MILITARY LAW REVIEW BICENTENNIAL ISSUE

HEADQUARTERS, DEPARTMENT OF THE ARMY SEPTEMBER 1975

DEPARTMENT OF THE ARMY PAMPHLET 27-100-Bicentennial Issue

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MILITARY LAW REVIEW

The *Military Law Review, Bicentennial Issue* commemorates the 200th anniversary of the Judge Advocate General's Corps, U.S. Army, in July 1975. This special edition is designed to make reprints of 17 articles which have significantly influenced the development and administration of military law conveniently available to all practitioners. The articles selected for republication have been chosen from a wide range of legal periodicals and address the history, growth and breadth, as well as the future of military law.

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 and the prefatory comments are those of the author and the editors respectively and do not necessarily reflect the views of The Judge Advocate General or any governmental agency.

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DEDICATION

On 29 July 1975 the United States Army Judge Advocate General's Corps celebrated its 200th birthday. William Tudor's appointment on 29 July 1775 by the Second Continental Congress as the Judge Advocate of the Army makes the office of The Judge Advocate General one of the oldest in the nation. Since that time military law has held a prominent place in the history of our nation and has touched the lives of the millions of Americans who have served in the armed services.

The heritage of today's Army lawyer is a rich one. Our predecessors have served the Army and the nation with dedication, devotion, and determination. This bicentennial issue of the *Military Law Review* is intended as a tribute to the thousands of Army lawyers who have followed William Tudor, and to those who will serve in the future. May it serve to remind us of our heritage and as a challenge to continue to build on the reputation of the Corps.

WILTON B. PERSONS, JR.
Major General, USA
The Judge Advocate General

Pamphlet
No. 27–100–Bicentennial Issue

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DEPARTMENT OF THE ARMY
Washington, D.C., *September 1975*

MILITARY LAW REVIEW—BICENTENNIAL ISSUE

Total Legal Service

Looking Ahead

I. PREFACE

PREFACE

This *Bicentennial Issue* of the *Military Law Review* commemorates the 200th anniversary of the Judge Advocate General's Corps, U.S. Army, in July 1975. This special edition is designed to make reprints of 17 articles which have significantly influenced the development and administration of military law conveniently available to all practitioners. The articles selected for republication have been chosen from a wide range of legal periodicals and address the history, growth and breadth, as well as the future of military law.

This collection of essays undertakes to demonstrate the special conditions affecting the military legal profession and to meet its needs. The editors, in consultation with the practicing bar and legal scholars, have sought two broad types of articles. First, those which presented the rich history of military law or successfully anticipated its course were selected in order to establish the linkages in time and socio-political context demanded by good historiography and jurisprudence. Entries in the second group are those found to have had a significant impact on legislation, judicial decision or administrative action. This test was considered sufficiently broad to encompass those seminal pieces which influenced the course of military legal thought and those on subjects other than criminal law which demonstrate the scope of military law in both its aspects.

As always, the effort is to provide something useful to the attorney facing the hard problems of the active practice of law. But one of the compensations of that practice is the combination of the challenge of problem solving with the opportunity for scholarship. Many of the excellent examples of academic effort available in the literature are not contained in this volume merely because of resource limitations. However, this collection will help put many problems in perspective and does show the range of scholarship available.

II. THE BEGINNINGS

HALLECK
STUART-SMITH
ANSELL
LANGLEY

THE BEGINNINGS: HALLECK ON MILITARY TRIBUNALS

General Henry W. Halleck was the first American writer on military law who achieved international stature. A contemporary and sponsor of Francis Lieber whose efforts to codify the law of land warfare first appeared in 1863 as General Order No. 100, Halleck published his *Elements of Military Law and Science* in 1846 and *Mining Laws of Spain and Mexico* in 1859. His best known work, *International Law, or Rules Regulating the Intercourse of States in Peace and War*, was published in 1861. Following service in the Far and Mid-West he was General-in-Chief of the Union Armies from July 1862 until March 1864. This article and one other, "Military Espionage," were written in 1864, but published posthumously in 1911. In this selection from the early period of military jurisprudence General Halleck presents the flavor of formative thought, indicates the scope of problems facing military lawyers at the beginning of the Classical Period of American military law, and sounds the major themes which will concern that jurisprudence more than a century later.[1]

[1] There is a surprising amount of literature, American and English, from the period before the Civil War, most of which reflects the dual function of the Army line officer of the time. Officers such as Benét and DeHart were commissioned in the combat arms, but wrote on criminal law and procedure while serving as "Professor of Law" at the United States Military Academy. A classic from that era is Major General Alexander Macomb's *The Practice of Courts-Martial* (1841).

MILITARY TRIBUNALS AND THEIR JURISDICTION†

*Henry Wager Halleck**

The early Romans had their *præfecti prætorio*, or military judges, afterwards replaced by *magistri militum*, who exercised a jurisdiction somewhat corresponding to modern courts-martial and military commissions. It is true that there has been much dispute in regard to the exact limits of this jurisdiction, as conferred by the laws which have been handed down to us, yet its general outlines have been pretty well agreed upon.

In the first place, they had exclusive jurisdiction of all civil and criminal causes between soldiers, and over soldiers in all their acts as such. In the second place, they had jurisdiction of all cases where the plaintiff or *amisior*, although a civilian, brought suit or made an *amistasion* before them against a soldier, on the maxim of "*actor sequitur forum rei.*" Again the same maxim applied to the case where a soldier brought suit or made accusation against a citizen before a civil court; the *prevention* in that case prevented him from pleading his privilege as a soldier. Nor could he plead this privilege in causes instituted against him in civil or criminal courts of ordinary jurisdiction before his enrolment as a soldier. So far as the jurisdiction of the civil courts was concerned, the soldier in actual service was considered an absentee, or enjoyed a kind of extraterritoriality, which compelled the citizen plaintiff or prosecutor to follow him to his own tribunal, which had

†Reprinted from 5 AM. J. INT'L L. 958 (1911).

The foregoing was found among the papers of General Halleck at his death, which occurred at Louisville, Kentucky, on January 9, 1872. The article is in the general's handwriting and was prepared probably in the latter part of the year 1864, its preparation having been suggested by the number of wrongful acts committed in the Northern States, at a considerable distance from the theatre of war, by persons having no direct connection with the military service. Although these acts had not been given the character of criminal offenses by acts of Congressional legislation, they were none the less subversive of public order and in the highest injurious to public safety.

The paper has value as expressing the views of one of the ablest and most experienced lawyers in the service of the Government in respect to the embarrassing conditions which confronted the administration of President Lincoln during the latter part of the year 1864.

GEORGE B. DAVIS.

*(1815-1872). B.S., 1839, the United States Military Academy; A.M., 1843; LL.D., 1862, Union College. When this article was written the author was a General in the United States Army and Chief of Staff of the Army serving in the War Department.

assigned to it a particular place in the army, both on the march and in camp.

In regard to the jurisdiction exercised by the Roman military tribunals, in time of war, over persons and property, not in the military service, or belonging to soldiers, whether in conquered or occupied territory, or within the limits of the empire, during an invasion or civil war, there seems to have been no fixed rule or, rather, the rule was varied at different times and made to conform to the circumstances of the particular case, or of the then existing war. The general principle to be deduced from the law and history of those times, and the discussions of modern commentators, is that there should be no wrong without a remedy, and that no crime could be committed with impunity; and that, therefore, where the ordinary civil tribunals could not, or did not take cognizance of wrongs or offenses, the military would do so, both within and without the limits of the empire.

In regard to conflicts of jurisdiction, in time of war, between the civil and military tribunals, we have very little information; but, as the result of such conflicts and discussions, we have the established maxim or rule "*inter arma leges silent*," or, as pretty liberally translated, "in time of war the civil authorities yield to the military," in other words, this rule was simply a result, or one of the results, of the great maxim which, on several occasions, saved the republic and the empire, "*salus populi suprema lex*."

After the wars of the Middle Ages, and when the European nations had settled down upon a more established system of civil and military jurisprudence, we find almost the same line of distinction between the jurisdiction of civil and military tribunals as that which had been observed by the Romans. But, with the advance of civil liberty and the recognition of civil rights, the jurisdiction of civil tribunals was extended and that of military courts contracted and limited.

It is not our present object to trace these fluctuations and changes, nor even to describe the present jurisdiction of military and civil courts in the different states of Europe. We shall allude to them simply to explain, illustrate or exemplify the jurisdiction of our own courts, and the application of our own laws, in peace and war.

It now seems to be an established and well-recognized principle of international law that, in time of war, the inhabitants of territory in the military occupation of an opposing belligerent are subject to the military authority of the conqueror. The government of places or territory so occupied is essentially of a military character and derives its authority directly from the laws of war. It does not result from anything in the constitution or laws of the conqueror or of the conquered, but directly from the fact of the existence of war and of the hostile occupation. The government of military occupation may or may not, at its option, supersede the civil tribunals by those of a

military character. If the former be permitted to continue in the exercise of their functions, they are nevertheless subordinate to, and may be controlled by the military authority, for the government is essentially of a military character.

The same principles apply to cases of civil war and insurrection, so far as regards places captured by or from either of the belligerent parties, if the contest be of such magnitude and duration as to give it the character of a formal war.

In all such cases the jurisdiction of the military tribunals of the conquering or occupying power over all persons in the places or territory occupied is general, and limited only by the will of the conqueror. It is not necessary to declare martial law, for it exists as a matter of fact. But when it is said that by the law of military occupation the jurisdiction of military tribunals is limited only by the will of the conqueror, it is meant, not the will of the particular commander, but of the conquering state as expressed through its constitutional authorities. The will of the United States in such cases may be expressed by a law of Congress limiting the powers of the Executive and of his military officers and military courts. Moreover, the powers and jurisdiction of the conqueror must conform to the laws of war, and to the principles of right and justice, for there is no power which can confer authority to do wrong.

We will next consider the jurisdiction of military tribunals within their own state or territory. This must depend in a great measure upon the municipal law and therefore varies in different states. But underlying this municipal law there are certain great principles of natural right, deduced from the laws of war, and recognized in international jurisprudence, which must govern more or less in times of insurrection, rebellion or invasion in the particular theatre of military operations, where the jurisdiction of the civil courts is suspended, or where their powers are entirely inadequate for the particular contingencies. In some countries these emergencies are provided for by specific legislation, while in others they are left to be determined by the more indefinite principles of the laws of war.

In the jurisprudence of France these conditions of things are carefully defined and provided for: 1st, the state of peace, where all cases are adjudged by the civil or military authorities, according to the class to which they belong, and the law applicable to the particular case; 2nd, the state of war, which may result from invasion or insurrection, and may apply to fortifications or to entire districts of country. The national guards are then under the military authorities, and civil officers, although still exercising their usual functions, must act in subordination to the military; 3rd, the state of siege, which is equivalent to the declaration of martial law in England. This may be proclaimed in all cases of imminent danger to interior or exterior

security. During its continuance all the powers with which the civil authority was invested, in respect to police and the preservation of order, pass to the military authority, which can exercise them exclusively, or concurrently, as it may deem proper. To these are added certain exceptional powers such as searching private houses, sending away non-residents, seizing arms and ammunition, prohibiting publications calculated to incite disorder; and the military tribunals may exercise jurisdiction of all crimes and offenses against the security of the state, the constitution, or public order, committed by persons in or out of the military service.

A similar system is adopted in Spain and most of the continental countries of Europe, and also by the English in foreign countries. Bruce says it is also applicable to Scotland; but in England they are somewhat tenacious of their ancient constitution whereby "no man can be tried but before the judge ordinary, by a jury of his peers." It having been found, however, impossible to maintain proper discipline in the army in time of peace, or to prevent and punish the military offenses of others in time of war or insurrection, without a resort to military tribunals, they pass an annual act of Parliament in regard to courts-martial in the army, and in time of domestic danger martial law is declared and enforced. So long as this continues military tribunals exercise jurisdiction over all persons for military offenses within the places in which it is so declared, but not in places where the civil courts continue to exercise their usual functions. This is based on the theory that martial law is incompatible with the existence of civil law, and that it is impossible for the two classes of tribunals to exercise their functions in the same place. Sir James Mackintosh has forcibly expressed himself in regard to the limitation of military jurisdiction derived from martial law: "While the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society, but no longer; every moment beyond is a usurpation." In brief, while the English constitution naturally requires that "no man can be tried but before the judge ordinary, by a jury of his peers," Parliament makes an exception of persons in the military or naval service in time of peace and, in time of public danger, of all persons in places where martial law is declared.

Many of our civil and military laws have been copied from the English, and the decisions of our tribunals have been greatly influenced by those of British courts. It must be remembered, however, that our Constitution and system of government differ in many essential particulars from theirs. While a standing army is deemed contrary to the Common Law of England, our Constitution permits it, and we are not compelled to resort to the expedient of an annual bill for its

continuance in Parliament, or "Mutiny Act" for its government. Nothing is said in our Constitution in regard to the power to declare or enforce martial law, but the contingency of the exercise of such power is foreseen and provided for in section 9, Article 1, which says:

> The privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.

This suspension is unquestionably, so far as it applies, a substitution of military for civil authority. It was at one time contended that this suspension could only be made by the authority of Congress, but since the learned and able commentaries of Mr. Binney, few will deny that the power may also be exercised by the President. And we think it will be generally admitted that, within the district of country where, in case of rebellion or invasion, the public safety has required the suspension of the writ of habeas corpus and the enforcement of martial law, the military authorities and tribunals may exercise jurisdiction of crimes and offenses against the military force and the public safety.

Of course Congress may by law limit and define this jurisdiction, but it can not entirely dispense with it, in the absence of all other authority, without resolving society into its original elements, and why may not such jurisdiction be conferred upon military tribunals, in time of rebellion or invasion, over military offenses committed elsewhere than in districts under martial law. It has never been doubted that such jurisdiction may be exercised where military offenses are committed by persons in the military or naval service of the United States, both in peace and war; but some have contended that it can not be given, even in war, over persons not in such service, on account of the prohibition contained in Article V of the Amendments to the Constitution. The clause here referred to is:

> No person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger.

It will be noticed that the language of the Constitution is, not *persons in*, but *cases arising in* the land and naval forces, etc. The terms are not convertible, and their difference is very important. If the excepting or excluding clause relates to persons, may not any person who is not in the military service be held to answer before a civil court for a capital or otherwise infamous crime without a presentment or indictment by a grand jury? On the contrary, if it relates to cases only, and not to persons, why may not any person be held to answer, without a presentment or indictment, in "cases arising in the land or naval forces; or in the militia when in actual service in time of war or public

danger?" In other words, are not persons who are not in the military service triable by military tribunals for military offenses arising in the military service in time of insurrection or rebellion?

Although the restriction of this article to persons in the military service seems to have been intended in some of our statutes it is by no means so in all. For example, section 28 of the law of March 3, 1863, declares that:

> All persons who, in time of war, or rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, etc., shall be triable by a general court-martial or military commission.

This certainly does not mean only persons in the military service of the United States, for such persons are seldom, if ever, "found lurking or acting as spies" within our lines. It unquestionably includes all persons, whether citizens or foreigners, enemies or friends, in the service or out of the service. And we think it is within the powers conferred upon Congress, because it is a "case arising in the land or naval forces" or "in the militia, when in actual service, in time of war or public danger."

Soon after the commencement of this rebellion it was found that military crimes and offenses were committed by persons not in the military or naval service which could not be punished by the civil courts and which the public safety required to be adjudicated by military tribunals. A partial remedy was sought for in the legislative declaration that certain classes, as civil employees, contractors, etc., were to be regarded as in the military service and, therefore, triable by the military tribunals. But this was merely evading the main question for, if such persons are not in the military or naval service, a legislative declaration does not make them so. If the prohibitory provision of the Constitution includes all persons not in the military service, it is obvious that Congress can not declare that any particular class, as clerks and employees in the Quartermaster's Department, or as merchants who sell, or contract to furnish to the Government hay, oats, flour, bacon, etc., shall be treated as persons in such service; for if it can be made to include one class, it may be made to include all classes, and thus annul the provision.

Moreover, it was soon found that such statutory declaration as to classes of persons did not reach the most dangerous individuals or the most criminal military offenses. It did not include rebel spies and northern traitors, who, from loyal States, were sending aid and comfort to the enemy; nor rebel murderers, robbers and incendiaries who, in loyal territory, murdered our citizens, robbed our banks, and burned our steamers, storehouses, bridges, etc. Most of these criminals were neither in the military service of the United States nor of the

rebels, nor were their crimes always committed in districts of country where military operations were carried on. And as their offenses were not against any statutory provision, but against the common laws of war, the civil courts could impose no punishment; but, being military offenses, that is, cases arising in the military service in time of war and public danger, they have been tried and punished by military tribunals. Probably in some cases the military courts went beyond the law, that is, tried offenses not defined by statute, but recognized as crimes by the common law of war. It is very possible also that in some cases these courts have done great injustice, but where is the court that has not done the same? But this is not the question under discussion: it is whether military courts may not, under the authority of Congress, try cases of military crimes or offenses arising in the military or naval service in time of war or public danger, although the individuals tried do not belong to the army or navy? If the Constitution prohibits such trials, then it is most certainly defective in a most vital point, for it deprives the Government of a most important and necessary means of repelling an invasion or suppressing a rebellion.

Fourth, except in districts under martial law, a military commission can not lawfully try any person not in the United States military or naval service for any offense whatever. Military commissions, as they now exist, differ from courts-martial in that the latter are established by statute and have only such jurisdiction as the law confers, while the former are established by the President, by virtue of his war power as commander-in-chief, and have jurisdiction of cases arising under the laws of war; courts-martial exist in peace and war, but military commissions are war courts and can exist only in time of war. Congress has recognized the lawfulness of these tribunals, and, in a measure, regulated their proceedings, but it has not defined or limited their jurisdiction, which remains coextensive with the objects of their creation, that is, the trial of offenses under the common laws of war, not otherwise provided for. They have also under the statute joint jurisdiction with courts-martial in cases of spies, murder, manslaughter, mayhem, robbery, arson, burglary, rape, etc., committed by persons in the military service.

First, there is nothing in the Constitution or laws, or in the nature of these tribunals to limit them to districts under martial law, or where the privilege of the writ of habeas corpus has been suspended, such declaration can neither originate nor confer jurisdiction.

Second, it is alleged that offenses committed within the limits of the rebel States, where we have no courts, can not be tried by United States courts sitting without such limits. This, if true, will be most encouraging to the rebels and their friends; it will be shown hereafter that the provision of the Constitution here referred to does not apply to military tribunals.

Third, no persons except such as are in the military or naval service of the United States are subject to trial by courts-martial—spies only excepted. Reference is here made to Articles V and VI of the Amendments to the Constitution in regard to indictments and trials by jury "except in cases arising in the land and naval forces and in the militia when in actual service in time of war or public danger." If this provision related to *persons* instead of *cases*, then certainly spies, not belonging to the services specified, can not be tried by court-martial, and would be entitled to indictment and trial by jury. Moreover, it would be necessary to take the jury from "the State and district wherein the crime shall have been committed."

Fourth, but it has been held by the United States Supreme Court that these provisions relate only to judicial courts, and that military tribunals are simply a portion of the military power of the Executive, but constitute no part of the judiciary established by the Constitution. It follows, therefore, that persons of whatsoever rank, profession or occupation may, in time of war or public danger, for military offenses, be subjected by Congress to the jurisdiction of courts-martial.

Fifth, they (military commissions) can investigate and report, but their report can be only a recommendation, or a statement of facts—never a finding or sentence.

THE BEGINNINGS: STUART-SMITH ON BRITISH MILITARY LAW

It is to be regretted that the full history of American military law has not been written, but the literature is developing. The *Military Law Review* series on great court-martial cases,[1] and articles such as "The Ansell-Crowder Dispute"[2] and "The U.S. Court of Military Appeals"[3] have accumulated much original material in a readily available source. Other law reviews than those selected for this compendium have articles by prominent writers with an historical bent, including Bishop, Fairman, Fratcher, Henderson and Wiener.

The Judge Advocate General's School, U.S. Army, has produced a *History of the Judge Advocate General's Corps*, published in 1975 which outlines the dominant themes and shows the breadth of military legal practice. The year 1975 also brought the publication of "The Reception of English Military Law into the United States"[4] which undertakes to build the bridge from the parent system to current practice. In 1977 McMillan Company plans to publish Edward Sherman's history of military criminal law.[5]

Here James Stuart-Smith, a British barrister and judge advocate of over twenty years' standing, traces the growth and development of the English system as well as its practice. Originally written to provide a source of material for the *Law Quarterly Review's* editor, this article was itself published and has become a standard in the field.

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[1] Two examples are: Robie, *The Court-Martial of a Judge Advocate: Brigadier General David G. Swaim (1884)*, 56 MIL. L. REV. 221 (1972); Marszaleck, *The Knox Court-Martial: W. T. Sherman Puts the Press on Trial*, 59 MIL. L. REV. 197 (1973).

[2] Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967).

[3] Willis, *The U.S. Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 (1972).

[4] Costello, *The Reception of English Military Law into the United States*, LEGAL HISTORY (New Delhi) (1975).

[5] Presently untitled, but in production.

MILITARY LAW: ITS HISTORY, ADMINISTRATION AND PRACTICE†

James Stuart-Smith *

PART I

A. GENERAL

A man who joins the army or air force, whether as an officer or a soldier or airman, does not cease to be a citizen. With a few exceptions, his position under the ordinary law of the land remains unaltered. If he commits an offence against the civil law he can be tried and punished for it by the civil courts. By joining the armed forces, however, he submits himself to certain additional statutory obligations which comprise the disciplinary code necessary to maintain order in a professional body within which good order and obedience are essential to its proper functioning. One of the incidents of membership of the armed forces is the liability to service in places outside the jurisdiction of the British courts, so that these statutes include, in the interests of the subject no less than those of the Crown, provisions for the trial of an offender for the commission of an offence which is against the law of England wherever he may commit it and by tribunals constituted of officers of the force to which he belongs.

The statutes to which the serviceman is at present subject are the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957. Whilst all have been slightly modified by subsequent legislation, their substantial provisions have remained unaltered. Although these Acts deal with such matters as conditions of enlistment, terms of service, pay, billeting, inter-service relations and many other matters, much of each of them is devoted to the disciplinary code of the service to which it relates and the setting up and procedure of the tribunals to try offences against it.

Section 103 of the Army Act 1955 provides for the making by the

* Assistant Judge Advocate General of the Forces (United Kingdom). The author is a member of the English Bar, called by the Middle Temple in November, 1948, having served in the Army from 1939 to 1947. At the time this article was written the author was an Assistant Judge Advocate General.

Secretary of State of Rules of Procedure for the investigation and trial of offences, both summarily (by a comanding officer or appropriate superior authority) and by court-martial, and sections 82 and 83 provide for the making of Regulations governing the exercise by commanding officers and appropriate superior authorities of their powers of summary trial and punishment. Similar provisions appear in the Air Force Act 1955 which is substantially identical in language and arrangement with the Army Act (subject to such obvious variations as arise from the different rank titles employed in the R.A.F. and, *mutatis mutandis* between the two Acts, in references in each Act to the sister service).

The Naval Discipline Act 1957, however, follows another pattern and differs from the other two Acts both as to its disciplinary provisions and the powers and procedures for their implementation in a number of substantial respects. The administration of the disciplinary aspects of Naval Law is under the supervision of the Judge Advocate of the Fleet. The present article is confined to the history and administration of military and (more recently) air force law, which are under the supervision of the Judge Advocate General of the Forces. In view of the close similarity between the Army and the Air Force Acts, it is convenient to frame all explanations in terms of the Army Act; it may be noted that the section numbers of the 1955 Act as cited apply equally to the Air Force Act 1955.

B. HISTORICAL

Up to 1689, when the first Mutiny Act was passed, military law and the tribunals which administered it rested upon the prerogative of the Crown. Until the establishment of a standing army in 1660, armies were raised only as required to mount an expedition, wage a particular war or put down a rebellion. For each such army the King would either himself make or authorize the army's commander to make Ordinances or Articles of War for its governance. These normally remained in force only until the army was disbanded, although Matthew Sutcliffe writes, "Although the warres be ended, yet are those that offend against the lawes of armes and during that time are not punished, to be apprehended and punished according to the same either by the Judge Marshall and the Provost Martiall, whose commissiones are to be extended so farre, or by the Judges of the Realme; that notorious faults do not pass without punishment."[1]

The Mutiny Act of 1689 was the first of a series of Mutiny Acts, re-enacted with only a few short intervals from year to year until 1879. The 1689 Act, although confining itself to the offences of mutiny and desertion, marks the beginning of an era, as it makes these offences

[1] *Practice, Proceedings and Lawes of Armes* (1593) p. 340.

statutory and prescribes to some extent the requirements of the court-martial to try offenders. Before the passing of the Army Act 1881 (which continued to govern military discipline until the coming into force of the Army Act of 1955) the Crown continued to make Articles of War, but they were only valid in so far as they were consistent with the Mutiny Act in force at the time.

From earliest times, however, the law governing the soldier was clearly codified and not, as is sometimes supposed, arbitrary. Examples of ordinances issued in the times of Richard II, Henry V and Henry VII may be found in Grose's *Military Antiquities* with descriptions and illustrations of the savage punishments that breaches of them might incur. Nonetheless, savage though the penalties they prescribed may have been, Cockburn L.C.J. in *R.* v. *Nelson & Brand* (1867)[2] remarks of the ordinances of Richard II ("Statutes, Ordinances and Customs to be observed in the Army": MSS—British Museum): "These statutes are very remarkable. They form an elaborate code, minute in its details to a degree that might serve as a model to anyone drawing up a code of criminal law. They follow the soldier into every department of military life and service. They point out his duties to his officers, his duties to the service, his duties to his comrades, his duties with regard to the unarmed population with whom he may come in contact. They show what would be infractions of these duties and attach specific penalties to every violation of the law so set forth." Those published by Henry VII, ". . . like the others, are elaborate, minute and particular to the greatest possible degree, pointing out all the duties of the soldier and all the offences of which a soldier's life may be capable, even to the irregularities which may interfere with his duty, and specifying the punishments which were to follow on the infraction of the law."[3] Cockburn goes on to consider the successive instruments issued for the governance of the Army up to his own time. He observes of the Mutiny Acts and Articles of War, ". . . any one who has taken the trouble to look into the Articles of War by which the Army is governed . . ." (*i.e.*, in 1867) ". . . must, I think, do those who framed them the justice to say they are most elaborate and precise, and that it is impossible for anyone who takes any trouble to ascertain his duty and the penalties which attach to the breach of it, not to be perfectly aware of the law by which he is to be governed."[4]

Nor have the military tribunals responsible for the trial of offenders against these ordinances, articles or acts, been arbitrary in their constitution or their powers. The ancestor of the present-day court-

[2] Special report, published by William Ridgway (1867) p. 89.
[3] *Ibid.* p. 90.
[4] *Ibid.* p. 91.

martial is generally believed to be the Court of the High Constable and Earl Marshal, which was established in the reign of Edward I or, it has been suggested, even as early as William the Conqueror's reign. (Although G. D. Squibb, Q.C., in his book *The High Court of Chivalry* questions this descent and whether the Court of the Constable and Marshal was ever concerned with army discipline.)

The court, sometimes known as the Court of Honour or Court of Chivalry, exercised jurisdiction over military offences, against the ordinances issued by or under authority of the King when an army was embodied. It enjoyed also a permanent jurisdiction over offences of murder and high treason committed abroad and, in its capacity as a court of honour, over questions of chivalry such as coat armour and precedence. (The jurisdiction of the Court of Chivalry as to questions relating to the right to use armorial ensigns and bearings still subsists. Although occasions for the exercise of this jurisdiction have been rare for some hundreds of years, the court was called upon to sit as recently as 1954, for the first time since 1737.[8])

The judges of the court were the High Constable and Earl Marshal of England who attended the King in his wars: The High Constable as the commander-in-chief under the King and the Earl Marshal as his deputy and, in modern terms, Adjutant and Quartermaster General. The offices of Constable and Marshal were, however, military offices with all armies of the period and it may well be that when these high officers of state, the High Constable and Earl Marshal, did not accompany an army, this judicial function was exercised by the Constable and Marshal of the army concerned.

The court was responsible for the trial of military offences until 1521, when the then holder of the office of Lord High Constable was beheaded, having come into conflict with the King, and the office was not re-bestowed. The court, however, continued to exercise jurisdiction under the Earl Marshal alone for a further century, although its function passed gradually to courts or committees of officers. These continued to be known as Courts of the Marshal and, in course of time, Courts-Martial.

C. THE JUDGE ADVOCATE GENERAL

It appears probable that from early times the Court of the Constable and Marshal was assisted by a civilian lawyer whose function was to superintend the procedures of the trial and advise the court as to the provisions of the civil law. Francis Markham, writing in 1622, points out that, "It cannot be denied but that in as much as the Civil Law hath the greatest sway in all martial crimes and controversies, therefore it is

[8] *Manchester Corporation v. Manchester Palace of Varieties Ltd.* [1955] P. 133.

necessary that the judge of these errors should be learned in that profession." The "judge" of whom this Epistle treats is " . . . The Judge Marshall, or as some call him (by the old Roman name) the Praetor or Judge in all Martiall causes. This is a renowned and reverend officer, (as some suppose) attendant, but as I confidently imagine rather an assistant to the Lord-Marshall."[6] If Markham's *Five Decades* are to be taken literally, the attendance of a Judge Martial at the Marshal's Court was clearly an accepted thing fifty years before 1622 and the tenor of Markham's Epistle does not suggest that this concept is to him of even comparatively modern origin. Although the officer was commonly described as that of Judge Marshall (or Marshal) or Auditor General, the present title of Judge Advocate appears to have been in use in England at least as early as the 17th century. It is evident from the importance attached to it by contemporary writers (*e.g.*, Markham and Sir James Turner in his *Pallas Armata*, 1670–71) that the office was regarded as of weight and substance; Markham describes it as being almost the same in effect and quality as the office of Recorder in a civil city or town.

The Articles of War put out by Charles I in 1629 empowered the Marshal's Court "to hear judge and determine any fact done by soldiers" (reserving the confirmation of death sentences to the General). Those published in 1639 specifically mentioned the "Advocate of the Army" and gave authority to the "Council of war and Advocate of the Army to enquire of the actions and circumstances of offences committed . . ." Orders issued by Charles II in 1662–63 gave authority to the General to constitute courts-martial and to the "Judge Advocate of the Forces" to take information and depositions on oath in all matters triable before court-martial. The terms of this requirement suggest that the Judge Advocate may have been charged with the responsibility, nowadays placed upon the accused's commanding officer, of conducting a preliminary investigation into the alleged offence and with the preparation of a summary or abstract of evidence.

In 1666 Samuel Barrow was appointed to be the first holder of the office of Judge Advocate General. It has been held in unbroken succession ever since and it becomes necessary from this date to distinguish between the term "judge advocate," used to refer to the functionary officiating in that capacity at a court-martial (and representing the Judge Advocate General at the trial) and the Office of Judge Advocate General [of the Forces]. Although the duties of the Judge Advocate General may have and probably did originally include personal attendance at courts-martial, it is certain that none has personally acted as judge advocate for more than a century and

[6] *Five Decades of Epistles of Warre* (1622), p. 109.

probable that the practice of appointing a deputy to perform this function is of much earlier date.

A detailed description by Francis Markham of the function of the Judge Marshal at an early seventeenth-century trial suggests that his role was of a judicial nature, hearing the evidence, making notes of it, summing up to the court the evidence and the law applicable, and, finally, announcing the sentence of the court.[7] It seems from another contemporary writer that the part of accuser may have been played by the Provost Marshal. The Articles of War of 1673, however, provided that "in all criminal cases which concern the Crown, our Advocate General or Judge Advocate of our Army shall inform the Court and prosecute." Thereafter and during the eighteenth century (and part of the nineteenth) the judge advocate was required to combine the functions of prosecutor and legal adviser to the court. In the latter capacity he was required to retire with them when they considered their finding and sum up in closed court. He was, in addition to these already mutually uneasy functions, also expected to advise the accused on matters of law should he require it. As Adye observed in his book on Courts-Martial published in 1769,[8] "That he shall first prosecute the prisoner and then, Proteus-like, change sides and furnish him with means and arguments to overthrow those he has before made use of. . . seems inconsistent with justice and common sense."

By the early years of the nineteenth century the invidious and inconsistent nature of the duties of the judge advocate had begun to be recognised and in some cases another officer was being appointed to prosecute. In 1829 the requirement that the judge advocate should prosecute was omitted from the Articles of War. It was not until 1860 that the Articles of War were amended expressly to provide that the judge advocate should not prosecute but should be completely impartial. He continued however to retire with the court until September 1947 when, as a result of recommendations made by a Committee which sat in 1946 under Lewis J., the Rules of Procedure made under the Army Act 1881 were altered to exclude the judge advocate from the court's deliberations on findings. The recommendations of the Lewis Committee, though, affected not merely the detailed function of the judge advocate but, more fundamentally, responsibilities of the Office of the Judge Advocate General.

From the first, the Judge Advocate General has been the legal officer entrusted by the Crown with the administration of military law. From 1694 onwards he was also required to attend the Board of General Officers which met regularly for the redress of grievances in the Army and, from the beginning of the eighteenth century, to act as

[7] *Ibid.* p. 111.
[8] P. 112.

its secretary and legal adviser. In this capacity he was involved in many questions outside those touching upon his legal office. When, in 1793, the office of Commander-in-Chief was created, the functions of the Board of General Officers came to an end, and with them the extra-legal responsibilities of the Judge Advocate General as its secretary. The Judge Advocate General, however, continued to act as legal adviser to the Commander-in-Chief and later, in succession, to the Army and Air Councils and the Defence Council. From at least the time of the Revolution of 1688 until 1706, the Judge Advocate General personally laid the proceedings of General Courts-Martial before the Sovereign for confirmation, but from 1706 and for a century afterwards, he was required to do so through the Secretary of State for War.

In 1806 the Judge Advocate General became a member of the Privy Council, again having personal access to the Throne and communicating the result of the Sovereign's pleasure to the Commander-in-Chief. The office was political, changing with the administration, and the Judge Advocate General shared with the Secretary of the State for War the responsibility of answering for the Army in Parliament. In the nineteenth century he bore Ministerial responsibility for the confirmation of proceedings of General Courts-Martial. In the latter part of the nineteenth century doubts were felt as to whether it was appropriate that the holder of a judicial office should be constantly altering with each change in the administration, and in 1893 the office was removed from the political sphere. It was bestowed upon Sir Francis Jeune (afterwards Lord St. Helier), then President of the Probate, Divorce and Admiralty Division of the High Court of Justice, who held it until 1905. It was then decided that it should be filled as a paid appointment by a person of suitable legal attainments, subject to the orders of the Secretary of State for War. The appointment to the Office continued however, to be by Letters Patent from the Crown.

From its inception, the responsibilities of the Office of Judge Advocate General included the provision of a judge advocate at a court-martial either by personal attendance or the appointment of a deputy. Clode, writing in 1869, remarks that, "It may be many years since a Judge Advocate General personally presided at a court-martial," and, as observed above, it is probable that none has done so since at least the beginning of the nineteenth century. The Judge Advocate General, however, as in the present day, reviewed the proceedings of trials to ensure their legal validity. The Mutiny Act of 1750 required him to act as custodian of the proceedings and he has, since 1748, been required to supply copies of proceedings to entitled persons. His broad function was always that of general legal adviser in matters of

military law to the supreme military authorities and also to subordinate general officers, as required. This responsibility included advising before trial on the charges to be preferred. In the nineteenth century the pragmatic view was held that the best way to avoid any miscarriage on legal or technical grounds was to make the person from whom post-trial criticism was most likely to come himself responsible for ensuring before trial that such errors would not occur.

Although the Articles of War of 1860 provided that the judge advocate at the trial should no longer play any part in the prosecution, the Judge Advocate General was not relieved of his responsibility for the preparation of the prosecution until 1948. In more modern times however, he had ceased to play any personal part in the preparation of prosecutions. During the 1914–18 War, and after, the duty of advising upon charges and evidence before the trial and of prosecuting in the more serious cases was undertaken by legally qualified military staff officers. In 1923 the Military Department of the Judge Advocate General's Office was formed to undertake, under a Military Deputy to the Judge Advocate General, these prosecuting functions. A similar Air Force department was established with like functions. These prosecuting departments were entirely separate from the judicial staff of the Judge Advocate General's Office and their functions did not embrace the provision of judge advocates, the giving of post-trial advice or the review of proceedings; these functions were undertaken by the civilian branch of the office which, in peacetime and up to the outbreak of war in 1939, was very small. The Judge Advocate General, although nominally responsible for supervising the work of all three departments, in practice exercised his constitutional duty of controlling military and air force law through his function of review, in which he was assisted by the judicial department, leaving the preparation of charges and the conduct of prosecutions to his Military and Air Force Deputies and their departments.

However, in 1938 a Committee was appointed under the chairmanship of Mr. Roland Oliver M.C., K.C. (later Oliver J.) to examine the existing system of trial by court-martial (and in particular to consider whether a right of appeal to a civil court should be established). The Oliver Committee (who saw no need for such a channel of appeal, and thought the existing system of review adequate) reported,[9] *inter alia*, that there appeared to be a general false impression that the process of legal review was performed by the same authority that had prepared the prosecution. They accordingly recommended that the functions of the prosecuting departments of the Judge Advocate General's Office be transferred to a new legal directorate which would be responsible not to the Judge Advocate General but jointly to the

[9] Cmd. 6200 H.M.S.O. 4s.

Adjutant General at the War Office and the Air Member for Personnel at the Air Ministry. To make the indepence of the Judge Advocate General as a judicial authority yet plainer, they recommended that he should no longer be responsible to the Service Ministers but he made responsible to some other Minister. Although these proposals were endorsed by an inter-departmental committee in 1939, their implementation was overtaken by the outbreak of war on September 3 of that year.

In 1946, a Committee under the chairmanship of Lewis J. was set up to review the recommendations of the 1938 Oliver Committee and to reconsider the proposal that a right of appeal to a civil court should be afforded. The report and recommendations of the Lewis Committee were submitted in 1948.[10] They were far-reaching and, in some respects, revolutionary. They endorsed strongly the Oliver Committee's recommendation that the nominal responsibility for prosecution be removed from the Judge Advocate General and transferred to Legal Directorates of the Army and Royal Air Force. During the course of its sitting, the Lewis Committee made certain interim recommendations which were put into immediate effect. One has already been mentioned; that the judge advocate should no longer retire with the court when they deliberated upon findings but should, like a judge with a jury, having summed up, leave them to consider their findings alone. Another served to abolish the procedure whereby findings of guilty and sentences were not announced forthwith in open court but promulgated to the accused only after confirmation. Among the more radical changes proposed by the Committee were recommendations as to the status and title of the judge advocate who, it was suggested, should be re-styled Judge Martial and assume the role of a presiding judge at the court-martial, with the court as a jury, and having as to sentences both a vote and a further casting vote in the event of equality of votes.

The Lewis Committee favoured the introduction of a system of oral appeal, but recommended that the appeal court should be constituted of the Chief Judge Marshal (formerly Judge Advocate General) and his judicial officers.

The Committee's recommendations were endorsed by an inter-departmental committee which sat under the chairmanship of Sir Albert Napier (Permanent Secretary to the Lord Chancellor and Clerk of the Crown) but subsequently, after considerable further discussion, those relating to changes in the title, status and functions of the Judge Advocate General and the judge advocates were not adopted; nor was their proposal that the appellate court should be constituted from within the Judge Advocate General's Office. Many

[10] Cmd. 7608 H.M.S.O. 1s. 3d.

of the other recommendations of the Committee were, however, implemented and, on October 1, 1948 the Judge Advocate General ceased to be responsible to the Service Ministers, and became responsible to the Lord Chancellor. On the same date the military and air force departments of the Judge Advocate General's Office ceased to exist as such, their functions being transferred to the Directorates of Army Legal Services and Legal Services Air Ministry in the departments of the Adjutant General and Air Member for Personnel respectively.

In 1951, the Courts-Martial (Appeals) Act[11] created the Courts-Martial Appeal Court which is constituted of the Lord Chief Justice and Puisne Judges of the High Court (or, if specially nominated, the Scottish or Northern Irish judges or persons of legal experience appointed by the Lord Chancellor). Part II of the Courts-Martial (Appeals) Act deals with the appointments and terms of service of the Judge Advocate General, Vice Judge Advocate General, Assistant Judge Advocates General and Deputy Judge Advocates.

The Army and Air Force Acts of 1955[12] and the Rules of Procedure[13] made thereunder empowered for the first time judge advocates to sit alone, in the absence of the court-martial, to determine questions relating to admissibility of evidence and applications for separate trial of a charge or of an accused from others charged in the charge-sheet.

In March 1956, judicial robes of a pattern approved by the Lord Chancellor were adopted for Assistant Judge Advocates General and Deputy Judge Advocates when sitting as judge advocates at courts-martial and were thereafter worn by them instead of, as hitherto, their robes as Members of the Bar.

D. THE OFFICE OF THE JUDGE ADVOCATE GENERAL IN 1969

The Judge Advocate General continues, as he has been since the first appointment to the Office was made in 1666, to be responsible for the judicial supervision and regulation of the disciplinary aspects of army (and now air force) law and for advising on legal questions generally affecting the military and air forces of the Crown. He holds his Office under Letters Patent from the Sovereign. Section 29 of Part II of the Courts-Martial (Appeals) Act 1951 requires that the person appointed to the Office shall be recommended to Her Majesty by the Lord Chancellor, to whom the Judge Advocate General was made responsible in 1948, bringing his Office into conformity with other judicial offices in this respect.

[11] 14 & 15 Geo. 6, c. 24. Part I of the Act was repealed and superseded by the Courts-Martial (Appeals) Act 1968 (1968, c. 20).

[12] 3 & 4 Eliz. 2, cc. 18 and 19.

[13] The Rules of Procedure (Army), 1956, S.I. 1956 No. 162 and The Rules of Procedure (Air Force), 1956, S.I. 1956 No. 163.

The Courts-Martial (Appeals) Act 1951 (Part II) also makes provision for the appointment of a number of officers to assist the Judge Advocate General. These include a Vice Judge Advocate General, a number of Assistant Judge Advocates General and a number of Deputy Judge Advocates. These are permanent civilian judicial appointments and their holders, who are appointed by the Lord Chancellor, can be removed from them only by the Lord Chancellor for inability or misbehaviour. The Judge Advocate General himself is removable on similar grounds, but only by the Sovereign.

By section 31 of Part II of the Courts-Martial (Appeals) Act 1951, seven years standing as a barrister or advocate (of the Scottish bar) are required to qualify a person for appointment as Vice Judge Advocate General or as an Assistant Judge Advocate General, unless the appointee be already a Deputy Judge Advocate. Five years standing as a barrister or advocate are required to qualify for appointment as a Deputy Judge Advocate. In practice appointments have been made from members of the Bar or advocates of experience in criminal practice or of previous judicial experience, and those appointed have tended to be of somewhat longer standing in their profession than the minimum required by the Act.

The functions of the Judge Advocate General include:

(i) The provision and appointment of judge advocates for all General Courts-Martial and, when requested, the more serious or complex District Courts-Martial.

(ii) Advising the military and air force authorities responsible for confirming and reviewing the proceedings of courts-martial as to their legal validity.

(iii) Advising on Appeal Petitions presented to the Defence Council pursuant to the Courts-Martial (Appeals) Act 1968.

(iv) Advising on all other petitions submitted by persons convicted by court-martial or military court against the court's finding or raising a point of law.

(v) Advising on general legal questions (excluding pre-trial questions relating to particular cases).

(vi) Advising, when requested, on the validity of summary awards.

(vii) The custody of the proceedings of courts-martial and the furnishing to entitled persons of copies.

The primary function of most of the Judge Advocate General's judicial officers, other than the Vice Judge Advocate General, consists in sitting as judge advocates at trials by court-martial under the Army and Air Force Acts. The judge advocate at a court-martial bears a responsibility towards the court, similar in many respects to that borne by a judge towards a jury.

He guides the forensic course of the trial; resolves any question of law (such as the admissibility of a particular item of evidence) which may arise during its progress, either in the presence of the court by indicating his opinion as to the correct decision or, if it is necessary to hear evidence and argument as to admissibility which it would be improper for the court to hear, by himself hearing and ruling upon it in their absence. Before the court retire to consider their findings, he delivers to them a summing-up, marshalling the evidence given and telling the court the principles of law they should apply. As mentioned above, since 1947 the judge advocate has not retired with the court when they consider their findings. In this respect, his position today is entirely analogous to that of a judge who has completed his summing-up to a jury, and if the court wish for further advice from him on any point their question must be put and dealt with by the judge advocate in reopened court. The judge advocate is not bound to accept the first verdict which the court return if it is, in his view, contrary to the law relating to the case, but may (though only once) advise them again of the findings which are in his view open to them. This power, however, with a court-martial extends only to findings of guilty or special findings and not to a finding of not guilty.[14] Sentence is decided by the court, advised by the judge advocate who retires with them.

Much of the work of the Judge Advocate General and his judicial officers, however, consists in the perusal of the proceedings of completed trials to ensure their validity. As the Judge Advocate General is the custodian of the proceedings of Army and Royal Air Force courts-martial, the proceedings of all trials, whether held in the United Kingdom or abroad, are eventually sent to his London Office. There each record is perused before being committed to storage. Before this final review, the proceedings of a trial may have been previously subject to perusal, either because the officer responsible for confirming the findings and sentence of the court wanted legal advice before doing so, or because the trial took place abroad. The Judge Advocate General has deputies or representatives in the Commands overseas, who review proceedings locally before forwarding them to London.

Petitions against the court's finding or raising a point of law on the sentence also fall to be advised on by the Judge Advocate General. The procedures prescribed by the Courts-Martial (Appeals) Act 1968 require as a condition precedent to the right to apply to the Courts-Martial Appeal Court that a Petition against the finding shall have been presented and rejected (except where a capital sentence is involved). The rights of a convicted person to petition or appeal are dealt

[14] *Cf. R. v. Crisp* (1912) 7 Cr.App.R. 173.

with in more detail below, but the Courts-Martial (Appeals) Act requires the Courts-Martial Appeal Court to have regard to any expression of opinion by the Judge Advocate General in considering whether a case is a fit one for appeal and may give leave to appeal without more. The Act further empowers the Judge Advocate General to refer any finding to the Courts-Martial Appeal Court on the ground that it involves a point of law of exceptional importance.

PART II

OFFENCES BY PERSONS SUBJECT TO MILITARY LAW: JURISDICTION

Many of the offences punishable under the penal sections of the Army Act 1955 (and the corresponding sections of the Air Force Act) are also offences against the civil criminal law. The most immediate instance of this is section 70 of the Army Act 1955 which provides that "(1) Any person subject to military law who commits a civil offence, whether in the United Kingdom or elsewhere, shall be guilty of an offence against this section." As subsection (2) of section 70 goes on to define a "civil offence" as meaning "any act or omission punishable by the law of England or which, if committed in England, would be punishable by that law," the effect of the section is to apply the English criminal law to the soldier wherever he may be.

Apart from this provision, that it shall be an offence against the Act to commit a civil offence, many of the offences against other sections of the Army Act 1955 involve conduct amounting to an offence against the criminal law. Examples may be found in sections 44 and 45 of the Act which deal with stealing, handling and malicious damage of public or service property and the property of comrades. Although section 33 (1) (*a*) and section 65 are directed to violence by a soldier junior in rank to a superior and vice versa, the gravity of the offence in military eyes being the affront to discipline, the offences themselves may well involve violence punishable as an assault.

Outside the United Kingdom a serviceman (or a civilian accompanying the forces as a dependent or by reason of his employment) will normally be tried by court-martial (or summarily if the offence is a minor one) for those offences which in England would be tried by the civil court. Courts-martial overseas accordingly are frequently called upon to try offences of great gravity, from murder downwards, indeed, the whole calendar of offences which would in the United Kingdom be tried by Assize Courts, Quarter Sessions, or magistrates' courts. (It should perhaps be observed that in some cases and circumstances the offender may be liable for trial by the country or colony in which the force is serving. This, however, depends upon the terms of

the treaty, agreement or order applying to the country or territory concerned, and is outside the scope of this article.)

Although subsection (4) of section 70 excludes from the charges which may be brought under that section in the United Kingdom the offences of treason, murder, manslaughter, treason-felony and rape, the provisions of the section as a whole apply equally to servicemen serving in the United Kingdom as to those serving abroad. Accordingly, when a soldier commits a civil offence in the United Kingdom (or a military offence involving conduct amounting to a civil offence), he may in law be tried either by a civil court as an offender against the civil criminal law, or by a military tribunal for his offence against the Army Act.

Trial before a civil court has always operated as a bar to subsequent trial on the same or a similar charge by the military authority. Although until quite recently the reverse was not the case, so that a civil court could try an accused person for an offence for which he had previously been tried by a military or air force tribunal (although required, in awarding punishment, to have regard to the punishment imposed by the military tribunal), section 25 of the Armed Forces Act 1966 removed this anomaly. Trial by a competent military authority now operates as a bar to subsequent trial for the same offence before a civil court.

The decision as to whether an alleged offence falling within this dual jurisdiction (and of which the civil police have cognisance) shall be tried by the civil or military rests, however, with the civil authority: normally, in practice, the police authority seised of the facts. If the events giving rise to the charge have occurred outside the barracks, they will usually have come to police attention in the ordinary way that such occurrences do. Additionally, however, the Commanding Officer is specifically required, in the United Kingdom, to report to the police any serious offence, such as treason, homicide, violence involving any serious injury, sexual assaults, and in particular any case at all involving the person or property of a civilian.[15]

The broad, generally accepted principle is that any offence affecting the person or property of a civilian (or in which a civilian is co-accused, in the United Kingdom, with the serviceman) will normally be dealt with by the civil court;[16] offences entirely domestic to the service will normally be handed over for trial by the service court. Each case, however, is considered on its merits and in applying these broad criteria a number of other considerations are also likely to be brought into account. Notably and in particular the gravity and nature of the offence (traffic offences are usually dealt with by the civil

[15] Queen's Regulations (Army) 734.
[16] *Ibid.*

court); whether it occurred on military property or outside; whether the offender was on duty or about his own affairs; the age and previous character of the offender. It may also, in some cases, be in the general interest to leave it to the services themselves to deal with a man whose offence has been committed on the eve of his departure for service overseas.

PART III

MILITARY ARREST AND TRIAL: PETITION AND APPEAL

A person subject to military law who is found committing an offence, or alleged to have committed or reasonably suspected of having committed an offence against the Army Act, may be arrested. The provisions relating to arrest are contained in section 74 of the Army Act 1955.

In military law there is no equivalent of bail in civil procedure. There are however two types of arrest, close and open. Close arrest corresponds to being, for a civilian, held in custody. Open arrest imposes some restrictions on the accused (for example, he may not leave the barracks or use such amenities as canteens) but leaves him otherwise at liberty.

Close arrest is normally employed only in circumstances corresponding to those in which the civilian would be refused bail and for similar reasons. Nor is an accused man kept in *open* arrest unless it is for some reason felt necessary to maintain a limited measure of control over his movements. In the majority of cases the accused soldier or airman is not placed in arrest at all or, if he has been arrested in the first instance, is released as soon as possible, being merely ordered to present himself at the appropriate place at the appropriate time for such inquiries and proceedings as may be held.

Section 53 of the Army Act 1955 contains stringent provisions to ensure that no person shall be kept in arrest unreasonably and without justification.

Further provisions of the Act, Rules of Procedure and administrative instructions are designed to ensure that no accused is kept in arrest unreasonably and that trial is as speedy as possible (see for example Army Act 1955, s. 75, Rules of Procedure 4 and 6 and Queen's Regulations paragraph 698). The procedure by which charges against an accused soldier or airman are investigated and brought to trial is in many respects analogous to those by which an alleged offence is investigated and tried by the civil courts. In military procedure the function undertaken by the magistrate, of himself disposing of minor charges and conducting a preliminary investigation of those to be

brought to trial before a superior court, is undertaken by the commanding officer.

It may be remarked that the commanding officer, in his capacity as examining magistrate, may dismiss any charge brought before him if he is not satisfied that it is made out: if he does dismiss it, his dismissal is final and the accused may not be tried again on that charge by any military authority (see Army Act 1955 section 134 (1) (b)), or indeed, since the coming into force of section 25 (1) (*b*) of the Armed Forces Act 1966, any civil court either. This applies to all offences whether or not within the jurisdiction of the commanding officer to try summarily.

The offences with which a commanding officer may deal summarily are set out in Regulation 11 of the Army Summary Jurisdiction Regulations 1966. The offences there listed amount, generally speaking, to disciplinary offences and do not include military offences involving such criminal elements as dishonesty or indecency.[17] The commanding officer's power to deal with civil offences is very restricted and confined to such offences as common assault, malicious damage not exceeding £ 25 and minor traffic offences.

The commanding officer may not deal summarily with an officer or a warrant officer. His powers of punishment as regards non-commissioned officers and soldiers are set out in section 78 (3) of the Army Act 1955. The maximum punishment that he may award a soldier is 28 days detention: he may not reduce a non-commissioned officer below his permanent rank. His power to fine both N.C.O. or soldier is limited to the equivalent of fourteen days of the offender's pay.

It is convenient to mention, in connection with summary disposal, that although the commanding officer himself may not deal summarily with officers or warrant officers, certain officers superior in rank and command to a commanding officer may deal summarily not only with warrant officers but with officers below the rank of Lieutenant-Colonel. The powers of punishment of such an appropriate superior authority are set out in section 79 (5) of the Army Act 1955. They are comparatively limited, the most severe being forfeiture of seniority of rank although, like the commanding officer, the appropriate superior authority may award a fine up to a maximum of the aggregate of fourteen days of the offender's pay.

In all cases, however, whatever the rank of the offender, a person charged with an offence against military law must in the first instance be brought before his commanding officer. The commanding officer must investigate the case in the prescribed manner. The manner of

[17] The Royal Air Force commanding officer is however empowered to try offences against sections 44 (1) and 45 of the Air Force Act 1955 which include offences of stealing, fraudulently misapplying or handling service property or the property of a comrade. (Summary Jurisdiction (Air Force) Regulations 1957 (as amended) r. 5.)

investigation is described in some detail in paragraphs 18 to 21 of Chapter 2 of the *Manual of Military Law* on pp. 12–16. It is sufficient here to observe that at a hearing before a commanding officer the accused is not called upon to plead guilty or not guilty to the charge, so that even when dealing summarily with a charge there is no such thing as a plea of guilty. Advocates are not engaged but the accused has the right to cross-examine the witnesses against him. Accordingly he may require that witnesses be called to give oral evidence but, if he does not demand this or disputes the evidence they give, the commanding officer may act upon written statements. The accused has, of course, the opportunity afforded him to make his defence to the charge and to call witnesses.

If the commanding officer is proposing to award any punishment which will affect the accused's pay (this of course includes not only such direct effects as a fine or stoppage from pay but also sentences of detention or reduction in rank of an acting N.C.O.), having arrived at the decision that the accused is guilty but before announcing his award, he must offer the accused the opportunity of being tried by court-martial in preference to accepting the award of the commanding officer.

Apart from this option, there is no right of appeal as such from the decision of a commanding officer by way of re-hearing. Nor indeed is there any express machinery under the Army Act 1955 for appeal from summary conviction by a commanding officer (or appropriate superior authority). A person aggrieved by such finding or award may, however, make complaint under sections 180 or 181 of the Act which deals with the redress of complaints; in such event the summary proceedings will be scrutinised by higher authority (and the advice of the Judge Advocate General sought if any question of law or procedure arises), section 115 providing for the review of summary findings and awards by a superior authority and affording powers to rectify any injustices or invalidities in finding or award.

Should the case be one with which the commanding officer is either not empowered or not prepared to deal summarily, then he must take steps to have the evidence reduced to writing with a view to its trial by court-martial (or, in an appropriate case, summary disposal by the appropriate superior authority).

(Although the reduction of evidence to writing is normally associated with the reference of the case for trial by some tribunal other than the commanding officer himself, there is in fact no reason why the commanding officer should not have evidence reduced to writing for his own convenience when he is proposing to deal with the matter summarily. So long, therefore, as the case is one with which he is empowered to deal, the procedure is flexible and he need not decide whether or not to deal summarily with the matter until after he has heard the evidence.)

The reduction of the evidence to writing is normally delegated to some officer other than the commanding officer himself and may be in the form of a Summary of Evidence, compiled on oath at a formal hearing in the presence of the accused, when he may cross-examine witnesses, or by the assembly of an Abstract of Evidence which is merely a set of statements taken from the prosecution witnesses. In either case the accused of course is given the opportunity of putting forward any answer he may wish to the charge and to the evidence of the prosecution witnesses before the commanding officer considers the matter judicially.

The reduction of the evidence to writing in this way serves a number of purposes. First, it enables the commanding officer to consider at leisure the manner in which he should deal with the case, *i.e.*, by dismissing it, dealing with it summarily (if this is open to him), or remanding it for trial by court-martial. If the commanding officer does decide to remand the matter for court-martial he forwards the Summary or Abstract of Evidence, together with the charge-sheet and certain other relevant documents (such as a statement as to the character of the accused), to superior authority who will normally be an officer empowered to convene a court-martial. If the military authority immediately superior to the commanding officer is for some reason not empowered to convene a court-martial or, in a case requiring trial by General Court-Martial, to convene a court of that denomination, then the documents will be forwarded to a yet higher authority. The officer who is responsible for convening the court-martial, however, is, like the commanding officer, required judicially to consider whether there is evidence justifying the trial of the accused and also, when the charge is one with which the commanding officer is empowered to deal summarily, whether it should in fact be tried by court-martial or whether the commanding officer should be directed to deal with it summarily. If, on the basis of the documents submitted to him, the convening officer does decide to convene a court-martial to try the case, copies of the Summary or Abstract of Evidence serve, like the depositions in a trial on indictment, to inform the accused and his legal representatives of the case against him, to provide the prosecutor with proofs of evidence of his witnesses and to furnish the president of the court (and judge advocate if one is appointed) with notice of the nature of the case. The members of the court, in common with members of a jury, are not given access to the contents of the "depositions" save to the extent that they may become admissible in evidence at the trial.[18] Rules of Procedure conform to civil prac-

[18] The provisions of sections 9 and 10 of the Criminal Justice Act, 1967, as to the use of written statements and the making of formal admissions are applied by section 12 of the Act to courts-martial, subject to appropriate modifications (Court-Martial) (Evidence) Regulations 1967 (S.I. 1967 No. 1807)). Section 11 of the Act as to notice of alibi also applies.

tice in providing for the service, if necessary, of notices of additional evidence.

The classes of officers having power to convene courts-martial are prescribed by section 86 of the Army Act 1955. Broadly, however, and for practical purposes, the officers having power to convene District Courts-Martial are those commanding brigades or in command of other establishments or bodies of troops of similar responsibility. General Courts-Martial, in the United Kingdom, are normally convened by officers in the position of the Commander-in-Chief of a Command.

A General Court-Martial consists of at least five officers and is normally presided over by a Colonel and sometimes by an officer of higher rank if the rank of the accused or the gravity of the charge demands it. It has (within the punishments prescribed by law) unlimited powers.

A District Court-Martial consists of at least three officers who are normally presided over by a Major or sometimes a Lieutenant-Colonel. Its powers are limited; it may not try officers, has restricted powers in sentencing warrant officers and may not impose a sentence exceeding two years' imprisonment.

It should perhaps be added that, although the ranks of presidents are in practice as has been indicated, in law the minimum rank for the president of either type of court-martial is that of Major (or the equivalent rank in the Royal Air Force) and in certain circumstances may (in law) be below even this.

A Judge Advocate must be appointed to all General Courts-Martial and may be appointed to any District Court-Martial. A convening officer will normally be advised by the Army Legal Services as to whether the case, if to be tried by District Court-Martial, is one in which application should be made for the appointment of a judge advocate; such considerations as the nature and gravity of the charge or the complexity of law or fact involved being taken into account.

Advice as to the framing of charges, the evidence to be called, and other matters concerned with the preparation for trial, is given by the Directorate of Army Legal Services (or the equivalent Directorate in the Royal Air Force) which also provides prosecutors for the more substantial cases. The Service legal directorates each administer a legal aid scheme to enable accused servicemen to be represented at courts-martial by practising civilian advocates.

The procedure at a court-martial attended by a judge advocate is substantially similar to the proceedings of a trial on indictment before a criminal court; such minor differences as exist are of form rather than

substance and no useful purpose would be served in seeking to catalogue them. A District Court-Martial sitting without a judge advocate follows a similar pattern of procedure save that there is, of course, no summing up; to this extent the procedure bears a superficial resemblance more to the proceedings of a magistrate's court. One procedural feature which may justify mention (common to all courts-martial whether attended by a judge advocate or not and also mandatory irrespective of whether or not the accused is professionally represented) is the requirement of Rule of Procedure 42 (1) that an accused who has offered a plea of guilty shall have explained to him, before his plea is accepted and a finding of guilty recorded, the nature of the charge, the general effect of his plea and its effect upon the procedure which the court will follow. This explanation is, in practice, couched in the simplest possible language and designed to ensure *inter alia* that an accused who may possibly have a defence to a charge is not allowed to plead guilty to it through any inadequate understanding of the legal position. If not satisfied that the prisoner fully understands the nature of the charge or the effect of his plea, the court may not accept a plea of guilty. The court may also decline to accept a plea of guilty if the president, having regard to all the circumstances, considers the accused is not guilty and a plea of guilty may not be accepted at all if the accused is liable on conviction to be sentenced to death.

The function of the judge advocate, where one has been appointed, has been touched upon above in Part I: it is sufficient to say that it is entirely of a judicial character and in some respects similar to the function of a judge sitting with a jury, although of course his part in the assessment of sentence is only advisory. Rule of Procedure 78 prescribes the general duties of the prosecutor and defending officer in terms which conform to the generally accepted duties of prosecution and defence in civil practice. The finding and sentence of the court are arrived at by a majority of the votes of the members of the court (save for findings involving a mandatory death penalty on sentences of death which require unanimity).

The ranges of punishments which a court-martial is empowered to award are prescribed by sections 71 (officers) and 72 (warrant officers and below) of the Act. The maximum punishment for each of the various military offences created by the Act is prescribed by the section creating it. The maximum punishment for a civil offence, charged under section 70 of the Act, is the maximum punishment which a civil court could award for that offence. The punishments which a court-martial may award include imprisonment and fines, although for an offence other than a civil offence the maximum fine which can be imposed is one equivalent to the aggregate of 28 days of

the offender's pay. In addition to imprisonment, a court-martial has at its disposal (though not for officers) the punishment of detention for up to two years in a service corrective establishment. As might be expected of a disciplinary tribunal constituted within a profession, the court has open to it a number of punishments touching the offender in his calling. The most severe of these, as with any profession, is expulsion. This at its most severe, can take the form of dismissal with disgrace from Her Majesty's service (or cashiering in the case of an officer) or, less condign, simple dismissal. These punishments may be awarded alone, as sufficient punishment in themselves, or coupled with a sentence of imprisonment or detention. (A sentence of imprisonment for an officer necessarily carries with it cashiering.) As the ultimate professional sanctions, they are treated as next only to imprisonment in their severity.[19] Accordingly, the punishment of detention for up to two years in a military corrective establishment is, in law at any rate, to be regarded as a lesser punishment than dismissal. Other punishments affect the rank or seniority of the offender, although an officer cannot be reduced in rank. The minimum punishments within the court's power are, for private soldiers or their equivalent, a fine and for those above that minimum rank severe reprimand or reprimand. These latter punishments, although of no immediate effect, serve to mark indelibly in the offender's service record the view taken by the court-martial of his conduct on the occasion in question. It may be noted that a court-martial does not have at its disposal the minor punishments, including restriction of privileges (the modern equivalent of the old and familiar "C.B.", confinement to barracks) or admonition, which may be awarded by a Commanding Officer. Nor has the court any powers analogous to those of a civil court to make a probation order or grant a conditional or absolute discharge. It may however make restitution orders in circumstances broadly comparable with those in which a civil court could make them and enjoys also a useful and not infrequently invoked power to place the offender under stoppages of pay to make good loss or damage caused (whether to the public or a private individual) by his offence. Such an order may be made either alone or in conjunction with some other punishment.

The finding and sentence of a court-martial are not valid until confirmed. The officers empowered to confirm findings and sentence of courts-martial are prescribed by section 111 of the Army Act 1955, but in most cases the confirming officer is the officer who convened the trial. Section 134 (2) (*a*) of the Act provides that a person shall not be deemed to have been tried by court-martial if confirmation is withheld, and accordingly he may in law be retried for the offence.

[19] See ss. 71 (3) and 72 (3) of the Army Act 1955.

The order for trial must, however, issue not later than 28 days after the promulgation of the decision to withhold confirmation. Perhaps the main advantage of this provision is to enable re-trial where the reason for non-confirmation of the first trial was merely procedural error on the part of an inexperienced court: it is also sometimes useful where it appears from the plea in mitigation advanced on the part of an accused who has pleaded guilty that he may in fact have had a defence to the charge. (Once confirmed, however, there is no power to order re-trial except in the circumstances prescribed by section 113A of the Army Act 1955 and section 19 of the Courts-Martial (Appeals) Act 1968; *i.e.*, where a conviction is quashed only by reason of fresh evidence.)

The powers of the confirming officer are set out in sections 109 and 110 of the Army Act 1955. Under section 109 a confirming officer may call upon a court to revise a finding of guilty (this is seldom done in view of the wide powers given by the following section), and section 110 gives him powers of quashing and substitution of findings and of remission, mitigation and commutation of sentences which are analogous to those enjoyed by the Criminal Division of the Court of Appeal in respect of criminal convictions.

Section 113 of the Act provides for the subsequent review of proceedings by an authority superior to the confirming officer and empowers the reviewing authority to exercise powers similar to those vested in the confirming officer.

The provisions of the Criminal Justice Act 1967 as to suspended sentences do not apply to courts-martial. The Army and Air Force Acts have, however, since 1920, contained a provision enabling a confirming or reviewing authority to suspend a sentence of imprisonment or detention and this power is extensively used. The court-martial itself has no power to pass a suspended sentence.

A person convicted by court-martial has open to him a number of means of petition or appeal.

He may, before confirmation, petition the confirming officer against finding or sentence or both. After the confirmation of the proceedings, he may at any time within six months of the date of promulgation submit a petition to a reviewing authority. (Promulgation is the formal notification to the accused of the decision of the confirming officer on the finding and sentence of the court-martial.)

It is also open to the convicted solider to pursue, if he wishes, the steps leading to an appeal to the Courts-Martial Appeal Court. Appeal to the Courts-Martial Appeal Court lies only as to finding; the court has no power to hear an appeal as to sentence. Except in the case of conviction involving a death sentence, the appellant must first present a petition against his conviction in prescribed form to the Defence Council. The petition must be presented within sixty days of promul-

gation if the court-martial was held abroad, or forty days if it was held in the United Kingdom. The right to apply for leave to appeal does not arise until either the petitioner has been notified of the rejection of his Petition or, if he does not receive such notification, until the expiry of (once again) either sixty or forty days from the date of presentation of his petition, according to where the trial took place.

Application for leave to appeal must be made within a prescribed period from the time when the right to apply became exercisable. The rules governing appeal once the right to apply for leave has arisen correspond closely to those governing an appeal to the Criminal Division of the Court of Appeal.

The responsibility for advising confirming and reviewing authorities (and the Defence Council) as to the exercise of their respective functions in connection with courts-martial and petitions and appeals by convicted persons rests, of course, with the Judge Advocate General of the Forces or, overseas, his Deputy or representatives.

Queen's Regulations require that the proceedings of all General Courts-Martial shall be submitted by the confirming officer for the legal advice of the Judge Advocate General (or his Deputy, etc.) before confirmation, and it is also open to a confirming officer in his discretion to obtain similar advice before confirming the proceedings of a District Court-Martial.

In addition to any advice that may have been given before confirmation, all proceedings are finally consigned to the custody of the Judge Advocate General (*vide* section 141 of the Army Act 1955) and before being stored away are subject to close scrutiny to ensure their legality. This applies to the proceedings of all Army and Royal Air Force courts-martial wherever in the world they may have been held, but in addition to this legal review in the London Office, proceedings of trials held in commands overseas in which the Judge Advocate General has a Deputy or representative are legally reviewed in that command before dispatch to the United Kingdom.

These processes of legal review are applied to all proceedings, irrespective of a petition by the accused or a specific request by a military authority. If however the accused does petition against finding, the authority to whom the petition is submitted will obtain the advice of the Judge Advocate General upon the petition; confirming and reviewing authorities may similarly, on occasion, seek advice in connection with a petition against sentence, particularly where this raises some point of law.

CONCLUSION

It will be appreciated that the majority of courts-martial convened are District Courts-Martial, dealing with comparatively simple of-

fences against service discipline (desertion or absence without leave, insubordination, disobedience to orders, etc.) and sitting without specialist legal assistance either on the Bench or on the part of the prosecutor or defending officer who, in such cases, are often relatively junior regimental officers. The President of the court, in many of these cases, is, however, an experienced and senior officer (Lieutenant-Colonel/Wing Commander or a senior Major) who has been allocated to a tour of full time duty as a permanent president of courts-martial and undergone a period of instruction in the Judge Advocate General's Office in trial procedure, the elementary rules of evidence and such basic principles of criminal and military law as are necessary to equip him to deal confidently and competently with the kind of cases he, with the court over which he presides, is likely to be called upon to try.

Although the special training of these officers for a specifically judicial function is undertaken by the Judge Advocate General, responsibility for the general legal instruction of serving officers (whose initial military education includes as part of the syllabus instruction in service law) rests with the service legal directorates. Under the auspices of these professional directorates, lectures are given for the benefit of all serving officers, whose examinations at various levels include papers in service law. Specialist courses provide training for regimental officers and others whose duties are likely to involve them particularly in the preparation of cases for trial or other aspects of discretionary procedures.

The District Court-Martial attended by a judge advocate and with professional advocates engaged takes place only when the charge to be tried is more serious than the routine military offence, or when the issues are unusually complex; to this extent it is less common than the court conducted exclusively by regimental officers and the full scale General Court-Martial is of comparative rarity. Whilst it is tempting to compare the two forms of court-martial with Quarter Sessions and Assizes, and to equate the exclusively lay District Court-Martial to a bench of magistrates, this would not be in all respects accurate. The powers of the District Court-Martial are unaffected by the presence or absence of a judge advocate, and the criteria which determine whether a case shall be tried by a District or General Court-Martial are other than those which determine whether a case shall be sent for trial to Assizes or Quarter Sessions. An officer cannot be tried before a District Court-Martial for any offence; apart, however, from those offences which carry a mandatory sentence beyond the maximum powers of a District Court-Martial (*i.e.*, two years' imprisonment) there is no limitation *in law* to the offences with which a District Court-Martial may deal and in some circumstances (for example, when it is known that the accused intends to plead guilty and the

circumstances are such that the higher sentencing powers of a General Court-Martial are manifestly not called for) offences which would not be triable at Quarter Sessions may be sent for trial before a District Court-Martial. It is obvious however that as a matter of practice graver charges will normally be sent for trial to a General Court-Martial as a tribunal having power to consider the award of an appropriate sentence if necessary and also as one more suitable for the hearing of a serious charge.

It remains to mention one form of court-martial rare in peacetime and not dealt with above. This is the Field General Court-Martial provided for by section 89 of the Army Act 1955. A Field General Court-Martial may, under section 84 (2) of the Act, be convened only on active service and when the convening officer is of opinion that it is not possible without serious detriment to the public service to try a charge by a General or District Court-Martial. The court consists of a President (who need in law be only a Captain but in practice, as with the General Court-Martial, is invariably above the minimum rank required) and not less than two other officers. In emergency it can consist of the President and only one other officer. If fully constituted, its powers are those of a General Court-Martial; if only two officers sit its maximum sentence is restricted to two years' imprisonment. The trial itself follows the same form as the other types of court-martial but some ancillary procedures, mainly concerned with pre-trial documentation, are simplified. The Field General Court-Martial is exceedingly rare in peacetime. During the 1939–45 War, Field General Courts-Martial became the normal form of trial; not only because the pre-trial paper work required was considerably reduced, but also because of the requirements of the Army Act that an officer must have two years' commissioned service to qualify him to sit as member of a District Court-Martial and three to sit on a General Court-Martial. The Act then in force did not prescribe any such qualification by length of service for officers to be appointed to sit on Field General Courts-Martial (nor does the 1955 Act) so that the adoption of this form of trial enabled advantage to be taken of the services of many officers, mature in years and experienced, in some cases with legal experience—including some who had already attained comparatively senior rank—but who were nonetheless not yet in law qualified to sit as members of a General or District Court-Martial.

The requirement that the findings of guilty and sentence of the court be confirmed applies equally to all types of court-martial, including the Field General Court-Martial and, as explained above, the proceedings of all trials are subject to scrutiny by a succession of different persons, military and civilian, at different levels, including at least one (and in most cases more than one) perusal within the office of

the Judge Advocate General. It is this feature of the court-martial system, taking place in every case and not depending on any representation having been made on the part of the convicted man, which affords perhaps its most notable safeguard. As a result of these processes of review, convictions are, from time to time, set aside and sentences substantially reduced, even though those concerned with the defence have not taken any step by way of petition. Apart from such automatic review, the accused's extensive rights of petition enable him to secure prompt legal scrutiny of the proceedings of his trial in the light of any specific ground of appeal he may wish to put forward, if his petition be against finding or, by the service authorities, of his sentence. A petition to the confirming officer can in most cases (save where the employment of a shorthand writer at the trial involves waiting for the transcribed record before consideration can be given to it) be presented and considered within a few days of the conviction. The system has accordingly the merit of enabling a conviction which appears for any reason to be invalid or unsatisfactory to be set aside with a minimum of delay. If, however, his petition is rejected at this stage the petitioner may promptly petition a reviewing authority or, if he wishes, submit it in the form of an Appeal Petition under the Courts-Martial (Appeals) Act 1968 to the Defence Council. This latter course will enable him to pursue the matter by way of appeal to the Courts-Martial Appeal Court and (with leave, if a point of law of general public importance is involved) even to the House of Lords.

THE BEGINNINGS: ANSELL ON MILITARY JUSTICE

The development of military criminal law has been marked by periods of quiet, orderly growth between wars and surges for change after each war as citizens react to the exposure to the special requirements of military life. The forces for change within the military community are usually less visible than those external to it, but at the end of World War I an intramural struggle erupted onto the public scene; fellow judge advocate Terry Brown tells the story fully in "The Crowder-Ansell Dispute."[1] This selection is General Ansell's own statement, valuable for the exposition of the forces for change and of the subjects considered. Ansell's influence was felt through the great changes in military criminal law which followed in 1920, 1948, 1950 and 1968. Other views on this period were expressed by Professors Morgan,[2] Wigmore[3] and Bauer.[4]

[1] 35 MIL. L. REV. 1 (1967).
[2] Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L.J. 52 (1919).
[3] Wigmore, *Lessons From Military Justice*, 4 AM. JUD. SOCY 151 (1920).
[4] Bauer, *The Court-Martial Controversy and the New Articles of War*, 6 MASS. L.Q. 61 (1921).

MILITARY JUSTICE†

S. T. Ansell [1]

I contend—and I have gratifying evidence of support not only from the public generally but from the profession—that the existing system of Military Justice is un-American, having come to us by inheritance and rather witless adoption out of a system of government which we regard as fundamentally intolerable; that it is archaic, belonging as it does to an age when armies were but bodies of armed retainers and bands of mercenaries; that it is a system arising out of and regulated by the mere power of Military Command rather than Law; and that it has ever resulted, as it must ever result, in such injustice as to crush the spirit of the individual subjected to it, shock the public conscience and alienate public esteem and affection from the Army that insists upon maintaining it.[2] Intemperate criticism of those who have pointed out these defects will not serve to conceal them.

It is conceded that, basically, our system is the British system as it existed at the time of the separation, which itself was of much more ancient origin. At that time one theory political and legal prevailed as to the place an Army should occupy as an institution of government. With the birth of our government, however, came the new political theory of popular sovereignty even over the Army, though unhappily our military code reflects the principles we repudiated. The basic deficiency of our system this day is to be found in the fact that our fundamental law and public opinion contemplate justice regulated by the law, whereas the Military Code and the Army recognize only such justice as Military Command may dispense. Under the one theory the Army is the Army of the King or, with us, of the President who is deemed to have succeeded to the royal prerogative over the Army, to

[1] (1875–1954). The author was a member of the Washington, D.C. Bar and served as acting Judge Advocate General of the Army from 1917 to 1919.

[2] Though seasonably invited by the *Quarterly* to prepare this article, I could find no opportunity to do so, and therefore at first declined. At the kindly instance of the editors, I have undertaken to write now on the very last day that permits of publication in this issue. I regret that a hurried preparation must result in the ineffective presentation of a subject which deserves the best thought and consideration of our profession.

be disciplined by him and his commanders under his ordinances and at his will; under the other, which is the theory established by our Constitution, Congress raises and supports armies and has exclusive power to prescribe the rules for its discipline. The one theory clearly represents the monarchical, reactionary and personal government view. The other is a necessary part of that larger theory of government which insists that the source of all political power is to be found in the people. Under the one theory the Army is an army of a king or emperor or other person in authority; under the other, it is an institution ordained by the people to do their service. Under the one, the obligation of the soldier is to a military chieftain; under the other, it is to the State. Under the one, the military relationship is governed by considerations of personal loyalty and fealty to those in authority; under the other, the military obligation is created and governed by law established by the people themselves. Under the one, the army has a detached, independent and self-sufficient existence, finding within itself the source of its own government; under the other it is but an institution of government, drawing, like all other institutions, its power from a common superior source upon which it depends for its government and its very existence. Under the one the common soldier was but a serf, a personal retainer of the King or a subordinate commander; under the other he is a citizen serving the State in the highest capacity of citizenship.

At the time of our separation the respective spheres of power of Parliament and the King over the Army had not been definitely determined but, on the other hand, were a matter of grave and serious contention; indeed, they have not been accurately determined to this day. A matter of such tremendous import to their liberties as the question of the control of the Army, the Fathers of our government were not disposed to leave unsettled. As they did not intend that our people should inherit this controversy regarding the control of the armed forces, so did they not intend that the Chief Executive of this nation should inherit those military powers which in the mother-land had been deemed inherent in the Crown. They resolved to make it certain that the Army of the United States should be called into being only by Congress, should continue to exist only at the will of Congress, and should be governed and disciplined only in accordance with laws enacted by Congress. Thus it was that the Constitution, while conferring upon the Chief Executive the power of command, expressly and exclusively conferred upon Congress the power to raise and support armies and the power to make rules for their regulation and government.

It is under this latter power that Congress enacts the code for the discipline of the Army, commonly known as the Articles of War. The power to make rules for the regulation and government of the armed

forces is the power to prescribe the relations, the authority and the rules of conduct of all the members of those forces, both officers and men, and to provide sufficient sanction. Congress has power to prescribe the substantive offense, the penalty, the tribunal and the methods of procedure and trial; all subject, of course, to the limitations upon the legislative power found elsewhere in the Constitution. Accordingly, it has the sole power to enact a penal code for the complete government of all who occupy the military status. A soldier is also a citizen, and his conduct must conform not only to the requirements of the general law of the land, but to the special requirements of the military establishment. The military code is comprehensive of both relations. It adopts the substantive provisions of general social law, and it denounces and penalizes the myriad manifestations of misconduct prejudicial to the military relation.

Such exercise of penal power should be in keeping with the progress of enlightened government and not inconsistent with those fundamental principles of law which have ever characterized Anglo-American jurisprudence. The Military Code, being a penal code, should be applied to none except upon probable cause. It should be specific with respect to the definition of the offense denounced and the penalty provided. It should particularize with respect to matters of procedure, that the trial may be full, fair and impartial. It should require recognition of those rules of evidence which our jurisprudence has evolved as necessary to elicit those facts upon which the ultimate conclusion of guilt or innocence may with safety and justice rest. With the utmost care it should guarantee those safeguards and that protection for an accused whose life and liberty are placed in jeopardy, which are the pride of our enlightened civilization. None of these things does our code do, and none of these things can it do, until it changes its base from the ancient English theory and comes to conform to American principles of government.

That our Articles of War, organically and largely in detail, are the ancient British Articles of 1774, can be shown historically as well as by mere comparison. John Adams, responsible for their hasty adoption by our Constitutional Congress to meet an emergency, said of them:

"There was extant, I observed, one system of Articles of War which had carried two empires to the head of mankind, the Roman and the British; for the British Articles of War are only a literal translation of the Roman. It would be vain for us to seek in our own invention or the records of warlike nations for a more complete system of military discipline. I was, therefore, for reporting the British Articles of War *totidem verbis* * * * *. So undigested were the notions of liberty prevalent among the majority of the members most zealously attached to the public cause that to this day I scarcely know how it was possible that these articles should have been carried. They were adopted,

however, and they have governed our armies with little variation to this day."[3]

He himself, appreciating their rigorous character, did not expect them to pass without substantial liberalization, for he further said: "It was a very difficult and unpopular subject and I observed to Jefferson that whatever alteration we should report with the least energy in it or the least tendency to a necessary discipline of the Army would be opposed with as much vehemence as if it were the most perfect; we might as well, therefore, report the complete system at once and let it meet its fate. Something perhaps might be gained."[4] Writing in 1805, he expressed surprise that it was possible that these articles could have been carried at all.

Military authorities and military text-writers, with the love that such have for ancient legal lineage, have always proclaimed their pride in this ancient code. For instance Winthrop says of it:

"Our military code, however, stands alone among our public statutes in its retaining many provisions and forms of expression dating back from 200 to 500 years, and while it is desirable that some of the articles should be made more precise or extended in scope and the code itself simplified by dropping a few articles and consolidating others, any radical remodeling which would divest this time-honored body of law of its historical associations and interests would be greatly to be deprecated."[5]

And the present Judge Advocate General, in proposing the so-called "revision of 1916," frankly said to the Committees: "It is to be doubted if the Congress has ever been called upon to amend legislation which is as archaic in its character as our present Articles of War." That "revision of 1916" made not a single systemic change in the Roman-English system adopted by the Continental Congress and in 1806 by the Congress under the Constitution. It did nothing but assemble, classify and render more convenient old articles, dressed them up in rather more modern language, wrote into them what hitherto had been legally implied into them by construction, and made not one single fundamental change. That this is so will become apparent upon a comparison of the 1916 revision with the law as it previously existed. Nobody, neither The Judge Advocate General, the Secretary of War nor either of the Committees of Congress, has ever regarded the project of 1916 as a real substantial revision; indeed, The Judge Advocate General took occasion to deny that it was anything but a restatement of existing law for the sake of convenience and clarity. Verification of this statement may be made by reference to the

[3] History of the Adoption of the British Articles of 1774 by the Continental Congress: Life and Works of John Adams, vol. 3, pages 68–82.

[4] *Supra*, note 3.

[5] Winthrop's Law, Standard Military Text, vol. 1, p. 15.

printed hearings before the Committee on Military Affairs upon the 1916 revision. There it will be found that the author of the project, discussing it before the Committees, article by article, was quick to assure them upon every occasion and with respect to every article having to do with military justice that the project made and contemplated no substantial change in the articles, which he truthfully traced to the British Articles of 1774 and beyond. He himself said, at page 43 of these hearings:

"If Congress enacts this revision, the service will not be cognizant of any material changes in the procedure, and courts will function much the same as heretofore. * * * The revision will make certain a great deal that has been read into the existing code by construction."

That was the truth. Nobody has experienced any change for the better.

Out of these opposite basic theories—on the one side that Military Justice is to be controlled by the power of Military Command and on the other that it is to be regulated by established principles of Law—arise the two antagonistic views as to the character of courts-martial. One is that a court-martial is an executive agency belonging to and under the control of the military commander; is, indeed, but a board of officers appointed to investigate the accusation and report their findings to the commander for his approval. Under such a theory, a commander exercises an almost unrestrained and unlimited discretion in determining (1) who shall be tried, (2) the *prima facie* sufficiency of the proof, (3) the sufficiency of the charge, (4) the composition of the court, (5) all questions of law arising during the progress of the trial, (6) the correctness of the proceedings and their sufficiency in law and in fact. Under such a theory all these questions are controlled not by law but by the power of Military Command.

Thus it is said by Winthrop, the greatest departmental authority upon Military Law:

"Courts-martial are not courts, but are, in fact, simply instrumentalities of the executive power provided by Congress for the President as Commander-in-Chief to aid him in properly commanding the army and enforcing discipline therein, and utilized under his orders or those of his authorized military representative; they are, indeed, creatures of orders and except in so far as an independent discretion may be given them by statute, they are as much subject to the orders of a competent superior as is any military body of persons."[6]

This, of course, is in accordance with the old monarchical view. At the time of our separation, the King was not only the commander of the Army, he was the legislator of the Army; he prescribed the Articles of War, the offenses and the penalty; he prescribed both the

[6] Winthrop's Military Law, vol. 1, p. 54.

substantive and procedural law; he prescribed the courts-martial, their jurisdiction and their procedure. He controlled the entire system of discipline and the methods of its administration. The Army was his, the officers were his officers and from him drew their authority. Courts-martial were courts-martial of the King and of the officers representing him and his power of command. The courts-martial, therefore, applied his law, his penalties, followed his procedure and were subject to his command. Under such a scheme, a court-martial was but an agency of command, nowhere in touch with the popular will, nowhere governed by laws established by the people to regulate the relation between sovereign and subject. It was not a judicial body. Its functions were not judicial functions. It was but an agency of the power of military command to do its bidding.

Basically, such is our system today. It does not contemplate that a court-martial shall be a court doing justice according to established principles of jurisprudence and independently of all personal power. Quite the contrary. It regards the court-martial simply as the right hand of the commanding officer to aid him in the maintenance of discipline. It is his agent; he controls it. It is answerable not to the law but to him. The court-martial is not a court at all; it is but an agency of military command governed and controlled by the will of the commander. Under such a system an officer, of course, belongs to a caste. Any officer can prefer charges against a man and at his will can succeed in getting him tried. The statute requires no preliminary investigation to determine whether or not the accused should be tried, and such investigation as is required by regulation is also controlled by the military commander, and is neither thorough nor effective. From then on everything is governed not by law but by the power of military command. The detail of counsel, the membership of the court, the question of the validity of the charge, the sufficiency of the evidence, the correctness of the procedure, the validity of the judgment and sentence and the thousand and one questions arising in the progress of a criminal trial are all left finally to the judgment of the commanding general. Even the ultimate conclusion of guilt or innocence is subject to his control. There is no right of review; there is no legal supervision. All is to be determined by the commanding general. Whatever he says is right; is right and becomes right as his *ipse dixit* regardless of general principles of jurisprudence, and right beyond any power of review. He is the law. No matter how great the departures are from the well established principles of law and right and justice, these departures become error or not, just as the commanding officer may choose to regard them. There is no legal standard to which court-martial procedure must conform and, therefore, there can be no error adjudged according to a legal standard. In other words, military justice is administered not according to a standard of law at all, but

under the authority of a commanding officer. The results are as might be expected when one man is left to be judged at the will of another—the penalties and sentences are shockingly harsh, and frequently shamefully unjust.

Such is our system conceded to be; and such, according to the militaristic view, ought it to be. The departmental view, as expressed in the hearings before the Committees in 1912, is that "the introduction of fundamental principles of civil jurisprudence into the administration of military justice is to be discouraged." In those hearings the present Judge Advocate General quoted, with approval, from Colonel Birkheimer, as follows:

"The military code prescribed a rule of conduct to a body of men who consecrate their lives to the profession of arms. The camp is the fittest field of application. It may be very objectionable in some respects contemplated from the purely legal standpoint and yet be admirably adapted to the purposes of uniting, governing, and directing to a single object the armed forces of the United States."

He further quoted from Judge Advocate General Lieber who, writing in 1879, said: "Military law is founded on the idea of a departure from civil law, and it seems to me a grave error to suffer it to become a sacrifice to principles of civil jurisprudence at variance with its object."

The militaristic view can be found no better expressed than in the following extract from an inspired editorial:

"An army, to be successful in the field, must from the moment it begins to train at home have absolute control of its discipline. The commanding general is everything. He must bear the three keys. He must have final control. He must be the judiciary, the legislative and the executive. If he were not, he would not have an army."[7]

According to this view, courts-martial are not courts of law, independently administering the law and governed by the law, but are indeed above the law. They are of an unquestionable rectitude and quality, and their methods and judgments are not to be tested by the simple rules designed for the government of men in all social relations. Officers of the Army—at least unless once entangled in their toils—love to denominate them "courts of honor," functioning independently of the ordinary rules for the government of ordinary human judgment and endowed with a refinement of judgment not recognized in other spheres of society. Being courts of "honor" and not of law, the members need know no law, are presumed to know no law, and, as a rule, do know no law. Thus it is that these principles designed to secure a fair and impartial trial evolved by our civilization and re-

[7] Editorial, *Chicago Tribune*, read into the Congressional Record of February 27, 1919, page 4641, by Representative Kahn, Chairman House Committee on Military Affairs.

garded as fundamental in our jurisprudence need not be observed by these courts. That a man shall not be tried except upon probable cause judicially determined; that he is entitled to a fair and impartial judge; that a judge may not sit in his own cause or be a prosecuting witness in the case before him; that the accused shall have the right to a judicial test of the validity of the accusation; that he shall be fully informed of the nature and cause of the accusation against him; that he is entitled to the assistance of counsel; that he is entitled to witnesses in his own behalf and the right to confront the witnesses opposed to him; that he has the right fully to test by proper cross-examination any witnesses regardless of rank or other earthly circumstance; that he is entitled to a public hearing, and finally shall be accorded an opportunity to appeal for clemency—these matters found essential to fairness in a court of law are not recognized as necessary to be secured to an accused on trial before these "courts of honor."

Our Constitution, however, contemplates a system of military justice and discipline based upon the opposite theory. It contemplates that the administration of military justice should be governed in accordance with the laws of Congress and not in accordance with the will of any person: that Congress should define specifically the offense; definitely prescribe the punishment, establish the procedure and base all upon the fundamental principles of our jurisprudence. Congress has utterly failed to legislate in furtherance of the constitutional and judicial theory and by its failure to legislate and by its adoption and retention of a system emanating out of a different theory, has left it so that Military Command may continue that mediaeval system of discipline which is governed not by law but by military power.

The highest tribunal of the land, whenever it has had the occasion to speak, has accentuated the fact that courts-martial are inherently courts dealing with judicial functions of the most sacred character. In *Runkel v. United States*,[8] the court, almost prophetically, said:

"The whole proceeding (the administration of military justice through courts-martial) from its inception is judicial. The trial, findings and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged *according to law*."[9]

[8] 122 U.S. 543 (1887), at p. 558; quoting Attorney General Bates, in an opinion furnished President Lincoln, March 12, 1864, II. Opinions Attorneys General, 21.

[9] Italics are the court's.

The same court said in *Grafton v. United States:* [10] "A court-martial is a court deriving its authority from the United States. * * * Congress, by express Constitutional provisions, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being twice put in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter."

The Grafton case is a land-mark pointing the way to those principles which must be recognized if the military code is to be liberalized and made to accord with the spirit of American institutions. It is particularly instructive in the present discussion. Under the military theory that a court-martial is not a court, that its functions are not judicial, and that it does not try crime but simply mere breaches of the military obligation, it had been the long standing view of the department, supported by the decisions of many of the lower federal courts, that the Constitutional prohibition against double jeopardy, and like principles of the Bill of Rights, had no application to these trials. Upon this theory an enlisted man, tried and acquitted by court-martial in the Philippines, of murder, was subsequently subjected to trial for the same homicide before a civil court in that federal jurisdiction. The civil court overruled the plea in bar of trial and its judgment upon conviction was sustained by the Supreme Court of the Philippines. The Supreme Court of the United States reversed the judgment, discharged the soldier from custody, and in doing so rendered an opinion which is of the greatest significance, though it seems to have fallen on deaf ears so far as the War Department and Congress are concerned. The court pointed out that a court-martial is a court exercising judicial functions, as much so as any other court of the United States; and after having further pointed out that the civil court had tried the soldier for an offense of which he had been previously acquitted by a court of the United States having competent jurisdiction (the court-martial), proceeded to say:

"It is attempted to meet this view by the suggestion that Grafton committed two distinct offenses—one against military law and discipline, the other against civil law which may prescribe the punishment for crimes against organized society by whomsoever those crimes are committed—and that a trial for either offense whatever its result, whether acquittal or conviction, and even if the first trial was in a court of competent jurisdiction, is no bar to a trial in another court of the same government for the same offense. We cannot assent to this view."

The court went on to say: "Congress by express Constitutional provision has the power to prescribe rules for the government and

[10] 206 U.S. 333 (1906), at p. 352.

regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being twice put in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter. If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States." And then the court took occasion to state that it based its decision that the soldier was entitled to this protection, not on the ground that an Article of War provides against second trials nor that the organic act of the Philippines contained a similar provision, but on the ground of constitutional requirement, saying: "But we rest our decision of this question upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or any other court, civil or military, of the same government."

Surely a court-martial may not perform its fundamental functions as a court of law without recognizing, and being compelled to recognize, those principles of civil jurisprudence designed to secure a fair trial.

The Code—The Articles of War—is, of course, a penal code; highly so. Being a penal code, according to every principle of Anglo-American jurisprudence the offenses denounced should be defined, the penalties provided made specific, and procedure should be established which should serve as a guide to the tribunal and a protection for the rights of the accused. This code, if such it can be called, does little or nothing more than permit the commander to do as he pleases. It is a "Do-as-you-please" code, out of deference to the power of military command. It prescribes little or no procedure. It contains forty-two punitive articles. The offense is defined in none of these, but is left to be taken care of by military custom. Twenty-nine of them prescribe that the offense denounced "shall be punished as a court-martial may direct." Under this authority the court-martial may award any punishment whatever except death, and for a minor military offense may, if they choose, sentence an offender to imprisonment for life. Eleven of the articles prescribe that the offenses therein defined "shall be punished by death or such other punishment as a court-martial may direct." For these offenses the court-martial may, in their discretion, award the sentence of death. And two articles make death mandatory. In time of war a court-martial may award any punishment it pleases other than death for any offense whatever, and for many offenses which in civil life would be regarded as meriting no serious punishment they may award the penalty of death. In time of peace Congress has authorized the President in such cases to fix

maximum limits of punishment, but, of course, not he, but the military men of the department really fix the penalties. Such a delegation of penal law-making power has little to commend it from any point of view.

Is it any wonder that sentences should have ranged over such a latitude in view of the fact that the courts have an unlimited discretion and power to award any punishment for any offense they please?

The military environment is not exactly congenial to justice. The militaristic mind is rather intolerant of those methods and processes necessary to justice. Justice is not a thing which can be left to nature unnurtured by man. Frequently it must be achieved through pain and toil. It is a high object of government, and government is required for its establishment. When resort is had to a trial, justice cannot be achieved unless the methods of the trial are themselves just. The procedure leading to the result and the result itself are essentially involved in justice, and if the procedure is wrong, so is likely to be the result. The one is no less important than the other. Neither the President nor any of his military subordinates should be permitted to prescribe those rules of procedure, including the rules of evidence, which govern the results in criminal prosecutions. To prescribe such procedure is not an executive function.

But the revision of 1916 expressly made it so. Three new substantive articles affecting military justice were introduced by the "revision of 1916," all of which were reactionary, still further subjecting judicial functions to military command. One of these (38th) authorized the President to prescribe the procedure, including modes of proof, in cases before courts-martial. This was enacted at the request of the military authorities and in deference to the military view which insists that military command should control the trial. It must also be remembered that while the statute in terms confers the power upon the President, as an administrative fact it is not the President who will exercise it, but the Chief of Staff and The Judge Advocate General of the Army,—ultra-military men. The President, then, has the power by express statutory delegation to prescribe modes of proof. Formerly, by the unwritten law military, courts-martial recognized, so far as they recognized any law, that they should apply the rules of evidence applied in the Federal criminal courts, that is to say, the common-law rules as modified by Congress. But the "revision of 1916" changed that and conferred the power to prescribe rules of evidence upon the President. This has operated as a license to courts-martial to follow their own views, or inquisitiveness, as to what evidence ought to be produced.

While the military mind is intolerant of protective principles and of rules governing a trial, it is particularly so of the rules of evidence. The professional officers of our Army in great numbers believed with

Napier, "that the business of courts-martial is not to discuss law, but to get at the truth by all the means in its power." Our officers, both in formal and in informal statements in support of our system of military justice, habitually drop into the very language used by that distinguished British officer who took the British Bar to task for its interference in court-martial matters and boldly declared: "We soldiers want to get at the fact (no matter how) for the sake of discipline. * * * There is no better witness against a man than himself."

That statement is axiomatic among our professional officers. They will hear of no qualifications nor can they see any evil consequences of the generous application of what is so good. It is the basis of military third-degree methods. It helps the investigating officer to impose his authority upon the unfortunate suspected man and enmesh him in words and conduct having no origin in fairness and truth. It is an excuse for the reception of incompetent confessions or for holding them to be without prejudicial effect. It justifies in a thousand instances that situation in which an accused, with incompetent counsel or none, is induced to take the stand and make out, for the benefit of the record at least, a case which the Government has failed to prove. Such an abandonment of established rules of evidence has resulted in many unjust convictions. Upon the observance of such rules depends the vital question of guilt or innocence. We may well be reminded of Warren's classic criticism of British courts-martial nearly four-score years ago, when he said:

"Our rules of evidence are the safeguards of every subject of your Majesty, high and low, rich and poor, young and old. Were those rules to be disregarded, anybody might at any time be found guilty of anything. They ought, of all others, to be kept inviolate; for the whole administration of justice depends upon them. They are, as I have this day seen observed in full force and eloquence, the result of the collective wisdom of generations and founded on the principles of immutable equity."[11]

This being a system that neither applies nor is governed by law, neither does it require or contemplate the services of judge or lawyer in the administration of its functions. Courts-martial consist of military men, untrained, of course, in the law, whose profession is not such as to render acute their sense of judicial appreciation. Nobody sits with them or over them with judicial competency to govern them in matters of law. As was once said by the distinguished British Barrister previously quoted:

"It would, indeed, seem as reasonable to expect fifteen military men capable of conducting satisfactorily a purely judicial investigation,

[11] "Letter to the Queen," p. 8.

dependent in every stage on the application of principles of a jurisprudence with which they cannot have become acquainted, as to imagine the fifteen judges of your Majesty's superior and common law courts at Westminster competent to form a correct opinion concerning critical military operations dependent upon pure strategical science."[12]

Errors committed in such trials by men ignorant of law are not likely to be untenable and idle according to any system of law. There are likely to be, indeed there are, ridiculous blunders with tragic consequences. Proceedings of courts-martial, consisting of unlettered men and having with them no judge of the law, and applying a code that, though penal, is not specific either in defining the offense, penalty or procedure, must be expected to be and frequently they are wrong from beginning to end; wrong in fact; wrong in law; wrong in the conduct of the inquiry; wrong in the findings; wrong in the "advice" given by compliant and impotent law officers, who recommend the approval of such proceedings; wrong in the ignorant confirmation of such proceedings; wrong in everything. And yet, of such errors there can be no review.

The system may well be said to be a lawless system. It is not a code of law; it is not buttressed in law, nor are correct legal conclusions its objective. The agencies applying it are not courts, their proceedings are not regulated by law, their findings are not judgments of law. The system sets up and recognizes no legal standard, and has no place for lawyers or judges. Whatever is done with the final approval of the convening commander is done finally beyond all earthly power of correction. Setting up no legal standard—in a word, being a system of autocracy and not law—it contemplates no errors of law and makes no provision for the detection and correction of errors that under the system can never occur. Accordingly, questions of law as such cannot arise, and such questions as do arise are presented to the commander for determination, not as questions of law to which he is bound to defer, but as questions to be disposed of by him finally and in accordance with his ideas, first, as to the requirements of discipline, and, secondly, of right and justice. The system, which is one of absolute penal government of every person subjected to military law, and which results in an almost incomprehensible number of courts-martial annually, is perhaps most remarkable in that is has no place for a lawyer. The military commander governs the trial from the moment of accusation to the execution of the sentence, and such law adviser as he may have on his staff is without authority or right to interpose. At every point the decision of the commanding general is final and beyond all review. All the legal reviewing machinery designed to "advise" commanders in the administration of justice is *extra-legal*, is

[12] *Supra*, note 11.

not established by law, much of it was created by me during the War, may be abolished at the pleasure of superior military authority (and doubtless will be). Such legal machinery does not function independently, but in strict subordination to the power of military command. The Judge Advocate General of the Army, his office, his department and all his functions, are by express provision of the statute made subject to the power of the Chief of Staff and the "decisions" of the Judge Advocate General and of every officer in his department, even upon questions of pure law, are subject to military "supervision."

Lawyers are used extra-legally and in an "advisory" way. Without recognized place or authority they, like other military men, are subjected to the power of military command. If there is a difference between the law-adviser and the military commander with absolute authority over the subject and, incidentally, over the personal fortunes of the "adviser" we know who will do the agreeing. Since, by statute, the Chief of Staff "supervises" the Judge Advocate General of the Army upon matters of pure military law, the "supervision" over the junior judge advocates may be expected to become imposition. So, we have recently heard some of these military minions of the law, after brief service under professional soldiers, say and affect to believe that notwithstanding the system is crude and the rules of evidence are ignored and counsel is obviously inadequate and "in a considerable percentage of the cases the decision is not sustained by the facts" of record, still they were convinced that no substantial injustice has been done. This shows, among other things, how the military relationship deflects legal judgment; how it imposes itself upon professional appreciations and obscures those first principles which are normally regarded as tenets of the faith and foundation stones of the temple of justice. The last man in the world to be expected to prefer his impression of moral guilt to guilt duly adjudged, his own judgment to the judgment of a court of law, his personal views upon insufficient investigation for the institutional results of established legal procedure—should be the lawyer. What does it mean for lawyers sitting in a judicial capacity to say: We find the soldier has not been well tried; we find that the rules of evidence were not observed in his case; we find that he had not the substantial right of assistance of counsel; we even find that the decision was not sustained by the facts of record; and yet, we are morally convinced that the accused was guilty, so let him be punished? That leads to something worse than injustice to the accused; it leads to anarchy. A lawyer breaks faith with his profession and his American citizenship when in the name of justice he can tolerate, much less advocate, such a state of things. Let us again pertinently quote Warren:

"It concerns the safety of all citizens alike, that legal guilt should be made the sole condition for legal punishment; for legal guilt, rightly

understood, is nothing but moral guilt ascertained according to those rules of trial which experience and reflection have combined to suggest, for the security of the state at large. * * * They (these fundamental principles of our law) have, nevertheless, been lost sight of and with a disastrous effect by the military authorities conducting, and supporting the validity of, the proceedings about to be brought before your Majesty."[13]

The system has resulted in many erroneous and unjust convictions. Surely we need not point out to a lawyer that clemency, even when generously granted, is a poor remedy in the case of a solider who should not have been convicted at all.

The vices of the present system, which Congress ought at once to remedy, may, as I see them, be summed up as follows:

1. Our code of military justice (technically known as the Articles of War, section 1342 of the Revised Statutes as amended), is thoroughly archaic. It is substantially the British code of 1774, which code was itself of much more ancient origin.

2. The so-called "revision of 1916" was but a verbal revision and made not a single systemic or substantial change; and such changes as were introduced but accentuated the vicious principles underlying the code.

3. Our code is a vicious anachronism among our institutions, coming to us, as it did, out of an age and a system of government which we properly regard as intolerable.

4. It came to us through a witless adoption, and our interests in, appreciation of, and attitude toward, military matters have never been such as to lead to any systemic change or to any thorough congressional investigation or other fair inquiry into its utter inadaptability to our conditions.

5. The hearings held upon the "revision of 1916" demonstrate that committees of Congress are not well advised when, in investigating military matters of this kind that involve the citizen and his rights when he becomes a soldier, they confine their sources of information to the War Department and the Army.

6. Missing. [ed.].

7. This code is in equally sharp conflict with any adequate military policy that is consistent with the principles of this Government. In my judgment an army of citizens can never again be subjected to such an ill-suited system.

8. The code is not a code of law; it is not buttressed in law, nor are legal conclusions its objective. The courts applying it are only agencies of military command, not courts of law; their proceedings are not regulated by law; their findings are not judgments of law.

[13] *Supra*, note 11, at p. 9.

9. Setting up and recognizing no legal standards, no lawyers, no judges—in a word, being lawless—it contemplates no errors of law and makes no provisions for their detection or correction.

10. Military autocracy is the frankly expressed fundamental theory of our code. By it our soldiery is governed not by law but by the unregulated will of a military commander. It is, in its entirety, a government by man and not by law. No finer example of such is to be found in any modern government.

11. By the adoption of this code Congress abdicated its constitutional prerogative to make the rules for the discipline of the Army, has authorized military command to make those rules and to do as it pleases in applying them, restrained by no law, no judge.

12. The Judge Advocate General of the Army and his office, the head of the Bureau of Military Justice, the only lawyer and the only legal establishment contemplated in the system, are by the laws of Congress made expressly subject to the "supervision" and control of the highest military authority, the Chief of Staff of the Army.

13. The result has been, as when men are subjected to the power of other men unregulated by law the result must ever be, a large measure of oppression, gross injustice, and discipline through terrorization.

14. Notwithstanding the tenacious adherence of our War Department to the existing system, it may be well for us to remember that even in times past it has been the subject of criticism of those of our most distinguished soldiers who have studied it—among whom may be mentioned Sherman, Fry and Lee and other Confederate leaders—to the effect that it is a system unsuited to our citizen armies.

THE BEGINNINGS: LANGLEY ON THE 1951 CODE

Herbert Butterfield, Frederick Bernays Wiener and others have prudently cautioned against reading history backwards. This admonition is particularly well-chosen in the case of the history of criminal law because no other branch of law is so sensitive to the changing values of a society. Civilian and military cases from early periods may horrify the reader of today who is conditioned by legal developments since 1960.

There was, however, a major event in military criminal law immediately preceding the civilian criminal law revolution, the passage of the Uniform Code of Military Justice which entered into effect on May 5, 1951. Much of what follows in this compendium is concerned with assessing the impact of the new basic law, but there is a place here for a contemporary statement.

The author foresees and discusses both the constitutional and institutional implications of the new statute. He anticipates the course of rulings on the right to counsel, the right against self-incrimination and other due process considerations. His predictions about how federal courts would expand the scope of their review of military cases and how the newly-created United States Court of Military Appeals would enter the legal structure were, perhaps, insufficiently heeded. The article concludes with fair comment on the problems of administration of criminal law in both civilian and military systems, and an admonition to the military to begin to police its own precincts.[1]

[1] There is a wealth of general comments on the 1951 Code. Comments by the Chairman of the drafting Committee appear as Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953), *reprinted in* 28 MIL. L. REV. 17 (1965). Professor Morgan's article was part of a valuable Symposium on military law. Other Symposia have been presented in 22 HASTINGS L. REV. 201 (1971), 10 AM. CRIM. L. REV. 1 (1971), and 49 IND. L.J. 539 (1974).

MILITARY JUSTICE AND THE CONSTITUTION—IMPROVEMENTS OFFERED BY THE NEW UNIFORM CODE OF MILITARY JUSTICE†

*Ernest L. Langley**

It is a basic tenet of American constitutional-criminal law that even the most patently guilty person may be so adjudged only in a proceeding where he is accorded all the rights, privileges, and immunities guaranteed to him by the Constitution.[1] To deny to an accused any of his constitutional rights is to deprive him of due process of law, and his conviction cannot stand. In case after case reaching appellate courts, the principal contention of the appellant is that his conviction was illegal because obtained in a proceeding where one or more constitutional safeguards were ignored. Of recent years many of these cases have been attacks on the validity of convictions by military courts-martial. As is generally true with any cross-section of cases urging constitutional questions, many of these attacks have been predicated on relatively insubstantial grounds.[2] Other cases, however, have pressed arguments of great force and have raised questions which demand most serious consideration.

The problem of providing a sound system of military justice is today more important than ever before. The large number of citizens called to arms during World War II magnified the problems inherent in the system as it has existed. During this period more trials were held and more persons were directly or indirectly concerned with the administration of military justice than at any previous time in our history. The Gray and Doolittle Committees, the 1948 revision of the

*Member of the Texas Bar. B.A., 1946, Texas Technical College; J.D., 1951, University of Texas. When this article was written the author was Editor-in-Chief of the *Texas Law Review*.

[1]Lisenba v. California, 314 U.S. 219 (1941); Brown v. Mississippi, 297 U.S. 278 (1936); Mooney v. Holohan, 294 U.S. 103 (1935); Powell v. Alabama, 287 U.S. 45 (1932).

[2]See, *e.g.*, Waite v. Overlade, 164 F.2d 722 (7th Cir. 1948), *cert. denied*, 334 U.S. 812 (1948); McClellan v. Humphrey, 83 F. Supp. 510 (M.D. Pa. 1949); Adams v. Hiatt, 79 F. Supp. 433 (M.D. Pa. 1948), *appeal dism'd*, 173 F.2d 896 (3d Cir. 1949).

Articles of War, and the adoption of the Uniform Code of Military Justice in 1950, were all outgrowths of the public feeling engendered by the military trials of World War II. Another consideration of pressing importance is the present augmentation of the armed forces in the face of the current world crisis. Still another factor impelling the military services to put their judicial house in order is the recognition that one objection to the enactment of a system of universal military training will be removed if the general public is made to feel that young trainees will receive fair treatment at the hands of the military authorities.

What are those aspects of the military justice system with regard to which constitutional questions have been or may be raised? It should be recognized that problems other than that of deprivation of constitutional rights may be involved. For example, Congress often provides more protection for an accused than the Constitution demands; or a person may be generally considered not within the ambit of the constitutional provisions yet he may be extended the same protection by statute. The deprivation of rights of these latter types may be considered a deprivation of "statutory due process." Such problems as these will be noted herein. Particular emphasis will be placed upon whether or not improvement in the operation of the system is to be expected when the new Uniform Code of Military Justice becomes operative in May, 1951.[3] The cases to be examined will be largely cases arising out of army and air force courts-martial during World War II, since these are far more numerous than cases from the naval courts. Likewise, since the Uniform Code is essentially a revision of the army's Articles of War, statutory comparisons and contrasts will be limited to those of the Uniform Code and the Articles of War.[4]

I. THE CONSTITUTIONAL BASIS FOR MILITARY JUSTICE

The power of Congress to establish a judicial system within the armed forces which is entirely separate from the civil judiciary has long been accepted as a power necessarily inherent in the provisions of Article I, Section 8, of the Constitution.[5] Although one basis for this

[3] Pub. L. No. 506, 81st Cong., 2d Sess. c. 169 (May 5, 1950). This revision of the statutory provisions for military justice substance and procedure will hereafter be referred to in the text as the Uniform Code, and will be cited U.C.M.J.

[4] The present system of military justice in the navy is prescribed in the Articles for the Government of the Navy. REV. STAT. § 1624 (1875), as amended, 34 U.S.C. § 1200 (Supp. 1950). Since its organization as a separate service, the air force has continued to use the army Articles of War. 10 U.S.C. §§ 1472-1593 (Supp. 1950).

[5] Carter v. Roberts, 177 U.S. 496 (1900); *Ex parte* Foley, 243 Fed. 470 (W.D. Ky. 1917). This power is said to spring from the following clauses of Art. I, § 8: "Section 8. The Congress shall have Power . . . [9] To constitute Tribunals inferior to the supreme Court . . . [11] To declare War . . . [12] To raise and support Armies . . . [14] To make Rules for the Government and

power has been said to be found in clause 9 of Article I, Section 8,[6] dealing with the power to constitute inferior tribunals, nevertheless it is accepted that the power to constitute military tribunals has no basis in the judiciary article, Article III.[7] Thus, the system of military tribunals is entirely separate from the civil judiciary, and the rules laid down for the latter do not apply to the former unless specifically so provided.[8] This concept of the independent military judiciary has been the basis for much of the feeling that military trials are basically unfair in their lack of provision for full review. This idea will be dealt with in more detail later.

II. CONSTITUTIONAL GUARANTEES IN MILITARY TRIALS

The safeguards that the Constitution provides for the accused in a criminal trial have been substantially defined by numerous court decisions, and there are few open questions in this field insofar as trials in the civilian courts are concerned. The same cannot be said, however, for military trials. Although many questions in this area have now come to be settled, there has been much controversy throughout our history as to which provisions of the Constitution relate to the military and which are concerned only with civilian trials. The Constitution is explicit in only one place with regard to the rights of an accused in a military trial, *viz.*, the requirement of indictment or presentment by a grand jury in cases of "capital or otherwise infamous" crimes specifically excepts cases arising in the land or naval forces,[9]

The controversy seems to stem largely from the generality of the war power.[10] An analogy may be drawn to the so-called police powers

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Regulation of the land and naval Forces . . . [16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States . . . the Authority of training the Militia according to the discipline prescribed by Congress . . . "

It may also be said that the provision of the Fifth Amendment excepting "cases arising in the land and naval forces" from the requirement of presentment or indictment by a grand jury is an inferential recognition of a separate judiciary system for the military forces.

[6] *Ex parte* Foley, *supra* note 5.

[7] *Ex parte* Quirin, 317 U.S. 1 (1942); Altmayer v. Sanford, 148 F.2d 161 (5th Cir. 1945); *Ex parte* Potens, 63 F. Supp. 582 (E.D. Wis. 1945).

[8] The provision of U.S. CONST. Art. III, § 1, that judges shall hold office during good behavior has never been deemed applicable to military courts. Thus, the provision in U.C.M.J. art. 67(a)(1) for the establishment of a court of military appeals states that the terms of the judges thereof shall be fifteen years, although in other respects this court is roughly equivalent to a United States court of appeals.

Nor is the provision of Art. III, § 2, that the trial of all crimes, except in cases of impeachment, shall be by jury, deemed applicable to military courts. De War v. Hunter, 170 F.2d 993 (10th Cir. 1948); *Ex parte* Benton, 63 F. Supp. 808 (N.D. Cal. 1945).

[9] U.S. CONST. AMEND. V.

[10] U.S. CONST. Art. I, § 8.

of the state, which, although not specifically set out in the Constitution, are said to be the powers "to prescribe regulations to promote the health, peace, morals, education, and good order of the people,"[11] or the "powers of a government inherent in every sovereignty to the extent of its dominions."[12] Just as controversy often arises as to the extent to which these vague powers may override the precepts of due process[13] or freedom of speech,[14] so too, controversy stems from the question of whether there is inherent within the powers to "raise and support Armies"[15] or to "declare War"[16] the power to place the interests of the service and the need for command discipline above the rights which the soldier would have in civilian life.

The principal constitutional guarantees which the accused in a criminal trial has are to be found in the Fifth and Sixth Amendments.[17] These guarantees are: (Fifth Amendment) no trial without presentment or indictment by a grand jury (except in the military forces), no double jeopardy, freedom from self-incrimination, the right to due process of law; and (Sixth Amendment) the right to a speedy and public trial, the right to trial by jury, the right to be informed of the nature of the charge against him, confrontation with the witnesses against him, compulsory process for defense witnesses, and the right to the assistance of counsel. There are, of course, other guarantees provided by the Constitution, some of which may or may not be involved in a criminal trial. Thus, the search and seizure clause of the Fourth Amendment[18] may be involved when evidence sought to be introduced was obtained illegally. The Seventh Amendment proscribes excessive bail and fines, and cruel and unusual punishments.[19] A further safeguard of personal liberty is found in Article I, Section 9, which provides that the privilege of the writ of habeas corpus shall not be suspended except when made necessary by rebellion or invasion.

Which, then, of these enumerated safeguards and guarantees are applicable to the accused in a military trial? There would seem to be no clear-cut answer to this question, and little of logic in some of the answers which may be found. Since the Constitution is explicit in excepting military trials from the requirement of presentment or indictment by a grand jury and makes no mention that such trials shall be considered different from civil trials in any other particulars, it

[11] Barbier v. Connolly, 113 U.S. 27, 31 (1885).
[12] License Cases, 5 How. 504, 583 (U.S. 1847).
[13] Miller v. Schoene, 276 U.S. 272 (1928).
[14] Gitlow v. New York, 268 U.S. 652 (1925).
[15] U.S. CONST. Art. I, § 8, cl. 12.
[16] U.S. CONST. Art. I, § 8, cl. 11.
[17] U.S. CONST. AMENDS. V, VI.
[18] U.S. CONST. AMEND. IV.
[19] U.S. CONST. AMEND. VII.

would seem to follow that a person should lose none of his other constitutional rights when he enters the armed forces. Yet this is not the case.[20] For example, it is clear that there is no right to a trial by jury in military courts,[21] although there is no explicit basis for such a position except that courts-martial without juries were an accepted feature of military life at the time of the adoption of the Constitution.[22]

A. *FOURTH AMENDMENT*

One of the few cases which deal with the applicability of the Fourth Amendment to trials by court-martial is *Romero v. Squier*.[23] The court there assumed that the Fourth Amendment prohibits unreasonable searches and seizures with regard to military personnel, and stated that the Government did not contend that the Amendment confers no rights on the accused in a court-martial proceeding. The court found no violation of the Amendment, however, and the importance of the case is not so much its holding as the manner in which it was assumed to be obvious without citation of authority that the Fourth Amendment is applicable to trials by courts-martial.

The Uniform Code makes no specific ruling on this question except that in Article 36 the power is conferred on the president to prescribe rules of procedure, including modes of proof, which shall "so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which shall not be contrary to or incon-

[20] However, one case has indicated that no rights other than that of indictment should be considered inapplicable to the military. Sanford v. Robbins, 115 F.2d 435 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941). Regardless of whether or not the Constitution guarantees these rights to the accused in a trial by court-martial, Congress has seen fit to grant most of them in such cases. See U.C.M.J. arts. 27, 30(b), 31, 32(b), 35, 44, 46, 55. *But cf.* U.C.M.J. art. 49(a), (d), (f), providing for evidence by deposition, depriving the accused of the right to confrontation with the witnesses against him except insofar as he may be represented in the taking of the deposition (see the last sentence of subsection (a) of Article 49).

For an exhaustive statement of the rights of an accused in a court-martial as they existed under the Articles of War before the 1948 amendments, see Armstrong, *Protection of the Accused's Rights in Courts-Martial*, 16 Miss. L.J. 175 (1944). This article was written by an army officer, and presents an over-idealized picture since the statute must necessarily be administered largely by military personnel not possessed of legal training, many of whom are more interested in discipline than in justice.

[21] *Ex parte* Quirin, 317 U.S. 1 (1942); De War v. Hunter, 170 F.2d 993 (10th Cir. 1948); *Ex parte* Benton, 63 F. Supp. 808 (N.D. Cal. 1945).

[22] See *Ex parte* Quirin, 317 U.S. 1, 39 (1942): "Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the judiciary Article . . . and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures. As this Court has often recognized, it was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial."

[23] 133 F.2d 528 (9th Cir. 1943), *cert. denied*, 318 U.S. 785 (1943).

sistent with this code."[24] The regulations made by the president with regard to illegally obtained evidence are set out in Paragraph 152 of the 1951 *Manual for Courts-Martial*.[25] The rules follow the pattern prescribed by the United States Supreme Court for trials in the federal district courts. Thus, evidence obtained as a result of an unlawful search of the property of the accused conducted or instigated by persons acting under authority of the United States is not admissible.[26] Likewise inadmissible is evidence obtained in violation of Section 605 of the Communications Act of 1934—so-called "wire tapping" evidence.[27] Further, evidence otherwise admissible which is obtained through information supplied by such illegally obtained evidence is inadmissible.[28] Since the military courts have no authority to return the seized property to the accused if he demands it, or to impound it to suppress its use as evidence, an objection to its use as evidence is timely if made at the time it is attempted to be introduced at the trial.[29] It should be noted, however, that search of property owned or controlled by the United States, or located in a foreign country or occupied country or occupied territory and occupied or used by persons subject to military law, need only be authorized by the local commander in order to make evidence obtained thereby competent.[30]

B. FIFTH AMENDMENT

As has been previously stated,[31] there is no right to a trial by jury in courts-martial. The argument that the court-martial is both judge and jury is not sound.[32] The "rose by any other name" argument is not valid here since the members of the court are arbiters of the law as well as triers of fact. The provisions of the Uniform Code, however, increase the resemblance of a court-martial to a judge and jury. Under

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[24] U.C.M.J. art. 36(a).

[25] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 152 (1951). This manual appears in its entirety in 16 FED. REG. 1303–1469 (1951).

[26] Weeks v. United States, 232 U.S. 383 (1914).

[27] 48 STAT. 1103 (1934). 47 U.S.C. 605 (1946); Nardone v. United States, 302 U.S. 379 (1937).

[28] Nardone v. United States, 308 U.S. 338 (1939).

[29] See Agnello v. United States, 269 U.S. 20 (1925).

[30] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 152 (1951).

[31] See text at note call 21, and see note 8 *supra*.

[32] By no reasonable analogy could a one-man summary court be compared with a judge and jury. But of course there is an analogy between summary courts-martial and the non-jury trial of petty offenses in the civilian courts. It may, of course, be further argued that under the Uniform Code the occasion will be rare when a person can be tried by summary court-martial if he objects, and that an analogy may be drawn between waiver of jury trial in the civil courts and trial by summary court-martial. See U.C.M.J. art. 20, providing that no person shall be tried by summary court-martial over his objection unless such trial is had in lieu of "company punishment" under Article 15, when the accused has elected to refuse such non-judicial punishment and has demanded trial by court-martial instead.

the new procedure, the law officer of a general court-martial bears a great resemblance to the judge in a civil court. He rules on interlocutory questions[33] instructs the courts on the elements of the offense, the presumption of innocence, the requirement of proof beyond a reasonable doubt, and the burden of proof,[34] and the court votes on its findings without the advice, vote, or presence of the law officer.[35] As has also been observed, the requirement of presentment or indictment by a grand jury specifically exempts cases arising in the land or naval forces, and no discussion seems necessary on this point.

With regard to those provisions of the Fifth Amendment other than trial by jury, however, the same unanimity of agreement is not found. Judge Frank, speaking for the second circuit, said simply: "The Fifth and Sixth Amendments are, of course, inapplicable to a court-martial."[36] Other courts have been equally certain that the provisions of both the Fifth and Sixth Amendments are applicable to military trials.[37] Regardless of language to the contrary in some cases, it seems clear that at least some provisions of these two Amendments are generally deemed applicable to court-martial trials. Certainly the reasoning of such a position is more tenable than that of the cases which deprive a person of the protection of the Constitution at a time when he has taken up arms to defend it.[38]

Such statements as that of Judge Frank above quoted may be taken to mean only that there is no blanket application of the Amendments to court-martial proceedings. If this is their meaning, the position taken is tenable but not well-stated. Such categorical statements should not be used unless they are intended to mean what they say, and if the position of the federal civil courts is to be that the Amendments are not applicable to military trials, it should be clearly so stated by the Supreme Court. To date this has not been the position of the Supreme Court.[39] Further, such a position should not be adopted.

[33] U.C.M.J. art. 51(b).

[34] U.C.M.J. art. 51(c).

[35] U.C.M.J. art. 26(b).

[36] United States *ex rel.* Innes v. Crystal, 131 F.2d 576, 577 n.2 (2d Cir. 1943). Judge Frank cited as authority for this statement, *Ex parte* Quirin, 317 U.S. 1 (1942), which contains broad language to this effect. *Id.* at 40. However the question in the *Quirin* case concerned only the right of enemy spies being tried before a military commission to a jury trial, and the broad language, which was not necessary to the decision of that case, is not generally followed by the inferior federal courts. See, *e.g.*, Romero v. Squier, 133 F.2d 528 (9th Cir. 1943), *cert. denied*, 318 U.S. 785 (1943). And the military establishment does not presume that it can conduct its trials without regard to the provisions of the Fifth and Sixth Amendments. See note 20 *supra*.

[37] De War v. Hunter, 170 F.2d 993 (10th Cir. 1948) (due process clause, Fifth Amendment); United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944) (same); Romero v. Squier, 133 F.2d 528 (9th Cir. 1943), *cert. denied*, 318 U.S. 785 (1943) (right to counsel, Sixth Amendment); Sanford v. Robbins, 115 F.2d 435 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941) (double jeopardy clause, Fifth Amendment).

[38] See United States *ex rel.* Innes v. Hiatt, 141 F.2d 664, 666 (3d Cir. 1944).

[39] See Wade v. Hunter, 336 U.S. 684 (1949), where the Court's decision assumed the applicability of the Fifth Amendment.

The exigencies of combat and the necessity for command discipline may demand that grand and petit juries be dispensed with, but there is no compelling reason to deny to military personnel the fundamental rights guaranteed to all persons alike by the Constitution.

The "double jeopardy" clause of the Fifth Amendment has clearly been deemed applicable to the military on numerous occasions.[40] The question which has been the sharpest thorn in the side of the courts in this area is not that of the applicability of the theory to military trials, but is the question of when jeopardy attaches. The traditional view of the military establishment has been that jeopardy does not attach until *the trial is complete and the sentence has been reviewed* and confirmed by the highest authority provided for in the review system. Thus, if the reviewing or confirming authority saw fit to "reverse" the court-martial and order a new trial, no question of double jeopardy was thought to arise. The analogy drawn was to a civilian trial where an appellate court reverses and remands.

The analogy, of course, is not sound. The conviction of a civilian offender is not reviewed except on the appeal of the offender himself, while all convictions by courts-martial are reviewed. Thus, the convicted soldier who knows himself to be guilty and considers himself fortunate to have gotten a light sentence may find that his case has been reversed and that he faces a new trial. Since Article of War 50½ was added in 1920,[41] it has been provided that on the so-called "rehearing"—actually a complete new trial before an entirely new court—the accused shall not be tried for any offense of which he was found not guilty by the first court, nor shall a sentence in excess of or more severe than the original sentence be enforced unless the sentence be based on a finding of guilty of an offense not considered upon the merits in the original proceeding.[42] This safeguard against a rehearing more onerous to the accused may be sufficient to prevent an attack on the ground of double jeopardy, but the last portion of the provision allowing the consideration of an offense not previously considered on

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[40] *E.g.*, Wade v. Hunter, *supra* note 39; Sanford v. Robbins, 115 F.2d 435 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941).

[41] A.W. 50½, 41 STAT. 799 (1920), as amended, 10 U.S.C. § 1522 (1946), *repealed*, 62 STAT. 638 (1948), 10 U.S.C. § 1522 (Supp. 1950). In Sanford v. Robbins, *supra* note 40, the petitioner was seeking release on habeas corpus from a 1919 court-martial conviction. He had previously been sentenced to death, but the president had ordered a new trial because of the feeling of a board of review that the trial had been unfairly conducted. On the second trial a life sentence was imposed. It was the opinion of the circuit court in 1940 that this procedure was not illegal, even though not specifically authorized (A.W. 50½ was not enacted until the year following this conviction), since it was not expressly prohibited by the Articles of War. According to the court, *it was the general practice prior to this particular case in 1919 for the reviewing or confirming* authorities to grant a new trial only at the request of the accused. The court held, however, that even if the consent of the accused was necessary before a new trial could be had, consent would be presumed when the sentence in the first trial was death.

[42] A.W. 50½, note 41 *supra*; A.W. 52, 62 STAT. 638 (1948), 10 U.S.C. § 1524 (Supp. 1950).

the merits would seem to be basically unfair to an accused who did not ask for a review of his conviction. This provision of the Articles of War is continued in the Uniform Code,[43] and the additional proviso is made that the new sentence can be more severe than the first if the sentence for the offense is mandatory.

It is not likely that a successful attack could be made on this method of review on constitutional grounds. As will be seen later, a civil court will review a court-martial conviction only in a habeas corpus proceeding, and then only on questions of jurisdiction or the legality of the sentence imposed.[44] Since Congress has given the express power to impose the second sentence, its legality is not subject to question, and there seems to be no tenable basis for urging, as it has been urged,[45] that the procedure followed so deprived the accused of his fundamental rights as to divest the court of jurisdiction over him. It is well-settled that due process in military trials consists of the military law,[46] and the military law here is plain: It is clear that no jeopardy attaches so as to prevent a rehearing until the highest reviewing authority in the military justice system has confirmed the sentence and its execution is ordered, regardless of whether or not the accused is satisfied with his first trial. Thus it is easily seen that any commander can override a court-martial which seeks to extend clemency to the accused through failure to consider some part of the charges preferred. He can continue to send the case back until some court convicts the accused on all of the charges, unless, of course, a court returns a finding of not guilty on the charge in question.

Another facet of the question of when jeopardy attaches was recently before the Supreme Court of the United States. In *Wade v. Hunter*,[47] the accused had been placed on trial in a divisional general court-martial, but the trial was continued at the instance of the court in order to give the prosecution an opportunity to secure additional evidence desired by the court.[48] Before the trial was resumed, the

[43] U.C.M.J. art. 63(b).

[44] Schita v. Cox, 139 F.2d 971 (8th Cir. 1944), *cert. denied*, 322 U.S. 761 (1944), *rehearing denied*, 323 U.S. 810 (1944). But see note 72 *infra*. For a discussion of the writ of habeas corpus as a means of attacking illegal courts-martial convictions, see Comment, Antieau, *Habeas Corpus Relief from Courts-Martial Convictions*, 28 TEXAS LAW REVIEW 556 (1950).

[45] See, *e.g.*, Shapiro v. United States, 69 F. Supp. 205 (Ct.Cl. 1947).

[46] United States *ex rel.* Creary v. Weeks, 259 U.S. 336 (1922).

[47] 336 U.S. 684 (1949).

[48] This procedure is authorized by the *Manual for Courts-Martial*: "The court is not obliged to content itself with the evidence adduced by the parties. When such evidence appears to be insufficient for a proper determination of the matter before it, or when not satisfied that it has received all available admissible evidence on an issue before it, the court may take appropriate action with a view to obtaining available additional evidence. The court may, for instance, require the trial counsel to recall a witness, to summon new witnesses, or to make an investigation along certain lines with a view to discovering and producing additional evidence." MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 54b(1951). The opportunity for problems of double jeopardy to arise under this procedure is plain.

division moved from the locality because of the combat situation, and the appointing authority withdrew the charges from the court and sent them to army headquarters, where a second trial was held in which conviction resulted. The question before the Supreme Court was whether or not jeopardy had attached in the abortive first trial, and it was held that it had not attached. The long-established position of the War Department that jeopardy does not attach until the conviction is confirmed was not affirmed, however, since the question of the validity of a rehearing was not presented, and since the basis for the decision was the supposed necessity for the transfer of the trial posed by the exigencies of combat. The result of *Wade* v. *Hunter* seems to be that the military establishment is now virtually its own judge of when the military situation demands the interruption of a trial.

The next provision of the Fifth Amendment to be considered is that against compulsory self-incrimination. The Articles of War[49] and the Uniform Code[50] both provide that no witness shall be compelled to incriminate himself. The Manual for Courts-Martial concedes that the protection of the Fifth Amendment in this respect extends to witnesses in trials by courts-martial.[51] But the important consideration is not the provisions of the statute but is the remedy available to the accused who has been convicted by his own testimony, and who now complains that such testimony was coerced from him or that it was given at a time when he had not been apprised of his right to remain silent. If the reviewing authorities fail to correct the error by ordering a new trial, the only available remedy is, of course, habeas corpus. In general, the courts have agreed that admission of evidence incompetent because it was taken in violation of the privilege against self-incrimination will not operate to deprive the court-martial of jurisdiction over the accused.[52] The result is that an accused has no real protection under the Constitution from being compelled to incriminate himself if the military review fails to accord him his rights.

When the Articles of War were amended in 1948, a provision was added to Article 24 making it "conduct to the prejudice of good order and military discipline," and thus punishable under Article of War 96.

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[49] A.W. 24, 62 STAT. 631 (1948), 10 U.S.C. § 1495 (Supp. 1950).

[50] U.C.M.J. art. 31.

[51] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 150b (1951).

[52] *Exparte* Steele, 79 F. Supp. 428 (M.D. Pa. 1948). See also Hayes v. Hunter, 83 F. Supp. 940 (D. Kan. 1948). *Cf.* Brown v. Sanford, 170 F.2d 344, 345 (5th Cir. 1948); Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946), 24 TEXAS LAW REVIEW 503, where a false statement made by the accused to the military police corporal who first questioned him was used to impeach him on cross-examination. The accused convinced the district court that he had made this statement because of the corporal's representation that whatever he (the accused) said might help him but would not be used against him. The district court considered this one of the factors in the pre-trial and trial procedure which combined to deprive the accused of so many of his basic rights as to divest the court-martial of jurisdiction over him. It is questionable whether or not this one error alone would have entitled the accused to release by habeas corpus.

to use coercion or unlawful influence to obtain a statement, admission, or confession from any accused or witness. It was further provided that any statement, admission, or confession so illegally obtained should not be received in evidence in any court-martial.[53] It was also made the duty of any person taking a statement from an accused to advise him that he need make no statement at all, and that any statement made would be used as evidence against him. These amendments provide all the safeguards reasonably necessary to the protection of the accused, and as long as they are observed by the military no constitutional questions should arise. The shortcoming of these provisions is, of course, that there may be no remedy beyond the military review.[54]

The Uniform Code dispenses with the provision specifically making it an offense to coerce a statement from a witness, although the Code does specifically forbid the practice and it is clear that such conduct would be punishable under the general article.[55] The necessity of warning the witness of his rights and the forbidding of the use of such statements as evidence are retained. The real improvement under the Uniform Code, however, is the provision for the independent Court of Military Appeals, to be discussed later, which may be expected to protect this constitutional right of military personnel in those cases which reach this court.

The last clause of the Fifth Amendment deemed pertinent to this discussion is the due process clause. This is the one constitutional provision most often invoked, and with the most success, by petitioners for habeas corpus relief from court-martial convictions. It seems beyond question that this constitutional safeguard is considered applicable to military trials.[56] Speaking of the Fifth Amendment, and more particularly of the double jeopardy clause, the court said in *Sanford v. Robbins*:[57]

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[53] U.C.M.J. art. 31(d).

[54] It has been argued that the amended A.W. 24 (and thus, by logical extension, U.C.M.J. art. 31) will operate to make the use of coerced confessions as evidence a constitutional matter. See Comment, Antieau, *supra*, note 44. This is a sound position. Disregard of this provision of the military law should be deemed a deprivation of due process of (military) law. Whether or not such deprivation would be deemed serious enough to be jurisdictional for purposes of habeas corpus relief, it would clearly seem to be cognizable by the presumably fair, civilian-manned court of military appeals within the military justice system under the Uniform Code. See text following note call 89.

[55] U.C.M.J. art. 98 makes it an offense knowingly to fail ". . . to enforce or comply with any provision of the code regulating the proceedings before, during, or after trial of an accused. . . ."

[56] United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); Sanford v. Robbins, 115 F.2d 435 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941); Brees v. Hunter, 75 F. Supp. 825 (D. Kan. 1948); Shapiro v. United States, 69 F. Supp. 205 (Ct.Cl. 1947). *But cf. Ex parte* Quirin, 317 U.S. 1 (1942); United States *ex rel.* Innes v. Crystal, 131 F.2d 576 (2d Cir. 1943), *cert. denied*, 319 U.S. 755 (1943), *rehearing denied*, 319 U.S. 783 (1943).

[57] 115 F.2d 435, 438 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941).

> We have no doubt that the provision of the Fifth Amendment, 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,' is applicable to courts martial. The immediately preceding exception of 'cases arising in the land or naval forces' from the requirement of an indictment, abundantly shows that such cases were in contemplation but not excepted from the other provisions.

The United States Court of Appeals for the Third Circuit had no doubt that the due process clause was applicable to courts-martial:

> We think that this basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court. An individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the nation's armed forces and has taken the oath to support that Constitution with his life, if need be. The guarantee of the fifth amendment that 'no person shall * * * be deprived of life, liberty, or property, without due process of law,' makes no exceptions in the case of persons who are in the armed forces. The fact that the framers of the amendment did specifically except such persons from the guarantee of the right to a presentment or indictment by a grand jury which is contained in the earlier part of the amendment makes it even clearer that persons in the armed forces were intended to have the benefit of the due process clause.[58]

With regard to military personnel, due process has not the same meaning that it has for civilians. That is, to those in the military service, the military law is due process of law.[59] Thus, there is no need

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[58] United States *ex rel.* Innes v. Hiatt, 141 F.2d 664, 666 (3d Cir. 1944). *Ex parte* Quirin, 317 U.S. 1 (1942), which has been said to be authority for the proposition that the Fifth and Sixth Amendments are not applicable to trials by courts-martial [see United States *ex rel.* Innes v. Crystal, 131 F.2d 576, 577 n.2 (2d Cir. 1943), *cert. denied*, 319 U.S. 755 (1943), *rehearing denied*, 319 U.S. 783 (1943)] is not authority for such a view. The *Quirin* case involved enemy spies, not American soldiers; the trial was before a military commission, not a court-martial; and the question before the Court concerned the right to indictment by a grand jury and trial by jury, and not the general question of the basic applicability of these Amendments to military trials. See note 36 *supra*.

[59] United States *ex rel.* Creary v. Weeks, 259 U.S. 336 (1922); De War v. Hunter, 170 F.2d 993 (10th Cir. 1948); United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); *Ex parte* Benton, 63 F. Supp. 808 (N.D. Cal. 1945).

It follows, therefore, that the failure of a court-martial to extend to an accused any of the rights given to him by the Uniform Code, or other statutes having to do with military personnel, would be a deprivation of due process. See note 54 *supra*. It has been contended that the statutory military law is, in some respects, so vague as to be unconstitutional. See Comment, Anticau, *supra* note 44, at 557. Professor Anticau refers, of course, to the general punitive articles, such as U.C.M.J. art. 134, making punishable ". . . all disorders and neglects to the prejudice of good order and discipline in the armed forces. . . ." The validity of this type of article has been successfully challenged with regard to a non-military offense. *Ex parte* Mulvaney, 82 F. Supp. 743 (D. Hawaii 1949) (rape by navy man; not an offense made cognizable in navy courts under a specific punitive article as it was in army courts). However, as the *Mulvaney* case suggests, when these vague articles are limited to "undefined but readily accepted offenses which have a military significance," there is not the same doubt as to their validity. The military has its own "common

for a jury in military trials,[60] and it is not necessary that appellate review be given to convictions by courts-martial other than that provided within the military establishment.[61] The generally recognized effect of the due process clause on military trials is that of requiring that such trials must apply the military law in a "fundamentally fair way,"[62] or that the soldier must have the same fair and impartial trial in the court-martial that he would have in a civilian court.[63] Thus, it is easily seen that the due process clause in military as well as civil trials is a "catch-all" clause, in which almost any fundamental error can be placed. There can be a deprivation of due process if the accused is not given the assistance of competent counsel,[64] or if the inadequacy of the pre-trial investigation deprives him of the opportunity to prepare his defense,[65] or if he is not given adequate time in which to prepare his defense.[66]

The importance of the due process clause lies in the manner in which it has recently come to be used by the courts to broaden the scope of civil review of convictions by courts-martial. It is well settled that the civilian courts cannot review the judgments of military courts on appeal and that habeas corpus is the only proper method of attacking a conviction by court-martial.[67] The only proper subjects of inquiry in such a habeas corpus review are whether or not the court-martial had jurisdiction over the person and the offense, and the power of the court to adjudge the sentence imposed. Since the latter is a simple matter, and may be presumed to be properly reviewed by the military authorities in almost every case, the important question is usually that of jurisdiction. More particularly, the question usually is: "Did the court-martial, by depriving the accused of his basic constitutional rights, lose jurisdiction over his person?"

By posing this question, and often answering it in the affirmative, the civilian courts have been enabled to broaden the scope of their review of military trials. This procedure is in line with a recent trend in civilian cases deemed necessary because of the fact that habeas corpus often may be the only available means of preserving the basic rights of a person who has been unfairly convicted.[68] One of the most

law," which should serve to uphold convictions under these articles based on purely military offenses.

[60] See notes 21 and 22 *supra*.

[61] United States v. Grimley, 137 U.S. 147 (1890).

[62] United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944).

[63] Beets v. Hunter, 75 F. Supp. 825 (D. Kan. 1948).

[64] *Ibid.*

[65] Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946), 24 TEXAS LAW REVIEW 503.

[66] Shapiro v. United States, 69 F. Supp. 205 (Ct.Cl. 1947).

[67] *In re* Yamashita, 327 U.S. 1 (1946); United States v. Grimley, 137 U.S. 147 (1890); United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); Sanford v. Robbins, 115 F.2d 435 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941). *But cf.* Shapiro v. United States, *supra* note 66; and see note 72 *infra*.

[68] See, *e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938) (accused deprived of benefit of counsel);

enthusiastic utilizations of this device is to be found in *Hicks v. Hiatt*,[69] a case presenting a situation in which the need for such a method of civilian review was shown by the fact that the military authorities, apparently realizing the injustice of the conviction, released the petitioner a few days before the court handed down its decision ordering him released on habeas corpus.[70] Another example of the need is the celebrated case of *Shapiro v. United States*,[71] where the final military review had approved the dismissal of Lt. Sharpiro (whose ingenuity in bringing his ignominy upon himself must be admired by those who contend that trials by courts-martial during the recent war often bore little resemblance to the accepted ideas of what a fair trial should be like)[72] adjudged in a trial where only eighty minutes elapsed between service of charges on the accused and the commencement of the trial.[73]

It may safely be contended that the military has brought this state of affairs upon itself. It is well known that trials by court-martial are not always conducted in a judicial atmosphere, witness, for example, the trial of Lt. Shapiro just noted.[74] In spite of the safeguards provided by the Articles of War[75] and the provisions for review by the Judge

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Mooney v. Holohan, 294 U.S. 103 (1935) (conviction on perjured testimony knowingly suborned by prosecution); Moore v. Dempsey, 261 U.S. 86 (1923) (trial conducted under mob influence).

[69] 64 F. Supp. 238 (M.D. Pa. 1946), 24 TEXAS LAW REVIEW 503.

[70] 64 F. Supp. at 250 n.28.

[71] 69 F. Supp. 205 (Ct.Cl. 1947).

[72] Lt. Shapiro showed his ingenuity in getting out of trouble as well as in getting into it. His sentence was dismissal, and he was very shortly inducted as a private. After his final separation from the service, he attacked his conviction by suing the United States for the difference between his pay as a private and what he would have received as a lieutenant. The court of claims deemed his conviction illegal, and recovery was allowed. See text at note call 67.

[73] In Note, 62 HARV. L. REV. 1377, 1378 n.4 (1949), it is suggested that the trend indicated in *Hicks v. Hiatt* of broadening the scope of civil review by enlarging the category of jurisdictional requisites may be reversed by the recent Supreme Court case, Humphrey v. Smith, 336 U.S. 695 (1949), which held that the pretrial investigation prescribed by [then A. W. 70, now U.C.M.J. art 32] is not a jurisdictional requisite. This is not necessarily so. In *Hicks v. Hiatt* it was pointed out that the failure to conduct an adequate pre-trial investigation deprived the accused of the opportunity to prepare his defense, which holding goes beyond the mere failure to conduct the investigation itself. In *Humphrey v. Smith* the Court expressly recognized that no prejudice to the accused resulted from the shortcomings in the pre-trial procedure. Congress, taking the same position as the Supreme Court in *Humphrey v. Smith*, provided in the Uniform Code, Article 32(d), that failure to conduct the pre-trial investigation "shall not constitute jurisdictional error." Nevertheless, it would seem that this statutory provision would not prevent another holding such as that in *Hicks v. Hiatt*. If the failure to conduct the investigation results in substantial prejudice to the rights of the accused guaranteed by the Constitution, the error may be deemed jurisdictional in spite of *Humphrey v. Smith* and Article 32(d) of the Uniform Code.

The importance of the question is, of course, lessened by the provision for more adequate appellate review under the Uniform Code. See U.C.M.J. arts. 67, 70. And see text at note call 89. If a full and fair civilian review is provided within the military justice system, the scope of habeas corpus review becomes of less importance.

[74] This state of affairs is not limited to military trials, of course, see the cases cited in note 68 *supra*.

[75] See note 20 *supra*.

Advocate General's Corps personnel, injustice in military trials has been condoned. Assuming that some, perhaps most, of this injustice is inadvertently approved, what are the reasons for such miscarriages of justice, and what improvements can be expected under the Uniform Code?

The chief reasons for failures of justice in military trials may be summed up as follows: command influence over courts-martial,[76] ineptitude of the courts, including appointed counsel, non-availability of an independent appellate review, inadequacy of the appellate record, inability of the defendant to urge alleged errors on appeal, and the disciplinary philosophy of the military establishment. If these factors can be eliminated, there is no reason why the military courts may not approach, or even surpass, in view of the recognized inadequacies of civilian juries, the civil courts in the dispensing of justice. Apparently most of these factors have been aimed at by Congress in the enacting of the Uniform Code. How well they have succeeded can only be speculated upon at present.

The evil of command influence over courts-martial is not newly apparent to the military or to Congress. The Articles of War include the unlawful influencing of the action of a court-martial or the censuring of a court among those offenses specifically prohibited by the punitive articles.[77] The Uniform Code[78] retains the proscriptions found in the Articles of War, but such action by an appointing authority is no longer specifically designated a punishable offense. This latter fact, however, probably is not important in view of the practical difficulties involved in enforcement,[79] and since punishment, if desired, can always be obtained under the general punitive article.[80] The elimination of this evil may be partially accomplished by Article 6 of the Uniform Code and its provisions for the appointment of and communication channels between judge advocates and legal officers. These legal officers are thus freed of some command influences, and it may be that they will be able to lessen command influence over courts-martial if they are sufficiently vigilant. The idealistic solution for the problem, a basic change of attitude by those commanders who feel that justice must subserve discipline, seems possible only following a general educational program within the services. It is clear that no external influences, legislative or judicial, are likely to have any appreciable effect in this area.

The Uniform Code hits sharply at the problem of ineptitude in the

[76] This factor is, of course, difficult to eliminate. No evidence of it will be found in the records of trials, and seldom will a soldier or officer have the temerity to voice such a charge against a commander, realizing the difficulty of substantiating it. But see text following note call 79.

[77] A.W. 88, 62 STAT. 640 (1948), 10 U.S.C. § 1560 (Supp. 1950).

[78] U.C.M.J. art. 37.

[79] See note 76 *supra*.

[80] U.C.M.J. art. 98; see note 55 *supra*.

courts. The Articles of War[81] provide that counsel in general courts-martial shall be judge advocates or lawyers "if available," and the only absolute requirement is that the defense counsel shall be so qualified if the trial judge advocate is. The Uniform Code,[82] however, provides that all general courts-martial shall be staffed by competent legal counsel, either judge advocates who are law school graduates or members of the bar, or persons who, although not judge advocates, are members of the bar of a federal court or the highest court of a state. The further provision is added that all such counsel shall be certified as competent to perform the duties of military counsel by the Judge Advocate General of his branch of service.[83] Surely the accused could ask no more; he is guaranteed the services of counsel as qualified as can be guaranteed by statute, and he retains the privilege of selecting his own counsel, subject to the military situation.

The qualifications prescribed for counsel for special courts-martial are the same under the Uniform Code as under the Articles of War. That is, the defense counsel must have at least the same qualifications as the trial counsel. Although this may be deemed inadequate by perfectionists, it is possibly the best that can be offered in view of the need for special courts in the lower echelons of command where it would not be feasible to guarantee the assignment of legal specialists or lawyers. The safeguard here is provided in the limited punishments which may be imposed by this inferior court.[84]

Besides changing the qualifications of counsel, the Uniform Code changes the composition of courts by providing for the appointment of a law officer for general court-martial.[85] This law officer replaces the law member of the court under the Articles of War; in addition to other duties, he assumes all functions of the latter except that of deliberating and voting with the rest of the court. He is to the court almost what the judge is to the jury in a civil court: He rules on all interlocutory questions arising during the proceedings except challenges to a member of the court,[86] and he charges the court on the law and the elements of the offense.[87] The law officer, like the appointed counsel, must be certified by the Judge Advocate General of the

[81] A.W. 11, 62 STAT. 629 (1948), 10 U.S.C. § 1482 (Supp. 1950).

[82] U.C.M.J. art. 27.

[83] There is, of course, a question as to the efficacy of this provision. Is not this certification likely to be a rather "mechanical" procedure?

[84] See U.C.M.J. art. 19.

[85] U.C.M.J. art. 26.

[86] U.C.M.J. art 5.(b).

[87] U.C.M.J. art. 51(c). He lacks some of the powers of a judge, however. He cannot direct findings, although he can make interlocutory rulings (which can be no more than advice) on a motion for a finding of not guilty, or the question of the accused's sanity. Nor can he even vote on challenges to members of the court, although similar questions are solely for the judge in civilian trials. There is no provision for allowing comment on the weight of the evidence, nor is it specifically forbidden. See MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 39b (1951).

service as competent to perform the duties of his position, and he must be a member of the bar of a federal court or of the highest court of a state. As in the case of provisions for counsel, Congress was not so solicitous of the accused before a special court-martial, and the president of the court is charged with the duties of the law officer of the general court-martial.[88]

It is in the revision of the review procedure that perhaps the most significant improvements are made by the Uniform Code.[89] Among the added reforms are:

(1) The establishment of a court of military appeals, composed of three judges appointed from civilian life by the president for fifteen-year terms. This court is essentially the equivalent of the United States courts of appeals, and it is even provided that judges from the latter court shall sit on the court of military appeals in case of the temporary disability of the judges thereof. This court should provide an independent review, free of any possible command influence or sense of military expediency which might influence the action of a military review. While this court does not automatically review every case, it does review all death sentences and cases affecting general and flag officers, and all cases referred to it by the Judge Advocate General. It has, in addition, a measure of discretionary review analogous to that of the United States Supreme Court. The chief importance of having this court is that it will no longer be necessary to use habeas corpus review, with its strict limitations, to obtain relief from an unfair court-martial conviction. It may be presumed that this civilian court will offer the same unbiased review of convictions by military courts that is now available only through habeas corpus review in the federal courts. This means that errors in the trial no longer will have to be so serious as to deprive the court-martial of jurisdiction in order to form the basis for invalidating a conviction.

(2) The accused is given the privilege of petitioning the court of military appeals for a review of his conviction in case such review is not automatic. He must, of course, take his case through the intermediate steps first.

(3) Provision is made for appellate counsel for both the Government and the accused in the review of the case by the board of review and the court of military appeals, although such counsel are not mandatory except in certain cases before the court of military ap-

[88] "If it is anticipated that complicated issues of law will be presented before a special court-martial, the convening authority should give consideration to appointing as a member of the court, if practicable, a lawyer qualified in the sense of [U.C.M.J.] Article 27c." MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 4d (1951).

[89] The provisions for review of courts-martial convictions are found in U.C.M.J. pt. IX, arts. 59–76. The individual provisions discussed in the text will not be cited separately here. The provisions for review under the present Articles of War are found in A.W. 46–53, 10 U.S.C. §§ 1517–1525 (Supp. 1950).

peals. The accused must be provided with counsel if the Government is represented by counsel, and he may demand appellate counsel in any case. The accused may be represented on the review by civilian counsel if provided by him.

(4) The defense counsel may, in the event of conviction, forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he may deem appropriate.[90] This may well permit the review of errors *aliunde* the record, such as command influence, which the accused has been able to have reviewed only on habeas corpus up to the present time.

(5) Failure of the prosecution to prove its case against the accused will no longer be the occasion for the ordering of a new trial. If the reviewing authorities deem the conviction invalid because of an insufficiency of evidence to support the findings, a rehearing is not permitted and the charges must be dismissed.

C. *SIXTH AMENDMENT*

It should be noted at the outset that many of the considerations previously discussed under the Fifth Amendment are applicable as well to the Sixth Amendment. In fact, in many cases where a person seeking habeas corpus review of a court-martial conviction has succeeded in obtaining his release because of violations of his rights under the Sixth Amendment, the violations have been deemed so serious as to amount to a deprivation of due process and the court has been deemed to have lost jurisdiction on that account.[91] However, as will be shown, there is at least one right given by the Sixth Amendment, the right to counsel, which has been considered by the United States Supreme Court to be of sufficient importance that denial of the right will cause the trial court to lose its jurisdiction over the accused.[92]

The rights guaranteed to an accused by the Sixth Amendment are: a speedy and public trial, trial by jury, the right to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, compulsory process for obtaining defense witnesses, and the assistance of counsel. The right to a jury trial has been discussed, and will not be further dealt with here. No cases were found dealing with the failure to inform the accused of the nature and cause of the accusation, and it may be assumed that such cases do not arise. It seems beyond the realm of probability that a trial could be held without the defendant's knowing the nature of the offense

[90] U.C.M.J. art 38(c).

[91] See *e.g.*, Shapiro v. United States, 69 F. Supp. 205 (Ct.Cl. 1947); Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946), 24 TEXAS LAW REVIEW 503.

[92] Johnson v. Zerbst, 304 U.S. 458 (1938).

charged. The only possibility would seem to be that such a case could arise if the defendant were illiterate or did not speak or understand the English language.

Nor were cases found dealing with the failure to grant a speedy and public trial. The Articles of War[93] and the Uniform Code[94] provide for a speedy trial in the interests of justice, but nevertheless provide also that the accused shall not be rushed to trial before he has had an opportunity to prepare his defense. It may be assumed that the military will ordinarily proceed with the trial without undue delay, erring on the side of too much speed rather than too little, if at all. The Uniform Code specifically makes it a punishable offense to confine or detain another except as may be provided by law,[95] or to delay unnecessarily in the disposition of any case of a person accused of an offense.[96] If the military authorities act under the code in a conscientious manner, these safeguards should be sufficient to guarantee the accused a speedy trial. It is not likely that delay in proceeding to trial would result in a loss of jurisdiction.

The provision for confrontation by the witnesses against the accused is not likely to cause many serious constitutional attacks on trials under the Uniform Code,[97] but one question of constitutionality may exist. The evidence of witnesses for the prosecution will, of course, be necessary to the proof of the commission of the offense charged. However, the deposition practice in courts-martial[98] may be deemed to raise constitutional questions in this area, although the deposition practice is of long standing and apparently has not heretofore been challenged. Two questions most likely to arise are: (1) The admissibility of a deposition for the prosecution obtained under the provisions of Article 49(a) of the Uniform Code, where the only representation of the accused at the taking of the deposition was an officer appointed for that purpose by "an authority competent to convene a court-martial for the trial of [the] charges";[99] and (2) whether or not reasonable

[93] A.W. 46, 62 STAT. 633 (1948), 10 U.S.C. § 1517 (Supp. 1950).

[94] U.C.M.J. arts. 30(b), 33, 34, 35.

[95] U.C.M.J. art. 97.

[96] U.C.M.J. art. 98.

[97] In Schita v. King, 133 F.2d 283 (8th Cir. 1943), the petitioner alleged that the witnesses in his 1917 trial before a general court-martial had testified in his absence, and had not been sworn. The circuit court remanded the case to the district court to hear evidence on these and other matters, in effect holding that if the allegations were true, habeas corpus should issue.

The 1951 Manual for Courts-Martial provides that an accused who voluntarily and wrongfully absents himself from his trial, after it has been commenced in his presence, will be deemed to have waived his right to confrontation, and that the trial may proceed without him. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 11c (1951). This procedure would appear to be valid. See Diaz v. United States, 223 U.S. 442, 455 (1912).

[98] See U.C.M.J. art. 49; MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 117a (1951).

[99] The convening authority is given considerable discretion in the matter of deciding when a deposition shall be taken before charges have been filed and where the accused is represented only by an officer appointed for that purpose, who may be totally unfamiliar with the case and

notice was given to the accused of the taking of the deposition. This latter question was said to be for the court-martial, and not reviewable on habeas corpus in *Hayes v. Hunter*.[100] The provisions of Article 49(a) of the Uniform Code being new, its validity has not yet been tested. It appears, however, that unless care is exercised it may be deemed to conflict with an important constitutional right.

The accused is clearly entitled to have such witnesses as he desires produced at the trial. The Uniform Code recognizes this right, providing that the defense shall have "equal opportunity" with the prosecution to obtain witnesses and other evidence.[101] Further, the code gives to courts-martial the same power to compel the attendance of witnesses as is given to civilian federal courts with criminal jurisdiction,[102] and the refusal of any person not subject to the code to appear when duly subpoenaed is made an offense against the United States.[103] The refusal of the court to continue the trial in order to obtain the testimony of available witnesses for the defense, requested by the accused, is a violation of his constitutional rights, and has been held to be the basis for habeas corpus relief.[104]

The right to counsel has been the most efficacious provision of the Sixth Amendment for military prisoners seeking relief from convictions by courts-martial. Since *Johnson v. Zerbst*,[105] a civilian case, held that a federal trial court could lose jurisdiction over an accused through failure to accord him the assistance of counsel, it has been assumed that a conviction had under such circumstances is void. It is clear that the accused in a military trial is entitled to the assistance of counsel.[106] Further, the appointment of counsel must not be an empty formality, but there must actually be an opportunity for the counsel to prepare the defenses available to the accused.[107] Although it has been said that under the Articles of War there was no requirement that the accused must have had the assistance of counsel at the pre-trial inves-

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who may have no other connection with it than the taking of the deposition. See MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 117a (1951). It is on the propriety of the exercise of this discretion that the constitutional question would seem to stand or fall.

[100] 83 F. Supp. 940 (D. Kan. 1948).

[101] U.C.M.J. art. 46.

[102] *Ibid.*

[103] U.C.M.J. art. 47.

[104] Anthony v. Hunter, 71 F. Supp. 823 (D. Kan. 1947).

[105] 304 U.S. 458 (1938).

[106] It is so provided in U.C.M.J. art. 27, except for trials by summary courts-martial, and it is seldom that a person will be tried by summary court-martial over his objection. See U.C.M.J. art. 20. See also the discussion in the text at note call 81 and following note call 89.

Query whether or not it would be held a deprivation of due process to deny counsel to an accused even in the absence of this provision of the Sixth Amendment, since it is so provided by "military law," and compliance with the military law is necessary to due process for military personnel. *But cf.* Humphrey v. Smith, 336 U.S. 695 (1949).

[107] Shapiro v. United States, 69 F. Supp. 205 (Ct.Cl. 1947); *cf.* Lewis v. Sanford, 79 F. Supp. 77 (N.D. Ga. 1948).

tigation,[108] the Uniform Code provides that counsel shall be furnished to the accused at the investigation, and that he must be informed of his right to counsel.[109] It has been held that the counsel need not be a lawyer, since the military law is due process of law to those in the military service,[110] and the military law makes an appointed defense counsel the same kind of officer at the bar of the court-martial as is an officer at the bar of any other court. However, a different question may arise under the Uniform Code when an unqualified person is appointed as counsel before a general court-martial,[111] or when the assistance of counsel is not given on the review of the conviction.[112] It is entirely probable that the civil courts and the court of military appeals will follow the reasoning of *Johnson v. Zerbst* and hold that inadequate or unqualified counsel is the same as no counsel at all.[113]

D. SEVENTH AMENDMENT

Little discussion of the provisions of the Seventh Amendment is deemed necessary. Bail is apparently unknown to military law, and the proscription of excessive fines and cruel and unusual punishments is a part of the military law.[114] Such matters as these, involving

[108] Romero v. Squier, 133 F.2d 528 (9th Cir. 1943), *cert. denied*, 318 U.S. 785 (1943).

[109] U.C.M.J. art. 32(b). Under A.W. 46(b), the accused could be represented by counsel at the pre-trial investigation, but no provision was made for informing him of this right, and it may be presumed that the accused who knew his rights sufficiently to know that he could demand counsel was rare.

[110] Adams v. Hiatt, 79 F. Supp. 433 (M.D. Pa. 1948) *appeal dism'd*, 173 F.2d 896 (3d Cir. 1949).

[111] See U.C.M.J. art. 27 for the requirements of counsel in general courts-martial.

[112] See U.C.M.J. art. 70.

[113] One may speculate upon the result of a complaint that petitioner was not adequately represented by counsel when the appointed counsel was a competent lawyer but had not been certified as competent military counsel by the Judge Advocate General under the provisions of U.C.M.J. art. 27(b)(2).

[114] "In determining the amount of a forfeiture or fine, particularly a large fine, the court should consider the ability of the accused to pay." MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 126h(1) (1951). Under the Articles of War, fines were expressly authorized as punishment only by Articles 80 (dealing in captured or abandoned property) and 94 (frauds against the Government), but subject to the provision of the Table of Maximum Punishments, fines were said to be authorized in other cases as well, where the Articles of War prescribed punishment "as the court-martial may direct." MANUAL FOR COURTS-MARTIAL, U.S. ARMY 130 (1949). None of the punitive articles of the Uniform Code specifically authorizes punishment by fine, but the Manual provides that: "All courts-martial have the power to adjudge fines instead of forfeitures in all cases in which the applicable article authorizes punishment as a court-martial may direct." MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 126h(3) (1951). However, as to enlisted men, it is further provided that no fine may be adjudged unless the case falls within the provisions of ¶ 127, § B, of the Manual (permissible additional punishments). This section provides that fines will not ordinarily be adjudged against a member of the armed forces unless he was unjustly enriched by his offense, except as punishment for contempt, or, in case of enlisted men, in lieu of forfeitures when a punitive discharge is given. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 127, § B (1951).

Both A.W. 41, 41 STAT. 795 (1920), 10 U.S.C. § 1512 (1946) and U.C.M.J. art. 55 prohibit cruel and unusual punishments.

primarily mere questions of fact, are usually properly controlled by the military. It is believed that few, if any, sentences are confirmed which exceed the allowable punishments under the patently constitutional Table of Maximum Punishments. No cases were found involving any of these matters, and it is not likely that any will arise.

III. DEFINITION AND GROWTH

FAIRMAN
HENDERSON
WEINER
WARREN
ROSS

DEFINITION AND GROWTH: FAIRMAN ON MILITARY JUSTICE

Prior to the Second World War little attention was paid to problems of military law by civilian writers except those like Morgan and Wigmore who had been brought to active duty by World War I. After 1940, problems associated with, even though not necessarily caused by, the military forces touched the lives of most Americans. That touching contributed to a fulsome development of legal literature on military subjects which accompanied the expansion of the provinces of military law.

Naturally, among the first to attract legal scholars was the government's exercise of military power in domestic areas: the problem of emergency powers and "martial law." The major early works on this subject were by Charles Fairman, Professor of Political Science at Stanford University and Colonel, Judge Advocate General's Department, U.S. Army;[1] the following article is the sequel, written by the same author after important case law had developed. Of particular importance in Fairman's analysis here is the taxonomy of military jurisdiction derived from earlier cases: a classification which made possible the critical distinctions among legal powers exercised by the military forces from their position as an instrument of national policy (martial law), a representative agency of the national government (military government and enforcement of the laws of war by military commission), and the power exercised under the power of Congress to make rules for the government of the forces. He wrote this to the military commander, but by the rules for good law review articles. The weaknesses in cases are pointed out, legal relationships defined, and the problems which befall the Army when it departs from its primary mission are highlighted. Fairman's work was the standard by which a succession of contributions was judged.[2]

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[1] Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1942); FAIRMAN, THE LAW OF MARTIAL RULE (2d ed. 1943).

[2] More recent statements are Wiener, *Martial Law Today*, 55 A.B.A.J. 713 (1969) and Engdahl, *The New Civil Disturbance Regulations: The Threat of Military Interventions*, 49 IND. L.J. 581 (1974).

THE SUPREME COURT ON MILITARY JURISDICTION: MARTIAL RULE IN HAWAII AND THE YAMASHITA CASE†

*Charles Fairman**

The situations which give rise to litigation to test the extent of military jurisdiction fall into four groups. There is, first, the system of military justice established by Congress for the Army and for the Navy, and extending in general to the members of those services respectively and to persons who accompany or serve with the forces.[1] Functional relation to the Army or to the Navy is the common factor which gives rational unity to this head of jurisdiction. Another and a far more troublesome bundle of problems has to do with measures of military control, unlawful under normal conditions, which in time of war or other public emergency have been taken within domestic territory enjoying the protection of the Constitution and the laws of the United States. A third group of problems arises out of military government "in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents."[2] And, finally, there is the jurisdiction to try violations of the laws of war, regardless of the place where such violations were committed, as expounded in the saboteurs' case, Ex parte *Quirin*.[3]

The present discussion deals with the second and fourth of these situations, and more particularly with two recent decisions of the Supreme Court: *Duncan v. Kahanamoku*,[4] which ordered the discharge

*Member of the Bars of the District of Columbia, Massachusetts and Missouri. A.B., 1918; A.M., 1920, University of Illinois; Ph.D., 1926; S.J.D., 1938, Harvard University; LL.B., 1934, University of London. When this article was written the author was Professor of Political Science at Stanford University.

[1] A. W. 2, 41 STAT. 787 (1920), 10 U. S. C. § 1471 (1940).

[2] See Chase, C. J., concurring in *Ex parte* Milligan, 4 Wall. 2, 141–42 (U.S. 1866).

[3] 317 U.S. 1 (1942).

[4] 66 Sup. Ct. 606 (Feb. 25, 1946). *White v. Steer* was decided in the same opinion.

of petitioners who had been sentenced by provost courts of the "Military Government" of Hawaii, and *Application of Yamashita*,[5] which refused to interfere by habeas corpus or prohibition with the sentence of a military commission which had tried a Japanese general for breaches of the laws of war.

I

On the afternoon of Sunday, December 7, 1941, the Governor of the Territory of Hawaii, in purported exercise of the authority set out in Section 67 of the Organic Act of 1900,[6] issued a proclamation declaring that the privilege of the writ of habeas corpus was suspended and placing the Territory under martial law; he therein called upon the Commanding General, Hawaiian Department, to prevent invasion, and authorized and requested him "during the present emergency and until the danger of invasion is removed" to "exercise all the powers normally exercised by me as Governor" or "by judicial officers and employees of this territory and of the counties and cities therein," and "such other and further powers as the emergency may require."[7] The Commanding General at once announced that he had "assumed the position of military governor of Hawaii," and thereafter a series of General Orders became the chief source of legislation within the islands. While these orders touched virtually every aspect of the life of the community, our present interest in following the litigation which eventually reached the Supreme Court relates particularly to the allocation of jurisdiction between the regular courts and extraordinary military tribunals.

The civil and criminal courts were not permitted to open on the day after Pearl Harbor. General Order No. 3 of December 7 created a military commission and two provost courts,[8] and General Order No. 4 of the same day declared the extent of their jurisdiction: cases "involving an offence committed against the laws of the United States, the laws of the Territory of Hawaii or the rules, regulations, orders or policies of the military authorities."[9] On December 16, 1941, by General Order No. 29, the various civil courts were authorized to

[5] 66 Sup. Ct. 340 (Feb. 4, 1946).

[6] 31 STAT. 153 (1900), 48 U.S.C. § 532 (1940).

[7] Transcript of Record, pp. 56–57, Duncan v. Kahanamoku, 66 Sup. Ct. 606 (Feb. 25, 1946); Honolulu Star-Bulletin, Dec. 8, 1941, p. 4. On December 9, the President expressed his approval of the declaration of martial law and the suspension of the writ. Transcript of Record, p. 61, Duncan v. Kahanamoku, *supra*.

[8] Honolulu Star-Bulletin, Dec. 9, 1941, p. 3. The military commission constituted on December 7 was of mixed composition, civil and military, with the Chief Justice of the Supreme Court of the Territory as President and Law Member; by General Order No. 25 of December 14, 1941, this order was revoked and a new military commission, composed entirely of army officers, was created.

[9] Honolulu Star-Bulletin, Dec. 9, 1941, p. 3.

proceed in certain limited types of cases (*e.g.*, probate, guardianship, and adoption matters, orders for support and maintenance, and appeals in civil and criminal cases) not involving jury trials.[10] Then, by General Order No. 57 of January 27, 1942, the courts were permitted, "as agents of the Military Governor," to resume their normal functions, subject to considerable exceptions.[11] No grand jury should be called, no jury trials held, no writ of habeas corpus granted.

This remained the situation on August 25, 1942, when White, a stockbroker in Honolulu, was tried in a provost court and convicted of embezzling the stock of a client in violation of the laws of Hawaii.[12] A sentence of five years in prison was imposed, but on review it was reduced to four years. White's subsequent application for a writ of habeas corpus became one of two cases which went up together to the Supreme Court.

By the late summer of 1942 it had become apparent that a relaxation of the military control was in order. The military situation in the Pacific was greatly improved, especially by the Battle of Midway in June, and there were signs of restiveness on the part of the population of Hawaii. Those at the head of the Department of the Interior desired a restoration of the civil government;[13] during the summer Governor Poindexter, who had declared "martial law" and called upon the Commanding General to take over the functions of government, resigned, and Judge Ingram M. Stainback, of the United States District Court for the Territory of Hawaii, was appointed in his stead. The military authorities moved in response to the change in conditions. General Order No. 133 of August 31 declared that the civil courts should thenceforth be free to exercise their normal jurisdiction, subject to certain restrictions and limitations. Among these were the following: the privilege of the writ of habeas corpus remained suspended; no criminal proceedings could be brought against any member of the forces or any person engaged in an activity under military direction; no civil suit could be maintained against any such person for any act done within the scope of such employment. It seemed that the regular courts would thenceforth be carrying on the great bulk of their ordinary business, and that the military commission and provost courts would be trying only violations of the laws of war and the proclamations and orders of the military authorities.

Such a view was somewhat upset, however, by General Order No. 135, which followed on September 4, "to define the criminal jurisdiction to be exercised by the Federal and Territorial courts and the courts established by the Military Governor, in accordance with

[10] *Id.*, Dec. 19, 1941, p. 9.
[11] *Id.*, Jan. 30, 1942, p. 8.
[12] HAWAII REV. LAWS (1945) § 11240.
[13] Transcript of Record, p. 881, Duncan v. Kahanamoku, 66 Sup. Ct. 606 (Feb. 25, 1946).

General Order No. 133." The United States district court was forbidden to try alleged breaches of a number of statutory provisions for the protection of the government, the war effort, and the national security. The territorial courts were forbidden to take jurisdiction over violations of a considerable body of local statutes and municipal ordinances against disorderly conduct, vagrancy, prostitution, and assault and battery against law enforcement officers, as well as over traffic offenses during a blackout or alert. The cases so excepted fell to the military tribunals.

The following winter Governor Stainback went to Washington to work for the revocation of the proclamation of "martial law."[14] Protracted negotiations followed between respresentatives of the Departments of War, Interior, and Justice. These discussions ran less to basic questions of law and principle, more to such specific matters as what activities would be handed back and what would remain under military control. The outcome was a compromise upon a list of matters which should revert to civil control.[15] Draft proclamations were prepared, for the Commanding General and the Governor respectively, to be issued simultaneously, relinquishing in the one case and resuming in the other the agreed list of matters. Among these were judicial proceedings, both criminal and civil, except prosecutions against members of the armed forces, civil suits against such members in respect of any act or omission certified to have been in line of duty, and prosecutions for violations of military orders. The proclamation to be issued by the Governor recited that "a state of martial law remains in effect and the privilege of the writ of habeas corpus remains suspended."[16] The draft papers were submitted to the President by the heads of the three departments, and received his approval on February 1, 1943; on February 8, the two proclamations were published at Honolulu, with the resumption of civil functions to take effect thirty days thereafter.[17]

In order that the Military Government's statute book might be cleared and brought into accord with the new condition of affairs, the military orders which were to remain in operation were consolidated in a new series of General Orders, No. 1 to No. 14, and the old orders, No. 1 to No. 181, were rescinded.[18] Paragraph 8.01 of General Order No. 2 in the new series read as follows:

> No person shall commit an assault or an assault and battery on any military police, any member of the shore patrol, or other military or naval personnel, with intent to resist, prevent, hinder,

[14] *Id.* at 880 *et seq.*
[15] *Id.* at 883–84.
[16] *Id.* at 856.
[17] *Id.* at 847 *et seq.*
[18] *Id.* at 94 *et seq.*

> or obstruct him in the discharge, execution, or performance of his duty as such, nor shall any person wilfully interfere or attempt to interfere with any military police, any member of the shore partrol, or other military or naval personnel in the performance of his official, defined, or required duties as such.[19]

A charge of assault and battery, if laid under this order, would be triable only in a military tribunal.

Such was the situation in the case of Lloyd C. Duncan, out of which developed the second of the habeas corpus proceedings taken on certiorari to the Supreme Court to test the legality of martial rule in Hawaii. Duncan was a shipfitter employed in the Navy Yard at Pearl Harbor. On March 2, 1944, he had been tried before a provost court on a charge of having, on February 24, assaulted a corporal and a private of the Marine Corps, on duty as sentries at the gate of the Navy Yard, in violation of the order quoted above. Duncan was convicted and sentenced to six months in the Honolulu jail.

On March 14, 1944, Duncan filed a petition in the United States district court for a writ of habeas corpus. On April 13, District Judge Metzger announced his findings and conclusions, sustaining the petition.[20] On April 20, judgment was entered accordingly.[21]

On April 14, 1944, Harry E. White, the stockbroker sentenced in August, 1942, for embezzlement in violation of the local law, brought habeas corpus proceedings. On May 2, District Judge McLaughlin granted the writ.[22]

Appeal was taken in each case, and the two matters were thenceforth heard together—in the Circuit Court of Appeals for the Ninth Circuit, where the judgments below were reversed,[23] and in the Supreme Court, which held that the petitioners were entitled to their release.[24] The opinion of the Court, delivered by Mr. Justice Black, held that the "martial law" authorized by Section 67 of the Organic Act did not extend so far as to justify the supplanting of the civil courts by military tribunals. Mr. Justice Murphy joined in this, but went further and held that what was done was inconsistent with the Bill of Rights of the Constitution as well. Chief Justice Stone concurred in the result, though he gave to Section 67 a wider import than the majority of the Court. Mr. Justice Burton, with whom Mr. Justice Frankfurter concurred, was of opinion that the Commanding General had not exceeded the permissible range of discretion under the circumstances shown to have existed.

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[19] *Id.* at 110.
[20] *Id.* at 389.
[21] *Id.* at 403.
[22] Transcript of Record, p. 57, Steer v. White, 66 Sup. Ct. 606 (Feb. 25, 1946).
[23] *Ex parte* Duncan, 146 F.(2d) 576 (C. C. A. 9th, 1944).
[24] Duncan v. Kahanamoku, 66 Sup. Ct. 606 (Feb. 25, 1946).

II

Before examining the four opinions delivered in the Supreme Court, it may be of interest to thumb through the records in the two cases. Duncan, in the traverse to the return, had taken an alternative position that, supposing an assault on a sentry to have been triable by military tribunal, the existence of the facts which might constitute a violation of General Order No. 2, paragraph 8.01, was a jurisdictional fact of which the provost court could not be the final judge.[25] On this basis, and in order that the court might "know the facts and circumstances surrounding the man's incarceration,"[26] counsel put in a good deal of testimony as to the events leading up to the encounter, thus going over the ground covered by the provost court in Duncan's trial there. Though it was not contended that the trial had been so unfair as to deny due process of law, yet something of that coloration was sought to be developed, and to be effaced, in the habeas corpus proceeding. The accused had not been represented by counsel at the hearing of his case;[27] but he had not asked for a lawyer and had stated that he was willing to go to trial.[28] At the time of the hearing he did not know where to locate a friend who had been present at the altercation with the marines and whom he had summoned as a witness; the provost judge did not explain that he might ask for an adjournment; but he had not sought delay and had stated that he was ready for trial.[29] The provost court had been held by a lieutenant commander, retired, who had completed ten years as judge of the Superior Court of California.[30]

The petition in White's case, while resting principally on the provost court's want of jurisdiction and the absence of grand jury and petit jury in violation of the Fifth and Sixth Amendments, went on to allege that the trial had been unfair. This contention rested on the facts that White had been arrested on August 20, held until August 22, and tried on August 25, notwithstanding that counsel had strenuously urged that a continuance was necessary to permit an adequate preparation.[31]

The records in the two cases set forth the testimony of a district magistrate of Honolulu, a judge of the territorial circuit court,[32] the

[25] Transcript of Record, p. 381, Duncan v. Kahanamoku, 66 Sup. Ct. 606 (Feb. 25, 1946) (Paragraph IV of traverse to return and answer to order to show cause).
[26] *Id.* at 508.
[27] *Id.* at 527.
[28] *Id.* at 577.
[29] *Id.* at 526, 536, 576.
[30] *Id.* at 939–41.
[31] Transcript of Record, pp. 7, 12, White v. Steer, 66 Sup. Ct. 606 (Feb. 25, 1946).
[32] Transcript of Record, pp. 591, 601, Duncan v. Kahanamoku, 66 Sup. Ct. 606 (Feb. 25, 1946).

Chief Justice of the Supreme Court of the Territory,[33] and Governor Stainback,[34] all to the effect that at the material dates the civil courts had been ready, willing, and prepared fully to discharge their normal functions. It was shown that theaters, bars, and places of amusement were reopened shortly after the attack on Pearl Harbor.[35] The petitioners put in evidence a quantity of material, such as service communiques, newspaper clippings quoting high commanders, and excerpts from service journals, showing the favorable progress of operations in the Pacific. Admiral Nimitz testified for the respondent as to the strategic situation. Was there at the moment an imminent danger of invasion of the Territory by the Japanese?

> A. Invasion by sea-borne troops in sufficient numbers to seize a bridgehead, no. I consider it neither imminent nor probable. But invasion by stealth, by submarine, commando raids, espionage parties, I consider it not only probable but imminent. It is constantly impending.[36]

General Richardson, who had succeeded General Emmons as Commanding General and "Military Governor" on June 1, 1943, was called by the respondent. In practical effect, of course, he was himself the defendant in the attempt to overthrow the system of provost courts. He made the same point as Admiral Nimitz, that despite the favorable course of the war in the Pacific, the security of Pearl Harbor remained a matter of urgent and anxious solicitude. What is of greater interest in the study of this litigation is General Richardson's statement of his views on the relevancy of trial by military tribunal to the security of the islands. Mr. Ennis, who appeared for the respondents at all stages, took the General over this difficult part of the case:

> Q. Now, General, turning to the subject of the provost courts, which Counsel has mentioned, will you state how you perceived the provost courts to be part of the military security system?
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> A. Well, in order to enable me to discharge my responsibilities under this modified form of martial law, and in order to achieve the security which is the only reason really for the prevalence and existence of the modified form of martial law here, I am concerned, as a soldier, with my duties of security. We have been obliged to publish regulations for the control of firearms, for the control of ammunition, for the illegal possession of radios, for the illegal possession of cameras, for the institution of the curfew, for the institution of the blackout, for the ejection of undesirables from restricted areas. In order to enforce those regulations, I must have at my disposal some sort of tribunal to that effect.

[33] Transcript of Record, p. 53, White v. Steer, 66 Sup. Ct. 606 (Feb. 25, 1946).

[34] Transcript of Record, p. 818, Duncan v. Kahanamoku, 66 Sup. Ct. 606 (Feb. 25, 1946).

[35] *Id.* at 583. This action was taken by General Order No. 68 of Feb. 4, 1942, suspending the closure imposed by General Order No. 2 of Dec. 7, 1941. Honolulu Star-Bulletin, Feb. 24, 1942, p. 2.

[36] Transcript of Record, p. 1078, Duncan v. Kahanamoku, 66 Sup. Ct. 606 (Feb. 25, 1946).

> Under the rules of martial law, we are authorized to appoint what is known as provost courts. These provost courts are nothing more or less than police courts. The layman might say, Why not do away with them? I personally have given great consideration to the elimination of provost courts, in order to try and carry out the directions of the President when he approved the suspension of the privilege of the Writ of Habeas Corpus and also the continuation of martial law in this Territory last [*sic*], hoping that I would be able to do away with the provost courts and turn the trial of those offenses over to the civil courts. But upon examination of the circumstances I found that it is impossible for the civil courts to try them because they are not offenses against Territorial laws, nor are they offenses against any known Federal statute.
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> Now, in rebuttal it will probably be said, But under the Organic Act the Governor can publish regulations for the punishment of infractions of these offenses.
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> Q. Under the Hawaiian Defense Act?
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> A. Under the Hawaiian Defense Act, as he did in the curfew and the blackout. But I should like to point out that in that instance—assuming that he did and that they were perfectly legal—then the violation of any of those offenses would have to be referred to a civil court for trial, with its concomitant delay. The military are the ones that detect these offenses. The military hold the witnesses, as a rule, and therefore we cannot brook a delay. And there must also be in the punishment a certain measure of retribution. The punishment must be swift, there is an element of time in it, and we cannot afford to let the trial linger and be protracted.
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> Again, to give another illustration, assuming that the Governor did publish regulations to this effect, I am forced then to be subjected, as Military Commander responsible for the security of these islands, I am forced to the control of another official for the enforcement of my regulations. To illustrate, well, suppose that we did turn them over to the civil authorities and that I had set the curfew, or the Governor had set the curfew at 10 o'clock. An emergency arises, and I feel that is should be changed instantly to 8 o'clock. I call upon the Governor. He says, No;—not arbitrarily but because he has a very honest difference of opinion—no, I think it should remain at 10 o'clock. And he refuses, therefore, to modify his order. What am I to do as Military Commander responsible for the security of these islands? The only recourse left is to reinvoke martial law, and then we are back where we started.[37]

Beyond question, here is a problem for which some solution must be found. No reasonable person can doubt that, in a place so exposed as Hawaii, throughout hostilities there must be defense regulations unknown to the ordinary law. Blackouts, curfews, means of rapid identification, and the placing of "off-limits" restrictions are obvious examples. The system of control must be flexible, for the regulations may have to be imposed, modified, or lifted without delay. They must be sanctioned by some ready mode of trial and punishment. And yet,

[37] *Id.* at 1026 *et seq.*

if the breach of such a regulation does not constitute a civil offense, the civil courts are incompetent to deal with it. So General Richardson was right in his contention that, if you must impose regulations, you must also have a court which will notice and enforce them. His answer to the difficulty was that he must have provost courts.

The problem needs further exploration. White, the stockbroker, had been tried for the purely statutory offense of embezzlement, and of course the ordinary courts would have been competent if they had been permitted to try the case. What military considerations stood in the way? Duncan, the shipfitter, had been charged with assaulting a military policeman, in violation of a General Order. The same act, to be sure, constituted a common assault punishable under the territorial law; yet, whatever one may think of the gravity of the particular encounter between Duncan and the marine corporal,[38] it seems that what would be a simple offense under ordinary circumstances takes on an added gravity in time of war when directed against one in a position of responsibility. If the penal code is sound in punishing assault upon a public officer in the execution of his duty more severely than an ordinary assault, it cannot be denied that in time of emergency an offense may take on a far more serious aspect when committed against personnel who for the moment are filling posts of responsibility. Hence, it did not quite meet the problem to insist that if Duncan had assaulted a sentry he could be punished by the territorial court for a breach of the local law.[39] Then, too, many of the acts which must be forbidden or controlled at an exposed point in time of war are perfectly innocuous and innocent under normal conditions.[40]

What possible solutions are there to consider? One, which General Richardson rejected, was that it might have been contrived, through cooperation between the Commanding General and the Governor, that the latter promulgate as regulations under the Territorial Defense Act such measures of control as were found necessary. Given the best

[38] Duncan, who had been drinking, allegedly addressed bad language to the sentry and disturbed traffic at an intersection. The sentry arrested him, and who struck blows after that was in dispute. *Id.* at 716–30.

[39] Under the local statute, the penalty for simple assault and battery was a fine of not more than $100 or imprisonment for not more than six months. So a civil judge could have imposed a punishment as severe as that to which the provost court sentenced Duncan. If in any similar emergency in the future, reliance should be placed upon the civil courts for punishing offenses against military personnel acting in performance of their duty, perhaps something could be done to convey to the judges an awareness of the military view of the gravity of such offenses. It might seem that an assault on a sentinel, who is armed and can take care of himself, is not a very serious matter; but the Army, for good reason, takes pains to instill a sense of the importance and responsibility of a sentry, and it would not do to allow that feeling to be undermined.

[40] Of the 22,480 persons arrested and convicted in the Provost Court for Honolulu during 1942, approximately 50 per cent were prosecuted for violations of General Orders. Less than 4 per cent of those arrested were sentenced to jail, prison, or other institutions, the remainder being fined or receiving suspended sentence. See Petitioner's Exhibit "P." Transcript of Record, p. 467, White v. Steer, 66 Sup. Ct. 606 (Feb. 25, 1946).

of understanding between the military and the territorial authorities, it is possible that effective cooperation might have been achieved along those lines.[41] Instead, unified action was achieved by the transfer of responsibility to the Commanding General. Had the military and civil authorities operated concurrently, but without accord, the situation would indeed have been unsatisfactory; for with their common superior far away in the White House, and with each side going up separate channels to the War and Interior Departments respectively, the reconciliation of differences would have proved too difficult.[42]

Another possibility lay in acting through Executive Order No. 9066 of February 19,[43] and Public Law No. 503 of March 21, 1942.[44] By this Executive Order, the President had authorized such military commanders as the Secretary of War might designate to prescribe military areas, from which persons might be excluded, and with respect to which the right of any person to enter, remain in, or leave should be subject to whatever restrictions the commander might in his discretion impose. On March 21, 1942, at the request of the Secretary of War, Congress buttressed the order with the above statute, which made punishable in the federal courts any violation of the restrictions imposed by military authority. Thus it became a federal offense to violate a military order in a designated military area. Here was machinery whereby a general could make his own regulations, with the sanction of Congress behind them. In rejecting this as a solution to the problem of Hawaii, General Richardson's view became more subjective and his argument far less persuasive:

> Q. Well, Counsel mentioned the power to set up a military area under Executive Order 9066, and to promulgate regulations in that way. Would that meet your problem of military security?

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[41] See HAWAII REV. LAWS (1945) § 13111. Apparently General Short, before the attack on Pearl Harbor, looked forward to this as at least a partial solution to the problem of control in the event of war. The brief which the American Civil Liberties Union filed, as *amicus curiae*, in the Circuit Court of Appeals for the Ninth Circuit in the *Duncan* case, quotes General Short as having testified as follows in support of the Territorial Defense Bill: ". . . many of these things can be done better by the civil authorities than by the military authorities, even after we possess the necessary powers to execute them. Many of them even after the declaration of martial law. . . . Proper action at this time might do much to delay or even render unnecessary a declaration of martial law . . . to provide this protection is entirely a function of the government and legislature. The military authorities have no place in such action . . . we would be invading the public affairs of the civil authorities. . . . I believe it is absolutely essential . . . to give the Governor the broadest possible power. . . . This, in all probability, will do away with the necessity for the declaration of martial law. . . ." Brief for American Civil Liberties Union, pp. 12–13, *Ex parte* Duncan, 146 F.(2d) 576 (C. C. A. 9th, 1944).

[42] Great Britain's defense regulations, it is true, were imposed chiefly by men in tweed, not olive drab; but they were acting as part of the responsible national government, at the very point where all power was integrated and where conflicts could be authoritatively settled. Cooperation between remote delegates, each with limited authority, obviously presents greater possibilities of continuing misunderstanding.

[43] 7 FED. REG. 1407 (1942).

[44] 56 STAT. 173 (1942), 18 U.S.C. § 97a (Supp. 1945).

A. No, it would not, for the following reason: We will assume that we are operating under Executive Order 9066. All of the offenses which are contained therein, if violated by anyone in this Territory, must of necessity be referred to the civil courts. The Military Commander, then, is subjected to all sorts of influences, political and otherwise, as happened in the cases on the east coast in both Philadelphia and Boston, when the Commander of the Eastern Defense Command ejected what he considered undesirable persons from the areas, and he was overruled by the courts and they were put in.

Now, in an area of this character, the Hawaiian group, which is an active theatre of war and which is in the theatre of operations, it is inconceivable that the Military Commander should be subjected for the enforcement of his orders to the control of other agents.[45]

Counsel for the petitioner brought the witness back to this point in cross-examination:

Q. . . . What I am trying to get from you is, why do you think we have got to have the provost courts? You first said that on account of the delays of the civil courts. Is that one of your reasons?

A. That is one reason, yes.

Q. You know that to be a fact, that there are delays in the civil courts of this Territory?

A. I would not say in the civil courts of this Territory because I am not familiar with them.

Q. Well, that is what we are talking about.

A. But I say this: I draw on my general experience.

Q. Well, is there anything else besides the delays of the civil courts?

A. Oh, yes, there are many reasons why we should have control under the provost court system. I thought I outlined that very elaborately in my direct testimony.

Q. One of the things you said was that you had to have some instrumentality to enforce your orders?

A. Yes, which are not offenses against the Territorial Courts or the Federal Courts.

Q. You are familiar with the fact that they could be made such?

A. But, as I said, even though they were made offenses, I would still have to go before the courts, the civil courts, which is objectionable when the offenses are of this character that rest upon security. And you place the Commander, then, of the area under the control of other agents for enforcement of his regulations when he has the responsibility of security. Are you going to take the responsibility for the security of these islands? Is the Court going to take the responsibility for the security of the fleet? Is Governor Stainback going to take the responsibility for the security of the fleet? No. I have it. And, nor my conscience and nor my duty will ever make me say that I don't need the authority that goes hand in hand with my authority [*sic*].[46]

[45] Transcript of Record, p. 1029, Duncan v. Kahanamoku, 66 Sup. Ct. 606 (Feb. 25, 1946).
[46] *Id.* at 1051 *et seq.*

The difficulty with this view is that it goes beyond the principle that the man on the spot in an emergency may do whatever can be shown necessary in the public defense, with legal responsibility as in other cases of summary executive action, and substitutes an absolute and wholly subjective measure of authority: the commander is free to do, directly and by his own agents, whatever in good faith he believes should be done. Authority is weighted one hundred per cent, while civil liberties and the values inherent in self-government are for the emergency reduced to the vanishing point. This is the theory which the Supreme Court, through Chief Justice Hughes, rejected in *Sterling v. Constantin*[47] as to "martial law" in time of economic maladjustment, and which the Court has rejected once more in the present case. It is more than the country will long accept; and, fortunately, a commander can operate successfully on a less extreme theory.

III

The opinions rendered in the lower courts need not detain us long; the Supreme Court Justices framed their opinions in their own way, relying on the record of the trial chiefly for the facts there developed. In Duncan's case, District Judge Metzger held that "martial law" did not lawfully exist during the year 1943, particularly after March 10, the day on which the civil authorities resumed their functions under the proclamations of the Governor and the Commanding General. Further, he held, the Office of Military Government was "without legal creation" and as such possessed no lawful authority over civilian affairs or persons. Hence, the provost court created by the Military Governor possessed no authority to try the petitioner. This, it is believed, was a somewhat artificial approach. Whatever the powers of the Commanding General, they flowed from the facts of the situation and not from what he called himself. The title of "Military Governor" may have been an irritant to the people of Hawaii; legally, it was irrelevant. The district court had earlier held in two unreported cases,[48] Ex parte *Glockner* and Ex parte *Seifert*, notwithstanding the decision of the Circuit Court of Appeals for the Ninth Circuit in Ex

[47] 287 U.S. 378 (1932).

[48] For a discussion of these cases, see Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii* (1943) 31 CALIF. L. REV. 474, 486 *et. seq.* Because of General Richardson's refusal to obey the writ, District Judge Metzger found him in contempt and imposed a fine of $5000. As a result of this action, General Richardson issued General Order No. 31, forbidding interference with military operations (with specific mention of Judge Metzger) under penalty of five years imprisonment or $5000 fine, or both. Emissaries from the Departments of Justice and War brought wiser counsel; Glockner and Seifert were sent outside the area and released; Judge Metzger reduced the fine to $100; and the President pardoned the General his contempt.

parte *Zimmerman*,[49] that the writ of habeas corpus was no longer suspended, so that question was considered settled by Judge Metzger.[50]

In White's case, District Judge McLaughlin held that there had been no necessity in August, 1942, for trying a civilian in a provost court: ". . . it is clear upon the record and upon the facts that White's military trial advanced, preserved, protected the military situation in Hawaii in August 1942 not one iota."[51]

The Circuit Court of Appeals for the Ninth Circuit reversed the judgments below.[52] Six circuit judges heard the argument, and found that it required four different opinions to express their divergent views. Healy, J., with whom Garrecht, J., concurred, prepared what may be regarded as the opinion of the court. Two questions, he said, were presented: (1) was the court below in error in holding the petitioners to have been unlawfully imprisoned; and (2) in any event, was the court precluded from inquiring into the legality of the detention because of the suspension of the privilege of the writ of habeas corpus.

First, as to the availability of the writ, the same circuit court of appeals had held in the *Zimmerman* case[53] that the privilege had been lawfully suspended by the Governor's proclamation of December 7, 1941. The court did not agree with the trial judge that this suspension had been terminated by the proclamation of February 8, 1943. But in view of the conclusions which the appellate court now reached on the other question it was unnecessary to consider whether the emergency existing at the time the petitions were filed was such as to warrant the suspension of the writ. So it was assumed, without deciding, that the trial court had not been disabled from entertaining the petitions. Next came the question of the legality of the imprisonment. The test applied was whether the executive had acted upon reasonable grounds. Where, as here, the conditions had called for the exercise of judgement and discretion and for the choice of means by those on whom was placed the responsibility for war-making, the opinion declared, it was not for any court to review the wisdom of their action or place its judgment against theirs—citing *Hirabayashi v. United States*.[54]

Wilbur and Mathews, JJ., concurred in the foregoing judgment, but held further that such changes as had occured in the condition of

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[49] 132 F.(2d) 442 (C. C. A. 9th, 1942), affirming a decision of Metzger, J., in the District Court for the Territory of Hawaii.

[50] Transcript of Record, p. 395, Duncan v. Kahanamoku, 66 Sup. Ct. 606 (Feb. 25, 1946).

[51] Transcript of Record, p. 73, White v. Steer, 66 Sup. Ct. 606 (Feb. 25, 1946).

[52] *Ex parte* Duncan, 146 F.(2d) 576 (C. C. A. 9th, 1944).

[53] *Ex parte* Zimmerman, 132 F.(2d) 442 (C. C. A. 9th, 1942).

[54] 320 U. S. 81 (1943).

the Territory did not restore the right to the writ of habeas corpus. They thought it "desirable to state this additional ground" for reversal "because the undetermined nature and effect of martial law whether exercised by virtue of the necessities of war or under express authorization, constitutional or statutory, is a matter of great doubt when sought to be applied in individual instances. . . ."[55] Certainly the Governor's proclamation of February 8, 1943, had not restored the privilege of the writ, they declared; it had said exactly the opposite. Whether the danger of invasion was so imminent as to demand the continued suspension of the writ was not considered a question for the judiciary, even assuming that the courts could set aside a wholly arbitrary, capricious, or unreasonable determination as mere fraud.

Denman, J., thought that the court should have confined itself to holding that the petitions were fatally defective in that they contained "no allegation of the sole fact necessary to sustain [them], namely, that at none of the pertinent times did the military authorities have *reasonable grounds to believe* the existence of such danger [of invasion]" or of the necessity for military adjudication rather than civil trial.[56] Judge Denman cited *Hirabayashi v. United States* and *Sterling v. Constantin* as having, in his opinion, established the test by which the petitions should be examined.

These opinions were all that were filed at the time, and the report stated that Circuit Judge Stephens did not participate in the decision. But, on March 1, 1946, sixteen months later, and four days after the Supreme Court had reversed the judgment of the circuit court of appeals, Judge Stephens filed a dissent, "Nunc pro Tunc as of Nov. 1, 1944."[57] In explanation of his reasons for withholding his dissent when the case was decided in the intermediate court, he wrote, "I was keenly aware of the fact that the war was yet to be won and that a dissenting opinion in these cases held more possibility of harm than of good. . . ." The opinion which he now filed was "the result of intensive reading and study and is thoroughly documented. I believe it to be a substantial contribution to the history of one of the most unique and important episodes in our nation's existence."[58] The dissent covers a good deal of ground, but its central position is expressed by the following propositions. That the writ had been suspended by the executive in pursuance of a congressional enactment, and that the suspension had not been revoked, was not conclusive of the question: ". . . the suspension cannot be legal unless there is as a fact imminent danger and . . . because of imminent danger the public

[55] 146 F.(2d) at 584.
[56] *Id.* at 590–91.
[57] *Ex parte* Duncan, 153 F.(2d) 943 (C. C. A. 9th, 1946) (dissenting opinion).
[58] *Ibid.*

safety requires the suspension of the writ."[59] Evidently, as he saw it, this was not a political question but one for judicial determination. On the fundamental problem of the validity of the trials by provost court, he concluded that on the facts found in the court below there was "no color of authority for the military to arrest a civilian, try and convict him, and send him to jail by order of a provost court, and that without the right of a jury."[60]

IV

We come now to the proceedings in the Supreme Court. Certiorari was granted on February 12, 1945.[61] Argument was heard on December 7 following, and the decision of the Court was announced on February 25, 1946.[62] By proclamation dated October 19, 1944,[63] and effective on the 24th—this was subsequent to the argument in the circuit court of appeals and just prior to the filing of the judgment there—the President had declared the privilege of the writ of habeas corpus restored and martial law terminated. In argument before the Supreme Court, the Government accordingly abandoned its contention as to the suspension of the writ and rested its case on the validity of the trials as within the "martial law" for which the Organic Act provided.

It followed that there was no occasion for the Supreme Court to discuss the problem, about which a new fog has recently gathered, as to what branch of the government is to judge whether, in cases of rebellion or invasion, the public safety does indeed require the suspension of the privilege of the writ of habeas corpus.[64]

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[59] *Id.* at 954.

[60] *Id.* at 957.

[61] Duncan v. Kohanamoku, 324 U.S. 833 (1945).

[62] 66 Sup. Ct. 606 (Feb. 25, 1946).

[63] Proclamation No. 2627, 9 FED. REG. 12831 (1944). By Executive Order No. 9489 of the same date, the President directed the Secretary of War to designate the Commanding General, United States Army Forces, Pacific Ocean Areas, as the military commander within the meaning of the Act of March 21, 1942. 9 FED. REG. 12831 (1944). The military commander would have power, on finding that there was military necessity therefor, to establish regulations on an important list of matters thereafter enumerated. Thus Hawaii emerged from a regime of "martial law" to a condition wherein necessary military controls could be established by regulation, with enforcement through the regular courts.

[64] The more significant authorities are collected and discussed in FAIRMAN, THE LAW OF MARTIAL RULE (2d ed. 1943) § 44. Heretofore the controversy has been whether it was for the executive or for Congress to make the determination. Marshall, C. J., said, *obiter*, in *Ex parte* Bollman, 4 Cranch 75, 101 (U.S. 1807): "If at any time the public safety should require the suspension of the powers vested by this [judiciary] act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide." See also 2 STORY, COMMENTARIES (5th ed. 1891) § 1342. The argument is strengthened by the circumstance that the provision restricting suspension of the writ of habeas corpus appears in Article I, § 9 of the Constitution—not in Articles II or III. But quite

Mr. Justice Black, for the Court, came at once to the question whether the "martial law" which Congress had authorized to be established went so far as to justify the trials by provost court here in question. If the construction of the statute gave an answer adverse to the military jurisdiction, it would be needless for the Court to decide the constitutional questions otherwise raised. The Court looked first to the language of the Organic Act, and particularly to its provision for placing the Territory under "martial law." But that expression is so loose and indefinite that the statute failed adequately to define the scope of the power it gave. Then did the legislative history yield an answer? The Government had pointed out that Section 67, in its provision for "martial law," had borrowed the language of the Constitution of the Republic of Hawaii, which itself had been construed and applied by the Supreme Court of the Republic in 1895 in the case of In re *Kalanianaole*[65]—a judgment in which the narrow doctrine of Ex parte *Milligan* had been rejected and the military trial of insurrectionists sustained. Mr. Justice Black found this circumstance too tenuous to govern the construction of the Organic Act, especially when the legislative history made it abundantly clear that Congress never intended that the United States Constitution should have a limited application to Hawaii.[66] The situation of the Islands was peculiar as to its exposure to invasion and the possibility that extraordinary measures might be necessary—but the Constitution means the same thing there that it would in other parts of the United States in like case. It is to be noted that no one on the Court differed from this conclusion.

The opinion continues:

> Since both the language of the Organic Act and its legislative history fail to indicate that the scope of "martial law" in Hawaii includes the supplanting of courts by military tribunals, we must look to other sources in order to interpret that term. We think the answer may be found in the birth, development and growth of our governmental institutions up to the time Congress passed the Organic Act. Have the principles and practices developed during the birth and growth of our political institutions been such as to persuade us that Congress intended that loyal civilians in loyal territory should have their daily conduct governed by military orders substituted for criminal laws, and that such civilians should be tried

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recently there have been contentions that it is for the courts to judge whether the facts warrant suspension of the writ. See, *e.g.*, Haney, J., dissenting in *Ex parte* Zimmerman, 132 F.(2d) 442, 451 (C. C. A. 9th, 1942).

[65] 10 Hawaii 29 (1895).

[66] It had been suggested, in argument and elsewhere, that martial rule in Hawaii could be sustained on principles not applicable to the mainland. The suggestion caused alarm in Hawaii, and prompted the bar association and the Attorney General of the Territory to file briefs as *amici curiae*. They were solicitous that there should remain no doubt that the Federal Bill of Rights is fully applicable in Hawaii.

> and punished by military tribunals? Let us examine what those principles and practices have been, with respect to the position of civilian government and the courts and compare that with the standing of military tribunals throughout our history.[67]

One divines at once how the opinion will run from here on. Instances selected from the constitutional history of England under the Stuarts, from the colonial struggle with George III, and from the occasional use of troops in aid of the civil power, go to show that legislatures and courts are cherished institutions and that military tribunals are not. Hence the conclusion:

> We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law" it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase "martial law" as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals.[68]

Mr. Justice Murphy picked up the theme on which Mr. Justice Black closed, and went on to elaborate *fortissimo*. Not only were the military trials in these cases unwarranted by the statute; they were obviously inconsistent with the Bill of Rights as well. His objections were leveled not so much at the contentions of the Government or the holding of the intermediate court as at the views expressed by General Richardson. Some of that testimony has been quoted above, and lawyers may think that Mr. Justice Murphy did not essay too difficult a task in rebutting it.

The concurring opinion of the late Chief Justice Stone is characteristic of that great man's utterances—terse, energetic, helpful in its straightforward good sense, and free from histrionics. "I do not think that 'martial law', as used in § 67 of the Hawaiian Organic Act, is devoid of meaning."[69] The executive had a broad discretion in determining what the emergency required. But executive action is not proof of its own necessity; what are the allowable limits of military discretion is a judicial question. "I take it that the Japanese attack on Hawaii on December 7, 1941, was an 'invasion' within the meaning of § 67. But it began and ended long before these petitioners were tried by military tribunals. . . . I assume also that there was danger of further invasion of Hawaii at the times of those trials. I assume also that there could be circumstances in which the public safety requires,

[67] 66 Sup. Ct. at 613. [68] *Id.* at 615–16. [69] *Id.* at 620.

and the Constitution permits, substitution of trials by military tribunals for trials in the civil courts. But the record here discloses no such conditions in Hawaii, at least during the period after February, 1942, and the trial court so found."[70] Trial in a civil court would no more have endangered the public safety than the gathering of the populace in saloons and places of amusement, which had been permitted by the military authorities. The conclusion was that the trials were not authorized by the statute.

Mr. Justice Burton, in whose dissent Mr. Justice Frankfurter joined, differed little from the Chief Justice in mode of approach; the variance in result was principally attributable to a difference as to the limits of tolerance to be admitted in passing upon military action in time of emergency. "It is well that the outer limits of the jurisdiction of our military authorities is subject to review by our courts even under such extreme circumstances as those of the battle field. . . . This Court can contribute much to the orderly conduct of government, if it will outline reasonable boundaries for the discretion of the respective departments of the Government, with full regard for the limitations and also for the responsibilities imposed upon them by the Constitution."[71] In this case he felt obliged "to sound a note of warning against the dangers of over-expansion of judicial control into the fields allotted by the Constitution to agencies of legislative and executive action."[72] He proceeded to a rather detailed survey of the history of military control in Hawaii, beginning with the black day of Pearl Harbor and noting the gradual lifting of restrictions. "Whether or not from the vantage post of the present this Court may disagree with the judgment exercised by the military authorities in their schedule of relaxation of control is not material unless this Court finds that the schedule was so delayed as to exceed the range of discretion which such conditions properly vest in the military authorities."[73] For himself, Mr. Justice Burton was unable to find that this discretion had been violated. And then, holding ajar a door which is ordinarily firmly closed, he afforded a glance at an interesting vista of speculation:

> One way to test the soundness of a decision today . . . is to ask ourselves whether or not on those dates [when the petitioners were tried], with the war against Japan in full swing this Court would have, or should have, granted a writ of habeas corpus, an injunction or a writ of prohibition to release the petitioners or otherwise to oust the provost courts of their claimed jurisdiction. Such a test emphasizes the issue. I believe this Court would not have been justified in granting the relief suggested at such times. Also I believe that this Court might well have found itself embarrassed had it ordered such relief and then had attempted to enforce its order in

[70] *Id.* at 621.
[71] *Id.* at 624.
[72] *Id.* at 622.
[73] *Id.* at 628.

the theater of military operations, at a time when the area was under martial law and the writ of habeas corpus was still suspended, all in accordance with the orders of the President of the United States and the Governor of Hawaii issued under their interpretation of the discretion and responsibility vested in them by the Constitution of the United States and by the Organic Act of Hawaii enacted by Congress.[74]

V

The import of the decision is that "a military program which took over all government and superseded all civil laws and courts" was not warranted by the provision in the Organic Act for placing the Territory under "martial law." The Court took pains to say that it was not passing upon "the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war"; that this was not a case where violators of military orders were to be tried by regular courts, as had been the situation in *Hirabayashi v. United States*; and finally, that "there was no specialized effort of the military, here, to enforce orders which related only to military functions, such as, for illustration, curfew rules or blackouts."[75] The army commander had taken over the entire function of government, and the courts, so far as they were regarded as "agents of the Military Governor."[76] This, it was held, was more than the language of the Act could be taken to mean.

It may be noted that the Court was interpreting a statute of 1900 providing generally for the government of the Territory, and that the particular section under consideration looked indefinitely into the future and was pointed at no specific emergency. A statute enacted in the face of some actual peril, and importing a legislative judgment of what the immediate situation required,[77] would no doubt be entitled to more indulgent consideration. But in any future emergency the commander will probably have to act without legislation adopted specifically for that situation, and indeed without even the support of a provision as strong as Section 67 of the Organic Act for Hawaii. So, while this decision is technically only a construction of statutory language, we may take it that it would be the view of the Justices who joined in it that a commander who has to act without any specific statute on which to rely will be constitutionally restrained by those principles which the Court finds applicable to the interpretation of

[74] *Id.* at 630–31.

[75] *Id.* at 611 and n.9

[76] General Order No. 57 of Jan. 27, 1942, Honolulu Star-Bulletin, Jan. 30, 1942, p. 8.

[77] As was Public Law No. 503 of March 21, 1942, 56 STAT. 173 (1942), 18 U. S. C. § 97a (Supp. 1945).

this statute. Indeed, as construed, the statute authorized nothing more than could have been sustained without it.

The great lesson to be learned from the case is that the Court has rejected the theory that, in a situation of threatened invasion or comparable emergency, it is proper for the commander to take upon himself the position of "military governor" of the entire community, bringing the whole field of government under his command and thereafter operating at will either through military subordinates or through civil functionaries acting as his "agents." This was the theory which General Richardson expounded, with evident sincerity and conviction, in his testimony, and this is the theory which the Court definitively repelled. The General was right in insisting on his point that it had been necessary to publish regulations, and in insisting that there must be some tribunal to enforce them. But when it came to the question of why the machinery provided by Executive Order No. 9066 and Public Law No. 503 would be unsatisfactory, the answer seemed to spring from the deep-seated preferences of a professional soldier rather than from any objective determination of the inadequacy of the method which Congress had provided. If alleged violations were triable in civil courts, it was said, the military commander would be "subjected to all sorts of influences, political and otherwise," which does not seem a rational conclusion. Trial in civil courts would bring "its concomitant delay."[78] Yet, when this objection was probed in cross-examination, it was apparent that it rested on nothing specific or tangible.

At the hearing on White's petition, the General was not called, his testimony in the *Duncan* case being introduced by stipulation. So there was no occasion to ask him why the trial by provost court of one charged with embezzlement was necessary to the defense of Hawaii. Indeed, it would seem that no convincing reason could have been advanced.

When the Commanding General of the Western Defense Command imposed a curfew upon persons of Japanese ancestry, the Supreme Court sustained him, pointing out that "reasonably prudent men charged with the responsibility of our national defense had ample ground for concluding that we must face the danger of invasion," and that "the challenged orders were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces, from the danger of sabotage."[79] Moreover, when the same commander ordered the exclusion of such persons from areas along the coast, the Court held again that it could not reject the finding of the military authorities: the

[78] Transcript of Record, p. 1028, Duncan v. Kahanamoku, 66 Sup. Ct. 606 (Feb. 25, 1946).
[79] Hirabayashi v. United States, 320 U.S. 81, 94, 95 (1943).

measure had "a definite and close relationship to the prevention of espionage and sabotage"; "the power must be commensurate with the threatened danger."[80]

Certainly the Pacific Coast was less threatened than Hawaii. And though the Japanese exclusion and the denial of trial in a civil court are not commensurable, one feels that the former measure was more severe than the latter. Does it seem strange that the Court, speaking through the same Justice, sustained the one and found the other excessive? Possibly both here and in the *Milligan* case the Court tended to become stricter after a war had been won. The remarks of Mr. Justice Burton suggest that this was a factor in the result. Yet a rational and wholly adequate explanation lies in this, that such measures as were sustained, though drastic, had a clear relation to a permissible end; the justification for trying Duncan and White by provost court really came to nothing more than *ipse dixit* of the commander.

We need a coherent doctrine for the future. We need not evolve new doctrine, for nothing that the Court has decided is inconsistent with what has always been sound in principle. And perhaps the place where it would be most useful for the doctrine to be taught is in the higher service schools of the army, in order that the commanding generals and senior staff officers of the future may have an accurate conception of the law and policy of military control as it impinges upon the civil affairs of a domestic community.

Military thinking runs to absolute solutions. Responsibility ordinarily carries with it the power to command. And it seems axiomatic that command is indivisible. Hence, to make a commander responsible for the safety of a threatened area calls to mind the analogy of an army post and suggests that the whole area is brought under command. Let no one forget that after the disaster at Pearl Harbor the military authorities at Hawaii bore a very anxious and lonely trust. It is not astonishing if, with a soldier's instinct, they acted on the theory—which Governor Poindexter's proclamation clearly expressed—that all powers of government were concentrated in the Commanding General. With the proclamation of martial law, it seemed no doubt that a switch had been thrown, the civil government had been disconnected, and thenceforth all power was to flow from a single generating source. It was a clear-cut solution, calculated to give strength and comfort to an anxious commander.[81] We now learn that

[80] Korematsu v. United States, 323 U.S. 214, 218, 220 (1944); *cf. Ex parte* Endo, 323 U.S. 283 (1944).

[81] Lawyers, too, crave black and white solutions. Recall Chief Justice Marshall's decisions in federal-state relations, as to which he believed there should be no clashing sovereignties, no interfering powers; and compare Mr. Justice Holmes' later insistence that most questions in the law are questions of degree. "North and South Poles import an equator." 2 HOLMES-POLLOCK

that theory was incorrect, and that a different analysis must be made. The program of "total military government" did not recognize adequately that the civil government should rightly have continued to preside over all matters which the public defense did not require to be placed under direct military control, nor did it take into proper account the basic principle that the commander's authority over civil affairs is limited to measures of demonstrable necessity. We must accept a scheme which accords with the judgments of the Court.

An adequate analysis, it is believed, would run in such terms as these. There is the highest constitutional sanction for suppressing insurrection, for repelling invasion, for using "the entire strength of the nation . . . to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care."[82] "The war power of the national government is 'the power to wage war successfully'. . . . Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it."[83] Broad as is the "permitted range of honest judgment as to the measures to be taken" by the commander on the spot, however, his discretion is not absolute and his will does not make the law. For "what are the allowable limits" of that discretion, "and whether or not they have been overstepped in a particular case, are judicial questions."[84] The power, then, is adequate to any danger; but those who exercise it must be prepared to satisfy the courts that there was a "direct relation,"[85] a "substantial basis for the conclusion" that this was indeed "a protective measure necessary to meet the threat."[86]

In principle the civil authorities—federal and state or territorial—continue to exercise their rightful powers. If the military commander exerts a control necessary to the accomplishment of a lawful mission, then *pro tanto* the civil authority gives way. As a matter of fact, the civil authority will no doubt bend for the moment to any command supported by force; questions of the rightfulness of the command are eventually resolvable by the orderly process of litigation, just as with any other exercise of executive power. We have not an absolute but a mixed situation; not exclusive but concurrent authority. This is not

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LETTERS (Howe ed., 1941) 28; *cf.* Fairman, *Judicial Attitudes Toward State-Federal Relations* (1942) 36 AM. POL. SCI. REV. 880.

[82] *See In re* Debs, 158 U. S. 564, 582 (1895).

[83] *See* Hirabayashi v. United States, 320 U.S. 81, 93 (1943).

[84] *See* Sterling v. Constantin, 287 U.S. 378, 399–401 (1932).

[85] *Id.* at 400.

[86] *See* Hirabayashi v. United States, 320 U.S. 81, 95 (1943).

congenial to the soldier's mind; but the alternative would obliterate interests of civil liberty and democratic government too valuable to be sacrificed more than is actually necessary.

The general gets under this theory all he really needs. What new controls does the emergency require? A curfew? A blackout? Special directions as to traffic to prevent confusion in case of an alert? Whatever is necessary, let it be done. Now, can the civil authorities meet those needs? If they are cooperative and can give effective enforcement, it will be in accord with basic principle, and an economy of military effort as well, to meet the need in that way. Much can be done to coordinate action by keeping the staff of the commander in constant touch with the civil government.[87] Should the civil authorities be unwilling or their efforts prove ineffective, or if the matter is of such vital importance that it must be brought directly under command, then let the commander himself exert the necessary control and issue the necessary regulations. Next, how shall such regulations be enforced? If there is legislation—such as Public Law No. 503—making the breach of such a regulation a criminal offense, then the ordinary courts will be available for enforcement. Barring some very special circumstance, such as local disaffection, it is not to be assumed in advance that the courts will be inert or ineffective. Perhaps here too some mutual understanding can tactfully be effected, although in such a situation judges and generals often view one another with initial mistrust. If there is no statutory basis upon which the civil courts could enforce necessary military regulations, presumably military commissions and provost courts would have a function to perform—and Mr. Justice Black's opinion takes care to point out that the decision of the Court does not extend to that situation.

It is desirable, even from the point of view of the military authorities, that the civil courts remain open and in the unfettered exercise of their jurisdiction—save as the suspension of the writ of

[87] Even within the armed services, safety and success may depend more upon effective liaison than upon direct command. Though all units and activities may be under the ultimate direction of one supreme commander, many arrangements have to be worked out directly between the elements concerned, without going up and down the channels of command. Teamwork, support, liaison, coordination are all ideas in common use in the army. In any headquarters, a staff section which initiates a recommendation is responsible for obtaining the concurrence of all other interested parties before the matter is presented to the chief of staff for action, and where concurrence is withheld, much will ordinarily be done to compromise the difference rather than to seek a command decision. Usually the order which is finally issued in the commander's name is thus the result of discussion and agreement, very much as an executive order of the President or an act of Congress may record a settlement freely arrived at by different agencies and interests in our democratic system. Indeed, there is a striking similarity between the functioning of a high headquarters and the ways of official Washington. The organization of united effort in the recent war abounded in striking illustrations of the truth that even in military matters *ad hoc* arrangements and concurrent effort may be used as well as direct command. Though a theater of operations was under a supreme allied commander, it took something much greater than mere command authority to attain the optimum contribution from each ally and co-belligerent.

habeas corpus may afford a delay in justifying detentions. For once the commander realizes that the principles of our law are broad enough to sustain all that he really needs to do, he should have no dread of that law. There may very likely be instances where an inferior court judge will take too narrow a view of executive action, but the Supreme Court may be looked to with confidence to set matters right on appeal. The military authorities may even welcome the opportunity to have their measures tested by timely resort to the courts. For example, in the matter of the saboteurs, the prompt action of the Supreme Court in hearing and deciding Ex parte *Quirin* [88] gave security to the Army and settled by an authoritative answer the quite ill-founded apprehension that the trial by military commission was improper. A shrewd counsellor, too, might explain to the general that sooner or later he doubtless will be called to account, and that experience shows that his chances of vindication are far better if the litigation occurs while the war is on. This is borne out in the present case, both by the concluding remarks of Mr. Justice Burton and by the curious circumstance of the delayed appearance of Judge Stephens' dissent. It seems to be confirmed by the judicial history of British defense legislation.

The foregoing cannot claim to be an exegesis of *Duncan v. Kahanamoku*. For what has been written above accepts the war power as one of the constitutional functions for which no apology need be made,[89] assumes that where commanders overstep the bounds in their civil relations it is more often from misconception than from an itch for power, and identifies the problem at hand as a special case of controlling administrative action by law and reconciling civil liberty with the imperative that the integrity of the nation must be preserved. The opinion in the *Duncan* case was cast in quite a different mold. Unlike that of Chief Justice Hughes in *Sterling v. Constantin*,[90] it does not work out an analysis or state a formula. It approaches the problem from the angle of the deprivation of petitioners' civil rights, and finds in the traditional subordination of military to civil power, as related to statutory construction, a sufficient basis for sustaining their contentions. The Court selects its theme with a high sense of public duty, and no doubt had excellent reasons for the particular line of thought which it adopted. Perhaps it was unwilling to come to close grips with the intricacies of a situation out of which other litigation may arise and come before the Court.

The Court's exposition, however, leaves difficulties in a mind which seeks with all due deference to learn just what is the law today.

[88] 317 U.S. 1 (1942).

[89] *Cf.* Frankfurter, J., concurring in Korematsu v. United States, 323 U.S. 214, 224 (1944). Of course, this implies no belief that "there will always be war."

[90] 287 U.S. 378 (1932).

For instance, Mr. Justice Black observed that "military trials of civilians charged with crime, *especially when not made subject to judicial review*,"[91] are obviously contrary to our political traditions. One wonders how, in practice, judicial review could be had over a system of military tribunals during a period of martial rule, assuming for the moment that the situation warranted trials by such courts. Neither the courts-martial which are provided by statute for the services nor the provost courts and military commissions which are created during periods of martial rule at home and military government abroad, are "courts" proceedings of which are reviewable by the federal judiciary.[92] "Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions."[93] One cannot suppose that the Supreme Court was suggesting that Congress create a legislative court to review the proceedings of such military tribunals as might be established in time of emergency. It used to be the practice in some of the British colonies, in periods of "martial law" incident to servile or native revolt, to designate civil judges to sit in extraordinary tribunals to administer summary punishment. In such a situation the judge sat not by virtue of his office but by reason of his appointment by the authorities administering "martial law." If the Commanding General had perpetrated such an anomaly as to order the judges to sit in review of the provost courts, it could only have been on the theory that they were so much his "agents" that he could direct them to exercise a jurisdiction not their own. Consequently, it is puzzling to imagine what the Court had in mind.

Another passage in the opinion gives rise to uncertainty and confusion. It runs as follows:

> The last noteworthy incident before the enactment of the Organic Act was the rioting that occurred in the Summer of 1892 at the Coeur d'Alene mines of Shoshone County, Idaho. The President ordered the regular troops to report to the Governor for instructions and to support the civil authorities in preserving the peace. Later the State Auditor as agent of the Governor, and not the Commanding General, ordered the troops to detain citizens without trial and to aid the Auditor in doing all he thought necessary to stop the riot. Once more, the military authorities did not undertake to supplant the courts and to establish military tribunals to try and punish ordinary civilian offenders.[94]

This appears to bring together in a composite sketch events which actually took place on two separate occasions, in 1892 and in 1899.[95]

[91] 66 Sup. Ct. at 612 (italics supplied).

[92] *Ex parte* Vallandigham, 1 Wall. 243 (U.S. 1863); *In re* Vadal, 179 U.S. 126 (1900); Carter v. McClaughry, 183 U.S. 365 (1902); *Ex parte* Quirin, 317 U.S. 1(1942).

[93] 27 STAT. 1030 (1892).

[94] 66 Sup. Ct. at 614.

[95] See SEN. DOC. NO. 263, 67th Cong., 2d Sess. (1922) 190 *et seq.*, 210 *et seq.*

Each disorder grew out of the activities of the Western Federation of Miners in the Coeur d'Alene. In the summer of 1892, Governor Willey called upon President Harrison for regular troops, and issued a proclamation declaring Shoshone County to be in a state of insurrection. The President issued his proclamation, pursuant to statute,[96] commanding the insurgents to disperse. Regular troops and state militia were sent to the scene, the commander of the former being instructed to report to the Governor for instructions, and to support the civil authorities in preserving the peace. On the appearance of the troops, the insurgents fled. Thereupon an anomalous condition ensued, with the commander of the state troops, acting as representative of the Governor, carrying on martial rule with the support of federal troops. After a month and a half, the regulars were withdrawn.[97]

"Later"—that is, seven years later—occurred the episode in which the State Auditor gave orders to the federal troops. After years of chronic unrest in the Coeur d'Alene, matters again became acute in April, 1899, when mine property valued at $250,000 was dynamited. Governor Steunenberg called upon President McKinley for troops—the state militia then being in federal service in the Philippines—and declared Shoshone County to be in a state of insurrection. The State Auditor was designated by the Governor as his personal representative; and, in disregard of the provisions of Army Regulations,[98] this

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[96] 27 STAT. 1030 (1892).

[97] H. R. REP. NO. 1999, 56th Cong., 1st Sess. (1900) 62 *et seq.*

[98] The relevant provisions are now incorporated in Army Regulations 500–50 (1945) ¶ 7–10:

"7. COMMAND.—*a.* In the enforcement of the laws, troops are employed as a part of the military power of the United States and act under the orders of the President as Commander in Chief. When intervention with Federal troops has taken place, the duly designated military commander will act to the extent necessary to accomplish his mission. In the accomplishment of his mission, reasonable necessity is the measure of his authority.

b. Federal troops used for intervention in aid of the civil authorities will be under the command of and directly responsible to their military superiors. They will not be placed under the command of an officer of the State Guard or of the National Guard not in the Federal service, or of any State, local, or Federal civil official; any unlawful or unauthorized act on the part of such troops would not be excusable on the ground that it was the result of an order or request received from any such officer or official. . . .

8. MILITARY COMMANDER.—In case of intervention with Federal troops, the military commander will cooperate to the fullest possible extent with the governor and other State and local authorities and forces, unless or until such cooperation interferes with the accomplishment of his mission. While the military commander is subject to no authority but that of his military superiors, he will bear in mind that the suppression of violence without bloodshed or undue violence is a worthy military achievement, and will employ only such force as is necessary to accomplish his mission. . . .

9. MARTIAL RULE.—Martial rule, also termed martial law, is the temporary government of the civil population through the military forces as necessity may require in domestic territory. It will not be proclaimed except by express direction of the President. . . .

10. END OF INTERVENTION.—The use of troops should end the moment that the necessity therefor ceases and the normal civil processes can be restored. Determination of the end of the necessity will be made by the War Department. The military commander will submit his recommendations whenever conditions warrant."

representative of state authority was allowed to exercise command over the regular troops sent to the scene. During the period of this emergency many persons were held without trial,[99] a search for arms was conducted, and a newspaper suppressed, all by the state officials, while the general officer commanding the regular troops put his power behind their decisions, and kept guard over those whom they wanted held in arrest. On May 8, 1899, "by order of the Governor and Commander in Chief," the Auditor published a proclamation which he had prepared in concert with the attorney for the mine operators, establishing a permit system for employment in the mines. It was submitted to the general, "as a matter of courtesy, to give the application dignity, and to receive assurance, in case there was an attempt to obstruct its enforcement, that [the Auditor] could call on the troops . . . for protection." The proclamation, as posted, bore the endorsement: "Examined and approved. H. C. Merriam, Brigadier-General, United States Army." This order required that an applicant for work in the mines must sign a statement which, *inter alia*, recited that he believed that the crimes had been perpetrated by the miners' unions of the Coeur d'Alene, and continued: "I hereby express my unqualified disapproval of said acts, and hereby renounce and forever adjure [*sic*] all allegiance to the said miners' unions. . . ." The representative of the state authorized to pass upon these applications to work was none other than the company doctor, who drew his compensation as such from deductions made by the company.

When Mr. Root became Secretary of War, he took steps to extricate federal troops from this situation.

This episode has had an unpleasant notoriety in the history of the labor movement. The House Military Affairs Committee held hearings and rendered majority and minority reports. Then the Industrial Commission went over the ground again. The case has generally been regarded as an example of how such an emergency should not be handled, particularly because it threw the authority and power of the United States behind the policies of state officials, no matter how partial or benighted such policies might be.[100]

It is hardly to be supposed that Mr. Justice Black and those who joined with him would with full knowledge have singled out this episode as a model to be followed. The fact that the emergencies of 1892 and 1899 seem to have been confused suggests rather that the reference was made without any detailed examination, simply be-

[99] *E.g.*, *In re* Boyle, 6 Idaho 609, 57 Pac. 706 (1899).

[100] This account is based on H. R. REP. NO. 1999, 56th Cong., 1st. Sess. (1900); SEN. DOC. NO. 142, 56th Cong., 1st Sess. (1900); *Report of the Industrial Commission*, H. R. DOC. NO. 181, 57th Cong., 1st Sess. (1901); BERMAN, LABOR DISPUTES AND THE PRESIDENT (1924) 36 *et seq.*; BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW (3d ed. 1914) 494 *et seq.* See also RICH, THE PRESIDENTS AND CIVIL DISORDER (1941) 113 *et seq.*

cause it appeared to support the proposition that military authorities ought to be subject to the civil government.[101] Yet the fact that the Justices saw no reason to pause over a narrative which shows the Federal Government, when acting to fulfil the guarantee of Article IV, Section 4, of the Constitution, handing over a portion of its armed forces to do as bidden by the representative of a governor in suppressing an industrial conflict, tends to confirm the impression that they did not analyze intensively the problem of executive action in time of emergency. They wanted to condemn the military trial of civilians under the "Military Government" of Hawaii—a conclusion which one can very readily understand—and, one may suppose, were unaware of the shadows which their language cast upon the problem.

To build up stereotypes of "the civil power" and "the military" tends to confuse analysis, just as "bureaucracy," "administrative despotism," and the like promote conceptualism in the consideration of other vexed problems of government. Of course the military forces of the United States are always subordinate to the civil authority: they have never set a President in awe or displayed any unwillingness to obey the directions of the Secretary of War. This was true even in Hawaii. But the subordination is through the legally established chain of command, up through the Chief of Staff to the Secretary of War, and not to any state or inferior federal civil officer.[102] Ordinarily the operations of the Army are largely self-contained. But on certain extraordinary occasions, recognized by the Constitution and the laws, the duties of a military commander impinge upon fields which are normally reserved to the individual or belong to the civil agencies of government, state, federal, or territorial. On such an occasion it is the duty of the commander to do no more—but not a whit less—than the public danger requires. Zeal, misdirected because of obscurity of analysis, sometimes leads to excesses. What is needed, it is believed, is a firm conception of principle; the practical problems, though difficult, are all susceptible of sound solution.

VI

The *Application of Yamashita*,[103] to test the validity of a trial for war crimes, was presented to the Supreme Court by officers who had

[101] If an instance was wanted to illustrate the principles which should govern such a use of federal military power, it is believed that the instructions of Secretary of War Garrison in 1914 when troops were sent into the mine fields of southern Colorado, would have given wiser counsel. They are set out in *Federal Aid in Domestic Disturbances*, SEN. DOC. NO. 263, 67th Cong., 2d Sess. (1922) 313 *et seq.*

[102] In this connection one may recall the *Posse Comitatus* Act of June 18, 1878, 20 STAT. 152 (1878), 10 U.S.C. § 15 (1940), which made it unlawful to employ any part of the Army as a *posse comitatus* or otherwise, save as *expressly* authorized by the Constitution or by act of Congress.

[103] 66 Sup. Ct. 340 (Feb. 4, 1946).

flown half way around the world in order that their professional and official duties as defense counsel might be fully discharged. The one aspect of the case in which the Justices were unanimous was that the defense had been conducted throughout with outstanding skill and resourcefulness.

Tomoyuki Yamashita was commanding general of the Fourteenth Army Group of the Japanese Army in the Philippine Islands, prior to his surrender to the United States forces on September 3, 1945. He was held as a prisoner of war until September 25, when a charge of having violated the laws of war was served upon him and his status was changed to that of one held to answer for a war crime. On October 8, at Manila, the accused was arraigned before a military commission of five general officers, and pleaded not guilty. A bill of particulars, setting forth sixty-four specifications, was filed at that time. The commission adjourned until October 29, to permit the six officers assigned as defense counsel to prepare for trial. When it reconvened, the commission denied a motion to dismiss the charge as failing to allege a violation of the laws of war. At this time a supplement bill of particulars, containing fifty-nine items, was filed. The prosecution continued until November 20, and the defense opened the next day. On December 7, the accused was found guilty and sentenced to death by hanging.[104]

On November 12, while the trial was proceeding, an action was instituted in the Supreme Court of the Commonwealth of the Philippines seeking writs of habeas corpus and prohibition directed to General Styer, Commanding General, United States Army Forces in the Western Pacific, by whose order the commission had been convened. Relief was denied in a judgment of November 27.[105]

On November 26, counsel dispatched by air a petition to the Supreme Court of the United States for writs of habeas corpus and prohibition.[106] Then, when the judgment of the Philippine court was handed down, a petition for certiorari was forwarded to the Court. On December 17, the Attorney General having indicated that the latter petition was in transit, the Court granted a stay of proceedings until the two matters could be considered together. The Secretary of War was requested to advise the military authorities of this action. On December 20, the Court entered an order setting January 7, 1946, for

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[104] *Id.* at 343.

[105] Transcript of Record, pp. 71–72, 77, Yamashita v. Styer, 66 Sup. Ct. 340 (Feb. 4, 1946).

[106] The prayer, not without reason, included the following: ". . . that should this Honorable Court decide that this petition cannot be filed as an original proceeding, that the Honorable Robert P. Patterson, and General Douglas A. MacArthur, and Lieutenant General Wilhelm D. Styer, be prohibited from executing any sentence of the Military Commission" until the outcome of the proceedings in the Supreme Court of the Philippines and, if need be, thereafter on certiorari. Petition, pp. 13–14, Application of Yamashita, 66 Sup. Ct. 340 (Feb. 4, 1946).

oral argument. Counsel were permitted to file their briefs in mimeographed form.

The petitions for writs and certiorari were denied on February 4 in an opinion by Mr. Chief Justice Stone. Justices Murphy and Rutledge filed dissents.

Some question was raised whether the military commission was properly constituted, but this need not detain us. General MacArthur had been directed by the Joint Chiefs of Staff to proceed with the trial of Japanese war criminals, and accordingly had ordered General Styer to bring Yamashita before a military commission on the charge prepared at General MacArthur's headquarters. Simultaneously the higher headquarters prescribed Regulations Governing the Trial of War Criminals,[107] of which Paragraph 16, "Evidence," became one of the controversial issues of the litigation.

The first really serious question was the sufficiency of the charge, which ran in these terms:

> Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the laws of war.[108]

The bill of particulars began by specifying that: "Between 9 October 1944 and 2 September 1945, at Manila and other places in the Philippine Islands, members of Armed Forces of Japan under the command of the Accused committed the following. . . ."[109] Counsel for the petitioner contended that "in essence . . . the petitioner is not charged with having done something or with having failed to do something. He is charged merely with having been something, to wit: a commanding officer of a Japanese force whose members offended against the law of war."[110]

One wonders why the charge was framed as it was, indicting the accused from the angle of negligence and then specifying a host of offenses by those under his command, from which it was to be concluded that the accused had violated the duty which international law imposes upon a commander. Did he (1) affirmatively direct the commission of the crimes; or (2) countenance their commission by

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[107] Transcript of Record, p. 14 *et seq.*, Yamashita v. Styer, 66 Sup. Ct. 340 (Feb. 4, 1946).
[108] *Id.* at 10.
[109] *Id.* at 24.
[110] Brief for Petitioner, p. 29, Application of Yamashita, 66 Sup. Ct. 340 (Feb. 4, 1946).

those under his command; or (3) simply fail to check, to inspect, and to exercise control over the forces for which he was responsible? Of course, a commander is not "criminally amenable as a guarantor against sporadic acts of individual lawlessness."[111] The issue which the prosecution raised, it would seem, really came to this: a commander has a duty, so far as he can, to cause the rules of warfare to be observed; did this commander do all he could have done, under the prevailing circumstances, to perform that duty? The charge could have been framed more clearly, and presumably the evidence available would have supported more positive language. Still, it is believed that the Court was sound in its conclusion:

> Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment. . . . But we conclude that the allegations of the charge, tested by any reasonable standard, adequately alleges [*sic*] a violation of the law of war. . . .[112]

Mr. Justice Murphy passes some pretty censorious comments upon the indictment as giving scope to "vengeance" and "the biased will of the victor." His assertions should be considered attentively. Bias and lack of objectivity are of course to be condemned—wherever they appear. Throughout his account, and particularly in the passage where he restates the charges in his own words,[113] he gives one to understand that Yamashita's alleged derelictions were really excusable because in truth the success of our attacks had made it impossible for him to control his troops. This reiteration that the atrocities of the soldiers were committed under battle conditions seems to be a gratuitous assumption, not reflected in the record. The assertion that "International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault . . ."[114] is, with respect, believed not to be correct. His duty is to do not the impossible, but as well as he can. Further on the assertion is made that "All of this was done without any thorough investigation and prosecution of those immediately responsible for the atrocities, out of which might have come some proof or indication of personal culpability on petitioner's part."[115] Unless this is derived from some source outside the record, it would appear to be quite unwarranted. A thorough investigation of alleged war crimes is a tedious and discouraging business, and it may be a long time before the results become evident. It is known that such investigations had been neglected? The fact that the highest commander was put on trial first does not appear im-

[111] Brief for Respondent, p. 55, Application of Yamashita, 66 Sup. Ct. 340 (Feb. 4, 1946).
[112] 66 Sup. Ct. at 349.
[113] *Id.* at 356–57.
[114] *Id.* at 357.
[115] *Id.* at 359.

proper; other trials seem to be coming on in due course. The opinion goes on to mention the need for "objective judicial review" and "a dispassionate attitude toward a case of this nature." Objectivity and a dispassionate attitude are greatly to be desired, and certainly the record in Yamashita's trial discloses matters calling for serious attention. But the deficiencies should not be made to appear greater than they were.

Mr. Justice Rutledge's dissenting opinion displays an anxious solicitude that these military trials meet the standards of the Anglo-American legal tradition, and he himself exemplifies in his careful examination of detail the fairness which he commends as a precept. Whether one agrees with him or not on his several points—and individuals will vary greatly in their evaluation of the competing interests involved—one must respect the ideal of justice for which he is striving.

He found the proceedings vulnerable, among other reasons, for the denial of an opportunity to prepare a defense. On reflection one concludes that this stemmed from the tremendous scope of the bill of particulars. In order to prove Yamashita's criminal negligence, the prosecution had specified a host of crimes by his subordinates, each of these events being in itself a matter on which a protracted trial might have been held. Surely it is desirable that a much higher degree of selectivity be observed in the preparation of war-crimes charges. It is worse than needless to charge all the atrocities the accused appears to have committed; the prosecution would do far better to select a few specific offenses which can be abundantly proved, and then have a trial which meets any reasonable standard of justice.

The following "particular" is cited, not as typical, but as being perhaps the loosest of the specifications:

> 72. During the period from 9 October 1944 to about 1 September 1945, in the Philippine Islands generally, deliberately, undertaking to terrorize, brutalize, massacre and exterminate non-combatant civilian men, women and children, and to pillage, loot, devastate, burn and otherwise destroy towns, cities and other settlements, and public and private property, including property used exclusively for religious, educational, hospital, scientific and charitable purposes.[116]

The question as to what standard of proof should be required is a burning issue about which any universal agreement is doubtless impossible. We come to it in this case via a troublesome problem of statutory construction. The Articles of War[117] enacted by Congress apply, in general, only to the system of courts-martial through which

[116] Transcript of Record, p. 39, Yamashita v. Styer, 66 Sup. Ct. 340 (Feb. 4, 1946).
[117] 41 STAT. 787 (1920), 10 U. S. C. § 1461 (1940).

justice is administered to persons subject to military law. A few articles, however, speak also of military commissions as well as courts-martial.[118] A military commission is the tribunal which has been developed in the practice of our Army for the trial of persons not members of our forces who are charged with offenses against the law of war or, in places subject to military government or martial rule, with offenses against the local law or against the regulations of the military authorities. One of the Articles of War which does embrace this tribunal of the common law of war is the following:

> Art. 25. Depositions—When Admissible.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: *Provided*, that testimony by deposition may be adduced for the defense in capital cases.[119]

Both because of this provision, and also on the broader ground of the lower probative value of affidavits, the Court was concerned to know how far such material had been used as proof by the prosecution. In response to a request from the bench, the Assistant Solicitor General later reported by letter that "On the basis of an analysis of all the evidence in the trial of Yamashita before the military commission, we find that in only seven specifications were affidavits used as the sole means of proof. In 59 specifications the proof offered did not include affidavits. In 35 specifications both oral testimony and affidavits were used."[120]

We look first to the construction of the statute. Certainly if the military commission which tried Yamashita was within Article 25 of the Articles of War, then depositions were not admissible against him. But the Court held that a commission to try an alleged war criminal is not embraced within that Article of War. The revision of 1916 reached out and made "subject to military law" some who theretofore would have been triable by military commission but not by court-martial. The persons thus caught in were thenceforth triable by either of those tribunals. But the jurisdiction of military commissions as it existed under the common law of war was expressly saved by Article 15 of the

[118] A. W. 15, 23, 24, 25, 26, 27, 38, 46, 80, 81, 82, 115.

[119] 41 STAT. 792 (1920), 10 U. S. C. § 1496 (1940).

[120] Brief for Respondent, p. 80, Application of Yamashita, 66 Sup. Ct. 340 (Feb. 4, 1946).

Articles of War. Consequently, a camp follower, now being "subject to military law," might be tried by either a court-martial or a military commission, and in either tribunal would have the benefit of Article 25. An alleged war criminal, however, not having been made "subject to military law" by the statute, received none of its protection and remains triable simply by the rules known to the common law of war. This brief summary skims over the intricacies of the question. The Court's construction is ingenious, and relies heavily on the explanation of General Crowder in sponsoring the changes before committees of Congress.[121] For reasons which will be set out presently, the result would seem a desirable one; but simply as a matter of construing the language of a statute, Mr. Justice Rutledge would seem to have the better of the argument. The Court, it is interesting to note, reached its conclusion on this point more boldly than did the Government's brief.[122]

A similar question arose as to whether Article 38 of the Articles of War[123] requires "the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States" to govern the proceedings of military commissions. The Court held, quite consistently, that the distinction it had just made between the statutory and the common-law-of-war jurisdiction of a military commission was also applicable here. Quite aside from this, it is obvious that Article 38 is permissive—"The President may"—and that the regulations which he is empowered to issue shall apply the rules of evidence only "in so far as he shall deem practicable." So, even if one should disagree with the Court's interpretation of Article 25, one might nevertheless agree with the Government's brief that "In the absence of action taken by the President under the 38th Article of War to prescribe the procedure and rules of evidence to be followed by military commissions, such tribunals are not governed by statutory rules. . . ."[124]

The Court's conclusion was that "The Articles left the control over the procedure in such a case where it had previously been, with the military command."[125] Hence, the question is settled, and it is not doubted that the Court settled it with due regard not merely for the

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[121] SEN. REP. No. 130, 64th Cong., 1st Sess. (1916) 40.

[122] See Brief for Respondent, p. 60, Application of Yamashita, 66 Sup. Ct. 340 (Feb. 4, 1946).

[123] "Art. 38. President May Prescribe Rules.—The President may, by regulation, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually." 41 STAT. 794 (1920), 10 70 U.S.C. § 1909 (1940).

[124] Brief for Respondent, p. 59, Application of Yamashita, 66 Sup. Ct. 340 (Feb. 4, 1946).

[125] 66 Sup. Ct. at 350.

problem of the statutory language[126] but also for the practical consequences of its decision. The opinion is ventured, with deference, that the Court reached a desirable result. Take first the much controverted matter of the rules of evidence, and in particular those promulgated by General MacArthur's headquarters.[127] These provisions seem to have been derived from three sources. The expression, "probative value in the mind of a reasonable man," comes from President Roosevelt's order convening a military commission for the trial of the saboteurs in 1942.[128] Sub-paragraph *a* blends this language with provisions derived from the Regulations for the Trial of War Criminals which the British Government promulgated by Royal Warrant of June 14,

[126] The justices had given this matter some study, and had differed among themselves in their conclusions, in *Ex parte* Quirin, 317 U.S. 1 (1942).

[127] Paragraph 16 of the Regulations Governing the Trial of War Criminals:

"16. Evidence.—a. The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) Any document which appears to the commission to have been signed or issued officially by any officer, department, agency, or member of the armed forces of any government, without proof of the signature or of the issuance of the document.

(2) Any report which appears to the commission to have been signed or issued by the International Red Cross or a member thereof, or by a medical doctor or any medical service personnel, or by an investigator or intelligence officer, or by any other person whom the commission finds to have been acting in the course of his duty when making the report.

(3) Affidavits, depositions, or other statements taken by an officer detailed for that purpose by military authority.

(4) Any diary, letter or other document appearing to the commission to contain information relating to the charge.

(5) A copy of any document or other secondary evidence of its contents, if the commission believes that the original is not available or cannot be produced without undue delay.

b. The commission shall take judicial notice of facts of common knowledge, official government documents of any nation, and the proceedings, records and findings of military or other agencies of any of the United Nations.

c. A commission may require the prosecution and the defense to make a preliminary offer of proof, whereupon the commission may rule in advance on the admissibility of such evidence.

d. If the accused is charged with an offense involving concerted criminal action upon the part of a military or naval unit, or any group or organization, evidence which has been given previously at a trial of any other member of that unit, group or organization, relative to that concerted offense, may be received as *prima facie* evidence that the accused likewise is guilty of that offense.

e. The findings and judgment of a commission in any trial of a unit, group or organization with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial by that or any other commission of an individual person charged with criminal responsibility through membership in that unit, group or organization. Upon proof of membership in such unit, group or organization convicted by a commission, the burden of proof shall shift to the accused to establish any mitigating circumstances relating to his membership or participation therein.

f. The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if the commission determines that justice so requires." Transcript of Record, pp. 18–20, Yamashita v. Styer, 66 Sup. Ct. 340 (Feb. 4, 1946).

[128] "Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man." 7 FED. REG. 5103 (1942).

1945.[129] Then the draftsman appears to have looked for inspiration to the Charter of the International Military Tribunal annexed to the Agreement of August 8, 1945, among the American, French, British, and Soviet Governments for the prosecution and punishment of the major war criminals of the European Axis.[130] Sub-paragraph *b* comes from Article 21 of the Charter; Sub-paragraph *c* is similar to Article 24 (d). The provisions for proceeding against members of organizations adjudged criminal are kindred to Article 10. Sub-paragraph *f* combines Articles 7 and 8 of the Charter.

In other overseas theaters, it has also proved necessary to adopt rules on the admissibility of evidence different from those which obtain in jury trials in American and British courts. The rule for the military government courts in the Mediterranean Theater of Operations was framed by British and American officers—for military government there was a combined enterprise—with a solicitude that considerations of justice and fair dealing should receive the maximum weight compatible with the security of our forces and the success of their operations against the Axis powers. The result was as follows:

> (a) An Allied Military Court shall admit such evidence including hearsay as in its opinion is relevant and material to the charges before it and shall, in deliberating on the judgment in each charge, take into consideration the nature of the evidence produced and the degree of reliance which can reasonably be placed upon it.
>
> (b) Where a written statement made by a person who is not called as a witness is admitted as evidence under the rule, it must be borne in mind that no opportunity for cross-examination as to the facts set out in the statement was given and that even if the statement is not inaccurate it may create a wrong impression by being incomplete.
>
> (c) Original documents should always be produced unless lost or destroyed.[131]

In the European Theater, the Outline of Procedure for Trial of Certain War Criminals by General and Intermediate Military Government Courts summarizes the rules of evidence prevailing there in the following language:

> a. A Military Government Court shall in general admit oral, written and physical evidence having a bearing on the issues before it, and which in the opinion of the court is of probative value, and may exclude any evidence which in its opinion is of no value as proof.

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[129] Published in Special Army Order A. O. 81/1945, June 16, 1945. The War Crimes Regulations (Canada), P. C. 5831, adopted by Order in Council of August 30, 1945, generally follow, but go somewhat further than the British rules of evidence. 3 CANADIAN WAR ORDERS AND REGULATIONS (1945) 371 *et seq.*

[130] (1945) 13 U. S. DEPT OF STATE BULL. 223.

[131] ALLIED CONTROL COMMISSION, CONSOLIDATED INSTRUCTIONS FOR ALLIED MILITARY COURTS (1944) 57.

b. The court shall in general require the introduction of the best evidence available. Hearsay evidence, including the statement sworn or unsworn of a witness not produced, is admissible; but if the matter is important and controverted, every effort should be made to obtain the presence of the witness, and an adjournment may be ordered for that purpose. The guiding principle is to admit only evidence that will aid in determining the truth.

c. Evidence of bad character of an accused shall be admissible before finding only when the accused person has introduced evidence as to his own good character or as to the bad character of any witness for the prosecution.

d. The court may at any stage of the examination question any witness and may call or recall any witness at any time before finding, if it considers it necessary in the interest of justice.

e. To admit in evidence a confession of the accused, it need not be shown such confession was voluntarily made and the Court may exclude it as worthless or admit it and give it such weight as in its opinion it may deserve after considering the facts and circumstances of its execution.

The provision adopted by the four governments signatory to the agreement for the trial of major war criminals of the European Axis is as follows:

> The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and shall admit any evidence which it deems to have probative value.[132]

Bearing in mind the respect which is held in this country for the views of the English judiciary in all that relates to the fairness of criminal trials, the following expressions of Lord Maugham and Lord Roche, in a debate in the House of Lords on war criminals, may be received with respect. Lord Maugham said in part:

> . . . I must say I am thoroughly of the opinion that war crimes should not be tried by lawyers and people who are bound by the rules which would obtain in a British court of justice. I think they should be tried by military tribunals, or mainly military tribunals, who will not be bound by the strict rules which we find work very well with respect to such crimes as the Courts have to try in this country, but who will be bound simply by ordinary opinions of fairness and justice which obtain just as strongly in a military court as in a court of lawyers. The more I think over the matter the more it seems to me clear that that must be so. . . .
>
> It is clear, too, that rules of evidence which apply to cases of trial in a country where the witnesses are nearly all of them in your jurisdiction are one thing, but quite another thing are the rules of evidence when you have got to get witnesses from all over the Continent who are subject to entirely different ideas of law, who

[132] Art. 19, Charter of the International Military Tribunal (1945) 13 U.S. DEP'T OF STATE BULL. 226.

> are perhaps not all of them aware of the sanctity of an oath, and whom it will be very difficult to get before a tribunal. People of that kind ought not to be judged by principles which we apply in a court of justice with a Judge of the High Court sitting and able to put forth the principles which we have adopted for many years and which are suitable for our country, but are not in the least suitable for some of the sort of crimes which would have to be tried.[133]

Lord Roche concurred: "I confess I am by the side of Viscount Maugham in wishing for not too meticulous, lawyer-like methods in our proceedings."[134]

It will perhaps lend realism to the problem to recall that an invading army must have tribunals to enforce the regulations it immediately has to make, to punish crimes against the local law, and to deal with spies and violators of the laws of war. One major phase in planning the invasion will be to draft and print the regulations which it will be necessary to impose, to prepare for an effective distribution of the local stocks of food, to concert methods for restoring the minimum essentials of community life, etc. An appropriate system of courts must be available to support this military government. The system must be flexible and mobile, to a degree never dreamt of by those who plan judicial reforms at home. When troops first land, there will be no judicial officers at hand, and the scheme of military tribunals must be such that a line officer can understand it. When shipping space is available, legal officers will be brought on. Presently conditions become somewhat more stable. Grades of courts must be established suitable to the varying gravity and difficulty of the cases. An appropriate method of reporting trials and keeping records must be prepared, and a system of supervision and review instituted. The situation will be constantly evolving as the army advances. Perhaps enough has been said to demonstrate that certainly at this stage it is utterly out of the question to talk of the rules of evidence applicable to jury trials in the courts at home. The line officer would say it was a lot of lawyers' technicalities and that it didn't make sense—and he would be right. And, for the ultimate interest of justice, it is undesirable for the soldier to believe that the law exacts the impossible. The rule quoted above for the Allied Military Courts is, however, the sort of statement which can be used under field conditions, with fairness to the accused. The mind of the trier is directed, not to artificial rules, but to the rational element involved in deciding whether the accused did commit the offense with which he is charged.[135]

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[133] 135 H. L. DEB. (5th ser. 1945) 663.

[134] *Id.* at 678.

[135] Compare the rule which the Circuit Court of Appeals for the Second Circuit laid down for an administrative tribunal: "We are of opinion that evidence or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done." *See* John Bene & Sons, Inc. v. FTC, 299 Fed. 468, 471 (1924).

Perhaps all this will be admitted, but it will be asked what this has to do with the trial of alleged war criminals after hostilities have ceased. Admittedly there is greater possibility of prescribing the common-law rules of evidence. Yet it is submitted that this is not desirable. If one has an effective court system in operation, and people have learned to make it work, there is much to be said for carrying on. Local counsel who appear in these military courts can understand a simple, rational system of proof, but ordinarily would not comprehend our rules of evidence. The matter, however, is more than one of convenience. For some years the leaders of the Axis governments and their followers systematically inflicted death and misery beyond one's power to comprehend. Almost all of the guilty will certainly escape. The utter magnitude of the problem of tracing out the wrongdoers is staggering. In many cases the victims were exterminated. The crimes were committed within the enemy's country, and today it is difficult beyond belief to assemble the witnesses and materials requisite to providing what man committed what specific crime. Evidence may lie thick at hand, but the task of making it yield specific accusations is discouraging. And yet one feels that, so far as resources and prosecuting staff are made available, the worst of these people ought to be tried and punished. This seems a dictate of justice, not of vengeance. Difficulties of working up a case are so great that a prosecutor is not likely to waste his resources on any but the most notorious offenders. Supposed hatred of the victor for the vanquished is believed to have very little to do with the motivation. What strikes one's mind in looking, for instance, at the man who ran the camp at Dachau is not that he is a German, nor that he was on the losing side, but that he inflicted human misery whose measure surpasses one's comprehension, just as no valley one has ever seen before has prepared one to appreciate the vastness of the Grand Canyon.

The specific question is whether a tribunal convened to try an alleged war criminal is precluded from giving consideration to evidence which would be excluded in a jury trial in a federal court. In the light of the Court's decision in *Application of Yamashita*, the answer is no. The members of the commission perform, of course, the functions of both judge and jury, and so must themselves direct their minds to the question of what they shall admit to the consideration of their minds. Even under the probative value rule, they must not make a finding of guilt unless on the basis of the materials presented their minds are convinced that the accused committed the offense charged.

The matter of using depositions has a special importance in war-crimes trials. Of course a deposition should not be used if the witness is reasonably available. The following may be taken as typical, however, of the actual course of events. A concentration camp or

prisoner-of-war enclosure is taken by advanced elements of the troops. The war-crimes investigating team will not be far, if at all, behind. It will begin to sort out the evidence which the inmates have to offer—multitudinous in quantity, though perhaps incomplete in detail. The victims were not invited up to the commandant's office to hear him give the order when some of their number were to be beaten; and yet from a mass of circumstances with a significance which will never be lost on those whose lives were in constant peril, it was "known" that those in charge were perpetrating certain enormities—"known," that is, in the sense of the certain conviction which springs from observing the sequence of events. The thing itself speaks. Now, of course, it will be difficult for the investigators to elicit and record on the spot from all the inmates all the facts which relate to the proof of all the crimes of which they "know." And, of course, the liberated prisoners must be repatriated as soon as practicable. The war-crimes investigation teams in the European Theatre, and quite likely elsewhere as well, were so organized that there was an interrogator to ask questions from the point of view of the prosecution and another to cross-examine as though he were defense counsel, so as to make the fairest and the tightest record possible under the circumstances. Then the witness was excused and proceeded on his way through the channels arranged for his repatriation. And the war-crimes investigating team went on to a further investigation, perhaps far removed from the scene of its last inquiry. It is not practicable to maintain touch with all the witnesses as they disappear into civil life. The records are examined, the very worst of those involved in the commission of crimes are picked out, the accused are located, charges are drawn, and the prosecutor appointed for the case prepares for trial. May he use a deposition—or must he locate, in America, France, Poland, the Soviet Union, or elsewhere, and bring back to the place of trial the victim whose evidence is sought? The construction which the Court gave to Article 25 of the Articles of War in the *Yamashita* case makes it possible for the prosecution to use depositions in capital cases tried by military commission. Of course, it is as much incumbent upon the tribunal as ever that it convict only those whom it is convinced, on the material before it, are guilty. It must not give to a deposition any more credence than in reason it is worth. In reaching its decision, it should consider: What element of the case rests upon deposition? Has that element nevertheless been established beyond reasonable doubt? If not, the commission should not convict.

A comparatively minor question in the *Yamashita* case—minor as contrasted with the issues just considered—was the following: Does one taken prisoner of war, and subsequently put on trial for offenses alleged to have been committed prior to his capture, enjoy the benefit

of the Geneva Prisoner of War Convention, and in particular Article 60, to the effect that the protecting power must be notified of a judicial proceeding directed against a prisoner? The Court concluded that the Convention applied to prisoners of war only as prisoners of war; its Chapter 3 describes the offenses which prisoners of war may commit *during captivity*, the penalties which may be applied for those offenses, and the procedure by which guilt may be determined, and accordingly does not extend to the case of a war crime committed before capture. The same conclusion was reached within our Army during the war, after a careful consideration which did not lose sight of the fact that any sharp practice on our part might well lead to reprisals.[136] It is believed that the conclusion is perfectly sound.

In *Application of Homma*,[137] the Court was presented with a case analogous to that of Yamashita, and relief was denied in a *per curiam* opinion on authority of that case. Justices Murphy and Rutledge filed short dissenting opinions.

The attempt by various governments of the United Nations to try the Axis "war criminals"—of late the expression "war criminals" has been used without precision to cover the various categories of offenders—is undoubtedly the largest judicial operation ever undertaken. There has been much discussion of the legal problems raised. Those questions present novel situations to test old principles, and some persons in positions of responsibility have believed it right at points to extend the boundaries of the law. Whatever one may think of these developments, no defendant, we may feel assured, will be condemned who has not certainly violated some old and established rule of international or municipal law. Practical, material, quantitative difficulties of breaking the mass into manageable tasks and of organizing to meet them have, however, far surpassed any problems of legal theory. Now time runs, and the actual accomplishments will appear pitifully small. The trial of any one case seems a herculean labor. But some cases have been prepared with meticulous care and presented with professional distinction, and some wicked men have been convicted. If there had been years available in which to gain experience, great improvements could have been made. Doubtless one mistake has been a tendency to try to prove too much in each case—in part a response, no doubt, to the magnitude of the offender's sinning. So trials may seem interminable even while the accused is having inadequate time to organize his defense. And then up comes a record which, in petitioner's brief and in Mr. Justice Rutledge's dissent, makes a poor showing. One may reflect, however, that in this

[136] OPS. JAG SPJGW 1944/8771 (unpublished opinion); see Brief for Respondent, p. 64, Application of Yamashita, 66 Sup. Ct. 340 (Feb. 4, 1946). This view had earlier been implied in 2 BULL. JAG 51, 54 (1943).

[137] 66 Sup. Ct. 515 (Feb. 11, 1964).

effort to prosecute war criminals and other Axis offenders,[138] millions of guilty men will escape and probably not one innocent man will be convicted. The Supreme Court, wisely it is believed, has left the responsibility with the executive branch of the Government. The moral responsibility is indeed a heavy one, and those upon whom it rests should persist with every effort to preserve all the essentials of truly fair and rational proceedings.

[138] Including here for the moment, as within the broad problem of Axis criminality, those who committed crimes against the Jews, Social Democrats, and various minority groups in Germany even before the war. Such acts were not war crimes, but they were violations of the laws of Germany. And they remained criminals by the German penal law, even though the Nazis were in power.

DEFINITION AND GROWTH: HENDERSON ON COURTS-MARTIAL AND THE CONSTITUTION

This article and Colonel Wiener's response to it which follows are two of the classics of military criminal law. Referred to by courts and writers as "the massive articles," they say about all that was worth saying in their time. They are frequently cited by federal and military courts who use them as complete sources and as brackets for the substantial range of problems subsumed by the juxtaposition of military and constitutional law. Henderson is more popular with those who take a restrictive view of the independence of the military justice system and Wiener is the protagonist of a view based on special military requirements. Both are exhaustive, scholarly and vastly informative.

COURTS-MARTIAL AND THE CONSTITUTION: THE ORIGINAL UNDERSTANDING†

*Gordon D. Henderson**

Such is the peculiarity of life that eight score and eight years after the bill of rights was sent to the states for ratification one can say, as Mr. Justice Black did this year on behalf of the Supreme Court, that "as yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials."[1] In the years since the formation of the Republic, the Supreme Court has enunciated a series of conflicting dicta that have led some writers[2] and courts[3] to think that the constitutional guarantees protecting individuals from the abuse of federal power do not apply to those subject to military law.[4] These dicta began with the statement by Mr. Chief Justice Chase in 1866 that "we think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment,"[5] continued with more ambiguous declarations[6] such as "to those in the military or naval service of the United States the military

*Member of the Bars of the District of Columbia and New York. A.B., 1951; LL.B., 1957, Harvard University. When this article was written the author was an Editor of the *Harvard Law Review*.

[1] Reid v. Covert, 354 U.S. 1, 37 (1957).

[2] *E.g.*, AYCOCK & WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 198–201 (1955); WINTHROP, MILITARY LAW AND PRECEDENTS *54 n.26, *241, *430 n.27, *605 (2d ed. 1920) (hereinafter cited as WINTHROP); Sabel, *Civil Safeguards Before Courts-Martial*, 25 MINN. L. REV. 323, 332 n.65 (1941); 21 GEO. WASH. L. REV. 492 (1953).

[3] *E.g.*, *Ex parte* Benton, 63 F. Supp. 808 (N.D. Cal. 1945); United States *ex rel.* Innes v. Crystal, 131 F.2d 576, 577 n.2 (2d Cir. 1943) (dictum).

[4] See also *Hearings on H.J. Res. 309 and Similar Measures Before the House Committee on Foreign Affairs*, 84th Cong., 1st Sess., pt. 1, at 156 (1955).

[5] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 138 (1866) (dictum). *But cf.* Burdett v. Abbot, 4 Taunt. 401, 449, 128 Eng. Rep. 384, 403 (Ex. Ch. 1812) (dictum), in which the Chief Justice said, "a soldier is gifted with all the rights of other citizens, and is bound to all the duties of other citizens. . . ." See also Heddon v. Evans, 35 T.L.R. 642 (K.B. 1919) (dictum).

[6] *Ex parte* Quirin, 317 U.S. 1, 40 (1942) (dictum); United States *ex rel.* Creary v. Weeks, 259 U.S. 336, 343–44 (1922) (dictum); United States *ex rel.* French v. Weeks, 259 U.S. 326, 335 (1922) (dictum); Grafton v. United States, 206 U.S. 333, 352 (1907) (dictum).

law is due process,"[7] and have culminated recently in both flat affirmations[8] and a firm disavowal[9] that the guarantees apply to courts-martial.

One reason for the confused state of judicial opinion has been the narrow scope of review traditionally afforded by the civil courts to judgments of courts-martial. Court-martial proceedings have never been directly reviewable in the civil courts.[10] These proceedings could be attacked collaterally on petitions for habeas corpus,[11] in suits for back pay,[12] or in actions against the court's members or those carrying out its orders for damages caused by illegal court-martial proceedings,[13] but in none of these cases did the scope of review extend beyond the question whether the court-martial had exceeded its jurisdiction. Thus, it was virtually impossible for one subject to military jurisdiction to obtain an adjudication in the civil courts of his allegations that a court-martial had infringed his constitutional rights.

When, in *Johnson v. Zerbst*[14] in 1938, the Supreme Court extended the scope of habeas corpus review of civil-court judgments to include the denial of constitutional rights among those jurisdictional issues it would adjudicate, most of the lower federal courts[15] and the Court of Claims[16] took advantage of their new freedom to hold that the constitutional guarantees contained in the bill of rights, with the exception of the rights to grand and petit juries, applied to courts-martial.

However, the issue again became clouded when in 1950 the Supreme Court, completely overlooking, it now appears,[17] *Johnson v. Zerbst*, said that the scope of civil-court review of courts-martial should not extend to constitutional questions.[18] This statement led many people to think that the Court was quietly indicating that the constitutional guarantees are inapplicable to courts-martial. But in

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[7] Reaves v. Ainsworth, 219 U.S. 296, 304 (1911) (dictum).

[8] Burns v. Wilson, 346 U.S. 137, 142–43, 146–47, 149, 152–55 (1953) (dictum); Wade v. Hunter, 336 U.S. 684, 692, 694 (1949) (dissenting opinion).

[9] Johnson v. Eisentrager, 339 U.S. 763, 783 (1950) (dictum). See also *id.* at 784 (dictum).

[10] The present statute makes the judgments of courts-martial "final." 10 U.S.C. § 876 (Supp. IV, 1957). See also Administrative Procedure Act § 2(a)(2), 60 Stat. 237 (1946), as amended, 5 U.S.C. § 1001(a)(2) (1952).

[11] *E.g.*, *In re* Grimley, 137 U.S. 147 (1890).

[12] *E.g.*, Swaim v. United States, 165 U.S. 553 (1897).

[13] *E.g.*, Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857); Wise v. Withers, 7 U.S. (3 Cranch) 330 (1806).

[14] 304 U.S. 458 (1938).

[15] *E.g.*, Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952), *aff'd sub nom.* Burns v. Wilson, 346 U.S. 137 (1953); Powers v. Hunter, 178 F.2d 141 (10th Cir. 1949), *cert. denied*, 339 U.S. 986 (1950); United States *ex rel.* Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); Schita v. King, 133 F.2d 283 (8th Cir. 1943); Sanford v. Robbins, 115 F.2d 435 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941); see Henry v. Hodges, 171 F.2d 401, 403 (2d Cir. 1948) (dictum), *cert. denied*, 336 U.S. 968 (1949).

[16] *E.g.*, Shapiro v. United States, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947).

[17] See Burns v. Wilson, 346 U.S. 137, 848 (1953) (separate opinion).

[18] Hiatt v. Brown, 339 U.S. 103 (1950).

1953 the Supreme Court decided *Burns v. Wilson*,[19] in which, using some language indicating that the bill of rights applies to courts-martial, the Supreme Court held that habeas corpus review of courts-martial judgments should be broader than it had been prior to *Zerbst*, although less broad than the corresponding review of civil-court judgments because Congress had stated that the decisions of the military authorities should be "final." The Court held that claims of the denial by courts-martial of constitutional rights should be considered on the merits by the civil courts only if the military authorities have not given them adequate consideration, stating that "it is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims."[20] Though the Court did not define the "fair consideration" that will bar civil-court review or make clear whether military decisions on questions of law as well as on questions of fact may be withdrawn from review, its opinion should probably be read as establishing a mood[21] whereby in future cases the civil courts, while serving as the final protectors of constitutional rights, should give as much deference as possible—more deference than is given to the decisions of civil courts—to military decisions.

Because of the limited scope of article III-court review of courts-martial it might be argued that it is meaningless to say that anyone has any constitutional rights before courts-martial.[22] However, a person may have a constitutional right although that right cannot be enforced in an article III court. For example, the Constitution gives no right to have federal questions tried in article III courts; it allows Congress to regulate the federal-question jurisdiction of these courts.[23] Although it has been trenchantly argued that this congressional power is not unlimited,[24] it has not been considered unconstitutional to deny review in article III courts of state-court decisions involving federal questions, as the first Judiciary Act did to some extent.[25] Similarly, it would not be contrary to the constitutional scheme to give the same finality to the judgments of federal legislative courts, such as the territorial courts, in some instances. The framers relegated the enforcement of military law to the tribunals to be set up by Congress

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[19] 346 U.S. 137 (1953).

[20] 346 U.S. at 144.

[21] *Cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[22] In the words of Justice Holmes, "legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." The Western Maid, 257 U.S. 419, 433 (1922).

[23] U.S. CONST. art. III, § 1; *id.* art. III, § 2, cl. 2.

[24] HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 312–40 (1953).

[25] Act of Sept. 24, 1789, c. 20, § 25, 1 Stat. 85. Under the provisions of this section state-court decisions upholding federal claims were not reviewable by the Supreme Court.

pursuant to its article I power to regulate the armed forces.[26] This court-martial system is as capable of enforcing the constitutional rights as it is of enforcing, as it does daily, the statutory rights of defendants. Whatever the wisdom today of continuing the limitations on article III-court review of courts-martial, it was no more impossible for the framers to think that the bill of rights could apply to the military judicial system than to think that it could apply to the article III system.

Most of the guarantees of the bill of rights have been incorporated into the Uniform Code of Military Justice,[27] and the Court of Military Appeals has stated that it will give these statutory provisions the same meaning as has been given to the constitutional provisions.[28] However, a majority of the Court of Military Appeals thinks that the constitutional guarantees do not apply to persons in the service.[29] Perhaps as a result, several of the decisions of that court in cases involving novel facts may be thought to differ from proper constitutional standards.[30] Beginning in 1953, Chief Judge Quinn, influenced by the several opinions in the *Burns* v. *Wilson* litigation, has declared that the guarantees apply to servicemen,[31] but he has not been able to convince the other two members of the court.[32]

An unprecedented number of Americans have in the past fifteen years, and will in the future, become subject to military justice. The federal civil courts and the military authorities will continue to have constitutional claims urged upon them by those subject to courts-martial. Because of these factors it is important to make an effort to resolve the question whether those in the service are protected by constitutional guarantees or derive their rights only from the impermanent will of Congress. It is thus time that a step toward settlement of this question be made by studying the original understanding of those responsible for the Constitution and the bill of rights.

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[26] U.S. CONST. art. I, § 8, cl. 14; Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

[27] *E.g.*, 10 U.S.C. §§ 827, 831, 837, 838, 844, 846, 855 (Supp. IV, 1957).

[28] *E.g.*, United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

[29] *E.g.*, United States v. Welch, 1 U.S.C.M.A. 402, 407, 3 C.M.R. 136, 142 (1952) (dictum); see United States v. Dean, 5 U.S.C.M.A. 44, 17 C.M.R. 44 (1954) (separate opinion); *id.* at 53, 17 C.M.R. at 53 (concurring opinion); *id.* at 56, 17 C.M.R. at 56 (concurring opinion).

[30] *E.g.*, United States v. Barnaby, 5 U.S.C.M.A. 63, 17 C.M.R. 63 (1954); United States v. Greer, 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953), 23 GEO. WASH. L. REV. 110 (1954); United States v. Sutton, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953), 22 GEO. WASH. L. REV. 502 (1954); United States v. Rosato, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953), 22 GEO. WASH. L. REV. 371 (1954).

[31] United States v. Voorhees, 4 U.S.C.M.A. 509, 531, 16 C.M.R. 83, 105 (1954); United States v. Barnaby, *supra* note 30, at 65, 17 C.M.R. at 65 (dissenting opinion); United States v. Williamson, 4 U.S.C.M.A. 320, 331, 15 C.M.R. 320, 331 (1954) (dissenting opinion); United States v. Sutton, *supra* note 30, at 228, 11 C.M.R. at 228 (dissenting opinion).

[32] See United States v. Dean, 5 U.S.C.M.A. 44, 53, 17 C.M.R. 44, 53 (1954) (concurring opinion); *id.* at 56, 17 C.M.R. at 56 (concurring opinion).

I. THE CONTINENTAL CONGRESS AND THE ARTICLES OF CONFEDERATION

Although those who framed and ratified the Constitution and its first ten amendments did not leave as much evidence of their thoughts concerning military justice as we might wish, they were aware, from the very beginning of the independence movement, of the problems peculiar to the regulation of the armed forces. The extent of this awareness is relevant to a proper construction of the Constitution.

On June 14, 1775, four days after it had resolved to collect saltpeter for the manufacture of gunpowder[33] and a day before it decided to appoint a commander-in-chief for the army,[34] the Continental Congress appointed a committee, of which George Washington was one member, to prepare rules and regulations for the government of the army.[35]

On June 16, 1775, John Adams and two others were appointed[36] to draft a commission for Washington, who had been unanimously elected the day before as Commander-in-Chief.[37] This commission enjoined Washington to cause "strict discipline and order to be observed in the army . . . and . . . to regulate . . . [his] conduct, in every respect, by the rules and discipline of war, (as herewith given you) . . . ."[38]

On June 30, 1775, Congress adopted the articles of war which the Washington committee had prepared.[39] They resembled the articles that had been enacted by Massachusetts earlier in the same year[40] and were similar to, but less complete than, the British articles of war in force at the beginning of the Revolution.[41] The next year General Washington informed Congress that the articles needed revision.[42] John Adams drafted the new articles,[43] which were agreed to by his fellow committee member Thomas Jefferson and were adopted by Congress, despite vigorous opposition,[44] on September 20, 1776.[45] These articles, which were more complete than the articles of 1775, closely resembled the British articles and were destined to remain in force with only minor alterations until 1806.[46]

[33] 2 JOUR. CONT. CONG. 85 (1775).
[34] 2 *id.* at 91.
[35] 2 *id.* at 89–90.
[36] 2 *id.* at 92–93.
[37] 2 *id.* at 91.
[38] 2 *id.* at 96.
[39] 2 *id.* at 111.
[40] See WINTHROP *1470.
[41] The British Articles of War of 1765, printed in WINTHROP *1448.
[42] See 3 WORKS OF JOHN ADAMS 68 (C. F. Adams ed. 1851).
[43] *Ibid.*; WINTHROP *12.
[44] 3 WORKS OF JOHN ADAMS 83–84 (C. F. Adams ed. 1851).
[45] 5 JOUR. CONT. CONG. 788 (1776).
[46] See WINTHROP *14.

In 1777, in the Articles of Confederation, Congress was given the

> exclusive right and power of . . . appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.[47]

During the Revolutionary War many of those who were responsible for the Constitution and the bill of rights served in the army. For example, John Marshall, who was later to be a prominent figure in the Virginia ratification convention and a member of the committee that drafted the Virginia proposals for a federal bill of rights,[48] was appointed Deputy Judge Advocate for the Army in 1777.[49]

II. THE CONSTITUTIONAL CONVENTION

Few remarks about the government of the armed forces survive in the records of the Constitutional Convention. The sole statement recorded in the debates concerning the clause giving Congress power "to make Rules for the Government and Regulation of the land and naval Forces"[50] is that it "was added from the existing Articles of Confederation."[51] The discussion of the clause conferring power "to raise and support Armies"[52] shows that, although there was substantial opposition to standing armies in time of peace, it was recognized that at least a small peacetime army would be required.[53] The members were aware, therefore, that the administration of the rules regulating the services would not be only a wartime problem.

When the militia clause, giving Congress power "to provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress,"[54] was debated, the following comments upon the administration of the militia were made:

> Mr. King [a member of the committee reporting the clause],[55] by way of explanation, said, that by *organizing*, the committee meant,

[47] U.S. ARTS. OF CONFED. art. IX, para. 4 (1777).

[48] 3 ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 656 (2d ed. repl. 1941) (hereinafter cited as ELLIOT'S DEBATES).

[49] 1 BEVERIDGE, THE LIFE OF JOHN MARSHALL 119, 138 (1916).

[50] U.S. CONST. art. I, § 8, cl. 14.

[51] 5 ELLIOT'S DEBATES 443; 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 330 (1911) (hereinafter cited as FARRAND).

[52] U.S. CONST. art. I, § 8, cl. 12.

[53] 5 ELLIOT'S DEBATES 442–43, 544–45; 2 FARRAND 329–30, 616–17.

[54] U.S. CONST. art. I, § 8, cl. 16.

[55] WARREN, THE MAKING OF THE CONSTITUTION 518 n.1. (1928).

> proportioning the officers and men—by *arming*, specifying the kind, size, and calibre of arms—and by *disciplining*, prescribing the manual exercise, evolutions, &c.
>
> . . . .
>
> Mr. Madison [who was to be an important figure in the Virginia ratification convention and who was to prepare the first draft of the federal bill of rights] observed, that "*arming*," as explained, did not extend to furnishing arms; nor the term "*disciplining*," to penalties, and courts martial for enforcing them.
>
> Mr. King added to his former explanation, that *arming* meant not only to provide for uniformity of arms, but included the authority to regulate the modes of furnishing, either by the militia themselves, the state governments, or the national treasury; that . . . disciplining must involve penalties, and every thing necessary for enforcing penalties.[56]

The only other portions of the Constitution, as it was reported by the convention, that have relevance to military law are the jury provision of article III[57] and the prohibition in article I of bills of attainder and ex post facto laws.[58] When the latter was debated there was no indication that it was not meant to restrict the power of Congress to regulate the armed forces. There is no reason why this prohibition should not apply to the regulation of the military and indeed Congress has been careful to make its penal military legislation operate only prospectively.[59]

When the article III clause stating that "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" was introduced, trials by courts-martial were not discussed. Yet it is clear that the framers did not intend to require juries in courts-martial. To explain this result it might be said that violations of the rules regulating the armed services are not "crimes," as that word is used in the Constitution.[60] But there is no evidence that the framers intended any such fine verbal distinction to be made, and both the texts on courts-martial[61] and the British[62] and American[63] articles of war that existed at the

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[56] See 5 ELLIOT'S DEBATES 464–65; 2 FARRAND 385.

[57] U.S. CONST. art. III, § 2, cl. 3.

[58] *Id.* art. I, § 9, cl. 3.

[59] See Uniform Code of Military Justice c. 169, §§ 4, 5, 14, 64 Stat. 145, 147 (1950); American Articles of War of 1806, c. 20, § 1, 2 Stat. 359. For other examples, see the preambles of the Rules and Regulations of the Continental Army (1775) and the Rules and Articles for the Better Government of the Troops (1776), printed in WINTHROP *478, *1489.

[60] *Cf.* WINTHROP *54 n.26.

[61] ADYE, A TREATISE ON COURTS MARTIAL *passim* (3d ed. 1785) (hereinafter cited as ADYE); BRUCE, INSTITUTIONS OF MILITARY LAW 226–93 (1717).

[62] British Articles of War of 1765, § 13, art. 3, printed in WINTHROP *1485; *id.* § 15, arts. 4, 12, 17, 19, 21, printed in WINTHROP *1463–66.

[63] Rules and Articles for the Better Government of the Troops § 12, art. 3 (1776), printed in WINTHROP *1495; *id.* § 14, arts. 10, 15, 17, 19, 22, printed in WINTHROP *1499–500; Amendments of 1786 to the Rules and Articles for the Better Government of the Troops (1776) preamble, printed in WINTHROP * 1504; *id.* arts. 14, 15, 16, 19, 22, printed in WINTHROP * 506–07. See also Rules and Regulations of the Continental Army arts. XXXVII, XXXXI,

time the Constitution was written referred to violations of the articles as "crimes."

Another explanation could be that this provision of article III was meant to apply only to trials in article III courts,[64] and courts-martial, being authorized as legislative tribunals under article I, need not specifically be excluded from this provision. As an interpretation of original intent, however, this explanation is fatally weakened by the fact that cases of impeachment, for which article I designates the Senate as the exclusive tribunal,[65] are specifically excluded. The most logical explanation for the failure to mention courts-martial in this clause is that it was the result of oversight. Indeed, as will be shown below, the adoption of the draft of the bill of rights as it was originally introduced in the First Congress and accepted by the House sitting as a committee of the whole would have entirely removed the ambiguity created by this clause.

III. THE DEBATES ON RATIFICATION OF THE CONSTITUTION

The record of the Virginia ratification debates is the only one in which are preserved significant remarks of the ratifiers concerning the provisions of the Constitution relating to the armed forces. The members of the Virginia convention, fearing that there were not adequate checks upon the power of the federal government, were especially concerned about the militia clause. Whereas many persons felt that a federal bill of rights was unnecessary, since it would merely declare expressly the checks on federal power that already were implied in the Constitution, the Virginians felt more strongly than most that a bill of rights was essential.

It is in these debates that is found the first strong evidence that it was intended that the bill of rights would apply to courts-martial. The fact that George Mason, Patrick Henry, and James Madison were deeply involved in these debates increases the debates' importance as indicators of the original understanding. These three men helped draft the Virginia bill of rights,[66] for which Mason deserves the primary credit,[67] and the Virginia proposals for a federal bill of rights.[68] Madison drafted the original version of the federal bill of rights.[69]

XXXXIII, XXXXV (1775), printed in WINTHROP * 1482–83; Massachusetts Articles of War of 1775, arts. 36, 40, 42, 44, printed in WINTHROP *1475–76.

[64] *Cf.* WINTHROP *241 n.38, *430 n.27, *605.

[65] U.S. CONST. art. I, § 3, cl. 6.

[66] BRANT, JAMES MADISON—THE VIRGINIA REVOLUTIONIST 234–37 (1941).

[67] 3 WORKS OF JOHN ADAMS 220 (C. F. Adams ed. 1851); BRANT, *Op. Cit. Supra* note 66, at 234–37.

[68] 3 ELLIOT'S DEBATES 656–59.

[69] See pp. 155–56 *infra*.

In a series of speeches, Mason, who was against ratification,[70] explained his fear that the militia clause would give Congress power to keep the militia under military law in time of peace. Cruel and ignominious punishments might then be inflicted on the members of the militia in order to discourage them so that a large standing army could be formed by the federal government to take the place of the local militia.[71]

Patrick Henry, an eloquent foe of the Constitution,[72] continued this argument, claiming that the reason cruel and unusual punishments could be imposed on the militia was that the Constitution contained no bill of rights. He said:

> Your men who go to Congress are not restrained by a bill of rights. They are not restrained from inflicting unusual and severe punishments, though the bill of rights of Virginia forbids it. What will be the consequence? They may inflict the most cruel and ignominious punishments on the militia, and they will tell you that it is necessary for their discipline.[73]

To counter this argument, Madison, who led the proratification forces,[74] was forced to appeal to considerations of practical politics.

> As to the infliction of ignominious punishments, we have no ground of alarm, if we consider the circumstances of the people at large. There will be no punishments so ignominious as have been inflicted already. The militia law of every state to the north of Maryland is less rigorous than the particular law of this state. If a change be necessary to be made by the general government, it will be in our favor. I think that the people of those states would not agree to be subjected to a more harsh punishment than their own militia laws inflict.[75]

To Mason, "this was no conclusive argument."[76] He agreed with Henry that a provision such as that in the Virginia bill of rights prohibiting cruel and unusual punishments was necessary to protect the militia.

> If there were a more particular definition of . . . powers, and a clause exempting the militia from martial law except when in actual service, and from fines and punishments of an unusual nature, then we might expect that the militia would be what they [presently] are.[77]

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[70] 3 ELLIOT'S DEBATES 655.

[71] 3 *id.* at 380–81, 402, 415–16, 425–26. Mason was deaf to the arguments of Madison and others that the militia clause plainly gave Congress power to govern the militia only when it was in the actual service of the federal government. 3 *id.* at 382–83, 391, 400, 407, 416, 440, 645.

[72] See 3 *id.* at 655.

[73] See 3 *id.* at 412.

[74] See BRANT, JAMES MADISON—FATHER OF THE CONSTITUTION 212–28 (1950).

[75] See 3 ELLIOT'S DEBATES 414.

[76] See 3 *id.* at 416.

[77] See 3 *id.* at 426.

These comments show several members of the Virginia convention assumed the Virginia bill of rights would apply to those in military service. Mason and Henry, two men of great significance to the bill of rights, were among these men. No one in the convention suggested that this assumption was unsound.

IV. THE BILL OF RIGHTS

A. THE FIFTH AND SIXTH AMENDMENTS

The phraseology of the fifth and sixth amendments creates the greatest barrier to reading the bill of rights as applying to trials in military tribunals. These amendments do not readily lend themselves to a construction that would make all of their provisions, other than those for grand and petit juries, applicable to courts-martial. Yet it is these other provisions in the two amendments that are of the greatest importance. If the phrasing of these two amendments means that none of their provisions was intended to apply to courts-martial, it might also indicate that none of the other of the first ten amendments was intended to apply.

The fifth amendment is phrased as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger;[78] nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Standing alone, this amendment does not create too much difficulty, for, although the phrase "except in cases arising in the land or naval forces" might be read as modifying the entire amendment, it would not be difficult to construe it as applying only to the provision for a grand jury.

The sixth amendment, read with the fifth, however, gives more difficulty.

> 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 defence.

[78] The clause "when in actual service in time of war or public danger" has been construed, correctly, to qualify only "or in the militia." Johnson v. Sayre, 158 U.S. 109 (1895).

Had courts-martial been excepted from the provision for jury trial, this amendment would present the same problem of construction as the fifth amendment. But here there is no express exception for military trials, although it is clear that juries were not meant to be required for courts-martial.

Because of this it can be argued that the wording of the two amendments indicates that neither of them was meant to apply to courts-martial. The exception in the fifth amendment can be read as qualifying the whole of that amendment. Since the jury provision of the sixth amendment was not intended to apply to courts-martial, the argument would continue, the framers must have thought that the language of that amendment made the whole of it clearly inapplicable to courts-martial. In addition, one could point out that the jury clause of article III fails to exclude courts-martial. The similar omission in the sixth amendment demonstrates that both provisions were intended to apply only to article III courts.

This construction is not without its difficulties. The reference to the article III clause is of little help to the argument, since it overlooks the fact that cases of impeachment are specifically excluded from that clause. Moreover, while the sixth amendment begins with the phrase "in all criminal prosecutions," which would have to be read as meaning "in all criminal prosecutions in the article III courts," the fifth amendment begins with a similar phrase, "no person shall be held to answer for a . . . crime." The words "in the article III courts" could be implied in this phrase as easily as they could be implied in the opening phrase of the sixth amendment. Yet cases arising in the land and naval forces are expressly excepted from the fifth amendment. It would have to be said either that this exception is mere surplusage or that the opening phrase of the fifth amendment is broader than that of the sixth. The first explanation violates the normal canons of construction. The second rests on a questionable reading of the language of the amendments.

There is only one construction of the sixth amendment that would make all of its provisions except that for jury trial applicable to courts-martial. It would have to be said that the framers intended the exception in the fifth amendment to apply also to the jury provision of the sixth amendment but to none of the other provisions of the sixth amendment, that their failure specifically to write the exception into the sixth amendment was the result of oversight or poor draftsmanship.

One hesitates to make either of these charges against the framers. Yet it is believed that the documents recording the evolution of these amendments support this view. The historical evidence also reveals that the jury provisions of the fifth and sixth amendments were

originally treated as being separate from the other provisions of these amendments, thus indicating that these other provisions may be read as applicable to courts-martial even though the jury guarantees are not.

Before the Federal Constitution was written, seven states had adopted bills of rights. The provisions of these bills are relevant in determining whether there was a common understanding underlying all of the various state bills of rights and the draft proposals that culminated in the federal bill of rights. The bills of Maryland,[79] North Carolina,[80] Pennsylvania,[81] Vermont,[82] and Virginia[83] contained many of the guarantees later written into the federal bill of rights. The draftsmen of these state bills failed to except military cases from any of the guarantees, even though these states, to govern their militia, used courts-martial, to which the jury guarantees were clearly not meant to apply.

This failure was probably the result of forgetfulness rather than an indication that none of the guarantees would apply to courts-martial. For, as has been seen, some of the Virginia ratification debaters who had drafted the Virginia bill thought that at least one provision of their bill would apply to courts-martial.[84] When a committee of the Virginia ratification convention drafted proposals for a federal bill of rights, it relied heavily on the Virginia bill. But immediately following the jury provision it added an exception for military cases. Paragraph eight of the Virginia proposals read:

> That, in all criminal and capital prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces;) nor can he be compelled to give evidence against himself.[85]

While it is not clear that the exception for land and naval forces was to apply only to the jury-trial portion, it is less difficult so to read the Virginia proposals than similarly to construe the fifth and sixth amendments. Many of those, including Mason, Madison, and Henry, who were responsible for the Virginia bill were also on the committee

[79] MD. CONST. declaration of rights (1776) (reprinted in I POORE, THE FEDERAL AND STATE CONSTITUTIONS 817 (2d ed. 1878)). The various state constitutions and bills of rights are reprinted in POORE, *op. cit. supra.*

[80] N.C. CONST. declaration of rights (1776).

[81] PA. CONST. declaration of rights (1776).

[82] VT. CONST. c. 1, arts. 1–19 (1777).

[83] VA. DECLARATION OF RIGHTS (1776). Many other states probably modeled their bills on that of Virginia. See BRANT, JAMES MADISON—THE VIRGINIA REVOLUTIONIST 235 (1941).

[84] See pp. 148–50 *supra.*

[85] 3 ELLIOT'S DEBATES 658.

that drafted these Virginia proposals.[86] It seems likely, therefore, that the reason they now included an exception for military cases was that their recent debates on the militia clause had made them aware of a problem which had not occurred to them when they drafted the Virginia bill.

The Massachusetts[87] and New Hampshire[88] bills, which also contained many of the present federal guarantees, excepted military cases only from trials by jury. Article XII of the Massachusetts bill provided:

> No subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.
>
> And the Legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.[89]

The New Hampshire bill was substantially the same, except that it added a double-jeopardy clause which did not exclude military cases from its prohibition.[90]

At the time of the ratification proceedings several states made proposals for amendments to the Federal Constitution similar to the present fifth and sixth amendments. The North Carolina proposal[91] was the same as the Virginia proposal quoted above. Massachusetts and New Hampshire proposed:

> That no person shall be tried for any crime, by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.[92]

Maryland's suggestion was:

> That there shall be a trial by jury in all criminal cases, according to the course of proceeding in the state where the offence is committed; and that there be no appeal from matter of fact, or second trial

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[86] See pp. 148–49 *supra*.
[87] MASS. CONST. pt. 1, arts. I–XXX (1780).
[88] N.H. CONST. pt. 1, arts. I–XXVIII (1783).
[89] MASS. CONST. pt. 1, art. XII (1780).
[90] N.H. CONST. pt. 1, arts. XV, XVI (1783).
[91] 4 ELLIOT'S DEBATES 243.
[92] 1 *id.* at 326; 2 *id.* at 177.

> after acquittal; but this provision shall not extend to such cases as may arise in the government of the land or naval forces.[93]

This is the only proposal that clearly excluded military cases from a guarantee other than those for grand and petit juries.

The New York proposals were at first considered to be "conditions" upon New York's ratification,[94] but at the last minute the form was changed so that ratification was made "in full confidence":[95]

> That no person ought to be taken, imprisoned, or disseized of his freehold, or be exiled, or deprived of his privileges, franchises, life, liberty, or property, but by due process of law.
>
> That no person ought to be put twice in jeopardy of life or limb, for one and the same offence; nor, unless in case of impeachment, be punished more than once for the same offence.
>
> . . . .
>
> That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.
>
> That (except in the government of the land and naval forces, and of the militia when in actual service, and in cases of impeachment) a presentment or indictment by a grand jury ought to be observed as a necessary preliminary to the trial of all crimes cognizable by the judiciary of the United States; and such trial should be speedy, public, and by an impartial jury of the county where the crime was committed; and that no person can be found guilty without the unanimous consent of such jury. But in cases of crimes not committed within any county of any of the United States, and in cases of crimes committed within any county in which a general insurrection may prevail, or which may be in the possession of a foreign enemy, the inquiry and trial may be in such county as the Congress shall by law direct; which county, in the two cases last mentioned, should be as near as conveniently may be to that county in which the crime may have been committed;—and that, in all criminal prosecutions, the accused ought to be informed of the cause and nature of his accusation, to be confronted with his accusers and the witnesses against him, to have the means of producing his witnesses, and the assistance of counsel for his defence; and should not be compelled to give evidence against himself.[96]

The land-and-naval-forces exception in the last-quoted paragraph clearly does not apply to the separate due-process, double-jeopardy, and cruel-and-unusual-punishments clauses. Although it is not completely clear whether the exception applies to all the guarantees contained in the last-quoted paragraph or just to the jury guarantees, it probably applies only to the latter. The phrases following the dash

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[93] 2 *id.* at 550. Compare the evolution of the New York constitutional provision guaranteeing counsel in criminal cases. N.Y. CONST. art. XXXIV (1777); N.Y. CONST. art. VII, § VII (1821); N.Y. CONST. art. I § 6 (1846).

[94] See 2 ELLIOT'S DEBATES 411.

[95] 1 *id.* at 329; 2 *id.* at 412.

[96] 1 *id.* at 328.

seem set off both by grammar and punctuation from the rest of the paragraph that contains the exception.

Soon after the First Congress convened Madison urged the House to pass upon proposals, which he had drafted, for amending the Constitution.[97] In a speech in which he attempted to overcome the resistance of those who did not wish the problem of amendments to interrupt the business of legislating for the formation of the Government, Madison set forth his proposed amendments.[98] To be added to article I, section 9, were the following clauses:

> No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; . . . .
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> . . . .
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel his defence.[99]

The following clause, the first part of which was desired because it required that the jury be taken from a smaller area than the entire state in which the crime was committed,[100] was to be inserted in place of the original jury clause of article III.

> The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same State, as near as may be to the seat of the offence.[101]

It will be noted that, had Madison's proposals been adopted without change, there would have been no difficulty in construing the provisions of the bill of rights, except the provisions for grand and petit juries, as applying to courts-martial. The express exception of mili-

[97] 1 ANNALS OF CONG. 424 (1789).
[98] 1 *id.* at 433–36.
[99] 1 *id.* at 434–35.
[100] See, *e.g.*, 1 *id.* at 760; 2 ELLIOT'S DEBATES 110, 400; 3 *id.* at 569, 578; 4 *id.* at 154.
[101] 1 ANNALS OF CONG. 435 (1789).

tary cases clearly does not apply to anything except the jury provisions. The troublesome jury clause of article III would have been removed and in its place would have been inserted a new clause covering both grand and petit juries. Even this new clause was not perfectly drafted, however. Although cases of impeachment and cases arising in the land and naval forces and in the militia are clearly excepted from the petit-jury portion of the clause, they are not so clearly excepted from the grand-jury portion. Yet Madison certainly intended the exception to apply to both portions.

The rules both of logic and of construction would lead to the conclusion that since Madison, a lawyer, was aware of the special problems of military cases and felt the need specifically to exempt them from one provision of the amendments, he intended that courts-martial should not be excluded from the other provisions. This view is reinforced when one remembers that Madison participated in the Virginia debates, in which it was strongly suggested that the provision relating to cruel and unusual punishments would apply to military law.

Madison was unable to persuade the House to consider his proposals when they were first introduced,[102] but he brought them forward again the next month.[103] A committee of eleven, of which Madison was a member, was then appointed to consider Madison's proposals and report on them to the House.[104] This committee reported Madison's proposals to the House, sitting as a committee of the whole, six days later.[105] The committee of the whole debated the proposals[106] and adopted all those quoted above.[107] The only change of any importance for our purposes was that the provision preventing one from being made a witness against himself was expressly qualified to apply only to criminal cases.[108]

During the House debates many of the members doubted the propriety of deleting a clause contained in the body of the Constitution and substituting a new clause for it,[109] feeling that amendments could be made only by adding clauses to the end of the instrument. The committee of eleven had decided otherwise and was supported by a vote taken during the first day of debate.[110] After the amendments had been approved by the committee of the whole, however, a motion to require the amendments to take the form of additional clauses at the

[102] See 1 *id.* at 442–50.
[103] 1 *id.* at 660.
[104] 1 *id.* at 664–65.
[105] 1 *id.* at 672.
[106] 1 *id.* at 703–63.
[107] 1 *id.* at 754, 756, 760, 761.
[108] 1 *id.* at 753.
[109] 1 *id.* at 707–17.
[110] 1 *id.* at 717.

end of the Constitution was passed.[111] Thereupon, by two-thirds vote the House adopted the amendments without substantial changes.[112] There were seventeen articles in the amendments adopted by the House, which were sent to the Senate for consideration.[113] The articles pertinent to the present fifth and sixth amendments were very little different from the original Madison proposals and read as follows:

> Eighth. No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offence, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.
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> Ninth. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, 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 defence.
>
> Tenth. The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial Jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a captial, or otherways [*sic*] infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same State.[114]

The Senate debated the House proposals on September 2, 4, 7, 8, and 9.[115] The content of the debates has not been preserved, but the *Senate Journal* does record the phraseology of the changes that were suggested in the Senate to the House proposals.[116] On September 4, the Senate adopted the eighth article after substituting "be twice put in jeopardy of life or limb by any public prosecution" for the phrase "except in case of impeachment to more than one trial or one punishment."[117] The ninth article was adopted without change.[118] All of the tenth article was stricken except "no person shall be held to answer for

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[111] 1 *id.* at 766. Mr. Sherman, who made the motion, had said that "the amendments might come in nearly as stated in the report, only varying the phraseology so as to accommodate them to a supplementary form." 1 *id.* at 708.

[112] See 1 *id.* at 766–78.

[113] 1 *id.* at 779; S. JOUR., 1st Cong., 1st Sess. 104–06 (1789). See also H.R. JOUR., 1st Cong., 1st Sess. 107–08, 112 (1789).

[114] S. JOUR., 1st Cong., 1st Sess. 105 (1789).

[115] 1 ANNALS OF CONG. 74–77 (1789).

[116] S. JOUR., 1st Cong., 1st Sess. 114–19, 121–27, 129–31 (1789).

[117] *Id.* at 119.

[118] *Ibid.*

a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury."[119]

As the amendments stood at this point, there was no petit-jury guarantee and no mention of military cases. Several days later, on reconsideration, the Senate incorporated the grand-jury guarantee, which was now the tenth article, into the eighth article.[120] This time military cases were specifically exempted from the scope of the grand-jury provision. The article was now phrased exactly as is the fifth amendment. Thus it was that when the Senate finished its debate on the house proposals there was no petit-jury guarantee.

This history demonstrates quite clearly that the Senate thought, as did the House, that courts-martial would be excluded only from the grand- and petit-jury guarantees. Madison's letters show that the cause of the Senate's disapproval of the tenth article must have been the failure to agree upon an appropriate definition of the vicinage from which the petit jury was to be taken.[121] Apparently there was no controversy in the Senate over the applicability of the amendments to courts-martial.

The House accepted some of the changes made by the Senate[122] and on September 21 a conference committee, of which Madison was a member, was appointed to deal with the remainder.[123] On September 24, this committee reported to both houses with proposals for a solution of their disagreements.[124]

The committee suggested, *inter alia*, that the important petit-jury guarantee, although this time it was without mention of military cases, be incorporated in the eighth article, which would then read exactly as does the sixth amendment.[125] Both houses agreed to this change,[126] and the amendments, in their present form,[127] were sent to the states for consideration.

Some light on the contemporary interpretation of the fifth and sixth amendments may be shed by the Pennsylvania Constitution of 1790, which was written soon after Congress reported the bill of rights to the

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[119] *Ibid.*

[120] *Id.* at 130. At the same time, a motion was made to reconsider the original tenth article and restore these words:

> The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger) shall be by an impartial jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites.

Ibid. The vote on this motion was eight to eight and the motion therefore failed. *Id.* at 130–31.

[121] 5 HUNT, THE WRITINGS OF JAMES MADISON 420–21, 424–25 (1904).

[122] 1 ANNALS OF CONG. 905 (1789); S. JOUR., 1st Cong., 1st Sess. 141 (1789).

[123] 1 ANNALS OF CONG. 905 (1789); S. JOUR., 1st Cong., 1st Sess. 142 (1789).

[124] 1 ANNALS OF CONG. 913 (1789); S. JOUR., 1st Cong., 1st Sess. 145 (1789).

[125] 1 ANNALS OF CONG. 913 (1789). See also S. JOUR., 1st Cong., 1st Sess. 145 (1789).

[126] 1 ANNALS OF CONG. 88, 913 (1789).

[127] See 1 *id.* at 72; 2 *id.* at 1988–90; S. JOUR., 1st Cong., 1st Sess. 163–64 (1789).

states. It contained provisions that may have been thought to have much the same meaning, as far as courts-martial are concerned, as the fifth and sixth amendments. These provisions were:

> That, in all criminal prosecutions, the accused hath a right to be heard by himself and his council [*sic*], to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; That he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.
>
> That no person shall, for an indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, or, by leave of the court, for oppression and misdemeanor in office. No person shall, for the same offence, be twice put in jeopardy of life or limb; nor shall any man's property be taken or applied to public use without the consent of his Representatives, and without just compensation being made.[128]

The Pennsylvania draftsman used some language from the Massachusetts and New Hampshire bills of rights[129] and some that is found in the various federal proposals. At first glance it seems clear that he intended to exclude military cases only from the grand- and petit-jury provisions. If this was his intent, he did not express it clearly. While the complaints served upon those accused of military crimes have always been called charges and specifications rather than indictments or informations,[130] the language of the second-quoted paragraph makes it appear that a court-martial proceeding is one brought by an information. And prosecutions by information are included in the petit-jury guarantee.

Before the significance of the history of the fifth and sixth amendments is fully analyzed, it will be helpful to examine the other amendments and the practices of courts-martial at the time the Constitution and the bill of rights were written.

B. THE OTHER AMENDMENTS

The remaining portions of the bill of rights present less difficulty than do the fifth and sixth amendments. The second, third, seventh, ninth, and tenth amendments need not be discussed, for they are not relevant to the present problem.

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[128] PA. CONST. art. IX, §§ 9, 10, (1790). These provisions were copied in CONN. CONST. art. I, § 9(1818) (slight change in wording); DEL. CONST. art. 1, §§ 7, 8 (1792) (slight change in wording); KY. CONST. art. XII, §§ 10, 11 (1792).

[129] See p. 153 *supra*.

[130] See, *e.g.*, WINTHROP *275–80.

There was no discussion by the framers whether the first amendment would or would not apply to persons in the military. It is significant that whereas the British articles of war of this period contained a section requiring soldiers to attend church,[131] the American articles passed by Congress have always merely "recommended" church attendance.[132] There seems little reason to suppose that the framers desired Congress to be wholly free of first-amendment restraints in legislating for the armed forces.[133]

Similarly, the framers did not mention the military during their debates on the fourth amendment. Although the portion of this amendment relating to warrants was intended primarily to protect the civil population against the oppressive practice of issuing general warrants,[134] and is not appropriate to military life, there is no difficulty in reading the provision against unreasonable searches and seizures as being separable[135] and protecting those on active duty with the military.

The eighth amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It is phrased as was the Virginia provision, which some of the members of the Virginia ratification convention thought would apply to courts-martial if it were incorporated in the Constitution.[136] The only problem of construction created by this amendment is caused by the fact that bail has never been granted to members of the military awaiting trial by courts-martial, although the analogous practice of allowing the accused, if an officer, to be left at large on the military reservation until trial, was common.[137] The Virginia debaters did not think of this as preventing the application of the other clauses of the provision to courts-martial. The phrase "excessive bail shall not be required" can be read as meaning that, where bail is appropriate, it must not be set in an excessive amount, rather than as

[131] British Articles of War of 1765, § 1, printed in WINTHROP *1448; Mass. Articles of War of 1775, art. 1, printed in WINTHROP *1471. See also British Articles of War of 1765, § 1, art. 3, printed in WINTHROP *1448.

[132] See, *e.g.*, Rules and Regulations of the Continental Army art. 2 (1775), printed in WINTHROP * 1478–79; Rules and Articles for the Better Government of the Troops § 1, art. 2 (1776), printed in WINTHROP *1489.

[133] For a discussion which assumes that the first amendment applies to the armed forces, and a discussion of the validity of various restraints on freedom of expression in the services, see Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187 (1957). See also WINTHROP *1015.

[134] See, *e.g.*, 3 ELLIOT'S DEBATES 448, 468, 588.

[135] The history of the amendment shows that the provisions are separable. See LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT 79–82, 102–03 (1937). Lasson states that the wording of the amendment was changed by the committee of three. *Id.* at 101. This statement is incorrect. See S. JOUR., 1st Cong., 1st Sess. 103–06 (1789); H.R. JOUR., 1st Cong., 1st Sess. 107–08 (1789).

[136] See pp. 148–50 *supra*.

[137] See ADYE 139–40; TYTLER, AN ESSAY ON MILITARY LAW, AND THE PRACTICE OF COURTS MARTIAL 202 (1800) (hereinafter cited as TYTLER).

meaning that bail must be granted in all cases. For example, it has not been thought constitutionally necessary to grant bail in capital cases. Since the purpose of the bail requirement is to allow an accused to remain free until and unless he is convicted of a crime, the requirement is inappropriate in the military where the individual has no freedom of movement but rather is at all times subject to control by his superiors. Therefore, it is not awkward to hold that the bail portion of this amendment does not apply to courts-martial, but that the prohibition of excessive fines and cruel and unusual punishments does.

Thus, there is no major barrier to holding the first, fourth, and eighth amendments applicable to persons in the armed forces. Many of the original drafts of the bill of rights, which excluded cases arising in the military from the requirement of juries, contained separate provisions, similar to these amendments, from which the military was not excluded.[138] This is additional evidence that these amendments were intended to be so applicable.

V. THE CONTEMPORARY PRACTICE IN COURTS-MARTIAL

Since the bill of rights generally was meant to codify existing practices and ideas,[139] there being no indication of an intent to have the amendments work a major reform of courts-martial, it is necessary to examine the practices of courts-martial in the period during which the bill of rights was written to see if they conformed substantially to the procedures and rights guaranteed by the first ten amendments. If they did not, it would indicate that the amendments were not intended to apply to courts-martial.

At the time the Constitution and the bill of rights were written it had been a long-standing practice of British military law that the ordinary rules against double jeopardy and self-incrimination applied to military tribunals.[140] Indeed, the contemporary texts stated that the ordinary procedures of the criminal courts were to be followed except as the articles of war otherwise provided.[141] The accused was

[138] In addition to the Madison and the House proposals, pp. 155–57 *supra*, see the proposals of various states. 1 ELLIOT'S DEBATES 325–27 (New Hampshire); 1 *id.* at 327–31 (New York); 3 *id.* at 657–61 (Virginia); 4 *id.* at 243–47 (North Carolina).

[139] Corcoran & Frankfurter, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 970 (1926).

[140] See ADYE 97; 1 MCARTHUR, PRINCIPLES AND PRACTICE OF NAVAL AND MILITARY COURTS-MARTIAL 138–39 (2d ed. 1805) (hereinafter cited as MCARTHUR); 2 *id.* at 60; TYTLER 245–46, 288; *cf.* Amendments of 1786 to the Rules and Articles for the Better Government of the Troops (1776) art. 6, printed in WINTHROP *1505; 2 MCARTHUR 39–40.

[141] ADYE 66; 1 MCARTHUR 225–26; 2 *id.* at 44. Both McArthur's and Tytler's book can be considered contemporary with the Constitution and bill of rights since the procedures of courts-martial did not change substantially between 1787 and 1805.

allowed to confront and cross-examine the witnesses against him.[142] When depositions or evidence were taken, it was required that the prosecutor and the accused be present.[143]

The treatises of the period state that it was customary to allow the attendance, at the court-martial, of the witnesses desired by the accused.[144] Though the military courts had no jurisdiction to compel the attendance of civilian witnesses, it was usual for both the prosecution and the accused to be allowed to obtain a subpoena from the appropriate civil court for this purpose.[145] Similarly, it was traditional to allow the accused legal assistance.[146] Counsel was usually a man in uniform; the use of civilian lawyers by either side was frowned upon since they were unfamiliar with military law.[147] A conception of due process also seems to have been applicable to military courts. The accused was entitled to a copy of the charges against him, which charges had clearly to state the nature of the offense charged.[148] Coerced confessions were not admissible.[149] The accused was entitled upon demand to a copy of the court-martial proceedings.[150] Any soldier who thought himself wronged by his superiors could have his grievance brought before a court-martial.[151]

The judgments of regimental courts were not final until they had been approved by the commanding officer, who could not sit on the court,[152] and these approvals were reviewable by a general court-

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[142] ADYE 172, 201; 2 MCARTHUR 71, 135–36; TYTLER 250, 311.

[143] Resolution of Nov. 16, 1779, 15 JOUR. CONT. CONG. 1278; Amendments of 1786 to the Rules and Articles for the Better Government of the Troops (1776) art. 10, printed in WINTHROP *1506; ADYE 199–200 n.§; 2 MCARTHUR 71; TYTLER 312 n.*.

[144] ADYE 201–02; 2 MCARTHUR 18, 135–36; TYTLER 309–10. The first American statutory guarantee of compulsory process for obtaining witnesses expressly applicable to defendants before courts-martial appeared in an 1814 act relating to the militia. Act of April 18, 1814, c. 82, § 4, 3 Stat. 134. The first statute expressly guaranteeing compulsory process to defendants in the regular federal criminal courts appeared in 1846. Act of Aug. 8, 1846; REV. STAT. § 878 (1875).

[145] 2 MCARTHUR 18; TYTLER 310. See also ADYE 180–81. A resolution of Nov. 16, 1779, 15 JOUR. CONT. 1277–78, recommended to the states that upon the application of judge advocates they grant writs to compel the attendance of civilian witnesses before courts-martial. The judge advocate has traditionally been the one to obtain or issue summons for both the prosecution and the defense. See, *e.g.*, TYTLER 222, 310; WINTHROP *277. The first statute giving the judge advocate the same subpoena power as a criminal court was the act of March 3, 1863; REV. STAT. § 1202 (1875).

[146] 2 MCARTHUR 42; TYTLER 253–55. See also ADYE 114.

[147] TYTLER 253–55.

[148] ADYE 123–24; 1 MCARTHUR 167; 2 *id.* at 5–9, 18; TYTLER 212–22.

[149] ADYE 153–54; 2 MCARTHUR 77–79.

[150] Rules and Articles for the Better Government of the Troops § 18, art. 3 (1776), printed in WINTHROP *1502; Amendments of 1786 to the Rules and Articles for the Better Government of the Troops (1776) art. 24, printed in WINTHROP *1507; TYTLER 370–71.

[151] Rules and Regulations of the Continental Army art. 14 (1775), printed in WINTHROP *1480; Rules and Articles for the Better Government of the Troops § 11, art. 2 (1776), printed in WINTHROP *1494; British Articles of War of 1765, § 12, art. 2, printed in WINTHROP *1457.

[152] Rules and Articles for the Better Government of the Troops § 14, arts. 10, 11 (1776), printed in WINTHROP *1499; Amendments of 1786 to the Rules and Articles for the Better

martial.[153] The judgment of a British general court-martial was not final until approved by the King or his commander-in-chief.[154] An American general court-martial was not final until approved by Congress or the commander-in-chief.[155] The military law was codified and less vague than the ordinary criminal law of the day.[156] The articles of war were required to be read to all soldiers upon enlistment and periodically thereafter.[157] Confinement before trial could not last longer than eight days or until a court-martial could conveniently be assembled.[158] The punishments inflicted by courts-martial were no more cruel than those inflicted by the criminal courts.[159]

It is plain that military courts were thought to be less desirable places in which to be tried than civil courts.[160] The proceedings were more summary. The court was an impermanent body and the accused was tried by his superior officers rather than by an independent judiciary. A jury was not available. The trial was conducted by military men usually without the presence of civilian counsel. Obviously more errors were likely to be committed in this system of law administration than in the permanent civil courts of record, although perhaps no more than in the magistrates' courts.[161] These characteristics of military justice were thought to be necessary if the armed services were to have the rapid judicial enforcement of rules that is essential to discipline.[162] However, it is apparent that to an extent

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Government of the Troops (1776) art. 2, printed in WINTHROP *1504; British Articles of War of 1765, § 15, arts. 12, 13, printed in WINTHROP *1465.

[153] ADYE 92; TYTLER 337–45.

[154] British Articles of War of 1765, § 15, art. 10, printed in WINTHROP *1464.

[155] Rules and Articles for the Better Government of the Troops § 14, art. 8 (1776), printed in WINTHROP *1499; see Amendments of 1786 to the Rules and Articles for the Better Government of the Troops (1776) art. 2, printed in WINTHROP *1504 (limiting the right to review).

[156] See 1 BLACKSTONE, COMMENTARIES 418 n. 16 (Hargrave ed. 1844) (note written by editor criticizing Blackstone's view); TYTLER 13–29. Blackstone was upset over Parliament's delegation of legislative power to the Crown to write the articles of war for the army. This led him to take a dim view of military law in the army, but not of military law in the navy. 1 BLACKSTONE, COMMENTARIES *416–20*.

[157] Rules and Regulations of the Continental Army art. 1 (1775), printed in WINTHROP *1478; Rules and Articles for the Better Government of the Troops § 3, art. 1 (1776), printed in WINTHROP *1490; *id.* § 18, art. 1, printed in WINTHROP *1502; British Articles of War of 1765, § 3, art. 1, printed in WINTHROP *1450; *id.* § 20, art. 1, printed in WINTHROP *1468.

[158] Rules and Regulations of the Continental Army art. 42 (1775), printed in WINTHROP *1483; Rules and Articles for the Better Government of the Troops § 14, art. 16 (1776), printed in WINTHROP *1500; Amendments of 1786 to the Rules and Articles for the Better Government of the Troops (1776) art. 16, printed in WINTHROP *1506; British Articles of War of 1765, § 15, art. 18, printed in WINTHROP *1466.

[159] See 4 BLACKSTONE, COMMENTARIES *375–78; TYTLER 319–26.

[160] See 3 FARRAND 208. See also the discussion of the Virginia ratification debates, pp. 148–50 *supra*.

[161] For a discussion of the broad extent of the jurisdiction of the magistrates' courts in England, see Corcoran & Frankfurter, *supra* note 139, at 925–33. The magistrates' courts were summary courts and their decisions were largely unreviewable.

[162] *E.g.*, TYTLER 11–12.

consistent with this necessity the accused was allowed most considerations of fair play.[163]

The texts of the time state that the civil courts could issue writs of prohibition against the execution of sentences imposed by courts-martial acting beyond their jurisdiction, and could even issue writs of error or certiorari to correct court-martial judgments just as they could correct those of the civil courts, although they would not do so unless manifest error had been committed.[164] However, in later writings it appears that the scope of review was never so broad and extended only to questions of jurisdiction.[165] Yet it is important that at the time the Constitution and the bill of rights were written the leading text writer on courts-martial felt that judicial review was possible to the same extent as in criminal cases in the courts of common law.[166]

Moreover, members of courts-martial could be sued for damages in the common-law courts if they acted improperly.[167] The contemporary texts[168] relate the leading case of Lieutenant Frye of the marines. In 1743 Frye had been convicted by a naval court-martial and sentenced to fifteen-years imprisonment. The evidence used to convict him was some depositions taken several days before the trial of persons whom Frye was never allowed to confront. When he objected to the use of this evidence, Frye was cursed by the court. Although the sentence was remitted by the King, Frye brought an action for false imprisonment in the Common Pleas Court against the president of the court-martial. He was awarded damages of 1,000 pounds, and the court indicated that he could still bring suit against the other members of the court-martial, which he did.

The contemporary practice of courts-martial was such that the application of the bill of rights to them would not have been considered a major reform. This supports the view that the amendments were intended to apply to those subject to military law. For, since the bill of rights was intended to codify existing practices, it was probably

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[163] See 1 BLACKSTONE, COMMENTARIES 418 n.16 (Hargrave ed. 1844) (note by editor).

[164] ADYE 63 n.*; TYTLER 167–72.

[165] CLODE, MILITARY AND MARTIAL LAW 158–60, 162–63 (2d ed. 1874); SIMMONS, COURTS MARTIAL 309 (7th ed. 1875).

[166] ADYE 63 n.*. It is impossible to know to what extent the framers were familiar with Adye's text. Adye was Deputy Judge Advocate of the British Army in America. The first edition of his work was published in New York. Since it was the only adequate treatise on courts-martial published before the bill of rights was written, it seems likely that at least some of the framers had read it. It is known that General Washington saw some of the court-martial records that carried Adye's signature. 25 WRITINGS OF GEORGE WASHINGTON 29 & n.41, 436–37 & n.50, 461 (1938).

[167] ADYE 63 n.*; 1 MCARTHUR 226–32; 2 *id.* at 159 n.*. See also SIMMONS, COURTS MARTIAL 310–11 (7th ed. 1875).

[168] ADYE 63 n.*; 1 MCARTHUR 229–32, app. 13, at 344–47; TYTLER 167 n.*. See also SIMMONS, COURTS MARTIAL 193 n.7 (7th ed. 1875).

meant to apply to any of the agencies of the federal government in which the codified practices were observed.

VI. CONCLUSION

Whether any of the first ten amendments are thought to apply to courts-martial depends largely on the construction given to the fifth and sixth amendments. The history of these two amendments up to the time they were sent to the Senate gives support to the view that, with the exception of their jury provisions, they were intended to apply to cases arising in the land and naval forces, rather than to the view that they were not intended to be so applicable.

Most of the various bills of rights and proposals for bills that contained the same guarantees as are in the fifth and sixth amendments seemed to rest on a common understanding that the rights of men apply to those in the service. The Massachusetts and New Hampshire bills, which had all of the guarantees that are in the fifth and sixth amendments except that for grand juries, clearly applied to courts-martial. All of the nonjury provisions of the New York proposals, which included all of the federal guarantees, seemed to protect those subject to military law. The same can be said for the provisions Pennsylvania adopted in 1790.

During the Virginia debates several of the convention members, including two who had helped draft the Virginia bill of rights, indicated, without contradiction, that if the provisions of the Virginia bill of rights were in the Constitution they would apply to courts-martial. Yet the Virginia bill of rights, which contained a jury guarantee, made no mention of courts-martial. The Virginia proposals for a federal bill of rights did mention courts-martial, but in nearly as ambiguous a fashion as do the existing amendments.

The proposals for the bill of rights Madison later drafted to put before the House were unambiguous on this point and clearly applied to courts-martial. Madison evidently intended his proposals to have the same substantive meaning in this respect as did the Virginia proposals.[169] His draft should therefore be viewed as a more accurately worded version of the substantive guarantees contained in the Virginia bill of rights and the Virginia proposals for a federal bill of rights, both of which he helped write.

Further evidence that there was a common understanding that the bill of rights would apply to those in the land and naval forces is furnished by the failure of anyone in the House to object to the fact

[169] See 3 WORKS OF JOHN ADAMS 220 (C. F. Adams ed. 1851); BRANT, JAMES MADISON—FATHER OF THE CONSTITUTION 264–66 (1950); LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT 96 n.62, 97–98, 100 (1937).

that the amendments as presented to and adopted by that body would probably be read as applying to courts-martial.

The issue ultimately is whether one wishes to interpret the changes occurring after the House proposals went to the Senate as manifesting an intent that these amendments should not protect those subject to military law. Because the acceptance of the position that these changes manifested such an intent would carve out a class of Americans who would be unprotected by the constitutional guarantees, it should be accepted with reluctance and only if it is supported by the most clear evidence.

The only evidence that might be thought to support this position is the Maryland proposal, which excepted courts-martial from its double-jeopardy provision, the failure of the Senate to accept the tenth article of the House proposals, and the changes made in the federal bill of rights during the negotiations, in which Madison played a role, between the Senate and the House.

What little evidence there is concerning the Senate debates and the Senate-House negotiations indicates that the changes made during them do not support this position. The Senate's failure to adopt the tenth article of the House proposals apparently was not because of disagreement over military cases. In his letters Madison listed several of the Senate's objections to the House proposals.[170] The objection to the tenth article was that in the petit-jury provision the vicinage from which the jury was to come and the "accustomed requisites" of jury trial could not be defined in a way that would be satisfactory to all of the states, which had differing practices. Madison's failure to mention that there was any objection in the Senate because the House proposals could be read as covering courts-martial is strong evidence that no such objection was made.

When the Senate debaters separated the grand-jury guarantee of the House proposals from the petit-jury guarantee, which was objectionable to them, they carefully added to the grand-jury provision a phrase excepting military cases. During their reconsideration of the petit-jury guarantee the Senate retained in it the exeption of military cases placed there by the House.[171] This is a clear demonstration that the Senate debaters must have thought, as did the House, that it was necessary to exclude military cases from these two guarantees but not from the others. That the exception of military cases was added to the fifth amendment only when the Senate moved the grand-jury guarantee into it shows that the exception was to apply only to that guarantee and not to the other provisions of the amendment.

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[170] 5 HUNT, WRITINGS OF JAMES MADISON 420–24 n.1 (1904).

[171] See note 120 *supra*.

The Madison letters, together with the evolution of the amendments in the Senate, lead also to the conclusion that the changes made by the Senate-House Conference Committee were not intended to make the amendments inapplicable to courts-martial. The present sixth amendment is vague because the important petit-jury guarantee, after having been phrased so as to compromise the disagreement between the houses, was tucked into it. In order to satisfy the Senate objections, this guarantee had to be phrased very briefly. It became merely a guarantee of a trial by an impartial jury of the state and district, to be previously ascertained by law, where the crime was committed. This was too brief to warrant being a separate amendment. Nor, as a matter of syntax, could it conveniently be added to the fifth amendment, which contained the grand-jury provision with its clause excepting military cases. It would fit very neatly into the ninth article of the House proposals, which could be changed to read:

> 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 . . . . (Emphasis added.)

But an exception for military cases could not easily be added to the proposal in this form.

In the process of adjusting the disagreements between the houses over the crucial substantive jury problems, the difficulty in applying the rephrased amendments to courts-martial might well have been overlooked. Perhaps those who favored the inclusion of an express petit-jury guarantee thought there was more chance of its being adopted and ratified if they placed it in the middle of the already accepted provisions of the sixth amendment, than if it were made a separate provision, to which an exception for military cases could have been added. At any rate, since vaguely phrased guarantees had been thought before to be applicable to courts-martial, there is little reason to suppose the framers felt that their now similarly vague amendments would suddenly acquire the contrary meaning merely because they had undergone changes that made them less clear than they once had been on this point. Furthermore, as we have seen, it is no easier to construe the amendments as changed as not applying to courts-martial than it is to construe them in the opposite manner.

On the whole, therefore, the evidence of the original intent favors the view that the bill of rights was intended to apply to those in the land and naval forces.[172]

[172] Of course, if the bill of rights applies to courts-martial, the content of its provisions would be adapted to the military context. For example, what constitutes due process or an unreasonable search and seizure would be different in the military sphere than in civilian life.

DEFINITION AND GROWTH: WIENER ON COURTS-MARTIAL AND THE BILL OF RIGHTS

Colonel William W. Winthrop's monumental *Military Law and Precedents*[1] is undoubtedly the most widely-quoted and authoritative source of American military law written by one person. Even today it is difficult to find a case or article which does not make its bow to him, and Winthrop wrote about criminal law only to 1895. Frederick Bernays Wiener, Army Colonel (Retired) and advocate before the Supreme Court, is the most prolific, widely-quoted and authoritative writer on military law of this century. His major works span the period from 1940[2] to 1969.[3] Included in that period is his effort as counsel to secure reargument and eventual victory in the landmark cases, *Reid v. Covert*[4] and *Kinsella v. Kruger*.[5] These cases overturned apparently settled law concerning courts-martial jurisdiction over dependents of military personnel in peacetime and provided the foundation for one of the best books available on military law and legal history.[6]

Much of Wiener's finest work has been done on the historical analysis of courts-martial jurisdiction and military crimes,[7] a subject which fascinates both constitutional lawyers and scholars. In addition to the next article by the late Chief Justice Warren, the question of constitutional limits on the military's disciplinary power has engaged a number of fine scholars influenced by the system, its scope, or the challenge of this article.[8]

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[1] W. WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1896).

[2] Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

[3] Wiener, *Martial Law Today*, 55 A.B.A.J. 713 (1969).

[4] 354 U.S. 1 (1957).

[5] *Id.* (a companion case).

[6] WIENER, CIVILIANS UNDER MILITARY JUSTICE (1967).

[7] *See* Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357 (1968).

[8] *See* Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1 (1971); Bishop, *Civilian Judges and Military Justice*, 61 COLUM. L. REV. 40 (1961); Barker, *Military Law, A Separate System of Jurisprudence*, 36 U. CIN. L. REV. 223 (1967); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 MAINE L. REV. 35 (1970); Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482 (1971).

COURTS-MARTIAL AND THE BILL OF RIGHTS: THE ORIGINAL PRACTICE†

*Frederick Bernays Wiener**

Former Attorney General Biddle has told this story about Mr. Justice Holmes:[1]

> In the Gavit case a taxpayer had achieved a temporary victory in the Second Circuit, where the court had held that income from a trust fund was not taxable under the Revenue Act of 1913. Holmes was interested, he said, because he enjoyed such an income. The taxpayer's argument passed the remark until the summation, when he ventured: "I hope, Mr. Justice Holmes, that the Statute of Limitations has not run in your case so that you will not be foreclosed from getting back the tax you have mistakenly paid to the Government." Everyone in the courtroom looked at the Justice. "Nothing you have said," he remarked with a deadly mildness, "nothing you have said, my dear sir, leads me to hope." He wrote the opinion reversing the judgment of the lower court.[2]

In the December 1957 issue of the *Harvard Law Review*, Mr. Gordon D. Henderson examines the question of the applicability of the Bill of Rights to trials by court-martial, and concludes that, on the whole, "the evidence of the original intent favors the view that the bill of rights was intended to apply to those in the land and naval forces."[3] This is a matter of more than passing personal interest; I contended in the *Krivoski* case that the guarantees of the first eight amendments, in particular that of the assistance of counsel contained in the sixth amendment, applied in full measure to trials by court-martial.[4] I was

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*Member of the District of Columbia Bar. Ph.B., 1927, Brown University; LL.B., 1930, Harvard Law School; LL.D., 1969, Cleveland-Marshall Law School.

[1] Biddle, *Mr. Justice Holmes*, in MR. JUSTICE 11 (Dunham & Kurland eds. 1956).

[2] Irwin v. Gavit, 268 U.S. 161 (1925).

[3] Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 324 (1957).

[4] Krivoski v. United States, 136 Ct. Cl. 451, 145 F. Supp. 239, *cert. denied*, 352 U.S. 954 (1956). The plaintiff and one Finley, both officers of the Army, were separately charged with a joint offense. Finley was tried first, and, represented by a civilian lawyer and a Captain Adams, pleaded not guilty. Plaintiff, a witness against Finley, had been interviewed before the trial by Adams in the latter's capacity as assigned counsel for Finley, and Adams suggested that

unsuccessful at all stages over a period of six years, culminating in denial of certiorari by the Supreme Court. I would therefore feel the warm suffusing glow of personal vindication if, ultimately, that tribunal were to espouse the views I then urged. But, to paraphrase Mr. Justice Holmes only slightly, nothing in the Henderson article leads me to hope. For the author has overlooked significant—indeed, controlling—contemporary materials and has at critical points misread the authorities he has cited.

I. THE REQUISITE PERSPECTIVE

The commonplace observation that hindsight is better than foresight is subject to a well-defined exception: Hindsight applied to history is almost invariably misleading. Maitland, the greatest of legal historians, continually warned against "after-mindedness."[5] "Again and again he emphasized the danger of imposing legal concepts of a later date on facts of an earlier date. . . . We must not read either law or history backwards. We must learn to think the thoughts of the past age—'the common thoughts of our forefathers about common things.'"[6]

And even if the present-day researcher can refrain from anachronistically reading his own views into the thoughts of those who preceded him by some 180 years, he must, certainly in any inquiry as to the contemporaneous scope of the American Bill of Rights, distinguish

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plaintiff claim his privilege against self-incrimination. Finley was convicted in a trial in which plaintiff testified for the prosecution, and Finley's conviction was sustained on the ground that he had counselled plaintiff to commit the offense. See United States v. Finley, 12 Bd. Rev.—Jud. Council 127, 145 (Bd. of Review 1951). After Finley's trial, the charges against the plaintiff, which had meanwhile been held in abeyance, were referred for trial. Captain Adams was then assigned as plaintiff's counsel. He pleaded plaintiff guilty, did not present to the court-martial matters that he later put into a clemency request, and submitted that clemency request too late. Plaintiff in the Court of Claims contended that his representation by Captain Adams was perfunctory in that he did not prepare the case and in that he did not present to the court-martial the one point of fact and the one point of law in plaintiff's favor. The court, however, rejected plaintiff's assertion that he had been denied effective assistance of counsel in violation of the sixth amendment.

Similar conflict of interest on the part of counsel in a civil prosecution has resulted in the setting aside of convictions. See, *e.g.*, Glasser v. United States, 315 U.S. 60 (1942); Craig v. United States, 217 F.2d 355 (6th Cir. 1954). For the higher standard required of court-appointed, as opposed to personally selected, counsel, see People v. Morris, 3 Ill. 2d 437, 445, 452–53, 121 N.E.2d 810, 815, 819 (1954). The civilian Court of Military Appeals has, since, *repeatedly reversed convictions because of conflict of interest on the part of appointed counsel.* See, *e.g.*, United States v. Grzegorczyk, 8 U.S.C.M.A. 571, 25 C.M.R. 75 (1958); United States v. Lovett, 7 U.S.C.M.A. 704, 23 C.M.R. 168 (1957).

Krivoski also contended in the Court of Claims that denial of his counsel's request for a copy of the Board of Review opinion to aid in preparing an appeal to the Judicial Council was a violation of the fifth amendment—but to no avail. Compare the holding as to right of access to files in Gonzales v. United States, 348 U.S. 407 (1955).

[5] Cam, *Introduction* to MAITLAND, SELECTED HISTORICAL ESSAYS at xix (Cam ed. 1957).

[6] *Id.* at xi.

carefully between, on the one hand, those of its provisions that were declaratory of principles generally accepted in the period from September 1787, when the Constitution was published by the Convention and the drive for enactment of a bill of rights began, to December 1791, when the first ten amendments became effective; and, on the other hand, those provisions that marked a change in what was then generally law.

Some of the amendments were declaratory only. Trial by petty jury had been part of the common law for centuries (and was moreover guaranteed by the Constitution proper),[7] presentment by grand jury went even farther back,[8] the concept of due process of law stemmed from Magna Carta,[9] and the guarantee of bail,[10] the privilege against self-incrimination,[11] and the prohibition against double jeopardy[12] were, all of them, well settled in English law.

Other guarantees were more recent, and hence more precarious. The limitation on unreasonable searches and seizures echoed Lord Camden's judgment in *Entick v. Carrington*[13] and recalled James Otis' immortal argument against writs of assistance.[14] The right to petition for redress of grievances stood as a reproach to George III's cavalier disregard of the colonists' remonstrances.[15]

Still other portions of the Bill of Rights were designed to correct existing evils. The prohibition directed at an establishment of religion was adopted at a time when state-supported churches were still far from being an institution of the past,[16] and when sectarian qualifications for state office still obtained.[17] And the right to counsel guaranteed by the sixth amendment placed federal criminal prosecutions on a

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[7] U.S. CONST. art. III, § 2; see 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 311–20 (7th ed. 1956); PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 124–31 (5th ed. 1956).

[8] 1 HOLDSWORTH, *op. cit. supra* note 7, at 321–23; PLUCKNETT, *op. cit. supra* note 7, at 428–29.

[9] See 1 HOLDSWORTH, *op. cit. supra* note 7, at 59–63.

[10] "The right to be bailed in certain cases is as old as the law of England itself, and is explicitly recognised by our earliest writers." 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 233 (1883).

[11] 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940).

[12] 4 BLACKSTONE, COMMENTARIES *315, *335–37, *361; 2 HAWKINS, PLEAS OF THE CROWN 515–24 (8th ed. 1824).

[13] 19 How. St. Tr. 1029 (1765).

[14] Paxton's Case, Quincy 51, 55 (Mass. 1761).

[15] See 1 HOLDSWORTH, *op. cit. supra* note 7, at 517. The right to petition was confirmed in paragraph 5 of the English Bill of Rights of 1689, 1 W. & M. 2d Sess., ch. 2.

[16] Massachusetts did not withdraw state support from churches until 1833, by article XI of the amendments to its constitution. See LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 42 (1957); COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 500, 515 (1902).

[17] Such qualifications were not abolished in Connecticut until 1818, COBB, *op. cit. supra* note 16, at 513, nor in Delaware until 1831, *id.* at 517, nor in Maryland until 1851. *Compare* MD. CONST. declaration of rights art. XXXV (1776) *with* MD. CONST. declaration of rights art. 34 (1851), printed in 3 Thorpe, *The Federal and State Constitutions*, H.R. Doc. No. 357, 59th Cong., 2d Sess. 1690, 1715 (1909).

fairer plane than most in England, where only persons accused of treason could be defended by counsel, and that only since 1696.[18] Persons charged in England with felonies could not be defended by counsel until 1836,[19] many years in the future. Many states—though not all—had rejected the British practice. By 1791, the right to counsel was extended by constitutions of seven states and the statutes and practice in two others.[20] Rhode Island, without a constitution, had early relaxed the traditional practice, although there does not appear to have been a definitive statute on the point until late in the eighteenth century.[21] In Virginia and South Carolina, counsel were permitted by statute, but only in capital cases.[22] By 1796, Connecticut allowed counsel in all cases as a matter of practice.[23] It is unclear whether Georgia conferred the right before 1798.[24] The federal Crimes Act of 1790, enacted by the same Congress that proposed the Bill of Rights to the states, permitted counsel, and required counsel to be furnished on request—but only in capital cases.[25] It would therefore be a fair summary to conclude that the sixth amendment, in so far as it granted the right to counsel "in all criminal prosecutions," guaranteed for all time a right only recently won, and that not universally nor in all cases.

When one examines the proposals for constitutional amendments made by the several ratifying conventions, it is again important to keep in mind the distinction between proposals that were declaratory of existing law and those that sought changes therein. This is particularly important with respect to the numerous proposals regarding military matters, because, to speak mildly, there existed in the late 1780's a considerable diversity of opinion regarding military policy.

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[18] Act of 1696, 7 & 8 Will. 3, ch. 3, § 1. Sir William Parkyns, tried for treason the day before this statute took effect, was not allowed counsel. Parkyns, 13 How. St. Tr. 63, 72–73 (1696).

[19] Act of Aug. 20, 1836, 6 & 7 Will. 4, ch. 114. For the earlier law, see 2 HAWKINS, PLEAS OF THE CROWN 554–57 (8th ed. 1824).

[20] See Powell v. Alabama, 287 U.S. 45, 61–62 (1932).

[21] The Rhode Island General Assembly on March 11, 1668/69 enacted "that it shall be accounted and owned from henceforth untill farther order, the lawfull privilege of any person that is indicted, to procure an attorney to plead any poynt of law that may make for the clearing of his innocencyee." 2. R.I. COLONIAL RECORDS 238–39. However, this provision was not carried into the compiled *Laws of R.I.* that were published in 1719, 1730, 1745–1746, and 1767.

At a trial of 26 pirates before a court of admiralty at Newport, R.I., in 1723, there is no sign of defense counsel. See UPDIKE, MEMOIRS OF THE RHODE ISLAND BAR 260–94 (1842).

Neither ARNOLD, A HISTORY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1860), nor BARTLETT, INDEX TO R.I. ACTS AND RESOLVES, 1758 TO 1850 (1856) lists any law relating to counsel in criminal cases. It would therefore appear that the right-to-counsel provision of the Declaration of Rights in R.I. PUBLIC LAWS 79, 80–81 (1798), was not adopted until 1798.

[22] Powell v. Alabama, 287 U.S. 45, 62 (1932).

[23] *Id.* at 63 & n.*.

[24] *Id.* at 63.

[25] Act of April 30, 1790, ch. 9, § 29, 1 Stat. 118.

Luther Martin left the Convention before it completed its work, and then opposed the Constitution because, among other things, it provided for an army in time of peace;[26] George Mason stayed to the end, but refused to sign, for this among other reasons;[27] and from Paris Jefferson urged a bill of rights which would afford "protection against standing armies."[28] Accordingly, numerous amendments were proposed either to prohibit a peace-time standing army altogether[29] or else to permit it only under strict limitations.[30] None was adopted; nevertheless, the unconstitutionality of a standing army in time of peace was still asserted by libertarians in the Senate when the miniscule increases of 1789 and 1790 were under consideration.[31]

There was diversity of view, also, concerning the status of the militia, which—despite its somewhat less than glorious service during the Revolution[32]—was proclaimed to be "the Palladium of our security."[33] Militia sentiment was strong enough to insure inclusion of the

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[26] 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 207 (1911); 12 DICTIONARY OF AMERICAN BIOGRAPHY 344 (1933).

[27] 2 FARRAND, *op. cit. supra* note 26, at 640.

[28] Letter From Thomas Jefferson to James Madison, Dec. 20, 1787, in 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (Boyd ed. 1955); Jefferson to Madison, July 31, 1788, in 13 *id.* at 440, 442, 443; see Dumbauld, *Thomas Jefferson and American Constitutional Law*, 2 J. PUB. L. 370, 383 (1953).

In view of the position taken by Martin, Mason and Jefferson, it seems difficult to support without qualification the conclusion of Mr. Justice Harlan concurring in Reid v. Covert, 354 U.S. 1, 68 (1956), that what the Founders feared "was a military branch unchecked by the *legislature*, and susceptible of use by an arbitrary *executive* power."

[29] See Rhode Island proposed amendment XII, in 1 ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 336 (2d ed. 1881) [hereinafter cited as ELLIOT'S DEBATES].

[30] Virginia and North Carolina proposed amendments against standing armies in time of peace in the absence of a two-thirds vote by Congress. 3 ELLIOT'S DEBATES 660 (Virginia, No. 9); 4 *id.* at 245 (North Carolina, No. 9). (All of the amendments proposed by the states, Rhode Island only excepted, are conveniently collected in DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 173–205 (1957)). New York and Rhode Island had each declared that standing armies in time of peace were dangerous to liberty, and should therefore be avoided, except in cases of necessity. 1 ELLIOT'S DEBATES 328 (New York); 1 *id.* at 335 (Rhode Island).

[31] THE JOURNAL OF WILLIAM MACLAY 221, 235 (1927 ed.). Maclay was a Senator from Pennsylvania.

[32] "To place any dependence upon Militia, is, assuredly, resting upon a broken staff." Letter From George Washington to the President of Congress, Sept. 24, 1776, in 6 THE WRITINGS OF GEORGE WASHINGTON 106, 110 (Fitzpatrick ed. 1932). "[I]f I was called upon to declare upon Oath, whether the Militia have been most serviceable or hurtful upon the whole; I should subscribe to the latter." 6 *id.* at 112.

> Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defence. This doctrine, in substance, had like to have lost us our independence. It cost millions to the United States that might have been saved. The facts, which from our own experience forbid a reliance of this kind, are too recent to permit us to be the dupes of such a suggestion.

THE FEDERALIST No. 25, at 122 (Beloff ed. 1948) (Hamilton).

[33] Letter from George Washington to the Governors of the Several States, June 8, 1783, in 26 THE WRITINGS OF GEORGE WASHINGTON 483, 494 (Fitzpatrick ed. 1932).

militia clause,[34] which embedded in the Constitution a system of divided military control that has plagued American military organization ever since and that cannot be said to be satisfactorily solved even yet;[35] and also to effect adoption of the second amendment,[36] a portion of the Bill of Rights that now and for some generations past has been solemn nonsense—and a dead letter.[37] Yet, ironically enough, the very exaggerations of the militia opponents of the new Constitution demonstrate the validity of—and were employed to justify—one of the most striking extensions of federal control, the regulation by Congress of the composition and jurisdiction of courts-martial of militia (now National Guard) not in federal service.[38]

Additionally, we must be circumspect in examining the Continental articles of war[39] when seeking to ascertain the constitutional rights of the officers and soldiers subject thereto. Secretary of War Knox immediately recognized in August 1798 "that the change in the Government of the United States will require that the articles of war be revised and adapted to the constitution."[40] Congress, the following month, simply continued the Continental articles in force, without more.[41] In the spring of 1790, they were re-enacted, "as far as the same

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[34] U.S. CONST. art. I, § 8, cls. 15–16.

[35] See Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940). For a proposal subsequent to the date of the cited article, see the COMMITTEE ON CIVILIAN COMPONENTS, RESERVE FORCES FOR NATIONAL SECURITY (1948), whose recommendations were successfully opposed by the National Guard.

[36] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

[37] See United States v. Miller, 307 U.S. 174 (1939) (not violated by tax laid on shotguns); Robertson v. Baldwin, 165 U.S. 275, 281–82 (1897) (dictum) (not violated by law prohibiting the carrying of concealed weapons).

[38] 32 U.S.C. §§ 326–33 (Supp. V, 1958), which derive from §§ 102–08 of the National Defense Act of 1916, ch. 134, 39 Stat. 208; see H.R. REP. No. 297, 64th Cong., 1st Sess. 2 (1916): "The framers of the Constitution evidently intended that the militia provided for in that instrument should be a national force and never had any doubt that Congress had full power to make it so." The report cites Patrick Henry in 1787: "Your militia is given up to Congress . . . . [A]ll power will be in their own possession. . . . By this, sir, you see that their control over our last and best defence is unlimited." 3 ELLIOT'S DEBATES 51, 52.

Note also that an amendment proposed by Virginia and North Carolina, that the militia "when not in the actual service of the United States, shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own state," 3 *id.* at 660; 4 *id.* at 243, and similar amendments proposed by Pennsylvania, 2 *id.* at 546, and New York, 2 *id.* at 406, all failed of adoption.

Additional references are Wiener, *supra* note 35, at 213–15.

[39] The Continental Articles and Rules for the Better Government of the Troops were adopted on September 20, 1776, 5 JOUR. CONT. CONG. 788 (1776). Section XIV thereof was repealed, and certain new articles adopted, on May 31, 1786, 30 JOUR. CONT. CONG. 316 (1786).

Articles of war in effect before 1806 will be cited to WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1896) [hereinafter cited as WINTHROP], where the military codes through 1874 are conveniently assembled. This work is available in a 1920 War Department reprint which indicates the pagination of the original second edition.

[40] 1 AMERICAN STATE PAPERS MILITARY AFFAIRS 6 (Lowrie & Clarke eds. 1832) [hereinafter cited as AM. ST. PAP. MIL. AFF.].

[41] Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96.

may be applicable to the constitution of the United States,"[42] a generalization that said very little, and that little as unhelpful in 1790, before ratification of the Bill of Rights, as when, after ratification, it was repeated with reference to the Army Articles in 1795[43] and 1796[44] and to those of the Navy when the Continental Articles for the Government of the Navy were revived in 1797.[45] The first complete *military codes under the Constitution* were those for the Navy, in 1799 and 1800, followed by one for the Army in 1806,[46] almost seventeen years after Secretary Knox had first called attention to the need for a revision.

One final point must be kept in mind at the outset. We are seeking to discover common understanding at a time when the scope of federal military law was exceedingly limited. It applied to a mere handful of individuals, all of whom were soldiers by choice,[47] and for the most part it denounced only offenses that were not punishable in courts of common law.

First, the scope of federal military law in 1789–1791 was extremely narrow in terms of the numbers affected thereby. President Washington transmitted to the Senate in August 1789 a statement from Secretary Knox showing that the troops in active service came to 672, and that there were wanting 168 "to complete the establishment."[48] By December 1792—after the disastrous defeats suffered by *Harmar* and *St. Clair at the hands of the Indians*—the authorized total was only 5,120.[49] But this was a paper figure; the actual total, as late as two years afterwards, was only 3,692.[50]

It is true that every state had its militia, in numbers that were impressive,[51] whatever might be said of its martial effectiveness. Militiamen when on duty were subject to state military codes of varying degrees of rigor.[52] Except in instances of insurrection or when

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[42] Act of April 30, 1790, ch. 10, § 13, 1 Stat. 121.

[43] Act of March 3, 1795, ch. 44, § 14, 1 Stat. 432.

[44] Act of May 30, 1796, ch. 39, § 20, 1 Stat. 486.

[45] Act of July 1, 1797, ch. 7, § 8, 1 Stat. 525.

[46] See pp. 181–88 *infra*.

[47] There was no national draft act until the Civil War. Act of March 3, 1863, ch. 75, 12 Stat. 731. Conscription measures were considered late in the War of 1812, see 1 AM. ST. PAP. MIL. AFF. 515, but none was adopted. UPTON, THE MILITARY POLICY OF THE UNITED STATES 123 (1912).

[48] 1 AM. ST. PAP. MIL. AFF. 6.

[49] 1 *id.* at 40.

[50] UPTON, THE MILITARY POLICY OF THE UNITED STATES 83 (1912).

[51] In the earliest militia return extant, dated January 1803, President Jefferson submitted to the House of Representatives the numbers of the militia in Massachusetts, Connecticut, Pennsylvania, Virginia, South Carolina, Georgia, and Mississippi Territory. 1 AM. ST. PAP. MIL. AFF. 159–62. This showed 31 major generals, 91 brigadier generals, 14,992 other officers, and 273,003 enlisted men.

[52] After the passage of the federal Militia Act of May 8, 1792, ch. 33, 1 Stat. 271, almost every state revised its militia laws to conform. See, *e.g.*, 1 CONN. STAT. tit. CXII, at 495 (1808); 2

called into the service of the United States, the militia were liable for only a few days of exercise each year.[53] The fine levied on enlisted men for nonappearance might be collected administratively, or by court-martial, or by a military court for the levying of fines, or even before a justice of the peace;[54] provisions varied from state to state, though the fines were invariably enforced by civil process.[55] The few trials of officers turned on disobedience of orders and on the terms of official communications made to superiors[56] in an age of exaggerated punctilio, when the low boiling point of a military temper was intertwined with honor itself.[57] But, except for the annoyance over the militia fines increasingly felt by the urban male population in the second quarter of the nineteenth century,[58] it is fair to say that the impact of state military law on the population was substantially nonexistent.

Second, the punitive articles of war in force from 1786 to 1806 were aimed, for the most part, only at military offenses—desertion,[59] absence without leave in numerous aspects,[60] mutiny,[61] war of-

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Laws Del. 1777–1797, ch. XXXVI (1797); Act of Dec. 14, 1792, Dig. Laws Ga. No. 468 (Watkins 1800).

See also Act of July 25, 1788, 1 Statutes of Ohio and the Northwestern Territory 92 (Chase 1833); Act of Dec. 13, 1799, 1 *id.* at 248–56 (militia laws of the Northwest Territory).

[53] See, *e.g.*, statutes cited note 52 *supra*. See also Mook, *Training Day in New England*, 11 NEW ENG. Q. 675 (1938).

[54] Kentucky and Virginia had military courts for the assessment of fines. See 1 Ky. Laws 1799, ch. CXIV, § 4, at 425; Va. Acts of 1792, ch. IV, § XXXIV. New Jersey and Pennsylvania provided mixed courts composed of civil and military officials to hear appeals from administrative assessments of fines. See Act of June 13, 1799, § XI, N.J. Laws Rev. 440 (Patterson 1800); 3 Laws Pa. ch. CLXXVI (Dallas 1793). Massachusetts provided that fines for neglecting to appear and for disorderly behavior would be collected after conviction before a justice of the peace. Mass. Laws May Sess. 1793, ch. I, §§ 19, 22. In the Northwest Territory, fines were collected by a tribunal designated a "court of inquiry and assessment of fines." Act of Dec. 13, 1799, § 23, 1 Statutes of Ohio and the Northwestern Territory 250 (Chase 1833).

[55] See, *e.g.*, statutes cited note 52 *supra*. See also Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

[56] See the four trials of officers of the Massachusetts Militia printed in THE MILITIA REPORTER (Boston 1810). See also TRIAL BY A COURT MARTIAL OF LIEUT. COL. GRENVILLE TEMPLE WINTHROP (1832); SMITH, REPORTS OF DECISIONS IN THE CIRCUIT COURTS MARTIAL (Portland, Me. 1831).

[57] Their day was one when the chastity of a gentleman's honor was thought to hover precariously on the brink of violation, to require a jealous and vigilant guard lest it suffer, without adequate defense, the taint of impugning rape. Jackson, Scott, Brown, Gaines, and Macomb were, after all, but true products of their times. Intensely jealous of their hard-won honors, fiercely ambitious for further renown, they came inevitably to regard one another as rivals rather than comrades. To yield one jot or tittle of prerogative was to compromise one's honor.
ELLIOT, WINFIELD SCOTT: THE SOLDIER AND THE MAN 257 (1937).

[58] See London, *The Militia Fine, 1830–1860*, 15 MILITARY AFFAIRS 133 (1951).

[59] Rules and Articles for the Better Government of the Troops § 6, arts. 1, 3 (1776) [hereinafter cited as Arts. of 1776], printed in WINTHROP *1492.

[60] Arts. of 1776, § 6, art. 2, § 13, arts. 1–4, printed in WINTHROP *1492, *1495–96.

[61] Arts. of 1776, § 2, arts. 3–4, printed in WINTHROP *1490.

fenses,[62] making false official statements or certificates.[63] The foregoing were not criminal at common law, and common-law felonies, except in so far as they were comprehended within larceny or embezzlement of military stores,[64] rioting,[65] or in the general articles denouncing "all crimes not capital" and conduct prejudicial to good order[66] or unbecoming an officer,[67] were not mentioned. To the contrary, the articles provided that, where military personnel were accused of committing offenses "punishable by the known laws of the land," their commander was required, under pain of being cashiered, "to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate."[68]

The foregoing must be emphasized, lest we be led to import into a consideration of the common understanding of 1787–1791 the vastly different situation of today.

At the peak of the World War II mobilization, when some 12,300,000 persons were subject to military law[69]—almost as many as the entire population of the country in 1830[70]—the armed forces handled one third of all criminal cases tried in the nation.[71] Selective-service legislation produced over ten million men directly[72] and assuredly stimulated hundreds of thousands to enter the service on their own. As of 1952, one ninth of the nation's crime potential was to be found in the armed forces,[73] and while the troop population today reflects the post-Korean demobilization and is smaller by about one third,[74] it is still substantial.

Moreover, the scope of offenses triable by courts-martial has been gradually but steadily broadened. Originally it was held that the phrase "to the prejudice of good order and military discipline" in the general article[75] modified the words "all crimes not capital" as well as

[62] Arts. of 1776, § 13, arts. 12–15, 17–22, printed in WINTHROP *1496–97.

[63] Arts. of 1776, § 4, arts. 4–5, § 5, art. 1, printed in WINTHROP *1491–92.

[64] Arts. of 1776, § 12, arts. 1–4, printed in WINTHROP *1494–95.

[65] Arts. of 1776, § 7, art. 4, § 13, art. 11, printed in WINTHROP *1493, *1496.

[66] Arts. of 1776, § 18, art. 5, printed in WINTHROP *1503.

[67] Amendments of 1786 to the Rules and Articles for the Better Government of the Troops (1776) art. 20 [hereinafter cited as Amends. of 1786], printed in WINTHROP *1506–07.

[68] Arts. of 1776, § 10, art. 1, printed in WINTHROP * 1494.

[69] THE WORLD ALMANAC 742 (1958).

[70] The figure for the 1830 census was 12,866,020. THE WORLD ALMANAC 258 (1958).

[71] Karlen & Pepper, *The Scope of Military Justice*, 43 J. CRIM. L., C. & P.S. 285, 297 (1952).

[72] THE ARMY ALMANAC 845 (1952).

[73] Karlen & Pepper, *supra* note 71, at 298.

[74] The peak strength of all the services during the Korean hostilities, at June 30, 1953, was 3,555,054. See [Jan.–June 1953] SECRETARY OF DEFENSE SEMIANN. REP. 99, 170, 254. The programed strength for June 30, 1958, was 2,608,000. Progress Reports and Statistics Office, Office of the Secretary of Defense, *Actual and Projected Active Duty Military Strength*, March 21, 1958.

[75] Arts. of 1776, § 18, art. 5, printed in WINTHROP * 1503; Art. War 99 of 1806, 2 Stat. 371 (now Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (Supp. V, 1958) [hereinafter cited as UCMJ]).

the expression "disorders and neglects,"[76] so that when a crime was committed against a person wholly unconnected with a military service, and no military order or rule of discipline was violated in and by the act itself, such act would not constitute a military offense.[77] Otherwise stated, the general article did not confer a general criminal jurisdiction.[78] But if the offense was committed while the soldier was in uniform, or in a place where civil justice could not conveniently be exercised, the transgression was held to be a military one;[79] and the broader construction was sustained by the Supreme Court in two cases involving sentinels.[80] In 1863, common-law felonies, including capital ones, were expressly made punishable in time of war.[81] Next, beginning in 1916, common-law felonies were made military offenses at all times,[82] except that murder and rape committed within the continental United States in time of peace could not be tried by court-martial.[83] In time of peace, soldiers accused of civilian offenses were still required to be turned over to the civil authorities on request.[84] Finally, in 1951, the Uniform Code of Military Justice removed all existing limitations so that even murder and rape committed by military personnel in the United States were made triable by court-martial at all times;[85] and the matter of delivery to the civilian authorities was left to regulation.[86] That is the present law, although by agreement between the Secretary of Defense and the Attorney General the scope for the exercise of military jurisdiction when concurrent with federal criminal jurisdiction has been curtailed.[87]

So much for essential background. It remains to consider, in the light of materials contemporaneous with the period under investigation—or at least contemporaneous with the lives of the Founders—the actual scope of particular provisions of the Bill of Rights which on their face might be thought applicable to persons

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[76] DIGEST OF THE OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 67, ¶ 2 (1895).

[77] *Id.* at 68–69, ¶ 3. The earliest restriction is found in a ruling by General Macomb, then commanding the Army, at a time when there were no judge advocates in the service. General Order 22 of 1833 [General Orders of the Army hereinafter cited as G.O., with date].

[78] 16 OPS. ATT'Y GEN. 578 (1880) (dictum). For recent reappearances of the older view, see United States v. Grosso, 7 U.S.C.M.A. 566, 23 C.M.R. 30 (1957); United States v. Williams, 8 U.S.C.M.A. 325, 24 C.M.R. 135 (1957); United States v. Gittens, 8 U.S.C.M.A. 673, 25 C.M.R. 177 (1958).

[79] See WINTHROP * 1123–26.

[80] *Ex parte* Mason, 105 U.S. 696 (1881); Grafton v. United States, 206 U.S. 333 (1907).

[81] Act of March 3, 1863, § 30, REV. STAT. § 1342, art. 58 (1875).

[82] Articles of War of 1916, ch. 418, § 3, art. 93, 39 Stat. 664.

[83] Art. War 92 of 1916, 39 Stat. 664.

[84] Art. War 74 of 1916, 39 Stat. 662.

[85] UCMJ arts. 118, 120, 10 U.S.C. §§ 918, 920 (Supp. V, 1958).

[86] UCMJ art. 14(a), 10 U.S.C. § 814(a) (Supp. V, 1958).

[87] Army Regs. 22–160, Oct. 7, 1955, implementing *Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction*, signed July 19, 1955.

subject to military law. The present article will consider the first military codes enacted by Congress, within fifteen years after ratification of the Bill of Rights, in an endeavor to ascertain how its guarantees were applied to military legislation. Next, there will be set forth the results of an intensive examination of the actual practice as to the right to counsel in trials by court-martial, with particular reference to cases that were reviewed and acted on by Presidents Madison, Monroe, and J. Q. Adams. Finally, there will be taken up, somewhat more briefly because the materials are scantier, the legislation and the practice in respect of the remaining guarantees.

II. THE FIRST MILITARY CODES UNDER THE CONSTITUTION

A. ARTICLES FOR THE GOVERNMENT OF THE NAVY

The last Continental frigate was sold in 1785,[88] and no measure for a navy for the new republic was enacted until 1794.[89] Even so, it was not until 1797 that Congress undertook to subject the new naval force to the Continental Articles for the Government of the Navy, "as far as the same may be applicable to the constitution and laws of the United States."[90] The Continental Navy Articles, adopted in November 1775,[91] like those for the Army adopted in September 1776,[92] had been drafted by John Adams.[93]

The earliest naval affairs were directed by the War Department,[94] but, when the quasi-war with France loomed, were placed under a newly created Navy Department.[95] Its head in November 1798, stating that the existing articles were "extremely defective," requested Captains Barry, Truxton, Dale, Decatur, and Tingey to "report a proper system."[96] Shortly thereafter, on January 23, 1799, Josiah Parker of Virginia introduced a measure in the House, and, "stating the bill was very long, and related entirely to the government of the

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[88] KNOX, A HISTORY OF THE UNITED STATES NAVY 44 (1948 ed.).

[89] Act of March 27, 1794, ch. 12, 1 Stat. 350; see Smelser, *The Passage of the Naval Act of 1794*, 22 MILITARY AFFAIRS 1 (1958).

[90] Act of July 1, 1797, ch. 7, § 8, 1 Stat. 525.

[91] 3 JOUR. CONT. CONG. 378–87 (1775).

[92] 5 JOUR. CONT. CONG. 788 (1776), printed in WINTHROP * 1489.

[93] See 3 WORKS OF JOHN ADAMS 68–69, 83–84 (C.F. Adams ed. 1851) (Army articles); 1 *id.* at 188; 3 JOUR. CONT. CONG. 277 (1775) (Navy articles).

[94] KNOX, *op. cit. supra* note 88, at 46; see 1 AMERICAN STATE PAPERS NAVAL AFFAIRS 6–56 (Lowrie & Franklin eds. 1834) [hereinafter cited as AM. ST. PAP. NAV. AFF.].

[95] See Act of April 30, 1798, ch. 35, 1 Stat. 553; Albion, *The First Days of the Navy Department*, 12 MILITARY AFFAIRS 1 (1948).

[96] Letter from Secretary of the Navy to Capt. John Barry, Nov. 29, 1798, in NAVAL DOCUMENTS, QUASI-WAR WITH FRANCE, OPERATIONS NOV. 1798–MAR. 1799, at 55–56 (1935).

Navy, he did not think it necessary to detain the House in reading it."[97]

The bill passed both Houses without a word of recorded debate, and without any notation of specific amendments in the journals; it became law on March 2, 1799.[98] Much of the act follows the Continental articles closely, substituting only the Secretary of the Navy for Congress, and the ships of the United States for those of the thirteen United Colonies. Some of the articles simply regulate matters of housekeeping on shipboard.[99] The only common-law offenses mentioned are stealing, embezzlement, murder, robbery, and theft.[100] Article 46, stating that "all faults, disorders and misdemeanors which shall be committed on board any ship belonging to the United States, and which are not herein mentioned, shall be punished according to the laws and customs in such cases at sea,"[101] recalls in its generality the ancient grants of jurisdiction to the English Court of Admiralty.[102]

This act of 1799 "for the Government of the Navy" appears to have been deficient in practice, as it was followed in little more than a year by an act "for the better Government of the Navy."[103] The purely regulatory provisions were dropped and the duties of crews in combat were spelled out in more detail. The common-law offenses mentioned were murder, embezzlement, and theft;[104] frauds against the United States and the burning of public property were made punishable;[105] the general article was continued in substance,[106] and it was further provided that "all offences committed by persons belonging to the navy while on shore, shall be punished in the same manner as if they

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[97] 9 ANNALS OF CONG. 2753 (1799).

[98] Act of March 2, 1799, ch. 24, 1 Stat. 709. For the completely unilluminating legislative history, see 9 ANNALS OF CONG. 2959, 2985 (1799) (House); 3 H.R. JOUR. 487, 491, 498, 502 (1799); 8 ANNALS OF CONG. 2230, 2232 (1799) (Senate); 2 S. JOUR. 597 (1799).

[99] *E.g.*, art. 15, 1 Stat. 710:

> A convenient place shall be set apart for the sick or hurt men, to which they are to be removed with thier hammocks and bedding, when the surgeon shall advise the same to be necessary, and some of the crew shall be appointed to attend them, and keep the place clean;—cradles and buckets with covers, shall be made for their use, if necessary.

[100] Art. 21, 1 Stat. 711 (stealing or embezzlement of stores); art. 29, 1 Stat. 712 (murder); art. 30, 1 Stat. 712 (robbery and theft); art. 40, 1 Stat. 713 (embezzlement).

[101] 1 Stat. 713.

[102] See 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 531, 535 (7th ed. 1956).

[103] Act of April 23, 1800, ch. 33, 2 Stat. 45. Again, there were no recorded debates, and no entries in the journals setting forth the text of amendments. See 10 ANNALS OF CONG. 655–56, 673–74 (1800) (House); 10 *id.* at 151, 159, 162 (1800) (Senate); 3 S. JOUR. 72, 73, 76 (1800).

[104] Art. XXI (murder), art. XXIV (embezzlement), art. XXVI (theft), 2 Stat. 48.

[105] Art. XVIII, 2 Stat. 47 (frauds against the U.S.); art. XXV, 2 Stat. 48 (burning of public property).

[106] "All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea." Art. XXXII, 2 Stat. 49.

had been committed at sea."[107] Perjury before naval courts-martial was left to be punished in the civil courts.[108] The 1800 Articles for the Government of the Navy appear to have worked satisfactorily, for no new compilation was enacted until 1862.[109]

B. ARTICLES OF WAR

As has been pointed out, the Continental Articles of War were several times re-enacted after 1789, on three occasions "as far as the same may be applicable to the constitution of the United States."[110] And, as the Army was from time to time enlarged under the impact of Indian troubles, the new troops were specifically made subject to the existing articles.[111] The power to approve death and dismissal cases, which the 1786 amendments to the Continential articles had lodged in Congress,[112] was in fact exercised by the commanding general in the early 1790's.[113] In 1796, Congress vested in the President the power to act on general-officer cases at all times and on death and dismissal cases in time of peace.[114] The latter two classes received presidential action thereafter,[115] and in 1802 the President's authority was ex-

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[107] Art. XVII, 2 Stat. 47.

[108] Art. XXXVII, 2 Stat. 50.

[109] Act of July 17, 1862, ch. 204, 12 Stat. 600.

[110] See pp. 176–77 *supra*.

[111] *E.g.*, Act of March 3, 1795, ch. 44, § 14, 1 Stat. 432; Act of May 28, 1798, ch. 47, § 2, 1 Stat. 558; Act of March 2, 1799, ch. 31, § 3, 1 Stat. 725.

[112] Amends. of 1786, art. 2, printed in WINTHROP *1504. The 1786 articles were contemporaneously referred to as articles "of the Appendix to the Rules and Articles of War." See, *e.g.*, *General Wayne's Orderly Book*, 34 MICH. PIONEER AND HIST. COLL. 341, 397 [hereinafter cited as Wayne Orderly Book]; General Wilkinson's Order Book, 1797–1808, 312 (ms. in National Archives Record Group 94, Entry 44) [hereinafter cited as Wilkinson Order Book].

[113] See G.O., H.Q. Pittsburgh, July 30, 1792, Wayne Orderly Book 354 (dismissal of an officer); G.O., H.Q. Hobson's Choice, Sept. 10, 1793, *id.* at 475–76 (dismissal of officers); G.O., H.Q. Green Ville, May 6, 1795, *id.* at 608 (same); G.O., H.Q. Green Ville, Nov. 28, 1795, *id.* at 654–57 (same). The instances of approved death sentences, principally for aggravated desertion, but for other offenses as well, are too numerous to be separately listed.

Before Wayne took the field, Brig. Gen. James Wilkinson forwarded to Secretary Knox an officer case involving a sentence of dismissal. Letter From Gen. Wilkinson to Secretary Knox, March 14, 1792, in 1 WILKINSON, MEMOIRS 1st app. 45 (1810). (This is a wholly different work from Wilkinson's *Memoirs of My Own Times*, published in 1816.)

Afterwards, on Dec. 29, 1792, Wilkinson wrote the Secretary to say that a general court-martial should be held where he was stationed. *Id.* at 100. When Knox inquired about the matter, Gen. Wayne replied, "Gen. Wilkinson has long since been Authorized to convene & hold General Courts Martial in all cases & to decide upon them (except where the life or dismission from service of a Commissioned Officer is concern'd, in that case I have directed him to transmit the proceedings of the Court or Courts—for my decision." Letter From Gen. Wayne to Secretary Knox, March 1, 1793, in 2 Campaign Into the Wilderness: The Wayne-Knox-Pickering-McHenry Correspondence 38 (Knopf ed. 1955).

[114] Act of May 30, 1796, ch. 39, § 18, 1 Stat. 485.

[115] See the following instances of presidential action: G.O., H.Q. D'Erroit, June 29, 1797, Wilkinson Order Book 38–39 (death sentence); G.O., H.Q. New Orleans, Jan. 11, 1807, *id.* at 679 (same); G.O., H.Q. Washington, Aug. 22, 1800, *id.* at 248 (dismissal of officer confirmed); G.O.,H.Q. Fort Adams, Jan. 14, 1802, *id.* at 373 (dismissal disapproved); G.O., H.Q. Grind

tended to include time of war as well as time of peace.[116] But a complete revision of the Articles of War was still four years away.

The first such revision, presented in the House by Mr. Varnum of Massachusetts on March 8, 1804,[117] had a short life. When its sponsor read proposed article 5, which modified the existing provision against officers or soldiers who "shall presume to use traiterous or disrespectful words against the authority of the United States in Congress assembled,"[118] so as to include also the President, the Vice-President and Congress within its terms, he ran into a hornet's nest. Mr. Nicholson of Maryland, a staunch Jeffersonian,

> said it was not his wish to fence round the President, Vice President, and Congress, with a second sedition law. If the officers of the Army conduct themselves improperly it is in the power of the Executive to punish them. They can be removed at the will of the President, or by a Court Martial. Besides, I do not understand the section. What is the meaning of 'traitorous words,' used against the President, Vice President and Congress. I know of no traitorous words that can be so used. There are none such to be found in the Constitution.

His motion to strike carried, the Committee of the Whole refused to sit again, and that was the end of the matter in that session.[119]

Mr. Varnum was somewhat more fortunate in the Second Session of the Eighth Congress. Together with Tallmadge of Connecticut, Paterson of New York, Clay of Virginia, and Butler of South Carolina—who were, all but the chairman, Revolutionary veterans[120]—he was named to a Committee to revise the rules and articles for the government of the Army of the United States; a bill was reported; and it duly passed the House, this time with no recorded discussion, and, according to a contemporary, without being read.[121]

In the Senate, however, the measure's deficiencies attracted John Quincy Adams of Massachusetts, who wrote:

> Its defects of various kinds were numerous, and among the most conspicuous was a continual series of the most barbarous English

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Stone Ford on the Bayou, Pierre, Feb. 7, 1802, *id.* at 378 (dismissal confirmed); G.O., H.Q. Fort Adams, March 26, 1802, *id.* at 380 (dismissal disapproved); G.O., H.Q. Washington, June 20, 1804, *id.* at 475–78 (same).

[116] Act of March 16, 1802, ch. 9, § 10, 2 Stat. 134.

By § 21 of the same act, 2 Stat. 136, the President was also authorized to appoint the judge advocate of every general court-martial, and "in cases where the President shall not have made such appointment, the brigadier-general or the president of the court may make the same."

[117] 13 ANNALS OF CONG. 1123 (1804).

[118] Arts. of 1776, § 2, art. 1, printed in WINTHROP 1489.

[119] 13 ANNALS OF CONG. 1190–91 (1804).

[120] See 18 DICTIONARY OF AMERICAN BIOGRAPHY 284 (1936); 14 *id.* at 292 (1934); 4 *id.* at 181 (1930); 3 *id.* at 368 (1929).

[121] 1 MEMOIRS OF JOHN QUINCY ADAMS 338 (C.F. Adams ed. 1874) [hereinafter cited as J. Q. ADAMS]. *But see* 14 ANNALS OF CONG. 807, 835–36, 858–59 (1804).

> that ever crept through the bars of legislation. In many instances the articles prescribing oaths, and even penalties of death, were so loosely and indistinctly expressed as to be scarcely intelligible, or liable to double and treble equivocation. Besides this, there were many variations from the old Articles, which I did not approve.[122]

If Senator Adams knew that his esteemed father, the ex-President, had submitted the bulk of the existing Articles of War in 1776,[123] he did not confide that fact to his diary. He noted only that General James Jackson, Senator from Georgia, who had reported the House version,[124] became so annoyed over Adams' insistence on taking up the bill article by article and over the latter's offer of so many grammatical amendments, that, in a fit of pique, he successfully moved to recommit the measure to Senator Adams,[125] *i.e.*, to a committee of which Adams was chairman.[126] The latter wrote:

> Yet I should have been ashamed hereafter to read in the statute books a law upon so important a subject, so grossly and outrageously defective and blundering in every part of its composition as this, with the consciousness that I had been a member of the legislature which enacted it. It was impossible to attempt any amendment without raising General Jackson's temper.[127]

Three days later, Adams consulted the Secretary of War respecting the Articles of War; that worthy, the notoriously inept Henry Dearborn, "did not appear himself to know the object of some new regulations introduced into the bill." [128]

On January 30, another short-tempered General Jackson entered the discussion; there was received in the Senate a remonstrance of some seventy-five Tennessee citizens and militia officers, headed by Major General Andrew Jackson. The document protested the case of Colonel Thomas Butler, a doughty adherent of the queue, who, refusing to obey General Wilkinson's order requiring all military men to crop their hair, had been, at the latter's behest, tried, convicted, reprimanded, and ordered to comply; the prayer of the petition was that Congress would make some regulation to exempt the militia from such an order.[129] This petition was referred to Adams' committee.[130] General Wilkinson, then commanding the army, had in fact ordered

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[122] 1 J. Q. ADAMS 338.
[123] See note 93 *supra*.
[124] See 3 S. JOUR. 432 (Jan. 10, 1805).
[125] See 1 J. Q. ADAMS 339.
[126] *Ibid.*; 3 S. JOUR. 440 (Jan. 25, 1805). The other members of the committee were Wright of Maryland and White of Delaware.
[127] 1 J. Q. ADAMS 339.
[128] *Ibid.*
[129] 1 AM. ST. PAP. MIL. AFF. 173–74; 1 J. Q. ADAMS 340; PLUMER, MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE 1803–1807, at 261 (E. S. Brown ed. 1923).
[130] *Ibid.*

Colonel Butler to trial by a second court-martial for the latter's continued refusal to cut off his queue.[131] Nonetheless, Wilkinson—characteristically ready to play both sides—visited the committee, "offered an Article ready drawn to exempt the militia from the rules of uniform,"[132] and, ten days later, submitted to the committee his own revision of all the Articles of War.[133] On February 25, Senator Adams reported the House bill with amendments,[134] but, this being the time of the final vote on the Chase impeachment,[135] the measure was, two days later, postponed to the next session.[136]

Four days after the Ninth Congress met, the sponsors of the revision returned to the attack. On December 6, 1805,

> Mr. Varnum said it would be recollected that the rules and regulations for the government of the Army had never been revised since the era of the present Government; and that consequently the rules and regulations established during the Revolutionary war still continued in force, though our circumstances had materially changed. From the present aspect of affairs, he thought it became necessary that a revision should take place, that they might be adapted to the provisions under the present Government.[137]

The provisions that were then to become law within four months were not only the first comprehensive code enacted for the army under the Constitution, but the last for the next 110 years.[138] It is of course not surprising that the members of the Ninth Congress failed to foresee the longevity of their creation, though it is perhaps passing

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[131] Winthrop said of the Tennessee remonstrance that "this appears to have been the end of the matter." WINTHROP *888. But subsequent research has indicated that Butler was tried again; that he was sentenced to forfeit command, pay, and emoluments for twelve months; and that he died of yellow fever thirteen days before the second sentence was approved. JACOBS, THE BEGINNING OF THE U.S. ARMY 1783–1812, at 262 (1947); JACOBS, TARNISHED WARRIOR: MAJOR-GENERAL JAMES WILKINSON 200–01 (1938).

The proceedings in Colonel Butler's first trial are announced, from Headquarters at New Orleans, in a General Order of Feb. 1, 1804. Wilkinson Order Book 448–56. Those of his second trial appear in G.O., H.Q. St. Louis, Sept. 20, 1805, *id.* at 563–65. The original hair-cutting order, H.Q. Pittsburgh, April 30, 1801, is as follows: "For the accommodation, comfort & health of the Troops, the hair is to be croped [*sic*] without exception & the General will give the example." *Id.* at 322.

[132] 1 J. Q. ADAMS 342.

[133] *Id.* at 349.

[134] 3 S. JOUR. 460 (1805).

[135] See 3 BEVERIDGE, LIFE OF JOHN MARSHALL 197–220 (1919).

[136] 3 S. JOUR. 461 (1805).

[137] 15 ANNALS OF CONG. 264 (1805).

[138] The next important revision was the 1916 Articles of War, Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 650. See S. REP. NO. 130, 64th Cong., 1st Sess. 17 (1916):

> The Articles of War as a code have not been comprehensively revised by Congress since 1806, the so-called revision of 1874, being limited to the elimination of redundant provisions, the supplying of obvious omissions, the reconciling of contradictions, and the curing of imperfections in form and language. In no sense should the congressional action of 1874 be regarded as a revision of the Articles of War.

See also *id.* at 28 (statement of Gen. Crowder).

strange that they said so very little about it while it was in their hands. The legislative debates echo only generalities, and do not mention the Bill of Rights.

On January 2, 1806, Mr. Campbell of Tennessee—he was later a notably ineffective Secretary of the Treasury in the second Madison Administration[139]—moved to strike out the death penalty from draft article 8, failure to suppress mutiny; the motion lost.[140] He then moved to strike out the same clause in draft article 9, offering violence to one's superior officer.[141]

> In support of this amendment, Mr. Campbell reprobated the idea of the lives of citizens being in the power of a court martial. He compared soldiers to mere machines, from the severity of the military law; he said almost every article in the bill was stained with blood; he drew a parallel between them, and the civil penal laws; and that when men know how small offences subjected them to death, they would be deterred from or disgusted in serving their country.[142]

Four Revolutionary veterans—Nelson of Maryland, Smilie of Pennsylvania, Macon of North Carolina, and Tallmadge of Connecticut—spoke in opposition:

> The necessity of a code of laws for the military differing from the civil law was demonstrated; and having, by the law as it stands, gone through the Revolutionary war with success, and in peace found no ill consequences arising therefrom, they thought it neither prudent nor safe to adopt the amendment.[143]

And Colonel Tallmadge "brought forward other instances of danger, when soldiers were not subject to severe laws. Soldiers, he observed, were a description of men, that must be ruled with severity. . . ."[144] Mr. Campbell's second amendment was also rejected.[145]

On January 8, 1806, Mr. Campbell moved to recommit the bill, "with the view of modifying it so as to render more definite the powers of courts martial, and particularly that power of inflicting the punishment of death should be more guardedly bestowed."[146] This motion was also defeated, 44–57,[147] and, after the bill was returned to Committee of the Whole for further amendments, it passed the House on January 10.[148]

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[139] See 3 DICTIONARY OF AMERICAN BIOGRAPHY 452 (1929).

[140] 15 ANNALS OF CONG. 326 (1806). Draft article 8 was taken from Arts. of 1776, § 2, art. 4, printed in WINTHROP *1490.

[141] Draft article 9 derived from Arts. of 1776, § 2, art. 5, printed in WINTHROP *1490.

[142] 15 ANNALS OF CONG. 326 (1806).

[143] *Ibid.*

[144] 15 *id.* at 327.

[145] *Ibid.*

[146] 15 *id.* at 337.

[147] 15 *id.* at 338.

[148] 15 *id.* at 338–39.

In the Senate, the bill was referred to a committee of which Adams appears to have been the principal working member; that committee had five meetings;[149] and on February 27, 1806, "they agreed to report the amendments as I have drawn them up, and almost in every point the same as those I reported to the bill at the last session. They were accordingly reported by the chairman, General Sumter," of South Carolina.[150]

Two days of debate sufficed for passage, "with all the amendments reported by the committee."[151] Only two of these proved controversial.[152] One restored the 100 lashes limit on corporal punishment from the 1776 and 1786 Articles[153] that the House had cut to fifty.[154] The other directed that the President's power of prescribing the uniform of the army[155] include "the manner of wearing the hair; but this power shall not be exercised over the militia."[156] At a conference, the House proposed a substitute amendment to the article concerning the uniform, namely, "but the manner of wearing the hair shall not be considered as a part thereof."[157] In the end, both houses receded from their hair amendments, fifty lashes became the maximum for corporal punishment,[158] and the bill was signed by President Jefferson on April 10, 1806.[159] For the most part, it simply carried forward the substance of the articles then existing.[160]

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[149] See 1 J. Q. Adams, 387, 391, 402, 410, 415.

[150] *Id.* at 416; 4 S. JOUR. 49 (1806).

[151] 4 S. JOUR. 56 (1806); 1 J. Q. ADAMS 420.

[152] For the Senate proceedings, see 15 ANNALS OF CONG. 143, 163, 181–82 (1806); the journals do not state most of the amendments. 4 S. JOUR. 53, 56. The two noted in the text were disagreed to by the House on March 24, and appear at 15 ANNALS OF CONG. 838 (1806), and 5 H.R. JOUR. 337 (1806).

[153] Amends. in 1786, art. 24, printed in WINTHROP *1507; Arts. of 1776, § 18, art. 3, printed in WINTHROP *1502.

[154] See 15 ANNALS OF CONG. 838 (1806).

[155] Art. War 100 of 1806, 2 Stat. 371.

[156] 15 ANNALS OF CONG. 838 (1806).

[157] 15 *id.* at 210. For references to the conferences, see 15 *id.* at 849, 878 (House); 15 *id.* at 199, 200–01, 207, 210 (Senate).

[158] 15 *id.* at 200–01. For the subsequent history of flogging in the United States Army, see WINTHROP *668–69. It was abolished in 1812, revived in 1833 for deserters, and finally done away with in 1861.

[159] Act of April 10, 1806, ch. 20, 2 Stat. 359. Later, in the 1806–1807 session, a committee of the Senate, of which J. Q. Adams was a member, appointed to inquire whether any amendments to the Articles of War were necessary, requested to be discharged, 16 ANNALS OF CONG. 25–26, 102 (1806), apparently because it came to no decision "respecting a proposed additional Article of War." 1 J. Q. ADAMS 453.

[160] When the 1776 articles are numbered consecutively, with the 1786 amendments substituted for § XIV, the result is, in large measure, the Code of 1806. Thus, § I, art. 1, down through § III, art. 2, of 1776, produces arts. 1 to 11 of 1806; § IV, art. 2 to § VIII, art. 1 of 1775, reappear as arts. 12–29 of 1806; and so on. Apart from verbal differences and minor revisions, there are actually surprisingly few omissions from the 1776–1786 code and likewise only a very few entirely new provisions in the 1806 Code.

III. ASSISTANCE OF COUNSEL AT MILITARY LAW

A. *THE FIRST MILITARY CODES*

Neither the 1799 nor the 1800 Articles for the Government of the Navy[161] made any mention of counsel for the prisoner. Article 48 of 1799[162] spoke of the judge advocate of a general court-martial, but said nothing about his functions. Article XXXVI of 1800[163] stated that he was to administer the oath to the members, and to take one himself; the rest is silence.

In the 1806 Articles of War, there is not only no provision for any counsel for the accused, but article 69[164]—taken verbatim from article 6 of 1786[165]—indicates that Congress considered that an accused soldier was on his own while standing trial. Here is the provision in pertinent part:

> The judge advocate . . . shall prosecute in the name of the United States, but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself. . . . .

Plainly, the foregoing reflects the Blackstonian, common-law notion of the judge as counsel for the prisoner,[166] rather than the sixth amendment's guarantee of the assistance of counsel. It will be noted that the judge advocate of 1806 and thereafter was not to consider himself as defense counsel in connection with the accused's plea, and that his defense duties were distinctly limited. Winthrop remarked that "this is a most imperfect and ineffective provision; objecting to leading questions is but a single feature of the function of counsel, and, as to questions 'to the prisoner', these are now unknown in our practice. . . . [T]he entire Article is in the main obsolete and futile. . . ."[167]

Another pertinent provision of the 1806 code was article 74, permitting the use of depositions in noncapital cases, "provided the prosecutor and person accused are present at the taking of the same, or are duly notified thereof."[168] The right is personal to the accused;

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[161] See pp. 181–83 *supra*.

[162] Act for the Government of the Navy, ch. 24, § 1, art. 48, 1 Stat. 714 (1799) [hereinafter cited as AGN of 1799].

[163] Ch. 33, 2 Stat. 50.

[164] Ch. 20, 2 Stat. 367 (1806).

[165] WINTHROP *1505.

[166] See 4 BLACKSTONE, COMMENTARIES *355–56.

[167] WINTHROP *291.

[168] 2 Stat. 368 (1806).

there is no mention of his counsel; and, again, the article was copied from what had been enacted in 1779[169] and again in 1786.[170]

B. THE EARLIEST AMERICAN TREATISES

Contemporaneous texts emphasize that the role of counsel at a military trial was extremely limited. He could be present as an adviser, but he could not be a speaker; he was not permitted to address the tribunal. We may for the moment pass over the English texts,[171] which were written at a time before a person accused of crime in England could have counsel in the civil courts, and concentrate on the first two purely American texts on military law.

The first of these was published in 1809 by Major Alexander Macomb of the Corps of Engineers—of whom more in due course—and was entitled *A Treatise on Martial Law, and Courts-Martial: as Practised in the United States of America;* here is what there is said about counsel before courts-martial:

> Courts-martial being in general composed of men of ability and discretion, but who, from the nature of their profession and general mode of life, are not to be supposed versed in legal subtilties or abstract and sophistical distinctions; and the cases that come before them giving rise to few questions of law; it has been considered as founded in established usage, that counsel or professional lawyers, are not allowed to interfere in their proceedings, or by argument or pleading of any kind to endeavor to influence either their interlocutory opinions or final judgment. This is a most wise and important regulation, nor can any thing tend more to secure the equity and wisdom of their decisions: for lawyers being in general as utterly ignorant of military law and practice, as the members of courts-martial are of civil jurisprudence and of the forms of the ordinary courts; so nothing could result from the collision of such warring and contradictory judgment, but inextricable embarrassment, or rash, ill-founded and illegal decisions.
>
> Although it is thus wisely provided, that professional lawyers shall not interfere in the proceedings of courts-martial, by pleading or argument of any kind, it is at the same time not unusual for a prisoner to request the court to allow him the aid of counsel to assist him in his defence, either in the proper conduct of exculpatory

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[169] Resolution of Nov. 16, 1779, 15 JOUR. CONT. CONG. 1277, 1278.

[170] Amends. of 1786, art. 10, printed in WINTHROP *1506. The final clause, "or are duly notified thereof," was added in 1806.

[171] The late eighteenth century British texts on military law are ADYE, A TREATISE ON COURTS-MARTIAL (1st ed. 1769); MCARTHUR, A TREATISE OF THE PRINCIPLES AND PRACTICE OF NAVAL COURTS-MARTIAL (1st ed. 1792); and TYTLER, AN ESSAY ON MILITARY LAW, AND THE PRACTICE OF COURTS-MARTIAL (1st ed. 1800).

Adye was a British officer on duty in America. His 1769 edition was printed and published in New York, the 1779 edition, in Philadelphia. See James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801*, in HARVARD LEGAL ESSAYS 159, 170, 180 (1934).

> proof, by suggesting witnesses, or in drawing up in writing a connected statement of his defence, and observations on the general import of the evidence. This benefit the court will never refuse to a prisoner; because under those unhappy circumstances, the party may either want ability to do justice to his own cause, or may be deserted by the presence of mind which is necessary to command and bring into use such abilities as he may actually possess. In this situation, however, the prisoner's counsel, who properly understands his duty, will see it is his part not to embarras, to tease or perplex the court, but rather to conciliate their favor, by wisely regulating the conduct of his client; nor to force the axioms and rules of the civil courts upon a military tribunal, but to instruct himself in that law which regulates their procedure, and accommodate himself to their forms and practice.[172]

Major Macomb in his preface acknowledged his indebtedness to the English work of Mr. Tytler, entitled *An Essay on Military Law, and the Practice of Courts Martial*.[173] This was an acknowledgment fully due, inasmuch as Macomb in the passage just quoted copied Tytler verbatim, or nearly so—though without quotation marks.[174] The few discrepancies appear to be inadvertences of a copyist rather than emendations by an editor. Indeed, Major Macomb copied so faithfully from the original that, in the passage dealing with the duties of the judge advocate towards the prisoner, he repeated Tytler's opening sentence—"Another part of the official duty of the Judge-Advocate, which though not enjoined by any particular enactment of the Military Law, has yet the sanction of general and established practice, is, that he should assist the prisoner in the conduct of his defence"[175]—without any apparent awareness that, in the American service, this duty flowed from article 69 of 1806.[176]

Macomb duly printed the Constitution of the United States, including the first twelve amendments thereto, in an appendix. One can only speculate whether the failure of this officer, "late Judge-Advocate on several Special Trials"[177] to point out any inconsistency between the

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[172] MACOMB, A TREATISE ON MARTIAL LAW, AND COURTS MARTIAL; AS PRACTISED IN THE UNITED STATES OF AMERICA 93–96 (1809).

[173] Tytler, a Scotsman, later became a judge of the Court of Session as Lord Woodhouselee. Lord Cockburn said that while "Tytler . . . was unquestionably a person of correct taste, a cultivated mind and literary habits, and a very amiable, . . . there is no kindness in insinuating that he was a man of genius. . . ." 19 DICTIONARY OF NATIONAL BIOGRAPHY 1378–79 (1917).

[174] See TYTLER, *op. cit. supra* note 171, at 253–55.

[175] *Compare* MACOMB, *op. cit. supra* note 172, at 169–71, *with* TYTLER, *op. cit. supra* note 171, at 362–64.

[176] 2 Stat. 367.

[177] MACOMB, *op. cit. supra* note 172, title-page. It is said in RICHARDS, MEMOIR OF ALEXANDER MACOMB 41–42 (1833) that the idea of publishing a treatise on military law was suggested to Macomb by the members of the court-martial at the first trial of Colonel Thomas Butler; see note 131 *supra*, who were impressed by his performance as judge advocate on the occasion. But contemporary sources establish that a Lt. James House was the judge advocate, and that Macomb, then only a lieutenant, was not a member of the court. See Wilkinson Order Book 448; Frederick-Town, Md., Herald, Dec. 3, 1803, p. 3; *id.*, March 24, 1804, p. 1.

sixth amendment and the first quoted passage lifted from Tytler, reflected his understanding that this amendment was inapplicable to military trials, or whether like his failure to refer to article 69 of 1806, it was simply an oversight occurring while he was engrossed in the copying process.

The next American book on military law, that of Isaac Maltby, a Brigadier General in the Massachusetts Militia, was published in 1813;[178] here are the author's comments on the function of counsel in trials by court-martial:

> It will be perceived, that in detailing the proceedings of courts martial, no mention has been made respecting counsel for the accused, other than the judge advocate; but that he appears to be acting, during the trial, in the capacity of attorney and counsellor for both parties. Attorneys are never admitted to speak in behalf of a prisoner before a court martial. They are admitted as *advisers*, and not as *speakers*. The remarks of Mr. Tytler, an approved writer on military law, are much in point, and are here quoted entire.[179]

General Maltby then proceeded to quote from Tytler what Major Macomb had merely copied, and continued:

> As the people of this country are very tenacious of the privilege of employing attorneys to plead in their behalf; and a refusal of courts martial to grant this indulgence, has sometimes excited no small degree of sensibility; we would not rest this on our own opinion, nor on a single authority.[180]

Next followed a quotation from McArthur's *Principles and Practice of Naval and Military Courts-Martial*:

> It is the practice at military courts to indulge any prisoner with counsel, or at least *amici curiae* (*i.e.* friends of the court) who may sit or stand near him, and instruct him what questions to ask the witnesses, with respect to matters of fact before the court; and they may commit to paper the necessary interrogatories as they arise, which the prisoner may give on separate slips of paper to the judge advocate, who reads them to the court; and if approved, that is, if proper to be put, he inserts them literally in the minutes.[181]

General Maltby then concluded:

> The judge advocate is generally a person of law talents, bound to assist the accused; and with the assistance allowed by the court, he

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[178] MALTBY, A TREATISE ON COURTS MARTIAL AND MILITARY LAW (1813).

[179] *Id.* at 73–74.

[180] *Id.* at 74.

[181] *Id.* at 75–76 (quoting 2 MCARTHUR, A TREATISE OF THE PRINCIPLES AND PRACTICE OF NAVAL AND MILITARY COURTS-MARTIAL 42–43 (2d ed. 1805)).

In a note to his second edition, 1 *id.* at xxvii–xxxii, McArthur alleged that DELAFONS, TREATISE ON NAVAL COURTS MARTIAL (1805) was lifted from his first edition. Delafons however claimed that his work had been written in 1792, before McArthur's treatise appeared.

> cannot be greatly in danger of suffering by the want of counsellors; especially when he will have the right of redress, in the civil courts, if *illegally injured*.[182]

It remains to consider how the principles above set forth by Macomb and Maltby were actually applied in the first American trials by court-martial after the Constitution, in both Army and Navy, of which records remain.

C. *THE EARLIEST ARMY TRIALS*

There are no complete proceedings of trials by American Army courts-martial prior to 1801 now in existence, inasmuch as all of the War Department files were destroyed in a fire on the night of November 8, 1800.[183] The results of trials by court-martial for the period 1792 to 1807 survive in the order books of the respective commanding generals, Wayne and Wilkinson. The earliest complete proceedings extant date from 1808.[184]

In one of the earliest of these, the trial of Captain W. Wilson of the Artillery in May 1809, before a general court-martial of Major Zebulon M. Pike, president, and Lieutenant William S. Hamilton, judge advocate, the accused had the services of one William Thompson as counsel.[185] Mr. Thompson examined witnesses, made objections, and read the accused's defense. The proceedings were disapproved by General Wilkinson, in large part because of the participation of counsel:

> But the grounds of Exception are so strong; the innovation so glaring & the precedent if permitted so pernicious in its Tendency, that the General owes it to the Army & to the State, not only to disapprove the proceedings and sentence of this General Martial [*sic*], but to exhibit the Causes of his disapproval.
>
> The main points of exception & those on which the general rests his opinion, are the admission of Counsel for the defence of the prisoner, to mingle in the deliberations of the Court, the rejection of a competent witness & the utter incompatibility of the facts found and the sentence uttered.
>
> Shall Counsel be admitted on behalf of a Prisoner to appear before a general Court Martial, to interrogate, to except, to plead,

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Id. at v. Delafons' view as to counsel was that "no barrister at law, nor any other person trained to the bar, is permitted to plead at a court martial, either in support of the prosecution, or in defence of the prisoner." *Id.* at 165–67.

[182] MALTBY, *op. cit. supra* note 178, at 76.

[183] 1 AMERICAN STATE PAPERS MISCELLANEOUS 232, 603 (Lowrie & Franklin eds. 1834). The second reference is to testimony given at the trial of Aaron Burr.

[184] 2 & 3 Proceedings of Courts-Martial, War Office (mss. in National Archives Record Group 153, Entry 14).

[185] 2 *id.* at 104–44.

to teaze, perplex & embarrass by legal subtilties & abstract sophistical Distinctions?

However various the opinions of professional men on this Question, the honor of the Army & the Interests of the service forbid it, & the interdiction is supported by the ablest witness on the Law Marshal; & by the uniform usage & practice of the American Army. Were Courts Martial thrown open to the Bar, the officers of the Army would be compelled to direct their attention from the military service & the Art of War, to the study of the Law.

No one will deny to a prisoner, the aid of Counsel who may suggest Questions or objections to him, to prepare his defence in writing—but he is not to open his mouth in Court.

The Case before us furnishes the strongest reasons, for this Rule. A Lawyer has been permitted to propose Questions, to make exceptions & to enter pleas, he contends that "the rule of Evidence is the same at common law & in Courts marshal" & yet he objects to & prevails over the Court not to admit the Evidence of a Deserter, altho' he well knew that objection could not be sustained in a Court of civil jurisdiction. He objects to the Question "did Captn. Wilson regularly attend to parade" and carries the Court with him, & yet afterward asks "who superintended forming parades" & he also presses a variety of leading Questions, What for—to mislead the Court & acquit himself with Zeal & fidelity to his Client—but is such sophistry or Chicanery necessary to a Court of Honor, the general believes not, and he flatters himself the Instance before us will never be seconded.[186]

The record of Gen. Wilkinson's first trial by court-martial, in 1811,[187] has disappeared, doubtless because no one on either side was particularly proud of it;[188] but so far as the proceedings can be reconstructed from secondary sources, it appears that, while Wilkinson had counsel, Rober B. Taney among them,[189] they did not speak in court. This conclusion rests, not on any assumption that Wilkinson's 1809 views carried over, for in his scale of values the jewel

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[186] 2 *id.* at 142–43.

[187] For the General Court-Martial Order in the case, dated Feb. 19, 1812, see 24 ANNALS OF CONG. 2125–37 (1812). Only a few scattered papers relating thereto remain in the National Archives. Misc. File 237, Old Army Records. The charges and specifications, some of the exhibits, and all of Wilkinson's defense, appear in 2 WILKINSON, MEMOIRS OF MY OWN TIMES 35–576, apps. I–CXXXII (1816). The trial was held in Frederick, Md., and is noted in the Frederick-Town Herald in the following issues: June 29; Aug. 24; Sept. 7, 14; Oct. 12; Nov. 9, 23, 30; Dec. 14, 28, 1811; Feb. 22, 29, 1812. See also JACOBS, TARNISHED WARRIOR: MAJOR-GENERAL JAMES WILKINSON 266–75 (1938), wherein it is pointed out that the papers that proved Wilkinson's guilt were at the time safely lodged in the Spanish archives.

[188] Wilkinson concurred in the President's proposal to postpone publication of the proceedings. JACOBS, TARNISHED WARRIOR: MAJOR-GENERAL JAMES WILKINSON 276 (1938); Letter From Gen. Wilkinson to President Madison, Feb. 27, 1812, in 46 Madison Papers No. 110 (ms. in Library of Congress); Letter From Gen. Wilkinson to President Madison, Feb. 29, 1812, in 46 *id.* No. 112.

[189] TYLER, MEMOIR OF ROGER B. TANEY 104–05 (1872); THE MEMOIRS OF GEN. JOSEPH GARDNER SWIFT 96–98 (1890); Frederick-Town, Md., Herald, Sept. 7, 1811, p. 3; National Intelligencer, Washington, D.C., Sept. 12, 1811, p. 3.

was inconsistency, but on the circumstance that his own memoirs do not mention counsel,[190] and, pre-eminently, on the fact that Lieutenant Colonel Macomb—the text-book copier—was a member of the court.[191] In the record of Wilkinson's second trial by court-martial, in 1815,[192] there is no sign of counsel appearing in any capacity and the same is true of that of General Gaines, held the following year.[193]

The question of the applicability of the right-to-counsel provision of the sixth amendment to trials by court-martial was, however, squarely raised at the trial of Brigadier General William Hull, which took place at Albany in 1814.[194] Hull, it will be recalled, was the superannuated Revolutionary hero who surrendered Detroit in 1813 without firing a shot.[195] He was charged with treason, cowardice, neglect of duty, and unofficer-like conduct.[196] The charges were drawn and signed by A. J. Dallas, then United States Attorney for the District of Pennsylvania, as judge advocate.[197] But Dallas came to have grave doubts regarding the Government's case, and was, at his request, excused from prosecuting.[198] This task devolved upon one Parker, the Army judge advocate, and a special judge advocate, Martin Van Buren.[199]

When the trial commenced, General Hull's legal advisers were simply introduced to the court-martial:

> General Hull appeared, and proposed that Robert Tillotson, Esq. should be admitted as his counsel; which was agreed to. . . .
> . . . .
> It was then proposed that C. D. Colden, Esq. should be the additional advocate in behalf of the prisoner, which was granted by the court.[200]

[190] 2 WILKINSON, MEMOIRS OF MY OWN TIMES 40 (1816): "To these charges I pleaded NOT GUILTY. The trial proceeded, and at its conclusion, I offered the following defence."

[191] RICHARDS, MEMOIR OF ALEXANDER MACOMB 47–48 (1833); Frederick-Town, Md., Herald, Sept. 14, 1811, p. 3.

[192] 1 Proceedings of Courts-Martial, War Office 131–488 (ms. in National Archives), reprinted in 3 WILKINSON, MEMOIRS OF MY OWN TIMES *passim* (1816). There is a printed copy of the General Court-Martial Order, dated April 22, 1815, in the library of the Judge Advocate General of the Army.

[193] Ms. in National Archives, item K2. The General Court-Martial Order appears in 11 NILES' WEEKLY REGISTER 216–20 (1816).

[194] A report of the Hull proceedings, made by Lt. Col. Forbes, was printed soon afterwards. REPORT OF THE TRIAL OF BRIG. GENERAL WILLIAM HULL (1814) [hereinafter cited as HULL TRIAL].

[195] For Hull's surrender and trial in their setting, see 6 HENRY ADAMS, HISTORY OF THE UNITED STATES 333–37 (1890); 7 *id.* at 414–17.

[196] HULL TRIAL app. 1–18.

[197] *Id.* at 18.

[198] WALTERS, ALEXANDER JAMES DALLAS 157–59 (1943).

[199] HULL TRIAL 3. Curiously enough, Van Buren in his *Autobiography*, H.R. DOC. NO. 819, 66th Cong., 2d Sess. pt. 2 (1920), says nothing about his part in either the first or second Wilkinson trial. For Van Buren's removal as prosecutor at the second Wilkinson trial, see note 271 *infra*.

[200] HULL TRIAL 4.

Two days later, the accused made a specific request that his counsel be permitted to address the court and to examine witnesses. Hull's argument on this position, which from internal evidence appears to have been largely the work of his counsel,[201] covers no less than ten pages of the printed trial. There is quoted here only the portion wherein he invoked the sixth amendment—with some diffidence:[202]

> But, Mr. President, I make a higher appeal upon this occasion than to English writers or English practice: I appeal to the constitution of our country; and if you do not find my claim sanctioned by the letter of that instrument, I am sure you will by its spirit, which I know must govern the deliberations and decisions of this honourable court.—By the amendments to the Constitution it is provided that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defence. I know well, Sir, that if this provision be taken in connection with the context, and the instrument be construed according to the technical rules of law, it will be considered as applying only to civil prosecutions—But, upon this occasion, and in this honourable court, I look for a disposition that shall trample upon professional quiblings. For, by minds that are able to separate and feel the influence of the rays of truth and justice, however they may be obscured by words and forms, when it was provided that the accused should have the benefit of counsel, how can it be supposed that it was intended to confine this provision to accusations before a civil court. Is there any reason that can apply to the admission of counsel before a civil tribunal, that does not apply to a military court? It is not to be supposed that the judges of a civil court are less learned, less honourable, or less humane, than those of any other tribunal. It is as much their duty to be counsel for the prisoner, as it is the duty of the Judge advocate or of the members of this court to discharge that charitable office. Can it then have been the intention of the constitution that counsel should be admitted in the one case and not in the other? In the passage before quoted, Judge Blackstone says, "upon what face of reason can that assistance be denied to save the life of man, which yet is allowed him for every petty trespass?" May I not ask upon what face of reason can that assistance be denied to save the life of man before a military court, which yet is allowed him before every other tribunal?

But it was the opinion of the court "that the communications by the prisoner's counsel should be made in writing through the accused."[203]

So the trial proceeded. The witnesses were examined by the accused with a lack of skill which will hardly occasion surprise; and at

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[201] Hull referred to himself as one "ignorant of law as a science." *Id.* at 5. But, in fact, he had attended the Litchfield Law School and was admitted to the bar in 1775. He practiced law in Massachusetts from 1786 on; and he was a judge of the Massachusetts Court of Common Pleas from 1798 until 1805. See CAMPBELL, REVOLUTIONARY SERVICES AND CIVIL LIFE OF GENERAL WILLIAM HULL 21, 218, 261, 266 (1848).

[202] HULL TRIAL 5–13. The portion quoted in the text is from pp. 9–10.

[203] HULL TRIAL 14.

the close of the trial, following argument by the special judge advocate, General Hull delivered his defense, which is to say, for two days and parts of two others he read a long speech that, no doubt, his counsel had also in large part written.[204] General Hull was found guilty and sentenced "to be shot to death," with a recommendation for clemency "in consideration of Brigadier General Hull's revolutionary services, and his advanced age. . . ."[205]

Under the provisions of article 65 of 1806, the proceedings, since they affected a general officer, were required to be "transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case."[206] The proceedings were signed and approved by the court-martial on March 28, 1814.[207] Here is the President's action in the case, dated April 25, 1814:

> The sentence of the court is approved, and the execution of it remitted.
>
> James Madison.[208]

The records of other army trials by court-martial up to about 1825 either do not show that counsel was present;[209] or show that counsel prepared the prisoner's defense and was permitted to read it to the court;[210] or that counsel was admitted "under the usual restriction."[211] The proceedings in the case last cited were approved by President J. Q. Adams.[212] No record has been found of cases in which counsel functioned as counsel with the approval of higher authority.

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[204] HULL TRIAL 155–56, app. 19–115.

[205] *Id.* at app. 118–19. The court-martial determined that it had no jurisdiction of the charge of treason, but indicated its view that Gen. Hull's conduct had not been treasonable. *Id.* at app. 118.

[206] 2 Stat. 367 (1806).

[207] HULL TRIAL app. 119.

[208] *Ibid.*

[209] TRIAL OF COL. THOMAS H. CUSHING (Philadelphia 1812); PROCEEDINGS OF A GENERAL COURT MARTIAL HELD AT FORT INDEPENDENCE, (BOSTON HARBOR,) FOR THE TRIAL OF MAJOR CHARLES K. GARDNER (1816); *Trial of Colonel William King (1819)*, in 2 AM. ST. PAP. MIL. AFF. 139–88 (approved by President Monroe, Feb. 7, 1820); *Court Martial of Colonel Talbot Chambers*, H.R. DOC. NO. 176, 19th Cong., 1st Sess. (1826) (approved By President J. Q. Adams on April 26, 1826); *Sentence of the Court Martial in Relation to Captain Dyson in 1814*, in 1 AM. ST. PAP. MIL. AFF. 588–89; *Trial of Colonel David Brearly*, in 2 *id.* at 110–16; *Trials of Certain Tennessee Militiamen in 1814*, in 3 *id.* at 703–84 (Dickins & Forney eds. 1860).

[210] PROCEEDINGS OF A GENERAL COURT MARTIAL FOR THE TRIAL OF LIEUT. COL. LOUIS BACHE 24, 39 (1815); Frederick-Town, Md., Herald, Dec. 24, 1803, p. 3 (trial of Major Ingersoll); *id.*, Dec. 10, 1803, p. 3 (trial of Colonel Butler; *id.*, March 24, 1804, p. 2: "Col. Butler, attended by his counsel Mr. J. H. Thomas, presented his defence, which was in part read by himself, and the remainder (owing to his indisposition from a severe cold) the Court permitted to be read by his Counsel."

[211] TRIAL OF MAJOR SAMUEL BABCOCK 40 (1825), reprinted in 2 AM. ST. PAP. MIL. AFF. 792, 806.

[212] G.O. 84 of 1826, at 20.

D. THE EARLIEST NAVAL TRIALS

At the trial of Captain James Barron of the Navy in 1808, on charges growing out of his surrender of U.S.S. *Chesapeake*,[213] the accused "prayed of the court to be allowed the indulgence of counsel to defend him," which was granted.[214] Counsel was permitted to make objections, to examine witnesses, and to read the defense.[215] But this was unusual; at most of the naval trials of the next two decades or so, restrictions were imposed that did not permit such participation.

Thus, at the trial of Lieutenant Beverly Kennon in 1824, Robert B. Taylor, Esq., who had defended Captain Barron, was allowed to assist as counsel "under the usual limitations."[216] What those limitations were was soon apparent.

> The proceedings being read, the counsel for the accused requested of the court that he might be allowed to read the minute prepared by him under their decision of Saturday, and he was informed that it must be presented in the usual manner, and, if deemed a proper instrument, it should then be read to the court.
>
> To this the counsel objected; he declined submitting his paper for inspection before it was read to the court.
>
> On which, the court being cleared, it was decided that the conditions of counsel being contrary to the usages of courts-martial, as well as to the practice during the course of the present trial, they declined admitting the paper offered by him; and do direct that the examination of the witness be resumed and limited within the charge and specifications before them.
>
> The court was then opened, and the above decision read. The counsel begged leave to offer an explanation of the remarks made through the Judge Advocate to the court; he did not intend that his objection should be construed to apply to the inspection of his minute by the court; he only objected under the impression that the paper was to be subjected solely to the inspection of the Judge Advocate, and received or rejected according to the opinion he might pronounce as to the propriety of its reception.
>
> The court, in consideration of this explanation, agreed that the paper should be read; whereupon, the court was cleared, and the paper handed in by the counsel for the accused read.[217]

Later in 1824 Lieutenant Weaver of the Navy was tried:

> He was . . . informed that his counsel would be admitted to appear

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[213] See 4 HENRY ADAMS, HISTORY OF THE UNITED STATES 4–24 (1890).

[214] PROCEEDINGS OF THE GENERAL COURT MARTIAL CONVENED FOR THE TRIAL OF COMMODORE JAMES BARRON OF THE U.S.S. CHESAPEAKE IN JANUARY 1808, at 23–24 (1822).

[215] See *id.* at 25, 39, 45–47, 54, 73, 103, 109, 145, 217, 267.

[216] 1 AM. ST. PAP. NAV. AFF. 956. See also TRIAL OF LIEUTENANT JOEL ABBOT, BY THE GENERAL COURT MARTIAL 7 (1822); THE TRIAL OF CAPTAIN JOHN SHAW BY THE GENERAL COURT MARTIAL 8 (1822).

[217] 1 AM. ST. PAP. NAV. AFF. 965. Kennon was acquitted, although "the court also consider it their duty to express their disapprobation of the unprecedented attempt of the accused, to influence their judgment and control their decision, by pointing out what that decision shall be." 1 *id.* at 973.

> in court and assist in his defence, under the following restrictions and conditions: The counsel may be present during the examination and cross-examination of witnesses, and assist the accused in conducting the same; but all questions must be proposed in writing, and handed to the Judge Advocate, to be submitted to the court, and be read to the witnesses by the Judge Advocate; and all motions to be made by the accused must, in like manner, be reduced to writing, and submitted to the court by the Judge Advocate.[218]

Weaver was convicted and was sentenced to be cashiered; the sentence was approved, on November 27, 1824, by President Monroe.[219]

In the following year, two senior naval officers were to stand trial. One was Captain Charles Stewart, and at his trial,

> it was announced that the court had agreed . . . to allow the gentlemen named as counsel to appear in that character under the restrictions customary in the practice of courts-martial. These restrictions the court understands to be, that all propositions, motions, and communications be made to the court in writing, by handing the same to the judge advocate; that all questions proposed on behalf of the accused be propounded in writing, through the judge advocate.[220]

Stewart was "most honorably acquitted."[221] The action of the new President, John Quincy Adams, reflected a careful study of the record:

> The proceedings and sentence of the court are approved; with the exception of the exclusion of Samuel Brown as an incompetent witness; the grounds of objection to his testimony, apparent on the face of the record, being considered as going to his credibility, and not to his competency.[222]

The second senior naval officer accused in 1825 was Captain David Porter, one of the heroes of the War of 1812, best known perhaps for his command of U.S.S. *Essex* at Valparaiso. The printed record of his trial[223] shows the kind of assistance his counsel was permitted to give him:

> Captain Porter was asked whether he was guilty or not guilty. Captain Porter requested permission to postpone,'till to-morrow morning, pleading to the same, and at the same time requested

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[218] 1 *id.* at 1052, 1054.

[219] 1 *id.* at 1058.

[220] 2 *id.* at 487, 491–92. "The court likewise accedes to the wish of Captain Stewart, to have a stenographer in the court for the purpose of taking notes of the proceedings and of the evidence, with the understanding that these notes are taken for the use of the accused alone, in aiding him on the present trial." 2 *id.* at 492.

[221] 2 *id.* at 520.

[222] 2 *id.* at 521.

[223] MINUTES OF PROCEEDINGS OF THE COURTS OF INQUIRY AND COURT MARTIAL, IN RELATION TO CAPTAIN DAVID PORTER (1825), reprinted in 2 AM ST. PAP. NAV. AFF. 132–440.

> permission of the Court to have counsel present in Court to aid him—to have a clerk to take minutes of the evidence, and also that he might be furnished with a copy of the charges and specifications as read by the Judge Advocate. To all these propositions the Court acceded; it being understood that the counsel of Captain Porter will be subject to the same restrictions as are usually adopted in Courts Martials. Captain Porter mentioned Walter Jones, Esquire, as the counsel whose presence he desired.[224]
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> . . . .
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> Captain Porter was then called upon to plead to the charges;—he requested, by way of plea, that he might be permitted to read by his counsel, and submit to the Court, a paper containing remarks upon the charges.[225]

After the accused had withdrawn certain of his objections to the charges, the prosecution called witnesses, all of whom were examined by the accused in person. Then—

> After mature deliberation, the Court determined that it would receive any communication from the Counsel of Capt. Porter in support of the exceptions which he had taken to the second charge and the specifications thereof; but that all such communications must be submitted in writing. . . .[226]

Subsequently,

> the counsel for the accused proposed reading a paper to the Court; the President of the Court announced to him that the opinion of the Court yesterday was, that all communications be submitted to it through the Judge Advocate.
>
> The counsel declining to pursue that course, the Court was cleared, and when it was opened, it was announced that the Court has decided that the following rule of practice be adopted.
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> The accused may submit his communications in writing to the Court; the same shall then be publicly read by the Judge Advocate, the Court reserving the right of admitting and receiving the papers, or any part thereof.[227]

Thereafter, "the Counsel for the accused, having obtained permission of the Court, proceeded to deliver the defence."[228] The court asked that the defense—*i.e.*, the closing argument—be submitted to it in writing, in default of which it proposed to retire to deliberate; no defense being produced, it proceeded to do so. Captain Porter was found guilty, and was sentenced "to be suspended for the term of six months. . . ."[229]

Counsel then sent his defense to the Secretary of the Navy, who in

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[224] PROCEEDINGS, *supra* note 223, at 360.
[225] *Id.* at 361.
[226] *Id.* at 387.
[227] *Id.* at 403.
[228] *Id.* at 410.
[229] *Id.* at 413.

turn referred it to the court with directions to consider it.[230] This action by the Secretary reflected, in fact, the directions of the President.[231] The court duly considered the defense, with the following comments:

> As, however, the Court is not in possession of the Defence, which, in violation of its rule and of precedent, was delivered orally, and from notes under the appearance of reading it. [*sic*] The Court has annexed this document to its proceedings, with this further observation, that nothing is perceived in it which can in the least vary the conclusion to which the Court had arrived.[232]

The President then proceeded to read the proceedings of the court-martial of Captain Porter. It occupied him for several days, on one of which he "compared the citations from Adye, McArthur, and Macomb on Courts-martial."[233] On August 17, 1825, John Quincy Adams indorsed the proceedings with a single word: "Approved."[234]

E. THE EARLIEST REGULATIONS; MACOMB'S REVISED TREATISE

The earliest regulations governing the armed forces that deal with courts-martial, although of somewhat later date than the trials that have just been reviewed, reflect the same practice as to counsel.

The first General Regulations for the Navy and the Marine Corps available in print were approved by the President on February 19, 1841.[235] They provided in article 506 that "the court may allow counsel to the accused, for the purpose of aiding him in his defence against the charges, but always under the restriction that all motions or communications shall be made in writing, and in the name of the accused." Nearly identical provisions appear in the next few compilations,[236] although by then we are no longer in the realm of persons contemporary with the adoption of the Bill of Rights.[237]

The first Army regulations that deal with courts-martial, those of 1835, contain the same provision in substance: "Both the prosecution and defense may be allowed, on request, the assistance of a friend or

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[230] *Id.* at 414.

[231] See 7 J. Q. ADAMS 44, 45.

[232] PROCEEDINGS, *supra* note 223, at 415.

[233] 7 J. Q. ADAMS 46.

[234] *Ibid.*; PROCEEDINGS, *supra* note 223, at 415; 2 AM. ST. PAP. NAV. AFF. 329.

[235] A copy is in the library of the Judge Advocate General of the Navy; there are no regulations of earlier date in the National Archives.

[236] Navy Reg. ch. XXXV, art. 27 (1853); Navy Reg. ch. LV, art. 32 (1857); Navy Reg. § 1237 (1865).

[237] HARWOOD, THE LAW AND PRACTICE OF U.S. NAVAL COURTS-MARTIAL 51 (1867), rests the assistance of counsel on the sixth amendment, but says on the very next page that "such assistance must be restricted to the giving advice, framing questions, or offering in writing any legal objections that the course of the proceedings may appear to render necessary." *Id.* at 52.

professional gentleman; but such assistant shall not address the court, or be permitted to interfere, in any way, with its proceedings."[238] The foregoing passage was omitted from the Army Regulations of 1841 and 1847; the latter compilation simply lists among the duties of the judge advocate "to admonish the accused, and guard him in the exercise and privileges of his legal rights."[239]

It is now time to return to Major Macomb of the Engineers, whom we left in 1809, just publishing his treatise after faithfully copying large excerpts of it from Tytler, and whom we saw briefly, as a lieutenant colonel, on the Wilkinson court-martial in 1811.[240] Macomb served gallantly and creditably in the War of 1812, becoming a brigadier general by regular commission and a major general by brevet; the war over, he was reduced by successive demobilizations to the substantive rank of colonel and Chief of Engineers.[241] But in 1828, his fortunes took a turn for the better. Major General Jacob Brown, commanding the Army, died. The obvious candidates for the position were Winfield Scott and E. P. Gaines, the two brigadier generals, both of whom were major generals by brevet; but they had engaged in such a long and unseemly row over their relative seniority and over the effect of their respective brevets, that President John Quincy Adams appointed the relatively junior Macomb to the vacancy.[242]

In 1840, Major General Macomb published a revision of his treatise under the title, *The Practice of Courts Martial*. This time he no longer slavishly copied from others, but expressed his views as to the place of military defense counsel in his own language:

> § 43. Accommodation is usually afforded, at detached tables, for the prosecutor and prisoner; also for any friend or legal adviser of the prisoner or prosecutor, the benefit of whose assistance they may, respectively, desire during the trial. Though the parties only are permitted to address the Court, it being an admitted maxim, in military Courts, that counsel are not to interfere in the proceedings or to offer the slightest remark, much less to plead or argue, yet a prisoner or prosecutor is not precluded the advantage of their presence and advice.
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> . . . .
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> § 93. Courts Martial are particularly guarded in adhering to the

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[238] Army Reg. art. XXX, § 34, at 96 (1833). An identical provision appears as art. 38, § 35, of the unauthorized version published in 1834.

[239] Army Reg. para. 330 (1847).

[240] See p. 195 *supra*.

[241] See 1 AM. ST. PAP. MIL. AFF. 673; 3 *id.* at 203 (Dickins & Forney eds. 1860).

[242] See ELLIOTT, WINFIELD SCOTT: THE SOLDIER AND THE MAN 227–28, 242–56, 399–400 (1937); SILVER, EDMUND P. GAINES, FRONTIER GENERAL 130–36 (1949); FRY, THE HISTORY AND LEGAL EFFECT OF BREVETS 96–131 (1877); RICHARDS, MEMOIR OF ALEXANDER MACOMB 118–20 (1833). References to the Scott-Gaines controversy fill vols. 7 and 8 of J. Q. ADAMS.

A shorter account of the contest appears in Wiener, *Mex Rank Through the Ages*. Infantry Journal, Sept. 1943, pp. 27–28.

> custom which obtains, of resisting every attempt on the part of counsel to address them; a lawyer is not recognized by a Court Martial, though his presence is tolerated, as a friend of the prisoner, to assist him by advice in preparing questions for witnesses, in taking notes and shaping his defence.[243]

Major General Macomb's treatise was revised by the then Attorney General of the United States, B. F. Butler, before it was published.[244] In February 1841, it was recommended to officers of the Army by the Secretary of War, J. R. Poinsett.[245] The paragraph last quoted found its way into state militia regulations, one of which was involved in the case about to be discussed, which illuminated the state understanding as to the right to counsel in military trials.

F. STATE MILITARY TRIALS

People ex rel. Garling v. Van Allen[246] was a common-law certiorari to review the proceedings of a brigade court-martial of the New York National Guard by which the relator had been tried and convicted, and before which, both before and after pleading to the charges, he had demanded that he be permitted to defend with counsel. The court-martial ruled that counsel could be permitted to act only under a provision of the General Regulations which was practically a verbatim copy of section 93 of Macomb's 1840 text.

Inasmuch as that regulation had been duly ratified by the New York Legislature,[247] the court-martial no doubt felt itself on safe ground. Garling's counsel remained during the trial, but was not allowed to examine or cross-examine the witnesses, or to address the court. On certiorari, the General Term affirmed the proceedings, but, on appeal, Garling prevailed.

The opinion of the Court of Appeals in this case is highly significant and illuminating in the present connection; what follows is largely drawn from that source.

New York had always been very specific regarding the right to counsel. Article XXXIV of its 1777 Constitution provided "that in every trial on impeachment, or indictment for crimes or misdemeanors, the party impeached or indicted shall be allowed counsel, as in civil actions."[248] In the Constitution of 1821, this was rewritten

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[243] MACOMB, THE PRACTICE OF COURTS MARTIAL 30, 47 (1840).
[244] *Id.* at x.
[245] *Id.* frontispiece.
[246] 55 N.Y. 31 (1873).
[247] N.Y. Sess. Laws 1870, ch. 80, § 252.
[248] 5 Thorpe, *The Federal and State Constitutions*, H.R. Doc. No. 357, 59th Cong., 2d Sess. 2635 (1909).

to state that "in every trial on impeachment or indictment, the party accused shall be allowed counsel as in civil actions."[249]

Did this later guarantee extend to courts-martial? That question was squarely raised—and as squarely decided—in *Rathbun v. Sawyer*[250] in 1836. Rathbun, a New York militiaman, who had badly misbehaved at a muster, was tried by a regimental court-martial for unsoldierlike appearance and disobedience of orders. "He demanded to have the benefit of counsel," which request the court-martial refused to grant, whereupon Rathbun brought certiorari to review his conviction.

The Supreme Court of the state, speaking through Nelson, J.—who later sat on the Supreme Court of the United States—held the constitutional guarantee inapplicable:

> The only provision in the statutes requiring counsel to be allowed to parties accused, is in the cases of *impeachment* and *indictment*. . . . The same provision is found in the 7th section of the constitution. It therefore rested solely in the discretion of the court martial, whether the party should be allowed counsel, and with the exercise of that discretion we will not interfere.[251]

When the New York Constitution of 1846 was under consideration, it was proposed to change that rule. The records of that convention show that "Mr. Stow moved to amend the ninth section so as to provide that no person shall be tried without counsel. In military trials, especially, should the accused have the benefit of counsel, and in such cases he never had it."[252] Accordingly, the right-to-counsel provision was amended, by the insertion of the italicized words, to read: "and in any trial *in any court whatever*, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions."[253]

This history of constitutional development disposed of the *Garling* case. The court-martial was, plainly, a court organized under the laws of the state. It was therefore subject to the provisions of the state constitution; and the Macomb-inspired section of the General Regulations, even though legislatively ratified, was accordingly unconstitutional and void.

Turning now to Massachusetts, we find there, in 1810, the trial of Captain Thomas Howe, charged with assorted disobedience of orders arising out of the governor's reorganization of the state militia. Captain Howe invoked article 12 of the Massachusetts Declaration of

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[249] N.Y. CONST. art. VII, § 7 (1821), printed in 5 Thorpe, *op. cit. supra* note 348, at 2648.
[250] 15 Wend. 451 (N.Y. 1836).
[251] *Id.* at 452.
[252] People *ex. rel.* Garling v. Van Allen, 55 N.Y. 31, 37–38 (1873).
[253] N.Y. CONST. art. 1, § 6 (1846).

Rights, which states, "and every subject shall have a right to produce all proofs that may be favorable to him, to meet the witnesses against him face to face, and to be fully heard in his defence by himself or his Counsel, at his election." Pointing out that 1810 was a time of peace, that the militia was not in active service, and that there was no declaration of martial law, Captain Howe concluded, "I therefore presume to think, that I have a right to Counsel, and with due respect do now request that it may be allowed me, and I hope this honorable Court will see cause to grant this my request."[254]

To no avail; the court

> after deliberation, directed the Judge Advocate to inform Capt. Howe, that it being the uniform custom of Courts Martial not to allow the admission of Counsel to plead openly before them, that his motion is overruled, and the Court further direct it to be recorded, that, in their opinion, no defendant can thereby be deprived of any advantage, because all the evidence and the defence must be in writing; and it is well known, that any defendant, before a Court Martial, can have all the aid and assistance which can be necessary or useful to him, by having a friend or friends setting by and assisting him with private advice; the Court further direct, that the defendant be informed that they cannot recognize officially, any person or persons who may be setting by him in the course of the trial.[255]

In the outcome, Captain Howe, was indeed not deprived of any advantage. He was acquitted,[256] and although the acquittal was disapproved by the Major General,[257] the case was over.

Only in Maine, no longer part of Massachusetts after 1819, was there a different pattern. The constitution of that state, adopted in 1819, contained the usual right-to-counsel provision.[258] The first militia law, of 1821, appeared to look the other way with respect to military trials:

> And it shall further be the duty of each Judge Advocate, or person officiating as such, at any court martial, impartially to state the evidence both for and against the officer or officers under trial, all which evidence shall be taken as in civil actions.[259]

The general and division courts-martial then prescribed were, six

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[254] *Capt. Howe's Trial*, in THE MILITIA REPORTER 249, 284 (Boston 1810).

[255] *Id.* at 253.

[256] *Id.* at 282.

[257] *Id.* at 283.

[258] "In all criminal prosecutions, the accused shall have a right to be heard by himself and his counsel, or either, at his election. . . ." MAINE CONST. art I, § 6 (1819).

[259] 2 MAINE REV. LAWS ch. 164, § 39 (1821). This provision had its counterpart in the earlier identical laws of Massachusetts and Vermont: "And the officer who shall appoint a Court-Martial shall at the same time appoint a suitable person for a Judge-Advocate, whose duty it shall be impartially to state the evidence, both for and against the Officer under trial." Mass. Laws May Sess. 1793, ch. IV, 35, at 306; Laws of Vt. ch. XLVII, § 31, at 457 (1797).

years later, superseded by a series of circuit court-martial,[260] whose proceedings were reported; and those reports show that the persons accused had counsel, who argued their cases.[261] The basis for such counsel does not appear.

The Maine innovation does not appear to have been widespread. The Connecticut militia law stated flatly "that an officer of the line shall be appointed to do the duty of judge advocate; and no other person whatever shall be admitted to solicit, prosecute or defend the arrested officer."[262] And in Rhode Island, where the 1798 declaration of rights conferred the right to counsel "in all criminal prosecutions,"[263] the General Assembly as late as 1840 nonetheless enacted that "in every court martial there shall be a judge-advocate, who shall discharge the duties of that office according to the usage and practice of courts-martial; and no other person shall be admitted to prosecute or defend an arrested officer."[264] The Northwest Territory made the judge advocate counsel for the prisoner in a provision taken almost verbatim from article 6 of 1786 (which was, as we have seen, later copied in article 69 of 1806).[265] All of the other laws were silent on the point now in question.[266]

G. CONCLUSION AS TO MILITARY RIGHT TO COUNSEL

Mr. Henderson says of the court-martial practice contemporary with the Bill of Rights that "it was traditional to allow the accused legal assistance."[267] The excerpts from the texts quoted, and the proceedings of the many federal and state military trials summarized above, demonstrate plainly that, if by "legal assistance" is meant the kind of representation that an Englishman accused of treason had had since 1696,[268] such assistance was assuredly not allowed the military accused. The quoted passage on this point is so misleading as to be plainly wrong.

Mr. Henderson's next sentence—"Counsel was usually a man in uniform; the use of civilian lawyers by either side was frowned upon

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[260] Maine Laws 1827, ch. 367.

[261] SMITH, REPORTS OF DECISIONS IN THE CIRCUIT COURTS MARTIAL (Portland 1831).

[262] 1 CONN. STAT. Laws tit. CXII, § 27 (1808).

[263] Declaration of Rights § 6, R.I. PUBLIC LAWS 80–81 (1798).

[264] R.I. Acts & Resolves Jan. Sess. 1840, at 3, § 80.

[265] Act of Dec. 13, 1799, § 42, art. 9, 1 Laws Northwest Territory 439 (Pease 1925). For the text of articles 6 of 1786 and 69 of 1806, see p. 188 *supra*.

[266] See statutes cited note 52 *supra*.

[267] Henderson, *Courts-Martial and the Constitution. The Original Understanding*, 71 HARV. L. REV. 293, 317–18 (1957).

[268] Illustrative are the defenses put up by counsel at the first treason trials following the effective date of the Act of 1696, 7 & 8 Will. 3, ch. 3: Rookwood, 13 How. St. Tr. 139 (1696); Cranburne, 13 *id.* at 221; Lowick, 13 *id.* at 267; Cook, 13 *Id.* at 311.

since they were unfamiliar with military law,"[269]—is equally erroneous. To the contrary, civilian judge advocates regularly appear in the earliest trials by court-martial in the United States Army elsewhere than in the field.[270] In the more important Army trials somewhat later, such as those of Generals Hull and Wilkinson, the prosecutor was likewise a civilian lawyer.[271] Indeed, all judge advocates in the Army from 1812 to 1818 were civilians without military rank.[272] And the judge advocate in every early American naval court-martial held in the United States was a civilian,[273] sometimes frankly selected for partisan political reason.[274]

Contemporaneous materials similarly undermine Mr. Henderson's primary thesis that, as a matter of original understanding, the guaran-

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[269] Henderson, *supra* note 267, at 318.

[270] See Wilkinson Order Book 251 (Mr. John T. Powell, Judge Advocate, Oct. 3, 1800); *Id.* at 572 (Jessee Bledsoe, Esq., Judge Advocate, Jan 29, 1806); *id.* at 639 (W. D. Nicholson, Esq., Judge Advocate, Nov. 1, 1806).

Somewhat earlier, it appears to have been customary to detail surgeons to function in that capacity. See *id.* at 91, 107, 110.

[271] Walter Jones, Esq., U.S. Attorney for the District of Columbia, was judge advocate at the first trial by court-martial of General Wilkinson. Martin Van Buren was special judge advocate and the prosecutor in fact at the trial of General Hull. See p. 195 *supra*. He was similarly detailed at the second trial of General Wilkinson; the latter, however, successfully objected, and established the rule, ever since followed, that a person not named in the order appointing the court-martial could not prosecute. See WINTHROP *271–72; 3 WILKINSON, MEMOIRS OF MY OWN TIMES 6–7 (1816); 1 Proceedings of Courts-Martial, War Office 131, 135–43 (ms. in National Archives).

See also TRIAL OF LT. COL. BACHE, *op. cit. supra* note 210 (John Leib, Esq., Judge Advocate); G.O. of Sept. 3, 1817 (Samuel Wilcocks, Esq., Judge Advocate for the trial of Lt. Col. Wharton of the Marine Corps); Act of Feb. 18, 1832, ch. 19, 6 Stat. 474 (private bill compensating a civilian for services as a judge advocate during the late war).

[272] See Act of Jan. 11, 1812, ch. 14, § 19, 2 Stat. 671; Act of April 24, 1816, ch. 69, § 2, 3 Stat. 297; ARMY REGISTER (1813–1818). The 1816 act, in so far as it dealt with judge advocates, was repealed, and provision was made for two judge advocates with the pay and allowance of topographical engineers, by the Act of April 14, 1818, ch. 61, § 2, 3 Stat. 426. By § 3 of the Act of March 3, 1813, ch. 52, 2 Stat. 819, a topographical engineer had the brevet rank and the pay and emoluments of a major of cavalry. Winthrop accordingly says that the judge advocates of 1818 were military officers. WINTHROP *270. However, in contemporaneous documents they are sometimes referred to as officers, *e.g.*, 2 AM. ST. PAP. MIL. AFF. 199, and sometimes as civilians, *e.g.*, ARMY REGISTER 1819, at 4; *id.* 1820, at 4; *id.* 1821, at 2; *Trial of Col. Williams King*, *supra* note 209. In the Army Reorganization Act of March 2, 1821, ch. 13, 3 Stat. 615, all judge advocates were dropped, and from then until the Act of March 2, 1849, ch. 83, § 4, 9 Stat. 351, there were no legal officers in the Army.

[273] See trials discussed in pp. 198–201 *supra* and those cited in note 216 *supra*; 4 NAVAL DOCUMENTS, BARBARY WARS 203 (1944); 6 *id.* at 232; WINTHROP *271 (citing 18 OPS. ATT'Y GEN. 135 (1885)).

The Navy also appears to have made judge advocates out of its doctors, according to one of the earliest Naval court-martial records in existence. See *Proceedings of a Court Martial Held on Board the U.S. Frigate Adams for the Trial of George Gallagher for Murder, St. Christopher, Oct. 2, 1799*, 1 Court Martial Records, 1799–1805, No. 2 (ms. in National Archives). The Judge Advocate, George Davis, was a surgeon. CALLAHAN, LIST OF OFFICERS OF THE NAVY OF THE UNITED STATES AND OF THE MARINE CORPS FROM 1775 TO 1900, 151 (1901).

[274] See Letter from Capt. Truxton to Secretary of the Navy, April 27, 1800, in NAVAL DOCUMENTS, QUASI-WAR WITH FRANCE, OPERATIONS JAN. 1800—MAY 1800, at 451–52 (1937): "I have appointed Robert Taylor Esquire Attorney at Law to officiate as Judge Advocate

tees of the Bill of Rights were thought to apply to courts-martial. Neither the 1799 nor the 1800 Articles for the Government of the Navy so much as mention counsel,[275] and the 1806 Articles of War show that as a matter of statute the prisoner was unattended on the taking of depositions and left to rely at the trial on such legal assistance as the prosecutor would accord him.[276] Articles 69 and 74 of 1806 show on their face that its framers considered the assistance-of-counsel provision of the sixth amendment to be for civilian consumption only.[277]

Mr. Campbell of Tennessee, who had railed at courts-martial in general and at the death penalty in particular in the course of his opposition to the 1806 code,[278] did not appear in the least troubled by the circumstance that a military prisoner had to look to the prosecutor as his counsel. Yet Campbell was a lawyer, and one sufficiently esteemed to be called within a few years to the bench of his state's highest court.[279] Moreover, John Quincy Adams, who had fly-specked the 1806 Articles of War in two sessions of Congress, and who was distinctly disturbed by their poor draftsmanship,[280] was apparently not concerned in the slightest by their failure to accord military persons any right to counsel.

We come now to three Presidents, all of them contemporaries of the Bill of Rights, who will be considered in the order of their terms of office. We know that Madison drafted the Bill of Rights, and that he led the successful struggle for its adoption in the First Congress.[281] Surely if anyone in 1789 had believed that the guarantee of right to counsel did apply or should apply to the land and naval forces, Madison would have known of it. Mr. Henderson writes that "the rules of both logic and of construction would lead to the conclusion that since Madison, a lawyer, was aware of the special problem of military cases and felt the need specifically to exempt them from one provision of the amendments, he intended that courts-martial should not be excluded from the other provisions."[282]

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of the said Court—Mr. Taylor is a member of the Legislature of this State—he is a good Federalist and has talents necessary for the Occasion in question."

[275] See p. 189 *supra*.

[276] See *ibid*.

[277] It should, however, be noted that only three persons who sat in the First Congress before the Bill of Rights was transmitted to the states for ratification served in the Ninth Congress; they were Gilman of New Hampshire, Sumter of South Carolina, and Andrew Moore of Virginia. See *Biographical Directory of the American Congress: 1774–1949*, H.R. Doc. No. 607, 81st Cong., 2d Sess. (1950).

[278] See pp. 187–88 *supra*.

[279] 3 DICTIONARY OF AMERICAN BIOGRAPHY 452 (1929).

[280] See pp. 184–86, 188 *supra*.

[281] BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 264–75 (1950); DUMBALD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 33–44 (1957); Henderson, *supra* note 267, at 309–13.

[282] *Id.* at 310.

If, in fact, such was Madison's intent, an opportunity to give effect to the Bill of Rights in that sense was squarely presented when the proceedings in General Hull's trial were laid before him. The circumstance that the draftsman and protagonist of the Federal Bill of Rights approved the proceedings in Hull's case, where the applicability of the sixth amendment had been expressly invoked, but in vain,[283] is well nigh conclusive evidence that Madison, like everyone else, never thought for a moment that its guarantee of counsel applied to military persons or that the phrase "in all criminal prosecutions" which introduces the sixth amendment included military prosecutions. Under any other view, it would have been Madison's duty to disapprove the sentence. Madison read court-martial records carefully,[284] and did not hesitate to point out irregularities therein.[285] It is simply not possible to argue that his approval of the record in General Hull's case involved a failure to note a question so fully and explicitly raised at that trial as the accused's request for effective assistance of counsel. The Hull trial is thus perhaps the weightiest evidence of all, because it constitutes Madison's actual and practical construction of *his* Bill of Rights.

President Monroe, likewise, had been a contemporary of the framing of the Constitution and of the drive for the Bill of Rights.[286] His relations with Madison were extremely close, personally as well as

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[283] See pp. 195–97 *supra*.

[284] "Among other jobbs on my hands is the case of Wilkinson. His defence fills 6 or 700 pages of the most collossal paper. The minutes of the Court, oral written & printed testimony, are all in proportion. A month has not yet carried me thro' the whole." Letter From President Madison to Thomas Jefferson, Feb. 7, 1812, in 8 THE WRITINGS OF JAMES MADISON 175, 176–77 (Hunt. ed. 1908).

See Letter From President Madison to Acting Secretary of War Dallas, April 14, 1815, in DALLAS, LIFE AND WRITINGS OF ALEXANDER JAMES DALLAS 399 (1872): "I am engaged with the proceedings of the court-martial on General Wilkinson. It is so extremely voluminous that I shall not be able to get through it for some days." See also *id.* at 400, 401, 407 (letters from Madison to Dallas dealing with Madison's reviews of court-martial proceedings).

[285] I have examined and considered the foregoing proceedings of the General Court Martial, held at Fredericktown, for the trial of Brigadier General James Wilkinson—and although I have observed in those proceedings, with regret, that there are instances in the conduct of the court, as well as of the officer on trial, which are evidently and justly objectionable, his acquittal of the several charges, exhibited against him, is approved, and his sword is accordingly ordered to be restored. James Madison. February 14, 1812.

G.O. of Feb. 19, 1812, 24 ANNALS OF CONG. 2138 (1812).

The foregoing action considerably toned down the draft that Paul Hamilton, Secretary of the Navy, had submitted to the President eight days earlier, though it preserved the substance. See 46 Madison Papers No. 93 (ms. in Library of Congress).

[286] STYRON, THE LAST OF THE COCKED HATS: JAMES MONROE AND THE VIRGINIA DYNASTY 107–29 (1945). "As for Monroe, he was uncertain: he saw that the Constitution without a bill of rights was an undemocratic document; but the question was whether to withhold ratification until a bill of rights was added, or to ratify it on condition that such a bill be added." *Id.* at 121. See also CRESSON, JAMES MONROE 96–103 (1946).

officially, and had been so for many years.[287] During his Presidency, from 1817 to 1825, the number of officers in both Army and Navy was sufficiently small so that the few court-martial cases that required presidential action[288] could be, and on occasion were, discussed in detail at Cabinet meetings.[289] On several occasions, President Monroe returned cases to courts-martial with directions for reconsideration.[290] Against this background, his approval of proceedings in which an accused military or naval person was denied the kind of assistance of counsel that he would have had in the civil courts[291] is further proof that James Monroe also did not believe that the sixth amendment applied to military trials.

We come finally to John Quincy Adams. He graduated from college in the year that the Constitutional Convention met,[292] and from then until 1790 studied law in the chambers of Theophilus Parsons.[293] The latter was a member of the Massachusetts ratifying convention,[294] and young Adams himself attended two sessions of the New Hampshire convention.[295] It is therefore most unlikely that he was unaware of what at that time was the prevailing understanding as to the scope of the Bill of Rights.[296] We have seen that, as a Senator, the younger Adams scrutinized the 1806 Articles of War more intensively than any member of either house.[297] For eight years in Monroe's Cabinet, he joined in and recorded the discussions of court-martial cases.[298] Becoming President himself, he gave exacting personal attention to the court-martial cases that came before him.[299] His recorded actions are far from perfunctory, and his disapprovals frequently constitute well-formulated opinions on questions of military law and disci-

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[287] See *id.* at 81.

[288] These included, for the Army, cases in time of peace involving the death sentence or involving the dismissal of a commissioned officer, and all cases involving a general officer, Art. War 65 of 1806, 2 Stat. 367; in the Navy, all cases involving the dismissal of a commissioned or warrant officer, and all death sentences, except for trials taking place outside the United States, AGN XLI of 1800, 2 Stat. 51.

[289] See 4 J. Q. ADAMS 141–43, 153–55, 408–13, 427–29, 434; 6 *id.* at 429, 453–54, 461. These citations do not include references to the court-martial of Ambrister and Arbuthnot in Florida by General Jackson for aiding the enemy. See WINTHROP *1139–40, *1711, *1297.

[290] 4 J. Q. ADAMS 427, quoted note 301 *infra*.

[291] See pp. 198–99 *supra* Case of Lt. Weaver of the Navy).

[292] 1 J. Q. ADAMS 22.

[293] 1 *id.* at 22–23; see LIFE IN A NEW ENGLAND TOWN: 1787, 1788—DIARY OF JOHN QUINCY ADAMS (C. F. Adams, Jr., ed. 1903).

[294] *Id.* at 95–96.

[295] *Id.* at 100, 101.

[296] See *id.* at 75, 81, 82, 93, 106 (entries dealing with the new Constitution). J. Q. Adams himself at first feared the Constitution would be adopted, and though not pleased with it, later became "converted, though not convinced." *Id.* at 75, 93.

[297] See pp. 184–86, 188 *supra*.

[298] See materials cited in note 289 *supra*.

[299] See, e.g., 7 J. Q. ADAMS 44–46, 177–78, 296, 375; 8 *id.* at 77.

pline.[300] Over the years, he formulated a consistent philosophy and policy in military cases.[301] Prior to publication, he discussed his prospective rulings with the service Secretaries[302] and with the Commanding General of the Army.[303] He studied texts on military law,[304] and went to some lengths in listening to the complaints of officers whose sentences of dismissal he had approved.[305] Con-

[300] See, *e.g.*, G.O. 64 of Dec. 29, 1827 (cases of Ass't Surgeon Bryant and Lt. Hunter, both of the Army); G.O. 51 of Sept. 4, 1828.

In Ass't Surgeon Bryant's case, General Winfield Scott had directed the court-martial to reconsider its ruling, at the same time increasing its membership; the augmented tribunal reversed the prior ruling. This was held erroneous by the President and disapproved by him, after discussions with Secretary Barbour and General Brown, commanding the Army. 7 J. Q. ADAMS 358, 363, 384.

Lieutenant Hunter had been convicted of challenging his superior, Colonel Josiah Snelling, to a duel in violation of Art. War 25 of 1806, 2 Stat. 363, and was sentenced to be cashiered, with a recommendation for clemency. The President approved the sentence, and remitted the cashiering,

> the principal consideration for which is the multiplied testimony on the face of the record that the prosecutor has been in the habitual practice of obtrusively declaring his readiness to waive his rank and meet in private combat any of his inferior officers, who might be dissatisfied with his conduct. Such declarations subversive of all discipline, are not only violations of the military character of him who makes them, but if made without special occasion, are mere vain boastings of personal courage, and if with occasion are direct provocations to a challenge. One of their most pernicious consequences, is, that they disqualify to the common sense and feeling of mankind the officer thus self-degraded to the level of his inferiors, from acting as a prosecutor against them for taking him at his word.

G.O. 64 of 1827, at 12–13.

In the naval case of Master Commandant Carter, the President wrote a letter to the judge advocate to be read to the court, explaining why the sentence to cashiering had been confirmed. 7 J. Q. ADAMS 372–73, 375, 378, 384–85.

[301] "This is the second instance within twelve months of sending to a Court-martial an opinion of the Attorney-General to induce them to reverse their judgment, which in both cases they have refused. I think the same result may almost always be expected." 4 J. Q. ADAMS 427 (Nov. 2, 1819). "Death was too severe a punishment for desertion in time of peace." 7 *id.* at 29 (June 25, 1826). "[I]nterferences of fathers and members of Congress with Courts-martial . . . [are] in no wise favorable to the support of discipline." 7 *id.* at 246–47 (March 24, 1827).

"In the case, as in that of Colonel Chambers, and indeed in every trial for drunkenness upon which I have been called to act, the mass of *negative* testimony, even from witnesses of the most respectable character—that is, of witnesses who say that the accused was not drunk at times when the positive witnesses swear that he was so—is surprising. Others swear of a confirmed and notorious sot that they have known him for years and never saw him drunk in their lives. This is so invariable a resource of defence in every trial for drunkenness that it may be classed with the alibi of the Old Bailey. Negative testimony in such cases proves absolutely nothing." 7 *id.* at 373 (Dec. 7, 1827). "The defence of Lieutenant Hunter is highly exceptionable—full of irrelevant and abusive matter, much of which ought not to have been allowed by the Court to appear upon the Record: most especially as they denied to the prosecutor the liberty of replying to it. The consequence is that he stands under scandalous imputations, and deprived of the means of refuting them. The right of self-defence is sacred, but should not be suffered to be used as a cloak for slander." G.O. 64 of Dec. 29, 1827, at 13.

[302] See 7 J. Q. ADAMS 44–46, 162–63, 165, 169, 309, 358, 363, 372–75, 384; 8 *id.* at 85.

[303] 7 *id.* at 384, 392.

[304] 7 *id.* at 46, 363.

[305] Ass't Surgeon Todsen was convicted of fourteen specifications laid under seven charges, and sentenced to cashiering, publication of his name, and the refund of $47 found to have been embezzled and misapplied; the sentence was approved by the President. G.O. 20 of 1826.

sequently, John Quincy Adams' approvals of court-martial cases in which defense counsel had not been permitted to address the court[306] must be taken to reflect a settled conviction, resting on long and careful study, that persons in the land and naval forces were not entitled to the kind of assistance of counsel that the Constitution guaranteed to civilians.

On the basis of contemporary materials, only one conclusion is possible: The right "to have the Assistance of Counsel for his defence," though in terms applicable to "all criminal prosecutions" like the companion right of trial "by an impartial jury of the State and district wherein the crime shall have been committed," was never thought or intended or considered, by those who drafted the sixth amendment or by those who lived contemporaneously with its adoption, to apply to prosecutions before courts-martial. As General Hull himself had said of the sixth amendment when he invoked it at his trial, "I know well, Sir, that if this provision be taken in connection with the context, and the instrument be construed according to the technical rules of law, it will be considered as applying only to civil prosecutions."[307]

IV. OTHER BILL OF RIGHTS GUARANTEES IN THE EARLY MILITARY LAW

Once we leave the realm of right to counsel, the materials are more scanty, there are fewer adjudications, and conclusions are in consequence somewhat more difficult to formulate. I agree with Mr. Henderson that "the second, third, seventh, ninth, and tenth amendments need not be discussed, for they are not relevant to the present prob-

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Periodically thereafter, the President considered the case and saw Todsen. See 7 J. Q. ADAMS 183, 188, 190, 192, 209, 212, 216. In March 1827, the President remitted the payment of the $47, for which Todsen was most grateful, 7 *id.* at 239, 240, but Todsen continued to visit, soliciting civilian employment with the Government, see 7 *id.* at 248–49, 282–83. The President finally had Todsen appointed surgeon of a ship engaged in colonizing Liberia. 7 *id.* at 285, 292, 378.

[306] See pp. 199–201 *supra; cf.* pp. 197–198 *supra.*

[307] HULL TRIAL 9, quoted p. 196 *supra.* Ten years later, after brooding about his conviction, Hull in a set of memoirs attacking General Henry Dearborn took an entirely different view of the sixth amendment: "It is binding on all courts both civil and military." HULL, MEMOIRS OF THE CAMPAIGN OF THE NORTH WESTERN ARMY OF THE UNITED STATES, A.D. 1812, at 147 (1824).

> Gen. H. A. S. Dearborn rushed into print in defense of his father:
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> I assert with confidence, *that the court acted in conformity to the established principles of martial law in refusing* "his counsel to open their lips," *in the presence of the court. This is the established law of all nations, and our naval and military courts have been, and still are governed by this rule.* For the truth of this declaration, I appeal to the writers on martial law, and to the officers of our army and navy.

DEARBORN, DEFENCE OF GEN. HENRY DEARBORN, AGAINST THE ATTACK OF GEN. WILLIAM HULL 27–28 (1824).

[308] This footnote was omitted in original text. (*ed.*)

lem."[309] There will be set forth below, in the order in which each remaining guarantee is set forth in the Constitution, such materials as have been found.

A. *FIRST-AMENDMENT GUARANTEES*

1. *Establishment of Religion.*—In his solitary dissent in *Illinois ex rel. McCollum v. Board of Educ.*,[310] Mr. Justice Reed pointed out that the armed forces had had chaplains "from early days." The first Army chaplains appear in the statute book in 1791[311] and the first in the Navy in the first naval act in 1794.[312] But chaplains for both Houses of Congress had been provided even earlier, in 1789.[313]

Both the Army and Navy articles encouraged religious devotions. Naval article 2 of 1799 stated, "commanders of the ships of the United States, having on board chaplains, are to take care, that divine service be performed twice a day, and a sermon preached on Sundays, unless bad weather, or other extraordinary accidents prevent."[314] Article II of 1800 repeated the foregoing and added, "that they cause all, or as many of the ship's company as can be spared from duty, to attend at every performance of the worship of Almighty God."[315] It was not until 1862 that the final portion was changed to "it is earnestly recommended,"[316] and in that form it still survives today.[317] A similar provision for the Army, "It is earnestly recommended to all officers and soldiers, diligently to attend divine service," was in article 2 of 1806,[318] drawn from its Continental predecessor;[319] but Winthrop considered it obsolete,[320] and it disappeared with the 1916 revision.

Congress did not, either in providing for chaplains or in recommending attendance at divine services, establish a state church; possibly the requirement for attendance in 1800 overstepped the command of the first amendment, assuming it to have been applicable to the

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[309] Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 315 (1957).

[310] 333 U.S. 203, 253-55 (1948).

[311] Act of March 3, 1791, ch. 28, §§ 5–6, 1 Stat. 222.

[312] Act of March 27, 1794, ch. 12, §§ 2, 6, 1 Stat. 350, 351.

[313] Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 71.

[314] 1 Stat. 709.

[315] 2 Stat. 45.

[316] Act for the Government of the Navy of 1862, art. 2, REV. STAT. § 1624 (1875) [hereinafter cited as AGN of 1862].

[317] 10 U.S.C. § 6031(b) (Supp. V, 1958). See H.R. REP. NO. 491, 81st Cong., 1st Sess. 38 (1949): "These are provisions which are of historical existence [*sic*] to the Navy and which the Navy desires to retain as statutory provisions."

[318] 2 Stat. 360.

[319] Arts. of 1776, § 1, art. 2, *printed in* WINTHROP, MILITARY LAW AND PRECEDENTS *1489 (2d ed. 1896) [hereinafter cited as WINTHROP]. Compare British Articles of War of 1765, § I, art. 1, printed in WINTHROP *1448.

[320] WINTHROP *1016.

naval forces. All that can be said with certainty is that all the legislation here set forth was nonsecular.

2. *Freedom of Speech*.—We have seen above[321] how, when in 1804 it was proposed to extend the Continental Articles of War denouncing the use by any officer or soldier of "traiterous or disrespectful words against the authority of the United States in Congress assembled, or the legislature of any of the United States in which he may be quartered," so that it would apply also to the President and Vice President, an objection on the ground that this was a second Sedition Act and that the Constitution did not define "traiterous . . . words" stopped the revision of the Articles of War until the next session. Two years later, in article 5 of 1806, the prohibition was enacted with but a slight amendment, so as to cover the use of "contemptuous or disrespectful words against the President of the United States, against the Vice President thereof, against the Congress of the United States, or against the chief magistrate or legislature of any of the United States, in which he may be quartered . . . ."[322]

Plainly, the right to use "contemptuous or disrespectful words" against the President, the Vice President, Congress, and state governors or legislatures is of the essence of the civil liberties of a citizen; such language thus directed is indeed a matter of daily occurrence; and when the Sedition Act of 1798[323] impinged on such activity, it was a matter of abiding conviction on the part of Jefferson and his followers that this measure was unconstitutional in the face of the first amendment's command that Congress shall not make any law "abridging the freedom of speech."[324] But no Jeffersonian in Congress objected once the word "traiterous" was stricken, and Jefferson himself signed the bill that enacted article 5 of 1806 into law.

Other limitations in the 1806 Articles of War on the untrammeled exercise of free speech fell under exceptions that seem well established. The power "to make Rules for the Government and Regulation of the land and naval Forces" must include, at a minimum, a power to preserve order therein; that would suffice to sustain the prohibition in article 24 against reproachful or provoking speeches,[325] that in article 25 and article 28 against challenges and upbraiding another for not accepting a challenge;[326] and, very likely, the prohibition in article 3 against "any profane oath or execration."[327] Even today, the guaran-

[321] See p. 184 *supra*.

[322] 2 Stat. 360.

[323] Act of July 14, 1798, ch. 74, 1 Stat. 596.

[324] See, *e.g.*, CHINARD, THOMAS JEFFERSON 342–47 (1939).

[325] 2 Stat. 363. To the same effect were AGN 27 of 1799, 1 Stat. 712, and AGN XV of 1800, 2 Stat. 47.

[326] 2 Stat. 363.

[327] 2 Stat. 360. Profane swearing was also prohibited by AGN 3 of 1799, 1 Stat. 709, and by AGN III of 1800, 2 Stat. 45.

tee of free speech does not protect "the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[328] The power "to raise and support Armies" necessarily implied the power to punish desertion to prevent their dissolution, and, in consequence, the power to punish anyone who advised or persuaded desertion in violation of article 23.[329] It is similarly not difficult to sustain the power to punish one who made known the watchword, in violation of article 53,[330] or one who corresponded with the enemy in the face of article 57,[331] the latter being an act which, quite plainly, verged on, if indeed it was not included within, the constitutional definition of treason.[332] And the prohibition against using menacing words in the presence of a court-martial, contained in article 76,[333] was necessary to protect the processes of those tribunals.

It is only the prohibitions against contemptuous and disrespectful words contained in article 5, and against contemptuous and disrespectful conduct against one's commanding officer in article 6[334]—conduct which as a matter of usage has always included words[335]—that seem on their face to run counter to the first amendment.

As a matter of Congressional power under the Constitution proper, it is of course not difficult to support these articles. The President is the Commander-in-Chief, and he would be an ineffective one if he could be assailed with impunity by those subject to his command. The same is true respecting subordinate commanders. Similarly, Congress is entitled to protection from the military on the principle of subordination of the military power, the violation of which was one of the grievances charged against George III in the Declaration of Independence.[336]

But—and this must not be ignored—Congress to that extent *has* made a law "abridging the freedom of speech."

There is room for thoughtful diversity of opinion regarding the scope of free speech in the armed forces,[337] but it is hardly open to

[328] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). The passage quoted begins, "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . ." *Id.* at 571–72. For differing later views as to the scope of constitutional protection for obscenity, see Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), and Roth v. United States, 354 U.S. 476 (1957).

[329] 2 Stat. 366.

[330] *Ibid.*

[331] *Ibid.* AGN 33 of 1799, 1 Stat. 712, and AGN X of 1800, 2 Stat. 46, were of similar import.

[332] "Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort." U.S. CONST. art. 3, § 3.

[333] 2 Stat. 368 (now UCMJ arts. 88–89, 10 U.S.C. §§ 888–89 (Supp. V, 1958)).

[334] 2 Stat. 360.

[335] See WINTHROP *874–77.

[336] "He has affected to render the Military independent of and superior to the Civil Power."

[337] See United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954); Vagts, *Free*

contend that the very concept of an armed force subordinate to civil authority is still consistent with a right on the part of members of such a force to have the same freedom of speech that is accorded civilians. Jefferson, who felt so strongly the unconstitutionality of the Sedition Act that he drafted the Kentucky Resolutions,[338] was clearly of this view, for he approved the 1806 Articles of War with their provisions that so markedly abridged the freedom of speech of those in uniform.

The conclusion is therefore inescapable that the Founders did not intend this portion of the Bill of Rights to apply to persons in the land and naval forces.

3. Petition for Redress of Grievances.—Ever since the beginning, the Articles of War have provided relief for any officer or soldier who "shall think himself wronged" by his superiors.[339] In somewhat similar form, the same provision was included in the earliest naval articles,[340] and their substance still survives today.[341]

The conclusion that these provisions reflected concepts of proper military administration rather than any recognition of fundamental constitutional rights of soldiers and sailors is reinforced by an incident occurring in Washington's first administration. In December 1792, General Wayne, then commanding the Army, sent Secretary Knox a copy of an address of the officers of the Legion of the United States regarding the inadequacy of the ration allowed the soldiery, with the request that it be submitted to the President for the immediate consideration of the federal legislature.[342] Knox did so, and replied:

> In the mean time I am ordered to express you his regret that this mode has been taken to bring the subject forward—A Statement from you as commanding Officer would be intitled to and receive the same consideration as if supported by every individual under your command. The assembling of military Officers, in order to add weight to their representations against an existing and known law at the time of their and their Soldiers engagements, is considered as prejudicial to that order which renders a disciplined preferable to an undisciplined body of Men. If Officers are suffered to

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Speech in the Armed Forces, 57 COLUM. L. REV. 187 (1957). This article seems to overlook the constitutional significance of Jefferson's part in enactment of the 1806 Articles of War.

[338] See 4 CHANNING, HISTORY OF THE UNITED STATES 224–29 (1917); 2 BEVERIDGE, THE LIFE OF JOHN MARSHALL 397–400 (1916); 1 VON HOLST, CONSTITUTIONAL HISTORY OF THE UNITED STATES 144–45 (1876).

[339] Arts. War 34–35 of 1806, 2 Stat. 364. These provisions were derived from the Revolutionary articles, Arts. of 1776, § 11, arts. 1–2, printed in WINTHROP *1494. The latter, in turn, were drawn from British originals. Art. LVII of James II (1688), printed in WINTHROP *1444; British Articles of War of 1765, § 12, arts. 1–2, printed in WINTHROP *1457; see 1 OPS. ATT'Y GEN. 166 (1811).

[340] "[H]e shall quietly and decently make the same [*i.e.*, just cause for complaint] known to his superior officer . . . ." AGN 26 of 1799, 1 Stat. 711.

[341] UCMJ art. 138, 10 U.S.C. § 938 (Supp. V, 1958).

[342] Letter From Gen. Wayne to Secretary of War Knox, Dec. 12, 1792, in 1 Campaign Into the Wilderness: The Wayne-Knox-Pickering-McHenry Correspondence 156 (Knopf ed. 1955).

> assemble and deliberate in such cases, the propriety of assembling the non commissioned and privates is separated by an ideal line only—It is hoped and expected that in all future cases, the suggestions for any modification of the laws relative to the Army and the reasons on which such suggestions are founded should be stated only by the commanding General.[343]

The portion of the fourth amendment relating to general warrants is, I agree with Mr. Henderson, "not appropriate to military life"; he says however, that "there is no difficulty in reading the provision against unreasonable searches and seizures as being separable and protecting those on active duty with the military."[344] Assuming the premise of separability, the conclusion does not follow.

B. FOURTH-AMENDMENT GUARANTEES

First, the development of the fourth amendment came rather late in our constitutional history. Not until 1886, in the *Boyd* case,[345] was that amendment given content, and the concept of excluding evidence obtained through an illegal search and seizure was first formulated in the *Weeks* case,[346] in 1914. There is nothing whatever in Winthrop on searches and seizures. Moreover, the *Weeks* principle does not appear in military law until the closing years of World War II;[347] nor was it applied to searches within military installations even in qualified form until 1949.[348]

Second, the modern view that the fourth amendment is aimed essentially at protecting the right to privacy[349] is, on its face, "not appropriate to military life." There is no privacy in military life, least of all for those in the ranks; their barracks, their few possessions, their very persons, are all subject to inspection by superiors as a matter of course without notice. And certainly the soldier of the 1790's—unpaid, poorly clothed, subject to frequent and brutal punishment, continually (if improperly) made to be servant to his officers[350]—had not even the tenuous and episodic privacy that his present-day successors have on occasion. The actualities of military life in the decade or

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[343] Letter From Secretary of War Knox to Gen. Wayne, Dec. 22, 1792, in 1 *id.* at 159.

[344] Henderson, *supra* note 309, at 315.

[345] Boyd v. United States, 116 U.S. 616 (1886).

[346] Weeks v. United States, 232 U.S. 383 (1914).

[347] See 3 BULLETIN OF THE JUDGE ADVOCATE GENERAL OF THE ARMY ¶ 395(27), at 512 (1944); 7 *id.* ¶ 395(27), at 75 (1948).

[348] U.S. DEP'T OF ARMY, MANUAL FOR COURTS-MARTIAL ¶ 138 (1949); *cf.* U.S. DEP'T OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES ¶ 152 (1951).

[349] *Cf.* Wolf v. Colorado, 338 U.S. 25, 27–28 (1949); Olmstead v. United States, 277 U.S. 438, 472–79 (1928) (Brandeis, J., dissenting).

[350] The frequency with which Wilkinson issued orders on the theme that "a Soldier by voluntary compact becomes the Servant of the State, but not the slave of an individual" show's that the practice was widespread. See General Wilkinson's Order Book, 1797–1808, at 10 (ms. in National Archives Record Group 94, Entry 44) [hereinafter cited as Wilkinson Order Book].

so after the adoption of the Constitution[351] utterly negative any notion that the first American soldiers were shielded against searches of any kind.

The short of the matter here is that Mr. Henderson has engaged in after-thinking—reading into the minds of the Founders views that were not fully formulated for well over a century afterwards, and retroactively applying those concepts to situations where, in fact, they were never sought to be applied.

C. *FIFTH-AMENDMENT GUARANTEES*

1. Protection Against Double Jeopardy.—A provision that "no officer, non-commissioned officer, soldier, or follower of the army, shall be tried a second time for the same offence" appears in article 87 of 1806.[352] This was new, and, being joined to the first paragraph of article 24 of 1786[353] with an "and," was doubtless added as an amendment by John Quincy Adams or his committee.[354]

While the common law dealt with the scope of the pleas of *autrefoits acquit* or *convict*,[355] and the Constitution spoke of "jeopardy," article 87 said "tried." Possibly all three versions were regarded simply as paraphrases; the nearly contemporaneous construction of "jeopardy" in the fifth amendment, for criminal prosecutions in the civil courts, was "nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon. This was the meaning affixed to the expression by the common law . . . ."[356] The problem in military cases lay in the circumstance that there was no judgment until the reviewing or confirming authority acted, and that such officer, be he a general, a fleet or squadron commander, or the President, could return the proceedings for revision.[357] In plain English, he could direct a more severe sentence.[358] This practice received the approval of the Supreme Court in *Ex parte Reed*,[359] a Navy case decided in 1879, and, notably, in *Swaim v. United States*,[360] where the President had twice returned an Army case in an ultimately unsuccessful effort to

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[351] See generally JACOBS, THE BEGINNING OF THE U.S. ARMY (1947); Wilkinson Order Book.

[352] 2 Stat. 369.

[353] WINTHROP *1507.

[354] See pp. 185, 188 *supra*.

[355] 2 HAWKINS, PLEAS OF THE CROWN 515–29 (8th ed. 1824).

[356] United States v. Haskell, 26 Fed. Cas. 207, 212 (No. 15321) (Washington, Circuit Justice, 1823).

[357] MACOMB, A TREATISE ON MARTIAL LAW AND COURTS MARTIAL 32–33 (1809); MALTBY, A TREATISE ON COURTS-MARTIAL AND MILITARY LAW 144 (1813).

[358] See 6 OPS. ATT'Y GEN. 200 (1853); WINTHROP *694–702.

[359] 100 U.S. 13 (1879).

[360] 165 U.S. 553 (1897), *affirming* 28 Ct. Cl. 173 (1893).

obtain from the court-martial a sentence dismissing the accused from the service.[361]

Winthrop's discussion of revision does not include revision of acquittals;[362] in time, however, the practice extended that far and in World War I was so widely—and, on the whole, so unwisely—exercised,[363] that in 1919, consequent upon public clamor,[364] it was prohibited by regulation[365] and the next year, forbidden by statute.[366]

The justification for revision of acquittals was said to lie in the supposed common-law right of a judge to require a jury to reconsider its verdict,[367] an approach that ignored the common-law qualification that this could not be done after the recording of an acquittal, which a jury could demand.[368] It is plain from early trials by court-martial that neither the extension of the revision procedure nor the attacks that led to its abandonment reflected the original practice.

In 1792, a sentence characterized as "mild" was confirmed without a return of the proceedings by General Wayne.[369] In 1793, he disapproved an acquittal, on the ground that the court-martial had assumed the power of pardoning; but he did not return the proceedings for revision.[370] In 1795, he disapproved the sentence of an officer sentenced to be reprimanded for a minor dereliction; the officer having already been reprimanded at the time, there should be no second reprimand for the same offense.[371] These instances are episodic only, and no consistent principle appears until after Wayne's death.

On March 17, 1801, General Wilkinson disapproved the proceedings of a general court-martial of Sergeant John Hughes because the sentence was unauthorized under article 24 of 1786.[372] "But that such

[361] See 18 OPS. ATT'Y GEN. 113 (1885); 28 Ct. Cl. at 195, 198; 165 U. S. at 563. Swaim was finally sentenced to suspension from rank and duty for 12 years, which made Col. G. N. Lieber Acting Judge Advocate General of the Army for all of that period as a colonel. Hence the service comment that the court which sentenced Gen. Swaim actually punished Col. Lieber.

[362] WINTHROP *694–702.

[363] See *Trials by Courts-Martial, Hearings Before Senate Committee on Military Affairs on S. 5320*, 65th Cong., 3d Sess. 34–35, 246–66 (1919); *Establishment of Military Justice, Hearings Before Senate Committee on Military Affairs on S. 64*, 65th Cong., 1st Sess. 1379–80 (1919).

[364] Bruce, *Double Jeopardy and the Power of Review in Court-Martial Proceedings*, 3 MINN. L. REV. 484 (1919); Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L.J. 52, 61–63 (1919).

[365] General Order 88, July 14, 1919 [General Orders of the Army hereinafter cited as G.O., with date].

[366] Art. War 40 of 1920, 41 Stat. 795.

[367] 6 OPS. ATT'Y GEN. 200, 206 (1853); WINTHROP *694–95.

[368] 2 HALE, PLEAS OF THE CROWN *299–300; 2 HAWKINS, PLEAS OF THE CROWN 623 (8th ed. 1824); Regina v. Meany, 9 Cox C.C. 231, 233 (Crim. App. 1862) (dictum).

[369] G.O., H.Q. Pittsburgh, Oct. 18, 1792, *General Wayne's Orderly Book*, 34 MICHIGAN PIONEER AND HISTORICAL COLLECTIONS 341, 396–97 (1905) [hereinafter cited as Wayne Orderly Book].

[370] G.O., H.Q. Hobson's Choice, July 6, 1793, *id.* at 445–46.

[371] G.O., H.Q. Green Ville, Aug. 27, 1795, *id.* at 638.

[372] WINTHROP *1507.

an atrocious offender should not escape punishment," another trial was ordered,[373] at which a due and legal sentence was adjudged.[374] Plainly, this was a second trial, not indeed a contravention of any article of war then in force, but certainly on its face contrary to the fifth amendment.

But, while General Wilkinson was quick to order a second trial because of an illegal sentence, he does not appear to have returned cases for the revision upward of inadequate sentences. In numerous cases, he criticized courts-martial for their leniency.[375] In one he reviewed the evidence at sufficient length so that the impropriety of the court's failure to adjudge dismissal from the Army became patent.[376] In another, where an officer was found guilty of the specification of making a false official statement but acquitted of the charge of conduct unbecoming an officer and a gentleman, General Wilkinson criticized the sentence of a reprimand because of the utter inconsistency of the findings.[377] In a third,[378] conviction of the particular offense made mandatory a sentence of dismissal[379]—the one situation in which revision is still permitted today.[380] Yet in none of these cases did General Wilkinson call on the court to revise its proceedings. A similar reluctance is apparent in at least one very early Navy case.[381]

Some years later, in 1818, Attorney General Wirt held in the case of Captain Hall that the President had the power to order a new trial since the court-martial had erred in excluding proper evidence.[382] The circumstance that the accused was anxious to clear himself at a

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[373] G.O., H.Q. Washington, March 17, 1801, Wilkinson Order Book 312.

[374] G.O., H.Q. Washington, March 28, 1801, *id.* at 316, 317.

[375] G.O., H.Q. Pittsburgh, Jan. 27, 1801, Wilkinson Order Book 285; G.O., H.Q. Washington, July 5, 1804, *id.* at 479, 285–87; G.O., H.Q. Natchitoches, Sept. 23, 1806, *id.* at 595, 596–99.

[376] G.O., H.Q. Washington, Nov. 30, 1804, *id.* at 504. The accused, a captain, was tried for "keeping a miss" in violation of the G.O. of May 22, 1797, against "Mistresses or Kept Women," *id.* at 8, 13, reaffirmed in the G.O. of March 11, 1800, *id.* at 218. ("[N]o Officer can be suffered to continue in Service, who indulges this illicit practice.") The evidence was overwhelming, yet the court-martial's sentence was only to two years' suspension from command but not from pay. The proceedings were disapproved because the effect of the sentence was to reward the accused at the cost of the Government.

[377] Trial of Capt. Nimrod Long, in 2 Proceedings of Courts-Martial, War Office 178, 187–88 (ms. in National Archives). Long was tried again the following year and sentenced to dismissal, 2 *id.* at 351–81, but his resignation was accepted prior to final action on the sentence. HEITMAN, HISTORICAL REGISTER OF THE UNITED STATES ARMY 640 (1903).

[378] Trial of Capt. W. Wilson, in 2 Proceedings of Courts-Martial, War Office 104–44 (ms. in National Archives).

[379] Art. War 45 of 1806, 2 Stat. 365.

[380] UCMJ art. 62(b)(3), 10 U.S.C. § 862(b)(3) (Supp. V, 1958): "In no case . . . may the record be returned—for increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory."

[381] Letter From Secretary of the Navy to Maj. Commandant Burrows, USMC, March 17, 1800, in NAVAL DOCUMENTS, QUASI-WAR WITH FRANCE, OPERATIONS, JANUARY 1800–MAY 1800, at 319 (1937).

[382] 1 OPS. ATT'Y GEN. 233 (1818).

second trial helped Mr. Wirt over the hurdle of article 87 of 1806, but as the members of the court did not agree with the Attorney General, the case occupied the attention of President Monroe's cabinet on several occasions.[383] Secretary of State John Quincy Adams likewise disagreed with the Attorney General, but did not rest his nonconcurrence on constitutional grounds.[384] The basic thought underlying the *Hall* ruling, that a trial vitiated by error was no trial at all even when the court had jurisdiction, emerged briefly in the Army Regulations of 1835;[385] but thereafter new trials at military law vanished,[386] and they do not appear again until World War I[387] and the 1920 Articles of War.[388]

In one instance, General Wilkinson's views foretold the future; in his *Memoirs* he stated that a case should never be taken from a court-martial prior to decision except in circumstances of imperious and justifiable necessity.[389] In 1949, the Supreme Court in *Wade v. Hunter*[390] agreed that, upon such a showing, a second trial before a new court-martial would not involve double jeopardy.[391]

In the *Wade* case, the Court assumed that the constitutional provision was applicable to military trials. The available materials do not permit a categorical conclusion on the validity of that assumption; they do not establish whether the prohibition against double

[383] See 4 MEMOIRS OF JOHN QUINCY ADAMS 141–43, 153–55 (C. F. Adams ed. 1874) [hereinafter cited as J. Q. ADAMS].

[384] I said . . . the difficulty appeared to me to be, that if a sentence of a conviction when disapproved by the President was no trial at all, I could not see how a sentence of acquittal, if disapproved, should be a trial. The argument of nullity applies as much to an acquittal disapproved as to a conviction disapproved; and if to an acquittal, then the eighty-seventh article of war is so far nugatory that an officer might be acquitted ten times over, by as many successive Courts-martial, and yet be said never to have had any trial at all.

4 J. Q. ADAMS 154.

[385] Army Regs. art XXXV, para. 12 (1835):

No officer or soldier being acquitted, or convicted of an offence, is liable to be tried a second time for the same. But this provision applies solely to trials for the same identical act and crime, and to such persons as have in the first instance been legally tried. If any illegality take place on the trial, the prisoner must be discharged, and be regarded as standing in the same situation as before the commencement of these illegal proceedings. The same charge may, therefore, be again preferred against the prisoner, who shall not plead the previous illegal trial in bar.

[386] See WINTHROP 693.

[387] Sanford v. Robbins, 115 F.2d 435 (5th Cir. 1940), *cert. denied*, 312 U.S. 697 (1941), involved the only new trial granted in World War I—on the ground that the first court-martial had lost jurisdiction because of the fundamental nature of the errors committed.

[388] Art. War 50½ of 1920, 41 Stat. 797 (now UCMJ art. 63, 10 U.S.C. § 863 (Supp. V, 1958)). Since the rehearing authorized by this provision is granted after an automatic appeal taken without the request of the accused, it raises nice questions of double jeopardy, see United States v. Zimmerman, 2 U.S.M.C.A. 12, 6 C.M.R. 12 (1952). Compare note 537 *infra*.

[389] 1 WILKINSON, MEMOIRS OF MY OWN TIMES 76 (1816).

[390] 336 U.S. 684 (1949).

[391] UCMJ art. 44(c), 10 U.S.C. § 844(c) (Supp. V, 1958), may or may not involve a legislative overruling of the *Wade* case. See S. REP. NO. 486, 81st Cong., 1st Sess. 20 (1949). The discussion in UNITED STATES DEPT OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES ¶ 56(b) (1951) is a masterful equivocation.

jeopardy, first written into article 87 of 1806, reflected a constitutional requirement or a mere carrying forward of a settled common-law principle. The circumstance that the Articles for the Government of the Navy never included a double-jeopardy provision at any time, from 1797 to 1951, is weighty evidence against the constitutional view. But all that can be said with certainty is that the actual construction of the double-jeopardy provision in the articles of war, from 1806 to 1919, honored the constitutional principle quite as much in the breach as in the observance, and that none of the discussions in the nineteenth century cited the fifth amendment.

2. The Privilege Against Self-Incrimination.—Wigmore has shown that the privilege against self-incrimination was well recognized at common law by the middle of the eighteenth century.[392] Tytler wrote in 1800 that "no witness is obliged to answer any question, the answer to which may oblige him to accuse himself of any crime or punishable offence,"[393] and Macomb duly repeated this passage in 1809.[394]

The privilege was accordingly recognized in early trials by court-martial. An Army trial in 1795 was disapproved by General Wayne because the court admitted testimony "tending to Criminate not only the Plaintiff but even the Witnesses;"[395] and at Commodore Barron's trial by naval court-martial in 1808, two witnesses were duly warned and reminded of their privilege by the court.[396]

The privilege against self-incrimination makes its first appearance in military legislation in article 6 of 1786, somewhat inferentially it is true, as that article as well as its 1806 successor simply directed the judge advocate, in his capacity as counsel for the prisoner, to object to "any question to the prisoner, the answer to which might tend to criminate himself."[397] Inasmuch as it was not until nearly a century later, in 1878, that the accused before a court-martial could give testimony, even in his own behalf,[398] this was hardly an important safeguard. Witnesses before courts-martial were not accorded the privilege by statute until much later, in 1901 before Army courts-martial,[399] and in 1909 before naval courts.[400]

Here again, there is nothing in the materials to suggest that a constitutional rather than a common-law principle was being applied.

3. Due Process of Law.—If by due process of law is meant the rule of

[392] 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940).

[393] TYTLER, AN ESSAY ON MILITARY LAW AND THE PRACTICE OF COURTS MARTIAL 288 (1st ed. 1800).

[394] MACOMB, *op. cit. supra* note 357, at 121.

[395] G.O., H.Q. Green Ville, March 30, 1795, Wayne Orderly Book 593–95.

[396] PROCEEDINGS OF THE GENERAL COURT MARTIAL CONVENED FOR THE TRIAL OF COMMODORE JAMES BARRON, 84, 98 (1822); WINTHROP *524–26.

[397] See pp. 189–90 *supra*.

[398] See Act of March 16, 1878, ch. 31, 20 Stat. 30.

[399] Act of March 2, 1901, ch. 809, § 1, 35 Stat. 950.

[400] Act of Feb. 16, 1909, ch. 131, § 12, 35 Stat. 622.

law in the sense of "the law of the land"—the original phrasing in the Magna Carta[401]—then, surely the earliest military cases reflect an adherence thereto. Proceedings are disapproved for insufficient evidence,[402] for irregularity,[403] for sentences that appear disproportionately severe for the offense[404] or that contravene the customs of the service.[405] The test is what had been customary at military law; to permit counsel to speak in court was not, and hence a proceeding in which that took place was disapproved.[406] But of due process of law as a constitutional concept, there is no trace.

Moreover, it must be born in mind that even the constitutional concept of due process of law meant to the Founders something very far removed from what it means today. Thus, from 1791 to 1862, the due-process clause of the fifth amendment and slavery existed together in the District of Columbia; and when that institution was abolished, the Constitution was invoked, not to free the slaves, but to assure such of their former masters as could prove loyalty to the Union just compensation for their loss.[407] Indeed, throughout the pre-Civil War period, due process of law was essentially procedural in scope.[408] It is later, in the course of the interpretation of the fourteenth amendment, that due process becomes substantive in nature. It appears first as a limitation upon legislative regulation of economic interests, there takes extreme forms, and then declines; while, almost concurrently, due process gradually absorbs the substance of the first eight amendments and today seems particularly to protect "personal rights," to what ultimate extent we do not yet know.[409]

It is sufficient for present purposes simply to note that even procedural due process in its present manifestations was unknown to the military proceedings of the Republic's first quarter-century; as we have seen, the prisoner was severely limited at the trial by the absence of effective counsel;[410] and the settled practice which permitted the judge advocate to be present with the court-martial while the members deliberated on findings and sentence, the accused meanwhile

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[401] See 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 61–63 (7th ed. 1956).

[402] *E.g.*, G.O., H.Q. Washington, Oct. 3, 1800, Wilkinson Order Book 251, 252 (disapproval by Gen. Wilkinson); G.O., H.Q. Ft. Adams, Jan. 14, 1802; *id.* at 373 (announcing disapproval by President Jefferson).

[403] G.O. Dec. 24, 1801, *id.* at 360–69 (withdrawal of challenged members reduced court below legal minimum).

[404] G.O. June 20, 1804, *id.* at 475–78 (announcing disapproval by President Jefferson).

[405] G.O., H.Q. Miami Villages, Sept. 28, 1794, Wayne Orderly Book 556 (sentence of 50 lashes "passed upon a warrant officer," viz., the Master Armourer, disapproved).

[406] Trial of Capt. W. Wilson, *supra* note 378.

[407] See Act of April 16, 1862, ch. 54, § 2, 12 Stat. 376.

[408] See Corwin, *The Doctrine of Due Process of Law Before the Civil War* (pts. 1–2), 24 HARV. L. REV. 366, 460 (1911).

[409] See the recent summary discussion in HAND, THE BILL OF RIGHTS 35–53 (1958).

[410] See pp. 193–201 *supra*.

remaining outside, was not forbidden until 1892.[411] Any attempt, therefore, to read into the early military law even the faint stirrings of the due-process learning that is so commonplace today would be as if "we armed Hengest and Horsa with machine guns or pictured the Venerable Bede correcting proofs."[412]

D. SIXTH-AMENDMENT GUARANTEES OTHER THAN RIGHT TO COUNSEL

1. The Right to Trial by an Impartial Jury.—Since all proceedings before courts-martial are criminal in nature, the sixth amendment's provision that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury" as a matter of language alone includes prosecutions by courts-martial. Since, however, the significance of this and other constitutional provisions "is to be gathered not simply by taking the words and a dictionary,"[413] we know—indeed it has never been doubted—that this does not follow: The soldier or sailor never had a right to trial by a jury.[414] The matter is generally put in terms of implied exception,[415] and sometimes is analogized to the similiarly implied exception for contemnors[416] and petty offenders.[417]

Any argument that all of the sixth amendment, excepting only the clause beginning "by an impartial jury," applies to military trials, necessarily involves some difficult textual exegesis; Mr. Henderson admits that the phraseology creates a barrier to his reading of the Bill of Rights;[418] and his treatment of the sixth amendment's text[419] seems labored and based in part on an assumption proved to have been unfounded.[420] The textual difficulties vanish only if we are prepared to assume this amendment's inapplicability. Let us examine some more of its guarantees.

2. The Right to a Speedy Trial.—The Continental Articles of War provided that no person arrested or confined "shall continue in his confinement more than eight days, or till such time as a court-martial can be conveniently assembled."[421] This was re-enacted in 1786 and again in 1806, each time with the word "conveniently" omitted.[422]

[411] Act of July 27, 1892, ch. 272, § 2, 27 Stat. 278; WINTHROP *288–89.

[412] MAITLAND, DOMESDAY BOOK AND BEYOND 356 (1897).

[413] Gompers v. United States, 233 U.S. 604, 610 (1914).

[414] Whelchel v. McDonald, 340 U.S. 122, 126–27 (1950).

[415] See *Ex parte* Quirin, 317 U.S. 1, 40–41 (1942) (dictum).

[416] Green v. United States, 356 U.S. 165 (1958); *In re* Debs, 158 U.S. 564, 594–96 (1895).

[417] District of Columbia v. Clawans, 300 U.S. 617 (1937); Schick v. United States, 195 U.S. 65 (1904).

[418] Henderson, *supra* note 309, at 303.

[419] *Id.* at 303–15.

[420] See pp. 206–208 *supra*.

[421] Arts of 1776, § 14, art. 16, printed in WINTHROP *1500.

[422] Amends. of 1786, art. 16, printed in WINTHROP *1506; Art War 79 of 1806, 2 Stat. 369.

The actual length of arrest or confinement was thus left indefinite, nor were any limitations imposed until 1862, in consequence of the confinement of General Stone without trial for some five months.[423] It is true that General Wilkinson, on the occasion of his second trial by court-martial in 1815, invoked the sixth amendment's guarantee of speedy trial as an argument against a proposed adjournment,[424] but in view of his stand against any right to the assistance of counsel in military trials,[425] this can hardly be deemed a declaration of principle.

In the Navy, article XXXIX of 1800[426] provided in essence, that a court-martial, once convened, should continue to sit—a protection against undue delay which Attorney General Cushing in 1853 said was "enacted in the spirit of the VIth article of the Amendments."[427]

Except for Wilkinson's single argument, no one in 1855 or earlier rested the desirable dispatch of military and naval trials on any constitutional requirement.

3. The Right to be Informed of the Accusation.—The provision of the sixth amendment giving accused the right "to be informed of the nature and cause of the accusation" was designed to ameliorate the common-law rule which, except in cases of treason after 1696,[428] denied the prisoner any right to learn the terms of the indictment until it was read over to him slowly at the trial.[429]

The American naval prisoner was not so handicapped. Article XXXVIII of 1800 required that the accused be furnished with charges when put under arrest,[430] a requirement that was implemented by the provision of the 1802 Navy regulations directing the judge advocate "to send an attested copy of the charge to the party accused, in time to admit his preparing his defence."[431]

There was no comparable statutory provision in the Articles of War, although in practice charges appear to have been routinely served in the Navy,[432] and the only disputes, as in General Wilkinson's second trial in 1815, turned on whether the charges on which the prisoner was arraigned varied materially from those served on him before the trial.[433] It was not until General Stone was arrested

[423] See Act of July 17, 1862, ch. 200, § 11, 12 Stat. 595; WINTHROP *164–66.

[424] 3 WILKINSON, MEMOIRS OF MY OWN TIMES 30 (1816). Wilkinson contended that this passage was omitted from the proceedings by the judge advocate. 3 *id.* at 29.

[425] See pp. 193–94 *supra.*

[426] 2 Stat. 51.

[427] 6 OPS. ATT'Y GEN. 200, 207 (1856).

[428] See 4 BLACKSTONE, COMMENTARIES *351–52.

[429] 1 STEPHEN, HISTORY OF THE CRIMINAL LAW 284 (1883). It appears that no one in England charged with a felony had the right to a copy of the indictment prior to April 1, 1916. Indictment R. 13(1) (1915), in First Schedule to the Indictment Act, 1915, 5 & 6 Geo. 5, ch. 90.

[430] 2 Stat. 50.

[431] Regulations Respecting Courts-Martial para. 4 (1802), printed in 2 NAVAL DOCUMENTS, BARBARY WARS, OPERATIONS 29, 39 (1940).

[432] MACOMB, *op. cit. supra* note 357, at 68, 172; MALTBY, *op. cit. supra* note 357, at 21.

[433] See 3 WILKINSON, MEMOIRS OF MY OWN TIMES 23–24 (1816).

and held for five months in 1861–1862 without service of charges upon him that the law was changed to require such service within eight days after arrest.[434]

4. The Guarantee of Confrontation.—With certain narrow exceptions, notably where the prior testimony of deceased or unavailable witnesses may be used, every witness for the prosecution in a criminal case must testify in person.[435] This follows generally from the sixth-amendment right "to be confronted with the witnesses against him," or, as it is phrased in some state constitutions, "to meet the witnesses against him, face to face."[436]

Yet before Army courts-martial, the prosecution has always been permitted to use depositions in noncapital cases; the provision dates from 1779,[437] it was re-enacted in 1786[438] and in 1806,[439] and has been law ever since.[440] True, the prisoner was entitled to be present—as has already been noted, no mention was made of any counsel for him[441]—but confrontation in the sense that the tribunal had an opportunity to see a live witness, "and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief,"[442] was a right not available to the military accused.

The Navy had no specific provisions for depositions until 1909.[443] Both services, however, permitted the prosecution to use the records of courts of inquiry as evidence in noncapital cases tried by courts-martial when oral testimony was not available. The Navy provision dated from 1800;[444] the Army's, first enacted in 1786[445] and repeated in 1806,[446] imposed the further limitation that records of courts of inquiry could not be used in dismissal cases.

The deposition practice does not seem to have been questioned on constitutional grounds until after the end of the Civil War, at which time it was sustained on the ground of the inapplicability of the sixth amendment to military trials.[447]

5. The Right to Compulsory Process of Witnesses.—The sixth amend-

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[434] WINTHROP *165–66.

[435] See 5 WIGMORE, EVIDENCE §§ 1395–418 (3d ed. 1940) especially §§ 1397, 1398, 1402.

[436] MASS. CONST. declaration of rights art. xii (1780); N.H. CONST. pt. I, art. xv (1783).

[437] Resolution of Nov. 16, 1779, 15 JOUR. CONT. CONG. 1277, 1278.

[438] Amends. of 1786, art. 10, printed in WINTHROP *1506.

[439] Art. War 74 of 1806, 2 Stat. 368.

[440] The provision now appears as UCMJ art. 49, 10 U.S.C. § 849 (Supp. V., 1958).

[441] See pp. 189–90 *supra*.

[442] Mattox v. United States, 156 U.S. 237, 242–43 (1895).

[443] Act of Feb. 16, 1909, ch. 131, § 16, 35 Stat. 622.

[444] Act of April 23, 1800, ch. 33, § 2, art. II, 2 Stat. 51.

[445] Amends. of 1786, art. 26, printed in WINTHROP *1507.

[446] Art. War 92 of 1806, 2 Stat. 370.

[447] DIGEST OF THE OPINIONS OF THE JUDGE ADVOCATE GENERAL 1912, XCI H, at 164–65 (1912) (citing rulings beginning in October 1865).

ment's guarantee of the right "to have compulsory process for obtaining witnesses in his favor" was long in being implemented; not until 1846 did Congress provide for process to compel the attendance of witnesses on behalf of criminal defendants in federal courts.[448]

With respect to military courts, it is necessary to distinguish between civilian witnesses and witnesses in the service. The latter were normally summoned by the judge advocate as a part of his duties, along with witnesses for the prosecution.[449] When the witnesses desired by the accused were at distant stations, orders from the War Department were necessary to procure their attendance; the question whether such orders should be issued was a matter that, at General Wilkinson's first trial in 1811, engaged the attention not only of the Secretary but of the President himself.[450]

When War Department orders were not forthcoming, and witnesses pleaded the exigencies of the service as an excuse for not appearing, the accused could not obtain their presence in person. This happened when General Wilkinson, at his second trial in 1815, sought the testimony of Generals Scott and Macomb and some others, and apparently did not care to risk taking their depositions.[451] Similarly, when General Swift was summoned on behalf of the prosecution at the same trial, he wrote the War Department asking whether he should appear or remain at his current duties; "a choice of duties being left to me by the War Department, I preferred the duty on the board at Baltimore. . . . I had no inclination to appear for or against either as a witness, and heard no more of the summons."[452] In one instance, the court granted a continuance "upon the application of the accused, who not having the same means of procuring the attendance of his witnesses as the prosecution possesses, is therefore in the opinion of the court entitled to more indulgence in this respect, than the prosecution."[453]

A temporary act passed in 1814 for the regulation of militia courts-martial while in federal service authorized the summoning of witnesses generally,[454] but no general subpoena powers were confer-

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[448] Act of Aug. 8, 1846, ch. 98, § 11, 9 Stat. 74.

[449] MACOMB, *op. cit. supra* note 357, at 172–73; MALTBY, *op. cit. supra* note 357, at 120–21.

[450] See the following letters in 45 Madison Papers (mss. in Library of Congress): Secretary Eustis to Madison, Sept. 11, 1811, No. 85; W. Jones to the Secretary of War, Sept. 11, 1811, No. 87; Secretary Eustis to Madison, Sept. 14, 1811, No. 91; Secretary Eustis to Madison, Sept. 25, 1811, No. 101. Orders were issued for the attendance of all the officers named in the request of the accused and of the court-martial, which adopted the request, see 45 *id.* No. 101, with the result that, as the Secretary had predicted in 45 *id.* No. 91, an acquittal resulted.

[451] ELLIOTT, WINFIELD SCOTT: THE SOLDIER AND THE MAN190–91 (1937); 3 WILKINSON, MEMOIRS OF MY OWN TIMES 39–42 (1816).

[452] THE MEMOIRS OF GEN. JOSEPH GARDNER SWIFT 137 (1890).

[453] PROCEEDINGS OF THE GENERAL COURT-MARTIAL CONVENED FOR THE TRIAL OF COMMODORE JAMES BARRON 143–44 (1822).

[454] Act of April 18, 1814, ch. 82, § 4, 3 Stat. 134.

red on Army courts-martial until the Civil War;[455] and Navy courts-martial had no statutory power to compel the attendance of civilian witnesses until 1909.[456]

The military accused unable to compel the attendance of witnesses had at least the consolation that for fifty-five years after the ratification of the Bill of Rights he was not in worse case than a civilian defendant in a court of the United States.

E. EIGHTH-AMENDMENT GUARANTEES

1. The Right to Bail.—The right to bail is perhaps one of the earliest rights known to the English law.[457] The requirement of excessive bail, which is to say, the denial of bail in practice, was charged against James II and prohibited for the future in the English Bill of Rights in 1689,[458] and from there the guarantee passed into our eighth amendment.

But "bail is wholly unknown to the military law and practice."[459] It is not even an indexed topic in Winthrop, and the only suggestion of it appears in the plainly unconstitutional Civil War legislation that purported to subject persons making contracts with the Army to trial by court-martial.[460] Possibly there is room for bail in situations in which a civilian is sought to be made amendable to military law.[461]

The very terms of the early statutes negative any notion of bail for military persons. The 1806 Articles of War permitted officers charged with offenses to be arrested,[462] but required enlisted men to be imprisoned, without regard to the gravity of the allegation.[463] Both provisions repeated those of 1786.[464] There was no relaxation of the mandatory requirement that enlisted men be confined[465] until 1891, when, by regulation, arrest was permitted for those charged with minor derelictions.[466] In the 1916 revision that provision was carried

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[455] Act of March 3, 1863, § 25, REV. STAT. § 1202 (1875).

[456] Act of Feb. 16, 1909, ch. 131, § 11, 35 Stat. 621; see 19 OPS. ATT'Y GEN. 501 (1891) (REV. STAT. § 1202 applies only to Army courts-martial).

[457] 1 STEPHEN, HISTORY OF THE CRIMINAL LAW 233 (1883), quoted in note 11 *supra*.

[458] 1 W. & M. 2d Sess. ch. 2, preamble, para. 10.

[459] DIGEST OF THE OPINIONS OF THE JUDGE ADVOCATE GENERAL ¶ IC, at 481 (1912).

[460] Act of July 4, 1864, ch. 253, § 7, 13 Stat. 397; Act of July 17, 1862, ch. 200, § 16, 12 Stat. 596; see *Ex parte* Henderson, 11 Fed. Cas. 1067 (No. 6349) (C.C.D. Ky. 1878).

[461] In United States *ex rel.* Guagliardo v. McElroy, 27 U.S.L. WEEK 2117 (D.C. Cir. Sept. 12, 1958), *reversing* 158 F. Supp. 171 (D.D.C. 1958), involving the constitutionality of the trial of a civilian employee by an Air Force court-martial in Africa, the relator on January 23, 1958, was granted bail by the Court of Appeals pending appeal.

[462] Art. War 77 of 1806, 2 Stat. 368.

[463] Art. War 78 of 1806, 2 Stat. 369: "Non-commissioned officers and soldiers, charged with crimes, *shall be confined*, until trial by a court martial, or released by proper authority." (Emphasis added.)

[464] Amends. of 1786, arts. 14–15, printed in WINTHROP *1506.

[465] Art. War 66 of 1874, REV. STAT. § 1342 (1875).

[466] G.O. 21 of 1891; WINTHROP *173–74.

into the Articles of War.[467] But confinement for minor offenses committed by soldiers was not discouraged by statute until 1920, nor were officers and soldiers placed on statutory equality with respect to arrest and confinement until that year.[468]

It is difficult to find in this uniform practice of dealing with military offenders anything but the consistent thought that bail was a right for civilians only. It may well be, as Mr. Henderson says, that "the requirement [of bail] is inappropriate in the military where the individual has no freedom of movement but rather is at all times subject to control by his superiors."[469] But it is this very inappropriateness which so strongly undercuts a contention that the Bill of Rights was intended to protect persons in the land and naval forces.

2. *Protection Against Cruel and Unusual Punishments.*—The eighteenth century in England was hardly an age of enlightenment in the field of punishment for crime. Every felony was punishable by death,[470] and the list of felonies had been greatly enlarged by statute.[471] Pressing to death—the *peine forte et dure*—was not abolished until 1772,[472] nor burning at the stake as a punishment for women convicted of petty treason until 1790.[473] And flogging in the British military and naval services was carried to such barbarous extremes that its execution "while savage in its cruelty to the subject, was demoralizing to those who inflicted and who witnessed it."[474]

Judged by contemporary British standards, the Continental Articles that limited corporal punishment to 100 lashes were indeed humane.[475] A proposal to raise this limitation to 500 lashes was rejected by Congress in 1781,[476] and the maximum figure of 100 was continued in 1786.[477] One-hundred lashes was the Navy maximum

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[467] Art. War 69 of 1916, ch. 418, 39 Stat. 661.

[468] Art. War 69 of 1920, ch. 227, 41 Stat. 802, provided:

[A]ny person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest as circumstances may require; but when charged with a minor offense only such person shall not ordinarily be placed in confinement.

The corresponding provision of Art. War 69 of 1916, 39 Stat. 661, was:

An officer charged with crime or with a serious offense under these articles shall be placed in arrest by the commanding officer, and in exceptional cases an officer so charged may be placed in confinement by the same authority. A soldier charged with crime or with a serious offense under these articles shall be placed in confinement, and when charged with a minor offense he may be placed in arrest.

[469] Henderson, *supra* note 309, at 316.

[470] 4 BLACKSTONE, COMMENTARIES *98.

[471] 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 41–79 (1948).

[472] 6 HOLDSWORTH, HISTORY OF ENGLISH LAW 417 (2d ed. 1937).

[473] 30 Geo. 3, ch. 48.

[474] WINTHROP *669–70. See also DEWATTEVILLE, THE BRITISH SOLDIER 109–22 (1955).

[475] Arts. of 1776, § 18, art. 3, printed in WINTHROP *1502.

[476] 20 JOUR. CONT. CONG. 657–58 (1781).

[477] Amends. of 1786, art. 24, printed in WINTHROP *1507.

by article XLI of 1800.[478] Soon, as has been seen, the Army limit was reduced to fifty.[479]

In the Army, desertion was at first a capital offense at all times;[480] not until 1830 was it made noncapital in time of peace;[481] and soldiers were regularly executed for deserting while the Army was commanded by St. Clair[482] and Wayne.[483] Wilkinson sometimes commuted death sentences with a dramatic last-minute reprieve;[484] but he recognized that a code which had no intermediate punishment between death and 100 lashes and which did not provide for confinement was badly deficient.[485] Thus, sentences were passed and approved that increased the pain inflicted by the permitted 100 lashes.

One innovation was to provide that the punishment be apportioned in equal installments on four successive days;[486] another, that there be

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[478] 2 Stat. 51.

[479] See p. 188 *supra*.

[480] See Arts. of 1776, § 6, art. 1, printed in WINTHROP * 1492; Art. War 20 of 1806, 2 Stat. 362.

[481] Act of May 29, 1830, ch. 183, 4 Stat. 418.

[482] Two soldiers taken in the act of deserting to the enemy were hanged on Oct. 23, 1791. 2 W. H. SMITH, THE ST. CLAIR PAPERS 249, 255 (1882).

[483] See Wayne Orderly Book *passim*; Letter From Gen. Wayne to Secretary of War Knox, Sept. 7, 1792, in 1 Campaign Into the Wilderness: The Wayne-Knox-Pickering-McHenry Correspondence 81 (Knopf ed. 1955):

> I now enclose extracts from General Orders, approving the sentences of a General Court Martial held at this place, by which four Soldiers were condemned to Death, & one to be shaved, branded & whipt.—John Elias . . . has been pardoned, the other three were shot to death on Sunday last—these exemplary punishments, I trust, will have the desired effect. No desertions have taken place from this post, for two weeks past.

Knox replied, "The sentences of the Courts Martial you have confirmed, seemed absolutely necessary—Hereafter it is to be hoped that there may be less call for the punishment of death." 1 *id.* at 88, 90.

[484] See G.O., H.Q. D'Etroit, June 29, 1797, Wilkinson Order Book 38; G.O., H.Q. D'Etroit, July 4, 1797, *id.* at 41; JACOBS, THE BEGINNING OF THE U. S. ARMY, 1783–1812, at 201–02 (1947).

[485] See Letter From Gen. Wilkinson to Secretary of War Knox, April 14, 1792, in 1 WILKINSON, MEMOIRS 1st app. 60 (1810):

> The heaviest penalties of the law short of death, to which the soldier is now subject, are one hundred lashes, and a month's fatigue; the disproportion, between this degree of corporal punishment, and a violent death, appears to me to border on extremes, and I am induced to believe the chasm may be occupied by some wholesome regulation, tending to cherish the claims of humanity, to foster the public interests, and to enforce due discipline. The terrors of a sudden death are generally buried with the victim and forgotten; whilst public, durable, hard labor, by a very natural concatenation of causes and effects, operates all the consequences of incessant admonition.
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> Subordinate commanders also felt the deficiency. See Letter From Col. Hamtramck to Gen. Wayne, Dec. 5, 1794, in 34 MICHIGAN PIONEER AND HISTORICAL COLLECTIONS 734 (1905), on soldiers convicted of larceny: "I have flogged them till I am tired. The economic allowance of one hundred lashes, allowed by government, does not appear a sufficient inducement for a rascal to act the part of an honest man."
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> After § 17 of the Act of May 30, 1796, ch. 39, 1 Stat. 485, provided that deserters must make good their terms of enlistment, sentences to confinement, often to be served in irons, appear in the Wilkinson Order Book in various forms.

[486] See Wayne Orderly Book *passim*.

intervals of one minute or half a minute between each stroke;[487] still another, that the lashes be applied with a wired cat;[488] sometimes the sentences combined all of these.[489] Wilkinson was far from being a loyal subordinate,[490] and when he later assumed command in his own right he made many changes simply for the sake of change.[491] At first he disapproved sentences that adjudged aggravated modes of flogging as being unnecessarily severe,[492] but in the end he approved them in all their refinements and combinations of cruelty.[493] Both Wayne and Wilkinson approved the branding of deserters with the letter *D*,[494] and they both approved sentences for the shaving of heads and eyebrows[495] and sentences to run the gauntlet.[496] One sentence on a deserter approved by General Wayne was "to have his head and eyebrows shaved, to be branded in the forehead with the letter D; to receive one hundred lashes, & to act as executioner to any Criminals as may be punished with Death";[497] Wilkinson approved one which provided, "head to be shaved, tared, and feathered, and drummed out of the Garrison with a halter round his neck."[498] On occasion Wilkinson appears to have been more tender-hearted than his pre-

[487] See, *e.g.*, G.O., H.Q. Hobson's Choice, June 12, 1793, Wayne Orderly Book 436 (provision for interval between each stroke added by Gen. Wayne); G.O., H.Q. Hobson's Choice, June 21, 1793, *id.* at 440–41.

[488] G.O., H.Q. Hobson's Choice, Aug. 5, 1793, *id.* at 461.

[489] *Ibid.* See also note 493 *infra*.

[490] See JACOBS, TARNISHED WARRIOR: MAJOR-GENERAL JAMES WILKINSON 130–57 (1938); JACOBS, THE BEGINNING OF THE U. S. ARMY, 1783–1812, at 162–63, 182, 190–92 (1947); WILDES, ANTHONY WAYNE 426–30, 431–35 (1941). See *id.* at 361 for a map showing the location of all the headquarters mentioned in Wayne's Orderly Book.

[491] JACOBS, THE BEGINNING OF THE U.S. ARMY, 1783–1812, at 182, 198 (1947).

[492] For example, there was a sentence of flogging with wire cats with an intermission of half a minute between each lash "which he disapproves and remits as unnecessarily severe & directs that it be performed in the customary mode." G.O., H.Q. Washington, Oct. 22, 1800, Wilkinson Order Book 256. See also G.O., H.Q. Fort Fayette, Feb. 28, 1801, *id.* at 290–91; G.O., H.Q. Fort Adams, Jan. 19, 1802, *id.* at 376.

[493] See, *e.g.*, G.O., H.Q. Fort Wilkinson, May 17, 1802, *id.* at 385, 388–89 (two cases of flogging with intermission between each lash); G.O., H.Q. Natchitoches, Oct. 21, 1806, *id.* at 629 (wire cats); G.O., H.Q. New Orleans, Dec. 26, 1806, *id.* at 662–68 (approving 16 sentences that involved flogging with wired cats, 13 of which provided for infliction on two or more separate occasions, and 7 of which further provided for an intermission between each lash).

[494] G.O., H.Q. Pittsburgh, Sept. 1, 1792, Wayne Orderly Book 370; G.O., H.Q. Hobson's Choice, Sept. 18, 1793, *id.* at 484; G.O., H.Q. New Orleans, Jan. 4, 1807, Wilkinson Order Book 670–71.

[495] *E.g.*, G.O., H.Q. D'Etroit, July 28, 1797, Wilkinson Order Book 64, 66; G.O., H.Q. Fort Wilkinson, May 17, 1802, *id.* at 385–87 (three sentences to have head and eyebrows shaved and to be drummed out of camp with a halter round the neck).

[496] *E.g.*, G.O., H.Q. Pittsburgh, Nov. 11, 1792, Wayne Orderly Book 401, 403; G.O., H.Q. D'Etroit, July 17, 1797, Wilkinson Order Book 53.

In THACHER, MILITARY JOURNAL DURING THE AMERICAN REVOLUTIONARY WAR (2d ed. 1827), there are references to the punishment of running the gauntlet in 1780; a considerable discussion of the mechanics of flogging during the same period; and an instance of an execution performed after the rope broke on the first attempt. *Id.* at 182–83, 192.

[497] G.O., H.Q. Pittsburgh, Sept. 1, 1792, Wayne Orderly Book 370.

[498] G.O., H.Q. Fort Fayette, May 3, 1801, Wilkinson Order Book 322, 323.

decessor,[499] but certainly there is no trace of recognition in such punitive ameliorations as are from time to time recorded in his Order Book that the Constitution imposed any limitation.

It is true that when Wayne proposed in August 1792 "a Brand with the Word Coward, to stamp upon the forehead of one or two of the greatest Caitiffs,"[500] Secretary Knox felt concern: "Branding however is a punishment upon which some doubts may be entertained as to its legality. Uncommon Punishments not sanctioned by Law should be admitted with caution although less severe than those authorized by the articles of War."[501] Neither party to the correspondence so much as mentioned the Constitution.

The time was not a tender one. The militia law of two states authorized the punishment of riding a wooden horse,[502] and that of another provided for causing the delinquent militiaman "to be bound neck and heels for any time not exceeding five minutes."[503] Violation of a number of federal civil offenses entailed flogging[504] and sitting in the pillory;[505] these punishments were not abolished until 1839.[506] Flogging in the Navy and on board merchant vessels was legal until 1850.[507] Flogging was forbidden in the Army after 1812;[508] in 1833 it was revived as a punishment for desertion;[509] and it was not finally prohibited until 1861,[510] nor branding until 1872.[511]

It is probably accurate to conclude that these later ameliorations reflected a changing community sentiment rather than any interpretation of the eighth amendment, though it must be conceded that this conclusion rests essentially upon silence.

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[499] See G.O., H.Q. St. Louis, Sept. 9, 1805, *id.* at 560: "It has been represented to the General that William Sanders was unable to bear the whole of the corporal punishment ordered to be inflicted on him on the 6th Instant [100 lashes], and did actually faint under the opperation; the General therefore thinks proper to remit the Risidue of the punishment, and directs, that Sanders be released from Confinement, and join the Company to which he belongs." See also G.O., H.Q. Chickasaw Bluffs, Aug. 28, 1798, *id.* at 140–41, involving a sentence to receive 100 lashes at four different times in equal proportions, in which Wilkinson "so far remits the Punishment . . . as to order the infliction of the whole this Evening at Retreat. . . ."

[500] Letter From Gen. Wayne to Secretary of War Knox, Aug. 10, 1792, in 1 Campaign Into the Wilderness, *op. cit. supra* note 483, at 51, 52.

[501] Letter From Secretary Knox to Gen. Wayne, Sept. 14, 1792, in 1 *id.* at 88, 90.

[502] 1 CONN. STAT. tit. CXII, § 18, at 508 (1808); 6 LAWS OF N.H. 1792–1801, at 86–87 (1917).

[503] Va. Acts 1792, ch. IV, § XXIV, at 10.

[504] Act of April 30, 1790, ch. 9, §§ 15–16, 1 Stat. 115; Act of March 2, 1799, ch. 43, §§ 14–15, 1 Stat. 736.

[505] *E.g.*, Act of April 30, 1790, ch. 9, § 18, 1 Stat. 116.

[506] Act of Feb. 28, 1839, ch. 36, § 5, 5 Stat. 322.

[507] Act of Sept. 28, 1850, ch. 80, 9 Stat. 515.

[508] Act of May 16, 1812, ch. 86, § 7, 2 Stat. 735.

[509] Act of March 2, 1833, ch. 68, § 7, 4 Stat. 647.

[510] Act of Aug. 5, 1861, ch. 54, § 3, 12 Stat. 317.

[511] Act of June 6, 1872, ch. 316, § 2, 17 Stat. 261.

F. CONCLUSION AS TO APPLICABILITY OF CONSTITUTIONAL GUARANTEES TO MILITARY PERSONS

Mr. Henderson admits that five of the first ten amendments are irrelevant for present purposes; that the guarantee of jury trial is unquestionably inapplicable to military persons despite the broad terms of the text; and that the provisions respecting bail and general warrants are inappropriate to the military situation. The survey of actual practice made herein has shown that at least five other guarantees in the Bill of Rights were either denied the serviceman entirely at the outset or else very substantially curtailed: the right to petition for redress against grievances, and protection against searches and seizures, denied in practice; freedom of speech and the right to confrontation, denied by statute; and, pre-eminently, the right to the assistance of counsel, denied inferentially by statute and absolutely in practice. The evidence as to the remaining guarantees is equivocal, though it is clear both from the early legislation and from early service practice that, to the extent that their substance was extended to the land and naval forces, such extension was not thought to rest on constitutional compulsion. Indeed, the most striking feature of the survey just completed is that for over half a century after the adoption of the Bill of Rights, its provisions were never invoked in a military situation save in a single instance, the trial of General Hull, and that the denial of its applicability to the military on that occasion was approved by no less an authority than the father of the Bill of Rights himself.[512]

It would no doubt be possible to classify some of the denied guarantees differently than Mr. Henderson has done: Freedom of speech and freedom from unreasonable searches and seizures could be deemed inappropriate to the military community; and the same treatment could be accorded the right to confrontation, on the view that military requirements and exigencies of the service must be given precedence over the extensive traveling that the personal presence of every witness would require. But even these modifications of Mr. Henderson's classification do not explain the consistent denial of the right to counsel, a right which is not in any sense inherently inappropriate at a military trial. Indeed, at the close of the present survey one is impelled to the conclusion that the real reason why the military accused was denied counsel in the sense that counsel functioned in the civil courts is to be found solely in one factor, namely, the Founders' understanding that the Bill of Rights had no application to the land and naval forces.

Let us test this counter-hypothesis. On this wholly different view,

[512] See pp. 196–97 *supra*. It is impossible to take very seriously Gen. Wilkinson's invocation of the guarantee of a speedy trial in 1815. See p. 225 *supra*.

no amendment need be dismissed as irrelevant; no amendment and no clause of any amendment need be put to one side as inappropriate in a military setting; there is no need to resort to textual gymnastics with respect to the guarantee of jury trial; and the authoritatively approved practice under which the accused was denied the effective assistance of counsel is perfectly understandable. There is no difficulty with respect to such of the guarantees as were extended in substance, since Congress of course may grant much that it is not required to grant. Some of the guarantees that received recognition were no more than generally accepted common-law principles, and the Constitution was never contemporaneously invoked in connection with them. This leaves as the only stumbling block the exception in the fifth amendment, permitting military prosecutions without grand-jury indictment, which, if the counter-hypothesis is sound, would be unnecessary.

Opinions may differ on whether this last factor should be considered a substantial obstacle. It rests on implication, and constitutes only negative evidence, whereas the obstructions that impede the other view rest on the most persuasive kind of positive evidence.

Finally, there is weighty additional evidence to support the counter-hypothesis that has just been advanced.

First, the man in the ranks was not a numerically significant segment of the community at the time in question—as we have seen, the number of persons subject to military law in 1789–1791 was exceedingly limited,[513]—and, highly significant in the present connection, he was but little regarded.

In contemporary England, "soldiers, as a class, were despised";[514] and, to judge from the compensation they could earn in this country, they were hardly more highly considered in the United States. In 1785, Congress paid an Army private 4 dollars a month;[515] in 1790, the pay was 3 dollars a month, from which 1 dollar for clothing and hospital stores was deducted.[516] Two years later, the deduction ceased, leaving a full 3 dollars a month.[517] In 1795 that sum became nearly 7 dollars,[518] but in the Army reorganization act in 1802 it was reduced to 5 dollars per month.[519] Sailors and marines were somewhat more generously paid. Their compensation was left to be fixed

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[513] See pp. 177–78 *supra*.

[514] MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 453 (1908).

[515] 28 JOUR. CONT. CONG. 247–48 (1785).

[516] Act of April 30, 1790, ch. 10, § 5, 1 Stat. 120.

[517] Act of March 5, 1792, ch. 9, § 7, 1 Stat. 242.

[518] Act of Jan. 2, 1795, ch. 9, § 1, 1 Stat. 408.

[519] Act of March 16, 1802, ch. 9, § 4, 2 Stat. 133.

by the President,[520] who allowed able seamen 11 dollars a month, and ordinary seamen and marine privates 9 dollars.[521]

Even in the 1790's, those figures were not calculated to attract the flower of the country's manhood into the ranks of its defenders, and in fact the Army was recruited from the very dregs of the population.[522] The remarkable circumstance is, not that it was defeated under Harmar and St. Clair, but that Wayne was able to lead the Legion to the victory at Fallen Timbers, which opened Ohio and the Old North West to permanent settlement.[523]

The low pay (which, often as not, remained unpaid in fact[524]), the arduous conditions of service, the frequent brutal punishments—all these reflected a low valuation of military activity that is the more striking since the Army at the time was not in garrison, growing fat at public expense, but was actively engaged in campaigning to protect the population against constant and sanguinary Indian depredations.

Second, the soldier was one who subjected himself to a discipline that was inconsistent with the freedom of a citizen. Blackstone spoke of a "state of servitude in the midst of a nation of freemen"[525] and referred to the soldier's position as "the only state of servitude in the nation."[526] In the United States there was at least one other state of servitude—one that did not appear seriously to trouble the libertarians of the day. We know that nothing in the Bill of Rights was deemed inconsistent with human slavery. Slaves were simply not within those protections and guarantees, any more than they were within the ringing sentiments about equality contained in the Declaration of Independence. To the extent that Blackstone's idea of military life as a form of servitude carried over across the ocean, it was at least not a unique state.

Third, and perhaps most significantly of all, the Founders had successfully carried on a long and bitter war, through a longer period of hostilities than that of any conflict which has engaged the Republic in the years since then. They cannot have been unaware of "the verdict of long experience, that an army cannot be kept together if its discipline is left to the ordinary common law."[527] And so they never thought of extending to soldiers the guarantees of common-law crimi-

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[520] See Act of July 11, 1798, ch. 72, § 2, 1 Stat. 595.

[521] 1 AMERICAN STATE PAPERS MILITARY AFFAIRS 28, 29 (Lowrie & Clarke eds. 1832).

[522] See JACOBS, THE BEGINNING OF THE U.S. ARMY, 1783–1812, at 78–79, *passim* (1947).

[523] *Id.* at 153–82.

[524] *Id.* at 77–78.

[525] 1 BLACKSTONE, COMMENTARIES *416.

[526] *Id.* at *417.

[527] MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 279 (1908). See also *id.* at 325: "It becomes always clearer that there must be a standing army and that a standing army could only be kept together by more stringent rules and more summary procedure than those of the ordinary law and the ordinary courts."

nal procedure that they wrote into the Bill of Rights for the protection of civilians. If the result was, as Blackstone observed of the annual English Mutiny Acts, that "soldiers . . . are thus put in a worse condition than any other subjects,"[528] it was at least a reasonable classification, and one well calculated to insure the public safety.

Therefore when, in 1866, Chief Justice Chase declared that "the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment,"[529] he was giving expression to a traditional view that rested on the original practice and that reflected the original understanding. Consequently the view set forth by Winthrop,[530] that the Bill of Rights applies only to trials in the civil courts and not to those in military tribunals—which are erected under a wholly independent power[531]—and that expounded by the Court of Military Appeals, which has stated that the serviceman's rights are statutory rather than constitutional,[532] must be regarded as correctly setting forth the Founders' real sentiments.

V. THE FUTURE OF CONSTITUTIONAL RIGHTS IN MILITARY LAW

But it does not follow from the foregoing demonstration that the framers of the Bill of Rights in 1789–1791 never intended its guarantees to apply to persons in the land and naval forces, that members of those forces must be held to have no constitutional rights today, or that they must be held to be unable to protect their rights in the same manner and by the same proceedings that are now available to civilians.

In part, of course, the inquiry is academic; over the years, Congress has gradually extended the serviceman's protection by statute, and today the Court of Military Appeals is giving to the statutory provisions a content which, in most instances, is indistinguishable from that of the constitutional norms regularly formulated and applied in the federal courts. Today the person in uniform enjoys the effective assistance of counsel,[533] he is accorded the full privilege against self-

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[528] 1 BLACKSTONE, COMMENTARIES *417.

[529] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 138 (1866).

[530] WINTHROP *54, *241, *430, *605.

[531] Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858); Crowell v. Benson, 285 U.S. 22, 90 n.26(b) (1932) (Brandeis, J., dissenting).

[532] United States v. Clay, 1 U.S.C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951).

[533] See UCMJ arts. 27, 70, 10 U.S.C. §§ 827, 870 (Supp. V, 1958). There have been numerous reversals of convictions for violation of the accused's right to counsel. *E.g.*, United States v. Brady, 8 U.S.C.M.A. 456, 24 C.M.R. 266 (1957) (inadequate representation at taking of depositions); United States v. Nichols, 8 U.S.C.M.A. 119, 23 C.M.R. 343 (1957) (exclusion of counsel at preliminary investigation); United States v. Tomaszewski, 8 U.S.C.M.A. 266, 24

incrimination,[534] he has the right of compulsory process for witnesses,[535] his right to freedom from unreasonable searches and seizures is receiving recognition,[536] his protection against double jeopardy is greater than that accorded civilians in many states,[537] due process in the sense of essential fairness is a concept fully enforced in court-martial proceedings,[538] and servicemen are granted considerable freedom of speech within the limitations necessary in a military society.[539]

The only substantive rights available to civilians but still unavailable to those in uniform are indictment by grand jury and trial by

C.M.R. 76 (1957) (exclusion of counsel at formal pretrial investigation) (compare the older rule, Romero v. Squier, 133 F 2d 528 (9th Cir.), *cert. denied*, 318 U.S. 785 (1943)); United States v. Lovett, 7 U.S.C.M.A. 704, 23 C.M.R. 168 (1957); United States v. Eskridge, 8 U.S.C.M.A. 261, 24 C.M.R. 71 (1957) (conflict of interest on part of appointed counsel).

[534] UCMJ art. 31, 10 U.S.C. § 831 (Supp. V, 1958); see, *e.g.*, United States v. Jordan, 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957) (privilege violated by order to submit urine specimen); United States v. Rosato, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953) (violated by order to submit handwriting samples). *Contra*, United States v. Barnaby, 5 U.S.C.M.A. 63, 17 C.M.R. 63 (1954); *cf.* United States v. Williamson, 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954).

[535] UCMJ art. 46, 10 U.S.C. § 846 (Supp. V, 1958); see United States v. Thornton, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (1957) (reversal for refusal to issue subpoenas for witnesses).

[536] See U.S. DEPT OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES ¶ 152 (1951); United States v. Ball, 8 U.S.C.M.A. 25, 29, 23 C.M.R. 249, 253 (1957) (dictum) (principle recognized although search upheld as reasonable under the circumstances). *But see* United States v. De Leo, 5 U.S.C.M.A. 148, 17 C.M.R. 148 (1954); *cf.* United States v. Noce, 5 U.S.C.M.A. 715, 19 C.M.R. 11 (1955) (§ 605 of Communications Act held inapplicable to military telephone system).

[537] See UCMJ art. 63(b), 10 U.S.C. § 863(b) (Supp. V, 1958), which provides that, on rehearing, *i.e.*, a new trial,

> the accused may not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence may be imposed, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory.

A similar limitation has existed in the law since 1920. Act of June 4, 1920, ch. 227, § 1, art. 50½, 41 Stat. 797. Only quite recently was the foregoing rule applied in the federal courts. See Green v. United States, 355 U.S. 184 (1957) (limiting Trono v. United States, 199 U.S. 521 (1905)). The states are still free to impose a heavier sentence on a new trial, see Palko v. Connecticut, 302 U.S. 319 (1937), and, in fact, nineteen states permit the action struck down in *Green*, imposition of a sentence for a greater offense upon retrial. Green v. United States, *supra*, at 216–18 n.4 (Frankfurter, J., dissenting).

See also UCMJ art. 44, 10 U.S.C. § 844 (Supp. V, 1958) (general prohibition against double jeopardy); United States v. Schilling, 7 U.S.C.M.A. 482, 22 C.M.R. 272 (1957); United States v. Padilla, 1 U.S.C.M.A. 603, 5 C.M.R. 31 (1952); United States v. Zimmerman, 2 U.S.C.M.A. 12, 6 C.M.R. 12 (1952).

[538] Examples of recent reversals because of unfairness include United States v. Ballard, 8 U.S.C.M.A. 561, 25 C.M.R. 65 (1958) (law officer protecting prosecution witnesses); United States v. Richard, 7 U.S.C.M.A. 46, 21 C.M.R. 172 (1956) (disclosures by member of court on *voir dire* prejudicial to accused); United States v. Webb, 8 U.S.C.M.A. 70, 23 C.M.R. 294 (1957) (member of court consulting textbook not in evidence); United States v. Williams, 8 U.S.C.M.A. 328, 24 C.M.R. 138 (1957) (conviction reversed and charges dismissed because of "plethora of errors"). See also cases cited note 596 *infra*.

[539] See United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

petty jury[540] (the former being a guarantee of doubtful value[541]); the right to confrontation;[542] and the right to bail.[543]

The only procedural right generally denied the serviceman is the right to collateral review of convictions based on the theory that tribunals having jurisdiction at the outset will lose such jurisdiction if they deprive the accused of constitutional rights in the course of the trial. This theory, first enunciated twenty years ago in *Johnson v. Zerbst*,[544] and since legislatively ratified, at least in part,[545] was applied in military trials by the Court of Claims in *Shapiro v. United States*.[546] The Government did not carry the case any higher;[547] *Shapiro* on its facts[548] was hardly an appealing vehicle for urging the traditional and much narrower scope of review,[549] least of all in the post-war anti-military climate prevailing in 1947.[550] The 1948 Articles of War contained a provision which on its face looked toward the other view,[551] and although the Attorney General blithely ignored

[540] See United States v. Burney, 6 U.S.C.M.A. 776, 796, 804, 21 C.M.R. 98, 118, 126 (1956).

[541] See Costello v. United States, 350 U.S. 359 (1956).

[542] United States v. Sutton, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953).

[543] The absence of the guarantee of bail was, surprisingly enough, overlooked in the *Burney* case; nonetheless, there is still no bail at military law. Compare opinion cited note 461 *supra*.

[544] 304 U.S. 458 (1938).

[545] See 28 U.S.C. § 2255 (1952) ("such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack. . . .").

[546] 107 Ct. Cl. 650, 69 F. Supp. 205 (1947).

[547] The Government stipulated judgment once its demurrer was overruled. 108 Ct. Cl. 754 (1947).

[548] Shapiro, a lieutenant in the Army, was detailed to defend a soldier of Mexican ancestry charged with assault with intent to rape. At the trial he substituted another soldier for the accused in order to demonstrate the mistake in identification. The substitute defendant was identified as the attacker and was convicted. Lt. Shapiro then informed the court of the deception he had practiced. Later, the real accused was tried and convicted. A few days thereafter, Lt. Shapiro was charged with conduct to the prejudice of good order and military discipline. The charges were served at 12:40 P.M., he was tried at 2 P.M. of the same day some 40 miles away, a continuance was denied, and he was sentenced to dismissal by 5:30 P.M. This sentence was duly confirmed. The court held that he was denied the effective assistance of counsel.

[549] Courts martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its power in the sentence pronounced. Carter v. Roberts, 177 U.S. 496, 498 (1900).

[550] See, *e.g.*, Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946) (*Contra*, Hiatt v. Brown, 339 U.S. 103 (1950)); Anthony v. Hunter, 71 F. Supp. 823 (D. Kan. 1947) (*Contra*, Humphrey v. Smith, 336 U.S. 695 (1949)). For the erosion in the lower federal courts of the traditional view as to scope of review which occurred during and immediately after World War II, see Pasley, *The Federal Courts Look at the Court-Martial*, 12 U. PITT. L. REV. 7 (1950).

[551] Art. War 50(h) of 1948, ch. 625, 62 Stat. 635, provided that, once military appellate review is completed, court-martial proceedings "shall be binding upon all departments, courts, agencies, and officers of the United States. . . ."

that provision,[552] the Supreme Court later did not; *Burns v. Wilson*[553] left little scope for collateral review in military cases.

But there was no opinion of the Court in *Burns v. Wilson*,[554] a circumstance that under settled rules deprives that decision of any value as a precedent[555]—although some lower courts appear to have overlooked this fairly obvious qualification.[556] Consequently, the question whether *Johnson v. Zerbst* collateral review is available in military cases, and the underlying and perhaps more fundamental question whether a serviceman has any constitutional rights, deprivation of which will cause the court-martial to lose jurisdiction in the course of the trial, are both still open. Significantly (if surprisingly), the Court in *Burns v. Wilson* did not consider the applicability of *Johnson v. Zerbst* to military trials; the question was not much discussed by counsel;[557] and when it was raised by Mr. Justice Frankfurter in his opinion on the petition for rehearing,[558] the Court was not interested.

Since there is no binding precedent, the question remains at large; and the circumstance that the Bill of Rights was in 1789–1791 not deemed to apply to servicemen does not, it is submitted, preclude a partial application now.

In many situations, of course, the original meaning of the Constitution is decisive:[559] "[W]e turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and in search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes."[560] Thus the boundaries of jury trial in criminal cases today are what they were

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[552] See 41 OPS. ATT'Y GEN. NO. 8 (Dec. 29, 1949), holding Art. War 50(h) did not preclude the reopening of a record of conviction by court-martial by a Board for the Correction of Records under § 207 of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 857 (now 10 U.S.C. §§ 1551–52 (Supp. V, 1958)).

[553] 346 U.S. 137 (1953).

[554] "Mr. Chief Justice Vinson announced the judgment of the Court in an opinion in which Mr. Justice Reed, Mr. Justice Burton and Mr. Justice Clark join." 346 U.S. at 138.

[555] Hertz v. Woodman, 218 U.S. 205, 212–14 (1910). "[T]he lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases." United States v. Pink, 315 U.S. 203, 216 (1942).

[556] *E.g.*, Day v. Wilson, 247 F.2d 60, 63 (D.C. Cir. 1957); Day v. Davis, 235 F.2d 379, 384 (10th Cir.), *cert. denied*, 352 U.S. 881 (1956); Bisson v. Howard, 224 F.2d 586 (5th Cir. 1955); Krivoski v. United States, 136 Ct. Cl. 451, 145 F. Supp. 239, *cert. denied*, 352 U.S. 954 (1956).

[557] The petition for certiorari in the case cited *Johnson v. Zerbst* at pp. 7, 8, and 18 for the proposition that decisions as to the scope of collateral review of convictions by court-martial were confused and needed to be clarified. Petitioners filed no brief on the merits; the Government did not cite *Johnson v. Zerbst* either in opposition or on the merits; and the petition for rehearing did not cite it further.

[558] 346 U.S. 846 (1953).

[559] See, *e.g.*, Carroll v. United States, 267 U.S. 132, 149 (1925); Mattox v. United States, 156 U.S. 237, 243 (1895).

[560] United States v. Classic, 313 U.S. 299, 317–18 (1941).

in 1789,[561] and so are those of jury trial in civil causes,[562] even though the 1789 practice is often difficult to determine.[563]

In other settings, we have gone far beyond the concepts of the Framers. To them, the right to the assistance of counsel meant the right to have counsel open his mouth in court and defend;[564] to us it now means supplying counsel in all federal felony cases,[565] and in all capital cases[566] and a good many noncapital cases[567] in the state courts. The states have been told that they may expect no definite line to be drawn in advance as to when and in what cases they must supply counsel.[568]

Just what the due-process clause of the fourteenth amendment was intended to mean at the outset is, to speak mildly, matter for extended debate. What is probably the most scholarly recent study appears to establish that this clause was not intended to incorporate the first eight amendments in their entirety,[569] and up to now the Supreme Court has adhered to this view;[570] but, in one form and another, large segments of the Bill of Rights have in fact been made into limitations on state action through the use of the due-process clause.[571] The trend is a relatively recent one; one has only to compare *Prudential Ins. Co. v. Cheek*[572] with *Terminiello v. Chicago*[573] to see how much ground has been covered in a generation. And one acute commentator has pointed out that today's interpretation of the sixth amendment reflects essentially an application of the fifth.[574]

The expansion of the Bill of Rights now suggested, to make essential parts of it applicable to men in the land and naval forces, will not

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[561] See, *e.g.*, *Ex parte* Quirin, 317 U.S. 1, 38–41 (1942); District of Columbia v. Clawans, 300 U.S. 617 (1937); *In re* Debs, 158 U.S. 564, 594–96 (1895); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

[562] *E.g.*, Baltimore & C. Line v. Redman, 295 U.S. 654 (1935); Capital Traction Co. v. Hof, 174 U.S. 1 (1899); Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830).

[563] *Cf.* Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913).

[564] See p. 174 *supra*.

[565] See, *e.g.*, Von Moltke v. Gillies, 332 U.S. 708 (1948); Walker v. Johnston, 312 U.S. 275 (1941); Johnson v. Zerbst, 304 U.S. 458 (1938).

[566] See Williams v. Kaiser, 323 U.S. 471 (1945); Powell v. Alabama, 287 U.S. 45 (1932).

[567] See, *e.g.*, Herman v. Claudy, 350 U.S. 116 (1956); Gibbs v. Burke, 337 U.S. 773 (1949); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Betts v. Brady, 316 U.S. 455 (1942).

[568] "Respondent argues that to hold to such precedents leaves the state prosecuting authorities uncertain as to whether to offer counsel to all accused who are without adequate funds and under serious charges in state courts. We cannot offer a panacea for the difficulty." Gibbs v. Burke, 337 U.S. 773, 780 (1949).

[569] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

[570] See, *e.g.*, Wolf v. Colorado, 338 U.S. 25 (1949); Adamson v. California, 332 U.S. 46 (1947).

[571] See Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

[572] 259 U.S. 530, 543 (1922).

[573] 337 U.S. 1 (1949).

[574] FREUND, ON UNDERSTANDING THE SUPREME COURT 34–35 (1949).

involve nearly as great an advance in constitutional interpretation as did *Brown v. Board of Educ.*[575] over the common understanding implicit in *Gong Lum v. Rice*,[576] nor will it encounter the community opposition which arises when a new doctrine runs ahead of and in opposition to community mores. Congress has, in fact, applied most of the Bill of Rights guarantees in the Uniform Code of Military Justice.[577] Indeed, in some aspects, the military accused has been and still is better off than a civilian defendant.

Thus, from 1776 on, the accused before a general court-martial has been entitled without cost to a copy of his record of trial;[578] the defendant in a federal court had no such right until 1944,[579] after *Miller v. United States*;[580] and where the defendant in a state court stands was not fully clarified in *Griffin v. Illinois*,[581] decided in 1956. The military accused was given appointed counsel in 1920;[582] the indigent federal defendant in noncapital cases had to wait until 1938 for this benefit, after *Johnson v. Zerbst*;[583] and, as has been pointed out, not every state defendant can claim appointed counsel as of right.[584] Then too, the Army since 1920,[585] and all the services since 1951,[586] have provided automatic appellate review at public expense, while in the federal civil courts, as current advance sheets show, we are still bogged down with certificates of good faith,[587] and with questions of how far appointed counsel are required to exert themselves on behalf of their court-provided client.[588]

Moreover, the services themselves have espoused the view that soldiers and sailors have constitutional rights. In 1920, the Judge Advocate General of the Navy declared that "all the amendments are applicable to persons in the land and naval forces in letter as well as in spirit, except the sixth amendment, and so much of the fifth amendment as relates to presentment or indictment by a grand jury." He

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[575] 347 U.S. 483 (1954).

[576] 275 U.S. 78 (1927).

[577] See pp. 236–38 *supra*; Solf, *A Comparison of Safeguards in Civilian and Military Tribunals*, 24 THE JUDGE ADVOCATE J. 5 (1957).

[578] Arts. of 1776, § 18, art. 3, printed in WINTHROP* 1502 (now UCMJ art. 54(c), 10 U.S.C. § 854(c) (Supp. V, 1958)).

[579] Act of Jan. 20, 1944, 28 U.S.C. § 753(f) (1952) (authorizing Government to pay transcript costs of proceedings in forma pauperis).

[580] 317 U.S. 192 (1943).

[581] 351 U.S. 12 (1956); see Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214 (1958).

[582] Act of June 4, 1920, ch. 227, § 11, art. 11, 41 Stat. 789.

[583] 304 U.S. 458 (1938).

[584] See p. 240 *supra*.

[585] Act of June 4, 1920, ch. 227, § 1, art. 50½, 41 Stat. 797.

[586] UCMJ arts. 65–70, 10 U.S.C. §§ 865–70 (Supp. V, 1958).

[587] *E.g.*, Johnson v. United States, 352 U.S. 565 (1957).

[588] *E.g.*, Ellis v. United States, 356 U.S. 674 (1958), *vacating and remanding* 249 F.2d 478 (D.C. Cir. 1957).

accordingly held applicable the sixth amendment's guarantee of a public trial, but sustained the proceedings because the court-martial sat behind closed doors at the express request of counsel for the accused.[589] In *Wade v. Hunter*,[590] both the Board of Review and the Assistant Judge Advocate General for the European Theater held, in 1945, that the double-jeopardy clause of the fifth amendment applied to trials by court-martial.[591] And a few years later, another Judge Advocate General of the Navy repeated and approved the views of his predecessor, even to the extent of suggesting that the contrary view had its origin in Chief Justice Chase's *Milligan* opinion.[592]

Finally—and this is perhaps most important—the position, number, composition, and recruitment of the armed services is so different by comparision with 1789–1791 that an approach which was adequate and commonplace then is wholly unsatisfactory and inappropriate today. Soldiers then were a few professionals; in today's wars whole nations are in arms. Then a commander could disapprove proceedings in which a lawyer appeared because the tribunal was "a Court of Honor."[593] Today the court-martial has developed into a court of general criminal jurisdiction, trying capital felonies everywhere, and fighting "a losing rear-guard action"[594] in the face of the recent restrictions on its jurisdiction over accompanying civilians.[595] The present paper has demonstrated that the Founders did not intend the Bill of Rights to apply to the minuscule Army and nonexistent Navy of 1789–1791, but it does not follow that they would have been led to a similar conclusion had they been dealing with the greatly enlarged armed forces and greatly widened military jurisdiction that are with us today.

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[589] Court-Martial Order 48 of 1920, at 10, 13, in 1 NAVY DEPARTMENT, COMPILATION OF COURT-MARTIAL ORDERS FOR THE YEARS 1916–1937, at 595, 597 (1940).

[590] 336 U.S. 684 (1949).

[591] "The Fifth Amendment itself, however, is a limitation of courts-martial, as they, like other Courts deriving from an exercise of Federal powers, are subject to the restrictions of the Bill of Rights except insofar as special constitutional provision for them is made." Transcript of Record, p. 70, Wade v. Hunter, 336 U.S. 684 (1949) (Board of Review). "I am in accord with the Board of Review in its analysis . . . . I further agree with the Board of Review that the 40th Article of War must be read in the light of the Fifth Amendment . . . ." *Id.* at 79. (Ass't Judge Advocate General).

[592] Colclough, *Naval Justice*, 38 J. CRIM. L., C. & P.S. 198, 200–01 (1947).

[593] See p. 194 *supra*.

[594] See Note, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, 71 HARV. L. REV. 712, 713 (1958).

[595] See Reid v. Covert, 354 U.S. 1 (1957) (no military jurisdiction in peacetime to try dependents for capital crimes); United States *ex rel.* Guagliardo v. McElroy, 27 U.S.L. WEEK 2117 (D.C. Cir. Sept. 12, 1958) (no jurisdiction over civilian employee); Smith v. Kinsella, S.D.W. Va., H.C. No. 1963, Aug. 12, 1957 (no military jurisdiction to try dependents for noncapital crimes); United States v. Tyler, Army Board of Review, CM 396739, Oct. 11, 1957 (no jurisdiction although offense treated as noncapital solely to permit use of prosecution depositions). See also Lee v. Madigan, 248 F.2d 783 (9th Cir. 1957), *cert. granted*, 356 U.S. 911 (1958) (involving the question of military jurisdiction over dishonorably discharged prisoners).

In view of the progressive statutory ameliorations culminating in the Uniform Code of Military Justice, only a short step forward is necessary; and with the Court of Military Appeals reversing the worst cases,[596] there will not be many instances where a military accused who has exhausted the involved processes of the Uniform Code will find any genuine necessity for resorting to collateral review in a federal district court.[597] Nonetheless, it is an intolerable principle that "a conviction by a constitutional court which lacked due process is open to attack by habeas corpus while an identically defective conviction when rendered by an *ad hoc* military tribunal is invulnerable,"[598] and yet that is where we would be if the doctrine of *Johnson v. Zerbst* were ultimately and authoritatively held inapplicable to military trials. *Leyra v. Denno*[599] teaches that full review of a claim of constitutional right in a state court is no bar to collateral review of the claim in a subsequent federal habeas corpus proceeding. Why then should it be a defense to such a proceeding that the military authorities have considered but denied a claim of constitutional right, as was held by the prevailing opinion in *Burns v. Wilson*?[600] The only answer is that such a view must be demonstrably unsound.

Consequently, I am still hopeful that, eventually, the military accused on collateral review will be accorded the same scope of inquiry as the civilian defendant,[601] and that such review will be placed squarely on the proposition that military personnel, like civilians, are within constitutional protections.

The short forward step here urged will not involve techniques foreign to the *elegantia juris* of current constitutional law. All that is

[596] *E.g.*, United States v. McMahan, 6 U.S.C.M.A. 709, 21 C.M.R. 31 (1956) (counsel defending murder case made no opening statement, closing argument, or discussion of sentence); United States v. Sears, 6 U.S.C.M.A. 661, 20 C.M.R. 377 (1956) (after accused acquired counsel, legal officer became member of special court and advised president on rulings); United States v. Parker, 6 U.S.C.M.A. 75, 19 C.M.R. 201 (1955) (accused in capital case ordered to trial one day after appointment of defense counsel); United States v. Whitley, 5 U.S.C.M.A. 786, 19 C.M.R. 82 (1955) (president of special court who made rulings favorable to accused removed during trial).

[597] Such applications will not cease altogether; hope springs eternal and "the prisoner, of course, has nothing to lose in any event." Price v. Johnston, 334 U.S. 266, 297 (1948) (Jackson, J., dissenting). Chessman v. Teets, 354 U.S. 156 (1957), will no doubt long serve to encourage the persevering.

[598] Burns v. Wilson, 346 U.S. 844, 851 (1953) (Frankfurter, J., dissenting on denial of rehearing).

[599] 347 U.S. 556 (1954).

[600] "It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims." 346 U.S. at 144 (Vinson, C.J.).

[601] In its Brief in Opposition to the Petition for Certiorari, p. 11, Krivoski v. United States, 352 U.S. 954, *denying cert. in* 136 Ct. Cl. 451, 145 F. Supp. 239 (1956), the Government said that "it is established doctrine that the exclusive judicial remedy by which the military convict may test the validity of his conviction is by application for a writ of habeas corpus." In view of United States v. Brown, 206 U.S. 243 (1907), *affirming* 41 Ct. Cl. 275, wherein a judgment for back pay was obtained and sustained where an officer had been convicted by an illegally constituted court-martial, the quoted statement seems erroneous.

necessary is, first, to read into the due-process clause of the fifth amendment the substance of the guarantees that have been read into the due-process clause of the fourteenth—guarantees whose substance is presently applicable to military persons—and to mark out a line from case to case with due regard to the actualities of the military situation. Opinions will of course differ as to where that line should be drawn in particular instances; sharply conflicting views may be anticipated; but the technique is a familiar one.[602] Nor need we fear whether the fifth amendment is as pliable as the fourteenth. Only recently the former's due-process clause was widened to include that equal protection of the laws which textually can be found only in the fourteenth.[603] A few years earlier, the fifth amendment was held to protect enemy aliens;[604] it has long guarded the goods of alien friends;[605] and some would have extended its mantle to cover the enemy belligerent invading our soil.[606] Surely it is not doctrinaire libertarianism to urge that its sweep is broad enough to harden into constitutional bone the gristle of statutory sanctions that now protects the personnel of our own armed services.

I do not rest this proposal on any after-readings of the original understanding; I think I have sufficiently demonstrated that the original understanding was quite the other way. Rather, I place my faith in the oft-demonstrated proposition that the meaning and scope of the Constitution are not static, but that they change, just as all law changes. The very history of law is, after all, a record of changing legal doctrines.

When, in the years to come, the serviceman shall be recognized as having constitutional rights, such recognition will be, not a reflection of original understanding, but a part of the continuing and continuous process of making law, insuring that, in Maitland's phrase, "every age should be the mistress of its own law."[607] Just as every generation

[602] *Compare* Rochin v. California, 342 U.S. 165 (1952), *with* Irvine v. California, 347 U.S. 128 (1954).

[603] Bolling v. Sharpe, 347 U.S. 497 (1954).

[604] Von Moltke v. Gillies, 332 U.S. 708 (1948).

[605] See Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931).

[606] See *In re* Yamashita, 327 U.S. 1, 26, 41 (1946); Homma v. Patterson, 327 U.S. 759, 761 (1946) (Murphy and Rutledge, JJ., dissenting in both cases).

[607] 3 MAITLAND, COLLECTED PAPERS 487 (1911).

makes its own law, so every generation can and must make its own constitutional law.[608]

[608] It is less than thirty years ago that my class at the Harvard Law School learned constitutional law from the late Professor Thomas Reed Powell, in a course that was divided into three parts. The first considered the due-process clause, concentrating on Adkins v. Children's Hospital, 261 U.S. 525 (1923); the second dealt with the commerce clause, emphasizing principally Hammer v. Dagenhart, 247 U.S. 251 (1918); the third covered the reciprocal immunity of governmental instrumentalities under Collector v. Day, 78 U.S. (11 Wall.) 113 (1870).

The cases cited have each been specifically overruled since then, by, respectively, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); United States v. Darby, 312 U.S. 100 (1941); and Graves v. New York *ex rel.* O'Keefe, 306 U.S. 46 (1939).

DEFINITION AND GROWTH: WARREN ON THE BILL OF RIGHTS

Appropriately, this article by then Chief Justice Earl Warren has become the "most influential" in terms of the numbers of cases and journals which have used it as a source of authority. It is also the article most frequently "cited" by the courts, rather than appearing after a "*See*" signal, as do most of the others. Chief Justice Warren's third James Madison Lecture at the New York University Law Center on February 1, 1962 was given at the beginning of a decade marked by unprecedented amounts of litigation in which the Armed Forces figured prominently. His views were taken as authoritative by the writers of Supreme Court opinions in three cases after his retirement and have been referred to in 21 other federal cases before and after that time. Additionally, his remarks have been mentioned by the authors of 24 law review articles.

The breadth and impact of this article may be indicated sufficiently by the ways in which it was later used by the Supreme Court. In the earliest case, *Parisi v. Davidson*,[1] the former Chief Justice was cited by the majority as authority for the existence of an "autonomous"[2] system of military criminal justice and by the dissent for the existence of limitations on the autonomy.[3] His language describing the tradition and scope of civilian control over military forces was adopted bodily by the dissent in *Laird v. Tatum*[4] and in *Gosa v. Mayden*[5] he was relied upon for an assertion of the integrity of the truth-determining process in military courts.[6]

[1] 405 U.S. 34 (1971).

[2] *Id.* at 41.

[3] *Id.* at 55 (dissenting opinion).

[4] 408 U.S. 1, 19 (1971).

[5] 413 U.S. 665, (1973).

[6] *Id.* at 685. For those interested in other citations the following volume and page citations to the Federal Second Reporter are provided: 348/55; 377/343; 387/152; 398/710; 447/254; 450/765; 478/780.

THE BILL OF RIGHTS AND THE MILITARY†

*Earl Warren**

It is almost a commonplace to say that free government is on trial for its life. But it is the truth. And it has been so throughout history. What is almost as certain: It will probably be true throughout the foreseeable future. Why should this be so? Why is it that, over the centuries of world history, the right to liberty that our Declaration of Independence declares to be "inalienable" has been more often abridged than enforced?

One important reason, surely, is that the members of a free society are called upon to bear an extraordinarily heavy responsibility, for such a society is based upon the reciprocal self-imposed discipline of both the governed and their government. Many nations in the past have attempted to develop democratic institutions, only to lose them when either the people or their government lapsed from the rigorous self-control that is essential to the maintenance of a proper relation between freedom and order. Such failures have produced the totalitarianism or the anarchy that, however masked, are the twin mortal enemies of an ordered liberty.

Our forebearers, well understanding this problem, sought to solve it in unique fashion by incorporating the concept of mutual restraint into our Nation's basic Charter. In the body of our Constitution, the Founding Fathers insured that the Government would have the power necessary to govern. Most of them felt that the self-discipline basic to a democratic government of delegated powers was implicit in that document in the light of our Anglo-Saxon heritage. But our people wanted explicit assurances. The Bill of Rights was the result.

This act of political creation was a remarkable beginning. It was only that, of course, for every generation of Americans must preserve its own freedoms. In so doing, we must turn time and again to the Bill

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* (1891–1974). The author was a member of the California Bar and was Chief Justice of the United States from 1953 to 1969.

of Rights, for it is that document that solemnly sets forth the political consensus that is our heritage. Nor should we confine ourselves to examining the diverse, complicated, and sometimes subordinate issues that arise in the day-to-day application of the Bill of Rights. It is perhaps more important that we seek to understand in its fullness the nature of the spirit of liberty that gave that document its birth.

Thus it is in keeping with the high purposes of this great University that its School of Law sponsor a series of lectures emphasizing the role of the Bill of Rights in contemporary American life. And it is particularly appropriate, after the splendid lectures of Mr. Justice Black[1] and Mr. Justice Brennan[2] on the relationship of the Bill of Rights to the Federal and State Governments, respectively, that you should delegate to someone the task of discussing the relationship of the Bill of Rights to the military establishment. This is a relationship that, perhaps more than any other, has rapidly assumed increasing importance because of changing domestic and world conditions. I am honored to undertake the assignment, not because I claim any expertise in the field, but because I want to cooperate with you in your contribution to the cause of preserving the spirit as well as the letter of the Bill of Rights.

Determining the proper role to be assigned to the military in a democratic society has been a troublesome problem for every nation that has aspired to a free political life. The military establishment is, of course, a necessary organ of government; but the reach of its power must be carefully limited lest the delicate balance between freedom and order be upset. The maintenance of the balance is made more difficult by the fact that while the military serves the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in a free society.

The critical importance of achieving a proper accommodation is apparent when one considers the corrosive effect upon liberty of exaggerated military power. In the last analysis, it is the military—or at least a militant organization of power—that dominates life in totalitarian countries regardless of their nominal political arrangements. This is true, moreover, not only with respect to Iron Curtain countries, but also with respect to many countries that have all of the formal trappings of constitutional democracy.

Not infrequently in the course of its history the Supreme Court has been called upon to decide issues that bear directly upon the relationship between action taken in the name of the military and the protected freedoms of the Bill of Rights. I would like to discuss here some

[1] Black, The Bill of Rights, 35 N.Y.U.L. Rev. 865 (1960).
[2] Brennan, The Bill of Rights and the States, 36 N.Y.U.L. Rev. 761 (1961).

of the principal factors that have shaped the Court's response. From a broad perspective, it may be said that the questions raised in these cases are all variants of the same fundamental problem: Whether the disputed exercise of power is compatible with preservation of the freedoms intended to be insulated by the Bill of Rights.

I believe it is reasonably clear that the Court, in cases involving a substantial claim that protected freedoms have been infringed in the name of military requirements, has consistently recognized the relevance of a basic group of principles. For one, of course, the Court has adhered to its mandate to safeguard freedom from excessive encroachment by governmental authority. In these cases, the Court's approach is reinforced by the American tradition of the separation of the military establishment from, and its subordination to, civil authority. On the other hand, the action in question is generally defended in the name of military necessity, or, to put it another way, in the name of national survival. I suggest that it is possible to discern in the Court's decisions a reasonably consistent pattern for the resolution of these competing claims, and more, that this pattern furnishes a sound guide for the future. Moreover, these decisions reveal, I believe, that while the judiciary plays an important role in this area, it is subject to certain significant limitations, with the result that other organs of government and the people themselves must bear a most heavy responsibility.

Before turning to some of the keystone decisions of the Court, I think it desirable to consider for a moment the principle of separation and subordination of the military establishment, for it is this principle that contributes in a vital way to a resolution of the problems engendered by the existence of a military establishment in a free society.

It is significant that in our own hemisphere only our neighbor, Canada, and we ourselves have avoided rule by the military throughout our national existences. This is not merely happenstance. A tradition has been bred into us that the perpetuation of free government depends upon the continued supremacy of the civilian representatives of the people. To maintain this supremacy has always been a preoccupation of all three branches of our government. To strangers this might seem odd, since our country was born in war. It was the military that, under almost unbearable conditions, carried the burden of the Revolution and made possible our existence as a Nation.

But the people of the colonies had long been subjected to the intemperance of military power. Among the grievous wrongs of which they complained in the Declaration of Independence were that the King had subordinated the civil power to the military, that he had quartered troops among them in times of peace, and that through his mercenaries he had committed other cruelties. Our War of the Rev-

olution was, in good measure, fought as a protest against standing armies. Moreover, it was fought largely with a civilian army, the militia, and its great Commander-in-Chief was a civilian at heart. After the War, he resigned his commission and returned to civilian life. In an emotion-filled appearance before the Congress, his resignation was accepted by its President, Thomas Mifflin, who, in a brief speech, emphasized Washington's qualities of leadership and, above all, his abiding respect for civil authority.[3] This trait was probably best epitomized when, just prior to the War's end, some of his officers urged Washington to establish a monarchy, with himself at its head. He not only turned a deaf ear to their blandishments, but his reply, called by historian Edward Channing "possibly, the grandest single thing in his whole career,"[4] stated that nothing had given him more painful sensations than the information that such notions existed in the army, and that he thought their proposal "big with the greatest mischiefs that can befall my Country."[5]

Such thoughts were uppermost in the minds of the Founding Fathers when they drafted the Constitution. Distrust of a standing army was expressed by many. Recognition of the danger from Indians and foreign nations caused them to authorize a national armed force begrudgingly. Their viewpoint is well summarized in the language of James Madison, whose name we honor in these lectures:

> The veteran legions of Rome were an overmatch for the undisciplined valor of all other nations, and rendered her the mistress of the world. Not the less true is it, that the liberties of Rome proved the final victim of her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to this safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.[6]

Their apprehensions found expression in the diffusion of the war powers granted the Government by the Constitution. The President was made the Commander-in-Chief of the armed forces. But Congress was given the power to provide for the common defense, to declare war, to make rules for the Government and regulation of the land and

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[3] 5 Freeman, George Washington 477 (1952).
[4] 3 Channing, A History of the United States 376 (1912).
[5] 24 Writings of Washington 272 (Fitzpatrick ed. 1938).
[6] The Federalist No. 41, at 251 (Lodge ed. 1888) (Madison).

naval forces, and to raise and support armies, with the added precaution that no appropriation could be made for the latter purpose for longer than two years at a time—as an antidote to a standing army. Further, provision was made for organizing and calling forth the state militia to execute the laws of the Nation in times of emergency.

Despite these safeguards, the people were still troubled by the recollection of the conditions that prompted the charge of the Declaration of Independence that the King had "effected to render the military independent and superior to the civil power." They were reluctant to ratify the Constitution without further assurances, and thus we find in the Bill of Rights Amendments 2 and 3, specifically authorizing a decentralized militia, guaranteeing the right of the people to keep and bear arms, and prohibiting the quartering of troops in any house in time of peace without the consent of the owner. Other Amendments guarantee the right of the people to assemble, to be secure in their homes against unreasonable searches and seizures, and in criminal cases to be accorded a speedy and public trial by an impartial jury after indictment in the district and state wherein the crime was committed. The only exceptions made to these civilian trial procedures are for cases arising in the land and naval forces. Although there is undoubtedly room for argument based on the frequently conflicting sources of history, it is not unreasonable to believe that our Founders' determination to guarantee the preeminence of civil over military power was an important element that prompted adoption of the Constitutional Amendments we call the Bill of Rights.[7]

Civil supremacy has consistently been the goal of our Government from colonial days to these. As late as 1947, when the Department of Defense was established, Congress specifically provided for a civilian chief officer. And when President Truman asked the Congress for an amendment to make an exception for a soldier and statesman as great as the late George C. Marshall, serious debate followed before the Act was modified to enable him to become Secretary of Defense, and then only by a small majority of the total membership of the House and less than half of the Senate.[8] Those who opposed the amendment often expressed their high regard for General Marshall, but made known their fears concerning any deviation, even though temporary, from our traditional subordination of military to civil power.[9]

[7] See, e.g., Pinkney's [*sic*] recommendations to the Federal Convention, 2 Records of the Federal Convention 341 (Farrand ed. 1911), and the discussion by Mason and Madison, id. at 617; Resolutions on Ratification of the Constitution by the States of Massachusetts, New Hampshire, New York and Virginia, reprinted in Documents Illustrative of Formation of the Union of American States, H.R. Doc. No. 398, 69th Cong., 1st Sess. 1018–20, 1024–44 (1927).

[8] The vote in the House was for: 220, against: 105, not voting: 104. In the Senate the vote was for: 47, against: 21, not voting: 28. 96 Cong. Rec. 14931, 14973 (1950).

[9] See, e.g., Remarks of Representatives Wolverton and Hoffman and Senators Watkins and Cain, 96 Cong. Rec. 14835, 14919, 15177, A6561 (1950).

The history of our country does not indicate that there has ever been a widespread desire to change the relationship between the civil government and the military; and it can be fairly said that, with minor exceptions, military men throughout our history have not only recognized and accepted this relationship in the spirit of the Constitution, but that they have also cheerfully cooperated in preserving it.

Thus it is plain that the axiom of subordination of the military to the civil is not an anachronism. Rather, it is so deeply rooted in our national experience that it must be regarded as an essential constituent of the fabric of our political life.

But sometimes competing with this principle—and with the "Thou Shalt Nots" of the Bill of Rights—is the claim of military necessity. Where such a conflict is asserted before the Court, the basic problem has been, as I have indicated, to determine whether and how these competing claims may be resolved in the framework of a lawsuit.

Cases of this nature appear to me to be divisible into three broad categories. The first involves questions concerning the military establishment's treatment of persons who are concededly subject to military authority—what may be termed the vertical reach of the Bill of Rights within the military. These questions have been dealt with quite differently than the second category of disputes, involving what may be called the horizontal reach of the Bill of Rights. Cases of this type pose principally the question whether the complaining party is a proper subject of military authority. Finally, there are cases which do not, strictly speaking, involve the action of the military, but rather the action of other government agencies taken in the name of military necessity.

So far as the relationship of the military to its own personnel is concerned, the basic attitude of the Court has been that the latter's jurisdiction is most limited. Thus, the Supreme Court has adhered consistently to the 1863 holding of *Ex parte Vallandigham*[10] that it lacks jurisdiction to review by certiorari the decisions of military courts. The cases in which the Court has ordered the release of persons convicted by courts martial have, to date, been limited to instances in which it found lack of military jurisdiction over the person so tried, using the term "jurisdiction" in its narrowest sense. That is, they were all cases in which the defendant was found to be such that he was not constitutionally, or statutorily, amenable to military justice. Such was the classic formulation of the relation between civil courts and courts martial as expressed in *Dynes v. Hoover*,[11] decided in 1857.

This "hands off" attitude has strong historical support, of course. While I cannot here explore the matter completely, there is also no

[10] 68 U.S. (1 Wall.) 243 (1863).
[11] 61 U.S. (20 How.) 65 (1857).

necessity to do so, since it is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.

However, the obvious reason is not always the most important one. I suppose it cannot be said that the courts of today are more knowledgeable about the requirements of military discipline than the courts in the early days of the Republic. Nevertheless, events quite unrelated to the expertise of the judiciary have required a modification in the traditional theory of the autonomy of military authority.

These events can be expressed very simply in numerical terms. A few months after Washington's first inauguration, our army numbered a mere 672 of the 840 authorized by Congress.[12] Today, in dramatic contrast, the situation is this: Our armed forces number two and a half million;[13] every resident male is a potential member of the peacetime armed forces; such service may occupy a minimum of four per cent of the adult life of the average American male reaching draft age; reserve obligations extend over ten per cent of such a person's life;[14] and veterans are numbered in excess of twenty-two and a half million.[15] When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.

Thus it was hardly surprising to find that, in 1953, the Supreme Court indicated in *Burns v. Wilson*[16] that court martial proceedings could be challenged through habeas corpus actions brought in civil courts, if those proceedings had denied the defendant fundamental

[12] Report of Secretary of War Knox to the Congress on the Military Force in 1789, communicated to the Senate on August 10, 1789, 1 American State Papers—Military Affairs No. 1. At the time of the Constitutional Convention, consideration was given to limiting the size of the National Army for all time to a few thousand men, through express constitutional provision. 2 Records of the Federal Convention 323, 329, 330, 616–17 (Farrand ed. 1911).

[13] Total strength of the armed forces on November 30, 1961, was estimated to be 2,780,975 by the Directorate of Statistical Services, Office of the Secretary of Defense, Pamphlet 22.1 (Dec. 20, 1961).

[14] The Universal Military Training and Service Act of 1951, §§ 4(b), (d), establishes an active duty tour of two years and a reserve obligation of six years thereafter, as the norm for all persons subject to the Act. 65 Stat. 78 (1951), as amended, 50 U.S.C. App. §§ 454(b), (d) (1958). In statistics compiled in 1959, the American male between 20 and 25 had a life expectancy of another 49.5 years. Nat'l Office of Vital Statistics, Life Tables § 5–5 (Dep't of Health, Educ. & Welfare 1959).

[15] On June 30, 1960, the Veterans Administration counted 22,534,000 veterans of all armed forces then living. 1960 Adm'r of Veterans Affairs Ann. Rep. 6–7 (1961).

[16] 346 U.S. 137 (1953).

rights. The various opinions of the members of the Court in *Burns* are not, perhaps, as clear on this point as they might be. Nevertheless, I believe they do constitute recognition of the proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.

Despite *Burns*, however, it could hardly be expected that the regular federal judiciary would play a large role in regulating the military's treatment of its own personnel. The considerations militating against such intervention remain strong. Consequently, more important than *Burns* from a practical point of view was the action in 1951 of another guardian of the Bill of Rights, Congress, in enacting the Uniform Code of Military Justice and in establishing the Court of Military Appeals as a sort of civilian "Supreme Court" of the military.[17] The Code represents a diligent effort by Congress to insure that military justice is administered in accord with the demands of due process. Attesting to its success is the fact that since 1951 the number of habeas corpus petitions alleging a lack of fairness in courts martial has been quite insubstantial.[18] Moreover, I know of no case since the adoption of the Code in which a civil court has issued the writ on the basis of such a claim. This development is undoubtedly due in good part to the supervision of military justice by the Court of Military Appeals. Chief Judge Quinn of that Court has recently stated:

> [M]ilitary due process begins with the basic rights and privileges defined in the federal constitution. It does not stop there. The letter and the background of the Uniform Code add their weighty demands to the requirements of a fair trial. Military due process is, thus, not synonymous with federal civilian due process. It is basically that, but something more, and something different.[19]

And the Court of Military Appeals has, itself, said unequivocally that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."[20]

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[17] See Uniform Code of Military Justice, 10 U.S.C. §§ 867, 876 (1958).

[18] Similarly, since the adoption of the Uniform Code of Military Justice, the Court of Claims has not granted relief in the form of back pay to claimants alleging wrongful dismissal from government service through court martial proceedings lacking fundamental fairness. Compare Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).

[19] Quinn, The United States Court of Military Appeals and Military Due Process, 35 St. John's L. Rev. 225, 232 (1961). In an early opinion, the Court of Military Appeals said, "If, because of the peculiarities of the military service, a variation from civilian practice is necessary to assure a fair trial, we should unhesitatingly adopt the procedure best suited to the administration of military justice, even though by so doing we may bring about a departure from a prior service rule." United States v. Hemp, 1 U.S.C.M.A. 280, 286, 3 C.M.R. 14, 20 (1952). Compare the evolution of the court's approach to "military due process" in United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951), with United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

[20] United States v. Jacoby, supra note 19, at 430–31, 29 C.M.R. at 246–47.

Thus our recent experience has shown, I believe, that the Court of Military Appeals can be an effective guarantor of our citizens' rights to due process when they are subjected to trial by court martial. Moreover, the establishment of a special court to review these cases obviates, at least to some extent, the objection of lack of familiarity by the reviewing tribunal with the special problems of the military. In this connection, I think it significant that, despite the expanded application of our civilian concepts of fair play to military justice, the Chairman of the Joint Chiefs of Staff, General Lemnitzer, declared not long ago:

> I believe the Army and the American people can take pride in the positive strides that have been made in the application of military law under the Uniform Code of Military Justice. The Army today has achieved the highest state of discipline and good order in its history.[21]

These developments support my conviction that the guarantees of our Bill of Rights need not be considered antithetical to the maintenance of our defenses.

Nevertheless, we cannot fail to recognize how our burgeoning army has posed difficult and unique problems for the Court in the application of constitutional principles. Thus, you may recall the case of Specialist Girard,[22] who, having been sent to Japan by the Army, contended that the Constitution entitled him to a trial by an American court martial for an offense committed on an American army reservation in Japan against a Japanese national. The surrender of Girard to Japanese authorities was consonant with well-established rules of international law, and the Court's opinion cited, as its authority, the decision of Chief Justice Marshall in *The Schooner Exchange*,[23] written in 1812. But the case brought to light some problems we should consider in the light of developments unforeseen at the time the Constitution was written: the world-wide deployment of our citizens, called to duty and sent to foreign lands for extended tours of service, who may, by administrative decision of American authorities, be delivered to foreign governments for trial.[24] We are fortunate that our

[21] Dep't of the Army Pamphlet No. 27–101–18 (Oct. 7, 1959), reprinted in 1960 U.S.C.M.A. Ann. Rep. 4. Similar views have been expressed by ranking officers of the Army and Navy. See Army Chief of Staff General Decker, id., and Navy Judge Advocate General Admiral Mott, An Appraisal of Proposed Changes in the Uniform Code of Military Justice, 35 St. John's L. Rev. 300 (1961).

[22] Wilson v. Girard, 354 U.S. 524 (1957).

[23] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

[24] A recent survey by the Department of Defense lists 19 countries with which the United States has entered Status of Forces Agreements similar to the one with which the Court dealt in *Girard*. In addition, this country is signatory to agreements with 56 nations (15 the same as SOFA signatories) in which military missions (as distinguished from troop deployments) have virtual diplomatic immunity. See also U.S. Dep't of State, Treaties in Force (Jan. 1, 1962).

experience in this area has generally been a happy one,[25] and thus, to date, these constitutional problems have been largely submerged.

However, unique constitutional questions are, at times, presented for decision, which questions are, in part, an outgrowth of our expanded military forces. One of the most recent of these arose in *Trop v. Dulles*,[26] decided in 1958. In that case the Court considered a provision of our law that acted automatically to denationalize a citizen convicted of wartime desertion by a court martial. Under this provision, over 7,000 men who had served in the Army alone, in World War II, were rendered stateless. It was the decision of the Court that, by this Act, Congress had exceeded its constitutional powers by depriving citizens of their birthright. Four members of the Court, of which I was one, expressed the view that this law, effectively denying the person's rights to have rights, was a cruel and unusual punishment proscribed by the Eighth Amendment. The need for military discipline was considered an inadequate foundation for expatriation.

The *Trop* case was an example, really, of how the Court has generally dealt with problems apart from the authority of the military in dealing with "its own." Rather, it was in the line of decisions dealing with attempts of our civilian Government to extend military authority into other areas. In these cases we find factors different from those the Court must consider persuasive in review of a soldier's disciplinary conviction by court martial. The contending parties still advance the same general argument: protected liberties versus military necessity. Here, however, the tradition of exclusive authority of the military over its uniformed personnel is generally not directly relevant. Here, the Court has usually been of the view that it can and should make its own judgment, at least to some degree, concerning the weight a claim of military necessity is to be given.

The landmark decision in this field was, of course, *Ex parte Milligan*,[27] decided in 1866. It established firmly the principle that when civil courts are open and operating, resort to military tribunals for the prosecution of civilians is impermissible. The events giving rise to the *Milligan* case occurred while we were in the throes of a great war. However, the military activities of that war had been confined to a certain section of the country; in remainder, the civil government operated normally. In passing upon the validity of a military conviction returned against Milligan outside the theater of actual combat, the Court recognized that no "graver question" was ever previously before it. And yet the Court, speaking through Mr. Justice Davis, reminded us that

[25] See Senate Comm. on Armed Services, Operation of Article VII, NATO Status of Forces Treaty, S. Rep. No. 1041, 87th Cong., 1st Sess. 2 (1961).

[26] 356 U.S. 86 (1958).

[27] 71 U.S. (4 Wall.) 2 (1866).

> by the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify . . . [Milligan's] military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings.[28]

I do not propose to discuss in detail other cases that have been decided in a wartime context, for the risk is too great that they lie outside the mainstream of American judicial thought. War is, of course, a pathological condition for our Nation. Military judgments sometimes breed action that, in more stable times, would be regarded as abhorrent. Judges cannot detach themselves from such judgments, although by hindsight, from the vantage point of more tranquil times, they might conclude that some actions advanced in the name of national survival had in fact overridden the strictures of due process.[29]

Obviously such a charge could not be made against the Court in the *Milligan* case. However, some have pointed to cases like the companion decisions of *Hirabayashi v. United States*[30] and *Korematsu v. United States*[31] as aberrational. There, you will recall, the Court sustained the program under which, shortly after the attack on Pearl Harbor, over 100,000 Japanese nationals and citizens of that ancestry living in the western United States were, under Executive Order, with congressional sanction, placed under curfew and later excluded from areas within 750 miles of the Pacific Coast or confined in government detention camps.

Whatever may be the correct view of the specific holding of those cases, their importance for present purposes lies in a more general consideration. These decisions demonstrate dramatically that there are some circumstances in which the Court will, in effect, conclude that it is simply not in a position to reject descriptions by the Executive of the degree of military necessity. Thus, in a case like *Hirabayashi*, only the Executive is qualified to determine whether, for example, an invasion is imminent. In such a situation, where time is of the essence, if the Court is to deny the asserted right of the military authorities, it must be on the theory that the claimed justification, though factually unassailable, is insufficient. Doubtless cases might arise in which such a response would be the only permissible one. After all, the truism

[28] Id. at 119.

[29] In times of stress, the Court is not only vulnerable, to some extent, to the emotions of our people, but also to action by Congress in restricting what that body may consider judicial interference with the needs of security and defense. Following the Civil War, Congress actually exercised its constitutional powers to provide for the rules governing the appellate jurisdiction of the Supreme Court, for this very purpose. See Ex Parte McCardle, 73 U.S. (6 Wall.) 318 (1867); 74 U.S. (7 Wall.) 506 (1868).

[30] 320 U.S. 81 (1943).

[31] 323 U.S. 214 (1944).

that the end does not justify the means has at least as respectable a lineage as the dictum that the power to wage war is the power to wage war successfully.[32] But such cases would be extraordinary indeed.

The consequence of the limitations under which the Court must sometimes operate in this area is that other agencies of government must bear the primary responsibility for determining whether specific actions they are taking are consonant with our Constitution. To put it another way, the fact that the Court rules in a case like *Hirabayashi* that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is.

There is still another lesson to be learned from cases like *Hirabayashi*. Where the circumstances are such that the Court must accept uncritically the Government's description of the magnitude of the military need, actions may be permitted that restrict individual liberty in a grievous manner. Consequently, if judicial review is to constitute a meaningful restraint upon unwarranted encroachments upon freedom in the name of military necessity, situations in which the judiciary refrains from examining the merit of the claim of necessity must be kept to an absolute minimum. In this connection, it is instructive to compare the result in *Hirabayashi* with the result in cases that have been decided outside the context of war.

In times of peace, the factors leading to an extraordinary deference to claims of military necessity have naturally not been as weighty. This has been true even in the all too imperfect peace that has been our lot for the past fifteen years—and quite rightly so, in my judgment. It is instructive to recall that our Nation at the time of the Constitutional Convention was also faced with formidable problems. The English, the French, the Spanish, and various tribes of hostile Indians were all ready and eager to subvert or occupy the fledgling Republic. Nevertheless, in that environment, our Founding Fathers conceived a Constitution and Bill of Rights replete with provisions indicating their determination to protect human rights. There was no call for a garrison state in those times of precarious peace. We should heed no such call now. If we were to fail in these days to enforce the freedom that until now has been the American citizen's birthright, we would be abandoning for the foreseeable future the constitutional balance of powers and rights in whose name we arm.

Moreover, most of the cases the Court has decided during this period indicate that such a capitulation to the claim of military necessity would be a needless sacrifice. These cases have not been argued or decided in an emergency context comparable to the early 1940's. There has been time, and time provides a margin of safety. There has

[32] Chief Justice Hughes, speaking for the Court in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).

been time for the Government to be put to the proof with respect to its claim of necessity; there has been time for reflection; there has been time for the Government to adjust to any adverse decision. The consequence is that the claim of necessity has generally not been put to the Court in the stark terms of a *Hirabayashi* case.[33]

An excellent example of the approach adopted by the Court in the recent years of peacetime tension is its disposition of the various cases raising the question of court-martial jurisdiction over civilian dependents and employees of the armed forces overseas. Such jurisdiction was explicitly granted by the Uniform Code of Military Justice, and hence the issue was whether the statutory provision was constitutional.

In what the Court came to recognize as a hasty decision, this exercise of jurisdiction was at first sustained in the most striking of the cases presenting the problem—the trial of the wife of an American soldier for a capital offense. During the summer following that decision, a rehearing was considered and finally ordered. The next June, the rewritten, landmark decision of *Reid v. Covert*[34] struck down this exercise of military jurisdiction as an unconstitutional expansion of Congress' power to provide for the government of the armed forces. In 1960, *Reid v. Covert* was followed by the Court in similarly invalidating court-martial convictions of civilians accompanying and those employed by our services overseas, whether or not the offenses for which they had been convicted were punishable by death.[35]

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[33] In this connection, we might also consider and compare the cases of Ex parte Quirin, 317 U.S. 1 (1942), and Abel v. United States, 362 U.S. 217 (1960). The former came before the Court at the outset of World War II, at a time when the outlook for the survival of the free world was dim. On the floor of Congress, fears were expressed that Hitler could subdue the country even without an invasion, through the use of "fifth columnists" and German allies thought to exist in every State of the Union. See 87 Cong. Rec. 555 (1941). When a small group of Nazi saboteurs was discovered on our shores, they were brought before a military tribunal—not our civilian courts. They were treated as wartime belligerents and spies, and ordered executed. The Supreme Court denied an application for a writ of habeas corpus, sustaining the military's jurisdiction.

However, when, in June 1957, Rudolph Abel was apprehended in his New York hotel room and identified as a Colonel in the Russian army, he was not brought before a court martial. A full civilian trial, with all the safeguards of our Bill of Rights, was accorded this agent of our adversary. Abel brought his case to the Supreme Court claiming the protection of our Constitution. I was among those who dissented from the Court's judgment that he had not been the subject of a constitutionally proscribed search and seizure. But all of the opinions reiterated our fundamental approach—that neither the nature of the case nor the notoriety of the defendant could influence our decision on the constitutional issue presented.

Cf. In re Yamashita, 327 U.S. 1 (1946), in which the Court denied habeas corpus relief to an officer of the enemy vanquished in a war fought in the cause of the Constitution, but who for his wartime actions, was subjected to an American military court whose procedures were questionably squared with the spirit of due process.

[34] 354 U.S. 1 (1957), withdrawing 351 U.S. 487 (1956).

[35] McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960) (employee—noncapital offense); Grisham v. Hagan, 361 U.S. 278 (1960) (employee—capital offense); Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960) (dependent—noncapital offense).

Several features of these cases are worthy of note. First of all, the urgency of wartime was absent. Extended analysis and deliberation on the part of the parties and the Court were possible. Secondly, while, of course, the Government rested heavily upon a claim of military necessity, that claim could not be pressed with the same force that it was in *Hirabayashi*. Alternative methods of dealing with the military's problems could be considered. Indeed, the Court itself suggested a possible alternative in one of its opinions—the creation of a military service akin to the Seabees to secure the services theretofore performed by civilians. And finally, the extension of military jurisdiction for which the Government contended was extraordinarily broad. At that time, there were 450,000 dependents and 25,000 civilian employees overseas.[36] We could not safely deal with such a problem on the basis of what General Anthony Wayne did or did not do to camp followers at frontier forts in the last decade of the 18th Century. In short, as in the case of trials of persons who are concededly part of the military, the burgeoning of our military establishment produced a situation so radically different from what the country had known in its distant past that the Court was required to return to first principles in coming to its judgment.

Another decision of the Court that is of significance in connection with the considerations I have been discussing was *Toth v. Quarles*.[37] There the Court held that a veteran holding an honorable discharge could not be recalled to active duty for the sole purpose of subjecting him to a court martial prosecution for offenses committed prior to his discharge. The question was of enormous significance in the context of present day circumstances, for the ranks of our veterans are estimated to number more than twenty-two-and-a-half-million. Thus a decision adverse to the petitioner would have left millions of former servicemen helpless before some latter-day revival of old military charges. So far as the claim of military necessity was concerned, the facts were such that the Court regarded itself as competent to deal with the problem directly. Mr. Justice Black, speaking for the Court said:

> It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefits of a civilian court trial when they are actually civilians. . . . Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.[38]

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[36] Brief for Petitioner, the Secretary of Defense, pp. 12, 71, 110–11, McElroy v. United States ex. rel. Guagliardo, 361 U.S. 281 (1960).

[37] United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).

[38] Id. at 22.

Attempts at extension of military control have not, of course, been confined to the field of criminal justice, nor have all of them been decided on constitutional grounds. *Harmon v. Brucker*[39] brought to the Court the Army's claim that it had the authority to issue to a draftee a discharge less than honorable on the basis of certain activities in which the soldier was said to have engaged prior to his induction, and which the Army thought made him a security risk. Again, the gravity of the constitutional issues raised was underscored by the existence of our system of peacetime conscription, for the sustaining of the Army's claim would have affirmed its authority to affect the pre-service political activities of every young American. A notable feature of the case was that the Solicitor General conceded that, if the Court had jurisdiction to rule upon the action of the Secretary of the Army, his action should be held to be unconstitutional. Thus the Government's case was placed entirely upon the asserted necessity for, and tradition of, the exclusive authority of the Secretary to act with unreviewable discretion in the cases of this nature. The Court, however, found it unnecessary to reach constitutional issues. It disposed of the case on the non-constitutional ground that the Secretary lacked statutory authority to condition the type of discharge he issued upon any behavior other than that in which the soldier engaged during his period of service. Such emphasis upon proper directives by Congress with respect to these problems, may be regarded as, in part, a further reflection of the principle of subordination of the military establishment to civil authority.

I cannot, of course, discuss more than a handful of the Supreme Court decisions bearing upon the military establishment's efforts to extend the scope of its authority in one way or another beyond service members. The cases I have dealt with, however, disclose what I regard as the basic elements of the approach the Court has followed with reasonable consistency. There are many other decisions that echo that approach, and there are some, to be sure, that seem inconsistent with it. But I would point to *Duncan v. Kahanamoku*,[40] in which the Court held, in the spirit of *Milligan*, although on non-constitutional grounds, that, after the Pearl Harbor attack, civilians in the Hawaiian Islands were subject to trial only in civilian courts, once those courts were open. And, of course, there have been a number of cases that, like *Harmon v. Brucker*, emphasize the Court's view that the military, like any other organ of government, must adhere strictly to its legislative mandate.[41]

[39] 355 U.S. 579 (1958).

[40] 327 U.S. 304 (1946). Cf. Madsen v. Kinsella, 343 U.S. 341 (1952).

[41] For example, in Bell v. United States, 366 U.S. 393 (1961), the Army was challenged for declining to pay former soldiers who, during the Korean War, and while prisoners of war of the enemy, had betrayed some fellow prisoners and had refused initial opportunities for repatria-

On the whole, it seems to me plain that the Court has viewed the separation and subordination of the military establishment as a compelling principle. When this principle supports an assertion of substantial violation of a precept of the Bill of Rights, a most extraordinary showing of military necessity in defense of the Nation has been required for the Court to conclude that the challenged action in fact squared with the injunctions of the Constitution. While situations may arise in which deference by the Court is compelling, the cases in which this has occurred demonstrate that such a restriction upon the scope of review is pregnant with danger to individual freedom. Fortunately, the Court has generally been in a position to apply an exacting standard. Thus, although the dangers inherent in the existence of a huge military establishment may well continue to grow, we need have no feeling of hopelessness. Our tradition of liberty has remained strong through recurring crises. We need only remain true to it.

The last phase of the problem of the military in our society—the relationship of the military to civil government and affairs—is much more complex, and also perhaps much more important, than the subjects I have just discussed.

This relationship of the military to the rest of us raises issues that are less graphic, less tangible, less amenable to review or control by the courts. This aspect of the problem encompasses not only actions taken by our civil government in the name of defense that may impinge upon individual rights, but also matters such as the influence exerted on the civil government by uniformed personnel and the suppliers of arms. Such problems are not always clearly visible. Nor is the impact of our

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tion. Despite the absence of any authority for withholding the pay earned and accrued by these men to the dates of their well-deserved dishonorable discharges, the Army refused to make payment. As the situation was summarized by the dissenting judge in the Court of Claims, "Finding nothing in the law books to justify its refusal to pay these men, it threw the books away and just refused to pay them. It could have set before these confused young men a better example of government by law." 181 F. Supp. 668, 675 (Ct. Cl. 1960). We agreed.

In similar vein have been the series of decisions concerning the conscription procedures of the Selective Service System. For example, this Term we have again had occasion to consider a conviction based on an alleged failure of a registrant to notify his draft board of a change of address. After three unsuccessful prosecutions for draft evasion, the Government secured a belated indictment, conviction and three-year prison sentence for the young man's questionable failure to notify his board promptly of a change of address. But, from the record, it seemed clear that it was the registrant's annoying persistence in pursuing appellate rights to secure an exemption from active duty on a claim of being a minister of Jehovah's Witnesses, that underlay the course of prosecution. Venus v. United States, 368 U.S. 345 (1961) (mem.). In 1955, in Gonzales v. United States, 348 U.S. 407 (1955), we were faced with a conviction for draft evasion, in which the draftee had not been accorded the simple right of examining a Department of Justice memorandum contesting his claims that he was a conscientious objector, and which memorandum had been presented to a Selective Service appeal board in reviewing Gonzales' classification. Understandably, we held that although the needs of the Army were great, it had to be fair in abiding by the law under which it sought conscripts. An additional factor of importance about these cases is that under the Selective Service law, violation of the call to military duty is a civil offense, punishable only in the civilian courts.

enormous financial, human and resource commitment to the needs of defense easy to measure.[42] Moreover, these problems often do not arise in a factual context suitable for a lawsuit and judicial review. Still, "cases and controversies" have occasionally arisen in recent years that suggest the magnitude of the difficulties we face.

Looking first at perhaps the broadest aspect of the problems generated by our defense needs, we could consider the question whether the industries basic to our defense are in all respects to be treated as "private" industry. In wartime, the total mobilization of our economy with its rationing, allocation of materials and manpower, and price and wage controls are acceptable restrictions for a free society locked in combat. The just compensation and due process provisions of the Constitution may be strained at such times. Are they to receive similar diminished deference in these days of "cold war"? This alone is a subject worthy of the most extended discussion. I can do no more here than suggest its pertinency. But it has been thrust upon the Court with a requirement for prompt decision in recent years.

You will recall the case of *Youngstown Sheet & Tube v. Sawyer*,[43] in which, in the midst of our military operations in Korea, the Court held that the President lacked the power, without specific Congressional sanction, to seize and operate the Nation's steel industry following its shut-down by a nation-wide strike. The numerous and lengthy opinions of the various members of the Court reveal the tremendous complexity of the issues such a case presents. And on what may the courts rely in such litigation? Consider these words from Mr. Justice Jackson's concurring opinion:

> A judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems . . . as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.[44]

The result in the *Youngstown* case may be compared to the decision

[42] The Defense Department now spends over 50% of the total federal budget, a sum almost 10% of our gross national product. It is estimated that 10% of the entire national labor force is, in some manner, employed in defense industries or the defense establishment itself. See N.Y. Times, May 21, 1961, p. 48, cols. 4–5; U.S. Dept. of Commerce, Statistical Abstract of the United States 235, 301 (1961).

[43] 343 U.S. 579 (1952).

[44] Id. at 634–35.

seven years later in *United Steelworkers of America v. United States*,[45] a decision reached during a time that no actual armed conflict engaged this country. There, the Court upheld a finding that since one per cent of the Nation's steel industry output was needed for defense purposes, the President had the authority, under the Taft-Hartley Act, to enjoin the union from continuing its strike, at least for eighty days. The critical factor upon which the injunction was based and sustained was a determination that even the temporary unavailability of one per cent of the industry's output might imperil the Nation's safety. Considerations that the injunction might infringe upon the workers' constitutional rights of free association, or perhaps the right *not* to work, fell, at least temporarily, before these findings. Should Congressional intervention—the difference between the *Youngstown* and *Steelworkers* cases—be so decisive? Would recourse to Taft-Hartley or other legislation by President Truman in 1952 have avoided the issues that made the *Youngstown* case so difficult? We need not, indeed cannot, answer that now. However, these cases illustrate the extent to which public and private interests merge and clash in controversies so vitally affecting the security of the Nation. The resolution of such cases is made no more simple or certain by the multitude of considerations that, while indisputably relevant, are outside the records before the courts.

On a less grand scale than the steel industry litigation, but perhaps no less significant, are the cases that have stemmed from the competition between the claims of national security and personal rights. The bulk of the many recent decisions concerning the contempt power of Congressional committees provides a graphic illustration. Some believe that these cases may be disposed of by the Court's balancing of the security of the Nation against the freedom of the individual litigant. If these are the appropriate weights to put in the scales, it is not surprising that the balance is usually struck against the individual. If balance we must, I wonder whether on the individual's side we might not also place the importance of our survival as a free nation. The issue, as I see it, is not the individual against society; it is rather the wise accommodation of the necessities of physical survival with the requirements of spiritual survival. Lincoln once asked, "[Is] it possible to lose the nation and yet preserve the Constitution?"[46] His rhetorical question called for a negative answer no less than its corollary: "Is it possible to lose the Constitution and yet preserve the Nation?" Our Constitution and Nation are one. Neither can exist without the other. It is with this thought in mind that we should gauge the claims of those who assert that national security requires what our Constitution appears to condemn.

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[45] 361 U.S. 39 (1959).

[46] 10 Complete Works of Abraham Lincoln 66 (Nicolay and Hay ed. 1894).

Naturally the radiations of security requirements have come before the Court in contexts other than Congressional investigations. Even more closely connected with the defense effort have been the decisions concerning the right to employment in government and industry.

One may compare, for example, the 1959 case of *Greene v. McElroy*[47] with last Term's decision in *Cafeteria Workers v. McElroy*.[48] In the former, a serious constitutional issue was raised by the Navy's action in denying, on questionable grounds, security clearance to a privately employed aeronautical engineer. This, in turn, effectively precluded him from pursuing his occupation. The Court was able, however, to dispose of the case on the non-constitutional ground that requirements of confrontation prescribed by existing law had wrongfully been ignored.[49] In *Cafeteria Workers*, on the other hand, where a short-order cook employed by a concessionaire on a military base was summarily refused further security clearance without hearing, explanation, or opportunity to rebut, the Court reached the constitutional question and, by a five-to-four vote, decided it against the employee. I joined Mr. Justice Brennan's dissent, which took the position that the Court, while conceding petitioner's right not to be injured arbitrarily by the Government, in fact made that right nonenforceable by refusing to accord petitioner any procedural protection.

One of the principal difficulties presented by these "security risk" cases is that the claim of necessity takes the form of an assertion of the right of secrecy. Thus, the claim, by its very nature, tends to restrict the ability of the Court to evaluate its merit. This in turn impairs the efficacy of judicial review as an instrument for preserving the guarantees of the Bill of Rights. While the dilemma is in some cases serious, *Cafeteria Workers*, the most recent expression of the Court's views on the subject, does not, in my judgment, represent a satisfactory guidepost for resolution of the problem.

Our enormous national commitment of defense will, of course, pose still additional, difficult problems for the courts. We have, in the past considered,[50] and will probably be called upon in the future to review,

[47] 360 U.S. 474 (1959).

[48] 367 U.S. 886 (1961).

[49] For decisions in a comparable vein, see Cole v. Young, 351 U.S. 536 (1956), limiting, through interpretation to those in "sensitive" positions, the power of the Executive summarily to dismiss government employees in the interest of "national security"; Vitarelli v. Seaton, 359 U.S. 535 (1959), requiring government agencies dismissing employees in nonsensitive positions on security grounds, to afford the employees an opportunity to see the charges against them and to confront adverse witnesses; Kent v. Dulles, 357 U.S. 116 (1958), upholding the right of citizens to travel freely in the absence of compelling restrictions clearly to be found in Congressional action.

[50] See, e.g., McKinney v. Missouri-K.-T.R.R., 357 U.S. 265 (1958); Hyland v. Watson, 287 F.2d 884 (6th Cir.), cert. denied, 368 U.S. 876 (1961). Cf. the recent decision of Australia's highest court invalidating a far reaching veteran's preference statute on the ground that with the World War II emergency past, the war power justification for such laws, under the Australian Constitution, had ceased. Illawarra District County Council v. Wickham, 101 Commw. L.R. 487 (Austl. 1959).

cases arising out of the effort to accord our large number of veterans special compensation or preferences in return for their service to the country. While recognizing the need for such programs, we are also asked to consider to what extent such preferences impinge on opportunities of other citizens, whose public service and welfare are no less deserving of recognition. Questions concerning the review of military procurement, in the light of claims of emergency need, expert judgment and secrecy of information are still largely unresolved. The problem of the extent to which members of the armed forces may properly express their political views to other troops, particularly subordinates in the chain of command, and to the public at large, are subjects of controversy. Questions of the right of the people to know what their government is doing, their right to travel, speak, congregate, believe, and dissent will arise again and again. It is to the courts that the task of adjudicating many of these rights is delegated. I am one who believes firmly that the Court must be vigilant against neglect of the requirements of our Bill of Rights and the personal rights that document was intended to guarantee for all time. Legislative or executive action eroding our citizens' rights in the name of security cannot be placed on a scale that weighs the public's interest against that of the individual in a sort of "count the heads" fashion. Democracy under our Constitution calls for judicial deference to the coordinate branches of the Government and their judgment of what is essential to the protection of the Nation. But it calls no less for a steadfast protection of those fundamentals imbedded in the Constitution, so incorporated for the express purpose of insulating them from possible excesses of the moment. Our history has demonstrated that we must be as much on guard against the diminution of our rights through excessive fears of our security and a reliance on military solutions for our problems by the civil government, as we are against the usurpation of civil authority by the army. That is the important lesson of the Court cases, most of which have arisen not through the initiative of the military seeking power for itself, but rather through governmental authorization for intervention of military considerations in affairs properly reserved to our civilian institutions.

In concluding, I must say that I have, of course, not touched upon every type of situation having some relation to our military establishment which the Court considers. Those to which I have pointed might suggest to some that the Court has at times exceeded its role in this area. My view of the matter is the opposite. I see how limited is the role that the courts can truly play in protecting the heritage of our people against military supremacy. In our democracy it is still the Legislature and the elected Executive who have the primary responsibility for fashioning and executing policy consistent with the Con-

stitution. Only an occasional aberration from norms of operation is brought before the Court by some zealous litigant. Thus we are sometimes provided with opportunities for reiterating the fundamental principles on which our country was founded and has grown mighty. But the day-to-day job of upholding the Constitution really lies elsewhere. It rests, realistically, on the shoulders of every citizen.

President Eisenhower, as he left the White House only a year ago, urged the American people to be alert to the changes that come about by reason of the coalescence of military and industrial power. His words were these:

> [T]his conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence—economic, political, even spiritual—is felt in every city, every state house, every office of the Federal Government. . . . [W]e must not fail to comprehend . . . [the] grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.
>
> [W]e must guard against the acquisition of unwarranted influence . . . by the military-industrial complex. . . .
>
> We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the . . . machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.[51]

Coming from one who was our great Field Commander in World War II and for eight years Commander-in-Chief as President of the United States, these words should find lodgment in the mind of every American. It is also significant that both his predecessor and his successor have conveyed the same thought in slightly different words.[52] I am sure that none of them thought for a moment that anyone was deliberately trying to change the relationship between the military and the civil government. But they realized, as we all must, that our freedoms must be protected not only against deliberate destruction but also against unwitting erosion.

We may happily note that the Constitution has remarkably weath-

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[51] N.Y. Times, Jan. 18, 1961, p. 22, cols. 5, 6.

[52] President Kennedy, in his special message to Congress on the defense budget delivered shortly after taking office, declared, "Neither our strategy nor our psychology as a nation—and certainly not our economy—must become dependent upon our . . . maintenance of a large military establishment. . . . Our arms must be subject to ultimate civilian control and command at all times. . . ." N.Y. Times, March 29, 1961, p. 16, cols. 1, 2.

Similarly, President Truman, on such occasions as his message to Congress urging the creation of a single Department of Defense, over which a civilian would preside, and his removal of General MacArthur as Commander of United Nations forces in Korea, reiterated these beliefs. 1945 Public Papers of the Presidents of the United States: Harry S. Truman 554–55, 558 (1961); 2 Truman, Memoirs 449 (1956).

ered a variety of crises. Some were as acute as those we face today. Today, as always, the people, no less than their courts, must remain vigilant to preserve the principles of our Bill of Rights, lest in our desire to be secure we lose our ability to be free.

DEFINITION AND GROWTH: ROSS ON THE HISTORICAL BACKGROUND OF THE 1968 ACT

The desecration of library books by marginal comment or removal of pages is not to be espoused. In one way, however, such actions may be taken as a measure of the utility of those articles so abused. This selection was torn from the collection of *The JAG Journal* (USN) held by each of two major libraries.[1]

When President Johnson signed the Military Justice Act of 1968 into law, he issued a statement briefly outlining the legal condition of American military personnel at various times in our history. He marked this Act as an advance equal to the promulgation of the Uniform Code of Military Justice in 1951 and said of the new statute's value to military personnel, "I am glad it goes to the root of the system they defend for all of us—the right of every citizen to justice and fairness under the law."[2]

The genesis of this landmark legislation is a challenging case study in the general question of how law develops: the forces for change and those which resist change appear and fade away; competition among interest groups for attention from the legislature causes delicate maneuvering and outcomes are governed by a host of external factors; finally, the adversary system hammers out something not totally objectionable to any of the major participants at a time when the Congress is ready and "law" is made.

That legislative history is equally valuable for the detail in which it exposes the growth of interplay between civilian and military law. General Crowder spent years trying to get the 1916 Articles of War through Congress; his disagreements with General Ansell were publicly aired in the committee battles preceding enactment of the 1920 Articles; and the Code of 1951 followed years of civilian studies, inter-service dispute, and extended hearings by both the House and Senate. However, all of those were dominated by a latent civilian-military confrontation which tended to cloud substantive issues. The progress of the 1968 Act was not immune from some of the same forces, but a distinctly different flavor came increasingly to dominate the process. "Reconciliation" might be the best one word for this new flavor because the civilian proponents of change found strong support from military sources on many points and the defenders of the military system found a surprising recognition of their arguments for unique military procedures and standards in many cases. All was not peace and gentleness, but the

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[1] Since restored through the courtesy of the Army Library.

[2] The full text is set out at 23 JAG J. 130 (1969).

prevailing sentiment was for progress within mutually acceptable limits.

Captain Ross, JAGC, USNR, provides the necessary background of this legislation and cogently summarizes the major changes. He identifies the impetus for change in most cases, and establishes a careful "audit trail" of each major change. There are further comments on this Act in the same issue of *The JAG Journal*; a collection of others meriting notice is provided.[3]

[3] Mounts and Sugarman, *The Military Justice Act of 1968*, 55 A.B.A.J. 470 (1969); Hannigan, *Manual for Courts-Martial, 1969 (Revised Edition)*, 11 AFJAG L. REV. 172 (1969); McCoy, *Due Process for Servicemen—The Military Justice Act of 1968*, 11 MIL. L. REV. 66 (1969); *see* Symposium—*Military Law*, 10 AM. CRIM. L. REV. 1 (1971).

THE MILITARY JUSTICE ACT OF 1968: HISTORICAL BACKGROUND†

*Joseph E. Ross**

Almost immediately after the Uniform Code of Military Justice went into effect on May 31, 1951, recommendations for improvement of the new system of military justice began to be made—by the services, by the judges of the Court of Military Appeals, by civilian agencies, and by individual citizens interested in military justice. Continuously thereafter until the present time such recommendations for change persisted. Although there had been a few changes made in the Code between 1951 and 1968, including the important revision of Article 15 in 1962,[1] it was not until the enactment of the Military Justice Act of 1968[2] that a substantial revision of the military justice code was made. As it turned out, the new law was the synthesis of recommendations received from all of the mentioned sources.

I. SERVICE RECOMMENDATIONS

Many of the recommendations for change came from the "Code Committee." The Code Committee, consisting of the judges of the Court of Military Appeals and the Judge Advocates General,[3] was established by Article 67(g), UCMJ,[4] to meet annually to make a comprehensive survey of the operation of the Code and to make an annual report thereon. In its first annual report the Committee sub-

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†Reprinted with permission of the author from 23 JAG J. 125 (1969).

*Chief, American Law Division and Assistant Director for Research and Analysis, The Library of Congress. B.A., 1943; LL.B., 1948, St. John's University. At the time this article was written, the author was a Captain in the Judge Advocate General's Corps, USNR.

[1] Pub. Law 87–648, sec. 1, 76 Stat. 447 (1962). Other revisions included the addition of Article 58(a) in 1960 (Pub. Law 86–633, sec. 1(1), 74 Stat. 468 (1960)), and Article 123a in 1961 (Pub. Law 87–385, sec. 1(1), 75 Stat. 814 (1961)), certain minor changes made by the Navy JAG Corps Act in 1967 (Pub. Law 90–179, 81 Stat. 546 (1967)), and the establishment of the Court of Military Appeals as the U.S. Court of Military Appeals under Article I of the Constitution in June 1968 (Pub. Law 90–340, 82 Stat. 178 (1968)).

[2] Pub. Law 90–632, 82 Stat. 1335 (1968).

[3] Including the General Counsel of the Department of Transportation.

[4] 10 U.S.C. 867 (g).

mitted several proposals for change and made three recommendations to the Congress:

(1) That legislation be enacted preventing special courts-martial from adjudging bad conduct discharges,

(2) That Congress take no legislative action on the other items herein enumerated at this time,

(3) That this Committee be authorized to file its annual report at the close of each calendar year.[5]

In its next report,[6] the Code Committee recommended numerous legislative changes. Interestingly, they included such proposals as one-officer general and special courts-martial, extension of the time to file a petition for new trial under Article 73, UCMJ[7] from one year to two years, the use of non-verbatim records of trial in certain general court-martial cases, and certain other procedural reforms. In one form or another these proposals came to be included in the Military Justice Act of 1968. The Committee also recommended increasing the non-judicial punishment powers of commanding officers, and the enactment of a specific bad check article. The latter proposals were enacted into law in revised form in 1962 and 1961 respectively.[8] In 1954, no action having been taken on the previous recommendations, the Code Committee reiterated them, and recommended hearings on them before the Armed Services Committees.[9] In 1955, the proposals were advanced by the Department of Defense and formally introduced in the Senate and House of Representatives.[10] Hearings on the House bill were initiated in the spring of 1956 by the House Armed Services Committee, but were not concluded before the adjournment of Congress.

The Code Committee continued, unsuccessfully, to urge adoption of its legislative proposal, which had come to be known as the "Omnibus Bill," in 1957, 1958 and 1959. In 1960, however, unanimity of the members of the Committee ended when the Army member withdrew the Army's support of the bill, in favor of a sweeping proposal for reform made to the Secretary of the Army by a committee of general officers headed by Lieutenant General Herbert B. Powell, U.S. Army. The Powell Report, which is contained in the Army's section of the 1960 Code Committee Report,[11] and which was charac-

[5] Code Committee Report, 5/31/51–5/31/52. The Navy and Coast Guard disagreed with the first recommendation.

[6] Code Committee Report, 6/1/52–12/31/53.

[7] 10 U.S.C. 873.

[8] Pub. Law 87–648, sec. 1, 76 Stat. 447 (1962) (increasing non-judicial punishment powers); Pub. Law 87–385, sec. 1(1), 75 Stat. 814 (1961) ("bad check" law).

[9] Code Committee Report, 1/1/54–12/31/54.

[10] S. 2133 and H.R. 6583, 84th Cong., 1st Sess. (1955).

[11] Code Committee Report, 1/1/60–12/31/60.

terized by the then Navy Judge Advocate General as tending to move military justice back toward the old "paternalistic" system, thus resulted for the first and only time in there being no joint report by the members of the Code Committee.

In 1961, the staff of the House Armed Services Committee suggested that, because of the press of legislative business in the Congress, individual sections of the Omnibus Bill deemed most important in the administration of military justice be submitted separately for the consideration of the Congress. Accordingly, three separate bills were drafted and designated respectively, for reference purposes, as the "A", "B", and "C" Bills. The "A" Bill provided for increased authority of commanders to impose nonjudicial punishment. With certain changes, it was subsequently enacted into law in 1962. The "C" Bill provided for a specific "bad check" article, and it was enacted into law in 1961, as aforesaid. The "B" Bill included provisions for the single-officer court, increased authority for law officers, and procedural changes, many of which came to be included in the Military Justice Act of 1968. In 1962 two more bills, labeled "D" and "F", were proposed, "D" providing for pretrial sessions before law officers, and "F" for improvement of sentence execution procedures.[12] These measures were not acted upon.

In 1963, the Code Committee combined the "B" and "D" Bills into a single new proposal denominated the "G" Bill, adding to it for the first time the significant recommendation that a bad conduct discharge may not be adjudged by a special court-martial unless the accused has had the opportunity for representation by qualified lawyer counsel. In the same report,[13] the Code Committee also proposed an "H" Bill modifying Article 73 to extend the time limit for petitions for new trial from one to two years, and, significantly, authorizing the Judge Advocate General to consider petitions for new trial in all court-martial cases, and not merely those which included a punitive discharge or confinement for one year or more. Due to the press of legislative business, however, no hearings were held on the proposals in 1963, 1964 or 1965. In 1966, however, the "G" and "H" Bills were introduced in both the House (H.R. 273, 277) and the Senate (S. 2096, 2097), and hearings were held on these and other proposals of Senator Sam J. Ervin, Jr., before joint sessions of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, and a special subcommittee of the Senate Armed Services Committee.[14] No legislation was reported out of committee following the hearings. In

[12] An "F" Bill, abolishing the summary court-martial, had been drafted but was not agreed upon by all of the members of the Code Committee.

[13] Code Committee Report, 1/1/63–12/31/63.

[14] *See* "CONGRESSIONAL PROPOSALS," *infra* p. 277.

August 1967, however, Congressman Charles E. Bennett of Florida introduced H.R. 12705, a bill combining the "G" and "H" Bills of the Code Committee. Hearings on H.R. 12705 were conducted before the House Committee on Armed Services on September 14 and October 26, 1967. Subsequently, this bill, with certain amendments, was redesignated by Mr. Bennett as H.R. 15971, was reported favorably by the House Armed Services Committee on May 21, 1968, and was passed by the House on June 3, 1968. The bill as thus passed included:

1. A new kind of special court-martial which included a law officer;
2. Single-officer general and special courts-martial on request of the accused;
3. Lawyer counsel for an accused as a prerequisite to the adjudging of a bad conduct discharge;
4. Pretrial sessions in general and special courts-martial with law officers;
5. Various procedural changes;
6. Revisions to Article 73 concerning petitions for new trial;
7. Authority for the Judge Advocate General to vacate or modify the findings or sentence in certain court-martial cases.

As explained hereinafter, substantial Senate amendments were to be made before H.R. 15971 became the Military Justice Act of 1968.

II. RECOMMENDATIONS BY CIVILIAN AGENCIES

Numerous proposals for revision of the Uniform Code of Military Justice have been made by various individuals and agencies interested in military justice—bar associations, veterans' organizations, law schools, and members of the bar. Notable because of their contribution to the legislation which ultimately became the Military Justice Act of 1968 are these:

A. AMERICAN LEGION

Following the release of an extensive report on the Uniform Code of Military Justice and the Court of Military Appeals in 1956, the American Legion sponsored a bill in furtherance of the report. The bill was introduced in the House as H.R. 3455 in January 1959. The philosophy of this bill was the removal of every vestige or possibility of command influence upon the decisions of courts-martial, and the placement of the administration of military justice more nearly in line with civilian practice. Among the specific changes recommended

were: prohibiting court-martial trials in time of peace for purely civilian-type felony offenses;[15] requiring lawyers on all inferior courts, the lawyer to be under the rating authority and command of the Judge Advocate General; authorizing the Court of Military Appeals to prescribe rules of procedure for all courts-martial; granting law officers of courts-martial the full status of a judge; and placing all boards of review under the Secretary of Defense. As might be expected, the American Legion proposal was not greeted with enthusiasm by the services and no congressional action was taken thereon.

B. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.

On March 1, 1961, a special committee on military justice of the Association of the Bar of the City of New York concluded that the "Omnibus Bill" was fine as far as it went, but that it did not go far enough. Concerning the American Legion bill the report commented that its reflection of dissatisfaction with the administration of the present system of military justice and general lack of satisfaction in the integrity and competence of military lawyers was unfounded. The report proposed no sweeping changes; instead it proposed corrective legislation within the existing framework of the Code.

C. PROFESSOR JOSEPH M. SNEE, S.J.

Father Snee is a professor of law at the University of Texas School of Law and a prominent military justice commentator. He has made several recommendations for improvement in the Uniform Code of Military Justice in recent years. As early as 1955 he suggested such changes as:

1. One-officer courts;
2. Military judges vice law officers;
3. Courts of military review vice boards of review;
4. Numerous procedural changes, many of which have since come to be adopted.

III. CONGRESSIONAL PROPOSALS

The two leading proponents of revision of military law in the Congress have been Senator Sam J. Ervin, Jr., a member of the Senate

[15] Interestingly, a case which has had substantially the same effect has recently been decided by the U. S. Supreme Court. In O'Callahan v. Parker, 393 U. S. 258 (1969), the Court held that a court-martial has no jurisdiction to try a military member who commits an offense in the civilian community which is not "service connected."

Committees on the Judiciary and the Armed Services, and Congressman Charles E. Bennett, a member of the House Armed Services Committee.

The Subcommittee on Constitutional Rights of the Senate Judiciary Committee, which is chaired by Senator Ervin, has long included in its area of concern the constitutional rights of servicemen. In early 1962, therefore, the Subcommittee conducted hearings to review, *inter alia*, "the rights that Congress had in mind when the Uniform Code was enacted." The Subcommittee heard testimony from numerous witnesses, including the Judge Advocates General and the judges of the Court of Military Appeals, and solicited voluminous information on the operation of the Code and on administrative discharge procedures. The Subcommittee also conducted an extensive field investigation in Europe "to obtain facts and views as to the adequacy of our present system of military justice." Subsequently, Senator Ervin caused to be introduced in the Senate 18 bills,[16] which would, among other things:

1. Change the title of law officer of general courts-martial to military judge, and establish independent trial judiciary systems in each service;
2. Establish a JAG Corps in the Navy;
3. Establish a Court of Military Review in each service to replace boards of review;
4. Broaden the prohibition against command influence;
5. Afford each accused the opportunity for lawyer counsel before a bad conduct discharge can be adjudged;
6. Require a law officer in bad conduct discharge special courts-martial;
7. Authorize one-officer general and special courts-martial;
8. Abolish the summary court-martial; and
9. Make numerous changes in the procedure and review of administrative discharge cases.

Joint hearings were conducted on Senator Ervin's bill before subcommittees of the Judiciary and Armed Services Committees in 1966. Again, as in 1962, numerous witnesses testified, some in support of and others in opposition to the proposals. No further action was taken on them, however, in the 89th Congress. Early in the 90th Congress Senator Ervin, joined by other senators, introduced S. 2009, a consolidation and refinement of his 18 previous bills. S. 2009 would enact the "Military Justice Act of 1967." The Defense Department objected to numerous provisions of the proposed act, and no hearing or other action was conducted thereon.

Late in the 89th Congress, and after the Ervin hearings in the Senate, Congressman Bennett introduced in the House H.R. 16115, a

[16] S. 745–762, 89th Cong., 2nd Sess. (1966).

consolidation, with some amendments, of the 18 Ervin bills. As soon as the 90th Congress convened in January 1967, Mr. Bennett introduced the same proposal in the new Congress as H.R. 226. As with S. 2009, the Defense Department objected to numerous provisions of H.R. 226, and no further action was taken thereon.

As indicated previously, in August 1967 Congressman Bennett introduced the Code Committee's "G" and "H" proposals as H.R. 12705, which ultimately became H.R. 15971, and which passed the House in June 1968.

IV. THE ERVIN AMENDMENTS

In late June 1968, after H.R. 15971 had been passed by the House and referred to the Senate Armed Services Committee, Senator Ervin advised the services that, while he was gratified that the House had passed the bill, he did not regard the bill as containing the "minimum reforms of the Uniform Code of Military Justice necessary to return the military system of criminal justice to the leading position it so recently occupied in American law." He proposed to add to H.R. 15971 many of the provisions of S.2009, specifically:

1. Redesignation of the law officer as military judge;
2. Statutory creation of the field judiciary;
3. Waiver of trial by full-member general and special courts upon the motion of the defendant, without the need for approval by the law officer and the convening authority;
4. Removal of the existing limitation on waiver of summary court-martial by a serviceman;
5. Requirement of legally qualified counsel in all special courts;
6. Requirement of a military judge in all special courts if a bad conduct discharge is to be adjudged;
7. Redesignation of the boards of review as Courts of Military Review as provided in title IV of S. 2009;
8. Revision of the language in Article 37 with respect to command influence.

In reply Senator Ervin was advised that many of his proposals were acceptable in principle, but that the Defense Department had objected to many specific provisions of S. 2009. The principal problem areas were these:

1. While the services agreed that the one-officer court concept was desirable, the elimination of the convening authority's right to consent thereto, as proposed by Senator Ervin, was not acceptable;
2. To require military judges in all bad conduct discharge special courts-martial was objectionable to the Navy because of the wide dispersion of its special court-martial commands and the inaccessibility of military judges to them;
3. To require the detail of qualified counsel for the accused in all

special courts-martial would require too many additional lawyers;

4. To give the accused the right to object absolutely to trial by summary court-martial could impede the efficient administration of military justice, especially if a lawyer counsel were required in all special courts-martial;
5. While the services favored the field judiciary concept, they did not favor it for special court-martial cases;
6. The proposed expansion of Article 37 with its limitations on fitness and efficiency reports would hurt the career advancement of court members and counsel.

Numerous discussions between the services and the Senate Armed Services staff followed. In the end, the positions of both sides were modified to some extent. The convening authority consent was eliminated from the one-officer court concept; an exception for physical impossibility or military exigencies was made to the requirement for military judges in all bad conduct discharge special courts-martial; the absolute requirement of detailing a qualified counsel for the accused in *all* special courts-martial was relaxed to provide the accused with the opportunity for such counsel upon request; the objection to the modification to the right to refuse a summary court-martial was thus eliminated; the field judiciary concept was modified to apply only to general courts-martial; and the Article 37 proposal was also modified. With matters as thus agreed upon, it was smooth sailing for H.R. 15971 through the Senate, and, as modified, through the House. The President signed the bill on 24 October 1968. The Military Justice Act of 1968 became the law.

For convenience of the reader, each provision of the Uniform Code of Military Justice substantially affected by the 1968 Act is listed below with references to its legislative history:

*§ 816. Art. 16. *Courts-martial classified*
References: H.R. 6583, 84th Cong., sec. 1(f); S. 752, 89th Cong., sec. 2; H.R. 273, 89th Cong., sec. 1(2); S. 2009, 90th Cong., sec. 302; H.R. 226, 90th Cong., sec. 2(b).
§818. Art. 18. *Jurisdiction of general courts-martial*
References: H.R. 273, 89th Cong., sec. 1(3).
§819. Art. 19. *Jurisdiction of special courts-martial*
References: S. 750, 89th Cong., sec. 1; S. 2009, 90th Cong., sec. 303; H.R. 226, 90th Cong., sec. 2(d).
§820. Art. 20. *Jurisdiction of summary courts-martial* References: S. 759, 89th Cong.; S. 2009, 90th Cong., sec. 304; H.R. 226, 90th Cong., sec. 2(e).
§826. Art. 26. *Military judge*
References: S. 745, 89th Cong., sec. 3; H.R. 273, 89th Cong., sec. 1(7); S. 2009, 90th Cong., sec. 306; H.R. 226, 90th Cong., sec. 2(g)(2).

*Title 10, U.S. Code.

§827. Art. 27. *Detail of trial and defense counsel*
References: S. 2009, 90th Cong., sec. 307.
§829. Art. 29. *Absent and additional members*
References: S. 752, 89th Cong., sec. 5(c); H.R. 273, 89th Cong., sec. 1(9); S. 2009, 90th Cong., sec. 308; H.R. 226, 90th Cong., sec. 2(i).
§837. Art. 37. *Unlawfully influencing action of court*
References: S. 749, 89th Cong.; S. 2009, 90th Cong., sec. 310; H.R. 226, 90th Cong., sec. 3(a).
§839. Art. 39. *Sessions*
References: S. 757, 89th Cong.; H.R. 273, 89th Cong., sec. 1 (12); S. 2009, 90th Cong., sec. 312; H.R. 226, 90th Cong., sec. 5.
§840. Art. 40. *Continuances*
References: H.R. 273, 89th Cong., sec. 1(13); H.R. 226, 90th Cong., sec. 6(a); S.2009, 90th Cong., sec. 313.
§841. Art. 41. *Challenges*
References: S. 752, 89th Cong., sec. 8; H.R. 273, 89th Cong., sec. 1(14); S. 2009, 90th Cong., sec. 314; H.R. 226, 90th Cong., sec. 6(b).
§842. Art. 42. *Oaths*
References: H.R. 273, 89th Cong., sec. 1(15); S. 2009, 90th Cong., sec. 315; H.R. 226, 90th Cong., sec. 6(c).
§845. Art. 45. *Pleas of the accused*
References: H.R. 273, 89th Cong., sec. 1(16), S. 2009, 90th Cong., sec. 316; H.R. 226, 90th Cong., sec. 8.
§851. Art. 51. *Voting and rulings*
References: S. 752, 89th Cong., sec. 9; H.R. 273, 89th Cong., sec. 1(17); S. 2009, 90th Cong., sec. 318; H.R. 226, 90th Cong., sec. 10(b).
§852. Art. 52 *Number of votes required*
References: H.R. 273, 89th Cong., sec. 1(19); S. 2009, 90th Cong., sec. 319; H.R. 226, 90th Cong., sec. 11.
§854. Art. 54. *Record of trial*
References: H.R. 273, 89th Cong., sec. 1(20); S. 2009, 90th Cong., sec. 320; H.R. 226, 90th Cong., sec. 12.
§857. Art. 57. *Effective date of sentences*
References: This revision of Article 57 was originated by the Army and was included in the DOD legislative program for the 90th Congress. The proposal was formulated following complaints, concerning the notorious Captain Levy case, that the UCMJ did not permit "bail" pending appellate review.
§866. Art. 66. *Review by board of review*
References: S. 748, 89th Cong.; S. 2009, 90th Cong., sec. 401; H.R. 226, 90th Cong., sec. 2(b) (1).
§868. Art. 68. *Branch offices*
References: S. 2009, 90th Cong., sec. 402(b); H.R. 226, 90th Cong., sec. 2(b) (2).
§869. Art. 69. *Review in the office of the JAG*
References: H.R. 277, 89th Cong., sec. 1(1); S. 2009, 90th Cong., sec. 402(d); H.R. 226, 90th Cong., sec. 14(a).
§873. Art 73. *Petition for a new trial*
References: H.R. 277, 89th Cong., sec. 1(2); S. 2009, 90th Cong., sec. 402(e); H.R. 226, 90th Cong., sec. 14(b).

IV. TOTAL LEGAL SERVICE

DESAUSSURE
ESGAIN and SOLF
NOONE
BAXTER
SEWELL
VAGTS

TOTAL LEGAL SERVICE: DESAUSSURE ON THE LAWS OF AIR WARFARE

This pioneering article by Colonel Hamilton DeSaussure discusses the dilemma created by the inadequacies of the laws of war, especially the law applicable to air operations in light of the need of air planners and flight personnel to know their rights and duties under the laws of war. This early recognition of the chaotic state of the laws of aerial warfare has been widely acknowledged today. The work of the International Committee of the Red Cross (frequently referred to as the ICRC) from 1969 to 1973 has resulted in two draft Protocols to the 1949 Geneva Conventions. The first Protocol concerns international armed conflict and the second Protocol deals with internal or civil war conflicts. These draft Protocols have been presented for consideration to a diplomatic conference of states, the first session of which met in 1974 in Geneva, Switzerland. The objective of these efforts is to improve and develop the laws of war.

In order to make more knowledge readily available to air planners and aircrews, new educational materials and programs are presently being prepared in accord with a new DOD Directive establishing a laws of war program.[1]

The Air Force has initiated a project to prepare a complete statement of the laws of aerial warfare and when this work is completed the United States will be the first nation to have completed such an effort. But this is in our tradition. As a result of the work of Dr. Lieber during the American Civil War, the United States became the first nation to clearly state the laws of war as they applied to land operations. The present Army Field Manual 27–10[2] can be traced to Dr. Lieber's earlier work. In like regard, Colonel DeSaussure may be regarded as the "father" of an effort at clearly stating the laws of war as they pertain to air operations.[3]

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[1] Department of Defense Directive No. 5100.77 (Sept. 5, 1974).

[2] U.S. DEPARTMENT OF ARMY, FIELD MANUAL NO. 27–10, THE LAW OF LAND WARFARE (1956).

[3] Introductory Abstract prepared by Captain Richard J. Erickson, USAF, Editor, *The Air Force Law Review*.

THE LAWS OF AIR WARFARE: ARE THERE ANY?†

*Hamilton DeSaussure**

Activity has increased within the United Nations recently to reexamine the laws of war and to update them to meet the modern conditions of armed conflict. In a resolution adopted unanimously on 13 January 1969, UN Res 2444,[1] the General Assembly emphasized the necessity for applying basic humanitarian principles to all armed conflicts and affirmed the three principles laid down by the International Committee of the Red Cross at their Vienna conference in 1965. First, that the rights of the parties to a conflict to adopt means of injuring the enemy are not unlimited; second, that the launching of attacks against the civilian populations *as such* is prohibited; and third, that "A distinction must be made between persons taking part in hostilities and the civilian population with the view of sparing the latter as much as possible." The U.N. General Assembly Resolution then invited the Secretary General, in consultation with the International Committee of the Red Cross, to study how to better apply the existing laws of war for "the better protection of civilians, prisoners and combatants and for the further limitation on certain methods and means of warfare." All states were asked to ratify the Hague Laws of War Conventions of 1899 and 1907, the Geneva Gas Protocol of 1925, and the Geneva Conventions of 1949. Pursuant to that resolution, the Secretary General circulated for comment among member states and international organizations a report entitled "Respect for Human Rights in Armed Conflicts."[2] His report contains a historical survey of the existing international agreements pertaining to the laws of war, urging those states which have appended reservations to withdraw them. The Secretary General requested that "special emphasis be

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*B. F. Goodrich Professor of Law, University of Akron School of Law. Professor DeSaussure spent the past academic year as Associate Director of the Institute of Air and Space Law at McGill University. At the time this article was written, the author had retired from the United States Air Force with the rank of Colonel and was an Associate Professor of Law at Akron University Law School.

[1] United Nations General Assembly Resolution, 2444, XXIII, 13 January 1969.

[2] Report of Secretary General, Respect for Human Rights in Armed Conflict, A/7720, 20 November 1969.

placed on the dissemination of the conventions to military personnel at all levels of authority, and on the instructions of such persons as to the IR principles and on the IR application." The observation was made that both juridical and military experts are needed to study this subject "so as to achieve, under the conditions of modern warfare, an adequate comprehension of the full range of technical and legal problems."

The Secretary General makes no specific plea for a convention regulating air warfare, but he does seem to indict "massive air bombing" by noting that, in some cases, this type of warfare has contributed to a very broad interpretation of what constitutes a permissible military objective. He states that strategic bombing has, in instances, been used for intimidating, demoralizing, and terrorizing civilians "by inflicting indiscriminate destruction upon densely populated areas." In the replies to the report, only Finland has specifically adverted to the need for a codification of the laws of air warfare.

This resolution was the result of a UNESCO convened Conference on Human Rights in Teheran in April of 1968. There, Resolution XXIII was adopted by the Conference with only one abstention and no votes against it. It was couched in stronger terms than later used in U.N. Resolution 2444, referring to the widespread violence and brutality of our times, including "massacres, summary executions, tortures, inhuman treatment of prisoners, killing of civilians in armed conflicts and the use of chemical and biological means of warfare including napalm bombing."[3]

With the background of the U.N. Resolution 2444 and the Teheran declaration, the ICRC decided to expand its scope of studies to include consideration of the laws of war as they apply to the regulation of the conduct of hostilities. A committee of experts of the ICRC convened in February, 1969 and formulated a report entitled "Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts."[4] It is the most authoritative treatment of the laws of war since World War II. It was the culmination of their observations made during the last 20 years of perennial armed conflicts, especially in Korea, the Middle East, Vietnam and the Yemen. The Red Cross believed it necessary as a result to consider the means of combat and the relation between combatants themselves.

The increased emphasis given to the regulation of armed conflict by the ICRC and the U.N. General Assembly makes it all the more necessary for air planners and flyers to know their rights and duties under the laws of war.

[3] Final Act of the International Conference on Human Rights Resolution, XXIII. Teheran, April—May 1968.

[4] International Committee of the Red Cross, Report of Experts, Prepared for Presentation to the 21st International Conference of the Red Cross at Istanbul, Turkey in September 1969.

There is no dearth of opinion that in the matter of air warfare there are, in fact, no positive rules. Air Marshall Harris, the famous chief of the British Bomber Command in World War II, wrote shortly after its conclusion that "In the matter of the use of aircraft in war, there is, it so happens, no international law at all."[5] This view has been echoed in more recent times by well-known international lawyers who have specialized in studies on the laws of war. "In no sense but a rhetorical one," wrote Professor Stone in 1955, "can there still be said to have emerged a body of intelligible rules of air warfare comparable to the traditional rules of land and sea warfare."[6] Professor Levie labeled the nonexistence of a code governing the use of airpower in armed conflict one of the major inadequacies in the existing laws of war.[7] While the view of Air Marshall Harris reflects a certain hopeless attitude toward any attempt to regulate this important form of warfare, the views of Professors Stone and Levie contain pleas to focus effort on its regulation and clarification.

There are only two provisions of existing international legislation which were drafted with the regulation of air warfare specifically in mind. One was the 1907 Hague declaration prohibiting the discharge of projectiles and explosives from balloons "or by other new methods of a similar nature." It was never ratified by major powers. With the introduction of the aircraft into World War I with its capacity for guided flight, the declaration became an open nullity.

The other provision of conventional law specifically framed to regulate air warfare is article 25 of the 1907 Hague Convention respecting the laws and customs of war on land (H.C. IV). That article provided that "The attack or bombardment, *by whatever means*, of towns, villages, dwellings, or buildings which are undefended is prohibited." The negotiating record shows that the words "by whatever means" were inserted specifically to regulate bombing attacks by air. It has been frequently referred to as a basis for seeking to limit the air operations of belligerents, and for protesting the declared illegal air activity of an enemy. However, undefended cities, in the historic sense, meant only those in the immediate zone of ground operations which could be seized and occupied by advancing ground forces without the use of force. In this sense the concept of the undefended locality has proved as empty in air combat as the balloon declaration. These two provisions so utterly ignored in the use of airpower by belligerents are the total sum of formal rules agreed to by any states on the conduct of hostilities from the airspace.

One official and ambitious attempt was made to completely codify

[5] A. Harris, Bomber Offensive 177 (1947).

[6] J. Stone, Legal Controls of International Conflicts 609 (1959).

[7] H. Levie, Report to the New York Bar Association, *Major Inadequacies in the Existing Laws of Armed Conflict* (1970).

the laws of air warfare after World War I. At the Washington Conference on the Limitation of Armaments in 1921, a resolution was unanimously approved by the United States, the United Kingdom, France, Italy, and Japan which called for a commission of jurists to convene at the Hague to study the subject. Legal experts from those countries and the Netherlands met there from December 1922 to February 1923 and framed an all-embracing codification of the subject intended to be a compromise between the "necessities of war and the requirements of the standards of civilization."[8] Their rules were never ratified, even by the parties to the Conference, but do reflect the only authoritative attempt to set down completely the air warfare rules. Prior to World War II, certain nations did indicate their intent to adhere to these rules, notably Japan in 1938 in their China campaign, but they had little influence in World War II.

This paucity of conventional rules has left airmen stranded for authoritative and practical guidance. It is true the airman is subject to the general laws of war to the same general extent as the sailor and the soldier, but where does he look for special rules governing his air activity? The British *Manual of Air Force Law* dispensed with any effort to formulate air warfare rules by stating in a footnote that in the absence of general agreement, it was impossible to include in that manual a chapter on air warfare.[9] The authoritative *U.S. Army Field Manual (FM 27–10)* on the law of land warfare, apart from references contained in the Geneva Conventions of 1949 respecting the status of aircrews as prisoners of war and medical aircraft, only refers to air activities in time of armed conflict in four instances. What a skimpy source of guidance for the inquiring airman when one notes the extensive scope of intended guidance of the draft Hague Rules of 1923 where such subjects as the marking of aircraft, aerial bombardment, the use of incendiary and explosive bullets were covered. Today's U.S. Air Force crewman about to enter a combat theater is still referred officially to the *Army Field Manual* for official instruction.

Three dilemmas confront the regulation of air hostilities. The Air Force draft, no more than the Hague Rules of 1923, can fully lay down the existing rules of air combat without a certain concordance among the major air powers and among belligerents as to how these dilemmas should be resolved. The first of these dilemmas is the permissible scope of the military objective. Inherent in this problem is whether in air warfare there is any realistic distinction to be made between combatants and noncombatants? Also, is there a middle category, the so-called quasi-combatant, which comprises the industrial work force

[8] From the Rapporteurs Summary *International Law and Some Current Illusions* (J. B. Moore, Rep. 1924).

[9] British Manual of Air Force Law 2 (1944).

of the enemy within the military objective. The U.N. Resolution 2444 stated the civilian population should not be the object of attack as such. Are civilians the direct object of attack when vital industrial and strategic targets are in the immediate vicinity, and how much bombing transfers civilians from the indirect object category to a direct object one? The late Professor Cooper in a lecture to the Naval War College in 1948, termed the definition of the military objective and the bombing of the civilian population the most crucial issue confronting any attempt to regulate this subject. The Secretary-General does recommend an alternative to arriving at an acceptable and agreed-upon definition of the military objective. This would be an enlargement of the concept of safety or protected zones to include specified areas where women, children, elderly, and sick could be located with immunity from air attack. Such areas would contain no objectives of military significance nor be used for any military purpose. They would have to be specially and clearly marked to be visible from the air. To be effective there would have to be an adequate system of control and verification of these zones. This verification would be carried out either by some independent agency as the ICRC or by one or more nonbelligerent nations acting in the capacity of a protecting power.[10] There is ample precedent for the creation of such protected areas in the 1949 Geneva Conventions.[11] The sick and wounded and civilian Geneva Conventions contain as annexes, draft agreements hopefully to be signed by potential belligerents before the outbreak of hostilities which provide for their establishment. It is specified that such zones are to comprise only a small part of the belligerent's territory, that they be thinly populated, and that they be removed and free from all military objectives or large industrial or administrative establishments. They may not be defended by military means (which includes the use of antiaircraft weapons or the use of tactical fighter aircraft or guided weapons). A concept of protected zones incorporating a broader category of the civilian population to be sheltered is an alternative to the concept of the undefended town or the open city which has not found favor in actual practice. There are some who do not believe the establishment of safety zones for potentially large segments of the civilian population is practicable. To be effective it is thought these zones would require thousands of square miles which would create insurmountable logistics problems and inevitably cause the areas to be used unlawfully for military advantages.[12]

Perhaps, however, the immunized areas need not be so broad. If one grants that the industrial work force, those actively engaged in

[10] A/7720, note 2, *supra* at 49, 50.

[11] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Field (TIAS 3362); and Geneva Convention for the Protection of Civilians, (TIAS 3365).

[12] See Levie, *op. cit. supra* note 7 at 45.

work directly sustaining the war effort of the belligerent, really have no entitlement to immunity, the physical breadth of the protected areas could be reduced. Such zones are a possible alternative to the continually frustrating efforts to pin down the elusive scope of the military objective. The Hague commission of jurists' definition of the military objective is a case in point. Military forces; military works; military establishments or depots; factories engaged in the manufacture of arms, ammunition, or distinctively military supplies; lines of communication or transportation used for military purposes only could be bombed from the air. This was hardly broad enough to cover the enemy's marshalling yards, his industrial centers, his shipping facilities, and means of communication. Moreover, cities, towns, and villages not in the immediate neighborhood of ground operation were prohibited.[13] This proved too limited when such cities and towns, far removed from the ground action, were known to be vital to the enemy's war effort. The totality of World War II saw both the Allies and the Axis expand considerably on the military objective. The German Luftwaffe destroyed Warsaw, Rotterdam, and Coventry by air very early in the war. The first thousand bomber raid of the war was launched by the British on Cologne the night of 30 May 1942 and destroyed 12 percent of the city's industrial and residential sections and caused 5,000 casualties.[14] It set the tone for the whole British night-bomber offensive against the Third Reich; the concept that area bombing of important industrial centers was best suited to bring Germany to her knees. U.S. forces, with their superior navigational aids, did seek to confine their targets to individually selected and identified factories, oil refineries, industrial plants, and shipyards in Europe, but in the Far East, Tokyo and Yokohama were saturated with explosive and fire bombs because of the Japanese shadow industries, the war production and parts-making in the individual home. The first night air raid by U.S. superfortresses in the Far East occurred on 9 March 1945 over Tokyo, and it is reported that 280 of these bombers destroyed several square miles of the center of the city. In the Korean conflict, precision bombing was again emphasized by the Air Forces (mostly U.S.) of the U.N. Command. The repair ships, docks yards, and military warehouses of North Korea were bombed without too much damage to the surrounding city. In the Vietnamese conflict, however, area or saturation bombing has been reintroduced, this time to penetrate the vast jungle canopy which serves as a protective layer for the network of Vietcong and North Vietnamese storage areas, communication and transportation complexes, and command posts.

[13] Hague Rules of Air Warfare Article, 24 (2) (1923).
[14] *See* 28 Air Force Magazine 34 (1945).

Both the charter for the trial of major war criminals for Europe and for the Far East define the wanton destruction of cities, towns, or villages, or devastation not justified by military necessity, as a war crime and inhumane acts committed against the civilian population as a crime against humanity.[15] Several high German Air Force officers were indicted for war crimes, notably Field Marshall Goering, and Generals Milch and Speidel. However, none were tried for their part in air operations.[16] It has been argued ably that the situation existed because both sides had equally participated in such attacks from the air, and therefore trial of Axis and Japanese leaders on this charge was inappropriate.[17] But was it because the evidence gathered did not substantiate a charge of wanton destruction in air attacks?

The ICRC has drawn a distinction between occupation or tactical bombardments and strategic ones. In the former category are those air raids closely allied to ground fighting. The experts suggested the institution of open localities for the protection of civilians. In strategic bombardments the experts believed the military objective must be sufficiently identified by the attacking force and that any loss to civilian life must be proportionate to the military advantage to be secured. Whenever the principle of proportionality might be violated, the combatant should refrain from the attack.[18] The experts fail, however, to adequately define what constitutes a military objective just as did the Hague Commission of Jurists. It is manifest they do not endorse strategic area bombing. They cite the proposition that to "attack without distinction, as a single objective, an area including several military objectives at a distance from one another is forbidden whenever elements of the civilian population or dwellings, are situated in between." While neither the Red Cross nor the Secretary General condones area bombing, belligerents are not likely to forego a valuable strategic option for air attacks which has proved so helpful in securing a more favorable and quicker termination of the conflict. Like the philosophy of defining the military objective exclusively, formulations which leave the military incapable of accomplishing its assignments are likely to be ignored. Hence the dilemma between the expression of hopes of experts and the actual practices of belligerents.

There does seem to be ground for compromise. Conceding that thousands of square miles could not be enclosed within safety zones, an extension of the 1949 Geneva Convention's hospital zones seems both desirable and feasible. Moreover, the Hague Convention for the

[15] Articles of the International Military Tribunal Established by the London Agreement, Article 6. A similar Tribunal was Established in the Far East.

[16] The *Einsatz-Gruppen* case, 15 Law Reports of the Minor War Crimes Tribunals 114, 115 (1947).

[17] Trial of the Major War Criminal Tribunals 337 (1947).

[18] Report of the ICRC Experts, note 4, *supra*, at 44.

Protection of Cultural Property provides another logical extension for over 57 states parties.[19] This convention is the product of an intergovernmental conference convened at the Hague in 1954. Whereas the Geneva Conventions of 1949 are for the protection of persons, the 1954 Hague Convention preserves cultural property. It is of special significance to airmen for several reasons. First, it equates "large industrial centers" to "military objectives" by providing that places of refuge for movable cultural property must be placed at an adequate distance from either. Second, it broadens the concept of the military objective by providing that this term include, by way of example, airports, broadcasting stations, establishments engaged upon work of national defense, ports, railway stations of relative importance, and main lines of communication. Third, it recognizes that the principle of imperative military necessity deprives cultural property of its protection, and finally, that in no event shall such cultural property be the subject of reprisal raids. All of these are important realistic principles fully applicable to air combat. The use of places of refuge, clearly marked and identified for the protection of cultural property could be the beginning of a wedge to increase objects and buildings to be immunized just as the extension of hospital zones is the opening to increase the areas for the protection of civilians. Certainly the enlargement of safety zones for property and people is compatible with area as well as precision bombing techniques. Neither concept requires the destruction of identified protected areas placed at an adequate distance from large industrial centers and essential military targets.

The second dilemma inhibiting the development of the laws of air warfare centers around the choice of weapons which may be employed. The historic St. Petersburg Declaration of 1868 which prohibited the use of explosive, fulminating, or inflammable substance in bullets has no application to air warfare because the use of such bullets in air war is for the purpose[20] of destroying aircraft and the enemy's resources on the ground and air and not primarily for the purpose of injuring enemy personnel. For the same reason, the old Hague Declaration of 1899 prohibiting the use of expanding bullets has not been extended to air operations. There are, however, three general areas where the type of weapon employed has evoked particular controversy with respect to aircraft. First, is the use of atomic weapons. There is substantial legal opinion that such weapons are unlawful. This view has been reflected by U.N. Resolution 1653

[19] *Convention of The Hague for The Protection of Cultural Property in Event of Armed Conflicts* (14 May 1954), reported in the ICRC Expert Report in Annex 5, at N16. At the time of this writing the United States is not a party, but it is expected that it will be.

[20] *But see* J. M. Spaight, Air Power and War Rights 198 (1947). The Declaration of St. Petersburg is reproduced in the ICRC Expert Report as Annex 1.

(XVI) which specifically provided that "Any state using nuclear and thermo nuclear weapons is to be considered as violating the Charter of the United Nations, acting contrary to the laws of humanity and as committing a crime against mankind and civilization." The Secretary General notes, however, that the legal effect of this resolution is subject to question because of the divided vote, 55 for, 20 against, and 26 abstentions. The ICRC experts were divided on how best to handle the question of nuclear use. They were unanimous that such weapons were incompatible with the expressed aim of the Hague Conventions to reduce unnecessary suffering. The present U.S. view as expressed in the *U.S. Army Field Manual* on the laws of war is clear. The use of such weapons does not violate international law in the absence of any customary rule or international convention.[21] The Red Cross also gave tacit recognition to this viewpoint at Vienna in 1965 by providing that the "General principles of the laws of war apply to nuclear and similar weapons."[22]

The second general area arousing controversy relates to the use of fire weapons and specifically napalm. Again the official U.S. position as reflected in our Army Field Manual is that their employment against targets requiring their use is not in violation of international law with the caveat that they are not to be used in a way to cause unnecessary suffering to individuals.[23] This view is in opposition to the Teheran resolution of May 1968 which expressly condemned napalm bombing. Some ICRC experts viewed the use of incendiaries as prohibited by the Geneva Protocol of 1925 because of its asphyxiating effects while others considered it was the use to which incendiaries were put which determined its lawfulness.[24] U.N. Resolution 2444 does not specifically condemn the use of incendiaries, including napalm, but the Secretary General states the regulation of its use clearly needs an agreement. Certainly, the extensive resort to incendiaries in World War II, Korea, and in Vietnam has demonstrated the military efficacy of this weapon. It is reasonable to conclude that only by special international agreement will its use ever be regulated.

The third area of general uncertainty relates to the use of weapons calculated to affect the enemy through his senses (including his skin), the use of chemical and bacteriological weapons. Included in this category are the use of noninjurious agents such as tear gas and also the use of herbicides and defoliants. All of these possible means of warfare center around the Geneva Gas Protocol of 1925 and its precise com-

[21] U.S. Army Field Manual FM 27–10 at 18.

[22] ICRC Resolution XXVIII, Vienna 1965, XXth Conference of ICRC.

[23] U.S. Army Field Manual FM 27–10 at 18.

[24] Geneva Protocol of June 17, 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare, reprinted in the ICRC Expert Report as Annex 3.

pass. The Protocol prohibits in war the use of asphyxiating, poisonous, or other gases and all analogous liquids, materials, or devices and, further, the use of bacteriological methods of warfare. More than 65 states are formally bound by this agreement. In 1966 the U.N. General Assembly passed a resolution by 91 in favor, none against, and four abstentions that called for the strict observance of the Protocol by all states and asking those members who had not done so to ratify it.[25] No one is against this protocol, but its correct interpretation finds nations in disagreement. Some believe the use of incendiaries and napalm are prohibited under the Protocol, many believe that riot control agents such as tear gas may not be employed, and there is a strong view that even herbicides fall within its purview. The U.S. position on these various views was stated by the President and the Secretary of State earlier last year. On 19 August the President, in submitting the Protocol to the U.S. Senate, stated that "The U.S. has renounced the first use of lethal and incapacitating chemical weapons and renounced any use of biological or toxic weapons."[26] The Secretary of State noted the Protocol had been observed in almost all armed conflicts since 1925 and that the United States understanding was that the Protocol did not prohibit the use in war of riot control agents and chemical herbicides. Further, that smoke, flame, and napalm are not covered by the Protocol's general prohibition.[27] This view is not generally shared.[28]

The third dilemma concerns the status of the aircrewman. Here is a problem of the enforcement of clearly defined rules rather than the development of new ones. The fallen airman poses problems of growing concern as he seems to be singled out for mistreatment or unauthorized public display with increasing frequency. Both the Hague Conventions of 1899 and 1907 respecting land warfare contained provisions that members of the armed forces were entitled to be treated as prisoners of war. Of course, this included all members.

Early in World War I there was some question as to the enemy airman's status, but no case appeared in which they were denied prisoner-of-war status. In World War II, however, the concept began to be advanced by some that airmen, unlike their brothers in arms on land and at sea, were not necessarily entitled to be humanely treated. In 1943 Himmler ordered all senior SS and police officers not to interfere between German civilians and English and United States flyers who baled [*sic*] out of their aircraft. In 1944 Hitler ordered Allied aircrews shot without trial whenever such aircrews had attacked German pilots or aircrews in distress, attacked railway trains,

[25] United Nations General Assembly Resolution 2162 (XXI), 5 Dec 1966.
[26] President Nixon's Message in LXIII Dep't State Bull. 273 (September 1970).
[27] *Ibid.*
[28] UN Resolution 2603 (XXIV). *See* Report of the First Committee A/7890.

or strafed individual civilians or vehicles. Goebbels referred to Allied airmen as murderers and stated it was "hardly possible and tolerable to use German police and soldiers against the German People when the people treat murderers of children as they deserve."[29] Although captured Allied airmen were largely accorded prisoner-of-war status by German authorities, there is enough evidence of mistreatment in the reports of the major and minor war criminals in Europe to reflect the beginnings of what could be a disturbing precedent. In the Far East, Allied airmen also suffered from deprivation of their prisoner-of-war status. Two of the U.S. aircrews which participated in the famous Doolittle air raids on Tokyo and Nagoya from the U.S. naval carrier *Hornet* were captured by Japanese troops when they made forced landings in mainland China. At the time of their capture there was no Japanese law under which they could be punished. This was remedied 4 months after their capture by the passage of the Enemy Airmen's Act of Japan. This act made it a war crime to participate in an air attack upon civilians, private property, or conduct air operations in violation of the laws of war. The law was made retroactive to cover those U.S. airmen already in their hands. In October 1942, 2 months after the passage of the Enemy Airmen's Act, three of the Doolittle raiders were sentenced and executed. The Judgment of the International Tribunal for the Far East reflects many instances thereafter where captured Allied airmen were tortured, decapitated, and even deliberately burned to death.[30]

The Charters of the International Military Tribunal (Nuremberg) and Tokyo expressly make it a war crime to murder or ill treat prisoners of war. Both General Keitel of the German Army General Staff and Kaltenbrunner of the Gestapo were charged and convicted with mistreating POW's, in part, it appears, for their role in the mistreatment of captured Allied airmen.[31]

However, in the trial of Japanese judges, Japanese judicial and prison officials were convicted on a different basis. The thrust of the holdings of the War Crimes Commissions in these cases was that the U.S. airmen were deprived of a fair trial and not that U.S. airmen, as lawful combatants, were entitled to POW status. The 1949 Geneva Convention on POW's confirmed the entitlement of aircrew members to the benefits of that Convention as well as "civilian members of military aircrews" and "crews of civil aircraft." Article 85 provides that prisoners of war prosecuted under the laws of the detaining power for acts committed prior to capture shall retain, even if convicted, the

[29] For the Views of the Axis Leaders on the Status of downed Allied Airmen, *see* 26 Reports of the Trial of Major War Criminals 275; 27 *id.* at 246; and 38 *id.* at 314 (1949).

[30] *See* Judgment of the International Military Tribunal for the Far East, Chapter VIII, at 1025 (1948).

[31] Trial of the Major War Criminals 289–92.

benefits of that Convention. Compliance with those provisions would prevent the denial of POW status to airmen, even those convicted during hostilities under such laws as the Japanese Enemy Airman Act. Unfortunately, most of the Communist bloc countries have entered reservations to article 85. The reservation of the North Korean Government is typical. They refused to be bound to provide POW status to individuals convicted under local law of war crimes under the principles of Nuremberg and the Tokyo Far East International Military Tribunal. The Government of China and the North Vietnamese reservations are similar. There are many cases of mistreatment of U.S. airmen in the Korean conflict, and the extortion of false germ warfare confessions for propaganda purposes and publicly parading them through the streets under humiliating circumstances. Although all captured U.N. Forces suffered to some extent under the fairly primitive conditions of confinement which existed, it was the airman who was singled out especially for public degradation, exposure to the press, and the forcing of confessions of illegal conduct.

The fate of all prisoners of war held by the North Vietnamese is at present a great concern because of the refusal of that Government to consider the 1949 Geneva Convention applicable to that conflict. Of interest to this discussion, however, is the particular light in which they consider captured U.S. airmen. A Hanoi press release with a date line of 10 July 1966 could well be expected to reflect their official attitude on this issue. A North Vietnamese lawyer writes that U.S. pilots are not prisoners of war but criminals, that air raids on densely populated areas in South Vietnam and on pagodas and hospitals in both the South and the North were conducted by B–52 bombers and are concrete war crimes and under paragraph 6(b) of the Nuremberg War Crimes Charter. He also cites the bombing and strafing of the dike system and other irrigation works and densely populated cities such as Hanoi and Haiphong as war crimes. The North Vietnamese lawyer specifically refers to article 8 of the Nuremberg Charter and states that even though accused airmen have acted strictly on orders given by their government or superiors, they remain individually responsible for the air attacks. The lawyer writes that the North Vietnamese Government "deliberately and clearsightedly ruled out (protection for) those prosecuted and accused of war crimes and crimes against mankind" in adhering to the Geneva Prisoner of War Convention. This is why, he concludes, U.S. pilots, who he labels as pirates, saboteurs, and criminals, can be tried, and presumably punished, under the North Vietnamese law of 20 January 1953, which he states relates to crimes against the security of North Vietnam.

It was the unanimous opinion of the Secretary General and the

ICRC experts that even where airmen had committed acts justifying their treatment as war criminals, they should be treated as prisoners of war.[32] Both believed that an airman behind enemy lines, in distress, and not employing any weapon should be protected from the civilian population.[33] Neither, however, gave any significant attention to the relation of war crimes as defined at Nuremberg and Tokyo to the conduct of air operations. In view of the nonprosecution of any Axis airman or official for their part in air activities, strategic bombing which by its nature is bound to cause a great deal of suffering and devastation, must be judged on different grounds. Certainly the impermissibility of the defense of superior orders has very questionable application to air combat. The experts and the Secretary both raised this issue in their report by stating that when the attack of the military objective will cause serious loss to the civilian population and is disproportionate to the military advantage, they must refrain from the attack. In recommending that the principles in U.N. Resolution 2444 be introduced into army military instruction, especially for air forces, the experts also state this is "to remind all the members of the armed forces that it is sometimes their duty to give priority to the requirements of humanity, placing these before any contrary orders they might receive."

The airman might properly ask how is he to know, flying off the wing of his flight leader at 30,000 feet, at night, or over a solid covering of clouds whether the damage his bombs inflict will meet the test of proportionality or his bombing will be indiscriminate. Or if he does exercise his individual judgment on a particular raid and refrains from the attack by leaving the formation, what proof can he give when a charge is brought by his own authorities for misbehavior before the enemy. It would seem the prosecutors and judges who presided at the War Crimes Trials in World War II had such thoughts when they chose to refrain from the prosecution of Axis airmen or officials for their participation in the conduct of air campaigns.

These then are three central dilemmas that impede the development of the laws of air warfare. All past effort to define by all-inclusive enumeration those objectives which are proper military targets have failed. Either they have been too restrictive or too indefinite to have been accorded much respect in actual practice. General exhortations to refrain from terror bombing, indiscriminate bombing, and morale bombing equally have a nebulous ring. There is no adequate standard to judge what constitutes this type of warfare, and no nation has considered that their combatant air forces have ever resorted to the use of terror or indiscriminate attacks.

[32] *See* Report of the ICRC Experts at 77.
[33] *Id.* at 78.

The 1954 Hague Convention for the protection of cultural property signals a milestone by providing agreement for the refuge of certain types of objects and buildings. Perhaps this concept can be enlarged to immunize other clearly defined resources and facilities of a belligerent nation. Common consent for the extension of hospital and safety zones to cover larger segments of the civilian population, removed from vital target areas, also is a growing possibility.

The dilemma of the choice of weapon is created by the uncertain status of the use of nuclear force, the use of incendiaries, including napalm, in air operations, and the use of modern agents designed to control the movement of people without producing significant harm, and to destroy plants, trees, and food resources by chemical means. The applicability of the Hague Regulations and the Geneva Gas Protocol to these forms of waging war is far from settled and taints the aircrewman who is detailed to employ them in the eyes of some.

Finally, the status of the aircrewman, who all too frequently serves as the focal point of the opposing belligerent's indignation and charges that the laws of war have been violated, must be restated. It is the airman who is especially vulnerable to mistreatment and denial of his rights under the Geneva Convention of 1949 because of the inherent destructive capacity his mission may produce and because he brings the misfortune of war to the enemy hinterland. Clarification of the Nuremberg principles as they apply to him, the airman, and withdrawal of reservations making possible his treatment as a war criminal are badly needed. His legitimate combatant status must be reaffirmed. That neither the weapons prescribed for his use nor the targets selected for his particular mission operate to remove him from the ranks of lawful combatants must be uniformly recognized. With agreement on these issues, useful, practical instructions to aircrews on their duties and limitations and on their rights and expectations, under the laws of war, easily follow.

TOTAL LEGAL SERVICE: ESGAIN AND SOLF ON THE 1949 GPW CONVENTION

Many scholars are as much intrigued by the sources of law and the processes of its development as they are fascinated with changes in its content. This article was written by two men long devoted in the military and civil service of the United States and relies heavily on the *Commentary* on the several Geneva Conventions of 1949 edited by M. Jean S. Pictet, Director for General Affairs of the International Committee of the Red Cross. The formulative impact of legal work preceding and just below the decision-making level has seldom been more clearly demonstrated. Since the time of Halleck, Lieber and Davis before 1900, the United States has been committed to the humane conduct of war and a leader of nations in the general application of principles of civilized conduct in theaters of war. Work such as this selection, the one which precedes it, and the one which follows manifests the continuity of a solid tradition and the resiliency of sound scholarship as it adapts institutions to changing norms. Esgain and Solf have leavened the intricacies of diplomatic products with the knowledge developed only by men of practical affairs, and translated the policies of nation-states into workaday rules for conduct in the heat of conflict. Given that no exposition of law will make all men perfect, their effort here was a base adequate to the task of educating several million soldiers in the rudiments of the law of war during the decade which followed its publication.[1]

[1] Reading on subjects in this article should be supplemented by two others: Draper, *Human Rights and the Law of War*, 12 VA. J. INT'L L. 326 (1972), and Levie, *Penal Sanctions for Maltreatment of Prisoners of War*, 56 AM. J. INT'L L. 433 (1962).

THE 1949 GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: ITS PRINCIPLES, INNOVATIONS, AND DEFICIENCIES†

Albert J. Esgain and Waldemar A. Solf***

I. INTRODUCTION

It is the purpose of this study to consider some of the fundamental principles, major innovations, and deficiencies of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949.[1] It is concerned particularly with the rights and obligations which the convention imposes on the signatory states and the individuals who are protected thereby, the measures which the convention provides for the enforcement of the obligations and the repression of war crimes, and the problems which have arisen incident to the interpretation of the convention. Space precludes a detailed consideration of many important technical areas which pertain to the maintenance and the internment of prisoners of war.

It is not surprising that the decade which witnessed Dachau, Auschwitz, the massive air bombardments of World War II, Hiroshima, and the trials of Axis war criminals produced the four Geneva Conventions of 1949.[2] These conventions which were the direct result of

*Attorney-Advisor, United States European Command. B.S., 1936; M.A., 1938, Ohio State University; LL.B., 1943, Duke University; Diploma in International Law, 1956, Cambridge University; LL.M., 1960, George Washington University. When this article was written, Mr. Esgain was Special Consultant to The Judge Advocate General of the Army on Private International Law Matters and Chief, Opinions Branch, International Affairs Division, Office of The Judge Advocate General, Department of the Army.

**Chief, International Affairs Division, Office of The Judge Advocate General, Department of the Army. A.B., 1935; J.D., 1937, University of Chicago. When this article was written, Mr. Solf was Staff Judge Advocate, Headquarters, Eighth United States Army.

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[1] [1955] 6 U.S.T. & O.I.A. 3316, T.I.A.S. No. 3364 (effective Feb. 2, 1956) [hereinafter referred to and cited as the 1949 GPW Convention].

[2] 1949 GPW Convention; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, [1956] 6 U.S.T. & O.I.A. 3516, T.I.A.S. No. 3365 (effective Feb. 2, 1956) [hereinafter referred to and cited as the Civilian Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12

the traumatic experience of the least restrained and the most destructive of modern wars mark the high water mark of the humanitarian effort to control the treatment of war victims by law-making treaties. The conventions which constitute approximately two-thirds of the conventional law of war[3] provide detailed, comprehensive, and paternalistic solutions to the problems of the past. However, it has been observed that while international law now provides adequate protection to prisoners of war, there is no effective means of controlling the manner by which injury may be inflicted upon belligerents.[4]

The concept that war is not a relationship between individuals, but a condition of animosity between states,[5] gave rise during the 18th Century to the derived principle that prisoners of war are to be treated humanely and to be detained for no purpose other than to prevent them from rejoining the fight. This principle, which had become firmly established by the middle of the 19th Century, led to the development of detailed rules pertaining to prisoners.[6] The first modern codification of the practice of nations with respect to prisoners of war was prepared in 1862 by Dr. Francis Lieber, a Professor of Political Science at Columbia University, and it was officially espoused by the Union during the Civil War.[7]

The humanitarian rules of war became the subject of numerous multilateral international conferences during the later part of the 19th Century and the first half of the 20th Century. The rules which resulted were the outgrowth of a mutual consensus that the plight of war victims should be ameliorated to the greatest extent compatible with the conditions which were inevitable in war. Thus the experience of past wars rather than broad political theory provided the basis for the present rules which pertain to prisoners of war.[8]

In 1874 the representatives of the European powers who had met at Brussels at the invitation of Russia drew up a "Project for an International Convention on the Laws and Customs of War" which contained

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August 1949, [1955] 6 U.S.T. & O.I.A. 3115, T.I.A.S. No. 3362 (effective Feb. 2, 1956) [hereinafter referred to and cited as the GWS (Field) Convention]; and the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, [1955] 6 U.S.T. & O.I.A. 3217, T.I.A.S. No. 3363 (effective Feb. 2, 1956) [hereinafter referred to and cited as the GWS (Sea) Convention].

[3] Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. YB. INT'L L. 360 (1952).

[4] *Id.* at 364.

[5] ROUSSEAU, DU CONTRACT SOCIALOU PRINCIPLE DU DROIT POLOTIQUE, bk. 1, 10 (1762); 2 VATTEL, LE DROIT DES GENS OU PRINCIPLE DE LA LOI NATURELLE 107, 117–18 (Carnegie Institution trans. 1916)

[6] See FLORY, PRISONERS OF WAR 16–21 (1942); Treaty of Amity and Commerce with Prussia, July 11, 1799, art. XXIV, 8 Stat. 162, T.S. No. 293; 2 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776–1909, at 1486 (1910).

[7] Instructions for the Government of Armies of the United States in the Field, GEN. O. 100 (1863).

[8] See FLORY, *op. cit. supra* note 6, at 160–61.

provisions applicable to prisoners of war. Although the Brussels Declaration did not become effective, it formed the basis of the regulations annexed to Hague Convention No. II of 1899 relative to the Laws and Customs of War on Land.[9] These regulations contained seventeen articles on the rights of prisoners of war. The Brussels Declaration also formed the basis of articles 4 to 20 of the regulations annexed to Hague Convention No. IV of 1907.[10] The detailed provisions of these regulations with respect to the treatment of prisoners of war established the principle that their treatment and maintenance should be analogous to that provided the troops of the Detaining Power.[11]

The effectiveness of the Hague Regulations in World War I was materially impaired by the general participation clause which made their provisions binding only between the signatories and inapplicable in the event that a non-contracting power become a belligerent.[12] The participation in World War I of Serbia and Montenegro, countries which had not ratified the 1907 Convention, was construed by the principal belligerents as rendering the Hague Regulations legally ineffective. In World War I Germany's disregard of many of the provisions of the Hague Regulations was predicated upon grounds of military necessity, and rationalized on the general participation clause.[13] The Allied powers, however, regarded certain of the provisions of these regulations as declaratory of customary international law, and as such, binding upon the belligerents.[14]

At the request of the Tenth International Conference of the Red Cross in 1921, the International Committee of the Red Cross prepared a draft convention to correct the defects of Hague Convention No. IV which had been disclosed during World War I. This draft formed the basis of discussion for the Diplomatic Conference which met in Geneva in 1929.[15] The treaty which resulted[16] in many respects

[9] See MALLOY, *op. cit. supra* note 6, at 2016–058 [effective Nov. 1, 1901].

[10] Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex thereto Embodying Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter cited as Hague Regulations of 1907]. See FLORY, *op cit. supra* note 6, at 21.

[11] 2 OPPENHEIM, INTERNATIONAL LAW 368 (7th ed. Lauterpacht, 1952).

[12] *Id.* at 234.

[13] By 1916 special bilateral conventions and cartels had been concluded between Germany and the Allies. The last of these, between the United States and Germany, was signed on November 11, 1918, the day the armistice was signed. These bilateral conventions had considerable effect upon the development of the 1929 Geneva Convention. See FLORY, *op cit. supra* note 6, at 22–23.

[14] *Ibid.*; FLORY, *op. cit. supra* note 6, at 19–20; 6 HACKWORTH, DIGEST OF INTERNATIONAL LAW 438 (1943).

[15] THE GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY III, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 5 (Pictet ed. 1960) [hereinafter cited as PICTET, COMMENTARY III, GPW CONVENTION].

[16] Convention of July 27, 1929, Relative To Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846 [hereinafter referred to and cited as the 1929 GPW Convention].

made, rather than declared, international law. Unlike the Hague Conventions, the 1929 Convention specified that its provisions were to be effective between the contracting parties[17] even though the convention had not been ratified by all of the belligerents. The 1929 Convention specified (article 89) that it was to be complementary to Articles 4 to 20 of the Hague Regulations of 1907 and in fact covered the substance of these regulations except to the extent that they dealt with parole.

The conventional law relating to prisoners of war, as set forth in the 1929 Convention and portions of the Hague Regulations of 1907, bore the full thrust of World War II. In two main theaters, Eastern Europe and the Far East the conventional law was, for all practical purposes, disregarded. Neither Japan nor the Soviet Union had ratified the 1929 Convention.[18]

In September 1941, there was circulated within the German High Command (OKW), a draft decree which stated that the humanitarian rules relative to the treatment of prisoners of war would not be applied to Soviet prisoners of war because the USSR had not ratified the convention.[19] In expressing his non-concurrence, Admiral Canaris, Chief of the German Secret Service, correctly pointed out that notwithstanding the fact that Russia was not a party to the convention, the customary principles of international law as to treatment of prisoners of war nevertheless remained applicable.[20] In approving the decree Field Marshal Keitel wrote: "The objections arise from the military concept of chivalrous warfare. This war is the destruction of an ideology. Therefore, I approve and back the measure."[21]

The extent to which this decree was carried out was attested by Rosenberg, Reichs Minister for Eastern Territories, who reported to Keitel in February 1942 that:

> The fate of the Soviet Prisoners of War is a . . . tragedy of the

[17] Art. 82, 1929 GPW Convention. The failure of the Soviet Union to ratify the 1929 GPW Convention, however, was soon to show that more than a mere rejection of the general participation clause was required.

[18] DRAPER, THE RED CROSS CONVENTIONS 23 (1958).

[19] 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 232 (1947) [hereinafter cited as 1 TRIAL OF MAJOR WAR CRIMINALS]. It is to be observed that in June 1941, the USSR advised the principal neutral states that it would comply with the provisions of the 1929 GPW Convention with respect to German invaders provided Germany observed the convention with respect to the USSR. See DRAPER, *op cit. supra* note 18, at 50.

[20] 1 TRIAL OF MAJOR WAR CRIMINALS 232. As to these principles he stated: "Since the 18th Century there have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoner of war from further participation in the war. The principle was developed in accordance with the view held by all armies that it is contrary to military tradition to kill and injure helpless people. . . . The decrees for the treatment of Soviet prisoners of war . . . are based on a fundamentally different viewpoint."

[21] *Ibid.*

> greatest extent. . . . A large part of them have starved or died because of the weather. . . . The camp commanders have forbidden the civilian population to put food at the disposal of prisoners and they have rather let them starve to death.
>
> In many camps when prisoners of war could no longer keep up the march because of hunger and exhaustion, they were shot before the eyes of the horrified population. . . .
>
> In Sachsenhausen alone, 60,000 Soviet prisoners of war died of hunger, neglect, torture, and shooting during the winter of 1941–42.[22]

Although the maltreatment of prisoners taken on the western front never approached this magnitude, there were nevertheless many grave departures from minimum standards.[23] The gross maltreatment of prisoners of war constituted a major portion of the indictments of the Germans and Japanese who were accused before the International Military Tribunals at Nurnberg and Tokyo and before the national war crimes tribunals of the Allied powers.

In other respects as well, World War II dramatically exposed the inadequacies of the conventional and customary rules to cope with the savagery which had been manifested during that war. Prisoner of war status had been denied members of the Axis armed forces who surrendered following the defeat of their State of Origin. Prisoners of war were not repatriated promptly and more than one million German and Japanese prisoners were still in Soviet hands[24] when the Diplomatic Conference met in 1949. Furthermore, the dearth of precedents for the trial of war criminals before international and national tribunals resulted in the application of *ad hoc* procedural rules which varied from state to state. The war crimes trials suffered as well from all the defects of hasty improvisation. The failure to apply the principles of assimilation in the procedures for war crimes trials resulted in severe criticism, in many respects justified, as to the manner in which the program had been conducted.[25]

II. THE 1949 GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR

The deficiencies disclosed by World War II and its aftermath caused the International Committee of the Red Cross to turn its

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[22] *Id.* at 231.

[23] *Id.* at 228–32. On October 18, 1942, OKW issued a decree that Allied commando units were to be slaughtered to the last man, whether or not armed, even if they attempted to surrender. In March 1944, a decree was promulgated which ordered the execution upon their recapture of escaped officers and noncommissioned officers. In March 1944, fifty RAF officers who had escaped were killed. On numerous instances Allied air crews were handed over to civilians for mob action.

[24] PICTET, COMMENTARY III, GPW CONVENTION 6.

[25] See text, VI PENAL AND DISCIPLINARY SANCTIONS, *B. Penal Sanctions, infra.*

attention to their correction. In April 1949, at the invitation of the Swiss government, delegates from fifty-nine states met at Geneva to consider drafts of four conventions for the protection of war victims.[26] By 1962, eighty-one states, including the United States and the USSR had ratified or acceded to these conventions.

Although there are several minor reservations to these conventions, there is only one of substantive importance to the Prisoner of War Convention—the Soviet Bloc reservation relative to the application of the convention to convicted war criminals.[27]

Of particular significance are the series of articles common to all four of the conventions which relate to the applicability of the conventions, the rights and obligations of the parties and of the individuals protected thereunder, and the execution and enforcement of the conventions. Agreement as to these common articles, all fundamental in nature, was achieved only through compromise at the cost of clarity. Nevertheless, the adoption of these common articles without any substantial reservation represents a remarkable achievement.[28]

The 1949 Geneva Prisoner of War Convention is significant in that it (a) provides a code of legal rules both fundamental and detailed for the protection of prisoners of war; (b) vests in prisoners of war the right to humane and decent treatment; (c) attempts to restrict abuses and infringements of humanitarian principles by imposing upon the parties the obligation to provide penal sanctions to those who commit grave breaches; (d) seeks to ensure that like abuses will not occur in the imposition of penal sanctions against offenders; (e) recognizes that prisoners of war owe no allegiance to the Detaining Power; (f) provides that both the legal status and the rights of prisoners of war are to be assimilated as closely as possible, to those of members of the Detaining Power's own armed forces; and (g) provides a comprehensive role for

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[26] These drafts had been developed successively by the International Committee of the Red Cross, a Preliminary Conference of the National Red Cross Societies in 1946, A Conference of Government Experts in 1947, and the 17th International Red Cross Conference at Stockholm in 1948. PICTET, COMMENTARY III, GPW CONVENTION 6. The Task of the conference was to replace the 1929 Geneva Convention relative to Prisoners of War and to the Sick and Wounded in the Field, the 10th Hague Convention of 1907 relative to the Sick, Wounded, and Shipwrecked in Maritime Warfare, and to prepare a completely new convention for the protection of civilians. *Id.* at 7.

[27] Reservations, [1955] 6 U.S.T. & O.I.A. 3467, at 3508, T.I.A.S. No. 3364.

[28] The Common Articles, as they appear in the 1949 GPW Convention are: *Article 1*, The absolute and unilateral obligation to observe the convention in all circumstances; *Article 2*, The conflicts to which the conventions are applicable; *Article 3*, Minimum standards to be observed in civil wars and internal conflicts; *Article 5*, The duration of applicability; *Article 6*, Freedom of states to conclude special agreements, not in derogation of the rights conferred on individuals; *Article 7*, Prohibitions against the renunciation of rights by individuals; *Articles 8–11*, Functions and roles of the Protecting Power; *Article 127*, Duty to disseminate text; *Article 129*, Obligation to repress grave breaches; *Articles 103–108*, Duty to punish grave breaches; *Article 130*, A definition of grave breaches; and *Article 131*, Responsibility of states, apart from individual responsibility, for grave breaches.

the Protecting Power, the International Committee of the Red Cross, and other relief organizations.

Before the convention could be ratified by more than a handful of states, serious defects which either had not been anticipated or had remained unresolved[29] were to be disclosed by the Korean conflict. The convention nevertheless, reflects a significant step forward in the development of rules of humanitarian practice in the treatment of prisoners of war. No international convention can be drafted so as to preclude those who are intent on violating its principles from rationalizing their breach on the basis of either real or fancied ambiguity, or on alleged exceptions to its general rules. Thus it was inevitable that there would be only partial compliance with the Geneva Prisoner of War Convention of 1949 during the Korean conflict as it occurred before the parties to the conflict had ratified the conventions and before necessary implementing machinery and procedures could be established. The convention did, nevertheless, establish broad guidelines and standards which were generally recognized by the parties to the conflict.

A. *GENERAL PROVISIONS*

Article 1, common to all four of the Geneva Conventions of 1949, obligates the contracting parties "to respect and ensure respect for the present Conventions in all circumstances." The words "in all circumstances" made it clear that the obligations were to be undertaken unilaterally rather than reciprocally, and that their binding effect did not depend upon the extent to which the other parties to the convention respected their obligation thereunder.[30] The convention requires that in time of peace, all preparatory measures, including the enactment of legislation necessary to repress grave breaches, be taken[31] and that the text of the convention be disseminated by means of educational programs in both the military and the civil community.[32]

The terms of article 1 clearly indicate that the benefits and burdens of the convention are to apply equally to both the aggressor and the

[29] Although the parties to the Korean conflict had not ratified the convention, both sides announced their intention to apply its general principles. Neither side, however, appointed a Protecting Power. Due to the absence of such protection many of the principles of the convention were not fully observed. See PICTET, COMMENTARY III, GPW CONVENTION 119 n.1.

Other deficiencies disclosed by that conflict were: (1) A failure to provide for the participation in war of the United Nations and other multinational regional organizations as "Detaining Powers"; (2) An excessive rigidity in such paternalistic provisions as the "nonrenunciation of individual rights" which prolonged the conflict for that substantial period of time which was required to negotiate the issue of involuntary repatriation.

[30] PICTET, COMMENTARY III, GPW CONVENTION 18.

[31] Arts. 127, 130, 1949 GPW Convention.

[32] Art. 127, 1949 GPW Convention.

victim of aggression. An illegal war therefore was not to preclude the applicability of the conventions to war victims.[33]

B. CONFLICTS TO WHICH APPLICABLE

Article 2 of the convention provides: "[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

This article resolved doubt as to the applicability of the convention to armed conflicts which are not considered by one or all of the belligerents as constituting a state of war.[34] After World War I numerous armed conflicts had occurred which were not considered by the belligerents as being wars and which thus enabled them to assert, under the language of existing conventions, that the provisions thereof were inapplicable.[35]

Deliberations leading to the 1949 conventions did not contemplate or consider collective enforcement action by the United Nations and the formation of closely integrated regional coalitions such as NATO and the Warsaw Pact. Thus, the term "High Contracting Parties" used in the convention left in issue the question of whether, and to what extent, the conventions were to have applicability to international and multinational organizations.[36]

Article 2[37] follows the precedent of Article 82 of the 1929 Convention and expressly excludes the general participation clause. It provides as well that the parties "shall be bound by the Convention in relation to a non-contracting power if the latter accepts and applies the

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[33] See DRAPER, THE RED CROSS CONVENTION 79 (1958). See also 2 OPPENHEIM, INTERNATIONAL LAW 218 (7th ed. Lauterpacht 1952) where it is stated that although the unlawful belligerent may not have a right to exercise all the rights which traditional international law confers, he must, during the pendency of war, receive the mutual benefit of the humanitarian principles. There is, however, a segment of international legal thought which would make the rules of warfare applicable to aggressors only, and would permit the defenders to pick and choose among the rules. See *Report of Study of Legal Problems of the United Nations*, 1953 PROCEEDINGS OF THE AM. SOCY OF INT'L LAW 131–35 (1953). *Compare* BAXTER, *The Role of Law in Modern War*, 1953 PROCEEDINGS OF THE AM. SOCY OF INT'L LAW 90 (1953).

[34] PICTET, COMMENTARY III, GPW CONVENTION 19; DRAPER, *op. cit. supra* note 33, at 10–11; 2 OPPENHEIM, *op. cit. supra* note 33, at 236. Article 2 of The Hague Convention of 1899 stated that the annexed regulations concerning the Laws and Customs of War on Land were applicable "in case of war." This definition was not repeated in either the Hague Convention IV of 1907 or in the 1929 Geneva Conventions. At the time it seemed redundant to include such a clause for the title and purpose of the conventions made it clear that they were intended for use in war time and the meaning of war did not seem to require definition. PICTET, COMMENTARY III, GPW CONVENTION 19.

[35] 2 OPPENHEIM, *op. cit. supra* note 33, at 293 n.1. In the Sino-Japanese conflict of 1937 when both belligerents desired a state of war, the 1929 GPW Convention was not legally applicable.

[36] See text, III GENERAL PROTECTION OF PRISONERS OF WAR, *1. Multi-Nation Commands*, *infra*.

[37] "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations."

provisions thereof." There was general agreement under this language that non-contracting parties were to be entitled to the benefits of the convention if they adhered to it. It was difficult, however, to achieve agreement as to the exact circumstances under which the contracting parties would be required to extend the benefits of the convention to non-contracting parties. The Canadian delegation to the conference proposed that the convention be binding only with respect to those non-contracting powers which complied with its provisions. The Belgian delegation proposed that it be binding only on those non-contracting powers which had received from a contracting party an invitation to accept the provisions of the convention and had in fact accepted such an invitation.[38] The text which was finally adopted was a compromise between the two proposals, one of which was considered to be too indefinite, the other too rigid. This compromise is troublesome in that it leaves to the discretion of the contrating party the determination of whether a non-contracting party has accepted the convention and, if it has, whether it is applying its provisions.[39]

C. *CONFLICTS NOT OF AN INTERNATIONAL CHARACTER*

Common article 3, undoubtedly inspired by the Spanish Civil War, establishes certain minimum standards which would regulate civil wars, insurrections, and other conflicts which are not of an international character.[40] With respect to such conflicts it is a "convention in miniature." It is the only article applicable to such conflicts when the parties thereto fail to adopt all or part of the convention by special agreement. This article states that persons who do not participate in hostilities, including members of the armed forces who have laid down their arms, are in all circumstances to be treated humanely without adverse distinction based on considerations of race, color, religion or faith, sex, birth, wealth, or similar considerations. Specifically, the article prohibits

[38] 2B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 108 (1949) [hereinafter cited as 2B FINAL RECORD].

[39] Since the provision involves the principle of reciprocity, it would appear that the failure of the non-contracting party to observe a particular article would legally exempt the adversary only from a like observance. See DRAPER, *op. cit. supra* note 33, at 11.

[40] There is a common assumption that such conflicts are characterized by a total lack of restraint and savagery. It is to be noted however that Lieber's enlightened code (Instructions for the Government of Armies of the United States in the Field, GEN. O. 100, War Dep't April 24, 1863) was inspired by the American Civil War. Furthermore, in the Swiss Sonderbund War of 1847, a civil war occasioned by religious beliefs, General Dufour, the federal commander, issued a series of rules for the army which demanded moderation and care for both prisoners and the wounded. His proclamation of November 7, 1847, materially assisted in the rapid healing of wounds of the conflict. His proclamation read: "Confederates, I place in your keeping the children, the women, the aged and the ministers of religion. He who raises a hand against an inoffensive person dishonors himself and tarnishes his flag. Prisoners and wounded, above all, are entitled to your respect and compassion the more so, because you have often been with them in the same camp." Cited by DRAPER, *op. cit. supra* note 33, at 3.

> at any time and in any place whatsoever . . . (a) violence to life and person, in particular, murder . . . mutilation, cruel treatment and torture; (b) taking of hostages, (c) outrages upon personal dignity . . . (d) the passing of sentences and the carrying out of executions without previous judgment by a regularly constituted court affording all judicial guarantees which are recognized as indispensable by civilized peoples.

This article also encourages the parties to the conflict, by special agreements, to bring all or part of the other provisions of the convention into force. Finally, and indispensably, it provides that the application of its provisions "shall not affect the legal status of the Parties to the Conflict."

Article 3 postulates a substantial innovation in the law of war for it extends the principle of international control to insurrections and rebellions, matters which had theretofore been considered as being essentially domestic in character. It is not surprising, therefore, that it took twenty-five meetings to achieve agreement on this article.[41] Its ultimate adoption and ratification without a single reservation is an affirmation in principle of the view that: "the observance of fundamental human rights has, insofar as it is the subject matter of legal obligations, ceased to be one of exclusive domestic jurisdiction of States, and has become one of legitimate concern for the United Nations and its members."[42]

Substantively, the obligations of the article are not revolutionary and as the International Committee of the Red Cross has pointed out,

> It merely demands respect for certain rules, which are already recognized as essential in all civilized countries, and were embodied in the national legislation of the States in question, long before the Convention was signed. What Government would . . . claim before the world, in case of civil disturbance which could justly be described as mere banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners, and to take hostages?[43]

Numerous troublesome problems, however, have arisen incident to its applicability,[44] the criteria which are to be used to distinguish an

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[41] 2B FINAL RECORD 9–19, 40–48, 75–79, 82–84, 90, 93–95, 97–102; PICTET, COMMENTARY III, GPW CONVENTION 28–34.

[42] 1 OPPENHEIM, INTERNATIONAL LAW 740 (8th ed. Lauterpacht 1955).

[43] PICTET, COMMENTARY III, GPW CONVENTION 36.

[44] The entitlement of the United States military personnel captured in Laos and Vietnam to POW status is not clear. The United States military personnel are present in an advisory capacity only, pursuant to the request of the Royal Laotian Government and the Government of the Republic of Vietnam. The United States does not consider itself to be a party to either conflict. Although the rebels consider the conflict in Laos to be a domestic one, the Royal Laotian Government has publicly denounced an extensive and aggressive participation in the conflict by troops from the Democratic Republic of Vietnam. There is also substantial evidence that troops from the Democratic Republic of Vietnam are actively participating in the conflict in

"internal conflict" from mere banditry,[45] and the possibility that recognition of belligerency in an extensive civil war may be considered as invoking the entire convention.[46] As article 3 does not "affect the legal status of the Parties to the Conflict," recognition of belligerency is not to be implied by its application. The legitimate government therefore may continue to try and punish captured rebels but they must be accorded a fair trial. Absent such a saving clause, it is doubtful that any agreement thereon could have been achieved.

D. CATEGORIES OF PERSONS ENTITLED TO PRISONER OF WAR TREATMENT

The 1949 Geneva Prisoner of War Convention vests specific inalienable rights and imposes particular immutable obligations upon the Detaining State, the State of Origin, and upon the prisoner of war himself.[47] An individual to be treated as a prisoner of war must not only have "fallen into the power of the enemy," but must be in one of the categories enumerated in article 4.[48] Persons who are not protected by the Geneva Prisoner of War Convention would, however, be entitled to the protection afforded either by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; or the Geneva Convention Relative to the Treatment of Civilian Persons in Time of War.[49]

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the Republic of Vietnam. All of the states which are alleged to be participating in the Laotian and Vietnamese conflicts, Laos, the Democratic Republic of Vietnam, the Republic of Vietnam, and the United States, are all signatories to the 1949 Geneva Conventions. Under these circumstances it would appear that legally the conflicts in both Laos and Vietnam are international rather than domestic conflicts. If considered to be an international conflict, then captured United States personnel, as persons accompanying the Royal Laotian Armed Forces and the Forces of the Republic of Vietnam, would be entitled to prisoner of war status under either Article 4A(d) or 4A(4) of the 1949 GPW Convention. If the conflicts are viewed as being domestic in nature and absent an agreement between the contending parties to apply all of the provisions of the 1949 GPW Convention, captured United States military personnel would be entitled only to the protection specified in Article 3 (humane treatment) of the 1949 GPW Convention. See PICTET, COMMENTARY III, GPW CONVENTION 22–23; 2 OPPENHEIM, *op. cit. supra* note 33, at 209–12, 370–71.

[45] Neither France nor the United Kingdom considered article 3 to be applicable in Algeria, Malaya, Kenya, and Cyprus. See DRAPER, *op. cit. supra* note 33, at 14. For an extensive discussion of such criteria see PICTET, COMMENTARY III, GPW CONVENTION 35–38.

[46] In 2 OPPENHEIM, *op. cit. supra* note 33, at 370–72, the view is expressed that recognition of belligerency makes what would otherwise be an internal conflict, one of an international character. *Cf.* DRAPER, *op. cit. supra* note 33, at 16, who is of the opinion that this view is untenable in the light of the clause which encourages special agreements to invoke the other provisions of the convention.

[47] Arts. 6, 7, 1949 GPW Convention.

[48] Article 5, 1949 GPW Convention provides that the convention is to apply "from the time they have fallen into the power of the enemy until their final release and repatriation."

[49] 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 848 (1949)

A significant amplification of the categories of persons entitled to prisoner of war status was effected by the 1949 Geneva Prisoner of War Convention. Article 4A(2), like Articles 1, 2, and 3 of the Hague Regulations of 1907, accords prisoner of war status to members of the armed forces and to members of volunteer corps and militia who (1) are commanded by a person responsible for their acts or omissions, (2) display a fixed distinctive emblem recognizable at a distance, (3) carry arms openly, and (4) conduct their operations in accordance with the laws and customs of war.

Additionally, article 4 continues in effect the protection accorded by the 1929 GPW Convention to camp followers and to members of a *levée en masse*[50]—*i.e.* those inhabitants of an unoccupied territory who on the approach of the enemy spontaneously take up arms to resist the invaders.

New categories protected by the 1949 GPW Convention include members of organized resistance movements, even those in occupied territory, if they meet the test established by article 4A(2). Superficially, it would appear that the inclusion of members of organized resistance movements in occupied territory within the categories of protected personnel is a substantial departure from pre-existing international law. On analysis, however, it becomes clear that as a practical matter the prerequisites that members of such movements, or partisans, bear distinctive insignia recognizable at a distance and that they carry arms openly, preclude its effective utilization. Only rarely will members of organized resistance movements in effectively controlled territories be able to comply with all of the conditions which are prerequisite to entitlement under the GPW Convention for to accomplish their mission they must work secretly, wear no uniforms, conceal their weapons, and withhold their identity prior to their strike.[51] Members of organized resistance movements in occupied territory who do not qualify as prisoners of war are, however, entitled to the protection of the Civilians Convention.[52] It is to be noted in this

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[hereinafter cited as 2A FINAL RECORD]; THE GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY IV, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 50 (Pictet ed. 1958) [hereinafter cited as PICTET, COMMENTARY IV, CIVILIAN CONVENTION]. Although an individual who has taken part in hostilities but who is not entitled to prisoner of war status may be treated as a war criminal, he does not thereby lose his entitlement to the protection specified in Articles 64 to 66 and 71 to 75 of the Civilian Convention.

[50] Art. 81, 1929 GPW Convention. See also Art. 2, Hague Regulations of 1907.

[51] DRAPER, *op. cit. supra* note 33, at 52. See also PICTET, COMMENTARY III, GPW CONVENTION 52–61.

[52] See note 50 *supra* and Arts. 64 to 75 of the Civilian Convention. Article 68 of the Civilian Convention provides in part that the death penalty may be adjudged only "where the person is guilty of espionage . . . serious sabotage against the military installations of the Occupying Power or of an intentional offence which caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before

connection that the Diplomatic Conference rejected a proposal which would have extended the provision of the *levée en masse* to uprisings in occupied territory[53] partly because of the special provisions for organized resistance movements.[54] It also rejected a proposal which would have extended the protection to individuals who, not being parties to a *levée en masse*, took up arms against an unlawful aggressor. The conference concluded that such individuals who were not a part of an organized resistance movement or of a *levée en masse*, should remain unprivileged belligerents. It was recognized that once an illegal war was commenced it must for all purposes be governed by the laws and customs of war. It was considered that any derogation from the rules of war for this purpose would lead to anarchy.[55]

E. PERIOD OF PROTECTION

Under Article 5, the provisions of the GPW Convention are to apply to prisoners of war "from the time they have fallen into the hands of the enemy until their final release and repatriation."[56] Although this article was intended to remove any ambiguity as to the precise moment when an individual's status as a prisoner vested, the commencement of protection in fact depends upon the determination of two separate and distinct factors: the moment at which an enemy may no longer be lawfully attacked; and the moment at which the rights and obligations to which prisoners of war are entitled become vested.

Under the customary rules of war, protection from attack begins when the individual has ceased to fight, when his unit has surrendered, or when he is no longer capable of resistance either because he has been overpowered or is weaponless.[57] These conditions will not always coincide in point of time with the actual assumption of physical custody by the captor state.[58] A soldier who has laid down his arms or

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the occupation began." The United States and the United Kingdom have filed reservations, reserving the right to impose the death penalty without regard to whether it was authorized by law in force at the time the occupation began.

[53] "[A] *levée* does not cover the case of an uprising after the enemy has occupied the part of the national territory concerned. Thus, before an invader crosses the national frontier, the whole able-bodied population may constitute a *levée en masse*. After invasion and occupation no *levée en masse* can take place in the area occupied, but there may be a *levée en masse* in the areas forward of the enemy and not yet occupied." Thus after invasion, the provisions of the convention with respect to organized resistance movements take effect. DRAPER, *op. cit. supra* note 33, at 53.

[54] 2 OPPENHEIM, *op. cit. supra* note 33, at 372.

[55] Gutteridge, *The Geneva Convention of 1949*, 26 BRIT. YB. INT'L L. 294 (1949).

[56] This article provides further that "should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories [of personnel] enumerated in Article 4, such persons shall enjoy the protection of the . . . Convention until such time as their status has been determined by a competent tribunal."

[57] FLORY, PRISONERS OF WAR 39 (1942).

[58] The distinction between exemption from attack and prisoner of war status may be illustrated by the case of United States v. Kraukoreit, 59 Bd. of Rev. 7 (1946), 5 BULL. JAG(ARMY)

whose command has been surrendered may no longer be attacked, but responsibility for his maintenance and treatment as a prisoner of war cannot be fixed on the captor state until it has assumed physical control. The Brussels declaration of 1874 avoided a direct statement as to the precise moment at which prisonership commenced, but did so indirectly by defining prisoners of war as lawful and disarmed enemies. There was, however, no precise conventional rule which fixed the commencement of prisonership.[59] Article 1 of the 1929 Geneva PW Convention approached the matter obliquely. It states that the convention applies to the persons mentioned in Articles 1, 2, and 3 of the 1907 Hague Regulations "who are captured by the enemy." It thus recognizes that custody is a condition precedent to prisoner of war entitlement.

In recognition of the meager facilities which are available for the processing of prisoners of war in maritime and aerial warfare, the 1929 Convention carefully provided that the convention applied:

> to all persons belonging to the armed forces of belligerents who are captured by the enemy in the course of maritime or aerial warfare, subject to such exceptions (derogations) as the conditions of such capture render inevitable. Nevertheless, these exceptions shall not infringe the fundamental principles of the present Convention; they shall cease from the moment when the captured person shall have reached a prisoner of war camp.[60]

Experience in World War II confirmed the fact that the conditions which necessitated exceptions to the full application of the convention in maritime and aerial warfare also existed in fluid combat situations.[61] The International Committee of the Red Cross proposed that

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262 (1946). German military forces in Italy surrendered as of May 2, 1945. On May 6, 1945, before their unit had been taken into custody, the three accused murdered a fellow soldier. After they came under Allied control the accused were tried by a United States general court-martial for murder in violation of Article of War 92. The Board of Review held that the accused were not subject to military law under Article of War 2 until they became prisoners of war, and held that they did not become such prisoners until they were actually taken into Allied custody. Accordingly, they did not violate the Articles of War. Because the victim was also a member of the German forces, the offense was not a violation of the law of war. It was, however, held to be a violation of Italian law which the United States forces had a right to enforce in view of Italy's status as an occupied country. Even if Italian law could not be enforced with respect to German forces in Italy during hostilities (*e.g.*, Coleman v. Tennessee, 97 U.S. 509 (1878)), it became enforceable against them upon the unconditional surrender of the German forces on May 2, 1945.

[59] See FLOBY, *op. cit. supra* note 57, at 39.

[60] Art. 1(2), 1929 GPW Convention.

[61] After the Dieppe landing in 1942, the Canadian forces handcuffed German prisoners for some hours in order to prevent escape. A waive [*sic*] of reprisals and counter-reprisals followed. On that occasion, the British government took the view that the convention was not applicable to captured personnel as long as they were still on the battlefield. PICTET, COMMENTARY III, GPW CONVENTION 73–74. There is considerable merit in the British position. If, in the tense circumstances which prevail in such fluid battle conditions as commando raids and airborne operations, the captors are denied the right to provide for their own security by handcuffing

the exceptions which were specified in the 1929 Convention should be extended to all warlike operations. This proposal would have resulted in a waiver of technical provisions without any impairment of fundamental principles. The conference, however, feared that any express distinction between fundamental principles and technical provisions might lead to an interpretation that the latter provisions were in fact optional. Article 5 as finally enacted provides that the convention in its entirety "shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation."[62]

Under this text it will be noted that a Detaining Power is now precluded from relaxing the standards fixed by the convention in the event the State of Origin capitulates unconditionally as did Germany in 1945.

Article 6 of the convention prohibited the parties to the conflict from alienating any of the rights which it confers upon a prisoner of war, and article 7 of the convention precludes the prisoner himself from renouncing the rights which the convention accords to him. The text of articles 5 and 7 considered together makes it clear that a prisoner of war is himself precluded from changing his status prior to the time of his final release and repatriation.[63]

F. ENTITLEMENT OF DESERTERS AND DEFECTORS TO PRISONER OF WAR STATUS

A question of significant importance, that of the entitlement of deserters and defectors to prisoner of war status, has arisen due to the imprecision of the language of Article 4 of the GPW Convention. As to military personnel article 4 provides that:

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

The term "fallen into the power of the enemy" replaced the term "captured by the enemy" which had been used in the 1929 Convention.[64] It is clear from the *travaux preparatoires* that this new terminol-

prisoners, there is great danger that the prisoner will be shot "while trying to escape" or "in self defense."

[62] See PICTET, COMMENTARY III, GPW CONVENTION 74.

[63] The provisions of the 1949 GPW Convention which preclude prisoners of war from voluntarily renouncing their rights have been construed as precluding them from renouncing their status as prisoners of war in order to return to a civilian status or to join the armed forces of the Detaining Power. U.S. DEP'T OF ARMY, FM 27-10, THE LAW OF LAND WARFARE para. 49 (1956) [hereinafter cited as FM 27-10].

[64] Art. 1, 1929 GPW Convention.

ogy was intended to be more comprehensive than that which had been utilized in the 1929 Convention. It was intended to encompass at least two additional classes of soldiers: those who are surrendered as a result of a national capitulation or armistice (referred to as "surrendered enemy personnel" during World War II),[65] and those who were present in the territory of the enemy at the outbreak of hostilities.[66] Was it, however, intended to cover persons who deserted their armed forces prior to their capture or surrender, or persons who at the time of their capture or surrender expressed a desire to serve the Detaining Power. Neither the convention nor its *travaux preparatoires* refer expressly to such persons.

For the purpose of this study a deserter is defined as a soldier who voluntarily abandons his force to avoid combat or for some other purpose, but who, *at the time of his capture or surrender*, has neither the intent nor the desire to sever his allegiance to his country, to bear arms on behalf of the Detaining Power, or to otherwise actively assist the Detaining Power in its military operations. A defector is defined as a soldier who voluntarily abandons his forces either for the purpose of bearing arms on behalf of the Detaining Power or to otherwise participate in military operations of the Detaining Power, or who *at the time of his capture or surrender*, makes known his previously formulated and present intent to bear arms on behalf of the Detaining Power or otherwise actively to participate in the military operations of the Detaining Power.

The status which is to be accorded deserters and defectors is of particular importance for it will determine, among other matters, the type of employment which may be required of them, their possible utilization as combatants against their own or other countries, their entitlement to repatriation, and their eligibility to asylum as political refugees upon the conclusion of hostilities. The treatment of defectors is a matter of considerable significance because of the possibility that in future conflicts ideological and political considerations will occasion widespread defection. Under these circumstances states will be inclined to deny deserters and defectors prisoner of war status, par-

[65] See 2A FINAL RECORD 237; PICTET, COMMENTARY III, GPW CONVENTION 50, 75–76. See also Picter, *Les Conventions de Geneve*, 1 RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONALE 79. At the conclusion of World War II, the German and Japanese troops which had been taken into Allied custody as a result of the mass capitulation of the Axis armed forces and the surrender of the Axis states, were not accorded prisoner of war status and were denominated as "surrendered enemy personnel." The Allies took the view that unconditional surrender gave them as Detaining Powers a free hand as to the treatment they could accord military personnel who had fallen into their hands following capitulation. Among the disadvantages suffered by such personnel were that their personal effects were impounded without a receipt, officers received no pay, and enlisted persons, although compelled to work, received no wages. In penal proceedings they were not entitled to the benefits of the 1929 GPW Convention.

[66] 2A FINAL RECORD 237.

ticularly if such action will make available to them, but not the enemy, the services of a substantial number of enemy personnel.

The entitlement of deserters and defectors to prisoner of war status depends in large part upon the interpretation which is given to the words "fallen into the power of the enemy." Properly, these words must be interpreted in the light of the overall objectives of the conference, the intent of the conferees, the circumstances existing at the time of the negotiation of the convention, the evils which the conference intended to obviate and, if appropriate, the prevailing practice of states with respect to the status of such persons prior to the 1949 GPW Convention.

If the GPW Convention is interpreted as being applicable to deserters and defectors, they being persons who have "fallen into the power of the enemy," they would, as prisoners of war, be ineligible for either voluntary or involuntary service as combatants. They would also be exempt from forced labor with respect to those categories of work which are proscribed by Articles 50 and 52 of the GPW Convention.[87] If the GPW Convention is interpreted as being inapplicable to them their status would, in almost all circumstances, be that of protected persons under the provisions of Article 4 of the Civilians Convention.[88] This article provides:

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.
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> . . . .

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[87] For the text of Articles 50 and 52, 1949 GPW Convention, see note 122 *infra*.

[88] It has been said that Article 4 of the Civilian Convention confirms a general principle that "Every person in enemy hands must have some status under international law: he is either a prisoner of war, and, as such, covered by the Third Convention [GPW], a civilian covered by the Fourth Convention [Civilian Convention], or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that this is a satisfactory solution—not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view." PICTET, COMMENTARY IV, CIVILIAN CONVENTION 51.

Although the issues of entitlement to prisoner of war status and repatriation are separate and distinct ones, it is to be noted that generally protected persons enjoy the same rights to repatriation under the Civilians Convention as that enjoyed by prisoners of war under the GPW Convention. It is to be noted as well that as a matter of practice states have generally granted asylum to deserters and defectors, as they have to prisoners of war—particularly when the provisions of an armistice agreement or those of a treaty of peace failed to immunize them from punishment by their state of origin for their desertion or defection. See Schapiro, *The Repatriation of Deserters*, 29 BRIT. YB. INT'L L. 310 (1952).

> Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons within the meaning of the present Convention.[69]

The Civilian Convention specifies, as does the GPW Convention, that special agreements may not adversely affect the situation of protected persons, nor restrict their rights under the convention.[70] and that such persons may not under any circumstance "renounce in part or in entirety the rights secured to them by the Convention."[71] Although this convention expressly prohibits an occupying power from compelling a protected person to serve in its armed or auxiliary forces,[72] it permits a protected person voluntarily to enlist in the enemy's armed forces.[73]

Article 4 of the GPW Convention is susceptible to at least three interpretations with respect to the categories of military personnel who are entitled to prisoner of war status.[74] First, *all* military personnel who are in the custody of the enemy. Second, all military personnel in the custody of a capturing force *except* deserters and defectors. Third, all military personnel in the custody of a capturing force—irrespective of the manner by which custody is effected—except those who advise the Detaining Power at the time they are taken into custody of their intent and desire to serve in the armed forces of the Detaining Power or to participate in activities which will foster the war effort of the Detaining Power.

States in determining which of these interpretations they are to adopt will be confronted with considerations of serious import. If deserters and defectors are to be considered as excluded from prisoner of war status, an unscrupulous belligerent may assert, contrary to

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[69] The protection provided by the Civilian Convention commences with the outset of the conflict or occupation. See Art. 6, Civilian Convention. Generally, in the territory of the parties to the conflict its application terminates upon the close of military operations and, in the case of occupied territory, one year after the general close of military operations. The occupying power, however, is bound for the duration of the occupation, to the extent that it exercises the functions of government in such territories, by the provisions of Articles 1 to 12, 27, 29 to 34, 47, 49, 51 to 53, 59, 61 to 77, and 143 of the Civilian Convention. See Art. 6, Civilian Convention.

[70] Art. 7, Civilian Convention.

[71] Art. 8, Civilian Convention.

[72] Art. 51, Civilian Convention. Article 147, Civilian Convention, states that a breach of this obligation constitutes a grave breach of the convention.

[73] Such enlistments, however, may not be the result of pressure or propaganda. Art. 7, 1949 GPW Convention. Under Articles 5 and 7 of the 1949 GPW Convention, prisoners of war are denied the right to voluntarily enlist in the enemy's armed forces.

[74] See Clause, *The Status of Deserters Under the 1949 Geneva Prisoner of War Convention*, 1961 MILITARY L. REV. 15, 36.

fact, that large numbers of prisoners who have passed into their custody are deserters or defectors and, as such, not entitled to prisoner of war status.[75] Proof to the contrary in time of combat would be difficult, particularly if a full and immediate investigation of such cases is infeasible or is not permitted.

States which in good faith adopt a policy which denies prisoner of war status to persons who are in fact deserters and defectors run the danger that under the guise of a similar policy an enemy state may attempt to justify its illegal conduct by the simple expedient of classifying any and all prisoners as deserters and defectors. On the other hand should states adopt the policy of according deserters and defectors POW status they would thereby deprive themselves of valuable military resources and other important advantages.

As indicated, neither the text of the GPW Convention nor its *travaux preparatoires* reflect the specific intent of the conferees as to the entitlement of deserters and defectors to the protection of the GPW Convention.[76] However, the *travaux preparatoires* are clear that the words "fall into the power of the enemy" were not intended to be identical in their effect to the words "captured by the enemy"[77] as used in the 1929 Convention. Further, the words "fall into the power of the enemy" were not intended to encompass only those whose surrender or capture was involuntary.[78]

As a practical matter soldiers who desert in order to avoid the conflict, but who are captured, do in fact fall involuntarily into the hands of the enemy just as much as do other prisoners who are captured or are surrendered.[79] Logically, there is no reason why those who desert to avoid the conflict and who fall into the hands of the enemy either voluntarily or involuntarily should be denied POW status while captured or surrendered defectors[80] are vested with such a status. It is clear that it was not intended that the convention would

[75] An interpretation which would exclude from prisoner of war status all military personnel in the custody of a Detaining Power who voluntarily sever their allegiance to their country and who assist the Detaining Power in its war effort, is considered to be unsupportable under the provisions of Articles 5 and 7 of the 1949 GPW Convention and the intent and objectives of this convention.

[76] See GARCIA-MORA, INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT 103 (1956) which is of the view that deserters were deliberately omitted from the categories of persons who are to be entitled to prisoner of war status under Article 4 of the 1949 GPW Convention and that as such they constitute a special category of persons.

[77] See Clause, *supra* note 74, at 31; Gutteridge, *The Geneva Convention of 1949*, 26 BRIT. YB. INT'L L. 294, 312–13 (1949); Yingling & Ginnane, *The Geneva Convention of 1949*, 46 AM. J. INT'L L. 393, 401 (1952).

[78] 2 A FINAL RECORD 237; PICTET, COMMENTARY III, GPW CONVENTION 50; Schapiro, *The Repatriation of Deserters*, 29 BRIT. YB. INT'L L. 310, 323 (1952).

[79] Schapiro, *supra* note 78, at 323 states that "a soldier who surrenders is just as much 'captured' as any other prisoner. . . ."

[80] Those who as of the time of their surrender or capture express their previously formulated intent to defect, they having been incapable theretofore of effectuating this intent because of their inability to free themselves from the physical control of their forces.

be used as a means of punishing deserters and defectors by denying them POW status.[81] On the contrary it was the objective of the convention to serve the cause of humanity and to insure by its provisions the general well-being of all prisoners. The inclusion of deserters and defectors as persons entitled to POW status would not be inconsistent with this objective and would perhaps best insure that the rights visualized for prisoners of war would neither be frustrated by contrivance nor be voluntarily alienated by the prisoners of war themselves. Furthermore, an interpretation which accords to deserters and defectors POW status would leave no gap under which an unscrupulous Detaining Power could, under the guise of compliance with the convention, deny to any captured or surrendered military personnel in its hands prisoner of war status on the basis of its unfounded assertion that they were in fact deserters or defectors.[82]

One authority who considers that the 1949 GPW Convention entitles deserters and defectors to POW status has stated that: "A member of the armed forces of the enemy who comes into the hands of a detaining power, from whatsoever motive and by whatever means, must be held as a prisoner of war and cannot leave his status as such, because he is powerless to surrender it."[83]

During the second meeting of the GPW drafting committee at Geneva, Mr. Wilhelm, a member of the legal staff of the International Red Cross, explained to the conferees that the conference of government experts held at Geneva in 1947, had approved the suggestion "that the words 'fallen into the enemy hands' had a wider significance than the word 'captured' which appeared in the 1929 convention, the first expression also covering the case of soldiers who had surren-

[81] It may be noted in this connection that deserters and defectors are not considered by the nations from whose forces they desert or defect as having lost, because of their conduct, their status as members of their armed forces, and that nations have uniformly held conduct of this nature to be punishable under their domestic law as military offenses. Clause, *supra* note 74, at 30. In any event, national legislation concerned with the punishment of these offenses is conclusive neither as to their continued military status nor as to their entitlement to prisoner of war status while they are in the hands of a Detaining Power under either the 1949 GPW Convention or the Civilian Convention.

[82] See 2B FINAL RECORD 17–18. In opposing the attempt of the French and British delegates to modify the text of Article 7 so that POWs would be permitted to enlist in the armed forces of a Detaining Power, the Norwegian representative observed that it would be very difficult to prove that coercion or pressure had been used to obtain from a prisoner his renunciation of rights under the convention as the Detaining Power could always assert that it had been freely obtained and, for that matter, could also obtain, with little difficulty a confirmation of that assertion from the prisoner himself. This same possibility would exist if the convention were interpreted as denying deserters and defectors prisoner of war treatment.

[83] Letter from Professor R. R. Baxter to J. W. Brabner-Smith, Esq. dated October 20, 1958 commenting upon a study prepared by the addressee on the "extent to which friendly personnel of an enemy nation, including surrendered military personnel, can legitimately be employed to assist the war effort of a nation as combatants, guerillas, or otherwise." In this letter he recognizes that his view on this matter is contrary to that expressed by Wilhelm and Draper. (File JAGW 1958/7580, Oct. 31, 1958, Office of The Judge Advocate General of the Army.)

dered without resistance or who had been in enemy territory at the outbreak of hostilities . . . ."[84] In a later article in which he amplified his views as to the entitlement of deserters and defectors to prisoner of war status he stated:

> In effect we have seen that it [GPW Convention] must in accordance with Article 4A be applicable to military personnel who fall into the power of the enemy. *The term 'fall' shows clearly that it applies to military personnel who pass into the power of the enemy not by their own volition but because of a force exterior to themselves, because they are forced to do so.* This conclusion is applicable to military personnel captured during combat as well as to those who surrender or capitulate, it being impossible for them to continue to fight.
>
> This reasoning based on the letter to the convention itself, corresponds to that which flows from its general economy or its spirit, it is established essentially to protect the combatants who, *even upon falling into the hands of the enemy, maintain the sentiment of remaining faithful to the army that they have served, and not those who, like deserters, decide to abandon the fight and their country* . . . . Many of its [GPW] articles such as the disposition concerning the communication of names, to repatriation, to financial resources, to the protecting power clearly imply a certain continuity of fidelity between the prisoner and his country of origin; it is difficult to visualize how all of these clauses could be applied to those who wish to sever their allegiance . . . .[85]

Although this statement can be read as denying prisoner of war status to deserters, and to those captured or surrendered personnel who as of the time of their surrender or capture do not desire to remain faithful to their country, Wilhelm concludes that the term deserter "must be reserved for those military personnel who place themselves voluntarily under the power of the enemy and who from the very beginning, have clearly manifested their intention to sever their allegiance with the country under which they have served."[86] Such deserters (defectors) in his opinion, need not be accorded prisoner of war status under the convention.[87] This view which places all deserters and some defectors in a prisoner of war status finds no express support in the *travaux preparatoires.*

There is no sound reason why a defector who had perfected his

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[84] 2A FINAL RECORD 237.

[85] Wilhelm, *Peut-on Modifier le Statut des Prisonnaires de Guerre?* 1953 REVUE INTERNATIONALE DE LA CROIX ROUGE 681. (Emphasis added.)

[86] *Id.* at 683.

[87] It is evident that the category of personnel which he describes are defectors, and not deserters who merely leave their duties intending to remain away permanently or indefinitely and who have no intention of severing their allegiance to their country or of cooperating with the Detaining Power. Mr. Wilhelm's view that those provisions of the convention which refer to "the communication of names, to repatriation, to financial resources to the protecting power" imply "a certain continuity of fidelity between the prisoner and his country of origin," finds no support in either law or practice. There is no international law of desertion and national laws do not generally deprive deserters or defectors of their nationality.

escape from his own forces should be allowed to serve the Detaining Power, while a person who intended to defect, but who was unable to effectuate this intent prior to the time of his surrender or capture should be denied this right.

It is Mr. Draper's view that:

> *Those who desert their own forces and give themselves up to the enemy as defectors do not, it is thought, 'fall into the power of the enemy' for they have voluntarily put themselves into his power, and have not been captured.* The important consequence may follow that such defectors, not being entitled to prisoner of war status, are not entitled to the rights conferred by this [Prisoner of War] Convention and may therefore volunteer to do propaganda work, broadcasting, television performances, etc., without there being any question of renouncing their rights under the convention.[88]

It appears that Draper uses the word "defectors" to describe prisoners who for any reason disassociate themselves from their forces and give themselves up to the enemy. Under this view it would appear that no deserter or defector would be entitled to POW treatment.

It is likely that had the GPW conferees been required to provide expressly for the status of deserters and defectors they would have supported the view that all deserters but no defectors were covered by Article 4A of the GPW Convention.[89] This view reflects the treatment accorded these categories of personnel under customary international law.[90]

Since the 1949 GPW Convention is subject to several interpretations on the issue of the entitlement of deserters and defectors to POW status, action should be taken now by the signatories to clarify this matter.[90a] The Swiss Federal Council could be requested to ascertain the position of all signatories on this issue. Should such an inquiry disclose a wide divergence of opinion, the settlement of the issue

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[88] DRAPER, THE RED CROSS CONVENTION 53–54 (1958). (Emphasis added.)

[89] It is doubtful that the signatory states would have agreed to consider defectors as covered by the 1949 GPW Convention and thereby deny themselves of the services of defectors. Since the convention is unclear on the matter of deserters and defectors, resort to customary international law must be had to resolve this issue. Under customary international law deserters and defectors were not entitled to POW treatment as a matter of law although the Detaining Power could, if it desired, accord them this status. Furthermore, those who were accorded this status could renounce it. See Clause, *supra* note 74, at 37.

[90] As a practical matter a Detaining Power would derive little advantage from an improper classification of prisoners of war as defectors. Deserters whom the Detaining Power forced into combat could not be relied upon. Under an improper classification as deserter, POWs could, however, be required to do certain work which prisoners of war may not be required to perform.

[90a] The United States position on this matter is not clear. FM 27–10 makes no reference to deserters or defectors or to their entitlement to prisoner of war treatment. Paragraph 70 of this manual states: "The enumeration of persons [those set forth in Article 4 of the 1949 GPW Convention] entitled to be treated as prisoners of war is not exhaustive and does not preclude affording prisoner of war status to persons who would otherwise be subject to less favorable treatment."

should be sought by a multilateral treaty. Should its settlement by means of a multilateral treaty be impossible, states, on the commencement of hostilities, should seek an agreement on this matter as well as on the measures which are to be utilized to insure the fulfillment of the obligations thereunder.

G. SPECIAL AGREEMENTS

Article 83 of the 1929 GPW Convention reserved to the parties the right to make special agreements in accordance with the practices established during World War I. It was contemplated that such agreements would provide benefits greater than those provided under the convention.

During World War II, however, the Vichy government entered into agreements with Germany which authorized the latter to use in German war industries French prisoners who consented to this type of employment. The agreements also allowed the prisoners to change their status to that of civilians.[91] This practice resulted in French prisoners being treated as slave laborers and often their exposure to allied war raids. The U.S. Military Tribunals in the trials of Krupp,[92] Milch,[93] and Flick,[94] rejected the validity of the Vichy agreements as being contrary to the spirit of the 1929 Convention and the illegal use of prisoners of war constituted one of the counts on which Krupp and Flick were convicted. In an effort to prevent recurrence of these abuses, Article 6 of the 1949 GPW Convention provides that "no special agreement shall adversely affect the situation of prisoners of war . . . nor restrict the rights which it confers upon them."

H. NON-RENUNCIATION OF RIGHTS

As a complement to article 1 (Application in All Circumstances), article 5 (Duration of Application), and article 6 (Prohibition of Agreements in Derogation of the Convention), article 7 specifies that "Prisoners of War may in no circumstances renounce in part or in entirety the rights secured to them by the . . . Convention." Thus, neither the State of Origin, nor the prisoner himself, nor the concurrence of both, can alter the prisoner's status or result in a waiver of his rights, until his "final release and repatriation."

It is not surprising that article 7 encountered considerable opposi-

[91] PICTET, COMMENTARY III, GPW CONVENTION 84.

[92] The Krupp Case, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 29, 1374, 1495 (1950).

[93] The Milch Case, 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 360–61, 779–80 (1950).

[94] The Flick Case, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 13, 1198, 1202 (1950).

tion[95] for some conferees consider that the right to a "freedom of choice" was a fundamental right of man.[96] Despite arguments to the contrary,[97] the conference was pursuaded that in time of war, prisoners of war do not in fact have the mental freedom to make a free choice. Duress could be so subtle as to be incapable of proof. The conferees concluded that the general benefits to be obtained by the flat prohibition outweighed the hardships that could result from denying the prisoner freedom of choice as to his status.[98] Broadly speaking, article 7 is significant for it recognizes protected persons as subjects of international law with direct rights and obligations thereunder.[99]

I. FUNCTION OF THE PROTECTING POWER

A Protecting Power is a neutral state which is entrusted by a belligerent with the protection of its interests and those of its nationals who are in the power of a third state.[100] The safeguards of the convention would be illusory if it were not for the functions which it vests in the Protecting Power. Thirty articles impose functions on the Protecting Power. These functions include among other matters, the transmission of correspondence and information,[101] the inspection of facilities,[102] the supervision of the distribution of relief,[103] and the representation of prisoners in judicial proceedings.[104] Articles 8 to 11

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[95] 2B FINAL RECORD 17, 18, 56, 110.

[96] See PICTET, COMMENTARY III, GPW CONVENTION 88.

[97] The British delegate commented acidly, "The Convention is particularly intended to give prisoners of war the greatest possible freedom. It seems strange for a humanitarian conference to have inserted an article stipulating that in no circumstances a prisoner of war may be allowed to make a free choice." The French delegate recalled that the Czechoslovak National Army was formed from among Austro-Hungarian prisoners of war held by the Allies during World War I. 2B FINAL RECORD 17. See also BENES, MY WAR MEMOIRS 180–218 (1928).

[98] See PICTET, COMMENTARY III, GPW CONVENTION 89–90. Within two years article 7 was to haunt the delegate from the free world in connection with communist insistence that a prisoner himself cannot waive his right to repatriation under article 118.

[99] Arts. 129, 130, 1949 GPW Convention.

[100] The concept of Protecting Power originated in the 16th century when only the principal sovereigns maintained embassies. These sovereigns claimed the right to take under the protection of their embassies foreign nationals of like culture, who were without national representation of their own. By the end of the 19th century, it became customary for states at war to request a neutral to act as Protecting Power with particular reference to the custody of the diplomatic and consular premises. During World War I, the role of the Protecting Power was expanded to safeguard the interest of prisoners of war in conjunction with the International Committee of the Red Cross. In recognition of this experience, Article 86 of the 1929 GPW convention provided a legal basis for the function of the Protecting Power, and vested the representative of Protecting Powers with unrestricted access to protected prisoners of war. During World War II, the burden of acting as Protecting Powers was borne principally by Sweden and Switzerland, which represented virtually all belligerents. At one time Switzerland was Protecting Power for thirty-five belligerent countries. PICTET, COMMENTARY III, GPW CONVENTION 93–95.

[101] Arts. 12, 23, 62, 63, 66, 69, 77, 120, 122, and 128, 1949 GPW Convention.

[102] Arts. 56, 78, 79, 96, and 126, 1949 GPW Convention.

[103] Art. 73, 1949 GPW Convention.

[104] Arts. 100–05, 107, 1949 GPW Convention.

are the basic articles. Article 8 states that the "Conventions shall be applied with the cooperation and under the scrutiny of the Protecting Power whose duty it is to safeguard the interests of the parties to the conflict." It was also recognized that no neutrals might be available in future wars. Accordingly, article 10 authorizes the parties, by agreement, to entrust such functions to an organization "which offers all guarantees of impartiality and efficacy." A resolution proposing the establishment of such an organization, however, was not adopted by the Diplomatic Conference.[105]

Article 10 also provides, that whenever prisoners cease to benefit from the activities of a Protecting Power, or of an organization, the Detaining Power must request a neutral state or an organization to assume the function. Should such a request prove fruitless, the Detaining Power must request the International Committee of the Red Cross or some similar body to assume the role.[106]

One of the reasons for the failure of a Protecting Power is the lack of a staff and the expenses involved. The convention makes no provision for reimbursement, leaving the matter to agreement between the states concerned.[107]

Only inchoate provisions have been made for the contingency of an absence of qualified neutrals. The failure to implement the provisions for the establishment of an international organization to assume the many important functions of the Protecting Power may leave future war victims in the position similar to that in which prisoners of war found themselves during the Korean conflict when no Protecting Power functioned as such.

III. GENERAL PROTECTION OF PRISONERS OF WAR

A. HUMANITARIAN PRINCIPLES

Articles 12 to 16 reaffirm the basic principle that prisoners of war are in the hands of the Detaining Power and not in those of the individuals or units which capture them; that they must at all times be treated humanely; that their honor and their person must be respected; that they must be provided maintenance free of charge; and that subject to considerations of age, sex, rank, and health, they must be treated alike without adverse distinctions based on race, nationality, religion, or political belief. Only article 12 which deals with the responsibility of the Detaining Power for the treatment of prisoners will be discussed in detail.

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[105] DRAPER, *op. cit. supra* note 88, at 55–56.

[106] The Soviet Union and its satellites made a reservation to this provision, declaring that they would not recognize the validity of a request by the Detaining Power to a neutral state or humanitarian organization unless the consent of the State of Origin is obtained.

[107] DRAPER, *op. cit. supra* note 88, at 56.

B. RESPONSIBILITY FOR TREATMENT

Article 12 places on the captor state the ultimate responsibility for the proper treatment of prisoners of war. To this end a transfer of prisoners of war to other powers may only be made subject to the conditions that the transferee power be a contracting party and that the Detaining Power satisfy itself that the transferee is able and willing to apply the convention. If the transferee fails in any important respect, the captor state is obligated to take steps to correct the deficiency or demand return of the prisoners.[108]

Article 12 presents difficult problems when applied to hostilities which are conducted by multi-national commands or by international forces directly responsible to the United Nations. It is unfortunate that the conference did not foresee that modern command organizations would differ materially from the traditional national forces of prior wars.

1. Multi-national commands.

When forces consist of different national contingents operating under a unified international command (*e.g.*, NATO) a prisoner may pass through numerous national hands before he arrives at a permanent internment camp. In the abstract it is possible to fix responsibility in the captor state, but in actual practice such fixing of responsibility may be both unrealistic and impractical.[109] It would appear more reasonable to fix responsibility on the multi-national organization, but being neither a "State" nor a "Detaining Power" it is ineligible under the convention to become a transferee. The authoritative Commentary of the International Committee of the Red Cross in this respect flatly states:

> A Unified Command which has authority over the armed forces of several countries cannot in this case take over the responsibility incumbent upon States; otherwise the proper application of the Convention which are . . . indissolubly linked to a structure composed of States would be endangered.[110]

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[108] Article 2, 1929 GPW Convention, similarly fixed responsibility for the treatment of prisoners of war on the "hostile government," but it was not clear whether responsibility could be transferred to a new Detaining Power. During World War I the United States took the position that if its prisoners were sent to an ally, the United States would not be relieved of the treaty obligation which it had assumed toward the State of Origin. See FLORY, PRISONERS OF WAR 45 (1942); U.S. WAR DEP'T DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL 1912–1931, at 1101–102.

[109] DRAPER, *op. cit. supra* note 88, at 57–58. If a Luxemburg company, operating as part of a French division assigned to a U.S. Army Corps captures a prisoner, who is evacuated through normal channels to a Spanish internment camp, how realistic is it to hold Luxemburg responsible for the treatment of the prisoner from the time of his capture until his final release and repatriation?

[110] PICTET, COMMENTARY III, GPW CONVENTION 132. Baxter, *Constitutional Forms and Some*

2. United Nations Enforcement Action.

Operations by forces directly responsible to the United Nations presents an even more troublesome problem than that presented by modern coalition organization. For the latter there may be a juridical, although impractical, solution. For the former there is a vacuum in the state of the law. As to this situation the International Committee of the Red Cross has stated that it is inconceivable that the United Nations would not comply with the letter of the Convention.[111] Although this may be true so far as the humanitarian treatment of prisoners is concerned, it overlooks the fact that the Detaining Power may be required of necessity to exercise penal sanctions to safeguard prisoners of war against violence from their fellow prisoners. Since the provisions regarding penal and judicial sanctions are inextricably tied to the national law of the Detaining Power, their imposition by a United Nations command is made impossible.[112] It is essential that a practical solution be found to this problem. The most feasible would be a designation, from among those contributing forces either to a multinational command or to the United Nations, of the power most capable of supporting prisoners of war in any combat zone as the responsible Detaining Power.[113]

In a recent memorandum, the International Committee of the Red Cross advised the governments of states which are both parties to the Geneva Convention and members of the United Nations, that the

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Legal Problems of International Commands, 29 BRIT. YB. INT'L L. 325 (1952) suggests two solutions: (1) A special agreement concluded in advance, whereby certain powers should be designated in advance to be responsible for the treatment accorded to prisoners of war; or, (2) Modification of the convention to substitute fixed standards in lieu of those applicable under the national law of the Detaining Power, coupled with a recognition that a multi-national organization or its military command might itself become a party to the convention. The ICRC Commentary, although recognizing the importance of the problem rejects the first suggestion with a doctrinaire expression of horror—it contravenes the responsibility of the captor state; it shrugs off the second solution as calling for an international codification of penal laws which might be difficult to obtain. PICTET, COMMENTARY III, GPW CONVENTION 133–34.

[111] PICTET, COMMENTARY III, GPW CONVENTION 133–34. See Moritz, *The Common Application of the Laws of War Within the NATO-Force*, 1961 MILITARY L. REV. 5–11, 19. The U.N. forces in the Congo have nevertheless acted as a Detaining Power without there being any objection voiced.

[112] During the Korean conflict, the United Nations command held a substantial number of prisoners of war who had commited murder of their fellows while in captivity. These prisoners were never brought to trial; although they were guarded by United States personnel, they were considered to be in the power of the United Nations command. The United Nations is not a Detaining Power within the meaning of the convention; neither is it possible for it to become a party by accession; nor is it a power within the meaning of article 2. As long as the fiction that these prisioners were held by the United Nations command was maintained, they could not be brought to trial. DRAPER, *op. cit. supra* note 88, at 69; Moritz, *supra* note 111, at 7–8. The United Nations has transferred prisoners in its custody who have committed war crimes to their national governments for punishment.

[113] Multi-national and international commands are a fact of the modern world scene and the anachronism of the Geneva Conventions will not compel a return to former practices.

United Nations had assured the International Red Cross that it would respect "the principles" of the Geneva Conventions and that "instructions to that effect had been given to the troops placed under its command."[114]

The memorandum notes that since the United Nations Organization is not a party to the Geneva Conventions, each state bound by the Geneva Conventions, "is personally responsible for the application of these conventions, when supplying a contingent to the United Nations." This memorandum in some respects creates, rather than resolves, problems which arise from the fact that the United Nations organization is not a party to the conventions. The text of the memorandum makes clear that all conflicts in which United Nations troops participate are conflicts of an international character and that each individual state which has made its national forces available to the United Nations for this purpose is itself a belligerent and a party to the conflict.[115] It would appear from this memorandum, however, that the United Nations intends to issue instructions to its forces which will require them to comply only with the general principles of the conventions. If this is a correct statement of the situation, such instructions, if complied with, would result in a breach of the convention by certain states contributing forces to the United Nations. A breach would result if a military contingent of a state which is a signatory to the Geneva Conventions should fail to comply with all of the provisions of the conventions in a United Nations action against another signatory state. If on the other hand the military contingent of a state which is not a signatory to the convention is participating in a United Nations action against a state which is a signatory the former would not be legally bound to comply with any of the provisions of the convention absent an agreement between the non-signatories and the signatory. Under these circumstances the commitment made by the United Nations does not insure full compliance by United Nations troops with all of the provisions of the conventions nor uniform conduct of United Nations troops with respect to prisoners of war and protected persons.

C. *LABOR OF PRISONERS OF WAR*

Although the detaining state has many obligations to prisoners of war, it also has rights with respect to them. Customary international law permits a Detaining Power, subject to certain limitations, to

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[114] Memorandum from the International Committee of the Red Cross to Governments of states party to the Geneva Conventions and members of the United Nations organization, *Application and Dissemination of the Geneva Conventions of 1949*, November 10, 1961.

[115] 2 OPPENHEIM, INTERNATIONAL LAW 649–50 (7th ed. Lauterpacht 1952). See also Lalive, *International Organization and Neutrality*, 24 BRIT. YB. INT'L L. 80–81 (1947).

utilize prisoner of war labor. While recognizing that such labor may make a substantial contribution to the economic resources of the Detaining Power, and thus contribute to its overall war effort, modern writers stress the humanitarian benefit of work as an antidote for the boredom of captivity.[116]

Customary restrictions which found expression in the Hague Regulations, and Article 27 of the 1929 Convention, exempted officers from the requirement of work, proscribed humiliating tasks, and directed that work be allotted in accordance with aptitude, physical fitness, age, and sex.[117]

It was a general principle, recognized as early as the 18th Century, that prisoners of war could not be required to perform work which was directly harmful to the State of Origin.[118] Although the distinction between military labor and other economically productive labor may have had economic logic in the 18th Century, modern conditions of total war have virtually eliminated the basis for the distinction. Nevertheless, the distinction is still recognized[119] and psychological and emotional factors make the distinction sufficiently real to justify it. The 1929 conference recognized that the provisions of Article 6 of the Hague Regulations of 1907 which limited prisoner of war labor to work that "had no connection with the operations of the war," would, if literally construed, preclude the employment of prisoners of war in any economically productive manner.[120] In an effort to be more explicit it added to the general restriction, an explicit prohibition against the employment of prisoners of war in the "manufacture or transportation of arms or munitions of any kind, or in transport of material destined for the combat units."[121]

There was still some doubt as to the exact meaning of the general restrictions as found in the 1929 Convention. The 1949 conference resolved this doubt by an enumeration of the classes of work permitted.[122] It is to be noted, however, that this article does not preclude

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[116] FLORY, PRISONERS OF WAR 71 (1942); PICTET, COMMENTARY III, GPW CONVENTION 259.

[117] FLORY, *op. cit. supra* note 116, at 71.

[118] In 1777 the Continental Congress ordered an investigation of reports that American prisoners had been ordered to work on British fortifications, indicating that reprisals would be taken if the reports were confirmed. *Id.* at 74.

[119] Art. 6, Hague Regulations of 1907. Art. 31, 1929 GPW Convention.

[120] PICTET, COMMENTARY III, GPW CONVENTION.

[121] Art. 21, 1929 GPW Convention.

[122] Article 50, 1949 GPW Convention provides: "Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes: (a) agriculture; (b) industries connected with the production or the extraction of raw materials, and manufacturing industries; public works and building operations which have no military character or purpose; (c) transport and handling of stores which are not military in character or purpose; (d) commercial business, and arts and crafts; (e) domestic service; (f) public utility services having no military character or purpose."

prisoners of war from volunteering for work or the Detaining Power from utilizing prisoners of war who volunteer for work[123] in industries which are not proscribed by article 50.

Articles 51 and 53 establish labor standards and accord prisoners the benefits of national labor laws, except those pertaining to wages.[124] Article 52 prohibits the employment of a prisoner on labor which is unhealthy or dangerous "unless he be a volunteer"; and there is a flat prohibition against labor "which would be looked upon as humiliating for members of the Detaining Power's own forces."[125]

IV. PENAL AND DISCIPLINARY SANCTIONS

A. THE PRINCIPLE OF LIMITED ASSIMILATION

The Hague Regulations of 1907 enunciated the principle of assimilation by providing that prisoners of war were to be subject to the same penal and disciplinary laws as members of the armed forces of the Detaining Power except for escapees who were subject to disciplinary punishment only.[126] World War I experience had shown that strict assimilation was subject to serious abuses. Military codes are designed to enforce the discipline, loyalty, and unity of the armed forces and they punish severely offenses which tend to undermine these qualities. Prisoners of war, however, owe no loyalty to the Detaining Power and it was unreasonable, therefore, that they should be held accountable to the same standard of conduct as were members of the Detaining Power's armed forces.[127] Accordingly, both Article 45 of the 1929 GPW Convention and Article 82 of the 1949 GPW Conven-

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Article 52, 1949 GPW Convention provides: "Unless he be a volunteer, no prisoner of war may be employed on labour which is of an unhealthy or dangerous nature. No prisoner of war shall be assigned to labour which would be looked upon as humiliating for a member of the Detaining Power's own forces. The removal of mines or similar devices shall be considered as dangerous labour."

[123] *Cf.* Article 31, 1929 GPW Convention which categorically forbade the employment of prisoners of war in the manufacture or transport of munitions. Violations of the prohibition formed one of the bases for the conviction of Krupp, Milch, and Flick. See notes 92, 93, and 94, *supra*.

[124] Working pay, according to Article 62, 1949 GPW Convention, must be a "fair working rate of pay" not less than .25 Swiss francs for a full day.

[125] Article 52, 1949 GPW Convention, classifies the removal of mines and similar devices as dangerous work, thus permitting prisoners of war to volunteer for such tasks. This rule had its genesis in World War II when French public opinion compelled the use of German prisoners of war in the removal of some 100,000 mines in violation of the prohibition contained in Article 32, 1929 GPW Convention. During the conference it was felt to be more humane to permit skilled prisoners of war to volunteer for mine removal than to risk the lives of unskilled civilians. Of course, the requirement for prompt evacuation (Article 19, 1949 GPW Convention) precludes the use of prisoners of war for mine removal in the combat zone. PICTET, COMMENTARY III, GPW CONVENTION 277, 280.

[126] Art. 8, Hague Regulations of 1907.

[127] FLORY, *op. cit. supra* note 116, at 90; PICTET, COMMENTARY, GPW CONVENTION 406–07.

tion provide that certain offenses which would be subject to severe punishment if committed by troops of the Detaining Power are, when committed by prisoners of war, to be considered as disciplinary infractions only.[128] As a result of these articles prisoners of war benefit both from the safeguards enjoyed by personnel of the Detaining Power and from the additional safeguards provided by the convention.[129]

B. DISCIPLINARY SANCTIONS

The maximum disciplinary punishment authorized by articles 89 and 90 for prisoners of war are: (1) a fine of fifty per cent of advanced pay and working pay for thirty days; (2) discontinuance of privileges over and above treatment provided by the convention for thirty days; (3) fatigue duties for two hours daily for thirty days; and (4) confinement for thirty days. The disparity between the disciplinary punishment permitted by the convention and that permitted under the national disciplinary codes of the various signatories[130] raises the question as to whether disciplinary punishments which exceed those prescribed by the national codes may under the provisions of article 87 of the convention be imposed upon a prisoner of war. Article 87 provides: "Prisoners . . . may not be *sentenced by the military authorities and courts of the Detaining Power* to any penalties except those provided in respect to members of the armed forces of said Power who have committed the same act."[131]

A literal construction of article 87 would preclude a prisoner from

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[128] Article 83, 1949 GPW Convention encourages the use of disciplinary rather than judicial sanctions "whenever possible." Unsuccessful escape is punishable by disciplinary punishment only, but the escapee may be subject to "special surveillance." A successful escape is not punishable at all. (Arts. 90–92.) Moreover, offenses committed with the sole intention of facilitating escape, and which do not entail violence of life and limb, may be punished as disciplinary infractions only. (Art. 93.)

[129] Article 82, 1949 GPW Convention, also provides that acts of prisoners denounced by the law of the Detaining Power which would not be punishable if done by the forces of the Detaining Power shall entail disciplinary punishment only. It appears that during World War II some states legislated against relations between prisoners of war and local women, measures obviously intended to bolster the morale of troops abroad. PICTET, COMMENTARY III, GPW CONVENTION 409.

[130] Under Article 15 of the United States Uniform Code of Military Justice (10 U.S.C. § 815) prior to February 1, 1963, the disciplinary punishment which could have been imposed upon military personnel was less severe than that authorized by the convention. However, the recent amendment to the UCMJ, effective February 1, 1963, makes punishment at least comparable in severity. 10 U.S.C.A. § 815 (Supp. 1962). In this connection it must be remembered that future amendments may revise the problem. This problem may also exist with respect to other nations.

[131] The word "sentenced" as used in this article applies to disciplinary sanctions as well as to punishment imposed by courts. This interpretation is supported by the fact that it refers to punishments (sentences) imposed both by the "military authorities" and by the "courts of the Detaining Power." It is clear from article 88 that for the purposes of the convention disciplinary punishments are "sentences."

being punished more severely than he could be punished under the disciplinary law of the Detaining Power. This construction is not supported by the International Committee of the Red Cross in its commentary which states that, "Article 89 establishes a disciplinary code in miniature" which in this regard replaces the legislation of the Detaining Power.[132]

C. *PENAL SANCTION*

With respect to pre-capture offenses (violations of the law of war committed prior to capture), articles 85 and 102 provide significant departures from the practice followed by the Allies after World War II. It is remarkable that less than four years after the World War II war crimes trials had begun, the principal Allies were willing to agree that the manner in which they had conducted these trials would in the future constitute a grave breach of international law.[133]

Article 63 of the 1929 Convention provided: "[A] sentence will only be pronounced on a prisoner of war by the same tribunal and in accordance with the same procedures as in the case of persons belonging to the armed forces of the Detaining Powers." Moreover, under United States municipal law in effect during World War II, prisoners of war were expressly made subject to court-martial jurisdiction by the provisions of Article of War 12[134] and, as such, were subject to trial and punishment by court-martial for violations of all articles of war except those which, because of their nature, could not apply to captured enemy personnel—*e.g.*, desertion, misbehavior before the enemy and relieving, corresponding with or aiding the enemy.[135] Furthermore, many of the procedural safeguards which had been incorporated into military law since 1863 had been made specifically applicable by the Articles of War to military commissions which exercised jurisdiction under the law of war.[135a] Nevertheless, in 1945, General Yamashita, Commander of the Japanese Forces in the Philippines, was convicted in the Philippines under orders which authorized the Commission to consider depositions, affidavits, hearsay, and other evidence which was not admissible either in a court-martial or a military commission under the Articles of War and the Manual for Courts-Martial, 1928.[136] On appeal from the denial by the

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[132] PICTET, COMMENTARY III, GPW CONVENTION 439–40.

[133] Art. 130, 1949 GPW Convention.

[134] 41 Stat. 787.

[135] 41 Stat. 787, Articles of War 58, 75, 81.

[135a] 41 Stat. 787, Articles of War 24, 25, 38. Traditionally military commissions had operated without statutory authorization as common-law war courts not subject to the procedural rules applicable to courts-martial.

[136] The regulations governing the trial of war criminals promulgated by General MacArthur's headquarters provided generally for the admission of all evidence that would have "probative

Philippine Supreme Court of Yamashita's petition for a writ of habeas corpus, the Supreme Court of the United States rejected the applicability of both the Articles of War and the Geneva Convention of 1929[137] holding that they were intended to apply only to offenses which were committed by prisoners of war *subsequent* to their capture.[138] The correctness of the Court's decision on this issue is debatable.[139]

This rationale of the *Yamashita* case became a precedent for war crimes trials conducted by allied national war crimes tribunals. Pleas of the accused and requests by the International Committee of the Red Cross for compliance with the provisions of the 1929 Geneva Convention were rejected in all reported cases except one which was tried in France in 1950.[140] Generally this rejection rested on an assertion that under established principles of customary law those who violated the laws of war could not avail themselves of the protection which they afford, and that the 1929 Convention, which made no mention of precapture offenses, was not intended to modify customary rules.[141] Logically, this is a refutation of the presumption of innocence. It is the equivalent of holding that those who violate the state criminal law may

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value in the mind of a reasonable man," and then set out evidence specifically admissible including depositions not taken in accord with Article 25 of the Articles of War. See Transcript of Record, pp. 18–20, *In re* Yamashita, 327 U.S. 1 (1946).

[137] *In re* Yamashita, *supra* note 136.

[138] The Court considered the convention inapplicable on the ground that in context it was apparent that article 63 of the convention was intended to apply to crimes committed by enemy military personnel only after they became prisoners of war. *Id.* at 20–23. See Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 HARV. L. REV. 833, 866–82 (1946) who agrees with this position. As to the inapplicability of the Articles of War to trial of enemy combatants by military commissions, the Court said that the jurisdiction of military commissions as it had existed under the common-law of war was expressly saved by Article 15 of the Articles of War in all cases except those involving the trial of a person "subject to military law" and that Article 2 of the Articles of War did not include enemy combatants. 327 U.S. at 18–20.

[139] Article of War 2 does not specify that prisoners of war are "subject to military law." Article of War 12, however, expressly makes prisoners of war subject to court-martial jurisdiction. Furthermore, Article of War 2 does not preclude the applicability to prisoners of war of those articles of war which by their express language are applicable to all persons who appear before or are tried by military courts or commissions. Article 25 allows the reading of depositions in evidence under prescribed conditions, "before any military court or commission in any case not capital." The exception made in capital cases is specified as being for the benefit of the defendant. See *In re* Yamashita, 327 U.S. 41, 61–72 (Rutledge, J., dissenting).

It is certainly arguable that Article 63 of the Geneva Convention of 1929 was intended to include enemy combatants interned under article 9 for crimes committed before their surrender, and Yamashita was interned under article 9. Article 63 is a part of § V ("Prisoner's Regulations with the Authorities") of Title III ("Captivity"). Title III regulates the conduct and activities of a prisoner of war while in captivity and there is language in many of the articles of § V which would support a construction that their provisions are applicable to war crimes as well as to other offenses. *Id.* at 74 n.37. *Cf.* Fairman, *supra* note 138, at 871–73. See also Note, 44 MICH. L. REV. 855 (1946).

[140] PICTET, COMMENTARY III, GPW CONVENTION 413.

[141] *Id.* at 414.

not avail themselves of the procedural safeguard which that law provides for the protection of the accused.

Article 85 of the 1949 Convention effects a deliberate reversal of this practice. It provides: "Prisoners of war, prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention." Among these benefits is article 102, which provides:

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present chapter have been observed.

Although some ambiguity is injected by the phrase, "prosecuted under the laws of the Detaining Power,"[142] the proceedings of the Diplomatic Conference make it clear that a reversal of the *Yamashita* doctrine was intended.[143] The delegates were unanimous in the view that prisoners of war tried for war crimes should have the benefits of the convention until their guilt has been proven. The Soviet Bloc, however, objected to the entitlement of prisoners of war to these benefits after conviction and interposed a reservation to that effect.[144]

The convention not only precludes a Detaining Power from trying prisoners by special *ad hoc* national tribunals, but precludes, for all practical purposes, their trial by International Military Tribunals. As it is improbable that the military law of the Detaining Power will authorize foreign officers to sit in judgment of its own military personnel, the creation of international tribunals of mixed compositions will in most cases be impossible. Even if the tribunal were to be composed entirely of personnel of one power, convened on the authority of the Unified Commander of an International Command as in *Hirota v. McArthur*,[145] and *Flick v. Johnson*,[146] the requirement of articles 85 and 102 could not be met.[147] Insistence that these trials be held by the regular national military tribunals provides a certain

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[142] In reviewing a World War II case to which the 1949 Convention was obviously not applicable, the Italian Supreme Military Tribunal construed this term as excluding violations of the law of war. *Id.* at 426. This construction is obviously strained for it is difficult to envision possible precapture offenses which violate the law of the Detaining Power (Coleman v. Tennessee, 97 U.S. 509 (1878)) and which do not violate international law.

[143] 2A FINAL RECORD 389–90, 559; PICTET, COMMENTARY III, GPW CONVENTION 413 n.1.

[144] PICTET, COMMENTARY III, GPW CONVENTION 423–24. In response to a request for a clarification of its reservation the Soviet Union advised the Swiss government that the reservation applies only after "the sentence becomes legally enforceable." After the sentence has been served, the benefits of the convention would be resumed.

[145] 338 U.S. 197 (1949).

[146] 174 F.2d 983 (D.C. Cir.), *cert. denied*, 338 U.S. 879 (1949), *rehearing denied*, 338 U.S. 940 (1950).

[147] Baxter, *The Role of Law in Modern War*, 1953 PROCEEDINGS OF THE AM. SOC'Y OF INT'L LAW 352.

standard of justice and procedure and insures familiarity of the court with its well-established tradition and procedures. This minimizes the danger that the courts will deprive the accused of rights because of ignorance.[148]

In addition to the requirement that prisoners of war be accorded all procedural safeguards established by the Detaining Power's military law, there is an additional requirement that there be an adherence to certain minimum standards of due process which may be greater than those provided by the law of the Detaining Power. In this respect, the convention forbids double prosecution for the same act,[149] and prohibits *ex post facto* trials[150] and compulsory self incrimination.[151] It further provides for a right to qualified counsel,[152] the right of appeal,[153] the right to a speedy trial, an ample opportunity to prepare the defense,[154] and for compulsory attendance of witnesses.[155] Before sentence is adjudged the court must be instructed that the prisoner of war, not being a national of the Detaining Power, is not bound to it by any duty of allegiance. Additionally, the court must be instructed that it is not bound to prescribe any minimum or mandatory penalty which may exist under the law of the Detaining Power.[156]

D. GRAVE BREACHES AND OTHER THAN GRAVE BREACHES OF THE CONVENTION

The GPW Convention, as does each of the other three Geneva Conventions of 1949, imposes upon the signatories the obligation (1) to "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present convention," as defined in each convention; (2) "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and . . . bring such persons, regardless of their nationality, before its own courts" or if it prefers and in accordance with its own legislation "hand such persons over for trial to another High Contracting Party concerned," providing such party "has made out a prima facie case"; (3) "to take measures necessary for the suppression of all acts contrary to

[148] One of the principal defects of the United States war crime trials was the use of evidence admissible under the Civil Law. Anglo-Saxon lawyers who had not been trained in the evaluation of such evidence lost all restraint when released from the limitation of the common-law exclusionary rules of evidence.

[149] Art. 86, 1949 GPW Convention.

[150] Art. 99, 1949 GPW Convention.

[151] *Ibid.*

[152] Arts. 99, 105, 1949 GPW Convention.

[153] Art. 106, 1949 GPW Convention.

[154] Art. 103, 1949 GPW Convention.

[155] Art. 105, 1949 GPW Convention.

[156] Arts. 87, 100, 1949 GPW Convention.

the provisions of the present Convention other than grave breaches . . ." and (4) to try those accused of breaches of the convention in its regular national courts under judicial safeguards "which shall not be less favourable than those provided by Article 105 and those following of the present Convention." If the accused is a prisoner of war the judicial safeguards may not be less favorable than those found in articles 84 to 88 and 99 to 108 of the convention.[157]

Article 130 of the 1949 GPW Convention defines grave breaches as:

> [T]hose involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the right to a fair and regular trial as prescribed in this Convention.

It is to be noted that all of the grave breaches of the 1949 GPW Convention, except that of wilfully depriving a prisoner of war of the right to a fair and regular trial, were even prior to the GPW Convention of 1949 offenses against the law of war. However, neither customary nor conventional international law provided sanctions for these offenses.[158]

Breaches of the GPW Convention which are other than grave breaches although not itemized include all other violations of, or failure to comply with, the provisions of the convention, some minor in nature,[159] and others of a very serious nature.[160]

The provisions of the GPW Convention which require the signatories to enact legislation punishing grave breaches and to take measures necessary to suppress other violations of the convention, were enacted to insure that violators of the convention would not remain unpunished and that they would be deprived of the sanctuaries which they had previously been able to find in certain neutral coun-

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[157] Art. 129, 1949 GPW Convention; Art. 146, Civilian Convention; Art. 49, GWS (Field) Convention; Art. 50, GWS (Sea) Convention. The specific judicial rights granted to prisoners of war are contained in Articles 84–88 and 99–108 of the 1949 GPW Convention. Prisoners of war whether tried for pre or post capture offenses are entitled by article 85 of the 1949 GPW Convention to all of the judicial safeguards mentioned in this convention.

[158] Wilful killing was proscribed by customary international law and Article 23(c) of the regulations annexed to the Hague Conventions of 1899 and 1907. Inhumane treatment was proscribed by customary international law, Article 4 of the regulations annexed to the Hague Convention of 1907, and the 1929 GPW Convention. Compelling a prisoner to serve in the forces of a hostile power was proscribed by Article 23 of Hague Regulations of 1907.

[159] Such as failure to quarter prisoners of war under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area. Art. 25, 1949 GPW Convention.

[160] Such as the exposing of prisoners of war unnecessarily to danger while they are awaiting evacuation from a combat zone (art. 19) or the sending of prisoners of war to, or detaining them in, areas where they may be exposed to the fire of the combat zone (art. 23).

tries.[161] Although punishment for breaches of customary and conventional international law was not unprecedented at the end of World War II,[162] the instances in which the personnel of the victorious powers had been tried were rare indeed.[163]

The provisions of the GPW Convention and those of the other Geneva Conventions of 1949 are a part of the laws and customs of war, the violations of which are commonly referred to as "war crimes." Thus, the "grave breaches" which are enumerated in the GPW Convention and the other three Geneva Conventions are "war crimes"[164] which the signatories of the conventions are obligated to try regardless of the nationality of the perpetrator of such crimes. It is clear that it was the intent of the conventions that all signatory states would be obligated to enact penal legislation which would extend to all persons and to all grave breaches no matter where committed.[165] Thus, the convention adopts the principle of universal jurisdiction over war crimes[166] which, together with its other provisions if they are com-

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[161] 2B FINAL RECORD 85, 114–18. THE GENEVA CONVENTION OF 12 AUGUST 1949, COMMENTARY I, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, 357–60 (Pictet ed. 1952) [hereinafter cited as PICTET, COMMENTARY I, FIELD CONVENTION]; PICTET, COMMENTARY III, GPW CONVENTION 619; PICTET, COMMENTARY IV, CIVILIAN CONVENTION 587, 590.

[162] *The Trial of Henry Wirz*, H.R. Doc. No. 23, 40th Cong., 2d Sess. 805 (1867). The Dreirwalde Case, 1 LAW REP. OF TRIALS OF WAR CRIMINALS 81, 86 (1947); The Doster Case, *id.* at 22; The Essen Lynching Case, *id.* at 88; The Abbaye Ardennes Case, *id.* at 97.

[163] 2B FINAL RECORD 85, 114. PICTET, COMMENTARY I, FIELD CONVENTION 352–53, 365; PICTET, COMMENTARY III, GPW CONVENTION 618, 621 n.1; PICTET, COMMENTARY IV, CIVILIAN CONVENTION 590 n.1.

[164] PICTET, COMMENTARY I, FIELD CONVENTION 351; PICTET COMMENTARY III, GPW CONVENTION 617; PICTET, COMMENTARY IV, CIVILIAN CONVENTION 583; DRAPER, THE RED CROSS CONVENTION 20 (1958); 2 OPPENHEIM, INTERNATIONAL LAW 395, 566, 567 n.2. (7th ed. Lauterpacht, 1955); Gutteridge, *The Geneva Conventions of 1949*, 26 BRIT. YB. INT'L L. 294, 305 (1949); Yingling & Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 427 n.112 (1952).

[165] Although the convention (art. 129) does not so expressly provide it is clear from the *travaux preparatoires* that it was intended that the legislation which the parties were to enact making punishable grave breaches of the convention would extend even to grave breaches committed during a conflict to which they were not parties. See DRAPER, *op. cit. supra* note 164, at 21; 2B FINAL RECORD 116; Gutteridge, *supra* note 164, at 294, 305; PICTET, COMMENTARY I, FIELD CONVENTION 365–66; PICTET COMMENTARY III, GPW CONVENTION 623; PICTET, COMMENTARY IV, CIVILIAN CONVENTION, 583–84, 587, 592, 601–02; Yingling & Ginnane, *supra* note 164, at 393, 426. See also § 1(1), Geneva Conventions Act, 1957, 5 & 6 Eliz. 2, c. 52, set forth in DRAPER, *op. cit. supra* note 164, at 119–24.

[166] Lauterpacht, *The Problem of the Revision of the Laws of War*, 30 BRIT. YB. INT'L L. 362 (1952). The convention fails to specify the period of time during which perpetrators of grave breaches may be brought to trial. Some authorities have expressed the view that under customary international law a peace treaty terminates jurisdiction over war crimes absent a provision of the treaty to the contrary. 2 OPPENHEIM, *op. cit. supra* note 164, at 611–12. It is possible therefore that some signatory states may interpret their obligation to punish war criminals as terminating upon the conclusion of a peace treaty. Under this view a signatory state which is not also a signatory to the peace treaty would be under no obligation to prosecute war criminals even though the peace treaty retained for the signatories thereof the subsequent right to try grave and non-grave breaches of the convention.

plied with, would rectify most of the serious deficiences which the conduct of the national war crimes programs subsequent to World War II had disclosed.[167]

The Geneva Conventions also provided that each party "shall take measures necessary for the suppression of non-grave breaches." It is arguable that since this language does not oblige the enactment of effective penal sanctions for the suppression of non-grave breaches, a state could properly discharge its obligations thereunder by means other than legislative sanctions—*e.g.*, by administrative measures. Because of this ambiguity, some authorities have viewed non-grave breaches as being too trivial to warrant punishment. Such an interpretation, it is believed, would negate the purpose of the conventions, for many types of culpable misconduct deserving of severe punishment constitute offenses which are cognizable only under the "non-grave breaches" portion of the Geneva Convention. Under this view in contrast to the effective universal sanctions applicable to any person who commits grave breaches, only ineffectual sanctions limited in their application by restrictive concepts of national jurisdiction would apply to perpetrators of non-grave breaches. An examination of the reports of the war crimes trials after World War II discloses that numerous accused were tried and convicted for the following serious offenses which, if committed now, would be non-grave breaches under the 1949 GPW Convention: (a) the use of prisoners of war for prohibited classes of work, such as the construction of fortifications on the front lines;[168] (b) the compulsory use of prisoners for unloading arms and ammunition from military aircraft;[169] (c) the compulsory employment of prisoners in the production of armament;[170] (d) the compulsory employment of prisoners in unhealthy conditions;[171] (e) the utilization of unsanitary or inadequate housing facilities for prisoners;[172] (f) the giving of false information to the Protecting Powers concerning the conditions of prisoners of war;[173] (g) exposing prison-

[167] DRAPER, *op. cit. supra* note 164, at 22–23. In the opinion of many scholars the convention would have been vastly more effective had it contained a criminal code concerned with war crimes which was specific and clear. See FEILCHENFELD, PRISONERS OF WAR 89-91 (1948). Such a criminal code was considered by the convention but it was not adopted.

[168] *In re* Manstein, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, Case No. 192, at 516–18 (1949).

[169] *In re* Student, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 118 (1948).

[170] *In re* Roechling, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBURG MILITARY TRIBUNALS 1061 (1951); United States v. Krupp, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1197, 1395 (1950).

[171] United States v. Weizsaecker, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 436–67 (1951).

[172] *In re* Natome Sueo, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, Case No. 96 (1947); *In re* Kellinger, 3 LAW REPORTS OF TRIALS OF WAR CRIMINALS 67 (1948).

[173] United States v. Weizsaecker, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 436–67 (1951).

ers to public humiliation;[174] (h) abandoning responsibility for the protection of prisoners by transferring them to unauthorized civilian organizations;[175] and (i) the infringement of the religious rights of prisoners.[176]

These and many other non-grave breaches would remain unpunished under the Geneva Conventions should there be no legislative provision for universal criminal jurisdiction over such offenses. To date only a very few states have enacted legislation of the nature envisaged by the conventions.[177]

The United States has not enacted implementing legislation. Presumably, it has taken the position that existing United States military law, the United States Penal Code, and state criminal law are sufficiently comprehensive to fulfill its treaty obligations.[178] Insofar as enforcement by federal and state courts is concerned, the applicable criminal statutes for such offenses as murder and other unlawful homicide as well as other offenses against the person of protected individuals, are limited to offenses committed within the territorial jurisdiction of the United States.[179] These statutes by themselves would not provide the jurisdiction which the Geneva Conventions require. The universal jurisdiction contemplated by the conventions is not self-executing under United States law. Treaties which require

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[174] *In re* Hirota, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES, Case No. 118, at 356, 371 (1948).

[175] *In re* von Falkenhorst, 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 18 (1949); United States v. Von Leeb, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 492 (1951).

[176] *In re* Tanaka Chuichi, 11 LAW REPORTS OF TRIALS OF WAR CRIMINALS 62 (1949).

[177] See PICTET, COMMENTARY III, GPW CONVENTION 629 for the type of legislation required for compliance with the provisions of Article 129 of the 1949 GPW Convention. As far as can be determined, only eight signatory states, the Netherlands, Switzerland, Yugoslavia, Czechoslovakia, Belgium, Ethiopia, Thailand, and the United Kingdom, have enacted legislation of the nature intended by the convention. A few states (*e.g.*, the United States) have considered their legislation to be adequate to fulfill their obligations under the convention. For comments on the legislation of the Netherlands, Switzerland, and Yugoslavia see PICTET, COMMENTARY III, GPW CONVENTION 621 n.1; PICTET, COMMENTARY IV, CIVILIAN CONVENTION 591 n.1. For the text of the Yugoslavian legislation see 46 AM. J. INT'L L. 36, 40–42 (Supp. 1952). For the text of the legislation of the United Kingdom and a criticism thereof see DRAPER, *op. cit. supra* note 164, at 119-24. See also Levie, *Penal Sanctions for Maltreatment of Prisoners of War*, 56 AM. J. INT'L L. 433, 455 n.90 (1962).

[178] During the Hearings before the Committee on Foreign Relations on the Geneva Conventions for the Protection of War Victims (U.S. Senate, 84th Cong., 1st Sess., June 3, 1955) it was asserted that as to grave breaches, "it would be difficult to find any of these acts which, if committed in the United States are not already violations of the Domestic law of the United States." *Id.* at 24. These hearings contain a letter from the Department of Justice stating that no new legislation need be enacted to provide effective penal sanctions for offenses designated as grave breaches under the 1949 GPW Convention. *Id.* at 58. It is obvious that these conclusions completely disregarded or reflect an ignorance of the universal jurisdiction espoused by the convention to which the United States was a signatory. See FM 27–10, pars. 506–07.

[179] United States v. Bowman, 260 U.S. 94, 97–102 (1922). See also Reid v. Covert, 354 U.S. 1 (1957); United States v. Flores, 289 U.S. 137 (1933); United States v. Rodgers, 150 U.S. 249 (1893); *In re* Ross, 140 U.S. 453 (1891); The Nanking, 292 Fed. 642 (1st Cir. 1900).

legislative enactment to make their provisions effective are considered by United States courts as being enforceable only after the enactment of the requisite legislation.[180]

The Uniform Code of Military Justice, however, provides a means for the repression of war crimes irrespective of the situs of the crime or the status of the offender. Article 18 of this code provides in relevant part: "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." Thus under the provisions of Article 18 of the Uniform Code of Military Justice,[181] the law of war is incorporated into United States military law and, as such, general courts-martial would appear to have jurisdiction over all grave and non-grave breaches of the conventions and over all alleged violators thereof, regardless of their nationality or status.[182]

Under United States jurisprudential law, however, the jurisdiction of United States Military Commissions over war crimes has been limited generally to times of war[183] and, as a matter of practice, limited as well to enemy nationals and persons who have assumed enemy character.[184] It is not beyond the realm of possibility, therefore, that under the language of article 18 which extends the jurisdiction of general courts-martial to "persons . . . subject to trial by a

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[180] United States v. Percheman, 7 Pet. (32 U.S.) 51, 89 (1833); Foster v. Nielsen, 2 Pet. (27 U.S.) 253, 314 (1829); Dickenson, *Are the Liquor Treaties Self-Executing?*, 20 AM. J. INT'L L. 444 (1926); 2 HYDE, INTERNATIONAL LAW 1462 (2d ed. 1945). This principle is also observed by the courts with respect to portions of treaties in force and calling for legislation without which the courts find it impossible to lend judicial aid.

[181] 10 U.S.C. § 818 (1959).

[182] See CM 302791 Kaukoreit, 5 BULL. JAG (ARMY) 262 (1946); CM 31830 Yabusaki, 6 BULL. JAG (ARMY) 117 (1947); CM 337089 Aikins, 9 BULL. JAG (ARMY) 71 (1950). The recent decisions of the United States Supreme Court striking the jurisdiction of courts-martial over civilians (Kinsella v. United States *ex rel* Singleton, 361 U.S. 234 (1960); McElroy v. United States *ex rel* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960)) are limited to a declaration that Article 2(11) of the Uniform Code of Military Justice (10 U.S.C. §§ 801–935 (1958)) which purports to vest in courts-martial jurisdiction over civilian camp followers outside the United States in time of peace, is unconstitutional. The Court was careful to distinguish the cases at issue which involved legislation enacted under the power of Congress to regulate the land and naval forces from legislation enacted under the war powers. Reid v. Covert, 354 U.S. 1, 33 (1957). The exercise of court-martial jurisdiction over civilians in time of peace has no legislative sanction prior to 1916. On the other hand military jurisdiction under the laws of war ante-date the U.S. Constitution. Madsen v. Kinsella, 343 U.S. 341 (1952); *Ex parte* Quirin, 317 U.S. 1, 41 (1942); District of Columbia v. Colts, 282 U.S. 62 (1930). Thus the portions of the UCMJ which confer jurisdiction over civilians in time of war and over persons who are triable under the laws of war rests on a much firmer constitutional basis than did Article 2(11) of the Uniform Code of Military Justice.

[183] *In re* Yamashita, 327 U.S. 1, 12–13 (1946).

[184] Johnson v. Eisentrager, 339 U.S. 763, 768–87 (1949); *In re* Yamashita, *supra* note 183, at 7–12, 20–21; *Ex parte* Quirin, 317 U.S. 1, 26–29, 37–39, 44–47 (1942); District of Columbia v. Colts, 282 U.S. 62 (1930). See also Green, *The Military Commission*, 42 AM. J. INT'L L. 832, 843–46 (1948); Kaplan, *Constitutional Limitations on Trials by Military Commissions*, 92 U. PA. L. REV. 119 (1943); Wright, *War Criminals*, 39 AM. J. INT'L L. 257, 277 (1945); Note, *Federal Military Commissions: Procedure and "Wartime Basis" of Jurisdiction*, 56 HARV. L. REV. 631 (1943).

military tribunal," United States courts may by interpretation limit jurisdiction of general courts-martial over war crimes to that traditionally exercised by United States Military Commissions.[185] Furthermore, even though there is no statutory restriction to the universal application of general court-martial jurisdiction under the law of war, Field Manual 27–10 prescribes policy limitations thereon.[186] It states:

> The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law.

This policy discourages the use of the only present legal means available to the United States for the universal repression of grave breaches. Insofar as persons who, except for the provisions of article 18, would not be subject to the Uniform Code of Military Justice there exists no United States legislation which would subject them to punishment for war crimes committed by them outside the territorial jurisdiction of the United States. Moreover, civilian criminal codes are not sufficiently comprehensive to reach all significant violations of the law of war even if committed within the United States. Although "wilful killing," "torture," or "inhuman treatment" might be punishable by analogy to such offenses as unlawful homicides and aggravated assaults, it is doubtful that "compelling a prisoner of war to serve in the forces of the hostile Power," or "wilfully depriving a prisoner of war of the right of fair and regular trial" is punishable under state or federal penal laws.

With respect to the military law of the United States as expressed in the Uniform Code of Military Justice, most violations of the law of war would be chargeable as violations of that code.[187] Nevertheless,

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[185] Reid v. Covert, 354 U.S. 1, 6–11 (1957); *Ex parte* Quirin, *supra* note 184, at 30; *In re* Yamashita, 327 U.S. 1, 20–25 (1946).

[186] FM 27–10, para. 507.

[187] See Uniform Code of Military Justice, Art. 80 (10 U.S.C. § 880) (attempts); Art. 81 (10 U.S.C. § 881) (conspiracy); Art. 92 (10 U.S.C. § 892) (failure to obey orders and regulations); Art. 93 (10 U.S.C. § 893) (cruelty and maltreatment); Art. 97 (10 U.S.C. § 897) (unlawful detention); Art. 98 (10 U.S.C. § 898) (noncompliance with procedural rules); Art. 102 (10 U.S.C. § 902) (forcing a safeguard); Art. 103 (10 U.S.C. § 903) (captured or abandoned property); Art. 105 (10 U.S.C. § 905) (misconduct as a prisoner); Art. 118 (10 U.S.C. § 918) (murder); Art. 119 (10 U.S.C. § 919) (manslaughter); Art. 120 (10 U.S.C. § 920) (rape); Art. 121 (10 U.S.C. § 921) (larceny); Art 122 (10 U.S.C. § 922) (Robbery); Art. 124 (10 U.S.C. § 924) (maiming); Art. 126 (10 U.S.C. § 926) (arson); Art. 128 (10 U.S.C. § 928) (assault); and Art 134 (10 U.S.C. § 934) (general article).

the principle of assimilation dictated by article 102 of the 1949 GPW Convention would not be respected if only enemy nationals are prosecuted under the law of war, while persons subject to United States municipal military law are prosecuted under one of the punitive articles of the Uniform Code of Military Justice. Although the court and trial procedure may be similar, substantial differences could exist with respect to the sentence adjudged. Thus, cruelty and maltreatment of protected persons is a grave breach under the 1949 GPW Convention for which there is no limitation as to the punishment which may be imposed. However, the maximum authorized punishment under the Uniform Code of Military Justice for cruelty, maltreatment, or oppression of a person subject to the order of the offender is only dishonorable discharge, total forfeiture of pay and allowances, and confinement at hard labor for one year.[188] Compliance with the mandate of the convention to provide effective penal sanctions for the repression of grave breaches requires, therefore, that the policy declarations contained in Field Manual 27–10 be thoroughly reconsidered.

Sole recourse to general courts-martial for trial of grave and non-grave breaches of the convention does not provide a complete solution or one which is entirely satisfactory. Trial of other than United States military personnel, particularly United States civilians, by general courts-martial in time of peace either in the United States or elsewhere for grave or other than grave breaches may not be acceptable to the American society. Furthermore, the jurisdiction of a military tribunal in time of peace over United States nationals and others in the United States for grave and non-grave breaches committed either in the United States or abroad would raise serious constitutional issues.[189] There are no compelling reasons why jurisdiction over such breaches of the convention should be triable only by general courts-martial or why United States nationals and others who are accused of such offenses and who are present in the United States should not be accorded a trial before a federal court, including indictment by grand jury, trial by jury, and trial before a judge with life tenure.

It would appear that the United States could best insure the full discharge of its obligations under the conventions by the enactment of legislation under which federal district courts would have jurisdiction to try any person who commits, no matter where, any of the acts or

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[188] MANUAL FOR COURTS-MARTIAL, 1951, para. 127(c). As a practical matter the table of maximum punishments of this manual for offenses which constitute war crimes should be applied to enemy nationals.

[189] See Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); *Ex parte* Milligan, 4 Wall. (71 U.S.) 2, 121–22 (1867).

omissions which are proscribed by the laws of war and as defined by the law of nations.[190]

The principle of universality of jurisdiction over grave breaches is restricted by the inadequacies of existing extradition practices and the dearth of extradition treaties. It is to be noted that article 129 of the convention imposes no obligation on states to enact extradition legislation or to extradite war criminals even when they are unwilling or unable to bring them to trial for their offenses. The existing legislation or the policy of many countries does not authorize the delivery of their own nationals to another power.[191]

As a practical matter, although the conventions provide a framework which is adequate to correct most of the deficiencies of the World War II war crimes programs, and provides a means for insuring that war criminals will not escape punishment, only good faith on the part of belligerents can insure the repression of grave breaches on an impartial and universal basis. Fear of retaliation, and the difficulty of obtaining evidence from the State of Origin with respect to precapture offenses has restrained belligerents from conducting war crimes trials during hostilities. Under the circumstances the tendency has been for the victor to try the vanquished only.[192]

The perpetuation of this practice would inevitably cast suspicion as to the impartiality of war crimes trials. Deep seated passions which characterize national attitudes against enemies labelled as war criminals tend to taint the essential fairness and impartiality of such trials. Procedural safeguards provided by law making treaties may go far to create the appearance of a fair trial, but the essential characteristics of a fair trial—an impartial tribunal—cannot be assumed with confidence

[190] Congressional enactment of definitive implementing penal legislation vesting in federal courts jurisdiction over all violations of the conventions, and preempting this field insofar as state courts are concerned, would best insure uniformity in prosecution, punishment, and punishment policies, and provide the best means under which the United States could fully discharge its obligation under the conventions. PICTET, COMMENTARY IV, CIVILIAN CONVENTION at 601–02 states that under the Civilian Convention many states will be required to "enact penal laws applicable to all offenders, whatever their nationality and whatever the place where the offense has been committed," and that it is "desirable that this legislation be in the form of special law, defining the breaches and providing an adequate penalty for each" and should it prove to be "impossible to enact special legislation, it will be necessary to resort to a simpler system which would include as a minimum: (a) special clauses classing as offenses with a definite penalty attached to each: torture, inhuman treatment; causing great suffering; destruction and appropriation of property not justified by military necessity; compelling a protected person to serve in the forces of a hostile power; wilfully depriving a protected person of the rights to a fair and regular trial; unlawful deportation or transfer; (b) a general clause providing that other breaches of the convention will be punishable by an average sentence, for example, imprisonment from five to ten years, insofar as they do not constitute offenses or crimes to which more severe penalties are attached in the ordinary or military penal codes. This general clause should also provide that minor offenses can be dealt with through disciplinary measures."

[191] DRAPER, *op. cit. supra* note 164, at 22.

[192] *Id.* at 23. No war crimes trials were held by the United Nations forces after the Korean conflict which ended in a stalemate.

when the victor sits in judgment over the vanquished, in an emotionally charged post-war environment. On the other hand the reluctance of national courts to punish their own nationals[193] who have committed war crimes pursuant to superior orders precludes a policy whereby victor and vanquished alike punish their own war criminals. The principle of universal jurisdiction embraced by the 1949 Geneva Convention provides a means for overcoming these deficiencies by authorizing a transfer of jurisdiction to neutrals. Such a solution, however, may not be politically feasible, for neutrals may be reluctant to assume such an obligation. Nevertheless, because the present conventions, for all practical purposes, preclude the establishment of international tribunals, the present search for a solution to this problem must be limited to the use of national tribunals.

Perhaps when the rule of law in international relations has become more firmly established and the International Court of Justice has achieved even greater status and prestige, it may be feasible to consider an international code of criminal law and procedure and to establish international criminal courts with jurisdiction to impose penal sanctions for violations of the law of nations.[194]

V. TERMINATION OF CAPTIVITY

A. *TERMINATION DURING HOSTILITIES*

Article 10 of the Hague Regulations of 1907 made provisions for the release of prisoners of war on parole, if such release was also authorized by the law of the prisoner's State of Origin. For this purpose each party to the conflict was required to notify the other if its laws permitted its nationals to accept liberty on parole. Article 11 of the regulations placed an obligation, both on the released prisoner and on his State of Origin, if it permitted parole, to honor the conditions of the parole. Article 12 provided that parole violators, when recaptured, forfeited their right to prisoner of war treatment. The 1929 Convention made no mention of parole, probably because the granting of parole was rare during World War I. The Hague Regulations on this matter, therefore, remained in force.[195]

Article 21 of the 1949 GPW Convention restates the substance of Articles 10 and 11 of the Hague Regulations of 1907. It does not, however, provide for the forfeiture of prisoner of war status for those who violate their parole.[196] This omission provides a ground for

[193] The United States in practice normally punishes as war crimes only those which are committed by enemy nationals or by persons serving the enemy. FM 27–10, paras. 505(c), 507(b).

[194] See 2 OPPENHEIM, INTERNATIONAL LAW 584–89 (7th ed. Lauterpacht 1952).

[195] 2 WHEATON, INTERNATIONAL LAW 185 (7th ed. Keith 1949).

[196] Gutteridge, *supra* note 164, at 349.

argument that Article 12 of the Hague Regulations is still in effect, or that the custom of which it is declaratory remains unaffected. The International Committee of the Red Cross has taken the view that a parole violation is a "precapture offense" and that the violator if recaptured, retains the benefits of the convention.[197] Field Manual 27–10 states that prisoners of war may be tried for a violation of parole under the provisions of Article 134 of the Uniform Code of Military Justice.[198] The maximum punishment may not exceed confinement at hard labor for six months for this offense.[199] The laws and regulations of most nations either discourage or forbid their nationals to accept parole.[200]

B. DIRECT REPATRIATION AND ACCOMMODATION IN A NEUTRAL COUNTRY

The purpose of detaining prisoners of war is to prevent their further employment by the enemy. It has long been recognized that the detention of seriously sick and wounded prisoners, whose chances of full recovery are slight, would not further this purpose and that such prisoners should be repatriated or transferred to a neutral country for internment. Both the 1929 GPW Convention (article 68) and the 1949 GPW Convention (article 190) require the repatriation of such persons except those who object (article 109).

C. RELEASE AND REPATRIATION AT THE CLOSE OF HOSTILITIES

The mutual repatriation of prisoners of war at the conclusion of war is an established principle of the customary law of war which found expression in the Hague Regulations of 1907. Article 20 of these regulations states that repatriation should be carried out as quickly as possible after the conclusion of peace. Treaties of peace, however, are rarely concluded immediately upon the cessation of actual hostilities. Because the Treaty of Versailles did not enter into force until January 15, 1920, the repatriation of German prisoners was delayed for fourteen months.[201] In an effort to prevent recurrence of delay in repatriation, Article 75 of the 1929 GPW Convention required, if possible,

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[197] PICTET, COMMENTARY III, GPW CONVENTION 181.

[198] FM 27–19, para. 72.

[199] MANUAL FOR COURTS-MARTIAL, 1951, para. 127(c).

[200] See FLORY, PRISONERS OF WAR 119 (1942); Manes, *Barbed Wire Command*, 1960 MILITARY L. REV. 9. The United States Code of Conduct, for example, imposes a duty upon an American prisoner of war to attempt escape, and as a corollary, it forbids him to accept release on parole. The United States Fighting Man's Code 42 (DOD) Pamph. 8–1 (1955).

[201] Immediate and unconditional release and repatriation of Allied prisoners of war was one of the stipulations of the Armistice of November 11, 1918. Wheaton, *op. cit. supra* note 195, at 189.

that repatriation take place immediately upon the conclusion of an armistice agreement. As to Germany, World War II ended with her unconditional surrender, not with an armistice or a peace treaty. Thus the elimination of the German state in this manner thwarted the normal operation of the convention with the result that the release and repatriation of German prisoners of war was long delayed. When the Diplomatic Conference met in Geneva in 1949[202] the USSR still held numerous German and Japanese prisoners of war.

Article 118 of the 1949 GPW Convention corrects this situation. It provides: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." The obligation to repatriate, furthermore, is made unilateral so that its implementation will not be frustrated by the necessity of obtaining the consent of both parties.[203]

Although no express provision was made for prisoners of war who did not desire repatriation, it would be inaccurate to say that this contingency was not considered.[204] It is to be noted in this connection that the principle of involuntary repatriation has not in practice been fully recognized.[205] During the Korean Armistice negotiations, over 22,000 North Koreans and Chinese held by the United Nations

[202] PICTET, COMMENTARY III, GPW CONVENTION 541–43.

[203] *Ibid.*

[204] At the Conference of Government Experts in 1945, the International Committee of the Red Cross invited attention to the fact that ideological differences resulted in unwillingness to be repatriated which had led to many suicides after World War II. Because they anticipated difficulty in obtaining asylum due to the strict immigration laws of some countries, the 1948 Conference elected not to recommend any special provisions for those unwilling to be repatriated. *Ibid.* At the Diplomatic Conference, the Austrian delegation proposed an amendment barring involuntary repatriation and authorizing the transfer of prisoners to any country willing to receive them. The Austrians pointed out that as a consequence of modern war, political, economic, and social changes in the home territory are frequently so great that prisoners may no longer wish to return home. The Soviet delegation opposed the Austrian suggestion because prisoners might not be able to express themselves with complete freedom. The United States delegation concurred in this view and the Austrian proposal was rejected. See 2A FINAL RECORD 324, 426.

[205] For an excellent historical study of the practices of nations with regard to the repatriation of defectors and deserters from the enemy see Schapiro, *The Repatriation of Deserters*, 29 BRIT. YB. INT'L L. 310–24 (1952). Detaining Powers considered that repatriation without a guarantee of amnesty would be both a breach of faith to the targets of their psychological warfare as well as bad policy, since it would discourage desertion to the particular Detaining Power in future wars.

Ideological motivations for eschewing involuntary repatriation are found in the treaties ending the several Russo-Turkish wars of the 18th and 19th century. Russia insisted on exceptions to the repatriation clauses with respect to those Turks who had embraced the Christian faith, and reciprocally, of those Christians who had embraced the Moslem faith.

Although the Hague Regulations of 1907 were silent on the issue of the disposition of deserters—because of his continued status as a member of the armed forces of the State of Origin, a prisoner of war who resists repatriation is in fact a deserter—the Versailles Treaty provided that the Allies might exclude from repatriation, those who did not desire it, with a further stipulation for amnesty for those whom the Allies chose not to grant asylum. The repatriation treaty of April 19, 1920 between Germany and Russia provided: "Prisoners of War and interned civilians of both sides are to be repatriated in all cases where they themselves desire it."

Command expressed their desire to renounce their right to be repatriated. The provisions of articles 7 and 118,[206] (non-renunciation of rights) provided the Communist bloc with a plausible basis for its insistence that all prisoners were to be repatriated, by force if necessary.

The Communists viewed the wording of article 118(1), as being categorical and argued that this view found support in the fact that the 1949 Diplomatic Conference had rejected an Austrian proposal which would have given an option to prisoners in this respect.[207] They contended as well that under article 7 prisoners were precluded from waiving any of their rights under the convention, including the right to repatriation. Furthermore, they construed article 109 which permitted a seriously sick or wounded prisoner to refuse repatriation during hostilities as impliedly denying to him such an option after the conclusion of hostilities.[208]

The United Nations Command countered this argument by reference to the general humanitarian purposes of the convention, particularly the protection of war victims. It was felt that forcible repatriation of a prisoner of war who, because of fear of punishment or because of ideological or other reasons, had freely rejected repatriation, would be incompatible with the spirit of the convention; that since prisoners of war had the right of option as to specific matters under the convention a further extension by analogy of such a right with respect to repatriation under artcle 118 was not excluded and therefore permissible; that it was incongruous to construe article 7 as prohibiting a prisoner from renouncing his "right" to be forcibly repatriated; and, finally, that the convention had not abolished the right of a state under customary international law to grant asylum at its option to particular categories or prisoners of war.[209] As one authority aptly put it, this construction of the convention with respect to the repatriation of prisoners of war rests on conventional and customary international law and conforms as well to the logical and moral postulate of the human right of individual freedom, limited only by the duty of its exercise within bona fide limits.[210]

The position of the United Nations Command and the United States that no prisoner of war would "be repatriated by force" or "be

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[206] Article 7, 1949, GPW Convention provides in pertinent part that "prisoners of War may in no circumstances renounce in part or in entirety the rights secured to them by the present convention. . . ."

[207] PICTET, COMMENTARY III, GPW CONVENTION 543.

[208] *Ibid*; Mayda, *The Korean Repatriation Problem and International Law*, 47 AM. J. INT'L L. 414, 426-39 (1953); Shapiro, *supra* note 205, at 323.

[209] PICTET, COMMENTARY III, GPW CONVENTION 543.

[210] See Mayda, *supra* note 208, at 427; Schapiro, *supra* note 205, at 323; U.S. DEPT STATE MEMORANDUM, *Legal Considerations Underlying the Position of the United Nations Command Regarding the Issue of Forced Repatriation of Prisoners of War*, pt. IV (Oct. 24, 1952).

coerced or intimidated in any way" eventually prevailed.[211] On December 3, 1952 the General Assembly of the United Nations took the position "that force shall not be used against prisoners of war to prevent or effect their return to their homeland. . . ."[212] To effectuate this position the United Nations resorted to a procedure under which those who did not desire to be repatriated were placed in the temporary custody of neutral powers, the NNRC, for resettlement or relocation to the extent possible, in accordance with their wishes.[213]

In view of the ultimate acquiesence of the Communist bloc in the principle of the United Nations resolution of December 3, 1952 it would appear that articles 7 and 118 may not be interpreted as requiring forcible repatriation, and that a Detaining Power may, if it desires, grant asylum to prisoners of war who do not wish to be repatriated.[214]

The doctrine supported by the United Nations Command and the United States at the conclusion of the Korean conflict that prisoners of war were not to be forcibly repatriated should not be construed as an unqualified principle. If taken literally it would require a Detaining Power to grant asylum, within its own territory if necessary, to any and all prisoners of war who for any reason did not desire to be repatriated. Such a result was not intended. The doctrine of nonforcible repatriation properly interpreted means simply that no prisoner of war who seeks asylum on certain proper grounds will be forcibly repatriated.[215]

It is doubtful that this doctrine would have been applied in its broad sense as it was after the Korean conflict, had the many thousands of prisoners of war been physically present in the United States or in a country other than Korea at the end of the conflict. Vital economic considerations, the need for stringent adherence to immigration

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[211] Mayda, *supra* note 208, at 435. See *Proposals in First Committee for Breaking Armistice Deadlock*, 13 U.N. BULL. 426 (1952) for a full review of the position of the United Nations and the Communist bloc countries.

[212] U.N. Doc. No. A/Res./18/VII (1952). The text of this United Nations General Assembly Resolution is set forth in 27 DEPT STATE BULL. 702 (1952). The resolution "affirms that the release and repatriation of Prisoners of War shall be effected in accordance with the 'Geneva Convention relative to the treatment of Prisoners of War,' dated Twelfth August 1949, the well-established principles and practice of International Law and the relevant provisions of the Draft Armistice Agreement; Affirms that force shall not be used against Prisoners of War to prevent or effect their return to their homelands, and that they shall at all times be treated humanely in accordance with the specific provisions of the Geneva Convention and with the general spirit of the Convention. . . ."

[213] Arts. II, IV, VII, and VIII of the Agreement Between The Comamander-in-Chief, United Nations Command, On The One Hand, And The Supreme Commander Of The Korean People's Army and the Commander Of The Chinese People's Volunteers, On The Other Hand, Concerning A Military Armistice In Korea, signed July 27, 1953. The text of this agreement appears in 29 DEPT STATE BULL. 137 (1953).

[214] See Baxter, *Asylum to Prisoners of War*, 30 BRIT. YB. INT'L L. 489 (1953).

[215] See Schapiro, *supra* note 205, at 310–24.

policies, and the infacility of relocating prisoners of war in other countries prevents, as a practical matter, a literal application of the doctrine of non-forcible repatriation. Properly construed it visualizes a proper application of the principle of asylum under all the facts and circumstances.[216]

There can be little doubt that Detaining Powers will in the future forcibly repatriate many prisoners of war. Asylum in the future should be granted as it has in the past only to prisoners of war who seek asylum on bona fide political grounds and to those who have upon promise of asylum voluntarily deserted their forces in order to assist the Detaining Power in its war efforts. Whether other categories of prisoners, including ordinary deserters who do not desire to be repatriated because they fear punishment for their desertion, are to be granted asylum should be determined in large part on the extent of the commitment made to them by the Detaining Power in its effort to induce deserters and the extent to which the provisions of an armistice agreement or of a treaty effectively immunize them from punishment for their desertion.

VI. CONCLUSION

The 1949 Geneva Prisoner of War Convention represents a noteworthy humanitarian contribution to the law of war. The convention has not only rejected the general participation clause of prior conventions but has provided as well for the applicability of the convention to all international armed conflicts on a unilateral basis between states which are signatories to the convention, and on a reciprocal basis with respect to relations between signatory and non-signatory states. It has by its prescription of minimum standards relative to conflicts not of an international character indicated the interest in and the obligations of the community of nations with respect to a matter which is essentially domestic in nature. It reflects in this respect the interdependence of nations and the concern of the world in domestic conflicts. The convention, subject to certain condi-

[216] In this respect it is to be noted that as of 1960 the NNRC still had under its control some eighty-eight ex-North Korean prisoners of war who had refused repatriation and who the NNRC had not been able to resettle, and for whom the United States was still paying, as it had since 1953, one-half of the expenses which had been incurred by the Indian government for their maintenance. Memorandum from the Indian Embassy, Washington, D.C., to the Dep't of State, dated Aug. 25, 1959, submitting a claim for the maintenance of these prisoners of war. The United States obligation in this respect arises under the commitments made by the United Nations under the "Terms of Reference for NNRC" pursuant to which one-half of the costs necessary to accomplish the resettlement of the prisoners of war would be borne by the parties to the Korean conflict. In 1960 the United States share amounted to 1,111,400 Indian rupies. The KPA/CPV in 1960 paid a similar amount to the Indian government.

tions precedent, also recognizes the role of organized resistance movements in the fluid nature of modern war. By fixing prisoner of war status in an almost immutable mold, the convention protects prisoners against special agreements which might be concluded between the Detaining Power and the State of Origin in derogation of the rights which the convention vests in them. The convention in effect places them in a status comparable to that accorded infants and incompetent persons under domestic law; they being unable to bargain away their own status or rights for either good or bad considerations.

The convention by clarifying the categories of work which may be demanded of prisoners, and by permitting them to volunteer for certain types of work, has removed ambiguities which had theretofore been troublesome. By the same token it provides in this respect a measure of flexibility in an otherwise rigid code.

The elaborate judicial safeguards established by the convention and their applicability to precapture offenses represent important humanitarian advances in the law of war. Perhaps the most significant accomplishments of the convention are reflected in its provisions which codify substantive prohibitions against grave breaches; fix national and individual responsibility for such breaches; embrace the principle of universal jurisdiction for the trial of such breaches; and imposes a clear and stringent duty to suppress them. By these provisions the convention has swept away the doubts which existed during World War II as to what acts or omissions were punishable as war crimes and the manner in which such crimes were to be adjudicated.

The convention, however, is not free from defect. In some respects it is too definitive and paternalistic. The marked rigidity which pervades many of its provisions may lead to their disregard as unrealistic or impractical and may subject the convention as a whole to a process of erosion. A failure to provide for exceptions to some of the technical requirements as to internment while prisoners are still on the battlefield impose what appear to be impossible standards on the captors.

It may also be that the convention's failure to recognize the role which closely integrated international and multi-national commands will play in future conflicts may frustrate many of its provisions. Furthermore, the reliance which the convention places on the role of the Protecting Power may also seriously impair the effectiveness of the convention should there be no qualified neutrals. The provision for the establishment of a substitute international body which could operate in lieu of a Protecting Power has not yet been implemented and, in fact, may never be implemented if there are no neutral states from which such a body could draw its personnel and on whose territory it could maintain its offices.

The ambiguity of the convention as to the entitlement of deserters and defectors to POW status and the serious repercussions which may be occasioned thereby is also a defect of the convention as is its failure to obligate the signatory states to enact legislation making other than grave breaches of the convention punishable offenses under the principles of universal jurisdiction.

The convention is also defective in that it fails to obligate the signatories to extradite, under appropriate safeguards, war criminals whom they are unwilling or unable to prosecute due to their failure to enact legislation of the nature mandated by the convention.

These and other defects, however, must not obscure the real achievements of the convention. These technical defects do not diminish from the resolution of the community of nations to render impossible in the future, the sordid tragedy that beset millions of prisoners in the past. The very fact that a consensus in the achievement of the humanitarian goals was reached in 1949, will facilitate efforts which should be undertaken now to correct the defects which have been recently brought to light.

TOTAL LEGAL SERVICE: NOONE ON PROBLEMS OF NON-APPROPRIATED FUNDS

The military lawyer's exposure to the commercial law field is largely encompassed by what the armed services call Procurement. This is big business, involving as it does the billions appropriated each year for the equipping, feeding and operations of the Defense Establishment. However, the literature of procurement is well served by the *Yearbook of Procurement Articles* which cumulates major articles in that field. At some risk to the notion of completeness, no effort has been made to either reprint from their well-selected distillation or to essay an independent choice.

A meritorious middle ground is available, however; it exists in one of the areas unique to law within the Government, particularly the uniformed services. Many activities necessary to the health, morale and welfare of government employees are conducted with self-generated money, rather than with funds appropriated by the Congress. Stores for the sale of personal, consumer items, called Post Exchanges (PX's) in the Army, or the Army and Air Force Motion Picture Service are examples of these "Non-Appropriated Fund" activities. Many of these funds are worldwide and provide services worth millions of dollars; others meet special local needs and the dollar implications may be quite low. In any case, buying and selling are much of their business and the procurement flavor is strong.

Legal control of these funds involves a special facet of the military lawyer's job, that of law-making for the military community. Most of the other selections in this issue show the military lawyer concerned with some external law that affects the organization or mission of the element he serves. In much of his work, however, he is concerned with internal, day-to-day activities of the community and with rule making or decision making for the community as such.

This selection touches a number of those bases. It is also a prime example of how useful some collections of words can be. Although it appeared as an Appendix to Senate Hearings, this article was distributed in original and photocopy to military legal offices around the world, supplementing fully the only other significant effort in the field which was then ten years old.[1]

The author is now a Colonel in the United States Air Force and Acting Staff Judge Advocate of the Strategic Air Command. His article brings together the colorful history of these funds with the sets of serious legal problems that arise when they operate as

[1] Kovar, *Legal Aspects of Non-Appropriated Funds*, 1 MIL. L. REV. 95 (1958).

"instrumentalities of the United States" in states of the United States, abroad, and in their contacts with private persons or businesses.

LEGAL PROBLEMS OF NON-APPROPRIATED FUNDS†

*Michael Francis Noone**

TABLE OF CONTENTS

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*Colonel, JAGC, U.S. Air Force. Acting Staff Judge Advocate, Strategic Air Command. B.S., 1955; LL.B., 1957; LL.M., 1962, Georgetown University; S.J.D., 1965 George Washington University.

The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of the Department of the Air Force or any other governmental agency.

INTRODUCTION

The term "non-appropriated fund activity" will not be found in any standard dictionary; yet, in its own way, it is as much a term of art as the analogous phrase "instrumentality of government" which has become an accepted legal term. The Armed Services define non-appropriated funds descriptively. The Army's definition is representative:

> The monies which support certain revenue producing, welfare and sundry activities which are not provided for in Congressional appropriations but are necessary adjuncts to the Armed Forces; the entities administering such monies.[1]

The Air Force definition is similar:

> Funds generated by Department of Defense military and civilian personnel and their dependents and used to augment funds appropriated by Congress to provide a comprehensive morale-building welfare, religious, educational, and recreational program designed to improve the well-being of military and civilian personnel and their dependents.[2]

The Navy and Marine Corps consider these funds in the same light.[3]

Some idea of the present size of these organizations is given in a recent congressional report which states that, as of August 29, 1963, there were 579 post exchanges and 678 ship's stores. Their annual volume of business exceeds $1,422,300,000[4] and causes them to rank seventh in the United States for retail sales.[5] While post exchanges, ship's stores, and officers' clubs are the richest, most active, and therefore the most prone to legal problems, they represent just one type of non-appropriated fund activity. Similar groups have been organized and operated aircraft, golf courses, hunting lodges, and luxury hotels. All of them partake of the character of "instrumentalities of the federal government."

It would not be an exaggeration to call their legal status bizarre. They are operations of the federal government, yet they are not. Courts have disagreed as to whether employees' torts fall within the ambit of the Federal Tort Claims Act. In suits based on a contract they are held to be immune from suit as agencies of the Government, yet

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[1] Army Regulation 320–5 (1961). Army Regulations will hereafter be cited as "AR"; Air Force Regulations as "AFR".

[2] Air Force Manual 11–1, Glossary of Standardized Terms (1963).

[3] NAVEXOS P–2409; Marine Corps Manual 7–3.

[4] Memorandum prepared by the Office of the Assistant Secretary of Defense. *Hearings Before the Subcommittee on Defense Procurement of the Joint Economic Committee*, Congress of the United States, 88th Cong., 1st Sess., 417 (1963).

[5] *Report of the Subcommittee on Defense Procurement of the Joint Economic Committee*, Congress of the United States, 88th Cong., 1st Sess. 16 (Comm. Print 1963).

the Tucker Act (which was intended to waive that immunity) does not apply. Traditionally, their property has been immune from state taxation and regulation since it was considered property of the United States; but, there is some question as to whether a theft of that property may be alleged to be from the United States.

These organizations have been known as "funds" in the sense that the money derived from, or given to, each has certain specified purposes. These purposes have included the support of widows, orphans, post schools, libraries, and post bands. As the objects to be supported proliferate, so do the funds. And, as the society within which they operate becomes more complex so do they. Since the majority of these groups are within the Department of Defense, my working definition of the term includes that limiting factor. For the purposes of this paper a military non-appropriated fund activity is any organization which is intended to carry out welfare, morale, and recreational functions of the Armed Forces, is recognized by executive regulation, and is under military supervision.

It is common for the Armed Services to divide these groups according to function: revenue, welfare, or sundry funds. The distinction among the three, while meaningful to those who administer the funds, has no practical effect.

The first two funds may be organized for either military or civilian personnel. Revenue producing activities are exemplified by the post exchange or the post civilian restaurant; their purpose is to provide merchandise and services while generating a reasonable profit which will be used to finance various welfare funds. Welfare funds are specifically established by regulation and are limited to the distribution of money for various comfort and recreational purposes for the personnel under their jurisdiction. Specific purchases are authorized and become the property of the fund, e.g., television sets in barracks' recreation rooms will belong to the post welfare fund.

Sundry fund activities are those organizations which do not fall into either of the two prior categories. Officers' clubs are sundry fund activities. All of these organizations have the following attributes: they are unincorporated associations composed either of servicemen and their families or of civilian employees of the Department of Defense; while they do not receive any direct aid in the form of annual appropriations from Congress, as will be shown, they do receive indirect support. Although alluded to in a number of statutes,[6] they are created and exist solely by virtue of the powers inherent in the executive branch. In the sense that there are no owners who share in

[6] *E.g.* 10 U.S.C. 4779, 9779; Act of March 2, 1903, 32 Stat. 927, 938; Act of March 4, 1933, 47 Stat. 1571, 1573; Act of June 26, 1934, 48 Stat. 1224, 1229; § 10a, Act of June 16, 1936, 49 Stat. 1521.

the distribution of revenue, these organizations are not "profit making"; yet many of them generate substantial sums which are used to supplement appropriated money for morale purposes.

As these activities multiply and spread into areas unthought-of a few years ago, it is obvious that American courts and legislatures are taking a second look at their hitherto inviolate status. Should they be classed part of the federal government in considering the application of certain statutes? Is there a valid reason for leaving many millions of dollars of sales immune from state taxation? Are their employees subject to laws governing federal workers? What is their status in international law? Should they remain immune from suits in contract?

These are some of the questions which I propose to answer. Before arriving at predictions, a certain foundation must be laid. Thus, the first chapter will be devoted to a factual recitation of the funds' historical antecedents, growth, and multiplication. The legal aspects of these topics will, in the main, be left for subsequent chapters.

CHAPTER I. HISTORICAL DEVELOPMENT

INTRODUCTION

Neither armies nor navies have ever supplied all the needs of their men. Caesar alludes to the itinerant merchants who followed the legions, selling items not considered necessaries by quartermasters.[1] These men came to be known as sutlers. The *Shorter Oxford English Dictionary* defines a sutler as one who follows an army or lives in a garrison town and sells provisions to soldiers. The word, first identified in 1590, is from early modern Dutch and means a small vendor. It seems that sutlers have always been held in ill-repute, since the term is derived from "soltelen" which means to befoul or perform mean duties.[2] While seamen had shops available when ashore, the merchants could not, of course, follow them to sea. "Bumboats" met the ships in foreign ports and attempted to supply the seamen with everything not issued through military channels; a practice discouraged by the navy, inasmuch as the bumboats sold contraband and prohibited articles, as well as charging monopoly prices for whatever they sold. The sailors' response was to organize ships' cooperatives which were called "slop chests." The *Shorter Oxford English Dictionary* traces the word "slop" to 1663, states that its derivation is unknown, and describes "slop" as "very cheap clothes like those sold in ship's stores."[3] This etymological discourse serves two purposes: illustrating the marginal social and economic status of these activities, while

[1] Caesar, de Bellow Gallico, Book VI line 37; Caesar, de Bello Africano, line 75.
[2] 2095. (3rd ed. 1959).
[3] *Id.*, 1918.

pinpointing with some degree of accuracy, the dates by which they had become recognized.

As the military often entered into informal arrangements to secure necessities, so did they organize for meals. Thus arose the third word which will consider: the "mess." *Oxford* defines a "mess" as "each of the several parties into which a regiment or a ship's company is divided, each taking their meals together," and notes the term's origin as being about 1690.[4] Thus we see that present officers' and enlisted men's messes are quite old, and have historically been private unincorporated associations organized originally to share in the benefits of pooled rations.

With this general historical data in mind, we can now direct our attention to the development of these groups in the United States.

ARMY NON-APPROPRIATED FUNDS AND THEIR ANTECEDENTS

Sutlers were first officially recognized by the American Army in the Articles of War of 1775[5] which outlined the sutler's responsibility and duties. During its early years, the regular army was small (amounting to less than three thousand officers and men at the time of the War of 1812),[6] and Congress was able to regulate its most routine activities. Thus it was that the General Regulations of the Army of 1821 were subsequently approved by the Congress.[7] Article 41 of these regulations authorized one sutler for each post or regiment. The sutler was allowed to sell on credit and, if unpaid, to present his bill to the paymaster who might deduct the debt from the soldier's pay. In return, the sutler paid for this franchise through an assessment which was based on the number of military personnel he was authorized to serve. The assessment, and any fines paid by the sutler, constituted the "post fund."[8]

The same General Regulations set up a council to administer the post fund and authorized expenditures for certain specified purposes, after the approval of the fund council and commanding officer. Proce-

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[4] *Id.* at 1249. Lest we think, however, that the social if not the economic status of the mess was higher than that of its cousins, Sheat in *The Concise Etymological Dictionary of the English Language* (1911), gives, as a second meaning, "food badly cooked."

[5] Articles XXXII, LXIV, and LXVI, Rules and Articles of War 1775, Appendix IX, Winthrop, *Military Law and Precedents*, 953 (2nd. ed., 1920 reprint). For this and much of the subsequent historical data, I am indebted to Lt. Col. Paul J. Kevar's excellent article, *Legal Aspects of Non-Appropriated Fund Activities*, 1 Military Law Review, 95 (1958); the *Hearings Before the Special Subcommittee on Resale Activities of the Armed Services, House Committee on Armed Services*, 81st Cong., 1st Sess. A. S. Document 104 (1949). [Hereafter cited as *1949 Hearings*].

[6] Dupuy, The Compact History of the United States Army, 311, (rev. ed. 1961).

[7] Act of March 2, 1821, 3 Stat. 615; See generally, Lieber, Remarks on the Army Regulations and Executive Regulation in General, pp. 61–84, War Dept. Doc. No. 63, (1878).

[8] Army Regulation of 1821.

dures for the administration and dissolution of such funds were also contained in the regulations approved by Congress. This fact becomes important when one recalls that statutory recognition of non-appropriated funds is rare; those who challenge their status have often argued that congressional approval of the specific fund is absent.

In 1835, company funds were established. While they had numerous sources of revenue, including the rental of billiard tables, they derived the bulk of their income from the "slush fund," i.e., from the sale of grease from the company mess and from other savings derived from the economical use of foods.[9] These funds were also subject to Army regulation and to the control of the unit commander. *Inter alia*, the regulation required that a quarterly report on the status of each fund be submitted to the Adjutant General of the Army.[10]

During the same period, Consolidated Officers' and Non-Commissioned Officers' Messes were recognized. The Army regulations of 1835 state:

> On many accounts it is desirable that the officers of the same regiment should form themselves into a mess and live together as one family. While such an association tends to promote the harmony and comfort of its members, it is at the same time, if judiciously managed, the most respectable and economical manner in which officers can live within their pay. To encourage the messing of officers, the government allows rooms, kitchens, and fuel.[11]

Regulations for this same year, in an apparent attempt to correct an abuse, state further: ". . . no non-commissioned officer or soldier is to be employed in any menial office or made to perform any service not strictly military, for the private profit of any officer or mess of officers."[12] It appears certain that, while officially accepted as authorized activities, messes were only slightly regulated and were deemed of litttle importance.

In contrast, the regulations of 1835 accord six pages to sutlers and post funds. The following example will illustrate the degree to which sutlers were regulated by Congress and the War Department. During this time, post-1835, there was apparently some doubt as to the

[9] 43 JAG Record Book 1882–95, 308. This opinion also points out that company funds could not use income derived from the sale of manure, used shells, and lead from target butts since these items were all property of the United States. The earliest opinion found in this area, 10 JAG Record Book 1882–95, 137 states in part: "[Regulations] covering a period of more than 46 years contain provisions for the pooling of rations, the sale thereof and use of the profit for the benefit of the company. . . . [While] recognized by army regulations, I cannot find that such a fund has ever been recognized as being public money." The JAG Record Book is not a publication but is a collection of the correspondence of the Office of the Judge Advocate General of the Army. The sole copy is in the possession of the National Archives.

[10] Para. 15, Army Regulations of 1835.

[11] Art. IX, para. 20, Army Regulations of 1835.

[12] *Id.* at para. 44.

sutlers' right to have debts deducted from soldiers' pay. In 1847 this right was terminated.[13] In 1858 the right was reinstated[14] and then withdrawn in 1861.[15] In 1862 it was again authorized within certain limitations,[16] and these limitations were interpreted in the broadest possible terms.[17] By the time of the Civil War, the sutlers' very existence was in question. In 1866 the position was abolished,[18] but, within a year, Congress authorized the establishment of "post traders" in remote areas.[19] The "remote area" requirement was amended in 1870[20] and eliminated in 1876.[21]

It was soon evident, however, that the popularity of the post trader was on the wane. This was reflected not only in the Congress' confused actions but in the Army's establishment of a competing fund, the post canteen, which the *Shorter Oxford English Dictionary* defines as a sutler's shop.[22] The term is first noted in 1737, and by 1744 had achieved its present meaning. (Great Britain's entry into the War of Austrian Succession in 1740 marked the end of nearly twenty years of peace. We may surmise that canteens first became common during those peaceful years of garrison duty.)

In the American Army, the canteen was first recognized by regulation in 1889.[23] By this time canteens had already begun to successfully compete with post traders and local merchants. In the earliest discovered legal opinion regarding canteens, the Judge Advocate General of the Army, on March 30, 1886, considered a letter of petition from local saloon keepers near Fort Snelling, Nebraska, and found their complaint about the competitive services offered by a post "canteen" or "amusement room" unjustified.[24] The following year, in a letter dated June 18, 1887, the Judge Advocate General of the Army rendered an opinion regarding the complaint of a post trader at Fort Leavenworth who contended that the post canteens were in competition with him, since they sold similar articles "as much as if they were a private store" and that this violated the exclusive license given the post trader. The opinion points out that canteens

> . . . are derived from England, the 'canteen' of the British Army being the 'sutler's' or 'trader's' store of the army in this country. The word canteen . . . has different signification [in the United

[13] Ch. 61, § 11, Act of March 3, 1847, 9 Stat. 185.
[14] Ch. 156, § 5, Act of June 12, 1858, 11 Stat. 336.
[15] Ch. 4, § 6, Act of Dec. 24, 1861, 12 Stat. 331.
[16] Ch. 4, § 3, Act of March 19, 1862, 12 Stat. 371.
[17] Dig. Op. JAG 1865, 337.
[18] Ch. 299, § 25, Act of July 28, 1866, 14 Stat. 336.
[19] Joint Resolution of March 30, 1867, 15 Stat. 29.
[20] Ch. 294, § 22, Act of July 15, 1870, 16 Stat. 320.
[21] Act of July 24, 1876, 19 Stat. 87 at 100.
[22] 259 (3rd ed. 1959).
[23] General Order No. 10, Feb. 1, 1889.
[24] 9 JAG Record Book, 1882–95, 301.

> States]. [They are] amusement rooms, with billiard tables, conducted on the principle of club orgainzations, where tobacco, cigars, cigarettes, hot coffee, and sandwiches are sold to the members of each company; the tobacco and cigars so sold being purchased by the quantity from the Subsistence Department [Quartermaster].
>
> Such so-called 'canteens' being organized and carried on in a company for the exclusive use and accommodation of its members . . . cannot be regarded as a trading establishment. Purchases and sales of merchandise are not being conducted in it for the public generally, nor as a matter of business for providing subsistence or profit as a means of livelihood.[25]

The opinion concluded by stating that the post trader's franchise did not exclude the Government's right to establish such funds.

The initial requirement that canteens could only be established at locations where there were no post traders was eliminated within a short time.[26] Company funds were prohibited from competing with the canteen.[27] The profits derived from the canteen were used to meet the recreational and welfare needs of the servicemen.[28] In 1892, the canteens were redesignated post exchanges.[29] They so thoroughly pre-empted the function of the post traders that, in the following year, Congress prohibited further appointment of the latter.[30] In 1895, post exchanges were authorized at all Army installations.

"The post exchange will combine the features of reading and recreation rooms, a cooperative store, and a restaurant. Its primary purpose is to supply the troops at reasonable prices with the articles of ordinary use, wear, and consumption not supplied by the government, and to afford the means of rational recreation and amusement."[31]

A lucid explanation of their legal status at that time is found in an opinion of the Judge Advocate General of the Army rendered in 1893:

> Now the Post Exchange is not a United States institution or branch of the United States military establishment, but a trading store permitted to be kept at a military post for the convenience of the soldiers. It is set up and stocked, not by means of an appropriation of public moneys, but by means of the funds of companies, etc.; the officers ordering the purchases . . . [are] responsible for the payment, not the Government.[32]

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[25] 17 JAG Record Book, 1882–95, 338; *Id.*, 340–341. The same reasoning, and nearly the same language, was used when Congress considered the abolition or limitation of post exchanges in 1949. *1949 Hearings*. Compare S. Doc. 149, 72d Cong. 2d Sess. (1932).

[26] General Order No. 51, May 13, 1890.

[27] Circular No. 1, Army Adjutant General's Office, Feb. 9, 1891.

[28] Circular No. 1, Army Adjutant General's Office, Feb. 9, 1891; Circular No. 7. Army Adjutant General's Office, June 10, 1890.

[29] General Order No. 11, Feb. 8, 1892.

[30] Act of January 28, 1893, 27 Stat. 426.

[31] General Order No. 46. Headquarters of the Army, July 25, 1895.

[32] 61 JAG Record Book, 1882–95, 479 (1893).

As units moved off post, their shares in the assets of the exchange were returned to them. The exchanges were authorized fuel and lighting at government expense; and, like their predecessors the canteens, they were authorized the use of available government buildings.[33] So generous was the Army in supporting these activities, that Congress felt compelled to limit the aid. A Bill containing the Army appropriations for Fiscal Year 1893 contained the following language inserted by the House of Representatives: ". . . and provided further, that hereafter no money appropriated for the support of the Army shall be expended for post gardens or canteens."[34]

While the Senate version stated:

> And provided further that hereafter no money appropriated for the support of the Army shall be expended for post gardens or exchanges, but this proviso shall not be construed to prohibit the use by post exchanges of public buildings or public transportation when not required for other purposes, or the purchase of subsistence or quartermaster's supplies at the same rate that officers are now allowed to purchase such supplies.[35]

The final version of the Appropriation Act stated:

> And provided further that hereafter no money appropriated for the support of the Army shall be expended for post gardens or exchanges, but this proviso shall not be construed to prohibit the use by post exchanges of public buildings or public transportation when, in the opinion of the Quartermaster General, not required for other purposes.[36]

The legislative history of this innocuous bill becomes important when one realizes that this is the first and last time the Congress officially states policy as to the support to be given exchanges.

The law against expending appropriated funds for exchanges did not apply to Congress. The Army Appropriation Act for Fiscal Year 1904 was the first of a number of Acts which appropriated money for non-appropriated fund construction and maintenance. It states:

> . . . [for] continuing the construction, equipment, and maintenance of suitable buildings at military posts and stations for the conduct of the post exchange, school building, reading, lunch, amusement rooms and gymnasium, to be expended in the discre-

[33] 51 JAG Record Book, 1882–95, 239 specifically notes that there may be no charge for these services. While this is the earliest recognition (by some six months) of appropriated fund support of nonappropriated fund activities, 10 JAG Record Book 1882–95, 127, held that the post trader was sufficiently a part of the military establishment as to entitle him to certain support, i.e., free timber and hay from an Indian reservation.

[34] 23 Cong. Rec. pt. 3, at 2274 (1892).

[35] *Id.*, pt. 4, at 3653.

[36] Act of July 16, 1892, ch. 195, 27 Stat. 178. This law is now codified as 10 U.S.C. 4779(c) and 9779(c). The house conferees explained the law as being ". . . a proviso that post exchanges shall be permitted to use public buildings or public transportation when, in the opinion of the Quartermaster General, not required for other purposes." 23 Cong. Rec., pt. 5 at 5590 (1892).

tion and under the direction of the Secretary of War, five hundred thousand dollars.[37]

It will be seen in this and subsequent chapters that the early prohibition against appropriated fund use has been so narrowly construed that it is of little practical effect.

NAVY AND MARINE CANTEENS AND EXCHANGES

While the legal history of these activities prior to World War I may never be written, due to the lack of historical data, it appears that their development paralleled the same activities in the Army. In the 1949 congressional hearings on post exchanges, a brief history of the Navy and Marine Corps activities was given:

> During 1900 the brigade commander of the Marine brigade in the Philippine Islands authorized the establishment of post exchanges at the Marine barracks, Cavite and Olongapo. These are the first post exchanges, as far as is known, in the Marine Corps. They were so successful that the brigadier general Commandant of the Marine Corps recommended that every post in the Marine Corps be authorized to have a post exchange in lieu of the post trader's store, so that enlisted men might derive some benefit from the profits thereon. This recommendation was approved by the Assistant Secretary of the Navy on June 20, 1912, when the last two post trader's stores were terminated and changed to post exchanges.
>
> . . . There was developed on board naval vessels, in the years preceding the Spanish-American War, the canteen financed by voluntary contributions from the officers and crew, later repaid from profits. These canteens endeavored to provide some of the comforts of life to naval personnel. They were operated in a most informal manner with little concern for accountability or responsibility. The cruise of the White Fleet around the world in 1908 proved the inadequacy of the canteen system and Congress subsequently authorized the establishment and operation with appropriated funds of ship's stores.
>
> . . . [The shore equivalent of ship's stores were ship's service stores which] originally . . . were small concessions operated for personal profit by enlisted men. However as it became necessary to expand the scope of the operation, the concession became quite profitable and the question of control became a problem. Ship's Service Stores were authorized as official sale activities by the Navy Regulations of 1923, which provide for operation of the stores with non-appropriated funds under the direction of command officers, and required that profits be used for the welfare and recreation of naval personnel. The profits subsequently became the prime source of funds for welfare and recreational purchases.[38]

Thus it is seen that the sole exception to the parallel development was in the congressional establishment of ship's stores, which were the

[37] Act of March 2, 1903, ch. 975, 32 Stat. 927 at 938.
[38] *1949 Hearings*, at 3494, 3504, 3505.

seagoing equivalent of ship's service stores. (Since 1949, ship's service stores have been called Navy Exchanges.) The ship's stores afloat, as they are now called, are appropriated fund activities although their profits are used as non-appropriated funds.[39]

MESSES PRIOR TO WORLD WAR I

There is also a dearth of opinion as to the legal status of messes in the period prior to World War I. It appears, however, that their basic structure, membership, and function had been determined by this time. The Army and the Navy agreed that officers' messes were private organizations.[40] It should be noted that there is a distinction between "closed" and "open" messes. The former are appropriated fund activities, restricted to those individuals at an installation or on a vessel who are on active military duty. Closed messes are in effect government-run dining halls; they make no profit and any funds which they collect are turned over to the United States. This distinction is obviously important when considering the status of a mess, but is rarely drawn in the Comptroller General decisions cited throughout this paper.

MODERN NON-APPROPRIATED FUND ACTIVITIES

We may therefore conclude that by World War I the two most important non-appropriated fund revenue activities, the post exchange and the ship's service store, had assumed the general outlines which they retain today. In 1941 the Army Exchange Service was organized and made generally responsible for the operation of post exchanges. At the same time, the old system, by which the military units on a post held shares in the exchange stock, was eliminated. When the Department of the Air Force was organized, the joint Army and Air Force Exchange Service was organized. It is managed by a Board of Directors, composed of general officers who are in turn responsible to the Secretary of their respective service. Similarly,

[39] The Act of June 24, 1910, ch. 378, 36 Stat. 619 (now at 10 U.S.C. 7604) authorized a 15% "amusement surtax" to sales made by ship's stores (the stores themselves had been recognized by the Act of May 13, 1908, ch. 166, 35 Stat. 146). The proceeds from this amusement surtax were used for recreational and welfare activities. When queried by the Secretary of the Navy as to whether the Anti-Deficiency Act (Act of July 12, 1870, ch. 251 § 7, 16 Stat. 251, 31 U.S.C. 665(a)) applied to such monies, the Comptroller of the Treasury replied that such funds were not public moneys within the meaning of the statute. (Unpub. decision—Comptroller of the Treasury, August 11, 1914.) *But cf.*, the Decision of the Comptroller of the Treasury, June 11, 1914, which states that a post exchange is an agency or instrumentality of the Government. Cited in Dig. Op. JAG 1912–17, 402.

[40] Dig. Op. JAG 1918, Vol. 2, 940, citing R.S. 1232 (now 10 U.S.C. 3639 & 8639) and Williams v. United States, 44 Ct. Cl. 175 (1909). However, another opinion suggests that the mess may under certain circumstances become a quasi-governmental institution. Dig. Op. JAG 1918, Vol. 2, 847.

most other non-appropriated fund activities are managed by a Board of Governors, responsible in turn to a military commander.

Revenue-producing activities turn their annual profits over to their respective military service. A Pentagon board then directs the distribution of the funds to subordinate commands while retaining some money for emergency loans and, in the case of the Army and the Air Force, for the self-insurance program (described *infra* in Chapter IV). Subordinate commands distribute the funds until they at last are received at individual military installations. At each installation, there is normally a board, appointed by the commander, which recommends to him the purposes for which the money should be spent. Once the projects are designated, officers appointed by the commander are authorized to enter into contracts to effect whatever purpose has been decided upon. The contracting officers who sign these agreements are not the same officers who are authorized to enter into appropriated fund contracts. It may be said that revenue-producing activities support welfare activities. I have outlined above the method by which welfare funds are spent. It should be noted that each of the services has specific regulations covering the expenditure of welfare funds.

Revenue and sundry fund activities, such as post restaurants and officers' clubs, may be organized by an installation commander. If initial capitalization is needed, a request may be made for a loan or grant from higher authority. While revenue-producing activities are required to turn over a certain percentage of their profits for welfare and recreational purposes, sundry funds are considered to be merely self-sustaining and are discouraged from making any appreciable profit from their operations. (The newest type of sundry fund activity, and one which by its nature can be expected to generate a number of legal problems, is the aero club. At the end of 1964, the Air Force reported 108 such clubs, with a total membership of approximately 9300 persons. The clubs operated 560 aircraft, of which 38 were club owned. The remaining 222 were on loan from the government.)[41]

Such organizations, staffed in part by active-duty military personnel, and supported in varying degrees by appropriated funds, are instrumentalities of the federal government. They are managed, supported, and regulated by appropriated-fund employees, are housed in federally constructed buildings, and their light and heat are paid for by the United States. Moreover, certain very measurable benefits accrue to the taxpayer inasmuch as the revenue, generated by the funds, provides money for welfare and recreation which would otherwise have to be appropriated by Congress. For example, during

[41] Air Force Times, November 11, 1964, p. 6, col. 1.

the last five fiscal years, the Army and Air Force Exchange Service has turned over the following amounts for disbursement as welfare funds:

Fiscal Year 1960	$61,699,879
Fiscal Year 1961	$55,293,669
Fiscal Year 1962	$54,170,269
Fiscal Year 1963	$51,357,932
Fiscal Year 1964	$62,346,774

If Navy and Marine exchange revenue is added to this amount, the "savings" to the taxpayer may amount to some $75,000,000 annually. Moreover, on three occasions (which will be discussed elsewhere in this paper), non-appropriated funds have been turned into the General Fund of the Treasury as miscellaneous receipts. There can be no doubt that these activities are instrumentalities, or arms, of the United States.

A non-appropriated fund activity may be a huge retail organization, exemplified by the exchange service; it may be a recreation center in the Bavarian Alps; a flying club, owning numerous planes; or a skiing club, dependent on the post welfare fund for skis to lend its members. No matter what size a non-appropriated fund may be, all such funds have one thing in common; they are creatures of regulation. The authority to organize and administer non-appropriated funds is found in the regulations of the Armed Services. In many instances, these regulations not only give explicit directions as to the operation of the funds, but also contain statements which affect the legal rights of individuals, not necessarily subject to those regulations, who come into contact with the fund.

REGULATIONS AND NON-APPROPRIATED FUNDS

Although statutory recognition of the funds has been slight and, until recently, federal and state decisions have been meager, it will be seen that the most persuasive authority has been the body of regulations issued by the Armed Services themselves. For example, in the very earliest case involving the tax liability of non-appropriated fund activities,[42] the Court of Claims looked to Army regulations to solve the question of immunity. Similarly, in a very recent case involving the tort liability of aero clubs,[43] Air Force regulations were used by the court in arriving at its decision.

Why are service regulations so important? From 1779, under its constitutional authority to raise and support the Army, Congress approved many of the Army's regulations. On occasion, Congress attempted to codify Army regulations. Of course, they were not

[42] Dugan v. United States, 34 Ct. Cl. 458 (1899).
[43] United State v. Hainline, 315 F.2d 153 (10th Cir. 1963).

successful, since the leisurely pace of the legislature could not cope with day-to-day changes in military requirements. By 1875, the President was authorized to issue regulations and subsequently the Secretary of each Federal Department was given the authority to promulgate regulations. None of the regulations governing the institution and operation of non-appropriated fund activities was ever passed on by Congress. However, in 1842 the Supreme Court in *U.S. v. Elaison*[44] confirmed the power of the executive branch to establish binding regulations. A hundred years later, in the leading case involving non-appropriated fund activities, *Standard Oil v. Johnson*,[45] the Supreme Court used this principle to point out that since exchanges are established by regulation they are legitimate parts of the federal government. The nature and effect of these regulations will be considered in subsequent chapters. Due to the absence of a statutory basis for non-appropriated funds, courts often look to the regulations and are sometimes misled by them.

CONCLUSION

While the history of non-appropriated funds and their predecessors can be traced back to the Seventeenth Century, they have achieved their present form during the past hundred years. Even during this comparatively short period, the funds have undergone substantial change and phenomenal growth. Neither the growth nor the change was apparent to those attorneys and judges who first considered non-appropriated fund legal problems. Mistaking changes in substance for those of form, they considered these organizations as something equivalent to voluntary unincorporated associations long after the funds had emerged from this chrysalis and had achieved a *de facto* status analogous to government corporations.

Since precedent is so rare in non-appropriated fund law, decisions are adhered to long after they have lost any practical relevance, and dicta has been accorded the authority of Holy Writ. As the body of law has increased, so has the confusion. In many cases, decisions and opinions have been reconcilable, though illogical. In others, it is obvious that the parties involved have only the slightest grasp of what a non-appropriated fund activity is.

If there is a common thread running through this paper, it is the reluctance of courts and administrative authorities to change their opinion, no matter how illogical, if the "weight of authority" supports them. A sign which used to have some popularity in federal legal offices said: "A governmental practice conceived in error does not elevate itself to the level of legality merely because it has been long

[44] 41 U.S. (16 Pet.) 291 (1842).
[45] 316 U.S. 481 (1942).

persisted in." This aphorism will have some application when we see the United States arguing that non-appropriated funds are immune from taxation as federal instrumentalities but are not subject to the Government's waiver of immunity in tort and contract. Unfortunately, the courts have aided and abetted this illogical position by an obstinate adherence to decisions which are either no longer relevant or based on faulty premises.

The next chaper will consider the relationship of non-appropriated funds with the states. There has perhaps been more case law in this area than in any other. By tracing the development of the law in this area, from the earliest decisions to the most recent ones, we will not only fill in the strictly historical outline previously given, but will also observe the reasoning which has lead to such confusion when applied to problems in criminal, contract, tort, and international law.

CHAPTER II. STATE TAXATION AND REGULATION OF NON-APPROPRIATED FUND ACTIVITIES

INTRODUCTION

In a sense, the chronicle of American constitutional history is the record of conflicts between state and federal authority. As the central government has grown, so has the discord. The history of state attempts to control non-appropriated fund activities mirrors this controversy in microcosm. State control can take diverse forms; but, it is normally intended to regulate the behavior of, and secure revenue from, commercial activities. For this reason, post exchanges and ship's service stores have been the focal point of litigation. However, the case law, once established, has been applied to all non-appropriated fund activities without exception.

As instrumentalities of the federal government, non-appropriated fund activities have consistently refused to subject themselves to any form of state licensing, regulation, or taxation. Since they contend that their immunity exempts them completely, from sales tax to fair trade laws, their argument has not been accepted passively. The states have, on the whole, been unsuccessful in their attempts to tap non-appropriated fund revenues, by they have not stopped trying, nor is it likely that they will ever foreswear this lucrative potential source of income. Further attempts are to be expected in the future; their nature, and probable success, can be estimated by examining the past and present.

Traditionally, the most important and ancient area of disagreement has involved the right of states to tax the revenue of these organizations. Two of the three Supreme Court decisions involving non-appropriated fund activities have been concerned with this topic,

while the third was concerned with the allied problem of state regulation. In the tax cases, it will be seen that the Court's opinions have not been accepted by local authorities as being wholly determinative. Since the government briefs cite one of the oldest and most established cases in American constitutional law, *McCulloch v. Maryland*,[1] it seems hard to believe that the issue is still being litigated, particularly when one reads the United States' briefs. Military legal publications are in particular agreement that the present immunity from state taxation which cloaks non-appropriated fund activites is directly derived from *McCulloch* and that the Supreme Court decision of *Standard Oil v. Johnson*,[2] which held non-appropriated fund activities immune from taxation, merely emphasized that which was already known (at least by anyone with any legal acumen). The Army, for example, in an Official publication calls *Standard Oil* a "natural consequence" of *McCulloch*.[3] The Air Force arrives at the same conclusion but uses somewhat less forceful language.[4] Their judgment, on its face, seems logical when one considers the Court's closing words in *Standard Oil*:

> . . . we conclude that Post Exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions; they are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunity it may have under the Constitution and federal statutes.[5]

Thus, the non-appropriated fund activity is as immune as its host, the War Department (now, the Department of Defense), and, although *McCulloch* was not cited in the *Standard Oil* case, the relationship seems clear.

It has been suggested that the doctrine of federal tax immunity is on the wane. If this is true, will the non-appropriated fund activity exemption be similarly diminished? The symbiotic relationship of appropriated and non-appropriated fund activities is imperfectly illustrated in *Paul v. United States*[6] which involved California's attempt to impose on appropriated and non-appropriated fund activities its minimum price laws for milk sales. The parties to the suit assumed that there was no distinction as to purchases by the activities. In this case, the Court did perceive a difference between the two. Was there one? Should there be one? These are some of the questions which this chapter will attempt to answer. Of course, the ultimate question remains: how firm is the legal foundation on which non-appropriated

[1] 17 U.S. (4 Wheat.) 316 (1819).
[2] 316 U.S. 481 (1942).
[3] Department of the Army Pamplet 27-187, "Military Affairs," 183 (1963).
[4] Air Force Manual 110-3, "Civil Law," 216 (1959).
[5] 316 U.S. 481, 485.
[6] 371 U.S. 245 (1963).

fund tax immunity rests? In answering this last question, a brief history of the concept of federal immunity from taxation and its vicissitudes will serve as an introduction.

THE FEDERAL GOVERNMENT'S IMMUNITY FROM STATE TAXATION

When *McCulloch* was decided in 1819, it declared that states may not impose special discriminatory taxes on federal instrumentalities. Ten years later the rule was expanded to preclude nondiscriminatory taxation by states.[7] While it was stated in *Van Allen v. Assessors*,[8] that this exemption could be waived, the immunity doctrine was gradually extended so that by 1928 the Supreme Court held in *Panhandle Oil v. Knox*[9] that a state's general sales tax could not be imposed on property sold to the federal government. The dissenting opinion in *Panhandle Oil*, and three years later, in *Indian Motorcycle Co. v. United States*[10] suggested that a more precise test should be used. The criterion proposed was that of incidence, i.e., a vendor's sales tax would be unconstitutional if applied to sales by the government, while a vendee's sales tax could not be imposed on sales to the government. At the inception of World War II, this doctrine was accepted in *Alabama v. King and Boozer*[11] and, in turn, it has gradually been expanded to allow more state taxation of federal activities. The sole exceptions to this intrusion have been those instrumentalities made expressly immune by statute.[12]

Some years ago, Thomas Reed Powell in *"The Waning of Governmental Tax Immunities"*[13] and *"The Remnant of Governmental Tax Immunities"*[14] argued that the scope of federal governmental tax immunity was diminishing. Certainly his judgment seems well considered today.

Of course, it is to be expected that the varying attitudes regarding non-appropriated fund activity tax immunity will to some extent reflect concurrent opinion regarding federal immunity from taxation.

EARLY OPINIONS AND DECISIONS ON FUND TAX LIABILITY

The earliest discovered opinion regarding non-appropriated fund tax liability is concerned with an attempt by the Republic of Texas to

[7] Weston v. Charleston, 7 U.S. (2 Pet.) 449 (1829).
[8] 70 U.S. (3 Wall.) 573 (1862).
[9] 277 U.S. 218 (1928).
[10] 283 U.S. 570 (1931).
[11] 314 U.S. 1 (1941).
[12] Federal Land Bank v. Bismark Lumber Co., 314 U.S. 95 (1945); See also, Carson v. Roane Anderson, 342 U.S. 332 (1952); Northwest Airlines v. Minnesota, 232 U.S. 292 (1944).
[13] 58 Harv. L. Rev. 633 (1945).
[14] *Id.* at 757.

impose import duties on the property of sutlers accompanying United States troops on an expedition into the country. A treaty between the United States and Texas relieved the former of any obligation to pay import duties on military material. In 1846 the Attorney General of the United States rendered an opinion that since sutlers were an integral part of the military, they fell within the treaty's exclusion and were thus not subject to taxation.[15] This decision was followed by another in 1855 which, citing *McCulloch v. Maryland*, held that the State of California could neither tax nor license sutlers in that state.[16] The position was refined somewhat in 1880 by imposing the requirement that the exemption would be available as a defense, only when sales were made solely to military personnel.[17] The earliest decision of the Judge Advocate General of the Army used the Attorney General's reasoning as found in the California case *supra*, and concluded in 1882 that the property of a post trader on a military reservation was not subject to state taxation.[18] However, there was not complete unanimity of opinion in this regard. Nine years later, the Supreme Court of Nebraska held that a post trader's property was taxable.[19] The court concluded that there was absolutely no evidence that the federal government intended traders to be immune and, in the absence of a specific prohibition, a tax was legitimate. The Army was aware of the decision, considered it to be incorrect, but took no steps to challenge it since the United States was not a party to the suit.[20] Nearly seventy years later when Professor Corwin summarized the present status of federal instrumentalities' tax exemption, he unconsciously paraphrased the opinion of the Nebraska Court:

> But Congress is still able, by virtue of the necessary and proper and supremacy clauses in conjunction, to exempt instrumentalities of the National Government, or private gains therefrom, from state or local taxation; but any person, natural or corporate, claiming such an exemption must ordinarily be able to point to an explicit stipulation by Congress to that effect. Moreover, Congress is always free to waive such exemptions when it can do so without breach of contract and any such waiver will generally be liberally construed by the Court in favor of the taxing authority.[21]

Thus, the Nebraska opinion, though never again cited in a nonap-

[15] 4 Ops. Att'y Gen. 462 (1846).

[16] 7 Ops. Att'y Gen. 579 (1855).

[17] 16 Ops. Att'y Gen. 651 (1880). Although not cited, Railroad Co. v. Penniston, 85 U.S. (18 Wall.) 5 (1870), which held valid a nondiscriminatory state tax on the property of a railroad which was charted by the United States to carry mail and troops (but which also engaged in private business) may have been the basis of the opinion. Sutlers were authorized to sell to wagon trains, immigrants, and other non-military personnel.

[18] XLV JAG Record Book, 1842–89. 426.

[19] County of Cherry v. Thacher, 32 Neb. 350, 49 N.W. 35 (1891).

[20] 49 JAG Record Book, 1882–95, 153.

[21] Corwin, *The Constitution and What It Means Today*, 181 (1958).

propriated fund context and rarely followed, has at least one supporter.

Although the United States argued that sutlers' and, under some circumstances, post traders' activities were immune from state taxation, a similar contention was not advanced regarding post canteens. In 1886 the Army Judge Advocate General, differentiating between taxation and licensing, did not contest the right of the State of Nebraska to compel a canteen to take out a state liquor license.[22] It should be noted however, that when this and similar decisions were subsequently digested by the Judge Advocate General's office, the rationale for allowing taxation and licensing is given as the lack of exclusive federal jurisdiction over the posts in question.[23] The 1886 opinion was written three years before canteens were first recognized by regulation,[24] ten years before *Dugan v. United States*[25] (holding such activities, if recognized by departmental regulations, to be federal instrumentalities, and, therefore, immune from federal taxation), and one year after the Supreme Court reaffirmed the exclusive jurisdiction of the federal government over property ceded to the United States.[26] Two years later, in 1888, the Secretary of the Treasury advised the Secretary of War that liquor and tobacco sales made by canteens would be taxed by the federal government, inasmuch as these organizations were merely private social clubs.[27] The following year, the Judge Advocate General of the Army stated that canteen liquor sales were subject to state taxation[28] and subsequent opinions in 1890[29] and in 1894[30] held that they were not immune from state licensing requirements. Thus it appears that while the Executive recognized that sutlers and post traders fell within the protected category, post canteens did not. Was this position inconsistent and what caused the double standard?

While the rationale for this distinction was never made explicit, it seems to rest on the fact that sutlers and post traders had been recognized by statute and regulation and canteens had not been accorded similar recognition. No one was willing to extend the instrumentality doctrine to cover organizations which were no more than private clubs. Apparently messes were considered to have the same status as canteens inasmuch as the Judge Advocate General of the Army, in an

[22] 29 JAG Record Book, 1882–95, 301.
[23] Dig. Op. JAG 1895, 738; Dig. Op. JAG, 1912, 1023.
[24] General Orders No. 10, Feb. 1, 1889.
[25] 34 Ct. Cl. 458, (1899), discussed *infra* pp. 377–79.
[26] Ft. Leavenworth R.R. v. Lowe, 114 U.S. 525, (1885).
[27] Letter, among miscellaneous papers fund in the *Dugan* file, Docket #20923, in the National Archives.
[28] 36 JAG Record Book, 1882–95, 161.
[29] 39 JAG Record Book, 1882–95, 375.
[30] 54 JAG Record Book, 1882–95, 171.

1878 opinion, described them as ". . . simply an association for the benefit of [the individual members]."[31] However, the attitude of the federal government toward the taxability of canteens underwent a change in 1897. At that time the Acting Commissioner of Internal Revenue advised the Collector of Internal Revenue in Baltimore that since post exchanges (the new name for canteens) had been put under the control of the Secretary of War, they were no longer subject to federal taxes.[32] The record is silent as to whether similar protection was afforded the messes. Initial recognition had taken place in 1889[33] and more regulations were published in 1895.[34] The Acting Comptroller of the Treasury, in a letter prepared at the time of the *Dugan* case, suggested that the Army's initial publication of post exchange regulations was an attempt to avoid the Treasury Department ruling[35] subjecting canteens to taxation.[36] While the suggestion seems reasonable, apparently it took two to five years for the Army to persuade just one Treasury Department office of the purported immunity. If the Army was intentionally trying to cloak post exchanges with governmental immunity, the first case involving this issue was of definite support.

DUGAN V. UNITED STATES: THE FIRST CASE INVOLVING THE FUNDS' IMMUNITY FROM TAXATION

Apparently, as a result of this change of policy, Lt. Thomas Dugan, Exchange Officer at Jefferson Barracks, Missouri, applied for a refund of the federal retail liquor dealer's tax. The Commissioner of Internal Revenue decided that the taxes should not have been paid but the Acting Comptroller of the Treasury refused to allow the refund. Their disagreement resulted in certification of the issue to the Court of Claims. *Dugan* v. *United States*[37] was the first federal court decision regarding non-appropriated fund activity tax immunity, and it is of some importance, particularly since the court's reasoning has been followed in a number of subsequent cases. Following the thesis argued by the Army,[38] the court's opinion simply said that exchanges were recognized by regulations promulgated by the government. The ex-

[31] 41 JAG Record Book, 1882–95, 155. See also, *id.* at 579, in which an opinion dated Sept. 10, 1886, pointed out that "a company fund has . . . [never] been recognized by law as public money."

[32] Letter dated July 6, 1897, from G. W. Wilson to Murray Vandiver; *Dugan File,* National Archives.

[33] G. O. 46, Adjutant General's Office, Feb. 1, 1889.

[34] G. O. 46, Headquarters of the Army, July 25, 1895.

[35] *Supra* note 27.

[36] Undated letter found in the *Dugan* case file, National Archives.

[37] 34 Ct. Cl. 458 (1899).

[38] Although the case was not agrued by the representatives of the Army Judge Advocate General's Department, the allied papers reflected that they prepared the pro-immunity brief in November.

change, as an entity, had been established by Executive Regulation. These regulations are binding.[39] Since the exchange is established and operated by the Executive for governmental purposes, it is a governmental enterprise. Because the government does not tax itself, the court held that exchanges were exempt from federal taxation.

Considering the regularity with which this case has been cited, it says much less than what is generally ascribed to it. First of all, of course, it is silent as to whether or not state taxation of exchanges is authorized. Moreover, the issue of tax liability was covered in a rather cursory fashion. The Court of Claims was chiefly concerned with its right to review the dispute, since the Commissioner of Internal Revenue contended that the court had no jurisdiction. The parties were in fact, the Commissioner and the Comptroller of the Treasury. Dugan was not represented by counsel and no arguments were advanced on his behalf. Thus it was that in the first modern decision concerning non-appropriated fund activity immunity, the issue itself was not even litigated in a meaningful fashion.

There were few "instrumentalities of government" at the turn of the century, (aside from the national banks), and none had been established by executive fiat. Until the *Dugan* case, the only protected activities had been national bonds,[40] income from national bonds,[41] national official salaries,[42] lands owned by the federal government,[43] and a congressional franchise to build a railroad.[44] Apparently the importance of the *Dugan* decision was not generally recognized and, considering the relative insignificance of these Executive creations, it is not surprising.[45] A thorough consideration of the case's tax implications would have been particularly enlightening since that same year the Attorney General had held in an opinion concerning the liquor sales function of exchanges, that:

> The post exchange . . . is in effect a voluntary association, similar to an unincorporated club, the officers and men composing the garrison constituting the members thereof, and the rules and conduct of the exchange being under the regulation and supervision of the War Department.[46]

1897. Moreover, while there is no evidence to substantiate the allegation that exchanges were made subject to regulation solely to gain tax immunity (as was suggested by the Comptroller), an Army opinion prepared a year before the *Dugan* case uses the same rationale as that submitted to the Court of Claims. Dig. Ops. JAG. 1901, 559.

[39] United States v. Eliason, 41 U.S. (16 Peters) 291 (1892).

[40] Weston v. Charleston, 22 U.S. (9 Wheat.) 738 (1834).

[41] Pollock v. Farmers L. & T. Co. 157 U.S. 429 (1895).

[42] Dobbins v. Comm'rs. of Erie City, 41 U.S. (16 Pet.) 435 (1842).

[43] Van Brocklin v. Tenn., 117 U.S. 151 (1886).

[44] California v. Central Pacific R.R., 127 U.S. 1 (1888).

[45] For the year ending June 30, 1897, the Adjutant General of the Army reported 75 exchanges in operation with gross receipts amounting to $1,606,485.71 and 169 civilian employees. *Annual Report of the Adjutant General for Fiscal Year 1897*.

[46] 22 Ops. Att'y Gen. 426, 429 (1899).

A state tax collector might reasonably infer from this language that, as a private club, the post exchange was taxable.

FEDERAL AND STATE TAXATION OF THE FUNDS PRIOR TO 1920

The War Department did not delay in putting the *Dugan* opinion to use as an instrument to avoid state taxation and, that same year, an opinion of the Judge Advocate General of the Army stated that exchanges, as instrumentalities of the United States, were immune from local sales and license taxes.[47] Shortly after the turn of the century, the doctrine was expanded to protect exchanges from territorial taxes.[48]

This simple immunity from all forms of taxation became somewhat more complicated during World War I. While it is impossible, due to lack of source documents, to do more than hypothesize, it is obvious that, as the need for revenue increased, pressure to limit the exemption grew. The first evidence of this pressure on the *Dugan* concept was in an opinion by the Judge Advocate General of the Army in late 1914 which held that since post exchanges are governmental agencies, they need not pay the Internal Revenue tax on tobacco but, that they must use the federal tax stamps.[49] A year later, the Judge Advocate General held that tobacco sold by post exchanges was subject to federal tax because the stamps were required.[50] There was no uniformity in the application of the rule, since in 1918 the Judge Advocate General of the Army said that while post exchanges did not have to pay the federal corporation and tobacco sales taxes, they did have to pay the federal stamp and transportation taxes.[51] In other opinions the same year the federal amusement tax was held inapplicable to admission fees at post exchange theatres[52] and proceeds derived from company fund billiard tables.[53] And so passed the doctrine that the Government does not tax itself; instead, the language of each statute was studied to determine its applicability.

During the period 1900–1920, only two decisions concerning the status of messes could be found. *Williams v. United States*[54] said that Navy messes ashore were, in effect, private associations although

[47] Dig. Op. JAG, 1912, 1026.
[48] Dig. Op. JAG, 1912, 1028.
[49] Dig. Op. JAG, 1912–1917, 459.
[50] Dig. Op. JAG, 1917, Vol. 1, 260.
[51] Dig. Op. JAG, 1918, Vol. 2, 263.
[52] *Id.* at 371.
[53] *Id.* at 629.
[54] 44 Ct. Cl. 175 (1909).

subject to the orders of the post commander. An opinion of the Army Judge Advocate General similarly described messes as private concerns.[55] It therefore appears doubtful that any attempt was made to cloak them with immunity.

STATES BEGIN TO ATTEMPT TAXATION

There is no evidence of state attempts to breach the immunity barrier until 1926, when the Judge Advocate General of the Navy opined that the California gasoline sales tax did not apply to sales made by ship's service stores inasmuch as they were Government instrumentalities.[56] Within the next ten years however, the tempo quickened. The first three cases involving non-appropriated fund activity immunity from state taxation arose in the period between *Panhandle Oil* (1928) which held that there could be no state tax on material sold to the federal government and *Indian Motorcycle* which in 1931 arrived at a decision similar to *Panhandle Oil* but suggested a change in policy. In *Thirty-First Infantry Post Exchange v. Posadas*,[57] decided in 1930, the Supreme Court of the Philippines upheld a territorial tax on property sold a post exchange and the Supreme Court of the United States did not feel that the decision warranted review. Three years later, in 1933, the Court refused to review the decision of a Federal Circuit Court of Appeals which in *Pan American Petroleum Corp. v. Alabama*[58] held an Alabama tax similarly valid, while going on to state that post exchanges were not, in fact, instrumentalities of the federal government. A year previously, a Federal District Court in Maryland, deciding the case of *United States v. Cordy*,[59] had neatly avoided the whole problem, when that state attempted to tax gasoline sales at the post exchange at Fort Meade which was a federal reservation. The state tax statute made sale and delivery in the state prerequisite to taxation. The court pointed out that delivery was on property over which the state's jurisdiction had been ceded. The court therefore evaded the instrumentality problem by holding that the statute exempted this type of transaction.

Thus we see that in the first three cases involving the immunity of non-appropriated funds from state sales tax laws, two cases held that the sales were subject to state taxation and the third was able to avoid reaching the ultimate question.

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[55] Dig. Op. JAG, 1918, Vol. 2, 959.

[56] File ENJJ-7-6-L 11-4 (260630) dated December 11, 1926. This and similar references are to unpublished opinions on file in the Navy Judge Advocate General's library.

[57] 54 Phil. Rep. 866 (1930), *cert. denied*, 283 U.S. 839 (1931). *Cf.* Walter E. Olsen & Co. v. Rafferty, 39 Phil. Rep. 464 (1919) which shows that exchanges had been paying taxes since 1904.

[58] 67 F.2d. 590 (5th Cir. 1933), *cert. denied*, 291 U.S. 670 (1934).

[59] 58 F.2d. 1013 (Md. 1932).

FIRST STANDARD OIL

In 1933, the Supreme Court of California was confronted with the *Cordy* problem; i.e., taxation of gasoline sold to a post exhcange on a federal reservation. In *People v. Standard Oil Co. of California*,[60] subsequently to be referred to as *First Standard Oil*, the Standard Oil Company, faced with a statute similar in language to that found in Maryland, urged the court to hold its sales immune from tax because of the *Cordy* decision and because of the *Panhandle Oil* case which, as will be remembered, said that sales to the United States were immune from state taxation. The California court refused to be distracted by *Cordy*, stating it was the intention of the California sales act to include all areas within the state. The court then went on to point out that there were a number of factors which satisfactorily established that post exchanges were not in fact part of the exempt activity of the federal government; post exchanges were not supported by appropriated funds, their debts were not debts of the United States,[61] and certain federal taxes were paid by exchanges. The court cited the *Thirty-First Infantry* case, in which the Philippine Supreme Court had held post exchange sales taxable, and a little known federal case, *Keane v. United States*,[62] which reversed a conviction of conspiring to defraud the United States because a post exchange was not part of the United States within the meaning of the statute. On the basis of this reasoning and with a passing comment that there was no burden here on interstate commerce, the court held that no exemption was available. Of course, the parties and sums involved were somewhat more substantial than in the earlier Nebraska case which had, forty-two years previously, reached the same conclusion,[63] and thus it was that the case was appealed to the Supreme Court of the United States.

Although the *Panhandle Oil* case had been a five to four decision (the dissenters stating that they felt some taxes on sales to the United States were legitimate), one of the four who had dissented in *Panhandle* wrote the decision reversing the California court. In *First Standard Oil*,[64] Justice McReynolds wrote the opinion for a unanimous court and found that California had no right to tax post exchange gas sales. The decision rested solely on the fact that the delivery took place on a federal reservation over which the state had no jurisdiction. The decision fell far short of an acceptance of the idea that these organizations were in fact part of the federal government, and were, per se, exempt.

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[60] 218 Cal. 123, 22 P. 2d. 2 (1933).
[61] Discussed *infra* at Chapter III.
[62] 272 F. 577 (4th Cir. 1921), discussed *infra* at Chapter V.
[63] Country of Cherry v. Thacher, 32 Neb. 350, 49 N.W. 351 (1891) discussed *supra* at p. 381–82.
[64] 291 U.S. 242 (1934), *rehearing denied*, 291 U.S. 630 (1934).

As a result of *First Standard Oil*, Congress, in 1936, passed the Hayden-Cartwright Act[65] which permitted states to impose their sales tax on gasoline sales by post exchanges. The statute said in pertinent part:

> . . . all taxes levied by a state . . . upon sales of gasoline and any other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges . . . and other similar agencies, located in military or other reservations, when such fuels are not for the exclusive use of the United States.[66]

A SLOW RECOGNITION OF FUND IMMUNITY

Although the concept of the non-appropriated fund as an instrumentality of government had reached its nadir in 1933, the coming of the New Deal brought, with it, slow acceptance of the theory. Executive Order 6589, dated February 6, 1934, exempted from the payment of Canal Zone license fees ". . . all vehicles owned and operated by the United States Government and by legally authorized instrumentalities thereof, such as post exchanges, company and recreational organizations of the Army." The Attorney General, when called upon to comment on the new Executive Order, did not refer to the recent court decisions denying the funds' immunity, but merely pointed out that the President had the authority to control vehicles in the Canal Zone and that, as pointed out in the *Dugan* case, the Government does not tax itself.[67] Similarly, a truck operated by a company fund was, according to an opinion of the Judge Advocate General of the Army, immune from taxation by the Territory of Alaska.[68] Of course, the agencies of the federal government had always felt that non-appropriated fund activities were immune per se, yet up until this time they had been singularly unsuccessful in persuading the courts.

Surprisingly, the first acceptance of the argument did not involve a military instrumentality. The state of South Carolina attempted to tax liquor sales made by exchanges operated as part of the Civilian Conservation Corps in that state and, in 1937, the United States brought suit to enjoin collection of the tax. A three-judge federal court agreed that exchanges were federal instrumentalities immune from state taxation. Their opinion, in *The First Query Case*,[69] (so called for convenience) pointed out that the Civilian Conservation Corps was a

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[65] 4 U.S.C. 104.

[66] *Ibid.* Minnesota v. Keeley 126 F. 2d. 863 (8th Cir. 1942), gives some legislative history on the bill and concludes that the intent of the Act was to collect any tax on purchases.

[67] 37 Ops. Att'y Gen. 435, (1934).

[68] Dig. Ops. JAG, 1912–1940, 889. Similar opinions of the Navy Judge Advocate General are found at CMO 11, 1936, p. 6; CMO 8, 1935, p. 11; CMO 11, 1934, p. 11; CMO 12, 1933, p. 13.

[69] United States v. Query, 21 F. Supp. 784 (E.D. So. Car. 1937).

creation of Congress, that the director of the Corps had the authority to make regulations, and that the exchanges were established by these regulations which have the force and effect of law. Therefore the exchanges were a legitimate function of the Civilian Conservation Corps and, as such, were immune from taxation. Although the court suggested that inquiry could be made into the validity of the request for exemption, the reasoning outlined above left little flexibility for maneuver. Using this decision, two years later the War Department sought an opinion from the Attorney General as to the validity of applying the Hawaiian Tobacco Tax Act to post exchange sales. In an opinion dated August 5, 1939,[70] post exchanges were held to be federal instrumentalities and, as such, their sales were considered to be immune from the sales tax. While reemphasizing the immunity of the exchanges, the Attorney General acknowledged that the doctrine of federal immunity was being eroded and stated that local sales to post exchanges would not be immune from taxation.[71]

State tax authorities were unwilling to take *First Query* as the final word. Kentucky made the next effort by attempting to tax beer sales to the post exchanges at Fort Knox and by requiring the exchanges to purchase state liquor licenses. The attempt was based on the Buck Resolution[72] which said, in effect, that persons were not immune from the state sales and use taxes merely because the sales or use took place on a federal reservation. Although the post exchange contended that another section of the Resolution[73] exempted sales by instrumentalities, and thus, those of post exchanges, the state disagreed. A brewing company supplying the exchanges sought a declaratory judgment to solve the problem. The United States District Court for the Western District of Kentucky accepted the instrumentality argument completely. Its decision, in *Falls City Brewing Co. v. Reeves*,[74] used the reasoning of the two *Query* cases (*Second Query* is discussed below) and concluded that post exchanges were instrumentalities and were therefore immune. The court noted in passing that the Congress' purpose in including the exclusionary clause in the Buck Resolution was to exempt post exchange and commissary sales from taxation.

SECOND STANDARD OIL: THE IMMUNITY CONCEPT VINDICATED

Although the theory of non-appropriated fund tax immunity seemed to be accepted by federal courts, the state of California had not

[70] 39 Ops. Att'y Gen. 316 (1939).

[71] This suggests that two years prior to *Alabama v. King and Boozer* the incidence test proposed by the minority of *Panhandle Oil* and *Indian Motorcycle* was on its way to acceptance.

[72] 4 U.S.C. 13

[73] 4 U.S.C. 107(a).

[74] 40 F. Supp. 35 (W.D. Ky. 1941).

surrendered. Once again suit was brought to collect tax on gasoline sold to post exchanges in that state. In *Second Standard Oil*[75] the sales were not made on state ceded property, so no question could be raised regarding the applicability of *First Standard Oil*, which had held sales on ceded property immune. In 1941 state Attorney General Earl Warren (who would consider a similar problem concerning his state's military installations twenty-two years later in *Paul v. United States*)[76] argued that there was no unanimity of opinion regarding the applicability of the immunity concept to post exchanges and that the sales were taxable; the California Supreme Court agreed. They noted that in *First Standard Oil* the United States Supreme Court had avoided a ruling that non-appropriated funds were federal instrumentalities and per se exempt from state taxation, and that the Court had similarly failed to establish the immunity concept in the *Pan American Petroleum* case. They concluded that *Dugan* and the *Second Query* case were against them, as was an unpublished Philippine case.[77] They distinguished the *First Query* case because the Civilian Conservation Corps had been established by statute and, using the same reasoning as in their prior decision, found *Cody*[78] distinguishable on the facts and the reasoning in *Keane*,[79] although a criminal case, much more persuasive. They found support for their reasoning in a decision of the Board of Tax Appeals for the District of Columbia.[80] Although they argued that the great weight of authority was in favor of taxation, their best argument was the fact that the Supreme Court had three times failed to answer the non-appropriated fund immunity question: twice by refusing certiorari, the *Thirty-First Infantry v. Posadas* and *Pan American Oil*, and once by carefully skirting the question, in *First Standard Oil*.

Unfortunately for California, the Supreme Court granted Standard Oil's appeal, possibly because a similar case had arisen elsewhere and its opinion was in direct opposition to that of the California court. The other decision was in the *Second Query* case[81] in which the United States had brought suit to enjoin the state of South Carolina's collection of license tax from all non-appropriated fund activities in that state. The Buck Act generally allowed such taxes but Section A

[75] Standard Oil Co. v. Johnson, 19 Cal. 2d. 104, 119 P. 2d 329 (1941).

[76] 371 U.S. 252 (1963), discussed *infra* at p.43.

[77] Post Exchange, 31st. Infantry v. Keaney, G.R. No. 30920 decided Aug. 28, 1929, by the Supreme Court of the Philippines (decision no longer available) apparently over-ruled by *31st Infantry v. Posadas*, 54 Phil. Rep. 866 (1930), *cert denied*, 283 U.S. 839 (1931) discussed at p. 377–79 *supra*.

[78] 58 F. 2d 1013 (Md. 1932).

[79] 272 F. 577 (4th Cir. 1921) discussed *infra* at Chapter VI.

[80] Post Exchange, The Army War College v. District of Columbia, Docket No. 462, July 27, 1941.

[81] United States v. Query, 37 F. Supp. 972 (S.C. 1941) *aff'd*, 121 F.2d 631 (4th Cir. 1941), *judgment vacated on other grounds*, 316 U.S. 486 (1942).

excluded taxes on the United States or its instrumentalities. Hewing closely to its *First Query* decision and citing the numerous Executive decisions in the area, a three-judge federal court found all the non-appropriated fund activities in the state immune from suit. The Circuit Court of Appeals sustained its opinion and the state appealed to the Supreme Court. Initially, the Supreme Court denied certiorari[82] and then subsequently granted it. Thus the Supreme Court heard arguments on *Second Standard Oil* and *Second Query* on the same day, and announced both decisions on June 1, 1942, with Justice Black writing both unanimous opinions.

The historic decision of the two is *Standard Oil v. Johnson*[83] since *Second Query* was sent back because improper procedures had been followed when the original decision was appealed. The Supreme Court in *Second Standard Oil*, while it did not cite *Dugan* or any of the prior "pro-instrumentality" cases, accepted that rationale completely. Basically, the Court followed the district court's opinion in *Second Query*, using in many instances such startingly similar language, that one is tempted to think of plagiary. The Court, going back to the reasoning of *Dugan*, pointed out that while non-appropriated fund activities were creations of regulations which have the force and effect of law, they were also recognized by statute. It concluded that:

> They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunity it may have under the Constitution and federal statutes.[84]

At last the instrumentality concept seemed completely litigated and the issue seemed settled once and for all, or, was it?

W. H. Church, a student at Tulane Law School, wrote a brief case note on the decision shortly after it was published.[85] Reviewing decisions from *McCulloch v. Maryland* to the present, he concluded that the *Second Standard Oil* case did not follow the prevailing tendency to limit federal tax exemption; either the decision was an anomaly, or it represented a change in the trend toward curbing federal immunity. For a number of years, neither alternative seemed to have been selected. Tax suits by states against non-appropriated fund activities have been brought to a standstill and the *Second Standard Oil* decision has been used to substantiate the Government's contention that for the purposes of both tort and contract, non-appropriated fund activities are federal instrumentalities.[86]

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[82] 314 U.S. 685 (1941).

[83] 316 U.S. 481 (1942).

[84] *Id.* at 485.

[85] Note, *Immunity of State and Federal Instrumentalities From Taxation; A Broad or Narrow Construction?* 17 Tul. L. Rev. 100 (1942).

[86] *Cf.* discussion *infra* at Chapters III and IV.

IF NOT TAXATION, THEN REGULATION?

Although the states have been temporarily stymied in their attempts to tax these organizations, they have not surrendered but have recently attempted to regulate non-appropriated fund sales and purchases. Three suits have resulted from these attempts. In *Sunbeam Corp. v. Central Housekeeping Mart*,[87] and in *Sunbeam Corp. v. Horn*,[88] the courts based their refusal to enforce "Fair Trade" regulations solely on the grounds that the post exchange sales were on a federal reservation. However, the latest case, *Parke Davis v. G.E.M., Inc.*[89] seems to rely more on the theory that non-appropriated fund activities, as instrumentalities of the federal government, are immune from regulation.[90]

While there is some confusion as to a state's right to regulate federal activities, the basic rules are settled. The Government is to be free from state regulation[91] and when state statutes interfere with federal laws, the latter will control.[92] However, state regulation of persons supplying goods and services to the federal government is not per se prohibited[93] and any exemption from control is to be narrowly construed.[94] With these general rules in mind, the latest Supreme Court decision, which concerned itself with state and federal conflict over non-appropriated fund activities, becomes more understandable.

The state of California attempted to compel milk producers to adhere to minimum prices when they made sales to military installations in the state. Some of the milk was purchased with appropriated funds (for consumption in mess halls and for resale in commissaries) while the remainder was purchased by non-appropriated fund activities (for resale in exchanges and clubs). The United States countered by bringing suit against the state Director of Agriculture, to enjoin him from enforcing the state regulations. A three-judge federal court granted the United States' motion for summary judgment.[95] California appealed to the Supreme Court.

Although both parties to the suit felt that there was no real distinction between the appropriated and non-appropriated fund pur-

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[87] 2 Ill. App. 2d 543, 120 N.E. 2d 362 (1954).

[88] 149 F. Supp. 423 (S.D. Ohio 1955).

[89] 20 F. Supp. 207 (Md. 1962).

[90] Cf. Mead Johnson & Co. v. G-E-X, Inc. of Albany, 1963 Trade Reg. Rep. para. 70,688, N.Y. Mis. (1963) in which the New York Supreme Court was faced with the defendant's contention that since the state Fair Trade Law was not applicable to post exchanges it should not be applicable to it. The court pointed out that the analogy was inaccurate, and that post exchanges, as federal instrumentalities, are immune from regulation.

[91] Mayo v. United States, 319 U.S. 411 (1943).

[92] Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1957); Compare U.S. v. Georgia Public Service Comm'n., 371 U.S. 285 (1963).

[93] Penn Dairies v. Milk Control Comm'n., 319 U.S. 261 (1943).

[94] *Ibid.*

[95] United States v. Warne, 190 F. Supp. 645 (N.D. Calif. 1960).

chases, the Court did not agree. Its decision, in *Paul v. United States*,[96] was primarily concerned with the conflicting policies of federal procurement law and state regulation. The Court pointed out that, under the Armed Services Procurement Act,[97] competition is required, while the California minimum price law effectively eliminated competition. In such a situation, federal policy would control. While this general statement might be said to have solved the problem with regard to the purchase of "subsistence" supplies for dining halls, some purchases were for resale through commissaries. The Armed Services Procurement Act does not require competitive bidding if the property purchased is to be resold.[98] Even though the requirement for competitive bidding is permissive and not mandatory in such a situation, the Court thought it clear that Congress intended that state price-fixing policies should not raise the cost of appropriated fund purchases. Of course, some of the milk was purchased by non-appropriated fund activities, to which the Procurement Act does not apply,[99] and toward which the Court took a different tack.

The majority opinion devotes eight pages to the problem of sales to non-appropriated fund activities,[100] without ever arriving at an answer. The Court was apparently troubled by the fact that there seemed to be no federal regulation which encouraged competitive bidding before non-appropriated fund activities made purchases.[101] As a matter of fact, there were a number of such regulations then in effect.[102] Since the Court could not refuse the state the right to regulate on the grounds of pre-emption, the only other possible basis was lack of jurisdiction over the area. Without citing the two *Sunbeam* cases, discussed *supra*, the Court supplied the same rationale by pointing out that there could be no regulation if the sales took place on federal property. No decision was reached on the regulation of sales to non-appropriated fund activities, and the case was returned for further evidence as to whether the sales were on federal property.

Can any conclusions be drawn from the *Paul* case? In my opinion, it says little about non-appropriated fund activities, and what is said, is said badly. We know that the instrumentality concept is inappropriate in cases involving state regulation, i.e., the mere fact that state regulations affect a federal instrumentality does not make the regulations

[96] 371 U.S. 252 (1963).

[97] 10 U.S.C. 2304.

[98] 10 U.S.C. 2034(a) (8).

[99] "This chapter applies to the purchase . . . of all property . . . and all services, for which payment is to be made from appropriated funds. . . ." 10 U.S.C. 3303(a).

[100] 371 U.S. 245, 263–270.

[101] 371 U.S. 245, 264.

[102] Para 4b, AR 60–1–/AFR 147–7; paras 62, 74, 74f, 75a(4) (4), 75b(1), 76a, and 76f, AR 60–20/AFR 147–14; para 15b, AR 60–25/AFR 147–19; para 36, AR 60–31/AFR 147–26. As a result of the *Paul* decision, the policy was restated in para 7 (changed) and para 15d, AR 60–10/AFR 147–7.

illegal. The more sophisticated test, involving a determination of conflict between state and federal regulations, was not used, apparently because no one realized that there were conflicting federal regulations. The issue turned solely on whether or not the state had any jurisdiction over the territory where the sales took place. Thus, the case proves very little, except to suggest that the Court and the Justice Department have the tendency to treat non-appropriated fund activities like part of the federal government whenever possible. Of course, even that supposition has little weight, since the same decision would have been reached if the questionable milk sales had been made on a military reservation to private persons, rather than to non-appropriated fund activities.

If any common thread can be detected in the four recent cases involving state regulation of non-appropriated fund activity sales and purchases, it is that non-appropriated fund activities have less to worry about when they are located on federal property. The right of the states to regulate off-base non-appropriated fund activities was implicitly conceded in at least one instance[103] but has never been litigated.

CONCLUSION

What conclusions can be reached regarding states' rights to regulate and tax non-appropriated fund activities? Recent attempts at regulation and taxation have been unsuccessful. State tax measures have foundered on the rock of the instrumentality concept which has been accepted only within the last thirty years. While attempts at regulation have failed previously because of lack of jurisdiction over federal reservations, does this mean that the states will halt their efforts? Probably not. That states will continue to seek chinks in the non-appropriated funds activities' armor is illustrated by the following case.

An Air Force Officers' Club purchased real estate in Virginia with non-appropriated funds. Federal statutes[104] require certain formalities before such property is bought, if the price exceeds $25,000. The purchase, which apparently exceeded that amount, had not been in accordance with the statutory requirements. Local authorities contended that since the purchase was in violation of the statute, the

[103] County of Culpeper v. Etter, Civil No. 2621, E.D. Va., June 25, 1963. On page 3 of the unpublished opinion, which denied the county's rights to tax real property owned by an officers' mess, the court pointed out that the mess had acceded to local alcoholic beverage control regulations. Earlier cases have held that a state has no right to prohibit the importation of liquor on federal reservations even though the state is dry, Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944), nor can such import sales be taxed if they are made by federal instrumentalities on the reservation, Maynard & Child, Inc. v. Shearer, 290 S.W. 2d 790 (Ky. 1956).

[104] *E.g.*, 10 U.S.C. 2662m; ch. 52, § 7, 3 Stat. 568 (1820), 41 U.S.C. 14.

property was subject to taxation. The United States District Court for the Eastern District of Virginia, in the case of *County of Culpeper v. Richard W. Etter,*[105] brushed aside this contention without commenting on it and pointed out that while legal title was held in the names of trustees (members of the Officers' Club Board of Governors), the beneficial owner was the club which, as an instrumentality of the federal government, was immune from taxation.

What about the standards which have been evolved to judge non-appropriated fund activity immunity? Is the present test, "if the organization is recognized by regulation, it is a government instrumentality and therefore immune," satisfactory? While all federal regulations are presumptively legal, this presumption may be rebutted.[106] As Professor Corwin described them, regulations fall generally into two categories, these are:

> . . . first, those that concern primarily the internal organizations of the administration, and so are of interest chiefly to its members or would-be members; secondly, those that supplement the general law.[107]

Regulations establishing and governing non-appropriated fund activities fall in the first category but, according to present military thinking, organizations need not be recognized at departmental level to avail themselves of immunity. The Army's position is that:

> . . . other authorized sundry or association funds may be established by an installation commander for such purposes as he deems fit . . . A[rmy] R[egulation] 230–5, para. 20g., appears broad enough to authorize the establishment of any legitimate activity as a non-appropriated fund activity, so long as the activity complies with applicable regulations.[108]

Similarly the Air Force allows base commanders to establish non-appropriated fund activities,[109] but has held that:

> An activity whose constitution or by-laws do not provide that the disposition of residual assets on dissolution will be as prescribed by the Secretary of the Air Force is not organized properly under the regulations and is not a Government instrumentality.[110]

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[105] County of Culpepper v. Richard W. Etter, Civil No. 2621, E.D. Va., June 25, 1963. *Contra,* Navy Opinion JF/NB 2 (411093) Jan. 20, 1942.

[106] United States v. Symonds 120 U.S. 46 (1887).

[107] Corwin, *The President, Office and Powers,* 393 (4th rev. ed. 1957).

[108] Department of the Army Pamphlet 27–187, Military Affairs.

[109] Para 43, AFR 176–1; para 3, AFR 176–11.

[110] AFM 110–3, 214, n. 13 (1959); while not cited, this opinion may be based on MS Comp. Gen. B–22551, Jan. 7, 1942, which held that a Navy Cafeteria Association was not a non-appropriated fund activity since its constitution provided that upon dissolution the ". . . funds of the association shall be donated to some charitable purpose. . . ." There were no problems of taxation raised in the decision, which suggested that the association's accumulated surplus might have to be turned in to the Treasury as Miscellaneous Receipts—an effective method for terminating the operations of any irregular organization.

Since any military commander is authorized to establish non-appropriated fund activities, it is to be expected that some will not follow statutory and regulatory requirements. Would such failure allow local tax authorities to pierce the veil of immunity? It is doubtful that courts would reach such a result because of the appropriated fund support normally accorded these organizations.

A whole body of law has been developed regarding the extent to which appropriated money may be used to support non-appropriated fund activities and will be discussed at some length in Chapter VI, *infra*. The earliest opinion regarding the degree of such support concerned itself with the request of a post trader in Montana who desired to accord himself the privilege, granted to the military, to use timber and hay from an Indian reservation. In an opinion dated June 2, 1886, the Judge Advocate General of the Army said:

> The post trader is a legally recognized institution. He supplies the reasonable wants of the post which cannot otherwise be supplied. He has military protection, and is assessed for the benefit of the post fund. He should, therefore, in my opinion, be regarded as sufficiently a part of the military establishment of the post as to entitle him to the benefit of the regulation referred to.[111]

Although some limitations were put on fund sources, the Judge Advocate General authorized the gift of fuel and lighting to canteens [112] and, by World War I, the privilege was extended to other non-appropriated fund activities.[113] During World War I, Navy non-appropriated fund activities were authorized government rates when they sent wires by Western Union.[114] Today, post exchanges and ship's stores use franked (postage free) envelopes. Officers' Clubs, post exchanges, and ship's stores are normally located in buildings constructed with appropriated funds,[115] and other activities may be given office space if it is available.

There are a number of administrative decisions which have held that when an association is not organized as a non-appropriated fund, its revenue has to be turned in to the Treasury as Miscellaneous Receipts because federal personnel and property have been used to generate the organization's income.[116] Since we have seen that the authority to establish non-appropriated fund activities is delegated to many individuals, we can guess that it is probable that some of the groups so organized have not met the requirements of the regulations.

[111] 10 JAG Record Book 1882–95, 137.

[112] 51 JAG Record Book 1882–95, 239.

[113] Dig. Ops. JAG 1918, Vol 2, 7.

[114] Letter, Secretary of the Federal Communications Commission to the Judge Advocate General of the Navy found in the latter's files for May 15, 1944.

[115] *E.g.*, 10 U.S.C. 4779(c).

[116] MS. Comp. Gen. decisions A–95642, March 19, 1943; B–22551, Jan. 7, 1942. Compare B–5900, May 28, 1946.

It appears doubtful that a tax suit against either type of irregularly organized association would be successful; while they may not be organized or operated in accordance with the law, their revenue is public money and, as such, is not subject to taxation.

Of course, it can also be argued that tax suits have been brought against post exchanges and Officers' Messes, both of which have been explicitly recognized by statute and regulation. If a post commander should organize a non-appropriated fund activity not so recognized, for example, a rod and gun club, would sales of equipment by the club be subject to state taxation? The United States would argue that as a duly organized non-appropriated fund activity, sales should be immune. The state might well point out that here there was no recognition by Congress or the Department of Defense of the importance of such a function and, that in the absence of such recognition, the organization's sales would be taxable. Although such an argument has not yet been advanced, as non-appropriated fund activities proliferate, so do the probabilities of taxation. What would be the outcome? It is hard to predict, but when one weighs the tendency to curtail federal immunity against a thirty-year-old tradition of exemption, my prediction for the immediate future is that courts will continue to protect the funds' status. Some support for this prediction is found in a recent case, *Texas v. National Bank of Commerce of San Antonio*,[117] in which the Federal Circuit Court of Appeals for the Fifth Circuit was faced with a *quo warranto* suit by the state which challenged the right of the bank to operate branches at various military installations in the state, when no permission had been given by Texas authorities. Using the rationale that the government may establish at these installations:

> . . . facilities which may have little or no direct relation to the base as a military installation and whose existence may be justified in large part solely on the basis of necessity or even of convenience.[118]

The court concluded that the decision to establish such facilities could not be questioned.

There is, however, no guarantee that Congress may not remove the mantle of immunity. Faced with ever-growing pressure both from commercial concerns who see non-appropriated fund activities as unfair competitors and from state taxing authorities who are always searching for new sources of revenue, the Legislators might succumb and either withdraw or severely curtail the privilege.

In summary, it may be said that non-appropriated fund tax immunity blossomed late and did not really develop until the 1920's and 30's. After a number of initial threats, immunity seems firmly established

[117] 290 F.2d 229 (5th Cir. 1961), *cert denied*, 368 U.S. 832 (1961).
[118] *Id.* at 234.

and, as a corollary, state regulation of non-appropriated fund activities has been generally unsuccessful. At this point, on the basis of the cases considered, it is tempting to conclude, that non-appropriated fund activities are merely arms of the federal government and, as such, the laws pertaining to the United States similarly apply to them. As will be seen in subsequent chapters, this statement is not correct. Perhaps non-appropriated fund activities would be better described as arms of the federal government to the extent it suits them. Their status in contract law best illustrates this.

CHAPTER III. NON-APPROPRIATED FUND CONTRACTUAL PROBLEMS

INTRODUCTION

We have seen in the prior chapter that, for all practical purposes, non-appropriated fund activities, as instrumentalities of the federal government, are immune from state taxation and regulation. One could reasonably assume, then, that as arms of the United States, they could sue and be sued on the same basis as the United States. The assumption, while logical, is incorrect. Although their tort liability is essentially that of the United States, they are immune from suits based on a contract. In fact, it is presently impossible to sue a non-appropriated fund for breach of contract, whether the suit is brought against the United States or against the individual entity. Once again, a history of the development of certain legal concepts, as applied to non-appropriated funds, may explain how they have come to enjoy this protected status.

NON-APPROPRIATED FUND CONTRACTS: THE EARLY YEARS

There are no reported cases regarding the contractual liability of sutlers, post traders, canteens, post funds, and similar organizations. While it may be argued that this shows they were not immune from suits on a contract, there are only two items of negative proof which lead to this conclusion: first, the manner in which exchange debts were treated; secondly, the fact that legal research shows no evidence of immunity being raised as a defense in such an instance.

The first administrative opinion concerning non-appropriated fund contractual liability was rendered on October 6, 1893. The Judge Advocate General of the Army, commenting on a proposed regulation, said:

> Now the Post Exchange is not a United States institution or branch of the United States military establishment, but a trading store permitted to be kept at a military post for the convenience of

> the soldiers. It is set up and stocked, not by means of an appropriation of public moneys, but by means of the funds of companies; *the officers ordering the purchase . . . [are] responsible for the payment, not the government.*[1]

Similarly another opinion given the following year states that the exchange:

> . . . is merely property—personal property—belonging to the organizations composing the garrison . . . a cooperative store . . . belong[ing] to certain people composing the military organizations which have paid for their shares of it.[2]

This attitude is understandable during the period when the canteen (exchange) was at best quasi-governmental. It could be expected that after the *Dugan*[3] case and its subsequent interpretations[4] which made the exchange, as part of the United States, tax exempt, their debts would be similarly treated. However, this was not so. Three years after *Dugan* the comptroller of the Treasury stated:

> Although the exchanges are established and maintained under special regulations, the Government does not become responsible for their debts or entitled to their credits.[5]

Four years later, he came to a similar conclusion regarding the debts of other Navy non-appropriated funds.[6] The reason for this ruling is predicated on two erroneous assumptions, as will be shown. The first is that if an officer representing a non-appropriated fund entered into a contract which he subsequently breached, he could be ordered to carry out the contract by his superior. The other assumption is that if no appropriated funds were used in the contract, none of the means of enforcing an appropriated funds contract could be used. It was not long, however, before these administrative rulings were challenged. The first time the issue was raised, the Court of Claims established an immunity which has been inviolate for over fifty years.

KYLE v. U.S.: THE FIRST NON-APPROPRIATED FUND CONTRACT CASE

Shortly after the turn of the century, a private in the Marine Corps was appointed post barber at the Boston Navy Yard. Since he received extra compensation for his work, his commander required him to pay ten dollars per month to the post fund, much as a sutler used to have to

[1] 61 JAG Record Book 1882–95, 479, 480 (emphasis supplied).
[2] 65 JAG Record Book 1882–95, 12.
[3] Dugan v. United States, 34 Ct. Cl. 458 (1899).
[4] Chapter II, *supra.*
[5] Letter to the Secretary of the Navy, dated April 22, 1902.
[6] 12 Comp. Dec. 678 (1906).

pay a monthly levy. At the time of his discharge, the Marine discovered that there was no authority for such an assessment and that, under similar circumstances, an Army private had recouped his "contributions." However, when the Marine made a claim on the Navy Department for reimbursement, he was advised that the money appropriated to pay claims against the Navy could not be used for such a purpose and that his only recourse was against the post fund or his commander.[7] He retained counsel and brought suit in the Court of Claims.

The resultant decision of *Kyle v. United States*[8] was the first to consider the contractual liability of non-appropriated funds. In it, the court apparently agreed that the assessment was illegal, but concluded that the United States was not the proper defendant. The court pointed out that the Treasury neither received non-appropriated fund revenues nor audited them, and that non-appropriated funds did not receive any appropriation. Therefore, said the court, the United States was responsible neither to the members of the fund, nor the plaintiff, since it was not a party to the transaction. Of course, neither the court nor the United States intended that Kyle be left without a remedy. He could, if he liked, sue either the fund or the commander in the local (Massachusetts) courts.[9]

Thus we see that the first assumption, that the Government would order an officer to do substantial justice when there was a breach of contract, was erroneous. The assumption was based on the belief that the military department concerned would always act judiciously. However, as will be seen in this and subsequent cases, there are many occasions when an administrative claim will not be honored although a subsequent judicial determination will establish the plaintiff's unquestioned right to recovery.[10] The *Kyle* case also illustrates the second erroneous assumption, that since appropriated funds were not used in the contract, the United States could not be committed to pay the resultant debt. In *Kyle*, this is evidenced by the court's comments regarding the lack of Treasury control over non-appropriated fund activities. As will be discussed later in this chapter, there is merit to a rule which precludes payment of appropriated funds for non-appropriated fund contractual obligations. This rule is based on the fiat discussed *supra* in Chapter II, which says: ". . . no money appropri-

[7] Although never stated explicitly, the correspondence suggests that while the agreement was illegal, the barber may have entered into it voluntarily. For this reason there was no apparent effort made to order the commander or the post fund to reimburse the claimant. Kyle papers, Court of Claims General Jurisdiction No. 29684, National Archives.

[8] 46 Ct. Cl. 197 (1911).

[9] Defendant's Answer, Kyle papers.

[10] See, for example, the *American Commercial Company* case discussed *infra* at pages 399 through 400.

ated for the support of the Army shall be expended for post . . . exchanges."[11] However, application of the rule need not leave an aggrieved plaintiff with a right and no remedy.

NON-APPROPRIATED FUND CONTRACTS DURING WORLD WAR I

I do not think that either the United States or the Court of Claims interpreted the *Kyle* case to mean that non-appropriated fund contractual claims were impossible of satisfaction. As noted previously,[12] the defendant's answer in *Kyle* suggested that the plaintiff could sue either his commander or the company fund in the courts of Massachusetts. A similar philosophy may be found in an opinion of the Army Judge Advocate General some years later:

> It is not the policy of the War Department to interfere in contractual relations between Post Exchanges and their creditors when there is a bona fide dispute which appears to be a proper case for judicial determination."[13]

Moreover, the War Department was willing to make a determination in some of the disputes, as is illustrated by a 1918 opinion of the Army Judge Advocate General:

> A Post Exchange is a voluntary unincorporated cooperative association of Army organizations, a kind of cooperative store in which all share the benefits and all assume a position analogous to that of partners. Contracts to purchase goods entered into by proper officers of a Post Exchange should be tested by the same rules of obligation which govern the agreements of individuals. If for any reason there should be an inability on the part of the Post Exchange to pay off just indebtedness in this way, this office believes that the Department should insist upon the organizations which participate in the Post Exchange themselves paying off all such obligations in proportion to their respective interests in the exchange.[14]

Of course, there were cases in which the War Department did not consider the contractor's claim to be just. While there is no record of suit ever having been brought in such a situation, two little known administrative decisions further illustrate the assumption that since appropriated funds were not used in such contracts, neither appropriated funds, not the fora normally associated with appropriated fund litigation, could be made available in the event of suit over a non-appropriated fund contract.

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[11] 10 U.S.C. 4779(e) and 9779(c).
[12] Note 9 *supra*.
[13] Dig. Op. JAG 1912–1917, 655.
[14] Dig. Op. JAG 1918, Vol. 2, 432.

The War Department Board of Contract Adjustment was a statutory creation,[15] intended to act as an administrative means for settling certain World War I contract claims against the United States. There are two cases involving non-appropriated funds among its reported decisions. Presumably the claimants sought the Board's aid after the War Department had refused to order the non-appropriated funds to pay the alleged debt. Without citing the *Kyle*[16] case (which had held no privity of contract between the plaintiff and the United States for a number of reasons, including the fact that no appropriated money was involved) the Board used a similar rationale in its first decision. In *Claim of Landauer Beverage Co.*,[17] the Board set the terms of reference for subsequent decisions in this area. The Board concluded that, since appropriated funds were not used in the contract, and since the individual representing the fund had not been officially designated a contracting officer, the contract was not a public contract within the meaning of the statute giving the Board jurisdiction. Similar reasoning disposed of the only other reported case involving non-appropriated fund contracts.[18] Was this a fair reading of the statute?

The First War Powers Act[19] related to Government contracts, required a report to Congress and, under certain circumstances, referral to the Court of Claims in cases of disputes. The War Department General Order which established the War Department Board of Contract Adjustment gave the Board's jurisdiction as: "Claims . . . which may arise under any contract made by the War Department."[20]

Considering the primitive status of non-appropriated funds during World War I (they were still essentially voluntary cooperative associations), it is not surprising that the Board concluded that its jurisdiction did not extend to such claims. We shall see that, during World War II, some post exchange contracts were first signed by government contracting officers, then assigned to the exchanges. Apparently this was not the case in the two contracts which the Board considered. If an authorized contracting officer had signed the agreements, it is possible that the Board might have found that it had jurisdiction. Once again, there is no evidence that failure to accord the contractors a hearing meant that they had no remedy. There was no bar to a suit in local courts although, as a practical matter, this may have been impossible due to the deactivation of the units which comprised the exchanges.

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[15] The First War Powers Act, Ch. 94, 40 Stat. 1272 (1919).
[16] Kyle v. United States, 46 Ct. Cl. 197 (1911).
[17] 1 War Department Board of Contract Adjustment 173.
[18] In re Claim of U.S. Rubber Co. 1 *Id.* 739.
[19] 40 Stat. 1272 (1919).
[20] War Department General Order No. 103, 1918, Section IV, Para. 5.

THE PERIOD FROM THE END OF WORLD WAR I UNTIL 1950

Apparently the contractual liability of non-appropriated funds was not a problem during the period between the two World Wars. Of course, the absence of published opinions may in part be due to the small size of the Armed Forces. The largest service, the Army, contained only 14,000 officers and 243,000 enlisted men, in September of 1940,[21] and, it was not until the Services began to expand that the problem was again raised.

In June of 1941 the Judge Advocate General of the Navy was asked if the Navy Department would pay non-appropriated fund debts if the ship's company, which had incurred the debts, were lost at sea. He initially refused to answer, stating that he would await a specific transaction.[22] However, after war had been declared, he reversed himself and, when faced with a similar question some months later, stated that the Navy Department would not honor such debts, pointing out that the Tucker Act,[23] which waived the immunity of the United States in suits on a contract, did not apply to non-appropriated funds.[24] One may only guess at the reason for this opinion but it may have been due to the same obstacle which the Navy Department faced in the *Kyle* case thirty years earlier: the absence of a statute or regulation which would authorize payment of such claims.

In 1942, the Supreme Court in the *Second Standard Oil*[25] case noted that non-appropriated fund obligations were not obligations of the United States. Although this was dicta, it was to have a serious impact on subsequent decisions.

There was hardly any reported non-appropriated fund contract litigation during World War II. However, from the few cases discovered, it appears that the trends already discerned continued to develop. The Judge Advocate General of the Army continued to pass on disputed non-appropriated fund contracts.[26] While the practice of bringing disputes to military authorities was encouraged,[27] the Army continued to insist that such contracts were not Government contracts in the sense of the United States being liable[28] nor, they concluded, was the fund council or its contracting officer.[29] The alleged non-governmental character of these contracts was carried out logically,

[21] Dupuy, *The Compact History of the United States Army*, 241 (new and rev. ed. 1961).
[22] Navy Opinion NL 38/A17–6(5) (410528), June 4, 1941.
[23] 28 U.S.C. 1491.
[24] JF/L13–2 (42019), January 27, 1942.
[25] 316 U.S. 481 (1942).
[26] *E.g.*, II Bull. JAG 27, 175; III Bull. JAG 87. During the decade 1940–1950 periodic paper bound supplements to the *Digest of Opinions of the Judge Advocate General* 1912–1940, were published as Bulletins of the Judge Advocate General.
[27] II Bull. JAG 294.
[28] *Ibid.*
[29] *Id.* at 410.

with the Army holding that neither the manpower controls (intended to protect Government contracts) nor the Renegotiation Act were applicable[30] even, if the latter situation, where the Quartermaster General had negotiated the contract which was then assigned to the Exchange Service.[31]

Although the available material is almost too scanty to merit comment, we can conclude on the evidence available, that there were no changes in non-appropriated fund contract policy during this period. Again, it should be noted that there is no evidence that the Government contended that the entities themselves were immune from suit; it merely argued that there could be no claim against the United States in the event of an alleged breach of contract.

THE FIRST MODERN SUIT ON A CONTRACT

And so the matter rested until 1950. As far as can be determined, no judicial opinion regarding non-appropriated fund contract liability had been rendered since *Kyle*. The United States District Court for the Eastern District of South Carolina rendered the first in a case captioned *Bleur v. United States*.[32] Mr. Bleur had a one-year contract of employment with the Parris Island (Marine Corps) Officers' Open Mess. The Mess breached the contract by terminating his employment before the year was up. When faced with his suit against the United States, the court's reasoning followed that of the Board of Contract appeals and administrative opinions cited *supra*, although these authorities were not cited. In its opinion the court pointed out that if the plaintiff were to be successful, the judgment would come from appropriated funds but ". . . [he] cannot expect to be paid from the funds of the United States"[33] since the non-appropriated fund regulation precluded the commitment of appropriated funds. The court concluded that if the plaintiff had a right of action it was against the organization, its officers, or members, and not against the United States. The case was dismissed.

Once again we see the assumption that if a judgment were rendered against the United States, the payment would have to be from appropriated funds which would be illegal since the service regulation precluded it. This problem was particularly serious prior to the passage of Section 1302 of the Act of July 27, 1956[34] since, until that

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[30] II Bull. JAG 175; *Id.* at 127.

[31] *Id.* at 326.

[32] 117 F. Supp. 509 (E. D. So. Car. 1950). American Commercial Co. v. U.S. Officers, 187 F.2d 91 (D.C. Cir. 1951), discussed *infra*, was originally filed in 1948 but was dismissed without opinion by the District Court. The Court of Appeals opinion was handed down in 1951.

[33] *Id.* at 510.

[34] Ch. XIII, §§ 1301, 1302, 70 Stat. 678, 694 (1956), 31 U.S.C. 724.

time, nearly all money judgments against the United States had to await passage of an appropriation. On occasion, Congress refused to make the appropriation.[35] Of course, presuming a judgment, it is possible that mandamus might lie against the official who refused to pay it. In the absence of a judgment, mandamus could not, of course, be used to compel payment of a contested claim. The courts in *Bleur* and in the subsequent non-appropriated fund contract cases, which were litigated before 1956, might well have asked themselves if Congress would appropriate money to pay the judgments. If the question were asked, the answer might very well have been in the negative, particularly when one considers the subject matter of the suits: officers' club employment contracts,[36] an agreement to purchase over a million dollars worth of liquor,[37] an agreement to supply advisory services to a cafeteria,[38] a slot machine contract,[39] and alleged wrongful withholding of post exchange wages.[40] None of these cases could be expected to pass through Congress unscathed.

An alternative to the use of appropriated funds will be discussed subsequently. At this point, it is enough to say that the court's dilemma in the *Bleur* case was a legitimate one and that its opinion did not make non-appropriated funds immune from suit. As had been done in the *Kyle* case, nearly forty years previously, the court pointed out that suit could be brought against the non-appropriated fund as an unincorporated association.

THE AMERICAN COMMERCIAL CASE

The next reported case on a non-appropriated fund contract, *American Commercial Co. v. United States Officers*,[41] was brought in the United States District Court for the District of Columbia and involved a million dollars worth of liquor which the plaintiff, an Italian corporation, had agreed to supply to various officers' and enlisted men's clubs in the European Theater of Operations. The pleadings and allied papers[42] reflect that the breach itself, which took place in 1947, was uncontested. Because the parties could not agree on the quantum of damage and inasmuch as European courts were thought to have no

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[35] Note. *The Court of Claims: Judicial Power and Congressional Review*, 46 Harv. L. Rev. 677, 685–86, 63 (1933); Hetfield v. United States, 78 Ct. Cl. 419 (1933); *accord*, Citizens Bank & Trust Co. v. United States, 240 F.2d 863 (D.C. Cir. 1956), *cert. denied*, 355 U.S. 825 (1957).

[36] Edelstein v. South Post Officers Club, 118 F. Supp. 40 (E.D. Va. 1951); Bleur v. United States, 117 F. Supp. 509 (E.D. So. Car. 1950).

[37] American Commercial Co. v. U.S. Officers, 187 F.2d 91 (D.C. Cir. 1951).

[38] Nimro v. Davis, 204 F.2d 734 (D.C. Cir. 1953).

[39] Edelstein v. South Post Officers Club, 118 F. Supp. 40 (E.D. Va. 1951).

[40] Borden v. United States, 116 F. Supp. 873 (Ct. Cl. 1953).

[41] 187 F.2d 91 (D.C. Cir. 1951).

[42] Civil No. 3896–48 U.S. District Court for the District of Columbia.

jurisdiction over the American Army and its organizations, the plaintiff was advised by the Army to file suit in the United States.

Although the Army regulation in effect at that time said that no appropriated funds would be used to support non-appropriated funds, the contract itself was silent as to any limitation of liability. Both sides agreed that there was little law on the nature and effect of non-appropriated fund contracts[43] and the main issue at trial was whether the United States District Court for the District of Columbia had jurisdiction over a contract which arose in Germany. The plaintiff, in an effort to avoid the jurisdictional question, had named as defendants the Secretaries of Defense and Army as well as certain other officials, as supervisory authorities of the clubs. The District Court agreed with the United States' contention that it had no jurisdiction over a totally foreign contract, and dismissed the suit without opinion.

The Circuit Court of Appeals in its per curiam decision affirmed the District Court, primarily on the basis that the clubs, as unincorporated associations, did not operate in the District of Columbia. However, the opinion did not stop there. Possibly in an effort to preclude future suits, its opinion elaborated on the immunity rationale. Citing the *Second Standard Oil*[44] case which had referred in passing to Army regulations which stated that non-appropriated fund obligations were not obligations of the United States, it concluded that, like post exchanges, clubs are organized for the benefit of the Army and, as instrumentalities of the federal government, partake of its immunity from suit in the absence of waiver. The opinion concluded by pointing out that none of the officials named in the complaint had the right to sue or be sued, or to accept service in the clubs' behalf. The implication was clear. Even if suit had been brought against the United States under the Tucker Act, the court did not feel that the Government's immunity from suit on a contract had been waived.

Although this opinion has been cited rarely, it offers the basis for the *Edelstein*[45] decision which is one of the leading decisions on the immunity of non-appropriated funds from suits on a contract.

THE EDELSTEIN CASE

The next suit involving non-appropriated fund contract liability was brought the year after *Bleur*.[46] The plaintiff had a contract with an officers' club at Fort Myer, Virginia. The contact required the plain-

[43] Neither party cited Kyle v. United States, 46 Ct. Cl. 197 (1911) which was nearly the only decision that concerned itself with fund contracts.

[44] 316 U.S. 481 (1942).

[45] Edelstein v. South Post Officers Club, 118 F. Supp. 40 (E.D. Va. 1951).

[46] Bleur v. United States, 117 F. Supp. 509 (E.D. So. Car. 1950).

tiff to supply slot machines and service to the club in return for a percentage of the machines' income. The contract, which had been renewed for a number of years, allowed for termination only in the event that the club went out of existence. The club's Board of Directors decided to purchase their own machines and advised the contractor that they were terminating the agreement with two months' notice. Suit was subsequently brought against the club, as an unincorporated association, in the Arlington, Virginia Circuit Court. Subsequently, the case was removed to the local United States District Court by motion of the United States Attorney.[47]

The resultant decision, *Edelstein* v. *South Post Officers Club*,[48] answered the courts' suggestion in *Bleur* and *Kyle*,[49] that suit should be brought against the organization rather than the United States. It does not appear that the court or parties were aware of these cases since neither was cited in the opinion nor alluded to in the allied papers.[50] Instead, the court relied on the *Second Standard Oil*[51] case and, in a fair example of syllogistic reasoning, concluded that officers' clubs, as instrumentalities, were immune from suit unless there had been a waiver of immunity. Finding no such waiver the court dismissed the suit. The opinion leaves two impressions. The first is that the court realized that it was leaving the plaintiff without a remedy, inasmuch as it acknowledged: "The result is that the club is obligated on its contract but cannot be *sued* for its breach, and the United States is neither liable nor suable thereon."[52]

The second impression is that perhaps the decision was not overly hard on the plaintiff since the court found that the plaintiff knew of the club's immunity from suit and that the club's obligations were not obligations of the United States.

On the face of it, the decision seems harsh but, as far as the particular plaintiff was concerned, not too unfair. However, the case file raises two questions. The first revolves around the court's statement that the plaintiff had legal notice of the club's status and immunity. The contract itself is silent in this regard, the only allusion to immunity being a clause which states:

> Article III. (a) . . . the *CONCESSIONAIRE* is in no sense the Agent of the United States, the Board of Governors, the Secretary-Treasurer, or Post Commander, and all of them are expressly exempt from any liability growing out of any act or acts of

[47] 28 U.S.C. 1442 and 1446, authorize such action whenever suit is brought against a federal officer for acts performed as part of his official duties.

[48] 118 F. Supp. 40 (E.D. Va. 1951).

[49] Kyle v. United States, 46 Ct. Cl. 197 (1911); Bleur v. United States, 117 F. Supp. 509 (E.D. So. Car. 1950).

[50] Civil No. 567 (1951), U.S. District Court for the Eastern District of Virginia.

[51] 316 U.S. 481 (1942).

[52] 118 F. Supp. 40 (E.D. Va. 1951).

CONCESSIONAIRE or his agents except those properly arising under the terms of their agreement.[53]

Certainly it would take a remarkable legal intellect to conclude from this statement that the club was immune from suit.

The only other sources of the plaintiff's "notice" could have been actual or constructive. There is no evidence to suggest that the contractor was personally advised of the club's immunity so we are compelled to conclude that the notice to which the court's opinion refers must have been constructive. Did the constructive notice arise from a statute? There was none. From case law? There had been two decisions rendered at the time the *Edelstein* contract was entered into: The 1911 Court of Claims opinion, *Kyle* v. *United States*,[54] which while holding the United States immune, suggested that the organization could be sued; and the dicta in *Second Standard Oil*[55] which stated that non-appropriated fund obligations were not obligations of the United States. The only other decisions were: *Bleur v. United States*[56] (handed down about the time the contract was defaulted), which restated the *Kyle* recommendation; the *American Commercial Case*[57] (rendered after the *Edelstein* suit had been removed to the District Court), which in dicta, stated that the funds could not be sued. The court decisions could hardly have been the source of the plaintiff's notice. The only "authority" which might have given Mr. Edelstein a hint was an Army regulation, in effect at the time the contract was entered into, which said:

> Para. 8: Legal Status. Clubs governed by these regulations are integral parts of the Military Establishment, are wholly owned Government instrumentalities and are entitled to the immunities and privilege of such instrumentalities except as otherwise directed by the War Department.
>
> Para. 28: If. Club contracts are solely the obligations of the Club. They are not Government contracts and the distinction between club contracts and Government contracts will be observed and clearly indicated at all times.[58]

The legal effect of these exclupatory statements will be discussed *infra*, as will the extent to which these and similar clauses can be said to put a contractor on notice. It suffices to conclude at this point that the notice to which the court alludes, was most recondite.

The second issue raised by an examination of the case file is concerned with the degree to which the issue of immunity was litigated by

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[53] Appendix to Defendant's brief. *Id.*
[54] 46 Ct. Cl. 197 (1911).
[55] 316 U.S. 481 (1942).
[56] 117 F. Supp. 509 (E.D. So. Car. 1950).
[57] American Commercial Co. v. U.S. Officers, 187 F.2d 91 (D.C. Cir. 1951).
[58] AR 210–60, 2 April 1947.

either of the parties. Neither attorney cited *Kyle* or *Bleur*[59] which suggested that non-appropriated funds could be sued as private associations. This failure may have been due to lack of diligence on the part of the plaintiff, and from the viewpoint of the U.S. Attorney, neither opinion was of any help to his contention. The U.S. Attorney did supply a copy of the *American Commercial* decision, which had only been announced two weeks previously by the Circuit Court of Appeals for the District of Columbia, and, although it was not cited in the *Edelstein* opinion, the two follow each other closely, except that what was dicta in *American Commercial* became the holding of *Edelstein*.

Since the criticisms which can be leveled at *Edelstein* are the same for all subsequent cases holding non-appropriated funds immune from suit, they will be reserved for the end of this chapter. It suffices to any at this point that the leading non-appropriated fund case involving contract law, *Edelstein*, resembles the leading tax case, *Dugan v. United States*,[60] in that in neither case were the issues clearly drawn and lucidly argued. Of course, it could be said that after *Edelstein* the authorities were split: *Kyle* and *Bleur* agreeing that while the United States was immune from suit on non-appropriated fund contracts, the organization could be sued; while *American Commercial* and *Edelstein* stated that the non-appropriated funds were also immune. *Second Standard Oil* added some weight to the latter position although its dicta merely repeated the Army regulation's exculpatory clause without comment.

ACCEPTANCE OF THE TOTAL IMMUNITY CONCEPT

Two decisions in 1953 eliminated any doubt as to where the weight of authority lay.

In *Nimro v. Davis*,[61] the Circuit Court of Appeals for the District of Columbia faced a case similar to *American Commercial* except that this time the contract and parties were within the jurisdiction of the court. The plaintiff's thirty-three thousand dollar suit for services rendered the Naval Gun Factory Lunch Room (a non-appropriated fund at the Washington Navy Yard, composed of civilian employees) named as defendants the organization's administrators, custodians, and directors.

Mr. Nimro was an attorney and represented himself in the suit. He alleged that he had been under contract with the fund from 1942 through 1948 and had performed numerous services for which he had not been compensated. The U.S. Attorney answered that this was, in

[59] Kyle v. United States, 46 Ct. Cl. 197 (1911); Bleur v. United States, 117 F. Supp. 509 (E.D. So. Car. 1950).

[60] 34 Ct. Cl. 458 (1899).

[61] 204 F.2d 734 (D.C. Cir. 1953).

effect, a suit against the United States and the plaintiff could not circumvent the issue by bringing the suit against the Government's agents. Of course, the implication was that if, in fact, this were a suit against the United States there had been no consent. The plaintiff's response was two-pronged: he contended that this non-appropriated fund differed substantially from military clubs and exchanges, and should be treated as an unincorporated association; in the alternative, he argued that, even if such a non-appropriated fund were normally an instrumentality of the United States, it had waived its immunity by numerous failures to adhere to regulatory requirements.[62] Although the Air Force had found the latter argument persuasive in two 1952 opinions,[63] the District Court was unimpressed and, treating the suit as one against the United States to which there had been no consent, granted the defendant's motion to dismiss.

The impact of the Circuit Court's opinion, which sustained the motion to dismiss, was dissipated inasmuch as it pointed out that since the suit was, in effect, one in contract against the United States, it could only be brought in the Court of Claims under the Tucker Act. However, the implication was clear that, following the rationale in its prior *American Commercial* opinion, the court felt that suits against non-appropriated funds were not legitimately within the purview of the Tucker Act.

Five months after *Nimro v. Davis*, the Court of Claims had its first opportunity since *Kyle*, decided forty years before, to pass on a non-appropriated fund contract suit. Its opinion in *Borden v. United States*[64] is probably the most important opinion in the non-appropriated fund contract area.

Mr. Borden was an employee of the Army Exchange Service stationed in Germany.[65] His contract allowed his employer to withhold his salary for claims due to fraud, breach of contract, or negligence. His office was burglarized and money belonging to the Exchange Service was stolen. The Army appointed a board which held him liable for the loss and, as a result, $1,677.14 was withheld from his pay. He sued the United States to recoup the money, alleging that the loss was not due to his negligence. The court agreed unanimously that, under the circumstances, the money should not have been withheld, but was divided in its opinion as to what was to be done.

The United States contended that it could not be sued on an Exchange Service contract, and offered as authority an Army regulation which stated in part:

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[62] Plaintiff's brief.

[63] Op. JAG AF 99–17.3, 25 August 1952; *Id.* 16 July 1952.

[64] 116 F. Supp. 873 (Ct. Cl. 1953).

[65] The incident which gave rise to the suit occurred in 1949 before the Army and Air Force had combined their Exchange Services.

> Exchange contracts are solely the obligation of the Exchange. They are not Government contracts and the distinction between exchange contracts and Government contracts will be observed and clearly indicated at all times.[66]

The court considered the contention and, after reviewing the degree of military supervision, control, and support involved in non-appropriated funds, concluded:

> For the Army to contend and to provide by regulation that it is not liable since it did not act in its official capacity would be like a man charged with extra marital activity pleading that whatever he may have done was done in his individual capacity and not in his capacity as a husband.[67]

The court pointed out:

> This, however, is not primarily a question of the reasonableness of regulations, nor whether the regulations were within the framework of the authorizing statute. It is a question of liability under a contract signed by a post exchange.[68]
>
> The court was faced with the Supreme Court's statement in the *Second Standard Oil* case: "The Government assumes none of the financial obligations of the exchange."[69]

This language, when combined with the decisions in *Bleur v. United States*,[70] *Edelstein v. South Post Officers' Club*,[71] as well as the inference to be drawn from *Kenny v. United States*[72] (a 1926 Court of Claims decision holding that post exchange obligations were not obligations of the United States and therefore the United States could not withhold an officer's pay to meet the obligation), and *Kyle v. United States*[73] led the court to ". . . reluctantly reach the conclusion . . ."[74] that the plaintiff could not sue the United States.

The majority opinion concluded:

> We think it is proper that this situation should be called to the attention of the Congress. It seems fair that either the Post Exchange or the Government should be subject to suit and liable for any breach of a contract that had been duly signed by the Army.[75]

Judge Whitaker, in his partial dissent, agreed that Borden was not negligent in handling the money but disagreed with the majority as to whether he had a right to action to recover the withheld pay. He felt that, while the Exchange Service was not a separate entity capable of

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[66] Para. 34(h) (1), Army Regulation 210–65.
[67] 116 F. Supp. 873, 877.
[68] *Ibid.*
[69] 316 U.S. 481, 484.
[70] 117 F. Supp 509 (E.D. So. Car. 1950).
[71] 118 F. Supp 40 (E.D. Va. 1951).
[72] 62 Ct. Cl. 328 (1926). *Contra* Henry Woog v. United States 40 Ct. Cl. 80 (1913).
[73] 46 Ct.Cl. 197 (1911).
[74] 116 F. Supp 873, 877.
[75] *Id.* at 878.

being sued, it was part of the Government of the United States and, as such, the United States became liable.

> The United States is liable because the contracts of the Army Exchange Service were made for the benefit of the United States. They were made to promote the welfare of the members of its military forces, to improve the Army mess, to contribute to the mental and physical improvement of the military personnel, and to aid in the enforcement of good order and discipline and to increase the efficiency of the Army by providing entertainment and pleasure for its members.
>
> Not only were its contracts made for the benefit of the United States, they were authorized by the Congress of the United States.[76]

Judge Whitaker found congressional authorization in Congress' recognition of exchanges by appropriating money for their construction as well as its acceptance of revenue from disbanded exchanges.[77] Since Congress passed the Tucker Act authorizing suits against the United States on express or implied contracts, what authority did the Army have to curtail this right? None, said the dissent. The judge pointed out that the sentence in *Second Standard Oil* which gave the majority so much difficulty was, in essence, dicta. He distinguished *Bleur's* employment contract on the basis that Congress had expressly prohibited payment of civilians employed by officers' messes with appropriated funds;[78] *Kyle* on the basis that a post or company fund was entirely different from the Exchange Service, and did not mention *Kenny*. He felt that the opinion in *Edelstein*, based as it was on the Army regulation, was incorrect. His peroration summarized the quandary in which the court found itself and offered a solution.

> We all agree somebody owes this plaintiff the money he claims; he worked for it and he is due it. The Army Exchange Service says it cannot be sued, and that is right. If the United States is successful in maintaining its claim that it cannot be sued, the plaintiff is wholly without a remedy. The money is owing to him, but nobody can be made to pay it. Congress did not mean for this to happen. It said so when it gave its consent to be sued on its contracts.[79]

While Judge Whitaker's voice was one of reason, crying in the wilderness, it was not listened to by the majority and Borden left with his claim unsatisfied, although there is some evidence that the Exchange Service later voluntarily paid his claim.[80]

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[76] *Id.* at 878, 879.

[77] Ch. 756, § 8, 48 Stat. 1224, 1229 (1934), 31 U.S.C. 725g; ch. 281, 47 Stat. 1571, 1573 (1933).

[78] In this, he was mistaken; the prohibition was in a regulation.

[79] 116 F. Supp 873, 880.

[80] Hq. Army & Air Force Exchange Service, *Supplement To A Study of the Legal Status of Army and Air Force Exchange Systems*, 9 March 15, 1954 (unpublished study of the Exchange Service).

THE PRESENT STATUS OF NON-APPROPRIATED FUND IMMUNITY FROM SUITS ON A CONTRACT

Five years after *Borden v. United States*, the Court of Claims was given an opportunity to re-examine its position on non-appropriated fund contracts. In *Pulaski Cab Company v. United States*[81] the judges showed that they had not changed their prior opinion. Justice Reed, late of the Supreme Court, wrote the decision. The post exchange at Fort Leonard Wood, Missouri had entered into contracts with two taxicab companies, granting them licenses, to do business on the post in return for ten per cent of their gross receipts. Subsequently, the agreements were terminated because they were in violation of Army regulations. When the companies attempted to recover the money, which they had paid the exchange, the Secretary of the Army ratified the agreements and the claims were refused.

Suit was filed by both companies in the Court of Claims; they alleged that their cause of action arose under 28 U.S.C. 1491, the Tucker Act, which states:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
> (1) Founded upon the Constitution; or
> (2) Founded upon any Act of Congress; or
> (3) Founded upon any regulation of an executive department; or
> (4) Founded upon any express or implied contract with the United States; or
> (5) For liquidated or unliquidated damages in cases not sounding in tort.

The United States moved to dismiss the suit, stating that the court lacked jurisdiction since the claims were not against the United States, and that the plaintiffs failed to state a cause of action. Affidavits were supplied to show that the funds were never deposited in the Treasury but were retained in the exchange system's private accounts.[82] The court's attention was also directed to the Army regulation cited earlier which said that exchange contracts were not contracts of the United States.

The court dismissed the plaintiffs' suit. In an apparent effort to meet Judge Whitaker's dissent in *Borden*, the majority opinion did not emphasize the statement in *Second Standard Oil* that the Government assumes none of the obligations of the exchange, but merely said: ". . . [the statement] may not be a definitive holding that the Government is not liable for the debts of the Exchange, but it points in that direction."[83]

[81] 157 F. Supp. 955 (Ct. Cl. 1958).
[82] Defendant's answer.
[83] 157 F. Supp. 955 at 957.

The judges admitted that there was some disagreement between courts as to whether the United States was liable for exchange activities (the disagreement was due to a split in opinions regarding tort liability).[84] The court harked back to *Bleur* and *Edelstein*, (both had held non-appropriated funds immune) on which it had relied in *Borden*. However, there was an important factual difference between the contracts in the prior cases and the one in *Pulaski Cab*. Apparently, as a result of *Borden* the Exchange Service had attempted to disclaim any liability on the part of the United States by inserting the following statement in all its contracts. "This agreement is not a United States Government contract but is solely the obligation of the party of the first part [Exchange]." [85]

While the majority's opinion does not say what weight they accorded this clause, they concluded:

> . . . that the United States has not consented to be sued upon a contract of this instrumentality which includes within its terms a specific declaration of governmental nonlibability.[86]

Certainly it had an effect on Whitaker, who said in his concurring opinion:

> I suppose that if an agent makes a contract for the benefit of his principal and expressly stipulates that only he, the agent, shall be liable thereon, and not the principal, and the other party agrees to the stipulation, it is binding, and the principal is absolved from liability. Since that has been done in this case I agree that the United States is not liable. But, except for this agreement I think the United States would be liable.[87]

The reasoning in this case is no more impressive than that found in *Borden*. The majority concluded that the United States had not consented to be sued on the contracts of such instrumentalities, but they did not discuss whether this lack of consent was express or implied. Instead of using the only congressional statement on this point: ". . . hereafter no money appropriated for the support of the Army shall be expended for post . . . exchanges," [88] they refer to the contract's attempt to limit liability. Can the executive branch limit its liability under the Tucker Act by such a disclaimer? No, if liability exists, it cannot be disposed of so easily.

In another attempt to buttress their argument, the majority allude to certain other nonprofit groups organized, in whole or in part, to aid servicemen:

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[84] See generally the discussion in Chapter V *infra*.
[85] 157 F. Supp. 955, 956.
[86] *Id.* at 958.
[87] *Id.* at 959.
[88] 10 U.S.C. 4779 and 9779(c).

> It could hardly be thought that the United States is responsible for the liability of the United Service Organizations or the Red Cross, however essential may be their contribution to the performance of governmental functions. Because the operation of Post Exchanges is deemed essential for governmental operation, it does not follow that the Government is any more liable for their contracts than they would be for a privately staffed agency that performed under contract the same functions.[89]

It is unfortunate that the court tried to compare such disparate organizations. There are a number of vital distinctions: the organizations cited by the court are incorporated; they have never held themselves to be anything but private groups; they are under no government control; they receive very little support from the military. As the court noted, they are privately staffed. Moreover, the military has never considered the Red Cross and United Service Organizations to be non-appropriated funds. It should be noted that the Government's brief did not attempt the analogy. This invidious comparison, which was to be used again by the Court of Claims in *Gradall v. United States*,[90] is best rebutted by an analytical approach used by the Comptroller General in an opinion dated September 16, 1946. The Comptroller had been called on to render an opinion as to the applicability of the Dual Compensation Law (discussed in Chapter VI, *infra*) when a retired serviceman was hired by the Emergency Relief Organization, an association much like the Red Cross and the United Service Organizations. The Comptroller General found that:

> Although the three original incorporators of the Army Emergency Relief were officials of the War Department and certain officials of the War Department automatically become principal officers of the said corporation by being such War Department Officials, and although it appears that the affairs of the corporation are, for the most part, administered by War Department and Army personnel, it seems clear that the corporation is not an agency of the United States Government, and that as a 'body politic and corporate' it may conduct its lawful affairs, within the scope of its [corporate] charter, without interference or assistance by the United States Government or by any department, agency or officer thereof, as such, except to the extent that the inherent nature of its activities may require.[91]

Similarly, the United Service Organization is incorporated in each state. The Red Cross is a national corporation chartered by Congress.[92] Both organizations, while tax exempt as charities, are not

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[89] 157 F. Supp. 955, 958.

[90] 329 F. 2d 960 (Ct. Cl. 1963).

[91] 26 Comp. Gen. 192 at 194–195.

[92] Act of Jan. 5, 1905, as amended by Act of May 8, 1947, ch. 50 §§ 1, 2, 61 Stat. 80. 36 U.S.C. 1.

immune from suits in contract and tort.[93] Thus, while there is a superficial resemblance between non-appropriated funds and the organizations cited by the Court of Claims, the most cursory analysis shows basic differences.

A discussion of the underlying principles serving as the rationale for *Pulaski Cab* and the other non-appropriated fund contract cases, will be reserved for the end of this chapter but three questions pertinent to all of these decisions might be kept in mind. How effective is the exculpatory language found in these contracts? What is the effect of the service regulations which state that exchange contracts are not contracts of the United States? Are non-appropriated fund contractors put on notice of their lack of recourse? These questions become particularly important in view of Whitaker's concurrence in the *Pulaski Cab* opinion.

As a footnote to the *Pulaski Cab* case, the latest important decision involving non-appropriated fund contracts, it should be reported that a private relief bill to pay the plaintiffs was, under the provisions of 28 U.S.C. 1492 and 2509, referred to the Court of Claims on June 23, 1960.[94] The Army comment on the bill[95] definitely underplayed the legalistic reasons for denying the claimants a forum and emphasized that the claim was not an equitable one, since the claimants had derived a substantial right in return for their payments. A negative report was made to the Senate since the claimants failed to appear before the court.[96]

Only two cases involving the applicability of the Tucker Act have been decided since *Pulaski Cab*. In *Baily* v. *United States*,[97] the United States District Court for Alaska dismissed a non-appropriated fund contract suit, using as its authority *Borden* and *Pulaski Cab*. It was clear that the Court of Claims has not changed its conclusions. In a recent decision involving a Capehart Act housing contract, the judges said:

> The contracts of such agencies (as Post Exchanges, etc.) although made by Government officers, do not oblige appropriated funds, do not create a debt of the United States, and may not be vindicated in this court.[98]

However, the Court of Claims' most recent pronouncement on non-appropriated fund matters, found in *Paul A. Keetz v. The United States*,[99] suggests that the court is still attempting to find a firm legal

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[93] See Ragan v. Dodge County Chapter Am. Red Cross, 73 Ga. App. 432, 36 S.E. 2d 831 (1946).

[94] Senate Resolution 332, 86th Congress, 2d Session (1960); Senate Bill 1935, 86th Congress 1st Session (1959).

[95] S. Rep. No. 1526, 86th Congress, 2d Session (1960).

[96] Congressional File 8–60, Court of Claims.

[97] 201 F. Supp. 604 (D. Alaska 1962).

[98] G. L. Christian & Associates v. United States, 312 F. 2d 418, 425 (Ct. Cl. 1963).

[99] No. 378–63, decided November 13, 1964.

basis for its ruling of immunity. In doing so, it makes explicit a problem which has been present since the first suit on a fund contract was brought against the United States. The *Keetz* case involved a suit brought by a discharged fund employee. In an effort to avoid the rule that fund contracts were not contracts of the United States, Keetz argued that he was fired in violation of the pertinent service regulations and that his suit was therefore "founded . . . upon . . . [a] regulation of an executive department"[100] over which the court had jurisdiction. In a brief opinion the court concluded that since it had previously ruled that fund employees were not employees of the United States,[101] it could not enforce a fund employee's suit against the United States. The plaintiff had also sought to name the fund as a defendant. The court denied his motion:

> . . . for the reason that this court does not have jurisdiction to grant a judgment against the Exchange Service, since recovery against the Exchange Service would be payable solely from non-appropriated funds . . . [regulations cited] . . . and 28 U.S.C. 2517(a) requires that all judgments rendered by us shall be paid out of appropriated funds.[102]

The right of an executive department to "regulate" a plaintiff's cause of action out of existence will be discussed in the conclusion of this chapter. However, *Keetz* is the first instance in which the Court of Claims has related the regulations' language to the court's statutory basis for payment of judgments. This may be construed as an effort to shift the fulcrum of the immunity rulings from a regulatory, to a statutory basis. The U.S. Code provision, pertaining to Court of Claims' judgments, states in part:

> Every final judgment rendered by the Court of Claims against the United States shall be paid out of any general appropriation therefore, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.[103]

The equivalent Code provision, for payment of judgments rendered by the District Courts says in part: "Payment of final judgments rendered by a district court against the United States shall be made on settlements by the General Accounting Office."[104]

Although the language differs, the effect is the same—judgments are to be paid by the General Accounting Office which is responsible

[100] 28 U.S.C. 1491.

[101] Brummitt v. United States, 329 F. 2d 966 (Ct. Cl. 1964), discussed *infra* at Chapter VI; Gradall v. United States, 329 F. 2d 960 (Ct. Cl. 1963).

[102] Paul A. Keetz v. United States, No. 378–63, Ct. Cl., Nov. 13, 1964, at p. 3.

[103] 28 U.S.C. 2517.

[104] 28 U.S.C. 2414.

for the disbursement of public funds. In drafting both laws, Congress assumed that judgments would be paid from appropriated funds. The Justice Department insists that judgments based on non-appropriated fund torts be paid from non-appropriated funds.[105] Should a judgment, founded on a non-appropriated fund contract, be rendered against the United States, it is certain that such a procedure would be followed. Thus, if one disregards the regulations (whose legality will be considered *infra*), there is no reason why the United States need pay such judgments from appropriated funds. Moreover, such a procedure would be in consonance with the congressional prohibition against using appropriated funds to support post exchanges.[106]

Would such judgments have a substantial impact on the assets of the non-appropriated funds and thus impede their welfare functions? While the amount of these funds has never been announced, the mere size of the post exchange and ship's store operations suggests that they would have no difficulty satisfying a judgment. Although other non-appropriated funds are smaller, they may look to their departmental welfare fund for assistance. Again, no figures have ever been published, but a War Department historian has supplied the total money available in the middle-to-late 1940's:

> During the war each company and battery in the Army had set up small company or battery funds. Money dribbled into these funds from post exchange dividends and private contributions. Under the law, money in the funds could only be spent for something that benefited all the men in the unit. Company and battery commanders tore their hair trying to think up things for which to spend it. . . . At the end of the war, when the batteries and companies were demobilized, this money was turned in to the United States Treasury. It totaled $41,000,000.
>
> Unfortunately for the government, no one had any right to touch the $41,000,000. It couldn't be appropriated by Congress and it couldn't be applied to the national debt. Moreover, the regulations concerning its expenditure still held. In 1946 the Secretary of War authorized the expenditure of $6,000,000 of it to build a new Old Soldier's Home—the $6,000,000 had to be given back because some attorney pointed out that the only people who would benefit were Regular Army old soldiers. Draftees were excluded.
>
> The whole question of the $41,000,000 was treated with great secrecy.[107]

Other evidence suggests that twenty million dollars from this fund was subsequently turned into the Treasury as miscellaneous receipts.[108] Certainly if departmental welfare funds can absorb tort

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[105] Letter of the Assistant Attorney General to the Judge Advocate General of the Air Force, dated August 1, 1960.

[106] 10 U.S.C. 4779 (c) and 9779 (c).

[107] Love, *Arsenic and Red Tape*, 118–19 (1960).

[108] *1949 Hearings* 3717.

judgments, there is no reason to believe that contract judgments, normally much smaller, would bankrupt them.

A WORD ABOUT NOTICE

Ever since 1946, there have been various statements in military regulations, pertaining to the alleged immunity of the funds and the United States from suits in contract.[109] We saw in the *Edelstein* case that the existence of such regulations may have led the court to conclude that the contractor had notice of immunity at the time he entered into the basic agreement. Although none of the non-appropriated fund contract opinions has emphasized the notice argument, it seems to have been a factor in some of the decisions, as is illustrated by the *Pulaski Cab* case, in which the Court of Claims cited *Federal Crop Insurance Corp. v. Merrill*[110] (a Supreme Court decision involving the binding effect of federal regulations).

Of course the *Merrill* decision becomes relevant only if the regulations were, in fact, published. As far as can be determined, none of the "immunizing" clauses are now included in the *Code of Federal Regulations*, nor, with one exception, does it appear that they have ever been so published. The sole exception is the Air Force version which was first inserted in the *Federal Register* in 1961,[111] later included in the *Code of Federal Regulations*,[112] and then deleted from the *Code* in October, 1964.[113]

Moreover, the language found in the regulations, and that of the required contract clause, fall far short of a statement that neither the United States nor the non-appropriated fund will be liable for contract damages. The regulations' language is exemplified by that found in the *Edelstein* case: "Club contracts are solely the obligation of the club. They are not Government contracts. . . ."[114]

While the contract clause presently required by the Air Force states:

> The ____ is a Non-Appropriated Fund activity of the Department (of the Air Force). No appropriated funds of the United States shall become due or be paid to the contractor by reason of this contract.[115]

This falls far short of the waiver situation posited by Whitaker in his concurring opinion in *Pulaski Cab:* here there is no waiver of the

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[109] *E.g.* AR 210–60; AR 210–65; AFR 176–8.
[110] 332 U.S. 380 (1947).
[111] 26 Fed. Reg. 2116, March 11, 1961.
[112] 32 Code Fed. Reg. 836.162.
[113] 29 Fed. Reg. 13670, October 6, 1964.
[114] AR 210–60.
[115] AFR 176–8, para. 18b.

principal's liability, with an express stipulation that the agent only shall be liable; instead, there is an effort to lead the contractor to the conclusion that the non-appropriated fund will be responsible for its own debts.

Pulaski Cab illustrates another flaw in the "notice" argument. In that case the contract was ratified by the General commanding the Army post and approved by an Army Major General, chief of the Army and Air Force Exchange Service, "pursuant to authority granted by the Secretary of the Army."[116] While it is well established that an agent acting without authority cannot bind the United States, the apparent authority of two high-ranking officers of the United States, who signed the contract in their official capacities, would, also lead the contractor to conclude that someone—the United States, if not the non-appropriated fund,—would be liable in case of a breach.

Although the rank of the officers in *Pulaski* was unusual, it is typical of a non-appropriated fund contract that a commissioned officer of the United States, acting in his official capacity, signs the agreement. As we shall see in Chapter VI, under some circumstances, officially designated contracting officers are now authorized to sign non-appropriated fund contracts. Such factors as these tend to negate the argument that non-appropriated fund contractors are on notice that neither the United States nor the fund can be sued in case of breach.

POSSIBLE ALTERNATIVES

It is incontrovertibly true that non-appropriated fund contractors should have some forum within which they can bring suit in case of an alleged breach of contract. At present their only recourse is to the Armed Services Board of Contract Appeals, if a "disputes" clause is included in the contract.

What is being done to correct this? Every session since 1959 Congress has been confronted with a bill intended to resolve the problem. The most recent bill[117] does not differ substantially from its predecessors.[118] The bill is intended to amend the Tucker Act by adding a new subsection:

> Section 2346, Title 28:
> (e) For the purpose of this section and section 1491 of this title, contracts entered into by non-appropriated fund activities of or under departments and agencies of the United States shall be held and considered to be contracts entered into by the United States, and a claim against a non-appropriated fund or activity arising out

[116] Defendant's Exhibit A. Pulaski Cab Co. v. United States, 157 F. Supp. 955 (Ct. Cl. 1958).
[117] H.R. 641, 89th Congress, 1st Sess. (1965).
[118] H.R. 547, 88th Congress, 1st Sess. (1963); H.R. 840, 87th Congress, 1st Sess. (1961); H.R. 13262, 86th Congress, 1st Sess. (1959).

of such a contract, shall be held or considered to be a claim against the United States.[119]

But, there is little interest in the bill and it has languished, without hearings, for some years. While such a bill would effectively prohibit the United States from persisting in its inequitable treatment of fund contractors, is its passage necessary? The most persuasive reason for its passage is the necessity of overcoming the growing body of erroneous case law which has made it ever more difficult for a court to fly in the face of precedent. However, such a bill is not a prerequisite to a judicial finding that the United States is not immune from suit on a non-appropriated fund contract.

Of course, there are other alternatives. These alternatives are all based on the assumption that either the non-appropriated fund or the United States should be legally responsible for the former's breach of contract. Certainly recent decisions of the Supreme Court suggest that sovereign immunity, as a doctrine, is suffering serious inroads.[120] But what of the suggestion, in the *Kyle* case, that suit could be brought in a state court against the responsible officers or the non-appropriated funds? From a plaintiff's point of view there are many practical shortcomings to such a procedure. First of all, the Department of Justice could, as it did in the *Edelstein* case, move for the suit's removal to the closest United States District Court since such a suit would be against employees of the United States, for acts accomplished as part of their official duties. Then, assuming a judgment for the plaintiff, there would be problems of enforcing the judgment since federal employees are immune from many collection actions. Similar problems of removal and enforcement would be faced if suit were brought against the non-appropriated fund as an unincorporated association. In the latter situation, if the non-appropriated fund refused to honor the judgment, problems of collection would be even worse. This is illustrated in an 1896 opinion of the Judge Advocate General of the Army, which held that a materialman's lien was not enforceable against the Soldier's Home since it was an instrumentality of the United States.[121]

The process of enforcing a judgment against a non-appropriated fund official is difficult, so difficult that it may be called impossible. Although the Supreme Court in the case of *F.H.A. v. Burr*[122] unanimously agreed that difficulties in execution should not bar a plaintiff's suit, there is no reason for the problem of execution to arise.

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[119] Op. cit. at n. 117.

[120] See, for example, National City Bank v. Republic of China, 348 U.S. 356 at 359–360 (1955).

[121] Dig. Ops. JAG 1901, 270.

[122] 309 U.S. 242 (1942).

A suit on a Government contract does not result in judgment against the contracting officer, nor against the department for which he acted; the judgment is against the United States. Non-appropriated funds, as instrumentalities, are granted certain privileges and immunities. As a corollary of this status, it seems fair to conclude that their contracts are contracts of the United States within the meaning of the Tucker Act. Is there anything in the Act itself which precludes such an interpretation? The language of the statute is quite unequivocal, referring as it does to contracts of the United States. Non-appropriated funds are not Government corporations, authorized to sue and be sued, yet they are part of the United States Government. There is no doubt that their contracts are contracts of the United States.

Would such a conclusion be inconsistent with the contract's status? No. As will be discussed in Chapter VI *infra*, a number of statutes applying to Government contracts have been considered applicable to nonappropriated fund contracts. As will also be pointed out in Chapter V *infra*, in overseas areas the United States has considered non-appropriated fund contracts to be agreements of the sovereign for the purpose of avoiding suits in foreign courts. Moreover, the United States has, on occasion, sued in its own name to enforce fund contractual obligations.[123] Inclusion of non-appropriated fund contracts within the purview of the Tucker Act is the only rational interpretation of the Act's language. The courts' prior refusal to do so was based on ignorance and an unwarranted reliance on old concepts of the nature of non-appropriated funds which, if they were ever germane, are appropriate no longer.

Perhaps the best way to illustrate the present status of the law in this area is to hypothesize the problems facing a non-appropriated fund contractor who believes that his contract has been breached. For the purposes of our hypothesis, the contractor's administrative remedy, via the Disputes Clause, will be deemed to have been unsatisfactory.

A HYPOTHETICAL CASE

The contractor must first decide whether to sue the fund, the fund's officers, or the United States.

In the event he attempts to sue the United States under the provisions of the Tucker Act, the Government will defend on the grounds that the Tucker Act does not apply to such contracts. In support of its contention, the United States can point to *Kyle v. United*

[123] United States v. Howell, 318 F. 2d 162 (9th Cir. 1963); United States v. Brethauer, 222 F. Supp. 500 (D. Mo. 1963); United States v. Phoenix Assurance Co., 163 F. Supp. 713 (N.D. Calif. 1958).

States,[124] which suggested that suit be brought against the fund or its officers; the Board of Contract Adjustment cases;[125] *Bleur v. United States*,[126] dismissed because payment of the judgment would be made from appropriated funds, which was prohibited by departmental regulations; *Borden v. United States*,[127] decided on the same basis; and *Pulaski Cab Co. v. United States*,[128] decided on the same basis, plus the fact that the contract said it was solely the obligation of the fund. *Bailey v. United States*[129] is the latest illustration of this approach. As further support for its position, the Government can point to dicta in *Second Standard Oil*[130] which said that fund obligations were not obligations of the United States, similar dicta in *American Commercial*,[131] and recent Court of Claims cases, as well as *United States v. Kenny*[132] which had held that missing post exchange funds could not be withheld from an officer's pay since there was no debt due the United States.

If the contractor attempts to sue the fund or its officers in a state court, as suggested in *Kyle*, the United States will appear and move for removal of the suit to a federal court under 28 U.S.C.A. 1442 and 1442a. The basis for this removal is that the suit involves officers of the United States acting in their official capacity. Once removed, the United States will argue in the federal court that there has been no waiver of the fund's immunity from suit on a contract. In support of this contention, the Government can point to *Edelstein v. South Post Officers' Club*,[133] *Nimro v. Davis*,[134] and dicta in *American Commercial*.[135]

At this point the average plaintiff would retire in dismay, leaving the Government with its record of victories intact. But, one wonders what would happen if the contractor's attorney were to have had the time, and the inclination to challenge the supposedly solid foundation on which the Government cases rest.

In analyzing the defenses which the United States puts forward in those suits where it is named defendant, plaintiff's attorney might well consider the relationship of the Government and the fund as that of principal and agent, for, after all, the fund is performing a governmental function—at least the Government argues this when states attempt

[124] 46 Ct. Cl. 197 (1911).
[125] I War Dept. Bd. of Contract Adjustment 173; *Id.* at 739.
[126] 117 F. Supp. 509 (E.D. So. Car. 1950).
[127] 116 F. Supp. 873 (Ct. Cl. 1953).
[128] 157 F. Supp. 955 (Ct. Cl. 1958).
[129] 201 F. Supp. 604 (Alaska 1962).
[130] 316 U.S. 481 (1942).
[131] American Commercial Co. v. U.S. Officers, 187 F. 2d 91 (D.C Cir. 1951).
[132] 62 Ct. Cl. 328 (1926).
[133] 118 F. Supp. 40 (E.D. Va. 1951).
[134] 204 F.2d 734 (D.C. Cir. 1953).
[135] American Commercial Co. v. U.S. Officers, 187 F.2d 91 (D.C. Cir. 1951).

to tax and regulate the funds. In examining *Kyle v. United States*,[136] which was decided in 1911 by the Court of Claims and which said that, while the United States was not liable, the fund could be, it will be seen that the court's intent was to prevent fund debts from being a burden on the public purse. Implicit in the court's reasoning, and in contemporary opinions of the Army Judge Advocate General,[137] was the belief that the organization and its members and officers could be sued in state courts. Certainly the federal removal statute then in effect[138] pertained only to revenue officers and officers of Congress when they were acting in connection with official duties and would not have been applied in such a case.[139] Apparently the Army and the Court of Claims concluded that the members of the post fund would have been individually liable presuming that they had approved or ratified the arrangement.[140]

In reality, the post fund, as an agent, was acting for its principal, the United States. The terms of the agency relationship, i.e., the fund's authorized activities, were set forth in Army regulations. Thus, the principal should have been liable for its agent's acts, presuming that it was acting within the scope of its agency. Understandably, the principal did not desire this liability since it had decided for convenience sake that it would not commingle its agent's revenues with other receipts; therefore, it would be paying its agent's debts from its general funds, but these same funds would not be the repository of non-appropriated fund revenue. The principal's decision to segregate fund revenues was not contested by its auditor (the Comptroller), since the latter's primary concern was with those moneys derived from taxation and appropriation. The fact remains however that Kyle's contract was with an officer of the United States, the post commander, who, as the officer responsible for the post fund, could reasonably be considered to have authority to enter into such an agreement.[141] As such, this was an express contract with the United States and within the purview of the Tucker Act. It should be remembered that while the Court of Claims erred in not accepting jurisdiction in the *Kyle* case, it did not intend to leave the plaintiff without a remedy since it expected that the contractor would be able to sue the officer or the association. However there would have been an insurmountable obstacle to any suit against a fund as an unincorporated

[136] 46 Ct. Cl. 197 (1911).

[137] 61 JAG Record Book 1882–95, 479 at 480; JAG Record Book 1882–95, 127; Dig. Op. JAG 1912–1917, 655; Dig. Op. JAG 1918, Vol. 2, 432; See also letter to the Secretary of the Navy, April 22, 1902; 12 Comp. Dec. 678 (1906).

[138] Act of March 3, 1911, Ch. 231, § 34, 36 Stat. 1097, 1098.

[139] People's U.S. Bank v. Goodwin, 162 F. 937 (C.C.S.D. N.Y. 1908).

[140] Robbins Co. v. Cook, 42 S.D. 136, 173 N.W. 445, (1919); Annot., 7 A.L.R. 222 (1920).

[141] Rives v. United States 28 Ct.Cl. 249 (1893).

association: there was nothing voluntary in the organization of post exchanges,[142] and other organizations required by regulation. Therefore, it is highly doubtful that a state court would have held the members liable for the debts of a group they were compelled to join.

Considering the next authority offered by the United States in our hypothetical case, the plaintiff's attorney would look to the decisions of the Armed Services Board of Contract Adjustment, wherein the Board held that it had no jurisdiction over non-appropriated fund contract disputes. The Board was chartered by Congress to handle contracts entered into by the War Department and its decisions merely applied a strict construction to the grant of jurisdiction. It should be noted in passing that the Armed Services Board of Contract Appeals, which has no such statutory basis, now accepts fund contract disputes.[143] Therefore the earlier administrative decision refusing jurisdiction was of little weight.

Bleur v. United States,[144] the next case to hold the United States immune from suit on a fund contract, offers a more complex question inasmuch as the court's decision was based on a regulation which prohibited the payment of fund liabilities with appropriated moneys. Should the court have considered itself bound by the regulation?

The deference a court gives to a regulation depends to a large degree upon whether it is interpretative or legislative. Legislative rules are often procedural, intended to govern the agency's operations. They are normally considered to be binding on a court if (a) within the general power given to the agency, (b) issued pursuant to proper procedure, and (c) reasonable. If we consider the regulation in *Bleur* to have been legislative we see that it fails to meet (a) and (c). Authority to limit the Tucker Act is not within the general power delegated to the Department of Navy, nor is such a limitation reasonable. "Reasonable" in Professor Davis' context relates both to constitutional due process and to the presumption that legislative bodies avoid the delegation of power to act unreasonably. Using this double-barreled concept of reasonableness, it could be concluded that, once Congress by implication gave non-appropriated funds authority to perform their necessary business for the benefits of the United States, they did so intending to accord fund contractors the same rights that any other contractor with the United States is given. Thus, the regulation, if legislative, is illegal.

More probably, the regulation falls into Davis' other category: interpretative rules. He states that regulations in the latter category

[142] Woog v. United States, 48 Ct. Cl. 80 (1913).
[143] *E.g.* ASBCA 771, April 29, 1963, BCA para. 3740, Lauris Beigh & Raymond H. Perk.
[144] 117 F. Supp. 509 (E.D. So. Car. 1950).

may be accorded the force and effect of law by the courts, depending on the degree to which the following conditions are met:

(a) whether the court agrees or disagrees with the rule;
(b) the extent to which the subject matter of the rule is within the special administrative competence of the agency, and beyond general judicial competence;
(c) whether the rule is a contemporaneous construction of the statute by those who are assigned the task of implementing and enforcing the statute;
(d) whether the rule is of long standing;
(e) whether the statute has been repassed by legislators who knew of the rule.[145]

If the regulation limiting payment for fund liabilities is considered to be interpretative, its basis is the early Judge Advocate General opinions and *Kyle*. Considering it to be interpretative, it will be seen that according to Professor Davis, the court in *Bleur* applied an incorrect standard when it said that it was bound by the regulation (the Supreme Court in its dicta in *Second Standard Oil* eight years before *Bleur* had made the same error). Interpretative rules are subject to judicial review, using the five criteria listed above. Of course factors (b), (c) and (e) are not present in the *Bleur* case. Since the court apparently agreed with the rule that appropriated funds should not be used to pay non-appropriated fund debts and since the administrative interpretation was of long standing, the court in *Bleur* might well have decided not to overturn the regulation since there still seem to be available the right to sue the fund itself. But, using the analysis above, the plaintiff's attorney could show that there was a marked flaw in the *Bleur* reasoning.

The next authority to be reconsidered is *Borden*,[146] decided in 1953. By this time, two courts had concluded that non-appropriated funds could not be sued for their own contracts: the Circuit Court of Appeals for the District of Columbia in *American Commercial*[147] and *Nimro v. Davis*,[148] and the United States District Court for the Eastern District of Virginia in *Edelstein v. South Post Officers' Club*.[149] Without passing on the merits of these opinions, there was now a weighty reason to overturn the regulation since to leave it unimpaired would be to preclude a plaintiff contractor from any judicial remedy.

In *Borden*, the Court of Claims refused to grasp the nettle and, without passing on the reasonableness of the regulation or its statutory basis, the court concluded that the United States could not be held liable for a contract executed by the Exchange Service. If their deci-

[145] Davis, Administrative Law Text §§ 5.03–5.11 (1959).
[146] 116 F. Supp. 873 (Ct. Cl. 1953).
[147] American Commercial Co. v. U.S. Officers, 187 F.2d 91 (D.C. Cir. 1951).
[148] 204 F.2d 734 (D.C. Cir. 1953).
[149] 118 F. Supp 40 (E.D. Va. 1951).

sion was based on the belief that the regulation was binding and could not be challenged, the belief was mistaken, as is clear from Professor Davis' rationale. If the opinion was based on the fact that the contract was with the Exchange Service, not the United States, the premise does not support the conclusion. Extensive evidence is available to prove that non-appropriated funds are duly authorized instrumentalities of the United States, organized for its benefit, receiving congressional support, and, on occasion, turning funds into the Treasury. While there may be some superficial resemblance to the United Service Organizations and the Red Cross, these two organizations have corporate charters, and the right to sue and be sued in their own right. Based on these factors alone, the analogy, as used by the Court of Claims, is both hasty and inaccurate. Of course, the Court of Claims was, after *Borden*, faced with an untenable position which was rapidly being strengthened by dicta from other courts depending on *Kyle*, *Borden*, and *Bleur*.

Five years later, the Court of Claims was given an opportunity to redeem its error in the *Pulaski Cab*[150] case. From the changed emphasis in the *Pulaski Cab* opinion, it is clear that the court had had second thoughts about *Borden* and the cases which preceded it. In *Pulaski Cab*, rather than looking to the regulation's exculpatory language, the court relied on the language of the contract which said that the agreement was not an obligation of the United States but solely that of the non-appropriated fund. Was such a reliance misplaced? Certainly Judge Whitaker, who had dissented in *Borden*, did not think so. While Whitaker was correct in stating in his concurring opinion, that a contract for the benefit of a principal can be drafted to make the agent solely liable, he is incorrect in stating that the principal is thus absolved from liability. If the principal benefits from the transaction, he remains liable under other than agency principles.[151] Although a suit against the United States, under the Tucker Act, must be based on a contract rather than "unjust enrichment," it should be clear that Whitaker's attempt to rationalize his concurrence in *Pulaski Cab* is not as firmly grounded as it seems. Moreover, there is a serious question as to whether the court should have accorded any weight to the exculpatory language in the contract.

The court knew, as did the United States when the exculpatory clause was made mandatory, that non-appropriated funds were immune from suit on a contract. Therefore, the effect of the clause was to insure that a Tucker Act suit, the plaintiff's only other remedy, would be barred by mutual agreement. Thus, the effect of the clause was to deprive any court of jurisdiction over the contract. It is well estab-

[150] 157 F. Supp 955 (Ct. Cl. 1958).
[151] Restatement, Agency §§ 141, 149, 150 (1933).

lished that contract provisions intended to oust courts of their jurisdiction are void as contrary to public policy.[152] Judge Whitaker, as a member of the Court of Claims, had applied this principle in *Beuttas v. United States*;[153] Judge Madden, in his concurring opinion in *Beuttas*, described the situation which led to Government's assertion that the contractor could not seek redress in the court, and concluded "No contractor in his right mind would ever intend to do that."[154] Such a statement could similarly be applied to the non-appropriated fund contractor who is presumed to have waived all his rights to a judicial review of the contract. As Mr. Justice Jackson said in his dissent in *Federal Crop Ins. Corp. v. Merrill*, "It is very well to say that those who deal with the Government should turn square corners. But there is not reason why the square corners should constitute a one-way street."[155]

Thus, on the basis of the analysis set forth above, neither the regulation nor the contract's exculpatory language is a valid reason for denying that the United States is liable for non-appropriated fund contracts.

However, the plaintiff's attorney must still offer a persuasive answer to the basic question: should a non-appropriated fund contractor be able to sue the United States if his contract is breached? Certainly Congress did not foresee these contractors as potential plaintiffs when it waived the United States' immunity from suit. But, he might argue, is that an adequate reason for denying a contractor the right to sue? There is no evidence that Congress had thought of non-appropriated fund torts when it drafted the Tort Claims Act, but courts have almost uniformly agreed that the waiver of sovereign immunity extends to such cases. Perhaps the plaintiff's attorney would use analogy as a useful means of solving the problem. If one considers the funds in the same light as government corporations, their relationship to the United States becomes somewhat clearer. While the non-appropriated funds are not statutory creations of Congress, their ties to the United States are extensive enough that there is no doubt that they are something more than private organizations allowed to operate on military installations. Moreover, it can be shown, Congress has recognized them again and again, and that the United States seeks to prohibit any interference with the funds' activities on the ground that they are instrumentalities of the United States.

Keeping these basic thoughts in mind, the plaintiff's attorney might ask the court to consider the status of government corporations. Of the many corporations organized by Congress, nearly all were given the

[152] Carbon Black Export, Inc. v. The Monrosa, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959).

[153] 60 F. Supp. 771 (Ct. Cl. 1944).

[154] *Id.* at 782.

[155] 332 U.S. 380, 387 (1947).

authority to sue and be sued[156] and that the Supreme Court has found that in those instances when the congressional grant of immunity was not explicit, it could be fairly implied.[157] In one case involving the alleged immunity of one of these corporations, the Supreme Court stated that immunity from suit would be less readily implied than immunity from taxation.[158] Can this legislative and judicial policy against immunity be applied to non-appropriated funds?

A direct comparison of non-appropriated funds and the typical government corporation is valueless because of one basic factor. Government corporations are explicit statutory creations, with their rights and liabilities set out at some length by Congress; non-appropriated funds are creatures of the Executive, their creators less subject to political pressure or judicial philosophy. However, there is a special type of government corporation which does offer a type for comparison: this is the corporation which is not a direct "emanation" of Congress (using Justice Frankfurter's term in *Keifer & Keifer*[159]) but is based on a grant of authority, express or implied, in a statute. This type of corporation is exemplified by the Regional Credit Corporation whose contracts were found subject to suit in *Keifer & Keifer v. R.F.C.*, and the United States Shipping Board's Emergency Fleet Corporation, held subject to suit in *Sloan Ship Yard's Corp. v. United States Shipping Board*.[160] In both of these instances, a waiver of immunity was inferred, and no damage was done to their operations.

Of course, it is one thing to say that the parents of such corporations are liable in contract and, another to make the United States responsible. Yet, when one considers suits involving these "subsidiary corporations" it is seen that the United States may sue to enforce their rights[161] and that, on occasion the United States is sued on their contracts.[162] Similarly, the United States has sued in its own name to enforce non-appropriated fund rights[163] and attorneys of the Department of Justice regularly defend suits against the funds even when no officer of the United States is directly involved. Certainly when the government corporation and non-appropriated fund look to the United States for help in plaintiffs' suits, there seems to be no difference between the two groups. Should there be a difference when the

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[156] Wolf, *State Taxation of Government Contractors* 208, 209 n. 45 (1964) gives a comprehensive list of such organizations.

[157] Keifer & Keifer v. R.F.C., 306 U.S. 381 (1939).

[158] Federal Land Bank v. Priddy, Ark., 295 U.S. 229 (1935).

[159] Keifer & Keifer v. R.F.C., 306 U.S. 381, 392 (1939).

[160] 258 U.S. 549 (1922).

[161] Renwicke v. United States, 207 F. 2d 429 (8th Cir. 1953).

[162] Traders Compress Co. v. United States, 174 F. Supp. 649 (Ct. Cl. 1947).

[163] United States v. Howell, 318 F. 2d 162 (9th Cir. 1963); United States v. Brethauer, 222 F. Supp. 500 (D. Mo. 1963); United States v. Phoenix Assurance Co., 163 F. Supp. 713 (N.D. Calif. 1958).

United States is sued on their contracts? The plaintiff's attorney would argue that there is no valid reason for such discrimination.

What of the fact that the non-appropriated fund official who signed the contract is not a "contracting officer" since he is not given a warrant to obligate funds of the United States? The attorney could point out that the non-appropriated fund contracting officers are under the control and supervision of their military supervisors, and in many instances the contracts are themselves signed by post commanders. What of the fact that fund money is not appropriated and does not come from the Treasury? Government corporations generate their own revenue and this does not make their funds less federal. The fact that the funds have turned in more than twenty million dollars to the Treasury (as well as alleviating a substantial burden on the taxpayer by generating recreational funds which would otherwise have to be appropriated), suggests that the United States has profited more than a little from the non-appropriated funds' operations.

Who can say what the result of the hypothetical case would be? There is no doubt, however, that litigation with the somewhat novel approach outlined above, would make the immunity concept harder to adhere to.

CONCLUSION

When we consider the chain of cases that has resulted in the present unfortunate situation in which non-appropriated fund contractors find themselves, we might recall the words of Justice Frankfurter:

> Case by case adjudication gives to the judicial process the impact of activity and thereby saves it from the hazards of generalizations insufficiently nourished by experience. There is, however, an attendant weakness to a system that purports to pass merely on what are deemed the particular circumstances of a case. Consciously or unconsciously the pronouncements in an opinion too often exceed the justification of the circumstances on which they are based, or, contrariwise, judicial preoccupation with the claims of the immediate [case] leads to a succession of *ad hoc* determinations making for eventual confusion and conflict. There comes a time when the general considerations underlying each specific situation must be exposed in order to bring the too unruly instances into more fruitful harmony.[164]

The time has come for the courts to make a similar reappraisal of their position in non-appropriated fund contract cases.

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[164] Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 at 705, 706 (1949) (F. Frankfurter, J., dissenting).

CHAPTER IV. NON-APPROPRIATED FUND TORT LIABILITY

INTRODUCTION

If, as was said in the introduction to Chapter II, the history of the conflict between state and federal government is the history of American constitutional development, so an account of the sovereign's immunity from tort claims reflects, in a similar fashion, the changing concepts of the Government's relationship with the individual citizen. The legal trends which resulted in the passage of the Federal Tort Claims Act[1] are far outside the scope of this chapter and familiar enough that they need not be repeated. It suffices to say that the Tort Claims Act, passed in 1946, provides, with certain exceptions, that the United States should be liable for the torts of its agents and employees if a private person would be liable in like circumstance.[2] In this chapter, we will see that two basic questions have been raised with regard to non-appropriated fund tort liability: whether a fund employee is an employee of the United States within the meaning of the Tort Claims Act; and, whether a fund employee can ever be a plaintiff under the Tort Claims Act. Although the two problems are best considered chronologically, there is little interrelationship between the two series of decisions. For that reason, the issues will be considered in separate sections of this chapter.

In the chapter devoted to the historical development of non-appropriated funds, we have seen that they had their antecedents in the very earliest days of the Republic. There is no evidence of any discussion regarding fund tort liability until the early 1940's. Primarily, there are two reasons for the absence of materials. The first is that non-appropriated funds did not possess many "tort-causing instrumentalities," e.g., automobiles, until the World War II period. Secondly, until 1958, Army and Air Force non-appropriated funds were protected by commercial insurance policies which required that contested claims be submitted to arbitration. (Navy funds still have this protection which effectively limits the number of tort suits brought.) Both of these factors offer some explanation for the unusual absence of tort litigation until the mid 1940's, and both explain in part the ever increasing number of suits brought during the last two decades.

[1] Act of August 2, 1946, 60 Stat. 842, 28 U.S.C. *passim* (1958).

[2] 24 *Federal Bar Journal*, Number 2 (1964), is devoted to the Federal Tort Claims Act and offers a thorough bibliography on problems arising under the Act, as well as articles on particularly troublesome topics.

NON-APPROPRIATED FUND TORT LIABILITY PRIOR TO THE PASSAGE OF THE FEDERAL TORT CLAIMS ACT

Before separating the decisions involving employee and third-party tort claims, it might be well to lay a foundation by considering the earliest administrative opinions in this area, as well as the only reported case which preceded passage of the Tort Claims Act. The earliest opinion, a 1942 ruling of the Army Judge Advocate General, held that non-appropriated fund employees were protected by neither state nor federal compensation laws and that the funds should secure private insurance for their employees' protection.[3] During these early years of World War II, there seems to have been no reluctance to face litigation, as is illustrated by an opinion, from the same source, regarding an accident between a post exchange truck and a civilian bus, allegedly caused by the latter:

> The resulting controversy should be settled or litigated between the post exchange and the bus company as between private business firms. Post Exchange property is not Government property and no action may be taken under [the regulations pertaining to individuals who damage Government property].[4]

While this opinion tempts the reader to conclude that Army authorities felt that non-appropriated funds were not to be considered arms of the sovereign for any purpose, such a conclusion flies in the face of the immunity arguments advanced during the same period when the funds' contract and tax liability were being considered.[5] This willingness to sue and be sued in tort is made somewhat more explicable by an opinion rendered the following year which stated that the head of Exchange Service, the largest of the non-appropriated funds, could authorize the purchase of liability insurance, even though exchanges could claim the "immunity available to the War Department" when authorized to do so.[6] Two months later, another opinion stated that members of the Armed Forces could sue the exchange for damage since there was insurance coverage and the insurance carriers had been instructed not to raise the immunity defense without authority to do so.[7]

What is apparently the first reported case involving a non-appropriated fund's tort liability arose in Alabama in the early 1940's. The Alabama Supreme Court was faced with the suit of a deceased employee's wife. She had instituted action under the state Workmen's Compensation Act, naming both the fund and its insurance company

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[3] I Bull JAG 199; *Accord*, *Id.* at 249.
[4] *Id.* at 351.
[5] Pp. 379–383, Chapter II, and p. 397, Chapter III, *supra*.
[6] II Bull JAG 226.
[7] *Id.* at 260.

as defendants. Lower courts had sustained the defendants' demurrers which seem to have been based on sovereign immunity.[8] Citing the *Second Standard Oil* case and *Second Query*,[9] the decision of *Humphrey v. Poss*[10] stated that post exchanges, as instrumentalities of the War Department, partook of the latter's immunity and could not be sued. Moreover, the court held that employees of the non-appropriated fund were employees of the United States, and, as such, were not covered by the state's Workmen's Compensation Act. The fact that the Judge Advocate General of the Army had previously held that fund employees were not protected by the federal compensation law was either unknown to the court, or disregarded.

Perhaps the most interesting aspect of this decision was the court's conclusion that non-appropriated funds were immune because there was no federal statute waiving their immunity. Using this rationale, the court was able to distinguish a number of decisions involving the Tennessee Valley Authority which, being a self-supporting operation, was purportedly analogous to a post exchange. The decision noted that Congress had given the Tennessee Valley Authority the power to sue and be sued, while no such authority had been given non-appropriated funds. In effect, the court held that from congressional silence, one might presume immunity. However, three years earlier in *Keifer and Keifer v. R.F.C.*,[11] perhaps the leading case on the immunity of federal instrumentalities, the Supreme Court of the United States had inferred from congressional silence a waiver of immunity. To the extent that the Supreme Court in *Keifer* had been able to infer immunity from a hundred years of congressional practice, the same reasoning may not be applicable to non-appropriated funds. However, the fact remains that appropriated fund instrumentalities were subject to suit in tort at the time the Alabama Supreme Court had concluded there could be no recovery for non-appropriated fund plaintiffs.

Humphrey v. Poss raises two interesting questions: why was the plaintiff compelled to sue, and, why was defense allowed to interpose the immunity argument? In response to the first question we can only surmise that the insurance company either refused to honor the claim or that the award was for some reason deemed insufficient. While the reason for the suit is of little moment, the reason for the defense and, the answer to the second question, is of far greater interest. We have already seen that the decision to plead immunity could only be made at the highest levels in the War Department.[12] A textbook sub-

[8] Legal Manual, Army and Air Force Exchange Service § 225 (1952).
[9] Pp. 383–386, *supra*.
[10] 245 Ala. 12, 15 So.2d 732 (1943).
[11] 306 U.S. 381 (1939).
[12] II Bull JAG 226, 260.

sequently prepared by the Army and Air Force Exchange Service suggests that authority to use the immunity defense was granted only under the most unusual circumstances:

> The Department of the Army is inclined to the view that exchanges should, if possible, waive governmental immunity with respect to commercial transactions and operations from which bona fide assertions of liability arise. Perhaps it might be well to say, rather than a waiver of governmental immunity on the part of the Exchange Service, that the Exchange Service should not take advantage of this governmental immunity or put it forward as a defense.[13]

The text states that, in *Humphrey v. Poss*, the defense was raised ". . . at the direct request of the War Department"[14] but offers no reason for the exception made in that instance. The fact that this case was an exception to the general rule that immunity would not be invoked does not appear to be generally known. As will be seen, subsequent decisions did not recognize that the immunity defense was to be raised solely in exceptional situations.

The Army and Air Force Exchange Service text, published in 1952, refers to certain other tort cases, apparently unreported, in which the immunity defense was used, even though it had not been raised by the defendant:

> Governmental immunity of Army and Air Force Exchanges has been invoked by State courts upon their own motion in litigation arising in connection with insurance coverage questions. Insurance policies formerly purchased by Exchanges carried specific covenants by the insurance carriers that no defense based on governmental immunity would be asserted. The Courts, in the instances mentioned above, invoked governmental immunity on their own motion and dismissed the cases. The result was that exchanges had paid insurance premiums for coverage when no liability could attach to the insurance carrier receiving the premiums in the event of a contested claim. As a result of this, the insurance companies covenanted to pay on such law suits only as the insured, the Exchange Service, might be found liable by a judicial determination.
>
> To correct this undesirable situation, agreements were accomplished with insurance carriers which provided that in the event of contested claims they would accept arbitration determinations by the American Arbitration Association in lieu of litigation.[15]

One can only wonder if these cases, like *Humphrey v. Poss*, were decided before the Tort Claims Act was passed. They probably did but they could have arisen any time prior to 1958, when Army and Air

[13] Exchange Service Legal Manual, *op cit. supra* note 8 at § 225.
[14] *Ibid.*
[15] *Id.* §§ 227, 228.

Force non-appropriated funds became self-insurers. The arbitration procedure seems to have been amazingly effective in that only eight reported tort cases, including *Humphrey v. Poss*, arose in the United States during the period that the non-appropriated funds carried commercial insurance.

At this point, the chapter will be divided into two sections; the first of these will be concerned with non-appropriated fund tort suits brought by third parties, while the second will involve suits brought by employees or their representatives.

SECTION A. THIRD-PARTY SUITS

The First Two Third-Party Suits

The early years of the Korean War saw the first third-party tort suits brought against the United States for non-appropriated fund torts.[16] In the first two cases, the reported facts are too sketchy for the reader to know that they involved non-appropriated funds; perhaps it is for this reason that they have been so rarely cited. The first case was *Brown v. United States*[17] and involved the wrongful death of a serviceman at a non-appropriated fund swimming pool. The United States relied on the *Feres* decision[18] in which the Supreme Court had held that servicemen were, under certain circumstances, barred from recourse to the Federal Tort Claims Act—apparently on the basis that their relationship with the federal government had no equivalent in civilian life.[19] The *Feres* decision had also stated that when a plaintiff had available an alternative system of compensation provided by the federal government, he could not elect the Tort Claims Act as his remedy. In the *Brown* case, however, a United States District Court concluded that mere employment as a serviceman was not enough to bar recovery, particularly when he was on leave at the time the Government's negligence caused his death. In effect, the court relied on the Supreme Court's decision in *Brooks v. United States*[20] which had held, three years before, the servicemen were covered by the Tort Claims Act when the injury was not incident to, or caused by, their military service. There is no mention made of the non-appropriated funds' special status in the *Brown* decision.

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[16] The first tort claims suit involving a non-appropriated fund was Faleni v. United States, 125 F. Supp. 630 (E.D.N.Y. 1949) which will be discussed *infra* in the section devoted to employee suits.

[17] 99 F. Supp. 685 (S.D. W.Va. 1951).

[18] Feres v. United States, 340 U.S. 135 (1950) discussed *infra* at p. 443.

[19] The Tort Claims Act states with some exceptions that the United States will be suable when, under similar circumstances, a private person would be liable.

[20] 337 U.S. 49 (1951).

The other case, *Brewer v. United States*,[21] was decided a year later and also involved a death at a non-appropriated fund swimming pool. The reported decision is also very terse, failing to note that the swimming pool was operated as a non-appropriated fund for civilian employees. The United States argued that the operation was not a governmental agency. The court held that since the pool was constructed, maintained, and operated by government agents, as well as being under their direct control and supervision, the negligence of the operators fell within the ambit of the Tort Claims Act.

In neither of these decisions is there any discussion of the non-appropriated fund status of the pools; although the Government's defense, as reported in the *Brown* opinion, suggests an effort to argue that non-appropriated funds were not agencies of the United States. A footnote, since superseded, in an Air Force legal manual says in part:

> . . . a claim in *Brown v. U.S.* 99 F. Supp. 685 (S.D. W. Va.) for the death of a sailor on furlough resulting from negligence in the operation of a swimming pool by the recreation fund of the Navy was filed under the Tort Claims Act. Judgment was granted in favor of the plaintiff but the question of the applicability of the Tort Act to the tortious acts of employees of non-appropriated fund activities was not raised. In *Brewer v. United States*, 108 F. Supp. 889 (M.D. Ga.) this defense was raised but the case was decided on another issue . . .[22]

While a reading of the *Brewer* opinion gives no indication of the "other issue" on which the case turned, the immunity argument was not pressed aggressively. In fact, currently military texts, in their discussion of non-appropriated fund tort liability, fail to allude to either *Brown* or *Brewer*,[23] apparently on the grounds that since the question of the fund's status was hardly litigated, the cases are not authority for holding non-appropriated funds liable under the Tort Claims Act.

An Attempt at Immunity

The first opinion which reflects a clear attempt on the part of the United States to exclude non-appropriated funds from Tort Claims Act coverage was *Roger v. Elrod*[24] which was decided by an Alaskan District Court in 1954. The plaintiff sued the United States and a serviceman for injuries resulting from a collision with a post exchange truck driven by the latter. The serviceman had been assigned to the fund as a full-time driver. The Government argued that, since *Faleni*

[21] 108 F. Supp. 889 (M.D. Ga. 1952).

[22] AFM 110–3, para. 50322, n. 62 (1 July 1955).

[23] See Department of the Army Pamphlet 27–187, Military Affairs, 183–184 (1963); Air Force Manual 110–3, Civil Law, para. 50320 (1959).

[24] 125 F. Supp. 62 (D. Alaska 1954).

v. United States[25] had held that non-appropriated fund employees were not employees of the United States for the purpose of suing the United States, the post exchange driver could not be considered an employee of the United States and therefore, his negligence was not compensable under the Tort Claims Act. The Alaskan Court distinguished *Faleni* on the grounds that Faleni was a civilian and the case had involved workmen's compensation. After reviewing *Second Standard Oil* as well as *Brewer and Brown*, the court concluded that the serviceman-driver was acting within the scope of his employment and that the United States was, therefore, liable for his negligence.

This opinion is subject to two interpretations: one narrow; the other, broad. The broad interpretation is that this case stands for the proposition that non-appropriated fund torts are compensable under the Federal Tort Claims Act. The narrow interpretation is that the assignment of a serviceman to full-time duty with a non-appropriated fund does not remove him from the Tort Claims Act's definition of an employee of the United States. When we recall the stubbornness with which the Government has fought any attempt to deprive the funds of their immunity, it is not surprising that the latter, narrow interpretation was selected by the Armed Forces.[26] While the Service's attitude is understandable and, in a limited sense, commendable—inasmuch as they were trying to preserve the funds' assets—it is not clear why the Department of Justice chose to defend *Roger v. Elrod* on the basis that the Tort Claims Act did not apply. Presumably, the exchange's insurance policy did not cover Government drivers; this presumption is based on the oft-stated policy that insurers would be required to litigate such claims on the merits. Whatever the rationale for the Department of Justice decision, we shall see that within a few years they had reversed themselves.

Two State Decisions Involving Non-Appropriated Fund Tort Liability

In the discussion of *Edelstein v. South Post Officers' Club*,[27] it was noted that when a suit is brought in a state court against a non-appropriated fund or its officers or employees, the United States may move for removal to the appropriate United States District Court. However, this is not always done, as is illustrated by the next two decisions.

In *Brame v. Garner*[28] the plaintiff sued the Fort Jackson Officers' Open Mess and the patron who had assaulted him there. The Mess, sued as an unincorporated association, made a special appearance,

[25] 125 F. Supp. 630 (E.D. N.Y. 1949).
[26] E.g. Army Regulation 230–8, para. 18f.
[27] 118 F. Supp. 40 (E.D. Va 1951).
[28] 232 S.C. 158, 101 S.E.2d 292 (1957).

arguing that *Second Standard Oil* had declared non-appropriated funds to be instrumentalities of the United States, and that War Department regulations stated that such instrumentalities were immune from suit. A similar affray in California led to the decision in *Alred v. Camp Irwin Non-Com Officers' Open Mess*[29] in which a similar defense was advanced. In both instances the state Supreme Courts duly respected the alleged immunity on the basis that "federal law" (i.e., departmental regulations) made non-appropriated funds immune. Unfortunately, both courts fell into the same error; their opinions confused their lack of jurisdiction over non-appropriated funds, which as part of the Department of Defense are not suable entities, with the thesis (by now disregarded in federal courts) that the funds were not suable because the United States had not consented to suit. It is obvious that the state courts felt that non-appropriated funds torts were not compensable in any forum; the cases cited make this clear. *American Commercial*,[30] *Edelstein*,[31] and even *Daniels*[32] can be interpreted to stand for the proposition that suits against the funds must be brought against the United States; while the court's use of *Borden*[33] and *Second Query*,[34] as well as the spurious argument that "since regulations say they are immune, they must be," make it clear that these courts were consigning tort plaintiffs to the limbo created for non-appropriated fund contractors.

In all fairness to the Departments of Justice and Defense, it should be noted: that neither of these two state suits were defended by United States Attorneys; that there is no evidence that the defense tactics were dictated by either of the two departments; and that, apparently, these cases were not used by the United States to bolster the immunity argument in subsequent cases. Both cases arose at a time when the clubs would have been covered by public liability insurance. It is quite possible that the defendants were represented by insurance companies; in such an instance, of course, the immunity defense should not have been used without Governmental approval. Perhaps the "why" of the defense is not as important as the fact that these two cases, by their nature, lent little strength to the camp which attempted to keep fund torts out of Tort Claims Act coverage.

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[29] 156 Cal. App. 2d 574, 319 P.2d 654 (1958); *cf.* Richardson v. United States, 226 F. Supp. 49 (E.D. Va. 1964).

[30] American Commercial v. U.S. Officers, 187 F.2d 91 (CCA D.C. 1951).

[31] Edelstein v. South Post Officers' Club, 118 F. Supp. 40 (D.C. Va. 1951).

[32] Daniels v. Chanute Air Force Base Exchange, 127 F. Supp. 920, (E.D. Ill. 1955) discussed *infra* at p. 442.

[33] Borden v. United States, 116 F. Supp. 873 (Ct. Cl. 1953).

[34] United States v. Query, 121 F.2d 631 (4th Cir. 1941), *affirming* 37 F. Supp. 972 (E.D. So.Car. 1941).

Fund Torts Are Within the Ambit of the Tort Claims Act

In the tort area, federal judges have become less and less prone to accept non-appropriated fund immunity arguments. In *Grant v. United States*,[35] a business invitee sued the United States for injuries sustained when he fell down the unlighted stairs of a ship's service store. He alleged that the proximate cause of the fall was the failure of the fund's military manager to check the lights. In 1949, nine years prior to the *Grant* opinion, the same court (the U.S. District Court for the Eastern District of New York), had held in *Faleni*[36] that a fund employee was not an employee of the United States; the effect of the decision was to allow Mrs. Faleni to institute a suit under the Tort Claims Act, although she had already received workmen's compensation. Now, the United States argued that *Faleni* meant that the manager's negligence was not the negligence of an employee of the United States. The court was not persuaded and, following the reasoning in *Roger v. Elrod*[37] without citing it, concluded that the exchange officer, when performing official duties, was an employee of the United States. The decision was affirmed on appeal,[38] although the Government was told it could seek recovery from the fund's insurer.

Holcombe v. United States[39] involved a suit brought by a fund employee and, as such, will be discussed in the next section of this chapter. At this point it suffices to say that the *Holcombe* decision, rendered on April 18, 1960, caused a complete reappraisal by the policymakers at the Department of Justice, who less than three months later, wrote the following letter to the Judge Advocate General of the Air Force:

> As you know, the United States has, from time to time, been sued under the Federal Tort Claims Act for damages caused by the negligent conduct of employees of non-appropriated fund instrumentalities. Through the years, the three Military Departments have urged the Department of Justice to dispute liability in these cases on the ground that such employees are not 'employees of the government' within the meaning of that phrase as defined in the Federal Tort Claims Act, 28 U.S.C. 2671; that Act defines an employee of the government as a person 'acting on behalf of a federal agency,' and the Military Departments have been of the view that a non-appropriated fund instrumentality is not a 'federal agency' within the meaning of the Act's definition of the latter phrase (ibid). The Justice Department has always had serious doubts as to the soundness of that contention and our doubts have

[35] 162 F. Supp. 689 (E.D. N.Y. 1958).
[36] Faleni v. United States, 125 F. Supp. 630 (E.D. N.Y. 1949).
[37] 125 F. Supp. 62 (D. Alaska 1954) discussed at p. 430–431, *supra*.
[38] 271 F.2d 651 (2d Cir. 1959).
[39] 277 F.2d 143 (4th Cir. 1960).

been the subject of considerable correspondence and discussions between our Departments; in fact, during the past year, Justice Department attorneys informally conferred with representatives of the Military Departments with regard to a legislative proposal designed to resolve the problem.

Nevertheless, and despite our doubts on the point, we have consistently advanced the views of the Military Departments before the courts, but without success. Until recently there have been no definitive decisions by the appellate courts on the point. However, the issue was squarely before the Court of Appeals for the Fourth Circuit in United States v. Holcombe, 277 F. 2d 143 (decided April 18, 1960); there the Court, in a logical and forceful opinion, rejected our contentions and held the United States answerable in damages, under the Federal Tort Claims Act, for the negligence of an employee of a non-appropriated fund instrumentality. There was an equally strong opinion by the District Court below (176 F. Supp. 297) which the Fourth Circuit here affirmed.

The *Holcombe* decisions, plus the recent decision of the Court of Appeals for the Second Circuit in *Grant v. United States*, 271 F. 2d 651 (where the Court, affirming the trial judge's determination that the United States is liable for the negligence of an employee of a ship's service store, held that liability insurance carried by the ship's service store inures to the benefit of the United States even though the United States was not specifically named as an insured), as well as the other cases which rejected our contentions (e.g., *Daniels v. Chanute Air Force Base Exchange*, 127 F. Supp. 920 (E.D. Ill.); *Roger v. Elrod*, 125 F. Supp. 62 (D. Alaska); *Brewer v. United States*, 108 F. Supp. 889 (M.D. Ga.), demonstrated the futility of pressing the point any further. And, the Solicitor General, upon full consideration of the matter, has determined not to seek Supreme Court review of the *Holcombe* decision. Therefore, our Department will no longer contend, in cases of this kind, that non-appropriated fund instrumentalities are not federal agencies within the meaning of the Federal Tort Claims Act.

In the past, regulations of the Military Departments governing the establishment and operation of non-appropriated fund activities, such as post exchanges, ship's stores, officers' clubs, and the like, required that public liability insurance be procured at the expense of such funds, so that judgments and compromise settlements resulting from tort claims arising out of their activities were not a burden upon the public treasury or the appropriations of the Military Department concerned. This was consistent with the traditional policy that these activities are operated and maintained primarily from their own receipts and savings, and are intended to be self-sustaining. I assume that the *Holcombe* and other like decisions will not result in a modification of that policy insofar as the payment of claims is concerned. It is my understanding that the non-appropriated fund activities of the Departments of the Army and of the Air Force have now adopted a program of self insurance and that the payments of tort claims, whether by judgment or compromise, will be made through its funds.

Accordingly, unless you advise to the contrary, our Department will transmit to you judgments as well as court-approved com-

promise settlements for processing for payment out of such funds in future cases arising from the negligence of employees of non-appropriated fund activities.[40]

Presumably, similar letters were sent the other Judge Advocates General, and no further defenses on the basis that these employees were not federal employees would be entered. This change in policy is reflected in the recent case of *Fournier v. United States*[41] in which a decedent's husband and daughter brought suit under the Tort Claims Act for her wrongful death due to the alleged negligence of the employees of the Officers' Club at Fort Jackson, Mississippi. The evidence established that the employees had continued to serve Mrs. Fournier liquor after her intoxication had become apparent and that the fall which caused her death was due, in part, to the club's failure to replace an exterior light. No effort was made to argue that the club employees were not employees of the United States.

At this point, one might well wonder why the United States fought such a stubborn battle to exclude non-appropriated funds from Tort Claims Act coverage, particularly in light of the Army's long standing policy that questions of liability would be litigated. One reason might be the *Faleni* case which, in a somewhat different context, had held that fund employees were not employees of the United States and was the first non-appropriated fund case involving the Tort Claims Act. (The *Faleni* case, while helpful to the immunity argument, received little subsequent support.) A second reason might be called "human" in the sense that few defendants hesitate to use a defense merely because it is of questionable value; the argument is, of course, that it is up to the court to determine the merit of the defense. While this is true, it is unfortunate that the United States was so reluctant to face judicial determinations of fund liability. A more charitable reason for the Government's refusal to admit the non-appropriated fund employees were employees of an instrumentality of the United States may, in part, be due to the various statutes which excluded them from laws pertaining to employees in the Civil Service of the Federal Government.[42] However, this argument seems particularly weak in light of the Tort Claims Act's reference to instrumentalities of the United States.

[40] Letter dated July 13, 1960 from George Cochran Doub, Assistant Attorney General, 243 AF JAG Reporter, 15 (August 1, 1960).

[41] 220 F. Supp. 752 (S.D. Miss. 1963).

[42] Act of June 19, 1952, ch. 4, §§ 1, 2, 66 Stat. 138, 139 as amended, July 18, 1958, Pub. Law 85-538, § 1, 72 Stat. 397, 5 U.S.C. 150k, k-1. Three decisions of the National Labor Relations Board have concerned themselves with the funds' status as an employer. The National Labor Relations Act specifically excludes the United States and wholly owned government corporations from its operations. Act of July 5, 1935, c. 372, § 2, 49 Stat. 450, as amended. 29 U.S.C. 152(2). When union organizers have attempted to take advantage of the Act, the NLRB has held that the funds, as part of the federal government, are excluded from the Act's coverage. Manned

Some Exceptions to the General Rule of Amenability to Suit

While the Department of Justice's letter had the effect of barring the "non employee" argument as a defense in tort suits against the United States, it could have been predicted that there would be exceptions to the rule. The first of these is found in *Hainline v. United States*,[43] a 1963 decision of the United States Court of Appeals for the Tenth Circuit which will have far-reaching implications. The plaintiff, driving a car near a civilian airport, was struck by an aero club plane being operated by an Air Force officer. Aero clubs are non-appropriated fund flying clubs open to certain classes of authorized users of military recreational facilities. The plaintiff brought suit under the Tort Claims Act and recovered a judgment against the United States. The United States District Court for the District of Kansas, in its unpublished Findings of Fact and Conclusions of Law,[44] concluded: that aero clubs were non-appropriated funds; and that a member of the fund is considered an employee of the fund (and, therefore, of the United States) when engaged in authorized club activities and, as such, is "acting within the scope of his employment." On this basis the court found for the plaintiff. It should be noted, at this point, that the pertinent Air Force regulation[45] stated that the term "employees" should be construed as being synonomous with "users" when referring to non-appropriated fund recreational operations.

The Circuit Court of Appeals reversed the trial judge. The court concluded that local law held that an employer would be liable for his employee's negligence only if the employee were furthering his employer's business at the time of the act complained of. And, although the stated purposes of aero clubs are to

> . . . stimulate an interest in aviation; to provide authorized personnel with an opportunity to engage in flying; *to develop skills* in aeronautics and related aero sciences *useful to the Air Force mission* at a limited cost to the government.[46]

The court found that any benefit to the Government was merely incidental to the pilot's personal benefit and enjoyment. Of particular interest was the court's response to the regulation which made non-

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Space Craft Center Cafeteria Workers & Local 968, Teamsters, 148 NLRB No. 129, September 25, 1964; Civilian Cafeteria Board, 106 NLRB 39 (1953); National Food Corporation, 88 NLRB 186 (1950). Thus, while fund employees are specifically excluded from the Civil Service, they have most of the benefits (and disadvantages) of federal employment. *E.g.* Exec. Order No. 11137, 29 Fed. Reg. 223 (1964) applied statutory overseas pay differentials and allowances to fund employees.

[43] 315 F.2d 153 (10th Cir. 1963).

[44] Civil No. W–2100, D. Kansas, April 26, 1962.

[45] Air Force Regulation 176–8; the latest version, dated December 30, 1964, does not contain this language.

[46] AFR 34–14 (emphasis supplied).

appropriated fund users, non-appropriated fund employees. The opinion states:

> The regulation, however, does not propose to, nor could it, enlarge the liability of the United States under the Federal Tort Claims Act or create any new or different definition of the word 'employee' as used in the Act.[47]

And yet, harken back to the non-appropriated fund tort cases litigated in state courts, as well as to the numerous contract cases, all of which had been decided on the rationale that service regulations could limit liability! Are the two conclusions inconsistent? They are, and *Hainline* stands for the correct proposition—that administrative regulations cannot modify a congressional grant of jurisdiction. The analogy is available to the next plaintiff who, in attempting to sue under the Tucker Act for a breach of contract, is told that service regulations preclude such suits against the non-appropriated fund and the United States.

When Is a Non-Appropriated Fund Not?

The most recent tort suit involving non-appropriated fund activities shows just how far the law had developed. The plaintiff in *Scott v. United States*[48] was a member of an Army riding club at Fort Benning, Georgia. He was injured in a riding accident and sued the United States under the Tort Claims Act. The Government defended on the ground that the club was not a non-appropriated fund and offered the club's constitution which had a statement to that effect. In its opinion, the court enumerated certain criteria which could be used in determining when a military club is a non-appropriated fund. Does a regulation say that the organization is a non-appropriated fund? What does the constitution say? Does the club develop skills useful to military? Does the club get support from appropriated funds? Does the military control its operations by appointing directors, approving contractors, or by taking over its assets on dissolution? Using these criteria, the court concluded that the riding club was not a non-appropriated fund and the United States was not, therefore, liable for its employees' torts.

Since the *Scott* opinion held that the club was not a non-appropriated fund it could be argued that this decision has no relevance to our discussion. But *Scott* is important for two reasons: it illustrates one situation in which the United States will not be held liable for what appears to be a non-appropriated fund tort; and, the criteria which it sets out will doubtless be used in future non-

[47] 315 F.2d 153, 156.
[48] 226 F. Supp. 864 (M.D. Ga. 1963).

appropriated fund cases since, as was noted in the first chapter, recreational activities are burgeoning. Usually this problem will arise when the United States is attempting to avoid liability for torts committed by a private organization.

A case decided early in 1964 presented the Court of Claims with an even more complex factual situation than that found in *Scott*. In *Brummitt* v. *United States*,[49] the plaintiff was an employee of the United States Officers' Open Mess, Taipei (Formosa). Although she had resided outside the United States for more than eighteen months, the Internal Revenue Service considered her salary to be taxable on the grounds that it was paid by an agency of the United States.[50] The Mess had been organized by ninety-three individuals who issued bonds to the members; profits were not turned into a welfare fund; and the books were not audited by the Government. Membership was not limited to servicemen, nor was the club located on Government property. The Mess had negotiated for a private construction loan and, for the first six years of its existence, the club's membership retained total control over its construction and bylaws. All these indicia suggested that the Mess was not a non-appropriated fund. However, its constitution and bylaws required that its administration be in accordance with fund regulations. Military personnel were assigned to the Mess. Government equipment was used in its operation, its food was imported duty free (a privilege normally accorded only Government instrumentalities), and it was authorized the use of the post exchange and the United States Post Office. The degree of appropriated fund support was so great that, in 1961, the Mess was expressly made a non-appropriated fund. The salary over which the case arose had been paid prior to that time. The Court of Claims concluded that while the Mess had received an unusual amount of appropriated fund support, it was not a non-appropriated fund. While the court did not explicitly set forth any guidelines, it seems to have used the same factors which were used in *Scott*.

Section B. Employee Suits

The First Suit

The introductory comments in this chapter noted that non-appropriated fund employees were not covered by federal systems of compensation and that, during World War II, the purchase of private insurance was authorized. Apparently this system of private insurance worked without difficulty. *Humphrey v. Poss* was the only re-

[49] 329 F.2d 966 (Ct. Cl. 1964).

[50] §911 of the Internal Revenue Code of 1954, 26 U.S.C. 911 stated that such salaries would be taxable.

ported case until the passage of the Tort Claims Act, after which the first opinion involving an employee's suit was in 1949. *Faleni v. United States*[51] involved a suit under the Tort Claims Act, brought by a fund employee who alleged that she had been injured by the negligence of a Navy (appropriated fund) bus driver. The Government moved for summary judgment, arguing on the basis of *Second Standard Oil's* "instrumentality" holding that a non-appropriated fund employee was an employee of the United States, and, that having received workmen's compensation from the state of New York, Mrs. Faleni was barred from any further recovery. The United States District Court for the Eastern District of New York concluded that the non-appropriated fund, a Navy ship's service store, was

> . . . merely an adjunct of and a convenience furnished by the Navy Department, and that an employee thereof is not an employee of the United States of America.[52]

The *Faleni* decision, as has already been seen, had a great impact on subsequent non-appropriated fund tort suits. As is usual in a situation where court and counsel are considering a novel problem, the resultant opinion is not entirely clear. The following facts do stand out: that the court was not willing to accept *Second Standard Oil* as being anything more than authority for the immunity of non-appropriated funds from state taxation; that the argument that service regulations would bar such a suit (possibly advanced) was not persuasive; and, that, as a matter of law, the court did not consider recovery under the private insurance policy as barring a subsequent suit.

It should be noted in passing: The Government's argument that Mrs. Faleni was an employee of the United States and, as such, could not seek recovery under the Tort Claims Act after having received compensation was apparently based on a number of cases involving the United States Employee's Compensation Statute[53] which had held that, once an employee had elected to proceed administratively under that statute, he could not subsequently sue the United States.[54] A similar philosophy had been espoused in cases involving the Public Vessels Act[55] when suits were brought by servicemen who had a pension plan available to them,[56] as well as one suit under the Railroad

[51] 125 F. Supp. 630 (E.D. N.Y. 1949).

[52] *Id.* at 632.

[53] Act of September 7, 1916, ch. 458, 39 Stat. 742.

[54] Dahn v. Davis, 258 U.S. 421 (1922); See Also Brady v. Roosevelt Steamship Co., 317 U.S. 575 (1942).

[55] Ch. 428, §1–10, 43 Stat. 112, 113 (1925), 46 U.S.C. 781–790.

[56] Bradley v. United States, 151 F.2d 742 (2d Cir. 1945), *cert. den.* 326 U.S. 795 (1946); Dobson v. United States, 27 F.2d 807 (2d Cir. 1928), *cert. den.* 278 U.S. 653 (1929).

Control Act[57] also brought by a serviceman.[58] In the *Faleni* case, the employee had not recovered any "federal" money under a statutory system of compensation but it appears that the United States was attempting to apply the same rule. The fact that the Government was attempting to expand the "election of remedies" concept during this period is illustrated by *United States v. Brooks*[59] in which the United States, the year before *Faleni*, had argued an even more restrictive concept: that the availability of another Governmental remedy (in the *Brooks* case, a pension plan) precluded suit under the Tort Claims Act. Presumably the fact that non-appropriated fund employees were covered by a private (as opposed to a public) system of compensation, when combined with the cases that had held fund contracts not to be contracts of the United States, led to the court's conclusion in *Faleni* that the single remedy concept would not be applied. It is somewhat surprising that the state of New York was willing to compensate someone who was arguably a federal employee and outside the scope of state coverage, particularly in view of *Humphrey v. Poss*, which had held that fund employees were not protected by the state. We can only conclude that the insurance carrier was instructed not to raise the "federal instrumentality" argument in the state proceedings.

Non-Appropriated Fund Employees Receive Federal Protection

Six months after the *Faleni* decision, the United States Employee's Compensation Statute was substantially amended by the Federal Employees' Compensation Act Amendments of 1949.[60] These amendments included in the definition of employees of the United States "employees of instrumentalities wholly owned by the United States"[61] and provided that:

> The liability of the United States or any of its instrumentalities under this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place of, all other liability of the United States or such instrumentality to the employee. . . .[62]

However, the definition of employee was unsatisfactory as far as the Armed Services were concerned. Legislation to make non-appropriated fund employees beneficiaries of the Compensation Act was included in the Department of Defense legislative program for

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[57] Railroad Control Act, ch. 25, 40 Stat. 451 (1918).

[58] Sandoval v. Davis, 288 F. 56 (6th Cir. 1923).

[59] 169 F. 2d 840 (4th Cir. 1948), *rev'd on other grounds*, 337 U.S. 49 (1949).

[60] Act of October 14, 1949, ch. 691, 63 Stat. 854.

[61] Ch. 691 § 108(b), 63 Stat. 860, 5 U.S.C. 790(b). The legislative history makes no reference to non-appropriated funds. H.R. Rep. No. 836, 81st Cong., 1st Sess. (1949).

[62] *Ibid.*

1949 and 1950 and submitted to the Eighty-First Congress.[63] The subsequent House Report agreed that fund employees were covered neither by the Federal Employees' Compensation Act nor by state acts.[64] By the Act of June 19, 1952,[65] non-appropriated funds were required to provide employee insurance coverage equivalent to that provided in the state where the fund was located; benefits equivalent to these provided by the Longshoreman's and Harborworker's Compensation Act[66] were required for Americans employed overseas. In 1958, the Employees' Compensation Act was amended to make the Longshoreman's Act applicable to all fund employees; at the same time, this system of compensation was made an exclusive remedy by using the language cited previously.[67]

Cases Which Preceded the Act

After 1958, non-appropriated fund employees no longer had the Tort Claims Act available to them as a remedy if they were injured on the job. Of course, the statute could not be applied retroactively, and this fact must be kept in mind considering cases in which the cause of action preceded passage of the law. The first of these was *Daniels v. Chanute Air Force Base Exchange*[68] in which the United States District Court for the Eastern District of Illinois arrived at the same conclusion that the Alaskan court had in *Roger v. Elrod:* that non-appropriated fund torts were compensable under the Tort Claims Act. In *Daniels*, the United States, as well as the exchange and Exchange Service, were named as defendants in a suit by an employee. All defendants moved to dismiss on four grounds: failure to state a cause of action; plaintiff's lack of jurisdiction over them; the defendants' lack of consent to be sued; and the United States' position of not being the employer of any person or agency alleged to have caused the plaintiff's injury. While the court granted the motion to dismiss the suit against the exchange and Exchange Service, apparently on the grounds that they were not suable entities, it held that a cause of section did exist against the United States. The court saw no difficulty in fitting non-appropriated funds within the definitions found in the Tort Claims Act where "federal agency" is defined to include "instrumentalities of the United States,"[69] and "employees of the United States" include "members of the military or naval forces."[70] Authority for the ruling was found in

[63] S. 4006 introduced August 2, 1950.
[64] H.R. Rep. No. 1995, 82d Cong., 2d Sess. (1952).
[65] 66 Stat. 138 (1952), 5 U.S.C. 150k.
[66] Chapter 18, Title 33, U.S.C.
[67] P.L. 85-538, 72 Stat. 937 (1958), 5 U.S.C.A. 150k and k-1.
[68] 127 F. Supp. 920 (E.D. Ill. 1955).
[69] 28 U.S.C. *Passim.*
[70] 28 U.S.C. 2671.

Second Standard Oil, as well as some of the subsequent tort and contract cases. To support its motion, the United States had used *Faleni* and *Keane v. United States*,[71] the latter a criminal case decided in 1921. The *Daniels* opinion flatly disagreed with *Faleni* (which had held that fund employees were not employees of the United States) and pointed out that while non-appropriated funds were theoretically self-supporting, Congress had appropriated money for their support and, on occasion, had accepted their revenues into the Treasury; moreover, the Armed Services' regulations allowed for extensive support of these activities. *Keane* was held to be irrelevant inasmuch as it had preceded, by twenty years, the definitive holding in *Second Standard Oil* that the funds were instrumentalities of the United States.

Daniels is an eminently practical decision: the court looked to see who had allegedly caused the injury, saw an agency of the United States operated by federal officers, and disregarded the arguments which had so obscured the non-appropriated fund contract cases. Admittedly, the definitions in the Tort Claims Act fit non-appropriated funds perfectly; but the argument that service regulations precluded such a suit was presumably raised, as it has been in *Faleni*, and given much shorter shrift than it had received in any of the contract cases. In *Daniels* the United States was clearly hoist by its own petard. One can hardly argue that non-appropriated funds are immune from state taxation, as federal instrumentalities, without doing serious damage to the argument that they are not federal instrumentalities under the Tort Claims Act. Of course, since the United States had argued that the plaintiff was not an employee of the Government, the *Feres*[72] decision (and other cases holding that federal employees with another method of compensation could not use the Tort Claims Act) was inappropriate.

The next employee who sued under the Tort Claims Act was not so fortunate. In *Aubrey v. United States*[73] the *Faleni* problem was again raised: did recovery under workmen's compensation bar a subsequent suit? After considering the 1952 Employees' Compensation Act and its legislative history, the Circuit Court of Appeals for the District of Columbia concluded that compensation was a non-appropriated fund employee's exclusive remedy. The following year the Ninth Circuit agreed in the decision of *United States v. Forfari*.[74] Obviously the two courts' disagreement with *Faleni* was not based on a retroactive application of the statute making compensation an exclusive remedy, since the statute had not been passed until 1958 (some time after the acts

[71] 272 F. 577 (4th Cir. 1921) discussed *infra* in Chapter VI.
[72] Feres v. United States 340 U.S. 135 (1950).
[73] 254 F.2d 768 (D.C. Cir. 1958).
[74] 268 F.2d 29, (5th Cir. 1959) *cert. den.* 316 U.S. 902 (1959).

which gave rise to the suits had taken place). However, case law can be applied retroactively and, by applying the reasoning found in *Feres v. United States*[75] and *Johansen v. United States*,[76] decided by the Supreme Court in 1950 and 1952 respectively, the same objective was reached. Justice Reed, who had participated in both *Feres* and *Johansen*, wrote the *Aubrey* opinion.

Feres and *Johansen* are discussed at great length in the next non-appropriated fund case which arose: *Holcombe v. United States*[77] in which the Fourth Circuit concluded that non-appropriated fund employees were employees of the United States. *Holcombe* did not involve the problem of whether workmen's compensation recovery bars suit under the Tort Claims Act, since there was no personal injury involved, but it did involve the application of *Feres* and *Johansen*. Mr. Holcombe, the civilian manager of an officers' club, had lent his car to a fellow employee for a business errand and she wrecked it; he sued the United States for the damage done to his car. The suit was initially dismissed by the District Court on the ground that the driver was not within the scope of her employment. On appeal, the United States argued that Mr. Holcombe's status as a fund employee barred the suit. In 1958, the Fourth Circuit remanded the case for a hearing on the merits.[78]

At the subsequent trial the sole issue was whether the plaintiff had a cause of action under the Tort Claims Act. Although the trial occurred a year before the Department of Justice letter cited supra, the United States conceded that Holcombe was an employee of the United States but argued that, as such, he could not sue. In a scholarly opinion,[79] the District Court divided those opinions limiting employee suits under the Tort Claims Act into two categories. The first category involves those cases in which the status of the plaintiff differed so strikingly from his civilian counterpart that there were no "like circumstances" where the United States, if a private person, would be held liable. This type of case is illustrated by *United States v. Brown*[80] and normally involves policemen and servicemen under strict discipline; in effect, public policy precludes granting them a cause of action against their employer since to do so would allow them to challenge the disciplinary system which they must accept. The second category, and that into which a civilian non-appropriated fund employee might be fitted, involves those instances where a "simple and certain" system of relief is available to the injured person and

[75] 340 U.S. 135 (1950).
[76] 343 U.S. 427 (1952).
[77] 277 F.2d 143 (4th Cir. 1960).
[78] 259 F.2d 505 (4th Cir. 1958).
[79] 176 F. Supp. 297 (E.D. Va. 1959).
[80] 348 U.S. 110 (1954).

where it appears that since the other system was created by Congress to aid a special class, the Tort Claims Act would be redundant. In *Feres v. United States*[81] servicemen were barred from suing under the Tort Claims Act because the Military Claims Act[82] was available to them; in *Johansen v. United States*[83] seamen were precluded from suit under the Public Vessels Act[84] because they were covered by federal workmen's compensation, as, in effect, are non-appropriated fund employees;[85] park policemen have been denied the right to sue because they have available a congressionally recognized relief fund.[86] Of course, said the court, all the cases above involved personal injury, for which Mr. Holcombe had no claim. In the *Holcombe* case, the United States was trying, in effect, to apply an extension of the *Feres* doctrine which had arisen in suits brought by servicemen for property damage[87] and in which the existence of the Military Claims Act[88] had been held to bar victory. The court concluded that since this remedy was not available to the claimant, the reasoning in the Claims Act cases was not germane. Moreover, it found that the Government's use of the contract immunity cases was inappropriate on the basis that "financial obligations" for which the United States should not (by regulation) be held liable applies to business debts not tort liability. (In doing so, it referred to *Brame v. Garner*[89] as a contract case when it, in fact, involved a tort suit.) The court found for the plaintiff.

When the United States appealed, the Fourth Circuit sustained the judgment after the Government once again argued that the United States could not be held liable for non-appropriated fund torts because it could not be sued on non-appropriated fund contracts. The Circuit Court was not impressed by the dicta from *Second Standard Oil* which, they pointed out, had been decided five years before passage of the Tort Claims Act. The opinion was explicit in holding that

> An Officers' Mess being an integral part of the military establishment, and an agency of the Government according to the usual meaning of the word, and having been held to be such in other contexts, it is difficult to escape the conclusion that the Federal Tort Claims Act encompasses it.[90]

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[81] 340 U.S. 135 (1950).
[82] 10 U.S.C. 2732, 2735.
[83] 343 U.S. 427 (1952).
[84] Ch. 428, § 1, 43 Stat. 112 (1925), 46 U.S.C. 781.
[85] Aubrey v. United States, note 73 *supra*.
[86] Lewis v. United States, 190 F.2d 22 (D.C. Cir. 1951), *cert. den.* 342 U.S. 869 (1951).
[87] United States v. United Services Automobile Assn. 238 F.2d 364 (8th Cir. 1956); Preferred Insurance Co. v. United States, 222 F.2d 942 (9th Cir. 1955), *cert. den.* 351 U.S. 990 (1956) *reh. denied* 351 U.S. 990 (1956); Zoula v. United States 217 F.2d 81 (5th Cir. 1954).
[88] 10 U.S.C. 2732, 2735.
[89] 232 S.C. 158, 101 S.E.2d 292 (1957) discussed *supra* at pp. 433–434.
[90] 277 F.2d 143 at 146.

Lowe v. United States[91] involved a suit brought by the survivors of a non-appropriated fund employee. The plaintiffs had originally sought compensation through state channels under the provisions of the workmen's compensation insurance policy. When their efforts failed, they sued the Government. The United States District Court for the Northern District of Mississippi dismissed the suit on two bases: res judicata (the prior ruling in the state forum); and, in line with *Aubrey* and *Forfari*, the fact that the plaintiff's remedy under the policy was exclusive. In *Rizzuto v. United States*,[92] decided a year later in 1961, the Tenth Circuit arrived at the same conclusion.

The Court of Claims recently had an opportunity to use its expertise in non-appropriated fund law when it was called upon to adjudicate the claim of a Navy exchange employee who sought to collect her compensation benefits. In *Denenberg* v. *United States*[93] the court granted the motion to dismiss for failure to state a cause of action inasmuch as there was no evidence that she had sought to collect from the insurance carrier. Following *Aubrey*, the court concluded that her administrative remedy was the only one available to her. Always willing to add a few words on its attitude towards fund contracts, the court said that while the Tort Claims Act

> . . . constituted a specific waiver of sovereign immunity by the Government, as to the actions of these instrumentalities. We can find no waiver of sovereign immunity regarding contracts of such instrumentalities, even assuming we were to find such a contract implicit in the [Compensation] Act. . . .[94]

However, Judge Durfee, who wrote the opinion in *Denenberg*, was to say a year later in an opinion representing the unanimous view of the Court of Claims, that: "The United States is not liable in tort for acts of the exchange or its employees,"[95] which suggests that the court disagrees with *Holcombe* and the subsequent decisions which have held the United States liable in third-party suits. The alternative conclusion is that the Court of Claims was confused.

The most recently reported case, a 1964 decision of a Federal District Court in Texas, *Amarillo Air Force Base Exchange v. Leavey*,[96] involved a suit by an airman who was a part-time employee at the exchange and whose claim under 5 U.S.C. 150 k and k–1 had been honored by the Department of Labor. The insurance carrier appealed the award on the basis that its policy's coverage did not extend to

[91] 185 F. Supp. 189 (N.D. Miss. 1960), *aff'd* 292 F.2d 501 (5th Cir. 1961).
[92] 298 F.2d 748 (10th Cir. 1961).
[93] 305 F.2d 378 (Ct. Cl. 1962); See also, Denenberg v. Employees' Liability Insurance Corp. 225 F. Supp. 461 (1963 E.D. Penn).
[94] 305 F.2 378 at 380.
[95] Gradall v. United States 329 F.2d 960 at 964 (Ct. Cl. 1963).
[96] 232 F. Supp. 963 (N.D. Tex. 1964).

military employees, whether paid by appropriated or non-appropriated funds. The court agreed and it can be inferred from the opinion that the court concluded that such claimants are outside the scope of the act, primarily because an award could impair the serviceman's right to collect service benefits.

CONCLUSION

Although it perhaps needs no further illustration, the record of these tort suits brought against the United States further reveals the extent to which efforts were made to exclude plaintiffs from any judicial remedy, although the Government seemed more willing to litigate non-appropriated fund tort liability in those instances where a private insurer would pay any judgment. When a plaintiff was seeking to supplement a compensation award every possible defense was raised.

It seems apparent that there would have been no change in policy after the Army and Air Force put their self-insurance program into effect, had it not been for the Department of Justice's refusal to espouse what it considered to be a hopeless cause. It should be noted that of all the reported third-party tort suits brought against the United States—excluding *Hainline and Scott*[97] (which did not involve immunity *per se*)—the only suits won by the United States were two brought in state courts which did not name the United States as defendant. In the ten reported cases involving employee suits, the United States won six on the "exclusive remedy" argument and one, *Humphrey v. Poss*,[98] which predated the Tort Claims Act, on the basis of sovereign immunity. Of the three which the United States lost, *Faleni* was a decision that no other court ever agreed with; in *Daniels* the "exclusive remedy" argument was not advanced; and in *Holcombe* it was held that there was no other remedy.

There is no reason to predict any change in judicial attitudes in future non-appropriated fund tort suits, nor in the Department of Justice's policy in defending such suits. Normally, non-appropriated fund torts when committed by a fund employee, military or civilian, acting within the scope of his employment, will be compensable under the Tort Claims Act although appropriated funds will not be used to pay the judgments. However, the typical tort suit brought by an employee will be dismissed on the basis that he has a uniform system of compensation otherwise available to him.

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[97] Hainline v. United States, 315 F.2d 153 (10th Cir. 1963); Scott v. United States 226 F. Supp. 864 (M.D. Ga. 1963).

[98] 245 Ala. 12, 15 So.2d 732 (Ala. 1943).

CHAPTER V. NON-APPROPRIATED FUNDS AND INTERNATIONAL LAW

INTRODUCTION

The operation of non-appropriated funds outside the United States seems to have caused few legal problems until the mid-1950's. The reason is obvious. Until the war with Mexico (1846–1848), American troops had never had occasion to operate outside their own country; and until World War I, those troops which were overseas were either in conquered territories (the Philippines and Cuba) or in areas where the United States was immune to any foreign interference (China). Apparently the only case which antedates 1953 is that cited in the chapter on taxation, wherein the Attorney General opined that sutlers traveling with our Army in the Republic of Texas were immune under the terms of the international agreement.[1] Since American troops in substantial numbers were stationed in friendly foreign nations during World War I, one could reasonably assume that some litigation involving non-appropriated funds would have arisen. Unfortunately, the record is silent. This may be due in part to the fact that nearly all welfare and recreational activities overseas during World War I were operated by a private organization, the Young Men's Christian Association.[2] During the same period, the British chartered a private corporation to service their armies' needs.[3] While the Young Men's Christian Association records concerning World War I are voluminous, none relate to their legal problems. We know only that French authorities allowed the Young Men's Christian Association to import unlimited quantities of goods without declaration, apparently because of the quasi-governmental character of their operations.[4]

During World War II and the decade immediately subsequent, very few suits seem to have been brought against non-appropriated funds in foreign courts. It is difficult to ascribe a reason for this apparent lack of controversy. In those countries we had occupied, there was doubt as to the non-appropriated funds' amenability to suit.[5]

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[1] 4 Ops. Att'y. Gen. 462 (1946) discussed at pp. 375, Chapter II, *supra*.

[2] Taft, W. H. (ed.), *Service with Fighting Men* (1922). In the introduction, William Howard Taft states that ninety percent of all overseas welfare activities were carried on in this fashion, in order to release troops for fighting. Besides reception rooms, resort hotels, etc., the YMCA also had a multi-million dollar exchange service, intended to replace the military's canteens. See Mayo, *That Damn Y* (1920) especially Ch. VII, The Post Exchange.

[3] Taft, *op. cit.* supra note 2, at 549.

[4] Mayo, *op cit.* supra note 2, at 85.

[5] This doubt was engendered by the regulations under which the occupying forces limited suits against them and by the prevalent American military concepts of immunity, *e.g.*, VIII Opinions of the Legal Advisor, Office of Military Government, Germany, 80 (1947), where *Second Standard Oil* was used to show that exchanges were part of the military establishment and Coleman v. Tennessee, 97 U.S. 509 (1879) and Dow v. Johnson, 100 U.S. 158 (1880), two early Civil War cases, were used to show that occupying military forces were not subject to local law. The result? The policy that non-appropriated funds were immune from foreign taxation.

This is perhaps best illustrated by the *American Commercial* case[6] which arose in Europe and in which both parties were unsure of the proper forum. Even after our enemies were given substantial self-government (Germany in 1949; Japan in 1951), few suits were brought against the non-appropriated funds.

LEGAL BACKGROUND

Of course, the non-appropriated funds operating overseas face the same problems as their domestic counterparts—problems of taxation and regulation, and amenability to suit in tort or in contract. As we have seen, all of these problems rest on one ultimate issue—whether or not the non-appropriated fund is subject to the jurisdiction of the nation in which it is located. Many factors influence the answer, varying from country to country, or even from one year to the next. As is true in most non-appropriated fund cases, the question is essentially one of immunity. In order to understand the present status of non-appropriated funds in international law, one must appreciate the changing concepts of immunity within which the non-appropriated fund overseas has developed.

While writers may disagree as to the ultimate basis of international law, there seems to be little argument that the single most important factor in determining the international law on a given topic is the degree of agreement within the international community. Of the theories which are nearly universally accepted, one of the most ancient and respected is that which holds a foreign sovereign immune from suit. An early expression of this by the American court is found in *The Schooner Exchange v. McFaddon*.[7] As the Harvard Research *Draft Convention on Competence of Courts in Regard to Foreign States* pointed out in 1932: "The peaceful intercourse of states could be predicated only on the basis of respect for other sovereigns . . . This practical necessity of international intercourse exists to an equal degree [today]. . . ."[8] The rule of immunity was easily applied when the cases involved attempts to sue a sovereign for breach of promise or debt, or suits in admiralty against vessels of war. Pragmatically, it had been agreed that immunity was a very practical answer to such efforts. Anything short of immunity would lead to war, or at least to unpleasant retaliation by the foreign state.

However, the twentieth century added a number of complexities which did not fit the old simplistic approach. States began to own railways, trading companies, and merchant fleets. As more and more

[6] 187 F.2d 91 (D.C. Cir. 1951).
[7] 11 U.S. (7 Cranch) 116 (1812).
[8] Comment on Art. 7, p. 527.

commercial enterprises began to be government-owned, questions were raised as to whether some state activities were more sovereign than others. Although there was essential agreement that historically governmental activities (e.g., the operation of vessels of war and diplomatic agents) should remain immune from foreign legal action, there was no consensus as to the immunity of state commercial activities. Surprisingly, domestic attitudes toward immunity had little impact on foreign policy. For example, the United States had gradually lowered the domestic immunity barrier for a hundred years before it declared in 1952 that, under some circumstances, foreign governments' commercial activities might be sued in domestic courts. The respective camps in 1952 lined up, as follows. For complete immunity were: the United States, British Commonwealth, Czechoslovakia, Estonia, possibly Poland, Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, Portugal, and Germany. The restrictive theory was adhered to by Belgium, Italy, Egypt, Switzerland, France, Austria, Greece, Rumania, and possibly Denmark and the Netherlands as well as Sweden and Argentina.[9] It will be noted that those nations supporting immunity were not those which were particularly enamored of public commercial enterprise nor were they, in many instances, those which accorded domestic institutions immunity. For the purpose of this paper, it suffices to say that each nation has a somewhat different view of immunity and that sweeping statements about "the generally accepted rule of international law" are particularly dangerous when referring to immunity.

Almost without exception, the cases discovered involving non-appropriated funds have arisen since 1953. A number of reasons may account for this: the fact that until 1958 non-appropriated funds had commercial insurance protecting them from tort suits; the special relationship of the United States with its host nations; and a natural reluctance, on the part of foreign nationals, to sue when administrative and diplomatic channels were available. These factors still exist today, but one has changed in the last decade. Until 1952, the Department of State insisted that foreign governments were immune from suit in our courts; and, as a corollary of this policy, we had requested similar treatment in most suits brought against the United States in other nations.

The State Department's *volte face* was announced in the famous *Tate Letter*[10] in which the Acting Legal Advisor of the Department advised that it would henceforth be the United States' policy to grant sovereign immunity to foreign governments only when public acts were involved. By implication, it could be deduced that the United

[9] 26 Dep't State Bull. 984 (1952).
[10] *Ibid.*

States would be more selective in its assertion of the immunity defense.[11] It may be coincidental, but the volume of suits brought against American non-appropriated funds overseas increased greatly after publication of the *Tate Letter*.

The most practical approach is a country by country survey of suits involving non-appropriated funds; in reviewing the cases, two factors and one caveat must be kept in mind. The factors are: the publication date of the *Tate Letter* (1952), and each foreign nation's attitude toward sovereign immunity. The caveat is that there have been so few reported decisions that it is difficult to ascribe a pattern to them.

THE UNITED KINGDOM

One of the earliest cases involving non-appropriated funds arose in Great Britain and it is, apparently, the only one which resulted in suit before that nation's courts. The case was captioned *Curry v. Howard and Caldwell*.[12] The plaintiff, a farm laborer, was struck by an Exchange Service vehicle driven by the defendant Howard, an American lieutenant. Curry first sought redress under the Foreign Claims Act,[13] but was advised that he should file a claim against the exchange's insurance carrier. When he could not satisfactorily settle his claim, he sued the driver and Colonel Robert Caldwell, Chief of the Air Force's European Exchange Service. The insurance company asked the Exchange Service for permission to assert the defense of sovereign immunity. The non-appropriated fund, however, waived the defense and, while the result of the trial is not known, there is no doubt that the English court's jurisdiction to hear the case was not challenged.

GERMANY

Suits sounding both in contract and in tort have arisen in Germany. Surprisingly, however, the earliest reference to non-appropriated fund status in Germany involved their liability for local taxes. In May 1947, the office of American Military Government for Germany rendered an opinion that non-appropriated funds were not liable to German taxation on the grounds that they were instrumentalities of the War Department (citing *Second Standard Oil*) and, thus, part of the Army of Occupation.[14]

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[11] See Bishop, *New United States Policy Limiting Foreign Immunity*, 47 Am. J. Int'l L. 93 (1953); Drachsler, *Some Observations on the Tate Letter* 54 Am. J. Int'l L. 790 (1960).

[12] Civil Suit filed July 22, 1953, High Court of Justice, Queens Bench Division, London. All information regarding this case is drawn from an unpublished memorandum of the General Counsel of the Army and Air Force Exchange Service entitled "A Study of the Legal Status of the Army and Air Force Exchange Systems," (1953).

[13] Act of January 2, 1942, 55 Stat. 880, 31 U.S.C. 224d, as amended.

[14] Vol. III Opinions of the Legal Advisor, Office of Military Government for Germany, 80 (1947).

As was pointed out in the prior chapter on non-appropriated fund tort liability, the commercial insurance policies, carried by non-appropriated funds, normally contained a provision that in the event of a dispute between the claimant and the insurance carrier, arbitration would be resorted to. This substantially limited the number of tort claims which resulted in suits. Of course, arbitration panels were not available overseas, and the result is reported in a 1953 memorandum of the General Counsel of the Exchange Service in which, referring to Germany, he states:

> It appears that in some instances, where there has been a desire to provide a forum for the claimant (American Arbitration Association panels are not available), the defense of governmental immunity has not been asserted. In other cases, governmental immunity has been successfully maintained. Judges of the High Commissioners' Court have, therefore, been placed in an unsupportable position of recognizing the immunity of [the European Exchange Service] from their jurisdiction, yet for expedience and convenience, assuming jurisdiction for the disposal of certain cases.[15]

Unfortunately, none of these District Court opinions were reported, but one is cited in a Court of Appeals decision. The cited portion, set forth below, suggests another reason why the courts were willing to accept jurisdiction:

> For the European Exchange System to dodge its responsibilities to set up a claims service, where just claims may fairly be heard and determined, by paying premiums to an insurance company to take care of them; and then for the insurance company to collect premiums but deny liability on the ground that the European Exchange System is a government agency, smacks of fraud.[16]

It should be noted that the Court of Appeals held that the European Exchange Service was immune, inasmuch as, at the time the suit was initiated, there were no provisions for waiving sovereign immunity; subsequently such waivers were authorized. In one subsequent tort case waiver was authorized, possibly due to the availability of commercial insurance.[17]

However, in the only fund contract suits arising in Germany, waiver was not authorized, possibly on the grounds that since there was a disputes clause in the contested contracts, the plaintiffs had been afforded a forum.

Both of the contract cases arose after the *Tate Letter*. In the first case, *Rotterdamache Margarine Industrie v. European Exchange System*,[18] the

[15] *Op. cit. supra* n. 12, at 6.

[16] Berufsgenossenschaft Nahrungsmittel und Fremdenverkehr v. European Exchange System, XIV Court of Appeals Reports 171 at 172 (U.S. Ct. of Appeals for the Allied High Comm. for Germany) (1952).

[17] Annelese Knoll v. EES and Karl Nowak, XVII Court of Appeals Reports 222 (U.S. Ct. of Appeals for the Allied High Comm. for Germany) (1953).

[18] Landgericht, Frankfurt/Main, Opinion of December 6, 1956, unreported. For the data concerning this and most of the cases reported in this chapter I am indebted to the Foreign Litigation Branch of the Civil Division, Department of Justice.

plaintiff alleged: that the non-appropriated fund was a separate legal entity of the United States, Department of the Army; that it was organized as a commercial enterprise for profit; and that, operating as a non-appropriated fund agency, it was not within the Army budget. It contended that, since exchange contracts were not contracts of the United States, suit could be brought against the Exchange Service as a separate body. Of course, the plaintiffs argued that the Exchange Service was a commercial, not a sovereign, activity. Although the defendant submitted all the standard arguments for immunity,[19] the court concluded that the non-appropriated fund was not immune since the contract was explicitly not a United States Government contract.

In the other case, *Wuliger v. Headquarters, 7480th Supply Group (Special Activities)*[20] the plaintiff sued because his employment contract with an Air Force exchange had been terminated. He used essentially the same argument as had been advanced in the *Margarine* case supra. However, the Labor Court in Weisbaden had no difficulty in concluding that the Exchange Service was an official (i.e., sovereign) activity of the United States and, as such, was immune.

FRANCE

On June 9, 1954 the Judge dePaux (Justice of the Peace) in Dange, rendered a decision in the case of *Billet v. Col. Stevenson*, which involved the suit of a former exchange employee, brought against the exchange officer for salary, accrued leave, and damages allegedly the result of improper firing. The court held that since the defendant was acting within the scope of his assigned duties, he was acting as an agent of the sovereign and the court had no jurisdiction. A week later, on June 16, 1954 the Counsel dePrud'hommes (Labor Court) in Bordeaux considered a similar complaint in *Bouchez v. Fagella, Director, Bussac Special Service Club.* The court held that the Service Club, as a branch of the United States Army, had no commercial character and, that the court had no jurisdiction to hear the employer's [employee's?] complaint. The following week, on June 23, the same court reached a similar finding in *Potasso v. Enlisted Men's Club in the Person of M/Sgt. Robert Bankson.* Other French cases which have held that the non-appropriated fund, as an employer, could not be used were *Rafanvitch v. French Central Exchange in the Person of Director General William R. Brashers*,[21] *Gerow v. French Central Exchange*,[22] and *Alwast v. Manager of*

[19] Substantial portions of both briefs are found in "Sovereign Immunity of Army and Air Force Exchange Systems from suits in Courts of Foreign Countries," Office of General Counsel, Army and Air Force Exchange Service, July 6, 1956, 42–50.

[20] Labor Court, Weisbaden, October 8, 1958, unreported.

[21] Labor Court, Fontainebleau, September 20, 1954, unreported.

[22] Labor Court, Bordeaux, October 4, 1954, unreported.

the French Central Exchange.[23] In the latter case, a Justice of the Peace Court had granted a default judgment against the non-appropriated fund[24] but was reversed on appeal. These decisions, and that of *Cohen Solal v. French Central Exchange*,[25] decided the following year, seemed to settle that an aggrieved fund employee could not sue his employer.

Only one French case has been discovered involving a non-appropriated fund contract. In *Montano v. NCO Open Mess*,[26] a cryptic Justice Department note states that the fund was found immune from suit on a contract.

As was pointed out in the introductory comments, France has held that the sovereign is not immune from suit for commercial activities. On this basis the French courts' refusal to accept jurisdiction when suit is brought against a recreational club is somewhat understandable. However, as will be seen in the discussion below, Italian courts have considered that some non-appropriated fund activities may be commercial in nature. It is, therefore, not clear why the French have been unwilling to entertain suits against exchanges which are certainly the most commercial of all non-appropriated fund activities.

JAPAN

Only three cases arising in Japan have been discovered; all of them involve labor disputes. In the earliest, *Tomizu Yukawa* v. *Lt. Col. Donald D. Hoover*,[27] the District Court of Amori refused jurisdiction in a suit against the officer in charge of an officers' club. The court, looking at the non-appropriated fund regulations and determining that the club was an instrumentality of the United States, concluded that the sovereign, as the real party in interest, could not be sued. However, in a decision later the same year (1955), *Satoshi Yamaguchi* v. *Capt. Lincoln McKay*,[28] another District Court accepted jurisdiction in a suit involving a non-commissioned officers' club at Itazuke Air Base. Neither the facts nor the court's decision is available in the latter case. In the third suit, *Suzuki* v. *Tokyo Civilian Open Mess*,[29] the Japanese Foreign Ministry appeared for the non-appropriated fund and made a suggestion of immunity which the court accepted. Since Japan adheres to the classical doctrine of total sovereign immunity, the

[23] Civil Tribunal, St. Nazaire, November 22, 1954, unreported.

[24] Judgment of March 19, 1954, Justice of the Peace Court, St. Nazaire.

[25] Civil Tribunal, Fontainebleau, No. 6–68 & 69 of 1955, decided October 19, 1955, reversing a judgment in absentia of Fountainebleu's Labor Court, dated February 15, 1954.

[26] Tribunal l'Enstance, Dreux (Eure-et-Loire), July 19, 1960.

[27] Case No. 140–4 of 1955, Amori District Court, February 14, 1956; No. 72, Hanrei Jiko, 1907 (April 1, 1956); 2 Jap. Ann. of Int. L., 140 (1958); reported *sub nom. In re* Hoover, [1956] Int'l L. Rep., 295 (No. 23).

[28] Case No. Yo–26 of 1956 Fukuoka District Court, March 23, 1956; No. 84, Hanrei Jiko, 25 (September 1, 1956).

[29] Tokyo District Court, March 16, 1957, unreported.

Yamaguchi case, in which a court accepted jurisdiction, is an unexplicable deviation.

ITALY

A number of interesting cases have arisen in Italy which, it will be recalled, has always adhered to the limited doctrine of sovereign immunity. The earliest reported decision, *Branno v. Ministry of War*,[30] involved a suit on a contract by a canteen concessionaire who apparently had been hired by a non-appropriated fund through the Italian Ministry of War. Although the United States contended that the non-appropriated fund was immune, the Italian Supreme Court concluded that the contract did not involve a public act and that Italian courts would have jurisdiction in such a situation. To further tarnish the immunity image, four default judgments against non-appropriated funds were granted by the Tribunal of Naples; three involved a Navy Enlisted Men's Club[31] and one involved a Navy exchange store.[32] This series of decisions culminated in the case of *Venezuelan Naval Mission v. Bernadini and others*[33] which involved the alleged breach of an employment contract with certain Italian citizens hired to work in the defendant's officers' mess. The Venezuelans contended that their non-appropriated fund contract was immune from challenge. The Italian Supreme Court, as it had in the earlier *Branno* case,[34] concluded that the contract was of a private character and that the rights of the parties could be adjudicated.

CONCLUSION

The cases described here are too few, and the facts too scanty, to do more than suggest a few conclusions. The first of three is that while the United States has consistently argued before American courts that non-appropriated fund contracts are not contracts of the United States, exactly the opposite approach is used in suits brought overseas. Suddenly, non-appropriated fund contracts are acts of a foreign sovereign, not challengeable in local courts. The results are as ludicrous as the position adopted, and are perhaps best illustrated in the German *Margarine* case discussed supra[35] in which the plaintiff argued that the exculpatory language of the non-appropriated fund

[30] Court of Cassation, June 14, 1954; [1955] Int'l. L. Rep., 756 (No. 22).

[31] Caiano v. U.S. Navy; Dubbio v. U.S. Navy; Grutty v. U.S. Navy, Tribunal of Naples, March 23, 1956.

[32] Tilena v. Ship's Store Ashore, Tribunal of Naples, January 25, 1957.

[33] Court of Cassation, October 28, 1959; Revista di Diritto Internazionale XLIII (1960) p. 525; [1963] Int'l. L. Rep. 413.

[34] Court of Cassation, June 14, 1954; [1955] Int'l. L. Rep., 756 (No. 22).

[35] Rotterdamache Margarine Industrie v. European Exchange System Landgericht, Frankfurt/Main, December 6, 1956, unreported.

contract and regulations, which purportedly immunized the United States from suit, proved that the contract was not an act of the sovereign. Meanwhile, the United States valiantly adduced evidence to show that the non-appropriated fund is an arm of the Government, that it was not a suable entity, and that (as a corollary) such a contract was an act of the sovereign. One wonders how the Court of Claims would have responded to such an argument.

We have seen in Chapter I that non-appropriated funds are integral parts of the Government and there can be no doubt that their contracts, and torts, are sovereign acts. We have seen further that the publication of the *Tate Letter* seems to have triggered a rash of suits against non-appropriated funds; in 1961, the State Department and Department of Justice were compelled to set up a special procedure to handle such suits.[36] However, the United States has continued to argue that the transactions of non-appropriated funds are public acts (Jure imperii) and not private ones (Jure gestionis), and may thus not be challenged in court. With few exceptions, notably in Italy, this argument has been successful. But, is it logical and does it accurately reflect the spirit of the *Tate Letter?*

Neither of these questions is easily answered. The question of limited or total jurisdiction has generated innumerable scholarly considerations, including one effort at predicting, on a nation by nation basis, the treatment which non-appropriated funds could expect overseas.[37]

The Department of Justice shows no evidence of an intent to apply the *Tate* philosophy by waiving the immunity of non-appropriated funds. Assuming that this policy remains consistent, what may be expected of the foreign courts where such suits might be brought? If there is a gradual trend toward limited immunity, it is so gradual that in the foreseeable future the funds and the United States will continue to enjoy immunity in those nations which follow the classical doctrine. Of course, there are bound to be judicial aberrations and "anti-immunity" decisions are not likely to be appealed when they do occur, as is illustrated by the rarity with which adverse decisions have been challenged by non-appropriated funds overseas. Presuming the status quo in those countries which adhere to the classical doctrine, no such presumption can attach to those nations which have already accepted the concept of limited immunity. Italy has held non-appropriated

[36] See unclassified instruction dated June 16, 1961, 53 Am. J. Int'l. L. 533 (1962).

[37] Herrod, *Sovereign Immunity and Military Activities Overseas*, Unpublished Thesis, Army JAG School (1956). Col. Herrod did not have the advantage of Department of Justice files and apparently based his paper on personal experience, correspondence with other Judge Advocates, and the analysis of foreign cases involving governmental commercial operations. Considering his limited sources, he is quite successful in predicting non-appropriated fund status on a country-by-country basis.

funds subject to suit; while the situation there will not change, so few Americans are stationed in Italy that it is doubtful that many cases will arise. France's position has remained anomolous; although adhering to the restrictive theory, her courts have persisted in considering non-appropriated funds immune. This may be due to the fact that all non-appropriated fund employees hired by the French Government are under an "indirect hire"[38] system, which invokes liability on the host government, while tort and contract claims have been settled amicably through administrative channels.

Although no substantial changes are predicted, as some of the antiimmunity decisions become known, it would not be surprising if they had their effect not only on foreign courts but on domestic ones as well. Problems involving the concept of sovereign immunity are particularly susceptible to a comparative law approach and if any American court were to attempt a new tack in non-appropriated fund law, these foreign decisions might well assume new importance. At the very least, the Government's arguments before foreign courts offer the domestic plaintiff a valuable source of impeaching material. While it can be argued that there are definite distinctions between the immunity arguments advanced overseas and those used in American courts, the fact remains that what is not a United States obligation in America undergoes a metamorphosis if subjected to an alien environment and suddenly becomes an act of the sovereign. It is difficult to offer a legal reason for the difference.

CHAPTER VI. MISCELLANEOUS PROBLEMS INVOLVING NON-APPROPRIATED FUNDS

INTRODUCTION

As we have seen, the anomolous status of non-appropriated funds has caused confusion in the major areas of the law: torts, contracts, taxation, and constitutional relationships. Prior chapters have covered the bulk of administrative and judicial opinions pertaining to non-appropriated funds, however, there remain a few topics which merit some comment. These subjects will be considered in random order, the only underlying theme being the impact of non-appropriated fund status on various legal concepts and statutes. However, it would be well to start with a short discussion on the limitations, if any, of non-appropriated fund operations.

[38] The indirect hire system is based on a contract of employment between the host nation and the employee, who is then directed to work at an American military installation. Although the employee is supervised and paid by the Americans, his employer is the host government.

CREATION OF NON-APPROPRIATED FUNDS AND THEIR AUTHORIZED ACTIVITIES

In the chapter devoted to the historical development of non-appropriated funds, it was seen that co-operative stores were the traditional source of fund revenues. While the total assets of non-appropriated funds have never been published, we have also seen that post exchanges and ship's stores operations are by far the largest contributors to recreation and welfare funds and that Exchange Service contributions to Army and Air Force Welfare Funds in the past five fiscal years have averaged fifty-six million dollars per annum. Money from these stores, limited sums appropriated by Congress, and revenue generated by various quasi-commercial activities, such as bowling alleys, messes, and other clubs, all serve to meet the recreational needs of servicemen, their families, and civilian employees of the Armed Forces. The fact that money is available seems to account for the need for such activities: if there could be said to be a Parkinson's law for non-appropriated funds, it would be that "Need expands more rapidly than the revenue available to meet it." Non-appropriated funds expand and proliferate in order to consume the revenue generated and to produce more income to meet greater demands.

With few exceptions, fund attempts to broaden the sources of income have been successful. In the chapter devoted to fund history, we saw that one of the earliest limitations imposed was a prohibition against the sale of Government property.[1] Subsequent decisions of the Judge Advocate General of the Army, made shortly after the turn of the century, stated that a post exchange might sell electricity to officers' quarters[2] and could rent a building, supply furnishing, and then establish a dormitory for transient military personnel in Manilla.[3] Certainly these activities were outside the scope of the original "co-operative store" concept but, Parkinson's Law was beginning to operate.

There was, however, a limit to what a single exchange officer could supervise, as well as practical limitations on the amount of capital which could be made available for expansion. One of the easiest ways to meet this problem was to enter into so-called "concessionaire agreements" with private individuals who would contract to meet the need for services. One of the earliest allusions to this practice is found in an Army Judge Advocate General opinion written during World War I.[4] Like so many of its kind, the opinion was concerned with the right of a non-appropriated fund to stop a

[1] Note 9, Chapter II *supra*.
[2] Dig. Op. JAG 1912–1917, 231.
[3] Op. JAG Vol. I, 1917, 98.
[4] *Id.* at 213.

soldier's pay for debts; it stated that while the procedure authorized for withholding money for debts to the Government was available to post exchanges, it could not be used for debts to private laundries. However, the opinion suggested, the post exchange could contract with the laundry and the servicemen could do business through the exchange, thus creating a debt in favor of the latter. Of course, such an arrangement was advantageous to the concessionaire, as well as to the non-appropriated fund, and such agreements became more and more common in subsequent years. The Comptroller General of the United States (whose relationship with non-appropriated funds will be considered shortly) challenged the propriety of some of the Navy's concessionaire agreements and, in 1928, required that the proceeds be turned into the General Fund of the Treasury as Miscellaneous Receipts.[5] This controversy continued as late as 1943, when the General Accounting Office advised that the receipts of a Navy cafeteria, run on a concession basis, could not be retained as non-appropriated funds but had to be turned over to the Treasury.[6] Retention of such funds must have been subsequently authorized since concessionaire agreements are often entered into by post exchanges and ship's service stores.[7] In 1947, however, the Judge Advocate General of the Navy opined that messes could not be run on a concessionaire basis[8] and, since then, none of the services have done so.

APPROPRIATED FUND SUPPORT

It will be recalled that an early statute prohibited the support of post exchanges and gardens with appropriated funds.[9] As can be imagined, this prohibition has been strictly construed by the Armed Forces. Although the Judge Advocate General of the Army prohibited the sale of appropriated fund property to increase the funds' revenues,[10] free fuel and lights were authorized for canteens;[11] this privilege was subsequently extended to exchanges and their operations, although not to concessionaires.[12] While enlisted men and officers were detailed to duty in exchanges, a statute[13] prohibited men from acting as officers' servants, and was, apparently, interpreted to preclude the

[5] NB 7/W4-13 (280114) September 25, 1928, 7 Comp. Gen. 806 (1928).

[6] MS. Dec. A-955642, March 19, 1943.

[7] See, for example, the *Army and Air Force Exchange Service Legal Manual* which contains numerous forms for such agreements.

[8] JAG: II: RT: eo: July 24, 1947.

[9] 10 U.S.C. 4779, 9779.

[10] Note 1 *supra*. See also Dig. Ops. JAG 1912-1917, 306, in which a post commander was prohibited from leasing government land under terms which would require the lessors to pay their rent to the post exchange.

[11] 51 JAG Record Book 1882-1895, 239.

[12] Dig. Ops. JAG Vol. 2, 1918, 7.

[13] Act of July 15, 1870, ch. 294, §14, 16 Stat. 319, now found at 10 U.S.C. 3639 and 8639.

former's assignments to officers' messes.[14] An early Court of Claims decision, *William* v. *United States*,[15] held that duty at an officers' club fell within that prohibition and that enlisted men could not be used as waiters. Today, officers and enlisted men are assigned to messes in supervisory positions only, while Navy Stewards in messes ashore are authorized on the grounds that they are a necessity for life aboard ship and, therefore, must keep current in their duties while serving ashore.

In 1941 the Comptroller General authorized shipment of non-appropriated fund property via Government Bills of Lading.[16] Subsequently, the privilege of shipping at Government rates was revoked on the grounds that since the Government did not become responsible for the non-appropriated fund's obligations, the beneficial rates could not be used in shipping fund property.[17] A few months later, the right to use Government Bills of Lading was withdrawn without explanation.[18] Yet, in recent years, non-appropriated funds have been authorized to ship cargo overseas via the Military Sea Transport Service at no cost,[19] and to seek the free transportation of passengers and cargo overseas on military aircraft.[20] Similarly, non-appropriated funds have had the privilege, for some twenty years, of sending telegrams at Government reduced rates.[21] While Navy ship's service stores were initially authorized the use of franked envelopes[22] and this privilege was later extended to messes,[23] only some non-appropriated funds presently use Government "penalty" envelopes. In 1946, Congress passed a law limiting Government vehicles to official uses;[24] less than a year later the Judge Advocate General of the Navy concluded that in view of *Second Standard Oil*, non-appropriated funds were an official Government activity and could use Government vehicles.[25] Today, all the services, under the authority granted them by Department of Defense Directive 1330.2, published on January 19, 1953, accord non-appropriated funds extensive appropriated fund support in-

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[14] IV Bull. JAG 278, reported Army Court Martial 280115 (1945) in which an enlisted man convicted of disobeying an order to perform KP at an officers' mess defended on the basis that the cited statute made the order illegal. The Judge Advocate General of the Army held that under the circumstances the order had a military purpose and was legal.

[15] 44 Ct. Cl. 175 (1909).

[16] Ms. Comp. Dec. B–18342, July 7, 1942, cited in I Bull. JAG 76. See also III Bull. JAG 35.

[17] 3 *Id.* 176.

[18] 3 *Id.* 311. The opinions referred to in notes 16 through 18 all concern post exchanges; presumably they were made applicable to all non-appropriated funds.

[19] Para. 4g (1) (c) and (2) (b), AR 55–168.

[20] Paras. 4a(1), 5(b)(1)(a)(6), AFR 76–15.

[21] Letter, Secretary of the Federal Communications Commission to the Judge Advocate General of the Navy, JAG: II: HJM: ac, May 17, 1944.

[22] JAG: HJD: ec, December 16, 1942.

[23] *Id.*, January 3, 1945.

[24] §16, P.L. 600, 60 Stat. 810 (1946), 5 U.S.C. 78.

[25] JAG: II: RT: eo., May 7, 1947.

cluding the use of buildings constructed with appropriated funds. The Directive was subsequently implemented by Service regulations.[26] The nature of this support is illustrated in Appendix I. Military installation commanders, appropriated fund employees, have been given the authority to employ and dismiss non-appropriated fund employees,[27] approve contracts,[28] and provide sanitation, security, and fire protection.[29] Moreover, one regulation specifically states that buildings erected with Exchange Service funds become the property of the United States.[30]

This recitation of appropriated fund support has a number of purposes. It illustrates another aspect of our Parkinson's Law: that as non-appropriated funds grow more wealthy and extensive, they look more and more to the United States for support. This same catalogue emphasizes the lack of logic implicit in attempting to treat non-appropriated funds as private, nongovernmental activities, whether the effort be a state's, in attempting to tax a non-appropriated fund, or a plaintiff's, in attempting to sue one as a private entity. However, if this roster of Governmental ties emphasizes the public nature of non-appropriated funds, an interesting question arises.

CAN NON-APPROPRIATED FUNDS BE AUDITED BY THE GENERAL ACCOUNTING OFFICE?

In a word, the Armed Services' response to this question would be "no." However, the *United States Government Organization Manual* for 1964–65, in discussing the purposes of the General Accounting Office, states that:

> It has responsibility for performing an independent Government-wide audit of receipts, expenditures, and use of public funds by departments and agencies of Federal Government. . . .
>
> To carry out these functions, the Comptroller General and his authorized representatives are authorized by law to have access to and examine any books, documents, papers or records . . . of any department or establishment.[31]

In view of this statement of authority, the first question to be answered is whether or not non-appropriated funds are public funds. *Black's Law Dictionary* defines public funds as:

> An untechnical name for (1) the revenue or money of a government, state, or municipal corporation; (2) the bonds, stocks, or other securities of a national or state government. Money, war-

[26] *E.g.* AR 210–55; AFR 34–67.
[27] AR 60–21/AFR 147–15.
[28] AR 60–20/AFR 147–14.
[29] AR 60–10/AFR 147–7.
[30] AR 60–20/AFR 147–14.
[31] At 35.

> rants, or bonds, or other paper having a money value, and belonging to the state, or to any country, city, incorporated town or school district. . . . [authorities cited] . . . The term applies to funds of every political subdivision of state wherein taxes are levied for public purposes. . . .[32]

To the extent that non-appropriated funds are the revenue or money of a government instrumentality, funds are public and fall within both the first and second definition of *Black*. The problem is, of course, that these funds, while "public," in some senses, have not been subjected to the same controls and safeguards as those imposed on appropriated funds.

This paper is devoted to the non-appropriated fund's ambiguous status, so it would serve no useful purpose to reiterate that which has already been said about the funds as Government instrumentalities. It will, however, be valuable to examine the attitude of the General Accounting Office, and its predecessors, towards them. The earliest reported Comptroller's decision, which concerned a Navy canteen (a non-appropriated fund) and an appropriated fund mess, suggested that both were subject to audit, although the Government would not be liable for any loss of money for the former.[33] In 1915, the then Acting Secretary of the Navy, Franklin D. Roosevelt, advised the Comptroller of the Treasury that the latter had no jurisdiction over non-appropriated funds. Apparently the Navy was successful in its efforts to preclude such audits, since the next allusion to them was some nineteen years later when the Judge Advocate General of the Navy concluded that the newly organized General Accounting Office had no more authority in this area than its predecessors.[34] However, the matter was not settled until after World War II. An unpublished decision of the Comptroller General, rendered in 1942, held that commissions from vending machines set up in an armory composed of 63 military men and over 10,000 civilians, could not be used for the former's recreational (non-appropriated) fund and that the money received should be turned into Miscellaneous Receipts of the Treasury.[35] Although the Judge Advocate General of the Army did not publicly disagree, the fund's custodian was criticized for allowing the auditors entrance without permission of the War Department.[36] A year later, the Army Judge Advocate General stated that the General Accounting Office had no interest in non-appropriated fund records.[37]

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[32](4th ed. 1951).

[33]12 Comp. Dec. 678 (1906).

[34]Op. JAG: LL 1/JF (340824), September 11, 1934.

[35]Ms. Comp. Gen. A–51624, October 14, 1942.

[36]II Bull. JAG 117.

[37]IV Bull. JAG 106, which in considering the applicability of the Act of July 7, 1943, 57 Stat. 380, 44 U.S.C. 366, to non-appropriated fund records, concluded that while the approval of the

During the House Armed Services Committee *Hearings before a Special Subcommittee on Resale Activities of the Armed Services*, which were held in 1949, a representative of the General Accounting Office testified that his office felt that non-appropriated funds, particularly the post exchange activities, should be audited. He stated that, while the General Accounting Office had reached this conclusion during World War II, the War Department had refused—on occasion physically barring General Accounting Office auditors, and the Comptroller General had not insisted.[38] At the conclusion of the hearings, the subcommittee stated that the General Accounting Office had agreed to forego its insistence on regular audits in return for a guarantee that non-appropriated fund accounting procedures would be changed to meet the General Accounting Office's more stringent standards,[39] and thus the matter stands today.

PROCUREMENT

If non-appropriated fund assets are not public, in the sense of being subject to audit by the General Accounting Office, then it might be reasonable to conclude that the various statutes which pertain to Government procurement do not apply to funds. This is generally correct but there are a number of exceptions. By administrative determination, the Walsh Healy Act[40] has been held to apply to non-appropriated fund contracts on the basis that the Act states it will apply if the contract was executed by an agency of the United States.[41] The Davis Bacon Act[42] was made applicable by a similar decision,[43] although it has been questioned.[44] One court has held the

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National Archives and Congress was required before the records could be destroyed, the General Accounting Office's permission need not be sought.

[38] *1949 Hearings*, 3701 et seq.

[39] *Subcommittee Report to the Full Committee on Investigations of Resale Activities of the Armed Forces*, 81st Cong. 1st Sess., 3809, A. S. Document 106 (1949). Compare S. Doc. 149, 72d Cong. 2d Sess. (1932).

[40] 49 Stat. 2036 (1936), as amended, 41 U.S.C. 35–45 (1958).

[41] II Bull. JAG 475; *Accord.* VI Bull. JAG 74; *In re* Park Sherman Co., Dept. of Labor Hearing Examiner's Dec. PC 424, Feb. 23, 1954 (10 WH cases 140; See also *In re* United Biscuit Co., Administrator's Dec. PC 770, April 25, 1963; *But Cf.* United Biscuit Co. v. Wirtz, Civil No. 278–61, D.D.C., Dec. 1, 1963, 48 CCH Labor cases p. 31,517.

[42] Act of March 3, 1931, ch. 411, § 1, 46 Stat. 1494 (1931); as amended 40 U.S.C. 276a.

[43] Letter to the Department of the Army, dated March 23, 1955 from Asst. Solicitor, Dept. of Labor.

[44] Donahue. The Davis Bacon Act and the Walsh Healy Public Contract Act: A Comparison of Coverage and Maximum Wage Provisions, XXIX Law & Contemp. Prob. 488, 501 concludes that this is a close question inasmuch as the Act refers to contracts to which the United States is a party and the contract immunity cases have held that fund contracts were not contracts of the United States. He is also troubled by the Supreme Court's distinction in Paul v. United States 371 U.S. 245 (1963) between appropriated and non-appropriated fund contracts. In support of the Department of Labor ruling *supra*, he cites the *Phoenix Assurance* case (note 46 *infra*) and a Comptroller General decision holding that the Dual Compensation Act (discussed *infra* at p.

Miller Act[45] applicable to non-appropriated funds contracts. In *United States v. Phoenix Assurance Co.*,[46] the United States District Court for the Northern District of California was faced with a situation in which a private contractor had been hired to build a library building at an Army post. The contract forms used were United States Government Standard Forms but had been amended to make a "Special Facility Fund" the other contracting party. The contractor breached; when the non-appropriated fund looked to the surety, that company, which had not noted the amendment in the forms, refused to finish the work. When suit was initiated, the surety contended that a building constructed by a non-appropriated fund, even though erected on Government property, was not a "public building" within the meaning of the Miller Act. Apparently, the defendant was relying on those cases which had held that non-appropriated fund contracts were not contracts of the United States while the United States used the tax (immunity) cases. The court concluded that since non-appropriated funds are arms of the Government, a fund building is a public building. Thus, the United States may seek judicial enforcement of its contractual rights against a recalcitrant contractor; but when the role is reversed, the contractor's only recourse is administrative.

Non-appropriated fund contracts are now being executed and administered by appropriated fund contracting officers. A recent revision to Air Force Procurement Instructions, AFPI section IV, part 50,[47] requires appropriated fund contracting officers to enter into and execute contracts for construction work and architect-engineer services funded completely from non-appropriated funds; the only exceptions to this rule are Exchanges and operations involving the Army and Air Force Motion Picture Service. An Air Force publication which announced the revision stated:

> This exception to the rule that contracting officers may act only in an advisory capacity on contracts obligating only non-appropriated funds was considered necessary in meeting the requirements of applicable Federal statutes (labor laws, etc.). In accomplishing such contracts, contracting officers must obtain written documentation from the appropriate AF welfare board or fund custodian approving the use of the non-appropriated funds and assuring fund availability when required for payments under the contract.[48]

470) applied to fund employees. Apparently the article was written before the Court of Claims concluded in Gradall v. United States, 329 F. 2d 960 (Ct. Cl. 1963) and Cockrill v. United States, No. 315–58, May 10, 1963, that the Act did not apply. The author also concludes that the Contract Work Hours Standards Act, §§ 101–106, 76 Stat. 357–359 (1962), 40 U.S.C. 327–332 applies to fund contracts since it is applicable to federal public works.

[45] Ch. 642, § 1, 49 Stat. 793 (1935), 40 U.S.C. 270.

[46] 163 F. Supp. 713 (N.D. Calif. 1958).

[47] AFPI Revision 45, August 28, 1964.

[48] XVI The TIG Brief 11 (1964).

One might wonder if a standard form government contract, signed by a contracting officer, and involving a "public building" erected with non-appropriated funds, might not give the Court of Claims some pause, if the United States argued that this was not one of its contracts.

The Executive Order pertaining to non-discrimination in employment has been applied to the funds,[49] and present practice indicates a similar application of Executive Order 10998, which authorizes Government employees to join labor unions.[50]

CRIMINAL LAW

When we consider the elaborate distinctions drawn between appropriated and non-appropriated funds, it is not surprising that the confusing status of the funds would be reflected in the area of criminal law. Since the basic purpose of the criminal charge is to advise the accused of his offense with particularity, the most troublesome question involving non-appropriated funds is whether or not their property is property of the United States. While modern criminal pleading has de-emphasized strict adherence to Common Law technicalities, indictments still fail when ownership is improperly alleged. It will be seen that this problem of pleading has arisen with some degree of regularity, as has a more basic question, the applicability of certain statutes which pertain to crimes against the United States.

The earliest discovered opinion, rendered by the Judge Advocate General of the Army in 1880, states that a theft of musical instruments purchased with non-appropriated funds but used by an appropriated fund activity (a military band), would be a theft of public property.[51] However, thirteen years later, the same source, in talking about failure to pay a debt due a post exchange, concluded that

> The civil obligation not being to the United States, the failure to meet it cannot . . . in my opinion involve a criminal liability to the United States which may be taken cognizance of by a United States military court.[52]

And, while fraud committed by a post exchange steward was considered a military offense,[53] falsification of non-appropriated fund records and embezzlement of the funds were not considered constituting a falsification of public funds.[54]

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[49] Exec. Order 10925, 26 Fed. Reg. 1977 (1961); Exec. Order 11114, 28 Fed. Reg. 6485 (1963).
[50] 27 Fed. Reg. 551 (1962).
[51] XLIV 1842–1889 JAG Record Book 249.
[52] 61, 1882–95 JAG Record Book. 479, 481.
[53] Dig. Op. JAG 1901, 558.
[54] CMO 190–1918, 17. In this regard it is entirely possible that there was no requirement imposed by regulation that non-appropriated fund records be kept; 26 Comp. Gen. 122 (1946) points out that Navy messes were unregulated for some years.

And thus the matter rested until 1921 when the first federal case pertaining to non-appropriated fund criminal offenses was decided. *Keane v. United States*[55] was decided by the Fourth Circuit in 1921. The accused had been convicted of conspiring to defraud the United States. He appealed on the basis that the facts established that the fraud, if it existed, was against a post exchange, which was not within the purview of the statute under which he had been convicted. The Circuit Court's opinion seems to have turned on two issues, one minor and the other major. The minor point seems to have been the fact that, while non-appropriated funds were authorized by regulation, they were not required and were, therefore, basically voluntary associations. However, the court's main reason for reversing the conviction was the fact that non-appropriated funds were (redundantly) not appropriated by Congress and, according to the court, were not public moneys. The latter conclusion was based on very weak authority: two World War I Board of Contract Adjustment decisions in which the Board had held itself lacking jurisdiction in non-appropriated fund contract disputes,[56] and the early statute[57] which had held that no funds would be appropriated for the support of post gardens and exchanges. The statute, said the court, was the only reference to post exchanges ever made by Congress. The court formulated a test—that Congress must appropriate funds to maintain and operate the activity being defrauded, before the criminal statute would apply. On the face of it, the conviction failed to meet this standard and was reversed.

One judge dissented in *Keane*, but his disagreement did not go to the nature of non-appropriated funds, turning on the fact that there had been a corrupt agreement for an officer of the United States to be false to his duties; using this rationale, there would have been a conspiracy to defraud the United States.

Keane has been rarely cited, in any context, for two reasons: the Government argument that non-appropriated funds are instrumentalities of the United States is not supported by the *Keane* opinion and, in the light of changing circumstances, the anti-instrumentality camp could not depend on its reasoning either. While *Keane's* rationale was valid at the time it was written, Congress did subsequently allude to non-appropriated funds, and they did become something more than voluntary associations as the right to organize and disband them was taken out of the hands of the membership and taken over by military commanders. Moreover, during the following two decades, starting with *First Query*[58] and culminating in the *Second Standard Oil* case,[59] a

[55] 272 F. 577 (4th Cir. 1921).
[56] 1 War Department Board of Contract Adjustments 160 and 527, discussed *supra* at p. 396.
[57] 27 Stat. 178 (1892), discussed *supra* at pp. 365.
[58] United States v. Query 21 F. Supp. 784 (E.D. So. Carolina 1937).
[59] 316 U.S. 481 (1942).

number of federal courts concluded that for some purposes at least, non-appropriated funds were instrumentalities of the United States. Thus, like the smile of the Cheshire cat in *Alice's Adventures in Wonderland*, the fact of the *Keane* opinion remained long after its substance had disappeared. Today, when post exchange sales are in the millions of dollars and the Governmental nature of non-appropriated fund operations is never less in doubt, it seems certain that the *Keane* conviction would not have been reversed.

This conclusion is supported by four opinions rendered in the early 1960's. The first, *Harlow v. the United States*,[60] involved crimes involving the European Exchange Service. The indictment was brought under 18 U.S.C. 202 and 371 which relate to acceptance of bribes by employees of the United States and conspiracy to defraud the United States. The defendants argued that they were not federal employees, but the Circuit Court of Appeals for the Fifth Circuit concluded that as employees of an instrumentality of the United States they were subject to prosecution under 18 U.S.C. 202. Surprisingly, the Circuit Court's opinion does not allude to the *Keane* rationale in its discussion of the conspiracy count, nor did the defendants apparently raise the issue. However, the court's opinion tied the non-appropriated fund to the United States so firmly that one could reasonably conclude that *Keane* had been over-ruled by implication. A year later the United States District Court for Missouri in *United States v. Brethauer*[61] was called upon to consider a prosecution under 18 U.S.C. 1001, which declares it a criminal offense to make false statements in any matter which falls within the jurisdiction of any department or agency. In *Brethauer* the false statement related to business with a post exchange, and the defendant, relying on *Keane*, moved to dismiss. While the *Brethauer* opinion, which denied the defendant's motion, turned in large part on the fact that the "false statement" statute was much broader than the statute in *Keane*, the court devoted an extensive portion of its opinion to an analysis of the nature of non-appropriated funds. The Court noted that while post exchanges do not have a statutory paternity, "Congress has constitutional power to authorize the adoption and legitimatization of many institutions that it may not have earlier chosen to sire."[62]

After considering *Second Standard Oil* and the statutory enactments pertaining to non-appropriated fund employees, the court concluded that the post exchanges were within the jurisdiction of a federal agency. The motion was dismissed and the defendant was subsequently convicted.[63]

[60] 301 F.2d 361 (5th Cir. 1962), *cert. denied* 371 U.S. 814 (1962).
[61] 214 F. Supp. 820 (W.D. Mo. 1963).
[62] *Ibid.*
[63] 222 F. Supp. 503 (W.D. Mo. 1963).

In a somewhat similar case, decided the same year, *United States v. Howell*,[64] the Government brought suit against post exchange concessionaires who had understated their gross receipts in order to limit their commission payments. While the Ninth Circuit dismissed those counts of the United States' suits which were based on the False Claims Act,[65] the court overruled the defendants' contention that the United States was not the proper person to bring the action, since the money allegedly due was to be paid to the non-appropriated fund. The court concluded that if post exchanges were federal agencies for the purpose of the Tort Claims Act and enjoyed Governmental immunity, they were such an integral part of the Government that the United States could sue to protect their interests. Almost the same reasoning was followed in an opinion covering the Government's civil suit against *Brethauer* (whose criminal prosecution is discussed *supra*). While that District Court concluded that the False Claims Act did not apply, it left open the question of the United States' right to bring a civil suit.[66]

However, these four decisions were thirty years in the future, and a number of other cases arose in the interim. In 1931, a sailor's conviction for embezzlement of non-appropriated funds was reversed because it was based solely on the fact that he was proven to have had possession of the funds and subsequently could not account for them. The Judge Advocate General of the Navy concluded that while this was enough to sustain a conviction involving public money, it was not enough when non-appropriated funds were involved.[67] Similarly in 1950, the Judge Advocate General of the Navy reversed a conviction for theft of property of the United States intended for the Naval Service; the property in question was whiskey, stolen from an enlisted men's club. The reversal was based on the reasoning that non-appropriated funds are, by their nature, not appropriated, and, therefore, property bought with these funds is not public.[68]

However, not all prosecutions involving non-appropriated fund crimes failed, as is illustrated by a number of Army opinions rendered during World War II. Article of War 93, pertaining to theft from any person, was held to apply thefts from a laundry fund,[69] as well as thefts from other funds.[70] Although non-appropriated fund records were held to be official, in the sense that one could be convicted of falsifying them,[71] it appears that the theft of funds could not be alleged

[64] 318 F.2d 162 (9th Cir. 1963).
[65] Act of March 2, 1863, ch. 67, §§ 1, 3, 12 Stat. 696, 698, 31 U.S.C. 231.
[66] United States v. Brethauer 222 F. Supp. 500 (D. Mo. 1963), *ret'd for further briefs.*
[67] CMO 12–1931, 15.
[68] MM Gregory, William Lee/A 17–20, March 24, 1950.
[69] CM 244621, III Bull. JAG 99.
[70] CM ETO 8164, IV Bull. JAG 232.
[71] CM ETO 8164, IV Bull. JAG 232.

as a theft of public money under Article of War 94 because there was no requirement that such money be turned over to the Treasury.[72] Since the passage of the Uniform Code of Military Justice,[73] the problem of alleging ownership rarely arises because the punishments for theft from a nongovernmental entity are the same as those in cases involving thefts from the United States.[74]

On occasion, the right of the military to use enlisted personnel in certain types of non-appropriated funds has been questioned. The problem arises in a criminal context when an individual, accused of disobeying a lawful order, defends on the basis that R.S. 1322,[75] which prohibits the use of enlisted men as servants, makes the order illegal. In World War II, a soldier, who raised this defense, was convicted of disobeying an order to perform K. P. at an officers' mess. In 1945, the Judge Advocate General of the Army concluded that, while it appeared that the soldier was being called on to act as a servant, he was in fact being used in furtherance of a military purpose and the order was therefore legal.[76] A similar decision was reached by the Court of Military Appeals in 1955.[77]

NON-APPROPRIATED FUND PROBLEMS INVOLVING RETIRED MILITARY PERSONNEL

Section 212a of the Economy Act of June 30, 1932, as amended,[78] also known as the Dual Compensation Law, provides that a commissioned officer, if retired from the federal service and continuing to work for the Government in another capacity, cannot earn more than an aggregate of ten thousand dollars from the two sources. The clear purpose of the law is to limit Government employment expenditures. Of course, the question arises as to whether or not a retired serviceman, employed by a non-appropriated fund, is subject to the Act. In 1934, the Judge Advocate General of the Navy concluded that the Act did not apply because the individuals who hired non-appropriated fund employees did not have the authority to hire Government employees.[79] The same opinion used the fact that the Comptroller of the Treasury was not concerned with non-appropriated funds as further evidence that the Act did not apply. What the Navy failed to realize was the fact that the Comptroller was definitely interested in the

[72] CM 33085, VIII Bull. JAG 13.

[73] 10 U.S.C. 801.

[74] See generally ACM 4374 Bergin, 7 CMR 501, 528 (1951) (dissent) which while it involves a trial under the Articles of War, discusses the ownership of non-appropriated fund property.

[75] 10 U.S.C. 3639 and 8639.

[76] CM 280115 IV Bull. JAG 278 (1945).

[77] United States v. Robinson, 6 U.S.C.M.A. 347, 20 C.M.R. 63. Compare United States v. Woolbright, 12 U.S.C.M.A. 450, 31 C.M.R. 36, in which the issue was raised but not decided.

[78] Act of June 30, 1932, ch. 314, § 212, 47 Stat. 406, as amended, 5 U.S.C. 59a.

[79] CMO 9–1934, 10.

expenditure of retired pay which was, of course, appropriated money. Two years later, the Comptroller held that the Act did apply to employees of the Naval Academy laundry, a non-appropriated fund;[80] the following year, he reaffirmed his opinion[81] and, when his ruling was challenged before the Court of Claims in the case of *Sullivan v. United States*,[82] the court agreed that the Act applied. In an unpublished opinion rendered in 1940, the Comptroller extended the Act's application to post exchanges[83] but was compelled to reaffirm it five years later.[84] In 1946, he made it clear that the Act also applied to Navy messes ashore (i.e., officers' clubs).[85]

One could conclude, from the number of rulings required, that the Armed Services did not make any effort to bar retired personnel from non-appropriated fund employment but preferred to interpret each ruling as applying only to the individual concerned. However, this was not the case; both the Army and Navy announced their decisions to their subordinate units and concluded that the Act did apply to all non-appropriated funds.[86] However, it appears that retired personnel were still hired by non-appropriated funds and that, short of periodic auditing of retired pay records, no steps were taken to advise retirees of the problem.

As a result of an audit, money was withheld from the pay of a retired Colonel, McFarland Cockrill, who was employed by the Fort Sam Houston (Texas) Golf Club, and from a retired Captain, Glen P. Gradall, an employee of the Army and Air Force Exchange Service. Both sued the United States in the Court of Claims, and both cases were decided on the same day, May 10, 1963. The shorter but more comprehensive opinion was *Gradall* v. *United States*,[87] in which the court held that the Dual Compensation Law did not apply to non-appropriated fund employees. As usual in such cases, the court began its decision with a review of *Second Standard Oil* and concluded that non-appropriated funds were instrumentalities of the United States. It then proceeded to examine the regulation, pertaining to the Exchange Service, which said in pertinent part:

> The United States is not responsible for contract, tort and compensation claims against the Army and Air Force Exchange Systems and has not waived its immunity from suit on those claims. Any claim arising out of the activities of the Army and Air Force

[80] 17 Comp. Gen. 786 (1938).
[81] 19 Comp. Gen. 191 (1939).
[82] 92 Ct. Cl. 154 (1940).
[83] MS Dec. B–10668, August 2, 1940.
[84] 24 Comp. Gen. 771 (1945).
[85] 26 Comp. Gen. 122 (1946).
[86] II Bull. JAG 373 (1943); *Id.* at 465 (1943); JAG: II: HTS: mh. December 19, 1946.
[87] 329 F.2d 960 (Ct. Cl. 1963).

Exchange Systems shall be payable solely from non-appropriated funds.[88]

The court also noted the regulation[89] and statute[90] which extended unemployment compensation benefits for federal employees to non-appropriated fund workers. Then, the *Gradall* reasoning becomes questionable. The court noted that non-appropriated fund employees cannot sue the United States under the Tort Claims Act or Federal Employees' Compensation Act, and cited *Aubry v. United States*[91] and *Denenberg v. United States*[92] as its authorities. Of course, the implication from these cases, which had held that an employee's only recourse is against the instrumentality and its insurer, is that the "immunity clause" cited in the regulation above, is correct as it applies to employees. What the court fails to mention is the fact that suits by non-appropriated fund employees against the United States have failed because, like other employees of the United States, they have available to them another remedy which is exclusive. If non-appropriated fund employees were *not* employees of the United States, they would of course be able to sue the United States under the Tort Claims Act, a fact which the Court of Claims chose to disregard. Moreover, while the court cites The Act of June 19, 1952,[93] which states *inter alia* that the provisions of the Federal Employees' Compensation Act will not apply to non-appropriated fund employees, the court fails to refer to Public Law 85-538[94] which, in 1958, gave the United States jurisdiction over non-appropriated fund employees claims by placing them under the Longshoremen's and Harbor Worker's Act. The court continues its attempted buttressing of the regulation by referring to the fact that the United States is not liable for non-appropriated fund contracts and by citing its very questionable conclusion in *Pulaski Cab*[95] that non-appropriated funds are similar to the Red Cross and the United Service Organizations.[96] While it is true that non-appropriated fund contracts have been persistently held not to be contracts of the United States and by implication, non-appropriated fund employees are therefore not employees of the United States, the contract cases are of questionable validity and are not determinative of the issue.

[88] AR-60-10/AFR 147-7A, Exchange Service, dated August 2, 1960, Section 1(7) cited at 329 F.2d 960 at 963. The new regulation issued on January 30, 1964, no longer contains this statement.

[89] *E.g.* AR 60-21, AFR 147-15.

[90] §1501, 68 Stat. 1130 (1963), 4 U.S.C. 1361.

[91] 254 F.2d 768 (D.C. Cir. 1958).

[92] 305 F.2d 378 (Ct. Cl. 1962).

[93] Act of June 19, 1952, ch. 4, §§ 1, 2, 66 Stat. 138, 139, as amended, July 18, 1958, Public Law 85-538, § 1, 72 Stat. 397, 5 U.S.C. 150k.-1.

[94] P.L. 85-538, 72 Stat. 397 (1958), 5 U.S.C. 150k, k-1.

[95] Pulaski Cab Co. v. United States 157 F. Supp. 955 (Ct. Cl. 1958).

[96] See 26 Comp. Gen. 192 (1946), which, by implication, distinguishes such groups from non-appropriated funds.

While the court's reasoning in *Gradall* has some semblance of validity up to this point, the next statement that the court makes, to substantiate its reasoning, is flatly incorrect: "The United States is not liable in tort for acts of the Exchange or its employees."[97] While this statement is true if one is speaking of employee suits, and is a correct summary of the Government's pre-1960 position with regard to third-party suits, the position was explicitly disavowed by the Department of Justice in their letter to the Judge Advocate General on August 1, 1960, because federal courts refused to accept the argument. Moreover, the Court of Claims was familiar with the third-party tort suits since, in *Denenberg v. United States*,[98] cited in the *Gradall* opinion, they had been compelled to consider the tort decisions in arriving at their decision.[99]

This is the heart of the *Gradall* opinion and its reasoning is seriously flawed. The opinion concludes by noting that its reasoning, which purportedly detects a trend establishing that non-appropriated fund employees are not federal employees, does not supply a wholly definitive answer. It then looks to the legislative history of the Economy Act and decides that the Act's purpose was to preclude dual payments, in excess of ten thousand dollars, from appropriated funds. While this is true, the fact remains that the Act was intended not only to limit payments to such dual employees, but also to discourage dual employment and to make the second position available to someone else. Although the Dual Compensation Law may have little relevance to a Government thirty years removed from the Depression, its subsequent amendments in 1954, 1955, 1957, 1958, and 1964 illustrate the fact that Congress still considers it a useful tool in limiting Governmental expenditure. In light of the fact that the Act applies to Government corporations, which have a degree of juridicial independence far greater than non-appropriated funds, it is doubtful if those men who drafted the law would agree with the Court of Claims' decision.

The case of *Cockrill v. United States*[100] was decided by the Court of Claims on the same day. The Court of Claims had previously considered Cockrill's claims.[101] At that time they noted that when Congress had passed a private relief bill to relieve Cockrill of part of his indebtedness

> It [was] apparent from the legislative history that the view of Congress was that the plaintiff was indebted to the Government, as the Comptroller General ruled that he was . . .[102]

[97] 305 F.2d 378, 380.
[98] 305 F.2d 378 (Ct. Cl. 1962).
[99] 305 F.2d 378, at 380.
[100] No. 315–58, May 10, 1963.
[101] 292 F.2d 288 (Ct. Cl. 1961).
[102] 292 F.2d 288, 289.

The court, however, held that Congress did not have authority to adjudicate the case of individuals and an Act of Congress purporting to do so would be a Bill of Attainder. The case was remanded for further information as to the fund's status. When it was determined that the club was a non-appropriated fund, the court, using *Gradall* as its authority, concluded that the Dual Compensation Act did not apply. In neither opinion did the court mention its *Sullivan* decision[103] in which it had previously held fund employees subject to the Act.

CONCLUSION

The relatively minor problems considered in this chapter illustrate once again the non-appropriated fund's anomolous situation. Of course, the whole Governmental system is designed to operate with appropriated funds; in those instances in which added flexibility is desired, Government corporations have been organized. However, the non-appropriated fund falls between these two stools. In each instance in which funds' status have been questioned, there have been two contervailing pressures within the Government: the desire of the military to take advantage of the funds' public nature to the extent that it is advantageous to them: and a concomitant desire, on the part of the courts and non-military agencies, to insure that these organizations do not burden the public purse. One additional factor has further confused the issue: the changing nature of the funds. Prior to World War II they were, in the eyes of all, essentially small, voluntary, private, un-incorporated associations with some vaguely defined connection with the federal government. By the end of the war, they were big business, closely supervised, and supported by the War Department. This change was substantial enough to have some effect on the essential nature of the non-appropriated fund. Yet, *Second Standard Oil*, which announced the change, does not seem to have recognized it. To the extent that old law is being used to support a new entity, many of the commonly accepted precedents are no longer relevant. In the concluding chapter, some suggestion and predictions for this new entity, the non-appropriated fund, will be made.

CHAPTER VII. A SUMMING UP

Perhaps this paper should have had a chapter entitled "The Elephant and the Law of Non-Appropriated Funds"; the digression is explained below.

The Spaniard considers the years between 1543 and 1681 to be the greatest period of his country's art and literature; "El Siglo de Oro,"

[103] Sullivan v. United States, 92 Ct. Cl. 154 (1940).

the Golden Age of St. John of the Cross, Lope de Vega, El Greco, Velazquez, and Murillo—all participants in this great flowering of Spanish culture. However, many observers feel that this period has been over emphasized in Spanish intellectual life and that energies which could have been used to create a new Golden Age, have instead been used to study and analyze past greatness. The attitude is illustrated by an anecdote popular in academic circles.

A wealthy philanthropist sponsored an international study of the elephant, to record the lore of the great beast before it became extinct. An international consortium of scholars labored for a year and produced a definitive treatise on the elephant. The chapter headings offered some insight into the national characteristics of the authors. The Americans had written on "Industrial Uses of Elephant By-Products"; the Germans on "The Elephant in War"; the French on "The Love Life of the Elephant"; the British on "The Elephant and the Empire"; and, the Spaniards, predictably, on "El Elefante en El Siglo de Oro."

Hopefully, the chapter headings of this work sound less forced than those in the apocryphal book on elephants. Regardless of the desirability for further study of the elephant, there can be no doubt that a thorough examination of the non-appropriated fund has been needed.

A hundred years ago the funds barely existed. Forty years later they had begun to assume their present form, although their legal attributes were still unknown. The first World War accelerated the development of a body of administrative decisions, much of it built around the *Dugan* case in which the Court of Claims had held the funds immune from federal taxation. The bulk of these decisions was written by the users of the funds, the Armed Services, and there gradually developed a theory which held that the funds were instrumentalities of the federal government and, as such, recipients of its privileges and immunities. Initially, the instrumentality concept (devised in the early 1900's to protect the funds from state taxation) was not well received; not until 1942, and the Supreme Court's decision in *Second Standard Oil*, was the theory accepted. By this time, military regulations had been tailored to conform to the theory, while the administrative opinions, the initial source of the concept, reinforced the regulations. Thus, there was a kind of unconcious conspiracy on the part of the military which resulted in a perpetuation and strengthening of the instrumentality idea. The body of law so developed was to be the sole source of enlightenment when courts were first called on to determine the nature and status of non-appropriated funds.

Even without this corpus of somewhat questionable law (questionable in the sense that most of the decisions were self-serving), it is not surprising that the Supreme Court agreed that the funds were immune from state taxation since by 1942 the organizations were so

inextricably entwined with the Armed Services that they were, without doubt, part of the federal government. However, the Court, in its opinion in *Second Standard Oil*, quite casually repeated another concept which had developed in the military and, by repeating it, was deemed to have approved it. This concept, innocuous on its face, was that the United States was not responsible for the debts of non-appropriated funds.

The doctrine of non-responsibility—or, as it was to develop, of irresponsibility—seems to have had two sources: the early statute which had prohibited the use of appropriated money to support post exchanges, and the *Kyle* decision in which the Court of Claims had advised an aggrieved plaintiff that the fund or its officers were the proper defendants in a contract suit, not the United States. There is a grave distinction between non-responsibility and immunity, although the result may be the same. Yet, within the last twenty-five years, courts have, with the encouragement of the United States, confused the two. The *Kyle* decision made sense in its historical context. At the turn of this century the funds were amorphous, little more than unincorporated associations having vague ties with the War Department. Moreover, courts were not prepared to deal with these creations of the executive branch since there was so little precedent to guide them. *Kyle* acted as a foundation for an imposing edifice of immunity which was created by the War Department in the subsequent forty years. This construction, composed of regulations and administrative rulings, failed to take into consideration the changing nature of the funds and the growing quasi-governmental functions of the federal government. *Kyle* lost its meaning but remained as precedent to bar suits against the United States. The other aspect of the *Kyle* decision, that the funds and their officers should be subject to suit for breach of contract, lost its meaning as these associations became less voluntary and their relationship with the United States, more explicit.

Half of the decisions involving suits on fund contracts are not subject to serious criticism. Those cases holding that neither the fund nor its officers can be sued merely restate accepted public law; for, neither contracting officers nor agencies or departments of the United States are independently suable for their official acts. However, the other line of cases, which holds that the United States is immune from suit on fund contracts, is eminently incorrect. It may be charitable to explain the error by saying that non-appropriated funds are confusing creatures, that their governing regulations are misleading, and that their contracts contain an exculpatory clause; yet all these factors cannot obscure the fact that non-appropriated funds are part of the United States and that, as such, their contracts fall within the ambit of the Tucker Act.

When suits involving the funds arose under the Tort Claims Act, it

is perhaps surprising that the Government did not succeed in its campaign of legal obscurantism. It may be that the Government's defeat was due solely to the inclusion of the word "instrumentality" in the Tort Act, a word which had had a far different meaning when the Tucker Act had been passed seventy-five years previously. From such a small difference, vital distinctions were to be drawn. Had it not been for the confusion in the contract cases, few of the problems in criminal law, international law, and in the treatment of the funds as public agencies, would have seemed so difficult. As more and more courts are called upon to consider non-appropriated fund cases, the earlier separatist concepts, devised by the Armed Services to enhance the funds' flexibility, are being disregarded for a theory which sees in the funds no more than a rather unusual kind of government agency.

The funds' legal development offers no startling insight into the public law, but it does illustrate and emphasize two truisms which deserve periodic recognition. The first, and perhaps the more important of these, is that in the case-by-case adjudication of problems involving a given subject there can be an over reliance on precedent. Like Topsy, non-appropriated funds "just growed," as did a body of law concerning them. To the extent that this body of law offered answers to individual questions, it was valuable; to the extent that the decisions were solely on an *ad hoc* basis, without any common thread of philosophy and without any recognition of the changing nature of the funds, they were bad. Laws must conform to a system of logic and be predictable if they are to have social value. Application of this criterion to non-appropriated fund law results in a high percentage of dross. This situation is particularly illustrated in the area of contract law, where the rationalizations put forward by the Court of Claims illustrate what happens when the law paints itself into a corner.

The other truism is that when judges depend on the parties' briefs for an appreciation of the law, the reliance may be misplaced. In many of the decisions which we have considered, it often seems that the ignorance of counsel has infected the court. This ignorance may be blamed in large part on the nature of non-appropriated funds. A Justice Department tax attorney or member of the tort branch can face fund problems in these areas with a degree of equanimity, for a tax or tort suit raises few unusual problems. However, this is not true for the expert in public contracts: there are no procurement regulations, no "normal" contracting officers, no standard forms. His expertise seems irrelevant, and thus he arrives at the easiest answer—that the fund's contract is not a public one. Plaintiffs' counsel are faced with the same problem although they have even less background to meaningfully litigate the issues. The court's problem is further exacerbated by a lack of trustworthy precedent, and by a nearly invincible ignorance of the

nature of the funds; the result is an unjustified reliance on the self-serving regulations drawn by the men who are charged with the responsibility of protecting the funds' assets. The relatively few cases reported offer witness to the efficiency and fairness of the administrative procedures available to resolve fund contract disputes. Of course, one may wonder how many potential litigants were dissuaded from suit by the half dozen contract cases which have been reported.

There is a consensus among government attorneys that there are few experts in non-appropriated fund law. Perhaps only those lawyers working directly for the Exchange Services would merit the title. Certainly no one else has more than a periodic exposure to fund problems. As we have seen, this lack of expertise has seriously hampered the courts in many of their decisions. The twenty or so reported cases which form the best known part of non-appropriated fund law barely suggest the wealth of material available. Of course, the availability is relative since most of the material is found only in a number of specialized publications which are not normally used for legal research, or even known of. As a result, the reported decisions, although built on a weak foundation, give the impression that non-appropriated fund law is more monolithic than is actually the case. Two examples of this will suffice. At the time when third-party tort suits were being defended on the grounds of sovereign immunity, the military's internal policy that the defense would not normally be raised was little known. Similarly, the Department of Justice's administrative agreement regarding the payment of tort judgments against the United States has received only limited publication. This lack of readily available material is not unusual when some of the more esoteric operations of the federal government are scrutinized but it is rare in an area as wide-spread and as prone to litigation as non-appropriated funds.

The legal history of non-appropriated funds has a number of non-legal corollaries. To the followers of Spengler and Toynbee, it might illustrate the decay of a society which allows its military to become so institutionalized that an important adjunct of the Army is the operation of retail stores, restaurants, libraries, and flying clubs. Others might see it exemplifying the American pioneer spirit: informal voluntary organizations to gain a desired end. Merchants see post exchanges as competitors, unfairly subsidized by the government. Servicemen see the funds as one of their few remaining fringe benefits, subject to erosion without any concomitant increase in pay. None of these views has any particular relevance to the legal aspects of fund operation, but all have had their part in shaping the attitudes of judges, commentators, legislators, and others who have been involved in legal decisions concerning the funds.

If this paper succeeds in persuading some of those individuals to take a second look at their preconceived ideas, it will have served its admittedly modest purpose.

APPENDIX, AIR FORCE APPROPRIATED FUND SUPPORT

SUPPORT OF FACILITIES FOR RELIGIOUS, MORALE, WELFARE, AND RECREATION ACTIVITIES

	Classes of Facilities and Activities					
	I	II	III	IV	V	VI
	Revenue Producing Activities. Exchanges and their enterprises; base restaurants; book departments; 35-mm theaters	Self-sustaining Activities. Open messes—officers'; noncommissioned officers' aviation cadets'; airmen's clubs (except service clubs); and civilian welfare activities	Sundry Fund Activities (except messes). Aero clubs; military and/or civilian recreation, social associations	Religious, morale, welfare activities for military personnel and their dependents and 16-mm theaters	Donated activities and those activities authorized by statute, agreement, or other departmental regulation	Meeting space for civic, fraternal, special and other private associations
1. Facilities as defined in par. 1d	A	A	A	A	A	O[1]
2. Construction, improvement modification, and relocation of facilities*	A	A	A	A	A	O
3. Maintenance and repair of facilities	A[2]	A[2]	A[2]	A	O	O
4. Collateral equipment*	A	A	A	A	O	O
5. Essential authorized equipment	N/A[3,4]	N/A[4]	N/A	A	O	O
6. Care and maintenance of Government-owned collateral and essential equipment	A[2]	A	A	A	O	O
7. Available Government-owned equipment on loan	A[5]	A[5]	A[5]	A[5]	A[5]	O[5]
8. Care and maintenance of Government-owned equipment on loan	N/A	N/A	N/A	A	O	O
9. Care and maintenance of non-Government-owned equipment	N/A	N/A	N/A	N/A	O	O
10. Utilities and telephone services	A[6]	A[6]	A[6]	A[6]	A[6,7]	O[7]
11. Janitorial supplies	N/A[8]	N/A	N/A	A	O	O
12. Reshipment of supplies on equipment purchased w/NA funds	A	A	A	A	O	O

Symbols: A—Appropriated funds—Military Construction Program, operations and maintenance, and Program-wide Management and Support funds.
N/A—Nonappropriated funds.
O—Funds of private organizations.

[1] When space is available and adequate.

[2] Normal maintenance and repair (the upkeep required to maintain and preserve facilities in accordance with standards the Air Force has prescribed for other facilities) is authorized for all religious, morale, welfare and recreation facilities listed in columns I through IV above, except as indicated below:

a. The requesting activity will pay for maintenance and repair furnished in excess of normal standards.

b. Maintenance and repair will not be provided for off-base facilities leased or constructed by nonappropriated funds until such time as Air Force acquires title to the facility. However, base engineers may perform on a reimbursable basis O & M work on such property within available manpower and resources, provided a formal work order request has been approved by the base commander.

c. Periodic sanding and finishing of bowling alleys may be accomplished by the base civil engineer, however, routine day-to-day maintenance is the responsibility of the operating unit.

d. Concessionaires will pay for all maintenance in accordance with the contract agreement.

[3] Motion picture projection equipment may be furnished from appropriated funds for 16-mm showings only.

[4] Essential basic equipment for exchange snack bars, cafeterias, open messes, etc., are defined in equipment schedules included on definitive designs for such facilities. Replacement will be from nonappropriated funds (except equipment issued to open messes used for essential feeding purposes will be replaced from appropriated funds).

[5] Available for loan when not in use or when not required by the military needs of the command. Activities in column I will reimburse the Government for the cost of moves from and return to Government storage and pay all maintenance costs. Aero clubs will reimburse for transportation (except original one-time flight to recipient club), maintenance, and repair costs for aircraft and engines issued on a loan basis.

[6] The following applies to utilities and telephone services:

a. All utilities will be furnished from appropriated funds, without reimbursement to:
   (1) Facilities listed under column IV;
   (2) Officers' messes required for essential feeding;
   (3) Clubs (other than noncommissioned officer clubs) operated for the benefit of enlisted personnel, which are not operated as self-sustaining activities;
   (4) Theaters (16-mm and 35-mm) except as noted below;
   (5) Swimming pools (see paragraph 7d(1));
   (6) Civilian firefighters' messes;
   (7) Red Cross facilities located on the base.

b. Utilities furnished activities outside the continental United States will be without charge, unless otherwise specified below.

c. Utility services furnished within the continental United States to base exchanges and exchange concessionaires:
   (1) Initially, the base civil engineer, in cooperation with the base exchange officer, will establish a two-year average cost of utilities to gross sales of the exchange service, including exchange operated concessionaires, in order to establish a percentage factor. Thereafter, the base exchange officer will notify the base civil engineer of the quarterly gross sales total, including concessionaire sales. The base civil engineer will bill the exchange each quarter on the established percentage factor. Base exchanges will in turn bill concessionaires and collect accordingly. Separate percentage factors may be computed for the exchange and its concessionaires;
   (2) The base civil engineer will recompute the rate annually or whenever major changes occur which affect utility consumption;
   (3) Where new bases or concessionaire activities are activated, percentage factors established at other bases of a similar size within the same geographic area will be used as the initial percentage rates.

d. Concessions, except exchange concessionaires will pay for all utilities furnished in accordance with the contract agreement.

e. Normal utilities (those utilities and services required for the useful operation or

occupancy of the facility, as determined by the installation commander) will be furnished from appropriated funds to all other religious, morale, welfare, and recreation activities not indicated in a above. Quantities furnished in excess of normal will be reimbursed at the following rates:

(1) Officers' and noncommissioned officers' open messes (other than those required for essential feeding) will reimburse for above normal service from mess funds at one-half of 1 percent of the sale of meals. To facilitate accounting procedures, payment may be computed at one-half of 1 percent of monthly food service receipts (see Account 303 and 304, AFM 177–4).

(2) Base restaurants, civilian clubs, and other feeding facilities will reimburse from above normal service at the rate of one-half of 1 percent of gross food sales. Compute payment in the manner indicated in (1) above.

(3) Other facilities will reimburse in accordance with rates specified in AFR 91–5.

f. Telephone service. Class C service may be furnished at no expense to all facilities listed under columns III, IV and to Class V if included in the agreement terms. Class B service will be furnished to facilities listed under columns I, II, and VI, except that Class C service may be provided to theaters when required primarily to conduct official Air Force business and specifically approved by the installation commander.

[7] Except when housed in public buildings used only incidentally or part-time as religious, morale, welfare, and recreation facilities.

[8] Janitorial supplies may be provided from appropriated funds for cleaning the theater whenever it has been used for other than AFMPS purposes.

[9] Under normal conditions nonappropriated funds will not be used for construction, (see par. 4b). However, when such funds are used cost of collateral equipment may be charged to N/A funds.

SUMMARY. LEGAL PROBLEMS OF NON-APPROPRIATED FUND ACTIVITIES

Itinerant traders have traditionally been associated with the military, supplying goods and services which were not available from official sources. At the time of the American Revolution, sutlers, as they were called, were subject to the control of military commanders and were required to pay a percentage of their profits to the commanders in return for the right to do business on the post. These license fees were used by the commanders to provide for the welfare and recreational needs of the units at a military installation. Officers were appointed to administer what came to be known as the post fund.

By the time of the Civil War, sutlers were closely supervised by Congress and the Department of the Army. The sutler system did not work satisfactorily during the war and, by the 1870's, an alternative method of supplying the needs of servicemen began to evolve. This alternative was the canteen, a co-operative store run by the members of a military unit. Profits from the canteens were used for the same purposes as the sutlers' fees. Both Congress and the Army allowed the sutler (now called the post trader) system to wither away. Post canteens, or exchanges, were not established by statute, but depended on regulations for their existence and organization. Post exchanges, and their Naval equivalents, the Navy Exchanges, are now the tenth largest retail sales operation in the United States. The Army and Air Force Exchange Service contributes between $50,000,000 and

$60,000,000 each year to the welfare and recreational activities of its respective Services. These funds are "non-appropriated" in the sense that the money is not derived from a Congressional appropriation.

The term "non-appropriated fund" gradually began to assume two meanings: the revenue itself, and the organizations which generate, administer, and spend the money. In the latter sense, there are revenue-producing funds, such as post exchanges and ship's services stores; welfare funds, organized at all levels of the military hierarchy to allocate the money; and sundry funds, which are among the ultimate recipients of the allocations, such as a post library, a flying club, or an officers' mess.

Since the revenue-producing funds are a type of retail activity, it is not surprising that both federal and state taxing authorities have considered their operations as potential sources of income. By the turn of this century, the federal government had concluded that it would not tax what it judged to be one of its own instrumentalities and, with certain limited exceptions, non-appropriated funds are today immune from federal taxation and licensing fees. State attempts to tax the funds were sporadic and were met with mixed success until the Depression, at which time a number of cases involving fund tax immunity arose. These cases, which resulted in divergent opinions on the amenability of funds to state taxation, culminated in an opinion of the Supreme Court which held, in early 1942, that non-appropriated funds, as instrumentalities of the federal government, were immune from state taxation. This general rule holds true today, with one important statutory exception, which requires funds to pay some gasoline taxes.

As state efforts to tax the funds diminished, a trend toward state regulation began. Although there have been few decisions in this area, it seems generally accepted that state fair trade laws, for example, do not apply to fund operations. However, a recent decision of the Supreme Court has cast some doubt on the funds' absolute immunity from state regulation.

There is a strange inconsistency in the legal character of non-appropriated funds. For tax purposes, these organizations are accepted as arms of the federal government and immune from taxation. A series of statutes and judicial decisions has held that the federal government and its instrumentalities are subject to suit for breach of contract. Logically, non-appropriated funds should be within the scope of this waiver of sovereign immunity. Yet, they have been held to be the sole exception to the waiver. As a result, the United States cannot be sued if a fund breaches its contract, nor is the fund itself subject to suit, either in state or federal courts.

The original bases for this exception were a number of judicial and administrative decisions which misinterpreted the nature of the funds

and relied on military regulations of questionable legality. The United States Court of Claims, the major forum for suits in contract against the federal government, has attempted to rationalize this anomoly on a number of grounds and domestic courts have followed its reasoning without question. The inequity of this situation is best illustrated by the fact that while neither the United States nor the fund may be sued if the latter breaches a contract, the United States has successfully sued contractors who breach a fund contract.

The reasoning which led to fund contract immunity is subject to criticism on a number of grounds. As stated above, there has been a general misunderstanding of the funds' operation and organization, as well as a misplaced reliance on administrative regulations which purport to immunize funds contracts from judicial review. Recent concepts in administrative law suggest that the regulations are illegal and it is perhaps for this reason that fund contracts now contain an exculpatory clause which is intended to bar suits. The Court of Claims has accepted this clause although it is intentionally misleading and violates the general rule that parties to a contract cannot contract away their right to judicial review. While an individual organization's immunity from suit may be defended on the basis that it is not a suable entity, it appears that the real reason for the United States' reluctance to acknowledge liability for fund debts is the fact that as a matter of routine, judgments based on a breached non-appropriated fund contract would be paid from appropriated funds.

In 1946, the United States waived its immunity from suits sounding in tort. Within a short time, a number of persons sued the United States for injuries caused by negligence of non-appropriated fund employees. These suits may be divided into two general categories: those suits brought by fund employees, and those brought by third persons. In both instances, the United States attempted to apply the same specious reasoning which had been successful in the contract suits. The situation was further confused by a number of statutes which were intended to clarify the quasi-federal status of non-appropriated fund employees.

When the suits were brought by third persons, courts have been in general agreement that the United States would be liable for the negligence of fund employees although the organizations themselves remained immune, apparently because they were not suable entities. However, when fund employees brought negligence suits against the United States, a number of different rationales were used to conclude that the plaintiff did not have a cause of action. Today, fund employees are considered to have an administrative system of compensation available to them and, as such, are generally prevented from suing the United States on the basis that they have an alternative remedy available to them.

An interesting problem which has arisen on a number of occasions involves the question of whether a given organization is a non-appropriated fund. This question is particularly important in the tort area since the negligence of a private organization's employee would not make the United States liable. Although there is little law in this area, courts have gradually begun to evolve certain criteria to determine an organization's status; in this regard, the administrative guidelines set forth by the Armed Forces are of only slight relevance. Courts are evidencing a similar degree of sophistication in cases which turn on the question of whether the user of fund property, e.g., the pilot of a flying club's plane, is an employee of the United States within the meaning of the Federal Tort Claims Act.

The United States had consistently argued that non-appropriated funds were immune from state taxation, regulation, and from suits in tort and contract until 1960, when the Department of Justice concluded that the immunity argument in tort suits brought by non-employees was no longer tenable. Since that time, tort judgments against the United States are, by administrative arrangement, paid out of non-appropriated funds. This decision to forego the immunity defense was not extended to cover contract suits.

The same immunity arguments which had been generally accepted by domestic courts were given a somewhat different reception when non-appropriated funds were sued by foreign plaintiffs in courts overseas. In international law there are two concepts of sovereign immunity: one holds a foreign sovereign and all its instrumentalities entirely immune from suit in domestic courts; the other states that the sovereign will be immune only when it is acting in a purely governmental (as opposed to commercial) capacity. In a number of instances, non-appropriated funds operating overseas have been held to be subject to suit in local courts, although the rationale for finding jurisdiction varied. Some courts have concluded that fund activities were of a commercial nature; others, that the funds were not instrumentalities of the United States. In the latter situation, the decisions seem to turn on the fact that the United States has refused to hold itself liable for the funds' contracts.

The equivocal nature of the non-appropriated funds has caused confusion in the major areas of the law: torts, contracts, taxation, and has also raised a number of minor questions. Do the various statutes pertaining to crimes against the United States apply to situations involving non-appropriated funds? After an initial hesitancy on the part of the courts, it appears that in most instances such crimes would be considered to be against the United States. Are there any limits on the types of non-appropriated fund activities which can be organized? Very little. To what extent can these groups look to appropriated funds for support? They may receive extensive aid. Do the laws

pertaining to government procurement apply to fund purchases? The answer seems to depend on the law in question. Are the funds subject to audit by the General Accounting Office? It would seem that they are, but Congress has acquiesced in their refusal to place themselves under such supervision. Retired military personnel are precluded from receiving total dual compensation when subsequently employed by the federal government (i.e., wages plus retired pay). Is an employee of an non-appropriated fund an employee of the United States for this purpose? Until recently, the answer was yes, but two recent decisions of the Court of Claims have now answered the question in the negative although the reasoning in both cases is most questionable. In these and other areas, it will be seen that the general trend has been to acknowledge the governmental nature of the funds, save where questions of policy or statutory interpretation intervene. The sole exception to this trend has been in those decisions of the Court of Claims which, in an attempt to remain consistent with the contract immunity cases, have obscurred the funds' status as federal instrumentalities.

There can be no real conclusion to what is, in effect, a compendium of the law as it affects, and is affected by, the concept of nonappropriated funds. As Mohammed's coffin rests, suspended between heaven and earth, so do the funds partake of both the private and public spheres of the law, striving for the best of both worlds. They are instrumentalities of the government only when it serves their purposes, e.g., in questions of immunity from suit and taxation, but not when it would impair their flexibility of operation, as when the General Accounting Office seeks to audit their activities. This anomoly has its sources in all three branches of the government: legislative reluctance to give a statutory basis to an operation which has done so well without one; judicial confusion as to the nature and effects of non-appropriated fund activities; and executive willingness to encourage the fluid status of the law as it pertains to the funds since the confusion has benefited their operation.

TOTAL LEGAL SERVICE: BAXTER ON SO-CALLED 'UNPRIVILEGED BELLIGERENCY'

Professor Baxter was the principal editor of *The Law of Land Warfare*[1] which has been the standard unrevised publication for the Army on that subject since 1956.

Because promulgated by the Secretary of the Army in directive style, it is law for the Army. Its intrinsic merits have made it strongly influential in the other military forces of the world. Professor Baxter, Editor of the *American Journal of International Law* and a Colonel in the U.S. Army Reserve (JAGC), has written widely and authoritatively on the law of war. This selection on "unlawful belligerents" was a threshold event, appearing as it did in 1951 when the world was becoming aware of the implications of the Korean Conflict. Conservative, but fully aware of the conditions of the time in which he was writing, then Major Baxter brought to light the legal consequences of ideological warfare and anticipated the problems international lawyers would face when dealing with those characterized by Chairman Mao as "fish in the sea."

[1] U.S. DEPT. OF ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE (1956).

SO-CALLED 'UNPRIVILEGED BELLIGERENCY': SPIES, GUERRILLAS, AND SABOTEURS†

Richard R. Baxter [1]

In an article in the previous issue of this *Year Book*[2] the duty of the inhabitant of occupied territory to refrain from conduct hostile to the occupant was assessed in the light of recent developments in the law, notably of the prosecutions for war crimes following the Second World War and the Geneva Conventions of 1949. It was suggested there that it is merely the superior power of the occupant rather than a precept of international law which forbids the inhabitant to injure the occupying Power. In arriving at that conclusion it was necessary to assess the roles played in the law of belligerent occupation by the military power of the occupant, by international law, and by municipal law. However, the somewhat perplexing question of the scope to be given to each of these elements is not confined to the law of belligerent occupation alone. It is present in an equally acute form in connexion with the problem of spies, guerrillas, saboteurs, secret agents, and other unlawful belligerents operating in areas which are not under belligerent occupation.

I. INTERNATIONAL LAW APPLIED TO WAR

Essentially, the outbreak of war[3] creates an area of anarchy in the world order, an area in which the normal law applicable to the peaceful intercourse of states is suspended. The propriety of statements that international law confers a 'right' to resort to war and to

[1] Professor of Law, Harvard Law School. A.B., 1942, Brown University; LL.B., 1948, Harvard Law School; Diploma in International Law, 1951, Cambridge University; LL.M., 1952, Georgetown University. When this article was written the author was a Major in The Judge Advocate General's Corps, U.S. Army. The opinions expressed are those of the author and do not necessarily represent the views of The Judge Advocate General or any governmental agency.

[2] Baxter, 'The Duty of Obedience to the Belligerent Occupation', in this *Year Book*, 27 (1950), p. 235.

[3] The word 'war', as used herein, refers not only to declared war but also to other cases of armed conflict and to the occupation of another state's territory even if the occupation meets with

exercise 'belligerent rights'[4] is highly questionable, and it is probably more accurate to assert that international law has dealt with war as a state of fact which it has hitherto been powerless to prevent. Animated by considerations of humanity and by the desire to prevent unnecessary suffering, states have nevertheless recognized limits on the unfettered power which they would otherwise actually enjoy in time of war. The law of war is, in the descriptive words of a war crimes tribunal, 'prohibitive law',[5] in the sense that it forbids rather than authorizes certain manifestations of force. During the formative period of codified international law, delegates to international conferences repeatedly declared that they would not accept proposed provisions which involved acquiescence in an enemy's exercise of jurisdiction over nationals of their state.[6] The report of the committee which dealt with the laws and usages of war to the Hague Conference of 1899 emphasized that it was not intended by Convention No. II to sanction the employment of force and that the purpose of the Convention was rather to restrict the exercise of power which an enemy might in fact wield over another state.[7]

War, conceived as a condition approximating to a state of international anarchy, is not an armed conflict between states as abstract entities. It is rather a conflict between populations, in which each national of one belligerent is pitted against each national of the other. Without the humane intervention of international law, war would entail death or enslavement for the combatant or non-combatant overcome by the enemy. To ancient Greece, all inhabitants of an enemy state were themselves enemies whose persons were at the

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no armed resistance. The law of land warfare was apparently applicable to such situations even before the adoption of the Geneva Conventions of 1949 (see *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (Cmd. 6964, H.M.S.O., 1946), p. 125, with reference to the occupation of Czechoslovakia), and the Conventions themselves are expressly made applicable to these various types of employment of armed force (common Article 2).

[4] Halleck, *International Law; or, Rules Regulating the Intercourse of States in Peace and War* (1861), p. 312; Hall, *A Treatise on International Law* (7th ed. by Higgins, 1917), pp. 389, 411; and see Jessup, *A Modern Law of Nations* (1948), p. 157. Although the title is somewhat misleading, Dr. Spaight makes plain early in his *War Rights on Land* (1911) that the 'rights' to which he refers are those of individuals to be protected in certain respects from the rigours of war (pp. 1–4).

[5] *United States v. List et Al.* (1948); *Trials of War Criminals*, xi (1950), pp. 1247, 1252; *Law Reports of Trials of War Criminals* (hereinafter referred to as *'War Crimes Reports'*), viii (1949), p. 66.

[6] See, for example, the remarks of the Netherlands delegate, concurred in by the Italian and Belgian delegates, to the Brussels Conference of 1874 (*Actes de la Conférence de Bruxelles* (1874), pp. 43–44, 204) and those of the Netherlands and Belgian delegates concerning uprisings in occupied areas (ibid., pp. 158–65).

[7] 'Besides, no member of the subcommission had any idea that the legal authority in an invaded country should in advance give anything like sanction to force employed by an invading and occupying army. On the contrary, the adoption of precise rules tending to limit the exercise of this power appeared to be an obvious necessity in the real interests of all peoples whom the fortune of war might in turn betray' (Report to the Conference from the Second Commission on the Laws and Customs of War on Land, in *Reports to the Hague Conferences of 1899 and 1907* (ed. by Scott, 1917), p. 140; see also pp. 140, 151 for like statements).

mercy of the conqueror, to be killed or made slaves as expediency might dictate,[8] and it has been said that only considerations of political policy dissuaded the Romans from following a like course.[9] Even through the Middle Ages it was the practice to kill infidels and to enslave Christians captured in war.[10] Since the founders of modern international law were not prone to overlook the verdict of the past, they were forced to admit that every enemy could in strict law be subjected to violence and could only urge that non-combatants be spared from attack as an act of mercy.[11] It is significant that the ancient form of declaration of war, which called upon the subjects of the declarant to do violence to the subjects of the enemy, continued in use even into the eighteenth century.[12] Although the declaration lost much of its literal sense with the passage of time, the view that war makes individuals in belligerent nations enemies one to the other persisted throughout the eighteenth[13] and nineteenth centuries[14] and still perhaps serves as a fundamental assumption of the law.[15] The courts of the United States have been particularly prone to start from the premiss that all inhabitants of the enemy state and all persons adhering to it are enemies, notably in connexion with property

[8] Phillipson, *The International Law and Custom of Ancient Greece and Rome* (1911), vol. ii, p. 251.

[9] Ibid., p. 253.

[10] Nys, *Le Droit de la guerre et les précurseurs de Grotius* (1882), pp. 115–18, 138–43.

[11] Grotius stated that, 'In general, killing is a right of war' (*De Jure Belli ac Pacis* (1646) ed., transl. by Kelsey, 1925), Book iii, ch. iv, v. i), '. . . according to the law of nations, any one who is an enemy may be attacked anywhere' (ibid., vii. 1), and 'How far this right to inflict injury extends may be perceived from the fact that the slaughter even of infants and of women is made with impunity' (ibid., ix. 1). It was the 'bidding of mercy' which called for the protection of certain categories of persons, such as children, women, old men, priests, writers, farmers, merchants, prisoners of war, suppliants, and those who gave themselves up to the victor (ibid., ch. xi, viii–xiv incl.). See also Rachel, *De Jure Naturae et Gentium Dissertationes* (1676), Dissertatio Altera De Jure Gentium, xlvi, xlvii.

[12] '[La Déclaration de Guerre] autorise, à la vérité, il oblige même tous les sujets, de quelque qualité qu'ils soient, à arrêter les personnes & les choses appartenantes à l'Ennemi, quand elles tombent entre leurs mains; mais il ne les invite point à entreprendre aucune expédition offensive, sans Commission, ou sans ordre particulier' (Vattel, *Le Droit des gens* (1758), Book iii, ch. xv, § 227; see Von Martens, *A Compendium of the Law of Nations* (transl. by Cobbett, 1802), p. 287 n. The last formal declaration of war, made by Great Britain in 1762 against Spain, which followed this form of words, is quoted in Twiss, *The Law of Nations considered as Independent Political Communities; On the Rights and Duties of Nations in Time of War* (1863), p. 85.

[13] In *Quaestionum Juris Publici Libri Duo* (1737), Van Bynkershoek declares that although the right of executing the vanquished has 'almost grown obsolete', this result is solely the consequence of clemency (Book i, ch. iii, p. 18).

[14] Twiss, op. cit., p. 84; Halleck, op. cit., p. 411. The texts uniformly stated, however, that usage or custom or law had confined the actual conduct of hostilities to the warring sovereigns and their troops.

[15] The *Manual of Military Law* (1929), Amendments No. 12 (1936), p. 5, takes this view.

rights,[16] treasonable conduct,[17] and commercial intercourse with the enemy at common law.[18]

Despite vast improvements in the lot of those who are without means of defence in war,[19] a number of tendencies are at work the effect of which is once more to extend, rather than to diminish, the extent to which each enemy national is involved in war. The first of these is the fact that contemporary conflicts are often fought in pursuance of an ideology. A burning conviction concerning a political or social philosophy may offer both an incitement and a rationalization for the extirpation of all those whose ideas are considered to be evil.[20] The second factor, a technological one, is that it has become increasingly difficult to differentiate between what were once distinguishable as 'military' and 'non-military' objectives, in the choice of target, in the aiming of the weapon, and in the destruction which it causes. That populations are, particularly in the stage of attack and active hostilities, increasingly subjected to the impact of war is a development in warfare of which international law cannot fail to take account.[21] Thirdly, the civilian has often voluntarily become a participant in warfare, as a guerrilla or as a member of the underground or as a secret agent, requiring, *inter alia*, stringent control of his activities or even internment if he is present on the domestic territory of a belligerent.[22]

The law of war has exercised its 'prohibitive' effect with respect to those persons who are in the power of the enemy and would otherwise be subject to the extreme license of war by extending special protection to certain categories of such individuals. The most familiar of these are the wounded and sick of the armed forces and so-called 'lawful belligerents' who, upon their coming into the hands of the enemy, become prisoners of war endowed with specific rights. Until comparatively recently the protection of civilian non-combatants has

[16] *Juragua Iron Co., Ltd. v. United States* (1909), 212 U.S. 297, 306–7; *United States v. Pacific RR. Co.* (1887), 120 U.S. 227, 233, 239; *Young v. United States* (1877), 97 U.S. 39, 61; *Lamar v. Browne et Al.* (1875), 92 U.S. 187, 194.

[17] *Stephan v. United States* (6th Cir. 1943), 133 F. 2d 87, 94, cert. denied (1943), 318 U.S. 781, rehearing denied (1943), 319 U.S. 783; *United States v. Fricke* (S.D.N.Y. 1919), 259 Fed. 673, 675.

[18] *White et Al. v. Burnley* (1857), 20 How. 235, 249; *The Rapid* (1814), 8 Cranch 155, 161; *Griswold v. Waddington* (1819), 16 Johns (N.Y.) 438, 447; *Grinnan et Al. v. Edwards et Al.* (1883), 21 W. Va. 347, 357.

[19] 'Modern American law has come a long way since the time when outbreak of war made every enemy national an outlaw, subject to both public and private slaughter, cruelty and plunder' (*Johnson v. Eisentrager* (1950), 339 U.S. 763, 768).

[20] Wright, *A Study of War* (1942), vol. ii, p. 160.

[21] Gutteridge, 'The Geneva Conventions of 1949', in this *Year Book*, 26 (1949), pp. 294, 319; Nurick, 'The Distinction between Combatant and Noncombatant in the Law of War', in *American Journal of International Law*, 39 (1945), p. 680.

[22] See Cohn, 'Legal Aspects of Internment', in *Modern Law Review*, 4 (1940–41), p. 200; Parry, 'The Legal Status of Germany and of German Internees', ibid., 10 (1947), p. 403; with respect to the practice of the United States see *Hirabayashi v. United States* (1943), 320 U.S. 81.

been on a somewhat primitive basis, resting as it did upon certain broad principles of international law and scattered provisions of the Hague Regulations, particularly those relating to belligerent occupation. With respect to those actually interned by a belligerent, the protection of the law of nations was so imprecise as to require their being placed in the status of prisoners of war, although they were not belligerents.[23] Such considerations as these, coupled with the suffering to which civilians were exposed during the Second World War, were compelling reasons for the adoption of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

Outside these three classes of persons to whom international law has offered shelter from the extreme violence of war, there are other persons who traditionally have not benefited from a privileged status under international law, namely, guerrillas, partisans, so-called 'war-traitors', *francs-tireurs*, and other persons who, in the face of the enemy or behind his lines, have committed hostile acts without meeting the qualifications prescribed for lawful belligerents.[24] The determination of the requirements to be established for those claiming prisoner-of-war status has not been easy, and it has been equally troublesome to assess the basis on which persons not so qualifying should be penalized or punished—whether as war criminals, or as violators of the laws and customs of war, or merely as persons whose acts have been harmful to the opposing belligerent. It has generally been understood that such persons are subject to the death penalty, and to that extent the law applicable to such combatants has been clear. The Geneva Conventions of 1949 have, however, instead of clarifying the status of these individuals, destroyed what little certainty existed in the law. It is probably safe to say that the Conventions are at their weakest in delineating the various categories of persons who benefit from the protection of each.

Article 4 of the Geneva Prisoners of War Convention of 1949 defines prisoners of war as including the members of the armed forces, militia and volunteer corps conforming with specified requirements, civilians accompanying the armed forces, the crews of merchant ships and civil aircraft, and *levées en masse* in unoccupied territory.[25] Mem-

[23] *R. v. Superintendent of Vine St. Police Station; Ex parte Liebmann*, [1916] 1 K.B. 268; *R. v. Bottrill; Ex parte Kuechenmeister*, [1947] 1 K.B. 41; the United States followed the same practice during the Second World War (Field Manual 27–10, *Rules of Land Warfare (1940)*, par. 70.

[24] Oppenheim, *International Law*, vol. ii (6th ed. by Lauterpacht, 1944), p. 454; *Manual of Military Law (1929)*, Amendments No. 12 (1936), p. 82; Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (1945), vol. iii, p. 1797; Field Manual 27–10, par. 348.

[25] Article 1 of the Geneva Prisoners of War Conventions of 1929 and Article 4 of the corresponding 1949 Convention purport to define the persons entitled to be treated as prisoners of war, while Article 1 of the Hague Regulations sets out to define the troops to whom the 'laws, rights, and duties of war apply'. Since persons both civilian and military have been considered to

bers of resistance movements who are commanded by a responsible person, wear a 'fixed distinctive emblem', carry arms openly, and conform with the law of war, even if operating in occupied territory, were extended the protection of prisoner-of-war status because of difficulties encountered in securing equitable treatment for guerrillas and members of resistance movements during the Second World War.[26] Fears that the opposing belligerent will be put at a military disadvantage by being required to treat such persons as prisoners of war[27] are probably based on the erroneous assumption that all persons engaged in resistance activities will meet the qualifications prescribed in Article 4. It is reasonable to suppose that guerrillas and members of resistance movements will more frequently than not fail to conform to these standards, since secrecy and surprise are the essence of such warfare.

Do then persons engaged in hostilities of a clandestine nature benefit from the protection of any other status? According to the letter of Article 4 of the Geneva Civilians Convention of 1949, persons who 'in any manner whatsoever, find themselves, . . . in the hands of a Party to the conflict' and do not benefit from one of the other Conventions are protected by that Convention. As indicated in the article referred to above,[28] persons guilty of hostile activities in occupied areas are subject to a special régime analogous to a system of municipal law, and spies and guerrillas in such areas are thus in something approaching a protected status. Article 5 of the same Convention, in addition to limiting the extent to which the Convention is applicable to persons guilty of hostile acts in occupied territory, states with respect to the 'territory of a Party to the conflict' that 'an individual protected person' (i.e. any person in enemy hands not otherwise protected) who is engaged in or suspected of hostile activities is not entitled to claim such rights and privileges under the Convention as would imperil the security of the detaining state. This language, and the absence of provisions elsewhere which would preclude strong action against captured unlawful belligerents, are indicative of an intention on the part of the draftsmen of the Convention not to exclude the customary penalties inflicted upon belligerents of this nature. Furthermore, the

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be protected by and subject to the laws, rights, and duties of war in connexion with war crimes prosecutions, there is reason to believe that Article 1 of the Hague Regulations is now to be interpreted only as defining those who are entitled to be prisoners of war upon capture and that, as to the signatories to the Prisoners of War Conventions of 1929 and 1949, the former definition has been superseded.

[26] *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*, International Committee of the Red Cross (1947), pp. 107–8.

[27] Strebel, 'Die Genfer Abkommen vom 12. August 1949—Fragen des Anwendungsbereichs', in *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 13 (1950), pp. 133–41.

[28] This *Year Book*, 27 (1950), pp. 261, 264.

failure of Article 5 to refer to areas where fighting is in progress outside occupied territory or the territory of the detaining state suggests that both Articles 4 and 5 were directed to the protection of inhabitants of occupied areas and of the mass of enemy aliens on enemy territory and that unlawful belligerents in the zone of operations were not taken into account in connexion with the two articles. It is reasonable to conclude that no provision of the Geneva Conventions of 1949 precludes the death penalty for unlawful belligerents in other than occupied territory[29] and that, *a fortiori*, lesser penalties may be imposed.

A category of persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949 thus continues to exist and to be subject to the maximum penalty which the detaining belligerent desires to impose. Individuals of this nature taken into custody for hostile conduct in occupied territory are, of course, the beneficiaries of a considerable number of procedural and substantive safeguards. But their counterparts in other areas are less fortunately circumstanced, and it is to this latter group that attention must be directed and to which reference is primarily made hereafter in speaking of spies, guerrillas, and other so-called 'unlawful belligerents'. The first genus to be considered will be the classic form of hostile activity in a guise which conceals the true character of the individual, namely, spies.

II. HOSTILE CONDUCT BY PERSONS NOT OF THE ARMED FORCES: SPIES

Over the course of years, much learned discussion has been expended on the question of the conformity of espionage in time of war with international law and with morality. From this consideration has emerged a virtual unanimity of opinion that while the morality of espionage may vary from case to case, some, and probably all, spies do not violate international law. A distinction may, of course, be made with respect to espionage other than in time of war, for such conduct is of doubtful compatibility with the requirements of law governing the peaceful intercourse of states.[30]

The great international lawyers of the past approached espionage, as they did so many other questions, from the standpoints of both law and morals. They were ultimately persuaded by the common view of mankind that persons acting as spies from patriotic motives pursue a

[29] See Article 68, Geneva Civilians Convention of 1949.

[30] Huybrechts, 'Espionnage et la convention de la Haye', in *Revue de droit pénal et de criminologie*, 31 (1950–1), p. 931.

moral course of conduct and concluded that the power of a belligerent to punish espionage directed against him arose not from the fact that the law prohibited the activity but from the danger which clandestine acts created and the resulting necessity that they be dealt with severely.[31] How this view was to be reconciled with the safeguards generally accorded enemy soldiers is most persuasively stated in the words of Gentili:

> This also is a reason why you should be unwilling to assume that role [of spy], because it is denied the privileges attaching to military service. And therefore the law against spies seems just, since they have divested themselves of the character which would prevent their being treated in that cruel and degrading fashion.[32]

At the Brussels Conference of 1874, thorough consideration was given to espionage in war, and the provisions there drafted[33] were carried over, almost without change, into the Hague Regulations of 1899 and 1907.[34] A number of states at the Conference strenuously resisted any suggestion that the proposed code should give legal sanction to an opposing belligerent's exercise of jurisdiction over a spy,[35] and the resulting article provided by way of compromise that a spy was to be treated according to the laws in force in the capturing army.[36] A recommendation that a distinction be made between professional agents and volunteers motivated by patriotic fervour met with an unfavourable reception,[37] but the Conference found it impossible to agree whether military and civilian spies were in all respects to be treated in the same manner.[38]

Articles 29 and 30 of the Hague Regulations do not attempt to do more then define the spy and require that he shall not be punished without trial, and it is to be observed that they do not purport to make espionage a violation of the Regulations. A further modification was in fact made in Brussels draft in order to avoid an implication that a spy is 'to be condemned by virtue of a declaration signed by his own Government.'[39] Moreover, the sanctioning by Article 24 of the 'employ-

[31] Belli, *De Re Militari et Bello Tractatus* (1563), Part viii, ch. i, § 42; Grotius, *De Jure Belli ac Pacis* (1646 ed.), Book iii, ch. iv, xviii. 3; Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764), ch. vii, §§ 884, 885, 893; Vattel, *Le Droit des gens* (1758), Book iii, ch. x, § 179.

[32] *De Jure Belli Libri Tres* (1612), Book ii, ch. ix, pp. 282–3.

[33] Articles 19–22, *Actes de la Conference de Bruxelles* (1874), p. 291.

[34] Articles 29–31.

[35] The delegations which were most articulate about this matter were those of Belgium, the Netherlands, and Italy (see p. 324, n. 2). The *Projet* had provided: 'L'espion pris sur le fait, lors même que son intention n'aurait pas été définitivement accomplie ou n'aurait pas été couronnée de succès, est livré à la justice' (*Actes*, p. 13).

[36] Article 19, *Actes*, p. 291.

[37] The proposal was made by the Spanish delegate (*Actes*, pp. 42, 203).

[38] The difficulty arose in connexion with the discussion of Article 21, dealing with the spy who had rejoined his army (*Actes*, pp. 44–45).

[39] Proceedings of the Second Subcommission, Second Commission, in *The Proceedings of the Hague Peace Conference: The Conference of 1899* (ed. by Scott, 1920), p. 489.

ment of measures necessary for obtaining information about the enemy' is strongly indicative that espionage falls into the same category as legitimate ruses of war.[40] In accordance with these provisions, recent texts,[41] military manuals,[42] and judicial opinions [43] have normally emphasized that espionage is not in violation of the law of nations but that a belligerent penalizes this conduct because of the danger it presents to him. Frequently military codes incorporate a definition of espionage, conforming to that of the Hague Regulations,[44] and thereby provide a positive legal precept in domestic law to fill up the measure of jurisdiction which international law concedes to be held by the offended state for the protection of its national security. Into this firmly established law some doubt has been interjected by *Ex parte Quirin et Al.*,[45] decided by the Supreme Court of the United States in 1942. Spies were considered by the Court to be 'offenders against the law of war subject to trial and punishment by military tribunals' for the 'acts which render their belligerency unlawful'.[46] A possible inference from this language is that the Court considered espionage to be subject to punishment as an international crime.[47] There is reason to suppose, however, that the tribunal was led by the somewhat imprecise distinction often made between 'lawful' and 'unlawful' combatants to conclude that failure to qualify as a lawful combatant could be described as a violation of international law. If,

[40] *Manual of Military Law (1929)*, Amendments No. 12 (1936), p. 36, n. 4; Field Manual 27–10, *Rules of Land Warfare* (1940), par. 203.

[41] Oppenheim, *International Law*, vol. ii (6th ed. by Lauterpacht, 1944), p. 329; Halleck, op. cit. (3rd Eng. ed. by Baker, 1893), vol. i, p. 571; Wheaton, *International Law*, vol. ii (7th Eng. ed. by Keith, 1944), p. 218; Westlake, *International Law*, Part ii (2nd ed., 1913), p. 90; Hall, *A Treatise on International Law* (7th ed. by Higgins), p. 579; Fauchille, *Traité de droit international public*, vol. ii (1921), p. 150; Calvo, *Le Droit international théorique et pratique* (5th ed., 1896), vol. iv, p. 178; Rolin, *Le Droit moderne de la guerre* (1920), vol. i, p. 266; Waltzog, *Recht der Landkriegführung* (1942), p. 54; but cf. Hyde, op. cit., vol. iii, p. 1865.

[42] *Manual of Military Law (1929)*, Amendments No. 12 (1936), p. 36; Field Manual 27–10, *Rules of Land Warfare* (1940), par. 203; *Kriegbrauch im Landkriege* (1902), p. 30.

[43] *United States ex rel. Wessels v. McDonald, Commandant of Brooklyn Navy Yard* (E.D.N.Y., 1920), 265 Fed. 754, dismissed per stipulation (1921), 256 U.S. 705; *United States v. List et Al.* (1948), *Trials of War Criminals*, xi (1950), p. 1245; *War Crimes Report*, viii (1949), p. 34; see *Opinions of the Attorneys General of the United States*, 31 (1920), p. 356, and 40 (1949), p. 561, concerning the jurisdiction of a United States military tribunal over one Witcke, alias Waberski, a German spy arrested in the vicinity of a military post.

[44] France, *Code de Justice Militaire*, Articles 237, 238; United States, *Uniform Code of Military Justice*, Article 106 (64 Stat. 138; 50 U.S.C. 700).

[45] 317 U.S. 1.

[46] 317 U.S. 31.

[47] This is the view adopted by Professor Hyde in 'Aspects of the Saboteur Cases', in *American Journal of International Law*, 37 (1943), p. 88. In commending the 'bold and fresh view' (p. 90) taken by the Supreme Court, he points to the inconsistency between the recognition of the propriety of a state's employment of espionage and the punishment of the spy so employed and suggests that both the act of the state and the act of the individual are equally violative of international law. It would appear, on the contrary, that the appearing inconsistency may be realistically resolved only by an acknowledgement that the act of neither is in contravention of international law.

indeed, the Court was proceeding on the assumption that the law of nations forbids the employment of spies and espionage itself, that view, it is submitted, fails to find support in contemporary doctrine regarding such activities in wartime.[48]

Article 31 of the Hague Regulations, which provides that a spy who is captured by the enemy after rejoining his army is to be treated as a prisoner of war and incurs no responsibliity for his previous acts of espionage, throws considerable light on the juridical status of espionage. Two reasons have been adduced for this limitation in punishment.[49] The first goes to the difficulty of proving the act after the individual has returned to his own army. To this it must be replied that if it is possible to gather and utilize proof of war crimes of the atrocity type years after the event took place, this explanation seems to lack substance. The other, which appears to be the correct reason, is that spying is a ruse of war, which the threat of 'punishment' is designed to deter. Once the act is completed, the deterrent purpose of the death penalty has no room for operation. The limitation of punishment thus offers a strong indication that espionage is not prohibited by the international law of war and that its suppression is instead left to the initiative of the opposing belligerent. Article 31 has been productive of some controversy concerning whether the immunity of the returned spy must be applied to the civilian secret agent as well as the military.[50] References in the article to a rejoining of the *army* and to subsequent treatment as a prisoner of war might seem, from a textual examination alone, to indicate that only a military spy was intended. However, the two possible bases for the limitation on the punishment of spies logically apply with equal force to both the military and civilian agent, and the great difficulty in many cases of establishing whether an individual acted in a military or non-military

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[48] Although the opinion contains copious citations to Field Manual 27–10, *Rules of Land Warfare* (1940), it does not refer to paragraph 203 of the Manual, which states that spies are *not* punished as 'violators of the law of war'. With respect to espionage, the Court alluded to paragraph 83 of General Orders No. 100, 24 April 1863, but the General Orders, which had been superseded many years previously, stated elsewhere that deception in war is 'a just and necessary means of hostility' (par. 101).

[49] Violle, *L'Espionnage militaire en temps de guerre* (1903), p. 160; Huybrechts, op. cit., pp. 937–8.

[50] In *Re Flesche, Nederlands Jurisprudentie*, 1949, No. 548, the Dutch Special Court of Cassation held that Article 31 does not apply to civilians, and that the immunity therein provided is confined to military personnel in the zone of operations. On the other hand, the *Manual of Military Law (1929)*, Amendments No. 12 (1936), p. 38, n. 5, and Rolin, op. cit., vol. i, p. 371, take the view that the immunity of the returned spy is a general one, applying to all persons of that character. Article 26 of the Manual prepared by the Institute of International Law extended the immunity to spies who had succeeded in quitting the territory occupied by the enemy (*Annuaire de l'Institut de droit international*, 5 (1881–2), p. 156).

For cases granting immunity to returned military spies see *In re Martin* (1865), 45 Barb. (N.Y. 142; *In re Rieger* (France, Cass. crim., 29 July 1948), Dalloz, *Hebdomadaire*, 1949, 193, with a note by de Vabres, *Recueil Sirey*, 1950, 1. 37 (under date of 20 July 1948).

capacity at the time of his act[51] further suggests that the protection of Article 31 is not confined to the military spy.

Questions of substance concerning spies may also arise in connexion with the limitation of Article 29 of the Hague Regulations to spies taken in the 'zone of operations'. In modern warfare, in which even the remotest town is exposed to the danger of attack by guided missiles, rockets, and parachute troops, the entire territory of a belligerent may with some justice be said to be in a zone of operations.[52] But it is normal to preserve some semblance of distinction between that area and territory which is not subject to military control, if only to provide a line of demarcation between the jurisdiction of the military and civilian authorities.[53] At the same time that military codes frequently contain a specific reference to the type of espionage defined in Article 29, the civil law also contains its own provisions for the protection of official secrets and for the general security of the state in time of war.[54] It is even clearer, however, that espionage falling under this latter type of interdiction cannot be said to be in violation of the law of nations, since its punishment has hitherto been effected without reference to that body of law. An alien enemy engaging in espionage, although divesting himself of the protection he might otherwise enjoy as a prisoner of war, is in turn protected by the safeguards of domestic law, which, by way of securing the liberties of loyal citizens, makes even active enemies benefit from the law's protection. As the difficulty of distinguishing the traitor from the spy and secret agent increases , by reason of the fact that a given act may be treasonable if committed by a citizen and espionage if committed by an alien,[55] the necessity of subjecting all persons outside the zone of operations to a common law and to a common tribunal grows correspondingly greater. Although problems of this nature have been productive of recommendations that espionage in time of war be the subject of an agreed international definition,[56] it has not been suggested that espionage should itself be interdicted by international law.

As long as espionage is regarded as a conventional weapon of war, being neither treacherous nor productive of unnecessary suffering, the sanctions visited on spies are only penalties to deter the use of that

[51] Huybrechts, op. cit., p. 941.

[52] *In re Rieger*, *supra*, recognized that even the unoccupied portion of France could be said to be in a zone of operations; see Waltzog, op. cit., p. 52.

[53] See *Ex parte Milligan* (1867), 4 Wall. 2.

[54] E.g. Official Secrets Act, 1911 and 1920 (1 & 2 Geo. V, c. 28; 10 & 11 Geo. V, c. 75); United States Code, Title 18, Chapter 37.

[55] As in France; see *Code Pénal*, Articles 76 and 77; de Vabres, 'La Répression de l'espionnage et la codification du Droit pénal international', in *Revue de droit international, de sciences diplomatiques et politiques*, 26 (1948), p. 341; Pella, 'La Répression des crimes contre la personnalité de l'état', in *Recueil des cours de l'Académie de droit international de la Haye*, 33 (1930), p. 726.

[56] A suggestion of this nature was made by General Arnaudeau (France) at the Brussels Conference of 1874 (*Actes*, p. 43); see de Vabres, op. cit., p. 350.

ruse. The actions of a spy are not an international crime, for by his conduct he merely establishes that he is a belligerent with no claim to any of the protected statuses which international law has created.

III. HOSTILITIES IN ARMS BY PERSONS NOT OF THE ARMED FORCES: GUERRILLAS

Hostilities in arms by persons not entitled to be treated as prisoners of war are of tremendously greater practical importance than espionage, but the law applicable to such conduct, is if anything, even less certain. These activities may take the form of individual acts of violence, in which case the expression *franc-tireur* is normally used, or may with greater probability be carried on by armed bands in guerrilla or partisan warfare. For want of better term, the expression 'guerrilla warfare' will be applied to all such acts, but with the qualification that it is not intended to refer, in the sense in which it is used in military science, to the warfare waged by detached troops of the armed forces, properly so identified, or to armed forces which continue fighting after a surrender, which presents a problem of another nature.[57] The word 'guerrilla' is most usefully applied in a legal context to armed hostilities by private persons or groups of persons who do not meet the qualifications established in Article 4 of the Geneva Prisoners of War Convention of 1949 or corresponding provisions of the earlier Conventions.[58]

The tendency of academic lawyers has been to charge guerrillas with acting in contravention of international law. It has been said that such armed bands carry on 'irregular war' because they are normally self-constituted, lack permanency, do not wear uniforms, carry on pillage and destruction, and are disposed to take few prisoners and to deny quarter.[59] The principal accusation which has been made against them is that they eventually degenerate into bandits, engaging in murder and robbery in hope of gain. As a consequence, the texts of the nineteenth and twentieth centuries are disposed to stigmatize guerrilla warfare and any private hostilities in arms as 'war crimes'.[60]

How well this characterization accords with the realities of modern warfare is open to serious question. It must be assumed at the outset

[57] Concerning which see Nurick and Barrett, 'Legality of Guerrilla Forces under the Laws of War', in *American Journal of International Law*, 40 (1946), p. 563.

[58] Article 1, Hague Regulations of 1907; Article 1, Geneva Prisoners of War Convention of 1929.

[59] Hyde, op. cit., vol. iii, p. 1797; Hyde's sentiments are those of Lieber in *Guerrilla Parties considered with Reference to the Laws and Usages of War* (1862), p. 7.

[60] Oppenheim, op. cit., vol. ii (6th ed. by Lauterpacht, 1944), pp. 451, 454; Fauchille, op. cit., vol. iii, pp. 99 ff.; Hyde, op. cit., vol. iii, pp. 1797–8; Halleck, op. cit., p. 386; Spaight, op. cit., p. 63; Waltzog, op. cit., p. 16; see to like effect the British *Manual of Military Law (1929)*, Amendments No. 12 (1936), p. 83, characterizing private hostilities in arms as illegitimate acts 'from the enemy's standpoint', and United States *Rules of Land Warfare* (1940), pars. 348, 351, and 352.

that guerrilla activities are an inevitable concomitant of hostilities waged by regularly constituted armed forces.[61] Isolated bodies of regular troops, greatly extended supply lines, and thinly scattered occupation forces offer inviting and advantageous targets to guerrilla columns. By contrast with the armed forces, guerrillas require little logistical support. Their casualties are slight. Above all they have the advantages conferred by the fact that they conceal their character as belligerents and are thus able to exploit to the full the element of surprise.[62]

Strategic and tactical considerations alone do not recruit guerrilla forces, and it must be remembered that the partisan exists in modern warfare because the civilian willingly takes up arms and fights. The guerrilla fighting of today had its forerunners in the resistance of the Spanish Maquis during the Peninsular Campaign[63] and in the hostilities of French civilians in the Franco-Prussian War, which brought the term *franc-tireur* into an undeserved prominence.[64] Resistance activities were an important instrument in the defeat of the Axis during the Second World War, and it is hardly possible to name an armed conflict which has taken place since the conclusion of those hostilities in which guerrillas have not played an important and often decisive role.[65] Only a rigid legal formalism could lead to the characterization of the resistance conducted against Germany, Italy, and Japan as a violation of international law. Patriotism, nationalism, allegiance to some sort of political authority have replaced the desire for loot, which has traditionally been attributed to the guerrilla, in motivating civilians to take an active part in warfare. And finally, it must not be forgotten that in the Marxist view of the 'people's war', to which a considerable number of important military powers subscribe, popular resistance, including guerrilla warfare, is regarded as a necessary and proper means of defence.[66]

The law of war has had to evolve an uneasy and sometimes unworkable compromise between the legitimate defence of regular belligerent forces and the demands of patriotism. An unwillingness to regard guerrillas as internationally criminal may be discerned at the very

[61] A related problem is that of the use of force by members of civil defence organizations who have not been equipped with uniforms or have not had an opportunity to don them (see *United States v. Hangobl* (1945), *War Crimes Reports*, xiv (1949), p. 86).

[62] Miksche, *Secret Forces; The Technique of Underground Movements* (1950).

[63] Napier, *History of the War in the Peninsula* (1828–40).

[64] See Rolin-Jaequemyns, 'Chronique du droit international; Essai complémentaire sur la guerre franco-allemande dans ses rapports avec le droit international', in *Revue de droit international et de la législation comparée*, 3 (1871), p. 288.

[65] United Nations forces in Korea have, for example, encountered guerrilla bands ranging in size from 50 to 2,000 men (*Eighth Report of the United Nations Command Operations in Korea, for the period 16 to 30 October 1950*, U.N.Doc. S/1885).

[66] Trainin, 'Questions of Guerrilla Warfare in the Law of War', in *American Journal of International Law*, 40 (1946), p. 534; Kulski, 'Some Soviet Comments on International Law', in *American Journal of International Law*, 45 (1951), p. 347.

threshold of the modern law of war, for the delegations at the Brussels Conference from those countries which had the most often been invaded insisted again and again on the right of the attacked country to call its citizens to arms to resist the enemy.[67] The protected position afforded the members of the *levée en masse*[68] is a monument to these sentiments, but the spontaneous mass uprising in the face of the enemy has lost any real significance. The *levée en masse* is actually an anomaly in the law, for its recognition poses threats not only to the country employing it but to the enemy as well. In an area where a levy exists, the enemy is not without basis in looking upon all inhabitants of the invaded area who are capable of bearing arms as potential enemies to be attacked or, if they surrender, to be made prisoners of war.[69] The very considerations which militate against treating all belligerents as prisoners of war apply with equal force to the members of the *levée en masse*.

The distinction between those forces entitled to be treated as prisoners of war upon capture and those not so qualified which had been worked out at Brussels was preserved in the Hague Regulations of 1899 and 1907.[70] Martens, the president of the 1899 Conference, drew attention to the fact that:

> The Brussels Conference, therefore, by no means intended to abolish the right of defence, or to create a code which would abolish this right. It was, on the contrary, imbued with the idea that heroes are not created by codes, but that the only code that heroes have is their self-abnegation, their will and their patriotism.
>
> The Conference understood that its duty was not to try to formulate a code of cases which cannot be foreseen or codified, such as acts of heroism on the part of populations rising against the enemy.
>
> It simply wished to afford the populations more guaranties than had existed up to that time.[71]

He went on to assert that the provisions drafted at the Brussels Conference had not been designed to deal with all cases and that they

[67] The Spanish delegation asserted that defensive war was for Spain a national war to which all the forces of the nation would be directed, regardless of the danger incurred (*Actes de la Conference de Bruxelles* (1874), pp 138–9). A member of the Italian delegation expressed the view that the Conference did not wish to indicate that resistance, other than in the form of the *levée en masse*, would be illegitimate (*Actes*, pp. 244–5). General de Leer of Russia expressed his Government's understanding that an attacked state has a right of defence without restriction, so long as it conforms to the law of war (*Actes*, p. 246).

[68] Article 10 of the Brussels Code; Article 2, Hague Regulations of 1907.

[69] *Manual of Military Law (1929)*, Amendments No. 12 (1936), p. 11.

[70] A proposed Article recognizing the right of the population of invaded territory to offer 'by all lawful means, the most energetic patriotic resistance against the invaders' was, however, not favourably received (Minutes of the Second Subcommission, Second Commission, Conference of 1899, Eleventh Meeting, 20 June 1899, in *The Proceedings of the Hague Peace Conferences: The Conference of 1899* (ed. by Scott, 1920), pp. 550–5.

[71] Minutes of the Second Subcommission, Second Commission, Conference of 1899, Eleventh Meeting, 20 June 1899, in *The Proceedings of the Hague Peace Conferences; The Conference of 1899* (ed. by Scott, 1920), p. 547.

left the door open to 'the heroic sacrifices which nations might be ready to make in their defence'. 'It is not our province', he added, 'to set limits to patriotism.'

It was not, however, until the conclusion of the Second World War that judicial consideration was given to the status of persons falling outside the class of so-called 'lawful belligerents'. In the *Hostages Trials*,[72] guerrillas were actually said, in legal intendment, to resemble spies in that the enemy punished such activities not because of their illegality in an international sense but because of the danger they presented to him. The prevailing view in the trials involving resistance in arms, whether in occupied or other than occupied territory,[73] appears to be in conformity with that expressed in the *Hostages* case. It was also made plain that guerrillas, like spies, may not be punished without trial.[74]

The Geneva Conference of 1949 was well aware of the problem implicit in the existence of guerrilla and partisan warfare and seemed to be under the impression that it had dealt with it in satisfactory fashion.[75] Members of resistance movements who comply with the conditions that they be commanded by a responsible person, wear a fixed distinctive sign, carry arms openly, and comply with the laws of war are, even in occupied areas, entitled to be treated as prisoners of war upon capture.[76] But because guerrilla warfare is in essence secret warfare, it is improbable that the majority of guerrillas will comply with these conditions, particularly those which relate to the wearing of distinctive insignia and the open carrying of arms.[77] If this is so, the problem of the guerrilla fighter is still one of customary international law. The fact that such persons are still left, subject to the procedural and general safeguards afforded by the Geneva Conventions of 1949, to the mercy of the enemy will in strict law lead to the extreme penalty

[72] *United States v. List et Al.* (1948), *Trials of War Criminals*, xi (1950), p. 1245; *War Crimes Reports*, viii (1949), p. 58.

[73] *United States v. Ohlendorf et Al.* (1948), *Trials of War Criminals*, iv (1949), p. 492.

[74] *United States v. List et Al.* (1948), *Trials of War Criminals*, xi (1950), p. 1290; *United States v. Von Leeb et Al.* (1948), ibid., p. 530; *War Crimes Reports*, xii (1949), p. 86; see the closing Address for the Prosecution in *United States v. Yamashita* (1945), ibid. iv (1948), p. 31. Article 5 of the Geneva Prisoners of War Convention of 1949 recognizes the necessity of a trial by providing that persons who have committed belligerent acts are to be protected by that Convention 'until such time as their status has been determined by a competent tribunal'.

[75] See Report of Committee II to the Plenary Assembly (CDG/PLEN. 76 Pris, 23 July 1949), p. 7.

[76] Article 4.

[77] The fear of Strebel that what he characterizes as a legitimation of resistance activities by civilians, particularly those in occupied territory, will put major obstacles in the path of the opposing belligerent (loc. cit., pp. 133 ff.) apparently proceeds from the assumption that large numbers of persons will be affected by those provisions of Article 4 of the Prisoners of War Convention of 1949 pertaining to resistance movements. It is believed that the disputed clauses of Article 4 represent only a slight derogation from the international common law of war and that the problem of guerrillas who are not entitled to be treated as lawful belligerents is still paramount. See also Brandweiner, 'Das Partisanenproblem und die Genfer Konventionen vom 12. August 1949', in *Juristische Blätter*, 72 (1950), p. 261.

of death. It may be expected, however, that more favourable treatment, specifically in the form of recognition as prisoners of war, will be held out as an inducement to persuade guerrillas to surrender. The listing of those persons who are entitled as a matter of law to be treated as prisoners cannot reasonably be construed as prohibiting a belligerent from granting that status of persons having no legal right thereto.[78]

When resistance activities in the form of guerrilla warfare are carried out in occupied areas, it would appear, in the light of prosecutions for war crimes and the Geneva Conventions of 1949, that they constitute no violation of any duty imposed by international law and cannot therefore be stigmatized as violative of international law.[79] As guerrilla activities in occupied areas during the Second World War proved to be of considerably greater consequence than those in the face of the enemy, there is reason to suppose that the law applicable to unoccupied areas should correspond to that to be invoked elsewhere, unless some distinction between the two which is of legal significance may be ascertained. But if such warefare within occupied areas, where the power of the enemy is already established, is not in contravention of the law of nations, how much less can similar activities in unoccupied zones, where the fortunes of battle are still in doubt, be said to have that character. Nor can it be argued that a state has no obligation to suppress guerrilla activities on its behalf in that portion of its territory which is occupied but that such a duty does arise where active hostilities are in progress in the face of the enemy. As long as partisan warfare is inspired by genuine allegiance rather than a desire for pillage and as long as guerrilla activities are looked upon as licit and laudable by the state on whose behalf they are undertaken and by third parties to the conflict, it is highly unreal to regard them as internationally criminal.[80]

Although guerrilla warfare and private hostilities in arms should not be regarded as violative of international law, this does not necessarily mean that persons carrying on such activities may not be guilty of war crimes in their strict sense. To apply the doctrine of membership in criminal organizations[81] to membership in any guerrilla band because of fears concerning their lawlessness would, of course,

[78] This was the view taken by the Danish delegate at the Geneva Conference of 1949 (*Verbatim Report of the Thirteenth Plenary Meeting, 26 July 1949*, CDG/PLEN/CR 13, p. 6).

[79] This *Year Book*, 27 (1950), pp. 253 ff.

[80] The assimilation of guerrillas to 'bandits' and 'pirates', as proposed by Cowles ('Universality of Jurisdiction over War Crimes', in *California Law Review*, 33 (1945), pp. 181–203), is unwarranted. Although some guerrillas may engage in banditry and thereby become guilty of the war crimes of murder, plunder, and wanton destruction, it is somewhat naive to suppose that a desire for blood and booty for their own sakes is the sole well-spring of such warfare and that guerrillas never devote themselves to the same missions as the regular armed forces.

[81] *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (Cmd. 6964, H.M.S.O., 1946), pp. 66 ff.

constitute an unwarranted extension of the principle, by a legislative rather than a judicial process, from individual organizations within a state to all groups of a specified type. The notion of complicity [82] may, however, involve the responsibility of persons associated with an individual organization of guerrillas members of which have committed criminal acts. Should members of such groups pillage, loot the dead and wounded in the area of battle, refuse to give quarter, or murder prisoners, they would, like members of the regular armed forces, be similarly accountable for their criminal acts.[83]

The guerrilla thus appears, like the spy, to be a belligerent who has failed to meet the conditions established by law for favoured treatment upon capture. The judicial proceeding to which a suspect is subjected is accordingly a determination whether or not he meets the qualifications prescribed for treatment as a prisoner of war or as a peaceful civilian. What formulation of law is necessary to permit his 'punishment' if he fails so to qualify is essentially a matter of domestic law or practice. In Germany, guerrilla warfare against the Reich was defined as a crime by German law.[84] In other countries a purported prosecution for acting in 'violation of the laws and customs of war' is probably to be construed as directed against an offence in violation of the military common law of the state concerned. In any case, the protection of international law, in the sense in which that law safeguards prisoners of war and peaceful civilians, terminates when the judicial proceeding reveals that the individual does not qualify for protected status.

IV. OTHER FORMS OF HOSTILE ACTIVITY BY PERSONS NOT OF THE ARMED FORCES

Clandestine activities in warfare are not confined to the work of the spy, the armed guerrilla, and the *franc-tireur*. Sabotage, intelligence activities other than espionage, propaganda, and psychological warfare may also be carried on by civilians or disguised military personnel, and their importance, by comparison with hostilities in arms, has become so great that partisan warfare has been given the name of 'sabotage with violence'.[85] Since guerrilla bands will depend upon these means of harming the enemy as well as on open combat, guerrilla warfare itself must be understood as embracing this wide range of activities. Such partisan warfare is usually carried on by civilians, as

[82] Article 2 (12) (iv), Draft Code of Offences Against the Peace and Security of Mankind, in *Report of the International Law Commission Covering its Third Session*, 16 May–27 July 1951 (U.N.Doc. A/CN. 4/48, 30 July 1951), par. 59.

[83] I.e. as 'marauders' or 'bandits' in the true sense of those words (see United States *Rules of Land Warfare* (1940), par. 353).

[84] Verordnung über das Sonderstrafrecht im Kriege und bei Besonderem Einsatz (Kriegssonderstrafrechtsverordnung), 17 August 1938, *R.G.Bl.*, 1939, I, 1455, Article 3.

[85] Miksche, op. cit., p. 142.

soldiers of the regular armed forces other than those detailed to organize and assist underground warfare derive no advantage in normal circumstances from assuming the garb of civilians. But military personnel will frequently be called upon to serve as secret agents and to perform clandestine functions not calling for the use of armed force. Both they and their counterparts in resistance movements will of necessity disguise themselves or keep in hiding in a manner resembling the clandestine activities of the spy.

To the hostile activities, other than open armed warfare, of those not qualified to be treated as prisoners of war, the term 'war treason' is most frequently applied. If that term, which is highly objectionable as a concept of occupation law,[86] is extended to hostile activities wherever conducted,[87] its use becomes even more difficult to justify. As to the enemy carrying on military operations in other than occupied territory, sabotage behind the lines is not treasonable in an international sense, because no juridical relationship exists between the offending combatant and the state affected. All the inconsistencies inherent in 'war treason' in occupied areas are thus only multiplied if that term is applied to hostile conduct elsewhere. Alternatively, persons carrying on secret warfare have been accused of the offence of 'unlawful combatancy', which the Supreme Court of the United States in *Ex parte Quirin*[88] declared to be violative of international law and presumably on that account a 'war crime'. In that case, eight Germans who had landed secretly in the United States and were bent on a mission of sabotage were held to be within the jurisdiction of a military commission, before which they had been tried on charges which included, *inter alia*, violation of the law of war in the form of 'unlawful belligerency'. The Court distinguished the lawful and unlawful combatant in the following terms:

> Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[89]

The unlawfulness of their conduct was based on the fact that they had clandestinely entered the United States on a hostile mission, 'discarding their uniforms upon entry'. While there is no doubt that secret agents of this nature are subject to trial under the statutes or military common law of the captor, the characterization of such

[86] This *Year Book*, 27 (1950), pp. 251–2.

[87] *Manual of Military Law (1929)*, Amendments No. 12 (1936), pp. 37, 83; Field Manual 27–10, *Rules of Land Warfare* (1940), par. 205; Oppenheim, *International Law*, vol. ii (6th ed. by Lauterpacht, 1944), p. 454.

[88] (1942), 317 U.S. 1.

[89] 317 U.S. 31.

conduct as a violation of international law arises, it is submitted, from a fundamental confusion between acts punishment under international law and acts with respect to which international law affords no protection. The German saboteurs were also charged with offences under the United States Articles of War, namely, those defining espionage and aiding the enemy,[90] and it would appear that these provisions of municipal law afforded a surer ground for their punishment that did the offence of 'unlawful belligerency' under international law, to which the Court primarily directed its attention.

It is uncontroverted that a person accused of hostile conduct other than as a member of those forces which are entitled to treatment as prisoners of war must be granted a trial. For the most part, the tribunal would appear to be charged only with the responsibility of determining whether the accused is to be treated as a prisoner of war, as a peaceful and therefore necessarily innocent civilian, or as neither, in which case he may be penalized. Once it has been discovered that the accused is not entitled to treatment as a prisoner of war, there appears in most circumstances to be no reason in law to inquire whether the individual is a civilian or a disguised soldier, for it would appear in the latter case that the soldier, even in occupied territory, is to be regarded as having thrown in his lot with the civilian population and to be subject to the same rights and disabilities. The question of his actual status may, however, be relevant to the penalty to be imposed, since the greater danger presented by the presence of disguised military personnel within or behind the lines may call for a proportionately greater punishment than is meted out to an offending civilian. Special problems are presented only in the case of military personnel seeking to avoid capture and escaped prisoners of war who are captured or recaptured in civilian clothes. The evader, as he is called, is often a member of an air force who has parachuted into territory held by the enemy and has disguised himself in an attempt to escape capture.[91] If he is taken by the enemy, the military tribunal determining his status may with some justification think him to be a spy, and the burden may be upon him to rebut that inference if it is once established that he is in the military service.[92] Dr. Spaight believes that the simple evader who is not a spy should be treated as a prisoner of war.[93] The prisoner of war who escapes will normally attempt to assume protective colouring and thus escape being taken. It is recognized that prisoners of war have a duty under their own law to

[90] Articles of War 82 and 81, then in effect.

[91] Secret activities to facilitate such escapes were carried on extensively during the Second World War (Hinton, *Air Victory: The Men and the Machines* (1948), p. 325); see *In re Schonfeld et Al.* (British Military Court, Essen, 1946), *War Crimes Reports*, xi (1949), p. 64.

[92] *Manual of Military Law (1929)*, Amendments No. 12 (1936), p. 37.

[93] Spaight, *Air Power and War Rights* (3rd ed., 1947), pp. 102–4.

escape,[94] and this obligation has been taken into account in placing severe limits on the punishment which may be meted out to a recaptured prisoner who, by the fact of escape, does not remove himself from prisoner-of-war status.[95] Why the evader and the escaping prisoner should benefit from a more favourable régime than their brethren bent on hostile missions within the enemy's lines can probably be explained only by the fact that their conduct in seeking to escape is not regarded as hostile. When, however—as happened in a number of commando and parachute raids—military personnel wear civilian clothes under their uniforms in order that they may assume the guise of civilians when their immediate mission is accomplished, their status is not easily ascertainable.[96] It would seem consistent with the law applicable to ruses and disguised belligerents that such individuals taken while still in uniform should be treated as prisoners of war on the ground that they have only prepared but have not yet executed their deceptive measures. If they should later be captured in civilian clothes, they would appear to be entitled to no better and no worse than falls to the lot of the civilian guerrilla.

Belligerents, both civilian and military, may also assume as disguise the uniform of the enemy. Some authorities regard this as a legitimate ruse before battle,[97] while others contend that the use of the enemy uniform should be absolutely forbidden in all circumstances,[98] save perhaps that of espionage. The view that such deception is permissible if not done in battle is to some extent supported by the outcome of the *Skorzeny* case,[99] which resulted in the acquittal of a number of Germans who had sought to deceive United States forces by the use of American uniforms and equipment. Although such conduct may not be a war crime, there is room for the view that individuals so disguising their true character are not entitled to be considered as prisoners of war and are to be treated as if they had been taken in civilian clothes. The fact that hostilities had ceased at the time of the *Skorzeny Trial* may account for the failure of the American

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[94] *In re Amberger* (British Military Court, Wuppertal, 1946), *War Crimes Reports*, i (1947), p. 81.

[95] Articles 91–94, Geneva Prisoners of War Convention of 1949.

[96] This question is raised in the annotation (p. 28) to *In re Von Falkenhorst* (British Military Court, Brunswick, 1946), *War Crimes Reports*, xi (1949), p. 18. Spaight states that the outer military garb of such persons might not serve to regularize their position (*Air Power and War Rights* (3rd ed., 1947), p. 314).

[97] Hall, op. cit. (8th ed. by Higgins, 1924), p. 649; Westlake, op. cit., Part ii (1907), p. 73; Fauchille, op. cit., vol. ii, p. 127. The question is essentially, of course, what use of the enemy uniform constitutes 'improper use . . . of the military ensignia and uniform of the enemy' within the meaning of Article 23 (f) of the Hague Regulations of 1907.

[98] Spaight, *War Rights on Land* (1911), pp. 106–110 (characterizing a rule which envisages a quick change of uniforms on the battlefield as 'stupid'); Jobst, 'Is the Wearing of the Enemy's Uniform a Violation of the Laws of War?', in *American Journal of International Law*, 35 (1941), p. 435, wherein the whole question is comprehensively discussed.

[99] *United States v. Skorzeny et Al.* (1947), *War Crimes Reports*, ix (1949), p. 90.

authorities to treat these persons in the same way as disguised persons taken in combat. The use of the Red Cross insignia as a means of deception is, of course, absolutely forbidden by the law of war and is a form of ruse punishable as a war crime.[100] With the question of such ruses, the point is reached at which the bearing of war on dissimulation may pass over from a denial of privilege under the law to active prosecution for the violation of the law of war.

V. CONCLUSIONS

The various types of hostile conduct which have just been described, although outwardly dissimilar, actually share a common characteristic—that of disregard for or deliberate non-compliance with the qualifications established for an individual's recognition as a prisoner of war upon capture. In a sense all of them also constitute ruses of one sort or another, if by ruse is understood any means of deceiving the enemy. Since these qualities are those which most conspicuously inhere in espionage, resistance activities in occupied areas, guerrilla warfare, and private hostilities in arms, they afford grounds for believing that all these acts of warfare, whether or not involving the use of arms and whether performed by military persons or by civilians, are governed by a single legal principle. That this larger category of hostile conduct is not violative of any positive prohibition of international law is demonstrable by much the same considerations as militate against an internationally imposed duty of obedience to the belligerent occupant. In both occupied and unoccupied areas, resistance activities, guerrilla warfare, and sabotage by private persons may be expected to continue on at least as widespread a basis in future warfare as they have in the past. More often than not, patriotism or some sort of political allegiance lies at the root of such activities. Consequently the law of nations has not ventured to require of states that they prevent the belligerent activities of their citizenry or that they refrain from the use of secret agents or that these activities upon the part of their military forces or civilian population be punished. Evidence of the unwillingness of international law to intervene in such matters is found in the failure of those who have compiled lists of 'war crimes' for which persons are actually to be tried to include such acts as espionage or guerrilla fighting. The weight of precedent and history represented by the law applicable to espionage and the importance for practical purposes of the law relating to the hostile conduct of occupied populations together suggest that the supposed illegality of those other types of secret warfare which have been mentioned is based upon a misconception. The correct legal formulation is, it is submitted, that armed and unarmed hostilities, wherever

[100] *United States v. Hagendorf* (1946), *War Crimes Reports*, xiii (1949), p. 146.

occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy. 'Unlawful belligerency' is actually 'unprivileged belligerency'.

International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponent. The peril to the enemy inherent in attempts to obtain secret information or to sabotage his facilities and in attacks by persons whom he often cannot distinguish from the peaceful population is sufficient to require the recognition of wide retaliatory powers. As a rough-and-ready way of distinguishing open warfare and dangerous dissimulation, the character of the clothing worn by the accused has assumed major importance. The soldier in uniform or the member of the volunteer corps with his distinctive sign have a protected status upon capture, whilst other belligerents not so identified do not benefit from any comprehensive scheme of protection. An exception must, of course, be made of the *levée en masse*, which cannot be reconciled on principle with the distinction otherwise made between privileged and unprivileged belligerents. There is considerable justice in the contention that to make the difference between life and death hang on the type of clothes worn by the individual is to create a 'clothes philosophy' of a particularly dangerous character. Indeed, the emphasis on the properly uniformed belligerent may be only a survival from the type of war fought by closely grouped ranks of soldiers, in which firing upon even individual detached soliders was regarded as violative of international law.[101] As the current tendency of the law of war appears to be to extend the protection of prisoner-of-war status to an ever-increasing group, it is possible to envisage a day when the law will be so retailored as to place all belligerents, however garbed, in a protected status.

The judicial determination which is necessary before a person may be treated as an unprivileged belligerent is in consequence not a

[101] Article 69, General Orders No. 100, 24 April 1863, prepared by Dr. Francis Lieber for the government of United States forces in the field, stated: 'Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.' It is perhaps this distaste for the killing of the detached soldier which accounts for the prohibition of assassination in customary international law. Although this rule is considered to have been incorporated into Article 23(b) of the Hague Regulations, which forbids treacherous killing (Field Manual 27–10, *Rules of Land Warfare* (1940), par. 31), practice must be considered to have given a restrictive interpretation to 'assassination', at least to the extent of not rendering internationally criminal the deliberate killing of individual enemies in battle or in occupied areas. It is, for example, questionable whether the killing of Heydrich in 1942 by three Czech nationals who had parachuted into Czechoslovakia (see Spaight, *Air Power and War Rights* (3rd ed., 1947), p. 305) could be said to be an international crime. But cf. *Opinions of the Attorneys General of the United States*, 11 (1869), p. 297, dealing with the assassination of President Lincoln.

determination of guilt but of status only and, for the purposes of international law, it is sufficient to ascertain whether the conduct of the individual has been such as to deny him the status of the prisoner or of the peaceful civilian. There is actually no need for the creation of separate categories of offences, since the person bent on espionage will be subject to the same maximum penalty as the individual who transmits information innocently acquired or who engages in secret warfare. The fact that a given individual will, as a matter of practice, carry on a variety of forms of hostile conduct is a further reason why international law need not work out any code of 'offences'. What is thereafter to be done to the individual who is found to lack a privileged status is left to the discretion of the belligerent. It may either, as a belligerent act, cause the execution of the offender or it may require the application of domestic law to determine something denominated in that municipal law as 'guilt'—but a guilt only in the sense of municipal law. In the case of occupied territory Articles 64, 65, and 67 of the Geneva Civilians Convention of 1949 impose a positive requirement that persons in occupied areas be tried only under a municipal law enacted for or applied to the occupied area, and the Convention as a whole so severely restricts the power of the occupant to deal freely with unprivileged belligerency[102] that the resistance worker or guerrilla in occupied territory is actually in a more favourable position than if he had been arrested or captured elsewhere.

A denial that unprivileged belligerency is a violation of international law does not, it must be emphasized, leave the opposing state powerless. Guerrilla warfare may still be met with open warfare and saboteurs and spies captured within the lines may still be penalized, but not for any violation of international law. Except to the extent to which the power to impose the death penalty has been removed by the Geneva Civilians Convention of 1949,[103] the offended state may employ that measure in dealing with clandestine hostile conduct. Moreover, the capturing state is not precluded from punishing an unprivileged belligerent for a war crime *stricti juris*, if he has, for example, killed civilians, or pillaged or refused to give quarter. Although it may be foreseen that in time of war bandits who live by pillage may attempt to contend that they are guerrillas fighting for the defence of their country, the degree to which they comply with the law of war generally applicable to the armed forces will afford the best indication of their purpose, and particularly of their adhesion to one of the belligerents in the conflict rather than to motives of private gain.

As has already been observed, 'unprivileged belligerency' partakes

[102] See Gutteridge, 'The Protection of Civilians in Occupied Territory', in *Year Book of World Affairs* (1951), p. 290.
[103] Article 68.

strongly of the nature of a ruse by reason of its clandestine character. The same 'statute of limitations' which forbids the punishment by the enemy of a spy who was returned to his own lines accordingly could be applied to other forms of unprivileged belligerency, and there would appear to be strong reasons of policy for doing so.[104] However, although it is easy to determine that a spy's mission is completed with his return to his own lines, to fix with certainty when the status of 'unprivileged belligerency' in other forms is at an end is extremely difficult. Nevertheless, the principle to be applied would appear to be that if an individual has either returned to his own lines or become part of the regular armed forces or has otherwise indicated the termination of his belligerent status, as by long abstention therefrom, he may not be prosecuted by the opposing state for his previous acts of unprivileged belligerency. In the case of guerrilla warfare or of resistance activities in occupied territory, the cessation of belligerent activity will in all probability be difficult to prove in practice. Furthermore, as the penalizing of the unprivileged belligerent is actually a belligerent act, there is no reason for such action after the definite cessation of hostilities, subject to the exception that new acts occurring thereafter would be punishable on the basis that they had constituted a resumption of hostilities.

[104] It was at one time suggested that the war traitor who had returned to his own lines should benefit from the immunity extended to the spy (Article 104, General Orders No. 100, 24 April 1863), but the contrary view now appears to prevail (*Manual of Military Law (1929)*, Amendments No. 12 (1936), p. 38; Field Manual 27–10, *Rules of Land Warfare* (1940), par. 213.

TOTAL LEGAL SERVICE: SEWELL ON GOVERNMENT PROPRIETORSHIP OF LAND

Professor Toxey H. Sewell, Colonel, JAGC, Retired is a specialist in matters of real property law and legislative jurisdiction as they relate to land owned by the United States. In this article Professor Sewell examines the distinction made by the courts between "sovereign" and "proprietorial" functions of the United States and describes it as a myth. He suggests that use of labels to solve legal questions concerning ownership of or activities on land owned by the United States does not properly permit analysis of the complex legal issues concerning title to and control of such lands. His treatment of this area, particularly the constitutional basis for United States ownership of land, makes this a seminal piece, although *Military Reservations*,[1] which he edited, had been the standard work for five years before this article was published. Some further notion of the range of problems affected by this author's work may be found in earlier editions of this *Review*.[2]

[1] U.S. DEP'T. OF ARMY PAMPHLET NO. 27-154, MILITARY RESERVATIONS (1963), *superseded by* U.S. DEP'T OF ARMY, PAMPHLET NO. 27-21, MILITARY ADMINISTRATIVE LAW HANDBOOK (1973).

[2] Lloyd, *Unlawful Entry and Reentry into Military Reservations in Violation of 18 U.S.C. § 1382*, 53 MIL. L. REV. 137 (1971); Peck, *Use of Force to Protect Government Property*, 26 MIL. L. REV. 81 (1964).

THE GOVERNMENT AS A PROPRIETOR OF LAND†

*Toxey H. Sewell**

I. INTRODUCTION

"Governmental powers cannot be contracted away. . . ." This pronouncement was made by the Supreme Court in an 1898 decision involving the right of a Government lessee to recover damages by reason of Federal action preventing him from enjoying the full benefits of his lease.[1] The Secretary of the Treasury had leased two islands off the Alaskan coast for the purpose of harvesting seals. Thereafter, pursuant to a treaty with Great Britain, the same officer so restricted the number of seals that could be taken on the islands as to drastically limit the value of the lease. The Supreme Court denied recovery on the ground that regulation of the seal fisheries "involved the exercise of power as a sovereign and not as a mere proprietor" and the former power could not be preempted by a government lease.[2] The decision seems to stand for the proposition that the federal government does some things as a sovereign and others as an ordinary proprietor. What it does in its private capacity does not necessarily bind it in its public functions. The sovereign hand need not know what the proprietorial hand is doing.

Such a view of the government as having two separate functional entities, one "sovereign" and the other "proprietorial," should not be accepted without further thought. There is more to the subject than might be supposed from the brief illustration given. The sovereign-proprietorial division of functions has, in fact, been suggested in a

*Professor of Law, University of Tennessee. B.S., 1942; J.D., 1948, University of Alabama; LL.M., 1954, the George Washington University. At the time this article was written the author was an Associate Professor of Law at the University of Tennessee.

[1] North Am. Commercial Co. v. United States, 171 U.S. 110 (1898).

[2] *Id.* at 137. *See also* Horowitz v. United States, 267 U.S. 458 (1924); Wah Chang Corp. v. United States, 282 F.2d 728 (Ct. Cl. 1960). "The government purely as a contractor . . . may stand like a private person . . . but by making a contract it does not give up its power to make a law. . . ." Mr. Justice Holmes in Ellis v. United States, 206 U.S. 246, 256 (1907).

great variety of contexts.[3] The present inquiry will center upon just how much validity there is to a distinction of this nature in the field of land ownership. In this regard, the United States is by far the largest owner of real property in the country. It is frequently said that this property is owned in essentially the same status as a private landowner.[4] The activities of the federal government in this area can thus be described as "proprietorial" in character. But, as will be seen, there are both obvious and subtle differences between the United States as an owner of real property and a private individual in a like capacity. The real issue is whether there is any substance to the concept of "proprietorial" ownership of real property by the government. There is, in this connection, a strong basis for saying that all activities of the federal government in the land ownership field are sovereign, and nothing else.[5] Such considerations place in context the scope of inquiry to be attempted by this article. While it is intended to concentrate on the so-called "proprietorial" features of federal land ownership, related aspects of the matter will be considered. Emphasis will necessarily be put on the points of similarity and difference between federal and private ownership of real property.

II. CONSTITUTIONAL BASIS

To begin with, it should be acknowledged that all ownership of land by the United States is *public* in character. Under our Constitutional system, it is not possible for the federal government to own land for private or personal purposes.[6] There are important ramifications to be drawn from these basic assertions; not the least of which is the idea

[3] *See* Alabama v. Texas, 347 U.S. 272 (1954), *rehearing denied*, 347 U.S. 950 (1954). Illustrations of the sovereign-proprietorial distinction will appear throughout this article. The term, "proprietorial," may be taken to describe governmental actions in the fields of contracting, property ownership, employment, and the like. Such matters have more or less exact counterparts in transactions between private parties. On the other hand, functions which are peculiarly governmental, and incapable of being performed by private parties, are "sovereign" or "governmental" in nature. Legislative and judicial actions partake of this character.

[4] Instances will appear elsewhere. The reasoning seems to be based on Cooke v. United States, 91 U.S. 389 (1875). "If it [the United States] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. . . ." *Id.* at 398. "The government enters into purely commercial contracts . . . on the same footing as any private contracting party. . . ." Waterman S. S. Corp. v. United States, 258 F. Supp. 425 (S. D. Ala. 1966).

[5] "It has frequently been stated that the United States, in performing [leasing functions] acts only in a governmental capacity [citing authorities]." United States v. Essley, 284 F.2d 518, 521 (10th Cir. 1960). "[F]rom the practical standpoint the sweeping concept of similarity between commercial and government contracts simply is not borne out. . . ." Vom Baur, *Differences between Commercial Contracts and Government Contracts*, 53 A.B.A.J. 247-51 (1967).

[6] "The United States does not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied . . . to pay the debts and provide for the common defense and general welfare. . . ." Van Brocklin v. Tennessee, 117 U.S. 151, 158-59 (1886). Note the reference to private property

that all property owned by the United States partakes of a governmental character and is entitled to the privileges and immunities accorded other federal instrumentalities. But there are other, at least equally important, aspects of the matter. The Constitution vests a peculiar autonomy and control over federal land in the general government. The United States does not have Constitutional power to legislate generally with respect to title and ownership of real property by private citizens, as this is left with the states.[7] Congress, however, is given a special Constitutional authority to enact laws with respect to the "territory or other property belonging to the United States."[8] It is appropriate to emphasize the broadness of this Congressional power. Courts have spoken of it, in general terms, as being "without limitation."[9] No congressional enactment known to the writer has been stricken down because it exceeded the power of congress over federal land. It is not necessary to illustrate the extent to which congress has exercised its prerogatives over government property, as casual reference to federal statutes will reflect the degree to which this has been done.

In any event it would seem that congress could control, in the minutest respect, every aspect of federal title and land ownership. Special forms of estates apparently could be created and substantive rules of state property law could be made inapplicable. It would appear that federal law could provide unique methods of construing deeds and other conveyancing instruments affecting federal title to land. But based on past experiences there is reason to question the broadness of some of these assertions, and there are wide gaps where congress has not stepped in and exercised the powers it possesses. These factors should not be permitted to obscure the essentially complete residual authority possessed by that body over property owned by the United States.

How, in view of this structure, can there be any such thing as *proprietorial* ownership of property by the federal government? The answer is that calling a government activity proprietorial does not mean that it is private in nature, but only like a private activity. In the process of fashioning principles of law in certain subject areas, the courts have found it appropriate to rely on the sovereign-proprietorial distinction. But this is largely a matter of terminology and conven-

ownership by monarchs. A well-known example is the Congo. This territory was "in the late Nineteenth Century and the early years of the Twentieth the private estate of King Leopold II of Belgium. In 1908 control passed to the Brussels Government. . . ." Clinton, *The United Nations and the Congo*, 47 A.B.A.J. 1079 (1961).

[7] See Pollard v. Hagan, 44 U.S. (3 How.) 212, 221 (1845).

[8] U.S. CONST. art. IV, § 3, cl. 2. *See* Alabama v. Texas, 347 U.S. 272 (1954), *rehearing denied*, 347 U.S. 950 (1954).

[9] United States v. California, 332 U.S. 19, 27 (1947) *opinion supplemented*, 332 U.S. 804 (1947), *rehearing denied*, 332 U.S. 787 (1947), *petition denied*, 334 U.S. 855 (1948).

ience. Not since the early days has it been seriously contended that government land ownership is anything other than public in character and subject to the special authority of congress. This basic concept permeates every aspect of federal land law and is the single most fundamental difference between the government as a proprietor of land and a private individual in like circumstances.

III. STATUTORY AUTHORIZATION

It follows that every real property transaction entered into by government officers must be authorized by congress. The cases establish that each acquisition, holding, or disposition of property by the federal government depends upon the proper exercise of a constitutional grant of power.[10] These broad assertions are subject to only minor qualifications and, by and large, will govern the validity of real property transactions involving government land. Federal statutes prohibit executive officials from acquiring interests in real property unless there is some express authorization from congress.[11] In furtherance of the described system, congress does, in fact, legislate concerning both acquisitions and dispositions of land. It is the practice to enact each year authorization legislation covering specific public works projects by name. Minor land acquisitions are usually provided for by permanent legislative authority.[12] Most disposals of federal land interests are likewise authorized by general and permanent statutory provisions.[13]

What happens when a real property interest is acquired or disposed of by a government agent without the requisite authority? To the extent that the authority of the government agent is limited by the absence of either legislative or regulatory authority, any person dealing with him is bound by the same limitation. "Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."[14] Case law establishes that the federal government is neither bound nor estopped by the actions of its agents

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[10] *See* United States v. Allegheny County, 322 U.S. 174, 182 (1944); United States v. Jones, 176 F.2d 278 (9th Cir. 1949); Osborne v. United States, 145 F.2d 892, 896 (9th Cir. 1944); United States v. Mallery, 53 F. Supp. 564, 569 (W.D. Wash. 1944).

[11] *See, e.g.*, 41 U.S.C. § 14 (1958).

[12] *See, e.g.*, 10 U.S.C. § 2674 (1958).

[13] *See* Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471-524 (1958).

[14] Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947). This principle is also applicable where the government agent lacks authority due to internal regulations. *See* G. L. Christian & Associates v. United States, 320 F.2d 345 (Ct. Cl. 1963), *cert. denied*, 382 U.S. 821 (1965).

beyond the scope of their authority,[15] although something in the nature of an estoppel is occasionally invoked to avoid manifest injustice.[16]

Lack of statutory authorization for a particular real property transaction involving government land will normally mean, therefore, that the transaction is not valid. The usual situation is where the federal agent, as well as the party dealing with him, act on the mistaken assumption that the particular acquisition or disposition is authorized. Statutory authority is not always a clear question and unexpected problems in this area can arise. A gift to the federal government cannot be accepted without statutory authority, for instance, if it would impose obligations of a continuing nature upon the United States.[17] Even where statutory authority to acquire or dispose of land seems to be provided, there is a tendency to construe it strictly. A general authorization to "develop" a particular facility, for example, has been determined not to include authority to acquire land necessary for that purpose.[18] The positive requirement for statutory authorization applies to disposition of property interests as well as to their acquisition. Federal land cannot be sold, given away, or abandoned without authority from congress.[19] Where land or facilities have been left idle due to the oversight, neglect, or lethargy of government agents, they are still not abandoned from a legal standpoint in the absence of legislative sanction.[20] Where the action of a government representative is conscious and wrongful, the same considerations dictate even more strongly that the transaction should not be upheld.[21]

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[15] *See, e.g., In re* Hooper's Estate, 359 F.2d 569, 577 (3d Cir. 1966), *cert. denied*, 385 U.S. 903 (1966); Beaver v. United States, 350 F.2d 4, 8 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966); Brubaker v. United States, 342 F.2d 655, 662 (7th Cir. 1965); Prestex, Inc. v. United States, 320 F.2d 367, 371 (Ct. Cl. 1963); G. I. Christian & Associates v. United States, 320 F.2d 345 (Ct. Cl. 1963), *cert. denied*, 382 U.S. 821 (1965). Where government agents represented to a seller of land that he would have priority to repurchase the same when the government use was discontinued, the representation was held not binding or enforceable. Harrison v. Phillips, 185 F. Supp. 204 (S. D. Texas 1960), *aff'd*. 289 F.2d 927 (5th Cir. 1961), *cert. denied*, 368 U. S. 835 (1961).

[16] *See* Walsonavich v. United States, 335 F.2d 96 (3d Cir. 1964).

[17] *See* Story v. Snyder, 184 F.2d 454, 456 (D. C. Cir. 1950), *cert. denied*, 340 U.S. 866 (1950). The attorney general has concluded, however, that an unconditional gift of property may be accepted without statutory authorization. 39 OP. ATT'Y GEN. 373 (1939); 28 OP. ATTY GEN. 413 (1910).

[18] Ms. COMP. GEN. B–115456 (July 16, 1953).

[19] *See* United States v. San Francisco, 112 F. Supp. 451, 453 (N. D. Cal. 1953), *aff'd*, 223 F.2d 737 (9th Cir. 1955), *cert. denied*, 350 U.S. 903 (1955); Osborne v. United States, 145 F.2d 892 (9th Cir. 1944); United States v. Mallery, 53 F. Supp. 564 (W.D. Wash. 1944).

[20] *See* Kern Copters, Inc. v. Allied Helicopter Service, Inc., 277 F.2d 308, 313 (9th Cir. 1960); City of Springfield v. United States, 99 F.2d 860 (1st Cir. 1938), *cert. denied*, 306 U.S. 650 (1938); United States v. Ballard, 184 F. Supp. 1 (D. N. M. 1960); United States v. City of Columbus, 180 F. Supp. 775 (S. D. Ohio 1960); United States *ex rel.* TVA v. Caylor, 159 F. Supp. 410 (E. D. Tenn. 1958).

[21] *See* United States v. Mississippi Valley Generating Co., 364 U.S. 520, 563–64 (1961), *rehearing denied*, 365 U.S. 855 (1961); *cf.* Muschany v. United States, 324 U.S. 49, 58 (1945).

There are some few situations where federal land transactions have been sustained without action by congress. In the international field, for instance, it would seem clear that the president could acquire or dispose of territory by treaty or agreement with a foreign state.[22] This is because foreign relations are the peculiar concern of the political branch of government. Furthermore, under proper circumstances, it is possible for the executive to seize private property as an exercise of the military power. While congressional authorization is usually provided for, actions of this nature, under some conditions can be upheld as purely executive actions based on military necessities.[23] Where private property is requisitioned under the military power for a public purpose, the owner is not deprived of his right to compensation under the Fifth Amendments.[24] In other words, while the United States may derive power to take private property summarily from the laws and prerogatives of war, the deprived owner still may have a right to reimbursement.[25]

The power of the president to seize property without statutory authority, in accordance with presumed emergency war powers, must be carefully circumscribed. The 1952 decision of the Supreme Court in *Youngstown Sheet and Tube Company vs. Sawyer*[26] illustrates the limited residual authority of the president in this area. In this case, the Court was called upon to consider the validity of a seizure of certain steel plants to prevent interference with the Korean War effort by a threatened strike. Although several statutes authorized action of this nature, the president did not purport to act under any of them, because they were "much too cumbersome, involved, and time-consuming for the crisis which was at hand." In a 6–3 decision the Supreme Court held the president's action unauthorized. Although the rationale of the majority was obscured by the fact that the six members contributed seven separate opinions, there was a consensus among the members that the Constitutional power to requisition

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[22] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

[23] Thus, the exigencies of war can justify a noncompensable taking or destruction of private property. United States v. Pacific R.R., 120 U.S. 227 (1887). A military officer is justified in seizing private property in an emergency. Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1852); The Prize Cases [The Amy Warwick], 67 U.S. (2 Black) 635 (1863). Interference with private property is justified as a matter of imperative military necessity in an area of combat during war. United States v. Russell, 80 U.S. (13 Wall.) 623 (1871).

[24] *See* United States v. Pee Wee Coal Co., 341 U.S. 114 (1951). Normally the basis for the government's liability for taking property is legislative authority for the taking. "In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized to do so. . . ." United States v. North Am. Transp. & Trading Co., 253 U.S. 330, 333 (1920).

[25] The Court of Claims has jurisdiction under the theory of an implied promise to reimburse the owner. *See* 28 U.S.C. § 1491 (1958) and United States v. Russell, 80 U.S. (13 Wall.) 623 (1871).

[26] 343 U.S. 579 (1952).

property, at least under the given circumstances, was in the congress rather than the president. The disagreement was over the extent to which the executive might exercise extraordinary power to seize property in other situations. Some members of the Court felt that no set of circumstances could justify an executive seizure of property. It would appear, however, that the majority of the Court would subscribe to the view that, in instances of true military necessity, seizures of property would be sustained in absence of statutory authorization.[27]

Apart from the international and military fields, there are a few minor and obvious situations where federal real property transactions have been upheld in absence of Congressional action. The attorney general has concluded, for instance, that an express statutory basis is unnecessary for the United States to acquire title to real property where authority may reasonably be implied from the circumstances.[28] Thus, where the federal government has taken a lien on real estate and forecloses the same to protect its security, an express authorizing statute is unnecessary.[29] It is also established that licenses may be granted over public property without statutory authorization.[30] This is permissible on the basis that no interest in real property is being granted, only the use of the same.

Two fundamental points connected with the statutory authorization requirement bear further emphasis. The first is that the actual authority of a government agent participating in a land transaction is an essential subject of inquiry. The doctrine of apparent authority, which can be relied upon in dealings with private agents, has little or no relevance where a government representative is involved.[31] In most instances, the authority of the federal agent will be clear to the person dealing with him, but there will be some cases where the matter should be gone into further. The authority of the federal representative should never be merely assumed. The second point to be noted is the extent to which the requirement of statutory authority touches and influences every aspect of federal land law. While this had already been demonstrated to a degree, it will become even clearer as other subjects are considered. The difference between the government and the private landowner is thus clearly drawn. The latter need not look to statutory authority to govern his transactions but may proceed on volition alone.

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[27] Only the concurring opinions of Justices Jackson and Douglas would appear to depart from this view. *Id.* at 592, 629.

[28] *See* 40 OP. ATT'Y GEN. 69 (1941); 22 OP. ATT'Y GEN. 665 (1899); 15 OP. ATT'Y GEN. 212 (1877).

[29] *See* 35 OP. ATT'Y GEN. 474 (1928).

[30] *See* Osborne v. United States, 145 F.2d 892 (9th Cir. 1944).

[31] *See* Whelan, Comment, *Government Contracts: Apparent Authority and Estoppel*, 55 GEO. L. J. 830–49 (1967).

IV. FEDERAL SUPREMACY

The Constitution and laws of the United States "shall be the supreme Law of the Land."[32] At an early date, the Supreme Court held that activities and instrumentalities of the United States are immune from state regulation.[33] The federal immunity doctrine envelops the entire range of federal activity.[34] Land ownership by the United States, being of an essentially public character, is entitled to the privileges and immunities accorded other federal activities.[35] It was held in 1886 that all federal land partook of a public character and was not subject to state taxation without consent of the United States.[36] In the same vein, it has been established that a state may not condemn land belonging to the United States without its consent.[37] Nor may federal authorities be required to comply with building codes and zoning requirements imposed by local State agencies.[38] A state may not require the federal government to comply with recording requirements in order to protect its title.[39] The above conclusions flow logically from the federal Supremacy premise. The general postulate,—that a state cannot prevent the federal government from acquiring land, disposing of it, or making an effective use of it,—would seem equally valid. As stated by the Supreme Court in *Kohl v. United States*,[40] the right of the federal government to acquire land

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[32] U.S. CONST. art. VI, cl. 2.

[33] M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[34] *See* Department of Employment v. United States, 87 S.Ct. 464 (1966); United States v. Boyd, 378 U.S. 39 (1964), *noted in* 17 VAND. L. REV. 1543 (1964); United States v. Georgia Pub. Serv. Comm'n, 371 U.S. 285 (1963); Paul v. United States, 371 U.S. 245, 248–63 (1963).

[35] "[Federal lands] will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers." Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 539 (1885).

[36] Van Brocklin v. Tennessee, 117 U.S. 151 (1886). Prior to this decision, there seems to have been considerable doubt about the matter. *See* United States v. Railroad Bridge Co., 27 F. Cas. 686 (No. 16,114) (C.C.N.D. Ill. 1855); United States v. Weise, 28 F. Cas. 518 (No. 16,659) (C.C.E.D. Pa. 1851); People v. Shearer, 30 Cal. 645 (1866); People v. Morrison, 22 Cal. 73 (1863).

[37] *See* Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917). A proceeding to condemn land, in which the United States has an interest, is a suit against the United States which may be brought only with the consent of congress. Minnesota v. United States, 305 U.S. 382, 386–87 (1939).

[38] *See* United States v. City of Chester, 114 F.2d 415 (3d Cir. 1944); United States v. Philadelphia, 56 F. Supp. 862 (E.D. Pa. 1944), *aff'd*, 147 F.2d 291 (3d Cir. 1945), *cert. denied*, 325 U.S. 870 (1945); Tim v. City of Long Branch, 135 N.J.L. 549, 53 A.2d 164 (1947); Curtis v. Toledo Metropolitan Housing Authority, 36 Ohio Op. 423, 78 N.E.2d 676 (Ohio Com. Pleas 1947).

[39] *See* United States v. Allegheny County, 322 U.S. 174, 183 (1944); United States v. Snyder, 149 U.S. 210 (1893); Norman Lumber Co. v. United States, 223 F.2d 868 (4th Cir. 1955), *cert. denied*, 350 U.S. 902 (1955); *In re* American Boiler Works, Inc., Bankrupt, 220 F.2d 319 (3d Cir. 1955); *In re* Read-York, Inc., 152 F.2d 313 (7th Cir. 1945).

[40] 91 U.S. 367 (1875).

pursuant to its laws cannot be made dependent on the "will of a State" or a private citizen.[41] It is likewise established that a state cannot prevent the federal government from disposing of Federal land within State boundaries.[42]

But all is not certain in this area. At an early date the Supreme Court held that New York could prevent by statute the devise of real property in the state to the United States.[43] Although it would appear that the Federal Supremacy doctrine was not specifically argued to the court, the assertion was advanced that the state prohibition violated an essential attribute of national sovereignty,—the right to acquire property by all methods known to the law. The court nevertheless held that the power to control devises of real property was in the state, and a person must "devise his lands in that state within the limitations of the statute or he cannot devise them at all."[44]

In *United States v. Burnison*,[45] the same issue was again brought before the Supreme Court. In this case, California statutes prohibited testamentary gifts of property to the United States. It was urged that the state law was in violation of the "Supremacy Clause" of the Constitution in that it infringed upon the "inherent sovereign power" of the United States to receive testamentary gifts. The Court refused to accept the argument and upheld the state law. The thrust of its reasoning was that state law may prevent a testator from leaving property to the United States, even though the law could not prevent the United States from taking it.[46] There are problems with this logic. The result is exactly the same whether the impact of the statute be

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[41] *Id.* at 371. Interestingly the argument had been presented that the United States could only condemn land as an agent of a State, and had to do so in the mode and by the tribunal which the State prescribed. *Id.* at 369. *See also in re* United States, 28 F. Supp. 758, 760–61 (W.D. N.Y. 1939).

[42] *See* Clackamus County v. McKay, 226 F.2d 343 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 904 (1955).

[43] United States v. Fox, 94 U.S. 315 (1876).

[44] *Id.* at 321.

[45] 339 U.S. 87 (1950).

[46] "[T]he Government argues a state cannot interfere with this power to receive [property]. This argument fails to recognize that the state acts upon the power of its domiciliary to give and not on the United States' power to receive. As a legal concept a transfer of property may be looked upon as a single transaction or it may be separated into a series of steps. . . . The United States' argument leads to the conclusion that no obstruction whatever may be put in the way of the United States' power to receive by will. Thus the United States could claim rights under the will of a testator whom the state had declared incompetent, or under a will that had not been witnessed and attested according to the laws of the state. The United States could take to the complete exclusion of a surviving spouse, notwithstanding the state law. . . . [W]e find nothing in the Supremacy Clause which prohibits the state from preventing its domiciliary from willing property to the Federal Government." *Id.* at 91–93. Would state law prevail if congress enacted a federal statute declaring that the government was a competent devisee, that a will not complying with State formalities would be sufficient, and that a surviving spouse would have no preemptive rights? *See* Part V *infra*. *See also* Succession of Shephard, 156 So.2d 287 (La. App. 1963). In line with the principal case, a State may impose an inheritance tax as a condition to a devise to the United States. United States v. Kingsley, 194 A.2d 735 (N.J. 1963).

upon the giver or the taker. In either event the federal government has been prevented from taking the gift and no other view of the matter seems realistic. Furthermore, the stated approach is difficult to reconcile with the established position of the Court that a state cannot prevent the federal government from taking title to property by purchase or condemnation.[47] Suppose a state were to enact legislation preventing private landowners from making *inter vivos* conveyances to the United States. Should such a prohibition be upheld as affecting the private grantor rather than the United States? In view of *Burnison*, the answer is not as clear as it might seem.

The conclusion to be drawn, however, is that government land ownership is generally immune from state regulation and control. Admittedly there are some chinks in the armor, but such state incursions as there have been are few and relate to areas where congress has not specifically acted. Can the United States be a true proprietor and be immune from state law? It would not seem so as private proprietorship necessarily depends for its efficacy on state law. The dividing line between the United States and the private owner is again clearly drawn. This is not the end of federal supremacy. As will be seen, this pervasive doctrine influences most features of federal land law.

V. EFFECT OF STATE LAW

It would be expected, on the basis of the foregoing discussion, that conveyancing practices involving federal land would be immune from state law. Logically, substantive principles of state law would yield in any case where title of the United States to particular property were jeopardized. Such questions as Federal title and lien would seem to "present questions of federal law not controlled by the law of any state . . ."[48] Case law establishes, however, that the operation and effect of conveyances to or from the United States will depend to a large degree on the content of State law. To a lesser extent, the effect of federal condemnation decrees vesting title in the United States is affected by state law. Statements in the reported cases often assert quite positively that state law must be observed in construing deeds and other instruments involving title to government land. Regardless of certain theoretical difficulties in doing so, therefore, the courts do treat the federal government very much like a private landowner who is buying or selling his own property.

It follows that the federal government is accorded the same remedies as a private landowner under state law to protect its property

[47] *See, e.g.*, Kohl v. United States, 91 U.S. 367 (1875).

[48] United States v. Jones, 176 F.2d 278, 281 (9th Cir. 1949).

rights.[49] Thus, the government has the right, as would any private owner, to recover damage for unauthorized use of federal land.[50] Just as the United States is entitled to claim the rights and benefits of state law, it likewise is subject to the obligations thereof. It is sometimes said that state law "controls" the rights acquired by the United States in purchasing land.[51] The deed or other instrument by which the government acquires title is to be construed in accordance with state, rather than federal law.[52] The government interest acquired under a lease[53] or condemnation decree[54] has been held to depend on state rules of substantive law.

Further, as party to a real estate transaction, the federal government is just as bound to carry out its share of the bargain as a private individual would be. As a general statement, the United States is bound on its land contracts, the same as a private citizen.[55] The government must perform its obligations in a bilateral contract to convey realty.[56] Just as a private landowner is subject to infirmities in a predecessor's title, the United States takes no more than its grantor owned. For instance, where the government purchases land from the administrator of an estate, it takes subject to limitations on his authority.[57]

It is therefore correct to say that the substantive content of state law must be looked to for the validity, operation, and effect of most real property transactions involving federal land. Why is this so? It is not because any federal statute commits federal conveyancing practices to the domain of state law,—indeed congress has been largely silent on the subject. This is really the crux of the matter. It is because congress

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[49] *See* Alabama v. Texas, 347 U.S. 272 (1954), *rehearing denied*, 347 U.S. 950 (1954); Atlantic Mut. Ins. Co. v. Cooney, 303 F.2d 253, 259 (5th Cir. 1962).

[50] *See* Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); United States v. Lagendorf, 322 F.2d 25 (9th Cir. 1963).

[51] United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806, 822 (S.D. Cal. 1958), *rehearing*, 193 F. Supp. 342 (S.D. Cal. 1961), *modified*, 347 F.2d 48 (9th Cir. 1965).

[52] A conveyance to the United States for a "life saving or life boat station" has been held to create a determinable fee under North Carolina law. Etheridge v. United States, 218 F. Supp. 809 (E.D. N.C. 1963). *See also* United States v. Beals, 250 F. Supp. 440 (D. R.I. 1966); *cf.* United States v. Chartier Real Estate Co., 226 F. Supp. 285 (D. R.I. 1964).

[53] *See* Werner v. United States, 10 F.R.D. 245 (S.D. Cal. 1950), *aff'd*, 188 F.2d 266 (9th Cir. 1951); United States v. Mallery, 53 F. Supp. 564 (W.D. Wash. 1944).

[54] Where the petition in condemnation covered all "real estate" at a site, State law was applied to determine what machinery and fixtures were included. United States v. Certain Property, Etc., 306 F.2d 439 (2d Cir. 1962), *aff'd after remand*, 344 F.2d 142 (2d Cir. 1965). As a general principle, federal courts will defer to state law to determine the extent of a real property interest being condemned. *See* Berger, *When is State Law Applied to Federal Acquisitions of Real Property*, 44 NEB. L. REV. 65, 71–72 (1965).

[55] *See* United States v. 85.11 Acres of Land, 243 F. Supp. 423 (N.D. Okla. 1965).

[56] It has been held that the United States does not become the equitable owner of real estate pursuant to a sales contract until it performs its part of the bargain. United States v. Davidson, 139 F.2d 908 (5th Cir. 1943).

[57] United States v. Williams, 164 F.2d 989 (5th Cir. 1948).

has been silent that courts have been forced to rely on state legal principles. A study of the cases makes it clear that federal law really controls federal real property transactions. The state rules are referred to only to establish the content of federal law. This is either on the theory that state law was accepted by the parties or it was impliedly adopted by congress.[58] As observed earlier, there should be no real doubt as to the right of the United States to legislate concerning its property. Also there is no doubt that, when it does so, conflicting State rules must yield. Court decisions applying State substantive law to federal land transactions must be regarded in this light. They cannot otherwise be reconciled with the Constitutional power of congress over federal land and the federal supremacy doctrine.

As suggested earlier, therefore, congress could provide by statute for peculiar conveyancing practices, special rules of real property law could be established, and unusual estates could be created. This has been done on occasion. A common example is where some restriction on the use or resale of land is imposed at the time the government disposes of it. In this regard, the right of the United States to dispose of its property is an essential sovereign function.[59] This power is absolute[60] and there is no overriding sovereign interest of the state to prevent congress from making such disposition as it sees fit.[61] In disposing of property, conditions may be annexed to the transfer.[62] Congress may prohibit absolutely or fix terms on which its property may be used.[63] In view of the Constitutional powers applying to federal property, it is entirely logical that provisions inserted by the

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[58] "Although the government urges us to look to 'Federal law' to determine what the [condemnation] included, it does not tell us where to find this—no corpus of Federal law on the subject exists. . . . [T]he practical considerations for referring to state law . . . are overwhelming. . . . Hence we hold that Congress meant us to refer to New York law to determine what the United States acquired when it 'took' what it did here. . . ." United States v. Certain Property, Etc., 306 F.2d 439, 444–45 (2d Cir. 1962), *aff'd after remand*, 344 F.2d 142 (2d Cir. 1965). *See also* United States v. Causby, 328 U.S. 256, 266 (1946). Federal law governs conveyances of indian lands held in trust by the government. But ". . . if [the Federal] intention be not otherwise shown, it will be taken to have assented that its conveyances should be construed and given effect . . . according to the law of the State in which the land lies. . . ." Choctaw and Chickasaw Nations v. Board of County Commissioners, 361 F.2d 932, 933 (10th Cir. 1966).

[59] *See* City of Springfield v. United States, 99 F.2d 860, 863 (1st Cir. 1938), *cert. denied*, 306 U.S. 650 (1938). *See also generally* Part II *supra*.

[60] Thus an action cannot be maintained to prevent the United States from disposing of land which had been condemned for a public purpose and then the purpose abandoned. Anderson v. United States, 229 F.2d 675 (5th Cir. 1956).

[61] Disposition of public property is within the "unfettered discretion" of congress and "[n]o overriding sovereign governmental authority of the State impinges upon that discretion. . . ." Clackamas County v. McKay, 226 F.2d 343, 345 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 904 (1955).

[62] *See* United States v. Board of Comm'rs, 145 F.2d 329 (10th Cir. 1944), *cert. denied*, 323 U.S. 804 (1945).

[63] *See* United States v. Fraser, 156 F. Supp. 144 (D. Mont. 1957), *aff'd*, 261 F.2d 282 (9th Cir. 1958).

federal government in its property conveyances will override state rules of substantive law.

The Supreme Court in *Ruddy v. Rossi*[64] had under consideration the validity of a federal statute which exempted homestead lands from debts incurred prior to the issuance of patents. In effect, the statute restricted the alienation of the lands in question after the federal government had conveyed them in fee simple to settlers. The Court upheld the provision on the basis that public lands "may be leased, sold or given away upon such terms and conditions as the public interests require."[65] Similarly, where a statute granting government lands to a city for a power project prohibited the grantee from selling or transferring the project to a private utility company, the provision was upheld as an "exercise of the complete power which Congress has over particular public property entrusted to it."[66]

The power of congress to establish federal rules with respect to its property is not restricted to disposal situations. Any type of contractual or property arrangement can be made the means for exercise of this Constitutional power. In *Wissner v. Wissner*,[67] the Supreme Court was asked to consider certain provisions of federal law involving servicemen's insurance which were said to be in conflict with the California community property law. The federal statute in question provided that the serviceman would have the right to both designate and change his wife as beneficiary and later change the designation in favor of his parents. He died and a contest developed between his widow claiming one-half the proceeds under the state community property law, and his parents, who asserted rights as sole beneficiaries under the federal provision. The Supreme Court held that the federal statute predominated. "The constitutionality of the congressional mandate above expounded need not detain us long. . . . The Act is valid. . . . However 'vested' [the widow's] right to the proceeds of nongovernmental insurance under California law, that rule cannot apply to this insurance. . . ."[68]

There is little difficulty in applying the above principle where the federal provision is clear and compelling. As legislation dealing with federal property is within the Constitutional power of congress, any state law to the contrary must yield. The federal supremacy concept could not mean otherwise. A problem of some magnitude is pre-

[64] 248 U.S. 104 (1918).

[65] *Id.* at 106.

[66] United States v. San Francisco, 310 U.S. 16, 30 (1940). The Court cited the U.S. CONST. art. IV, § 3, cl. 2 as the specific basis for its holding. It is common for Congress to provide that conveyed property shall be used for a particular purpose and cannot be resold. *See* Act of July 14, 1954, ch. 482, § 2, 68 Stat. 474.

[67] 338 U.S. 655 (1950).

[68] *Id.* at 660–61. The Court based its remarks in part on another provision of the governing statute which provided that "no person shall have a vested right" to the insurance proceeds.

sented, however, when the underlying federal provision does not expressly spell out a special federal rule to be applied. The leading case of *Clearfield Trust Company v. United States*[69] involved such a situation. The United States had sued the Clearfield Trust Company on a guaranty of prior indorsements. It appeared that a particular government check negotiated by the company contained a forged indorsement. The lower court held that, since the United States had unreasonably delayed in giving notice to the company of the forged indorsement, it was barred from recovery under the law of the state. The Supreme Court rejected this view of the matter and held that federal "common law" should be applied.[70]

The most recent judicial development in this area is *United States v. Yazell*,[71] This case involved an attempt by the federal government to recover from a married woman a loan by the Small Business Administration, in the face of a state law providing that a married woman could not bind her separate property. The Supreme Court denied recovery and held that the state rule of law applied to the situation. The decision does not stand for the proposition that the state law as such applied to the transaction. Rather, it is consistent with the decision that the state principle was merely adopted as the governing federal rule.[72] The sense of the decision is that, in the absence of specific federal provisions, the state rule of law will be applied to proprietorial actions of the government unless "implementation of federal interests" requires overriding the state principle.[73] In determining that no "fed-

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[69] 318 U.S. 363, 744 (1943).

[70] "[T]he rule of Erie R. Co. v. Tompkins, 304 U.S. 64. . . . does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. . . . The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. . . . The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." *Id.* at 366–67. It has been held that a suit by a government subcontractor against the prime contractor for an "equitable adjustment" involves a sufficient federal interest to warrant application of federal "common law." American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640 (9th Cir. 1961), *noted in* 75 HARV. L. REV. 1956–58 (1962), 61 COLUM. L. REV. 1519–23 (1961), and 60 MICH. L. REV. 219–23 (1961). For an analysis of the *Clearfield Trust* doctrine and its application to federal land acquisitions, *see* Berger, *When is State Law Applied to Federal Acquisitions of Real Property*, 44 NEB. L. REV. 65–81 (1965).

[71] 382 U.S. 341 (1966).

[72] "Although it is unnecessary to decide in the present case whether the Texas law of coverture should apply *ex proprio* vigore — on the theory that the contract here was made pursuant and subject to this provision of state law — or by 'adoption' as a federal principle, it is clear that the state rule should govern. There is here no need for uniformity. There is no problem in complying with state law. . . ." *Id.* at 357.

[73] *Id.* at 352. It has recently been held that federal, rather than state, law determines whether subsequent accretion to land granted by the United States to a private party belongs to the owner or the State. ". . . [A] dispute over title to lands owned by the Federal Government is governed by federal law, although of course the Federal Government may, if it desires, choose to select a

eral interests" predominated in the given situation, the Court noted that there was no requirement for the rule applied to S.B.A. loans to be "uniform in character throughout the Nation," as had been the case in other situations where a special federal rule had been devised and applied.

There is little question but that court decisions relating to contracting, insurance, and commercial paper apply in principle to real estate transactions. All are proprietorial, or—as the courts sometimes say—, "commercial" in nature. Based on the precedents, it would seem that, in the normal case, state rules of law will determine the operation and effect of a federal land transaction. It is probable that these rules are applied as adopted principles of federal law, but there may be a slight question on this point. If a special federal provision has been promulgated, however, it will be applied. Even in absence of such a provision, where a predominant federal interest so warrants, the courts will "fashion" a special principle of federal law. As thus stated, these pronouncements are entirely consistent with the Federal Supremacy doctrine.

VI. ADVERSE POSSESSION

It is a small transition from the discussion above to adverse possession, prescription, laches, and estoppel as methods of obtaining or losing title to land. Analytically, state law determines the rights in land a person may obtain by the stated methods. State statutes of limitation or, in some instances, judicially evolved rules of laches and estoppel, will bar the interests of the record owner. There is little or no "federal law" on the subject. As noted earlier, state rules of law must be looked to in most instances for the operation and effect of transactions involving federal land. It would thus appear that the United States, in accordance with this principle, could both gain and lose property interests by reason of state rules of law relating to adverse possession. This is not the case.

It was held at an early date that private occupancy of public land, no matter how long continued, will not deprive the government of its title.[74] The federal government is not bound by a state statute of

state rule as the federal rule." Hughes v. State of Washington, 88 S.Ct. 438, 440 (1967). *See also* Roecker v. United States, 379 F.2d 400 (5th Cir. 1967), holding that state law will be applied to determine whether the guardian of an incompetent veteran can change the beneficiary on government life insurance, in absence of applicable Veterans Administration regulations.

[74] Lindsey v. Miller, 31 U.S. (6 Pet.) 666, 673 (1832). The equitable doctrine of laches likewise may not be applied to deprive the United States of rights. United States v. Insley, 130 U.S. 263, 266 (1889). Nor may the doctrine of presumption of payment due to lapse of time. United States v. Harvey, 174 F. Supp. 573 (D. Kan. 1959). But the theory of presumption of a lost grant applies to the sovereign and may operate to deprive the United States of property interests. United States v. Fullard-Leo, 331 U.S. 256, 270–81 (1947). There is some authority to the effect that laches is available to one sued by the government on the basis of a "proprietorial" interest, in

limitations and any attempt expressly to subject the United States to such a statute "would be beyond the power of the state to pass."[75] Federal supremacy is the fundamental basis of this principle, but there are public policy implications as well.[76] Note also should be taken of the relevance to this subject of the requirement for statutory authorization. As we have seen, federal land may not be disposed of without authority of congress. Is not the adverse possession problem merely another application of this familiar principle? Perhaps so, but the courts have not always been so forthright in their portrayal of reasons.[77] The case seems to rest largely on federal supremacy and public policy. It may be accepted as valid, however, that congress could provide for private occupancy of public land to ripen into interests adverse to the United States.[78]

The more engaging question is whether the federal government may acquire interests in real property by adverse possession. This is a matter of considerable practical significance. In developing larger federal reservations, it is usually necessary for government officials to acquire, by purchase or condemnation, a number of separate parcels from private owners. Quite often small "islands" or "pockets" are left within the larger expanse. This may be due to inaccuracy in surveys, because land descriptions do not join, or for similar reasons. In any event, it is important to know whether long and continued possession by the federal government will be sufficient to perfect its title to these and other parcels.

Assuming in a given case that the United States can properly be brought into court as a party litigant, there seems to be no good reason why it cannot rely on statutes of limitation the same as any other litigant. It was thus held, at an early date, that the government could take advantage of statutes of limitation, although it could not be bound

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contrast to its sovereign capacity. United States v. National City Bank of N.Y., 28 F. Supp. 144 (S.D. N.Y. 1939); *cf.* Cooke v. United States, 91 U.S. 389 (1875). One decision has given effect to a State statute preventing the United States from extinguishing outstanding mineral interests by prescription. United States v. Nebo Oil Co., 190 F.2d 1003 (5th Cir. 1951).

[75] United States v. Thompson, 98 U.S. 486, 490 (1878).

[76] "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are nor bound by any statute of limitations, unless congress has clearly manifested its intention that they should be so bound. . . ." United States v. Nashville, Chattanooga, & St. Louis Ry., 118 U.S. 120, 125, (1866).

[77] *But see* Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917); Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966).

[78] *Cf.* United States v. Rose, 346 F.2d 985, 990 (3d Cir. 1965). There are instances where congress has permitted adverse holding to the government. *See, e.g.*, The Color of Title Act, 43 U.S.C. § 1068 (1958).

by them without its consent.[79] But such statutes are normally suspended during any period of time that the party claiming advantage of them is not subject to suit. The difficulty with the present situation is that the federal government has not consented to, and is therefore immune from, suits to recover possession of real property. It would thus seem that it is not possible for the United States to rely on statutes of limitation concerning occupancy of land to perfect its title by adverse possession. Yet the matter has not received so orderly a treatment.

The 1893 decision of the Supreme Court in *Stanley v. Schwalby*[80] is still the principal word on the subject. An action of trespass to try title had been brought against certain military officers in charge of a military reservation in Texas. It appeared that the reservation was a regular and established military post and the defendants were occupying it under authority of the government. They defended on the basis of certain statutes of limitation of Texas. The Supreme Court held that the defendants could take advantage of the state statutes.[81] In so concluding, the Court reasoned that the federal government could rely on statutes of limitation concerning occupancy of land, that it could do so even though immune from suit, that government agencies could likewise claim the benefits of such statutes because their principal could do so, and because actions could be brought against the agents at any time, "the objection cannot be raised against them that the statute could not run because of inability to sue." Just how material the last point was to the decision is not clear. Is it *necessary* that its agents be amenable to suit before the United States may claim rights by adverse possession? To the extent there is such a requirement, the value of *Stanley v. Schwalby* as a precedent has been drastically challenged because of recent developments limiting the right to sue federal officers in possession of government land.

Beginning with *United States v. Lee*,[82] a principle began to develop

[79] "[While] the king is not bound by any act of Parliament unless he be named therein by special and particular words . . . [h]e may take the benefit of any particular act though not named. The rule thus settled as to the British crown is equally applicable to this government. . . ." Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227, 239 (1873).

[80] 147 U.S. 508 (1893).

[81] "This brings us to consider the objection that the United States cannot obtain or be protected in the title, through adverse possession, unless an action would lie against them for the recovery of the property. It by no means follows that because an action could not be brought in a court of justice, therefore possession might not be regarded as adverse so as to ripen into title. In the case of a government, protest against the occupancy and application for redress in the proper quarter would seem to be quite as potential in destroying the presumption of the right to possession . . . as the action itself. . . . [I]nasmuch as an action could have been brought at any time after adverse possession was taken, against the agents of the government . . . the objection cannot be raised against them that the statute could not run because of inability to sue. . . . Agents when treated as principals may rely upon the protection of the statute. . . ." *Id.* at 517, 519.

[82] 106 U.S. 196 (1882).

that a suit against a federal officer in possession of government land was not a suit against the sovereign and could be maintained as a personal action against the officer. In the cited decision the Virginia estate of General and Mrs. Robert E. Lee had been acquired by the United States for non-payment of taxes. An ejectment proceeding was brought against the government custodians of the land. The Court concluded that the tax sale was invalid and the action against the federal officers was not a suit against the United States. This principle was relied on by the Court in *Stanley v. Schwalby*. Subsequent refinements of the idea have been to the effect that the action of a federal officer affecting real property can be made the basis of suit for specific relief only if the officer's action is "not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." [83] So limited, the *Lee* doctrine has current validity only "where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation." [84] Applying the revised principle in *Malone v. Bowdoin*, [85] the Court held that an action in ejectment against a Forest Service Officer in charge of federal land was an action against the United States and could not be maintained against the officer as an individual in absence of a showing his actions were unconstitutional or in excess of statutory authority. [86]

Is it possible that the federal government can claim rights in land by adverse possession only when the occupancy is either unconstitutional [87] or not authorized by statute? [88] In view of outstanding case law on the subject, this question does not admit of a completely satisfying answer. The entire matter could stand a clarifying look by the courts. The structural basis of *Stanley v. Schwalby* has been brought into question by the recent decisions. Did it ever make real sense to reason that the United States could claim rights under statutes of limitation while being immune from suit? Conceptual problems of this

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[83] Larson v. Domestic & Foreign Corp., 337 U.S. 682, 702 (1949), *rehearing denied*, 338 U.S. 840 (1949). *See also* Dugan v. Rank, 372 U.S. 609, 621-22 (1963).

[84] Larson v. Domestic & Foreign Corp., 337 U.S. 682, 97 (1949).

[85] 369 U.S. 643 (1962).

[86] An action against the Secretary of the Interior was not dismissed where it alleged that officer asserted control over land outside his jurisdiction and otherwise acted beyond his statutory authority. Zager v. United States, 256 F. Supp. 396 (E.D. Wis. 1966).

[87] Is any authorized "taking" Constitutional because the owner has recourse to the courts for compensation? *See* United States v. Causby, 328 U.S. 256, 267 (1946). Is not the root of the problem whether the acquisition is authorized by a "valid" (*ergo* Constitutional) statute? *See* Pittle, *Suits Against the United States for Taking Property Without Just Compensation*, 55 GEO. L.J. 631-46 (1967); Roady, *Lee, Land, Larson, and Malone—Sovereign Immunity Revisited*, 43 TEXAS L. REV. 1062-71 (1965).

[88] The reasoning seems circuitous. Unless authorized by statute the government could not acquire title. *See* Part III *supra*.

nature seem not to bother the state and lower federal courts that continue to follow the doctrine of the old cases.[89]

VII. TITLE AND CONTROL

While ownership of federal property is in the United States as an entity,[90] its *control* is reposed in some department or agency. In this sense the federal government is the owner of all its property, but only a vicarious user. A great deal of practical and unexpected difficulty can be caused by this rather basic concept. Control is similar to ownership in some respects, in others quite different. There is no substantial counterpart in private land ownership practices.

To begin with, land is said to be under the "control" or "jurisdiction" of a department or agency head when it is subject to his authority, management, and responsibility. The federal government is organized in such way that particular governmental functions are made the primary responsibility of corresponding departments and agencies. Real property involved in performance of agency functions is placed under the control of the agency using it. The agency then manages and otherwise exercises legal responsibility over the land. There is usually a brace of federal statutes directing and permitting an agency head to take various actions with respect to property under his control. With rare exceptions, the head of a department or agency can exercise no authority over property of another department or agency.[91] This comports with orderly administration.

How does a department or agency obtain control? Statutory authority is necessary, just as in the case of acquisitions and dispositions. Sometimes this authority is express, as where real property is trans-

[89] There are a number of recent decisions to the effect that the federal government and the states can acquire interests by adverse possession. Beaver v. United States, 350 F.2d 4 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966); United States v. Chatham, 208 F. Supp. 220 (W.D. N.C. 1962), *rev'd on other grounds*, 323 F.2d 95 (4th Cir. 1963); Miner v. Yantis, 102 N.E.2d 524 (Ill. 1951); Commonwealth Dep't of Parks v. Stephens, 407 S.W.2d 711 (Ky. 1966); Lincoln Parrish School Bd. v. Ruston College, 162 So.2d 419 (La. App. 1964), *cert. denied*, 164 So. 2d 354 (La. 1964); Cerel v. Town of Framingham, 171 N.E.2d 840 (Mass. 1961); Southern Reynolds County School Dist. v. Callahan, 313 S.W.2d 35 (Mo. 1958); Feeler v. Reorganized School Dist., 290 S.W.2d 102 (Mo. 1956); Williams v. State Bd. of Educ., 147 S.E.2d 381 (N.C. 1966); Johnson v. State, 418 P.2d 509 (Ore. 1966). One of the more recent of these decisions based its conclusion on *Stanley v. Schwalby* and stated that "[n]o case to the contrary has been cited. . . ." Commonwealth Dep't of Parks v. Stephens, 407 S.W.2d 711, 712 (Ky. 1966).

[90] There are minor exceptions, such as wholly-owned government corporations and lands held in trust. *See* 31 COMP. GEN. 329–30 (1952).

[91] Thus a complaint alleging that the Secretary of the Interior is asserting control over land outside his jurisdiction states a good cause of action. Zager v. United States, 256 F. Supp. 396 (E.D. Wis. 1966). For exceptional situations where the head of one department may exercise a degree of control over property of another, *see* 43 U.S.C. § 158 (1958) and 40 U.S.C. § 318b (1958).

ferred from one agency to another.[92] Or it may be implied, as where the president sets aside land from the public domain and places it under control of a department without express legislative sanction.[93] He can also act on the basis of implication and transfer land that has been reserved for the use of one agency to another department or agency.[94] When a department or agency acquires real property for its own use, pursuant to enabling legislation, authority to assume control over the property is likewise to be implied. But situations are rare where control can be reposed in a government agency without a clear mandate from congress. Once land has been purchased or condemned for a particular public purpose, it cannot be diverted to another in absence of statute.[95] Thus, even within an agency there is difficulty in changing the use of land to other than that for which it was acquired. It is even clearer that, where land has been purchased under a specific appropriation for a particular purpose, it may not be transferred from one department to another without statutory authorization.[96]

It is the practice of government agencies to grant "permits" entitling other agencies to enjoy temporary use of real property. Such an arrangement does not transfer control of the property, but only its temporary use. Statutory authority is therefore unnecessary. There are problems with respect to the use of property under permit. For instance, the funds of the using agency are not available for the purpose of repair, restoration, and improvement of the premises when the permit is terminated.[97] The reason for this rule is that funds appropriated by congress are intended only for the beneficial use of the agency concerned. In addition, as the statutory authority of an agency head to manage property is normally limited to that under his "control," it is probable that the using agency will be powerless to take many essential actions concerning land held under permit.

An attribute of having title in the United States as an entity, with only control in the various departments and agencies, is that one government agency may not convey or lease property to another. Further, unless there is clear statutory authority to do so, an agency cannot condemn property under the control of another. The reason supporting these statements is that an owner cannot sell to himself. Lands held by wholly-owned government corporations, or in trust, are in an excepted category. As congress has authorized such lands to be

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[92] *See, e.g.*, 10 U.S.C. § 2571 (1958) and Federal Property & Administrative Servs. Act of 1949, § 202(a), 40 U.S.C. § 483(a) (1958).

[93] United States v. Midwest Oil Co., 236 U.S. 459 (1915).

[94] *See* 37 OP. ATT'Y GEN. 417, 433 (1934).

[95] *See* Loehler v. United States, 90 Ct. Cl. 158 (1940).

[96] *See* 33 OP. ATT'Y GEN. 288 (1922).

[97] *See* 32 COMP. GEN. 179 (1952); 31 COMP. GEN. 329 (1952).

treated differently, other government agencies may lease facilities to them for a monetary consideration.[98]

Situations occur where federal land is under the control of no particular department or agency. Where this happens, congress had residual authority by reason of its Constitutional power over federal property. In *United States v. Northern Pacific Railway Company*,[99] public land had been granted to a railroad on condition that work would begin and be completed within certain specified times. There was a default and judicial proceedings were initiated by the attorney general to declare a forfeiture. The Court upheld a dismissal of the suit on the ground that the attorney general had no authority to reassert control over the property on behalf of the United States. There was no legislative authorization for the forfeiture proceedings.[100] This is one of the clearest illustrations of the principle that a federal agency must have authority from the congress to assume control over government land. It also emphasizes the degree of autonomy congress may exercise over federal property. It is clear from the authorities that congress itself, without recourse to the executive branch, can act by commission to enforce a reversion of title.[101] This is unusual in that most governmental functions involve action by executive officials.

Enough has been said to show that the concept of control is sufficiently unique and technical to cause difficulty for the unwary both in and out of government. There is no counterpart in the domain of private land law. To the private owner, title and control are synonymous. In the government, it is the exceptional case where this is true. The most important aspect of the control problem is the requirement for statutory authority. In this respect the pertinent considerations are not unlike those relating to acquisition and disposition of title.

VIII. AGREEMENT TO ACCEPT GOVERNMENT AS ORDINARY PARTY

There is one type of situation where the United States appears to step down from its government pedestal and to occupy essentially the

[98] *See* 31 COMP. GEN. 329 (1952); 20 COMP. GEN. 699 (1941).

[99] 177 U.S. 435 (1900).

[100] "In what manner the reserved right of the grantor for breach of . . . condition must be asserted so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. . . ." *Id.* at 440; *cf.* United States v. California, 332 U.S. 19 (1947), *opinion supplemented*, 332 U.S. 804 (1947), *rehearing denied*, 332 U.S. 787 (1947), *petition denied*, 334 U.S. 855 (1948). For a dicussion of "inquest of office at common law," *see* Atlantic & Pacific R.R. v. Mingus, 165 U.S. 413, 431 (1897).

[101] *See* 41 OP. ATT'Y GEN. 311 (1957); OP. ATT'Y GEN. 250 (1879).

same position as an individual transacting private business. This is where the party dealing with the government voluntarily agrees to treat the latter as an ordinary proprietor. Normally the government is subject to legal and constitutional requirements of due process, equal protection, just compensation, reasonableness, and the like. But where it acts on the basis of agreement by the other party, these requirements are inapplicable. In such a situation, the government appears to assume a truly proprietorial character in its undertakings. Admittedly the case is special and can be rationalized on the basis that the consent of the other party is the operative factor.

Agreement by the party dealing with the government may be a matter of express contract, a condition for the use of land, a provision in a lease, a covenant in a deed, and so forth. On principle, the United States is entitled to enforce its rights under such circumstances in a way that might be unlawful or unconstitutional if done in its governmental capacity. As a party to a real estate transaction of the sort described, the government can be as arbitrary and unreasonable as any private party could be. The reason is that the other party dealing with the government is free to enter into any type of arrangement he wishes. If he voluntarily agrees to an unconscionable bargain, he cannot object that the other party is the United States. The point can be illustrated by reference to certain decisions of the Supreme Court relating to "disputes" clauses in government contracts. These clauses permit the government contracting officer to decide disputes arising under the contract. In *United States v. Wunderlich*,[102] the Court held that such decisions were entitled to a binding and conclusive effect on the private contracting party. The specific basis for the holding was that the latter had voluntarily agreed to the "disputes" provision.[103] The decision of the government officer was allowed to stand even though "arbitrary, capricious, and grossly erroneous."[104] It is apparent that most government actions so characterized would be subject to attack on constitutional and other grounds. Voluntary acceptance on the part of the party dealing with the United States is the reason for the difference in treatment in the given instance. But should not agreements of this type be inherently unconstitutional and invalid? Although *Wunderlich* and other cases say they are permissible, there are theoretical problems. A waiver of constitutional safeguards is involved. The voluntary-agreement concept must thus be reconciled

[102] 342 U.S. 98 (1951).

[103] "Respondents were not compelled or coerced into making the contract. It was a voluntary undertaking on their part. As competent parties they have contracted for the settlement of disputes in an arbitral manner. This . . . congress has left them free to do. . . ." *Id.* at 100.

[104] Such a finding had been made by the Court of Claims. *Id.* at 100. As a result of the *Wunderlich* decision congress enacted remedial legislation which has, in turn, given rise to problems of a different sort. *See* Sachter, *The Court of Claims and the Wunderlich Act: Trends in Judicial Review*, 1966 DUKE L. J. 372–91 (1966).

with the general principle that the United States in exercising Constitutional power over its property acts always in a governmental capacity.[105]

The idea that a person may agree to treat the government as an ordinary proprietor appears somehow more palatable in the area of standard government contracting than in fields more related to land ownership. Some courts view ordinary governmental leasing operations as always being sovereign in nature.[106] The logical extension of this idea can be illustrated by the case of *Rudder v. United States*[107] wherein the Court of Appeals of the District of Columbia held the action of the government illegal in evicting tenants of public housing for refusing to certify they were not members of "subversive" organizations. The court observed that "[t]he government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process. . . ."[108] The contrary view is represented by *United States v. Blumenthal*[109] in which the Third Circuit considered the same problem. A government agency had leased commercial property to a tenant in the Virgin Islands on a month-to-month basis and subsequently terminated it without specifying the reason. The Court held the action was valid. "But the [Government], which is here acting in its proprietary rather than its govenmental capacity, has the same absolute right as any other landlord to terminate a monthly lease . . . without being required to give any reason for its action. . . ."[110]

Similar problems are involved in the operation of "recapture" clauses included in conveyances or leases of federal land. Such clauses provide that the property may be taken back on occurrence of a stated contingency, usually in event of national emergency. The reason for which the property may be recaptured is not usually specified, and attempts to limit recaptures by implication to any certain purpose have not been treated sympathetically by the courts.[111] In accepting a conveyance or lease subject to a recapture clause, it would appear that

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[105] "[It is contended] that the United States, in leasing its public domain, acts in a proprietary capacity. . . . It has frequently been stated that the United States, in performing the functions which are reserved to it in the Constitution, acts only in a governmental capacity [citing authorities]. . . ." United States v. Essley, 284 F.2d 518, 521 (10th Cir. 1960).

[106] *Id. See also* United States v. Thompson, 114 F. Supp. 874 (S.D. N.Y. 1953). This case contains a good statement of the contrary argument, *viz*, that Government leasing operations are merely proprietorial.

[107] 226 F.2d 51 (D.C. Cir. 1955).

[108] *Id.* at 53. The facts of the case were that the rentals were entered into on a month-to-month basis and a private landlord would have had a legal right to terminate them for any reason.

[109] 315 F.2d 351 (3d Cir. 1963).

[110] *Id.* at 353. The Supreme Court has not ruled on the precise point. *See* Thorpe v. Housing Authority, 87 S.Ct. 1244 (1967).

[111] *See* United States v. 93.970 Acres of Land, 360 U.S. 328 (1959).

the private party has agreed that the government can act to assert its rights like another private party. In this respect the pertinent considerations are the same as those considered previously. In *Hingham Management Corporation v. United States*[112] the Court of Claims was presented with a claim for just compensation arising out of the termination of a lease of a Navy facility to prevent unauthorized removal and sale of government property. The lease was terminable at any time prior to its expiration and during a period of national emergency. It was contended that government action pursuant to this clause was neither reasonable nor sufficiently related to the national emergency. The court did not agree. "If the plaintiff in the present case felt that the rights reserved by the Department of the Navy were unfair or inequitable, it should not have agreed to the terms proposed. Having agreed to those terms, it is bound by them."[113] The operation of recapture clauses can result in substantial inequity on occasion. Apparently for this reason the Court of Claims has taken the view that just compensation under the Constitution will be paid for a taking pursuant to a recapture clause unless the clause clearly spells out a right to take without compensation.[114] Conversely, where such a right is sufficiently provided for, it will be given effect regardless of Constitutional requirements of just compensation.

It is apparent from the foregoing that the federal government can contract away the impediments of sovereign status in dealing with private parties. There are occasional voices of dissent, and some difficulty in the Constitutional area, but the above statement appears to represent the state of the law. To the extent indicated the United States enters into commercial transactions, including those relating to real property, like an ordinary proprietor rather than a sovereign. Constitutional requirements binding the United States become inapplicable in this context. The basis for this treatment is the consent of the individual dealing with the government. A person is free not to deal with the United States if he does not like the conditions laid down.

IX. CONCLUSION

A realistic view of this subject must disclose the essentially sovereign nature of the United States in all its real property undertakings. Calling federal land ownership "proprietorial" cannot change its basic Constitutional and legal status. While there is an effort on the part of the courts to assimilate the United States to a private

[112] 166 F. Supp. 615 (Ct. Cl. 1958).

[113] *Id.* at 616. Presumably the incumbrance created by a recapture provision is taken into account in fixing the consideration.

[114] *See* West Virginia Pulp & Paper Co. v. United States, 109 F. Supp. 724 (Ct. Cl. 1953).

owner of land, this is in reality a screen, adopted as a matter of terminology and convenience. In every case where it makes any real difference, the sovereign status of the federal government shines through. The applicability of state laws to federal real property transactions is tolerated as a matter of convenience, but only so long as no federal interest is at stake and never where federal law is to the contrary. The only clear situation where the United States seems to act like a true proprietor is where the party dealing with the government so agrees, and this situation is unique and easily rationalized. One has to be impressed with the power of congress over federal land. It is complete, authoritative, and absolute. Congress speaks the ultimate word on acquiring, using, controlling, and disposing of land. Even the most basic state laws in the real property field will fall before the mandate of congress, or what the courts suppose it to be. In this and other respects, federal supremacy is the doctrine to be reckoned with in the federal real property field. Only in line with these considerations does the concept of the United States as a proprietor of its real property take on any content and significance.

TOTAL LEGAL SERVICE: VAGTS ON FREE SPEECH IN THE ARMED FORCES

Courts use law review articles in many ways, some articulated, others not. Judicial resistance to mention, let alone citation, of noncase materials substantially ended during the 1930's as a result of the wide-ranging interests of Mr. Justice Brandeis reflected in his footnotes. Seldom do courts refer to a journal item for proposition of law, unless the author was, like Warren, a Chief Justice. On the other hand, courts today frequently use an article as a symbol or referent for the legal situation it describes and name the article as a base from which to say that the case before it is unlike the referent.

Professor Vagts' article selected here was described by the court in *Cortright v. Resor* as concerned with "the delicate relationship between the civilian heads of government and military commanders,"[1] a problem not before that court. Such statements have a positive impact even though cast negatively: the court is saying that from the article referred to we can determine that our immediate legal problem is not in the category considered by the article or that the rules of law there expounded are applicable only as there stated.

This selection set the stage for a body of comment accelerated by the era of dissent during the 1960's. Professor Vagts was most concerned with institutional relationships, the problem of civilian influence over the military forces, and the extent to which personal liberties are subordinated to that end. These were problems for Wiener, Henderson and Warren, too,[2] and from the basic issues flow subsets of problems for the soldier who criticizes his leaders[3] or their solutions to national issues.[4] This article remains useful because of its level of attack and warranted selection because it has become a point of reference for scholars and jurists.

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[1] 325 F. Supp. 797, 824 (E.D.N.Y. 1971).

[2] *See* pp. 141, 171, 249, *supra*.

[3] Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697 (1968).

[4] Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J. 325 (1971).

FREE SPEECH IN THE ARMED FORCES†

*Detlev F. Vagts**

The classic conception of the military man as strong but silent, calm, and close mouthed has been flouted by memoir writing generals from Caesar to Bradley, military theoreticians from Sun Tszu to Douhet, and military controversialists from Machiavelli to Billy Mitchell. Often such outpourings have aroused repressive efforts by military and civilian authorities. Our earliest record of such censorship seems to come from the twentieth century B.C. when the Pharaoh Sesostris I dismissed an excessively boastful general, Mentuhotep, and removed his likeness from the triumphal monuments he had erected.[1] The efforts of the Defense Department during recent years to confine the public statements of its personnel within the bounds of "constructive criticism" are not the first and will not be the last such endeavors in the twentieth century A.D.[2]

The difficulties involved in striking a workable balance between the interest of free speech and the interest of discipline and security in the military will demand considerable attention during the coming years as the United States faces an enemy capable of launching an immediate and devastating attack on its cities and people.[3] As is to be expected in a society where the military and the civilian are not separated in watertight compartments, civilian disputes over free speech have had echoes in the military. The Supreme Court has been in the throes of adapting a freedom of speech philosophy born in Jeffersonian democracy and nurtured amid the annoying but unmenacing agitations of Jehovah's Witnesses to a world situation that resembles a state of siege.[4] Meanwhile, military personnel have been

*Professor of Law, Harvard University Law School. A.B., 1948; LL.B., 1951, Harvard University. When this article was written the author was a member of the New York Bar, associated with the law firm of Cahill, Gordon, Reindel and Ohl.

[1] BREASTED, A HISTORY OF EGYPT 166 (1951).

[2] See text at note 97 *infra*.

[3] This article is limited to American experiences, though occasionally the experiences of other nations are illuminating, particularly the attempts of the Weimar Republic to keep the army out of politics. See DEUTSCHE GESCHICHTE SEIT 1918 IN DOKUMENTEN 172 (Forsthoff ed. 1935).

[4] Corwin, *Bowing Out "Clear and Present Danger,"* 27 NOTRE DAME LAW 325 (1952).

embroiled in a series of disputes among themselves and their civilian associates that has cast into sharp relief the issues of military freedom of speech.

I. BASIC POLICY CONSIDERATIONS

The armed forces are intimately allied with war and crisis, and war and crisis are closely tied to that clear and present danger to the national interest that calls forth and justifies restrictions on free speech. It has thus always been taken for granted that the military should not be permitted greater freedom than their civilian counterparts; the limitations that apply to all of us—on obscenity, state secrets, and incitement to riot and rebellion—apply in full force to military personnel.[5] The further implication seems always to be present that the armed forces should be subject to even greater limitations. What factors actually dictate such narrowing of their freedom? Do any factors counterbalance them?

Extra restraints on speech in the armed services are ultimately rooted in the need for a rigid and thoroughgoing attitude of subordination towards superior authorities. Language by subordinates that criticizes and discredits superior authorities and institutions tends to shake that atmosphere of discipline without which any armed force must degenerate into a mere armed rabble amid the stresses of peacetime boredom and wartime fear. While repression cannot reach into men's minds to create better morale or discipline, it can inhibit the spread of demoralizing ideas. While the cohesiveness of the lower echelons can thus be maintained, the morale of higher authorities is enhanced because they need not anticipate the floods of abuse that necessary but unpopular measures often arouse. Emotional outbursts from mothers, veterans, retailers, and other special interest groups have been known to sway the judgment of the most authoritarian military minds; the high command should be able to rely on silent support, if not enthusiasm, within the military establishment itself.

In addition to the homegrown and relatively harmless discontents that bring about honest, if immoderate, criticism of defense authorities, there must also be considered the more insidious efforts of the Communists to undermine the military structures of capitalist countries by persistent propaganda and infiltration. In times of real crisis, this agitation, often carried on under the guise of defending the civil liberties of the soldiers and sailors and improving military justice, might compel drastic countermeasures.[6]

A strong reason for controls on military speech is the commitment

[5] See text at notes 36–38 *infra*.

[6] POSSONY, A CENTURY OF CONFLICT 145–46, 172 (1953).

of the United States to civilian supremacy over the armed forces. The pyramid that starts with privates, seamen, and airmen bound to respect their noncommissioned officers culminates in generals and admirals bound to respect civilian secretaries and the President. These officials, who bear the ultimate responsibility, need protection from irresponsible abuse by their subordinates. Their situation is far different from that of Treasury officials, for example, who need not demand instant obedience from masses of armed men and need not command the same type of loyalty. This civilian dominance must face not only the abuse called forth by the policies of the moment but also the less immediate threat that the military might invade the field of politics and gradually or by coup d'etat establish themselves as the nation's rulers. The danger that the United States might become another Syria or Paraguay may seem remote today, but caesarism was a living issue in the early days of the republic,[7] and shadowy suspicions gain some substance from time to time when a new bevy of generals and admirals wins high diplomatic and administrative posts or some proconsul attempts to defy Washington foreign policy. The future will apparently bring us an expanding peacetime military establishment with more and more career officers who might come to feel that the crucial issues of defense demand that they abandon the apolitical tradition of our services and invade the field of politics. In that case we might be compelled to reinforce the traditional restrictions on the political activity of military officers by adding and enforcing additional legal prohibitions.

For many listeners an officer's words have a peculiar aura of responsibility and officiality. Many find it hard to believe the standard disclaimer that a general or admiral is speaking only for himself and "not necessarily" for the service as a whole. This skepticism may find support in the traditional service antipathy towards "lone wolf" pronouncements. The special status carries with it a need for corresponding curbs on irresponsibility in its use. Where it was formerly feared that intemperate words by military men might jeopardize relations between the federal government and the states, there is now a very real danger that blustering speeches might upset the often delicate relationships between ourselves and our allies and antagonists. Unwise declamations cannot only be characterized as sabre rattling by sincere persons; they can also form the "germ of truth" from which vast and meretricious propaganda claims of American war-mongering can be cultivated.[8]

All these factors justify the imposition upon armies and navies of restraints not usually applicable to civilians. A sad paradox requires

[7] SMITH, U.S. MILITARY DOCTRINE 14–16 (1955).
[8] United States v. Grow, 3 U.S.M.C.A. 77, 87, 11 C.M.R. 77, 87 (1953).

that the serviceman sacrifice some of the liberties which he is called upon to protect—no revolutionary regime has ever found it possible to grant true democracy to an Army.[9] The national defense brooks no opposition and overrides many freedoms.

> When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[10]

Even in peacetime the military must act as if war were imminent, for new habits cannot be established on the day "the balloon goes up." The curbs dictated by these considerations are not as shocking as they might appear to those who imagine they are without counterparts in civilian life and forget that employees of private companies are not protected by law or custom from dismissal if they utter opinions distasteful to the management.[11]

There are, however, significant factors that must be weighed against these demands for conformity, discipline, and subordination. There is the simple fact that freedom of speech is one of the individual's most precious rights, a fundamental liberty rooted deeply in our ethics, politics, and religion. It stands as an end in itself, deserving our defense against every encroachment not required by some competing interest critical to our survival. A person who enters the armed services remains an individual, a possessor of rights as well as a subject of duties, and his sacrifices of basic liberties should be kept to a minimum. A government which boasts that it is a government of, for, and by the people—all the people—cannot reduce millions of men to second class citizens.[12]

If non-pragmatic factors do not suffice, there are a number of practical adverse consequences that could arise from unwise and unnecessary curbs. If the American temperament is considered, it seems dangerous to prevent accumulated military discontent from being discharged through the virtually harmless channels of griping to friends or writing letters to the editors of service or civilian papers or to families at home. Even in societies far more autocratic than our own, grumbling in the ranks has been considered the natural concomitant of military hardship and boredom, and its absence dreaded. A degree of freedom of expression may also encourage needed men to remain in the service, while it would be hard to make service attractive to men who regarded themselves as objects of oppression. In any event, upon

[9] POSSONY, A CENTURY OF CONFLICT 255 (1953).

[10] Schenck v. United States, 249 U.S. 47, 52 (1919), per Holmes, J.

[11] NLRB v. Local 1229, Int'l Brotherhood of Elec. Workers, 346 U.S. 464 (1953) (criticizing employer's product not a protected activity); Thomas, *The "Isms" are Out*, The Reporter, Feb. 24, 1955, p. 33.

[12] *Cf.* United Public Workers, CIO v. Mitchell, 330 U.S. 75, 115 (1947) (dissenting opinion).

leaving the service such men would be free to release their resentment to all parties, including prospective recruits.

The effective management of our defense system demands that the maximum of military knowledge be available to those who must make policy decisions. Such knowledge must come from people within the military establishment who have had relevant experience. It is true that in addition to regular command channels there exist certain official means by which opinions, even somewhat dissenting ones, may filter upward—chaplains, inspectors general, unsatisfactory reports on equipment, and so forth. Both the military and large pyramidally organized corporations have found, however, that such institutionalized sources of information are unsatisfactory for bringing to the top data not in line with approved thinking.[13] In preventing unofficial opinions from competing in the military marketplace of ideas, we grant a dangerous monopoly to official dogma that may shelter a stagnation and inefficiency we can ill afford in these swift and perilous times. By preventing independently thinking officers from speaking their piece, we encourage mental laziness; deprive the Defense Department, Congress, and the voters of valuable sources of data; and threaten to reduce even further the small roster of American officers who make lasting contributions to military thought.[14] It is neither logical nor sound policy to encourage officers to foster public relations by presenting the viewpoint of the military departments in speeches, articles, and books, but at the same time to discourage them from expressing an unstereotyped views of their own.[15]

Just where these conflicting factors favoring freedom of military speech and supporting its suppression should find their reconciliation cannot be determined with precision. The aim of this article is merely to analyze past experience and present some preliminary conclusions.

II. OPERATIVE CONTROLS

A. LEGISLATIVE

1. *The specific clauses.*

Throughout the history of American military justice there have been three statutory provisions explicitly regulating military expression. The first, forbidding "provoking words or gestures," is in effect the counterpart of the "fighting word" ordinance upheld in *Chaplinsky v. New Hampshire*[16] and applies to face-to-face interchanges between

[13] Duffield, *Organizing for Defense*, Harv. Bus. Rev., Sept.-Oct. 1953, pp. 29, 41; for comparable civilian problems see WHYTE, IS ANYBODY LISTENING? *passim* (1952).

[14] SMITH, U.S. MILITARY DOCTRINE ix (1955).

[15] See Address by Lt. General L. S. Kuter, Commander, Air University, *Professional Writing in the Air Force*, Pegasus Magazine, Sept. 1954, p. 8.

[16] 315 U.S. 568 (1942); *cf.* Cantwell v. Connecticut, 310 U.S. 296 (1940).

military personnel that are likely to cause an immediate breach of the peace, such as drunken obscenities.[17] The second penalizes "any person . . . who behaves with disrespect towards his superior officer," non-commissioned officers being included under a different clause.[18] Most applications of this section have also involved face-to-face insults and contempt, so that significant issues of freedom of speech have not arisen. The *Manual for Courts-Martial* has directed a restrictive administration of this clause. It should not be used so as to hold one accountable for things said or done in "purely private conversation."[19] One can often avoid application of the clause by refraining from referring to particular officers and by refraining from using language implying more than honest difference of opinion.

Most prosecutions for expressing dissident opinions have been laid under a third clause, article 88 of the Uniform Code of Military Justice and its predecessors. This provision now reads:

> Any officer who uses contemptuous words against the President, Vice President, Congress, Secretary of Defence, or a Secretary of a Department, a Governor or a legislature of any State, Territory or other possession of the United States in which he is on duty or present shall be punished as a court-martial may direct.[20]

The ancestor of this clause appeared in the 1776 Code prepared for our fledging Army by a committee consisting of Jefferson, Adams, Rutledge, Wilson, and Livingston; the close association of these men with the early struggle for civil liberties has been used to justify the constitutionality of several traditional military law provisions.[21]

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[17] Article 117 of the Uniform Code of Military Justice, 64 STAT. 139 (1950), 50 U.S.C. § 771 (1952) (hereinafter referred to as UCMJ).

[18] UCMJ arts. 89, 91. Using provoking words and gestures under article 117 is a lesser included offense within disrespect. United States v. Nicolas, 14 C.M.R. 683 (1954).

[19] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 168 (1951). The same paragraph says "it is not essential that the disrespect be in the presence of the superior," but in fact this is usually the case. See, *e.g.*, United States v. Higgins, 4 U.S.M.C.A. 143, 15 C.M.R. 143 (1954); United States v. Montgomery, 11 C.M.R. 308, *petition for review denied*, 3 U.S.M.C.A. 826, 12 C.M.R. 204 (1953). In civilian cases, too, contemptuous acts or words in the presence of the object of contempt are less protected than those at a farther remove. *Compare* Sacher v. United States, 343 U.S. 1 (1952), *with* Bridges v. California, 314 U.S. 252 (1941).

[20] UCMJ art. 88.

[21] United States v. Lee, 4 C.M.R. 185 (1952). The original version, like so much of our civil and military law, was drawn from a British model. Little change was made except in transferring the protection from "the Sacred Person of his Majesty or any of our Royal Family" to "the people of the United States in Congress assembled or the legislature of any of the United States in which he may be quartered." For the history of this section see DAVIS, MILITARY LAWS OF THE UNITED STATES 375–76 (3d ed. 1915); WINTHROP, MILITARY LAW AND PRECEDENTS 565 (2d ed. 1920); MILITARY LAWS OF THE UNITED STATES 251–53 (9th ed. 1949). It was section II, article 1 in the British 1765 Articles and in the 1776 American version, article 5 in the 1806 Articles, article 19 in the 1874 revision, and article 62 in the 1920 act. Corresponding to changes in political structure, later revisions added the President, Vice President, department heads, and the state governors. The description of the condemned language was changed from "traitorous or disrespectful" to "contemptuous or disrespectful" and finally to merely "contemptuous." In

Article 88 and its predecessors have been used with a restraint reflected in the meager interpretative material. The *Manual* states that private conversations should not be made the basis for a court-martial and that even emphatically expressed adverse criticism cannot be prosecuted if it is not contemptuous in itself or in view of the surrounding circumstances.[22] Courts-martial have been advised to be circumspect and cautious and not to take acts and words "in the sense which might happen to be put on them by a too delicate sensibility."[23] Truth is no defense, however, since contempt and malice are the gist of the offense; both the private and the public lives of the officials concerned are protected from that malice.[24]

Most of the rare prosecutions under this clause occurred during the Civil War; most of them involved expressions of contempt for President Lincoln though some involved words directed against the President and Congress and one against a state governor.[25] Disregarding those cases where the violent denunciations were in accord with administration policy, such as those of the New Jersey regiment that passed a resolution denouncing its home legislature for condemning the war,[26] much credit is due to the restraint of the authorities on both sides in not prosecuting more cases despite the grave provocations afforded by volunteers and even by regulars such as General McClellan.[27]

Three cases, all involving New York volunteers, are perhaps illustrative of the conduct thought serious enough to be punished. Second Lieutenant George D. Wiseburne was sentenced to two years duty on Ship Island for saying "the executive has seen proper to make the army the emancipation of the negro slaves" and "has seen fit by his recent proclamation to say that all colored persons, of good condition, will be received into the armed service of the United States, thus making the negro my equal."[28] The reviewing authority "commuted" the sentence to a mere dismissal from the service, a poor advertisement for

1950 enlisted men were exempted from the clause, but at the same time its scope was extended to include the Navy, which had previously relied on its general articles to cover such offences. UCMJ art. 88; see LEGAL AND LEGISLATIVE BASIS, UCMJ 256 (1950).

[22] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 167 (1951). The MANUAL FOR COURTS-MARTIAL, U.S. AIR FORCE 203–04 (1949), has almost identical language. The MANUAL FOR COURTS-MARTIAL, U.S. ARMY 146 (1928), has no discussion of article 62 at all. See also WINTHROP, *op. cit. supra* note 21, at 566.

[23] O'BRIEN, AMERICAN MILITARY LAWS 66 (1846).

[24] WINTHROP, *op. cit. supra* note 21, at 566.

[25] *Ibid.*

[26] 2 WILLIAMS, LINCOLN FINDS A GENERAL 553 (1949).

[27] See 1 FREEMAN, LEE'S LIEUTENANTS 99–100, 117, 625, 664–66 (1941), for episodes involving (1) Beauregard's letter of criticism of Bull Run, read to the Confederate Congress; (2) the demotion of General Whiting for an insulting letter rejecting a preferred Mississippi regiment; (3) a bitter letter by General Toombs to the Vice President; (4) a feud in the Richmond papers between Longstreet and A. P. Hill. See also 2 WILLIAMS, *op. cit. supra* note 26, at 229–30.

[28] General Order 33, Dep't of the Gulf, April 25, 1863.

Ship Island! First Lieutenant Charles T. Bruen was also dismissed for saying that Lincoln and Senator Henry Wilson were "a set of God-damned abolitionists" and "suckers" and that "all they were working for was the total abolition of slavery and the destruction of the rights of the Southern people,"[29] as was Captain Charles Arthur for saying that the President was a traitor and a loafer and that he defied anyone to show anything the President had done to end the rebellion.[30]

During World War II an army private attacked President Roosevelt, telling his fellow soldiers that he was a dirty politician whose only interest was gaining power and safeguarding the wealth of the Jews and who was "enslaving the world" while Hitler and his allies "were in the right" and their plan was "one of necessity through moral truth." The court of appeals turned down his appeal from a denial of habeas corpus, stating that the petitioner's brief "bristles with the idea that he should be permitted to denounce the government and lend aid and comfort to the enemies of the Republic in time of war, and that such conduct is one of his freedoms."[31] This, the court regarded as self refuting. Except in this instance, article 88 has lain dormant in recent years, and such curbs on speech as have been thought necessary have been applied in other ways.[32]

2. *The general articles.*

In addition to the articles specifically directed at certain types of self expression, the so-called general articles have been applied to free speech situations. Article 133 proscribes conduct unbecoming an officer and a gentleman; article 134, applicable to all military personnel, forbids "all disorders and neglects to the prejudice of good order and discipline in the armed forces," all "conduct of a nature to bring discredit upon the armed forces," and "crimes and offenses not capital."[33] Under the "crimes and offenses not capital" clause, the provisions of general federal civilian criminal law are incorporated by reference. Many of these provisions involve only ordinary criminality such as the Dyer[34] and Mann Acts,[35] but some also impinge upon free

[29] General Order 88, Dep't of Washington, Aug. 18, 1864.

[30] General Order 171, Army of the Potomac, Oct. 24, 1862.

[31] Sanford v. Callan, 148 F.2d 376 (5th Cir.), *cert. denied*, 326 U.S. 679 (1945).

[32] For example, the action by the Navy against Captain Dierdorff for saying that Senator Kilgore was not fit for an admiral to wipe his boots on, which aroused much congressional discussion of article 88, was not, and could not have been, based upon article 88. N.Y. Times, Feb. 19, 1949, p. 3, col. 5; N.Y. Times, Feb. 20, 1949, p. 26, col. 3. See *Hearings Before the Senate Subcommittee on Armed Services*, 81st Cong., 1st Sess. 97–101, 209, 331–32 (1949); Comment, 35 CORNELL L.Q. 137 (1949).

[33] UCMJ arts. 133, 134.

[34] United States v. McCarthy, 4 U.S.C.M.A. 385, 15 C.M.R. 385 (1954).

[35] United States v. Miller, General Court-Martial Order 146, Fourth Air Force, June 30, 1955.

speech, for example, the laws banning transmission of obscene matter by mail,[36] the communicating of classified material to unauthorized persons,[37] and the incitement of sedition or mutiny or interference with recruiting.[38] A specification may state an offense under article 134 even though it omits one of the necessary elements of the civilian criminal law,[39] but ordinarily a specification under article 134 cannot thus eliminate one of the elements of another article of the Code and still state an offense.[40] For example, soldiers who deserted to work for the Soviet secret police violated article 134, even though their acts were not full fledged violations of the Smith Act.[41] Similarly, an airman who nailed seditious theses to the door of the library on an Alaskan air base may be punished though not guilty of sedition under title 18.[42] If utterances would not constitute the crime of sedition, however, they cannot be punished unless they were designed to promote disaffection. This is true even if the statements are "reprehensible and vulgar," as, for example, "Captain, you are no damned good and the Coast Guard is no damned good."[43]

In addition to these laws of general applicability, some that deal with the activities of federal employees can also be applied to military personnel so as to affect their freedom of speech. Officers of the armed services are "officers of the United States" in such a sense as to bring them within provisions of the Hatch Act[44] and are subject to other laws that, for example, prohibit the maintaining of troops at the polls, the polling of troops as to political preferences, the solicitation of campaign funds by civil servants or on military reservations, and the use of government stationery for lobbying.[45]

Besides enforcing civilian legislation incorporated by reference, the military may create new offenses of their own under the "disorders and neglects" clause. This power, on its face in derogation of constitutional inhibitions on ex post facto declarations of criminality and the creation of crimes by analogy, has been sustained on the grounds that

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[36] United States v. Westfall, General Court-Martial Order 5, Western Air Defense Force, March 21, 1955.

[37] United States v. Mills, 4 C.M.R. 676 (1951).

[38] 18 U.S.C. §§ 2387, 2388 (1952).

[39] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 213(d)(5) (1951).

[40] See United States v. Holiday, 4 U.S.C.M.A. 454, 16 C.M.R. 28 (1954); United States v. Norris, 8 C.M.R. 36 (C.M.A. 1953).

[41] United States v. Blevens, 15 C.M.R. 501 (1953), *aff'd*, 5 U.S.C.M.A. 480, 18 C.M.R. 104 (1955); United States v. Dorey, 14 C.M.R. 350 (1953), *petition for review denied*, 4 U.S.C.M.A. 724, 15 C.M.R. 431 (1954).

[42] See United States v. McQuaid, 5 C.M.R. 525 (1952).

[43] United States v. Gustafson, 5 C.M.R. 360 (1952).

[44] 53 STAT. 1148 (1939), as amended, 5 U.S.C. § 118 (1952); see Op. JAGAF 1952/104, Aug. 11, 1952, reported 2 DIG. OPS. JAG. *Retirement* § 792. *But see* 40 OPS. ATT'Y GEN. 103 (1941) (Hatch Act not applicable to National Guardsman ordered to active duty).

[45] 18 U.S.C. §§ 592, 593, 596, 602, 603, 606, 607, 1913 (1952).

military necessity requires a flexible reserve power, that the encrustation of precedents has rendered the clause's meaning clear, and that the founding fathers approved it when they drafted the Constitution.[46] Indeed, it is scarcely more vague than such civilian offenses as vagrancy or "disorderly conduct."[47] The general articles, covering offenses ranging from abusing a public animal to wearing unauthorized insignia,[48] have trenched upon the free speech area, as where they have penalized obscene movie shows[49] or officers who falsely accused their fellows of perjury, dementia, or the like (thus making the articles a criminal libel law).[50] During the Civil War the general articles were used to reach acts beyond the scope of the specific article; for example, a private who could not be punished under the specific article—which protects only the incumbent president—for saying he was glad Lincoln had been assassinated was reached under the "disorders" clause.[51]

The classic clash between the general article and free speech was *United States v. Mitchell*, the prosecution of the flamboyant theoretician and propagandist of air power.[52] The charges involved a speech and press release at San Antonio that criticized the Army's neglect of the development of airpower, particularly such episodes as dishonestly staged anti-aircraft artillery tests, the retention of obsolete aircraft, and the crash of the dirigible Shenandoah. Mitchell had gone so far as to refer to the "incompetency, criminal negligence and almost treasonable administration of the national defense by the Navy and War Departments."[53] The specifications under the general article alleged that speech was "to the prejudice of good order and military discipline," that it was "insubordinate to the administration of the War Department," and that the speech was "highly contemptuous and disrespectful" of the War and Navy Departments.[54] The net effect of these charges was to imitate the contempt provisions of the

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[46] See United States v. Frantz, 7 C.M.R. 37 (1953); United States v. Lee, 4 C.M.R. 185 (1952).

[47] See Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1221 (1953).

[48] MANUAL FOR COURTS-MARTIAL, UNITED STATES 219 (1951) (Table of Maximum Punishments).

[49] United States v. Cowan, 12 C.M.R. 374 (1953); United States v. Jewson, 7 C.M.R. 213 (1951), *aff'd*, 4 U.S.C.M.A. 50, 5 C.M.R. 80 (1952); *cf.* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

[50] General Court-Martial Order 1, Hq. of the Army, Jan. 3, 1881 (Lt. Wisharth); General Order 30, Hq. of the Army, Aug. 4, 1852 (Asst. Surgeon Campbell); WINTHROP, *op. cit. supra* note 21, at 713, 727, 731.

[51] General Order 105, Dep't of Missouri, April 28, 1865 (Pvt. Peters).

[52] The most complete available report seems to be that found in 19 AVIATION (1925). Mitchell's sister alleges that the record disappeared mysteriously. MITCHELL, MY BROTHER BILL 326 (1953).

[53] 19 AVIATION 744 (1925); see *id.* at 318–20.

[54] *Id.* at 744.

specific article, though none of the individuals protected by that article was involved.

General Mitchell's defense challenged Generals Bolley and Summerall as being committed to the fight against a separate air service.[55] It then attempted to prove the truth of the insubordinate statements by calling to the stand a distinguished array of witnesses including Major Spaatz, Major Arnold, Captain Rickenbacker, and Rear Admiral Sims. The court admitted this testimony but refused to make a ruling whether truth was a defense to the charge, which, by analogy to the practice under the specific article, it should not have been.[56] A second line of defense was the argument that freedom of speech was guaranteed to service personnel along with all constitutional rights other than indictment and trial by grand and petty jury. President Coolidge's Annapolis graduation speech was quoted:

> The officers of the Navy are given the fullest latitude in expressing their views before their fellow citizens, subject, of course, to the requirement of not betraying those confidental affairs which would be detrimental to the service.[57]

Even before the trial Mitchell had raised this issue by charging that fellow officers were being bulldozed by threats to their service careers into testifying along orthodox lines before congressional committees. He himself was looking for no advancement, he proclaimed, for he had already suffered for his outspokenness.[58] None of these tactics prevailed. The court found him guilty of all counts, but, despite the Trial Judge Advocate's passionate onslaught—excessive by present military standards—upon the "self advertiser and wildly imaginative hobby riding egomaniac,"[59] he was only suspended from rank and command for five years. After the sentence had been affirmed by the Judge Advocate General, General Mitchell resigned.[60] This result may serve as an example of the dangers of just a little too much zeal in military reform carrying an officer beyond the bounds of military manners and ruining his career. It is in sharp contrast to the continued progress of Mitchell's fellow crusader, Admiral Sims, despite constant reprimands and other difficulties for overexuberance in speech never quite amounting to excess.[61]

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[55] *Ibid.* Shortly thereafter General Summerall was himself disciplined by President Coolidge for campaigning against the cuts in military spending. N.Y. Times, May 15, 1955, p. 87, col. 1.

[56] See 19 AVIATION 770–72 (1925).

[57] *Id.* at 744.

[58] *Id.* at 803.

[59] *Id.* at 911.

[60] DIG. OPS. JAGA 1912–1940, § 454(27); Mitchell's counterpart in Italy, General Douhet, was also court-martialed for his propaganda activities on behalf of airpower. SMITH, U.S. MILITARY DOCTRINE 134 (1955).

[61] MORRISON, ADMIRAL SIMS 276–84, 482–85 (1942).

B. MILITARY REGULATIONS

1. *Regulations of general application.*

From time to time the services have tried, by general regulations, to cover the gaps left by Congress in limiting military expression. These directives have tried to crystallize the unwritten traditions and customs of the service into more or less firm and broad rules. In the Army, regulations attempting to curb political activity existed as early as 1914[62] and were expanded in the early 1920's by Secretary Newton D. Baker as a result of General Leonard Wood's pursuit of the presidential nomination.[63]

The Army's AR 600–10 (as supplemented by certain other regulations) is probably the most comprehensive of the various attempts to codify the subject; its salient points may be paraphrased as follows:[64]

> (1) Active duty or retired personnel may not attempt to influence Congressional action, except for private relief bills.
> (2) Active duty personnel, while retaining the right to vote and to express political views privately and informally, may not participate in political campaigns, committees, or conventions, including speechmaking, article writing, or fund solicitation.
> (3) Officers may testify as to their own opinions and beliefs if summoned before a congressional committee.
> (4) Speeches discussing military problems from the standpoint of the Defense Department are both authorized and desired but the military status of officers, particularly regulars, tends to produce confusion and limits their right to make presentations on political, diplomatic, or legislative matters or on questions tending to involve superiors in controversy or to undermine discipline.
> (5) Writing for publication is encouraged subject to censorship regulations. Clearance for speeches or publications should be procured in case of doubt.

Apparently there have been no courts-martial for violation of this regulation,[65] a fact which may indicate either that it was generally successful in achieving its object of instilling caution into the officer corps or that it was thought not to be sufficiently clear to serve as a basis for punitive action.

For a time the Air Force operated under Army regulations including AR 600-10;[66] as it grew more independent it shifted to its own series of regulations, none of which covered the topic of speeches and

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[62] 1 JESSUP, ELIHU ROOT 247 (1938).

[63] Time, June 23, 1952, p. 19.

[64] AR 600–10, Nov. 10, 1950; for an extended summary see THE AIR FORCE OFFICER'S GUIDE 319–22 (4th ed. 1950).

[65] There have, however, been prosecutions under the "conflicts of interests" sections of AR 600–10 which deals with military discipline generally. See, *e.g.*, United States v. Long, 12 C.M.R. 420 (1953); United States v. Walters, 11 C.M.R. 355 (1953).

[66] United States v. Sippel, 8 C.M.R. 689 (1953), *aff'd*, 4 U.S.C.M.A. 50, 15 C.M.R. 50 (1954).

publications with the same comprehensiveness. AFR 11-7 cites and reinforces the statutory provision that there shall be no interference with communications between servicemen and Congress or congressmen;[67] AFR 5-43 gives base commanders the power to ban objectionable literature;[68] AFR 190-6 places on each member of the Air Force the responsibility for not disclosing security matters and for refraining from public pronouncements on "political, diplomatic," and legislative matters and on "matters the treatment of which tends to prejudice discipline."[69] Some lower echelons of the Air Force have also published regulations covering these subjects.[70]

Navy regulations covered the same general ground and even purported to put limits on the right of naval personnel to respond to requests for information by Congress or congressmen.[71] When Secretary Forrestal consulted Walter Lippman on the topic of general regulations of this type during the "Battle of the Admirals," it was Lippman's opinion that the topic was not susceptible of comprehensive regulation and that general exhortation and a code of moral suasion were the best approach to the problem.[72] After some hesitations this policy was adhered to.

2. *Censorship regulations.*

One of the major types of regulation by which the armed services have tried to control expression has been the censorship directive. This type of order does not tell the speaker or writer directly what he can or cannot say; rather it instructs him to obey the orders of other individuals to whom the power is delegated to censor materials according to broad standards. The failure to submit material for censorship or refusal to abide by the censor's decision becomes a violation of the regulation and punishable as such. In civilian life such "prior restraints" have been denounced by the courts,[73] and peacetime civilian censorship is largely limited to such informal arrangements as the

[67] AFR 11-7, Dec. 19, 1951, para. 6.

[68] AFR 5-43, Feb. 9, 1953.

[69] AFR 190-6, Dec. 3, 1954. See also AIR FORCE MANUAL 190-4, ¶ 19 (1952): "accuracy, propriety and conformance with policy." AIR FORCE PAMPHLET 190-1-2 (a set of cards for speakers): "no controversial statements which might reflect injuriously upon the Air Force. . . ."

[70] For example, the Air Defense Command, a branch that through its ground observer posts and interceptor bases near urban areas is particularly sensitive to public opinion, provided for a time that speeches were not to concern foreign policy, defined as statements that could "reasonably be expected to substantially influence or affect international diplomatic relations" or speeches that would "create a sufficient national impact to undermine public morale or jeopardize the defense program." AIR DEFENSE COMMAND REG. 190-7, Aug. 24, 1951.

[71] See NAVY REGS. art. 95, as cited in SMITH, AMERICAN DEMOCRACY AND MILITARY POWER 236 (1951).

[72] THE FORRESTAL DIARIES 515-16 (Millis ed. 1951).

[73] See Near v. Minnesota, 283 U.S. 697 (1931).

motion picture code and local comic book regulations.[74] In the military, on the other hand, censorship long existed and is likely to remain, even where faintly disguised as "public relations clearance." During the Civil War, censorship was lax enough to permit correspondents and soldiers alike—many men fell into both categories—to endanger the security of military operations by the looseness of their tongues and pens;[75] by World War II, the censorship organization had grown so vast that its commanders were accused at times of empire building at the expense of more directly combatant forces. At a time when our military and diplomatic policies still suffered from initial confusion, our censorship policies tended ultimately to undermine public trust and understanding rather than to fortify and strengthen them.[76]

Since 1945 military censorship has been in the form of clearance procedures controlled by the Security Review Branch of the Office of Public Information in the Army and similar offices in the other services. The actual policies of these offices are not expressed in visible objective form, and the practices vary widely from time to time and place to place. However, in *United States v. Voorhees*[77] we are fortunate to have a clinical dissection of the Army's censorship system. In that case the system was tested by the military courts and found drastically wanting. As was said by Judge Brosman, the case is replete with irony:[78] a censor was tried for violating censorship and most of the material thought objectionable was a criticism of a violation of security censorship by his former superior, General Douglas MacArthur, whose own military career ended abruptly due to his proclamations in defiance of higher authority. Lieutenant Colonel Voorhees had written several pieces about the Korean War. He submitted the manuscript for a book to the Office of Public Information, and that office, without raising security objections, tried to get him to drop certain passages for reasons of "propriety." When he refused, his commanding general gave him a direct order to withdraw the entire manuscript. Voorhees again refused to comply and the book was published. In addition, he permitted two of his articles, which contained nothing resembling a security violation, to be published without prior clearance.

Voorhees was tried on five counts of defying the regulation and his superiors. Found guilty on all five, he was sentenced to dismissal and

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[74] Note, 68 HARV. L. REV. 489 (1955).

[75] ANDREWS, THE NORTH REPORTS THE CIVIL WAR 198, 359 (1955).

[76] AIR FORCE MANUAL 190-5 (1954).

[77] 10 C.M.R. 529 (1952), *rev'd*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954), 23 GEO. WASH L. REV. 481 (1955); for civilian analogies see State *ex rel.* Curtis v. Steinkellner, 247 Wis. 1, 18 N.W.2d 355 (1945); *cf.* Kane v. Walsh, 295 N.Y. 198, 66 N.E.2d 53 (1946).

[78] 4 U.S.C.M.A. at 544, 16 C.M.R. at 118.

forfeiture of all pay and allowances. The Army Board of Review sustained the sentence (2 to 1), though it disapproved all but one specification.[79] The Court of Military Appeals also sustained but one specification; however, it returned the case for a rehearing on the sentence, which it found excessive for one purely technical offense. Since the Army has not chosen to hold a rehearing, the accused has been, in effect, acquitted.[80]

The process through which this result was reached is interesting but complex. Each question must be considered in the light of the crucial provisions of AR 360–5, dated October 20, 1950, and of the Johnson Memorandum of June 7, 1949, which clarified the original Forrestal consolidation memorandum setting up the Defense Department Public Information Office by limiting "the responsibility of public information officers . . . to deletion of matter which is classified for security reasons."[81]

(1) Can the Army constitutionally limit the freedom of speech of its personnel? Are freedom of speech and of the press among those constitutional rights apparently guaranteed the serviceman? Until the *Voorhees* case was decided in 1954 no positive statement on this question was available.[82] In the *Voorhees* case Chief Judge Quinn made it clear he believed the first amendment applicable:

> Plainly AR 360–5 imposes restrictions on the free expression of ideas by Army personnel. The question then is whether those limitations set out in the regulation constitute an illegal departure from the Constitutional prohibition on legislation "abridging the freedom of speech," which is contained in the First Amendment.
>
> . . . .
>
> . . . . I think I should make it clear that, in my opinion, every individual in the military service is entitled to the same constitutional rights, privileges, and guarantees as every other American citizen, except where specifically denied or limited by the Constitution itself. . . .[83]

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[79] 10 C.M.R. 529 (1952).

[80] N.Y. Times, Nov. 4, 1954, p. 12, col. 4.

[81] AR 360–5 provides: "Public information officers normally perform the duties of security review. This function is limited to the deletion of classified matter and review for accuracy, propriety, and conformance to policy. Specific violations of security directives, policies or regulations will be brought to the attention of the person submitting material for review.

"Personnel of the Army Establishment are personally responsible for their writings and public statements. Personnel on active duty will submit their writings and public statements to the appropriate security review authority. Retired personnel and civilian personnel employed by the Army Establishment will submit their writings and public statements to the appropriate security review authority when the material concerns military subjects. In no instance should the material be submitted to a publisher prior to clearance. Civilian component personnel who have written material intended for public release which concerns military subjects should submit the material to appropriate security review authority when there is any doubt concerning its security or propriety."

[82] WINTHROP, *op. cit. supra* note 21, at 655–66, the leading military law authority, is silent as to freedom of speech but seems to believe the first amendment applicable.

[83] 4 U.S.C.M.A. at 521, 531, 16 C.M.R. at 95, 105.

Judges Latimer and Brosman did not expressly deny this premise, but they did lay stress on the consideration that differences between civilian and military circumstances justify restrictions on the usual free speech guarantees. Judge Latimer's attenuation of the first amendment virtually wiped out the implied concession that it was applicable at all:

> I believe it ill-advised and unwise to apply the civilian concepts of freedom of speech and press to the military service unless they are compressed within limits so narrow they become almost unrecognizable.[84]

The consensus then appears to be that the freedom of speech guarantee does apply in theory to the military but that in practice the protection it affords will be narrowly construed.

(2) For what reasons can the Army impose limitations? On this question there was much more variance. Judge Latimer's opinion makes far reaching claims for controls based on "policy and propriety"; otherwise he feared that "a few dissident writers . . . could undermine the leadership of the armed services. . . ."[85] Conceding the value of free debate in civilian life, he maintained that "a war cannot be won in the halls of debate, and conditions do not permit meeting lies with truth." On the other hand, Judge Brosman, at the other extreme, entertained doubts as to the Army's right to control any but security matters, but he did not commit himself to any rigid borderline.[86]

(3) Can the Army use censorship to impose these limitations? There was much discussion in all opinions about the applicability of the *Near v. Minnesota* rule against prior restraints, a doctrine sometimes thought too flexible even as applied in civilian life. Judge Latimer found it inapplicable:

> Assuming arguendo that the privilege of free speech is a preferred right, we should not prefer it to such an extent that we lose all other benefits of our form of government. A demoralized and undisciplined military service could cost us all those we possess, and hostility to prior restraints on communications should not be permitted to endanger our nation.[87]

Judge Brosman looked at the needs of national security somewhat differently:

> Balancing, on the one hand, the Congressionally authorized deterrents available for conduct which undermines discipline against the amorphism of the Army's censorship, on the other, I

[84] *Id.* at 531, 16 C.M.R. at 105.
[85] *Id.* at 532–33, 16 C.M.R. at 106–07.
[86] *Id.* at 545–61, 16 C.M.R. at 119–25.
[87] *Id.* at 534–35, 16 C.M.R. at 108–09.

cannot descry the overriding necessity that *I* would require to sustain the legality of the restrictions the latter imposes.[88]

(4) Assuming censorship is not per se illegal, was AR 360–5 clear enough to act as a basis for penal action? None of the judges was favorably impressed by the draftsmanship of AR 360–5, a feeling heightened by testimony from some of the clearance officers that they were unsure of its meaning. The regulation shifted uneasily from "will submit" to "should submit," failed to define the term "clearance," and left in doubt what was meant by "the appropriate reviewing authority." There was doubt as to the status of a reserve officer author who fell under one clause as "active duty personnel" but also under one governing "civilian component personnel." There was argument, too, whether the regulation purported to cover only military and allied topics or all publications including those dedicated to "the amours of a Texas rattler."[89] Only the dissenting member of the Board of Review seems to have thought that these difficulties wholly voided the regulation.[90] The other opinions focussed on the key phrase "policy and propriety," Judge Brosman finding this phrase no more adequate than the "sacrilegious," "immoral," or "harmless" previously held by the Supreme Court to be adequate standards of action in free speech cases.[91] Judge Latimer felt that it would be possible, if the issue were presented in a different context, to look outside AR 360–5 to other Army directives and decide from them what "policy" meant.[92]

(5) What in fact did AR 360-5 authorize censors to delete? All reviewers agreed it was meant to cover "security." Chief Judge Quinn thought that the conflicting portions of the regulation, read in the light of the Johnson Memorandum restricting review to security matters, could be reconciled in such a way that "policy and propriety" meant no more than "security" and were mere surplusage.[93] The others felt that AR 360-5 had tried to cover some ground beyond "security," in which a natural reading of the regulation seems to support them; they believed that the existence of the Defense Department's Johnson Memorandum was the only thing that limited the Army's regulation to security alone and made anything else *ultra vires*.[94]

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[88] *Id.* at 548, 16 C.M.R. at 122.

[89] *Id.* at 536, 552, 16 C.M.R. at 110, 126. The view that all writings by active duty personnel must be submitted for censorship is supported by the contrast with the provision for reservists that covered only material "which concerns military subjects." See note 81 *supra*.

[90] 10 C.M.R. at 545–46.

[91] 4 U.S.C.M.A. at 545–46, 16 C.M.R. at 119–20.

[92] *Id.* at 538, 16 C.M.R. at 112.

[93] *Id.* at 515–25, 16 C.M.R. at 89–99. The term "security" itself is capable of extension and abuse. AIR FORCE MANUAL 190–5, ¶ 15b (1954): "The word 'security' covers a lot of ground. Is it security matter, or is it policy simply, to look askance at material which says one's own troops are weak, demoralized, or otherwise ill-suited to their tasks?"

[94] 4 U.S.C.M.A. at 534, 16 C.M.R. at 109 (1954).

After the *Voorhees* case the armed forces issued a joint series of directives on censorship which stressed the predominantly wartime and emergency nature of censorship and stressed that only "security violations" were to be eliminated.[95] However, these directives cover only censorship of the press; censorship of military personnel is still covered, in the Air Force at least, by different regulations establishing much broader authority for clearance or censorship activity.[96] When the current clearance provisions are considered in the light of the new Defense Department policy permitting clearance only for "constructive contributions,"[97] the result of a new *Voorhees* case would be extremely difficult to predict. The current maze of directives might well run afoul of the courts' obvious distaste for broad and poorly defined censorship.[98]

3. Regulations of specific application.

In addition to directives that can be roughly classified as general in scope, military authorities from time to time issue orders in response to a particular situation that can be considered as only temporary in time and limited in scope. At times these commands, hastily drafted and delivered, appear to conflict with more general directives and cause confusion.

A notable instance of the use of specific orders appeared during the struggles over the unification of the armed forces that flared intermittently between 1945 and 1949. The Navy, fearing eclipse by the other services, found itself in continual opposition to the program. All through the congressional hearings during the latter part of 1945 capitol hill committee rooms rang with angry military voices. The admirals lined up in solid opposition to the administration's plan which Admiral Halsey bluntly characterized as "a wild-cat scheme" and "un-American, un-democratic and damn dangerous."[99] The Army was provoked to retaliate and the conflict threatened to degenerate into personal abuse. Secretary of the Navy Forrestal, irked by General Doolittle's criticisms of the Navy, suggested to Secretary of War Patterson that such bickering harmed national security and

[95] See AIR FORCE MANUAL 190–5 (1954).

[96] AFR 190–6, Dec. 3, 1954. See also Anderson, *Official Clearance for Publication*, 7 AIR U. Q. REV. 128, 129 (1954). This regulation must also be considered in the light of President Truman's 1950 Memorandum calling for clearance of all pronouncements on military and diplomatic affairs, but probably restricted in scope to the MacArthur episode that evoked it. 4 U.S.C.M.A. at 522, 16 C.M.R. at 96. Judge Latimer felt that the Truman Memorandum did not apply to the *Voorhees* situation because it was limited to military officials and to data directly affecting the relations with the United Nations. *Id.* at 536, 16 C.M.R. at 110.

[97] See N.Y. Times, April 28, 1955, p. 8, Col. 4.

[98] 4 U.S.C.M.A. at 554, 16 C.M.R. at 129.

[99] N.Y. Times, Dec. 7, 1945, p. 5, col. 1.

should be curbed.[100] Somewhat later his aide, Struve Hensel, charged the Army with "muzzling" its officers' real views on unification.[101] Patterson denied the muzzling charge, rejected Forrestal's suggestion, and said that Army officers could "freely express their own personal convictions with force and vigor."[102] The War Department ruling was that "officers, if invited, are authorized to accept invitations to address groups of civilians on this subject. These addresses should be informative, not argumentative or of a crusading nature." Shortly thereafter the Navy Department, under pressure from the White House, itself issued an order restraining its own officers:

> In view of the President's message to Congress urging the passage of legislation for a Department of National Defense, officers of the Navy and Marine Corps are expected to refrain from opposition thereto in their public utterances in connection therewith, except that when called as witnesses before committees of Congress they will, of course, give freely and fully their views and respond to any questions asked.[103]

President Truman, who had made up his mind in favor of unification, became annoyed at the furor. In December 1945 hope was expressed that the services would fall in line behind his support of the program.[104] In April he said that the Navy must support him, although he conceded to officers the right to express themselves as individuals.[105] He implied that if the admirals kept up the fight he would "attend to it later." This occasioned a further Navy Department order curbing its officers' speeches. Nonetheless, President Truman had occasion a few days later to rebuke Rear Admiral A.S. Merrill for a speech in Dallas criticizing the curb order.[106]

Even after the unification legislation was passed, the program faced stiff resistance from ancient customs and attitudes. The conflict was intensified by a violent competition for funds and manpower in a period of austerity in military budgets. In 1949 submerged resentments broke out into the open during the hearings on appropriations for the Air Force's B–36 intercontinental bomber program. Defense Secretary Forrestal had been considering curbs during 1948, though none materialized.[107] A mysterious memorandum appeared which

[100] N.Y. Times, Nov. 10, 1945, p. 1, col. 4; N.Y. Times, Nov. 13, 1945, p. 1, col. 4.
[101] N.Y. Times, Dec. 15, 1945, p. 1, col. 6.
[102] *Ibid.*
[103] N.Y. Times, Dec. 20, 1945, p. 1, col. 8, p. 14, col. 1.
[104] N.Y. Times, Dec. 21, 1945, p. 9, col. 2.
[105] N.Y. Times, April 12, 1946, p. 1, col. 4.
[106] N.Y. Times, April 18, 1946, p. 11, col. 1.
[107] THE FORRESTAL DIARIES 149 (Millis ed. 1951). In suggesting tentative curbs on the services, Forrestal implied that the Navy could make such curbs stick but the Air Force could not. *Ibid.* Forrestal's caution in this area that calls for "considerable discretion" was regarded as wise by the TASK FORCE REPORT ON NATIONAL SECURITY ORGANIZATION, COMMISSION ON EXECUTIVE BRANCH OF THE GOVERNMENT 84 (1949) (Hoover Report).

went beyond alleging that the B–36 was an inadequate weapon to charge that it was conceived in fraud and deceit. This memorandum was traced to a civilian employee of the Navy Department,[108] but further inquiry implicated a Captain Crommelin, who admitted sharing in its authorship and predicted that his career was at an end.[109] Temporarily this fear proved vain, since he was moved to a rear admiral's job, but Navy Secretary Matthews promptly moved him downstairs again.[110] His next appearance is as a figure distributing in "a shadowy corridor" copies of a letter by Vice Admiral Bogan through channels to Matthews, endorsed by Admiral Denfeld and Admiral Radford. Radford said:

> Rightly or wrongly, the majority of officers in the Pacific fleet concur with Captain Crommelin and with the ideas expressed by Vice Admiral Bogan above. Most will avoid any statements to that effect and they would probably question the propriety and timing of such public statements. Nevertheless, it would be a grave mistake to underestimate the depth and sincerity of their feelings.[111]

Not all of the Navy's opposition was subterranean. Admirals Ofstie, Blandy, Radford, and even the reluctant Denfeld testified before Congress, despite the pressures exerted by Matthews who sought to force all comments to go through channels and to limit the Navy's presentation of its case.[112] These curbs led to a "jeering laugh of disbelief" when he said that he didn't see how navy officers could be barred from freely giving their views.[113] Hanson Baldwin, Annapolis graduate and military commentator, attributed to these tactics the frustration and low morale then prevalent in the Navy.[114] While naval personnel seized every available opportunity to express their feeling of the peril to the Navy and their anxiety that their outspoken opposition would lead to wholesale purges, the other services supported the theory that military men owe a duty of silent obedience to the most distasteful measures. General Bradley in his famous "fancy Dan" speech called upon all military personnel to follow the dictates of loyalty to their superiors. He stated:

> I believe that the public hearing of the grievances of a few officers who will not accept the decisions of the authorities established by law, and charges as to our poor state of preparedness, have done infinite harm to our national defense, our position of leadership in

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[108] N.Y. Times, Aug. 25, 1949, p. 1, col. 3.
[109] N.Y. Times, Sept. 11, 1949, p. 1, col. 2.
[110] N.Y. Times, Sept. 16, 1949, p. 1, col. 6.
[111] N.Y. Times, Oct. 4, 1949, p. 1, col. 6.
[112] N.Y. Times, Oct. 8, 1949, p. 1, col. 8; N.Y. Times, Oct. 12, 1949, p. 1, col. 8; N.Y. Times, Oct. 14, 1949, p. 1, col. 1.
[113] N.Y. Times, Sept. 17, 1949, p. 1, col. 6.
[114] N.Y. Times, Oct. 7, 1949, p. 1, col. 8.

> world affairs, the position of our national policy and the confidence of the people in their government.[115]

Air Force leaders such as Vandenberg (who labeled the Navy's actions "an extraordinary episode") and Symington thought that the Navy was revealing classified data, harming its own morale, and confusing the civilian population.[116]

In the end the Navy lost in its opposition to the B–36 and its desire for a giant carrier. Captain Crommelin, passed over for promotion, was denied the court-martial he demanded, was reprimanded, and transferred to San Francisco.[117] Admiral Denfeld, despite the protests of Congressman Vinson that it was a reprisal for testimony given under safe conduct, was summarily removed by President Truman.[118]

Six years later the picture has changed dramatically. Unification is now one of the accepted ideas of defense thinking. While the B–36, now fading into obsolescence, proved itself as an interim weapon, the Navy has at length received its giant carrier.[119] Individual leaders of the naval opposition such as Radford and Burke have been admitted to the councils of the administration.[120] Service morale has recovered, at least from that type of depression. In the light of this after-acquired wisdom it seems probable that the national interest was in the long run better served by the frank, if occasionally bitter, expression of differing opinions. The view that washing the dirty linen of the Defense Department in public was necessary, that naval officers owed duties to their subordinates, to Congress, and to the people, as well as to the Defense Department, seems better founded than the alarmist cries and inconsistent demands for curbs from various contemporaries whose disinterestedness in demanding silent obedience from others was sometimes not unqualified.[121]

More dramatic even than the "Battle of the Admirals" was the so-called "Great Debate," which involved another special restriction on free speech. On December 5, 1950, due to tensions arising from

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[115] N.Y. Times, Oct. 20, 1949, p. 1, col. 1.

[116] N.Y. Times, Oct. 19, 1949, p. 1, col. 6.

[117] N.Y. Times, Nov. 19, 1949, p. 1, col. 3; N.Y. Times, Nov. 20, 1949, p. 1, col. 4; N.Y. Times, Dec. 17, 1949, p. 10, col. 6. It was said that Secretaries Johnson and Matthews were in favor of the court-martial and were dissuaded by the more conciliatory Admiral Sherman. Time, Nov. 21, 1949, pp. 25-26; Time, Nov. 28, 1949, p. 12.

[118] N.Y. Times, Oct. 28, 1949, p. 1, col. 8.

[119] N.Y. Times, Oct. 2, 1955, p. 1, col. 3.

[120] Rear Admiral Arleigh Burke became Chief of Naval Operations in 1955, despite having been temporarily taken off a promotion list by President Truman for his role as leader of Operation 23 against the Air Force. Time, June 6, 1955, p. 25.

[121] N.Y. Times, Nov. 27, 1949, p. 90, col. 1; N.Y. Times, Nov. 28, 1949, p. 6, col. 4. Ex-President Hoover agreed, saying "one of the requirements of maintaining freedom is the public washing of linen." Time, Oct. 31, 1949, p. 14. See also Leach, *Obstacles to the Development of American Air Power*, 299 ANNALS 67, 68 n.1 (1955).

conflicts of opinion between Washington and Tokyo as to the correct method of continuing the Korean struggle, President Truman forwarded to the Joint Chiefs of Staff a memorandum as follows:

> In the light of the present critical international situation, and until further written notice from me, I wish that each one of you would take immediate steps to reduce the number of public speeches pertaining to foreign or military policy made by officials of the departments and agencies of the Executive Branch. . . .
>
> No speech, press release, or other public statement concerning military policy should be released until it has received clearance from the Department of Defense. . . .
>
> The purpose of this memorandum is not to curtail the flow of information to the American people, but rather to insure that the information made public is accurate and fully in accord with the policies of the United States Government.[122]

While it was couched in general terms, it is resonable to assume in the light of its language and of the situation from which it arose, that this regulation was directed only to the particular "present critical international situation" and was not intended to apply generally. It was not implemented by permanent regulations; and, although never rescinded as far as is known, it has not been regarded, as was the regulation in the *Voorhees* case, as laying down important long range directives or as setting forth a lasting curb on free speech.[123] The Pentagon forwarded the message to Tokyo on December 6, 1950, and reminded General MacArthur of it on March 24, 1951.[124] A series of incidents, however, involving primarily the issuance by Tokyo of a peace ultimatum to the Communists and the writing by MacArthur of a letter to Representative Joseph Martin commenting strongly on the conduct of the Korean War, caused the President to remove General MacArthur from his command. This sudden and dramatic act gave rise to extended hearings before the Senate Committee on Armed Services in which there was not only detailed exploration of the substantive problems of our Far East policy but also what is probably the most thorough public discussion on record of the question of military freedom of speech. While the deposed proconsul claimed that "no more subordinate soldier has ever worn the American uniform" he asserted that "no segment of American society shall be so gagged that the truth and the full truth shall not be brought out." He replied to queries that his subordinates spoke to him with full frankness and that

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[122] United States v. Voorhees, 4 U.S.C.M.A. 509, 519, 16 C.M.R. 83, 93 (1954); *Hearings Before the Committee on Armed Services and the Committee on Foreign Relations, United States Senate, to Conduct an Inquiry into the Military Situation in the Far East*, 82d Cong., 1st Sess. 3536 (1951) (hereinafter cited as *Far East Hearings*). See also the interchange between Truman and MacArthur in Life, Feb. 13, 1956, p. 66, which adds little to the above.

[123] See note 96 *supra*.

[124] *Far East Hearings* 3536, 3542.

he would not even object to one of them communicating with Congress, providing that he did so in a gentlemanly way.[125] He asserted that his expression of differences of opinion had not weakened the United Nations in the eyes of enemies and allies, although he conceded there were degrees of propriety about such utterances.

General Marshall's testimony represented a viewpoint almost diametrically opposed to MacArthur's. He disapproved this "wholly unprecedented situation of a local theater commander publicly expressing his displeasure at and his disagreement with the foreign and military policy of the United States."[126] A coloquy with Senator Bridges followed:

> Q. Don't you believe that if a United States Senator or a Congressman of the United States writes a letter to a military policy making authority that he is entitled to get a frank reply?
>
> A. No sir; I don't think from the senior commander when he knows he is advocating something to the leader of the opposition party to the administration that he as the commander is in total opposition to his own people.[127]

He recalled General Pershing's obedience, despite his own views, to President Wilson's order to withdraw from Mexico in 1917 and felt that this pattern of loyalty to the hierarchy must be followed, that an officer must "accept those inhibitions if you undertake that type of career." Until retirement an officer should keep silent, though perhaps not entirely mummified, lest he undermine discipline and confuse our allies.[128] General Bradley largely concurred in these views, following his own disapprobation of the rebellious admirals of '49.[129] Recalling his own disagreements with superiors over such issues as pressing east to Berlin ahead of Russians in 1945, he stated that a military man should present his views to his superiors before the decision is made and then abide by their decision. He believed that it would be ruinous for us to speak with two voices to our own people and our allies; military discipline would be lost. He agreed with Senator Morse that an unwritten law required officers to express their differences only within the system:

> Q. Is it not true that it is an historic custom and a long established tradition in American military system that while men are on active duty in responsible positions as high officers, they do not take their disagreements with their superiors directly to the public for a public debate but they try to iron out their differences through the channels of command?

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[125] *Far East Hearings* 27, 99, 114.
[126] *Far East Hearings* 325.
[127] *Far East Hearings* 380.
[128] *Far East Hearings* 392.
[129] See text at note 115 *supra*.

A. We are taught to argue and present all the reasons we can think of with reference to any action until the decision is made and we argue with the man who is going to make the decisions. After the decision is made we abide by that decision and do not carry it to the public.

Q. Would it be accurate for me to say that it is very much of an unwritten law within American military tradition that if a high officer of the military finds himself in such complete disagreement with his superiors that he cannot, in his opinion, with intellectual honesty and good ethics execute their orders, that he should resign his commission and then as a civilian take the issue to the country?

A. I think it is a general principle, and it doesn't apply only to the military. I think it applies to any civilian occupation. If a vice president of a company does not agree with the policy of the board, I think he usually gets out. I think we would follow the same principle.[130]

The testimony of General Lawton Collins stressed that one's loyalty to one's country should be expressed through channels and rejected Senator Hickenlooper's suggestion that MacArthur as a "proconsul" had more scope than other officers to expound his personal dissents.[131]

The consequences of this debate as far as our Asiatic problems are concerned remain inconclusive. As far as military free speech is concerned, a clarifying step was taken shortly thereafter by the insertion in the Universal Military Training Act of a provision protecting the right of the serviceman to communicate directly with Congress and Congressmen on all matters, excepting only restrictions necessary to security. This act invalidated some prior service regulations and established one of the few clear rulings in the whole field.[132]

A more recent example of specific regulation of expression was the incident in which the commandants of West Point and Annapolis barred participation in the nationwide college debates on recognizing Red China. Hanson Baldwin defended the curb against critics whom he accused of "some absurb and unreasoned comments," basing his defense on a distinction between intramural and public addresses.[133] Others, perhaps closer to Mr. Baldwin's own views during the "Battle of the Admirals," considered the order an "ill advised attempt to straitjacket thinking."[134] President Eisenhower, himself, expressed his regret, stating that the cadets should be considered more as students than as soldiers and should be given corresponding freedom.[135] When it is remembered that cadets who advocate recognition do so not

[130] *Far East Hearings* 1041.
[131] *Far East Hearings* 1194.
[132] Universal Military Training Act, 65 STAT. 75 (1951), 50 U.S.C. § 454(a) (1952).
[133] N.Y. Times, Nov. 21, 1954, p. 1, col. 6.
[134] N.Y. Times, Dec. 2, 1954, p. 30, col. 8.
[135] N.Y. Times, Nov. 24, 1954, p. 1, col. 6.

from personal conviction but only for argument's sake, it seems unsound to argue that discipline could be undermined thereby, almost as unsound as to argue that "aggressor" forces on maneuvers are levying war against the United States. More justified from a clear and present danger viewpoint was the directive during the recent 1955 crisis in French North Africa by the local Air Force commander that airmen and dependents refrain from political or religious discussions with either Frenchmen or natives.[136]

4. Informal administrative action.

Personnel on active military service are subject to an unusual extent to sudden, drastic changes, at the discretion of superior authority. A change of station, a missed promotion, a separation from active duty, all these can bring not only temporary inconvenience but also lasting ruin for a lifetime's career. It is inherent in the nature of military organizations that such changes must lie within the uncontrolled discretion of military commanders who bear the responsibility for conducting operations and who often cannot be expected to give more than intuitive reasons for their acts. These prerogatives cannot be hedged about with legal safeguards; they are the military counterparts of "non-reviewable administrative actions."[137]

The elusive nature of such actions does not make them less influential in limiting the activities of subordinates.[138] On the contrary, a man who feels that a certain way of expressing himself is frowned upon by superiors, or may be deemed contrary to the "customs of the service," or may provoke a bad efficiency rating, is more likely to abstain from both the conduct directly disapproved and conduct resembling it than a man concerned only with avoiding a clearly defined criminal enactment. The incidence of these sanctions and controls, imposed without findings or opinions, is difficult to determine; our discussion can draw only upon a few salient cases in which the connection between the military man's statement and the action taken against him was made obvious by open avowal or unmistakable circumstantial evidence.

One action easily adapted to punitive motives is separation from service. Legally, the right of the serviceman, particularly the reserve officer, to remain on active duty is not well protected—an officer may be removed by such means as Congress may direct so long as such

[136] N.Y. Times, Sept. 11, 1955, p. 9, cols. 1, 2.

[137] See DAVIS, ADMINISTRATIVE LAW c. 19 (1951).

[138] For judicial recognition of these pressures, in a case where they worked in the direction of producing speech (a confession) rather than repressing it, see United States v. Gibson, 3 U.S.C.M.A. 746, 755, 14 C.M.R. 164, 173 (1954) (concurring opinion): "In the military system there exist certain pressures of authority and rank which conceivably may deprive an individual of his mental freedom to choose between speaking and remaining silent."

discharge is honorable in nature. Thus, a man with long accumulated pension rights and an expertise not easily marketable elsewhere may find himself without any protection, being told that a man has no more vested right to be an officer than a policeman.[139] For some, a premature but honorable release would only be a blessing. Many involuntarily recalled reservists must have envied Lt. (j.g.) W. H. Evans when his open letter to Mr. Kohlberg of the "China Lobby" caused his return to civilian life from arduous duty in Korean waters. When it is considered that his statements about President Truman and "Red Dean" Acheson, their "pro-Soviet, one world administration," and their soft policy towards Red China violated article 88 and constituted a disobedience of several direct orders, this action seems too lenient.[140] For others, such as General MacArthur or Admiral Denfield, separation involved no great direct personal sacrifices, the blow being cushioned by a pension or comparable civilian job. For most career reserve officers the threat of such separation is a real one and strongly motivates them not to say anything that could be held against them during a "RIF." Still, most military men would agree with General Bradley that one who cannot express himself within military channels should resign, should, as the British have said, abandon "the fishes and loaves of office" and choose between "the quarterdeck and silence or Westminster and gas."[141]

The threat of being transferred from station to station or job to job also exerts strong leverage on an officer. When in 1925 Mitchell charged that the "brass" were pressuring younger air corps officers into dropping their advocacy of air power,[142] there were only a few air bases, all within the United States and its territories; in 1956 when bases range from Guam to Thule the threat is yet more serious. In the past, the removal of Major General Johnson Hagood from his command for criticizing the New Deal,[143] the rearrangement of General Leonard Wood's command for his political activities,[144] the transfer of General George Patton to a "paper command,"[145] and the suspension

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[139] See Opinion of the Judge Advocate of the Army 1954/7460, Aug. 27, 1954, reported in 4 DIG. OPS. JAG, *Officers* § 147.1 (1954–55); *cf.* McAuliffe v. Bedford, 155 Mass. 216, 29 N.E. 517 (1892); People *ex rel.* Clifford v. Seannell, 74 App. Div. 406, 77 N.Y. Supp. 704 (1st Dep't 1902), *aff'd*, 173 N.Y. 606, 66 N.E. 114 (1903). A dishonorable or undesirable discharge is subject to more formal review methods. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶¶ 76, 83 (1951); Pasley, *Sentence First—Verdict Afterwards*, 41 CORNELL L.Q. 545 (1956); Note, 70 HARV. L. REV. 533 (1957).

[140] See N.Y. Times, June 1, 1951, p. 1, col. 6, p. 4, col. 8.

[141] 2 ESHER, JOURNAL AND LETTERS OF VISCOUNT ESHER 289 (Brett ed. 1934); 1 MACREADY, ANNALS OF AN ACTIVE LIFE 171 n. (1924); *Far East Hearings* 753. *But cf.* CHAFEE, FREE SPEECH IN THE UNITED STATES 553 (1948).

[142] See text at note 58 *supra*.

[143] N.Y. Times, Dec. 23, 1948, p. 19, col. 5.

[144] *Far East Hearings* 389.

[145] See BRADLEY, A SOLDIER'S STORY 230–31 (1st ed. 1951).

of General Anderson from the Air University for "preventive war" speeches have all been attributed to their expressions.[146] This potent weapon can hardly be taken from the military; an officer can have no legally vested right to a particular assignment, and his proclivity for statements that embarrass superiors and allies may well justify his removal to a less sensitive and important post.[147]

Promotion with attendant increases in pay, perquisites, prestige, and power is naturally a basic stimulus for those in service; in the absence of an unmitigated seniority system it offers possibilities for discrimination on an undisclosed basis, and generally the connection is hard to establish. Air Force regulations do specifically provide that effectiveness reports shall comment on an officer's ability to represent the air force to the public.[148] Congressional confirmation of promotions has been held up for political reasons. During the Civil War several Union generals were penalized for not giving the Committee on the Conduct of the War the sort of criticism of their superiors that the Committee wanted.[149] In World War II General Patton's nomination to be major general was tabled after his speech in England to the effect that it was our destiny to rule the world.[150]

III. CONCLUSION

A. *WHAT METHODS SHOULD BE USED FOR CONTROLLING SPEECH?*

Criminal statutes, general and specific regulations, censorship, and informal administrative actions have been discussed as means by which the competing interests of free speech and military discipline are satisfied. Each has its advantages and its drawbacks. Applied with restraint, the specific clauses of the Uniform Code have curbed some distinctly dangerous types of speech; their very definiteness makes them easy to evade, however, since they apply more to the style than the content of speeches. The general articles seem to be particularly poorly adapted to this type of situation; their existence just barely passes muster under constitutional conceptions of vagueness and ex post facto legislation. In the light of the well established constitutional requirement that statutes limiting speech be reasonably clear and not

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[146] N.Y. Times, Sept. 2, 1950, p. 1, col. 4. In a similar category might fall George Earle's transfer to Samoa for displeasing President Roosevelt by threatening to denounce our Russian policy, a fall from grace von Papen found similar to his own exile to Flanders after expressing unpopular views on America during World War I. VON PAPEN, MEMOIRS 523 (1954).

[147] *Far East Hearings* 1014; see Orloff v. Willoughby, 345 U.S. 83, 88 (1953).

[148] AFR 36-10, Oct. 21, 1954.

[149] Williams, *The Committee on the Conduct of the War*, 3 J. AM. MIL. INST. 139, 146, 152 (1939).

[150] BRADLEY, A SOLDIER'S STORY 230-31 (1st ed. 1951); BUTCHER, MY THREE YEARS WITH EISENHOWER 530-31, 535-36 (1946). It has been alleged that a rear admiral's promotion was, without publicity, blocked due to Secretary of Defense Wilson's crackdown on public statements. Newsweek, April 11, 1955, p. 25.

excessively broad, a statute proscribing all conduct prejudicial to good order and discipline in the armed forces seems defintely unsuitable for dealing with an area where competing policy factors require careful line-drawing.

The force of custom and tradition reinforced by the judicious use of administrative sanctions will usually provide a sufficient deterrent to prevent the average officer from openly advocating major deviations from accepted policies. This type of administrative action will necessarily be with us so long as there is an effective army; the discretion of the commanders entrusted with the national defense must remain extensive and substantially uncontrolled, except for an occasional congressional intervention in the unusual, flagrant case. The deterrent force of custom and tradition may, however, be inadequate to deal with the occasional firebrand or fanatic, particularly when that person is not seeking a career in the service and thus has little to lose.

Censorship appears to be an unsatisfactory alternative, one to be used only sparingly in critical situations. The necessity of submitting to censorship will of itself deter many prospective authors from publishing their views. Censors are apt to be hyper-cautious, particularly at lower military echelons. They tend to refuse clearance to anything that might ultimately prove controversial or offensive to some well-known figure. The poor definition of censorship criteria tends to create forbidden twilight zones around the few topics that must of necessity be barred to servicemen. The delays occuring "while the censor ponders moodily on 'policy and propriety' " may serve to nullify the impact of a communication because the public's interest in military matters is particularly evanescent.[151] It would seem, therefore, that censorship should be avoided except in emergency situations. Consideration should also be given to the establishment of safeguards to prevent the abuse of censorship powers when they must be used. A requirement that written findings and opinions be filed to support each denial of clearance and, perhaps, that denials be reviewed by a board independent of direct military control would be a welcome innovation.

The remaining alternatives are general and specific regulations, and it appears that a substantial area must be covered largely by these devices. Military regulations have the advantage of being relatively flexible, since they require no congressional approval. On the other hand, they can reach large groups of personnel through the military organizational machinery and can clarify the borderlines of forbidden territory. Generally, the primary purpose of such regulations should be to inform and to crystallize custom rather than serve as a basis for

[151] United States v. Voorhees, 4 U.S.C.M.A. 509, 553, 16 C.M.R. 83, 127 (1954) (dissenting opinion).

punitive action. Most servicemen would welcome the increased use of such guides. The area covered by such regulations should be kept to a minimum, and directives issued to meet the needs of a critical situation should not survive the need that they were devised to meet. In the interest of uniformity these regulations should be promulgated for all services by a single office under the Secretary of Defense.

B. WHAT TOPICS SHOULD BE CONTROLLED?

Certain areas of communication have already been specifically barred to servicemen by the Uniform Code and the civilian criminal law. These include (a) contempt for civilian and military superiors, (b) sedition and obstruction of recruiting, (c) provoking words or threats, and (d) partisan politics.[152] There still remains, however, a certain undefined area where skilled draftsmanship is needed to produce regulations adequately separating forbidden from harmless writings. The phraseology of the present criteria seems far too indefinite: "prejudicial to good order and discipline in the armed forces," "policy and propriety," "political, legislative and diplomatic," and the like are merely catchwords.[153] The limitation of service personnel to "constructive contributions" announced by the Defense Department in 1955 as a result of an admiral's article on prisoner of war policy and various other inter-service rivalries and outbursts cannot be said to have gone beyond the catchword stage; Secretary Wilson himself admitted his inability to give the phrase concrete meaning.[154]

The test which the Air Force derived from older Army regulations seems to be a more serious attempt to grapple with the problem. That test bars statements that "could reasonably be expected to substantially influence or affect international diplomatic relations or create sufficient national impact to undermine public morale or jeopardize the defense program."[155] In fields such as antitrust law where complete precision is not possible, some degree of ambiguity must be accepted;[156] but it seems that the services have made little genuine attempt to clarify regulation criteria and to make them readily available to their personnel. The following is suggested as a tentative outline of the subjects which clearly defined regulations should include in the category of forbidden statements, subject, of course, to the statutory privilege for communications to Congress:

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[152] See text at notes 16–61 *supra*.

[153] See text at notes 92–98 *supra*.

[154] N.Y. Times, Mar. 31, 1955, p. 1, col. 8; N.Y. Times, April 27, 1955, p. 14, col. 5. See also the series of comments by Hanson Baldwin, N.Y. Times, April 13, 1955, p. 12, col. 5; N.Y. Times, April 15, 1955, p. 12, col. 3.

[155] See note 70 *supra*.

[156] Nash v. United States, 229 U.S. 373 (1913).

(a) Language concerning foreign nations that would incite hatred of a foreign country by the people of the United States or would tend to strain foreign relations; unauthorized advocacy of a given foreign policy, in particular, advocacy of preventive war;

(b) Language degrading to other armed services;

(c) Language in opposition to controversial policies that have been declared by the President to have been finally decided by competent authority (such bar automatically to expire within a limited period);

(d) Language impugning the motives and competence of military and civil authority in contrast to disputes as to policy and judgment; in particular, language calculated to shake public faith in the motives and competence of those authorities;

(e) Language calling for displacement of civil authority by military authority in areas allotted by the constitution to civilian supremacy.

C. *WHAT PERSONS SHOULD BE RESTRICTED IN THEIR SPEECH?*

The power of the military to restrict speech is co-extensive with the jurisdiction granted by Congress in article 2 of the Uniform Code. This jurisdiction extends to active duty personnel and some others, including overseas dependents and retired regulars.[157] The question arises whether all such persons should be treated alike as far as speech questions are concerned.

Active duty personnel are obviously covered by the Code and are generally treated on the same basis regardless of rank and component, but certain distinctions must be made in the free speech field. Naturally, only a subordinate can show disrespect to a superior; and, thus, there are more opportunities for a private to be insubordinate than a general. On the other hand article 88 now penalizes only officers, and some regulations have been directed, at least in emphasis, at officers alone. Such restrictions on officers can be justified on the ground that they form more of a danger to civilian supremacy, that they are more apt to be fluent and convincing writers and speakers, and that their statements carry more weight with the public. This theory might also tend to support the application of stricter curbs to officers above the grade of colonel; most of the spectacular episodes mentioned above involved generals and admirals. On the other hand, any distinction that discriminates against personnel of higher rank tends to some degree to diminish incentive to seek promotion. On the balance, however, it seems right that, at least in practice, curbs will more generally be applied against senior officers than junior officers and enlisted men.

To some extent regulations on speech have distinguished between regular officers and others. In earlier times they were thought to

[157] See UCMJ art. 2

compose a peculiar caste from which a dangerous caesarism might emerge; it was also believed that their statements would have a particularly official weight in public eyes.[158] Today, as other diffrentiations, such as the rule that regulars may not sit on courts-martial of reservists, are discarded, it is to be expected that limitations on free speech will also be equalized, now that the terms "career officer" and "reserve" are ceasing to be mutually exclusive.[159]

While a reserve officer not on active duty is not subject to military law, a retired regular is. Because Army regulations pertaining to political activities were thought to apply to retired officers, a special Army ruling was required before it was clear that General MacArthur could carry on political activities after being removed from active command. That decision seems to have been based more on policy than on conceptual theory.[160] Similarly, some doubt existed as to the propriety of retired officers' campaigning on behalf of Senator McCarthy by signing and circulating petitions.[161] To the degree that the public thinks of retired officers as part of the military and to the degree that their activities affect admiring juniors still on active duty, such curbs seem justified.

Dependents are covered by the Code only if they are overseas or in the field of combat, but there is even some doubt as to the constitutionality of this limited assumption of jurisdiction.[162] Curbs imposed on service wives in the Moroccan crisis would be legal by the jurisdictional standard set by the Code, but efforts to prevent them from agitating for more commissaries are not.[163] Except for a provision prohibiting servicemen from attempting to do through their families what they cannot do themselves (similar to that present in Hatch Act regulations),[164] there seems no need to attempt such an extension of jurisdiction. When accompanying troops in the field or overseas, correspondents may similarly be subject to military jurisdiction. Several were court-martialled during the Civil War; and in Korea several were threatened, but the threat was never carried out.[165] Civilian

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[158] See text at note 7 *supra*.

[159] United States v. Walters, 11 C.M.R. 355 (1953). Some discrimination against officers directly connected with public information services is justified since they might gain an unfair competitive advantage over newspapermen by virtue of such a dual position. See Baldwin, *Pentagon Press*—II, N.Y. Times, April 14, 1955, p. 14, col. 5.

[160] N.Y. Times, June 18, 1952, p. 1, col. 6; Time, June 23, 1952, p. 19; Opinion of the Judge Advocate General of the Army, 1952/8902, Nov. 24, 1952, reported in 2 DIG. OPS. JAG, *Retirement* § 81.1 (1952–53).

[161] N.Y. Times, Nov. 21, 1954, p. 47, cols. 1–3.

[162] UCMJ art. 2(11); see Reid v. Covert, 351 U.S. 487, *rehearing granted*, 77 Sup. Ct. 123 (1956).

[163] N.Y. Times, June 4, 1949, p. 2, col. 2.

[164] See United Public Workers v. Mitchell, 330 U.S. 75 (1947).

[165] ANDREWS, THE NORTH REPORTS THE CIVIL WAR 553, 618, 649 (1955); VOORHEES, KOREAN TALES 111–12 (1952).

employees of the services are also covered by the Code and regulations when overseas, but they are otherwise governed by civil service regulations which do affect their free speech rights. The problems of civil servants of the Defense and State Departments are in many ways analogous to those of the serviceman.[166]

D. *WHAT MEANS OF COMMUNICATION ARE COVERED?*

There can be no regulation of mere uncommunicated thought; the military will not even take disciplinary action when thoughts are noted down in a "black book" so long as such documents are not allowed to fall into hostile hands.[167] By specific congressional enactment communications to Congress and congressmen are privileged against military reprisal.[168] Beyond that, the application of article 88 and the wording of most military regulations have been directed at "public" rather than "private" pronouncements. While the delineation between the two has not been clearly worked out, the theoretical distinction between speech directed only at family and friends and that which may have a wide and harmful impact is clear. Some cases that hold, in connection with charges of disrespect to superiors, that a poker game with a few officers is not "private" probably would not be applied to other types of free speech problems.[169] A gathering of more than a few individuals would be considered "public," particularly if they were not exclusively military personnel and more particularly if news correspondents were present. A meeting of officers, particularly a professional society, might be exempt. Printed dissemination, particularly in a magazine or newspaper, would be considered "public," except possibly in cases involving a professional journal read only by military men.[170] Since the dangers to national security and military discipline are mostly to be found in wide dissemination, it would seem wise to interpret "public" in a restrictive sense.

The determination of a boundary between permissible and impermissible military expression is a difficult task. As the future will bring more and more crises with accompanying violent differences of opinion, there will undoubtedly be a need for more decisions and rulings. If injustice is to be minimized, such directives will have to be framed in more precise terms and not left in the confusing tangle of self-

[166] See Krock, *Off-The-Record Talk Problem in Capitol*, N.Y. Times, April 3, 1955, §4, p. 3, col. 2. It was a memo by a Navy Department civilian that touched off the B-36 struggle. See text at note 108 *supra*. AR 380-5 attempted to cover civilian employees of the Army in its censorship program.

[167] WINTHROP, *op. cit. supra* note 21, at 713 n.34; *cf.* United States v. Grow, 3 U.S.C.M.A. 77, 11 C.M.R. 77 (1953).

[168] See note 132 *supra*.

[169] United States v. Montgomery, 11 C.M.R. 308 (1953) (poker game not "strictly private" under article 89).

[170] Anderson, *supra* note 96, at 129.

contradiction into which they have drifted in the past; concentration and coordination will be demanded of those who undertake this difficult but important task. It is to be hoped that they will approach these duties with a sense of the inherent tragedy of the dilemma posed by the conflicting demands of liberty of expression and discipline, and that they will not be provoked by ill-timed and annoying criticism into promulgating blanket restrictions that extend far beyond the needs of the moment. During World War II General Eisenhower was faced with many problems in deciding whether to curb or loose the incautious tongues of his subordinates. He evolved a tendency to lean in the direction of freedom of expression;[171] as President he appears to have developed a less permissive attitude towards critics and to have let himself be swept along by those who desire a united and monolithic defense structure at the expense of free and full discussion. Probably the future will confirm the experience of the past that drastic measures are not necessary and that the natural self restraint of military men bred in a tradition of reticence is, except in unusual cases, adequate guarantee against abuses of freedom of speech.

[171] BUTCHER, MY THREE YEARS WITH EISENHOWER 769–801 (1946).

V. LOOKING AHEAD

HODSON
WACKER

LOOKING AHEAD: HODSON ON THE FUTURE OF MILITARY JUSTICE

Writing in 1966 on "The Role of Criticism in the Development of Law," then Chief Judge Quinn of the United States Court of Military Appeals decried the tendency of military legal writers to avoid critical writing in favor of mere narrative exposition of case law. He said:

> A bare bones catalogue of court decisions is no more helpful to the advancement of the rule of law, and the improvement of its administration, than the merely inflamatory type of article. I personally regret, therefore, that so many military writers now eschew the truly critical review, leaving the field almost entirely to the civilian law reviews and civilian bar association journals.[1]

The case for a critical approach was put more bluntly by Judge Carl McGowan of the District of Columbia Court of Appeals. Speaking in January, 1975, to the National Conference on Appellate Justice, he said that "Professions with any pretense to reliance upon the reasoning faculties do not shrink from inward inquiry — and they act at their peril when they fail to do so imaginatively, persistently and ruthlessly."[2]

"Looking ahead" involves at least implicit criticism and some prescience.[3] The shape of things to come will be the product of current dissatisfactions, the momentum of forces in being, and of the propensity to strive toward ideals. All these exist in the decision makers for military law, and have been particularly strong since the end of World War II.

May 5, 1951, was a watershed date in the administration of criminal justice in the Armed Forces. Some have termed the process since that time the "civilianization," the "judicialization" or the "lawyerization" of the system; but for the military lawyer the problem was to implement the will of Congress, not to find an abstraction. In the Army, one man's career spanned all the important changes, ending with distinguished service as The Judge Advocate General and, upon recall from retirement, as Chief Judge of the newly established Army Court of Military Review.

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[1] 35 MIL. L. REV. 47, 52 (1967).

[2] *Quoted in* The Third Branch, February, 1975, p. 2.

[3] An example of such prescient writing is Hodson, *The Manual for Courts-Martial–1984*, 57 MIL. L. REV. 1 (1972).

General Hodson's mastery of the criminal law, military and civilian, is demonstrated in this selection. He "sets the record straight" as to the nature and origins of criticisms of military law, the relationship of legal developments in the civilian environment to those in the military, and as to the specific requirements for the separate system of criminal law for the Armed Forces. His work summarizes and orients over 30 years of legal growth and discusses current problems in terms of current legal thought. This puts him at odds with some, "current legal thought" being almost always divided. Similarly, those concerned about the administration of the whole Army are not always in agreement and some would receive General Hodson's proposals more favorably than would others.

In any event, this selection illustrates a wholesome conjunction of the military and legal ethic; there is concern for the mission and concern for the institution. That there are proposals for change but reflects the continuing search for excellence which has marked the administration of criminal justice in the Armed Forces.[4]

[4] Reappraisals need not always result in a preponderance of criticism. *See* Moyer, *Procedural Rights of the Military Accused: Advantages Over A Civilian Defendant*, 22 MAINE L. REV. 105 (1970); Hodson, *Is There Justice in the Military?*, The Army Reserve Magazine, November-December 1969, p. 22; BISHOP, JUSTICE UNDER FIRE (1974); Staring, DeBarr, Ratti, Prugh and Vague, *The Evolving Military Law*, 61 A.B.A.J. 305 (1975).

MILITARY JUSTICE: ABOLISH OR CHANGE?†

*Kenneth J. Hodson**

I. AN ESTIMATE OF THE SITUATION

From the viewpoint of the large majority of the people of the United States, World War I and World War II were popularly supported wars. Yet each was followed by significant criticism of the administration of criminal justice in the armed forces.[1] It is not surprising, then, that the Vietnam conflict—a highly controversial undertaking—generated a multitude of articles, mostly critical, about various aspects of the present system of military justice.[2] This widespread interest in

*Member of the Bar of Wyoming. A.B., 1935; LL.B., 1937, University of Kansas. When this article was written, the author was a Major General in the Judge Advocate General's Corps, U.S. Army and Chief Judge of the U.S. Court of Military Review. The opinions expressed in this article are those of the author and do not necessarily represent the views of any governmental agency.

[1] As to World War I, *see* Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967). For examples of World War II criticism, *see* REPORT OF THE WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE, Dec. 13, 1946, chaired by Arthur T. Vanderbilt of New Jersey [hereinafter cited as VANDERBILT REPORT]; Pasley and Larkin, *The Navy Court-Martial: Proposals for its Reform*, 33 CORNELL L.Q. 195 (1947); Comment, *Codified Military Injustice*, 35 CORNELL L.Q. 151 (1949).

[2] The following symposia are illustrative: *Justice in the Military*, 22 MAINE L. REV. 3 (1970); *Military Law*, 22 HASTINGS L.J. 201 (1971); *Due Process in the Military*, 10 SAN DIEGO L. REV. 1 (1972); *Military Law*, 10 AM. CRIM. L. REV. 1 (1971). The latter contains a 19-page bibliography of recent books and works about military law, but principally about military justice.

The articles in these symposia show that legal scholars with limited experience in the administration of criminal law, military or civilian, are generally more critical of the administration of military justice than authors with extensive experience in criminal law. Military justice did not escape criticism from within the military, however. Non-lawyer military men condemned the system because it is "so ponderous and obtuse that a unit commander cannot possibly have the time or the means to apply the system. . . ." Howze, *Military Discipline and National Security*, 21 ARMY, Jan. 1971, at 13. Complaints of this type from commanders became so strident during the latter part of the Vietnam conflict that the then Chief of Staff of the Army, General William C. Westmoreland, appointed a committee under the chairmanship of Major General S. H. Matheson, a non-lawyer with extensive experience as a troop commander at division and lower levels, to evaluate military justice. The committee found that the complaints of commanders "that military justice, as presently administered, has had an adverse effect on morale and discipline" were not supported by the facts and that the complaints indicated an ignorance of the system by those affected by it, particularly junior officers and noncommissioned officers. REPORT TO GENERAL WILLIAM C. WESTMORELAND, CHIEF OF

military criminal law was due, not only to the length, media exposure, and unpopularity of the Vietnam imbroglio, but also to the criminal law explosion, which occurred during the same period as that conflict. The explosion was a result of the rising crime rate and the decisions of the Supreme Court of the United States in cases such as *Gideon v. Wainwright*,[3] *Miranda v. Arizona*,[4] and *Argersinger v. Hamlin*.[5] These decisions thrust thousands of lawyers into a field of the law with which they were almost totally unfamiliar and which many of them had previously considered to be an undesirable area of legal practice. When these lawyers found themselves handling criminal cases for the first time, they discovered a system of criminal justice that had been largely unchanged for almost 200 years. There was agreement among many members of the bar that reform and improvement of the civilian system of criminal justice was long overdue.[6]

Shortly after the *Gideon* decision was handed down, the Institute of Judicial Administration proposed to the American Bar Association (ABA) that the latter take on the task of developing standards for the Administration of Criminal Justice in state and federal courts. The ABA accepted the proposal and, after ten years of work by some of the best and most experienced lawyers and judges in the nation, the seventeenth and final draft of Standards for Criminal Justice (Standards)[7] was approved in February 1973. Chief Justice Warren E. Burger characterized the ABA project as "perhaps the most ambitious single undertaking in the history of that great organization."[8] Commenting on the development of the Standards from his position as one of the three chairmen of the Special Committee which supervised the project, as well as from the vantage point of a chairman of one of the

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STAFF, U.S. ARMY, BY THE COMMITTEE FOR EVALUATION OF THE EFFECTIVENESS OF THE ADMINISTRATION OF MILITARY JUSTICE, June 1, 1971.

[3] 372 U.S. 335 (1963) (fourteenth amendment requires that indigent defendant in criminal trial be assisted by counsel).

[4] 384 U.S. 436 (1966) (prosecution may not use statements of the accused unless it demonstrates the use of procedural safeguards effective to secure the fifth amendment's privilege against self-incrimination).

[5] 407 U.S. 25 (1972) (accused may not be deprived of liberty as a result of any criminal prosecution in which he is denied assistance of counsel).

[6] *See Justice in the States*, in ADDRESSES AND PAPERS OF THE NATIONAL CONFERENCE ON THE JUDICIARY, MAR. 11–14, 1971 (W. Swindler ed.).

[7] ABA PROJECT OF MINIMUM STANDARDS FOR CRIMINAL JUSTICE [hereinafter cited as ABA STANDARDS]. They provide the most meaningful and objective standards by which to measure any system of criminal justice, military or civilian. For information concerning the standards and their development, *see The Conference on the Criminal Justice Standards*, 55 JUDICATURE 355–388 (1972); Clark, *The American Bar Association Standards for Criminal Justice: Prescription for an Ailing System*, 47 NOTRE DAME LAWYER 429 (1972); Erickson, *The ABA Standards for Criminal Justice*, CRIMINAL DEFENSE TECHNIQUES, Appendix A (Cipes ed. 1972); Clark, *Why the ABA Standards?*, 33 LA. L. REV. 541 (1973).

[8] From a speech to the National Association of Attorneys General, Washington, D.C., February 6, 1970, *as quoted in* Clark, *supra* note 7, 47 NOTRE DAME LAWYER at 431.

Advisory Committees which drafted several of the Standards, Chief Justice Burger stated:

> Very early, and this means four and a half to five years ago, we came to a realization that the key to the administration of criminal justice was that there must, in every case of serious consequence be a counsel for the prosecution, a counsel for the defense, and a judge. And we likened that to a three-legged stool, or a tripod, of which you will be hearing more and more as time goes on, and we concluded that the system cannot work without all three. Like the stool or the tripod, if you can take one leg away or weaken it, you impair the entire system.[9]

Critics of the military justice system have concluded that it violates this tripod concept. Typical is this comment:

> The most important feature of the traditional military justice structure retained by the [Uniform Code of Military Justice] was "command control" of the court-martial. Command control refers to the right of an individual commander to convene a court-martial for trial of one of his men, to appoint all the personnel (including counsel and jury) from his officers, and to exert general supervisory power over the entire proceedings from pre-trial investigation to post-sentence review.[10]

While the above comment describes one facet of the military justice system, it fails to take account of the many safeguards which have caused other observers to conclude that military justice, in practice, is actually more protective of the rights of the accused than most civilian systems of criminal justice.[11] It must be admitted, however, that military justice fails to measure up to the tripod concept recommended by Chief Justice Burger, basically because there is an insufficient separation between the prosecuting and defending functions.

In addition to the rising crime rate and the Supreme Court decisions concerning rights of an accused, another development during the Vietnam conflict focused attention on the administration of military justice—extensive litigation in the federal courts challenging various aspects of the military criminal justice system. In 1969, the Supreme Court surprised military lawyers with its decision in *O'Callahan v. Parker*,[12] which held that court-martial jurisdiction would be limited to "service-connected" offenses. Legal questions immediately arose as to the meaning of the term "service-connected."[13] Although in the

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[9] *Proceedings at the 1969 Judicial Conference, United States Court of Appeals, Tenth Circuit: Minimum Standards for Criminal Justice*, 49 F.R.D. 347, 358 (1969).

[10] Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971).

[11] *See* Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 MAINE L. REV. 105 (1970), *reprinted in* 51 MIL. L. REV. 1 (1971). *See also* Nichols, *The Justice of Military Justice*, 12 WM. & MARY L. REV. 482 (1971).

[12] 395 U.S. 258 (1969).

[13] *E.g.*, Relford v. United States Disciplinary Commandant, 401 U.S. 355 (1971). The

closing moments of the October 1972 term a plurality of the Court concluded that the decision in *O'Callahan* would not be applied retroactively,[14] litigation involving the meaning of "service-connected" continues.[15] In addition, the Supreme Court has now agreed to hear two cases in which lower courts have held that two punitive articles of the Uniform Code of Military Justice are unconstitutionally vague and indefinite.[16]

Paralleling and, to a limited degree, echoing the scholarly criticism and judicial challenges to the system of military justice were various Congressional proposals. Senator Birch Bayh (Democrat from Indiana) and Congressman Charles Bennett (Democrat from Florida) introduced similar legislation[17] in the ninety-third Congress seeking

Supreme Court held that "when a serviceman is charged with an offense [in this case, rape] committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial. . . ." *Id.* at 369. Thus, such crimes are "service-connected" within the meaning of *O'Callahan*.

[14] Gosa v. Mayden, 413 U.S. 665 (1973).

[15] For examples, *see* Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969) (off-base possession of marijuana by serviceman "service-connected"); Schroth v. Warner, 353 F. Supp. 1032 (D. Hawaii 1973) (off-base transfer of marijuana by serviceman is not "service-connected"); Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973) (officer's off-base sale of marijuana to an enlisted man is not "service-connected").

[16] Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir.), *cert. granted*, 414 U.S. 816 (1973); Levy v. Parker, 478 F.2d 772 (3d Cir.), *cert. granted*, 94 S. Ct. 286 (1973). The cases deal with articles 133 and 134 of the Uniform Code of Military Justice which provide for punishing "conduct unbecoming an officer and gentleman," "all disorders and neglects to the prejudice of good order and discipline in the armed forces," and "conduct of a nature to bring discredit upon the armed forces."

[17] S. 987, 93d Cong., 1st Sess. (1973); H.R. 291, 93d Cong., 1st Sess. (1973). Senator Mark Hatfield (Republican from Oregon) also introduced several bills aimed at reforming military justice and administrative discharge procedures. S. 2202–2214, 93d Cong., 1st Sess. (1973). The Hatfield bills would establish judicial circuits throughout the world, but commanders would retain authority to determine whom to prosecute, subject to a judicial determination of probable cause prior to docketing a case for trial by general court-martial. For a discussion of earlier versions of these bills, see Sherman, *supra* note 10; *see also* Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455 (1971); Comment, *Beyond the Military Justice Act of 1968: Proposed Amendments to the Uniform Code of Military Justice*, 7 COLUM. J. OF L. AND S. PROB. 278 (1971); Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971); Barker, *Command Influence: Time for Revision?*, 26 JAG J. 43 (1971). *Compare* Rydstrom, *Uniform Courts of Military Justice*, 50 A.B.A.J. 749 (1964). For background on the problem of command influence see Johnson, *Unlawful Command Influence: A Question of Balance*, 19 JAG J. 87 (1965); West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A.L. REV. 1 (1970).

Other legislation included bills by Senator Sam J. Ervin, Jr. (Democrat from North Carolina) and Congressman Bennett to ensure due process at administrative elimination proceedings. S. 2684, 93d Cong., 1st Sess. (1973); H.R. 86, 93d Cong. 1st Sess. (1973). H.R. 86 is the same as H.R. 10422, 92d Cong. 1st Sess. (1971), which passed the House of Representatives and was pending before the Senate Committee on Armed Services when Congress adjourned. This bill had the backing of the American Bar Association and the Department of Defense, but not the support of Senator Ervin. *See* Ervin, *Military Administrative Discharge: Due Process in the Doldrums*, 10 SAN. DIEGO L. REV. 9 (1972). *See also* Fairbanks, *Disciplinary Discharges—Restricting the Commander's Discretion*, 22 HASTINGS L.J. 291 (1971); Lynch, *The Administrative Discharge: Changes Needed?*, 22 MAINE L. REV. 141 (1970); Lane, *The Undesirable Discharge: Administrative Tool or Backdoor Court?*, 22 ARMY, NOV. 1972, at 19; NAACP SPECIAL CONTRIBUTION FUND, THE SEARCH FOR MILITARY JUSTICE 14–16, 23-24 (1971) [hereinafter cited as NAACP RE-

to provide an answer to the above-mentioned criticism of actual or potential command control of courts-martial.[18] They would establish an independent court-martial command, which would contain the judicial, defense, and prosecution functions and would take away the commander's authority to determine whom to try by court-martial. Responsibility for bringing offenders to trial would be vested in the chief of a prosecution division, roughly analogous to a United States attorney, who would be required to refer charges to trial whenever he "determines that there is sufficient evidence to convict."[19] He would also decide whether the offense should be tried in a court of limited or general jurisdiction.

Senator Bayh's bill would leave present military criminal jurisdiction intact, although it calls for a special committee to study whether to transfer jurisdiction of certain cases involving desertion and other unauthorized absences to the federal courts. The Bennett bill, however, would limit court-martial jurisdiction to military offenses and to civilian offenses if committed outside the territorial limits of the United States. Likewise, a bill by Senator Mark Hatfield (Republican from Oregon) would take away military jurisdiction over civilian and certain military offenses if committed within the United States, a territory, or possession.[20] Under the Bennett and Hatfield proposals, the offenses over which the military would no longer have jurisdiction would be tried in federal court.

In view of the many challenges to the system of military justice, there is a question whether the armed forces actually needs a separate system of justice. If it needs a separate system, a secondary question is raised, namely, whether it can measure up to the tripod concept of Chief Justice Burger and and the American Bar Association Standards for Criminal Justice.[21]

PORT]; DEPARTMENT OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 108–111 (1972) [hereinafter cited as 1972 DOD TASK FORCE REPORT].

[18] See note 10 and accompanying text *supra*.

[19] S. 987, 93d Cong., 1st Sess. (1973); H.R. 291, 93d Cong. 1st Sess. (1973).

[20] S. 2213, 93d Cong., 1st Sess. (1973).

[21] There are 17 ABA Standards for the Administration of Criminal Justice: (1) Providing Defense Services, (2) Pretrial Release, (3) Fair Trial and Free Press, (4) Electronic Surveillance, (5) Discovery and Procedure Before Trial, (6) Pleas of Guilty, (7) Joinder and Severance, (8) Speedy Trial, (9) Trial by Jury, (10) Sentencing Alternatives and Procedures, (11) Probation, (12) Criminal Appeals, (13) The Prosecution Function and the Defense Function, (14) Appellate Review of Sentences, (15) Post-Conviction Remedies, (16) Function of the Trial Judge, and (17) Urban Police Function. The military clearly measures up to or exceeds many of the standards such as those on Pretrial Release, Fair Trial and Free Press, Discovery and Procedure Before Trial, Pleas of Guilty, Joinder and Severance, Speedy Trial, Criminal Appeals, Appellate Review of Sentences, and Post-Conviction Remedies. It falls short of several other standards, such as Trial by Jury, Sentencing Alternatives, and Probation, but there is no apparent opposition within the armed forces to amending the Uniform Code of Military Justice to comply with the purpose and spirit of these standards. *See* ANNUAL REPORT OF THE U.S. COURT OF

II. THE NEED FOR A SEPARATE SYSTEM

The traditional reasons for a separate system of military criminal justice are usually stated as follows: the need for discipline—the key ingredient of a successful army—requires a system of justice that is speedier and more certain than the civilian system. Military justice must also be responsive to the needs of the commander, able to function outside the territorial United States and able to punish certain conduct—principally insubordination and unauthorized absence—that does not violate civilian laws.[22] But some commentators make little or no attempt to justify the need for a separate system of military justice; instead, they have been satisfied to trace its historical development and to explain that "courts-martial . . . are in fact simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein."[23]

In reviewing challenges to court-martial jurisdiction, the Supreme Court has generally been content to assume that a separate system of military justice is necessary. Speaking of the approach of the Supreme Court, Justice William O. Douglas has commented: "This Court, mindful of the genuine need for special military courts, has recognized their propriety in their appropriate sphere. . . ."[24] An earlier Supreme Court, speaking through Justice Brewer, articulated one of the most frequently quoted reasons for special rules in the military: "An army is not a deliberative body. . . . Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."[25] Justice Harlan, in his dissent in *O'Callahan v. Parker*, listed various reasons for a separate system of military justice.[26] Among the reasons were the need to protect members from misconduct of fellow members because of the close proximity in which they must work and live, and the need to protect the reputation of the service which is impaired by misconduct that dis-

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MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE (1969, 1970, 1971, 1972) [hereinafter cited as the CODE COMMITTEE REPORTS]. *See also* 1972 DOD TASK FORCE REPORT, *supra* note 17.

[22] R. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 1–7 (1956); C. BRAND, ROMAN MILITARY LAW ix–xix (1968); Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5 (1971); Nichols, *supra* note 11; JUSTICE AND THE MILITARY 1–150, 1–151 (H. Moyer, Jr. ed. 1972).

[23] W. WINTHROP, MILITARY LAW AND PRECEDENTS 49 (2d ed. 1920) (emphasis in original). *See also* G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES ix-vi (2d ed. 1909); W. AYCOCK and S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 3–15 (1955).

[24] O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

[25] *In re* Grimley, 137 U.S. 147, 153 (1890).

[26] 395 U.S. at 281.

credits the service.[27] Although it is clear that the Supreme Court will restrict the scope of court-martial jurisdiction to "the least possible power adequate to the end proposed,"[28] the Court has clearly acknowledged the legitimacy of a separate system of military justice.

Is there a need for a separate system of military justice in today's armed forces, and, if so, what kind of a system should it be? Traditionally, the *sine qua non* of success in battle has been discipline. Military justice has been justified as being necessary to the maintenance of that discipline. Yet even a cursory study of world history shows that despite the existence of military codes which permitted prompt and summary punishment of military malfeasors, nevertheless, cowardice, malingering, sitdown strikes, and mutinies have not been unknown. Examples of the latter are the refusal of Alexander's veterans to follow him into another apparently endless and useless campaign,[29] the mutiny of the Roman legions after Augustus,[30] the mutiny of the Pennsylvania and New Jersey troops in 1781,[31] the mutiny of the British Navy in 1797,[32] the refusal of the French under General Nivelle to continue a useless assault on the Hindenburg line in 1917 after suffering 118,000 casualties in two weeks,[33] and the conduct of the Italian Army at Caporetto that same year, when 50,000 were killed or wounded, 300,000 were taken prisoners, and 400,000 deserted.[34] In the light of these sobering incidents—and history records others—there is good reason to doubt the value of military justice in "enforcing" discipline in the traditional sense. A more enlightened view has been expressed by General Westmoreland, former Army Chief of Staff: "A military trial should not have a dual function as an instrument of discipline and as an instrument of justice.

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[27] Besides the Supreme Court, other civilian courts have spoken of the need for a separate system and the reasons for the need. For example, the Court of Claims emphasized a different factor in justifying the special rules governing the conduct of Army officers: "In military life there is a higher code termed honor, which holds its society to stricter accountability, and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code." Fletcher v. United States, 26 Ct. Cl. 541, 563 (1891), *aff'd*, 148 U.S. 84 (1893).

[28] Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230–31 (1821), *as quoted in* Toth v. Quarles, 350 U.S. 11, 17 (1955). The Court indicated that a good basis for limiting court-martial jurisdiction was the fact that diversion of military manpower to try soldiers, except to maintain discipline, would interfere with the primary business of the army—fighting wars. An earlier court had said that it was the mission of armies not only to fight wars, but to win them. Hirabayashi v. United States, 320 U.S. 81, 93 (1943), *citing* Hughes, *War Powers Under the Constitution*, 42 A.B.A. REP. 232 (1917).

[29] L. MONTROSS, WAR THROUGH THE AGES 43 (3d ed. 1960).

[30] I TACITUS ANNALS §§ 16–49, in 15 GREAT BOOKS OF THE WESTERN WORLD (R. Hutchins ed. 1952).

[31] R. DUPUY AND T. DUPUY, THE COMPACT HISTORY OF THE REVOLUTIONARY WAR 422 (1963).

[32] L. MONTROSS, WAR THROUGH THE AGES 485 (3d ed. 1960).

[33] *Id.* at 726–27.

[34] *Id.* at 734.

It should be an instrument of justice and in fulfilling this function, it will promote discipline."[35]

There are others who agree with General Westmoreland's analysis. For example, a Task Force on the Administration of Military Justice in the Armed Forces, appointed in April 1972 by the Secretary of Defense, was charged by him, *inter alia*, to "recommend ways to strengthen the military justice system and 'enhance the opportunity for equal justice for every American service man and woman.'"[36] The Task Force, composed of nine civilian lawyers and judges and five military officers, four of whom were lawyers, served under the co-chairmanship of the General Counsel of the National Association for the Advancement of Colored People and an Army Commander. At the beginning of its report, the Task Force concluded:

> . . . there does exist a need in the armed forces for a system of justice, administered fairly, effectively, and promptly, to preserve and inspire adherence by all of its members to the limitations imposed upon them by law. . . . These [members] are, in the main, young Americans who are, in an all too brief a period of time, expected to be strenuously trained, equipped and taught to use dangerous and deadly weapons, deployed in foreign environments, separated from the restraining and congenial influences of family and friends, and subjected to the greatest variety of hazards, personal strains and stresses, and the simultaneous, but often unfamiliar, requirement of teamwork and unselfish sacrifice. . . . [But] no need is seen to consider the sacrifice of justice for the sake of discipline. The two are, for American servicemen, inextricable, and the latter cannot exist without the former. That is not to say, however, that the fundamental need for discipline of the armed forces can be ignored or glossed over. The services simply cannot function without it, and the country that fails to require its military forces to preserve discipline, that is, responsiveness and obedience to its lawful authority, will soon find itself defenseless, its forces turned into uncoordinated gangs and individuals. Apart from failure in its mission, the members could become a threat to the peace of the Republic they are sworn to defend.[37]

At the present time, the armed forces are suffering from racial disharmony and drug abuse as well as experiencing expression of individualistic attitudes and diversity of opinion in ways which would not have been expected or tolerated formerly. There is no choice except to cope with these problems. They must be recognized as problems, and fair, intelligent, workable solutions must be found. They cannot be eliminated by threats of severe, summary punishment. As stated by one

[35] Westmoreland, *supra* note 22, at 8. An earlier version of this same philosophy appeared in the COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, REPORT TO THE SECRETARY OF THE ARMY (1960), chaired by LTG Herbert B. Powell [hereinafter cited as POWELL REPORT]. General Westmoreland, then a division commander, was a member of this committee.

[36] 1972 DOD TASK FORCE REPORT, *supra* note 17, at 1.

[37] *Id.* at 12–14.

commentator: "Commanders who resort to military justice as a substitute for their own inadequacies are barking up the wrong tree. . . . We cannot afford the smoke screen of 'easy' justice behind which poor leadership has ever flourished."[38] Furthermore, surveys of soldier attitudes reflect that they are motivated more by peer or "buddy" pressure, by pride in their unit, and by faith in their leaders than by fear of severe punishment. Also important to this motivation—which results in good discipline, high morale, and unit esprit—is the unified support of the American people.[39]

Even though discipline cannot be "enforced" by punishment alone, it is obvious that no segment of our society can function unless it has a system of criminal justice which can impose penalties with sufficient certainty and severity to deter most of its members from violating its rules most of the time. It is also clear, it seems to me, that the armed forces must have a separate system of justice for a variety of practical reasons.

The basic purpose of a system of military justice is to maintain an environment of law and order within the military unit or community so that responsible and intelligent leadership can function properly and thus achieve good discipline, high morale, and unit esprit. It must work effectively in a volunteer peacetime Army as well as in an

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[38] Graf, *Only a Leader Can Command a Company*, 21 ARMY, Nov. 1971, at 59. In October and November 1972, the aircraft carriers Kitty Hawk and Constellation were the scenes of serious incidents with racial overtones involving insubordination, sit-ins, disobedience, and assaults by dissident sailors, a majority of whom were black. A Special Sub-committee of the House Armed Services Committee found that permissiveness exists in the Navy, *i.e.* a failure to require that existing standards be met. The sub-committee found no evidence of racial discrimination but agreed that certain black sailors perceived racial discrimination. *See* SPECIAL SUBCOM. ON DISCIPLINARY PROBLEMS IN THE U.S. NAVY OF THE HOUSE COMM. ON ARMED SERVICES, H.A.S.C. No. 92-81, 92d Cong., 2d Sess. (1973). The Army, Air Force, and Marine Corps have experienced similar problems.

[39] Far more important in establishing discipline than the threat of severe punishment is a belief that the system of justice is fair. Pertinent is a remark of the NAACP Committee which studied the problems of black servicemen in West Germany: "If significant proportions of soldiers are convinced that military authority is illegitimate, then the military organization is seriously challenged. The equitable exercise of military justice is key to maintaining legitimate leadership and authority in the American military." NAACP REPORT, *supra* note 17, at 5. The Vanderbilt Committee observed,

> Nothing can be worse for their morale than the belief that the game is not being played according to the rules in the book, the written rules contained in the Articles of War and the Manual for Courts-Martial. The foundation stone of the soldier's morale must be the conviction that if he is charged with an offense, his case will not rest entirely in the hands of his accuser, but that he will be able to present his evidence to an impartial tribunal with the assistance of competent counsel and receive a fair and intelligent review. He is an integral part of the army, and the army courts are his system of justice. Everything that is practicable should be done to increase his knowledge of the system and to strengthen his respect for it, and if possible, to make him responsible in some particular for its successful operation. These "justice" considerations are important to a modern peacetime army as well as to a wartime army.

VANDERBILT REPORT, *supra* note 1, at 5–6.

expanded, rapidly mobilized, non-volunteer, wartime Army. An ad hoc system, which would lie dormant in the law books until triggered by a declaration of war, would be likely to result in wholesale miscarriages of justice simply because the personnel mobilized to administer it, not having had any actual experience in the administration of criminal justice in an armed force, in peace or war, would tend to over-react—particularly to incidents sounding in insubordination, including disobedience of orders.[40]

One of the principal reasons why the armed forces must have a separate system of justice is because they must be prepared to operate in areas, both in the United States and overseas, where the civilian courts may not be functioning, or, although functioning, may be hostile to the military mission,[41] or have no interest in expending their funds for the trial and confinement of United States military personnel, particularly when the alleged misconduct affects only another member of the armed forces or United States property.[42] Another

[40] My personal observation was that some of the instances of military injustice in World War II, *i.e.* severe initial sentences for military-type offenses, occurred because the civilian lawyers who had been commissioned as judge advocates, not being experienced in military matters, gave too much weight to the commander's views of what punishment was necessary to maintain discipline in his unit. To put it another way, the lawyer was unwilling to take the responsibility for losing a battle by interjecting strong views about rehabilitating the offender when the commander believed that a severe sentence was necessary to deter others. For this reason, I have serious doubts that the German system of expanding courts-martial jurisdiction in wartime is a good solution, even though plans call for a sizeable reserve of military judges who are trained in military justice matters. Krueger-Sprengel, *The German Military Legal System*, 57 MIL. L. REV. 17, 24 (1972). For what appears to be a contrary view, see Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398 (1973). Experience in the administration of military justice in World War II may not be too helpful in analyzing this problem, however, as the administration of civilian criminal justice, particularly in state courts, was of a summary nature. For an example, *see* Brown v. Mississippi, 297 U.S. 278 (1936). Since procedures in Army courts-martial were governed to a large extent by federal rules and procedures, even with the "command influence" of World War II, courts-martial were more protective of an accused's rights than state courts. The real criminal law revolution was not felt in state courts until Gideon v. Wainwright, 372 U.S. 335 (1963). *See* Griswold, *The Long View*, 51 A.B.A.J. 1017 (Nov. 1965). The military justice system had been modernized by the Uniform Code of Military Justice in 1951.

[41] For example, when federal troops were used to carry out a court order permitting James Meredith to attend the University of Mississippi in the fall of 1962, one soldier was indicted by the local grand jury for firing his weapon at students who were molesting him while he was performing guard duty. Acting under the authority of article 14 of the Uniform Code of Military Justice, 10 U.S.C. § 814 (1970), the Secretary of the Army refused the request of the local authorities that the soldier be delivered for trial by a state court. Contemplate, also, the problems that would have resulted if the U.S. forces had not had a separate system of justice when they were ordered into the Dominican Republic in 1965 or Lebanon in 1958.

[42] Although the decisions in Reid v. Covert, 354 U.S. 1 (1957), Kinsella v. Singleton, 361 U.S. 234 (1960), Grisham v. Hagan, 361 U.S. 278 (1960), and McElroy v. Guagliardo, 361 U.S. 281 (1960), concerned civilians accompanying U.S. armed forces overseas rather than military personnel themselves, they help by analogy to illustrate the problem. Those decisions abolished court-martial jurisdiction over civilians accompanying or serving with the U.S. armed forces overseas in time of peace. Nevertheless, foreign countries where our troops are stationed have been reluctant to prosecute cases involving civilians who commit offenses against other United States personnel or United States property. For all practical purposes, most of these persons

reason favoring a separate system of justice, particularly in wartime, is that of manpower conservation. If a branch of the armed services has jurisdiction over offenses committed by a serviceman, it can frequently rehabilitate him for further military service without interrupting his training during the pretrial and trial phase of the case.[43]

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generally escape all punishment or receive no meaningful punishment.

In some cases, the jurisdictional gap created by court decisions has resulted in unexpected hardship. Subsequent to the decisions depriving courts-martial of jurisdiction over civilians accompanying the armed forces overseas, an American civilian employee of an armed forces contractor killed a fellow employee on Ascension Island, which was subject to British jurisdiction. The British reluctantly assumed jurisdiction. The trial judge was brought in from England, and the accused retained at his own expense a lawyer from Toronto, Canada. Two officers from the Royal Air Force and Royal Navy served as Assessors (advisors to the court on the facts). The accused's defense of self-defense was rejected and he was convicted of voluntary manslaughter and sentenced to the maximum punishment of eight years. The accused appealed his case to the court in Kenya on a written brief, because he could not afford to have his lawyer appear in person. The appellate court sustained the conviction. Thus after long delays and extraordinary expense, the accused found himself confined in Wormwood Scrubbs, a prison located outside of London, far from his relatives in North Carolina.

Similarly, no workable remedy has been found to fill the jurisdictional gaps that were created by other court decisions during the Vietnam conflict. In Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969), the court ruled that a court-martial was without jurisdiction to try an American merchant seaman for murdering a fellow merchant seaman in DaNang in August 1967. In United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970), two of the three judges on the U.S. Court of Military Appeals ruled that a court-martial was without jurisdiction to try an Army civilian employee in Vietnam for conspiring to steal U.S. property in August 1968, because it was not time of war within the meaning of 10 U.S.C. § 802(10). Following these decisions, there were numerous other instances of U.S. civilian employees of the armed forces in Vietnam going unpunished for offenses for which members of the armed forces were regularly being tried and punished. The result was unequal treatment of those serving the armed forces; the treatment depended on whether they were drafted into the armed forces and sent to Vietnam or had volunteered to work there as an employee of the armed forces or an armed forces contractor. The South Vietnam government displayed little interest in prosecuting such persons if their offense was against another American or against U.S. property, unless the punishment was likely to be a fine.

The jurisdictional gap which received the most attention, however, was that created by Toth v. Quarles, 350 U.S. 11 (1955), holding that a former serviceman was not subject to trial by court-martial for an offense committed during his service, despite a statutory provision, 10 U.S.C. § 803 (a), which would have made him amenable to trial. For all practical purposes, this decision immunized the former servicemen who were implicated in the My Lai incident. Although an argument can be made that these persons could have been tried by a military commission (including a general court-martial sitting as a tribunal for the punishment of war crimes) as provided by articles 18 and 21 of the Uniform Code of Military Justice, 10 U.S.C. §§ 818, 821 (1970), overcoming the serious jurisdictional hurdles in the face of the public opposition to the punishment of the My Lai participants would have involved lengthy litigation.

As an example of this same type of situation in the United States, the sparsely populated counties surrounding some Army posts prefer not to exercise jurisdiction in a contested case involving Army personnel because of the cost of a jury trial, although they will exercise such jurisdiction if the soldier will plead guilty and a fine is an appropriate punishment.

[43] Since O'Callahan v. Parker, 395 U.S. 258 (1969) (discussed in text at note 12 *supra*), two developments have shown the value of broad military justice powers in a conflict of the Vietnam type, *i.e.* a war lacking a Congressional declaration. Prior to *O'Callahan*, it was customary for law enforcement authorities of ports to deliver a sailor to his vessel if he was involved in a not too serious offense, as it was well known that the captain could make a proper disposition of the matter. Following *O'Callahan*, however, local authorities were reluctant to deliver offenders who were charged with "non-service-connected" offenses. Some Army personnel discovered that

The one question remaining is whether the military should *administer* its own system of justice. It would be impractical for civilian courts in the United States, even if they were functioning, to exercise jurisdiction over all offenses committed overseas. If Congress were to establish civilian courts in overseas areas, and practical and constitutional problems could be overcome, such courts might be able to function in wartime. Since they would be dependent on the military for administrative support, it is difficult to see how they would be different from similar courts composed of and administered by military personnel. It is extremely unlikely that such courts could function effectively overseas in time of peace because of the objections of the foreign countries in which our troops are stationed. While those countries with which we have status of forces agreements permit our military courts to function on the grounds that they are necessary to maintain discipline within our armed forces, experience with the consular courts indicates that these countries would consider the establishment of a United States civilian court on their soil as an infringement of their sovereignty.[44]

If the above rationale is correct, it follows that the armed forces of the United States need their own system of criminal justice in peace and in war, manned and supervised by the military.[45]

O'Callahan would permit them to delay or avoid shipment to Vietnam if they committed minor, "non-service-connected" offenses just prior to their scheduled departure date. Prior to *O'Callahan*, civilian law enforcement authorities would not file criminal charges in such cases as they did not want to interfere with personnel movements and they knew that Army authorities would make a proper disposition of the offender. After *O'Callahan*, they began to file such charges and request the military authorities to hold the serviceman for trial by civilian court, thereby interrupting his shipment. Apparently, this type of problem would not exist if Congress had officially declared war, as considerable weight was given to the fact that O'Callahan had committed his offenses in time of peace (1956). In Gosa v. Mayden, 413 U.S. 665, 693 (1973), Justice Stewart, concurring in the companion case of Warner v. Flemings, 413 U.S. 665 (1973), stated that "a serviceman who deserts his post during a time of *congressionally* declared war and steals an automobile is guilty of a 'service-connected' offense." *Id.* at 693 (emphasis supplied).

[44] Rev. Stat. 4083–4130 (1878); Act of Aug. 1, 1956, ch. 807, 70 Stat. 773. *See In re* Ross, 140 U.S. 453 (1891). *See also* Frankfurter's concurring opinion in Reid v. Covert, 354 U.S. 1, 43 (1957); J. SNEE and A. PYE, STATUS OF FORCES AGREEMENT AND CRIMINAL JURISDICTION (1957). *But see* Sherman, *supra* note 40.

Some countries where our troops are stationed have even objected to trials by general courts-martial (the military court of general criminal jurisdiction) on the grounds that these courts, as they have jurisdiction over civilian-type offenses, would infringe upon the sovereignty of the countries where they sit. For this reason, during the early- and mid-1960's, general court-martial trials involving offenses committed in South Vietnam or Thailand were held in Okinawa, resulting in unusual delays and expense.

[45] Of some interest in this regard is the experience of the Soviet Army. Following the Bolshevik revolution, drastic changes were made in the strict military discipline of the Czarist army, to include permitting self-government among the troops, restricting the powers of officers, introducing political commissars, abolishing the death penalty, permitting enlisted men to sit on courts-martial, and introducing a general spirit of camaraderie into the armed forces. Although the military code was tightened up to some extent in 1919 and 1925, it was not until the Soviet failure in Finland in 1940 that the Code was redrafted with a view to stricter accountability of the soldier for his acts, a de-emphasis of rights of offenders and the re-emphasis

III. THE MILITARY PROSECUTOR

Military commanders now have the authority not to prosecute men assigned to their unit, even for serious offenses, absent objection by a higher commander,[46] and to decide what court will try a case when prosecution is deemed necessary. The Bayh and Bennett legislation appears to require prosecution in all cases where there is sufficient evidence to convict, unless, with respect to a minor offense, the commander first imposes nonjudicial punishment.[47] To the extent that the legislation bars prosecutorial discretion, it is unrealistic. The administration of criminal justice, not being an exact science, must perforce give some person or tribunal broad authority to determine whether a person should stand trial and, if so, for what offense or offenses.[48]

The Bayh and Bennett legislation would give the authority to decide whether a charge should be tried by court-martial to the Chief of the Prosecution Division of a Courts-Martial Command,[49] a military lawyer who is independent of command and is responsible only to the Judge Advocate General for the performance of his duties. In cases tried at present by summary and special courts-martial, Army commanders frequently make this decision without the benefit of the advice of a lawyer. If the legislation intends the military prosecutor to have the usual prosecutorial discretion of his civilian counterpart, as he should,[50] such an approach would have the advantage of making a

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of duties, including the absolute duty of obedience. H. BERMAN and M. KERNER, SOVIET MILITARY LAW AND ADMINISTRATION (1955).

[46] General Eisenhower felt prosecutorial discretion was particularly important in wartime. *See* United States v. Fields, 9 U.S.C.M.A. 70, 74, 25 C.M.R. 332, 336 (1958).

[47] S. 987, 93d Cong., 1st Sess. (1973); H.R. 291, 93d Cong., 1st Sess. (1973).

[48] Justice Holmes observed, "What have we better than a blind guess to show that the criminal law in its present form does more good than harm. . . . Does punishment deter? Do we deal with criminals on proper principles?" O. HOLMES, COLLECTED LEGAL PAPERS 188–89 (1920).

[49] S. 987, 93d Cong. 1st Sess. §§ 830, 833(a) (1973); H.R. 291, 93d Cong., 1st Sess. §§ 830, 833(a) (1973).

[50] In the civilian community, police and prosecutors exercise broad discretion not to file a complaint or to prosecute. Chief Justice Burger has commented that "[n]o public officials in the entire range of modern government are given such wide discretion on matters dealing with the daily lives of citizens as are police officers." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE URBAN POLICE FUNCTION 2. This comment also applies to military police, although, being less experienced on the average than civilian police, they have far less discretion in this area. The ABA Standards for the Prosecution and the Defense Function recognize the wide discretion of the prosecutor: "The breadth of criminal legislation necessarily means that much conduct which falls within its literal terms should not always lead to criminal prosecution. It is axiomatic that all crimes cannot be prosecuted even if this were desirable. Realistically, there are not enough enforcement agencies to investigate and prosecute every criminal act which occurs. Some violations occur in circumstances in which there is no significant impact on the community or any of its members. . . . The public interest is best served and even-handed justice best dispensed not by a mechanical application of the 'letter of the law' but by a flexible and individualized application of its norms through the exercise of the trained discretion of the prosecutor as an administrator of justice." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE PROSECUTION FUNC-

lawyer responsible for investigating complaints,[51] evaluating the sufficiency of the evidence, and determining whether charges should be tried, and, if so, by what level of court.[52] It can be argued that an independent prosecutor would be likely to be more even-handed than a commander in his treatment of alleged offenders, *e.g.*, the prosecutor would not give preferential treatment to officers or senior noncommissioned officers or "cover up" incidents which might reflect adversely on the Army as an institution.[53] These apparent advantages are easily

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TION AND THE DEFENSE FUNCTION 93–94 (citations omitted). *See also* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 133–34 (1967); THE PROSECUTOR'S DESKBOOK 23 (P. Healy and J. Manak eds. 1971); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE URBAN POLICE FUNCTION 116–21; McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. 1154, 1156 (1970); McIntyre, *A Study of Judicial Dominance of the Charging Process*, 59 J. CRIM. L.C. & P.S. 463 (1968).

The National Advisory Commission on Criminal Justice Standards and Goals recommends that the prosecutor establish objective screening criteria to answer such questions as "whether the prosecution would further the interests of the criminal justice system" and "whether the value to society of prosecution and conviction would be commensurate with financial, social, and individual costs." THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME 144 (1973) [hereinafter cited as NATIONAL ADVISORY COMMISSION REPORT].

[51] It is clearly desirable to have a lawyer involved at an early stage in the charging process to screen out cases in which there is insufficient evidence and to insure the correctness of the charge. The question is whether it is necessary to use a lawyer independent of command or whether the commander's legal advisor, his "house-counsel," can be trusted to perform this function. In this regard, the Judge Advocate General of the Army recently announced the applicability of the ABA Standards, including the Prosecution Function, to military justice procedures. 2 THE ARMY LAWYER No. 8, at 12–13 (1972), thereby providing professional guidelines for exercise of the prosecution function by the staff judge advocate.

[52] In civilian jurisdictions the prosecutor's decision whether to charge is more or less final as grand juries tend to rubberstamp his recommendation. Helwig, *The American Jury System: A Time for Re-examination*, 55 JUDICATURE 96, 98 (1971). The National Advisory Commission Report recommends that a grand jury indictment not be required for any criminal prosecution. NATIONAL ADVISORY COMMISSION REPORT, *supra* note 50, at 151. In jurisdictions where the prosecutor takes his case before a magistrate, he generally has the option of asking the grand jury to indict if the magistrate discharges the accused. *E.g.*, FED. R. CRIM. P. 5.1(b). *See generally*, Hodson, *Courts-Martial and the Commander*, 10 SAN DIEGO L. REV. 51 (1972). To make it clear to the public, but particularly to the media, that an accused is not "under indictment" until a case is referred for trial, a military charge should be relabeled "a complaint."

[53] *See* Quinn, *Prosecutorial Discretion: An Overview of Civilian and Military Characteristics*, 10 SAN DIEGO L. REV. 36 (1972). Judge Quinn, a member of the U.S. Court of Military Appeals since its creation, suggests that the broader prosecutorial discretion in the military gives the latter a greater capability for providing justice in a particular case.

As to preferential treatment, or overcharging, I have seen no evidence to indicate that commanders are more error prone than the average civilian prosecutor. Time and space do not permit a discussion of the problem of who is to file charges and make the decision to prosecute senior officers. Essentially the same problem would exist in the military in this area as exists in civilian life. For example, witness the difficulty of appointing an "independent" prosecutor in the Watergate affair. *See* Note, *The Special Prosecutor in the Federal System: A Proposal*, 11 AM. CRIM. L. REV. 577 (1973). The authors suggest that courts should take on the task of reviewing prosecutorial discretion.

In July 1973, the President of the American Bar Association appointed a Special Committee on Federal Law Enforcement Agencies. One of its projects is to determine whether the Attorney General, who is politically responsible to the President, ought to have the ultimate responsibility for investigating and prosecuting some types of federal crimes. 13 CRIM. L. REP. 2318 (1973).

outweighed by the disadvantages. The basic flaw, it seems to me, is that we cannot hold the commander responsible for carrying out his mission, which requires a well-disciplined unit, if we give to an independent command, albeit staffed by lawyers, the authority to maintain the kind of law and order within the unit which will encourage good discipline, high morale, and unit esprit.

In the military at present, commanders exercise broad discretion whether to prosecute. Any person subject to the Uniform Code of Military Justice may prefer charges against any other person.[54] Those charges are then forwarded to the soldier's immediate commander[55] who, after a preliminary inquiry,[56] may dismiss the charges, impose nonjudicial punishment[57] or forward the charges, together with the evidence supporting the charges, to a higher commander recommending disposition by court-martial. Each higher commander has the same alternatives, limited only to the extent that he may not direct a lower commander to prefer charges if the lower commander feels it would be inappropriate,[58] or may not "direct or recommend" that a lower commander impose nonjudicial punishment for an incident which might otherwise be handled informally.[59] The convening authority is encouraged to dismiss charges when "they are trivial, do not state offenses, or are unsupported by available evidence, or because there are other sound reasons for not punishing the accused with respect to the acts alleged."[60] The Manual for Courts-Martial pro-

Several factors operate in the military to prevent abuse of discretion: (1) the Army, Navy, and Air Force have central criminal investigative agencies whose reports are distributed to higher headquarters, making it difficult, if not impossible, for a lower commander to conceal alleged misconduct; (2) the statutory authority for a serviceman to write his congressman, 10 U.S.C. § 1034 (1970), and the frequency with which servicemen exercise this right, tends to prevent cover-up of derelictions: as in civilian life, incidents are sometimes not reported above the victim-offender level; (3) from time immemorial, one of the gauges of leadership is the court-martial rate in a unit for purely military offenses, such as insubordination or unauthorized absence. Thus commanders try to avoid courts-martial for such offenses.

A majority of the members of the DOD Task Force on the Administration of Military Justice in the Armed Forces concluded that "systemic racial discrimination exists throughout the armed services and in the military justice system." 1972 DOD TASK FORCE REPORT, *supra* note 17, at 22. The NAACP Report concluded, after surveying the administration of military justice system in the U.S. forces in Europe, that "large numbers of black soldiers . . . believe that the military justice system is discriminatory and unjust." NAACP REPORT, *supra* note 17, at 5.

[54] Uniform Code of Military Justice art. 30 [hereinafter cited UCMJ], 10 U.S.C. § 830 (1970); MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 29*b* (rev. ed. 1969) [hereinafter cited as MCM].

[55] MCM, *supra* note 54, at ¶ 31.

[56] *Id.* at ¶ 32*b*.

[57] *Id.* at ¶¶ 32*d-f*. Nonjudicial punishment is minor punishment which can be imposed by a commander upon a member of his command. UCMJ art. 15, 10 U.S.C. § 815 (1970). *See* note 72 *infra*.

[58] *See, e.g.*, United States v. Rivera, 45 C.M.R. 582 (A.C.M.R. 1972).

[59] ARMY REGULATION 27–10, ch. 3, ¶¶ 3, 4*b* (Nov. 26, 1968).

[60] MCM *supra* note 54, at ¶¶ 32*d*, 33*f*, 35*a*; ABA STANDARDS ON THE PROSECUTION FUNCTION, *supra* note 50, at § 3.9, which are applicable in the Army, set forth objective criteria for determining whether these "sound reasons" exist.

vides that the maximum punishment for the offense charged, the character of the accused, and his prior service should be considered in reaching a disposition of the charges.[61] This procedure, including the recommendation at each echelon of command, is designed to ensure proper exercise of broad prosecutorial discretion so that charges will be handled at as low a level as is consistent with appropriate and adequate punishment.[62]

Allowing the commander to decide whom to try by court-martial is consistent with the concept that a commander cannot be held responsible for mission accomplishment unless he is given the necessary resources and authority. As a law-abiding environment is essential to good discipline, without which the unit cannot hope to succeed, it follows that the commander must have sufficient authority to enable him to maintain the required degree of law and order.[63] To use a civilian analogy, the electorate should not hold a mayor or a governor responsible for a breakdown of governmental functions caused by a breakdown in law and order unless he has been given adequate resources for law enforcement and authority to influence the police and prosecutors to perform their duties properly.

Another flaw in the Bayh proposal is that it would split the respon-

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[61] MCM *supra* note 54, at ¶¶ 32*b*, 32*f*(4)(*d*), 33*b*.

[62] *Id.* at ¶ 3(*g*.

[63] The Supreme Court has arrived at this same conclusion in determining that a civilian-type offense committed by a soldier on a military post in peacetime is "service connected," thereby subjecting the offender to trial by court-martial. Justice Blackmun, speaking for a unanimous Court, said:

> We stress: (a) The essential and obvious interest of the military in the security of persons and of property on the military enclave. . . . (b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order. . . . (c) The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission. . . .

Relford v. Commandant, 401 U.S. 355, 367 (1971).

With respect to international matters, an earlier Court had gone even further. In considering the responsibility of a wartime commander for atrocities committed by his troops, the Court concluded that "[the provisions of the Hague Conventions and the 1929 Geneva Convention] plainly imposed on the petitioner . . . an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population." *In re* Yamashita, 327 U.S. 1, 16 (1946). The military commission which condemned General Yamashita delivered a brief explanation for its findings: "Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. . . . It is for the purpose of maintaining discipline and control, among other reasons, that military commanders are given broad powers of administering military justice. . . ." Solf, *A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy*, 5 AKRON L. REV. 43, 60 (1972). Professor Taylor, who teaches Constitutional Law, had suggested in his book, T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970), that the My Lai cases should have been tried by military commission, apparently because of his dissatisfaction with the fact that courts-martial are limited to a consideration of the specific offenses and offenders before them; in a sense, he feels that war crimes, even when committed by U.S. troops, will not be adequately tried by a court-martial because the accused has too many protections. Solf, *supra* at 65–68.

sibility for the administrative management of soldiers, including their reassignment or their administrative discharge, from the responsibility of deciding whether they should be prosecuted. When a soldier is alleged to have committed an offense, the basic question presented is what is the best disposition to be made of him, considering his prior record, his ability and training, the nature of the offense and its impact on discipline, and the nature of the unit's mission. The responsibility for providing an answer to this question should not be divided between two people, one who has an overall responsibility for creating and maintaining discipline, and the other who has no responsibility except to consider the nature of the offense and to determine whether the evidence will support a trial by court-martial. The proposed split of responsibility means that neither the commander nor the prosecutor will be able to consider all of the alternatives that should be available in determining the best disposition of the matter.[64] An inherent conflict between these two decision-makers is bound to result, not necessarily because they disagree, but because neither person has access to sufficient data to make an informed disposition. Law enforcement is a difficult job under the most favorable circumstances, that is, when all its aspects, from police selection and training through the judicial process to correction and rehabilitation, are carefully coordinated. To split, deliberately, the responsibility for law enforcement in the military is to plan for failure.

The Bayh proposal is also faulty in its assumption that the best way to improve military justice is to make it more like civilian criminal justice. There is little support for this assumption.[65] Although several billions of dollars have been pumped into state law enforcement agencies in the last few years, the crime rate is still high.[66] An examination of the commentaries supporting the American Bar Association Standards of Criminal Justice reflects a civilian criminal justice system that needs drastic overhauling in many of the states if it is to serve either society or the accused.[67]

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[64] ABA STANDARDS ON THE PROSECUTION FUNCTION, *supra* note 50, at § 3.8, and NATIONAL ADVISORY COMMISSION REPORT, *supra* note 50, at ch. 6, strongly recommend that consideration be given to non-criminal disposition of offenders in appropriate cases.

[65] Professor Karlen, the Director of the Institute of Judicial Administration during its management of the ABA project to develop standards for criminal justice, feels that changing military justice to make it conform to existing civilian criminal justice would be a step backward. Karlen, *Civilianization of Military Justice: Good or Bad*, 60 MIL. L. REV. 113 (1973).

[66] FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS (1971) (1972).

[67] Former United States Supreme Court Justice Tom C. Clark, chairman of the ABA committee charged with implementing the Standards, has reported that the task is an onerous one. "Not only are we faced with overhauling an antiquated and neglected system but also with bringing uniformity to 50 different systems interlaced with a federal system." Clark, *The Implementation Story–Where We Must Go*, 55 JUDICATURE 383 (1972).

Anthony G. Amsterdam of the Stanford University law faculty has suggested the urgent need to appraise civilian criminal justice, not by a discussion of rights the criminal has but by

My judgment as to who should exercise prosecutorial discretion in the military is, of course, subjective. My experience has been that the senior commanders who exercise court-martial jurisdiction are generally fair-minded men of integrity. Civilian lawyers who defend criminal cases in both military and civilian courts have told me that commanders are no more guilty of "overcharging" than many civilian prosecutors. On balance, I would leave the decision to prosecute with the commander, but only after he has received the advice of his legal advisor. Further, his legal advisor's determination that the expected evidence is insufficient to establish a prima facie case should be binding on the commander. If it is decided to file charges with a court, the legal advisor would be responsible for providing prosecution counsel. The result would be that the commander's legal advisor would perform duties similar to those of an attorney general of many states; he would not only be the legal advisor to the commander (similar to a governor), but he would also be responsible for prosecution of cases in the command (similar to a state). Adequate protection to the accused would be provided by a probable cause hearing before an independent magistrate,[68] representation by an independent legal counsel,[69] trial by a randomly selected jury presided over by an independent judge,[70] and, in the event of conviction, appellate review by independent, impartial tribunals.[71] In my view this system would best serve the accused and the armed forces.

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examination of the treatment he actually gets. Amsterdam, *We Have Two Kinds of Justice–One for the Poor and One for Us*, II INTELLECTUAL DIGEST, Aug. 1972, at 49. The well-known writer John Hersey, after studying the administration of criminal justice in New Haven, commented in a letter to the Forum for Contemporary History,

> I have presumed to write such a letter as this only because of my novelist's sense of what happens to *all* the human beings, judges included, in the ambiance of court-oriented criminal justice, with its atmosphere of pragmatism, of getting the job done in the crudest but quickest way; with, in the end, its cynicism, its assumption that riffraff are probably guilty, its lesson to the accused poor that justice is a matter of wheeling and dealing, of influence ("I can get you a suspended sentence if you'll cop the plea"), and so of copping out, playing the game, fitting in with the system's requirement that the job of the courts be done, above all, with dispatch. The noble ideal, "innocent until proved guilty," gives way to a corrupt and crime-feeding one, "let off easy if copped as guilty."

Hersey, *The Pit*, III INTELLECTUAL DIGEST, NOV. 1972, at 92–93.

If the courts or the Congress deprive the military of authority to administer criminal justice, they may not be doing the military accused any favor, as his rights are uniformly better protected in military courts than in civilian courts. *See* the articles collected at Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27 n.2 (1972); THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION (H. Jones ed. 1965); Karlen, *supra* note 65.

[68] Section 832 of the Bayh and Bennett legislation would provide for a probable cause hearing before a military judge who is responsible for the performance of his duties to the Judge Advocate General of his service.

[69] See Part IV, The Military Defense Counsel, p. 597 *infra*.

[70] See Part V, The Military Trial Judge, p. 601 *infra*.

[71] Such a review is now provided for cases involving a general officer or a sentence to death, dishonorable or bad conduct discharge, or confinement for one year or more. UCMJ art. 66, 10

There is an additional assumption in the Bayh and Bennett bills which warrants brief comment; that is that a military lawyer who is independent of command would make a better prosecutorial decision than a military lawyer who is the legal advisor of a commander. Presumably, both lawyers would come from the same legal corps and both would have about the same experience and training. However, one would spend full time as a prosecutor, whereas the other would be involved only in those cases arising in his command. There is some danger that the full-time prosecutor might be rated for promotion purposes on his conviction rate, as there would be little else to consider in judging his capabilities and potential. Under these circumstances, I am not persuaded that the full-time prosecutor will make the better decision, if this means a decision that best balances the rights of the accused against the needs of the military community.

IV. THE MILITARY DEFENSE COUNSEL

Free legal counsel is provided to the military accused at all stages of a case, from initial interrogation through appellate review, without regard to his financial circumstances.[72] It seems, therefore, that the defense leg of Chief Justice Burger's tripod is a strong one in the military, being even more protective of the accused than the ABA Standards, which would provide free counsel only to a person "who is financially unable to obtain adequate representation without substantial hardship to himself or his family."[73] But the military system

U.S.C. §866 (1970). There is no provision for a review of other cases by a judicial tribunal. The Bayh and Bennett legislation at sections 869 provide that such cases be reviewed by the Judge Advocate General. For an alternate proposal, see note 104 *infra*.

[72] 10 U.S.C. § 832 (preliminary investigation), §§ 827 and 838 (trial by general or special court-martial), §870 (appeal); United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) (custodial interrogation); United States v. Adams, 18 U.S.C.M.A. 439, 40 C.M.R. 151 (1969) (line up). It is a general rule in all the services that an accused may confer with free legal counsel before he decides to accept nonjudicial punishment from his commander under UCMJ art. 15, 10 U.S.C. §815 (1970). As acceptance of such punishment, except on shipboard, is similar to the civilian practice of "forfeiting collateral," it is clear that the services are more liberal in affording free counsel to the accused than the ABA Criminal Justice Standards, which provide for counsel "in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed. . . ." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PROVIDING DEFENSE SERVICES §4.1. Of course, this provision of the standards must now be construed in light of Argersinger v. Hamlin, 407 U.S. 25 (1972), holding that absent a knowing and intelligent waiver imprisonment may not be imposed unless the accused is represented by counsel at his trial. The *Argersinger* guideline was adopted by the military for trials by summary courts-martial (which can impose one month's confinement) in United States v. Alderman, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973). In Daigle v. Warner, 490 F.2d 358 (9th Cir. 1973), the court held that the sixth amendment right to counsel does not apply to trials by summary courts-martial but due process will require counsel if one is necessary to enable the accused to present some defense or mitigation.

[73] ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PROVIDING DEFENSE SERVICES, *supra* note 72, at §6.1. As the lowest ranking enlisted man in the Army now receives more than $3,900 per year ($4,300 after four months' service), plus clothing,

suffers from the fact that the free counsel is an officer who is usually assigned by the convening authority from the office of the staff judge advocate, which also provides prosecution counsel.[74] Thus the practice appears to violate the spirit, if not the letter, of section 1.4 of the ABA Standards for Providing Defense Services, which requires that a defense lawyer have professional independence and be "subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice."[75]

The deficiencies of the above military practice can be summarized as follows: (1) A client may have less confidence in a lawyer assigned by the convening authority than he would in an independently assigned lawyer;[76] (2) a counsel may have less confidence in his own independence than he would if he owed no obligation to the command staff judge advocate, who, for all practical purposes, is in charge of the prosecution;[77] (3) the convening authority can assign the "too successful" defense counsel to the prosecution or to duties other than defense work;[78] and (4) counsel may prosecute one day and defend the next, performing disparate duties which require handling of police and criminal investigators in radically different ways.[79]

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rations, quarters, medical care, and related benefits, it is possible that many military accused might not qualify for free counsel under the Standards, particularly as they may continue to draw their pay until completion of appellate review following their conviction.

[74] Although a staff judge advocate has many other legal duties (*e.g.*, he serves as General Counsel for his commander) in the criminal law field, he performs duties somewhat similar to those of a U.S. District Attorney, in that he is responsible for investigation and trial of criminal cases. For a discussion of the problems presented by this practice, *see* Murphy, *The Army Defense Counsel: Unusual Ethics for an Unusual Advocate*, 61 COLUM. L. REV. 233 (1961); Willis, *supra* note 67, at 48-49 n.121.

[75] ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PROVIDING DEFENSE SERVICES §1.4. The Bayh and Bennett legislation provide that a "military defense counsel may, at any time, at Government expense, seek such collateral relief as he deems necessary to protect the rights of the accused in any court having jurisdiction to grant such relief." S. 987, 93d Cong., 1st Sess. §833(c) (1973); H.R. 291, 93d Cong., 1st Sess. §833(c) (1973). If legislation were enacted to give military courts all-writs power, and permitted petitions for writs of certiorari to the Supreme Court, both of which have been proposed, such collateral attacks would be unnecessary. *See* CODE COMMITTEE REPORTS, *supra* note 21, at 20-21 (1970), 21-22 (1971). In the interim, a military lawyer in the Army may act as counsel in a collateral attack in the federal courts only with the approval of the Judge Advocate General. Provisions for requesting this approval authorize the requesting counsel to seek the support of the Chief of the Defense Appellate Division on a privileged basis. ARMY REGULATION 27-40, ¶¶ 1-4 (June 17, 1973). Such collateral attacks during the pendency of proceedings are usually unsuccessful because of the exhaustion of remedies doctrine. Gusik v. Schilder, 340 U.S. 128 (1950); Noyd v. Bond, 395 U.S. 683 (1969). *But see* Parisi v. Davidson, 405 U.S. 34 (1972).

[76] 1972 DOD TASK FORCE REPORT, *supra* note 17, at 81; NAACP REPORT, *supra* note 17, at 13. The NAACP report finds, however, that black soldiers in Germany distrust profoundly all legal counsel available to them, whether judge advocate officers or civilian lawyers and that "white JAG officers have 'zero credibility.' "

[77] *See* Willis, *supra* note 67, at 48-49 n.121.

[78] R. RIVKIN, GI RIGHTS AND ARMY JUSTICE: THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW 264 (1970).

[79] A.B.A. STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS NO. 1235 (1972) [hereinafter cited as A.B.A. OPINION 1235].

The military practice has recently drawn criticism. The Standing Committee on Ethics and Professional Responsibility of the American Bar Association, after considering the manner of furnishing military defense counsel in the Coast Guard, urged that whenever possible, trial and defense counsel should be afforded different facilities, should answer to different superiors, and should be assigned either as a prosecutor or defense counsel while assigned to one command.[80]

The 1972 Department of Defense Task Force Report on the Administration of Military Justice in the Armed Forces recommended that "[a]ll judge advocate defense counsel be placed under the direction of the appropriate Judge Advocate General. . . ."[81] In response to this recommendation, the Secretary of Defense directed the military departments to "submit plans to revise the structure of the judge advocate organization to place defense counsel under the authority of The Judge Advocate General."[82]

As early as October 1972, the Air Force had assigned its defense counsel for general courts-martial (the court of general criminal jurisdiction) to the Air Force's trial judiciary division, which operates under the supervision of the Air Force Judge Advocate General. In the light of the 1972 DOD Task Force Report and the directive of the Secretary of Defense, the Air Force began to implement an Area Defense Counsel Program in January 1974. Under this program, all defense counsel would be assigned to the Appellate Defense Division of the Office of the Air Force Judge Advocate General, would be located in separate facilities on each base, and would perform their duties under the professional supervision of chief circuit defense counsel in each judicial circuit. The circuit defense counsel would be supervised by the Chief of the Appellate Defense Division. Area defense counsel would be responsible for defending in special court-martial cases, counseling the accused in Article 15 cases, and defending respondents in administrative proceedings which may result in adverse personnel action.[83]

In response to the directive of the Secretary of Defense, the Army and the Navy have also submitted plans for an independent defense corps. The Army plan is similar to that of the Air Force, *i.e.* there

[80] *Id.*

[81] 1972 DOD TASK FORCE REPORT, *supra* note 17, at 124–25.

[82] Secretary of Defense Memorandum, Subject: Report of the Task Force on the Administration of Military Justice in the Armed Forces, Jan. 11, 1973.

[83] 12 AIR FORCE JAG REPORTER §B (Dec. 1973). The Air Force was better able than its sister services to furnish defense counsel for general courts-martial from a central office, not only because of the availability of in-house air transport, but also because its caseload is small. For example, for the fiscal year ending June 30, 1972, the Air Force had only 162 general courts-martial, compared to 2217 in the Army and 873 in the Navy. The Coast Guard had six. The figures for special courts-martial are comparable: 2245 for the Air Force, 16,613 for the Army, 9796 for the Navy, and 167 for the Coast Guard. CODE COMMITTEE REPORTS (1972), *supra* note 21.

would be a separate defense corps, organized by Army judicial circuits, and serving under the professional supervision of a chief defense counsel who would be responsible to the Judge Advocate General. Prior to implementing the plan, however, the Army has directed that offices of defense counsel will be "visibly separate" from those of staff judge advocates and prosecution counsel.[84] This was followed by a strongly worded directive of the Army Judge Advocate General to all staff judge advocates, advising them that, pending action by the Secretary of Defense on the separate defense corps concept, they should raise the competence and independence of their defense counsel by training, by establishing a fixed pattern of rotation of counsel, by designating a chief defense counsel who would supervise other defense counsel and would be responsible only to the staff judge advocate or his deputy, and by providing facilities for defense counsel which can be identified as separate by the military public.[85]

The Navy plan for a separate defense corps, scheduled for implementation on July 1, 1974, generally provides that all trial personnel, to include the judge and counsel for the prosecution and defense, will be assigned to Navy Legal Services Offices throughout the world, each of which will have a judge advocate as the officer in charge. The latter will perform his duties under the professional supervision of the Navy Judge Advocate General. In a sense, the Navy plan conforms rather closely to the organization proposed by the Bayh and Bennett legislation.[86]

The chief obstacle to the implementation of a separate defense corps in the Army and the Navy is the need for additional judge advocate personnel to staff the separate organization; there is also a shortage of experienced defense counsel to serve in a professional supervisory capacity. Increased use of paralegal personnel to assist both prosecution and defense counsel is being emphasized in the Army as a means of alleviating this shortage.

Although the military services and their Judge Advocates General are acting in good faith in attempting to improve the quality and independence of defense counsel, it is apparent that the shortage of judge advocates, particularly experienced judge advocates, will delay the establishment of worldwide separate defense corps in the Army and the Navy.[87] Until such an independent corps is created, the

[84] Letter, Department of the Army, Subject: Support for Military Legal Counsel, June 15, 1973.

[85] Letter, Office of The Judge Advocate General, Department of the Army, Subject: Providing Adequate Defense Services—The Defense Counsel, August 24, 1973.

[86] Information about the Navy plan was furnished informally on March 5, 1974, by the officer-in-charge of the Navy-Marine Corps Judiciary Activity.

[87] *See* note 83 *supra*. H.R. 4606, 92d Cong., 1st Sess. (1971), would have solved, or assisted in solving, this shortage problem by providing professional pay for military lawyers similar to that provided for military doctors. Although this bill passed the House of Representatives unani-

defense leg of Chief Justice Burger's tripod must rely for its strength on the professional integrity of the young military lawyers who serve in the trial defense role. As in the past, there is evidence that they will perform their duties in a professionally independent manner and will not allow themselves to be intimidated or cowed by either the actual or supposed harassment of a military superior.[88]

V. THE MILITARY TRIAL JUDGE

Since it came into being in 1951, the United States Court of Military Appeals has striven to ensure the judicial independence of the military trial judge, even though he was, for a long period of time, a member of the convening authority's command and a member of the office of the staff judge advocate of the convening authority. In one of its early opinions, the court declared that the law member's (predecessor to the law officer and to the military judge) position with respect to a court-martial is "closely analogous to that of the judge in the criminal law administration of the civilian community. . . . He is the court-martial's advisor and director in affairs having to do with legal rules or standards and their application."[89] Two years later the court emphasized its intent "to assimilate the status of the law officer wherever possible, to that of a civilian judge of the Federal system."[90] Thus it came as no surprise to have the court clothe the law officer with the power to declare a mistrial in a proper case, despite a lack of authority therefor in the Uniform Code of Military Justice or the Manual for Courts-Martial.[91] The Military Justice Act of 1968 created a trial judge who was divorced from the commander who convened the court-martial presided over by the judge.[92] Because he has judicial

mously, the Congress adjourned before it could be considered by the Senate. Legislation has been enacted by the Ninety-Third Congress which will help, but not solve the shortage problem, by permitting each service to send 25 officers per year to law school. Pub. L. No. 93-155, §817 (Nov. 16, 1973)(U.S. CODE CONG. & AD. NEWS 4136, to be codified at 10 U.S.C. §2004).

[88] The 1972 Department of Defense Task Force reported:

> [S]ome defense counsel stated to the Task Force that they have been harrassed by their commanders and even, in some cases, by their staff judge advocates when they have zealously defended cases of particular interest to the command. Some defense counsel felt that, because they had conducted successful defenses in a number of cases of special interest to the commander, they were reassigned to less desirable duties within the office of the staff judge advocate. Undoubtedly, such pressure has occurred from time to time, but it appears not to be pervasive.

II 1972 DOD TASK FORCE REPORT, *supra* note 17, at 66–67.

[89] United States v. Berry, 1 U.S.C.M.A. 235, 240, 2 C.M.R. 141, 146 (1952).

[90] United States v. Biesak, 3 U.S.C.M.A. 714, 722, 14 C.M.R. 132, 140 (1954).

[91] United States v. Richard, 7 U.S.C.M.A. 46, 21 C.M.R. 172 (1956). For discussions of the court's development of the independence of the law officer, see Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MIL. L. REV. 39 (1959); Cretello and Lynch, *The Military Judge: Military or Judge?*, 9 CALIF. WESTERN L. REV. 57 (1972).

[92] Act of Oct. 24, 1968, Pub. L. No. 90-632, 82 Stat. 1335. The court exercised an early

independence, training and experience, and the firm support of the United States Court of Military Appeals, the military trial judge is clearly a strong leg on our tripod of justice. However, there have been suggestions that the trial judge, although independent of command, lacks many of the judicial powers of his civilian counterpart.[93] He has only a limited contempt power.[94] He does not have a broad sentencing power.[95] He has little, if any, authority to grant extraordinary relief, as he is appointed to preside over trials on a case-by-case basis. Lacking a continuing jurisdiction, it would be infeasible for him to exercise an "all-writs" power similar to that permitted a federal trial judge.[96] The Code Committee Reports for 1969, 1970, 1971, and 1972 indicate that legislative proposals are being considered which would give the trial judge increased authority in the contempt, sentencing, and extraordinary relief areas.[97] Similarly, the Bayh and Bennett proposals provide for increased powers of the military trial judge in these three areas.[98]

The above proposals would improve the administration of criminal justice in the military. With the advent of the newly approved ABA Standards of Judicial Administration, however, the organizational structure of the military judiciary, from top to bottom, should be studied to see if it can and should conform to those standards. A cursory comparison of those standards with the existing military judiciary shows that there are significant differences between the present military judicial organization and the unified court system and unified court structure envisioned by sections 1.10 and 1.11 of the new standards.[99] A brief discussion of some of those differences follows.

The Military Justice Act of 1968[100] established in each service a separate military trial judiciary, whose members are assigned to and directly responsible to the Judge Advocate General of their service.[101]

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opportunity to strengthen the authority of the newly created military trial judge by opining that the military judge, not the commander who convened the court, was authorized to determine the proper place of trial. United States v. Williams, 21 U.S.C.M.A. 420, 45 C.M.R. 194 (1972).

[93] CODE COMMITTEE REPORTS (1970), (1971), (1972), *supra* note 21; Hodson, *Perspective-The Manual for Courts-Martial-1984*, 57 MIL. L. REV. 1 (1972); Cretello and Lynch, *supra* note 91.

[94] UCMJ art. 48, 10 U.S.C. §848 (1970).

[95] UCMJ art. 51, 10 U.S.C. §851 (1970). The military judge may impose the sentence in a non-capital case only if the accused has requested trial by judge alone. If the trial is by court members, they, not the judge, impose the sentence.

[96] 28 U.S.C. §1651 (1970).

[97] See legislation cited in note 19 *supra*.

[98] S. 987, 93d Cong., 1st Sess. § 826(b)(1973); H.R. 291, 93d Cong., 1st Sess. § 826(b)(1973).

[99] ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO COURT ORGANIZATION, as approved by the ABA House of Delegates at its midwinter meeting in February 1974.

[100] Note 92 *supra*.

[101] UCMJ art. 26(c), 10 U.S.C. §826(c) (1970). *See also* UCMJ art. 6, 10 U.S.C. §§806, 3037

It also created a Court of Military Review for each service, whose members are likewise directly responsible to their respective Judge Advocate General.[102] Although these trial and appellate judges are free of the influence of commanders in the field, they do not have the independence and tenure suggested by the new ABA Judicial Administration Standards Relating to Court Organization. The present military judicial organization would be similar to the federal judiciary if the federal judges performed their duties under the direction and supervision of the Attorney General, or similar to a state system if state trial and appellate judges served under the direction of the attorney general of the state. Further, certain quasi-judicial functions are performed by the Judge Advocate General,[103] with the result that legal opinions on questions arising in court-martial trials are issued, not only by trial and appellate judges, including the judges of the Court of the Military Appeals—the supreme court of the military—but also by the Judge Advocate General of each service. This judicial system is a far cry from the unified organization prescribed by the ABA Court Organization Standards.[104]

(1970), which provide, with respect to the Army, that the Judge Advocate General shall direct judge advocates (military lawyers) in the performance of their duties. The effect of this statute is ameliorated by UCMJ art. 37, 10 U.S.C. §837 (1970), providing, in effect, that no one subject to the UCMJ shall interfere with or influence the performance of a judicial function under the UCMJ. A violation is punishable under UCMJ art. 98, 10 U.S.C. §898 (1970).

[102] UCMJ art. 66, 10 U.S.C. §866 (1970). The court, an intermediate appellate court, has fact-finding power with authority to mitigate or commute the sentence if found to be inappropriate.

[103] UCMJ art. 69, 10 U.S.C. §869 (1970). Among other powers, the Judge Advocate General of each service may grant postconviction relief to persons convicted by courts-martial whose cases were not reviewed by a Court of Military Review. Under the same article, the Judge Advocate General is authorized to refer certain cases to the Court of Military Review, *i.e.* grant the accused the right to have his case considered by the court.

[104] In addition to the commander's corrective power under UCMJ art. 15, 10 U.S.C. §815 (1970), the military has a three tiered trial court system, consisting of summary, special, and general courts-martial. UCMJ art. 16, 10 U.S.C. §816 (1970). The ABA Judicial Administration Standards relating to Court Organization §1.10, recommends a single trial court of general jurisdiction. A similar recommendation had been made by the POWELL REPORT, *supra* note 35, which, in 1960, had recommended abolition of the summary and special courts-martial. Both the Bayh and Bennett legislation would eliminate the summary court-martial, Senator Bayh favoring retention of the present general and special court-martial, S. 987, 93d Cong., 1st Sess. §§816, 818, 819 (1973), and Congressman Bennett favoring an "upper" and "lower" court, with a rather bizarre division of jurisdiction. For example, the "upper" court could try forgery, but not larceny; the "lower" court could try larceny but not forgery. In both instances they would have jurisdiction over these and other civilian-type offenses only if they were committed outside of the United States. See H.R. 291, 93d Cong., 1st Sess. §§816, 818, 819 (1973).

While consideration should be given to a unification of the trial court structure, it is also important that the highly fragmented appellate structure of the military be studied to see if it should conform to the ABA standards. In addition to the quasi-judicial powers now exercised by the Judge Advocate General, see note 103 *supra*, the convening authority of each court-martial performs an initial legal review of the record and determines the legal sufficiency of the findings and the sentence. UCMJ arts. 60–64, 10 U.S.C. §§860–64 (1970). Records which involve a general officer, death, or punitive discharge or confinement for one year or more are then forwarded for appellate review by the Court of Military Review. UCMJ art. 66, 10 U.S.C. §866

An additional weakness of the military judicial system is the lack of statutory provision for a military judicial conference or council or for the Court of Military Appeals to promulgate uniform rules for the administration of military justice.[105] Clearly, with the advent of the new Judicial Administration Standards, the military justice system should be surveyed objectively and analytically to determine whether it can or should measure up to those standards which are designed to establish a court system to "serve the courts' basic task of determining cases justly, promptly, and economically."[106] Surely, the military cannot quarrel with this objective.

VI. CONCLUSION

Since the Military Justice Act of 1968 was enacted, the services have continued to expand the responsibility of military judges and to search for ways to provide more independent, more experienced prosecutors and defense counsel. All services have adopted, so far as they are applicable, the American Bar Association Standards for Criminal Justice. Unquestionably, however, legislation is needed to permit further modernization of the system. It is unreasonable to think that there could be a revolution in civilian criminal justice without its having an impact on military justice. Paradoxically and unknown to many of its severist critics, the military has been in the vanguard of

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(1970); *MCM*, *supra* note 54, at para. 91*f*. General court-martial records not involving a general officer, death, or punitive discharge or confinement for one year are forwarded for review by the Judge Advocate General. UCMJ art. 69, 10 U.S.C. §869 (1970). Other records of trial (those by summary court and those by special court not involving a bad conduct discharge) are reviewed by a judge advocate, usually one on the staff of the commander who exercises general court-martial jurisdiction. UCMJ art. 65*c*, 10 U.S.C. §865*c* (1970). The commander exercises one other important appellate judicial function: he acts on prosecution appeals from a ruling by the trial judge dismissing a specification. UCMJ art. 62*a*, 10 U.S.C. §862*a* (1970). While the prosecution should be authorized to appeal certain interlocutory rulings of the trial judge, ABA Standards relating to Criminal Appeals §1.4, the determination of such an appeal should be made by a tribunal which is a part of the independent, unified judiciary.

[105] *See* ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO COURT ORGANIZATION §§1.11, 1.30, 1.31, 1.32, 1.33. In the military, uniform rules are prescribed by the President under UCMJ art. 36, 10 U.S.C. §836 (1970). Chief Judge Quinn of the Court of Military Appeals has suggested that the court should have rulemaking power. Quinn, *Courts-Martial Practice*, 22 HASTINGS L.J. 201, 203 (1971). The nearest analogy to a military judicial conference is the Code Committee, which consists of the three judges of the Court of Military Appeals and the Judge Advocates General of all services. UCMJ art. 67, 10 U.S.C. §867 (1970). If a military judicial conference were prescribed by statute, it should include not only appellate and trial judges, but perhaps also the Judge Advocate General of each service. However, *see* 28 U.S.C. §331 (1970), which establishes the Judicial Conference of The United States and provides that the Attorney General, who is not a member of the conference, shall, upon request of the Chief Justice, make a report. The Judge Advocate General has powers and responsibilities similar in many respects to the Attorney General.

For a brief but informative discussion of the Judicial Conference of the United States, see Myers, *Origin of the Judicial Conference*, 57 A.B.A.J. 597 (1971).

[106] ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO COURT ORGANIZATION §1.00.

this criminal law revolution, and thus has fewer changes to make to modernize itself than many of our states. Because the military has proved that it is capable of administering a system of military justice that fairly protects the rights of the accused and is willing to make even further evolutionary changes in that system, national security should not be jeopardized by an overreaction to the incessant clamoring of a few critics, several of whose writings reflect a lack of objectivity. Fortunately, as in the past, Congress will provide the armed services with an opportunity for a fair hearing before changes are made. Legislation will undoubtedly be enacted to strengthen the authority of the military judge, the independence of defense counsel, and to a certain extent the independence of the appellate courts. As a minimum, this legislation should provide that (1) military juries be randomly selected; (2) military judges of general courts-martial (as well as military appellate judges) be appointed by the President to permanent courts for a term of years, be empowered to issue extraordinary writs in support of their authority in the administration of military justice, be authorized to impose sentences, including probation, in all except capital cases, and be given broadened contempt power; (3) a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals, be established and given power to prescribe rules of procedure and evidence; (4) an accused who has exhausted his military remedies by appeal to the Court of Military Appeals, be permitted to petition the Supreme Court for a writ of certiorari; (5) defense counsel be made as independent of command as possible under the circumstances and be given a fair opportunity to compete for promotions; (6) adequate administrative and logistical support be provided to permit the military judiciary to function independently and efficiently; and (7) commanders, at all levels, be completely relieved of the responsibility of exercising any function related to courts-martial except, acting through their legal advisors, to file charges with a court for trial, to prosecute, and, in the event of conviction, to exercise executive clemency by restoring the accused to duty.

If these changes are made, no one should claim that courts-martial are "simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein."[107] Rather, the courts-martial would be a viable part of a modern judicial system, operating under the judicial umbrella of the Supreme Court of the United States. It should be unnecessary to go further and take the undesirable step of removing the prosecution function from the commander and his legal advisors, as the Bayh and Bennett legislation would do, or to limit further the subject matter

[107] WINTHROP, *supra* note 23, at 49.

jurisdiction of the courts. Rational allocation of the prosecution, defense, and judicial function would give the military a criminal justice system in which both commanders and accused can have confidence.

In brief, although the three legs of Chief Justice Burger's tripod of justice are sounder and as equal in strength in the military as they are in civilian criminal justice systems, there is a need to improve the experience of counsel for both sides, a need to give the defense counsel additional independence, a need to modernize the military judicial structure and its procedures, and a need to augment the military criminal justice system with adequate supporting personnel, services, and facilities in order to make the most effective use of military lawyers and judges.

LOOKING FORWARD: WACKER ON SUPERVISORY WRITS

The preceding article by former Army Judge Advocate General Hodson looked generally at the military criminal justice system and suggested study of changes likely to bring the system even closer to civilian practice. Air Force Captain Wacker here takes an exhaustive, specific look at the United States Court of Military Appeals and posits a legal basis for one major development within the present organizational structure.

This article, too, is critical where accuracy seems to demand comment, but well within Chief Judge Quinn's admonition that the utility of critical appraisal is inversely proportional to the calumny it contains. Wacker provides a useful summary of the aspirations, performance and potential of the Supreme Court of the military, as Chief Justice Warren described the United States Court of Military Appeals. He also relates the court to its constituency and shows one or two facets of the growing interface between this "Article I" court and the federal civilian courts. These are all themes which have played an important part in the literature.[1]

Captain Wacker foresees a marked expansion of the use of supervisory writs by the USCMA. He reaches that expectation from a view of the law-making forces at work, the inability of the court to reach major portions of the system otherwise, and from a view of the intent of Congress concerning the nature and quality of legal controls on the military system. Though new, as "looking ahead" pieces must be, this has the potential to play a substantial role in the progress of military criminal law.[2]

[1] *E.g.*, Willis, *The United States Court of Military Appeals: Its Origins, Operation and Future*, 55 MIL. L. REV. 39 (1972); Weckstein, *Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1 (1971); Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3 (1970).

[2] A more conservative view, before the U.S. Supreme Court opinion in Parisi v. Davidson, 405 U.S. 34 (1972), is presented in Grafman, *Extraordinary Relief and the U.S. Court of Military Appeals*, 24 JAG J. 61 (1969).

THE "UNREVIEWABLE" COURT-MARTIAL CONVICTION: SUPERVISORY RELIEF UNDER THE ALL WRITS ACT FROM THE UNITED STATES COURT OF MILITARY APPEALS†

*Daniel J. Wacker**

Direct judicial review of court-martial convictions is a recent innovation in American military law. Until the enactment of the Uniform Code of Military Justice (UCMJ)[1] in 1951, only severely limited collateral review was available, obtained through petition to the federal courts for a writ of habeas corpus. Under settled doctrine, habeas petitions were entertained only when the accused was still in custody.[2] Furthermore, the scope of review was limited to the narrow question of whether the military tribunal had jurisdiction to try the accused.[3] Thus, prior to the UCMJ, the vast majority of military convictions were reviewed solely by the accused's military commander, although if a serious penalty were involved, ultimate review lay in the hands of the President.[4]

Such non-judicial procedures for the review of convictions reflected

*Captain, JAGC, U.S. Air Force. B.S., 1971, the United States Air Force Academy; J.D., 1974, Harvard Law School. The views expressed in this article are solely those of the author and do not necessarily reflect the views of the United States Air Force or any other governmental agency.

[1] 10 U.S.C. §§801–940 (1970).

[2] *See, e.g.*, Wales v. Whitney, 114 U.S. 564 (1885) (serviceperson's sentence involving restriction to Washington, D.C., held insufficient restraint on personal liberty for purpose of invoking habeas corpus). Recent cases involving civilians have relaxed the custody requirement. *See, e.g.*, Jones v. Cunningham, 371 U.S. 236 (1963) (parole held to be a sufficient custody for purpose of invoking habeas corpus); Carafas v. La Vallee, 391 U.S. 234 (1968) (release of an accused from confinement while a petition for a writ of habeas corpus is pending will not bar relief).

[3] *See, e.g.*, Hiatt v. Brown, 339 U.S. 103 (1950); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). *But cf.* Burns v. Wilson, 346 U.S. 137 (1953) (decided after UCMJ). For a discussion of the history of collateral attack upon court-martial convictions through habeas corpus see *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1208 (1970).

[4] Under General Order No. 7 (1918), *cited in* Currier & Kent, *The Boards of Review of the Armed Services*, 6 VAND. L. REV. 241 (1953), the Army had created "boards of review" to examine all court-martial convictions involving general officers or resulting in sentences of death, dismissal,

the traditional theory that courts-martial and indeed the entire military justice system were mere instruments of command discipline.[5] In response to post-World War II dissatisfaction[6] with this archaic notion, Congress, in enacting the UCMJ, established new military appellate courts and thereby introduced judicial review on a much broader scale.[7] Reformers in Congress hoped that these new courts would check improper command influence and restore confidence in the fairness and impartiality of the military justice system.[8]

Unfortunately, these hopes have not been fully realized. The effectiveness of the military appellate courts created by the UCMJ has been severely hampered by a vestigial Code provision[9] which, in part, limits their jurisdiction to cases involving serious penalties.[10] As a

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dishonorable discharge, or confinement in a penitentiary. The function of these boards, however, was not "judicial" in that they lacked power to reverse or modify findings. The boards served only to advise the Judge Advocate General (JAG), the chief legal officer of the Army, who could adopt their opinion or reject it taking action on his own to affirm or reverse the case. In addition, the JAG could forward the case to the Secretary of War for consideration by the President. Congress enacted this General Order into law in 1920 as Article of War 50½. Act of June 4, 1920, ch. 227, §1, art. 50½, 41 Stat. 797. Following its separation from the Army in 1947, the Air Force continued to be governed by the Articles of War and, therefore, established its own boards of review. Act of July 26, 1947, ch. 343, tit. 2, §§207–08, 61 Stat. 495. The Navy did not establish boards of review until the enactment of the UCMJ. *See generally* Fratcher, *Appellate Review in American Military Law*, 14 MO. L. REV. 15 (1949).

[5] The following statement by a former Judge Advocate General of the Army exemplifies this viewpoint: "Courts-martial are not part of the judiciary of the United States, but are simply instrumentalities of the executive power. They are creatures of order; the power to convene them, as well as the power to act upon their proceedings being an attribute of command." G. Davis, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 15 (3d rev. ed. 1915). *See also* F. Wiener, MILITARY JUSTICE FOR THE FIELD SOLDIER (2d rev. ed. 1944) (handbook for legally untrained court members repeatedly defines the function of a court-martial as dispensation of command discipline).

[6] *See generally* REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE TO THE SECRETARY OF WAR (1946) [hereinafter cited as *Vanderbilt Report*]. The Vanderbilt Committee conducted hearings in eleven cities in order to investigate complaints against the administration of military justice during World War II. The committee found widespread abuses in sentencing practices as well as an alarming degree of command influence over the conduct and outcome of trials. For a discussion of command influence see note 17 *infra*.

[7] 10 U.S.C. §§ 866(b) (1970). Congress created a Board of Review in each service (presently called Courts of Military Review) and a single Court of Military Appeals (COMA) over all of the Boards. *See* pp. 613–14 *infra*.

[8] Congressman Philbin, a member of the House Armed Services Committee, best expressed this sentiment: "This court will be completely detached from the military in every way. It is entirely disconnected with the Department of Defense or any other military branch, completely removed from any outside influences. It can operate, therefore, as I think every Member [*sic*] of Congress intends it should, as a great, effective, impartial body sitting at the topmost rank of the structure of military justice and insuring as near as it can be insured by any human agency, absolutely fair and unbiased consideration for every accused. Thus, for the first time this Congress will establish, if this provision is written into law, a break in command control over courts-martial cases and civilian review of the judicial proceedings and decisions of the military." 95 CONG. REC. 5726 (1949).

[9] 10 U.S.C. § 867(b) (1970).

[10] *See* 10 U.S.C. § 866(b) (1970) (review limited to cases involving flag or general officers, or where punishment extends to death, dismissal, discharge, or confinement for one year or more); *see* p. 614 *infra*.

result, judicial review is still unavailable to most service personnel convicted by court-martial.[11]

This Article focuses upon the appellate jurisdiction of the United States Court of Military Appeals (COMA),[12] the court of last resort within the military justice system.[13] The issue is whether COMA may afford greater access to judicial review by expanding its powers under the All Writs Act[14] and thereby hear cases over which it does not possess ordinary review jurisdiction. The Article will first examine COMA in detail by reviewing its legislative history, examining its statutory jurisdiction, and tracing its emergence as the supreme and supervisory court of the military. Section II of the Article will then consider COMA's initial and short-lived attempt to use the All Writs Act to expand its powers over "unreviewable cases." In arguing that COMA's subsequent retraction of such power was too rash, the Article will consider the Supreme Court's interpretation of the Act. Finally, after noting a recently advanced analysis of supervisory writs, the last Section will present a theory under which COMA, intended by Congress to be the "Supreme Court" of the military, would be able to grant extraordinary relief under the All Writs Act in cases not within its statutory review jurisdiction.

I. THE UCMJ AND COMA: A "SUPREME COURT" FOR THE MILITARY

A. *THE HISTORY OF COMA'S LIMITED JURISDICTION*

The idea of creating a supreme court for the military justice system originated in the Committee on the UCMJ formed by Secretary of Defense James Forrestal in 1948 at the suggestion of Congress.[15]

[11] One study of the courts-martial reviewed by military appellate courts concludes that the Courts of Military Review are able to review only six percent of all courts-martial while COMA has acted in only 17.3 percent of all cases previously referred to a Court of Military Review. *See* Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 76 n. 189 (1972) [hereinafter cited as Willis]. COMA has jurisdiction to act in any case previously reviewed by a Court of Military Review. 10 U.S.C. § 867(b) (1970).

[12] The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, changed "Court of Military Appeals" to "United States Court of Military Appeals." The court remained a "legislative court" created under Article I of the Constitution and located for "administrative purposes only" in the Department of Defense. 10 U.S.C. § 867 (1970).

[13] A discussion of collateral judicial review in the federal courts of court-martial convictions is beyond the scope of this article.

[14] 28 U.S.C. § 1651(a) (1970). For a detailed history of this Act, which originated with the First Judiciary Act, Act of Sept. 24, 1789, ch. 20, §§ 13, 14, 1 Stat. 80, 81, see note 113 *infra*.

[15] For descriptions of the Committee's work by two former members, see Larkin, *Professor Edmund M. Morgan and the Drafting of the Uniform Code*, 28 MIL. L. REV. 7 (1965); Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953) [hereinafter cited as Morgan]. For a detailed examination of the legislative history of the Court of Military Appeals, see Willis, *supra* note 11, at 51–71; W. Generous, SWORDS AND SCALES 44–45, 51 (1973) [hereinafter cited as Generous].

Forrestal instructed the Committee to draft a new military code which could meet three objectives: first, to make uniform the criminal justice systems of the various services; second, to modernize the existing Articles of War in order to protect the rights of service personnel subject to the Code and increase public confidence without unduly hindering military functions; and third, to improve the arrangement and draftsmanship of the existing statute.[16] During the 1949 Congressional hearings on the Committee's draft proposal, these three objectives coalesced into one overriding concern: the elimination of improper command influence,[17] which had long plagued military justice and which had been well publicized during the World Wars.[18]

An appellate court was seen as the key to the effective control of command influence under the proposed bill.[19] In addition, many proponents of such a court contended that the Uniform Code by itself

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[16] Letter from James Forrestal to the Committee on the UCMJ, Aug. 18, 1948, *cited in* Willis, *supra* note 11, at 54.

[17] "Command influence" connotes those improper actions taken by a commander in attempting to influence the outcome of a court-martial. As the "convening authority" of a court-martial, a military commander is responsible for referring charges to a court, choosing the court members from personnel under his command, passing upon certain rulings of the military judge, and performing an initial review of convictions. *See* 10 U.S.C. §§ 822–65 (1970). Such a role in the military justice system provides ample opportunity for abuse. *See generally* West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A.L. REV. 1 (1970) [hereinafter cited as West]. Professor Edmund Morgan, chairman of the Committee on the UCMJ, was one of many witnesses at the congressional hearings on the UCMJ who pointed to command influence as the primary abuse to be corrected by the passage of the Code: "One important concern of the committee throughout its deliberation was the position of military command in the court-martial system. . . . It was recognized from the beginning by the committee that a system of military justice which was only an instrumentality of the commander was as abhorrent as a system administered entirely by a civilian criminal court was impractical." *Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong., 1st Sess. 37 (1949) [hereinafter cited as *1949 Senate Hearings*]. *See Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 626, 640, 647, 665, 718, 741 (1949) [hereinafter cited as *1949 House Hearings*].

[18] *See, e.g.*, Karlen, *The Personal Factor in Military Justice*, 1946 WIS. L. REV. 394. *See also Vanderbilt Report*, *supra* note 6.

[19] In response to a question during the House hearings on what the proposed Code did to curb command influence, Professor Morgan pointed to the improved system of appellate judicial review: "Now [the Boards of Review] can act on the facts. We think that [it is] a means of lessening command influence. And when it is a question of law, the case then—in the severe cases—will go to the [Court of Military Appeals], which will be a civilian court and, of course, entirely outside the influence of any officer." *1949 House Hearings*, *supra* note 17, at 608. In the departmental recommendation on the bill, Secretary of Defense Forrestal also cited the proposed scheme of judicial review as among the most significant steps toward the elimination of command influence. Letter from James Forrestal to Hon. Millard E. Tydings, chairman, Senate Committee on Armed Services, Feb. 8, 1949, 1950 U.S. CODE CONG. SERV. 2263, 2265. When the revised version of the UCMJ finally reached the floor of Congress, numerous legislators hailed the establishment of COMA as the most significant guarantee against command influence. *See, e.g.*, 95 CONG. REC. 3719 (1949) (Congressman Sabath calls COMA the most important part of the UCMJ); *id.* at 5726 (remarks of Congressman Philbin *quoted at* note 8 *supra*); 96 CONG. REC. 1441 (Senator Morse considered there to be "no greater assurance of justice" than COMA); *id.* at 1444 (Senator Kefauver considered COMA to be "a great step toward civilian influence in our military justice").

would be unable to achieve the goal of uniformity in the administration of justice among the various branches of the armed services; they urged that a single supreme court for all the services would ensure that interpretations of the Code and the Constitution were applied uniformly.[20]

The UCMJ was a product of these concerns and, as enacted in 1951, established the following multilayered approach to appellate review in the military. Upon completion of a court-martial, a case is initially reviewed for error by the military commander who convened the court-martial.[21] The convening authority must take preliminary action to affirm, reverse, or modify the findings and sentence.[22] At the next level lies a Court of Military Review[23] within each service empowered to redetermine controverted questions of fact, judge the credibility of witnesses, and review the law.[24] The decision of the Court of Military Review may be appealed to COMA, which is composed of three civilian judges appointed by the President for fifteen-year terms.[25] COMA must hear any such case in which the sentence as affirmed extends to death, involves a flag or general officer, or is certified for review by the Judge Advocate General.[26] In other cases coming from a Court of Military Review, COMA may

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[20] In the House hearings, for example, Professor Morgan stressed that the proposed Court of Military Appeals was "necessary to insure uniformity of interpretation and administration throughout the armed forces." *1949 House Hearings*, *supra* note 17, at 604. Later, in the Senate hearings, he pointed out that an intent to secure uniformity similarly lies behind Article 67(g). *1949 Senate Hearings*, *supra* note 17, at 49. This article provides that COMA and the Judge Advocates General "shall meet annually to make a comprehensive survey of the operation of this chapter" and shall publish an annual report with "recommendations relating to uniformity of policies as to sentences, amendments to this chapter, and any other matters considered appropriate." 10 U.S.C. § 867(g) (1970).

[21] 10 U.S.C. § 860 (1970) (initial action on the record); *id.* § 861 (initial action on the record of a general court-martial). If the convening authority of a special court-martial has approved a sentence of a bad conduct discharge, the record must be sent to the convening authority exercising general court-martial jurisdiction for further review. *Id.* § 865(b). In practice, these commanders are assisted in their review by their staff judge advocates, who are lawyers designated to perform legal duties under the UCMJ. *Id.* § 806.

[22] *See id.* § 862 (situations in which a convening authority may reconsider and revise a ruling or a finding of a court-martial); *id.* § 863 (situation in which a rehearing is improper); *id.* § 864 (rules governing a convening authority's approval of findings and sentence); *id.* § 865(b) (review by a general court-martial convening authority after final action of a special court-martial convening authority in cases involving a bad conduct discharge).

[23] Known as "Boards of Review" under the UCMJ as enacted in 1951, the Courts of Military Review received their present title under the Military Justice Act of 1968, Pub. L. No. 90–632, 82 Stat. 1335 (codified at 10 U.S.C. § 866 (1970)).

[24] 10 U.S.C. § 866(c) (1970).

[25] *Id.* § 867(a)(1).

[26] *Id.* § 867(b)(1), (2). The Judge Advocate General is the chief legal officer within each service. He performs numerous quasi-judicial functions under the Code such as the review of courts-martial under the UCMJ not within the jurisdiction of the Courts of Military Review. *Id.* § 869.

either grant or deny review at its discretion.[27] With minor exceptions, a judgment by COMA is final.[28]

COMA's jurisdiction to review any case under Article 67 is conditioned upon previous review by a Court of Military Review.[29] However, the authority of a Court of Military Review to pass upon a conviction and thus open the way for review by COMA is limited to:

> Every case of trial by court-martial in which the sentence, as approved, affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad conduct discharge, or confinement for one year or more.[30]

With one minor exception,[31] cases falling outside this provision do not receive the attention of any appellate court. An individual convicted by a summary court-martial,[32] a "non-bad conduct discharge" special

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[27] *Id.* § 867(b)(3).

[28] *Id.* § 876. *Cf. id.* § 867(f). The President must review any sentence extending to death or involving a general or flag officer. *Id.* § 871(a). He may commute any such sentence and, in the case of a general or flag officer, may order its suspension. The secretary of each service has a similar duty to pass upon any sentence involving the dismissal of a commissioned officer (other than a flag or general officer), cadet, or midshipman. *Id.* § 871(b). In addition, the service secretary or his representative may remit or suspend any unexecuted portion of any court-martial sentence other than a sentence approved by the President. *Id.* § 874(a). The Judge Advocates General may on the petition of the accused grant a new trial on the grounds of newly discovered evidence or fraud on the court any time within two years after the convening authority's approval of the findings of a court-martial. *Id.* § 873.

A case is never "final" under the UCMJ in the sense that it is immune from collateral attack in the federal courts. Such forms of collateral attack include statutory habeas corpus, *see* 28 U.S.C. § 2241 (1970); Burns v. Wilson, 346 U.S. 137 (1953); suits for back pay in the Court of Claims, *see* 28 U.S.C. § 1491 (1970); Augenblick v. United States, 377 F.2d 586 (Ct. Cl. 1967), *reversed on other grounds*, 393 U.S. 348 (1969); statutory mandamus relief to compel correction of a military record, *see* 28 U.S.C. § 1361 (1970); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965); and requests for a declaratory judgment, *see* 28 U.S.C. § 2201 (1970); Homey v. Resor, 455 F.2d 1345 (D.C. Cir. 1971). *See generally* H. Moyer, JUSTICE AND THE MILITARY §§ 6-100 to 6-394 (1972) [hereinafter cited as Moyer].

[29] 10 U.S.C. §§ 867(b) (1)-(3) (1970).

[30] *Id.* § 866(b). This jurisdictional limitation is based upon the sentence approved by the convening authority, *id.* § 864, or, in the case of a special court-martial which has adjudged a bad conduct discharge, by the general court-martial convening authority, *id.* § 865(b). Thus, in order to "keep the case within the family," a convening authority could reduce the sentence below the Article 66 jurisdictional limit thereby preventing the Court of Military Review from reviewing a case. *Cf.* Robison v. Abbot, 23 U.S.C.M.A. 219, 49 C.M.R. 8 (1974).

[31] Under the UCMJ, the Judge Advocates General may certify the record of any general court-martial, regardless of sentence, to the appropriate Court of Military Review. *Id.* § 869. The decision of this court in such a case may not be reviewed by COMA except upon further certification by the JAG. *Id.* § 867(b) (2). The Judge Advocates General have used certification almost exclusively as a means of appealing Court of Military Review decisions which are adverse to the government. *See generally* Mumney, *Judicial Limitations Upon a Statutory Right: The Power of the Judge Advocate General to Certify Under Article 67(b) (2)*, 12 MIL. L. REV. 193 (1961).

[32] Summary courts-martial, which under the UCMJ consist of one commissioned officer without a military judge, have jurisdiction to try enlisted service personnel for any noncapital offense and to adjudge any sentence prescribed by Presidential regulations except death, dishonorable or bad conduct discharge, confinement for more than one month, hard labor without confinement for more than forty-five days, restrictions to specified limits for more than

court-martial,[33] or any special or general court-martial[34] which has not sentenced him to death, dismissal, discharge, or confinement for more than one year, has no opportunity to obtain review of his conviction by an appellate court. Instead, final review of a special court-martial is conducted by the commanding officer who convened the court[35] and, in the case of a general court-martial, by the Judge Advocate General of the respective service.[36] Thus, for more than ninety percent of all court-martial convictions,[37] review and final disposition of an accused's case still occur only administratively within the command or Judge Advocate General channels of each service.

Congress' rationale for conditioning appellate jurisdiction upon the severity of an accused's sentence is difficult to discern from the legislative history. The subject of limited appellate jurisdiction received only passing attention in the hearings on the UCMJ.[38] The commentary which accompanies Article 66 states only that the Article "adopts the Army system of review by formally constituted

two months, or forfeitures of more than two-thirds of one month's pay. *Id.* §§ 816, 820. The accused may object to a trial by a summary court-martial, in which case the charge is referred to a special or general court-martial.

[33] A special court-martial consists of not less than three members, or a military judge and less than three members, or, if the accused so requests, a military judge alone, provided that one has been detailed to the court and the military approves. *Id.* § 816. A special court-martial has jurisdiction to try all offenses and to adjudge any sentence under regulations prescribed by the President except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, or forfeiture of pay exceeding two-thirds pay per month or any forfeiture of monthly pay for more than six months. *Id.* § 819. A bad conduct discharge, however, may be adjudged only in cases to which a qualified defense counsel and (except in cases of extreme necessity) a military judge have been detailed and in which a verbatim transcript is prepared. If one of these latter requirements is missing, the court-martial is referred to as a "non-bad conduct discharge special court-martial."

[34] A general court-martial consists of a military judge and not less than five members, or at the judge's discretion if the accused so requests, of a military judge alone. *Id.* § 816. It has jurisdiction to try all offenses including those cognizable under the law of war and to adjudge any sentence not otherwise proscribed, including death. *Id.* § 818.

[35] *Id.* § 864 (approval by the convening authority); *id.* 865(c) (disposition of the record after approval by a convening authority). A defendant convicted by a special court-martial always retains the right to petition the Judge Advocate General for "appropriate relief" under revised Article 69. *See* Military Justice Act of 1968, Pub. L. No. 90–632, 82 Stat. 1335 (codified at 10 U.S.C. § 869 (1970)).

[36] 10 U.S.C. § 864 (1970) (approval by the convening authority); *id.* § 865(a) (disposition of the record after approval by the convening authority); *id.* § 869 (review by the Judge Advocate General after review of the general court-martial by the convening authority).

[37] *See* note 11 *supra*.

[38] Professor Morgan's only comment on the subject of appellate review jurisdiction concerned the reason for making review by the Court of Military Review turn upon the sentence as "approved" rather than as ordered into "execution." *See* 10 U.S.C. §§ 865(b), 866(b) (1970). Morgan felt that conditioning the review upon the approved sentence would eliminate the problem posed by a convening authority who might, for example, approve a punitive discharge but "suspend" its execution in order to avoid judicial review. *1949 House Hearings*, *supra* note 17, at 610.

The Committee on the UCMJ made one reference to the limitation upon COMA's review jurisdiction in its commentary on Article 69. In explaining the Committee's decision not to

boards."[39] This "Army system of review" was created in 1918 in response to a shocking incident at Fort Sam Houston, Texas.[40] Following a bitter racial disturbance in which several soldiers and civilians were killed, the local commander court-martialed sixty-three black soldiers for mutiny. Thirteen of the fifty-five who were convicted received death sentences. Since the executions took place hours after the trial, none of those executed had any opportunity to appeal his conviction.

In order to prevent a recurrence of such "summary justice," the Army established several boards of review to render advisory opinions on the legality of convictions.[41] But the very concept of appellate review by such a board, even in an advisory capacity, conflicted with the prevailing notion that courts-martial were but disciplinary instruments of command.[42] Therefore, the Army confined this review procedure to those cases where the sentences were severe enough to cause potentially irremediable injury. To this end the service restricted the boards' jurisdiction in terms almost identical to the present Article 66.[43] This limitation thereby left the control of all but the most serious cases where it had always been—in the hands of the accused's commander.

Under the UCMJ, however, the traditional notion that courts-martial were but disciplinary instruments of command was "going by the board."[44] Nevertheless, the jurisdictional restriction upon appellate review remained. The issue arose in the congressional hearings only during discussion of the appropriate number of judges to handle COMA's workload.[45] The one witness who formally called for automatic judicial review of all courts-martial argued that seven judges could adequately handle the resulting workload.[46] But since

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afford an accused the right to petition COMA for review after an adverse decision by the Court of Military Review in a general court-martial case which the JAG had previously referred to a Court of Military Review under Article 69, *see* note 31 *supra*, the commentary states only that "[s]ince these cases involve minor sentences, no review by [COMA] is felt to be appropriate." *1949 House Hearings*, *supra* note 17, at 1196.

[39] *1949 House Hearings*, *supra* note 17, at 1187 (commentary presented by Felix E. Larkin, Asst. Gen. Counsel to the Dep't of Defense and member of the Committee on the UCMJ). The Senate report on the UCMJ adopts that language of the Code Committee's commentary. S. Rep. No. 486, 81st Cong., 1st Sess. (1949).

[40] *See Hearings on S. 5320 Before the Senate Committee on Military Affairs*, 65th Cong., 3d Sess. 39-43 (1919).

[41] *See* note 4 *supra*.

[42] *See* p. 610 *supra*.

[43] *Compare* Article of War 50½, Act of June 4, 1920, ch. 227, sec. 1, art. 50½, 41 Stat. 797, *with* 10 U.S.C. § 866(b) (1970), *quoted at* p. 614 *supra*.

[44] *1949 Senate Hearings*, *supra* note 17, at 49 (testimony of Professor Morgan).

[45] *1949 House Hearings*, *supra* note 17, at 1281–84; *1949 Senate Hearings*, *supra* note 17, at 52–53.

[46] *1949 House Hearings*, *supra* note 17, at 841; *1949 Senate Hearings*, *supra* note 17, at 252 (statement of Professor Arthur J. Keeffe of Cornell Law School).

estimates of COMA's potential workload varied considerably,[47] the committees decided to adopt a "wait and see" attitude and approved the original proposal for three judges and limited jurisdiction.[48]

B. *COMA'S EMERGENCE AS THE SUPREME COURT OF THE MILITARY*

Despite the statutory restriction upon its ordinary review jurisdiction, COMA was able to exert a firm hand in the military justice system. COMA occupied an unprecedented position[49] and was relatively free to adopt positions and lay down rules with an eye toward the modernization of military justice.[50]

The court moved quickly to secure this position of supremacy by challenging the President's power to make authoritative interpretations of the UCMJ.[51] In 1953, COMA declared a punishment authorized by the President in the new Manual for Courts-Martial[52] to

[47] Estimates of the total proportion of cases which COMA would be obliged to review under its restricted jurisdiction ranged from the Army's figure of eighty-five percent of all courts-martial to the Navy's figure of only five percent. *1949 House Hearings*, *supra* note 17, at 1286; *1949 Senate Hearings*, *supra* note 17, at 260.

[48] *1949 House Hearings*, *supra* note 17, at 1287. There is no indication that Congress affirmatively intended to preserve military control over the review of all convictions resulting in lesser sentences, as it did in restricting jurisdiction of the old Army boards of review. In other words, Congress did not attempt to segregate minor cases from judicial review but rather acted affirmatively to provide an additional level of review—judicial in nature—for the most serious cases. To read into the provisions for judicial review an intention to preserve minor cases for the disciplinary control of the convening authority would be at odds with the purpose behind the passage of the UCMJ itself—the elimination of command influence in the military justice system. *See* p. 612 *supra*. Congress confirmed its intention not to grant complete control over judicially unreviewable courts-martial to the convening authority by providing the defendant in such cases with the means to obtain relief from the Judge Advocate General under "new" Article 69. *See* Military Justice Act of 1968, Pub. L. No. 90–632, 82 Stat. 1335 (codified at 10 U.S.C. § 869 (1970)).

[49] Professor Morgan himself likened COMA to a "supreme judicial military court," *1949 House Hearings*, *supra* note 17, at 609, and other commentators made similar comparisons. *See, e.g.*, Fedele, *The Manual for Courts-Martial—Its Legal Status and the Effect of Decisions of the United States Court of Military Appeals*, 23 FORDHAM L. REV. 323 (1954).

[50] Brosman, *The Court: Freer than Most*, 6 VAND. L. REV. 166 (1953) (author was one of COMA's three original judges).

[51] As Commander-in-Chief, the President had traditionally exercised broad powers to promulgate rules for the administration of military justice having the force of law. *See* Carter v. McClaughry, 183 U.S. 365, 386 (1902); Smith v. Whitney, 116 U.S. 167 (1886); United States v. Freeman, 44 U.S. (3 How.) 556, 567 (1845). The President promulgated the first Manual for Courts-Martial for the Army in 1898 but did not receive formal statutory authority to do so until 1916. Act of Aug. 29, 1916, ch. 418, § 3, art. 38, 39 Stat. 650. This Manual was revised in 1916, 1917, 1920, and 1948. The President promulgated the Naval Courts and Boards, equivalent to the Manual but without formal statutory authorization in 1923 and revised it in 1937. The President issued manuals for the Coast Guard and the Air Force in 1949. *See generally* Moyer, *supra* note 28, at § 2–506.

[52] Under the UCMJ, Congress delegated to the President authority to promulgate a new uniform manual: "The procedure, including modes of proof, in cases before courts-martial . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or

be cruel and unusual and thus prohibited by a specific provision of the Code.[53] In *United States v. Cothern*[54] the court proceeded further and invalidated a presumption in the Manual although it did not conflict with any specific provision of the Code. COMA found the Manual provision, which permitted a court to infer an intent to desert the service solely from the length of an accused's unauthorized absence, repugnant to the principle that desertion required a specific intent.[55] The court explained that "[w]here the Manual conflicts with the Code *or the law, as interpreted by this Court*, it must give way."[56] In spite of heavy criticism,[57] COMA further expanded its role in 1960 by an-

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inconsistent with this chapter." 10 U.S.C. § 836(a) (1970), and to prescribe maximum punishments for offenses, *id.* § 856. Under the authority of Articles 36(a) and 56, the President promulgated a new uniform Manual for Courts-Martial in 1951 and revised it in 1969. Exec. Order No. 11476, 3 C.F.R. 802 (Comp. 1966–70), 34 Fed. Reg. 10502 (1969) (latest revision) [hereinafter cited as MCM]. COMA immediately accorded the new Manual for Courts-Martial the force of law. United States v. Lucas, 1 U.S.C.M.A. 19, 1 C.M.R. 19 (1951), and noted that the only limit which Article 36 imposed upon the President was that the Manual be neither inconsistent with nor contrary to the Code. United States v. Merritt, 1 U.S.C.M.A. 56, 1 C.M.R. 56 (1951).

[53] United States v. Wappler, 2 U.S.C.M.A. 393, 9 C.M.R. 23 (1953) (citing 10 U.S.C. § 855 (1970)). COMA soon invalidated other provisions of the 1951 Manual for Courts-Martial dealing with sentences, *see, e.g.*, United States v. Varnadore, 9 U.S.C.M.A. 471, 26 C.M.R. 251 (1958) (¶ 127b prohibiting confinement for more than six months without a discharge held contrary to Articles 18–20, 66); court-martial procedure, *see, e.g.*, United States v. Jones, 7 U.S.C.M.A. 283, 22 C.M.R. 73 (1956) (procedure in appendix 8a for challenging jurors held contrary to Articles 41, 51); and the privilege against self-incrimination, *see, e.g.*, United States v. Rosato, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953) (provision authorizing an order for defendant to produce handwriting exemplar held contrary to Article 31).

[54] 8 U.S.C.M.A. 158, 23 C.M.R. 382 (1957).

[55] *Compare* MCM, 1951, ¶ 164a(1) *with* 10 U.S.C. § 885(a)(1) (1970).

[56] 8 U.S.C.M.A. at 160, 23 C.M.R. at 384 (emphasis added). For COMA invalidations of other provisions in the Manual which did not conflict with a specific provision in the UCMJ, see United States v. Curtin, 9 U.S.C.M.A. 427, 26 C.M.R. 207 (1958) (Manual provision which purported to make mere constructive knowledge of a lawful order sufficient knowledge to constitute a violation of Article 92(2) for a knowing failure to obey, construed to require actual knowledge); United States v. Johnson, 7 U.S.C.M.A. 488, 22 C.M.R. 278 (1957) (Manual provision in force since 1928 which purported to define the conditions under which a pass may be "abandoned" for purposes of UCMJ offense of desertion under Article 85 held not to control); United States v. Jenkins, 7 U.S.C.M.A. 261, 22 C.M.R. 51 (1956) (Manual provision which defined "enlistment" for purposes of UCMJ's proscription against fraudulent enlistment held invalid). For an elaborate compilation of COMA alterations to the Manual through 1955, see Murphy, *Manual for Courts-Martial: Modification by the Court of Military Appeals*, JAG J., Feb. 1956, at 3.

COMA did recognize a limit to its power to overturn Presidential regulations: "If a rule of evidence prescribed by the President is not contrary to Constitutional due process or to the provisions of the Uniform Code of Military Justice, this Court cannot invalidate the President's directive because its disadvantages outweigh its merits, or because a different procedure is followed in the Federal criminal courts." United States v. Wimberley, 16 U.S.C.M.A. 3, 11, 36 C.M.R. 159, 167 (1966).

[57] *See, e.g.*, REPORT TO HON. WILBUR M. BRUCKNER, SEC'Y OF THE ARMY, BY THE COMM. ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY (Jan. 18, 1960) [hereinafter cited as *Powell Report*]. This committee, composed of Lt. Gen. Powell and nine other general officers, urged legislative reversal of several COMA decisions interpreting the fourth amendment and Article 31, the UCMJ privilege against self-incrimination, in favor of the accused over Government arguments

nouncing its readiness to invalidate provisions of the UCMJ when it found them contrary to the Constitution.[58] A few months later, the court acknowledged the significance of this progression of cases by declaring itself to be the "Supreme Court" of the military.[59]

C. COMA'S SUPERVISION OF MILITARY JUSTICE

Long before declaring itself the military's supreme court, however, COMA had assumed other incidents of "supreme" status besides its authority to invalidate presidential decrees. For example, in *United States v. Clay*,[60] the court encountered the failure of a court-martial president to instruct panel members on the elements of an offense. This omission clearly violated Article 51, which requires such instructions, but the Board of Review had sustained the conviction under the UCMJ's version of the harmless error rule.[61] Nevertheless, COMA overturned the conviction by articulating a judicial exception to the harmless error rule for infractions of procedure which deny "military due process."[62] This result, designed to force courts-martial to com-

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of "military necessity." The Secretary of the Army endorsed the report which continued to receive praise a decade later from the Chief of Staff, formerly a member of the committee. *See* Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. (1971). *See generally* Generous, *supra* note 15, at 133–45.

The Judge Advocates General themselves adopted a position opposed to that of COMA in the 1954 and 1960 annual reports on the operation of the UCMJ. They urged repeal or limitation of several recent COMA holdings in the interest of command discipline. *See* JOINT REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE COAST GUARD OF THE DEPARTMENT OF THE TREASURY (1954), (1960) (issued pursuant to 10 U.S.C. § 867(g) (1970)).

Unofficial criticism was also widespread. *See, e.g.*, Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U.L. REV. 861 (1959).

[58] *See* United States v. Jacoby, 11 U.S.C.M.A. 428, 431, 29 C.M.R. 244, 247 (1960) (COMA acknowledged its duty to interpret the UCMJ "so that it accords with the Constitution if that construction is at all possible" and overruled two earlier cases which construed Article 49 so as to conflict with the sixth amendment). *Cf.* United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963) (acknowledges in dicta that most constitutional safeguards apply to service personnel); United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) (fifth amendment privilege against self-incrimination applicable to service personnel).

[59] United States v. Armbruster, 11 U.S.C.M.A. 596, 598, 29 C.M.R. 412, 414 (1960).

[60] 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

[61] "A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." 10 U.S.C. § 859(a) (1970). This rule is analogous to the federal harmless error rule, codified at 28 U.S.C. § 2111 (1970).

[62] Judge Latimer explained this exception: "There are certain standards in the military accusatorial system which have been specifically set by Congress and which we must demand be observed in the trials of military offenses. . . . We conceive these rights to mold into a pattern similar to that developed in federal civilian cases. For lack of a more descriptive phrase, we label the pattern as 'military due process' and then point up the minimum standards which are the framework for this concept and which must be met before the accused can be legally convicted." 1 U.S.C.M.A. at 77, 1 C.M.R. at 77.

ply with Article 51 in the future, amounted to an exercise of "supervisory power."[63]

COMA pursued the supervisory efforts[64] begun in *Clay*, but soon found the concept of military due process of limited use. The concept was seen to embody only those statutory rights granted service personnel by the UCMJ, and thus did not permit the court to control other objectionable practices not expressly prohibited by the Code.[65] To expand its power over the conduct of courts-martial, COMA

[63] Supervisory power is a doctrine invoked by an appellate court in a criminal case as authority for establishing a rule or procedure which is not required by the Constitution or any statute but is designed to ensure a greater degree of fairness in the criminal justice system. One commentator finds that the Supreme Court, for example, has invoked supervisory power in three different situations: first, cases in which the Supreme Court has promulgated an exclusionary rule to prevent further violation by federal officers of a particular statutory requirement, *see e.g.*, McNabb v. United States, 318 U.S. 332 (1943) (Court announced rule that any confession obtained by federal officers during an illegal detention would be inadmissible at trial even though such a confession might in fact be voluntary); second, cases in which the supervisory power is used to raise the level of "fairness" in the judicial process through the promulgation of procedural rules, *see e.g.*, Jencks v. United States, 353 U.S. 657 (1957) (Court adopted discovery rule requiring Government to produce written statements made before trial by an informer-witness even though such a holding was not constitutionally required); and third, cases in which the Supreme Court has outlawed certain practices of officials which are not illegal or unconstitutional but are nonetheless reprehensible from a judicial perspective, *see e.g.*, Offutt v. United States, 348 U.S. 11 (1954) (summary contempt conviction vacated because the trial judge had acted in a judicially unwise manner even though the Court found that the petitioner's conviction was otherwise warranted by his "reprehensible conduct"). Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 193–213 (1969). Commentators disagree over the judicial origin of supervisory power. *See, e.g.*, Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050 (1965) ("inherent power" of federal courts to remedy unfairness); Comment, *Supervisory Power of the Federal Courts in Criminal Prosecutions*, 9 U. KAN. L. REV. 317 (1961) (constitutional duty to protect the public from governmental abuses).

Since COMA reversed in *Clay* despite the apparent applicability of the harmless error rule, its purpose was not to prevent a specific injustice to the accused. Rather, its decision was an exercise of supervisory power designed to enhance the quality of justice administered by courts-martial in general by requiring trial judges to follow a particular procedure when instructing the court.

[64] These acts of supervision by COMA should not be confused with the supervisory function which the Judge Advocates General perform under the Code when making regulations concerning the administration of military justice. *See, e.g.*, 10 U.S.C. § 806(a) (1970) (imposes duty to "make frequent inspections in the field in supervision of the administration of military justice"); *id.* § 867(g) (COMA and the JAGs to meet each year to prepare a comprehensive survey of the operation of military justice). Such supervision pertains primarily to the regulation of the day-to-day administrative business of the justice system. Policies established under this "supervisory power" are, in the event of conflict, subordinate to those of the Court of Military Appeals. *Cf. United States v. Armbruster*, 11 U.S.C.M.A. 596, 598, 29 C.M.R. 412, 414 (1960) (dicta).

[65] See Judge Brosman's discussion of military due process in United States v. Woods, 2 U.S.C.M.A. 203, 8 C.M.R. 3 (1953). For a critical study of early decisions concerning military due process, see Wurfel, *"Military Due Process": What Is It?*, 6 VAND. L. REV. 251 (1953).

In United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960), the court discarded the *Clay* formulation of military due process. In its place, it applied to all military defendants the protection of the Bill of Rights except those provisions which are "expressly or by necessary implication inapplicable" to service personnel. Furthermore, in United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), the court held that it was obliged to follow all the Supreme Court constitutional holdings except those, once again, "expressly or by necessary implication inapplicable" and applied the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), to the military. *But see* United States v. Prater, 20 U.S.C.M.A. 339, 342, 43 C.M.R. 179,

devised another exception to the harmless error rule which it termed "general prejudice."[66]

The initial applications of this new theory were used to control the acts or omissions of the law officer who occupied a position in a court-martial similar to that of a judge.[67] COMA employed the general prejudice doctrine to reverse convictions in *United States v. Berry*,[68] where a court-martial president[69] had, without authority, attempted to overrule actions of the law officer, and in *United States v. Keith*,[70] where a law officer had conferred with court members out of the presence of the defendant's attorney. Prior to enactment of the UCMJ, the law officer of a court-martial panel had been anything but a judge; he had shared his judicial functions with both the president of the court-martial and the other court members.[71] Both *Berry* and *Keith* represented attempts by the court to enhance the "judicial" character of the law officer under the Code. To support these holdings, COMA cited Congress' avowed goal of eliminating command influence and concluded that this purpose implied a complete break with the old procedure.[72] In its place, the court argued, Congress intended "that

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182 (1971) (Judge Darden hinting that there is no presumption that fifth amendment due process applies to the military).

Recently, the court has begun to use material prejudice or prejudice per se doctrines in reversing cases for violations of constitutional or fundamental statutory rights. *See, e.g.*, United States v. Kaiser, 19 U.S.C.M.A. 104, 41 C.M.R. 104 (1969); United States v. Reynolds, 16 U.S.C.M.A. 403, 37 C.M.R. 23 (1966). These cases have been criticized as deliberate circumventions of the harmless error rule. See, e.g., Brown, Miranda *Errors: Always Prejudicial or Sometimes Harmless?*, 24 JAG J. 51 (1969); Larkin, *When Is an Error Harmless?*, 22 JAG J. 65 (1967).

[66] Judge Brosman of COMA described this exception: "We have in mind here a situation in which the error consists not in a violation of constitutional or legislative provisions, but involves instead an overt departure from some 'creative and indwelling principle'—some critical and basic norm operative in the area under consideration. Such a compelling criterion we find within the sphere of this Court's effort in the sound content of opposition to command control of the military judicial process to be derived with assurance from all four corners of the Uniform Code of Military Justice." United States v. Lee, 1 U.S.C.M.A. 212, 217, 2 C.M.R. 118, 122 (1952). General prejudice is distinct from the concept of material prejudice or prejudice per se, *see* note 65 *supra*. The latter concept establishes an inference that an accused has been specifically prejudiced by the violation of certain constitutional or statutory rights. In contrast, general prejudice is invoked to circumvent the harmless error rule when a reversal is necessary not to prevent the accused from being prejudiced but to deny to the government the fruits of engaging in certain improper practices.

[67] The Military Justice Act of 1968, Pub. L. No. 90–632, 82 Stat. 1335 (codified at 10 U.S.C. § 826 (1970)), changed the term "law officer" to "military judge."

[68] 1 U.S.C.M.A. 235, 2 C.M.R. 141 (1952).

[69] In military justice parlance, the "president" of the court-martial is the highest ranking member of the panel of officers and enlisted people who make up the "court." In courts-martial to which a judge has been detailed, *see* 10 U.S.C. § 826 (1970), the "court" is essentially the jury and the "president" is essentially its foreman. *See id.* at § 851. When a military judge is not detailed to a special court-martial, the president assumes part of the role of a judge as well.

[70] 1 U.S.C.M.A. 493, 4 C.M.R. 85 (1952).

[71] *See generally* Morgan, *supra* note 15; Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3 (1970).

[72] United States v. Berry, 1 U.S.C.M.A. 235, 240, 2 C.M.R. 141, 146 (1952).

the law officer perform in the image of a civilian judge."[73] Congress had not expressly directed such a change in status, however,[74] and COMA finally recognized in *United States v. Biesak*[75] that these developments were "in accordance with *our* aim to assimilate the status of the law officer, wherever possible, to that of a civilian judge of the federal system."[76] So strong was the court's "aim" that COMA subsequently went beyond both the Code and Manual to grant law officers the power to declare mistrials,[77] challenge court members *sua sponte*,[78] and grant changes of venue.[79]

COMA's rulings in these cases were essentially an exercise of supervisory power.[80] In each instance, the court disregarded the actual effect of the alleged "error" upon the outcome of the case; the court's real concern was to establish a stricter standard of judicial conduct applicable in all future cases. The general prejudice doctrine merely served to circumvent the statutory restrictions of the harmless error rule. COMA's assumption of such an active supervisory role ensured that the formation of the military justice system would be a continuing process.[81]

Encouraged by the success of these early supervisory efforts, COMA has developed more formal means of supervision in recent years. The court has used its opinions as a vehicle for issuing formal procedural rules for the conduct of courts-martial.[82] In an effort to

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[73] United States v. Keith, 1 U.S.C.M.A. 493, 496, 4 C.M.R. 85, 88 (1952).

[74] *See* Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MIL. L. REV. 39, 63 (1959).

[75] 3 U.S.C.M.A. 714, 14 C.M.R. 132 (1954).

[76] *Id.* at 722, 14 C.M.R. at 140 (emphasis added). Writing almost twenty years later, Judge Quinn of COMA argued that the court's effort to strengthen the powers and status of the law officer prepared the way for trials before military judges without a court panel, a key innovation of the Military Justice Act of 1968. Quinn, *Courts-Martial Practice: A View from the Top*, 22 HAST. L.J. 201 (1971). *See* 10 U.S.C. §§ 816, 851(d) (1970).

[77] United States v. Stringer, 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954).

[78] United States v. Jones, 7 U.S.C.M.A. 283, 22 C.M.R. 73 (1956).

[79] United States v. Gravitt, 5 U.S.C.M.A. 249, 17 C.M.R. 249 (1954).

[80] COMA had announced its intention to supervise the activities of law officers in an earlier case, United States v. O'Neal, 1 U.S.C.M.A. 138, 144, 2 C.M.R. 44, 50 (1952): "[W]e also recognize the presence in an appellate tribunal of broad authority to regulate the conduct of the trial judge as well as that of the jury. He—the judge—may be 'supervised' in the performance of his official functions by an appropriate appellate bench just as the same agency may 'regulate' the jury in the prosecution of its duties."

[81] The court has continued its efforts to control judicial conduct, *see, e.g.*, United States v. Jackson, 3 U.S.C.M.A. 646, 14 C.M.R. 64 (1954), and to make the law officer an authority figure, *see, e.g.*, United States v. Cole, 12 U.S.C.M.A. 430, 31 C.M.R. 16 (1961); United States v. Johnpier, 12 U.S.C.M.A. 90, 30 C.M.R. 90 (1961); United States v. Duncan, 9 U.S.C.M.A. 465, 26 C.M.R. 245 (1958). *See generally* Bodziak, *The Law Officer Under the UCMJ: Authoritative Court of Military Appeals Concept*, 16 JAG J. 3 (1962).

[82] COMA has formally promulgated rules, effective thirty days after the date of its opinions, in United States v. Care, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969) (requires a military judge to inquire into the prudence of an accused's guilty plea); United States v. Donohew, 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969) (requires the military judge to explain to an accused at trial the elements of his right to counsel); United States v. Rinehart, 8 U.S.C.M.A. 402, 24

free the administration of justice from the specter of command influence, it has established a post-trial procedure to resolve allegations of improper command influence arising on appeal[83] and has outlawed the practice, common among some convening authorities, of withdrawing cases from court-martial panels which they feel were too lenient in other cases.[84]

In its most far-reaching exercise of supervisory power, COMA has acted to curb the growing problem of undue delay in bringing confined defendants to trial.[85] The UCMJ does not provide a bail procedure for pretrial detainees but does grant them the right to either a "speedy trial" or an immediate dismissal of all charges.[86] To force compliance by military authorities with the speedy trial guarantee, COMA established a rebuttable presumption that a denial of the right to a speedy trial has occurred when pretrial confinement exceeds three months.[87] Even more striking in its conceptual significance, however, is COMA's recent extension of this presumption to post-trial delays in cases where a convicted serviceperson is held in confinement for more than three months pending review of the case by a convening authority.[88] Unlike the statutory right to a speedy trial, the right to "speedy disposition" or a remedy for its violation is found nowhere in the Code. Nonetheless, the court accorded service personnel this right as

C.M.R. 212 (1957) (forbids use of Manual for Courts-Martial during trial by court-martial panel members). Judge Duncan proposed another formal rule which would require that an accused be furnished with counsel either on preference of charges or within eight days of arrest or confinement, whichever is earlier. *See* United States v. Mason, 21 U.S.C.M.A. 389, 45 C.M.R. 163 (1972) (separate opinion).

[83] United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), *enforced*, United States v. Board of Review Nos. 2, 1, 4, 17 U.S.C.M.A. 150, 37 C.M.R. 414 (1967). Under this procedure a case involving a post-trial allegation of improper command influence is referred by the Court of Military Review to another convening authority who convenes a "general court-martial" before a judge without court members solely for the purpose of taking evidence on the question of command influence. With the benefit of the judge's findings on this issue, the second convening authority then performs another review of the original trial.

[84] United States v. Walsh, 22 U.S.C.M.A. 509, 47 C.M.R. 926 (1973). The court explained the supervisory nature of its decision: "Discovering no specific prejudice, if a rehearing of any sort is afforded, it, of necessity, must be predicated on the concept of general prejudice. This court has general supervisory power over the administration of military justice. . . . In certain instances where failure to observe recognized standards of proper process is so egregious that important fundamental rights cannot be maintained if the practice is condoned, then we see our duty to act in effort to restore fairness to this appellee and to clearly institutionalize our expectations for future adherence to the standard." *Id.* at 512, 47 C.M.R. at 929 (citation omitted).

[85] *See generally* Tichenor, *The Accused's Right to a Speedy Trial in Military Law*, 52 MIL. L. REV. 1 (1971); Moyer, *supra* note 28, at §§ 2-470 to 2-482.

[86] 10 U.S.C. § 810 (1970).

[87] United States v. Burton, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971). COMA has unrelentingly insisted upon strict compliance with the *Burton* mandate. *See, e.g.*, United States v. Durr, 22 U.S.C.M.A. 562, 48 C.M.R. 47 (1973) *reversing* United States v. Durr, 47 C.M.R. 622 (AFCMR 1973).

[88] Dunlap v. Convening Authority, 23 U.S.C.M.A. 135, 48 C.M.R. 751 (1974).

well as the remedy of dismissal by citing only its desire "to preserve the integrity of the courts-martial system."[89]

A court which possesses the power to invalidate presidential or congressional provisions in order to protect the rights of service personnel has fulfilled the congressional design of creating a supreme court of the military. Viewing this progress with approval, the United States Supreme Court acknowledged in 1968 that COMA was "the court to which Congress has confided primary responsibility for the supervision of military justice in this country and abroad."[90] In spite of such recognition, however, COMA's ability to carry out this responsibility has been seriously and incongruously hampered by its apparent lack of statutory authority to conduct ordinary judicial review of most courts-martial.[91] COMA itself recognized this problem and discovered a means by which to provide limited review of cases not defined by Article 66. As the next Sections will show, however, COMA's attempt to extend its appellate power over such cases was unfortunately and unnecessarily short-lived.

II. COMA AND THE ALL WRITS ACT: INITIAL RESPONSE TO THE "UNREVIEWABLE" COURT-MARTIAL

An opportunity to circumvent the restrictive jurisdictional statute of the military appellate courts arose in 1966 when COMA proclaimed its authority to grant extraordinary relief under the All Writs Act[92] in

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[89] *Id.* at 138, 48 C.M.R. at 754.

[90] Noyd v. Bond, 395 U.S. 683, 695 (1969).

[91] *See* pp. 614–15 *supra*. Recognizing that the "instrument of discipline" notion of military justice, *see* note 5 *supra*, is still erroneously but widely held, several critics have warned of the danger which military control of the review process poses to an accused's right to obtain meaningful review. *See, e.g.*, West, *supra* note 17, at 150–51; 116 CONG. REC. 27678 (1970) (remarks by Senator Bayh). While some commentators have questioned the independence of both COMA and the Courts of Military Review, *see, e.g.*, Benson, *The United States Court of Military Appeals*, 3 TEXAS TECH. L. REV. 1 (1971); Meyer, *The Leaderless Stepchild of the Federal Courts*, The Washington Post, Nov. 3, 1974, § C, at 5, col. 1, they would undoubtedly agree that the possibility of obtaining meaningful relief is greater before one of those courts than before a convening authority alone, especially when claims of command influence are involved. *See* Moyer, *supra* note 28, at § 3–340: "Command influence is most likely to be encountered if a constitutional issue is to be raised, if a novel defense is presented, if vigorous defense would involve the presentation of facts that will reflect adversely on either the accused's or the defense counsel's superiors, if the defense involves some attack on the military justice system itself, if the offense is regarded as a direct threat upon the authority of the commanding officer or the discipline of the unit, or if the defense to be raised is command influence itself." Furthermore, the military's denunciation of COMA's recent trends in the area of constitutional rights, *see Powell Report*, *supra* note 57, betrays its hostility to such allegations of error and underscores the importance from the accused's standpoint of having an opportunity to present constitutional claims to an appellate court.

[92] 28 U.S.C. § 1651(a) (1970): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

United States v. Frischholz.[93] Although not itself a grant of jurisdiction, the Act empowers a court to utilize extraordinary writs[94] ancillary to its primary jurisdiction conferred independently by another statute.[95] There is no requirement that this primary jurisdiction be a presently existing, "actual" jurisdiction. Thus, in *Frischholz*, over five years had passed since COMA had denied the defendant's petition for review under Article 67.[96] Although that conviction had thereby become final and presumably unreviewable, the court held that it possessed authority to issue a writ of error coram nobis in aid of its earlier or "past" exercise of actual jurisdiction.[97] Having asserted All Writs Act

[93] 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966). The holding in *Frischholz* was not without precedent. As early as 1954, Judge Quinn in United States v. Best, 4 U.S.C.M.A. 581, 16 C.M.R. 155 (1954), hinted that COMA possessed extraordinary powers, and a concurring opinion that same year by Judge Brosman revealed a belief that the court came within the All Writs Act, *see* United States v. Ferguson, 5 U.S.C.M.A. 68,86, 17 C.M.R. 68,86 (1954). The question was also raised but left unanswered in *In re* Taylor, 12 U.S.C.M.A. 427, 31 C.M.R. 13 (1961); United States v. Tavares, 10 U.S.C.M.A. 282, 27 C.M.R. 356 (1959); United States v. Buck, 9 U.S.C.M.A. 290, 26 C.M.R. 70 (1958).

[94] Those extraordinary writs available under the All Writs Act include any prerogative writ once available under the common law. Mandamus will issue to compel an inferior court to do its duty, *e.g.*, *Ex parte* United States, 287 U.S. 241 (1932), or to undo an order which an inferior court has already made in excess of its authority, *e.g.*, *In re* Winn, 213 U.S. 458 (1909). Prohibition will issue to restrain a judicial or quasi-judicial tribunal about to take cognizance of matters outside the scope of its authority. *See, e.g.*, *Ex parte* Chicago, R.I. & P. Ry., 255 U.S. 273 (1921). Common law certiorari will issue to compel an inferior court to certify the record of a particular case to the appellate court for review. *See, e.g.*, United States v. Beatty, 232 U.S. 463 (1914). Common law habeas corpus will issue to an inferior officer commanding him to release a person illegally detained or to bring the detainee before the issuing court so that proper disposition may be made of a particular matter. *See, e.g.*, Price v. Johnston, 334 U.S. 266 (1948). Coram nobis will issue to bring before a court a judgment previously rendered by it for the purpose of reviewing an error of fact not apparent in the evidence originally before that court. *E.g.*, United States v. Morgan, 346 U.S. 502 (1954). Other writs available under the All Writs Act which may issue under proper circumstances include subpoena, *see, e.g.*, Bethlehem Shipbuilding Corp. v. NLRB, 120 F.2d 126 (1st Cir. 1941); injunction, *see, e.g.*, FTC v. Dean Foods Co., 384 U.S. 597 (1966); and *ne exeat* to obtain bail in an equity action, *see, e.g.*, D. Ginsberg & Sons v. Popkin, 285 U.S. 204 (1932). *See generally* 9 J. Moore, FEDERAL PRACTICE ¶ 110–26 (1970) [hearinafter cited as Moore]. The actual label used in requesting a writ is unimportant as long as the relief sought is clearly delineated. *See Ex parte* Simons, 247 U.S. 231, 240 (1918). Many petitions to COMA, for example, merely request "appropriate relief," *see, e.g.*, Collier v. United States, 19 U.S.C.M.A. 511, 42 C.M.R. 113 (1970); or "extraordinary relief," *see, e.g.*, Dunlap v. Convening Authority, 23 U.S.C.M.A. 135, 48 C.M.R. 751 (1974). For the types of extraordinary relief which COMA is willing to grant under the All Writs Act, see note 99 *infra*.

[95] Benson v. State Bd. of Parole and Probation, 384 F.2d 238 (9th Cir.), *cert. denied*, 391 U.S. 954 (1968); Edgerly v. Kennelly, 215 F.2d 420 (7th Cir. 1954), *cert. denied*, 348 U.S. 938 (1955).

[96] United States v. Frischholz, 12 U.S.C.M.A. 727, 30 C.M.R. 417 (1961).

[97] United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966). Although in *Frischholz* COMA denied relief on the merits, it has granted relief in other cases in aid of past exercises of jurisdiction despite technical finality of the conviction under 10 U.S.C. § 876 (1970). *See* note 185 *infra*; Del Prado v. United States, 23 U.S.C.M.A. 132, 48 C.M.R. 748 (1974) (coram nobis granted where COMA had earlier affirmed case); Lohr v. United States, 21 U.S.C.M.A. 150, 44 C.M.R. 204 (1972) (although COMA had denied petitioner's earlier petition for ordinary review, it granted "appropriate relief" overturning conviction). *But see* Hendrix v. Warden, 23 U.S.C.M.A. 227, 49 C.M.R. 146 (1974) (having earlier denied ordinary review, COMA dismissed petition for habeas corpus on grounds that conviction was final and relief would not "aid" jurisdiction).

authority, COMA received scores of petitions for extraordinary relief. Borrowing heavily from federal decisions interpreting the All Writs Act,[98] the court granted relief in several situations which it deemed sufficiently "extraordinary."[99]

The next step toward legitimately circumventing its jurisdictional limitations came when COMA held that the mere potential of an exercise of appellate jurisdiction in the future was sufficient under the All Writs Act to support a grant of extraordinary relief. Thus, in *Gale*

[98] *See, e.g.*, West v. Samuel, 21 U.S.C.M.A. 290, 45 C.M.R. 64 (1972). In dismissing a petition for interlocutory relief, the court utilized much of the language appearing in federal decisions: "Extraordinary writs are reserved for really extraordinary causes, and then only to confine an inferior court to the lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. Platt v. Minn. Mining & Mfg. Co., 376 U.S. 240 . . . (1964).

"This supplemental power is to be used only in the exceptional case where there is a clear abuse of discretion or usurpation of judicial power. Banker's Life and Casualty Co. v. Holland, 346 U.S. 379 . . . (1953). It was not intended to be used as a vehicle for piecemeal appeals from interlocutory rulings. *Cf.* United States v. Best, 6 U.S.C.M.A. 39, 19 C.M.R. 165 (1955); Medina v. Resor, 20 U.S.C.M.A. 403, 43 C.M.R. 243 (1971)." 21 U.S.C.M.A. at 291–92, 45 C.M.R. at 65–66.

Like the federal courts, COMA requires that other available remedies be exhausted before a petitioner may seek extraordinary relief. *See, e.g.*, Catlow v. Cooksey, 21 U.S.C.M.A. 106, 44 C.M.R. 160 (1971). *See generally* Moyer, *supra* note 28, at §§ 2–838, 2–844, 6–234.

[99] For example, COMA has shown its willingness to act in cases of illegal pre- or post-trial confinement when a commander's action in confining the accused constitutes an abuse of discretion and the petitioner has exhausted other remedies. *See, e.g.*, Dunlap v. Convening Authority, 23 U.S.C.M.A. 135, 48 C.M.R. 751 (1974); Collier v. United States, 19 U.S.C.M.A. 511, 42 C.M.R. 113 (1970); Johnson v. United States, 19 U.S.C.M.A. 407, 42 C.M.R. 9 (1970). COMA has granted pretrial relief in at least two cases where the trial court patently lacked jurisdiction over the person or the subject matter. Zamora v. Woodson, 19 U.S.C.M.A. 403, 42 C.M.R. 5 (1970), Flenier v. Koch, 19 U.S.C.M.A. 630 (1969). COMA has categorized *Zamora* and *Fleiner* as cases in which the court stands ready to grant relief to prevent a "waste of time and energy" of military courts. Chenoweth v. Van Arsdall, 22 U.S.C.M.A. 183, 188, 46 C.M.R. 183, 188 (1973). COMA invoked this language in Brookins v. Cullins, 23 U.S.C.M.A. 216, 49 C.M.R. 5 (1974), where it granted a writ to halt courts-martial convened by the commander who had previously acted as chief accuser.

COMA will grant extraordinary relief to preserve its own jurisdiction from illegal acts. *See, e.g.*, Maze v. United States Army Court of Military Review, 20 U.S.C.M.A. 599, 44 C.M.R. 29 (1971)(COMA retroactively applied an earlier decision which held unlawful a Court of Military Review's *en banc* reconsideration of individual panel decisions); Jones v. Ignatius, 18 U.S.C.M.A. 7, 39 C.M.R. 7 (1968)(convening authority's reduction of a bad conduct discharge to an additional five months' confinement in order to remove the case from the jurisdiction of the Court of Military Review held illegal since it resulted in a total sentence in excess of what a special court-martial was authorized to give); United States v. Board of Review Nos. 2, 3, 4, 17 U.S.C.M.A. 150, 37 C.M.R. 414 (1967) (writ granted to compel Board of Review to follow procedure established by COMA in earlier case as to the resolution of issues of command influence).

Relief in the nature of coram nobis after completion of appellate review will issue where jurisdictional defects going to the composition of the court-martial appear for the first time, *see, e.g.*, Gallagher v. United States, 22 U.S.C.M.A. 191, 46 C.M.R. 191 (1973), or where there is a new showing of mental incapacity of accused at time of trial, *see, e.g.*, United States v. Jackson, 17 U.S.C.M.A. 681 (1968).

For a comprehensive analysis of COMA decisions involving extraordinary writs, see Moyer, *supra* note 28, at §§ 2–830 to 2–844; Grafman, *Extraordinary Relief and the U.S. Court of Military Appeals*, 24 JAG J. 61 (1969); Rankin, *The All Writs Act and the Military Judicial System*, 53 MIL. L. REV. 103 (1971).

v. United States,[100] the court announced its readiness to grant interlocutory relief in a pending court-martial:

> [Article 67(b)] does not purport to act as a jurisdictional prohibition against granting extraordinary relief at an earlier stage of a criminal proceeding against an accused. Its purpose is to limit our review in cases properly before us as to questions of law. On the other hand, the same article indicates the intent of Congress to confer upon this court a general supervisory power over the administration of military justice.[101]

Since the petitioner in *Gale* sought interlocutory relief in a general court-martial, the case might eventually have come before COMA on ordinary review had Gale received a sentence of adequate severity.[102] However, when *Gale's* broad supervisory language was combined with *Frischholz's* assertions of authority to grant post-trial relief, the prospect arose that COMA might be ready to grant extraordinary relief from any court-martial conviction, including those which it could not ordinarily review under Article 67. In *United States v. Bevilacqua*,[103] COMA initially acknowledged its willingness to grant relief in such a case. There, a special court-martial had sentenced the petitioner to a reduction in grade and partial forfeiture of pay, penalties insufficient to sustain ordinary judicial review. After exhausting his non-judicial review alternatives, the petitioner sought coram nobis relief. Although ultimately denying relief on the merits, COMA stated that the jurisdictional limitation of Article 67(b) would not prevent the court from granting relief in such a case. Citing *Frischholz* and *Gale*, the court broadly interpreted its jurisdiction:

> These comments and decisions certainly tend to indicate that this Court is not powerless to accord relief to an accused who has palpably been denied constitutional rights, in any court-martial; and that an accused who has been denied his rights need not go outside the military justice system to find relief in the civilian courts of the federal judiciary.[104]

The hope that COMA would grant extraordinary relief under *Bevilacqua* in any court-martial was, however, short-lived. Although the Supreme Court's first reference to *Bevilacqua* had not been unfavorable,[105] it shortly thereafter added the following footnote to its opinion in *Noyd v. Bond*:

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[100] 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967).

[101] *Id.* at 42, 37 C.M.R. at 306 (citations omitted). COMA denied relief on the merits. However, COMA soon granted interlocutory relief in aid of potential jurisdiction in several other cases. *See, e.g.*, Brookins v. Cullins, 23 U.S.C.M.A. 216, 49 C.M.R. 5 (1974); Petty v. Convening Authority, 20 U.S.C.M.A. 438, 43 C.M.R. 278 (1971); Fleiner v. Koch, 19 U.S.C.M.A. 630 (1969).

[102] *See* p. 615 *supra*.

[103] 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968).

[104] *Id.* at 11–12, 39 C.M.R. at 11–12.

[105] *See* United States v. Augenblick, 393 U.S. 348, 350 (1969) (in collateral attack upon

> [W]e do not believe that there can be any doubt as to the power of the Court of Military Appeals to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court. A different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes. *Cf.* United States v. Bevilacqua.[106]

Although *Noyd* dealt only with the question of a serviceperson's right to federal habeas corpus relief pending final review of the court-martial conviction by COMA, the language of this footnote, in the opinion of several commentators, dampened COMA's ardor for expanded review.[107] A few months later, COMA "clarified" *Bevilacqua* in *United States v. Snyder*,[108] which concerned a petition for post-trial relief from a conviction that had resulted in a sentence insufficient to sustain COMA's jurisdiction. The court dismissed the petition for lack of jurisdiction after concluding that the requested relief would not "aid its jurisdiction" over any case normally reviewable under Article 67.[109] COMA added that the broad language of *Bevilacqua* must be taken to refer to cases over which it has ordinary review jurisdiction.

By adopting such a restrictive interpretation of the "in aid of jurisdiction" clause of the All Writs Act, however, COMA has unnecessarily limited its ability to grant extraordinary relief in numerous situations potentially affecting the constitutional or statutory rights of service personnel.[110] Had COMA faced a situation slightly different from that in *Snyder*—one that warranted the grant of some sort of supervisory writ—it might have recognized the tendency of such relief to aid the court's ordinary review jurisdiction. As will be discussed in Section III, *Snyder* was not an appropriate case for the grant

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court-martial conviction which had resulted in a sentence below jurisdictional minimums for COMA review, Supreme Court noted in United States v. Juhl, a case decided with *Augenblick*, that extraordinary relief might now be available to the accused under *Bevilacqua*).

[106] 395 U.S. 683, 695 n.7 (1969).

[107] *See, e.g.*, Everett, *Collateral Attack on Court-Martial Convictions*, 11 AF JAG L. REV. 399, 407 n.45 (1969).

[108] 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969).

[109] *Id.* at 482–83, 40 C.M.R. at 194–95.

[110] COMA has refused to entertain petitions for extraordinary relief in numerous situations on the grounds that it lacks jurisdiction. *See, e.g.*, Robison v. Abbot, 23 U.S.C.M.A. 219, 49 C.M.R. 8 (1974) (special court-martial resulting in a bad conduct discharge which the convening authority commuted to forfeiture of pay); McLemore v. Chafee, 20 U.S.C.M.A. 680 (1970) (general court-martial not resulting in sentence sufficient for Article 66 review); Thomas v. United States, 19 U.S.C.M.A. 639 (1970) (summary court-martial); Whalen v. Stokes, 19 U.S.C.M.A. 636 (1970) (non-judicial punishment under Article 15 for minor offenses); Hurt v. Cooksey, 19 U.S.C.M.A. 584, 42 C.M.R. 186 (1970) (administrative decision upon reversal of a court-martial conviction to award back pay only up to the date of expiration of enlistment); *In re* Watson, 19 U.S.C.M.A. 401, 42 C.M.R. 3 (1970) (non-bad conduct discharge special court-martial); *In re* Guadalupe, 18 U.S.C.M.A. 649 (1969) (denial of request for hardship discharge); Mueller v. Brown, 18 U.S.C.M.A. 534, 40 C.M.R. 246 (1969) (administrative denial of conscientious objector discharge application); *In re* Taylor, 12 U.S.C.M.A. 427, 31 C.M.R. 13 (1961) (JAG's decertification of a judge advocate).

of supervisory relief, and therefore its holding should not necessarily be read as excluding the possibility of granting such relief in cases over which the court does not possess ordinary review jurisdiction.

Furthermore, the Supreme Court recently implied in *Parisi v. Davidson*[111] that its cautionary reference to the *Bevilacqua* dicta in *Noyd* was not meant to preclude a more expansive interpretation of the All Writs Act. In *Parisi*, the Supreme Court considered a petition for habeas corpus from a military administrative discharge board's allegedly erroneous denial of a serviceman's application for discharge as a conscientious objector. The Court addressed the question of whether an extraordinary writ from COMA is available as one alternate source of relief which must be exhausted before such an individual may petition the federal courts for a writ of habeas corpus. The Court noted that the proceeding under consideration involved a purely administrative ruling and, citing *Snyder*, stated that COMA is limited by statute to considering appeals from court-martial convictions only. But the Court then added, "Whether this conceptual difficulty might somehow be surmounted is a question for the Court of Military Appeals itself ultimately to decide. *See* United States v. Bevilacqua."[112]

This renewed reference to *Bevilacqua* indicates that a less restrictive interpretation of the "in aid of jurisdiction" clause by COMA would be well-received. Before delineating a somewhat broader interpretation of this clause, however, it is essential first to examine the Supreme Court's construction of the All Writs Act.

III. FEDERAL COURT INTERPRETATION OF THE ALL WRITS ACT

The present codification of the All Writs Act applies to "the Supreme Court and all Courts established by Act of Congress";[113]

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[111] 405 U.S. 34 (1972).

[112] *Id.* at 44 (citations omitted).

[113] 28 U.S.C. § 1651(a) (1970). For the text of the Act, see note 92 *supra*. The All Writs Act dates back to two sections in the First Judiciary Act, Act of Sept. 24, 1789, ch. 20, §§ 13, 14, 1 Stat. 80, 81. Section 13 as carried forth in § 234 of the Judicial Code of 1911, ch. 231, § 234, 36 Stat. 1156, authorized the Supreme Court to grant writs of prohibition or mandamus "in cases warranted by the principles and usages of law." Section 14 as carried forth in § 262 of the Judicial Code, ch. 231, § 262, 36 Stat. 1162, authorized the Supreme Court, the courts of appeals, and the district courts to issue all writs not specifically provided for by statute "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." These two provisions were consolidated in 1948 under 28 U.S.C. § 1651(a).

Section 13 and its successor, § 234 of the Judicial Code, applied exclusively to the Supreme Court. Since they lacked an "in aid of jurisdiction" clause, the Supreme Court had on occasion treated these sections as independent grants of jurisdiction akin to the special supervisory jurisdiction exercised by the Court of King's Bench at common law. *See, e.g., Ex parte* Bradley, 74 U.S. (7 Wall.) 364 (1868). In contrast, § 14 and its successor, § 262 of the Judicial Code, had always been viewed, due to their "in aid of jurisdiction" requirements, as authorizations to grant

thus it applies to COMA. Like other federal courts, COMA must follow the Supreme Court's interpretations of the Act.[114] Unfortunately, the Supreme Court's efforts to construe the All Writs Act have failed to define clearly the Act's grant of power. In an effort to determine the Act's legitimate reach, the following analysis will review the Supreme Court's liberalization of the Act's jurisdictional requirements, examine the cases which have developed the concept of supervisory writs, compare the use of extraordinary writs at common law with the development of supervisory writs, explore the public interest orientation of supervisory writs, and finally, reconsider COMA's restricted view of its extraordinary writs power under the All Writs Act. This discussion will attempt both to gauge the legitimacy of COMA's present course of action and to lay the groundwork for arguing in Section IV for an expansion of COMA's authority to grant extraordinary relief in cases not otherwise within its ordinary review jurisdiction.

A. THE LIBERALIZATION OF JURISDICTIONAL REQUIREMENTS

The essential requirement of the All Writs Act is that the issuance of a writ be "necessary or appropriate in aid of [a court's] jurisdiction."[115] The ambiguity of this standard has given rise to considerable judicial confusion.[116] If narrowly construed, the requirement would

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extraordinary relief only when ancillary to a jurisdiction otherwise acquired by statute over a particular case. *See* pp. 631–34 *infra*.

When the 1948 revision applied the "in aid of jurisdiction" clause generally to all actions under the All Writs Act, some jurists maintained that Congress had withdrawn the above-mentioned supervisory jurisdiction. *See, e.g.*, La Buy v. Howes Leather Co., 352 U.S. 249, 260 (1957) (Brennan, J., dissenting); *In re* Josephson, 218 F. 2d 174 (1st Cir. 1954) (opinion of Chief Judge Magruder).

The Reviser's Note to the 1948 codification, however, reveals no intention to curtail any of the powers once possessed exclusively by the Supreme Court under § 234 of the Judicial Code. The note states only that § 234 was omitted because it was "unnecessary in view of the revised section." H.R. Rep. No. 308, 80th Cong., 1st Sess., A144–A145 (1947). *See* 9 Moore, *supra* note, 94, at ¶ 110.26 n.14 (considers "astonishing" the contention that the 1948 revision withdrew Supreme Court's special jurisdiction under § 234 of the Judicial Code). *Cf.* Fourco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222, 227 (1957) ("No changes of law or policy are to be presumed from changes of language in the [1948] revision unless an intent to make such changes is clearly expressed." *Fourco Glass* was decided after *Josephson* and *La Buy* but dealt with a section other than All Writs Act). The Supreme Court has never resolved this issue. Therefore, in using Supreme Court precedent to interpret the All Writs Act for application to COMA, it is important to bear in mind the distinction between these two components. Only Supreme Court cases which deal with the authority of the courts of appeals to issue writs or those which specify § 14 or its successor, § 262 of the Judicial Code, as the pre-1948 source of extraordinary powers are appropriate for interpreting the extent of COMA's Powers under the All Writs Act.

[114] *Cf.* United States v. Swain, 10 U.S.C.M.A. 37, 27 C.M.R. 111 (1958).

[115] 28 U.S.C. § 1651(a) (1970).

[116] For example, COMA's present interpretation of the "in aid of jurisdiction" clause has been a matter of internal dispute. In his dissent in Collier v. United States, 19 U.S.C.M.A. 511, 517,

authorize courts to grant relief only when essential to the exercise of actual jurisdiction over a case. Through the years, however, the Supreme Court has rejected such a restricted view in favor of a more liberal construction. The result has been to mold the All Writs Act into a flexible tool by which appellate courts can supervise the activities of lower tribunals.

The first departure from the literal terms of the statute came when the Supreme Court approved the issuance of extraordinary writs in aid of past exercises of appellate jurisdiction.[117] As early as 1891, the Court in In re *Washington & Georgetown Railroad Co.*[118] issued a writ of mandamus to enforce a mandate that it had issued in an earlier stage of the litigation although the monetary amount in controversy on remand was no longer sufficient to meet the Court's jurisdictional minimum. In the 1954 case of *United States v. Morgan*,[119] the Supreme Court went one step further and sanctioned the issuance of a writ in aid of a past exercise of jurisdiction under circumstances not amounting to the enforcement of its own prior mandate. Although the petitioner's conviction had long become final and was immune from collateral attack under statutory modes of review,[120] the Court held that the All Writs Act would support the issuance of a writ of coram nobis to correct prejudicial errors not apparent in the evidence originally before the trial court.[121]

Another line of cases expanded the in aid of jurisdiction requirement to cases only potentially within the jurisdiction of an appellate

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42 C.M.R. 113, 119 (1970). Judge Darden argued that a writ can only be said to "aid" the potential jurisdiction of the court if it is essential to prevent frustration of that jurisdiction. He considered the "frustration condition" to be a jurisdictional prerequisite to the grant of relief under the Act even though the Supreme Court had already rejected this position. *See* pp. 632–33 *infra*. He continued to maintain this position each time the court was asked to consider a writ in aid of potential jurisdiction. *See, e.g.*, Petty v. Convening Authority, 20 U.S.C.M.A. 438, 443, 43 C.M.R. 278, 283 (1971) (dissenting opinion). Judge Darden's position is similar to that taken by Chief Judge Magruder concerning the issuance of writs in federal practice. *See, e.g., In re* Josephson, 218 F.2d 174, 177–80 (1st Cir. 1954).

In contrast, the other All Writs Act requirement that a writ be "agreeable to the usages and principles of law," 28 U.S.C. § 1651(a) (1970), has engendered few problems. Although it technically incorporates extraordinary writ practice under the common law, United States v. Hayman, 342 U.S. 205 (1952), the courts have taken the latter requirement to imply little more than the usual rule that they must, as in all matters, follow their own precedents.

[117] This involved the same concept followed by COMA in United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966), when in the aid of a past exercise of jurisdiction, the court proclaimed its authority to grant relief under the All Writs Act. *See* p. 625 *supra*.

[118] 140 U.S. 91 (1891).

[119] 346 U.S. 502 (1954).

[120] *Id.* at 504. Since petitioner was held to be no longer in custody under his federal conviction and sentence, he was not eligible for statutory habeas corpus or statutory coram nobis relief under 28 U.S.C. § 2255 (1970.)

[121] In dissent, Justice Minton joined by three other justices noted that the effect of the decision was to authorize relief in aid of a jurisdiction which had been completely "exhausted." 346 U.S. at 515.

court.[122] In *McClellan v. Carland*,[123] the Supreme Court ruled that a court of appeals could grant interlocutory relief in order to reverse a trial judge's illegal stay of proceedings pending the outcome of litigation in a state court. The Supreme Court conditioned its ruling, however, upon a showing that the writ was necessary to prevent the illegal act from depriving the appellate court of an opportunity to review the case at some point in the future.[124] Two decades later in Ex parte *United States*,[125] the Court held that potential discretionary jurisdiction, as opposed to a jurisdiction which arises automatically upon the request of the accused, was sufficient to support extraordinary relief.[126] The Court continued to limit the use of such relief to situations where issuance was necessary to prevent an illegal act by a trial judge which could thwart the eventual attachment of appellate jurisdiction over the particular controversy in question.[127]

Gradually, the Supreme Court relaxed this "frustration of jurisdiction" requirement for extraordinary relief. In *Adams v. United States* ex rel. *McCann*,[128] the Court suggested for the first time that the phrase "necessary for the exercise of . . . jurisdiction"[129] did not mean necessary to prevent frustration of jurisdiction.[130] However, since

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[122] This involved the same concept followed by COMA in Gale v. United States, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967), where the court announced its readiness to intervene in a pending court-martial. *See* p. 627 *supra*.

[123] 217 U.S. 268 (1910).

[124] *Id.* at 280.

[125] 287 U.S. 241 (1932). The government sought a writ of mandamus directly from the Supreme Court to compel a district court judge to issue a bench warrant so that the prosecution of an indicted defendant might begin.

[126] Direct appellate review of the district judge's decision lay in the court of appeals; the Supreme Court had only discretionary jurisdiction on petition for a statutory writ of certiorari. In holding that this discretionary jurisdiction was sufficient to support issuance of a writ, the Court rejected its contrary holding in two earlier cases, *In re* Massachusetts, 197 U.S. 482 (1905), and *In re* Glaser, 198 U.S. 171 (1905), 287 U.S. at 247.

[127] *Id.* at 246. In this case, the issue was whether a district court judge could refuse to issue a bench warrant after a Grand Jury had returned an indictment. The Supreme Court took jurisdiction under the All Writs Act on the government's showing that the Court's potential jurisdiction would be thwarted since the person indicted might never have been arrested and brought to trial. As a result, the appellate court would never have had an opportunity to review the conviction which might have resulted.

[128] 317 U.S. 269, 273 (1943). The court of appeals had granted a writ of common law habeas corpus under the All Writs Act in a case over which it had already acquired "actual" jurisdiction through the petitioner's filing of a formal appeal. Seeing obvious merit in the indigent petitioner's case, the court of appeals did not require him to undergo the hardship of prosecuting his formal appeal to completion but instead overturned his conviction on this petition for the writ. On certiorari, the Supreme Court held that the appellate court did not abuse its discretion in granting extraordinary relief but reversed on the merits.

[129] Under § 262 of the Judicial Code of 1911, ch. 231, § 262, 36 Stat. 1162, the version of the All Writs Act in effect at that time, courts could issue all writs "which may be necessary for the exercise of their respective jurisdictions." Under the present codification, courts may issue all writs "necessary *or appropriate* in aid of their respective jurisdictions. . . ." 28 U.S.C. § 1651(a) (1970) (emphasis added).

[130] 317 U.S. at 273. The Court observed that "[a] Circuit Court of Appeals is not limited to

Adams involved a writ issued in aid of jurisdiction which had already attached, the Court's comment could not immediately be applied to situations involving only potential jurisdiction. Continuing the liberalizing process in Ex parte *Peru*,[131] the Court totally removed the "frustration condition" from its own authority to grant extraordinary relief in cases over which it possessed only potential jurisdiction. However, the holding could not be applied to situations involving the potential jurisdiction of other courts covered by the All Writs Act because the Supreme Court partially relied upon its exclusive power under section 234 of the Judicial Code of 1911.[132] Finally, in the 1943 case of *Roche v. Evaporated Milk Association*,[133] the Court held that possible frustration of jurisdiction was not a necessary prerequisite to a court of appeals' granting extraordinary relief in a case involving only potential jurisdiction. Citing *Adams*, the Court characterized the frustration condition as merely one "[c]onsideration . . . of importance" which a court of appeals should take into account when deciding whether extraordinary relief is warranted in a particular case.[134] Although the practical effect of *Roche* was to retain the frustration condition as a rule of propriety[135] governing appellate discretion to grant extraordinary relief, the decision did imply that the restraint was judicially created and could be changed by the Supreme Court.

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issuing a [common law] writ of habeas corpus [under the All Writs Act] only when it finds it is 'necessary' in the sense that the court could not otherwise physically discharge its appellate duties." *Id.*

[131] 318 U.S. 578 (1943). Claimants had filed a libel in district court against a vessel which claimed immunity from suit by virtue of Peruvian government ownership. Although the State Department officially recognized Peru's claim, the district judge refused to honor it and proceeded with trial. The Peruvian government bypassed the court of appeals and sought an interlocutory writ directly from the Supreme Court. Although its potential jurisdiction was not threatened, the Court issued the writ directly to the district court noting that the "public importance and exceptional character" of the case required immediate action. *Id.* at 586. *See also* United States Alkali Export Ass'n v. United States, 325 U.S. 196 (1945); De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212 (1945).

[132] Ch. 231, § 234, 36 Stat. 1156. *See* note 113 *supra*.

[133] 319 U.S. 21 (1943). The court of appeals had granted a writ of mandamus to compel reinstatement by a district judge of the defendant's plea in abatement to an antitrust indictment. The case had not yet come within the appellate court's actual jurisdiction nor did the action of the trial judge tend to frustrate appellate review.

[134] *Id.* at 26. In reversing, the Court made it clear that the flaw in the appellate court's decision was not lack of jurisdiction to issue the writ, but only improper exercise of its discretion. *Id.* at 25–26.

[135] A rule of propriety is distinct from a jurisdictional prerequisite. The latter is, of course, founded upon statute and therefore represents the minimum restriction placed upon a court's ability to act. A rule of propriety, however, is a judicially created standard which governs a court's exercise of discretion under a jurisdictional statute. *See* Bell, *The Federal Appellate Courts and the All Writs Act*, 23 Sw. L.J. 858, 860 (1969) [hereinafter cited as Bell]. A court which acts in violation of a rule of propriety does not necessarily exceed its powers under the statutory grant of jurisdiction but may still be guilty of an abuse of discretion. Under the All Writs Act, the rules of propriety function to confine a court's exercise of "extraordinary" power to situations requiring "extraordinary" action.

After a flurry of cases suggesting the possibility of such change,[136] the Court in *La Buy v. Howes Leather Co.*[137] finally upheld the grant of a writ by a court of appeals under circumstances posing no threat to potential jurisdiction.

In *La Buy* a district judge had referred two antitrust cases to a master over the objections of all parties. Federal Rule of Civil Procedure 53(b) clearly permitted a district judge to refer a complex case in an exceptional situation and left the determination of the requisite exceptionality to the judge's discretion. Finding an abuse of this discretion, the court of appeals granted a writ of mandamus directing the trial judge to hear the case himself.[138] On certiorari to the Supreme Court, Judge La Buy argued that the court of appeals had no power to issue the writ since the disputed reference did not tend to frustrate appellate review. The Supreme Court acknowledged that Judge La Buy's order could have been reviewed on appeal from final decision, but cited *Roche* and rejected La Buy's argument:

> The question of naked power has long been settled by this court. . . . Since the Court of Appeals could at some stage of the proceedings entertain appeals in these cases, it has power in proper circumstances as here, to issue writs of mandamus reaching them.[139]

The Court then paid lip service to the traditional notion that mandamus could issue only to correct a "clear abuse of discretion or 'usurpation of judicial power'."[140] Although the disputed reference was clearly within Judge La Buy's power, the Court purported to find an abuse of discretion and upheld the grant of the writ.

Had the reasoning in *La Buy* ended there, the decision's significance would have been limited to liberalizing the in aid of jurisdiction requirement of the All Writs Act. Read this way, *La Buy* clearly authorizes an appellate court inferior to the Supreme Court to grant extraordinary relief in aid of potential jurisdiction in certain circumstances even in situations where relief is not essential to prevent frustration of that jurisdiction. The truly significant aspect of this decision, however, was the Court's invocation of a concept which it termed "supervisory control."

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[136] *See, e.g.*, Parr v. United States, 351 U.S. 513 (1956); Banker's Life & Cas. Co. v. Holland, 346 U.S. 379 (1953).

[137] 352 U.S. 249 (1957).

[138] Howes Leather Co. v. La Buy, 226 F.2d 703 (7th Cir. 1955).

[139] 352 U.S. at 255.

[140] *Id.* at 257.

B. THE CONCEPT OF "SUPERVISORY WRITS"

La Buy made a qualitative as well as a quantitative leap in extraordinary writ theory by suggesting that lower appellate courts should and do exercise a supervisory function in the federal judicial system: "We believe that *supervisory control* of the District Courts by the Courts of Appeals is necessary to the proper judicial administration in the federal system."[141] The impetus for the Court's important remark may have sprung in part from the specific circumstances of the case, particularly the fact that the evidence of Judge La Buy's alleged abuse of discretion was far from overwhelming. The Supreme Court attempted to supply evidence of such an abuse by likening the situation in *La Buy* to two earlier cases, *Los Angeles Brush Corp. v. James*[142] and *McCullough v. Cosgrave*,[143] where the Court granted writs preventing the reference of patent cases to masters without a showing of the requisite exceptional circumstances. In both cases, however, the references were made pursuant to a prior agreement among the judges of the district to refer all antitrust cases to masters regardless of their exceptionality. The agreement, therefore, amounted to a nullification of the federal rule. In *La Buy* no such agreement, either express or implied, existed. Undaunted, the Court purported to find a similarity insofar as references by district judges had become an "all too common" practice which had invoked adverse comment from the court of appeals.[144] Thus, despite the attempted justification in traditional terms, the Supreme Court's apparent intention was to permit an inferior appellate court to exercise supervisory control over lower courts to discourage the use of references in future cases.

Aside from discussing *Los Angeles Brush* and *McCullough*, the Court did not explain the term "supervisory control." Since Congress has not granted a common law supervisory jurisdiction[145] to the federal

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[141] *Id.* at 259-60 (emphasis added).

[142] 272 U.S. 701 (1927) (original grant of mandamus by the Supreme Court under successor version of § 13 of the First Judiciary Act). *See* note 113 *supra*.

[143] 309 U.S. 634 (1940) (original grant of mandamus by the Supreme Court per curiam). *See* note 142 *supra*.

[144] 352 U.S. at 258 (citing Krinsley v. United Artists Corp., 235 F.2d 253, 257 (7th Cir. 1956)).

[145] At common law an appellate court had an inherent power under its supervisory jurisdiction to prevent injustice by intervening in cases pending before lower courts or to grant relief in cases not otherwise reviewable under statute. 1 W. Holdsworth, HISTORY OF THE ENGLISH LAW 226 (7th rev. ed. 1956) [hereinafter cited as Holdsworth]. An exercise of supervisory *jurisdiction* is distinct from an exercise of supervisory *power* in that an appellate court invokes its supervisory power to support a decision in a case already before it under ordinary statutory jurisdiction. *See* note 63 *supra*.

Federal courts of appeals occasionally refer to what they incorrectly call their "supervisory jurisdiction" when issuing a writ to an inferior court. In such cases, the court in fact has merely invoked power to issue a writ under the All Writs Act in aid of actual or potential jurisdiction

appellate courts,[148] the Court clearly did not intend to imply that the courts of appeals possessed such jurisdiction. In order to understand the function suggested by the Court's enigmatic reference to "supervisory control," it is helpful first to consider the circumstances under which common law courts once granted "supervisory writs."[147]

C. *EXTRAORDINARY WRITS: A COMPARISON OF COMMON LAW AND FEDERAL COURT CONCEPTS*

In England all of the extraordinary or prerogative writs originated in the Court of King's Bench.[148] The writs of mandamus and certiorari were the means by which King's Bench carried out its responsibility to supervise the administration of justice in the lower courts.[149] The broad concern for the public interest inherent in a court's decision to grant mandamus or certiorari[150] distinguished these supervisory writs from the institutional conflicts which gave rise

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over the particular matter before it. *See, e.g.*, Smith v. Katzenbach, 351 F.2d 810 (D.C. Cir. 1965); United States v. United States Dist. Ct., 238 F.2d 713 (4th Cir. 1956), *cert. denied sub nom.*, Valley Bell Dairy Co. v. United States, 352 U.S. 981 (1957).

[148] The Supreme Court, however, may be an exception. *See* note 113 *supra*.

[147] A "supervisory writ," as the term is used in this Article, is not necessarily issued under a supervisory jurisdiction, *see* note 145 *supra*, but may be granted in aid of a statutory jurisdiction. A supervisory writ connotes that type of extraordinary relief granted when an appellate court proceeds by means of a writ to carry out its unique responsibility to "supervise" the administration of justice. The result accomplished by a supervisory writ issued in a case not then before the court is, therefore, similar to the result accomplished by an exercise of supervisory power in a case already before the court.

[148] 1 F. Pollock & F. Maitland, THE HISTORY OF ENGLISH LAW 150-51 (2d rev. ed. 1959) [hereinafter cited as Pollock & Maitland]. A writ was "prerogative" because it issued at the behest of the King, himself theoretically a judge on the Court of King's Bench, to protect royal interests. de Smith, *The Prerogative Writs*, 11 CAMB. L. J. 40, 56 (1953) [hereinafter cited as de Smith].

[149] Professor Jaffe has traced the functional origin of these two writs: "In granting certiorari and mandamus, Chief Justice Holt said in 1700: '[N]o court can be intended exempt from the superintendency of the King in this court . . . .' Lord Coke, who appears to have invented mandamus, if not out of whole cloth then at least out of a few rags and tatters, asserted King's Bench jurisdiction 'so that no Wrong or Injury, either Publick or Private, can be done, but that it shall be reformed or punished by due Course of Law.' Lord Mansfield's claims for the writ were no less grandiose: 'It was introduced to prevent disorder from a failure of justice and defect of the police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there *ought* to be one.' " L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 462 (Ab. Stu. Ed. 1965) (citations omitted) (emphasis added by Jaffe) [hereinafter cited as Jaffe]. *See also* Jaffe & Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L. Q. REV. 345 (1956).

[150] At early common law, the writ of certiorari was demandable in criminal cases as of right only by the crown. 1 Holdsworth, *supra* note 145, at 228. Furthermore, in review of a criminal case by supervisory certiorari the only factor subject to scrutiny is the external validity of the record including both the sufficiency of the charges and the apparent jurisdiction of the trial court. *Id.* at 213. 10 Holdsworth, *supra* note 145, at 244 (1st ed. 1938). This limited scope of review arises from the theoretical basis of the supervisory function itself—the notion that a supreme court possesses the inherent power to preserve the integrity of the judicial system

to the other prerogative writs.[151] In deciding whether to exercise discretion to issue a supervisory writ, a court would weigh the public significance of the case against the purely private interest of the petitioner.[152]

As the political conflicts which had nourished the growth of the prerogative writs at common law gradually disappeared, however, the distinction in availability among various writs also faded. The weighing of the public interest in the decision to grant mandamus and certiorari became less pronounced as the issuance of writs to correct technical "excesses" of jurisdiction grew more predictable.[153] Both writs were applied in circumstances more varied than before. Certiorari, for example, became available not only to correct specific excesses of jurisdiction but also to conduct a general review of the record both as to questions of law and the sufficiency of the evi-

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against the blatant abuses of its officers. This integrity suffers when the proceedings fail to present even an external appearance of legality. Thus, a writ will issue to remedy such an apparent abuse of jurisdiction in order to preserve the public image of justice. Conversely, review that went beyond the external validity of the record would not as directly tend to preserve this integrity and would inure primarily to the benefit of the individual petitioner. Supervisory certiorari, therefore, is unavailable in such a case, which falls more appropriately within the class intended to be governed by statutory modes of review.

[151] The writ of prohibition, for example, originated during the conflict between the ecclesiastical and the common law courts and was used to protect the royal courts from the former's overzealous assertion of power. 1 Pollock & Maitland, *supra* note 148, at 129, 250-51, 479. It was later used to stem the rising power of the courts of admiralty. de Smith, *supra* note 148, at 49. Similarly, King's Bench utilized habeas corpus to extend the jurisdiction of common law courts at the expense of admiralty courts and the Chancery by releasing royal subjects who had been confined illegally. 9 Holdsworth, *supra* note 145, at 108–25 (3rd ed. 1944). The writ of error coram nobis served to enhance the King's position as the "fountain of justice" under the common law. 1 W. Blackstone, COMMENTARIES *266, as against other courts by relieving manifest injustice apparent from facts outside the record of trial. 1 Holdsworth, *supra* note 145, at 224. The writ forced a return of the record to the trial court for appropriate action in light of the facts not brought out at the original trial. *See* 28 ST. JOHN'S L. REV. 295 (1954).

[152] *See* Jaffe, *supra* note 149, at 462-64. The same public interest notion operated in the Supreme Court's decisions to grant extraordinary relief in *Ex parte* United States, 287 U.S. 241, 248–49 (1932) and *Ex parte* Peru, 318 U.S. 578, 586 (1943). *See* pp.632–33 *supra*. Writs such as prohibition or habeas corpus would be granted as a matter of right where a petitioner had established that proper grounds existed for exercise of the King's prerogative. *See* de Smith, *supra* note 148, at 44, 55. Mandamus and certiorari, however, were never issued as a matter of right; their issuance lay totally within the discretion of the issuing court. A court would always refuse to issue mandamus or certiorari where the injury to the public from its grant would outweigh the value to the petitioner.

The public interest factor also governs the discretionary grant of statutory certiorari by the Supreme Court. According to Chief Justice Taft, "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). *See* NLRB v. Mexia Textile Mills, Inc., 339 U.S. 563n 572-74 (1950) (Frankfurter, J., dissenting).

[153] During the Age of Reform in nineteenth century England, certiorari, mandamus, and prohibition became available for a wide variety of purposes including the examination for validity of local laws and ordinances, corporate actions, and administrative decisions. 14 Holdsworth, *supra* note 145, at 244–49 (1st ed. 1964).

dence.[154] Thus, it is not surprising that a doctrine of supervisory certiorari never arose in the federal system.[155]

The federal courts, of course, are not creatures of the common law; they possess only the jurisdiction conferred upon them by Congress in accordance with the Constitution. The common law writ of certiorari available under the All Writs Act retained a very limted function unrelated to supervision.[156] Similarly, supervisory mandamus never acquired an indentity in the federal courts distinct from that of traditional mandamus.[157] Therefore, when the term supervisory mandamus was used in *La Buy*, the Court could have meant nothing more than traditional mandamus.[158] However, the fact that *La Buy* approved for the first time the use of a writ by a court of appeals in a unique situation[159] suggests a contrary conclusion. Professor Moore reads *La Buy* as establishing a new category of "supervisory mandamus" whose exercise is regulated by a set of propriety standards distinct from those governing traditional mandamus.[160]

[154] 14 AM. JUR. 2d *Certiorari* § 2 (1964). Under the common law as inherited in many states, however, mandamus and certiorari did continue to function in a supervisory capacity. Some states incorporated the concept of supervisory control by the highest court into their state constitutions. *See Annot.*, 112 A.L.R. 1351 (1938). Other states maintained the same concept as part of the common law. In states of both categories, certiorari still remains the primary means by which the Supreme Court can review the legality of any judicial act of a lesser tribunal when a statutory mode of review is unavailable.

[155] Congress never specifically authorized the federal courts to grant common law certiorari except under the All Writs Act in aid of a jurisdiction otherwise granted. The courts of the District of Columbia functioned originally as common law courts of general jurisdiction, however, and thus could issue the writ as an original matter, although common law certiorari fell into disuse following the Supreme Court's decision in Degge v. Hitchcock, 229 U.S. 162 (1913) (Postmaster General's order after hearing barring the use of the mails held not reviewable on common law certiorari). The Second Circuit thereafter hinted that supervisory certiorari might be available to review the external validity of draft board proceedings, *see* Angelus v. Sullivan, 246 F. 54 (2d Cir. 1917), but this suggestion was never adopted by the courts of appeals. *See, e.g.*, Drumheller v. Berks County Local Bd. No. 1, 130 F.2d 610 (3d Cir. 1942).

[156] Common law certiorari has most often been utilized where review by statutory writ is unavailable either because a lower court erroneously denied leave to appeal, *see, e.g.*, Stiffler v. United States, 319 U.S. 38 (1943), because the case was never technically "in" a court of appeals from which a case could be taken to the Supreme Court, *see, e.g.*, House v. Mayo, 324 U.S. 42 (1945), or in order to bring the entire record of a proceeding before a court so that it might more effectively consider a petition for extraordinary relief, *see, e.g.*, De Beers Consol. Mines v. United States, 325 U.S. 212 (1945). These functions are unrelated to supervision in that they primarily benefit only the petitioner and do not have the public interest orientation inherent in the supervisory function. *See* pp. 639–41 *infra*.

[157] However, courts have sometimes incorrectly referred to the grant of traditional mandamus against an inferior court by an appellate court as an example of "supervision." *See, e.g., In re* Josephson, 218 F.2d 174, 179 (1st Cir. 1954).

[158] *E.g.*, Doble v. United States Dist. Ct., 249 F.2d 734, 735 (9th Cir. 1957); Massey-Harris-Ferguson, Ltd. v. Boyd, 242 F.2d 800, 803 (6th Cir. 1957).

[159] *La Buy* was the first time that the Supreme Court upheld the grant of a writ by a court of appeals in aid of potential jurisdiction to remedy a situation which did not tend to thwart the appellate court's exercise of jurisdiction. *See* p. 634 *supra*.

[160] *See* 9 Moore, *supra* note 94, at ¶ 110.26–.28 (1970). *See also* Belcher v. Grooms, 406 F.2d 14, 16 n.3 (5th Cir. 1968). *But see* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 771–80 (1957) (fears that a concept of "supervisory mandamus" might be used to circumvent the final decision rule).

D. A PUBLIC INTEREST THEORY OF SUPERVISORY WRITS

A recent analysis of the All Writs Act seeks to resolve these conflicting conclusions by interpreting *La Buy* to authorize a form of mandamus broader in scope than traditional mandamus but still sufficiently circumscribed so as not to allow courts of appeals an unrestrained review of interlocutory rulings by district courts.[161] According to this theory, supervisory mandamus would issue against a judge in a particular case to correct an instance of a "significant erroneous practice" commonly engaged in by trial judges.[162] For supervisory mandamus to issue, the practice in question need not constitute an abuse of discretion or usurpation of power as required under traditional standards of propriety. Rather, the practice need be only of such magnitude as to affect adversely the administration of justice in future trials should it continue unchecked.[163]

According to this theory, *La Buy* can also be read to authorize a practice of "advisory mandamus" designed to settle "novel and important" questions of law arising during trial on the disputed rulings of the trial judge.[164] Under this analysis, a writ may issue to decide such questions whenever the following factors are present: (1) when the same novel question is likely to arise soon in other trials, thereby increasing the usefulness of an immediate instructive decision; (2) when a likelihood exists that the trial judges in those other cases may enter an erroneous decision because the basic issue remains unsettled at the appellate level; and (3) when the alternative of awaiting resolution on the matter of ordinary appeal is unsatisfactory, either because the question is of a type difficult to reach on appeal or because the unsettled state of the legal question would cause prejudice in the

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[161] Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973) [hereinafter cited as *Supervisory Mandamus*]. The Note does not deal with the "in aid of jurisdiction" clause of the All Writs Act in the manner in which it arises in this Article. Since a final judgment in any case in a lower federal court is ultimately reviewable in some federal appellate court, the Note assumes for purposes of its analysis that the jurisdictional requirement has been met through the existence of potential jurisdiction. *See id.* at 596– n.7.

[162] *Id.* at 610.

[163] *Id.* at 610–11.

[164] *Id.* at 611. The Note cites two lower court cases which have invoked *La Buy* to support "advisory" uses of mandamus. *Id.* at 613 n.76. In Atlass v. Miner, 265 F.2d 312 (7th Cir. 1959), *aff'd*, 363 U.S. 641 (1960), decided two years after *La Buy*, the Seventh Circuit granted mandamus compelling a trial judge to revoke an oral discovery order in an admiralty case. The court found that this order, made pursuant to a local rule of court, involved a "fundamental procedural question" the resolution of which would "affect procedure in all admiralty proceedings." 265 F.2d at 313. A decade later, the Fifth Circuit in SEC v. Krentzman, 397 F.2d 55 (5th Cir. 1968), utilized *La Buy* in a similar manner. In a corporate reorganization proceeding, the SEC moved the district court for permission to cross-examine witnesses and to introduce evidence at the bankruptcy hearing. The district judge denied the motion under an erroneous interpretation of the Bankruptcy Act. Proclaiming the need for a rapid resolution of this issue of first impression, the court of appeals cited *La Buy* and issued the writ.

interim.[165] This theory is supported by two decisions since *La Buy* in which the Supreme Court suggested that the grant of a writ to settle new and important questions of law is an appropriate exercise of an appellate court's duty of supervision under proper circumstances.[166]

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[165] *Supervisory Mandamus*, *supra* note 161, at 611–12.

[166] *Id.* at 613, 622. In Schlagenhauf v. Holder, 379 U.S. 104 (1964), the district judge ordered the defendant in a negligence action to submit to a physical examination pursuant to Rule 35 of the Federal Rules of Civil Procedure which authorizes the judge to order such a test for "good cause" when a physical condition is "in controversy." Although the constitutionality of the rule as applied to a plaintiff had long been established, the defendant attacked the order on constitutional and statutory grounds and further asserted that the requirements of "good cause" and "in controversy" did not exist. Denying his petition for a writ, the court of appeals upheld the constitutionality of the rule but did not reach his alternate contention because his petition did not allege a "usurpation of power" as required by traditional mandamus doctrine. In affirming the denial of the writ, the Supreme Court agreed that the constitutional issue presented a question for traditional mandamus. However, the Court remanded the defendant's alternate contention to the court of appeals stating that as long as the case was already before the court on a traditional power question, the court of appeals should have decided the second issue "to avoid piecemeal litigation and to settle new and important problems." 379 U.S. at 113.

Although this holding authorized an appellate court to employ mandamus in an advisory capacity, the decision seemed to condition a court's authority to do so upon the fortuitous existence of a traditional mandamus question in the same case. Nevertheless, the Note cites three circuits which have read *Schlagenhauf* to authorize advisory mandamus despite the lack of a traditional mandamus question. *Supervisory Mandamus*, *supra* note 161, at 616–17. *See* United States v. Hughes, 413 F.2d 1244 (5th Cir. 1969), *vacated as moot sub nom.* United States v. Gifford-Hill-American, Inc., 397 U.S. 93 (1970) (writ granted to reverse pretrial order thereby deciding the "new issue" of whether Rule 16 of the Federal Rules of Criminal Procedure permitted the blanket discovery of statements made by witnesses to a grand jury); United States v. United States Dist. Ct., 444 F.2d 651 (6th Cir. 1971), *aff'd.*, 407 U.S. 297 (1972) (court denied government's petition for mandamus but reviewed the "great issue" of first impression raised by the warrantless wiretapping of domestic subversives); *In re* Ellsberg, 446 F.2d 954 (1st Cir. 1971) (court denied relief but reviewed merits of first impression claim that defendants had standing in a removal proceeding to force the government to disclose whether it had used evidence obtained from illegal wiretaps to procure the indictment). *But see* Miller v. United States, 403 F.2d 77 (2d Cir. 1968) (traditional power question considered to be essential under *Schlagenhauf* before an ancillary issue of first impression could be reached on the mandamus petition).

The second Supreme Court case cited by the Note was Will v. United States, 389 U.S. 90 (1967), the Court's only other comment on the use of supervisory mandamus. There, the defendant in a criminal case filed a discovery motion which the government argued was not within the judge's power to grant. When the judge nevertheless granted the motion, the government obtained a writ of mandamus from the court of appeals overturning the motion. On certiorari, the Supreme Court reversed finding no "usurpation of power" under the traditional mandamus doctrine. The government had contended that the judge's conduct was representative of a "pattern of manifest noncompliance with the rules governing federal criminal trials" and thus was a proper subject under *La Buy* for an exercise of supervision by the court of appeals. *Id.* at 99. The Court acknowledged that it had "recognized in *La Buy* that the familiarity of a court of appeals with the practice of the individual district courts within its circuit was relevant to an assessment of the need for mandamus as a corrective measure." *Id.* at 96. But the Court then noted its disfavor toward government appeals in criminal cases where speedy trial guarantees applied and where a history of congressional limitation upon the government's right of appeal reflected deference to double jeopardy considerations. Furthermore, the record failed to disclose any evidence of a persistent evasion of the rules and the court of appeals in its unreported opinion failed to "supply a reasoned justification" for its action. Under these circumstances, a "mandamus from the blue" could not possibly serve "a vital corrective and didactic function" and thus the Court concluded that the case was not appropriate for supervisory relief. *Id.* at 107.

Although this interpretation of *La Buy* discusses supervisory and advisory mandamus as two distinct concepts, these functions of mandamus actually represent two aspects of a single "supervisory mandamus" under the common law theory as amplified in this Article. As noted above, the primary beneficiary of an exercise of supervisory mandamus at common law is not an individual litigant but a particular judicial or governmental interest furthered by the grant of relief.[167] This public interest orientation is also apparent under the concept of supervisory mandamus derived from *La Buy*. The rationale for correcting a "significant erroneous practice" of trial judges is to improve the overall quality of the judicial system. If the judge's error was not common but affected only the case then before him, a supervisory writ would be improper because no public benefits would flow from an interruption of the normal appeal process. The exercise of advisory mandamus as derived from *La Buy* has a similar public interest orientation. Advisory mandamus advances the integrity of the legal system by using a current case to settle vexing legal issues in order to ensure the just and efficient resolution of future cases. Thus, the concepts of supervisory and advisory mandamus derived from *La Buy* merely represent two forms of supervisory relief under the "public interest orientation" theory as derived from the common law.

The issuance of either form of supervisory relief involves a further relaxation of traditional standards of propriety which ordinarily restrict a court's discretionary grant of extraordinary writs. In large part, these standards are forged in deference to the final decision rule, which requires that only final judgments of a trial court can be reviewed by an appellate court.[168] This rule reflects the public interest in an orderly and efficient legal system which preserves the integrity of each stage of the statutory review process from trial to final appeal.[169] The traditional standards of propriety function to prevent wholesale circumvention of the final decision rule by ensuring that extraordinary relief will issue only in extraordinary situations.[170]

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[167] *See* pp. 636–37 *supra*.

[168] 28 U.S.C. § 1291 (1970). Both courts and Congress have created numerous exceptions to the final decision rule. *See generally* Frank, *Requiem for the Final Judgment Rule*, 45 TEXAS L. REV. 292 (1966); C. Wright, LAW OF FEDERAL COURTS §§ 101–02 (2d ed. 1970) [hereinafter cited as Wright]. Nevertheless, the final decision rule is still considered a basic policy underlying federal appellate practice. *See* Andrews v. United States, 373 U.S. 334, 340 (1963).

Although no single provision of the UCMJ states a final decision rule, COMA has in effect given due regard to the rule as policy. For example, before deciding whether circumstances are sufficiently "extraordinary" to grant extraordinary relief, the court requires the petitioner to demonstrate that the "ordinary course of the proceedings against him through trial and appellate channels is not adequate." Font v. Seaman, 20 U.S.C.M.A. 387, 390, 43 C.M.R. 227, 230 (1971).

[169] Wright, *supra* note 168, at § 101.

[170] Bell, *supra* note 135, at 861.

When the extraordinary power of a court is invoked primarily to remedy an injustice to an individual petitioner and not to vindicate a matter of public interest, the public policy behind the final decision rule dictates an application of the traditional propriety standards. However, in a situation calling for the correction of improper judicial activity or the settlement of a novel legal issue, the public necessity for an immediate decision can be said to outweigh the public policy behind the traditional standards of propriety. Therefore, the traditional standards which would ordinarily restrain the exercise of extraordinary power do not control in a case where supervisory relief is warranted.

E. SNYDER REEXAMINED

COMA's restrictive interpretation of the All Writs Act in *United States v. Snyder*[171] deserves careful reexamination in light of this public interest theory of supervisory writs. A few weeks after Snyder's conviction for adultery was finalized by convening authority approval, the Supreme Court decided *O'Callahan v. Parker*.[172] There, the Court held that courts-martial had jurisdiction to try service personnel only for "service-related" offenses. Snyder petitioned COMA for relief under *O'Callahan* arguing two points: first, that *O'Callahan* should be applied retroactively to his conviction; and second, that the offense of adultery with another service member's spouse is not "service-connected." COMA dismissed Snyder's petition stating broadly that it lacked jurisdiction under the All Writs Act to issue a writ in any case over which it lacked ordinary review jurisdiction.[173]

Although Snyder's petition was correctly dismissed, the restricted view of the "in aid of jurisdiction" clause expressed in the case need not and should not be read to broadly limit COMA's authority under the All Writs Act. An adequate basis for the result rests in the fact that the case did not present a situation calling for the grant of a supervisory writ. Neither of Snyder's contentions raised an issue of public importance concerning the proper administration of justice in the trial courts. An immediate decision of the issue concerning the retroactive application of *O'Callahan* would not have "instructed" trial judges because, in the military, trial courts do not have jurisdiction to entertain collateral attacks upon past convictions.[174] In courts-martial con-

[171] 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969). *See* p. 628 *supra*.

[172] 395 U.S. 258 (1969).

[173] Since Snyder's sentence fell below the requirements stated in 10 U.S.C. § 866(b) (1970), the Court of Military Review lacked jurisdiction, 10 U.S.C. § 867(b) (1970). *See* pp. 614–15 *supra*.

[174] Unlike most civilian trial court judges, military judges do not preside over a court for a defined term nor do they take cognizance of whatever matters come before it. While military judges are judge advocates assigned to perform judicial duties by the Judge Advocate General, a

vened after *O'Callahan*, of course, the question of retroactivity would not arise. Nor would the immediate resolution of the question concerning the service-connection of the offense have contributed materially to the proper administration of justice. There was no indication that a trial judge would not be equipped to rule properly, if this issue did arise, given the criteria established in *O'Callahan*.

Since *Snyder* did not present a situation calling for a supervisory writ, the case should not be read as foreclosing supervisory relief in a proper case which happens to fall outside COMA's ordinary review jurisdiction. The question of whether COMA could indeed grant a supervisory writ in such a statutorily "non-reviewable" case in aid, nevertheless, of its Article 67 jurisdiction is the critical inquiry of this Article and will now be addressed.

IV. COMA'S SUPERVISORY RELIEF IN OTHERWISE "UNREVIEWABLE" COURTS-MARTIAL

Central to both an appellate court's exercise of supervisory power and its grant of supervisory writs is a public interest motivation. In invoking supervisory power to support a particular holding, an appellate court uses the occasion of ordinary review to impose prospectively a certain standard of "fair play"—over and above that normally required by constitution or statute—upon the entire criminal justice system.[175] Similarly, by granting a supervisory writ, an appellate court may seek to correct an unjust practice in the criminal justice system or settle a novel legal issue likely to recur.[176] Under both forms of supervision, the remedy is directed to the public interest by enhancing the fairness and integrity of the judicial process irrespective of an incidental benefit to the individual petitioner.[177] The theory of this article, under which COMA may issue a writ in a case not within its ordinary review jurisdiction under Article 67(b) but nonetheless "in aid of" that jurisdiction, proceeds from this "public" nature of supervision. This theory enables COMA to issue such writs in two distinct situations.

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judge's jurisdiction only commences when a convening authority formally details him or her to a particular court-martial for the purpose of hearing only those cases which the convening authority specifically refers to it. *See* 10 U.S.C. § 826 (1970). Since the court-martial is a temporary tribunal, the convening authority may create or dissolve it at will, and, therefore, military judges lack many of the judicial attributes of their civilian counterparts. *See generally* Moyer, *supra* note 28, at §§ 2-620 to 2-631.

[175] *See* p. 619 *supra*.

[176] *See* p. 641 *supra*.

[177] There are, however, a few cases in which the Supreme Court has invoked its supervisory power to accomplish a result which solely benefits the party before the court. *See, e.g.*, Mortensen v. United States, 322 U.S. 369 (1944) (supervisory power invoked to incorporate certain matters into the official record of the case before the Court).

A. EXTRAORDINARY WRITS TO ENFORCE SUPERVISORY MANDATES IN AID OF PAST JURISDICTION

The first situation occurs when COMA grants an extraordinary writ to enforce an earlier display of supervisory power exercised in a case over which the court had ordinary review jurisdiction. Several hypotheticals will illustrate the problem. Suppose the government apprehends, charges, and confines a service member pending trial. Thereafter, the convening authority refers the case to a non-bad conduct discharge special court-martial,[178] a trial court over which the military appellate courts do not possess ordinary review jurisdiction. However, because government investigators have not yet identified all the accused's alleged accomplices, the convening authority delays trial.[179] As a result, the accused remains in pretrial confinement for more than ninety days raising the presumption that he has been denied a speedy trial under the rule of *United States v. Burton*.[180] The accused makes futile requests through military channels for a prompt trial as well as an explanation. Might the accused before trial obtain mandamus from COMA to force compliance with COMA's earlier decision in *Burton*?

In the alternative, suppose the case finally goes to trial, but the military judge fails to advise the accused of his rights to counsel as required by the supervisory rule in *United States v. Donohew*[181] and denies his motion to dismiss the charges under the *Burton* mandate even though the government offers no explanation for delay. The accused fails to obtain redress through non-judicial military appellate channels including that provided under Article 69[182] despite a showing of prejudice resulting from the clear failure to follow the *Burton* and *Donohew* directives. Might the accused then obtain relief in the nature of certiorari after trial from COMA?

The answer to both hypothetical questions would be "yes" under this article's theory of All Writs Act jurisdiction. In the *Burton* and *Donohew* cases, COMA promulgated supervisory rules designed to ensure greater fairness in the military justice system. Since COMA's mandate in each case applied to *all* courts-martial convened more than

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[178] *See* p. 615 *supra*.

[179] The Air Force Court of Military Review described a similar situation in detail in United States v. Durr, 47 C.M.R. 622 (AFCMR 1973). Durr was one of many individuals held in pretrial confinement for more than ninety days in order to allow the government to complete an extensive pretrial investigation of drug use at one installation. The government's case against several defendants revolved around a single informer whose testimony was essential in each trial. The Court of Military Review accepted the government's argument that such circumstances satisfied its "heavy burden" to justify extended pretrial confinement. COMA reversed per curiam. United States v. Durr, 22 U.S.C.M.A. 562, 48 C.M.R. 47 (1973).

[180] 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971). *See* p. 623 *supra*.

[181] 18 U.S.M.C.A. 149, 39 C.M.R. 149 (1969). *See* p. 622 *supra*.

[182] *See* note 35 *supra*.

thirty days after the date of the opinion,[183] the accused in the above hypotheticals comes within the class COMA attempted to protect. Therefore, in keeping with the All Writs Act requirement that an extraordinary writ may issue only "in aid of" a court's jurisdiction, a writ here would serve to enfore COMA's supervisory mandates in the two earlier cases and hence would "aid" the court's past exercise of actual jurisdiction.

COMA has already established the foundation for such a theory in *Belichesky v. Boxman*.[184] There, the petitioner had been convicted by a special court-martial consisting of a military judge who presided without court members upon the oral request of the accused. The Court of Military Review affirmed the conviction which became final under Article 76 when Belichesky failed to seek ordinary review by COMA.[185] Subsequently, however, COMA held in *United States v.*

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[183] Each time that COMA has exercised supervision through formal rule making, *see* note 82 *supra*, it has defined the class to whom the mandate is applicable. *See, e.g.*, United States v. Rinehart, 8 U.S.C.M.A. 402, 410, 24 C.M.R. 212, 220 (1957) ("practice of using the Manual by members of a general court-martial or special court-martial (except the president) . . . [must] be completely discontinued on a date no later than thirty days after the promulgation of the mandate in this case"); United States v. Donohew, 18 U.S.C.M.A. 149, 152, 39 C.M.R. 149, 152 (1969) ("*Accordingly, the record in each special or general court-martial convened more than thirty days after the date of this opinion should reflect this requirement* [that the judge explain to the accused the elements of his right to counsel] *has been met.*") (italics in the original); United States v. Care, 18 U.S.C.M.A. 535, 541, 40 C.M.R. 247, 253 (1969) ("[. . . the record of trial *for those courts-martial* convened more than thirty days after the date of this opinion must reflect [that the judge has questioned the accused as to the basis of his guilty plea]") (emphasis added). In Gale v. United States, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967), COMA expressly acknowledged once again that *Rinehart* "mold[ed] military practice by way of adjudication" and as such was an exercise of supervisory power applicable in all future special or general courts-martial. *Id.* at 42, 37 C.M.R. at 306. The rule promulgated in *Rinehart* was not applied to a summary court-martial because such a court under 10 U.S.C. § 816(3) (1970) consists only of one commissioned officer, who, in the absence of a judge, must refer to the Manual for Courts-Martial for guidance. Similarly, *Donohew* excluded summary courts-martial since there the accused had no right to counsel. *See* 10 U.S.C. § 27(a) (1970); United States v. Alderman, 22 U.S.C.M.A. 298, 46 C.M.R. 298 (1973). COMA adopted the presumption that an accused's right to speedy trial has been denied when pretrial confinement exceeds ninety days "[f]or *offenses* occuring after the date of this opinion" in United States v. Burton, 21 U.S.C.M.A. 112, 118, 44 C.M.R. 166, 172 (1971) (emphasis added). COMA extended this presumption in Dunlap v. Convening Authority, 23 U.S.C.M.A. 135, 138, 48 C.M.R. 751, 754 (1974) ("30 days after the date of this opinion, a presumption of a denial of speedy disposition of the case will arise when the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within 90 days of the date of such restraint after completion of trial").

For an indication of COMA's view on the universal binding effect of these formal rules as well as other supervisory holdings, see p. 647 *infra*.

[184] 21 U.S.C.M.A. 146, 44 C.M.R. 200 (1972).

[185] *See* note 188 *infra*. 10 U.S.C. § 876 (1970) provides that all convictions as approved, reviewed, or affirmed under the UCMJ are "final and conclusive" and "binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in [10 U.S.C. § 873 (1970)], and to action by the Secretary concerned as provided in [10 U.S.C. § 874 (1970) (authority to remit or suspend a sentence, or substitute an administrative for a punitive discharge)], and the authority of the President."

The Supreme Court has held that this finality provision does not prevent collateral attack upon court-martial jurisdiction on a petition for habeas corpus. *See* Reid v. Covert, 354 U.S. 1

Dean[186] that a request to be tried by a military judge alone must be made in writing. When the convening authority later sought to execute Belichesky's sentence in spite of *Dean*, Belichesky petitioned COMA under the All Writs Act to restrain execution of the sentence arguing that *Dean* should be applied retroactively to invalidate his conviction and sentence. The court agreed, set aside the findings, and terminated the sentence. It did not discuss, however, how the relief tended to aid ordinary review jurisdiction.[187]

Indeed, since Belichesky had failed to petition COMA for ordinary review, the court never acquired such jurisdiction.[188] Nevertheless,

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(1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); *cf.* Gusik v. Schilder, 340 U.S. 128 (1950) (pre-UCMJ case). Similarly, COMA has held that the "finality" of a conviction under Article 76 does not prevent later extraordinary relief in several situations. COMA will grant an extraordinary writ in aid of past jurisdiction at any time to reverse a conviction by a court-martial which lacked personal jurisdiction provided COMA has earlier acted upon the case either by formally reviewing it, *see* United States v. Jackson, 17 U.S.C.M.A. 681 (1968), or by denying the accused's original petition for ordinary review, *see* Asher v. United States, 22 U.S.C.M.A. 6, 46 C.M.R. 6 (1973); Gallagher v. United States, 22 U.S.C.M.A. 191, 46 C.M.R. 191 (1973).

In these cases, COMA permitted collateral attack under the All Writs Act upon the "jurisdiction" of a court-martial. The range of errors deemed jurisdictional is broad. In *Jackson*, for example, the court detected a possibility that the accused lacked sufficient mental capacity and responsibility, holding these conditions to be jurisdictional prerequisites. In United States v. Ferguson, 5 U.S.C.M.A. 68, 17 C.M.R. 68 (1954), COMA recognized that the concept of jurisdictional error may include any fundamental procedural error. There, Judge Latimer observed that "the Supreme Court has, for the Federal civilian system, rejected the narrow definition of the term, and widened the area in which it will consider cases involving infringements on constitutional privileges." *Id.* at 77, 17 C.M.R. at 77. But *cf.* Hendrix v. Warden, 23 U.S.C.M.A. 227, 49 C.M.R. 146 (1974) (although petitioner did not allege jurisdictional error but did allege denial of constitutional rights at trial, COMA dismissed petition stating that conviction had earlier become final upon denial of ordinary review). *See* Moyer, *supra* note 28, at §§ 1-700 to 1-706.

Moreover, COMA will grant extraordinary relief despite finality in cases containing prejudicial defects in appellate procedure even when these defects do not amount to jurisdictional error. *See, e.g.*, Lohr v. United States, 21 U.S.C.M.A. 150, 44 C.M.R. 204 (1972) (Court of Military Review acted improperly and COMA subsequently denied petition for ordinary review); Maze v. United States Army Court of Military Review, 20 U.S.C.M.A. 599, 44 C.M.R. 29 (1972) (Court of Military Review acted improperly and COMA subsequently denied relief on ordinary review).

[186] 20 U.S.C.M.A. 212, 43 C.M.R. 52 (1970).

[187] COMA merely stated that the case was "cognizable," citing only footnote 1 in Johnson v. United States, 19 U.S.C.M.A. 407, 408, 42 C.M.R. 9, 10 (1970) (writ in the nature of habeas corpus granted in aid of potential jurisdiction over a case which the Judge Advocate General had just returned to the convening authority for retrial under 10 U.S.C. § 873 (1970)). 21 U.S.C.M.A. at 149 n.3, 44 C.M.R. at 203 n.3. Footnote 1 in *Johnson* merely lists four cases: United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966); Gale v. United States, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967); Jones v. Ignatius, 18 U.S.C.M.A. 7, 39 C.M.R. 7 (1968); and United States v. Snyder, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969). All four cases involved a question of either past or potential jurisdiction over the same case, and *Snyder* specifically denied the existence of power to issue a writ where the court could not have earlier reviewed the case. *See* p. 628 *supra*.

[188] *See* Gallagher v. United States, 22 U.S.C.M.A. 191, 193, 46 C.M.R. 191, 193 (1973); Allen v. United States, 21 U.S.C.M.A. 288, 289, 45 C.M.R. 62, 63 (1972); Enzor v. United States, 20 U.S.C.M.A. 257, 259, 43 C.M.R. 97, 99 (1971) (Darden J., concurring in the result). Where through no fault of his own, an accused has failed to petition COMA within the allotted thirty days after receiving notification of the decision of a Court of Military Review, *see* 10 U.S.C.

COMA said that it would not tolerate a convening authority who sought to "ignore the plain holding in the *Dean* case."[189] The clear inference is that the writ was intended to aid the past exercise of the court's jurisdiction in *Dean*.

Such an inference is further strengthened by COMA's pronouncements on the degree of compliance expected with its mandates. In holding that its mandates bind the Comptroller General of the United States,[190] COMA forcefully stated:

> Congress has made it the duty of the Judge Advocate General of each service to effectuate the mandate of this Court in the particular case. Article 67(f), Uniform Code of Military Justice. . . . But it is the *responsibility of every person* in the armed forces concerned with military justice *to adhere to settled principles of law*. Indeed, a knowing and intentional failure to enforce or to comply with these principles may constitute a violation of Article 98. . . . [A] ruling by an agency or officer of the Government relating to the powers of a court-martial, which is contrary to the decisions of this Court, has no place in a court-martial proceeding.[191]

Similar assertions have been directed to lower courts[192] and to convening authorities.[193] COMA has also indicated recently that its mandate over a particular case does not become unenforcible merely because subsequent events at trial deprive the court of ordinary appellate jurisdiction.[194] The rationale here is similar to that in *Belichesky*,

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867(c) (1970), COMA may still grant ordinary review for good cause shown. *See* Allen v. United States, 21 U.S.C.M.A. at 289, 45 C.M.R. at 63 (dicta), *citing* United States v. Ponds, 1 U.S.C.M.A. at 385, 3 C.M.R. 119 (1952); United States v. Brown, 19 U.S.C.M.A. 629 (1970); Enzor v. United States, *supra*; and Goodman v. Secretary of the Navy, 21 U.S.C.M.A. 242, 45 C.M.R. 16 (1972). In *Belichesky*, however, COMA specifically noted that Belichesky was absent without leave when notification of the Court of Military Review decision was made. 21 U.S.C.M.A. at 149, 44 C.M.R. at 203. As a result of this unexcused failure to petition COMA for ordinary review within the thirty-day time limit, COMA never acquired jurisdiction.

[189] 21 U.S.C.M.A. at 149, 44 C.M.R. at 203.

[190] United States v. Armbruster, 11 U.S.C.M.A. 596, 29 C.M.R. 412 (1960).

[191] *Id.* at 598, 29 C.M.R. at 414 (emphasis added). The Article 98 remedy, 10 U.S.C. § 898 (1970), which COMA mentioned in *Armbruster* is in practice illusory. *See* Moyer, *supra* note 28, at § 3–340 (regards Article 98 as a "dead letter"). There has been only one recorded prosecution under Article 98. *Id.* at § 3–361.

[192] *See, e.g.*, United States v. Kepperling, 11 U.S.C.M.A. 280, 285, 29 C.M.R. 96, 101 (1960).

[193] *See, e.g.*, United States v. Kuchinsky, 17 U.S.C.M.A. 495, 38 C.M.R. 293 (1968); United States v. Stevens, 10 U.S.C.M.A. 417, 27 C.M.R. 491 (1959).

[194] *See* Thornton v. Joslyn, 22 U.S.C.M.A. 436, 47 C.M.R. 414 (1973). In aid of its potential jurisdiction, COMA granted a petition for extraordinary relief from the convening authority's inordinately long post-trial delay in reviewing the record of trial. The court ordered the convening authority to take immediate action on the record in order to facilitate final disposition by the Court of Military Review if appropriate. COMA stated that even if the convening authority eventually reduced the sentence below the minimum for review by an appellate court, COMA reserved the right to issue "such further orders as may then appear necessary and appropriate." *Id.* at 437, 47 C.M.R. at 415. This holding is in line with the federal rule which acknowledges continuing authority to enforce a mandate despite a present absence of actual or potential jurisdiction. *See* United States v. United States District Court, 334 U.S. 258 (1948); *In re* Washington & Georgetown R.R., 140 U.S. 91 (1891).

that trial or review proceedings which flaunt a COMA mandate threaten COMA's authority regardless of whether or not COMA continues to possess actual appellate jurisdiction.

Nor is there any statutory impediment to this exercise of power under the All Writs Act. Nothing in the legislative gloss on Article 67 prevents COMA from enforcing a previously issued supervisory mandate in a subsequent case over which the court lacks ordinary review jurisdiction. The limitation of jurisdiction contained in Article 67 was intended not to preserve "minor" cases for military control but to assure COMA's ability to provide meaningful review by limiting its workload.[195] Enforcement of prior supervisory mandates regardless of jurisdiction would be unlikely to increase COMA's workload so appreciably as to impair its ability to provide meaningful review. Instead, the increased respect afforded COMA would dissuade inferior courts and convening authorities from engaging in practices which contravene COMA mandates. Denying COMA the means to enforce prior supervisory mandates effectively permits military authorities to ignore COMA rulings in any case where there is no prospect for ordinary COMA review. Such a result defeats the dual purpose behind the creation of COMA itself—the elimination of command influence and the attainment of uniformity among the services in the law applied in courts-martial.[196]

An even more compelling reason exists for permitting COMA to enforce a supervisory mandate in subsequent cases. Suppose two individuals are jointly convicted of the same offense but only the first receives a sentence sufficiently severe to invoke ordinary judicial review. An interpretation of the Article 67 jurisdictional limitation which would permit COMA to enforce its supervisory mandate in the case involving the more severe sentence but not in the other would violate the latter defendant's constitutional right to the equal protection of the laws.[197]

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[195] *See* p. 616–17 *supra*.

[196] *See* p. 611–13 *supra*.

[197] The equal protection clause of the fourteenth amendment does not directly apply to the federal government but a principle of federal equal protection is applicable to the federal government as a matter of due process under the fifth amendment. *See* Frontiero v. Richardson, 411 U.S. 677, 680 n.5 (1973) (equal protection held applicable to members of the armed services); Bolling v. Sharpe, 347 U.S. 497 (1954). The Constitution does not require legislatures to provide an opportunity for appellate review of criminal convictions to a defendant who has been accorded due process in the trial forum. Griffin v. Illinois, 351 U.S. 12, 18 (1956); District of Columbia v. Clawans, 300 U.S. 617, 627 (1937). Consequently, the principle of equal protection is not violated simply because some but not all defendants are afforded judicial review. The Constitution does require, however, that when a legislature affords appellate rights to some but not all defendants, it must do so in conformity with the principles of equal protection. Lindsey v. Normet, 405 U.S. 56, 77 (1972). Thus, the concept of equal protection does not prohibit a statutory classification which provides for differing treatment. However, the overall legislative purpose for the differing treatment must be constitutionally permissible and the selected

Suppose that in the hypothetical posed above COMA dismisses a petition for extraordinary relief from the accused for lack of jurisdiction under the doctrine of *United States v. Snyder*.[198] In this attempt to comply with the "in aid of jurisdiction" clause of the All Writs Act, the court would in effect be invoking Article 66,[199] which allocates appellate judicial resources to only those cases in which the accused has received a severe sentence. As incorporated into Article 67,[200] this classification is intended to limit COMA's workload and thus achieve the ultimate Congressional purpose of ensuring COMA's continued ability to provide "meaningful review."[201] Assuming arguendo that such a classification could withstand equal protection scrutiny in the ordinary review situation,[202] it would nevertheless fail to satisfy the requirements of equal protection when applied to prevent the issuance of a supervisory writ in aid of past jurisdiction.

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classification must be at a minimum both reasonable in itself and bear a "fair and substantial relation" to this purpose. Baxstrom v. Herold, 383 U.S. 107 (1966).

Under the "old" doctrine of equal protection, the requirement that statutory classifications bear some rational relationship to legitimate state purposes was satisfied by the most minimal showing that such a classification could conceivably advance such a legislative goal. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949); Kotch v. Bd. of River Pilot Comm'rs, 330 U.S. 552 (1947). During the Warren era, however, the Supreme Court formulated a "new" theory of equal protection analysis which prescribed "strict scrutiny" for classifications which impinged upon a "fundamental interest" such as the right to vote, *see, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), and for enactments which contained "suspect" classifications based, for example, on race, *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967). When strict scrutiny was applied, the Court would determine whether the particular legislative goal behind the statutory classification was "compelling" and whether that goal could be achieved through less restrictive means. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969). There are indications that the Burger Court has shrunk from such a "two-tiered" approach to equal protection analysis. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. Rev. 1, 10–20 (1972). Conversely, the Burger Court has breathed new life into the "old" equal protection. *See, e.g.*, James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972). This new formulation of "old" equal protection affirmatively requires that legislative classifications bear a substantial relationship to legitimate legislative goals. *See* Gunther, *supra*, at 20–24.

[198] 19 U.S.C.M.A. 480, 40 C.M.R. 192 (1969). *See* p. 628 *supra*.

[199] 10 U.S.C. § 866(b) (1970). *See* p. 614 *supra*.

[200] 10 U.S.C. § 867(b) (1970). *See* p. 614 *supra*.

[201] *See* United States v. Gallagher, 15 U.S.C.M.A. 391, 395, 35 C.M.R. 363, 367 (1965).

[202] In United States v. Gallagher, 15 U.S.C.M.A. 391, 35 C.M.R. 363 (1965), COMA rejected an equal protection challenge to 10 U.S.C. § 867(b)(1) (1970), which provides for automatic review by COMA of any case affecting a general or flag officer or extending to death, but accords only discretionary review to all other defendants within the court's jurisdiction. After the Board of Review had affirmed his conviction for robbery, Gallagher unsuccessfully petitioned COMA for review. Thereafter, in a petition for reconsideration, he argued that Article 67 denied him the equal protection of the laws because in providing automatic review only to officers of general rank, it discriminated against others like himself.

In response, the court initially recognized that the provisions of Article 67 were part of Congress' "painstaking effort to establish a system of meaningful review." *Id.* at 395, 35 C.M.R. at 367. The court then scrutinized the particular classification between mandatory and discretionary review. It found justification for setting general rank officers apart from all others both

When a military judge, convening authority, or other person associated with an "unreviewable" court-martial acts in contravention to a COMA mandate, COMA's denial of a supervisory writ amounts to

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on the basis of their "overall importance in command, direction and achievement of victory" and the disadvantages which they are likely to suffer as a result of being tried by court members junior to them in rank. *Id.* at 395–96, 35 C.M.R. at 367–68. *See* 10 U.S.C. § 825(d)(1) (1970) (where possible, an accused should not be tried by court members junior to him in rank). Finding this classification in itself to be "reasonable," COMA examined the relationship of that classification to the overall purpose behind the limitation on mandatory review. Since that purpose, the preservation of COMA's ability to provide meaningful review, could only be achieved by keeping COMA's workload within manageable limits, Congress was justified in attempting to restrict this workload by means of discretionary rather than mandatory review. Since it was available only to an "infinitesimal" number of individuals, mandatory review could not, COMA argued, appreciably increase the workload of COMA and thus would not jeopardize the quality of review accorded to others within COMA's discretionary jurisdiction. *Id.* at 396, 35 C.M.R. at 368.

In this connection, COMA sought to avoid characterizing the classification challenged in *Gallagher* as one which involved a fundamental interest. Thus, it had to distinguish Griffin v. Illinois, 351 U.S. 12 (1956) (state must provide transcript to an indigent appellant just as it does to one who has the means with which to purchase a transcript), in which the Supreme Court recognized a fundamental interest in the right of an accused to equal and just treatment in the criminal appellate process. COMA argued that the classification invalidated in *Griffin* was one which in effect denied a transcript to a minority class composed of indigents but provided one to everyone else who could afford it. 15 U.S.C.M.A. at 397, 35 C.M.R. at 369. The court noted that the inverse of that situation existed in *Gallagher*; the specific privilege unavailable to Gallagher was likewise unavailable to the vast majority of appellants who like Gallagher [had not] qualified for COMA review. The fact that a tiny group enjoyed a privilege above the rights afforded to others did not, in the absence of specific harm to the excluded class, violate equal protection. Consequently, based upon the propriety of the legislative purpose, the reasonableness of the classification chosen to accomplish it, the tendency of the classification to further that purpose, and the lack of harm to those denied mandatory review, COMA upheld the classification. *Id.* at 309, 35 C.M.R. at 371.

This decision was reaffirmed on collateral attack in Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 881 (1966). A similar equal protection attack was mounted against the Judge Advocate General's exclusive right to control whether COMA will hear an appeal from a Court of Military Review decision in a case which the Judge Advocate General had originally referred to the Court of Military Review under 10 U.S.C. § 869 (1970). Section 869 denies the accused in such a case the right to petition COMA for review, but 10 U.S.C. § 867(b)(2) (1970) grants to the Judge Advocate General the exclusive right to certify the case to COMA. COMA upheld the classification as a reasonable means by which to achieve the goal of maintaining uniformity of law among the services. United States v. Monett, 16 U.S.C.M.A. 179, 36 C.M.R. 335 (1966).

The *Gallagher* decisions discussed the classification between mandatory and discretionary review only in light of the distinction between general rank officers and other service personnel. They did not address the distinctions based on severity of sentence. In District of Columbia v. Clawans, 300 U.S. 617 (1937), the Supreme Court upheld a statute which failed to provide appellate review for petty misdemeanor convictions but provided review for more serious offenses. However, a classification based on the seriousness of an offense is conceptually different from the UCMJ classification which is based upon the severity of sentence. The severity of sentence does not necessarily reflect the seriousness of the offense. Thus, a serviceperson may be convicted of a serious offense but may receive a sentence involving only eleven months' confinement and loss of rank. Although his or her crime and sentence are hardly "minor," he or she would nonetheless be denied judicial review. An accomplice who was convicted for the same crime but who received an additional month's sentence would be accorded judicial review. A study of whether this difference in treatment could withstand minimal or strict equal protection scrutiny in the ordinary review situation is beyond the scope of this Article.

an invidious discrimination because the classification invoked is not rationally related to the dual congressional purposes of achieving uniformity and preventing command influence in court-martial practice. Although Congress did limit COMA's ordinary review jurisdiction, it did not intend that the concept of "meaningful review" should limit the court's supervisory efforts designed to preserve the fundamental constitutional and statutory rights of all service personnel.[203]

COMA's ability to provide such meaningful review rests upon its authority to enforce its express supervisory rulings against the interference of command influence. The Article 66 classification based upon the severity of sentence may serve to lighten COMA's workload, arguably freeing the court to pursue other more "meaningful" matters. But the fact that the sentence classification could have this effect when applied in a particular case is not sufficient to validate a classification which is grossly over- or under- inclusive.[204] By employing a sentence classification so as to permit enforcement of an earlier supervisory mandate by some appellants and not others, COMA dilutes the authoritative nature of its supervisory rulings and thereby fails to advance the dual congressional purposes behind COMA. Thus, when employed in supervisory situations, this classification cannot stand as a means rationally related to the legislative goals.[205]

This result follows from COMA's own equal protection holdings. In *United States v. Gallagher*,[206] the court not only examined the

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[203] *See* Noyd v. Bond, 395 U.S. 683, 695 (1969); Burns v. Wilson, 346 U.S. 137, 141 (1953); United States v. Frischholz, 16 U.S.C.M.A. 150, 152, 36 C.M.R. 306, 308 (1966); United States v. Armbruster, 11 U.S.C.M.A. 596, 598, 29 C.M.R. 412, 414 (1960).

[204] *See* Rinaldi v. Yeager, 384 U.S. 305 (1966). In *Rinaldi*, the Supreme Court struck down a state statute which sought to recover the cost of transcripts originally provided free to indigent criminal appellants. The obligation to reimburse the state was imposed solely upon state prison inmates whose appeals had been unsuccessful. Applying "minimal scrutiny" in a search for "some rational basis" for the classification, *see* note 197 *supra*, the Court found that the repayment obligation turned solely upon the nature of an indigent convict's penalty—imprisonment in a state prison. Even though this classification may in certain cases have resulted in the advancement of the state's two goals—to discourage frivolous appeals and to reimburse the state for furnishing transcripts—the Court nevertheless held that this classification bore no rational relationship to the state's goals. It was both overinclusive in that it discouraged meritorious appeals and underinclusive in that it failed either to discourage frivolous appeals or to recoup the cost of transcripts from those who were not imprisoned.

[205] *Cf.* Lindsey v. Normet, 405 U.S. 56 (1972). There, the Burger Court applied its reinvigorated form of "old" equal protection analysis, *see* note 197 *supra*, to a state summary eviction statute which required tenants to post bond in twice the amount required of landlords in order to appeal an adverse decision in an eviction action. The state argued that such a classification was designed to discourage frivolous appeals and to secure the landlords' interest in their properties and rent. The Supreme Court held that this classification which dealt with prerequisites to appeal violated the equal protection clause because it lacked a reasonable relationship to both state goals. Not only did the classification fail to deter frivolous appeals by those who could afford the double-bond but the amount of the double-bond requirement was not objectively geared to the amount which the landlord stood to lose as a result of being forced to defend his case on appeal.

[206] 15 U.S.C.M.A. 391, 35 C.M.R. 363 (1965). *See* note 202 *supra*.

rational basis of the classification but also scrutinized any harmful effect the classification might have on those excluded from the favored class. Similar analysis is warranted here. Although supervisory mandates are by their nature intended to benefit all future criminal defendants, those defendants with lesser sentences, unlike the rest, would be left without an effective remedy to enforce these mandates should the military refuse to follow COMA rulings. Such a hardship imposed upon the disfavored class by the effect of the sentence classification would, under COMA's formulation of equal protection scrutiny in *Gallagher*,[207] constitutionally invalidate the classification.[208]

Therefore, by effectively conditioning the right to relief upon the severity of sentence, COMA violates its own interpretation of the equal protection clause. To avoid such a result, COMA should take a broad view of its power to enforce its own mandates utilizing the All Writs Act in aid of its past jurisdiction. In so doing, COMA would eliminate an injustice and preserve its position as the supreme court of the military.

B. SUPERVISORY WRITS IN AID OF POTENTIAL JURISDICTION OVER A CLASS OF FUTURE CASES

The public interest orientation of supervisory writs also authorizes the issuance of a writ to aid COMA's potential jurisdiction over a class of future cases, even where the case presently before the court is not subject to ordinary review. Such a future class would include cases presenting either the same unjust practice or the same legal question as that involved in the particular case before the court. A hypothetical will illustrate this situation.

Suppose one of the services promulgates a general regulation prohibiting service personnel from engaging in a particular form of politi-

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[207] *Id.* at 396, 35 C.M.R. at 368.

[208] COMA's formulation of equal protection doctrine in *Gallagher* foreshadowed the Burger Court's recent reformulation of "old" equal protection. *See* note 197 *supra*. The Burger Court's new approach to "minimal" equal protection scrutiny to ensure that the statutory means are substantially related to the legislative goals includes an evaluation of the hardship imposed upon the excluded class. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56, 79 (1972), *discussed at* note 205 *supra* (Court noted that indigent tenants would be especially disadvantaged by the requirement that they post double-bond as a prerequisite to appeal); James v. Strange, 407 U.S. 128, 135–36 (1972) (Court invalidated state's method of recouping legal defense fees from indigent defendants because the scheme denied them certain exemptions available to civil judgment debtors); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 169–70 (1972) (Court invalidated state's discrimination between legitimate children and dependent, unacknowledged illegitimate children in awarding benefits for death of a common father). Under pre-Burger Court "old" equal protection scrutiny, a court merely searched for "any rational basis" for a challenged classification and did not necessarily look into the hardship imposed upon the excluded class. *See, e.g.*, Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947) (pilot licensing classification based upon family heritage held valid although it significantly disadvantaged members of minority groups).

cal expression. Thereafter, in an effort to rid his unit of political activists, a commander desires to make an example of one such person by charing him or her with a violation of Article 92[208] for failure to obey the new general regulation.[210] In a pretrial motion the accused argues that the regulation is unconstitutional on its face under the first amendment. The motion is denied. After trial by a general court-martial, the defendant is convicted and given a sentence below the minimum necessary to invoke appellate remedies.[211] The defendant petitions COMA for extraordinary relief under the All Writs Act. Assuming that the petitioner has exhausted his or her non-judicial appellate remedies, the question is whether COMA has the power to grant such relief although it lacks ordinary review jurisdiction.

Under the criteria previously considered,[212] the issue presented by the petition for relief is a proper subject for the grant of a supervisory writ by COMA. First, there is a significant possibility that the issue will arise in future cases given the general applicability of the subject regulation and the likelihood of effective enforcement. Second, in future courts-martial presenting the same issue, the decisions of trial judges are likely to be erroneously influenced by the fact that senior

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[208] 10 U.S.C § 892(1) (1970).

[210] The battery of potential restraints under the UCMJ upon a serviceperson's constitutional rights is huge. *See, e.g.*, Parker v. Levy, 94 S.Ct. 2547 (1974) (upheld conviction of a doctor under both Article 133 for "conduct unbecoming an officer" and Article 134 for conduct "prejudicial to good order and discipline" because of statements made while refusing to train medics bound for Vietnam); United States v. Alexander, 22 U.S.C.M.A. 485, 47 C.M.R. 786 (1973) (black soldier's conviction under Article 92 for violation of a general regulation against demonstrating overturned because the grievance gathering in which he took part held not to constitute a demonstration); United States v. Daniels, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970) (conviction of a black marine under Article 134 because he made anti-war statement to other blacks reversed for instructional error); United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967) (officer who participated in a demonstration convicted under Article 88 which forbids officers from using "contemptuous words" when referring to public officials); United States v. Sood, 42 C.M.R. 635 (ACMR 1970) (soldier-prisoner's conviction under Article 134 overturned where grievance demonstration in which he participated held not to constitute "mutiny"). For detailed study of the decisions dealing with the first amendment rights of service personnel, see Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697 (1968); Moyer, *supra* note 28, at §§ 4–100 to 4–550; Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HAST. L.J. 325 (1971).

[211] For an unreported case presenting substantially similar facts, see United States v. Culver, *discussed in* Moyer, *supra* note 28, at § 4–311. Culver, an Air Force Judge Advocate, *see* 10 U.S.C. § 801(13) (1970), participated in a demonstration in civilian clothes with two hundred other service personnel at the United States Embassy in London. He was charged with a violation of a general regulation prohibiting all demonstrations by service personnel in foreign countries. Upon trial and conviction by a general court-martial, he received a sentence insufficient to invoke judicial review. He was even foreclosed from mounting a collateral attack upon his conviction in the federal courts because custody was lacking for habeas corpus purposes, *see generally* Moyer, *supra* note 28, at § 6–123, and because an adequate amount in controversy probably did not exist for purposes of federal declaratory relief. *See* Avrech v. Secretary of the Navy, 94 S. Ct. 3039 (1974).

[212] The analysis here closely follows the argument for advisory mandamus developed in *Supervisory Mandamus*, *supra* note 161, at 611–12. *See* p. 639 *supra*.

military authorities rejected the accused's constitutional contentions during non-judicial review.[213] An immediate resolution of the constitutional claim would thus serve a vital corrective function. Finally, waiting for the issue to arise on ordinary review would result in delay and might thus cause great injustice in the interim to defendants in other "unreviewable" cases.[214]

The theory advanced here—that the "in aid of jurisdiction" clause provides jurisdiction over a class of future cases—finds support in two decisions involving an appellate court's authority to preserve the ability of a federal judge to perform his duties. The first, *United States v. Malmin*,[215] involved the illegal removal of a judge by the governor of the Virgin Islands in 1920. The United States disputed the legality of the removal and petitioned the Third Circuit Court of Appeals for a writ of mandamus compelling Judge Malmin to reassume his office.[216]

Agreeing that the removal was illegal, the court sought a basis for fashioning an appropriate remedy. The court denied that it possessed a statutory version of common law supervisory jurisdiction by virtue

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[213] Moreover, since general regulations are presumed lawful, *see* United States v. Nation, 9 U.S.C.M.A. 724, 726, 26 C.M.R. 504, 506 (1958), trial judges are far more likely to view the invalidation of general regulations to be a function of appellate rather than trial courts.

[214] The injustice caused by a delay in deciding a particular legal issue may arise in several ways. For example, even though COMA may eventually declare a regulation or practice unconstitutional or otherwise illegal, its holding will most likely have no effect upon those convictions which were based upon the illegal regulation or procedure and which became final under 10 U.S.C. § 876 (1970) without judicial review prior to COMA's ruling. COMA often does not accord its decisions a retroactive effect even when the after-discovered error is jurisdictional. *See, e.g.*, Mercer v. Dillon, 19 U.S.C.M.A. 264, 41 C.M.R. 264 (1970). In addition, there may be an indirect injustice imposed upon those forced to forego the exercise of certain constitutional rights for fear of prosecution. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965). Such a "chilling effect" upon the exercise of constitutional rights can be especially potent in the military where the threat of disciplinary action can take numerous "unreviewable" forms. *See, e.g.*, Anderson v. Laird, 466 F.2d 283, 284 (D.C. Cir.) (concurring opinion of Bazelon, C.J.), *cert. denied*, 409 U.S. 1076 (1972) (held unconstitutional the century-old rule of mandatory chapel attendance at the nation's service academies which had traditionally been enforced by various means short of court-martial). *See generally* Note, *The Chilling Effect In Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

[215] 272 F. 785 (3d Cir. 1921).

[216] In setting up the local government of the Virgin Islands, Congress provided for a governor to be appointed by the President and empowered the existing colonial council to enact laws subject to a right in the President to set aside any enactment. Act of Mar. 3, 1917, ch. 171, §§ 1, 2, 39 Stat. 1132. The Act further provided that local tribunals would remain open and that appeals from these courts would be taken to the Third Circuit Court of Appeals. Acting under the authority of this legislation, the council authorized the governor to appoint two district judges for a term of good behavior or until the President or Congress might direct otherwise. Thereupon, the governor appointed Judge Malmin to serve in one of those positions. Exercising his power to disapprove enactments of the colonial council, the President in 1920 set aside the law which authorized the governor to appoint the district judges. The governor then removed Malmin and appointed someone else to take his place. The United States government petitioned the Court of Appeals arguing that the governor was now without authority either to remove any judge he had already appointed or to appoint a new judge. 272 F. at 788.

of its appellate position over a United States territory.[217] Instead, the court looked to the All Writs Act asking "whether the instant case is such as to invoke the remedy of mandamus in aid of this court's appellate jurisdiction."[218] Interpreting this "appellate jurisdiction" to mean something which continually exists rather than something which arises from an appeal taken in a particular case, the court explained how the requested relief would "aid" that jurisdiction:

> Matters which disturb that [appellate] jurisdiction, either before or after it is invoked, are, therefore, cognizable here. If the absence of a lawfully appointed judge of a District Court, from which appeals lie to this court, thereby affects the right of litigants to take appeals and the right of this court to entertain them, confessedly this court has power to restore the orderly proceedings of the trial court by commanding the absent judge to return and transact its business.[219]

The court recognized that an immediate exercise of extraordinary power would preserve the integrity of those cases tried in the future before Judge Malmin's would-be successor, whose appointment could not therein effectively be litigated. In a genuine supervisory fashion, the court emphasized the important bearing which the requested relief would have upon the "right of the public to a properly constituted trial court from which appeals can validly lie."[220] Consequently, in aid of its potential jurisdiction over those future, unrelated cases, the appeals court granted the writ.[221]

The second discussion of this theory appears in a concurring opinion by Justice Harlan in *Chandler v. Judicial Council of the Tenth Circuit*.[222] This case climaxed a long dispute between Judge Chandler of the District of Oklahoma and the Judicial Council[223] concerning the manner in which he discharged his duties.[224] The Council had invoked its statutory power to make "all necessary orders for the effective and expeditious administration of the business of the courts within its circuit,"[225] and ordered that all cases pending before the judge be reassigned and that he not be assigned any new cases.[226]

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[217] 272 F. at 791.

[218] *Id.* at 792.

[219] *Id.*

[220] *Id.*

[221] When the Governor later expressed discontent over this decision, the President ordered him not to interfere with the court's mandate, and Judge Malmin thereafter reassumed his post. *See* United States v. Malmin, 272 F. 797, 798 (3d Cir. 1921) (denial of a petition for rehearing).

[222] 398 U.S. 74 (1970). *See* Comment, 51 B.U.L. REV. 106 (1971).

[223] The function and membership of the Judicial Councils are defined in 28 U.S.C. § 332 (1970).

[224] For background on Judge Chandler's alleged improprieties see Note, *The Chandler Incident and the Problems of Judicial Removal*, 19 STAN. L. REV. 448 (1967).

[225] 28 U.S.C. § 332 (1970).

[226] The Council later modified its order to permit Judge Chandler to preside over those cases already assigned to him. *See* 398 U.S. at 80.

Judge Chandler requested leave to file a petition in the Supreme Court for mandamus and/or prohibition challenging the order on the grounds that it exceeded the statutory power of the Council, infringed upon the independence of federal judges under Article III of the Constitution, and usurped the impeachment power of Congress.

The opinion of the Court never reached the question of the Court's jurisdiction to issue the writ under the All Writs Act because Judge Chandler was found not to have exhausted other avenues of relief.[227] Justices Black and Douglas dissented on the grounds that the writ should issue to prevent what they regarded as an unconstitutional interference with the independence of the federal judiciary.[228] Justice Harlan would have granted leave to file but concurred in the denial of the writ because he agreed on the merits with the Council's action.[229] In order to support their positions, these three justices had to reach the question of jurisdiction. Justices Black and Douglas viewed the Council as an inferior judicial tribunal whose actions gave rise to cases or controversies within the appellate jurisdiction of the Court.[230] On that assumption alone, both dissenters argued that mandamus was an appropriate remedy under the All Writs Act. Justice Harlan was unsatisfied with the dissenters' failure to analyze carefully the basis for relief. He recognized that although the Council's order was a judicial act review of which would be appellate in nature, the Supreme Court does not necessarily have the power to issue mandamus.[231] Congress can limit the Court's exercise of appellate jurisdiction as it has in effect done through ordinary review statutes and the "in aid of jurisdiction" clause of the All Writs Act. Thus the problem for Justice Harlan was to define how the requested relief would "aid" the Court's statutory jurisdiction.

Reviewing earlier cases in which the Court had granted relief under the All Writs Act, Justice Harlan recognized that in each case the Supreme Court possessed statutory jurisdiction to review that case at a later stage.[232] In contrast, he noted that Judge Chandler's reliance on the All Writs Act was founded upon the fact that the action of the Judicial Council "touches through Judge Chandler's fate, hundreds of

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[227] *Id.* at 86–87. However, writing for a majority of four, Chief Justice Burger referred to the constitutional requirement that the Court's review of such a controversy be "appellate" and opined that it would be "no mean feat" to show that the Council's order was a "judicial" act and was therefore reviewable as an appellate matter. 398 U.S. at 86. *Compare* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Court's grant of mandamus to federal officer would not be an exercise of appellate jurisdiction), *with Ex parte* Crane, 30 U.S. (5 Pet.) 190 (1831) (mandamus issued to a lower court is an exercise of appellate jurisdiction).

[228] 398 U.S. at 136 (Douglas, J., dissenting); *id.* at 141 (Black, J., dissenting).

[229] *Id.* at 129 (Harlan, J., concurring).

[230] *Id.* at 133–34 (Douglas, J., concurred in by Black, J., dissenting).

[231] *Id.* at 111 (Harlan, J., concurring).

[232] *Id.* at 112–13.

cases over which this Court has appellate or review jurisdiction."[233] As such, the immediate grant of extraordinary relief would "aid" the Court's potential jurisdiction over all future cases. Acknowledging that this interpretation of the "in aid of jurisdiction" clause has "no direct precedent in this Court,"[234] Justice Harlan nevertheless found it to be "wholly in line with the history of [the All Writs Act] and consistent with the manner in which it has been interpreted both here and in the lower courts."[235] He expressly rejected the notion that this interpretation was merely an extension of earlier holdings based upon the Supreme Court's supervisory jurisdiction under section 234 of the Judicial Code.[236] Instead, he grounded his views in section 262, the predecessor of the present All Writs Act.[237] After discussing *Malmin* with approval, Justice Harlan concluded that the Court had the power to grant extraordinary relief in aid of its potential jurisdiction over those future cases which could be affected by the Council's order.[238]

Justice Harlan's interpretation of the jurisdiction clause, similar to that made in *Malmin* by the court of appeals, tends to support an assumption of jurisdiction by COMA in aid of potential jurisdiction over future cases. Although both *Malmin* and *Chandler* concerned the effect of a judge's absence from duty, their broad interpretation of the "in aid of jurisdiction" clause should not be confined to such a situation. This interpretation has not arisen in other contexts simply because there are few situations in federal practice under which such an analysis would be required to sustain the grant of a writ.[239] Given the universal availability of appellate review over cases entering the federal courts, the issuance of a writ by an appellate court will always

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[233] *Id.* at 113.

[234] *Id.*

[235] *Id.*

[236] *See* note 113 *supra*.

[237] 398 U.S. at 117 n.15.

[238] *Id.* at 116–17.

[239] On only one other occasion did the Supreme Court utilize the All Writs Act § 14 of the First Judiciary Act, *see* note 113 *supra*, to grant relief in an "unreviewable" case. *See In re* Chetwood, 165 U.S. 443 (1897). Chetwood was convicted of contempt by a federal circuit court for violating an injunction against prosecuting two statutory writs of error to the Supreme Court. These writs of error involved two suits which Chetwood had earlier brought in state courts concerning the disposition of the assets of an insolvent bank of which he was a shareholder. The contempt proceeding in the federal circuit court was based upon an action brought by the receiver of the same bank to prevent interested parties from invoking the jurisdiction of the state court. The federal contempt conviction, which occured at a time when the Supreme Court did not have either mandatory or discretionary jurisdiction over such a case in the federal courts, was not reviewable in any federal appellate court. Nevertheless, the Supreme Court reversed the contempt conviction on a writ of common law certiorari issued under § 14. The Court did not discuss how the writ aided its jurisdiction. However, the Court appears to have considered its review under the All Writs Act of the "unreviewable" contempt conviction to be "in aid of" that jurisdiction which it had already acquired over Chetwood's two cases on the writs of error from the state courts. The Court interpreted *Chetwood* as such in United States v. Mayer, 235 U.S. 55, 71 (1914).

be "in aid of" either its actual or potential jurisdiction over the same case.

Under military law, of course, the situation is far different from ordinary federal practice. An interpretation of the All Writs Act permitting the grant of a supervisory writ to aid potential jurisdiction over a class of future, reviewable courts-martial and to enforce past exercises of supervisory power is necessary to compensate for the unavailability of statutory judicial review in most courts-martial. This expanded interpretation would at once be broad enough to permit supervision and narrow enough to avoid the consequences of indiscriminate review of the type suggested in *United States v. Bevilacqua*,[240] where COMA boldly asserted power to remedy the denial of rights "in any court-martial."[241] *Bevilacqua*'s overly enthusiastic assertion lacked any supporting analysis demonstrating how the grant of extraordinary relief in "unreviewable" cases would materially aid COMA's jurisdiction. Consequently, the case pressed the limits of COMA's statutory review jurisdiction under Article 67.[242] The subsequent retraction in *United States v. Snyder*[243] was in part necessary to confine COMA's assertion of power within the limits intended by Congress in creating a supreme court of the military. However, a supervisory interpretation of the "in aid of jurisdiction" clause which would allow COMA to restrain an unfair procedure or settle a novel question of law avoids the pitfall of *Bevilacqua*'s overly broad assertion. The adoption of such an interpretation would bolster COMA's ability to carry out its Congressionally intended duty to eradicate command influence and to achieve uniformity in the military justice system.

V. CONCLUSION

In enacting the Uniform Code of Military Justice, Congress intended to eradicate the abuse of command influence in courts-martial and to achieve uniformity in the criminal justice systems of the various armed services. Central to this scheme was the creation of an appellate system of judicial review at whose pinnacle stood the United States Court of Military Appeals. Congress expected this civilian court to become a supreme court of the military, actively engaged in supervising the military justice system within each service. Although COMA immediately began to discharge this responsibility through assertions of supervisory power, the court's effectiveness was severely hampered by a UCMJ provision confining its ordinary review jurisdiction to cases involving severe sentences.

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[240] 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968). *See* p. 627 *supra*.
[241] *Id.* at 12, 39 C.M.R. at 12.
[242] 10 U.S.C. § 867(b) (1970). *See* p. 614 *supra*.
[243] 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969). *See* p. 628 *supra*.

An opportunity to overcome this unintended barrier to effective supervision arose when COMA declared that it possessed extraordinary powers under the All Writs Act. This Act, however, permits a court to issue writs only "in aid of jurisdiction." COMA subsequently and unnecessarily limited its ability to provide relief under the All Writs Act by narrowly construing this clause to authorize relief only in those cases otherwise qualifying for ordinary COMA review. This construction failed to consider the concept of supervisory writs which originated at common law and which has recently reappeared in federal decisions dealing with the All Writs Act. The public interest orientation of these supervisory writs suggests a theory under which COMA could grant a supervisory writ to review an ordinarily "unreviewable" court-martial. Under this theory, a supervisory writ could issue in two situations: first, to aid COMA's past jurisdiction over cases involving an exercise of supervisory power, and, second, to aid COMA's potential jurisdiction over a class of future cases which would eventually fall within the court's ordinary review jurisdiction.

By adopting this supervisory interpretation of the "in aid of jurisdiction" clause, COMA could assert authority in limited circumstances to decide issues arising in "unreviewable" courts-martial. The exercise of such authority accords well with Congress' purpose behind both the enactment of the UCMJ and the creation of COMA. Armed with such authority, COMA would be better able to fulfill its duty to supervise the administration of military justice.

By Order of the Secretary of the Army:

FRED C. WEYAND
General, United States Army
Chief of Staff

Official:
PAUL T. SMITH
Major General, United States Army
The Adjutant General

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