DEPARTMENT OF THE ARMY PAMPHLET 27-100-11

MILITARY LAW REVIEW

HEADQUARTERS, DEPARTMENT OF THE ARMY JANUARY 1961

PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

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HEADQUARTERS,
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MILITARY LAW REVIEW

Articles:

Comments:

ARMY RELATIONS WITH THE CONGRESS*

BY COLONEL JAMES K. GAYNOR**

I. INTRODUCTION

The founding fathers, in drafting the Constitution of the United States, wisely provided for three branches of the federal government, each independent but with a system of checks and balances.

The Congress, which is the legislative branch, was given the power to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government of the military forces, and to organize and call into service the militia.[1] In designating the President of the United States as the commander-in-chief,[2] however, the military forces were placed in the executive branch of the government. Although commanded by the President, the military forces are dependent upon the Congress for their existence, for the rules which govern them, and equally important, for the money necessary to maintain them.

At one time the regulation of the military services by the Congress included such minutiae as a provision that women may accompany troops as laundresses but not to exceed four per company,[3] that one cook shall be authorized each company of less than thirty men and two cooks for each company of more than thirty men,[4] and that enlisted men shall be furnished tobacco by commissaries not to exceed 16 ounces per month.[5]

The regulating of such details long since has been delegated to the executive branch of the government. Nevertheless, the Congressional regulation of the military services still is quite extensive, as evidenced by the 595 pages of title 10 of the United States Code when the codification was enacted in 1956,[6] with the supplementary codification of 1958 requiring 106 additional pages of the Statutes at Large.[7]

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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 nor any other governmental agency.

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1 U.S. Const. art. I, § 8.

2 *Id.* art. II, §2.

3 Rev. Stat. § 1240 (1875).

4 *Id.* § 1233.

5 *Id.* § 1149.

6 70A Stat. 1 (1956).

7 72 Stat. 1437 (1958).

II. LEGISLATIVE LIAISON

The President of the United States has a duty to recommend to the Congress such measures "as he shall judge necessary and expedient."[8] To assist the President in performing this duty, each principal agency of the executive branch of the Government has an office or personnel responsible for legislative liaison.[9] These functions may be performed by one or a few people in some agencies whereas in the larger agencies, such as the military departments, the legislative liaison offices may have several divisions performing different functions.[10]

Just as the primary mission of a military organization is to win in battle with a minimum of loss, the primary mission of legislative liaison is to assist the Congress in such a way that needed legislation will be enacted and proposals which are harmful will be defeated. In accomplishing this mission, the Congress must be kept informed and a favorable atmosphere must be maintained. The Army has a Chief of Legislative Liaison,[11] the Navy has a Chief of Legislative Affairs, the Air Force has a Director of Legislative Liaison, and there is an Assistant to the Secretary of Defense for Legislative Affairs[12] although some legislative functions are performed in the Department of Defense General Counsel's office. The legislative liaison offices of the services have some differences in internal organization but the same general functions must be performed. There must be a central point of contact for Congressional reactions; the legislative program must be formulated and administered; the views of the military departments must be expressed concerning bills which have been introduced, where such views are requested by Congressional committees; legislative counsel must be provided for witnesses who appear before Congressional committees; the Congress must be made aware of military policies, objectives, and requirements; inquiries from Members of Congress must be answered; and escort officers must be provided for Members of Congress or Congressional staff members who visit military installations. Furthermore, the military secretariat and the military staffs must be kept informed of Congressional matters, and Congressional implications must be considered in the planning and formulation of military policy.

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[8] U.S. Const. art. II, § 3.

[9] Responsible for legislative liaison for President Eisenhower were Maj. Gen. Wilton B. Persons, USA–Ret., formerly Army Chief of Legislative Liaison, and his deputy, Col. Bryce N. Harlow, USAR.

[10] See Kefauver, *Executive-Congressional Liaison,* 289 Annals of The American Academy of Political and Social Science 108 (1953).

[11] Par. 15, AR 10–5, 22 May 1957, as amended by Change 4, 10 July 1959; AR 1–20, 24 Jan 1956.

[12] DOD Directive 5105.13, 10 Aug 1957.

There is one important exception in the responsibilities of the legislative liaison offices. In the Office of the Secretary of Defense and in each of the military services, it is the Comptroller who is responsible for all appropriations bills and all liaison with the Committees on appropriations. With respect to appropriation matters, the Comptroller offices perform functions which correspond to those of the legislative liaison offices.

An example of legislative liaison during the Revolutionary War is reported to have taken place early in 1781 when General "Mad Anthony" Wayne and six regiments of Pennsylvania troops marched to Princeton and camped while negotiating with the Continental Congress, then sitting at Philadelphia, about back pay and discharges for those who had served three years.

Responsibility for Army relations with the Congress was assigned in 1918 to the War Plans Division of the War Department General Staff. In 1921, the position of Deputy Chief of Staff was created and among the duties was responsibility for legislative matters. Also created was an advisory council to consider legislative recommendations of the War Department General Staff and submit them to the Secretary of War. A branch was created in the office of the Deputy Chief of Staff to act as a clearing house for all legislative proposals, and this branch was reconstituted in February 1931 as the Budget and Legislative Planning Branch. With the reorganization of the War Department in 1942, a Legislative and Liaison Division was created as a staff agency of the War Department,[13] and the division was placed under the supervision of the Chief of Information in the office of the Chief of Staff in 1948.[14] The Office of the Chief of Legislative Liaison was created in February 1950, removed from the supervision of the Chief of Information and placed directly under Chief of Staff supervision.[15] The office was transferred in February 1955 from the Army staff to the office of the Secretary of the Army.[16]

The present Chief of Legislative Liaison is a major general[17] and the deputy is a brigadier general.[18] In addition to an executive

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[13] WD Cir. 59, 1942.

[14] DA Cir. 342, 1948.

[15] DA Cir. 12, 1950.

[16] DA Gen. Order 15, 1955.

[17] Maj. Gen. R. L. Vittrup became Chief of Legislative Liaison in August 1959. His predecessors were Maj. Gen. Wilton B. Persons, Dec. 1941–July 1948; Maj. Gen. Clark L. Ruffner, July 1948–Aug. 1950; Maj. Gen. Miles Reber, Aug. 1950–Sept. 1953; Brig. Gen. (later, Maj. Gen.) Clarence J. Hauck, Jr., Oct. 1953–July 1956; Brig. Gen. Joseph E. Bastion, Jr., acting, July–Oct. 1956; and Maj. Gen. J. H. Michaelis, Nov. 1956–Aug. 1959.

[18] Brig. Gen. H. A. Gerhardt became Deputy Chief of Legislative Liaison in November 1959, succeeding Brig. Gen. C. G. Dodge who was promoted to major general and assumed command of the 1st Cavalry Division in Korea.

and an administrative office, there are five divisions in the Office of the Chief of Legislative Liaison. The total strength authorization is thirty officers and forty-eight civilians. Officers assigned to the Legislative Division and the Congressional Investigations Division are judge advocates; all other officers are selected from the line.

The Legislative Division has administrative responsibility for the Department of Defense Legislative Program within the Department of the Army, provides legislative counsel for Army witnesses who appear before Congressional committees to testify concerning legislative proposals, has administrative responsibility for the expression of military views upon legislative proposals introduced into the Congress where such views are requested by Congressional committees, monitors legislative hearings which are of interest to the Army, and prepares fact sheets with respect to important legislative proposals which are of interest to the Army. An exception to the foregoing is any matter relating to an appropriations bill or a Committee on Appropriations, which is a Comptroller responsibility.

The Congressional Investigations Division monitors investigative hearings and provides counsel for Army witnesses called upon to testify before Congressional committees on investigative matters. A Congressional committee has investigative power because legislation may result from the investigation. So long as a matter is in the investigative state, the Congressional Investigations Division has monitoring responsibility, but when a numbered bill or resolution is introduced, the responsibility is transferred to the Legislative Division.

The Congressional Liaison and Inquiry Division maintains personal contact with individual Members of Congress to keep them informed of Army policies and requirements and provide answers to their inquiries. This division maintains an office in the Senate Office Building and another in the House Office Building to which Congressional inquiries may be directed. It provides an escort officer if a Member of Congress or a Congressional committee visits an Army installation. During the fiscal year ending June 30, 1960, escort officers were provided for 129 separate trips involving more than 150 Members of Congress and more than 100 Congressional staff members. Along with the Special Operations Division, the Congressional Liaison and Inquiry Division provides replies to the numerous inquiries which are received from Members of Congress. The number of communications received from Members of Congress which must be answered is very large. In 1959 there were some 41,000 written inquiries, 76,000 telephonic

inquiries, and more than 46,000 verbal inquiries to liaison officers from Members of Congress. In addition, there were over 4,000 written inquiries and more than 6,000 telephonic inquiries from Congressional Committees.

The Special Operations Division answers Congressional inquiries and provides information to Members of Congress and Congressional committees. Its functions are distinguished from similar functions of the Congressional Liaison and Inquiry Division according to the subject matter involved.

The Plans and Projects Division participates in Department of the Army planning to insure that legislative or other Congressional implications are considered, performs overall planning functions for the Chief of Legislative Liaison, maintains the research files which are necessary to the operation of legislative liaison, maintains a schedule of Congressional hearings, and has administrative responsibility for the travel of Congressional personnel to Army installations.

The legislative liaison offices of the other services are so organized as to provide for the accomplishment of all of the foregoing functions. The Navy has a Congressional Legislative Division, a Congressional Liaison Division, a Congressional Investigations Division, a Congressional Information Division, and a special projects unit. The Air Force has a Congressional Committee Division and a Congressional Inquiry Division, with Senate and House liaison offices operating apart from either division. In the Office of the Secretary of Defense, liaison functions are performed by the Assistant to the Secretary for Legislative Affairs, and the administering of the legislative program and expressing military views on bills are functions of the Legislative Reference Service. The latter operates in the office of the General Counsel.

In performing their functions, legislative liaison personnel must be mindful that there is no chain of command in the Congress such as exists in the military structure. The leaders in Congress may have influence and they may be persuasive but they have no power of command. The decisions which are made in the legislative process are group decisions. Therefore, many decisions are the result of compromise. It may be necessary to accept amendments to a proposal in order to get the support of some members of the body. When legislative counsel learns of a proposed amendment, he must quickly evaluate it to determine whether it will be harmful to the military service, and if so, the extent to which it will be harmful. It may be possible to persuade the leadership that the amendment should not be adopted. If it appears that the measure cannot be adopted without the amendment, a determination must

be made as to whether it would be better to have the measure defeated than adopted with the amendment. This is illustrative of the many problems which legislative liaison personnel face in the performance of their duties.

III. THE LEGISLATIVE PROGRAM

Each year the Department of Defense formulates a legislative program which includes legislative proposals recommended by the Secretary of Defense or the military services. The number of proposals on the program varies from year to year; there may be as few as 60 or as many as 150. Some are extremely important while others may be less important, but, needless to say, each program proposal is of great interest to those affected by it. The military pay proposal was important in 1958 and the extension of selective service was important in 1959. Each year considerable attention must be given to the Military Construction Authorization Bill.[19]

Congress cannot appropriate money unless there first has been authorizing legislation. The annual appropriations for military pay, operations, and maintenance are authorized by permanent legislation, but military construction requirements vary from year to year. Planned construction by all of the military services is included in one bill with different titles for the Army, Navy, Air Force, and reserve components. If the Army wishes to construct barracks at a post which it is estimated will cost $100,000, authorization for the construction must be given by an authorizing act, and the funds then must be appropriated by a separate act. The appropriations act cannot provide a greater amount than that which is in the authorizing legislation.

The Department of Defense Legislative Program is formulated from the recommendations of the military services and the various offices directly under the Secretary of Defense.[20] Instructions are issued prior to mid-summer of each year with respect to the following year's program. A Department of the Army directive sets forth the mechanism within the Army for having a proposal recommended for the legislative program.[21] For example, if the

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[19] Also see § 412(b) of the act of August 10, 1959, 73 Stat. 302 (1959), which provides: "No funds may be appropriated after December 31, 1960, to or for the use of any armed force of the United States for the procurement of aircraft, missiles, or naval vessels unless the appropriation of such funds has been authorized by legislation enacted after such date."

[20] DOD Directive 5500.1, 1 Oct 1957, is the basic directive upon the subject. For a discussion, see Bartimo, *Legislative Proposals from within the Department of Defense*, JAG Journal [Navy], Oct 1959, p. 9. Also see DOD Directive 5500.4, 2 Oct 1957.

[21] DA Memo 340-6, 11 Oct 1955, with Change 1, 21 Feb 1956.

Deputy Chief of Staff for Personnel believes that the Congress should provide a new enlisted grade structure, his office will outline a legislative proposal and obtain the concurrence of all interested Army staff agencies, including The Judge Advocate General for legal implications, the Comptroller for fiscal implications, and the Chief of Legislative Liaison for legislative implications. Legislative drafting service is provided by The Judge Advocate General, and the Chief of Staff must recommend approval by the Secretary of the Army. The Chief of Legislative Liaison sends the proposal to the appropriate Assistant Secretary of the Army for approval by the Secretary, obtains the concurrence of the Navy and Air Force, and then sends it to the Secretary of Defense for his approval. Thereafter it must have the approval of the Bureau of the Budget,[22] which coordinates it with any other affected agencies of the executive branch of the Government.[23] Upon the receipt of Bureau of the Budget approval, the proposal is sent to the presiding officers of the Senate and House with requests for enactment.

Proposals which are a part of the Department of Defense Legislative Program form but a small proportion of the bills introduced during a session of Congress, which, in one way or another, may have military implications. When a bill or resolution is introduced and is referred to a Congressional committee, the committee almost invariably will send a copy to each agency of the executive branch which will be affected by it with a request for its views. In the course of a session of Congress, there will be perhaps 2,000 introduced in which the views of the military services will be requested. The committee normally sends a request for views to the Secretary of Defense, and in most cases his office will assign "reporting action," as it is known, to the military service having primary interest in the subject matter.[24] Some of the reports upon bills are prepared in the Office of the Secretary of Defense and concurrence of the services is requested. If one of the services prepares the report, it must obtain concurrence from the other services and Department of Defense approval. In any case, the views expressed must have Bureau of the Budget ap-

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[22] Bureau of the Budget, Cir. No. A–19, revised 16 June 1960.

[23] Discussed in Cook, *DOD Legislative Proposals and the Bureau of the Budget*, JAG Journal [Navy], Oct 1959, p. 13.

[24] See DA Memo 1–27, 8 May 1959, for policy guidance in furnishing information to Congressional Committees; DA Memo 340–6, 11 Oct 1955, with Change 1, 21 Feb 1956, for the mechanics of preparing reports; DA Memo 340–7, 3 May 1957, for responsibilities and channels in connection with Congressional correspondence; DA Memo 340–15, 1 Aug 1958, with Change 2, 18 June 1959, for guidance in the preparation of fact sheets and summary sheets; and DA Memo 380–10, 15 July 1957, relating to the furnishing of classified information to Congressional committees.

proval although in a rare case a committee will request that action be expedited and not await Bureau of the Budget approval. In such a case the report will include a disclaimer, stating that the views expressed have not been approved by the Bureau of the Budget.

IV. THE INDIVIDUAL AND CONGRESS

A member of the military service may have contact with one or more Members of Congress in various ways. He may be assigned the task of replying to a Congressional inquiry. His organization may be visited by a Member of Congress or by members of a Congressional committee. He may, when in Washington, call upon his Congressman. He may write to his Congressman and request intervention in an official matter. He may testify before a Congressional committee, either as an official representative of the Department of the Army or upon request of the committee because he is known to have knowledge of a subject under consideration.

Thousands of inquiries are received each year from Members of Congress by Army Legislative Liaison, and many others are sent directly to military organizations by Members of Congress or are forwarded by Headquarters Department of the Army for direct reply. Although in a rare case a Member of Congress may express indignation at an alleged injustice, such is the exception. In most cases, the Member of Congress will have received a letter from a constituent asking that he "do something" about a situation with the expectation that Congressional "pressure" will be exerted to produce results. While the Members of Congress recognize that a large number of the complaints they receive are without merit, they nevertheless are not fulfilling their function of representing their constituents if they do not at least make an inquiry. They cannot disregard very many such letters if they expect to be re-elected. Whether the Member of Congress simply has requested information or whether, in the rare case, he has caustically inferred that the military service was wrong, each reply must follow the same rules.

A reply to a Congressional inquiry should state facts unless it involves classified information, and in that case, guidance should be sought from the Chief of Legislative Liaison.[25] If a particular law or regulation provides the answer, it should not only be cited but there should be sufficient explanatory matter to show its application. A letter which states that action was taken "in accordance with existing law and regulations" really gives no answer; such

[25] See DA Memo 340–7 and DA Memo 380–10, *supra* note 24.

language may even give the impression that the applicability of the law or regulation is open to question. The letter must be courteous, and it must be so phrased that there will be no objection to the Member of Congress sending a copy of it to the constituent who inquired. As a matter of fact, in a large number of cases, the Member of Congress will send a copy of the reply to his constituent to show that he has inquired about the matter. In composing a reply to a Congressional inquiry, the writer should visualize the recipient's point of view. He should consider how he would react upon receiving the letter if he were the Member of Congress or the constituent.

When a Member of Congress or a Congressional committee visits a military organization, advance notice usually is given and there usually is an escort officer from Army Legislative Liaison. Guidance will be provided by the escort officer if the opportunity presents itself. There are certain rules which must be followed, however, not only by the commander and officers of the organization visited but also by the troops. A member of a Congressional committee staff or of a Member of Congress' personal staff may not appear to have as much prestige as a Member of Congress, but such persons perform important functions in the legislative process and should receive substantially the same courtesies as the Member of Congress if the visit is of an official nature. The Congressional visitor may visit the military organization upon invitation of the commander, for example, to deliver an address or to attend an official function. In such a case the visitor should be treated as a distinguished guest, and the courtesies to be extended should follow a rule of prudence similar to that which exists in civilian life.

If the Congressional visitor is not an invited guest, it should not be assumed that he is on a pleasure visit at the expense of the taxpayers, despite an occasional newspaper article which is critical of so-called "junkets." A Member of Congress or a staff member is not permitted to make an investigatory trip unless it is authorized by the chairman of the committee which he represents. If he is authorized by the committee to make the trip, he is an official representative of that committee and is required to report his findings or conclusions to the committee upon completion of the trip.

It should be recognized that Congressional visitors usually are excellent judges of human nature or they would not be holding the places in the federal government which they hold. Any attempt to overwhelm them—or in soldier's language, to give them a "snow job"—will not likely create the intended impression. Although

one should be courteous to the Congressional visitor, he need not be servile; he may be forceful without deference. The classification of security information which may be given the Congressional visitor usually will be available beforehand, but even if the visitor is entitled to receive certain classified information, he should be told at the time that it is classified. It never is safe to underestimate the knowledge of the Congressional visitor, yet it should not be taken for granted that the visitor will know all details of that which is the subject of the inquiry. One who is discourteous to a Congressional visitor, or loses his temper, or is not prompt, is not a credit to the military service. Above all, those in the field should keep the Chief of Legislative Liaison informed of all matters relating to Congressional visits and visitors since the Legislative Liaison office can be of considerable assistance.

The member of the military service, particularly the officer, who is stationed in Washington or who visits Washington is encouraged to call at the office of his Congressman and sign the visitor's register. He may not be able to talk with his Congressman, for the Members of Congress are busy; he may only have a chance for a few words with the administrative assistant. There is scarcely a Member of Congress, however, who is not pleased when one of his constituents pays a "courtesy call" at his office, and the member of the military service who does so may create an excellent impression for the service. One should not insist upon seeing the Congressman unless encouraged to do so by members of the Congressman's staff. If he does have an opportunity to talk with the Congressman, he should remember that Members of Congress are busy; one should confine his visit to five or ten minutes unless the Congressman insists that he remain longer.

Each member of the military service is guaranteed three courses of action if he feels that he has a complaint which cannot be adjusted in the normal course of command, or which he feels will not be adjusted. He may visit a chaplain, he may complain to an inspector general, or he may write to his Congressman. Although the number of officers who become so indignant that they write their Congressman is very few, the problem may arise as to the course of action to be taken when an enlisted member of the service writes to his Congressman. Unfortunately, an officer may learn of this only when he receives a letter through military channels informing him that he is the subject of the complaint.

It is well to know the law and the Army Regulations applicable to letters to Members of Congress. The traditional prohibition, known for so many years, has ceased to exist. The present statute upon the subject is as follows:

"No person may restrict any member of an armed force in communicating with a Member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States."[26]

The implementing Army Regulation is in substantially the same language:

"Military personnel of the Army may communicate with any member, or committee of Congress on any subject, except when the communication is unlawful, or is in violation of a regulation necessary to the security of the United States."[27]

A member of the military service is not permitted to communicate classified security information to anyone, even a Member of Congress, unless he is authorized to do so by proper military authority. An example of an unlawful communication not involving classified security information is one which is libelous or slanderous. Members of Congress have an immunity from actions in libel or slander for anything said on the floor of either house,[28] and this has been extended by interpretation to those who, within the scope of their official duties, give information to Congressional committees upon committee request.[29] However, an individual cannot avoid liability for a libelous or slanderous statement for the sole reason that it was written or spoken to a Member of Congress.

The proportion of Army officers who at some time may be called upon to testify before a Congressional committee is relatively small. Nevertheless, during a session of Congress, dozens of Army officers appear as witnesses before Congressional committees. A general or field-grade officer may be selected to present the Army views in support of or in opposition to a bill or with respect to a matter under investigation. If the matter is of sufficient importance, however, this duty may devolve upon a civilian official in the office of the Secretary of the Army, such as the Secretary himself, the Under Secretary, an Assistant Secretary, or one of their deputies. If the matter under consideration is broad in scope, one or more Army officers may accompany the principal witness as support witnesses. They are available to assist the principal witness by providing information upon request, or if there is a line of questioning involving details, the testimony may be given by the support witness. The individual who is selected as a witness to represent the Army will be provided guidance by the Office of

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[26] 10 U.S.C. § 1034 (1958).

[27] Subpar. 16*a*, AR 600–10, 19 Dec 1958.

[28] U.S. Const. art. I, § 6.

[29] Pearson v. Wright, 156 F. Supp. 137 (D.D.C. 1957). Compare Tenny v. Brandhove, 341 U.S. 367 (1951), rehearing denied, 342 U.S. 843 (1952); and Barksey v. United States, 167 F.2d 241 (D.C. Cir. 1948), *cert. denied*, 334 U.S. 843 (1949).

the Chief of Legislative Liaison (or the Comptroller, if the appearance is to be before an Appropriations Committee). The requirements for Army personnel who appear as witnesses before Congressional committees are set forth in Army directives.[30] These should be followed, and notification should be given to the Chief of Legislative Liaison of an expected appearance before a Congressional committee unless the requirement for the appearance emanated from his office. In any event, the Legislative Liaison office has experienced legislative counsel who will assist Army witnesses who appear before Congressional committees. Only the very imprudent will neglect to utilize their services.

In a rare case, an individual member of the service—officer or enlisted—may request that he be heard by a Congressional committee upon a particular matter. The following is provided by Army Regulations:

> "It is the policy of the Department of the Army to make the maximum information available to congressional committees as to its operations and activities, subject to the provisions of AR 380–5 [which deal with classified information]. When requested to appear before a committee of Congress, military personnel of the Army will effect coordination with the Chief of Legislative Liaison, Office, Secretary of the Army (or the Comptroller of the Army on matters pertaining to appropriations) for guidance or assistance as deemed necessary."[31]

Unless a person is known to have peculiar knowledge of a particular matter, he is not encouraged to volunteer as a witness if he has not been selected to appear as an official representative of the Army. If the individual volunteers to testify for his own purpose and is stationed some considerable distance from Washington, he may be expected to take leave and make the trip to Washington at his own expense unless some obvious advantage to the Committee or to the Army is apparent.

V. CONCLUSION

There can be no doubt that proper Congressional relations are extremely important to the Army. Although the Chief of Legis-

[30] DA Memo 1–24, 17 Feb 1959. The Comptroller of the Army has issued a pamphlet to provide guidance for appearances before the Committee on Appropriations. A splendid article by one of the counsel of the House Committee on Armed Services is Blandford, *Testifying Before Congressional Committees*, 81 U.S. Naval Institute Proceedings 295 (1955). Also see Mott, *Testifying Before a Congressional Committee*, JAG Journal [Navy], Oct 1959, p. 21.

[31] Subpar. 16*b*, AR 600–10, 19 Dec 1958. The prior regulation, subpar. 16*b*, AR 600–10, 15 Dec 1953, provided: "Except when summoned or requested to appear . . . no military personnel on active duty will appear before committees of Congress unless authorized or directed by the Secretary of the Army." For an interpretation of this regulation, see JAGA 1955/4685, 13 May 1955. For an interpretation of the regulation in effect prior to that time (par. 15, AR 600–10, 10 Nov 1950), see JAGA 1951/7089, 27 Nov 1951.

lative Liaison has a primary responsibility for Congressional relations, any member of the service may at some time or another be in a position to enhance or harm those relations. The member of the military service who has occasion for contact with the Congress or a Member of Congress would do well to seek and follow the guidance of the Office of the Chief of Legislative Liaison.

One who is not familiar with the Congress may have the impression that Ham Fisher's characterization of Congressman Weidebottom, Al Capp's characterization of Senator Phogbound, and Lichty's characterization of Senator Snort in the comic sections of the newspapers are typical. The one who is familiar with the Congress can give assurance that nothing could be farther from the truth.

Since there are 537 members of the Congress, there are varying personalities and backgrounds.[32] Some are jovial, some are friendly, and some are irascible. By and large, they are a sincere group who work far longer hours than probably would be required in their professions or in industry and who, despite varying shades of political belief, have the welfare of the country at heart. Each has attained a measure of success or he would not have been elected to Congress. More than four-fifths of the group must seek re-election every two years, if they expect to remain in Congress. Even should the voters make a mistake upon one occasion and elect a less-than-able man or woman, they are not likely to repeat the mistake. In a democracy such as ours, few things can remain hidden.

The Members of the Congress of the United States deserve high praise for the tremendous job they do for the country. Army personnel should do all in their power to assist them and nothing to deter them.

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[32] For example, many Congressmen are war veterans. More than 25 members of the 86th Congress were in the Army reserve. Among the reservists whose branch was JAGC were Senator Yarborough (D.–Tex.), a Colonel; Colonels Ashmore (D–S.C.), Albert (D.–Okla.), and Pirnie (R.–N.Y.); Lieutenant Colonels Adair (R.–Ind.), Fountain (D.–N.C.), and Rogers (D.–Tex.); Majors Foley (D.–Md.), Levering (D.–Ohio), and Poff (R.–Va.); and Captain Giaimo (D.–Conn.). Among the World War II judge advocates were Congressmen Rhodes (R.–Ariz.), Denton (D.–Ind.), Rodino (D.–N.J.), Miller (R.–N.Y.) and Evins (D.Tenn.). Congressmen O'Hara (D.–Ill.) and Ray (R.–N.Y.) were judge advocates during World War I. Among the Congressional staff members who are reserve judge advocates are Colonel John C. Herberg, Jr., Office of the Senate Legislative Counsel; Lieutenant Colonel Eli E. Nobleman, Senate Committee on Government Operations; Major James H. Duffy, Privileges and Elections Subcommittee of the Senate Committee on Rules and Administration; Captain William A. Cook, Office of Congressman Riley (D.–S.C.); and Captain William H. Jordan, Jr., Office of Senator Russell (D.–Ga.).

THE STATUS OF DESERTERS UNDER THE 1949 GENEVA PRISONER OF WAR CONVENTION*

BY CAPTAIN JAMES D. CLAUSE**

I. INTRODUCTION

Soldiers who desert their own forces and go over to the enemy as defectors appear destined to play an important role in future wars. When the lines of battle are clearly drawn between two fundamental ideological beliefs the instances of desertion and demand for asylum may be expected to increase many fold. The probability of this assumption is vividly illustrated by the repatriation problem of the recent Korean conflict. Another element of modern warfare which supports this assumption is the increased emphasis placed on the use of psychological warfare, with its appeals to enemy personnel to desert. The tactical and psychological advantage of individual, and particularly mass desertions by enemy personnel, will certainly not be overlooked by belligerents in future wars.

While it is recognized that desertion may be motivated by reasons other than ideological beliefs, this study is concerned primarily with this type of deserter because of his growing importance and possible utilization. His status in international law must be analyzed now in the relative calm of peace, or a forced solution will be found in the heat and haste of war which will satisfy few when peace is again restored.

The main purpose of this article is to review the pertinent provisions of the 1949 Geneva Prisoners of War Convention[1] and other sources of international law to determine the respective rights and duties of deserters and their captors. To make such a determination it is necessary to resolve the issue of whether a deserter must be accorded prisoner of war status under the 1949 Convention. If deserters are included within the provisions of that Convention then there is little doubt as to their rights and

* 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 Eighth Advanced Class. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School nor any other governmental agency.

** JAGC, U.S. Army; LL.B, Loyola University of New Orleans, 1952.

[1] Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug 1949 [1955] 6 U.S.T. & O.I.A. 3316, T.I.A.S. No. 3364 (effective 2 Feb 1956). Hereinafter, all references to the Convention or mention of specific articles refer to this Convention unless otherwise indicated.

duties. However, the 1949 Convention presents, rather than solves, the problem of initial status. This status, because of the express prohibitions in the articles, becomes crucial.

The absence of the word "deserter" from the enumeration of persons who are given prisoner of war status under Article 4 of the Convention creates the first difficulty. In view of the differences in the practice of nations prior to the 1949 Convention it might be concluded that if the drafters had intended that deserters be covered, the simple inclusion of the word in Article 4 would have easily disposed of the matter. However, it cannot be assumed that the silence as to this class of individuals was a mere oversight on the part of the drafters. The two views that immediately present themselves are (1) that the language of Article 4 is sufficiently broad to include deserters or (2) that the omission in the Convention evidences an intent on the part of the drafters that their status remain at the discretion of the captor as was the practice prior to 1949. This study will analyze both views in order to determine the correct legal interpretation of the Article.

One of the major consequences of the determination of whether or not deserters are covered by the Convention is the utilization which may be made of them during the period of hostilities. This question of utilization of deserters has not posed a major problem in past wars, not only because of their small number, but also because formerly they could be utilized even if given prisoner of war status. However, such utilization may prove to be an important issue in future ideological conflicts, particularly in the event of mass desertions. It is not unlikely that an entire enemy unit may desert and go over to the opposing force for the express purpose of fighting against their own forces and thus assist in the liberation of their nation from what they consider to be an adverse political ideology. Under such circumstances a belligerent can certainly be expected to give serious consideration to enlisting these deserters in his struggle against the enemy. This history of warfare is not devoid of instances where deserters have been utilized to great advantage by a belligerent. If all deserters must be considered as prisoners of war under the Convention, the impact of Article 7 and Article 50 upon their utilization presents a serious problem.

The construction of the 1949 Convention in regard to forced repatriation of prisoners of war no longer is a major problem. In the light of the Korean Conflict, it is doubtful that many would now seriously contend that deserters should be forceably repatriated whether or not they are given prisoner of war status.

Therefore, this issue, so prominent in the writings of scholars six to eight years ago, will not be explored to any great extent in this article.

II. INTERNATIONAL LAW PRIOR TO THE 1949 GENEVA CONVENTION

Any attempt to properly evaluate the effect of the 1949 Convention and the intent of its drafters with respect to the status of deserters necessarily encompasses a review and understanding of the customary and conventional law prior to 1949.

A. *CUSTOM*

The major difficulty of a study of custom is the lack of a sufficient number of precedents from which one can determine what nations considered to be their obligatory practice. This difficulty, along with the fact that few controversial problems have been generated in the past concerning the status of deserters, undoubtedly explains the slight attention devoted to this area of international law by the publicists. However, some few practices have developed which are apparently accepted by most nations and sufficiently supported by the writings of authorities, to be considered as having attained the effect of customary international law. While it is not within the scope of this article to develop and discuss these principles in exhaustive detail, a brief recognition of their existence is considered essential to a proper understanding of the problems presented by the 1949 Convention. These practices may be grouped under three headings, (1) the right to receive deserters, (2) the right to utilize deserters, (3) the right to grant asylum to deserters after hostilities have ceased. This third category is a recognition of a fourth right possessed by the deserter's own state, that is the right to punish the deserter upon his recapture. These four rights will now be discussed individually.

1. *Right to Receive Deserters*

The right of belligerents to receive deserters necessarily forms the basis of the customary rules with regard to deserters. This right was established as early as the time of the Greeks and Romans.[2] Grotius concisely stated the custom of his day, as follows:[3]

> We receive deserters by the law of war; that is, it is not contrary to the law of war for us to receive him who abandons the side of the enemy and chooses our own.

[2] See generally 2 Phillipson, The International Law and Custom of Ancient Greece and Rome 68–69, 282 (1911).

[3] Grotius, De Jure Belli ac Pacis Libri Tres, bk. 3, ch. 1, § 22 (Kelsey transl. 1925).

The reason for the establishment of this custom of warfare is not difficult to envision; for a belligerent by receiving deserters gained not only a tactical advantage, but also the advantage of its demoralizing effect on the troops of his enemy. It is extremely doubtful that any belligerent has ever or would ever forego these advantages.

A more recent authority, Fiore, further noted that: [4]

> Each commander of belligerent armies shall have the right, without violating military honor, to welcome enemy deserters.

Other authorities,[5] as well as the United States Supreme Court,[6] have given recognition to this customary rule of law. It should also be noted that this right has been extended to cover the right of belligerents to induce enemy soldiers to desert.[7]

2. *Utilization of Deserters*

States recognized not only the right to receive deserters but also the right to accept their services for any purpose when *voluntarily* offered. This included allowing them to be enlisted in the army of the receiving state.[8] As most nations failed to distinguish between deserters and prisoners of war with respect to their voluntary utilization, it is difficult to cite authority relating solely to deserters; but it is readily apparent that if this principle applied in the case of prisoners of war, it likewise applied to deserters, whether or not they were accorded prisoner of war status.

Many instances in the history of warfare could be cited where deserters or prisoners of war were used to advantage. The history of American warfare since the Revolutionary War reveals instances of such utilization. While General George Washington objected to such a practice at first, he subsequently suggested that prisoners of war be offered inducements such as promotions in return for enlistments in the American Army.[9] During the war between the states the enlistment of deserters and prisoners of war was utilized by both sides.[10] In the war with Mexico, various

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[4] Fiore's International Law Codified 563 (Borchard 1918).

[5] See, *e.g.*, Du Payrat, Le Prisonnier De Guerre Dans La Guerre Continentale 151 (1910); Rolin, Le Droit Moderne de la Guerre 384 (1920).

[6] United States v. Reading, 59 U.S. (18 How.) 1 (1855).

[7] U.S. Dep't of Army Field Manual 27-10, The Law of Land Warfare, par. 49 (1956) (hereinafter cited as FM 27-10).

[8] See Flory, Prisoners of War 141-142 (1942); Spaight, War Rights on Land 144 (1911); *but see* 6 Hackworth, Digest of International Law 260 (1943).

[9] See Lewis and Mewha, History of Prisoner of War Utilization by the United States Army 1776-1945, U.S. Dep't of Army Pam. 20-213, at 14 (1955).

[10] *Id.* at 31; see also Flory, *op. cit. supra* note 8, at 143 n. 24.

inducements were used to effect the desertion of American soldiers who subsequently were formed into a Mexican battalion which fought against the United States.[11] Similarly, the United States accepted the services of deserters, and it was in a case brought by one such deserter that the Supreme Court stated:[12]

> . . . by the law of war either party to it may receive and list among his troops such as quit the other, unless there has been a previous stipulation that they shall not be received.

Other major nations, such as Britain, France, Germany and Russia, have likewise utilized and enlisted prisoners of war and deserters.[13] Thus this customary rule appears sufficiently established without the necessity of a complete recital of the history of warfare.

3. *Recapture of Deserters by Their Own Forces*

The apparent consequences of acts of desertion necessarily resulted in the establishment of a strong rule respecting their treatment upon recapture by the nation from whom they deserted.[14] The following statement by Halleck undoubtedly reflects the philosophy of most nations on this issue:[15]

> Deserters, found by the victor among his enemies, are guilty of a crime against him, and he has an undoubted right to punish them, and even to put them to death. They are not properly considered enemies, nor can they claim to be treated as such; they are perfidious citizens, who have committed an offense against the state; their enlistment with the enemy cannot obliterate that character, nor exempt them from the punishment they have deserved, and they are generally punished under some municipal law. They are not protected by any compact of war, as a truce, capitulation, cartel, etc., unless especially and particularly mentioned and provided for. They are not military enemies in the general meaning of that term, nor are they entitled to the rights of ordinary prisoners of war, either under the law of nations, or by the general terms of a special compact or agreement.

It was the consequence of this rule that apparently restrained nations in the utilization of deserters in positions that might have readily resulted in their recapture by their former forces.

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[11] See Prugh, *Prisoners at War: The POW Battleground*, 60 Dick. L. Rev. 124, n. 7 (1955); Fooks, Prisoners of War 84 (1924).

[12] United States v. Reading, *supra* note 6.

[13] For examples of British practice see Schapiro, *The Repatriation of Deserters*, 29 Brit. YB. Int'l L. 316 (1952); France, see 2B Final Record of the Diplomatic Conference of Geneva of 1949, at 18 (1949); Germany, see Prugh, *supra* note 11, at 124; Russia, see Flory, *op. cit. supra* note 8, at 143.

[14] See, *e.g.*, Hall's International Law 656 (8th ed. 1924); 2 Oppenheim's International Law 213–214 (6th ed. Lauterpacht 1940); Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, War Dep't, Apr 24, 1863, Art. 48.

[15] 2 Halleck's International Law 38 (4th ed. 1908).

4. *Repatriation of Deserters*

Another effect of the rule respecting the harsh treatment of deserters upon their recapture or return to their former forces is the issue of repatriation. Historically the publicists recognized that to repatriate deserters in the absence of a treaty to that effect violated the humanitarian principles of warfare.[16] However, the practice of nations has been far from uniform in this area. Mr. Schapiro, in an excellent article entitled, "The Repatriation of Deserters", outlines in great detail the practice of nations through the centuries.[17] Although he cites instances wherein no apparent distinction was made between deserters and prisoners of war, it should be noted that he recognizes that certain types of deserters may have been excluded from those prisoners who were repatriated.[18] Also in instances where deserters were clearly included within those prisoners who were repatriated, their subsequent fate was usually safeguarded by amnesty provisions within the treaty of peace.[19] Mr. Schapiro recognizes several cogent reasons why the practice of repatriation of deserters is both unwise and unhumanitarian.[20]

The practice of the United States in this area has apparently been consistent in recognizing the right of a deserter not to be forcefully repatriated. The Supreme Court in the case referred to above stated that:[21]

> . . . when they (deserters) have been received, a high moral faith and irrevocable honor, sanctioned by the usages of all nations, gives to them protection personally, and security for all that they have or may possess.

Francis Lieber in his famous "Instructions for the Armies of the United States in the Field", clearly recognized this principle.[22] It was also later incorporated in the Basic Manual, Rules of Land Warfare, as being based on the "unwritten law of war".[23] Opinions

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[16] See, *e.g.*, Grotius, *op. cit. supra* note 3; Gentili, De Jura Belli Libri Tres, bk. 3, ch. 17 (Rolfe transl. 1933); Vattel, Le Droit des Gens, bk. 3, ch. 8, § 144 (Fenwick transl. 1916).

[17] Schapiro, *The Repatriation of Deserters*, 29 Brit. YB. Int'l L. 310 (1952).

[18] *Id.* at 312.

[19] *Id.* at 313–315.

[20] *Id.* at 311; see also Garcia-Mora, International Law and Asylum as a Human Right 107 (1956).

[21] United States v. Reading, *supra* note 6.

[22] Instructions for the Government of Armies of the United States in the Field, *supra* note 14, at Art. 42–43.

[23] U.S. War Dep't Field Manual 27–10, Rules of Land Warfare, par. 160 (1940).

of both the Judge Advocate General [24] and the State Department [25] have followed this rule of non-forceable repatriation of deserters. Thus the rule finds ample support in the practice of the United States as well as the writings of the publicists.

B. *CONVENTION LAW*

In considering the law prior to 1949 the major multilateral conventions respecting warfare cannot be overlooked. A review of these conventions fails to disclose any provisions which could be considered as relating specifically to deserters. While it apparently has never been contended that conventional law required that they be given prisoner of war status, as a matter of policy, it appears that most nations accorded them such status during hostilities if they were interned.[26] The prevailing practice was perhaps best summarized in the British Manual of Military Law as follows:[27]

> Deserters from the enemy should be treated as prisoners of war, unless special circumstances render it desirable to liberate them.

The according of such a status was not based on a conventional obligation but rather on practical considerations. While such a practice provided for their humane treatment if interned, it recognized the right to release them from such status. Such a release could have been occasioned by a desire to accept their voluntary enlistment or to preclude any demands for their repatriation against their will.

The question arose during World War II as to whether utilization of prisoners of war violated the 1929 Geneva Prisoners of War Convention.[28] The United States faced this problem with respect to numerous Korean prisoners who were members of the armed forces of Japan.[29] The position was taken that to accept even the voluntary services of such Korean prisoners of war without the consent of Japan would be violative of the Convention. However, to release such persons from their prisoner of war status and subsequently accept their services in military operations against Japan, would not contravene any rule of inter-

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[24] Dig. Op. JAG 1912, at 1076; Memorandum for The Judge Advocate General, 15 Jan. 1945, SPJGW 1944/15641.

[25] U.S., Dep't of State Memorandum, Legal Considerations Underlying The Position of The United Nations Command Regarding The Issue of Forced Repatriation of Prisoners of War, 24 Oct 1952, part I p. 3 (hereinafter cited as Dep't of State Memorandum).

[26] See Flory, *op. cit. supra* note 8, at 30–31.

[27] Great Britain, War Office, Manual of Military Law, 1929, Art. 64.

[28] Geneva Convention Relative to the Treatment of Prisoners of War, 29 July 1929, T.S. No. 846, 47 Stat. 233.

[29] Memorandum for The Judge Advocate General, 31 July 1944, SPJGW 1944/8412.

national law or the Convention.[30] A similar position was taken with respect to Italian prisoners of war.[31]

The Nuremberg Court, during the War Crimes Trials following World War II, in resolving this issue, did not mention any necessity for a prior release from prisoner of war status. The Court stated:[32]

> The counsel for prosecution contends that the use of prisoners of war for espionage and other like purposes against their own nation, even if voluntary, is a violation of international law and the Hague Convention Respecting the Rules and Customs of War. (Art. 6, Ch. II (Hague Convention No. IV, 18 Oct. 1907); and Art. 31, Ch VI, Geneva Convention (Prisoners of War Convention, 27 July 1929).) No other authority other than the Articles themselves has been cited to us, and we have been unable to find any. Ordinarily a national of a country, whether or not he is in military service, who gives aid or comfort to the enemy, is a traitor to his country. But we have never before heard it suggested that the enemy who takes advantage of his treason is guilty of a breach of international law. We hold that the cited prohibitions of the Hague Convention prohibit the use of prisoners of war in connection with war operations, and apply only when such use is brought about by force, threats, or duress, and not when the person renders the services voluntarily.

C. *CONCLUSION—STATUS AS OF 1949*

From the foregoing considerations it is concluded that the rules relating to the status of deserters prior to the Convention of 1949 were: (1) they were not required to be given prisoner of war status, (2) they could be given such status if the captor so wished, (3) they could voluntarily renounce that status with permission of the detaining power. Thus it can be seen that whether or not they were accorded prisoner of war status was of slight consequence in their utilization prior to 1949. The detaining power did not lose its customary right to utilize their voluntary services by affording them a prisoner of war status. While it might be argued that the deserter gained protective rights by such prisoner of war status, it is unlikely that he would have been treated any less humane than prisoners of war if this status were denied him during hostilities. Conversely he was not necessarily made the subject of a forced repatriation by virtue of having been given prisoner of war status initially.

II. EFFECTS OF THE 1949 CONVENTION

The most important question raised by the Convention is whether deserters *must* be accorded prisoner of war status. The

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[30] *Ibid.*

[31] Memorandum for The Judge Advocate General, 15 Jan 1945, SPJGW 1944/15641.

[32] United States v. Von Weizsaecker, et al. (Ministries Case) 14 Trials of War Criminals before the Nuremberg Military Tribunals 667 (1951).

entire impact of this issue in future ideological conflicts lies in the area of their voluntary utilization. It has been pointed out that in the past there was little reason to distinguish between deserters and prisoners of war with respect to their utilization or enlistment. Thus the question arises as to the effect of the Convention on the prior customary law. Although it may be determined that under the Convention they are not required to be considered as prisoners of war, the provisions of the Convention may well determine whether a particular nation will find it feasible to voluntarily accord them an irrevocable prisoner of war status which would limit their future usefulness.

A. *EFFECT ON UTILIZATION OF PRISONERS OF WAR*

The Convention in Article 50 sets forth an explicit and elaborate clarification of the permissible limits of prisoner of war utilization. It indicates that any activity that is of a military character or purpose is prohibited. It is noted, however, that the Article uses the language "may be compelled to do only such work", leaving some doubt as to whether a prisoner might volunteer to do work other than that enumerated.[33] Certainly Article 52 forms a good basis for the conclusion that some work in addition to that enumerated is allowed where the prisoner volunteers. It provides that:

> Unless he be a volunteer, no prisoner of war may be employed on labor which is of an unhealthy or dangerous nature. . . . The removal of mines shall be considered as a dangerous labor.

Thus it seems clear that a prisoner could volunteer to remove mines even though he could not be compelled to do so.[34]

With respect to enlisting prisoners in the armed forces of the detaining power, Article 130 lists as a grave breach the compelling of a prisoner to serve in the forces of the hostile party. Again the Convention uses the term "compelled," which leaves some doubt as to the question of voluntary enlistments. However, it can be explained that the Article makes the use of force to effect such enlistments a grave breach, but cannot be used as authority to support the position that the acceptance of voluntary enlistments is not a minor breach. There are many actions which a

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[33] The questions of whether this language extends the prior law and the nature of work prisoners may volunteer to perform are apparently open to speculation. See Baldwin, *A New Look At The Law of War: Limited War And Field Manual 27-10*, 4 Military L. Rev. 7, n. 26 (Dep't of Army Pamph. 27-100-4, 1959). See also Greenspan, The Modern Law of Land Warfare 119 (1959).

[34] Gutteridge, *The Geneva Conventions of 1949*, 26 Brit. YB. Int'l L. 316 (1949).

belligerent may take which do not amount to grave breaches, but are none the less in violation of the Convention.

Actually these Articles add little to what was already provided in prior Conventions. However, they do spell out more clearly the exact limits of prisoner utilization. It cannot be said that they have settled all possible sources of confusion in this area. Article 52 leaves much to be desired with respect to the activities a prisoner may voluntarily perform.

The ink was hardly dry on the Convention when it played a major role in the Korean Conflict. While neither party had yet ratified the Convention, all parties agreed to its application.[35] Disagreement as to its interpretation was not only a major issue but is credited with prolonging the hostilities. However, the major concern was not with the question of utilization of prisoners of war, but rather the impact of Article 7 on the issue of repatriation. While this issue prompted many legal articles respecting the repatriation issue, there was little or no mention of utilization.

It is interesting to note, however, that there was an apparent violation of this area of the Convention on the part of the Chinese Communists. During the Panmunjom negotiations the following charge was made: [36]

> The United Nations Command knows, and your side knows that we know, that you have captured many more soldiers of the Republic of Korea than the 7,142 listed in your data. Where are all these soldiers now? Some of them who have succeeded in making their way back to our lines have told us of having been forced to fight against their own army until they managed to escape. But thousands of others are still serving in your army. You say they are all volunteers. We are by no means convinced that this is so, in the light of what those returned soldiers have told us. In any case, these captured soldiers are, and always have been, entitled to the status of prisoners of war. This means that they should never have been used to do work directly connected with military operations. This means that you should have shielded them and protected them from the effects of military action. Obviously, these two rights—the right of all prisoners of war not to participate in work which contributes directly to the conduct of the war and the right to be protected from the effect of military operations—preclude the use of prisoners of war in actual military service against their own forces. We feel that your side has flagrantly violated these basic precepts by impressing prisoners of war into your own forces.

The Communists defended this charge only on the allegation that the prisoners had been released from their status as a humanitarian

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[35] N.Y. Times, July 14, 1950, p. 1, col. 1; Dep't of State Memorandum, pt. IV at 1.

[36] Joy, How Communists Negotiate 113 (1955); see also Dep't of State Memorandum, pt. IV at 22.

measure and had voluntarily enlisted in their forces.[37] Apart from the allegation that force and coercion had been used to effect these enlistments, such voluntary releases and enlistments probably could have been supported as legal under the law as existing prior to the Convention. However, in view of Article 7 and the clear intent of the drafters of the 1949 Convention such a practice could no longer be supported. It is also highly doubtful that such a large number as four-fifths of all prisoners were voluntary enlistees. Thus it appears that the fears of Mr. Morosov of the Soviet Union, that any wording of Article 7 that would allow prisoners of war to renounce their rights or status would clearly lead to abuses, were well founded.[38]

B. *EFFECT ON PERMANENCY OF PRISONER OF WAR STATUS*

1. *Impact of Article 7*

The greatest impact upon the prior law respecting utilization is the addition of Article 7. While Articles 50 and 52 leave some room for argument as to the limits of voluntary prisoner utilization, Article 7 appears clear and emphatic on the question of renouncing their rights or status as prisoners of war. The Article provides that:

> Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article if such there be.

The original text of Article 7 submitted to the XVIIth Red Cross Conference at Stockholm and settled by the government experts merely provided that prisoners of war could not "be induced by constraint or by any other means of coercion to renounce their rights".[39] Had this wording of Article 7 been retained it would have been consistent with the language of Articles 50, 52 and 130. Thus, this would appear to have permitted the prior practice of allowing a prisoner to renounce his status or rights to continue. However, the final text adopted at Stockholm deleted the words "be induced by constraint or by any other means of coercion" and adopted the wording presently provided in the Convention.[40] This Article was vigorously debated at the Diplomatic Conference and a

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[37] See Joy, *op. cit. supra* note 36, at 111; Joy, *My Battle Inside the Korea Truce Tent*, Colliers, Aug 31, 1952, p. 71; see generally Mayda, *The Korean Repatriation Problem and International Law*, 47 Am. J. Int'l L. 416 (1953).

[38] 2B Final Record of the Diplomatic Conference of Geneva of 1949, at 56 (1949) (hereinafter cited as Final Record).

[39] See 2B Final Record 17; also quoted in Dep't of State Memorandum, Supp. to pt. IV at 1.

[40] *Ibid.*

strong move was made to revert to the language as originally drafted.[41]

2. *Intent of the Drafters*

The intent of the Representatives at Geneva in adopting Article 7 can hardly be questioned after considering the debates which preceded its adoption. Mr. Pilloud of the International Committee of the Red Cross pointed out to the representatives at Geneva that Article 7 was new and had been established because it seemed necessary to protect prisoners of war against the temptation of giving up their status for another, such as that of a civilian worker, or to join the forces of the detaining power.[42] He indicated that the Stockholm Conference had gone too far and thus they should revert to the original text submitted at Stockholm.

In support of this proposition, Mr. Gardner, of the United Kingdom, indicated that the Convention was intended to give the prisoner of war the greatest possible freedom and therefore it seemed strange for a humanitarian conference to insert an article which in no circumstances allowed a prisoner to make a free choice.[43]

Mr. Lamarle of France objected strenuously to any wording which would absolutely forbid the enlistment of prisoners of war in the armed forces of the detaining power.[44] He cited the case of the inhabitants of Alsace-Lorraine, annexed by force by the Reich in 1871, who in 1914 became prisoners of the French and wanted to join their forces. He felt that it was contrary to the honor of prisoners of war not to allow them to serve in the armies of the power who captured them. Therefore, in certain circumstances protected persons should not be prevented from renouncing their rights. This view was supported by Miss Gutteridge of the United Kingdom, who stated that there could be occasions when it might be in the interest of protected persons to waive their rights under the Convention.[45]

The motive which prevented a return to the original draft of Article 7 was a strong concern for the protection for prisoners of war, even at the expense of sacrificing their freedom of choice.[46] Mr. Yingling of the United States supported the strongly worded Article on the basis that it was clear and definite.[47] Strong support

[41] See *id.* 17–18, 56.
[42] *Id.* at 17.
[43] *Ibid.*
[44] *Id.* at 18, 56.
[45] *Id.* at 56.
[46] *Id.* at 17–18, 56.
[47] *Id.* at 56.

for this view was voiced by Mr. Morosov of the Soviet Union, who feared that the French proposal, if followed, would open the way to abuse.[48]

Mr. Castberg of Norway also pointed out the dangers inherent in allowing the protected person to renounce the rights granted them by the Convention. His final comments are summarized in the Final Record as follows: [49]

> In the States having social legislation persons who benefit through them cannot renounce the rights derived from them. This principle may lead to harsh consequences, but it is effective in insuring the protection of persons protected by the Convention. Supposing an agreement was reached between the Detaining Powers and prisoners of war or detained civilians according to which the later would renounce the rights given to them by the Convention, Mr. Castberg thinks that it would be very difficult to prove that coercion or pressure has been used. Powers who have obtained a renunciation will have no difficulty in asserting that it was obtained with the free consent of those concerned, and for their part, the latter might confirm this allegation. The only way to insure the sought for protection would be to set up in a general ruling the invalidity of a renunciation of the rights given by the Convention.

The strict wording of Article 7 was finally adopted. The more liberal article sponsored by France and Britain was considered to be too open to abuses to be acceptable. Common experiences apparently fostered the feeling that prisoners while in confinement are not normally capable of freely making a genuine waiver of rights.[50]

In summary, it appears obvious that the general intent of the Representatives in the adoption of Article 7 was broad enough to prohibit the former practice of allowing a prisoner of war to renounce his rights in order to enlist in the forces of the detaining power or to perform other prohibited activities. While it was recognized that this might result in hardship in some cases, the concern for the well being of the majority of prisoners prevailed.

3. *U. S. View of Article 7*

Although the Article speaks only of the prohibition against renouncing "rights", it seems apparent from the debates that this necessarily includes renouncing one's status as a prisoner of war. Certainly one of the major rights of the Convention is the right to prisoner of war status under Article 4. This view has been explicitly adopted by the United States in Field Manual 27-10, which specifically provides that: [51]

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[48] *Ibid.*
[49] *Id.* at 17–18.
[50] See Draper, The Red Cross Conventions 18 (1958).
[51] FM 27–10, par. 87.

> . . . prisoners of war are precluded from renouncing not only their rights but also their status as prisoners of war, even if they do so voluntarily. The prohibition extends equally to prisoners renouncing their status in order to become civilians or to join the Armed Forces of the Detaining Power.

C. *EFFECT ON REPATRIATION OF PRISONERS OF WAR*

Although repatriation of deserters was not an issue during the Korean negotiations, the serious problems raised during this war respecting the repatriation of prisoners of war should be noted because of (1) the questionable status of deserters, (2) the practice of according them prisoner of war status during hostilities, and (3) the interpretation placed upon Article 7 by the negotiators in solving the repatriation problem.

The problem arose when it was determined that large numbers of prisoners of war held by the United Nations Command objected to being repatriated and would resist with force any attempted repatriation.[52] This raised the issue of whether under the Convention prisoners could be granted asylum after hostilities. Article 118 provides essentially that prisoners must be released and repatriated without delay after the cessation of hostilities. Article 7 prohibited a prisoner from renouncing his rights even if done voluntarily. The Communists immediately seized upon these Articles to support the position that repatriation must be effected in all cases, even to the extent of using force if necessary.[53] The major factor in their support was the clear language of these Articles of the Convention, the intent of which appeared evident upon their face.[54] Thus their position could not be easily dismissed.

A detailed Memorandum, prepared by the United States State Department, set out the legal considerations underlying the position of the United Nations Command in their stand against forced repatriation. The main thrust of this position is based upon the long recognized right of a nation to grant asylum to prisoners of war and the lack of any specific evidence in the working papers indicating that it was the intent of the drafters or the diplomatic representatives to overturn this well established rule of international law.[55] With respect to Article 7 it was contended that the intent of its adoption was to prevent forced military service or

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[52] *45th U. N. Command Operations Report on Korea*, 27 Dep't State Bull. 272 (1952).

[53] *Ibid.*

[54] For an excellent review of the position of both sides and the proposed solutions see *Proposals in First Committee for Breaking Armistice Deadlock*, 13 U. N. Bull. 426 (1952); See also Charmatz and Wit, ***Repatriation of Prisoners of War and the 1949 Geneva Convention***, 62 Yale L.J. 395 (1953).

[55] Dep't of State Memorandum, pt. IV.

labor and not to force repatriation. Humanitarian undertones are present throughout the legal memorandum. Thus it can be seen that perhaps the greatest consideration in the United Nations position was that to force the repatriation of prisoners of war would violate the humanitarian principles upon which the Convention is based.

The deadlock was finally broken when it was agreed to submit all prisoners of war to an impartial screening body composed of neutral nations, which would determine those prisoners who wanted to be repatriated and those who wished to remain.[56] Thus forced repatriation was not effected and a precedent has been established for solving a similar problem in future hostilities.

In view of the scope of this article, a complete consideration of the pros and cons of the repatriation problem is not warranted. This question has received the most extensive treatment by the legal writers of any section of the Convention, or even the Convention itself.[57] Considering the position taken by the United Nations that the Convention does not require forced repatriation, and the support given this position by the great majority of legal writers, it may safely be stated that in future ideological conflicts the forced repatriation of neither prisoners of war nor deserters is likely to be effected.

This principle is now incorporated in Department of Army Field Manual 27–10, The Law of Land Warfare, which states that "a Detaining Power may, in its discretion, lawfully grant asylum to prisoners of war who do not desire to be repatriated".[58]

III. STATUS OF DESERTERS UNDER THE CONVENTION

A. *THE IMPORTANCE OF THE PROBLEM*

With the foregoing background in mind, it remains to be considered whether the Convention requires that deserters be given prisoner of war status. This question derives its importance solely from the effect of the Convention on the issue of prisoner of war utilization. Were it not for the addition of Article 7 and the clear intent of the drafters and diplomatic representatives in its adoption, this question would be academic at best, for without this prohibition against the renunciation of rights, the prior customary rule would permit a belligerent to utilize deserters by allowing them to renounce their prisoner of war status. Had it

[56] *Text of Korean Armistice Agreement*, 29 Dep't State Bull. 137 (1953).

[57] *E.g.*, Potter, *Repatriation of Prisoners of War*, 46 Am. J. Int'l L. 508 (1952); Charmatz and Wit, *supra* note 54 at 395; Mayda, *supra* note 50 at 414; Lundin, *Repatriation of Prisoners of War: The Legal and Political Aspects*, 39 A.B.A.J. 559 (1953); Baxter, *Asylum to Prisoners of War*, 30 Brit. YB. Int'l L. 489 (1953).

[58] FM 27–10, par. 199.

been determined in Korea that prisoners of war must be forceably repatriated under Articles 118 and 7, the importance already attached to the initial status of deserters would have been immeasurably increased. The forced repatriation of deserters, if given prisoner of war status, would certainly have required that every effort be made under the Convention not to accord them such status.

B. *INTERPRETATIVE MATERIAL*

1. *The Provisions of Article 4 and 5*

Due to the absence of the word "deserter" or any language which can be interpreted as referring specifically to deserters, in the text of the Convention, this issue is not easily resolved. If they are to be included, this result must flow from an interpretation of the language of pertinent articles to determine if they are sufficiently broad to include deserters within their terms. At this point it should be noted that the Convention contains no articles which establish a method for its interpretation.

Article 4 of the Convention contains a far more comprehensive listing of persons who must be given prisoner of war status than the previous 1929 Geneva Prisoners of War Convention and yet deserters are not included within its enumeration. This Article provides in pertinent part:

> A. Prisoners of War, in the sense of the present Convention, are persons belonging to one of the following categories, *who have fallen into the power* of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict, as well as members of the militias or volunteer corps forming a part of such armed forces. (Emphasis supplied.)

Article 5 uses similar language in referring to the commencement of prisoner of war status and provides as follows:

> The present Convention shall apply to the persons referred to in Article 4 from the time they *fall into the power* of the enemy and until their final release and repatriation. (Emphasis supplied.)

It has apparently never been contended that deserters lose their status as members of the armed force from which they desert merely by their act of desertion.[59] Therefore, it follows that they are within the category of persons enumerated in sub-paragraph 1 of Article 4, as members of the armed force of a party to the conflict. The crucial question must then resolve itself in the interpretation of the language "fallen into the power" as used in both Articles 4 and 5. This language is new to the 1949 Convention

[59] This conclusion is supported by the strong recognition in international law of the right of a belligerent to punish desertion as a military offense. *Cf.* authorities cited note 14 *supra*.

and was not contained in the earlier 1929 Convention which utilized the words "who are captured by the enemy".[60] Was it the intent of the drafters in changing this language to increase the scope of the Article to include deserters?

2. *The Working Papers*

The working papers do not answer this question specifically. When this change was approved by the Diplomatic Conference it was stated that the words "fallen into the hands" had a wider significance than the word "captured" in that it covered the case of soldiers who had surrendered without resistance or who had been in enemy territory at the outbreak of hostilities.[61] It might be argued that deserters fall into the category of soldiers who surrender without resistance; however, this conclusion does not appear to be based on reality. Deserters are seldom referred to as soldiers who surrender without resistance, but rather as those who leave their own forces and voluntarily go to the enemy. It appears more likely that this language was aimed at capitulations which under the 1929 Convention might have been considered as not being covered by the word "captured".[62] It would also include those enemy personnel who surrendered without ever offering resistance, such as those on enemy soil at the outbreak of hostilities, or those so quickly over-run that resistance was impractical. However, it can be seen that in these instances the surrender is motivated by some exterior force and not by the soldier's personal desire to sever himself from his former force. Had the drafters been concerned about deserters they undoubtedly would have chosen more specific language to spell out their intent. There is other evidence in the working papers which indicates that the drafters did not contemplate any new category of persons in Paragraph A of Article 4.[63] In discussing Paragraph A, it was simply stated that this paragraph covered the traditional type prisoner of war.[64] Paragraph B, about which the drafters appeared primarily concerned, was intended to cover those persons in occupied or non-belligerent territory where the experiences of World War II evidenced a need for a more specific status.[65] This

[60] 1929 Geneva Convention, *supra* note 28, at Art. 1.

[61] See 2A, Final Record 237.

[62] See Pictet, *Les Conventions De Geneve*, 1950 I Recueil Des Cours, Academie De Droit International 79.

[63] See 2A, Final Record 244.

[64] See Yingling and Ginnane, *The Geneva Conventions of 1949*, 46 Am. J. Int'l L. 401 (1952); see also Gutteridge, *The Geneva Conventions of 1949*, 26 Brit. YB. Int'l L. 312–313 (1949).

[65] *Ibid.*

issue so monopolized the Convention in discussing Article 4 that little was said about the traditional prisoner of war.[66]

3. *Opinions of the International Law Authorities*

Although much has been written on the Convention and particularly on the question of prisoner repatriation, very few legal writers have given any consideration to the status of deserters. What little consideration it has received has been summary at best and amounts to mere recognition of the vexing problems it presents. For this reason the authorities discussed below are not to be considered as representing any great weight of authority, but rather constitute their own points of view. However, the stature of these authorities indicates that they will be given considerable weight in the resolution of this problem.

a. *Rene Wilhelm*

Mr. Wilhelm, a member of the legal staff of the International Red Cross and an Expert at the Diplomatic Conference, is the person who explained to the Conference the effect of the change in language from "captured" to "fallen into the power".[67] The importance of Mr. Wilhelm in drafting and interpreting the provisions of the Articles of the Prisoner of War Convention is apparent from a reading of the working papers.[68] His opinion on this question of the meaning of the term "fallen into the power" necessarily carries great weight. In an article in the Revue International de la Croix Rouge, he considered the proper interpretation of this terminology, as well as the question of deserters as prisoners of war. He states therein:[69]

> In effect we have seen that it (the Convention) must in accordance with Article 4A be applicable to military personnel who fall into the power of the enemy. The term "fall" shows clearly that it applies to military personnel who pass into the power of the enemy not by their own volition but because they are forced to do so. This conclusion is applicable to military personnel captured during combat as well as to those who surrender or capitulate, it being impossible for them to continue to fight.

Here it is felt that Mr. Wilhelm has stated the precise intent of the drafters and the understanding of the members of the Conference with respect to the term "fall". It seems clear that this language requires that there be a force exterior to the person which motivates his surrender and cannot be interpreted to mean one who by his own volition places himself in the hands of the enemy.

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[66] See 2A, Final Record 237–249.

[67] *Id.* at 237.

[68] See 3 Final Record 201.

[69] Wilhelm, *Peut-on Modifier Le Statut Des Prisonnaires De Guerre?*, 1956 Revue Internationale de la Croix-Rouge 28–31.

However, Mr. Wilhelm continues and adds another consideration:[70]

> This reasoning based on the letter of the Convention itself, corresponds to that which flows from its general economy or its spirit; it is established essentially to protect the combatants who, even upon falling into the hands of the enemy, maintained the sentiment of remaining faithful to the army that they have served, and not those who, like *deserters*, decided to abandon the fight and their country, with all the consequences which result therefrom. Many of its (Geneva Convention on Prisoners of War) articles such as the dispositions with respect to the communications of names, to repatriation, to financial resources, to the protecting power, clearly imply a certain continuity of fidelity between the prisoner and his country of origin; it is difficult to visualize how all of these clauses could be applied to those who wish to sever their allegiance.

The reasoning of Mr. Wilhelm as to why persons like deserters could not have been intended to be covered seems both logical and practical and is certainly in accordance with professed humanitarian principles of the Convention. It must be noted, however, that he has chosen to consider not only the question of voluntarily placing in the hands of the enemy, but also the intent to sever allegiance. The importance he places on the effect of this element of allegiance with relation to deserters is obvious in the following language:[71]

> The term deserter must be reserved for those military personnel who place themselves voluntarily under the power of the enemy and who from the very beginning have clearly manifested their intent to sever their allegiance with the country under which they have served.

From the above quote it is clear that Mr. Wilhelm is establishing a double test which must be met before a belligerent can consider an enemy soldier a deserter and thus one who need not be given prisoner of war status under the Convention. His first test is certainly founded on logic and a plain interpretation of the language of Article 4. However, it is contended that his second test, that of professing an intent to sever allegiance, is a consideration which is not required by the Article and merely a factor to be considered by a belligerent in determining whether or not to accord prisoner of war status to one who is a deserter.

Desertion is an offense against the municipal law of the nation from which the person deserts. Whether that person deserted with the express intent of severing his allegiance or merely as a result of the lack of desire to fight, he is none the less a deserter, and should be considered as such if he voluntarily places himself in the hands of the enemy, regardless of the intent that motivated his act. While it is recognized that one who deserts, with the intent to sever his allegiance is probably guilty of treason, and the

[70] *Ibid.*
[71] *Ibid.*

other only of the act of desertion in time of war, this is a problem of their own municipal law and not an element of the Convention. Once they meet the test of voluntarily placing themselves into the hands of the enemy, without any exterior force on the part of the other belligerent, they should not be considered as having "fallen into the power of the enemy".

b. *Gerald Draper*

Another authority, Mr. Gerald Draper, appears to support the double test of Mr. Wilhelm. Mr. Draper, in his book, "The Red Cross Conventions", states:[72]

> Those who desert their own forces and give themselves up to the enemy as *defectors* do not, it is thought, 'fall into the power of the enemy' for they have voluntarily put themselves into his power, and have been captured. The important consequences may follow that such defectors, not being entitled to the rights conferred by this (Prisoners of War) Convention and may therefore volunteer to do propaganda work, broadcasting, television performances, etc., without there being any question of renouncing their rights under the Convention. (Emphasis added.)

If Mr. Draper intended by the use of the word "defector" to mean one who evidences his intent to sever his allegiance, then he, as Mr. Wilhelm, feels that this element of intent is necessary to bring the deserter outside the language "fallen into the power". But from the reasoning of Mr. Draper it can be seen that what brings them outside this language is the fact that they have voluntarily put themselves into the power of the enemy. Thus it appears that both authorities recognize that it is the act of voluntarily placing themselves in the power of the enemy that brings them outside the category of those who "fall into the power". However, they are attempting to interject into the test a subjective element of intent, an element the weight of which should be left to the discretion of the captor. This element of intent will necessarily be considered as a policy matter by the captor in determining whether or not to give the deserter prisoner of war status. If the captor determines that the deserter is still faithful in his ideological beliefs to his forces of origin, then there could be no advantage in not giving him prisoner of war status. It must be remembered that the main reason for not according him prisoner of war status is not to mistreat him but rather to allow his voluntarily utilization in accordance with customary practice and thus escape the prohibition of Article 7. It must be recognized that in most instances the act of desertion will be prompted by strong ideological beliefs and a desire to aid the enemy in furtherance of these beliefs. Only such strong beliefs could motivate the

[72] Draper, The Red Cross Conventions 53–54 (1958).

deserter to risk the possible consequences of his act of desertion, particularly in the event of his recapture.[73]

c. *Manuel Garcia-Mora*

Mr. Garcia-Mora in his book, *International Law and Asylum as a Human Right,* uses only the general term deserter and does not state what he would consider essential to constitute one a deserter under the Convention.[74] He appears to support the view that the absence of deserters from the broad category of prisoners of war under the Convention was perhaps a deliberate omission and that they thus belong to a special category of persons. However, it cannot be overlooked that Mr. Garcia-Mora was concerned primarily with the question of asylum to deserters after the cessation of hostilities and did not specifically consider the effect of his theory on their utilization.

d. *L. B. Schapiro*

Mr. Schapiro, in an article on the Repatriation of Deserters, appears to take the same position as Mr. Garcia-Mora; that, in the absence of express provisions relating to deserters, it must be assumed that it was the intent of the drafters to leave the customary practice unaffected.[75] He feels, however, that the status of deserters will, according to common practice, be assimilated to that of prisoners of war during the period of hostilities. With respect to the change in the language of Article 4 from that used in the 1929 Convention, he expresses the view that the terms are identical in their effect.

This observation of Mr. Schapiro that the terms "fallen into the power" and "captured" are identical has support. It has been noted that many writers have long used the term "fallen into the power" in referring to prisoners of war and its use in the 1949 Convention cannot be considered as a new addition to the laws of war. It is interesting to note that in referring to deserters many of the writers have used the term "receive", that is, prisoners of war are captured or fall into an enemy's power, while deserters are "received."

e. *FM 27–10, Law of Land Warfare*

Department of the Army Field Manual 27–10, which includes the provisions of the 1949 Convention, does not spell out in clear

[73] See note 15 *supra.*

[74] Garcia-Mora, International Law and Asylum as a Human Right 103 (1956).

[75] Schapiro, *The Repatriation of Deserters,* 29 Brit. YB. Int'l L. 323 (1952).

language the distinction between deserters and prisoners of war. Paragraph 70 of the Manual states:

> The enumeration of persons entitled to be treated as prisoners of war is not exhaustive and does not *preclude affording* prisoners-of-war status to persons who would otherwise be subject to less favorable treatment. (Emphasis supplied.)

The enumeration referred to is contained in paragraph 61, and is identical to the provisions of Article 4 of the Convention. While paragraph 70 does not specifically use the term deserters, it is particularly worthy of note that the index under the title deserters refers to this paragraph. Paragraph 70 clearly recognizes that Article 4 is not exhaustive and thus allows a commander the right of *affording* prisoner of war status to persons not included, which might be argued as including deserters in view of the reference in the index and their absence from the category of persons enumerated in Article 4. Since paragraph 70 is rather poorly worded, it should be rewritten to clearly spell out its intent. With the probable increase in the number of desertions in a future ideological war, the action to be taken by a commander with respect to deserters should be clearly set out.

C. *POSSIBLE INTERPRETATIONS*

Having considered the pertinent articles and the opinions of the few authorities who have attempted to interpret the Convention with respect to the status of deserters, there appears to be four possible points of view. Thus it is contended that the following are possible interpretations of Article 4, as to those military personnel upon whom a belligerent is required under the Convention to grant prisoner of war status.

(1) All military personnel in the hands of the enemy, irrespective of the manner in which they came into custody or their intent.

(2) All military personnel in the hands of the enemy, except those who voluntarily placed themselves under the power of the enemy and have from the beginning manifested their intent to sever their allegiance.

(3) All military personnel in the hands of the enemy, except those who voluntarily placed themselves under the power of the enemy, regardless of their intent.

(4) All military personnel in the hands of the enemy, except those who have deserted their own forces, including those deserters who by mere chance have been captured by the enemy.

The first assertion is based upon the strictest possible interpre-

tation of Article 4. Such an interpretation completely eliminates from customary law recognition of persons such as deserters. Even the language of the Convention does not appear to force such a conclusion, and certainly the working papers do not support the proposition that it was the intent of the drafters or the diplomatic representatives to effect such a conclusion. Such a position would appear to violate even the humanitarian principles upon which the Convention is based. For, as pointed out by Mr. Wilhelm, many of the Articles of the Convention itself would impose unreasonable results when applied to certain types of deserters.[76]

Such an interpretation would estop a belligerent from ever utilizing the voluntary services of deserters. While it is true that the Convention attempts to effect this result with respect to those who are prisoners of war, to extend this to deserters would appear to extend the rule beyond the Convention requirements. The unrealistic result of such an unwarranted extension would be particularly evident in the case of an individual who has deserted as a result of his ideological beliefs and voluntarily placed himself in the power of the enemy for the express purpose of aiding in the overthrow of what he considers adverse elements which control his nation. To attempt to place all such persons in a category where, by the impact of Article 7, their services could not be utilized, would be to expect the impossible in future ideological conflicts. Such a result would merely force these persons into guerilla or underground units where their protection would be far less than that of a deserter.

The second possible interpretation is supported by the writings of both Mr. Wilhelm[77] and Mr. Draper.[78] This view recognizes a realistic approach to the problem and would allow the voluntary utilization of that category of deserters who are the most likely to offer their services. The main objection to this interpretation is that it injects into the language "fallen into the power" an element of intent which need not be considered to determine whether or not one is a deserter. If it is contended that it is the voluntary placing into the power of the enemy that takes an individual out of the provisions of Article 4, then this test alone should be the legal consideration. Once an individual has voluntarily effected this result, his intent would appear to have importance only with respect to his voluntary utilization, and not to his status.

The third interpretation is considered to be the most reasonable. It is based purely upon the meaning of the words "fallen into the power", without consideration of any subjective elements such

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[76] Wilhelm, *supra* note 69, at 28.
[77] *Ibid.*
[78] Draper, *op. cit. supra* note 72.

as intent. Still it does not appear to violate the spirit of the Convention. A commander should be able to ascertain whether an individual has voluntarily placed himself under his power, or has merely fallen into his power by virtue of the exterior force of the tactical situation.

Those persons who will be covered by this view, but who do not intend to sever their allegiance, are not likely to suffer from the loss of prisoner of war status. A belligerent will probably not attempt to force their utilization for two principle reasons. First, any less humane treatment than prisoners of war would restrain other posible deserters. The tactical and psychological advantages of such desertions are too great to risk such an effect. Second, any forced utilization would be of questionable value. It must be remembered that a belligerent could determine to accord them prisoner of war status and probably would do so in such cases, or perhaps a belligerent might even enhance their position above that of prisoner of war for the psychological purpose of inducing other desertions. Even if such status were not accorded them, there is strong support for the view that if they are not accorded prisoner of war status they would become protected persons under the 1949 Civilians' Convention.[79] As protected persons they could not be compelled to serve in the armed or auxiliary forces of the detaining power.[80]

The fourth interpretation, that all deserters from their own forces, even those captured by chance, are not included within Article 4, probably extends Article 4 beyond its permissible limits. It might be argued that Mr. Garcia-Mora and Mr. Schapiro support this position by their assertions that deserters are probably not prisoners of war under the Convention. However, it must be considered that both authors were concerned primarily with the repatriation of deserters and whether they would extend this to the area of their posible utilization must remain subject to question.

Where deserters have been captured or fallen into the power of the enemy within the apparent meaning of the Convention, the mere fact that they have deserted their own forces should not allow a belligerent to consider them other than as a prisoner of war. By their act of desertion they have merely violated their own municipal law and this should have no apparent effect upon their status under the Convention. It cannot be reasonably argued

[79] The Geneva Conventions of 12 August 1949, Commentary IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War 50 (Pictet ed. 1958).

[80] Geneva Convention Relating to the Protection of Civilian Persons in Time of War, 12 Aug 1949 [1955], 6 U.S.T. & O.I.A. 3516, T.I.A.S. 3365 (effective 2 Feb 1956), Art. 51; see also FM 27-10, pars. 418-420.

that the municipal law of a particular nation forms a part of the Convention which would effect a change of the language "fallen into the power".

In view of the determination that prisoners of war need not be forceably repatriated under the Convention, their being accorded such status would not operate to their detriment. It would only be in the case of forced repatriation where they might suffer and such an action would be highly unlikely.

A fifth interpretation which was considered, but rejected, was to exclude from prisoner of war status those who do not desert, but at the time of their surrender, or capture, or subsequently, voluntarily terminate their allegiance to their forces of their country and offer to aid their captors. Such personnel clearly "fall into the power" of the enemy within the meaning of Article 4, and to allow them to renounce such status would violate the provisions of Article 7.

IV. CONCLUSION

It is one thing to analyze and interpret the Convention to determine the status of deserters and the consequent limitations upon their utilization. It is an entirely different matter to determine whether the resulting rule is acceptable or one that will likely be adhered to in future hostilities. The suggestion that only those deserters who voluntarily place themselves in the custody of the enemy may be considered as being exempt from prisoner of war status and the resulting impact of Article 7 extremely limits those persons whose voluntary services may be utilized by a belligerent. However, it seems apparent that with respect to those persons falling within this exception, their voluntary utilization would not violate either the spirit of the Convention or the humanitarian principles of warfare.

The nations of the world are becoming more and more separated by the Cold War into two basic ideologies, communist on the one hand and non-communist nations on the other. The differences in population and manpower between them may be expected to be great. While nuclear weapons could probably neutralize any differences in size, their use may not be forthcoming, due to equal development of such weapons and a recognition that their use could result in annihilation of both sides. Thus the Achilles' Heel of one or the other may well be the loyalty of its forces. In this battle for the minds of men, it is not beyond the realm of possibility that large segments of either force might desert, or after being taken prisoners, indicate their desire to sever their allegiance.

That such a possibility exists is evidenced by the writings of a recent Soviet military defector who stated:[81]

> The presence in the armed forces of members of national minorities, many of whom were vicims of brutal reprisals for their defections in the last war, raises the question of the loyalty of at least a large portion of the Soviet forces. In time of war this would be a source of weakness or even peril to the Soviet state. The security system operating throughout the Soviet armed forces breeds constant discontent and irritation even at the highest levels in the Red Army, particularly owing to the supervision of the ordinary military establishment by the political MVD troops with their independent command and ancillary services of all kinds.

The internal revolts within the Communist satellite nations, as well as the large number of refugees escaping from these nations, certainly indicates that a serious problem of loyalty exists within the communist block.

Is there a rule of law that would prevent the free world from utilizing the voluntary services of these troops in (1) the event of their desertion, or (2) when, as prisoners of war, they offer their services? For deserters there is no prohibition. For prisoners of war there is the 1949 Convention which denies the captor some of the benefit of their voluntary service.

Whether the adoption by the delegates of Article 7 will achieve its desired effect of the ultimate in protection for prisoners of war is yet to be seen. Certainly this result was far from realized during the Korean Conflict, wherein wholesale violations of the Convention on the part of the Communists were the rule rather than the exception. Only time will tell whether this protection was worth the price paid for it.

The one paramount effect of Article 7 was to increase the importance of the status of deserters in future hostilities.

[81] Tokaev, Soviet Imperialism 70 (1954).

OFFICIAL RECORDS AND BUSINESS ENTRIES: THEIR USE AS EVIDENCE IN COURTS-MARTIAL AND THE LIMITATIONS THEREON*

BY LIEUTENANT DONALD E. SELBY**

I. INTRODUCTION

Since the advent of the Uniform Code of Military Justice [1] and its companion-in-arms, the Manual for Courts-Martial, 1951, (hereafter referred to as the Manual), legal scholars and practitioners have commented freely on many aspects of military law. Little has been written, however, about the individual rules of evidence in trials by courts-martial. Since many of the rules set forth in the Manual [2] are identical with those in civil life, the absence of comment is understandable. In most instances the military lawyer can look to the existing writings of his civilian brothers for interpretation and discussion of the myriad, and sometimes confusing, decisions of the courts. There are, however, some aspects of the military rules of evidence which need clarification either because of their special nature or their frequency of use in courts-martial. One aspect is the use of entries in official records and business entries as evidence in trial by court-martial.

The "official records" and "business entry" exceptions to the hearsay rule of evidence are found in both military and federal law. Contrary to the belief of some attorneys, little difference exists between the federal provisions [3] and the provisions in the Manual.[4] In fact, the "business entry" provisions in the Manual were based on the federal statute.[5] It can be fairly stated that what is often mistaken for a difference in the rule is actually a difference in frequency of use. The very nature of the military establishment, with its constantly changing and shifting personnel and its worldwide bases, creates additional problems for the mili-

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[1] 10 U.S.C. §§ 801–940 (1958) (hereinafter referred to as the Code or UCMJ).

[2] Chap. XXVII, MCM, 1951.

[3] 28 U.S.C. § 1733 (1958) (official records); 28 U.S.C. § 1732 (1958) (business entries).

[4] Par. 144b, MCM, 1951 (official records); Par. 144c, MCM, 1951 (business entries).

[5] Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 229.

tary lawyer who must present evidence before courts-martial. Trial and defense counsel are almost daily faced with the problem of absent witnesses who have either been transferred or are unavailable due to military necessity. As a result, frequent recourse must be had to rules of evidence which will permit counsel to place facts before the courts-martial without the physical presence of the witness having knowledge of those facts. Of necessity, then, the exceptions to the hearsay rule must be used.

An official statement, in writing, made as a record of a fact or event by an individual acting in the performance of an official duty, imposed upon him by law, regulation, or custom, to know or ascertain through appropriate and trustworthy channels of information the truth of the matter and to record it, is admissible in evidence before a court-martial to prove the truth of such matters.[6] Any writing or record made as a memorandum of record of any act or event, is admissible in evidence before a court-martial as evidence of such act or event if made in the regular course of business at the time of such fact or event or within a reasonable time thereafter. The fact that the person making the entry may have lacked personal knowledge of the matters recorded affects only the weight of the evidence and not its admissibility.[7]

Every military attorney is familiar with the examples of military records containing entries which may be admissible in evidence under the "official record" exception to the hearsay rule.[8] The morning report (in the Army and Air Force) and the service record entry (in the Navy) are used daily to prove the offense of unauthorized absence in courts-martial. Specific sanction for such use is found in the Manual, wherein it is stated:

> Absence without leave is usually proved, prima facie, by entries in the morning report . . . and by entries in the service record or unit personnel diary . . . they are evidence . . . of the absence without proper authority and attendant facts and circumstances required to be recorded . . . .[9]

Thus, in the absence of rebutting evidence, the official record or records may prove every element of the offense.

Reason dictates that there must be some limitations as to what matters may be proved under these exceptions. The Manual lists several specific limitations:

> The mere fact that a document is an official writing or report does not, in itself, make it admissible in evidence to prove the truth of the

[6] Par. 144b, MCM, 1951.
[7] Par. 144c, MCM, 1951.
[8] Par. 144b, MCM, 1951.
[9] Par. 164a, MCM, 1951.

matters therein stated. An official writing may be admitted in evidence for this purpose only when it comes within one of the recognized exceptions to the hearsay rule.[10]

The official records and business entries must be properly authenticated.[11]

Records or entries of "opinion" are not admissible under either exception to the hearsay rule.[12]

In considering official records, the recording official must not only have had a duty to make an entry as to a certain fact or event but must also have had a duty to know or ascertain the truth of the matter set forth in the record.[13]

Similarly, it is not sufficient that a particular business entry was made in the regular course of conduct which had some relationship to business if it was not made in the regular course of business.[14]

Neither the official record nor the business entry exception to the hearsay rule renders admissible in evidence writings or records made principally with a view to prosecution.[15]

A news account of an incident is not admissible, under either of these exceptions to the hearsay rule, to prove the incident.[16]

In this article the decisions of the federal courts and the United States Court of Military Appeals[17] will be examined to determine the extent to which these exceptions to the hearsay rule may be used in courts-martial. An effort will also be made to determine the scope of application of the limitations on their use as set forth in the Manual, and to determine whether any additional limitations have been imposed by the courts.[18]

II. THE OFFICIAL RECORDS EXCEPTION TO THE HEARSAY RULE OF EVIDENCE

A. *The Reason for the Exception*

Before proceeding to a consideration of the courts' interpretations of the official records exception to the hearsay rule, it would be well to consider the reason for the exception. As in the case of the other exceptions to the hearsay rule, the basis can be generally stated as one of "necessity" and "trustworthiness." However, "necessity" in this case is reduced to a high degree of expediency. Thus it is not required that the public official be shown

[10] Par. 144a, MCM, 1951.
[11] Par. 143b(2) (a)–(f), par. 144c, MCM, 1951.
[12] Par. 144d, MCM, 1951.
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*
[17] Hereinafter referred to as Court of Military Appeals.
[18] The problem of authentication of official records and business entries will not be treated in succeeding chapters except as necessary to discussion of other limitations.

to be "unavailable by reason of death, absence, or like circumstances." [19]

> Although, then, there is strictly no necessity for employing hearsay, in the sense that the personal attendance of the officer is corporally impossible to obtain, there is nevertheless a high degree of expediency that the public business be not deranged by insisting on the strict enforcement of the Hearsay rule.[20]

In addition there is a great likelihood that a public official would have no memory at all respecting the hundreds of entries that are little more than mechanical.[21] In the military sphere there is not only a necessity that the performance of official duty be uninterrupted, but there exists also the recurring problem of absolute unavailability of officers who may have made the entries in official records. The exigencies of the service requiring frequent transfers of personnel and the urgency of military operations dictate that some substitute be utilized for parol testimony.

The influence of the official duty, whether imposed by statute, regulation, or by implication inherent in the official position, to make an accurate statement is considered sufficient to provide the element of "trustworthiness" justifying the acceptance of the hearsay statement.

> [I]n the matters in which the law of Evidence is concerned, official duty is on the whole a vital force, more potent than might be supposed, even in a community where official ceremony and dignity are as little regarded as with us. And even if the traditional assumption of the potency of official duty and honor be in some regions or for some classes of incumbents more a fiction than a fact, it is at least a fiction we can hardly afford in our law openly to repudiate.[22]

It might well be added, parenthetically, that the very nature of the military establishment, i.e., the strict regulatory provisions governing every facet of military business, together with the absolute necessity for rigid adherence to the principles of integrity and honor essential for the maintenance of discipline, furnish an even greater guarantee of trustworthiness.

Official records, or "official statements" as Professor Wigmore prefers to delineate them,[23] were admissible at common law.[24] However, many states have enacted specific statutes, either of general application or for limited purposes, making official records admissible in evidence. So too, the Congress has provided for the admissibility of official records in the federal courts.[25]

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[19] 5 Wigmore, Evidence § 1631 (3d ed. 1940).

[20] *Ibid.*

[21] Wong Wing Foo v. McGrath, 196 F.2d 120 (9th Cir. 1952).

[22] 5 Wigmore, Evidence § 1682 (3d ed. 1940).

[23] *Id.* § 1630.

[24] See, *e.g.*, Evanston v. Gunn, 99 U.S. 660 (1878).

[25] 28 U.S.C. § 1733 (1958) (implemented by Fed. R. Civ. P. 44 and Fed. R. Crim. P. 27).

Similarly, the admission of official records in evidence in courts-martial is specifically provided for in the Manual.[26]

The next consideration, then, is the specific provisions of the military and federal rules.

B. *The Military and Federal Rules*

1. *The Military Rule*

> An official statement in writing, whether in a regular series of records or a report, made as a record of a certain fact or event is admissible as evidence of the fact or event if made by an officer or other person in the performance of an official duty, imposed upon him by law, regulation, or custom, to record such fact or event and to know, or to ascertain through appropriate and trustworthy channels of information, the truth of the matter recorded.[27]

2. *The Federal Rule*

> (a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.
>
> (b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.[28]

It is apparent from a reading of the federal rule that no attempt has been made to prescribe the requirements which must be met before the "books or records or minutes of proceedings" qualify for admission into evidence. The federal statute deals primarily with the method of proof of official documents and is of no aid in determining what kinds of official documents are admissible.[29] Such questions must be worked out in consonance with common law principles as interpreted by the courts of the United States in the light of reason and experience.[30] No difference in application of the rule has been recognized between documents of federal, state, and county governments.[31]

The military rule, on the other hand, has been couched in such terms as to provide specific basic prerequisites which must be met before an "official statement" is qualified for admission into evidence as an exception to the hearsay rule. These basic prerequisites can be said to constitute limitations on admissibility, since it will be seen that failure to meet them will preclude admissibility. Amplifications of these inherent limitations as well as certain

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[26] Par. 144a, 144b, 144d, MCM, 1951.

[27] Par. 144b, MCM, 1951.

[28] 28 U.S.C. § 1733 (1958).

[29] Olender v. United States, 210 F.2d 795, 800 (9th Cir. 1954). *Accord:* United States v. Grayson, 166 F.2d 863 (2d Cir. 1948); Vanadium Corp. of America v. Fidelity and Deposit Co. of Maryland, 159 F.2d 105 (2d Cir. 1947).

[30] Olender v. United States, *supra* note 29, at 801.

[31] *Ibid.*

other limitations not apparent on the face of the rule, are also found in the Manual.[32]

Since the military rule is more precise and is more easily adaptable to at least a general categorization of the limitations on admissibility, the case law will be considered with the emphasis on military cases, indicating where appropriate, agreement or disagreement in the federal courts as the case may be.

C. *The Record Must Be Official*

1. *Military Law*

When offered in evidence as an official record, a particular document must first be shown to be "official" in that it is a report or entry in a record *required* by law, regulation or custom. The court may take judicial notice of the pertinent regulations or customs of the armed service concerned.[33]

The following examples will serve to illustrate the various types of records required by regulations which have been held admissible under the official records exception:

> Extract from the "Time Lost" section of a service record reflecting the inception of an unauthorized absence where current regulations required determination and recordation of the inception of unauthorized absences for the purposes of computing time lost from duty;[34]
>
> Transfer orders, including letter type orders, required by regulations to be maintained in a service record;[35]
>
> A "Plan of the Day" setting forth the routine of the day for ship's personnel and other official information where Navy Regulations required its maintenance.[36]

However, information not required by regulations to be recorded will not be admissible. Accordingly, where Marine Corps regulations in effect at the time a certain entry was made in the accused's records did not require a recording of the manner in which a period of AWOL was terminated, such an entry which purported to show that the accused had been apprehended was not admissible as an official record to show the fact of apprehension.[37]

Similarly, a portion of a service record entry showing termination of an unauthorized absence which related that the accused had been apprehended by civil authorities, tried and convicted for vagrancy was held not to be within the meaning of

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[32] Par. 144d, MCM, 1951.
[33] Par. 147a, MCM, 1951.
[34] United States v. McNamara, 7 USCMA 575, 23 CMR 39 (1957).
[35] United States v. Johnson, 10 USCMA 630, 28 CMR 196 (1959).
[36] United States v. McBride, 6 USCMA 430, 20 CMR 146 (1955).
[37] United States v. Bennett, 4 USCMA 309, 15 CMR 309 (1954).

"circumstances of return" required to be recorded by navy regulations and therefore inadmissible hearsay.[38]

The same limitation is applicable to records offered by the defense. Thus an entry in a service record offered by the defense to establish that the accused qualified as a marksman on a given date during the period of absence alleged was not admissible as an official record where existing regulations would require an entry only if he qualified as an expert.[39]

While the cases speak repeatedly of entries made pursuant to a duty to record imposed by regulation, only one case has been found in which it was said that the duty to make a specific entry could be rested on custom. In that case, a trial for desertion, certain communications from the Commanding General, Air Training Command, accepting an unconditional resignation submitted by the accused and directing his discharge by a certain date, were offered by the defense. Also admitted were certain indorsements to the communications and teletype messages concerning the same subject. Although the admissibility of the documents was sustained on the basis that they were official records, made pursuant to regulations, the Air Force Board of Review said:

> Even absent such specific requirements . . . , it can scarcely be denied that a tender thereof, [the resignation] and the consequent steps taken to approve or disapprove it, constitute a fact or event that the military authorities concerned would, by recognized custom and usage, generally record by written communications between the headquarters concerned.[40]

The only definition of "custom" is found in paragraph 213a of the Manual which says:

> In its legal sense the word "custom" imports something more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common consent have attained the force of law in the military or other community affected by them . . . .

It is apparent that this definition contemplates a service-wide "method of procedure or mode of conduct" rather than a local nature. In any event, the problem is probably academic since, as the same paragraph of the Manual points out, many customs of the service are now set forth in regulations of the various armed forces. In addition, where it could be shown that particular entries were regularly made in accordance with practice or custom, they would probably qualify as business entries, admissible under a separate exception to the hearsay rule. Where clearly admissible

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[38] United States v. Hall, 10 USCMA 136, 27 CMR 210 (1959). *But see* United States v. Coates, 2 USCMA 625, 10 CMR 123 (1953). (See also nn. 103–5 *infra* and accompanying text.)

[39] United States v. McNamara, *supra* note 34, at 578, 23 CMR at 42.

[40] ACM 11650, *Bean*, 21 CMR 699, 703 (1956).

under the business entry exception, it would be highly unlikely that counsel would jeopardize his case on the chance that it would be admissible as an official record.

2. *Federal Law*

Official records were admissible in evidence in the federal courts prior to the inception of the federal statute. The test for admissibility was based on the common law reliance on the inherent trustworthiness of records prepared by public officials in the course of their duty.

Thus in 1878 the United States Supreme Court upheld the admissibility of weather reports and data prepared by the U.S. Signal Service as official records even in the absence of a specific statute authorizing their admission in evidence.[41] The Court found that existing statutes required meteorological information to be taken at military posts and required the Secretary of War to provide for reports of this data. Accordingly the Court held that the reports were required to be kept in the course of official duty.[42] Similarly, in a civil suit by the United States to recover dividends on capital stock, the United States Supreme Court upheld the admissibility of Treasury Department records reflecting receipt of certain dividends to prove the truth of the entries and as tending to show that certain other dividends were not received. The Court based the admissibility of the records on the fact that they were required by law to be kept.[43] So too, in a suit involving disputed water rights, a report of a state engineer required by state law to be made in such cases was admissible as an official record.[44]

As was found to be true in the military cases, a failure to show that a particular entry in an official record was, in some manner, required will preclude its admission into evidence under the exception. Thus in a dispute concerning the conveyance of land, a "census" of Indians entitled to participate in the division of lands granted by the Treaty of Prairie du Chien, offered to prove the age of a certain Indian, was held inadmissible since the Act of Congress did not require ascertainment of the respective ages of the Indians nor the preservation of the "census" itself as a public record.[45]

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[41] Evanston v. Gunn, 99 U.S. 660 (1878).

[42] *Id.* at 666. *Accord:* Minnehaha County, S. D. v. Kelley, 150 F.2d 356 (8th Cir. 1945).

[43] Chesapeake and Delaware Canal Co. v. United States, 250 U.S. 123 (1919).

[44] Pacific Livestock Co. v. Lewis, 241 U.S. 440 (1916). *Cf.* Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944).

[45] Hegler v. Faulkner, 153 U.S. 109 (1894).

Some controversy exists as to the admissibility of reports submitted by other than public officials *to* government agencies pursuant to statutory requirements. For example, in a case involving the loss of a dredge hull while being towed by a tug, a report filed by the master of the tug in compliance with Coast Guard regulations was admissible in evidence as an official record.[46] However, monthly returns of sales made by oleomargarine dealers required by internal revenue regulations were not admissible as official records,[47] nor were records of sugar sales though required by regulations.[48] The rationale of the opinions excluding such "ad hoc" reports appears to be a serious doubt as to their necessity and trustworthiness.

Research fails to reveal any specific case on this particular point in the military. However, since military personnel are required to file income tax returns and are subject to assessment, it is certainly conceivable that such records could be utilized in courts-martial.

In the federal courts, while there is no specific mention of official records "required by custom," there is mention of entries made in public records in the "course of public duty." Professor Wigmore states the rule as being based on the official duty to act, that is, "wherever there is a duty to do, then there is also a duty to record the things done." [49] Thus where a contract for sale of mining leases covering Indian lands was subject to the approval by the Secretary of the Interior, interdepartmental communications containing corroborating evidence of departmental willingness to approve the sale if the cooperation of the owners could be assured were properly admitted as official records.[50]

D. *The Entry Or Record Must Be Properly Recorded*

1. *Military Law*

The record must, on its face, have been prepared in the manner prescribed by regulations. If the pertinent regulation, pursuant to which an entry is made, requires a specific manner of preparation, the failure to comply with such requirement may be fatal.

An extract copy of a morning report entry certified by the cus-

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[46] Sternberg Dredging Co. v. Moran, 196 F.2d 1002 (2d Cir. 1952). *Accord:* Lewis v. United States, 38 F.2d 406 (9th Cir. 1930); McInerny v. United States, 143 F. 729 (1st Cir. 1906); 5 Wigmore, Evidence § 1633a (3d ed. 1940).

[47] United States v. Elder, 232 Fed. 267 (D.C. Cir. 1916).

[48] Matthews v. United States, 217 F.2d 409 (5th Cir. 1954).

[49] 5 Wigmore, Evidence § 1639 (3d ed. 1940), and cases cited therein.

[50] Vanadium Corp. of America v. Fidelity and Deposit Co. of Maryland, 159 F.2d 105 (2d Cir. 1947). (The court reasoned that the communications contained the very essence of the Assistant Secretary of Interior's decision which he was required to make and was therefore similar to a formal opinion.)

todian of the original report to contain all signatures which appeared on the original was held inadmissible as an official record where no signature appeared on the entry and the morning report regulation required all such entries to be signed. On its face, this record had not been prepared in accordance with the controlling regulation.[51] Similarly a morning report entry which was initialed and not signed as required by regulations was inadmissible as an official record.[52] However, the failure to include the words "corrected entry" on a morning report which in fact corrected a previous report did not of itself render the subsequent report unofficial or inadmissible where not "material to the execution" of the document.[53] It should be noted that what is "material to the execution" of the document is not defined[54] and is decided on a case by case basis.

2. *Federal Law*

No specific case has been found wherein the federal courts have discussed a requirement that the official statements must be recorded in the precise manner specified by a statute or regulation. It would appear reasonable, however, to expect that a showing of an omission of a material fact, required by a statute or regulation to be recorded, could successfully be asserted as a bar to admission of such record on the basis that it would not satisfy the courts as to its trustworthiness.

E. *Must Record A Fact Or Event*

1. *Military Law*

It will be recalled that the military rule requires that the entry concerned must pertain to a "fact or event."[55] In this area, the drafters of the Manual chose to amplify the limitation inherent in the basic rule. For this purpose, an opinion is not a fact.[56]

It is immediately apparent that many entries in military records, required by law, regulation, or custom, run head-on into this prescription. It is arguable, at least, that such entries as "unauthorized absence," "breach of arrest," "apprehension," "escape from confinement," etc., are not really facts but are the opinions or legal conclusions of the person making the entry.[57]

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[51] United States v. Parlier, 1 USCMA 433, 4 CMR 25 (1952).

[52] United States v. Henry, 7 USCMA 663, 23 CMR 127 (1957); *but see*, CM 387850, *Slabonek*, 21 CMR 874 (1956), *pet. denied*, 7 USCMA 772, 21 CMR 340 (1956) (report initialed instead of being signed, held not to undermine circumstantial probability of trustworthiness and admitted as a business entry).

[53] United States v. Anderten, 4 USCMA 354, 15 CMR 354 (1954).

[54] CM 394273, *Witty*, 23 CMR 515 (1957).

[55] See text accompanying note 27 *supra*.

[56] Par. 144d, MCM, 1951.

[57] *Evidence*, Special Text of The Judge Advocate General's School, U.S. Army, 1959, at 2205.

This was successfully urged in a case where a service record entry was offered in evidence, reciting that the accused had missed the movement of his ship on a certain date, and that such movement was known to him by virtue of its having been published at quarters and in the "Plan of the Day." Only that portion of the entry relating that the accused missed the movement of his ship was held admissible under the official records exception. That portion of the record which related that the movement of the ship was known to the accused by being published at quarters and in the "Plan of the Day" was held to be a mere opinion or conclusion of the entrant and, as such, pure hearsay incompetent to prove knowledge.[58] However, in a case involving the charge of desertion, a Navy Board of Review held that it was not error to admit into evidence service record entries containing the word "deserter" where the Law Officer instructed the court (both at the time of admission and during final instructions) that it must make an independent determination of the presence or absence of an intent to desert.[59] Similarly, in an Air Force trial for desertion, service record extracts which contained, *inter alia*, an entry, "DFR as des," (dropped from rolls as deserter) were held to be of no legal efficacy even though required by regulations. The court held that the particular entry related to an administrative determination which could not be considered as evidence bearing on intent to remain away permanently, and a failure by the Law Officer to so instruct was error.[60]

As the Manual points out, "it is often difficult as a practical matter to draw the line between what is opinion and what is fact." [61] However, the Manual also points out that:

> [s]ome assertions based on trained observation which, strictly speaking, might be considered statements of opinion so closely approximate statements of fact as to permit the law to place them in the latter category rather than in the former and to admit a record of them in evidence without appreciable risk of doing an injustice because of the lack of opportunity to cross-examine.[62]

Tacit recognition of this is found in a case in which a log entry in a guard report book to the effect that the officer of the guard

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[58] NCM 81, *Thornton*, 2 CMR 610 (1952).

[59] NCM 373, *Tainpeah*, 18 CMR 382 (1954) (the opinion does not make clear whether the entry "deserter" was actually required by regulation).

[60] ACM 12395, *Graham*, 22 CMR 810 (1956), *pet. denied*, 7 USCMA 786, 22 CMR 331 (1956). (Here the entry was required by regulations for personnel accounting purposes and the administrative determination was required for the disposition of the man's records. The duty imposed on the entrant was to ascertain that the member had been absent for 30 days, but was not to ascertain his intent.)

[61] Par. 144d, MCM, 1951.

[62] *Ibid.*

had found the accused (sentry) fast asleep in a truck and had relieved him of duty, was admitted in evidence as an official record without objection.[63] The Court of Military Appeals, speaking through Judge Latimer in an opinion concurred in by Chief Judge Quinn, said by way of dictum:

> It may well be that an opinion entry which states that a sentry was asleep so closely approximates a statement of fact as to permit its use in an official document. . . .[64]

No case has been found, however, in which such an entry has been admitted in evidence.

Despite the suggestion that entries relating to unauthorized absence, apprehension, escape from confinement, etc., might arguably be termed opinions or legal conclusions, the Court of Military Appeals has consistently upheld their admissibility when such entries are required by regulation. It should be noted, however, that these entries relate to personnel accounting matters and no indication has been found that the court would countenance the admissibility of opinions relating to other matters merely because regulations require an entry of that nature in an official record.[65]

2. *Federal Law*

In general, the federal cases follow the rule that official records containing opinions and conclusions are not admissible in evidence under this exception to the hearsay rule. Thus a written report of a state gas inspector, required by state law to be submitted to the fire marshal, and which contained the inspector's opinion as to the cause of an explosion was held inadmissible when offered to prove the main issue in a civil case, i.e., negligence.[66] There the court acknowledged that in some instances reports, findings, and conclusions of public officials concerning causes and effects have been held admissible under the official records exception when made pursuant to authority to conduct hearings in the public interest.[67] However, the following language of the court expresses the rule generally applied:

> But expressions of opinion and conclusions on causes and effects based upon factual findings are not always admissible as public records,

[63] United States v. Johnson, 9 USCMA 178, 25 CMR 440 (1958).

[64] *Id.* at 180, 25 CMR at 442 (while this entry was found to be inadmissible because the entrant was present and testified at the trial, there then being no necessity for the use of the official record the majority of the court found no prejudice in its admission).

[65] For example, it would not appear that an official record containing the opinion of an accident investigator as to the cause of an accident would be admissible even if such a report were required by regulations.

[66] Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944).

[67] See, *e.g.*, Pacific Livestock Co. v. Lewis, 241 U.S. 440 (1916).

> especially when it is shown either that the conclusion or opinion which the statement purports to convey would not be admissible if tendered by the direct testimony of the maker, or if the denial of the right to cross-examination would result in the perversion of the rule of trustworthiness and reliability . . . . The search is for the truth and the trial court is the first and best judge of whether tendered evidence meets the standard of trustworthiness and reliability which will entitle it to stand as evidence of an issuable fact, absent the test of cross-examination.[68]

In holding that the trial court was justified in excluding the report, the court said:

> The statement is not inadmissible because of its lack of authenticity or because it is not a public document subject to public inspection, but because the matter and things contained therein express merely the opinion of one whose official office and duty does not rise to the duty of an adjudicator of causes and effects.[69]

In a similar vein, reports made by a coal company to the Bureau of Labor Statistics which indicated that certain strikes were caused by efforts to unionize truck mines were held to be inadmissible as official records, even though filed with an agency of the United States, since the reports dealt with the matters at issue and were matters resting on conclusions and hearsay.[70]

In the discussion of the business entry exception to the hearsay rule[71] it will be seen that a difference of opinion exists between the various circuits as to the admissibility of investigative reports under that exception.

F. *Presumptions*

When a properly authenticated document or admissible copy thereof appears, on its face, to satisfy the requisites of an official record certain presumptions arise. It will be presumed, prima facie, that the record was made by a person required by law, regulation, or custom to do so and that the entrant performed the duty properly. The decided cases indicate that these presumptions will survive even in the face of evidence which, if believed, casts doubt thereon. The record will lose its aura of "officiality" only when the contrary evidence is undisputed. Only then are the presumptions overcome and the record rendered inadmissible.

1. *Military Law*

The tenor of the Court of Military Appeals' approach to the presumption of regularity was evident in the case of *U.S.* v. *Masusock*,[72] decided soon after the UCMJ became effective. The then

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[68] Franklin v. Skelly Oil Co., *supra* note 66, at 572.

[69] *Ibid.*

[70] UMW v. Patton, 211 F.2d 742 (4th Cir. 1954), *cert. denied*, 348 U.S. 824 (1954).

[71] See Part III, *infra*.

[72] 1 USCMA 32, 1 CMR 32 (1951).

existing regulations provided that an individual other than a commanding officer could sign morning reports only if so authorized by the commanding officer. In *Masusock*, the morning reports were signed by a personnel officer, but no evidence was offered to show his authority for signing. In its ruling on the assertion by appellate counsel that such morning reports were hearsay and inadmissible, the court's attitude was made plain in the following language:

> [T]here is a presumption that the records emanating from official unit sources are the records required by regulation to be kept and that the person recording even though not shown as the commanding officer knew or had the duty to know or ascertain the truth of the facts or events recorded . . . .[73]
>
> We must presume that the commanding officer adopted a preferred practice and designated the personnel officer; or, that the latter arrogated to himself the duties belonging to another officer. As between the two, we believe the former in keeping with and the latter contrary to ordinary standards of conduct. Such being the case, the presumption of regularity attends and if petitioner seeks to overcome the presumption he must introduce some evidence to rebut it . . . .[74]

This case has been cited repeatedly and is still good law today.

The strength of the presumption is further evidenced by a case in which it was held that the presumption attached even though the entrant was a legal officer whose duties do not normally include the maintenance of personnel records and the prosecution was not required to show affirmatively that the legal officer had been delegated authority to make such entries or to maintain such records.[75]

The presumption can be effectively destroyed, however, as in a case where it was shown that the person signing a morning report was not authorized by regulations to do so, and had acted at the direction of another who had only delegated authority to sign the report.[76]

2. *Federal Law*

Examination of the federal cases discloses no specific expression as to the necessity that the original official record be signed by a person authorized to do so when law or regulation require a signature. There is no doubt, however, that in any such case in which it could be shown that a record was prepared by an unauthorized person it would be excluded. Thus in a case where copies of a

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[73] *Id.* at 35, 1 CMR at 35.

[74] *Id.* at 37, 1 CMR at 37.

[75] United States v. Moore, 8 USCMA 116, 23 CMR 340 (1957); *cf.* NCM 152, *Johnson*, 6 CMR 459 (1952) (noncommissioned warrant officer can make entries in personnel record when properly designated).

[76] ACM 12908, *Leach*, 23 CMR 732 (1956).

secret decree and ministerial order of the Spanish Government were offered as official records, the court said that while it was not inconceivable that a custodian of records could perjure himself and falsify documents, the rule and statute presume that such would not be the case but that evidence rebutting the presumption would always be received.[77] Implicit therein is the idea that the regularity of the document offered, including the authority of the person who prepared it, is always open to challenge.

Similiarly, in several cases, reports or documents submitted to federal agencies by non-official persons in compliance with statutes or regulations were held admissible as official records where the signatures thereto purported to be those of the proper persons and no further proof was required.[78] This of course does not preclude an attack by the opponent on the authenticity of the signatures on the original records which, if successful, would destroy the validity of the record. It seems reasonable to believe that this same rule would apply to an entrant who is in fact a public official.

3. *Duty Performed Properly*

> In the absence of proof to the contrary it will be presumed that the individual charged with the duty to prepare a particular record performed that duty properly in the sense that he knew, or ascertained through appropriate and trustworthy channels of information, the truth of the matter recorded and accurately recorded such matter.[79]

4. *Delayed Entries*

a. *Military Law*

For admissibility purposes, the presumption of regularity will withstand a showing that the entry was made a substantial period of time after the occurrence of an event.

The Court of Military Appeals initially approached the problem of the effect on admissibility of a delay in making entries in official records with some caution. Thus in *United States* v. *Hagen*[80] a service record entry which showed on its face that it had been made 89 days after commencement of an unauthorized absence, and 27 days after termination of the absence was held admissible in evidence.

> It is not, however, an unyielding condition precedent that the record have been made *within a certain specified time*. We are sure that the establishment of such a qualification would gravely misconstrue the *ratio* of the premise underlying the official records' exception to the hearsay rule.

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[77] Banco de Espana v. Federal Reserve Bank, 114 F.2d 438 (2d Cir. 1940).

[78] *E.g.*, Desimone v. United States, 227 F.2d 864 (9th Cir. 1955); Lewis v. United States, 38 F.2d 406 (9th Cir. 1930).

[79] *Evidence*, Special Text of The Judge Advocate General's School, U.S. Army, 1959, at 2204.

[80] 2 USCMA 324, 8 CMR 124 (1953).

> This is not to say at all, however, that the time when a morning report or service record entry is made is totally irrelevant—for, of course, numerous legal analogies, as well as the dictates of common sense, *require that it be made within a reasonable time.* In the very nature of the problem no more precise yardstick may be furnished. Suffice it to say that the time lag involved in the instant case did not exceed permissible limits. We should also observe that the lapse of time between the happening of an event, and the execution of a record concerning it, may be considered as bearing in numerous ways on the credibility of the latter or an extract copy thereof.[81] (Emphasis added.)

Somewhat later the Court of Military Appeals used broader language in considering a delayed corrective entry in a morning report, stating:

> We are aware of no limitation of time governing the making of a corrective entry, and none has been called to our attention. In fact, the necessity for such a correction would seem properly to bring it within the popular precept "better late than never."[82]

More recently, in a trial for desertion, the court considered a delayed correction of a morning report entry made some 3½ years after the alleged commencement of an unauthorized absence.[83] With a nod to the previous cases which had intimated that admission of a service record entry might depend upon the interval of time between the making of the entry and the occurrence of the fact or event recorded, the court reiterated its language in *U.S.* v. *Wilson*[84] as the basis for upholding the admission of the delayed entry in the instant case. By way of dictum, the court added:

> Substantial delay in performing the act [making the entry] may indeed make it difficult for the official to ascertain the truth of the matter set forth in the record . . . . But the possibility that the difficulty may induce the official to record the matter without any real effort to determine its truth is no reason to deny the *power* to make the entry . . . .[85]

The rule is clear, then, that delay in time alone in making an entry in an official record will not, in itself, preclude its admissibility.

b. *Federal Law*

While no cases have been found in which the federal courts have discussed the effect of a delay in making entries in federal records as such, some indication is found that the courts are influenced by the time the entries are made. In *Chesapeake and Delaware Canal Company* v. *United States,*[86] the court admitted

[81] *Id.* at 325–26, 8 CMR at 125–26; *accord:* United States v. Barrett, 3 USCMA 294, 296, 12 CMR 50, 52 (1953) (delay of 46 days); CM 367480, *Brown,* 13 CMR 303 (1953) (delay of 1½ years).

[82] United States v. Wilson, 4 USCMA 3, 5, 15 CMR 3, 5 (1954).

[83] United States v. Takafuji, 8 USCMA 623, 25 CMR 127 (1958).

[84] 4 USCMA 3, 5, 15 CMR 3, 5 (1954).

[85] United States v. Takafuji, 8 USCMA 623, 626, 25 CMR 127, 130 (1958).

[86] 250 U.S. 123 (1919).

into evidence, as official records, certain Treasury Department records. In discussing the trustworthiness of the records, the court pointed out that the records required regular, contemporaneous entries. [87]

In several instances, the language of the federal courts, in considering the admissibility of federal records, has included such phrases as "in the usual course of business," [88] "not transactions recorded in the ordinary course of business." [89] It is not clear whether the courts were stating a requirement for a contemporaneous recording of an event or whether they merely intended to indicate that regular and contemporaneous entries enhance the trustworthiness of the official records. The latter view seems the more logical, however.

5. *Corrected Entries*

a. *Military Law*

The presumption of regularity will also withstand a showing that a different entry was made originally and thereafter changed by a subsequent entry.

Thus, a corrected morning report entry showing a man AWOL as of 30 November 1950 was held admissible despite the fact that a morning report entry made some four months previous listed the man as missing in action as of 30 November 1950.[90] Neither the delay in making the correction nor the conflict between the entries rendered the corrected entry inadmissible.[91]

This approach to corrected entries has been consistently adhered to by the Court of Military Appeals. As recently as 1958 the court, in a case where the corrected entry was made over 3½ years after the original entry, reasserted the proposition that a delay in making the correction does not destroy the presumption that the entry is accurate for admissibility purposes but may affect the weight to be given it.[92]

The language of the Court of Military Appeals, in a case involving a corrected entry made 13 months after the original, furnishes some indication of the rationale of this approach.

> It must not be overlooked that morning reports serve numerous purposes in the military services. They furnish significant historical information

[87] *Id.* at 128, 129.

[88] O'Brien v. United States, 192 F.2d 948, 950 (8th Cir. 1951) (application for transfer to Organized Reserve and personnel records).

[89] UMW v. Patton, 211 F.2d 742, 751 (1954), *cert. denied*, 348 U.S. 824 (1954) (report made by coal company to Bureau of Labor Statistics).

[90] United States v. Williams, 1 USCMA 186, 2 CMR 92 (1952).

[91] *Ibid.*

[92] United States v. Takafuji, 8 USCMA 623, 25 CMR 127 (1958) (In the AWOL area, a delayed entry would also be a corrected entry in all cases.)

> of value in personnel accounting and in related management and planning. In addition, they afford data often used in connection with the adjudication of substantial claims against the Government and with critical determinations by the Veterans Administration. Because of these varied and important uses, some extending into a period long after the events recorded, it seems unthinkable that the Government would not demand the correction or deletion of a statement determined to be erroneous—no matter when the original entry had been made . . . .[93]

b. *Federal Law*

While no case authority can be cited, if a federal statute required specific entries to be made in government records and also provided for subsequent corrective entries, the courts would apply the circumstantial probability of trustworthiness to allow its admission into evidence.[94] There is no sound reason for saying that a correction entered in a record at a date subsequent to the happening of an event would be any less reliable than an original entry when the corrective entry is required. In any event the opponent is free to introduce evidence to rebut the entry with evidence which might disprove the entry in its entirety or at least cast doubt on its validity.

6. *Conflicting Entries*

a. *Military Law*

The presumption of regularity is not overcome by a showing that an entry is inconsistent or conflicts with other entries in official records. Examination of the cases discloses that, whether by design or by coincidence, the problem of whether an inconsistent or conflicting entry may be given any weight has been resolved by giving the accused the benefit of any inconsistency.

Thus in a case charging desertion with intent to shirk important service on 25 June 1952,[95] the prosecution introduced four morning report entries to establish the inception and termination of the unauthorized absence. The first, dated 17 November 1952 showed the accused as AWOL since 25 June 1952. The second, also dated 17 November 1952, showed the accused dropped from the rolls effective 25 July 1952. The third, dated 18 November 1952, corrected the second entry dated 17 November 1952 to show the accused dropped from the roles, effective 24 July 1952. The fourth, dated 29 December 1952 showed the accused's return to military custody on 26 December 1952. The defense introduced in evidence a special order disclosing that the accused was to report

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[93] United States v. Wilson, 4 USCMA 3, 5, 15 CMR 3, 5 (1954).

[94] See, *e.g.*, Chesapeake and Delaware Canal Co. v. United States, 250 U.S. 123 (1919).

[95] United States v. Phillips, 3 USCMA 557, 13 CMR 113 (1953).

to a certain replacement unit (the unit which made the morning report entries of 17 and 18 November) on 30 June 1952. An Army Board of Review held the first three entries inadmissible, apparently on the theory that the first entry was erroneous and the subsequent entries relating to dropping from the rolls being predicated on the erroneous entry were premature and therefore not made pursuant to law or regulation, and thus failed to meet the test for admissability as official records. The Court of Military Appeals reversed the Board of Review, saying:

> Stated somewhat differently, the opinion (Board of Review) seems to state that an official has a duty to prepare an accurate report, and if he fails to do so the record is not official. We had not understood the law to be to the effect that the duty depended upon accuracy and we cannot adopt that concept. The duty to make entries in morning reports is created and controlled by regulations and if the duty is performed the document is official regardless of its degree of accuracy . . . . It is intended that the accounting be accurate but mistakes creep in. That possibility, however, does not eliminate the necessity for accounting . . . .[96]

The Court of Military Appeals then held that the special order interpreted with the other documents fixed the inception of the absence as 30 June 1952 and the termination as 26 December 1952,[97] thus giving the accused the benefit of the inconsistency.

Again, where three morning reports were introduced showing the accused AWOL as of 31 May, 6 June, and 9 June, respectively, it was held that the inconsistency affected the weight but not the admissibility of the entries. The records, when considered with other evidence explaining the inconsistencies was sufficient to sustain a finding that the absence began on *9 June*.[98]

Similarly, in a case where the same entry in a morning report contained inconsistent terminology (present not for duty—AWOL), an Air Force Board of Review held that since regulations required that the true change of status be recorded it would be presumed that the entry "PNFD" was inacurrate and surplusage and could be disregarded except as to the weight to be afforded the entry.[99]

b. *Federal Law*

An expression of the probable result where official records introduced in federal courts are found to contain inconsistencies is found in *Southard* v. *United States*.[100] The court, in considering

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[96] *Id.* at 562, 13 CMR at 118.
[97] *Ibid.*
[98] United States v. Anderten, 4 USCMA 354, 15 CMR 354 (1954); *cf.* NCM 119 *Watson*, 3 CMR 461 (1952).
[99] ACM 7841, *McNeil*, 14 CMR 710 (1954).
[100] 218 F.2d 943 (9th Cir. 1955).

the admissability of sales documents from government agencies said:

> The sales documents will make a prima facie case for sale and delivery which will be sufficient alone to draw an issue for the government in a contested case unless the documents are self vitiating. That is, there must be nothing on the face of the documents which throws doubt on the sale or delivery having been made; otherwise the prima facie case is not made by the documents alone.[101]

The court went on to say that the federal rule does not make a government document received in evidence conclusive, irrefutable, or immutable. If the documents do not speak the truth, the defense can prove their untruth.[102] Thus, inconsistencies in official records will be treated by the federal courts as of no effect for admissibility purposes, but can affect the weight to be afforded the records.

7. *Information Recorded Was From A Proper Source*

a. *Military Law*

"An official record is not rendered inadmissible merely because it is shown to have been based entirely upon hearsay. This circumstance goes only to the weight to be accorded the evidence. However, it is possible for the party opponent to establish that the source of the information was unreliable and thereby effectively destroy the presumption that the entry was based upon trustworthy information and is accurate."[103] However, an official record, otherwise admissible, is not subject to objection on the ground that it was compiled from notes or memoranda or from other official records.[104]

A landmark case in this area is *United States* v. *Coates*.[105] There, existing Navy regulations provided that when an absentee returned to a base other than that from which he had absented himself the circumstances of his return would be recorded in his service record. An entry which recited the following was held admissible to prove two periods of unauthorized absence and escape from confinement. The accused absented himself from a naval base on 9 January; was apprehended by civilian authorities

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101 *Id.* at 947.

102 *Ibid.*

103 *Evidence*, Special Text of The Judge Advocate General's School, U.S. Army, 1959, at 2207.

104 Par. 144b, MCM, 1951.

105 2 USCMA 625, 10 CMR 123 (1953); *accord:* CM 394601, *Maldonado-Garcia*, 23 CMR 513, 514 (1957) ("Whether he actually knew—or even could have known personally—of the matters concerned is no longer material"). *But see*, United States v. Hall, 10 USCMA 136, 27 CMR 210 (1959) (entry reciting apprehension, trial and conviction by civil authorities for vagrancy —details of civil conviction not within "circumstances of return").

on 9 April and delivered to an Air Force base; was confined at that base and escaped; was again apprehended by civilian authorities and delivered to the Air Force base on 14 April; was delivered to a Navy recruiting station on 16 April and then delivered to a naval base (not his original duty station) where the record entry was made. A Navy Board of Review held the service record entry inadmissible because, among other reasons, the entries made by the Naval officer recorded events which transpired at an Air Force base. The Court of Military Appeals held that since the officer labored under a duty to learn from reliable sources what had taken place there and record it, *where* the event took place was of little moment and that circumstance would not operate as a bar to the admission of the record.[106] Again, contrary to the Board of Review, the Court of Military Appeals held that the information recorded by the Naval officer need not have been based on official records made and kept by an officer within the command of the Air Force who had the duty to record such events:

> Such a restriction is entirely unwarranted . . . . If it can be shown that the data reported are inaccurate, or even that the source of the reporting officer's information was not reliable, these are matters for the defense to bring forward . . . .[107]

The Court of Military Appeals further held that the information recorded need not have been obtained from sources within the command of the recording officer, saying: "Certainly, sources outside the command—particularly those of a military nature—may be wholly as reliable as those within it."[108]

Later, in *United States* v. *Simone* [109] and *United States* v. *Bongiorne,* [110] the court stated that when required by regulations, morning report and service record entries showing that the accused had been apprehended are sufficient—absent any sort of challenge to the correctness of the facts recited—to sustain a finding that the accused had been apprehended.

The strength of the presumption of regularity is again seen in *United States* v. *McNamara* [111] in which an indorsement forwarding the accused's service record to the Adjutant General of the Army pursuant to regulations after he had been dropped from the rolls on a given date as AWOL, was held admissible to established the absent status on that date although the date recited in the indorsement might have been based on a morning re-

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[106] United States v. Coates, *supra* note 105 at 629, 10 CMR at 127.
[107] *Ibid.*
[108] *Ibid.*
[109] 6 USCMA 146, 19 CMR 272 (1955) (Army).
[110] 6 USCMA 165, 19 CMR 291 (1955) (Marine Corps).
[111] 7 USCMA 575, 23 CMR 39 (1957).

port which was shown to be improperly prepared and not admissible in evidence itself.

A bare objection to official records on the basis that the entrant had no personal knowledge of the events recorded will not overcome the presumption of regularity.[112] Even if it is shown that the entry was based solely on hearsay the presumption remains, unless or until evidence is produced to show that the source of information was unreliable or untrustworthy. Just what circumstances will suffice to establish unreliability or untrustworthiness has not been spelled out by the Court of Military Appeals or the Boards of Review. However, where it can be shown that the source of information is one which normally is not required or expected to have or furnish such information the presumption of regularity will fall. Thus certain morning report entries shown to have been prepared at the instigation of a base legal officer who determined what entries should be made (as distinguished from merely giving advice as to the accused's status) were inadmissible as official records, the legal officer not being an appropriate source of information as to matters to be entered on morning reports.[113]

b. *Federal Law*

The matter of the source of the information recorded in official records presents the main area of difference between the military and federal courts. Since official documents are a substitute for the personal appearance of the recording official in court, such documents to be admissible must concern matters to which the official could testify if he were called to the witness stand.[114] It has been generally held that the facts stated in the document must have been within the personal knowledge and observation of the recording official *or his subordinates,* and that reports based upon general investigations and upon information gleaned second hand from random sources must be excluded.[115] There are, however, decisions apparently contra to the latter portion of the previous statement.[116]

Where the documents offered as official records are submitted by "ad hoc" officials pursuant to statute, they are admissible if properly authenticated by the custodian thereof and the documents,

[112] United States v. Strong, 1 USCMA 627, 5 CMR 55 (1952).

[113] United States v. Anderten, 4 USCMA 354, 15 CMR 354 (1954) (Opinion by Latimer, J.; Brosman, J., in a separate opinion, concurred in the result; Quinn, C. J., dissented).

[114] Olender v. United States, 210 F.2d 795, 801 (9th Cir. 1947); 5 Wigmore, Evidence § 1635 (3d ed. 1940).

[115] Olender v. United States, *supra* note 114, at 801.

[116] See Olender v. United States, *supra* note 114, at 801 and cases cited therein.

on their face, purport to bear the signatures of the persons required to submit them.[117]

However, mere certification of a document by a public officer does not necessarily establish as a fact the correctness of statements or figures therein. Thus in a case where the United States asserted a counterclaim for overpayment on a contract, the court held inadmissible certain sheets of paper containing certain totals and summaries which the Comptroller General certified that he had received from the Federal Trade Commission. No one who had anything to do with the preparation of these figures was called to testify as to their correctness or how they were arrived at, yet the papers were offered to establish the amounts of overpayment. The court said:

> This court will not accept certified copies as proof of facts as to the correctness of figures contained in documents certified by an official of the government who has received such documents from some other official, department, or commission.[118]

G. *Records Made for the Purposes of Prosecution*

1. *Military Law*

The official record exception to the hearsay rule does not render admissible in evidence writings or records made principally with a view to prosecution, or other disciplinary or legal action, as a record of, or during the course of investigation into alleged unlawful or improper conduct.[119] If, however, a legitimate purpose exists for recording the information concerned, wholly apart from any criminal investigation, the limitation would not apply.

Official entries in morning reports, logs, unit personnel diaries, and service records as to absence without leave and escape from confinement are admissible because such entries are made for the legitimate purpose of personnel accounting.[120]

Thus a corrected entry in a morning report made six months after the original entry is admissible in a trial for desertion, if made in accordance with regulations, even though made, in part, for the purpose of furnishing evidence for the prosecution.[121]

However, where corrections to morning report entries are made

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[117] *E.g.*, Desimone v. United States, 227 F.2d 864 (9th Cir. 1955); Holland v. United States, 209 F.2d 516 (10th Cir. 1954). *Cf.* Greenbaum v. United States, 80 F.2d 113 (9th Cir. 1935) (where certified copies of records did not show signatures of persons who submitted tax returns).

[118] Mohawk Condensed Milk Co. v. United States, 48 F.2d 682 (Ct. Cl. 1930); *accord:* Lomax Transport Co. v. United States, 183 F.2d 331 (9th Cir. 1950).

[119] Par. 144d, MCM, 1951.

[120] *Ibid.*

[121] United States v. Williams, 1 USCMA 186, 2 CMR 92 (1952); *accord:* ACM S-6695, *Barnett*, 13 CMR 718 (1953).

at the suggestion or instigation of a legal officer for the purposes of prosecution, the entries may be inadmissible.[122] Similarly a Navy shore patrol report setting forth in narrative form the accused's acts of misconduct is inadmissible except for that portion showing the name, rank, serial number and organization of the accused and the fact of his arrest. The narrative portion is made for the purpose of prosecution only and is therefore inadmissible.[123] It should be noted, however, that the inclusion in an official record of information possibly made solely for the purpose of prosecution, does not vitiate and render incompetent the portions of the record otherwise admissible.[124]

The question might be asked whether service record entries reflecting that an accused was apprehended might not be said to have been made principally with a view to prosecution. Except for the possible requirement that such fact be ascertained to justify the payment of a reward to civil authorities, there appears to be no other purpose for such an entry. However, the Court of Military Appeals has specifically held that where existing regulations require the recording of the circumstances of return of an unauthorized absentee, an entry reflecting that he was apprehended is admissible under the official records exception.[125]

An extension of this liberal approach by the court is seen in *United States* v. *Krause*,[126] where the court upheld the admissibility of an entry reflecting apprehension even though it was apparent that the Army had changed its regulations to require such an entry for the specific purpose of coming within the rule just discussed. There the court said:

> The provisions for an entry regarding the circumstances of return was added to enable the Army to avail itself of our holding in United States v. Coates . . . that an official record entry showing such circumstances was admissible in evidence . . . .[127]

The change in Army regulations was not unexpected, however. Previously, the provision for recording "circumstances of return" was not contained in Army regulations and the Army and Air Force Boards of Review consistently rejected such entries when offered in evidence.[128] The court honored the rationale of these decisions, but in *United States* v. *Bennett*[129] gave strong indica-

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[122] United States v. Wilson, 4 USCMA 8, 15 CMR 3 (1954).

[123] CGCMS 19442, *Johnson*, 4 CMR 496 (1952).

[124] CM 346993, *Brown*, 1 CMR 199 (1951), *pet. denied*, 1 USCMA 701, 1 CMR 98 (1951).

[125] United States v. Coates, *supra* note 105.

[126] 8 USCMA 746, 25 CMR 250 (1958).

[127] *Id.* at 748, 25 CMR at 252.

[128] *E.g.*, CM 364614, *Johnson*, 11 CMR 458 (1953); CM 352323, *Hurshman*, 5 CMR 242 (1952).

[129] 4 USCMA 309, 15 CMR 309 (1954).

tion that it would extend its holding in *United States* v. *Coates*[130] if the regulations were changed and invited such a change in Army and Air Force regulations by saying:

> Moreover, we are little disposed to substitute . . . our own views concerning official duties imposed by the necessarily technical Army and Air Force directives governing the preparation of morning reports. Unless and until those directives are modified, the result of existing Army and Air Force decisions will stand so far as we are concerned.[131]

After discussing the desirability of uniformity among the services, the court said further:

> [w]e are troubled little by this lack of uniformity. It is attributable solely to differing regulations among the several Armed Forces—*and these may be changed at will.*[132] (Emphasis added.)

Subsequently, in *United States* v. *Simone*,[133] the court noted that the Army had changed its personnel accounting regulations less than three months after the *Bennett* decision to provide for recording of the "circumstances of return." True to its indication in *Bennett* the court upheld the admissibility of an entry relating that the accused's absence had been terminated by apprehension.

It is significant that in none of these cases did the Court of Military Appeals discuss the limitation on entries made principally with a view to prosecution. Here again, it is suggested that in the area of personnel accounting, the court will not exclude entries required by regulations to be made.

The real objection to the admissibility of entries reflecting "circumstances of return" was, however, aptly expressed by an Army Board of Review, commenting on the *Simone* case, in a subsequent trial for desertion.

> Likewise, we may note that the entry in the morning report as to apprehension is made for no other purpose than the custody and punishment of the absentee. We are not dealing here with public records which are made primarily for purposes of personnel records, or fiscal accounting, etc. but with an entry made only with a view to fixing or limiting the severity of the accused's punishment. Accordingly, the safeguards which are present in the cases of Treasury records, registers of vital statistics, etc., are not present in these cases (*cf.* Chesapeake & D. Canal Co. v. United States, 240 F. 2d 903 (3rd Cir. 1917).[134]

The effect of these decisions was far reaching since the Court of Military Appeals had already said that in a desertion case

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130 United States v. Coates, *supra* note 105.

131 United States v. Bennett, *supra* note 129, at 816, 15 CMR at 316.

132 *Ibid.*

133 6 USCMA 146, 19 CMR 272 (1955).

134 CM 394601, *Maldonado-Garcia*, 23 CMR 513, 515 (1957). (Despite this language the Board of Review felt that the decision in *Simone* was controlling, and sustained the admission of an entry reflecting apprehension.)

a finding of apprehension may be rested solely on an official entry.[185] Just how far the Court of Military Appeals will extend this doctrine remains to be seen. However, it is suggested that necessarily involved is the attitude of the Court of Military Appeals toward the admission of legal conclusions or opinions contained in official records when regulations require such entries. Since the Court has already sanctioned entries concerning unauthorized absence, breach of arrest, and escape from confinement as sufficient basis for convictions for such offenses,[186] it is clear that entries which can be even remotely related to personnel accounting will be admissible even though the primary purpose of the entry might be for subsequent prosecution, and even though the entry constitutes a legal conclusion or opinion. However, as previously suggested, it is doubtful that the court will extend this beyond personnel accounting matters.

2. *Federal Law*

As in the military courts, where a legitimate purpose exists for recording information in official records, wholly apart from criminal investigation or prosecution, the fact that portions of the record may also be concerned with matters of value in a criminal prosecution will not render the record inadmissible.

Thus, in a prosecution for violation of the Selective Service Act the only evidence before the court was the defendant's Selective Service file from his local draft board. Included therein, along with routine matters relating to classification, were papers from the induction station indicating that he had failed to report for induction and a "Delinquent Registrant Report," required by regulations to be made to the United States Attorney. No objection to the admission of the file in evidence was made at the trial level and the only objection made on appeal was that some of the entries in the file contained hearsay relative to his failure to report. The Court of Appeals for the Ninth Circuit held that the file was admissible as an official record without discussion.[187] It is interesting to note that although it might have been argued that the papers relating to failure to report for induction and the "Delinquent Registrant Report" were made with an eye to prosecution, counsel apparently did not raise it, nor did the Court of Appeals consider it. It is of course apparent that a legitimate

[185] United States v. Wilson, 4 USCMA 3, 15 CMR 3 (1954).

[186] See, *e.g.*, United States v. Wilson, 4 USCMA 3, 15 CMR 3 (1954); United States v. Barrett, 3 USCMA 294, 12 CMR 50 (1953); United States v. Lowery, 2 USCMA 315, 8 CMR 115 (1953); United States v. Masusock, 1 USCMA 32, 1 CMR 32 (1951).

[187] Kariakin v. United States, 261 F.2d 263 (9th Cir. 1958).

purpose existed for the file quite apart from any consideration of possible prosecution.

In other cases considered by the federal courts, entries specifically prepared for possible litigation have been determined to be not within the meaning of "books or records of account or minutes of proceedings" and have been disposed of under the "Federal Business Entries" rule.[138] Under that rule entries found to be made for the purposes of litigation or prosecution are usually inadmissible.[139]

Throughout the courts' consideration of this problem is the basic requirement that the records or entries therein must carry with them some guarantee of trustworthiness.

H. *Evidence of Lack of Entries*

1. *Military Law*

Where law, regulation, or custom requires that a certain fact or event be recorded, proof that such a fact or event is not recorded in appropriate official records is admissible to show that the fact or event did not occur. Such proof can be furnished in the form of a properly authenticated certificate or statement by a custodian of official records or by his deputy or assistant, that after a diligent search no record or entry of a specified tenor was found to exist in the records of his office.[140] This is a logical extension of the presumption of regularity, i.e., it is presumed that the official whose duty it was to record such fact or event would have done so had it occurred.

2. *Federal Law*

As in the military, a certificate of the custodian of official records is admissible to prove the lack of a particular record in a federal office; however, parol evidence may be given and proof may be made by any qualified person who has examined the record, as well as the custodian.[141]

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[138] 28 U.S.C. § 1732 (1958).

[139] See, *e.g.*, United States v. Ware, 247 F.2d 698 (7th Cir. 1957) (identifying data written by federal agents on envelopes containing narcotics); Yung Jin Teung v. Dulles, 229 F.2d 244 (2d Cir. 1956) (State Dept. "Status Report" in passport application case); Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954) (worksheets prepared by internal revenue agent from defendant's records).

[140] Par. 143a, MCM, 1951; ACM 9515, *Dowling*, 18 CMR 670 (1954).

[141] Fed. R. Civ. P. 44(b), (c); Fed. R. Crim. P. 27; Jackson v. United States, 250 F.2d 897 (5th Cir. 1958).

I. *What May Be Proved* [142]

Having examined the cases to ascertain the requirements for admissibility of official records and the pitfalls created by the limitations thereon, the question then arises, "What can be proven by official records?"

In the area of personnel accounting, record entries alone have been held sufficient to sustain findings of:

Unauthorized absence; [143]

Escape from confinement; [144]

Breach of arrest; [145]

The fact of apprehension.[146]

With respect to the element of intent, the following have been held admissible as having a bearing thereon:

"Periodic Operations Reports" reflecting that a particular organization was involved in combat as bearing on intent to desert to avoid hazardous duty;[147]

Record entries reflecting that an accused had been apprehended at a point far distant from his organization as bearing on his intent to remain away permanently.[148]

Entries in medical records have been held admissible for the following purposes:

Entries in a death certificate to establish the identity of the deceased person and the cause of his death;[149]

A diagnosis of "drug addiction" contained in a clinical record, to establish the qualification of the person (concerning whom the diagnosis had been made) to identify a substance, given him by an accused, as heroin.[150]

Official records relating to the issuance of medical supplies have been held admissible, as in a case where an issue slip retained by a military pharmacy, reflecting the withdrawal of drugs, was

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[142] The primary concern here being the effect of the various limitations on the military courts, only military cases will be treated in this section. It should be noted that only examples of admissible record entries are given. The list of examples is not intended to be all inclusive.

[143] United States v. Masusock, 1 USCMA 32, 1 CMR 32 (1951).

[144] United States v. Lowery, 2 USCMA 315, 8 CMR 115 (1953).

[145] United States v. Barrett, 3 USCMA 294, 12 CMR 50 (1953).

[146] United States v. Coates, 2 USCMA 625, 10 CMR 123 (1953).

[147] CM 351951, *Pascal*, 3 CMR 379 (1952), *pet. denied*, 2 USCMA 663, 5 CMR 131 (1952); par. 210a, MCM, 1951.

[148] CM 394433, *Herring*, 23 CMR 489 (1957). (When considered in conjunction with a plea of guilty to unauthorized absence, may be sufficient to sustain a finding of guilty of desertion.)

[149] CM 350930, *Rowland*, 2 CMR 549 (1952), *pet. denied*, 1 USCMA 719, 4 CMR 173 (1952).

[150] ACM 7234, *Quindana*, 12 CMR 790 (1953). (It is noted that the Board of Review did not even discuss the possibility that the diagnosis was an opinion or conclusion which might affect its admissibility nor does it appear that the issue was specifically raised by trial or appellate counsel.)

held admissible as bearing on the identity of certain drugs found in the possession of an accused who was ultimately charged with larceny of narcotics.[151]

The making of particular entries in official records and the falsity of oral official statements may be established through the use of official records, as in the following:

An aircraft flight report may be used to prove the making of an entry by an accused in a trial for making a false entry;[152]

In a perjury trial an official record may be used to disprove the truth of a statement alleged to have been perjured, and if known to the accused, may be sufficient to sustain a conviction of perjury.[153]

III. THE BUSINESS ENTRY EXCEPTION TO THE HEARSAY RULE

A. *The Basis for the Rule*

Turning now to the business entry exception to the hearsay rule, it would be well to pause briefly to consider the reason for the exception.

Like most hearsay exceptions, the present day business entry rule is a creature born of the principles of necessity and a circumstantial guarantee of trustworthiness. The requisites and historical development of the business entry exception have received considerable attention from the courts and legal writers.[154] Little would be gained for present purposes by a lengthy consideration of the historical development.

As in the case of the official records exception to the hearsay rule, the business entry exception was evolved by the common law and ultimately became the subject of specific statutory enactment.[155] The legislation was based on the recognition that records made and relied upon in the regular course of business may be regarded as trustworthy without verification by all the persons who contribute to them. Professor Wigmore cites three distinct

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[151] CM 354625, *Dodge*, 8 CMR 330 (1952), *aff'd*, 3 USCMA 158, 11 CMR 158 (1953).

[152] ACM 6458, *Taylor*, 10 CMR 669 (1953).

[153] CM 393094, *Martin*, 23 CMR 437 (1956), *pet. denied*, 8 USCMA 762, 23 CMR 421 (1957).

[154] See, *e.g.*, Morgan, *The Law of Evidence* 51 (1927); Norville, *The Uniform Business Records As Evidence Act*, 27 Ore. L. Rev. 188 (1948); Comment, *Evidence: The Business-Entry Exception to the Hearsay Rule*, 35 Calif. L. Rev. 434 (1947); Note, *Revised Business Entry Statutes: Theory and Practice*, 48 Colum. L. Rev. 920 (1948); Radtke v. Taylor, 105 Ore. 559, 210 Pac. 863 (1922) (an exhaustive development of the exception); 5 Wigmore, Evidence § 1519–1521 (3d ed. 1940).

[155] 28 U.S.C. § 1732 (1958).

though related motives which operate to secure a sufficient degree of trustworthiness:

> (1) The habit and system of making such a record with regularity calls for accuracy through the interest and purpose of the entrant; and the influence of habit may be relied upon, by very inertia, to prevent casual inaccuracies and to counteract the possible temptation to misstatements . . . .
> (2) Since the entries record a regular course of business transactions, an error or mis-statement is almost certain to be detected and the result disputed by those dealing with the entrant . . . .
> (3) If, in addition to this, the entrant makes the record under a duty to an employer or other superior, there is the additional risk of censure and disgrace from the superior, in case of inaccuracies,—a motive on the whole the most powerful and most palpable of the three. . . .[156]

B. *The Rules*

1. *Military Law*

> Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible as evidence of the act, transaction, occurrence, or event if made in the regular course of any business and if it was the regular course of such business to make such memorandum or record at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter. All other circumstances of making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility. The term "business," as used in this paragraph, includes business, profession, occupation, and calling of every kind.[157]

2. *Federal Law*

Subsection (a) of the federal statute[158] is identical with the military rule as set forth above. In fact, the Manual provision was expressly modeled on the federal statute.[159] The remaining subsection of the federal statute, relates to the admissibility of copies and is not necessarily germane to the discussion.

There have been relatively few cases before the Court of Military Appeals and the various Boards of Review which involved specific problems relating to business entries. Whether this is due to disuse of the exception or to an absence of controversy concerning it is not clear. The federal courts, on the other hand have dealt with the problem extensively, as have the legal writers. Accordingly, in discussing the limitations on the use of the business entry exception, the emphasis will necessarily be on the law as developed by the federal courts.

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[156] 5 Wigmore, Evidence § 1522 (3d ed. 1940).
[157] Par. 144c, MCM, 1951.
[158] 28 U.S.C. § 1732 (1958).
[159] Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 229.

Immediately apparent in the military and federal rules are three specific limitations:

The entry must be made in the regular course of business.
Must record an act, transaction, occurrence or event.
The entry must be made at or near the time of the act, transaction, occurrence or event.

C. *Regular Course of Business*

1. *Federal Law*

A literal reading of the federal statute would seem to indicate that practically any writing or record made in the regular course of business would be admissible under this exception.[160] However, such has not been the case. Two distinct approaches have been made to the interpretation of the exception as to the meaning of "regular course of business."

The first, a restrictive interpretation, was advanced by the United States Supreme Court in *Palmer* v. *Hoffman*.[161] There a signed statement, executed by the engineer of a train involved in a grade-crossing collision, for submission to the State Public Utility Commission in accordance with a long standing procedure of the railroad was held not admissible as a business entry. In finding that the statement was not made "in the regular course of business" within the meaning of the statute the court said:

> It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls.[162]

The Court recognized that companies do regularly record their employees' versions of their accidents but stated that to place such statements within the meaning of the Act would be a perversion of the rule and would leave the door wide open to avoidance of cross-examination.

> Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability . . . acquired from their source and origin and the nature of their compilation.[163]

In summing up the test under the statute the Court said:

> The several hundred years of history behind the Act . . . indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But *'regular course' of business must find its meaning in the inherent nature*

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[160] Note, *Revised Business Entry Statutes: Theory and Practice*, 48 Colum. L. Rev. 920, 923 (1948).
[161] 318 U.S. 109 (1943).
[162] *Id.* at 113.
[163] *Id.* at 114.

of the business in question and in the methods systematically employed for the conduct of the business as a business.[164] *(Emphasis added.)*

This decision and that of the Circuit Court of Appeals in the same case[165] have been criticized.[166] However, the Supreme Court reiterated its stand, taken in *Palmer* v. *Hoffman*, at a later date.[167]

The restricted view of the scope of the exception has of course had its adherents subsequent to the Supreme Court's decision. Thus a record made by a police department of convictions in court was inadmissible under the business entry exception.[168]

> While the Police are, of course, directly concerned with convictions for crime, and in the ordinary course of their business properly keep records of such convictions for their own information, such notations are not the sort of record which is admissible under the Federal Shop Book Rule. Such notations are relevant to and useful in the "business" of the Police, but the recordation of convictions is not itself part of their "business" . . . . The preparation and maintenance of notations of events outside the operation of the business are not the recordation contemplated.[169]

Similarly, in *Buckley* v. *Altheimer*,[170] a private diary or book kept by an attorney, decedent's financial backer and business adviser, containing entries relating to financial transactions between the attorney and the decedent were inadmissible under the business entry exception in a suit by decedent's administratrix against a third party. Exclusion of the diary was based on the informality of the entries and the absence of any evidence that the attorney was regularly engaged in the money-lending business.[171]

In a similar vein, letters written by outside doctors to a railroad's Chief Medical Examiner at his request, which contained prior history, as well as subjective findings and conclusions, were not admissible as business entries in a suit involving the railroad.[172]

> Actually these letters appear to have been written not as normal or routine records of medical observation or treatment but rather as aids in resolving a controversy about legal responsibility. "Their primary utility is in litigating, not in railroading" or in healing. To admit them would be to bring "the business of preparing cases for trial within the purview of the Federal Business Records Act."[173]

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[164] *Id.* at 115.

[165] Hoffman v. Palmer, 129 F.2d 976 (2d Cir. 1942) (speaking of inadmissibility based on motive to misrepresent).

[166] See, *e.g.*, Morgan, *The Law of Evidence, 1941–1945*, 59 Harv. L. Rev. 481, 565–567 (1946); Note, 17 So. Calif. L. Rev. 165 (1944).

[167] Hickman v. Taylor, 329 U.S. 495, 518–519 (1947): "There, as here, the 'several hundred years of history behind the act . . . indicate the nature of the reforms which it was designed to effect' . . . . We refused to apply it beyond that point. We should follow the same course of reasoning here."

[168] Clainos v. United States, 163 F.2d 593 (D.C. Cir. 1947).

[169] *Id.* at 595, 596.

[170] 152 F.2d 502 (7th Cir. 1945).

[171] *Id.* at 507.

[172] Masterson v. Pennsylvania R. Co., 182 F.2d 793 (3d Cir. 1950).

[173] *Id.* at 797.

An Army Air Force Board's report of an aircraft accident, containing unsworn statements of witnesses, various reports concerning the aircraft involved and the conclusions of the members of the Board were also held properly excluded under the *Palmer* v. *Hoffman* doctrine.[174]

There has been, however, much interpretation and circumvention of the *Palmer* v. *Hoffman* doctrine by the lower federal courts. The hub of this action has been the Circuit Court of Appeals for the Second Circuit.

For example, in an action against a trust company for commissions for production of a buyer for a controlling interest in two corporations, a history sheet, or diary of events relating to an estate and trust which owned the stock, was admissible as a writing or record made in the regular course of business, over objections that it was a self-serving document and not in the regular course of business.[175] Accepting the *Palmer* v. *Hoffman* statement that "regular course of business must find its meaning" in the inherent nature of the business the court held that the business of a corporate trustee justified the establishment of a practice of keeping detailed records of day by day events affecting its trusts and that such records were in the regular course of business.[176]

Similarly, in a proceeding before a tax court to redetermine a deficiency in the estate tax on the theory that the decedent made transfers of property in contemplation of death, hospital records made during decedent's hospitalization for cerebral hemorrhage prior to the transfers were held admissible as business entries on the basis of the absence of a motive to misrepresent, and that *Palmer* v. *Hoffman* did not preclude the admissibility of such records.[177]

In admitting, as a business entry, a memorandum of a telephone conversation between a bank employee and the defendant relating to ownership of certain monies on deposit, the court held that the memorandum was a routine record made for the bank's business as such and with no motivation to prepare for litigation.[178]

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[174] Chapman v. United States, 194 F.2d 974 (5th Cir. 1952), *cert. denied*, 344 U.S. 821 (1952). (While neither the District nor Circuit Court spelled out the specific reason for rejection, it apparently rested on a view that the source and nature of the information were unreliable.)

[175] Waters v. Kings County Trust Co., 144 F.2d 680 (2d Cir. 1944), *cert. denied*, 323 U.S. 769 (1944).

[176] *Id.* at 682.

[177] Buckminster's Estate v. Commissioner, 147 F.2d 331 (2d Cir. 1944).

[178] United States v. Moran, 151 F.2d 661 (2d Cir. 1945) (here again the court interpreted the facts to fit within Palmer v. Hoffman and specifically eliminated the "prepared for litigation" aspect).

Again in *Lopoczyk* v. *Poling*,[178] in stating that an entry in a ship's logbook was admissible as a business entry, the court said:

> The entry was made while the captain was carrying out the official duties of his position; and it was not in fact self-serving or the outgrowth of any prejudice in favor of the party offering it, so as to fall within the prohibition of Palmer v. Hoffman . . . .[180]

One of the more widely discussed cases, and certainly one of the most liberal interpretations of *Palmer* v. *Hoffman* is *Pekelis* v. *Transcontinental and Western Air*.[181] There the Second Circuit specifically interpreted the doctrine of *Palmer* v. *Hoffman* as not precluding the admissibility, as business entries, of reports made by boards appointed by the defendant airline to investigate a crash in Ireland. The language of the Court in reply to defendant's contention that the doctrine of *Palmer* v. *Hoffman* precluded the admissibility of such reports, speaks for itself.

> The reports in the case at bar were "regular" within the meaning of the statute, because they were required not merely in investigating the accident at the Shannon Airport but all future accidents. However, the opinion of the Supreme Court added that regularity of preparation would not in itself be enough to justify the use of the evidence. We think the court evidently was aiming at the evils of introducing evidence built up to promote the self-interest of the entrant. Thus, the opinion stated that the purpose of the act was to "facilitate admission of records which experience has shown to be quite trustworthy." 318 U.S. 113, 63 S.Ct. 480. Accordingly, "the character of the records and their earmarks of reliability . . . acquired from their source and origin and the nature of their compilation" was said to be the test for their qualification under the statute. 318 U.S. 114, 63 S.Ct. 480. . . .
>
> The reports in the case at bar were against the interest of the entrant when made, since they charged serious fault on the part of employees Both and Langsdale, and whether or not completely accurate were clearly not part of a story cooked up in advance of litigation in the disguise of business records. Moreover, it is not the entrant who here sought to introduce the reports, but the plaintiff, and this too tends to show that they were not contrived by the entrant for litigation. Palmer v. Hoffman was given the above interpretation by this court in United States v. Moran, 151 F.2d 661, 662, 167 A.L.R. 403, and Lopoczyk v. Chester A. Poling, Inc. 152 F.2d 457, 460, note 4. We hold that Palmer v. Hoffman did not preclude the reception under the business entry statute of the reports offered in the case at bar.[182]

Again, in *Korte* v. *New York, N.H. & H.R. Co.*,[183] the court admitted reports from doctors in the form of letters to a defendant railroad in a suit under the Federal Employees Liability Act as business entries. In overruling defendant's objection that

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[178] 152 F.2d 457 (2d Cir. 1945).
[180] *Id.* at 460.
[181] 187 F.2d 122 (2d Cir. 1951), *cert. denied*, 341 U.S. 951 (1951).
[182] *Id.* at 129, 130.
[183] 191 F.2d 86 (2d Cir. 1951), *cert. denied*, 342 U.S. 868 (1951).

the doctors were unconnected with the railroad and the intimation that the entry must be in the regular course of defendant's business, the court pointed out that it was the business of the doctor within which the entry must have been made and not that of the railroad.[184] The court again pointed out that since the entries were offered by the plaintiff and not by the defendant for whom they were made, the *Palmer* v. *Hoffman* limitation would not be applicable.[185]

It is thus apparent that, at least in the Second Circuit, the emphasis has been on "motive to misrepresent" as the test for admissibility, and *Palmer* v. *Hoffman* has been interpreted as being aimed at the evils of introducing evidence built up to support the self-interest of the entrant.[186]

Under both interpretations of "regular course of business" the types of entries or records admitted by the courts have been both varied and numerous.[187]

2. *Military Law*

The interpretation of "regular course of business" as set forth in *Palmer* v. *Hoffman* was adopted by the drafters of the Manual for Courts-Martial, 1951, in limiting the admissibility of business entries in courts-martial.[188] Thus the following language is found in the Manual:

> It is not sufficient that a particular entry was made in the regular course of conduct which had some relationship to business if it was not made in the regular course of a business. "Regular course" of business must find meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.[189]

Recognition of the identity of the federal statute and the mili-

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[184] *Id.* at 90; *cf.* Masterson v. Pennsylvania R. Co., 182 F.2d 793 (3d Cir. 1950).

[185] Korte v. New York, N.H. & H.R. Co., *supra* note 183 at 90. (*But see* dissent of Chase, J. at 92.)

[186] Recent Cases, 5 Vand. L. Rev. 651–55 (1952).

[187] See, *e.g.*, Connelly v. United States, 249 F.2d 576 (8th Cir. 1957), *cert. denied*, 356 U.S. 921 (1958), *reh. denied*, 356 U.S. 964 (1958) (transcript of telephone conversations kept in log in government office); Hines v. United States, 220 F.2d 381 (D.C. Cir. 1955) (manifest kept by taxi driver); Finnegan v. United States, 204 F.2d 105 (8th Cir. 1953), *cert. denied*, 346 U.S. 821 (1953), *reh. denied*, 346 U.S. 880 (1953) (shorthand notes taken by a secretary showing defendant's visits to a government office); Duncan v. United States, 197 F.2d 935 (5th Cir. 1952), *cert. denied*, 344 U.S. 885 (1952) (long distance telephone toll tickets); United States v. Moran, 151 F.2d 661 (2d Cir. 1945) (memorandum of a telephone conversation between a defendant and a bank employee made as a routine entry); United States v. Quick, 128 F.2d 832 (3d Cir. 1942) (entries re disbursements made in operation of illicit still).

[188] Legal and Legislative Basis, Manual for Courts-Martial, 1951, p. 229.

[189] Par. 144d, MCM, 1951.

tary rule and the availability of federal case law as a direct means of interpretation of the rule is seen in *United States* v. *Villasenor*.[190] In that case, where a custodian of certain funds had, for a period of nine months, complied with informal instructions to the effect that any cash not deposited in the banks should be placed in a sealed envelope, marked to show the name of the fund and the amount of cash, and placed in a safe, such a notation was admissible as a business entry and was sufficient to establish the corpus delicti of larceny.

> It is only necessary that the record be regularly kept for a business purpose and not for only the idle amusement or private information of the maker.[191]

Similarly, where an accused was charged with wrongful appropriation of a government pistol, it was held that the information contained in the charge roster of the arms room which issued the pistol, showing to whom it had been issued and that it had not been returned, was admissible in evidence as a business entry.[192]

While, as previously stated, there have been relatively few cases in number before the military appellate courts which involved specific problems relating to business entries, a wide variety of types of entries have been held to be in the regular course of business. For example, the following types of entries have been admissible:

> Entries in death certificates[193] and autopsy reports[194] offered to show the cause of death;
>
> Entries relating to daily retail merchandise, cash, and sales reports;[195]
>
> Hotel guest registration cards;[196]
>
> A written document entitled "Notification of Appointment and Relief of Certifying Officer or Alternate," made and forwarded by the commanding officer of a base to a finance officer for comparison purposes in finance matters;[197]

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[190] 6 USCMA 8, 19 CMR 129 (1955); *accord*, ACM 5561, *Roberson*, 12 CMR 768 (1953), *pet. denied*, 3 USCMA 839, 13 CMR 142 (1953).

[191] United States v. Villasenor, *supra* note 190 at 8, 19 CMR at 134. (The court pointed out that the entry was made in the regular course of the accused's business of collecting funds, was in strict compliance with instructions, and was one likely to further the purposes of the business of collecting and safeguarding funds.)

[192] United States v. Moten, 6 USCMA 359, 20 CMR 75 (1955). (The court said this was admissible even though not qualified under the official records exception.)

[193] CM 351485, *Sechler*, 3 CMR 216 (1952); *accord*, ACM 7321, *Kinder*, 14 CMR 742 (1954).

[194] CM 347748, *Martin*, 1 CMR 370 (1951).

[195] ACM 6597, *Hamilton*, 11 CMR 672 (1953).

[196] ACM 8913, *Torbett*, 17 CMR 650 (1954).

[197] ACM 5527, *Fournie*, 6 CMR 746 (1952).

Assignment orders maintained in the process of receiving and assigning personnel.[198]

However, it has been held that laboratory reports such as a blood alcohol analysis are not admissible under the busines entry exception under the doctrine of *Palmer* v. *Hoffman* that the business of preparing cases for trial is not within the exception to the hearsay rule.[199] Similarly, reports of laboratory analysis of urine specimens in narcotics cases have been excluded on the basis that they were prepared for trial and were not, therefore, entries in the regular course of a business.[200] It should be noted, however, that the foregoing cases did not involve laboratory analyses prepared for use in hospital treatment or diagnosis in the normal course of the business of a hospital. The "view to prosecution" objection would probably not be applicable in such cases.

D. *Fact or Event*[201]

Generally, only those business entries which record facts or events, as opposed to opinion, are admissible under the exception to the hearsay rule. There is, however, no one rule by which it can be determined whether a given entry is based on fact or opinion. The thin line between fact and opinion is such as to defy formulation of a precise rule. The decisions of the courts do, however, furnish some guidelines in this area.

1. *Federal Law*

The case of *New York Life* v. *Taylor*[202] is perhaps the leading case for at least one definition of opinion within the context of the business entry exception. There an action was brought against an insurer to recover under a double indemnity life insurance clause based upon death resulting from a patient falling down a flight of stairs at Walter Reed Army Hospital. Original records of the Army hospital were offered in evidence to prove that the insured's state of mind was suicidal. In particular, two psychiatric reports containing diagnoses of ". . . Psychoneurosis, hypochondriasis" and ". . . psychoneurosis, hysteria, conversion type," respectively, were considered as bearing on the state of mind. In

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[198] ACM 7064, *Weiler*, 12 CMR 845 (1953).

[199] CM 393521, *Westcott*, 23 CMR 468 (1957); *contra*, CM 361199, *McLean*, 10 CMR 183 (1953), *pet. denied*, 3 USCMA 812, 10 CMR 159 (1953). (In this case the technician who made the analysis was present in court and testified.)

[200] CM 391475, *Bates*, 22 CMR 413 (1956); *accord*, CM 389398, *Spencer*, 21 CMR 504 (1956).

[201] For our purposes, "act, transaction, occurrence, or event" as used in the military and federal rules can be considered as encompassed within the terms "fact or event."

[202] 147 F.2d 297 (D.C. Cir. 1945).

holding that the records were not admissible as business entries, the court said:

> Such records must be those which are a product of routine procedure and whose accuracy is substantially guaranteed by the fact that the record is an automatic reflection of observations . . . *This obviously excludes those which depend on opinion or conjecture.* The internal check on the reliability of admissible records comes from two sources: (1) an efficient clerical system, and (2) *the fact that they are the kind of observations on which competent men would not differ.*[203] (Emphasis added.)

Citing *Palmer* v. *Hoffman,* the court reiterated the statement in that case that the "Federal Shop Book Statute is not one 'which opens wide the door to avoidance of cross-examination . . .'" and held that the diagnosis of a psychoneurotic state involves conjecture and opinion and must be subjected to the safeguard of cross-examination of the physician who makes it.[204] The majority opinion in this case has been widely criticized.[205] A vigorous dissent in the case maintains that "any development in, and any manifestation of, the patient's mental or physical condition is an occurrence or event," and that "observation, diagnosis, and treatment also are acts, occurrences or events" which, when recorded in the regular course of business, are admissible as business entries.[206] The dissent points out that "recorded diagnoses are 'systematically employed for the conduct of the business' and 'relied upon in affairs of life and death' and therefore establishes the relative trustworthiness required by *Palmer* v. *Hoffman.*"[207] The dissenting judge asserts that:

> Records which meet all possible tests are not to be excluded, in the teeth of the statute, in order to preserve intact the right of cross-examination as it existed at common law. To preserve that right intact would repeal the statute: for any application of the Shop Book Rule, as of any other exception to the hearsay rule, by admitting hearsay necessarily avoids cross-examination.[208]

It must be said that both the majority and dissenting opinions in this case are logical and persuasive, leaving the reader with a distinct impression that even the courts cannot define with pre-

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[203] *Id.* at 303.

[204] *Id.* at 304.

[205] See, *e.g.,* Morgan, *The Law of Evidence, 1941–1945,* 59 Harv. L. Rev. 481 (1946); Notes, 33 Geo. L. J. 349 (1945); 54 Yale L. J. 868 (1945).

[206] New York Life v. Taylor, *supra* note 202, at 308.

[207] *Id.* at 309.

[208] *Id.* at 311; *But see, id.* at 306 (majority opinion): "To admit this potpourri [the myriad records of personnel activities, recording of credit information, etc.] on the sole tests of regular recording and absence of motive to misrepresent would be a drastic impairment of the right of cross-examination. *In a criminal case it is doubtful whether such a deprivation of the right of the accused to be confronted with the witnesses against him would be constitutional.*" (Emphasis added.)

ciseness the type of entries which would be admissible under the business entry exception.

The *New York Life* v. *Taylor* interpretation, at least as to psychiatric diagnoses, was reiterated in *Lyles* v. *United States*.[209] Again, the reasoning of the dissenting opinions are equally as persuasive as the majority as to this point.

The same conflict of authority exists in the other federal courts.[210] The basic disagreement appears to be whether, in attempting to ease the burden of proving transactions occurring in the regular course of business, the Congress, in effect, opened the door to the introduction into evidence (by way of business entries) of any matter recorded in the regular course of business regardless of its nature or source.

2. *Military Law*

The drafters of the Manual gave clear indication of which view should be adopted as to opinion in business entries when they cited the holding in *New York Life* v. *Taylor* as to admissibility of psychiatric reports as an example of an inadmissible entry; and further cited the same case as authority for the exclusion of newspaper reports as business entries.[211] Significantly the Manual, in discussing insanity, contains the following specific provision as to evidence on the issue of insanity:

> So much of the report of a board of medical officers or any other medical record as pertains to entries of facts or events which are properly admissible under the official records or business entry exceptions to the hearsay rule . . . may be received in evidence. *The opinions as to the mental condition of the accused contained in such a report are not within these exceptions to the hearsay rule.*[212] (Emphasis added.)

Thus certificates of the findings of a board of medical officers and clinical records containing psychiatric evaluations and the opinions of the members of the board as to the mental condition

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[209] 254 F.2d 725 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 1067 (1958).

[210] See *e.g.*, (following New York Life v. Taylor, *supra* note 202): Baltimore and Ohio R. Co. v. O'Neill, 211 F.2d 190 (6th Cir. 1954) (unsworn written reports containing doctor's conclusions); Gordon v. Robinson, 210 F.2d 192, 196 (3d Cir. 1954) (*dicta* stating views as to what is admissible under the federal statute—". . . it was Congress' purpose to admit into evidence entries of a purely clerical or routine nature not dependent upon speculation, conjecture or opinion . . ."); England v. United States, 174 F.2d 466 (5th Cir. 1946) (medical records containing opinions and conclusions); *but cf.* Medina v. Erickson, 226 F.2d 475 (9th Cir. 1955), *cert. denied*, 351 U.S. 912 (1956); Korte v. New York, N.H. and H.R., 191 F.2d 86 (2d Cir. 1951), *cert. denied*, 342 U.S. 868 (1951); Pekelis v. Transcontinental and Western Air, 187 F.2d 122 (2d Cir. 1951), *cert. denied*, 341 U.S. 951 (1951).

[211] Legal and Legislative Basis, MCM, 1951, pp. 229–30.

[212] Par. 122c, MCM, 1951.

of an accused have not been admissible under the business entry exception.[213]

However, death certificates and autopsy reports reciting the cause of death have been admitted as business entries.[214] Such entries would, of course, meet the requirement in *New York Life* v. *Taylor* that the observations be of a kind on which competent men would not differ. It would also follow that such entries in records as "unauthorized absence," "apprehension," "breach of arrest" (admissible in official records) would also meet this requirement.

Applicable in the same context is the language of the Manual:

> [S]ome assertions based on trained observation which, strictly speaking, might be considered statements of opinion so closely approximate statements of fact as to permit the law to place them in the latter category . . . without appreciable risk of doing an injustice because of the lack of opportunity to cross-examine.[215]

As a caveat, it has been said that a pathologist's entry in an autopsy report as to whether death was caused by homicide, accident, or suicide would not be inadmissible solely on the ground that it constitutes an opinion had it been based on reports made to the pathologist by others, since the business entry rule specifically states that the fact that a particular entry was not based on the personal knowledge of the entrant will not affect its admissibility.[216] The actual ground for exclusion of such entry is a combination of the opinion limitation and the "regular course of business limitation."[217]

It is apparent that the courts have been unable to define with any degree of preciseness the borderline between fact and opinion. The "rough test" suggested in *Evidence, Special Text of The Judge Advocate General's School, U. S. Army, 1959,* offers at least one possible solution to the problem:

> [I]t may be stated that if the particular entry contains an "opinion" as to which reasonable men, if fully aware of the data upon which the opinion is based, might disagree, then the person who drew the conclusion should be subjected to cross-examination on this point.[218]

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[213] ACM 6678, *Hale,* 11 CMR 768, 774 (1953), *pet. denied,* 3 USCMA 834, 12 CMR 204 (1953).

[214] See, *e.g.,* ACM 7321, *Kinder,* 14 CMR 742 (1954) (death certificate); CM 351485, *Sechler,* 3 CMR 216 (1952), *aff'd,* 3 USCMA 363, 12 CMR 119 (1953) (death certificate); CM 347778, *Martin,* 1 CMR 370 (1951) (autopsy report).

[215] Par. 144d, MCM, 1951. *Cf.* dicta in United States v. Johnson, 9 USCMA 178, 180, 25 CMR 440, 442 (1958) (entry in guard report that sentry was found "fast asleep").

[216] Legal and Legislative Basis, MCM, 1951, p. 230. *But see* the discussion of "hearsay on hearsay," *infra,* subsection F.

[217] *Ibid.*

[218] *Evidence,* Special Text of the Judge Advocate General's School, U.S. Army, 1959, at 2303.

This "rough test" is certainly in keeping with what has been said to be the basis for the exception, that is, the admissibility of a particular entry would depend on the inherent trustworthiness of that particular type of entry.

E. *Entries Made for the Purpose of Prosecution*

The business entry exception does not render admissible in evidence writings or records made principally with a view to prosecution.

1. *Federal Law*

The courts, in determining that a particular entry was not made in the "regular course of business," frequently assert that the making of the entry is more in the nature of the "business of litigating" than that of the business concerned. Thus in *Palmer* v. *Hoffman* the statement of an engineer involved in a railroad accident, furnished to the company as part of its normal procedure, was held to be more in the business of preparation for litigation than the business of running a railroad.[219]

Similarly, certain medical reports have been held to have a primary utility in litigating and not in railroading or healing.[220]

So, too, worksheets prepared by an internal revenue agent recording information from an accused's personal records were inadmissible as business entries since made in preparation for prosecution and no internal check on the reliability of the agent's work was present.[221]

Tally sheets and calculations based upon them were held not business entries when the evidence showed they were made for exclusive use in litigation;[222] nor were notations made by government agents on envelopes formerly containing heroin since made primarily for prosecution and only incidentally for police business.[223]

In all of these cases it is apparent that the "view to prosecution" is treated more as a part of the determination of whether the entry was in the "regular course of business" rather than as a separate limitation.

2. *Military Law*

As in the case of official records, the Manual specifically provides

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[219] 318 U.S. 109 (1943).

[220] Masterson v. Pennsylvania R. Co., 182 F.2d 793 (3d Cir. 1950).

[221] Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954); *contra*, Zacher v. United States, 227 F.2d 219 (8th Cir. 1955); United States v. Mortimer, 118 F.2d 266 (2d Cir. 1941), *cert. denied*, 314 U.S. 616 (1941).

[222] Morton Butler Timber Co. v. United States, 91 F.2d 884 (6th Cir. 1937).

[223] United States v. Ware, 247 F.2d 698 (7th Cir. 1957).

that the business entry exception will not render admissible entries made principally with a view to prosecution.[224] Thus a report of a blood alcohol analysis has been excluded for the reason, *inter alia,* "The business of preparing cases for trial is not included in the business entry rule."[225]

The provisions of the Manual leave no doubt that investigative reports prepared with the eventuality of a court-martial or other disciplinary action in mind would be inadmissible.

F. *Personal Knowledge on the Part of the Entrant Not Required*

Both the federal business entry statute and the military rule on business entries expressly provide that lack of personal knowledge by the entrant or maker of an entry may be shown to affect its weight but shall not affect its admissibility.

1. *Federal Law*

Thus in a prosecution for carnally knowing a female under the age of 16 years, certain slides bearing vaginal and urethral smears, taken from the victim, were held admissible under the business entry exception, even though the doctor who prepared the slides and the bacteriologist who performed the microscopic examination had no personal knowledge of any of the steps from preparation of the slides to their production in court.[226] The court said that the slides were admissible because they were routine reflections of the day-to-day operations of the hospital and any objections based on the lack of personal knowledge did not affect their admissibility but went, instead, to the weight to be accorded them.[227] The admissibility of the slides was critical to the prosecution since the victim refused to testify and the proof of carnal assault rested substantially on the bacteriologist's testimony regarding the presence of sperm. His testimony, in turn, rested solely on the slides. Here the court avoided the issue concerning the chain of custody of the smears by admitting the slides as business entries.

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[224] Par. 144d, MCM, 1951.

[225] CM 393521, *Westcott,* 23 CMR 468 (1957); *accord,* CM 391475, *Bates,* 22 CMR 413 (1956).

[226] Wheeler v. United States, 211 F.2d 19 (D.C. Cir. 1953), *cert. denied,* 347 U.S. 1019 (1954), *reh. denied,* 348 U.S. 852 (1954). (It is interesting to note that no objection was made on the basis that the slides were prepared principally with a view to prosecution, nor did the court consider it. However, the court appeared completely satisfied as to the trustworthiness of the slides and as to the routineness of their preparation; it is highly doubtful if such an argument would have prevailed.)

[227] *Id.* at 23.

Similarly, ledger sheets prepared from information contained in invoices in the regular course of business are admissible, as are the invoices, without the testimony of the persons who made the invoices or the mechanics who performed the labor.[228]

So also, in a prosecution for conspiracy to unreasonably restrain trade, exhibits containing statements made by GMAC field representatives to their superiors were admissible as business entries without the necessity of calling as witnesses, the persons who had made them to identify them.[229]

An additional limitation has been imposed by some courts where the fact or event recorded was not known by the entrant personally but was based on information furnished to the entrant by some other person. In this respect it has been said:

> The statute did not mean to make competent whatever the entrant picked up from random sources, although it was part of his business to pick up information where and when he could and make a record of it. The "act, transaction, occurrence or event" which the entrant records must be one of which either he has knowledge, or which he learns from a declarant who shall "in the course of the business transmit the information for inclusion in the memorandum." "Multiple hearsay" is no more competent now than single hearsay was before.[230]

2. *Military Law*

As previously stated, the Manual rule specifically provides that lack of personal knowledge on the part of the entrant may affect the weight to be given a particular business entry but will not affect its admissibility. No cases have been found in which the Court of Military Appeals or the Boards of Review have discussed this problem. It is suggested, however, that application of the limitation espoused in *United States* v. *Grayson*,[231] would logically follow in military cases. This would be consistent with the *Palmer* v. *Hoffman* doctrine.

G. *The Entry Must Be Made At or Near the Time of the Fact or Event*

1. *Federal Law*

One of the prime reasons cited for the "trustworthiness" of business entries has been that their accuracy is substantially

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[228] Stegemann v. Miami Beach Boat Slips, Inc., 213 F.2d 561 (5th Cir. 1954).

[229] United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941), *cert. denied*, 314 U.S. 618 (1941), *reh. denied*, 314 U.S. 707 (1941).

[230] United States v. Grayson, 166 F.2d 863 (2d Cir. 1948); *accord*, Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954); *cf.*, 5 Wigmore, Evidence § 1630a (3d ed. 1940, Supp. 1959) and cases cited therein; Central R. Co. v. Jules S. Sottnek Co., 258 F.2d 85, 88 (2d Cir. 1958); Yung Jin Teung v. Dulles, 229 F.2d 244 (2d Cir. 1956).

[231] 166 F.2d 863 (2d Cir. 1948).

guaranteed by the fact that the record is an automatic reflection of observations.[232] To insure the presence of such guarantee of "trustworthiness" the federal statute includes the requirement that the entry must be made at or near the time of the "act, transaction, occurrence, or event." Therefore, in laying the foundation for the admission in evidence of business entries it must be shown not only that it was the regular course of business to make such entries, but also that it was the regular course of business to make such entries at the time of occurrence.

Application of this requirement is seen in the following cases:

Entries on a bill of lading, made by the master of a ship, pertaining to cargo received on board were admissible under the business entry exception where it was shown that such entries were regularly made at approximately the time the cargo was received on board; [233]

Similarly, memorandum of disbursements made by the operators of an illicit still were held to be business entries, within the statute, as entries made of acts or transactions "then occurring"; [234]

So also, in a prosecution for rape, a manifest kept by a taxi driver was admissible as a business entry, the court noting that the entries thereon were made within a "reasonable time" after the event in issue.[235]

2. *Military Law*

The military rule being identical with the federal statute, it follows, of course, that the same requirement as to time of entry is applicable.

Thus a document entitled "Declaration of Desertion," dated four months subsequent to the commencement of an absence without leave therein recorded, was not admissible as a business entry to prove the commencement of such absence because it was not made at the time of the "act, transaction, occurrence, or event," or within a reasonable time thereafter.[236]

In *United States* v. *Villasenor,* discussed previously,[237] the Court of Military Appeals specifically noted that the entry was contemporaneous with the act.

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[232] See, *e.g.*, Gordon v. Robinson, 210 F.2d 192 (3d Cir. 1954) (citing S. Rep. No. 1965, 74th Cong., 2d Sess., pp. 1–2, April 20, 1936—Chairman Summers of the House Judiciary Committee in explaining the bill on the floor).

[233] United States v. Rappy, 157 F.2d 964 (2d Cir. 1946), *cert. denied,* 329 U.S. 806 (1947).

[234] United States v. Quick, 128 F.2d 832 (3d Cir. 1942) (the court also holding that the statute does not discriminate between lawful and unlawful businesses). *See also,* Standard Oil Co. of Cal. v. Moore, 251 F.2d 188 (9th Cir. 1957), *cert. denied,* 356 U.S. 975 (1958) (ledger entries based on cash register tapes posted shortly after end of each month).

[235] Hines v. United States, 220 F.2d 381 (D.C. Cir. 1955); *cf.*, United States v. Indian Trailer Corp., 226 F.2d 595 (7th Cir. 1955).

[236] NCM 61, *Gaddis,* 2 CMR 575 (1951) (was admissible as an official record).

[237] United States v. Villasenor, *supra* note 190 and accompanying text.

H. *Application of the Best Evidence Rule*

Although, strictly speaking, the Best Evidence Rule might be said to constitute a limitation on the use of business entries, its nature is not such as to come within the purview of this treatise. However, counsel and the law officer should be aware of its application.

1. *Federal Law*

Under the federal rule, photographic, photostatic or micro-film copies of business records are admissible equally with the original records provided the copies are themselves made in the regular course of business. The copies are admissible whether or not the original is still in existence.[238]

It should also be noted that the business entry statute did not affect the exception to the best evidence rule that secondary evidence of voluminous records is admissible when the records are available for examination by the opposing party.[239]

2. *Military Law*

The Manual specifically provides that, if not themselves made as business entries, copies and written compilations of business entries are generally subject to objection on the ground that they are secondary evidence.[240] However, when a copy is itself a business entry, it will be admissible.

Thus in a desertion case where the admissibility of an extract copy of a morning report as an official record was challenged because the original report was initialed rather than signed as required by regulations, at the inception of the absence, a Board of Review considered its admissibility as both an official record and as a business entry.[241] Although indicating that the extract was admissible as an official record, the Board held that since for twenty years, and up until approximately one month before the alleged absence, authentication of morning reports was accomplished by the initials of the authenticating officer, the original report was admissible as a business entry. The Board said:

> Since an extract copy of a morning report is in itself a business entry of wide acceptance in the military service it is not objectionable on the grounds that it is secondary evidence.[242]

When records or entries are properly admissible as business entries, parol testimony as to the contents of the records is subject

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[238] 28 U.S.C. § 1732b (1958).

[239] See, *e.g.*, United States v. Mortimer, 118 F.2d 266 (2d Cir. 1941), *cert. denied*, 314 U.S. 616 (1941).

[240] Par. 144c, MCM, 1951.

[241] CM 387850, *Slabonek*, 21 CMR 374 (1956), *pet. denied*, 7 USCMA 772, 21 CMR 340 (1956).

[242] *Id.* at 379.

to objection on the basis of the best evidence rule; however, the absence of objection will constitute a waiver.[243]

I. *Evidence of Lack of Entries*

Turning now to the problem of the significance of the absence of an entry concerning a fact or event, what is the state of the law?

It will be recalled that in both the federal and military courts evidence of the absence of an entry in an official record is admissible to prove that an event did not occur.[244] While it might be argued that the absence of a particular entry in a business record should have no probative value, there being no official duty to record as in the case of official records, such an argument ignores one of the bases of the business entry exception, so well expressed by Professor Wigmore,[245] that is, the "business duty" to record. Certainly the evidence laying the foundation for testimony as to the absence of an entry provides ample room for the judge or law officer to determine the trustworthiness of such testimony. Both the federal courts and the military do not follow the strict interpretation, and do admit evidence as to the absence of particular entries.

1. *Federal Law*

A typical example of the federal courts' attitude toward evidence of the absence of a particular entry in the records of a business is seen in *McDonald v. United States*.[246] There the defendant had testified that he had made a cash payment to the president of a certain company. After denying receipt of the money, the president was permitted to testify that he, and an accountant, had searched the company's books and found no record of a cash payment by the defendant. The Court of Appeals, in sustaining the admissibility of the testimony, pointed out that it was not introduced to prove any specific transactions or figures which could have more accurately have been proved by the books themselves, but merely to prove the absence of any entry pertaining to the alleged cash payment. The court added that the best evidence rule did not apply in this situation.[247]

2. *Military Law*

The Court of Military Appeals and the Boards of Review have

[243] See, *e.g.*, ACM 6597, *Hamilton*, 11 CMR 673 (1953); ACM S–2708, *Clements*, 5 CMR 716 (1952); *cf.*, CM 364545, *Ryder*, 12 CMR 397 (1953), *pet. denied*, 3 USCMA 838, 13 CMR 142 (1953).

[244] See nn. 139–41 *supra* and accompanying text.

[245] See note 156 *supra* and accompanying text.

[246] 200 F.2d 502 (5th Cir. 1952).

[247] See Pen-Ken Gas and Oil Corp. v. Warfield Natural Gas Co., 137 F.2d 871 (6th Cir. 1943).

also approved the admission of evidence relating to the absence of a particular entry. Thus, in a prosecution for larceny of two electric razors, testimony by an investigator that he had examined the business records of a Navy Exchange, where the accused had claimed to have purchased the razors, and that he had found no entry reflecting their purchase by the accused, was admissible to refute the accused's claim of lawful possession of the razors.[248]

Similarly, in a check forgery case, evidence that the records of the drawee bank disclosed no account in the name of the drawer of the check was admissible to show that no such account existed.[249]

In a case concerning the making of a false official statement, the accused alleged that he had received a certain telegram to the effect that his mother was ill. In sustaining the admissibility of testimony by the manager of the local Western Union office that his records did not reflect receipt of any such telegram addressed to the accused, an Air Force Board of Review said:

> [W]e believe that such evidence is admissible where as here, it is adduced through the medium of one familiar with the manner in which the business entries were made, including the nature and scope thereof, and the trustworthiness or weight to be given to such testimony could be fully probed through the medium of cross-examination or otherwise.[250]

IV. CONCLUSIONS

A. *Official Records*

A synthesis of the cases, in which the admissibility of military records into evidence under the official records exception to the hearsay rule has been in issue, results in the formulation of two general categories of limitations.

The first may be said to consist of those limitations pertaining to the making of the record itself.

(1) In order that a record come within the exception, it must first be established that the particular report or entry is required by law, regulation, or custom. In the military, as a practical matter, in almost all instances the record is found to be based on regulations.

(2) To be admissible, the entry or record must be properly recorded. In this area the person making the entry must comply, in effect, with the requirements as to form. If the entrant fails to prepare the record in the manner prescribed and the defect or

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[248] United States v. Grosso, 9 USCMA 579, 26 CMR 359 (1958).

[249] ACM 5920, *Calhoun*, 9 CMR 687 (1953), *pet. denied*, 3 USCMA 817, 11 CMR 248 (1953).

[250] ACM 7081, *McDonough*, 12 CMR 883, 890 (1953), *pet. denied*, 3 USCMA 838, 13 CMR 142 (1953); *accord*, ACM 7004, *Weiler*, 12 CMR 845 (1953); ACM 5293, *Downing*, 6 CMR 568, 571 (1952).

omission is "material" to the execution of the document the record will be excluded.

(3) The record must be prepared by the proper person, i.e., by one designated by law, regulation or custom to act, or by one to whom the authority to act has been properly delegated.

(4) The duty must be performed properly. The courts have liberally applied the presumption of regularity to the latter two limitations. Thus, in the absence of proof to the contrary, it is presumed that the record was prepared by the proper person and that any action necessary under regulations to authorize the individual preparing the record to do so has been taken and that he is not an "officious intermeddler."

Similarly, in the absence of proof to the contrary it is presumed that the person whose duty it was to prepare the record performed the duty properly from the standpoint of accurate recording of information, known or ascertained by him through appropriate and trustworthy channels.

As we have seen, this presumption withstands, for admissibility purposes, a showing that a particular entry was made a substantial period of time after the occurrence of an act or event; or that a different entry was made originally and was subsequently changed; or that a particular entry is inconsistent within itself or with entries in other official records. It is a fair statement then that unless evidence to the contrary is undisputed, the presumption of regularity will permit admission of the record into evidence and the evidence to the contrary will merely go to the weight to be accorded the entry.

The presumptions are not unreasonable when it is recalled that the very basis of the exception to the hearsay rule is the inherent guaranty of trustworthiness in the actions taken by an officer (military or civilian) in the performance of his duty. This guaranty of trustworthiness is the underlying premise of the decisions of the federal courts as well as the military.

A legitimate commentary in concluding this category might well be that the difficulties encountered with these limitations are self-made. Examination of the cases leads to the inevitable conclusion that a working knowledge of these limitations and care in preparation for trial in the use of official records would have obviated any necessity for consideration of the admissibility of many official records by the appellate courts, at least as to this category of limitations.

The second category can be said to be concerned with the substance of the records. Herein lies the area of uncertainty, both in the federal courts and the military.

The most troublesome limitation can be delineated as requiring that the particular entry must pertain to a fact or event, as distinguished from an opinion or conclusion. As previously noted, there is no clearly perceptible dividing line between fact and opinion. It is arguable at least that many, if not most of the military entries used as evidence, such as "AWOL," "breach of arrest," "escape from confinement," etc., are opinions or conclusions rather than facts. Significantly, however, only one case was found where it even appeared that a Board of Review excluded a portion of an official record as constituting an opinion.[251] It appears, therefore, that when regulations require a specific entry, it will be presumed that the individual preparing the record ascertained the facts necessary to support the conclusion contained in the entry.

The federal courts appear to be in disagreement as to the admissibility of records containing opinions when the person making the record or report was under a duty to express an opinion.

Considering both the military and federal court approaches to the problem as a whole, it is submitted that the law officer in ruling on this point should ask himself these questions:

(1) Would the opinion which the entry purports to convey, standing alone, be admissible if tendered by the direct testimony of the maker?

(2) Is the "opinion," contained in the record, one as to which reasonable men if fully aware of the data upon which the opinion is based, would agree?

(3) Is the nature of the "opinion" such that in the absence of cross-examination the entry could be considered trustworthy or reliable?

If the answer to any of these questions is no, the entry should be excluded, for then the ultimate test of reliability and trustworthiness has not been met.

While not, strictly speaking, a question of the substance of the record itself, the limitation as to entries made principally with a view to prosecution is concerned with more than the mere making of the record. The attitude of the military appellate tribunals can, with one exception, be summed up as follows: if a legitimate purpose exists for recording the particular information concerned, wholly apart from any criminal investigation or potential disciplinary action, the record will be admissible. The specific sanction, even invitation, by the Court of Military Appeals of changes in Army and Air Force regulations so as to include entries con-

[251] ACM 12395, *Graham*, *supra* note 60.

cerning the circumstances of return of an absentee,[252] remains unexplained. Clearly, as was recognized by the court, the regulation was specifically designed for the purpose of providing evidence for use in criminal trials. The only apparent explanation is its remote relation to personnel accounting and the prior sanction of such entries when required by Navy Regulations. However, it is apparent that having allowed entries relating to the circumstances of return, the court did not intend to open the door to matters in aggravation not germane to the actual circumstances of return.[253] Since in *United States* v. *Coates*,[254] all of the entries admitted relating to the circumstances of return were directly or at least indirectly related to the military, the two cases are not necessarily inconsistent.

Similarly, while not clearly a question of the substance of an entry, the problem of the source of information is more appropriately considered here. The Manual rule makes it perfectly clear that personal knowledge on the part of the entrant is not required, provided the information used is obtained through appropriate and trustworthy channels. It follows then, that a showing that a particular entry in a record was based solely on hearsay, including notes or memoranda from official records would not suffice to preclude its admissibility unless it were also shown that the source of information was unreliable or untrustworthy.

While the federal courts appear to have a somewhat more restrictive view as to the source of information—if not within the personal knowledge or observation of the entrant, the information must have been within the personal knowledge or observation of his authorized subordinates—it is submitted that no real difference exists.

Despite the language in *United States* v. *Coates* that the source of information need not be based on official records, nor be obtained from sources within the immediate command, there is no indication that just any source of information will suffice. The Court of Military Appeals has not defined what sources of information are unreliable or untrustworthy. However, as a rule of thumb, it can be said that where it can be shown that the source of information is one which normally is not required or expected to have or furnish such information the record may not be admissible.

The question might be asked whether the report of an investigation convened in accordance with regulations would be admis-

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[252] See nn. 126–33, *supra* and accompanying text.
[253] United States v. Hall, *supra* note 105.
[254] United States v. Coates, *supra* note 105.

sible to prove the truth of its contents under the official records exeception. Proponents of such a record might argue that such a report was official in that it was prepared in accordance with regulations; the officer who prepared the report had the duty to know or ascertain the truth of its contents; and lastly, the report was made in the performance of an official duty. In the light of the limitations previously discussed, the answer is clear that such record would be inadmissible for several reasons. Using as a convenient example the informal investigation report contemplated by the *1955 Naval Supplement to the Manual for Courts-Martial, United States, 1951*,[255] we find that the report must contain, *inter alia*, findings of fact, opinions, and recommendations. Clearly, the findings of fact are merely the evaluation of evidence by the investigating officer. The opinions would probably require negative answers to all three of the questions suggested previously. Finally, the recommendations would undoubtedly be irrelevant. With all due respect to investigating officers, the reliability and trustworthiness of such reports is not that contemplated by the official records exception.

Admissibility of such records has, in fact, been urged.[256] The suggestion by the proponents that submission of such reports to the adversary prior to trial with an option on his part to insist on the presence of the reporting officer (good cause being shown) would provide adequate safeguards,[257] does not overcome the weaknesses previously pointed out. Under such circumstances, the door would seem to be open to a stipulation which would obviate the necessity for use of the official records exception. Suffice it to say, that neither the federal courts nor the military courts have adopted this approach, nor, in the opinion of this writer, should it be recommended.

B. *Business Entries*

Inherent in the rule stated in the Manual and the federal statute relating to business entries are three general limitations.

(1) The entry must have been made in the regular course of business.

(2) The entry must record an act, transaction, occurrence or event.

(3) The entry must have been made at or near the time of the act, transaction, occurrence or event.

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[255] Section 0303g.

[256] See, McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 Iowa L. Rev. 363 (1957); *but see*, Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 8 Baylor L. Rev. 1, 3–4 (1956).

[257] McCormick, *supra* note 256.

There is, of course, a divergence of opinion in the federal courts as to what constitutes "regular course of business." The essence of the divergence is the age old clash betwen conservatism and liberalism.

On the one hand is the doctrine of strict interpretation in *Palmer* v. *Hoffman*.[258] This can be said to confine the exception to routine, clerical type entries made in the everyday operation of a business as a business. Perhaps it might also be said that the strict approach would exclude everything but the workaday, nuts and bolts, dollars and cents matters, which require little more than an automatic recordation of facts or transactions. In furtherance of this approach is *New York Life* v. *Taylor*[259] which would exclude anything other than routine observations.

On the other hand, while "motive to misrepresent" might be a factor, it is not the controlling one in what constitutes the regular course of business. The doctrine espoused by the United States Court of Appeals for the Second Circuit, seems to go too far in applying the exception. To say that any entry regularly made or required to be made in the conduct of a business falls within the exception is too extreme. Nor is it any answer to say that where no motive to misrepresent is present, as where the record is offered by a party other than the entrant, there is a sufficient guaranty of trustworthiness. Such an approach opens the door to the admission of opinion, double hearsay and totally irrelevant matters. In *Pekelis* v. *Transcontinental and Western Air*[260] the investigative reports admitted into evidence were full of opinions, conclusions, hearsay-on-hearsay, etc.

The military has chosen to follow the strict interpretation of the rule. It can be said that in order for a military record to qualify under this exception the entry must have been made in pursuance of some aspect of military duties. However, it is not necessary that the entry be required by regulation, directive, or order. It must be remembered that the purpose of the entry must be to carry on the particular activity and not be primarily concerned with preparing for litigation. It is in this area that the writer experiences difficulty in seeing the justification for exclusion of reports of laboratory analyses solely on the ground that they are prepared for litigation. Certainly it could have been argued in *United States* v. *Villasenor*[261] that collecting funds was not the "regular course" of military business; however, the language of the Court of Military Appeals makes it eminently

[258] Palmer v. Hoffman, *supra* note 161.
[259] New York Life v. Taylor, *supra* note 202.
[260] Pekelis v. Transcontinental and Western Air, *supra* note 181.
[261] United States v. Villasenor, *supra* note 190.

clear that such an argument would not be accepted. While there is a valid objection to the use of reports of laboratory analyses on the basis that they are opinions which should be subject to cross-examination, it is not that they are not made in the regular course of business. Both from the overall standpoint of the "military business" and from the standpoint of a business within a business, it is the task of military laboratories to conduct analyses of all kinds for a myriad of purposes.

The question might be asked as to when a business entry becomes one. Is there any length of time during which the type entry must be made before it becomes an entry in the regular course of business? The cases do not provide an answer. Perhaps it can be said that if a regulation or directive is issued requiring the maintenance of a specific record, the entries therein are admissible from the date of their inception. But what about records voluntarily kept by a soldier to make his performance of duty more efficient? Here, it is suggested, only the test of time will prove its validity as a business entry. How long? Long enough so that when offered in evidence the law officer and the appellate tribunals will be satisfied as to their reliability and inherent trustworthiness.

It is apparent that "regular course of business" is not determined solely by the regularity of entry, but it is also affected by the nature of the entry. Thus we find it necessary that the entry be one of fact or event. It is clear that the drafters of the Manual intended that military courts follow the doctrine of *New York Life v. Taylor*[262] that entries based on opinion and conjecture are not within the exception. Here then, is the reason for the exclusion of the laboratory reports. The conclusions of the analyst are not so definite as to be routine and not so inherently reliable or trustworthy as to eliminate the necessity for cross-examination.

Here too is the reason why investigative reports, even though required by regulations or directives, should be excluded. The very nature of the investigative process is such as to necessitate inclusion of opinions and conjecture.

As in the case of official records, the question arises as to the dividing line between fact and opinion. The test suggested in the consideration of official records is equally applicable here.[263]

The limitation as to time of recording is basically an effort to guaranty the reliability of the record. By requiring contemporaneous recording or at least recording within a reasonable time, the possibility of error and interpretation on the part of the entrant is lessened. While the cases give no hint as to exact time

[262] New York Life v. Taylor, *supra* note 202.
[263] See note 252, *supra* and accompanying text.

limits, it is suggested that the nature of the entry may be a factor. Obviously a simple fact or event is not as likely to be as quickly forgotten or as subject to interpretation as a more complicated fact situation or event. Accordingly the time of recording might very well be different, depending on the apparent reliability of the entry from the standpoint of probable accuracy.

The limitation set forth in the Manual that entries made principally with a view to prosecution are not admissible is also applicable to business entries. Here, its significance, or its application is different from that of official records. If the entry is made principally with a view to prosecution, the federal courts would probably hold that the entry was not in the regular course of business and therefore inadmissible. In the official records exception it would appear that an otherwise admissible official record would be excluded on this basis independently of any other limitation. In business entries the view to prosecution limitation is a part of the limitation that the entry must be in the regular course of business.

A final consideration in the business entry exception is that of the source of information. Unlike the official records exception, there is no requirement in the rule or statute of personal knowledge on the part of the entrant or a duty to ascertain the truth of the entry from a reliable or trustworthy source. Such lack of knowledge on the part of the entrant affects only the weight to be afforded the entry, not its admissibility. It is submitted that the rule espoused in *United States* v. *Grayson*,[264] that only those entries based on the entrant's personal knowledge or on information furnished by persons required so to do in the regular course of business are admissible, should be adopted by the military courts.

A hypothetical situation might well serve to sum up this section. Let us assume that a post regulation, promulgated pursuant to a local safety program, requires, *inter alia*, that a report be submitted to the Post Safety Officer of all motor vehicle accidents occurring on the post. The purpose of such report is stated by the regulation to be to indicate what traffic control measures might be taken to avoid accidents. Assume further that a report is submitted showing that an accident, in which an accused was involved, occurred because the accused drove past a "yield right of way" sign without first ascertaining that the way was clear. Would this report be admissible either as an official record, or as

[264] United States v. Grayson, *supra* note 230.

a business entry to establish (1) the fact that the accident occurred; or (2) that it was caused as stated?[265]

First, it should be noted that the regulation is local in nature and not service-wide in application. It is, therefore, unlikely that the Court of Military Appeals would accord it the status of an official record within the meaning of the exception.[266]

Would the report then be admissible under the business entry exception? Looking to the federal courts for comparable situations, almost without exception, the courts have held inadmissible accident reports prepared by state or federal police officers, even though made pursuant to law or regulation.[267] The rationale of these decisions seems to be that the accident reports lack the basic elements of reliability and trustworthiness, in that such reports are necessarily based on secondhand information and contain the deductions, opinions, and conclusions of the person making the report.

Turning now to the military courts, it might be said that, at least for the purpose of establishing the fact that there had been a collision, such a report should be admissible for that limited purpose. However, it is suggested that there is no real necessity for the use of the report, since the fact of the collision would be readily ascertainable and could be proven by parol testimony.

As to the second problem of the admissibility of the portion of the report which reflects that the collision was caused by the accused having driven through a "yield right of way" sign, the reasons for its exclusion are manifest. If this entry were made by an accident investigator, it is highly doubtful that the entry would be based on the investigator's personal knowledge since, almost without exception, accident investigators are not on the scene when the accident happens. Thus it would follow that such entry would necessarily be based on information obtained from other persons who might have witnessed the accident. It might be said that the Manual specifically states that an entry in a business record need not be based on the personal knowledge of the entrant. However, an examination of the cases leads to the conclusion that it was not the intent of the drafters of either the federal or military rules to open the door wide to all double hearsay. In this regard the application of the rule applied by the

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[265] This hypothetical situation was suggested in *Evidence*, Special Text of The Judge Advocate General's School, U.S. Army, 1959, at 2210.

[266] The reported cases upholding the admissibility of official records have been based on regulations of the individual services of service-wide application.

[267] See, *e.g.*, Hunt v. United States, 231 F.2d 784 (8th Cir. 1956); Gencarella v. Fyfe, 171 F.2d 419 (1st Cir. 1948).

United States Court of Appeals for the Second Circuit is not only desirable but necessary. It will be recalled that that court held that entries made in business records, not based on the personal knowledge of the entrant, should be admissible only when such information is furnished by persons who are required in the course of the same business to furnish such information to the entrant for recording.[268] To hold otherwise would be to totally eliminate the opportunity to cross-examine the persons who furnished the facts upon which the investigator based his conclusion that the accused was at fault.

It should be apparent that that portion of the report stating that the accused was at fault is nothing more than the opinion or conclusion of the investigator. Cross-examination of the investigator would reveal that the opinion or conclusion was based on hearsay and deduction and would, in most cases, render him incompetent in that respect.

Quite aside from the other factors discussed is the objection to the entry reflecting fault, on the basis that it was made principally with a view to prosecution. Although there is a separate and distinct purpose for the report, that is the post safety program, a requirement in the regulation that a finding as to fault be made could have only one purpose—disciplinary action. Despite the Court of Military Appeals' sanction of the change in regulations to provide for recording the circumstances of return of an unauthorized absentee,[269] there is little likelihood that the court would extend that rule to this situation.[270]

While many may disagree with the concept of a strict interpretation of the official record and business entry exceptions to the hearsay rule, it would be well to recall the reasons for their existence.

As previously stated the official records exception is based primarily on the necessity, or more properly expediency, that public officials be not interrupted in the performance of their duties for the purpose of appearing in court. The element of trustworthiness allowing the elimination of cross-examination is said to be found in the nature of the duties.

The business entry exception arose out of necessity as the rapidly expanding commercial world increased in complexity and the common law rules of evidence were found unworkable, and in

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[268] United States v. Grayson, *supra* note 230.

[269] United States v. Krause, *supra* note 126.

[270] This is not to say that entries reflecting the presence of traffic control devices, skid marks, weather conditions, etc., would be subject to this objection. Obviously, such information could be of considerable value to the safety aspect, aside from disciplinary action.

many instances resulted in injustices being done. The guarantee of trustworthiness is found in the routineness of the entry and the very human element of the concern of the entrant that he not lose his job due to inaccurate entries.

Nowhere, either in the language of the courts or in the language of the writers, is there found any advocacy that the expediency found in the use of records should ever subordinate the protections afforded the accused in a criminal case. The drafters of the Manual have clearly indicated their intent that these exceptions be strictly interpreted and applied. In view of the Court of Military Appeals' concern for the rights of the individual accused, it is suggested that this intent will find scrupulous application.

To take a man's money or property is a serious thing, but to take his freedom or his life transcends it by far. The need for the preservation of the rights of confrontation and cross-examination should, therefore, be more jealously guarded in criminal matters.

ANNEXATIONS OF MILITARY RESERVATIONS BY POLITICAL SUBDIVISIONS*

BY CAPTAIN RALPH B. HAMMACK**

I. INTRODUCTION

There are approximately 1400[1] military reservations[2] in the United States owned by the federal government and occupied, operated, or supervised by the Departments of the Army, Air Force, and Navy for military purposes. These properties fall into several categories based on use—Army posts, forts, camps, naval bases, air bases, navy yards, arsenals, ordnance plants, depots, hospitals, ports, and many others. In view of the technological advances that have been made in weapons systems and equipment suitable for military uses since the end of World War II, the activities at the military installations, particularly the industrial type, have expanded substantially in order to produce the modern materiel and weapons required for our armed forces.

Also, after World War II ended, there existed a serious lack of suitable housing for military personnel at or near most of the military installations. This situation led to the enactment by Congress of the so-called "Wherry Housing Act"[3] in 1949, and the "Capehart Act"[4] in 1955. These acts provided for the construction of housing on or near military reservations by private contractors for occupancy by military and civilian employees of the Armed Forces. As a result of these housing programs and the expanded activities carried out upon these military reservations, there is now a large concentration of persons and valuable property on many of the reservations. Such reservations represent large military communities and include most facilities usually found in any modern urban community. As many of these military communities are located near a city or town, an increasing number of

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[1] Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, *Jurisdiction Over Federal Areas Within the States, Part I, The Facts and Committee Recommendations*, pp. 84, 89, 94 (1956).

[2] The term "military reservation" in its ordinary sense means any place used for military purposes. 1 Bull. JAG 148 (1942).

[3] 63 Stat. 570 (1949).

[4] 69 Stat. 635, 646–54 (1955), as amended, 12 U.S.C. § 1748 (Supp. I, 1959), 42 U.S.C. § 1594 (Supp. I, 1959).

attempts have been made by these neighboring municipalities to extend their boundaries so as to include these military communities.

The subject of the annexation of military reservations by political subdivisions of a state covers such a broad field that a detailed discussion of all facets of that subject has not been attempted. It is for that reason the bounds of this article have been limited generally to the significant effects of annexation as they relate to the jurisdiction of the federal government, the powers which may be exercised by the local political subdivision, the duties and obligations of the annexing subdivision to provide normal municipal services, and the rights and privileges of the persons residing within an annexed military reservation with respect to voting in the state and local elections, and attendance of children residing upon the military reservations at the local schools without payment of tuition.

The furnishing of governmental services, including fire and police protection, refuse and garbage collection, maintenance of streets, and other municipal services to the thousands of persons either residing or employed on many of our military reservations, represents an imposing burden on the governmental agency which must furnish them. Since these services are usually furnished by the municipal government for all members of the municipality, it would be reasonable to assume that a municipality voluntarily annexing a military reservation would be obliged to furnish these services to all persons in the annexed area. Similarly, it would be reasonable to assume that the inhabitants of the annexed military reservation would be afforded the civil and political privileges afforded all other members of the municipality to vote in the local elections and to send their children to the local schools. These assumptions may or may not be warranted, depending upon the measure of legislative jurisdiction possessed by the state and its political subdivisions over the particular military reservation concerned. For this reason, a brief historical development of the manner in which our military reservations have become subject to varying degrees of state and federal legislative jurisdiction will permit a better understanding of the significance that may be attached to their annexation by political subdivisions.

II. ACQUISITION OF MILITARY RESERVATIONS AND OF LEGISLATIVE JURISDICTION OVER THEM BY FEDERAL GOVERNMENT

A. Methods of Acquiring Military Reservations and Legislative Jurisdiction

The Constitution of the United States makes reference to but

one method by which the federal government may acquire land within a state to be used for military purposes.[5] That method is by purchase of the land for use as a fort, magazine, arsenal, dock-yard or other needful building, with the consent of the state wherein the land is situated. The courts have, however, recognized the power of the federal government to acquire land for military purposes by such other means as purchase based upon voluntary agreement, condemnation for public use, foreclosure of liens, devise or succession where state law does not prohibit such devises, by acceptance as a gift from states and individuals, and by setting it aside from the public domain.[6] As a consequence of our military reservations having been acquired by these different methods,[7] the federal government has not always received a uniform measure of legislative jurisdiction over them.

It is probable that the majority of military reservations have been acquired by the method referred to in the Constitution, because of the requirement of a federal statute enacted in 1841, prohibiting the expenditure of public money for the erection of public works until there had been received from the appropriate state the consent to the acquisition by the United States of the site upon which the structure was to be placed.[8] The giving of such consent by the state resulted in the transfer of exclusive legislative jurisdiction over such site to the federal government by operation of article I, section 8, clause 17, of the Constitution. This statute was amended in February, 1940, so as to make acquisition of legislative jurisdiction by the United States over land purchased with the consent of state optional rather than manda-

[5] U.S. Const. art. I, § 8, cl. 17: "Congress shall have power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings. . . ."

[6] United States v. Pekins, 163 U.S. 625 (1896) (foreclosure of lien); Van Brocklin v. Tennessee, 117 U.S. 151 (1886) (purchase without consent of state); Kohl v. United States, 91 U.S. 367 (1875) (eminent domain); Fay v. United States, 204 Fed. 559 (1st Cir. 1913); Crook, Horner & Co. v. Old Point Comfort Hotel, 54 Fed. 604 (E.D. Va. 1893) (donations); Dickson v. United States, 125 Mass. 311 (1877) (devise or succession); State v. Oliver, 162 Tenn. 100, 35 S.W.2d 396 (1930) (donation).

[7] For discussion of various methods by which the United States has acquired land and military reservations, see Davis, *The Acquisition, Acceptance, and Loss of Jurisdiction over Military Reservations: Relative Rights of the State and Federal Government Regarding Service of Process, Highways, and Application of the Federal Assimilative Crimes Act*, Ch. III, a thesis presented to The Judge Advocate General's School, 1955.

[8] Rev. Stat. § 355 (1875).

tory.[9] As to the military reservations acquired by the United States prior to February 1, 1940, over which the states had tendered exclusive jurisdiction to the federal government by means of a consent or cession statute, acceptance of such jurisdiction by the United States was presumed in the absence of an intent by the federal government not to accept such jurisdiction.[10] There is a conclusive presumption against the acceptance of any legislative jurisdiction over lands acquired after February 1, 1940, by the federal government, unless a formal acceptance of jurisdiction is filed by the United States.[11] The current policy of the federal government is not to seek jurisdiction over federal lands within the states except in unusual circumstances. This policy, as applicable to the Department of the Army, is set out in AR 405–20, 24 April 1957.

The federal government has acquired legislative jurisdiction over some military reservations not purchased with the consent of a state, by means of a cession of jurisdiction by the state pursuant to a "cession" statute. It has also reserved all or a portion of its jurisdiction, in some instances, over military reservations withdrawn or set aside from the public domain, when admitting into the Union the state within whose borders the reservations are located. When these latter methods were utilized to obtain or retain legislative jurisdiction, the federal government was not required to secure exclusive jurisdiction over the reservations concerned, and frequently did not do so.[12]

The federal government has not acquired any measure of the states' legislative jurisdiction over many reservations. These reservations are held in a proprietorial capacity only and are subject to the jurisdiction of the state. Like other federal property, however, they are free from any interference of the states which will destroy or impair their effective use for the purposes of the federal government.[13]

B. *Retrocessions of Legislative Jurisdiction*

It has been settled that a state may not unilaterally recapture jurisdiction over an area previously ceded by it to the United

[9] 54 Stat. 19 (1940), 40 U.S.C. § 255 (1958). It was generally thought that no reservations of state jurisdiction were possible when federal jurisdiction was acquired by this constitutional method until James v. Dravo Contracting Co., 302 U.S. 134 (1937).

[10] Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885).

[11] 54 Stat. 19 (1940), 40 U.S.C. § 255 (1958).

[12] See Fort Leavenworth R.R. v. Lowe, *supra* note 10, at 540.

[13] This freedom from state interference exists independently of the express provisions of U.S. Const. art. IV, § 3, cl. 2 and art. VI, cl. 2. See Fort Leavenworth R.R. v. Lowe, *supra* note 10, at 529.

States.[14] However, Congress has enacted many statutes retroceding jurisdiction to the states over named military reservations, for various purposes, such as the policing of highways which cross military reservations.[15]

More important, however, Congress has enacted several statutes since 1936 retroceding jurisdiction to the states, and in some cases to their political subdivisions, to exercise certain governmental powers and functions in *all* federal areas, including those nominally under the exclusive jurisdiction of the federal government. The so-called "Lea Act" or "Hayden-Cartwright Act",[16] authorized the states to levy taxes upon sales of gasoline and other motor fuels when such products were sold on United States military reservations for the use of consumers other than the federal government. Another 1936 statute enacted by Congress permitted the application of state workmen's compensation laws to federal areas.[17] State unemployment compensation laws were extended to federal areas by a provision of the Social Security Act Amendments of 1939.[18]

A retrocession statute of major importance was enacted by Congress in 1940. This law,[19] commonly known as the "Buck Act", retroceded to the states and to their duly constituted taxing authorities jurisdiction to levy and collect sales, use, and income taxes within federal areas. The federal government and its instrumentalities were excepted from the operation of the Act.

One last retrocession statute worthy of mention is the following quoted provision of the Military Leasing Act of 1947:[20]

> The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated.

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[14] Yellowstone Park Transportation Co. v. Gallatin County, 31 F.2d 644 (9th Cir. 1929), *cert. denied*, 28 U.S. 555 (1929); In re Ladd, 74 Fed. 31 (C.C.D. Neb. 1896).

[15] *E.g.*, 49 Stat. 1108 (1936) (jurisdiction over highway at Presidio of San Francisco, California); 55 Stat. 608 (1941) (highway crossing Vancouver Barracks Military Reservation, Washington); and 69 Stat. 132 (1955) (highway crossing Fort Devens Military Reservation, Mass.).

[16] 4 U.S.C. § 104 (1958).

[17] 49 Stat. 1938 (1936), 40 U.S.C. § 290 (1958). Employees of federal government and instrumentalities are not covered under such act. Breeding v. Tennessee Valley Authority, 243 Ala. 240, 9 So. 2d 6 (1942); Op. JAGN P3–2/P7 (350924–5), May 18, 1938; JAGA 1949/8889, Feb. 15, 1950; *id.* 1949/5319, Aug. 3, 1949; *id.* 1944/6234, July 5, 1944.

[18] Int. Rev. Code of 1954, § 3305.

[19] 4 U.S.C. § 105–10 (1958).

[20] 10 U.S.C. § 2667(e) (1958).

The Wherry Housing Act of 1949[21] made provision for arrangements whereby military areas, including areas under the exclusive jurisdiction of the United States, might be utilized for the construction of housing for rental to military personnel. The Military Leasing Act of 1947[22] supplied the authority to lease military areas for such housing. At first, there was some doubt whether Congress intended, by these two statutes, to permit taxation by the states and local governments of the leasehold interests in the housing projects constructed on military reservations under exclusive federal jurisdiction. The Supreme Court of the United States resolved this doubt by holding such interests to be taxable in the case of *Offutt Housing Company* v. *Sarpy County*.[23]

C. *Present Jurisdictional Status of Military Reservations*

It is clear from the foregoing development of the acquisitions and retrocessions of legislative jurisdiction that there is no general rule which can be applied to define the respective jurisdictions of the federal, state, and local governments concerning any particular military reservation. In order to ascertain the precise jurisdictional status, one must look to the time of acquisition of the reservation, the method or methods by which jurisdiction over it was obtained by the federal government, the specific terms of the cession or consent statute, any judical decisions rendered with respect to these statutes, and the retrocessions of jurisdiction over it to the state by Congress.

Thus, our military reservations today fall under one or more of the following federal legislative jurisdictional statutes: "exclusive," "partial," "concurrent," or "proprietorial interest only." The term "exclusive jurisdiction" is used herein to describe the jurisdictional status of areas over which exclusive legislative jurisdiction was originally ceded to the United States, with no reservation made by the state except the right to serve civil and criminal process in such areas. Admittedly, the federal government no longer exercises exclusive jurisdiction, in its true sense, over any military reservation because of the aforementioned retrocessions of jurisdiction. "Concurrent legislative jurisdiction" applies in those instances wherein in granting to the United States authority which would otherwise amount to exclusive jurisdiction over an area, the state concerned has reserved to itself the right to exercise concurrently with the United States, all of the same authority. "Partial legislative jurisdiction" is applied in those instances wherein the federal government has been granted for

[21] 63 Stat. 570 (1949).
[22] *Supra* note 20.
[23] 351 U.S. 253 (1956).

exercise by it over an area in a state certain of the state's authority, but where the state concerned has reserved to itself the right to exercise by itself or concurrently with the United States, other specific authority constituting more than the right to serve civil or criminal process in the area, such as the right to tax private property. "Proprietorial interest only" is applied in those instances where the federal government has acquired some right or title to an area in a state but has not obtained any measure of the state's authority over the area.[24]

III. LEGAL ASPECTS OF ANNEXATION PROCEEDINGS

A. *Capacity of Political Subdivisions of State To Annex Military Reservations*

The annexability of military reservations under the exclusive jurisdiction of the federal government by municipal corporations has been questioned and sustained by the highest court of each of the three states of Texas, Virginia, and Kentucky.[25] The Supreme Court of the United States, in considering an appeal from the judgment in the case before the Kentucky court, which involved the annexation of a Navy ordnance plant by Louisville, removed any doubt that may have remained as to the legal capacity of a municipality to annex such a military reservation, when it said:

> When the United States, with the consent of Kentucky, acquired the property upon which the Ordnance Plant is located, the property did not cease to be a part of Kentucky. . . . In rearranging the structural divisions of the Commonwealth, in accordance with State law, the area became a part of the City of Louisville, just as it remained a part of the County of Jefferson and the Commonwealth of Kentucky. A state may conform its municipal structures to its own plan, so long as the State does not interfere with the exercise of jurisdiction within the Federal area by the United States. . . . A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. . . .[26]

This case has dispelled the notion that a federal area under

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[24] These definitions are adopted from the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, *Jurisdiction Over Federal Areas Within the States, Part II—A Text of the Law of Legislative Jurisdiction*, p. 10 (1957). This text contains a comprehensive coverage of the subject of legislative jurisdiction over federal areas.

[25] Commissioners of Sinking Fund of the City of Louisville v. Howard, 248 S.W.2d 340 (Ky. 1952) (annexation of Navy ordnance plant by the City of Louisville); Wichita Falls v. Bowen, 143 Tex. 45, 182 S.W.2d 695 (1944) (annexation of Sheppard Field, a military reservation by the City of Wichita Falls); and County of Norfolk v. City of Portsmouth, 186 Va. 1032, 45 S.E.2d 136 (1947) (annexation of Norfolk Navy Yard by City of Portsmouth).

the exclusive jurisdiction of the United States is not a part of the state in a geographical or physical sense, and has made it clear that the mere fact of exclusive federal jurisdiction over an area will not preclude application of state and local annexation laws to the area.

B. *Nature and Source of Annexation Power*

The Supreme Court of the United States has on many occasions defined the power of the states with respect to the control of the boundaries of their political subdivisions.[27] The nature of this power was emphatically proclaimed in the land-mark case of *Hunter* v. *Pittsburgh*,[28] which involved the annexation of the small city of Allegheny by the larger city of Pittsburgh, Pennsylvania. The Court said:

> The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter, and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protests. In all these respects the State is supreme, and its legislative body conforming its action to the State constitution, may do as it will, unrestrained by any provision of the Constitution of the United States . . . and there is nothing in the Federal constitution which protects them from these injurious consequences. The power is in the State, and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.[29]

The great power of a state with respect to its internal structure is illustrated by the very recent case of *Gomillion* v. *Lightfoot*.[30] There, the Legislature of Alabama had passed a statute which altered the boundaries of the city of Tuskegee in Macon County so that substantially all of the negroes who had been qualified voters in the city were placed outside of the city limits. The United States Court of Appeals for the Fifth Circuit found that such a statute was not violative of either the fourteenth or fifteenth amendments. The Supreme Court, however, held that a state may not change the boundaries of a city if the effect thereof is to

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[26] Howard v. Commissioners, 344 U.S. 624, 629 (1953). The circuit court of Jefferson County, Kentucky, had granted judgment below in favor of appellant taxpayers, holding that they were not in the city and therefore not subject to a tax imposed by the City of Louisville because the Navy ordnance plant ceased to be a part of the Commonwealth of Kentucky when exclusive jurisdiction over it was acquired by the United States.

[27] Mt. Pleasant v. Beckwith, 100 U.S. 514 (1879); Laramie County v. Albany County, 92 U.S. 307 (1875).

[28] 207 U.S. 161 (1907).

[29] *Id.* at 178–79.

[30] 270 F.2d 594 (5th Cir. 1959), *rev'd and remanded*, 29 U.S.L. Week 4024 (U.S. Nov 14, 1960).

disenfranchise virtually all negro voters in violation of the fifteenth amendment.

Assuming that the state's action is not in violation of the fourteenth or fifteenth amendments, there is at least one other qualification which has been placed upon its exercise.

That qualification is that a state, by statute or otherwise, may not authorize one of its political subdivisions to annex territory solely for the purpose of receiving revenue from the annexed area, where such territory cannot receive any benefit whatsoever from the annexing subdivision. Thus, in *Myles Salt Co.* v. *Commissioners of St. Mary and Iberia Drainage District,*[31] the Supreme Court of the United States held that the annexation of an island on which the plaintiff owned certain interests in salt deposits which would become subject to certain taxes afterwards, which interests could not possibly receive or have need for drainage facilities or services from an annexing drainage district, constituted a taking of property without due process of law in violation of the fourteenth amendment.

In the absence of a showing that territory is annexed to disenfranchise a racial minority or for the purpose of receiving revenue from the territory, with no intention of furnishing any benefits, protections, or services to such territory, there appear to be no other limitations in the federal constitution to prevent the annexation of territory by politial subdivisions of a state.

C. *Substantive Criteria for Annexation*

The criteria for land which may be annexed also varies from being merely "adjacent" to being found "necessary and expedient" by the governing body approving the annexation. Generally, there must be a reasonable and valid purpose or need for the annexation.[32] What constitutes a reasonable basis or valid purpose for the annexation is usually found by the annexing governing bodies or courts without difficulty. Annexations to make the geographical boundaries regular,[33] to foster the growth and prosperity of the city, [34] to permit the furnishing of proper municipal services, such as sewer, gas, water, or drainage purposes, street and highway development, [35] and to permit improvement in the adequacy of school facilities for the areas concerned [36] are ex-

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[31] 239 U.S. 478 (1916).

[32] Sugar Creek v. Standard Oil Co., 163 F.2d 320 (8th Cir. 1947); New Orleans R.R. v. Vidalia, 117 La. 561, 42 So. 139 (1906).

[33] Catterlin v. Frankfort, 87 Ind. 45 (1882).

[34] Yancy v. Fairview, 23 Ky. L. Rep. 2087, 66 S.W. 636 (1902).

[35] Sugar Creek v. Standard Oil Co., *supra* note 32.

[36] Redfield School Dist. No. 12 v. Redfield Independent School Dist. No. 20, 14 S.D. 229, 85 N.W. 180 (1901).

amples which the courts have held to be reasonable or valid purposes.

Several courts have held that a municipality cannot annex territory for revenue purposes only, over the objection or protests of the property owners of the property to be annexed, where no compensating benefit to the annexed territory would result.[37] The Virginia Supreme Court of Appeals held that the equitable criterion of whether suburban areas should be annexed to the city is not alone the services rendered to the properties in outside areas but includes also those enjoyed by individuals themselves while at work in the city, or visiting its churches, stores, public library, theater, civic clubs and other places of business and recreation.[38] Although the court was referring to the benefits available to the owners of industrial property adjacent to the Norfolk Navy Yard which was annexed in the same proceedings by the city of Portsmouth, and not to the residents or employees of the navy yard, the same benefits would be available to these persons. The court indicated though that the only effect of the annexation of the navy yard would be to permit the city of Portsmouth rather than Norfolk County to collect the sales, use, and income taxes in the navy yard as permitted by Congress.[39]

The great weight of authority, however, is to the effect that the courts cannot interfere with the annexation of territory to a municipal corporation even if the effect is to subject the annexed territory to taxation for municipal purposes from which it derives no benefit.[40] There have been no judicial decisions resolving the specific question whether a military reservation can properly be annexed by a municipality where the sole purpose of the annexation is to apply municipal taxes. While the court in the Norfolk navy yard annexation made no mention of any benefits which would accrue to the residents or employees of the navy yard in return for the taxes to be imposed and collected by the annexing city, it implied that they would receive many intangible benefits. It is doubtful that this specific question will ever arise, since a municipality attempting to annex a military reservation will be

[37] City of Lexington v. Rankin, 278 Ky. 388, 128 S.W.2d 710 (1939); Forbes v. Meridian, 86 Miss. 243, 38 So. 677 (1905); Witham v. City of Lincoln, 125 Neb. 366, 250 N.W. 247 (1933); State *ex rel.* Bibb v. City of Reno, 64 Nev. 127, 178 P.2d 366 (1947); Warwick County v. City of Newport News, 120 Va. 177, 90 S.E. 644 (1916); Jones v. City of Clayton, 7 S.W.2d 1022 (Mo. App. 1928).

[38] County of Norfolk v. City of Portsmouth, 186 Va. 1032, 45 S.E.2d 136 (1947).

[39] *Ibid.*

[40] State *ex rel.* Johnson v. Sarasota, 92 Fla. 563, 109 So. 473 (1926); Chicago, R.I. & P. R.R. v. Galyon, 179 Okla. 570, 66 P.2d 1066 (1937). See also Annot., 62 A.L.R. 1024 (1929); Annot., 27 L.R.A. 739 (1895).

likely to disclaim any such single purpose of an annexation, and can always point to the intangible benefits similar to those mentioned by the Virginia court regarding the industrial land in the Norfolk annexation case.

In defining lands which are annexable, a few courts have held that such lands must be so situated with reference to the city that it may reasonably be expected that after the annexation they will unite with the city in making a homogenous city, which will afford to its several parts the ordinary benefits of local government; that is, that the area to be annexed should have a unity of interest with the corporation as will make it a proper subject of municipal government.[41]

Notwithstanding the urban characteristics of parts of the military reservations, it is arguable that these areas which are under exclusive federal jurisdiction do not meet the literal criteria for annexation under the laws of many states as interpreted by their courts, either as to reasonableness or the unity of interest which will make them a proper subject of municipal government. In those states which consider that they are without the necessary power to provide governmental services within an exclusively federal jurisdiction area, it can hardly be said that such area is adaptable to urban purposes, or necessary and convenient to a reasonable exercise of the city government of an annexing municipality. It must be conceded, however, that under the present criteria set out in the annexation laws as to land which may be annexed, many of our military reservations, or at least those portions of the reservations which have the urban-like facilities, meet the prescribed criteria.[42]

IV. OVERT EFFECT OF ANNEXATION UPON JURISDICTION OF FEDERAL AND LOCAL GOVERNMENTS

A. *Alterations of Jurisdictional Status*

The Supreme Court has asserted that the respective powers of the federal government and of the state government within an annexed military reservation are not altered or changed by an annexation.[43] The paramount significance of an annexation of a military reservation by a political subdivision, insofar as the matter of jurisdiction is concerned, is that the annexing political subdivision of the state acquires a portion of the state's jurisdic-

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[41] Vestal v. Little Rock, 54 Ark. 321, 15 S.W. 891 (1891), *aff'd on rehearing*, 54 Ark. 329, 16 S.W. 291 (1891), and see Annot., 62 A.L.R. 1024 (1929).

[42] For a collection of annexation laws of the first forty-eight states, see Dixon & Kerstetter, *Adjusting Municipal Boundaries, The Law and Practice in 48 States* (1958).

[43] Howard v. Commissioners, *supra* note 26, at 626.

tion over such annexed military reservation. The annexation results in a transfer of the exercise of the state's governmental functions within the annexed area from one political subdivision of the state, usually the county, to another political subdivision of the state which incorporates the military reservation within its territorial limits. The extent of the governmental functions which the annexing political subdivision may exercise within the annexed military reservation will depend on the powers that have been lawfully delegated to it by the parent state.[44] These powers are not always clearly defined or determinable with the degree of certainty that is desirable, as may be seen from a consideration of some specific powers and functions of government herein.

B. *Annexing Political Subdivision's Jurisdiction to Tax*

An argument which has been advanced frequently in attacking annexations of land by political subdivisions of a state is that the annexation will result in the levy of taxes by the annexing political subdivision upon the property or persons within the annexed area, without any benefit or protection being provided within the annexed area in return for the taxes levied and collected. On a few occasions, taxpayers within an annexed military reservation have resisted the levy and collection of taxes by a municipal corporation on this ground. The United States has not intervened in the courts, however, in any proposed annexation of a military reservation solely because of the likelihood that it will result in certain taxes being imposed upon residents or employees of the military reservation.

The "Buck Act" opened the way for the local political subdivisions of the states to impose certain sales, use, and income taxes within federal areas located within their territorial boundaries. This act has served as an incentive or motivating factor for many municipalities to seek annexation of military reservations situated nearby.

One of the earliest cases in which the validity of a tax imposed pursuant to the authority of this act was questioned, is *Kiker* v. *City of Philadelphia.*[45] There, the plaintiff, a resident of New Jersey who worked at the League Island navy yard in Philadelphia, sought the restraint of the collection of an income tax

[44] In Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907), the court said: "We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon where they are applicable. Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. . . ."

[45] 346 Pa. 624, 31 A.2d 289 (1943).

imposed upon him as an employee in the city on the ground that he received no benefit or protection from the taxing city of Philadelphia. The plaintiff commuted to and from his home in New Jersey to the navy yard via a boat across the Delaware River, and made no use of the streets of Philadelphia, and claimed that he received no other tangible benefits or protections from the city. Aside from the concrete benefit found by the court that the city cut the ice in the Delaware River in the winter months, which permitted the plaintiff to get to work, it stated what it considered to be the guiding principle of law as to the benefits which are necessary to sustain a municipal tax. The court stated:

> It is clear that in classifying persons for taxation an obligation on the part of the taxing power to make available some benefit to them must exist. . . . A State may reserve to itself the power to tax in an area within the geographical limits when ceding jurisdiction to the National Government over such territory. When the State does make such reservation in its Act of Cession, the obligation of furnishing protection and benefits to the persons and property within the confines of the ceded area impliedly remains in the State. . . . This obligation can be called into play at any time the national government refuses or neglects to furnish them. . . . The fact that the Federal government, as far as League Island is concerned, does not at this time see fit to take full advantage of the obligation of this Commonwealth, or its political subdivision, the City of Philadelphia, to make available protection and benefits to persons and property on the Island, does not justify our invalidation of the income tax in question, as far as plaintiff and those in a similar position are concerned.[46]

In the *Howard* case,[47] following the annexation of the navy ordnance plant by Louisville, the city passed an ordinance levying an annual license fee for the privilege of engaging in work in the city.[48] The license fee was measured by one percent of all salaries, wages, commissions, and other compensation earned in the city. The appellant, Howard, contended that the license tax could not be levied by the city because it was neither one of those taxes permitted or authorized to be exercised by the cities of Kentucky under

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[46] City of Cincinnati v. Faig, 145 N.E.2d 563 (Municipal Court of Cincinnati, Ohio, Criminal Division, 1957) in which case an "income" tax similar to that in the Kiker case was held to be valid. The Supreme Court of the United States had indicated that the test of whether a local tax violates the due process clause is whether it bears some fiscal relation to the protections, opportunities, and benefits given by the local government, or in other words, whether the local government has given anything for which it can ask a return. Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1941); Davis v. Howard, 306 Ky. 149, 206 S.W.2d 467 (1947), wherein a "use" tax imposed upon a motor transport operator within the Fort Campbell, Kentucky-Tennessee Military Reservation was upheld.

[47] Howard v. Commissioners, *supra* note 26.

[48] Louisville, Ky., Ordinance 83 (1950).

the state law[49] nor an "income" tax authorized by the "Buck Act"[50] for exercise in federal areas by the states and their political subdivisions.

Section 106 of the Buck Act (4 U.S.C. 106) provides in part:

> No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, *having jurisdiction to levy such a tax*, by reason of his residing within a Federal area. . . . (Emphasis added.)

Section 110(c) of the Buck Act[51] defines "income tax" as follows: "The term 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." The Supreme Court held that the Louisville tax, while not an 'income tax' within the meaning of the Kentucky law was an 'income tax' within the meaning of the Buck Act. Two members dissented, expressing their opinions that such tax was a privilege tax on the right or privilege of working for the federal government rather than an "income tax" and that Congress had not permitted this type of tax to be levied in federal areas by the Buck Act.

These opinions exemplify the broad and liberal interpretation by the courts of local ordinances imposing taxes pursuant to the authority granted by Congress in the "Buck Act."

Similarly, the Supreme Court has liberally construed the provisions of the former section 6 of the Military Leasing Act[52] to authorize taxation by local government of the interest of a lessee of property leased under the Act, even though the property was located on land which was under the exclusive jurisdiction of the United States.[53] Numerous states and political subdivisions thereof proceeded to tax the so-called lessee's interest in these Wherry housing projects on military reservations following this decision of the Supreme Court.

The importance of this exercise of the local taxing power as to these projects has been diminished by a subsequent change in the method of handling the construction of housing on military reservations brought about by the enactment of the "Capehart Act."[54] Under this Act the private interest of the lessee is extinguished by transfer of the project to the control of the military departments upon completion of the construction. While the

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[49] The Kentucky court of appeals had held that the particular tax involved in this case was not an "income tax" within the meaning of the Kentucky constitution but a tax upon the privilege of working within the City of Louisville. Louisville v. Sebree, 308 Ky. 420, 214 S.W.2d 248 (1948).

[50] 4 U.S.C. § 105–10 (1958).

[51] 4 U.S.C. § 110(c) (1958).

[52] 10 U.S.C. § 2667(e) (1958).

[53] Offutt Housing Co. v. Sarpy County, 351 U.S. 253 (1956).

[54] *Supra* note 4.

lessee's interest remains taxable by local political subdivisions, Congress has provided that a deduction shall be made from the local tax on the lessee's interest in these projects of such amount as the Secretary of Defense or his designee determines to be equivalent to any payments made by the federal government to the taxing authority with respect to such property, plus such amount as may be appropriate for any expenditures made by the federal government for the provisions of maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services which are customarily provided by the state, county, city, or other local taxing authority with respect to similar property.[55]

The various types of taxes that may be levied upon persons within military reservations by local taxing authorities pursuant to the "Buck Act" and the other acts of Congress which have retroceded to the states and their political subdivisions jurisdiction to impose specific taxes within federal areas have been defined and settled by the courts. There remains some uncertainty, however, whether private property located on a military reservation under the exclusive jurisdiction of the United States, may be taxed by the states or their political subdivisions, irrespective of any provision of the "Buck Act." This uncertainty may be seen in three comparatively recent decisions which are based on almost identical factual situations.[56] The International Business Machines Corporation, (hereafter IBM), had leased certain of its machines to the Army and the Air Force for use within military installations in Louisiana, Georgia, and Florida. Each state, or one of its subdivisions, levied a personal property tax on the machines and IBM sought to avoid the taxes. Each state had in effect a cession or consent statute ceding exclusive jurisdiction over the military installations to the United States.

As to the property in Louisiana, the court of that state reasoned that it had been firmly established by the decisions of the United States Supreme Court in the cases of *James* v. *Dravo Contracting Co.*[57] and *Silas Mason Co.* v. *Tax Commission of Washington,*[58] that the United States did not have to accept exclusive jurisdiction over land acquired within a state, and that the presumption that the United States had accepted exclusive jurisdiction over lands acquired prior to February, 1940 might be rebutted by the circumstances.

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[55] *Ibid.*

[56] International Business Machines Corp. v. Vaughn, 98 So. 2d 747 (Fla. 1957); International Business Machines Corp. v. Evans, 213 Ga. 333, 99 S.E.2d 220 (1957); International Business Machines Corp. v. Ott, 230 La. 666, 89 So. 2d 193 (1956).

[57] 302 U.S. 134 (1937).

[58] 302 U.S. 186 (1937).

As the military installations involved were being furnished fire protection, sewerage, water and drainage service, and traffic regulation by the city of New Orleans, the court found that the acceptance of such services was evidence of an intent on the part of the federal government not to accept exclusive jurisdiction over the areas. As to the military installations involved which had been acquired by the United States subsequent to February 1940, the court determined that the United States had not accepted either exclusive or partial jurisdiction in accordance with the provisions of Revised Statute 355, as amended.[59] The property of IBM at all installations concerned in Louisiana was held to be taxable.

The Georgia court also held the machines of IBM located on an Air Force base in that state, to be subject to an ad valorem property tax, but for a different reason than was found by the Louisiana court. The Georgia court also noted that the Supreme Court had held that a cession of jurisdiction to the federal government could be qualified by the state. This court then determined that the attempted cession of exclusive jurisdiction by the State Legislature was contrary to the provisions of the Georgia constitution which prohibited the grant, limit, gift, or restraint of the State's right to tax corporate property.[60] The cession statutes were declared to be void to the extent that they undertook to waive the sovereign right of the State of Georgia to tax. The court said:

> Even though the United States Constitution authorizes the federal government to accept exclusive jurisdiction when the State consents to the purchase of lands, that which the State constitution forbids the Legislature to do, the Constitution of the United States cannot require done . . . Nothing in the Constitution of the United States can confer upon the Georgia Legislature, an iota of power to legislate for Georgia.[61]

The position of the Georgia court finds some literal support by the Supreme Court's statement in *United States* v. *Unzeuta*,[62] that "The terms of the cession, *to the extent that they may lawfully be prescribed*, determined the extent of the Federal jurisdiction." (Emphasis added.)

The Florida court rejected a similar argument to that made before the Georgia court, that the cession statute must be read together with another provision of the state constitution requiring taxes to be levied, which would result in ceding the state's

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[59] 54 Stat. 19 (1940), 40 U.S.C. § 255 (1958).

[60] Ga. Const. art. 7, § 1, par. 5 (1877): "The power to tax corporations and corporate property shall not be surrendered, or suspended by any contract, or grant to which the State shall be a party."

[61] International Business Machines Corp. v. Evans, *supra* note 56, at 335, 99 S.E.2d at 222.

[62] 281 U.S. 138, 142 (1930).

jurisdiction except the jurisdiction to tax. The Florida court construed the provision of the State constitution [63] requiring the levy of taxes to be inapplicable to areas which were under the exclusive jurisdiction of the United States, and held that the State can exercise only those powers it has specifically reserved in the cession or consent statute.

While states and local political subdivisions are without authority to tax federally-owned [64] or privately-owned [65] property located on military reservations over which the state has not reserved taxing powers, there remains a possibility that private property on many reservations may be subjected to taxes by states and political subdivisions pursuant to reserved powers of taxation which were mistakenly believed to have been ceded to the federal government.

Whether a political subdivision annexing a military reservation may levy ad valorem property taxes within the military reservation therefore remains an unsettled question in many states. However, it is now assured that by annexation of a military reservation, municipal corporations are afforded an opportunity to impose additional taxes upon the persons residing or employed there, pursuant to the consent of Congress, provided they have been delegated powers by the parent state to levy the particular types of taxes consented to by Congress.

At the present time, this power to impose income and personal property taxes within military reservations has been limited insofar as military personnel are concerned, by the provisions of the Soldiers' & Sailors' Civil Relief Act of 1944.[66] This Act provides that the property and income of any person who is within a state solely by reason of military orders shall not be deemed to have a situs in the state for purposes of taxation. Nonetheless, the civilian employees, bona fide residents of the state in which the reservation is located, and the employees of concessionaires and contractors on annexed military reservations represent a potential and lucrative source of revenue for the municipalities annexing a military reservation.

[63] Fla. Const. art. XVI, § 16 (1885): "The property of all corporations, except the property of a corporation which shall construct a ship or barge canal across the Peninsula of Florida, if the legislature should so enact, whether heretofore or hereafter incorporated, shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes."

[64] Surplus Trading Co. v. Cook, 281 U.S. 647 (1930); Van Brocklin v. Tennessee, 117 U.S. 151 (1886); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[65] S.R.A. Inc. v. Minnesota, 327 U.S. 558 (1946); Wisconsin Central R.R. v. Price Country, 133 U.S. 496 (1890); United States v. Hoboken, 29 F.2d 32 (D.C.N.J. 1928).

[66] 56 Stat. 777, as amended, 50 U.S.C. App. § 574 (1958). See Dameron v. Brodhead, 345 U.S. 322 (1953).

V. RIGHTS OF INHABITANTS OF MILITARY RESERVATIONS UNDER EXCLUSIVE FEDERAL JURISDICTION WITH RESPECT TO SUFFRAGE AND EDUCATION

A. *Traditional View Denying Rights*

Article I, section 8, clause 17 of the federal constitution was criticized in a few of the ratifying conventions, on the grounds that it might be destructive of the civil and political rights of persons residing in the areas covered by its provisions. The proponents asserted that such rights could be protected by the states in giving their consent to the purchase of areas for military purposes by the federal government through stipulations and conditions interposed at the time of giving consent to the purchase.[67] However, few stipulations or conditions protecting the civil and political rights of the persons residing in such areas were attached to the early grants of consent of the states to such purchases.

The fears expressed by the critics of the above-mentioned constitutional provision were echoed in 1811 by the Massachusetts court in *Commonwealth* v. *Clary*.[68] In this case, the jurisdiction of the state court to try one Clary for selling liquor in the Springfield Arsenal without a license, was questioned. The court found that the state court was without jurisdiction, and undertook consideration of the effects of the exclusive federal jurisdiction in the arsenal upon the residents. The court said:

> An objection occurred to the minds of some of the members of the court that if the laws of the commonwealth have no force within this territory, the inhabitants thereof cannot exercise any civil or political privileges . . . . We are agreed that such consequences thereby imposed on those inhabitants; because they are not interested in any elections made within the State, or held to pay any taxes imposed by its authority, nor bound by any of its laws.[69]

This same court, in 1841, following the same reasoning set out in the 1811 decision, held specifically that the persons residing in areas under the exclusive jurisdiction of the federal government, where there was no other reservation of jurisdiction than the right to serve process, did not acquire any elective franchise as inhabitants of the towns in which such territory is situated, nor were they entitled to the benefits of the common schools in these towns.[70]

In an attempt to avert such consequences, the Legislature of

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[67] 4 Elliott, Madison Papers Containing Debates on the Confederation and Constitution 219–20; 3 *id.* 435–38.

[68] 8 Mass. 72 (1811).

[69] *Ibid.*

[70] Opinion of the Justices, 42 Mass. (1 Metc.) 580 (1841).

Ohio included in its consent statute ceding jurisdiction to the United States over a disabled soldiers' home or asylum in Montgomery County, the following proviso:

> [a]nd provided further, that nothing in this act shall be construed to prevent the officers, employees, and immates of said asylum who are qualified voters of this state, from exercising the right of suffrage at all township, county, and state elections, in the township in which the national asylum shall be located.[71]

However, the Supreme Court of Ohio, in an 1869 decision,[72] held that the operation of article I, section 8, clause 17 of the federal constitution fixed the exclusive jurisdiction of the federal government over the institution, its lands, and its inmates, and that as a consequence the attempted reservation of the voting rights or privileges of former residents was meaningless and of no legal effect. The court said:

> By becoming a resident inmate of the asylum, a person, though up to that time he may have been a citizen and resident of Ohio, ceases to be such; he is relieved from any obligation to contribute to their revenues, and is subject to none of the burdens which she imposes upon her citizens. . . . We are unanimously of the opinion that such is the law, and with it we have no quarrel; for there is something in itself unreasonable that men should be permitted to participate in the government of a community and in the imposition of charges upon it, in whose interests they have no stake, and from whose burdens and obligations they are exempt. . . .[73]

This principle of law that a state is not legally competent to qualify its cession of jurisdiction to the United States where transfer of jurisdiction is accomplished pursuant to the Constitutional method, has been formally repudiated by the Supreme Court.[74] However, where a state has not expressly qualified its cession of jurisdiction to reserve the civil and political rights of the residents of an area purchased for military use by the United States with the consent of the state, the right of inhabitants of such areas to

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[71] Act of April 13, 1867, 4 O.L. 149.

[72] Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397 (1869). Congress retroceded jurisdiction over the soldiers' home in 1871 to the State of Ohio, 16 Stat. 399, and this retrocession was held in Renner v. Bennett, 21 Ohio St. 431 (1871), to have restored the rights of the inmates and employees to vote in local elections. In United States v. Cornell, 25 Fed. Cas. 646 (No. 14,867) (C.C.D.R.I. 1819), Mr. Justice Story had expressed doubt that any attempted reservation of state jurisdiction beyond the power to serve civil and criminal process for actions arising from acts outside of an area ceded in accordance with the provisions of art. I, § 8, cl. 17 would be valid.

[73] Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397 (1869).

[74] James v. Dravo Contracting Co., 302 U.S. 134 (1937).

vote in state and local elections, has been denied by several courts, based upon the reasoning of the Ohio court.[75]

The rationale of these early decisions denying the right to vote of persons residing on federal enclaves seems to be that since they are exempt from any burdens or obligations imposed upon the citizens and residents of the state, they are not entitled to participate in the government of the state or community in which they reside, or to receive any benefits therefrom.

The factual basis upon which these decisions were founded has changed in substantial respects in recent years. By virtue of the numerous retrocessions of jurisdiction to the states by Congress over areas which were under the exclusive jurisdiction of the United States, the states and local governments now exercise jurisdiction over persons in these areas for many purposes.

In *Arledge* v. *Mabry*,[76] it was urged by the United States, *amicus curiae*, that as a result of these retrocessions of jurisdiction to the states, that the residents of areas in Los Alamos, New Mexico ceded to the United States pursuant to article I, section 8, clause 17, of the Constitution, could no longer be said to be non-residents of the state in which such areas were situated. The New Mexico court, in holding that this did not affect the right of residents in the area to vote, said:

> To the extent any of the acts and things done on the condemned area in an application of state law are outside the purview of congressional authorization, they cannot impinge upon the exclusive jurisdiction of the federal government otherwise obtaining. If exclusive jurisdiction . . . be ceded to the United States by a state, such jurisdiction cannot be recaptured by the state by later statute without consent of the United States . . . . We find no federal statute receding jurisdiction of the . . . area to New Mexico in the particulars here involved. . . . The question is a legislative one and, however strong our wish that residents of this community might enjoy the elective franchise, we may not properly further that desire by an act of judicial legislation.[77]

The New Mexico court also noted that Congress had on several occasions enacted statutes retroceding jurisdiction to the states to permit residents of federal areas to vote who had been denied the right to vote by judicial decisions. It especially noted that a bill had been introduced in the preceding session of the Congress for

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[75] State *ex rel.* Parker v. Corcoran, 155 Kan. 714, 128 P.2d 999 (1942); Herken v. Glynn, 151 Kan. 855, 101 P.2d 946 (1940); Arledge v. Mabry, 52 N.M. 303, 197 P.2d 884 (1948); McMahon v. Polk, 10 S.D. 296, 73 N.W. 77 (1897); State *ex rel.* Lyle v. Willett, 117 Tenn. 334, 97 S.W. 299 (1906); In re Highlands, 48 N.Y. St. Rep. 795, 22 N.Y. Supp. 137 (Sup. Ct. 1892); State *ex rel.* Wendt v. Smith, 63 Ohio L. Abs. 31, 103 N.E.2d 822 (1951).

[76] 52 N.M. 303, 197 P.2d 884 (1948).

[77] *Id.* at 331, 197 P.2d at 895. Congress retroceded to New Mexico jurisdiction over the part of Los Alamos which was under the exclusive jurisdiction of the United States to alleviate this problem. 63 Stat. 11 (1949).

the purpose of restoring the elective franchise to residents of Los Alamos, but that the bill had failed of enactment because of the lack of time before the end of the session. The court was not inclined to overrule these precedents so as to admit that the voting rights could be restored to these residents without specific congressional action.

B. *Judicial Inroads on Traditional View Denying Suffrage*

Some four years after the New Mexico case, the right of fifteen petitioners residing on military reservations in Monterey County, California to vote in a state election was in issue before the highest California court in the case of *Arapajolu* v. *McMenamin*.[78] Some of the petitioners resided at Fort Ord, some at the Presidio of Monterey, and the others at Hunter Liggett Military Reservation. Exclusive legislative jurisdiction over all of the military reservations had been ceded to the United States. Article II, section 1 of the California constitution, extended the right to vote to every citizen of the United States over twenty one years of age who had resided in the state for one year preceding the date of the election, and in the county for ninety days, and in the election precinct for fifty four days preceding the elections.

The court, in resolving the question whether the petitioners were 'residents of the state, county, and election precinct' for electoral purposes, recognized that it was a well-established rule of law that residence on areas *under the exclusive jurisdiction of the federal government* is not residence within the state which will qualify the resident to be a voter. It concluded that the decisions giving rise to this rule were based on the rationale of *Sinks* v. *Reese*,[79] that residents of such areas are relieved from any obligation to contribute to the revenues of the state and are subject to none of the burdens which the state imposes on her citizens, and are therefore not entitled to any rights or privileges accorded by the state.

The court then reviewed the acts of Congress which had permitted the application of state laws upon federal areas, and concluded that the application of these laws depended upon the existence of state jurisdiction over such federal areas. It followed, said the court:

> [t]hat the jurisdiction of the federal government over these lands is no longer full and complete or exclusive; that a substantial portion of such jurisdiction now resides in the states and such territory can no longer be said with any support in logic to be foreign to California, or outside of

[78] 113 Cal. App. 2d 824, 249 P.2d 318 (1952).
[79] Sinks v. Reese, *supra* note 73.

California, or without the jurisdiction of California, or within the exclusive jurisdiction of the United States.[80]

It was thus held by the court that the petitioners were residents of the state of California entitling them to vote in all elections of the state, if otherwise qualified.

The Supreme Court of West Virginia was impressed with, and adopted, the views of the California court, in sustaining the right of a resident of the naval reservation at South Charleston, to run for and hold a political office.[81] The state had reserved only the right to serve civil and criminal process in the naval reservation when ceding jurisdiction to the federal government. The court said, nonetheless,: ". . . insofar as this record shows, the Federal Government has never accepted, claimed, or attempted to exercise, any jurisdiction as to the right of any resident of the reservation to vote."[82] The majority of the court thereupon held that a resident of the naval reservation, being otherwise qualified, was entitled to vote at a municipal, county, or state election, and to hold a municipal, county, or state office.

While the latter two decisions are the only judicial recognition of the existence of a right to vote or hold office in persons residing on what is usually defined as an area under the exclusive jurisdiction of the federal government, California has by statute preserved voting rights to such residents in areas acquired by the federal government after enactment of the statute.[83] On the other hand, at least one state has a constitutional prohibition against such persons voting, namely, Rhode Island,[84] and several states have provisions in their constitutions to the effect that members of the armed forces shall not be deemed residents of the state by reason of being stationed therein.[85]

Many states have enacted absentee voting laws to permit members of the armed forces, as well as other government employees, who are bona fide residents of the particular state, to vote in federal, state, and local elections by absentee ballots. Yet, there are many members of the armed forces and civilian employees residing on military reservations who have severed all ties with

[80] Arapajolu v. McMenamin, 113 Cal. App. 2d 824, 831, 249 P.2d 318, 323 (1952).

[81] Adams v. Londeree, 139 W. Va. 748, 83 S.E.2d 127 (1954).

[82] *Id.* at 750, 83 S.E.2d at 129.

[83] *E.g.*, Cal. Govt. Code § 126(e).

[84] R.I. Const. art. II, § 5 (1843).

[85] *E.g.*, S.D. Const. art. 7, § 7; Wash. Const. art. VI, § 4. This latter section provides: "For the purpose of voting and eligibility to office no person shall be deemed to have gained a residence by reason of his presence or lost it by reason of his absence, while in the civil or military service of the state or of the United States."

their native states and are desirous of residing or establishing residence in the community where they now live. These civilian employees are without any voice in the government of their local community, the state, or of the federal government, yet they are subject to the same burdens and obligations as citizens of the states who are afforded the electoral privilege.

The qualifications of electors for state and local elections are generally prescribed in the constitution of most states.[86] In a few states, however, municipal corporations are permitted to prescribe the qualifications of voters for municipal elections. With but few exceptions, the voters at municipal elections are required to be citizens of the United States and of the particular state, and to have resided in the city or town for a specified period.[87]

Consequently, annexation of a military reservation by a municipality, in and of itself, may not affect the right of the residents thereon to vote, in the absence of judicial action or statutory enactments to the contrary. Furthermore, one court has held that a statute authorizing the annexation of territory to a municipality did not deprive the people of the annexed area of any constitutional right of local self-government.[88] Nevertheless, when viewed in light of the fact that the majority of states and local subdivisions derive benefit from revenues resulting from taxation of persons and property on the reservations following annexation of such reservations, the denial of the right to vote in local and state elections as residents of the annexing community is a wrong deserving of immediate correction.

C. *Inroads on Traditional View Denying Free Education*

The common-law obligation of the parent for the education of his children has been modified by constitutional and statutory provisions in the United States and it is now recognized that education is a proper function and duty of state governments.[89] The legislatures of the states are generally required by constitutional provisions to provide a uniform system of schools, where tuition shall be free and equally open to all children residing in the state.[90] In performing this duty legislatures have employed agencies such as the counties, municipalities, and school districts,

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[86] *E.g.*, Ark. Const. art. III; Fla. Const. art. VIII; Ga. Const. art. XI, § 3; Kan. Const. art. IV, § 169; Ky. Const. § 145; Mo. Const. art. VIII (1875).

[87] 1 McQuillan, Municipal Corporations § 12.06 (3d ed. 1949).

[88] Waslien v. Hillsboro, 48 N.D. 1113, 188 N.W. 738 (1922).

[89] State *ex rel.* Walsh v. Hine, 59 Conn. 50, 21 Atl. 1024 (1890); Associated Schools v. School Dist., 122 Minn. 254, 142 N.W. 325 (1913); State *ex rel.* Haig v. Hauge, 37 N.D. 583, 164 N.W. 289 (1917).

[90] See 47 Am. Jur. *Schools* §§ 7, 8 (1943).

and have delegated to them a very large degree of power over school affairs within their respective areas.

The statutes establishing free school systems generally provide for operation of the schools by taxing the inhabitants of the particular municipality or district in which the schools are located. As a rule, therefore, the free school privileges of a district, city, or town are open only to children who are bona fide residents of that district, city, or town.[91] Residence for the purpose of school attendance has in most states been construed liberally as evidencing an intent on the part of the state that all children within its border shall enjoy the opportunity of a free education.

Notwithstanding this strong prevailing policy that all children are entitled to a free education and the liberal construction that has been given the term "residence" for purposes of entitlement to school privileges, several states and their political subdivisions have considered children residing on federal enclaves as nonresidents of the state and school district within whose borders they reside. These children have been denied access to the schools in such district without payment of tuition or other charges in lieu thereof. The rationale of court decisions denying free education to these persons was that there was no obligation to provide benefits to the residents of exclusive federal areas because these residents were subject to no burdens imposed by the state.

As late as 1953, this view was followed by the Pennsylvania Supreme Court to deny the children residing on the grounds of a veterans administration hospital the privilege of attending the public schools without payment of tuition.[92]

However, several states have passed laws authorizing the attachment of military reservations to school districts or other political subdivisions for the purpose of providing free schooling to the children residing on the reservations. Where this has been done, however, there have generally been some economic or pecuniary benefits to the annexing political subdivisions resulting from the attachment. For example, the State of Oklahoma enacted a statute pursuant to which the Fort Reno Quartermaster Depot, also known as the Fort Reno Military Reservation, was detached from two school districts and attached to a third district for school purposes.[93] The annexation resulted in the admission of children

[91] Stanford Graded School Dist. v. Powell, 145 Ky. 93, 140 S.W. 67 (1911).

[92] Schwartz v. O'Hara Township School Dist., 375 Pa. 440, 100 A.2d 621 (1953). See also State *ex rel.* Moore v. Board of Education of Euclid School Dist., 33 Ohio Op. (Ct. App. Cuyahoga County) 433, 69 N.W.2d 391 (1945).

[93] Art. 7, Ch. 34, Sess. Laws of 1935 (70 Okla. St. Ann. § 779), amending § 7114, O.S. 1931.

residing on the reservation to the schools of the annexing district without payment of tuition whereas they had been denied free schooling in the districts from which the reservation was detached. The state had reserved the right to tax railroad properties on the military reservation when ceding jurisdiction over it to the United Sates, and under the laws of Oklahoma the taxes received from such railroad properties were allocated to the school districts in which such properties were located. In upholding the validity of this statute against an attack by the two school districts losing this revenue as a result of the annexation, the court stated: "The taxes from the taxable property on the reservation rightfully go to the School District assuming the burden of providing the facilities for the education of the children from the territory thus attached." [94]

Texas enacted a similar statute [95] which provided that upon the filing of the written consent of the commanding officer, on behalf of the Secretary of War, the Fort Bliss Military Reservation, Texas, might be attached to an independent school district. Pursuant to this statute, Fort Bliss was annexed by the El Paso Independent School District which included the city schools in El Paso. Prior to the annexation, Fort Bliss had been divided between five separate school districts. The statute authorizing the annexation also provided that school districts in which military reservations were located might enumerate the children residing on the military rseervations within the districts in the computation of the per capita apportionment of funds receivable from the state by school districts. Many of the children residing on the military reservation had been attending the El Paso schools even before the annexation and such schools were also receiving federal financial aid because of their attendance.[96]

In *Harmony Grove School District* v. *Camden School District*,[97] without the existence of any statutory authorization, the Supreme Court of Arkansas stated that it was the constitutional duty of

[94] In re Annexation of Reno Quartermaster Depot, 180 Okla. 274, 278, 69 P.2d 659, 661 (1937).

[95] Art. 2756b, Vernon's Ann. Civil Statutes (Texas) (1935).

[96] The validity of this statute authorizing the annexation of Fort Bliss, Texas, was upheld in Central Education Agency v. Independent School Dist., 152 Tex. 56, 254 S.W.2d 357 (1953). Nebraska has also enacted a statute authorizing military reservations within that state to be included in local school districts and providing for the admission of children residing on the military reservations to the schools without payment of tuition. Neb. Rev. Stat. § 79-446 (1943).

[97] 302 S.W.2d 281 (Ark. 1957).

the state to educate all children residing in the state, including those residing in military reservations under the so-called exclusive jurisdiction of the United States. In reaching this conclusion, the court judicially noticed that the Secretary of the Army had affirmatively consented to the annexation of the Fort Bliss Military Reservation by a Texas school district. It also considered the fact that Congress had enacted legislation authorizing federal financial aid to the state and local education agencies because of the impact of federal projects upon the educational institutions in the area where such federal projects were undertaken.[98] These acts, stated the court, reflected the policy of the federal authorities to leave the education of children within the area of the United States military reservations to state and local agencies charged with such duty, and was a clear indication that Congress fully recognized the jurisdiction of such local agencies over the federal areas for school purposes. The court further determined that, in carrying out the state's constitutional duty to educate its children, the local school district was not exercising any jurisdiction contrary to or conflicting with that exercised by the federal government in the naval depot.[99]

There have been relatively few instances in which the privileges of children residing in military reservations under the exclusive jurisdiction of the United States have been questioned in the courts in recent years. An important factor in curtailing the denial of school privileges and of litigation in this field has been the assumption by the federal government of a substantial portion of the financial burden of local governments in the operation and maintenance of schools, in those areas where the impact of federal activities has placed a heavy burden on them. Pursuant to congressional enactments [100] the federal government is authorized to contribute a substantial amount of funds to local school agencies, for each child attending school in the particular school district who resides on a federal area or whose father is employed by the federal government in the area. Such payments may be made to local school districts, however, only if the schools admit children residing on federal enclaves free of tuition, and if the number of federally-connected children constitutes a prescribed minimum percentage of the total number of children attending school in the

[98] 64 Stat. 1100 (1950), as amended, 20 U.S.C. 236–45 (1958); 64 Stat. 967 (1950), 20 U.S.C. 271–80 (1958).

[99] Harmony Grove School Dist. v. Camden School Dist., *supra* note 97, at 281.

[100] See note 98 *supra*.

district.[101] However, there is no legal obligation upon municipalities or school districts to participate in this program and many of them have not done so.

D. *Significance of Annexation Upon School Privileges*

The annexation of a military reservation may result in a loss of free school privileges for those children residing on an exclusively federal jurisdiction area where the former school districts were receiving federal aid but the new school district is not entitled to participate in the federal aid program because of the lack of the prescribed minimum number of federally-connected children in the district. It also appears that annexations may have other effects on the schooling arrangements at the military reservations. The schools of the annexing district may be superior or inferior to the schools previously attended by the resident children, they may be a greater or lesser distance from their actual residences, and admission of the children to the new school may result in a gain or loss of free education privileges.

Since the furnishing of educational opportunities to children residing on military reservations and other federal enclaves does not depend upon the right of the local political subdivisions of the state actually to exercise jurisdiction *within* such federal areas, there would seem to be no legal objection or obstacle to their admitting children residing in such areas to the schools situated within the territorial limits of the school districts. In fact, their failure to admit such children tuition-free to the local schools following an annexation can hardly be reconciled with fair and equitable principles, when it is considered that the inhabitants will be liable for the payment of many local and state taxes which are allocable in part to the operation of the local schools.

The most material consequences of an annexation of a military reservation, particularly to the military personnel concerned, often will be the changes relating to the existing school arrangements for children residing on the reservation. These changes may be beneficial or detrimental to the children and to the other entities affected by the annexation. The magnitude of the changes that will occur in this respect should be evaluated and given great weight by the military departments in formulating a decision

[101] 3% of pupils of school agencies having less than 35,000 pupils in average daily attendance throughout the year and 6% of pupils in large school districts, which are those having over 35,000 pupils in daily average attendance, must be federally connected—that is, their parent or parents must work or reside on the federal property or their parents must work for the federal government in the district concerned. The amount of federal funds payable for children residing on federal areas was greater than for those residing off federal areas whose parents were employed by the federal government.

whether to resist any proposed annexation of a military reservation by a political subdivision.

VI. EXERCISE OF MUNICIPAL POWERS AND FUNCTIONS WITHIN ANNEXED MILITARY RESERVATIONS

A. *Fire Fighting and Fire Protection*

As a general rule when a municipality extends its boundaries, the new area is subject to the same burdens of taxation, including those arising from obligations of bonds voted before annexation, and is entitled to the same privileges, protection, and advantages as property already within the municipal limits.[102] Although federal property annexed by a political subdivision is not taxable, it is now firmly established that cities and towns annexing military reservations may levy and collect various taxes upon the persons and their property within such military reservations. The existence of the powers of municipal corporations to annex military reservations and to impose taxes upon the persons and property in such annexed areas raises the question as to what protection, opportunities, and benefits the annexing municipal corporations are obliged to give in return for the exercise of these powers.[103]

In numerous decisions, the courts have stated that the chief purpose of a municipal corporation is to supply local services or needs, conveniences and comforts to all residents within the prescribed territorial limits of the municipal corporation, and that the needs of the municipality and the benefits to the property and residents thereon are the sole justification for inclusion of land within municipal limits.[104] It has also been said that every municipal corporation must have its boundaries fixed, definite, and certain, in order that they may be identified, and that all may know the exact section of territory or geographical division embraced within the corporate limits, and over which the local corporation exercises governmental powers and has the responsibility to furnish the normal municipal services including fire protection, police protection, street-cleaning and maintenance, and

[102] Jones v. Memphis, 101 Tenn. 188, 47 S.W. 138 (1898). In this case, a statute excluding annexed territory from benefits of police, fire, and light protection for period of ten years, and exempting area from taxation for those purposes, was held to violate state constitutional provision that taxation must be uniform and equal throughout the state, and also invalid because all parts of city are entitled to the same protections and advantages. Also see Rhyne, Municipal Law § 2–40 (1957).

[103] In Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1941), the Supreme Court indicated that the test of whether a local tax violates the due process clause is whether it bears some fiscal relation to the protections, opportunities, and benefits given by the local government, or in other words, whether the local government has given anything for which it can ask a return.

[104] McQuillan, Municipal Corporations § 279 (2d ed. 1928).

the like.[105] As a general rule the powers of a municipal corporation cease at municipal boundaries and cannot, without plain manifestation of legislative intention, be exercised beyond its limits, but the legislature may, and often does, authorize the exercise of powers beyond municipal limits.[106]

These statements are so clear as to the purpose of a municipal corporation, that it would appear to be free from doubt that the members of a municipal corporation, its citizens, and all those residing within its boundaries, and none others, are entitled to the benefits, privileges and immunities and are subject to the burdens and liabilities of the communities. Such statements taken literally would make no exceptions. However, the cases in which these pronouncements were made, related only to the general powers of municipal corporations where private lands were involved, and there was no issue before the courts concerning the powers and obligations of a municipal corporation with respect to a federal enclave located within the prescribed territorial limits of the municipal corporation. As to the military installations under the concurrent jurisdiction of the United States and the state in which such installations are located, the Comptroller General of the United States has ruled that the obligation to furnish these services would be a concomitant of the powers exercised by the state and local authorities within such areas.[107]

The Comptroller General has on several occasions indicated his views particularly with respect to the obligation of municipal corporations and other political subdivisions of the state to furnish fire fighting services to military reservations located within their territorial boundaries. In *24 Comp. Gen. 599* (1945), he considered the question whether there was a legal duty upon the city of Detroit or its fire department, to extinguish fires at Fort Wayne, a military reservation. The city officials contended that no such duty extended to Fort Wayne, because of its ownership by the federal government, notwithstanding the admitted fact that the property is located within the city limits. Their viewpoint was based on the lack of control or authority to enforce ordinances regulating construction of buildings, fire control regulations, inspections, and the non-payment of taxes by Fort Wayne or the federal government for the support of city services. The Comptroller General contended on the other hand that such duty did exist. His reasoning was substantially as follows: The estab-

[105] People *ex rel.* Adams v. City of Oakland, 92 Cal. 611, 28 Pac. 807 (1891); State *ex rel.* Johnson v. Owens, 92 Fla. 356, 109 So. 423 (1926); Howell v. Kinney, 99 Ga. 544, 27 S.E. 204 (1896).

[106] See 62 C.J.S. *Mun. Corps.* § 141 (1949).

[107] Ms. Comp. Gen. B–126228, Jan. 6, 1956.

lishment and operation of a fire department by a municipal corporation is a governmental function. As the governmental functions of a municipal corporation are exercised for the benefit and welfare of the community at large, such functions are not mere franchises or privileges to be performed or ignored by the municipality at its discretion, but rather legal duties imposed by the state upon its creation; and such duties are of a mandatory nature, notwithstanding the lack of civil liability for negligence in the performance thereof.[108] Furthermore, the Supreme Court of Michigan has said that it is the duty of a municipal fire department to extinguish all fires within the limits of the municipality. Hence, it may be accepted as established . . . that there is a legal duty upon the City of Detroit to extinguish all fires within its municipal limits.[109]

That the city of Detroit was prohibited from levying taxes on the property involved and from enforcing any fire control regulations within the military reservation were deemed not to have any connection with the duty of the city to provide the fire protection services, by the Comptroller General. Although the jurisdictional status of Fort Wayne was not disclosed in the decision, he made it clear that he considered it the legal duty of the city to provide fire protection services for federal property within the city limits regardless of the jurisdictional status.[110]

The position of the Comptroller General seems to be that political subdivisions of the state have a mandatory duty to provide fire protection for federal property within their territorial limits irrespective of any liability for or payment of taxes for such services.[111] In *35 Comp. Gen. 311* (1955), he found an additional

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[108] Mason v. Fearson, 50 U.S. 248 (1850); Rose v. Gypsum City, 104 Kan. 412, 179 Pac. 348 (1919); Marxer v. City of Saginaw, 270 Mich. 256, 258 N.W. 627 (1935); City of Uvalde v. Uvalde Electric & Ice Co., 250 S.W. 140 (Tex. 1913).

[109] 24 Comp. Gen. 599, 600 (1945).

[110] *Id.* at 602. In 32 Comp. Gen. 91 (1952), a similar view was taken that under the provisions of Va. Code § 27–11 (1950) it is the legal duty of a political subdivision of that state to extinguish fires within its limits, including the Norfolk Navy Yard, which was under the exclusive jurisdiction of the United States. See also 30 Comp. Gen. 376 (1951); 26 *id.* 382 (1946); Ms. Comp. Gen. B–126228, Jan. 6, 1956; *id.* B–105602, Dec. 17, 1951; *id.* B–28369, Sep. 22, 1942.

[111] 26 Comp. Gen. 382 (1946); 24 Comp. Gen. 599 (1945). In the former decision, the Navy Department was not permitted to contract with the Cabin John (Maryland) Volunteer Fire Department for standby fire protection of the David Taylor Model Basin, Carderock, Maryland. Here all private property owners were required to pay fire tax which was used to maintain the voluntary fire department. Montgomery County, in which the Navy installation was situated, had no county fire department serving the area. The Comptroller General stated that one of the governmental functions ordinarily performed by a municipality, county, or other political subdivision of a state

factor to support his position. This decision involved a proposed contract between the United States and the Community Fire Protection District of St. Louis County, Missouri, for fire protection to the St. Louis Area Support Center, an Army installation situated within the fire protection district, as well as within the city limits of Overland, Missouri. Overland was also in the fire protection district and paid assessments, charges, and taxes for fire protection services. A section of the Missouri Statutes [112] provides for the voluntary exclusion of property from fire districts. As no action toward securing the exclusion of the government property had been taken by the government officials, with respect to the property involved, this, said the Comptroller General, indicated that the property was to be included in the fire district for purposes of receiving fire protection. Moreover, as the property was also within the limits of the city of Overland, both the fire district and the city were obligated to furnish the fire protection to the Government property.

Whether the mere inclusion of a military reservation within the limits of a municipal corporation through annexation would give rise to an obligation on the part of the annexing municipal corporation to furnish fire fighting services, in the annexed area, is questionable in the case of military reservations under the exclusive jurisdiction of the United States. However, this question need not be decided, inasmuch as municipal corporations generally are empowered to levy various types of taxes and do so, in all annexed military reservations. A question which needs to be decided, however, is whether the power of municipal corporations to levy taxes in military reservations under exclusive jurisdiction of the federal government gives rise to the specific obligation for the annexing municipal corporations to provide fire fighting service in annexed reservations.

This question has not been faced squarely by any court, though several courts have had occasion to consider and discuss it in cases where the validity of taxes imposed by municipalities upon persons in federal enclaves was in issue. In *Kiker* v. *City of Philadelphia*,[113] where the validity of the Philadelphia income tax ordinance as applied to employees of a navy yard was questioned for lack of correlative benefits in return for the levied tax, the court states that the federal government's recession to the state of a

is that of furnishing fire protection. He considered that the county was obliged to furnish this fire protection, even if it were done through a volunteer fire department employed by the county, and that the federal government is entitled to the benefits of such a protection without regard to the payment of the fire tax assessed upon private owners in the same area.

[112] Mo. Rev. Stat. § 321.220 (1949).

[113] 346 Pa. 624, 31 A.2d 292 (1943).

portion of the exclusive jurisdiction previously obtained from it, namely, the power to tax pursuant to the Buck Act, included the incident obligations which were impliedly transferred originally with the cession. These 'incident obligations impliedly transferred' are not spelled out clearly, but the court had this to say about them:

> There is no doubt that after the cession, Philadelphia was obligated to confer all the usual attributes of government—the same as those possessed by residents and citizens of Philadelphia—upon those deriving income from working on League Island: fire and police protection, the right to use all municipal facilities, etc. This obligation can be called into play at any time the national government refuses or neglects to furnish them. . . .[114]

This recognition by the Pennsylvania court that the acceptance of the jurisdiction retroceded to Pennsylvania and to its political subdivision, the city of Philadelphia, to impose taxes in the navy yard, carried with it the obligation to furnish fire protection and other municipal services in the navy yard has been cited approvingly by at least two other courts.[115] It is interesting to note, however, that the obligation to furnish fire protection was regarded as a secondary one to be available only when the national government refuses or neglects to furnish the services, or when it sees fit to take full advantage of the obligation.

It is believed that the Pennsylvania court placed undue reliance on the decision of the Supreme Court of the United States in *James* v. *Dravo Contracting Company*.[116] In this latter case, the Supreme Court held that a state, in ceding jurisdiction to the United States over an area in a 'consent statute', could reserve to itself the power to tax in such area. In the course of its opinion, the Court stated that a transfer of legislative jurisdiction carries with it not only benefits, but obligations. While the specific issue in the case was the validity of a reserved power to tax, the state (West Virginia) had in fact reserved concurrent jurisdiction with the federal government over the area involved. Thus, the *Dravo* case supports a proposition that where the state retains concurrent jurisdiction over a military reservation when ceding jurisdiction to the federal government, there is an obligation of the state and its political subdivisions to furnish municipal services within an annexed military reservation. It is not so clear, however, that this obligation would exist to furnish municipal services, such as fire fighting, within an annexed military reservation, where the only power reserved or receded to the state, was

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[114] *Id.* at 629, 31 A.2d at 294.

[115] Davis v. Howard, 306 Ky. 149, 206 S.W.2d 467 (1947); City of Cincinnati v. Faig, 145 N.E.2d 563 (Mun. Court of Cincinnati, Ohio 1957).

[116] 302 U.S. 148 (1937).

the power to tax in the federal area. No assurance can be had that an annexing political subdivision will recognize such correlative obligations with respect to an annexed military reservation which is under exclusive federal jurisdiction, in the absence of a state statute or state judicial decision to that effect.

B. *Maintenance of Roads and Streets*

Under the state annexation laws, the public highways within territory annexed by a municipal corporation become, *ipso facto,* streets of the annexing municipality, to the extent of transferring control and jurisdiction thereover from the state and county to the municipality.[117] Accordingly, the jurisdiction and responsibility possessed by the state and county over roads within or through a military reservation which is annexed by a city will be transferred to the latter by the act of annexation, though the ownership of such roads will not be effected thereby. As the maintenance and repair of streets, including the cleaning and the removal of snow therefrom, constitute the exercise of a governmental function, the exercise of such function by a municipal corporation in a military reservation will depend on the possession of the requisite jurisdiction over such roads and highways.

The jurisdiction over roads and highways within or traversing military reservations is often difficult to determine. The resolution of a question involving this jurisdiction frequently involves such basic considerations as title, easements, whether the roads were in existence at the time the land was acquired by the United States, and whether any conditions were attached when the state relinquished jurisdiction to the United States. The mere fact that the United States has acquired exclusive jurisdiction over the military reservation is not always indicative that exclusive jurisdiction over the highways and roads is also in the federal government.

The transfer of jurisdiction over a military reservation without any express exception of jurisdiction over rights-of-way for roads by the state at the time of transfer of jurisdiction would seem to deprive the state of any jurisdiction and control over the rights-of-way. The Supreme Court, in the case of *United States* v. *Unzeuta,*[118] held that an extension of federal legislative jurisdic-

[117] 25 Am. Jur. *Highways* § 259 (1940).

[118] United States v. Unzeuta, 281 U.S. 138, 144 (1930). *But see* Atcher v. Elizabethtown Lincoln-Mercury, Inc., 249 S.W.2d 743 (C.A. Ky. 1952) in which case, it was held that the state court had jurisdiction of a civil action arising out of an automobile accident occurring on U.S. Highway No. 60 within the Fort Knox Military Reservation, Kentucky. Kentucky had retained a right-of-way over this highway at the time the federal government acquired title to the land with the unconditional approval of the State of Kentucky. The court stated that the right-of-way has never been out of the territorial control of the State. The soundness of this decision is open to question in light of the Supreme Court's decision in the Unzeuta case.

tion over a privately owned railroad right-of-way located within an area which was owned by the federal government vested exclusive jurisdiction in the federal government. The court concluded that rights-of-way for various purposes, such as railroads, ditches, pipe lines, telegraph and telephone lines across federal reservations, may be entirely compatible with exclusive jurisdiction ceded to the United States. The same view would appear to follow with respect to rights-of-way for roads and highways retained by the states and other governmental bodies at the time the federal government acquires legislative jurisdiction over the military reservations traversed by such roads.

The jurisdictional status of roads and highways through federal enclaves has been the subject of many judicial controversies.[119] The disputes frequently involved the construction and effect of easements, licenses, and other grants of uses upon the jurisdiction of the federal government or the state government within such areas. Suffice it to say, that in the final analysis, the responsibility of municipalities with respect to the policing, control and maintenance of highways and roads within military reservations located within the municipal limits resolves itself into a question of jurisdiction. Where the state has retained concurrent jurisdiction over such roads, or the jurisdiction to open and repair them, an annexing municipal corporation would succeed to the powers and duties of the state with respect thereto. These considerations point up the necessity of first attempting to learn the true jurisdictional status of a road or highway when any question involving the relative rights and obligations of the federal government and of the state and local governments are concerned.

Congress has on occasion enacted legislation concerning the granting of easements and rights-of-way, the extension of roads and streets, and control and jurisdiction relative to roads and highways within military reservations. The most recent of these statutes is now codified in 10 U.S.C. 2668, which authorizes the secretaries of the military departments to grant easements for rights-of-way over lands under their control to states, counties, municipal corporations, and others, for roads and streets, under such terms as they may prescribe. Few problems should be encountered in determining where responsibility rests for the maintenance and repair of such roads covered by these grants as the secretaries may, and should, include in the terms and conditions of the grants a requirement for the grantee to maintain the streets

[119] Colorado v. Toll, 268 U.S. 228 (1925); Robbins v. United States, 284 Fed. 39 (8th Cir. 1922); see Golden Gate Bridge and Highway Dist. of Calif. v. United States, 125 F.2d 872 (9th Cir. 1942).

unless they intend such obligation to remain with the military departments.

The Comptroller General of the United States has indicated that his views relating to fire fighting extend to other similar services ordinarily rendered by or under the authority of a state.[120] Although no case or decision is found to indicate that he has considered the specific question, it is considered very probable that he would find that a municipal corporation's duty to maintain and repair the city streets would extend to the streets and roads within an annexed military reservation which are in fact public streets or public roads, as distinguished from the private or post roads which are not open to the public generally.

The problem concerning the obligation of a municipal corporation to maintain and repair public streets in an annexed military reservation is similar to the problem with respect to the furnishing of fire fighting services. The municipal corporation is empowered to collect various taxes, such as license taxes for use of private automobiles on the city streets, within military reservations, and in most states is allocated revenue received by the state from the sales of motor fuel and gasoline on military reservations levied pursuant to the "Lea Act."[121] As these taxes received from fuel and gasoline sales normally are ear-marked in substantial part for maintenance, construction, and repair of roads, there ought to exist an implied obligation on the part of an annexing municipal corporation to expend a portion of this revenue for maintenance of roads and streets within the annexed military reservation. However, where the military reservation is one that is under the exclusive jurisdiction of the United States, there can be no assurance that the annexing municipal corporation will be legally capable of exercising the governmental function of road maintenance within such reservation, in the absence of statutory authority or binding judicial precedent.

C. *Applicability of Municipal Ordinances*

The states are without authority to legislate in or to enforce any of their laws or regulations within areas under the exclusive jurisdiction of the federal government except as expressly author-

[120] Ms. Comp. Gen. B–50348, July 6, 1945; *cf. id.* B–51630, Sep. 11, 1945, where estimates and hearings made clear that an appropriation act was to cover cost of police and fire protection under agreements with municipalities. As to water service, and other services such as sewage disposal, the Comptroller General has approved contractual payments, where such services are not billed on a flat rate service fee, which he equates to an unlawful tax, but are based on the quantity of water or services rendered. See 31 Comp. Gen. 405 (1952); 29 *id.* 120 (1949); 20 *id.* 206 (1940); 6 *id.* 741 (1927).

[121] Internal Revenue Code of 1954, § 3305.

ized by Congress.[122] In other words, by acquisition of exclusive legislative jurisdiction over an area, Congress obtains the power of regulation and control in such matters as ordinarily fall within the police power of the state.[123] Of course, the state and local regulatory laws promulgated in the exercise of the state police power are applicable on military reservations not under the exclusive or partial jurisdiction of the United States, unless they are inconsistent or in conflict with federal law or policy. The now classic example illustrating the differing applications of local regulatory laws in military reservations is found in the cases of *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania,*[124] and *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California.*[125] In the first case, certain state regulations governing the minimum price at which dairies might sell milk within the state of Pennsylvania were held applicable to appellant dairy's sales of milk made to the Army authorities within Indiantown Gap Military Reservation. This reservation was held by the United States under a lease from the Commonwealth of Pennsylvania, and the federal government had acquired no measure of legislative jurisdiction over the area. In the second case, the same type of regulations promulgated by the California Department of Agriculture governing sales of milk in California, were held not to be enforceable against a dealer selling milk to Army units at Moffett Field, California, because this field was under the exclusive jurisdiction of the United States. It appears from these cases that there is a rule of complete exclusion of state and local regulatory measures in federal enclaves, except as specifically relaxed by Congress. However, the Court recognized the doctrine that some local laws not inconsistent with federal policy remain in force and effect in a federally-acquired tract of land over which the federal government also acquires exclusive jurisdiction, until altered by national legislation.[126] The Court did not have to decide whether the milk control regulations would have been effective in Moffett Field, had such regulations existed at the time the federal government acquired legislative jurisdiction over the area, since the regulations were issued long after the federal government had acquired jurisdiction thereover.

Attempts on the part of the states and their political subdivisions to regulate other activities on exclusively federal jurisdiction

[122] See James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940).
[123] *Ibid.*
[124] 318 U.S. 261 (1943).
[125] 318 U.S. 286 (1943), *petition for rehearing denied,* 318 U.S. 801 (1943).
[126] The court cited James Stewart & Co. v. Sadrakula, *supra* note 122, for this proposition. See Chicago, R.I. & P. Ry. v. McGlinn, 114 U.S. 542 (1885).

areas have met similar fates. Thus, it has been held that a state may not require a permit to sell liquor in such areas,[127] nor require that a ship carrying stone from one state to an area under exclusive federal jurisdiction in another state comply with regulations prescribing a specific manner of weighing and marking the cargo;[128] nor require persons doing business in federal enclaves to comply with state insurance licensing regulations.[129] Local ordinances requiring administrative action, likewise, have no application to areas under exclusive federal legislative jurisdiction.[130] In consonance therewith, it was held that the city of Oklahoma City, Oklahoma could not enforce a municipal ordinance requiring contractors working in the city to obtain certain licenses and bonds, and to undergo certain inspections of their projects by municipal building inspectors, in the case of a contractor constructing a housing project in an exclusively federal jurisdictional area.[131]

The exclusion of the states and local subdivisions from exercising certain police powers in federal areas exists without regard to whether the state has surrendered any measure of its own jurisdiction to the federal government. This immunity of the federal government with respect to the use and control of its property rests upon the broader, basic doctrine, that the police power of a state can not be exercised so as to impede, obstruct, burden, or interfere with any national power. In *Oklahoma City* v. *Sanders*,[132] the local ordinance was held inapplicable to a contractor in a federal enclave, notwithstanding that Congress had enacted the following provision in an Act authorizing the housing project which the federal contractor was constructing:

> The acquisition by the United States of Land for low cost housing . . . shall not be held to deprive any state or political subdivision thereof of its civil and criminal jurisdiction in and over such property, or to impair the civil rights under the local law of the tenants or inhabitants of such property; and insofar as any such jurisdiction has been taken away from

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[127] In re Ladd, 74 Fed. 31 (C.C.D. Neb. 1896).

[128] Mitchell v. Tibbetts, 34 Mass. (17 Pick.) 298 (1836).

[129] Op. A.G. Cal., LB 286/906 (Apr. 1, 1952).

[130] Anderson v. Chicago & Northwestern R.R., 102 Neb. 578, 168 N.W. 196 (1918); James Stewart & Co. v. Sadrakula, *supra* note 122.

[131] Oklahoma City v. Sanders, 94 F.2d 323 (10th Cir. 1938). Other state and local licensing provisions are also inapplicable in federal enclaves: A physician in such area is not subject to state law relating to practice of medicine and surgery. Lynch v. Hammock, 204 Ark. 911, 165 S.W.2d 369 (1942). TJAG of the Army has expressed the view that state license laws generally have no application to persons doing business on a reservation over which the United States has exclusive legislative jurisdiction, Op. JAG, Army 004.6 (June 27, 1942). Neither State nor local authorities may enforce health laws and regulations in such areas. Op. A.G. Ohio, No. 3704 (1941), p. 319.

[132] 94 F.2d 323 (10th Cir. 1938).

> any such state or subdivision, or any such rights have been impaired, jurisdiction is hereby ceded back to such state or subdivision.[133]

The court reviewed the text and the reports of the Congressional committee considering this Act, and concluded with reasonable certainty that the purpose of the Act was to authorize service of civil and criminal processes of the state upon the premises, to enable persons residing thereon to serve as jurors in the state courts and to vote in elections under the state law, and to otherwise exercise the rights of citizens of the state. It was not the purpose, the court said, that the state should have the right to exert police power there through application of municipal ordinances relating to licenses, bonds, and inspections in the course of construction thereon of buildings by the United States Government, as no such legislative intent or desire was indicated by the Act.[134]

In addition to the 'supremacy clause' and article I, section 8, clause 17, of the Constitution, as sources of constitutional power of the federal government to enjoy the freedom of its operations from state and local interference, article IV, section 3, clause 2, of the Constitution[135] vests in Congress certain authority with respect to any federally owned lands which it alone may exercise without interference from any source. As was stated in *Utah Power & Light Co.* v. *United States*;[136]

> Not only does the Constitution (Art. IV, sec. 3, cl. 2) commit to Congress the power "to dispose of and make all needful rules and regulations respecting" the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them. . . . And so we are of the opinion that the inclusion within a state of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power.

The principle that the states and political subdivisions may

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[133] 49 Stat. 2026 (1936).

[134] Oklahoma City v. Sanders, *supra* note 131, at 329.

[135] This clause reads: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any Claims of the United States, or of any particular State."

[136] 243 U.S. 389, 403–05 (1917).

not exercise police power emanating from the law of the state upon military reservations under the exclusive jurisdiction of the United States, except as specifically authorized by Congress seems to be so firmly established, that it is seldom questioned anymore.

Although there appears to have been a trend away from the complete exclusory effect of state jurisdiction within federal enclaves in many fields it has not yet gained much support in the police power field.[137]

It is surmised that the annexation of military reservations by municipal corporations will give rise to many controversies between the municipal authorities and the military authorities as to the proper scope of the police power of the municipal authorities within such reservations. In the case where the military reservation annexed is under the exclusive jurisdiction of the United States such controversies relating to the application of local ordinances and police power measures should present no difficulty in resolving. However, where the state and its political subdivisions exercise concurrent jurisdiction over an annexed military reservation, the local authorities are likely not to be fully aware of the limitations upon the exercise of local police powers through municipal ordinances and otherwise, arising out of the 'supremacy clause' and article IV, section 3, clause 2 of the Constitution. While it may be clear to the local authorities that zoning ordinances, for example, may not be enforced in any military reservation, the unenforceability of many other ordinances may not be so apparent.

VII. CONCLUSION

The extent of the jurisdiction that annexing political subdivisions of a state may exercise in annexed military reservations remains in a state of uncertainty, and particularly so in those military reservations which are under the exclusive or partial jurisdiction of the United States.

There have been a few judicial decisions in recent years that these latter reservations remain a part of the state and its political subdivisions in which the reservations are located, and that inhabitants of such areas are entitled to the same civil and political privileges as all other residents of the states, such as the right to vote and to attend the local free public schools. The weight of judicial authority supports the view, however, that these military reservations under the exclusive jurisdiction of the federal government, while a part of the state territorially or physically, are

[137] *But see* dissenting opinion of Mr. Justice Frankfurter in Pacific Coast Dairy, Inc. v. Dept. of Agriculture of California, 318 U.S. 286, 298 (1943).

not a part of the state or its political subdivisions for the exercise of any governmental functions, except as explicitly authorized by Congress.

This view accords with the established rule that statutes ceding or receding jurisdiction are to be strictly construed for the reason that it is a matter of the very greatest importance to both the federal and the state governments affected.[138] It does not necessarily follow that the authority granted by a cession or recession statute for the exercise of certain powers or functions does not include by fair implication the exercise of obligations and functions incidental to the exercise of the powers specifically granted. There appears to be no sound reason, for example, why the authority granted to the states and political subdivisions to levy and collect taxes from persons within military reservations under exclusive federal jurisdiction should not by implication include the authority of the taxing authorities to provide the governmental services to these taxed persons which are paid for in some measure by the taxes received from them.[139] Congress must have intended or contemplated that the grantees of these taxing powers would provide or bestow some benefit in the form of governmental services in return for the taxes, rather than receiving a windfall without any correlative obligations.

It is now generally recognized that the inhabitants of federal enclaves are within and subject to the territorial jurisdiction of the states and political subdivisions in which they are situated for many purposes. Thus, the factual basis upon which the courts have denied the civil and political privileges to these inhabitants as residents of the states no longer exists. These inhabitants are now subject to substantially the same burdens and obligations as are imposed by the states and political subdivisions upon all members of these political entities. Accordingly, they should be treated equally with all other members of these entities with regard to voting rights, schooling privileges, and the receipt of the normal state and municipal services particularly within the competence of these governmental entities.

In the absence of a state statute or judicial precedent, however, there can be no assurance that the states and political subdivisions will depart from the traditional view of considering inhabitants of military reservations non-residents for purposes of entitlement to civil and political privileges, and for the receipt of any other governmental services, except as Congress has expressly permitted. Where Congress has not retroceded jurisdiction over military reservations under exclusive federal jurisdiction to the

[138] Six Cos., Inc. v. DeVinney, 2 F.Supp. 693 (D. Nev., 1933).
[139] See, however, 4 U.S.C. § 108 (1940).

states for exercise of the following specific functions, there remains some doubt whether a state statute or judicial decision which purports to uphold the extension of civil and political privileges and the furnishing of fire protection and other municipal type services to inhabitants of these military reservations is legally permissible, since the states and political subdivisions may not unilaterally recapture any jurisdiction previously ceded to the United States. The furnishing of governmental services as fire fighting and street maintenance within military reservations obviously would constitute an exercise of jurisdiction by the governmental agencies furnishing such services.

The courts which have most recently considered the question have asserted by way of dicta that taxing political subdivisions of the state and the state itself have concomitant duties and obligations to furnish fire protection and other municipal services, and to provide school facilities, in return for taxes received, from all inhabitants of the taxing districts. As all federal areas are now within the taxing jurisdiction of the states and their political subdivisions, it is inconceivable that the taxpayers are not eligible to receive the governmental services paid for by the taxes received from them.

This conclusion has not received sufficient judicial support to warrant an assurance that a municipal corporation or other political subdivision of a state annexing a military reservation under exclusive or partial federal jurisdiction will consider itself obligated or empowered to furnish any governmental services within the annexed reservation. In these situations, an annexing municipal corporation is apt to reap a revenue windfall from the taxes received from the civilian employees, concessionaires, and contractors performing work within these military reservations. These taxes will in many cases be passed on to the federal government in the form of higher costs for the work, supplies, and services furnished by the taxpayers. The result to the federal government will be that it not only furnishes fire protection and other municipal type services to the inhabitants of the military reservations but that it also contributes indirectly to the annexing municipal government for these same services without receiving the benefits thereof.

In those military reservations over which the states exercise concurrent jurisdiction with the federal government or full and complete jurisdiction to the exclusion of the latter government, the obligation of the state and its political subdivisions within which these areas are situated, to extend civil and political privileges and to furnish all municipal services to the inhabitants, appears never to have been denied or refused acknowledgment by

the states. Thus, if the military reservations under the exclusive or partial federal jurisdiction are to be prevented from becoming the prey of municipal corporations as a source of windfall revenue, Congress must enact legislation retroceding to the states a concurrent jurisdiction over those military reservations, where it can be done without prejudice to the paramount security interests of the United States involved in the reservations.

This solution is deemed to be the only one which will assure that the inhabitants of the military reservations which are now under the so-called exclusive jurisdiction of the federal government will be treated equally with all residents of the states and political subdivisions wherein they live, for all purposes. This course of action seems to be necessary, because under the present state annexation laws, the federal government's ability and capacity to oppose annexation of military reservations by political subdivisions successfully is very limited. This is particularly the case where private land is included in the same annexation proceeding as the military land, as each private land owner generally has an equal voice or vote in the annexation proceeding with the federal government, notwithstanding the fact that the military reservation may comprise virtually all of the total land involved in the proceeding.

The removal of such reservations from an exclusive jurisdictional status will discourage many inequitable annexations and will result in making clear to all concerned the rights, duties, and obligations of the annexing political subdivisions, the states, and the federal government with respect to those military reservations sought to be annexed.

THE STATUS OF SPOUSES AS WITNESSES BEFORE COURTS-MARTIAL*

BY CAPTAIN BUEFORD G. HERBERT**

I. INTRODUCTION

The marital relationship has been the basis for certain restrictive doctrines as to witnesses and testimonial evidence since the early common law. One doctrine has prevented either spouse from testifying in behalf of the other. This doctrine is now abolished practically everywhere. Another doctrine has prevented either spouse from testifying against the other. This doctrine, although long criticized,[1] is still very much alive,[2] and is the primary concern of this article.

There are two other restrictive doctrines dependent upon the marital relationship: the privilege of inter-spousal communications of a confidential nature, and the doctrine preventing either spouse from testifying to nonaccess to bastardize a child born of the wife during the marriage. These latter doctrines are not within the scope of the discussion.

The military rules respecting inter-spousal testimony have roots in both the common law and the practice of the federal courts. Additionally, the present practice in the federal courts exerts considerable influence upon the interpretation of the military rules. Consequently, so much of the development of the rules in the federal courts will be traced as is necessary to show the origin, development, and interpretation of the present military rules. No attempt will be made to appraise the utility or desirability of the rule prohibiting adverse spousal testimony, not only because

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[1] "It debases and degrades the matrimonial union; converting into a sink of corruption what ought to be a source of purity. It defiles the marriage contract itself, by tacking to it in secret a license to commit crimes." 5 Bentham, Rationale of Judicial Evidence 343 (1827).

[2] "The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy is necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now." Hawkins v. United States, 358 U.S. 74, 77 (1958).

quite enough has been said in that regard,[3] but also because the presentation of the rule itself is a sufficiently challenging task. Little reference will be made to the rules of the various states, since they are largely statutory.

Although inter-spousal testimony is but a small segment of the overall field of military rules of evidence, an understanding of the approach of the United States Court of Military Appeals to this area may well give a valuable insight into the court's overall concept of the rules of evidence to be applied in courts-martial. For this reason, the decisions of the court are closely examined and evaluated.

II. HISTORY AND DEVELOPMENT OF THE RULES IN THE FEDERAL COURTS

As previously stated, a consideration of the history and development of the federal rules will help us to understand the development and content of present military rules, and also will show the limitations of using the federal rules in discovering and interpreting the military rules and limitations. That there is a general relationship between the federal and military rules of evidence is apparent from Article 36, Uniform Code of Military Justice,[4] which provides:

> The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or inconsistent with this code.
>
> All rules and regulations made in pursuance of this article shall be uniform insofar as practicable and shall be reported to the Congress.

This Article gives discretion to the President to prescribe rules of evidence by regulation, but indicates the intent of Congress that he use as a guide the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts. The President has exercised this authority by promulgating the Manual for Courts-Martial, United States, 1951. The drafters of the Manual were of course influenced by what they considered to be the federal rules, and indicated that if the Manual, as the primary source for rules of evidence for courts-martial should

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[3] See Appelton, The Rules of Evidence Stated and Discussed, ch. IX (1860); 5 Bentham, *op. cit. supra* note 1, at 327–49; 8 Wigmore, Evidence § 2227–28 (3d ed. 1940) (hereinafter cited as Wigmore); Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675 (1928).

[4] 10 U.S.C. § 836 (1958).

prove inadequate, recourse should be had to the rules of evidence used in the United States District Courts, and, if no answer was found there, to the rules of evidence at common law.[6]

The United States Supreme Court was first faced with the task of deciding what rules of evidence should be applied in criminal cases in the federal courts in 1851. In *United States* v. *Reid*,[8] the question arose whether in a trial in Virginia, a co-indictee, separately tried, was a competent witness on the defendant's behalf. An 1849 Virginia statute made such a person competent. The Court refused to follow this statute on the ground that section 34 of the Judiciary Act of 1789,[7] requiring conformity to state laws in "trials at common law" did not apply to criminal cases, so consequently a state statute enacted subsequent to 1789 was not applicable. The Court found the applicable law by "necessary implication" from the fact that the method of summoning jurors under the Judiciary Act of 1789 was that in effect in the several states at the time of its passage.[8] So the Court found the law respecting admissibility of evidence in criminal cases to be ". . . the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789 . . . ,"[9] and held the witness incompetent. The practical effect of this decision was to make the English common law rules of evidence the rules of evidence in federal criminal cases.[10]

In 1891, the Supreme Court held the law of Texas at the time of its admission to the Union was binding upon the federal court.[11] In 1892, in *Benson* v. *United States*,[12] the court applied the common law authorities to reach a different result than *Reid* as to the same class of witness, and in so doing used the phrase "in the light of general authority and sound reason,"[13] in pointing out that the trend of legislation and judicial opinion had been to abolish the common law disqualification of witnesses. Subsequently in 1918, the *Benson* case was relied upon in *Rosen* v. *United States*[14] to justify disregard of the New York Law of 1789 concerning the competency of a witness previously convicted of perjury. The

[5] Par. 137, MCM, 1951; Legal and Legislative Basis, MCM, 210 (1951).

[6] 53 U.S. (12 How.) 361 (1851).

[7] 1 Stat. 73 (1789).

[8] Section 29, Judiciary Act of 1789 had, in fact, been repealed as of the date of *United States* v. *Reid*. 5 Stat. 394 (1840).

[9] United States v. Reid, *supra* note 6, at 361.

[10] Knoell v. United States, 239 Fed. 16, 22 (3d Cir. 1917).

[11] Logan v. United States, 144 U.S. 263 (1892). In that case, there arose the question of the rules of evidence applicable in a federal court in Texas. That state had been admitted to the Union subsequent to the enactment of the Judiciary Act of 1789.

[12] 146 U.S. 325 (1892).

[13] *Id.* at 335.

[14] 245 U.S. 467 (1918).

Court quoted the phrase "in the light of general authority and sound reason" of *Benson* and stated:[15]

> We conclude that the dead hand of the common law rule of 1789 should no longer be applied to cases such as we have here. . . .

It appeared in 1918, therefore, that the United States Supreme Court was moving away from the rules of the common law, or more technically, the rules in force in the states in 1789, or at time of admission.[16]

Now let us attempt to relate the foregoing background to our immediate problem—the status of spouses as witnesses in criminal cases in the federal courts. Consistent with *Reid* and *Logan*, it was held that the rules in force in 1789 were to decide the competency of one spouse for or against the other. The Supreme Court and the lower federal courts prior to 1918 consistently held that one spouse was not a *competent* witness for or against the other.[17]

It was to be expected, in view of the United States Supreme Court's relaxed attitude toward the rules respecting competency of witnesses evidenced by the *Rosen* case, that subsequent to 1918 the Court would relax its rule with respect to the competency of spouses as witnesses. However, in *Jim Fuey Moy* v. *United States*,[18] decided in 1920, the Court refused to find error in the trial court's ruling that the defendant's wife was not a competent witness in his behalf. The Court, in reaching this result, cited *Logan* v. *United States*[19] and *Hendrix* v. *United States*[20] and reaffirmed the principle that the rules of evidence in force in 1789 were controlling. *Rosen* was not mentioned. Most of the lower federal courts in decisions subsequent to *Jim Fuey Moy* considered that case to have settled the question of competency of one spouse as a witness for the other and made no mention of the rules in force in the state in 1789 or at the time of its admission.[21] Thus the matter stood until 1934, when the Court decided *Funk* v.

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[15] *Id.* at 471.

[16] See, *e.g.*, Greer v. United States, 245 U.S. 559, 561 (1918).

[17] Stein v. Bowman, 38 U.S. (13 Pet.) 209 (1839) (actually this case is dicta on this point since it was a civil case, but it is usually cited as showing the thinking of the court in this area at the time); Lucas v. Brooks, 85 U.S. (18 Wall.) 436 (1873) (also a civil case and thus dicta, but illustrative of the Court's thinking); Graves v. United States, 150 U.S. 118 (1893); Hendrix v. United States, 219 U.S. 79 (1911); United States v. Jones, 32 Fed. 569 (D.S.C. 1887).

[18] 254 U.S. 189 (1920).

[19] *Supra* note 11.

[20] *Supra* note 17.

[21] Liberato v. United States, 13 F.2d 564, 566 (9th Cir. 1926); Lowe v. United States, 282 Fed. 597, 599 (9th Cir. 1922); Krashowitz v. United States, 282 Fed. 599 (4th Cir. 1922); *but see* Rendleman v. United States, 18 F.2d 27 (9th Cir. 1927); Slick v. United States, 1 F.2d 897 (7th Cir. 1924).

United States,[22] in which certiorari was granted to review affirmance of conviction for conspiracy to violate the Prohibition Law.[23] The sole issue was the resolution of what law was applicable to determine the competency of petitioner's wife as a witness in his behalf at the trial. The Court pointed out what it felt to be the real distinction between the two lines of authority represented by *Reid* and *Logan* on the one hand, and *Benson* and *Rosen* on the other:[24]

> With the conclusion that the controlling rule is that of the common law, the *Benson* case and the *Rosen* case do not conflict; but both cases reject the notion, which the two earlier ones seem to accept, that the courts, in the face of greatly changed conditions, are still chained to the ancient formulae and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions.

The Court declared that the present case fell within *Benson* and *Rosen*, particularly the latter, and reversed the lower federal court, thus holding that the wife of the defendant was a competent witness in his behalf in criminal cases. The Court expressly overruled *Hendrix* and *Jim Fuey Moy*. In the closely following case of *Wolfle* v. *United States*,[25] the United States Supreme Court explained *Funk* as holding that "the rules governing competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common-law principles as interpreted and applied by the federal courts in the light of reason and experience."[26]

Some commentators saw *Funk* and *Wolfle* as the death-knell of the common law marital disqualification rules,[27] and it must be admitted that this attitude seems to have been shared by some of

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[22] 290 U.S. 371 (1934).
[23] United States v. Funk, 66 F.2d 70 (4th Cir. 1933).
[24] 290 U.S. at 379.
[25] 291 U.S. 7 (1934).
[26] *Id.* at 12.
[27] "The *Funk* decision has given free rein to the federal judiciary to define the law upon a given subject in the light of fundamentally altered conditions and on the basis of present day standards of wisdom and justice which may call for a rejection of the rule of privilege, but there is a lack of merit in a contention that those standards require homage to the exception to disguise such rejection. Consideration of the problem on certiorari has been denied by the Supreme Court on two separate occasions [U.S. v. Mitchell, 321 U.S. 794 (1944); Cohen v. United States, 235 U.S. 696 (1914)], but a future consideration may enlighten the inferior courts to the fact that marital privilege has lost its place in an age where the indicia of justice is the truth, rather than sentimentality." McCloud, *Evidence: Privilege to Exclude the Testimony of the Wife in Criminal Cases*, 30 Okla. L. Rev. 225, 227 (1950).

the lower federal courts. In *Yoder* v. *United States*,[28] the Court of Appeals for the Tenth Circuit, although unnecessary to its decision since defendant's wife had secured a divorce prior to trial, in holding that the accused's wife could testify against him, went out of its way expressly to rest the case on the premise that *Funk* had completely destroyed the marital disqualification of witnesses in the federal courts. The other Courts of Appeals were not quite so convinced as to the relaxation of the common law rule respecting adverse spousal testimony and continued to prohibit one spouse from testifying *against* the other,[29] unless they could stretch the injured person exception to that rule to reach the desired result.[30] The Seventh Circuit in *United States* v. *Lutwak*,[31] however, in admitting the testimony of defendants' wives against them, expressly commented upon and approved the *dicta* in *Yoder* concerning abolishment of the rule prohibiting adverse spousal testimony. Of course, the *Yoder* case received favorable comment in the law reviews.[32]

Before leaving *Funk*, it is important to note that the rule announced therein and in *Wolfle* was codified in the Federal Rules of Criminal Procedure, which provides:[33]

> Rule 26 Evidence. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience.

We now come to the latest, and in fact quite recent, chapter in the development of the federal rules respecting inter-spousal testimony in criminal cases. In *Hawkins* v. *United States*,[34] the Supreme Court was faced with a decision of the Court of Appeals

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[28] 80 F.2d 665 (10th Cir. 1935).

[29] United States v. Walker, 176 F.2d 564 (2d Cir. 1949), *cert. denied*, 338 U.S. 891 (1949); Brunner v. United States, 168 F.2d 281 (6th Cir. 1948); Paul v. United States, 79 F.2d 561 (8d Cir. 1935).

[30] See Shores v. United States, 174 F.2d 838 (8th Cir. 1949); Hayes v. United States, 168 F.2d 986 (10th Cir. 1948). The United States Court of Appeals in Ryno v. United States, 232 F.2d 581 (9th Cir. 1956), refused to endorse the district court's liberal interpretation of the effect of *Funk* upon the general rule, and its enlarging of the injured-person exception to include offenses against the property of the other spouse.

[31] 195 F.2d 748 (7th Cir. 1952), *aff'd*, 344 U.S. 604 (1953). The Supreme Court based its affirmance upon the fact that there was involved a "sham" marriage with "ostensible" wives, and so the rule prohibiting anti-spousal testimony was held not applicable.

[32] See Note, 24 Calif. L. Rev. 472 (1935); Note, 4 Duke B.A.J. 107 (1936); Note, 35 Mich. L. Rev. 329 (1936); Note, 20 Minn. L. Rev. 693 (1935); Note, 10 So. Calif. L. Rev. 94 (1936).

[33] Fed. R. Crim. P. 26.

[34] 358 U.S. 74 (1958).

of the 10th Circuit[35] which, relying upon its decision in *Yoder* had upheld as proper the trial court's allowing the testimony of the defendant's wife as a witness for the prosecution in a Mann Act prosecution in which the wife was not the victim. Thus the United States Supreme Court was faced squarely with the issue it had been able to avoid in *Lutwak, i.e.*, was the rule prohibiting the adverse spousal testimony still valid? The Court proceeded to make poor prophets of most of the legal commentators and those lower federal courts which saw *Funk* as the end of the inter-spousal testimony rules.

The Court summarized the development and application of the spousal testimony rules at common law and in the federal courts, and concluded that, although the rule prohibiting favorable spousal testimony was supported by reasons which had been undermined by time and changes in legal practices, it was not prepared to admit the same as to the rule barring testimony of one spouse against the other.

The Court saw as the reason for the rule prohibiting adverse spousal testimony the policy of fostering family peace for the benefit of the family and the public as well. Although the Government had requested relaxation of the rule only to permit testimony voluntarily given by the witness-spouse, the Court could see no less disturbance to marital harmony by voluntary than by forced testimony. It pointed out that both Congress and the Court, by decision or under its rule making power, could change the rule "where circumstances or further experience dictate,"[36] and offered as proof of such power the fact that "over the years the rule has evolved from the common law absolute disqualification to a rule which bars the testimony of one spouse against the other unless both consent,"[37] and that Congress had acted to enable either spouse to testify where the other is being prosecuted for bigamy, polygamy, unlawful cohabitation, or importing aliens for immoral purposes.

The Court concluded:[38]

> Under these circumstances we are unable to subscribe to the idea that an exclusionary rule based on the persistent instincts of several centuries should now be abandoned. As we have already indicated, however, this decision does not foreclose whatever changes in the rule may eventually be dictated by reason and experience.

The present federal rule, therefore, is that one spouse is a competent witness in favor of the other in criminal prosecutions, but

[35] Hawkins v. United States, 249 F.2d 735 (10th Cir. 1958).
[36] 358 U.S. at 78.
[37] *Ibid.*
[38] 358 U.S. at 79.

each spouse is entitled to a privilege prohibiting the testimony of the one against the other—such privilege belonging both to the party-spouse and the witness-spouse. This rule is, of course, ever subject to the supervisory power of the United States Supreme Court under Rule 26 and thus subject to whatever changes may be dictated by reason and experience.

One further aspect of the federal rule which deserves notice is the so-called evolution of the rule prohibiting adverse spousal testimony from one of competency to one of privilege. As mentioned above, the United States Supreme Court recognized, and thus tacitly approved, this evolution in *Hawkins*.[39]

III. HISTORY AND DEVELOPMENT OF THE RULES IN MILITARY LAW

The history and development of the status of spouses as witnesses before courts-martial is included solely as background necessary for a proper understanding of the present rules, and is not intended to be a complete or comprehensive historical survey of the origin and development of the military rules respecting spousal testimony.

In the early days of military law the common law rule that neither spouse was a competent witness against or for the other was applied in trials by courts-martial, subject to exception in cases where the trial was for bodily injury or violence inflicted by the one spouse upon the other.[40] It appears that where the exception applied the injured spouse could testify for or against the other.[41]

A. *Manual for Courts-Martial, 1917*

The first military codification of the rules respecting interspousal testimony was that contained in the Manual for Courts-Martial, 1917. The Introduction to that Manual stated that Professor Wigmore aided substantially in the preparation of the chapter on "Evidence." [42]

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[39] As evidencing this evolution, the Court cited Stein v. Bowman, *supra* note 17; Funk v. United States, *supra* note 22; Benson v. United States, *supra* note 12; and United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1943).

[40] Davis, Military Law of the United States 257, 258 (1890); Winthrop, Military Law and Precedents 335 (2d ed., 1920 reprint); Dig. Ops. JAG 1880, p. 482.

[41] See DeHart, Observations on Military Law and the Constitution and Practice of Courts-Martial 397 (1862).

[42] MCM, 1917, at XIV, which stated: "In scope it has been extended to include chapters on 'Evidence' and 'Punitive Articles.' In the preparation of the former chapter this office has had the assistance of Prof. Wigmore of the Northwestern University. . . . Prof. Wigmore has given liberally of his time in the preparation of this chapter, has lent the authority of his name to what appears therein. . . ."

Examination of the Manual provisions as to inter-spousal testimony reveals clearly Wigmore's handiwork. They provided:

> Marital relationship was a disqualification at common law. Except in certain cases, husband or wife could not testify either for or against one another. This rule has been abolished in most states. In courts-martial the rule is as follows:
>
> (1) Wife or husband of an accused may testify on *behalf* of the accused without restriction.
>
> (2) Wife or husband of an accused may *not* be called to testify *against* the accused without the consent of both accused and witness, unless on a charge of an offense committed by the accused against the witness.
>
> (3) Wife or husband of any person may not testify to confidential communications of the other, unless the other gives consent. The last two rules are rules of privilege, and are more fully stated under "privilege." [43]

So we have a military rule permitting one spouse to testify on behalf of the other seventeen years before such a rule was adopted in the federal courts; [44] and the rule prohibiting adverse spousal testimony is already classed as a rule of privilege, even though there appears some confusion of concept or terminology in referring to it also as a "general rule of exclusion." The rule permitting one spouse to testify on behalf of the other which began with the 1917 Manual has remained unchanged to the present day. Consequently, the discussion of the military rules will involve primarily the rule respecting adverse spousal testimony and the injured-person exception to that rule. What is strange, in view of Wigmore's participation, is the statement that at common law the

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[43] Par. 213, MCM, 1917. Par. 228 of his Manual provided: "PRIVILEGE OF WIFE AND HUSBAND TO TESTIFY—At common law the early rule was that neither husband nor wife is competent as a witness against the other, but later admitted an exception in a case of bodily injury inflicted by one of them upon the other.

"Certain departures have been made from the common-law rule by Federal statutes and decisions of the courts which, giving consideration to the reasons —*i.e.*, the necessities of justice that demand relaxation of the rule in cases of bodily injury—have extended the field of instances to which the necessities of justice must necessarily apply.

". . . .

"Wherever, therefore, the policy of necessity of admitting her as a witness against her husband is sufficiently strong to overbalance the principle of public policy, upon which the general rule of exclusion is based, she ought to be received as a witness. . . . And so the wife should be permitted to testify against the husband whenever she is the particular individual directly injured by the crime committed by her husband and the facts are peculiarly within her knowledge and impossible or difficult of proof by any witness other than the wife. . . . It would therefore be appropriate in such cases against a husband as bodily injury of any character inflicted by him upon her, bigamy, polygamy, or unlawful cohabitation, abandonment of wife and children, or failure to support them, for the wife to be permitted to testify against the husband."

[44] Funk v. United States, *supra* note 22.

rule prohibiting adverse spousal testimony was one of competency. In his treatise, Wigmore viewed the disqualification of the wife to testify on her husband's behalf as a rule of competency, but the disqualification of the wife to testify against her husband as a rule of privilege. He viewed the privilege prohibiting adverse spousal testimony as belonging equally to the accused and the witness spouse.[45] Another anomaly is the statement of the injured-person exception in such a manner as to indicate that the necessity required to invoke the rule is a particular, rather than a general, one, but the inclusion of offenses such as polygamy and unlawful cohabitation which would not seem in many cases to require the testimony of the wife and which could hardly be said to be "an offense committed by the accused against the witness." Note, too, that the 1917 Manual is silent as to compellability of the injured spouse as a witness, but it certainly implied that such spouse would not be compellable, and it was so held in a 1919 case.[46]

B. *Manual for Courts-Martial, 1921*

The Manual for Courts-Martial, 1921, contained provisions as to inter-spousal testimony substantially similar to those of the 1917 Manual, except that it expressly provided that the injured-spouse was not a compellable witness; it added the following offenses to the injured person exception: designating another woman beneficiary under the War Risk Insurance Act, and using or transporting the wife for white-slave or other immoral purposes; and the statement that the injured-person exception was based upon necessity was deleted.[47]

C. *Manual for Courts-Martial, 1928*

The Manual for Courts-Martial, 1928, departed slightly from the 1917 and 1921 Manuals in its wording of the rules respecting inter-spousal testimony. It provided in pertinent part: [48]

> Wife and husband may testify in favor of each other without limitation; but unless both consent neither wife nor husband is a *competent* witness against the other, except as follows: A wife may testify against her husband without his consent whenever she is the individual or one of the individuals injured by an offense charged against her husband.

The offenses listed under the injured-person exception were: bigamy, polygamy, unlawful cohabitation, abandonment of wife and

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[45] 8 Wigmore § 2227; 2 *id.* § 612. *But see* 9 Halsbury, The Laws of England § 775 (1909); Stewart, The Law of Husband and Wife 73 (1885); Peake, Compendium of the Laws of Evidence 173 (2d ed. 1812). These authorities treat the rule as one of competency both as to favorable and adverse spousal testimony.

[46] CM 121028, *Dorton*, 14 Nov. 1919.

[47] Pars. 213, 228, MCM, 1921.

[48] Par. 120*d*, MCM, 1928. (Emphasis added.)

children, or failure to support them, or using or transporting the wife for "white slave" or immoral purposes. It was expressly provided that the injured spouse could not be compelled to testify.[49]

One change from the previous Manual is the wording of the injured-person exception, in that it departs even further from the idea that the spouse's testimony must be necessary in the particular case or that she must be directly, or even in fact, injured by the offense charged against the husband.

Another change is the statement of the general rule prohibiting adverse spousal testimony in terms of competency, and elimination of its general characterization as a "rule of privilege." This change appears to have been one of terminology only, however, as the operation of the rule itself is identical with those of the 1917 and 1921 Manuals, *i.e.*, both spouses are given the privilege generally to refuse to testify adversely, or to have the other testify adversely, and the injured spouse cannot be compelled to do so.

With respect to the right of the accused-spouse to take advantage of the denial of the privilege of the injured witness-spouse not to testify adversely, the rules of the 1917, 1921, and 1928 Manuals were more consistent with modern concepts of rules of competency than rules of privilege,[50] it being held that the denial of the witness-spouse's privilege was prejudicial to the substantial rights of the accused.[51]

In any event, however, the rules of the 1928 Manual as to interspousal testimony were essentially the same as those of the earlier Manuals, which were stated, and considered, to be rules of privilege.

The difference in classification of the rule as one of competency or privilege may produce different solutions to questions of who may waive the benefits of the rule, who may complain on appeal of a denial of his benefits, and whether the injured spouse may be compelled to testify.[52] The fact that at common law the injured spouse was compelled to testify [53] is perhaps the strongest evidence

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[49] *Ibid.*

[50] See McCormick, Evidence 151 (1954).

[51] CM 121028, *Dorton*, 14 Nov. 1919; CM 270942, *MacDonald*, 46 BR 1 (1945).

[52] For a discussion of the distinction between a rule of competency and a rule of privilege as it affects the present military rule, see *Exercise of the Privilege, infra.* For a discussion of the distinctions between rules of competency and rules of privilege generally, see Maguire, Evidence: Common Sense and Common Law 78–92 (1947); McCormick, *The Scope of Privilege in the Law of Evidence*, 16 Texas L. Rev. 447 (1938).

[53] Rex v. Lapworth [1931] 1 K.B. 117; *cf.* Leach v. Rex [1912] A.C. 305; Husbands and Wives as Witnesses at Common Law, 67 Just. P. 543 (1903); Evidence of Spouses in Criminal Law, 103 Law. J. 633 (1953); 9 Halsbury, *op. cit. supra* note 45, at § 405.

of actual court practice available on the issue of classification of the rule. This indicates strongly that the rule was one of competency, since if the injured spouse had a privilege not to testify, the fact of injury to her would not seem a valid basis for denying that privilege.[54] As pointed out previously, however, Wigmore viewed the disqualification of the wife to testify against her husband as a rule of privilege.[55] This view has been uncritically accepted by most modern United States legal commentators[56] as well as the Supreme Court.[57]

Compare the discussion of the early military rules respecting adverse spousal testimony with the analysis of the 1917, 1921, and 1928 Manuals for Courts-Martial by Judge Latimer in *United States* v. *Leach*.[58]

> [T]he Manual [1917] made both husband and wife competent in certain instances, but neither could be compelled to testify. In addition, a further shield was thrown around them in that a showing of necessity was suggested. A somewhat similar statement may be found in paragraph 228 of the Manual for Courts-Martial, US Army 1921, but at that time the rule of necessity was eliminated.
>
> In the Manual for Courts-Martial, US Army, 1928, paragraph 120, the same general principle was expressed, and it appeared to be still treating the subject as one of competency. That is, a spouse was incompetent generally, but in the excepted cases, he or she was competent and could testify over the objection of party-spouse. However, the testimony could not be compelled. If I understand the concept underlying that theory, it is no more than this: A spouse is competent in limited areas, but there is a privilege which is exercisable by the witness . . . . [s]he may or may not testify according to her desires.

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[54] A strong argument could perhaps be made that the public interest in punishing the accused-spouse outweighs the interest of the witness-spouse not to testify against him and thus render Wigmore's dichotomy of dual privilege compatible with the actual common law practice of compelling the injured-spouse to testify. However, Wigmore's citation of Rex v. Lapworth (*supra* note 53) for the proposition that the privilege is "rarely . . . denied to belong to the witness-spouse" (8 Wigmore § 2241) coupled with the fact that he did not consider compellability of the injured-spouse in his treatise, and that he wrote the rule of the 1917 Manual for Courts-Martial so that the injured-spouse was not a compellable witness, indicate that he did not believe that the injured-person exception destroyed the privilege of the witness-spouse. Whether he did not discover that at common law the injured-spouse was compelled to testify, or, knowing, simply chose to ignore it, cannot be determined.

[55] 8 Wigmore § 2227; 2 *id.* 612.

[56] See, *e.g.*, Brosman, *Edward Livingston and Spousal Testimony in Louisiana*, II Tul. L. Rev. 243, 253, n. 40, where, in discussing the proposed codes of evidence for Louisiana compiled by Edward Livingston, the author points out that Livingston considered both the rule as to favorable and adverse spousal testimony as a single rule of competency, and, after citing Wigmore as *contra* authority, remarks: "Bentham too falls into both these errors."

[57] Hawkins v. United States, 358 U.S. 74 (1958).

[58] 7 USCMA 388, 399, 22 CMR 178, 189 (1956).

> Sometime thereafter, the rules as to both competency and compellability were completely changed, and the doctrine of privilege was recognized.

Apparently, Judge Latimer is of the opinion that the common law rule respecting adverse spousal testimony was a rule of competency and that it was this rule that was in force under the 1917, 1921, and 1928 Manuals for Courts-Martial. Consider in this connection, this quotation from his opinion in *Leach*:[59]

> I believe my development will show clearly that assuming the common-law rule prevailed in military law and that incompetency and privilege prevented one spouse from testifying against the other, the law is no longer to that effect.

Although Judge Latimer gives lip service to Wigmore's dichotomy of the rules,[60] he apparently does not recognize this dichotomy when applied, for, as we have seen, the earliest military codification of the rules of inter-spousal testimony was in the 1917 Manual, which was the product of Wigmore, who insisted that the rule at common law was one of privilege, and the rule was expressly characterized as such in the 1917 Manual.

As evidencing the complete change in the rules of competency and compellability as they existed in the 1917, 1921, and 1928 Manuals, and the recognition of the doctrine of privilege, Judge Latimer cites paragraph 134*d*, Manual for Courts-Martial, 1949. Let us take a look at that Manual to see what these drastic changes are.

D. *Manual for Courts-Martial, 1949*

Paragraph 134*d*, Manual for Courts-Martial, 1949 provides:

> Husband and wife are competent witnesses in favor of each other. Although husband and wife are competent witnesses against each other, the general rule is that either spouse may assert a claim of privilege against the use of one of them as a witness against the other. This privilege does not exist, however, when the husband or wife is the individual or one of the individuals injured by an offense charged against the other, as in a prosecution for bodily injuries inflicted by one upon the other, for bigamy, polygamy, unlawful cohabitation, abandonment of wife or children or failure to support them, or for using or transporting the wife for "white slave" or other immoral purposes. When the privilege does exist, it may be waived with the consent of both spouses to the use of one of them as a witness against the other.

Although the 1949 Manual expresses the general rule as to adverse spousal testimony in language different from that of the earlier Manuals, comparison of the content and application of the rules does not justify the statement that the rule as to competency was completely changed and the doctrine of privilege recognized.

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[59] *Id.* at 398, 22 CMR 178 at 188.

[60] He makes the following statement in analyzing 8 Wigmore § 2227: "The two concepts of competency and privilege should be kept separate and apart, for if they are not, difficulties are encountered when other principles are applied." United States v. Leach, *supra* note 58, at 395, 22 CMR at 185.

Actually, the 1949 Manual states expressly what the 1917 and 1921 Manuals left to implication, and corrects the misstatement of the general rule by the 1928 Manual, thus preserving Wigmore's dichotomy of the general rule prohibiting adverse spousal testimony as a privilege belonging to both spouses.

The 1949 Manual did change the rule as to compellability, by changing the wording of the injured-person exception. Therein lies the distinction between the 1949 and the earlier Manuals. The 1917 Manual by implication, and the 1921 and 1928 Manuals expressly, provided that the injured spouse could not be compelled to testify. This was consistent with a treatment of the rule as one of privilege, and with Wigmore's general analysis of the rule. The 1949 Manual evaded the problem altogether by adopting the rule that there is no privilege when the injured-person exception applies. If there is no privilege and the spouse is a competent witness, should not the injured spouse be compellable? Thus, although Judge Latimer says the doctrine of privilege was recognized in the 1949 Manual, the practical result of the basic change therein was a return to an incident of the rule as one of competency, *i.e.*, the compellability of the injured spouse as a witness.

With this history of the military rules respecting inter-spousal testimony before us, let us now turn to a consideration of the present military rules.

IV. THE PRESENT MILITARY RULES

A. *Manual for Courts-Martial, 1951—General*

The starting point of, and the framework for, the present military rules respecting inter-spousal testimony is the statement of the rules appearing in the Manual for Courts-Martial, 1951, at paragraph 148*e*.[61]

[61] Par. 148*e* provides that: "Husband and wife are competent witnesses in favor of each other. Although husband and wife are also competent witnesses against each other, the general rule is that both are entitled to a privilege prohibiting the use of one of them as a witness (sworn or unsworn) against the other. This privilege does not exist, however, when the husband or wife is the individual or one of the individuals injured by the offense with which the other spouse is charged, as in a prosecution for an assault upon one spouse by the other, for bigamy, polygamy, unlawful cohabitation, abandonment of wife or children or failure to support them, for using or transporting the wife for 'white slave' or other immoral purposes, or for forgery by one spouse of the signature of the other to a writing when the writing would, if genuine, apparently operate to the prejudice of such other. When the privilege does exist, it may be waived by the consent, express or implied, of both spouses to the use of one of them as a witness against the other. If one spouse testifies in favor of the other, the privilege may not be asserted upon cross-examination of the spouse who has so testified, provided such cross-examination is limited to the issues concerning which such spouse has testified on direct examination and to the question of his or her credibility."

There is little difference between provisions of the 1949 and and 1951 Manuals for Courts-Martial with respect to inter-spousal testimony. As has been the case since the 1917 Manual, both spouses are competent to testify without restriction on behalf of the other. This aspect of the rules, therefore, requires no further comment. The rule in the 1951 Manual for Courts-Martial as to adverse spousal testimony is the same as that in the 1949 Manual. It is a rule of privilege, running to both spouses, jointly and severally; the privilege disappearing when the witness-spouse is the one injured by the offense of which the accused-spouse is charged. The principal differences between the 1949 and 1951 Manuals are: (1) the 1951 Manual provides that if the spouse is called as a defense witness there is a waiver of the privilege as to cross-examination upon issues concerning which there was direct testimony and on the question of the credibility of the witness; (2) the 1951 Manual extends the privilege to unsworn testimony of the spouse; and (3) the 1951 Manual adds under the injured-person exception "forgery by one spouse of the signature of the other to a writing when the writing would, if genuine, apparently operate to the prejudice of such other." In the light of the previous discussion of the 1949 Manual for Courts-Martial, as compared with the previous Manuals, it is clear that the major difference between the rule as stated in the Manual for Courts-Martial, 1951, and the other Manuals prior to 1949, is that the privilege is treated as non-existent when the injured-person exception is applicable. As pointed out in the discussion of the provisions of the 1949 Manual, the statement of the general rule as to adverse spousal testimony follows Wigmore, whereas the statement of the injured-person exception evades the problem of compellability of the injured spouse as a witness, which is left unsolved by Wigmore. Consider the following statement of the drafters of the 1951 Manual as to the basis of paragraph 148*e*:[62]

> Generally speaking, the discussion appearing in this paragraph was taken from paragraph 134d, MCM, 1949. It will be noticed that in the 1951 text, as in the 1949 text, the general rule prohibiting the use of one spouse as a witness against the other is treated as a privilege and not as a rule of competency. See Wigmore, sec. 2227 et. seq; United States v. Mitchell. 137F (2d) 1006, 1008. It will also be noticed that this privilege does not exist, and that the spouse—if he or she is otherwise competent as a witness—occupies no exceptional status and *may be required to testify,* if he or she is the victim of the transgression with which the other spouse is charged. See Rex v. Lapworth, (1931) 1KB117; 28 RCL, Witnesses, section 68.

Note that Wigmore and *United States* v. *Mitchell,* which is based upon Wigmore, are cited in support of the general rule,

[62] Legal and Legislative Basis, MCM, 1951, at 235 (1951). (Emphasis added.)

while the provision providing for compellability of the injured spouse, *i.e.*, the provision that the privilege does not exist where the exception applies, is based primarily upon *Rex* v. *Lapworth*, an English case in which it was held that the injured spouse may be compelled to testify on the ground that at common law the injured spouse became a competent witness, and enjoyed the same status as any other witness, including being required to testify.[63] As mentioned above in connection with the 1949 Manual, it is curious that the Manual general rule, which is expressly said by its drafters to be a rule of privilege, should have an exception, the main incident of which is derived from a rule of competency.

So much for the general background of the present Manual rules. Let us now proceed to a detailed examination of the components of the rule of the present Manual respecting adverse spousal testimony and an analysis of its interpretation in the military cases to attempt to arrive at the present military rule in action. Of necessity reference will be made to federal cases in areas where no military case is available.

B. *Who Are Spouses Under the Rule*

The rule prohibiting adverse spousal testimony extends only to lawful wedlock,[64] and divorce will terminate the application of the rule to either party to the marriage, since it is the status of the parties at the time of trial and not at the time of the offenses that controls.[65] It follows, of course, that a divorced spouse may testify as to matters occurring during the marriage.[66] Spouses of a valid common law marriage enjoy the protection of the privilege.[67] However, the burden of establishing the validity of such a marriage is upon the accused.[68] The Manual specifically provides that the offense of bigamy is within the injured-person exception to the rule, and the Court of Military Appeals has specifically held that the accused may not prohibit the first spouse from testifying.[69] As to whether such spouse may be compelled to testify will be discussed *infra* in connection with the injured-person excep-

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[63] *Cf.* Leach v. Rex [1912] A.C. 305, in which it was held that in the case of offenses added to the common law injured-person exception by the English Criminal Evidence Act the injured spouse may not be required to testify.

[64] CM 395341, *Boone*, 24 CMR 400 (1957); CM 337089, *Alkins and Seevers*, 5 BR–JC 362 (1949).

[65] Pereira v. United States, 202 F. 2d 830 (5th Cir. 1953), *aff'd*, 347 U.S. 1 (1954); Yoder v. United States, 80 F.2d 665 (10th Cir. 1939).

[66] United States v. Ashby, 245 F.2d 684 (5th Cir. 1957); United States v. Gonella, 103 F.2d 123 (3d Cir. 1939).

[67] United States v. Richardson, 1 USCMA 558, 4 CMR 150 (1952).

[68] This is in accord with the rule generally followed in military law. See par. 67*e*, MCM, 1951. CM 395341, *Boone*, 23 CMR 400 (1957).

[69] United States v. Wise, 10 USCMA 539, 28 CMR 105 (1959).

tion. Logically, it should follow that if the second marriage is bigamous the privilege should not extend to the second spouse of the accused, who is not a lawful spouse. However, determination of these questions involves determination of ultimate issues which the court must decide in arriving at its findings. Who is to make these determinations?

The bigamy situation has never been passed upon by the Court of Military Appeals. However, the case of *United States* v. *Richardson* [70] indicates that the court will follow what is considered the orthodox rule that where the competency of evidence depends upon the existence of a disputed fact, the judge determines the existence of the preliminary fact upon a preponderance of all the evidence.[71]

In *Richardson* the accused was charged with two specifications of taking indecent liberties with a female under 16 years of age. He sought to defend on the ground of common law marriage between himself and the girl, and before any evidence was heard the defense moved to dismiss the charges on that ground. The law officer denied the motion after hearing evidence thereon in an out of court hearing. Subsequently, during the course of the trial the defense failed to object to the testimony of the alleged victim on the ground of marital privilege. The United States Court of Military Appeals found the procedure utilized by the law officer to decide the motion to be inappropriate because the motion was in effect a motion for a finding of not guilty based on the concept that a husband is not guilty of taking indecent liberties by placing his hands on the person of his wife. To this extent the law officer was said to have invaded the province of the court-martial in precluding a review of his ruling. With respect to the competency of the victim to testify, however, the court stated: [72]

> If the parties were married, the accused could claim a privilege against his wife testifying. A determination of the relationship for this purpose is an interlocutory question and one which should be ruled on by the law officer. . . . Perhaps the best procedure would have dictated that he await the time the question was raised by defense counsel. However, it sometimes expedites the trial of cases to adopt a procedure which permits all preliminary or interlocutory questions based on out-of-court testimony to be determined before the trial on the merits commences. We see nothing erroneous with a law officer hearing evidence outside the presence of members of the court prior to trial for the purpose of being prepared to rule on anticipated questions of law.

Some federal and state courts have departed from the orthodox rule and introduced varying tests for the judge to apply in de-

[70] *Supra* note 67.
[71] 97 C.J.S. *Witnesses* § 119f (1955); 5 Wigmore § 1385.
[72] 1 USCMA at 563, 4 CMR at 155.

termining the preliminary question.[73] Others have submitted the issue to the jury after appropriate instructions from the judge.[74]

These departures have been criticized as relaxing the requirements for proof of the preliminary fact necessary to the reception of the evidence and thus devitalizing the exclusionary rules of privilege.[75]

The United States Supreme Court has held that a "sham" marriage, entered into with the express understanding of the parties that its sole purpose was to circumvent the immigration laws of the United States and that it was never to be consummated, does not render the persons thereto spouses within the meaning of the rule.[76] However, it appears that the spouses would be entitled to the privilege even if they entered into the marriage for the express purpose of gaining its benefits, so long as a genuine marriage was contracted.[77]

The separation of the parties generally is held to have no effect upon the application of the rule, unless, of course, one spouse is charged with an offense arising out of such separation, such as abandonment of wife or child, which comes within the injured person exception.[78]

C. *What Testimony Is Prohibited*

Unlike the privilege extending to confidential communications between spouses, the rule prohibiting adverse spousal testimony does not depend upon the nature of the testimony sought to be elicited from the witness-spouse by the prosecution. The rule of the Manual prohibits the testimony of one spouse against the other, sworn or unsworn. Therefore, testimony in any form is prohibited. Since, as we have seen, the relationship at the time

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[73] *Compare* Miles v. United States, 103 U.S. 304 (1881) *with* Lutwak v. United States, 195 F.2d 748 (7th Cir. 1952), *aff'd*, 344 U.S. 604 (1953); see also, Matz v. United States, 158 F.2d 190 (D.C. Cir. 1946).

[74] Chadwick v. Wiggin, 95 Vt. 515, 116 Atl. 74 (1922); People v. Talbott, 65 Cal. App. 2d 654, 151 P.2d 308 (1949).

[75] See Comment, 20 U. Chi. L. Rev. 313 (1953). Although the Court of Military Appeals approved in *Richardson* the determination of the preliminary fact by the law officer, paragraph 67*e*, MCM, 1951, apparently would permit the law officer to submit the question to the court.

[76] Lutwak v. United States, 344 U.S. 604 (1952). Note also that *Lutwak* involved the "coincidence" problem discussed in connection with *Richardson*.

[77] 3 Wharton, Criminal Evidence § 771 (12th ed. 1955).

[78] See Jackson v. United States, 250 F.2d 897 (5th Cir. 1958); United States v. Winfree, 170 F. Supp. 659 (E.D. Pa. 1959); 97 C.J.S. *Witnesses* § 81 (1955); 3 Wharton, *op. cit. supra* note 77, at § 772.

of trial controls, the privilege extends to testimony concerning offenses committed prior to the marriage.[79]

The privilege prevents testimony of a spouse against a co-defendant of the other spouse. This has been held even though the spouse of the witness is being tried separately and is not then on trial.[80] However, when under the circumstances the accused-spouse is immune from harm by the testimony of the other spouse, such as by reason of plea of guilty or prior conviction, the other spouse will be permitted to testify against the co-defendant.[81]

The purpose of the prohibition in the Manual of unsworn testimony of the one spouse is to prevent the reception in evidence against the other spouse of hearsay declarations that ordinarily would be admissible under some exception to the hearsay rule, such as spontaneous exclamation.[82] Of course, if the testimony would be admissible in any event under the injured-person exception, the prohibition as to unsworn testimony would not affect it.[83]

The prohibition as to unsworn testimony should not extend to extrajudicial statements of the one spouse in the presence of the other accused-spouse indicating his guilt, where the accused's failure to deny the statements indicated their truth. In such a case, the statements are not offered as those of the other spouse but as those of the accused by assent.[84]

What of evidence secured from the other spouse by the prosecution, such as documents? Wigmore felt that such evidence should be excluded, for to admit it would be a violation of the spirit of the rule.[85] In a case decided under the 1928 Manual, a Board of Review held that a letter from the accused's mother to his wife, which was given by the wife to the trial judge advocate to impeach the mother, "was a circumvention of the spirit and purpose of the rule of the Manual for Courts-Martial, paragraph 120*d* . . . and it would better have been excluded." [86] In view of the obvious intent of the drafters of the 1951 Manual to narrow the scope

[79] Wyatt v. United States, 263 F.2d 304 (5th Cir. 1959); United States v. Gwynne, 209 Fed. 993 (E.D. Pa. 1914). Note, however, that the two cases are *contra* on the question of whether the injured-person exception applies where the pre-marriage offense is against the present wife. See discussion of injured-person exception, *infra*.

[80] Paul v. United States, 79 F.2d 561 (3d Cir. 1935); United States v. Knoell, 230 Fed. 509 (E.D. Pa. 1916), *aff'd*, 239 Fed. 16 (3d Cir 1917); 97 C.J.S. *Witnesses* § 103 (1955).

[81] Parnell v. United States, 64 F.2d 824 (10th Cir. 1933); Astwood v. United States, 1 F. 2d 639 (8th Cir. 1924).

[82] See ACM 7732, *Hawley*, 14 CMR 927 (1954); Legal and Legislative Basis, MCM, 1951, at 235 (1951).

[83] Legal and Legislative Basis, MCM, 1951, at 235, 236 (1951).

[84] United States v. Anthony, 145 F. Supp. 323 (E.D. Pa. 1956); 8 Wigmore § 2238.

[85] 8 Wigmore § 2283.

[86] CM 285445, *Canavan*, 56 BR 73 (1945).

of the privilege it is felt that today a different result would be reached.

In a recent federal case,[87] a contrary result was reached on similar facts where the wife voluntarily furnished information to the federal agents investigating her husband's income tax returns. The court indicated, however, that the result would have been different had there been a subpoena, order, or other court process requiring her to furnish the information, or if the information had been furnished in a judicial proceeding. This raises the problem of the application of the privilege to proceedings before the Article 32 investigating officer. In view of the pronouncements of the Court of Military Appeals that such proceeding is judicial in nature,[88] it would appear that the privilege should be applicable to the Article 32 investigation. The rule generally is held to extend to any proceeding wherein the testimony of one spouse directly incriminates the other.[89]

D. *Exercise of the Privilege*

Consideration of the method of exercise of the privilege prohibiting adverse spousal testimony involves the questions of: whose is the privilege; how the privilege is asserted; what is the effect of a violation of the privilege; and whether the privilege can be waived and, if so, how and by whom.

As we have seen, paragraph 148*e*, Manual for Courts-Martial, 1951 provides:

> Although husband and wife are also competent witnesses against each other, the general rule is that both are entitled to a privilege prohibiting the use of one of them as a witness (sworn or unsworn) against the other.

The drafters of the Manual clearly intended to incorporate the theory of Wigmore into the Manual rule. It was Wigmore's view that the privilege belonged equally to the accused-spouse and the witness-spouse, and that either could assert it to prevent the one from testifying against the other.[90] Normally, the question of who possesses a privilege is important in determining who may assert the privilege, who may waive it, and the effect of a wrongful denial of it, *i.e.*, who can benefit on appeal from error in its denial. As noted in the discussion of the federal rules, Wigmore's dichotomy of the privilege as belonging equally to both spouses causes little difficulty in its application to the general rule; however, *this duality of privilege concept encounters logical difficulties* if it is sought to be applied to the injured-person exception. The reason for this difficulty is, it is submitted, that as expressed by

[87] United States v. Winfree, 170 F. Supp. 659 (E.D. Pa. 1959).

[88] United States v. Nichols, 8 USCMA 119, 23 CMR 343 (1957).

[89] 58 Am. Jur. *Witnesses* § 180 (1938); 3 Wharton, *op. cit. supra* note 77, at § 773.

[90] 8 Wigmore § 2241.

Wigmore, and by the present Manual, the practical operation of the general rule, even though it is expressed as a rule of privilege, is indistinguishable from its operation if it were considered a rule of competency, whereas when Wigmore's dual privilege concept is applied to the injured-person situation its operation as a rule of privilege may be entirely different than if it were a rule of competency. Although this discussion of "whose is the privilege" is of particular importance to the consideration of the injured-person exception, and might well be delayed until that point, it should prove helpful to an understanding of waiver and the effect of a denial of the benefits of the rule.

The principal distinction between a rule of privilege and a rule of competency aside from the claimed difference in purpose [91] is that the rule of privilege may be asserted only by the person who has the outside relationship favored by the privilege,—this may, or may not, be the adverse party to the legal action—whereas, the rule of competency may be invoked, as of right, only by the person whose interest in having the verdict follow the facts is at stake in the trial—the party adverse to the offeror of the evidence. In both cases, an improper denial of the benefit of the rule may be taken advantage of on appeal only by the person who could invoke its benefits at the trial. The common idea that a rule of competency may not be waived, while a rule of privilege may, is not a valid distinction.[92] Let us see how these distinctions might affect the

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[91] A rule of privilege is said to be designed not to reveal the truth, but to conceal it, in the interest of outside social relationships which are regarded of sufficient social importance to justify sacrifice of otherwise material facts, while a rule of competency is designed to keep out unreliable facts. McCormick, Evidence § 72 (1954). The different reasons advanced for the marital disqualification rules at common law, *i.e.*, to avoid perjury, to foster family peace, etc., would appear to qualify them either as rules of competency or privilege as far as this test is concerned. For a discussion of the various reasons advanced for the rules, see 2 Wigmore § 602 and 8 *id.* § 2228.

[92] Benson v. United States, 146 U.S. 325 (1892); *cf.* Graves v. United States, 150 U.S. 118 (1898). Consider McCormick's statement: "In our off hand thinking about evidential privileges as distinguished from rules of exclusion, we are apt to assume that the difference is that a privilege may be claimed or waived at one's election, whereas a rule of exclusion operates automatically to keep evidence out. A moment's reflection will cause us to abandon this view. We would recall that a rule of exclusion, no less than the privilege, will also be waived ordinarily, if it is not promptly claimed, and only in rare instances will the trial judge of his own motion interpose to enforce the rule." McCormick, Evidence § 72 (1954). Compare Judge Latimer's statement: "The two concepts of competency and privilege should be kept separate and apart, for if they are not, difficulties are encountered when other principles are applied. Certainly, if competency is imposed by law, I would not be confronted with a waiver or with the question of who might claim the privilege for neither the witness-spouse nor the party-spouse would be required to claim the privilege as the statute would do that much for them." United States v. Leach, *supra* note 58, at 395, 22 CMR at 185.

practical operation of the Manual rule depending upon whether it is considered a rule of competency or a rule of privilege. In the usual case where the spouse is offered by the prosecution, if the rule was considered one of competency, the accused-spouse, as the party adverse to the offeror and interested in the presentation of competent evidence, alone could invoke the rule. If he failed to do so, it would be waived. The witness-spouse would have the same status as any other witness. Under the Manual rule, which is a rule of privilege, if the accused-spouse fails to assert the rule, the witness-spouse may do so, and vice-versa. If both fail to assert the rule it is waived.[93] In practical operation, however, it is normally the accused who asserts the rule, either alone or in conjunction with the witness-spouse. In any event, it is the accused-spouse who benefits primarily from the rule, whether it be asserted by him or the witness-spouse, and it is the accused who as a practical matter controls its operation, since if the accused-spouse should not wish the witness-spouse to assert the privilege he may call her as his own witness, whereas, if she does not desire to assert the privilege but wishes to testify, the accused may assert it to frustrate her testimony. But consider the situation when the injured-person exception applies. Clearly, the accused-spouse cannot claim the benefits of the rule, whether it be one of competency or privilege, for if he could there would be no exception. But what of the witness-spouse? If the rule is one of competency, the witness-spouse cannot invoke the rule at any time, it belongs exclusively to the accused. If the rule is one of privilege, what happens to her privilege? Is there any reason to deny her the privilege because it is denied to her husband? Does she not still have the marital relationship which *she* may wish to preserve? Yet the public at large may have an interest in punishing the wrongdoer, and her testimony may be necessary to a conviction.[94] Whose is the privilege now? *Shores* v. *United States*[95] resolved the question by finding that the exception was without the operation of the rule and that therefore there was no privilege. The drafters of the Manual solved it in much the same manner by providing that there was no privilege when the injured-person exception applies. So in that situation the privilege belongs to no one.

Let us now return to the remaining questions we set for ourselves at the outset of our discussion of the exercise of the privilege. We have seen that, consistent with the dual nature of the privilege, the privilege can be waived by the consent of *both* spouses to the

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[93] Par. 148*e*, MCM, 1951.
[94] See note 54 *supra*.
[95] 174 F.2d 838 (8th Cir. 1949).

use of one of them as a witness against the other.[96] This consent may be express or implied. This suggests that a mere failure to object would be considered consent, and hence a waiver. Such has been the practice.[97] The *Richardson* case indicates, however, that if for any reason the failure to object may not reasonably be construed as consent, waiver will not be invoked. There can be little quarrel as to the desirability of such a result. The Manual also provides expressly for waiver as to cross-examination within the scope of direct examination and on credibility, where the accused has called the other spouse as a witness.

Since failure to object is considered waiver, and in the absence of the privilege the spouse is a competent witness, it follows that the person possessing the privilege must assert it by objecting at trial if he is to enjoy its benefits. Since the privilege belongs to both spouses, either may assert it at trial. We have seen that where the accused-spouse asserts the privilege he bears the burden of convincing the law officer that the witness is his spouse.[98] This is consistent with the Manual characterization of the rule as an exception to the general rule that both spouses are competent as witnesses against the other. As indicated above in the discussion of *Richardson,* the Court of Military Appeals has held that the question is an interlocutory one to be decided by the law officer upon a preponderance of all the evidence. In the ordinary case, the testimony of the witness-spouse, in absence of contrary evidence, would be sufficient to establish the marriage relationship, whether the privilege is asserted by the witness-spouse or the accused-spouse.[99]

We have seen that either the accused-spouse or the witness-spouse can assert the privilege. There still remain several interesting questions as to the method, and effect, of exercise of the privilege. Can they avoid having to assert the privilege before the court, either by advance notice to the trial counsel that the privilege will be claimed or by insisting upon asserting, and having decided, the question of the application of the privilege outside the hearing of the court? Does the answer to this question involve the

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[96] Judge Latimer, in United States v. Leach, *supra* note 58, at 398, 22 CMR at 188, views the privilege as "single and indivisible, but it may be exercised by either the party-spouse, the witness-spouse, or both." See the discussion of the views of Chief Judge Quinn and Judge Ferguson *infra* under "the injured-person exception."

[97] CGCM 9832, *Yzaguirre,* 19 CMR 585 (1955).

[98] United States v. Richardson, *supra* note 67; CM 395341, *Boone,* 23 CMR 400 (1957).

[99] For the procedure followed in a federal court in a so-called coincidence case, *i.e.,* where the preliminary question upon which admissibility depended coincided with an ultimate question which the court must determine, see Matz v. United States, 158 F.2d 190 (D.C. Cir. 1946).

bigger question of whether the exercise of the privilege can validly be made the basis for an inference adverse to the accused-spouse as to the nature of the testimony of the other spouse, had such other spouse been permitted to testify. Should the answer to the latter question differ, depending upon whether the privilege was asserted by the accused or the witness? May the accused take advantage on appeal of an erroneous denial of the privilege of the witness-spouse?

The reason an accused desires to avoid claiming an exclusionary privilege in open court is to avoid the risk that the court may infer that the excluded evidence would be unfavorable to his cause. Consequently, if the exercise of the privilege can validly be made the basis of an adverse inference, as by trial counsel's argument, there should be no right to avoid exercise of the privilege in open court.

It is a general rule that if a party has it peculiarly within his power to produce witnesses or evidence within his control an adverse inference may be drawn from his failure to produce them.[100] If this rule is followed in this situation, the exercise of the privilege by the accused properly would be the basis for an adverse inference. But what if the witness-spouse alone asserts the privilege? In such cases, the accused has not asserted the privilege. Is the assertion of the privilege by the witness-spouse a matter sufficiently within the accused's control to make it fair to apply the rule to him? Since the accused can call the other spouse as his witness if he does not acquiesce in the assertion of the privilege by the witness, and he can assert the privilege if the witness fails to do so, he does have complete control over the witness and a very real advantage over the prosecution in the use of the witness. Consequently, if the adverse inference is proper at all, it should be available regardless of whether the witness-spouse or the accused-spouse asserts the privilege. There are no military cases involving this question. In one federal case, the appellate judge utilized the adverse inference from the accused's failure to call his wife to corroborate his testimony to find sufficient evidence to sustain the conviction.[101] In assessing the accused's explanation of his newly acquired means in defense of a robbery charge, Judge Learned Hand said:[102]

> His explanation of his new wealth his wife could have confirmed and she alone; she was a competent witness, *Funk* v. *United States*. . . .

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100 2 Wigmore §§ 285–91.

101 United States v. Fox, 98 F.2d 913 (2d Cir. 1938).

102 *Id.* at 915; *cf.* Graves v. United States, 150 U.S. 118 (1893), decided when the accused's wife was not a competent witness for or against him.

> The inference that she would not have confirmed him drawn from his failure to call her was much stronger than the contrary inference from the prosecution's failure; and his privilege against self-incrimination did not protect him against such an inference.

Judge Hand recognized the advantage of the accused as to calling the spouse as a witness, and apparently would permit comment by the prosecution on the exercise of the privilege. It must be recognized, of course, that use of the adverse inference would have the effect of undermining the value of the privilege. Since the Court of Military Appeals has not shown any tendency to narrow the scope of the privilege, it is doubtful that it would approve of trial counsel's attempt to utilize it.

If it is not considered proper for the trial counsel to comment in argument on the exercise of the privilege, then logically the accused should be permitted to assert the privilege and have the question decided outside the hearing of the court, for the only possible reason to insist upon its assertion in open court is the hope that the court will draw the adverse inference. Wigmore reports the majority rule to be that the prosecutor may not comment on the exercise of the privilege, but states that "the party desiring to compel the spouse to testify may at least call for the testimony, and is not to be deprived of it until the party-spouse formally objects and claims the privilege.[103] However, he apparently does not consider the situation where the prosecutor is informed in advance that the spouse will not be permitted to testify. In the latest supplement to his work there is added this paragraph to the above quoted discussion:[104]

> Even in a jurisdiction which allows the calling of the defendant's wife as a witness, it has been held that if the prosecuting attorney, knowing that she will not be permitted to testify, nevertheless calls her to the stand, his act in so doing constitutes prejudicial error.

Although within the dichotomy of privilege and competency set out above, it could be argued that the witness-spouse exercises the privilege solely of the witness and that its denial infringes only her right, since the accused is also the owner of the privilege and it can be waived only with the consent of both, it is doubtful that the court would draw such a fine distinction, even where the accused failed to object and assert his own privilege upon denial of that of the witness. There is the further factor that if the privilege of the witness-spouse is erroneously denied, the accused is subjected to the risk that the court will draw an adverse inference from his exercise of the privilege. To require him to assume that risk or lose the benefit of the privilege entirely would be in-

[103] 8 Wigmore § 2243.
[104] 8 Wigmore § 2243 (Supp. 1959, at p. 266, n. 5).

consistent with not permitting trial counsel to argue on the inference. Consequently, it is believed that the accused would have standing on appeal to complain of the erroneous denial of the privilege of the witness-spouse, regardless of whether he subsequently exercised *his* privilege. If he exercised *his* privilege and it was sustained, he could still complain of the possible adverse inference arising from his having been forced to exercise it, and if he failed to exercise *his* privilege he could complain of the erroneous receipt of the wife's testimony in violation of both his and her privilege.

E. *Injured-Person Exception*

At common law there was an exception to the accused's privilege or right to prohibit the adverse testimony of the other spouse in cases where the other spouse was injured by the offense charged against the accused. Whether we say the other spouse was competent to testify in these instances, as is thought to have been the actual common law practice, or that the privileges of the party-spouse and witness-spouse disappeared, as is provided for in the present Manual, the result was the same: The injured spouse was permitted, and also could be compelled, to testify against the other spouse. This is called the injured-party, or injured-person, exception to the general rule prohibiting adverse spousal testimony. The phrase injured-person is thought more appropriate in the criminal practice. The injured-person exception of the Manual for Courts-Martial, 1951, reads as follows:[105]

> This privilege does not exist, however, when the husband or wife is the individual or one of the individuals injured by the offense with which the other spouse is charged, as in a prosecution for an assault upon one spouse by the other, for bigamy, polygamy, unlawful cohabitation, abandonment of wife or children or failure to support them, for using or transporting the wife for "white slave" or other immoral purposes or for forgery by one spouse of the signature of the other to a writing when the writing would, if genuine, apparently operate to the prejudice of such other.

As we saw in the discussion above of "whose is the privilege" and the general background of the rule of the 1951 Manual, the effect of the injured-person exception of the Manual is to destroy entirely the privilege prohibiting adverse spousal testimony. This means the dual privilege of party-spouse and witness-spouse, not just the privilege of the party-spouse. As a result of the operation of the exception, therefore, the witness-spouse is a competent witness to testify against the accused-spouse, and enjoys the same status as any other witness. She should, therefore, be a compellable witness. A literal reading of paragraph 148*e*, Manual for

[105] Par. 148*e*, MCM, 1951.

Courts-Martial, 1951, and the portions of the Legal and Legislative basis set out above, seems conclusive of this point. Our problem in this area, therefore, should be to determine when the injured-person exception applies. But, as stated above in the discussion of "whose is the privilege," the failure, or refusal, of certain members of the United States Court of Military Appeals to accept this interpretation has produced confusion as to the correct interpretation of the Manual rule. The case in point is *United States* v. *Leach*.[106] The problem in this case was whether the law officer erred in compelling the wife of the accused soldier to testify for the prosecution on the charges of adultery and unlawful cohabitation over the objection of both the accused and the wife.

Judge Latimer wrote the majority opinion, and, although his treatment of the history and development of the common law and military rules respecting inter-spousal testimony are not particularly helpful, he did perceive the proper interpretation of the Manual injured-person exception:[107]

> The provision then goes on to say that in those instances where the wife is the injured party, there is no privilege. If there is no privilege, I fail to understand how either party has the right to claim one. A construction to that effect would ignore the plain meaning of the words used. There is no mention of any exception for either spouse, and a construction which could grant a privilege to the witness-spouse would be judicial legislation contrary to the well expressed intent of the military legislators and in direct conflict with other canons of statutory construction.

Judge Ferguson, in his separate concurring opinion, saw no need to reach the question of compellability of the wife as a witness:[108]

> The offense was against the wife. Therefore the perpetrator of the wrong, the accused, is certainly in no position to claim prejudice, regardless of the question of compellability of the wife. It appears to be the better rule that in such instances a defendant has no standing to complain. The reasons for exception from testimonial duty are personal to the witness, "it concerns solely *the interests of the witness* in his relation to justice and the state, — his interests not to have his testimonial duty enforced against him where paramount considerations of policy prevail over the purpose of judicial investigation." The privilege does not exist for the benefit of the party nor for the sake of the better ascertainment of the truth of his cause. Wigmore, supra, sec. 2196.

The section of Wigmore referred to deals generally with privileges, but with respect to anti-marital testimony it refers to section 2241, in which Wigmore discusses the general rule prohibiting adverse spousal testimony and says the privilege belongs to both the party-spouse and witness-spouse. Judge Ferguson failed to appreciate the fact that Wigmore does not consider the effect of the injured-

[106] 7 USCMA 388, 22 CMR 178 (1958).
[107] *Id.* at 398, 22 CMR at 188.
[108] *Id.* at 404, 22 CMR at 194.

person exception upon the dual privilege. One wonders what his ruling would be if the law officer, in a case not involving the injured-person exception, erroneously overruled the objection of the witness-spouse and compelled her to testify, the accused failing to assert the privilege. If he adhered to the same analysis he employed in this case, might he not say that the accused had waived the benefit of the privilege, despite the waiver provision of the Manual?[109]

Chief Judge Quinn was of the opinion that the law officer erred in compelling the wife to testify. He interpreted the rule of the Manual in the light of the rule of the District of Columbia upon the theory that by Article 36, Uniform Code of Military Justice, "Congress intended that the court-martial practice correspond as nearly as possible with that recognized in the trial of criminal cases in the United States District Courts,."[110] Since the District of Columbia Code provides that the injured spouse cannot be compelled to testify, he felt that the Manual rule, in order to comply with Article 36, must be the same. However, as we have seen from our discussion of the federal rules above, the question of compellability of the injured spouse is unsettled in the federal courts, because neither the United States Supreme Court under its rule making power, nor the Congress by statute, has spoken on the question. Congress *has* spoken for the District of Columbia in the promulgation of its Code. Thus, with respect to rules of evidence in the trial of criminal cases, the District of Columbia stands alone.[111] So, in his search for "the federal rule," Chief Judge Quinn turns first to the one jurisdiction that is least likely to furnish the general rule. He does consider other federal cases. He says:[112]

> Turning to the cases, every Federal case on the subject that I know of, and which was decided before promulgation of the Manual, has recognized the privilege. . . . (citing cases). In none of these cases was the witness-spouse compelled to testify.

It is interesting to note that none of the four cases cited involved the issue of compellability of the injured witness-spouse. One of the cases cited was *United States* v. *Mitchell*[113] which, as we have seen, adopted in *dicta* Wigmore's dichotomy of the rules. Two did not even involve the injured-person exception.[114] Apparently,

[109] See the discussion of this problem *supra* under "Exercise of the Privilege."

[110] United States v. Leach, *supra* note 106, at 405, 22 CMR at 195.

[111] Griffin v. United States, 336 U.S. 704 (1948).

[112] United States v. Leach, *supra* note 106, at 405, 22 CMR at 195.

[113] 137 F.2d 1006 (2d Cir. 1943), *cert. denied*, 321 U.S. 794 (1943).

[114] United States v. Walker, 176 F.2d 564 (2d Cir. 1949); United States v. Levy, 153 F.2d 995 (3d Cir. 1945).

Chief Judge Quinn's research did not disclose *Shores* v.*United States*,[115] discussed above, which held that the injured spouse could be compelled to testify. It is interesting that the question of compellability of the injured spouse as a witness appears not to have arisen in the federal courts until after *Mitchell, i.e.*, until after the transition of the rule in the federal courts from one of competency to one of privilege. Chief Judge Quinn sees this paucity of cases on the point as evidence that the injured spouse could not be compelled to testify. It is submitted, however, that a more logical reason is that prior to this transition the injured spouse was considered a competent witness and thus compellable the same as any other witness, and the question was not raised.

Chief Judge Quinn's opinion in *Leach* was not, however, his first word on the injured-person exception and compellability of the injured spouse. In *United States* v. *Strand*,[116] he compared the Manual rule with that of the District of Columbia, and his interpretation of Wigmore's statement of the rule, expressly recognizing that the drafters of the Manual intended that the injured spouse should be compelled to testify, but refused to decide the question of compellability of the injured spouse. His opinion in *Leach* indicates that he has finally decided not to follow the rule of the Manual.

So far as compellability of the injured spouse is concerned, it appears that Judges Latimer and Ferguson will join to reach the proper result, *i.e.*, compellability. Whether Judge Ferguson's and Chief Judge Quinn's faulty analysis of, and refusal to accept, the Manual rule will create other difficulties in the application of the injured-person exception, or in the application of the general rule, can not be determined at this time. The significance and effect of their interpretation of the injured-person exception and Article 36, Uniform Code of Military Justice, upon the military justice system generally will be discussed *infra*.

Let us now turn to a consideration of when the injured-person exception applies. Of course, generally speaking, it applies when the spouse is the individual or one of the individuals injured by the offense with which the other spouse is charged. The difficulty here is in determining what type of injury is contemplated, and the offenses which are thought to produce such injury. The Manual gives a list of the type of offenses contemplated. This list is only illustrative, and not exclusive,[117] but how are we to know what other offenses may be added to the list? Here the common

[115] *Supra* note 95. The injured spouse also was compelled to testify in Wyatt v. United States, 263 F.2d 304 (5th Cir. 1959), although of course that case was decided subsequent to publication of the Manual.

[116] 6 USCMA 297, 20 CMR 13 (1955).

[117] *Ibid.*

law is not helpful because of its narrow basis for applying the exception, and the federal decisions are not much more helpful because of the uncertainties in the various lower federal courts as to just how far the injured-person exception can be carried. This is particularly true of offenses against the other spouse's property. As we have seen, subsequent to *Funk* v. *United States*,[118] some of the lower federal courts viewed that case as *carte blanche* authority to disregard the privilege, and permitted one spouse to testify against the other on the joint premises that the privilege was dead and that the injured-person exception applied.[119] Clearly, *Hawkins* v. *United States* [120] destroyed the premise that the privilege as to adverse spousal testimony could be ignored completely, but *Hawkins* did not affect, nor did it explain, the application of the injured-person exception,[121] since in that case the wife was not the victim of the offense of which the accused was charged. Consequently, it is still too early to tell just what extensions of the exception will be attempted by the lower federal courts, and just how far the United States Supreme Court will go in permitting such extensions. As pointed out above in the discussion of the federal rules, in view of *Hawkins*, any narrowing of the privilege in the federal courts will have to come through interpretation of the injured-person exception.

An understanding of the offenses to be included within the scope of the exception must be sought by an interpretation of the Manual provision in the light of the intent of its drafters.

The general intent of the drafters appears to have been to limit the scope of application of the privilege. This inference is justified by the express provisions for liberal waiver, and the provision that the privilege does not exist where the injured-person exception is applicable, thereby providing for compellability of the injured-spouse as a witness.

Since it is clear that the specific offenses listed as coming within the injured-spouse exception are merely illustrative, it would be valid to ascertain the type or classification of offenses listed by determining the interest of the innocent spouse sought to be protected or vindicated by the specific illustrative offenses.

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[118] See text accompanying note 22 *supra*.

[119] United States v. Ryno, 130 F. Supp. 685 (S.D. Calif. 1955), *aff'd*, 232 F.2d 581 (9th Cir. 1956); Hermann v. United States, 220 F.2d 219 (4th Cir. 1955); United States v. Graham, 87 F. Supp. 237 (E.D. Mich. 1949).

[120] See text accompanying note 34 *supra*.

[121] This fact seems to have escaped some armed forces lawyers. Consider the following quotation: "Though there has been diversity of opinion and variety of result heretofore, the Hawkins decision has recommitted the federal courts to the common law rule excluding the wife as a witness against her husband except in cases of physical violence committed against her." Brief for Appellant, p. 19, United States v. Wise, 10 USCMA 539, 28 CMR 105 (1959).

The following possible interests of the innocent spouse appear to be involved in the listed offenses: (1) freedom from bodily injury (assault); (2) freedom from injury to property (forgery, failure to support wife or children); (3) freedom from mental suffering arising from violations of the marriage relationship (bigamy, polygamy, unlawful cohabitation); (4) freedom from injury to the marital relationship (abandonment, failure to support wife or children). The offenses listed to illustrate one interest may, of course, shade over into another; for example, bigamy could be classified as an offense injuring the marital relationship and also as one causing the other spouse mental suffering as a result of a violation of the marriage relationship. Our classification has not covered the listed offenses of using or transporting the wife for white slave or other immoral purposes. Where the wife is forced to engage in such conduct these offenses could reasonably be classified under (1) (3) or (4) above. Where the wife is a willing "victim" of such offenses the interest sought to be protected may well be primarily that of society generally. However, the interest of the wife in not having her morals corrupted would also be present. So we can list that as another interest. The interests listed under (3) and (4) above will present the most difficult problem of application when it is sought to classify non-listed offenses. For example, should violation of, or injury to, the marriage relationship include offenses such as murder of the other spouse's child? There is no doubt that such offenses impair the marriage relationship and cause mental suffering to the other spouse. But is such suffering caused to the other spouse, *qua* spouse; that is, does the other spouse *because of such position* suffer injury not only in excess of that inflicted upon the public generally, but in excess of that normally suffered by any other person, no matter what his relationship to the accused? It is conceded that a liberal interpretation of violations of the marriage relationship causing mental suffering to the other spouse, or injury to the marriage relationship, would destroy the privilege, since it can be argued that any offense by one spouse affects the other more adversely than the public generally and thus injures the marital relationship. However, it is felt that this approach to the question will eliminate much of the confusion which now exists, and, if applied reasonably, will still have a great deal of room for application of the privilege. For example, would not the offense of rape, incest, and carnal knowledge clearly be construed to come within the exception under this approach? Would this be a radical extension of the exception? On the other hand, would the inclusion of murder, or mis-treatment of the other

spouse's child be a reasonable extension? Does the special injury here arise from the marital or parental relationship?

Should it logically make any difference that the offense charged is attempt or assault with intent to commit an offense normally within the exception? For example, should not the spouse be permitted or required to testify if the other spouse's attempt to murder was foiled? Or should we limit the spouse's testimony to dying declarations? This may sound absurd, but consider the recent case of *Benn* [122] in which an Army Board of Review held that attempted carnal knowledge was not within the exception, although both sides conceded that if the completed act of carnal knowledge had been charged, the exception would have been applicable.

The method used by the United States Board of Military Appeals in determining whether offenses not specifically listed in the Manual are within the injured-person exception has not been consistent from case to case. In *United States* v. *Strand*,[123] Chief Judge Quinn, with Judges Latimer and Brosman concurring, held the sending by the husband to the wife of a false notification of his death to be in effect an abandonment, and, therefore, within the exception. The reasoning employed shows that an approach somewhat similar to that suggested above was followed. Chief Judge Quinn, in considering whether the offense was within those listed in the Manual, said: [124]

> Plainly, the enumeration is illustrative, not exclusive. It is also clear that injury to a testifying spouse is not confined to physical wrong but includes injury to personal rights. . . .
> The actual offense with which the accused is charged is misuse of the mails. However, the individual rights of the wife are nevertheless affected.

In *Leach*, Judge Latimer apparently followed the suggested approach in determining that adultery was an offense falling within the exception. Judge Latimer said:[125]

> Certainly, the ordinary meaning of the language used and the class of offenses mentioned point unerringly to the construction that "injury" embraces mental suffering arising from violations of the marriage relationship.

Judge Ferguson said:[126]

> Examples of numerous offenses against the wife are delineated in the Manual in connection with her competency as the injured party. One of the examples is unlawful cohabitation. It would be unrealistic to hold that unlawful cohabitation with another woman would be an offense against the wife, yet adultery would not.

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[122] CM 401537, *Benn*, 5 May 59.
[123] *Supra* note 116.
[124] United States v. Strand, *supra* note 116, at 304, 305, 20 CMR at 20, 21.
[125] United States v. Leach, *supra* note 106, at 397, 22 CMR at 187.
[126] *Id.* at 404, 22 CMR at 194.

Although he did not articulate his mental process in coming to the conclusion, apparently Judge Ferguson also utilized the suggested approach. Chief Judge Quinn, on the other hand, completely ignored the classification of offenses listed in the Manual for Courts-Martial, and searched for the "federal rule" on the treatment of adultery.

He found the "federal rule" in the old case of *Bassett* v. *United States*,[127] wherein the United States Supreme Court in interpreting a Utah statute held that it was merely declaratory of the common law and that since at common law only offenses of violence by one spouse against the other were within the injured-person exception, the offense of polyamy was not within the exception. The Court said:[128]

> Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife and, as the statute speaks of crimes against her, it is simply an affirmation of the old, familiar, and just common law rule.

Since both bigamy and polygamy are included in the offenses listed specifically in the Manual, it is difficult to see how Chief Judge Quinn can possibly rationalize not including adultery within the exception on the ground that it is an offense against the marital relationship and not against the wife. Compare his treatment of adultery in *Leach* with that of bigamy in *United States* v. *Wise*.[129] There he found the Manual rule regarding bigamy as "firmly grounded in precedent." The precedent cited was an 1887 statute, which provided that "in any prosecution for bigamy . . . under any statute of the United States" one spouse is a "competent witness" against the other.[130] Could there be any clearer Congressional intent to include offenses against the marital relationship within the exception?

Chief Judge Quinn's approach in *Leach* in seeking the federal rule to determine if an offense is within the exception is unsatisfactory not only because it disregards the rule of the Manual, but also because, as pointed out above, the federal decisions are presently unsettled as to the scope of the injured-person exception. In fairness to Chief Judge Quinn, however, it should be understood that his opinion in *Wise* concerning bigamy was not in disregard of the Manual rule which specifically lists bigamy but was in reply to a contention of appellant that paragraph 148*e* of the Manual for Courts-Martial, 1951, and military cases construing the injured-person exception of that paragraph to include offenses involving injury to the marital relationship, were not in accord with

[127] 137 U.S. 496 (1890).
[128] *Id.* at 506.
[129] 10 USCMA 539, 28 CMR 105 (1959).
[130] 24 Stat. 635 (1887).

traditional military law nor with general federal practice and should be overruled.[131] Therefore, Judge Ferguson's concurrence with Chief Judge Quinn's opinion in *Wise* cannot be taken as an indication that he is endorsing Chief Judge Quinn's practice of searching for the federal rule to determine if an offense should be considered within the exception.

Having determined in the particular case that the offense charged against the one spouse is one that normally falls within the operation of the injured-person exception, either because it is specifically listed in the Manual or because it may be subsumed thereunder in the manner suggested, we must then face the problem of whether for the exception to apply it must appear that the other spouse was in *fact* injured by such offense.

The common law is of little assistance here since at common law the exception was limited almost exclusively to offenses involving physical violence to the person of the innocent spouse, which of course did involve injury in fact. However, in such cases the gravity of the injury inflicted or intended or the amount of force used does not appear to have been a determining factor. The nature of the offense appears to have been the primary consideration.

It is submitted that here too it is the nature of the offense rather than the fact or extent of injury which was intended, and should be held, to control. In other words, if the offense is of the class which is considered normally to injure the innocent spouse within the limits which have been suggested in the above discussion of the type of offenses included within the exception, the exception should apply. To require a showing of actual injury to the innocent spouse is felt to be subject to the objections that it (1) would necessitate undue consumption of time; (2) would create substantial danger of confusing the issues; (3) would subvert the purpose and policy of the rule by encouraging the reluctant witness-spouse to commit perjury to escape being compelled to testify, and by forcing the willing witness-spouse to choose between perjury and condemnation of the accused-spouse, for, as pointed out by the United States Supreme Court in *Hawkins* v. *United States*,[132] voluntary con-

[131] "To summarize, the military law on point would appear to indicate that an injury to the marital relationship would be sufficient. Based upon the Manual provision and its supposed foundation in traditional military law and general federal precedent, the issue both as to the testimony of Evelyn B. Wise on the bigamy charge and her testimony on the forgery charge would seem to be foreclosed. Appellant respectfully submits, however, that decisions of this Honorable Court and the provisions of paragraph 148*e* of the Manual upon which these decisions are based are neither in accord with traditional military law nor with general federal practice and that they should be overruled." Brief for Appellant, *supra* note 121, at p. 6.

[132] 358 U.S. 74 (1958).

demnation is apt to be more damaging to the relationship than involuntary testimony; (4) would defeat the intent of the drafters of the Manual to provide for compellability of the injured spouse, since the witness-spouse could avoid being compelled to testify by claiming there was no injury, particularly in offenses involving violation of the marital relationship; (5) would defeat the intent of the drafters of the Manual to narrow the scope of the privilege by a broadening of the scope of the exception, and (6) would lead to ridiculous results in the application of the rule.

An idea of the results that would flow from the requirement of actual injury to the innocent spouse may be gained from the following hypothetical situation: The accused is married to an independently wealthy woman. In view of his low pay as a Captain and the prospect of many long years in such grade, he begins to cast an envious eye towards his wife's money. One day she receives through the mail as a gift from her wealthy parents a check for $10,000. Angered at this slight on her "independence," the wife throws the check on the desk and says that she doesn't want it and is going to return it to her parents. The accused forges his wife's name to the check and cashes it and secretly buys himself a Mercedes SL–500. Subsequently, having had a change of heart, the wife decides to keep the check and buy her husband a Mercedes SL–500. When she discovers the check is missing, thinking it was stolen by an enlisted man who worked as a handy-man around the house, she reports the loss to the military police. Subsequent investigation points to the husband and he is tried for forgery. At the court-martial, in an out of court hearing held to determine whether she shall be required to testify against her husband, the wife testifies that she is not angry at her husband, does not wish to testify against him, and was not injured by his act because she has plenty of money and was in fact going to keep the check solely to buy her husband a Mercedes SL–500. Is she an injured spouse within the Manual rule exception?

Among the illustrative offenses in the Manual is forgery by one spouse of the signature of the other to a writing when the writing would, if genuine, apparently operate to the prejudice of such other. Yet, the wife says she was not in fact injured.

In connection with our hypothetical case, consider the recent cases of *United States* v. *Wooldridge*[133] and *United States* v. *Wise*,[134] both involving the offense of forgery of the wife's name to a class Q allotment check.

[133] 10 USCMA 510, 28 CMR 76 (1959).
[134] 10 USCMA 539, 28 CMR 105 (1959).

In *Wooldridge*, the evidence was undisputed that the accused without authority of his wife signed his wife's name to four allotment checks naming her as payee, and disposed of the proceeds. Chief Judge Quinn, in an opinion concurred in by Judge Ferguson as to result only, held that there was "insufficient evidence to show that the accused's action in signing his wife's name to the allotment checks resulted in injury to her."[135] To support his holding, Chief Judge Quinn drew upon several sources of authority. He noticed the nature of the allotment check and that the wife is not, by statute, given a separate and exclusive property interest in its proceeds, and then made this curious statement:[136]

> If he has some sort of vested interest in the allotment, it may be that he has an implied authority to change the check to cash and use the proceeds for the "special purpose" for which the check is intended.

Aside from the evidentiary question, the first thought that comes to mind here is, why all this concern about permitting or compelling the wife to testify on a forgery charge if the husband had implied authority to convert the check to cash? If he had such authority, would there be a forgery? To support this so-called "implied authority," Chief Judge Quinn cited *United States* v. *Ryno*.[137] In that case, the accused was also charged with forgery of the wife's allotment check, and the trial judge permitted the wife of the accused to testify as to his lack of authority to sign her name to the check. To support his ruling in this regard, the trial judge relied upon the fact that the accused had abandoned his right to claim the privilege by living in an adulterous relationship, and the fact that the forgery of the wife's name was a crime against her and an interference with her right "to have the integrity of the Government check respected by omission therefrom of forgeries."[138] It is true that the trial judge in *United States* v. *Ryno* waxed eloquent as to the abandonment of the marital duties and said:[139]

> By abandonment of the marital duties and privileges, such a husband has also abandoned any right to assert a privilege to have his wife barred from giving testimony in a prosecution against him.

Careful reading of the trial judge's opinion discloses that he is attempting to use the *dictum* of the United States Supreme Court in the *Funk*[140] case as to examining the question of marital privileges "in the light of general authority and sound reason." To accomplish this he tried to bring the offense within the injured

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135 United States v. Wooldridge, *supra* note 133, at 515, 28 CMR at 81.
136 *Id.* at 513, 514, 28 CMR at 79, 80.
137 130 F. Supp. 685 (S.D. Calif. 1955), *aff'd*, 232 F.2d 581 (9th Cir. 1956).
138 *Id.* at 690.
139 *Id.* at 688.
140 *Supra* note 22.

person exception, and also to narrow the scope of the privilege generally by denying the privilege to the undeserving spouse who has abandoned his marital duties. It is noteworthy that he cited *Funk*, the dissenting opinion of Judge Clark in *United States* v. *Walker*,[141] and Rule 26 of the Federal Rules of Criminal Procedure to sustain his attack on the general rule of privilege.[142] Chief Judge Quinn attempted to reverse this process and argue that lack of evidence of abandonment of marital rights by the accused is sufficient to show that the innocent spouse was not *injured* by the accused's forgery. Apparently he failed to realize that the portion of *Ryno* concerning abandonment of marital duties is not based upon the injured-person exception but upon the erroneous belief that *Funk* had abolished the rule prohibiting adverse spousal testimony. The United States Court of Appeals for the Ninth Circuit disposed of the attempt of the trial judge in *Ryno* to broaden the scope of the injured-person exception and to narrow the scope of the general rule of marital privilege by finding it unnecessary to decide the question. It simply found sufficient evidence to corroborate the accused's confession in evidence *aliunde* the wife's testimony. Chief Judge Quinn dismissed the action of the court of appeals by saying:[143]

> For the purposes of this case, we can disregard the limiting effect of this holding on the ruling of the trial judge.

The Court of Appeals did answer the accused's contention that he had implied authority to endorse the check—"There is no merit in appellant's point that appellant had right by operation of law to endorse the check in question. To hold otherwise would, in many cases, frustrate an evident purpose of Congress to provide for dependents of servicemen and protect them against possible neglect and indifference."[144] But Chief Judge Quinn cites this case as authority for the proposition that the wife is not injured by the husband's forging her name to the allotment check!

Judge Ferguson concurred in the result reached by Chief Judge Quinn in *Wooldridge* on the basis that "an enlisted member of the military service has such a property interest in a Class Q allotment check, designed to pay a basic allowance for quarters, that the endorsement thereon of his wife's signature does not constitute an injury to her upon which the competency of her testimony

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141 *Supra* note 29, at 569.

142 See the discussion of the federal rules, *supra*.

143 United States v. Wooldridge, *supra* note 133, at 514, n. 5, 28 CMR at 80, n. 5. Although for purpose of argument Chief Judge Quinn might validly have ignored the court of appeals limiting opinion, how could he ignore the limiting effect of Hawkins v. United States?

144 Ryno v. United States, 232 F.2d 581, 584 (9th Cir. 1956).

over his objection may be predicated" [145] As to the effect of this on the issue of forgery or no forgery, he stated:[146]

> Whether that property interest is also sufficient to bar the accused's conviction of forgery of such an allotment check is not now before us.

Judge Latimer dissented on the ground that the court was not at liberty to ignore the rule set out in the Manual by the President pursuant to Article 36, UCMJ. He then proceeded to demonstrate that the wife of the accused was an "injured party" within the Manual exception by showing how she would be injured by being deprived of money for support. Our hypothetical situation above seems a little more real when we consider his concluding remark on this matter:[147]

> I know not what it takes to injure some people, but I venture to suggest that to all but the wealthy service wife, depriving them of the monthly sums due under the allotment program would not only be an injury, it would be a calamity.

In *United States* v. *Wise*,[148] the accused had been found guilty of bigamy and forgery of his wife's name on her allotment checks. The fact situation surrounding the forgery was quite similar to that in *Wooldridge, supra*, with the added factor that the accused's wife was shown (by the accused's testimony) to have a bad moral character, to have married him without having loved him, to have refused to live with him, and, upon his threatening to send her allotment checks back to Washington, to have told him she "didn't give a damn" about what he did with the checks. Chief Judge Quinn wrote the majority opinion, Judge Ferguson concurring, and Judge Latimer dissenting.

With respect to the bigamy, after outlining the history of the application of the privilege to the offense of bigamy in the federal courts, and concluding that its inclusion within the exception had been fixed as a rule of evidence within Rule 26, Chief Judge Quinn concluded that ". . . the Manual statement is firmly grounded in precedent. . . . We hold, therefore, that the accused's wife was a competent witness and could *voluntarily* testify against him on the bigamy charge"[149] (emphasis added).

As to the forgery offenses, Chief Judge Quinn adverted to *Wooldridge* and stated:[150]

> We noted several courts which considered the matter concluded the spouse

[145] United States v. Wooldridge, *supra* note 133, at 515, 28 CMR at 81.
[146] *Id.* at 516, 28 CMR at 82.
[147] *Id.* at 519, 28 CMR at 85.
[148] *Supra* note 134.
[149] United States v. Wise, *supra* note 134, at 542, 28 CMR at 108. Note the use of the word "voluntarily." Could Judge Ferguson's concurrence indicate that he is swinging over to Chief Judge Quinn's viewpoint on the issue of compellability?
[150] *Ibid.*

> whose signature was forged was not competent to testify against the other. We did not decide whether a different rule obtains in the military because of the Manual provision, or whether "in the light of reason and experience" such other rule should apply.

He then pointed out that both *Wooldridge* and *Wise* involve Government allotment checks, and that the husband has a substantial interest in its proceeds, and then said:[151]

> In this case, undisputed evidence shows the accused's wife refused to live with him, and told him he could do whatever he pleased about the allotment. The wife's own testimony shows she renounced all interest in the February check and its proceeds, and did not expect to receive any more checks. Therefore signing her name to the checks did not constitute an injury to her. Consequently, as to the forgery specifications, the defense objection to the competency of the wife to testify against the accused was erroneously overruled.

Is Chief Judge Quinn saying that the wife authorized the accused to endorse her checks? Judge Latimer thinks not, for in his dissent he pertinently points out that if this were the case the endorsement would not be forgery and the evidentiary question would never have been reached. Is the Chief Judge saying then that where the wife does not fulfill her marital obligations, she has no interest in the allotment check which will make her an injured person if that interest is unlawfully appropriated? If the checks were stolen by a stranger, would not her interest support a charge of larceny alleging her as the owner? Could Chief Judge Quinn be announcing a new rule that the injured spouse who has not fulfilled the marital obligations will not be given the "benefit" of the injured-person exception? It is indeed curious that he upholds a privilege intended to preserve the marital relationship by showing that the relationship is at an end? Judge Latimer dissented as to the wife's being injured by the forgery on the same basis that he dissented in *Wooldridge*. In addition he found the wife's bad character to be irrelevant to any issue in the case.

It is believed that the foregoing discussion of *Wooldridge* and *Wise* is sufficient support of the assertion that it is the nature of the offense charged rather than the fact or extent of actual injury that should control the application of the injured-person exception. In fact, Chief Judge Quinn has apparently applied that test in other cases. In *United States* v. *Strand*,[152] after finding that the husband's false notice of his death constituted an abandonment, he found the exception to be applicable without inquiring as to actual injury. Indeed, the holding that the notice could not be the subject of forgery is equivalent to a holding that there was no injury. In *United States* v. *Leach*[153] he did not mention actual injury in

[151] *Ibid.*
[152] *Supra* note 116.
[153] *Supra* note 106.

connection with the unlawful cohabitation offense which he inferentially found to be within the exception. And, most curious of all, in *United States* v. *Wise* where he looked for actual injury in connection with the forgery offense, he held bigamy to be within the exception with no mention of actual harm to the wife. Judge Ferguson likewise has never applied the specific injury test except in *Wooldridge* and *Wise*, and his concurring opinion in *Wooldridge* indicates that his position in those cases is really that a husband cannot be guilty of forgery in endorsing without authority his wife's name to her allotment check because of the peculiar nature of the check. Undoubtedly Chief Judge Quinn's opinions in those two cases are affected by his feeling that a husband should not be convicted of forgery under those circumstances. What is unfortunate is that the rules of evidence should be perverted to reach what is considered a just result in a particular case. Surely a less confusing and more forthright basis for reaching the desired result should be found.

Judge Latimer has never applied the actual injury test to determine the application of the exception, although in *Wooldridge* he did attempt to rebut the opinion of Chief Judge Quinn by showing that there was actual injury to the witness-spouse. Consequently, it is felt that outside the area of forgery of allotment checks, Judge Ferguson, at least, will join Judge Latimer in applying what might be termed the "general injury" or "nature of the offense" test, *i.e.*, not requiring actual injury but only that the offense be one generally falling within the class of offenses considered to be within the exception. This will eliminate some of the confusion surrounding the application of the exception when an offense has been determined to be of the general class falling within the exception. It will not, of course, affect the troublesome problem discussed above of deciding what offenses not specifically listed in the Manual shall be considered within the exception.

One further aspect of the injured-person exception deserves mention. It will be recalled that in discussing "who are spouses" under the adverse spouse rule it was stated that application of the rule depended upon the status of the parties at time of trial and that consequently the accused could gain the benefit of the rule by marriage subsequent to the offense. One important limitation of this application of the rule is that marriage of the victim of an offense which is normally within the injured-person exception will not defeat application of the exception, although apparently such was not the case at the common law.[154]

[154] Wyatt v. United States, 263 F.2d 304 (5th Cir. 1959); *contra*, United States v. Gwynne, 209 Fed. 993 (E.D. Pa. 1914).

F. *Effect and Significance of Court of Military Appeals Decisions*

There are at present only two areas in which the military law respecting inter-spousal testimony is seriously confused. These areas are the question of compellability as a witness of the injured spouse, and the application of the injured-person exception when the offense charged against the husband is forgery of the wife's allotment check. On the question of compellability the Court of Military Appeals has managed to come up with the proper answer, despite faulty interpretation of the Manual rule by two of the judges. If the result of this confusion of interpretation and application can be limited simply to the inability of the Government to prosecute successfully the soldier who forges his wife's allotment check, there is not too much reason to be disturbed. However, it is alarming that even this much confusion has resulted from so few cases, and what is worse, and what must be apparent from the foregoing discussion of the several judges' views, is the danger that the approach presently being used will only create more confusion and uncertainty. For example, the question of what offenses generally fall under the injured-person exception may well cause trouble in the future. Even so, if involved were only the military law respecting inter-spousal testimony, because of the relative infrequency of cases in that area, there would be little cause for concern, and one might be justified in dismissing this study as an interesting intellectual exercise. However, the present status of inter-spousal testimony is symptomatic of a larger, much more serious problem, involving the very foundation of rules of evidence in military law. The decisions of the United States Court of Military Appeals which have been discussed above demonstrate clearly that one member of the court has an erroneous belief as to the source and content of the rules of evidence generally to be applied in trials by courts-martial, and that another member joins in that erroneous belief, at least in part.

Several quotations from the opinions of Chief Judge Quinn will serve to point up the above assertion. Consider the following quotation from his analysis of the Manual inter-spousal testimony rules in *United States* v. *Leach*:[155]

> Manifestly, Congress intended that the court-martial practice correspond as nearly as possible with that "recognized in the trial of criminal cases in the United States District courts." Article 36, UCMJ, 50 USC 611. What then was the Federal procedural background against which the Manual was promulgated? Certainly it was not Rex v. Lapworth 1KB117 (1931) a British case. . . . One of the primary sources which this Court

[155] United States v. Leach, *supra* note 106, at 405, 22 CMR at 195.

has consistently recognized is the District of Columbia Code enacted by the United States Congress.

The following is from his opinion in *United States* v. *Wise* where he is discussing whether forgery of the wife's allotment check is within the injured-person exception:[156]

> A more difficult question is presented by the forgery offense. In United States v. Wooldridge, supra, we reviewed the same issue. We noted that several courts which considered the matter concluded the spouse whose signature was forged was not competent to testify against the other. We did not decide whether a different rule obtains in the Military because of the Manual provision, or whether "in the light of reason and experience" such other rule should apply.

Judge Ferguson concurred outright with Chief Judge Quinn in *Wise* and concurred in a separate opinion in *Leach* in which he also ignored the rule of the Manual, but relied upon Wigmore rather than "federal rule."

The above quotation from *United States* v. *Wise* becomes more meaningful if considered in juxtaposition with the following quotations from the appellant's brief of that case before the Court of Military Appeals:[157]

> He (Judge Quinn in *Leach*) did not find the Lapworth case to be in accord with the federal practice which Article 36 required to be followed in courts-martial.

and:[158]

> Appellant respectfully submits, however, that decisions of this Honorable Court and the provisions of paragraph 148e of the Manual upon which these decisions are based are neither in accord with traditional military law nor with general federal practice and that they should be overruled.

Although Chief Judge Quinn took the trouble to demonstrate that the Manual rule as to inclusion of bigamy in the injured-person exception was consonant with the federal practice, he found it unnecessary to take issue with the above interpretation of his views of Article 36, Uniform Code of Military Justice and paragraph 148*e*, Manual for Courts-Martial 1951. It is clear that though he may not go so far as to maintain that Article 36 *requires* the Manual rules of evidence to follow those in the United States District Courts, he does believe that if at all possible the Manual must be construed so as to agree therewith. The fallacy of his utilization of the District of Columbia Code to find the "federal rule" has already been adequately discussed. The nature and extent of any power of the Court of Military Appeals to supervise the administration of military justice generally is beyond the scope of this study. Clearly, any such power should not extend to overruling or even ignoring the rules of evidence prescribed by

156 United States v. Wise, *supra* note 134, at 542, 28 CMR at 108.
157 Brief for Appellant, *supra* note 121, at p. 4.
158 *Id.* at p. 6.

the President pursuant to Article 36, particularly where there cannot be any contention that such rules violate the Uniform Code.[159]

The legislative history of Article 36 shows beyond cavil that the President is not confined to prescribing rules of evidence generally recognized in the trial of criminal cases in the United States District Courts. Consider the following excerpts from the Congressional hearings on Article 36 of the Uniform Code when desirability of confining the President to the federal rules of evidence was discussed:[160]

> MR. ELSTON. One other question, Mr. Chairman, and that is about the rules of evidence, I am referring to subsection (a) . . . .
>
> . . . .
>
> Can you give us any case in which the rules of evidence generally recognized in the United States District Courts should not apply?
>
> MR. LARKIN. No, I cannot think of one so far as a criminal case is concerned, at this minute. But I have not tried to make a comparison throughout.
>
> MR. RIVERS. Under this section why could not the President say, I do not deem it practicable that the generally accepted rules of evidence apply under this. The President might be a layman.
>
> MR. ELSTON. He could say that.
>
> MR. RIVERS. Surely.
>
> . . . .
>
> MR. ELSTON. What we are complaining about is when you get outside of the code and he issues regulations saying what the rules of evidence shall be.
>
> . . . .
>
> MR. RIVERS. Why not cut out "so far as he deems practicable"?
>
> MR. ELSTON. Those are the words that I object to. I would suggest,

[159] See on the authority of the Court of Military Appeals to overrule the Manual for Courts-Martial generally, Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U. L. Rev. 861 (1959). With respect to the rules of evidence, Colonel Fratcher limited his discussion to the Manual provisions concerning confessions and depositions. How much stronger an argument could he have made if he had included areas such as inter-spousal testimony where no rationalization as to conflict with the Uniform Code is possible? The weakness of Colonel Fratcher's article is that he attacks the Court of Military Appeals for faulty interpretation of the UCMJ and the Manual, *i.e.*, he disagrees with the court's interpretation that in many respects the Manual conflicts with the Code. This might be termed an "abuse of discretion" by the court. However, with respect to the marital privilege there can be no contention of conflict with the UCMJ. Hence here the court's failure to follow the Manual might well be termed an "abuse of power." The power to judge might include the power to judge wrongly, but whence comes the power to add to the power to judge?

[160] *Hearings on H.R. 2498 Before a Subcommittee of the Committee on Armed Services, House of Representatives*, 81st Cong., 1st Sess. 1016–19 (1949).

Mr. Chairman, that we pass this until the next meeting . . . .
MR. LARKIN. Mr. Chairman, may I inquire whether the striking out of these words would require us to use rules before the United States District courts in criminal cases which may not be applicable and see if I can discover any tangible instance. If not, I am sure we would have no objection.

In the next meeting on Article 36, Mr. Larkin pointed out certain *differences between military rules and those followed in the federal* courts, and said:[161]

We would be faced, in other words, if that language is deleted, and the Manual by this article requires that the principles and laws of evidence generally recognized by [sic] adopted, with following rules that actually are not practicable.

. . . .

. . . If the services have in the past written a manual which has been approved and promulgated by the President which does generally follow Federal law, I think they can be trusted to do so in the future, in addition to the fact that the Manual will come to Congress.

Now Congress can object to any rule of evidence in the manual by saying; "We do not think that is the generally recognized Federal rule, and we want you to change it."

I think it is better to do it that way then to strike out the discretionary language and put these rules in a strait jacket.

Now there may be other important differences. As I say, we just have not had time to compare each and every Federal rule and try to understand what is the generally recognized one. That is one of the difficulties.

. . . .

MR. ELSTON. Mr. Chairman, I did not object to it before, I said I have an open mind on it, but I thought we ought to be advised. As to how far they might go under the language. It seems to me, in view of Mr. Larkin's explanation that the words *(so far as he deems practicable) could hardly* be deleted. . . .

MR. LARKIN. Yes.

MR. ELSTON. Congress will have an opportunity to pass on them later anyway.

MR. LARKIN. That is right.

. . . .

MR. LARKIN. Exactly so. What I was trying to point out was the difficulty of picking what is supposed to be the generally recognized rule. I am frank to say I just do not know what it is.

When the fact that Congress has never expressed dissatisfaction with the rules of evidence promulgated by the Manual for Courts-Martial, is considered with the above evidence that the President was not limited to the "federal rule" in the first instance, there would appear to be no excuse for even considering the federal decisions unless the Manual rules are ambiguous or do not cover

[161] *Id.* at 1062–64

the problem.[162] Judge Latimer seems to be the only member of the Court of Military Appeals who recognizes such fact. Consider his statements in *United States* v. *Leach*:[163]

> I believe the framers of the Manual recognized the drift away from the rigidity of the common law, and certainly if the Federal courts have the authority to proclaim a rule prescribing the qualifications of a witness, then Article 36 of the Uniform Code of Military Justice, 50 USC Sec. 611, is ample authority for the President to do likewise. Congress granted him the authority to prescribe mode of proof before courts-martial, and he has promulgated a rule of competency which is binding on this court.

and:[164]

> While I have presented some of the arguments to support the Manual rule, there may be good countervailing ones. I need not decide which of the two sides of the argument are the most persuasive nor which I prefer. All I need to do is to establish that the Manual rule is not so unreasonable to be nonenforceable. If it is not, I am not free to disregard it.

Moreover, the fact that appointed appellate defense counsel requested the Court of Military Appeals to overrule paragraph 148*e* of the Manual and cases based thereon as being "neither in accord with traditional military law nor with general federal practice,"[165] and appellate Government counsel argued the issue in an opposing brief without even mentioning Article 36, Uniform Code of Military Justice,[166] shows quite clearly that it is not only certain members of the Court of Military Appeals who fail to understand the source and content of the rules of evidence to be applied by courts-martial.

V. CONCLUSION

In the area of inter-spousal testimony before courts-martial, the United States Court of Military Appeals has erred in its interpretation and application of the Manual for Courts-Martial, 1951. The effect of this error upon the military law respecting such testimony is not of itself any great deterrent to the efficient administration of military justice. Its significance lies in the

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[162] Par. 137, MCM, 1951, provides in part: "So far as not otherwise prescribed in this manual, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts or, when not inconsistent with such rules, at common law will be applied by courts-martial."

[163] *Supra* note 106, at 394, 395, 22 CMR at 184, 185.

[164] *Id.* at 400, 22 CMR at 190.

[165] See note 131 *supra*.

[166] Government counsel also failed to point out that the Manual listed forgery of the other spouse's name as within the injured-person exception but tried, on the basis of United States v. Strand, to argue that the forgery constituted an abandonment of the wife, after practically conceding the case by this statement: "As to most instances of forgery, the courts appear generally to be in accord that this is not a crime against the person of the other spouse so as to permit the latter to testify against the forger upon a criminal prosecution for that offense. (See, 11 ALR 2d, *Supra*, sections 10 and 89)." Brief on Behalf of the Government, p. 5, United States v. Wise, 10 USCMA 539, 28 CMR 105 (1959).

fact that in refusing to follow the Manual rule the Court of Military Appeals has abused its powers. Already there is talk of appeal to higher judicial authority or to curbing legislation if the court does not exercise greater restraint in the exercise of its power to determine that regulations of the President are invalid.[167] The effect on the military justice system of attempted exercise of either alternative is not pleasant to contemplate. There is great danger that many of the improvements brought about by the enactment of the Uniform Code of Military Justice would be lost. Every effort must be made to find a solution within the framework of the existing system. The poor quality of some briefs presented to the Court of Military Appeals on cases in this area indicates that the services could do much to alleviate the problem by closer supervision and control, and continuing education, of appellate counsel.

[167] Fratcher, *supra* note 159, at 890.

COMMENTS

SOME THOUGHTS ON FEDERAL COURTS AND ARMY REGULATIONS.* Among military lawyers and other officials there has long been a distinction made between Army regulations which are in implementation of a particular statute and those which are not. It is agreed by these authorities that a regulation implementing a statute has the "force of law" and is binding on the Secretary of the Army himself as well as on others until changed in a general and prospective manner. However, where a regulation is considered not to implement any certain act of Congress, the traditional view has been that the Secretary is not bound, but in his discretion he may waive the regulation or make exceptions to it.[1] In 1954 the United States Supreme Court held in *Accardi* v. *Shaughnessy*[2] that regulations promulgated by the head of an executive department (the Attorney General) prescribing administrative procedure in a matter over which he had by law an absolute discretion were binding on the department head and that a violation of those regulations invalidated his final discretionary action in the case. The decision with its progeny gives reason to believe that the distinction as to types of Army Regulations may be no longer valid and that the nonbinding view of regulations not in implementation of statute has been undercut. Without attempting to exhaust authority on the point, this comment sets forth some thoughts on the probable impact of the *Accardi* line of decisions in this area of military law.

The rule, dating well back into the nineteenth century, that even the promulgating authority is bound by regulations made pursuant to statute, seems to be based on the theory that such regulations are in effect a part of the statute; they are thus, in legal contemplation, of substantially equal dignity. A regulation has been so classified only if it could be pinned to a particular act of Congress and if there could be found an express or implied delegation by Congress to the executive head to make rules to carry out the act's purposes. This often has raised close questions, and through the years numerous opinions have issued from 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 nor any other governmental agency.

[1] JAGA 1958/6456, 5 Sep. 1958; 15 Comp. Gen. 935 (1936); Op. JAGN 1953/169, 15 Aug. 1953, 3 Dig. Ops. Warr. & Fl. Off. § 27; Lieber, Remarks on The Army Regulations 6–9 (1898).

[2] 347 U.S. 360 (1954).

Judge Advocate General of the Army as to whether certain regulations were of this type. Thus the opinion was given that AR 635–120 concerning resignations of officers is not in implementation of statute and hence its provisions may be waived by the Secretary.[3] On the other hand, for example, "instructions" to officer selection boards were said to implement the statute authorizing the boards.[4] Army regulations not stemming from an identifiable statute depend for their efficacy ultimately on the constitutional authority of the President as commander in chief and as the executive. "These constitute the greater part of the Army regulations. They are not only modified at will by the President," wrote Lieber, "but exemptions from particular regulations are given in exceptional cases . . . ."[5] Winthrop was somewhat ambiguous: "While regulations, 'intended for the government and direction' of officers and agents under his authority, would not legally restrain, in the exercise of his executive powers, the President, or the head of the Department by whom the same were made, yet the President, as well as any other executive official, would be so far bound by general regulations framed by him that he could not justly except from their operation a particular case to which they applied."[6] Whatever meaning may be put on that statement, the consistent position in the Army has been that regulations not in implementation of statute may be waived by executive discretion in individual cases.

Apart from the recent *Accardi* line of cases, the courts in the past seem to have supported the military view, although the pertinent case law is small and unsatisfactory. Many opinions proclaim that Army regulations have the force of law,[7] and it has been said that they bind the Secretary and his subordinates.[8] But in most of these cases it appears that the regulations implemented a statute; in the others this point is not clear.

Litigation squarely challenging an official exception to or violation of a regulation not in implementation of a Congressional act has been scarce. Perhaps *Palmer* v. *United States* [9] is a case in point. There a former coast-guardsman sued for pay from the date of his discharge to the end of his enlistment period, his claim being

[3] JAGA 1960/4045, 2 May 1960.

[4] 10 U.S.C. § 3297(a) (1958); JAGA 1960/3544, 2 Feb. 1960.

[5] Lieber, *op. cit. supra* note 1, at 9.

[6] Winthrop, Military Law and Precedents 32 (2d ed. 1896, 1920 Reprint).

[7] Public Utilities Comm'n v. United States, 355 U.S. 534 (1958); Standard Oil Co. v. Johnson, 316 U.S. 481 (1942); United States v. Freeman, 44 U.S. (3 How.) 556 (1845); United States *ex rel.* Hirshberg v. Malanaphy, 163 F.2d 503 (2d Cir. 1948); Terry v. United States, 97 F. Supp. 808 (Ct. Cl. 1951). See also Arthur v. United States, 16 Ct. Cl. 422 (1880).

[8] See, *e.g.*, Cravens v. United States, 124 Ct. Cl. 415 (1952).

[9] 72 Ct. Cl. 401 (1931).

that the discharge was invalid because it was in violation of the applicable regulations. It was undisputed that they were not followed by the commanding officer in making the discharge, but the court said this was "entirely immaterial" and of no avail to the plaintiff. The court concluded:

> The regulations established by the Treasury Department pertain solely to administrative matters. As before stated, they were not made for the purpose of carrying out any provision of the law but solely in the interest of orderly and consistent procedure in the service. It appears to be well settled not only by court decisions but by an unbroken practice in the military service which dates back to a time long preceding the organization of our Government that the courts will not interfere with or review the actions of proper officers in the military forces done in some administrative proceeding and not in conflict with any statute.[10]

In earlier dictum, the Court of Claims said that regulations prescribed by the Secretary "intended for the direction and government of the officers of the Army and agents of the Department do not bind the Commander-in-Chief nor the head of the War Department."[11] And in connection with a regulation which prohibited the transfer of an infantry officer to a cavalry regiment except upon the mutual application of two officers who wished to exchange, it was remarked that "it is not clear to the court that the Army regulations referred to would be binding upon the President in a case where the interests of the service require such a transfer."[12] Somewhat contrary to these statements is an 1861 opinion of the Attorney General that certain regulations on the assignment of officers "may not have the authority of law, it is yet quite obvious that, until abolished, no sound principle would justify even the President in violating them."[13]

Whether or not the federal judiciary in the past would have followed the proposition that an Army regulation issued solely under executive authority does not control the executive, it seems quite doubtful today that the courts will do so where the official action contrary to regulation disadvantages an individual to the extent that he has standing to challenge the action. This conclusion comes not from any one decision directly in point but rather from a group of recent adjudications which reveal a trend. The problem is an aspect of the relation of the judiciary to the executive under our constitutional scheme, or, more specifically, of judicial review of military activity. Quite obviously, the Supreme Court has become more sensitive to complaints of persons allegedly aggrieved by the military.[14] This is reflected in the tone of the opinions

[10] *Id.* at 406.
[11] Smith v. United States, 24 Ct. Cl. 209, 215–16 (1889).
[12] Byrne v. United States, 24 Ct. Cl. 251, 255 (1889).
[13] 10 Ops. Att'y Gen. 11, 17 (1861).
[14] See Jaffe, The Right to Judicial Review II, 71 Harv. L. Rev. 769, 784 (1958).

denying military power to try civilians by court-martial[15] and reviewing and setting aside an undesirable discharge.[16] Such a judicial attitude is in turn simply a reflection of the times, namely, the presence in our midst for the indefinite future of a large armed service continually taking in and discharging thousands of citizens. This enormous military establishment is not at war and yet it is entirely different in personnel and mission from the peacetime standing army of old. Coupling with this the Supreme Court's heightened sensitivity in general to governmental impingement on the individual, we get the current judicial climate, the forecast of which is a greater scrutiny of military administrative action.

In three decisions within the last six years—*Accardi* v. *Shaughnessy*,[17] *Service* v. *Dulles*,[18] *Vitarelli* v. *Seaton*[19]—the Supreme Court has made it plain that, although a matter may be wholly within otherwise judicially uncontrollable executive discretion, when the executive prescribes regulations as to the manner in which he will exercise that discretion he is bound to follow his own regulations; action by him to the detriment of an individual in violation of such regulations is illegal, and relief can be had in court.

In *Accardi*[20] a statute provided that "the Attorney General may . . . suspend deportation" of an alien. Though not required to do so by the statute, the Attorney General by regulation set up a procedure before a board to be followed by an alien seeking suspension, and the board was instructed in the regulations to "exercise such discretion and power conferred upon the Attorney General by law . . ." The board's decision was made final except in those cases reviewed by the Attorney General. Accardi's complaint was that a fair consideration of his application by the board was prevented by the Attorney General's own public prejudgment. The court agreed, saying that "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner."[21] Accordingly, the discretionary refusal to suspend deportation was set aside. This decision was reached over the dissent of four justices who took the position that since the board members were appointed by

[15] Kinsella v. Singleton, 361 U.S. 234 (1960); McElroy v. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Reid v. Covert, 354 U.S. 1 (1957); Toth v. Quarles, 350 U.S. 11 (1955).

[16] Harmon v. Brucker, 355 U.S. 579 (1958).

[17] 347 U.S. 260 (1954).

[18] 354 U.S. 363 (1957).

[19] 359 U.S. 535 (1959).

[20] 347 U.S. 260 (1954).

[21] *Id.* at 267. This decision was criticized on the ground that an executive act of grace would not seem to be judicially reviewable. 22 Geo. Wash. L. Rev. 756 (1954). Obviously, the Supreme Court has rejected that unqualified view.

and responsible to the Attorney General and their every decision subject to his unlimited review and revision, the refusal to suspend could not be impeached by showing overinfluence on such subordinates whose opinion was only advisory anyway.

In *Service* v. *Dulles*[22] Congress had provided that "the Secretary of State may, in his absolute discretion, . . . terminate the employment of any officer or employee" in the State Department whenever "he shall deem such termination necessary or advisable in the interests of the United States." The Secretary had promulgated regulations governing procedure in discharges under this statute. These were interpreted by the Court to allow action by the Secretary himself only after action unfavorable to the employee by the Departmental Loyalty Security Board and Deputy Under Secretary. In Service's case this administrative action was favorable; thus the subsequent discharge directed by the Secretary violated the regulations. Seeing no distinction between this and *Accardi*, the court held the dismissal of Service invalid.

The government employee in *Vitarelli* v. *Seaton*[23] was not under the protection of the Civil Service Act or any other law, so he could have been summarily dismissed at any time without being given a reason. However, under a statute and executive order relating to discharge of employees on security grounds, the Secretary of the Interior had formulated procedural standards for such dismissals. Although the Secretary could have fired Vitarelli outright without stating a reason, having gratuitously decided to give national security as a reason, the Court said, he was bound to follow the rules he had laid down for discharges on that ground. Examining the record, the Court found that contrary to those regulations an inadequate statement of charges was served, irrelevant inquiry was pursued before the board, and cross-examination of an adverse witness was not allowed. The dismissal was thus held to be illegal.

Now what is the rationale of these decisions? The Court did not go deeply into this, but it is submitted that at bottom the decisions rest on notions wrapped up in the phrase "government under law," a feeling that where administrators make rules which they hold out as governing they cannot at will depart from them. Involved is a deep seated aversion to capriciousness and arbitrariness by officialdom. Even those who govern are under the law, albeit the law of their own making. This has been well put by Judge Prettyman in a case of the *Accardi* type:

> The basic problem is the "rule of law." We have law—either statute or rules legally adopted,—and we are supposed to be governed by them. If

[22] 354 U.S. 363 (1957).
[23] 359 U.S. 535 (1959).

> our governors merely do whatever strikes them as just and fair and reasonable at the moment, we have rule by men instead of rule by law. These are not cliches. Rule by law alone is the precise essential which differentiates our system from the totalitarian system.[24]

Furthermore, an inseparable feature of our constitutional rule of law is the institution of judicial review; it is for the courts to say what the law is and to pass ultimately on the legality of official action.[25] This function is performed, however, only when one injured challenges the exercise of governmental authority in the form of a controversy over which the United States courts have jurisdiction.

Because of the requirement, referred to as standing to sue, that to invoke the aid of a court a person must show some definable injury personal to himself, as distinguished from injury to a general mass of the public, a great deal of administrative action is unchallengeable as a practical matter.[26] This would seem to be true of most military administration, even where in violation of regulation, which has to do with the organization and operation of the Army but does not directly relate to personnel. Moreover, a departure from the provsions of an Army regulation often works to the benefit rather than the detriment of an individual, as for example a waiver of the time limitation on the award of the Army Commendation Ribbon[27] or of the provisions on resignations of officers.[28] Indeed the very reason the Secretary wants to make an exception to a regulation is frequently to benefit a member of the service, rather than penalize him. In such a case there is obviously no justiciable complaint.

A controversy cognizable by the courts is therefore most apt to arise when a serviceman is disadvantaged by official action under or in violation of Army regulations concerned with personnel—e.g., with promotion, reduction, discharge, retirement, pay and allowances. Here there should be no problem of standing. There may be problems, however, of exhaustation of administra-

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[24] McKenna v. Seaton, 259 F.2d 780, 786 (D.C. Cir. 1958) (dissenting opinion). See also Parker, Administrative Law 194 (1952).

[25] Marbury v. Madison, 1375 U.S. (1 Cranch) (1803); see generally, Jaffe, The Right to Judicial Review *I and II*, 71 Harv. L. Rev. 401, 769 (1958).

[26] See Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 140–41, 150–57 (1951) (majority and concurring opinions); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); 3 Davis, Administrative Law Treatise, § 22.01 *et seq.* (1958). On standing to litigate the type of discharge received, see Jones, Jurisdiction to Review the Character of Military Administrative Discharges, 57 Colum. L. Rev. 917, 921–29 (1957).

[27] Subpar. 3a, AR 762–5–1, 20 Jul. 1956; JAGA 1959/7976, 2 Dec. 1959.

[28] AR 635–120, 25 Nov. 1955; JAGA 1960/4045, 2 May 1960.

tive remedies[29] and of sovereign immunity,[30] but these can be surmounted by the plaintiff. The review provisions of the Administrative Procedure Act likewise must be considered, although it is generally thought that these do not change what is otherwise the law of judicial review.[31] As to the statutory jurisdiction of the court, there is little difficulty about an action in the Court of Claims for compensation;[32] if injunctive or declaratory relief is sought in the federal district court the plaintiff can state a federal claim but he must satisfy the jurisdictional amount also, and this may give him trouble.[33] Assuming, however, that these hurdles are crossed, we get to our central question: will a court grant relief to one injured by military administrative action taken in violation of a valid regulation? If, broadly speaking, the *Accardi* rationale applies to the military then there is the further and troublesome question of whether it is broad enough to judicially invalidate administrative action violative of a regulation which does not implement a statute. In other words, in light of *Accardi* and later cases, is the military lawyer's traditional distinction between regulations which do and do not implement statutes likely to be of any legal significance in the federal courts?

Accardi, Service, and *Vitarelli* arose in the Justice, State, and Interior Departments respectively. In *Accardi* the action concerned an outsider—an alien being deported; in the other two an internal matter was involved—the discharge of departmental employees. In all three the action taken by the executive head was action committed to his discretion. It seems unlikely that the Supreme Court would completely exempt the Defense Department or Department of the Army from similar judicial scrutiny. In fact, two lower federal courts have already applied *Accardi* and *Service* to the Army in reviewing and holding illegal dismissals of civilian employees. A court of appeals, in *Coleman* v. *Brucker*,[34]

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[29] See Note, 70 Harv. L. Rev. 533, 535–38 (1957); 3 Davis, Administrative Law Treatise § 20.01, *et seq.* (1958).

[30] See Developments in the Law: Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 850–64, 901, 912–21 (1957); Jones, *supra* note 26, at 952 *et seq.*

[31] 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958). See Atchison, T.&S.F. Ry. v. United States, 130 F. Supp. 76 (E.D. Mo.), *aff'd*, 350 U.S. 892 (1955); Jaffe, The Right to Judicial Review II, 71 Harv. L. Rev. 769, 790–91 (1958); 4 Davis, Administrative Law Treatise § 28.08 (1958). While some parts of the APA except the military, there appears to be no such exception in this section on judicial review. *Id.* at § 28.16 (pp. 81–82).

[32] 28 U.S.C. § 1491 (1958).

[33] 28 U.S.C. § 1331 (1958)—the general federal question jurisdictional provision—appears to be the only basis on which a district court's jurisdiction can rest. It requires that there be more than $10,000 in controversy. See Note, 9 Stan. L. Rev. 170, 176–80 (1956).

[34] 257 F.2d 661 (D.C. Cir. 1958).

a declaratory action, held that SR 620-220-1 was not complied with in that certain findings were not communicated to the employees being released; hence a summary judgment for defendant was reversed. In *Watson* v. *United States* [35] plaintiff was attacking the legality of her discharge as a probationary clerk-typist. The Court of Claims had first denied recovery, but the Supreme Court remanded for reconsideration under *Service*.[36] The court then found that Civil Service and War Department regulations required that a statement of reasons for unsatisfactory conduct be furnished the employee prior to dismissal, but that such statement was not in fact furnished plaintiff until six months later. Saying that if in *Service* a violation of regulations could support an injunction, a violation here could support a claim for compensation, the court allowed recovery from the date of the abortive dismissal. It is interesting that the pre-*Service* view of the court in its first opinion was that the Army regulations in question were merely housekeeping rules for the guidance of departmental officers and a violation of them gave no enforceable right to any person affected.[37]

In other recent litigation, not involving the military, courts have applied the *Accardi* doctrine in holding invalid the removal of an Internal Revenue agent,[38] in holding that an applicant for employment in the merchant marine was entitled to have his application processed in accordance with applicable Coast Guard regulations,[39] in an action for breach of contract with the government,[40] and in an action to enjoin enforcement of a fraud order of the Postmaster General.[41]

That this legal notion of an administrator's being bound by his own rules is not novel, even as applied to the Army, is evidenced by a Court of Claims decision [42] ante-dating *Accardi* in which an Army officer's widow recovered the difference between her husband's retired pay and active duty pay from the date of his purported retirement until his death. The court went on the ground that the retirement order was in conflict with the pertinent Army Regulation and hence of no effect. It is not consistent, the court said, with "any policy of government by law, that an administrator should have the reserved power to follow the law he has

[35] 162 F. Supp. 755 (Ct. Cl. 1958).
[36] 355 U.S. 14 (1957).
[37] Watson v. United States, 137 Ct. Cl. 557, 581 (1957).
[38] Whiting v. Campbell, 275 F.2d 905 (5th Cir. 1960).
[39] Graham v. Richmond, 272 F.2d 517 (D.C. Cir. 1959).
[40] School District 2 Fractional v. United States, 229 F.2d 681 (6th Cir. 1956).
[41] Jeffries v. Olesen, 121 F. Supp. 463 (S.D. Calif. 1954).
[42] Cravens v. United States, 124 Ct. Cl. 415 (1952).

made, or depart from it, at his discretion."[43] The Supreme Court itself had actually applied the principle years before in a deportation case.[44]

This whole group of decisions enforcing compliance with valid administrative regulations is quite similar analytically to those compelling adherence to statutory authority and executive orders. They are all rooted in the premise that no executive agent can act outside the law and that the judiciary has final power to declare the law. Thus in *Cole* v. *Young* [45] and *Peters* v. *Hobby* [46] the Supreme Court held the discharge of government employees invalid as the action in question was not within the scope of the governing statute and executive order, respectively. And in *Harmon* v. *Brucker* [47] the court ruled that on the record before it the Army was not empowered by the statute in question to grant an undesirable discharge. It is but a slight step more to say, particularly in light of *Accardi, Service,* and *Vitarelli,* that the Army cannot act with regard to its personnel contrary to whatever regulations are in effect at the time. The one difference between the case of a statute and that of a regulation is that often the administrator need not promulgate a regulation; he may act wholly at his own discretion, limited if at all perhaps only by what a court might find to be abusive or arbitrary. But with a statute the administrator has no such initial choice; Congress has already laid down the rules. Measured by the "rule of law" rationale, however, this is immaterial, for once a rule is laid down it governs all as long as it stands, assuming that the rule itself squares with any underlying statute and ultimately with the Constitution.

Clackum v. *United States*[48] shows that military administrative action can run afoul of the Constitution and accordingly be held invalid when brought before a court. In that case a WAF sued in the Court of Claims for pay from the date of her purported discharge "under conditions other than honorable," given pursuant to Air Force regulations on the discharge of homosexuals. Apparently these were complied with, and there was no want of statutory authority. The court seemed to rest its decision solely

[43] *Id.* at 429.

[44] Bridges v. Wixon, 326 U.S. 135 (1945).

[45] 351 U.S. 536 (1956).

[46] 349 U.S. 331 (1955).

[47] 355 U.S. 579 (1958). This case has been widely discussed in legal periodicals. See Comment, Mil. L. Rev., Apr. 1959 (DA Pam 27–100–4, 1 March 1959), p. 123; Note, 9 Stan. L. Rev. 170 (1956); 47 Geo. L. J. 185 (1958); 25 Geo. Wash. L. Rev. 616 (1957); 57 Mich. L. Rev. 130 (1958); 42 Minn. L. Rev. 135 (1957); 36 Tex. L. Rev. 222 (1957).

[48] No. 246–56, Ct. Cl., 20 Jan. 1960.

on the Constitution. The power of the military to discharge the WAF whenever it pleased and "for any reason or for no reason" was not doubted. "But it is unthinkable that it should have the raw power," the Court said, "without respect for even the most elementary notions of due process of law, to load her down with penalties. It is late in the day to argue that everything that the executives of the armed forces do in connection with the discharge of soldiers is beyond the reach of judicial scrutiny."[49] The constitutional defect was the lack of a fair hearing, specifically the failure of the Air Force to make known to the accused the evidence against her and to allow her to face her accusors. Thus we see here a nascent constitutional concept which has been much discussed with reference to civilians in the government[50] being applied full-blown to military affairs, just as the judicial check on statutory power of administrators was carried over to the armed services in *Harmon* v. *Brucker*.[51] It seems almost certain that the *Accardi* rule on regulations will likewise apply in the military realm.

Whether military action is attacked as violative of regulation or statute or Constitution, it is important to distinguish between judicial power to review and the scope of review. Power to review, that is, jurisdiction, is now clear. The remaining and more difficult problem is that of the extent of its exercise—how far should or will the judiciary go in overturning acts of military authorities? No doubt the Supreme Court will tread carefully here, as it has done in the past, recognizing that the armed forces are unique among governmental agencies and that they constitute a "specialized community." [52] Allowing the executive all necessary flexibility and yet keeping the military under law is the accommodation the Court must make.

Reverting to the case where under general executive power the Secretary of the Army has promulgated a regulation not in implementation of any statute, will a court invalidate action not in compliance with that regulation and clearly detrimental to a serviceman? For example, the regulations on reducing enlisted men provide that if reduction for inefficiency is contemplated of one in a permanent grade above E–4 "the matter will be referred to a board of officers for consideration" and that "the board will

[49] *Id.* at p. 4.

[50] See Greene v. McElroy, 360 U.S. 474 (1959); Rauh, Nonconfrontation in Security Cases: The Green Decision, 45 Va. L. Rev. 1175 (1959).

[51] 355 U.S. 579 (1958). *E.g.*, in Social Security Bd. v. Nierotko, 327 U.S. 358 (1946), the Court said, at 369: "Administrative determinations must have a basis in law and must be within the granted authority. Administration, when it interprets a statute so as to make it apply to particular circumstances, acts as a delegate to the legislative power. . . . An Agency may not finally decide the limits of its statutory power. That is a judicial function."

submit its findings and recommendations to the convening authority who will give them due consideration in taking final action in the case." [53] Recently The Judge Advocate General has given the opinion that a reduction without reference to a board in accordance with this provision is not void;[54] until a soldier so reduced is restored to his former grade by proper order he holds the grade to which reduced. Apparently the opinion would be otherwise if this regulation were in implementation of statute. Assume that an enlisted man so reduced brought suit for the difference in pay between his former grade and his reduced grade. The court would then be faced with the question whether under *Accardi* the administrative action was invalid. Reference to a board is likewise required by regulation when a person is to be eliminated from the service for unsuitability.[55] Although this appears not to be grounded on any particular statute,[56] would a discharge for unfitness without reference to a board be vulnerable to judicial attack? In these and numerous other matters which regulations direct to be referred to so-called nonstatutory boards there might be instances where the board, having the matter properly before it, fails to follow the procedure laid down by regulation. Among other things, AR 15–6 provides that "In every case in which the conduct, efficiency, fitness, or pecuniary liability of any person is to be investigated, such person will be afforded a hearing and the investigating officer . . . will, at a reasonable time in advance of the hearing, deliver . . . to the individual concerned a written communication stating . . . ." the specific matter under investiga-

[52] Orloff v. Willoughby, 345 U.S. 83, 94 (1953). "When the issue concerns the organization, administration, and discipline of forces under control of the military, judicial control is presumptively excluded. Orloff . . . exemplifies this, if somewhat ambiguously." Jaffe, The Right to Judicial Review, 71 Harv. L. Rev. 769, 782 (1958). "Some administrative action is not, never has been, and from a practical standpoint cannot be subject to judicial review even to the extent of an inquiry into arbitrariness or abuse of discretion. . . . [S]hould the courts inquire whether a commanding officer of a domestic military post has abused his discretion in denying a requested leave?" 4 Davis, Administrative Law Treatise § 28.16, pp. 82, 83 (1958).

[53] Subpar. 27e, AR 624–200, 19 May 1958.

[54] JAGA 1959/7089, 17 Nov. 1959; 60 JALS 45/18 (1960). See also JAGA 1960/4401, 22 Jul. 1960.

[55] Par. 8, AR 635–209, 8 Apr. 1959.

[56] The main statutes dealing with the separation of enlisted members of the Army are collected in 10 U.S.C. §§ 3811–3818 (1958). None concerns unsuitability. § 3811 provides: "(a) A discharge certificate shall be given to each lawfully inducted or enlisted member of the Army upon his discharge. "(b) No enlisted member of the Army may be discharged before his term of service expires, except—(1) As prescribed by the Secretary of the Army; . . . ." In a loose sense the regulations on elimination for unsuitability might be said to implement this statute, but in that sense all Army regulations might be considered in implementation of statute. See text accompanying note 59, *infra*.

tion, probable witnesses to be called, and other items.[57] The regulation goes on to detail the procedure to be followed during and after the hearing. The probem is to what extent noncompliance with any of these provisions will subject to judicial attack the final administrative action against a person.

It is submitted that the *Accardi* doctrine cannot be said to be inapplicable merely because these regulations do not implement particular statutes. It is probably true that in most actions where the plaintiff has been granted relief under that doctrine the regulations have been in implementation of statute, although in some there was in the background only a general statute of the broadest variety.[58] But the more important point is that the opinions put no reliance on this feature; the thrust of the opinions is that where an administrator prescribes regulations, even though he need not have done so, he himself is bound to adhere to them.

There is now a practical reason why the classification of regulations along the traditional line might be discarded—it is almost impossible to administer. In 1956 when Title 10 of the U.S. Code, dealing with the armed forces, was revised and enacted into positive law, several sections were included spelling out broad executive power to issue regulations. Section 3061 says: "The President may prescribe regulations for the government of the Army." And section 3012 which sets out the authority of the Secretary of the Army contains this provision: "(g) The Secretary may prescribe regulations to carry out his functions, powers, and duties under this title." A revisor's note appended to this section in the Code states that "Subsection (g) is inserted to make express the Secretary's general authority to issue regulations, which has been expressly reflected in many laws and left to inference in the remainder." In view of this situation, are not all Army regulations now "in implementation of statute"—the foregoing statutes, if no other? [59]

To say that the long-standing military distinction between types of regulations will be ignored by the courts is not to say that every violation of any regulation by the Army in dealing with its personnel will warrant judicial redress.[60] This is an area that

[57] Subpar. 6a, AR 15–6, 25 Jul. 1955.

[58] *E.g.*, in Service v. Dulles, 354 U.S. 363 (1957), the underlying statute was the so-called McCarran Rider, 60 Stat. 458, which in essence simply said that "the Secretary of State may, in his absolute discretion, . . . terminate the employment of any officer or employee of the Department of State . . . ."

[59] Apparently The Judge Advocate General thought the revision was unwise. Prior to the enactment of Title 10 he stated: ". . . it is considered desirable to retain in the codification all those provisions of law which expressly authorize the President to issue regulations relating to the government and administration of the Army." JAGA 1953/9108, 1 Dec. 1953.

[60] See note 52 *supra*. See also 5 U.S.C.A. § 1009(e).

will continue to be hammered out by the courts. Undoubtedly there is a zone in which a sort of *de minimis* concept can operate. It is probable that for a violation of regulation to invalidate action in the eyes of a court the regulation would have to be one which affords the individual some substantial safeguard or benefit. Emphasis has been put on this in all of the cases granting relief since *Accardi*. Those case have dealt with regulations providing for such things as a fair hearing, adequate notice of charges, and confrontation of witnesses. In this context has lately emerged the term "administrative due process." As a court recently said: "... where administrative regulations set a higher standard of procedural due process than that required by the Constitution or the statute, violation amounts to a denial of administratively-established due process of law."[61] While the phrase is perhaps useful in conveying the idea of fundamental fairness, it also tends to confuse technically, by using the words "due process," a constitutional basis of decision with the *Accardi* basis, the latter being nonconstitutional. However, the same attitude of procedural fair play does underlie both.[62] This appears to be the only guide available at present, vague as it is, as to which regulations the courts might compel the Army to abide by.

There is a suggestion that the Secretary of the Army might avoid *Accardi* and *Service* by writing into his regulations an express reservation of his discretion to waive them or make exceptions to them. The theory seems to be that a case of noncompliance could not then be in violation of the regulations because the regulations themselves say the Secretary need not always comply. The Judge Advocate General has indicated that the Secretary can do this,[63] but the Comptroller General appears to have taken the position that it is unauthorized at least as to those regulations implementing statutes.[64] This question, like the others, must in the long run be measured against the image of government under law, taking into account of course that we are dealing with immense executive power in military affairs. Nevertheless, as the Court of Claims has said, it is inconsistent with law that "an administrator should have the reserved power to follow the law he has made, or depart from it, at his discretion." [65] It would seem to make little difference whether he has written such "reserved power" into his regulation.

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[61] Jeffries v. Olesen, 121 F. Supp. 463, 476 (S.D. Calif. 1954).

[62] See 7 U. Fla. L. Rev. 328 (1954).

[63] See JAGA 1960/3544, 2 Feb. 1960; JAGA 1958/6456, 5 Sep. 1958.

[64] 37 Comp. Gen. 820, 821 (1958).

[65] Cravens v. United States, 124 Ct. Cl. 415, 429 (1952).

The trends in the federal courts which have been touched on here do not signal any wholesale take-over of the military establishment by the judiciary. Indeed a careful look at the decisions to date reveals the actual intrusion to have been slight. There is no intimation that the armed forces lack full power to punish, discharge, retire or reduce in grade any of their personnel at any time. The judicial supervision goes more to the *manner* of doing these things. The upshot is that while the Army can handle its members with wide freedom, in doing so it must follow a procedure that not only does not pass the outer limits of due process or of statutory authority but is also in keeping with its own regulations.

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MILITARY INSTALLATIONS: RECENT LEGAL DEVELOPMENTS.* At the present time, the Army has approximately 8,700,000 acres of military property and 4,800,000 acres of civil works land under its control.[1] This is a large area and legal problems arising from the acquisition, administration, and disposition of such lands are many and varied. In aggregate size, for instance, Army-controlled properties are slightly smaller than the State of West Virginia but larger than Maryland.

The quantity of land under control of the Department of the Army has increased appreciably since the beginning of World War II, in line with a general Governmental trend in that direction. In fact, Federal ownership of real property has become a significant factor in State and local government administration and development.[2] When viewed in the light of an increasing population, the political and fiscal importance of territory to these entities is obvious. Quite naturally this situation has resulted in certain pressures toward increased control and taxation of Federal lands and activities by States. This consideration underlies in some degree practically all of the more significant developments in the law which affect Army real property.

It is the purpose of this comment to review several legal developments in this field which are of probable interest and usefulness to judge advocates and legal personnel, with special emphasis on subjects related to Army installations as such.[3] This subject selection is not intended to be exhaustive, and matters of limited or technical interest have been omitted. While the command or post judge advocate is not likely to come in contact with the bulk of legal questions relating to Army real property,[4] certain types of questions do arise locally on a fairly frequent basis.

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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 nor any other governmental agency.

[1] DOD Report to Congress, as of 30 June 1959. (Land in Alaska and Hawaii is not included in these figures.)

[2] Nearly one-half of the land in our 11 western States is Federally-owned. GSA Inventory Report on Real Property Owned by the United States Throughout the World As of June 30, 1958, at 18.

[3] See generally AR 1–140, 9 Dec. 1957 (duties of TJAG); subpar. 7*b*, AR 405–80, 29 July 1955 (processing of deeds and similar instruments); subpar. 14*l*(2), AR 405–10, 10 June 1957, and subpar. 3*f*, AR 405–5, 5 Sep. 1950 (custody of title records); subpar. 6*a*(2)(*a*), AR 345–20, 9 Mar. 1956 (release of information from title records).

[4] For example, preparation of instruments disposing of Army real property interests (see subpar. 7*b*, AR 405–80, 29 July 1955).

On such occasions, complex questions of law and factual situations are likely to be involved. Some knowledge of background, trends, and developments in the field is invaluable in handling such cases.

I. JURISDICTION

One of the foremost subjects in this category is the matter of legislative jurisdiction. This is, in reality, a field of law in itself and the most complex questions arising in the Government real property field usually concern legislative jurisdiction, in one form or another. The subject is not new and has received the attention of judge advocates since the beginning of our Army. In simplest terms, the problem in a particular case is whether the Federal Government or the State has authority to legislate over a portion of Government property.[5]

At the outset it is proper to dispel one misconception which frequently arises concerning legislative jurisdiction. This is the assumption that each entire installation is under the same type of jurisdiction. Many requests are received by The Judge Advocate General for a list of posts under "exclusive jurisdiction" in a State or command.

As a matter of fact, generalization as to the jurisdictional status of a partciular military reservation, or group of them, is nearly always incorrect and useless. With rare exceptions, each Army installation is heterogenous in nature, consisting of a number of separate tracts acquired in different ways, from diffierent persons, and at different times. There may be several hundred such tracts in a single reservation. In resolving jurisdictional status, each tract must be considered a separate entity, apart from the remainder of the reservation. Due to constant changes in State laws, different acquisition dates, and other factors, it is the usual situation for a number of tracts to be under one type of Federal legislative jurisdiction and others under another type. The different jurisdictional types are occasionally mixed at random in a completely hodge-podge fashion.

Obviously this situation is undesirable and it tends to interfere

[5] The term "exclusive legislative jurisdiction" is applied to situations wherein the Federal Government has received all the legislative authority of the State, with no reservation made to the State except the right to serve process resulting from activities which occurred off the land. The term, "concurrent legislative jurisdiction" is applied to those instances wherein the State has the right to exercise, concurrently with the United States, all of the same authority. In addition, there are Army lands under exclusive State jurisdiction. The term, "proprietorial interest only" is sometimes applied to this situation, indicating that the Federal Government has ownership, but not jurisdiction. *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Part II*, at 10–11 (1957).

in a very real sense with the administration and application of criminal and civil laws. When a crime is committed on a military installation, it is often necessary to develop proof as to the particular acquisition tract on which the offense was committed so that jurisdiction can be determined as to it. Sometimes a survey is necessary, because roads, buildings, and other physical landmarks usually have no relation to tract lines. The proper tribunal to try the case may depend on determination of the acquisition tract.[6]

The desirability of having a uniform jurisdictional status throughout each installation has been recognized, but no satisfactory means to accomplish this objective is in existence. Several possibilities suggest themselves. An obvious course is for the Federal Government to seek uniform, exclusive jurisdiction over each entire installation. For this to be a practicable solution, however, the laws of the particular State must cede or consent to the acquisition of jurisdiction by the United States. States are becoming increasingly reluctant to part with legislative jurisdiction in this manner and a number of statutes have been changed to preclude the acquisition of exclusive jurisdiction by the Federal Government.[7] Another solution is for the Federal Government to retrocede its legislative jurisdiction to the States. This would require Federal enabling legislation and, possibly, some changes in State law.

Along this line, the Department of the Army several years ago took the position that, in general, exclusive Federal jurisdiction is not always desirable and it is often preferable to have State laws apply throughout military reservations to the maximum extent possible.[8] This policy may seem surprising at first, as it would appear to subject post activities to the possibility of State interference. While this reservation may be valid to a very limited extent,[9] it is usually a matter of some advantage for State legislative jurisdiction to extend throughout a particular reservation. This is due to the absence of any general body of civil laws applicable to areas under exclusive Federal legislative jurisdiction.

In this regard, while Congress has enacted fairly comprehensive criminal statutes covering such lands,[10] the same is not true as

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[6] There have been cases where both Federal and State courts declined jurisdiction. See United States v. Tully, 140 Fed. 899 (C.C. Mont. 1905).

[7] See Cal. Stats. 1959, p. 1914, Ch. 1485, eff. 6 July 1959; Ill. Rev. Stat., Vol. 2, p. 1430, approved 10 July 1953.

[8] AR 405–20, 24 Apr. 1957.

[9] *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Part I*, at 39–49 (1956).

[10] See generally Title 18, United States Code. Any void is filled by the so-called Assimilative Crimes Act, 18 U.S.C. § 13 (1958).

to civil laws.[11] In matters relating to notarial acts, contracts, wills, domestic relations, citizenship and voting, etc., this is a real disadvantage. The authority of guards to make arrests on lands under exclusive Federal jurisdiction provides frequent cause for concern. At an early date, the Supreme Court, by analogy to principles of international law, ruled that, on acquisition of Federal legislative jurisdiction, State rules are frozen and continue to apply as Federal law until changed by Congress.[12] This is merely an expedient and not a satisfactory solution. State laws are constantly changing and, as noted, legislative jurisdiction is obtained over different parcels at different times. This means that different civil laws may be applicable at different locations throughout the particular reservation. A conveyance by a married woman may be void, for instance, on one part of an installation unless acknowledged apart from her husband, but valid on another.[13] Brief research into the laws of any State containing large Federal reservations will uncover numerous possibilities for incongruities and conflicts of this nature.[14] Furthermore, the non-applicability to areas under exclusive Federal legislative jurisdiction of State statutes enacted subsequent to the transfer of jurisdiction to the Federal Government results in the civil law applicable in such areas gradually becoming obsolete.[15]

Several years ago an "Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States" was constituted on recommendation of the Attorney General as approved by the President. It submitted its report in 1957, recommending that general legislation be enacted to permit department heads to retrocede unnecessary jurisdiction to the several States.[16] The report contained a comprehensive study of the whole matter of Federal jurisdiction and concluded that, while a measure of Federal jurisdiction may be advisable in some instances, the advantages of State legislative jurisdiction are generally preponderant.[17]

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[11] Congress has authorized application of State laws in limited fields, such as taxation, 4 U.S.C. §§ 104, 105, 106, unemployment compensation, Int. Rev. Code of 1954, § 3305, and workmen's compensation, 49 Stat. 1938 (1936), 40 U.S.C. § 290 (1958).

[12] Chicago Railway Co. v. McGlinn, 114 U.S. 542 (1885).

[13] Consider any tract in California over which exclusive jurisdiction was acquired before 1895 (see Mathews v. Davis, 36 Pac. 358 (Cal. 1894); Cal. Civ. Code, § 1093).

[14] See Arlington Hotel Co. v. Fant, 278 U.S. 439 (1929); Bickel Co. v. Wright's Administrator, 202 S.W. 672 (Ky. 1918).

[15] Report, *op. cit. supra* note 5, at 159.

[16] Report, *op. cit. supra* note 9, at 70–79.

[17] *Id.* at 70.

During the 85th Congress a bill was approved by the Senate to implement the above recommendations.[18] It was later recalled from the House of Representatives under a motion for reconsideration and was not acted upon again before adjournment. To accomplish the same purpose, another bill was introduced during the 86th Congress.[19] This bill passed the Senate on 25 May 1960 and was referred to the Committee on Government Operations of the House of Representatives on 31 May 1960. No action was taken on the measure by the House of Representatives before its adjournment on 1 September 1960, but in all probability the bill will be reintroduced during the next session of Congress. It should be observed that the proposed legislation is not designed to be mandatory in scope, that is, it would not require relinquishment of Federal jurisdiction, but would merely provide discretionary authority for the head of each department to retrocede jurisdiction on a selective basis.

II. JURISDICTION RECORDS

Determination of the jurisdictional status of a particular parcel of Federal land is not always a simple matter. Moreover, there is a serious lack of reliable information on this subject at command and installation level. The difficulty which a commander or post legal officer experiences in ascertaining the nature of legislative jurisdiction over his installation illustrates the problem. Unless the judge advocate has a reliable jurisdictional summary in his files, derived from some prior incident or study, there is relatively little likelihood that the matter can be resolved locally. Assistance may sometimes be obtained from the United States Army district engineer for the area, but not on any assured basis.[20] There is no official publication to which the judge advocate can turn for reliable and current information.

This was not always the case. In the past The Judge Advocate General has published comprehensive summaries of title and jurisdiction information for military installations.[21] These publications were not kept current during World War II and most of the information contained in them is now obsolete, due to the many acquisitions and dispositions of Army property during the

[18] S. 1538, 85th Cong.

[19] S. 1617, 86th Cong.

[20] District engineers are required to furnish installation commanders with installation maps and basic data on installation boundaries. See par. 24, AR 405–10, 10 June 1957.

[21] U.S. War Dep't, Outline Description of Military Posts and Reservations in the United States and Alaska (1904); U.S. War Dep't, Military Reservations, National Cemeteries, and Military Parks (Rev. Ed. 1916). The latest compilation was a set of pamphlets arranged by States, published in 1940–42 and entitled "Military Reservations." A set of these pamphlets is present in most SJA offices.

past 20 years. In case of some of the older acquisitions the information is still useful, at least from a historical standpoint.

The Judge Advocate General is the custodian of records and documents pertaining to jurisdiction over Army lands.[22] At the present time, when it becomes necessary to determine jurisdiction over any particular tract of Army land, the matter must be resolved by research of these basic records. Many requests are received for statements of jurisdiction over particular installations or portions thereof. Often the research becomes complex and time-consuming, especially in case of larger reservations. The delay is so substantial in some instances that the requesting party cannot afford to wait for accurate data and is forced to rely on approximate information. These difficulties, of course, result from the unwieldy procedure of having to conduct original record search in each instance. The obvious value of a centralized set of jurisdictional summaries, maintained on a current and reliable basis, has long been recognized. This would eliminate a large amount of costly research and permit accurate and expeditious answers to inquiries concerning jurisdictional matters. In recognition of this problem, The Judge Advocate General has completed plans to compile, for larger military installations, current and reliable control records showing the type of jurisdiction over each tract. Work on the project will begin in the immediate future. It is too early to predict the success of this venture, in view of the large amount of work involved, but it is anticipated that the set of records which will be developed will provide an invaluable means to resolve jurisdictional questions on an accurate and timely basis.

III. ALASKA-HAWAII STATEHOOD

While perhaps of limited interest to judge advocates not stationed in Alaska or Hawaii, a problem of some potential importance has been created by the statutes admitting these two new States. As previously noted, the terms, "exclusive legislative jurisdiction" and "concurrent legislative jurisdiction," have fairly well-accepted meanings.[23] While substantial portions of both Statehood acts[24] relate to transfer of public lands and similar matters, raising various problems of interpretation, the provisions in both statutes pertaining to legislative jurisdiction over Federal properties are highly unusual and significant. Instead of following established concepts of legislative jurisdiction each statute reserves "exclu-

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[22] See note 8 *supra.*

[23] See note 5 *supra.*

[24] Alaska—Act of 7 July 1958, 72 Stat. 339; Hawaii—Act of 18 Mar. 1959, 73 Stat. 4.

sive legislative authority" [25] to the Federal Government over lands held for defense purposes prior to statehood, but qualifies this reservation by the following proviso:

> "[t]he reservation of authority in the United States * * * of the power of exclusive legislation * * * shall not operate * * * to prevent the said State [i.e. Alaska or Hawaii, as the case may be] from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority * * *."

The above provisions seem to do three inconsistent things at once, viz: (1) they reserve *exclusive* legislative jurisdiction to the Federal Government; (2) they grant *concurrent* jurisdiction to the State; and (3) they retain a sort of residual veto power over State legislative authority. Needless to say, exclusive Federal jurisdiction cannot exist if the State has concurrent authority in the field. Nor can it be truly said that the State has concurrent jurisdiction if the Federal Government can oust it by enacting legislation which is "inconsistent" with the State authority. The exact type of legislative authority which has been created over military reservations in Alaska and Hawaii is thus uncertain at this date. Substantial problems may be anticipated before the matter is clarified.

IV. MUNICIPAL ANNEXATION

Judge advocates occasionally become involved in problems connected with attempted annexation of military installations by municipalities and other State political subdivisions. With increasing frequency, requests are being received by Army authorities from local governments to consent or agree to annexation of military installations or portions thereof. In the normal case, the matter is initially brought to the attention of the commanding officer of the facility by local officials. Confusion is likely to develop at this stage, due to certain misconceptions on the subject and the absence of established policy guidnace. The misconceptions have to do primarily with the effect of annexation as such. It is usually assumed that annexation will produce undesirable consequences and affect the legislative jurisdiction of the annexed area.

In fact, this is seldom if ever the case. Annexation of Federal land is usually beneficial, rather than detrimental, to the area and its inhabitants, if any. Possible advantages are fire protection, purchase of water at lower rates, closer and better schools, municipal police protection of the perimeter of the installation, etc.

[25] The term is synonymous with "exclusive legislative jurisdiction." See note 5 *supra*.

In the normal case, the local agency desires the annexation to permit it to annex territory beyond the installation, as most annexation statutes do not permit annexation of territory that is not contiguous.

It is settled that annexation has no effect on Federal legislative jurisdiction.[26] Recently, the Supreme Court noted that annexation is merely an adjustment of political boundaries within the State and does not interfere with Federal activities or functions.[27] Under this view, State law could permit annexation of military reservations on a unilateral basis, that is without consent of military authorities.[28] Usually, however, the State annexation statute requires the consent of or a petition from them.

A post commander who is approached for annexation has little guidance or precedent to assist him in dealing with the situation, nor does his judge advocate. While he may be familiar with the foregoing principles and may actually desire the annexation for the benefit of his post, he is likely to encounter problems of a procedural nature in handling the matter. There is no reference to annexation in Army regulations or directives. A recent case pointed up the present difficulties in dealing with such a matter.[29] An adjacent municipality had requested the commanding officer of an installation to petition for annexation, with obvious benefits to the Federal area. The commanding officer, in turn, inquired as to his authority to participate in the annexation. At first it was decided that Federal enabling legislation would be necessary to permit Army authorities to comply. It was subsequently determined that the general administrative authority of the Secretary of the Army was sufficient to enable him to authorize the proposed action without further legislation.

It is probable that this case may result in the issuance of instructions to assist commanders in dealing with annexation situations. Some guidance of this sort would serve to remove some of the complexity from an otherwise simple matter.

V. RESERVE TRAINING FACILITIES

Several developments have taken place recently with respect to utilization and construction of Reserve training facilities. These result from the enactment in 1950 of legislation dealing especially with this subject.[30]

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[26] This principle has been followed for many years by The Judge Advocate General. See JAG 680.41, 18 January 1935.

[27] Howard v. Commissioners of Louisville, 344 U.S. 624 (1953).

[28] This was actually the situation in the Howard case, *supra* note 27.

[29] JAGR 1960/1837, 30 Mar. 1960.

[30] National Defense Facilities Act of 1950, now 10 U.S.C. § 2231 *et seq.* (1958).

One provision of the Act has reference to civic use of Government-owned facilities.[31] Army regulations have recently been issued [32] revising earlier instructions [33] on this subject. The earlier instructions covered only facilities constructed from general appropriations rather than pursuant to the special authority of the 1950 legislation. The new regulations cover civic use of all Reserve training facilities regardless of the construction authority. They restate the policy that civic uses are to be authorized on a one-time basis only. Continuous or recurring uses are not permissible. A specific prohibition is included against making Reserve training facilities available for local school purposes on a long-term basis.

The 1950 legislation covers not only Army Reserve training facilities but those constructed by the States for National Guard use as well. In general, such projects are financed partly through Federal funds contributed to the State. It is the usual practice for the underlying land to be furnished by the State, but this has not been entirely uniform. Each year a number of special statutes have been passed by Congress authorizing gratuitous transfer of Federal land to particular States for such purposes. Recently the Bureau of the Budget questioned the preferential effect of such transfers, in view of the fact that other States supplied their own real property. It had been the practice of the Department of the Army not to oppose such legislative proposals in making official reports to Congress. The Bureau of the Budget recommended that this practice be re-evaluated. As a result, the foregoing policy has been revised. Hereafter the Department of the Army will oppose legislation authorizing the transfer without consideration of land required by a State for a National Guard armory.[34]

A principal objective of the 1950 legislation was to provide for joint utilization of Reserve training facilities. In other words, it is intended that the Army Reserve, the National Guard, the Naval Reserve, etc., in a particular locality use a single training facility rather than separate ones.[35] There are substantial practical problems connected with full realization of this objective, primarily with respect to basic control over particular facilities. Although the statute is several years old, the first few of such projects involving joint construction for the Army Reserve and National Guard have been started only recently. Unusually complex agreements between Army authorities and State agencies are necessary in such cases to cover such things as design approval,

[31] 10 U.S.C. § 2235 (1958).
[32] AR 140–488, 29 Feb. 1960, issued pursuant to DOD Directive 1225.4, 17 May 1955.
[33] SR 140–480–10, 18 Mar. 1953.
[34] JAGR 1959/4244, 20 May 1959.
[35] See DOD Directive 1225.5, 30 Sep. 1959.

construction, control, ownership, utilization, maintenance, civic use, etc.[36]

VI. MINERAL EXPLORATION

Questions occasionally arise with respect to prospecting for minerals on military reservations. Recent legislation has been enacted which has a direct bearing on this subject.[37] Under the provisions of this legislation, the pre-acquisition status of the particular land, i.e. whether it was privately-owned or part of the public domain, is significant. In general, the following principles now apply to prospecting for and removal of minerals from military installations by private parties: (1) the Corps of Engineers may process licenses for mineral exploration on military lands acquired by purchase, gift, or condemnation from private owners;[38] (2) the Department of the Army has no authority to permit such exploration on military lands withdrawn from the public domain and reserved for military purposes, but the recent legislation referred to above gives the Department of Interior such authority;[39] (3) similarly, the Department of Interior, rather than the Department of the Army, can dispose of minerals on lands reserved from the public domain;[40] (4) there is no authority for the disposal of minerals on military lands acquired from private sources, except that the Department of the Army can permit erection of oil wells when necessary to preserve deposits.[41]

The principles stated above have reference only to mineral deposits in place. Treasure trove is subject to different considerations. There is no authority to permit the taking of treasure trove from Army lands by private individuals.[42] Statutory provisions exist, however, which appear to give the Secretary of the Treasury certain prerogatives in this respect.[43] Those provisions of the Federal Property and Administrative Services Act of 1949 [44] relating to disposition of abandoned private property on military reservations would appear applicable to abandoned treasure trove to the same extent as other personal property.[45]

VII. HUNTING AND FISHING

The last few years have seen substantial changes with respect

[36] JAGR 1959/7964, 8 Dec. 1959.
[37] Act of 28 February 1958, 72 Stat. 27.
[38] Subpar. 5*c*, AR 405–80, 29 July 1955.
[39] Act of 28 February 1958, *supra* note 37.
[40] *Ibid.* See also JAGR 1957/9612, 15 Jan. 1958.
[41] *Ibid.* See 40 Op. Atty. Gen. 41 and subpar. 5*e*, AR 405–80, 29 July 1955.
[42] JAGR 1956/1850, 15 Feb. 1956.
[43] Rev. Stat. § 3755 (1875), 40 U.S.C. § 310 (1958).
[44] 63 Stat. 378 (1949), as amended, 40 U.S.C. § 472 *et seq.* (1958).
[45] AR 643–40, 20 May 1955.

to hunting, fishing, and trapping on Army installations. At one time military reservations were regarded as separate enclaves in so far as wild game is concerned, largely removed from the reach of civilian sportsmen. This is no longer the situation, due to a revision of Army policy and related Federal legislation in the field.[46] This legislation has the further effect of requiring persons who hunt on military reservations to secure State licenses. This is true even as to military personnel, under certain circumstances, who hunt and fish on land under exclusive Federal jurisdiction.

Further legislation on this subject was introduced during the 86th Congress.[47] The bill in question would authorize installation commanders to charge fees for special hunting and fishing permits and use the proceeds for game management. It was passed by the House of Representatives on 21 March 1960, by the Senate on 1 September 1960, and was signed by the President on 15 September 1960.

VIII. WATER REGULATION

Water is a scarce commodity in our western States and the situation appears to become more critical as time passes. During the past several years there have been several attempts to secure passage of legislation which would apply State water conservation and regulatory laws upon military reservations and other Federal areas. The Department of Defense, in recognition of the seriousness of problems in this field, has generally favored limited concessions.[48] Recent proposals, which would tend to subordinate military requirements to the provisions of State law and civilian needs, have been opposed.[49] It is probable that legislation will be enacted in the future which will, in some degree, affect the use and management of water resources on some of our Army installations.

TOXEY H. SEWELL*

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[46] AR 210–221, 1 Oct. 1958; Act of 28 Feb. 1958, 72 Stat. 27.

[47] H.R. 2565, 86th Cong., 2d Sess., P.L. 86–797, 74 Stat. 1052 (1960).

[48] DOD Rept. on H.R. 4567, 86th Cong.; DOD Rept. on S. 851, 86th Cong.

[49] Report on draft bill at 37–39, Committee Print 19, Interior and Insular Affairs Committee, House of Representatives, 86th Cong., 1 Mar. 1960.

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By Order of *Wilber M. Brucker*, Secretary of the Army:

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Chief of Staff.

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