed permissible additional punishment is reprimand. It can be adjudged in any case<sup>30</sup> and, unlike fine, does not appear to be the same form as any of the three usual maximum sentence components. Therefore, like reduction, it should be included in the maximum sentence instructions under *Crawford* if it is to be legal when adjudged.

In summary, the law officer or president should now instruct that the maximum sentence includes discharge (or dismissal), confinement, forfeiture, reduction, and reprimand. This is an increase over prior practice, but it is not too demanding or time consuming. This is also the most limited analysis of the *Crawford*

<sup>25</sup> *United States v. Cuen*, 9 USCMA 332, 26 CMR 112 (1958).

<sup>26</sup> Para. 126h(3), MCM, 1951.

<sup>27</sup> *United States v. Cuen*, 9 USCMA 332, 26 CMR 112 (1958).

<sup>28</sup> *United States v. McElroy*, 3 USCMA 606, 14 CMR 24 (1954); *United States v. DeAngelis*, 3 USCMA 298, 12 CMR 54 (1953).

<sup>29</sup> See *United States v. Russo*, 11 USCMA 352, 29 CMR 168 (1960).

<sup>30</sup> Section B, para. 127c, MCM, 1951.

## INSTRUCTIONS ON THE SENTENCE

result—that the instructions given by the law officer or president become the law of the case and that if they fail to include all portions of the maximum sentence, any part adjudged but not instructed upon cannot stand.

The difficulty with this interpretation is that *Crawford* may signify much more. It is noted that the Chief Judge cited one lesser included offense case and another findings case to support his conclusion.<sup>31</sup>

If sentencing instructions are to be thus analogized, the Court would be forced to state that a failure to instruct on lesser forms of punishment might be in error in some cases. Judge Latimer's dissenting opinion indicates that he felt that the majority might be entering this area. The problems arising from such a rule are at once obvious: lesser included offenses need only be instructed upon if reasonably raised by the evidence,<sup>32</sup> but what kind of evidence in extenuation and mitigation raises a lesser form of punishment as an issue; since such a question probably cannot be resolved, must *all* lesser forms be instructed upon?

Opposed to this view of *Crawford* is the clear fact that the opinion makes no explicit reference to such a requirement and such a far-sweeping change in court-martial procedure should not be based on speculation. The lesser included offense case cited by Chief Judge Quinn deals with a situation where the instructions given defined only a lesser offense and the court purported to find the greater.<sup>33</sup> Also, Judge Ferguson's concurrence should not be interpreted as pointing to any necessity for instructions on lesser forms of punishment because he has expressed himself to the contrary in other cases.<sup>34</sup> An Army board of review has concluded that *Turner* does not necessitate instructions on the lesser forms.<sup>35</sup> The *Turner* rule only requires that the law officer or president instruct on the *maximum* sentence and the safest position at this time would appear to be that *Crawford* simply redefines "maximum." The *Powell* opinion offers no elaboration on this problem.

### III. IS FAILURE TO INSTRUCT PREJUDICIAL?

Whether a failure to instruct is prejudicial error is a more challenging problem than the original determination that such a failure constitutes error. The question here is whether the law

<sup>31</sup> *United States v. Goddard*, 1 USCMA 475, 4 CMR 67 (1952); *United States v. Rhoden*, 1 USCMA 193, 2 CMR 99 (1952).

<sup>32</sup> *United States v. Wilson*, 7 USCMA 713, 23 CMR 177 (1957); *United States v. Clark*, 1 USCMA 201, 2 CMR 107 (1952).

<sup>33</sup> *United States v. Goddard*, 1 USCMA 475, 4 CMR 67 (1952).

<sup>34</sup> *United States v. Hollis*, 11 USCMA 235, 29 CMR 51 (1960) (dissent).

<sup>35</sup> CM 402281, Stephenson, 28 CMR 544 (1959).

## MILITARY LAW REVIEW

officer's or president's erroneous omissions created a fair risk that the court members adjudged a more severe sentence than they would have if properly instructed. In making this determination, it is necessary to examine the extent to which appellate authorities will use the sentence actually adjudged, argument of counsel, a member's assumed knowledge, or other factors in the record to demonstrate that the court members were actually working under correct or substantially correct impressions as to the maximum sentence.

The most extreme error under *Turner* appears when there are no instructions given at all. *United States v. Reid*<sup>36</sup> was such a case. There, a special court-martial adjudged a sentence within permissible and jurisdictional limits. Chief Judge Quinn wrote the majority opinion affirming the board of review's conclusion that the error was non-prejudicial. He cited three indications that the court was aware of pertinent limitations: the sentence actually adjudged was much less severe than the maximum under the Table of Maximum Punishments and was well within jurisdictional limits; the court omitted the accused's "class Q" allotment in determining forfeitures; and, it can be assumed that special court-martial members are "well aware" of jurisdictional limits. Judge Latimer concurred, and was willing to state that *Turner* shouldn't even require instructions where the maximum sentence is the jurisdictional limit of a special court. He said, ". . . it can be categorically stated [that court members] are required to know the maximum penal limits of the inferior courts."<sup>37</sup> Also, the court here affirmatively demonstrated this knowledge. Judge Ferguson dissented and stated that, "I am unwilling to presume that the members of a court-martial know the law."<sup>38</sup> He attacked the justification that the sentence actually imposed proved knowledge by indicating that this was speculation and that the court may have been so wrong on the maximum test that they thought themselves lenient when in fact they adjudged the maximum sentence. A similar result followed in a later case<sup>39</sup> with Judge Ferguson concurring because *Reid* fixed the law. In this latter case, there was much less evidence to show knowledge on the part of the court of the maximum sentence. This error was apparently overlooked in one later case.<sup>40</sup>

<sup>36</sup> 10 USCMA 71, 27 CMR 145 (1958).

<sup>37</sup> *Id.* at 72, 27 CMR at 146.

<sup>38</sup> *Id.* at 73, 27 CMR at 147 (dissent). For a later special court-martial case in which it was obvious that neither the president nor the members knew the maximum, see *United States v. Spiva*, 10 USCMA 307, 27 CMR 381 (1959).

<sup>39</sup> *United States v. Fannin*, 10 USCMA 135, 27 CMR 209 (1959).

<sup>40</sup> *United States v. Cuen*, 9 USCMA 332, 26 CMR 112 (1958).



## INSTRUCTIONS ON THE SENTENCE

The cases cited above establish that in some instances it is possible that a complete failure to instruct is non-prejudicial in a special court-martial. It is doubtful that the same result would follow in a general court-martial case where the maximum sentence changes with each offense. It is also doubtful that the same rule would follow in special court-martial cases where the maximum sentence was less than the jurisdictional maximum. In these situations there would have to be convincing evidence in the record that the court members were aware of pertinent limitations because any presumption of knowledge on their behalf would probably not be made.<sup>41</sup>

In *Crawford* and *Powell*, the error found was in the failure to instruct on one element of the maximum sentence. The sentence actually adjudged included an otherwise permissible reduction. Additionally, the court members proved that they knew that it was permissible by their very action in imposing it. Thus, the factors present in the aforementioned cases were present here and would seem to dictate a finding of no prejudice. Chief Judge Quinn, however, purports to distinguish *Reid* by stating that the court members here disregarded the instructions and imposed a sentence in excess of what they were told they could. It is difficult to see how this distinguishes the cases. If the Chief Judge is holding that prejudicial error occurs for every departure from instructions by court members, then surely the *Reid* case must be wrong because it demonstrates the most extreme departure possible. If the theory is that the instructions given are the law of the case and must be observed, then why did the Court bother to search for prejudice in *Reid*? It must be concluded that *Reid* has been overruled or that the anomalous situation exists in which the greater the error, the less the prejudice. Judge Ferguson's concurrence, of course, needs no such explanation as it is entirely consistent with his dissent in *Reid*. Judge Latimer's dissent in *Crawford* examines the factors used in assessing prejudice in *Reid* and finds sufficient evidence that the court members could not have been misled by the president's omission.

The question presented in *Powell* is somewhat different than that involved in determining prejudice. Having once decided that the automatic reduction is not a valid trial level consideration, the question of prejudice is the same as in *Crawford*. But here, because the convening authority's action brought the statute into effect, the Air Force argued that the entire problem was mooted. Judge Ferguson, however, separates this later action from the judicially imposed reduction and—apparently just to keep the

<sup>41</sup> See Judge Latimer's separate opinion in *United States v. Reid*, 10 USCMA 71, 27 CMR 145 (1958).

## MILITARY LAW REVIEW

record straight—declares the reduction portion of the sentence to be invalid. Thus, the *Crawford* approach was again followed and no stated search for prejudice was made. Judge Latimer in his vigorous dissent, calls this action an "abortive act . . . attempting to breathe life into a dead issue and thereby give importance to a matter which is *de minimis*."<sup>42</sup> Nevertheless, Judge Ferguson's opinion furnishes stronger proof that the Court is not to be bothered by hunting for prejudice where a sentence is not supported by instructions.

It was concluded earlier that *Crawford* should not be interpreted as requiring instructions on lesser forms of punishment. However, the problems in determining prejudice in this area should be discussed for comparison and for this purpose it will be assumed that such a failure could be error. Where there are no instructions on lesser forms, but the court adjudges one within permissible limits, the accused has a stronger ground for asserting harm than in the *Crawford* situation. The reason is that the court members would be making a value judgment by substituting one form for another and the question is not only whether they knew the maximum limits of the lesser form but whether they understood the relative weight of the two.

It would be very taxing to assume that court members carry around the ratios in the Table of Maximum Punishments<sup>43</sup> in their heads. A strict interpretation of Chief Judge Quinn's opinion would not permit the use of the law of the case theory to obviate a search for prejudice in this situation because the court has not exceeded the maximum sentence stated in the instructions actually given. The Chief Judge might, however, reach a similar result by a process like that used in *United States v. Hollis*<sup>44</sup> in which there appears to be an assumption that a lesser form uninstructed upon is not, in a sense, a legitimate area of inquiry for a court. Judge Ferguson faced a similar problem in *Hollis* and concluded that it can be assumed that court members have some familiarity with the lesser forms of punishment. Thus he would probably be willing to examine the entire record for prejudice, although this seems strange in the light of his opinion in *Reid* in which he was not willing to assume knowledge of the jurisdictional maximum of a special court-martial. It can be assumed that Judge Latimer who is consistent in *Reid*, *Crawford*, and *Hollis*, would also examine the proceedings for prejudice.

The case presenting the greatest chance for prejudice would be one in which there were no instructions on a lesser form of pun-

<sup>42</sup> 10 USCMA at 290, 30 CMR at 290 (1961).

<sup>43</sup> Para. 127c, MCM, 1951.

<sup>44</sup> *United States v. Hollis*, 11 USCMA 235, 29 CMR 51 (1960).

## INSTRUCTIONS ON THE SENTENCE

ishment, but the court did not adjudge one. Here it could be asserted that the court did not even know of the existence of the punishment and there would be nothing in the record to refute this contention. This problem demonstrates another strong argument to support the conclusion that *Crawford* was not intended to indicate that a failure to instruct on lesser punishments is error.

To summarize, the cases appear to be inconsistent in the area of determining the prejudicial effect of error. Where no instructions at all are given in a special court-martial, the Court will search the record for proof that the court acted under a proper belief as to the maximum sentence. The same result might not hold true in a general court-martial case because an assumption of any knowledge on the members' part is extremely speculative. A failure to instruct on one element of the maximum will not be examined for prejudicial effect even though the record clearly shows that the members were not misled.

Once a finding of prejudicial error is made, it should be cured in the normal manner by remission of the tainted portion of the sentence, reassessment, or, in an extreme case, direction of a sentence rehearing.

## IV. CONCLUSIONS

The great difficulty experienced by the Court of Military Appeals in this area stems as much from the present system as anything else. Sentencing is ordinarily the function of the trial judge, but the framers of the Code, in line with prior tradition and necessitated to an extent by the lack of a permanent trial judge, have seen fit to allow the court members to impose the sentence. Thus, there is very little civilian precedent to rely on in providing for procedural details. As Judge Latimer points out in his dissent in *Crawford*, it is very strange that a group exercising an essentially judicial function is denied access to the controlling authorities in their search for the maximum and an appropriate sentence.<sup>45</sup> Yet the wisdom of *Rinehart* can hardly be doubted, especially in view of the fact that many Manual provisions have been found to be void due to a conflict with the Code.<sup>46</sup> It is better for the court members to rely on rather incomplete instructions rather than being furnished erroneous authorities. But accepting the

<sup>45</sup> *United States v. Crawford*, 12 USCMA at 207, 30 CMR at 207 (dissent).

<sup>46</sup> *E.g.*, *United States v. Jobe*, 10 USCMA 276, 27 CMR 350 (1959) (para. 127b, MCM, 1951); *United States v. Simpson*, 10 USCMA 229, 27 CMR 303 (1959) (para. 126e, MCM, 1951); *United States v. Smith*, 10 USCMA 153, 27 CMR 227 (1959) (para. 126d, MCM, 1951); *United States v. Jones*, 10 USCMA 122, 27 CMR 196 (1959) (para. 126a, MCM, 1951); *United States v. Varnadore*, 9 USCMA 471, 26 CMR 251 (1958) (para. 127b, MCM, 1951).

## MILITARY LAW REVIEW

fact that instructions are necessary does not fully answer the question as to how the members of a court are to obtain guidance on sentencing. Must the instructions be as formalized and as binding as those employed for determining guilt or innocence? Should errors be as serious in effect? It is thought not, and at times the Court appears to have assumed as much.<sup>47</sup> This portion of the trial should be in a more relaxed atmosphere designed solely to reach a sentence appropriate for individual offenders. Rules of evidence are relaxed here.<sup>48</sup> Why shouldn't the instructional requirements be similarly reduced?

The perplexing problem of the extent to which court members can be assumed to know the law in this area is created by practical, rather than purely legal, considerations. To assume that court members know the cases in which suspension from rank or command, for example, may be imposed and further realize the differences between the two is pure fiction. But this fiction is necessary if required instructions are to be kept within reasonable limits. A more justifiable approach to the question of instructions on lesser forms of punishment would be that no instructions are required on them *sua sponte* and that the defense waives any contention that a court did not know of their availability by failing to request a specific instruction on a particular form. Where a court actually adjudges a less severe form, it should be allowed to stand in the absence of positive indications in the record that the court was misguided as to limits or applicability of the punishment. The enforcement of a waiver would, perhaps, lead to appellate claims of inadequate representation by trial defense counsel in cases in which he failed to request instructions when he had substantial evidence in extenuation and mitigation. But this question would be easier to handle than the speculation involved in determining what rules guided court members in their deliberations.

An expanded sentence worksheet has been suggested as one manner of improving guidance of court members. Examples of these forms are found in the Manual<sup>49</sup> and the *Law Officer's Pamphlet*.<sup>50</sup> It should be noted that none of these forms now indicate how lesser forms should be substituted or the permissible limits of lesser forms. Such a worksheet would have to be greatly expanded, and the chance for error might outweigh the help that

<sup>47</sup> The Court has held on occasion that error in setting the maximum too high was *de minimis*. *E.g.*, *United States v. Helfrick*, 9 USCMA 221, 25 CMR 483 (1958).

<sup>48</sup> *United States v. Blau*, 5 USCMA 232, 17 CMR 232 (1954).

<sup>49</sup> App. 13, MCM, 1951.

<sup>50</sup> App. XXXVII, U.S. Dep't of Army, Pamphlet No. 27-9, *Military Justice Handbook—The Law Officer* (1958).

## INSTRUCTIONS ON THE SENTENCE

appellate authorities would gain in using such an exhibit in assessing prejudice.

In conclusion, it cannot presently be determined the extent to which the Court of Military Appeals will formalize instructional requirements on the sentence. In view of the apparent conflict between *Reid* and *Crawford*, the test for determining prejudice in instructional error is also uncertain. Until these problems are solved, presentencing procedure will continue to present an area of litigation.

The only real solution must come from a drastic change in military punishment. Doubtlessly, the many forms of punishment peculiar to the military are useful in maintaining discipline and an effective military operation. However, the wisdom of allowing their imposition at the trial level is doubtful under present codal practice.

Perhaps the court-martial should be limited to the three normal forms of punishment, with lesser forms reserved for substitution, where appropriate, at higher levels.



# THE MEASURE OF EQUITABLE ADJUSTMENTS FOR CHANGE ORDERS UNDER FIXED-PRICE CONTRACTS\*

BY CAPTAIN GILBERT J. GINSBURG\*\*

## I. INTRODUCTION

The changes clause of fixed-price supply contracts<sup>1</sup> currently provides:

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract . . . *If any such change causes an increase or decrease in the cost of, or the time required for the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly . . .* (Emphasis added.)

The changes clause of fixed-price construction contracts provided<sup>2</sup> until recently:<sup>3</sup>

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract within the general scope thereof. *If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly . . .* (Emphasis added.)

The "equitable adjustment" referred to in both clauses, taken literally, requires where appropriate an adjustment in contract price which is "equitable." Contracting officers, administrative boards, and the courts have been given the problem of interpreting the meaning of "equitable" through the determination of adjustments in particular cases.<sup>4</sup> It has been decided, for instance, that

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\* 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 or any other governmental agency.

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<sup>1</sup> Standard Form 32 (Oct. 1957 Edition), Article 2; Armed Services Procurement Reg. 17-103.2 (clause dated Jan. 1958) (hereinafter cited as ASPR).

<sup>2</sup> Standard Form 23A (March 1953 Edition), Article 3.

<sup>3</sup> The clause was changed by the April 1961 Edition of Standard Form 23A, 41 C.F.R. § 1-17.401 (1961).

<sup>4</sup> An equitable adjustment, under the appropriate changes clause, is to be made by the contracting officer, and it is binding on the contractor subject to his rights of appeal under the disputes clause. ASPR 7-103.12 (clause dated Jan. 1958); Standard Form 32 (Oct. 1957 Edition), ¶12; Standard Form 23A (March 1953 Edition), ¶6.

## MILITARY LAW REVIEW

an allowance for profit should be included in equitable adjustments.<sup>5</sup>

### II. THE COST OR SUBJECTIVE MEASURE

VS.

### THE VALUE OR OBJECTIVE MEASURE

In order to determine an equitable adjustment, it is necessary to determine the difference in the cost of performance of the work as changed by the change order and the work had the change order not been issued.<sup>6</sup> The problem is, whose cost of performance is meant? Should the difference be measured by comparing the actual costs (which the Government would be likely to pay on the open market) of a "reasonable contractor" or by measuring the difference in the actual (or anticipated) cost to the particular contractor with whom the Government holds the contract? The former measure constitutes the "value" or "objective" approach to measuring equitable adjustments, while the latter constitutes the "actual cost" or "subjective" approach.<sup>7</sup> In the majority of cases in which the amount of equitable adjustment is contested, the issue of which of the two approaches should be taken is not raised because in most cases there is no difference between the actual and reasonable costs of performance. It is only where there is a difference between actual and reasonable costs that the choice between the objective and subjective approach must be made. Such a difference occurs whenever the contractor has an advantage or disadvantage vis-à-vis the general public or the "market." For instance, he or his subcontractor may make a mistake in a bid,<sup>8</sup> he may pay his supplier a price higher or lower<sup>9</sup> than the "market price," or he may perform more or less<sup>10</sup> efficiently than other contractors.

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<sup>5</sup> MacDonald Construction Company, ASBCA No. 95 (March 29, 1950). See also G. M. Manufacturing, Inc., ASBCA No. 2883 (Nov. 7, 1957), 57-2 BCA ¶1505.

<sup>6</sup> See Bruce Construction Corp., ASBCA No. 5932 (Aug. 30, 1960), 60-2 BCA ¶2797.

<sup>7</sup> Compare S. N. Nielsen Co., Eng. C & A No. 408 (Nov. 12, 1953), with Dibs Production and Engineering Co., ASBCA No. 1438 (March 26, 1954).

<sup>8</sup> Nielsen v. United States, 141 Ct. Cl. 793 (1958); The Lofstrand Company, ASBCA No. 4336 (Oct. 10, 1958), 58-2 BCA ¶1962.

<sup>9</sup> Bruce Construction Corp., Eng. BCA No. 1359 (June 30, 1959), *rev'd on other grounds*, ASBCA No. 5932 (Aug. 30, 1960), 60-2 BCA ¶2797.

<sup>10</sup> Dibs Production & Engineering Company, ASBCA No. 1438 (March 26, 1954).



## MEASURE OF EQUITABLE ADJUSTMENTS

### III. THE CASES

*The Nielsen Case*—The case most often cited by the proponents of the "value" or "objective" approach to the measure of equitable adjustments is the case of *Nielsen v. United States*.<sup>11</sup> That case involved a contract for the construction of a building and utilities. The contractor (referred to herein as "N") bid a fixed amount for the utilities work, and he was awarded a lump sum contract for both items. N's bid for the outside utilities was based in part on a sub-bid of \$45,000 by a subcontractor, (referred to herein as "O") for the electrical work of which \$22,564.32 was allocated to the outside electrical work on the alert hangar. The sub-bid, in turn, was based on a sub-sub-bid by a second-tier subcontractor (referred to herein as "A"). A's bid was in error and he refused to perform at his quoted price. A written subcontract was in effect between N and O, but there was no contract in effect between O and A requiring A to perform. The contract between N and O provided in part:

... the terms and provisions of [the contract between the Government and N] except as specifically modified by this Agreement, . . . are made a part of this Agreement; and further that [O] grants to [N] those rights powers and remedies in every detail and respect and in the same language and intent which [N and the Government] reserve to themselves . . . .

Subsequent to award of the contract to N, but before he began construction of the utilities, the Government issued a change order changing the outside electrical work on the alert hangar to a less costly type. Upon receiving the change order, O refused to perform the changed work and N contracted with a different subcontractor (referred to herein as "C") to perform the work as changed for \$19,180. The Government claimed, as an equitable adjustment the decrease in "value" or in the reasonable cost of performance of the work, the sum of \$41,510, as measured by the government estimates of the cost of performance before and after the change. N contended that the measure of the equitable adjustment should be the difference between his actual costs of performing the work before and after the change, *i.e.*, the difference between his contract price with O for the unchanged work and his contract price with C for the work as changed—the sum of \$3,384.32. Subsequent offers of compromise by N were rejected by the Government and N appealed to the Corps of Engineers Board of Contract Appeals<sup>12</sup> (the "Engineers BCA"). That Board rendered a 2-1

<sup>11</sup> 141 Ct. Cl. 793 (1958).

<sup>12</sup> The representative of the Chief of Engineers to decide disputes between Corps of Engineers construction contractors and contracting officers. The Board was formerly referred to as the Corps of Engineers Claims and Appeals Board.

## MILITARY LAW REVIEW

decision in favor of the Government.<sup>13</sup> The Board cited with approval the objective approach and punctuated the opinion with phrases such as "reasonable cost," "what it would have cost," "value," and "reasonable value."

The dissenting Board member noted that the subcontract between O and N bound O to the terms of the changes article in the prime contract. N presumably could have required O to perform the work as changed, with a commensurate equitable adjustment, computed in accordance with the changes article. Instead, N released O from his subcontract.

N appealed the decision to the Armed Services Board of Contract Appeals<sup>14</sup> (the "ASBCA") which sustained the Engineers Board of Contract Appeals by a 12-4 decision.<sup>15</sup> The majority noted that the method of arriving at an equitable adjustment utilized by the contracting officer was that of comparing the reasonable cost of performing the work before and after the change, found the method to be "basically sound" and found "no fault with it or its application in the instant case." Further, the Government did not have actual or constructive knowledge of the amounts allocated by N to the various portions of the work composing his bid and the Government was not on notice of the mistake in his bid. A dissenting opinion was not filed by the minority.

N then brought suit in the Court of Claims.<sup>16</sup> That court dismissed N's petition for relief, noting that his claim for the difference between his anticipated actual costs before and actual costs after the change was only another way of seeking reformation of the contract on account of his unilateral mistake.<sup>17</sup>

It should be noted that while the Engineers BCA adopted the objective approach in reaching its decision in *Nielsen*, the ASBCA merely found "no fault with it or its application in the instance case."<sup>18</sup> Thus, while the Engineers BCA decision in *Nielsen* constitutes a precedent for the objective approach, the ASBCA opinion may well be limited in application to the facts of the case before it, and at best it constitutes a doubtful precedent for broad

<sup>13</sup> Appeal of S. N. Nielsen Company, Eng. C & A No. 408 (Nov. 12, 1953).

<sup>14</sup> The representative of the Secretary of the Army to decide disputes on appeal from decisions of contracting officers and intermediate boards. ASPR, App. A (July 1, 1960).

<sup>15</sup> Appeal of S. N. Nielsen Company, ASBCA No. 1990 (Oct. 1, 1954).

<sup>16</sup> A court with jurisdiction to render judgment upon a claim against the United States founded upon the Constitution, a statute, or executive regulation, a contract, or damages not sounding in tort. 28 U.S.C. § 1491 (1958).

<sup>17</sup> *Nielsen v. United States*, 141 Ct. Cl. 793 (1958). Prior to this decision, the ASBCA had, on one occasion, corrected a contractor's mistake through an equitable adjustment for a change. *Keco Industries*, ASBCA No. 2476 (March 30, 1958).

<sup>18</sup> Appeal of S. N. Nielsen Company, ASBCA No. 1990 (Oct. 1, 1954).

## MEASURE OF EQUITABLE ADJUSTMENTS

application of the objective approach. The Court of Claims opinion states that the actual cost or subjective approach cannot be used to correct a unilateral mistake in bid made by the contractor. It does not constitute precedent for a general application of the objective approach. Moreover, the court found that N's "losses would have been the same if the change order had not been issued, since [N] finds no fault with the contracting officer's figures as to the costs as they would have been without the change order and the costs as they were under the change order."<sup>19</sup> This is an indication that the court found that in this case, the Government's cost figures constituted both the reasonable cost for performing the work before and after the change and the actual costs which N would have incurred before the change and which he did incur after the change. Thus, the court was not required to reach the subjective-objective issue and the opinion may well not constitute precedent for adopting the objective approach even where a mistake in bid is involved.

*The Engineers BCA Cases After Nielsen*—Despite the weakness of the *Nielsen* decisions of the Court of Claims and the ASBCA as precedent for the objective approach, the Engineers BCA has consistently followed the objective approach.<sup>20</sup> In the cases of *Malan Plumbing Company, Inc.*<sup>21</sup> and *Westover and Hope, Inc.*,<sup>22</sup> the objective approach resulted in a savings to the Government over the subjective approach. In *Malan*, the contractor was inefficient; in *Westover and Hope*, the contractor received a mistakenly low quote from a supplier (similar to the *Nielsen* situation.) In both cases, the subjective approach would have resulted in a more favorable award to the contractor. On the other hand, in the case of *Montgomery Construction Company*,<sup>23</sup> the use of the objective approach effected a result more favorable to the contractor. In that case, the contractor obtained a price from his neighbor below the market price for a small amount of earth moving added by a change order. Said the Board: "We are of the opinion that the appellant is entitled to charge the Govern-

<sup>19</sup> 141 Ct. Cl. 793, 796, 797 (1958).

<sup>20</sup> Bruce Construction Co., Eng. BCA No. 1359 (June 30, 1959); J. J. Fritch General Contractor, Inc., Eng. C & A No. 1072 (March 31, 1958); Montgomery Construction Co., Eng. C & A No. 1008 (Aug. 30, 1957); Westover and Hope, Eng. C & A No. 1057 (Dec. 14, 1956); Malan Plumbing Co., Eng. C & A No. 1019 (June 11, 1956).

<sup>21</sup> Eng. C & A No. 1019 (June 11, 1956). This case involved the changed conditions article (article 4 of Standard Form 29A) rather than the changes article, but the Board noted that "the ground rules for establishing [price adjustments under the changes, changed conditions and suspension of work articles] are fairly well settled."

<sup>22</sup> Eng. C & A No. 1057 (Dec. 14, 1956).

<sup>23</sup> Eng. C & A No. 1008 (Aug. 30, 1957).

## MILITARY LAW REVIEW

ment the fair and reasonable price for the earth delivered at the job site, and without diminution because of the bargain he negotiated with another." Thus, the Engineers BCA has applied the objective approach "across the board"—where it results in a more favorable result for the Government and where it results in a more favorable result for the contractor. Some of the reasons justifying the objective approach were advanced by the Engineers BCA in *Malan*. Were an actual cost (subjective) approach used, "the same set of facts would produce as many different results as there were original bidders." Further, "the contract articles contemplating price adjustments [the changes, changed conditions, and suspension of work articles] all provide for issuance of orders prior to accomplishment of the work covered thereby, thus confirming that they anticipate the 'reasonable estimate' approach, rather than the 'actual cost' approach."

*The ASBCA Cases*—In contrast to the Engineers BCA, the Armed Services Board of Contract Appeals, except perhaps in *Nielsen* has consistently followed the subjective, rather than objective, approach.<sup>24</sup> In the case of *Dibs Production and Engineering Company*,<sup>25</sup> the contractor was required to deliver unpainted seat assemblies and seat releases. By a change order he was required to paint the items prior to delivery. The contractor was inexperienced in painting operations and the costs he incurred both for labor and materials on the changed work were higher than those which a contractor experienced in painting operations would have incurred. The Board determined that the equitable adjustment for the change order was not to be based on the cost at which the work could be done, but rather "the standard to be used should reflect as far as possible the *experienced costs* of the [contractor]." (Emphasis added.) The case of *Franklin Metal Products Co.*<sup>26</sup> involved the issuance of a change order changing the destination points of items required by the contract to be delivered F.O.B. destination.<sup>27</sup> The contracting officer, in determining the amount of the equitable adjustment, used the difference in motor carrier freight rates between the destinations and claimed a credit for the Government of \$26,070.94. The contractor argued

<sup>24</sup> The Ensign-Bickford Company, ASBCA No. 6214 (Oct. 31, 1960), 60-2 BCA 2817; The Lofstrand Company, ASBCA No. 4386 (Oct. 10, 1958), 58-2 BCA 1962; Franklin Metal Products Co., ASBCA No. 2496 (Aug. 23, 1955); Dibs Production & Engineering Company, ASBCA No. 1488 (March 26, 1954); Cf. Bruce Construction Corp., ASBCA No. 5982 (Aug. 30, 1960), 60-2 BCA 2797.

<sup>25</sup> ASBCA No. 1488 (March 26, 1954).

<sup>26</sup> ASBCA No. 2496 (Aug. 23, 1955).

<sup>27</sup> "F.O.B. (or free-on-board) destination" means that the contractor (seller) is required to deliver goods to a specified destination for a single price which includes all freight costs, packaging expenses, etc.

## MEASURE OF EQUITABLE ADJUSTMENTS

that the difference in motor carrier freight rates should not be used because he did not intend to use common carriers for shipments under the contract, but rather intended to purchase his own trucks to make the deliveries. The contractor contended that the credit to the Government should only be \$9,220.00. Said the Board, in following the subjective approach: "We see no reason why a contractor should not have the benefits of the advantages he may possess for bid-making purposes. Any justifiable reductions by reason of the 'Changes' provision of the contract should be measured upon the basis of his bid, not upon general freighting principles that he did not seek to apply in such a case."<sup>25</sup> The Board also followed the subjective approach in the appeal of *The Lofstrand Company*.<sup>29</sup> The contractor there submitted a bid based in part on a quotation by a reputable supplier of \$12.80 each for thermometers required as components of the bid items. The quotation was "guaranteed for 30 days." The thermometers originally specified were never ordered by the contractor, because the contracting officer issued change orders resulting in the requirement of a less rugged thermometer. The cost (both actual and reasonable) of the new thermometers was \$8.53 each. Prior to establishing the equitable adjustment based on the change orders, the contracting officer obtained a quotation of \$34.69 on the originally required thermometers from the only manufacturer making them. (Subsequently, the contractor obtained a quotation from the same manufacturer of \$31.77.) The contracting officer claimed a credit for the Government of the difference between the reasonable cost before (\$34.69) and after (\$8.53) the change orders, or \$26.16 each (plus overhead and profit). The ASBCA, however, refused to follow the reasonable cost (or objective) method proposed by the Government. Instead, the Board found the equitable adjustment to be the difference between the anticipated actual cost before (\$12.80) and after (\$8.53) the change order, or \$4.27 (plus overhead and profit). In justifying its subjective approach, the Board said:

The issue before us involves a basic question as to whether a contractor shall be denied the privilege of protecting itself against market vicissitudes by obtaining firm quotations from responsible suppliers of competent items. Here we have the Government arguing that by virtue of the

<sup>25</sup> The Board, however, found that the contractor failed to sustain his burden of proving that his estimated costs were in fact less than the motor carrier freight rate and the Government was permitted to take the entire credit claimed.

<sup>29</sup> ASBCA No. 4336 (Oct. 10, 1958), 58-2 BCA ¶1962. The decision was rendered by the full Board by a vote of 13-2. ASBCA decisions on controversial matters are no longer decided by the entire Board. Instead, the case is decided by the three panel chairmen. ASPR, App. A, Part 2, Preface (July 1, 1960).

## MILITARY LAW REVIEW

change to the cheaper substitute thermometer, the fact that the contractor obtained a firm bid for a contract specification thermometer has become immaterial. The Government says the contractor made a mistake and cites previous Board decisions in which it was ruled that an equitable adjustment under the 'Changes' article is not a proper vehicle for correcting a low bid. The difficulty with that argument is that it does not apply to this case. Had the contractor merely gotten an estimate which turned out to be too low, it would bear the consequences of the error because, when it bid using the too low estimate, it made a mistake itself. But here the contractor made no mistake, as *the firm quotation froze its cost at the \$12.80 offered by the plumbing supplier, notwithstanding the fact that such supplier made a mistake and conceivably might have attempted to dishonor it.*<sup>29</sup>

In the recent case of *The Ensign Bickford Company*,<sup>31</sup> the Board again followed the subjective approach in finding that a contractor who acted reasonably in negotiating a change in price with his subcontractor as the result of a government change order was entitled to an equitable adjustment based on the difference between his anticipated costs prior to the change order and his actual costs resulting from the change, including the amount paid his subcontractor. The Board found him to be entitled to the equitable adjustment even though his subcontractor's price was later determined to be much higher than a fair price would have been. The Board, in noting that it was "principally concerned with the increase in [the contractor's] costs and not in the increase in someone else's costs," followed the reasoning set forth in the *Dibs* case, *supra*.

*A Comparison of the Nielsen and Lofstrand Cases*—The *Nielsen* case<sup>32</sup> is the case relied on most heavily by the proponents of the objective approach<sup>33</sup> and the *Lofstrand* case<sup>34</sup> is a good example of the application of the subjective approach. There is a striking similarity, however, between the facts in the two cases. The following facts were identical in both cases: A change order was issued by the Government substituting a less expensive item of work for a more expensive one. The Government claimed a credit as the equitable adjustment for the change order. The work before the change was ordered had not been performed in any part,

<sup>29</sup> *Ibid.* (emphasis added).

<sup>31</sup> ASBCA No. 8214 (Oct. 31, 1960), 80-2 BCA ¶2817.

<sup>32</sup> *Nielsen v. United States*, 141 Ct. Cl. 793 (1958); *S. N. Nielsen Company*, ASBCA No. 1990 (Oct. 1, 1954); *S. N. Nielsen Company, Eng. C & A No. 408* (Nov. 12, 1953).

<sup>33</sup> See *Bruce Construction Corp., Eng. BCA No. 1359* (June 30, 1959); *J. J. Fritch General Contractor, Inc., Eng. C & A No. 1072* (March 31, 1958); *Westover and Hope, Eng. C & A No. 1057* (Dec. 14, 1956); *Malan Plumbing Company, Eng. C & A No. 1019* (June 11, 1956).

<sup>34</sup> *The Lofstrand Company, ASBCA No. 4336* (Oct. 10, 1958), 58-2 BCA ¶1962.

## MEASURE OF EQUITABLE ADJUSTMENTS

thereby making the use of experienced actual costs impossible. The cost of the work after issuance of the change order was not in dispute. A mistake was made by a subcontractor (or supplier) in a firm quotation which was used by the prime contractor in computing his bid. The subcontractor's bid was firm and enforceable (although the Board evidences some doubt as to the enforceability of the quotation in *Lofstrand*). Thus, the two cases are identical in all important respects, except that opposite results were reached by the Board, through the utilization of two different approaches (objective and subjective) to the computation of the equitable adjustment.

One possible explanation for the different results is that the *Nielsen* case involved a construction contract and the *Lofstrand* case involved a supply contract. The language of the changes clauses in the two types of contracts differs slightly.<sup>35</sup> However, the difference in language has never been held to constitute a basis for different interpretations of when or by what measure an equitable adjustment should be made.<sup>36</sup> Another possible explanation for the different results is that a construction contractor is held to a different standard of reasonableness than a supply contractor in dealing with his subcontractors. Or, perhaps all contractors are held to the same standard of reasonableness and are required to bind their subcontractors and suppliers to perform, subject to an equitable adjustment, changed work where the change is within the scope of the subcontracts. The principal difficulty with this explanation of the different results in *Nielsen* and *Lofstrand* is that the Board nowhere makes a distinction between supply and construction contracts nor does it suggest that a contractor is obligated to require his subcontractors to perform changes within the scope of their work.

A better explanation is that in *Nielsen* the prime contractor had a subcontract requiring the subcontractor to perform any changes ordered by the prime contractor subject to an equitable adjustment,<sup>37</sup> but the prime contractor *released* the subcontractor from its contractual obligation because of the mistake.<sup>38</sup> However, this

<sup>35</sup> See text accompanying notes 1 and 2 *supra*.

<sup>36</sup> See *Malan Plumbing Company, Eng. C & A No. 1019* (June 11, 1956), the relevant portion of which is quoted in note 21 *supra*, which held that equitable adjustments under the changes clause in construction contracts (Standard Form 23A) are to be computed on the same basis as under the changed conditions article (the material language of which is the same as the language of the changes article in supply contracts (Standard Form 32)). See also *Great Lakes Dredge and Dock Co. v. United States*, 119 Ct. Cl. 504, 508, 96 F. Supp. 923, 924 (1951).

<sup>37</sup> See the dissenting opinion in *S. N. Nielsen Company, Eng. C & A No. 408* (Nov. 12, 1953).

<sup>38</sup> *Ibid.*; *Nielsen v. United States*, 141 Ct. Cl. 793, 802 (1956).

## MILITARY LAW REVIEW

explanation, too, is vulnerable to the argument that neither the Engineers BCA, the Armed Services BCA, nor the Court of Claims expressly based its decision on the release by the prime contractor of his subcontractor.

The last explanation which could account for the different results reached in the two cases is that *Lofstrand* overruled *Nielsen*. The Board in *Lofstrand* did not state that its decision in *Nielsen* was being overruled. On the contrary, it distinguished those Board decisions which held "that an equitable adjustment is not a proper vehicle for correcting a bid" (presumably referring to *Nielsen*), on the basis that the mistake in *Lofstrand* was not that of the prime contractor but that of his supplier. But in *Nielsen* the mistake was not made by the prime contractor or even by the subcontractor, but rather was made by a second-tier subcontractor. The Board's distinction, therefore, would appear to be an attempt to avoid overruling a case which it is not desired to follow. The *Lofstrand* case was decided after all three *Nielsen* opinions<sup>39</sup> had been rendered. While the ASBCA clearly does not have the power to overrule the Court of Claims, it appears by the above-quoted language that the Board interpreted the Court of Claims' holding in *Nielsen* to be merely that a mistake in bid by a contractor cannot be corrected by an equitable adjustment. Additional support for this explanation of the diverse results (i.e., that *Lofstrand* overruled *Nielsen*) is found in the positions taken by members of the ASBCA who participated in the decisions in both cases. Seven Board members participated in both decisions. Of these, three out of the seven dissented in the *Nielsen* case and concurred in *Lofstrand* and one concurred in *Nielsen* and dissented in *Lofstrand*. Thus, four out of the seven voted differently in the two cases, dissenting in one and concurring in the other. Since there was only a total of six dissents in the two cases, the change in position of these Board members is significant. Clearly, the explanation that *Lofstrand* overruled *Nielsen* is a most reasonable one.

*The Appeal of Bruce Construction Corp.*—The case of *Bruce Construction Corp.*,<sup>40</sup> recently decided by the ASBCA, cited the *Nielsen* case, if not with approval at least without disapproval. A constructive change order was issued which substituted one type of cement block for another. The substitute block, which had been newly-developed, was billed to the contractor at the same price as the old block. Subsequent experience with the new block revealed that it was more costly to supply than the old block and in later contracts, the new block was supplied to the contractor (and perhaps to the public) at a higher price than the old block.

<sup>39</sup> See note 32 *supra*.

<sup>40</sup> ASBCA No. 5932 (Aug. 30, 1960), 60-2 BCA ¶2797.



## MEASURE OF EQUITABLE ADJUSTMENTS

The contracting officer refused to make an adjustment in the contract price, since the contractor paid no more for the new block than for the old and, thus, did not incur increased costs as a result of the change. On appeal, the Engineers BCA followed the objective approach, citing *Nielsen* as precedent, and awarded the difference between the value of the two blocks to the contractor. The Engineers' Board then determined that the value of the new block was evidenced by the price paid by the contractor for it in subsequent contracts after some experience in working with the new block had been obtained.<sup>41</sup> On appeal to the ASBCA, the award to the contractor was set aside and the determination of the contracting officer thereby sustained. The ASBCA cited *Nielsen*, not because it supported the objective or value approach, but to sustain the proposition that forward pricing is to be utilized in pricing equitable adjustments for change orders. As to whether the objective or subjective approach should be used, the Board said: "[W]here the market value concept is to be applied it must be the prevailing fair market value at the time of the purchase of the sand block and not the market value on a subsequent date." The Board then found that the price actually paid by the contractor for the new block constituted the market value at the time the block was purchased. Thus, since cost equalled value, both approaches gave the same result and it was unnecessary for the disposition of the appeal to choose between them. Since it was unnecessary for the disposition of the case to choose between the two approaches, the language quoted above is only dictum. It may perhaps be explained in part by the fact that the author of the ASBCA opinion in *Bruce* was one of the two dissenters in *Lofstrand*.

### IV. THE TOTAL COST AND JURY VERDICT METHODS OF MEASURING EQUITABLE ADJUSTMENTS

Two additional methods of measuring equitable adjustments have evolved in the past few years. The subjective approach has resulted in the evolution of a method of proving actual costs, known as the "total cost method." The total cost method involves measuring equitable adjustments by the difference between the estimated cost of performance (generally measured by the contract price) and the total cost incurred by the contractor in performing the changed work. This measure has been used by the Court of Claims on occasion<sup>42</sup> but is limited to "an extreme case under proper safe-

<sup>41</sup> Eng. BCA No. 1359 (June 30, 1959).

<sup>42</sup> See *Oliver-Finnie Company v. United States*, 279 F.2d 498 (Ct. Cl. 1960); *MacDougald Construction Co. v. United States*, 122 Ct. Cl. 210 (1952); *Great Lakes Dredge & Dock Co. v. United States*, 119 Ct. Cl. 504, 96 F. Supp. 923 (1951), cert. den., 342 U.S. 953 (1952).

guards,"<sup>43</sup> "where the bid figure [contract price] can be proved to be reasonable, where there are no factors other than the change order increasing the costs and where there is no other way to arrive at an equitable adjustment."<sup>44</sup> Thus, the total cost method is to be used only as a last resort.<sup>45</sup>

The "jury-verdict method" is another recently developed method of measuring equitable adjustments and is used "where each side presents convincing but conflicting evidence as to what the amount of an equitable adjustment should be, where upon consideration of the evidence neither side is considered entirely correct and it is apparent that some allowance by the Board is proper, and where evidence is sufficient to permit the Board to make some reasonable decision as to a proper allowance that is in excess of that allowed by the contracting officer."<sup>46</sup> This method has been resorted to by the Court of Claims and ASBCA where neither party can prove accurately amounts in question.<sup>47</sup>

The jury-verdict method is itself neither an objective nor subjective approach to the measuring of equitable adjustments, but it may be consistent with either approach, depending on whether "value" or "actual cost" is used as the yardstick for the "verdict."

## V. THE SEVERIN DOCTRINE

Closely related to the problems of the determination of equitable judgments is the "Severin Doctrine." The case of *Severin v. United States*<sup>48</sup> formulated the rule that where a contractor in a subcontract stipulates that he shall not be responsible to his subcontractor for any loss, damage or delay caused by the Government (or by any other subcontractor), the contractor may not recover from the Government on behalf of and for the benefit of

<sup>43</sup> *McGraw v. United States*, 131 Ct. Cl. 501, 511, 130 F. Supp. 394, 400 (1955).

<sup>44</sup> *H. R. Henderson and Co. and A & H, Inc.*, ASBCA No. 5146 (June 9, 1960), 60-1 BCA ¶2662.

<sup>45</sup> See *Oliver-Finnie Company v. United States*, 279 F.2d 498 (Ct. Cl. 1960); *McGraw v. United States*, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955); *H. R. Henderson and Co. and A & H, Inc.*, ASBCA No. 5146 (June 9, 1960), 60-1 BCA ¶2662; *Air-A-Plane Corporation*, ASBCA No. 3842 (Feb. 29, 1960), 60-1 BCA ¶2547.

<sup>46</sup> *Air-A-Plane Corporation*, ASBCA No. 3842 (motion for reconsideration) (June 27, 1960); see *Holly Corp.*, ASBCA No. 3628 (June 30, 1960), 60-2 BCA ¶2685.

<sup>47</sup> *Western Contracting Corp. v. United States*, Ct. Cl. No. 344-55, Dec. 30, 1958; *P. M. Painting Co.*, ASBCA No. 4954 (Nov. 30, 1959), 59-2 BCA ¶2420; *Lake Union Drydock Co.*, ASBCA No. 3073 (June 8, 1959), 59-1 BCA ¶2229.

<sup>48</sup> 99 Ct. Cl. 435 (1943), *cert. den.*, 322 U.S. 733 (1944). The doctrine is restated in *Continental Ill. Nat. Bk. v. United States* (second Severin case), 121 Ct. Cl. 203, 101 F. Supp. 755 (1952).

## MEASURE OF EQUITABLE ADJUSTMENTS

the subcontractor (on the theory that the contractor is not damaged, regardless of any hardship suffered by the subcontractor, and that the subcontractor may not sue because there is no privity of contract between him and the Government). This doctrine is clearly consistent with the subjective approach and inconsistent with the objective approach, since it is based on a determination of whether the contractor's costs have been changed as a result of the change order. If the contractor need not pass on to his subcontractor amounts recovered from the Government for additional costs incurred by the subcontractor, then the contractor should not be permitted to recover. If, on the other hand, he is claiming an equitable adjustment on behalf of the subcontractor and the subcontractor has a right to recoup any such recovery from the contractor, then the contractor may properly recover from the Government,<sup>49</sup> perhaps on the theory that he is acting as an agent or broker for the subcontractor. In recent years, the Severin doctrine has been held not to apply unless the stipulation in the subcontract relieving the contractor of liability to the subcontractor (the "exculpatory clause" is unequivocal.<sup>50</sup> But where the exculpatory clause unequivocally relieves the contractor of liability to the subcontractor for monies collected from the Government, the Severin doctrine operates to preclude recovery.<sup>51</sup>

### VI. THE PURPOSE OF EQUITABLE ADJUSTMENTS UNDER THE CHANGES CLAUSES

The changes clauses serve the function of permitting the Government to amend the contract unilaterally instead of negotiating a new agreement each time a change is desired. Permissible changes are limited to those "within the scope of the contract" and in construction contracts are limited to the drawings and specifications. Without the changes clause, normal contract administration would bog down, as it is not at all unusual to find

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<sup>49</sup> *United States v. Blair*, 321 U.S. 730 (1943). *United States v. Blair* has been asserted by some to hold that the Severin doctrine does not apply to claims under the changes clause. See Comment, *The Severin Doctrine*, Mil. L. Rev., October 1960, p. 191, 197. However, the Severin doctrine has been applied by the Court of Claims and ASBCA subsequent to the *Blair* decision and has never been overruled.

<sup>50</sup> *E.g.*, *Donovan Construction Co. v. United States*, 138 Ct. Cl. 97, 149 F. Supp. 898 (1957); *A. DuBois and Sons, Inc.*, ASBCA No. 6176 (Aug. 31, 1960), 60-2 BCA ¶2750, *motion for reconsideration denied*, Jan. 31, 1961; *Morrison-Knudsen Company*, ASBCA No. 4929 (Aug. 15, 1960), 60-2 BCA ¶2799; *J. M. Brown Construction Co.*, ASBCA No. 3469 (July 26, 1957), 57-2 BCA ¶1377.

<sup>51</sup> *Ukropina-Polich-Kral and W. H. Darrough & Sons, Eng.* BCA No. 1710 (Jan. 13, 1961). See *Charles H. Tompkins Company*, ASBCA No. 2661 (Nov. 25, 1955).

## MILITARY LAW REVIEW

tens and often hundreds of change orders issued under a single contract. An argument can be made that the existence of the changes clause supports the objective approach. It can be reasoned that in the absence of the changes clause with its provision for equitable adjustments, a contractor who was requested to quote a price on a change could have "held out" for the "value" of the changed work, even if he could perform the work for less than the value. It may then be argued that a contract clause should not be construed as taking away any more rights of the parties than is necessary. Since the principal function of the changes clause is to give the Government the right to require changes in the performance of the work, it is arguable that the right to hold out for the fair value of the changed work was not "taken away" from contractors by the adoption of the changes clause. On the other hand, it is also arguable that unless the Government had the right to require changes in the work, it would be impossible for the Government to fulfill its procurement responsibility. Thus, the concept of contractors "giving up" rights by virtue of inclusion of the changes clause is only hypothetical, since contracting in the absence of the clause would be untenable. On the other hand, it would not be inconceivable that contracts include the changes clause without also containing a provision for equitable adjustment of the contract price upon the issuance of a change order. If the changes clauses were included in contracts but without the equitable adjustment provisions, the contractor would be required to perform all changes (within the scope of the contract) ordered by the Government without an adjustment of the contract price. A prudent businessman performing such a contract would have to pad his bid price to cover the very real contingency that extensive changes might be ordered. The addition of a provision for equitable adjustments in changes clauses eliminates substantially all of these contingencies and permits the contractor to remove most of the padding from his bid. If the objective approach were followed in computing equitable adjustments, a prudent contractor might wish to retain some of the padding in his bid price since some equitable adjustments may not compensate him fully for his increased costs resulting from the change,<sup>52</sup> even though in other situations he could conceivably obtain a windfall.<sup>53</sup> On the other hand, if the subjective approach is followed, the contractor will

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<sup>52</sup> *E.g.*, the contractors in *Nielsen v. United States*, 141 Ct. Cl. 793 (1958); *Wastover and Hope, Eng. C & A No. 1057* (Dec. 14, 1956); *Malan Plumbing Company, Eng. C & A No. 1019* (June 11, 1956).

<sup>53</sup> *E.g.*, the contractor in *Montgomery Construction Company, Eng. C & A No. 1008* (Aug. 30, 1957).

## MEASURE OF EQUITABLE ADJUSTMENTS

be fully compensated by equitable adjustments for all changes.<sup>54</sup> He is not faced with the contingencies existing under the objective approach which would require him to pad his price. If the principal purpose, therefore, of the equitable adjustment provisions of the changes clauses is to minimize contingencies and to secure a "close" (unpadded) price to the Government, then the subjective approach appears to better serve the purpose.

Proponents of the objective approach have argued that if the equitable adjustment were not based on "value," there would be as many different equitable adjustments for the same work as there are different contractors.<sup>55</sup> The simple response is that there is only one contractor performing the changed work for each contract. Thus, for each change order issued, only one equitable adjustment need be made, whether the objective or subjective approach is used.

It has also been argued by some that the utilization of the subjective approach converts a fixed-price contract into a cost-reimbursement type. An equitable adjustment under the subjective approach does not consist merely of a reimbursement of extra costs plus a profit obtained under a prearranged formula. Rather, the adjustment is to be "equitable," rewarding the contractor for initiative and penalizing him for inefficiency. Furthermore, application of the subjective approach to equitable adjustments does not turn a fixed-price contract into a cost-reimbursement type any more than does a provision for price redetermination. Redetermination of a contract price pursuant to a price revision clause does not cause the contract to become a cost-reimbursement type, even where the redetermination is made after completion of the contract and where all of the contractor's cost figures have been submitted.<sup>56</sup> Moreover, in price redetermination, the entire contract price is redetermined. An equitable adjustment under the changes clause covers only the increased costs caused by the issuance of the change, and the contract price is otherwise unaffected.

The problems of proof involved in the utilization of the two approaches (objective and subjective) should also be considered. Proof under the subjective approach requires the determination of the estimated cost of the contractor's performance with and without the issuance of the change order. The objective approach, on the other hand, requires first a definition of the concept of a

<sup>54</sup> Unless he performs less adequately than his ability permits. Thus, he may be held to a subjective standard of reasonableness.

<sup>55</sup> See *Malan Plumbing Company, Eng. C & A No. 1019* (June 11, 1956).

<sup>56</sup> *General Electric Company, ASBCA No. 4865* (July 1, 1960), 60-2 BCA ¶2705.

"reasonable contractor," and then a determination of what it would cost such a contractor to perform with and without the issuance of the change order. Under the objective approach, the actual contractor's cost figures are not relevant to determination of an equitable adjustment, unless it is first determined that he fits the definition of a reasonable contractor. It should be noted that the subjective approach does not fail where the contractor's cost figures are unavailable. In such cases, it may be necessary to determine his costs in the absence of (or with) the issuance of the change by figures obtained independently of the contractor's actual experience. Such figures, of course, constitute evidence (although concededly not the most desirable evidence) of the contractor's actual costs with and without the change.<sup>57</sup> On balance, it is difficult to find that the use of the objective rather than subjective approach simplifies the problems of proof in arriving at equitable adjustments.

## VII. REVISION OF THE CHANGES CLAUSES

While the problem of choosing between an objective or subjective measure for equitable adjustments is caused in large part by the term "equitable adjustment" and its connotation of flexibility, the problem is also affected by other language of the changes clause. The changes clause in fixed-price supply contracts<sup>58</sup> provides for an equitable adjustment "[i]f any such change causes an increase or decrease in the cost of . . . performance . . .," while the changes clause in fixed-price construction contracts provided,<sup>59</sup> until revised in April, 1961, for equitable adjustments "[i]f such changes cause an increase or decrease in the amount due under [the] contract . . . ." Although the wording of both clauses had been interpreted as having the same meaning,<sup>60</sup> nevertheless the dissimilarity of language permitted the inference that different meanings were intended. The changes clause of fixed-price construction contracts has now been changed to read as follows:<sup>61</sup>

The Contracting Officer may, at any time, by written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope. *If such changes cause an increase or decrease in the Contractor's cost of, or the time required for performance, of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly.* (Emphasis added.)

<sup>57</sup> See Spiotta and Company, ASBCA Nos. 3959, 4084, 4085, 4270, and 4271 (June 28, 1957), 57-1 BCA ¶1327.

<sup>58</sup> See note 1 *supra*.

<sup>59</sup> See note 2 *supra*.

<sup>60</sup> See note 35 *supra*.

<sup>61</sup> Standard Form 23A (Jan. 1961 Ed.), Article 3, 41 C.F.R. § 1-17.401 (1961).

## MEASURE OF EQUITABLE ADJUSTMENTS

The clause has thus been altered to parallel substantially the changes clause in fixed-price supply contracts, with the exception that "the cost of performance" has been specified to be "the Contractor's cost of performance," answering the question of whose cost of performance is meant.<sup>62</sup>

The changes clause in fixed-price supply contracts<sup>63</sup> will probably be changed to conform with this language in the next revision of the standard form for supply contracts.

However, even if such change were made, the difficulty of choosing a measure for equitable adjustments would not be completely removed. "[A]n increase or decrease in the Contractor's cost of . . . performance" is a condition precedent to the making of an equitable adjustment. It does not govern the measure of the equitable adjustment. Thus, the problem of whether to use the objective or subjective measure would appear to remain. However, when a change order is issued, an equitable adjustment in the contract price may not be made unless an increase or decrease has occurred in the contractor's cost of performance. Thus, unless *his* costs have changed, he is not entitled to an equitable adjustment. But in many cases, the contractor's costs may not increase and yet the Government may obtain by a change order a more valuable substitute for the contract requirements. In such cases, while the objective approach would require an equitable adjustment in the contract price, such adjustment may *not* be made because the contractor's costs would not have changed. Thus, the objective measure of equitable adjustments breaks down under the revised language of the changes article in construction contracts. It seems clear that the subjective approach is a more reasonable one for the new clause.

It remains to be seen how the Boards and Court of Claims will interpret the language of the new clause. However, the new language will probably result in a uniform acceptance of the subjective approach to the determination of equitable adjustments for change orders.

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<sup>62</sup> In the case of MacDonald Construction Company, ASBCA No. 98 (March 29, 1950), the ASBCA, in a dictum, stated that "the word 'cost' as used in the 'Changed Conditions' article . . . must refer to the cost to the Government."

<sup>63</sup> Standard Form 32.





## COMMENTS

**NON-DISCRIMINATION IN EMPLOYMENT: EXECUTIVE ORDER 10925.\*** On March 6, 1961, the President issued Executive Order 10925,<sup>1</sup> which established the President's Committee on Equal Employment Opportunity (hereinafter referred to as "the Committee"). The Committee was established in order to "permanently remove from Government employment and work performed for the Government every trace of discrimination because of race, creed, color or place of national origin."<sup>2</sup> The Committee replaced and consolidated the functions of two prior committees which were formed during the prior administration. Both the President's Committee on Government Employment Policy<sup>3</sup> and the Government Contract Committee<sup>4</sup> (generally known as the President's Committee on Government Contracts) were abolished by the Executive Order and their functions were transferred to the Committee.

### I. NONDISCRIMINATION IN GOVERNMENT EMPLOYMENT

The President's Committee on Government Employment Policy, abolished by Executive Order 10925, was established because "it is essential to the effective application of [the Government's policy prohibiting discrimination in federal employment] in all civilian personnel matters that all departments and agencies of the executive branch of the Government adhere to this policy in a fair, objective, and uniform manner."<sup>5</sup> The Committee was to:

(a) Advise the President periodically as to whether the civilian employment practices in the Federal Government are in conformity with the non-discriminatory employment policy . . . and, whenever deemed necessary or desirable, recommend methods of assuring uniformity in such practices;

\* 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 or any other governmental agency.

<sup>1</sup> 26 Fed. Reg. 1977 (1961). The order became effective on April 5, 1961. Sec. 402, 26 Fed. Reg. 1979 (1961).

<sup>2</sup> Remarks of President Kennedy, Meeting of the President's Committee on Equal Employment Opportunity, April 11, 1961. For a discussion of the constitutionality of the government's nondiscrimination policy, the social, economic and political implications of the policy and reasons justifying it, see Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 Va. L. Rev. 837, 856-871 (1957).

<sup>3</sup> Established by Exec. Order No. 10590, 20 Fed. Reg. 409 (1955), as amended by Exec. Order No. 10722, 22 Fed. Reg. 6287 (1955).

<sup>4</sup> Established by Exec. Order No. 10479, 18 Fed. Reg. 4899 (1953), as amended by Exec. Order No. 10482, 18 Fed. Reg. 4944 (1953), and Exec. Order No. 10733, 22 Fed. Reg. 8135 (1957).

<sup>5</sup> Exec. Order No. 10590, 20 Fed. Reg. 409 (1955).

## MILITARY LAW REVIEW

(b) At the request of the head of a department or agency, or the [compliance officer] thereof, consult with and advise them concerning non-discriminatory employment policies . . . and regulations of such department or agency relating to such policies;

(c) Consult with and advise the Civil Service Commission with respect to civil-service regulations relating to non-discriminatory practices . . . ;

(d) Review cases referred to it . . . and render advisory opinions on the disposition of such cases to the heads of the departments or agencies concerned;

(e) Make such inquiries and investigations as may be necessary to carry out its responsibilities . . . .<sup>4</sup>

The power of the Committee to "review cases referred to it" was limited to the cases referred by the head of an executive department or agency, or his designated representative, "for review and an advisory opinion whenever he deem[ed] necessary"<sup>5</sup> or when requested by the complainant pursuant to regulations of the department or agency concerned.<sup>6</sup> The broadest power of the Committee was to make such inquiries and investigations as were necessary to carry out its responsibilities. As a result of such investigations the Committee advised the President of findings and recommended methods which would better effect the federal nondiscrimination policy. Hearings of cases by complainants alleging discrimination resulted in "advisory opinions . . . to the heads of the departments or agencies concerned." The Committee did not have direct power of enforcement of its recommendations.

Executive Order 10925 directed the (new) Committee "immediately to scrutinize and study employment practices of the Government of the United States, and to consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination within the executive branch of the Government."<sup>7</sup> All executive departments and agencies were directed by the Executive Order to "initiate forthwith studies of current government employment practices within their responsibility" and to submit reports to the Committee "no later than sixty days from the effective date of [the] order."<sup>8</sup> The Committee was then required to "report to the President on the current situation and recommend positive measures to accomplish the objectives of [the] order."<sup>9</sup> The previously mentioned powers, functions and duties of the President's Committee on Government Employment Policy have been transferred to the (new) Committee.<sup>10</sup> The Committee,

<sup>4</sup> *Id.* § 2.

<sup>5</sup> *Id.* § 4.

<sup>6</sup> *Id.* § 3(a).

<sup>7</sup> Exec. Order No. 10925, § 201, 26 Fed. Reg. 1977 (1961).

<sup>8</sup> *Id.* § 202.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Id.* § 204.

therefore, has the same powers and duties as its predecessor, together with the additional duties of submitting a report and recommendations to the President, presumably as soon as possible (based on the studies initiated "forthwith" by the executive departments)<sup>13</sup> as well as the reports required "periodically" and recommendations required "whenever deemed necessary or desirable."<sup>14</sup>

## II. NONDISCRIMINATION BY GOVERNMENT CONTRACTORS

The Government Contract Committee, abolished by Executive Order 10925, was formed because "a review and analysis of existing practices and procedures of government contracting agencies show that the practices and procedures relating to compliance with the nondiscrimination provisions [in government contracts] must be revised and strengthened to eliminate discrimination in all aspects of employment."<sup>15</sup> The Committee was to "make recommendations to the contracting agencies for improving and making more effective the nondiscrimination provisions of government contracts;"<sup>16</sup> to "receive complaints of alleged violations of the nondiscrimination provisions of government contracts," to transmit the complaints to the appropriate contracting agencies for handling, and "to review and analyze the reports submitted to it by the contracting agencies;"<sup>17</sup> to "encourage the furtherance of an educational program by employer, labor, civil, educational, religious, and other voluntary non-governmental groups in order to eliminate or reduce the basic causes and costs of discrimination in employment;"<sup>18</sup> to "establish and maintain cooperative relationships with agencies of state and local governments, as well as with non-governmental bodies;"<sup>19</sup> to "establish such rules as may be necessary for the performance of its functions;"<sup>20</sup> and to "make annual or semiannual reports on its progress to the President."<sup>21</sup> The following clause was required to be inserted in all contracts executed by contracting agencies, except where expressly exempted by executive order<sup>22</sup> or the

<sup>13</sup> *Id.* § 202.

<sup>14</sup> Exec. Order No. 10590, § 2(a), 20 Fed. Reg. 409 (1955).

<sup>15</sup> Exec. Order No. 10479, 18 Fed. Reg. 4899 (1953).

<sup>16</sup> *Id.* § 4.

<sup>17</sup> *Id.* § 5.

<sup>18</sup> *Id.* § 6.

<sup>19</sup> *Id.* § 7.

<sup>20</sup> *Id.* § 4.

<sup>21</sup> *Ibid.*

<sup>22</sup> See Exec. Order No. 10557, para. 2, 19 Fed. Reg. 5655 (1954); Armed Services Procurement Reg. para. 12-803 (July 1, 1960).

## MILITARY LAW REVIEW

### Government Contract Committee:<sup>23</sup>

In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause.

The contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.<sup>24</sup>

The head of each contracting agency was primarily responsible for obtaining compliance by contractors and subcontractors with the nondiscrimination provisions, and was required to "take appropriate measures to bring about . . . compliance."<sup>25</sup> The contracting agencies were also required to "cooperate with the Committee and, to the extent permitted by law, to furnish the Committee such information and assistance as it may require in the performance of its functions."<sup>26</sup>

Apparently the efforts of the executive departments and agencies and the Government Contract Committee under the existing executive orders were not considered adequate by the new administration. The preamble to Executive Order 10925 states that "a review and analysis of existing Executive orders, practices and government agency procedures relating to government employment and compliance with existing non-discrimination contract provisions reveal an urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity."<sup>27</sup> The Executive Order continues in the new committee the old committee's functions of receiving and handling complaints,<sup>28</sup> and encouraging the furtherance of educational programs of non-governmental groups.<sup>29</sup> However, the Committee has been given additional duties and responsibilities. A new nondiscrimination clause has been substituted for the former one, set forth *supra*,

<sup>23</sup> See Government Contracts Committee Interpretation of Exec. Orders No. 10479 and No. 10557, 19 Fed. Reg. 5655 (1954); Armed Services Procurement Reg. paras. 12-804, 12-805 (July 1, 1960).

<sup>24</sup> Exec. Order No. 10557, 19 Fed. Reg. 5655 (1954).

<sup>25</sup> Exec. Order No. 10479, § 1, 18 Fed. Reg. 4899 (1953).

<sup>26</sup> *Id.* § 4.

<sup>27</sup> Exec. Order No. 10925, Preamble, 26 Fed. Reg. 1977 (1961).

<sup>28</sup> *Id.* § 309(b).

<sup>29</sup> *Id.* § 311.

## EXECUTIVE ORDER 10925

to be inserted in all government contracts of \$10,000 or more except those exempted by the Committee:<sup>30</sup>

In connection with the performance of work under this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the said labor union or workers' representative of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

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<sup>30</sup> *Id.* §§ 301, 303. The Committee has set forth the following total exemptions:

- a. contracts, subcontracts, purchase orders, and other transactions other than government bills of lading, not exceeding \$10,000. 26 Fed. Reg. 6585, § 60-1.3(b) (2) (1961).
- b. contracts performed outside the United States where there is no recruitment of workers within the United States. 26 Fed. Reg. 6585, § 60-1.3(b) (5) (1961).
- c. contracts, subcontracts, and purchase orders for standard commercial supplies or raw materials, subject to removal of the exemption by the Executive Vice Chairman as to specific supplies or materials. 26 Fed. Reg. 6585, § 60-1.3(b) (6) (1961).
- d. plants or facilities which are in all respects separate and distinct from those activities of the contractor connected with the performance of the contract, pursuant to a ruling by the Executive Vice Chairman. 26 Fed. Reg. 6585, § 60-1.63(b) (1961).

The Committee has also granted partial exemptions to subcontractors with several small subcontracts under the same principal contract and to carriers under government bills of lading. 26 Fed. Reg. 6585, § 60-1.3(b) (3), (4) (1961).

In addition, the Executive Vice Chairman can exempt specific contracts, subcontracts, and purchase orders where he deems that special circumstances in the national interest so require. 26 Fed. Reg. 6585, § 60-1.3(b) (1) (1961).

## MILITARY LAW REVIEW

(5) The contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's non-compliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be cancelled in whole or in part and the contractor may be declared ineligible for further government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(7) The contractor will include the provisions of the foregoing paragraphs (1) through (6) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to . . . Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for non-compliance: *Provided, however,* that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.<sup>21</sup>

Among the provisions of the Executive Order with which the contractor is required by paragraph (4) of the clause to comply is section 302. This requires the contractor to file, and cause each of his first-tier subcontractors to file, "Compliance Reports" with the contracting agency. The reports, which are subject to review by the Committee upon its request, are to "contain such information as to the practices, policies, programs, and employment statistics of the contractor and each subcontractor . . . as the Committee may prescribe."<sup>22</sup> If the contractor or subcontractor has an agreement or understanding with a labor union, the report is to include "such information as to the labor union's . . . practices or policies as the Committee may prescribe." If the union refuses to supply the contractor with the requisite information, the contractor must certify that the information could not be obtained and set forth what efforts he has made to obtain the

<sup>21</sup> Exec. Order No. 10925, § 301, 26 Fed. Reg. 1977 (1961). For a summary of the rules and regulations issued on July 13, 1961, by the President's Committee on Equal Employment Opportunity to implement the Executive Order, see 30 U.S.L. Week 2039 (July 18, 1961). The verbatim text is set forth in 26 Fed. Reg. 6585-90 (1961).

<sup>22</sup> *Id.* § 302 (a). See 26 Fed. Reg. 6585, § 60-1.5 (1961).

information.<sup>33</sup> If the Committee directs, the contractor can also be required to submit as part of the report, a signed statement from an official of the labor union stating that the union does not discriminate and that it agrees that "recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the [executive] order. In the event that the union or representative shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement."<sup>34</sup>

It is readily apparent that the Executive Order 10925 represents a different attitude toward discrimination in government contracting than did the former orders. The burden is now placed on the contractor to show that he does not discriminate.<sup>35</sup> Non-compliance with the nondiscrimination clauses may result in the contract being canceled and the contractor being "blacklisted" (placed on a debarred bidders' list),<sup>36</sup> in prosecution of the contractor for the furnishing of false information,<sup>37</sup> and in such other sanctions as may be provided "by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law."<sup>38</sup> Although it threatened termination under the contract "defaults" clause in many instances, the Government Contract Committee did not announce the termination of a single contract for violation of the (old) nondiscrimination clause or the blacklisting of any contractor. The introduction of specific sanctions against noncomplying contractors into government contracts should certainly strengthen the power of the new Committee. There is, of course, no contractual relation between the Government and labor unions and, therefore, there is no contractual sanction against the unions. However, unions may be required to issue statements as to their nondiscrimination in accepting members or be condemned by their silence. Unions that do not cooperate with the Committee may be the object of public hearings, special reports to the President, recommendations of "remedial action if . . . necessary or appropriate," and wide publicity (to "Federal, state or local agenc[ies]").<sup>39</sup>

<sup>33</sup> *Id.* § 302(b).

<sup>34</sup> *Id.* § 302(c).

<sup>35</sup> *Id.* § 302.

<sup>36</sup> *Id.* § 301(6). A contractor can only be blacklisted after a hearing by the Committee. *Id.* § 310(b). The contracting agency can terminate the contract without prior approval of the Committee. 26 Fed. Reg. 6585, § 60-1.24 (b) (3) (1961).

<sup>37</sup> *Id.* §§ 301(6), 312(c). Such action cannot be taken without the prior approval of the Committee. 28 Fed. Reg. 6585, § 60-1.24 (b) (3) (1961).

<sup>38</sup> *Id.* § 301(6).

<sup>39</sup> *Id.* § 304.

## MILITARY LAW REVIEW

Each of the contracting agencies is primarily responsible for obtaining compliance with the rules, regulations and orders of the Committee with respect to its contractors, and is to cooperate with the Committee and "furnish it such information as it may require in the performance of its functions."<sup>40</sup> The Committee, however, may itself investigate or cause to be investigated by a contracting agency or the Department of Labor the employment practices of any government contractor or subcontractor,<sup>41</sup> may receive and cause to be investigated complaints by employees or prospective employees of a government contractor or subcontractor,<sup>42</sup> and "may hold such hearings, public or private, as the Committee may deem advisable for compliance, enforcement, or educational purposes."<sup>43</sup>

The Committee is permitted to issue "United States Government Certificate[s] of Merit" to employers or employees organizations which are or may be engaged in work under government contracts if the Committee is satisfied that the practices and policies of the employers or employee organizations "conform to the purposes and provisions of [the executive] order."<sup>44</sup> The Committee may provide that employers or employee organizations holding current Certificates of Merit need not furnish compliance information,<sup>45</sup> and the Committee may suspend or revoke Certificates of Merit at any time for noncompliance.<sup>46</sup>

### III. THE COMPOSITION OF THE COMMITTEE

The Government Contract Committee consisted of one representative from the Atomic Energy Commission, the Department of Commerce, the Department of Defense, the Department of Labor and the General Services Administration, plus ten additional members appointed by the President, including a Chairman, a Vice Chairman, and an Executive Chairman.<sup>47</sup> The Vice President of the United States was designated as the Chairman. The Committee on Equal Employment Opportunity is composed of the heads of each of the government agencies represented on the Gov-

<sup>40</sup> *Id.* § 307.

<sup>41</sup> *Id.* § 309(a).

<sup>42</sup> *Id.* § 309(b).

<sup>43</sup> *Id.* § 310(a).

<sup>44</sup> *Id.* § 316.

<sup>45</sup> *Id.* § 318.

<sup>46</sup> *Id.* § 317.

<sup>47</sup> Exec. Order No. 10479, § 3, 18 Fed. Reg. 4999 (1953), as amended by Exec. Order No. 10482, 18 Fed. Reg. 4944 (1953) and Exec. Order No. 10733, 22 Fed. Reg. 8135 (1957).



## EXECUTIVE ORDER 10925

ernment Contract Committee, with the addition of the Secretaries of the Army, Navy and Air Force, the Chairman of the Civil Service Commission and the Administrator of the National Aeronautics and Space Administration,<sup>48</sup> plus an unlimited number of additional members "as the President may from time to time appoint."<sup>49</sup> The Vice President of the United States is the Chairman of the Committee<sup>50</sup> and the Secretary of Labor the Vice Chairman.<sup>51</sup> Each agency head other than the Secretary of Labor "may designate an alternate to represent him in his absence."<sup>52</sup> The Secretary of Labor has "general supervision and direction of the work of the Committee and of the execution and implementation of the policies and purposes of [the executive] order."<sup>53</sup> An Executive Vice Chairman, designated by the President, is primarily responsible for carrying out the functions of the Committee between meetings.<sup>54</sup>

### IV. SUMMARY

Executive Order 10925 is aimed at ending discrimination in employment practices of the Government and of its contractors and subcontractors. The powers of the newly-established Committee on Equal Employment Opportunity are substantially the same as its predecessor committee in the field of government employment practices. However, the powers of the Committee have been "beefed-up" with regard to employment policies and practices of government contractors and subcontractors. The Committee has been given the power to investigate discriminatory policies and practices of labor unions, even to the extent of requiring the contractor to obtain statements from union representatives. The Committee has been given the power to impose sanctions on contractors in the event of noncompliance and many of these sanctions are incorporated in the nondiscrimination clause in the contract. The Chairman of the Committee, the Vice President of the United States, has declared that the Committee meant "business" and

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<sup>48</sup> Exec. Order No. 10925, § 102(b)(c), 26 Fed. Reg. 1977 (1961).

<sup>49</sup> *Id.* § 102(d).

<sup>50</sup> *Id.* § 102(a).

<sup>51</sup> *Id.* § 102(b).

<sup>52</sup> *Id.* § 102(c).

<sup>53</sup> *Id.* § 102(b).

<sup>54</sup> *Id.* § 102(e). See 26 Fed. Reg. 6585, §§ 60-1.3-1.6, 60-1.20-1.31, 60-1.41, 60-1.43, 60-1.61-1.63 (1961).

## MILITARY LAW REVIEW

would not hesitate to bring about the "long overdue" elimination of discrimination.<sup>55</sup>

GILBERT J. GINSBERG\*

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\* *First Meeting, President's Committee on Equal Employment Opportunity, April 11, 1961.*

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## FOREIGN MILITARY LAW NOTES

### THE MILITARY LEGAL SYSTEMS OF SOUTHEAST ASIA\*

#### I. LEGAL ORGANIZATION IN THE ARMED FORCES OF THE PHILIPPINES\*\*

BY COLONEL CLARO C. GLORIA\*\*\*

The Judge Advocate General's Service of the Philippines was created pursuant to Sec. 25(a) in conjunction with Sec. 25(c) of the National Defense Act, as amended. In its almost 25 years of existence it has grown in stature, with its functions reaching into the highest levels of the government. The simple explanation for its growth lies in the growth of the Armed Forces of the Philippines itself. Other important considerations arise from the international commitments of the Philippines, as dictated by treaties and agreements in which the military play a major role. The increasing dependence of the government on the Armed Forces in both military and non-military activities has brought about a corresponding addition to the complexity and frequency of legal problems requiring the professional services of judge advocate officers.

The Judge Advocate General's Service plays an important role in the life of the Armed Forces of the Philippines, especially in an age where the rule of law in international relations and in the solution of international problems, is fast gaining adherence. This points to the ever present need of revitalizing the Judge Advocate General's Service. It must be taken into account in this regard that the career officers of the Judge Advocate General's Service are, by and large, capable of performing various functions outside of the legal profession. In their functions as either experts on legal matters or as representatives of the Armed Forces, they are able to exert their unique influence. In the role of experts, the judge advocate officers are contributing to the military process special skills or knowledge not otherwise available. This may consist of information, analysis and interpretation. As experts

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\* This is the third in a series of articles to be published periodically in the *Military Law Review* dealing with the military legal systems of various foreign countries. Those articles previously published in this series are: (1) Mortiz, *The Administration of Justice Within the Armed Forces of the German Federal Republic*, *Mil. L. Rev.*, January 1959, p. 1; and (2) Hollies, *Canadian Military Law*, July 1961, p. 69.

\*\* 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 or any other governmental agency or any agency of the Republic of The Philippines.

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## MILITARY LAW REVIEW

their position is chiefly advisory. They are in the position of being consulted as to their views and recommendations on a regular basis. In the role of a representative of the Armed Forces, on the other hand, the essential contribution of judge advocate officers to the military process is both expert knowledge and representation of inter-service interests and responsibilities. Whenever they are granted representation in a military or joint military-civilian conference dealing with problems of national interest, they share responsibility for the decisions reached. In effect they participate as members of a cooperative enterprise in which they have a recognized authority. This important phase of the function arising from the growth, importance and prestige of the service warrants the elevation of ranks of certain judge advocate positions and the strengthening of the legal staffs in various commands.

As a consequence of the present setup and the peculiar function of the judge advocate officers, it has become a pattern for most of them assigned in the General Headquarters of the Armed Forces of the Philippines, in the four major services, and in the Military Areas and Philippine Constabulary Zones, and other major commands, to appear before the civil courts in behalf of the Armed Forces of the Philippines or military personnel, perform military court duties as law member, the judge advocate or defense counsel, or sit in important conferences, either military or civil. These duties are apart and distinct from the normal function of judge advocate officers as staff officers of major service or unit commanders.

### A. MAJOR FUNCTIONS OF THE DIFFERENT BRANCHES OF THE JUDGE ADVOCATE GENERAL'S OFFICE

1. *The Judge Advocate General.* The Judge Advocate General is the Chief Law Officer of the Military Establishment and the Chief Legal Adviser of the Department of National Defense. In view of his position his office is located at the General Headquarters of the Armed Forces of the Philippines in Camp Murphy, Quezon City. He supervises the system of military justice throughout the Armed Forces, and assists in the resolution of all applications for amnesty under various proclamations of the President of the Philippines.

In addition, The Judge Advocate General is charged with:

a. Furnishing professional legal assistance to Armed Forces of the Philippines personnel in cases pending before the appellate civil courts (Supreme Court or Court of Appeals), as well as before the inferior courts in cases involving personnel of General Headquarters and units directly under it.

b. Rendering legal advice and assistance to the Chief of Staff and the Secretary of National Defense on matters concerning Armed Forces plans and policies, the interpretation of laws and regulations of general application to the Armed Forces, the drafting and legal sufficiency of bills, executive orders, and contracts as may be required by the Armed Forces, and the legal status (appointment, promotion, pay and allowances, line of duty determinations, and retirement) of military personnel in separate units directly under General Headquarters.

c. Supervising appellate review required by Article of War 50 and SJA reviews required by Article of War 45.

d. Statutory functions pertaining to the settlement of the estates of deceased military personnel and the distribution of certain benefits incident to death in the military service.

e. Technical supervision, professional guidance, and training of all staff judge advocates, including the publication of The Digests of Opinions of TJAG, the Bulletin of TJAG, the Judge Advocate General's Service Chronicle and other military law periodicals; maintaining records of courts-martial and international military agreements and related documents; and maintaining the military law library.

2. *Deputy Judge Advocate General.* The Deputy Judge Advocate General assists in the discharge of the duties of The Judge Advocate General and, in his absence, performs his functions; plans, directs, and helps establish the policies of the office; reviews and supervises the preparation of statistical reports; determines and reports, after an analysis of compiled data, unsatisfactory conditions in the field; and coordinates and screens the work of the branches under his functional supervision.

3. *Executive Officer.* The Executive Officer assists the Deputy Judge Advocate General in the discharge of his duties and, in his absence, performs his functions. He prepares general directives and recommendations to the field concerning the administration of military law; advises on matters to improve administration and organizational procedures; initiates and enforces measures for the internal safeguarding of military information, classified documents and materials; and coordinates and screens the work of the branches under his functional supervision.

4. *Administrative Branch.* This branch enunciates policies for the efficient and orderly administration of the office; studies and prepares plans for administrative procedures; maintains and safeguards all records of the office; gives instructions to and takes care of the assignment and/or reassignment of officers, enlisted men, civilian employees assigned to the office; renders reports

## MILITARY LAW REVIEW

required by superior authority; processes cases for assignment to branches or sections concerned and assists in the coordination of their work; takes charge of the procurement, care and distribution of the supplies and equipment of the office; performs office and service functions; codifies and compiles all laws and regulations affecting the Armed Forces of the Philippines; and takes charge of the publication and distribution of office publications. The Personnel Section of this branch handles all matters pertaining to the assignment, reassignment, appointment, pay, promotion, and transfer of military and civilian personnel; enunciates policies for the efficient and orderly administration of the office; gives instructions to officers, enlisted men and civilian employees assigned to the office in connection with their duties; and prepares reports required by superior authority.

5. *Military Affairs Branch.* This branch renders legal advice to The Judge Advocate General on matters concerning Armed Forces organization, line of duty status of military personnel, pay and allowances, retirements, promotions, discharges, leaves, etc.; contracts and biddings; miscellaneous matters and legal sufficiency of drafts of regulations, circulars, memorandums, staff studies, etc.; preparation and/or legal sufficiency of drafts of Executive Orders.

a. *Legal Opinions Section.* Prepares legal opinions on appointments, enlistments, pay and allowances, status, promotions, discharge, retirements, separation, discipline and administration of military and civilian personnel of the Armed Forces of the Philippines, and on interpretation of laws and regulations not specifically allotted to the other branches of The Judge Advocate General's Office.

b. *Contracts, Bids, etc. Section.* Handles all matters concerning public bidding, and prepares drafts or passes on the legal sufficiency of contracts, wherein the Armed Forces of the Philippines is a party.

c. *Legislative and Regulations Section.* Prepares and reviews drafts of bills, reports, orders, circulars, regulations and memoranda of the Armed Forces.

d. *Administrative Boards Section.* Reviews proceedings of Line of Duty Status Boards, Loyalty Status Boards, Accountability and Irregularity Boards, and other investigation and fact-finding boards.

6. *Military Justice Branch.* This branch supervises and administers the system of military justice for the entire Armed Forces of the Philippines. All records of trial of the three classes

## LAW OF SOUTHEAST ASIA

of courts-martial are examined and passed upon for their legal sufficiency and for recommendation of such appropriate action and, if found to be complete and accurate, disposed of pursuant to Article of War 34. It, likewise, passes upon records of investigation by Courts of Inquiry, the Inspector General's Service, and boards appointed by the Chief of Staff and renders opinions thereon. This branch also renders advice on legal problems growing out of the administration, control, discipline, status, civil relation and activities of the personnel of the military establishment, and the legal phases of military discipline. It acts on applications for amnesty and makes recommendations, answers correspondence, and renders written and/or verbal opinions on matters of clemency, discharges, court-martial jurisdiction and all questions pertaining to the Articles of War and the Manual for Courts-Martial. It also conducts lectures on military law and courts-martial procedures to officers and men of the different units of the Armed Forces, when officially directed or when so requested.

a. *Staff Judge Advocate Section.* Reviews and examines every record of trial by general court-martial or record of trial by special court-martial, in which a bad conduct discharge has not been adjudged, before action of the convening authority is taken on the case. Under the 45th Article of War, a commanding officer vested with court-martial jurisdiction who has no staff judge advocate (or if he has one but cannot act as such because of illness or legal disqualification), may refer the record of trial in any case to The Judge Advocate General for review and recommendation before he acts thereon. The proper review of the case is undertaken by this section.

b. *Miscellaneous and Examination Section:*

(1) Handles all matters of miscellaneous nature relating to the proper and orderly administration of military justice.

(2) Makes recommendation of clemency after examination of all evidence and papers of a case; makes appropriate reply to all inquiries concerning the status and rights of persons tried or triable by courts-martial.

(3) Prepares opinions and correspondence in regard to dismissal, reclassification, resignation, charges, punishment and discipline in cases pending before courts-martial, military boards or commissions.

(4) Recommends legislation and reviews proposed legislation relating to the administration of military justice, Armed Forces Regulations, Manual for Courts-Martial and matters relating thereto.

## MILITARY LAW REVIEW

(5) Prepares forms of specifications not covered in the Manual for Courts-Martial.

(6) Furnishes advice in connection with court-martial cases and answers inquiries in connection thereto.

(7) Handles matters of special importance referred to The Judge Advocate General by higher officers or by officers in the field.

(8) Maintains records and statistical data relative to trials by general court-martial, and, based upon studies thereof, recommends adoption of policies designed to give optimum efficiency in the administration of military justice.

(9) Studies, renders opinions and makes recommendations on all matters relating to the jurisdiction of courts-martial and all questions arising under Article of War 105.

(10) Examines the legal sufficiency of all records of trial by general court-martial, except those cases wherein the sentences as finally approved by the reviewing authority include: (1) death, (2) dismissal, dishonorable discharge or bad conduct discharge not suspended, or (3) penitentiary confinement unless the sentence to dishonorable discharge or penitentiary confinement is based entirely upon pleas of guilty.

(11) Places the stamp of final approval on all records determined to be legally sufficient, recommends their filing and makes final disposition of all such records pursuant to Article of War 34 and Section 87(c), Manual for Courts-Martial.

c. *Amnesty Section.* Conducts investigations in matters of application for amnesty under various proclamations of the President of the Philippines; deputizes boards of officers to conduct investigation; reviews applications for benefits under it; prepares legal opinions on questions bearing on amnesty; prepares resolutions for the Armed Forces of the Philippines Amnesty Commission; issues subpoenas to witnesses; keeps records of applicants for amnesty conducted before the Commission; and performs such other duties which may aid the Commission in the expeditious discharge of its functions.

7. *Claims Branch.* The Judge Advocate General exercises his function as administrator of certain estates under Republic Act No. 136 through this branch which receives, adjudicates and settles claims, and administers the monies of minors deposited with The Judge Advocate General consistent with the probate jurisdiction conferred on him by the above-mentioned law. The functions of this branch have been enlarged in the matters of adjudication of death gratuities and accrued and unpaid dis-



## LAW OF SOUTHEAST ASIA

ability pensions of armed forces personnel under Republic Act 610; the adjudication of accrued and separation gratuities under Republic Act 340; the adjudication of financial relief pursuant to Department Order 89; and the adjudication of back pay benefits under Republic Act 304, as amended. This branch also undertakes the reception, filing, processing, and assertion of claims of deceased members of the Philippine Scouts and/or their survivors under United States Public Law 85-217. In addition, it likewise prepares legal opinions on matters regarding benefits under various acts of the legislature, the Government Service Insurance System, the Armed Forces of the Philippines Mutual Benefit System, and other benefits due members of the Armed Forces. Finally, this branch has been designated as the legal division of the Veterans Back Pay Commission, and all legal problems of the Commission and its Army Screening Board are referred to it for legal opinion.

8. *Legal Services Branch.* This branch, and the Professional Service Section thereof, is primarily charged with the rendering of legal assistance to the Department of National Defense and the Armed Forces of the Philippines. It represents the Secretary of National Defense and the Chief of Staff in cases before the courts and/or administrative bodies; it acts as legal counsel or legal adviser to service personnel with cases pending in courts and/or other government agencies; it assists in the prosecution or in the defense of military personnel facing charges before the civil courts, and coordinates and supervises all actions, legal or equitable, where the Department of National Defense or the Armed Forces of the Philippines is the interested party.

9. *Board of Review.* The Board of Review was created by The Judge Advocate General pursuant to Article of War 50 to review records of trial in which there have been adjudged a sentence requiring approval or confirmation by the President and those with dishonorable discharge in cases of enlisted personnel.

10. *Special Assistants to The Judge Advocate General.* The Special Assistants to The Judge Advocate General review cases under Article of War 45 of general courts-martial requiring Board of Review action under Article of War 50 and review opinions of the Board of Review for concurrence or dissent of The Judge Advocate General. In addition, this section is charged with editing the BULL-JAG and performing such legal research and work or study for, and/or special assignments by, The Judge Advocate General, the Deputy Judge Advocate General, the Executive Officer, and the Chief of Staff of the Armed Forces of the Philippines.

## MILITARY LAW REVIEW

### B. JUDGE ADVOCATES OF MAJOR SERVICES

In addition to duties at General Headquarters, judge advocate officers are assigned to the different major services of the Armed Forces of the Philippines, namely: Philippine Army, Philippine Navy, Philippine Air Force, and Philippine Constabulary. Each of these services is under the command of a general officer who is authorized to appoint courts-martial. Consequently, the assignment of judge advocate officers in every major service is indispensable. As many as twenty judge advocates are performing legal work in every major service. These officers are directly responsible to The Judge Advocate General of the Armed Forces of the Philippines in the performance of their duties as they belong to one common service, the Judge Advocate General's Service, of which The Judge Advocate General himself is the chief.

### C. THE PHILIPPINE CODE

The military code of the United States produced a salutary effect in the system of military justice in the Philippines. In fact, the first military law enacted by the National Assembly of the Philippines (Commonwealth Act No. 408), approved on September 14, 1938, and consisting of one hundred and twenty articles, is essentially American. It is a counterpart of the American Articles of War of 1928. The only difference is the omission of the American article (Article of War 28) referring to certain acts constituting desertion, in the Philippine Articles of War. In implementation of Commonwealth Act No. 408 and pursuant to the authority vested in the President of the Commonwealth of the Philippines by Article 37 thereof, Executive Order No. 178, dated December 17, 1938, was promulgated, prescribing the rules of procedure, including modes of proof in cases before court-martial, courts of inquiry, military commissions, and other military tribunals in the Army of the Philippines. These rules are designated as the Manual for Courts-Martial, Philippine Army.

At present Commonwealth Act No. 408, as recently amended by Republic Act No. 242 and further amended by Republic Act No. 516, is still the organic law of the Armed Forces of the Philippines. The influence of the American code is still predominant. The Armed Forces of the Philippines are patterned after the United States Army, and it is to be expected that the Philippine court-martial system is similar to that of the United States. But being in its early stage, it cannot escape from various defects, which, in one way or another, seriously impede the speedy administration of military justice.

## D. CONCLUSION

We are in a world harassed by conflicting ideologies and political intrigues. In our efforts to preserve our inalienable rights we look upon the military as one of the bulwarks of our national security. It has thus become one of the most important missions of the Republic of the Philippines to maintain its Armed Forces in the highest possible standard based upon a reasonable but firm discipline.

Along with this precept, it has been found that the military court-martial system is an effective instrumentality in attaining the essential objective of discipline. Consequently, in that system the Philippines has placed its trust.

## II. THE MILITARY LEGAL SYSTEM OF THE REPUBLIC OF CHINA\*

BY MAJOR GENERAL LEE PING-CHAI\*\*

### A. INTRODUCTION\*\*\*

The concept of military law has both a broad and a narrow sense. Military law in its narrow sense is the law governing the Armed Forces; it denotes "The Penal Law for the Armed Forces" and other special penal enactments. In its broad sense it implies any laws or regulations employed in cases involving either a military person or a non-military person who must be tried by a military tribunal. Military law operates to maintain military discipline and increase military potential.

Chinese military law has a long history. It can be traced back four thousand six hundred years to the time when Hwang-ti waged war with Chi-yu at the battle of Cho Lo, and issued his first regulations. In order to carry out military orders he created a Chinese military law, which, under the ancient system, was only a system of military regulations. The period of military regulations lasted a very long time, and, until the establishment of the Republic of China, provided a traditional base. The new government promulgated the "Army Criminal Regulation," "Navy Criminal Regulation" and "Army Judgment Procedure" which prohibited military superiors from punishing criminals as they pleased and provided that judgments must be based only on legal foundations. In this way the modern military law system superseded the ancient military regulations.

In 1929 the "Penal Law for the Armed Forces" was effective and in force. There followed in 1930 the "Trial Law for the Armed Forces;" in 1942 the "Brief Regulations for Trials for War-time Armed Forces;" in 1947 the "Method for Handling Military Law Cases;" in 1949 the "Statute of Limitations for Military Trials;" in 1950 the "War-time Military Law;" and in 1951 the "Supple-

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\* 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 or any other governmental agency or any agency of the Republic of China.

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\*\*\* The author and the *Military Law Review* gratefully acknowledge the services of Austin J. Gerber, Major, JAGC, U. S. Army, for his assistance in translating this article from Chinese and in helping to prepare it for publication. Major Gerber is currently assigned to the U.S. Military Attache's Office in the Republic of China.

mentary Method for Hearing Criminal Cases by Military Organizations." This new method divided the jurisdiction between judges and procurators and instituted a public defender system. With the enactment in 1953 of the "Method for Selecting Lawyers in Criminal Cases Tried by Military Organizations," the military legal system of China was completed.

A "Military Trial Law" was promulgated in 1956 with a view to meeting new circumstances. It adopted an appellate system and unified all the regulations concerning military trials. It was similar in scope to the United States Uniform Code of Military Justice which became effective in 1951.

### B. MILITARY LEGAL SYSTEM

In Chinese military law, the military trial organization is divided into three levels with provisions for preliminary and appellate trial procedure. This is known as the three-level, two-trial system.

#### 1. *Definition of the Military Trial Organization (MTO)*

A Military Trial Organization is defined as any organization which has the right to establish courts-martial to exercise military judgment. The military trial system is classified into three levels:

a. The Lower Military Trial Organization which comprises part of the following organizations:

- (1) Army Headquarters
- (2) Divisional Headquarters
- (3) Independent Brigade Headquarters
- (4) Naval and Air Force Military District Headquarters
- (5) Military organizations on an identical level with those listed in the foregoing four items. The defense command and fortress headquarters organized with judge advocate organizations belong to this category.

(6) Hsien (county) governments or other organizations of equal level which have been approved or are authorized by the Supreme Military Trial Organization to hold military trials during war time.

b. The Higher Military Trial Organization which comprises part of the following:

(1) General Headquarters of the Army, Navy and Air Force or other military organizations of equal level. The Headquarters Combined Services Force or the Taiwan Defense Command belongs to this category.

(2) In war time, the supreme command of the local peace preservation armed units of a province or an equal administrative

## MILITARY LAW REVIEW

district that has been approved or authorized to hold military trials by the Supreme Military Trial Organization. Provincial Garrison Command Headquarters belong under this category.

c. The Ministry of National Defense is the Supreme Military Trial Organization. This Central Supreme Military Organization exercises the highest jurisdiction.

### *2. The Division of Jurisdiction of the Military Trial Organization*

The various Military Trial Organizations have jurisdiction for the original trial of criminal cases involving military personnel on active duty; provided, however, that only the Supreme Military Trial Organization has jurisdiction for the original trial of criminal cases involving general officers and their equivalents. Civilian officers of rank equal to generals and military personnel not on active duty but whose former rank was general are likewise subject only to the jurisdiction of the Supreme Military Trial Organization. In criminal cases involving military personnel not on active duty but who are to be tried by court-martial, primary jurisdiction rests with the MTO at the site of the crime, or where the accused resides or where he was found.

In cases involving joint offenders and over which several Military Trial Organizations have concurrent jurisdiction the principle of combined jurisdiction instead of separate jurisdiction is utilized in order to avoid an unbalanced judgment. Jurisdiction in such cases is determined in one of the following three ways:

a. Where two organizations of unequal levels have concurrent jurisdiction over a criminal case, the jurisdiction thereof shall be assumed by the superior Military Trial Organization.

b. Where two organizations of equal level have concurrent jurisdiction over a criminal case, jurisdiction will continue in the one that first assumed jurisdiction. Where a case is simultaneously assumed by several organizations and ultimate jurisdiction over it cannot be decided through mutual agreement, the issue must be submitted to their common superior Military Trial Organization for its final determination.

c. Where active duty military personnel and non-active military personnel are jointly accused, the MTO that has jurisdiction over the military personnel on active duty assumes complete jurisdiction over the case.

### *3. The Organization of Courts-Martial*

The MTO executes the national power of punishment and selects several military judges to organize courts-martial. Courts-martial are classified into trial courts, appellate court and extraordinary

trial court as follows:

a. Trial court is a court-martial of the first instance. It can be further classified into three kinds:

(1) Summary trial court which consists of only one judge sitting in a trial.

(2) Common trial court which consists of three judges jointly sitting in a trial.

(3) Superior trial court which consists of five judges jointly sitting in a trial.

All the Military Trial Organizations may organize summary and common trial courts, provided, however, that the lower Military Trial Organization has the approval or authorization of the Supreme Military Trial Organization to hold military trials. Hsien (county) Government or other organizations of equal level have the power to organize summary trial courts only.

Superior trial courts shall be organized by the Ministry of National Defense, provided, however, that a higher Military Trial Organization duly authorized may also organize the same to try cases involving general officers and their equivalents.

The position of a judge for a trial court may be filled by a military judge or by a regular military officer. The judge of a summary trial court shall be a judge advocate and shall perform the function of a presiding judge. The assignment of judges for a court that jointly sits in a trial shall be determined according to the following: (1) judge advocates are assigned in the case of military personnel on active duty who have violated the Criminal Code or its special enactments, and also in the case of military personnel who are not on active duty, and prisoners-of-war or surrendered enemy troops who have committed an offense subject to military trial; and (2) judge advocates and military officers who possess a technical knowledge which might be involved in the facts of a particular case are appointed jointly to conduct a trial when an offense of the Penal Law for the Armed Forces or its special enactments has been committed by military personnel on active duty. However, the number of the military officers shall not exceed one half of the total members of the said court.

The presiding judge of the court that jointly sits in a joint trial shall be either a judge advocate of seniority or a military officer of high rank whose rank shall not be lower than that of the accused.

b. An appellate court-martial is a court-martial of second instance. It can be further classified as follows:

(1) A common appellate court which consists of three judges, jointly sitting, of whom no less than two must have

## MILITARY LAW REVIEW

"selected appointment" rank, *i.e.*, selected by the President of the Republic of China.

(2) A superior appellate court which consists of five judges jointly sitting, all of whom must have "selected appointment rank."

Common appellate courts may be organized by approved higher Military Trial Organizations and the Supreme Military Trial Organization. A superior appellate court may be organized only by the Supreme Military Trial Organization. During war time the Supreme Military Trial Organization may establish branch appellate courts-martial in a war-zone.

Appellate courts shall be composed of judge advocates provided, however, that in holding a Ti-Shen proceeding (*i.e.*, similar to a habeas corpus proceeding) or a trial at the place where the accused is located, if the case concerns military personnel on active duty who have violated the Penal Code for the Army, Navy and Air Force or its special enactments, such proceeding shall include judge advocates and military officers.

c. An extraordinary trial court-martial is a court-martial for trials of the character described in section 5(h), *infra*. It shall be organized by the Supreme Military Trial Organization and shall consist of five judges with "selected appointment" rank.

### 4. Jurisdiction of Courts-Martial

a. The summary trial court has jurisdiction over (1) enlisted men, other than NCO's, and their equivalents who have committed crimes not punishable by life imprisonment or the death penalty; and (2) non-commissioned officers or company grade officers and their equivalents who have committed crimes punishable by a term of imprisonment not exceeding five years.

b. The common trial court has jurisdiction over (1) enlisted men, other than NCO's, and their equivalents who have committed crimes punishable by life imprisonment or the death penalty; (2) non-commissioned officers or company grade officers and their equivalents who have committed crimes punishable by a term of imprisonment exceeding five years; and (3) field grade officers and their equivalents who have committed crimes.

c. The superior trial court has jurisdiction over criminal cases involving general officers and those of equivalent rank.

The jurisdiction of courts-martial over criminal cases involving enlisted military personnel not on active duty is the same as that applied to enlisted men on active duty. The jurisdiction of courts-martial over civil servants is determined by their rank in proportion to military rank. Jurisdiction over commissioned and non-commissioned officers who are not on active duty is determined



by their original military rank. Jurisdiction over prisoners of war and surrendered enemy troops is the same as in the case of enlisted men.

d. The common appellate court reviews the trial judgments of the following cases:

(1) Enlisted men and their equivalents who have been sentenced to a punishment less than life imprisonment.

(2) Non-commissioned officers and company grade officers or their equivalents who have been sentenced to a punishment less than a definite term of imprisonment.

(3) Field grade officers and their equivalents who have been sentenced to a term of imprisonment not exceeding seven years.

(4) Officers and enlisted men who have been informed of a judgment of "not guilty," "exempt from prosecution," "punishment remitted" or "case not to be prosecuted" by a court-martial.

e. The superior appellate court-martial reviews cases other than those set forth in the paragraph above.

The common appellate courts of the higher Military Trial Organization review trial judgments rendered by its subordinate lower Military Trial Organizations. The common appellate court of the Supreme Military Trial Organization reviews trial judgments rendered by the higher Military Trial Organizations.

f. The extraordinary trial court adjudicates cases in which the final judgments of lower courts have been found to be contrary to law.

## 5. *The Spirit of the Existing Military Legal System*

### a. *Military Procurators*

Each Military Trial Organization has its military procurator. The military procurator, under the guidance and supervision of his superior military commanding officers, prosecutes, in the name of the state, those military personnel on active duty who are alleged to have committed certain crimes. A ruling not to prosecute shall be made by a military procurator where evidence of a crime having been committed is insufficient.

### b. *Independent Court-Martial System*

A court-martial must independently perform its functions of trial free from any interference whatsoever. Judgments of courts-martial must be approved by the superior officer of the MTO concerned. However, judgments by the Superior Appellate Court of the Supreme MTO must be submitted to the President for approval. If, in considering the case, the approving authority is dissatisfied with a judgment, he may submit it for appellate re-

## MILITARY LAW REVIEW

view, but no application may be made for further review of a judgment by the appellate court.

### c. *Right to Counsel*

With a view to protecting the interests of an accused, the Law of Military Trial-expressly provides that an accused has the right to choose his own advocate. His immediate superior, statutory agent, spouse, blood relatives or collateral relatives within third degree of kindred or a family head or member may independently choose an advocate for the accused. An accused shall not choose more than two advocates.

Where the minimum punishment for the accused's crime exceeds a five-year term of imprisonment and no advocate has been chosen by him, the presiding judge shall appoint a public defender for him. A spouse, blood relative or collateral relative within third degree of kindred, a family head or member, or statutory agent of the accused may request the court to allow him to serve as an assistant and in that capacity present his opinion to the court on the date set for trial.

### d. *Open Trials*

A court-martial must perform its functions openly, except in cases involving secrets of national defense and cases concerning military honors. The procurator and the accused are on the same level; each can attack and defend. The judge shall serve as an independent third party and render his judgment on the basis of the arguments. No coercion, unlawful influence, or unlawful inducement may be used when questioning an accused. An open trial serves to seek out the truth and is conducive to the rendering of a fair judgment.

### e. *Appellate Review*

Formerly there was only a one-trial system, but today there is a right to appeal the judgment of the trial court. The judgments of cases submitted for appellate review must be rendered thoroughly in writing. If facts involved are not clear, the case may be sent back for re-trial, and, when necessary, a *Ti-shen* proceeding (*i.e.*, similar to a habeas corpus proceeding), or a trial at a place where the accused is located, may be held. This is one of the most important improvements in Chinese military law.

### f. *Exceptions to Rulings*

An exception is an objection upon a matter of law to a ruling made by the court. This is a new provision for the benefit of the accused.

### g. *New Trials*

After a judgment of "guilty" has become final, an applica-

tion for a retrial may be made for the benefit of the person sentenced if there are new facts or newly discovered evidence. Such application may be made by the military procurator of the original MTO, the person sentenced, or the immediate superior, statutory agent, or spouse of the person sentenced. If the sentenced person is deceased or in a state of mental disorder, his spouse, lineal blood relatives, collateral blood relatives within third degree of kindred, matrimonial relatives within the second degree, or head of his family or member thereof may make an application for retrial. If an application for retrial is meritorious, a ruling for retrial is granted. If not meritorious, the application is dismissed by a ruling.

#### *h. Extraordinary Trials*

Where it is discovered after judgment has become final that the trial was conducted contrary to law, the military procurator concerned may prepare a written statement for the Chief Military Procurator of the Supreme Military Trial Organization, and the latter may convene an extraordinary trial in which any part of the judgment contrary to law shall be nullified. In case the original judgment was advantageous to the accused, no heavier punishment can be imposed; on the other hand, if the original judgment was disadvantageous to the accused, a new judgment shall be granted. The operation of the extraordinary trial unifies the various viewpoints of law and protects the rights of an accused.

#### *6. The Organization Outlines of Military Law Units*

The organization of military law units of all levels is established on a staff basis. Under the Ministry of National Defense there are (1) the Military Law Bureau, under which there are three sections, namely, Administrative, Prosecution, and Trial, in charge of the investigation and trial of cases involving officers and enlisted men of units directly subordinate to the Ministry and general officers of the Armed Forces, and all the administrative matters pertaining to military law of the Armed Forces; (2) the Retrial Bureau under which there are the Administrative Office, High Judge Advocate Office, Procurators Office and four Retrial Sections in charge of re-trial of cases of the Armed Forces and matters pertaining to extraordinary trials.

The Military Law Bureau corresponds to the Judge Advocate General's Office of the United States Army. The Retrial Bureau, although perhaps possessing somewhat more autonomy than the Boards of Review in the United States system, and somewhat less than the U.S. Court of Military Appeals, corresponds to those appellate bodies.

## MILITARY LAW REVIEW

In the Army, Navy, Air Force, Combined Services, Garrison Commands and other equivalent units, there are Judge Advocate Divisions under which there are Administrative, Prosecution and Trial Sections. In the Army, every army headquarters, corps headquarters and division headquarters has a Judge Advocate Section. In the Navy, every naval district, marine headquarters and marine division headquarters has a Judge Advocate Section. In the Air Force, each command such as Operation, Supply, Anti-aircraft Artillery and Garrison Brigade has a Judge Advocate Office. Moreover, each Garrison District under the Garrison Command also has a Judge Advocate Office. For each of the above-mentioned judge advocate units there are military procurators and military judges handling military legal services.

The officers in charge of the respective Military Trial Organizations handle all administrative matters pertaining to military law, direct the organization of courts-martial, and distribute operations of prosecution in compliance with the orders of the respective superior officer concerned. Military judges join the organization of courts-martial and exercise independently their court-martial jurisdictions. Military procurators exercise their prosecution rights for the State against criminals. Public defenders must do their best to defend accused both in light of the facts of the case and the laws involved. Legal clerks are in charge of matters such as statistics, numbering cases, records, etc., under the supervision of the military law officer in charge, trial judge, or military procurator.

The word "Military Law Officer" is construed to refer to the military law officer in charge, military trial officer, military procurator and the public defender. They are appointed if they possess one of the following qualifications: (1) passed examination for military law officers; (2) qualified to be a judicial officer or a judge of Hsien (County) Judicial Division; or (3) qualified as a military law officer prior to the enforcement of the Military Trial Law.

### *7. Legal Operations*

In order to show something of the military system in action, let us examine in some detail the steps taken in the prosecution of a case and also take a look at some of the services rendered by the military law units.

#### *a. Analysis of the Prosecution of a Case*

(1) Preliminary Investigation. This is, of course, the first official step in the process leading to the trial of a case. A military procurator must, when an information is laid before him or complaint made to him, or upon voluntary surrender, or when

otherwise it is known to him that there is suspicion of an offense having been committed, immediately institute a preliminary investigation. This preliminary investigation consists of the following steps: (1) interrogation of the informant, accuser, the accused, and other parties concerned; and (2) the examination of evidence. The military procurator, in order to investigate evidence and the circumstances of a crime, may make inspections, summon witnesses, and call experts to render impartial opinions.

(2) Prosecution. If the evidence obtained by a military procurator during a preliminary investigation is sufficient to show to his satisfaction that the accused probably committed a crime, prosecution is commenced. Where the evidence fails to show a reasonable probability that the accused committed the crime, a ruling not to prosecute is made by the procurator.

(3) Trial. A court-martial, having received a prosecution together with the dossier, starts a trial according to the following procedure: (1) interrogation of the accused; (2) examination of the evidence; (3) arguments upon the law and facts by the military procurator, by the accused, and by the defense counsel; (4) discussion of applicable articles of the code of the Republic of China, and the permissible penalties; and (5) pronouncement of guilty or not guilty.

#### b. *Functions and Services of the Military Law Units*

In addition to duties connected with the investigation, trial, and review of criminal cases, the military law units at the various levels, under the supervision and direction of the Military Law Bureau, perform other functions and provide other services.

A continuing program is carried on to acquaint personnel with the provisions of military law. This program includes the distribution of basic readers in military law and a military law magazine to all personnel. Also, each week there is presented a radio broadcast which involves some aspect of military law.

Secondly, an active, continuing program of legal assistance for all military personnel is carried on by the military law units. This program includes advice and assistance over the wide range of personal problems, the mediation of disputes, and the furnishing of legal counsel where a lawsuit becomes necessary.

Additionally, the military law units provide legal services for the other military organizations within the Armed Forces. This service covers a broad and diverse field ranging from the many matters which might be termed "military affairs" to such things as procurement.

Unlike the Judge Advocate General's Corps of the United States Army, the Military Law Bureau of the Chinese Army is

## MILITARY LAW REVIEW

charged with the supervision of military prisons. This duty involves all the ramifications of prison administration and operation, and prisoner education and rehabilitation.

Finally, the Military Law Bureau is also charged with the responsibility of training military law personnel. This training consists of formal education and special training. To provide a supply of fully qualified lawyers for the Armed Forces, the Ministry of National Defense established in 1957 a Military Law School which operates under the supervision of the Military Law Bureau. This school offers a four year law course to selected graduates of the Chinese high middle school. The school is operated on the combined forces concept and furnishes trained lawyers for all branches of the Armed Forces. A graduate from the school receives a degree of bachelor of laws and a commission as second lieutenant, or equivalent, and is obligated to serve ten years on active duty in the Armed Forces. In addition to providing a formal legal education, the school also provides short courses for reserve military legal officers. These reserve officers are graduates of civilian law schools who must, under the conscription law, attend such courses. Both the graduates of the four year course of the Military Law School and the reserve officers must pass the High Civil Service Examination in order to become judge advocates.

### C. CONCLUSION

There have been substantial improvements in Chinese military law since the inauguration of the new system. The law, coordinated within the military command, has been simplified. Military legal personnel are protected and may not suffer decreased emolument, suspension of office or discharge therefrom unless the same are effected according to law. An appellate system has been adopted. A defense system, an exception system, a retrial system and an extraordinary trial system have also been established, which insures the continuance of efficient discipline, while protecting the legal rights of all military personnel.

Every effort is made to investigate cases quickly and fairly; to prevent crimes; to stabilize and raise morale; to utilize prison labor for reconstruction; and to cultivate new cadres. The standard of military legal personnel has been improved in order that our military law operations might become more effective, and in order to create the necessary motivation for the strengthening of military potential.

### III. THE MILITARY JUDICIAL SYSTEM OF THAILAND\*

BY MAJOR GENERAL SAMRAN KANTAPRAPHA\*\*

#### A. INTRODUCTION

At present, Thailand has a constitution as its basic law, with the sovereign power being threefold, namely, the legislative power wielded by Parliament, the executive power by the Council of Ministers, and the judicial power by the courts. The King of Thailand is the Head of State and rules under the constitution and other laws, being advised by the Privy Council. Succession to the throne is governed by Royal Court Regulations relating thereto, subject to the consent of Parliament.

#### B. GOVERNMENTAL ADMINISTRATION

The administration of the Kingdom is divided into three sections, namely: (1) the central administration; (2) the regional administration; and (3) the local administration. The central administration is divided into (1) the Office of the Prime Minister; (2) the Ministries; and (3) the departments or other political organizations with the status of departments.

##### 1. *The Office of the Prime Minister*

There are currently 22 government branches under the supervision of this office, but only those relevant to the present topic shall be discussed. The universities are also under the office of the Prime Minister. Graduates of the two universities which produce lawyers and administrators may be found in nearly every branch of the government.

The Office of the Juridical Council is also under the Office of the Prime Minister. As a branch of Parliament and the Government, its duties are to draft laws or regulations as directed by Parliament or the Council of Ministers; be available for consultation and to give legal opinions to the government's political organizations; and to try and adjudicate administrative cases which are under the jurisdiction of the Juridical Council.

##### 2. *The Ministries*

In addition to the Office of the Prime Minister, there are at

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\* 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 or any other governmental agency or any agency of the Kingdom of Thailand.

\*\* Vice Judge Advocate General, Royal Thai Army; Member, Military Supreme Court of Thailand; Graduate, Law School of the Ministry of Justice (Thammasat University), 1925.

## MILITARY LAW REVIEW

present 12 Ministries, but only those relevant to this topic shall be discussed.

### a. *The Ministry of Interior*

This Ministry is basically concerned with local administration, public welfare and safety, and keeping public order. Its work is distributed among many departments, but reference will be made only to those relevant to this topic.

*The Police Department*—Initially, there is the Police Department, whose duty it is to protect against wrongdoing and to suppress crime. In the Changwats (provinces) of Bangkok and Dhonburi, upon the arrest of a second-time offender on a petty charge or where the law allows payment of a fine in lieu of imprisonment, the police may order such settlement as provided by law. If the accused agrees, the matter is concluded. If he does not, the case must be tried by a competent court. In other Changwats, the inquiry officials, composed jointly of police and administrative officials, exercise such power.

In criminal cases which entail a heavier punishment or which are beyond the authority of the inquiry officials to order settlement, the inquiry officials must compile a file of evidence and forward it to the Public Prosecutor who then issues a prosecution order or a non-prosecution order, based on the evidence contained in the file. If the evidence is insufficient to justify a prosecution order, the Public Prosecutor may order further inquiry.

If a particular case is within the jurisdiction of the military courts and must be tried by them, the inquiry officials must forward the file of inquiry to the Military Prosecutor, who shall then order prosecution or non-prosecution, and if after perusal of the file the Military Prosecutor considers the evidence incomplete, he may request further inquiry before ordering prosecution.

*Department of Public Prosecution*—Secondly, there is the Department of Public Prosecution. The duties of the Public Prosecutor are to prosecute criminal offenders, such offenses being deemed to have been committed against the State; and to advise the Ministries, branches and departments including the municipalities, on matters of law and litigation and on such business as may involve legal problems. Apart from these duties, the Public Prosecutor is the legal representative of the Ministries, branches and departments, and the municipalities, in actions brought by them or against them, and the Public Prosecutor also represents government servants who are sued or prosecuted for acts done in the course of duty.



b. *The Ministry of Justice*

All the civilian courts of justice are under the Ministry of Justice, and the Minister of Justice is responsible for the efficiency of the administrative work of all the courts under the Ministry of Justice. The courts, however, have exclusive control over the judicial work, *i.e.*, the trial and adjudication of cases, which includes giving orders or final judgments thereon.

*Types of Courts*—The courts of justice are divided into three categories, namely, (1) the courts of first instance; (2) the Appeal Court; and (3) the Supreme (Dika) Court. The courts of first instance try and adjudicate all civil and criminal cases. There are several of these courts in Bangkok and Dhonburi, including a Central Juvenile Court, a Civil Court, a Criminal Court, and District Courts. In the outlying regions, the courts of first instance are the Changwat Courts and the District Courts. The Appeal Court is the intermediate court. Litigants not satisfied with the decision of a court of first instance may appeal to the Appeal Court. There is only one Appeal Court and this is located in Bangkok. Litigants not satisfied with the decision of the Appeal Court may appeal to the Dika Court. There is only one Dika Court and this is also located in Bangkok.

*Jurisdiction*—The jurisdiction of the various courts is as follows:

(1) District Courts are competent to try and adjudicate cases and to make inquiries or issue any order within their territorial jurisdiction, for which a single judge is competent. In criminal cases, they are competent to sentence individuals to not more than six months imprisonment or a fine not exceeding 2,000 baht. In civil cases, they are competent to deal with disputed property or claims not exceeding 2,000 baht. Where there is no claim in money, *e.g.*, an action for eviction, the case must be brought in a Civil or Changwat Court.

(2) The Changwat Courts are competent to try and adjudicate all civil and criminal cases within their territorial jurisdiction without exception.

(3) The Juvenile Court has jurisdiction to try and adjudicate civil and criminal cases in which certain specified categories of juveniles are involved.

(4) The Civil Court has unlimited jurisdiction over civil cases.

(5) The Criminal Court has unlimited jurisdiction over criminal cases.

(6) The Appeal Court is competent to try and adjudicate all civil and criminal cases where there are appeals against judgments or orders of the courts of first instance.

## MILITARY LAW REVIEW

(7) The Dika Court is competent to try and adjudicate cases where there are appeals against judgments or orders of the Appeal Court in accordance with the provisions of law governing appeals to the Dika Court. Additionally, the Dika Court has jurisdiction in several other specified areas. After a decision by this court is reached, there is no further appeal.

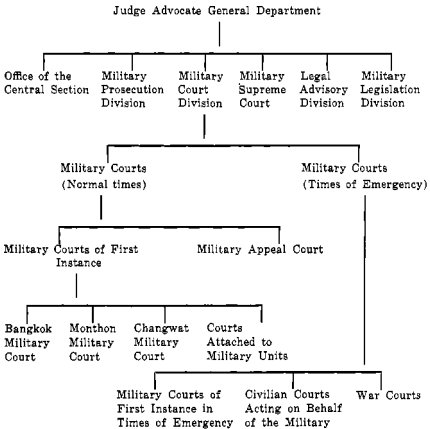
### *C. ADMINISTRATION OF MILITARY LAW*

The Defense Ministry is divided into the Office of the Secretary to the Minister, the Office of the Under-Secretary, and the Supreme Command Headquarters of the Army, Navy, and Air Force, each of the latter having its own Judge Advocate General Section whose primary duty is to make inquiries and to perform other legal duties.

There is only one Judge Advocate General Department, which is administered in the Office of the Under-Secretary. The Judge Advocate General Department is divided into the Office of the Central Section, the Military Prosecution Division, the Military Court Division, the Legal Advisory Division, and the Military Legislation Division. The Central Section deals with administration, services, supplies, and finance. The Military Prosecution Division primarily deals with bringing cases before the military courts. The Military Court Division controls the administrative work of the military courts. The Legal Advisory Division interprets laws and advises on other legal matters, apart from other duties as prosecutors and officers of the military courts.

All the military courts are created by virtue of the Act on the Organization of Military Courts, and are attached to the Ministry of Defense. The Minister of Defense is responsible for the administrative work of the military courts. The Judge Advocate General Department, however, controls the administration of the military courts, as the law organizing the military courts empowers the Judge Advocate General to lay down regulations concerning the administration of the military courts, which regulations must be approved by the Minister of Defense. The power to try and adjudicate cases, including the making of orders thereon, is the independent right of the courts or judges. The following is a chart of the organization of the Judge Advocate General Department:

## LAW OF SOUTHEAST ASIA



*Military Judges*—Judges of the Military Supreme Court and Military Appeal Court are appointed by royal decree, but the power to appoint judges of the military courts of first instance has been delegated. Accordingly, the Minister of Defense appoints the judges of the Bangkok Military Court; the commanding officers of Monthon Army divisions appoint the judges of the Monthon military courts; the commanding officers of Changwat Army divisions appoint the judges of the Changwat military courts, and the commanding officers of the various other Army units concerned appoint the judges of courts attached to their units.

As regards the war courts, when the necessity arises for an Army or Naval unit in the theater of operations to appoint a war court, the highest ranking commanding officer present, who has under his command not less than one Army battalion or who is captain of a ship or commander of a fortress or other military stronghold, or someone acting on his behalf, has the power to appoint judges of a war court. If the matter involves joint action by the Army, Navy, or Air Force, then the highest ranking officer

## MILITARY LAW REVIEW

present has the power to appoint the judges of the war court.

The law setting up the military court system does not make any distinction between the Army, Navy, Air Force, or persons attached to the Ministry of Defense, who are all equally subject to military law and the military courts. For this reason, judges appointed to the military courts are selected from the three forces, and the judges may be appointed for a definite period, and then replaced, or judges may be appointed for only a particular case as it arises. Judges appointed to the Military Appeal Court and the Military Supreme Court are also selected from the three forces, but their appointments are normally permanent.

There are two types of military legal officers, namely, those without other legal duties who are appointed military judges, and officers who have direct legal duties and are appointed judge advocates. A judge advocate must have many qualifications, such as a bachelor's degree in law or an equivalent or higher degree, ordinary membership in the bar association, training in military law and in his particular duties, and experience as a legal officer or assistant prosecutor in a Changwat or Monthon military court. Only after an officer has passed through the various branches of work and demonstrated abilities suitable for appointment as a judge advocate may he be appointed a judge advocate.

Legal officers, prosecutors, military prosecutors or assistant military prosecutors all must have a standard of education and qualifications similar to a judge advocate and must have passed their training in particular duties. This leads eventually to their appointment as judge advocates.

In times of emergency or when there is war or a state of war or when martial law has been proclaimed, (except in the war court) the person empowered to appoint judges of the military court of first instance also has the power to appoint civilian judges as military judges and appoint civilian prosecutors and court clerks or other qualified persons as military prosecutors and clerks as necessity may demand.

*Military Law*—Military personnel are generally subject to the laws of the State in the same manner as ordinary citizens are. Moreover, soldiers are also subject to military law and discipline. The military courts therefore must apply both civilian and military law in order to try offenders who are within the jurisdiction of the military courts. Similarly, military law must be used if the accused soldier is tried by a civilian court.

The laws, rules, and regulations issued under military law apply in a military criminal procedure. In case there is no such military law, rule, or regulation, the Criminal Procedure Code

shall apply *mutatis mutandis*. If a particular point is not provided for in the Criminal Procedure Code, then the provisions of the Civil Procedure Code shall be applied as far as possible.

When an offense is committed, the commanding officer normally appoints an inquiry committee in which a legal officer is included. If, as a result of the inquiry, it appears that the offense may be dealt with by disciplinary measures, the case is submitted to a commanding officer who has power to order punishment. If it cannot be dealt with by disciplinary measures or is an offense which must be tried in court, the file of the case must be forwarded to the Military Prosecutor in order to proceed with the trial in the proper court.

*Trial*—The preliminaries of trial in Thailand's military courts are not so involved as in some other countries. Objections may be made against prosecutors and judges, and the law clearly provides that they are bound to withdraw from the case should they be disqualified on any ground. Testimony given in court is recorded by the judges. If the panel of judges includes a judge advocate, the judge advocate records the testimony. Upon completion of trial and when appeal is sought, the file is sent to the higher courts without need for further typing or transcription. The testimony so recorded is read to the witness in the presence of the court, the parties, and the public. If the testifying witness finds the testimony as recorded correct, he shall attest the fact by signing his name thereto and he shall sign every page of the testimony, including such places where there have been corrections. Delivery of every document and evidence must be supported by evidence of delivery and receipt.

All judges, whether judge advocates or military judges, have the right to vote on issues of fact and of law. They act both as judges and juries.

The feeling of experienced Thai judges is that trial and adjudication of a case is made much easier when judges are allowed to hear the witnesses, record the evidence material to the issues and see the complexities of the case at first hand. The use of skilled men such as military judges and judge advocates who know both facts and law is felt to be more effective in the weighing of factual evidence than the use of laymen. Moreover, as the judges are able to complete the whole file themselves, laymen need not be entrusted with any part of the trial.

*Jurisdiction Over The Person*—The following persons are subject to the jurisdiction of the military courts:

- (1) Commissioned officers in active service;
- (2) Commissioned officers not in active service, but only in

## MILITARY LAW REVIEW

cases of offenses against orders or regulations as provided by the Military Criminal Code;

(3) Warrant officers and soldiers, conscripted or in active service, or national servicemen under the laws relating to national service;

(4) Military cadets, as determined by the Ministry of Defense;

(5) Reserves who are conscripted or whom the military authorities call up for regular service in a military unit;

(6) Civilians attached to military service, but only for offenses committed in the course of military duties, or other offenses committed in or near military barracks, bivouacs, camps, or military vessels, aircraft, or any other vehicle under the control of the military authorities;

(7) Persons in lawful detention by or in the lawful custody of the military authorities; and

(8) Prisoners of war or enemy aliens in the custody of the military authorities.

Thailand is a party to the Geneva Convention dealing with prisoners of war, dated August 12, 1949. Accordingly, an act was passed in 1955 whereby all laws, rules, and regulations promulgated under the act or under the convention shall be applied to prisoners of war, and provides in effect that should an existing law conflict with the aforesaid convention, the military courts and civilian courts shall give precedence to the rules of the convention.

*Jurisdiction Over the Subject Matter*—The military courts are competent to try and adjudicate and pass sentence in criminal cases where the offender is a person subject to military law at the time of the offense. However, criminal offenses committed before entering military service but discovered during military service are not triable by the military courts. All offenses committed during military service are triable by the military courts, even if the offense is discovered after the offender has been discharged from the military service. Additionally, the military courts may commit for contempt of court any person, even though he be not subject to military law, who is guilty of contempt of court as provided in the Civil Procedure Code.

In times of national emergency, the military courts may have jurisdiction in criminal cases over citizens generally, when the offense is of the kind defined in a proclamation of martial law and is committed in the area where martial law is in force.

The following cases, even though the offender is subject to military law, do not lie within the jurisdiction of the military courts:

## LAW OF SOUTHEAST ASIA

(1) Where the offense is committed jointly by a person subject to military law and a person not subject to military law;

(2) Where the case involves another case which lies within the jurisdiction of the civilian courts;

(3) Where trial must be held in the juvenile courts; and

(4) Where the military courts deem that they do not have jurisdiction.

Cases which do not lie within the jurisdiction of the military courts must be tried in the civilian courts. A case which a civilian court has accepted for trial, although it later appears from the proceedings to lie within the jurisdiction of the military courts, shall be continued to be tried and adjudicated in the civilian court.

*Appeals*—In normal times, the parties may appeal a case within 15 days, while the person empowered to appoint judges of first instance and the person empowered to order punishment may appeal within 30 days of the judgment. Appeal to the Military Appeal Court may be made on both questions of fact and law, provided such questions have been raised in the military court of first instance. Appeal to the Military Supreme Court may be made on questions of law, provided such questions have been raised in the military court of first instance, unless the question concerns public order or non-compliance with the provisions relating to appeals.

*Military Counsel*—In peacetime, an action in a military court may be prosecuted either by a military prosecutor or by the injured party, if the latter is subject to military law. If the injured party is not subject to military law, the military prosecutor must be appointed to bring the action.

In times of emergency, only the military prosecutor may bring action in the military courts, the war courts or the civil courts which try and adjudicate cases on behalf of the war courts. Whether or not the injured person is subject to military law, the military prosecutor must be appointed to bring the action.

If the military prosecutor is of the opinion that a case is not lawfully within the jurisdiction of the military courts, the file of inquiry should be forwarded to the civilian public prosecutor for further action. The public prosecutor may not return the file.

In peacetime, civilian advocates may plead and practice before the military courts. Additionally, officers who have graduated in law may, with the permission of a commanding officer of a battalion or above and permission of the court, represent the accused in the military courts. Moreover, the prosecutor or advocate,

## MILITARY LAW REVIEW

whether in the civilian or military courts of Thailand, who are entitled to plead in the courts of first instance, may follow the case to the Appeal and Supreme (Dika) Courts.

*Relationship Between Military and Civilian Courts*—In trying and adjudicating civil cases, the civilian courts must accept the facts as they appear in a judgment of the military court in a criminal case. A military court may, however, send an issue for investigation to a civilian court in a locality where there is no military court. After judgment by a military court in a criminal case in which the accused is ordered to return property or pay the value thereof in connection with wrongdoing, the file of the case must be sent to the civilian court in the locality where the accused's property is situated for further action if such property must be seized to obtain payment. Finally, in wartime, in addition to the war courts, civilian judges, prosecutors, and clerks may be appointed to positions in the military courts, or the venue of civilian courts may be taken over by the military courts, if necessary.

*Military Courts in Times of Emergency*—Times of emergency relate to war, a state of war, or a state of martial law. Military courts existing in peacetime remain competent to try and adjudicate criminal cases during times of emergency. If martial law has been proclaimed, or if the supreme commander of military forces has ordered that the military courts shall have the power to try and adjudicate other criminal cases under the provisions of law relating to military law, the military courts shall have such additional powers as proclaimed or ordered.

Upon the termination of war or a state of war or discontinuation of martial law, the military courts are still competent to try and adjudicate pending cases that have not been tried. In addition, the person empowered to appoint judges and the Minister of Defense have the power to transfer such cases or order the accused to be tried in another military court and to empower such court with the same powers and duties as a military court in times of emergency.

Upon cessation of war or a state of war or upon discontinuation of martial law, war courts have the power to proceed with cases then pending trial as though it were a court in times of emergency.

*Execution of Judgment*—Previously, the judgment of a military court had first to be approved by the person empowered to order punishment before it could be executed. However, an amendment to the Law for the Organization of the Military Courts of



1955 abolished the need to approve judgments, so that the military courts became courts in the fuller sense of the term.

Upon final judgment by a military court, the court shall send notice of final judgment to the person empowered to order punishment. Such person shall sign an order attached thereto to the prison authorities to execute the sentence contained therein.

In peacetime, if a military court of first instance sentences the accused to death or life imprisonment, the military court of first instance is bound to send the judgment to the Military Appeal Court for reconsideration. Should the file of the case be required, the court of first instance shall forward it. Such judgment becomes final only after approval by the Military Appeal Court. In war time, however, or if the judgment is a judgment of the war courts, then it is not necessary to send such judgment to the Military Appeal Court.

The court has power to order detention of the accused until special circumstances, such as insanity of the accused, have ceased to exist. In cases where the accused is sentenced to death, he cannot be executed until 60 days have elapsed since the reading of the judgment, unless a petition for mercy has been made to the King or a petition for a pardon or reduction of sentence has been made by the minister whose ministry is in charge of the prison, in which case execution shall be stayed until 60 days from the date of the petition.

Judgments of the war courts, or courts acting on behalf of war courts, may be immediately executed by the person empowered to order punishment, unless there is sufficient cause to warrant postponement, such as insanity of the convicted person. Where the accused is a prisoner of war or where an international convention applies, then the case shall be dealt with in accordance with the applicable international conventions.



**CUMULATIVE INDEX**  
**1961 MILITARY LAW REVIEW**

**(DA Pams. 27-100-11 through 27-100-14)**

References are to numbers and pages of Department of the Army Pamphlets 27-100-11 through 27-100-14. For example, a reference to "12/145" signifies pamphlet number 27-100-12, page 145. See DA Pam. 27-100-12, pages 289-304, for a cumulative index to DA Pams. 27-100-1 through 27-100-12.

**TABLE OF LEADING ARTICLES AND  
COMMENTS—AUTHORS**

Adkins, Lieutenant Allan B., <i>Recent Developments—Instructions on the Sentence</i> .....	14/109
Avins, Alfred, <i>A History of Short Desertion</i> .....	13/143
Clause, Captain James D., <i>The Status of Deserters Under the 1949 Geneva Prisoner of War Convention</i> .....	11/15
Clausen, Captain Hugh J., <i>Rehearings Today in Military Law</i> .....	12/145
Cobbs, Cabell F., <i>The Court of Military Appeals and the Defense Counsel</i> .....	12/131
Davis, Captain Bruce E., <i>A Supplement to the Survey of Military Justice</i> .....	12/219
Decker, Major General Charles L., <i>Foreword, A Symposium on Military Justice—The Uniform Code of Military Justice, 1951-1961</i> .....	12/v
Everett, Robinson O., <i>The Fast-Changing Law of Military Evidence</i>	12/89
Feld, Benjamin, <i>Development of the Review and Survey Powers of the United States Court of Military Appeals</i> .....	12/177
Gaynor, Colonel James K., <i>Army Relations With The Congress</i> .....	11/1
Ginsberg, Captain Gilbert J., <i>Non-Discrimination in Employment: Executive Order 10925</i> .....	14/141
Ginsberg, Captain Gilbert J., <i>The Measure of Equitable Adjustments for Change Orders under Fixed-Price Contracts</i> .....	14/123
Gloria, Colonel Claro C., <i>Legal Organization in the Armed Forces of the Philippines</i> .....	14/151
Hammack, Captain Ralph B., <i>Annexations of Military Reservations by Political Subdivisions</i> .....	11/99
Herbert, Captain Bueford G., <i>The Status of Spouses as Witnesses Before Courts-Martial</i> .....	11/141
Hollies, Group Captain J. H., <i>Canadian Military Law</i> .....	13/69
Kates, Lieutenant Colonel Robert C., <i>Limitations on Power of the Convening Authority to Withdraw Charges</i> .....	12/275
Kelly, Major Joseph B., <i>A Legal Analysis of the Changes in War</i> ...	13/89
Kurth, Colonel Edward H., <i>The Aftermath of the Michigan Tax Decisions: State Taxation of Federal Property and Activities Today</i>	13/167
Lee, Major General Ping-chai, <i>The Military Legal System of the Republic of China</i> .....	14/180
Lerner, Harry V., <i>Effect of Character of Discharge and Length of Service on Eligibility to Veterans' Benefits</i> .....	13/121
Maguire, Lieutenant Colonel Robert F., <i>Interrogation of Suspects by "Secret" Investigation</i> .....	12/289

## MILITARY LAW REVIEW

McHughes, Captain Lee M., <i>The Hiss Act and Its Application to the Military</i> .....	14/67
Meador, Daniel J., <i>Some Thoughts on Federal Courts and Army Regulations</i> .....	11/187
Meengs, Captain Philip G., <i>Pretrial Hearings for Courts-Martial</i> ....	12/49
Moritz, Doctor Gunther, <i>The Common Application of the Laws of War Within the NATO-Forces</i> .....	13/1
Mummey, Lieutenant Colonel Robert M., <i>Judicial Limitations upon a Statutory Right: The Power of The Judge Advocate General to Certify under Article 67(b)(2)</i> .....	12/198
Murphy, Major Wallace S., <i>The Function of International Law in the International Community: The Columbia River Dispute</i> .....	13/181
Murphy, Lieutenant Colonel William A., <i>The Formal Pretrial Investigation</i> .....	12/1
O'Brien, William V., <i>Some Problems of the Law of War in Limited Nuclear Warfare</i> .....	14/1
Remington, Frank J., <i>Communicating Threats—Its Relation to Extortion and Provoking Speeches and Gestures</i> .....	12/281
Samran, Major General Kantaprapha, <i>The Military Judicial System of Thailand</i> .....	14/171
Selby, Lieutenant Donald E., <i>Official Records and Business Entries: Their Use As Evidence in Courts-Martial and the Limitations Thereon</i> .....	11/41
Sewell, Lieutenant Colonel Toxey H., <i>Military Installations: Recent Legal Developments</i> .....	11/201
Shaw, Lieutenant Colonel William L., <i>Selective Service: A Source of Military Manpower</i> .....	13/35
Simon, Major James E., <i>A Survey of Worthless Check Offenses</i> .....	14/29
Stillman, Lieutenant Jacob H., <i>A Supplement to the Survey of Military Justice</i> .....	12/219

### TABLE OF LEADING ARTICLES AND COMMENTS—TITLES

Aftermath of the Michigan Tax Decisions: State Taxation of Federal Property and Activities Today, The, <i>Colonel Edward H. Kurth</i> .....	13/167
Annexations of Military Reservations by Political Subdivisions, <i>Captain Ralph B. Hammack</i> .....	11/99
Army Relations With The Congress, <i>Colonel James K. Gaynor</i> .....	11/1
Canadian Military Law, <i>Group Captain J. H. Hollies</i> .....	13/69
Common Application of the Laws of War Within the NATO-Forces, The, <i>Doctor Gunther Moritz</i> .....	13/1
Communicating Threats—Its Relation to Extortion and Provoking Speeches and Gestures, <i>Frank J. Remington</i> .....	12/281
Court of Military Appeals and the Defense Counsel, The, <i>Cabell F. Cobbs</i> .....	12/131
Development of the Review and Survey Powers of the United States Court of Military Appeals, <i>Benjamin Feld</i> .....	12/177
Effect of Character of Discharge and Length of Service on Eligibility to Veterans' Benefits, <i>Harry V. Lerner</i> .....	13/121
Fast-Changing Law of Military Evidence, The, <i>Robinson O. Everett</i>	12/89
Formal Pretrial Investigation, The, <i>Lieutenant Colonel William A. Murphy</i> .....	12/1

## 1961 CUMULATIVE INDEX

Function of International Law in the International Community: The Columbia River Dispute, The, <i>Major Wallace S. Murphy</i> .....	13/181
Hiss Act and Its Application to the Military, The, <i>Captain Lee M. McHughes</i> .....	14/67
History of Short Desertion, A, <i>Alfred Avins</i> .....	13/143
Interrogation of Suspects by "Secret" Investigation, <i>Lieutenant Colonel Robert F. Maguire</i> .....	12/269
Judicial Limitations upon a Statutory Right: The Power of The Judge Advocate General to Certify under Article 67(b) (2), <i>Lieutenant Colonel Robert M. Mummey</i> .....	12/193
Legal Analysis of the Changes in War, A, <i>Major Joseph B. Kelly</i> ....	13/89
Legal Organization in the Armed Forces of the Philippines, <i>Colonel Claro C. Gloria</i> .....	14/151
Limitations on Power of the Convening Authority to Withdraw Charges, <i>Lieutenant Colonel Robert C. Kates</i> .....	12/275
Measure of Equitable Adjustments for Change Orders under Fixed-Price Contracts, The, <i>Captain Gilbert J. Ginsburg</i> .....	14/123
Military Installations: Recent Legal Developments, <i>Lieutenant Colonel Tozey H. Sewell</i> .....	11/201
Military Judicial System of Thailand, The, <i>Major General Samran Kantaprapha</i> .....	14/171
Military Legal System of the Republic of China, The, <i>Major General Lee Ping-chai</i> .....	14/160
Non-Discrimination in Employment: Executive Order 10925, <i>Captain Gilbert J. Ginsburg</i> .....	14/141
Official Records and Business Entries: Their Use As Evidence in Courts-Martial and the Limitations Thereon, <i>Lieutenant Donald E. Selby</i> .....	11/41
Pretrial Hearings for Courts-Martial, <i>Captain Philip G. Meenge</i> .....	12/49
Recent Developments—Instructions on the Sentence, <i>Lieutenant Alan B. Adkins</i> .....	14/109
Rehearings Today in Military Law, <i>Captain Hugh J. Clausen</i> .....	12/145
Selective Service: A Source of Military Manpower, <i>Lieutenant Colonel William L. Shaw</i> .....	13/35
Some Problems of the Law of War in Limited Nuclear Warfare, <i>William V. O'Brien</i> .....	14/1
Some Thoughts on Federal Courts and Army Regulations, <i>Daniel J. Meador</i> .....	11/187
Status of Deserters Under the 1949 Geneva Prisoner of War Convention, The, <i>Captain James D. Clause</i> .....	11/15
Status of Spouses as Witnesses Before Courts-Martial, The, <i>Captain Bueford G. Herbert</i> .....	11/141
Supplement to the Survey of Military Justice, A, <i>Captain Bruce E. Davis and Lieutenant Jacob H. Stillman</i> .....	12/219
Survey of Worthless Check Offenses, A, <i>Major James E. Simon</i> .....	14/29
Symposium on Military Justice, A—The Uniform Code of Military Justice, 1951-1961, Foreword, <i>Major General Charles L. Decker</i> ....	12/v

### BOOKS REVIEWED AND NOTED

Dahl, Richard C., and Whelan, John F.: The Military Law Dictionary (Oceana, 1960).....	13/197
--	--------

# MILITARY LAW REVIEW

## BOOK REVIEWS—REVIEWERS

Fulton, Captain William S., Jr.: The Military Law Dictionary (Dahl and Whelan).....	13/197
--	--------

## SUBJECT WORD INDEX

ACCUSED	
Rights of at Article 32 investigation.....	12/1
AIR FORCE	
Law of air warfare.....	13/1
ANNEXATION	
By municipalities .....	11/201
Of military reservations.....	11/99
APPEAL	
Power of TJAG to certify cases to USCMA, limitations thereon....	12/193
ARMY	
Field Army Tactical Operations Center.....	14/1
History of short desertion in.....	13/143
Interpretations of Army regulations by federal courts.....	11/187
Operations in pentomic warfare.....	14/1
Relations with Congress.....	11/1
ARRAIGNMENT	
Limitations on power of convening authority to withdraw charges before .....	12/275
AVIATION LAW	
Law of air warfare.....	13/1
AWOL	
Relation to desertion.....	13/143
BOOK REVIEWS	
The Military Law Dictionary, Dahl and Whelan.....	13/197
BUSINESS ENTRIES	
Effects of USCMA decisions.....	12/89
Use as evidence and limitations thereon.....	11/41
CANADIAN LAW	
Canadian military law.....	13/69
CERTIFICATION	
Effect of moot questions.....	12/193
Limitations upon the right of TJAG to certify cases to USCMA	12/193
Refusal to answer certified questions.....	12/193
CHARGES AND SPECIFICATIONS	
Communicating threats .....	12/281
Extortion .....	12/281
Limitations on power of convening authority to withdraw.....	12/275
Provoking speeches and gestures.....	12/281
USCMA decisions re, 1 July 1959 to 5 August 1960.....	12/219
Upon rehearing .....	12/145
Worthless check offenses.....	14/29
CIVIL AFFAIRS	
Operations in pentomic warfare.....	14/1
CIVILIAN PERSONNEL	
Effect of pentomic warfare on.....	14/1
Jurisdiction over .....	12/219
Non-discrimination in employment.....	14/141
Protection of in occupied zones.....	14/1

## 1961 CUMULATIVE INDEX

<b>CLAIMS</b>	
Eligibility to veterans' benefits.....	13/121
Procedures for obtaining veterans' benefits.....	13/121
<b>CODE OF CONDUCT</b>	
Application during pentomic warfare.....	14/1
<b>COMMUNICATING THREATS</b>	
Relation to extortion and provoking speeches and gestures.....	12/281
<b>CONDUCT IMPROPER UNDER UCMJ (ARTS. 133, 134)</b>	
Communicating threats .....	12/281
Worthless check offenses.....	14/29
<b>CONFESSIONS AND ADMISSIONS</b>	
Interrogation of suspects by "secret" investigation.....	12/269
<b>CONFINEMENT</b>	
Status of deserters.....	11/15
<b>CONSTITUTIONAL LAW</b>	
Aftermath of Michigan tax decisions .....	13/167
Selective Service System .....	13/35
<b>CONTRACTS</b>	
Change orders under fixed-price contracts .....	14/123
Government contractors as purchasing agents .....	13/167
Measure of equitable adjustments .....	14/123
Non-discrimination by government contractors .....	14/141
Purpose of equitable adjustments under changes clause .....	14/123
State taxation of government contractors .....	13/167
<b>COUNSEL</b>	
Conduct of: USCMA decisions re, 1 July 1959 to 5 August 1960....	12/219
Inadequate representation .....	12/131
Right to at Article 32 investigation .....	12/1
Survey of USCMA decisions re defense counsel .....	12/131
Upon rehearing .....	12/145
<b>COURT OF MILITARY APPEALS</b>	
Civilian Advisory Committee .....	12/177
Power to order rehearings .....	12/145
Recent decisions concerning instructions on the sentence .....	14/109
Review and survey powers .....	12/177
Survey of decisions concerning defense counsel .....	12/131
Survey of decisions concerning evidence .....	12/89
Survey of decisions concerning worthless check offenses .....	14/29
Survey of decisions from 1 July 1959 to 5 August 1960 .....	12/219
Work of the court, statistics of October 1959 term .....	12/219
<b>COURTS-MARTIAL</b>	
Appointment and composition.....	12/275
Convictions and offenses subject to Hiss Act application .....	14/67
<b>DEFENSE COUNSEL</b>	
Hiss Act considerations .....	14/67
Inadequate representation by .....	12/131
Survey of USCMA decisions re .....	12/131
<b>DEFENSES</b>	
To worthless check offenses .....	14/29
USCMA decisions re, 1 July 1959 to 5 August 1960 .....	12/219
<b>DEPOSITIONS</b>	
Effect of USCMA decisions .....	12/89
USCMA decisions re, 1 July 1959 to 5 August 1960 .....	12/219
Use of in rehearings .....	12/145

# MILITARY LAW REVIEW

## DESERTION

History and origin of .....	13/143
Legislative background of .....	13/143
Short or constructive desertion .....	13/143

## DETENTION

Unlawful .....	12/219
----------------	--------

## DISCHARGE

Character of as affecting eligibility to veterans' benefits .....	13/121
---	--------

## DISOBEDIENCE OF ORDERS OR REGULATIONS

General orders .....	12/219
----------------------	--------

## ENLISTMENT

Constructive .....	12/219
Fraudulent .....	12/219
Induction by Selective Service as affecting .....	13/35
Subject to Hiss Act determinations .....	14/67
Validity of for veterans' benefits .....	13/121

## ESPIONAGE

Conspiracy to commit .....	12/219
Under the Hiss Act .....	14/67

## EVIDENCE

Body fluids .....	12/89
Documentary .....	12/89
Drugs and lie detectors .....	12/89
Fast-changing military law of .....	12/89
Handwriting exemplars .....	12/89
Lack of, upon rehearing .....	12/145
Obtained through interrogation of suspects at "secret" investigation .....	12/269
Official records and business entries, use of and limitations thereon .....	11/41
Re worthless check offenses .....	14/29
Scope of cross-examination of accused .....	12/219
Stipulations .....	12/219
Testimony of spouses .....	11/141
USCMA decisions re, 1 July 1959 to 5 August 1960 .....	12/219
Use of former record and testimony in rehearings .....	12/145
Utilized in Hiss Act determinations .....	14/67

## EXTORTION

Relation to communicating threats and provoking speeches and gestures .....	12/281
---	--------

## FALSE OFFICIAL STATEMENTS

Effect of USCMA decisions .....	12/89
---------------------------------	-------

## FOREIGN LAWS

Application during pentomic warfare .....	14/1
Application of Geneva Conventions in pentomic warfare .....	14/1
Common application of within NATO forces .....	13/1
Geneva prisoner of war convention (1949) .....	11/15
Legal organization in the Armed Forces of the Philippines .....	14/151
Military judicial system of Thailand .....	14/171
Military law of Canada .....	13/69
Military legal system of the Republic of China .....	14/160

## GUILTY PLEAS

At rehearings .....	12/145
---------------------	--------



## 1961 CUMULATIVE INDEX

HEARINGS	
Pretrial, scope of.....	12/49
HEARSAY RULE	
Business entries exception.....	11/41
Official records exception.....	11/41
INSTRUCTIONS	
Effect of failure to instruct on sentence.....	14/109
On the sentence.....	14/109
Re worthless check offenses.....	14/29
Upon rehearing .....	12/145
INTENT	
Required in short desertion cases.....	13/143
Re worthless check offenses.....	14/29
INTERNATIONAL LAW	
Application during pentomic warfare.....	14/1
Canadian military law.....	13/69
Columbia River dispute.....	13/181
Common application of within NATO forces.....	13/1
Function of in the international community.....	13/181
Humanitarian laws of war in pentomic operations.....	14/1
Legal analysis of the changes in war.....	13/89
Legal organization in the Armed Forces of the Philippines.....	14/151
Means of peaceful settlement under.....	13/181
Military judicial system of Thailand.....	14/171
Military legal system of the Republic of China.....	14/160
NATO as a subject of.....	13/1
Restraints on conduct of war.....	13/89
Riparian rights under.....	13/181
Rule of military necessity.....	13/89, 14/1
Status of deserters.....	11/15
Unification within NATO.....	13/1
Use of international waterways.....	13/181
INTOXICATION	
As a defense.....	12/219
INVESTIGATIONS	
Article 32, effect of error at.....	12/1
Article 32, nature of .....	12/1
Article 32, survey of USCMA decisions.....	12/89, 12/219
Formal pretrial .....	12/1
Of charges .....	12/219
Secret, interrogation of suspects.....	12/269
JUDICIAL NOTICE	
Effect of USCMA decisions.....	12/89
JURISDICTION	
Lack of, rehearings.....	12/145
Over military reservations.....	11/201
Termination thereof .....	12/219
USCMA decisions re, 1 July 1959 to 5 August 1960.....	12/219
LARCENY	
By check—a survey.....	14/29
LAW OFFICER	
Power to order rehearings.....	12/145
Requirement for instructions on sentence.....	14/107

# MILITARY LAW REVIEW

## LEGISLATIVE LIAISON

Army relations with Congress..... 11/1

## MILITARY AFFAIRS

Army Board for Correction of Military Records..... 14/67  
Eligibility to veterans' benefits..... 13/121  
Hiss Act and its application to the military..... 14/67  
Interpretations of Army regulations by federal courts..... 11/187

## MILITARY JUSTICE

USCMA decisions re, 1 July 1959 to 5 August 1960..... 12/219

## MILITARY PERSONNEL

Application of Hiss Act to..... 14/67  
Army relations with Congress..... 11/1  
Available for use in rehearings..... 12/145  
Care of sick and wounded..... 14/1  
Effect of pentomic warfare on..... 14/1  
Eligibility to veterans' benefits..... 13/121  
Limitations on power of convening authority to withdraw charges 12/275  
Status of deserters under Geneva POW convention (1949)..... 11/15

## MILITARY RESERVATIONS

Annexation by political subdivisions..... 11/99  
Hunting and fishing rights..... 11/201  
Mineral exploration ..... 11/201  
Recent legal developments..... 11/201  
Water regulation ..... 11/201

## MISTAKE

As a defense..... 12/219

## NARCOTICS OFFENSES

Wrongful possession ..... 12/219

## NAVY

Law of naval warfare..... 13/1

## NONAPPROPRIATED FUND ACTIVITIES

Application of Hiss Act to employees of..... 14/67

## NON-DISCRIMINATION

By government contractors..... 14/141  
Effect of Executive Order 10925..... 14/141  
In government employment..... 14/141

## OFFICIAL RECORDS

Effect of USCMA decisions..... 12/89  
Use as evidence and limitations thereon..... 11/41

## PAY AND ALLOWANCES

Effect of Hiss Act on..... 14/67

## PLEAS AND MOTIONS

USCMA decisions re, 1 July 1959 to 5 August 1960..... 12/219

## PRESUMPTIONS

Effect of USCMA decisions..... 12/89

## PRETRIAL

Hearings ..... 12/49  
Investigations ..... 12/1  
Procedure ..... 12/49  
Scope of ..... 12/49  
Status of ..... 12/49

## 1961 CUMULATIVE INDEX

<b>PRISONERS</b>	
Duties of detaining power under the Geneva Conventions.....	14/1
Status of deserters.....	11/15
<b>PRIVILEGED RELATIONS AND COMMUNICATIONS</b>	
Husband—wife .....	12/219
<b>PROCEDURE</b>	
Pretrial .....	12/219
Proposed pretrial .....	12/49
Trial .....	12/219
<b>PROCUREMENT</b>	
Aftermath of the Michigan tax decisions.....	13/167
Measure of equitable adjustments for change orders under fixed-price contracts .....	14/123
Non-discrimination in government employment and by government contractors .....	14/141
Purpose of equitable adjustments under the changes clause.....	14/123
The Severin doctrine.....	14/123
<b>PROVOKING SPEECHES</b>	
Relation to communicating threats and extortion.....	12/281
<b>REHEARINGS</b>	
Authority to order.....	12/145
Convening authority's action.....	12/145
Historical development of.....	12/145
Limitations on .....	12/145
Procedure .....	12/145
Types of .....	12/145
Use of in military law.....	12/145
<b>RESERVE FORCES</b>	
Training facilities .....	11/201
<b>RETIREMENT</b>	
Effect of Hiss Act on retirement benefits.....	14/67
<b>REVIEW</b>	
By courts of Selective Service classifications and orders.....	13/35
By USCMA of defense counsel tactics.....	12/131
Judicial limitations upon the power of TJAG to certify cases to USCMA .....	12/193
Of Hiss Act determinations.....	14/67
Power of commutation.....	12/219
Review and survey powers of USCMA.....	12/177
Scope of, by USCMA.....	12/177
USCMA decisions re, 1 July 1959 to 5 August 1960.....	12/219
Vote required for petitions of review.....	12/177
<b>SEARCH AND SEIZURE</b>	
Effect of USCMA decisions.....	12/89
USCMA decisions re, 1 July 1959 to 5 August 1960.....	12/219
<b>SELECTIVE SERVICE</b>	
Aliens .....	13/35
Conscientious objectors .....	13/35
Constitutionality of .....	13/35
Delinquency .....	13/35
History of .....	13/35
Legislative background of.....	13/35
Registration and classification under.....	13/35

## MILITARY LAW REVIEW

Terminology .....	13/35
<b>SELF-INCRIMINATION</b>	
Interrogation of suspects at "secret" investigation.....	12/269
USCMA decisions re, 1 July 1959 to 5 August 1960.....	12/219
<b>SENTENCE AND PUNISHMENT</b>	
As affects Hiss Act determinations.....	14/67
Automatic reductions .....	12/219
Execution of punitive discharge.....	12/219
Instructions on maximum punishment.....	12/219, 14/109
Recent developments re instructions on sentence.....	14/109
Reduction .....	14/109
Rehearing on sentence.....	12/145
Requirement for instructions on.....	14/109
USCMA decisions re, 1 July 1959 to 5 August 1960.....	12/219
<b>SOUTHEASTERN ASIAN LAW</b>	
Legal organization in the Armed Forces of the Philippines.....	14/151
Military judicial system of Thailand.....	14/171
Military legal system of the Republic of China.....	14/160
<b>STATE LAWS</b>	
Discrimination against federal government.....	13/167
Taxation of federal property and activities.....	13/167
<b>TAXES</b>	
Aftermath of Michigan tax decisions.....	13/167
State taxation of federal property and activities.....	13/167
<b>UNIFORM CODE OF MILITARY JUSTICE</b>	
Article 31 .....	12/89, 12/219, 12/269
Article 32 .....	12/1, 12/219
Article 67(b) (2) .....	12/193
Article 83 .....	12/219
Article 85(a) (2) .....	13/143
Article 92(1) .....	12/219
Article 97 .....	12/219
Article 117 .....	12/281
Article 121 .....	12/219
Article 121 (worthless check offenses) .....	14/29
Article 127 .....	12/281
Article 133 (worthless check offenses) .....	14/29
Article 134 (communicating threats) .....	12/281
Article 134 (false swearing) .....	12/219
Article 134 (narcotics offenses) .....	12/219
Article 134 (usury) .....	12/219
Article 134 (worthless check offenses) .....	14/29
Civilian Advisory Committee.....	12/177
Proposed pretrial hearings under.....	12/49
Review and survey powers of USCMA.....	12/177
The Military Law Dictionary, Dahl and Whelan.....	13/197
<b>VETERANS' BENEFITS</b>	
Character of discharge.....	13/121
Eligibility to .....	13/121
Entitlement of dependents to.....	13/121
History of .....	13/121
Legislative background of .....	13/121
Length of service.....	13/121

## 1961 CUMULATIVE INDEX

Types of .....	13/121
<b>WAR</b>	
Historical analysis of.....	13/89
Legal analysis of the charges in.....	13/89
NATO and the laws of war.....	13/1
Pentomic concept of.....	14/1
Problems of common application of laws of war within NATO....	13/1
Restraints on conduct of.....	13/89
Rights and duties of deserters.....	11/15
Role of law in a limited war.....	13/89
Short desertion in.....	13/143
Use of nuclear weapons in.....	13/1, 14/1
<b>WARNING</b>	
Requirements of by Article 31(b), UCMJ.....	12/89, 12/269
USCMA decisions re, 1 July 1959 to 5 August 1960.....	12/219
<b>WITNESSES</b>	
Status of spouses.....	11/141
<b>WORTHLESS CHECK OFFENSES</b>	
New legislation regarding.....	14/29
Pleading problems .....	14/29
Survey of .....	14/29

BY ORDER OF THE SECRETARY OF THE ARMY:

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