

MILITARY LAW REVIEW

Vol. 29

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HEADQUARTERS, DEPARTMENT OF THE ARMY
JULY 1965

PREFACE

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

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

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G. NORMAN LIEBER

Acting Judge Advocate General
1884-1895

Judge Advocate General
1895-1901

Guido Norman Lieber was born in Columbia, South Carolina, on May 21, 1837. He was graduated from South Carolina College in 1856 and received his LL.B. from Harvard Law School in 1858.

After being admitted to the New York bar he practiced until the outbreak of the Civil War. In 1861 he was commissioned a First Lieutenant in the 11th U.S. Infantry, Regular Army. He remained an infantry officer for a year and a half, serving with McClellan during the Peninsular campaign. On June 27, 1862, he was breveted a captain for his "gallant and meritorious service" in the Battle of Gaines Mill. Captain Lieber also served at the Second Battle of Bull Run.

In November of 1862 he was offered an appointment as a Judge Advocate of Volunteers. Lieber accepted the position and was appointed as a major. On May 28, 1864, Major Lieber was decorated again for "gallant and meritorious service" for the Red River, Louisiana, campaign. He received the brevet rank of Lieutenant Colonel of Volunteers in March of 1865 for faithful service during the War. Electing to remain in the Army after the war, the future Judge Advocate General was made a Major in the Regular Army in 1867.

It was not surprising that G. Norman Lieber remained in the Judge Advocate General Department. He followed in the footsteps of his father, Dr. Francis Lieber, who, as special legal advisor to the War Department, drafted the well-known General Order 100 of 1863, the basis of modern land warfare law. (See 27 *Mil. L. Rev.* 1 (1965).)

In 1881 The Judge Advocate General of the Army, Brigadier General McKee Dunn, retired, and Major David G. Swaim was promoted and appointed Judge Advocate General. His assistant was Colonel Guido Norman Lieber. Three years later, General Swaim was court-martialed for improper conduct in a business transaction and sentenced to suspension from rank and duty for a period of twelve years. While General Swaim retained the title, thereafter Colonel Lieber actually performed all the duties

of The Judge Advocate General and was appointed Acting Judge Advocate General in 1884. In December of 1894 the remaining portion of General Swaim's sentence was remitted, and he was allowed to retire. Shortly thereafter, G. Norman Lieber was appointed a Brigadier General and named Judge Advocate General of the United States Army.

General Lieber retired on May 21, 1901, after serving forty years in the Army, sixteen of which were as head of the Judge Advocate General's Department. This period, which included the Spanish American War, saw a major increase in the Judge Advocate General's Department and is the longest tenure held by any Judge Advocate General.

General Lieber is well known in military justice as the author of *Remarks on the Army Regulations* (1898), perhaps better known as *Lieber on Army Regulations*, and *The Use of the Army in Aid of the Civil Power* (1898). In addition, General Lieber published numerous articles on military law and related fields.

G. Norman Lieber died on April 25, 1923, in Washington, D.C. He was eighty-five. His excellent library of both history and military law is now a part of the library in the Office of The Judge Advocate General.

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 DEPARTMENT OF THE ARMY
 WASHINGTON, D.C., 1 July 1965

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THE DEFENDANT'S RIGHT TO OBTAIN EVIDENCE: AN EXAMINATION OF THE MILITARY VIEWPOINT*

BY MAJOR ARNOLD I. MELNICK**

I. INTRODUCTION

It seems self-evident that whatever the contents of the trial file, the proof of any case turns on testimony of the witnesses who actually appear and testify at the trial. Almost every attorney has discovered at least once that this seemingly simple aspect of preparing for trial can present difficult and sometimes insoluble problems which may even frustrate his efforts to achieve a trial result favorable to his client. Thus, the task of insuring that desired witnesses appear and testify, while apparently unexciting, and often mechanical, is of critical importance, and it is indeed curious that it has been the subject of comparatively little analytical inquiry.

The most obvious sources of the difficulties in obtaining witnesses, and other evidence, encountered by attorneys appearing in civilian courts, particularly those representing defendants at criminal trials, are the limited areas reached by the trial court's compulsory process,¹ the defendant's responsibility for obtaining his own witnesses,² and the modest financial resources of most defendants. While courts-martial are said to relieve military accused of these handicaps, the attorney who practices before military courts still must struggle for his witnesses and his evidence, although his problems generally have a different genesis, and center primarily on the limitations which have been placed on his access to compulsory process.

* The opinions and conclusions expressed 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 See, *e.g.*, the development of a uniform act to subpoena out-of-state witnesses, 58 AM. JUR. *Witnesses*, § 12 (1948).

² See *United States v. Di Gregorio*, 148 F. Supp. 526 (S.D.N.Y. 1957); *State v. Jones*, 57 N.J. Super. 260, 154 A.2d 640 (1959).

II. THE PRESENT RULE IN THE MILITARY

The dilemma of the military attorney may be illustrated best by considering the hypothetical, but all too probable, situation of the neophyte practitioner in military courts who is generally aware that Article 46 of the *Uniform Code of Military Justice*³ appears to guarantee both parties equal opportunity to obtain witnesses, and has read the recent observations of the United States Court of Military Appeals that, "At the trial itself, the accused's right to subpoena witnesses and the motion for appropriate relief give him practically unlimited means for the production of evidence favorable to him."⁴

Should he fail to seek further, the young attorney will be unpleasantly surprised, when he attempts to secure his witnesses, to learn that he must address his requests to his adversary, the trial counsel, and that the latter has the responsibility and *sole authority* for obtaining *all* defense evidence,⁵ including all witnesses, friendly or hostile, military,⁶ and civilian.⁷ If the trial counsel does not believe that the requested witnesses are necessary he may refuse to procure them, and the defense attorney will be forced to seek relief from the convening authority or the court-martial, if the latter has convened.⁸ When he moves for such relief, however, he will be required to support his request with statements setting forth a synopsis of the testimony he expects from the desired witnesses, full reasons necessitating the personal appearance of the witness, and any other matter showing that such expected testimony is necessary to the ends of justice.⁹

Should counsel protest that the procedure he must follow is contrary to the Code, and to the views of the Court of Military Appeals, he will be advised that not only are the steps required of

³ Hereinafter cited as UCMJ art. ____.

⁴ *United States v. Franchia*, 13 U.S.C.M.A. 315, 320, 32 C.M.R. 315, 320 (1962).

⁵ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, para. 115a [hereinafter cited as MCM, 1951, para. ____]; cf. MCM, 1951, para. 115c.

⁶ MCM, 1951, para. 115b. Throughout this article references to witnesses include both civilian and military witnesses unless the context requires otherwise. References to compulsory process include both subpoenas for civilian witnesses and orders for military witnesses.

⁷ MCM, 1951, para. 115d.

⁸ MCM, 1951, para. 115a.

⁹ *Ibid.*

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him prescribed by Presidential regulation in the current *Manual for Courts-Martial*, but that this procedure has been formally approved by the United States Court of Military Appeals in a definitive opinion:

In *United States vs. DeAngelis*, 3 USCMA 298, 12 CMR 54, this Court held that before compulsory process to compel attendance will issue "the testimony of any witness requested by the defense must be shown to be both material and necessary, as a condition precedent to the issuance of process to compel his attendance." Whether a requested witness' testimony is both material and necessary is a question to be determined by the particular facts of the individual case.¹⁰

Finally, should counsel point out that the financial resources of his military client permit him to absorb the costs of obtaining the witnesses he desires, his position would not be improved one whit, for the procedure set forth in the Manual does not distinguish between witnesses obtained at the expense of the United States and those whose expenses are met by the accused.¹¹

But the conundrum which faces defense counsel is not limited to what he may consider to be premature disclosure of his client's evidence. Even though he fully complies with the procedural requirements of the Manual, he has no assurance that either the convening authority or the law officer will authorize his subpoenas. The accused's burden is substantive as well as procedural, and he must satisfy the law officer or convening authority that the witnesses he seeks are, in fact, necessary and material to his case.¹² Should he be denied, the accused may raise the issue of denial of process on appeal. However, this will not improve his situation significantly since the Court of Military Appeals and boards of review have made it clear that they will not reverse an unfavorable ruling unless satisfied that the accused has demonstrated that the witnesses desired are material and necessary.¹³

¹⁰ *United States v. Harvey*, 8 U.S.C.M.A. 538, 543, 25 C.M.R. 42, 47 (1957).

¹¹ See MCM, 1951, para. 115a; cf. *United States v. Harvey*, *supra* note 10 (alternative holding). Indeed, there is no procedure for the witness to be paid by the government, and the government to then be reimbursed by the defendant, the ordinary civilian practice. Compare *ibid.* Thus, where the defendant does pay the expenses of his witness, it is a private transaction subject to considerations of propriety.

¹² WC NCM 60-00871, Cunningham, 30 C.M.R. 698 (1960), *rev'd on other grounds*, 12 U.S.C.M.A. 402, 30 C.M.R. 402 (1961); ACM 10050, Graalum, 19 C.M.R. 667, *pet. denied*, 6 U.S.C.M.A. 812, 19 C.M.R. 413 (1955); cf. *United States v. De Angelis*, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

¹³ See *United States v. Harvey*, 8 U.S.C.M.A. 538, 25 C.M.R. 42 (1957); *United States v. Thornton*, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (1957); WC NCM 60-00871, Cunningham, *supra* note 12; ACM 10050, Graalum, *supra* note 11; cf. *United States v. De Angelis*, *supra* note 12.

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Unfortunately, one may not readily ascertain what this burden of persuasion encompasses, for while military appellate tribunals consistently evoke the rule, they have done little to define it and resolve the subsidiary issues it raises. The Court of Military Appeals on one occasion expressed the view that if an accused would be entitled to directly present testimony of the requested witnesses at trial, his subpoena should be granted.¹⁴ It has also suggested that appellate review should be concerned only with abuse of discretion in denying process.¹⁵ For the most part, however, the Court and boards of review have not utilized either approach; instead they have evaluated the requests for process against the record of the completed trial and all the information available on appeal, and using some unrecorded standard, determined for themselves whether the requested witnesses were material and necessary.¹⁶ Examination of the recorded opinions indicates that more often than not, they have found the accused's request to be wanting.

As a consequence those who must make the practical decisions, the accused, counsel, the law officer and the convening authority have been left without objective criteria to guide them. It does not appear unfair to observe that in the current state of the law whether in any particular case the accused has met his burden and is entitled to process remains a gamble for the accused, and a matter of speculation for the law officer and convening authority, to be resolved by each upon the basis of their subjective evaluation of the evidence presented and the surrounding facts.

In sum then, not only must the accused justify his request for compulsory process, but the burden he must meet is far from clearly defined. It seems worthwhile to reiterate that in theory, at least, this rule applies to military witnesses as well as to their civilian counterparts, and to those close at hand as well as those located at some distance from the place of trial. The rule also encompasses all documentary evidence desired by the defense.¹⁷ Significantly, the converse situation does not exist so that while trial counsel is enjoined to procure only material prosecution

¹⁴ See *United States v. Thornton*, *supra* note 13.

¹⁵ *United States v. Thornton*, 8 U.S.C.M.A. 446, 450, 24 C.M.R. 256, 260 (1959) (dissenting opinion).

¹⁶ See *United States v. Harvey*, 8 U.S.C.M.A. 538, 25 C.M.R. 42 (1957); ACM 10050, Graalum, 19 C.M.R. 667, *pet. denied*, 6 U.S.C.M.A. 813, 19 C.M.R. 413 (1955); WC NCM 60-00871, Cunningham, 30 C.M.R. 698 (1960) *rev'd on other grounds*, 12 U.S.C.M.A. 402, 30 C.M.R. 402 (1961); ACM 16772, Shelby, 29 C.M.R. 823 (1960); *cf.* *United States v. De Angelis*, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

¹⁷ MCM, 1951, para. 115a.

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witnesses, he need not secure approval of his decisions in this regard, least of all from the accused or his attorney.¹⁸

It is true, of course, that once an accused has complied with the Manual and established that the witnesses he desires are material and necessary to his case, he is entitled to their personal presence, and he cannot be required to accept a deposition or stipulation as a substitute.¹⁹ But this is a dearly purchased right, and it has been acquired at the price of revealing the accused's case and trial strategy to the Government.

It is also true that in many commands, the Manual requirements are not closely enforced and compulsory process is made available to the accused without any preliminary disclosure. While such treatment is enlightened and desirable, it does not make the instant inquiry any less valid. Assuming that they are proper, the local adoption of less demanding rules is purely discretionary. While they may be evidence that the Manual is not practical, or is too strict, they cannot deprive the Manual rule of the force and effect of law or bar its application whenever desired. Further, one need only casually examine the reported cases to become aware that the Manual rule is, in fact, widely utilized.

One may well understand the neophyte military practitioner's alarm when he learns of these limitations on his client's ability to obtain compulsory process. Indeed, even the experienced military counsel may become uneasy when he is reminded of the full impact of the Manual rules. The United States has undertaken to exercise complete and exclusive control over the means by which a military accused may obtain the evidence he requires for his defense. It is a control which is so broad that if enforced literally, it must handicap the accused in the presentation of his case, even in the best of circumstances.

To state the rule is sufficient to raise some doubt as to its propriety, for it appears to strike at the very heart of our adversary concept of justice.²⁰ Such broad authority may well be justified, but it should not be accepted uncritically. Some healthy skepticism is particularly appropriate here as this control is bot-tomed solely on an Executive directive rather than any statute or provision of the Constitution.²¹ This is not to say that further

¹⁸ MCM, 1951, para. 115a; *cf.* *State v. Reyes*, 209 Or. 595, 638, 308 P.2d 182, 197 (1957).

¹⁹ See *United States v. Thornton*, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (1957).

²⁰ Compare, *e.g.*, *Watts v. Indiana*, 338 U.S. 49 (1949); *United States v. Teller*, 13 U.S.C.M.A. 323, 323, 32 C.M.R. 323 (1962).

²¹ Compare *United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962).

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examination will not reveal that the military rule is based on adequate legal precedent and satisfies a real military need; however, it is important that the military services engage in careful self-analysis of their procedures since the limited scope of appellate review by non-military agencies heightens their moral obligation to police their own conduct and refrain from exceeding the limitations of their authority.²² In addition, the several Congressional revisions of our disciplinary articles within the last 40 years, with their attendant criticism of military justice, suggest that there are cogent practical reasons for such self-discipline.²³

Accordingly, further examination of the present military treatment of compulsory process appears to be both a valuable and a valid undertaking. We shall begin our challenge of the present rule with an evaluation of the rules utilized by similarly situated practitioners in civilian courts. An examination of the historical origins, and subsequent development of the military rule is relevant also, for despite the recent statutory revisions, many of our present concepts and procedures are direct descendants of institutions long forgotten, and may be understood only by referring back to them.²⁴ Finally, we shall explore the applicable practical considerations unique to the military environment, and consider the constitutional standards, if any, we must honor.

III. THE CURRENT RULE IN THE FEDERAL COURTS

It may be expected that the reader will soon challenge the basic premise of this article and protest that the military practice concerning compulsory process is not exceptional, but parallels similar procedures in civilian courts. In answer the writer submits that whatever similarity there may be between the military rule and general civilian practice is of a superficial nature. Careful examination reveals that the law in the federal courts, the touch-

²² See *Hearings Pursuant to S. Res. 260 on Constitutional Rights of Military Personnel Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 2d Cong., 2d Sess. 63, 99-103 (1962) [hereinafter cited as *Hearings on Constitutional Rights*].

²³ *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess., No. 37 *passim* (1949) [hereinafter cited as *House Hearings on UCMJ*]; *Hearings on Constitutional Rights*, *supra* note 20, at 200.

²⁴ See Powell, *Some Thoughts On History of the Formative Years As It Relates To Government of the U.S. Army*, May 1961, at 145-47 (unpublished thesis in The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia).

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stone of our military procedure,²⁵ is significantly different from, and substantially more liberal than that in military forums. The same conclusion appears generally true with respect to compulsory process in state courts, although it is not the object of this article to explore state procedures. We may expand upon this by considering the federal rules concerning compulsory process, and those relating to the utilization of depositions, a subject inextricably bound up in the military law relating to process.

A. THE RIGHT TO COMPULSORY PROCESS

1. Witnesses.

Initially, a defendant before an English court charged with an offense more serious than a misdemeanor was not entitled to call witnesses in his own behalf.²⁶ While the prosecutor may have been obliged to call all material witnesses, the injustice inherent in such a one-sided procedure is obvious, and was keenly felt at the time.²⁷ Agitation and a change in the British monarch ultimately remedied the situation, and statutes promulgated less than a century before the ratification of the Constitution extended to all accused the right to call and present witnesses in their defense.²⁸

With this struggle behind them, the American colonists were well aware of the need for guaranteeing accused persons compulsory process, and the absence of such a right was one of the objections noted when the proposed Constitution was first sent to the several states for ratification in 1787.²⁹

These securities for personal liberty thus embodied were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

²⁵ See, e.g., *United States v. Boysen*, 11 U.S.C.M.A. 331, 29 C.M.R. 147 (1960); MCM, 1951, para. 137; UCMJ art. 36.

²⁶ HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 9 (1951); PASCHAL, *THE CONSTITUTION OF THE UNITED STATES* 265 (1868); STEVENS, *SOURCES OF THE CONSTITUTION OF THE UNITED STATES* 231-232 (1894); STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 662-664 (1833); see *State v. Dehler*, 257 Minn. 549, 102 N.W. 2d 696 (1960); cf. *In re Dillon*, 7 Fed. Cas. 710, 712 (No. 3914) (N.D. Calif. 1854).

²⁷ HELLER, *op. cit. supra* note 26; PASCHAL, *op. cit. supra* note 26; STORY, *op. cit. supra* note 26.

²⁸ HELLER, *op. cit. supra* note 26, at 106-107; STORY, *op. cit. supra* note 26.

²⁹ HELLER, *op. cit. supra* note 26; STORY, *op. cit. supra* note 26, at 658.

Time has proven the discernment of our ancestors. . . . Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. . . .³⁰

Among the amendments to the Constitution adopted in response to the general demand for additional safeguards against possible oppressive action by the federal government, was the sixth, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

A statutory right to compulsory process was created in 1790,³¹ a year before the ratification of the sixth amendment.³² However, the legislation pertained only to treason and other capital offenses, and did not afford process to indigent persons so charged,³³ thus in some measure justifying the popular demand for additional constitutional safeguards.

While the sixth amendment apparently created a right to compulsory process in all federal criminal actions, indigent persons were not believed to fall within its protection,³⁴ and it was not until 1846 that penniless accused were permitted to subpoena witnesses at public expense. Their access to such process was severely limited, however, for subpoenas for indigents could not extend outside the district in which the court sat, nor more than 100 miles from the place of trial. Further, they were issued at the discretion of the trial judge, but only after the accused had satisfactorily demonstrated that he was in fact impecunious, and that the witnesses he desired were material to his defense. Even then the trial judge could limit the number of defense witnesses that might be called.³⁵ This statutory plan has been reenacted several times during the intervening years and exists today in a somewhat modified form.

³⁰ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866).

³¹ See ch. 9, § 29, 1 Stat. 119 (1790) (now 18 U.S.C. § 3005 (1958)).

³² 7 ENCYC. AMERICANA 576 (1957).

³³ See *United States v. Fore*, 38 F.Supp. 142 (S.D. Cal. 1941); *cf. Nabb v. United States*, 1 Ct. Cl. 178 (1864).

³⁴ *United States v. Van Duzee*, 140 U.S. 169 (1891).

³⁵ Ch. 98, §11, 9 Stat. 74 (1846) (now FED. R. CRIM. P. 17b); *O'Hara v. United States*, 129 Fed. 551 (6th Cir. 1904).

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It was not deemed necessary until recently to statutorily supplement the right to compulsory process invested in non-indigents by the sixth amendment. The courts honored it generally upon the basis of their general authority to issue process,³⁶ and in accordance with the rule announced by Chief Justice Marshall in *United States v. Burr*:³⁷

So far back as any knowledge of our jurisprudence is possessed, the uniform practice of the country has been to permit any individual who was charged with any crime, to prepare for his defense, and to obtain the process of the court for the purpose of enabling him to do so. This practice is as convenient and as consonant to justice as it is to humanity. It prevents, in a great measure, those delays which are never desirable, which frequently occasion the loss of testimony, and which are often oppressive. . . . The right of an accused person to the process of the court to compel the attendance of witnesses seems to follow, necessarily, from the right to examine those witnesses; and, wherever the right exists, it would be reasonable that it should be accompanied with the means of rendering it effectual. . . . General principles, then, and general practice are in favor of the right of every accused person, so soon as his case is in court, to prepare for his defense, and to receive the aid of the process of the court to compel the attendance of his witnesses.

The Constitution and laws of the United States will now be considered for the purpose of ascertaining how they bear upon the question. The eighth [sic] amendment to the Constitution gives to the accused, "in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor." The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter. . . .

Upon immemorial usage, then, and upon what is deemed a sound construction of the Constitution and law of the land, the court is of opinion that any person charged with a crime in the courts of the United States has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses. Many delays

The right to compulsory process enjoyed by both indigents and non-indigents has recently been codified in Rule 17 of the *Federal Rules of Criminal Procedure*. It may be noted that the scope of the subpoena available to indigents has been broadened, but

³⁶ Ch. 22, § 6, 1 Stat. 335 (1793) (now FED. R. CRIM. P. 17a); see, e.g., *In re Subpoena Duces Tecum*, 248 Fed. 137 (E.D. Tenn. 1916).

³⁷ 25 Fed. Cas. 30 (No. 14692d) (C.C.D. Va. 1807).

³⁸ *Id.* at 32-33.

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that the preliminary burden they must meet has not varied significantly since 1846.³⁹

Federal decisions pertaining to compulsory process are meager, particularly by comparison with the litigation which ebbs and flows around other portions of the Constitution and its amendments. Conceivably, this is because there are few really conflicting social interests involved; it may also be evidence that the right is truly accepted as essential to a fair trial. At any rate, the Supreme Court has never dealt with the issue squarely, although a few of its decisions have touched upon the right in passing. The lower courts have developed the law in an almost off-handed manner, distinguished by an absence of citation and an abundance of dicta, and an eye to the practical aspects of the fact situations before it.

In their interpretation of the sixth amendment, the courts and the Congress have been influenced in a marked degree by the common law development in England. Thus, the right to compulsory process was originally believed to extend only to those who could meet the expenses of their witnesses, and it was felt that indigent persons were excluded from any constitutional

³⁹ FED. R. CRIM. P. 17:

"(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed, and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a commissioner in a proceeding before him, but it need not be under the seal of the court.

"(b) Indigent Defendants. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government."

But see COMMITTEE OF RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, SECOND PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURT rule 17(b) and committee note thereon, at 19-21 (1964). The new rule would permit *indigents* to obtain process on *ex parte* application. No affidavits or other writings would be necessary, and the showing of materiality made to the judge would be *in camera* out of the hearing of the prosecutor. Thus, the judge could protect the public treasury while the prosecutor would be deprived of this pretrial discovery in cases involving indigents as he presently is deprived in cases involving non-indigents.

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protection.⁴⁰ Accordingly, the restriction, by judicial decisions and statutes, upon the efforts of paupers to obtain free compulsory process have been regarded as without constitutional infirmity.⁴¹ However, more recent decisions have indicated that the poor are also entitled to compulsory process,⁴² and have justified the restrictions upon their applications for subpoenas as reasonable measures designed to safeguard the public treasury.⁴³

Unlike his penniless brother, however, it appears that the non-indigent defendant has always been free of any judicial control and scrutiny of his requests for process. The sixth amendment, by its terms, affords him what appears to be an absolute right to purchase the presence of the witnesses he desires to present in his defense.⁴⁴ He is, by statute, now entitled to process issued as a matter of course by the clerk of the court.⁴⁵ The evidence indicates that this has always been the case, and that, with one recorded exception,⁴⁶ judges have not imposed prior restraints upon non-indigent accused, and have never required them to reveal the nature of the testimony they are seeking nor to demonstrate its materiality.⁴⁷ Since such restrictions would patently

⁴⁰ See *United States v. Van Duzee*, 140 U.S. 169 (1891) (*semble*); *United States v. Fore*, 38 F. Supp. 142 (S.D. Cal. 1941); *cf. O'Hara v. United States*, 129 Fed. 551 (6th Cir. 1904); compare *West v. State*, 1 Wis. 209 (1858).

⁴¹ See, *e.g.*, *Meeks v. United States*, 179 F.2d 319 (9th Cir. 1950); *Wallace v. United States*, 174 F.2d 112 (8th Cir. 1949); *cert. denied*, 337 U.S. 947 (1948); *Brewer v. Hunter*, 163 F.2d 341 (10th Cir. 1947); *cf. Reistroffer v. United States*, 258 F.2d 379 (8th Cir. 1958), *cert. denied*, 358 U.S. 927 (1959).

⁴² See, *e.g.*, *Feguer v. United States*, 302 F.2d 214, 240-241 (8th Cir. 1962); *Murdock v. United States*, 283 F.2d 585 (10th Cir. 1960), *cert. denied*, 366 U.S. 953 (1961); *United States v. McGaha*, 205 F.Supp. 949 (E.D. Tenn. 1962); *Reid v. Charney*, 235 F.2d 47 (6th Cir. 1956) (*dictum*).

⁴³ See *Murdock v. United States*, *supra* note 42; *cf. Feguer v. United States*, *supra* note 42; *United States v. McGaha*, *supra* note 42.

⁴⁴ See *State v. Hornsby*, 8 Rob. 554, 559-60 (La. Ct. Err. & App. 1844).

⁴⁵ FED. R. CRIM. P. 17a; 4 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 129 (1951); WHITMAN, FEDERAL CRIMINAL PRACTICE UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE 136-137 (1950); Orfield, *Subpoena in Federal Criminal Procedure*, 13 ALA. L. REV. 1, 7, 42, 56, 87 (1960).

⁴⁶ *May v. United States*, 175 F.2d 994 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 830 (1949) (court refused to issue defense subpoena calling Secretary of State in case involving influence peddling by Chairman of House Committee on Military Affairs unless the defense informed court what testimony would be expected); see *United States v. Kinzer*, 98 F.Supp. 6, 9 (D.C. 1951) (*dictum*). Both cases are distinguished by the absence of any supporting authority.

⁴⁷ *United States v. Burr*, 25 Fed. Cas. 30 (No. 14692d) (C.C.D. Va. 1807); *Holtzoff, The New Federal Criminal Procedure*, 37 J. CRIM. L. & CRIMINOLOGY 111, 115 (1946); see *United States v. Cooper*, 4 U.S. (4 Dall.) 341 (C.C. Penn. 1800); *In re Subpoena Duces Tecum*, 248 Fed. 137 (E.D. Tenn. 1916); *United States v. Seeger*, 180 F.Supp. 467 (S.D.N.Y. 1960); *West v. State*, 1 Wis. 209 (1853); *cf. Homan v. State*, 23 Tex. App. 212, 4 S.W. 575 (1887); *In re Dillon*, 7 Fed. Cas. 710, 713-14 (No. 3914) (N.D. Calif. 1854) (*dictum*).

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deny that an accused has an uncontestable right to pay for his witnesses, their absence is convincing evidence of judicial acquiescence in the existence of such a right. Conceivably, the orderly administrations of justice may permit a witness *who has been served with process* to contest the need for his testimony at a preliminary hearing,⁴⁸ but generally, the need for, and materiality of the testimony of a witness, is a matter to be determined at the trial itself, and not before.⁴⁹

It should be noted that the right to process, of necessity, includes adequate time to serve the desired witness and obtain his physical presence.⁵⁰ Thus, while the right may not be exercised in a manner purposely designed to delay trial,⁵¹ once a timely request has been made, an accused must be given reasonable time, including any necessary continuances, to obtain the presence of his witnesses.⁵²

2. Documents.

Although not specifically mentioned in the sixth amendment, the right to compulsory process has historically been deemed to include the compulsory production of documents desired by the defendant.⁵³ To compel the production of documents, courts have traditionally issued subpoenas duces tecum, either as part of their general authority to subpoena,⁵⁴ or under the "All Writs" act.⁵⁵ The *Federal Rules of Criminal Procedure* represent the first statutory regulation of the subject, and Rule 17c thereof provides:

. . . (c) For Production of Documentary Evidence and of Objects.

A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court

⁴⁸ See *Overholzer v. De Marcos*, 149 F.2d 23 (D.C. Cir.); *cert. denied*, 325 U.S. 889 (1945).

⁴⁹ *United States v. Seeger*, 180 F. Supp. 467 (S.D.N.Y. 1960).

⁵⁰ *Paoni v. United States*, 281 Fed. 801 (3d Cir. 1922).

⁵¹ *Neufeld v. United States*, 118 F.2d 375 (D.C. Cir), *cert. denied sub. nom.*; *Ruben v. United States*, 315 U.S. 798 (1941); see *Bandy v. United States*, 296 F.2d 882 (8th Cir. 1961) (alternative holding), *cert. denied*, 369 U.S. 831 (1962).

⁵² *Paoni v. United States*, 281 Fed. 801 (3d Cir. 1922); *Graham v. State*, 50 Ark. 161, 6 S.W. 721 (1888); *State v. Berkley*, 92 Mo. 41, 4 S.W. 24 (1887); see 22A C.J.S. *Criminal Law*, § 494(2) (1961).

⁵³ See *United States v. Burr*, 25 Fed. Cas. 30 (No. 14692d) (C.C.D. Va. 1807); *In re Subpoena Duces Tecum*, 248 F. 137 (E.D. Tenn. 1916); *In re Dillon*, 7 Fed. Cas. 710 (No. 3914) (N.D. Calif. 1854); *Orfield*, *supra* note 45, at 42.

⁵⁴ See, *e.g.*, *In re Subpoena Duces Tecum*, 248 F. 137 (E.D. Tenn. 1916); *In re Dillon*, 7 Fed. Cas. 710 (No. 3914) (N. D. Calif. 1854).

⁵⁵ *Orfield*, *supra* note 45, at 42.

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may direct that books, papers, documents, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Unfortunately, the production of documentary evidence almost always has some aspect of a discovery proceeding, since even the most legitimate request may pertain to evidence never closely examined before, and will necessitate the inspection and rejection of certain items. Further, there has been an ever-growing tendency in civilian courts to expand the defendant's pretrial discovery of evidence in the hands of the prosecutor and to use subpoenas duces tecum for this purpose. All of this has created a plethora of litigation in the area, and a confusing swirl of decisions has tended to obscure the real constitutional issues involved. It is not the purpose of this article to unscramble the puzzle; it has been attempted by others.⁵⁶ It is sufficient to say that an accused has an absolute right, safeguarded by the sixth amendment, to the ultimate compulsory production of documentary and other physical evidence he needs to present his defense, and that this right extends to matters in the custody of both the prosecutor and third parties.⁵⁷

The two problems at the heart of this right are both procedural. The first concerns the degree to which prior restrictions may be imposed upon the defendant's right to compel production. The inquiry is valid, because the compulsory production of documents cuts deeply into the protections against self-incrimination and unreasonable search and seizure provided by the fourth and fifth amendments. The second problem pertains to the extent to which an accused may inspect documents he has subpoenaed prior to trial, and thus achieve some degree of pretrial discovery.

With respect to controlling the issuance of subpoenas duces tecum, it has been considered the better view to require the defendant to demonstrate only that upon their face the items he desires may have legitimate evidentiary value, and that he is not

⁵⁶ See Orfield, *supra* note 45; Roysden, *Discovery in Federal Criminal Cases: What Must the Government Reveal?* April 1962, (unpublished thesis in The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia).

⁵⁷ See, e.g., *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951); *Christoffel v. United States*, 200 F.2d 734 (D.C. Cir. 1952), *rev'd on other grounds*, 345 U.S. 947 (1952) (memo); *Forgotson, The Jencks Legislation: The Status of the Accused's Federal Discovery Rights*, 38 TEXAS L. REV. 595 (1960); *cf. Edwards v. United States*, 312 U.S. 473 (1940).

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embarked upon a fishing expedition.⁵⁸ He is not required to reveal in detail the nature of the document and its materiality.⁵⁹ Rule 17c provides for the issuance of the subpoena duces tecum as a matter of course, and leaves it to the divulging party to move to quash upon a claim that the subpoena is unreasonable and oppressive.⁶⁰ Even then, the defendant need only show a good faith belief that the documents have legitimate evidentiary value.⁶¹ The final determination of materiality and admissibility is reserved for trial, and the requested documents need not be surrendered until then.⁶²

Inspection prior to trial presents a knottier problem. It appears to be the present view that while a subpoena duces tecum will be granted upon a minimal showing that the items may have evidentiary value, pretrial inspection by comparison will not be permitted without a substantial showing that the items involved are material to the defendant's case.⁶³ The theory behind this view appears to be that such a showing of materiality by a defendant prior to inspection precludes the possibility that the inspection is intended solely as a discovery device.

B. THE RIGHT TO CONFRONT WITNESSES

The term confrontation is generally accepted as describing a compound right which all accused in federal criminal proceedings enjoy to require that prosecution evidence which may be proven by the oral testimony of witnesses be so proved at trial, to face and cross-examine such prosecution witnesses at trial, and to have the triers of fact observe and evaluate such witnesses.⁶⁴ It was developed to preclude the use of ex parte depositions and affidavits as evidence⁶⁵—a common practice in early

⁵⁸ See *United States v. Burr*, 25 Fed. Cas. 30 (No. 14692d) (C.C.D. Va. 1807); *United States v. Jannuzzio*, 22 F.R.D. 223 (D. Del. 1958); cf. *Kelly v. United States*, 73 A.2d 232 (D.C. Mun. Ct. App. 1950), *rev'd on other grounds*, 194 F.2d 150 (D.C. Cir. 1952).

⁵⁹ *United States v. Burr*, *supra* note 58 at 35; *In re Subpoena Duces Tecum*, 248 Fed. 137 (E.D. Tenn. 1916); cf. *Kelly v. United States*, *supra* note 58.

⁶⁰ See *United States v. Van Allen*, 28 F.R.D. 329 (S.D.N.Y. 1961); *Orfield*, *supra* note 45, at 42-45.

⁶¹ *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1950); *United States v. Jannuzzio*, 22 F.R.D. 223 (D. Del. 1958).

⁶² *E.g.*, *United States v. Wortman*, 26 F.R.D. 183 (E.D. Ill. 1960); *United States v. Jannuzzio*, *supra* note 61; *United States v. Bennethum*, 21 F.R.D. 227 (D. Del. 1957).

⁶³ See note 62 *supra*.

⁶⁴ See *Dowdell v. United States*, 221 U.S. 325 (1911); *Kirby v. United States*, 174 U.S. 47 (1899).

⁶⁵ See *Dowdell v. United States*, 221 U.S. 325 (1911).

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England.⁶⁶ The right was recognized at common law subject to several exceptions which permitted the use of testimony offered at an earlier time, providing the accused had been afforded the opportunity to cross-examine.⁶⁷ The exceptions were based on necessity and permitted the introduction of former testimony or depositions in circumstances where the witness had subsequently died,⁶⁸ become insane,⁶⁹ was too ill to be moved,⁷⁰ or had been kept away by the accused.⁷¹

The right to confrontation did not appear in the original Constitution, but it was subsequently added as the result of popular outcry.⁷² Several authors insist that the right to confrontation was firmly imbedded in the common law at the time, and profess surprise at the demand for the specific safeguard.⁷³ However, the right was not fixed in the common law until the period 1660-1695,⁷⁴ and the American colonists may be deemed to have exercised commendable caution in this matter.⁷⁵

Professor Wigmore viewed the right to confrontation as basically an almost immutable guarantee of the right to cross-examine at some time before or during trial, and a secondary right to have the witness viewed by the triers of fact.⁷⁶ The latter was desirable, but not necessary, and it bowed to the requirements of necessity.⁷⁷ The Wigmore analysis has the effect of justifying the creation of new exceptions to the right to confrontation so long as the accused is permitted to cross-examine on some occasion. It has received wide support in state⁷⁸ and military⁷⁹ circles.

⁶⁶ See *West v. Louisiana*, 194 U.S. 258 (1903); *Mattox v. United States*, 156 U.S. 237 (1895); *cf. Motes v. United States*, 178 U.S. 458 (1899) (absence of living witness must have been caused by defendant).

⁶⁷ See 5 WIGMORE, EVIDENCE, § 1364 (3d ed. 1940).

⁶⁸ See *Mattox v. United States*, 156 U.S. 237 (1895).

⁶⁹ *West v. Louisiana*, 194 U.S. 258, 264 (1903) (dictum).

⁷⁰ See *Ibid.*

⁷¹ See *Motes v. United States*, 178 U.S. 458 (1899).

⁷² 3 STORY, *op. cit. supra* note 26.

⁷³ See 3 STORY, *op. cit. supra* note 26; STEVENS, *op. cit. supra* note 26.

⁷⁴ 5 WIGMORE, *op. cit. supra* note 67.

⁷⁵ See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119-21 (1866).

⁷⁶ See 5 WIGMORE, *op. cit. supra* note 67, §§ 1365, 1377, 1395, 1397. *But cf. State v. Berkley*, 92 Mo. 41, 4 S.W. 24 (1887).

⁷⁷ *Id.* at §§ 1396, 1402.

⁷⁸ See 14 AM. JUR. CRIMINAL LAW § 184 (1938); 16 AM. JUR. DEPOSITIONS § 13 (1938); Annot. 90 A.L.R. 377.

⁷⁹ *Cf. United States v. Parrish*, 7 U.S.C.M.A. 337, 22 C.M.R. 127 (1956); *United States v. Sutton*, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953). *But cf. United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960) (overruling *Sutton* and *Parrish*, *supra*). Professor Wigmore emphasized that in all cases the statement introduced as an exception to the confrontation rule

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In the federal system, however, the scope of confrontation, and the exceptions thereto, have been regarded as fixed as it existed at common law at the time of the adoption of the sixth amendment.⁸⁰ It appears that the prosecution has never been authorized by Congress to take or introduce depositions;⁸¹ the reported cases have all dealt with prosecution evidence presented in the form of prior testimony or testimony adduced at a preliminary hearing.⁸² Accused were not permitted to take depositions prior to 1882,⁸³ and even then, the statutory authority for such depositions was disputed until the adoption of the *Federal Rules of Criminal Procedure*.⁸⁴ Rule 15 now provides:

(a) When Taken. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness. . . .

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity;

must be given before an official authorized to compel attendance and answers to cross-examination, 5 WIGMORE, *op. cit. supra* note 67, §§ 1373, 1376. This requirement has sometimes been relaxed, *United States v. Eggers*, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953) (prior testimony before Article 32 investigating officer).

⁸⁰ See *Salinger v. United States*, 272 U.S. 542 (1926); *Mattox v. United States*, 156 U.S. 237 (1895).

⁸¹ See *United States v. Cameron*, 15 Fed. 794 (C.C.E.D. Mo. 1883); *FED. R. CRIM. P.* 15a; 4 BARRON AND HOLTZOFF, *op. cit. supra* note 45, at 118; Orfield, *Depositions in Federal Criminal Procedure*, 9 S.C.L.Q. 376, 383 (1956); *cf. Blackmer v. United States*, 49 F.2d 523 (D.C. Cir. 1931), *aff'd*, 284 U.S. 421 (1932); *United States v. Haderlein*, 118 F. Supp. 346 (N.D. Ill. 1953).

⁸² Note as an exception to this general rule the statute authorizing either party to a criminal action to utilize commissions to prove the genuineness of foreign documents. Either oral or written interrogations may be employed. 18 U.S.C. §§ 3492, 3493, 3494 (1958).

⁸³ See Orfield, *supra* note 81; *United States v. Wilder*, 14 Fed. 303 (C.C.S.D. Ga. 1882); *cf. United States v. Cameron*, 15 Fed. 794 (C.C.E.D. Mo. 1883).

⁸⁴ See *Luxenberg v. United States*, 45 F.2d 497 (4th Cir. 1930), *cert. denied*, 283 U.S. 820 (1931).

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or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

The enumerated circumstances permitting the introduction of defense depositions do not raise constitutional questions, since they pertain to defense witnesses in chief; nevertheless, district courts have been reluctant to permit their use.⁸⁵

The exceptions to the accused's right to confrontation of prosecution witnesses are not set forth in any United States statute, but are part of the substantial body of precedents which federal courts have created in the evidentiary area.⁸⁶ The federal courts have judicially limited exceptions to confrontation to circumstances where, subsequent to testifying at a trial or preliminary hearing, the witness has died, become insane, is too ill to testify, or has been induced to leave or hide by the accused.⁸⁷ Dying declarations and collateral documentary evidence are also considered to be exceptions.⁸⁸ Expressly rejected as exceptions to the rule have been situations where the witness has left the jurisdiction of the court and is still living,⁸⁹ and where the witness cannot be found, but it does not appear that the defendant caused his disappearance.⁹⁰

By comparison, it appears that Congress, in the *Uniform Code of Military Justice*⁹¹ has chosen to permit military courts to recognize a greater number of exceptions to the confrontation rule than are honored in the federal courts, and the use of depositions by the prosecution as well as the defense has been authorized.

⁸⁵ See, e.g., *United States v. Soblen*, 203 F. Supp. 642 (S.D.N.Y. 1961), *aff'd*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962); *United States v. Grado*, 154 F. Supp. 878 (W.D. Mo. 1957); *United States v. Glesing*, 11 F.R.D. 501 (D. Minn. 1951).

⁸⁶ Compare *Fed. R. Crim. P.* 26.
⁸⁷ See notes 66-82 *supra* and text accompanying.

⁸⁸ See *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (dictum); *Kirby v. United States*, 174 U.S. 47, 61 (1898) (dictum); *Mattox v. United States*, 156 U.S. 237, 243-44 (1895) (dictum); *cf. Salingger v. United States*, 272 U.S. 542 (1926).

⁸⁹ See *United States v. Angel*, 11 Fed. 34 (C.C.D. N. Hamp. 1881); *but cf. Territory v. Gusman*, 86 Hawaii 42 (1942); *Kemp v. Govt. of Canal Zone*, 167 F.2d 938 (5th Cir. 1948). The precise issue was waived in both of the latter cases.

⁹⁰ See *Notes v. United States*, 178 U.S. 458 (1899).
⁹¹ USMJ art. 49.

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It seems fair to conclude from the foregoing that the rules relating to compulsory process employed in federal courts differ from those utilized by military forums in four aspects. Two are substantive in nature, and two are procedural. With respect to the substantive law, we have seen that—

1. Unlike military courts, federal courts accord to non-indigent accused an absolute right to compulsory process, unqualified by any requirement that they first reveal to the prosecutor the nature of the testimony they expect.
2. Federal courts have placed constitutional limits on the use of depositions which are substantially narrower than those set forth in the *Uniform Code of Military Justice*. Further, the prosecution is presently not permitted to utilize depositions at all.

The procedural differences noted are:

1. Accused who seek subpoenas duces tecum are entitled to the writ as a matter of course, and need only justify their request if the surrendering party moves to quash. Even then, only a minimal showing of justification need be made to justify production at trial, as distinguished from pretrial inspection.
2. Unlike his military counterpart, the federal prosecutor has no official role in determining whether any accused's application for subpoena or subpoena duces tecum will be granted.

Are these differences significant? One would be hard put to support any other conclusion. Considered separately, the first three give the defendant in a federal court a tactical advantage the military accused does not enjoy. Taken together, these differences reflect a completely different philosophy, one which affords a non-indigent accused, and in some respects all accused, maximum freedom in the acquisition of evidence, and which does not give to those reasonable for prosecuting him the discretion to decide whether he may have that evidence.

Thus, we may say that the military practice of controlling process does not find any support in federal court procedures; but such a conclusion does not of itself justify a judgment that the military procedure must be modified. The legality of military rules does not necessarily depend upon their conformity with federal practice, and, more important at this stage of our inquiry, military practice may well be the product of practical problems which federal courts need not resolve. Let us consider next then, the history of the military rule.

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IV. THE HISTORY OF THE MILITARY RULE

A close logical relationship exists between the compulsory appearance of witnesses and the utilization of substitutes such as depositions and former testimony. They are, after all, merely opposite aspects of the same problem—the presentation of evidence to the triers of fact. The connection is not readily manifest in the civilian development of the law relating to confrontation and compulsory process, probably because of the related constitutional prohibitions. It is, however, apparent in the development of these doctrines in military jurisprudence.

The Articles of War did not initially contemplate the compulsory production of witnesses before courts-martial, nor did they authorize the use of depositions.⁹² Congress gave some attention to these matters in 1779 when, by resolution, it permitted the use of depositions taken on oral interrogatories in non-capital cases and recommended that the various states promulgate legislation compelling civilians to appear as witnesses before courts-martial upon application of a judge advocate.⁹³ Unfortunately, this was Congress' last word upon the question of compulsory process until 1863. Until the latter date courts-martial were unable to compel civilian witnesses to appear before them.⁹⁴ Congress evinced a greater interest in depositions, however, and formally amended the Articles of War in 1786 to provide for their use.⁹⁵ A substantially identical provision was included in the Articles of War in 1806.⁹⁶ Both statutes contemplated that the testimony of only non-Army witnesses could be so presented, required that the depositions be taken orally with the accused present, and admitted them only in non-capital cases.⁹⁷ It appears that the depositions so authorized were utilized whenever the desired civilian witness would not voluntarily appear. Former testimony was utilized in the same circumstances, and both depositions and former testi-

⁹² See Resolution of September 20, 1776, 1 JOURNALS OF THE AMERICAN CONGRESS 482 (1823).

⁹³ See Resolution of November 16, 1779, 3 JOURNALS OF THE AMERICAN CONGRESS 392 (1823).

⁹⁴ 9 OPS. ATT'Y GEN. 311 (1859); DE HART, OBSERVATIONS ON MILITARY LAW 152-153 (1862); WINTHROP, MILITARY LAW AND PRECEDENTS 200-201 (2d ed. rev. 1920). *Contra*, MACOMB, A TREATISE ON MILITARY LAW AND COURTS-MARTIAL 141 (1809).

⁹⁵ See Resolution of May 31, 1786, as printed in CALLAN, THE MILITARY LAWS OF THE UNITED STATES 78-83 (1863).

⁹⁶ Articles of War of 1806, art. 74, ch. 20, 2 Stat. 368.

⁹⁷ See 2 OPS. ATT'Y GEN. 344 (1830); BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 126 (6th ed. 1868); DE HART, *op. cit. supra* note 94. *Contra*, O'BRIEN, A TREATISE ON AMERICAN MILITARY LAWS AND THE PRACTICE OF COURTS-MARTIAL 186 (1846).

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mony were admitted when the witness was dead.⁹⁸ The problem was somewhat circular, however, as courts-martial were powerless to compel a witness to appear and render a deposition before the proper civilian authority.⁹⁹

Since Congress chose to take remarkably little interest in the manner in which courts-martial were to procure necessary evidence, military authorities promulgated the necessary procedures administratively.¹⁰⁰ While civilian witnesses remained an unsolved problem, authority over military witnesses was unquestioned, and they were considered to be under a duty to testify when properly summoned.¹⁰¹ There is no evidence that the military accused's right to summon witnesses in his defense was ever questioned, at least in principle.¹⁰² Macomb indicates that initially the accused and the judge advocate each summoned their witnesses separately.¹⁰³ It does not appear that any officer was vested with authority to review and reject the accused's requests for witnesses.¹⁰⁴ The parties also exchanged their witness lists in advance to avoid general surprise and delay.¹⁰⁵ Later, however, they gave their lists to the court-martial on the day of the trial.¹⁰⁶ The necessary expenses of the military witnesses were borne by the United States;¹⁰⁷ however, it was apparently not unusual for accused to bear the expenses of their witnesses.¹⁰⁸

This procedure changed at some time no later than 1857.¹⁰⁹ The Army Regulations published that year charged the judge advocate with responsibility for procuring all the necessary witnesses and forbade him from obtaining any witness at the expense of

⁹⁸ See BENET, *op. cit. supra* note 97, at 310-11; DE HART, *op. cit. supra* note 94, at 379; MACOMB, *op. cit. supra* note 94, at 126; O'BRIEN, *op. cit. supra* note 97.

⁹⁹ 9 OPS. ATT'Y GEN. 311 (1859).

¹⁰⁰ This was done by texts, general orders issued by military departments, and Army Regulations. The first *Manual for Courts-Martial* was promulgated in 1895. See DIG. OPS. JAG 1901, App. A, ch. IV, p. 747. The first *Manual* promulgated by authority of the President appeared in 1921.

¹⁰¹ MACOMB, *op. cit. supra* note 94, at 138.

¹⁰² Colonel Wiener relates an anecdote to this effect. Wiener, *Courts-Martial and The Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 283-284 (1958).

¹⁰³ See MACOMB, *op. cit. supra* note 94, at 138-139, 172-173.

¹⁰⁴ See MACOMB, *op. cit. supra* note 94, at 138-139; *id.*, THE PRACTICE OF COURTS-MARTIAL 82-83 (1840); O'BRIEN, *op. cit. supra* note 97, at 281-282.

¹⁰⁵ See MACOMB, *op. cit. supra* note 94, at 172.

¹⁰⁶ O'BRIEN, *op. cit. supra* note 97, at 282.

¹⁰⁷ MACOMB, *op. cit. supra* note 94, at 139.

¹⁰⁸ See O'BRIEN, *op. cit. supra* note 97, at 258.

¹⁰⁹ See Army Regs. para. 871 (1857). But not much before 1857. Compare Army Regs. para. 871, *supra*, with O'BRIEN, *op. cit. supra* note 97, MACOMB, THE PRACTICE OF COURTS-MARTIAL 82-83 (1840), and Army Regs., *passim* (1847).

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the United States, or any officer of the Army, unless satisfied that his testimony was material and necessary to the ends of justice. It was said that charging the judge advocate with the duty of obtaining the prisoner's witnesses insured that they would be properly called and present at the trial.¹¹⁰ Investing the judge advocate with the discretion to reject the accused's requests was necessary, because accused, under the pressure of the charges, sometimes desired witnesses whose testimony was not relevant or was cumulative.¹¹¹ The judge advocate's decision could be appealed to the court-martial.

The Civil War brought about a substantial change in this procedure. Pursuant to Section 25, Sundry Civil Appropriation Act of 1863, every judge advocate of a court-martial could issue compulsory process,¹¹² and Section 27 of the Enrollment Act permitted the depositions of witnesses residing beyond the limits of the state, territory, or district in which the court-martial sat to be utilized in non-capital cases.¹¹³ The congressional design is somewhat obscure. Congress did not debate the process statute, and discussion of the deposition provision was limited to some general criticism of the limitation on the right to confrontation which it effected.¹¹⁴ The latter was of particular significance at this time because another provision of the Enrollment Act extended the jurisdiction of courts-martial to include rape, murder, aggravated assault, robbery, and a number of other felonies, which theretofore had been prosecuted only in civilian courts.¹¹⁵ Military authorities, accordingly, were left with great discretion in administering these provisions and over the years developed policies which are still with us.

Whatever the originally contemplated meaning of the 1863 deposition statute, it was soon administratively determined that it encompassed the depositions of both military and civilian witnesses¹¹⁶ and permitted written interrogatories as well.¹¹⁷ The

¹¹⁰ See DE HART, *op. cit. supra* note 94, at 84.

¹¹¹ See BENET, *op. cit. supra* note 97, at 74; DE HART, *op. cit. supra* note 94, at 85.

¹¹² Ch. 79, § 25, 12 Stat. 754 (1863). This may have legalized a practice Army commanders had already improvised. See DIG. OPS. JAG 1868, *Witness* paras. 9, 14.

¹¹³ Ch. 75, § 27, 12 Stat. 736 (1863).

¹¹⁴ See CONG. GLOBE, 37th Cong., 3d Sess. 1256 (1862-1863).

¹¹⁵ See Reid v. Covert, 354 U.S. 1, 23-24 n. 42 (1957); Caldwell v. Parker, 252 U.S. 376 (1920); Coleman v. Tennessee, 97 U.S. 509 (1879).

¹¹⁶ See DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 295 (1st ed. 1898); U.S. WAR DEPT., A MANUAL FOR COURTS-MARTIAL 87 (1901) [hereinafter cited as MCM, 1901]; WINTHROP, *op. cit. supra* note 94, at 352. *Contra*, BENET, *op. cit. supra* note 97, at 126.

¹¹⁷ See DAVIS, *op. cit. supra* note 116, at 296; DUDLEY, MILITARY LAW AND

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process statute was interpreted as authorizing the subpoena and attachment of any civilian witness found anywhere within the federal jurisdiction.¹¹⁸ Construed together, these two statutes gave the judge advocate discretion as to the manner in which he would present the testimony of both civilian and military witnesses located outside the state, district or territory in which the court-martial was sitting.¹¹⁹ This discretion encompassed the accused's witnesses also. Army Regulations provided that the judge advocate would obtain all witnesses, both prosecution and defense, and that he would not obtain witnesses at the expense of the United States unless satisfied they were material and necessary.¹²⁰ Further, by exercising what they apparently considered to be their inherent authority to issue process, military authorities undertook to require accused to present the testimony of their defense witnesses by deposition, and refused process out-of-hand on a few occasions for other reasons. Thus was developed the far-reaching policy of denying the personal appearance of those defense witnesses whose testimony might be presented by deposition, if honoring the request would result in delaying the trial¹²¹ or prejudicing the public interest or military service because of the absence of the witness from his normal duties,¹²² or extraordinary expense or embarrassment to the military service.¹²³ Written interrogatories were used in almost every such case.¹²⁴ Requests for witnesses who were reported to have been disloyal or rebels occasionally were denied on those grounds alone.¹²⁵ It was contemplated that the expenses of all witnesses, civilian and military,

THE PROCEDURE OF COURTS-MARTIAL 123 (3d ed. rev. 1910); WINTHROP, *op. cit. supra* note 94, at 355.

¹¹⁸ See DIG. OPS. JAG 1895, *Witness* para. 12; DIG. OPS. JAG 1868, *Witness* para. 17; BENET, *op. cit. supra* note 97, at 127; WINTHROP, *op. cit. supra* note 94, at 201-202.

¹¹⁹ But not if the witness is located within those geographical limits, except by consent of the parties, DIG. OPS. JAG 1912, *Articles of War*, para. XCI, K (July 1879; Nov. 1895; Nov. 1906; June 1907; June 1908); MCM, 1901, at 162 n. 1.

¹²⁰ See Army Regs. para. 922 (1895); DUDLEY, *op. cit. supra* note 117, at 107-108; MCM, 1901, at 24, 33; WINTHROP, *op. cit. supra* note 94, at 188-189. See also, U.S. WAR DEP'T, A MANUAL FOR COURT-MARTIAL (1905) [hereinafter cited as MCM, 1905]; U.S. WAR DEP'T, A MANUAL FOR COURT-MARTIAL (rev. ed., 1908) [hereinafter cited as MCM, 1908].

¹²¹ See DIG. OPS. JAG 1895, *Witness* para. 9.

¹²² See DIG. OPS. JAG 1895, *Witness* para. 10, Ninety-First Article para. 2; DIG. OPS. JAG 1868, *Witness* para. 15; DAVIS, *op. cit. supra* note 116 at 295; WINTHROP, *op. cit. supra* note 94, at 352.

¹²³ See WINTHROP, *op. cit. supra* note 94, at 188.

¹²⁴ See MCM, 1908; DAVIS, *op. cit. supra* note 116 at 295; DUDLEY, *op. cit. supra* note 117, at 264; MCM, 1901, at 37-38; MCM, 1905; WINTHROP, *op. cit. supra* note 94, at 355. Oral interrogatories were not mentioned until 1921.

¹²⁵ See DIG. OPS. JAG 1868, *Witness* paras. 16, 24, 25.

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would be paid by the United States.¹²⁶ These practices were apparently not considered by Congress when it appropriated the 1863 provisions into permanent law.¹²⁷

Towards the turn of the century some doubt arose that the judge advocate's authority to subpoena extended past the boundaries of the district, territory, or state in which the court-martial sat.¹²⁸ Thus, depositions once more became a necessary extension of the arm of the court-martial rather than an alternate means of acquiring evidence. Unfortunately, the process limitation meant that witnesses could not be compelled to appear before deposing officers,¹²⁹ and the military courts were returned to the situation as it existed before 1863. The loss was only partial, however, because military witnesses could be compelled to appear, and the statute was still interpreted as permitting their depositions.¹³⁰

This situation was remedied in 1916 when the revised Articles of War extended the authority of the judge advocate until it was co-equal with the limits of general federal jurisdiction, and provided punishment for a failure to appear or testify before a military court by deposing officer. In addition, the statute expanded the grounds for admitting depositions into evidence to basically what the Code reflects today.¹³¹ Thus, the prosecutor could once

¹²⁶ See Army Regs. para. 963 (1895); DIG. OPS. JAG 1868, *Witness* paras. 4-6; DIG. OPS. JAG 1895, *Witness* paras. 21, 34; DUDLEY, *op. cit. supra* note 117, at 108-109, 531-532; SCOTT, AN ANALYTICAL DIGEST OF THE MILITARY LAWS OF THE UNITED STATES 287 n. 16c (1873); WINTHROP, *op. cit. supra* note 94, at 203.

¹²⁷ See REV. STAT. § 1202 (1875); Articles of War of 1874, art. 91, REV. STAT. § 1342 (1875).

¹²⁸ See *Hearings on S. 3191 Before the Subcommittee on Military Affairs, United States Senate*, 64th Cong., 1st Sess. 30 (1916) [hereinafter cited as *Hearings on AW 1916*]; MCM, 1901, at 37; DAVIS, *op. cit. supra* note 116, at 248; DUDLEY, *op. cit. supra* note 117, at 110. *Contra*, DIG. OPS. JAG 1895, p. 758 n. 1.

¹²⁹ See *Hearings on AW 1916, supra* note 128, at 53.

¹³⁰ See MCM, 1901, at 37-39. The following procedure was generally announced in the foregoing publication:

- a. The judge advocate was responsible for obtaining all witnesses.
- b. He would not obtain a witness at the expense of the United States, without an order of the court, unless satisfied that the witness was material and necessary.
- c. The testimony of *all* witnesses located outside the state, district, or territory in which the court-martial was sitting, both military and civilian, was normally presented by depositions taken on written interrogatories.
- d. In capital cases, and all others where the judge advocate would certify that the interests of justice demanded that the witness testify before the court-martial, he could subpoena the witnesses. Military witnesses would be required to attend wherever stationed.

¹³¹ See Articles of War of 1916, arts. 22, 23, 25, ch. 419, § 3, 39 Stat. 654-655 (1916).

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more choose the form in which he could present his evidence to the court, either by deposition or live witnesses. There is no evidence that Congress demonstrated any interest in the military compulsory process practice, and it appears to have largely assumed the need for depositions.¹³²

The 1917 *Manual for Courts-Martial*,¹³³ which implemented the statute, did not depart from the prior Army views relating to compulsory process. The judge advocate was responsible for summoning all witnesses, and would not summon witnesses at the expense of the United States unless satisfied that the witness' testimony was material and relevant.¹³⁴ Defense witnesses would usually be summoned, however. Apparently the judge advocate was also empowered to determine whether a witness for either party was so essential that he should testify in person instead of by deposition.¹³⁵ An appeal to the convening authority or court-martial was authorized, and former testimony was formally recognized as admissible,¹³⁶ apparently for the first time,¹³⁷ when the witness was dead or beyond the reach of process, and his personal attendance could not be obtained. As in all subsequent Manuals, the payment of all witness fees by the United States was contemplated.¹³⁸

The 1920 revision of the Articles of War did not effect any changes in the law relating to the subjects we are examining. The 1921 revision of the Manual, however, reflected a measure of the reform which had produced the new statute. Thus, while the judge advocate still procured them, the accused was for all practical purposes guaranteed the personal presence of *all* his requested witnesses.¹³⁹ Further, oral depositions were officially authorized. Reform was short-lived, however, and in 1928 the Manual was again revised.¹⁴⁰ Once again the trial judge advocate had the discretion to reject the accused's requests for a witness "where there is reason to believe that the testimony of a witness so requested would be immaterial or unnecessary, or that a deposition

¹³² See *Hearings on AW 1916*, *supra* note 128, at 35, 54-55.

¹³³ *Manual for Courts-Martial, United States Army, 1917* [hereinafter cited as MCM, 1917].

¹³⁴ See MCM, 1917, para. 161.

¹³⁵ See MCM, 1917, para. 165.

¹³⁶ See MCM, 1917, para. 275.

¹³⁷ Compare DIG. OPS. JAG 1912, *Discipline*, para. XI A.13 (1865).

¹³⁸ See MCM, 1917, paras. 163, 172, 184-185, 189, 193.

¹³⁹ See *Manual for Courts-Martial, United States Army, 1921*, paras. 159, 161, 165.

¹⁴⁰ See *Manual for Courts-Martial, United States Army, 1928* [hereinafter cited as MCM, 1928].

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would fully answer the purpose and involve less expense or inconvenience. . . ." ¹⁴¹ In 1946 Congress took a belated interest in the accused's right to compulsory process, an interest that produced a 1948 amendment to the Articles of War which provided that witnesses for the defense would be subpoenaed upon request of the defense counsel in the same manner as witnesses for the prosecution. ¹⁴² This was apparently not regarded as modifying the existing practice, as the process provisions of the 1949 Manual did not depart in significant detail from those of its predecessor. ¹⁴³

Finally, in 1951, Congress rewrote the process article to guarantee both parties equal opportunity to obtain witnesses. ¹⁴⁴ But, it was not overly interested in the mechanics of the procedure and left this to the President. ¹⁴⁵ Again, the present Manual does not indicate that Congress contemplated any procedural changes. Its provisions reflect basically the past views as to compulsory process. ¹⁴⁶ Its drafters have advised us that such restrictions are necessary to prevent arbitrary and unreasonable requests for defense witnesses and to excuse witnesses who should not be required to attend personally because of distance or position. ¹⁴⁷

Change eventually came to the military practice, however, through the medium of the United States Court of Military Appeals. That body has had occasion to examine the military process and deposition procedure in a number of cases. While the general practice of requiring the accused to obtain his witnesses through the trial counsel has been approved, ¹⁴⁸ the court has modified the Manual somewhat by guaranteeing to the accused the physical presence of *all* material defense witnesses. ¹⁴⁹ More recently, the court determined that the accused must be permitted to be physically present and to cross-examine at deposition proceedings. ¹⁵⁰

Several conclusions stand out in this long development. At the outset it is patent that Congress' lack of interest in military pro-

¹⁴¹ MCM, 1928, para. 97. In such a circumstance the matter might be referred to the convening authority or court-martial.

¹⁴² Articles of War of 1920, art. 22, as amended, ch. 625, § 213, 62 Stat. 630 (1948).

¹⁴³ See Manual for Courts-Martial, United States Army, 1949, para. 105 [hereinafter cited as MCM, 1949].

¹⁴⁴ See UCMJ art. 46.

¹⁴⁵ See H.R. REP. NO. 491, 81st Cong., 1st Sess. 24 (1949); S. REP. NO. 486, 81st Cong., 1st Sess. 21 (1949).

¹⁴⁶ See MCM, 1951, para. 115.

¹⁴⁷ See U.S. Dep't of Defense, Legal and Legislative Basis, Manual for Courts-Martial, United States, 99 (1951, 1958 reprint) [hereinafter cited as Legal and Legislative Basis].

¹⁴⁸ See *United States v. Harvey*, 8 U.S.C.M.A. 538, 25 C.M.R. 42 (1957).

¹⁴⁹ See *United States v. Thornton*, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (1957).

¹⁵⁰ See *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

cedure left the Army with little choice but to develop its own rules administratively. These policies, such as the acquisition of all witnesses by trial counsel, the discretion to deny defense requests for witnesses considered unnecessary, and the assumption that the United States would pay for the expenses of all witnesses, have been perpetuated, once more administratively, until today they have an aura of age which makes them appear self-evident. Yet, despite their long history, they remain nothing but administrative practices, their true origin obscured by time. Congress has for the most part never completely comprehended their significance, has never fully tested their present worth, and has ignored them more than it has approved of them. It would not be fair to regard their long existence as evidence of a legislative design, nor as anything but an Executive assessment of their value.

Secondly, there has been a general failure to distinguish the initial need for depositions from their value in a modern environment. It is obvious that in their early years courts-martial could not have functioned without depositions, and that they made available evidence which was otherwise inaccessible. It is even true that this condition existed in part between the Civil War and 1916. But all this changed when, in the latter year, courts-martial received full authority to compel the presence of witnesses and other evidence. Since that date, one could argue with increasing effectiveness that depositions were not necessary but merely convenient. Yet, over these years, Congress has steadily broadened the scope of the use of depositions without requiring the services to offer any factual support for their increased utilization, with the result that today the conviction that they are needed is based more on speculation than on recorded fact.

Finally, with the exception of the statutory limitation which created the need for depositions, examination has revealed no facts so unique that military courts could have adopted no other solution to the problem of compulsory process than that which we have considered here. While a detailed examination of the reasons advanced in support of the military practice will be made later, it seems worthwhile to note that the general problems faced by military courts with respect to compulsory process were basically no different than those which frustrated civilian courts, and they could have been solved in the same way. Indeed, they were so treated until the middle of the 19th century. When, at that time, the practice we have traced was adopted, it seems fair to conclude that the decision was bottomed on administrative convenience rather than factual need.

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V. EVALUATION OF THE MILITARY RULE

We have seen that there are essential differences between the military and civilian rules pertaining to compulsory process and confrontation, and that the federal rules afford accused persons substantial advantages not permitted by their military counterparts. We have seen also that the military rule as to compulsory process has been developed and promulgated administratively, is not founded upon any readily apparent unique need, and has never been fully evaluated by Congress. Finally, upon its face, it appears to directly conflict with the congressional desire that the accused and the prosecution have equal opportunity to obtain witnesses.

Our examination of the development of the military confrontation practice has revealed that a real need existed, initially, for the use of depositions and former testimony because of the limited ability of courts-martial to compel the attendance of non-military witnesses. However, the need for the present broad authority to substitute depositions for live witnesses has never really been documented.

The basic question remains, however. Assuming *arguendo* that the military practice is not the model we desire, or believed it to be, is it so defective that it must be changed? What criteria should be utilized in resolving this question? Three tests come to mind.

We may consider whether the military practice is constitutional. This determination is not novel or unfounded. It is true that it was long asserted by military scholars and the federal courts that the constitutional safeguards in the Bill of Rights did not apply to military courts.¹⁵¹ However, this contention was necessarily based upon policy considerations, since only one portion of the Bill of Rights specifically authorized courts-martial to disregard the individual safeguards it created.¹⁵² It was tenable, and palatable, only as long as the armed services remained small, and were composed of volunteer professional soldiers. However, in the past 25 years a large part of our male

¹⁵¹ See, e.g., *Ex parte Benton*, 68 F. Supp. 808 (N.D. Calif. 1945); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 136-42 (1866) (concurring opinion); WINTHROP, *op. cit. supra* note 94, at 165 n. 38, 287 n. 27, 398; Carbaugh, *The Separateness of Military and Civil Jurisdiction—A Brief*, 9 J. CRIM. L. & CRIMINOLOGY 571 (1918); Connor, *Hearsay in Military Law*, 30 VA. L. REV. 462, 475, 476 (1944); cf. *Dynes v Hoover*, 61 U.S. (20 How.) 65, 79 (1858).

¹⁵² An excellent example of this approach may be found in *Ex parte Milligan*, *supra* note 151.

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population has experienced military service, and it appears that this situation will continue indefinitely. It has become increasingly difficult to convince the growing ranks of citizen soldiers that they must surrender their constitutional rights during the period of their military service.¹⁵³ This has stimulated a counter-vailing notion which has caused the courts concerned with the problem, if not the military authorities,¹⁵⁴ to relax their prior view to some extent.¹⁵⁵

The United States Court of Military Appeals has adopted a more liberal approach and has determined that members of the armed forces are entitled to all the protections of the Bill of Rights, except those that are expressly or by necessary implication inapplicable.¹⁵⁶ It has, moreover, specifically held that the right to confrontation guaranteed by the sixth amendment is applicable to trials by court-martial.¹⁵⁷ One can find no reason for reaching a different conclusion with respect to that portion of the same amendment which guarantees compulsory process.

The utility of the present rule seems a valid consideration. Say what we will about the independence of the military judicial system, it seems obvious that it cannot afford to act arbitrarily. If accused persons are deprived of rights or advantages they enjoy in federal courts, and probably elsewhere, the services must demonstrate a counterbalancing need for the limitations they have imposed, and the advantage thereby given to the prosecution.

¹⁵³ See, e.g., Antieau, *Courts-Martial and the Constitution*, 33 MARQ. L. REV. 25 (1949); Farmer and Wels, *Command Control—Or Military Justice?*, 24 N.Y.U.L. REV. 263 (1949); Keffe and Moskin, *Codified Military Injustice*, 35 CORNELL L.Q. 151 (1949); Re, *The Uniform Code of Military Justice*, 25 ST. JOHN'S L. REV. 155 (1951). The ground swell began in 1919. See, e.g., Mechem, *Due Process of Law in the Military Establishment*, 89 CENT. L.J. 427 (1919); Peterson, *A Review of General Crowder's Letter on Military Justice*, 89 CENT. L.J. 44 (1919); Ansell, *Some Reforms in our System of Military Justice*, 32 YALE L.J. 146 (1922).

¹⁵⁴ See *Hearings Pursuant to S. Res. 200 on Constitutional Rights of Military Personnel Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. 99 (1962).

¹⁵⁵ See *Burns v. Lovett*, 202 F. 2d 335 (D.C. Cir. 1952), *aff'd sub. nom. Burns v. Wilson*, 346 U.S. 137, 142 (1953); *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947); Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 186-188 (1962); *cf. Wade v. Hunter*, 336 U.S. 684 (1949).

¹⁵⁶ See *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1961).

¹⁵⁷ See *United States v. Jacoby*, *supra* note 156.

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A final standard we may utilize is applicable legislation. Courts-martial are creatures of statute, and the matters we are examining here are, for the most part, encompassed in provisions of the *Uniform Code of Military Justice*. It can hardly be denied that military procedures must conform to the requirements of the Code, when such mandates exist.

Considered separately, or together, these criteria appear to be valid measures of almost any military judicial procedure, for they examine not only the internal validity of the rule, but also its conformance with the external standards set by the political sovereign from which military courts draw their authority. It seems fair to say that a rule which does not satisfy each of these tests is objectionable.

Let us utilize these tests, then, to evaluate the military approach to compulsory process and confrontation. Although they are really one combined process in military jurisprudence, for the sake of simplicity we will examine compulsory process and confrontation separately.

A. THE RIGHT TO COMPULSORY PROCESS

1. *The Constitutional Problem.*

a. *Witnesses.* Considered in its constitutional aspect, the military rule concerning compulsory process may be regarded as acceptable in part, and objectionable in part. In their application to the requests of indigent accused, the military restrictions on process do not appear significantly different from those civilian statutory controls which federal courts have invariably approved. The delegation of some decision-making authority to the trial counsel does not appear to be constitutionally significant, although as a practical matter it may be unwise and undesirable.

A contrary conclusion is required, however, when the Manual restrictions are enforced against non-indigent accused. The accused who is able to meet his expenses has the unqualified right to subpoena any witness he desires. The broad control which the Manual purports to exercise over the subpoena requests of all accused, solvent as well as improverished, has the practical effect of denying non-indigent accused the compulsory process which the Constitution guarantees them. The constitutional posture of the military rule is not altered by the fact that the Manual obviously contemplates that the United States will meet the expenses of all defense witnesses. Despite the solid historical foundation for the policy of treating all accused as indigents,

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it is still in the final analysis simply an administratively created rule, one which makes non-indigent accused the beneficiaries of a gratuity. It can hardly be seriously contended that the United States may require non-indigents to accept undesired Government aid and thereby surrender their constitutional right to process.

A fair question here, and one which goes to the crux of this issue, is whether any defendant is ever entitled to more than what the Manual appears to provide, that is, to be permitted to present his necessary and material witnesses at trial. This approach, however, oversimplifies the problem, for the question is not merely whether an accused has such a right, but how the necessary determinations are made. The only logical and fair time to determine whether a witness is necessary and material is during trial, for the admissibility of evidence is at best a complex decision, depending upon a variety of factors which cannot be fully evaluated or perhaps even foreseen earlier. The federal courts strip the indigent of this right not because it is not deemed to be valuable, but because he is penniless and, thus, either not entitled to such protection, or forced to accept its dilution because of the need to protect the public treasury.¹⁵⁸

Conversely, a determination of materiality and necessity made prior to trial can at best be speculative, not only with respect to the issues which will develop at trial but also as to the relative credibility of the witnesses. One may wonder, for example, whether a trial judge at the *Cunningham* and *Graalum*¹⁵⁹ trials would really have excluded as cumulative the testimony of the witnesses those accused were not permitted to subpoena, and whether the unsuccessful accused might have fared better had they been permitted to choose for themselves the witnesses they would present in their behalf. Similarly, it may be doubted that the accused in *United States v. Harvey*,¹⁶⁰ would not have raised the issue of self-defense had his substantiating witness been made available. Thus, the Manual is objectionable not because accused are really entitled to more than their necessary and material witnesses, but because the procedure it requires denies non-indigent accused that opportunity.

This raises a final thought. The military services have long attempted to afford equal protection to all accused regardless of

¹⁵⁸ See notes 42-43 *supra* and text accompanying.

¹⁵⁹ See ACM 10050, *Graalum*, 19 C.M.R. 667, *pet. denied*, 6 U.S.C.M.A. 813, 19 C.M.R. 413 (1955); WC NCM 60-00871, *Cunningham*, 30 C.M.R. 698 (1960), *rev'd on other grounds*, 12 U.S.C.M.A. 402, 30 C.M.R. 402 (1961).

¹⁶⁰ 8 U.S.C.M.A. 538, 25 C.M.R. 42 (1957).

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their economic station. This is a doctrine which has received constitutional recognition from the Supreme Court only in comparatively recent years,¹⁶¹ and the services have every right to be proud of their leadership in this field. It will be possible to bring the compulsory process procedure within constitutional limits either by adopting what is essentially the federal practice, or attempting to accord all accused a broader subpoena authority such as non-indigents enjoy. While the latter is not required at the present, it reflects a view which will in all probability be adopted by civilian courts eventually.¹⁶² It will be in the military tradition of far-sighted improvement of criminal law if the services choose to pioneer such a practice now.

There is a second, and no less important, constitutional problem. Assuming the Manual is amended to permit process desired by non-indigent accused to issue as a matter of course, may the accused still be required to relay requests for all witnesses to the trial counsel? Stated in another way: May the United States require all accused to advise the trial counsel in advance of the contemplated defense witnesses? This is clearly the result of the present Manual procedure, and for all practical purposes such a situation appears to have always existed in military jurisprudence.

It seems obvious that defense counsel's decisions concerning the witnesses he will utilize are a synthesis of his work product, his privileged conversations with his client, and the accused's possibly incriminating revelations. All three are protected from discovery.¹⁶³ However, the civilian practice of issuing blank subpoenas is comparatively recent,¹⁶⁴ and it has never been suggested that the prior practice of requesting the issuance of process by formal motion was constitutionally defective because it was not secret and *ex parte*.¹⁶⁵ Similarly, it has been held that indigent accused are not entitled to secret hearings on their

¹⁶¹ See *Griffin v. Illinois*, 351 U.S. 12 (1956).

¹⁶² Compare, *e.g.*, *Griffin v. Illinois*, *supra* note 161. See also note 39 *supra*.

¹⁶³ *Cf. Hickman v. Taylor*, 329 U.S. 495 (1946); *United States v. Carter*, 15 F.R.D. 367 (D.C. 1954); MCM, 1951, para. 151.

¹⁶⁴ Compare FED. R. CRIM. P. 17a and *In re Subpoena Duces Tecum*, 248 Fed. 137 (E.D. Tenn. 1916), with *United States v. Burr*, 25 Fed. Cas. 30, 35 (No. 14692d) (C.C.D. Va. 1807), and *In re Dillon*, 7 Fed. Cas. 710 (No. 3914) (N.D. Calif. 1854).

¹⁶⁵ See, *e.g.*, *United States v. Burr*, 25 Fed. Cas. 30, 35 (No. 14692d) (C.C.D. Va. 1807).

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motions for compulsory process.¹⁶⁶ However, these precedents are not dispositive, since civilian accused need only subpoena those witnesses who will not voluntarily appear, and this may be less than the total number of defense witnesses called.

The question has never been decided. It seems apparent that the civilian practice reflects a balance between orderly judicial administration and the constitutional guarantees of accused persons. When one considers that the most critical rights available to a defendant are at stake, it seems fair to speculate that any military procedure which exceeds the civilian practice in its intrusion upon those rights would be constitutionally objectionable unless justified by some additional strong public interest. Requiring accused to advise the prosecution of the defense witnesses who will appear voluntarily clearly exceeds the limits of the civilian practice, and obviously cuts deeply into the accused's privileges. No counterbalancing public interest is readily apparent. Accordingly, it is suggested that this is the dividing line: while a non-indigent accused cannot complain because he must request the United States to issue compulsory process for his involuntary witnesses, assuming such process issues as a matter of course, such an accused cannot be compelled to reveal the voluntary witnesses he will call at his own expense.

At the same time there are valid reasons why the services should retain control of the mechanical procedure for issuing subpoenas and not permit a more liberal procedure, at least as to military witnesses. Conceivably, non-indigent accused could be given subpoena authority, as they have for all practical purposes under Rule 17a, but such authority would result in confusion and unnecessary impairment of military functions, difficulties which the trial counsel avoids by necessary coordination and choice of the trial date.

b. *Documents.* The compulsory production of documents raises a more complex problem. The Manual does not distinguish between non-military witnesses called to testify and those subpoenaed for the sole purpose of bringing desired documentary evidence. The obvious implication is that in case of disagreement the accused must offer the same extensive justification of his requests for documents that he must make when he seeks witnesses who will testify in his behalf. It may be concluded that the need to protect third parties from unwarranted compulsory disclosure justifies requiring even non-indigent accused to demonstrate the existence of a valid, good faith interest in the docu-

¹⁶⁶ See *Thomas v. United States*, 168 F.2d 707 (5th Cir. 1948).

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ments desired. However, the supporting evidence required by the Manual exceeds by far the minimal showing of need outlined by Chief Justice Marshall,¹⁶⁷ and appears constitutionally objectionable when applied to non-indigent accused.¹⁶⁸

The status of military documents is even less satisfactory. The present Manual provides that documents in the control of military authorities will be produced "upon proper request,"¹⁶⁹ and prior Manuals have not been more specific. One can only speculate, therefore, as to the burden the accused must meet, and wonder whether it is any greater than when the documents involved are in civilian hands.¹⁷⁰ In such circumstances, the conclusion seems inescapable that paragraph 115c is simply too vague to be enforced.

Significantly, the Court of Military Appeals failed to even mention paragraph 115c in its disposition of a recent case dealing with a request for documents in military custody; it relied instead, upon the provisions of the federal rules of criminal and civil procedure.¹⁷¹ Unfortunately, the problem cannot be avoided by ignoring the Manual. It is the source of military procedure, and those charged with the administration of military justice are bound to follow it. Their task is not made easier by affording them the alternatives of interpreting paragraph 115c or applying the court's opinion in *Franchia*. It may be hoped that when the opportunity next presents itself, the court will use it either to give the Manual provision meaning or declare it a nullity.

2. *The Question of Utility.*

The military practice fares no better when it is examined from the viewpoint of utility. As we have seen, discovery of the accused's witnesses, and control of his requests for process, have been broadly justified at various times as necessary safeguards to avoid surprise and delay at trial,¹⁷² to insure that the desired

¹⁶⁷ See *United States v. Burr*, 25 Fed. Cas. 30, 35 (No. 14692d) (C.C.D. Va. 1807).

¹⁶⁸ See *id.* at 35-38.

¹⁶⁹ See MCM, 1951, para. 115c.

¹⁷⁰ There is evidence to that effect, JAGJ 1957/5086 (17 June 1957). However, there is no basis for placing an increased burden on the accused. See *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951); *United States v. Burr*, 25 Fed. Cas. 30 (No. 14692d) (C.C.D. Va. 1807).

¹⁷¹ See *United States v. Franchia*, 13 U.S.C.M.A. 315, 32 C.M.R. 315 (1962).

¹⁷² See MACOMB, A TREATISE ON MILITARY LAW AND COURTS-MARTIAL 172 (1809).

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witnesses were present when needed,¹⁷³ to prevent the accused from summoning unnecessary witnesses,¹⁷⁴ to protect military and civilian officials from being unnecessarily summoned from their duties to testify when a deposition would be an adequate substitute,¹⁷⁵ to insure that the proceedings were not delayed and the United States embarrassed by intentional defense requests for unneeded witnesses,¹⁷⁶ and to save the public treasury from unnecessary depletion.¹⁷⁷ No real distinction has ever been drawn between subpoenas for witnesses and subpoenas duces tecum.

Of all the reasons advanced, the desire to shorten the trial by avoiding surprise is the most valid. The recommended amendment to the *Federal Rules of Criminal Procedure* which requires accused to give advance notice of their intention to raise the defense of alibi appears to have a similar goal.¹⁷⁸ Unfortunately, although obviously of practical value and perhaps even philosophically attractive, such compulsory discovery raises the constitutional problem noted earlier. The more limited requirement that notice of alibi be given was rejected by the Supreme Court when it was first proposed in 1946. Whatever its ultimate fate, it may be seriously doubted that the broader military requirement would withstand a constitutional test.

Protecting officials from the unnecessary inconvenience of testifying may also be regarded as having utility. However, it is difficult to accept this contention seriously when we note that the determination as to inconvenience is not made by the witness, or even by his commanding officer or superior, but rather by the local convening authority.

The remaining grounds do not appear to be defensible. The advent of appointed defense counsel should have relieved prosecution authorities of responsibility for the timely appearance of the accused's witnesses and removed their concern that the accused would summon immaterial witnesses. Of course, it is conceivable that appointed counsel would intentionally issue frivolous process, but the available evidence indicates that such misconduct is almost

¹⁷³ See DE HART, *OBSERVATIONS ON MILITARY LAW* §4 (1862).

¹⁷⁴ See BENET, *A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL* 126 (6th ed. 1868); DE HART, *op. cit. supra* note 173.

¹⁷⁵ See DIG. OPS. JAG 1895, *Witness* para. 10; *Legal and Legislative Basis*, *supra* note 147, at 99.

¹⁷⁶ See *ibid.*

¹⁷⁷ See *United States v. De Angelis*, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

¹⁷⁸ See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts* 5 (1962).

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non-existent, and compels the conclusion that such a danger is wholly speculative. Further, it may be dealt with by disbarment or similar administrative action at independent proceedings.

Finally, there is the matter of safeguarding public funds. While this is an obviously valid public policy, it may be doubted that it has any direct relationship to the efficient operation of courts-martial. Further, if the protection of public funds is a specific goal of the military practice, one wonders at its failure to provide any pretrial forum in which the subpoenaed witness may demonstrate that he has no material testimony to offer. Obviously trial counsel err also; yet military jurisprudence has apparently never provided a safeguard against their mistakes.

3. *Compliance with Applicable Legislation.*

The final measure of the military rule is its compliance with the standard set by Congress in the *Uniform Code of Military Justice*. The statutory right to compulsory process¹⁷⁹ which Congress belatedly afforded accused in 1948, was intended to effect the recommendation of the Durham Committee in 1946 that paragraph 97 of the 1928 Manual be altered to insure defense counsel the same right to procure witnesses which the prosecution enjoyed.¹⁸⁰ Paragraph 97 at this time provided:

The trial judge advocate will take timely and appropriate action with a view to the attendance at the trial of the witnesses who are to testify in person. He will not of his own motion take such action with respect to a witness for the prosecution unless satisfied that his testimony is material and necessary and that a deposition will, for any reason, not properly answer the purpose, or will involve equal or greater inconvenience or expense. Such action will be taken with respect to all witnesses requested by the defense except that where there is reason to believe that the testimony of a witness so requested would be immaterial or unnecessary, or that a deposition would fully answer the purpose and involve less expense or inconvenience, the matter may be referred for decision to the appointing authority or to the court, according to whether the question arises before or after the trial commences. The trial judge advocate may consent to admit the facts expected from the testimony of a witness requested by the defense if the prosecution does not contest such facts or they are unimportant. . . .

The process provisions of the 1949 Manual did not, however, differ significantly from its predecessor.¹⁸¹ Indeed, it may have

¹⁷⁹ Articles of War of 1920, art. 22, as amended, ch. 625, § 213, 62 Stat. 630 (1948): "Witness for the defense shall be subpoenaed, upon request by the defense counsel, through process issued by the trial judge advocate, in the same manner as witness for the prosecution."

¹⁸⁰ See H.R. REP. NO. 2722, 79th Cong., 2d Sess. 4 (1946); H.R. REP. NO. 1034, 80th Cong., 1st Sess. 11-22 (1947).

¹⁸¹ See MCM, 1949, para. 105.

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been more restrictive since it has been interpreted as requiring accused to show not only that the desired witness was necessary and material, but also that a deposition would not suffice.¹⁸² When the Articles of War were subsequently revised, the process article was rewritten to read: "The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. . . ." ¹⁸³

The legislative history of the *Uniform Code of Military Justice* indicates that its drafters intended the phrase "equal opportunity to obtain witnesses and other evidence" to mean exactly what the words imply and that they intended to reenact the 1948 amendment and go a little further.¹⁸⁴ The 1951 Manual, however, remains substantially unchanged. Its authors offer the following explanation of paragraph 115:

The fourth subparagraph implements the initial provisions of Article 46 that the trial counsel, defense counsel, and the courts-martial shall have equal opportunity to obtain witnesses and other evidence. . . .

The fourth sentence, which provides that the trial counsel will take the same timely and appropriate action to provide for the appearance of defense witnesses whose testimony before the court is material and necessary, is based on the sentence in the commentary to Article 46 that the article was intended to insure equality between the parties in securing witnesses. However, experience has shown that some defense counsel present arbitrary and unreasonable requests for witnesses merely for the purpose of creating confusion, diversion, or delay. In order to curb such practices, it is provided that the trial counsel, who, as is stated in paragraph 44g(1), is prohibited from performing any act inconsistent with a genuine desire to have the whole truth revealed, will screen defense counsel's request for witnesses. In case the trial counsel and the defense counsel disagree whether it is necessary that the requested witness be subpoenaed, the matter will be referred to the convening authority or to the court, depending upon whether the court is in session. It is believed that the provisions of this paragraph may be relied upon as a rule of thumb concerning the authority for denying the personal attendance of a witness who, because of distance or position, that is, status or duty assignment, should not be required to attend personally. In the case of such a disagreement between the trial counsel and the defense counsel, the defense counsel will be required to show,

¹⁸² See *United States v. De Angelis*, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

¹⁸³ UCMJ, art. 46.

¹⁸⁴ See *Hearings on H.R. 4088 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess., No. 37, at 1057 (1949) [hereinafter cited as *House Hearings on UCMJ*]; *Hearings on S. 557 and H.R. 4080 Before a Subcommittee of the Committee on Armed Services, United States Senate*, 81st Cong., 1st Sess. 101, 111 (1949); H.R. REP. No. 491, *supra* note 145; S. REP. NO. 486, *supra* note 145. See also, U.S. DEP'T. OF DEFENSE, *UNIFORM CODE OF MILITARY JUSTICE—TEXT, REFERENCES AND COMMENTARY* 66 (1949).

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in the manner indicated in this paragraph, that the personal attendance of the witness is necessary.¹⁸⁵

The only possible lesson to be drawn from this short history is that the present Manual rule does not reflect Congress' desires. It cannot be otherwise, for while Congress has twice passed legislation designed to expand the process provisions of the 1928 Manual, the President has twice promulgated Manuals which continue those provisions substantially unaltered. The limitations which the present Manual places upon the accused are particularly questionable, for Article 46 was intended only to authorize the President to work out the mechanics of the right granted by the first sentence of that Article.¹⁸⁶ Paragraph 115 clearly goes much further and substantially modifies the accused's statutory right to process.¹⁸⁷

It has been suggested that the Manual does not really limit the accused since both he and the trial counsel labor under the same restrictions upon process, at least theoretically.¹⁸⁸ The short answer is that counsel are not equally restricted since the trial counsel's decisions are not subject to review while the defense counsel's are. But further, Article 46 was not designed merely to make both parties equal at any level chosen by the President. Its statutory history reflects, rather, the intention of guaranteeing accused a positive right to compulsory process, a right not subject to administrative modification or dilution.

The guarantee of "equal opportunity to obtain witnesses and other evidence," raises another problem. Does Article 46 grant the accused the right to present his case by way of admissible substitutes for live witnesses? We know that the present Manual and Code authorize the use of depositions and former testimony under certain circumstances even though the witness is alive and able to attend the trial. The prosecution appears to have such alternatives, although there have been a few judicial hints to the contrary.¹⁸⁹ Does the accused? Or may the convening authority, for example, prohibit a defense deposition on the grounds that the United States will produce the witness?

¹⁸⁵ Legal and Legislative Basis, *supra* note 147, at 99.

¹⁸⁶ H.R. REP. NO. 491, *supra* note 145.

¹⁸⁷ See Legal and Legislative Basis, *supra* note 147, at 99; Warns, *Obtaining of Witnesses*, JAG J. 5 (April 1951).

¹⁸⁸ See Warns, *supra* note 187.

¹⁸⁹ See *United States v. Daniels*, 11 U.S.C.M.A. 52, 28 C.M.R. 276 (1959); *United States v. Britton*, 13 U.S.C.M.A. 499, 33 C.M.R. 31 (1963) (concurring opinion).

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The issue has apparently never been squarely before a military court, so we must speculate. The answer seems to turn upon the particular statute involved. The *Federal Rules of Criminal Procedure*, for example, authorize the trial judge to reject defense requests for a deposition and require the presence of the witness. The Code is not so broad, and when Article 46 is read in conjunction with Article 49 it appears that in the absence of some overriding considerations, the accused could not be barred from obtaining his depositions. A similar conclusion follows with respect to former testimony.

B. THE RIGHT TO CONFRONT WITNESSES

Unlike the situation just described, the military deposition practice has always met the statutory standards. Indeed, anything less would be difficult to envision, for the provisions of the Articles of War and the *Uniform Code of Military Justice*¹⁹⁰ authorizing the use of depositions were intended to assist the prosecution and eliminate the need for transporting witnesses from distant places.¹⁹¹ Congress, at least recently, has also regarded depositions as helpful to the accused.¹⁹² Whether the military practice satisfied the Constitution is another question, however. Although the Court of Military Appeals has ostensibly laid the matter to rest,¹⁹³ the present deposition statute raises several constitutional problems which have never been considered.

We have already noted the Supreme Court's conservative approach to the problem of confrontation,¹⁹⁴ and have seen that prosecution depositions are not utilized in criminal proceedings in the federal courts. One unfortunate side-effect is the paucity of relevant precedent to aid our inquiry. Several principles do emerge, however, from the existing decisions, particularly those of the Supreme Court. They are: (1) Confrontation has not occurred unless there is a physical meeting between the accused, and/or his counsel, and the witness, at which the latter testifies and the former may cross-examine; (2) the testimony, and cross-examination, must be before a judicial body charged with judging the facts of the particular case; and (3) recorded testimony meeting the foregoing standards may be utilized at trial as a substitute

¹⁹⁰ UCMJ art. 49.

¹⁹¹ See *Hearings on S. 3191 Before the Subcommittee on Military Affairs, United States Senate, 64th Cong., 1st Sess. 54-55 (1916)* [hereinafter cited as *Hearings on AW 1916*].

¹⁹² See *House Hearings on UCMJ, supra note 184, at 696*.

¹⁹³ See *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

¹⁹⁴ *But cf. Pointer v. Texas*, ___ U.S. ___, 18 L. ed. 2d 923 (1965); *Douglas v. Alabama*, ___ U.S. ___, 13 L. ed. 2d 934 (1965).

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for the personal appearance of a prosecution witness only under circumstances of necessity recognized at common law at the time of the adoption of the Constitution. These were death, insanity, illness or infirmity, and absence induced by the accused. Also admitted as exceptions were dying declarations and collateral documentary evidence.¹⁹⁴

The importance of these requirements should be manifest. The value of personal cross-examination is too obvious to require comment, and has recently been vindicated in military jurisprudence.¹⁹⁵ Presentation of testimony before a trier of fact, if only a commissioner at a preliminary hearing, is scarcely of less significance. No attorney with any amount of trial experience can have failed to note that there is a significant difference between the demeanor of a witness before a deposing officer and his conduct at an actual trial. Nor can he have failed to observe that cross-examination at trial produces a test of veracity which is seldom achieved during the taking of a deposition. Finally, limiting the use of substitutes to those recognized at common law insures that the accused will be denied confrontation only because of public necessity, rather than to safeguard the public's convenience.¹⁹⁶

The military deposition practice has never achieved such standards. It was only recently that the accused was again guaranteed personal confrontation at depositions.¹⁹⁷ Deposing officers have no fact-finding authority and carry out only ministerial functions. Prior to 1916 they could not even compel witnesses to appear and testify.¹⁹⁸

Lastly, the circumstances in which depositions¹⁹⁹ and former testimony²⁰⁰ may be admitted into evidence far exceed any possible requirements of public necessity. In addition to the generally recognized exceptions of death, and illness or infirmity, depositions may be utilized if the witness cannot be found, is more than 100 miles from the place of trial, resides or is beyond the state, district, or territory in which the court-martial is sitting, or is unable or refuses to appear because of imprisonment, military necessity, nonamenability to process, or other

¹⁹⁴ See notes 66-82, 87-88, *supra*, and text accompanying.

¹⁹⁵ See *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

¹⁹⁶ Compare *Legal and Legislative Basis*, *supra* note 147; *DIG. OPS. JAG 1895, Witness* para. 10; *Hearings on AW 1916*, *supra* note 191, at 54.

¹⁹⁷ See *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

¹⁹⁸ Ch. 809, § 1, 31 Stat. 950 (1901); *Hearings on AW 1916*, *supra* note 191, at 53; Note, 26 AM. L. REV. 245 (1892).

¹⁹⁹ UCMJ art. 49(d); MCM, 1951, para. 145a.

²⁰⁰ MCM, 1951, para. 145b.

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reasonable causes. Former testimony may be utilized if the witness is dead, insane, ill, cannot be found, beyond the reach of process, or is more than 100 miles away. Accepting the fact that some substitute is permissible for the testimony of a witness who has left the jurisdiction or cannot be found, a conclusion not yet settled in federal law,²⁰¹ surely public necessity cannot excuse the offering party from first demonstrating that it did not cause the absence or disappearance, either purposely or through negligence.²⁰² The Manual and statute are silent on these points.²⁰³ While it may be said that such a showing was omitted because military needs might require moving witnesses elsewhere, the obvious answer is that in such a circumstance the move can be justified by a showing of military necessity.

One may similarly challenge the use of depositions because the witness is imprisoned. The authority of federal courts to compel the presence of such persons is well established.²⁰⁴

The most questionable practice by far, however, is the admission of former testimony and depositions solely because the witness is over 100 miles away or resides outside the state, territory, or district in which the court-martial is sitting. Public necessity undoubtedly dictated such a rule when courts-martial were unable to compel the presence of witnesses located beyond those boundaries. However, that problem disappeared, for all practical purposes, in 1916 when the limits of compulsory process were extended until they were coequal with general federal jurisdiction.²⁰⁵ Today, there can be no justification for using the depositions or former testimony of witnesses who are amenable to process and otherwise able to testify, solely because they are located some arbitrary distance from the place of trial. At least one case²⁰⁶ forbids the practice. Such a procedure does not satisfy any public need, although it undoubtedly is invaluable to the prosecutor because it permits him to choose the easiest way to present his evidence.

²⁰¹ See note 89, *supra*, and text accompanying.

²⁰² Compare *Motes v. United States*, 178 U.S. 458 (1900); *Reynolds v. United States*, 98 U.S. 145 (1879).

²⁰³ See MCM, 1951, para. 145*b*; *cf.* UCMJ art. 50. Compare FED. R. CRIM. P. 15(e). The Manual does not even require the party offering the former testimony of a witness who is beyond the reach of process to demonstrate that the witness will not return voluntarily. See MCM, 1951, para. 145*b*. Compare UCMJ art. 49(d).

²⁰⁴ See *Neufeld v. United States*, 118 F.2d 375 (D.C. Cir. 1941).

²⁰⁵ See *Hearings on AW 1916*, *supra* note 191, at 30, 52; USMJ art. 46.

²⁰⁶ *United States v. Thomas*, 28 Fed. Cas. 79 (No. 16476) (C.C.D.C. 1847).

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From the practical viewpoint, the standard defense of the use of depositions has been necessity—there is no other practical way to resolve the conflict between the operational requirements of the mobile, far-flung military services, and our traditional notions of fair trial and proof beyond a reasonable doubt.²⁰⁷ But the argument is factually weak. During the period from the Revolution until 1863, depositions by military persons could not be considered by courts-martial. Yet, despite the generally poor communications and far-flung mission of the Army during this period, it has never been suggested that requiring soldiers to personally appear and testify caused justice to fail or paralyzed military operations. Depositions were admissible during the period 1863-1916 only if the witness was outside the district, territory, or state in which the court-martial sat—the outer boundaries of the compulsory process the judge advocate might issue. But if a witness was within this geographical area, regardless of its size, his deposition could not be used. The Army was spread thin during these years also, and had traveled to Cuba and the Philippines. Yet it was not until 1916, relatively modern times, that a Judge Advocate General of the Army suggested that the burden was too much and drew up a statute adding the 100 mile limit.²⁰⁸ Even then the problem could not have been too pressing for it was not until 1928 that the Manual was amended to permit the use of the former testimony of witnesses who were available but located more than 100 miles away.²⁰⁹

Thus, it has only been in more recent years, as transportation and communications improved, that the services have requested more liberal deposition provisions from Congress. Had the need been as critical as the advocates of depositions now picture it, surely the Articles of War would have been amended earlier. At the present, transportation is so speedy and efficient that generally there can be no valid basis for the use of depositions in peacetime.²¹⁰ Of course, there are always situations where a civilian witness will not be amenable to process, but on the whole they are infrequent. Certainly depositions from military personnel should be rare, for they are always amenable to orders

²⁰⁷ See *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); *United States v. Sutton*, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953), *overruled*, *United States v. Jacoby*, *supra*; *Peterson, Confrontation in Trials by Court-Martial*, 12 OKLA. L. REV. 491 (1959).

²⁰⁸ *Hearings on AW 1916*, *supra* note 191, at 54.

²⁰⁹ Compare MCM, 1928, para. 117b, with MCM, 1917, para. 275, and MCM, 1921, para. 275.

²¹⁰ *Peterson*, *supra* note 207, at 496.

and may easily be returned to the place of trial. It may be argued that military efficiency precludes this, and it is true that military necessity is one basis for utilizing a deposition. However, the history of the Code leaves no doubt that its authors viewed little short of war or an armed conflict as an adequate excuse for a deposition on that ground. Clearly, they did not contemplate the term to be a synonym for convenience.²¹¹

Unfortunately, it is apparently quite common to utilize a deposition when a prosecution witness has been routinely transferred to a new station. Aside from its practical aspect, such a practice is of doubtful validity. The accused's right to the personal presence of material defense witnesses is no longer doubted.²¹² Witnesses obviously do not have immutable labels, so that a prosecution witness may also have testimony of affirmative value to the defense.²¹³ In such a circumstance, it appears likely that the accused could successfully contend that the witness is a material defense witness also.

There is a somewhat more basic objection, however. The duty of the prosecution to conduct itself according to high ethical standards is well recognized. This generally includes an obligation not to send important witnesses out of the jurisdiction.²¹⁴ A related rule is that which bars the party inducing a witness to leave the jurisdiction from introducing the witness' deposition or former testimony.²¹⁵ There is no apparent reason why these rules should not apply as fully in military courts as elsewhere. It may be well that because of their limited jurisdiction courts-martial cannot effectively prevent civilian witnesses from rendering themselves nonamenable to military process; however, the services are not so helpless with respect to their own personnel, and may retain them if they desire. The sovereign on whose business the witness is transferred is the same sovereign in whose name the accused is prosecuted. There is more reason to re-

²¹¹ See *House Hearings on UCMJ*, *supra* note 184, at 1070.

²¹² See *United States v. Thornton*, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (1957).

²¹³ See *State v. Papa*, 32 R.I. 453, 80 Atl.2d 12 (1911).

²¹⁴ *Cf. People v. Wilson*, 24 Ill.2d 425, 182 N.E.2d 203 (1962). However, a different problem is faced when the transfer of the witness is not to a different assignment, but rather in preparation for separation. The trial counsel, or convening authority cannot prevent such a transfer and therefore, as the absence is not attributed to them, such a situation should be treated in a similar manner to a civilian witness; i.e., subpoena after separation if possible, otherwise use deposition or prior testimony. Compare note 215 *infra* and text accompanying.

²¹⁵ See *Motes v. United States*, 178 U.S. 458 (1899); *Fed. R. Crim. P.* 15(e); *cf. Reynolds v. United States*, 98 U.S. 145 (1878).

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lieve the United States of responsibility for these acts, than there has been to refrain from invoking the prohibition against double jeopardy because prosecutions have been brought by different agencies of the same sovereign. It can hardly be doubted that the United States would be barred from introducing against a civilian accused the deposition of a military witness it had transferred.²¹⁶ The result should not be different because the accused is a soldier. The same conclusion would be reached if the converse occurred and the accused was removed from the geographical location of the witnesses.²¹⁷

C. THE RULE IN WARTIME

If the foregoing remarks are given practical effect, it cannot be denied that the practice in military courts will be narrowed in some important aspects. The critical inquiry is whether such changes will detrimentally effect court-martial procedure in wartime. Careful reflection suggests that the changes will not significantly impair efficiency. True military necessity justifies practices considered objectionable in peacetime,²¹⁸ and there seems to be no reason why an adequate accommodation cannot be made with respect to the matters under examination here. The Army's difficulty in the past has stemmed primarily from its attempt to introduce procedures acceptable only in wartime into unremarkable peacetime situations.

Military necessity would undoubtedly justify a rather extensive use of depositions, although it is unlikely that a return to written interrogatories could ever be supported. In reality this is as it should be, for it would hardly be fair to impose the higher sentences available in wartime and at the same time permit the prosecution to utilize evidence of lower quality and lesser reliability.

The accused's right to process presents a more difficult problem. However, where a desired witness is unavailable because of military operations, or is outside the theatre of operations so that his travel to the trial would be hazardous and costly, the circumstances are analogous to those where the desired witness is not amenable to the process of the jurisdiction in which the

²¹⁶ Cf. *Motes v. United States*, *supra* note 215; *The Samuel*, 14 U.S. (1 Wheat.) 9 (1816).

²¹⁷ *But cf. Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950).

²¹⁸ See *Wade v. Hunter*, 336 U.S. 684 (1949); Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 192-98 (1962); cf. *Gori v. United States*, 367 U.S. 364 (1960) (dissenting opinion).

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accused is being prosecuted and will not appear voluntarily. In the latter circumstances there is precedent for resolving the problem by a prosecution stipulation that the desired witness would testify as expected.²¹⁹ Such a procedure could be adopted profitably by courts-martial. There seems little doubt that other fair substitutes could be developed also.

VI. CONCLUSIONS

It is the writer's view that the military procedure pertaining to compulsory process, and the related question of confrontation, is not satisfactory. Its legality may be validly questioned, and there is no evidence that the practical needs of the military require it to remain unchanged. Fortunately, it is within the power of the services to correct these defects by making relatively simple changes in their practice. By way of summary, it is recommended that the following modifications of the present military procedure be accomplished:

1. The distinction between subpoena ad testificandum and subpoena duces tecum be formally recognized; and
 - a. A procedure for issuance of subpoenas duces tecum be developed which conforms to the *Federal Rules of Criminal Procedure* and *United States v. Burr*.²²⁰
 - b. The present practice of obtaining all witnesses at the expense of the United States be supplemented by expressly permitting accused to procure particular defense witnesses, or all defense witnesses, at their own expense without prior evaluation for materiality or necessity. Then if such witnesses will not appear voluntarily, subpoenas should issue as a matter of course. This resembles the British practice.²²¹
 - c. The convening authority determine the materiality of witnesses requested at government expense upon the basis of the pretrial file and any other information the accused voluntarily offers.
 - d. The Code be amended to permit the law officer to rule on pretrial motions for compulsory process and mo-

²¹⁹ See 22A C.J.S. *Criminal Law* Sec. 494(2)-(3); *Graham v. State*, 50 Ark. 161, 6 S.W. 721 (1888). *But cf.* *State v. Berkley*, 92 Mo. 41, 4 S.W. 24 (1887).

²²⁰ *Johnson v. Walker*, 199 F. Supp. 86 (E.D. La. 1961); 25 Fed. Cas. 80 (No. 14692d) (C.C.D. Va. 1807).

²²¹ See THE WAR OFFICE, 1 MANUAL OF MILITARY LAW 459 Rule 22(1) (n), 460 n. 12 and 13 (1956).

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tions to quash such process. This should be part of the pretrial conference procedure now contemplated.

2. The trial counsel be relieved of any responsibility for determining whether a subpoena duces tecum shall be issued, or defense witnesses obtained at the expense of the United States. These decisions should be made by the convening authority upon the advice of the staff judge advocate. If the court-martial has been convened, the responsibility should be that of the law officer. When the Code is amended to authorize the pretrial conferences, the law officer should be authorized and required to decide such preliminary questions, as does his civilian counterpart.
3. The trial counsel should be responsible for the actual obtaining of only those witnesses who will not appear voluntarily or whose appearance generates an expense to the United States which the accused will not absorb. Whether local military witnesses and employees who testify as defense witnesses represent an expense the United States might not otherwise be required to meet is an interesting question. As a practical matter defense counsel often obtain the voluntary appearance of such witnesses without utilizing the service of the trial counsel, and such a procedure seems a worthwhile reduction of the latter's administrative load.
4. Substitutes for confrontation at trial should be limited to former testimony and oral depositions. They shall be admitted into evidence only in those circumstances which the Supreme Court has recognized as common law exceptions to the confrontation rule, and also where military necessity requires it.
5. Except at the insistence of the accused, no deposition should be admitted in trial by general court-martial which does not consist of testimony offered before the Article 32 investigating officer during the course of his investigation.

Such changes would require amendments to the Manual and the Code for permanence. In the interim, however, they could be effected administratively, preferably at Department of Army level. Undoubtedly some of the changes would place additional burdens upon the military prosecutor, but they are the product

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of affording military accused valuable rights they do not now enjoy, and are entitled to receive.

The reader should not be misled by this frank evaluation. The administration of military justice does not present a bleak picture. In general its principles and practices equal or are more enlightened than its civilian counterparts. The comments set down here are intended to help perpetuate that high standard. The area of military law we are examining presents a problem which cannot be profitably overlooked. The services have labored long to convince Congress and the public that military justice is the equal of civilian justice, at least in peacetime. The continued criticism, and investigation of military justice procedures, suggests, however, that this educational effort has been less than successful.²²² The services, unfortunately, are judged not by their successes, but by their mistakes which investigation may bring to light. For this reason, if no other, it is unwise to permit a source of criticism to exist, for continued failure to convince their critics of the overall high standard of military justice could bring about a substantial loss of the authority the services now possess to regulate their own disciplinary problems.²²³

²²² See, e.g., *Hearings Pursuant to S. Res. 260 on Constitutional Rights of Military Personnel Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. 1-5 (1962).

²²³ Compare *id.* at 922.

MILITARY-LEGAL CONSIDERATIONS IN THE EXTENSION OF TERRITORIAL SEAS*

BY LIEUTENANT COMMANDER KEITH D. LAWRENCE**

I. INTRODUCTION

A. GENERAL INTRODUCTION

In 1960, when the nuclear-powered submarine *Triton* made its submerged circumnavigation of the globe, it passed, submerged, through the Surigao Strait north of Mindanao in the Philippines, across the Mindanao Sea, through the Celebes Sea to the Makassar Strait between the islands of Borneo and Celebes, and on south of Java into the Indian Ocean. Had the unilateral claims of the Philippines¹ and Indonesia² to the waters within their respective archipelagos as internal waters, the Philippine claim

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¹ The Philippine Ministry of Foreign Affairs notified the United Nations Secretariat on Dec. 12, 1955, that "all waters around, between and connecting the different islands belonging to the Philippine Archipelago irrespective of their widths or dimensions, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines." *Laws and Regulations on the Regime of the Territorial Sea*, U.N. Doc. No. ST/LEG/SER.B/6, at 39 (1956).

² On Feb. 18, 1960, Indonesia published its Regulation in Lieu of Act No. 4. Clause 2 of Art. 1 claims as inland seas all those areas of the sea within straight baselines "connecting the outermost points on the low water mark of the outermost islands or part of such islands comprising Indonesian territory." *Addendum to Supp. to Laws and Regulations on the Regime of the Territorial Sea*, U.N. Doc. No. A/CONF.19/5Add.1, at 3-4 (1960).

³ In a note verbale dated Jan. 20, 1956, from the permanent mission of the Philippines to the United Nations, 2 YB. INT'L L. COMM. 69-70 (A/CN.4/99) (1956), the Philippine representative claimed as territorial sea all of the area designated by the Treaty of Paris of Dec. 10, 1898. This area forms a box of high sea around the islands, the boundary of which extends almost to Taiwan on the north and is as far as 300 miles from Philippine land in some sections.

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of territorial waters even beyond twelve miles,³ and Indonesia's claim to a territorial sea of twelve miles, been recognized by the United States⁴ or established in international law, such navigation would have been impossible without a bilateral agreement. In making such a journey, *Triton* silently maneuvered through areas claimed by the Philippines and Indonesia as their respective territorial seas and internal waters. Under the general rule of international law, vessels may not pass through internal waters as a matter of right, even if their passage is innocent.⁵ Even where innocent passage is allowed, either in the territorial seas by international law or in inland waters in accordance with international law⁶ or the retractable benevolence of the coastal state,⁷ submarines are required to travel on the surface of the water and to show their flag.⁸

This is an example of only one of the numerous adverse effects that an internationally recognized extension of territorial seas would impose. Arthur Dean, the chairman of the United States delegations at both the 1958 and the 1960 Geneva conferences on the law of the sea, has stated that:

The desire of the United States to maintain a relatively narrow territorial sea and, more particularly to prevent any extension to 12 miles was based not merely on the fact that the 3-mile limit has long been recognized in international law but also on compelling military and commercial considerations.⁹

The United States, of course, is by no means the only beneficiary of a narrow territorial sea. As two authorities have phrased it, the retention of narrow territorial sea limits is in the public interest of the "whole of mankind." It results in a "great net advantage in community values."¹⁰

It will be the purpose of this study to investigate some of the military considerations involved in an extension of the territorial

⁴ The United States recognizes neither the Indonesian nor the Philippine claims to a territorial sea greater than three miles from the low water line. Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 34 AM. J. INT'L L. 751, at 765 (1960).

⁵ 1 OPPENHEIM, INTERNATIONAL LAW 461 (8th ed., Lauterpacht ed. 1955).

⁶ Convention on the Territorial Sea and the Contiguous Zone, April 12, 1961, art. 5, U.N. Doc. No. A/CONF.13/L.52 (1958). This convention entered into force on September 10, 1964, and had been ratified by 23 states as of February 1965.

⁷ For an example see Indonesian Regulation in Lieu of Act No. 4, art. 3, *supra* note 2.

⁸ DRAFT CONVENTION, ART. 12, HAGUE CODIFICATION CONFERENCE, 1930 (League of Nations Pub. No. C. 1930 v. 9); Convention on the Territorial Sea and the Contiguous Zone, art. 14 (6), *supra* note 6.

⁹ Dean, *Freedom of the Seas*, 37 FOREIGN AFFAIRS 83, 89 (1958).

¹⁰ McDUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS 51-56 (1962).

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seas of the world from a legal viewpoint and, in so doing, to stress the necessity for considering the military implications thereof whenever policy regarding international agreements in this area is formulated.

The freedom now enjoyed by citizens of the United States and other nations of the free world can most easily be lost by indifference to the military necessities of the nation. Specifically, what good, in the protection of the free world, is a strong Navy if, out of political expediency, its hands should be tied by agreements limiting its area of operation to such an extent that it can no longer act effectively?

The question is not asked to belittle the beleaguered politicians. It is raised simply to express the belief that it is not only proper but imperative that international policy makers, both military and civilian, consider the adverse effects which the extension of territorial seas would have on the capability of their nation's armed forces to perform successfully their mission of preserving freedom as a way of life. Mr. Dean supplied emphasis for this point when, shortly after the 1958 Geneva Conference, he wrote that:

For navigational purposes . . . [the extension of the territorial sea] would change a large Pacific area into a series of unconnected "lakes" of high seas. Surface warships and transports might operate in the straits connecting the international bodies of water, but this right would not, in the absence of a treaty, extend to an aircraft's right to fly over them or to a submarine's right to operate under the surface of them.¹¹

B. *INDONESIAN EXAMPLES*

In the following discussion of these problems, a large number of examples will be taken from the conditions as they exist in Indonesia. This has been done intentionally to stress the magnitude of the combined effects in any one part of the world.

For the past several years, Indonesian policies and pronouncements have been of prime concern to United States diplomats working on Southeast Asian problems. Since December 18, 1957, Indonesia has unilaterally claimed not only a twelve-mile breadth for its territorial sea, but that this distance is measured seaward not from its coasts but from straight base lines connecting spec-

¹¹ Dean, *supra* note 9, at 90. Mr. Dean, of course, did not limit the effects of an extension of the territorial seas to the Pacific area.

ified protruding points of the various islands in its archipelago.¹² When one considers that Indonesia is the world's largest archipelago,¹³ consisting of¹⁴ approximately 13,000 islands¹⁵ spread across the waters for more than 1,100 miles from north to south and over 2,800 miles east to west, encompassing roughly 2,500,000 square miles of which only about 575,000 are land, the geographical magnitude of its claim to territorial and inland waters becomes apparent. Its political-military magnitude is equally apparent from its position, both geographic and political, in Southeast Asia. It is here that many historic and important sea and air lanes run through and over the oceans and straits which Indonesia now claims to be internal and territorial. Inasmuch as an extension of the territorial seas to twelve miles would make all of the passages through the Indonesian islands internal or territorial waters, recognition of¹⁶ and obedience to Indonesia's claim would effectively close the major gateways to the Indian Ocean.

C. EXCLUSION OF FISHERIES PROBLEMS

Indonesia, however, has not furnished an example of one of the problems that has beset conferences on the extension of territorial seas: the problem of fishing rights. That this has been a problem in discussions in this area indicates a confusion with regard to the concept of territorial waters. This confusion may best be classified as a failure to distinguish between a coastal state's national boundary designation on the seaward edge of the territorial sea and the various partial jurisdictional rights which it may exercise in limited areas of the high seas.

In conformity to the doctrine of freedom of the seas, there has

¹² Council of Ministers of the Republic of Indonesia proclamation of Dec. 13, 1957. For a translation of the Indonesian text as published in the Indonesian law journal "Hukum," vol. 1958, No. 5-6, Annex I, see SYATAUW, SOME NEWLY ESTABLISHED ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW 173-74 (1961).

¹³ N. Y. WORLD TELEGRAM & SUN, WORLD ALMANAC FOR 1964, at 355.

¹⁴ 15 ENCYCLOPEDIA AMERICANA 70 (1962).

¹⁵ 3 OFF. REC. U.N. CONF. ON THE LAW OF THE SEA 48, (A/CONF.13/39) (1958).

¹⁶ A unilateral extension does not in itself bind other nations. In the Anglo-Norwegian Fisheries Case [1951] I.C.J. Rep. 132, the court summarized the rule by saying: "The delimitation of sea areas has always an international aspect, it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law." The United States, the United Kingdom, and at least 14 other governments still regard the Indonesian waters as high seas, GREAT BRITAIN CENTRAL OFFICE OF INFORMATION, THE TERRITORIAL SEA 5 (1960).

been no right to exclusive fishing areas in the high seas.¹⁷ Thus, in order to claim exclusive fishing rights it has been necessary to claim co-extensive territorial seas. In 1956, however, at a meeting of the Sixth Committee of the United Nations, a new concept was introduced when Canada proposed the creation of a contiguous zone for exclusive fishing beyond the three-mile territorial sea and which would extend to a limit of twelve miles.¹⁸ Canada again proposed this concept at the 1958 Geneva Conference.¹⁹ At the 1960 Conference the United States joined Canada in proposing a six-mile territorial sea and an additional six-mile exclusive fishing zone.²⁰ This "six-plus-six" proposal has been adopted by Senegal, South Africa, Tunisia, Turkey, and Uruguay²¹ and may well be on its way to adoption by custom.

The right to exclusive fishing is one of those various partial jurisdictional rights which could well be exercised by a coastal state in specified areas of the high seas by international agreement or custom but which should be distinguished from the setting of a nation's boundary in the sea. The claiming of exclusive rights does not carry with it a claim to that complete sovereign jurisdiction which a nation may exercise within its own boundaries whether they be on land or sea. This being the case, it is not only feasible, but practical and logical as well, to divorce the fisheries question from the territorial seas question.²²

¹⁷ Yalem, *The International Legal Status of the Territorial Sea*, 5 VILL. L. REV. 206, 210 (1960), where it is stated that "although customary international law has long recognized that coastal states may exercise sovereignty beyond their territorial sea for the purpose of enforcing sanitary, customs, immigration and fiscal regulations, the question of exclusive fishing rights within the contiguous zone has never been sanctioned by international law."

¹⁸ U.N. GEN. ASS. OFF. REC., 11th Sess., 6th Comm., 498d meeting, para. 57 (1956).

¹⁹ Submitted as U.N. Doc. No. A/CONF.13/C.1/L.77/Rev.1 (1958), on March 29, 1958; see statement of Prime Minister Pearson before the Canadian House of Commons. 108 H.C. DEB. 621 (1963), reprinted in 2 INT'L LEG. MATERIALS 664 (1963).

²⁰ Submitted to 14th Plenary Meeting April 25, 1958, as U.N. Doc. No. A/CONF.13/L.29 (1958).

²¹ See letter from U.S. Assistant Secretary of State Dutton to U.S. Senator Gruening reprinted in 109 CONG. REC. 11279-80 (1963).

²² By thus eliminating an unnecessary and contentious problem, perhaps there would be a better capability of arriving at an agreement on the breadth of those seas within which a coastal nation may exercise its complete sovereignty. In essence, of course, the U.S.-Canada proposal at the 1960 Geneva Convention drew the distinction between fishing rights and territorial jurisdiction in its 6-mile territorial sea, plus 6-mile exclusive fishing zone proposal. Might not the proposal have had a better chance of passage had it been divided into two distinct proposals so that the legal-political-economic influences and considerations attendant upon its one separate part would not affect the passage of the other part?

In other areas of extra-territorial rights this distinction has already been drawn. The breadth of the territorial sea does not affect the coastal state's right to protect itself by reasonable means nor the assertion of its sovereign rights to the natural resources of the continental shelf, nor the enforcement of its customs, fiscal, immigration and sanitation laws and regulations in a contiguous zone. These interests are a source of legitimate concern to every coastal state, but they can be adequately protected by the imposition of reasonable controls on the use of the high seas without the necessity of a broad territorial sea.²³

D. MILITARY ADVANTAGES OF A BROAD TERRITORIAL SEA

The United States would not have to defend the three-mile limit unless other nations felt that there were compelling reasons for its replacement. The protection of fishing interests is one of the most frequently expressed reasons.²⁴ While other economic, social, and political reasons have also been given, it is submitted that an equally compelling reason is the substantial military benefit to be gained. This has seldom been advanced as a reason for extension for the motive behind such extensions is not always honorable. It results in a benefit to a nation that is trying to disrupt international commerce and is willing to risk violating the law in order to promote its goal of domination. As the legal effects of a broad territorial sea are discussed more fully below, the importance of this benefit and the threat to freedom which it imposes should become obvious. It is the vision of this threat that prompts this study of what has been called "one of the most controversial questions in contemporary international law."²⁵

II. STATUS OF THE THREE-MILE LIMIT

In order to appreciate the importance of a narrow territorial sea to the defense of the free world, it is necessary to understand the status of the three-mile limit and some of the forces at work,

²³ For another treatment of this idea, see McDUGAL & BURKE, *op. cit. supra* note 10, at 516-20.

²⁴ "The interest in fisheries . . . overshadows all other particular interests that might be advanced to justify the extension." *Id.* at 71. This is an "extravagance" since authority in a territorial sea is much more comprehensive than is necessary for control of fishing. *Id.* at 71-74.

²⁵ Sorensen, *Law of the Sea*, Int'l Conc. No. 520, at 242 (1958). Prof. Sorensen was the Danish representative at the 1958 Geneva Conference.

both behind the scenes and out on the international stage, to broaden it.²⁶

A. EXTENSIONS OF BREADTH

As long ago as 1793, the United States adopted a three-mile limit to its territorial sea²⁷ and in 1794 Congress decreed that "cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States or within a marine league [three nautical miles or 3.453 statute miles] of the coasts or shores thereof" would be subject to the jurisdiction of the United States District Court.²⁸ Since 1793 it has been the traditional position of the United States that the three-mile limit is not only domestic law but also the maximum breadth cognizable under international law and the greatest breadth which conforms to the long-established doctrine of the freedom of the seas. In 1922 the Supreme Court of the United States expressed judicial cognizance of the United States position when, in *Cunard v. Mellon*,²⁹ it noted that:

It is now settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes . . . a marginal belt of the sea extending from the coastline outward a marine league, or three geographical miles.

The use of the words "recognized elsewhere" by the Court must be interpreted as meaning "recognized by some other countries" rather than "recognized by all maritime states" for the honeymoon of the three-mile limit was even then beginning to wane.

By 1930, disagreements over the breadth of territorial seas had become prominent enough to be considered by the Hague Codification Conference. Most of the participating nations favored either a three-mile or a six-mile breadth. Only the Soviet Union claimed a twelve-mile breadth.³⁰ Although it appeared that a greater number were willing to accept a three-mile limit, the matter of the recognition of a contiguous zone for purposes such as customs, fiscal, immigration, and sanitary controls, was tied

²⁶ For a concise, comprehensive history of the origin of the concept of a territorial sea and its width, see Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 597 (1959).

²⁷ See BRITTIN & WATSON, *INTERNATIONAL LAW FOR SEAGOING OFFICERS* 54 (2d ed. 1960).

²⁸ 1 Stat. 384 (1793).

²⁹ 262 U.S. 100, 122 (1923).

³⁰ MCDUGAL & BURKE, *op. cit. supra* note 10, at 536.

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into the discussion and voting. Since there was not a sufficient number of states in favor of both a three-mile limit and a contiguous zone, the Conference was concluded without reaching agreement on the breadth of the territorial sea.

With the birth of the United Nations, a new attempt was to be made to come to an international decision as to the legal breadth of a territorial sea. The International Law Commission of the United Nations studied all facets of the law of the sea and completed its final draft report³¹ to the General Assembly in 1956. As to the breadth of the territorial sea, the Commission was less than specific. It approached the question in this manner:

1. The Commission recognizes that international practice is not uniform as regards the delimitation of the territorial sea.

2. The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles.

3. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less.³²

With the Commission's report as a guide, the United Nations Conference on the Law of the Sea³³ met in Geneva, Switzerland, from February 24 to April 28, 1958.

One product of the Conference was a Convention on the Territorial Sea and the Contiguous Zone.³⁴ Its twenty-three substantive articles summarize most of the law of the territorial sea. Conspicuously absent is any affirmation of the breadth of the territorial sea. Despite the enormous number of matters upon which agreement was reached, the delegates could not arrive at a breadth agreeable to at least two-thirds of the delegates, as required by Conference procedural rules.³⁵

The Convention describes the limits of the territorial sea by saying only that "The outer limit of territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea."³⁶ A review of the Conference record, however, leaves little doubt but

³¹ For the text of the draft articles see U.N. Doc. No. A/CONF.13/32 (1958).

³² *Id.* art. 3.

³³ Hereafter referred to as the 1958 Geneva Conference.

³⁴ See note 6 *supra*.

³⁵ Required by rule 35(1) for matter of substance. U.N. Doc. No. A/CONF.13/35 (1958).

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that the vast majority of the delegations present disapprove of a territorial sea of a greater breadth than twelve miles, but this was not retained in the Convention itself.

The United States delegation entered the Conference with the strong belief that the three-mile limit was firmly established in international law. To support this conclusion, the United States delegation could rely not only on the historical claims of most coastal nations, but also on the fact that more states, and among them most of the major maritime powers, adhered to the three-mile limit than to any other single limit.³⁷ While this is an impressive statement, it must also be remembered, particularly when assessing the results of the Conference, that, of the seventy-three coastal states in attendance, hardly more than twenty adhered to the three-mile rule at the time the Conference convened.³⁸

Among the dissenters were Chile,³⁹ Ecuador, and Peru⁴⁰ which claimed 200 miles in order to protect their fisheries. Canada and Iceland desired twelve miles for the same reason. India, Burma, Thailand, Cambodia, Korea and South Viet Nam wanted an extension of the three-mile limit in order to restrict Japanese fishing. The Philippines and Indonesia asserted special rights in large areas of the high seas which would close important navigation and aerial routes to and between India, Australia and New Zealand. And the Union of Soviet Socialist Republics, together with its satellite bloc and several Arab states, wanted a twelve-mile limit, predominantly for political-military purposes.⁴¹ In

³⁶ The Convention on the Territorial Sea and the Contiguous Zone, art. 6, *supra* note 6.

³⁷ Sorensen, *supra* note 25, at 244.

³⁸ *Id.* at 243. For a summary of the 1956 positions of 38 maritime nations see MacChesney, *Situation, Documents and Commentary on Recent Developments in the International Law of the Sea*, 51 NAVAL WAR COLLEGE BLUE BOOK SERIES, 439-501 (1957).

³⁹ The Chilean vote against the United States compromise proposal of six miles is alleged to have been made not out of opposition to the proposal but in retaliation for the recommendation of the U.S. Secretary of the Interior that the United States restore tariffs on copper. See Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 607, 616 (1958). However, Chile, by Presidential Declaration, had claimed a 200-mile breadth since June 25, 1947. GREAT BRITAIN CENTRAL OFFICE OF INFORMATION, *THE TERRITORIAL SEA* 4-5 (1960).

⁴⁰ By Presidential Decree of Nov. 2, 1949. GREAT BRITAIN CENTRAL OFFICE OF INFORMATION, *op. cit. supra* note 39.

⁴¹ See Dean, *Freedom of the Seas*, 37 FOREIGN AFFAIRS 83 (1958).

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addition, El Salvador, as a part of its Constitution, issued September 7, 1950, claimed 200 miles and Argentina, by a decree dated October 11, 1946, claimed all of its "epicontinental sea and continental shelf."⁴²

With all of these divergent views and special interests, it became apparent that a two-thirds majority of states at the Conference would not support a three-mile limit. In an effort to reach agreement, the United States delegation proposed the "six-plus-six" compromise previously mentioned.⁴³ Of all the proposals at the Conference relative to the breadth of the territorial sea, this proposal received the most votes. It failed of passage by only seven votes.⁴⁴

A second Conference was convened in Geneva in March 1960 with an agenda limited to two questions: the breadth of the territorial sea and the fishery limits. It was generally recognized at this conference that a proposal to retain the three-mile limit had no chance of passage. Therefore, the United States and Canada joined to submit a proposal, similar to the "six-plus-six" compromise proposal introduced by the United States at the 1958 Geneva Conference. Because of the requirement that two-thirds of those voting must be in favor, the proposal was defeated by one vote. No other proposal regarding the breadth of the territorial sea or fishing limits having survived, the Conference was concluded without adopting any proposal on the two questions before it.

With the failure of a second conference to reach two-thirds agreement on the subject, one may ask with some concern what the present law is. Writing in 1960, Professor Carl Franklin contended that:

While it is true that in recent years the world has witnessed an increasing number of claims by coastal states to a wider territorial sea,

⁴² GREAT BRITAIN CENTRAL OFFICE OF INFORMATION, *THE TERRITORIAL SEA* 4-5 (1960). Other states having recently extended their claims to 12 miles were Panama in Dec. 1958, China (People's Republic) and United Arab Republic in Sept. 1958, Iraq and Saudi Arabia in Nov. 1958, Libya in March 1959, Iran in April 1959, and Ethiopia since 1953. *Ibid.* With regard to the Panama claim, it should be noted that the effect is to require all ships passing through the Canal Zone to first pass through Panamanian territorial waters. This results from the fact that territorial sea of the Canal Zone only extends out 3 miles. *Ibid.* Thus, recognition of Panama's claim would mean that she could regulate all commerce passing through the canal.

⁴³ See notes 17-21 *supra* and text accompanying.

⁴⁴ See 2 OFF. REC. U.N. CONF. ON THE LAW OF THE SEA 39 (A/CONF.13/36) (1958).

the long history of state practice by the principal maritime states supports the conclusion that the three-mile limit still more nearly represents customary international law than any other figure. Certainly this minimum breadth of territorial sea represents the most rational preference viewed from the perspective of the world community for achieving the maximum utilization of the high seas. [Citations omitted]⁴⁶

At the conclusion of the 1958 Geneva Conference, Mr. Dean presented a somewhat more unequivocal stand.

It is . . . unwarranted to assume that the traditional three-mile limit of the territorial sea is no longer international law. All efforts to agree on a new figure failed. The fact that a two-thirds vote could not be obtained in favor of the three-mile limit shows merely a desire on the part of many nations to extend their territorial sea, not that such an extension in international law has been accomplished.⁴⁶

It will come as no surprise to learn that Professor Grigory Tunkin, the chairman of the Soviet delegation, disagreed. Professor Tunkin was adamant in stating that "It was conclusively shown in speeches to the Conference that the 3-mile limit is not and never has been a generally recognized rule in the law of the sea. The Conference once and for all buried the 3-mile limit legend."⁴⁷ Not in the least conceding the correctness of Professor Tunkin's conclusion, Mr. Dean summarized United States policy at the end of the 1958 Geneva Conference and reiterated the same policy at the close of the 1960 Conference. He wrote:

We have made it clear from the beginning that in our view the 3-mile rule is and will continue to be established international law, to which we adhere. It is the only breadth of the territorial sea on which there has ever been anything like common agreement. Unilateral acts of states claiming greater territorial seas are not only not sanctioned by any principle of international law but, are indeed in conflict with the universally accepted principle of freedom of the seas. . . .

We have made it clear that in our view there is no obligation on the part of States adhering to the 3-mile rule to recognize claims on the part of other States to a greater breadth of territorial sea. On that we stand.⁴⁸

Since the termination of the 1960 Geneva Conference there have been a number of states which have unilaterally extended

⁴⁶ Franklin, *The Law of the Sea: Some Recent Developments*, 53 NAVAL WAR COLLEGE BLUE BOOK SERIES 89 (1961).

⁴⁶ Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 607, 616 (1958).

⁴⁷ Tunkin, *The Geneva Conference on the Law of the Sea*, INT'L AFFAIRS 47 (Moscow, 1958); 3 OFF. REC. U.N. CONF. OF THE LAW OF THE SEA 168-69; (A/CONF.13/39) (1958); 2 *id.* 37 (A/CONF.13/38).

⁴⁸ Dean, *Freedom of the Seas*, 37 FOREIGN AFFAIRS 83, at 91 (1958).

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their territorial seas.⁴⁹ Indonesia has reiterated its claim to twelve miles. Albania, Malagasy Republic, and Sudan have joined the twelve-mile group. Cameroon now claims six miles and Senegal, South Africa, Tunisia, Turkey, and Uruguay have adopted the "six plus six" formula proposed by the United States and Canada at the 1960 Geneva Conference. Morocco and Norway claim a twelve-mile fishing zone. Denmark has extended the fisheries limits around Greenland from three to twelve miles and Canada announced its intention to do the same in mid-May of 1964 in order "to protect Canada's fishing industry."⁵⁰

All in all, over forty states now claim territorial seas of various widths greater than three miles⁵¹ and while, despite these defections, there are still more states recognizing the three-mile limit than any other single breadth, one wonders whether the three-mile rule is not a lost cause. Are not the cautious words of Professor Franklin that "the three-mile limit still more nearly represents customary international law than any other figure,"⁵² more realistic than the flat statement of Mr. Dean that the three-mile rule "will continue to be established international law."⁵³

In view of the United States conclusion at the 1960 Geneva Conference that it would be useless to propose a three-mile limit and the number of states that have increased their territorial seas since that time, it would seem that the era of the three-mile limit is fast drawing to a close. To borrow a simile from Dr. Jorge Bocobo of the Philippine delegation at the 1958 Geneva Conference, have we not witnessed the death of Mr. Threemiles and now are watching his heirs, Mr. Sixmiles and Mr. Twelvemiles argue over the settlement of the estate.

To carry the analogy further, however, until the estate is settled—until the heirs know how they will fare under the will—Mr. Threemiles still wields some influence. While the exact limit to be recognized in international law is unsettled and in a confused state, the United States is still in a position, holding to the three-mile rule, to negotiate, seek concessions, and, in general, insure that its interests are protected from the adverse effects of an internationally recognized extension should it materialize.

⁴⁹ See letter of U.S. Assistant Secretary of State Dutton to U.S. Senator Gruening, reprinted in 109 CONG. REC. 11279-80 (1963).

⁵⁰ From statement by Prime Minister Pearson, note 19 *supra*.

⁵¹ *Ibid.*

⁵² Franklin, *supra* note 45.

⁵³ Dean, *Freedom of the Seas*, 37 FOREIGN AFFAIRS 83, 91 (1958).

B. EXTENSIONS OF BASELINE

Even though agreement on a breadth for the territorial sea is reached someday, that will not completely settle the problems in this area. So far we have been concerned with the outer limit or end of the territorial sea, but necessarily included in the breadth of this sea is the problem of its beginning; that is what is to be used as the inner limit, the starting point from which to measure the agreed-upon distance? What is the baseline?

While several methods by which to determine a baseline have been proposed,⁵⁴ there are, currently, two ways which have been internationally recognized. The differences resulting from these two ways are often enormous. The first method has met with the widest usage. In this method the baseline follows the shoreline, curving in and out in accordance with the irregularities of the shore. While there has not been complete agreement among the nations using this method as to where the shoreline is—high water mark, low tide mark, or where the sea becomes navigable—the low tide line was adopted by the North Sea Fisheries Convention of 1882 between Great Britain, Germany, Belgium, Denmark, France and The Netherlands,⁵⁵ and has generally been adopted in the practice of states.⁵⁶

The second method for setting a baseline seems to have been established as far back as 1604 when King James I of England decreed that imaginary lines be drawn from headland to headland on the coast of England and proclaimed the waters landward of these lines to be "king's domain" or "king's chambers."⁵⁷ In modern parlance we would call them "internal waters." Although the "king's chambers" doctrine was rejected in the arbitration between the United States and Great Britain concerning

⁵⁴ At the 1930 Hague Conference the United States proposed an "arc of circles" method whereby a ship would simply draw a circle around itself, the radius thereof being the width of the territorial sea, and if the circle touched land at any place, the ship was within a territorial sea. This method was again introduced by the United States at the 1958 Geneva Conference. It failed to receive approval at either conference. In the meantime, Great Britain sought to rely on it in the Fisheries Case [1951] I.C.J. Rep. 116. The court stated in its opinion that "It is not obligatory by law," and refused to follow it.

⁵⁵ Convention for Regulating the Police or North Sea Fisheries, art. 2, FOREIGN REL. U.S. 438 (1887).

⁵⁶ [1951] I.C.J. Rep. 116, 128.

⁵⁷ 3 GIDEL, LE DROIT INTERNATIONAL PUBLIC DE LA MER 505 (1934).

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the ship *Washington* in 1854,⁵⁸ the headland to headland method of setting baselines continued to be used by some few nations. In 1949 a rebirth was given to this method when, in the *Anglo-Norwegian Fisheries Case*,⁵⁹ Great Britain contested a 1935 Norwegian decree in which the straight baseline method was used to delimit the territorial sea off Norway's northern coast. In a lengthy opinion which cites Norway's historic use of straight baselines, its economic advantage to the inhabitants of the area, and its usefulness in delimiting rugged coasts, the court determined, by ten votes to two, that the method employed for the delimitation of the fisheries zone by the decree was not contrary to international law.⁶⁰

The opinion has been expressed that the court's finding "cannot be held . . . [to have] created a precedent since it dealt with a unique geographical configuration of a coast which—as the court repeatedly said—was 'exceptional'."⁶¹ Logic and reasonableness, as well as the repeated statement of the court, uphold this opinion as to the application of the court's opinion. Some nations, however, seeking to extend their territorial seas, generally for economic reasons,⁶² have ignored it and have resorted to the baseline system even though their coasts do not conform to the "exceptional" situation in the *Fisheries Case*. In April 1950, the Icelandic Ministries of Fisheries, relying on the pleadings of Norway in the *Fisheries Case*, issued regulations prohibiting all trawling and Danish seine-netting within an area four miles seaward of baselines drawn from the outermost points of its northern coast. Despite protests from other nations, on March 19, 1952, after the decision in the *Fisheries Case*, Iceland confirmed its previous action and extended it to all coasts.⁶³ Instead of smoothing out an exceptionally rugged coast, the Icelandic regulation had the effect of squaring off the coastline and including large areas of the high seas within their internal and territorial waters.

Canada has also declared its intention to use the straight base-

⁵⁸ 4 MOORE, INTERNATIONAL ARBITRATION 4342 (1898). The *Washington* was seized while fishing in the Bay of Fundy, 10 miles off Annapolis, Nova Scotia. The British claimed that the bay was inland waters since a line drawn from headland to headland would have this effect. The arbiter found that the area was too large to be considered a bay.

⁵⁹ *Fisheries Case* [1951] I.C.J. Rep. 116.

⁶⁰ *Id.* at 143.

⁶¹ COLOMBOS, INTERNATIONAL LAW OF THE SEA 108 (5th ed. 1962).

⁶² See MCDUGAL & BURKE, *op. cit. supra* note 10, at 409.

⁶³ *Laws and Regulations on the Regime of the Territorial Sea*, U.N. Doc. No. ST/LEG/SER.3/6, at 516 (1956).

line method. In his statement to the House of Commons,⁶⁴ Prime Minister Pearson said that:

[T]he Canadian Government has decided to establish a 12 mile exclusive fisheries zone along the whole of Canada's coastline as of mid-May, 1964, and to implement the straight baseline system at the same time as the basis from which Canada's territorial sea and exclusive fisheries zone shall be measured.

Considering that Canada possesses the world's longest coastline,⁶⁵ it is readily apparent that this decision by the Canadian government, if recognized, will create large new areas of inland and territorial waters out of the high seas.

An interesting sidelight in this area is the case of California. As a result of the Supreme Court's decision in the tideland cases,⁶⁶ California acted to recover the territorial sea and other parts of the continental shelf which had thereby been taken away from her. Her method: in reliance upon the *Fisheries Case* she drew a straight baseline.⁶⁷ Thus she claimed to have pushed the territorial sea outward and to have recovered as inland waters important parts of her previous territorial sea.

Other evidences of the rebirth of the straight baseline are the previously mentioned cases of the Philippines⁶⁸ and Indonesia.⁶⁹ Until December 13, 1957, Indonesia had claimed, as its territorial waters, a distance measured outward for three miles from each island. On that date the Council of Ministers of the Republic of Indonesia declared⁷⁰ that, henceforth, the thousands of islands making up the Republic would be considered as a single archipelago within straight baselines connecting the protrusions of the outermost islands. Thus, not only were all of the islands to be treated as a single unit, but all waters between those islands were to be part of the same unit, and therefore, internal waters of Indonesia. The Council also, by this same declaration, sought to extend the territorial seas of Indonesia from a three-mile width around each island to a twelve-mile width measured outward from the newly declared straight baselines. On February 18, 1960, this declaration was reworked into a government order entitled "Regulation in Lieu of Act No. 4" and promulgated over

⁶⁴ 108 H.C. DEB. 621 (1963), reprinted in 2 INT'L LEG. MATERIALS 664 (1963).

⁶⁵ *Ibid.*

⁶⁶ *U.S. v. California*, 332 U.S. 19, 29-33 (1947).

⁶⁷ Calif. Stats. 1949, c. 6s, § 1, at 82, CALIF. GOV'T CODE § 170.

⁶⁸ See note 1 *supra*.

⁶⁹ See note 2 *supra*; notes 12-16 *supra* and text accompanying.

⁷⁰ See note 12 *supra*.

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the signature of President Sukarno.⁷¹ A map was included on which the exact baselines were imprinted.

As might be expected, these unilateral declarations by the Indonesian government met with the disapproval of most of the maritime nations which had, throughout history, used the important and much traveled straights and waters around Indonesia.⁷² In an effort to counter this disapproval, proposals were submitted at the 1958 Geneva Conference which would have approved the Indonesian proclamation of December 13, 1957.⁷³ These proposals were withdrawn,⁷⁴ however, and the legality of such an extension of territorial seas and inland waters has continued to be contested. Fortunately, Indonesia has not pressed its claim to such an extent that serious conflict would arise.⁷⁵

Both the International Law Commission and the 1958 Geneva Conference authorized the use of the straight baseline method, but limited it to deeply indented coasts or situations where there are numerous coastal islands.⁷⁶ From this wording a controversy

⁷¹ Translation published in *Addendum to Supp. to the Laws and Regulations on the Regime of the Territorial Sea*, U.N. Doc. No. A/CONF.19/5Add. 1, at 3-4 (1960).

⁷² For the United States response to the Indonesian claim, see *N.Y. Times*, Jan. 18, 1958, p. 3, col. 1. For other protests, see SYATAUW, *SOME NEWLY ESTABLISHED ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW* 174-75 (1961).

⁷³ Philippine proposal of April 1, 1958, U.N. Doc. No. A/CONF.13/C.1/L.98 and Yugoslavian proposal of March 26, 1958, U.N. Doc. No. A/CONF.13/C.1/L.59.

⁷⁴ The Philippine proposal was withdrawn on April 16, 1958, *1st Comm. Summary Rec.*, 3 OFF. REC. U.N. CONF. ON THE LAW OF THE SEA, 148 (A/CONF.13/39) (1958). On April 17, the Yugoslavian proposal was withdrawn presumably because the question needed "further study." *Id.* at 162-63.

⁷⁵ SYATAUW, *op. cit. supra* note 72, at 175.

⁷⁶ The articles of the Convention which are pertinent to the selection of a baseline read as follows:

"Article 3

"Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

"Article 4

"1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

"2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

"3. Baselines shall not be drawn to and from low-tide elevations unless lighthouses or similar installations which are permanently above sea level have been built on them.

has now arisen as to whether the straight baseline method can be applied to mid-ocean groups of islands.⁷⁷ In other words, does the Convention on the Territorial Sea and the Contiguous Zone authorize the use of straight baselines to connect the islands of an archipelago State? Considering the wording of the Convention itself, together with its close resemblance to the conclusion of the International Court of Justice in the *Fisheries Case*,⁷⁸ with its specialized geographical situation, it is doubtful whether the Convention provision can be so interpreted.⁷⁹

III. ADVERSE EFFECTS OF EXTENSION OF THE TERRITORIAL SEA

A. GENERAL INTRODUCTION

From the foregoing it appears that efforts are being made to extend the territorial seas by many means, the two most important being by an extension of the breadth of the territorial

"4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken in determining particular baselines, or economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

"5. The system of straight baselines may not be applied by a State in such a manner to cut off from the high seas the territorial sea of another State.

"6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

"Article 5

"1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

"2. Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters."

⁷⁷ See Sorensen, *Law of the Sea*, INT'L CONC. No. 520, at 239-40 (1958). The United States has its own internal problem in this regard in the form of the Hawaiian Islands. In 1963 an inter-island "sky bus" was placed in operation. Since the operations had tentative state approval but not federal approval, a dispute arose as to whether the plane was flying inter-state (leaving the territorial area of Hawaii, flying over international waters, and then re-entering Hawaii) or intra-state (on the theory that the waters between the islands are a part of the state).

⁷⁸ See notes 59-61 *supra* and text accompanying.

⁷⁹ The legality of use of the straight baseline method by oceanic archipelagoes is an unsettled question. For articles dealing with the question see Evensen, *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagoes*, 1 OFF. REC. U.N. CONF. ON THE LAW OF THE SEA 289, 302 (A/CONF.13/37) (1958); Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L L. 751, 765 (1960); Sorensen, *supra* note 77, at 239.

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sea itself and by use of straight baselines from which to begin the measurement. The situation regarding the breadth of the territorial sea is in a state of flux but change from old accepted practices seems inevitable. This discussion of the adverse effects of the change is designed primarily to indicate why that change must be forestalled as long as possible. It should also point up areas in which action must be taken to preserve as many of the military advantages to the free world of the three-mile limit as possible when greater limits become recognized in international law.

The nations of the world have been prompted to advocate a narrower or a broader territorial sea for a number of reasons. Chief among them are security, fishing, and economic factors other than fishing.

In 1702, the Dutch writer, Cornelius van Bynkershoek, authored the maxim "potestatem terrae finiri, ubi finitur armorum vis."⁸⁰ Although perhaps not literal,⁸¹ this maxim may be contextually translated as "the territorial sovereignty ends where the power of arms ends."⁸² This was an early expression of the concept that the territorial sea should be measured by the actual range of coastal cannon. Although impossibly wide breadths would now be required, the military consideration of "defendability," which set a narrow limit in 1702, is still being urged as the criteria to be used. Now, however, it is used to expand the breadth of the territorial sea for alleged security reasons.⁸³

Despite the advent of intercontinental ballistic missiles and the accompanying reduction in the importance of a wide territorial sea for protective purposes, security remains as a major consideration for some nations.⁸⁴ Those who are apprehensive about the use of large fleets against them, such as the use of the United States fleet off Lebanon in 1958, assume that those nations who advocate a narrow limit do so for military or political reasons inconsistent with the security of the coastal nation. Such

⁸⁰ BYNKERSHOEK, *DE DOMINIO MARIS DISSERTATIO*, first published in 1702 and reprinted in *OPERA MINORA* 364 (Editio Secunda 1744).

⁸¹ In a translation by Magoffin in *THE CLASSICS OF INTERNATIONAL LAW* 44 (Scott ed. 1923), the word "control" rather than "sovereignty" is used.

⁸² As interpreted by Walker, *Territorial Waters: The Cannon Shot Rule*, 22 *BRIT. YB. INT'L L.* 210, at 211-12 (1945).

⁸³ See the Ceylonese and Saudi Arabian references to the cannon shot rule at the 1958 Geneva Conference, 8 *OFF. REC. U.N. CONF. ON THE LAW OF THE SEA* 27, 36 (A/CONF.13/39) (1958).

⁸⁴ For a general discussion asserting the absence of a modern need for a wide territorial sea for defense purposes in view of modern weapons, see McDUGAL & BURKE, *op. cit. supra* note 10, at 516-20.

nations, stressing the proximity of large fleets, urge a broader territorial sea in order to move the threat further away. Opposed to this rationale are those nations which see a greater threat to their own security in the broad territorial sea.⁸⁵ For instance, the United States has urged the retention of the three-mile limit in order to protect against an increase in violations of neutral waters and in order to insure the unrestricted use of as many straits and sea areas as possible for the effective operation of a deterrent fleet and its supporting merchant vessels.

There are numerous economic effects which would result from an increase in the breadth of the territorial seas, such as the increased cost of navigational aids, the expense of rerouting airlines to avoid illegal overflight, the rerouting of merchant ships to avoid hampering regulations, and loss or increase of subsurface maritime wealth including fish, other sea life and minerals. The effects of military significance, however, can for the most part be classified under one heading: passage. Is there innocent passage in territorial waters, and, if so, what is innocent and what is passage? What limitations can be imposed upon passage by the littoral state? How can these limitations affect deployment and mobility of a sea or air force? What effect does neutrality have on passage?

In considering all of these matters, there is one observation that must be kept in mind. There is a tremendous contrast between the geographic situation of the free world and that of the Communist bloc. For the most part, the Communist world is in a neat package of land-connected states. True, it is gaining a few unconnected outposts now, such as Cuba, but the great bulk of the Communist states are still connected by railways, highways, and transcontinental airways. Opposed to this, the free world is an oceanic confederation. Its connecting lines are oceans and straits.

Survival of the free world nations is dependent upon their freedom to use the seas.⁸⁶ One may thoughtlessly argue that the sea is a large place and the loss of three million square miles

⁸⁵ In a statement made before the Senate Foreign Relations Committee on January 20, 1960, Mr. Dean has commented that "U.S. defensive capabilities would be so profoundly jeopardized by our acceptance of a greater than 6-mile territorial sea that those responsible for planning for our defense have concluded that we must take a position against such a course in any event." 42 DEP'T STATE BULL. 251, at 260.

⁸⁶ See Eller, *Implications of Soviet Sea Power*, THE SOVIET NAVY 289, 304-09, 326-27 (Saunders ed. 1958), for a fact-filled article supporting the assertion that the free world is an oceanographic confederation dependent on sea communications.

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of free sea by the extension of territorial limits would still leave plenty of room. It is not a question of having plenty of room. It is a question of having room where it is needed. By simple mathematics, surveillance of a coast line, whether from the air or sea, is nine miles better from three miles off the coast than it is from twelve, and adequate photographic and visual intelligence are vital to many military operations. Conversely, the deterrent effect of a fleet is considerably reduced when it must be stationed so far off shore that it cannot be seen.

Consider also the fate of unhampered passage through straits. Of the thirty-eight leading straits in the world, one study has shown that only three would remain open as high seas under a twelve-mile territorial sea regime.⁸⁷ Most of the maritime highways of the world would fall within the restrictions of territorial waters if the breadth of such waters were extended to twelve miles.⁸⁸

Relying on this difference in geographic configuration, the Communists may well be seeking to weaken the free world's lines of communication and to restrict the effectiveness of its defenses by broadening territorial seas.⁸⁹

The Russian leaders are not unaware of the dependence of the free world on communications. Rear Admiral Andreev of the Soviet Navy has stated that American troops abroad and all of the NATO Allies are so dependent upon transoceanic supply that they "cannot conduct wide scale combat operations" without it. According to the Admiral "*the very possibility of conducting war depends [for the 'imperialist' states] upon the support of uninterrupted operation of sea and ocean communications.*"⁹⁰

⁸⁷ See Kennedy, *A Brief Geographical and Hydrographical Study of Straits Which Constitute Routes for International Traffic*, U.N. Doc. No. A/CONF. 13/6Add. 1 (1957), published in U.N. Doc. A/CONF.13/37, at 114 (1957).

⁸⁸ See Dean's statement before the 4th meeting of the Committee of the Whole on March 20, 1960, 1960 OFF. REC. U.N. CONF. ON THE LAW OF THE SEA, para. 11, U.N. Doc. No. A/CONF.19/8; statement of Paris Bey el-Khouni, 1 ILC Yb. 213 (1956).

⁸⁹ See Nicholl, *Geography and Strategy*, THE SOVIET NAVY 243, 244 (Saunders ed. 1958), where R/ADM. Nicholl states that "by every conceivable means of diplomacy, subversion, propaganda and by the active support of nationalist movements [Russia] . . . has sought, not without success, to weaken the network of bases available to the rest of the world." "Her object is to ensure that her naval forces are in a position to cut the vital sea communications of the NATO powers."

⁹⁰ Andreev, *Sea and Ocean Communications in Contemporary War*, Krasnaia Zvezda, April 25, 1957, quoted in GARTHOFF, *SOVIET STRATEGY IN THE NUCLEAR AGE* 202 (Rev. ed. 1962).

"The Soviet leaders have thoroughly grasped the main lesson of both world wars, namely, that the Allies were very nearly defeated at sea, and only achieved victory by making a supreme effort to control their sea communications."⁹¹ Realizing these facts, Soviet strategists have given to their submarines, as one of their substantial missions, the interdiction of the sea communications of the free world.⁹²

B. INNOCENT PASSAGE

Innocent passage is a Pandora's box of troublesome problems, the top of which will be opened even further by the extension of territorial limits and more of its contents will pour out to plague international harmony. The legal issues involved in innocent passage problems, to one extent or another, embrace most of the ills, of a military nature, evolving from an extension of territorial seas. It is, therefore, the first area of concern to be discussed in detail. Other effects will later be singled out for comment, but primarily as applications of the legal issues to be discussed in this section.

At the outset it will be advantageous to consider three matters which are *not* included in the so-called "right" of innocent passage: Submerged passage, overflight, and internal waters.

1. *Submerged Passage.*

Under article 14, paragraph 6, of the Convention on Territorial Sea and the Contiguous Zone, "Submarines are required to navigate on the surface and to show their flag" when operating within the territorial waters of another state. The requirement that a submarine navigate on the surface in territorial waters unless it has permission to do otherwise is a well-recognized customary rule in international law and was recommended by the International Law Commission.⁹³ Recognition of the rule by the United States is evidenced by Navy Regulations⁹⁴ which direct: ". . . nor shall submarines be submerged within . . . territorial waters without . . . permission [from the government of the country concerned.]" While violation of this rule is rather easily accomplished, and of great benefit to the violator, as will

⁹¹ Nicholl, *supra* note 89, at 243-44.

⁹² GARTHOFF, *op. cit. supra* note 90. For another recent appraisal of the role of the Soviet submarine see Macintyre, *The Submarine Threat*, THE SOVIET NAVY 168 (Saunders ed. 1958).

⁹³ *Articles Concerning the Law of the Sea*, § 15(5), U.N. Doc. No. A/CONF.12/32 (1958).

⁹⁴ U.S. Navy Regulations, 1948, § 0622(4).

be discussed later, its violation, when detected, is considered a serious matter. Note, for instance, an Argentine response to a suspected submersion. According to an Argentine government report, on May 21, 1958, an unidentified, submerged submarine was sunk by Argentine vessels within territorial waters because it had not surfaced and shown its flag as required.⁹⁵ While later information disclosed that the supposed submarine was merely a false contact, the incident illustrates the seriousness of detected disobedience. Thus, for a country that is concerned with world opinion and is trying to abide by international law, a submarine must rise and proceed to navigate on the surface where its agility is decreased.

Under present day conditions, why is such a rule necessary? If the commander of a submarine wishes to pass innocently through a territorial sea, what difference does it make whether he is under or on top of the sea? The main difference, of course, is that his presence, nationality, and purpose is more obvious if he is surfaced. Does this requirement really protect the coastal state today? If the submarine is present to launch an attack, a mere twelve miles is not going to stop it. Missiles fired from submerged submarines have greater range than that. There is no longer the need in every instance for risking the dangers of coming into a harbor or close to shore in order to strike. And if close proximity is required, a surfaced submarine can get closer to its target in peacetime. Since the main danger in peacetime is from surprise attack and that cannot be eliminated by a twelve-mile territorial sea, does not the inconvenience of the rule to the submarine outweigh its benefits to the coastal state? True, if a submarine must surface while going through a strait, a migration of submarines from one area to another would be more easily detected, but if the purpose of the migration were an attack, there is little reason to anticipate compliance with the surfacing requirement anyway. Coastal underwater detection devices are not yet so effective that a submarine is deprived of a better chance of secrecy if submerged.

Under wartime conditions the only application of the rule would be in neutral waters. While the rule is justified as a protection against violation of neutral waters, this situation does not justify a blanket rule covering other situations as well.

2. *Overflight.*

Another area where innocent passage has no application, is in overflight. An airplane has no right of innocent passage over

⁹⁵ For a report of this incident, see N.Y. Times, May 24, 1958, p. 1, col. 6.

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the territorial waters of a nation.⁹⁵ The result of this restriction is drastic. A submarine can surface and become entitled to the same right of innocent passage as a surface warship. An airplane is dependent upon treaties and agreements.

Although eminently important in all types of transit, whether on, under, or over the sea, it is in this area of overflight that certain geographical facts of life are most poignant. Most of the more important narrow passages connecting important bodies of water are high seas under a three-mile territorial limit and territorial waters under a twelve-mile limit. Of more than one hundred important international straits that are now high seas, more than fifty would become territorial seas under a six-mile rule and all would be reduced to territorial seas if a twelve-mile limit were recognized.⁹⁷ Thus, birth of a twelve-mile territorial sea would signal the death of over one hundred strategically and economically important air routes. Planes can either go around nations, traversing the high seas, or they can become dependent on agreements and treaties—tolerance and cooperation—for their operations.

In one of his articles subsequent to the 1958 Geneva Convention, Mr. Dean summarized the current situation with regard to airplanes by saying that "there is no right for aircraft to overfly another nation's territorial sea except under a treaty, with its consent, or pursuant to the Chicago Civil Aviation Convention of 1944 as to the contracting parties thereto. [citation omitted]"⁹⁸ Inasmuch as this Convention⁹⁹ is a prominent source for the right of overflight, it is well to note two facts about it. First, almost all Communist bloc countries are *not* signatories and are thus not bound by its terms and grant of privileges. Second, article 3(c) thereof provides that, "No state aircraft [including military aircraft] of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof." As to military aircraft, at least, there seems to be little room for doubt. There is no right in the absence of special agreement.

⁹⁵ McDUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS* 486 (1962); 1 OPPENHEIM, *INTERNATIONAL LAW* 523 (8th ed., Lauterpacht ed. 1955).

⁹⁷ Franklin, *supra* note 45, at 90; Dean, *Statement before Senate Foreign Relations Comm.*, Jan. 20, 1960, 42 DEP'T STATE BULL. 251, at 260.

⁹⁸ Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 607 at 610 (1958).

⁹⁹ Convention on International Civil Aviation, April 4, 1947, 61 Stat. 1180; T.I.A.S. No. 1591; 15 U.N.T.S. No. 295.

Again, as with submarines, the question may be asked: Why? Why not allow innocent passage of military airplanes?¹⁰⁰ It is conceded, to begin with that overflight must be subject to some controls by the coastal state or an international body set up for that purpose in order to provide for air safety, to protect against nuisance, and to close certain security areas not customarily used for overflight. Aside from these factors, with which aviation has long had to contend, what purpose is now served by the denial of the right of innocent passage? Two purposes come to mind. First, the denial affords a nation the opportunity to flex its international muscles by asserting its national sovereignty. This hardly seems to be adequate justification for the denial. Secondly, it provides some measure of secrecy by protecting against the gathering of coastal intelligence by aerial reconnaissance. When one stops to think about it, however, there is little difference except for the angle of view between a fishing boat plying the waters a mile or so off the Florida coast and an airplane a mile or so above it.

This angle, of course, may be all important, but is the need for security from the prying "eyes" of an airplane on the coast of such great importance that a coastal boundary should be given greater protection than a land boundary? States bounded by land have no extra distance for protection along such boundaries.

3. *Internal Waters.*

The third area that is exempted from the burden of innocent passage rights is inland waters. Under most circumstances, inland waters are not affected militarily by an extension of the territorial sea. There are two important exceptions, however. One occurs where the opening to an area of water was too broad for that water to be classified as a bay under a narrow limit but narrow enough to become a bay under a broad limit. In such cases not only does the extension of the territorial limit create a bay out of the high seas, but it also causes the outer limit of the territorial sea to be measured from the mouth of the bay rather than from the shore. A second exception, with more serious consequences, arises where the territorial sea is extended by the use of straight baselines. The circumstance in Indonesia has been discussed previously¹⁰¹ and is an excellent example of

¹⁰⁰ In view of the shooting down of an unarmed United States training plane over East Germany in January 1964 when it lost its bearings due to radio failure, it is recognized that the task of convincing the Soviet bloc to give up the prohibition against over-flight in its territorial sea may well be impossible. See N.Y. Times, Jan. 30, 1964, p. 1, col. 4.

¹⁰¹ See notes 67-74 *supra* and text accompanying.

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this exception. By its proclamation,¹⁰² Indonesia has attempted to create an area of internal waters over which it would have complete sovereignty. If this extension is recognized, Indonesia will become a country that is predominantly under ocean water, and the trading nations of the world will be deprived of the free use of historic and well-traveled high sea trade routes.

The general rule that there is no innocent passage in inland or internal waters has been limited by both consent and convention. Indonesia is also an example of the consent exception. Article 3 of Act No. 4¹⁰³ provides that "(1) Innocent passage in the inland seas of Indonesia is open to foreign water transport. (2) Innocent passage as referred to in clause (1) can be regulated by a Government Regulation." Such regulations were promulgated as Government Ordinance No. 8 on July 28, 1962.¹⁰⁴ In these regulations there are provisions in article 4 for the prohibiting of peaceful passage. Article 7 particularly restricts innocent passage for military ships. It provides that:

(1) Before undertaking a peaceful passage in the sea territory or internal waters of Indonesia, the foreign warships and Government vessels that are not merchant ships must first notify the Minister/Chief-of-Staff of the Navy, unless the said passage is along sea lanes which have been or will be determined by the Minister/Chief-of-Staff of the Navy.

(2) When crossing through Indonesian waters, foreign submarines must sail on the surface of the water.

In the Explanatory Memorandum on Act 4,¹⁰⁵ the Indonesian government is explicit in pointing out that this grant of innocent passage in internal waters is designed to stimulate commercial shipping and, since it pertains to inland seas, that "Indonesia may withdraw the facilities granted." It would seem quite clear that Indonesia feels it has made these concessions as a matter of grace and not in recognition of the rights of any other nation.

At that time, of course, Indonesia's feelings as to grace were quite correct. It has acted as a matter of grace, albeit a grace prompted by economic necessity. During the seventh session of the International Law Commission, it was decided to make provision for innocent passage through waters that would become internal as a consequence of using the straight baseline method

¹⁰² See note 12 *supra*.

¹⁰³ See note 2 *supra*.

¹⁰⁴ Stat. Bk. (1962) No. 36.

¹⁰⁵ Contained in annex to Circular No. H. 248 of the *Commercial Advisory Foundation in Indonesia*.

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of determining territorial seas.¹⁰⁶ Essentially, article 5 of the Convention of the Territorial Sea and the Contiguous Zone¹⁰⁷ is an adoption of the Commission's decision. Thus, by convention, there is a right to innocent passage in internal waters.¹⁰⁸

4. *Surface Passage.*

Article 14 of the Convention on the Territorial Sea and the Contiguous Zone provides, in part, that "ships of all States . . . shall enjoy the right of innocent passage through the territorial sea." This expresses, in a few words, the general rule of customary international law. In practice, however, the matter is not as simply stated. The portion of the article quoted contains three words the interpretations of which have caused anything but a uniform conclusion among legal authorities and nations. These three words are: innocent, passage, and ships.

a. *What is innocent?* The article itself attempts to define the word "innocent." It states, in paragraph 4, that "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law."¹⁰⁹ Mr. Yingling, a United States' delegate, expressed the view, in the debate on this paragraph, that the sole test of the innocence of a passage was whether or not it was prejudicial to the security of the coastal state. He defined the word security as applying to military security or other threats to the sovereignty of the coastal state and not to economic or ideological security.¹¹⁰ In making this statement, Mr. Yingling was addressing himself to a United States proposal which omitted the words "peace, good order or" as well as "and with other rules of international law." In view of these amendments, Mr. Yingling's

¹⁰⁶ International Law Comm'n, REPORT, U.N. GEN. ASS. OFF. REC. 8th Sess., Supp. No. 9, at 4 (A/3159) (1953).

¹⁰⁷ Note 76 *supra*.

¹⁰⁸ Inasmuch as previously established international law contains no such right in internal waters, the Convention speaks as law only among the parties thereto. See note 6 *supra*.

¹⁰⁹ Inasmuch as the only specific reasons for denying such passage are the peace, good order, and security of the coastal state, as enumerated in the article, the additional words "other rules of international law" would seem to be merely redundant and not suggestive of other qualifications. There was at the conference, however, an insistence by a number of delegations that these words were necessary. In a debatable situation, then, one may expect to be faced with an argument, based on "other rules of international law," in an attempt to broaden the justification for a denial of passage on the basis that it lacked innocence.

¹¹⁰ 1st Comm. Summary Rec. of Meetings and Annexes, 3 OFF. REC. U.N. CONF. ON THE LAW OF THE SEA 82-83 (A/CONF.13/39) (1958).

sole test becomes only one of several tests. In addition, the passage must not violate the peace and good order of the state. These are tremendously important additions for they cultivate wide fields, fertile for the raising of objections to passage. There are, of course, obvious actions which would be to the prejudice of peace, good order and security. But who is to define these terms in less obvious cases? In the final analysis it will in most cases be the judicial or executive authorities of the coastal state.¹¹¹ This would be particularly true where the vessel concerned is not government owned since a privately owned ship does not have the same immunity from seizure granted to a government owned ship. Whether owned privately or by the government, however, the whole tenor of the Convention and the debates accompanying its formation point to a conclusion that the decision of the coastal state as to its own peace, good order and security will at least be given great weight if an international decision is necessary. The coastal state controls the innocence of the ship in another way, also. In a later section the controls and regulations that a state may impose will be discussed. It will suffice here merely to note that should a passing ship fail to comply with regulations lawfully imposed by the coastal state, its ship's passage is no longer innocent.¹¹²

b. *What is passage?* Having once found that the transit is innocent, it must then be determined that it is passage. Innocent intentions alone do not qualify a ship for innocent passage. Here again, the article itself affords some help. One paragraph contains the definition that "passage means navigations through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters."¹¹³

While there is no express statement that navigation must be by direct routes, the reasonable implication of the wording is that

¹¹¹ See McDougal & Burke, *op. cit. supra* note 96, at 66, where it is stated that "the authority accorded a coastal state in the territorial sea, is and must be, very comprehensive indeed, extending even to a substantial measure of discretion in determining the innocent character of a particular passage. . . ." These authors also see in art. 14(4) of the Convention on the Territorial Sea and the Contiguous Zone considerable authority [for the coastal state] to qualify passage as non-innocent." *Id.* 67. At the 1958 Geneva Conference, Mr. Yingling voiced the United States position that in the first instance, the determination as to whether a passage was innocent or not was up to the coastal state. 3 OFF. REC. U.N. CONF. ON THE LAW OF THE SEA 84 (A/CONF. 13/39) (1958).

¹¹² Convention on the Territorial Sea and the Contiguous Zone, April 12, 1961, art. 17, U.N. Doc. No. A/CONF.13/L.52 (1958).

¹¹³ *Id.* art. 14, para. 2.

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the ship must take a route which will accomplish the traversing without undue time spent in doing it. This conclusion is strengthened by the next paragraph in the article which dictates that "passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress." Thus it would seem that drills, such as "man-overboard" or "zig-zag", and military exercises could not be conducted in territorial waters. While they are innocent, because they are not directed against the peace, good order, or security of any state, still they are not passage and are forbidden in the absence of agreement.

c. *Are conventional warships included?* The interpretation of the word "ships" has the greatest military consequence. The main question is, does it include warships? Merchant ships clearly have the right of innocent passage. Do warships?¹¹⁴ There is a great split among authoritative writers in international law as well as among nations.¹¹⁵ One early authority contended that warships do not have the right of innocent passage.¹¹⁶ A noted English authority finds that:

[T]he question is controversial whether they enjoy the same right of innocent passage [as merchant ships]. The better view appears to be that such user should not be denied in time of peace when the territorial waters are so placed that passage through them is necessary for international traffic.¹¹⁷

That he is definitely restricting the innocent passage of warships is borne out by his later comment that:

. . . a distinction ought to be drawn between warships and merchant vessels. The reason for granting this right [of passage] to merchant vessels is mainly that sea navigation ought to be free and that trade communications should not be interrupted between the various parts of the world. Moreover, the presence of powerful warships in territorial waters and only three miles distant from the shore may prove a serious danger to small nations. It is, therefore, reasonable to concede to a State the right to enact regulations regarding the passage of foreign warships through its territorial waters, if considerations based on its safety and protection justify it.¹¹⁸

¹¹⁴ At the 1958 Geneva Conference the Russian delegate expressed, as the Soviet position, that innocent passage pertained only to merchant ships and not to warships. 3 OFF. REC. 32, U.N. Doc. No. A/CONF.13/39 (1958).

¹¹⁵ For a more complete discussion of the conflicting views of legal writers see 1 BRUEL, INTERNATIONAL STRAITS 123-43 (1947). Bruel's conclusion was that "a right proper for warships to pass through territorial waters cannot yet be assumed to exist." *Id.* at 230.

¹¹⁶ HALL, A TREATISE ON INTERNATIONAL LAW, 198 (8th ed., Higgins ed. 1924).

¹¹⁷ COLOMBOS, *op. cit. supra* note 61, at 121.

¹¹⁸ *Id.* at 238. While it is reasonable to agree with the conclusion stated, it seems unreasonable to agree with the implication that the reasons stated

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Another noted current authority concludes that "under customary international law . . . coastal states do not possess an arbitrary competence to deny passage to warships."¹¹⁹ This same authority, however, believes that "there is a considerable body of opinion that . . . [warships have] no right of passage through the territorial sea."¹²⁰

A third current authority in international law, writing before the 1958 Geneva Conference, has stated that "a right for the men-of-war of foreign States to pass unhindered through the maritime belt is not generally recognized."¹²¹ He continues by saying, however, that:

As a rule, . . . in practice no State actually opposes in time of peace the passage of foreign men-of-war and other public vessels through its maritime belt. It may safely be stated, first, that a usage has grown up by which such passage, if in every way inoffensive and without danger, shall not be denied in time of peace; and, secondly, that it is now a customary rule of International Law that the right of passage through such parts of the maritime belt as form part of the highways for international traffic cannot be denied to foreign men-of-war.¹²²

It is unfortunate that all nations do not agree with this general rule. In actual practice, the policies of nations have been as diverse as the statements of the experts.¹²³ In 1910, Elihu Root expressed what was then the traditional United States position as follows: "Warships may not pass without consent into this [territorial sea] zone, because they threaten. Merchantships may pass and repass, because they do not threaten."¹²⁴ By the time of the Hague Codification Conference in 1930, the United States had altered its view only slightly. It then considered that warships could pass as a matter of courtesy but not as a matter of

justify a distinction between warships and merchant vessels. "That sea navigation ought to be free" is a commendable goal, but it applies to warships as well as merchant vessels. "That trade communications should not be interrupted" is also a commendable goal, but one which can be retained, under present conditions, only if our navies have the freedom of movement necessary to protect shipping. As to the third reason, where is the danger in having warships off-shore if they are in innocent passage?

¹¹⁹ McDUGAL & BURKE, *op. cit. supra* note 96, at 221.

¹²⁰ *Id.* at 485.

¹²¹ 1 OPPENHEIM, *op. cit. supra* note 96, at 494.

¹²² *Ibid.*

¹²³ For the 1929 position of a number of states see 2 BASIS FOR DISCUSSION, CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW (League of Nations Pub. No. C.74.M.39.1929.V.).

¹²⁴ XI *Proceedings, North Atlantic Coast Fisheries Arbitration*, S. Doc. No. 870, 61st Cong., 3d Sess. 2007 (1910).

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right.¹²⁵ Article 12 of the draft convention prepared by the Hague Conference is an expression of this position. In part, it provides that "as a general rule, a coastal State will not forbid the passage of foreign warships in its territorial sea, and will not require a previous authorization or notification. The coastal State has the right to regulate the conditions of such passage."¹²⁶

The International Law Commission arrived at essentially the same conclusion¹²⁷ as the Hague Conference. When the Commission draft was studied by the 1958 Geneva Conference, however, dispute arose as to the requirement of prior authorization or notification. Some delegations contended that prior authorization was required. Others required only that prior notification be given the coastal country. Still others held to the conclusion that no clearance procedure is necessary as a prerequisite to innocent passage of warships.

By the time of this conference the United States had swung over to the latter view and was joined by a sufficient number of states so that, when the matter of authorization and notification came on for a vote, they failed to receive the two-thirds majority required. This cannot be interpreted as an affirmation of the "no clearance" policy. It simply means that the Conference could not reach agreement and, therefore, the Convention is mute. A look at the proceedings of the committee which studied the Convention leads to the conclusion that a majority of the delegations may not have intended that warships *should* have a right to innocent passage¹²⁸ and it has been vigorously argued that the

¹²⁵ See the Russian statement of the U.S. policy at 2 OFF. REC. U.N. CONF. ON THE LAW OF THE SEA 68 (A/CONF.13/38) (1958). The present U.S. position is that warships do have a right of innocent passage through territorial seas. See *id.* 67-78. This position is supported by "strong legal arguments." McDUGAL & BURKE, *op. cit. supra* note 96, at 556. Apparently, however, the U.S. fears that disagreements among nations as to the right will, as a practical matter, make effective invocation of the right impossible. *Ibid.*

¹²⁶ DRAFT CONVENTION, ART. 12 (League of Nations Pub. No. C., 1930, vol. 9), as quoted in COLOMBOS, *op. cit. supra* note 61, at 238.

¹²⁷ Article 24 of the Commission's proposed draft reads: "The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of articles 17 and 18."

¹²⁸ Professor Sorensen summarizes the situation by saying, "Consequently, the Convention as it now stands contains no special provision relating to the innocent passage of warships, but only the general rules applicable to all ships. The actual text of the Convention would therefore warrant the conclusion that warships have the same rights in this respect as other ships, but the proceedings of the Conference leave no room for doubt that this was not the intention of the majority of delegations." Sorensen, *Law of the Sea, INT'L*

proceedings clearly show that they *do* not have such a right.¹²⁸

Discussion thus far has included conflicting authorities and a currently mute convention. While these are indicative of a theoretical conclusion, based on an interpretation of the minutes of the Conference, a more practical determination of whether a state can rely on the innocent passage of warships unhampered by clearance requirements can be found in the actual practice of nations. As stated above, many coastal states do not afford the right of innocent passage to warships. That it may only be a simple majority rather than a two-thirds majority is little consolation in our concern for unhampered freedom of innocent passage. It is not the number who maintain controls as much as it is their location and power.

In this connection it is significant to note that with the exception of Poland, all of the Communist nations that signed the Convention reserved the right of the littoral state to determine whether or not warships might pass through their territorial sea and, if so, how they might do it. Other states have expressed their intentions in other ways. An example is Ghana's amendment to the United States-Canadian "six-plus-six" proposal at the 1960 Geneva Conference.¹²⁹ Ghana would have required prior notification.

d. *Are atomic-powered warships included?* Most of the discussion in the foregoing subsection had only conventional warships in mind. With the advent of atomic-powered warships a new reason for desiring more abundant high seas and a corresponding decrease in coastal state-controlled territorial waters has come into existence.

The question of whether an atomic ship is to be treated any differently in international law than a conventionally-powered ship¹³¹ has received recent attention in international conferences and treaties. As a result, on May 25, 1962, the Brussels Conven-

Conc. No. 520, at 235 (1958). McDougal specifically qualifies Sorensen's conclusion by stating that "the predominant expectation of states [at the 1958 Conference], therefore, appears to be that warships have a right of access to the territorial seas, subject to notification." McDougal & Burke, *op. cit. supra* note 96, at 220. Thus, even if the right exists it is not unqualified.

¹²⁹ See comment by Dr. El-Erian of Egypt in U.N. GEN. ASS. OFF. REC. 13th Sess. 6th Comm., 14 (A/C.6/SR.590) (provisional record) (1958).

¹³⁰ U.N. Doc. No. A/CONF.19/L.10 (1960).

¹³¹ While the Convention on the Territorial Sea and the Contiguous Zone, art. 16, para. 3, requires that, if innocent passage is to be suspended, it must be done "without discrimination amongst foreign ships," this admonition would seem to apply to equal treatment of nations rather than types of warships.

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tion on the Liability of Operators of Nuclear Ships¹³² was opened for signature. During the conference which formulated this Convention, the United States opposed its application to warships. However, the Convention was made applicable to warships as well as merchant ships and the United States did not sign it. Joining the United States in a refusal to sign was the Soviet Union. Thus, neither of the states which possesses nuclear-powered ships agreed to be bound.

As indicated by the title of the Convention, it deals mainly with financial liability. This is typical of most of the discussion in this area. Very little has been said, directly, with regard to the right of nuclear-powered ships to innocent passage and legally acceptable excuses for denying such passage. Perhaps an indication of the status which a nuclear warship may be expected to have in territorial waters may be gained from the fact that the United States has found it necessary, before sailing the nuclear merchant ship *Savannah* into foreign waters, to conclude specific agreements with the coastal states.

Because of the breadth of its terms, the United States' agreement with the Federal Republic of Germany¹³³ is of particular note. In addition to indemnification for loss in case of nuclear accident, this agreement makes entry into the coastal waters of Germany subject to prior German approval and inspection, including access to operational records. Even when approved, the ship must follow special instructions as to routes, pilotage, tug assistance, and other similar matters.

From these indications it is apparent that not only will nuclear ships be required to conform to more stringent rules than conventionally-powered ships but that the coastal states may have virtually unlimited power to effectively deny passage on grounds of security and safety. It is doubtful that the right of inspection could be made to apply to warships because of their traditional immunity. However, since a number of nations require prior notification or authorization even from conventional warships, it is not hard to imagine that serious attempts will be made to impose this requirement on nuclear-powered warships.

e. *Closure of the territorial sea.* In addition to the highly ques-

¹³² Reprinted in 57 AM. J. INT'L L. 268 (1963). For more complete information on the Convention see Konz, *The 1962 Brussels Convention on the Liability of Operators of Nuclear Ships*, 57 AM. J. INT'L L. 100 (1963).

¹³³ Agreement with the Federal Republic of Germany on the Use of Territorial Waters and Ports by the N.S. *Savannah*, Nov. 29, 1962, 13 U.S.T. & O.I.A. 2567, T.I.A.S. No. 5223.

tionable status of the right of warships to innocent passage,¹³⁴ there are at least three other important reasons why innocent passage through territorial seas is a poor substitute for free use of high seas.¹³⁵ These reasons are the right of the coastal state to close its seas, the right of the coastal state to impose regulations on the use of its seas, and the effect of wartime conditions on passage.

The littoral state has the right to take such action as is necessary within its territorial seas to protect itself against any acts prejudicial to its security. This includes the right to restrict temporarily, or to completely suspend for a temporary period, innocent passage in definite areas.¹³⁶ The 1930 Hague Conference on Codification produced the first general indication that there was a growing consensus among states to the effect that a state could suspend the passage of warships through its territorial seas.¹³⁷ Article 16 of the Convention on the Territorial Sea and

¹³⁴ See 1 OPPENHEIM, *op. cit. supra* note 96, at 853.

¹³⁵ In listing the authority which a state has within its territorial sea, McDougal gives examples of nine reasons why a territorial sea is a poor substitute for free high seas. They are:

"1. Exclusive rights of exploitation and control over animal and mineral resources of the marginal belt;

"2. The competence to exclude passage through the marginal belt by qualifying the character of the passage sought or, under some conditions, by suspending any passage at all (the coastal state has a wholly discretionary authority to exclude any passage by aircraft);

"3. Authority to subject navigation in the belt to the regulation of the coastal state;

"4. An indeterminate competence over events and persons aboard passing vessels;

"5. An equally indeterminate competence over the vessel itself for the purpose of judging claims against it;

"6. A competence commensurate with the obligation to maintain safety of navigation in the belt;

"7. Authority to protect against pollution from passing ships;

"8. Authority to prescribe and apply regulations concerning security, customs and health;

"9. Authority to control belligerent use of neutral waters, a control that might be onerous and even embarrassing to the claimant during times of violence." McDUGAL & BURKE, *op. cit. supra* note 96, at 72. All but items 1, 4, and 5 apply to warships.

¹³⁶ See COLOMBOS, INTERNATIONAL LAW OF THE SEA 120-21 (5th ed. 1962); BRITTON & WATSON, INTERNATIONAL LAW FOR SEAGOING OFFICERS 65-8 (2d ed. 1960). See also McDUGAL & BURKE, *op. cit. supra* note 96, at 181, where it is claimed that "a state may assert authority to deny passage by virtue of its general competence to prescribe for events within the territorial sea," or on the basis that the passage "has prejudicial impact on local security and other interests" or on the grounds that it is "non-innocent." These three grounds are termed "functional equivalents."

¹³⁷ *Id.* at 202.

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the Contiguous Zone gives further expression to this right and added to it certain limitations to insure fairness.¹³⁸

The article goes on to codify an important exception to the general right of closure. Paragraph 4 states that:

There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state.

In this area, too, there have been disputes over the status of warships. The better opinion, supported by the decision of the International Court of Justice in the *Corfu Channel Case*,¹³⁹ is that innocent passage cannot be denied to foreign warships if the area is actually a strait and is customarily used in international traffic.¹⁴⁰ This case arose out of a series of transits by warships of Great Britain through Corfu Channel, the territorial waters of Albania. On the first entry of British ships, Albania had fired at them from the shore. On October 22, 1946, Great Britain sent a second group of ships through the channel with the announced intention of firing back if fired upon. Albania did not open fire but the fleet ran into a field of anchored automatic mines in the Corfu Strait, heavily damaging *HMS Saumarez* and causing some damaging of *HMS Volage*. Great Britain then sent minesweepers through the channel in order to gather evidence. In expressing its view, the International Court of Justice declared that:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.¹⁴¹

Based on this statement of the law, the court concluded that the second passage was innocent even though the purpose of the passage was to test the peaceableness of the coastal country but the third passage, to gain evidence, was not innocent.

¹³⁸ Art. 16 provides, *inter alia*, that "Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published."

¹³⁹ [1949] I.C.J. Rep. 4.

¹⁴⁰ See COLOMBOS, *op. cit. supra* note 136, at 237; 1 OFFENHEIM, *op. cit. supra* note 96, at 511.

¹⁴¹ [1949] I.C.J. Rep. 4, at 28.

The court was also of help in settling the question as to what is a strait. According to the court, the criteria for determining whether a strait is international is in "its geographical situation as connecting two parts of the high seas and the fact that it is being used for international navigation."¹⁴²

f. *The right to regulate.* Although warships have a better right of innocent passage in straits than they do in ordinary territorial sea, even here that right is not unqualified. The warship must still obey the regulations of the coastal state if it is to retain its innocent status.¹⁴³ Specifically, the coastal state may limit the number of warships which it will allow to use the strait at any one time and the length of their stay.¹⁴⁴ It may also prescribe definite routes to be followed during their passage.¹⁴⁵

These two regulations have their particular applicability in straits, but they have their counterparts, and many more besides, in the multitude that littoral states may prescribe for their territorial seas in general. They may make regulations concerning the rules of the road, use of radar, obligatory pilotage, the exclusion of foreign pilots, the protection of buoys, beacons, lightships, submerged cables and pipelines, and the prohibition of maneuvers or gunnery practice within a fixed distance from shore.¹⁴⁶ These are but a few.

It is generally recognized that a littoral state may set rules requiring ships passing through its territorial seas to render certain salutes and to show the flag of the ship's nationality. Failure to do so has resulted in serious consequences. In 1864, the British schooner *The Mermaid* failed to exhibit her flag while she was in Spanish territorial waters. She was sunk by Spanish cannon-shot.¹⁴⁷ In February, 1958, the Indonesian navy arrested and held the British ship *Moon Breezes* for failure to fly the British colors while in Indonesian waters.¹⁴⁸ Indonesia has also furnished at least two other examples of regulations and their effects. In August, 1960, it forbade Dutch vessels from picking

¹⁴² *Ibid.*

¹⁴³ See McDOUGAL & BURKE, *op. cit. supra* note 96, at 259, where it is stated that "there can be no doubt that coastal states can make compliance with some coastal laws a precondition to innocent passage."

¹⁴⁴ See COLOMBOS, *op. cit. supra* note 136, at 181.

¹⁴⁵ BRUEL, *INTERNATIONAL STRAITS* 245 (1947).

¹⁴⁶ See COLOMBOS, *op. cit. supra* note 136, at 120-1; Franklin, *The Law of the Sea: Some Recent Developments*, 53 NAVAL WAR COLLEGE BLUE BOOK SERIES 89, 131-47 (1961).

¹⁴⁷ See COLOMBOS, *op. cit. supra* note 136, at 150.

¹⁴⁸ See BRITTIN & WATSON, *op. cit. supra* note 136, at 68.

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up or discharging passengers or cargo in Indonesian waters.¹⁴⁹ Thus, although the Dutch ships could sail through the newly created "internal waters" of Indonesia, they could conduct no commercial operations. Three years later Indonesia's quarrel was with Malaysia. On December 26, 1963, the Indian ship *Mohamedi* with 276 persons aboard, stuck on a reef near an island between Singapore and Indonesia. The *Barbain*, a British Navy salvage ship out of Singapore, went to its aid but was ordered out of the area by three Indonesian gunboats.¹⁵⁰

These last two Indonesian actions raise the question: What determines the validity under international law of a regulation of a coastal state? Basically, this question is answered by balancing one paragraph of the Convention on the Territorial Sea and the Contiguous Zone against two others. On the one hand, "The coastal State must not hamper innocent passage through the territorial sea."¹⁵¹ On the other hand, "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent"¹⁵² and:

Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law, and, in particular, with such laws and regulations relating to transport and navigation.¹⁵³

One intention of the Conference is clear enough from these quoted paragraphs. Coastal states do have the right to make regulations provided those regulations are necessary to prevent passage which is not innocent and provided they do not hamper innocent passage.¹⁵⁴

The line between these two provisions can only be drawn by using the test of reasonableness. Assume, for example, that a coastal state issues a regulation prohibiting the carrying of nuclear weapons aboard ships in its territorial seas. Obviously, such

¹⁴⁹ N.Y. Times, June 20, 1960, p. 56, col. 7.

¹⁵⁰ Washington Evening Star, Dec. 27, 1963, p. A-11.

¹⁵¹ Art. 15, para. 1.

¹⁵² Art. 16(1).

¹⁵³ Art. 17.

¹⁵⁴ Although the matter is not expressly stated in the record of the conference, McDougal, with "first-hand" information concludes that another intention of the delegates was to allow a coastal state to preclude innocent passage for a violation of a regulation pertaining to the "peace, good order or security" of the coastal state on the ground that such a violation made the passage not innocent. Ships could not be excluded for violation of other regulations. McDUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS* 254 (1962).

a regulation would be of gigantic military significance. Is it a lawful regulation?¹⁵⁶

In 1923, in pursuance of a Prohibition policy, the United States Treasury issued a notice which prohibited the introduction of all liquor into the territorial waters of the United States. In writing about this situation, one authority has stated that "it is believed that the proposition is unquestionable that under international law every nation may prohibit the introduction into its territory of any commodity which it sees fit to exclude."¹⁵⁶ While agreeing with the statement as a basic tenet, a number of nations contested the United States prohibition on the ground that by international comity, they had a right to ship their products through the territorial waters of other nations without being stopped. Even these nations, however, recognized that comity did not extend this right to the shipment of items that would disturb public order.¹⁵⁷ The first question, then, to be answered is whether, under the conditions existing at the time, the introduction aboard ship of nuclear weapons into the territorial waters would disturb public order or endanger national security.

In the Committee debate on the Convention on the Territorial Sea and the Contiguous Zone, Yugoslavia introduced a proposal which would have allowed the coastal state to deny innocent passage "to any ship carrying any kind of nuclear weapon."¹⁵⁸ This proposal was rejected with only seven votes in favor of it.¹⁵⁹

The conclusion may be drawn from this rejection that there is no blanket prohibition in international opinion against the carrying of nuclear weapons in territorial seas. This does not answer the question, however. Just because a regulation against *every carrying* of nuclear weapons would, in international opinion, constitute an undue hampering of innocent passage does not mean that *every regulation* against carrying nuclear weapons would obtain the same result. The test of reasonableness must be applied. If the regulation pertained to only one situation or one area where a particular, recognizable, serious danger to the security of the state existed from the passage of nuclear weapons, it might

¹⁵⁶ For a detailed analysis of this question, see Franklin, *supra* note 146, at 139-44.

¹⁵⁶ JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 219 (1927). See 1 OPPENHEIM, *INTERNATIONAL LAW* 323 (8th ed., Lauterpacht ed. 1955), to the same effect with regard to trade restrictions.

¹⁵⁷ JESSUP, *op. cit. supra* note 156, at 221-28.

¹⁵⁸ U.N. Doc. No. A/CONF.13/C.1/L.21 (1958)

¹⁵⁹ 3 OFF. REC. U.N. CONF. ON THE LAW OF THE SEA 131 (A/CONF.13/39) (1958).

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indeed be reasonable for the state to prohibit it. Using the test of reasonableness, then, a state may issue regulations which ships in innocent passage must obey.

In discussing the enforcement of regulations, a distinction must be made between warships and merchant ships.¹⁶⁰ There has long been a standing rule of international law under which warships are immune from the jurisdiction of a foreign coastal state whenever their presence in the port of that state has been either expressly or impliedly allowed. In *The Schooner Exchange v. McFadden*,¹⁶¹ Chief Justice Marshall blazed a trail that has been referred to by courts ever since.¹⁶² In 1810, during the Napoleonic wars, French authorities had seized *The Schooner Exchange* which, until seizure, had been the property of United States citizens. The schooner was converted into a French warship, *Le Balaou*, and, as such, entered the port of Philadelphia. Her former owners sought to gain possession of her. Holding for France, Chief Justice Marshall stated: "It seems to the Court to be a principle of public law that national ships of war, entering the port of a friendly Power open for their reception, are to be considered exempted by the consent of that Power from its jurisdiction."

In 1879, in much the same language, the English Court of Admiralty concurred with the *Exchange* opinion. The case was that of *The Constitution*,¹⁶³ a United States frigate which became stranded off the English coast and was towed to an English port. The amount tendered to the tug owners for salvage was not adequate in their view and they sought to restrain the frigate from leaving port until their demands were satisfied. The Court of Admiralty denied that the tug owners had such a right against a warship of a foreign sovereign.

While both of these cases dealt with ships in port, the result is essentially the same for the territorial sea. Warships enter the

¹⁶⁰ In the past the distinction has been between government-owned ships and privately-owned ships. With the communist claim that all of their ships are government-owned and the distaste on the part of other countries for granting immunity to all communist ships regardless of their purpose, a new distinction had to be drawn. Art. 21 of the Convention on the Territorial Sea and the Contiguous Zone expresses this new distinction by providing that government ships operated for commercial purposes will be treated the same as merchant ships.

¹⁶¹ 7 Cranch. 116 (1812).

¹⁶² Although Chief Justice Marshall apparently overlooked a contrary decision by the U.S. Attorney General, 1 OPS. ATT'Y GEN. 87 (1799), and there have been attempts to discredit this case, it is still a recognized landmark in the area of immunity of warships.

¹⁶³ *The Constitution*, 48 Law Rep., Prob., Divorce & Adm. Div. 15 (1879).

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territorial waters of a coastal state under a consent implied in international custom. They must be treated as though they are "floating portions of the flag state."¹⁶⁴ Thus, if an offense occurs and a warship is the offender, only two courses are open to the aggrieved state under international law. First, it may, if the violation continues after the ship has been notified of it, require the ship to leave the territorial sea.¹⁶⁵ Second, the offended state may protest to the government of the state to which the offending ship belongs.

The plight of merchant ships is another matter, however, and, because they transport military supplies as well as support the civilian community from which military supplies and support are derived, their plight is of decided military importance.¹⁶⁶ Articles 18, 19 and 20 of the Convention on the Territorial Sea and the Contiguous Zone express a summary of the international law in this area.¹⁶⁷ By express language and by permissive rather than mandatory phrases, these articles allow many instances in which the free movement of merchant ships can be impeded in territorial waters. Of particular importance to a discussion of enforcement of regulations are the provisions of article 20. In part it provides that where there are "obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State," that state may "arrest the ship for the purpose of . . . civil proceedings." Further, the state has the right, "in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters." In other words, if a foreign merchant ship violates a regulation of the coastal state while in the territorial or inland waters of that state, it

¹⁶⁴ 1 OPPENHEIM, *op. cit. supra* note 156, at 461, 852-55.

¹⁶⁵ Convention on the Territorial Sea and the Contiguous Zone, art. 23, *supra* note 112; 1 OPPENHEIM, *op. cit. supra* note 156, at 855.

¹⁶⁶ Mr. Dean, in his usual perceptiveness, has commented that "The operation of commercial shipping on, or commercial aircraft over, water would also be greatly handicapped, slowed down and subjected to interminable delays. Indeed, it would seem to have been part of the Russian purpose in backing extensions of the territorial sea so to hamper the commerce of the free world as a part of its sand-in-the-gear-box technique. . . . The right and ability of merchant ships carrying goods and passengers to schedule the most economical passage possible between ports, to enter and leave harbors freely, and to move on the surface of the water without interruption or delay would be jeopardized." Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 607, 612 (1958).

¹⁶⁷ For a good analysis of this area of law see Lee, *Jurisdiction Over Foreign Merchant Ships in the Territorial Sea: An Analysis of the Geneva Convention on the Law of the Sea*, 55 AM. J. INT'L L. 77 (1961).

may be arrested for civil proceedings.¹⁶⁸ This threat, as well as the threat of any hindrance or nuisance from the regulations of coastal states could well cause the merchant lines to change to longer routes. Whether they do this or lose money due to delays, shipping costs are increased. These costs ultimately are borne by the countries dependent upon ocean commerce for their existence. Since, in general, these are the free countries of the world, the members of the oceanic confederation, the Communist countries have much to gain by broadening territorial seas.

g. *Passage in wartime.* The foregoing discussion of innocent passage has dealt primarily with a peacetime situation. A much different picture is presented under a wartime situation. There is, of course, no right of innocent passage between antagonists nor are they concerned with the legality of their acts in each other's territorial seas as long as they do not violate the laws of war. The concept of innocent passage applies only in neutral waters and is severely limited by the requirement that neutral waters not be used to advance the war effort of the belligerents. A peacetime extension of territorial seas with the right of innocent passage would, to a large extent, become a wartime extension without such rights. A strait which now is high seas would, if it became the territorial sea of a neutral nation in wartime due to an extension of the breadth of the territorial seas, be closed to any activity which would promote the wartime goals of a belligerent. It is obvious that the extent and seriousness of this result is entirely dependent upon which countries are neutrals and which are not. The United States must assume the worst, however, for it cannot base policy on the unlikely chance that all of the important routes will be under its control or that of its allies. Assuming the worst in this respect, and remembering that over half of the 100 most important straits would become territorial seas under a breadth of six miles and all would be in that category under a twelve-mile limit, a major disadvantage to the free world in the extension of the breadth of territorial seas is evident.¹⁶⁹

¹⁶⁸ But see Sorensen, *Law of the Sea*, INT'L CONC. NO. 520, at 195, 234 (1958), where the conclusion is that, although the coastal state is authorized to enforce its regulations, it is not allowed to prevent passage merely on the ground of their violation.

¹⁶⁹ In a statement made before the Senate Foreign Relations Committee on Jan. 20, 1960, Dean stated that "under the 12-mile territorial sea rule, 18 straits would come under the sovereignty of states which possibly would claim the right to terminate or interfere with the transit of our warships or aircraft, and . . . the denial of passage through these . . . straits would present for [the United States] . . . a completely unacceptable impairment of [its] . . . defensive mobility and capacity." 42 DEP'T STATE BULL. 251, 260 (1960).

C. VIOLATIONS OF NEUTRAL TERRITORY

Ordinarily, innocent passage refers to passage that is innocent as to the security and peace of the coastal state. When a neutral is involved in wartime, that passage must be innocent as to a belligerent state as well. When it is not, there has been a violation of neutral territory.

For instance, during peacetime the passage of a ship through the territorial sea of one state does not concern any other state. The ship owes a duty to obey the regulations of the coastal state but not those of any other state. Likewise the coastal state owes a duty to the ship not to unduly hinder its passage or fail to warn it of dangers but does not owe any duty to a third state. In wartime, however, belligerents are interested in the circumstance of an enemy ship because it has a direct effect on its military strategy. Therefore, a neutral country owes a duty to third states who are belligerents not to allow their enemies to unlawfully use its waters. In a sense the passing ship also owes a duty to the third state since its passage must be in accordance with international law which gives a belligerent state a basis to require that its enemy not violate neutral territory.

At the Geneva Conference, one of the dominant themes expressed by the United States against the extension of the territorial seas was that extension would encourage an increase in violation of neutral territory. The broader the neutral territorial sea is, the more attractive it becomes to a belligerent ship. One reason, of course, is that navigation is easier if it is within sight of chartered navigational objects, lighthouses, et cetera, and ships' captains are generally disposed to navigate where it is easiest. The broader the territorial sea, whether neutral or not, the greater the temptation to go within it in order to use on-shore navigation aids. For a case in point, consider the seizure of the *Flying Clipper*, a Swedish ship, by the Russians in the Baltic Sea on August 29, 1956.¹⁷⁰ Because of a storm the *Flying Clipper* had drifted off course and had entered the twelve-mile zone claimed by Russia in order to use landmarks to check its position.

Of greater concern, however, is the intentionally belligerent use of neutral waters. Submarines, for instance, would be par-

¹⁷⁰ N.Y. Times, Aug. 30, 1956, p. 4, col. 6.

ticularly lured into the excellent haven furnished by a broad territorial sea. Navigation hazards within a three-mile limit, as well as the good chance of detection within that range makes the use of neutral waters an undesirable evasive maneuver. Between three and twelve miles, however, the hazards to submerged navigation are decreased, in most areas and, because present day detection of underwater objects at a distance beyond three miles is not adequate, this area furnishes a tempting, although illegal, haven.¹⁷¹ The submarine would be out of range of ordinary detection from the shore and, unless a pursuing surface fleet openly violates the neutrality of the coastal country by making an attack within its territorial sea, from a surface anti-submarine force. Thus, an enemy submarine might avoid detection and capture when it is pursued, but it can do even more than that. Nestled securely in the safety of neutral waters, the submarine might, without interference, launch an attack against the coastal state or against an enemy target within range of the neutral state's territorial seas. Because of their numerical superiority in submarines,¹⁷² this situation would be of particular advantage to the Soviet Union. This may well be another reason for the Russian insistence on broad territorial seas and is certainly a cogent reason why the free world would want to keep as much open seas as possible.

In view of imminent attack from a submarine lurking in neutral waters, the captain of a warship could hardly be blamed if he elected to take direct defensive action rather than to submit a protest through diplomatic channels.¹⁷³ Assuming he violates neutral territorial waters and attacks the malevolent submarine, may he capture her or take her crew captive? Since a submerged submarine is not in innocent passage, the answer is probably yes. But as to a surface ship, unless its belligerent purpose can be proven, the answer is no. As an exception to the general rule that enemy property can be captured wherever it happens to be, enemy property located in the territorial waters of a neutral state

¹⁷¹ Although art. 14 of the Convention on the Territorial Sea and the Contiguous Zone requires submarines to navigate on the surface and to show their flag, it would be optimistic and naive to expect an enemy to abide by this provision during wartime.

¹⁷² Since the end of World War II, a considerable shipbuilding program has been maintained by the Russian Navy, and it is estimated that Russia now has over 500 submarines, JANE'S FIGHTING SHIPS 288 (1959-60). The submarine has the dominant role in Russian naval strategy. See notes 89-92 *supra* and text accompanying.

¹⁷³ For an interesting case where a Captain elected to attack an enemy ship in neutral waters, see the exchange notes of the *Dresden* incident as reported in 7 HACKWORTH, DIGEST 870-71 (1943).

is not the subject of capture. Even though capture is unintentionally accomplished in neutral waters, the property must be returned to the enemy.¹⁷⁴ In *The Vrow Anna Catharina*,¹⁷⁵ the issue was whether a ship had been seized on the high seas or "within the protection of land." Sir William Scott set forth the gravamen as follows:

The sanctity of a claim of territory is undoubtedly very high. . . . When the fact is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy.

Article I of Hague Convention XIII¹⁷⁶ espoused the same principle by requiring belligerents to "respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality."

The case of the *Altmark*, which arose in February, 1940, during the Second World War, illustrates, however, that this immunity of an enemy from attack in neutral waters pertains only where the enemy property is present "in innocent passage." This incident also points out another example of the misuse of territorial waters that would be increased with a broader limit to the military detriment of a nation trying to respect neutral rights. The *Altmark*,¹⁷⁷ a German naval auxiliary, was used to transport British merchant seamen prisoners who had been captured by the German cruiser *Admiral Graf Spee*. Having been taken in the South Atlantic, it was necessary to transport them back to Germany through the Allied naval blockade which existed at that time. In order to avoid capture or attack in the English Channel, the *Altmark* went north through Icelandic waters and then started south using the neutral Norwegian territorial waters as a protected corridor. British forces, however, learned of the presence of the *Altmark* and, when Norwegian authorities refused to allow a British inspection of the ship, the British forces boarded the *Altmark* and released the prisoners.

While the *Altmark* incident illustrates an illegal belligerent use of neutral waters, it also shows that neutrality is a two-way street. Both the neutral country and the ships using its waters have

¹⁷⁴ See COLOMBOS, *op. cit. supra* note 136, at 544.

¹⁷⁵ 5 C. Rob. 15, 165 Eng. Rep. 681 (1808) (dictum).

¹⁷⁶ Convention XIII of October 18, 1907, concerning the Rights and Duties of Neutral Powers in Naval War, Second Hague Peace Conference, Feb. 1, 1910, 36 Stat. 2415, T.S. No. 545.

¹⁷⁷ See 7 HACKWORTH, *DIGEST*, 568-69 (1943) for another statement of the facts.

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their respective duties under international law. Hague Convention XIII codifies these "do's and don't's" of neutral waters. With the Convention as a background, arguments have raged between nations and authorities as to whether Norway was delinquent in its duties as a neutral by allowing the *Altmark* to use its waters and whether the British forces had the right to make a search as they did.¹⁷⁸

The duty of Norway is important in this discussion because it indicates the adverse military effect which a neutral state's decision may have. If the neutral state decides that the action of an enemy belligerent ship is legal and will take no action against it, it places the burden upon the opposing belligerent of either accepting that decision or running the danger of violating neutrality. Looking at the question from the other side, if the neutral decides that a transit of one of our ships is not innocent, it may detain or otherwise interfere with the passage of that ship.¹⁷⁹ Thus, looking at the question from either side, a broadening of the territorial seas will produce a broadening of the area in which a neutral state may adversely affect our wartime efforts.

Whether the British forces were acting lawfully in the *Altmark* situation depends upon an interpretation of the circumstances. There is general, although not unanimous, support¹⁸⁰ among authorities for the position that:

a belligerent is not forbidden to resort to acts of hostility in neutral jurisdiction against enemy troops, vessels, or aircraft making illegal use of neutral territory, waters or air space, if a neutral State will not or cannot effectively enforce its rights against such offending belligerent forces.¹⁸¹

The breach of neutrality must, however, be sufficiently serious to justify such an extreme measure. It must be required for self-preservation.¹⁸² According to the International Court of Justice, the use of force in territorial water to obtain evidence upon which to prosecute a breach of a coastal state's duty to shipping in those

¹⁷⁸ For a general discussion of Norwegian and British rights and duties see MacChesney, *The Altmark Incident and Modern Warfare—"Innocent Passage" in Wartime and the Right of Belligerents to Use Force to Redress Neutrality Violations*, 52 NW. U. L. REV. 320, 337-40 (1957). For opinions holding Norway to have been under a duty to prevent passage, see 2 OPPENHEIM, INTERNATIONAL LAW 692-95 (7th ed. Lauterpacht 1952). *Contra*, 1939 Naval War College, International Law Situations 14-15 (1941).

¹⁷⁹ Hague Convention XIII, art. 24, *supra* note 176.

¹⁸⁰ MacChesney, *supra* note 178, at 339. *But see* Bisschop, *The Altmark*, 9 TRANSACT. GROU. SOC'Y 67 (1941), where it is held that neither illegal confinement nor retaliation was justification for the British action.

¹⁸¹ U.S. DEP'T OF THE NAVY, LAW OF NAVAL WARFARE, § 441 (1955).

¹⁸² MacChesney, *supra* note 178 at 337-40.

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waters is not a serious enough cause to justify help.¹⁸³ How much more serious it must be is an unanswered question in international law. The result, in any case, is that a broad territorial sea gives an enemy more room in which to operate clandestinely and gives the United States less operating room in which to ferret out such activity.

D. MOBILITY AND DISPERSAL

The hindrance on operating room which is a concomitant of a broad territorial sea is a complaint of much more general application than not being able to investigate violations of a coastal state's sovereignty. It is a military burden whether in peace or war or cold war.

In these days, with the possibility of nuclear attack, fleets must be dispersed over a wide area. While it is true that a twelve-mile territorial sea would still leave quite a large ocean area for dispersal of fleets, this is not the answer to the problem. Part of the problem is how to get to these areas. The old World War II tight formation of ships to guard from submarine attack has had to give way to a dispersed formation more suitable to defense against nuclear attack. For a present-day task group to travel about the oceans, they should be dispersed over an area roughly the size of New York State.¹⁸⁴ It is obviously difficult to move a group of this size through congested areas such as straits and island-spotted seas without lessening its defenses. Any extension of territorial seas makes it that much more difficult. Because of the uncertainty of the right of innocent passage for warships in peacetime and the limit of three warships that can be in neutral territorial seas at any one time during wartime,¹⁸⁵ it is conceivable that the number of passages open to Naval forces could be extremely limited with a broad territorial sea. This could force a large amount of military traffic through one area, increasing the risk of attack in that area.

An even more important part of the problem is whether the forces can be dispersed in an area where they can be effective. For an example, assume that fighting broke out in Singapore. If the Navy were to respect the claimed Indonesian internal and

¹⁸³ See *Corfu Channel Case* [1949] I.C.J. Rep. 4. Although this was not a neutrality case it is analogous to the extent that the same circumstance in neutral waters would not justify self-help either.

¹⁸⁴ See statement of Adm. Burke quoted in Eller, *Implications of Soviet Sea Power*, THE SOVIET NAVY 299, 313 (Saunders ed. 1958).

¹⁸⁵ Hague Convention XIII, art. 15, *supra* note 176.

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territorial waters, it would be impossible to disperse a task group in the immediate area. This is not an isolated instance. In the Aegean, the eastern Mediterranean, the other seas around Indonesia, and the seas adjacent to the Philippines and Japan, an extension of each island's territorial sea would restrict the operational ability of the fleet.¹⁸⁶ Such an extension would have made the landing of American troops in Lebanon of questionable legality. In the area between Formosa and China, the recognition of a twelve-mile territorial sea would mean that the United States ships protecting Quemoy and Matsu would violate territorial waters.¹⁸⁷

E. DIPLOMATIC DEPLOYMENT

During the past few years the Navy has been particularly effective because of its capability of being deployed quickly for limited war and cold war purposes to prospective trouble spots, without violating national sovereignties. The effectiveness of this capability of bringing pressure to bear without firing a shot and of staying as long as necessary is attested to by the inverse tribute paid to it by Soviet Premier Khrushchev. In a letter received September 8, 1958, by President Eisenhower, Mr. Khrushchev stated:

In connection with the practice of transporting war fleets and air units from one end of the globe to another, for example, the regions of the Near and Middle East, the Far East, Latin America etc. in order to bring pressure to bear here on some, there on other states and to attempt to dictate one's will on them, in general the question arises— isn't it time to finish with such actions which, it goes without saying, can in no way ever be recognized as normal methods in international relations. There arises the legitimate question—ought this not be discussed in the UN and a decision be adopted forbidding powers from employing such movement of its naval and air forces for purposes of blackmail and intimidation and to the effect that these forces would be held within the limits of their national frontiers.¹⁸⁸

In order to be able to be of continued effectiveness on these "diplomatic deployments" it is essential that the same proximity of free world power to communist-inspired trouble spots be maintained. In other words, since its main reason for effectiveness is the psychological effect of its presence, it must be capable of being seen. A fleet only three miles away can be easily seen. If it must be dispersed six miles out, its effectiveness is diminished.

¹⁸⁶ See Dean, *Freedom of the Seas*, 37 FOREIGN AFFAIRS 83, 90 (1958).

¹⁸⁷ Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 607, 612 (1958).

¹⁸⁸ Reprinted in 39 DEPT STATE BULL. 499, at 500 (1958).

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If twelve miles, it is out of sight and mind. Its presence is a mere rumor which dare not materialize without treading on sovereign seas.

F. CALM WATER OPERATIONS

A final result to be discussed is the deprivation of the use of much calm water lying in land-protected areas within twelve miles of the shore. Not only is the use of such water of benefit during rough weather but it is also ideally suited for a number of military exercises. Refueling at sea, transfer of supplies and personnel, the launching and recovery of aircraft, gunnery exercises, and many others can be accomplished with less risk of loss and damage if they can be performed in the calm of sheltered waters.

IV. CONCLUSION

In the foregoing pages an attempt has been made to set forth some of the militarily important legal effects that would result from extensions of territorial seas under present conditions and laws. The compilation is not exhaustive. The more important areas have been selected and discussed in an effort to typify the legal results that can be expected.

To say that the survival of the free world depends upon the maintenance of the three-mile limit is, of course, an exaggeration. But to say that the loss of a narrow territorial sea limit in favor of a broad limit is a major step in the direction of the defeat of the free world is fearfully realistic. The free world is dependent upon its sea lanes and the air lanes above them for its communications. A nation that can block or disrupt the sea lanes has won a major, if not the deciding battle against the oceanic community of nations in which we live.

How can the extension of territorial seas serve this purpose? By closing large areas of the high seas to overflight and submerged passage. By carving out of the high seas large areas of territorial waters with the hindrances, restrictions, and increased shipping costs that can result thereby. By making international straits out of the high seas and imposing the same hindrances. By opening up broad havens for enemy submarines. By increasing the temptation to violate territorial seas in order to obtain more reliable navigational information. By providing wider corridors for less conspicuous belligerent passage in neutral waters. By depriving the maritime nations of the world of areas

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of calm waters. And by placing limitations upon the mobility of the fleet in general, whether subsurface, surface, or aerial.

Having previously drawn the conclusion that an extension of the territorial limit is inevitable if the present trend is not altered, the question remaining is: What to do about it? One alternative is to seek to impose and retain, by international agreements, the protection afforded by a narrower limit. This could well include the expansion of the doctrines of innocent passage to insure its application to surface warships and to broaden its application to include subsurface transit and flights over straits and similar waterways. The preservation of high sea transit rights in the expanded areas would prove beneficial. The imposition of limitations on the use of the straight line method of determining baselines would be helpful although attempts to this end at the Geneva Conference were largely to no avail.

As an alternative approach, it is suggested that the concept of a territorial sea has outlived its need. To say that it should be abandoned altogether and that all external waters should revert to the high seas would seem to be an extreme suggestion. Certainly a great amount of educating would be required for such a proposal to be successful. It is advanced, however, with the belief that it affords a solution for the future. Is there any longer a reasonably valid need for the exercise of total sovereignty in a comparatively narrow strip of water along the coasts of a nation? Can a need be named which could not as easily be taken care of by the allowance for a special, limited exercise of sovereignty in the adjacent maritime area?¹⁸⁹ Coastal states already have the right to reasonably protect themselves, the right to natural resources of the continental shelf, and the right to enforce customs, fiscal, immigration and sanitation laws and regulations beyond its territorial sea. Should, by international consensus, other special extensions of sovereignty be required, such as an exclusive fishing zone, they can be added to the list. But by doing away with the concept of the territorial sea we would do away with the restricting concepts, terminology, and practices that surround it and could start afresh in accordance with modern needs. Most states have no extra area of protection along their land boundaries. Why should

¹⁸⁹ Although not made with a total discarding of territorial seas in mind an apropos statement has been made that "whatever the particular interests motivating claims to extension by individual states, the necessary measures for securing such interests hardly require community recognition in the claimant state of all the exclusive authority customarily associated with the territorial sea." McDUGAL & BURKE, *op. cit. supra* note 154, at 74.

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the nations of the world be deprived of high seas to furnish such an area along ocean boundaries?

Are the attempts to expand the territorial seas of the world a vital problem in our day? They most certainly are. The Russian bear is avaricious. He works in many areas and in many ways to satisfy his cupidity. One of these is the extension of territorial seas. Mr. Khrushchev has promised the United States a burial. It may not be on land. It can just as well take place at sea.

PHILIPPINE MILITARY JUSTICE*

BY MAJOR VALENTIN E. ESCUTIN**

I. INTRODUCTION

This article gives a brief account of the court-martial system as it exists today in the Philippines and draws a comparison between the American and Philippine systems. The discussion of Philippine military law, although limited in scope, is comprehensive enough to provide the reader with a working knowledge of Philippine military jurisprudence. Considerable emphasis has been placed on court-martial procedure and allied subjects of major importance.

In a comparison of the two court-martial systems, it should be noted that the Philippine system was patterned after the American. Notwithstanding this American origin, the Philippine procedure differs in some respects. It is these differences that will be studied.

II. SOURCES OF PHILIPPINE MILITARY LAW

The Philippines had a system of administering military justice as early as 1896 when the then Philippine Revolutionary Army established a court-martial system to enforce discipline. The Philippine Revolutionary Army court-martial was of Spanish origin.¹ During the American regime, the Chief of Constabulary was empowered by law to punish summarily members of the organization for inefficiency, misconduct or disloyalty.² He was also authorized to designate a summary court officer in each Constabulary post or command.³

Upon the establishment of the Philippine Commonwealth, the National Assembly of the Philippines enacted Commonwealth Act No. 408 (approved on September 14, 1938) consisting of 120 articles. Essentially of American origin, the *Philippine Articles of War*⁴ are the counterpart of the American Articles of War.

* 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 GLORIA, PHILIPPINE MILITARY LAW 4 (1956).

² Revised Administrative Code of the Philippines §§ 649, 856 (1917).

³ Revised Administrative Code of the Philippines § 855 (1917); Philippine Constabulary Manual, para. 282 (1930).

⁴ Hereinafter cited as AW, PA; see GLORIA, *op. cit. supra* note 1, at 9.

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Commonwealth Act No. 408 was subsequently implemented by Executive Order No. 178 of December 17, 1938, and later amended by Republic Acts 242 and 516. The implementing executive order prescribes the rules of procedure, including modes of proof in cases before courts-martial, courts of inquiry, military commissions and other tribunals. These rules are designated as the *Manual for Courts-Martial, Philippine Army*.⁵ As implemented and amended, Commonwealth Act No. 408 is still the organic law of the Armed Forces of the Philippines.

III. DISCIPLINARY POWERS OF COMMANDING OFFICERS

Minor offenses or infractions invariably demand some kind of disciplinary action short of court-martial. For the prompt and efficient disposition of such offenses, commanding officers are authorized to impose limited forms of disciplinary punishment upon members of their command without the intervention of a court-martial. The forms of authorized disciplinary punishment are limited and the procedure for imposing them clearly prescribed.⁶

The commanding officer fully investigates the facts before he takes action. There is no particular form of investigation. He usually has to interview the persons having knowledge of the offense and gives the accused an opportunity to explain his side of the case. The commanding officer is required to explain to the accused his right to remain silent, but that if he chooses to say something, it may be considered against him.

If the commanding officer finds that an offense was committed and disciplinary action is appropriate, he will call the accused, state briefly and clearly the nature of the offense, and inform him that he proposes to impose disciplinary punishment unless trial by court-martial is demanded. The accused must be given an opportunity to demand trial before punishment is imposed. Otherwise, a subsequent order of punishment is illegal. If he demands trial, disciplinary action cannot be taken.

The accused is not entitled to be informed of the punishment to be imposed. The commanding officer determines the appropriate punishment for the offense and informs the accused of the punishment, if no demand for trial is made. At the same time the accused is notified of his right to appeal to the "next superior authority" if he believes the punishment to be unjust. The appeal has to be in writing and signed, with a statement of reasons

⁵ Hereinafter cited as MCM, PA; see MCM, PA, p. vii.

⁶ See AW 105, PA.

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why the punishment is considered unjust or excessive.⁷ The superior authority may modify or set aside the punishment but he may not increase it or impose a different kind of punishment.

Acceptance of a punishment without protest is deemed a waiver of the right to demand trial.⁸ Furthermore, failure of the accused to demand trial may preclude him from denying his guilt upon appeal.⁹ The appeal is limited to cases where the punishment is deemed unjust or disproportionate to the offense. Any punishment adjudged for purely minor offenses is a bar to trial by court-martial for such offenses. However, if it should develop that serious offenses have in fact been committed, the accused could legally be brought to trial by court-martial notwithstanding prior disciplinary action.¹⁰

Disciplinary punishments are not previous convictions by court-martial. Nevertheless, they may be shown in mitigation when imposed for an offense connected with an offense for which the accused is on trial.¹¹

Among the authorized forms of disciplinary punishments are admonition or reprimand. In addition, the withholding of privileges, extra fatigue, restrictions to certain specified limits, or hard labor without confinement may be imposed. However, any one punishment, or any combination, may not exceed one week.

The officer exercising general court-martial jurisdiction may impose upon an officer of his command below the grade of brigadier general a forfeiture of not more than one-half of such officer's monthly pay for three months. In the Philippine Navy, a commander of a commissioned vessel may also impose a punishment on a commissioned officer, suspension from duty, arrest or confinement not to exceed ten days.¹²

IV. COURTS-MARTIAL

A. TYPES OF COURTS-MARTIAL

There are three kinds of courts-martial: General, Special, and Summary.¹³ The membership of these courts varies from a minimum of one member for a summary court-martial, three for

⁷ *Ibid.*; U.S. WAR DEPT., TECHNICAL MANUAL 27-255, MILITARY JUSTICE PROCEDURE, para. 15-a, at 11-12 (1945) [hereinafter cited as TM 27-255].

⁸ AW 105, PA.

⁹ See *Ibid.*

¹⁰ See Dig. Ops. JAG 1912-1940, § 462(2), at 369 (31 January 1930).

¹¹ See SPJGJ 1943/7419, 24 May 1943, as digested in 2 BULL. JAG, USA 183-184.

¹² AW 105, PA.

¹³ AW 3, PA.

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a special court-martial, to five for a general court-martial.¹⁴ All officers on active duty in the Armed Forces of the Philippines may serve on courts-martial. Enlisted men may likewise serve on the court of enlisted persons or trainees when requested in writing by the accused. However, an officer or enlisted man cannot sit as a member of a general or special court-martial when he is the accuser or a witness for the prosecution.

Military personnel with less than two years' service may not be appointed as members of courts-martial.¹⁵ This service requirement for membership in courts-martial is one of the differences between the Philippine and American systems. The need for the requirement in the Philippine system is dictated by a demand for personnel who, by reason of training and experience, are best qualified to sit as members of the court. It is felt that such qualification can be attained after two years in the service.¹⁶

B. COURT-MARTIAL APPOINTING AUTHORITIES

General courts-martial are appointed by the President of the Philippines, the Chief of Staff of the Armed Forces of the Philippines and the Chief of Constabulary. Special courts-martial are appointed by the commanding officer of a major command or task force, military area, or division. Such commander may likewise appoint a general court-martial when empowered by the President. Any authority who can appoint a general court-martial can also appoint a special court-martial. If the commander is the accuser or the prosecutor, the court may be appointed by superior competent authority.

The appointing authority details, as the law member of a general court-martial, an officer of the Judge Advocate General's Service or any other officer who is a member of the Philippine bar and duly certified by the Judge Advocate General. In the absence of the law member, the court cannot receive evidence

¹⁴ AW 5-7, PA.

¹⁵ AW 4, PA.

¹⁶ Because of the recent decision of the U.S. Court of Military Appeals in *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964), this difference between the two systems as to enlisted men may not exist in practice any longer. Since the court held in *Crawford* that it was not improper to limit enlisted personnel on courts-martial to the higher enlisted grades, the convening authority has considerable freedom in selecting court members with several years of military service, as was done in *Crawford*. The difference that now exists in fact is that under the Philippine Articles of War, the convening authority must pick personnel with two years' experience; under the American practice he is permitted, but not compelled, to pick experienced enlisted men.

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or vote upon a finding or sentence.¹⁷ The law member is the counterpart of the law officer in the American system. But unlike the latter, he sits and votes as a member of the court.

The commanding officer of a garrison, fort, camp, brigade, regiment, detached battalion or squadron or other detached command cannot appoint a special court-martial unless empowered by the President. This is another distinguishing feature of the Philippine system. However, to enhance the speedy administration of justice, there is a move to grant subordinate commanders statutory authority to appoint special courts-martial.

Summary courts-martial are appointed by certain specified subordinate commanders who, in addition, may appoint special courts-martial when empowered by the President. When only one officer is present in a command, he automatically assumes the duties of summary court officer without any order of appointment.

C. JURISDICTION

1. *Persons Subject to Military Law.*

The following persons are subject to military law:

(1) All officers and soldiers in the active service of the Armed Forces of the Philippines or of the Philippine Constabulary; all members of the reserve force, from the dates of their call to active duty and while on such active duty; all trainees undergoing military instructions; and all other persons lawfully called, drafted, or ordered into, or to duty for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;

(2) Cadets, flying cadets, and probationary second lieutenants;

(3) All retainers to the camp and all persons accompanying or serving with the Armed Forces of the Philippines in the field in time of war or when martial law is declared though not otherwise subject to the articles of war;

(4) All persons under sentence adjudged by courts-martial.¹⁸

2. *Jurisdiction as to Place.*

The jurisdiction of courts-martial is co-extensive with the territory of the Philippines. It also extends to places held or occupied by the Philippine Armed Forces, and to Philippine military personnel when traveling through friendly foreign nations.¹⁹

A court-martial convened at any locality within the Philippines may legally take cognizance of an offense committed at any other such locality. Such a court, unlike a civil tribunal, is not restricted

¹⁷ AW 8, PA.

¹⁸ AW 2, PA.

¹⁹ WINTHROP, MILITARY LAW AND PRECEDENTS 81-83, 485 (2d ed. rev. 1921).

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in the exercise of its authority to the limits of a particular province or other district or region.²⁰

3. *Jurisdiction as to Persons and Offenses.*

General courts-martial have jurisdiction to try a person subject to military law for any crime punishable by the Articles of War. They may also try any other person who by the law of war is subject to trial by military tribunals.²¹ Special courts-martial and summary courts-martial have jurisdiction to try any offense not capital. The jurisdiction of special courts-martial extends to all persons in the military service, while that of summary courts-martial is limited to enlisted men.²² Moreover, noncommissioned officers cannot be tried by a summary court if they object, unless authorized by the officer exercising general court-martial jurisdiction.²³ Officers are triable only by general and special courts-martial.²⁴

4. *Jurisdiction as to Punishments.*

A general court-martial can adjudge any punishment authorized by law or the custom of the service, including a bad conduct discharge.²⁵ In the Philippine Navy, general courts-martial may impose deprivation of liberty on shore as a punishment, or solitary confinement including confinement on diminished rations, but it may not exceed thirty days.²⁶

The power of special and summary courts-martial to adjudge punishment is limited. A special court-martial cannot adjudge dishonorable discharge or dismissal or confinement in excess of six months, nor adjudge forfeiture of more than two-thirds pay per month for a period not exceeding six months.²⁷ Subject to approval of the sentence by an officer exercising general court-martial jurisdiction and subject to appellate review by the Judge Advocate General, a special court-martial may, nevertheless, adjudge a bad conduct discharge in addition to other authorized punishment. In such a case, a complete record of the proceedings of and testimony admitted by the court is taken.²⁸ The Navy special courts-martial may also impose deprivation of liberty on shore or a sentence of confinement with diminished rations not exceeding thirty days.²⁹

²⁰ *Ibid.*

²¹ AW 12, PA.

²² AW 13, 14, PA.

²³ *Ibid.*

²⁴ AW 12, 13, PA.

²⁵ AW 12, PA.

²⁶ *Ibid.*

²⁷ AW 13, PA.

²⁸ *Ibid.*

²⁹ *Ibid.*

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A summary court-martial cannot adjudge confinement in excess of one month, restriction to limits for more than three months or forfeiture or detention of more than two-thirds of one month's pay. However, again the Navy is an exception. Its summary courts may impose deprivation of liberty on shore or confinement including solitary confinement not exceeding fifteen days, or solitary confinement on diminished rations not exceeding thirty days.³⁰

The maximum amount of confinement and forfeiture (or of confinement and detention) may be imposed together in one sentence. If it is desired to adjudge both forms of punishment, *i.e.*, confinement and restriction to limits, in one and the same sentence, there must be an apportionment. For example, assuming the punishment to be in conformity with other limitations, a summary court might impose confinement at hard labor for fifteen days, restriction to limits for forty-five days and forfeiture of two-thirds of one month's pay.

D. ARREST AND CONFINEMENT

A military offender charged with a crime is placed in arrest or confinement. When charged with a minor offense, he is not ordinarily placed in confinement. If placed in arrest, he is restricted to limits. Breaking arrest or escaping from confinement is a separate offense punishable by court-martial.³¹

A commissioned officer can direct or order the arrest or confinement of an enlisted man.³² This power may be delegated by a commanding officer of a company or detachment to his non-commissioned officers with respect to enlisted men belonging to his own company or detachment, or enlisted men of other organizations temporarily subject to the commander's jurisdiction.³³

An officer may be placed in arrest or confinement only by order of a commanding officer.³⁴ This may be effected without preferring charges against him at the time. However, a written report must be made to the officer having general court-martial jurisdiction.³⁵ A commanding officer may not delegate to others his power to arrest and confine officers. The order placing an officer in arrest or confinement must be the order of the commander him-

³⁰ AW 14, PA.

³¹ AW 70, PA.

³² *Ibid.*; Manual on Military Justice, AFP 12 (1953).

³³ AW 70, PA; TM 27-255, para. 19-a, at 16.

³⁴ AW 70, PA; MCM, PA, § 20, at 14.

³⁵ See *supra* note 32.

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self. The order may be issued through other officers or be communicated to the person arrested either in writing or orally.³⁶

E. CHARGES

Charges are commonly initiated by bringing to the attention of the military authorities information concerning an alleged offense committed by a military offender. Such information may be received from anyone whether subject to military law or not.³⁷ Charges and specifications are signed by the accuser under oath that he has personal knowledge of, or has investigated, the matters set forth and that they are true in fact, to the best of his knowledge and belief.

By the custom of the service, all military charges are preferred by a commissioned officer. However, this practice may eventually be discarded in favor of the American procedure of allowing enlisted personnel to prefer charges.

Charges proceeding from a person outside of the Army, and based upon testimony not in the possession or knowledge of the military authorities, are, in general, required to be sustained by affidavits or other reliable evidence as a condition to their being adopted.³⁸ It is ordinarily preferable, however, for one who claims that an offense has been committed to inform the immediate commanding officer of the accused of the alleged offense and allow him to take such action as he deems necessary. The person who prefers the charges is known as the accuser.³⁹

F. PRETRIAL INVESTIGATION

No charge is referred to a general court-martial for trial without a thorough and impartial investigation. The investigation includes inquiries as to the truth of the matter set forth in the charges, the form of the charges, and what disposition of the case is to be made in the interest of justice and discipline. At such investigation, full opportunity is afforded the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation. The investigating officer examines available witnesses requested by the accused. Charges forwarded after such investigation are accompanied by a statement of the substance of the testimony taken on both sides. Before directing the trial

³⁶ MCM, PA, § 20, at 14; TM 27-255, para. 19-b.

³⁷ AW 71, PA; MCM, PA, § 25, at 16.

³⁸ See AW 71, PA; DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES (3d ed. rev., 1915).

³⁹ AW 71, PA; TM 27-255, para. 23-b, at 20.

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of any charge by general court-martial the appointing authority is required to refer it to his staff judge advocate for consideration and advice.⁴⁰

On the question of right to counsel at the pretrial investigation, the Philippine system still adheres to the concept that the accused is not entitled to counsel as a matter of right. It presupposes that the pretrial investigation is not a part of the court-martial trial proper where the accused has the right to be represented by counsel.

When any person subject to military law is placed in arrest or confinement immediate steps are taken to try him or to dismiss the charge and release him. Unnecessary delay in investigating or carrying the case to a final conclusion is an offense punishable by court-martial. When a person is held for a trial by general court-martial, the commanding officer shall, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. When it is not practicable, he makes a report to superior authority of the reasons for delay. The trial judge advocate is required to serve upon the accused a copy of the charges. Failure to serve such charges is a ground for a continuance unless the trial is limited to the charges already furnished the accused. In time of peace no person can, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.⁴¹

The statutory requirement of a pretrial investigation is not jurisdictional. The tendency is to sustain the validity of the findings and the sentence even if no thorough and impartial pretrial investigation was conducted, provided that the substantial rights of the accused were not injuriously affected by the manner in which the investigation was conducted.⁴²

G. PROCEDURE

1. *Trial Judge Advocate to Prosecute; Counsel to Defend.*

The trial judge advocate of a general or special court-martial prosecutes in the name of the People of the Philippines and, under the direction of the court, prepares the record of its proceedings. The accused has the right to be represented by counsel of his own selection, civil counsel if he so provides, or military

⁴⁰ AW 71, PA.

⁴¹ *Ibid.*

⁴² See 2 BULL. JAG, AFP 58 (1948).

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if such counsel is reasonably available. Otherwise, he is to be represented by the defense counsel duly appointed for the court.⁴³ Such counsel need not be a lawyer. However, as a matter of policy, if the trial judge advocate is a lawyer the duly appointed defense counsel must also be a lawyer.

The offended party may, either personally or through counsel, assist the trial judge advocate in the preparation of the case. However, during the hearing of the case, the trial judge advocate handles the prosecution to the exclusion of any interested party.⁴⁴ As in a criminal case before the civil courts, the defense counsel represents the accused at the trial and presents his evidence. Regardless of his personal opinion as to the guilt of the accused, he guards the defendant's interests by all legitimate means and presents any proper ground of defense or extenuation.⁴⁵

2. Oath.

Before proceeding with any trial and before entering upon their duties, the clerical assistants (reporter and interpreter) of the court are first sworn. The swearing of the members of the court takes place after the challenge. All persons who give evidence during the trial are likewise examined under oath in the prescribed form.⁴⁶ The oath required of court members has to be administered before the trial of each and every case tried by the same court.⁴⁷

3. Challenges.

Members of general or special courts-martial may be challenged for cause by the accused or the trial judge advocate. The court determines the relevancy and validity of the challenge, and does not consider a challenge of more than one member at a time. Challenges by the trial judge advocate are ordinarily presented and decided before those of the accused. Each side is entitled to one peremptory challenge, but the law member cannot be challenged except for cause.⁴⁸ Among the causes for challenge are:

- (1) That the challenged member is not competent or is not eligible to serve on courts-martial.
- (2) That he is not a member of the court.
- (3) That he is the accuser as to any offense charged.
- (4) That he will be a witness for the prosecution.
- (5) That (upon a rehearing) he was a member of the court which first heard the case.

⁴³ AW 17, PA.

⁴⁴ 1 BULL. JAG, AFP 15 (1947).

⁴⁵ MCM, PA, § 45-b.

⁴⁶ AW 19, PA.

⁴⁷ WINTHROP, *op. cit. supra* note 19, at 232.

⁴⁸ AW 18, PA.

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(6) That he personally investigated an offense charged as a member of a court of inquiry or otherwise.

(7) That he has formed or expressed a positive and definite opinion as to the guilt or innocence of the accused as to any offense charged.

(8) That he will act as a reviewing authority or staff judge advocate on the case.

(9) Any other facts indicating that he should not sit as a member in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality.⁴⁹

4. Continuances.

Following the challenge and before pleading to the general issue, the accused is advised to enter any special plea or motions. Any motion for continuance by either side may be made at this time. The court has discretion to grant, for reasonable cause, a continuance to either party for such time and as often as may appear to be just.⁵⁰

5. Refusal or Failure to Plead.

After the court has disposed of all the special pleas and motions, or if there are no special pleas or motions to make, the accused is asked to plead to the general issues. If he refuses or fails to plead or enters a plea of guilty improvidently, the accused is tried as if he has pleaded not guilty.⁵¹

6. Process to Obtain Witnesses.

Trial judge advocates of general or special courts-martial and summary courts are empowered to issue process to compel witnesses to appear and testify in the same instances in which courts of the Philippines having criminal jurisdiction may lawfully issue process.⁵² A subpoena is issued sufficiently in advance to permit service to be made or accepted, and at least 24 hours before the time the witness will have to start from home in order to comply with the subpoena.⁵³ The attendance of persons in the military service stationed at the place where the court is convened, or at a nearby station, is ordinarily obtained by informal notice served by the trial judge advocate. If formal notice is necessary, the trial judge advocate makes a request to the proper commanding officer to order the witness to attend.⁵⁴

7. Refusal to Appear or Testify.

Civilians, not subject to military law, may be subpoenaed to appear as witnesses before military tribunals. Their willful failure

⁴⁹ MCM, PA, § 58-c, at 47.

⁵⁰ AW 20, PA.

⁵¹ AW 21, PA.

⁵² AW 22, PA.

⁵³ MCM, PA, § 79-b.

⁵⁴ See MCM, PA, § 79-c.

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or refusal to appear or to qualify as witnesses, or to testify or produce documentary evidence which they have been legally subpoenaed to produce, constitutes contempt for which they may be punished on information in the Court of First Instance of the province or city where the subpoena is issued. Civilians subpoenaed are entitled to fees the Chief of Staff may prescribe, and traveling expenses.⁵⁵

8. *Depositions.*

A duly authenticated deposition taken upon reasonable notice to the opposite party may be read into evidence in any case not capital, if such deposition is taken where the witness resides, is found, is about to go outside of the Philippines, or beyond the distance of 150 kilometers from the place of trial or hearing, and will probably continue absent when the testimony is required, or when the witness is unable to appear to testify at the place of trial by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause. Testimony by deposition may be presented by the defense in capital cases.⁵⁶

Depositions may be taken before and authenticated by any officer, military or civil, authorized to administer oaths by the laws of the Philippines or the place where the deposition is taken.⁵⁷

9. *Admissibility of Records of Courts of Inquiry.*

Records of proceedings of courts of inquiry may, with the consent of the accused, be read into evidence before courts-martial in cases which are not capital and which do not extend to the dismissal of an officer. However, the defense may introduce such records in capital and officer dismissal cases.⁵⁸

10. *Compulsory Self-Incrimination Prohibited.*

No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence, can be compelled to incriminate himself, or to answer any question not material to the issue when such answer might tend to degrade him.⁵⁹ The Bill of Rights of the Constitution of the Philippines provides that in a criminal case no person shall be compelled "to be a witness against himself."⁶⁰ The principle embodied in this provision applies to trial

⁵⁵ AW 23, PA.

⁵⁶ AW 25, PA.

⁵⁷ AW 26, PA.

⁵⁸ AW 27, PA.

⁵⁹ AW 24, PA.

⁶⁰ See PHIL. CONST. art. II, § 1, para. 16.

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by courts-martial and is not limited to the person on trial, but extends to any person who may be called as a witness.⁶¹

A similar provision (Art. 31a) appears in the American *Uniform Code of Military Justice*. Unlike its American counterpart, AW 24 does not specifically provide for a warning requirement similar to that provided in Article 31b. However, it is a practice of Philippine investigators to preface their investigations with a warning or statement of the individual's right under AW 24.

11. Contempts.

To protect the dignity of the court and insure a proper administration of justice, military tribunals may punish any person who commits direct contempt. The punishment cannot exceed ten days confinement or two hundred pesos, or both.⁶² Misbehavior in the presence of or so near a court or judge as to interrupt the administration of justice, including disrespect toward the court or judge, or refusal to be sworn or to answer as a witness, or to subscribe an affidavit or deposition when lawfully required so to do, are among the acts which constitute direct contempt.⁶³ No form of trial or investigation is required. The act having transpired in the presence (or in the sight or hearing) of the court, no evidence is in general necessary to inform it of the circumstances, nor is any introduced in practice.⁶⁴

12. Introduction of Evidence.

The trial proper begins with the introduction of the testimony on behalf of the government. The trial judge advocate may open the prosecution with a statement of the case against the accused which he proposed to establish by testimonial or documentary evidence. The first witness for the prosecution is then called, sworn and examined by the trial judge advocate. When the direct examination has been concluded, the accused is given an opportunity to cross-examine the witness. After the cross-examination has been completed the witness may be re-examined by the trial judge advocate, after which he may be re-examined by the accused. If the accused desires to examine the witness in respect to matters not developed during the examination in chief, his proper course is to summon the witness to testify in his behalf at a later stage of the trial. However, if he only has a few questions, they may be asked, with the consent of the court, while the witness is on the stand. After the trial judge advocate and the accused have completed their examination of a particular wit-

⁶¹ See MCM, PA, § 122-b.

⁶² AW 31, PA.

⁶³ See RULES OF COURT (PHILIPPINES), Rule 64, § 1.

⁶⁴ See WINTHROP, *op. cit. supra* note 19, at §10.

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ness, an opportunity is afforded to the members of the court to propound questions. In strictness, the court may put questions at any time; they are properly asked, however, after the witness has been regularly examined by the parties.

When all the witnesses for the prosecution have been called and examined and the trial judge advocate has introduced and submitted his documentary evidence, he announces, "The prosecution rests."

The accused may then present his defense. Defenses vary considerably in point of sufficiency or legal validity; some being a complete answer to the charges, and others operating merely to reduce the degree of criminality, or to diminish the gravity of the offense which is shown to have been committed.⁶⁵

The defense presents its case in the same manner as outlined above for the prosecution. The trial judge advocate administers the oath to the witnesses and asks the same preliminary questions as are addressed to witnesses for the prosecution. The defense thereafter conducts the direct and redirect examination and the prosecution conducts cross and recross-examination. The accused can only become a witness at his own request. He has the right to make a sworn or unsworn statement. If he prefers to remain silent, no inference may be drawn from this fact and no comment made. If the accused testifies on less than all the specifications charged, the cross-examination must be limited accordingly. If there appears to be any doubt as to the accused's understanding of his rights as a witness, the court should satisfy itself by questions addressed directly to the accused, and additional explanation, if necessary, that he understands, and, after consultation with his counsel have him state again what he elects to do. If additional explanation is made, the record will so indicate. In this case the explanation itself need not be recorded, but the response, if any, must be.

After the defense has finished its case, the prosecution may call or recall witnesses in rebuttal. If he has done so or does not wish to rebut the evidence of the defense, the trial judge advocate asks the court if it wishes to have any witnesses called or recalled. If witnesses are called, the trial judge advocate will conduct the direct and redirect examination unless the court otherwise directs.⁶⁶ The trial judge advocate has the right to make an opening argument, which he may waive. In addition, if any argument

⁶⁵ See DAVIS, *op. cit. supra* note 38, at 111.

⁶⁶ See MCM, PA, § 75-b.

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is made on behalf of the defense, the trial judge advocate may make a closing argument in rebuttal.⁶⁷

13. *Closed Sessions.*

Upon completion of arguments, the court is closed. At this point all persons leave the room except the members of the court. The trial judge advocate is not permitted to consult the court in closed session without the accused and his counsel being present.⁶⁸

14. *Method of Voting.*

The law member of a general court-martial, or president of a special court-martial, rules in open court upon interlocutory questions, other than challenge. If any member objects to such a ruling the court is cleared and closed and the question decided by a majority vote, *viva voce*. A ruling of a law member upon any interlocutory question, other than a motion for a finding of not guilty or the accused's sanity, is final and conclusive.

When the court has been cleared the members proceed to vote on the findings. The vote is by secret written ballot which is counted by the junior member and checked by the president, who forthwith announces the result of the ballot to the members of the court.⁶⁹

15. *The Findings.*

The law member of a general court-martial or the president of a special court-martial is required to apprise the court of the fundamental presumption of innocence in favor of the accused;⁷⁰ that the court, in order to convict the accused, must be satisfied beyond a reasonable doubt that the accused is guilty as charged;⁷¹ that if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in the accused's favor and he shall be acquitted; and that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no such doubt.⁷²

The vote may be preceded by an explanation of legal principles involved by the law member and free discussion by the members of the court. This explanation is normally undertaken by the law member for the enlightenment of the members of the court. But unlike the American system, the law member is not required

⁶⁷ *Id.* § 77.

⁶⁸ AW 29, PA.

⁶⁹ AW 30, PA.

⁷⁰ Bull. No. 23, Headquarters, Armed Forces of the Philippines, August 12, 1950, at 15-16.

⁷¹ *Ibid.*

⁷² AW 30, PA.

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to give instruction or explanation unless requested by any member of the court. In this manner, the danger of the law member influencing his co-members in the court is minimized.

The vote itself is secret. Specifications are voted upon first, and then the charges under which they are laid, otherwise the order of voting will be determined by the president subject to the objection of the other court members.⁷³ A vote upon a lesser included offense or upon a finding with exceptions and substitutions may properly be taken after a vote on specifications or charges as written.⁷⁴

A two-thirds vote of the members present is required for conviction of any offense except spying⁷⁵ which requires a unanimous vote.⁷⁶ Should the number of votes required for a finding of guilty not be obtained, the finding is automatically not guilty. The president may, however, in the closed session, require reconsideration of the vote until the court is convinced that the ballots cast represent the considered and final judgment of the court. A finding of guilty in which the requisite number of the court concurs becomes the finding of the court but may be reconsidered by the court at any time before the finding is announced or the court opens to receive evidence of previous convictions.⁷⁷

When the court has reached its findings, the court is opened. In the presence of the accused, his counsel, and the personnel of the prosecution (all of whom remain standing), the president, if the court has acquitted the accused of all specifications and charges, announces the acquittal. If the court has found the accused guilty of any offense, the president will not announce its findings but will proceed to receive any evidence of previous convictions and allow the prosecution to read the personal data from the charge sheet concerning the accused.⁷⁸ Thereafter, the court is again closed to vote on the sentence.

It should be noted that unlike the American system the court does not initially reopen to announce a finding of guilty and receive evidence in mitigation, extenuation or aggravation other than evidence of previous convictions and the accused's personal data. This procedure is more in keeping with the criminal procedure in civil law countries (like the Philippines) of having the prosecution and defense submit all their respective evidence (in-

⁷³ MCM, PA, § 78.

⁷⁴ MCM, PA, § 78-b, c.

⁷⁵ AW 83, PA.

⁷⁶ AW 42, PA.

⁷⁷ MCM, PA, § 78-d.

⁷⁸ MCM, PA, § 79-c.

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cluding those in mitigation, extenuation, and aggravation) to the court before the findings.

16. *The Sentence.*

Deliberation on the sentence may include full and free discussion. It is customary to permit each member to propose a sentence in writing. They are collected by the junior member and given to the president who puts the proposed sentences to vote beginning with the lightest. Voting on the sentence is by secret, written ballot, and it is obligatory on each member, regardless of his vote on the findings, to vote for an appropriate sentence for the offenses of which accused was found guilty. If the required number of votes are not obtained on any one of the proposed sentences, new sentences may be proposed, and voted on.⁷⁹

A unanimous vote of the members present is required to impose the death penalty, and a three-fourth's vote is required for a sentence of life imprisonment or confinement for more than ten years. All other sentences are determined by a two-third's vote. As with the findings, the president, subject to being overruled by the court, may require reconsideration of any sentence voted and continue voting until the court is convinced that the ballots cast represent the considered and final judgment of the court.⁸⁰

Where two or more persons have been found guilty on joint or common charges each must be sentenced separately, although the punishment awarded may be the same. The court shall award a single sentence for all offenses and not a separate sentence for each of them.⁸¹ The sentence may not exceed the maximum limits for the offense or offenses of which accused is convicted.⁸²

17. *Court to Announce Action.*

When the court arrives at a sentence, the court will be opened, and the president will announce the findings and sentence in the presence of the accused, his counsel, and the prosecution. If the court so decides, the findings and sentence need not be announced in open court for security reasons. After the sentence has been announced, if there are no other cases before the court, the court will adjourn to meet at the call of the president.

Immediately after final adjournment of the court, the commanding officer of the accused is notified as to the result of trial.⁸³ This report is made even if the court has not announced

⁷⁹ MCM, PA, § 80-b.

⁸⁰ See MCM, PA, § 80-b.

⁸¹ *Ibid.*

⁸² MCM, PA, § 104.

⁸³ See CM 233806, as digested in 2 BULL. JAG, USA 185 (1943).

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the result of the trial in open court. The purpose of this requirement is to enable the commanding officer to make any appropriate action affecting the restraint of the accused.

18. *Records.*

Each general court-martial keeps a separate record of its proceedings in the trial of each case. Such record is authenticated or signed by the president and the trial judge advocate. In case of non-authentication by reason of death, disability, or absence of either or both of them, the record is signed by a member in lieu of the president and by an assistant trial judge advocate in lieu of the trial judge advocate; otherwise by another member of the court.⁸⁴

Special and summary courts-martial likewise keep records of their proceedings. A separate record for each case is authenticated in such manner as may be required by regulations which the president may from time to time prescribe.⁸⁵

The preparation of the record of trial is the responsibility of the trial judge advocate. He is amenable to trial for neglect of duty for unreasonable delay in forwarding a record.⁸⁶ He is duty bound to promptly forward the record, not only because directed to do so by the military laws and regulation, but because common justice requires that the defendant be speedily punished if guilty or released if innocent.

19. *Disposition of Records—General and Special Courts-Martial.*

Records of general and special courts-martial are forwarded to the appointing authority or to his successor in command for action.⁸⁷ Thereafter, a general court-martial record with the action of the reviewing authority, is transmitted directly to the Judge Advocate General of the Armed Forces of the Philippines. With the record will be forwarded the accompanying papers, five authenticated copies of the order, if there be any, promulgating the result of the trial, and a signed copy of the review of the staff judge advocate. This applies equally to cases where the sentence is suspended, but where action by a confirming authority other than the President is necessary. Where the order of execution is withheld, the reviewing authority is required to elicit, before forwarding the record, the data necessary for drafting a general court-martial order, and when such order is issued, to forward

⁸⁴ AW 32, PA.

⁸⁵ AW 33, PA.

⁸⁶ MCM, PA, § 85-a.

⁸⁷ AW 34, PA.

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five authenticated copies.⁸⁸ Special court-martial records, together with copies of the order publishing the result of the trial, are forwarded by indorsement to the officer exercising immediate general court-martial jurisdiction for action. Thereafter, they are transferred to the permanent file in the office of the Judge Advocate General.⁸⁹

20. *Disposition of Records—Summary Courts-Martial.*

After the officer appointing the court reviews the record, a report of each trial by summary courts-martial is transmitted to a designated general headquarters.⁹⁰ Records of trial are filed together in the office of the commanding officer and constitute the summary court record of the command. A copy of each record is sent to the officer exercising immediate general court-martial jurisdiction over the command. Three years after action, a record of trial by summary court-martial may be destroyed.⁹¹

21. *President May Prescribe Rules.*

The President issues from time to time regulations governing the procedure and modes of proof in cases before courts-martial, courts of inquiry, military commissions and other military tribunals. These regulations authorize military tribunals to apply, if practicable, the rules of evidence generally recognized in the trial of criminal cases in the civil courts of justice of the Philippines.⁹²

22. *Effect of Irregularities.*

Irregularities, such as an improper admission or rejection of evidence or error as to any matter of pleading or procedure, do not invalidate the proceedings of a court-martial unless they injuriously affect the substantial rights of the accused. The omission of the words "hard labor" in any sentence adjudging confinement does not deprive the authorities executing such sentence of the power to require hard labor as a part of the authorized punishment.⁹³

H. LIMITATIONS UPON PROSECUTIONS

The period that must elapse in order to constitute a bar to a prosecution varies in general with the gravity of the offense.⁹⁴

⁸⁸ MCM, PA, § 87-c.

⁸⁹ *Ibid.*

⁹⁰ AW 35, PA.

⁹¹ See MCM, PA, § 87-c.

⁹² See AW 37, PA.

⁹³ See AW 36, PA.

⁹⁴ See DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 111 (3d ed. rev. 1915).

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Except for desertion, murder or rape in time of war, or for mutiny or for war offenses, the period of limitations upon court-martial trial and punishment is two years from the date of the commission of the offense to the arraignment of the accused. For desertion in time of peace and for some other types of offenses, the period of limitations is three years from the time the offense was committed. The period of any absence from the jurisdiction of the Philippines, and any period during which the accused is not amenable to military justice, are excluded from the computation. If the Secretary of National Defense certifies that a trial during time of war would be detrimental to the prosecution of the war, the period of limitations is extended to the duration of the conflict and six months thereafter.⁹⁵

The accused cannot, without his consent, be tried a second time for the same offense. No proceeding in which the accused has been found guilty can be considered a trial until the reviewing and, if there be one, the confirming authority have taken final action. A record of trial cannot be returned for reconsideration when there has been an acquittal; a finding of not guilty of any specification; a finding of not guilty of any charge (unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some Article of War); or the sentence originally imposed, with a view to increasing its severity, is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had. Courts-martial cannot, in any proceeding or revision, reconsider their findings or sentence in any particular in which a return of the record of trial for such reconsideration is prohibited.⁹⁶

I. PUNISHMENTS

Military tribunals are forbidden by statute from imposing certain forms of punishment. In some instances this prohibition is absolute, as in case of flogging, or of branding, marking, or tattooing the body. Other punishments, the death penalty, for example, are prohibited in time of peace only, and may be imposed in time of war or in the presence of the enemy. Military duty is honorable, and to impose it in any form as a punishment tends to degrade it to the prejudice of the best interests of the service.⁹⁷

Except for certain offenses, military offenders under a court-martial sentence cannot be punished by confinement in a peni-

⁹⁵ AW 38, PA.

⁹⁶ AW 39, PA.

⁹⁷ DAVIS, *op. cit.* *supra* note 94, at 163; AW 40, PA.

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tentiary unless the period of confinement authorized and adjudged by court-martial is more than one year and the court-martial conviction is recognized as an offense of a civil nature punishable by penitentiary confinement for more than one year by a statute of the Philippines, or by way of commutation of a death sentence. The excepted offenses are desertion in time of war and repeated desertion in time of peace and mutiny. When a sentence of confinement is adjudged for two or more acts, any one of which is punishable by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary. Persons sentenced to dishonorable discharge and to confinement, not in a penitentiary, are confined in disciplinary barracks or elsewhere, but not in a penitentiary.⁹⁸

V. ACTION BY APPOINTING OR SUPERIOR AUTHORITY

Every record of trial by a general court-martial or military commission, or every record by a special court-martial in which a bad conduct discharge has been adjudged and approved by the appointing authority, are forwarded to the reviewing or confirming authority for action. Before acting, the record is referred to a staff judge advocate or the Judge Advocate General.

A court-martial sentence is not carried into execution until approved by the officer appointing the court. A special court martial sentence which includes a bad conduct discharge is likewise not carried into execution without the approval of the convening authority and the officer authorized to appoint a general court-martial.⁹⁹

Incident to his power to approve a court-martial sentence, the reviewing authority can approve a finding; approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense; approve or disapprove the whole or any part of the sentence; and remand the case for rehearing.¹⁰⁰ Similar powers are conferred upon the confirming authority.¹⁰¹ Certain types of sentences, such as a sentence imposed upon a general officer, dismissal of an officer and sentence of death, require confirmation by the President before they are carried into execution.¹⁰²

Any unexecuted portion of a court-martial sentence may be mitigated or remitted by the authority having the power to order

⁹⁸ AW 41, PA.

⁹⁹ AW 45, PA.

¹⁰⁰ AW 46, PA.

¹⁰¹ See AW 48, PA.

¹⁰² See AW 47, PA.

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the execution of such sentence. However, sentences approved or confirmed by the President and those involving loss of files by an officer cannot be remitted by any authority inferior to the President. When empowered by the President, the commanding general of Army in the field or the area commander may approve or confirm and commute (but not approve or confirm without commuting), mitigate, or remit and then order executed as commuted, mitigated, or remitted any sentence which requires the confirmation of the President before it may be executed.¹⁰³

Before any record of trial involving an adjudged sentence requiring presidential approval or confirmation is submitted to the President, it is examined by a board of review. This board consists of one or more officers of the Judge Advocate General's Service.¹⁰⁴ It submits its opinion to the Judge Advocate General who transmits the record and the board's opinion, with his recommendation, to the Chief of Staff for action of the President.

The execution of any sentence involving the death penalty, dismissal not suspended, dishonorable discharge not suspended, bad conduct discharge, or confinement in a penitentiary, cannot be ordered unless and until the board of review has, with the approval of the Judge Advocate General, held the record of trial legally sufficient to support the sentence. However, unlike the American system, the reviewing authority may, upon his approval of a sentence involving dishonorable discharge, bad conduct discharge or confinement in a penitentiary, order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications for which the accused has pleaded guilty. Apart from the accused's plea of guilty, perhaps the plausible reason for this provision is the fact that except for the sentence of death, no presidential action is required to order into execution a sentence not involving dismissal or penitentiary confinement of an officer or presidential appointee.

When the board of review, with the approval of the Judge Advocate General, holds the record in a case in which the order of execution has been withheld legally sufficient to support the findings and sentence, the Judge Advocate General is required to advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of the sentence. When the order of execution has been withheld, and

¹⁰³ AW 49, PA.

¹⁰⁴ Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office with equal powers and duties. The President is empowered to establish a separate system of review for cases when the accused is a member of the Philippine Constabulary. AW 50, PA.

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the board of review holds that record of trial is legally insufficient to support the findings or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in the holding of the board, the findings and sentence are vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General. The record is then transmitted through the proper channels to the convening authority for a rehearing or such other proper action. In the event that the Judge Advocate General disagrees with the holding of the board of review, all papers in the case, including the opinion of the board and the Judge Advocate General's dissent are forwarded directly to the Chief of Staff for presidential action. The President may confirm the action of the reviewing or confirming authority, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, and vacate any finding of guilty or the sentence, in whole or in part.¹⁰⁵ It can readily be seen that appellate review under the Philippine procedure is not as complicated as under the American. This is explained by the fact that the former has no court of military appeals.

Every record of trial by a general court-martial, in which examination by the board of review is not provided, is examined in the Judge Advocate General's Office. If it is found legally insufficient to support the findings and sentence, in whole or in part, the record is examined by the board of review. If the board also finds such record legally insufficient to support the findings and sentence, it submits a written opinion to the Judge Advocate General, who transmits the record and the board's opinion with his recommendation, to the Chief of Staff for the action of the President. In any such case the President may approve, disapprove or vacate in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence, or any part of it, and direct the execution of sentence as confirmed or modified. He may also restore the accused to all rights affected by the findings or sentence held to be invalid. The President's order to this end is binding upon all departments and officers of the government.¹⁰⁶

In disapproving or vacating a sentence, the President or any reviewing or confirming authority may direct a rehearing before a court composed of officers, or officers and enlisted men, who are not members of the court which first heard the case. Upon each

¹⁰⁵ AW 50, PA.

¹⁰⁶ *Ibid.*

rehearing the accused cannot be tried for any offense of which he was not found guilty by the first court nor may he be sentenced in excess of the original sentence. After any rehearing requested by the President, the record of trial is, after examination by the board of review, transmitted by the Judge Advocate General, with the Boards' opinion and his recommendation to the Chief of Staff for action by the President.¹⁰⁷

The Chief of Staff has discretion, upon application and good cause, to grant a new trial, or vacate a sentence, restore rights, privileges, and property affected by a sentence. Further, he can substitute a form of discharge authorized for administrative issuance in any court-martial in place of a dismissal, dishonorable discharge, or bad conduct discharge if application is made within one year after final disposition of the case upon initial appellate review. With respect to wartime offenses, the application for a new trial is to be made within one year after termination of the war.¹⁰⁸

A provision exists in the American system which is narrower in scope. It does not have a provision extending the time for filing a petition when the trial occurs during time of war. It only allows a petition to be made if the convening authority approves a sentence involving death, dismissal, a dishonorable or bad conduct discharge, or for confinement for a year or more.¹⁰⁹ In addition, the basis for the petition must be newly discovered evidence or that there was fraud on the court.¹¹⁰ The petition for a new trial is addressed to the Judge Advocate General for his action or, if the case is pending before the board of review or court of military appeals, action by either of said bodies as the case may be. Further, unlike the Philippine system, the American system vests the authority to substitute an administrative form of discharge for a discharge or dismissal in the Secretary of the Army instead of the Chief of Staff.

A sentence of dismissal or death may be suspended by competent authority until the pleasure of the President is known. In this case, a copy of the order of suspension, together with a copy of the record of trial, is transmitted to the President.¹¹¹

The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, or at any time thereafter, while the sentence is being

¹⁰⁷ AW 50-A, PA.

¹⁰⁸ AW 50-B, PA.

¹⁰⁹ See UNIFORM CODE OF MILITARY JUSTICE, art. 73.

¹¹⁰ *Ibid.*

¹¹¹ AW 51, PA.

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served, suspend the execution, in whole or in part of any sentence that does not extend to death. Further, he may restore the person under sentence to duty during the suspension. A sentence or any part of it, which has been suspended, may be remitted, in whole or in part, by the officer who suspended it (except in cases of persons confined in the penitentiaries), by his successor in office, or by any officer exercising appropriate court-martial jurisdiction over the command in which the person under sentence may be serving at the time. Subject to the foregoing exceptions, the same authority may vacate the order of suspension at any time and order the execution of the sentence or the suspended part thereof insofar as the same have not been previously remitted, subject to like power of suspension. The death or honorable discharge of a person under a suspended sentence operates as a complete remission of any unexecuted or unremitted part of such sentence. A sentence approved or confirmed by the President cannot be suspended by any other authority.¹¹²

Only the President can direct the execution or remission of any part of the sentence imposed upon a soldier whose sentence of dishonorable discharge has been suspended until his release from confinement in a penitentiary.¹¹³ The only plausible reason that can be given is that the prisoner's status is now that of a public prisoner and is already beyond the control of the commander who originally appointed the court and approved the sentence.

VI. CONCLUSION

The court-martial system of the Philippines has proven very effective in enforcing military discipline at all levels of command. Maximum use by commanding officers of their disciplinary powers in dealing with minor offenses has kept court-martial cases to a minimum. Nevertheless, delays in bringing the accused to trial and other deficiencies noted in the past twenty-five years have emphasized the need for changes. Inaction in the exercise of presidential powers under the Articles of War, brought about by the multifarious duties of the President's office, has accounted for a number of these delays.

To insure a more efficient and speedy administration of military justice, it has been proposed that the President be authorized to delegate to the Secretary of National Defense so much of his powers under the Articles of War as he may prescribe by regulations; and that the statutory authority to appoint a general

¹¹² AW 52, PA.

¹¹³ AW 53, PA.

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court-martial and to summarily order the discharge of an enlisted man (now vested in the President, the Chief of Staff and the chief of Constabulary) be extended to commanders of major commands and certain subordinate commanders. These proposed changes are now the subject of legislation by the Philippine Congress.

COMMENTS

SELECTIVE SERVICE RAMIFICATIONS IN 1964.* The year 1964 has proved to be one of marked significance to the Selective Service System. There have been indications of an extension of Selective Service into relatively new fields. There has been discussion of a repeal of the basic Selective Service statute. The circumstance that 1964 has been a year of national elections may have been a cogent reason why increased attention has been focused upon the System.

The purpose of this study is to seek to bring up to date two previous articles in this publication by this writer discussing Selective Service to the time of mid-1963.¹ We shall consider legislative changes, trends in litigation, the physical examination of 18-year-olds who are registrants and the deferment of married registrants.

I. LEGISLATIVE CHANGES

The Universal Military Training and Service Act² was extended by Congress from July 1, 1963, for an additional four years ending July 1, 1967.³

Direct legislative amendment has not been extensive. Public Law 88-110, approved September 3, 1963,⁴ set forth a uniform reserve enlistment program for the Armed Forces. There is provided an enlistment of six years in the Ready Reserve for men, ages 17 to 26, including a minimum of four months of active duty for training. Those who enlist become members of the Ready Reserve or may perform other Ready Reserve service prescribed by the Secretary of Defense.

* 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 See *Selective Service: A Source of Military Manpower*, 13 Mil. L. Rev. 35 (1961); *Selective Service Litigation Since 1960*, 23 Mil. L. Rev. 101 (1964). Insofar as possible, there will be an avoidance of restating what is set forth in either of the two articles and to which the attention of the reader is respectfully directed.

² See 62 Stat. 604 (1948), as amended, 50 U.S.C. App. §§ 451-473 (Supp. V 1963).

³ See 77 Stat. 4 (1963), 50 U.S.C. App. § 467(c) (Supp. V 1963).

⁴ See 77 Stat. 134 (1963), 10 U.S.C. §§ 270(b), 511, 50 U.S.C. App. §§ 456(c) (2), 463(a) (Supp. V 1963).

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This repeals legislation found in Section 262⁵ of the Armed Forces Reserve Act of 1952. Section 262 contained the so-called six months reserve enlistment active duty for training (ACDUTRA) program for men 17-18½ years of age who were subject to Selective Service induction.

The result is that a man may now enlist, prior to age 26, in the Ready Reserve, including the National Guard, and he is deferred from induction via Selective Service as long as he participates satisfactorily with his reserve unit. Such a man is placed in Class IV-A (completed military service) after he has performed six years of service as an active reservist, including at least four months ACDUTRA.

Public Law 88-110 also amended the Universal Military Training and Service Act to restore former exemptions from the conflict of interest laws. The amendment applies within the Selective Service Section to uncompensated officials, members of the National Selective Service Appeal Board and hearing officers conducting hearings on appeals of registrants claiming to be conscientious objectors. This was deemed necessary because of the adoption of Public Law 87-849, approved October 23, 1962,⁶ which has re-enacted the *conflict of interest* restrictions from which Selective Service personnel had been exempted since 1940, prior to Public Law 87-849. The exemption of certain Selective Service personnel from the conflict of interests rule was achieved by amending Section 13(a) of the Act⁷ to add a conforming reference to Sections 203, 205, and 207 of Title 18, United States Code.

A further change of the Act is achieved in Public Law 88-360, approved July 7, 1964,⁸ which amended Section 6(o)⁹ of the Act relative to exempting sole surviving sons from induction into the military. Section 6(o) now additionally provides that where the father of a family has died as a result of his military service, a registrant who is the sole surviving son of the family shall not be inducted. However, the registrant by volunteering waives the exemption in Section 6(o). Further, the registrant shall not be eligible for the exemption during a period of war or national emergency declared by Congress.

⁵ Ch. 608, pt. II, § 262, 66 Stat. 481 (1952), as amended; see 50 U.S.C. § 1013 (Supp. V 1963).

⁶ See 18 U.S.C. §§ 201-218 (Supp. V 1963).

⁷ See 77 Stat. 126 (1963), as amended, 50 U.S.C. App. § 463(a) (Supp. V 1963).

⁸ See 78 Stat. 296 (1964), as amended, 50 U.S.C.A. App. § 456(o) (1964).

⁹ See *Ibid.*

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II. SELECTIVE SERVICE NUMERICAL STRENGTH

The following table reflects the total numbers of registrants in each Selective Service classification on a nation-wide basis and also shows the various manpower classifications used in the Selective Service System as of December 1, 1964:¹⁰

Classification Picture December 1, 1964

	<i>Class</i>	<i>Number</i>
Total	-----	28,994,334
I-A and I-A-O		
	Examined and qualified -----	113,642
	Not examined -----	732,455
	Not available for induction or examination -----	227,991
	Induction or examination postponed -----	3,158
	Married, 19 to 26 years of age -----	517,957
	26 years and older with liability extended -----	70,197
	Under 19 years of age -----	318,367
I-Y	Qualified only in an emergency -----	1,692,864
I-C		
	Inducted -----	223,576
	Enlisted or commissioned -----	1,614,099
I-O		
	Examined and qualified -----	2,021
	Not examined -----	5,768
	Married, 19 to 26 years of age -----	2,625
I-W		
	At work -----	2,286
	Released -----	5,981
I-D	Members of reserve component -----	1,017,404
I-S	Statutory deferment	
	College -----	3,145
	High school -----	231,828
II-A	Occupational deferment (except agricultural) -----	159,747
II-A	Apprentice -----	14,346
II-C	Agricultural deferment -----	19,000
II-S	Occupational deferment (student) -----	1,438,104
III-A	Dependency deferment -----	2,964,358
IV-A	Completed service: Sole surviving son -----	2,298,916
IV-B	Officials -----	51
IV-C	Aliens -----	9,588
IV-D	Ministers, divinity students -----	84,899
IV-F	Not qualified -----	2,437,769
V-A	Over age liability -----	12,782,692

¹⁰ Selective Service, vol. XV, No. 2, February 1965, p. 1 (the Monthly Bulletin of National Headquarters of the Selective Service System, Washington 25, D.C.) [hereinafter cited as Selective Service].

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The following discloses the total numbers of registrants inducted into the Army through Selective Service from January 1963 through December 1964:¹¹

1963	
January	4,327
February	4,396
March	8,977
April	9,913
May	9,681
June	4,247
July	6,879
August	12,000
September	12,000
October	17,000
November	17,000
December	13,400
1964	
January	16,000
February	12,000
March	14,000
April	12,000
May	12,000
June	6,000
July	8,000
August	3,300
September	6,200
October	6,600
November	8,600
December	7,800

Including the December 1964 call, there has been a grand total induction of approximately 3,168,000 registrants since 1948.¹²

A call was issued to the states from the Selective Service System for 1,175 physicians to be inducted in the summer months of 1964. The physicians were allocated on the basis of 650 to the Army, 325 to the Navy and 200 to the Air Force.¹³

For the year 1965, the Department of Defense has requisitioned 950 physicians through Selective Service to be brought to active

¹¹ Extracted from each applicable Monthly Bulletin of Selective Service.

¹² Selective Service, vol. XIV, No. 11, November 1964, p. 1. There are two new developments which may greatly increase the number of persons inducted. Signs may point to Selective Service inductions for the Navy beginning shortly. The Navy has not used Selective Service in recent years except for medics. The second development is the sharp increase in the Army call-up. In April 1965, Selective Service called 13,700 men for the Army.

¹³ Selective Service, vol. XIV, No. 4, April 1964, p. 4. This action was taken under the so-called Doctor's Draft, 64 Stat. 826 (1950), as amended, 50 U.S.C. App. § 454(i) (1958). The method was upheld in *Bertelsen v. Cooney*, 213 F.2d 275 (5th Cir. 1954), cert. denied, 343 U.S. 856 (1954).

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duty by mid-summer 1965. The requirements of each service are 550 to the Army, 275 to the Navy, and 125 to the Air Force.¹⁴

The Defense Department further requisitioned through Selective Service 100 veterinarians for the Army to be called in mid-1964.¹⁵ The induction of physicians and veterinarians was necessary where there had been a failure of qualified, trained registrants to apply for reserve commissions leading to tours of active duty.

III. LITIGATION IN 1964: THE SUPREME BEING ISSUE

Three cases in the circuit courts of appeals were of particular concern to Selective Service in 1964. Each case posed the same issue of the so-called "Supreme Being" application. They were *United States v. Seeger*,¹⁶ *United States v. Jakobson*,¹⁷ and *Peter v. United States*.¹⁸ In each of these cases, the United States Supreme Court granted certiorari,¹⁹ and rendered a final decision on March 8, 1965, on the basic issue involved, namely, the Supreme Being test. The Supreme Court decision affirming *Seeger* and *Jakobson* (but affirming *Seeger* on other grounds), and reversing *Peter*, will be discussed below.

In 1964, the issue of the "Supreme Being" belief required of a registrant seeking exemption under certain circumstances came to a head with regard to the First Amendment. Section 6(j) provides that the Act shall not:

. . . be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. . . .²⁰

Under the facts in *Seeger*, the registrant declared that he was unwilling to participate in any violent military conflict, either

¹⁴ Selective Service, vol. XV, No. 2, February 1965, p. 1; *id.*, No. 3, March 1965, p. 3.

¹⁵ Selective Service System Library Digest, July 15, 1964, p. 2.

¹⁶ 326 F.2d 846 (2d Cir. 1964), *aff'd on other grounds*, 380 U.S. 163 (March 8, 1965) (belief in Supreme Being as required by statute).

¹⁷ 325 F.2d 409 (2d Cir. 1963), *aff'd*, 380 U.S. 163 (March 8, 1965).

¹⁸ 324 F.2d 173 (9th Cir. 1963), *rev'd*, 380 U.S. 163 (March 8, 1965), 8, 1965).

¹⁹ See 377 U.S. 922 (1964). The citation is the same for each of the three cases.

²⁰ See 62 Stat. 609 (1948), as amended, 50 U.S.C. App. § 456(j) (1958).

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as a combatant or non-combatant, because of his personal belief in the "welfare of humanity and the preservation of democratic values." A state of war, therefore, he concluded, was "futile and self-defeating" and "unethical." Seeger was a member of an "exceptionally religious" family. The defendant was convicted of refusing to submit to induction into the armed forces in the District Court,²¹ and appealed his conviction. The Court of Appeals for the Second Circuit held that the Act in limiting the conscientious objection exemption from military service to persons who believe in a Supreme Being, violated the due process clause of the Fifth Amendment by creating an unwarranted classification applied to a registrant whose dislike of war was sincere. The court noted that Buddhism, Taoism, Ethical Culture, and Secular Humanism do not teach a belief in the existence of a Supreme Being. Plato, Aristotle, and Spinoza evolved comprehensive ethical systems of moral integrity without a belief in God.²² The Court cited *Torcaso v. Watkins*²³ and also placed reliance on *School Dist. of Abington Twp. v. Schempp*,²⁴ as well as *Engel v. Vitale*.²⁵ The court in *Seeger* declared:

It has often been noted that the principal distinction between the free world and the Marxist nations is traceable to democracy's concern for the rights of the individual citizen, as opposed to the collective mass of society. And this dedication to the freedom of the individual, of which our Bill of Rights is the most eloquent expression, is in large measure the result of the nation's religious heritage. Indeed, we here respect the right of Daniel Seeger to believe what he will largely because of the conviction that every individual is a child of God; and that Man, created in the image of his Maker, is endowed for that reason with human dignity.²⁶

In *Jakobson*, the registrant did not claim to be a conscientious objector when he filed his Selective Service questionnaire form in September 1953 with his local board. In April 1958, he filed

²¹ See 216 F. Supp. 516 (S.D.N.Y. 1963), *rev'd* 326 F.2d 846 (2d Cir. 1964), *reversal aff'd on other grounds*, 380 U.S. 163 (March 8, 1965) (belief in Supreme Being as required by statute).

²² *United States v. Seeger*, *supra* note 21.

²³ 367 U.S. 488 (1961). The court struck down a provision in the Maryland constitution which required a declaration of belief in the existence of God in order to qualify for the office of notary public.

²⁴ 374 U.S. 203 (1963). A Pennsylvania statute could not authorize the reading of excerpts from the Bible, nor the recitation of the Lord's Prayer by the students in unison at the opening of each school day.

²⁵ 370 U.S. 421 (1962). The State of New York could not permit a school district to attempt a program of daily classroom prayers in the public schools although observance of the prayer interval was voluntary on the part of the students and the prayer recited was denominationally neutral.

²⁶ 326 F.2d 846, 854-55 (1964), *aff'd on other grounds*, 380 U.S. 163 (March 8, 1965) (belief in Supreme Being as required by statute).

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the required form, and claimed to be conscientiously opposed to combatant military service, and stated that he believed in a Supreme Being. He asserted that he was not a member of any religious sect. In response to a 43-page discussion in writing of his views, his local board classified Jakobson as I-A-O (qualified for non-combatant service) rather than I-O (conscientious objector). He was convicted for refusal to submit to induction, and the Court of Appeals for the Second Circuit reversed the conviction. It found that Jakobson's beliefs met the Supreme Being test. However, it was unable to decide whether the Appeal Board rejected Jakobson's claim because it found he was insincere or because Jakobson's belief did not satisfy the Supreme Being standard.²⁷ The court then dismissed the indictment.

In *Peter*,²⁸ the Court of Appeals for the Ninth Circuit affirmed a conviction of the registrant for failure to submit to induction. The court held that the local board had a basis in fact for denial of a conscientious objector classification to a registrant such as Peter who was not a member of any religious organization and who did not clearly manifest a belief in a Supreme Being. The court cited *Berman v. United States*,²⁹ where it was determined that the expression "religious training and belief" as used in the Selective Service Act of 1940, as amended,³⁰ exempting from combat training any person who by reason of religious training is conscientiously opposed to participate in war, was written into the statute for the specific purpose of distinguishing between a social belief or a moralistic philosophy and a belief based upon the individual's responsibility to an authority higher and beyond any worldly one. (It is noteworthy that Congress followed the *Berman* decision in the 1948 Act³¹ in linking religious training and belief to the Supreme Being notion.)

Perhaps the earliest decision under the 1940 Act³² as to religious belief necessary to sustain a conscientious objection was *United States v. Coton*,³³ where Judge Hand declared that a conscientious objection must stem from a religious training and

²⁷ *United States v. Jakobson*, 325 F.2d 409 (2d Cir. 1963), *aff'd*, 380 U.S. 163 (March 8, 1965).

²⁸ *Peter v. United States*, 324 F.2d 173 (9th Cir. 1963), *rev'd*, 380 U.S. 163, (March 8, 1965).

²⁹ 156 F.2d 377 (9th Cir. 1946), *cert. denied*, 329 U.S. 795 (1947).

³⁰ Ch. 720, 54 Stat. 885 (1940), as amended.

³¹ 62 Stat. 604 (1948), as amended, 50 U.S.C. App. §§ 451-473 (Supp. V 1963).

³² Ch. 720, 54 Stat. 885 (1940), as amended.

³³ 133 F.2d 708 (2d Cir. 1943).

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belief rather than philosophical or political convictions. It was deemed insufficient that the registrant's objection to war should be based upon personal reasoning rather than upon religious convictions.

*United States v. Etcheverry*³⁴ was an appeal from a conviction of violating the Act and the conviction was affirmed. A "peacetime conscription" as distinguished from a "draft in time of war" did not deprive the registrant of his liberty under the Fifth Amendment. There was no violation of the First Amendment, in the matter of an alleged establishment of a religion, nor was there any discrimination in restricting the recommendation of conscientious objection to those who believe in a Supreme Being.

Etcheverry posed the Supreme Being issue found in *Seeger*, *Jakobson* and *Peter*. The Supreme Court, as recently as March 1964, did not grant certiorari. However, by May 4, 1964, the Supreme Court granted certiorari upon the issue in *Seeger*, *Jakobson* and *Peter*.

The three cases were argued before the Supreme Court in mid-November 1964.³⁵ Decision issued March 8, 1965, concerning the three consolidated cases.³⁶ The Court affirmed the circuit court results in *Seeger* and *Jakobson*, but reversed judgment in *Peter*. The Court concluded that Congress in using the expression "Supreme Being" was merely classifying the meaning of religious training and belief so as to embrace all religions, but to exclude what were essentially personal, political, philosophical or sociological notions. The Court stated that the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of the believer parallel to that filled by an orthodox belief in God. The net result was to broaden the meaning of "Supreme Being" under Section 6(j).

In *Peter*, the Court recognized that the defendant had acknowledged "'some power manifest in nature . . . the supreme expression'" that aids man in ordering his life. The registrant had stated to the local board that "'you could call that a belief in the Supreme Being or God.'" Under these facts, the court concluded that the local board should have granted an exemption

³⁴ 320 F.2d 873 (9th Cir. 1963), cert. denied, 375 U.S. 930 (1963); rehearing denied, 375 U.S. 989 (1964); 2d rehearing petition denied, 378 U.S. 939 (1964).

³⁵ See *United States v. Seeger*, 38 U.S.L. WEEK 3185 (U.S. November 24, 1964).

³⁶ See *United States v. Seeger*, 380 U.S. 163 (March 8, 1965).

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to Peter who satisfied the statutory requirements in Section 6(j) of the Act. Thus, under the facts in each instance, Seeger, Jakobson and Peter proved sufficient individual belief in a Supreme Being to qualify for exemption.

IV. MISCELLANEOUS LITIGATION IN 1964

In *Hamilton v. Commanding Officer*,⁸⁷ the Ninth Circuit Court of Appeals held that a Selective Service Board was justified in denying a registrant a dependency deferment or exemption although he was the conservator of the estate of his widowed mother who was suffering from Parkinson's Disease. The matter arose in application for habeas corpus by the inducted registrant directed to the Commanding Officer of the Armed Forces Examining and Induction Station. The married inductee reported that he was giving the sum of \$75 monthly to his mother as her entire income. The mother had remarried and there was reason to believe that the new husband might seek to squander the small estate. The court concluded that the Appeal Board had resolved the issues on the record before the Board.

In *Whitney v. United States*,⁸⁸ a conviction was affirmed for failure to report for civilian work of national importance in lieu of induction into the military service. The Fifth Circuit Court of Appeals held that the registrant's prior statements explaining why he could not accept assignments to civil duties, coupled with the presumption that he received a letter containing a notice from his local board which had been mailed, met the requirements of proof that his failure to report for induction was both knowing and willful.

In *MacMurray v. United States*,⁸⁹ the Circuit Court of Appeals for the Ninth Circuit reversed a conviction of a registrant for refusing to submit to induction into the armed forces. Under the facts, the Department of Justice had refused to conduct a hearing in the matter of the registrant's claim to be a conscientious objector. Normally, where the local board has denied classification to a registrant as a conscientious objector and an appeal is taken to the Appeal Board, the Department of Justice conducts an inquiry and hearing under the provisions of Section 6(j) ⁴⁰ of the Universal Military Training and Service Act which provides: "Upon the filing of such appeal, the appeal board shall

⁸⁷ 328 F.2d 799 (9th Cir. 1964).

⁸⁸ 328 F.2d 88 (5th Cir. 1964).

⁸⁹ 330 F.2d 928 (9th Cir. 1964).

⁴⁰ Sec 62 Stat. 609 (1948), as amended, 50 U.S.C. App. § 456(j) (1958).

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refer any such claim to the Department of Justice for inquiry and hearing." As the result of such inquiry, the Department submits a recommendation to the Appeal Board which is generally followed in the matter of appeal.

In this case, the Department argued that the registrant's ineligibility for exemption was clear from the face of the record because hearings were available only to those professing a belief in a Supreme Being. On the Selective Service form, MacMurray stated he did not so believe. The court held that as the inquiry by the Department into the character and good faith of the registrant's objections to military service is provided for the benefit of the registrant and to explore uncertainties, the denial of such a hearing was fatal to the validity of the induction order which issued to the defendant.

In *Fitts v. United States*,⁴¹ it was determined that a Jehovah's Witness was not a minister of religion and not exempt from Selective Service, where he took part in religious activities only when he had spare time, and his farming took precedence over his ministerial work affairs. Here, the registrant claimed his ministerial work totaled about forty-eight hours monthly. The local board had estimated his ministerial service to be ten hours weekly. The court saw that the secular activities of the defendant were his primary activity.

In *Porter v. United States*,⁴² a conviction of a registrant was affirmed. The marriage of the registrant and his development of conscientious objections occurred *after* he received an order to report for induction into the military. The local board was not authorized to reopen his I-A classification, as regulations prohibited such reopening after the mailing of an order to report, unless the local board first found that there had been a change of status over which the registrant had no control. Here, there was no denial of due process because the local board did not formally consider evidence of a change of status occurring after the mailing of an order to report for induction. The registrant failed to notify the local board of his marriage and failed to file the conscientious objector form.

In *Reynolds v. S & S Corrugated Paper Machinery Co.*,⁴³ the district court was concerned with the right of a discharged serviceman to gain reinstatement in employment he had held

⁴¹ 334 F.2d 416 (5th Cir. 1964).

⁴² 384 F.2d 792 (7th Cir. 1964).

⁴³ 230 F. Supp. 855 (E.D.N.Y. 1964).

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with the defendant corporation prior to his induction. Section 9 of the Act in substance provides that if an employee leaves for required military service, he is entitled, when he returns to civilian life, to reinstatement "if still qualified to perform the duties of such position."⁴⁴

The plaintiff, after induction, had sued his former employer for assault by representatives of the employer during a strike which occurred prior to his induction. While on military leave, the plaintiff visited the plant, and informed his former fellow employees of the pending suit. Under these facts, it was held that the employer was justified in not reemploying the plaintiff. The evidence disclosed that shortly after the alleged assault, the plaintiff had termed the assault "unfortunate," and had publicly stated that the entire incident would be ignored by him. The court considered the tactics of the serviceman-employee to be "disruptive."

*United States v. Planas*⁴⁵ was a prosecution for failure to perform a duty imposed under the Act. The defendant's claim that he was a conscientious objector was allowed by his local board. He began work at the Rockland State Hospital on December 3, 1962, for a period of two years of directed civil employment in lieu of induction into the Armed Forces. He worked until May 12, 1968, when he absented himself on a permanent basis without any official leave. This would correspond to a desertion from the Armed Forces by an inductee for 21 months military service. The defendant had registered in 1955 and claimed exemption under Section 6(g)⁴⁶ as a minister of Jehovah's Witnesses as well as a conscientious objector.

The local board denied his claim that he was a minister. The registrant claimed in a written memorandum filed with the board that he devoted 15 hours monthly to preaching and teaching, and also gave an additional 15 hours monthly to distributing literature for a total of 30 hours monthly or about 7 hours weekly. However, the same registrant at a later date before the Government Appeal Agent claimed without corroborative proof that he was giving 27 hours weekly. The court held that the evidence established a *basis in fact* for the local board's finding that the defendant's religious activities did not entitle him to exemption

⁴⁴ 62 Stat. 604 (1948), as amended, 50 U.S.C. App. § 459 (Supp. V 1963).

⁴⁵ 226 F. Supp. 808 (S.D.N.Y. 1964).

⁴⁶ See 62 Stat. 604 (1948), as amended, 50 U.S.C. App. § 466(g) (Supp. V 1963).

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as a minister of religion (IV-D). The court declared that the scope of judicial review is "severely limited," and that the religious activities of the defendant did not comprise his *vocation*, but were only his part-time avocation.

V. EXAMINATION OF REGISTRANTS AGED 18 YEARS

On January 5, 1964, President Lyndon B. Johnson directed the Selective Service System and the Department of Defense to conduct early examinations of new registrants.⁴⁷

The President's directive was intended to extend a physical examination to new registrants aged 18 years who were finished in school and otherwise available for employment. These registrants were to receive the armed forces physical examination as a preliminary step in the national program designed for the conservation of manpower.

The President's statement included the following:

I regard with utmost concern . . .

First, that one-third of the Nation's youth would, on examination, be found unqualified on the basis of standards set up for military service and

Second, that poverty is the principal reason why these young men fail to meet these physical and mental standards.

I am directing the Secretary of Defense and the Director of the Selective Service System to proceed to conduct, as soon as possible, examination of all new registrants who are out of school and otherwise available for service. The Universal Military Training and Service Act of 1951 provides that each selective service registrant be classified and examined "as soon as practicable following his registration." For those who are no longer in school or college, this can best be done while they are still eighteen. This will enable those who are qualified for military service to plan intelligently their future careers in this respect. It will enable those found unqualified to get to work promptly on the education, training, or health services which can be of benefit to them. The examinations given to selective service registrants provide a unique opportunity to measure all young men by a single yardstick, so that both they and their communities can judge their performance, and improve it where necessary.⁴⁸

The first effects of the examination of 18-year-old registrants may now be noted. The registrants fell into all classifications except Class V-A which is overage. A report as of November 30, 1964, showed that there were a total of 1,276,278 registrants 18 years of age, but not yet 19 years. Of this great number, all but 200,000 have now been classified. Looking at the group

⁴⁷ Selective Service, vol. XIV, No. 2, February 1964, pp. 3-4.

⁴⁸ *Ibid.*

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classified, more than 385,000 are available for military service. These include 4,767 registrants who are married. More than 103,000 registrants 18 years of age are not qualified for military service under the present standards prevailing through November 1964. It is interesting that in Class I-Y (registrants who would serve only in war or emergency), there are more than 66,000. In Class IV-F there are nearly 37,000. Thus, as a result of early examination, over 100,000 18-year-olds have been shown to be comparatively unavailable for military service. Almost 67,000 18-year-olds are now in military training or had completed their service by the end of November 1964. Over 41,000 were enlisted or commissioned on active duty. Some 21,000 were in the active reserve and classified I-D.⁴⁹

The category of *students* attracts the majority of 18-year-olds. 405,873 of these registrants are classified as students in high school or college. Over 190,000 are deferred in Class I-S for high school attendance. 294,000 are in Class II-S which comprises students who are occupationally deferred.⁵⁰

There were 1,704 18-year-old registrants classed as conscientious objectors to all military service. In Class IV-D, there appear 4,899 ministers or divinity students.⁵¹

The rate of disqualification or rejection for military service runs at about 42 percent among the new aged 18-year-olds. This is a relatively high rejection rate.

The purpose of the examination was to permit new registrants found qualified to know this circumstance at an early date in order that they could adjust probable military service into their career plans. Conversely, men found to be disqualified could undertake remedial programs calculated to give mental, moral or physical assistance. Early examination of the 18-year-old is a phase of the President's Manpower Conservation Program.

The Department of Labor is cooperating with all state public employment offices to extend an interview leading to individual counseling for all young men rejected by the Armed Forces. The initial interview is to occur at the Armed Forces Examining Station. The purpose is to seek to assist the young rejectee to adjust himself in the national economy to a role suited for his deficiencies. He may also plan to overcome any mental or medical defects discovered.⁵²

⁴⁹ Selective Service, vol. XV, No. 2, February 1965, pp. 1-4.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Selective Service, vol. XV, No. 1, January 1965, p. 1.

VI. DEFERMENT OF MARRIED REGISTRANTS

On September 10, 1963, President John F. Kennedy deferred married registrants from induction into the Army through Selective Service.⁵³ To be deferred from induction a married man must maintain a bona fide family relationship.⁵⁴

By the end of 1963, the effect of reclassification of married men by the local boards was evident. The age of inducted registrants dropped sharply downward as older men in I-A Class became fewer. In December 1963, the majority of inducted registrants (91.9 percent) were over 22 years but under 24 years. In December 1962, before the deferment of married men, the majority (93.3 percent) of inducted registrants were over 23 years but under 26 years. The average age of induction dropped at least one year.⁵⁵

VII. REPLACEMENT OF SELECTIVE SERVICE?

On April 17, 1964, President Johnson established the President's Commission on Manpower authorized to assess "the Nation's Current and Prospective Manpower Requirements and Supplies." This Commission was appointed under the authority set forth in the Manpower Development and Training Act of 1962.⁵⁶

On April 18, 1964, at a specially called press conference, President Johnson ordered a sweeping study of military manpower policies to determine whether the Selective Service induction can be eliminated by the 1970's. The Secretary of Defense was directed to consider an alternative to the present draft including meeting our military manpower needs on an entirely voluntary basis. The President stated that he was "concerned" that the original principle of equal sharing of military service obligations "may have drifted" in practice. The Secretary of Defense study is to be completed within one year from April 1964.⁵⁷

⁵³ See Exec. Order No. 11119, 28 Fed. Reg. 9865 (1963). Previously by Exec. Order No. 11098, 28 Fed. Reg. 2615 (1963), fathers were placed in a deferred classification.

⁵⁴ Exec. Order No. 11119, 28 Fed. Reg. 9865 (1963).

⁵⁵ Selective Service, vol. XIV, No. 3, March 1964, p. 2.

⁵⁶ See 76 Stat. 23 (1962), as amended, 42 U.S.C. §§ 2571-2620 (Supp. V 1963).

⁵⁷ N.Y. Times, April 19, 1964, p. 1; Sacramento Bee, April 19, 1964, p. A-2. Apparently the oral directive to the Secretary of Defense was comparable to the VCOG familiar in military usage.

An interesting commentary in this matter of involuntary versus voluntary induction into the armed forces is the comment of the Honorable Norman S. Paul, Assistant Secretary of Defense for Manpower, who in December 1963, presented a prepared statement to the Senate Subcommittee on Employment and Manpower. The Subcommittee was concerned with the impact of national defense on manpower availability. The Assistant Secretary stated:

. . . Our experience has indicated that the draft will continue to be essential to maintain our military strength in the years immediately ahead. On the average, we expect an annual requirement for about 90,000 draftees during the next 4 years—higher in some years, such as 1964; lower, in others.

In addition, the existence of a draft liability has been a major factor influencing many young men to volunteer for enlistment or officer programs. In the absence of a military service obligation, our studies indicate that the enlistment and officer procurement programs of all services would be seriously impaired, with the most severe impacts undoubtedly occurring in recruitment of higher quality enlisted personnel and in procurement of officers, particularly those with specialized backgrounds in engineering, science, and the health professions.

In this context, I would like to refer briefly to the contention sometimes advanced that the draft could be eliminated, if military pay rates were raised sufficiently. There may be some theoretical rate of pay sufficient to attract the required manpower—in total numbers—into the Army and the other Services. We do not know—and have no accurate way of estimating now—just how high that rate would have to be.

I might add, finally, that our analysis of foreign military manpower systems has not revealed any effective alteration to some form of military service obligation, in any country whose military strength ratios in relation to population are at all comparable to our own.⁵⁸

VIII. CONCLUSION

The beginning of the year 1965 by way of litigation has helped to resolve the Supreme Being issue which has involved the First Amendment in any consideration of a conscientious objector exemption under the Act. The years 1963 and 1964 have demonstrated that Executive Orders by the President of the United States can be successfully utilized to achieve such results as the early examination of 18-year-olds, the deferment of married men, and the deferment of fathers. This would seem to demonstrate the elasticity inherent within the Selective Service System. It should be borne in mind that Selective Service comes into a major use in time of war or national emergency when there may not be sufficient time to enact legislation *ab initio* starting

⁵⁸ Selective Service, vol. XIV, No. 1, January 1964, pp. 2-3.

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from a complete absence of any form of registration, classification and involuntary induction. We should consider well before the present Selective Service System, which dates from 1948, is scrapped or abandoned in favor of what may be an optimistic trust in the volunteering process. The repeal of Selective Service in some measure would suggest unilateral disarmament in a world of tensions and stress.⁵⁹

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⁵⁹ There has not been discussed the Economic Opportunity Act of 1964, the so-called "War on Poverty" statute designed to combat poverty within the United States: P.L. 85-452, 78 Stat. 508, S. 2642, August 11, 1964. The impact upon the Selective Service System has not yet been fully determined. The statute in regard to a youth program provides for a "Job Corps" functioning through State-operated youth camps. The Director of Selective Service is a member of the National Economic Opportunity Act Council. Essentially, the statute provides for a Community Action Program designed to combat poverty. There is established a federal Office of Economic Opportunity.

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THE STAFF JUDGE ADVOCATE AND THE CID.* Only when all of the facts of a criminal case are before the staff judge advocate can he properly perform his statutory duties. Thus the relationship between the staff judge advocate, the provost marshal, and his investigatory arm, the criminal investigation detachment¹ is of great importance in determining the efficiency of the administration of military justice at any unit or post.

The detection and proper investigation of crime are foundation stones in any effective program for enforcement of law and order and certainly no less so in the military service than elsewhere. Furthermore, the proper investigation of crime is so closely related to our important function, the administration of justice, that the Staff Judge Advocate cannot avoid involvement in the process.²

The degree of coordination and cooperation between the staff judge advocate and the CID varies from place to place and depends largely upon the attitudes and personalities of the individuals concerned. By and large the relations between these key individuals are good.³ However, problems do arise; investigations sometimes are incomplete or improperly conducted.

These difficulties may be caused by personality differences or because, in some areas, the provost marshal and judge advocate work for different commanding generals and at different levels of command.⁴ Most often it appears that frictions occur because the parties take each other for granted and do not place enough emphasis on the importance of the relationship. Whatever the cause, anything less than one hundred per cent cooperation leads

* This comment 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 Twelfth Career Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

¹ Hereinafter referred to and cited as CID.

² Letter from Colonel William G. Easton, Command Staff Judge Advocate, United States Continental Army Command, to author, dated December 11, 1963.

³ In a survey of thirteen major command staff judge advocates conducted by the author, a majority of those replying specifically mentioned that such relationships were good. Yet one-half also made specific suggestions for the improvement of such relationships.

⁴ *E.g.*, Europe, where the CID may work for a provost marshal assigned to an Area Command while the staff judge advocate is assigned to a division level unit.

to errors which make the successful prosecution of cases difficult, if not impossible.

In spite of the fact that most investigative mistakes are caught prior to reaching the appellate courts, a survey of five recent years⁵ indicates the following mistakes are still being made by Army criminal investigation personnel:

- (1) Failure to advise the accused of the offense of which he was suspected in violation of the *Uniform Code of Military Justice*,⁶ Article 31.⁷
- (2) Persuading an accused not to seek counsel since he was not then under charges.⁸
- (3) Interrogating an accused suffering from a hangover and developing the confession through leading questions by the agent based upon interview with other witnesses.⁹
- (4) Interrogating an accused during the recess of a general court-martial when the agent knew the accused was represented by counsel, knew who that counsel was, and had been with that counsel for a short time prior to the interrogation.¹⁰
- (5) Persistently interrogating an accused, who had not been formally arrested, for a period of several days in spite of his unequivocal indication that he desired to avail himself of his right to remain silent.¹¹
- (6) Requiring an accused to identify clothing without a proper warning.¹²
- (7) Seizure of improper objects.¹³
- (8) Conducting an illegal search.¹⁴

The purpose of this article is to explore one oft-suggested solution, judge advocate control of the CID, as well as several specific solutions proposed by the author.

⁵ Commencing with Volume 26, *Court-Martial Reports*.

⁶ Hereinafter referred to as the Code and cited as UCMJ.

⁷ See CM 398262, Mahon, 26 C.M.R. 601 (1958).

⁸ See *ibid.*

⁹ See CM 400034, Whitlow, 26 C.M.R. 666 (1958). During examination the agent admitted the accused had stated that he did not remember. The statement, which was in the first person and in narrative style, was excluded by the Board of Review as not worthy of belief.

¹⁰ See CM 399759, Grant, 26 C.M.R. 692 (1958).

¹¹ See CM 400516, Gallegos, 27 C.M.R. 579 (1958).

¹² See *United States v. Williams*, 10 U.S.C.M.A. 578, 28 C.M.R. 144 (1959).

¹³ See CM 401337, Waller, 28 C.M.R. 484 (1959), *aff'd* 11 U.S.C.M.A. 295, 29 C.M.R. 111 (1960).

¹⁴ See *United States v. Smith*, 13 U.S.C.M.A. 553, 33 C.M.R. 85 (1963); CM 407443, Rogers, 32 C.M.R. 628 (1962).

I. CURRENT PRACTICES

Current Army doctrine gives the provost marshal staff responsibility for military police operations including the investigation of crime.¹⁵ Provost marshal staff doctrine specifically calls for the provost marshal to exercise ". . . staff supervision, direction, and control of criminal investigation activities within the command. . . ." ¹⁶ This is done by virtue of his position as the principal staff assistant of the commander in matters concerning the investigation and detection of crime.

Typically, "the provost marshal section of a command headquarters is normally subdivided into functional subdivisions . . ." ¹⁷ one of which is an investigations (criminal investigation) division, branch, or section.¹⁸ A detachment commander, who may also serve on the staff of the provost marshal, normally directs and supervises the administration and operations of the detachment.

The staff judge advocate is charged with the supervision of ". . . the administration of military justice within the command."¹⁹ Additionally, as stated in the *Staff Judge Advocate Handbook*, "military justice in a very real sense represents the correctional side of military discipline."²⁰ Thus, as heretofore mentioned, the assigned functions of the staff judge advocate and the provost marshal are so closely related that these officers must work together to assure proper discipline in the command.

However, the importance of this relationship is barely mentioned in provost marshal literature. United States Department of the Army, *Field Manual Number 19-20, Military Police Investigation* (1961) contains two short subparagraphs dealing with liaison with the staff judge advocate. Subparagraph 25a (3) provides—"in addition, it is essential that the investigator maintain such liaison with the appropriate staff judge advocate, or his

¹⁵ See U.S. DEPT OF ARMY, FIELD MANUAL NO. 101-5, STAFF OFFICERS FIELD MANUAL STAFF ORGANIZATION AND PROCEDURE para. 3.43e(7) (1960).

¹⁶ U.S. DEPT OF ARMY, FIELD MANUAL NO. 19-90, THE PROVOST MARSHAL para. 75b (1958). See also U.S. DEPT OF ARMY, FIELD MANUAL NO. 19-20, MILITARY POLICE INVESTIGATIONS para. 5b (1961); PROVOST MARSHAL GEN. SCHOOL, U.S. DEPT OF ARMY, STUDENT REFERENCE 19-17, MILITARY POLICE ORGANIZATIONS AND OPERATIONS—II para. 15f(1)(c) (1961).

¹⁷ U.S. DEPT OF ARMY, FIELD MANUAL NO. 19-90, *supra* note 16, para. 19.

¹⁸ *Id.* Chapter 2.

¹⁹ U.S. DEPT OF ARMY, FIELD MANUAL NO. 101-5, *supra* note 15, para. 3.47b.

²⁰ U.S. DEPT OF ARMY, PAMPHLET NO. 27-5, STAFF JUDGE ADVOCATE HANDBOOK para. 10a (1963).

representative, as will assure that the investigative action is in consonance with the court's legal and procedural requirements." Subparagraph 50b(1)(e) provides that one of the duties of the detachment commander is to maintain ". . . close liaison with the appropriate judge advocate."²¹ United States Department of the Army, *Field Manual 19-90, The Provost Marshal* (1953) provides "the provost marshal maintains close liaison with all other special staff sections in order to coordinate military police activities of mutual interest."²² The reader is then referred to a chart indicating matters of primary interest to provost marshals and special staff agencies.²³ These two publications appear to be the only provost marshal guidance generally available which contain any references to the staff judge advocate-provost marshal relationship.

A survey of provost marshal training materials covering military police and criminal investigation detachment organization and techniques²⁴ similarly reveals scant references to the vital interest of the staff judge advocate in this field and most often the materials repeat or paraphrase the matter quoted above from the two provost marshal Field Manuals. Many sections deal with procedures and techniques governed by military law which are currently in a state of flux²⁵ without a single reference to the interest of the staff judge advocate in such procedures and techniques, or the necessity of securing current information from the staff judge advocate.²⁶

²¹ Further, the topics of these subparagraphs are not even shown in the field manual's index.

²² Para. 10.

²³ U.S. DEP'T OF ARMY, FIELD MANUAL NO. 19-90, *supra* note 16, Appendix II.

²⁴ Materials surveyed included: Provost Marshal Gen. School, U.S. Dep't of Army, Student Text 19-160, Organization, Mission and Functions of Military Police Units and the Office of the Provost Marshal General (1962); Provost Marshal Gen. School, U.S. Dep't of Army, Student Reference, unnumbered, Command and Staff Procedures III (1961); Provost Marshal Gen. School, U.S. Dep't of Army, Student References unnumbered, 19-17 & 19-18, Military Police Organizations and Operations—I, II and III (1961); Provost Marshal Gen. School, U.S. Dep't of Army, Student Reference 19-20, Introduction to Criminal Investigation (1962); Provost Marshal Gen. School, U.S. Dep't of Army, Student Reference 19-21, Military Police Criminal Investigation Administration and Special Operational Procedures (1962); and Provost Marshal Gen. School, U.S. Dep't of Army, Student Reference 19-23, Criminal Investigation Methods and Techniques (1962).

²⁵ *E.g.*, the field of search and seizure.

²⁶ The interested reader may compare the references to the provost marshal and his functions in U.S. DEP'T OF ARMY, PAMPHLET NO. 27-5, *supra* note 20, where the relationship between the staff judge advocate and the provost marshal is spelled out in much greater detail.

Although it appears that sufficient stress, in published doctrine, is not placed upon mutual cooperation of the parties concerned, the parties do, as a practical matter, cooperate with each other to a surprising degree. This does not, however, imply that means cannot be devised to improve the relationship.

Cooperation may and does solve many of the problems which have and will arise; however, there is still a need for Army-wide procedures to remedy problems which arise in several of the areas because of a lack of authority to pursue a designated and desired course of action. It also appears that provision should be made to cover those situations where cooperation, because of personalities or conflicting requirements, cannot be obtained.

In the author's opinion, the following problem areas represent the principal detrimental shortcomings in the relationship between the staff judge advocate, the provost marshal, and the criminal investigation detachment:²⁷ (1) A lack of an authorized procedure to allow judge advocate participation in an investigation from the commencement of such investigation, (2) A need for an Army-wide requirement that Reports of Investigation prepared by criminal investigation detachments be forwarded to the appropriate staff judge advocate, (3) A need for the staff judge advocate to be able to receive timely information regarding cases upon which he must take action, and (4) A lack of authority for privileged defense use of the investigative and technical facilities of the criminal investigation detachment.

On this latter point, while some may feel that this is solely a problem of the defense, it is submitted that the staff judge advocate, in his role as the supervisor of the administration of military justice, is responsible for assuring that the accused receives a fair trial. His duty is to see that justice is done.²⁸ Thus, in the broad sense, the problem of the lack of privileged defense investigative facilities is his, as well as the defense counsel's problem.²⁹

²⁷ These problems, briefly mentioned here, will be discussed hereafter in detail, in connection with the author's proposed solution.

²⁸ See, e.g., *United States v. Albright*, 9 U.S.C.M.A. 628, 26 C.M.R. 408 (1958).

²⁹ This problem is illustrated by the comment of Colonel James Garnett, JAGC, who, while Chief of Defense Appellate Division, Office of the Judge Advocate General, remarked "unfortunately in the military, neither at the trial nor appellate levels are there any investigative personnel or facilities for the *privileged* use of defense counsel." American Bar Association, Section of Criminal Law, 1958 Proceedings at 72.

Whether these deficiencies require the seemingly drastic remedy of placing the CID under the staff judge advocates' control, or whether other less drastic measures can or should be devised, presents a real and practical problem in the administration of criminal justice.

II. JUDGE ADVOCATE CONTROL OF CRIMINAL INVESTIGATION DETACHMENTS

One proposal, often discussed in field commands, is that the staff judge advocate should exercise control over the local CID.³⁰ This solution has, to many persons, assumed the dimensions of a sovereign remedy to cure all ills. But, is it practical or necessary?

The proposal envisages that the entire CID, including its commander, would be placed under the control of the staff judge advocate or one of his assistants.³¹ Administration, training and the like would remain a unit responsibility. The Provost Marshal General would be ultimately responsible for providing trained, accredited investigators for the unit.

This proposal would result in more efficient investigations directed towards the ultimate requirements of trial by court-martial. It would lessen, if not completely stop, criticism that investigations are not complete, and would lessen the possibility of investigative errors that present barriers to the successful legal prosecution of a case. Similarly such an arrangement would do much to free counsel from certain non-legal work which might be more profitably performed by investigative personnel.

Delays, apparently due to different investigative priorities, have caused at least one command to assign investigative per-

³⁰ A variation of this proposal, that "investigations . . . of all crime should be conducted under legal supervision, and [that] at the top of the Army investigative body should be . . . military lawyers responsible for the propriety of such investigations . . ." was recently proposed by Major General Charles L. Decker, the immediate past Judge Advocate General of the Army, in his report to Congress, United States Court of Military Appeals and The Judge Advocates General of the Armed Forces, Annual Report for the period January 1, 1963, to December 31, 1963, at 74.

³¹ In this comment, this proposal will be discussed in terms of operational control. While other degrees of control are possible, operational control presents the greatest problem. If one should decide to adopt such a solution, but in a lesser degree, some other form, *e.g.*, staff supervisor, could easily be substituted for operational control.

sonnel to its legal office.³² This arrangement, in its particular context, has worked out well.

Looking to civilian criminal practice one finds a certain close analogy to the proposed practice both in the United States and abroad. In our federal government the principal federal investigative agency, the Federal Bureau of Investigation, works directly under the control of the Attorney-General of the United States.³³ In Germany, the prosecutor exercises complete control over the handling of an investigation. He is empowered to instruct investigative officials whenever he desires.³⁴

While the author knows of no state jurisdiction which places the entire investigative force under the control of prosecuting attorney (as apparently is the case with our Federal Bureau of Investigation and in Germany), much of the literature and the reasoning therein, discussing the placing of a number of investigators under such an officer, is appropos and will apply by analogy.

Many states, through their courts, have interpreted statutes concerning the prosecutor's duties as requiring *him to investigate* all criminal acts even prior to the ascertainment of a suspect.³⁵ Most scholarly comment seems to accept the fact that a prosecuting attorney will have investigators.³⁶ Budgets and statutory authority provide extensively for such investigators.³⁷ Professor Sutherland notes that "the prosecutor is tending to become a criminal investigator."³⁸ Typical of the reasoning justifying the use

³² The Director of the Legislative and Legal Department, United States Civil Administration of The Ryukyu Islands has two CID agents assigned to his office. However, it should be noted that this officer has no court-martial jurisdiction and is basically responsible for the prosecution of non-military American nationals in the Civil Administration Court in Okinawa.

³³ UNITED STATES GOVERNMENT, ORGANIZATION MANUAL, 1963-64, at 596.

³⁴ Section 152, GERICHTSVERFASSUNGSGESETZ (Court Organization Law) and §§ 161 and 163 STRAFPROZESSORDNUNG (Code of Criminal Procedure) (Ger.).

³⁵ See, e.g., *People v. Dorsey*, 176 Misc. 932, 29 N.Y.S.2d 637 (Queens County Court, 1941) where the court said "the district attorney is wholly responsible for the investigation and prosecution of all crimes and offenses . . . within the county." (Emphasis added.) However, there is a split of authority of his responsibility to investigate. The interested reader is referred to Note, *The Investigative Function of the Prosecuting Attorney*, 48 J. CRIM. L., C.&P.S. 526 (1958), which discusses the pros and cons of the assignment of investigators to a prosecuting attorney.

³⁶ See, e.g., CAVAN, CRIMINOLOGY 355 (2d Ed. 1955); SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 281 (4th Ed. 1947); B. SMITH, POLICE SYSTEMS IN THE UNITED STATES 93 (2d rev. ed. 1960).

³⁷ The author knows from personal experience that in Kings County (Brooklyn), New York, the District Attorney maintains investigators on a twenty-four-hour-a-day basis.

³⁸ SUTHERLAND, *op. cit. supra* note 36.

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of investigators is Professor Duane R. Nedrud's comments to the effect that "if the District Attorney has his own investigators, *he* has someone to check information . . . and make original investigations. . . ." ³⁹ [Emphasis added.]

It appears highly unlikely that the practice of having investigators under the control of the prosecutor could survive as long as it has (for at least two decades), without a terrible outcry, if such a procedure was not generally workable.

However, will such a system work in the Army? Can or should control of the CID be given to the staff judge advocate? Should some investigators be assigned to the Staff Judge Advocate? It is the author's strong opinion that such solutions should not be adopted.

Control of the detachment could be given to the staff judge advocate, to his Chief of Military Justice, or to the regular (putative) trial counsel. What effect would the activities necessary to such control have upon that officer's other functions? They would, I submit, serve to disqualify the office concerned.

A. STAFF JUDGE ADVOCATE

In determining the effect of such activities on the duties of the staff judge advocate I have selected the post-trial review⁴⁰ as an appropriate point of examining what activities will disqualify. This appears proper since Article 6(c) of the Code, the principal statutory authority involved, concerns itself with the disqualification of a staff judge advocate to a "reviewing authority."⁴¹ Additionally, it is possible that certain activities may occur either immediately prior to or during the trial which might affect the staff judge advocate's eligibility to perform his statutory functions.

The Court of Military Appeals and the service Boards of Review have allowed the staff judge advocate some leeway in his pretrial activities. It has been held proper and not disqualifying for him to—

³⁹ Nedrud, *A Proposed Department of Criminal Justice Act*, 52 J. CRIM. L., C.&P.S. 107 (1961).

⁴⁰ UCMJ art. 61.

⁴¹ But see MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, paras. 85b and 85a. An interesting discussion as to whether UCMJ art. 6(c), the paragraphs referenced *supra*, and the cases interpreting them may disqualify the staff judge advocate at an earlier stage may be found in West, *Permissible Bounds of Staff Judge Advocate Pretrial Activity*, 23 MIL. L. REV. 85 (1964).

- (1) Advise the investigating officers.⁴²
- (2) Advise the trial counsel.⁴³
- (3) Return charges for reconsideration of a more serious offense.⁴⁴
- (4) Telephonically contact prosecution witnesses regarding their availability and inquiring about part of their testimony.⁴⁵
- (5) Prepare and draft charges.⁴⁶

The rationale of the aforementioned cases is well stated in the leading case of *United States v. DeAngelis*⁴⁷ where a unanimous court said:

Since a staff judge advocate is the administrator of military justice and discipline, it would be incongruous in the extreme were we to assume that he is unable to function at all unless or until charges have been preferred and investigated. Because of his position and the knowledge of law he possesses, all members of the armed forces consult him when violations of . . . the Uniform Code of Military Justice occur It is obvious that the use of his services minimizes the risk of error arising from faulty pretrial investigations, and appreciably reduces the preference of ill-founded charges against those subject to military law.

However, this accommodation has been largely restricted. The Court of Military Appeals appears to be following the precept set forth in *Legal and Legislative Basis, Manual for Courts-Martial, 1951*⁴⁸ that ". . . although not mentioned in Article 6c, it follows that any person who has acted in a partisan capacity . . . should not subsequently act as staff judge advocate . . . in the same case." Thus the Court of Military Appeals and the service Boards of Review have held the following pretrial activities to disqualify the staff judge advocate from preparing the post-trial review:⁴⁹

⁴² See *United States v. De Angelis*, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

⁴³ See *United States v. Mallicote*, 13 U.S.C.M.A. 374, 32 C.M.R. 374 (1962); *United States v. Haimson*, 5 U.S.C.M.A. 208, 17 C.M.R. 208 (1954).

⁴⁴ See ACM 17070, Moore, 30 C.M.R. 901 (1960), *rev'd on other grounds* 12 U.S.C.M.A. 696, 31 C.M.R. 282 (1962).

⁴⁵ See *United States v. Dodge*, 13 U.S.C.M.A. 525, 33 C.M.R. 57 (1963).

⁴⁶ Cf. *United States v. Smith*, 13 U.S.C.M.A. 553, 33 C.M.R. 85 (1968). This case involved the eligibility of the staff judge advocate to write the pretrial advice required by UCMJ art. 34 (a) rather than the post-trial review.

⁴⁷ 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

⁴⁸ At 138.

⁴⁹ See generally U.S. DEP'T OF ARMY, PAMPHLET NO. 27-175-1, MILITARY JUSTICE—REVIEW OF COURTS-MARTIAL—Part I, sec. 17 (1962); West, *supra* note 41.

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- (1) Lack of impartiality.⁵⁰
- (2) Personal involvement in pretrial investigation.⁵¹
- (3) Working with the prosecution to compel a witness to testify.⁵²
- (4) Procuring a grant of immunity for a witness.⁵³
- (5) Bias as evidenced by legal advice given in connection with related pecuniary liability proceedings.⁵⁴

Since appellate bodies are reluctant to allow any more pre-trial activity on the part of the staff judge advocate than is absolutely necessary, it would appear prudent for the staff judge advocate to avoid even the appearance of evil. Control of the CID would clearly necessitate the performance of disqualifying acts.

Disqualification of the staff judge advocate for pretrial activities would habitually deprive the convening authority of the advice of his senior judge advocate, and the purpose of the Code in requiring such advice⁵⁵ would be thwarted in spirit if not in letter. The pretrial advice of the staff judge advocate is ". . . an important pretrial protection granted an accused. . ." ⁵⁶ The post-trial review has also been held to be of substantial importance; in *United States v. Kema*⁵⁷ the court said "it is to gain the benefit of his [the staff judge advocate's] legal knowledge together with his military experience that Article 61 provided for review by him of each case." Because of the staff judge advocate's "unique" knowledge and experience, no change should be made in current military justice procedures which require him to render such advices.⁵⁸

Additionally, other problems can be foreseen. The staff judge advocate may have to testify as a prosecution witness; such

⁵⁰ See, e.g., *United States v. Albright*, 9 U.S.C.M.A. 628, 26 C.M.R. 408 (1958); *United States v. Clisson*, 5 U.S.C.M.A. 277, 17 C.M.R. 277 (1954).

⁵¹ See e.g., *United States v. Turner*, 7 U.S.C.M.A. 38, 21 C.M.R. 164 (1956); *CM 373477, Leo*, 17 C.M.R. 387 (1954), *pet. for review denied*, 18 C.M.R. 333 (1955).

⁵² See *United States v. Kennedy*, 8 U.S.C.M.A. 251, 24 C.M.R. 61 (1957).

⁵³ See *United States v. Cash*, 12 U.S.C.M.A. 708, 31 C.M.R. 294 (1962); *United States v. Albright*, 9 U.S.C.M.A. 628, 26 C.M.R. 408 (1958).

⁵⁴ See *ACM 15904, McArdle*, 27 C.M.R. 1006 (1959).

⁵⁵ UCMJ art. 61.

⁵⁶ *United States v. Schuller*, 5 U.S.C.M.A. 101, 17 C.M.R. 101 (1954).

⁵⁷ 10 U.S.C.M.A. 272, 27 C.M.R. 346 (1959).

⁵⁸ Other schemes could be presented which would obviate this problem. However, discussion of these would involve a complete reevaluation of our present system, and would be manifestly beyond the scope of this comment.

action, *per se*, should disqualify him from writing the review.⁵⁹ Similarly, problems in the shadowy area of command influence will be raised in those cases where the staff judge advocate might have to write the efficiency report of both the commanding officer of the criminal investigation detachment and the defense counsel. As a practical matter many staff judge advocates would feel that they could not “. . . guarantee a fair and impartial trial if [their] . . . handiwork is placed in issue along with the fate of the accused.”⁶⁰

B. CHIEF OF MILITARY JUSTICE

Nor would the proposal be made more feasible by placing the control of investigations under the Chief of Military Justice. That officer would be disqualified to aid in preparing the post-trial advice,⁶¹ a function in which he is customarily involved,⁶² to the detriment of the efficient operation of the section.

However, there is still a stronger objection to this proposal. The Court of Military Appeals and the Army Boards of Review have shown a tendency to ascribe the actions of a Chief of Military Justice to his staff judge advocate. In *United States v. Kennedy*⁶³ the Court of Military Appeals said “. . . when a staff judge advocate or his immediate juniors become the architects of a conviction . . . it seems most improbable that on review that which has been devised will be questioned.” [Emphasis added.]

⁵⁹ See ACM 6711, Stowe, 12 C.M.R. 657 (1953) (dictum). The implication of disqualification is so obvious that no reported military case squarely presents the point. While the testimony of counsel is frowned upon, it is not considered prejudicial error *per se*, *United States v. Stone*, 13 U.S.C.M.A. 52, 32 C.M.R. 52 (1962); *United States v. McCants*, 10 U.S.C.M.A. 346, 27 C.M.R. 420 (1959).

⁶⁰ *E.g.*, letter from Colonel John W. Burtchael, Army Staff Judge Advocate, United States Army, Alaska, to author, undated. The Court of Military Appeals seems to have carved out an exception regarding advice given by the staff judge advocate to trial counsel. *E.g.*, *United States v. Mallicote*, 13 U.S.C.M.A. 374, 32 C.M.R. 374 (1962); *United States v. Haimson*, 5 U.S.C.M.A. 208, 17 C.M.R. 208 (1954). The court evidently feels that the restrictions placed upon the giving of such advice produce a situation where the staff judge advocate is not placed in the position of placing his own handiwork in issue. Additionally, the defense counsel may, at least in theory, also receive advice from the staff judge advocate. However, the court has not tended to broaden this exception; it has, in fact, indicated that an attorney should not place his handiwork in issue. In *United States v. McCants*, *supra* note 59, the court recognized the possibility of a prosecutor who testifies becoming prejudiced.

⁶¹ *United States v. Haimson*, *supra* note 60.

⁶² U.S. DEPT OF ARMY, PAMPHLET NO. 27-5, STAFF JUDGE ADVOCATE HANDBOOK para. 10d(1)(g), Appendix I, para. VI 3c(5) (1963).

⁶³ 8 U.S.C.M.A. 251, 24 C.M.R. 61 (1957) (dictum).

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The court went on to disqualify the staff judge advocate from writing the post-trial review. An Army Board of Review held the staff judge advocate disqualified to prepare the post-trial review where the Chief of the Military Justice Division of his section performed acts which were disqualifying.⁶⁴ The Board of Review said ". . . it seems clear when the Chief of Military Justice in an Army Judge Advocate Section becomes the accuser in a case, the staff judge advocate is substantially 'committed' . . ." If the chief of military justice is given control over the local criminal investigation detachment it is submitted that the aforementioned tendency would become more pronounced; such action would thus be an invitation to trouble. The problems which occur when the staff judge advocate becomes disqualified would be doubled, to the severe detriment of the operation of the judge advocate section. This double disqualification of the staff judge advocate and his chief of military justice would remove two senior officers from participation in the review of the case. This action is directly contrary to the reasons stated by the Court of Military Appeals in *United States v. Kema*⁶⁵ for having the staff judge advocate make a post-trial review of the court-martial proceedings. Additionally, normal manning levels do not provide sufficient personnel to allow the disqualification of both the staff judge advocate and his chief of military justice in every case, without requiring that other personnel, who have other important duties, be directed to perform the review functions of the aforementioned officers to the detriment of their own work, and the work of the section, in general.

C. TRIAL COUNSEL

It is also submitted that there may also be a serious legal objection to vesting control of investigative personnel in the regular trial counsel. The Court of Military Appeals and the service Boards of Review have bent over backwards to prevent calling the trial counsel an investigating officer and thus disqualifying him from participation in a trial. For example, the Court of Military Appeals in *United States v. Lee*⁶⁶ did not disqualify a trial counsel who was the accuser in the case and who also made a preliminary investigation prior to signing the charges. Appellate bodies have also refused to disqualify a trial

⁶⁴ CM 400540, Beach, 27 C.M.R. 601 (1958).

⁶⁵ 10 U.S.C.M.A. 272, 27 C.M.R. 346 (1959).

⁶⁶ 1 U.S.C.M.A. 212, 2 C.M.R. 118 (1952).

counsel because of prior connection with a case as the post judge advocate,⁶⁷ as the squadron legal officer who participated in initiating the investigation of the accused,⁶⁸ or as the Chief of Military Justice of the office responsible for the case.⁶⁹ Nor does investigation prior to actual appointment as trial counsel lead to disqualification.⁷⁰ The court almost seems to presume that a person who acts in a case and later is appointed as trial counsel, acted with knowledge of such future appointment and hence in the performance of his duties as counsel.⁷¹

Early in its history the Court of Military Appeals, in the *Lee* case, quoted with approval the definition of an investigating officer which appears in the *Manual for Courts-Martial*⁷² and provides:

[T]he term 'investigating officer' . . . shall be understood to include a person who, under the provisions of 84 and Article 32, has investigated that offense or a closely related offense alleged to have been committed by the accused. The term also includes any other person who, as counsel for, or a member of a court of inquiry, or as an investigating officer or otherwise, has conducted a personal investigation of a general matter involving the particular offense; however, it does not include a person who, in performance of his duties as counsel, has conducted an investigation of a particular offense . . . with a view towards prosecuting . . . it before a court-martial. [Emphasis added.]

The *Lee* case may and has been read as allowing pretrial activities prior to actual appointment.⁷³

Thus while it appears there is no legal objection presently to a *trial counsel's* pretrial investigatory activities, the decisions have been careful to limit such activities to persons who do so in the performance of their duties as counsel.⁷⁴ In *United States*

⁶⁷ CM 401400, Hardy, 28 C.M.R. 554 (1959), *rev'd on other grounds* 11 U.S.C.M.A. 521, 29 C.M.R. 337 (1960). Note, however, that the case was referred to trial at a higher level.

⁶⁸ *United States v. Whitacre*, 12 U.S.C.M.A. 345, 30 C.M.R. 345 (1961).

⁶⁹ *United States v. Erb*, 12 U.S.C.M.A. 524, 31 C.M.R. 110 (1961).

⁷⁰ *United States v. Schreiber*, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955); *United States v. Lee*, 1 U.S.C.M.A. 212, 2 C.M.R. 118 (1952); ACM 10226, Sax, 19 C.M.R. 826 (1955), *pet. for review denied*, 6 U.S.C.M.A. 822, 19 C.M.R. 413 (1955).

⁷¹ There is, of course, no problem if an officer engages in pretrial activities in a case and later takes no further part in that case.

⁷² *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 64a.*

⁷³ *E.g.*, *United States v. Schreiber*, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955); *accord*, *United States v. Stringer*, 4 U.S.C.M.A. 494, 16 C.M.R. 68 (1954); ACM 10226, Sax, 19 C.M.R. 826 (1955), *pet. for review denied*, 6 U.S.C.M.A. 822, 19 C.M.R. 413 (1955).

⁷⁴ *United States v. Stringer*, *supra* note 73; *accord*, *United States v. Schreiber*, *supra* note 73.

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v. Stringer,⁷⁵ the Court of Military Appeals pointed out this distinction in the following language:

[I]t is clear that some degree of differentiation was intended between those who make inquiries *qua* investigators and those who do so in the performance of their duties as counsel.

Yet the court has gone so far as to permit a trial counsel to act as legal advisor to an Article 32 Investigating Officer.⁷⁶ Rather than characterizing such activity as that done in the performance of duty as counsel, the court held that such activity was ". . . not within the prohibition of Article 27(a). . ." ⁷⁷ Clearly this case indicates one of the perimeters of permissible activity in this field of law. It is also possible that the reasoning in the *Kennedy*⁷⁸ and *Beach*⁷⁹ cases might be extended so as to disqualify the staff judge advocate because of the activities of his trial counsel. Additionally, since the trial counsel is normally a junior officer, he would not have the experience nor the maturity to solely and completely exercise effective control over criminal investigation activities. The young lawyer is busy enough learning the skills of his trade, without having to run an investigative branch as well.

D. GENERAL

Similar legal reasoning would apply to any other member of the judge advocate's staff; in addition, it is extremely doubtful if the duties of such other personnel would permit them to do the job.

The exercise of operational control, by the staff judge advocate or his chief of Military Justice, over a number of investigators (who might be assigned to his office) is subject to the same legal objections heretofore mentioned. While this objection might not apply to investigators working directly for counsel, the author believes other procedures, which are hereafter set forth, will cover situations where counsel has need of investigative services.

⁷⁵ 4 U.S.C.M.A. 602, 18 C.M.R. 226 (1955).

⁷⁶ *United States v. Young*, 13 U.S.C.M.A. 134, 32 C.M.R. 134 (1962).

⁷⁷ *United States v. Young*, *supra* note 76. In *United States v. Weaver*, 13 U.S.C.M.A. 147, 32 C.M.R. 147 (1962) the Court of Military Appeals permitted trial counsel to appear at a pretrial investigation to represent the government. However, the court, which in effect characterizes this activity as similar to those done in the performance of duty as counsel, distinguishes this situation from the one in *United States v. Young*, *supra*.

⁷⁸ *United States v. Kennedy*, 8 U.S.C.M.A. 251, 24 C.M.R. 61 (1957) (dictum).

⁷⁹ CM 400540, *Beach*, 27 C.M.R. 601 (1958).

Additionally, the author's survey⁸⁰ indicates that several judge advocates would seriously object to taking on additional, non-legal work. Also it may be contended that judge advocates may lack sufficient specialized training in the investigative and enforcement fields; there appears to be substantial merit in such a contention. While the fields of trial practice and investigation often overlap, there are many instances where each requires skills and knowledge not demanded by the other.⁸¹ While a judge advocate may be a skilled investigator, and undoubtedly many are, this is not necessarily so.

Other possible problems are conflicts in training and administrative procedures, and the inherent difficulties of a split in law enforcement agencies. This latter problem, in a civilian context, has been commented on by Smith in *Police Systems in the United States*⁸² wherein the author describes the assignment of police to the prosecutor and states that "by such means the police establishment . . . may be split into two parts, with responsibility for the direction so completely diffused that they become . . . not merely separate but rival organizations." Students of the administration of criminal justice have often opposed such a fragmentation because ". . . it produces friction between the police and prosecutor. . . ." ⁸³ Thus there appears to be at least some scholarly controversy concerning the use of such investigators in spite of the general nature and feasibility of the practice.

While the analogy between the staff judge advocate and prosecuting attorney is close, it is not close enough. The staff judge advocate is more than a prosecuting attorney. While the Court of Military Appeals has, on occasion, analogized the duties or position of a staff judge advocate to those of a district attorney,⁸⁴ it has, when squarely confronted with the issue, retreated from this position.⁸⁵ The staff judge advocate has been described by the Court of Military Appeals in *United States v. Albright*⁸⁶ as ". . . an officer of a court whose function must carry with it a

⁸⁰ See note 3, *supra*.

⁸¹ Additionally the CID performs other non-legal functions; e.g., physical security surveys.

⁸² (2d rev. ed. 1960) at 93.

⁸³ SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 281 (4th ed. 1947).

⁸⁴ E.g., *United States v. Hayes*, 7 U.S.C.M.A. 477, 22 C.M.R. 267 (1957) ("In a general way the position of the staff judge advocate can be likened to that of a district attorney."); accord, *United States v. Lee*, 1 U.S.C.M.A. 212, 2 C.M.R. 118 (1952).

⁸⁵ See, e.g., *United States v. Albright*, 9 U.S.C.M.A. 628, 26 C.M.R. 408 (1958).

⁸⁶ *Supra*, note 85.

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high degree of impartiality and fairness. . . ." The court went on to state that "an affiliation of advocacy of [such] an officer . . . does not go hand in hand with the concept of military due process." In other ways the staff judge advocate has less power than a prosecuting attorney since the staff judge advocate is not the ultimate authority in deciding whether or not a case will be tried.⁸⁷

Normally the defense counsel is a member of the staff judge advocate's office.⁸⁸ Thus the staff judge advocate is responsible for more than merely furnishing the officer who will prosecute the case; he also furnishes counsel for the defense. Possible unfavorable inferences might be drawn in the military because even though there is a close association between our civilian counterpart, the District Attorney, and his respective police departments, the District Attorney devotes his efforts towards prosecuting the accused—not towards defending him, as is the responsibility of the staff judge advocate.

One final reason against the adoption of the proposal to place the CID, and hence criminal investigation activities, under the control of the staff judge advocate is that as an officer of the court the staff judge advocate's duty is to see that justice is done;⁸⁹ ". . . [I]f the prosecutor or the staff judge advocate were to take a biased position . . . his action would be inconsistent with his role of an impartial judicial officer. . . ." ⁹⁰

Because of these strong practical, legal, and ethical arguments, it would be unwise to give the staff judge advocate control over the local CID. While this proposal may have initial appeal, mature and careful consideration of the consequences seems to inevitably lead to the conclusion that this proposal is not the panacea it seems, but, like medicine taken improperly, may do serious harm instead of curing.

III. JUDGE ADVOCATE PARTICIPATION IN INVESTIGATIONS

One practical proposal would be to establish a procedure which would allow a judge advocate officer, normally the putative trial counsel, to participate in the investigation of serious cases from

⁸⁷ E.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 35a.

⁸⁸ See U.S. DEP'T OF ARMY, PAMPHLET NO. 27-5, STAFF JUDGE ADVOCATE HANDBOOK para. 10b(3)(b)3 (1963).

⁸⁹ See *United States v. Albright*, 9 U.S.C.M.A. 628, 26 C.M.R. 408 (1958).

⁹⁰ Note, *The Investigative Function of the Prosecuting Attorney*, 48 J. CRIM. L., C.&P.S. 526 at 528 (1958).

the commencement of the investigation. This would be similar to ". . . the practice in the offices of most [large city] prosecutors to have an assistant take charge whenever a homicide or major . . . [case] occurred."⁹¹

This procedure would allow the lawyer member of the team to be in from the inception of the case which he will later be required to present. It would materially aid in such areas as the preservation of material evidence, the proper questioning of suspects, and the giving of timely legal guidance to the investigator.

The following procedure might easily be inserted in appropriate provost marshal or judge advocate Army Regulations:

In any case punishable under the Uniform Code of Military Justice by a sentence of death, the provost marshal shall immediately notify the staff judge advocate of such incident. The staff judge advocate may, upon receipt of such notification, assign an officer of his section to work with the investigator or investigators assigned to such case by the provost marshal.

In any other case, upon the concurrence of the parties concerned, a judge advocate officer may be assigned to work with criminal investigators in the investigation of such case.

The foregoing proposal would provide for cooperation, but not control, between the judge advocate and criminal investigator. The procedure is initially limited to death penalty cases, which as a practical matter, in peacetime, would be largely rape and murder cases.⁹² In such cases the use of the procedure is optional with the staff judge advocate concerned. The proposed solution also provides for the same procedure in non-capital cases if the staff judge advocate and provost marshal should desire it.⁹³ I have selected capital cases as the dividing line because of the microscopic examination conducted of death sentence cases by various appellate bodies.⁹⁴ The doctrine of *United States v. Lee*⁹⁵ would obviate any legal objections to such an arrangement.

This procedure would do much to counter those objections raised against the defects of current procedures, yet it would eliminate the undesirable element of judge advocate control.

⁹¹ See FRANK, DIARY OF A D.A. 98 (1960).

⁹² The following articles of the UCMJ carry potential death penalties: Articles 82, 85, 86, 87, 90, 94, 99, 100, 101, 102, 104, 106, 113, 118, and 120. However, most of these involve conduct which could only occur during a period of hostilities.

⁹³ E.g., procurement fraud cases.

⁹⁴ See, e.g., *United States v. Henderson*, 11 U.S.C.M.A. 556, 29 C.M.R. 372 at 388 (1960) (dissent) where Judge Ferguson said "in capital cases, however, we are usually more solicitous of the accused's right to a fair trial."

⁹⁵ 1 U.S.C.M.A. 212, 2 C.M.R. 118 (1952).

IV. THE JUDGE ADVOCATE'S RIGHT TO OBTAIN INFORMATION

The staff judge advocate has, at times, an absolute need to obtain information. The principal example of this is when he prepares his pretrial advice. The Code⁹⁶ and the cases interpreting it⁹⁷ place a ". . . duty on the staff judge advocate to make an independent and *informed* appraisal of the evidence as a predicate for his recommendation."⁹⁸ [Emphasis added.]

One method of giving the staff judge advocate the information he needs is to routinely furnish him with a copy of the report of investigation prepared by the CID in virtually all positive cases.⁹⁹ Current practice in this regard depends on local SOP's and is not uniform nor Army-wide. However, "the staff judge advocate or one of his subordinate judge advocate officers should review all criminal investigation reports. . . ." ¹⁰⁰

This small but important point could easily be remedied by an amendment to subparagraph 26c(11) of Army Regulations Number 195-20, which sets forth the distribution of such reports of investigation, by providing that one copy of each report will be forwarded to the appropriate staff judge advocate.

Normally, this Report of Investigation will furnish the staff judge advocate with all the information necessary¹⁰¹ to make the "informed appraisal" required of him. In other cases he will need more information.¹⁰² Usually this matter worked out mutually between the provost marshal and the staff judge advocate; however, problems do arise. Sometimes, in spite of provost marshal cooperation, or because of the lack of it, a satisfactory mutual solution cannot be worked out. The staff judge advocate must then be given a tool to obtain the information he needs;

⁹⁶ UCMJ art. 34.

⁹⁷ *E.g.*, United States v. Brown, 13 U.S.C.M.A. 11, 32 C.M.R. 11 (1962); United States v. Greenwalt, 6 U.S.C.M.A. 569, 20 C.M.R. 285 (1955).

⁹⁸ United States v. Greenwalt, *supra* note 55. Other articles of the Code, *i.e.*, Articles 10 and 33, make it necessary for this advice and the proceedings thus far held, to be conducted in an expeditious fashion.

⁹⁹ U.S. Dep't of Army, Form 19-65; Army Regs. No. 195-10 (4 Feb 1964).

¹⁰⁰ U.S. DEP'T OF ARMY, PAMPHLET No. 27-5, STAFF JUDGE ADVOCATE HANDBOOK para. 28c (1963); *accord, id.* para 10b(2) (b).

¹⁰¹ It is also normally used to determine what witnesses will be called and what evidence will be examined during the Article 32 investigation.

¹⁰² The problem as to whether the receipt of such information will require a new Article 32 investigation is beyond the scope of this comment.

the exigencies of the situation do not relieve him from his statutory duty.¹⁰³

At present the staff judge advocate can return the charges and the accompanying investigation to the summary court-martial convening authority who forwarded them, with directions to secure additional information. This is not the optimum solution, since most of the information would still have to be gathered by additional investigation by investigative personnel. Criminal investigations sometimes seem to have a regrettable tendency to lag and it is possible for a case to be tried and forwarded for appellate review prior to the completion of the investigation.

It is proposed that the following be incorporated into Army Regulations:

In any case which has been referred to a staff judge advocate for consideration and advice under Article 34, Uniform Code of Military Justice, the appropriate provost marshal shall, upon request by such staff judge advocate, immediately order the criminal investigation detachment responsible for the investigation of the case to continue the investigation by pursuing the lines of investigation requested by the staff judge advocate.

This proposed solution provides the staff judge advocate with the information he needs at the time he needs it. It is not subject to any legal objection, nor is it so broad as to cause any practical problems. It is designed to take care of very *limited, unusual* situations. However, should such a situation occur, the staff judge advocate must, and the convening authority should "... be apprised of factors that may have a substantial influence on [their] . . . decision."¹⁰⁴ Only if all the facts are known can the staff judge advocate fulfill his responsibility and the convening authority make a decision that is fair to the accused and designed to further the administration of military justice in his command.

V. PRIVILEGED DEFENSE USE OF THE INVESTIGATIVE AND TECHNICAL FACILITIES OF THE CRIMINAL INVESTIGATION DETACHMENT

I feel there is room for improvement in our military defense system . . . and I would like to see the defense counsel in the field and in my

¹⁰³ UCMJ art. 34. In *Talbott v. United States ex rel. Toth*, 215 F.2d 22 at 28 (D.C. Cir. 1954) (dictum) *rev'd on other grounds sub nom. United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) the court said "these provisions [Articles 32 and 34] of the Uniform Code seem to afford an accused as great protection by way of preliminary inquiry . . . as do requirements for grand jury inquiry and indictment."

¹⁰⁴ *United States v. Brown*, 18 U.S.C.M.A. 11, 32 C.M.R. 11 (1962).

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own Defense Appellate Division have available investigators who are bound by the attorney-client privilege.¹⁰⁵

As heretofore stated, the staff judge advocate, as the administrator of military justice in a command, is responsible for assuring justice to the defendant. By thus construing his office, the staff judge advocate has a real concern with the quality and problems of the defense of an accused. The lack of privileged defense use of investigative and technical services is one of the most serious problems facing the defense. For "whenever the lack of money [or any other reason] prevents a defendant from securing [a] . . . trained investigator or technical expert, an unjust conviction may follow."¹⁰⁶

The problem of investigators for the defense has been most recently discussed in connection with proposed public defender legislation which was studied in the Congress of the United States. In the Report of the Committee on Defense of Indigent Persons on H.R. 2696, 87th Congress, 1st Session,¹⁰⁷ Section 2a(3) the following language is contained:

The public defender may now appoint investigators as well as clerks. *This will serve to increase the effectiveness of the defender's task, as an investigatory staff is essential to the preparation of the defense, and many times is more important than trial skill. [Emphasis added.]*

Again, Colonel Garnett in a letter to Major General Charles L. Decker, then Chairman of the Criminal Law Section of the American Bar Association, quotes Mr. Edward Morgan as saying:

My experience for ten years as a defense attorney . . . convinces me that the proper analysis and development of the fact situation is the most pressing need of the lawyer. In every case, and most particularly in cases involving a defense of persons charged with crimes, without a proper investigatory staff trained in scientific detection, evidence becomes meaningless and proper examination . . . becomes impossible.¹⁰⁸

It appears these arguments carry much weight in the Congress since all of the recent legislation introduced on this subject has made provision for defense investigative services,¹⁰⁹ and the re-

¹⁰⁵ Speech by Colonel James Garnett, Aug. 25, 1958, American Bar Association, Section of Criminal Law, 1958 Proceedings at 72, 75.

¹⁰⁶ Letter from President John F. Kennedy to Vice-President Lyndon Johnson and Speaker John H. McCormack, dated March 8, 1963, transmitting his proposed Criminal Justice Act of 1963.

¹⁰⁷ Committee on Defense of Indigent Persons, Criminal Law Section, American Bar Association.

¹⁰⁸ Letter from Colonel James Garnett, Chairman, Committee on Defense of Indigent Persons to Major General Charles L. Decker, Chairman, Criminal Law Section, American Bar Association, dated July 7, 1961.

¹⁰⁹ E.g., S.1057, 88th Cong., 1st Sess. (1963); H.R. 7457, 88th Cong., 1st Sess. (1963); H.R. 2696, 87th Cong., 1st Sess. (1961).

cently passed Criminal Justice Act ¹¹⁰ provides for funds for such investigative services. Similarly, the *Model Defender Act* ¹¹¹ provides, in pertinent part that "the public defender may appoint . . . investigators. . . ." ¹¹² The comment following this section provides ". . . the effectiveness of the office will be greatly reduced unless there is provision for an investigator." ¹¹³

As the military criminal law system is a leader in the matter of according rights to the accused,¹¹⁴ it appears extremely necessary to provide the military defense counsel with proper investigative services. To be effective and of any use to the defense, such services will necessarily have to be privileged. If this is so, and certainly there is a strong case that it is, the problem becomes one of working out a method of providing such services within the military framework.

It is proposed that paragraph 116 of the *Manual for Courts-Martial* be amended by adding a new subparagraph as follows:

Where a case has been referred for trial by general court-martial, or for trial by special court-martial, and the services of an investigator or investigative services are necessary for the defense, application should be made to the convening authority for permission to use the investigative personnel or services of his command. Such request, which shall itself be privileged, shall be in writing and shall state the necessity therefor. If the convening authority to whom such a request is directed has no investigative personnel or no appropriate investigative services within his command, such application will be forwarded, with appropriate recommendations, to the next superior officer in the chain of command who has such personnel or services available. The term "investigator," as used in this paragraph, shall include technical investigative personnel such as lie-detector operators, handwriting experts, and similar personnel.

All matters developed or discovered by an investigator authorized under this paragraph shall be treated as privileged matter. No information developed by such an investigator shall be disclosed, nor shall any physical evidence discovered by such investigator be turned over to any person other than the counsel, or such person as may be designated in writing by him, who made the request for such services.

The foregoing provides a workable solution within the military framework. It follows the principle that the job of the criminal investigator is to get the facts, not to get an accused. However,

¹¹⁰ 18 U.S.C. § 3006A (1964 U.S. Code Cong. and Ad. News 2783).

¹¹¹ Drafted by the Nat'l Conference of Commissioners on Uniform State Laws.

¹¹² MODEL DEFENDER ACT § 3(b) (1959).

¹¹³ MODEL DEFENDER ACT § 3(b), comment (1959).

¹¹⁴ *E.g.*, the warning requirement of UCMJ art. 31; the extremely liberal discovery afforded the accused by the MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951.

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the procedure is not automatic and thus the convening authority or his representative will be able to screen out and deny unnecessary requests. In case of denial of such a request, the defense counsel will be able to litigate the reasonableness of such denial.¹¹⁵

The procedure is based upon the mechanics of paragraph 116 of the *Manual for Courts-Martial*; the experience factor gained in the use of paragraph 116 of the Manual indicates that such a procedure is workable on a day-to-day basis.¹¹⁶

The absolute privilege between the attorney and the investigator is necessary and in accordance with an enlightened view of the law.¹¹⁷ The investigator is an extension of the defense attorney and for that reason should communicate only with him.

By adopting this proposed solution, we can give the defense an essential tool to use when it is needed. Only by allowing full and free investigation to the limits of our resources can we hope to ascertain the truth.

VI. CONCLUSION

Procedures, in and of themselves, do not provide optimum solutions to problems. Basically ". . . a good relationship between the [military] police and the staff judge advocate already exists."¹¹⁸ The building and fostering of this relationship remains the key to the accomplishment of the mission of both. Judge advocates should continue to educate CI agents to the ad-

¹¹⁵ See, e.g., ACM 16772, Shelby, 29 C.M.R. 823 (1960).

¹¹⁶ A discussion of paragraph 116 of the MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951 and the surrounding cases may be found in Gilbreath, *Expert Witnesses at Government Expense for Accused Persons in Trials by Courts-Martial* (unpublished thesis in the library of The Judge Advocate General's School, Charlottesville, Virginia.) The reasons stated for this proposal might well justify the full time assignment of defense investigators similar to the current practice in public defender offices. However, that additional step has not been recommended since such a proposal would not be practically acceptable at this time. Adoption of the author's proposal might well furnish empirical data for this further concept.

¹¹⁷ See, e.g., *State v. Kociolak*, 23 N.J. 400, 129 A.2d 417 (1957) where the court stated communications between defendant's attorney and an expert retained by him are privileged; CAL. CODE OF CIVIL PROCEDURE § 1881 providing ". . . nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity," and CAL. PENAL CODE § 1102 making the rules of evidence in civil actions applicable generally to criminal actions; for an account of the relationship between the Public Defender and his investigators see BLISS, *DEFENSE INVESTIGATION* 53 (1956).

¹¹⁸ Letter from Colonel William G. Easton, Command Staff Judge Advocate, United States Continental Army Command, to author, dated Dec. 11, 1963.

vantage of consulting with the chief of military justice or the regular trial counsel from the beginning of his investigation; the staff judge advocate should keep the provost marshal advised of changes in the law and periodically offer to present legal instruction to the CI detachment in the area.

However, at times, detailed procedures are necessary. The staff judge advocate and provost marshal may not be in accord as to what must be done; again, the parties may wish to proceed along certain lines but feel they are not authorized to do so. In such cases official procedures are necessary to accomplish the desired task and to fulfill the assigned mission.

There is a great need for procedures authorizing privileged defense use of the investigative and technical facilities of the local criminal investigation detachment and for permitting judge advocate participation in legally difficult investigations. These two proposals balance each other and are measures which will increase the likelihood that the truth will be found. This tends to protect the innocent suspect and insure a legal conviction of the guilty accused.

The proposal designed to insure that the staff judge advocate receives the reports of investigation of the local criminal investigation detachment merely makes mandatory a procedure which is fairly common at present. However, this small but vital point is important enough so that the practice should be made Army-wide.

The proposal to permit the staff judge advocate to obtain needed information was designed to cover certain unusual situations. It is an extraordinary procedure and would be used sparingly. However, certain situations are conceivable where this procedure could be used and would be necessary for the accomplishment of the staff judge advocate's statutory responsibilities.

The adoption of these proposals will provide procedures which will help build the vital relationship between the staff judge advocate, the provost marshal and the criminal investigation detachment of a command. The judge advocate and provost marshal team has always contributed materially to the Army's law enforcement effort; these proposals will help it do so more effectively in the future.

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BOOK REVIEWS*

CRIMINAL PROCEDURE IN THE UNITED STATES DISTRICT AND MILITARY COURTS. By Marvin Comisky and Louis D. Apothaker, Philadelphia, Pennsylvania: Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 1963. Pp 453.

For more than a decade the relationship between the procedure in Federal District Courts and in Courts-Martial has been of steadily increasing interest to both the military and civilian practitioner. The Congress itself, when enacting the *Uniform Code of Military Justice*,¹ provided that the procedure in military tribunals might be prescribed by the President by regulations which should, so far as he deems practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts.² Pursuant to the authority delegated to him by the Congress and by virtue of his authority as President of the United States, the President has prescribed the procedure and rules of evidence for military tribunals in the form of an Executive Order.³ The Manual has been of inestimable value for the services, not only for the military lawyer, but also for "counsel" practicing before special courts-martial who need not be qualified lawyers.⁴ Even the United States Court of Military Appeals has referred to the Manual in somewhat glowing terms.⁵ However, it has been clear for at least several years that Manual provisions can not be followed uncritically in every case.⁶ As a matter of fact, it has been recognized that the Manual can be a dangerous instrumentality in the hands of people who are not thoroughly familiar with military law.⁷ In the first instance, it must be recognized

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

¹ 10 U.S.C. §§ 801-936 (1956) [hereinafter cited as UCMJ].

² UCMJ art. 36.

³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, issued by Executive Order 10214, 16 Fed. Reg. 1303 (1951) [hereinafter cited as MCM, 1951].

⁴ See *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

⁵ See *United States v. Drain*, 4 U.S.C.M.A. 646, 648, 16 C.M.R. 220, 222 (1954); *United States v. Hemp*, 1 U.S.C.M.A. 280, 285, 3 C.M.R. 14, 19 (1952).

⁶ See, e.g., *United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1952).

⁷ See *United States v. Rinehart*, 8 U.S.C.M.A. 402, 24 C.M.R. 213 (1957).

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by the user that only those portions which are procedural in nature have the force of law,⁸ and substantive portions, while perhaps of some persuasive value,⁹ need not be followed.¹⁰ However, the mere fact that a provision is procedural in nature does not necessarily require an adherence to it. Two tests must be satisfied before such a provision will be held to be of binding character. First, the provision must not be contrary to the Code;¹¹ and, second, it must be prescriptive.¹² Moreover, in the event there is doubt as to the prescriptive or discursive nature of a provision, it will be presumed that the President intended to follow the federal rules, since Article 36 of the Code requires him to do so wherever practicable.¹³ Consequently, there is a tendency to hold in such cases that a provision simply discusses a prevailing federal rule.

A treatise comparing the federal and military procedure has long been overdue. A careful work of that nature would be of great value to both the military and to the civilian practitioner who appears before military tribunals.¹⁴ Messrs. Comisky and Apothaker have made the first serious effort in that direction. Their book consists of 184 pages of text and 248 pages of appendices. Approximately 20 percent of the text and 38 percent of the appendices are devoted directly to Military Justice. The authors have attempted to make those portions of the book dealing with civilian practice more than merely a catalogue of relevant rules and statutory provisions, and at various places throughout those portions there appear several "how to do it" practical hints in interviewing the client and witnesses, pleadings, selecting the jury, arguments, requests for instructions, motions, and in the fields of sentencing, probation, and parole. Since the book is intended to be a basic practice manual in criminal procedure, only occasionally is an effort made to analyze or critically examine some of the serious basic problems in criminal justice. The portions of the book dealing with civilian procedure appear to be of some value to the lawyer with limited experience with federal criminal practice.

⁸ *United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1952).

⁹ See *United States v. Margelony*, 14 U.S.C.M.A. 55, 33 C.M.R. 267 (1963).

¹⁰ *United States v. Bernacki*, 13 U.S.C.M.A. 641, 33 C.M.R. 173 (1963); *United States v. Smith*, 13 U.S.C.M.A. 471, 33 C.M.R. 3 (1963).

¹¹ UCMJ art. 36.

¹² *United States v. Moore*, 14 U.S.C.M.A. 535, 34 C.M.R. 415 (1964).

¹³ *Ibid.*

¹⁴ *Cf. United States v. Kraskouskas*, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958).

The authors have catalogued the various stages of military justice procedures, but they have unfortunately relied too heavily upon provisions of the Manual. While reference is made to some of the decisions of the United States Court of Military Appeals which have invalidated Manual provisions, the discussion of military procedure is in general misleading, since the authors have omitted many other decisions of the Court which have interpreted Manual provisions and in some instances created entirely new concepts. A few examples of the deficiencies of the book in this area follow.

The authors compare the Article 32 Pretrial Investigation with the indictment by a civilian grand jury. While some comparisons are no doubt present, the Court of Military Appeals has stated that the Investigation is more analogous to the preliminary hearing.¹⁵ Moreover, it would appear that the Investigation has far more of the characteristics of a preliminary hearing than of an indictment. The authors cite the case of *United States v. Gunnels*¹⁶ and *United States v. Rose*¹⁷ as authority for the proposition that a military accused has a right to have counsel with him during the interrogation before charges are preferred. The Court has refused to go that far, and in one case,¹⁸ it specifically refused to so hold. The authors indicate at page 77 that the law officer has no authority to forbid the taking of a deposition. This position is based upon the Manual interpretation¹⁹ of Article 49a of the Code which provides that depositions may be taken unless forbidden by the convening authority for good cause. The Court of Military Appeals, however, apparently has not been impressed with that provision of the Manual and has approved the action of a law officer in forbidding depositions without bothering to discuss the paragraph in question.²⁰ The authors indicate at page 97 that an officer can be eliminated from the service by court-martial sentence only by a dishonorable discharge. Actually, officers can be eliminated punitively only by a dismissal.²¹ The authors state at page 110 that when there is no objection to the challenge of a member of a court-martial, the member is excused forthwith. That position is based upon provisions to that effect

¹⁵ See *United States v. Eggers*, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953).

¹⁶ 8 U.S.C.M.A. 130, 23 C.M.R. 354 (1957).

¹⁷ 8 U.S.C.M.A. 441, 24 C.M.R. 251 (1957).

¹⁸ *United States v. Melville*, 8 U.S.C.M.A. 597, 25 C.M.R. 101 (1958).

¹⁹ MCM, 1951, paras. 117c, g.

²⁰ See *United States v. Murph*, 13 U.S.C.M.A. 629, 33 C.M.R. 161 (1963).

²¹ See UCMJ, Art. 71b; *United States v. Briscoe*, 13 U.S.C.M.A. 510, 33 C.M.R. 42 (1963). Of course, the effects of a dismissal and of a dishonorable discharge are practically equivalent.

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found in the Manual at paragraph 62h(2). This treatment would perhaps be more helpful to the practitioner if it were qualified to reflect the decision of the Court of Military Appeals in the area.²² On page 162, the authors state that "the accused has ten days from the day the sentence is adjudged within which to submit his request that he be represented by appellate counsel" before a board of review. That statement is based upon Manual provisions to the same effect.²³ The value of the work would be improved by reflecting therein the decisions of the Court invalidating that provision of the Manual,²⁴ and extending the time to ten days from the date the accused is notified of the convening authority's action.

The authors cite 84 decisions of the Court of Military Appeals and boards of review. In only two instances do they specifically identify a decision as being that of the Court. In all other instances the form of citation does not distinguish between decisions of the Court and those of the boards of review. Only a lawyer thoroughly familiar with the thirty-five volumes of the *Court-Martial Reports* is able to identify a particular decision as that of the Court. The neophyte, to whom this portion of the book is directed, would not likely be in a position to do so. This defect is aggravated by the fact that the authors apparently assume that decisions of the boards of review and those of the Court are of substantially equal authority.²⁵ The value of the book would be enhanced considerably if the form of citation clearly identified a particular decision as being that of either the Court or of a board of review.

²² See *United States v. Jones*, 7 U.S.C.M.A. 283, 22 C.M.R. 73 (1956), holding that a failure of the law officer to permit the court members to vote on the challenge is contrary to Articles 41, 51, and 52 of the Code. In that case, however, it was further held that a failure to follow the prescribed Codal procedure, while error, was not prejudicial in the particular case.

²³ MCM, 1951, para. 48j(3).

²⁴ *United States v. Darring*, 9 U.S.C.M.A. 651, 26 C.M.R. 431 (1958).

²⁵ The decisions of the boards of review are of persuasive value only in sister services and are often not even followed in the same service. See, e.g., ACM 14745, Swanson, 25 C.M.R. 832 (1958). The Court never attributes to them more than persuasive authority and sometimes ignores them altogether. In this connection, the authors sometimes appear to place unwarranted reliance upon decisions of boards of review. For example, at 162, the authors refer to "Billingly and Stone, 20 C.M.R. 917 (1955)" as "changing the rule" set forth in MCM, 1951, para. 75b(3). Of course, since this is an Air Force Board of Review decision, it could have that effect, if at all, only in the service appointing the board.

The authors refer, apparently with approval, to "Court-Martial Instruction Draft and Guide," as being discussed in *United States v. Grier*,²⁶ as an aid to the law officer in preparing his instruction. In *Grier*, the Court actually referred to Department of the Army Pamphlet 27-9, *Military Justice Handbook, The Law Officer* (1954), which, however, has been superseded by the 1958 edition of that publication.²⁷

The appendices appear to be of some value to the busy civilian practitioner. In addition to the *Federal Rules of Criminal Procedure*, various sections of Title 18 of the *United States Code*, a time table for lawyers under the Rules, and various forms for practice in the civilian courts are reproduced. The authors also reproduce in the appendices the *Uniform Code of Military Justice* and the "Procedural Guide for Practice before General and Special Courts-Martial."²⁸ Unfortunately, however, the Guide is reproduced without change, comment, or criticism and, therefore, includes several procedures which are archaic, invalidated, or frowned upon by the Court of Military Appeals.

In view of the heavy reliance upon the *Manual for Courts-Martial*, with only limited consideration of the decisions of the United States Court of Military Appeals as well as an unfortunate substantial failure to distinguish between decisions of the Court and the boards of review, the book appears to have only limited value in the military justice field. The *Manual for Courts-Martial* is presently under revision by the services to reflect the many changes in individual rules and entire concepts brought about by the decisions of the United States Court of Military Appeals, and, when completed, it may be relied upon to some extent as the *vade mecum* of the military practitioner. Neither now nor then, however, may it safely be utilized without reference to the decisions of the Court.

In spite of the defects mentioned, however, it is believed that the authors have rendered a service to those interested in both military and federal practice. They have demonstrated the need for further comparative studies of these two vital and dynamic

²⁶ 6 U.S.C.M.A. 218, 19 C.M.R. 344 (1955).

²⁷ Even the latest edition has become substantially outmoded due to decisions of the Court of Military Appeals in many important areas. A later edition is already being prepared.

²⁸ MCM, 1951, Appendix 8a.

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systems of law. It is to be hoped that they soon will be forthcoming.

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WHEN YOU NEED A LAWYER. By Kenneth and Irene Donelson. New York: Doubleday & Co., 1964. Pp. 287.

One of the most difficult problems faced by the judge advocate in advising personnel of his command in the legal assistance program is that often the potential client does not realize that he has a legal problem until it is almost too late for the legal advisor to be of help. On the other hand, wholesale attempts to inform non-lawyer personnel of what the law is, in anticipation of their problems, is fraught with the danger that the individual so informed may attempt to act exclusively as his own lawyer, without recourse to the advice of qualified counsel. Nowhere more than in the law is that maxim true which teaches that a little knowledge is a dangerous thing. However, despite the obvious difficulties of writing "law for the layman," there is an almost universal acceptance at the bar of the need for programs in this area. *Time Magazine* has recently been carrying a feature which reports and analyzes the important legal issues of the day for the non-lawyer. Anthony Lewis, staff legal writer for the *New York Times*, has contributed much toward lay understanding of the legal issues in the news, and when the United States Supreme Court renders an important decision, many thousands of people turn first to his column to find out exactly what has happened. On a more personal level, the American Bar Association has begun the project of preparing and distributing to local newspapers a law-for-the-layman column, entitled "The Family Lawyer." The Army has undertaken a program of "preventive law" as part of the legal assistance service rendered to soldiers.¹ Part of this program involves dissemination in lay language of legal information of interest and importance to the ordinary serviceman.² The Staff Judge Advocate of one Division in Europe, as part of this program, distributes monthly a bulletin for the information of the personnel of that command.³ Thus, those who undertake to write a "layman's handbook of law" are in good company, notwithstanding the obvious pitfalls of such an endeavor.

When You Need A Lawyer, by Kenneth and Irene Donelson of the California Bar, is the best effort in writing a law for the layman manual to come across this reviewer's desk in a long time. The major problem with most writing in this field is that

¹ See Army Regulations No. 600-14 (10 Jan 1963).

² JAGAA BUL. No. 1965-3A, para. IVD (4 Mar 1965).

³ See also SNYDER, EVERY SERVICEMAN'S LAWYER (Stackpole, 1963), reviewed by this reviewer in *Army Magazine*, December 1964, at p. 78.

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after the correct and proper introduction is given indicating that the volume is not intended to be a substitute for a lawyer, the author thereafter proceeds to write a manual giving definite legal answers to legal questions which, despite the caveat, must be extremely tempting for the layman to use in place of a lawyer. Nevertheless, the layman quite often needs information about the law in order to determine whether he should see a lawyer. It is this approach and this theme that the Donelsons have most artfully developed. Each of the areas of law discussed is presented not in terms of substantive answers but in terms of the information needed by the layman in order to form a judgment as to whether he should seek counsel. Further, unlike other works in this field, this volume is not simply a second-rate legal horn-book. This is evidenced by its method of organization which does not follow a law school subject matter division in its chapters, but rather a division which is relevant to the layman's thinking and approach.

Not all topics in the law are covered but rather those with which the ordinary citizen will most often meet and on which he may be undecided about the need for counsel. Domestic relations covers a larger portion of this book than the ordinary legal curriculum. On the other hand, there is nothing on corporations (the authors apparently assuming that anyone who gets involved in corporate activity knows that the answer to the question "When do you need a lawyer?" is "always"). There is, however, a worthwhile section on "Going into Business" which includes some practical comments on partnerships. Other substantive areas covered include "Wills," "A Death in the Family," "Buying and Selling a Home," "Libel, Slander, and the Right of Privacy." There are also excellent sections on automobile accidents, buying on credit, and children. In addition, there are several sections on nonsubstantive areas of interest to the layman. There is a good chapter on courtroom procedure which should make the layman more at ease when appearing as a party or a witness. There is also an extremely useful section on "Choosing a Lawyer" and "Proper Legal Fees," probably the most important topic in any manual of law for the layman and quite often the least developed. The book is replete with cases reduced to non-technical terms which are used, not to point out abstract legal principles, but to point out the real necessity of counsel in situations where the layman might otherwise believe that he could "go it alone." The Donelsons certainly develop the theme current in the folkways of our legal tradition that "he who acts as his own lawyer has a fool for a client."

On the question of whether an individual should write his own will, the Donelsons make their point in another interesting way. They quote the following old toast of English lawyers:

Now this festive occasion our spirit unbends,
 Let us never forget the profession's best friends,
 So we'll send the wine around and a nice bumper fill
 To the jolly old fellow who writes his own will.⁴

In addition to illuminating the problem of when the layman needs a lawyer, the Donelsons also give the layman some ideas on problems that it is primarily his responsibility to solve. They point out, for example, the foolishness of writing a will (or more correctly having it written by an attorney) and thereafter hiding it so carefully that it can't be found after your death.⁵ There is some constructive personal advice, that the Donelsons have no doubt acquired from years of the human experience of the practice of the law, concerning such matters as marital difficulties, the adoption of children, etc., which, while they might not be classified as strictly legal, nevertheless are extremely useful and very appropriate in a volume of this type. The Donelsons convey to the potential client an honest appraisal of the lawyer's frame of mind. They speak about the good attorney and the good client; indeed the reader of this volume can be expected to avoid those inconsiderate and unthinking actions which strain the attorney-client relationship.

The Donelsons are extremely accurate in those areas where their purpose necessitates a discussion of the rules of substantive law, and their writing demonstrates a great breadth of knowledge and experience. The secret of writing this type of volume appears to this reviewer to consist of making *general* rather than *universal* statements about even the clearest propositions, and then substantiating them with specifics: "For example, the law in California is . . ." or "A New York statute provides that. . ." In this way, not only will error be avoided, but further, there will be communicated to the lay reader sufficient information to inform him generally without encouraging him to act in reliance on the information in all situations without professional advice. This style is particularly necessary in areas where the attorney is "certain" that the law is universal. The Donelsons have slipped into this error once or twice and have made universally applicable statements about the law in some situations where the law is to the contrary in one or more jurisdictions. Nevertheless, this

⁴ P. 179.

⁵ See pp. 179-80.

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rarely occurs and is not a serious problem. By and large, the Donelsons have perfected that skill of general legal writing (particularly in writing for the layman) which can be best described as the artful hedge. There is no information contained in this volume which, to the best of this reviewer's knowledge, would be seriously misleading to a potential client anywhere in the United States. Finally, it is important that the Donelsons do not pretend to have covered the entire field. Their recognition of the limitations of any endeavor of this type is best summed up by the concluding paragraph of their book:

It would be impossible to set forth every situation in which you should seek legal advice. New situations arise each day; and as we speed ahead in our space age, many new legal problems we never dreamed of before will be born. Just remember this: When in doubt, call your lawyer. Ignorance of the law is no excuse—especially when there's help as close as your telephone.⁶

Of course, the civilian client always has the problem of whether legal advice in a particular situation is worthwhile, and preliminary advice on this itself may cost him money. This is a problem which the serviceman does not face, and it is therefore always amazing to note how many servicemen do not obtain legal advice when they should have it. The only answer must be that they are unaware either of the availability of the legal assistance program or of the times when it should be used. Considering the tremendous effort made by the Army to make soldiers aware of the existence of the legal assistance program,⁷ the latter reason must be the dominant one. If this is so, then the Donelsons' volume is an excellent piece of writing to have easily available to every serviceman and is a worthwhile item for unit libraries and like facilities. Although this book speaks in general terms and does not particularly address itself to the military situation, nevertheless, one thing that is apparent in the work of any legal assistance office is that most of the soldier's legal problems are not substantially different from those of his civilian brother.⁸

This book, *When You Need A Lawyer*, by Kenneth and Irene Donelson, is probably one of the best efforts to date to commu-

⁶ P. 278.

⁷ See Army Regulations No. 600-14, para. 4a (10 Jan 1963). See also *Personal Finances: Aiding the Serviceman*, N. Y. Times, Jan. 6, 1964, p. 42, col. 2.

⁸ Compare SNYDER, *op. cit. supra* note 3.

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nicate to the lay public the function of the attorney in general practice, his availability, and the need for his services.

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