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MILITARY LAW REVIEW

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HEADQUARTERS, DEPARTMENT OF THE ARMY

APRIL 1962

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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.

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DISCHARGE AND DISMISSAL AS PUNISHMENT IN THE ARMED FORCES *

BY CAPTAIN RICHARD J. BEDNAR**

I. INTRODUCTION

This article is concerned with two rather narrow facets of a rather broad subject. It involves an examination of one form of punishment (viz, punitive separation from the armed forces) first as a concept, and particularly from the view of the imprints made by its employment, and second from the standpoint of the effect certain United States Court of Military Appeals decisions have had and may be expected to have on the use and usefulness of punitive separation as punishment. Accordingly, there is a blending of a conceptual approach with practical considerations. Essentially, this work, with respect to the subject concerned, involves an analysis of where we are, where we seem to be going and whether we ought to continue in that direction or take another tack. Is punitive separation as a form of punishment in the military sound conceptually? Is it an effective form of punishment? These are the two prime questions to be answered.

To further set the scene, it may be well to mention briefly some of the matters with which this article is not concerned. Except insofar as is related to the problem of what various forms a punitive separation may take, it is not within the scope of this work to consider "administrative" separations from service. Within this category are discharges resulting from action other than judicial, *e.g.*, discharges for alcoholism, inaptitude, shirking of duties and sexual perversion. While it cannot be denied that there are penal aspects attached to certain administrative discharges, they are obviously beyond the scope here because they result from action of a non-criminal forum.

Treatment of the subject in this article does not extend to a consideration of the several means by which a punitive discharge may be changed in form, mitigated or expunged *after* execution. Hence,

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* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Ninth Career Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the view of The Judge Advocate General's School or any other governmental agency.

** JAGC, U.S. Army; Military Affairs Division, Office of the Judge Advocate General of the Army, Washington, D.C.; LL.B., 1954, Creighton University School of Law; Member of the Nebraska Bar.

there is no discussion of what authority the civilian courts may have in this area or what relief may be granted petitioner by the Army Discharge Review Board or Army Board for Correction of Military Records (or similar boards of the sister services). Similarly, it is beyond the scope here to consider the authority of the service secretaries to substitute an administrative form of discharge for an executed punitive discharge or dismissal pursuant to Article 74(b), Uniform Code of Military Justice.

Finally, this article is not concerned with parole and clemency as such. While it is generally difficult to exclude consideration of problems of parole, clemency, and rehabilitation of criminals from the general subject of punishments, the narrow aspects of the one kind of punishment with which this work is concerned permit such exclusion without affecting completeness.

II. WHAT IS THE NATURE OF THIS PUNISHMENT

A. *A BROAD FOCUS ON THE AREA*

"To be dishonorably discharged from the service." It is well known to the practitioner and critic of military law that these words,[1] when uttered by the president of a general court-martial in pronouncing sentence on an accused, set in motion a series of mandatory reviews of that sentence within our system of military justice and, depending on the outcome of such reviews, may signify loss of important benefits and rights for the offender to whom they are spoken.[2] It is also common knowledge that such sentence, when approved and executed, puts an end to the military service of the individual concerned. But these most obvious consequences of a punitive discharge are hardly complete explanations of the fundamental nature of such punishment.

During the hearings on a bill which was later to form the basis of the Uniform Code of Military Justice,[3] the widespread concern over the seriousness of the punitive discharge was quite evident.[4] Today, it is generally agreed that in most cases the punitive discharge is the most severe of several usual sentence elements. What is this thing? How does it punish? Why is it considered a grave

[1] As will be demonstrated later, the consequences of two other recognized forms of punitive separation, *i.e.*, "dismissal" and "bad-conduct discharge" are closely parallel with those of the dishonorable discharge.

[2] For a summary of these benefits and rights and the effects thereon by various discharges, see the Appendix. For another recent compilation of statutes treating incidents of punitive discharge from the service, see Brown, *The Effects of the Punitive Discharge*, The JAG Journal, January–February, 1961, at p. 13.

[3] Act of 5 May 1950, 64 Stat. 108, codified into positive law, 10 U.S.C. §§ 801–940 (1958) (hereinafter referred to as the Code or UCMJ and cited as UCMJ, art. ____).

[4] See, *e.g.*, *Hearings on H.R. 2498 Before the House Armed Services Committee*, 81st Cong., 1st Sess. 631, 691, 697, 839 (1949).

punishment? These are some of the questions which may be answered by examining the fundamental nature of discharge and dismissal as punishment.

To the military practitioner, the red-bound book [5] which invariably is found on or very near his desk is often the best place to begin inquiry into a particular problem in military justice. In this instance, the Manual for Courts-Martial is not too much help. From it we can learn that a dishonorable discharge [6] "should be reserved for those who should be separated under conditions of dishonor, after having been convicted of . . . felonies, or of offenses of a military nature requiring severe punishment."[7] We can also discover from a reading of the Manual that a bad-conduct discharge [8] is "less severe" than a dishonorable discharge and "is designed as a punishment for bad conduct rather than a punishment for serious offenses."[9] While the Manual does not define a "dismissal,"[10] the term is often compared to the other forms of punitive separation authorized for enlisted men, and, by inference, is equated to a dishonorable discharge.[11] Accordingly, in order to gain a fuller understanding of this punishment, it is necessary to look into the basis and authority for punitive discharge and dismissal, analyze certain cases and opinions of writers in the field, examine and compare its several forms, and scrutinize the consequences of such punishment.

B. *FEDERAL CONSTITUTION AND STATUTES*

Most studies in the science of military law may logically trace a theme from the Constitution of the United States. A consideration of punitive separations from the Armed Forces is no exception to

[5] U.S. Dep't of Defense, Manual for Courts-Martial, United States, 1951 (hereinafter referred to in this article as the Manual or MCM, 1951, and cited as MCM, 1951, para. ____).

[6] Enlisted men may be punished by a dishonorable discharge only for certain offenses in violation of the Code. MCM, 1951, para. 127*c*.

[7] MCM, 1951, para. 76*a*(6).

[8] The imposition of a bad-conduct discharge is restricted to enlisted men; its use to effect the punitive separation of officers or warrant officers from the service is without statutory sanction and neither authorized by regulations nor permitted by custom of the service. CM 396001, Morlan, 24 CMR 390 (1957).

[9] MCM, 1951, para. 76*a*(7).

[10] An officer may be punished by dismissal and a warrant officer may be punished by dishonorable discharge for an offense in violation of the Code. MCM, 1951, para. 126*d*; United States v. Bell, 8 USCMA 193, 24 CMR 3 (1957). Dismissal is equivalent to dishonorable discharge. CM 368421, Ballinger, 13 CMR 465 (1953). As an "inchoate officer," dismissal is the only appropriate means of punitively separating a cadet from the service. United States v. Ellman, 9 USCMA 549, 26 CMR 329 (1958). Unlike a dishonorable or bad-conduct discharge, no certificate is issued in the dismissal of an officer.

[11] Insofar as incidents of discharge are concerned, a dismissal is equivalent to a dishonorable discharge (see the Appendix).

this general rule. As will be established later, the history of our military law is much older than the Constitution; however, the basic source of authority for courts-martial to impose punishment is found in that document.[12] Pursuant to its authority under the Constitution, Congress has, from time to time, enacted legislation limiting the kind and amount of and prescribing the procedure for imposition of court-martial punishment.

On May 5, 1950, Congress enacted the current comprehensive statute [13] covering the administration of military justice, of which punishment is but a small part. Generally speaking, the punishments which may be inflicted under the Code are not expressed in certain terms;[14] however, forbidden punishments are specifically listed.[15] Most "punitive" articles [16] of the Code, after defining the particular offense, declare that the punishment shall be "as a court-martial may direct." However, Article 56 provides that whatever punishment a court-martial shall impose for an offense "shall not exceed such limits as the President may prescribe for that offense." Pursuant to this authority, the President has established a Table of Maximum Punishments,[17] which attempts to list the ceiling price for every transgression cognizable as a crime by courts-martial. It is in this table that we find authorized, for certain offenses, punitive separation from the service. Not long after its enactment, the United States Court of Military Appeals held that the power given by the Code to the Chief Executive is not an illegal delegation by Congress of legislative authority.[18]

Not all types of courts-martial have jurisdiction to impose punitive discharges and dismissals, notwithstanding that the maximum punishment authorized for the offense involved may include a punitive separation. Subject to the Table of Maximum Punishments, a general court-martial has jurisdiction to adjudge any punishment not forbidden by the Code.[19] While a special court-martial may not

[12] U.S. Const. art. I, § 1, which grants all legislative power to Congress; art. I, § 8, cl. 14, which gives Congress power to make rules for the government and regulation of the land and naval forces; art. II, § 2, cl. 1, which designates the President as Commander-in-Chief of the Army and Navy.

[13] Uniform Code Military Justice [UCMJ]. See note 3 *supra*.

[14] See, *e.g.*, UCMJ, art. 18, which provides that general courts-martial may ". . . adjudge any punishment not forbidden by th[e] Code." In this regard, it is to be noted that, in drafting the current Code, the punishments which may be adjudged have been changed from those "authorized by law or customs of the service" to those "not forbidden by this code" because the law and customs of each of the services differ. U.S. Dep't of Defense, Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, p. 173.

[15] UCMJ, art. 55, "Cruel and unusual punishments prohibited."

[16] UCMJ, arts. 77–134.

[17] MCM, 1951, para. 127*c*, § A.

[18] United States v. Prescott, 2 USCMA 122, 124, 6 CMR 122, 124 (1952).

[19] UCMJ, art. 18.

adjudge a dishonorable discharge or dismissal, a bad-conduct discharge may be imposed, provided a complete record of proceedings and testimony before the court is made.[20] Finally, summary courts-martial may not adjudge any type of punitive separation.[21] The differences in these punishments are discussed later.

C. *A QUICK LOOK AT HISTORY*

The basis and authority for the imposition of punitive discharges by courts-martial have roots extending very deep into history. No doubt the original "punishment" of a punitive discharge was the dishonor, shame and infamy which attached to individuals who were so discharged. A kind of dishonorable discharge was the ancient and well-known punishment of banishment. In order to purge society of one who threatened the security of the group, exile was ordered. The custom of ostracism as punishment was well known even among the ancient Greeks.[22] Blackstone referred to banishments as resulting in a "civil death."[23]

Special tribunals for the trial of military offenders have existed at least from the days of the Roman legions,[24] and it was an ancient rule [25] that only a court-martial could impose a punitive discharge:

> The Captain has power in his Company to make two Serjeants, three Corporals, and five Landpassades; but he cannot by his own authority casheer them, whatever their fault may be: that depends on a Council of War.[26]

In the United States, courts-martial have been punishing crimes committed by military offenders since the adoption of the first American Articles of War by the Continental Congress in 1775,[27] which, in turn, were based primarily on the then existing British Military Code.[28]

Punitive separation was recognized as a form of punishment for officers as early as the American Articles of War of 1775. Pursuant to the American Articles enacted on May 31, 1786 (Article 13), non-commissioned officers and enlisted men could be dishonorably discharged by the sentence of a general court-martial.[29]

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[20] UCMJ, art. 19.

[21] UCMJ, art. 20.

[22] Barnes & Teeters, New Horizons in Criminology 339 (2d ed. 1955).

[23] 1 Blackstone, Commentaries on the Laws of England 32 (4th ed. Cooley 1899).

[24] Winthrop, Military Law and Precedents 45 (2d ed. 1920).

[25] For a modern-day exception to this ancient rule, see Pasley, *Sentence First—Verdict Afterwards*, 41 Cornell L.Q. 545 (1956).

[26] DeGaya, The Art of War 17-32 (English translation from Fr. 1678), quoted in Mummey, *A Brief History of Summary Punishment in the Armies of the World*, 15 Fed. B.J. 286, 298 (1955).

[27] Winthrop, Military Law and Precedents 47 (2d ed. 1920).

[28] *Id.* at 21.

[29] *Id.* at 973.

And even in those early days, a soldier dishonorably disccharged lost certain military benefits such as travel pay and retained pay.[30]

It should be noted that originally there were two forms of punitive separation for officers—dismissal and cashiering. The first form apparently was a bare dishonorable termination of service, while the second, in addition to a dishonorable separation from the service, involved a disability to hold public office. Eventually all distinctions between these two forms of punishment ceased to exist, and by 1890 cashiering meant the same as dismissal.[31] In the early days of our nation there was no question whether the character of the punitive separation was appropriately publicized. For example, Article 4 of the Additional Articles of War of 1775 provided:

> In all cases where a commissioned officer is cashiered for cowardice or fraud, it be added in the punishment that the crime, name, place of abode, and punishment of the delinquent be published in the newspapers, in and about the camp, and of that colony from which the offender came, or usually resides; after which it shall be deemed scandalous in any officer to associate with him.

An English writer of the seventeenth century, one Gittins, summed it up well when he said: "A soldier should fear only God and Dishonour."[32]

Although it has long been known in the Navy (since 1885), the bad-conduct discharge is a comparatively new form of punishment in the Army. It was first established as a proper means of punitive elimination from this service in 1948, by amendments to the then existing Articles of War.[33] Bad-conduct discharges are now authorized punishment for enlisted men in all services under the present Code.[34]

D. *THE FORMS OF PUNITIVE SEPARATION*

The regulations of the Army list five types of discharge which may be given. They are: dishonorable, bad-conduct, undesirable, general and honorable. No discharge certificate is issued when an officer is dismissed from service.[35] As will be demonstrated later, the first two types of discharge are given under sentence of a court-martial; the last three listed are given as the result of *administrative action*. Accordingly, the concern here is with the first two

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[30] Winthrop, A Digest of Opinions of the Judge Advocates General of the Army 301 (1895).

[31] *Id.* at 214.

[32] Earle, Curious Punishments of Bygone Days 119 (1896).

[33] Selective Service Act of 1948, ch. 625, § 210, 62 Stat. 630 (repealed by Act of 5 May 1950, 64 Stat. 147).

[34] See note 8 *supra*.

[35] Army Regs. No. 635–5, para. 4*d* (Mar. 2, 1960).

types and with dismissal of officers, which also results from sentence of court-martial. In general, it may be said that general and honorable discharges are given under honorable conditions while the others are given under dishonorable or other-than-honorable conditions.[36] The effects of these characterizations are discussed later.

1. *Dismissal:* As was indicated above,[37] only a general court-martial has jurisdiction to impose a dismissal. Dismissal is an appropriate sentence [38] for an officer only, and is equivalent to a dishonorable discharge.[39] Stated simply, a dismissal is a dishonorable expulsion of an officer from the service.[40] A noted author in the field has phrased it this way:

> . . . Its effect is to completely separate the officer so sentenced from the military service, and to restore him to the status of a citizen. He can re-enter the service only in pursuance of an appointment by the President with the consent of the Senate.[41]

While this type of separation is labeled as "dishonorable," it seems that somehow we have lost an appreciation of the ignominious character once attached to dismissal. With the passing of time, the use of formal ceremony in connection with a dismissal, such as the breaking of an officer's sword, or the cutting off of his shoulder straps or other insignia, or the drumming out of the camp, has been eliminated, and the original lasting sting inherent in this punishment, *i.e.*, degradation, loss of reputation and disgrace, has ceased.[42]

Today, it seems that dismissal is looked at, not so much from the aspect of the inherent ignominy involved, as from the material consequences of the event. With certain minor exceptions,[43] a dismissal operates to bar to the recipient all rights under laws administered by the Veteran's Administration,[44] as well as many benefits administered by the armed services and other federal and

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[36] See Appendix.

[37] See note 19 *supra.*

[38] An officer may be punished by dismissal for *any* offense in violation of the Code. MCM, 1951, para. 126*d;* United States v. Goodwin, 5 USCMA 647, 18 CMR 271 (1955).

[39] JAGA 1950/4075 (Aug. 9, 1950). See also note 10 *supra.*

[40] See United States v. Bell, 8 USCMA 193, 24 CMR 3 (1957).

[41] Davis, A Treatise on the Military Law of the United States 166 (2d ed. rev. 1904).

[42] For a description of some of the public humilities once facing an officer sentenced to dismissal, see Winthrop, Military Law and Precedents 408 (2d ed. 1920).

[43] *E.g.*, National Service Life Insurance.

[44] 38 U.S.C. § 3103 (1958). For a detailed treatment of the effect of punitive discharges on eligibility for veteran's benefits, see Lerner, *Effect of Character of Discharge and Length of Service on Eligibility to Veterans' Benefits*, Mil. L. Rev., July 1961, p. 121.

state agencies.[45] One can only speculate as to the measure of stigma attached to a dismissal by prospective employers in private industry and as to the extent of material "punishment" incurred by the dismissed job-seeker.

A problem in this area is that there is nothing in the military sentence structure for officers which is equivalent to the bad-conduct discharge authorized for enlisted personnel. Hence, for an officer who has been convicted of an offense involving mere bad-conduct, a court-martial must either impose no discharge or the dishonorable-type discharge called dismissal. Or, stating the problem another way, an officer's conduct is either honorable or dishonorable—there is no middle ground.[46]

2. *Dishonorable Discharge:* The rule is clear that only a general court-martial may adjudge a dishonorable discharge, and, "being a *punishment*, it cannot be prescribed by an order."[47] There has been one notable exception.[48] In January 1954, 21 American prisoners of the Korean War (all enlisted men) refused to be repatriated. Accordingly, under administrative procedures, the Army proceeded to drop them from the rolls as deserters. In the words of one author, here is what then happened:

> When word of this proposed action reached the Secretary of Defense, the Honorable Charles E. Wilson, he said that the men should be dishonorably discharged. The Judge Advocate General of the Army advised the Secretary of the Army that this could not be done except pursuant to the sentence of a general court-martial. When he learned of this, the Secretary of Defense requested the opinion of the General Counsel of the Department of Defense, the Honorable H. Struve Hensel, who said that it could be done. Secretary Wilson thereupon ordered the Secretary of the Army to issue dishonorable discharges to the men. He complied.[49]

The same writer, in a well-reasoned article, concludes that because the men were not tried by court-martial the Defense Secretary's action was illegal.[50] He is not alone in that conclusion.[51]

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[45] For a graphic illustration of these many benefits and rights which are affected, the reader's attention is invited to the Appendix, a chart prepared in the Military Affairs Division, Office of the Judge Advocate General of the Army, October 1, 1960.

[46] Under the former Article of War 95, any officer convicted of "conduct unbecoming an officer and a gentleman" was automatically sentenced to be dismissed from service. Under the present Code (Art. 133), the punishment for this offense is within the discretion of the court. United States v. Downard, 1 USCMA 346, 3 CMR 80 (1952).

[47] Davis, A Treatise on the Military Law of the United States 356 (2d ed. rev. 1904).

[48] For a detailed discussion of the legality of this exception, see Pasley, *Sentence First—Verdict Afterwards*, 41 Cornell L. Q. 545 (1956).

[49] *Id.* at 546.

[50] *Id.* at 547.

[51] For example, Justice Felix Frankfurter has been reported to be of the opinion that the discharges were illegal because they were given without a court-martial. The Washington Post, Jan. 15, 1961, p. A8, col. 1.

Insofar as the inherent ignominy and after-service consequences are concerned, a dishonorable discharge for an enlisted man is exactly the same as a dismissal for an officer.[52] In theory at least, a person sentenced to dishonorable discharge is "practically an outcast,"[53] and is saddled with a burdensome handicap which follows him through life.[54] Any offense in the military which may result in a dishonorable discharge bears a heavy load of moral turpitude and properly may be considered a felony.[55] While a dishonorable discharge is a severe penalty today, it once was the rule that such discharge, when based upon conviction of wartime desertion, automatically resulted in the offender losing his United States nationality.[56] Only recently has the Supreme Court of the United States declared unconstitutional the statute providing for such loss of nationality.[57]

3. *Bad-Conduct Discharge:* This form of punitive separation may be adjudged by either a general or special court-martial,[58] and is appropriate for enlisted personnel only.[59] The bad-conduct discharge is generally regarded as less severe than a dishonorable discharge;[60] the latter is frequently "mitigated" to the former. However, a bad-conduct discharge may be adjudged upon conviction of any offense for which dishonorable discharge is author-

[52] See Appendix.

[53] Holtzoff, *Administration of Military Justice in the United States Army*, 22 N.Y.U. Law Q. Rev. 17 (1947).

[54] See statement of Mr. John J. Finn, Judge Advocate, Dist. of Col. Department of the American Legion, *Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong., 1st Sess. 195 (1949).

[55] United States v. Moore, 5 USCMA 687, 18 CMR 311 (1955).

[56] 66 Stat. 241 (1952), 8 U.S.C. § 1425 (1958).

[57] Trop v. Dulles, 356 U.S. 86 (1958).

[58] UCMJ, arts. 18 and 19.

[59] MCM, 1951, para. 126*d*.

[60] The following remarks from the congressional hearings, in connection with legislation to adopt the bad-conduct discharge for the Army, give some insight into the intended differences between a bad-conduct and dishonorable discharge: "Mr. Elston. Now for the sake of the record, what is the difference between a bad-conduct discharge and a dishonorable discharge? General Hoover. It is a little hard to define. The bad-conduct discharge is, frankly, taken from the Navy procedure. It is in degree of severity, we think, a step lower than a dishonorable discharge. . . . It is a lesser punishment, as we conceive it, than a dishonorable discharge. Its usefulness would apply particularly to the military type of cases, as distinguished from the felony-type cases. Mr. Elston. Well, for all practical purposes, it is about the same thing as a dishonorable discharge. General Hoover. There isn't a tremendous amount of difference." *Hearings on Court-Martial Legislation, Senate Committee on Armed Services*, 80th Cong., 2d Sess. 2025, quoted in JAGJ 1953/4541 (May 22, 1953).

ized.[61] The Table of Maximum Punishments[62] lists some 21 offenses for which a bad-conduct but *not* a dishonorable discharge may be imposed. Most of these are "military offenses" or common law crimes not involving moral turpitude. Additionally, an accused may be punished by a bad-conduct discharge if he is convicted of two or more offenses, none of which are punishable by a punitive discharge, or if he has previous convictions of two or more offenses punishable by a punitive discharge.[63] There are some conditions to this last rule not relevant to the purposes of this article.[64]

For all the services, but for the Army in particular, a significant problem exists because of the very different consequences which may flow from a bad-conduct discharge imposed by a general court-martial as compared with one adjudged by a special court-martial. This problem is discussed in Part III, *infra*. It is sufficient here to observe that a bad-conduct discharge imposed by a general court-martial results in a loss of the same federal rights and benefits lost because of dismissal or dishonorable discharge.

4. *A Synthesis:* To conclude this study in parallels and differences, discussed in an endeavor to gain an insight into the essence of punitive separation as punishment, it is well to put together the important similarities and dissimilarities of the three types. Perhaps the most significant feature is the fact that the real punishment which flows from any of the separations adjudged by a general court-martial is not prescribed by the Code, but is a result of the adverse treatment ascribed to such discharge by other laws and by other individuals. The Code merely calls for the characterization of the severance from service. It is for other laws and for society in general to draw the after-service penalties which are attached to any form of punitive separation. In this regard, a punitive separation from the service is not unlike certain discharges by employers in American industry. The dishonor or shame experienced by those who are discharged depends upon the reason for the discharge, the individual's personality and sensitivity, and the manner in which he is treated by others following the discharge.

This particular aspect of the punishment weighs differently on each individual and is difficult to measure. More easily gauged are

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[61] MCM, 1951, para. 127*c*.

[62] MCM, 1951, para. 127*c*, § A.

[63] MCM, 1951, para. 127*c*, § B; Exec. Order No. 10565, Sep. 28, 1954, amends this section to permit a dishonorable discharge for three previous convictions during the year next preceding the commission of the instant offense.

[64] For a good discussion of additional punishment based on either previous convictions or multiple offenses, see Pemberton, *Punishment of the Guilty: The Rules and Some of the Problems*, Mil. L. Rev., October 1959, pp. 114–17.

the material consequences of the discharge—loss of government benefits and rights and the certain handicap in obtaining other desirable employment. Herein, for most, lies the real and lasting punishment, the real pain for the offense.

The dissimilarities in the three forms of punitive separation lie in the fact that one (dismissal) is appropriate for officers, the remaining two for enlisted personnel. The difference in degree between a bad-conduct and dishonorable discharge seems more apparent than real. In the words of one authority,[65] the oft-spoken distinction between a dishonorable and bad-conduct discharge is "so much double talk."

III. THE EMPLOYMENT OF DISCHARGE AND DISMISSAL AS PUNISHMENT

Having established some notions respecting the nature of discharge and dismissal as punishment, it is appropriate to turn next to the significant problems which arise out of the employment of such punishment. Not all problem areas are discussed, but only those which are within the scope of this article and appear to be most vexing. The important area to be probed here is the use of punitive separation, particularly from the view of the impressions recently struck thereon by the heavy—and frequently ill-defined—blows of the Court of Military Appeals. Rather than attempting the rather artificial division of these matters into pre-trial, trial and post-trial groupings, the problems are treated according to subject matter.

A. *A CIRCUMSCRIPTION OF FORMS*

Traditionally, there has been a definite distinction between discharges given as a result of administrative action and discharges imposed as punishment by courts-martial.[66] The current statute establishing this distinction insofar as enlisted personnel are concerned—statutes similar in language date back to 1776—appears in title 10, United States Code, section 3811:

> (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;

[65] *Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Senate Committee on the Armed Services*, 81st Cong., 1st Sess. 249 (1949).

[66] Snedeker, Military Justice Under the Uniform Code 437, 441, 442 (1953); Everett, Military Justice in the Armed Forces of the United States 243–47 (1956).

(2) by sentence of a general or special court-martial; or
(3) as otherwise provided by law.[67]

The authority for separation of regular officers of all of the armed services is found in title 10, United States Code, section 1161:

(a) No commissioned officer may be dismissed from any armed force except—
(1) by sentence of a general court-martial;
(2) in commutation of a sentence of a general court-martial; or
(3) in time of war, by order of the President.
(b) [not here pertinent].

Section 1162 of title 10 applies to discharge of reserve officers:

(a) Subject to other provisions of this title, reserve commissioned officers may be discharged at the pleasure of the President. Other Reserves may be discharged under regulations prescribed by the Secretary concerned.
(b) [not here pertinent].

This authority is subject to title 10, United States Code, section 1163 (a), which provides:

(a) An officer of a reserve component who has at least three years of service as a commissioned officer may not be separated from that component without his consent except under an approved recommendation of a board of officers convened by an authority designated by the Secretary concerned, or by the approved sentence of a court-martial. . . .

This clear distinction between punitive and administrative discharges extends even to the terms used in characterizing discharges.[68] The following terms are uniformly applied by all the services:

1. Honorable—administrative action only.
2. General—administrative action only.
3. Undesirable—administrative action only.
4. Bad Conduct—general or special court-martial sentence.
5. Dishonorable—general court-martial sentence only.

The Appendix indicates the conditions under which these various discharges are issued.

If doubt ever existed that there are only three forms of discharge recognized as punitive (dismissal, dishonorable and bad-conduct), *recent opinions of the Court of Military Appeals* have unequivocally obviated that doubt. In 1955, a Navy board of review was the first appellate body under the Code to proclaim that a special court-martial was without power to impose an "undesirable discharge" and that such sentence was a nullity.[69]

[67] An identical statute exists for the Air Force, viz. 10 U.S.C. § 8811 (1958). In the Navy, Marines and Coast Guard, the power to issue administrative discharges is regarded as a "housekeeping device" dependent not on statute, but on *inherent executive power*. For a discussion of this principle, see NCM 5505513, Calkins, 20 CMR 543 (1955).

[68] A common policy with respect to administrative discharges was established for all services by Dep't of Defense Directive No. 1332.14 (Jan. 14, 1959).

[69] NCM 5505513, Calkins, 20 CMR 543 (1955).

It was not until November 1960 that the Court of Military Appeals had occasion to speak in this area, and then concluded that there are only two forms of punitive separation for enlisted men—dishonorable and bad-conduct discharge. The case was *United States v. Phipps.*[70] The accused airman had been tried by a special court-martial and sentenced to a bad-conduct discharge. After intermediate appellate authorities affirmed, the Court granted the accused's petition for review on the issue of whether it was correct for trial counsel to have advised the trial court that "the only punitive discharge which this court by its very nature can adjudge is a bad conduct discharge."[71] In an unanimous opinion upholding this advice, the Court of Military Appeals observed that Congress provided for appellate review only in the case of bad-conduct and dishonorable discharges, "thus according recognition to the fact that only these two methods of separation may be used in court-martial sentences."[72] Additionally, the Court relied on the fact that, at the time the Code was enacted, courts-martial of all three of the armed services were limited to dishonorable and bad-conduct separation from service, and that Congress did no more than recognize military practice as it existed at that time.[73]

That case was soon followed by *United States v. Bedgood,*[74] wherein Judge Latimer, in concurring in the result, stated that a general court-martial could not legally adjudge a general discharge; *United States v. Goodman,*[75] holding that a law officer was correct in refusing to instruct a court-martial that it might adjudge an undesirable discharge or a general discharge; *United States v. O'Neal,*[76] holding that a law officer properly refused to permit a sentence work sheet to be revised to indicate that permissible penalties included an undesirable or general discharge; *United States v. Plummer,*[77] wherein the Court held that a convening authority had no power to change a dismissal to an administrative discharge; and *United States v. Middleton,*[78] standing for the proposition that a board of review has no power to direct an accused's separation from service by way of an administrative discharge.

As a result of all of these recent cases, it may be said, in sum-

[70] 12 USCMA 14, 30 CMR 14 (1960).
[71] A special court-martial has no jurisdiction to impose a dishonorable discharge. UCMJ, art. 19. This accounts for use of the words "this court by its very nature."
[72] United States v. Phipps, 12 USCMA 14, 30 CMR 14 (1960).
[73] *Id.* at 16, 30 CMR at 16.
[74] 12 USCMA 16, 30 CMR 16 (1960).
[75] 12 USCMA 25, 30 CMR 25 (1960).
[76] 12 USCMA 63, 30 CMR 63 (1960).
[77] 12 USCMA 18, 30 CMR 18 (1960).
[78] 12 USCMA 54, 30 CMR 54 (1960).

mary, that neither a court-martial, a convening authority nor a board of review may lawfully direct an undesirable or a general discharge as court-martial punishment. It is the conclusion of the Court that Congress, in enacting the Uniform Code, did not intend to expand the traditional forms of punitive separation. Accordingly, the recognized forms of discharge which a court-martial may adjudge have been clearly circumscribed.

Ought there be additional forms of punitive discharge? Should the permissible characterizations of court-martial imposed separation be expanded? Perhaps what those who would expand the types of punitive separation have been seeking is a vehicle by which a court-martial can rid the service of an accused who, although thoroughly unworthy to remain in service, is not deserving of the permanent stigma inherent in a dishonorable or bad-conduct discharge. In view of the present law, a court-martial may be faced with the dilemma of not being permitted to adjudge what it considers an appropriate form of separation and having, therefore, to choose between too much or too little, between the traditional forms of punitive discharge or no discharge at all. In effect, Congress has declared a *minimum* sentence in this area, viz: bad-conduct discharge for enlisted personnel, dismissal for officers. No similar minimums have been established with respect to confinement or forfeiture of pay.

It may be argued that there really is no problem. While a court-martial is prohibited from adjudging a discharge less severe in degree than a bad-conduct discharge, and for that reason may elect to adjudge no discharge at all, the offender may nevertheless be separated administratively after trial as an undesirable. However, it would appear that the commander who uses administrative procedures in lieu of established judicial machinery violates the spirit of the Code and flies in the face of the very reason for the distinction between administrative and judicial discharges. And does it not seem to be an extreme waste of effort to go through two long procedures when one may do?

Obviously, to expand the forms of punitive separation would create inestimable confusion both inside and outside the military departments. This would be particularly true if the military establishment were to use the same terms now applied to administrative separations for punitive discharge. (Unless, of course, the ridiculous measure of doing away with all administrative separations were taken. This problem is more fully discussed in Part IV, *infra*.) If this should occur, one couldn't readily determine whether a former soldier with a "general discharge" had been separated for a blameless inaptitude or because of a court-martial conviction for

a serious crime. To expand the forms of punitive discharge by using different labels would not only require a vast public re-education as to what the new forms signified, but would require new legislation and new regulations for the many state and federal agencies who determine eligibility for benefits on the basis of the characterization of discharge made by the military establishment.

The more feasible alternatives, therefore, would be to leave untouched the law as it is with respect to forms of punitive discharge or to abolish degrees and have only one form of punitive separation for all. The better solution is extensively treated in Part IV, *infra*.

B. *THE SPECIAL COURT-MARTIAL BAD-CONDUCT DISCHARGE*

Closely related to the problem of the circumscription of forms of punitive discharge is the problem resulting from the power of special courts-martial to impose bad-conduct discharges. It will be recalled that the Code[79] permits both general and special courts-martial to impose bad-conduct discharges. However, since special courts-martial have no jurisdiction to impose a bad-conduct discharge "unless a complete record of the proceedings and testimony before the court has been made,"[80] and since current Army Regulations[81] effectively preclude the assignment of a reporter to make such complete record, it is the rule that, in the Army at least, such discharges are imposed only by general courts-martial. The Navy and Air Force have no similar restrictions; special courts-martial in these services frequently adjudge bad-conduct discharges.

Since legally trained personnel are not required on special courts-martial (even the president of the court need not be and usually is not a lawyer), it takes little imagination to guess the quantity of legal errors and the quality of fairness and justice afforded an accused before this tribunal in comparison with a general court-martial. There appear to be several good reasons why a special court-martial should not have jurisdiction to impose a punitive discharge. Specifically:

(1) Unavailability of and lack of requirement for legally trained personnel as court members or counsel.

(2) Paucity of court reporters.

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[79] UCMJ, arts. 18 and 19.

[80] UCMJ, art. 19.

[81] Pursuant to Army Regs. No. 22–145 (Feb. 13, 1957), reporters are not available for special courts-martial without prior approval by The Judge Advocate General.

(3) Maximum time of confinement [six months] completed before appellate review is complete.[82]

If a bad-conduct discharge is imposed by a general court-martial, the offender is ineligible for veteran's benefits;[83] however, if the discharge is imposed by a special court-martial, eligibility for veteran's benefits is dependent upon an adjudication by the Veteran's Administration.[84] If the discharge is determined by them to have been under conditions other than dishonorable,[85] the offender is entitled to veteran's benefits. Admittedly, loss of veteran's benefits is only a part of the punishment which flows from a punitive discharge; however, it is a significant part. The inequality, of course, lies in the fact that mere differences in commanders' attitude may determine whether a thief or adulterer winds up tried by and discharged by a special or by a general court-martial. Another inequality lies in the fact that the Army uses general courts-martial almost exclusively for trial of those cases likely to result in sentence to bad-conduct discharge.

The alternative solutions to this problem are fairly obvious. Congress could change the statutes giving the Veteran's Administration discretion in this area; the services could standardize their practices; Congress could act to revoke jurisdiction to impose bad-conduct discharges from special courts-martial or eliminate special courts-martial or eliminate bad-conduct discharges. The most recent comprehensive study of military justice in the Army was conducted by a committee appointed by former Secretary Wilber M. Brucker and headed by Lieutenant General Herbert B. Powell. This committee—referred to as the Ad Hoc Committee—submitted its report on January 18, 1960; it was approved by the Secretary on October 13, 1960. Among its many farsighted recommendations was one to eliminate summary and special courts-martial.[86] Adoption of this recommendation would certainly obviate the problem of unequal treatment described above.

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[82] May 1951—May 1952 USCMA and The Judge Advocates General of the Armed Forces and General Counsel of the Dep't of Treasury Ann. Rep. 4 (hereinafter cited as USCMA and TJAG Ann. Rep.).

[83] Except for war-risk insurance, Government or National Service Life Insurance, all benefits to those discharged by general court-martial are barred. 38 U.S.C. § 3103 (1958).

[84] 38 U.S.C. § 101(2) (1958).

[85] V.A. Regs. 1012, 38 C.F.R. § 3.12 (1961), contains a list of the type of conduct which will be determined to be "under conditions other than dishonorable."

[86] U.S. Dep't of Army, Report of The Committee on The Uniform Code of Military Justice, Good Order and Discipline in the Army 4 (1960) (hereafter referred to as Ad Hoc Committee Report).

C. *SUSPENSION AND VACATION OF SUSPENDED DISCHARGES*

A court-martial sentence to discharge or dismissal does not necessarily mean expulsion from the service. Several acts can and often do occur during review procedures[87] to modify or remit such sentence.

Except for those offenses for which a mandatory punishment is provided,[88] the Code does not appear to prohibit a court-martial from suspending a discharge or dismissal.[89] However, a court-martial is not specifically granted power to suspend. The reasons appear to be that suspension is considered a mitigation of the penalty,[90] and that historically power to mitigate has been closely linked with the executive power to order into execution. Therefore, such power is vested only in those reviewing authorities who have the power to order a sentence into execution.[91] Hence, a board of review does not have authority to suspend.[92] Power to suspend a punitive separation is vested only in the Chief Executive, the Secretary and the convening authority.[93]

In addition to having the power to suspend, a convening authority has a *duty* to carefully review each sentence and to consider possible suspension thereof.[94] While he may not suspend a sentence beyond expiration of the current enlistment or period of service,[95] and should not suspend discharge or dismissal of one

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[87] Briefly, the appellate steps are as follows: Before acting on a record of trial of a case involving a sentence to discharge or dismissal, the officer exercising general court-martial jurisdiction (reviewing authority) is required to refer it to his staff judge advocate (UCMJ, arts. 61, 65(b)) who, in turn, must give the reviewing authority his written opinions and recommendations (UCMJ, art. 61). Following such review, the reviewing authority is required to take his formal "action" on the sentence (UCMJ, arts. 60, 64). In every case where the sentence, as approved by the reviewing authority in his action, extends to dismissal or punitive discharge (or affects a general or flag officer or extends to death or confinement for one year or more), the record is referred to a "board of review" in the office of The Judge Advocate General for a second review (UCMJ, art. 66(b)). No sentence to dismissal may be executed until affirmed by a board of review and approved by the Secretary of the military department (art. 71(b)); no dishonorable or bad-conduct discharge may be executed until affirmed by a board of review and, in proper cases reviewed by the Court of Military Appeals (UCMJ, art. 71(c)).

[88] UCMJ, art. 106 (Spying); UCMJ, art. 118 (Murder).

[89] See *Ex parte* United States, 242 U.S. 27 (1916). A court-martial, as a jury, has no authority to suspend a sentence. United States v. Samuels, 10 USCMA 206, 27 CMR 280 (1959).

[90] NCM 71, Clapp, 2 CMR 590 (1952).

[91] United States v. Simmons, 2 USCMA 105, 6 CMR 105 (1952)..

[92] United States v. Woods, 12 USCMA 61, 30 CMR 61 (1960).

[93] UCMJ, art. 71.

[94] United States v. Wise, 6 USCMA 472, 20 CMR 188 (1955); *accord*, United States v. Laurie, 6 USCMA 478, 20 CMR 194 (1955).

[95] MCM, 1951, para. 97*a*.

whose offense clearly indicates disqualification for further military service,[96] a convening authority may otherwise suspend a discharge or dismissal without regard to approval or disapproval *or execution of other sentence elements.*[97]

Since these rules regarding suspension are quite clear, no significant problems exist today with respect to suspension. However, when it comes to vacation of a suspended sentence to punitive discharge, many tender areas become apparent. The pertinent portions of Article 72, Uniform Code of Military Justice, provide:

> (a) Prior to the vacation of the suspension of a special court-martial sentence which as approved includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation. The probationer shall be represented at such hearing by counsel if he so desires.
>
> (b) The record of the hearing and the recommendation of the officer having special court-martial jurisdiction shall be forwarded for action to the officer exercising general court-martial jurisdiction over the probationer. If he vacates the suspension, the vacation shall be effective, subject to applicable restrictions in Article 71(c), to execute any unexecuted portion of the sentence except a dismissal. The vacation of the suspension of a dismissal shall not be effective until approved by the Secretary of the Department.

Article 71(c) provides:

> No sentence which includes, unsuspended, a dishonorable or bad-conduct discharge, or confinement for one year or more shall be executed until affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals.

Until recently, not all suspensions of discharge and dismissal were thought to create a probation within the meaning of Article 72. A type of suspension of punitive separation, which would end automatically when the offender concerned completed his period of confinement or when appellate reivew in his case was completed, whichever occured later, was recognized.[98] Employment of this provision provided the accused with the opportunity of redeeming himself in the military service. If he "soldiered" well and demonstrated that he was a fair risk for further service, he could be restored to duty and his punitive discharge could be remitted. Conversely, if he did not demonstrate his worthiness for restoration, the discharge would be executed upon the occurrence of the latter of the two conditions. Now, however, it is the law that *any* suspension of a punitive discharge places the accused in a

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[96] MCM, 1951, para. 88*e*(1). However, the convening authority is not bound by this policy and apparently may suspend *any* punitive discharge he chooses. CGCMS 20909, Brockmiller, 27 CMR 919 (1959).

[97] MCM, 1951, para. 88*e*(2); United States v. Phillips, 1 USCMA 349, 3 CMR 83 (1952).

[98] MCM, 1951, para. 88*e*(2)(b).

status of probation and that this status cannot be changed to his detriment without independent cause and without a hearing at which he may be represented by counsel. Unless the suspension is so altered, the accused must be fully restored to duty at the completion of the period of probation fixed in the action.[99] Hence, restoration to duty, which was formerly contingent on a positive demonstration of worthiness, apparently is now dependent on mere abstention from misconduct.[100]

The most important advantage of the former nonprobationary type suspension was that it gave commanders a convenient opportunity to size up prospective candidates for restoration to duty without incurring the risk of an *automatic* restoration based on mere abstention from misconduct. Now, convening authorities who are responsible for approving or suspending punitive discharges are extremely selective in whom they choose to make probationers. Since the cases [101] deciding that any suspension of a punitive discharge created an Article 72 type probation, the discharges are being suspended in only about ten per cent of the cases, whereas over 60 per cent were formerly suspended.[102] Hence, an important device once widely used in the field of rehabilitation and restoration is falling into disuse.

Another perplexing problem has developed in determining whether there has been a breach of probation of such a nature as to authorize vacation of the suspension and execution of the discharge. It will be recalled that once a punitive discharge has been suspended it may not be vacated without independent cause.[103] This means cause other than that which resulted in the court-martial trial and sentence to punitive discharge. The problem stems from the fact that, prior to recent court decisions, probation was ordinarily predicated upon conditions over which the accused had some control and with which he had to comply to escape punishment. But when the only condition in a case is the mere passage of time (when the punitive discharge is suspended until completion of confinement or appelate review) what can be alleged as the violation of probation—the independent cause—in order to

[99] United States v. May, 10 USCMA 358, 27 CMR 432, *affirming* CM 400193, May, 27 CMR 570 (1959); United States v. Cecil, 10 USCMA 371, 27 CMR 445 (1959).

[100] An observation contained in Ad Hoc Committee Report 131.

[101] United States v. May and United States v. Cecil, note 99 *supra*.

[102] Ad Hoc Committee Report 131–32. According to the 1959 Annual Report of USCMA and The Judge Advocates General of the Armed Forces, for the period November 1958 through March 1959, 62.26% of all sentences to punitive discharge were suspended by convening authorities, whereas only 9.1% were suspended for the period July 1959 through November 1959 (after *May* and *Cecil*). *Id.* at 45.

[103] United States v. May, note 99 *supra*.

vacate the suspension? With reference to this very issue, Judge Latimer remarked:

> . . . how would the accused either live up to or violate that term or condition? And, what possibly could the government establish as the "alleged violation of probation"? [104]

The recent decisions, therefore, have created new problems for the military as a whole as well as for the individual commander. What does the court mean by "independent cause," or stated another way, what must be established in order to vacate the suspended discharge? Is it sufficient "independent cause" that the probationer was 15 minutes late to duty? Must he commit a violation of the Code? Is mere lack of proper attitude and motivation sufficient? This is the problem, and there is no easy answer. Further, since the Code provides no appellate review of a vacation of suspension of discharge, it is unlikely that this problem will be judicially tested. One possible judicial avenue would be in the Court of Claims on the theory of arbitrary or capricious action in vacating the suspension and ordering the discharge. However, at this writing, no such test has occurred.

Apparently, an accused may knowledgeably *request* execution of a suspended punitive separation.[105] But short of this easy out, one can only speculate as to the proper criteria for vacation proceedings. Some guideposts were planted during the House hearings on the bill which was to become the Uniform Code of Military Justice. Statements of one of the chief draftsmen of the Code seem to indicate that some misconduct short of an offense under the Code is a sufficient basis for vacation of a suspended discharge:

> To assure that when a man who has been returned to duty and is charged with violation of this state of probation, that the suspended sentence that he has received or the suspension of the execution is not capriciously revoked or arbitrarily revoked, and that the discharge will not be capriciously executed and have him discharged from the service, we have provided this hearing so that *the elements of the offense or the facts of the conduct which is charged amounts to a violation on his part are clearly set forth.*[106]
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> . . . .
>
> Now when he is back on duty on probation there are a number of instances where such persons *commit additional offenses or in some way by their conduct violate the standard of good behavior.* In the same

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[104] 10 USCMA at 368, 27 CMR at 442 (dissenting opinion).

[105] Dicta in United States v. Smith, 11 USCMA 149, 28 CMR 373 (1960). As an interesting sidelight to the problem under consideration, this case stands for the proposition that an accused is entitled to a probationary suspension of a bad-conduct discharge imposed by a sentence on rehearing, where the action of the convening authority on the prior sentence had included suspension of such discharge.

[106] Testimony of Felix Larkin, Ass't Gen. Counsel, Dep't of Defense, *Hearings on H.R. 2498 Before the House Armed Services Committee*, 81st Cong., 1st Sess. 1208 (1949) (emphasis added).

> fashion as in civilian courts, upon such violations, they may be returned to serve out the unexpired portion of their sentence or the dishonorable discharge or bad-conduct discharge which has been suspended may be revoked.[107]

Hence, it would appear that some conduct short of violation of the Code may afford sufficient basis for vacation proceedings. Thus, so long as his actions were not arbitrary or capricious, a commander apparently could vacate a suspended discharge and order its execution on the basis of any conduct or behavior developed during the required hearing which manifested unworthiness for restoration to duty.

It would appear that for any such behavior or conduct during the probationary period, the commanding officer of the probationer may: (1) impose non-judicial punishment under the provisions of Article 15, Uniform Code of Military Justice, if the conduct constitutes a violation of the Code; (2) prefer court-martial charges, if the conduct constitutes a violation of the Code; (3) initiate proceedings to vacate the suspension; (4) where appropriate, use any combination of (1) and (3) or (2) and (3).

Another problem arises with respect to the hearing required in order to vacate the suspension. This problem exists whenever the probationer is tried, convicted, and sent to prison by civilian authorities,[108] or is absent without authority. If the commander does not wish to eliminate the wrongdoer administratively,[109] but desires to vacate the suspended punitive discharge, how does he meet the requirement for a hearing? Obviously, some arrangements must be made to bring the accused to the hearing. The only real problem, therefore, is the practical difficulty of arangements with civilian confinement authorities or of waiting until the individual returns to military control. No broad rules can be laid down here.

A recommendation of the Ad Hoc Committee[110] would cure most sore spots in this area. Under the Committee's proposal a sentence control board would be established by the Secretary of each military department. It would be granted authority to manage *all* aspects of the disposition of prisoners serving confinement. It is envisioned that after the convening authority has acted in a case, the entire responsibility for discretionary review of sentences to confinement would rest with the board—including all sentences of enlisted men to punitive discharges. According to the plan, no discharge could be executed until reviewed by the sentence control

[107] *Id.* at 1208–1209 (emphasis added).

[108] Based on material contained in Johnson, *Vacation of Suspension*, The JAG Journal, October 1952, p. 14.

[109] Army Regulations of the 635–200-series.

[110] Ad Hoc Committee Report 135–37.

board. This would eliminate the problem of whether a punitive discharge should be suspended by the convening authority, since no discharge would be executed until the individual had received an evaluation by the board as to suitability for restoration.[111] If, upon such review, it were determined that punitive discharge was appropriate, the sentence control board would merely direct its execution. The board would also have authority to direct that another type (even administrative) discharge be issued.[112]

D. *COMMUTATION*

Initially, it would be useful to define commutation. The United States Supreme Court in *Mullan v. United States*[113] described it thusly:

> It may be conceded that there is a technical difference between commutation of a sentence and the mitigation thereof. The first is a change of punishment to which a person has been condemned into one less severe, substituting a less for a greater punishment by authority of law. To mitigate a sentence is to reduce or lessen the amount of the penalty or punishment.[114]

Accordingly, commutation differs from mitigation in that the former is a change of punishment to one of a different nature,[115] and contemplates a substitution,[116] whereas mitigation is "a reduction in quantity or quality, the general nature of the punishment remaining the same."[117] The power to commute a dismissal or punitive discharge to a sentence of a different nature may be exercised by the President or by the Secretary of the Army (or his designate).[118] For good cause, the Secretary may substitute an administrative discharge "for a discharge or dismissal *executed* in accordance with the sentence of a court-martial."[119] In time of war, a dismissal may be commuted to reduction to an enlisted grade.[120]

Prior to the case of *United States v. Russo*,[121] decided April 8, 1960, it was thought to be the law that neither a convening authority nor a board of review had power to commute a court-martial sentence.[122] As an exception a board of review, upon a determina

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111 *Id.* at 136.
112 *Id.* at 137.
113 212 U.S. 516.
114 *Id.* at 519.
115 MCM, 1951, para. 105*a*.
116 Webster's New World Dictionary (College Ed. 1956).
117 MCM, 1951, para. 88*c*.
118 MCM, 1951, para. 105*a*; United States v. Goodwin, 5 USCMA 647, 18 CMR 271 (1955).
119 UCMJ, art. 74(b) (emphasis added).
120 UCMJ, art. 71(b).
121 11 USCMA 352, 29 CMR 168 (1960).
122 United States v. Hunter, 2 USCMA 37, 6 CMR 37 (1952).

tion that the evidence in a case was sufficient to support only an offense included within the offense of premeditated murder, could commute the death sentence to a period of confinement.[123] In *Russo*, the accused was found guilty of premeditated murder and sentenced, *inter alia*, to be put to death. Although the convening authority approved the findings and sentence, he recommended commutation to dishonorable discharge, total forfeitures, and life-time confinement. The board of review thought the recommendation appropriate, but considered itself powerless to change the penalty. Hence, the board affirmed the findings and sentence. Upon automatic review, the Court of Military Appeals held that both the convening authority and board of review have authority to "lessen the severity" of a death penalty by "converting" it to dishonorable discharge and confinement at hard labor.

Any thoughts that the *Russo* holding would be limited to death cases were short-lived. In *United States v. Plummer*,[124] decided November 18, 1960, the accused officer was sentenced to dismissal and total forfeitures. The Court had the following comments regarding the commutation power of the convening authority:

> . . . It may be that he found a dismissal fully appropriate. It is also arguable that he did not believe accused deserved such a severe penalty but was unaware of his full authority with respect to changing the form of punishment. In this connection it is important to note that the action was taken before publication of our opinion in . . . Russo . . . wherein we held that a convening authority or a board of review might properly reduce a sentence through exercise of the power of commutation. . . . In taking his new action on the sentence, the convening authority should do so with full recognition both of the fact that the accused stands convicted of only one charge and the full breadth of his duty and authority concerning the appropriateness of the penalty to be approved.[125]

However, the scope of the commutation power is still wide open to speculation. To what sentences may a punitive discharge be commuted? What sentences, other than death, may be commuted to a punitive discharge? Thus far, all that is known is that the punishment of a court-martial may not be added to,[126] and that a punitive discharge may not be changed to one "administrative" in character. In his dissenting opinion in *Russo*, Judge Latimer observed that allowing reviewing authorities to change sentences

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[123] United States v. Bigger, 2 USCMA 297, 8 CMR 97 (1953). Although not strictly commutation, the cases of United States v. Bell, 8 USCMA 193, 24 CMR 3 (1957), and United States v. Alley, 8 USCMA 559, 25 CMR 63 (1958), hold that a court-martial sentence of an officer to dishonorable discharge may be changed to dismissal.

[124] 12 USCMA 18, 30 CMR 18 (1960).

[125] *Id.* at 19–20, 30 CMR at 19–20.

[126] MCM, 1951, para. 88*a*.

not only as to amount but as to kind could ". . . lead to a crazy-quilt pattern of punishment . . . ."[127] He also remarked that:

> . . . [B]eneath the doctrine of commutation is the right of the accused to accept the substitution. . . . I wonder if he is not entitled to a hearing on [the issue of whether the newly imposed punishment is less than the original sentence of the court] . . . and whether all reviewing authorities will become boards for the reimposition of sentences.[128]

Notwithstanding the apparent unlimited breadth and scope attached to the powers of commutation by the Court in *Russo* and *Plummer*, a redefinition of "commutation" by the Court seems inevitable. The only alternative would be confusion and chaos. It is anticipated that eventually the Court's definition of "commutation" will be much the same as what is now regarded as "mitigation." Hence, the power of reviewing authorities to change a sentence will be limited to *lesser degrees within the same broad class or genus*.[129] Thus, with respect to the question of what sentences may be "commuted" to a punitive separation, the rule will not be extended beyond death cases. The clue to this result is found in Chief Judge Quinn's comment on the *Russo* holding in *United States v. Woods*:[130]

> We pointed out that whether it be called mitigation, commutation, or alteration, each reviewing authority, under the terms of its statutory power to "affirm . . . such part or amount of the sentence" as it determines to be correct, can approve a sentence which does not exceed in severity that adjudged by a court-martial. *Underlying this principle is the idea that a court "must assume that every rational person desires to live as long as he may." . . . . On that assumption, we had no difficulty in concluding that changing a sentence from death to life imprisonment merely mitigates its severity.*[131]

It would appear, a fortiori, that a punitive discharge "does not exceed in severity" a death sentence, as execution is unquestionably the most severe form of punitive separation. While this article is not concerned with sentences other than to discharge and dismissal, the same principle of *ejusdem generis* should apply to other sentence elements.

It is further submitted that the problem of to what sentences a punitive discharge may be "commuted" may be solved by again applying the "same class or genus" rule suggested above. The crucial point is that the "commuted" sentence may not be "more severe than the original." The answer to this problem was sug-

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[127] United States v. Russo, 11 USCMA 352, 362, 29 CMR 168, 178 (1960).
[128] *Ibid.*
[129] Contrary to this view, an Air Force board of review recently approved the action of a convening authority in commuting an adjudged sentence of suspension from rank for twelve months to forfeiture of $25.00 per month for a like period. ACM 17261, Christensen (January 23, 1961), *aff'd*, 12 USCMA 393, 30 CMR 393 (1961).
[130] 12 USCMA 61, 30 CMR 61 (1960).
[131] *Id.* at 62, 30 CMR at 62 (emphasis added).

gested by the Court of Military Appeals in 1954 in a case involving not commutation, but a sentence on rehearing. However, the same rule applies in both instances, *i.e.*, the sentence on rehearing may not be "more severe than" the approved sentence of the original trial. The case was *United States v. Kelley*,[132] and the issue was what, upon a rehearing, constitutes a sentence no more severe that a previously adjudged punitive discharge? In posing the problem, Judge Brosman, in his concurring opinion, remarked:

> Of course, I am sure that all reasonable men would agree that the loss of one day's pay must be regarded as a lesser punishment than separation from a military service by means of a bad-conduct discharge. But what of ten days? Or thirty? or six months? . . . .[133]

In suggesting a solution to the problem, Judge Brosman observed that all punishments imposable by courts-martial may be roughly divided into five categories, viz: (1) loss of life; (2) loss of money (either directly, by forfeiture or fine or indirectly, as by reduction in grade); (3) loss of physical freedom; (4) loss of military grade (which involves both loss of money and loss of reputation); and (5) loss of reputation (the most severe form of which is punitive discharge). In finding a punishment "no more severe than the one adjudged," one should remain within each category.

> And why? For the plain reason that . . . one simply cannot, save for the roughest sort of practical purpose—compare chalk with cheese.[134]

Hence, to apply Judge Brosman's logic to the problem of to what sentences a punitive discharge may be "commuted," one need only remain within the boundaries of the category. It would thus appear that a punitive discharge could properly be "commuted" to (1) a lesser degree of punitive discharge, (2) loss of military grade, (3) reprimand or admonition. No doubt there are other punishments which logically fall within the category of loss of reputation.[135]

IV. THE EFFECTIVENESS OF DISCHARGE AND DISMISSAL AS PUNISHMENT

A. *WHAT IS ITS PURPOSE?*

It is probably a self-evident proposition that an evaluation of any sort requires the application of some standard or norm. Clearly defining the norm is particularly difficult here, since the

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[132] 5 USCMA 259, 17 CMR 259 (1954).

[133] *Id.* at 264, 17 CMR at 264.

[134] *Ibid.*

[135] In United States v. Batson, 12 USCMA 48, 30 CMR 48 (1960), the Court tacitly approved a commutation of dismissal, confinement for 10 weeks and a forfeiture to a loss of 500 unrestricted numbers and a forfeiture. The commutation action was done by a board of review.

subject under consideration is only one type of punishment. The typical sentence to punitive separation usually includes additional elements, such as confinement, reduction in grade and loss of pay. How then should one judge the effectiveness of discharge and dismissal as punishment? Much has been written about purposes and theories of punishment in general and of military punishment in particular.[136] While it is far beyond the scope of this article to analyze the several theories, it is necessary to pose what appears to be the proper purpose of discharge and dismissal so that its effectiveness may be judged. In the civilian community at least, the modern trend seems to be that punishment should be designed to rehabilitate and restore the criminal to society. Hence, on first impression, it would appear that punitive separation, which expels the offender from the military community, is out of step with the modern trend. One author phrased it this way:

> Ideally, punishment must not have an effect of disgracing the individual in the eyes of his peers, but rather it "must bring about a [moral and psychological] . . . regeneration . . . . To this end punishment should prepare and give assurance of social reinstatement and never impose an indelible stigma . . . . There is a growing sentiment in favor of abolishing punishment that dishonors and of discarding the distinction made between infamous and non-infamous punishment." [137]

Quite obviously, however, the needs of the military society are different from the civilian society. In the military there is a need for discipline[138] and regimentation quite without counterparts in a civilian community. In the words of a well known student of military law, Mr. Frederick B. Wiener:

> . . . The object of the military law's punishment is . . . to give the first offenders such a slug that others will profit by that example and not do likewise. . . .
>
> Harsh? Yes, undoubtedly; but the underlying concept of an Army is obedience. And while an Army composed of literate free men can be led in large measure by precept, example, and exhortation, there is always a large indifferent segment, and always an irreducible minimum who respond only to fear. It is only through punishment and the fear of punishment that this last group and many in the indifferent group can be made to obey. The Army needs obedience and must have it. . . . The Army not only wants its men to refrain from striking each other;

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[136] *E.g.*, Bentham, Rationale of Punishments and Rewards (1825); Gillin, Criminology and Penology (3d ed. 1945); Sutherland and Cressey, Principles of Criminology (5th ed. 1955); Wines, Punishment and Reformation (rev. ed. 1919).

[137] Salleilles, The Individualization of Punishment 269 n. 18 (2d ed. 1911), quoted in Note, *Punishment: The Reward for Guilt*, 5 Buffalo L. Rev. 304 (1956).

[138] Army Regs. No. 600-10, para. 1 (Dec. 19, 1958), define discipline as "an outward manifestation of mental attitude and state of training which renders obedience and proper conduct intuitive under all conditions. It is founded upon respect for, and loyalty to, properly constituted authority."

> it wants them all to march in one prearranged direction. How can you mount a D-Day invasion without regimentation? And how attain regimented obedience unless such obedience can be made attractive by comparison with the fate in store for those who prefer individualism? [139]

While it cannot be disputed that "the power to command depends upon discipline, and discipline depends upon the power to punish,"[140] there are, it is submitted, additional factors to consider. It would seem that, in general, the proper purposes of military punishment should be parallel with the purposes in the civilian society, with the added factor of discipline.

The Ad Hoc Committee stated what it regarded as the prime requisites of an effective system of justice in the military:

> (1) the military justice system must foster good order and discipline at all times and places; (2) it must provide for rehabilitation of usable military manpower.[141]

Logically and historically this standard is a good one to apply in this area, particularly in an evaluation of punishment. Effective control of *usable* manpower is manifestly a keystone to success in battle. In adopting this standard as the one by which punitive discharge and dismissal ought to be evaluated, it should be borne in mind that the days of the need in war for vast numbers of troops may have expired. There are few places in today's modern armed forces for those lacking in ability or willingness to learn new skills. Even the guerilla fighter is a skilled specialist. Just as there is ever decreasing room for the inept and unskilled, there should be ever decreasing effort expended on the recidivist, the hoodlum and the incorrigible non-conformist. At the same time one cannot lose sight of the fact that the "high-in-spirit," and the occasional trouble-makers, often become the heroes of the fire-fight. Accordingly, while the first element of the committee's standard may be applied without modification, the emphasis within the second element should be on the word "useable."

B. *WHAT IS THE NEED FOR PUNITIVE SEPARATION?*

It sincerely may be asked if the stated purposes of military punishment might not effectively be fulfilled without the element of punitive discharge and dismissal. Are not sentences to confinement, loss of pay and loss of military grade sufficient sanctions to maintain usable manpower? It is submitted that they are not and that punitive separation has a proper place in the scheme of things.

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[139] *Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Senate Committee on the Armed Services*, 81st Cong., 1st Sess. 140 (1949).

[140] See Swaim v. United States, 28 Ct. Cl. 173, 221, 222 (1893), *aff'd*, 165 U.S. 553 (1897).

[141] Ad Hoc Committee Report 129.

In the first place, it stands to reason that an honorable discharge is an esteemed goal to be achieved by those who are summoned or who volunteer to serve their nation in uniform. It is a powerful motivation to endure the discomforts of military life and to respond willingly to its demands. Conversely, the threat of permanent dishonor and potential loss of federal and state benefits represented by the punitive separation poses no small measure of restraint upon the would-be offender. Even for those who never intend to apply for a "G.I." loan, vocational training or civil service employment, the handicap of a punitive discharge when it comes to applying for a job at the corner garage or upstate construction company is well known. And for those who have accumulated some credit toward retirement, the punitive discharge spells the loss of many thousands of dollars. Mere confinement is not enough.

In the second place, the impact on discipline necessarily involved when one who has been in and out of the stockade is kept in service is immeasurable. To allow such an individual to remain in close association with other good soldiers or sailors or airmen is unthinkable.[142]

In time of war the need for the punitive discharge in the military catalogue of punishments is most obvious. While there is a great demand for manpower, there is an even greater demand that offenders be punished by something more than *mere imprisonment* while the real soldiers are dying in cold snow or steaming slime. In the words of a former United States Secretary of War:

> . . . Soldiers are entitled to the assurance that no soldier can dodge the perils of battle without paying a heavy price.[143]

Particularly in time of war or national emergency the *punitive* discharge—with its characterization of dishonor—complements a sentence to confinement. It would be manifestly unfair to those who are serving loyally and well to grant to the offender a warm bed in jail or "an easy ticket back to civilian life."[144]

C. *IS THERE A MORE EFFECTIVE WAY?*

All will concede that there is always a need for some method of involuntarily separating unwanted offenders from the military service, but some will not agree that court-martial action is the best way. In judging the effectiveness of discharge and dismissal as punishment, it seems necessary to dwell briefly on this issue and

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[142] See United States v. Barrow, 9 USCMA 343, 345, 26 CMR 123, 125 (1958).

[143] Patterson, *Military Justice*, 19 Tenn. L. Rev. 12 (1945).

[144] Ward, *UCMJ—Does It Work?*, 6 Vand. L. Rev. 225 (1953).

consider the alternative. If we abolish discharge and dismissal as forms of court-martial punishment, the only remaining method of eliminating offenders is through some sort of administrative action.

Admittedly, there will always be a need for the administrative avenue of separating certain categories of individuals from the service. As examples, it would be preposterous to require courts-martial to determine eligibility for separation by virtue of hardship or dependency, minority, inaptitude, and character or behavior disorders. These are but a few examples which illustrate the necessity of an administrative means of expelling unwanted individuals. And, many of these individuals are separated with discharges characterized in such a manner that certain real penalties result.[145]

Acknowledging the need for an administrative means of ridding the service of certain categories of personnel is far from establishing a reason for transferring the task of adjudging *punitive* discharges from a judicial to an administrative forum. On the contrary, it is submitted that only a court-martial is the proper forum for determining such matters. Putting aside for the moment the important consideration of the good order and discipline fostered by the employment of the punitive separation, there are at least four good reasons for not disturbing the status quo in this area.

1. By the very nature of judicial as opposed to administrative action, only a judicial forum can operate in a climate relatively free from command influence.[146]

2. The "due process" safeguards afforded only by adversary

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[145] Under regulations governing the Veteran's Administration, note 85 *supra*, an "Undesirable Discharge" may result in loss of all benefits administered by the V.A. Chief Judge Quinn has remarked that ". . . An undesirable discharge is just as severe a punishment as a bad-conduct discharge . . . . I certainly think the services should not be permitted to give an undesirable discharge except as the result of a court-martial." *Hearings Before a Subcommittee of the House Committee on Appropriations on D.O.D. Appropriations 1961*, 86th Cong., 2d Sess., pt. 4, 561–62. While the present Code was under consideration by the Senate, a suggestion was made that the bill (S. 857) be amended so as to provide that no discharge other than under honorable conditions be given except pursuant to court-martial sentence. Letter from Senator McCarran, as Chairman of the Committee on Judiciary to Senator Millard E. Tydings, April 30, 1949, quoted in *Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong., 1st Sess. (1949).

[146] "Command influence" was a problem which played a large role in prompting passage of the UCMJ. In its report on the bill which was to become the basis of the UCMJ, a House subcommittee stated that "perhaps the most troublesome question presented was that of command control." H.R. Rep. No. 491, 81st Cong., 1st Sess. 28 (1949). For a discussion of this area, see Cutler, *Command Control Versus Command Responsibility*, A Thesis Presented to The Judge Advocate General's School, April 1957, pp. 7–18 (unpublished).

judicial proceedings can adequately protect the substantial rights of the potential candidate for punitive discharge.[147]

3. An administrative procedure to determine whether an offender should be retained or discharged after conviction by courts-martial of a felony or serious military offense would entail unnecessary duplication of effort.

4. The general public would not tolerate a shift from a judicial forum.[148] Accordingly, it is submitted that courts-martial action is the most effective method of accomplishing punitive separation of offenders from service.

D. *HOW CAN DISCHARGE AND DISMISSAL AS PUNISHMENT BE MADE MORE EFFECTIVE?*

Having examined something of the nature, employment, purposes and effectiveness of this punishment, and having identified the most significant problem areas involved, it is appropriate to close with a few notions on how discharge and dismissal might be made a more effective punishment. Again, it is to be remembered that a punitive discharge is typically adjudged in connection with a term of confinement, forfeiture of pay and loss of military grade. Accordingly, punitive separation is to be reviewed here in its normal setting, and the following should be read with that in mind:

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[147] For the general rules applicable to the conduct of administrative investigations and hearings in the Army, see Army Regs. No. 15-6, § II (Nov. 3, 1960).

[148] Criticism of the "undesirable discharge" is especially strong. See note 145 *supra*. To illustrate something of the flavor of recent criticism, the following is quoted from JAGA 1959/1684 (February 16, 1959): "It appears that present concern relative to the issuance of undesirable discharges parallels to a great extent those matters considered by the Congressional investigation in 1946; for example, that undesirable discharges are given for a variety of reasons of disparate gravity, that the conduct of the member in many cases does not warrant the stigma and loss of privileges and benefits attached to the undesirable discharge, and that there is a lack of uniformity in administering the procedures and requirements established for the undesirable discharge of a member. Although not strictly pertinent to the present discussion, an indication of public interest and concern in military administrative matters is contained in a recent report of a committee of the American Bar Association which recommended legislation to provide for judicial review by Federal courts of the action taken pursuant to findings and recommendations of boards for correction of military records." It is to be noted that about 40 bills were introduced in the 86th Congress (collectively referred to as "Doyle Bills," because most are patterned after Congressman Doyle's H.R. 88, 86th Cong., 1st Sess. (1959)) providing generally for administrative boards to give mandatory review of evidence of good character and conduct in the civilian community after discharge in determining whether correction of discharges should be made or certificates of "Exemplary Rehabilitation" issued.

1. It appears that a shift of emphasis from the spiritual to the material in the way we look upon the penal aspects of courts-martial discharge and dismissal has been experienced. The tendency is to measure the punishment not so much from the aspect of the character judgment involved as from the view of the loss of federal benefits which result.[149] The real punishment should be the haunting realization to the offender that he has been judged to be "dishonorable" and that honorable men both in and out of the military community will shun him and seek to avoid the malodorous taint which he bears. Unfortunately, however, it is the loss of "G.I." benefits which receives the most prominent attention. Part of the difficulty, it seems, is that it is not the military departments (which actually impose the discharge) which determine eligibility for many of the benefits, but rather other executive agencies, with, in some instances, other standards.[150] Mainly, however, it would appear that the reason for the shift in emphasis must be attributed to the popular sense of what is and what is not important in our modern society. Obviously, for a problem of such complexity no single step toward solution seems significant. Perhaps the one thing which the military services can do is to embark on a more vigorous program of inculcating traditional notions of patriotism, fidelity and honor among its members, especially the young members. We need to underscore the honorable discharge as a most esteemed prize to be won and its antithesis as the most damning judgment in the catalogue of military punishments. Just as those who are inclined to serve well should be motivated toward the highest levels of achievement in order to win their honorable discharge, those with propensities toward crime should be turned from that direction by the heat of certain shame and disgrace which emanates from the brand of the dishonorable discharge.

2. The nature of the bad-conduct discharge was examined above in Part II and the significant problems in its employment were treated in Part III. It will be recalled that whereas there is only one kind of punitive separation for officers, viz, dismissal, enlisted men may be given either a dishonorable or bad-conduct discharge. It is submitted that punitive separation would be made more effective by either more precisely defining the distinctions between dishonorable and bad-conduct discharge or by eliminating the latter entirely. Apparently Congress sees no real distinction in the two, for they have provided for the same appellate review with respect to both [151] and have required the Veteran's Adminis-

[149] See, *e.g.*, U.S. Dep't of Army, Pamphlet No. 27–9, Military Justice Handbook—The Law Officer 67 (Instructions as to Sentence) (1958).

[150] See note 85 *supra*.

[151] UCMJ, arts. 66 and 71.

tration to accord both the same treatment when imposed by a general court-martial.[152] As was pointed out above, the distinction drawn in the Manual is extremely vague.[153] Probably, the most important difference is that a bad-conduct discharge sounds less severe. In the absence of a clear distinction, the inequality of treatment which is bound to result is obvious. Conduct which to one court-martial is "dishonorable" is regarded as "bad" by another. A convening authority who believes he is granting clemency by "mitigating" a dishonorable discharge to a bad-conduct discharge is deceived. Some leveling-out may be accomplished by the boards of review, but again there are certain to be some differences between one board and the next, between an Army board and one in the Navy or Air Force. Aditionally, all a board of review may do in leveling-out is "reduce" a dishonorable to a bad-conduct discharge.

After service, another kind of problem concerning the bad-conduct discharge becomes apparent. A sailor who has received a bad-conduct discharge upon trial by special court-martial may receive veteran's benefits, whereas his counterpart—perhaps also a former sailor—is denied all veteran's benefits because his bad-conduct discharge was imposed by a general court-martial.

Finally, it seems that conditions of war or national emergency cast a graver significance on all offenses committed by those in uniform. Truely, all military offenses committed in such times should be regarded as serious, thus rendering inappropriate a bad-conduct discharge.

It would appear that the interests of justice would be served and better uniformity of treatment accomplished by adopting the following changes:

a. Standardize the practice in all services with respect to the special court-martial bad-conduct discharge.[154]

b. Suspend use of the bad-conduct discharge in time of war or national emergency.

c. In time of peace, authorize imposition of bad-conduct discharge only for certain military offenses and non-felony type comman law crimes.

3. The problem of the criteria to be used in vacation of suspended sentences to punitive discharge was discussed in detail in Part III. If the problem has not been strongly voiced heretofore, the reasons probably lie in the fact that commanders are now suspending discharges in less than ten per cent of the cases[155] and

[152] See Appendix.

[153] MCM, 1951, paras. 76*a*(6) and (7).

[154] For another solution, see the recommendation in Ad Hoc Committee Report 135–37.

[155] See note 102 *supra*.

that there is no appellate review of proceedings to vacate a suspended discharge. The value of the suspended discharge in any rehabilitation program is obvious. Equally obvious is the importance of the commander having swift and workable authority to vacate the suspension. Accordingly, it is submitted that the military departments, following the lead of the Air Force in this regard, should take a bold stand on the feasibility of establishing a liberal criteria to be applied in vacation of suspended discharges.[156] It would appear that, so long as his actions were not arbitrary or capricious, and so long as the procedural requirements of affording a hearing and counsel to the respondent were followed, a commander should be permitted to base the vacation of a suspended punitive discharge on *any act* or *conduct* reasonably indicative of unworthiness for restoration to or continuance on active duty. Thus armed, commanders may be expected to return to their previous liberal practice of suspending discharges in more than 50 per cent of the cases.[157]

4. The potential snarl of difficulties implicit in the *Russo* and *Plummer* decisions concerning power of convening authorities and boards of review to commute sentences was described in Part III. The maze which threatens to result from exercise of the power to commute is readily apparent.[158] It would appear that the only workable measure which may be taken to halt the impending confusion is to redefine our notions as to commutation. This may re-

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156 The present practice in the Army and Navy is that the vacation must be based on some violation of the Code committed subsequent to the suspension. U.S. Dep't of Army, Cir. No. 633-1 (May 20, 1959); Dudley, *Vacation of Suspended Sentences*, The JAG Journal, Nov.-Dec. 1959, p. 15. In addition to acts of misconduct occurring subsequent to the date of the sentence, the Air Force practice recognizes such factors as psychoneurotic disorders, character and behavior traits, and lack of motivation to perform further military service as establishing a basis for vacation proceedings. Air Force TJAG Letter 59/8, subject: Vacation of Suspended Punitive Discharges (May 18, 1959).

157 See note 102 *supra*.

158 This point is aptly illustrated by events occurring subsequent to the writing of this article. On February 23, 1962, in United States v. Johnson, No. 15,467, the Court of Military Appeals held that one year's confinement could not be commuted by the convening authority to a *bad conduct discharge* even with the written consent of the accused. In United States v. Rodriguez-Garcia, No. 15,510, decided the same day, the Court held invalid a commutation from one year's confinement to a *BCD suspended*. And, finally in United States v. Fredenburg, No. 15,854, also decided the same day, the Court held illegal a commutation from one year's confinement to a *dishonorable discharge*. An Army board of review, in a case not certified to the Court, CM 406450, Danenhour, 4 Dec 61, has stated, however, that a commutation from 18 months' confinement to a dismissal, *without* the accused's consent, was legal, but only approved a sentence of six months' confinement. For a review of these cases and a chronological development of the doctrine of commutation, see U.S. Dep't of Army, Pamphlet No. 27-101-95, pp. 8-11 (1962) (Judge Advocate Legal Service).

quire legislation. What is needed is a return to the traditional concept that *only* the President and Secretary of the department may change the *nature* of a punishment, *i.e.*, commute. However we may choose to describe the clemency powers of convening authorities and boards of review, they should not have the power to alter the *nature* of the imposed punishment. Particularly with respect to clemency action regarding punitive discharges, convening authorities and boards of review should be required to remain within the limits of the category into which a given sentence element, by its nature, appropriately falls. The principle of *ejusdem generis* should prevail.

V. APPENDIX [1]

INCIDENTS OF DISCHARGE

Table I: *Types of Discharges*

Type	*Authority for discharge*	*Condition under which issued*
Honorable	AR 635-200 (EM) AR 635-5 (Officers)	Convenience of the Government; Expiration of enlistment; Minority; Resignation; Dependency or hardship; Disability; Revocation or termination of appointment; Discharge to accept appointment
General	AR 635-200 (EM) AR 635-5 (Officers)	Convenience of the Government; Disability, disloyal or subversive; Expiration of enlistment; Minority; Resignation —Unsuitability; Homosexuality
Undesirable	AR 635-200 (EM)	Misconduct; Homosexuality; Qualified resignation, unfitness; Disloyal and subversive; AWOL or Desertion
Discharge [2] (under other than honorable conditions)	AR 635-5 (Officers)	Conviction of felony by civil authorities; Security violation
Bad Conduct Discharge	Sentence of a special court-martial	
Bad Conduct Discharge	Sentence of a general court-martial	
Dishonorable	Sentence of a general court-martial (Dismissal by sentence of general court-martial is equivalent to dishonorable discharge)	

See footnotes on page 42.

Type	*Authority for discharge*	*Condition under which issued*
Resignation for the good of the service AR 635-89 (officers) Homosexuality In lieu of courts-martial	AR 635-120 (Officers) AR 635-5 (Officers) (The provisions of AR 635-5 apply to all officers of the Army; AR 140-175 provide that Reserve officers being separated will be furnished discharge certificates in accordance with AR 635-5)	

Table II: *Benefits Administered by the Army*

Type of benefit	*Eligibility*
1. Death Gratuity (10 U.S.C. 1475 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Eligible [3]
Discharge Under Other Than Honorable Conditions	Eligible [3]
Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
2. Headstone Marker (Section 1, act of 1 July 1948, 62 Stat. 1215, as amended, 24 U.S.C. 279a)	
Honorable	Eligible
General	Eligible
Undesirable	Not Eligible
Discharge Under Other Than Honorable Conditions	Not Eligible
Bad Conduct Discharge by Sentence of a Special Court-Martial	Not Eligible
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
3. Mustering-out Payments (38 U.S.C. 2101 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Not Eligible
Discharge Under Other Than Honorable Conditions	Not Eligible
Bad Conduct Discharge by Sentence of a Special Court-Martial	Not Eligible
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible

See footnotes on page 42.

Type of benefit	*Eligibility*
4. Payment for Accrued Leave (Armed Forces Leave Act of 1946, 60 Stat. 963, as amended, 37 U.S.C. 32 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Not Eligible
Discharge Under Other Than Honorable Conditions	Not Eligible
Bad Conduct Discharge by Sentence of a Special Court-Martial	Not Eligible
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
5. Retirement Pay for Non-Regular Service (10 U.S.C. 1331 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Eligible
Discharge Under Other Than Honorable Conditions	Eligible
Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible
Bad Conduct Discharge by Sentence of a General Court-Martial	Eligible
Dishonorable	Eligible
Resignation for the Good of the Service	Eligible
6. Transportation Allowance for Dependents and Shipment of Household Goods (Paragraphs 7011–5, 8009–4, Joint Travel Regulations)	
Honorable	Eligible
General	Eligible
Undesirable	Not Eligible
Discharge Under Other Than Honorable Conditions	Not Eligible
Bad Conduct Discharge by Sentence of a Special Court-Martial	Not Eligible
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
7. Transportation in Kind (Paragraph 5300 *et seq.*, Joint Travel Regulations)	
Honorable	Eligible
General	Eligible
Undesirable	Eligible
Discharge Under Other Than Honorable Conditions	Eligible
Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible
Bad Conduct Discharge by Sentence of a General Court-Martial	Eligible
Dishonorable	Eligible
Resignation for the Good of the Service	Eligible

Type of benefit	*Eligibility*
8. Burial in National Cemetery (Section 1, act of 14 May 1948, 62 Stat. 234; 24 U.S.C. 281)	
Honorable	Eligible
General	Eligible
Undesirable	Not Eligible
Discharge Under Other Than Honorable Conditions	Not Eligible
Bad Conduct Discharge by Sentence of a Special Court-Martial	Not Eligible
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
9. Use of Wartime Title; Wear of Uniform of Wartime Grade when authorized by Presidental regulations (10 U.S.C. 772(e))	
Honorable	Eligible
General	Eligible
Undesirable	Not Eligible
Discharge Under Other Than Honorable Conditions	Not Eligible
Bad Conduct Discharge by Sentence of a Special Court-Martial	Not Eligible
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
10. Admission to Soldiers' Home [4]	

Table III: *Benefits Administered by the Veterans' Administration* [5]

Type of benefit	*Eligibility*
1. Dependency and Indemnity Compensation (38 U.S.C. 410 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Eligible [3]
Discharge Under Other Than Honorable Conditions	Eligible [3]
Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
2. Pension for Service-Connected Disability (38 U.S.C. 301 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Eligible [3]
Discharge Under Other Than Honorable Conditions	Eligible [3]

See footnotes on page 42.

Type of benefit	*Eligibility*
Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
3. Pension for Non-Service-Connected Disability (38 U.S.C. 501 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Eligible [3]
Discharge Under Other Than Honorable Conditions	Eligible [3]
Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
4. Vocational Rehabilitation (38 U.S.C. 1501 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Eligible [3]
Discharge Under Other Than Honorable Conditions	Eligible [3]
Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
5. Education and Training (38 U.S.C. 1601 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Eligible [3]
Discharge Under Other Than Honorable Conditions	Eligible [3]
Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
6. Loans (38 U.S.C. 1801 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Eligible [3]
Discharge Under Other Than Honorable Conditions	Eligible [3]

See footnotes on page 42.

Type of benefit	*Eligibility*
Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
7. Unemployment Compensation (38 U.S.C. 2001 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Eligible [3]
Discharge Under Other Than Honorable Conditions	Eligible [3]
Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
8. Special Housing (38 U.S.C. 801 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Eligible [3]
Discharge Under Other Than Honorable Conditions	Eligible [3]
Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
9. Hospitalization (38 U.S.C. 601 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Eligible [3]
Discharge Under Other Than Honorable Conditions	Eligible [3]
Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
Dishonorable	Not Eligible
Resignation for the Good of the Service	Not Eligible
10. Domiciliary Care (38 U.S.C. 601 *et seq.*)	
Honorable	Eligible
General	Eligible
Undesirable	Eligible [3]
Discharge Under Other Than Honorable Conditions	Eligible [3]

See footnotes on page 42.

	Type of benefit	*Eligibility*
	Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
	Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
	Dishonorable	Not Eligible
	Resignation for the Good of the Service	Not Eligible
11.	Out-Patient Medical and Dental Treatment (38 U.S.C. 601 *et seq.*)	
	Honorable	Eligible
	General	Eligible
	Undesirable	Eligible [3]
	Discharge Under Other Than Honorable Conditions	Eligible [3]
	Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
	Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
	Dishonorable	Not Eligible
	Resignation for the Good of the Service	Not Eligible
12.	Prosthetic Appliances (38 U.S.C. 613)	
	Honorable	Eligible
	General	Eligible
	Undesirable	Eligible [3]
	Discharge Under Other Than Honorable Conditions	Eligible [3]
	Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
	Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
	Dishonorable	Not Eligible
	Resignation for the Good of the Service	Not Eligible
13.	Seeing-Eye Dogs and Mechanical Electronic Equipment (38 U.S.C. 614)	
	Honorable	(Eligibility dependent upon entitlement to disability compensation)
	General	
	Undesirable	
	Discharge Under Other Than Honorable Conditions	
	Bad Conduct Discharge by Sentence of a Special Court-Martial	
	Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
	Dishonorable	Not Eligible
	Resignation for the Good of the Service	Not Eligible

	Type of benefit	*Eligibility*
14.	Automobiles (38 U.S.C. 1901 *et seq.*)	
	Honorable	(Eligibility dependent upon entitlement to disability compensation for one of specified disabilities)
	General	
	Undesirable	
	Discharge Under Other Than Honorable Conditions	
	Bad Conduct Discharge by Sentence of a Special Court-Martial	
	Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
	Dishonorable	Not Eligible
	Resignation for the Good of the Service	Not Eligible
15.	Compensation for Service-Connected Death (38 U.S.C. 1301 *et seq.*)	
	Honorable	Eligible
	General	Eligible
	Undesirable	Eligible [3]
	Discharge Under Other Than Honorable Conditions	Eligible [3]
	Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
	Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
	Dishonorable	Not Eligible
	Resignation for the Good of the Service	Not Eligible
16.	Compensation for Non-Service Connected Death (38 U.S.C. 501 *et seq.*)	
	Honorable	Eligible
	General	Eligible
	Undesirable	Eligible [3]
	Discharge Under Other Than Honorable Conditions	Eligible [3]
	Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
	Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
	Dishonorable	Not Eligible
	Resignation for the Good of the Service	Not Eligible
17.	Burial Expenses (38 U.S.C. 902 *et seq.*)	
	Honorable	Eligible
	General	Eligible
	Undesirable	Eligible [3]
	Discharge Under Other Than Honorable Conditions	Eligible [3]
	Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
	Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
	Dishonorable	Not Eligible
	Resignation for the Good of the Service	Not Eligible

See footnotes on page 42.

	Type of benefit	*Eligibility*
18.	Burial Flags (38 U.S.C. 901)	
	Honorable	Eligible
	General	Eligible
	Undesirable	Eligible [3]
	Discharge Under Other Than Honorable Conditions	Eligible [3]
	Bad Conduct Discharge by Sentence of a Special Court-Martial	Eligible [3]
	Bad Conduct Discharge by Sentence of a General Court-Martial	Not Eligible
	Dishonorable	Not Eligible
	Resignation for the Good of the Service	Not Eligible

[1] Prepared in the Military Affairs Division, Office of the Judge Advocate General of the Army. Current as of 1 October 1960.

[2] Resignations for the good of the service are normally accepted as under other than honorable conditions and a discharge (under other than honorable conditions) is issued. Subparagraph 4*d*, Army Regulations 635–120, dated 25 November 1955, provides, however, that if the Department of the Army determines that the resignation be accepted under honorable conditions, an honorable or general discharge may be furnished. As a matter of policy if it is determined that the resignation is under honorable conditions it is no longer considered a resignation "for the good of the service" but as a resignation under honorable conditions. Title 10, United States Code, section 1161 and 6408 provides for the dropping from the rolls of an officer absent without leave more than three months or who has been convicted by civilian authorities and sentenced to confinemnt in a Federal or state penitentiary or correctional institution. This office has previously stated that such separation will usually be characterized as under other than honorable conditions.

[3] Subject to a review of the facts surrounding the discharge by the agency administering the benefit except in the case of death gratuities by the Administrator of Veterans Affairs.

[4] Section 4821, Revised Statutes (24 U.S.C. 49) provides that certain soldiers with service in the Army of the United States are eligible for admission to the Soldiers' Home. Section 4822, Revised Statutes (24 U.S.C. 50) provides "the benefits of the Soldiers' Home shall not be extended to any soldier in the regular or volunteer service, convicted of felony or other disgraceful or infamous crimes of a civil nature after his admission into the service of the United States; nor shall any one who has been a deserter, mutineer or habitual drunkard be received without such evidence of subsequent service, good conduct, and reformation of character as is satisfactory to the commissioners."

[5] 38 U.S.C. 3103 provide in substance that discharge or dismissal by reason of sentence of GCM and other discharges and dismissals specified, shall bar all rights based upon the period of service from which discharged or dismissed, under any laws administered by the Veterans' Administration.

SPACE—A LEGAL VACUUM *

BY JOSEPH J. SIMEONE, JR.**

I. INTRODUCTION

When the first Sputnik pierced the atmosphere enveloping the earth just four short years ago, the words of H. G. Wells, in one of his fascinating stories, echoed prophetic:

> We have learned now that we cannot regard this planet as being fenced in and a secure abiding-place for man; we can never anticipate the unseen good or evil that may come upon us suddenly out of space. It may be that in the larger design of the universe [what has happened] is not without its ultimate benefit for men; it has robbed us of that serene confidence in the future which is the most fruitful source of decadence.[1]

And now that Gagarin, Shepard, Grissom, and Glenn Titov, have penetrated the threshold of infinite space the legal aspects of these space activities become urgently important in order to achieve order and stability out of the numerous scientific achievements. For without law and order in any field of man's achievements, chaos, rivalries and uncertainties result which lead to either individual or national conflicts. Both former President Dwight D. Eisenhower and President John F. Kennedy have emphasized the critical need for cooperation and agreements to limit the use of outer space to peaceful purposes rather than to have another "focus for the arms race."

To discuss a few of the many pressing problems is the purpose of this article. Obviously the legal problems cover every phase of man's activities. Suppose, an astronaut blasts off from the earth in the new Saturn or Nova rocket and is never heard from again. When is his wife entitled to collect his life insurance? Suppose, as has recently been suggested, that the first manned moon shot be made by one American, one Russian and one citizen of a neutral country and a tort occurs on board. What law would govern liability, if any? Would the same rules governing neutrality, belligerency, piracy, tortious violations or business transactions be applied to space activities or will new concepts have to be created to meet

* This article is based on an address given by the author on October 20, 1961, in conjunction with the St. Louis University Founders' Week. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] Wells, War of the Worlds, Epilogue (1895).

new demands?[2] What rule or jurisprudential system will govern our relationship with any space beings? It is not possible, therefore, to discuss here the many legal problems or even to refer to the mass of legal literature;[3] hence, it is necessary to concentrate on those areas particularly pressing.

Voices are crying for some rules and regulations to fill the legal vacuum before more and more spectacular Soviet space achievements.[4] Although some would prefer to apply the common law doctrines of applying the law to the facts and let the issues be decided as they arise,[5] it would seem that "world civilization has

[2] Yeager, *Space Law—Recent Practical Achievements*, an address quoted in Menter, Astronautical Law (1959), and reprinted in Legis. Ref. Serv., Library of Congress, *Legal Problems of Space Exploration—A Symposium*, S. Doc. No. 26, 87th Cong., 1st Sess. 349, 375 (1961) (hereinafter referred to as S. Doc. No. 26).

[3] Pepin estimates that in 1959 there were some 12,000 pages of writing devoted to space law, mostly after the orbiting of Sputnik I. The writings probably have doubled since then. Pepin, *Les Problemes Juridiques de L'espace*, 6 McGill L. J. 30 (1959). John C. Hogan has posed some forty questions concerning activities in space. Hogan, *A Guide to the Study of Space Law*, 5 St. Louis U.L.J. 79 (1958).

[4] David F. Maxwell, Chairman of the American Bar Association's Special Committee on the Law of Outer Space, has stated: "Scientific achievements could pose 'a real threat' to peace unless the law catches up." St. Louis Globe-Democrat, Aug. 10, 1961. U.N. Ambassador Adlai Stevenson said at the time of Titov's flight: "This event sharpens the need for some action to regulate the use of outer space and to keep the arms race from spreading to that field. The President has recently announced his proposals for cooperative sharing of communications and weather satellites. . . . We hope the Russians won't delay longer in joining us in co-operative regulation in the use of outer space." St. Louis Post-Dispatch, Aug. 7, 1961, p. 1.

[5] Admiral Chester Ward, the former Judge Advocate General of the Navy, stated in 1957 that he did not think that this country had enough information about space to regulate man's activities. Ward, *Projecting the Law of the Sea into the Law of Space*, JAG J., March 1957, at p. 3, reprinted in S. Doc. No. 26, at 120. Loftus Becker, the legal adviser to the Department of State, holds to the view that the law of space "should be based upon the facts of space, and that there is much more we have to learn before we shall be in a position to say what shall be the general legal principles applicable to activities in that region. This is in accord with the tendency of development of the common law, which has been on a case-by-case basis." Becker, *United States Foreign Policy and the Development of Law for Outer Space*, JAG J., February 1959, at p. 4. Professors Lipson and Katzenbach suggest that the "absence of any law of Outer Space, is for the time being, a healthy condition-one which will gradually change, bit by bit, as conflicting interests arise and are properly weighed in the balance." Quoted in Keating, *Space Law and the Fourth Dimension of Our Age*, an address given at the Ninth Annual Congress of the International Astronautical Federation, reprinted in S. Doc. No. 26, at 432–33. Col. Morton S. Jaffe, JAGC, U.S. Army, has taken a very practical approach: "I wonder whether we, or the potential users, know enough at this point to attempt definitions of controlling factors in our own national interests. And, it seems to me, in this new field, in which our national defense is intimately bound up, it is that national interest which primarily must be prosecuted. We cannot cavalierly disregard our sovereignty." Jaffe, *Some Considerations in the International Law and Politics of Space*, 5 St. Louis U.L.J. 375, 379 (1958).

passed the point . . . where it can afford to sashay into space without some anticipation of the consequences or permit the concept of space regulations to 'just grow'."[6]

It is submitted that the following major legal problems are critical:

(1) Is outer space free for all nations to use and explore for scientific progress or is outer space subject to the sovereignty of the subjacent state? There are various ways of stating this question—What *right* does one country have to orbit a satellite over another without its consent, or how far up may one nation exercise its rights of sovereignty so as to prohibit the orbiting of satellites?

(2) Can the proliferation of space hardware continue without some international regulation?

(3) What is the liability, if any, for damages caused by rockets, boosters, satellites etc.?

(4) What is the legal status of celestial bodies? May they be appropriated by one of the space powers to the exclusion of all other countries?

II. SOVEREIGNTY

The problem of sovereignty has probably captured the attention of most writers in the field. The problem was discussed as early as 1951 by Professor Cooper[7] and by many authors since then. The old doctrine—*Cujus est solum ejus et usque ad coelum*[8]—was the guiding principle in English law.[9] But with the development of air power, such a doctrine, of necessity, gave way. The first attempt to make "airspace" free was at the 1902 Brussels meeting of the Institute of International Law. Paul Fauchille first advanced the case for "freedom of the air." His argument was based on the law of the sea—that complete freedom of the air should

[6] Keating, *supra* note 5, at 432, 435.

[7] Cooper, *High Altitude Flight and National Sovereignty*, an address given before the Escuela Libre de Derecho in Mexico City in 1950, reprinted in S. Doc. No. 26, at 1.

[8] The doctrine is fully discussed in McNair, The Law of the Air, ch. 2 (1953); Klein, *Cujus Est Solum Ejus Est*, 26 J. Air L. & Com. 237 (1959); 2 Blackstone, Commentaries 18 (8th ed. 1778). Professor Cooper has traced the history of the doctrine in 1 McGill L. J. 23 (1952).

[9] Horizontal sovereignty of a state has not been questioned since the doctrine of territoriality became established in Anglo-American law. And either by statute or by custom each sovereign exercises jurisdiction over the high seas to a prescribed distance from the shore. Since the days of George Washington, the United States has claimed jurisdiction up to one sea league or three nautical miles from the shore. 1 Hyde, International Law, Chiefly as Interpreted and Applied by the United States 451 (2d ed. 1945). In some instances the United States exercises jurisdiction beyond this limit, as in the case of the anti-smuggling act. 49 Stat. 517 (1935), 19 U.S.C. § 1701 (1958).

be guaranteed so that the air could be used without violation of the sovereignty of the subjacent state.[10] But Fauchille was challenged in 1906 by the eminent British lawyer, John Westlake, who urged state sovereignty.[11] With the pressure of events in the second decade of this century, the Paris Convention of 1919,[12] signed by the United States but not ratified, provided that each sovereign state had exclusive sovereignty over the air space above its territory. This doctrine was carried over into subsequent conventions and is presently embodied in the present Chicago Convention.[13] The question whether this convention governs flights beyond the "airspace" has been debated by many authors and various theories have been set forth. It is fair to say that most authors believe that the convention does not apply to activities in space, for many reasons. Practical considerations refute the vertical sovereignty theory as well as the language of the convention itself. Limitless sovereignty cannot practically be achieved, so that outer space is to be "res extra commercium." One authority holds to the view that fundamental difficulties preclude the sovereignty principle:

> The first is that any projection of territorial sovereignty into space beyond the atmosphere would be inconsistent with the basic astronomical facts. The revolution of the earth on its own axis, its rotation around the sun, and the motions of the sun, and the motions of the sun and the planets through the galaxy all require that the relationship of particular sovereignties on the surface of the earth to space beyond the atmosphere is never constant for the smallest conceivable fraction of time. Such a

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[10] See the Project drafted by the Institute of International Law for the Regulation of Aerostats and Wireless Telegraphy in 7 Am. J. Int'l L. Supp. 147 (1913): "Art. 1. The air is free. States have no authority over it, in time of peace or in time of war, other than that which is necessary for their own preservation." It is interesting to note that the early pilots were known as aerostats.

[11] For discussions of the early freedom principle, see Young, *The Aerial Inspection Plan and Air Space Sovereignty*, 24 Geo. Wash. L. Rev. 565, 569–80 (1956); Cooper, *Legal Problems of Upper Space*, an address before the American Society of International Law, 1956, reprinted in S. Doc. No. 26, at 66; Murphy, *Air Sovereignty Considerations in Terms of Outer Space*, 19 Ala. L. Rev. 11 (1958).

[12] Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919 (superseded by the Chicago Convention, note 13 *infra*).

[13] Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 (effective April 4, 1947): "The contracting states recognize that every state has complete and exclusive sovereignty over the airspace above its territory." The Soviet Union is not a party to the convention although the sovereignty principle is embodied in Article 2 of the Soviet Air Law of April 27, 1932. See Aaronson, *Aspects of the Law of Space*, L.T., Oct. 25, 1957, p. 219; Hogan, *Legal Terminology for the Upper Regions of the Atmosphere and for the Space Beyond the Atmosphere*, 51 Am. J. Int'l L. 362 (1957). The Air Code of the U.S.S.R., Aug. 7, 1935, provides in Section 1: "The U.S.S.R. shall have complete and exclusive sovereignty over the airspace of the US.S.R." House Comm. on Science and Astronautics, 87th Cong., 1st Sess., *Air Laws and Treaties of the World Annotated* (Comm. Print 1961).

> projection into space of sovereignties based on particular areas of the earth's surface would give us a series of adjacent irregularly shaped cones with a constantly changing content. Celestial bodies would move in and out of these cones all the time.[14]

Most authorities are in favor of the freedom principle.[15] But once the freedom principle is accepted no agreement can be reached on the point where freedom exists and sovereignty prevails. Various proposals have been made, ranging from 30 miles to infinity.[16] Whether there is an official position of the United States is difficult to determine, but Loftus Becker, the legal adviser of the Department of State, in 1958 indicated that since the atmosphere extends 10,000 miles above the surface it "would be perfecctly rational for

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[14] Jenks, *International Law and Activities in Space*, 5 Int'l & Comp. L.Q. 99, 103 (1956). Professor Cooper has argued in favor of the zone theory. The first zone would be an affirmation of the Chicago Convention, the second or contiguous zone would be controlled by the sovereign up to 300 miles, providing for the right of transit for all non-military flight instrumentalities, and the third zone would be free for the passage of "all instrumentalities." Cooper, *Legal Problems of Upper Space*, 23 J. Air L. & Com. 308 (1956). He later extended the 300 mile limit to 600 miles. See Letter From Professor Cooper to Editor, London Times, Sept. 2, 1957, discussed in Pepin, *Space Penetration*, an address before the American Society of International Law, reprinted in S. Doc. No. 26, at 233. See also Professor Cooper's view that the freedom principle should apply at a point at which a satellite may be put into orbit and that the "airspace does not extend to the area in which a satellite may be put in orbit around the earth." Cooper, *The Rule of Law in Outer Space*, 47 A.B.A.J. 23 (1961). Cooper and others have argued that the term "aircraft" in the Chicago Convention is limited to the atmosphere. Cooper, *Legal Problems of Upper Space*, 23 J. Air L. & Com. 308 (1956); Haley, *Space Law—Basic Concepts*, 24 Tenn. L. Rev. 643 (1956).

[15] Schacter, *Legal Aspects of Space Travel*, J. Brit. Interplanetary Soc'y 14 (1952); Meyer, *Rechtlicke Probleme des Weltraumflugs*, 2 Zeitschrift fur Luftrecht 31 (1953); Jenks, *supra* note 14; Welf-Heinrich, *Air Law and Space*, 5 St. Louis U.L.J. 11, 67 (1958). For the various views, see House Comm. on Science and Astronautics, *Survey of Space Law*, H.R. Doc. No. 89, 86th Cong., 1st Sess. (1959).

[16] The various views are summarized by Col. Martin Menter, U.S. Air Force, in *Legal Problems of Future Space Exploration and Travel*, an address before the School of Aviation Medicine, January 1961:

"(a) Height to which airborne vehicles requiring aerodynamic lift can ascend—about 25 miles.

"(b) Height at which aerodynamic lift ceases entirely, and Kepler (*i.e.*, centrifugal force) takes over—about 52 miles.

"(c) Height arbitrarily determined above point where aerodynamic lift ceases but below that at which an unmanned free falling satellite will orbit—between about 52 and 100 miles—the lowest perigee thus far has been about 100 miles.

"(d) Lowest height at which an unmanned free falling satellite will orbit at least once around the earth—between 70 and 100 miles.

"(e) Height to which subjacent state may exercise effective control.

"(f) Height arbitrarily determined above lower orbital limit." Haley has suggested the Karman line—about 55 miles. Haley, *Law and the Age of Space*, 5 St. Louis U.L.J. 1 (1958); H.R. Doc. No. 89, *supra* note 15, at 21; Haley, *Space Age Presents Immediate Legal Problems*, in First Colloquium on the Law of Outer Space 5, at 8 (1958).

us to maintain that under the Chicago Convention the sovereignty of the United States extends 10,000 miles from the surface of the earth . . ."[17]

The question may properly be asked whether there is any need at all for specifying a line above which there is complete freedom of use. For several years now each nation has orbited satellites without protest. Hence, it is argued that consent to operate in space has already been given. This is the view of the Ad Hoc Committee on the Peaceful Uses of Outer Space of the United Nations In its report it is said:

> The Committee . . . believes that, with this practice, there may have been initiated the recognition or reestablishment of a generally accepted rule to the effect that, in principle, outer space is, on conditions of equality, freely available for exploration and use by all in accordance with existing or future international law or agreements.[18]

At present, however, there is no agreement defining sovereignty and it has been said that this existing vacuum may lead to "grave international misunderstanding if permitted to continue too long."[19]

Whether there is a definite need for regulatory agreements fixing the sovereignty of nations in outer space has been seriously questioned. On the one hand the absence of definite rules would and could lead to gross misunderstanding. A definite agreement fixing "outer space" would inform the world when a particular type of conduct has become unlawful. The uncertainties that will develop with increasing space activities would demand that specific rules be established to specify international legal conduct. Yet the United States cannot afford to fix a particular boundary in outer space above which is free territory for the use of other space powers to the detriment of the United States without some effective controls. In the first place there are many scientific uncertainties at this stage of space development. Secondly, national security and self-protection would seem to prohibit the United States (and other space powers) from permitting freedom for all types of space activity which may be highly injurious to our own self-interests. There is no permanent dividing line between air and space. The recent events of the X–15 and the Dynasoar program emphasize this point. Hence the policies at the present time would preclude a definite agreement defining the *limits* of sovereignty, and

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[17] Becker, *Major Aspects of the Problem of Outer Space*, a statement made before the Special Senate Committee on Space and Astronautics, May 14, 1958, in S. Doc. No. 26, at 396, 401.

[18] Report of the Ad Hoc Committee on the Peaceful Uses of Outer Space, U.N. Doc. No. A/4141 (1959) (hereinafter referred to as the U.N. Ad Hoc Committee Report).

[19] Cooper, *Proceedings of the American Society of International Law*, April 1956, in H.R. Doc. No. 89, *supra* note 15.

would seem to postpone for an indefinte period a binding multilateral space agreement detailing a fixed boundary.[20]

Yet, such policies would not preclude an agreement that "space is free" for the use and exploration of all nations. "Outer space" should be explored to the utmost for scientific and "peaceful," *i.e.*, "non-aggressive" purposes, so as to prohibit the oribiting of "space-weapons." Such an agreement is easier to be reached than a specific agreement defining a limit. And such an agreement would have the effect of marking the aggressor if such conduct were pursued in violation thereof.

The most that can be hoped for at the present time in these years of early space exploration is that space should be free for the peaceful uses of any nation engaged in space activity and the prohibition of orbiting space weapons. If this were accomplished, it would not only be highly beneficial for all mankind, but would be a great stride forward to ease the mounting fears.

III. REGULATORY NEED FOR ACTIVITIES IN SPACE

A second problem that will become increasingly more difficult as more and more satellites are placed in orbit is the need for some rules regulating the many space ventures.[21] The report of the Ad Hoc Committee of the United Nations recognizes that priority treatment should be given to the allocation of radio frequencies, identification and registration of space vehicles, landing and reentry of space vehicles.[22] Since some of the satellites will continue their orbit indefinitely and emit radio signals for long periods, interference with presently allocated frequencies will become a serious problem.[23] Furthermore, with the increase in activity there is a need for the prevention of physical interference between aerospace vehicles and satellites or their propulsion units.[24] The

[20] See Note, *National Sovereignty of Outer Space*, 74 Harv. L. Rev. 1154, 1169–74 (1961).

[21] As of October 8, 1961, there were 27 United States satellites still in orbit and four Russian satellites. See Diagram, New York Times, October 8, 1961, Space Section. For a complete list of satellites launched through the end of 1960, see the 1961 World Almanac 147, and S. Doc. No. 26, at 1306 *et seq.* By the end of 1960, 76 satellites had been launched, some unsuccessfully. S. Doc. No. 26, Appendix F.

[22] U.N. Ad Hoc Committee Report 24.

[23] See Haley, *Space Age Presents Immediate Legal Problems*, in First Colloquium on the Law of Outer Space 5 (1958).

[24] The U.N. report considered this a serious problem: "As the launchings of space vehicles become more numerous and widespread throughout the world, practical problems will clearly arise in regard to the prevention of physical interference between space vehicles, particularly rockets, and conventional aircraft. . . . It was considered that Governments could give early attention to the problem of interference between aircraft and space vehicles and that technical studies could usefully be undertaken, if necessary, with the assistance of competent specialized agencies." U.N. Ad Hoc Committee Report 24.

first violation of the rules with reference to radio frequencies was the frequency used in Sputnik I. The frequency used—20.005 megacycles—interfered with the frequency assigned by international authorities to Kootwijk, The Netherlands.[25] As more and more satellites are orbited with more powerful and longer lasting radio transmitters, the problem will worsen. "A failure to allocate frequencies for national space programs increases the difficulty of prescribing norms with regard to either intentional or unintentional jamming of communication facilities. Interference by one state with another's space program, or interference by space vehicles with normal communication channels, could lead to retaliation and a serious situation or dispute among nations."[26] Some progress in this area is being accomplished. A conference is scheduled for 1963 to discuss and resolve major matters related to astronautical radio allocations.[27] Whether this will be successful in solving the multitude of problems remains to be seen. What may be needed is a study within the United Nations to adjust the radio frequencies used in space craft with those frequencies already assigned.

With reference to the increasing number of satellites, rules and regulations will eventually have to be established to govern space navigation and to regulate the numerous simultaneous activities by space nations. As the numbers of hardware increase, suitable means for identifying satellites, identifying orbits, prescribing the times, manner and sites of launch, certification of astronauts, flight patterns, etc. will surely have to be developed.[28]

IV. SPACE SATELLITE TORTS

A third problem that exists for which there is no present solution is the question of liability of the space powers for injuries caused by space activities. This was also one of the legal problems susceptible of priority treatment in the Ad Hoc Committee report

[25] See Haley, *supra* note 23, at 15. The whole system of international law regulating telecommunications culminated in the International Telecommunication Union, currently governed by the provisions of the Buenos Aires Convention of 1952. International Telecommunication Convention, Annexes, and Final Protocol, Dec. 22, 1952 [1955] 6 U.S.T. & O.I.A. 1213, T.I.A.S. No. 3286. For the history and scope of the Telecommunication Union, see Aaronson, *Space Law*, reprinted in S. Doc. No. 26, at 221, 227.

[26] A.B.A. Rep., Comm. on Law of Outer Space, Int'l & Comp. L. Sect., Proceedings, at 215, 226 (1959).

[27] Haley, *A Basic Program for the 1963 Extraordinary Administrative Radio Conference on Space Communications*, an address delivered to the Eleventh Congress of the International Astronautical Federation, 1960, reprinted in S. Doc. No. 26, at 694.

[28] Some proposals have already been made. Jenks, *supra* note 14; Cox and Stoiko, Spacepower, What It Means To You, ch. 13, *The Need for a United Nations 'Space Law* (1958); Menter, *Astronautical Law* (1959) (unpublished thesis, No. 86, Industrial College of the Armed Forces).

of the United Nations.[29] Suppose a portion of a satellite, or one of the stages of the rocket falls back to earth and injures person or property. Scientists tell us that when a rocket is launched the first stage will accelerate to a height of about fifty miles and then fall back to earth. The first stage may fall as far away as three hundred miles from the launching site. It has been said that the carrier of Sputnik III which fell into the South Pacific Ocean was about the size of a pullman car, and weighed between two and five tons. It could easily have fallen into a populated area. If such a disaster should occur, what is the liability of the sovereign launching the vehicle? More complicated situations may result. What is the liability of the Soviet Union to a citizen of the United States who is injured by a Sputnik, or the liability of the United States for injuries to foreign citizens? Liability for space vehicle injuries has been discussed by several writers.[30]

The doctrine in the law of torts—that of ultra-hazardous activity—could possibly be transferred to apply to damage from space activity.[31] And combining this doctrine with the responsibility of the United States under the Federal Tort Claims Act,[32] it would be arguable that liability should result. But in *Dalehite v. United States* [33] the Supreme Court of the United States held that the federal government was not responsible for damages resulting from the explosion of nitrate, nor did liability arise by virtue of carrying on an extra-hazardous activity, in the absence of negligence. Under the present state of the law, there is a question whether the doctrine could be applied against the United States to an injury caused by a falling satellite.

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[29] U.N. Ad Hoc Committee Report 23–24.

[30] The two most comprehensive articles are Beresford, *Liability for Ground Damage Caused by Spacecraft*, 19 Fed. B.J. 242 (1959), and Haley, *Space Vehicle Torts*, 36 U.Det. L.J. 294 (1959). See also de Rode-Verschoor, *The Responsibility of The States for the Damage Caused by the Launched Space Bodies*, an address delivered before the International Astronautical Federation, Aug. 29, 1958, reprinted in S. Doc. No. 26, at 460; Parry, *Space Law: Surface Impact Liability*, 14 Okla. L. Rev. 89 (1961).

[31] The doctrine stems, of course, from the decision of Rylands v. Fletcher, [1868] L.R. 3 H.L. 330. In the opinion Lord Cranworth stated: "In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage." *Id.* at 341. For a discussion of the doctrine, see Prosser, Torts § 59 (2d ed. 1955); Prosser, *The Principle of Rylands v. Fletcher*, in Selected Topics of the Law of Torts 135 (1954); Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. Pa. L. Rev. 298 (1911).

[32] 28 U.S. C. § 1346(b) (1958). For discussions of the act, see Ake, *Federal Tort Claims Act Summarized*, 6 Clev.-Mar. L. Rev. 277 (1957); Weaver, *F.T.C.A. in a Nutshell*, 7 Clev.-Mar. L. Rev. 106 (1958); Hunt, *The Federal Tort Claims Act: Sovereign Liability Today*, Mil. L. Rev., April 1960, p. 1.

[33] 346 U.S. 15 (1933). See also Bartholomae Corp. v. United States, 135 F. Supp. 651 (S.D. Cal. 1955).

Perhaps the decisions involving falling aircraft establish a closer analogy. Despite the comparable safety of aircraft, many decisions and writers hold to the view that any injury caused by an aircraft to persons on the ground should be compensated without proof of negligence.[34] In one decision, *United States v. Praylou*,[35] a government plane exploded and fell in South Carolina injuring the plaintiffs. Negligence was neither alleged nor proved. Under the law of South Carolina absolute liability was imposed. The Fourth Circuit held the Government responsible for the resulting injuries and stated:

> One who flies an aeroplane is opposing mechanical forces to the force of gravity and is engaged in an undertaking which is fraught with the gravest danger to persons and property beneath it if it is not carefully operated. At common law the hazardous nature of the enterprise subjected the operator of the plane to a rule of absolute liability to one upon the ground who was injured.[36]

But the difficulty lies in the fact that many states have abandoned the doctrine of absolute liability with reference to aircraft,[37] and if governmental liability would turn upon the state law, no uniform rule could be established. Therefore, whether a citizen could recover against the United States under the present Federal Tort Claims Act without showing negligence in launching the satellite is doubtful. Furthermore, the pecularities of local law would determine liability—an unsatisfactory solution. An amendment of the Federal Tort Claims Act would provide a clearer solution. Liability could be imposed for any injury caused either by negligence or "harm caused by aircraft or spacecraft, regardless of negligence."

Notwithstanding the deficiencies in the Federal Tort Claims Act, an injured person has limited redress under the National Aeronautics and Space Act.[38] Section 203 (13) (a) of that act provides that the Administration is "authorized . . . to consider . . . and pay, on behalf of the United States . . . any claim for $5,000 or less . . . for bodily injury, death, or damage . . . resulting from the conduct of the Administration's functions . . ." If damages in excess of this amount are claimed and the Administration considers the claim a meritorious one, it is then to report the facts and circumstances to the Congress for consideration.[39] Under this act there is

[34] Uniform Aeronautics Act § 5 imposes absolute liability for damages. See discussions of this liability in Haley, *supra* note 30, at 298, and the excellent article by Wolff, *Liability of Aircraft Owners and Operators for Ground Injury*, 24 J. Air L. & Com. 203 (1957). See also Restatement, Torts § 520 (1938).

[35] 208 F.2d 291 (4th Cir. 1953).

[36] *Id.* at 293.

[37] Six states have retained the doctrine of absolute liability; seven states have repealed the absolute liability provisions of the Uniform Aeronautical Act; and eight states have statutes that apply the ordinary rules of negligence. See the classifications of states in Wolff, *supra* note 34, at 218–19.

[38] 72 Stat. 426–438 (1958), 42 U.S.C. §§ 2451–2459 (1958).

[39] 72 Stat. 429 (1958), 42 U.S.C. § 2473 (13)(A) and (B) (1958).

no requirement that negligence be alleged or proved. While this is a step in the right direction, the act is limited by administrative settlement to $5,000 and the provisions of the act are not the equivalent of legally enforceable rights.

Many difficulties arise in the event a Russian rocket or satellite injures a citizen of the United States. In the absence of any international convention on the subject, claims would have to be presented through diplomatic channels by the individual [40] or the government would assert the right of the individual through the International Court of Justice.[41]

There is no positive formulation, as yet, dealing with injuries from space-craft. The Rome Conventions,[42] which impose absolute liabiblity upon proof of damage caused by *aircraft* to a limited extent ($33,000 for injury or death), may not be applicable to spacecraft. Individuals have urged, therefore, that an international agreement similar to the Rome Convention be adopted for injuries by space-craft.[43] In the absence of such agreement, recovery, if any, would be difficult to achieve.

V. EXPLORATION AND APPROPRIATION OF CELESTIAL BODIES [44]

Now that Major Gherman S. Titov has orbited the earth, scientific sources predict that it will not be much longer before the Russians will land a man on the moon and perhaps other celestial

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[40] Haley, *supra* note 30, at 313–14.

[41] Haley, *supra* note 30, at 314. See also H.R. Doc. No. 89, *supra* note 15, at 25.

[42] International Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface, May 29, 1933. Commonly known as the Rome Convention, this treaty has been ratified by only a few countries. See Shawcross and Beaumont, Air Law § 6004, at 1187 (1950). There are actually two Rome Conventions, one signed in 1933 and the other in 1952 . For the provisions of the 1933 convention, see Shawcross and Beaumont, *supra*, at 608–613. For a report of the 1952 convention, see 20 J.Air L. & Com. 89 (1953). Fifteen states signed the 1952 convention at the conclusion of the conference which drew it up. For a list of these states, see 19 J. Air L. & Com. 443 (1952).

[43] Jenks, *supra* note 14; Cooper, *Memorandum of Suggestions for an International Convention on Third Party Damage Caused by Space Vehicles*, a paper presented to the Eleventh International Astronautical Federation Congress, Aug. 16, 1960, reprinted in S. Doc. No. 26, at 680.

[44] Von Der Heydte, *Discovery in International Law*, 29 Am. J. Int'l L. 448 (1935); Schacter, *Who Owns the Universe*, in Senate Comm. on Science and Astronautics, 85th Cong., 2d Sess., *Space Law—A Symposium* (Comm. Print 1958); Jacobini, *Effective Control as Related to Extension of Sovereignty in Space*, 7 J. Pub. L. 97 (1958); Finch, *Territorial Claims to Celestial Bodies*, a paper presented to the Tenth International Astronautical Federation Congress, Sept. 4, 1959, reprinted in S. Doc. No. 26, at 626; Yeager, *The Moon—Can Earth Claim It?*, a paper delivered at the Eleventh International Astronautical Federation Congress, Aug. 16, 1960, reprinted in S. Doc. No. 26, at 757.

bodies.[45] The present Administration is committed to landing a man on the moon within the decade. When this fact occurs, what will be the legal status of these celestial territories? May these bodies be subject to appropriation by any nation which claims them? What, under present principles of international law, is effective appropriation? Will claims be made by any or all of the space powers for tactical advantages? Or will these bodies be subject to use by any and all nations without specific appropriation? To date no nation has claimed any celestial body. But it is worthy of note that when Lunik II struck the moon on September 13, 1959, Premier Kruschechev stated:

> The Soviet people . . . are proud of their scientists, engineers, technicians and workers who have been the first in the world to send to the moon a container with scientific equipment and a pennant with the Soviet Union's coat of arms and thereby secured priority for our country. Thus, we, the Soviet Union have made certain of priority in the first successful rocket flight to the moon.[46]

Has he, by this statement, claimed the moon and appropriated it? If so, how effective is this appropriation under international law?

In the early days of world discovery claims rested on symbolic acts of possession.[47] In those days of exploration, claims were settled sometimes by war and sometimes by Papal Bulls.[48] As time progressed other solutions prevailed. Under these solutions neither discovery nor symbolic acts have been held sufficient to award new territories to a particular country. For example, in the dispute between Norway and Denmark relating to the legal status of Eastern Greenland, the Court of International Justice stated:

> [C]laim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.[49]

Under present international rules claims to land or bodies recognized as *terra nullius* rests on "actual occupancy." And this implies the intention to act as sovereign and to exercise sovereignty over the body capable of appropriation. This modern principle has been applied in a number of decisions of interna-

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[45] Kenneth Gatland, Vice-President of the British Interplanetary Society, has said that he expects the Russians to land a man on the moon by 1967. St. Louis Post-Dispatch, Aug. 7, 1961, p. 1.

[46] New York Times, Sept. 15, 1959, p. 22, col. 5.

[47] 1 Hyde, *op. cit. supra* note 9, at 321; Keller, Lissitzyn and Mann, Creation of Rights of Sovereignty Through Symbolic Acts 148–49 (1938).

[48] On May 4, 1493, Pope Alexander VI issued the "Inter Caetera," suggesting a division of the New World between Spain and Portugal. See Finch, *supra* note 44, at 626.

[49] Legal Status of Eastern Greenland, P.C.I.J., ser. A/B, No. 53, at 45 (1933).

tional courts,[50] and is recognized by leading authorities.[51] If these doctrines were applied to acquisition of celestial bodies, mere symbolic exercise of authority would not be sufficient to acquire interests therein. Before a race develops to occupy celestial bodies the successful negotiations concerning Antarctica may suggest an answer.[52] But the only true remedy to offset competing claims is to adopt the suggestion of the late Secretary General of the United Nations. In an address in 1958 he expressed the hope:

> [T]hat the General Assembly, as a result of its consideration, would find the way to an agreement on a basic rule that outer space, and the celestial bodies therein, are not considered as capable of appropriation by any state, and that it would further affirm the overriding interest of the community of nations in the peaceful and beneficial use of outer space and initiate steps for an international machinery to further this end.[53]

VI. SUGGESTED SOLUTIONS TO SPACE PROBLEMS

Many diverse groups and agencies have begun to concern themselves with the legal problems presented by space achievements. And there are many resolutions offered and solutions proposed. The General Assembly established an Ad Hoc Committee on the Peaceful Uses of Outer Space in 1958; the Committee became a permanent one in 1959, but as yet it has to hold its first meeting. Each House in the Congress has established a standing Committee on Space Sciences after Special Committees on Space and Astronautics were appointed. The American Bar Association appointed a special Committee on the Law of

[50] *E.g.*, in The Island of Palmas (United States v. The Netherlands), in 22 Am. J. Int'l L. 867 (1928), the arbitrator held that the claim of the United States, based on discovery without subsequent exercise of authority, was not sufficient to overcome The Netherlands' claim, based on continuous peaceful dominion.

[51] Professor Oppenheim states: "Theory and practice agree nowadays upon the rule that occupation is effected through taking possession of, and establishing an administration over, territory in the name of, and for, the acquiring State. Occupation thus effected is real occupation, and, in contradistinction to *fictitious* occupation, is named *effective* occupation. Possession and administration are the two essential facts that constitute an effective occupation." 1 Oppenheim, International Law § 222 (1955 ed.). See also Lindley, The Acquisition and Government of Backward Territories in International Law 159 (1920).

[52] The proposed treaty on Antarctica is discussed in Finch, *supra* note 44, at 636 *et seq.* For the text of the treaty, see S. Doc. No. 26, at 1297–1303. Article I provides: "1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons. . . ."

[53] Address by Secretary-General Dag Hammarskjold, *The United Nations and Outer Space*, The U.S. Governors' Conference, May 19, 1958, reprinted in S. Doc. No. 26, at 263.

Outer Space which dealt with the legal problems.[54] The American Bar Foundation also has made its report to the National Aeronautics and Space Administration in October 1960.[55] The Ad Hoc Committee on the Peaceful Uses of Outer Space of the United Nations published its report in 1959.[56]

A number of other groups have been seriously concerned with the legal questions. The International Astronautical Federation founded in 1950 by a number of national societies interested in rocketry and space exploration has held numerous conferences and discussed the legal questions.[57]

Despite all this activity no great progress has yet been made. At the present time we are slowly drifting along with the hope that rules will be developed and that they will somehow be worked out without great disaster. This is a dangerous practice. It would seem that the time is now ripe[58] to achieve agreement between the space powers on certain broad policy questions concerning outer space. The initiative must come from the President to propose certain resolutions so that the United Nations can provide the forum for achieving international agreements. A hint of what is to come was given in the President's address to the United Nations. He stated that "we shall urge proposals extending the United Nations Charter to the limits of man's exploration in the universe, reserving outer space for peaceful use, prohibiting weapons of mass destruction in space or on celestial bodies, and

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[54] A.B.A. Rep., Comm. on Law of Outer Space, Int'l & Comp. L. Sect., Proceedings, at 215 (1959).

[55] The American Bar Foundation project reporters were Professors Leon Lipson and Nicholas de B. Katzenbach. This excellent and voluminous report is reprinted in S. Doc. No. 26, at 779.

[56] Report of the Ad Hoc Committee on the Peaceful Uses of Outer Space, U.N. Doc. No. A/4141 (1959).

[57] For a description of the work of the various non-governmental groups, see Galloway, *World Security and the Peaceful Uses of Outer Space*, an address delivered at the Eleventh Congress of the International Astronautical Federation, Aug. 16, 1960, reprinted in S. Doc. No. 26, at 684; Haley, *Recent Developments in Space Law and Metalaw—Work of International Groups*, 24 Harv. L. Rec. No. 2 (1957); Galloway, *Introduction* to S. Doc. No. 26, at xi–xxii.

[58] The position of the United States has been, and still is, that it would be "willing to enter any reliable agreement which would . . . mutually control the outer space missile and satellite development." State of the Union Address, President Dwight D. Eisenhower, in New York Times, Jan. 11, 1957, p. 9. See also Letter From President Eisenhower to Soviet Premier Bulganin, Jan. 12, 1958, in S. Doc. No. 26, at 992; and Address by President Eisenhower, U.N. General Assembly, Sept. 22, 1960, in S. Doc. No. 26, at 1009.

In March 1958, Soviet U.N. Representative Sobolev proposed certain measures for consideration. U.N. Doc. No. A/3818 (1958). For similar proposals, see Galina, *For Equal Collaboration in the Peaceful Use of Cosmic Space*, Izvestia (Moscow), Sept. 17, 1958, p. 5, in S. Doc. No. 26, at 1058; and Zourek, *What Is the Legal Status of the Universe?*, in S. Doc. No. 26, at 1109.

opening the mysteries and benefits of space to every nation. We shall further propose, finally, a global systems of communication satellites linking the whole world in telegraph, telephone, radio and television. The day need not be far away when such a system will televise the proceedings of this body to every corner of the world." [59]

Once certain broad resolutions are introduced and agreed upon, then more detailed programs under the direction of already existing international bodies could be established. For the present it would seem that now is the time to introduce in the United Nations the following six point program concerning outer space:

(1) That outer space be declared free only for the peaceful use of all nations, thus explicitly prohibiting orbital weapons.

(2) That a permanent agency of the United Nations be set up to establish rules and regulations governing the registration, flight plans, navigation and radio communications of orbital satellites.

(3) That the use of certain scientific satellites, *e.g.*, weather and communication satellites, be utilized for the benefit of all nations, whether that nation be a space power or not, for international communication, broadcasting or telecasting.

(4) That nations engaged in space activity officially recognize their liabilities for any injuries to persons or property resulting from space activity.

(5) That celestial bodies be declared incapable of appropriation by any one country.

(6) That a permanent committee of the United Nations be established to coordinate and collate scientific international data for the benefit of all mankind, to appraise the effectiveness of early resolutions and to suggest further detailed aggreements and proposals.

While it may seem impossible, in the view of the difficulty of the world powers to achieve agreements in the past, would it not be a great gesture for this country to propose and offer to the world, as soon as possible, suggestions for an agreement for a global system of weather prediction, a global system of communications, the prohibition of all orbital weapons, and the free use of celestial bodies? While the Eastern world may shock mankind with explosions of fifty megaton bombs, let the United States shock mankind with an explosion for peace. Perhaps no agreement will ever be reached, but despite frustrations and heart-

[59] Address by President Kennedy, U.N. General Assembly, Sept. 26, 1961.

aches on the long road to achieve solutions to the most fascinating exploration in history, one must continue to work hard and long toward achieving those solutions. One might bear in mind the old saying: "When you reach for the stars, you may not quite get one; but you won't come up with a handful of mud, either." [60]

[60] Two days after the address upon which this article is based was given, Harlan Cleveland, Assistant Secretary of State for International Organizations, in addressing the faculty convocation of St. Louis University's Founders' Week, stated that the Kennedy administration would propose a seven point program to the U.N. General Assembly. The seven points were as follows:

(1) Explicit confirmation that the U.N. Charter applies to the limits of space exploration.
(2) A declaration that space and heavenly bodies are not subject to claims of national sovereignty.
(3) An international system for registering all objects launched into space.
(4) A specialized space unit in the U.N. Secretariat.
(5) A world weather watch using satellites.
(6) A cooperative search for ways toward weather modification.
(7) A global system of communications to link the world by telegraph, telephone, radio and television. New York Times, Oct. 23, 1961, p. 1, col. 1.

ARGUMENT OF MILITARY COUNSEL ON FINDINGS, SENTENCE AND MOTIONS: LIMITATIONS AND ABUSES *

BY LIEUTENANT COMMANDER GARDINER M. HAIGHT **

I. INTRODUCTION

An undisputed, and most valuable, right of counsel in adversary proceedings is the right to present argument to the triers of the facts. Of course, the value of oral argument is in direct proportion to the skill of the advocate presenting it, but even when employed by the novice it is an effective tool in the trial lawyer's kit. There is no way to empirically ascertain the number of cases in which the forensic ability of counsel has been the factor which tipped the scales of justice in favor of his client or, conversely, the number of cases in which justice was not done because of inept argument. Suffice it to say, the fact that such can happen enhances rather than diminishes the value and importance of oral argument.

Judicial recognition was given to the value of argument of defense counsel in *United States v. Sizemore*,[1] when Chief Judge Quinn of the United States Court of Military Appeals said:

> The right—and duty—of defense counsel to present a closing argument is not to be lightly brushed aside. Where the case is long and hotly contested, and a planned strategy has been pursued by defense, the closing argument may be crucial. Out of the wealth of testimony adduced, defense must bring together the portions that are favorable to the accused and present them in a light that will appear most convincing to the triers of fact. If this is not done by defense counsel, there is a danger that the court may not understand or appreciate the defense theory. It is not exaggeration to say that many criminal cases are won for the accused in the course of closing argument.[2]

In order for counsel to consider himself proficient in this field it is by no means enough that he should be able to speak clearly

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[1] 2 USCMA 572, 10 CMR 70 (1953).

[2] *Id.* at 574, 10 CMR at 72.

and well. In addition to this he must understand, and mold his argument to conform to, the rules governing this aspect of his work. It is the principal purpose of this article to examine and delineate these "ground rules" of oral argument.

In military procedure, argument to the "jury"—the members of the court-martial—takes place after both sides have rested and prior to instructions by the law officer.[3] At this stage of the proceedings the court has before it, depending upon the skill of counsel presenting the case, either an orderly and logical unfolding of the facts of the case or a jumble of matter which it must unravel in its search for the truth. In either case, and more particularly the latter, the argument of counsel is of inestimable value in convincing the court that the array of evidence supports his contentions. It is not necessary for counsel to attempt to overwhelm the court with bombast, oratory or theatrics. Many counsel have found to their dismay that histrionics are calculated to dissuade, rather than persuade, the knowledgeable officers composing a court-martial. It is when counsel veers from an orderly, straight-forward, logical and sincere presentation that he commits error by falling into the traps that await the rabid partisan. For while counsel does have a right to argue, this right does not extend to an absolute freedom of expression.

The rules governing argument might appear simple on their face, but their practical application in the trial forum is often complex. It is the heat of litigation which causes the transgression that results in error.

The trial counsel may waive the right to argue to the court. He has the option of presenting argument or remaining silent and resting on the evidence he has adduced.[4] Except in the most unusual case, the defense counsel does not have such a choice and is subject to judicial rebuke should he fail to support the cause of his client to the fullest extent of his forensic ability.[5] Judge Latimer said this regarding the duty of defense counsel to present argument:

> While he who defends must prepare, consult, examine and cross-examine opposing witnesses, and, if possible, produce evidence of his own, his duties do not end there. As important as any of those is the overriding necessity of presenting to the court members, by oral argument, the facts, circumstances, and inferences in a light most favorable to an accused. Except in unusual circumstances, a failure to do that is, for all practical purposes, an admission of guilt. Certainly, the presentation of

[3] U.S. Dep't of Defense, Manual for Courts-Martial, United States, 1951, para. 73*a*. (The Manual for Courts-Martial will be referred to hereinafter in the footnotes as "MCM, 1951, para. ____" and in the text as "the Manual.")

[4] MCM, 1951, para. 72*a*.

[5] United States v. McMahan, 6 USCMA 709, 21 CMR 31 (1956).

> a "jury argument" is a virtual cornerstone of the universal right to assistance of counsel . . . .[6]

If counsel are to be bound by rules in the presentation of oral argument, where are the rules to be found? The Uniform Code of Military Justice[7] is silent with respect to argument. The Manual sets forth only the most general guidelines with regard to the order[8] and content[9] of argument on the findings. The Law Officer Pamphlet provides a modicum of clarification.[10] With regard to argument upon motions and other interlocutory matters, the Manual merely states that they may be made.[11] While it does provide that both sides are entitled to an opportunity properly to present and support their respective contentions upon any question or matter presented to the court for decision,[12] it is silent on the specific subject of argument upon the quantum of punishment.[13] The Law Officer Pamphlet contains some material concerning arguments with respect to the sentence,[14] but for a variety of reasons the language contained therein is open to question.[15] It is obvious, then, that in order to find meaningful rules to which the limits of his argument must conform, the military counsel must seek them in the decisions of the Court of Military Appeals and other appellate bodies. These decisions will be analysed in this article.

The leading judicial pronouncement of the rules governing argument of counsel is contained, most succinctly, in the case of *Berger v. United States*.[16] After recounting the pronounced and

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[6] *Id.* at 721, 21 CMR at 43; *accord*, Collingsworth v. Mayo, 173 F.2d 695 (5th Cir. 1949); United States v. Sizemore, *supra* note 1; People v. Ambach, 247 Ill. 451, 93 N.E. 310 (1910) (reversed where trial court instructed jury to disregard the argument of counsel entirely).

[7] 10 U.S.C. §§ 801–940 (1958). The Uniform Code of Military Justice will be referred to hereinafter as "UCMJ."

[8] MCM, 1951, para. 72*a*.

[9] MCM, 1951, para. 72*b*.

[10] U.S. Dep't of Army, Pamphlet No. 27–9, Military Justice Handbook—The Law Officer 51 (1958).

[11] MCM, 1951, paras. 53*g*, 57*g*, 58*f*, 62*h*, 67*e* and 73*c*(2).

[12] MCM, 1951, para. 53*g*.

[13] MCM, 1951, para. 75. In *A Plot of the Rocks and Shoals in the Manual for Courts-Martial*, JAG J., October 1958, p. 5, the following unofficial annotation to the Manual appears: "P. 121. After 75*d* add the following new subparagraph: *e. Argument:* After either or both sides have introduced matter having a bearing upon the sentence, either side may present argument upon the quantum of punishment to be imposed. Such argument, however, should be confined to the facts adduced during the presentencing procedure, to the evidence in the case and the reasonable deductions therefrom, and to the argument of opposing counsel. See 72. See U.S. v. Weller, 18 CMR 473."

[14] U.S. Dep't of Army, Pamphlet No. 27–9, Military Justice Handbook—The Law Officer 64 (1958).

[15] The subject of argument on the sentence will be considered commencing with the text accompanying note 107 *infra*.

[16] 295 U.S. 78 (1935).

persistent misconduct of the prosecuting attorney, the Court said:

> He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones.[17]

It is one purpose of this article to define the boundaries between such hard blows and foul ones.

Suppose that counsel, through stratagem, ignorance or carelessness, exceeds the bounds of proper argument or fails otherwise with regard to it. What effect will this have upon the rights infringed, or the conviction obtained, thereby? A further purpose of this article is to examine cases in which such error has been committed and the measures which have been held effective in dealing with it either at the time of the trial or subsequent thereto.

II. ARGUMENT ON FINDINGS

A. *BY THE PROSECUTION*

1. *Inflammatory Statements*

Among the errors committed by trial counsel most often noted are those of a nature calculated to inflame the passions and prejudices of the court or to weigh upon its sympathies in favor of the specific victim of the wrongdoing of the accused, the class to which the victim belongs or society in general.

Many crimes, particularly sex offenses, are by their very nature inflammatory. The courts in dealing with allegedly improper arguments in such cases have distinguished between inflammatory statements inherent in the offense and those which might be termed excessively or recklessly inflammatory.

In the rape case of *United States v. Ransom*[18] the accused contended he was prejudiced by inflammatory statements in the trial counsel's closing argument. The Court of Military Appeals did not restrict its examination to the remarks [not set forth in the opinion] singled out by the defense as improper, but studied the entire closing argument with great care. It concluded that the remarks of the trial counsel were essentially comments on reasonable inferences to be drawn from the circumstances surrounding the offense and as such they did not overstep the bounds of propriety and fairness.

So also in *United States v. Day*,[19] the trial counsel in his closing argument mentioned not only the indecent assaults by the accused upon his victim, but parenthetically mentioned the fact that in furtherance of his intent to ravish he roughly tossed the

[17] *Id.* at 88.
[18] 4 USCMA 195, 15 CMR 195 (1954).
[19] 2 USCMA 416, 9 CMR 46 (1953).

baby of his victim into his truck. The Court concluded that since there was evidence of this fact in the record the trial counsel did not exceed fair argument in utilizing the totality of circumstances surrounding the offense to substantiate his views. In both the *Ransom* and *Day* cases the test seems to be whether there is some evidence in the record upon which the remarks of counsel can be reasonably based. The Court in *Day* summarized by stating that, "While inflammatory comments should be avoided, facts and circumstances interwoven with the offense need not be shunned even though they cast the accused in an unfavorable light." [20]

The analogy of this latter rule with that regarding evidence which might be considered inflammatory is obvious, and the rules applicable to the one apply similarly to the other. With regard to inflammatory evidence, if the item of proof is admissible for a legitimate purpose, the fact that it may also tend in this undesirable direction is, in and of itself, no ground for reversal.[21] In *United States v. Harris*,[22] the Court of Military Appeals said, "Whether or not they [photographs of the victim's body] were inflammatory is not the matter of importance. They served a legitimate purpose and that renders them admissible . . . . We do not view them as of such a nature as to be likely to be unduly inflammatory." [23] The sense of this is very near that of the excerpt from *Day* quoted above.

Doubtless the reason that there is a judicial tendency to discourage the use of evidence or argument that might be inflammatory is the fear that sensationalism will overshadow probative value and that logic will yield to passion. Nonetheless, there is no need to avoid any legitimate argument solely because it may have inflammatory side effects.

Another factor included within the question of inflammatory argument is the manner in which the trial counsel chooses to characterize the accused. Apparently a specious judicial distinction was drawn between a "sex maniac" and "sex fiend" in the Army board of review cases of *United States v. Thomas*[24] and *United States v. Jernigan*.[25] In the former, a rape case, the board concluded that the trial counsel's characterization of the accused as a "sex maniac" in a loose sense did not go beyond fair comment and was not erroneous. On the contrary, in *Jernigan*, which involved indecent liberties, the trial counsel's reference to the ac-

[20] *Id.* at 425, 9 CMR at 55.
[21] United States v. Bartholomew, 1 USCMA 307, 3 CMR 41 (1952).
[22] 6 USCMA 736, 21 CMR 58 (1956).
[23] *Id.* at 744, 21 CMR at 66.
[24] CM 365107, 12 CMR 385 (1953).
[25] CM 365353, 13 CMR 396 (1953).

cused as a "sex pervert" and "sex fiend" was held to operate on the emotions, passions and prejudices rather than reason and to be intemperate, ill-advised and unduly denunciatory.

Another judicial examination of the characterization by a trial counsel of an accused sex offender occurred in *United States v. Hurt*.[26] Comments by the trial counsel that perhaps the accused felt that he could only find virginity in a six-year-old child and that because of feelings of sexual inferiority the accused sought out prostitutes and little girls were held to be proper comments on the evidence. The Court of Military Appeals again allowed considerable latitude in comment upon the evidence and stated that these comments did not amount to an unjustifiable injection of the accused's character into the case.

Crimes of violence other than sex offenses are also calculated to raise a question of whether given language is improper or inherent in the offense under consideration. One such area involves language used to describe an alleged murderer. In *United States v. Lee*,[27] the trial counsel said the accused was a "cold-blooded murderer." This language was held not to overstep the bounds of propriety and fairness. At least one civilian jurisdiction has reached a contrary result on nearly identical language. In *Commonwealth v. Capalla*,[28] the Pennsylvania Supreme Court said, "No man on trial for murder can be officially characterized as a murderer or as a 'cold-blooded killer' until he is adjudged guilty of murder or pleads guilty to that charge."[29]

From the foregoing cases it should be clear that no hard and fast rule can be advanced concerning language which is utilized by the prosecutor to characterize the accused, but it does appear that the Court of Military Appeals is willing to be more liberal regarding such language and reluctant to hold that any such language is improper. It may well be that a decision will rest upon the facts of a given case; however, unwarranted epithets should be avoided and the skillful advocate will have no need of them.

Counsel may argue as forcefully as his skill permits, but he must take care not to mistake inflammatory matters for force. He may not utilize such matters for their own sake and must make certain that anything he says which may have a tendency to be inflammatory has a firm foundation in the evidence. In determining whether his remarks are inflammatory in fact, they will be examined in their entirety and not removed from context.

[26] 9 USCMA 735, 27 CMR 3 (1958).
[27] 4 USCMA 471, 16 CMR 145 (1954).
[28] 322 Pa. 200, 185 Atl. 203 (1936).
[29] *Id.* at 204, 185 Atl. at 205.

2. *References to the Accused*

Trial counsel for various reasons often feel constrained to make reference to the presence of the accused in the courtroom. Most of the time this belaboring of the obvious is a rather thinly veiled attempt to call attention to the fact that the accused has not testified. As such, several civilian jurisdictions consider the remarks erroneous.[30] However, the military has taken a more qualified view. In the *Hurt* case,[31] where the trial counsel commented upon the accused's lack of emotion at the trial, the Court of Military Appeals held that calling attention to the accused's presence and demeanor is not improper comment on his failure to testify. This view finds support in several Circuit Courts of Appeals.[32]

If the trial counsel may comment upon the presence and appearance of the accused, to what extent may he characterize, denounce or vilify the accused during the course of such comment? It will be recalled that in the *Lee* case [33] it was permissible to call the accused a "cold-blooded murderer." What other comments are within the bounds or propriety and fairness?

Until the decision of the Court of Military Appeals in *United States v. Doctor*,[34] the boards of review, while recognizing the rule that it is improper for the prosecuting attorney to denounce and vilify the defendant, had difficulty in determining when the trial counsel had in fact done this. In a barracks larceny case, it was held not improper under the circumstances to refer to the accused as a "barracks thief of the worst type."[35] To call one accused of forgery a "wicked and conniving" "scoundrel" and "liar" was classified as improper denunciation, but non-prejudicial.[36] The trial counsel was held to have exceeded the scope of permissible argument in a false official statement case by calling the accused a liar.[37] Such vilification of the accused was deemed intemperate and inflammatory, but under the circumstances of the case not prejudicial.

In the *Doctor* case, the accused was on trial for false swearing. The trial counsel chose not to cross-examine the accused when the latter took the witness stand. Responding to the defense counsel's criticism of such failure on his part, the trial counsel said he did

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[30] See Comment, *Permissible Scope of Summation*, 36 Colum. L. Rev. 931 (1936).

[31] *Supra* note 26.

[32] United States v. Reining, 167 F.2d 362 (5th Cir. 1948); United States v. Durbin, 93 F.2d 499 (2d Cir. 1937).

[33] *Supra* note 27.

[34] 7 USCMA 126, 21 CMR 252 (1956).

[35] ACM 9406, Weller, 18 CMR 473 (1954).

[36] ACM 6826, Bryant, 12 CMR 833 (1953).

[37] ACM 7395, Westergren, 14 CMR 560 (1953).

not like to hear lies uttered from the witness stand.[38] In holding that the crime charged plays a decided part in the thrust of counsel's argument and that in a false swearing case where the accused's testimony was diametrically opposed to that of the prosecution witnesses, the trial counsel is within the limits of reasonable persuasion if he calls the accused a psychopathic liar, Judge Latimer, speaking for the Court, said:

> Trial counsel has the duty of prosecuting a case and he is permitted to comment earnestly and forcefully on the evidence, as well as on any inferences which are supported reasonably by the testimony. He may strike hard blows, but they must be fair. *If his closing argument has a tendency to be inflammatory, we must make certain it is based on matters found in the record. Otherwise, it is improper.* The issues, facts, and circumstances of the case are the governing factors as to what may be proper or improper.[39]

The italicized portion reiterates the view expressed in *Day* that inflammatory argument is not per se improper.

Another large problem area is created by the trial counsel's burning desire to make absolutely certain that no member of the court overlooks the fact that the accused has not testified. The Manual states that he may not comment on the failure of the accused to testify.[40] Clearly, this proscription extends to a direct statement by the trial counsel that the accused can take the witness stand and explain the questioned events.[41] So also does it apply to an attempt to accomplish this end by inference or conjecture.[42]

If the trial counsel cannot comment directly or by inference, to what extent may he comment tangentially on the failure of the accused to testify by utilizing such remarks as, "In the absence of contradiction the government has established the elements of the offense charged beyond a reasonable doubt", or "The defense has offered no evidence to explain this charge"? A remark that the evidence is uncontroverted does not constitute error where the facts are such that other evidence besides the accused's denial is available to the defense to refute the prosecution's evidence.[43] However, where no one except the prosecution witness and the accused were present when the alleged offense was committed and where the acts charged were of such a nature that only the

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[38] The subject of retaliatory comment upon argument of opposing counsel will be considered at the text accompanying note 73 *infra*.

[39] United States v. Doctor, *supra* note 34, at 133, 21 CMR at 259 (emphasis added).

[40] MCM, 1951, para. 72*b*.

[41] United States v. Bowen, 10 USCMA 74, 27 CMR 148 (1958).

[42] United States v. Skees, 10 USCMA 285, 27 CMR 359 (1959).

[43] Peden v. United States, 223 F.2d 319 (D.C. Cir. 1955); United States v. Brothman, 191 F.2d 70 (2d Cir. 1951); United States v. Morrison, 6 F.2d 809 (8th Cir. 1925); ACM 5819, Hanna, 7 CMR 571 (1952).

accused could reasonably have been expected to furnish testimony contradicting the prosecution's, such comment by the trial counsel is erroneous.[44]

A different situation exists where the accused has made a pretrial statement or maintained a pregnant silence prior to trial. Reference to the accused's prior statement that he had a right to refuse to answer any questions under Article 31, UCMJ, where such reference would amount to asking the court-martial to consider this statement on the part of the accused as direct proof of at least one element of the offense charged, is erroneous.[45] However, when the accused testifies at the trial and attempts to explain away his pretrial silence, the trial counsel may argue that the accused's prior silence when he should have spoken constituted a tacit admission of guilt.[46]

With regard to the pretrial silence of the accused as compared with his failure to testify at his trial, the late Chief Justice Von Moschzisker of the Pennsylvania Supreme Court had this to say:

> It has long been established in the English law that when one is accused of crime and stands silent, that that fact may be offered in evidence in any criminal court. Now why, when one is accused of crime outside the court and stands silent, and that may be offered in evidence, why, when he is accused of crime inside the courtroom, should the prosecutor, and the judge, be denied the privilege of a common sense comment that this man or woman who is accused has offered no explanation? The jury must think of that, and why should it not be argued to them? It seems to me not only the lack of the essence of common sense, but nonsensical. It is an old rule that arose in different times.[47]

This issue has been debated for many years. The proponents of such comment state, as Judge Von Moschzisker, that it is inevitable that the juror of average intelligence will draw an inference in any event, so why should it be avoided? To this the opponents reply that if it is in fact so obvious and inevitable no comment is necessary to parade the fact before the court. The second argument advanced by the proponents is that an innocent defendant cannot have any good reason to refuse to testify and

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[44] Barnes v. United States, 8 F.2d 832 (8th Cir. 1925); United States v. Linden, 296 Fed. 104 (3rd Cir. 1924); CM 401902, Cazenave, 28 CMR 536 (1959).

[45] United States v. Brooks, 12 USCMA 423, 31 CMR 9 (1961); United States v. Hickman, 10 USCMA 568, 28 CMR 134 (1959).

[46] MCM, 1951, para. 140*a*; United States v. Sims, 5 USCMA 115, 17 CMR 115 (1954). *But see* United States v. Brooks, *supra* note 45, in which the Court held that it was prejudicial error (1) to receive in evidence testimony from two CID agents that accused relied upon his rights under Article 31 during the pretrial investigation and (2) to permit trial counsel to cross-examine the accused as to the reasons for his pretrial silence.

[47] 56 A.B.A. Rep. 137, 140 (1931). Until relatively recent times the accused could not be a witness in his own behalf in most jurisdictions; this is the old rule against comment on accused's failure to testify to which Chief Justice Von Moschzisker referred.

that juries are inclined to be sympathetic to one who testifies. The opponents counter by stating that juries are not sympathetic at all after the accused has been subjected to a searching cross-examination into his past offenses. In this point appears to lie the crux of the conflict. Here, each proposal is capable of eliciting even more controversial counter-proposals. For example, if it is in fact a fear of cross-examination on prior offenses that compels an innocent accused to refrain from testifying, then why not prohibit such cross-examination of the accused and then allow comment upon a failure to testify? This, in turn, amounts to rewarding the accused for his prior transgressions and enhances his credibility by placing him on a higher plane than other witnesses, whose prior offenses, if pertinent, may be inquired into on cross-examination.

Those in favor of comment argue that there is no compulsion to testify and that by testifying or choosing silence the accused acts voluntarily and this act of volition is the proper subject of comment. This runs counter to the argument of the opponents that the accused has a constitutional right to choose between silence and cross-examination and comment upon his choice is a violation of this constitutional right.

The real or imagined fear of those opposed to such comment that to allow it would be to cause prosecutors to become less diligent in their conduct of the case is allayed by the proposal that such comment not be allowed unless and until the prosecution has made out a prima facie case against the accused. This latter proposal is entirely logical for, when the tactical situation has reached this point, the accused probably will have to take some action if he is to escape conviction. The failure of the accused to testify under these circumstances is even more notable and furnishes stronger grounds for allowing comment upon his failure.

Finally, the opponents argue that to permit comment upon the failure of the accused to testify amounts to a shifting of the burden of proof or, in the alternative, that if the burden of proof is not in fact shifted, to allow comment would be to add considerable weight to the prosecution's position in a close case and could raise distracting collateral issues which would only tend to confuse the jury.

Both sides of this controversy are well presented through the medium of collections of cases, statutes and opinions in the law review articles and comments set forth below.[48]

[48] Comment, 6 DePaul L. Rev. 83 (1956); Legislation, 25 Fordham L. Rev. 381 (1956); 28 N.Y.U. L. Rev. 1049 (1953); Comment, 37 Mich. L. Rev. 777 (1939); Reeder, *Comment Upon Failure of Defendant to Testify*, 31 Mich. L. Rev. 40 (1932); Bruce, *The Right to Comment on Failure of the Defendant to Testify*, 31 Mich. L. Rev. 226 (1932); Dunmore, *Comment on Failure of Accused to Testify*, 26 Yale L. J. 464 (1917).

It appears obvious and inevitable that the court members will draw an unfavorable inference, if only subconsciously, from the failure of the accused to take the stand in his own behalf. This being the case, the strongest argument in favor of allowing comment by the trial counsel upon this is that founded on common sense. However, to permit indiscriminate use of this tactic by the prosecution might give rise to some of the dangers envisioned by its opponents. Therefore, such comment should be allowed, subject to the restriction that it be permitted only after the prosecution has made out a prima facie case. Of course, were comment permitted, the necessity for proper instructions by the law officer under the circumstances of each case would be of the utmost importance.

3. *Matters Not In Evidence*

The Manual provides that counsel may not comment in argument upon matters not in evidence before the court.[49] The most obvious examples of facts not in evidence and upon which counsel may not comment in argument are those which the law officer has ruled inadmissible [50] and those upon which no evidence has been presented.[51]

The real danger in permitting counsel to argue facts not in evidence is that the jury in its deliberations will consider such argument as worth as much as evidence properly admitted. As Mr. Justice Maxey of the Pennsylvania Supreme Court noted in his dissenting opinion in *Commonwealth v. Masserelli:*[52]

> Jurors are not trained to discriminate between facts legally proved and alleged facts lodged in their minds by reckless and unsworn statements.[53]

This propensity of counsel to attempt to bolster his case by means of "testifying" as to a fact apparently within his personal knowledge during argument without taking an oath or being subjected to cross-examination was noted with disapproval in *United States v. Spangelet,*[54] wherein defense counsel sought to impeach the testimony of the major prosecution witness, who was also under indictment, by showing that the witness' bond was reduced from $50,000 to $1,000 after a conference with the prosecutor and that the witness had every reason to lie to benefit himself. By way of rebuttal, the prosecutor said, "I have never made a deal with anybody." This put into issue the personal in-

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[49] MCM, 1951, para. 72*b*.
[50] United States v. Porter, 10 USCMA 427, 27 CMR 501 (1959).
[51] United States v. Anderson, 8 USCMA 603, 25 CMR 107 (1958).
[52] 304 Pa. 335, 156 Atl. 101 (1931).
[53] *Id.* at 343, 156 Atl. at 104.
[54] 258 F.2d 338 (2d Cir. 1958).

tegrity of the prosecutor and, in a case where the crux is the credibility test between the government witness and the accused, constituted reversible error. When confronted with this type of situation, the prosecutor must rely upon rebuttal matter other than his own unsworn statements.

It might be noted parenthetically that there is no prohibition against counsel being sworn and taking the witness stand just as any other person. Canon 19 of the Canons of Professional Ethics limits this by providing, in part, ". . . Except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client." Where the trial counsel testifies, for him to subsequently argue that his own testimony rebuts that of the expert witness of the defense, while not reversible error, indicates poor judgment and is highly improper.[55] The various reasons assigned for its impropriety are that the jury has difficulty in discriminating between the evidence the counsel has given under oath and his comments in argument;[56] that the counsel is liable to be prejudiced in favor of his cause;[57] that the functions of witness and advocate should be disassociated;[58] and that such practice offends against the Canons of Professional Ethics.[59]

Another case concerning itself with the issue of comment upon matters not in evidence, as well as posing a question of ethics, was presented to the Court of Military Appeals in *United States v. Beatty.*[60] Both the trial counsel and defense counsel knew of prior acts of sexual intercourse on the part of the sixteen year old prosecutrix which might have had a bearing on her credibility in a case of assault with intent to commit rape. While neither side delved into her purple past, the defense counsel attempted to cast her in the role of a trollop. Trial counsel countered this by saying, "There has been no one to testify that they ever knew of her having sexual relations with anyone. As far as we know, she is a virgin. . . ."

Chief Judge Quinn, for the majority, held that the trial counsel exceeded the bounds of fair argument and deliberately conveyed to the court the false impression the prosecutrix was a virgin. He was of the opinion that a military prosecutor should not be allowed knowingly to convey a false impression to the court even though defense counsel apparently acquiesces. However, he held that the misconduct was not reversible error where the

[55] United States v. McCants, 10 USCMA 346, 27 CMR 420 (1959).
[56] 58 Am. Jur. *Witnesses* § 155 (1948).
[57] *Ibid.*
[58] Robinson v. United States, 32 F.2d 505 (8th Cir. 1928).
[59] Canons of Professional Ethics 19; Zeidler v. State, 189 Wis. 44, 206 N.W. 872 (1926).
[60] 10 USCMA 311, 27 CMR 385 (1959).

evidence of guilt is clear and compelling.[61] Judge Latimer, concurring in the result, with regard to this question, said that the trial counsel only met the innuendos created by the defense, and his statement, "As far as we know. . . .", was merely an impersonal commentary on the evidence before the court. Judge Ferguson dissented on other grounds.

It appears clear that the trial counsel's remark, as phrased, does not convey to the court matters exclusively within his knowledge. If he had said, "As far as *you* know. . . .", it would have been improper by implying that he had facts to the contrary, but his use of "we" did not carry this connotation. His remark does not appear to fall within Judge Maxey's objectionable category of "alleged facts." Rather, it appears that the trial counsel urged the court members to utilize what they observed in the courtroom and to draw upon their common experience in ascertaining the likelihood of the prosecutrix' virginity.

Obviously, the proper method for counsel to employ when there are facts upon which he desires to argue is to get them into evidence.[62] As a corollary, when the trial counsel has no admissible evidence of prior offenses of the accused, it is prejudicial error for him to imply in argument that the accused was in fact guilty of other offenses.[63]

Similarly, when the trial counsel in *United States v. Allen*[64] referred to the recent best-selling novel "Anatomy of a Murder" as depicting the manner in which a shrewd attorney may fabricate a defense of insanity through the medium of the "lecture" to his client, the Court of Military Appeals found such innuendo to be improper argument which, together with other errors, required reversal. Judge Latimer dissented, stating that it was clear that trial counsel was presenting his argument in the form of a similitude and that his inference found considerable support in the record.[65]

4. *Personal Meliefs, Feelings and Opinions*

Canon 15 of the Canons of Professional Ethics and the Manual[66] employ nearly identical language in stating that it is improper for

[61] This aspect of the effects of forensic misconduct will be considered at the text accompanying note 146 *infra*.

[62] United States v. Anderson, *supra* note 51; NCM 340, Schriver, 16 CMR 429 (1954).

[63] United States v. Britt, 10 USCMA 557, 28 CMR 123 (1959); *accord*, ACM 13805, Abernathy, 24 CMR 765 (1957).

[64] 11 USCMA 539, 29 CMR 355 (1960).

[65] An opinion supporting Judge Latimer is contained in an excellent treatment of this entire area: Levin & Levy, *Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum*, 105 U. Pa. L. Rev. 139 (1956).

[66] MCM, 1951, paras. 44*g*(1) & 48*c*.

counsel to assert in argument his personal belief in the guilt or innocence of the accused or in the justice of his cause. In this area the courts are confronted with the question of whether the remarks of counsel are in fact a statement of his personal opinion or merely intended to be argument that the government had, or had not, met its burden of proof.

A statement by the prosecutor which was susceptible of being interpreted as an expression of personal opinion of the guilt of the defendant was held to be not unfair or prejudicial in *United States v. Battiato*.[67] This result was reached because the prosecutor did not intimate that he had personal knowledge of facts showing the defendant's guilt. A similar view was expressed by the Sixth Circuit Court of Appeals in *Henderson v. United States*[68] when it stated:

> It is not misconduct on his [the prosecutor's] part to express his individual belief in the guilt of the accused if such belief is based solely on the evidence introduced and the jury is not led to believe that there is other evidence, known to the prosecutor, but not introduced, justifying that belief.[69]

However, Circuit Judge McAllister filed a strong dissent in which he said of the prosecutor, "He is not, however, justified in thrusting his personality into the case and expressing his opinion that the defendant is guilty. . . . If he violates this rule, he is guilty of misconduct. . . ."[70] The Second Circuit Court of Appeals in *United States v. Kiamie*[71] expressed disturbance with the prosecutor stating his personal opinion of the guilt of the accused. However, the court was confronted with the situation of the prosecutor's remarks having been elicited in retaliation to expressions by the defense counsel of his personal belief in his client's innocence. In this context the court found no error, thus indicating that in this area it is permissible to fight fire with fire. Two wrongs may not make a right, but the judicial sentiment seems to be that if the defense counsel has violated Canon 15 it would be unfair to allow him to invoke it against the prosecutor. It is submitted that the Canon and the Manual provisions were not intended to be this malleable and that the proper procedure at the trial level would be for the presiding judge or law officer

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[67] 204 F.2d 717 (7th Cir. 1953). The statement was: "If I, in my own mind, thought for one minute that these defendants were not parties to this case, I certainly would not have the courage to stand up here and argue before you that they were guilty. It is never our intention to prosecute and try innocent men." 204 F.2d at 719. *Cf.* CM 363993, Shipley, 14 CMR 342 (1954).

[68] 218 F.2d 14 (6th Cir. 1955).

[69] *Id.* at 19.

[70] *Id.* at 22.

[71] 258 F.2d 924 (2d Cir. 1958); *cf.* State v. VanLuven, 124 Wash. 222, 163 P.2d 200 (1945).

to stop improper argument which injects personal opinions into the case thus leaving no room for the retaliatory opinion of the opposing counsel.

The prosecutor's characterization of himself as a "thirteenth juror" and vigorous expression of his personal opinion as to the trustworthiness of the government's evidence and the consequent guilt of the defendant was found highly improper and reversible error in *Greenberg v. United States.*[72] The court cited Canon 15 to the effect that it is improper for counsel to assert in his argument his personal belief in the justice of his cause. It continued with a discussion of several specific reasons why such argument is improper. First, to allow it would be to permit the prosecutor to testify without cross-examination. Secondly, it would create a false impression of reliability and credibility of counsel and would give the prosecutor an edge because of his official backing. Thirdly, a ticklish problem would be presented where the defense counsel does not believe in his client's innocence. Thus finding himself impaled upon the horns of a dilemma, must he nonetheless argue that he does believe in his client's innocence in order to counter the argument of the prosecution? The court noted with reluctance that special circumstances, such as that in *Kiamie, supra,* may justify this sort of argument by the prosecuting attorney, but that it will not be allowed as a matter of course.

The clear determination of impropriety of the prosecutor's expression of his personal opinion of the guilt of the accused contained in the *Greenberg* case and in Circuit Judge McAllister's dissent in *Henderson* presents a better and more workable view than the hazy rules permitting such comment announced by the *Henderson* majority and in the *Battiato* case. It is submitted that fewer problems will be created in the future by a rigid adherence to Canon 15 and the applicable Manual provisions than by an attempt to circumvent or ignore them.

5. *Retaliatory Comment on Argument by Defense Counsel*

It will be recalled that in *United States v. Doctor,*[73] the trial counsel responded to defense counsel's challenging criticism of his failure to cross-examine the accused by saying that he did not like to hear lies uttered from the witness stand. This statement was precipitated by the defense counsel's comments, and, while it would have been improper initially, the defense counsel opened up the subject and the trial counsel may reply—even though his argument goes outside the evidence. The general rule with regard

[72] 280 F.2d 472 (1st Cir. 1960).
[73] *Supra* note 34.

to retaliatory argument was summed up by the Court of Military Appeals as follows:

> Matters which ordinarily are not the subject of comment may become relevant if they are opened up by defense counsel . . . . [W]e mention the fact that defense counsel do take some risk. If they seek to make capital out of asserted failures on the part of the prosecution, they must be prepared to be met by an explanation for the omission. There are numerous authorities to the effect that a prosecutor's reply to arguments of defense may become proper, even though, had the argument not been made, the subject of the reply would have been objectionable.[74]

However, there is at least one area where the rule of retaliation is inapplicable. Where the defense counsel in argument first mentioned a Secretary of the Navy policy instruction with regard to the punitive discharge of thieves and asked the court to make an exception to its application in the accused's case, the trial counsel was held to have erred when he retaliated by asking the court to take judicial notice of and to enforce the policy.[75]

A more recent case in this area is *United States v. De Bell*,[76] in which the Court of Military Appeals held that it was error for the trial counsel, in replying to a defense objection to admission of secondary evidence, to point out that the defense had refused to produce certain original checks. However, it was held that there was no possibility of prejudice in these remarks, since there was sufficient evidence in the record to support the prosecution's case against the accused without the additional evidence. Accordingly, it was concluded that the members of the court would not draw any adverse inferences from the refusal of the defense to produce the original checks.

6. *Comments on the Duty of the Court*

The trial counsel is unlikely to enjoin the court to do its duty unless he figures that that would be tantamount to conviction of the accused, and if he desires to couch his argument in terms of a call to duty, he may do so. Generally, the prosecutor may illustrate to the court the effect of its findings on the community or society generally with respect to obedience to the law, but comments in that regard become improper when they are unreasonable, intemperate or extravagant in portraying the consequences of an acquittal.[77] An example of improper argument

[74] 7 USCMA at 134, 21 CMR at 260; *accord*, United States v. Kiamie, *supra* note 71; Ochoa v. United States, 167 F.2d 341 (9th Cir. 1948); United States v. Anderson, 12 USCMA 223, 30 CMR 223 (1961); NCM 373, Tainpeah, 18 CMR 382 (1954).

[75] United States v. Davis, 8 USCMA 425, 24 CMR 235 (1957).

[76] 11 USCMA 45, 38 CMR 269 (1959) (Opinion by Chief Judge Quinn in which Judge Latimer concurred in the result (on grounds of waiver); Judge Ferguson dissenting).

[77] ACM 8768, Doyle, 17 CMR 615 (1954).

upon the duty of the court to convict was contained in *United States v. Cook*,[78] in which the accused was being tried for involuntary manslaughter of a Filipino arising out of a fight in a Philippine bar. The prosecution testimony was weak and sufficiently conflicting so as to be capable of creating a reasonable doubt. The trial counsel in his argument stressed the importance of the case to United States-Philippine relations and its impact on the Philippine community with its consequent effect on American forces there. The Court of Military Appeals stated that where the evidence is in conflict an untoward incident could substantially influence the deliberations of the court-martial. The Court found that the statements of the trial counsel supplied the untoward incident and stated that an appeal to a court to predicate its verdict upon the probable effect of its action on relations between the military and civilian community is improper.

7. Stating—or Misstating—the Law

The Court of Military Appeals has stated that counsel may argue any legal theory he so desires consistent with the facts of the case, and it is clear that trial counsel has the right to discuss the law applicable to the case.[79] While the Court of Military Appeals has not been confronted with the issue, at least one board of review has indicated that the defense counsel similarly has this right by holding the law officer to be in error where he prevented the defense counsel from entering upon a discussion of applicable legal principles concerning reasonable doubt.[80]

The extent to which counsel may go in discussing the applicable law has been the subject of careful judicial scrutiny. It is clear that the court is to receive the law from the law officer, or in the case of a special court-martial, from the president, and counsel must be careful not to encroach upon this prerogative.[81] However, trial counsel before a special court-martial has also been characterized as an "oracle" from which the court receives advice on matters of law and as such is subject to an even greater duty of care.[82]

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[78] 11 USCMA 99, 28 CMR 323 (1959); *cf.* United States v. Mamaluy, 10 USCMA 102, 27 CMR 176 (1959) (similar language contained in law officer's instructions).

[79] United States v. Adams, 5 USCMA 563, 18 CMR 187 (1955); United States v. Fair, 2 USCMA 521, 10 CMR 19 (1953).

[80] CM 367313, Beachley, 13 CMR 392 (1953).

[81] United States v. Strong, 1 USCMA 627, 5 CMR 55 (1952); United States v. Fair, *supra* note 79.

[82] United States v. Hatter, 8 USCMA 186, 23 CMR 410 (1957); *accord*, United States v. King, 12 USCMA 71, 30 CMR 71 (1960). When the president of a special court-martial is in doubt as to the law, he may request the trial counsel to obtain legal authorities. MCM, 1951, para. 44*g*(1). *Cf.* United States v. Fair, *supra* note 79.

When counsel reaches for the Court-Martial Reports or other authorities to read an excerpt from an opinion to the court-martial, he runs the risk of judicial disapproval of his actions, for here he comes closest to interposing himself between the law officer and the court as the source of the law. A preferable procedure would be to have the law officer include the desired language in his instructions to the court. The least that can be demanded of the trial counsel who feels compelled to read anything to the court is that he permit the law officer to examine it first.[83] Judicial disapproval of the notion of counsel reading authorities to the court-martial was summed up in *United States v. O'Brien*,[84] where, in a case in which the trial counsel read from a board of review decision, it was said, "Perhaps, strictly speaking, this action may have constituted error; certainly, it did not accord with the preferred practice."[85] However, in this case, the Court found no prejudice.

Regardless of what other tactics have been approved by the Court of Military Appeals, it will not countenance a misstatement of law by counsel in his argument.[86]

B. *BY THE DEFENSE*

Since in proper argument by defense counsel generally will not prejudice the accused, obviously this issue is not often raised on appeal. The theory seems to be that if the defense counsel exceeds the bounds of proper argument, which are applicable as well to defense counsel as to trial counsel, and the accused is acquitted, whatever detriment the government might suffer, the accused can scarcely complain. On the other hand, if he is convicted in spite of his counsel's tactics, he cannot legally complain in that case either for he did have the benefit, such as it was, of his counsel's improprieties.

A word of caution may be in order here. The foregoing should not be construed as allowing defense counsel *carte blanche* in his pleas to the court. In his argument, the defense counsel is subject to the same legal and ethical rules which bind the trial counsel. As noted, his forensic errors are seldom the subject of judicial attention. However, certain restrictive areas have been delineated.

One such area involves the making of admissions contrary to the interests of the accused, contrary to his plea of not guilty, or contrary to the entire theory of the defense. This area naturally overlaps that having to do with the adequacy of counsel. Examples of this sort of comment by defense counsel which have been held to

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[83] United States v. Fair, *supra* note 79.
[84] 3 USCMA 105, 11 CMR 105 (1953).
[85] *Id.* at 108, 11 CMR at 108.
[86] United States v. Hatter, *supra* note 82.

prejudice the accused are an admission in a case involving failure to obey an order that the accused actually knew of the order,[87] and a virtual concession of guilt by the appointed defense counsel in a premeditated murder case in which the individual defense counsel, who had conducted virtually the entire defense, had stressed the theory of accident.[88] The simplicity of these cases is beclouded by the result in *United States v. Young*.[89] There, when the defense counsel conceded the guilt of one co-accused in an attempt to save the other, a majority of the Court of Military Appeals found his remarks unobjectionable since they were intellectually honest. It remains to be seen to what extent the Court will carry its intellectual honesty test. However laudable it might be for defense counsel to be candid and intellectually honest, the propriety of his argument and the adequacy of his representation should not be measured by that yardstick. To do so imposes an artificial limitation and an unfair burden upon defense counsel. It is to be hoped that the Court of Military Appeals, having initiated this device, will limit it severely and not permit wholesale concessions of guilt under the guise of intellectual honesty.

In the case of an unpopular prosecution, it would appear to be improper for the defense counsel to tell the court members to violate their oaths. However, there is no need for him to do this. This situation provides an excellent opportunity for the employment of forensic skill. As in many other areas, counsel should be able to convince the court to reach the result he desires by means of inference and implication without ever once straying from the limits of proper argument.

Defense counsel may not utilize the argument to unleash a stream of indecorous abuse, mockery and contempt. When he thus exceeds the limits of decency he is properly subject to punitive action.[90]

Reference was made earlier to the value of the argument of defense counsel and his duty to his client in that regard.[91] While defense counsel can rarely prejudice his client by means of his choice of words, he can do so by a complete failure to argue.[92]

As there is with regard to argument of trial counsel, there is a similar duty upon the law officer to see that the defense counsel ob-

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[87] United States v. Smith, 8 USCMA 582, 25 CMR 86 (1958).
[88] United States v. Walker, 3 USCMA 355, 12 CMR 111 (1953).
[89] 10 USCMA 97, 27 CMR 171 (1959).
[90] United States v. DeAngelis, 3 USCMA 298, 12 CMR 54 (1953); *cf.* Sacher v. United States, 343 U.S. 1 (1952).
[91] See text accompanying note 1 *supra*.
[92] United States v. McMahan, 6 USCMA 709, 21 CMR 31 (1956); United States v. Sizemore, 2 USCMA 572, 10 CMR 70 (1953).

serves the legal and ethical limits of proper argument. However, he must take care not to overstep his prerogatives in so doing.

He must not improperly limit defense counsel's argument. In *Sizemore* [93] the precipitating factor in the defense counsel's refusal to present argument was the denial by the law officer of a ten minute recess for the defense counsel to organize his thoughts. The Court of Military Appeals held that the law officer's refusal was an abuse of discretion and that the error was compounded thereafter by defense counsel's failure to argue.

Similarly, limitation of the time of argument may result in reversible error.[94] However, in a case in which the defense counsel estimated that his argument would last one-half hour, the law officer was held not to have abused his discretion or improperly or adversely affected the deliberations of the court when, after one and one-quarter hours, he asked counsel to limit his argument.[95]

The defense counsel has the same right to discuss his theory of the law as does trial counsel [96] and the law officer has been held to be in error where he prevented the defense counsel from entering upon the discussion of applicable legal principles.[97]

The avenues open to the law officer for coping with improper argument of the defense counsel are very similar to those with regard to that of trial counsel. He should not hesitate to stop improper argument sua sponte and to give the court curative instructions regarding it. If the misconduct of defense counsel is persistent or aggravated, an admonition, either in or out of the presence of the court depending on the circumstances of the case, would be appropriate. If all else fails, contempt proceedings may be warranted. The post-trial devices of an unsatisfactory fitness report and decertification by the Judge Advocate General should prove sufficient to prevent a recurrence.

III. ARGUMENT ON MOTIONS AND ON THE SENTENCE

A. *ON MOTIONS*

The Manual provides that the parties shall be accorded an opportunity to argue their respective contentions on any controverted point.[98] This sweeping coverage extends down to, and includes, objections, and an arbitrary refusal to entertain at least a statement of the grounds for an objection may constitute error.[99]

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[93] 2 USCMA 572, 10 CMR 70 (1953).

[94] United States v. Rossi, 9 F.2d 363 (8th Cir. 1925).

[95] United States v. Gravitt, 5 USCMA 249, 17 CMR 249 (1954).

[96] See text accompanying note 79 *supra*.

[97] CM 367313, Beachley, *supra* note 80.

[98] MCM, 1951, para. 53*g*.

[99] United States v. Brown, 10 USCMA 482, 28 CMR 48 (1959); *cf.* United States v. Walker, 9 USCMA 187, 25 CMR 449 (1958).

ARGUMENT OF MILITARY COUNSEL

In *United States v. Bouie,*[100] the attention of the Court of Military Appeals was directed specifically towards argument of counsel on motions. There, the defense counsel announced a desire to argue upon a motion for a finding of not guilty in open court. In substantiation of the defense position upon the motion defense counsel commenced reading a headnote from a board of review decision. The law officer sustained the trial counsel's objection to this procedure and forbade the defense counsel from reciting the facts of the cases upon which he relied in support of the motion, while allowing him to argue the law.

The Court of Military Appeals, in dealing with the issue thus raised, said that it is unquestionably improper for counsel to argue the facts of another case to a court-martial. But, it stated, the reason for the rule ceases to exist where counsel's argument is directed to the law officer in support of a motion seeking appropriate relief. Where such argument is directed to the law officer, the preferred practice is for the argument to be held out of the presence of the court-martial members, but with regard to a motion on which the law officer rules subject to objection by any member of the court,[101] the argument must perforce be before the members of the court. The Court held that the law officer erred by not allowing the defense counsel to continue his argument, but under the circumstances of the case such error was not prejudicial.[102]

The Court stated that in those areas in which the law officer rules subject to objection by any member of the court "the members of a general court-martial are the triers of the fact and, in effect, of the law as well."[103] Obviously the Court intended a narrow interpretation of the word "law" in this context, for the only legal question upon which the members of the court rule is whether the evidence at that point is sufficient as a matter of law to establish a prima facie case. The language of the Court should not be construed as a license for the court members to usurp the functions of the law officer with regard to the determination of the law applicable to the case. This the law officer would still do, preferably at an out-of-court hearing prior to the time the motion is argued to the court-martial. Then, in arguing to the court, counsel would be limited to the framework of the law of the case as determined by the law officer. Of course, as the Court states, "It would be a cumbersome procedure to require in these situations that counsel present his argument twice-once before the law officer and again before the

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[100] 9 USCMA 228, 26 CMR 8 (1958).
[101] UCMJ, art. 51(b).
[102] *Cf.* ACM 6175, Simon, 8 CMR 783 (1953).
[103] United States v. Bouie, *supra* note 100, at 233, 26 CMR at 13.

court."[104] This would be true if the two arguments were identical; however, the arguments are based upon entirely different subject matter. The former, before the law officer, is to establish the law of the case and the later, to the court members, is upon the issue of the existence of a prima facie case.

The decision in *Bouie* and whatever confusion it may engender are the result of the present system under the Uniform Code of Military Justice which permits the court members to overrule the decision of the law officer in certain specified areas.[105] It has been proposed that Article 51(b), UCMJ, be amended to provide that the law officer rule finally on a motion for a finding of not guilty.[106] This amendment is sorely needed to obviate such situations as arose in *Bouie* and their attendant problems.

B. *ON THE SENTENCE*

What has been said thus far with regard to the value of, and rules governing, argument on the findings is generally applicable to that on the sentence as well. The subject of argument on the sentence was given thorough treatment in a recent issue of the *Military Law Review*.[107] However, there have been some new areas of this subject explored and some familiar ones revisited since the date of that article.

Considerable attention has been paid recently to the content of argument on the sentence at a rehearing. It has been held improper for the trial counsel to inform the court members of the maximum punishment which the accused could receive if the case were an original trial.[108] In *United States v. Simpson*,[109] the trial counsel in his argument on the sentence upon a rehearing said that a bad-conduct discharge is not a permanent blot on the record of the accused and that any discharge but a dishonorable discharge could be wiped off the record by the Board for the Correction of Military Records. The Court of Military Appeals found it highly improper for the trial counsel to refer to possible ameliorative action by administrative agencies since such a comment presents a fair risk of improperly influencing the sentence deliberations of the court-martial. This attitude concerning reference to the possibility of

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[104] *Ibid.*

[105] UCMJ, art. 51(b).

[106] U.S. Dep't of Army, Report of the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army 108 (1960).

[107] Chilcoat, *Presentencing Procedure in Courts-Martial*, Mil. L. Rev., July 1960, p. 127.

[108] United States v. Nix, 11 USCMA 691, 29 CMR 507 (1960).

[109] 10 USCMA 229, 27 CMR 303 (1959).

appeal, parole, pardon or other ameliorative action finds support in other authorities.[110]

Similarly, if the trial counsel conveys to the court-martial during the presentencing procedure the idea that the convening authority has already considered certain clemency factors in determining the type of court to which the charges should be referred he has committed error.[111]

Neither may the trial counsel in a special court-martial set out the maximum punishment from the Table of Maximum Punishments for the offenses for which the accused is on trial when this figure substantially exceeds the punishment power of the special court-martial.[112]

Since the decision in *United States v. Phipps*,[113] which held that courts-martial may separate persons from the service only by means of a dishonorable or bad conduct discharge, defense counsel may not be permitted to urge the court-martial to adjudge an undesirable or general discharge.[114]

Among the familiar areas revisited are those of the role of trial counsel in the special court-martial and the question of Navy Department policy directives.

In *United States v King*,[115] the trial counsel attempted to influence the court members by mentioning the sentences awarded in other cases. The Court of Military Appeals stated that the sentences imposed on other persons involving different facts do not aid the court in fitting the punishment to the person on trial. Trial counsel's argument was inappropriate and may well have caused the court members to believe that uniformity in punishment required the imposition of a punitive discharge. Outlining the role and responsibility of the trial counsel in a special court-martial, the Court said that the trial counsel is to aid the president in determining the law, and his statements, if unquestioned by the defense, are accepted as stating correct legal principles. Accordingly, he should carefully limit his arguments to the evidence in the record, to fair inferences therefrom and matters relevant to the appropriateness of punishment.

The spectre of command influence again reared its head in *United States v. Leggio*.[116] There it was held to be prejudicial error

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[110] See generally Note, *Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 Colum. L. Rev. 946 (1954).

[111] United States v. Crutcher, 11 USCMA 483, 29 CMR 299 (1960); United States v. Carpenter, 11 USCMA 418, 29 CMR 234 (1960).

[112] United States v. Crutcher, *supra* note 111; *cf.* United States v. Green, 11 USCMA 478, 29 CMR 294 (1960).

[113] 12 USCMA 14, 30 CMR 14 (1960).

[114] United States v. Goodman, 12 USCMA 25, 30 CMR 25 (1960).

[115] *Supra* note 82.

[116] 12 USCMA 8, 30 CMR 8 (1960).

for the trial counsel during argument on the sentence to refer to a policy message concerning the removal from the service of persons in certain grades who have shown potential for trouble making.

IV. THE EFFECT OF ERROR

A. *CURING DURING TRIAL*

1. *Generally*

Assuming that one or more of the errors outlined previously in this article is committed, the effects of the error can be dealt with in a variety of ways. In some instances the error can be coped with effectively during trial. Theoretically, the effect of the error may be dissipated entirely at that time. Among the methods which may be employed in the courtroom to correct error are the prompt retraction of erroneous comments by the offending counsel, the waiver of objections to the comment by the opposing counsel and the appropriate action of the law officer. Among the latter are the stopping of improper argument sua sponte or upon objection of counsel, the giving of curative instructions to the court and the assertion of his discretionary functions, among which is the power to declare a mistrial.

2. *Retraction of Improper Remarks*

To judge from the reported cases the application of the rule of retraction of improper argument is greater in the civilian area than the military.[117] In theory the prompt retraction by the erring counsel expunges the error from the record so effectively that there is no issue remaining to litigate, or the retraction coupled with ameliorative instructions is sufficient to remedy any evil that the remark might have worked.

3. *Waiver by Opposing Counsel*

With regard to waiver by the actions, or lack thereof, of the defense counsel, it is difficult to detect the rule from the exceptions which have been engrafted upon it. The Court of Military Appeals in *United States v. Doctor* [118] enunciated the general outlines of the rule. However, many other cases, treated herein, in an attempt to protect against an infringement of the rights of the accused, have interposed exceptions.

In *Doctor* the Court, after a discussion of the applicable federal decisions,[119] stated that:

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[117] 53 Am. Jur. *Trial* § 505 (1945); Comment, 36 Colum. L. Rev. 931 (1936).

[118] 7 USCMA 126, 21 CMR 252 (1956).

[119] Dunlop v. United States, 165 U.S. 486 (1897); Langford v. United States, 178 F.2d 48 (9th Cir. 1949).

> The failure to object in the trial arena where the harmful effects, if any, might be ameliorated by prompt instructions from the law officer, normally raises the doctrine of waiver and precludes an accused from asserting a claim of error on appeal.[120]

The Court would not allow trial defense counsel to give silent assent to trial counsel's argument at the trial only to be "second-guessed" by appellate defense counsel's claim of impropriety and error.

The first exception is the "miscarriage of justice" or "interests of justice" exception, expounded in *United States v. Shees*.[121] In that case improper argument by the trial counsel was directly connected to, and the error compounded by, an erroneous ruling by the law officer on an important issue raised by a defense objection. In these circumstances, reasoned the Court of Military Appeals, it would be a miscarriage of justice to disregard the error on the ground of waiver.

In *United States v. Cook*,[122] where it is not clear whether the defense counsel desired to object to the argument of the trial counsel or to reply by additional argument, the majority of the Court refused to hold against the accused where there was no clear indication of waiver. Judge Latimer would adhere to an earlier, unencumbered rule, and in dissenting said:

> Certainly I experience some difficulty in finding that arguments incite anger, animosity, or ill will and divert the minds of the court away from their primary duty when the trial defense counsel is so little concerned by what is being said that he sits in silence and asks for no curative measures by the law officer.[123]

In special courts-martial where counsel are nonlawyers and obviously not trained to either recognize the error involved or intelligently waive its harmful effects, the Court of Military Appeals is properly less inclined to apply the doctrine of waiver. So, in a case where nonlawyer trial counsel mentioned matters not in evidence in his rebuttal argument on the sentence, nonlawyer defense counsel was held not to have waived an objection to the error.[124]

The theory of non-imposition of the doctrine of waiver in special courts-martial was extended to cover cases with lawyer counsel participating in *United States v. Hatter*,[125] where the Court said:

> We have not been disposed to enforce the doctrine of waiver in special court-martial trials, and the facts of this case convince us to stay within that doctrine. True it is that lawyers tried the case, but the presiding officer was not trained in the law, and undoubtedly trial counsel was the

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[120] United States v. Doctor, *supra* note 118, at 135, 21 CMR at 261.

[121] 10 USCMA 285, 27 CMR 359 (1959). See also United States v. Sims, 5 USCMA 115, 17 CMR 115 (1954).

[122] 11 USCMA 99, 28 CMR 323 (1959).

[123] *Id.* at 104, 28 CMR at 328.

[124] United States v. Anderson, 8 USCMA 603, 25 CMR 107 (1958).

[125] *Supra* note 82.

oracle through which the court received its instructions on the law.[126] The Court recently reaffirmed this position in *United States v. King*.[127]

Hatter and *King* mark the logical culmination of the path followed by the Court of Military Appeals since it first departed the straight and narrow of *Doctor*. The Court has shifted from a willingness to allow waiver to the point where it now finds itself grasping for grounds to refuse waiver. Previously, waiver was measured by the yardstick of ability of counsel; now, in *Hatter*, the Court has decided it is rather a question of the qualification of the presiding officer which is determinative. The ability of counsel to look out for himself no longer is a factor. The logic of Judge Latimer's dissent in *Cook* is much more compelling than his opinion for the Court in *Hatter*. It is submitted that the doctrine of waiver should be invoked in accordance with the rule of *Doctor* and the spirit of the dissent in *Cook*. If this were done, reasonable rules would return to this area.

4. *Functions of the Law Officer*

The law officer must play an active, rather than passive, role in setting the limits of argument. He need not wait for counsel's objection to improprieties on the part of opposing counsel, but, when the occasion demands, should stop improper argument on his own motion. Among those occasions which have been delineated by appellate tribunals are a misstatement of law by the trial counsel [128] and improper argument with regard to inferences to be drawn from the silence of the accused.[129] A Circuit Court of Appeals case, which has been cited with approval by military authorities, states that not only should the trial judge stop improper argument, but his prompt and emphatic condemnation may cure an improper argument of government counsel.[130] Other federal cases conform to the rule requiring immediate correction and rebuke in aggravated cases even where defense counsel does not rise to object.[131]

Once improper argument is made it appears incumbent upon the law officer to take some action with regard to it. Usually this will be in the form of curative instructions by means of which the law officer attempts to salvage something from the wreckage wrought by counsel's unfortunate choice of words. The law officer's efforts

[126] 8 USCMA at 189, 23 CMR at 413.
[127] *Supra* note 82.
[128] United States v. Fair, 2 USCMA 521, 10 CMR 19 (1953).
[129] ACM 11275, Nelson, 20 CMR 849 (1955).
[130] Knowles v. United States, 224 F.2d 168 (10th Cir. 1955); *cf.* ACM 13805, Abernathy, 24 CMR 765 (1957); ACM 11275, Nelson, *supra* note 129.
[131] Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960).

usually receive appellate blessing if he completely counters the erroneous statement and instructs the court upon the proper rule of law to apply.[132] However, should he neglect to correct erroneous comments left with the court-martial by counsel, reversal will generally be necessary.[133]

In spite of all the law officer can do, there are occasions when cautionary instructions are insufficient to undo the damage that has been done and there remains a fair risk that the court-martial will be improperly influenced.[134] Also, there is the danger that the law officer's so-called curative instructions may create more problems than they cure. It is entirely possible that the instructions will serve to highlight the error and imbed the erroneous remark even more firmly in the minds of the court members. A possible remedial device would be to inquire of the defense counsel out of the hearing of the court whether he desired that the curative instruction be given, but this act, in itself, may tend to highlight the error in the mind of the alert court member. For the present there is a duty on the law officer to instruct sua sponte regardless of any possible adverse side effects.[135]

An interesting situation exists with regard to the class of cases involving reference to policy directives during the course of court-martial proceedings. In *United States v. Fowle* [136] and *United States v. Estrada* [137] the majority of the Court of Military Appeals stated that no cautionary instruction to the members of the court that they may disregard the announced policies of their commander can relieve the error from prejudice. Judge Latimer, concurring by separate opinion in the former and dissenting in the latter, maintains that such an instruction is sufficient if the members of the court are aware of the policy directive prior to any reference to it at the trial and the instruction makes it clear that the policy is no more than a guide and the court members are entitled to use their own unfettered discretion as to the appropriateness of the sentence.

Perhaps this area is not entirely closed, for in *United States v. Cummins*,[138] the Court, with Judge Ferguson dissenting, upheld the argument of trial counsel in which he referred to a policy with regard to punishment set forth in the Manual, but made it clear the court was free to adjudge any permissible sentence. Chief Judge Quinn, writing for the majority, appears to have adopted Judge

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[132] United States v. Carpenter, *supra* note 111; ACM 6711, Stowe, 12 CMR 657 (1953).

[133] United States v. Cox, 9 USCMA 275, 26 CMR 55 (1958); *cf.* United States v. Porter, 10 USCMA 427, 27 CMR 501 (1959).

[134] United States v. Britt, 10 USCMA 557, 28 CMR 123 (1959).

[135] *Ibid.*

[136] 7 USCMA 349, 22 CMR 139 (1957).

[137] 7 USCMA 635, 23 CMR 99 (1957).

[138] 9 USCMA 669, 26 CMR 449 (1958).

Latimer's test of whether the court understands it is free to exercise its discretion and award any legal and appropriate sentence. There would appear to be scant logical distinction between the trial counsel and the law officer informing the court-martial that it is not bound by the policy directive. Therefore, it is believed that, in the future, the Court of Military Appeals will depart from a rigid interpretation of the *Fowle* and *Estrada* cases and hold that there are situations in which curative instructions by the law officer are effective in this area.

The law officer has a fairly wide range of discretion as to just exactly what steps he will take to counter improper argument. Several of the avenues open to him were mapped in *United States v. Lackey*,[139] a case which involved the possibility of command control. The Court said:

> The failure of the law officer to take action sua sponte is crucial. If he had felt that there was no validity in the claim of command control, he should have taken steps to correct the impression. On the other hand if he sensed that the comment would lead the court members to conclude that the commanding general had authorized trial counsel to advise them of his wishes, the law officer's duty required that he either call for a retraction and instruct the members to disregard such incantations, or declare a mistrial.[140]

The effect of cautionary instructions upon a motion for mistrial after an erroneous remark by trial counsel is discussed in *United States v. Shamlian*.[141]

The law officer runs a risk of being accused of abusing his discretion when he grants trial counsel too broad latitude in his argument,[142] or when he unduly limits the argument of the defense counsel.[143]

B. *SUBSEQUENT TO TRIAL*

The test for prejudice in argument employed in the federal courts was advanced in *Williams v. United States*.[144] As enunciated therein the inquiry is simply to ascertain whether the improper comments of the prosecutor may reasonably be considered to have prejudiced the defendant by affecting the court's deliberations. This rule has been followed subsequently in both civilian and military tribunals.[145] Stated somewhat differently, if the appellate court determines that the misconduct is substantial, then reversal

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[139] 8 USCMA 718, 25 CMR 222 (1958).

[140] *Id.* at 720, 25 CMR at 224.

[141] 9 USCMA 28, 25 CMR 290 (1958).

[142] United States v. Fair, *supra* note 128.

[143] United States v. Bouie, 9 USCMA 228, 26 CMR 8 (1958); United States v. Walker, 3 USCMA 355, 12 CMR 111 (1953).

[144] 168 U.S. 382 (1897).

[145] United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir. 1946); ACM 9406, Weller, 18 CMR 473 (1954); ACM 8768, Doyle, 17 CMR 615 (1954); ACM 7395, Westergren, 14 CMR 560 (1953).

will follow unless it appears that the same verdict would have been returned if the improper argument had not been made.[146]

A slight extension of the foregoing rule, and the one most often followed in the military cases is what might be called the "clear and convincing" test. This was first pronounced by the Court of Military Appeals in *United States v. Valencia*,[147] in which it was said that even where the trial counsel's actions constituted misconduct, it did not result in substantial prejudice to the accused, since the evidence of guilt of the offense charged was overwhelming, clear and convincing. This reluctance to reverse an otherwise valid conviction in spite of prosecutor forensic misconduct if the evidenc of guilt is compelling is now a well-settled rule.[148]

A further test for prejudice devised by the Court of Military Appeals, or perhaps it is merely a means of applying the first mentioned test above, is whether the sentence imposed is considerably below the maximum punishment for the offenses found and below the maximum imposable by the court.[149]

Obviously, where, because of the nature of the case, it cannot be ascertained whether the trial counsel's remarks were prejudicial in fact, the accused is entitled to the benefit of the doubt.[150]

Thus we are left with the highly anamolous conclusion that the only case in which it may be permissible for trial counsel to employ improper argument is the very case in which he has no need of such questionable tactics to secure a conviction.

The detection of prejudicial error in the conduct of defense argument is somewhat easier to delineate. If the defense counsel refuses to argue [151] or if, during the course of his argument, he makes admissions inimical to the interests of the accused which remain uncorrected,[152] reversal is required. In the event the defense counsel makes an argument detrimental to his client the law officer should take steps to have him retract it and then give curative instructions in much the same manner as if the trial counsel had committed the error. Presumably, since retraction and curative instructions will operate to cure an error where the trial counsel is concerned, so will they in this case.

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[146] Pacman v. United States, 144 F.2d 562 (9th Cir. 1944).

[147] 1 USCMA 415, 4 CMR 7 (1952).

[148] United States v. Anderson, 12 USCMA 223, 30 CMR 223 (1961); United States v. Hickman, 10 USCMA 568, 28 CMR 134 (1959); United States v. Beatty, 10 USCMA 311, 27 CMR 385 (1959) (Unlawful command influence is an exception to this rule).

[149] United States v. Carpenter, *supra* note 111.

[150] United States v. Crutcher, *supra* note 111.

[151] United States v. McMahan, 6 USCMA 709, 21 CMR 31 (1956).

[152] United States v. Smith, 8 USCMA 582, 25 CMR 86 (1958); United States v. Walker, *supra* note 143.

If error is committed at the trial and remains uncorrected, it is possible for prejudice to be removed by modification of the findings and reassessment of the sentence by the convening authority or subsequent reviewing authorities. The prejudicial impact of trial counsel's remarks concerning the accused's failure to testify concerning alleged family problems in his trial for desertion was held to be effectively removed by the action of the convening authority in reducing the finding of desertion to one of absence without leave, with appropriate reduction of the sentence in *United States v. Bowen.*[153] Reassessment of the sentence by a board of review was held sufficient to expunge trial counsel's erroneous argument with regard to factors to consider in arriving at the sentence in *Schiavo.*[154] However, efforts to reform the sentence by reducing the amount of confinement are ineffective when the error goes to the punitive discharge.[155]

The remedy to be employed when the errors are so aggravated that their prejudicial effect permeates the entire case and cannot be alleviated by the ameliorative action of the reviewing authorities may extend from the ordering of a rehearing [156] to the reversal of the conviction and dismissal of the charge.[157]

Where the error extends only to the sentence a rehearing limited to reassessment of the sentence is the appropriate corrective vehicle.[158]

V. CONCLUSIONS

Argument is a valuable ally of evidence in achieving success at trial. However, its value is greatly diminished if error is permitted to creep into it. Whether the error results from ignorance of the rules governing argument or, worse, a consciously calculated effort on the part of counsel to improperly secure his ends, it is equally inexcusable. If counsel is conversant with the rules, as enunciated in judicial decisions, and observes them, he may avoid the commission of error which may serve to negate an otherwise successful result.

In striking hard blows in the course of argument, counsel must avoid foul blows. He may not engage in inflammatory argument for its own sake, but he need not avoid legitimate argument merely

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[153] 10 USCMA 74, 27 CMR 148 (1958).

[154] ACM 9778, 18 CMR 858 (1955).

[155] United States v. Lackey, *supra* note 139; United States v. Fowle, *supra* note 136.

[156] United States v. King, 12 USCMA 71, 30 CMR 71 (1960); United States v. Britt, *supra* note 134; United States v. McMahan, *supra* note 151.

[157] United States v. Williams, 8 USCMA 328, 24 CMR 138 (1957).

[158] United States v. Crutcher, 11 USCMA 483, 29 CMR 299 (1960); United States v. Anderson, 8 USCMA 603, 25 CMR 107 (1958); United States v. Rinehart, 8 USCMA 402, 24 CMR 212 (1957); United States v. Estrada, 7 USCMA 635, 23 CMR 99 (1957).

because it may tend to have inflammatory side effects. Vilification of the accused, such as characterizing one accused of homicide as a "cold-blooded murderer," is of questionable propriety and should be avoided. Forensic skill is more than an acceptable substitute for vituperation.

Up to the present time the proponents of comment upon the failure of the accused to testify in his own behalf have not made great inroads into the rule which prohibits such comment. Even with regard to what might be called tangential references to this subject the trial counsel must exercise extreme caution. However, there is much to be said in favor of permitting such comment and it is felt that it should be, and eventually will be, allowed subject to certain limiting conditions. But for the present, counsel must avoid any statement which directly or inferentially may be taken as a comment upon the failure of the accused to testify in his own behalf.

Counsel must not "testify" or introduce facts not in evidence during his argument. He should not intimate to the court that he is in possession of matters which have not been introduced in evidence which would tend to support his side of the case. Should he desire to testify, he may do so as any other witness, but there are a variety of reasons why he should not do so.

While the simile is recognized as a valid device in argument, its use in the military unfortunately is apparently limited and counsel should exercise care in painting too vivid a word picture for the court.

A statement of counsel's personal belief in the guilt or innocence of the accused or in the justice of his cause is best avoided entirely or stopped by the law officer. Judicial attempts to circumvent this rule and to allow such a statement are vague and ambiguous in theory and cumbersome in practice.

The defense counsel may point the finger of scorn and derision at the prosecution and contend that its case is pitifully inadequate, but he opens up areas not otherwise properly the subject of argument by trial counsel at his peril. Trial counsel should be quick to grasp any opportunity to engage in retaliatory argument and he can often employ it with telling effect where he is forbidden to touch on the subject initially.

Both counsel may argue applicable legal principles to the court, but must be careful not to usurp the prerogatives of the law officer or to misstate the law in so doing. The trial counsel of the special court-martial is under an even greater duty of care, having been characterized as the oracle from which the court derives its law.

The fact that there are not as many decisions relative to argument of the defense counsel should not be interpreted to mean

that his argument is subject to no boundaries. He is bound by the same legal and ethical rules as the trial counsel. The approval of intellectual honesty on the part of defense counsel by the Court of Military Appeals is subject to abuse and may create the problem of having to determine whether the defense counsel is being intellectually honest or is merely conceding guilt without trying to provide a defense for the accused.

Both sides may argue the law and facts to the court upon a motion for a finding of not guilty. As the system exists under the Uniform Code of Military Justice, the influence of the law officer in this area has been reduced to a minimum. It is to be hoped that the proposal to amend the Code to provide that the law officer rule with finality upon the motion for a finding of not guilty will be adopted. The amendment provides for a procedure more orderly and logical than that now in existence.

Once errors occur in argument they may be cured at trial by retraction, waiver by the opposing counsel and appropriate action by the law officer. The latter must act promptly and where there is no objection by the opposing counsel, he must take action in the appropriate case on his own motion. He is invested with broad discretionary powers with regard to the regulation of argument.

With reference to the rules governing waiver by opposing counsel of errors in argument it is felt that there should be a return to an earlier position where the doctrine was invoked absent good and sufficient reasons to the contrary rather than that of the present extreme reluctance to permit waiver to occur. There is no need for excessive judicial paternalism in this area.

If error occurs at the trial and remains uncorrected it will not necessitate reversal upon review if the same result, *i.e.*, conviction, would have followed in any event.

Many of the problems in the area of argument to the court-martial are brought about because the rules of oral argument have not been enunciated sufficiently clearly or adhered to sufficiently strongly by appellate tribunals to impress upon counsel their importance. Counsel have been permitted to become careless and complacent and dependent upon the doctrine of waiver or the corrective action of reviewing authorities to cure their mistake.

What is needed is more than a judicial wringing of hands and plaints about the poor quality of oral argument. Rather than lowering the judicial standards to permit continually poorer and more erroneous argument to slip by, the rules should be rigidly enforced and counsel should be made to adhere to higher standards of professional conduct when arguing before a court-martial. It is not impossible to secure the desired results while still observing the rules of argument.

A SUPPLEMENT TO THE SURVEY OF MILITARY JUSTICE *

BY
CAPTAIN JOHN W. CROFT **
AND
FIRST LIEUTENANT ROBERT L. DAY ***

I. FOREWORD

The original survey of military justice entitled "The Survey of The Law-Military Justice: The United States Court of Military Appeals—29 November 1951 to 30 June 1958" appeared in the January 1959 issue of the *Military Law Review*.[1] That survey represented the collective efforts of several officers of the Government Appellate Division, Office of the Judge Advocate General, to present a summary of Court of Military Appeals landmark cases. The first supplement to the survey appeared in the April 1960 issue of the *Military Law Review*[2] and was written by two officers assigned to the Government Appellate Division. The second supplement was written by two officers assigned to the Military Justice Division, Office of the Judge Advocate General, and it was published in the April 1961 issue of the *Military Law Review*.[3] In the latter supplement, the authors considered the work of the Court on a court term basis rather than on a fiscal year basis. The authors of this supplement also consider the court term a more practicable period with which to work. Consequently, the cases discussed in this supplement will be those decided during the October 1960 Term (1 October 1960 through 30 September 1961).

It should be noted that Judge Latimer's term ended on May 1,

* The opinions and conclusions expressed herein are those of the authors and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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1 Mil. L. Rev., January 1959, p. 67.

2 Fischer and Sides, *A Supplement to the Survey of Military Justice*, Mil. L. Rev., April 1960, p. 113.

3 Davis and Stillman, *A Supplement to the Survey of Military Justice*, Mil. L. Rev., April 1961, p. 219.

1961, during the middle of the Court's term. His successor, Judge Paul Kilday, did not qualify and take his seat on the Court until the beginning of the October 1961 Term. Accordingly, all of the decisions of the Court after May 1, 1961, represent the views of only the two remaining judges. Likewise, the dissenting opinions of Judge Ferguson and Chief Judge Quinn during this term may take on an increasing importance, depending upon Judge Kilday's views. Where important, these dissents will be noted in the footnote references to the case. Important opinions handed down by the Court since Judge Kilday's assumption of his position will also be indicated, where they have affected the previous holding of the Court.

II. PRETRIAL AND TRIAL PROCEDURE

A. *CHARGES AND SPECIFICATIONS: INVESTIGATION, SUFFICIENCY, MULTIPLICITY*

1. *Article 32*

The Court of Military Appeals continued to emphasize the need for a completely impartial Article 32 investigation. In *United States v. Cunningham*,[4] it was held that, where the investigating officer was also the accuser, and sixteen important government witnesses were not called at the Article 32 pretrial investigation, the officer was disqualified to act as the investigating officer, and there was incontestable harm to the accused.

2. *Sufficiency*

The test of the sufficiency of a specification is not whether it could have been made more definite and certain but whether it contained the elements of the offense intended to be charged and sufficiently apprised the accused of what he must be prepared to meet, and whether the record enables him to avoid a second prosecution for the same offense.[5] With this in mind, the Court considered the legal sufficiency of charges and specifications in six cases during the October 1960 Term. A specification alleging that the accused ". . . wrongfully appropriated lawful money and/or property of a value of about $755.51. . . ." was held to be void for uncertainty in its description of the property appropriated.[6] The Court, in effect, condemned the use of the conjunctive-disjunctive "and/or" in any place in the specification. Prior cases had clearly established that the *offense* could not be charged in the conjunctive

[4] 12 USCMA 402, 30 CMR 402 (1961).

[5] United States v. Karl, 3 USCMA 427, 12 CMR 183 (1953); United States v. Sell, 3 USCMA 202, 11 CMR 202 (1953); U.S. Dep't of Defense, Manual for Courts-Martial, United States, 1951, para. 87*a*(2) (hereinafter referred to as the Manual and cited as para. ____, MCM, 1951).

[6] United States v. Autrey, 12 USCMA 252, 30 CMR 252 (1961).

or the disjunctive.[7] It was held in *United States v. Means*[8] that an allegation that an act (use of marijuana) was committed in a specified city was a sufficient allegation of the place of occurrence, as would be an allegation that the offense was committed at a military installation. No further particularization was necessary, although, the Court pointed out, the accused is free to demand further particulars if he believes he has insufficient information. The issue of duplicity was also raised in *Means*, with reference to the allegation that the accused used marijuana "from on or about 1 April 1959 to on or about 30 September 1959." The Court rejected accused's contention that because use of marijuana is not a continuing offense, but a one-time type of offense, the specification was duplicitous, and it upheld the form of the specification. The allegation of the time of the offense in the manner in which it was alleged in *Means* redounds to the benefit of the accused for purposes of the maximum punishment,[9] and the accused could not later be tried for the use of marijuana at any specific time within the general period first alleged.[10] The specification in *United States v. Brown*,[11] alleged that accused "... wrongfully, willfully, maliciously, and without justifiable cause, communicate[d] . . . a defamatory statement . . . concerning Lieutenant . . . ." On petition, and upon the issue of the deficiency of the specification in failing to allege the falsity of the statement, the Court "looked to the four corners" of the specification and held that it alleged in express words or by necessary implication the falsity of the statement. Specifications alleging perjury in violation of Article 131 were involved in *United States v. Chaney*,[12] and *United States v. Warble*.[13] The Court held simply that a specification which follows the language of the statute defining the offense, and the form of specification prescribed therefor, is legally sufficient. Finally, specifications alleging that the accused "wrongfully and indecently" induced an enlisted man to disrobe, and attempted to induce another enlisted person to disrobe, in violation of Article 133, were upheld by the Court in *United States v. Holland*.[14] The Board of Review had set aside the find-

[7] *Id.* at 253, 30 CMR at 253.

[8] 12 USCMA 290, 30 CMR 290 (1961). Judge Ferguson dissented.

[9] The effect of joining several violations as one reduces the maximum punishment which may be adjudged. See United States v. Means, *supra* note 8 at 294, 30 CMR at 294.

[10] United States v. Maynazarian, 12 USCMA 484, 31 CMR 70 (1961). This opinion was rendered in the October 1961 Term.

[11] 12 USCMA 368, 30 CMR 368 (1961).

[12] 12 USCMA 378, 30 CMR 378 (1961).

[13] 12 USCMA 386, 30 CMR 386 (1961).

[14] 12 USCMA 444, 31 CMR 30 (1961).

ings of guilty on the basis that the quoted words were insufficient to show the criminal nature of the accused's acts.[15]

3. *Multiplicity*

One transaction, or what is substantially one transaction, should not be made the basis for an unreasonable multiplication of charges against one person,[16] but ordinarily, it is not prejudicial to the accused to allow the court-martial to return a finding on each of the multiplicious charges.[17] However, the maximum punishment for each offense may not be aggregated where the separate charges are multiplicious.[18] The test of whether the offenses of which the accused has been convicted are multiplicious for sentence purposes or whether they are punishable separately, set forth in the Manual is this: if each offense requires proof of an element not required to prove the other, the offenses are separate.[19] Thus, it is multiplicious, and error, to treat breach of arrest and absence without leave as separate for punishment where they occurred at the same time.[20] Similarly, charges alleging that the accused submitted a false official report in violation of Article 107 and Article 134 (see 18 U.S.C. § 1001 (1958)) and two charges alleging the same offenses as violations of Article 133, were held to be multiplicious in *United States v. Middleton*.[21] However, it was also held that the resultant prejudice would have been cured had the law officer correctly instructed the court that the maximum punishment was limited to the punishment imposable for the most serious of the offenses found.[22] In *United States v. Stanaszek*,[23] the accused was ordered to report back to his station. He failed to obey the order and he remained absent without leave. Later, he was convicted of failure to obey a lawful order and desertion. The Court concluded that the offenses were multiplicious for punishment purposes. It is difficult to reconcile the holding in *Stanaszek* with the test of separability previously announced by the Court and as set forth in the Manual.[24]

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[15] NCM 60–01767, Holland (undated).
[16] Para. 26*b*, MCM, 1951.
[17] United States v. Middleton, 12 USCMA 54, 30 CMR 54 (1960).
[18] *Id.* at 58, 30 CMR at 58.
[19] Para. 76*a*(8), MCM, 1951.
[20] United States v. Franklin, 12 USCMA 477, 31 CMR 63 (1961).
[21] 12 USCMA 54, 30 CMR 54 (1960).
[22] *Id.* at 59, 30 CMR at 59.
[23] 12 USCMA 408, 30 CMR 408 (1961).
[24] Mindful of the rule that charges will be held to be multiplicious for sentence purposes where proof of each charge requires proof of an element not common to the other charge if the differences in elements are illusory or both charges are predicated on a single act, (see note 67, *infra*), it would still seem that failure to obey an order and desertion are separate for punishment purposes.

B. *COMPOSITION OF THE COURT-MARTIAL*

Decisions of the Court during the last term include the following holdings concerning the composition of the court-martial. The proceedings were declared a nullity where two members of the court to which charges were originally referred were present and participated in the actual trial although they never were appointed to the second court which actually heard the case.[25] The mere fact of prior knowledge of the circumstances surrounding an accused's case, gleaned through official duties, does not constitute a ground for challenge against a member.[26] An accuser should not be used as the official reporter for proceedings against the accused, but on the facts no prejudice to the accused resulted.[27] Finally, the presence of the command legal officer in closed sessions of a court-martial is erroneous and presumptively prejudicial.[28]

C. *COMMAND INFLUENCE*

Subsequent to trial, and prior to action by the convening authority in *United States v. Betts,*[29] the accused submitted a petition for probation to the convening authority. Attached to the petition was the indorsement of the station commanding officer which referred to SECNAV Instruction 1620.1, a directive that known homosexuals "must be eliminated from the service." [30] The convening authority denied the petition for probation and approved the sentence. If the convening authority was under the belief that the SECNAV instruction was mandatory, or if the Court determined as a matter of law that the instruction was mandatory, the holding in *United States v. Doherty*[31] would require the return of the record to the convening authority for reconsideration. The Court, Judge Ferguson dissenting, did not reach such a conclusion. Rather, it held that the advice of the staff legal officer to the convening authority, that he should not approve the sentence unless he found it to be legal and ap-

[25] United States v. Harnish, 12 USCMA 443, 31 CMR 29 (1961).

[26] United States v. Talbott, 12 USCMA 446, 31 CMR 32 (1961).

[27] United States v. Payne et al., 12 USCMA 455, 31 CMR 41 (1961).

[28] United States v. Smith, 12 USCMA 127, 30 CMR 127 (1961).

[29] 12 USCMA 214, 30 CMR 214 (1961). Chief Judge Quinn concurred without opinion. Judge Ferguson dissented on the basis of the Court's previous holdings in United States v. Doherty, 5 USCMA 287, 17 CMR 287 (1954), and United States v. Plummer, 7 USCMA 680, 23 CMR 94 (1957).

[30] The precise instruction by the Secretary of the Navy herein involved was also before the Court in United States v. Doherty, *infra* note 31.

[31] 5 USCMA 287, 17 CMR 287 (1954), in which the Court held that if there is a fair risk that the affirmance by the convening authority of the punitive discharge was prompted by the belief that he was obliged to do so, the accused is entitled to a reconsideration by the convening authority.

propriate, and two letters from officers of the command recommending probation, affirmatively showed that the convening authority was properly informed. The opinion does repudiate dictum in *United States v. Jemison*[32] to the effect that administrative policies should form no part of the basis for the convening authority's action. It is questionable, however, whether a general rule can be formulated as to what constitutes sufficient evidence to compel a conclusion that the convening authority fully understood the weight of the instruction and his discretion with respect to the sentence. Would, for example, the advice of the staff legal officer in the *Betts* situation, alone, suffice to dispel an inference that the convening authority was not aware of the latitude he possessed?

In prior cases wherein trial counsel's argument in court had reference to an administrative policy unfavorable to the accused, the Court has held such argument to be prejudicially erroneous,[33] and in *United States v. Leggio*,[34] the Court made no exception to the rule.

United States v. Danzine[35] involved lectures by the convening authority and his staff judge advocate given to the members of the court which tried the accused. The lectures were delivered from written statements, previously submitted to the defense for comment, approximately four weeks before trial. Defense counsel at trial made a motion for appropriate relief asserting the unlawful command influence arising from the lectures. The motion was denied, and, on petition, the Court affirmed the conviction and held that the lectures did not constitute unlawful command influence. Judge Latimer, in the majority opinion, stated that it is the subject matter of the lecture and *not* by whom it is delivered that is the important consideration. However, language in the opinion portended a finding of unlawful command influence in several cases pending before the Court during the October 1961

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[32] 10 USCMA 472, 28 CMR 38 (1959). Notwithstanding Judge Ferguson's reference to the Court's "declaration" in *Jemison*, it is submitted that the policy expressed was neither forceful nor a declaration, but rather an expression of doubt. See 10 USCMA at 474, 28 CMR at 40.

[33] United States v. Coffield, 10 USCMA 77, 27 CMR 151 (1958); United States v. Lackey, 8 USCMA 718, 25 CMR 222 (1958).

[34] 12 USCMA 8, 30 CMR 8 (1960). See also the more recent decision in United States v. Rivera, 12 USCMA 507, 31 CMR 93 (1961), in which Judge Kilday joined Chief Judge Quinn's affirmance of accused's conviction. Judge Ferguson again dissented vigorously.

[35] 12 USCMA 350, 30 CMR 350 (1961). See also United States v. Davis, 12 USCMA 576, 31 CMR 162 (1961), in which Judge Kilday expressed his agreement with the opinion and the result reached in *Danzine*.

Term.[36] Chief Judge Quinn concurred in the result, and Judge Ferguson dissented, expressing his view that, "a *convening authority* may not lawfully address members of a court-martial with respect to the principles of law which they are to apply or the sentences which they should impose." [37]

D. *PLEAS AND MOTIONS*

1. *Speedy Trial*

Apparently, the concern which the last survey expressed for the future of the rule of *United States v. Brown*[38] was justified. Briefly, the Court in *Brown* held that whenever it affirmatively appears that officials of the military services have not complied with the requirement of Articles 10 and 33, Uniform Code of Military Justice, and the accused challenges this delict, the *prosecution* is required to show the full circumstances of the delay. In *United States v. Williams*,[39] the total time between the accused's return to military control and the date of trial was 124 days. At the trial, the law officer peremptorily denied the accused's motion for dismissal of charges on account of the delay, but, subsequently, he held an out-of-court hearing to determine the merits of the motion. The majority opinion states as follows:

> Looking at the record of the proceedings as a whole, it clearly appears that the Government was actively engaged throughout the period in preparing the case against the accused in order to bring him to trial.[40]

Thus, it was apparent that a majority of the Court had chosen to follow the rationale in *United States v. Davis*,[41] *i.e.*, if it appears

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[36] The Court implied that, *inter alia*, the following would be improper for comment before prospective court members: (1) an indication that the court members should abdicate their rightful responsibilities in reliance upon corrective action upon subsequent review, (2) the suggestion of a specific sentence, even by indirection. 12 USCMA at 353, 30 CMR at 353. In CM 405993, Barrett, lectures by an assistant staff judge advocate reminded potential court members that the convening authority could lower a sentence but could not raise it, and in CM 405690, Kitchens and Smith, [as in *Barrett*] a letter was sent to prospective court members by an assistant staff judge advocate calling attention to light sentences in the command and comparing them to more severe sentences which had previously been given for similar offenses. On 22 December 1961, the Court of Military Appeals, in a unanimous decision, decided the above cases and held that the letter constituted unlawful command influence, and the cases were returned for submission to a board of review for "reassessment of the sentence by elimination of the punitive discharge, or for a rehearing." United States v. Kitchens, 12 USCMA 589, 31 CMR 175 (1961). *Accord*, United States v. Smith, 12 USCMA 594, 31 CMR 180 (1961); United States v. Barrett, 12 USCMA 598, 31 CMR 184 (1961).

[37] 12 USCMA at 354, 30 CMR at 354 (emphasis added).

[38] 10 USCMA 498, 28 CMR 64 (1959); see discussion in Davis and Stillman, *supra* note 3, at p. 237.

[39] 12 USCMA 81, 30 CMR 81 (1961). Judge Ferguson dissented.

[40] *Id.* at 83, 30 CMR at 83.

[41] 11 USCMA 410, 29 CMR 226 (1960).

from the record of trial and allied papers that there was no oppressive design or lack of reasonable diligence, the rigid rule of the *Brown* decision would not be applied. Even prior to their decision in *Williams*, the Court indicated the course they could be expected to follow. In *United States v. Batson*,[42] the Court rejected the argument that, in ruling on the accused's motion to dismiss for lack of a speedy trial, the law officer could not consider as evidence a chronology of events detailed and submitted to the commanding officer by the investigating officer. It is hoped that the rationale of the *Williams* decision will be followed in the future.[43] The rule of the *Brown* case is unnecessarily restrictive and, unless there is nothing in the proceedings to enlighten the law officer or president, it is neither necessary to protect the substantial rights of the accused, nor of assistance to the court in its function of punishing the guilty.

2. *Motion for Severance*

In *United States v. Payne, et al.*[44] the Court, in dictum, concurred in the proposition that, "... a trial so massive and [so] complicated that no jury could follow the evidence or separate defendants from each other would be a deprivation of due process."[45] Nevertheless, in this case, which involved four accused, numerous witnesses, hostility between witnesses, fifty assignments of error on appeal, and charges alleging conspiracy, larceny, false claims, impersonation of an officer, and wrongful possession of false credentials, the Court held the law officer properly denied the motion for a severance.

3. *Mistrial*

Discretion to declare a mistrial, *sua sponte*, has been vested in the law officer. However, the remedy is drastic, and in the case of incompetent evidence being admitted, only where such testimony is inflammatory or highly prejudicial to the extent that its impact cannot be erased reasonably from minds of ordinary persons is there occasion for the law officer to grant a motion for a mistrial. In *United States v. Johnpier*,[46] the law officer became convinced that the case was proceeding under inappropriate

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[42] 12 USCMA 48, 30 CMR 48 (1960). Judge Ferguson concurred in the result without opinion.

[43] Until Judge Kilday has an opportunity to address himself to this problem, however, it will be difficult to discover a firm rule in this area, in view of Judge Ferguson's dissent in *Williams* and his adherence to the strict rule of the *Brown* case.

[44] 12 USCMA 455, 31 CMR 41 (1961).

[45] *Id.* at 460, 31 CMR at 46.

[46] 12 USCMA 90, 30 CMR 90 (1961).

charges. Accordingly, he suspended the trial under the provisions of paragraph 55 of the Manual for Courts-Martial pending further direction by the convening authority. The court reconvened one month later. At that time, the law officer declared a mistrial on the grounds that the action of the convening authority, which obviously overruled the judgment of the law officer, would influence the court, and because of certain evidence before the court which should not have been considered. The Court held that the latter reason alone was sufficient to support the ruling of the law officer. Additionally, and gratuitously since it was not necessary for the decision, the Court overruled its prior sanction of the procedure provided in paragraph 55 of the Manual, expressed in *United States v. Turkali*.[47] "We are convinced," the Court stated, "that the paragraph 55 procedure for suspension of trial in order to obtain the views of the convening authority is both archaic and injudicious. It is contrary to the express language of Article 51, and violates the spirit of the Uniform Code and the purposes for which it was enacted."[48]

E. *CONDUCT OF TRIAL*

1. *Argument of Counsel*

In *United States v. King*,[49] the Court held improper the argument of the trial counsel, before a special court-martial, in which he informed the court of the sentence given accused for absence without leave in six cases he had defended, the implication being that this was an appropriate consideration for the court in adjudging the sentence. Where the defense counsel stated in open court that there were witnesses whom the prosecution had not called who might testify favorably to the accused and trial counsel stated he would call these witnesses if defense desired and they would testify favorably to the prosecution's case, the majority opinion in *United States v. Anderson* [50] held trial counsel's statement to be advocacy in reply to the defense intimation of deficiencies in the case and not improper presentation of unsworn testimony. Moreover, the Court pointed out, reversal of a conviction on the ground of improper argument by trial counsel is not justified if the evidence of guilt is clear and compelling.

2. *Inadequacy of Representation*

Where, on rehearing, the accused pleaded guilty to the offense

[47] 6 USCMA 340, 20 CMR 56 (1955).
[48] 12 USCMA at 94, 30 CMR at 94.
[49] 12 USCMA 71, 30 CMR 71 (1960).
[50] 12 USCMA 223, 30 CMR 223 (1961). Judge Ferguson concurred in the result.

charged, and defense counsel refused to present *any* evidence in mitigation or extenuation in order to *eliminate any possibility that the accused might again repudiate his plea,* the Court held that the inadequacy of the defense counsel, and the error generated by his actions, impugned the validity of the entire trial and not just the sentence.[51] In *United States v. Winchester,*[52] individual military counsel, in open court, accused his client of having perjured himself. Accused did not object to the continued participation of individual counsel and counsel did in fact continue in the case. The Court held that the accusation, taken together with later remarks to the effect he would try to make a fair statement in mitigation but that he would be laboring under certain mental difficulties, showed inadequate representation which could not be cured by a reduction in the period of confinement.

III. MILITARY CRIMINAL LAW

A. *SUBSTANTIVE OFFENSES*

1. *Conspiracy, Article 81*

In *United States v. Nathan,*[53] the Court held that where both of the accused's alleged co-conspirators were acquitted of the offense of conspiracy, it was error to try the accused for that offense.

2. *Failure to Obey Order or Regulation, Article 92*

All activities which are reasonably necessary to safeguard and protect the morale, discipline, and usefulness of the members of a command, and which are directly connected with the maintenance of good order in the services, are subject to the control of the officers upon whom the responsibility of the command rests.[54] With this in mind, the Court decided three cases involving the issue of the legality of an order or a regulation promulgated by commanding officers. In *United States v. Wilson,*[55] the accused admitted that he had stolen a tape recorder while under the influence of alcohol. The squadron commander immediately arranged a conference with the accused at which he "restricted . . . [the accused] to the billets" and ordered him "not to indulge in alcoholic beverages." Appellate defense counsel argued that, because the order was unlimited as to time or place or the reasonable requirements of the service, the order was illegal. Government counsel countered with the argument that since the order merely required the accused to refrain from drinking while on duty and while in the barracks, the only

[51] United States v. Rose, 12 USCMA 400, CMR 400 (1961).
[52] 12 USCMA 74, 30 CMR 74 (1961).
[53] 12 USCMA 398, 30 CMR 398 (1961).
[54] United States v. Martin, 1 USCMA 674, 5 CMR 102 (1952).
[55] 12 USCMA 165, 30 CMR 165 (1961).

two places he was authorized to be, it was directly connected to the needs and purposes of the military. The Court noted that there was no suggestion that the accused had been drinking during duty hours, and that the order was not intended to prevent misdeeds during that period; and, since drinking in the billets was already prohibited, the order was unnecessary insofar as it was intended to apply to the time spent in the billets. The Court concluded that "the order was to apply in all places and on all occasions," and, "in the absence of circumstances tending to show its connection to military needs, an order which is so broadly restrictive of a private right of an individual is arbitrary and illegal." [56]

The second case, *United States v. Wheeler*,[57] involved a general regulation which prohibited the marriage of naval personnel in the Philippines without the written permission of the Commander, U.S. Naval Forces, Philippines. Appellate defense counsel attacked the legality of the regulation on four grounds: (1) it was an intrusion into religious practices, as it required the counsel of a chaplain; (2) it could not be asserted against a civilian (the intended spouse); (3) it was unreasonably restrictive because it required presentation of a medical certificate showing the applicant and the intended spouse to be free from specified illnesses and diseases, and it required the written consent of a parent or guardian for parties under twenty-one years of age; and (4) it was invalid because it required an arbitrary "cooling-off period." In *United States v. Nation*,[58] the Court had declared illegal the predecessor regulation because it then included a mandatory six month waiting period between submission of the request for permission to marry and the time when the request would first be considered, but the Court expressly avoided the question of whether the right of servicemen to marry while serving overseas was the proper subject of reasonable control and regulation by military commanders. Thus, the significant aspect of *Wheeler* is not that the Court distinguished the *Nation* decision and held the terms of the regulation to be reasonable, but that it held that a military commander, in foreign areas, may impose reasonable restrictions on the right of military personnel of his command to marry. Apparently because of Judge Ferguson's vigorous dissent in the *Wheeler* case on the principal issue (the amenability of service personnel based overseas to regulations promulgated by military commanders restricting the right to marry) and the expiration of Judge Latimer's term, the issue in *Wheeler* was reliti-

[56] *Id.* at 166-67, 30 CMR at 166-67.

[57] 12 USCMA 387, 30 CMR 387 (1961).

[58] 9 USCMA 724, 26 CMR 504 (1958).

gated in *United States v. Smith*,[59] and the Court, Judge Kilday for the majority, reaffirmed the holding in *Wheeler*.

Failure to obey an order to perform work on a golf course was held to establish an offense under Article 92 where there was no evidence in the record indicating that the golf course was privately owned.[60]

8. *Larceny, Wrongful Appropriation, Article 121*

In *United States v. Ford*,[61] the Court distinguished its holding in *United States v. McFarland*,[62] and held that where an individual was not the actual thief, but only a statutory principal to the crime of larceny, this connection with the larceny does not bar his prosecution for receiving the stolen goods. The providence of a plea of guilty to the offense of larceny was in issue in *United States v. Dosal-Maldonado*.[63] There the accused took money from the locker of a man whom he believed had cheated him in a card game. The Court held the plea was provident insofar as the amount taken exceeded the amount lost by the accused in the card game, but that there would be serious doubt as to the providence of the plea had the amount taken equalled the amount lost. The Court sustained the plea of guilty of larceny of an amount in excess of the accused's losses and returned the record for reconsideration of the sentence.

In *Oakes*,[64] an Army board of review set aside findings of guilty of the wrongful sale of government property in violation of Article 108, Uniform Code of Military Justice, and it refused to affirm a finding of guilty of larceny in the belief that the latter was not a lesser included offense of the crime charged. On certification from The Judge Advocate General of the Army, the Court affirmed the decision of the board of review and held that larceny is not a lesser included offense of wrongful sale of government property in the absence of allegations which would fairly embrace the elements of the former offense.[65] In addition, the Court distinguished its holding in *United States v. Brown*,[66] pointing out that in *Brown* the issue was whether findings of guilty of both wrongful sale of government property and larceny, based on the same act, were multiplicious for sentence purposes. Although the test for separability is whether each offense requires proof of an element not required to prove the other, where the differences were "illusory," [*e.g.*, where there was but one act by the accused] separate

[59] 12 USCMA 564, 31 CMR 150 (1961).
[60] United States v. Fidler, 12 USCMA 454, 31 CMR 40 (1961).
[61] 12 USCMA 3, 30 CMR 3 (1960).
[62] 8 USCMA 42, 23 CMR 266 (1957).
[63] 12 USCMA 442, 31 CMR 28 (1961).
[64] CM 405006, Oakes (Feb. 10, 1961).
[65] United States v. Oakes, 12 USCMA 406, 30 CMR 406 (1961).
[66] 8 USCMA 18, 23 CMR 242 (1957).

charges were held to be multiplicious for punishment in *Brown* even though the separate offenses each contained an element not common to the other and did not necessarily have a greater and lesser relationship.[67]

In *United States v. Roark*,[68] and *United States v. Bridges*,[69] an opinion originally authored by Chief Judge Quinn as a dissent in an earlier case,[70] which later became the opinion of a majority of the Court,[71] restricted further the scope of the offense of wrongful appropriation. In *United States v. Krull*,[72] a majority of the Court held that the accused's assertion that he only intended to borrow the item in question did not state a defense to wrongful appropriation. Chief Judge Quinn entered a lengthy dissent in which he stated, "This statement [that he only intended to borrow] completely negatived the existence of an *animus furandi* and, therefore, conclusively demonstrated a fatal deficiency in his understanding of the charges . . ."[73] Later, in *United States v. Krawcyzk*,[74] the Court held that unless the identical property taken could be returned, no issue of wrongful appropriation was raised, and only the offense of larceny was in issue. Chief Judge Quinn again dissented. Approximately four years later, the dissent in *Krull* and *Krawcyzk* became the majority opinion in *United States v. Hayes*.[75] In this case, Chief Judge Quinn extended the rationale of his previous dissents to its logical conclusion by requiring an additional finding; the intent to deprive temporarily "must include a mens rea." The opinion stated that ". . . the mere 'borrowing' of an article of property without the prior consent of the owner does not make out either of the offenses defined in Article 121."[76] The Court in *Hayes* expressly overruled the *Krull* and *Krawcyzk* cases insofar as they held that only the issue of larceny is raised when money is taken and the same money could not be returned.[77]

In the *Bridges* case, *supra*, the accused was convicted of wrongful appropriation of a motor vehicle. Evidence revealed that the owner of the car had informed the accused that because he (the owner) was not sober, he planned to leave the car at the hotel, and

[67] *Id.* at 20, 23 CMR at 244.
[68] 12 USCMA 478, 31 CMR 64 (1961).
[69] 12 USCMA 96, 30 CMR 96 (1961).
[70] See United States v. Krawcyzk, 4 USCMA 255, 260, 15 CMR 255, 260 (1954); United States v. Krull, 3 USCMA 129, 134–36, 11 CMR 129, 134–36 (1953).
[71] United States v. Hayes, 8 USCMA 627, 25 CMR 131 (1958).
[72] 3 USCMA 129, 11 CMR 129 (1953).
[73] *Id.* at 135, 11 CMR at 135.
[74] 4 USCMA 255, 15 CMR 255 (1954).
[75] 8 USCMA 627, 25 CMR 131 (1958).
[76] *Id.* at 629–30, 25 CMR at 133–34.
[77] *Id.* at 629, 25 CMR at 133.

he refused the accused's request for a ride to another village. Accused had, in the past, been denied the use of the car. During the owner's temporary absence from the room, the accused took the car keys and left with the car. There was some question as to whether the accused had intended to return the car to the base or whether he was on his way to see a female acquaintance, but this was not important in the case. The Court held, on an instructional issue, that the court-martial could reasonably have found that the accused lacked the criminal frame of mind necessary for a conviction of wrongful appropriation.[78] Seven months later, in *Roark, supra,* the Court found that the accused had taken money from the locker of a friend whom the accused had warned about keeping money in his (the friend's) locker. The accused testified that he took the money only to teach his friend a lesson. "This," the Court ruled, "is a wholly innocent purpose, not a criminal or evil one .... Accused's disclaimer of any criminal intent is a 'total defense' to a prosecution under Article 121." [79] Conspicious by its absence was any reference to the case of *United States v. McCoy.*[80] In that case, the accused testified that he found a wallet which he knew belonged to Private L., but that he kept it to teach the owner a lesson. Judge Brosman stated, "The claim by the accused that he was merely seeking to 'teach . . . [the owner] a lesson' constitutes no sort of justification . . . ." [81] The following passage from the majority opinion is noteworthy, if no longer the law:

> . . . [T]he policy of military law to protect the owner of property to the utmost is very much to the point. Moreover, the *Krull* case seems to repudiate for the military establishment any element of the outmoded concept of *lucri causa*—that is, the notion that, to be guilty to larceny, one taking an other's goods must have had in mind some gain to himself. . . . [I]t is plain that the owner of the goods suffered a legally cognizable harm of injury, in that he lost the use of that property. Under the circumstances of the present case, this is all that is required to sustain findings of guilty to a charge of wrongful appropriation.[82]

The *Bridges* and *Roark* cases stand for the proposition that Article 121 does not proscribe all wrongful takings even where the statutory intent to deprive is present. In addition to the intent to deprive, a "criminal" or "evil" intent must be found to exist. The Court cites as authority for such a proposition the case of *United States v. Norris.*[83] However, the *Norris* case held only that there is no offense under Article 134 known as wrongful taking which does not require an element of specific intent. It is quite

[78] 12 USCMA at 99, 30 CMR at 99.
[79] 12 USCMA at 479, 31 CMR at 65.
[80] 5 USCMA 246, 17 CMR 246 (1954).
[81] *Id.* at 248, 17 CMR at 248.
[82] *Id.* at 249, 17 CMR at 249.
[83] 2 USCMA 236, 8 CMR 36 (1953).

another matter to say that not all wrongful takings with the specific intent (to deprive temporarily) constitute a violation of Article 121. If, by enactment of Article 121 without the mention of a requisite "evil intent" or "mens rea" other than "temporarily to deprive," the Congress intended to proscribe a so-called "public welfare offense," then the Court has, by judicial legislation, transformed an offense *mala prohibita* into an offense punishable only when the offender may be considered to be a "bad man."

In *Morissette v. United States*,[84] the Supreme Court was presented with a situation analogous to the issues presented in the *Bridges* and *Roark* cases. Petitioner Morissette was convicted of stealing and knowingly converting property [bomb casings] of the United States in violation of title 18, United States, Code, section 641.[85] At the trial, the accused testified that he believed the casings were castoff and abandoned, that he did not intend to steal the property, and that he took it with no criminal intent. The trial court charged the jury that, if the accused took the casings, without any permission, from property of the United States Government, he is guilty of the offense. On appeal, the Court of Appeals affirmed the conviction and ruled that this particular offense requires no element of criminal intent.[86] The conclusion reached by the Court of Appeals was premised on the failure of the Congress to express a requisite criminal intent within the language of the statute. On writ of certiorari, the Supreme Court traced the development of the "public welfare offenses," and the legislative history of the statute involved, and reversed the decision of the Court of Appeals because they found ". . . no grounds for inferring any affirmative instruction from Congress to eliminate intent from any offense with which this defendant was charged."[87]

It is clear that, at least during the early years of the Uniform Code of Military Justice, and subsequent to the *Morissette* decision, the Court of Military Appeals construed the offense of wrongful

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[84] 342 U. S. 246 (1952).

[85] "§641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use, or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be . . . . " 18 U.S.C. § 641 (1958).

[86] 187 F. 2d 427 (6th Cir. 1951).

[87] 342 U.S. at 273.

appropriation to be an offense *mala prohibita*.[88] It is equally clear that this construction has been repudiated, and, in view of the *Morissette* decision, perhaps rightly so. However, in the absence of a *clear* expression of the intent of the Congress to adopt the common law concept of larceny, there is substantial justification in the military for the former construction. Circumstances inherent within military life require that personal property be respected to a much greater degree than in civilian jurisdictions. Moreover, the practical problems encountered in applying the test of whether certain conduct constitutes wrongful appropriation stagger the imagination. Certainly, no one should argue with the inherent justice in Chief Judge Quinn's example of the book-borrowing friend.[89] Suppose, however, the item borrowed was money or something more valuable than a book, and, in reliance on the apparent loss of the missing property, the victim changes his legal status to his disadvantage; *e.g.*, forced to borrow funds at substantial cost, or he is unable to do something he would otherwise have been able to do, such as taking advantage of a bargain purchase. These circumstances in no way affect the innocent motivation of the borrower, yet, in the communal form of life found in the military, it is hard to imagine that this practice could be condoned. Where, then, lies the *locus poenitentiae* at which an innocent intent becomes criminal, and what factors are determinative?

4. *Housebreaking, Article 130*

Article 130 denounces the offense of unlawful entry into the *building* or *structure* of another with intent to commit a criminal offense therein. The property protected by this statute is limited to real property and such form of personal property as is usually used for storage or habitation,[90] and the Court has held that an automobile is not a building or structure within the meaning of Article 130.[91] During the term here considered, the Court held, in *United States v. Taylor and Barnes*,[92] that an aircraft is not such property as was intended to be cloaked with protection against unlawful entry under Article 134, nor, therefore, is it properly the subject of the offense of housebreaking under Article 130.

[88] See United States v. Krawcyzk, note 70 *supra*, in which the following statement is found: Presumably with regard for certain conditions conducive of thievery which inescapably characterize the communal life of the Armed Services, those draftsmen selected rules which in most instances are stringent . . . . " 4 USCMA at 258, 15 CMR at 258. See also the *Krull* and *McCoy* cases, notes 72 and 80 *supra*.

[89] See United States v. Hayes, 8 USCMA 627, 630, 25 CMR 131, 134 (1958).

[90] United States v. Gillin, 8 USCMA 669, 25 CMR 173 (1958).

[91] *Ibid.*

[92] 12 USCMA 44, 30 CMR 44 (1960). Chief Judge Quinn dissented.

However, in dictum contained in the majority opinion, Judge Latimer suggested that, if a plane was loaded with goods in interstate or foreign commerce, so as to come within the terms of title 18, United States Code, section 117, "that section might properly provide the foundation for charging a crime or offense not capital under the third category in Article 134." Furthermore, the Court pointed out that the result reached did not prevent the government from punishing the accused if property within or part of the aircraft was damaged or taken. In *United States v. Hall*,[93] the Court held that a railroad freight car is a structure within Article 130.

5. *Assault and Battery Upon a Child Under Age of Sixteen Years, Article 134.*

In *United States v. McCormick*,[94] the Court of Military Appeals held that it is error to charge an assault and battery upon a child under the age of sixteen as a violation of the general article. The holding does not preclude charging indecent assault as a violation of the general article, nor does it specifically apply to an assault with intent to commit certain offenses of a civil nature.[95] The rule of pre-emption applies, Judge Ferguson concluded, even when all of the elements of an offense plus an additional factor are alleged and proved, and, writing for the majority, he rejected the contention that pre-emption applies only when the services attempt to strike an element from an offense and punish the remaining misconduct as service discrediting. The decision of the board of review was affirmed on the basis that the error involved in the instructions on the maximum sentence was *de minimis*. Chief Judge Quinn concurred in the result, pointing out only that to establish the offenses charged, circumstances showing discredit to the Armed Forces must be proved and that the difference in pleading and proof is wholly immaterial in this case. Judge Latimer also concurred in the result, but dissented from Judge Ferguson's conclusions as to the issue of pre-emption.[96]

6. *Kidnapping, Article 134*

In *United States v. Picotte*,[97] and companion cases,[98] the Court held that the offense of unlawful detention, proscribed by Article 97, does not pre-empt the offense of kidnaping under Article 134.

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[93] 12 USCMA 374, 30 CMR 374 (1961).

[94] 12 USCMA 26, 30 CMR 26 (1960).

[95] See para. 213*d*(1), MCM, 1951.

[96] As Judge Latimer points out, the *McCormick* case established no law since the concurring opinion was predicated on a basis other than pre-emption.

[97] 12 USCMA 196, 30 CMR 196 (1961).

[98] United States v. Harkcom, 12 USCMA 257, 30 CMR 257 (1961); United States v. Wright, 12 USCMA 202, 30 CMR 202 (1961).

In *Picotte*, the accused was convicted of kidnaping under the terms of the Colorado criminal statute which was assimilated into Federal law under the Assimilative Crimes Act[99] and charged under Article 134, crimes and offenses not capital. The maximum punishment for the offense is that provided by the state law inasmuch as the Assimilative Crimes Act assimilates not only the offense but also the punishment. Chief Judge Quinn's unqualified concurrence in Judge Latimer's opinion further indicates his agreement with Judge Latimer on the issue of pre-emption. However, Judge Ferguson, although concurring in the result, reiterated his views on pre-emption as expressed earlier in the *McCormick* case, *supra*.

7. *Mail Offense, Article 134*

In *United States v. Manausa*,[100] the Court, for the first time, expressly held that mail is protected until delivery to the addressee or his duly authorized representative. It had been clear that mail in the United States Postal Service channels was protected by title 18, United States Code, section 1702. What was not clear was whether similar protection was afforded to mail in military postal channels, either prior to entry into United States Postal Service channels or after removal therefrom. In *Manausa*, the accused had received written authorization to pick up the personal mail of his superior noncommissioned officer. This particular function formed no part of the accused's official duties. On these facts, the Court found that the accused was the duly constituted agent of the addressee of the letters, and held that the letters were therefore no longer mail matter within the protection of the mail statutes and regulations since the letters were delivered within the meaning of the statute.[101] Four months later, a variant of the factual situation in *Manausa* was presented in a case certified to the Court by The Judge Advocate General of the Air Force. In *United States v. Rayfield*,[102] the accused had the official duty, as first sergeant, to open, evaluate, and distribute as appropriate, all incoming mail addressed to his commanding officer. In this capacity, the accused secreted certain letters pertaining to his personal indebtedness. The Court, distinguishing *Manausa*, pointed out that accused was not acting as a *personal* agent for the *convenience* of his commanding officer, instead, he had the *official military duty* to transmit further the correspondence to the proper office, and, so, he was a part of the military postal system. Accordingly, the conviction and the decision of the board of review

[99] 18 U.S.C. § 13 (1958).
[100] 12 USCMA 37, 30 CMR 37 (1960).
[101] *Id.* at 41–42, 30 CMR at 41–42. Chief Judge Quinn dissented.
[102] 12 USCMA 307, 30 CMR 307 (1961).

were affirmed. The dissenting opinions of Chief Judge Quinn in *Manausa* and of Judge Ferguson in *Rayfield* present a decided risk in evolving a general rule from these cases.

8. *Mailing Obsence Matter, Article 134*

The Federal Mail Obscenity Statute [103] provides that every "obscene, lewd, lascivious . . . matter, thing, device, or substance" is nonmailable matter. Sergeant Bobby G. Holt, a married, thirty-one year soldier, deposited several letters in the mail to his thirteen year old girl friend, which letters contained expressions of ardor substantially unlike those normally used. Sergeant Holt pleaded guilty to the offense of mailing obscene letters in violation of Article 134, and the board of review, adopting the "prurient interests" test of obscenity, held the plea of guilty to be improvident in view of Holt's testimony, after findings, that he intended the letters as love letters.[104] On certification from The Judge Advocate General of the Army, the Court reversed the decision of the board of review and affirmed the conviction.[105] "Purity of motive," the majority opinion stated, "is no defense to impurity of writing; consequently, unless the language of the letters is not obscene as a matter of law, nothing in the accused's testimony . . . is inconsistent with . . . his plea of guilty." [106] The Court concluded that by any standards the letters were obscene. Incidental to the principal holding were the holdings of the Court that the word "matter" in the statute embraces letters, and that the fact that the letters concerned were personal love letters or that they were "private communications between two people who [have] a close and personal relationship" does not take the letter out of the operation of the statute.

9. *Worthless Checks, Article 134*

Paragraph 138*a* of the Manual for Courts-Martial provides in part as follows:

> Some examples of those presumptions which are nothing more than justifiable inferences are:
>
> > When it is shown that as a result of his own act a person did not have sufficient funds in the bank available to meet payment upon presentment in due course of a check drawn against the bank by him, it may be presumed that at the time he uttered the check, and thereafter, he did not intend to have sufficient funds in the bank available to meet payment of the check upon its presentment in due course.

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[103] 18 U.S.C. § 1461 (1958).
[104] CM 405340, Holt (March 29, 1961).
[105] United States v. Holt, 12 USCMA 471, 31 CMR 57 (1961).
[106] *Id.* at 472–73, 31 CMR at 58–59.

Nevertheless, in *United States v. Groom*,[107] the Court held that evidence that the accused overdrew his account on three occasions and subsequently redeemed each check, without more, was insufficient in law to permit an inference that the accused dishonorably failed to maintain sufficient funds on deposit to cover the returned checks. Evidence that the accused redeemed the bad checks or evidence of other extenuating factors, should be admissible in rebuttal of the inference permitted by paragraph 138*a* of the Manual. Such evidence should not, however, prevent the inference from coming into existence, nor should it destroy the inference after it has come into existence.[108] The problem of proving bad check offenses in the military, which was further complicated by cases such as *Groom*, may have been lessened when the President aproved H.R. 7657.[109] This act, which became effective on 1 March 1962, provides a specific statutory inference of the requisite intent to defraud or deceive and knowledge of the insufficiency of the funds available for payment of the check. It appears clear from statements made in the course of the congressional hearings on the bill that it was the intention of the framers of the statute that if an accused fails to redeem a worthless check within the five day statutory period, such failure constitutes prima facie evidence of intent to deceive or defraud and of the requisite knowledge and this evidence continues to exist regardless of any evidence admitted in rebuttal.[110]

B. *DEFENSES*

In *Troxell*, [111] a Navy board of review held that an accused could not waive his rights under the statute of limitations, and the board set aside the findings and sentence. Upon certification of the case to the Court by The Judge Advocate General of the Navy, the accused, for some unexplained reason, joined government counsel in contending that the statute of limitations may be waived, and prayed for reversal of the board's decision. The Court obliged the accused by holding that an accused must interpose the statute in order to gain the benefit that it confers, that the law officer must advise an apparently uninformed accused of the terms of Article

[107] 12 USCMA 11, 30 CMR 11 (1960); see also United States v. Brand, 10 USCMA 437, 28 CMR 3 (1959), and cases cited therein; United States v. Milam, 12 USCMA 413, 30 CMR 413 (1961); United States v. Bullock, 12 USCMA 142, 30 CMR 142 (1961).

[108] See Comment, Uniform Rule of Evidence 14.

[109] Pub. L. No. 87–685, 87th Cong., 1st Sess. (Oct. 4, 1961), now codified as Article 123(a), Uniform Code of Military Justice, 10 U.S.C. § 923(a) (Supp. 1961).

[110] *Hearings Before Subcommittee No. 1 of the House Committee on Armed Services*, 87th Cong., 1st Sess. 1987 (1961).

[111] NCM 60–00106, Troxell, 30 CMR 586 (1960).

43, and that an accused who, with full knowledge of his privilege under Article 43, "fails to plead the statute in bar of prosecution or imposition of sentence, thereby waives his rights thereunder." [112] A negotiated plea of guilty was involved in *Troxell.* Presumably, if the accused had pleaded not guilty, he could have asserted the statute as an affirmative defense and would not have been required to plead the statute "in bar of prosecution or imposition of sentence." In *United States v. Aau,*[113] the Court held that the trial of the accused after he had participated in the ancient Samoan custom of "Ifoga," by which he is forgiven in the family of the victim, did not twice place the accused in jeopardy where (1) the offenses were committed in Hawaii, and (2) there was no evidence the offense could be prosecuted in a Samoan court or that "Ifoga" was a recognized defense in Samoa to the offenses charged. In *United States v. Pruitt,*[114] the defense of entrapment was asserted at the trial level to a charge alleging the making of a false official statement. The Court held that the defense of entrapment was not presented because, "the evidence compellingly shows that the accused was not enticed, induced, or compelled to lie and to falsify . . . ." [115] In a "bad check" case in which the accused testified he had been drinking heavily and could not remember writing the checks, the Court, in *United States v. Milam,*[116] held that a genuine inability or failure to recall the making and uttering of a check would, in an appropriate case, negate the existence of bad faith. The Court found, however, that this was not an "appropriate case" since the claim of amnesia related only to the issuance of the checks and offered no insight into the accused's state of mind or intent upon discovery that the checks had been written but prior to presentation and dishonor. This, the Court held, is a neutral circumstance. In a special court-martial in which the issue of self-defense was raised, and the president instructed the court that a person may lawfully meet force with a like degree of force, the Court held that the instruction did not prejudice the accused because there was no fair risk that the court-martial understood the principle to mean that the defender was limited to the identical amount of force threatened by the attacker.[117] In *United States v. Chaney,*[118] the Court held that evidence that the accused was intoxicated at a certain period

[112] United States v. Troxell, 12 USCMA 6, 30 CMR 6 (1960).
[113] 12 USCMA 332, 30 CMR 332 (1961).
[114] 12 USCMA 322, 30 CMR 322 (1961).
[115] *Id.* at 327, 30 CMR at 327.
[116] United States v. Milam, note 107 *supra.*
[117] United States v. Straub, 12 USCMA 156, 30 CMR 156 (1961). Judge Ferguson dissented.
[118] 12 USCMA 378, 30 CMR 378 (1961). Judge Ferguson dissented on this issue in the case.

of time and that he later testified concerning this period was not a defense to a charge of prejury based on the testimony but did raise the defense of mistake. The defense of mistake was also raised in *United States v. Pitts*,[119] wherein the Court held that no issue of mistake was raised where the accused took rations from his own organization intending to give them to others in another unit in reliance on a "custom" of the Navy [sometimes referred to as "moonlight requisitioning"] which would sanction such a practice. A mistake must be honest to be a defense to larceny, and the Court noted that there was no contention by the accused that what he did was legal or defensible. In a prosecution for the wrongful and dishonorable failure to maintain sufficient funds to cover checks, it was held that instructions by the law officer that "a mistake as to the existence of adequate funds must be both honest and reasonable," and, later, "that . . . [if] the court was not satisfied beyond a reasonable doubt that his mistaken belief was the result of gross indifference on his part, you must acquit the accused," were not misleading when considered as a whole.[120]

IV. EVIDENCE

A. *SEARCH AND SEIZURE*

United States v. Harman[121] presented a complicated factual situation. Without warning the accused of his rights under Article 31, Uniform Code of Military Justice, Sergeant H directed the accused to point out his bunk and get his equipment. The accused complied with the order. The stolen property was discovered, and the accused was given an Article 31 warning. Later that afternoon, the accused executed a written confession. The defense counsel contended that the confession was involuntary and inadmissible since it was a direct result of a prior illegal search and seizure and an illegal interrogation. The board of review held that the law officer erred in admitting the accused's pretrial confession, set aside the findings and sentence, and ordered the charges dismissed.[122] In reversing the board, the Court held that the search and seizure were not illegal due to the failure to give an Article 31 warning.

In *United States v. Sellers*,[123] the accused had on several occasions failed to comply with directives to produce certain government fund records. The accused's commanding officer and an investigator were aware of the location of the records and went

[119] 12 USCMA 106, 30 CMR 106 (1961). Again Judge Ferguson dissented.
[120] United States v. Bullock, 12 USCMA 142, 30 CMR 142 (1961). Judge Furguson dissented.
[121] 12 USCMA 180, 30 CMR 180 (1961). Judge Ferguson dissented.
[122] CM 404301, Harman (March 2, 1961).
[123] 12 USCMA 262, 30 CMR 262 (1961).

to the accused's quarters to obtain them. The accused's wife unlocked the accused's automobile in which the records were located, and the records were removed therefrom. The Court held that the evidence did not demonstrate that there was any search involved in the case inasmuch as the precise location of the missing records was known. The seizure was legal since the United States was indisputably entitled to the property attached, and the manner of seizure was reasonable.

Relying on *United States v. Williams*,[124] *United States v. Bunting*,[125] and Army Regulations 600–20,[126] the Court held in *United States v. Murray*,[127] that under the factual situation presented, a Chief Warrant Officer was the commanding officer of the accused and lawfully could search the accused's quarters. The commanding officer was temporarily absent from duty and, with the knowledge of the commanding officer, Lieutenant S (next in command) advised CWO M that he (the Lieutenant) would be gone for the day and that the CWO was in charge. Evidence that the accused was involved in a mail offense came to the attention of CWO M and he searched the accused's quarters. Upon returning, the Lieutenant directed another search of the accused's quarters. Evidence tending to incriminate the accused was discovered during both searches. Upon being confronted with the incriminating evidence and after being warned pursuant to Article 31, the accused confessed. The Court held that the Chief Warrant Officer was acting as unit commander and had authority to examine the accused's belongings. The Court had no doubt that the CWO had probable cause to suspect that the accused had committed a mail offense.

The Court held in *United States v. Whitacre* [128] that it was not necessary to give an Article 31 warning in order to obtain consent to search. It was further held that it was unnecessary to advise an accused of his right not to consent to a search without a warrant or its military equivalent before a search so predicated may be found to be lawful. The Court went on to find that the accused had consented to the search; and the seizure resulting therefrom was lawful.

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[124] 6 USCMA 243, 19 CMR 369 (1955).

[125] 4 USCMA 84, 15 CMR 84 (1954).

[126] Para. 9a of Army Regs. No. 600–20, Personnel—General, Command, dated 15 February 1957, as changed, provides: "In the event of the death, disability, or temporary absence of the commander of any element of the Army, the next senior regularly assigned officer present for duty . . . will assume command until relieved by proper authority."

[127] 12 USCMA 434, 31 CMR 20 (1961).

[128] 12 USCMA 345, 30 CMR 345 (1961).

B. *SPONTANEOUS EXCLAMATIONS*

In *United States v. Knight*,[129] the Court had occasion to determine the admissibility of a witness' testimony concerning the utterance of an eight year old girl. A limited recitation of the facts is necessary in order to better understand the Court's decision. A little girl came running out of the men's restroom with flushed cheeks, excited and crying. There was testimony that a few minutes earlier, she had appeared happy and friendly and laughing. The witness asked the child what was wrong, and the girl related the events of an indecent assault. The Court held that the evidence was sufficient to establish that a "mental disturbance" had occurred and that the child volunteered her utterance under conditions which guaranteed that it was related to an unusual event, was spontaneous, without reflection, and not the product of imagination. There was the required independent evidence of the exciting or unusual event; therefore, the utterance was not used merely as a predicate for its own admission.

C. *PAST RECOLLECTION RECORDED*

In *United States v. Webb*,[130] the Court held for naught some of the most cunning and expert detective work ever performed by an amateur. The victim, Specialist B, who had recently received his pay, noticed that three of his newly acquired $20 bills were missing. The victim informed Lieutenant C [the victim's company commander] of his misfortune. Lieutenant C recalled that he had paid his men in alphabetical order and had used new $20 bills, the serial numbers of which were in numerical sequence. Lieutenant C telephoned the two men paid immediately prior to the victim and the two men paid immediately after the victim. The Lieutenant directed each of the four men called to read off the serial numbers of their $20 bills. The Lieutenant recorded the numbers and verified them by having the men repeat the numbers, and by reading back the numbers he had recorded. After the list was completed and checked, the Lieutenant had recorded a group of serial numbers with three figures missing in the middle, obviously the victim's currency. Then memory failed, for at the trial neither Lieutenant C nor any of the four men telephoned by him could recall the numbers. Lieutenant C testified that he recorded correctly the information given him, and each of the men whom he telephoned testified that he had read correctly the serial numbers from his bills to Lieutenant C. The Court held the evidence was not admissible as a memorandum of past rec-

[129] 12 USCMA 229, 30 CMR 229 (1961). Judge Ferguson dissented.
[130] 12 USCMA 276, 30 CMR 276 (1961). Chief Judge Quinn dissented.

collection recorded. The requisite predicate for admission of such evidence includes knowledge by the witness that the facts were correctly set forth at the time of recording, even though they be presently forgotten. The Court noted that the adventure was a joint enterprise, but concluded that the resulting memorandum was nevertheless inadmissible since it had not been prepared in the regular course of business, and no factual pattern of that nature was involved.

D. *OPINION TESTIMONY*

In *United States v. Lindsay*,[131] the law officer asked a witness whether a German police station sign labeled "Landpolizei" could be mistaken for a gasthaus sign by a person who could not read German and whether the shape of the sign was similar to a gasthaus sign. Chief Judge Quinn and Judge Ferguson considered the questions by the law officer improper requests for opinion testimony. However, they found no prejudicial error since the purpose of the question and the state of the evidence did not show that the law officer was biased against the accused or predisposed toward the prosecution. Judge Latimer concurred in the result, but he would widen further the permissible scope of the law officer's inquiry.

It was held prejudicial error in *United States v. Jefferies*[132] for the president of a special court-martial to permit the trial counsel to adduce testimony from an air police investigator that the accused intended to steal certain property. The Court held that the prejudice went to the sentence only, since the accused judicially confessed to the lesser offense of wrongful appropriation.

E. *TESTIMONY OF OTHER ACTS OF MISCONDUCT*

In *United States v. Bryant*,[133] the Court considered the admissibility of testimony concerning certain acts of misconduct of which the accused was not charged. Citing *United States v. Landrum*,[134] the Court held that the evidence of the other transactions [135] reasonably tended to show a plan or design on the part of the accused to purchase exchange items for unlawful resale. The Court noted that the time interval between the

[131] 12 USCMA 235, 30 CMR 235 (1961).
[132] 12 USCMA 259, 30 CMR 259 (1961).
[133] 12 USCMA 111, 30 CMR 111 (1961).
[134] 4 USCMA, 707, 16 CMR 281 (1954).
[135] The questioned evidence indicated that in April and May the accused had made a series of sales, in Spanish bars and in his apartment in Spain, of items not available from Spanish sources and reasonably available from Armed Forces retail stores in Spain.

earlier sales and those charged was reasonably close, and that the number of sales was sufficient to show purchases of a substantial quantity of exchange items.

The Court found error, although non-prejudicial, in *United States v. Woddley*,[136] where the law officer admitted into evidence a prosecution exhibit which contained incompletent remarks concerning the accused's poor conduct and efficiency.

In *United States v. Sellers*,[137] wherein the accused was charged with wrongful appropriation, *inter alia*, all three judges agreed that testimony concerning the accused's frequent gambling, overdrawn checking account, and indicating that he had written bad checks in the amount of $149, was admissible to establish motive of the accused.

A pretrial statement, in *United States v. Payne*,[138] a common trial, contained remarks by one of the accused which were unfavorable to his fellow miscreants. The statement was admitted into evidence, and the portion pertaining to the other accused was not masked. The law officer instructed the court-martial members not to consider the statement as evidence against the other accused. The Court held that the record of trial convincingly indicated that the court members understood the limitation upon them, that they conscientiously followed the instruction, and that there was no reversible error.

F. *ARTICLE 31, CONFESSIONS AND SELF-INCRIMINATION*

The admissibility of the result of a blood alcohol test of the accused was questioned in *United States v. Hill*.[139] It was held that an order to provide a sample of blood for clinical purposes is valid. Further, the Court held that the accused's consent to the procurement of the evidence so obtained made the evidence admissible against him. It noted that the evidence was sufficient to support a finding that the accused was advised of and understood his rights under Article 31, and that the accused consented to the taking of the sample in the belief that he might obtain a favorable result.

In *United States v. Aau*,[140] the accused had been injured; and, while he was still in serious condition, a civilian policeman interrogated him without giving an Article 31 warning. The resulting statements were admitted into evidence. The next day civilian

[136] 12 USCMA 123, 30 CMR 123 (1961). Judge Ferguson dissented.
[137] 12 USCMA 262, 30 CMR 262 (1961).
[138] 12 USCMA 455, 31 CMR 41 (1961).
[139] 12 USCMA 9, 30 CMR 9 (1960).
[140] 12 USCMA 332, 30 CMR 332 (1961).

policemen and an armed forces policeman interrogated the accused without giving an Article 31 warning; however, no statements resulting from this interrogation were offered into evidence. A few days later the accused made a full oral confession to civilian and armed services police investigators after being warned under Article 31. This confession was admitted into evidence. The defense showed that an agreement existed between the civilian police and the armed services police that servicemen suspected or accused of a serious offense would be turned over to the military, and that the civilian policeman who first interrogated the accused was aware of the agreement and was "pretty well aware" that the accused was a sailor. Whether the relationship between the civilian police and the armed forces police constituted the civilian police instruments of the military was a question of fact, and the Court held that there was sufficient evidence to support a finding that the civilian police were not instruments of the military.

In *United States v. Acfalle*,[141] the Court again was faced with the issue of whether a confession was properly received in evidence. The accused, a native of Guam, was apprehended by Air Police as he left the airplane upon his arrival in Guam. He was allowed to see his wife, provided they spoke only English in the presence of an Air Police agent. The accused was confined and removed from Guam to Japan for the admitted purpose of isolating him and to have available facilities for a polygraph examination. Accused denied that he was warned of his rights under Article 31 or advised of the nature of the investigation. He also contended that he was ill during the interrogation. The Court concluded that there was evidence in the record of trial from which the law officer and members of the court-martial could infer that the confession did not result from his removal from Guam to Japan, airsickness, illness of relatives, lack of full communication with his family, and the other circumstances depicted, but because of an overwhelming consciousness of guilt. The Court went on to reverse for an instructional deficiency by the law officer in not tailoring his instructions to the peculiar situation presented by this record and for apparently failing to recognize possible considerations of constitutional due process involved in the court-martial's ultimate decision on the statements.

It is well settled in military law that to sustain findings of guilty in a case where a confession by the accused has been admitted into evidence, such confession must be corroborated by substantial, independent evidence tending to establish the existence of

[141] 12 USCMA 465, 31 CMR 51 (1961).

each element of the offense charged.[142] Such corroborating evidence may be direct or circumstantial.[143] In *United States v. Young*,[144] the Court noted that in larceny cases the testimony needed to corroborate a confession is a showing that property of a given value is missing, under circumstances indicating that it probably was stolen.[145] The Court held that there was sufficient proof of record to corroborate the voluntary confession of guilt, since the cash register was shown to be short, and the use of fraudulent vouchers to conceal that deficiency was a circumstance indicative of the probability of theft.

In a landmark case, *United States v. Brooks*,[146] an Army Criminal Investigation Detachment Agent testified at the trial that he advised the accused of his rights under Article 31 and informed him of the nature of the offense of which he was suspected. He also testified that the accused became visibly upset and "at that time he told me he did not wish to talk about it any more." Another CID agent, after giving the Article 31 warning, testified that he also questioned the accused. In response to this questioning, the accused replied that "he didn't wish to make a statement." At this point, defense counsel objected; and the testimony was ordered stricken from the record and the court was instructed to disregard the testimony. Similar instructions were given by the law officer when the second agent testified that the accused refused to make a statement and that the accused had been requested to take a polygraph examination. The accused took the stand to testify on the merits and was cross-examined regarding his exercise of rights afforded by Article 31. The Court reversed, holding that the accused's pretrial reliance on Article 31 may not be "paraded" before a court-martial in order that guilt may be inferred from his refusal to comment on charges against him.[147] It was also held that it was error to cross-examine the accused, upon his taking the stand to testify on the merits, regarding his previous exercise of Article 31 rights. The Court relied heavily on *Stewart v. United*

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[142] United States v. McFerrin, 11 USCMA 31, 28 CMR 255 (1959); United States v. Mims, 8 USCMA 316, 24 CMR 126 (1957); United States v. Villasenor, 6 USCMA 3, 19 CMR 129 (1955); United States v. Landrum, 4 USCMA 707, 16 CMR 281 (1954); United States v. Isenberg, 2 USCMA 349, 8 CMR 149 (1953).

[143] United States v. Petty, 3 USCMA 87, 11 CMR 87 (1953).

[144] 12 USCMA 211, 30 CMR 211 (1961).

[145] See United States v. Evans, 1 USCMA 207, 2 CMR 113 (1952).

[146] 12 USCMA 423, 31 CMR 9 (1961).

[147] See United States v. Bayes, 11 USCMA 767, 29 CMR 583 (1960); United States v. Kowert, 7 USCMA 678, 23 CMR 142 (1957); United States v. Armstrong, 4 USCMA 248, 15 CMR 248 (1954). Compare United States v. Bolden, 11 USCMA 182, 28 CMR 406 (1960).

States,[148] a recent Supreme Court decision involving a similar factual situation.

In *United States v. King*,[149] the Court held that there was a fair risk that the accused had been prejudiced by a comment of a disgruntled court-martial member (who wanted to ask improper questions) to the effect that a court-martial had always been given the right to ask questions and, if the accused wanted to remain silent, it meant something to him [the member]. The president of the special court-martial did not correct the erroneous statement of law or instruct the member that he could not draw unfavorable inferences from the accused's silence.

G. *TESTIMONY BY THE ACCUSED*

In *United States v. Wannenwetsch*,[150] the defense announced the intention of the accused to testify. The law officer warned counsel for the accused that the accused would be subject to cross-examination if he testified. Accused took the stand and testified that he was the author of a letter that contained bizarre statements, which he hoped would bolster his defense of mental irresponsibility. Over defense objection, the trial counsel cross-examined the accused on the merits. The Court held that the accused had placed his mental responsibility in issue, and the trial counsel was within his rights to develop testimony which rebutted, was inconsistent with, or raised doubts about the testimony offered by the accused. Once the accused sought to bolster his defense from the witness stand, he became a witness for the purpose of establishing a lack of criminal intent. The Court noted that the accused was not seeking to keep adverse evidence out of the record but was seeking to bring before the court-martial testimony which would and did rebut the prosecution's evidence on intent.

In *United States v. Stivers*,[151] it was held that the testimony of an accused in extenuation and mitigation could not be used at a rehearing to establish guilt on the merits.[152] The Court stated that testimony by an accused in extenuation and mitigation is designed only to ameliorate punishment.

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[148] 366 U.S. 1 (1961).

[149] 12 USCMA 71, 30 CMR 71 (1960).

[150] 12 USCMA 64, 30 CMR 64 (1960).

[151] 12 USCMA 315, 30 CMR 315 (1961).

[152] Para. 75*c*(2) of the Manual provides in part, "Statement of accused.—Whether or not he testified on the issue of guilt or innocence or as to matters in extenuation or mitigation, the accused may make an unsworn statement to the court in mitigation or extenuation of the offenses of which he stands convicted. . . . This unsworn statement is not evidence, and the accused cannot be cross-examined upon it, but the prosecution may rebut statements of fact therein by evidence." See United States v. Tobita, 3 USCMA 267, 12 CMR 23 (1953); United States v. Daniels, 11 USCMA 52, 28 CMR 276 (1959); CM 389689, Riggs, 22 CMR 598 (1956).

V. SENTENCE AND PUNISHMENT

A. *INSTRUCTIONS ON MAXIMUM PUNISHMENT*

1. *Generally*

An instruction to the effect that normally the maximum punishment will be reserved for a case in which there is evidence of a previous conviction involving an offense at least as serious as the one for which the accused is on trial is "unwise and impractical." However, unless there exists some basis from which it can fairly be said the instruction harmed the accused by adversely influencing the deliberations of the court members there is no risk of prejudice. In *United States v. Slack,*[153] such an instruction was given, and, after three minutes deliberation on the sentence, the court did impose the maximum punishment. The Court found "substantial justification in the surrounding circumstances for the sentence imposed" and held that the nature of the entire instruction on the maximum punishment was such that the court-martial *understood* it was not bound by conscience, law, or practice to adjudge the maximum sentence because of accused's previous convictions. Instructions based on paragraph 76 of the Manual are apparently viewed with suspicion by the Court, and they should not be used without some refinement.[154]

In *United States v. Middleton,*[155] the law officer instructed the court that the maximum sentence included confinement at hard labor for five years. In fact, the Court determined, the maximum punishment included confinement for only one year. The court-martial adjudged a sentence of dismissal and total forfeitures but no confinement. The Court rejected government counsel's contention that since no confinement was adjudged it would be purely speculative to suppose the court was adversely influenced by the instructional error and the Court properly distinguished the case of *United States v. Thorpe,*[156] cited by government counsel. Accordingly, the Court set aside the sentence and ordered a rehearing thereon. It is interesting to compare the *Middleton* factual situation with that in other cases involving overstatement of the maximum sentence by the law officer. Where the law officer instructed that the maximum period of confinement imposable was one year, and on appeal it was determined that the maximum was only four months, the Court held that because of the *great dis-*

[153] 12 USCMA 244, 30 CMR 244 (1961).

[154] See United States v. Mamaluy, 10 USCMA 102, 104, 27 CMR 176, 178 (1959); United States v. Slack, *supra* note 153.

[155] 12 USCMA 54, 30 CMR 54 (1960).

[156] 9 USCMA 705, 26 CMR 485 (1958). The *Thorpe* case involved a misstatement of the maximum period of confinement in the staff judge advocate's review.

parity between the instruction and the actual maximum, redetermination of the sentence by court-martial was justified.[157] As in *Middleton,* the sentence adjudged by the court-martial did not include confinement. On the other hand, where the maximum sentence was found to include confinement for fifteen years, the law officer overstated the maximum by ten years, the court-martial adjudged confinement for two years, and the convening authority reduced this to nine months, the Court held that the error was too slight to justify remand.[158]

2. *Binding on Court*

In *United States v. Crawford,*[159] a special court-martial adjudged a sentence well within the jurisdictional limits of a special court-martial and the maximum punishment for that offense. On review before a Navy board of review, appellate defense counsel contended that the reduction portion of the sentence to a bad conduct discharge and reduction to the grade of private could not stand in view of the failure of the president of the court to mention reduction in grade as part of the maximum sentence. The board of review affirmed the sentence and The Judge Advocate General of the Navy certified the case to the Court on the issue of: "Whether the reduction in grade portion of the sentence is legal." Chief Judge Quinn, writing for the majority, stated ". . . in the absence of correction even erroneous instructions mark out the legal framework within which the court may properly exercise its powers." [160] Cases cited to support the proposition set forth involved instructions to the court on the elements of the offense, and, as Judge Latimer pointed out in his dissent, the result reached in *Crawford* must be predicated on the conclusion that the rules which govern instructions prior to findings are equally applicable to instructions on the maximum sentence.

3. *On Rehearing*

The Court had two occasions during the October 1960 Term to consider the effect of instructions on the maximum punishment to a special court-martial, on rehearing, which informed the court of the reason for the limited punishment that could be adjudged, *i.e.,* that the convening authority had approved a particular sentence on the original trial.[161] In both instances this advice, in one

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[157] United States v. Melville, 8 USCMA 597, 25 CMR 101 (1958).

[158] United States v. Reams, 9 USCMA 696, 26 CMR 476 (1958).

[159] 12 USCMA 203, 30 CMR 203 (1961); see also United States v. Powell, 12 USCMA 288, 30 CMR 288 (1961).

[160] *Id.* at 204, 30 CMR at 204.

[161] United States v. McCoy, 12 USCMA 68, 30 CMR 68 (1960); United States v. Witherspoon, 12 USCMA 177, 30 CMR 177 (1961).

case by the president and in the other by the trial counsel, was condemned and the cases were returned for further action. To summarize, on rehearing, the court-martial should not be informed of the maximum punishment authorized under the Table of Maximum Punishments,[162] the jurisdictional limits of a special court-martial for punishment purposes,[163] or of the reason why the court may not exceed the sentence which is stated to be the maximum punishment in that case.[164] The maximum sentence which may be adjudged on rehearing is, of course, ". . . the lowest quantum of punishment approved by a convening authority, board of review, or other authorized officer . . . unless the reduction is expressly and solely predicated on an erroneous conclusion of law." [165]

B. *IMPOSITION OF AN ADMINISTRATIVE DISCHARGE BY COURT-MARTIAL*

In *United States v. Phipps*,[166] after findings, the president of the special court-martial inquired of counsel whether or not the court was limited to a bad conduct discharge in sentencing the accused and if it could impose a general discharge. Trial counsel advised the court that it could adjudge a discharge of a punitive nature only. On petition of the accused after affirmance by intermediate appellate authorities, the Court held that the advice of the trial counsel was correct. It is significant, Judge Ferguson pointed out in his majority opinion, in which Chief Judge Quinn concurred in a separate opinion, that Congress provided for review only in the case of bad conduct and dishonorable discharges, and that other appellate rights were accorded the accused without reference to any other type of discharge. On the same day the *Phipps* case was decided, the Court also handed down its decision in *United States v. Bedgood*.[167] There, the accused was sentenced, *inter alia*, to be "dismissed from the service . . . with a general discharge," and the convening authority "modified" this portion of the sentence to read, "to be dishonorably discharged from the service . . . ." The board of review held the substitution by the convening authority to be illegal and approved only reduction and total forfeitures.[168] The Judge Advocate General of the Army certified the case to the Court which held that, in view of the

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[162] United States v. Jones, 10 USCMA 532, 28 CMR 98 (1959).
[163] United States v. Ledlow, 11 USCMA 659, 29 CMR 475 (1960).
[164] United States v. Witherspoon, note 161 *supra*.
[165] United States v. Jones, 10 USCMA 532, 28 CMR 98 (1959); United States v. Dean, 7 USCMA 721, 23 CMR 185 (1957).
[166] 12 USCMA 14, 30 CMR 14 (1960).
[167] 12 USCMA 16, 30 CMR 16 (1960).
[168] CM 403477, Bedgood (April 4, 1960), *reconsideration denied* (May 17, 1960).

action taken by the board of review, the issue was moot. Subsequent cases have held (1) that since a court-martial cannot adjudge an administrative discharge, neither can a convening authority convert a punitive discharge to one intended only for administrative issuance,[169] (2) that a law officer is correct in refusing to instruct a court-martial that it might adjudge an undesirable or a general discharge,[170] and (3) that a law officer was correct in refusing to permit a sentence work sheet furnished the members to be revised to indicate that permissible punishments included an undesirable or general discharge.[171]

C. *AUTOMATIC REDUCTIONS: ARTICLE 58(a) AND THE SHUMATE CASE*

The last annual "Supplement to the Survey of Military Justice" contains a detailed discussion of the circumstances leading to the enactment of Article 58(a), Uniform Code of Military Justice.[172] During the October 1960 Term, the Court had occasion to analyze Article 58(a) in only one case. It is believed that, although this case did not present the exact issue of whether a reduction under Article 58(a) was invalid as in *United States v. Simpson*,[173] the language of the Court conclusively indicates that when the Court is presented with the issue, such a reduction will not be set aside. In *United States v. Powell*,[174] the accused was sentenced to a bad conduct discharge, forfeiture of $40.00 per month for six months, confinement at hard labor for six months, and reduction to the grade of Airman Basic. Intermediate appellate authorities affirmed the sentence, and the Court granted accused's petition on the issue of whether the reduction portion of his sentence was legal in view of the failure of the president of the court to include it as a possible penalty in his instructions on the maximum sentence. Government counsel argued, and Judge Latimer agreed in his dissenting opinion, that the issue was mooted by enactment of Article 58(a). Secondly, government counsel argued that Article 58(a) had the effect of incorporating a reduction in the sentence by operation of law. The Court rejected these arguments on the basis that it must distinguish between "administrative" and "judicial" action. It could not consider the administrative consequences of Article 58(a), and must limit its determination to the legality of the sentence adjudged by the court-martial viewed at

[169] United States v. Plummer, 12 USCMA 18, 30 CMR 18 (1960).
[170] United States v. Goodman, 12 USCMA 25, 30 CMR 25 (1960).
[171] United States v. O'Neal, 12 USCMA 63, 30 CMR 63 (1960).
[172] See Davis and Stillman, *supra* note 3, at pp. 263–67.
[173] 10 USCMA 229, 27 CMR 303 (1959).
[174] 12 USCMA 288, 30 CMR 288 (1961).

the time it was adjudged. Relying on its earlier decision in *Crawford*,[175] the Court held the reduction portion of the sentence to be illegal and set it aside. In the opinion, the following significant language is found:

> Nothing . . . indicates it [Art. 58(a)] was intended to impose a judicial reduction . . . . Hence, it hardly can be logically argued that the statute has the effect of inserting reduction into the sentence as an additional punishment.
>
> Rather, it [Art. 58(a)] was intended to make the reduction an administrative consequence of the enumerated sentences.[176]

In the last annual "Supplement," the authors summarized four opinions prepared by the Office of the Judge Advocate General of the Army. The third such cited opinion [177] concluded that where a court-martial sentence provides for an *intermediate reduction* and confinement or hard labor without confinement, the court-martial sentence is legal and consistent, notwithstanding the *Flood* and *Rivera* decisions,[178] and the convening authority may legally approve such a sentence. The opinion concluded, in such cases, pursuant to Article 58(a), the accused, nevertheless, is reduced administratively to the lowest enlisted grade effective on the date of the convening authority's action. The authors correctly pointed out that the board of review decision in *Goodman*[179] cast considerable doubt on the correctness of the opinion of The Judge Advocate General. Subsequently, an Army board of review in *Shumate*[180] specifically held that, notwithstanding the fact that Article 58(a) is administrativee in nature, enactment of this statute breathed new life into the *Flood* and *Rivera* holdings which had been, in effect, suspended during the hiatus between the *Simpson* case and the enactment of Article 58(a). Neither *Goodman* nor *Shumate* was certified to the Court, and the authors have no knowledge of any case pending before the Court which will present this issue.

D. *MULTIPLE SENTENCES*

Article 57(b), Uniform Code of Military Justice, provides that

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[175] 12 USCMA 203, 30 CMR 203 (1961). See note 159 *supra*.

[176] 12 USCMA at 289, 30 CMR at 289.

[177] JAGJ 1960/8544 (Sept. 6, 1960).

[178] United States v. Flood, 2 USCMA 114, 6 CMR 114 (1952); CM 357430, Rivera, 7 CMR 323 (1953).

[179] CM 404965, Goodman (Dec. 14, 1960). The board stated, "We are concerned with the instructions of the law officer . . . (he did not instruct the court that a sentence to confinement results in automatic reduction to the lowest enlisted grade) and . . . Thus, the court-martial was given the impression that it was permissible to adjudge confinement and reduction to a lower intermediate grade." The board did not expressly hold the instruction to be erroneous, but stated that any injustice to the accused could be corrected by reassessment of the sentence.

[180] CM 405188, Shumate, 30 CMR 556 (1961).

a period of confinement contained in a court-martial sentence begins to run from the date adjudged but periods during which the confinement is suspended are excluded in computing the service of the term. Air Force Manual 125–2, September 1, 1956, provides that where a person already serving a court-martial sentence to confinement is convicted for a second offense and sentenced to a term of confinement, the subsequent sentence begins to run as of the date adjudged and interrupts the running of the prior sentence. In *United States v. Bryant*,[181] appellate defense counsel argued that Articles 14(b) and 57(b) are exclusive, and in the absence of other exceptions to the rule that sentences to confinement run from the date adjudged, a second sentence to confinement runs concurrently from the date adjudged with any existing confinement the accused might then be serving. Accordingly, the defense argument continued, the provisions of Air Force Manual 125–2 were in conflict with the Code. The Court (Judge Latimer writing the majority opinion) rejected defense's argument and held that multiple sentences to confinement are to be served consecutively and that the Air Force Manual provisions were not inconsistent with the Code. Basic in the Court's reasoning was the historical precedent in the military for consecutive rather than concurrent sentences,[182] and a decision of a United States Court of Appeals.[183] The Court also noted the anomalous situation which would result if a second sentence, imposed by a civilian court, runs consecutively under Article 14(b), and a second sentence, imposed by a court-martial, runs concurrently. It is noted that Judge Ferguson entered a forceful dissent, pointing out the general rule that courts may not properly go behind the plain and unambiguous words of a legislative enactment. If the principle of *expressio unius est exclusio alterius*[184] has retained any vigor, then on reconsideration by the Court, Judge Ferguson's dissenting opinion will return to haunt military penologists.

E. *POST TRIAL CLEMENCY RECOMMENDATIONS*

In *United States v. Huber*,[185] the Court delineated an area within which a recommendation for clemency made by the court-martial which convicted and sentenced the accused will not be held to be inconsistent with the sentence adjudged. Previously, the Court had stated that consideration must be given to the "surrounding circumstances" to determine whether inconsistency

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[181] 12 USCMA 133, 30 CMR 133 (1961).
[182] The Court cited Winthrop, Military Law and Precedents 404 (2d ed. 1920); MCM, U.S. Army, 1917, 1921.
[183] Edwards v. Madigan, 281 F. 2d 73 (9th Cir. 1960).
[184] See Crawford, Statutory Construction § 195 (1940).
[185] 12 USCMA 208, 30 CMR 208 (1961).

exists between the sentence imposed and that recommnded.[186] One of these circumstances was, of course, the timing of the recommendation. However, it was not clear whether any one factor or combination of factors would be conclusive. In *Huber*, the Court expressly adopted the Federal law that "Federal civil jurors may not impeach their verdicts by post-trial declarations." Chief Judge Quinn, for the Court, stated, "The same rule should be applied to statements by court-martial members which are made *following adjournment* and which do not form an integral part of the announcement of the sentence. . . ." [187] Assuredly, by any test, the recommendation made here would be held not to be inconsistent, because it was made after trial and was initiated by the defense counsel.

VI. POST TRIAL REVIEW

A. *COMMUTATION*

In *United States v. Russo*,[188] the Court held that a convening authority or a board of review might properly commute a death sentence to a dishonorable discharge and confinement at hard labor. In *United States v. Plummer*,[189] the Court extended to convening authorities the power to commute any sentence to a lesser punishment. This was a logical, but considerable, extension of the power granted by *Russo* to commute a death penalty. *Plummer* was reversed because the convening authority, who took his action prior to the publication of the *Russo* decision, approved a sentence to dismissal and total forfeitures, but he "recommended that the dismissal be commuted to provide for an administrative form of discharge under other than honorable conditions." The staff judge advocate, in his review, commented that "Because of his [the accused's] previous excellent military record and his attitude of sincere repentance I believe the dismissal should be commuted to an administrative form of discharge under other than honorable conditions." The Court described as uncertain the intent of the convening authority in approving the dismissal and recommending its commutation; therefore, the action by the convening authority ". . . read in light of the staff judge advocate's review and the *Russo* decision, is sufficiently ambiguous to demand its return." The convening authority was adjured to consider the full breadth of his duty and authority concerning the appropriateness of the penalty to be approved, but the Court did not define the "full

[186] United States v. Kaylor, 10 USCMA 139, 27 CMR 213 (1959).

[187] 12 USCMA at 210, 30 CMR at 210 (emphasis added).

[188] 11 USCMA 352, 29 CMR 168 (1960).

[189] 12 USCMA 18, 30 CMR 18 (1960).

breadth of his authority." In *United States v. Christensen*,[190] the action of the convening authority in commuting to a forfeiture of $25.00 per month for 12 months an officer's sentence to suspension from rank for 12 months was approved. In discussing the convening authority's power to commute, Judge Latimer, with Chief Judge Quinn and Judge Ferguson concurring in the result without separate opinion, set out two limitations: "[1] the punishment to which the sentence adjudged could be commuted must be no more severe than that originally imposed by the court-martial and [2] that the sentence as changed be one which was within the court's sentencing power."[191] Judge Latimer concluded that " . . . he [the convening authority] must be allowed some latitude in selecting punishment which he believes is less severe than that imposed by the court-martial. There being no common denominator in the many forms of permissible penalties . . . his judgment on appeal [should be affirmed] unless it can be said that, as a matter of law, he has increased the severity of the sentence."[192] The Court determined that in this particular case, the punishment, as changed, was no greater than the original punishment. Several cases decided since the end of the October 1960 Term[193] have provided certain guidelines for the resolution of this area of military law.[194] However, all of the problems involved have not been settled.

B. *REHEARINGS*

In *United States v. Cox*,[195] a majority of the Court held that a rehearing on findings *and* sentence could be ordered before a special court-martial where the original hearing was before a general court-martial. In an earlier case,[196] the Court of Military Appeals held that where the rehearing was on the sentence only, it could not be held before a special court-martial if the original trial was before a general court-martial. In *Cox* the Court declared that the reversal of a conviction by an appellate authority and the direction of a rehearing of a case generally leaves the proceedings

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[190] 12 USCMA 393, 30 CMR 393 (1961).

[191] *Id.* at 394, 30 CMR at 394.

[192] *Id.* at 394–95, 30 CMR at 394–95.

[193] United States v. Johnson, No. 15,467; United States v. Rodriguez-Garcia, No. 15,510; United States v. Fredenburg, No. 15,854, all decided on February 23, 1962. See digests of these cases in U.S. Dep't of Army, Pamphlet No. 27–101–93, pp. 1–2 (1962) (Judge Advocate Legal Service).

[194] For a review of the commutation cases and a chronological development of the doctrine of commutation, see U.S. Dep't of Army, Pamphlet No. 27–101–95, pp. 3–11 (1962) (Judge Advocate Legal Service).

[195] 12 USCMA 168, 30 CMR 168 (1961).

[196] United States v. Martinez, 11 USCMA 224, 29 CMR 40 (1960).

in the same position as before trial, with certain exceptions.[197] Judge Ferguson dissented on the basis that there was no distinction between the *Cox* situation and the *Martinez* situation. Accordingly, this issue may yet be relitigated and decided in accordance with his views.

C. *NEW TRIAL*

The Court held, *inter alia*, in *United States v. Woolbright*,[198] that the petitioner had failed to show the exercise of due diligence to obtain the alleged evidence that he now asserts as "newly discovered." The Court reiterated the requirement that to obtain a new trial under Article 73, it must appear that the "newly discovered" matters would not have been discovered by the exercise of the due diligence at or before the trial.[199] In *United States v. Fidler*,[200] a companion case to *Woolbright*, the Court denied a a new trial on the same ground.

D. *STAFF JUDGE ADVOCATE REVIEW*

In *United States v. Blackwell*,[201] the Court denounced as insufficient that portion of the post trial review which dealt with the sufficiency of the evidence because it merely stated the "bare conclusion" of the staff legal officer (citing *United States v. Fields*[202] and *United States v. Bennie*[203]). The staff judge advocate had limited his discussion of the sufficiency of the evidence as follows:

> The findings are correct in law and fact, and competent evidence of record establishes the guilt of the accused beyond a reasonable doubt of each offense of which he was convicted.

E. *APPELLATE REVIEW*

1. *Review by Boards of Review*

The Court held in *United States v. Middleton*[204] that a board of review has no power to direct an accused's separation from the service by way of an administrative type discharge, citing *United*

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[197] No person who was a member of the original court may serve as a member on rehearing, and the sentence on rehearing may not exceed or be more severe than that adjudged at the original trial. Article 63(b), UCMJ, 10 U.S.C. § 863(b) (1958). See United States v. Kelley, 5 USCMA 259, 17 CMR 259 (1954).

[198] 12 USCMA 450, 31 CMR 36 (1961).

[199] United States v. Childs, 5 USCMA 270, 17 CMR 270 (1954). See United States v. Blau, 5 USCMA, 232, 17 CMR 232 (1954); United States v. Bourchier, 5 USCMA 15, 17 CMR 15 (1954).

[200] 12 USCMA 454, 31 CMR 40 (1961).

[201] 12 USCMA 20, 30 CMR 20 (1960).

[202] 9 USCMA 70, 25 CMR 332 (1958).

[203] 10 USCMA 159, 27 CMR 233 (1959).

[204] 12 USCMA 54, 30 CMR 54 (1960).

States v. Phipps.[205] In *United States v. Woods,*[206] it was held that a board of review has no power to suspend the execution of a punitive discharge. The Court based its opinion on long-standing precedent[207] and noted that the board was in error in discerning in the *Russo* case[208] "an intimation" that the earlier cases were erroneous.

The Court in *United States v. Fagnan*[209] considered an Army board of review's refusal "to consider a psychiatric report and a letter from a confinement officer on the question of the appropriateness of accused's sentence." During its consideration of the cause, the board of review requested appellate defense counsel to secure a psychiatric examination of the accused. He was so examined, and the report of such examination contained findings that the accused was "fully responsible for his offenses" and certain findings and recommendations which were favorable to the accused. There was also filed with the board a letter which had been received from the correctional officer in whose custody the accused had been placed. The letter was highly favorable to the accused. The board refused to consider either the psychiatric report or the letter and ultimately affirmed the sentence as legally and factually proper. The Court held that a board of review, as an "intermediate appellate judicial tribunal," is limited in its consideration of information relating to the appropriateness of sentence to matters included in "the entire record." The Court defined the entire record as "the transcript and the allied papers, as well as any appellate brief prepared [by trial defense counsel] pursuant to . . . Article 38,"[210] and affirmed the decision of the board.

The Court held in *United States v. Witherspoon*[211] that it was prejudicial error not to afford an accused the right to be represented by counsel before a board of review which had received the record upon remand for the purpose of reassessing the sentence, to purge the harm occasioned by an erroneous instruction regarding the maximum sentence.

2. *Review in the Court of Military Appeals*

In *United States v. Bedgood,*[212] the Court declined to answer a question certified by The Judge Advocate General of the Army on

[205] In *Phipps* the Court held that a court-martial could not adjudge an administrative type discharge. See note 166 *supra.*

[206] 12 USCMA 61, 30 CMR 61 (1960).

[207] United States v. Simmons, 2 USCMA 105, 6 CMR 105 (1952). See United States v. Cavallaro, 3 USCMA 653, 14 CMR 71 (1954). Compare United States v. Estill, 9 USCMA 458, 26 CMR 238 (1958).

[208] 11 USCMA 352, 29 CMR 168 (1960).

[209] 12 USCMA 192, 30 CMR 192 (1960).

[210] *Id.* at 195, 30 CMR at 195.

[211] 12 USCMA 409, 30 CMR 409 (1961).

[212] 12 USCMA 16, 30 CMR 16 (1960).

the ground that the issue certified was moot. The board of review had disapproved the punitive discharge approved by the convening authority but commented that a court-martial could lawfully adjudge an administrative type discharge. Judge Latimer concurred in the result on the ground that the holding in *United States v. Phipps*[213] answered the certified question.

The *Bedgood* decision and *United States v. Armbruster*[214] were cited by the Court in *United States v. Higbie*[215] where it again refused to answer a certified question. There, the board of review had reassessed the sentence on the ground that the convening authority, after disapproving one offense, might have considered the sentence originally adjudged for three offenses as the limit applicable to the two remaining ones. The board so acted because of the possible influence which the dismissed charge may have had upon the convening authority when he approved the sentence, and upon "the entire record in this case." The Court held that where a board of review bases a determination of the appropriateness of sentence upon the entire record, one of the many factors it considered may not be dissected out in order to have the Court of Military Appeals answer a certified issue, the answer to which cannot affect the board's utimate decision.

In *United States v. Foti,*[216] in an opinion authored by Judge Latimer, the Court again held that a certified issue was not properly before it. The Court said that the board, in reassessing the sentence on the basis of the entire record, considered certain matters in extenuation and mitigation, and it held that review of such a determination was beyond the scope of the Court's powers. Judge Ferguson, concurring in the result, agreed that the question submitted was hypothetical and need not be answered. It appears that the Court will not answer questions of law certified pursuant to Article 67(b)(2) of the Code where the board of review determines the appropriateness of the sentence on the basis of the entire record even through erroneous principles of law may be announced in the written opinion of the board.

In *United States v. Leggio,*[217] the Court had another opportunity to limit its review of certified questions. The board of review had reassessed the sentence, and the member who wrote the opinion stated that he considered the argument of the trial counsel to be error which might or might not have been prejudicial. Another member concurred in the result, and the third member dis-

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[213] See note 205 *supra*.
[214] 11 USCMA 596, 29 CMR 412 (1960).
[215] 12 USCMA 298, 30 CMR 298 (1961). Judge Latimer dissented.
[216] 12 USCMA 303, 30 CMR 303 (1961).
[217] 12 USCMA 319, 30 CMR 319 (1961). Judge Latimer dissented.

sented.[218] Judge Ferguson, writing for the majority, held there was no question which the Court was empowered to review since the reassessment of the sentence must have resulted from a consideration of appropriateness of the sentence, inasmuch as the question of legal error did not appear to have been finally resolved by the board, even by the author of the principal opinion. Judge Latimer would have answered the certified question since he felt the board had found prejudicial error.

In another case[219] involving the power of the Court to review determinations of boards of review, the Court, citing *United States v. Moreno*,[220] held that a finding of fact by a board of review supported by substantial evidence is not reviewable by the Court of Military Appeals.

The Court had an opportunity to determine the effect of an honorable separation upon the appellate review procedure in *United States v. Loughery*.[221] At the request of the accused, and after the Court of Military Appeals had granted his petition to review the case, the Secretary of the Navy acted administratively to separate the accused under honorable conditions. The Court split three ways in its rationale. Judge Ferguson thought there was error in the record and that the judgment below should be reversed and the charges dismissed. Chief Judge Quinn felt that the proceedings had been abated by the accused's separation under honorable conditions; however, he concurred in the reversal and dismissal of the charges as a practical disposition of the case. Judge Latimer believed that the rights of the parties were fixed by their mutual agreement and would dismiss the petition for review; but, if the case were to be considered on the merits, he would find no prejudicial error.

In *United States v. Williams*,[222] the Court reversed the conviction and ordered the charges dismissed because of the existence of numerous errors "each prejudicial inherently and in fact to a greater or lesser degree" and cumulatively requiring reversal.

Finally, the Court held that a decision of The Judge Advocate General of the Air Force to decertify an officer as qualified to serve as law officer, trial counsel, or appointed defense counsel in general courts-martial is an administrative, not a judicial, decision and it is not subject to review in the Court of Military Appeals.[223] In referring to its status, the Court noted that it was not a court of original jurisdiction with general unlimited powers in

[218] SPCM NCM 60-00875, Leggio (undated).
[219] United States v. Holland, 12 USCMA 444, 31 CMR 30 (1961).
[220] 6 USCMA 388, 20 CMR 104 (1955).
[221] 12 USCMA 260, 30 CMR 260 (1961).
[222] 12 USCMA 376, 30 CMR 376 (1961).
[223] In re Taylor, 12 USCMA 427, 31 CMR 13 (1961).

law and equity. The Court also noted that the decision of The Judge Advocate General of the Air Force did not deprive the officer of his standing as a member of the legal profession and did not prevent his practice before that Court.

VII. APPENDIX—WORK OF THE COURT

The statistics in Tables I and II are the official statistics compiled by the Clerk's Office, United States Court of Military Appeals, pursuant to the provisions of Article 67(g), Uniform Code of Military Justice. The statistics in Tables III through VI inclusive were compiled in the Opinions Branch, Military Justice Division, Office of the Judge Advocate General, Department of the Army, and are, thus, unofficial.

Table I. Status of Cases Docketed

Total by Services	Total as of June 30, 1959	July 1, 1959 to June 30, 1960	July 1, 1960 to June 30, 1961	Total as of June 30, 1961 [a]
Petitions (Art. 67(b)(3)):				
Army	7,757	342	371	8,470
Navy	2,435	310	330	3,075
Air Force	2,866	330	252	3,448
Coast Guard	38	1	1	40
Total	13,096	983	954	15,033
Certificates (Art. 67(b)(2)):				
Army	105	6	11	122
Navy	151	23	7	181
Air Force	36	7	6	49
Coast Guard	6	0	0	6
Total	298	36	24	358
Mandatory (Art. 67(b)(1)):				
Army	31	0	0	31
Navy	2	1	0	3
Air Force	1	1	1	3
Coast Guard	0	0	0	0
Total	34	2	1	37[b]
Total cases docketed	13,428	1,021	979	15,428[c]

[a] While this supplement covers a period greater than Fiscal Year 1960, the Clerk's Office, USCMA, *maintains statistics on a fiscal year basis only.*

[b] 2 flag officer cases: 1 Army and 1 Navy

[c] 15,182 cases actually assigned docket numbers. 104 cases counted as both Petitions and Certificates. 5 cases Certified twice. 128 cases submitted as Petitions twice. 2 Mandatory cases filed twice. 5 Mandatory cases filed as Petitions after second Board of Review Opinion. 1 case submitted as a Petition for the third time.

Table II. Court Action

	Total as of June 30, 1958	July 1, 1959 to June 30, 1960	July 1, 1960 to June 30, 1961	Total as of June 30, 1961
Petitions (Art. 67(b)(3)):				
Granted	1,318	124	114	1,556
Denied	11,369	843	842	13,054
Denied by Memorandum Opinion	1	1	0	2
Dismissed	9	0	1	10
Withdrawn	279	20	8	307
Disposed of on Motion to Dismiss:				
With Opinion	7	0	1	8
Without Opinion	36	0	2	38
Disposed of by Order setting aside findings and sentence	2	1	0	3
Remanded to Board of Review	107	8	23	138
Court Action due (30 days)[d]	67	77	57	57
Awaiting briefs[d]	29	19	25	25
Certificates (Art. 67(b)(2)):				
Opinions rendered	282	29	37	348
Opinions pending[d]	6	10	2	2
Withdrawn	5	1	0	6
Remanded	0	1	0	1
Set for hearing[d]	0	0	0	0
Ready for hearing[d]	0	1	1	1
Awaiting briefs[d]	6	6	1	1
Mandatory (Art. 67(b)(1)):				
Opinions rendered	33	2	1	36
Opinions pending[d]	0	1	0	0
Remanded	1	0	0	1
Awaiting briefs[d]	1	0	1	1
Opinions rendered:				
Petitions	1,115	113	91	1,319
Motions to Dismiss	10	0	1	11
Motion to Stay Proceedings	1	0	0	1
Per Curiam grants	22	0	4	26
Certificates	245	27	34	306
Certificates and Petitions	35	2	3	40
Mandatory	33	2	1	36
Remanded	49	6	21	76
Petition for a New Trial	1	0	0	1
Petition for Reconsideration of Petition for New Trial	1	0	0	1
Motion to Reopen	1	0	0	1
Total	1,513	150	155	1,818[e]

Table II. Court Action—Continued

	Total as of June 30, 1959	July 1, 1959 to June 30, 1960	July 1, 1960 to June 30, 1961	Total as of June 30, 1961
Completed cases:				
Petitions denied	11,369	843	842	13,054
Petitions dismissed	9	0	1	10
Petitions withdrawn	279	20	8	307
Certificates withdrawn	5	1	0	6
Opinions rendered	1,459	144	133	1,736
Disposed of on Motion to Dismiss:				
With opinion	7	0	1	8
Without opinion	36	0	2	38
Disposed of by Order setting aside findings and sentence	2	1	0	3
Remanded to Board of Review	106	9	23	138
Total	13,272	1,018	1,010	15,300

	Pending Completion as of —		
	June 30, 1959	June 30, 1960	June 30, 1961
Pending cases:			
Opinions pending	30	38	16
Set for hearing	0	1	0
Ready for hearing	1	0	1
Petitions granted—awaiting briefs	15	9	17
Petitions—Court action due 30 days	67	77	57
Petitions—awaiting briefs	29	19	25
Certificates—awaiting briefs	6	6	1
Mandatory—awaiting briefs	1	0	1
Total	149	150	118

[d] As of June 30, 1959, 1960, and 1961.

[e] 1,818 cases were disposed of by 1,727 published opinions. 96 opinions were rendered in cases involving 57 Army officers, 20 Air Force officers, 13 Navy officers, 3 Marine Corps officers, 2 Coast Guard officers, and 1 West Point Cadet. In addition 19 opinions were rendered in cases involving 20 civilians. The remainder concerned enlisted personnel. The Court remanded 47 cases in Fiscal Year 1959 by Order; 6 cases in Fiscal Year 1960 by Order; and 21 cases in Fiscal Year 1961 by Order.

Table III. Sources of Cases Disposed of by Published Opinions[f]

	Army	Navy	Air Force	Coast Guard	Total
Petition	28	29	22	0	79
Certification	12	10	6	0	28
Motion to Dismiss	0	0	1	0	1
Total	40	39	29	0	108

[f] Covers the period of the supplement, 1 October 1960 to 11 August 1961 (the entire October 1960 term); figures cover only published opinions.

Table IV. Disposition of Cases Through Published Opinions[g]

	Affirmed	Aff in Part Rev in Part	Remanded	Reversed	Dismissed	Total
Petition	40	2	1	36	0	79
Certification	16	1	0	10	1	28
Motion to Dismiss	1	0	0	0	0	1
Total	57	3	1	46	1	108

[g] Period Covered: 21 October 1960 to 11 August 1961; figures cover only published opinions.

Table V. Reversals of Special Courts-Martial Cases Versus General Courts-Martial Cases Considered by Court[h]

	Special (%)	General (%)	Total (%)
Army	([i])	13 (34%)	13 (34%)
Navy	14 (66⅔%)	9 (56%)	23 (62%)
Air Force	7 (58%)	5 (31%)	12 (42.8%)

[h] Period covered: 1 October 1960–11 August 1961; figures cover only published opinions. The purpose of this chart is to compare special courts-martial cases with general courts-martial cases, with respect to the incidence of error found by the Court of Military Appeals. Accordingly, the figures in this chart do not include cases in which the Court of Military Appeals, although reversing board of review decisions, upheld the convictions.

[i] Not utilized at present time (AR 22–145).

Table VI. Action of Individual Judges [1]

	Quinn	Latimer	Ferguson	Total
Wrote opinion of Court	34	27	39	100
Concur with opinion of Court	45	14	22	81
Concur with separate opinion	4	6	1	11
Concur in result	12	12	18	42
Concur in part/dissent in part	1	6	2	9
Dissent	4	11	18	33
Total	100[2]	76[2]	100[2]	276

[1] Period covered: 1 October 1960–11 August 1961.

[2] Figures do not include 8 per curiam opinions; figures cover only published opinions.

COMMENTS

THE HISS ACT AMENDMENTS.* The so-called Hiss Act[1] was substantially amended in the 87th Congress by Public Law 87–299.[2] Prior to these amendments, the Hiss Act had become a matter of concern for the military because of its application to military personnel convicted by courts-martial.[3] The recent amendments to the act have special significance in this respect. It is the purpose of this comment to discuss the amendments in light of this significance.

I. PURPOSE OF THE NEW LEGISLATION

The Hiss Act, as originally passed, provided that federal officers and employees, including military personnel, who committed certain acts or who were convicted of certain offenses would be denied their federal retirement benefits. The act was broad in its language and scope of application. The legislative history of the act discloses that Congress was concerned principally with federal officers and employees who committed acts or who were convicted of offenses adversely affecting the national security. However, the legislative history also reflects a broader congressional intent to deny federal retirement benefits to any officers and employees who broke faith with the federal government.[4]

The legislative history of the recent amendments to the Hiss Act discloses that Congress discovered that the act, as originally passed, denied federal retirement benefits to persons to whom it had not been anticipated or intended that the act apply. However, Congress also declared that the act should deny federal officers and employees their retirement benefits if they committed acts or were convicted of offenses affecting the national security. It is stated, in part, in the Senate report[5] on the amendments:

* * * * * * *

> The original intent of legislation in this area was to deny the payment of a civilian annuity or retirement pay to a person who committed an of-

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

[1] 68 Stat. 1142 (1954), as amended, 5 U.S.C. §§ 2281–2288 (1958).

[2] Act of Sept. 26, 1961, 75 Stat. 640. For a complete text of the pertinent amendments, see Mil. L. Rev., October 1961, pp. 99–107.

[3] For an analysis of the Hiss Act prior to its amendment, see McHughes, *The Hiss Act and Its Application to the Military*, Mil. L. Rev., October 1961, p. 67. This comment is intended to supplement that article.

[4] H. R. Rep. No. 2488, 83d Cong., 2d Sess. 4 (1954).

[5] S. Rep. No. 862, 87th Cong., 1st Sess. (1961).

fense involving the national security. However, because of a long series of amendments the act of September 1, 1954, has gone far beyond this objective and has resulted in a serious miscarriage of justice by denying rightful benefits to former employees and military personnel and their survivors for reasons having no relation to the original purpose of the legislation.

H. R. 6141 will remedy this situation by providing for the restoration of civilian annuities and retired military pay to former employees and military personnel (including survivors) who have been denied such benefits under the act of September 1, 1954, on account of offenses not related to national security. It will not permit the payment of a civilian annuity or military retired pay to any individual whose acts or omissions are related in any way to the national security of the United States.

Clear evidence has been developed in public hearings both in the House and in the Senate that the present law does not reflect our traditional sense of justice. A number of individuals have lost and others still in service are faced with the prospect of losing valuable benefits because of offenses not only minor in nature but in no way related to security. In many cases, the courts did not even assess penalties, yet the individuals lost their annuities.

This denial of civilian annuity rights and military retired pay extends, also, to widows and children, who have lost valuable survivor annuities in some cases because their husbands or fathers committed offenses having nothing to do with the national security but coming within the purview of the provisions of the act as it now stands.[6]

* * * * * * *

The reasons for denying federal retirement benefits to officers and employees who commit acts or who are convicted of offenses against the national security is clearly stated in the House report [7] on the amendments:

* * * * * * *

It is apparent to this committee that a significant principle with respect to the nature of the benefits at issue has not been given the proper weight in the consideration of existing law. This principle is to the effect that an individual who assumes public office or employment accepts all of the obligations (explicit and implicit) of such office or employment as well as the emoluments thereof. When an individual enters the service of the United States, he imposes upon himself an extraordinary—even a unique—commitment of complete and unswerving loyalty to government and to country. This obligation of loyalty is preemptive of any and all rights and benefits accruing from public office or employment. Fulfillment of such obligation of loyalty at all times is an absolute condition precedent to the granting, vesting, and receipt of any right, benefit, or remedy arising out of the office or employment in the past, present, or future.

Breach of this obligation or high trust by an individual guilty of an act or omission which impairs the national security abrogates from the beginning any obligation of the United States to pay benefits based on the service of such an individual. All claims for such benefits must stand or fall along with those of the individual whose conduct is at issue. In

[6] S. Rep. No. 862, *supra* note 5, at 2.

[7] H. R. Rep. No. 541, 87th Cong., 1st Sess. (1961).

the case of such breach of trust, it is entirely fitting and proper to deny such benefits and at the same time make appropriate return of contributions made by the individual concerned. These benefits are, in part, in the nature of gratuities because of Government contributions toward such benefits. In effect, the payment of any such benefits to any such individual would be shocking to the public conscience and morals and repugnant to the high principles on which our Government is founded.[8]

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II. SCOPE OF THE NEW LEGISLATION

As a result of these second thoughts by Congress on the need for and purpose of the Hiss Act, the act now applies only to federal officers and employees who commit acts or who are convicted of offenses against the national security. This is true with respect to both civilian officers and employees and military personnel.

Prior to the amendments to the Hiss Act, a part of subsection 1(2) of the act was the principal concern of the military with respect to military personnel convicted by courts-martial. This provision stated that a federal officer or employee was not entitled to receive retirement benefits, if he was, or ever had been, convicted of an offense which is a felony under the laws of the United States or the District of Columbia, provided the offense was committed in the exercise of his "authority, influence, power, or privileges as an officer or employee of the Government." As a result of several decisions by the Comptroller General and some opinions of The Judge Advocate General of the Army, the rule developed that this provision of the act applied to a military member convicted by general, special or summary courts-martial, if the offense under the Uniform Code of Military Justice [9] of which he was convicted was "analogous" to a felony under the laws of the United States or the District of Columbia, was punishable under the Table of Maximum Punishments [10] by death or confinement in excess of one year, and the evidence introduced at the trial gave clear and convincing proof that the offense was committed in the exercise of his "authority, influence, power, or privileges as an officer or employee of the Government." An offense was "analogous" if the specification which alleged the offense set forth in express language, or by necessary implication, the essential elements of an offense under the laws of the United States or the District of Columbia. An offense was committed in the exercise of some "authority, influence, power, or privileges as an officer or employee of the Government," if the person who committed the offense did so in the exercise of some duty or the

[8] H. R. Rep. No. 541, *supra* note 7, at 3.

[9] 10 U.S.C. §§ 801–940 (1958), as amended.

[10] U.S. Dep't of Defense, Manual for Courts-Martial, United States, 1951, para. 127*c*.

commission of the offense was made possible by the position he held or the duties to which he was assigned. [11]

As a result of the above rule, subsection 1(2) of the Hiss Act was found to apply in cases in which military personnel were convicted by courts-martial of offenses such as larceny, bribery, wrongful disposition of government property and wrongful appropriation of government vehicles. [12] As now amended, it is unlikely that the act would apply in such cases.

For the military, the most significant sections in the Hiss Act, as now amended, are subsections 1(a)(2) and 1(b)(2), concerning offenses under the Uniform Code of Military Justice related to the national security, and section 2 of the amendments to the act, concerning the restoration of retirement benefits previously denied. [13]

Subsection 1(a)(2) provides that federal retirement benefits shall not be paid to any person convicted prior to, on, after 1 September 1954 [14] of a violation of Articles 104 (aiding the enemy) [15] or 106 (spying) [16] of the Uniform Code of Military Justice, or predecessor offenses (Articles of War 81 or 82). This subsection also makes similar provisions for persons convicted of any offense under the Uniform Code of Military Justice, or a similar predecessor offense, under charges and specifications alleging a violation of any of the numerous offenses against the national security specified in other provisions of subsection 1(a) of the Hiss Act, as now amended, "if the executed sentence includes death, dishonorable discharge, or dismissal from the service, or if the defendant dies before execution of such sentence as finally approved." [17]

Subsection 1(b)(2) contains provisions similar to that part of subsection 1(a)(2), just described, which relates to conviction for

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[11] For an analysis, discussion and citation of the decisions of the Comptroller General and the opinions of The Judge Advocate General of the Army, see McHughes, *op. cit. supra* note 3, at 71–88.

[12] For a discussion of the kind of facts involved in the commission of the mentioned offenses which caused the determination to be made that the Hiss Act applied to the persons so convicted, see McHughes, *op. cit. supra* note 3, at 80–84.

[13] Other provisions of the Hiss Act as now amended relating to the denial of federal retirement benefits involve acts or offenses such as perjury (subsection 1(a)(3)), subornation of perjury (subsection 1(a)(4)), refusal to testify (subsection 2(a)), and false statements (subsection 2(b)). The act also provides for the restoration of retirement benefits based upon certain actions by the President (section 6).

[14] This is the effective date of the original Hiss Act.

[15] UCMJ, art. 104, 10 U.S.C. § 904 (1958).

[16] UCMJ, art. 106, 10 U.S.C. § 906 (1958).

[17] Examples of the type of offenses set forth elsewhere in subsection 1(a) are: disclosure of classified information, espionage, treason, sedition, recruiting for service against the United States, and enlistment to serve against the United States.

violations of the Uniform Code of Military Justice other than violations of Articles 104 and 106, *except that this provision applies only to convictions prior to, on, or after the date of the recent amendments to the act (26 September 1961)*. This time limitation applies to all the provisions of subsection 1(b) of the act, as now amended. The reason behind this limitation is that subsection 1(b) lists offenses against the national security established since the Hiss Act was first enacted or offenses against the national security which were not specified in the act as originally passed. [18]

Section 2 of the recent amendments provides that federal retirement benefits denied any person under the provisions of the Hiss Act prior to the amendments shall be restored, both prospectively and retroactively, unless the retirement benefits "remain nonpayable" as a result of the amendments.

III. CONCLUSIONS

The new provisions of the Hiss Act which relate to courts-martial convictions measurably lessen the impact of the act upon the military. Previously, the act applied in many cases of a minor nature which were unrelated to the national security. This is no longer true. There is only one case known to have been considered by The Judge Advocate General of the Army which concerned national security. This case involved an officer who was convicted by a general court-martial for a violation of Article 134 of the Uniform Code of Military Justice [19] for recording speeches while a Korean prisoner of war which were detrimental to the United States. [20]

In connection with the amendments to the Hiss Act, The Judge Advocate General of the Army has stated that all cases which either involve (1) the restoration of retirement benefits or (2) application of the Hiss Act amendments to military personnel who are, or have been, convicted of a violation of Articles 104 or 106 of the Uniform Code of Military Justice (or Articles of War 81 or 82) or *any other violation* of the Uniform Code of Military Justice (or similar violations of the Articles of War), if the *executed* sentence included death, dismissal, or dishonorable discharge, should be referred to his office for consideration. [21]

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[18] H. R. Rep. No. 541, 87th Cong., 1st Sess. 3–4 (1961).

[19] UCMJ, art. 134, 10 U.S.C. § 934 (1958).

[20] JAGA 1960/4402 (July 27, 1960).

[21] JAGA 1961/5461 (October 27, 1961), in U.S. Dep't of Army, Pamphlet No. 27–101–84, p. 6 (1961) (Judge Advocate Legal Service). The position of The Judge Advocates General of the Navy and Air Force in this connection is not known.

To conclude, the Hiss Act as now written no longer presents a serious problem for the military. However, it is important that the military take prompt action to restore entitlement to retired pay to those persons who are entitled to have it restored by virtue of the amendments to the Hiss Act. The military should also take action, where warranted by the amendments, to correct the military records of those persons to whom the act was found to apply, but who may not yet be eligible to retire.

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