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Articles

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EXTRATERRITORIAL JURISDICTION AND ITS EFFECT ON THE ADMINISTRATION OF MILITARY CRIMINAL JUSTICE OVERSEAS*

Captain Jan Horbaly**
and
Miles J. Mullin***

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*This article is an adaptation of a paper submitted in partial fulfillment of the requirements for the LL.M. degree at the University of Virginia School of Law. The opinions and conclusions presented herein are those of the authors and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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I. INTRODUCTION

The Congress of the United States currently is engaged in the most comprehensive and thorough effort ever undertaken to revise, reorganize and recodify the nation's federal criminal laws. The revision began in 1966 when Congress created the National Commission on Reform of the Federal Penal Laws to review existing federal criminal statutes and to recommend legislation for improving the federal criminal justice system. The Commission submitted its report and recommendations to Congress in 1971 and soon thereafter Congress commenced hearings on federal criminal law reform.

In rewriting the country's criminal statutes, Congress has considered the recommendations of the Commission, as well as hundreds of additional proposals for change submitted by interested parties throughout the country. Now, after years of study and many months of congressional hearings, a new federal criminal code has been drafted and is being considered by members of Congress in the form of legislation entitled the "Criminal Justice Reform Act of 1975."[1]

The proposed Act stands as a detailed compendium of criminal law reform measures and represents an endeavor on the part of Congress to establish a complete federal criminal code within title 18 of the United States Code. In addition, the recommended legisla-

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[1] S. 1, 94th Cong., 1st Sess.(1975)[hereinafter cited as the Criminal Justice Reform Act of 1975]. The proposed Criminal Justice Reform Act of 1975 was introduced in the Senate by Senators McClellan, Hruska, Bayh, Eastland, Fong, Griffin, Mansfield, Moss, Scott, Taft and Tower on January 15, 1975 and referred to the Senate Committee on the Judiciary. The same Act was introduced in the House of Representatives on February 27, 1975 by Representative Wiggins and was referred to the Committee on the Judiciary. H.R. 3907, 94th Cong., 1st Sess.(1975). The Criminal Justice Reform Act of 1975 is an amended version of the Federal Criminal Code Reform Act of 1973 introduced in the Senate on January 4, 1973 as S.1. *See* S. 1. 93d Cong., 1st Sess. (1973).

tion also contains many novel provisions and innovative reforms.[2] One of the exciting new changes included in the revised code is a set of provisions providing for extraterritorial application of the federal criminal laws.[3] Under the new extraterritorial provisions, the jurisdiction of the federal judiciary will be expanded to permit federal courts to try cases involving American citizens who commit criminal offenses in foreign countries.

The need for applying federal criminal laws overseas has become increasingly apparent in recent years, as the number of American citizens living and travelling abroad has increased significantly[4] and as the number of criminal offenses involving Americans abroad has grown dramatically. Unfortunately, current United States Code provisions, as a general rule, do not permit federal courts to exercise jurisdiction over Americans living and travelling outside of the United States. Because the federal courts usually do not have jurisdiction over Americans in foreign countries, most federal crimes committed by American citizens overseas cannot be prosecuted in the United States. To correct this anomaly, special provisions providing for the application of federal laws outside the

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[2] *See generally* Brown & Schwartz, *New Federal Code Is Submitted,* 56 A.B.A.J. 844 (1970). *See also Hearings on the Report of the National Commission on Reform of the Federal Criminal Code Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 92d Cong., 1st Sess., pt. I, at 53 (1971) [hereinafter cited as *Hearings*].

[3] S. 1, 94th Cong., 1st Sess. § 204 (1975). *See* H.R. 3907, 94th Cong., 1st Sess. § 204 (1975).

[4] TABLE I. United States Population Living Abroad: 1950-1970

Type	1970	1960	1950
U.S. civilian population abroad[1]	680,060	761,892	[4]179,950
Federal civilian employees	56,448	35,825	26,910
Dependents of Federal employees	371,586	503,400	107,350
Armed Forces	317,999	462,504	(NA)
Federal civilian employees	53,367	40,596	(NA)
Crews of merchant vessels	15,910	32,466	45,690
Other citizens	[2]236,336	[2]190,701	(NA)
Armed Forces	[3]1,057,776	609,720	301,595

[1]Excludes U.S. citizens temporarily abroad on private business, travel, etc. Such persons were enumerated at their usual place of residence in the United States as absent members of their own households.

[2]Based on 20-percent sample of reports received. Excludes "other citizens."

[3]Represents U.S. citizens abroad for extended period and their family members. Since this population was enumerated on a voluntary basis, its coverage is probably less complete than that of other categories of Americans abroad.

[4]Based partially on tabulations provided by Department of Defense.

U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970, SUBJECT REPORTS, FINAL REPORT PC(2)-10A, AMERICANS LIVING ABROAD vii (1973).

territorial limits of the United States are included in the proposals to reform the federal criminal code.

Enactment of the proposed provisions providing for application of the federal criminal code overseas will greatly improve the administration of justice within the federal system. One advantage to the new legislation is that serious crimes committed by American citizens outside the territorial limits of the United States will be subject to prosecution in federal district courts.[5] A further advantage is that Americans tried in federal courts for committing crimes overseas will be entitled to constitutional protections and safeguards which would be denied them if they were tried in foreign courts.[6] In addition, the proposed provisions will eliminate inconsistencies in the application of the federal criminal laws overseas[7] and should do away with many of the difficulties experienced by American judges in determining which federal criminal statutes Congress intended to be applied outside the territorial limits of the United States.[8]

While there are numerous advantages to the extraterritorial legislation proposed, there also are some disadvantages. One major disadvantage in the proposed legislation is its failure to provide means for enforcement of federal criminal laws beyond the boundaries of the United States.[9] A further disadvantage, and one not yet discussed in the public hearings held on the new federal criminal code, concerns the impact of the extraterritorial application of

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[5] Note, *Extraterritorial Jurisdiction · Criminal Law · Extraterritorial Reach of Proposed Federal Criminal Code · Government Employees Abroad · Conduct Endangering Certain Interests of the United States · Section 208 of the Proposed New Federal Criminal Code, National Commission on Reform of Federal Criminal Laws, Final Report*, 13 HARV. INT'L L.J. 346, 355 (1972) [hereinafter cited as *Extraterritorial Jurisdiction*]. *See* Reid v. Covert, 354 U.S. 1, 5-14 (1957).

[6] *Extraterritorial Jurisdiction, supra* note 5, at 362.

[7] WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL CODE 72 (1971) [hereinafter cited as WORKING PAPERS]. *See Hearings, supra* note 2, pt. III, subpt. D., at 3159.

[8] WORKING PAPERS, *supra* note 7, at 71.

[9] *Extraterritorial Jurisdiction, supra* note 5, at 355-59. A related disadvantage concerns the existence of extradition treaties and the failure of the legislation to deal with existing treaty provisions which will hinder successful enforcement of federal law in foreign countries. For a discussion of this problem *see Hearings, supra* note 2, pt. X, at 7419-25.

federal law on the operation of the military criminal justice system overseas.[10]

Most certainly, enactment of the proposed legislation providing for extraterritorial jurisdiction will have a significant impact on the administration of military justice outside the United States. First, the return of substantial numbers of American soldiers assigned overseas to the United States for prosecution of nonservice connected offenses will create major logistical problems for the military system. Secondly, the necessity of having to process requests from civilian authorities for assistance in the investigation of civilian and nonservice connected offenses will place substantial burdens on the armed services, in addition to raising questions concerning the use of military personnel to enforce civil laws overseas.

Because of the importance of maintaining discipline among American soldiers assigned outside of the United States, and in view of the reduction in the number of armed forces personnel stationed abroad, any limitation on the exercise of military jurisdiction overseas and any use of military personnel by civilian authorities to investigate civilian offenses committed overseas should be considered carefully. Under the legislation presently proposed, the potential for misuse of military investigatory personnel by civilian authorities and the return to the United States of substantial numbers of American servicemen for prosecution are realistic possibilities. In order to avoid problems in these areas, Congress must expand the provisions of the proposed legislation to permit the military to exercise jurisdiction over nonservice connected offenses committed by its members overseas, and expressly

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[10] Sections 204(g) and 205(a)(3) of the Criminal Justice Reform Act of 1975 provide for the continued operation of the military criminal justice system overseas. Section 204(g) contains a new military exception clause not found in any of the previous extraterritorial provisions submitted to the Congress. No explanation exists as to why the military exception clause was included in this version of section 204(g). The only comment made in the hearings prior to the addition of the military exception clause to section 204(g) was the following:

> [S]uppose that a serviceman in Japan were to rape a Japanese girl. Under the proposed section of extraterritorial jurisdiction the United States could say that that serviceman should be tried in the United States. Imagine, however, the uproar that would develop in Japan were that serviceman found "not guilty" or to receive a lenient sentence. The assertion of extraterritorial jurisdiction under such a circumstance would only serve to rub salt in diplomatic wounds.

Report of the American Bar Association Section of International Law's Committee on International Criminal Jurisdiction, Hearings, supra note 2, pt. X, at 7415. It is doubtful that this one statement caused the drafters to add the military exception clause to section 204(g).

Other than the above statement, nothing has been published in the hearings concerning the impact of extraterritorial jurisdiction on the administration of military justice overseas.

authorize military personnel to investigate federal offenses involving American civilians in foreign countries.

This article recommends that several changes be made in the proposed federal criminal code. The changes suggested are consistent with the purpose of reforming the federal criminal laws and tend to supplement the present proposals. To fully comprehend the significance of the recommended changes, it is important to understand the need for extraterritorial application of the federal law and the type of extraterritorial jurisdiction legislation presently being considered by the Congress. In addition, it is necessary to examine the effect of the proposed provisions on the administration of military criminal justice overseas and the nature of existing legislation denying civilian authorities the use of military personnel for civilian law enforcement purposes. After reviewing these matters, the weaknesses in proposed extraterritorial jurisdiction legislation will be discussed and ways of strengthening the legislation will be suggested.

II. FEDERAL CRIMINAL LAW REFORMS

A. THE GROWTH OF THE FEDERAL CRIMINAL LAW

Defining federal criminal offenses and prescribing procedural rights guaranteed by the Constitution to those accused of violating the federal law has been a responsibility assumed by the Congress since the founding of the United States in 1789. Indeed, it was soon after the ratification of the Constitution that the First Congress of the United States passed the Crimes Act of 1790.[11] Under the provisions of this Act, 19 offenses including treason, murder, piracy, bribery, forgery, larceny, and obstruction of process were made crimes against the United States. Also under the Act, persons charged with committing such crimes were guaranteed the right to a copy of the indictment, the right to a list of the jury and witnesses, the right to stand mute, and the right in capital cases to compel the attendance of witnesses.

Since the passage of the Crimes Act, Congress has responded to a growing society's continuing need for greater protection by enacting numerous criminal statutes. The Crimes Act of 1790 contained 19 criminal offenses. Today it is estimated that well over 2500

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[11] Act of April 30, 1790, ch. 9, 1 Stat. 112. The purpose of this early statute was to define acts of misconduct that could be tried by the federal courts and to identify important procedural rights guaranteed to persons accused of violating the provisions of the statute.

criminal offenses are contained in the Statutes at Large.[12] These figures represent not only an expansion in the number of offenses made punishable under the federal law, but they also reflect a substantial increase in the exercise of federal jurisdiction over criminal offenses as well as a significant growth in the complexity of the federal criminal laws.

The complexity is attributable largely to the manner in which Congress has enacted proscriptive legislation. Traditionally, Congress enacts criminal statutes on an ad hoc basis responding to the need of the moment without regard for existing legislation or concern for grouping criminal laws together in one section of the federal code.[13] The lack of a rational approach to the enactment of criminal laws and the absence of legislative craftsmanship have resulted in a great amount of duplication and contradiction in the federal statutes. In addition, Congress' failure to repeal antiquated laws, along with the judiciary's development of federal criminal law on a case-by-case basis, has contributed further to the confusion.[14]

B. PAST EFFORTS AT REFORM

On three previous occasions, in 1877, 1909 and 1948, Congress attempted to reform the federal statutes.[15] The primary purpose of these early efforts at reform was to consolidate the federal statutes

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[12] *See* Act of June 25, 1948, ch. 645, tit. 18, 62 Stat. 683, which lists 2424 crimes. This figure does not include those crimes included in other titles of the United States Code.

[13] The current Federal criminal law demonstrates in numerous instances the effects of this haphazard development. Obsolete statutes clutter the existing title 18 . . . Whatever reasons existed for [slave trade and foreign-commissioned piracy] statutes in the 19th or 20th centuries, they are of dubious necessity in the 1970's.

Important criminal statutes are scattered throughout the various titles of the United States Code. . . [R]elease of restricted data under the Atomic Energy Act—which is by any measure a form of treason or sabotage—is found in title 42, entitled, "The Public Health and Welfare." Aircraft hijacking a capital offense, is found in title 49, Transportation. The criminal laws concerning the sale or possession of narcotics and other dangerous drugs are buried in the regulatory provisions of title 21, Food and Drugs. Similarly, the felony penalties for criminal evasion of Federal income taxes appear in title 26, the Internal Revenue Code

Substantially similar offenses are covered by a multiplicity of statutes For example, there are literally dozens of statutes that cover the one basic offense of theft . . . appearing in titles covering such things as Commerce and Trade (title 15), Conservation (title 16), Foreign Relations (title 22), and Labor (title 29). Part of this proliferation is the result of keying offenses to separate and limited jurisdictional bases—the common method employed in Federal criminal legislation, especially in the present century. . . No rational, modern, and well-conceived criminal code should tolerate such a widespread listing of essentially similar criminal offenses. Such a proliferation of statutes covering basically the same offense leads inevitably to conflicts, inconsistencies, and confusion.

Testimony of Hon. John N. Mitchell, Attorney General of the United States, *Hearings, supra* note 2, pt. I, at 17.

[14] *See Hearings, supra* note 2, pt. I, at 16.

[15] Act of March 3, 1873, ch. 241, 17 Stat. 579; Act of June 20, 1874, ch. 333, 18 Stat. 113; Act of Feb. 18, 1875, ch. 80, 18 Stat. 316; Act of Feb. 27, 1877, ch. 69, 19 Stat. 240 (in the

and to eliminate inconsistent and obsolete provisions. None of the major reforms, however, involved substantive or innovative change.[16]

In spite of these reforms, the federal criminal laws remain confused and disorganized. "Important criminal statutes are scattered throughout the various titles of the United States Code....[and s]ubstantially similar offenses are covered by a multiplicity of statutes."[17] Moreover, contradictory provisions still exist.[18] While some of the duplication and confusion has been introduced into the Code since the 1948 revision, much of it is of longstanding duration, simply having been overlooked in previous reforms.[19] All of this has led one commentator to conclude that the United States federal criminal code is nothing more than "a patchwork of ad hoc efforts to improve 19th century justice."[20]

C. NATIONAL COMMISSION ON REFORM OF THE FEDERAL PENAL LAW

Recognizing the great need for reform and aware that the federal law had not been overhauled substantially in almost 200 years, Congress in 1966 created the National Commission to Reform the

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preparation of the Revised Statutes of the United States); Act of Mar. 4, 1909, ch. 321, 35 Stat. 1088; Act of Jun. 25, 1948, ch. 645, 62 Stat. 683.

> The 1948 revision was intended to revise, codify, and enact into positive law, title 18 of the United States Code, which was entitled, "Crimes and Criminal Procedure." The 1948 revision was what its name implies—a mere pulling together of many of the disparate criminal statutes enacted over the years, some elimination of inconsistencies, and a reenactment of these statutes in a simple alphabetical arrangement from aircraft and animals to treason and white slave traffic. Thus in most respects the title 18 codification avoided any substantive change or innovation.

Testimony of Hon. John N. Mitchell, Attorney General of the United States, *Hearings, supra* note 2, pt. I, at 16. *See* McClellan, *Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L.J. 663, 672-85. *See also* Note, *Piggyback Jurisdiction in the Proposed Federal Criminal Code*, 81 YALE L.J. 1209 n.1 (1972).

[16] *Hearings, supra* note 2, pt. I, at 16.

[17] *Id.* at 17.

> For example, 18 U.S.C. §1111 deals with homicide within the special maritime and territorial jurisdiction, and 18 U.S.C. §751 deals with assassination of various important federal officials. As a result multiple provisions deal with the same basic misconduct; the repetition is required only because there is more than one basis for federal jurisdiction over such misconduct.

FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 12 (1971) [hereinafter cited as FINAL REPORT].

[18] *Hearings, supra* note 2, pt. I, at 17.

[19] The existing so-called Code is a partial compendium of obsolete and arbitrary provisions, chaotic in its sentencing and at least a century out-of-date with respect to the division of responsibility between the federal government and the States as regards law enforcement.

Statement of Prof. Louis B. Schwartz, Director, National Commission on Reform of Federal Criminal Laws, *Hearings, supra* note 2, pt. I, at 106.

[20] *Id.* at 16.

Federal Penal Laws.[21] The Commission's membership was bipartisan and its purpose was to make recommendations for improving the federal criminal justice system.[22] The duties of the Commission were defined specifically:

> [To] make a full and complete review and study of the statutory and case law of the United States which constitutes the federal system of criminal justice for the purpose of formulating and recommending to the Congress legislation which would improve the federal system of criminal justice. It shall be the further duty of the Commission to make recommendations for revision and recodification of the criminal laws of the United States, including the repeal of unnecessary or undesirable statutes and such changes in the penal structure, as the Commission may feel better serve the ends of justice.[23]

Thus, the National Commission was given complete authority to review and recommend changes to all aspects of the federal criminal justice system.

When the Commission met, it decided to devote itself primarily to the task of reforming the federal substantive criminal law.[24] After three years of investigation, research and study the Commission published a Study Draft of its conclusions and recommendations.[25] Five thousand copies of the *Study Draft* and *Working Papers* were circulated among congressional committees, elected public officials, federal judges, law professors and private attorneys for their comments and recommendations.[26] After evaluating the responses and making suggested changes, the Commission published its *Final Report* and submitted the *Report* to the President and Congress in January 1971.[27]

The Commission's *Final Report* and *Working Papers* have provided the Congress with the result of extensive research and some thoughtful recommendations for reform. The Senate Subcommittee on Criminal Law and Procedures has been holding hearings on the *Final Report* and its recommendations for the last four years, using the *Report* and the recommendations as the basis for revising and improving the federal criminal law system. If the recommendations contained in the Commission's *Final Report* are

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[21] Act of Nov. 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516, *as amended*, Act of Jul. 8, 1969, Pub. L. No. 91-39, 83 Stat. 44.

[22] *Id.* § 2(b).

[23] *Id.* § 3.

[24] FINAL REPORT, *supra* note 17, at xi.

[25] NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE (1970) [hereinafter cited as STUDY DRAFT].

[26] FINAL REPORT, *supra* note 17, at xii n.2.

[27] *Id.* at i. The *Final Report* was submitted to the President and Congress pursuant to section 8 of the Act of Nov. 8, 1966.

enacted into law, monumental change in the federal criminal justice system and a considerable expansion in the scope of federal jurisdiction will occur.

D. EXTRATERRITORIAL JURISDICTION PROPOSED

One of the innovative proposals included in the Commission's *Final Report* is a provision for extraterritorial application of the federal criminal code.[28] It was the opinion of the Commission that the federal law should be applicable to certain criminal offenses committed overseas, since presently many Americans who commit federal crimes in foreign countries cannot be prosecuted in the United States.[29]

Because of Congress' failure to enact a statute setting forth "a clear and simple statement of the circumstances under which the federal government will prosecute crimes committed abroad,"[30] the judiciary has assumed the responsibility for defining when criminal offenses committed overseas are subject to the jurisdiction of the federal courts.[31] As a result, most of the law concerning the application of federal statutes outside the boundaries of the United States has been developed on a case-by-case basis. To eliminate the confusion created by the judiciary's piecemeal approach to the problem of extraterritorial application of federal statutes, the Commission proposed legislation which would explicitly provide for extraterritorial jurisdiction.

The Commission's recommendations concerning extraterritorial jurisdiction have been well received, and have been included as part of the proposed Federal Criminal Code Reform Act of 1975.[32] This expansion of federal law is necessary and it is certain that some form of extraterritorial jurisdiction legislation will be enacted into law when reform of the federal criminal laws is completed.

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[28] FINAL REPORT, *supra* note 17, at 21. *See* notes 160-175 and accompanying text *infra* for a discussion of the National Commission's recommended extraterritorial jurisdiction provision.

[29] *See* WORKING PAPERS, *supra* note 7, at xxxi:

> The following are striking examples of situations not presently covered by federal law, but reached under the proposed redefinition of federal extraterritorial jurisdiciton: a) murder of an American ambassador by his wife or a member of his staff, b) murder by a serviceman who has since been discharged and c) assault by an American in Antarctica or in space.

[30] *Extraterritorial Jurisdiction, supra* note 5, at 348-49. *See* Section III.D, *infra* for a discussion of the difficulties experienced by federal judges in deciding whether particular statutes should be applied extraterritorially.

[31] FINAL REPORT, *supra* note 17, at 22. *See also Extraterritorial Jurisdiction, supra* note 5, at 348-49.

[32] S. 1, 94th Cong., 1st Sess. §204 (1975); H.R. 3907, 94th Cong., 1st Sess. §204 (1975).

III. THE NEED FOR EXTRATERRITORIAL APPLICATION OF THE FEDERAL PENAL CODE

The Commission's decision to recommend extraterritorial application of the federal criminal laws was based on four factors: (1) the increased involvement of Americans in international affairs; (2) the inability of the federal courts to exercise jurisdiction over many American-related offenses committed overseas; (3) the difficulty experienced by federal judges in deciding which federal statutes can be applied extraterritorially; and (4) the limiting effect of Supreme Court decisions denying the military court-martial jurisdiction over American civilians accompanying the armed forces overseas. While each of these factors is important, it was the combination of the factors that convinced the Commission that provisions for extraterritorial jurisdiction should be included in any reform of the federal criminal laws.

A. EXPANSION OF AMERICAN INTERESTS ABROAD

The first factor considered by the National Commission was the proliferation of American interests abroad. The twentieth century has seen a substantial increase in the involvement of the United States in international affairs; not only has the amount of American investment and trade with foreign nations grown tremendously since the turn of the century, but also the number of Americans travelling and living overseas has increased significantly.[33] The great expansion of American interests throughout the world has swelled the number of Americans living outside the boundaries of the United States to over 1,750,000.[34] Unfortunately the development of American interests abroad has been accompanied by a substantial increase in the amount of crime committed by American citizens overseas. According to figures compiled by the Department of State, the number of Americans under detention in foreign countries on drug charges alone increased from 142 in 1969 to 1,361 in 1975.[35] The exceptional growth in American crime abroad has caused the Government increasing concern and is one of the factors the Commission considered in

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[33] *See* note 4 *supra*.

[34] *Id.*

[35] United States Department of State memorandum, Americans Arrested and Under Detention Abroad on Drug Charges, Mar. 10, 1975, on file at the United States Department of State.

recommending that the federal laws be given extraterritorial application.[36]

B. THE LIMITED REACH OF THE FEDERAL LAW

Another factor considered by the National Commission in evaluating the need for extraterritorial jurisdiction was the number of American citizens overseas who are beyond the reach of the few federal statutes which specifically apply to Americans outside the territorial limits of the United States.[37] For example, Status of Forces Agreements which permit the United States to exercise jurisdiction over Americans serving with and accompanying the armed forces overseas do not apply to other American civilians living outside of the United States.

An example of a Status of Forces Agreement is the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA),[38] which authorizes the United States to exercise federal criminal jurisdiction over soldiers, civilian employees of the armed forces and dependents serving in host North Atlantic Treaty Organization countries. Under the provisions of the NATO SOFA, any American serviceman, civilian employee of the armed services, or dependent who commits a crime in a host country can be prosecuted in a federal court, if the crime is punishable under the laws of the United States and is not punishable under the laws of

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[36] STUDY DRAFT, *supra* note 25, at xxxi. *See Extraterritorial Jurisdiction, supra* note 5, at 348.

[37] STUDY DRAFT, *supra* note 27, at xxxi.

[38] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, 19 June 1951, 4 U.S.T. 1792, T.I.A.S. 2846, 199 U.N.T.S. 67 [hereinafter cited as NATO SOFA]. *See* North Atlantic Treaty Between the United States of America and Other Governments, 4 April 1949, 68 Stat. 2241, T.I.A.S. 1964, 34 U.N.T.S. 243. *See also* Re, *The NATO Status of Forces Agreement and International Law*, NW. U.L. REV. 349, 350 (1950) [hereinafter cited as Re]. The purpose of the NATO Status of Forces Agreement was:

> [T]o establish and set forth the terms and conditions that will determine the rights, duties, and privileges and immunities of the forces of one country sent into or stationed in the territory of another country, both of which countries are parties to the agreement.

Re, *id.* at 352. The Agreement was signed by the United States in London on June 19, 1951 and was ratified by the Senate on July 15, 1953 by a vote of 72 to 15. 99 CONG. REC. 8837-38 (1953). *See also* Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 COL. L. REV. 1091 (1953).

the host country.[39] Where the offense is punishable under the laws of both the host country and the United States, the United States can try the offender by court-martial if the host country waives its right to try him.[40]

American civilians in foreign countries, who are not military dependents or civilian employees of the armed forces, however, are not and never have been subject to the provisions of Status of Forces Agreements. Hence, they are not amenable to the jurisdiction of the federal courts under such agreements, and cannot be prosecuted by federal authorities for crimes committed abroad.

In 1957 the constitutionality of the Uniform Code of Military Justice and NATO SOFA provisions permitting the United States to exercise court-martial jurisdiction over civilian employees of the armed forces and their dependents was challenged in the United States Supreme Court. The Court ruled that the provisions contained in the Uniform Code and NATO SOFA giving the military authority to try civilian employees or their dependents by court-martial for crimes committed overseas were unconstitutional.[41] In so ruling, the Court limited the exercise of federal jurisdiction under the provisions of the Uniform Code and Status of Forces Agreements, and expanded the number of American civilians overseas who are beyond the reach of the federal law. As a result of the Court's decision in this and similar cases, civilian employees of the armed forces, their dependents and the dependents of servicemen, charged with capital and noncapital offenses can no longer be prosecuted by federal authorities under the provisions of Status of Forces Agreements and the Uniform Code for crimes committed in foreign countries.[42]

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[39] Article VII, paragraph 3(a) of the NATO Status of Forces Agreement provides that a Sending State has primary jurisdiction over:

> (i) offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that state or of a dependent, (ii) offenses arising out of any act or omission done in the performance of official duty.

See Mills, *O'Callahan Overseas: A Reconsideration of Military Jurisdiction Over Servicemen's Non-Service Related Crimes Abroad,* 41 FORDHAM L. REV. 325, 336-38 (1972) [hereinafter cited as Mills]. *Cf.* Army Reg. No. 27-51, para. 4 (7 Nov. 1975) which provides in part that:

> A friendly foreign force has the right to exercise jurisdiction in the United States over offenses committed by its members which are punishable by its law but not by the law of the United States or by the law of any political subdivision thereof.

In addition the Regulation provides for the exercise of concurrent jurisdiction, the exercise of primary jurisdiction, and the waiver of primary jurisdiction by the United States.

[40] NATO SOFA, art. VII, § 3(c).

[41] *See* Reid v. Covert, 354 U.S. 1, 15-18 & 15 nn. 29-30.

[42] *See generally* Section III.D. *infra.*

While it is true that American civilians, including civilian employees of the armed forces and dependents, always can be prosecuted by foreign authorities for criminal offenses committed within the jurisdictional limits of a foreign nation, it is also true that host countries often are reluctant to prosecute American offenders when the offense involves only American interests or American citizens.[43] Because the host country is in no way connected or associated with the crime, there is little motivation for the foreign nation to exercise its right to prosecute and accept the burden of trying the offense or the offender.[44] As a general rule, in such situations the offender is not tried and the offense goes unpunished.[45]

Even in instances where the host country is desirous of prosecuting an American criminal, it may be precluded from doing so where the offender is entitled to diplomatic immunity. Under recognized principles of international law, the privilege of diplomatic immunity is extended to ambassadors, their families and their servants.[46] In addition, an ambassador's subordinates are entitled to immunity for criminal offenses committed while performing official duties.[47] The extension of diplomatic immunity to an ambassador and those accompanying him is automatic upon the establishment of an embassy in another nation;[48] it is not dependent upon the law of any particular country, but rather is based on the law of nations[49] and is given to insure that governments are not "hampered in their foreign relations by arrest or harassment of, or interference with, their diplomatic representatives."[50]

Under the doctrine of diplomatic immunity, United States ambassadors and their families and staffs are immune from prosecu-

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[43] *See* STUDY DRAFT, *supra* note 25, at xxxi. *See also* FINAL REPORT, *supra* note 17, at 22.

[44] STUDY DRAFT, *supra* note 25, at xxxi.

[45] *Id.*

[46] *See, e.g.*, 22 U.S.C. §252 (1970) which provides that:

> Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any ambassador or public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.

[47] Carrera v. Carrera, 174 F.2d 496, 498 (D.D.C. 1949) (domestic servant to Czechoslovakian Embassy in United States entitled to diplomatic immunity). *See* Comment, *Immunities of Diplomatic Officers*, 27 YALE L.J. 392 (1917); Recent Case, 27 HARV. L. REV. 489 (1914).

[48] Holbrook v. Henderson, 4 Standf. 619 (N.Y. Super. Ct. 1851).

[49] *See id.*

[50] United States *ex rel.* Casanova v. Fitzpatrick, 214 F. Supp. 425, 428 (S.D.N.Y. 1963) (resident member of Staff of the Permanent Mission of Cuba to the United

tion for criminal offenses committed in the nations in which they are serving. Since such offenses are also generally beyond the reach of federal law,[51] and thus not subject to prosecution within the United States, it is possible that an offender with diplomatic immunity can escape punishment for a serious crime committed overseas.

Similarly when offenses are committed in an area over which no country exercises jurisdiction, the offender may never be subject to prosecution. Examples of crimes of this type are offenses committed in outer space,[52] on oil derricks located out at sea,[53] or on floating icebergs.[54] Where crimes have been committed in places over which no nation has jurisdiction, the federal courts have had difficulty determining whether they have jurisdiction to try the offense and the offender.

One case illustrating the problems courts experience in this area is *United States v. Escamilla*,[55] in which the issue was whether the federal jurisdiction of the United States extended to an ice island floating in the Arctic Circle. In *Escamilla* the defendant was convicted of involuntary manslaughter for an offense committed on "Fletcher's Ice Island T-3, an unclaimed island of ice in the Arctic Ocean,"[56] while he was employed by the General Motors Defense Research Laboratory. The island had been occupied by the United States Government since 1952 and used as a research station.

Although the defendant challenged the jurisdiction of the federal district court to try him for the offense with which he was charged, his motion was denied. He appealed his conviction to the Court of Appeals for the Fourth Circuit alleging, among other matters, that "[t]he district court was in error when it ruled that the special maritime and territorial jurisdiction of the United States extended

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Nations charged with conspiracy to commit sabotage held not entitled to diplomatic immunity).

[51] STUDY DRAFT, *supra* note 25, at 20; FINAL REPORT, *supra* note 17, at 22. *But see* United States v. Erdos, 474 F.2d 157 (4th Cir. 1973) (senior diplomatic official serving in the American Embassy in the new Republic of Equatorial Guinea convicted in federal court for criminal offense committed within a diplomatic compound).

[52] *See* Grove, *Criminal Jurisdiction in Outer Space*, 6 INT'L LAW 313 (1972). *See also* STUDY DRAFT, *supra* note 25, at xxxi; FINAL REPORT *supra* note 17, at 22; Brown & Schwartz, *New Federal Code Is Submitted*, 56 A.B.A.J. 844, 847 (1970); *Extraterritorial Jurisdiction, supra* note 5, at 352; *Hearings*, *supra* note 2, pt. I, at 53, 176 & pt. V, 4841.

[53] *Hearings*, *supra* note 2, pt. V, at 5405.

[54] STUDY DRAFT, *supra* note 25, at xxxi; FINAL REPORT, *supra* note 17, at 22; *Hearings*, *supra* note 2, pt. I, at 53, pt. V at 4841 & 5405, pt. X at 7407 & 7413; *Extraterritorial Jurisdiction*, *supra* note 5, at 352. *See* United States v. Escamilla, 468 F.2d 341 (4th Cir. 1972).

[55] 468 F.2d 341 (4th Cir. 1972).

[56] *Id.* at 343.

to crimes committed on T-3."[57] In an en banc decision six judges on the court of appeals divided equally on the jurisdictional issue, thereby affirming the lower court's ruling on that point.[58]

Escamilla illustrates the difficulties that arise when criminal offenses are committed in places where no country has jurisdiction to try the offender. The existence of situations like the one raised in *Escamilla* and the others noted where American citizens are outside the reach of federal laws, not subject to the jurisdictional provisions of international treaties, and beyond the reach of foreign laws, served to convince the members of the National Commission of the need for extraterritorial application of the federal laws.

C. EXTRATERRITORIAL STATUTES

Another factor the Commission considered in weighing the need for extraterritorial legislation was the difficulty experienced by federal judges in deciding whether a particular federal statute should be applied extraterritorially. In part, Congress' failure to pass legislation on the subject of extraterritorial jurisdiction and its failure to specify in enacted statutes whether the provisions included in such legislation were to be applied extraterritorially have caused judges great problems in deciding whether the courts have jurisdiction to hear cases involving violations of federal law overseas. In addition, the absence of a clear government policy on prosecuting American citizens charged with committing offenses overseas,[59] and the absence of judicial precedent regarding extraterritorial application of federal statutes have contributed to the difficulties experienced by federal judges in deciding cases in this area.[60]

Criminal statutes providing that particular offenses can be prosecuted in federal courts, no matter where the offense occurs, have caused the judiciary no problems. For example, the statute making treason an offense unquestionably applies extraterritorially:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort *within the United States or elsewhere*, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined not less than $10,000, and shall be incapable of holding any office under the United States.[61]

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[57] *Id.*
[58] *Id.* The district court's decision in *Escamilla* was, however, reversed on other grounds.
[59] FINAL REPORT, *supra* note 17, at 22. *See also* WORKING PAPERS, *supra* note 7, at 71.
[60] WORKING PAPERS, *supra* note 7, at 69.
[61] 18 U.S.C. §2381 (1970) (emphasis added).

Other statutes, however, are not so clear. For example, section 1546 of title 18 of the United States Code makes forgery and misuse of immigration visas and other permits an offense punishable in federal court, but contains no provision for extraterritorial application. The result has been that some courts have held the section applies extraterritorially while other courts have held it does not. In part, section 1546 provides:

> Whoever . . . uses, attempts to use, possesses, obtains, accepts or receives any immigration visa or permit, or other document required for entry to the United States, knowing it to be . . . falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained . . . or
>
> Whoever knowingly makes under oath any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations . . . [s]hall be fined . . . or imprisoned.[62]

To determine if Congress intended this section of the Code to be applied extraterritorially, the courts have been forced to examine the statute's legislative history.[63]

Because Congress seldom considers the issue of extending domestic legislation outside the territorial limits of the United States in its published hearings, the legislative history of such statutes is often of little value in determining whether Congress intended the provisions of the statutes to have extraterritorial effect. When an examination of legislative history has proven fruitless, federal judges have looked to judicial precedent,[64] rules of statutory construction[65] and principles of international law[66] to aid them in determining if a statute is to be applied extraterritorially. Since there is a strong presumption that criminal statutes do not have extraterritorial application,[67] federal judges are reluctant to give statutes extraterritorial application where Congress has not provided clearly that they should be applied overseas.[68]

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[62] 18 U.S.C. §1546 (1970).
[63] *See* Meredity v. United States, 330 F.2d 9, 10 (9th Cir. 1964).
[64] *See* Rivard v. United States, 375 F.2d 882, 885-87 (5th Cir. 1967).
[65] United States v. Erdos, 474 F.2d 157, 159 (4th Cir. 1973); United States v. Pizzarusso, 388 F.2d 8, 9 (2d Cir. 1968).
[66] WORKING PAPERS, *supra* note 7, at 71.
[67] *See, e.g.*, United States v. Pizzarusso, 388 F.2d 8, 9 (2d Cir. 1968)
[68] *See* American Banana Co. v. United Fruit Co., 213 U.S. 374 (1909). *See also* Yenkichi Ito v. United States, 64 F.2d 73, 75 (9th Cir.), *cert. denied*, 289 U.S. 762 (1933). As a general rule, "the Supreme Court in discussing the extraterritorial effect of domestic legislation has said: 'that the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears'." Puhl v. United States, 376 F.2d 194, 196 (10th Cir. 1967). *Accord, In re* Quinn, 525 F.2d 222, 223 (1st Cir. 1975) (defendant granted immunity from federal

One set of statutes illustrating the difficulties courts experience in determining congressional intent regarding extraterritorial application are the Code provisions dealing with alien and immigration offenses. In many cases aliens have been prosecuted under such statutes for immigration application violations committed in United States consular offices located in foreign countries. Because the immigration statutes do not explicitly provide for their application overseas, the aliens have argued that the federal courts have no jurisdiction to try them for alien and immigration offenses committed overseas. The response of the federal courts on this issue has not been uniform.

In *United States v. Baker*,[69] an alien was tried for willfully misstating information in his application for immigration to the United States while he was in Canada.[70] During his trial the defendant challenged the jurisdiction of the United States to indict and try him for an offense committed in Canada.[71] In granting the defendant's motion for dismissal, the court ruled that the United States did not have authority to indict and prosecute an individual for a crime committed outside the territorial limits of the United States.[72] In reaching its decision, the court relied in large part on the following statement from Oppenheim's treatise on international law:

> The question of "whether States have a right to jurisdiction over acts of foreigners committed in foreign countries . . . ought to be answered in the negative. For at the time such criminal acts are committed the perpetrators are neither under the territorial nor under the personal supremacy of the States concerned. And a State can only require respect for its laws from such aliens as are permanently or transiently within its territory. No right for a State to extend its jurisdiction over acts of foreigners committed in foreign countries can be said to have grown up according to the Law of Nations, and the right of protection over citizens abroad held by every State would justify it in an intervention in case one of its citizens abroad should be required to stand his trial before the courts of another State for criminal acts which he did not commit during the time he was under the territorial supremacy of such State."[73]

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prosecution refused to testify on grounds that his testimony might subject him to prosecution in England for offenses committed in the United States).

[69] 136 F. Supp. 546 (S.D.N.Y. 1955).

[70] 18 U.S.C. §1001 (1970). That section states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both.

[71] 136 F. Supp. at 547.

[72] *Id.*

[73] *Id.* at 548, *quoting from* L. OPPENHEIM, INTERNATIONAL LAW § 147 (3d ed. 1920). *See* Yenkichi Ito v. United States, 64 F.2d 73 (9th Cir.), *cert. denied*, 289 U.S. 762 (1933)

For these reasons, the court held that the defendant could not be tried in a federal court of the United States for an offense committed in Canada.

Baker was a case of first impression. Six years later, the same issue was presented to another federal district court in *United States v. Rodriguez*.[74] In *Rodriguez*, six defendants were charged with conspiring to secure their unlawful entry into the United States by means of sham marriages to American brides, and with making false oaths before United States consular personnel in Mexico, Panama and Costa Rica. At their trial, the defendants challenged the jurisdiction of the court to try them for offenses committed outside of the United States.[75]

Contrary to the decision in *Baker*, the court held that the defendants could be prosecuted by the United States for false statements made overseas in connection with the procurement of documents necessary for admission to the United States.[76] In reaching his decision, the trial judge in *Rodriguez* relied not only on the language of the statutes under which the charges were laid[77] but also on the language of other sections of the United States Code, sections that evinced a congressional intent to have the principal statute apply extraterritorially.[78] On appeal, the Ninth Circuit Court of Appeals affirmed the district court's ruling.[79]

Although other federal courts have reached the same result as the court in *Rodriguez*, they have done so for different reasons. In *United States v. Pizzarusso*,[80] a Canadian citizen was charged, tried and convicted of "knowingly making a false statement under oath in a visa application to an American consular official located in a foreign country." On appeal, the defendant alleged that the district court did not have jurisdiction to try her for an offense committed in Canada outside the territorial limits of the United States. After reviewing the provisions of section 1546, the court of appeals

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(federal statute prohibiting aliens from unlawfully entering the United States not violated when aliens were 40 miles off shore at the time their vessel was seized).

[74] 182 F. Supp. 479 (S.D. Cal. 1960), *aff'd sub nom.* Rocha v. United States, 288 F.2d 545, 547 (9th Cir. 1961).

[75] The specific question the court addressed was as follows:

> May aliens, found within the United States, be prosecuted here for the commission of crimes allegedly committed outside the territorial limits of the United States, when the crimes charged concern the use of false statements to secure the documents necessary for admission into the United States?

182 F. Supp. at 481-82.

[76] *Id.* at 494.

[77] 18 U.S.C. §1546 (1952).

[78] *See* 182 F. Supp. at 486.

[79] Rocha v. United States, 288 F.2d 545, 547 (9th Cir. 1961).

[80] 388 F.2d 8 (2d Cir. 1968).

concluded that Congress intended that the section be applied extraterritorially.[81] The court reasoned that the interest of the Government in the regulation of foreign affairs included the procedures regarding the issuance of visas and that false statements made by the applicant for a visa could be expected to have a detrimental effect upon governmental interests. In addition, the court reasoned that under the protective theory of international law, a state

> has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.[82]

For these two reasons, the court of appeals concluded that the district court had jurisdiction over the offense charged.

In discussing the international law aspects of the case, the court noted that in an analogous fact situation, the Ninth Circuit similarly had held Congress intended section 1546 to be applied extraterritorially.[83] The court observed, however, that the Ninth Circuit's decision was based on a finding that "jurisdiction rested partially on the adverse effect produced as a result of the alien's entry into the United States."[84] The Second Circuit in *Pizzarusso* rejected this line of reasoning. In the opinion of the Second Circuit, an offense under section 1546 is complete when committed overseas and not when the person enters the country.[85] Consequently, the court concluded there was no need for the Ninth Circuit to rely on the territorial theory to support the exercise of jurisdiction over section 1546 offenses.

While some federal courts have disagreed about the extraterritorial reach of section 1546, other federal courts have avoided completely the jurisdictional problems posed by the section. In *Chin Bick Wah v. United States*[86] a Chinese alien was charged with violating the statute by making false statements on an immigration visa in Hong Kong. The defendant was tried, convicted and

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[81] *Id.* at 10.

[82] *Id., quoting from* RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 33 (1965). *See also* United States v. Archer, 51 F. Supp. 708 (S.D. Cal. 1943) (federal district court had jurisdiction to try alien for false swearing charge on the theory that an overseas consulate was part of the territory of the United States and on the theory that harm would result in the United States).

[83] 388 F.2d at 11, *citing* Rocha v. United States, 288 F.2d 545 (9th Cir.), *cert. denied,* 366 U.S. 948 (1961).

[84] 388 F.2d at 11.

[85] *Id.*

[86] 245 F.2d 274 (9th Cir.), *cert. denied,* 355 U.S. 870 (1957).

sentenced to one year's imprisonment. Since neither the district court nor the court of appeals which affirmed the conviction addressed the issue of whether offenses committed in Hong Kong by an alien could be tried in the United States federal courts, it is reasonable to conclude that the courts either assumed that jurisdiction to try the offense existed, or failed entirely to recognize the issue.[57]

The *Baker, Rodriguez, Pizzarusso* and *Chin Bick Wah* cases illustrate the difficulty that the federal courts have experienced in deciding whether aliens who make false statements to obtain entry into the United States can be charged and tried for violating federal laws. In *Baker*, the court held they could not be tried. In *Rodriguez* and *Pizzarusso*, the courts held for different reasons that aliens could be tried. And in *Chin Bick Wah*, the court failed to even discuss the jurisdictional problem. Recognizing the need to eliminate this type of confusion and to promote greater consistency and uniformity in such cases, the National Commission concluded that a provision providing for extraterritorial application of the federal penal laws was needed.

D. SUPREME COURT DECISIONS LIMITING EXTRATERRITORIAL JURISDICTION UNDER THE UNIFORM CODE OF MILITARY JUSTICE

The last factor considered by the National Commission in evaluating the need for extraterritorial application of the federal criminal code was a line of cases decided by the United States Supreme Court in the late 1950's and early 1960's which significantly limited the scope of military jurisdiction by holding certain articles of the Uniform Code of Military Justice[58] unconstitutional. As a result of these decisions, discharged servicemen, dependents and civilian employees of the armed forces are no longer subject to military jurisdiction and cannot be tried by

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[57] *See* United States v. Rodriguez, 182 F. Supp. 479, 493 (S.D. Cal. 1960). *See also* United States v. Flores-Rodriguez, 237 F.2d 405 (2d Cir. 1956).

[58] Uniform Code of Military Justice, arts. 1-140, 10 U.S.C. §§ 801-940 (1970) [hereinafter cited as Uniform Code in text and UCMJ in footnotes] was passed by Congress in 1950 and the armed forces began to try soldiers for violations of the Code in 1951. The purpose of the Act was "[t]o unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice." Act of May 5, 1950, ch. 169, 64 Stat. 107.

military courts-martial for criminal offenses committed while accompanying the armed forces overseas.[89]

Under the provisions of the Uniform Code of Military Justice, the military was given jurisdiction to try discharged servicemen, dependents and civilian employees for offenses committed outside the territorial limits of the United States. Article 3(a) of the Uniform Code provided that soldiers discharged from military service could be tried by court-martial for serious offenses committed during their prior active duty service if it appeared that no federal court had jurisdiction over the offense. In part, article 3(a) stated:

> [A]ny person charged with having committed, while in a status in which he was subject to [the UCMJ] an offense against [the UCMJ] punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by court-martial by reason of the termination of said status.[90]

In addition, Article 2(11) of the Uniform Code provided that civilians "serving with, employed by, or accompanying the armed forces outside the United States" could be tried by court-martial for any offenses committed overseas.[91] Through these two articles Congress was able to make a limited group of civilians subject to court-martial jurisdiction for offenses committed outside of the territorial limits of the United States. Articles 3(a) and 2(11), therefore, were an early attempt by Congress to extend the exercise of federal jurisdiction to civilians overseas.[92]

1. Discharged Servicemen

The constitutionality of article 3(a) was first challenged in *Talbott v. United States ex rel. Toth*.[93] In *Toth*, the defendant was a

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[89] *See generally* Bell v. Clark, 308 F. Supp. 384, 386-87 (E.D. Va. 1970) for a short discussion of the cases in this area. The individual cases are treated in greater detail later in this article.

[90] UCMJ, art. 3(a), 50 U.S.C. §553(a) (1952). The validity of a similar type of statute providing that "a person accused of committing fraud against the Government while in military service was amenable to trial by court-martial after his discharge from the service" had been upheld numerous times. Talbott v. United States, 215 F.2d 22, 26 (D.C. Cir. 1954). *See also* Kronberg v. Hale, 180 F.2d 128 (9th Cir. 1950); *Ex parte* Joly, 290 F. 858 (S.D.N.Y. 1922); United States *ex rel.* Marino v. Hildreth, 61 F. Supp. 667 (E.D.N.Y. 1945); Terry v. United States, 2 F. Supp. 962 (D.D.C. 1933).

[91] UCMJ, art. 2(11), 50 U.S.C. §552(11) (1952).

[92] *See* United States *ex rel.* Hirschberg v. Cooke, 336 U.S. 210 (1949); *Hearings on H.R. 2498 Before the Subcomm. on Armed Services of the House of Representatives*, 81st Cong., 1st Sess. 617, 800, 883-84, 902, 1262 (1949). *See also* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 15 n.8 (1955); United States v. Gallagher, 7 U.S.C.M.A. 506, 509-10, 22 C.M.R. 296, 299-300 (1957); Morgan, *Court-Martial Jurisdiction Over Non-Military Persons Under the Articles of War*, 4 MINN. L. REV. 79, 83-84 (1920).

[93] 113 F. Supp. 330 (D.D.C. 1953), *rev'd sub nom.* Talbott v. United States, 215 F.2d 22 (D.C. Cir. 1954). The Judge Advocate General of the Army, Major General Ernest M.

civilian who had been discharged from the Air Force in December 1952. Four months after his release from military service, Air Force officials charged Toth with premeditated murder and conspiracy to commit murder in violation of Articles 81 and 118 of the Uniform Code of Military Justice. The charges alleged that the offenses occurred while Toth was stationed in Korea. Shortly after Toth was charged, military authorities, acting pursuant to the provisions of article 3(a), apprehended Toth at his place of employment and returned him to Korea where he was placed in confinement pending trial by general court-martial.

Toth's sister filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia. The petition alleged that article 3(a) was unconstitutional and that as a result, Toth had been transported illegally from Pittsburgh to Korea. Although the district court granted the writ and ordered Toth released from confinement, the order was stayed pending an appeal by the Secretary of the Air Force.[94]

The court of appeals reversed and remanded "the case . . . with instructions to discharge the writ and to return Toth to the custody of the military authorities."[95] Upholding the constitutionality of article 3(a), the court reasoned that

> the Constitution gave Congress power "To make Rules for the Government and Regulation of the land and naval Forces." Congress has made such rules, and among them is the one before us. In effect this section of the Uniform Code is no more than a provision by Congress that an honorable discharge from military service shall not be an absolution for crimes theretofore committed. In substance and effect it is a general condition at-

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Brannon, argued against the passage of Article 3(a) of the Uniform Code of Military Justice.

> He asked Congress to "confer jurisdiction upon Federal courts to try any person for an offense denounced by the [military] code if he is no longer subject thereto. This would be consistent with the fifth amendment of the Constitution." The Judge Advocate General went on to tell Congress that "If you expressly confer jurisdiction on the Federal courts to try such cases, you preserve the constitutional separation of military and civil courts, you save the military from a lot of unmerited grief, and you provide for a clean constitutional method for disposing of such cases."

quoted in United States *ex rel.* Toth v. Quarles, 350 U.S. 1, 21(1955). *See Hearings Before the Subcomm. of the Senate Comm. on Armed Services on S. 857 and H.R. 4080*, 81st Cong., 1st Sess. 256-57 (1949).

The My Lai incident and the trial of Lieutenant Calley almost fell subject to this provision. Calley was charged with violating the Uniform Code of Military Justice one day before he was to be discharged from active duty. *See* United States v. Calley, 46 C.M.R. 1131, 1142 (ACMR), *aff'd*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973). On habeas corpus, Lt. Calley was initially ordered released, Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), but that order was reversed, 519 F.2d 182 (5th Cir. 1975).

[94] *See* 215 F.2d at 25.

[95] *Id.* at 31.

> tached by Congress to discharges from the service. We perceive no constitutional invalidity in such a provision.[96]

Toth appealed the court's decision to the United States Supreme Court which granted certiorari on the question of the constitutionality of article 3(a).[97]

In *United States ex rel. Toth v. Quarles*[98] the Supreme Court reversed the court of appeals' decision and ruled article 3(a) to be unconstitutional.[99] In writing for the majority, Justice Black concluded that "Congress cannot subject civilians like Toth to trial by court-martial."[100] "Like other civilians," Justice Black noted, discharged soldiers, "are entitled to have the benefits of safeguards afforded those tried in the regular courts authorized by Article 3 of the Constitution."[101] In addition, he observed that:

> [A]ny expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of the federal courts set up under Article 3 of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals.[102]

It made no difference to Justice Black that Toth could not be prosecuted in any way by the federal government for the offenses committed in Korea.[103]

The effect of the Court's decision in *Toth* is that the government's award of a military discharge carries with it a grant of immunity from federal prosecution for offenses committed outside the United States.[104] With the military courts unable to exercise jurisdiction over ex-servicemen for such offenses, and with the federal courts unable to exercise jurisdiction over crimes committed outside the United States, American soldiers separated from military service cannot be punished or held criminally responsible for crimes committed beyond the boundaries of the United States.

2. Civilian Dependents

Article 2(11) provides for the exercise of military jurisdiction over civilian dependents.[105] Its constitutionality was challenged in 1957

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[96] *Id.* at 25.
[97] United States *ex rel.* Toth v. Talbott, 348 U.S. 809 (1954).
[98] 350 U.S. 11 (1955).
[99] *Id.* at 23.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 15.
[103] *Id.* at 21.
[104] STUDY DRAFT, *supra* note 25, at xxxi.
[105] UCMJ, art. 2(11), 10 U.S.C. § 802(11) (1970).

when the Supreme Court was asked to decide whether civilian dependents accompanying the armed forces could be tried by military courts-martial for offenses committed overseas. In *Reid v. Covert*[106] the wife of an Air Force Sergeant stationed in England was charged with the murder of her husband. Under the provisions of article 2 (11), Mrs. Covert, a civilian dependent "accompanying the armed forces outside the United States," was charged with premeditated murder in violation of Article 118 of the Uniform Code of Military Justice. She was tried by a general court-martial composed of Air Force officers; she was found guilty and was sentenced to life imprisonment. On appeal, an Air Force Board of Review affirmed the conviction.[107] The United States Court of Military Appeals, however, reversed her conviction on the ground that procedural errors had been committed when the trial court instructed the court members on the issue of Mrs. Covert's mental responsibility.[108]

Before she could be retried by the military, Mrs. Covert petitioned the District Court for the District of Columbia for a writ of habeas corpus on the grounds that article 2(11), which permitted the trial of civilian dependents by court-martial, was unconstitutional. Relying on the Supreme Court's decision in *Toth*, the district court ordered Mrs. Covert released from confinement.[109] The Government appealed the ruling to the Supreme Court and the Court granted certiorari on the issue of the constitutionality of article 2(11).[110]

In *Kinsella v. Krueger*,[111] a companion case, the wife of an Army Colonel stationed in Japan was charged under the Uniform Code with the premeditated murder of her husband.[112] Pursuant to the provisions of article 2(11), Mrs. Smith, like Mrs. Covert, was tried by general court-martial. A court of officers found Mrs. Smith guilty of premeditated murder and sentenced her to life imprisonment. Her conviction was affirmed by an Army Board of Review[113] and the United States Court of Military Appeals.[114]

After Mrs. Smith had exhausted the military remedies available

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[106] 354 U.S. 1 (1957).
[107] United States v. Covert, 16 C.M.R. 465 (AFBR 1954).
[108] United States v. Covert, 6 U.S.C.M.A. 48, 19 C.M.R. 174 (1955).
[109] *See* 354 U.S. at 4.
[110] 350 U.S. 985 (1955).
[111] 354 U.S. 1 (1957).
[112] The charge was a violation of Article 118 of the UCMJ, 50 U.S.C. §712 (now 10 U.S.C. §918 (1970)).
[113] United States v. Smith, 10 C.M.R. 350 (ABR 1953), *decision on reconsideration*, United States v. Smith, 13 C.M.R. 307 (ABR 1953).
[114] United States v. Smith, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954).

to her, her father filed a petition for a writ of habeas corpus on her behalf in the Federal District Court for the Southern District of West Virginia. The petition requested that Mrs. Smith be released from confinement on the ground that the court-martial which tried her "was without jurisdiction because Article 2(11) of the UCMJ was unconstitutional insofar as it authorized the trial of civilian dependents accompanying servicemen overseas."[115]

In denying the petition, the district court ruled that Congress had the power under article I, section 8 of the Constitution and the necessary and proper clause to authorize the trial by courts-martial of civilians accompanying the armed forces overseas in time of peace and therefore upheld the constitutionality of article 2(11). Mrs. Smith's father appealed the dismissal of the writ to the Fourth Circuit Court of Appeals and while the appeal was pending, the Supreme Court granted certiorari on the issue of the constitutionality of article 2(11), an issue already pending before it in *Reid v. Covert.*

In 1956, the Supreme Court in *Reid v. Covert*[116] and *Kinsella v. Krueger*[117] upheld the constitutionality of article 2(11) and the courts-martial convictions of Mrs. Covert and Mrs. Smith. Later, a majority of the Court voted to reconsider their decisions in these two cases and petitions for rehearing were granted.[118] After additional argument and further consideration, the Supreme Court withdrew its previous opinions and judgments and held in a second set of opinions also styled *Reid v. Covert*[119] and *Kinsella v. Krueger*[120] that the wives of soldiers stationed overseas "could not be tried by military authorities."[121]

In support of its holding that the wives of American soldiers stationed overseas had a constitutional right to be indicted by a grand jury and tried by a jury of their peers, the Court reasoned that:

> [W]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.[122]

These opinions established that dependents charged with capital

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[115] *See* Reid v. Covert, 354 U.S. 1, 4-5 (1954); United States v. Kinsella, 137 F. Supp. 806, 807 (S.D.W. Va. 1956).
[116] 351 U.S. 487 (1956).
[117] 351 U.S. 470 (1956).
[118] 352 U.S. 901 (1956).
[119] 354 U.S. 1 (1957).
[120] *Id.*
[121] *Id.*
[122] 354 U.S. at 6. *See also* United States *ex rel.* Guagliardo v. McElroy, 259 F. 2d 927, 929-30 (D.C. Cir. 1958).

offenses while accompanying the armed forces overseas in time of peace were entitled to a civilian trial with the procedural safeguards guaranteed by the Bill of Rights and the Constitution. Thus, the decisions denied military authorities the power to try civilians committing capital offenses overseas.

Because many courts viewed the Supreme Court's holdings in *Reid* and *Krueger* as prohibiting only the courts-martial of civilian dependents charged with capital offenses, the constitutionality of trying civilian dependents charged with noncapital offenses also was challenged. In *Kinsella v. United States ex rel. Singleton*[123] the Supreme Court further limited the scope of the exercise of military jurisdiction by holding that the "military could not exercise jurisdiction over civilian dependents charged with noncapital offenses."[124] In *Singleton*, Joanna S. Dial and her serviceman husband were charged with the unpremeditated murder of their 1-year-old son in Germany.

The Dials were tried together by general court-martial in Baumholder, Germany. Upon their pleas of guilty they were convicted of involuntary manslaughter, and sentenced to the maximum punishment authorized by the Manual for Courts-Martial. An Army Board of Review[125] and the United States Court of Military Appeals[126] upheld the right of the military courts to exercise jurisdiction over civilian dependents charged with noncapital offenses and affirmed the trial court's decision.

Mrs. Dial was returned to the United States and was confined at the Federal Reformatory for Women at Alderson, West Virginia. A petition for a writ of habeas corpus was filed on her behalf by her father in the United States District Court for the Southern District of West Virginia challenging the constitutionality of her conviction by court-martial for a noncapital offense committed overseas. While expressing disagreement with the Supreme Court's decision in *Krueger*, the same district court whose denial of a petition for a writ of habeas corpus in Mrs. Smith's case had been reversed by the United States Supreme Court in *Kinsella v. Kreuger*,[127] nevertheless applied the *Krueger* rationale and granted Mrs. Dial's writ of habeas corpus ordering her released from custody.[128]

The Government appealed the district court's decision granting the writ to the United States Supreme Court. In *Kinsella v. United*

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[123] 361 U.S. 234 (1960).
[124] *Id.* at 249.
[125] United States v. Dial, CM 397520 (ABR 1958) (unpublished opinion).
[126] United States v. Dial, 9 U.S.C.M.A. 541, 26 C.M.R. 321 (1958).
[127] *See* notes 111-122 and accompanying text *supra*.
[128] United States v. Kinsella, 164 F. Supp. 707 (S.D.W. Va. 1958).

States ex rel. Singleton[129] the Supreme Court denied the government's appeal and affirmed the district court's decision. In writing the majority opinion, Justice Clark stated that Mrs. Dial was entitled to the safeguards provided by the Consitution and that the military did not have authority to try her by court-martial for a noncapital offense committed overseas while she was accompanying her husband who was in the armed forces.[130]

In *Reid, Krueger,* and *Singleton,* the Supreme Court established that civilian dependents accompanying the armed forces outside the United States cannot be tried by courts-martial for either capital or noncapital offenses committed overseas. The effect of these decisions was to deny to Congress the use of the Uniform Code of Military Justice to exercise criminal jurisdiction over a limited class of American civilians living abroad. In these cases, the Supreme Court extended constitutional protections to another group of civilians, who now are subject to neither the jurisdiction of courts-martial nor jurisdiction of federal courts, and who in no way can be punished or held criminally responsible by a judicial tribunal of the United States for crimes committed beyond the boundaries of the United States.

3. Civilian Employees

In addition to providing that civilian dependents accompanying the armed forces outside of the United States could be tried by court-martial for offenses committed overseas, Article 2(11) of the Uniform Code also provided that persons "serving with [or] employed by . . . the armed forces outside the United States"[131] were subject to trial by military court-martial for crimes committed overseas. Because the Supreme Court rulings in *Reid, Krueger,* and *Singleton* were limited to that portion of article 2(11) dealing with persons "accompanying the armed forces outside the United States," the constitutionality of the portion of the article subjecting civilians employed by the armed forces overseas to trial by court-martial for offenses committed overseas remained uncertain.

Some courts reasoned that because the "persons accompanying" part of article 2(11) was held unconstitutional, the remainder of the article was also unconstitutional.[132] Other courts, however, concluded that the remaining provision of article 2(11) providing for

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[129] 361 U.S. 234 (1960).
[130] *Id.* at 249.
[131] UCMJ, art. 2(11), 50 U.S.C. §552(11) (now 10 U.S.C. §802(11) (1970)).
[132] *See* United States *ex rel.* Guagliardo v. McElroy, 259 F.2d 927, 931-33 (D.C. Cir. 1958).

the exercise of military jurisdiction over those "serving with [or] employed by" the armed forces was still valid.[133] In upholding the constitutionality of this section of article 2(11), these courts relied on the reservation clause in title 10, United States Code, which provides that

> If a part of this Act is invalid, all parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.[134]

Because of the diversity of interpretations, the Supreme Court was called upon in *Grisham v. Hagan*[135] to rule on the constitutionality of the remaining portion of Article 2(11).

In *Grisham* the defendant was a civilian, employed by the United States Army Corps of Engineers in Orleans, France, who was arrested by French authorities for the premeditated murder of his wife in Orleans. Within three weeks of his arrest, Grisham was released to American military authorities at the Army's request, and charged with premeditated murder in violation of Article 118, Uniform Code of Military Justice. In his trial by general court-martial, Grisham objected to being tried by the military on the ground that "exclusive jurisdiction over the offense upon which he was arraigned was vested in France and was punishable only under French law."[136] After his motion to dismiss the charges on the ground that the court-martial did not have jurisdiction to try him was overruled, Grisham stood mute and a plea of not guilty was entered on his behalf. He was convicted of unpremeditated murder and sentenced to life imprisonment.[137]

Following his conviction, Grisham petitioned for a writ of habeas corpus in the Federal District Court for the Middle District of Pennsylvania alleging that

> the court-martial was without jurisdiction because Article 2(11) of the Uniform Code of Military Justice was unconstitutional in so far as it authorized the trial by court-martial of . . . a civilian employee of the United States Army and that as a civilian [he] had been deprived of his constitutional rights to indictment by a grand jury and trial by jury.[138]

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[133] *See In re* Yokoyama, 170 F. Supp. 467, 469 (S.D. Cal. 1959); Grisham v. Taylor, 161 F. Supp. 112, 114-15 (M.D. Pa.), *aff'd*, 261 F.2d 204, 205 (3d Cir. 1958). *See also* then Circuit Judge Burger's dissent in United States *ex rel.* Guagliardo v. McElroy, 259 F.2d 927, 933-40 (D.C. Cir. 1958).

[134] Savings and Separability Provision, 10 U.S.C.A. prec, Subtitle A note, 801 note at 1 (1975). *See also* Act of Aug 10, 1956, Pub. L. No. 84-1028, §49(d), 70A Stat. 640.

[135] 361 U.S. 278 (1960)

[136] *See* Grisham v. Taylor, 161 F. Supp. 112, 113 (M.D. Pa. 1958).

[137] *See id.*

[138] *Id.*

The district court dismissed the petition, ruling that employees of the armed forces serving overseas could be tried by court-martial under the provisions of article 2(11) for offenses committed overseas.[139] The Third Circuit Court of Appeals affirmed on the grounds that Grisham was an employee closely connected with the Army, that he was associated with the Army by his own choice, and that civilian employees accompanying the armed forces traditionally had been tried by military courts-martial for offenses committed while employed overseas.[140]

The Supreme Court granted certiorari on two issues: were courts-martial of civilians employed by the armed forces overseas constitutional and were the provisions of article 2(11) severable.[141] The Supreme Court held that civilian employees of the armed forces charged with capital offenses committed while serving overseas are entitled to the constitutional rights of indictment by grand jury and trial by jury, just as civilian dependents are under the Court's decision in *Reid v. Covert*.[142] Therefore, the military did not have jurisdiction to try Grisham for a capital offense committed overseas while he was employed by the armed forces and his conviction was reversed.[143]

In *McElroy v. United States ex rel. Guagliardo*[144] and *Wilson v. Bohlender*[145] the Supreme Court was presented with the question of whether civilians employed by the armed forces could be tried by court-martial for noncapital offenses committed overseas. In *McElroy*, the defendant, Dominic Guagliardo, was a civilian

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[139] *Id.* at 115.

[140] Grisham v. Taylor, 261 F.2d 204, 206 (3d Cir. 1958). *Contra, In re* Yokayama, 170 F. Supp. 467, 469 (S.D. Cal. 1959).

[141] 361 U.S. at 281.

[142] *See* notes 107-110 & 116-122 and accompanying text *supra*.

[143] 361 U.S. at 280. *See also* Latney v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969) (Navy lacked jurisdiction to try civilian merchant seaman for murder committed in Da Nang, South Vietnam); United States v. Zamora, 19 U.S.C.M.A. 403, 42 C.M.R. 5 (1970) (court-martial charges pending against a civilian serving with the armed forces in Vietnam ordered dismissed); United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970) (Department of Army civilian accompanying the armed forces overseas not subject to trial by court-martial for offenses committed in Vietnam because Vietnam War was not a war formally declared by Congress); Robb v. United States, 456 F.2d 768 (Ct. Cl. 1972) (claim for refund of fine paid by Department of Navy civilian convicted by court-martial in Vietnam granted). For further discussion of the phrase "in time of war" *see* United States v. Anderson, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968); United States v. Bancroft, 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953); Note, *Military Law—"In Time of War" Under the Uniform Code of Military Justice: An Elusive Standard*, 67 MICH. L. REV. 841 (1969).

[144] 361 U.S. 281 (1960).

[145] *Id.* (a companion case).

employed as an electrical lineman by the United States Air Force at a depot near Casablanca, Morocco. In 1957, he and two enlisted men were charged by military authorities with larceny and conspiracy to commit larceny of government property from the depot supply house. The three accused were tried and convicted of the charges by general court-martial and were sentenced to be confined at hard labor for three years and fined $1000 each. Confined in the Air Force stockade in Morocco, Guagliardo filed a petition for a writ of habeas corpus in the District Court for the District of Columbia alleging that "he had been deprived of his constitutional rights to indictment by a grand jury and trial by a jury."[146] In denying the petition, the district court upheld the constitutionality of that section of article 2(11) which permitted the military to exercise court-martial jurisdiction over civilians employed by the armed forces overseas and charged with noncapital offenses.[147] In reaching this decision the court reasoned:

> That a law subjecting personnel of the type involved in this case to trial by court-martial is necessary and proper for carrying into execution the power to make rules for the government and regulation of the land and naval forces, is demonstrated by a consideration of the consequences of any conclusion that would deny this authority to the Congress. It is manifestly essential to enforce law and order at stations maintained by the armed forces of the United States in foreign countries. The use of civilian employees is frequently indispensable in connection with the operation of these stations. If court-martial jurisdiction may not be exercised in respect to such civilians, other means of law enforcement would create difficulties that in some instances might prove insuperable.[148]

The accused appealed and the court of appeals concluded that the attempt by Congress in subparagraph (11) of article 2 to extend courts-martial jurisdiction to civilian employees serving overseas with the armed forces violated article III, section 2 of the Constitution and the fifth and sixth amendments, and therefore was unconstitutional.[149] Because of the decision's conflict with the Third

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[146] United States *ex rel.* Guagliardo v. McElroy, 158 F. Supp. 171, 172 (D.D.C. 1958).
[147] *Id.* at 179.
[148] *Id.* at 178.
[149] United States *ex rel.* Guagliardo v. McElroy, 259 F.2d 927, 933 (D.C. Cir. 1958). Then Circuit Judge Burger registered a strong dissent. *Id.* at 933-40. The grounds of his dissent are summarized in United States *ex rel.* Wilson v. Bohlander:

> (1) The majority result was not compelled by Reid v. Covert, because a civilian employee could be either "in" the armed forces in accord with the Black opinion, or that he could be within the Necessary and Proper Clause as suggested by the concurring opinions. (2) There is historic precedent for subjecting civilian employees to court martial jurisdiction whereas there is none for dependents. (3) Clear necessity exists for subjecting civilian employees to court martial jurisdiction. (4) No practical alternative exists.

167 F. Supp. 791, 797 (D.D.C. 1958).

Circuit's opinion in *Grisham*, which had ruled that civilian employees of the armed forces could be tried by court-martial under article 2(11), the Supreme Court granted the government's petition for certiorari.[150]

In *Wilson v. Bohlender*,[151] a companion case, the defendant, a civilian auditor employed by the Department of the Army in Berlin, Germany, was charged by military authorities under article 2(11) with various acts of sexual misconduct. Wilson was tried by general court-martial, and pleaded guilty to the charges. He was convicted of the offenses to which he entered pleas and was sentenced to ten years' confinement at hard labor. Subsequently, his conviction was affirmed by an Army Board of Review[152] and by the United States Court of Military Appeals.[153] While confined at Fitzsimmons Army Hospital, Wilson filed a petition for a writ of habeas corpus challenging the constitutionality of his trial under the provisions of Article 2(11) of the Uniform Code. In a well written opinion the district court concluded that

> Congress may, under the authority of the Necessary and Proper Clause, provide for court-martial jurisdiction in non-capital cases over other than uniformed members of our armed forces when necessary for the effective government and regulation of those armed forces . . . . [and that] court-martial jurisdiction in non-capital cases over civilian employees of the armed forces in foreign lands is necessary for the effective government and regulation of our armed forces.[154]

For this reason, the court dismissed the petition. Wilson appealed the denial of his writ to the Tenth Circuit Court of Appeals, but prior to oral argument the Supreme Court granted certiorari in his case.[155]

The Supreme Court's opinion in *McElroy* and *Wilson*, written by Justice Clark, dealt first with the issue of the severability of article 2(11). The Court concluded that "[t]he intention of Congress in providing for severability [in title 10 and in the Uniform Code of Military Justice] is clear, and legal effect can be given to each category standing alone."[156] The Court next addressed the application of article 2(11) to noncapital offenses committed by civilian employees of the armed forces. Concluding that the rationale previously announced in *Singleton* and *Grisham* was controlling,

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[150] 359 U.S. 904 (1959).
[151] 361 U.S. 281 (1960).
[152] United States v. Wilson, CM 392423 (ABR 1958) (unpublished opinion).
[153] United States v. Wilson, 9 U.S.C.M.A. 60, 25 C.M.R. 322 (1958).
[154] United States *ex rel.* Wilson v. Bohlander, 167 F. Supp. 791, 799 (D.D.C. 1958).
[155] 359 U.S. 906 (1954).
[156] 361 U.S. at 285.

the Court held that the trial of American citizens by court-martial under the provisions of article 2(11) was constitutionally impermissible.[157]

In *Grisham*, *McElroy*, and *Wilson*, the Supreme Court established that civilian employees serving with or employed by the armed forces outside the United States are not subject to military jurisdiction and therefore cannot be tried by court-martial for either capital or noncapital offenses committed overseas. In these cases, the Court reasoned that civilians employed by the armed forces overseas are entitled to the same constitutional protections and safeguards available to citizens charged with criminal offenses within the United States.

By holding article 2(11) unconstitutional, the Supreme Court denied the military the authority to exercise court-martial jurisdiction over another group of American civilians living overseas. In so doing, the Court denied Congress the option of using the military criminal justice system as a vehicle for the prosecution of American citizens who commit criminal offenses outside the territorial boundaries of the United States in time of peace.[158] As a result, ex-servicemen, dependents and civilian employees of the armed forces cannot be tried by court-martial for offenses committed overseas. This means that in the absence of federal statutes making such crimes punishable under federal law, these individuals must be prosecuted in foreign courts or not prosecuted at all. The inability of the military to undertake the prosecution of individuals falling within these three classes for crimes committed overseas, and the absence of any adequate jurisdictional basis for the United States to prosecute such offenses were factors which influenced the National Commission to recommend that the federal criminal code be given application extraterritorially.

IV. PROPOSALS FOR REFORM

The substantial increase in the number of American citizens living abroad and the inability of the United States Government to prosecute them for offenses committed overseas were two important factors in the National Commission's decision to recommend that a section providing for extraterritorial jurisdiction be included in any revised federal penal code. The failure of Congress to specify which federal criminal statutes should be applied overseas, as well as the Supreme Court's decisions restricting the exercise of military

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[157] *Id.* at 286. *See* Brown & Schwartz, *New Federal Code Is Submitted*, 56 A.B.A.J. 844, 846 (1970).

[158] *See also* note 143 *supra*.

criminal jurisdiction over American civilians accompanying the armed forces overseas also were major factors in the National Commission's decision to include extraterritorial provisions in its recommendations. It was primarily the recognition of these four factors that prompted the National Commission to question the soundness of the government's traditional policy of not prosecuting civilians who commit crimes in foreign countries. The combined effect of these factors convinced the Commission of the need for legislation which would extend the reach of federal law to individuals who commit offenses outside the United States.

A. NATIONAL COMMISSION PROPOSAL

The proposals included in the *Final Report* of the National Commission for extending federal jurisdiction to offenses committed overseas have met with general approval.[159] This favorable response is attributable to a recognition that such legislation is not only legally sound, but also certainly needed. The National Commission's recommended provisions for implementing the concept of extraterritorial jurisdiction are contained in section 208 of its *Final Report*. Section 208 would authorize, except as otherwise provided by statute or treaty, the prosecution of eight types of offenses committed overseas by American civilians.[160]

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[159] *See, e.g., Hearings, supra* note 2, pt. III, subpt. c, at 1920; pt. V, at 5405; pt. X, at 7406.

[160] **§208. Extraterritorial Jurisdiction.**

Except as otherwise expressly provided by statute or treaty, extraterritorial jurisdiction over an offense exists when:

(a) one of the following is a victim or intended victim of a crime of violence: the President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice President-elect, or any individual who is acting as President under the Constitution and laws of the United States, a candidate for President or Vice President or any member or member-designate of the President's cabinet, or a member of Congress, or a federal judge;

(b) the offense is treason, or is espionage or sabotage by a national of the United States;

(c) the offense consists of a forgery or counterfeiting, or an uttering of forged copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents issued by the United States; or perjury or a false statement in an official proceeding of the United States; or a false statement in a matter within the jurisdiction of the government of the United States; or other fraud against the United States, or theft of property in which the United States has an interest, or, if committed by a national or resident of the United States, any other obstruction of or interference with a United States government function;

(d) the accused participates outside the United States in a federal offense committed in whole or in part within the United States, or the offense constitutes an attempt, solicitation, or conspiracy to commit a federal offense within the United States;

(e) the offense is a federal offense involving entry of persons or property into the United States;

(f) the offense is committed by a federal public servant who is outside the territory of the United States because of his official duties or by a member of his household residing abroad or by a person accompanying the military forces of the United States.

(g) such jurisdiction is provided by treaty; or

The first three subsections, dealing with criminal offenses against the United States Government, provide the United States with jurisdiction to prosecute crimes of violence committed overseas against high-ranking United States government officials;[161] acts of treason, espionage or sabotage against the United States;[162] and acts which obstruct or interfere with a function of the United States Government.[163]

The remaining five subsections deal generally with the application of criminal statutes overseas. The first provides for federal prosecution of any person who participates outside of the United States in an offense committed within the United States as well as persons outside of the United States who solicit or conspire to commit an offense within the United States.[164] Subsequent provisions make any offense involving "entry of persons or property into the United States" punishable in the federal courts even though committed extraterritorially[165] and also permit the exercise of federal jurisdiction over American civilians employed by the federal government overseas.[166] In addition, this last provision extends jurisdiction to members of the employees' households and to those accompanying the armed forces overseas.[167] In effect, this portion of section 208 extends the application of federal jurisdiction to American civilians and dependents living or assigned overseas as well as to diplomatic personnel overseas.[168]

The final subsections extend the application of extraterritorial jurisdiction to all offenses which under treaty provisions are triable in United States federal courts;[169] and those committed by or against an American citizen outside the jurisdiction of any nation.[170] Thus, an American citizen committing a criminal offense on an ice island in the Arctic ocean or in outer space is subject to prosecution in federal court.[171]

(h) the offense is committed by or against a national of the United States outside the jurisdiction of any nation

FINAL REPORT, *supra* note 17, at 21-22 [hereinafter cited as National Commission Proposal]. *See* Official Comment, *id.* at 22. *See also* WORKING PAPERS, *supra* note 7, at 33, 69-76, 424, 506.

[161] National Commission Proposal, *supra* note 160, § 208(a).

[162] *Id.* § 208(b).

[163] *Id.* § 208(c).

[164] *Id.* § 208(d).

[165] *Id.* § 208(e).

[166] *Id.* § 208(f).

[167] *Id.*

[168] FINAL REPORT, *supra* note 17, Comment at 22.

[169] National Commission Proposal, *supra* note 160, § 208(g).

[170] *Id.* § 208(h).

[171] FINAL REPORT, *supra* note 17, Comment at 22.

While it is true that certain provisions of section 208 deal with criminal conduct which previously has been within the jurisdiction of the federal courts,[172] other provisions of the section are the creative work of those serving on the National Commission.[173] It is these latter provisions that effectively extend the reach of federal jurisdiction to American civilians around the world, and it is through these provisions that the National Commission has provided the means to satisfy the jurisdictional needs of the United States.

The significance of section 208 is that all American citizens, residents and aliens who could not be tried in federal courts for offenses committed overseas would be subject to federal prosecution. In addition, discharged servicemen, civilian employees of the Government and civilian dependents of those accompanying the armed forces overseas also would be subject to federal prosecution for offenses committed outside the territorial limits of the United States. The provisions set forth in section 208 represent a major change in America's traditional policy of exercising restraint in extending federal jurisdiction overseas. The section also provides, for the first time ever, a comprehensive statement of the federal government's intention to prosecute offenses committed beyond its boundaries.[174]

Section 208 and the other portions of the National Commission's *Final Report* were submitted to the President of the United States in January 1971.[175] In 1972, the Justice Department and the Staff of the Senate Judiciary Committee both submitted to the House of Representatives and the Senate proposals of their own for revising the federal criminal laws, both of which provided for extraterritorial application of federal penal code.[176]

B. DEPARTMENT OF JUSTICE PROPOSAL

The Department of Justice's proposal for extraterritorial jurisdiction is set forth in section 204 of Senate Bill 1400 and is similar to

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[172] *E.g.*, treason. *See* Kawakita v. United States, 343 U.S. 717 (1952); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

[173] *E.g.*, subsections (e), (f) and (h).

[174] *See* FINAL REPORT, *supra* note 17, § 208 Comment at 22. *See also Hearings, supra* note 2, pt. I, at xi.

[175] *Hearings, supra* note 2, pt. I, at i.

[176] S. 1400, 93d Cong., 1st Sess. (1973); H.R. 6046, 93d Cong., 1st Sess. (1973) (Justice Department proposal); S. 1, 93d Cong., 1st Sess. (1973) (Senate Staff proposal).

the provision submitted by the National Commission.[177] In its proposal, the Justice Department deleted none of the Commission's extraterritorial provisions and made only a few additions.

Subsection (a) of the Justice Department proposal adds federal public servants performing diplomatic duties outside of the United States to the National Commission's provision regarding crimes committed against high-ranking government officials.

In subsection (b) the Justice Department proposal adds a phrase which makes the "disclosing or mishandling [of] national defense information or disclosing or unlawfully obtaining classified information" an offense punishable in the federal courts.[178] Subsection (d) of the Justice proposal is a new provision not found in the National Commission's section 208. This subsection provides that any person involved in the "manufacture or distribution of narcotics or other drugs for import into the United States" is subject to federal prosecution.[179] Subsection (i) of the Justice proposal merely amplifies the materials on treaty jurisdiction contained in subsection (h) of the National Commission's proposal.[180] The remaining

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[177] §204. *Extraterritorial Jurisdiction of the United States*

Except as otherwise expressly provided by statute, treaty or executive agreement, the circumstances in which the United States has extraterritorial jurisdiction over an offense described in this title include the following:

(a) the offense is a crime of violence and the victim or intended victim is a United States official, or a federal public servant outside the United States for the purpose of performing diplomatic duties,

(b) the offense is treason, sabotage against the United States espionage, disclosing or mishandling national defense information, or disclosing or unlawfully obtaining classified information;

(c) the offense consists of a counterfeiting or forgery of, or uttering of counterfeits or forged copies of, or issuing without authority, seals, currency instruments of credit, stamps, passports, or public documents which are or which purport to be issued by the United States; perjury or false swearing in an official proceeding of the United States; making a false statement in a United States government matter or a United States government record; bribery or graft involving a public servant of the United States; other fraud against the United States or theft of property in which the United States has an interest; impersonation of a public servant of the United States; or, if committed by a national or resident of the United States, any other obstruction of or interference with a United States government function,

(d) the offense involves the manufacture or distribution of narcotics or other drugs for import into the United States;

(e) the offense involves entry of persons or property into the United States;

(f) the offense is committed in whole or in part within the United States and the accused participates outside the United States, or the offense constitutes an attempt, conspiracy, or solicitation to commit an offense within the United States;

(g) the offense is committed by a federal public servant who is outside the United States because of his official duties or by a member of his household residing abroad, or by a person accompanying the military forces of the United States,

(h) the offense is committed by or against a national of the United States outside the jurisdiction of any nation; or

(i) the offense is comprehended by the generic terms of, and is committed under circumstances specified by, an international treaty or convention adhered to and ratified by the United States which provides for, or requires the United States to provide for, such jurisdiction.

S. 1400, 93d Cong., 1st Sess. § 204 (1973); H.R. 6046, 93d Cong., 1st Sess. § 204 (1973) [hereinafter cited as DOJ Bill]. *See also Hearings, supra* note 2, pt. V, at 4883.

[178] DOJ Bill, *supra* note 177, § 204(b).

[179] *Id.* § 204(d).

[180] *Compare id.* § 204(i) *with* National Commission Proposal, *supra* note 160, §208(h).

sections of the Justice proposal[181] are the same as those in the National Commission's proposal.

While the Department of Justice proposal for extraterritorial jurisdiction is substantially similar to the provisions submitted in section 208 of the Commission's *Final Report*, its additions and reorganization are valuable and tend to make the section more logical and complete.

C. SENATE JUDICIARY STAFF PROPOSAL

The proposal for extraterritorial jurisdiction submitted by the Senate Judiciary Staff is set forth in section 1-1A7 of Senate Bill 1[182] and is somewhat different from the proposal submitted by the National Commission. The Senate Judiciary Staff proposal not only adds to the Commission's suggested provisions but also deletes and substantially rephrases some of the remaining provisions.

Subsection (a) of the Senate Staff proposal provides that extraterritorial jurisdiction exists when "the victim is a Federal public servant."[183] This provision deletes the reference to United States officials listed in the National Commission's version[184] and does not include the Justice Department's explanation that the term federal public servant includes persons assigned overseas performing diplomatic duties.[185]

The Senate Staff's subsection (b) is a new section not included in either the Commission or the Justice drafts. It provides that an

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[181] DOJ Bill, *supra* note 177, § 204(c), (e), (f), (g), (h).

[182] § *1-1A7. Extraterritorial Jurisdiction*

Except as otherwise expressly provided, extraterritorial jurisdiction over an offense exists when:

(a) the victim is a Federal public servant;

(b) the property which is the subject of the offense is owned by or in the custody or control of the United States or is being manufactured, constructed, or stored for the United States;

(c) the offense is committed by a national of the United States, except that this section is not applicable if the conduct is not prohibited under the law of the territorial jurisdiction in which it is committed;

(d) the offense is (1) treason, espionage, or sabotage against the United States; (2) trafficking in drugs destined for eventual distribution or sale in the United States; (3) forgery or counterfeiting, uttering of forged copies or counterfeits, or issuance without authority of the seals, currency, instruments of credit, stamps, passports, or public documents issued by the United States; (4) perjury or a false statement in an official proceeding of the United States; or (5) any form of fraud against the United States;

(e) the person participates outside the United States in an offense committed in whole or in part within the United States, or the offense constitutes a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense within the United States;

(f) the offense involves the entry of persons or property into the United States; or

(g) such jurisdiction is provided by treaty.

S. 1, 93d Cong., 1st Sess. § 1-1A7 (1973) [hereinafter cited as Senate Staff Bill]. *See Hearings, supra* note 2, pt. V, at 4231-32.

[183] Senate Staff Bill, *supra* note 182, § 1-1A7(a).

[184] National Commission Proposal, *supra* note 160, § 208(a).

[185] *See* DOJ Bill, *supra* note 177, § 204(a).

offense against property owned or controlled by or in the custody of the United States is punishable under the federal law. Also, any offense against property being "manufactured, constructed, or stored for the United States" is made punishable under this provision of the Senate proposal.[186] Subsection (c) is also a new provision and provides that American nationals committing crimes overseas can be prosecuted in the federal courts unless the conduct is not a crime in the territory where the act occurs.[187]

Subsection (d) of the Senate proposal is a combination of the National Commission's provisions (b) and (c) and lists five types of offenses which are punishable under federal law. One of the five types of offenses included in this section, "trafficking in drugs destined for eventual distribution or sale in the United States,"[188] is also specifically set out in the Justice Department proposal,[189] but is not part of the National Commission's provisions.

Subsections (e), (f) and (g) of the Senate proposal correspond with subsections (d), (e) and (g) of section 208 of the National Commission's proposal. The Senate proposal, however, does not contain the provision making an offense committed outside the territory of any nation a crime punishable under federal law.[190]

Generally the Senate Staff's proposal contains most of the substantive provisions included in section 208 of the National Commission's *Final Report*. The Senate proposal, however, does rearrange and combine a number of the National Commission provisions. In addition, the Senate proposal includes two provisions not found in the National Commission draft, those which make offenses against United States property punishable in federal court, as well as offenses committed by American citizens overseas in territory where the conduct is not recognized as legal.

D. REFORM ACT OF 1975 PROPOSAL

The most recent proposal for the extraterritorial application of the federal criminal code is included in the criminal law reform legislation introduced in the Congress early in 1975. The bill, entitled the Criminal Justice Reform Act of 1975, was introduced in the Senate in January 1975[191] and in the House in February 1975.[192]

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[186] Senate Staff Bill, *supra* note 182, §1-1A7(b).
[187] *Id.* § 1-1A7(c).
[188] *Id.* § 1-1A7(d).
[189] DOJ Bill, *supra* note 177, § 204(d).
[190] The National Commission proposed this provision in their § 208(h). *See* note 160 *supra*.
[191] S. 1, 94th Cong., 1st Sess. (1975).
[192] H.R. 3907, 94th Cong., 1st Sess. (1975).

The provisions establishing extraterritorial jurisdiction are set forth in section 204 of the Act.[193]

The provisions of section 204 are a combination of proposals submitted by the National Commission, the Justice Department, and the Senate Judiciary Staff. In a format similar to that in the National Commission's proposal, section 204 divides extraterritorial crimes into nine categories and provides that the commission of any of the listed offenses outside of the United States is a crime punishable under the federal law.

For example, subsection (a) of section 204 provides that a violent crime committed overseas against "a United States official" or "a federal public servant . . . performing official duties"[194] is an offense against the United States punishable under federal law. This provision is taken from subsection (a) of the Justice Department proposal[195] and differs from the wording of the Justice

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[193] **§204. Extraterritorial Jurisdiction of the United States**

Except as otherwise expressly provided by statute, or by treaty or other international agreement, an offense is committed within the extraterritorial jurisdiction of the United States if it is committed outside the general jurisdiction of the United States and:

(a) the offense is a crime of violence and the victim or intended victim is:

(1) a United States official; or

(2) a federal public servant outside the United States for the purpose of performing his official duties;

(b) the offense is treason, sabotage against the United States, espionage, disclosing or mishandling national defense information, or disclosing or unlawfully obtaining classified information;

(c) the offense consists of:

(1) counterfeiting or forgery of, or uttering of a counterfeited or forged copy of, or issuing without authority, a seal, currency, instrument of credit, stamp, passport, or public document that is or that purports to be issued by the United States;

(2) perjury or false swearing in a federal official proceeding;

(3) making a false statement in a federal government matter or a federal government record;

(4) bribery or graft involving a federal public servant;

(5) fraud against the United States or theft of property in which the United States has an interest;

(6) impersonation of a federal public servant;

(7) any obstruction, impairment, or perversion of a federal government function, if committed by a national or resident of the United States;

(d) the offense consists of the manufacture or distribution of narcotics or other drugs for import into, or eventual sale or distribution within, the United States;

(e) the offense consists of entry of persons or property into the United States;

(f) the offense is committed in whole or in part within the United States and the accused participates outside the United States, or the offense constitutes an attempt, conspiracy, or solicitation to commit an offense within the United States;

(g) the offense is committed by a federal public servant, other than a member of the armed forces who is subject to court-martial jurisdiction for the offense, who is outside the United States because of his official duties, or by a member of his household residing abroad because of such public servant's official duties, or by a person accompanying the military forces of the United States;

(h) the offense is committed by or against a national of the United States at a place outside the jurisdiction of any nation; or

(i) the offense is comprehended by the generic terms of, and is committed under circumstances specified by, a treaty or other international agreement, to which the United States is a party, that provides for, or requires the United States to provide for, federal jurisdiction over such offense.

S. 1, 94th Cong., 1st Sess. § 204 (1975); H.R. 3907, 94th Cong., 1st Sess. § 204 (1975) [hereinafter cited as Reform Bill].

[194] *Id.* § 204(a).

[195] DOJ Bill, *supra* note 177, § 204(a).

Department proposal only in that the words "federal public servant . . . performing his *official* duties" have been substituted for the words "federal public servant . . . performing his *diplomatic* duties."[196] The effect of the change in wording is to broaden the Justice Department's provision by extending its protection to any federal public servant performing official duties overseas.

Subsection (b) provides that crimes involving the security of the United States and the unlawful use or disclosure of classified material are punishable as violations of the federal law.[197] Under this provision, those accused of treason, sabotage or espionage can be prosecuted by the Government in a federal court. This subsection is precisely the same as subsection (b) of the Justice Department proposal and is broader in scope than subsection (b) of the National Commission proposal because it makes misuse of classified information an offense.[198]

Subsection (c) makes specific crimes committed against the United States Government overseas subject to federal jurisdiction. Under the provisions of subsection (c) counterfeiting and forgery of official government documents are federal offenses; so too are false official statements, perjury in federal proceedings, bribery of federal public servants, frauds committed against the United States and impersonation of United States government officials. In addition, subsection (c) provides that any United States national or resident overseas who interferes with the accomplishment of a function of the federal government can be prosecuted in the federal courts for such interference.[199] All of the offenses included in subsection (c) of section 204 are taken from subsection (c) of the Justice Department proposal.[200] Most of the offenses also appear in subsection (c) of the National Commission's proposal[201] and subsection (d) of the Senate Judiciary proposal.[202]

Subsection (d) makes the importation of dangerous drugs into the United States a federal offense; specifically it prohibits the "manufacture or distribution of narcotic drugs for importation into, or eventual sale or distribution within, the United States."[203]

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[196] *Compare* Senate Staff Bill, *supra* note 182, § 1-A7(a) *with* Reform Bill, *supra* note 193, § 204(a).

[197] Reform Bill, *supra* note 193, § 204(b).

[198] *Compare* Reform Bill, *supra* note 193, § 204(b) *with* DOJ Bill, *supra* note 177, § 204(b) *and* National Commission Proposal, *supra* note 160, § 208(b).

[199] Reform Bill, *supra* note 193, § 204(c).

[200] *See* DOJ Proposal, *supra* note 177, § 204(c).

[201] *See* National Commission Proposal, *supra* note 160, § 208(c).

[202] *See* Senate Staff Bill, *supra* note 182, § 204(d).

[203] Reform Bill, *supra* note 193, § 204(d).

Subsection (d) is drafted broadly and represents a combination of the provisions included in subsection (d) of the Justice Department proposal and subsection (d)(2) of the Senate Judiciary Staff proposal.[204]

Subsection (e) of the Act makes the unlawful movement of persons or property across the boundaries of the United States a federal offense punishable in the federal courts.[205] This provision also appears in subsection (e) of the Justice Department proposal, subsection (e) of the National Commission proposal, and subsection (f) of the Senate Judiciary Staff[206] proposal.

Subsection (f) extends federal jurisdiction to Americans outside the United States who are involved in the commission of crimes within the United States.[207] The provision also applies to persons outside of the United States who conspire or attempt to commit crimes inside the United States. The wording of this provision is exactly the same as the wording of subsection (f) of the Justice Department proposal.[208] Subsection (e) of the Senate Judiciary Staff proposal[209] and subsection (d) of the National Commission's proposal[210] also make such conduct unlawful.

Subsection (g) provides that criminal offenses committed overseas by federal public servants, members of their families, or by persons accompanying the military forces overseas are punishable in the federal courts.[211] This provision is included specifically to make civilian dependents, civilian employees and discharged American soldiers subject to federal jurisdiction. The provision also makes diplomatic personnel, including their families and staffs, subject to federal jurisdiction. This subsection specifically exempts members of the armed forces who are subject to court-martial jurisdiction for offenses committed overseas from the extraterritorial jurisdiction of the United States.[212] While subsection (f) of the National Commission proposal[213] and subsection (g) of the Justice Department proposal[214] similarly provide for the

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[204] *Compare id. with* DOJ Bill, *supra* note 177, § 204(d) *and* Senate Staff Bill, *supra* note 182, § 1-1A7(d)(2).
[205] Reform Bill, *supra* note 193, § 204(e).
[206] *Compare id. with* DOJ Bill, *supra* note 177, § 204(e), National Commission Proposal, *supra* note 160, § 208(e) *and* Senate Staff Bill, *supra* note 182, § 1-1A7(f).
[207] Reform Bill, *supra* note 193, § 204(f).
[208] DOJ Bill, *supra* note 177, § 204(f).
[209] Senate Staff Bill, *supra* note 182, § 1-1A7(e).
[210] National Commission Proposal, *supra* note 160, § 208(d).
[211] Reform Bill, *supra* note 193, § 204(g).
[212] *See* note 10 *supra*.
[213] National Commission Proposal, *supra* note 160, § 208(f).
[214] DOJ Bill, *supra* note 177, § 204(g).

extraterritorial application of the federal law to federal public servants who commit crimes overseas, neither of the provisions exempts military personnel from its application. In addition, this provision of section 204 specifically states that only members of a federal public servant's "household residing abroad because of such public servant's official duties"[215] are subject to federal jurisdiction. This provision is not found in any of the proposals previously submitted.

Subsection (h) extends the reach of federal jurisdiction to offenses committed outside the jurisdiction of any nation. This subsection specifically provides that an offense "committed by or against a national of the United States *at a place* outside the jurisdiction of any nation" is punishable under federal law.[216] Except for the three words "at a place," subsection (h) of section 204 is identical to subsection (h) of both the Justice Department and the National Commission proposals.[217]

Subsection (i) provides that the United States will act in accordance with the provisions of international treaties or agreements which provide for, or require it to exercise jurisdiction over certain types of crimes.[218] This provision is broader than subsection (g) of the National Commission's proposal and subsection (g) of the Senate Judiciary Staff's proposal[219] which provide that the United States will exercise jurisdiction overseas in accordance with the terms of international treaties. Subsection (i), however, is similar to subsection (i) of the Justice Department proposal.[220]

These nine sections represent the means by which the United States can be expected to exercise federal jurisdiction extraterritorially in the future. While it is possible that some further amendments and refinements will be made to these provisions, it is generally agreed that the concept of extraterritorial jurisdiction is, indeed, an integral part of the reform legislation proposed, and that the concept will become a reality when the proposals for reform of the federal criminal laws are enacted into law.

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[215] Reform Bill, *supra* note 193, § 204(g).
[216] *Id.* § 204(h) (emphasis added).
[217] *Compare id. with* DOJ Bill, *supra* note 177, § 204(h) *and* National Commission Proposal, *supra* note 160, § 208(h).
[218] Reform Bill, *supra* note 193, §204(i).
[219] *Compare id. with* National Commission Proposal, *supra* note 160, § 208(g) *and* Senate Staff Bill, *supra* note 182, § 1-1A7(g).
[220] *See* DOJ Bill, *supra* note 177, § 204(i).

V. THE LEGALITY OF EXTRATERRITORIAL JURISDICTION

The legality of the proposed legislation authorizing the United States Government to exercise federal jurisdiction extraterritorially is generally recognized.[221] Not only do specific provisions of the Constitution empower Congress to enact such legislation, but also recognized principles of international law support the enactment of legislation having extraterritorial effect.

A. THE CONSTITUTIONAL BASIS

Most federal courts have held that the application of federal criminal law to Americans overseas is constitutional. As early as 1808, the United States Supreme Court in *Rose v. Hinely*[222] expressed approval of extending the federal law beyond the territorial limits of the United States. Chief Justice Marshall, writing for the Court, however, was careful to state that in extending the federal law overseas, Congress could "only affect its own subjects and citizens."[223] In 1824, Justice Story in *The Appollon*[224] similarly approved the exercise of federal jurisdiction over American citizens outside the borders of the United States when he stated that "[t]he laws of no nation can justly extend beyond its own territories, except so far as it regards its own citizens."[225] These two statements often are cited as indicating the Supreme Court's approval of extraterritorial application of federal law.[226]

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[221] *See* WORKING PAPERS, *supra* note 7, at 71. *But see* United States v. Keaton, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969) in which the United States Court of Military Appeals stated:

> Insofar as we are aware venue does not lie in Article III courts for those offenses proscribed in the Uniform Code which are not, at the same time, violations of the laws enacted under the authority of Article III, section 2, of the Constitution. It would appear then that there are a large number of codal offenses which could be committed by a serviceman overseas for which he could not be returned to the United States for trial, nor be given the benefits of indictment and trial by jury . . . for the simple reason that the offenses are not cognizable in any civil court in the United States.

Id. at 67, 41 C.M.R. at 67.

[222] 8 U.S. (4 Cranch) 241, 279 (1808) (dictum). *See Extraterritorial Jurisdiction*, *supra* note 5, at 348 n.6.

[223] 8 U.S. at 279.

[224] 22 U.S. (9 Wheat.) 362 (1824).

[225] *Id.* at 370.

[226] Although the Supreme Court stated in Sandberg v. McDonald, 248 U.S. 185 (1918), that legislation is "presumptively territorial and confined to limits over which the lawmaking power has jurisdiction," *id.* at 195, the question of whether congressional legislation such as criminal sanctions shall be given extraterritorial

The opinions of Chief Justice Marshall and Justice Story are early references to what are now recognized as the territorial and nationality principles of international jurisdiction respectively.[227] However, in neither the *Rose* nor *Appollon* cases did Marshall or Story cite any reason supporting, or sources authorizing, the exercise of federal laws overseas. It only can be assumed that they were of the opinion that their statements were supported by notions of international law or by specific provisions of the Constitution.

Like Chief Justice Marshall and Justice Story, many federal judges have assumed that extraterritorial legislation is constitutional, or based upon some principle of international jurisdiction. In most cases, the judges simply have failed to question the legality of legislation extending the reach of federal jurisdiction overseas. Instead, they have turned directly to the difficult question of determining whether Congress intended for a particular statute to be applied extraterritorially.[228]

Other federal judges have been more analytical in their approach

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effect has been further refined. In United States v. Bowman, 260 U.S. 94 (1922), the Court, in dealing with statutory construction, explained:

> Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. . . . But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

Id. at 98. Certain prohibitory statutes, like the fraud on the Government in *Bowman*, would fall within the latter classification of criminal statutes in which, although they contain "no words which definitely disclose an intention to give [them] extraterritorial effect, . . . the circumstances require an inference of such purpose." New York Cent. R.R. v. Chisholm, 268 U.S. 29, 31 (1925) (citation omitted). *See* United States v. Flores, 289 U.S. 137, 155 (1933). The Supreme Court has noted that other nations should not object to the exercise of American jurisdiction in these cases since they involve conduct the punishment of which "could not offend the dignity or right of sovereignty of another nation." Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381 (1948) (citations omitted). *See also* Blackmer v. United States, 284 U.S. 421, 437 n.2 (1932); Mills, *supra* note 39, at 359 n.238. *But see* The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 146 (1812).

[227] For an explanation of these principles *see* note 245 and accompanying text *infra*.

[228] *See, e.g.*, United States v. Erdos, 474 F.2d 157, 159-60 (4th Cir. 1974). *See also* George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609, 614-

and have looked first for a constitutional provision or other source that empowers Congress to enact legislation having extraterritorial application. An example of this latter approach is the opinion in *United States v. Rodriguez*[229] where the court held that aliens found in the country could be prosecuted in federal court for immigration offenses committed outside the territorial limits of the United States. Before reaching its conclusion, the court carefully examined the Constitution for provisions empowering Congress to enact legislation having application outside the territorial limits of the United States. The Court concluded that two provisions of the Constitution permit the enactment of extraterritorial legislation: article I, section 8, clause 10 and article III, section 2, clause 3.[230] Article I, section 8, clause 10 provides that:

> The Congress shall have the Power . . . To define and punish Piracies and Felonies committed on the High Seas and *Offenses against the Law of Nations*.[231]

and article III, section 2, clause 3 provides that:

> The Trial of all Crimes . . . shall be held in the State where said Crime shall have been committed; but *when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed*.[232]

The Court relied primarily on "the power of Congress to define and punish offenses against the law of nations" as the source supporting enactment of extraterritorial legislation[233] and then proceeded to find that Congress had intended that section 1546 be given extraterritorial application.[234]

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28 (1966) [hereinafter cited as George].

[229] 182 F. Supp. 479, 486 (S.D. Cal. 1960).

[230] The court rejected the following provisions of the Constitution as not pertinent:

> [1.] Article III, Sec. 2, Clause 1.
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party; To Controversies . . . between a State; or the Citizens thereof, and foreign States, Citizens or Subjects."
> [2.] Article I, Sec. 8, Clause 4.
> The Congress shall have Power . . . To establish a uniform Rule of Naturalization . . ."
> [3.] Article I, Sec. 8, Clause 18.
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government or Officer thereof."

Id. at 487.

[231] U.S. CONST. art. I, § 8, cl. 10 (emphasis added).

[232] U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

[233] 182 F. Supp. at 487. *See* George, *supra* note 228, at 615-16, where the author suggests that the combination of the broad powers delegated to the Congress and the grant of authority to do that which is necessary and proper to execute the powers provides the source for enactment of extraterritorial legislation.

[234] 182 F. Supp. at 494. *See* notes 174-179 and accompanying text *supra*.

B. THE INTERNATIONAL LAW BASIS

In addition to relying on specific provisions of the Constitution to support its holding that section 1546 was to be applied extraterritorially, the *Rodriguez* court also reasoned that such legislation could be based on the inherent power of a sovereign government to protect itself from acts committed against it from outside its borders.[235] In developing this idea the court first discussed the relationship of the Constitution to the people and the internal exercise of power by the Government. The court noted that Mr. Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*[236] best summarized the relationship:

> The broad statement that the federal government can exercise no power except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect to our internal affairs.
>
> It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.[237]

For Justice Sutherland, then, the primary purpose of the Constitution is to establish the relationship between the Government and its people, not to define the government's relationship to other sovereign governments throughout the world.

Having agreed that the Constitution of the United States merely governs the internal matters of government, and that a higher international law, or the "Law of Nations," governs the external matters of government and the exercise of national power among sovereign nations, the court proceeded to list a number of external powers exercised by the Government that are not authorized by the Constitution. These include the power "to acquire territory by discovery and occupation, to expel undesirable aliens, and to make such international agreements as do not constitute treaties."[238]

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[235] 182 F. Supp. at 487-92. *See* George, *supra* note 228, at 612.

[236] 299 U.S. 304 (1936).

[237] *Id.* at 315-18. Justice Sutherland went on to state that upon becoming a separate nation, America received all the powers of a sovereign that Great Britain possessed. For a criticism of Sutherland's theory, *see* Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1967). *See also* Reid v. Covert, 354 U.S. 1, 5-6 (1957), in which Justice Black stated:

> At the beginning we reject the idea that when the United States acts against citizens abroad, it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its powers and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.

Justice Black therefore did not accept the idea that the United States can act outside of the Constitution. *See* George, *supra* note 228, at 615.

[238] 182 F. Supp. at 490.

The possession of such power is inherent in all sovereign nations and the exercise of this power is controlled by rules of international law, and not by the provisions of a nation's internal laws. The court further summarized this idea in the following manner:

> To put it in more general terms, the concept of essential sovereignty of a free nation clearly requires the existence and recognition of an inherent power in the state to protect itself from destruction [and to permit it to operate independently in a world of sovereign nations]. This power exists in the United States government absent express provision in the Constitution, and arises from the very nature of the government which was created by the Constitution.[239]

The court concluded that once a government possesses powers which it can use externally in its relations with sovereign nations, Congress, as the legislative body of the Government, can go beyond the scope of the Constitution in enacting legislation authorizing the Government to exercise powers in the conduct of foreign affairs.

In other words, the United States can utilize principles of international law to support the enactment of legislation to protect itself and its people from acts committed against it from outside its boundaries. In enacting legislation dealing with the international exercise of power

> the Congress may pick and choose whatever recognized principle of international jurisdiction is necessary to accomplish the purpose sought by the legislation. The mere fact that, in the past Congress may not have seen fit to embody in legislation the full scope of its authorized powers is not a basis for now finding that those powers are lacking. Disuse, or even misuse of power inherent in the federal government, or given to it by the Constitution, is not a valid basis . . . to hold that this power may not later be employed in a proper fashion. Thus, having found that [a] . . . principle exists as a recognized doctrine of international law, or the "Law of Nations," it becomes a principle that Congress can rightfully incorporate into its legislation without waiting for action to be taken by foreign governments which would grant the United States the right to exercise jurisdiction.[240]

Therefore, the enactment of extraterritorial legislation can be based upon accepted rules of international law and does not necessarily have to be based upon principles of constitutional law.

In the area of international jurisdiction, nations generally have relied on six principles to support extraterritorial exercise of their criminal jurisdiction. Five of the principles first appeared in a Harvard Research Project Report published in 1935 considering problems in international jurisdiction.[241] These five principles are

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[239] *Id.*

[240] *Id.*

[241] *See Harvard Research in International Law, Part II, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. I 435 (1935).

> . . . first, the *territorial principle*, determining jurisdiction by reference to the place where the offence is committed; second, the *nationality principle*, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the *protective principle*, determining jurisdiction by reference to the national interest injured by the offence; fourth, the *universality principle*, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the *passive personality principle*, determining jurisdiction by reference to the nationality or national character of the person injured by the offence.[242]

In addition to these five, Professor Ved P. Nanda suggests that:

> . . . one could perhaps add another basis, usually called the "*Floating Territory*" *principle*. Under this principle, a ship or aircraft operating under the flag of a state is amenable to the exercise of that state's assertion of legislative authority.[243]

Whenever nations have asserted criminal jurisdiction extraterritorially, they have done so on the basis of one of these six principles of international jurisdiction. In *Rodriguez*, the court made reference to five of these six principles, but relied on the protective principle to support its conclusion that Congress had the power to give section 1546 extraterritorial application.[244]

It follows from the reasoning in *Rodriguez* that Congress is empowered under the provisions of article I, section 8, clause 10, and article III, section 2, clause 3 of the Constitution, to enact the reform legislation provision providing for extraterritorial application of the federal law presently being considered by it. In addition, Congress has been informed that each of the provisions providing for extraterritorial jurisdiction is based on at least one of the six general principles of international jurisdiction set forth above.[245] Congress, therefore, is authorized by both specific provisions of the

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[242] *Id.* at 445.

> Of these principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most states, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely, though by no means universally, accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of states and contested by others, is admittedly auxiliary in character and is probably not essential for any state if the ends served are adequately provided for on other principles.

Id. *See* George, *supra* note 228, at 613-14.

[243] *Hearings*, *supra* note 2, pt. III, subpt. c, at 1915. *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§28-29, 31-32 (1965).

[244] 182 F. Supp. at 487.

[245] For a complete discussion of the relationship of the principles of international jurisdiction to the proposed extraterritorial jurisdiction provisions included in the National Commission's proposal (Brown Commission), the Senate Judiciary Staff

Constitution and recognized principles of international law to enact extraterritorial jurisdiction legislation.

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proposal, and the Department of Justice proposal, *see Hearings, supra* note 2, pt. X, at 7415-18. Especially pertinent to the discussion of effects of the proposed legislation on the administration of criminal justice overseas are the comments on the nationality and university bases:

NATIONALITY PRINCIPLE

[Nationality or duty of allegiance to United States]

Brown Commission	Senate Judiciary Staff (S-1)	Department of Justice (S. 1400-H.R. 6040)
Section 208(b). The offense is treason, espionage, or sabotage by a national of the U.S.	Section 1-1A7(d). The offense is . . . treason.[1]	Section 204(b). The offense is treason.[1]
Section 208(c). If committed by national or resident of the U.S., any other obstruction or interference with a U.S. Government function.	Section 1-1A7(c). The offense is committed by a citizen of the United States except that this section is not applicable if the conduct is not prohibited under the law of the territorial jurisdiction in which it is committed.	Section 204(c). Same as Brown Commission Draft Sec 208(c).
Section 208(f). The offense is committed by a federal public servant who is outside the U.S. because of official duties, or by a member of his household residing abroad, or by a person accompanying the military forces of the U.S.		Section 204(g). Same as Brown Commission Draft Sec 208(f).
Section 208(g). The offense is committed by . . . a national of the U.S. outside the jurisdiction of any nation.		Section 204(h). Same as Brown Commission Draft Sec 208(g)

Comments on Nationality Principle

1. Section 208 f (Brown Commission), 1-1A7c (Senate Judiciary Draft) and Sec 204(g) (Department of Justice Bill) would fill three serious gaps in the spectrum of U.S. criminal sanctions.

a. American diplomatic personnel are immune from the criminal law of the receiving state. In the absence of U.S. criminal sanctions denouncing offenses against the peace and order of the community, they are also immune from U.S. law with respect to most homicides, and other crimes affecting private interests. Other countries generally provide for criminal sanctions against their nationals for crimes committed abroad on the nationality principle.

b. In time of peace civilians employed by, serving with, and accompanying the U.S. armed forces abroad are not amenable to any U.S. jurisdiction for offenses against peace and order of the community. (Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. U.S. ex rel Singleton, 361 U.S. 234 (1960); Grisham v. Hagen, 361 U.S. 278 (1960); McElroy v. U.S. ex rel Guagliardo, 361 U.S. 281 (1960));

c. There is no U.S. forum which now has constitutional statutory authority to try former servicemen for military offenses and offenses against the peace and order of a community if such offenses were committed abroad while the individual was in the armed forces (U.S. ex rel Toth v. Quarles, 350 U.S. 11 (1955)).

2. Sec 208 f of the Brown Commission draft has been criticized as providing the U.S. criminal jurisdiction over non-U.S. nationals who happen to fit within the definition of "federal public servants," the foreign dependents of a federal public servant, and foreigners who happen to accompany the U.S. forces abroad. As the type offenses reached under this base are not those directly prejudicing a Governmental function, it was suggested that the protective principle was being stretched too far. The Department of Justice draft is subject to the same comment. If this objection is deemed meritorious, Sec 208(g) (Brown Commission) and Sec 204 h (Dept of Justice) can be changed to read:

"The offense is committed by a national of the U.S. or by a person who owes allegiance to the United States who (1) is a federal public servant who is outside the United States because of official duties, or (2) a member of the household of such a federal public servant residing abroad, or (3) a person accompanying the military forces of the U.S."

VI. EXTRATERRITORIAL JURISDICTION AND THE APPLICATION OF *O'CALLAHAN* OVERSEAS

When legislation similar to the proposed Federal Criminal Law Reform Act is enacted into law and its extraterritorial provisions are given effect, the reach of federal jurisdiction will extend throughout the world. This comprehensive expansion of the federal criminal law not only will broaden the scope of federal jurisdiction, but also will add a new dimension to the prosecution of federal offenses. It is predictable that this vast expansion of the federal law will have a major impact on the administration of military criminal law in the foreign countries where American soldiers are stationed.

The effect of the proposed extraterritorial jurisdiction provisions on the administration of military criminal law overseas raises two

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UNIVERSALITY PRINCIPLE

Brown Commission	Senate Judiciary Staff (S-1)	Department of Justice (S. 1400-H.R. 6046)
Section 208(g). Such jurisdiction is provided by treaty.	Section 1-1A7(f). Same as Brown Commission Draft.	Section 204(i). The offense is comprehended by the generic terms of, and is committed under circumstances specified by, an international treaty or convention adhered to and ratified by the United States which provides for, or requires the United States to provide for, such jurisdiction

Comments on Universality Principle

1. Each of the draft bills would provide a jurisdictional base for the exercise of criminal jurisdiction as provided by treaty, provided the substantive offense is otherwise defined in Part II. Among the treaties thus implemented would be:

a. Convention on Offenses Committed on Board Aircraft, Tokyo Convention, 14 September 1963 (TIAS 6768).

b. Hague Hijacking Convention, 16 December 1970 (TIAS 7192).

c. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal Convention, 23 September 1971 (TIAS 7570).

d. Common Articles 49-50/50-51-51/129-130/146-147 of the Geneva Conventions of 1949 for the Protection of War Victims, (TIAS 3362, 3363, 3364, and 3365). These provisions require the parties to the Geneva Conventions to enact legislation necessary to provide effective penal sanctions for persons committing or ordering the commission of grave breaches of the Geneva Conventions. Under present U.S. statutory law only military courts have the universal jurisdiction contemplated in the Conventions, but the erosion of military jurisdiction over civilians and former service members has raised doubts concerning the constitutionality of such military *jurisdiction*.

2. It should be noted that all grave breaches enumerated in Articles 50/51/130/147 are not defined in Part II, but the most serious ones involving unlawful homicides and assaults are obviously covered. Gaps in the spectrum of substantive offenses can be considered later. The important objective is to provide for jurisdiction in the Federal courts to try all persons, regardless of their nationality or status, against whom there exists probable cause to believe that they have committed a grave breach of the conventions.

3. The language of the Department of Justice draft is intended to make the clause more specific. The only substantive difference noted, however, is affected by the words: "an international treaty or convention adhered to and ratified by the U.S." This would provide a jurisdictional base for offenses (otherwise included among the substantive crimes of Part II) as soon as the United States ratifies the instrument whether or not the treaty is legally effective. Under the Brown Commission and Senate Committee drafts the treaty could not furnish a

interesting questions. The first concerns the application of *O'Callahan v. Parker*[246] to criminal offenses committed outside of the United States and whether the military will be able to retain its court-martial jurisdiction over soldiers who commit nonservice connected offenses overseas. The second question concerns the Posse Comitatus Act and the propriety of using military personnel to investigate violations of federal law by civilians overseas.[247]

A. THE O'CALLAHAN DECISION

In 1969, the Supreme Court of the United States significantly changed the scope of military court-martial jurisdiction when it held in *O'Callahan* that nonservice connected offenses could not be tried by court-martial. O'Callahan was a sergeant in the United States Army stationed at Fort Shafter, Hawaii. On July 20, 1956 while on pass and dressed in civilian clothes, O'Callahan and a friend went to a bar in downtown Honolulu. After a few drinks the defendant went to the fourth floor of the hotel where he broke into a room and assaulted and attempted to rape a 14-year-old girl. When she resisted his efforts, he fled from the room, and later was apprehended on Waikiki Beach by hotel security personnel and held until Honolulu Police arrived. Upon learning that O'Callahan was a member of the Army, the police released him to the custody of the Hawaiian Armed Services Police. The Armed Services Police returned O'Callahan to Fort Shafter where he later confessed to the crimes and was placed in pretrial confinement.

O'Callahan was charged with attempted rape, housebreaking and assault with intent to commit rape in violation of Articles 80, 130 and 134 of the Uniform Code of Military Justice.[248] He was tried by general court-martial at Fort Shafter in October 1956 and was convicted of assault with intent to commit rape, attempted rape, and housebreaking with intent to commit rape. He was sentenced to a dishonorable discharge, total forfeiture of all pay and allowances and confinement at hard labor for ten years. An Army Board of Review affirmed his conviction[249] and the United States Court of Military Appeals denied his petition for review.[250]

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jurisdictional base until it becomes legally effective. Many multilateral treaties do not become effective until a certain proportion of States ratify it.

[246] 394 U.S. 258 (1969).

[247] For discussion of these issues, *see* Section VII *infra*.

[248] UCMJ, arts. 80, 130, 134, 10 U.S.C. §§ 880, 930, 934 (1970).

[249] United States v. O'Callahan, CM 393590 (ABR 1956) (unpublished opinion)

[250] United States v. O'Callahan, 7 U.S.C.M.A. 800 (1957). Ten years later the United States Court of Military Appeals denied O'Callahan's petition for Writ of Error Coram Nobis. United States v. O'Callahan, 16 U.S.C.M.A. 568, 37 C.M.R. 188 (1967).

In 1965, O'Callahan petitioned the Federal District Court for the District of Massachusetts for a writ of habeas corpus alleging that the military did not have jurisdiction to try him for offenses committed while he was off post and off duty. Chief Judge Wyzanski held that the military had jurisdiction to try O'Callahan for the offenses and denied his petition.[251]

In 1966, while confined at the United States Penitentiary at Lewisburg, Pennsylvania, O'Callahan filed another petition for a writ of habeas corpus, this time in the United States District Court for the Middle District of Pennsylvania, again alleging that the military did not have jurisdiction to try him by court-martial for the offenses of which he had been convicted. The district court denied O'Callahan's second petition on the grounds that he had presented the same issue in his petition to the Massachusetts court and that court had ruled against him.[252] O'Callahan appealed the second denial but the court of appeals affirmed the lower court's decision.[253]

In 1968, O'Callahan petitioned the Supreme Court of the United States for review. After examining his case, the Court granted certiorari on the question of whether

> . . . a court-martial, held under the Articles of War, Tit. 10, USC § 801 et seq., [has] jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court.[254]

In 1969, in an opinion written by Justice Douglas, the Supreme Court held that the offenses with which O'Callahan was charged and tried were not service connected. Therefore, O'Callahan could not be tried by court-martial for their commission.[255]

In reaching its decision the Court stated that criminal defendants in the civilian community are, under the Constitution, entitled to the "benefits of indictment by a grand jury and a trial by a jury of

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[251] O'Callahan v. Chief U.S. Marshal and Dept. of Army, Misc. Civil 66-8-W (1966), *cited in* United States *ex rel.* O'Callahan v. Parker, 256 F. Supp. 679, 681 (M.D. Pa. 1966).

[252] United States *ex rel.* O'Callahan v. Parker, 256 F. Supp. 679, 681 (M.D. Pa. 1966). *See generally* 28 U.S.C. §2244 (1970).

[253] United States *ex rel.* O'Callahan v. Parker, 390 F.2d 360 (3d Cir. 1968). *See* Thompson v. Willingham, 318 F.2d 657 (3d Cir. 1968). *See also* O'Callahan v. Parker, 372 F.2d 136 (3d Cir. 1967).

[254] 393 U.S. 822 (1968). *See also* O'Callahan v. Parker, 395 U.S. 258, 261 (1969).

[255] 395 U.S. at 274. The Court voted 5 to 3 to reverse O'Callahan's court-martial conviction. Chief Justice Warren and Justices Black, Douglas, Brennan, Fortas and Marshall voted with the majority. Justices Harlan, Stewart and White dissented.

their peers in a civilian court."[256] In contrast, the Court noted that these rights were not applicable when individuals were tried by courts-martial because of the special needs of the military to maintain discipline. The absence of these protections in court-martial proceedings led the majority to conclude, just as Justice Black had concluded in *United States ex rel. Toth v. Quarles,* that military tribunals must be restricted "to the jurisdiction deemed absolutely essential to maintaining discipline among the troops in active service . . . ."[257]

Recognizing those tried by military courts are denied these two important rights, the majority noted that O'Callahan was off post and off duty at the time the offenses were committed, that he was dressed in civilian clothes during the commission of the offenses and that his intended victim was a civilian. Furthermore, the Court noted that the offenses with which O'Callahan was charged had no independent military significance and thus were in no way related to O'Callahan's military duties. For these reasons, a majority of the Court concluded that O'Callahan's offenses were not "service connected," and that the military did not have jurisdiction to try him by court-martial.[258]

Justice Harlan, joined by Justices Stewart and White, dissented. Justice Harlan argued that military status was sufficient in itself to permit the military to exercise court-martial jurisdiction over O'Callahan and that Congress within its article I powers could expand the jurisdiction of the military justice system to permit the exercise of jurisdiction over all offenses committed by servicemen. In addition, Justice Harlan pointed to weaknesses in the historical analysis relied upon by the majority[259] and noted inconsistencies in the majority opinion.[260]

The effect of the *O'Callahan* decision was to limit court-martial jurisdiction to the trial of service connected offenses. Unfortunately, Justice Douglas, in his majority opinion, did not define the term "service connected"; nor did he describe the types of situations in which the *O'Callahan* decision was to be applied.

Two years later in *Relford v. Commandant*[261] the Supreme Court was presented with an issue arising out of the uncertainty and con-

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[256] 395 U.S. at 273.
[257] 350 U.S. 11, 22 (1955).
[258] 395 U.S. at 274.
[259] *Id.* at 274, 276-80.
[260] *Id.* at 281-83.
[261] 401 U.S. 355 (1971)

fusion generated by the *O'Callahan* decision.[262] In *Relford,* the accused was charged with kidnapping and raping two women, one the wife of a serviceman, and the other, the 14-year-old sister of a serviceman, in violation of Articles 120 and 134, Uniform Code of Military Justice.[263] The offenses occurred on the military reservation at Fort Dix and the adjacent McGuire Air Force Base. At the time of the offenses, Relford was dressed in civilian clothing. After he was arrested by the military police, Relford confessed to both attacks, was tried and convicted by general court-martial, and was sentenced to a forfeiture of all pay and allowances, reduction to the lowest enlisted grade and death.[264] An Army Board of Review reduced his sentence to a dishonorable discharge and 30 years' confinement at hard labor,[265] and the United States Court of Military Appeals denied Relford's petition for review.[266]

In 1967, Relford filed a petition in federal district court for a writ of habeas corpus alleging that he had been denied the effective assistance of counsel at his trial by court-martial.[267] His petition was denied and Relford appealed to the court of appeals where he argued not only that he had been represented inadequately, but also that his confession and the results of a lineup had been admitted improperly into evidence during his court-martial. After reviewing Relford's allegations, the Tenth Circuit Court of Appeals denied his petition.[268]

Relford then appealed to the Supreme Court where for the first time he argued that the offenses for which he was tried were not "service connected" and that under *O'Callahan* the military lacked jurisdiction to try him.[269] In addressing the merits of Relford's contentions, Justice Blackmun, writing for the majority, reviewed the Supreme Court's opinion in *O'Callahan* and concluded that in reaching that decision the Court had relied on the following 12 factors in deciding whether O'Callahan's offenses were service connected:

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.

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[262] *See* McCoy, *Equal Justice for Servicemen: The Situation Before and Since O'Callahan v. Parker,* 16 N.Y.L. FORUM 1, 16 (1970). *See also* Justice Harlan's dissent in O'Callahan v. Parker, 395 U.S. 258, 283-84 (1969).
[263] UCMJ, arts. 120, 134, 10 U.S.C. §§ 920, 934 (1970).
[264] *See* 401 U.S. at 365.
[265] *See id.* at 361.
[266] United States v. Relford, 14 U.S.C.M.A. 678 (1963).
[267] *See* 401 U.S. at 362.
[268] Relford v. Commandant, U.S. Disciplinary Barracks, 409 F.2d 824, 825 (10th Cir. 1969).
[269] 401 U.S. at 363.

3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. The offense's being among those traditionally prosecuted in civilian courts.[270]

After evaluating the facts in *Relford* and comparing them with the enumerated factors, the majority concluded that Relford's offenses were service connected. In addition, Justice Blackmun stated "that when a serviceman is charged with an offense 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."[271] For these reasons, the Court held that Relford was tried properly by court-martial on the charges preferred against him.

Realizing that other problems would arise in this area, the majority concluded with the following observation:

> We recognize that any *ad hoc* approach leaves outer boundaries undetermined. *O'Callahan* marks an area, perhaps not the limit, for the concern of civil courts and where the military may not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time.[272]

Left for decision at another time was the question of the application of *O'Callahan* to nonservice connected offenses committed by American soldiers assigned overseas.

B. O'CALLAHAN DENIED APPLICATION OVERSEAS BY MILITARY COURTS

Soon after the decision in *O'Callahan*, the United States Court of Military Appeals began to apply the standard of service connection

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[270] *Id.* at 365.
[271] *Id.* at 369.
[272] *Id.*

in military cases.[273] In *United States v. Keaton*,[274] the Court of Military Appeals was presented with the issue of whether *O'Callahan* had application overseas.[275] In *Keaton*, the accused, an airman, was tried by general court-martial at Clark Air Force Base in the Republic of the Philippines and convicted of assault with intent to commit murder in violation of Article 134, Uniform Code of Military Justice.[276] An Air Force Court of Military Review affirmed Keaton's conviction and sentence,[277] and the Court of Military Appeals "granted review to determine the validity of the accused's conviction in light of the constitutional limitations on court-martial jurisdiction delineated in O'Callahan . . . ."[278]

In determining whether the military had jurisdiction to try Keaton for an offense committed off post in a foreign country, the Court of Military Appeals first examined the Supreme Court's opinion in *O'Callahan* and then reviewed the treaty provisions in effect between the United States and the Republic of the Philippines governing the exercise of jurisdiction in criminal matters. The court concluded that since the victim of Keaton's offense was another serviceman, the military had jurisdiction to try Keaton by court-martial.[279] Having decided that the offense was service connected and that *O'Callahan* would not apply, the court decided to address the question of whether the military could have exercised jurisdiction over Keaton had he been charged with a nonservice connected offense.

In answering this question, the court reasoned that if the military could not exercise jurisdiction over military personnel who commit nonservice connected offenses overseas, soldiers would have to be returned to the United States in order to be subject to prosecution by the Government.[280] Since the federal district courts do not have jurisdiction to try many of the nonservice connected

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[273] The first cases in which the new rule was applied were United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969) (military lacked jurisdiction to try the accused for rape, robbery, sodomy and attempts to commit such offenses committed during off duty hours against civilian victims who lived off post) and United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969) (military lacked jurisdiction to try the accused for importation and transportation of marihuana, but did have jurisdiction to try him for wrongful use and possession of marihuana).

[274] 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969).

[275] *Id.* at 65, 41 C.M.R. at 65. *See generally* Annot., 14 A.L.R. FED 152, 190 (1973).

[276] UCMJ, art. 134, 10 U.S.C. § 934 (1970).

[277] United States v. Keaton, ACM 20413 (AFBR) (unpublished opinion).

[278] 19 U.S.C.M.A. at 65, 41 C.M.R. at 65.

[279] *Id.* at 67, 41 C.M.R. at 67.

[280] *Id.* The possibility of having to return soldiers to the United States for trial of nonservice connected offenses also was discussed in Williams v. Froehlke, 356 F. Supp.

offenses committed overseas,[281] the court concluded that most of the soldiers could not be returned to the United States for prosecution and trial.[282] These soldiers would then either be tried in foreign courts[283] or not tried at all.[284] It was the court's opinion, therefore, that the application of *O'Callahan* overseas would deny the United States all means of prosecuting nonservice connected offenses committed by American servicemen in foreign countries.

Reasoning that the Supreme Court obviously did not intend such a result in deciding *O'Callahan,* the Court of Military Appeals examined the Constitution and concluded that the provision empowering Congress "to make Rules for the Government and Regulation of the land and naval forces," when read with the necessary and proper clause, was sufficient to support the exercise of court-martial jurisdiction over nonservice connected offenses:

> [I]t seems clear that *foreign trial* by court-martial of all offenses committed abroad, including those which could be tried by Article III courts if committed in this country, is a valid exercise of constitutional authority . . . .
>
> We hold, therefore, that the constitutional limitation on court-martial jurisdication laid down in *O'Callahan v. Parker* . . . is inapplicable to courts-martial held outside the territorial limits of the United States.[285]

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591 (S.D.N.Y. 1973), where the court stated that:

> Extraterritorial application would force the government to the unfortunate choice of bringing a soldier who commits an offense abroad to the United States for trial or remanding him for that purpose to the courts of the country in which he is located. Since the former option would often entail prohibitive difficulty and expense, the latter course would normally be followed. In view of *O'Callahan's* concern with the constitutional rights of servicemen-defendants, rights which would in many instances be better protected by United States courts-martial than in the civilian courts of foreign nations, such a result would be anomalous.
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> Admittedly, with regard to military dependents and employees, the same difficult dilemma resulted from the Court's decision in *Reid*, and the Court, nonetheless, refused to uphold court-martial jurisdiction over them.

Id. at 593-94.

[281] "With but few exceptions, see e.g. 18 USC § 1111, our federal criminal statutes are inapplicable to extra-territorial acts and crimes committed abroad and thus not 'offenses against the United States' which District Courts are properly constituted to try. 18 U.S.C. § 3231." Bell v. Clark, 308 F. Supp. 384, 388 (E.D. Va. 1970). *See* Hemphill v. Moseley, 443 F.2d 322, 323 (10th Cir. 1971).

[282] 19 U.S.C.M.A. at 67, 41 C.M.R. at 67.

[283] Gallagher v. United States, 423 F.2d 1371, 1374 (Ct. Cl. 1970). In Williams v. Froehlke, 356 F. Supp. 591 (S.D.N.Y. 1973), the court listed the constitutional rights that would be denied American soldiers tried in foreign courts:

> Among the rights which might be diluted or denied by foreign courts are: 1) right to counsel; 2) freedom from self-incrimination, 3) protection from double jeopardy; 4) freedom from cruel and unusual punishment; 5) protection from unreasonable searches and seizures; and 6) right to a speedy trial. Furthermore, in most countries the accused soldier would not be afforded grand jury indictment and trial by jury, which are the chief rights of which a court-martial deprives him.

Id. at 594 n.3. *But see* Mills, *supra* note 39, at 352.

[284] Williamson v. Alldridge, 320 F. Supp 840, 843 n.4 (W.D. Okla. 1970).

[285] 19 U.S.C.M.A. at 67-68, 41 C.M.R. at 67-68. It is important to note that the principle set forth in *Keaton* does "not apply where the crimes are committed in the United

Based on the *Keaton* language that the United States Supreme Court "did not intend to limit court-martial jurisdiction in friendly foreign countries,"[286] the Court of Military Appeals, as well as the Courts of Military Review, have approved the court-martial convictions of soldiers committing nonservice connected offenses in Germany,[287] Okinawa,[288] British West Indies,[289] and Mexico.[290] Because of the consistent holdings of the military courts on this issue, it is generally accepted that the decision in *O'Callahan* is not applicable "to courts-martial conducted outside the territorial limits of the United States *for offenses committed abroad.*"[291]

States and the court-martial is conducted in a foreign country." United States v. Bowers, 47 C.M.R. 516, 518 (ACMR 1973) (worthless checks written in civilian community in Pennsylvania while accused was on thirty-day home leave from his unit in Germany were not triable by court-martial).

[286] Rice, *O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman*, 51 MIL. L. REV. 41, 67 (1971).

[287] United States v. Blackwell, 19 U.S.C.M.A. 196, 41 C.M.R. 184 (1970) (willfully damaging the property of a civilian, assault with a means likely to produce grievous bodily harm, assault with intent to commit rape, assault and battery, and communication of indecent language to a female off post in Germany); United States v. Bryan, 19 U.S.C.M.A. 184, 41 C.M.R. 184 (1970) (negligent homicide of German citizen off post in Germany); United States v. Gill, 19 U.S.C.M.A. 93, 41 C.M.R. 93 (1969) (robbery of two German citizens off post in Germany); United States v. Higgenbotham, 19 U.S.C.M.A. 73, 41 C.M.R. 73 (1969) (unpremeditated murder of a German national in civilian community in Germany); United States v. Stevenson, 19 U.S.C.M.A. 67, 41 C.M.R. 69 (1969) (unpremeditated murder of a Canadian soldier in civilian community in Germany); United States v. Easter, 19 U.S.C.M.A. 68, 41 C.M.R. 68 (1969) (attempted housebreaking committed in civilian community in Germany); United States v. Weinstein, 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969) (offenses involving marihuana committed in civilian community in Germany). *But see* United States v. Bowers, 47 C.M.R. 516 (ACMR 1973) (no service connection where accused opened checking account at American Express in Germany and wrote bad checks in Pennsylvania while on a thirty-day leave from his unit in Germany).

[288] United States v. Davis, 20 U.S.C.M.A. 27, 42 C.M.R. 219 (1970) (possession of marihuana off post in Okinawa); United States v. Ortiz, 20 U.S.C.M.A. 21, 42 C.M.R. 213 (1970) (robbery of Okinawan taxi driver off post in Okinawa). *See* United States *ex rel.* Jacobs v. Froehlke, 334 F. Supp. 1107 (D.D.C. 1971) (carnal knowledge off post in Okinawa); Williamson v. Alldridge, 320 F. Supp. 840 (W.D. Okla. 1970) (murder of a Ryukyuan citizen off post in Okinawa). For a thorough discussion of the Okinawan judiciary system and its relationship to United States military personnel and American civilians living in Okinawa, *see* United States v. Vierra, 14 U.S.C.M.A. 48, 33 C.M.R. 260 (1963) (search warrant issued by Ryukyu Civil Administrative Court for search of serviceman's property upheld); Rose v. McNamara, 252 F. Supp. 111 (D.D.C.), *aff'd*, 375 F.2d 924 (D.C. Cir. 1967) (naturalized American civilian residing in Okinawa convicted of income tax evasion).

[289] United States v. Hansford, 46 C.M.R. 670 (CGCMR 1972) (indecent assault upon a British subject in the British West Indies).

[290] United States v. Newvine, 48 C.M.R. 189 (AFCMR 1974) (unpremeditated murder of Mexican prostitute in Mexico).

[291] United States v. Bowers, 47 C.M.R. 516, 517-18 (ACMR 1973).

C. O'CALLAHAN DENIED APPLICATION OVERSEAS BY FEDERAL COURTS

A number of federal civilian courts also have held that the Supreme Court's decision in *O'Callahan* has no application to non-service connected offenses committed overseas. Since the pronouncement of the *O'Callahan* decision in 1969, the Second, Fourth, Seventh and Tenth Circuit Courts of Appeals, as well as the United States Court of Claims, have held that the military has jurisdiction to try soldiers by court-martial for nonservice connected offenses committed in foreign countries and that *O'Callahan* has no application overseas. The significance of these decisions it that the courts have denied the application of *O'Callahan* overseas for a variety of reasons.

In 1974, the Second Circuit Court of Appeals was asked in *Williams v. Froehlke*[292] to rule on the extraterritorial application of *O'Callahan*. In *Williams*, a soldier serving in the United States Army in Germany was charged with robbing a German cab driver. At the time of the robbery, it was alleged that Williams, the accused, was off post and dressed in civilian clothing. His trial by general court-martial resulted in convictions of robbery and additional charges for which he was sentenced to a dishonorable discharge and five years' confinement at hard labor.

After serving his sentence, Williams learned of the Supreme Court's decision in *O'Callahan* and petitioned the Federal District Court for the Southern District of New York requesting that his court-martial conviction be set aside and that he be issued an honorable discharge. In part, he contended that "under the rule enunciated in *O'Callahan v. Parker* . . . the court-martial lacked jurisdiction to try him for the robbery offense."[293] While conceding that Williams' arguments had an "appealing logical consistency," the court, nevertheless, was not persuaded that the Supreme Court intended *O'Callahan* to have application overseas and granted the government's motion for summary judgment.[294]

In affirming the lower court's ruling denying the accused relief, the court of appeals held that the reach of *O'Callahan* "did not ex-

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[292] 490 F.2d 998 (2d Cir. 1974).
[293] Williams v. Froehlke, 356 F. Supp. 591, 592 (S.D.N.Y. 1973). The Second Circuit Court of Appeals had held in United States *ex rel.* Flemings v. Chaffee, 458 F. 2d 544 (2d Cir. 1972), that *O'Callahan* was applicable retroactively.
[294] 356 F. Supp. at 594.

tend to the jurisdiction of courts-martial in peacetime to try non-service connected offenses committed by servicemen against foreign persons in foreign lands."[295] In reaching its decision, the court concluded that

> [T]here was a sufficient connection between [Williams'] offenses and his service status to characterize his crime as "arising within the land or naval forces" for purposes of the exception in the Fifth Amendment.[296]

In addition, the court noted that the sixth amendment protections were not available to the accused since there were no article III courts in Germany, and if the case had been returned to the United States, the jury would not be composed of persons of the State and place where the offense occurred. Morever, the court concluded that while the limitations in the fifth and sixth amendments could be applied to limit the exercise of court-martial jurisdiction over non-service connected offenses committed by soldiers within the territorial boundaries of the United States, the same limitation could not be applied to such offenses committed overseas where no federal courts were available to try the offenses.[297] For these reasons, the lower court's decision to dismiss the accused's action was upheld.

The Fourth Circuit Court of Appeals, in a similar case, also was asked to rule on the application of *O'Callahan* overseas. In *Bell v. Clark*[298] the accused, a Private First Class serving with the United States Army in Germany, was charged with the rape of a German citizen approximately five miles from the base where he was stationed. At the time of the offense, Bell was off duty and dressed in civilian clothes. Bell was apprehended shortly after the commission of the offense and confessed to the crime. His trial by general court-martial convened in Germany resulted in a conviction and Bell was sentenced to a dishonorable discharge, forfeiture of all pay and allowances, seven years' confinement and reduction to the lowest enlisted grade. An Army Court of Military Review affirmed his conviction,[299] and the United States Court of Military Appeals denied the accused's petition for a grant of review.[300]

Having exhausted his military remedies, Bell petitioned the Federal District Court for the Eastern District of Virginia for a writ of habeas corpus alleging that:

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[295] 490 F.2d at 1001.
[296] *Id.* at 1003-04.
[297] *Id.*
[298] 308 F. Supp. 384 (E.D. Va. 1970), *aff'd*, 437 F.2d 200 (4th Cir. 1971).
[299] United States v. Bell, CM 413745 (ABR 1966) (unpublished opinion).
[300] United States v. Bell, 16 U.S.C.M.A. 600 (1966).

> [T]he military was without jurisdiction to try him for the nonservice connected offense, and that by their so doing he was denied his procedural rights of trial under a grand jury indictment and trial by jury secured him by Article III, § 2, and the Fifth and Sixth Amendments to the Constitution of the United States.[301]

In denying the accused's petition, the court limited *O'Callahan's* application "to nonservice connected crimes committed by servicemen at a place where jurisdiction by civil courts guaranteeing the application of constitutional rights is available."[302] Since no article III courts were available to the accused in Germany, the court reasoned that the trial of the accused by court-martial did not violate any of his constitutional rights.

Bell appealed the denial of his petition to the court of appeals where he reiterated his arguments. In considering Bell's appeal, the Fourth Circuit examined the provisions of Article VII of the NATO SOFA, under which German authorities waived their right to exercise jurisdiction over Bell. The court concluded that the provisions of Article VII "unequivocally preserve jurisdiction in the United States Military authorities in Germany over crimes committed there by American soldiers."[303] The court reasoned further that this portion of Article VII "is impliedly an assurance to the 'receiving State' that those servicemen of the 'sending State' who break the former's laws should be tried immediately."[304] In reaching its decision, the court recognized that a denial of court-martial jurisdiction in cases such as Bell's would undermine and destroy comity between the United States and the other signatory nations. For these reasons the court affirmed the lower court's decision dismissing the accused's petition for a writ of habeas corpus.

The issue of *O'Callahan's* application overseas also was raised in the Seventh Circuit in *Wimberly v. Laird.*[305] In *Wimberly,* the accused, while serving in Germany, was charged with premeditated murder of a German national.[306] He confessed to the murder and was tried in Germany by a general court-martial which found him guilty of the offense and sentenced him to death. An Army Board of Military Review affirmed the findings of guilty, but reduced the sentence to a dishonorable discharge, forfeiture of all pay and

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[301] 308 F. Supp. at 385.
[302] *Id.* at 389.
[303] 437 F.2d at 202-03. *See also* Marymount v. Joyce, 352 F. Supp. 547 (W.D. Ark. 1972) (Air Force Master Sergeant's court-martial conviction in England for the murder of his wife upheld).
[304] 437 F.2d at 202-03.
[305] 472 F.2d 923 (7th Cir.), *cert. denied,* 413 U.S. 921 (1973).
[306] UCMJ, art. 118, 10 U.S.C. § 918(1) (1970).

allowances, and life imprisonment.[307] The accused's conviction also was affirmed by the United States Court of Military Appeals.[308]

While confined in the federal penitentiary at Marion, Illinois, the accused petitioned the federal district court for a writ of habeas corpus. The district court denied the petition and the accused appealed, alleging that "the military tribunal had no jurisdiction to try him for murder because his offense was not 'service connected'."[309] He also alleged that he had been denied the effective assistance of counsel at his court-martial.

In support of his contentions that the court-martial lacked jurisdiction over the offense, the accused argued that he was dressed in civilian clothes at the time of the offense, that the offense occurred off post and bore no relation to the military, and that the victim was a German civilian who had no connection with the United States Government. In response the government counsel argued that if the purpose of the *O'Callahan* decision was to provide greater protection to American servicemen by making available to them the rights to indictment by grand jury and trial by jury of their peers, that purpose would be defeated by extending *O'Callahan* overseas since "constitutional protections are not available in cases involving the violation of foreign law."[310]

The court of appeals rejected the contentions of the accused and held that *O'Callahan* could not be applied overseas.[311] The court found that

> . . . the fact that petitioner was present in Germany as a result of his status as a member of the United States Army provided a sufficient "connection" between his offense and his service status to characterize his crime as "arising in the land or naval forces" within the meaning of the Fifth Amendment.[312]

The court concluded that the combination of the presence of a soldier in a foreign country and the commission of a nonservice connected offense is sufficient to establish a service connection enabling the military to exercise court-martial jurisdiction over the accused.

In *Hemphill v. Moseley*,[313] the Tenth Circuit Court of Appeals also declined to apply *O'Callahan* outside the territorial limits of

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[307] United States v. Wimberly, CM 409334 (ABR 1965) (unpublished opinion).
[308] United States v. Wimberly, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).
[309] 472 F.2d at 923.
[310] *Id.* at 924.
[311] *Id.*
[312] *Id.* at 925.
[313] 448 F. 2d 322 (10th Cir. 1971).

the United States. In *Hemphill,* the accused was a soldier serving with the United States Army in Germany. He was tried and convicted by general court-martial in Mannheim, Germany for wrongful appropriation of an automobile, unlawful entry and assault with intent to commit rape. These offenses were alleged to have occurred off post and while the accused was on leave and out of uniform. He was sentenced to a dishonorable discharge, total forfeitures, confinement at hard labor for 20 years and reduction to the lowest enlisted grade. An Army Board of Review affirmed the accused's conviction[314] and the United States Court of Military Appeals denied his petition for a grant of review.[315]

While serving his sentence in the federal penitentiary at Leavenworth, Kansas, the accused petitioned the United States District Court for the District of Kansas for a writ of habeas corpus. In the petition, Hemphill alleged that his court-martial conviction and sentence were invalid in view of the Supreme Court's decision in *O'Callahan.*[316] In denying his petition, the district court distinguished the petitioner's case from *O'Callahan* noting that O'Callahan's offenses were committed in Hawaii and were subject to prosecution in civil courts, while the accused's offenses were committed in Germany, and were not subject to civil prosecution.[317]

Moreover, the court noted that under the provisions of the NATO SOFA soldiers charged with committing nonservice connected offenses in Germany were to be tried by court-martial. For these reasons, the court held that "the constitutional limitations on courts-martial jurisdiction announced in the *O'Callahan* case are inapplicable to courts-martial held outside the territorial limits of the United States."[318] In support of its decision the district court relied on *Keaton* and related cases.[319]

In an appeal to the Tenth Circuit Court of Appeals the accused renewed his jurisdictional allegations. The court of appeals noted that Hemphill's offenses occurred outside the territorial limits of the United States and concluded that this fact alone distinguished Hemphill's case from *O'Callahan.* In ruling against the application of *O'Callahan* overseas, the court also noted that *O'Callahan*'s offenses were committed on American territory and could have been prosecuted in the civilian courts where defendants are af-

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[314] United States v. Hemphill, CM 414604 (ABR 1967) (unpublished opinion).
[315] United States v. Hemphill, 17 U.S.C.M.A. 642 (1967).
[316] Hemphill v. Moseley, 313 F. Supp. 144, 145 (D. Kan. 1970).
[317] *Id.*
[318] *Id.*
[319] *See* notes 273-291 and accompanying text *supra.*

forded "the full panoply of constitutional protections."[320] In the principal case, however, the accused's offenses were committed on foreign territory and could not have been prosecuted in federal civilian courts. In addition, the court noted that because federal criminal statutes do not apply extraterritorially, the accused's offenses were not "offenses against the United States" and therefore were not subject to prosecution in the federal courts. Because there is no way in which the constitutional protections afforded defendants prosecuted in United States federal civilian courts could be made available to soldiers like Hemphill, the court reasoned that the application of *O'Callahan* outside the territorial limits of the United States would serve no purpose. Therefore, the court refused to apply *O'Callahan* overseas and affirmed the lower court's decision denying Hemphill's petition for a writ of habeas corpus.[321]

In 1970, the United States Court of Claims was asked whether *O'Callahan* was entitled to extraterritorial application in *Gallagher v. United States*.[322] In *Gallagher*, the accused, an American soldier serving in Germany, was arrested by German police for assaulting and robbing a German civilian. The offenses occurred off post while the accused was on leave and dressed in civilian clothing. The accused was released to the custody of the military authorities and subsequently was tried by court-martial and convicted of the offenses.

After serving his sentence, Gallagher sued the United States in the Court of Claims to collect back pay lost as a result of his court-martial sentence. In presenting his case to the court, Gallagher argued that because his offenses were not service connected, the court-martial lacked jurisdiction to try him. For this reason, he concluded his conviction was void and he was entitled to back pay.

The Court of Claims rejected these arguments relying heavily on the reasoning set forth in United States Court of Military Appeals' decisions holding that *O'Callahan* did not have application overseas.[323] The court noted that the significant distinction between *O'Callahan* and the decisions which found service connection in similar offenses was the situs of the offense. After noting

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[320] Hemphill v. Moseley, 443 F.2d 322, 323 (10th Cir. 1971).

[321] *Id.*

[322] 423 F.2d 1371 (Ct. Cl. 1970).

[323] *E.g.*, United States v. Higgenbotham, 19 U.S.C.M.A. 73, 41 C.M.R. 73 (1969) (unpremeditated murder of a German citizen off post in Germany); United States v. Easter, 19 U.S.C.M.A. 68, 41 C.M.R. 68 (1969) (attempted housebreaking in civilian community in Germany); United States v. Keaton, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969) (assault with intent to commit murder off post in the Philippines). *See* notes 273-291 and accompanying text *supra*.

this difference, the court concluded that crimes committed by American servicemen against local civilians in a friendly foreign country are service connected offenses triable by courts-martial. Indeed, to find otherwise, in the court's opinion, could undermine and impair the accomplishment of the mission of the United States Armed Forces serving in foreign countries around the world.[324]

The court also reasoned that if *O'Callahan* were applied overseas, the exercise of military jurisdiction in foreign countries over nonservice connected offenses would cease, and soldiers charged with such crimes would be subjected to trials in foreign courts, "some of which have a reputation for harsh laws and savagely operated penal institutions."[325] Having found that Gallagher's robbery of a German civilian off post was a service connected offense, and having concluded that servicemen, like Gallagher, would be subject to trial in the German courts for such offenses if the military were without power to try them, the Court of Claims held that the United States Army had jurisdiction to court-martial Gallagher and denied his claim for back pay.[326]

Thus, in addition to the United States Court of Military Appeals, the United States Court of Claims and four circuit courts of appeals have ruled that the military has jurisdiction to try soldiers by court-martial for nonservice connected offenses committed overseas. Because of the uniformity with which the federal courts have held that *O'Callahan* is not applicable overseas, one would expect to find some similarity in the rationales relied upon by these courts in support of their decisions, but none exists. On the contrary, the courts have denied the application of *O'Callahan* overseas for a variety of reasons.

The Fourth Circuit Court of Appeals declined to extend the holding in *O'Callahan* overseas on the ground that the provisions of Article VII of the NATO Status of Forces Agreement and Article XIX of the Supplemental Agreement provide for the exercise of military jurisdiction over nonservice connected offenses.[327] In contrast, the Second and Tenth Circuit Courts of Appeals declined to apply *O'Callahan* extraterritorially in part because of the absence overseas of federal civilian forums in which soldiers committing nonservice connected offenses could be prosecuted.[328] The Tenth

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[324] 423 F.2d at 1373.
[325] *Id.* at 1374.
[326] *Id.*
[327] Bell v. Clark, 437 F.2d 200, 202-03 (4th Cir. 1971). *See* notes 298-304 and accompanying text *supra*.
[328] *See* Williams v. Froehlke, 490 F.2d 998, 1002-04 (2d Cir. 1974); Hemphill v. Moseley, 443 F.2d 322, 323 (10th Cir. 1971). *See* notes 273, 293 & 313 and accompanying text *supra*.

Circuit also reasoned that if the thrust of *O'Callahan* was to afford soldiers accused of nonservice connected offenses the constitutional protections found in the federal courts, the application of *O'Callahan* overseas would serve no purpose, since no federal court exists in which soldiers charged with nonservice connected offenses overseas could be prosecuted. [329] Taking a different approach, the Seventh Circuit Court of Appeals, the Court of Claims, and, in part, the Second Circuit Court of Appeals reasoned that any serious crime committed by an American serviceman off post in a foreign country is a "service connected" offense over which the military has authority to exercise jurisdiction.[330]

Thus, for different reasons the federal courts consistently have held that *O'Callahan* does not have application overseas. While the courts do differ in their rationales, they all agree that *O'Callahan* is not to be applied outside of the territorial limits of the United States. The uniformity among the courts on this issue seems to reinforce the correctness of the decisions in this area.

D. O'CALLAHAN'S APPLICATION OVERSEAS UNDER EXTRATERRITORIAL JURISDICTION

Enactment of the Criminal Justice Reform Act of 1975 and implementation of the proposed extraterritorial provisions will cause a significant expansion in the exercise of federal jurisdiction and will create a substantial increase in the number of federal prosecutions of American citizens charged with the commission of criminal offenses overseas. It also will mean that American citizens charged with violations of the federal laws outside the territorial limits of the United States will be entitled to all of the constitutional protections they would have if their crimes had been committed within the United States.

The expansion of federal jurisdiction and the corresponding extension of constitutional protections to American citizens charged with the commission of offenses overseas should produce a new wave of challenges to the military's exercise of court-martial

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[329] *See* Hemphill v. Moseley, 443 F.2d 322, 323 (10th Cir. 1971); Williams v. Froehlke, 490 F.2d 998, 1002-03 (2d Cir. 1974). *See also* Wimberly v. Laird, 472 F.2d 923, 924 (7th Cir.), *cert denied*, 413 U.S. 921 (1973).

[330] Wimberly v. Laird, 472 F.2d 923 (7th Cir.), *cert. denied*, 413 U.S. 921 (1973); Gallagher v. United States, 423 F.2d 1371, 1373 (Ct. Cl. 1970). *See* Williams v. Froehlke, 490 F.2d 998, 1003-04 (2d Cir. 1974).

jurisdiction over soldiers charged with the commission of nonservice connected offenses overseas. Upon the enactment of the new legislation, soldiers tried by court-martial for committing nonservice connected offenses in foreign countries will begin to challenge not only the exercise of military jurisdiction over such offenses, but also the validity of military and civilian federal court decisions holding that *O'Callahan* has no application overseas. In challenging these decisions, soldiers will argue that the rationales relied upon by the courts in denying *O'Callahan* application overseas are no longer controlling in view of the extraterritorial jurisdiction of federal criminal law.

For example, the rationale of the Fourth Circuit Court of Appeals in *Bell v. Clark*,[331] that the provisions of the NATO Status of Forces Agreement preserve to the military the exercise of jurisdiction over nonservice connected offenses, will be attacked on the ground that treaty provisions cannot be used to deny soldier-defendants their constitutional rights to indictment by grand jury and trial by a jury of their peers. Those attacking the circuit court's reasoning will argue further that the protections of the Constitution are of primary importance and cannot be legislated away by treaty provisions.[332] In addition, they also will argue that while the treaty rationale may have been persuasive at a time when soldiers overseas had no access to federal courts, the rationale loses persuasiveness when the alternative to a military court-martial under NATO SOFA provisions is a federal trial affording an accused constitutional protections under the fifth and sixth amendments.[333]

The rationale relied upon by the United States Court of Military Appeals and the Second and Tenth Circuit Courts of Appeals in denying *O'Callahan* application overseas also is subject to attack. These courts reasoned that the availability of an alternative forum was an essential element in *O'Callahan* and because no alternative federal civilian forums were available to soldiers charged with committing nonservice connected offenses in foreign countries,

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[331] 437 F.2d 200, 202-03 (4th Cir. 1971). *See* notes 299-304 and accompanying text *supra*.

[332] In this regard, advocates attacking the reasoning of the circuit court will contend that the new extraterritorial legislation nullifies treaty provisions which are in conflict with it. In support of this contention, advocates will argue that the Supreme Court of the United States has

> repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of the conflict renders the treaty null.

Reid v. Covert, 354 U.S. 1, 18 (1957) (citations omitted). *See also* Whitney v. Roberts, 124 U.S. 190, 194 (1888).

[333] *See generally* Reid v. Covert, 354 U.S. 1, 16-19 (1957).

O'Callahan would not be given application overseas.[334] Since the provision of the new legislation extends the reach of federal jurisdiction throughout the world, opponents will argue that an alternative federal forum is now available to servicemen committing such offenses, and that under *O'Callahan* the military should be denied the right to exercise jurisdiction over this type of offense.[335]

For the same reason, opponents will argue that the Tenth Circuit's additional rationale for not applying *O'Callahan* overseas also lacks merit. The Tenth Circuit Court of Appeals reasoned that if the purpose of *O'Callahan* was to extend to soldiers charged with nonservice connected offenses the constitutional protections available in the federal courts, the purpose could not be effectuated in foreign countries where federal courts were not sitting and could not exercise jurisdiction over the offenses charged. Opponents to this line of reasoning will argue that under the provisions of the proposed legislation, the purpose of *O'Callahan* can be effectuated overseas and that servicemen should be afforded the constitutional protections made available by the federal courts.

Similarly, the reasoning used by the Seventh Circuit Court of Appeals, and relied upon partially by the Second Circuit Court of Appeals and the United States Court of Claims, also will be challenged by those opposing the exercise of military jurisdiction over nonservice connected offenses committed off post in foreign countries. These courts reasoned that the commission of a nonservice connected offense off post by a soldier stationed in a foreign country is a "service connected" offense triable by military court-martial.[336]

While it is true that the commission of offenses by American soldiers in the civilian communities of foreign countries tends to create bad public relations and undermines the performance of the armed forces' mission overseas, critics nevertheless will contend that the same argument could be made for the exercise of military court-martial jurisdiction over nonservice connected crimes committed off post in the civilian communities within the territorial boundaries of the United States.[337] In addition, it will be argued that the intent of *O'Callahan* will be ignored if courts forego a detailed inquiry into the existence of service connection and simply conclude that every offense committed overseas is "service connected."

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[334] *See* text accompanying notes 274-285, 295-297 & 311-312 *supra*.

[335] O'Callahan v. Parker, 395 U.S. 258, 266-67, 274 (1969).

[336] *See* Mills, *supra* note 39, at 346-47 n.150.

[337] *See* O'Callahan v. Parker, 395 U.S. 258, 281 (1969) (Harlan, J., dissenting).

Lastly, opponents of the reasoning of the Seventh Circuit will argue that the thrust of *O'Callahan* was to preserve the benefits of the fifth and sixth amendments for servicemen by limiting to the greatest extent possible the exercise of military jurisdiction over them. When the mission of the armed forces and the military's need to handle quickly offenses committed off post are balanced against the entitlement of those accused of such crimes to their constitutional protections of the right to indictment by grand jury and trial by a jury of their peers, opponents of the service connection argument will argue that the protection of the constitutional rights of the individual is most important.

Once the main rationales supporting the military and federal court decisions have been undercut, there are not many arguments remaining that can be made against denying *O'Callahan* application overseas. It might be argued that the imposition of the *O'Callahan* holding overseas would create great logistical problems for the armed forces in the sense of having to return substantial number of American soldiers to the United States for trial in federal district courts for offenses committed overseas. While this may be true, the United States Supreme Court has stated that difficulty of this nature should not be permitted to stand in the way of the exercise of one's constitutional rights.[338]

It also may be contended that specific provisions of the Constitution support the exercise of court-martial jurisdiction over military personnel accused of committing nonservice connected offenses. It can be argued, as it was in *United States v. Keaton*,[339] that the constitutional provisions empowering the Congress to "make Rules and Regulations for the Armed Forces"[340] and to do that which is "necessary and proper to enforce"[341] such laws are sufficient to uphold the military's exercise of court-martial jurisdiction over nonservice connected offenses. In response to this traditional argument often presented in favor of maintaining or extending the scope of military jurisdiction,[342] opponents will argue that the necessary and proper clause cannot be used by the Government as a means of denying servicemen the constitutional rights which the United States Supreme Court has held are applicable to those serving in the armed forces.

Opponents also will contend that in *O'Callahan* the Supreme

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[338] *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 62 (1972) (Powell, J., concurring).
[339] 19 U.S.C.M.A. 64, 67, 41 C.M.R. 64, 67 (1969).
[340] U.S. CONST. art. I, § 8, cl. 14.
[341] U.S. CONST. art. I, § 8, cl. 18.
[342] *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14 (1955); Reid v. Covert, 354 U.S. 1, 5-6 (1957).

Court held soldiers charged with committing nonservice connected offenses are entitled to the constitutional protections of an indictment by a grand jury and a trial by their peers in a civilian court.[343] In addition, those who favor restricted courts-martial jurisdiction will argue that:

> [T]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civilian courts, and, more importantly, acts as a deprivation of the right to jury trial and other treasured constitutional protections.[344]

For these reasons opponents will conclude, not only that soldiers charged with nonservice connected offenses overseas are entitled to the same constitutional protections as are civilians committing similar types of offenses overseas,[345] but also that the necessary and proper clause should not be used to defeat important constitutionally protected rights extended to servicemen who commit nonservice connected offenses within the United States.

Two other theories denying the application of *O'Callahan* overseas are based on the concept of military necessity. One argument is "that countries will be less willing to accept United States troops if the military commanders lack constitutional power to discipline them by courts-martial."[346] The other argument is that "there is a 'greater need to maintain discipline among troops stationed in foreign countries' and that this requires 'broader military jurisdiction' than at home."[347]

In rejecting these contentions, those opposing continued military jurisdiction over nonservice connected offenses overseas will cite arguments made during the NATO SOFA negotiations on the question of the exercise of jurisdiction over American troops and the desire of NATO countries to retain criminal jurisdiction over American servicemen stationed in their countries.[348] In addition, critics will contend that the United States Supreme Court impliedly rejected the second argument in *O'Callahan* when it stated that the trial of nonservice connected offenses in civilian courts would not

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[343] O'Callahan v. Parker, 395 U.S. 258, 272-73 (1969).
[344] Reid v. Covert, 354 U.S. 1, 21 (1957).
[345] *See* Mills, *supra* note 39, at 354-55.
[346] *Id.* at 358.
[347] *Id.*
[348] *See also* Note, *Criminal Jurisdiction over American Armed Forces Abroad*, 70 HARV. L. REV. 1043 (1957).

noticeably affect the maintenance of military discipline within the armed forces.[349]

E. AMENDING SECTION 204(g) TO DENY O'CALLAHAN APPLICATION OVERSEAS

Most of the arguments relied upon by the military and federal courts which have denied the application of *O'Callahan* overseas will no longer be persuasive once Congress enacts legislation providing for extraterritorial application of the federal criminal laws. The arguments noted above are the ones soldiers will make in favor of extending the application of *O'Callahan* beyond the territorial limits of the United States; these also are the arguments the Supreme Court found persuasive two decades ago in holding that the military could not exercise court-martial jurisdiction over civilian dependents and employees accompanying the armed forces overseas.[350]

The enactment of legislation providing for extraterritorial jurisdiction will strengthen arguments favoring the application of *O'Callahan* overseas. The most persuasive of these arguments is that American servicemen charged with nonservice connected offenses outside the territorial limits of the United States should be entitled to the same constitutional protections enjoyed by civilians at home and abroad and by soldiers serving within the United States.

The strongest argument against applying *O'Callahan* overseas is the adverse impact such a decision would have on military operations outside the United States. Having to return soldiers charged with nonservice connected offenses to the United States for trial will adversely affect the relationship between American armed forces and local nationals overseas in communities where American servicemen are stationed.[351] It also will have an adverse effect on maintaining discipline among American soldiers assigned overseas.

When extraterritorial jurisdiction is enacted into law the arguments for and against the application of *O'Callahan* overseas

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[349] Mills, *supra* note 39, at 358.

[350] *See* notes 103-182 and accompanying text *supra*.

[351] *See* the comment of the American Bar Association Section on International Law's Committee on International Criminal Jurisdiction, which discusses the difficulties that would result from returning soldiers to the United States at note 10 *supra*.

will be presented to the federal and military courts by soldiers tried and convicted by military courts-martial for offenses committed overseas. In resolving the difficult issue of the applicability of *O'Callahan* overseas, the courts will seek guidance from the extraterritorial jurisdiction provisions contained in section 204(g) of the Criminal Justice Reform Act of 1975. The courts will find that section 204(g) provides that:

> Except as otherwise expressly provided by statute, or by treaty or other international agreement, an offense is committed within the extraterritorial jurisdiction of the United States if it is committed outside the general jurisdiction of the United States and: . . . (g) the offense is committed by a federal public servant, *other than a member of the armed forces who is subject to court-martial jurisdiction for the offense* . . . .[352]

With respect to this provision, soldiers charged with committing nonservice connected offenses overseas will argue that the military exception contained in subsection(g) does not apply to servicemen who commit nonservice connected offenses overseas.

For the reasons enumerated earlier, these soldiers will contend that *O'Callahan* provides that nonservice connected offenses must be tried in federal district courts where soldiers are afforded the same constitutional protections enjoyed by civilians charged with committing crimes overseas. In other words, soldiers charged with nonservice connected offenses will argue that *O'Callahan* has application outside of the United States and requires that nonservice connected offenses must be tried in federal court; hence, soldiers who commit nonservice connected offenses are not "members of the armed forces . . . subject to court-martial jurisdiction" under section 204(g).

In opposition, the Government will argue that *O'Callahan* has no application outside of the United States and that for this reason soldiers who commit nonservice connected offenses overseas are "members of the armed forces . . . subject to court-martial jurisdiction" under section 204(g). Further the Government will argue that soldiers charged with nonservice connected offenses are not subject to the jurisdiction of the federal courts and need not be returned to the United States for trial.

Unfortunately, the provisions of section 204(g) provide no guidance as to whether Congress intends that *O'Callahan* be applied outside the territorial limits of the United States. Nor is guidance provided in the published legislative history or previous court decisions. In addition, the military exception clause may pre-

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[352] S. 1, 94th Cong., 1st Sess. §204(g) (1975); H.R. 3907, 94th Cong., 1st Sess. §204(g) (1975) (emphasis added). The 12 volumes of Public Hearings on S. 1, *see Hearings*, *supra* note 2, do not mention the problem of *O'Callahan*'s application overseas under extraterritorial jurisdiction. The International Affairs Division of The Office of

sent another problem. Because the clause exempts crimes committed by members of the armed forces subject to court-martial jurisdiction from the extraterritorial jurisdiction of the United States, it is arguable that crimes committed on active duty by servicemen subsequently discharged from the armed forces are no longer subject to the extraterritorial jurisdiction of the United States.

Defense lawyers will argue that the military exception clause means that soldiers who commit crimes while serving overseas are subject only to court-martial jurisdiction and cannot be prosecuted in federal courts under the extraterritorial jurisdiction provisions. If the military fails to charge a soldier with an offense and he is subsequently discharged from active duty, he is no longer subject to military jurisdiction and cannot be tried by court-martial. Neither can he be tried by federal authorities. Since the offense was committed while he was a member of the military and subject only to court-martial jurisdiction, the military exception clause applies and federal extraterritorial jurisdiction does not attach to the offense. For this reason, critics argue that the military exception clause retains the gap in federal jurisdiction over *Toth*-type offenses that extraterritorial jurisdiction was designed to eliminate.

To clarify the *O'Callahan* and *Toth* problems, and to provide guidance for the courts which will be called upon to interpret this section, Congress should amend the proposed section 204(g) to provide that soldiers who commit nonservice connected offenses overseas are subject to court-martial jurisdiction; and to provide that members of the armed forces who have been discharged from active duty and are no longer subject to court-martial jurisdiction are subject to the extraterritorial jurisdiction of the United States for offenses committed while on active duty.

To accomplish these changes section 204(g) should be changed to read:

> (g) the offense is committed by a federal public servant, other than a member of the armed forces *charged under the Uniform Code of Military Justice with a service connected or nonservice connected offense*, who is outside the United States because of his official duties;

By providing that the military can continue to exercise court-martial jurisdiction over nonservice connected offenses overseas, Congress can codify the present state of the law as uniformly adhered to by the federal and military courts. In addition, by dis-

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The Judge Advocate General, however, has considered the problem and has concluded that the federal courts would have no difficulty in denying *O'Callahan's* application overseas under the provisions proposed. DAJA-IA 1975/1079 (9 Oct. 1975).

cussing the issue Congress will provide legislative guidance in an area in which questions are likely to be raised. The amendment also will aid the military in maintaining discipline overseas by preserving the existing jurisdictional structure for the administration of military justice and will eliminate the logistical difficulties occasioned by having to return military personnel to the United States for trial in federal courts.[353]

Under the amended statute soldiers charged with nonservice connected offenses committed overseas will not be able to argue, as they can under the presently proposed provisions, that the exception does not apply to them. On the contrary, the amended statute makes all servicemen charged with service and nonservice connected offenses overseas subject to court-martial jurisdiction.

Soldiers tried and convicted under the amended legislation can contest the constitutionality of the provisions in federal court after exhausting their military remedies.[354] In view of the Supreme Court's recognition of the importance of maintaining discipline

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[353] Justice Clark discussed the problems involved in returning American civilians to the United States for trial of offenses committed overseas in Kinsella v. Krueger, 351 U.S. 470 (1956). In returning American soldiers to the United States for trial of nonservice connected offenses committed overseas, the same types of difficulties would be present.

> First, a condition precedent to trial in this country would be the consent of the foreign nation concerned in each individual case. This consent could always be withheld and it is likely that foreign nations would refuse to cede jurisdiction over serious offenses when trial might be held many thousands of miles away. Even where jurisdiction was obtained, the deterrent effect of such prosecutions might well be vitiated by the distance and delay involved. Secondly, both the government and the accused would face serious problems in the production of witnesses. . . . Attendance of foreign witnesses could be only on a voluntary basis and the testimony of no foreign witness could be compelled if the witness or his government refused. The expense of transporting witnesses would be considerable for the Government and probably impossible for a defendant, whose successful defense may depend on the demeanor of one witness. In fairness, the Government would have to bear the expense of transporting the defendant's witnesses as well as its own, and the possibilities of abuse are obvious.
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> Finally, a breakdown of the figures on trial by courts-martial of civilians abroad from 1950-1955 shows that some 2,000 of the 2,260 cases tried involved offenses for which the maximum punishment was six months or less. The Government might be unwilling to undergo the heavy expense and inconvenience of trial here for such minor offenses. The alternatives would be either trial by the foreign country or no trial at all; the result must be the practical abdication of American juridical authority precisely what Congress wished to avoid.

Id. at 480 n.12. While *Krueger* was reversed on rehearing, 354 U.S. 1 (1957), the logistical difficulties raised by Justice Clark still have validity today.

In United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955), Justice Black implied that Congress could enact a statute like the amendment proposed to subsection (g) of section 204. In *Toth* Justice Black said: "It is also true that under the present law courts-martial have jurisdiction only if no civilian court does. But that might also be changed by Congress." *Id.* at 20. An amendment to subsection (g) similar in content to the amendment proposed above was introduced by Representative Kastenmeier on 25 November 1975. Under Mr. Kastenmeier's change subsection (g) would read:

> (7) the offense is commited by a Federal public servant, other than a member of the armed forces *who, at the time charged,* is subject to court-martial jurisdiction for the offense . . .

H.R. 10850, 94th Cong., 1st Sess. § 204(7) (1975) (emphasis added).

[354] Schlesinger v. Councilman, 420 U.S. 738 (1975).

and a respect for duty in the military,[355] and the Court's recent hesitancy to extend constitutional protections to those accused of criminal acts,[356] it is indeed doubtful that the amended legislation would be declared unconstitutional.

In addition, the inclusion of a specific provision providing for the exercise of extraterritorial jurisdiction over criminal offenses committed by former servicemen will eliminate any confusion which might arise from the military exception clause, and will achieve the objective of filling the jurisdictional gap created by the United States Supreme Court's decision in *Toth v. Quarles.*

While the enactment of extraterritorial jurisdiction raises important questions concerning the application of *O'Callahan* beyond the territorial limits of the United States, it also raises equally important questions involving the use of military personnel to investigate civilian and nonservice connected offenses committed overseas.

VII. EXTRATERRITORIAL JURISDICTION AND CRIMINAL INVESTIGATIONS BY THE MILITARY

A. GENERALLY

The Attorney General of the United States and civilian investigatory agencies of the federal government are primarily responsible for the investigation and prosecution of criminal offenses committed within the United States.[357] Under the extraterritorial jurisdiction provisions included in the Criminal Justice Reform Act of 1975, the Attorney General and his investigative support agencies also will have primary responsibility for investigating most offenses committed outside the United States.[358] While the Attorney General will be responsible for investigating offenses committed overseas, the new legislation does not provide him with any additional investigative support for use outside of the United States. Because federal law enforcement

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[355] *See, e.g., id.* at 757; Parker v. Levy, 417 U.S. 733, 743 (1974).

[356] *See* Gunther, *1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972). *See also* Kurland, *1970 Term: Notes on the Emergence of the Burger Court,* 1971 SUP. CT. REV. 265, 272.

[357] *See, e.g.,* 28 U.S.C. § 533 (1970).

[358] *See* S. 1, 94th Cong., 1st Sess., tit. I, pt. IV, ch. 30 (1975).

agents are not now routinely stationed in foreign countries, these new responsibilities for investigating criminal offenses committed overseas will present major problems for the Attorney General.[359]

In the absence of adequate numbers of federal civilian law enforcement personnel available for assignment overseas, it is conceivable that the federal courts and civil law enforcement agencies will look to the armed forces of the United States stationed in foreign countries for assistance in the investigation and prosecution of crimes which are subject to the extraterritorial jurisdiction of the United States. In this regard, it is possible that the military will be asked to not only investigate crimes overseas, but also gather evidence for use in government prosecutions, and make arrangements for the presence of foreign witnesses in trials held in the United States. In some cases, the military may even be requested to take an accused into custody and to return him to the United States for trial.[360]

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[359] Whether the United States can investigate offenses subject to its extraterritorial jurisdiction is another question. Although the United States legislatively may limit the activities and the conduct of its citizens while they are within the territory of another sovereign, principles of international law prevent one nation from transgressing the sovereignty of another nation. *Hearings*, *supra* note 2, pt. III, subpt. c, at 1918 (statement of Mr. Nanda). As a result of this principle, one nation cannot perform sovereign acts within the territory of another nation. I OPPENHEIM'S INTERNATIONAL LAW 295 (8th Lauterpacht ed. 1955). Thus, one sovereign should not exercise its power within the territory of another sovereign. Case of the S.S. "Lotus," (1927) D.C.I.J., ser. A. Nos. 9, 18. *See* RESTATEMENT OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 20, at 59 (1965). This includes sending a law enforcement officer into a sovereign state to perform a criminal investigation. *See* Kampfer v. Public Prosecutor of Zurich, Annual Digest, 1941-41 Case No. 2 (Swiss Federal Tribunal (1939)), *cited in* I OPPENHEIM, *id.*, at 295 n.1. *But see* Stonehill v. United States, F.2d 738, 739 (9th Cir. 1968).

Exceptions to the general principle are recognized. *See generally* 2 HACKWORTH DIGEST OF INTERNATIONAL LAW 393-417 (1941); I HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 519 (1947). The performance of police functions by agents of one sovereign within the territory of another sovereign, however, is not among the exceptions.

[360] The inability of the United States authorities to arrest an offender while he is within the jurisdiction of another territorial sovereign would severely limit the effective operation of the extraterritorial provision. Although the general rule is that only the processes of the territorial sovereign may be used as the foundation for the restraint of an individual within that nation, I HYDE, INTERNATIONAL LAW 733 (1947); Dominquez v. State, 90 Tex. Crim. App. 92, 97 (1921); *cf.* Vaccaro v. Collier, 51 F.2d 17 (4th Cir. 1931); I OPPENHEIM'S INTERNATIONAL LAW (8th Lauterpacht ed. 1955) 295 n.1; Hartfield, *Extraterritorial Application of Law—General Principles*, 64 AM J. INT'L L. 130 (1970), some commentators believe that military law enforcement personnel may have the authority to arrest individuals subject to the extraterritorial provision. *Extraterritorial Jurisdiction*, *supra* note 5, at 358. Not only does this position offend traditional principles of international law but may also offend notions of

The use of military personnel in this manner by civil law enforcement personnel may be a violation of federal law. Originally enacted in 1878, the Posse Comitatus Act[361] prohibits the use of Army and Air Force personnel to execute local, state, or federal laws, unless expressly authorized by the Constitution or an Act of Congress. In its proposals to reform the federal criminal laws, Congress has recommended that Navy personnel also be prohibited from enforcing civil laws, unless expressly authorized by the Constitution or an Act of Congress.[362]

The Constitution does not authorize civilian officials to use military personnel to enforce or execute local, state or federal laws. While in the past Congress has authorized the use of military personnel in such a manner,[363] it has not expressly authorized the use of Army, Air Force, or Navy personnel to execute federal criminal laws being applied overseas. Thus, the pivotal question is whether

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consititutional due process. *See* JAGW 1960/1134 (16 June 1960) (the involuntary detention of civilian members of a force or of a dependent is a violation of due process); JAGJ 1960/8346 (6 May 1960) (the same rule applies to involuntary detention of a tourist).

If, however, the individual arrested is a member of the military, his arrest by United States personnel will not violate the integrity of the territorial sovereign if a status of forces agreement exists between the countries. *See, e.g.*, Schwartz, *International Law and the NATO Status of Forces Agreement*, 53 COLUM. L. REV. 1091 (1953). *See generally* S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW (1971). The United States has status of forces agreements with the majority of countries in which military forces are stationed. *See* Mills, *supra* note 28. The status of forces agreements, however, would not allow the United States to arrest civilians or dependents. *Hearings on the Operation of Article VII, NATO SOFA Treaty before a Subcomm. of the Senate Comm. on the Armed Services*, 91st Cong., 2d Sess. 8 (1970).

Of course, a sovereign can specifically authorize an investigation upon its territory by an agent of another sovereign. And, some states will grant this authority more freely than others. Discussion, 64 AM. J. INT'L LAW, at 146 (Prof. Basil Yanakakis). Even when a nation will not grant this authority all is not lost. The concept of "international juridical assistance and cooperation," governed by specific requirements, entails juridical assistance rendered by the officials of a territorial sovereign to another nation. *See generally*, II INTERNATIONAL CRIMINAL LAW. JURISDICTION AND COOPERATION 171-74, 189-259 (M. C. Bassiouni & V. P. Nanda eds. 1973). This assistance includes, among other things, extradition, interrogation of witnesses, delivery of real evidence, and service of documents. *Id.* at 202-11. The concept does not, however, permit the agents of one sovereign to operate within the territory of another sovereign. *See also* Army Reg. No. 27-51, para. 7 (7 Nov. 1975) which provides:

> Military police of the [United States' Army are authorized to apprehend any member of a friendly foreign force [in the United States] upon the request of the commanding officer of that force or his designated representative.

[361] 18 U.S.C. § 1385 (1970).

[362] S. 1, 94th Cong., 1st Sess. § 127 (1975).

[363] *See, e.g.*, 10 U.S.C. §§ 331-33 (1970).

the Posse Comitatus Act will prohibit the use of military personnel to execute the laws of the United States which are being applied extraterritorially.[364]

B. REFORM PROVISIONS AND THE INVESTIGATION OF OFFENSES COMMITTED OVERSEAS

The National Commission's *Study Draft* provides that the existing investigatory jurisdiction of federal agencies is to remain unchanged by the new criminal code.[365] The Commission undoubtedly realized that in some instances the need for effective criminal law enforcement would create new and unforeseen investigative problems and it therefore authorized federal agencies to reallocate investigative authority among themselves if it would promote efficiency.[366] The National Commission also undoubtedly realized that the increased federal jurisdictional base would create a need for additional federal manpower resources. Although this problem was never considered directly, some concluded that the increased jurisdiction would provide the impetus for the expansion of investigative manpower resources.[367]

In section 3-10A1(a) of the original Senate Judiciary Staff proposal for reform of the federal criminal code, the Attorney General was given the responsibility for promulgating administrative regulations regarding the "exercise of criminal investigative authority by federal law enforcement agencies."[368] In addition, the proposal contained a provision which authorized the armed services to assist civil authorities in the conduct of investigations of certain types of criminal offenses.[369]

Under the provisions of the Criminal Justice Reform Act of 1975,

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[364] The military departments may be precluded by their own regulations from investigating offenses that will be triable under the extraterritorial provision. *See* Army Reg. No. 190-24, Marine Corps. Order No. 1620.2A, BUPERS Inst. 1620.4A, Air Force Reg. No. 125-11 (Joint Service Regulation dated 12 Feb. 1974); Army Reg. No. 195-2 (23 Aug. 1973). *See also* Army Reg. No. 190-22 (12 June 1970).

[365] STUDY DRAFT, *supra* note 25, at 5-6.

[366] *Id.*

[367] *See* WORKING PAPERS, *supra* note 7, at 56-57.

[368] S. 1, 93d Cong., 1st Sess. § 3-10A1(a) (1973). Criminal investigative authority conferred by another statute on a particular agency or commission, however, was not to be affected by these regulations. *Id.* § 3-10A1(c).

[369] *Id.* § 3-10A1(b). S. 1400, 93d Cong., 1st Sess., tit. II, § 279 (1973) contained a similar provision.

specific government agencies have primary responsibility for investigating particular types of crimes.[370] The investigation of all other crimes will be the responsibility of the Federal Bureau of Investigation.[371] The proposed legislation also provides that law enforcement agencies within the Government can transfer investigative responsibility among themselves.[372] Any transfer of such responsibility, however, must be agreed upon by the heads of the agencies involved and by the Attorney General. Since the term "law enforcement agency" encompasses all governmental agencies authorized to conduct criminal investigations,[373] arguably the armed services, which are authorized to conduct criminal investigations, could be asked to investigate crimes which are within the primary investigative responsibility of another agency. However, the absence in the 1975 Reform Act of the provision contained in the original Senate Judiciary Staff proposal authorizing the use of armed forces personnel in civil investigations militates against such a conclusion. Under the 1975 Act, the military is no longer authorized to cooperate with civil law enforcement agencies in the investigation of certain criminal offenses. This deletion, while seemingly insignificant in itself, reflects a resistance on the part of Congress to use the armed services to enforce civil laws.

In addition to addressing the investigative functions under a new criminal code, some of the various reform proposals have addressed the arrest of individuals outside of the United States. The original Senate Judiciary Staff proposal provided that an authorized agent of the United States could arrest an individual charged with an offense that was triable within the extraterritorial jurisdiction of the United States.[374] In effecting an arrest outside the territorial boundaries of the United States, the agent had to follow the rules of the jurisdiction where the individual was found. Consequently, an agent of the United States could arrest an individual found overseas, but only after he had complied with the territorial sovereign's laws. No similar provision is found in the Reform Act of 1975.

Although section 3303(b) of the new bill generally speaks to the arrest of persons charged with offenses over which extraterritorial jurisdiction exists, the provisions of the section apply only if the ac-

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[370] S. 1, 94th Cong., 1st Sess. § 3001(a) (1975).
[371] *Id.*
[372] *Id.* § 3001(b).
[373] *See id.* § 111 and the definition of "law enforcement officer" therein.
[374] S. 1, 93d Cong., 1st Sess. § 3-11B2 (1973).

cused is outside the United States and outside the jurisdiction of any nation.[375] The proposed code does not mention specifically the investigation of offenses committed overseas. Moreover, it does not mention the arrest of individuals who have committed crimes subject to the extraterritorial jurisdiction of the United States but who are physically within the territorial jurisdiction of another nation.

Implementation of the extraterritorial provisions of the Code will require that overseas crimes be investigated and that agents be given the power to arrest, to hold, and to return an accused to the United States for trial. While the drafters have made provision for such activity in areas over which no nation exercises jurisdiction,[376] they have failed to provide for such activity within the territory of another sovereign. In the absence of provisions authorizing American law enforcement agents in foreign nations to arrest individuals charged with offenses triable in the United States, it seems inevitable that some responsibility for enforcing the code overseas will be placed upon the military. The important question to be answered therefore concerns the role that the military *may play* in these investigations if called upon for assistance.

C. THE MILITARY AND THE CIVIL LAWS

The history of the United States reflects that Americans traditionally have resisted any participation by the military in "civilian affairs."[377] This strong insistence upon limiting military operations in time of peace is founded in the Constitution and its provisions which repose in the legislative branch of the Government the responsibility for controlling the use of the military in the realm of civil affairs.[378] In particular, the framers of the Constitution intended that Congress should control any use of the armed forces to execute domestic policy.[379]

Although the President was designated commander-in-chief of the armed forces,[380] Congress was given certain powers regarding

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[375] S. 1, 94th Cong., 1st Sess. § 3303(b) (1975).

[376] *Id.*

[377] *See* Laird v. Tatum, 408 U.S. 1, 15-16 (1973); *cf.* U.S. CONST. amend. III. *See also* Raymond v. Thomas, 91 U.S. 712, 716 (1876); United States v. Walden, 490 F.2d 372, 376 (4th Cir. 1974); Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV 181, 185 (1962); 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 209 (1911).

[378] *See, e.g.*, U.S. CONST art. I, § 8, cl. 15.

[379] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952).

[380] U.S. CONST. art. II, § 2, cl. 1.

the nation's military forces.[381] Pursuant to its constitutionally granted authority, Congress has authorized the President to use federal troops to enforce federal[382] and state laws.[383] However, these authorizations provide for the use of troops only under specified circumstances. While the President may possess inherent power under the Constitution to use the armed forces to fulfill his domestic duties,[384] this power is limited by congressionally prescribed bounds.[385] Therefore, the President may only use the armed forces to fulfill his constitutionally prescribed responsibility to see that the laws are faithfully executed if their use has been provided for by Congress. In some situations, Congress has explicitly forbidden the use of federal troops[386] and it has also enacted a general statute which forbids the use of the Army and the Air Force to execute the laws unless expressly authorized by the Constitution or by an Act of Congress.

The Posse Comitatus Act provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.[387]

With one major exception the Act has remained essentially un-

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[381] U.S. CONST. art I, § 8, cl. 12 (raise and support the military forces); *id.* § 8, cl. 14 (provide rules for the government and regulation of land and naval forces); *id.* § 8, cl. 15 (call forth the militia to execute the laws of the United States); *id.* § 8, cl. 16 (organize, arm, and discipline the militia).

[382] 10 U.S.C. §§ 332 & 333 (1970); 31 U.S.C. § 686 (1970); 18 U.S.C. § 3056 (1970) (support of secret service in performance of its protective duties).

[383] 10 U.S.C. § 331 (1970).

[384] U.S. CONST. art. II, § 3; *see* U.S. CONST. art. VI, § 1, cl. 2. But one court has alluded to the possibility that there might be a "constitutional objection to the use of the military to enforce civilian laws." United States v. Walden, 490 F.2d 372, 376 (4th Cir. 1974).

[385] *See* Note, *Honored in the Breech: Presidential Authority to Execute the Laws with Military Force*, 83 YALE L.J. 130, 133-37 (1973) [hereinafter cited as Yale note]. *See also* United States v. Red Feather, 392 F. Supp. 916, 921 (D.S.D. 1975) in which the court ruled that "the clause contained in 18 U.S.C. § 1385 'uses any part of the Army or the Air Force as a posse comitatus or otherwise' means the direct active use of Army or Air Force personnel and does not mean the use of Army or Air Force equipment or materiel."

[386] 18 U.S.C. § 592 (1970) (troops stationed at polling places).

[387] 18 U.S.C. § 1385 (1970). *See* Lorence, *The Constitutionality of the Posse Comitatus Act*, 8 U. KAN. CITY L. REV. 164, 169-74 (1940) for a general discussion of the historical background of the Act. For a discussion of the use of the armed forces as a posse comitatus before the Act was passed *see* E.S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, at 130-38 (1957).

changed since its original enactment. At one time, the use of the Army to enforce the civil laws in Alaska was permissible since Alaska was specifically exempted from the Act's prohibition, but that exemption has been repealed.[388] The conforming amendments of the Reform Act of 1975, amendments which bring the other titles of the United States Code into line with the provisions of the Reform Act, will reenact the statute in substantially the same form as it is today except that the Navy will be included within the coverage of the Posse Comitatus Act.[389]

Originally enacted as a rider to an Army Appropriations Bill, the Posse Comitatus Act was the congressional response to an opinion of the Attorney General which advised that a local marshal or sheriff could call forth a posse comitatus[390] to enforce civil statutes. The opinion provided that the posse comitatus could be composed of all persons in a district including members of the United States Army.[391] When the Bill was introduced in the House, one of its sponsors stated that the military should be used to enforce civil statutes only if expressly authorized to do so by Congress,[392] and that

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[388] The Posse Comitatus Act was originally section 15 of the Act of June 18, 1878, 20 Stat. 145, 152 (1878). In 1900, Congress passed an amendment to the Act which made it inapplicable to Alaska. Act of June 6, 1900, ch. 786, § 29, 31 Stat. 330 (1900). This exemption was later repealed by Pub. L. No. 86-70 (1959). When title 10 of the United States Code was codified in 1956, the Posse Comitatus Act was restated without substantive change except that the words "Air Force" were included. Act of August 10, 1956, § 18, 70A Stat. 626.

[389] S. 1, 94th Cong., 1st Sess.

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, knowingly uses any part of the Army, Navy, or Air Force as a posse comitatus or otherwise to execute the laws is guilty of a Class A misdemeanor. Nothing in this section shall be construed to affect the law enforcement functions of the United States Coast Guard.

Id., tit. II, pt. G, 127.

[390] Posse Comitatus is defined in BLACK'S LAW DICTIONARY (4th ed. rev. 1968) as "[t]he power of force of the county. The entire population above the age of 15, which a sheriff may summon to his assistance in certain cases; as to aid him in keeping the peace, in pursuing and arresting felons, etc. 1 B. Comm. 343; Comm. v. Martin, 7 Pa. Dist. R. 219 224." at 1324.

[391] 6 OP. ATT'Y GEN. 466 (1854). *Accord*, 16 OP. ATT'Y GEN. 162 (1878). *See also* 7 CONG. REC. 3851 (1878).

[392] 7 CONG. REC. 3846-47 (Congressman Knott). The sponsors of the bill were aware that certain statutes already authorized the use of the military under certain circumstances to enforce civil laws. These statutes were sections 5298 and 5299 of the Revised Statutes of 1873. These sections are now codified at 10 U.S.C. §§ 332 and 333 respectively. The debates reveal that these sections were not to be affected by the passage of the bill. 7 CONG. REC. 3846 (1878).

violations of the Act would subject everyone including the President to punishment.[393]

When the Senate considered the Bill, it added a provision allowing the Army to be used to enforce the civil laws if such use is expressly authorized by the Constitution.[394] Additionally, the legislative history of the Act, as reflected in the Senate debates, reveals that the prohibition was to extend to the use of any part of the Army, even if such use was other than as a posse comitatus.[395]

Although the Act provides that the armed forces may be used to execute the domestic laws if *expressly authorized by the Constitution,* this provision is a vestige of congressional infighting[396] and means little in light of the absence of any constitutional provision giving such express authorization. In addition, it has been strongly argued that the word "expressly" cannot be construed as limiting the powers which flow to the President by implication from other constitutional provisions: such powers, even though merely implied, are derived from the Constitution and cannot be overridden by mere legislative act.[397] The implied powers utilized to justify execution of civilian law by the armed forces are typically the powers to "take care that the laws be faithfully executed"[398] and to protect the states from "domestic violence."[399] Neither of these clauses has been held to justify military intervention in the day-to-day enforcement of civilian criminal laws and consequently, such law enforcement will have to be expressly authorized by Act of Congress,[400] a requirement which has been held to apply to the enforcement of federal laws as well as state laws.[401]

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[393] 7 CONG. REC. 3846-47 (1878). The Act was intended to reach "from the Commander-in-Chief down to the lowest officer in the Army who may presume to take upon himself to decide when he shall use the military force in violation of the law of the land." *Cf.* Youngstown Sheet & Tube Co. v. United States, 343 U.S. 579, 644-45 (1951) (Jackson, J., concurring).

[394] 7 CONG. REC. 4240 (1878). *See also id.* at 4243.

[395] *Id.* at 4241, 4245. *See* United States v. Jaramillo, 380 F. Supp. 1375, 1379 (D. Neb. 1974).

[396] *See* Yale note, *supra* note 385, at 143 n.96.

[397] Furman, *Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act,* 7 MIL. L. REV. 85, 91 (1960). For this proposition Furman cites President Taft's argument that the President's constitutional powers as Commander-in-Chief give him the authority to use the armed forces to suppress insurrection and take care that the laws are faithfully executed.

[398] U.S. CONST. art. II, § 3.

[399] U.S. CONST. art. IV, §4. *See* Furman, *supra* note 397, at 88.

[400] *See* Wrynn v. United States, 200 F. Supp. 457, 465 (E.D.N.Y. 1961) (the statute is "absolute in its command and explicit in its exceptions "); 19 OP. ATT'Y GEN. 570 (1890); 19 OP. ATT'Y GEN. 368 (1889); 19 OP. ATT'Y GEN. 293 (1889); 17 OP. ATT'Y GEN. 242 (1881); 17 OP. ATT'Y GEN. 333 (1882).

[401] 41 OP. ATT'Y GEN. 313, 340 (1957) (This opinion dealt with the President's power to

The Act, intended to limit the use of the military in the execution of civilian laws, may be violated by military intervention at various stages of the criminal process. Regardless of the status of the individual requesting military assistance, the Act is violated if the military assists in enforcing civil laws outside the boundaries of congressional authorization. When a civilian provides the impetus for the military's enforcement of civil laws, he is guilty of a violation of the Act for he has utilized the military to enforce the civil laws. Thus, the President can be guilty of violating the Act, as can the Attorney General or any other individual who uses the military to assist in law enforcement in the absence of express congressional authorization.

D. EXTRATERRITORIAL APPLICATION OF THE POSSE COMITATUS ACT

In 1924, The Judge Advocate General of the Army concluded that the Posse Comitatus Act applied extraterritorially.[402] It was his opinion that the Act prohibited the use of the Army to enforce the general laws of the United States in foreign countries. For example, the Army could not take custody of a civilian prisoner in China and hold him pending his trial by a United States court.[403] The Act, however, was never thought to prohibit the use of the military in enforcing the laws within the territories and possessions of the United States.[404]

The Army changed its position on the extraterritorial applica-

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use federal troops to enforce a federal court order on school desegregation in Little Rock, Arkansas. Since the use of federal troops was based upon the provisions of 10 U.S.C. § 333—execution of the laws of the United States was hindered by a combination; persons were being deprived of a right under the Constitution; and the state would not protect that right—it was expressly authorized by an Act of Congress.); 17 OP. ATT'Y GEN. 71 (1881) (The use of federal troops of the United States to aid civil authorities in arresting certain persons charged with robbing a federal employee who was in the execution of his official duties was prohibited by the Act.); 16 OP ATT'Y GEN. 162 (1878) (A marshal of the United States could not be aided by the military in the execution of process under the circumstances of the case as they stood at the time that the question was presented to the Attorney General for his opinion.).

[402] JAG Opin. (Army) 541.1 (5 Mar. 1924) (Transportation of an individual to the United States after he had been convicted of an offense by a United States court sitting overseas would violate the Act.); JAG Opin. (Army) 014.5 (27 Oct. 1923) *See also* JAG Opin. (Army) 684 (1 Ap. 1925); JAG Opin. (Army) 370.6 (16 Jan. 1924).

[403] JAG Opin. (Army) 014.5 (20 Dec. 1923).

[404] For a discussion of the application of the Posse Comitatus Act in the territories of the United States and in United States possessions *see* Furman, *supra* note 397, at 109-10. The proposed federal criminal code contains a section which deals with the exercise of criminal jurisdiction by the United States in possessions and territories. S. 1, 94th Cong., 1st Sess. §203 (1975) (Special Territorial Jurisdiction).

tion of the Act, however, after the First Circuit Court of Appeals decided *Chandler v. United States*.[405] Chandler, an American citizen charged with treason, was taken into custody by United States Army personnel in Germany after World War II at the request of the Justice Department. At the time of the arrest, Germany was an occupied enemy territory, where the military power was in control and Congress had not set up a civil regime. The accused was subsequently returned to the United States for trial.

At trial the defendant moved for dismissal of charges because his apprehension and arrest were in violation of the provisions of the Posse Comitatus Act. In affirming the trial court's denial of the motion, the court of appeals found that the statute was not the type that was to be given extraterritorial application in the absence of language to the contrary. The court found that there were no civil law enforcement authorities in Germany at the time that the defendant was arrested. Therefore, the only way the accused could have been brought to trial was through use of the military and it would have been "unacceptable" for Chandler to escape trial. The entire tone of the court's opinion indicates that its decision on this point was based upon a balancing of equities; and, the balance weighed against the defendant's escape from trial for his crimes.

Another case often cited as authority for the proposition that the Act has no extraterritorial application is *Gillars v. United States*.[406] A careful reading of the court's opinion in *Gillars*, however, suggests that the court would, in some instances, apply the Act extraterritorially. After stating that Congress intended that the Act would "preclude the Army from assisting local law enforcement officers in carrying out their duties,"[407] the court found that the Army was the "law enforcement" agency in Germany when the defendant was arrested. Thus, it was not "assisting local law enforcement officers" when it took the accused into custody. As an Army of occupation, it had the right and responsibility to govern the territory until a civil regime was established. This right included enforcing the laws. Accordingly, the arrest was not a violation of the Act.

The extraterritorial application of the Act also was addressed in *United States v. Cotton*[408] where the defendants, who had been indicted in California for the commission of a federal offense, were taken into custody in Vietnam by military law enforcement of-

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[405] 171 F.2d 921 (1st Cir. 1948). *Accord*, Iva Ikuko Toquri D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951).
[406] 182 F.2d 962 (D.D.C. 1950).
[407] *Id.* at 972.
[408] 471 F.2d 744 (9th Cir. 1973).

ficers, placed on a military aircraft, flown to Hawaii, and there relinquished to the control of civilian officials. In rejecting the defendants' contention that the method of their apprehension and return deprived the trial court of jurisdiction, the court of appeals found that a violation of the Posse Comitatus Act does not preclude a trial court from exercising jurisdiction over the person of the accused.[409] However, the court did recognize that the defendants may have "independant remedies against those whose conduct they complain of, . . ."[410] Thus, although the court refrained from expressing any opinion on the possible violation of the Act, its decision implies that a violation of the Act may be committed when an accused is taken into custody by military officials in a foreign country and returned to the United States in aid of civilian criminal proceedings.

This same conclusion was expressed previously by one armed service in an administrative opinion which stated that the Act did not generally limit the activities of military investigators in foreign countries.[411] If, however, military criminal investigators overseas were used as backup or in support of criminal law enforcement activities in the United States, there would be a violation of the Act unless the activity fell within the Act's exceptions.[412]

With the advent of the new criminal code and its extraterritorial jurisdiction provision, the Posse Comitatus Act undoubtedly will apply extraterritorially.[413] This conclusion is supported by an examination of that provision.

The extraterritorial jurisdiction provision, section 204, states that an offense is committed within the extraterritorial jurisdiction of the United States unless the offense is committed within the general jurisdiction of the United States or unless a statute, treaty, or international agreement provides otherwise. Additional

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[409] The court found that a violation of the Posse Comitatus Act was not such an extensive violation of the due process rights of the defendants as to require dismissal of the charges or a finding of lack of jurisdiction. 471 F.2d at 748-49.

[410] 471 F.2d at 748 n.7.

[411] DAJA-AL 1973/3387 (12 Jan. 1973).

[412] *Id. See* United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975) (use of Army and Air Force equipment at Wounded Knee did not violate Posse Comitatus Act).

[413] Strict observance of the provisions of the Posse Comitatus Act has become more important since the decision in United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1975). In *Jaramillo* a violation of the Posse Comitatus Act resulted in the dismissal of the charges against the defendant. (One of the elements of the charge, however, was that the law enforcement officers had been acting in the lawful execution of their duties when the defendant purportedly interfered with that execution). *See also* United States v. Walden, 490 F.2d 372 (4th Cir. 1974); United States v. Banks, 383 F. Supp. 368 (D.S.D. 1975) (use of military personnel at Wounded Knee found to preclude a finding that law enforcement officers were "lawfully engaged in the lawful performance of [duty]" in light of the Posse Comitatus Act).

jurisdictional prerequisites are set out in the section and at least one must be satisfied if extraterritorial jurisdiction is to attach. Each prerequisite is a separate ground upon which extraterritorial jurisdiction over the offense may be asserted and if one prerequisite is satisfied, extraterritorial jurisdiction will attach. Consequently, it will no longer be necessary to look to the nature of the crime to determine whether it should be applied extraterritorially.

This disunion is the result of a conscious effort to divorce questions of jurisdiction from the nature of the substantive criminal offense.[414] The *Final Report* of the National Commission specifically recommended that federal jurisdiction be determined without reference to the nature of the offense committed.[415] By stating the jurisdictional base separately, this result is achieved.[416] Thus, the rationale of the court in *Chandler,* based on an examination of the substantive offense itself, will no longer be appropriate.

Section 204(g) of the Reform Act of 1975 provides that the extraterritorial jurisdiction will exist if an offense is committed by a federal public servant who is outside the United States because of his official duties. The section, however, also qualifies this general proposition by limiting the grant of jurisdiction to a public servant "other than a member of the armed forces who is subject to court-martial jurisdiction for the offense."[417]

Therefore, the use of the armed forces by a federal public servant to execute the laws constitutes an offense for the purpose of the application of section 204(g). And, as a result of this section, a federal public servant outside the general jurisdiction of the United States who uses the armed forces to execute federal criminal laws will be subject to trial under the extraterritorial provision of the proposed code.[418] For example, if an embassy official has the military conduct an investigation in aid of a prosecution in a federal district court in the United States, he is subject to trial under federal criminal law. Likewise, a military member who, while stationed overseas, uses the armed forces to execute federal laws

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[414] 121 CONG. REC. (daily ed. Jan. 15, 1975) (remarks of Senator McClellan who introduced the 1975 version of Senate 1 for himself and others).
[415] FINAL REPORT, *supra* note 17, at xii.
[416] Agata, *Memorandum on Extraterritorial Jurisdiction* (1970) *in* WORKING PAPERS, *supra* note 7, at 72 [hereinafter cited as Agata].
[417] S. 1, 94th Cong., 2d Sess. § 204(g) (1975).
[418] For the purposes of the proposed code an offense is:

> . . . conduct for which a term of imprisonment or a fine is authorized by a federal statute, or would be if a circumstance giving rise to federal jurisdiction existed, or, if qualified by the word 'state,' 'local,' or 'foreign,' conduct for which a term of imprisonment or a criminal fine is authorized by such state, local, or foreign law.

S. 1., 94th Cong., 1st Sess. § 111 (1975).

also would be subject to the extraterritorial jurisdiction of the United States unless he could be tried by court-martial for the offense. Because a military member who violates the Act overseas would be subject to trial by court-martial for that violation,[419] he would not be subject to the extraterritorial jurisdiction of the United States.

Section 204(f) of the Reform Act of 1975 is also relevant. Under this section, an offense is committed within the ambit of the extraterritorial jurisdiction of the United States if the crime is committed partially or completely within the United States and the accused participates outside the United States. The comment on Study Draft section 208, predecessor of section 204, states that the provision was intended to give the United States jurisdiction over "conduct outside the United States involved in the commission or intended commission of crimes within the United States."[420] A memorandum found in the *Working Papers* of the National Commission,[421] however, gives the section a broader interpretation.

The memorandum states that the section was the result of an attempt to codify the "objective territorial principle" of jurisdiction.[422] Developed to expand the state's power to control conduct that was adverse to its interests,[423] the objective territorial principle permits a state to assert its jurisdiction over an individual whose conduct has detrimental effects within its territory.[424] It

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[419] *See, e.g.*, OP. JAGN 1974/3363 (7 May 1974) which indicates that violations of the Posse Comitatus Act by Naval personnel may be prosecuted under Article 92, UCMJ, 10 U.S.C. 892 (1970). A member of the armed services may be charged with the commission of noncapital offenses and crimes, including noncapital offenses and crimes made punishable in federal civil courts by enactments of the Congress under the third clause of Article 134 of the Uniform Code of Military Justice. 10 U.S.C. § 934 (1970). *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.) para. 213e. This charging is not, however, without limitations. Only if the offenses or crime is committed "within the geographical boundaries of the area in which the statutory provision is applicable," can it be charged as a violation of Article 134. Accordingly, there can be no prosecution under the Uniform Code for the commission of an offense or crime if the offense or crime was committed at a place where the referent law did not apply. *Id.* Since jurisdiction over the military member could be asserted under the provision of 204(g) but for the exception, a violation of the Posse Comitatus Act can be the basis for a charge laid against the military member under Article 134.

[420] STUDY DRAFT, *supra* note 25, Comment on § 208, at 19.

[421] Agata, *supra* note 416, at 60.

[422] *See* Straussheim v. Daily, 221 U.S. 280 (1911); United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1965). Brierly finds that this principle was recognized in the Case of the S.S. "Lotus." BRIERLY, THE LAW OF NATIONS 220 (1949). *See also Hearings, supra* note 2, pt. X, at 7415-18; note 242 and accompanying text *supra*.

[423] United States v. Pizzarusso, 388 F.2d 8, 10 (2d Cir. 1965).

[424] *Harvard Research, supra* note 241, at 435, 484.

allows a state to assert jurisdiction if any part of an offense is committed in its territory or when the criminal conduct produces an effect in the state.[425] By applying this principle through the provisions of section 204(f), the United States will be able to assert federal criminal jurisdiction when the commission of a federal crime takes place partially or entirely within the United States.[426]

The key to the application of section 204(f) will be whether the "offense is committed in whole or in part in the United States." If armed forces personnel stationed overseas are used to support criminal law enforcement activities in the United States, part of the prohibited conduct, the "use," undoubtedly will take place within the United States. Thus, extraterritorial jurisdiction attaches and the individuals making such use of the armed forces will be subject to prosecution in federal civilian courts.

It will be unnecessary, however, to resort to the extraterritorial provision to establish jurisdiction if a government official in the United States requests or demands that the armed forces investigate a criminal offense overseas. That official has used the military to execute the laws. Since the use was not authorized, the Posse Comitatus Act has been violated. And since the use of the military was by the official who was within the United States, the offense was committed within the general jurisdiction of the United States.

E. AN EXTRATERRITORIAL INVESTIGATION AMENDMENT TO THE POSSE COMITATUS ACT

Upon enactment of extraterritorial jurisdiction, civilian officials who use armed forces personnel to enforce federal laws overseas will be subject to prosecution for violation of the Posse Comitatus Act. In addition, the use of the military in this manner by civilian officials may result in a dismissal of the federal prosecution of overseas offenses because of military involvement in violation of the Posse Comitatus Act.[427]

To avoid the prosecution of civilian officials and the dismissal of federal criminal cases, civilian and military personnel overseas must comply with the provisions of the Posse Comitatus Act. The inability of civilian law enforcement officials to use the armed

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[425] Agata, *supra* note 416, at 75.

[426] *See, e.g.*, authorities cited note 413 *supra*.

[427] *See, e.g.*, United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1975).

forces overseas to investigate crimes committed outside of the United States, together with Congress' failure to provide means for the enforcement of federal laws overseas, makes effective enforcement of the federal law overseas under extraterritorial jurisdiction impossible.

To ensure that the federal laws are enforced effectively overseas, Congress must either provide federal law enforcement officials with additional personnel to investigate and enforce the federal laws overseas or expressly provide by an Act of Congress that armed forces personnel may assist federal civilian law enforcement officials in the investigation of offenses committed outside of the United States.

The Posse Comitatus Act specifically provides that the military may be used to execute civil laws if such use is expressly authorized by an Act of Congress. Congress can authorize the use of the military to enforce federal criminal laws which are applied extraterritorially by passing an Act to that effect. To accomplish this result, Congress should add to the Criminal Justice Reform Act of 1975 the following provision:

> § 3003 Investigation of Offenses Subject to the Extraterritorial Jurisdiction of the United States.
>
> Any other statute, rule or regulation notwithstanding, the Army, Air Force and Navy may aid civilian law enforcement officials in the conduct of investigations, in the arrest of criminal offenders, and in the preparation for trial of criminal offenses subject to the extraterritorial jurisdiction of the United States. Such aid, however, may only be rendered by the Army, Air Force, or Navy outside the territorial limits of the United States.

The addition of this amendment to the proposed Criminal Justice Reform Act of 1975 will authorize civilian law enforcement officials to request assistance from armed forces personnel overseas when such assistance may be necessary.

VIII. CONCLUSION

Enactment of the proposed extraterritorial jurisdiction provisions contained in the Criminal Justice Reform Act of 1975 will enable the United States to exercise jurisdiction over many types of offenses involving the federal government and American civilians overseas. As presently written, however, the provisions providing for extraterritorial jurisdiction raise serious questions regarding the exercise of military jurisdiction over nonservice connected offenses outside the United States and the use of military personnel by civilian authorities to enforce federal laws overseas.

This article recommends eliminating these problems by making two amendments to the proposed provisions providing for extraterritorial application of the federal criminal law overseas. Enactment of the suggested amendments will enable the military to continue to exercise jurisdiction over nonservice connected offenses, and will authorize civilian law enforcement authorities to request the assistance of military personnel in enforcing the federal laws overseas.

THE LEGITIMACY OF MODERN CONVENTIONAL WEAPONRY*

Captain Paul A. Robblee, Jr.**

I. INTRODUCTION

> And there were voices, and thunders, and lightnings; and there was a great earthquake, such as was not since man was upon the earth, so mighty an earthquake *and* so great![1]

In recent years certain categories of modern conventional weapons have been criticized as causing unnecessary suffering or having indiscriminate effects. This criticism has been disseminated principally in reports prepared by the United Nations,[2] the International Committee of the Red Cross (ICRC),[3] the Swedish

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[1] *Revelation* 16:18 (King James).

[2] *See* REPORT OF THE SECRETARY GENERAL, GENERAL AND COMPLETE DISARMAMENT, NAPALM AND OTHER INCENDIARY WEAPONS AND ALL ASPECTS OF THEIR POSSIBLE USE, U.N. Doc. A/8803 (1972), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as U.N.S.G. NAPALM REPORT.].

[3] *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS: REPORT OF THE WORK OF EXPERTS (1973), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as I.C.R.C. WEAPONS REPORT]. Sweden and several other states sought to have this report established as the authoritative documentary base for the 1974 I.C.R.C. Lucerne Weapons Conference. The Canadian and United Kingdom delegations effectively refuted this and were sustained by the Conference Chairman. U.S. Dep't of Army Message RUEKJCS/9337, 271455Z Sep. 74, pt. 3, copy on file in the International Affairs Division of The Office of The Judge Advocate General, Department of the Army [hereinafter cited as I DA MSG].

government,[4] and the Swedish Peace Research Institute (SIPRI).[5] Specific weapons categories thus challenged are: (1) incendiary weapons;[6] (2) small calibre, high velocity ammunition;[7] (3) blast and fragmentation weapons;[8] and (4) time-delayed, delayed action weapons.[9] In particular, the adequacy of existent legal criteria which regulate the utilization of such weapons in armed conflict, the criteria of unnecessary suffering and indiscriminate attack,[10] was expressly or impliedly questioned. Moreover, the report of the Swedish government advocated the construction of new, more objective legal criteria to supplement the existent legal criteria.[11] In this regard, many such proposals have indeed been advanced.

For example, factors such as medical effects, the degree of disability inflicted, the risk of death, and the strain on medical resources resulting as a consequence of the employment of conventional weapons in battle are among those new criteria which have been proposed as quantifiers appropriate to determine whether a

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[4] *See* A SWEDISH WORKING GROUP STUDY, CONVENTIONAL WEAPONS, THEIR DEPLOYMENT AND EFFECTS FROM A HUMANITARIAN ASPECT RECOMMENDATIONS FOR THE MODERNIZATION OF INTERNATIONAL LAW (1973), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as SWEDISH WEAPONS STUDY]. The Swedish delegation to the 1974 I.C.R.C. Lucerne Weapons Conference did not seek to have this study made the authoritative base for the Conference. *See* I DA MSG, *supra* note 3.

[5] *See* STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, NAPALM AND INCENDIARY WEAPONS, SIPRI INTERIM REPORT (1972), copy on file in the International Affairs Division of The Office of The Judge Advocate General, Department of the Army [hereinafter cited as SIPRI NAPALM REPORT].

[6] *See* U.N.S.G. NAPALM REPORT, *supra* note 1; SIPRI NAPALM REPORT, *supra* note 5. I.C.R.C. WEAPONS REPORT, *supra* note 3, at 69-81; SWEDISH WEAPONS STUDY, *supra* note 4, at 114-17.

[7] I.C.R.C. WEAPONS REPORT, *supra* note 3, at 38-49; SWEDISH WEAPONS STUDY *supra* note 4, at 117-19.

[8] I.C.R.C. WEAPONS REPORT, *supra* note 3, at 50-60; SWEDISH WEAPONS STUDY, *supra* note 4, at 119-26.

[9] I.C.R.C. WEAPONS REPORT, *supra* note 3, at 61-68; SWEDISH WEAPONS STUDY, *supra* note 4, at 126-33.

[10] *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS 6-12 (1974), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as I.C.R.C.L.W.R.]; Bettauer, *Statement on Legal Criteria, in* U.S. DEP'T OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 23-26 (G. Aldrich, Chmn. 1974), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as Bettauer, U.S.L.W.R.]; REPORT OF THE SECRETARY GENERAL, I RESPECT FOR HUMAN RIGHTS IN ARMED CONFLICTS: EXISTING RULES OF INTERNATIONAL LAW CONCERNING THE PROHIBITION OR RESTRICTION OF USE OF SPECIFIC WEAPONS 17-19, U.N. Doc. A/9215 (1973), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter referred to as I U.N.S.G.W.R.].

[11] SWEDISH WEAPONS STUDY, *supra* note 4, at 163-71.

given weapon inflicts unnecessary suffering.[12] Criteria unrelated to existent legal criteria have been proposed as well. These proposals suggest the utility of criteria such as public opinion, the laws of humanity, and treachery or perfidy[13] as being appropriate to judge the admissibility of weapons in war.[14]

The challenge to existent legal criteria regulating conventional weaponry is therefore one of considerable dimension. However, at bottom, that which is ultimately in issue, when the relative merits and demerits of existent and proposed legal criteria are argued, is the capacity of each to command a commonly shared interpretation and widespread recognition as law binding on all states. Absent this capacity, neither existent nor proposed criteria can operate to regulate the acquisition, development, or use of weaponry deemed essential to the efforts of all states to guarantee the peace and avoid Armageddon. The reality of a world in which the condition of war has been the rule, and not the exception,[15] simply will not permit it.

Mindful of the foregoing, this article will examine in detail the legal criteria in both categories to ascertain their capacity to regulate weaponry. In order to accomplish this purpose, the existent legal criteria regulating weaponry are first placed in perspective by an analysis of the history of weapons regulation. Subsequently, the existent and proposed legal criteria are compared and contrasted. Thereafter, selected[16] modern conventional weapons which have been criticized as causing unnecessary suffering or being indiscriminate in their effects are tested for legality pursuant to existent and proposed legal criteria to obtain a comparative evaluation of the function of each. Upon completion of this evaluation, the

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[12] *Id.* at 23-88; I.C.R.C.L.W.R., *supra* note 10, at 7-8.

[13] I.C.R.C.L.W.R., *supra* note 10, at 10; Bettauer, U.S.L.W.R., *supra* note 10, at 25. The prohibition against treachery or perfidy is generally regarded as germane to treacherous or perfidious conduct in war and not to the legitimacy of particular weapons in international law. In this regard Article 23b of the Regulations annexed to the 1899 Hague II and the 1907 Hague Convention IV provide that it is forbidden "[t]o kill or wound treacherously individuals belonging to the hostile nation or army." Article 23b, Regulations annexed to the 1907 Hague Convention IV, 36 Stat. 2277, T.S. No. 403.

[14] I.C.R.C.L.W.R., *supra* note 10, at 10-12.

[15] Q. WRIGHT, A STUDY OF WAR 56 (abr. ed. 1964). In this regard, Professor Wright comments that "the United States entered the community of nations out of a revolution and since that time has experienced the benefit of only 20 years peace in the last two centuries."

[16] Weapons thus selected include: (1) the fire bomb; (2) the M-16A1 rifle; (3) cluster bomb units; and (4) scatterable mines. They represent, respectively, the conventional weapons categories which limit the scope of this article *i.e.*, incendiary weapons; small calibre, high velocity ammunition; blast and fragmentation weapons; and time-delayed, delayed action weapons.

article presents conclusions and offers recommendations to reasonably resolve some of the problems presented by the current and proposed tests used to judge the legitimacy of conventional weaponry.

II. REGULATION OF WEAPONRY IN WAR—AN HISTORICAL PERSPECTIVE

> When Odysseus has gone to Ephyra to procure a deadly drug for smearing his arrow, Ilus, refused to give it to him, on the ground that the gods would not sanction such an act.[17]

A. ANCIENT ORIGINS TO THE ERA OF HUGO GROTIUS

The modern law of war regulating weaponry, just as its parent law of war, traces its beginnings to antiquity, a period in which war was conducted with extreme cruelty and brutality.[18] Indeed, it is implicitly argued by some that the few evidences of restraint occurring in this period were the result of considerations of practical necessity, uninfluenced by any murmurings of the principle of humanity.[19] Whatever the initial motivation, it is clear that ancient man did make some effort to regulate warfare[20] and the weapons employed to wage war. With regard to the latter, the Hindu Code of Manu, developed in India during the sixth century B.C., represents

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[17] C. PHILLIPSON, II INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 209 (1911).

[18] J. BOND, RULES OF RIOT 8 (1974) [hereinafter cited as BOND]; L. FRIEDMAN, I LAW OF WAR 5 (1972) [hereinafter cited as FRIEDMAN].

[19] BOND, *supra* note 18, at 11-12; I FRIEDMAN, *supra* note 18, at 4-5. *But see* SWEDISH WEAPONS STUDY, *supra* note 4, at 11. There, the Study notes that although the rules of war were originally developed for practical reasons, they were early combined with "stipulations of a humanitarian nature."

[20] For example, the rules of the ancient Hebrews provided:

> 10 When thou comest nigh unto a city to fight against it, then proclaim the peace.
> 11 And it shall be, if it make thee answer of peace, and open unto thee, then it shall be, *that* all the people *that* is found therein shall be tributaries unto thee, and they shall serve thee.
> 12 And if it will make no peace with thee, but it will make war against thee, then thou shalt besiege it:
> 13 And when the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword:
> 14 But the women, and the little ones, and the cattle, and all that is in the city, *even* all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee.
> 15 Thus shalt thou do unto all the cities *which are* very far off from thee, which are not of the cities of these nations.
> 16 But of the cities of these people, which the Lord thy God doth give thee *for* an inheritance, thou shalt save alive nothing that breatheth:

Deuteronomy 20:10-16 (King James).

what is regarded as man's earliest recorded effort to regulate weaponry by prohibiting the use of poison or other inhumane weapons in warfare. The seventh book of the Code, for example, provided the following among other rules intended to regulate land warfare: "When the king fights with his foes in battle, let him not strike with weapons concealed in wood, nor with such as arrows barbed, poisoned, or the points of which are blazing with fire."[21] Similarly, the Roman and Greek cultures prohibited the use of poison as a weapon,[22] because it was deemed cowardly[23] or, as Ilus admonished Odysseus, its use was offensive to the gods.

In the Middle Ages, weaponry was subjected to further regulation by the law of war. In this period theologians of the Catholic Church such as Saint Augustine made significant contributions to the law of war.[24] The influence of churchmen was considerable in that with the fall of Rome in 476 A.D.[25] these men were enabled to rise to the fore and warn earthly sovereigns not to command their soldiers onto the battlefield except in a just war.[26]

The influence of theologians later waned when the just war concept proved to be without effect in stopping wars between Christian leaders.[27] Nevertheless, the influence of the clergy had made its impact on the law of war: war as an instrument of foreign policy could not proceed wholly upon the caprice of the prince resorting to it. It was now improper to commit men to battle for unjust causes.

Moreover, the rules relating to the admissibility of weapons in war were enunciated. In 600 A.D., the Saracens, as a result of the promulgation of rules of war based entirely on the Koran,[28] outlawed the use in war of burning arrows,[29] the incendiary weapons of the time. In 1139, at the Second Lateran Council, Pope Innocent III prohibited the use of the arbalist and the crossbow.[30] His efforts, however, were apparently unsuccessful, as widespread use of these

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[21] I FRIEDMAN, *supra* note 18, at 3.

[22] C. PHILLIPSON, *supra* note 17, at 208-09.

[23] *Id.*

[24] *See* I FRIEDMAN, *supra* note 18, at 5-13; BOND, *supra* note 18, at 12-13; SWEDISH WEAPONS STUDY, *supra* note 4, at 11.

[25] MONTGOMERY OF ALAMEIN, A HISTORY OF WARFARE 131 (1968).

[26] ST. AUGUSTINE, THE CITY OF GOD 231 (J. Healy transl. 1931). The objective of a just war was "to avenge injury, that is when that people or city against whom war is to be declared has neglected either to redress injuries done by its subjects or to restore what they have wrongfully seized."

[27] BOND, *supra* note 18, at 13.

[28] SWEDISH WEAPONS STUDY, *supra* note 4, at 11.

[29] *Id.* at 12.

[30] C. FENWICK, INTERNATIONAL LAW 667 (4th ed. 1965) [hereinafter cited as FENWICK]; J. SPAIGHT, WAR RIGHTS ON LAND 76 (1911) [hereinafter cited as SPAIGHT].

weapons persisted in subsequent years.[31]

Further, a law of arms developed in the Middle Ages which was influential in broadening the law of war to bind sovereigns and knights alike.[32] Based on a code of chivalry, this law required a life of loyalty and honor of its adherents and thus served to regulate not only the conduct of combatants but also the internal discipline of armies.[33] Nevertheless, chivalry's efforts to prohibit the use of technologically advanced weaponry as unworthy of brave men resulted in failure, as such appeals to chivalric idealism proved ineffective in quenching man's thirst for more decisive weaponry in combat.[34]

The next important movement in the development of the law of war came largely as a result of Hugo Grotius' publication of his treatise *The Law of War and Peace*[35] in 1625. Significant to the subsequent development of the law of war regulating weaponry was Grotius' reliance in this work on the practices of states as a legitimate means of deriving the substantive principles of law of war. For the first time the practices of nations were considered along with the works of scholars, philosophers, writers, and churchmen as relevant to the issue of the scope of permissible conduct in battle.[36]

In this regard, Grotius proceeded on the assumption that "the practices of states were not improper deviations from a theological norm, but expressions of a natural order whose principles he could determine."[37] In effect, this approach represented a major rethinking of the philosophical foundations of the law of war. Essentially a positivistic, pragmatic view, it rejected the earlier approach propounded by Catholic theologians and enabled Grotius to introduce principles applicable to both Catholic and Protestant leaders.[38] Julius Stone elaborates on the concept as follows:

> With creative ambiquity . . . Grotius simultaneously based the law of nations on a second foundation, namely the practice of States, as evidence

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[31] FENWICK, *supra* note 30, at 667.

[32] BOND, *supra* note 18, at 13.

[33] M. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 239 (1965).

[34] SPAIGHT, *supra* note 30, at 76. Professor Spaight commented in this regard, "were not sword and lance and crossbow the weapons for knights." The disdain which knights of this period felt for technologically improved weaponry is also reflected in the works of the Chevalier Bayard, who in 1524, when dying of a wound caused by an arbalist, is said to have thanked God that he had never shown mercy to a musketeer. FENWICK, *supra* note 30, at 677 n.21.

[35] H. GROTIUS, THE LAW OF WAR AND PEACE (L. Loomis transl. 1949).

[36] I FRIEDMAN, *supra* note 18, at 14-15.

[37] *Id.* at 15.

[38] *Id.*

> of natural law. . . . He argued, that states, consisting as they do of rational men, must have manifested the rules of reason in their past practice. This practice was therefore evidence of what reason prescribed and thus of natural law itself.[39]

Though Grotius' work was much criticized in its time, its introduction of the principle that international law, in particular the law of war, could be ascertained from the practice of states, as evidence of natural law, conferred on it enduring value which continues undiminished today.

Grotius' *The Law of War and Peace* was also significant to the law of war regulating weaponry in that it articulated the principle that restraint should be observed in war, a principle which is fundamental to the ends of both existent and developing legal criteria.[40] As Leon Friedman has pointed out in this regard, Grotius warned that fighting unsupported by necessity should not be undertaken, nor should poison be employed in war or drinking water be polluted.[41]

These proscriptions are still contained in the existent law of war. Grotius' admonition against unnecessary fighting, for example, first finds articulation in the St. Petersburg Declaration of 1868 which states:

> . . . [T]he only legitimate object which States should endeavor to accomplish during war is to weaken the military force of the enemy;
>
> That for this purpose, it is sufficient to disable the greatest possible number of men.[42]

The principle was also reflected in Article 22 of the "Regulations respecting the laws and customs of war on land"[43] annexed to the 1899 Hague Convention II[44] and the 1907 Hague Convention IV[45] which provides that "the right of belligerents to adopt means of injuring the enemy is not unlimited."[46] Grotius' prohibition of the use of poison in the conduct of hostilities is codified in Article 23 of the Hague Regulations where subparagraph *a* provides that in addition to prohibitions provided by special conventions it is particularly prohibited "to employ poison or poisoned arms."[47]

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[39] J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 13 (1959).

[40] I FRIEDMAN, *supra* note 18, at 15.

[41] *Id.*

[42] R. PHILLIMORE, III INTERNATIONAL LAW 160 (3d ed. 1885).

[43] 32 Stat. 1811 [hereinafter cited as Hague Regulations].

[44] 32 Stat. 1803; T.S. No. 392 [hereinafter referred to as Hague II].

[45] 36 Stat. 2277; T.S. No. 539 [hereinafter referred to as Hague IV]; U.S. DEP'T OF ARMY, PAMPHLET NO. 27-1, TREATIES GOVERNING LAND WARFARE 5 (1956) [hereinafter cited as DA PAM 27-1].

[46] Hague Regulations, *supra* note 43, art. 22.

[47] *Id.*, art. 23a.

B. THE MODERN ERA

In the seventeenth and eighteenth centuries the principles of war which Grotius had expressed in *The Law of War and Peace* came to be accepted and practiced as definitive postulates of customary international law.[48] Prior to 1850, states incorporated them into treaties,[49] and by 1863 the United States Army had issued the first detailed military regulation embodying Grotian principles.[50] Entitled "Instructions for the Government of the Armies of the United States in the Field," General Order No. 100 was significant in that "it was complete, humane, and easily comprehensible to commanders in the field,"[51] so much so, in fact, that the armies of other nations soon followed suit with similar codes modeled after it.[52] Yet, as war turned the corner into modern times, the view that the conduct of hostilities required more comprehensive regulation by the law of war gathered strength.

In particular, the modern times brought with them instruments of war much more efficient and devastating in their effects than their predecessors. Grant, in his condemnation of the Confederate use at Vicksburg of explosive musket balls which caused increased suffering without any corresponding benefit, affords a typical manifestation of the increasing despair felt by men faced with the capabilities of advanced weaponry.[53]

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[48]G. BAKER, I HALLECK'S INTERNATIONAL LAW 13-14 (1908).

[49]BOND, *supra* note 18, at 18. *See also* I FRIEDMAN, *supra* note 18, at 149-51. On September 10, 1785, the United States and Prussia signed a treaty of "amity and commerce." Article XXIII of that agreement is illustrative of the manner in which such treaties expressed Grotian principles:

> If war should arise between the two contracting parties the merchants of either country, then residing in the other, shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely carrying off all their effects, without molestation or hindrance: And all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers and fishermen unarmed and inhabiting unfortified towns, villages or places and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments and shall not be molested in their persons, nor shall their houses or goods be burnt, or otherwise destroyed, nor their fields wasted by the armed forces of the enemy, into whose power, by the events of war, they may happen to fall, but if any thing is necessary to be taken from them for the use of such armed force the same shall be paid for at a reasonable price. And all merchant and trading vessels employed in exchanging the products of different places, and thereby rendering the necessaries, conveniences and comforts of human life more easy to be obtained, and more general, shall be allowed to pass free and unmolested and neither of the contracting parties shall grant or issue any commission to any private armed vessels empowering them to take or destroy such trading vessels or interrupt such commerce.

8 Stat. 94-96; T.S. No. 292.

[50]*Instructions for the Government of the Armies of the United States in the Field*, General Orders No. 100 of April 24, 1863 [hereinafter cited as General Order No. 100].

[51]I FRIEDMAN, *supra* note 18, at 152.

[52]*Id.*

[53]W. WINTHROP, MILITARY LAW AND PRECEDENTS 785 (2d ed. reprint 1920).

John Bright, in a speech delivered before the House of Commons on July 21, 1856, expressed well the concern of man over the changed nature of warfare. His observations which, in part at least, would later motivate states to codify the law of war, particularly the rules regulating weaponry, point out that

> [s]uccess in war no longer depends on those circumstances that formerly decided it. Soldiers used to look down on trade, and machine making was, with them, a despised craft. No stars or garters, no ribbons or baubles bedecked the makers and workers of machinery. But what is war becoming now? It depends, not as heretofore, on individual bravery, or the power of a man's nerves, the keenness of his soul, if one may so speak, but it is a mere mechanical mode of slaughtering your fellow men. This sort of thing cannot last. It will break down by its own weight. Its costliness, its destructiveness, its savagery will break it down, and it remains but for some Government—I pray that it may be ours!—to set the great example to Europe by proposing a mutual reduction of armaments.[54]

However, it was not until 1868 that the European nations were for the first time successful in prohibiting the use of a specific weapon by an international agreement.[55] In the Treaty of St. Petersburg they agreed to ban the employment of "any projectile of a weight below 400 grammes (about fourteen ounces avoirdupois) which is either explosive or charged with fulminating or inflammable substances."[56]

In 1874, the Russian government, upon the urgings of Fedor de Martens, a native scholar, sought to convene an international conference for the purpose of promulgating an exhaustive code based on the American Lieber Code to be binding on all states.[57] As a result, fifteen nations, represented by international lawyers, diplomats, and military men gathered in Brussels to draft such a code pertaining to the law of land warfare.[58] The Conference adopted a proposed Declaration of the Laws and Customs of War which, though never ratified,[59] included important proposals concerning the means of injuring an enemy. The Declaration proposed, for example, that "the laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy,"[60] and outlawed "the employment of arms, pro-

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[54]J. SCOTT, I HAGUE PEACE CONFERENCES OF 1899 AND 1907 at 32 (1909).
[55]BOND, *supra* note 18, at 20.
[56]FENWICK, *supra* note 30, at 557.
[57]I FRIEDMAN, *supra* note 18, at 152.
[58]*Id.*
[59]BOND, *supra* note 18, at 20-21.
[60]D. SCHINDLER & J. TOMAN, THE LAWS OF ARMED CONFLICT 29 (1973) [hereinafter cited as SCHINDLER & TOMAN].

jectiles or *material calculated to cause unnecessary suffering. . . .*"[61]

Further restraints were imposed on the use of weapons of war in 1899 and 1907 at Hague II and Hague IV respectively. In addition to Article 23a of the Hague Regulations which prohibited the use of poison as a weapon, Article 23e, as translated from the original French text of 1899 to English, prohibited the employment of "arms, projectiles or *material of a nature to cause superfluous injury.*"[62] Although the 1907 English translation was at variance with the 1899 translation of the prohibition, the original French text remained the same.[63] This matter will be dealt with in greater detail in the next section.

The conferees, beyond drafting Hague II and Hague IV in 1899 and 1907 also prepared three declarations which forbade first "the discharge of projectiles and explosives from balloons and by other methods of a similar nature;"[64] second, "the use of projectiles the sole object of which was the diffusion of asphyxiating and deleterious gasses,"[65] and finally, "the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions."[66] Great Britain, however, refused to sign this latter declaration against dum-dum bullets in 1899 as it felt that it was inappropriate to outlaw a particular bullet as causing unnecessary suffering by specification of the details of construction of the projectile.[67] The United States, also preferring a prohibition framed in more general terms, persisted in its refusal to sign the Declaration even past the British acceptance in 1907.[68] While none of the declarations received sufficient signatures to confer upon it general

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[61] *Id.* (emphasis added).

[62] FENWICK, *supra* note 30, at 668.

[63] SCHINDLER & TOMAN, *supra* note 60, at 77. The authentic French text of Article 23e of the Hague Regulations annexed to Hague II and Hague IV is as follows. "Outre, les prohibitions établies par des conventions speciales, il est notamment interdit: . . . d'employer des armes, des projectiles ou des matieres propre a causer des maux superflus." I U.N.S.G.W.R., *supra* note 10, at 17-18.

[64] Declaration (IV, 1) to Prohibit for a Term of Five Years the Launching of Projectiles and Explosives from Balloons and Other Methods of a Similar Nature. 32 Stat. 1839-42; SCHINDLER & TOMAN, *supra* note 60, at 133-37.

[65] Declaration (IV, 2) Concerning Asphyxiating Gasses; 1 AM. J. INT'L L. 155-57 (Supp. 1907); SCHINDLER & TOMAN, *supra* note 60, at 99-101.

[66] Declaration (IV, 3) Concerning Expanding Bullets, 1 AM. J. INT'L L. 157-59 (Supp. 1907); SCHINDLER & TOMAN, *supra* note 60, at 103-05. Referred to colloquially as dum-dum bullets, they were originally developed by the British for employment in maintaining colonial rule in India. *See* FENWICK, *supra* note 30, at 669.

[67] FENWICK, *supra* note 30, at 669.

[68] CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE PEACE CONFERENCES AND THEIR OFFICIAL REPORTS 33 (J. Scott ed. 1916) [hereinafter cited as REPORT TO SECRETARY OF STATE].

validity as an international agreement codifying customary international law at the time of its adoption,[69] those relating to poison and dum-dum bullets attained the status of customary international law during the First World War.[70]

To this date, Hague IV of 1907 remains the last international agreement regulating the admissibility of those categories of conventional weapons enumerated at the outset of this article as causing unnecessary suffering or having indiscriminate effects.[71] However, the principles of the 1907 agreement have been joined by the legal criterion of indiscriminate attack, which though not unequivocally expressed in any international agreement, is regarded as a valid legal criterion regulating weaponry in customary international law.[72]

Codification by international agreement of rules regulating "other"[73] conventional weaponry since 1907 is extremely limited as well. In fact, there have been only two such agreements. The first, signed in 1922, restricted the use of submarines and prohibited the use of asphyxiating gasses.[74] The second, the 1925 Geneva Protocol, was more extensive in its scope and banned the employment in warfare of asphyxiating, poisonous or other gases and bacteriological methods of warfare.[75]

Other initiatives were undertaken to revise the law of war in the aftermath of World War II. These resulted in the successful promulgation of such conventions as the four Geneva Conventions of August 12, 1949,[76] and the 1954 Convention on the Protection of

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[69]FENWICK, *supra* note 30, at 668. That is to say that such declarations were not binding on nonsignatory states.

[70]*Id.* at 669. Prohibitions relative to poison and dum-dum bullets achieved the status of customary international law as a result of the practices of states in World War I in refraining from their use.

[71]SWEDISH WEAPONS STUDY, *supra* note 4, at 13. For a listing of conventional weapons categories criticized as causing unnecessary suffering or having indiscriminate effects *see* note 16 *supra*.

[72]I.C.R.C.L.W.R., *supra* note 10, at 9.

[73]This term refers to conventional weaponry not included in the four conventional weapons categories listed at note 16 *supra*.

[74]I FRIEDMAN, *supra* note 18, at 154.

[75]M. HUDSON, III INTERNATIONAL LEGISLATION 1670-72 (1931); SCHINDLER & TOMAN, *supra* note 60, at 109-19.

[76]In August 1949 the four Conventions below were promulgated:

a. The Geneva Convention for the Amelioration of the Wounded and Sick in the Armed Forces in the Field. 6 U.S.T. 3114; T.I.A.S. 3362; 75 U.N.T.S. 31.

b. The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea. 6 U.S.T. 3217; T.I.A.S. 3363; 75 U.N.T.S. 85.

c. The Geneva Convention Relative to the Treatment of Prisoners of War. 6 U.S.T. 3316; T.I.A.S. 3364; 74 U.N.T.S. 135.

d. The Geneva Convention relative to the protection of Civilian Persons in Time of War. 6 U.S.T. 3516; T.I.A.S. 3364; 75 U.N.T.S. 287.

Cultural Property in cases of armed conflict.[77] However, these international agreements, while significant advances in the law of war, did not address the question of further legal restrictions appropriate to the development or employment of conventional weapons in war.

One of the most notable trends in the law of war regulating weaponry during the post-World War II period was the emergence of the Regime of International Human Rights. The well-known British international law scholar and practitioner, Colonel G.I.A.D. Draper, for example, wrote that the bodies of law represented by the Law of War and the Regime of International Human Rights "have met, are fusing together at some speed, and that in a number of practical instances the Regime of International Human Rights is setting the general direction, as well as providing the main impetus of the revision of the Law of War."[78]

Indeed, this trend is evidenced in a series of United Nations General Assembly resolutions which began on December 19, 1968 with the adoption of United Nations General Assembly Resolution 2444. Entitled "Respect for human rights in armed conflicts," that measure initiated efforts to prohibit or restrict the use of conventional weapons alleged to cause unnecessary suffering or have indiscriminate effects.[79] Resolution 2444 invited the Secretary General of the United Nations, together with the ICRC and other appropriate international organizations to study:

> (a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts;
>
> (b) The need for additional humanitarian international conventions or other appropriate legal instruments to ensure the better protection of civilians, prisoners, and combatants in all armed conflicts *and the prohibition and limitation of the use of certain methods and means of warfare. . .*[80]

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[77]249 U.N.T.S. 216; SCHINDLER & TOMAN, *supra* note 60, at 544-56.

[78]Draper, *The Ethical and Juridical Status of Constraints in War*, 55 MIL. L. REV 169 (1972).

[79]G.A. Res. 2444, 23 U.N. GAOR Supp. 18, at U.N. Doc. A/7218 (1969) [hereinafter cited as Resolution 2444]. Related General Assembly Resolutions include: G.A. Res. 2597, 24 U.N. GAOR Supp. 30, at U.N. Doc. A/7909 (1969); G.A. Res. 2856, 26 U.N. GAOR Res. at U.N. Doc. A/8589 (1971); G.A. Res. 2853, 26 U.N. GAOR Res. at U.N. Doc. A/8589 (1971); G.A. Res. 3032; REPORT OF THE SECRETARY GENERAL. II RESPECT FOR HUMAN RIGHTS IN ARMED CONFLICTS: EXISTING RULES OF INTERNATIONAL LAW CONCERNING THE PROHIBITION OR RESTRICTION OF THE USE OF SPECIFIC WEAPONS. Annex I, 12, 16, 27, 29, 38 U.N.Doc. A/9215 (1973), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as II U.N.S.G.W.R.].

[80]Resolution 2444, *supra* note 79 (emphasis added); II U.N.S.G.W.R. *supra* note 79, at 12.

Further, from 1970 on, Sweden, supported by a number of other states, has urged the nations of the world to consider the question of banning or restricting the use of conventional weapons deemed to cause unnecessary suffering or to have indiscriminate effects.[81] Indeed, proposals pertaining to this matter were considered at the 1971 and 1972 Conferences of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts convened by the ICRC.[82]

At each conference the United States, in concert with other western nations, took the position that consideration of such proposals was outside the scope of the conference and should properly be addressed in a disarmament forum.[83] In particular, the United States was concerned that work on specific conventional weapons would delay the progress of the ICRC, which at that time had already made substantial advances on two additional protocols to the 1949 Geneva Conventions for the protection of war victims.[84] This question ultimately resolved itself in November 1973 at the XXIId International Conference of the Red Cross. There it was agreed that work on specific conventional weapons was possible without prejudicing the additional draft protocols referred to above, and the ICRC agreed to convene a Conference of Government Experts on Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects. This conference was conducted in Lucerne, Switzerland between September 24 and October 18, 1974.[85]

Meanwhile, in June 1973, the ICRC presented its complete ad-

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[81] Bettauer, *Introduction, in* U.S. DEPT OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 1 (G. Aldrich, Chmn. 1974), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter referred to as Bettauer, *Introduction*, U.S.L.W.R.]. Sweden's interest in banning or restricting conventional weapons deemed to cause unnecessary suffering or have indiscriminate effects cannot be fixed with precision. It may be surmised, however, that United States use of such conventional weaponry in the Republic of South Vietnam motivated her interest, at least in part.

[82] *Id.* These conferences were convened to consider, among other things, proposals relating to ways and means of restraining modern conventional weaponry criticized as causing unnecessary suffering or having indiscriminate effects. *See* notes 2-5 *supra*.

[83] *Id.*

[84] *Id.*

[85] *Id.* The work of the conference [hereinafter referred to as the Lucerne Weapons Conference] was examined by an *ad hoc* committee of the Diplomatic Conference which met in Geneva, Switzerland from 3 February to 18 April 1975. A second conference of government experts continued the study in September 1975. DAJA-IA 1974/1133, 11 Dec. 1974, on file in the International Affairs Division of The Office of The Judge Advocate General, Department of the Army.

ditional draft protocols for consideration.[86] Article 34, contained in Part III of the draft protocols, for the first time called upon potential contracting parties to the protocol to conduct a legal review of new weapons in the research and development stage to determine whether their use would cause "unnecessary injury."[87]

Significantly, although the United States Government had taken no formal action on Article 34, the United States Department of Defense (DOD) substantially adopted its object and purpose by its unilateral promulgation of DOD Instruction 5500.15, effective October 16, 1974.[88] Applicable to all component elements of DOD, the Instruction requires the Secretary of each military department to ensure

> . . . that a legal review by his Judge Advocate General is conducted of all weapons intended to meet a military requirement of this Department in order to insure that their intended use in armed conflict is consistent with the obligations assumed by the United States under all applicable international laws including treaties to which the United States is a party and customary international law, in particular the laws of war.[89]

Moreover, the Instruction requires that the legal review of weapons occur before the award of an initial contract for production in the acquisition and procurement of new weapons or weapons systems.[90] Accordingly, the Instruction is designed to preclude in the first instance the development of weaponry not deemed to be lawful pursuant to existent legal criteria. Thus existent legal criteria regulating weaponry are allowed to operate in a time period likely to be most conducive to the objective application of such

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[86] *Id.*

[87] International Committee of Red Cross, Draft Additional Protocols to the Geneva Conventions of August 12, 1949 at 1-2 (1973); II U.N.S.G.W.R., *supra* note 79, at Annex II, 1.

[88] Dep't of Defense Instruction No. 5500.15 (Oct. 16, 1974) [hereinafter cited as DOD Instruction]. *See also New DOD Instruction on Legality of Weaponry in International Law*, THE ARMY LAWYER, Nov. 1974, at 25-26 [hereinafter cited as *New DOD Instruction*].

[89] DOD Instruction, *supra* note 88, at para. IV.A.

[90] *Id.* at para. IV. A. 1. Department of the Army implementation will be accomplished by adding the weapons review requirement to the procurement cycle already established. This was accomplished by amending two Army regulations. The first was amended to require a legal review of weapons before engineering development and again before initial production of a weapon or weapons system. Army Reg. No. 15-14, App. B, para. o (1 Feb. 1975); *id.*, app. C, para. j. The second was amended to require the responsible Army agency to coordinate early in the development cycle or before initiation of engineering development with the Office of The Judge Advocate General for review pursuant to the DOD Instruction. Army Reg. 70-1, paras, 1-4a (8) & 4-3 (an), (1 May 1973). DAJA-IA 1974/1014, 14 Feb. 1973, on file in the International Affairs Division of The Office of The Judge Advocate General, Department of the Army.

criteria, *i.e.,* before substantial funds have been invested in the development of any new weapon.

Promulgation of this Instruction is the latest development in the law of war regulating weaponry.[91] Though it seeks only to insure that no weapon or weapons system is developed which does not comply with existent legal criteria governing the admissibility of weaponry in war,[92] its potential to breathe new life into such existent legal criteria is self-evident. In particular, if its procedures are adhered to by the United States and other states which adopt similar procedures to insure the development of lawful weaponry, this Instruction will have been profoundly influential in achieving a more humane battlefield.

C. SUMMARY

Man from the beginning of recorded history has looked to the law of war to provide a means by which the implements of war could be made humane. Both specific and general prohibitions of conventional weaponry have been adopted to effect this end in the face of technological advances which have made such weaponry increasingly more destructive. Many years have elapsed since the existent law of war regulating weaponry was last expanded, and the question of whether time and technology have rendered such existent legal criteria ineffectual to perform their humanitarian function necessarily arises. Having considered the historical development of the rules of international law regulating weaponry, this article will proceed to assess the adequacy of existent and proposed legal criteria to regulate modern conventional weaponry in order to come to appropriate conclusions and make meaningful recommendations.

III. EXISTENT AND PROPOSED LEGAL CRITERIA TO DETERMINE THE LEGITIMACY OF MODERN CONVENTIONAL WEAPONS IN ARMED CONFLICT

> A fundamental purpose of the law of war is to mitigate the suffering and damage caused by armed conflict to the greatest extent possible without unduly restricting the legitimate application of force to achieve the purpose of war.[93]

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[91] *New DOD Instruction*, *supra* note 88, at 25-26.
[92] *Id.*
[93] Bettauer, U.S.L.W.R., *supra* note 10, at 23.

A. GENERAL

Noted at the outset of this inquiry were those existent legal criteria recognized as declaratory of customary international law which today regulate the admissibility of conventional weapons in war—the legal criteria of unnecessary suffering and indiscriminate attack. Apart from certain absolute prohibitions,[94] these two existent legal criteria operate to implement the humanitarian purpose of the general principle of customary international law announced in Article 22 of the Hague Regulations. It is Article 22 that provides "that the means and methods of injuring the enemy [are] not unlimited."[95] Accordingly, the function of these criteria may, as a preliminary matter, be described as limiting the permissible level of violence in war. Implicit in legal criteria which sanction such a permissible level of violence is the interaction of the complementary principles of military necessity and humanity from the customary international law of war.[96] However, before examining the operation of these complementary principles within existent legal criteria regulating conventional weaponry, it is ap-

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[94]In addition to existent legal criteria regulating weaponry, states have agreed to restrain or prohibit specific weapons. Such prohibitions and restraints are:

a. Poison and Poisoned Weapons: Article 23a of the Hague Regulations outlaws the use of poison or poisoned weapons. Hague II, *supra* note 44; Hague IV *supra* note 45.

b. Expanding Bullets: The 1899 Hague Declaration is limited to a prohibition of "the use of bullets which expand or flatten easily in the human body such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions." *Declaration Concerning Expanding Bullets 1899*, 1 AM. J. INT'L L. 157-59 (Supp. 1907).

c. Lightweight Explosive and Incendiary Projectiles: The 1868 St. Petersburg Declaration prohibits the use of any projectile of a weight below 400 grams which is either explosive or charged with fulminating or inflammable substances. This prohibition was undertaken because it was believed that the banned projectiles inflicted suffering and injury in excess of that which was required to disable an enemy soldier. *Declaration Renouncing Use in Time of War of Explosive Projectiles Under 400 Grammes Weight 1868*, 1 AM. J. INT'L L. 95-96 (Supp. 1907) [hereinafter cited as St. Petersburg Declaration]. The practices of states modified this absolute proscription when it became obvious that "fulminating" projectiles had military utility as tracer ammunition and similarly that explosive bullets possessed military utility when used as anti-aircraft munitions. J. SPAIGHT, AIR POWER AND WAR RIGHTS 208-11 (1947).

d. Naval Mines and Warfare: Articles 1-3 of Hague Convention No. VIII of 1907 Pertaining to the Laying of Automatic Submarine Contact Mines provide:

Article 1. It is forbidden:

1. To lay unanchored contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;

2. To lay unanchored automatic contact mines, which do not become harmless as soon as they have broken loose from their moorings.

3. To use torpedoes which do not become harmless when they have missed their mark.

Article 3. When anchored automatic contact mines are employed, every precaution must be taken for the security of peaceful shipping.

[95]Hague IV, *supra* note 45, Hague Regulations, art. 22.

[96]M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 314 (1959) [hereinafter cited as GREENSPAN]; C. HYDE, III INTERNATIONAL LAW CHIEFLY AS INTERPRETED BY THE UNITED STATES 1801 (1945) [hereinafter cited as HYDE]; J. MOORE, VII A DIGEST OF INTERNATIONAL LAW 178 (1906); FENWICK, *supra* note 30, at 654-55.

propriate that the function of the principles be analyzed in greater detail.

1. The Operation of the Complementary Principles of Military Necessity and Humanity in the Law of War

The nature of the complementary functioning of the principles of military necessity and humanity is perhaps best evidenced in the preambular language of Hague IV of 1907.[97] There the contracting parties unequivocally declared their purpose to be the proscription of suffering and damage to property in excess of that which is necessary to accomplish the legitimate requirements of war. The operation of the principle of humanity at once, therefore, may be seen as subordinate to the principle of military necessity and intended to restrain the use of all kinds and degrees of suffering, injury, or destruction which is not necessary to the accomplishment of the legitimate military mission.[98] Professor Baxter described the relationship of these complementary principles as below:

> The law of war is itself a compromise between unbridled license, on the one hand, and on the other, the absolute demands of humanity, which if carried on to a logical extreme, would proscribe war altogether. Stated in other terms, the law seeks to limit the measures of war to those activities which produce suffering out of all proportion to the military advantage to be gained.[99]

While the principles of military necessity and humanity might be viewed as mutually incompatible in that they appear to serve opposing interests, this is not the case.[100]

Specifically, the principle of military necessity may be said to imply the principle of humanity, thus resulting in principles complementary to each other and not opposed.[101] Although the principle of military necessity operates to legitimize the use of that kind and level of force necessary to accomplish permissible military requirements in war as quickly as possible, it nevertheless disallows the use of force that is excessive or disproportionate to such pur-

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[97]Hague IV, *supra* note 45, at Preamble.

[98]FENWICK, *supra* note 30, at 655; GREENSPAN, *supra* note 96, at 313.

[99]Baxter, *The Geneva Conventions of 1949*, 9 NAVAL WAR COLLEGE REV. 59 (1956).

[100]U.S. DEPT OF NAVY, MANUAL NWIP 10-2, LAW OF NAVAL WARFARE 2-8 (1955) [hereinafter cited as NWIP 10-2].

[101] *Id.* U.S. DEPT OF ARMY, FIELD MANUAL 27-10, LAW OF LAND WARFARE, para. 3, at 3-4 (1956) [hereinafter cited as FM 27-10]; Memorandum from DAJA-IA for Mr. Dwayne Anderson, Deputy Director Negotiations and Arms Control, OASD/ISA, 3 (Jun. 25, 1974), on file in the International Affairs Division of The Office of The Judge Advocate General, Department of the Army and in the International Law Division of The Judge Advocate General's School [hereinafter cited as memorandum for OASD/ISA]. *See generally* sources cited note 96 *supra*.

poses.[102] That is, it makes unlawful the use of force which needlessly or unnecessarily causes or aggravates both human suffering and damage to property.[103]

The interaction of these complementary principles necessarily implies the principle of economy of force and the rule of proportionality which together give full effect to the requirements of the principle of humanity.[104]

Paragraph 41 of Department of the Army Field Manual 27-10, *The Law of Land Warfare,* correctly describes the rule of proportionality in relation to targets as requiring that "loss of life and damage to property must not be out of proportion to the military advantage to be gained."[105] Applied to the selection of weaponry, the rule of proportionality requires that the foreseeable effect of the weapon to be used must not be out of proportion to the foreseeable advantage expected to be gained pursuant to its use.[106]

Thus, if a soldier elected to use an anti-tank weapon such as the 106mm recoilless rifle (106RR) developed by the United States instead of his rifle to incapacitate an enemy soldier, his choice would be in contravention of the rule of proportionality. Accordingly, the soldier's use of the 106RR against the enemy soldier would be unlawful. If he used that weapon against an enemy tank, the contrary result would follow, as the rule of proportionality would not have been violated.

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[102] *Id.*

[103] *Id.*

[104] O'Brien, *The Meaning of Military Necessity in International Law,* I INST. OF WORLD POLITY 138 (1957) [hereinafter cited as O'Brien]; M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 528 (1961) [hereinafter cited as MCDOUGAL & FELICIANO]. McDougal and Feliciano wrote of the rule of proportionality as integral to the principle of military necessity that:

> The principle of military necessity may accordingly be said to permit the exercise of that amount of violence which is indispensably necessary (proportionate and relevant for promptly repelling and terminating highly intense initiating coercion against "territorial integrity" or "political independence"—indispensably necessary, in a word, for successful defense or community enforcement actions.

Id. See also Memorandum attached to Letter from Harry H. Almond, Jr., to Colonel John J. Douglass, Mar. 15, 1973 at 27-31 on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as Almond Letter]. *Contra,* Kelly, *Gas Warfare in International Law,* 9 MIL. L. REV. 1, 50 (1960). The author treats "proportionality" as a general principle of customary international law. However, whether applicable internally as a "rule" or externally as a general principle of customary international law, the function of the proportionality concept appears to be the same legally, *i.e.,* to insure that "loss of life and property must not be out of proportion to the military advantage to be gained." *See* note 105 *infra.*

[105] FM 27-10, *supra* note 101, at 19.

[106] Memorandum for OASD/ISA, *supra* note 101.

Although the foregoing example was exaggerated for the purpose of illustrating the operation of the rule of proportionality, the decision of what weapon is appropriate for use against a particular target is necessarily highly subjective, and thus best evidenced by the practices of states.[107] In light of the subjectivity of the proportionality decision, writers typically have given its meaning a broad construction.[108]

The principle of economy of force has been accurately defined by Professor Osgood as follows:

> . . .[The principle of economy of force] prescribes that in the use of armed force as an instrument of national policy no greater force should be employed than is necessary to achieve the objectives toward which it is directed; or, stated in another way, the dimensions of military force should be proportionate to the value of the objectives at stake.[109]

More commonly thought of in the context of being one of the classic principles of war,[110] the function of this principle is similar to that of the rule of proportionality in that the two operate to limit violence in war to that which is permissible pursuant to legitimate military requirements.[111]

The rule of proportionality compels this result for humanitarian reasons,[112] while the principle of economy of force does so for logistical reasons.[113] However, the principle of economy of force may ultimately have the more significant impact in restraining suffering and destruction in war in that this principle is sensitive to the relationship between costs incurred by and benefits accruing to the state developing and using the weapon.[114] In particular, the

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[107] *Id. See also* Bettauer, U.S.L.W.R., *supra* note 10, at 24.

[108] Ample latitude, for example, appears evident in the following descriptions of the proportionality equation:

> While great latitude has been and should be permitted in interpreting "proportionality" *in military necessity*, this requirement precludes acts which cause great military suffering without a corresponding military advantage. O'Brien, *supra* note 104, at 145.
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> If an act is essential, if the destruction is not wanton, and the results to be gained . . . are not grossly disproportionate. . . . M. ROYSE, AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE 137 (1928);
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> Forces should refrain from measures which cause additional suffering to military and civilian personnel without compensating military advantage to an overwhelming degree. P. JESSUP, A MODERN LAW OF NATIONS 216 (1952).

[109] R. OSGOOD, LIMITED WAR: THE CHALLENGE TO AMERICAN STRATEGY 4 (1957).

[110] Prugh, *Current Initiatives to Reaffirm and Develop International Humanitarian Law Applicable in Armed Conflicts*, 8 INT'L LAWYER 262, 263 (1974) [hereinafter cited as Prugh].

[111] *Id.*

[112] FM 27-10, *supra* note 101, at 19; Almond Letter, *supra* note 104, at 27-28.

[113] Almond Letter, *supra* note 104, at 28-31.

[114] Washington Post, Jan. 26, 1975, at A1, col. 6. *See generally* J. Burke, *Inflation Scarcity, Dual Threat to Readiness*, 9 ARMY (Nov. 1974).

principle possesses utility to both restrain the needless development of increasingly complex and costly weapons for which no real military requirement exists, and preclude the unnecessary expenditure of munitions on the battlefield.[115]

Indeed, the above analysis which indicates that the principle of military necessity in customary international law implies the complementary interaction of the principles of humanity and economy of force as well as the rule of proportionality, is consistent with the principle of military necessity as it was first codified in General Order No. 100. General Order No. 100 read in pertinent part:

> Art. XIV. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.[116]

Later codifications of the principle of military necessity evidence the operation of the complementary principles as well. The 1868 Declaration of St. Petersburg, for example, in addition to declaring that the "only legitimate object which states should pursue in the conduct of hostilities is to weaken the enemy's military force,"[117] also observed that this purpose would be exceeded by the "employment of arms which uselessly aggravate the sufferings of disabled

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[115]Letter from S. L. A. Marshall to Dr. Joseph Sperraza, Sept. 7, 1973, on file in the International Affairs Division of The Office of The Judge Advocate General and in the International Law Division of The Judge Advocate General's School [hereinafter referred to as S.L.A.M. Letter]. Mr. Marshall, in commenting on the principle of economy of force in war, stated:

> [W]astage of material that contributes nothing to success in the field is not more to be abhorred than the production of material that is unlikely to be of effective use when war comes. It is on this ground precisely that I question such projects as the air scatterable mine and the extension of the range of the 155 mm.

[116]Friedman, *supra* note 18, at 161. *See also* Pictet, *International Humanitarian Law*, 6 INT'L REV. OF THE RED CROSS 456, 466 (1966). The following excerpts provide a further exposition of the concept of military necessity as codified from the customary international law:

> Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war, it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of a peculiar danger to the captor: it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy, of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in a public place do not cease on that account to be moral beings, responsible to one another and to God.
>
> Military necessity does not admit of cruelty, that is the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

Id.

[117]I U.N.S.G.W.R., *supra* note 10, at 20.

men or render their death inevitable."[118] Moreover, this view of military necessity is reflected in the Hague Regulations which reject the German doctrine of military necessity,[119] *Kriegraison*,[120] which asserted a right in belligerents to violate the law of war whenever the military situation, in the estimation of the ground commander, required such violation. Rejection of the doctrine of *Kriegraison* was confirmed by the decisions of the war crimes tribunals which followed World War II.[121]

2. Application of Complementary Principles to Existent Legal Criteria Regulating Weaponry

The operation of the complementary principles of military necessity and humanity provides the framework out of which legal criteria regulating weaponry have evolved.[122] For example, Article 22 of the Hague Regulations, which limits the means and methods of combat, is an embodiment of the complementary principles.[123] Similarly, Article 23e of the Hague Regulations provides that "it is especially forbidden . . . to employ arms, projectiles, or material calculated to cause unnecessary suffering,"[124] and thus also embodies the purpose of the principles of military necessity and humanity. Accordingly, when applied to weaponry, the complementary principles derivatively establish the principle that belligerents may use any weapon not proscribed by international law in combat, provided that incidental suffering and destruction occasioned by such use are not excessive when measured against the military utility of the weapon and the military necessity which requires its use.[125]

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[118] *Id.*

[119] GREENSPAN, *supra* note 96, at 297.

[120] The German *Kriegraison* theory contains essentially the view that any means and methods of war are permissible if, in the view of the military commander they are necessary for success, notwithstanding any laws to the contrary. U.S. DEPT OF ARMY, PAMPHLET 27-161-2, II INTERNATIONAL LAW 9-10 (1962) [hereinafter cited as DA PAM 27-161-2.]

[121] United States v. Wilhelm List et. al, 11 TRIALS OF WAR CRIMINALS 1253-54 (1949).

[122] Memorandum for OASD/ISA, *supra* note 101, at 2.

[123] *Id.* at 1-2.

[124] Hague IV, *supra* note 45.

[125] Memorandum for OASD/ISA, *supra* note 101. Application of complementary principles is reflected in the writings of such contemporary writers as Hall, Spaight and Hyde:

> In a broad sense it may be said that a belligerent has the right to employ all kinds of violence against the property and person of his enemy as is necessary to convince the latter to come to terms. Thus it may be said that prima facie all forms of violence are permissible. Such violence, however, is subject to the justification, that it be necessary. Necessary violence has therefore come to have a special meaning which has given rise to certain prohibiting usages. For example, acts of violence are prohibited when it can be established that they are wanton or that they are grossly disproportionate to the objective sought to be attained.

In this regard, however, it must be remembered that the operation of the complementary principles of military necessity and humanity inevitably allows a permissible level of violence.[126] That is to say, the principle of humanity operates to the extent that the legitimate military requirements permit.[127] Accordingly, it may be said that the resultant permissible level of violence may fluctuate in concert with the legitimate military requirements of the tactical situation on the battlefield. Therefore, the degree of suffering or destruction a particular weapon may cause cannot alone be the legal test of a weapon's admissibility in war.[128] Rather, the admissibility determination must be grounded on a finding that the suffering or destruction caused by a particular weapon by its use in a given manner was plainly excessive or disproportionate to the military advantage reasonably expected to be gained from its use.[129]

The remainder of this section will consider both existent and proposed legal criteria to determine when suffering and destruction caused by a weapon are excessive to the military advantage which the user reasonably believes will accrue to him by using the weapon. Further, the de Martens Clause, found in the Preamble to Hague IV of 1907, will be considered, as it is relied on as a substan-

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W. HALL, A TREATISE ON INTERNATIONAL LAW 685 (8th ed. 1924);

> The general principle of war law is this, that no engine of war may be used which is (if one may use the term) superrogatory in its effect. The principle results from the compromise of the humanitarian and military interests, the latter for war is war, being the more powerful interest of the two. The military commander, intent on victory, seeks to employ such instruments as will best achieve the end of war, the disabling of the greatest possible number of the enemy. Death, agony, mutilation, these he would avoid if he could, they are not ends in themselves, for the modern military leader arrogates no such divine call to exterminate and mutilate as old world leaders, especially under theocracies.

J. SPAIGHT *supra* note 30, at 75;

> The task of specification is primarily a military rather than a legal one, calling for technical opinions whether the blows to be inflicted by new instrumentalities such as those designed and employed in the course of World War I possess a military value which outweighs in significance the severity and the magnitude of the suffering caused by their use and likely to be incidentally felt by non-combatants.

HYDE, *supra* note 96, at 1814.

[126] *See* authorities cited note 96 *supra*.

[127] Memorandum for OASD/ISA, *supra* note 101.

[128] *Id.*

[129] DAJA-IA 1974/1039, 26 July 1974, on file in the International Law Division of The Judge Advocate General's School. The opinion indicates that the military advantage inuring to the benefit of the user of a weapon results upon a determination of the military utility of a weapon, *i.e.*, the weapon's effectiveness, *see* Bettauer, U.S.L.W.R., *supra* note 10, at 23-24; and the military necessity to employ the weapon, JAGW 1962/1032 (9 Feb. 1962) on file in the International Affairs Division of The Office of the Judge Advocate General, Department of Army, and with the International Law Division of The Judge Advocate General's School.

tive basis for proposed modifications of the rules regulating weaponry.[130] This is significant because it is this clause which emphasizes the purposes sought to be advanced by the further codification of the law of war and underlies the continuing applicability of the principles of the law of war, the practices of civilized people pursuant to the laws of humanity, and the dictates of public opinion in instances not specifically addressed by the Conventions.[131] In this sense, the primary importance of the clause is that it negates the view that all which is not specificallly prohibited by the law of war is lawful.[132]

B. EXISTENT LEGAL CRITERIA TO REGULATE CONVENTIONAL WEAPONRY

1. Unnecessary Suffering

In accordance with the complementary principles of military necessity and humanity, Article 23e of the 1899 Hague Regulations, as translated from the original French text,[133] declares that it is especially impermissible "to employ arms, projectiles, or materials of a nature to cause superfluous injury."[134] While the original French version of Article 23e was not altered by Hague IV in 1907, the English translation was rendered differently than it had been in 1899. Curiously, the English translation of Article 23e in 1907 prohibited "the employment of arms, projectiles or material calculated to cause unnecessary suffering."[135] No apparent reason suggests itself for the variance in English translations. In this regard, the United States delegate to Hague IV reported to the Secretary of State upon completion of the Peace Conference only that Article 23, as it relates to weaponry, prohibits "certain means of destruction and certain actions of belligerents."[136] No reference was made to subparagraph *e* of the Article.

As a result, there exists some concern that the actual legal criterion of unnecessary suffering has not been fixed.[137] Some express the view that "superfluous injury" is the closest English

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[130]I U.N.S.G.W.R., *supra* note 10, at 19. Hague IV, *supra* note 45, at Preamble; DA PAM 27-1, *supra* note 45, at 5-6.

[131]Memorandum for OASD/ISA, *supra* note 101, at 2; I U.N.S.G.W.R., *supra* note 10, at 19.

[132]*Id.*

[133]*See* authorities cited note 63 *supra*.

[134]Hague II, *supra* note 44, Hague Regulations, art. 23e.

[135]Hague IV, *supra* note 45, Hague Regulations, art. 23e.

[136]REPORT TO SECRETARY OF STATE, *supra* note 68, at 103.

[137]*See* I.C.R.C.L.W.R., *supra* note 10, at 7.

translation of the original French and also the more objective criterion to evaluate inasmuch as "injury" is more susceptible to quantification than "suffering" per se.[138] Others contend that the difference is of little consequence, as the criterion of "unnecessary suffering" enjoys recognition in its own right as declaratory of customary international law.[139]

Additionally, the latter translation of 1907 introduces the words "calculated to cause." In this regard, there was consensus among government weapons experts at the Lucerne Weapons Conference that these words contained an element of calculation or design which might not be present in the corresponding French words "propre à causer."[140] However, this is not to suggest that the element of calculation or design contained in the English translation limits the scope of the proscription to prohibit only those weapons affirmatively proven to have been developed for the purpose of inflicting unnecessary suffering. Such a reading would appear to be manifestly inappropriate given the purposes of the law of war generally, and would work an emasculation of the intended purpose of the prohibition.[141] The better view of the element of calculation would appear to be that it extends the applicability of the criterion to the weapons designer, requiring him not to develop a weapon which would foreseeably inflict unnecessary suffering "per se" on the battlefield.[142] It, therefore, is of particular significance to any legal review required of weaponry before embarking on the procurement process.

Notwithstanding these points, it is clear that the criterion of unnecessary suffering was included in the Hague Regulations in order to prohibit or restrict the use of weapons which inflict suffering, or injury, or damage to property unnecessary to the accomplishment of legitimate military requirements.[143] In this

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[138] *Id.*

[139] *Id.* These experts are of the view that since the criterion of unnecessary suffering has achieved independent status as declaratory of customary international law, it would be inappropriate to attempt to remove the subjective element contained in the word "suffering" by a substitution of the word "injury."

[140] *Id.*

[141] I DA MSG, *supra* note 3, at 2. This conclusion appears to be supportable as there was no intimation at the Lucerne Weapons Conference that the word "calculate" had any significance beyond the fact that it was useful as a check on weapons designers. *See* note 142 *infra*.

[142] Bettauer, U.S.L.W.R., *supra* note 10, at 25. Mr. Bettauer stated that "calculate" does have "relevance in focusing on foreseeability of the unnecessary suffering and thus has application to the weapons designer."

[143] *See* authorities cited note 96 *supra*.

regard, there was general agreement at the Lucerne Weapons Conference that the correct legal test for "unnecessary suffering" requires a comparison between the suffering or damage caused by the weapon and the weapon's anticipated military advantage.[144] Specifically, if the former is excessive when compared to the latter, then the weapon's use is unlawful. It is important to emphasize here that "anticipated military advantage," as referred to above, contemplates an evaluation of both the military utility[145] possessed by the weapon and the military necessity occasioning resort to its use for legitimate military purposes.[146] As is evident, the difficulty which is presented by the foregoing formulation is that the criteria used to evaluate either side of the equation are highly subjective and susceptible of varied interpretations.

United States representatives to the Lucerne Weapons Conference, for example, took the position that the legal test for "unnecessary suffering" was a subjective one even where universally acceptable factual data pertaining to questioned weapons were available.[147] Moreover, this difficulty was exacerbated, in the view of these experts, by the fact that military utility could not be determined by a mere assessment of battlefield casualties and the medical effects of conventional weaponry.[148] Rather, the United States view was that the "unnecessary suffering" criterion was not met until the suffering inflicted clearly outweighed the military advantage reasonably seen accruing to the user of the weapon because, in addition to battlefield casualties, other more subjective factors had to be considered in evaluating a weapon's military utility. These factors, generally less susceptible of quantification, included the following: (1) the weapon's effectiveness to destroy or neutralize enemy materiel; (2) its effectiveness against particular targets; (3) its ability to interdict enemy lines of communication and to affect morale; (4) its cost; (5) its effectiveness in providing

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[144] I.C.R.C.L.W.R., *supra* note 10, at 8. There was widespread agreement among experts that in determining what injury was superfluous and what suffering was unnecessary, one balanced the injury or suffering inflicted (humanitarian aspect) against the military necessity for using the particular weapon (military side). *See* DAJA-IA 1974/1039, *supra* note 129.

[145] DAJA-IA 1974/1133, *supra* note 85. Widespread agreement existed among the conferees at the Lucerne Weapons Conference that the principal factor to be weighed in determining whether suffering caused by a weapon is unnecessary is military utility.

[146] Bettauer, U.S.L.W.R., *supra* note 10, at 23; DAJA-IA 1974/1039, *supra* note 129.

[147] Bettauer, U.S.L.W.R., *supra* note 10, at 24. Reference is made to the difficulty of objectively quantifying such factors as a weapon's effectiveness to destroy or neutralize enemy materiel and availability of alternate weapons.

[148] *Id.*

security for friendly troops; and (6) the availability of alternative weapons.[149]

Another view, in this regard, was presented in a paper by Colonel David Hughes-Morgan of the United Kingdom. Colonel Hughes-Morgan argued that as a matter of international law, the proper legal test of "unnecessary suffering" required a determination of

> . . . whether the weapon is calculated to cause (propre à causer) injury or suffering greater than that required for its military purpose; and in this regard a weapon which in practice is found inevitably to cause injury or suffering disproportionate to its military effectiveness would be held to contravene this prohibition.[150]

His test required first, a determination of the weapon's effects in battle; second, an evaluation of the military requirement necessitating its use; and third, a determination that the effect of the weapon was not disproportionate to the military necessity occasioning its use.[151]

Furthermore, Colonel Hughes-Morgan argued that other factors were relevant to the military utility determination. He noted, for example, that the military requirement for the weapon, *i.e.*, the nature of the target, had to be considered.[152] An anti-tank weapon, for example, could not be viewed as illegal because, in defeating enemy armor, it inflicted severe suffering on the tank crew within. Similarly, a rifle capable of defeating body armor or steel helmets should not be deemed illegal as causing unnecessary suffering, notwithstanding the fact that such a weapon inflicts severe suffering upon the unprotected individual soldier. This is true because, while it would perhaps be ideal to supply the military commander with a broad enough selection of weapons to enable him to match the required amount and kind of force to each target he might be required to engage, it simply is a physical and logistical impossibility. A soldier is limited in what he can carry, and armies are logistically limited in the varieties of weapons available to them.[153]

In contrast with this position, Swedish experts to the Conference urged the consideration of such humanitarian factors as medical

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[149] *Id.*

[150] Colonel Sir David Hughes-Morgan, Legal Criteria for the Restriction of Use of Categories of Conventional Weapons, at 6, paper presented the International Committee of the Red Cross Conference of Govenment Experts on the Use of Certain Conventional Weapons in Lucerne, Switzerland in 1974. Copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as Hughes-Morgan].

[151] *Id.*

[152] *Id.* at 5.

[153] *Id.*

effects, degree of disability, risk of death, overburdening of medical resources, and public opinion in determining the admissibility of conventional weapons in warfare.[154] Such factors, they contended were more objective in that they could more readily be quantifed as dispositive of the infliction of suffering disproportionate to or clearly outweighing the military advantage of conventional weapons.[155]

In the final analysis, however, the best test of which weapons contravene the criterion of unnecessary suffering is the practices of states.[156] Such practices may result, on the one hand, in a new weapon's acceptance as legitimate in war on the basis of widespread usage.[157] On the other hand, the practices of states in refraining from using a particular weapon may result in the prohibition or restriction of use of such weapon in customary international law.[158] This may cause an existing restraint in conventional law or customary international law to be altered in its application. Field Manual 27-10, for example, interprets Article 23e of the Hague Regulations as not prohibiting "the use of explosives contained in artillery projectiles, mines, rockets, or hand grenades"[159] notwithstanding the fact that the St. Petersburg Declaration of 1868 prohibited, among other things, explosive projectiles below the weight of 400 grams.[160]

2. Indiscriminate Attack

The customary rule of international law that provides that parties to armed conflict restrict their operations to legitimate military targets[161] avoiding direct attack on civilians so far as possible,[162] and the Preamble to the 1868 Declaration of St. Petersburg[163] are relied on for the proposition that existent international law prohibits indiscriminate weapons.[164]

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[154]I.C.R.C.L.W.R., *supra* note 10, at 7-8; I DA MSG, *supra* note 3, at 3-4. Swedish proposals to adopt objective factors dispositive of unnecessary suffering, however, did not receive substantial support.

[155]Bettauer, U.S.L.W.R., *supra* note 10, at 23.

[156]Memorandum for OASD/ISA, *supra* note 101, at 5-6; FM 27-10, *supra* note 101, at 18.

[157]Memorandum for OASD/ISA, *supra* note 101, at 5-6.

[158]*Id.*

[159]FM 27-10, *supra* note 101, at 18.

[160]St. Petersburg Declaration, *supra* note 94; I U.N.S.G.W.R., *supra* note 10, at 19.

[161]II OPPENHEIM'S INTERNATIONAL LAW 346 (7th Lauterpacht ed. 1952).

[162]*Id.*

[163]St. Petersburg Declaration, *supra* note 94, at Preamble; I U.N.S.G.W.R., *supra* note 10, at 19.

[164]Hughes-Morgan, *supra* note 150, at 6.

Although this legal criterion is not clearly and unequivocally stated in any convention or treaty in force,[165] it was generally accepted at the Lucerne Weapons Conference as a valid legal criterion to regulate weaponry in the existent law of war.[166] Considerable divergences exist as to the reach of this criterion. For example, the principle unquestionably prohibits indiscriminate attacks.[167] However, it is much more questionable whether it is applicable both to indiscriminate attacks and to weapons which may be regarded as "inherently indiscriminate,"[168] as asserted in the Swedish Weapons Study.[169]

At the Lucerne Weapons Conference, the United States argued that it was not the destruction of civilian objects or injury and suffering inflicted on civilians incident to legitimate attacks on military targets alone which constituted the proper test of indiscriminateness. Rather, the United States view was that, in addition to the aforementioned, it was the extent to which the incidental suffering or damage was reasonably foreseeable and disproportionate to the military advantage thought to be gained.[170] Having taken this position the United States then asserted that because of the subjective nature of factors which might bear on the proportionality equation, the legal test of indiscriminate attack was met only when "the risk of civilian loss [was] clearly disproportionate to the military advantage anticipated."[171]

A weapon, therefore, becomes unlawful pursuant to this criterion when the military advantage accruing to its user as a result of attacks on military targets is exceeded by incidental harm to

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[165] I.C.R.C.L.W.R., *supra* note 10, at 9. The consensus thus achieved is the result of a widespread recognition that Article 25, Hague Regulations is declaratory of the general principle of customary international law that the bombardment of undefended places is forbidden. Hague IV, *supra* note 45, Hague Regulations, art. 25.

[166] *Id.*

[167] *Id.*; Bettauer, U.S.L.W.R., *supra* note 10, at 25.

[168] *Id.* In this regard, disagreement among the experts existed as to whether this criterion had achieved the status of customary international law. Most agreed that it would be extremely difficult to apply because all weapons can be used indiscriminately. Further, except for the weapon purposely designed to be incapable of selective use, all conventional weapons could be used in such a manner as to insure that no civilians would be hit. Colonel (Sir) David Hughes-Morgan offered a generic prohibition of "inherently indiscriminate" weapons. It would have prohibited "the use of any weapon which cannot be accurately directed against military targets." Hughes-Morgan, *supra* note 150, at 10.

[169] SWEDISH WEAPONS STUDY, *supra* note 4, at 111.

[170] Bettauer, U.S.L.W.R., *supra* note 10, at 25-26.

[171] *Id.* at 26; *see* DAJA-IA 1974/1039, *supra* note 129, at 3. In this opinion of The Judge Advocate General the test is stated as being "whether the suffering and destruction caused by the weapon or by its employment in a particular fashion is *needless, superfluous, or plainly disproportionate to the military advantage reasonably expected from the use of the weapon.*" (emphasis added).

civilians in their persons and their property.[172] Destruction of non-military targets incidental to attacks on military targets alone is not sufficient to render a weapon illegal, because such a rule would not enable the accomplishment of legitimate military requirements. Thus, the likelihood of incidental destruction of non-military targets and injury to noncombatants pursuant to the employment of a particular weapon, not prohibited by international law, must be balanced against the significance of the military advantage sought and the necessity for using a particular weapon to accomplish a permissible military purpose.

C. PROPOSED LEGAL CRITERIA TO REGULATE WEAPONRY

1. Treachery or Perfidy

Article 23b of the Hague Regulations provides that "it is especially forbidden to kill or wound treacherously individuals belonging to the hostile nation or army."[173] This criterion was suggested in the Swedish Weapons Study as a means of prohibiting weapons deemed to be indiscriminate in their effect, as for example, land mines and ambush weapons, which are target activated.[174]

However, weapons experts at the Lucerne Weapons Conference were divided on the question of whether treachery or perfidy should be given status as a legal criterion governing the legitimacy of conventional weaponry.[175] Experts taking the view that treachery or perfidy should have status as an additional criterion regulating weaponry favored substituting the term "perfidy" for "treacherousness," as "perfidy" is a concept being developed in conjunction with the Draft Additional Protocols to the Geneva Conventions of 1949.[176]

Australian experts offered the following as a working definition of a perfidiously used weapon. Their proposal provided that "(1) the use of any weapon in such a way that it places the intended victim under a moral, juridical, or humanitarian obligation to act in such a way as to endanger his safety, is perfidious."[177] However, this

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[172]Memorandum from OASD/ISA, *supra* note 101, at 7.

[173]Hague IV, *supra* note 45, Hague Regulations, art. 23b; I U.N.S.G.W.R., *supra* note 4, at 19.

[174]SWEDISH WEAPONS STUDY, *supra* note 4, at 111.

[175]I.C.R.C.L.W.R., *supra* note 10, at 10. *See* discussion at note 13 *supra*.

[176]*Id.*

[177]Dep't of Army Message RUEKJCS/8377, 161420Z Oct. 74, at 3, copy on file in the International Affairs Division of the Office of The Judge Advocate General, Department of Army [hereinafter referred to as II DA MSG.]

definition was not generally accepted. Mr. Jean Pictet, President of the Conference, proposed that the Conference's final report indicate that some degree of consensus had been achieved to forbid (1) the use of explosives deemed to be perfidious in nature, such as toys and objects used typically in everyday life, and (2) booby traps which, in the circumstances they are employed, present a real danger to the civilian population.[178] This, however, did not receive support and was withdrawn.[179]

In contrast, the United States expert adopted a more traditional position[180] and asserted that the prohibition against treachery referred essentially to treacherous or perfidious conduct and was not relevant to the legality of particular weapons per se under international law.[181] In view of the action the Conference ultimately took with respect to treachery as indicated above, it may be concluded that treachery is presently deemed to be an inappropriate criterion to regulate weaponry.

2. Public Opinion and the Laws of Humanity

As has previously been indicated, the purpose of the de Martens Clause was to insure that no nation would regard that which was not specifically forbidden by the laws of war as implicitly legal.[182] This was regarded as a further humanitarian check on the excesses of war.

Experts at the Lucerne Weapons Conference, in an effort to develop new legal criteria regulating weaponry, seized upon that portion of the de Martens Clause which provides that "inhabitants and belligerents remain under . . . the governance of the principles of the law of nations, . . . established among civilized peoples, . . . *the laws of humanity, and . . . the dictates of the public conscience,*"[183] and proposed that public opinion and the laws of humanity be adopted as a new legal criterion.

If adopted, the new legal criterion of public opinion would operate

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[178] *Id.*

[179] *Id.*

[180] Typical of the traditional view of treachery in war are Professor Lauterpacht's comments:

> [Article 23b of the Hague Regulations] . . . prohibits any treacherous way of killing and wounding of combatants. Accordingly, no assassin must be hired; and no assassination of combatants be committed, a price may not be put on the head of any individual; proscription and outlawing are prohibited; no treacherous request for quarter must be made, no treacherous simulation of sickness or wounds is permitted.

II OPPENHEIM'S INTERNATIONAL LAW 341 (7th Lauterpacht ed. 1952).

[181] Bettauer, U.S.L.W.R., *supra* note 10, at 25. See discussion at note 13 *supra*.

[182] I.C.R.C.L.W.R., *supra* note 10, at 10.

[183] Hague IV, *supra* note 45, at Preamble.

to deny the admissibility in war of weapons thought to be contrary to the principle of humanity as conceived by the general public.[184] However, a wide divergence of opinion emerged as to the feasibility of adopting this criterion as a means of regulating weaponry. The narrower view taken of the proposal was that a weapon's admissibility in warfare could not be denied on the basis of public opinion, until it was affirmitively established that the influence of public opinion had resulted in the introduction of a new principle of customary international law denying the legitimacy of a particular weapon in war.[185]

On the other hand, the broader view would require only a showing of a strong demand for the proscription of a particular weapon evidenced by public opinion in order to prohibit the use of a given weapon pursuant to this criterion.[186] Specific tests offered to identify a weapon as violative of the criterion of public opinion were "ecological damage"[187] and "abhorrent nature of the weapon."[188] Evidently these were proposed to restrain or prohibit certain weapons thought to be most notorious in their effects, such as napalm.[189]

The fundamental difficulty with accepting the public opinion criterion is that it is more appropriate as a political consideration than as an independent legal criterion regulating weaponry. Its lack of utility as a legal criterion to prohibit weaponry is best illustrated by its failure to recognize the basic nature of international armed conflict—fundamentally opposed interests locked in conflict on the battlefield.[190]

Specifically, it fails to recognize that a state that has made the serious decision to resort to war in furtherance of its foreign policy is unlikely to refrain from using its most effective weapons to accomplish its purposes despite world public opinion inevitably united against it. Such opinion simply becomes immaterial. Similarly, public opinion obviously would be ineffectual to cause an attacked state to defend against such an attack with anything less than its own most effective weapons. In particular, the only public opinion that counts in such a situation is that existent in the attacked state.

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[184] I.C.R.C.L.W.R., *supra* note 10, at 10.

[185] *Id.*

[186] *Id.*

[187] *Id.* at 11. This criterion contemplates the prohibition of weapons whose use would do irreparable damage to the environment.

[188] *Id.*

[189] *Id.*

[190] The remarks of Rubin *in Proceedings of the American Society of International Law*, 67 AM. J. INT'L L. 165 (1973).

The criterion of the laws of humanity, as well as that of public opinion, has been relied on to prohibit weapons deemed to be "abhorrent in their nature."[191] An evaluation of the feasibility of a rule based on the laws of humanity as a method of reducing the evils of war necessitates a determination of whether such a criterion would not impermissibly restrain the legitimate conduct of war pursuant to the principle of military necessity. Unquestionably, the principle of humanity operates in the existent rules regulating weaponry to limit the level of violence in war to that which is absolutely necessary to the accomplishment of the military purpose; however, it remains to be seen whether the principle of humanity can successfully be made dominant to that of military necessity and retain its effectiveness as a legal criterion regulating weaponry. In effect, utilizing a legal criterion stressing the primacy of the laws of humanity would appear to work this result.

IV. A COMPARISON OF THE ADEQUACY OF EXISTENT AND PROPOSED CRITERIA TO REGULATE CONVENTIONAL WEAPONRY

> These apparently simple and straight forward humanitarian objectives, however, are very difficult to obtain. *They cannot be achieved by drafting protocols that will not stand up to the test of the battlefield, they cannot derive from conventions that few nations will sign, fewer ratify, and fewer still adhere to.*[192]

A. GENERAL

This section seeks to ascertain the impact and adequacy of proposed legal criteria as tests establishing the permissibility of specific modern conventional weapons which have been challenged as causing unnecessary suffering or having indiscriminate effects. In particular, the legality of the fire bomb,[193] the M-16A1

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[191]I.C.R.C.L.W.R., *supra* note 10, at 11.

[192]Prugh, *supra* note 110, at 263.

[193]The fire bomb is described as below:

> [Fire bombs] are usually thin-walled metal containers filled with thickened gasoline or other flammable material using a white phosphorous igniter. They are generally inexpensive and some models have the advantage of being field-assembled. When the munitions break open on impact, the fill agent is ignited and scattered as globules over a target area. These munitions are delivered by ground-support aircraft and are designed for use against readily combustible targets or as direct casualty agents.

rifle,[194] cluster bomb units,[195] and scatterable mines,[196] representing the major conventional weapons catergories currently being challenged,[197] will be tested for legality pursuant to existent and proposed legal criteria. This approach is taken because a meaningful comparison of existent and proposed criteria to regulate weaponry may best be obtained by applying such criteria to those particular conventional weapons criticized as most inhumane. Further, the results obtained through analysis of par-

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M. Mikulak, *Statement in* U.S. DEPT OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 28 (G. Aldrich, Chmn. 1974), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as I Mikulak, U.S.L.W.R.].

[194]The M-16 is described as below:

> The M-16 rifle is the U.S. Army's basic small calibre weapon. Primarily an antipersonnel weapon, the M-16 is used in conjunction with other weapons when attacking or defending against personnel. Any rifle less effective than the M-16 would not be sufficient to carry out its designed mission. A weapon more complex than this rifle is neither economical nor practical to issue to every soldier. There is no current U.S. replacement planned for the M-16.

Staples, *Military Utility of Small Calibre Weapons, in* U.S. DEPT OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 77-78 (G. Aldrich, Chmn. 1974), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as I Staples, U.S.L.W.R.].

[195]Cluster bomb units are described as below:

> In weapons where maximum fragmentation is the desired effect, casings are designed to produce a uniform fragment size. Cluster bombs may frequently contain fragments of a predetermined size and weight or units of submunitions with independently functioning fuses, to maximize effects on either material or personnel targets.
>
> The submunitions employed are utilized to achieve a larger area of coverage at the expense of a reduced payload for the individual unit. Some cluster bombs are carried, aimed, and released as a single bomb unit. At a preestablished point in the flight trajectory, the weapon activates to open the container and deploy the submunitions. These disperse, individually, arm and continue to the target. Other types of dispenser weapons require a shallow dive or level delivery and the pattern will always impact along the aircraft line of flight. The direction of fragment projection is determined by the shape of the casing, the location of the fuse, fuse function delay, the impact velocity of the bomb, and the composition of the impact point. The initial velocity of fragments is also dependent on the velocity of the bomb, the type of explosive and the weight-charge weight ratio. As the fragments travel through the air, the initial velocity is decreased by air drag.

Vaught, *Intervention on Fragmentation Munitions, in* U.S. DEPT OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 107 (G. Aldrich, Chmn. 1974), copy on file in International Law Division of The Judge Advocate General's School [hereinafter cited as I Vaught, U.S.L.W.R.].

[196]Scatterable mines are described as below:

> . . . [S]catterable mines. . . . serve much the same functions as emplaced mines, but with the additional utility that follows from the rapidity with which they can be deployed . . . . [They can] be used offensively by providing flank security for advancing forces or securing newly-gained positions from counter-attack.

I.C.R.C.L.W.R., *supra* note 10, at 66.

[197]*See* authorities cited notes 6, 7, 8 & 9 *supra*.

ticular weapons will be generally applicable to other weapons within the weapons categories represented.

B. LEGALITY OF SPECIFIC CONVENTIONAL WEAPONS

As was indicated in the preceding section, the proportionality equation representing humanitarian concerns for disproportionate suffering and destruction on the one hand, and the legitimate claims of military necessity, on the other, is of critical significance in evaluating the legitimacy of conventional weaponry, whether by existent or proposed legal criteria. Significantly, in this regard, the existent law of war permits belligerents to use whatever weapons they choose, provided that they are not forbidden by the law of war and do not violate the proportionality equation as it operates in existent legal criteria.[198] That is to say, the proportionality equation is not violated unless it is shown that the suffering and destruction resulting from the use of the weapon are plainly excessive when balanced against the military advantage accruing to the user of the weapon.[199]

However, proposed legal criteria, whether they merely be new quanitifiers for triggering existent legal criteria[200] or new legal criteria in their own right,[201] appear to be directed at altering the traditional operation of the proportionality equation as described above. Therefore, the following analyses of controversial conventional weapons will attempt to determine the effect this alteration will have on the operation of the proportionality equation.

1. The Fire Bomb (Incendiary Weapons)[202]

a. The Controversy

The use of napalm has been roundly attacked as causing unnecessary suffering or having indiscriminate effects.[203] The United Nations Secretary General Napalm Report, for example, declared that napalm was one of the most lethal weapons in existence today,

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[198] Authorities cited notes 125 & 129 *supra*.

[199] *Id.*

[200] These include such factors as medical effects, degree of disability, risk of death, overburdening of medical resources. Authorities cited note 12 *supra*; I DA MSG, *supra* note 3, at 3-4.

[201] Specifically, this includes the criteria of treachery or perfidy, public opinion, and the laws of humanity. I.C.R.C.L.W.R., *supra* note 10, at 10-12.

[202] A description of the fire bomb is at note 193 *supra*.

[203] SWEDISH WEAPONS STUDY, *supra* note 4, at 116; I.C.R.C. WEAPONS REPORT, *supra* note 3, at 81; N.Y. Times, Oct. 18, 1972 at 2, col. 1; N.Y. Times, Aug. 23, 1973, at 37, col. 5.

but did so on the basis of an undocumented personal communication which alleged that one-third of napalm's victims die within 24 hours after contact.[204] Napalm was, in short, an all or nothing weapon.[205]

Those who would have its use prohibited in armed conflict as violative of the legal criterion of "unnecessary suffering," rely on such factors as the severe nature of the burn wounds inflicted, the degree of pain and suffering which victims of war wounds must endure, and the burden on medical resources which is incident to the prolonged and complicated medical treatment which must be rendered.[206] Proponents of this view, in addition, seek to devalue the military utility of the use of napalm, suggesting the substitution of alternative weapons as an appropriate solution.[207] On the other hand, those who would not have its use banned generally regard the foregoing proposed legal criteria as factually unsupported.[208]

Proponents of the view that napalm is indiscriminate cite the large scale use of incendiaries in the Second World War as illustrative of indiscriminate usage in the past.[209] Further, they urge that even if the user of napalm intends it to affect only the target against which it is delivered, its secondary effect may well be indiscriminate "due to the self-propagation character of fire."[210] Those who are of the contrary persuasion deny that napalm is indiscriminate in its nature or in its use and dismiss World War II incendiary air raids as descriptive only of an obsolete method of warfare.[211] Secondary spread of fire does not always occur; rather, its occurrence varies with the nature of the target.[212]

Finally, others assert that napalm should be prohibited as having poisonous or asphyxiating effects.[213] However, this view is dis-

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[204]U.N.S.G. NAPALM REPORT, *supra* note 2, at 33.

[205]*Id.*

[206]I.C.R.C.L.W.R., *supra* note 10, at 26-29.

[207]*Id.* at 24-25, 30. For example, some experts suggested the appropriateness of new fragmentation weapons as substitutes for the fire bomb provided the increased cost could be justified on the basis of increased effectiveness.

[208]*Id.*

[209]*Id.* at 31; U.N.S.G. NAPALM REPORT, *supra* note 2, at 41-43.

[210]U.N.S.G. NAPALM REPORT, *supra* note 2, at 20-25.

[211]Mikulak, *Statement, in* U.S. DEP'T OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 45 (G. Aldrich, Chmn. 1974), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as II Mikulak].

[212]*Id.* at 44; I.C.R.C.L.W.R., *supra* note 10, at 31.

[213]U.N.S.G. NAPALM REPORT, *supra* note 2, at 25; I.C.R.C.L.W.R., *supra* note 10, at 32.

puted as being supported by erroneous medical data.[214] Still others rely on the de Martens Clause and allege that napalm should be banned as offensive to the "public conscience," as a weapon abhorrently cruel in nature.[215] Contrary to this, some insist that public opinion is principally a political factor and is without independent status as a legal criterion regulating weaponry.[216]

b. Legality of the Fire Bomb

In general, the position of the United States is dispositive of the view taken by those who would maintain that the suffering and destruction incident to the use of the fire bomb are not excessive when weighed against the military advantage which accrues to the user. Fundamental to this position is a determination that the fire bomb has military utility necessitating its use against a particular target.[217]

In the view of the United States, for example, the fire bomb possesses military utility against such targets as "exposed military personnel, field fortifications, parked aircraft, motor transport

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[214]Pruitt, *Intervention, in* U.S. DEPT OF STATE. REPORT OF THE UNITED STATES DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 39 (G. Aldrich, Chmn. 1974), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as Pruitt, U.S.L.W.R.]. Dr. Pruitt notes that "[t]he statements about the biochemical characteristics of carbon monoxide are certainly true but the [U.N.S.G. NAPALM REPORT paragraph 117] includes no measurement of carbon monoxide or carboxyhemoglobin levels in any patient with napalm injuries suggesting that this comment is unfounded speculation."

[215]I.C.R.C.L.W.R., *supra* note 10, at 11.

[216]*Id.* at 31; authorities cited notes 187-190 *supra*.

[217]Vaught, *Statement by United States Expert on Military Utility of Incendiary Weapons, in* U.S. DEPT OF STATE. REPORT OF THE UNITED STATES DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 36 (G. Aldrich, Chmn. 1974), copy on file in the International Law Division of The Judge Advocate General's School. Mr. Vaught comments:

> Technically, I consider flame weapons are effective weapons to employ against pill boxes, bunkers, covered foxholes, fortifications with small gun ports, and enemy personnel concealed within heavy vegetation; open parts, hatches, and engine airtakes of armored vehicles, combustible supplies and ammunitions. The unavailability of flame weapons would necessitate the employment of less effective weapons such as small arms, demolitions and grenades. Greater reliance on small arms and other weapons carries the added risk of greater exposure to the individual soldier since he must gain closer access to the target . . . . Limited support can be provided by artillery and air delivered high explosive and fragmentation munitions. However, this creates a major safety problem to one's own forces engaged in close combat. Under the circumstances, when high explosive fragmentation weapons are used, your own forces are required to pull back during delivery of the weapons, thereby losing the momentum of the attack in an offensive engagement, or losing valuable ground in a defensive engagement. Finally the psychological advantages gained by the employment of flame weapons cannot be discounted as a major advantage in its use.

Id.

vehicles, ammunition or supply depots in the open, stationary armored vehicles or unbuttoned tanks, unhardened radar and communications facilities, wooden rolling stock, and warehouses of combustible construction."[218] Nevertheless, the United States at the same time concedes that there are alternative weapons which possess this utility. Such alternative weapons include explosives, and fragmentation or cluster munitions. However, the United States insists that no substitute exists for the fire bomb against targets in close proximity to friendly troops. In such a situation the use of alternative weapons would be too risky.[219]

In this regard, the legality of the use of napalm and other incendiaries against targets requiring their use was recently reasserted in an opinion of The Judge Advocate General of the United States Army.[220] Relying on the principle that "belligerents may employ any means and methods of combat, not prohibited by international law, so long as the suffering and destruction resulting from their use is not excessive when weighed against the military utility of those means and the military necessity for their employment,"[221] the opinion noted that "the key issue was whether the suffering and destruction caused by the weapon or by its employment in a particular fashion was needless, superfluous or plainly disproportionate to the military advantages reasonably expected from the use of the weapon."[222]

Two things are at once evident from this opinion. First, the "military advantage"[223] side of the proportionality equation represents an evaluation of the military utility a weapon is thought to possess and the military necessity occasioning its use. The military advantage determination therefore entails more than a determination that mere benefit will accrue to the user of the weapon.[224]

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[218]II Mikulak, U.S.L.W.R., *supra* note 211, at 44.

[219]I Mikulak, U.S.L.W.R., *supra* note 193, at 30. *See also* authorities cited notes 228-230 *infra*.

[220]DAJA-IA 1974/1039, *supra* note 129. *Contra*, II OPPENHEIM'S INTERNATIONAL LAW 520 (7th Lauterpacht ed. 1952).

[221]DAJA-IA 1974/1039, *supra* note 129.

[222]*Id.*

[223]*Id.*

[224]Paust, *Weapons Regulations, Military Necessity and Legal Standards: Are Contemporary Department of Defense "Practices" Inconsistent with Legal Norms*, 4 DENVER J. INT'L L. & POL. 229, 231-32 (1974).The author expressed concern that DOD had shifted to a mere military benefit test or *Kriegraison* theory of military necessity by using the words "military advantage" inuring to the benefit of the user of a weapon to establish the admissibility of the weapon in war. It is clear that no such shift has occurred. Military advantage may be said to equate to a determina-

Secondly, it is clear that the United States is of the view that the military advantage accruing to the user of napalm clearly outweighs any concern that the suffering and destruction caused by the weapon's use might be needless, superfluous, or plainly disproportionate. Hence, the weapon's use is regarded as lawful.[225]

It is notable, however, that the United States, while thus insisting on the legality of use of the fire bomb and other incendiaries, effectively imposes a higher legal standard on their use than it does as to other conventional weapons. American military law requires the commander desiring to employ it to determine first, that its use will not cause unnecessary suffering, and second, that his intended target requires its use.[226] With other conventional weapons the individual soldier or his commander is only required to determine that the suffering and destruction resulting from the weapon's use will not be disproportionate to the military necessity requiring him to use it.[227]

Additionally, the fire bomb would appear not to be violative of the existent legal criterion prohibiting weapons having indiscriminate effects. In this regard, as indicated above, American military law is more restrictive on the use of fire weapons than on other conventional weapons in combat. Also, available factual data suggest that the air delivery of the fire bomb on the target can be accomplished with extreme accuracy in close air support of troops on the ground.[228]

For example, fire bombs in this role are generally dropped from an altitude of 50-350 feet when the attack aircraft is not further than 1,000 feet from the target.[229] Delivery accuracy under typical conditions is said to be within 100 feet with an area of effectiveness, elliptical in shape, approximately 120 meters long and 25 meters wide.[230] Alternative weapons are indicated as having substanially larger maximum effective areas, thus tending to disprove the contention that the fire bomb is a weapon with an unusually large area of effectiveness with attendant indiscriminate effects against civilians and civilian property.[231]

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tion of the weapon's military utility and the military necessity requiring its use. Authorities cited note 129 *supra*.

[225]DAJA-IA 1974/1039, *supra* note 129; *see* Bettauer, U.S.L.W.R., *supra* note 10, at 23.

[226]DAJA-IA 1974/1039, *supra* note 129, at 5; FM 27-10, *supra* note 101, at 18.

[227]*Id.*

[228]II Mikulak, U.S.L.W.R., *supra* note 211, at 46-47.

[229]*Id.* at 47.

[230]*Id.*

[231]Reed, *Statement*, *in* U.S. DEP'T OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE

An analysis of the fire bomb's admissibility in combat using the proposed factors suggested as determinative of the unnecessary suffering criterion would undoubtedly compel a contrary result. Consideration of factors which attempt to quantify unnecessary suffering, such as mortality rates, the painfulness and severity of wounds, the increased burden on medical resources or the incidence of permanent disfigurement or damage, if accepted as factually correct and adopted, would unnaturally affect the operation of the complementary principles of military necessity and humanity within the unnecessary suffering criterion. The result, it is submitted, would be to work a reversal of the relationship between the complementary principles, rendering that of humanity dominant. Applied to the operation of the proportionality equation, this would compel a determination that the weapon is inadmissible in war.

For example, if the medical data relating to napalm's capacity to poison or asphyxiate [232] were accepted as valid, then napalm's use by definition would be unlawful. Accordingly, it is of the utmost importance that there be general agreement as to the effects of a weapon's use. Otherwise there can never be agreement with respect to its admissibility.

In contrast, however, it is likely that the fire bomb could withstand a legal analysis applying the proposed criterion prohibiting weapons which are deemed to be inherently indiscriminate in their effects. The discussion of the accuracy of the air delivery system and the nonavailability of suitable alternative weapons is again germane.[233]

A legal analysis applying such proposed legal criteria as the "public conscience" and the "laws of humanity" found in the de Martens Clause would again operate to reverse the role of the principle of humanity over that of military necessity with the consequent result of rendering the weapon illegal pursuant to the resulting modified rule of proportionality.

Therefore, it is readily apparent that the proposed legal criteria, save that which would prohibit weapons having "inherently indiscriminate" effects, would almost certainly render the fire bomb inadmissible in combat although it is deemed permissible under the existent legal criteria of the law of war.

UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 54-55 (G. Aldrich, Chmn. 1974), copy on file in the International Law Division of The Judge Advocate General's School.

[232] Pruitt, U.S.L.W.R., *supra* note 214, at 41.

[233] Authorities cited notes 228-30 *supra*.

2. M-16A1 Rifle (Small Calibre, High Velocity Ammunition)[234]

a. The Controversy

The legality of the use in armed conflict of small calibre, high velocity projectiles, such as the 5.56 mm bullet fired by the M-16A1 rifle, is challenged as being in violation of the 1899 Declaration on Expanding Bullets[235] and the prohibition against weapons which cause unnecessary suffering.[236] For example, the ICRC Weapons Report concluded that small calibre, high velocity projectiles when fired at 800m/sec result in wounds which resemble in kind and effect the wounds inflicted by dum-dum bullets on impact with the human body.[237]

Inasmuch as small calibre, high velocity ammunition is fired from point weapons, it is not challenged as being indiscriminate.[238] However, it has been challenged as causing unnecessary suffering on the basis that such ammunition exceeds factors proposed as benchmark quantifications of unnecessary suffering. These factors include a projectile muzzle velocity in excess of 800m/sec,[239] ef-

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[234]A description of the M-16A1 rifle is at note 194 *supra*.

[235]1 AM. J. INT'L L. 155 (Supp. 1907).

[236]Paust, *supra* note 224.

[237]I.C.R.C. WEAPONS REPORT, *supra* note 3, at 49. The Report's conclusion as to small calibre, high velocity ammunition stated:

> 126. In recent years, certain military requirements, notably for lighter, more convenient personal weapons for the individual soldier have led to the development of small-calibre projectiles that are fired at considerably greater velocity than hitherto. Wounds from projectiles that strike the body at more than about 800m/sec differ both in degree and in kind from wounds caused by lower-velocity projectiles. Because of the tendency of high-velocity projectiles to tumble and become deformed in the body, and to set up especially intense hydrodynamic shock-waves, the wounds which they cause may resemble those of dum-dum bullets

Id.

[238]I.C.R.C.L.W.R., *supra* note 10, at 44. There was general agreement among experts that only the criterion of unnecessary suffering was material to weapons which fire small calibre, high velocity ammunition, as such weapons are designed for use against point targets.

[239]I.C.R.C. WEAPONS REPORT *supra* note 3, at 38-49. The Report concluded that small calibre, high velocity projectiles (*i.e.*, those with striking velocities which exceed 800m/sec) cause dum-dum bullet effects because of phenomena which included high "efficiency of energy deposit," projectile tumbling, break up and cavitation effects produced by such projectiles. *Contra*, I Copes, *Small Calibre Projectiles*, *in* U.S. DEPT OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 61 (G. Aldrich, Chmn. 1974), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as I Copes, U.S.L.W.R.].

ficiency of energy deposit,[240] projectile tumbling,[241] bullet break up and cavitation effects produced by such projectiles,[242] and difficulty of treatment due to medical inexperience in treating such wounds in peacetime.[243]

b. Legality of the M-16A1 Rifle (M-16)

Of fundamental importance to an analysis of this weapon pursuant to traditional norms regulating weaponry in war is an evaluation of its military utility. It is noteworthy that the military utility of the M-16 was unquestioned by all conferees to the Lucerne

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[240] I.C.R.C. WEAPONS REPORT, *supra* note 10, at 44. The Report concluded that the efficiency of energy deposit for any projectile resulted from the percentage of its available kinetic energy which it transfers to the target on impact and described efficiency of energy deposit:

> 93. It is instructive to consider the case of two bullets that have the same kinetic energy but different calibres. The bullet of the smaller calibre has the smaller weight, so that if its kinetic energy is to equal that of the larger bullet it must be projected at a higher velocity, for its kinetic energy is proportional to the product of its weight and the square of its velocity. However, the velocity of the smaller bullet will decline more rapidly as it proceeds along its trajectory so that, even if the initial kinetic energy of the smaller bullet is equal to that of the larger one, this equality will not be maintained, and its energy will fall below that of the larger bullet. If, therefore, the user wishes to secure the advantages of lighter ammunition and lighter weapons, he must endow the lighter bullets with a greater initial velocity (though the consequence of the square law relating velocity and kinetic energy is that this increase need not be very large). This increase in velocity tends to increase markedly the severity of the wounds inflicted by the lighter bullets.

Id.

[241] *Id.* at 40, 44. The Report concluded that one of the principal reasons which caused pointed projectiles to tumble end over end upon impact was projectile velocity, *i.e.*, the greater the velocity, the more pronounced the tumbling effect becomes. Additionally, the Report concluded that tumbling is caused by a projectile which has not been properly stablized by barrel rifling.

[242] *Id.* at 46. The Report concluded that bullet break up and cavitation effects occurred as to projectiles which strike with velocities in excess of 800m/sec, but not below 800m/sec. In this regard the Report provided:

> 101. The wound caused by a low velocity projectile in human tissue is localized. As in the case of a knife wound, it is only the tissue in direct contact with the projectile which is affected. Little energy is transferred to tissues in the vicinity and the wound practically speaking is localized.
> 102. The situation is very different when a high velocity projectile strikes tissue. A temporary cavity is formed behind the projectile because the tissue is thrown out at high speed radically from the projectile by the hydrodynamic shock wave. The force with which the tissue is slung apart depends on the energy the projectile imparts as it passes along its path. The temporary cavity reaches it maximum size about two milliseconds after the strike, and pulsates with declining amplitude, soon shrinking to a smaller, permanent cavity. As the projectile passes, it sets up a strong shock wave in the surrounding tissue. This can damage blood vessels and nerves which are at a considerable distance from the path of the projectile. Even bones at some distance can be fractured. The shock waves sent out as the cavity pulsates are not so strong, but may cause some increase of the damage. The high radial force to which the tissue is subjected when the temporary cavity is formed is the main cause of the damage produced by high velocity projectiles.

Id.

[243] *Id.* at 48. The Report concludes that because high velocity wounds rarely occur in peacetime, most surgeons are unfamiliar with the specific treatment that should be rendered, resulting in prolonged healing periods and a high risk of death.

Conference.[244] In this regard, the military utility of the M-16 was best described by the United States. Specifically, the M-16 was, first, effective at ranges of less than 400-450 meters, the range within which United States experiences in World War II and Korea had indicated that small arms engagements would occur. Secondly, use of the weapon was described as permitting the heavily burdened soldier to maintain the same degree of firepower at a reduced weight.[245] And finally, the M-16 allowed every soldier to have an automatic fire capability whenever the situation required it, while the weapon's lighter ammunition facilitated battlefield resupply in greater quantities, enabling the resupply of field units for longer periods of time.[246]

In addition, the United States presentation indicated that the M-16 possessed less "stopping power"[247] than the M-14 but, at the same time, was more accurate due to the reduction in recoil stemming from the smaller projectile fired.[248] Both the M-16A1 and the AK-47 rifles were judged far more effective than the M-14 in terms of expected casualties per combat load. In general, they produced two times the number of combat casualties that could be produced by the M-14.[249] Thus, on one side of the proportionality equation, there is clear evidence of military utility in the M-16 rifle, resulting in an increased degree of military advantage accruing to its user.

Furthermore, as indicated earlier, the M-16 cannot be challenged on grounds that it is inherently indiscriminate.[250] The M-16, like all rifles, is designed for point targets, and as the discussion of its military utility above indicates, it is even more accurate than its military predecessors.

Difficulty does arise, however, in assessing its legal status as a weapon deemed to cause "unnecessary suffering" or to produce a "dum-dum bullet effect." In general, this is true because of a lack of conclusive evidence as to the effect of the M-16's 5.56 mm projectile on impact with human tissue. For example, the 800m/sec "high and low"[251] velocity effects criterion which was suggested in the

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[244] I.C.R.C.L.W.R., *supra* note 10, at 45.

[245] I Staples, U.S.L.W.R., *supra* note 194, at 79.

[246] I Staples, U.S.L.W.R., *supra* note 194, at 78-79.

[247] *Id.* at 80. Stopping power refers to the probability of incapacitation given a single hit.

[249] *Id.*

[248] *Id.* at 81. This results because of the increased number of M-16 and AK-47 rounds which may be carried per combat load in comparison to the M-14. The result is enhanced effectiveness.

[250] I.C.R.C.L.W.R., *supra* note 10, at 44.

[251] Authorities cited notes 237 & 239 *supra*.

Swedish Weapons Study[252] and in the ICRC Weapons Report,[253] was discredited early in the Lucerne Weapons Conference as a factor dispositive of unnecessary suffering.[254] Criticism and contrary technical data were so overwhelming that Sweden ultimately conceded that the actual cut-off point could be as low as 600 m/sec.[255] However, Sweden continued to insist that high velocity wounds were extremely severe and were caused by the transonic flow phenomenon.[256]

Medical evidence presented generally concluded that it was not possible "to determine the causative agent, *i.e.*, M-16, AK-47, M-14 or M-1, which created a specific wound."[257] A medical paper was presented by Great Britain on projectile trauma which developed the point that severe bullet wounds were common to modern rifles generally and not exclusive to weapons firing small calibre high velocity projectiles.[258] Technical data presented by the United States indicated that such criteria as bullet tumbling, break up and cavitation effects resulted from the impact of low velocity projectiles as well as high velocity projectiles.[259] Projectile tumbling was shown to be the result primarily of striking yaw and not velocity.[260] Finally, Swedish efforts to establish "efficiency of energy deposits" as a criterion on which the 5.56 mm bullet fired by the M-16 might be likened to a dum-dum bullet were effectively shown to be erroneous by a Danish report which indicated that the wounding effect of high velocity projectiles generally was much less severe than that of dum-dum bullets.[261]

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[252]SWEDISH WEAPONS STUDY, *supra* note 4, at 117-18.

[253]I.C.R.C. WEAPONS REPORT, *supra* note 3, at 49.

[254]I Copes, U.S.L.W.R., *supra* note 239.

[255]Dep't of Army Message RUEKJCS/9819, 291521Z Oct. 74, copy on file in the International Affairs Division of The Office of The Judge Advocate General, Department of the Army [hereinafter cited as III DA MSG]; I.C.R.C.L.W.R., *supra* note 10, at 43.

[256]III DA MSG, *supra* note 255. The "transonic flow phenomenon" has reference to systemic physiological changes which occur as a result of being wounded by a small calibre, high velocity projectile. In particular it relates to regional blood flow in the vicinity of the wound. I.C.R.C.L.W.R., *supra* note 10, at 43.

[257]III DA MSG, *supra* note 255. Agreement was general among conferee experts in this regard, except those from Sweden and Austria, who asserted the view that small calibre, high velocity wounds differ in kind and degree from those of other weapons.

[258]*Id.*

[259]I Copes, U.S.L.W.R., *supra* note 239.

[260]*Id.* at 66.

[261]III DA MSG, *supra* note 255, at 2-3. This report discussed experimental data on standard 5.56 mm and 7.62 mm ammunition as well as 7.62 mm dum-dum ammunition. Conclusions reached in the report indicated that standard 7.62 mm and 5.56 mm ammunition produced comparable effects while those of the 7.62 mm dum-dum ammunition were substantially more severe. The report concluded that comparison of the 5.56 mm projectile to the dum-dum was inappropriate.

In consequence of the unsettled nature of the criteria discussed above, it cannot be concluded that the M-16 rifle is in contravention of the existent legal criterion prohibiting weapons causing unnecessary suffering. Further, it would appear that the practice of states, with regard to modern military rifles whose medical effects were shown to be not unlike that of M-16, would support this conclusion. Weapons in this latter category would, for example, include the AK-47 and the M-14.

Moreover, the facts presented above do not support assertions that the M-16 violates the prohibition against dum-dum bullets. Although the United States is not a party to the 1899 Hague Declaration on Expanding Bullets, it nevertheless regards itself as bound thereby in the fullest sense.[262] Field Manual 27-10 is unequivocal in this regard, indicating that usage has established the inadmissibility in war of "irregularly shaped bullets . . . and the scoring of the surface or the filing off of the ends of the hard cases of bullets."[263]

These conclusions affirming the legality of the M-16 and finding it does not cause unnecessary suffering or have dum-dum bullet effects, however, must be reversed if one examines the weapon in terms of the aforementioned proposed factors which quantify unnecessary suffering. Indeed, all modern military rifles would arguably be subject to prohibition as causing unnecessary suffering or having a dum-dum bullet effect if subjected to evaluation under these proposed quanitifers. Clearly, this result again illustrates the difficulty of formulating rules regulating weaponry while permitting legitimate uses of such weapons.

3. Cluster Bomb Units (Blast and Fragmentation Weapons)[264]

a. The Controversy

Cluster Bomb Units (CBU's) are generally attacked as causing unnecessary suffering or having indiscriminate effects. One author writes, for example, that "both in design and in its practical deployment, the most indiscriminate antipersonnel weapon used in the Vietnam War was almost certainly the so-called Cluster Bomb Unit (CBU)."[265] Similarly, the ICRC Weapons Report concudes that CBU's are "area weapons having an obvious and uncon-

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[262]Dep't of Defense, OSD Corres. 17018 *in* Rovine, *Contemporary Practice of the United States Relating to International Law*, 68 AM. J. INT'L L. 528-30 (1974).

[263]FM 27-10, *supra* note 101, at 18.

[264]A description of CBU's is at note 195, *supra*.

[265]Krepon, *Weapons Potentially Inhumane: The Case of Cluster Bomb*, 52 FOR. AFF. Q. 595 (1974).

trollable tendency towards indiscriminateness. . .,"[266] and estimates that a single CBU-24 dropped from an altitude of 600 feet would disperse its fragments in such a manner as to kill or wound people at a maximum effective range of 300 by 900 meters.[267]

Moreover, weapons in this category are condemned as causing unnecessary suffering on the basis of such proposed factors as increased mortality rates resulting from high velocity fragments, pain and suffering resulting from multiple wounds, and increased levels of incapacitation flowing from use of improved fragmentations.[268]

b. Legality of CBU's

Initially, the military utility determination relative to CBU's must take cognizance of the fact that historically the greatest incapacitator of combatants has been fragmentation munitions. In this regard, a recent study of United States Army and Marine casualty experience indicated that "out of 7,091 casualties investigated 4,497 . . . 63% were from fragmentation munitions."[269] These statistics indicate the obvious military utility of CBU's as area weapons designed for use against personnel or materiel;[270] CBU's also have military utility as a highly effective means of

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[266] *Id.* at 598; I.C.R.C. WEAPONS REPORT, *supra* note 3, at 60.

[267] I.C.R.C. WEAPONS REPORT, *supra* note 3, at 57. The Report asserted that:

> 137. *A single 350-kg fragmentation cluster-bomb may effectively cover an area of about 300 x 900 m. A fighter bomber can carry at least four weapons of this type*, and a larger aircraft many times more. Although *heavy bombers* usually carry antimateriel weapons, these *may have antipersonnel effects over an area of several square kilometers per aircraft.*

Id. (emphasis added).

[268] Copes, *Intervention—Blast and Fragmentation Weapons, in* U.S. DEPT OF STATE. REPORT OF THE UNITED STATES DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE SUFFERING OR HAVE INDISCRIMINATE EFFECTS 101 (G. Aldrich, Chmn. 1974), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited as II Copes, U.S.L.W.R.]

[269] I Vaught, U.S.L.W.R., *supra* note 195, at 109.

[270] *Id.* at 107. Military utility presentations given by the United States, the United Kingdom, the Federal Republic of Germany, and France were very similar in content as to fragmentation weapons. In particular,

> [t]he points of increased area of effectiveness, fewer rounds required to achieve desired effectiveness; reduced effects of terrain shielding; reduced logistical burdens were frequently mentioned. [It was] further pointed out that an alternative was to use increased numbers of standard HE rounds, with more devastating effects on personnel, with no decrease in area which needed to be covered. [Federal Republic of Germany] stated that their possession of CBU's may actually be a deterrent to the start of hostilities.

Dep't of Army Message RUEKJCS/8073, 111406Z Oct. 74, at 2, 3. Copy on file in the International Affairs Division of The Office of The Judge Advocate General, Department of Army [hereinafter cited as IV DA MSG.]

engaging modern infantry, which today, due to its increased organic firepower is able to move in widely dispersed formations thus reducing its vulnerability to antipersonnel weaponry.[271] Moreover, it is said that the use of the CBU is cost effective, as it reduces logistical burdens by enabling the expenditure of fewer artillery rounds.[272] Further, it is effective in a flak suppression[273] role in built up areas,[274] and its use is preferable to the use of high explosive artillery rounds which would produce a more severe effect on personnel in the same area covered.[275] Accordingly, the feasibility of utilizing substitute weapons is not considered to be a realistic alternative.

As has been indicated, the greatest difficulty in evaluating CBU's for compliance with the law of war exists with respect to their potential for indiscriminateness. This difficulty arises because CBU's represent the most advanced antipersonnel fragmentation weapons.[276] In short, they are highly effective.

Notwithstanding this fact, it cannot be concluded that weapons of this type cause unnecessary suffering or are indiscriminate in their effect, assuming they are lawfully used. That is to say, the use of CBU's does not violate existent legal criteria regulating weaponry until the suffering and destruction resulting from their use clearly exceed the military advantage accruing to their user.[277] Nor may it be concluded that CBU's are indiscriminate, as the evidence indicates that CBU's are capable of accurate delivery on their target.[278]

As a consequence, they are not weapons illegal per se; rather their legality in the conduct of hostilities is dependent on the use to which they are put. Moreover, with respect to the legality of CBU's pursuant to existent legal criteria in the law of war, the practice of states has clearly established the admissibility in war of fragment-producing weapons, such as artillery projectiles, mines, rockets, and hand grenades, notwithstanding the 1868 Declaration of St. Petersburg which declared "explosive bullets" illegal in war.[279]

On the other hand, adopting a test which gives primacy to the goal of avoiding unnecessary suffering would render CBU's inad-

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[271] I.C.R.C.L.W.R., *supra* note 10, at 51.

[272] *Id.*

[273] "Flak suppression" has reference to the suppression of anti-aircraft fires.

[274] IV DA MSG, *supra* note 270, at 2.

[275] *Id.*

[276] See J. TOMPKINS, THE WEAPONS OF WORLD WAR II 112-13 (1966).

[277] *See* Bettauer, U.S.L.W.R., *supra* note 10, at 23; sources cited note 129 *supra*.

[278] I Vaught, U.S.L.W.R., *supra* note 195.

[279] FM 27-10, *supra* note 101, at 18.

missible in war, for the same reason the M-16 and the fire bomb would be outlawed. Very simply, adoption of such factors would render the principle of humanity dominant in the proportionality equation, thus rendering the weapon unlawful. However, as with the M-16 and the fire bomb, medical and technical data relating to the degree of suffering and damage resulting from the use of CBU's remain inconclusive,[280] thereby making a meaningful legal analysis of its admissibility in war highly speculative.

For example, United States experts at the Lucerne Conference established that although the probability of being hit increases significantly with the use of controlled fragmentation techniqes, it does not follow, as is suggested in paragraph 124 of the ICRC Weapons Report, that the improved fragmentation munitions' "hit probability and its incapacitation or kill probability will be increased."[281]

In particular, the United States urged that additional factors had to be considered before this could reasonably be concluded. First among these additional factors was the fact that improved munitions were lighter and smaller than standard fragmentation munitions. Secondly, the velocity of these smaller fragments degraded in air more rapidly than did that of the larger fragments thus causing less severe wounds, and finally, the increased number of fragments produced by the improved munitions had to be considered on a weapon by weapon basis.[282]

The study presented by the United States, having considered these factors, affirmed the contention that improved fragmentation munitions meant more hits, but noted that even with improvements, only 30% of the targets struck received multiple hits [283] It also concluded that the "average level of incapacitation caused by conventional munitions was still 30% higher than that caused by the improved munitions."[284]

The United States challenged other conclusions contained in the ICRC Weapons Report as well. For example, the conclusion contained in paragraph 126 of the Report indicated that a person standing 15 meters from the detonation point of a CBU submuni-

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[280]See II Copes, U.S.L.W.R., *supra* note 268. Mr. Copes took issue with the claim that small multiple wounds cause more pain than substantially larger wounds, *see* I.C.R.C. WEAPONS REPORT, *supra*, note 3, at 35 and indicated that "even if increased pain does result it would be more than offset by the decreased average level of incapacitation and probability of death which occurs for wounds which result from improved as opposed to conventional munitions."

[281]I.C.R.C. WEAPONS REPORT, *supra* note 3, at 53.

[282]II Copes, U.S.L.W.R., *supra* note 268, at 96.

[283]*Id.* at 97.

[284]*Id.*

tion weighing 0.5 kilogram "[would] probably be hit by at least five fragments, each weighing about half a gram."[285] To this allegation, the United States replied that no single CBU submunition or "bomblet" is presently capable of producing the number of fragments required to achieve the hit probability stated in the ICRC Weapons Report.[286]

Moreover, the United States took issue with the Report's conclusion concerning wounds caused by low mass, high velocity fragments. In this regard, United States data confirmed that mass and velocity were significant factors in determining the wounding effects of such projectiles.[287] However, the United States asserted that its data indicated "that the wound caused by the significantly heavier but lower velocity, conventional munition fragment would cause much more intensive damage than the fragment from the improved munition."[288] In fact, "using criteria developed to predict probability of death as a function of fragment mass and velocity, the chance of death was determined to be approximately 7 times greater with the conventional than with the improved munition fragment."[289] Finally, the United States concluded that the wound inflicted by a conventional fragment would be more painful than that inflicted by the improved fragment, as more tissue is affected by the larger fragments of the conventional munition.[290]

4. Scatterable Mines (Delayed-Action Time-Delayed Weapons)[291]

a. The Controversy

Though delayed action weapons are not criticized as causing unnecessary suffering, they are challenged as being inherently indiscriminate or treacherous, if used against areas where civilian populations and combatants may be in close proximity in terms of time.[292] It is the time-delay feature characteristic of weapons in this category that enables them to be detonated at predetermined intervals or at random.[293] Additionally, such weapons may be deployed to be activated upon contact with the target, as where a land mine is triggered inadvertently by the foot of an unsuspecting soldier.[294] Charges of indiscriminateness and treachery, however, do not ex-

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[285] I.C.R.C. WEAPONS REPORT, *supra* note 3, at 56.
[286] II Copes, U.S.L.W.R., *supra* note 268, at 100.
[287] *Id.* at 101.
[288] *Id.*
[289] *Id.*
[290] *Id.*
[291] A description of the scatterable mine is at note 196 *supra*.
[292] I.C.R.C. WEAPONS REPORT, *supra* note 3, at 68.
[293] *Id.* at 31-36.
[294] *Id.* at 32.

tend to such situations where there is a reasonable expectation that employment wil affect only combatants in or near the planned target area, and it is unlikely that the area will later be occupied by civilians.[295]

It is said, for example, that the deployment by air of scatter bombs ought to be prohibited for indiscriminateness, while their deployment by artillery should be permitted, being a more accurate means of delivery.[296] At the very least, say those challenging this weapon, means of accurately recording and registering weapons deployed in this manner must be developed.[297]

b. Legality of Scatterable Mines

It is likely that the legality of scatter bombs in war may be maintained in the face of charges that such weapons tend to be indiscriminate or treacherous. First, it is not seriously contended that the weapon cannot be delivered on the target accurately or that it causes unnecessary suffering. Secondly, humanitarian concerns regarding the weapon's potential indiscriminateness or treacherousness can be adequately satisfied, as the criticized qualities may be remedied by the user without significant difficulty or expense. Scatterable mines, for example, may be constructed with built-in self-destruct mechanisms,[298] thereby removing the danger to the civilian population while not adversely affecting the military advantage to user of the weapon.

However, it is important here to note that the complementary principles of military necessity and humanity in the proportionality equation have not been affected by the operation of proposed criteria. That is to say, the principle of military necessity remains dominant to that of humanity and the weapon is rendered admissible in war.

This is significant because scatterable mines possess undeniable military utility in their ability to restrict enemy movement on the battlefield both offensively and defensively.[299] In addition, their

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[295]SWEDISH WEAPONS STUDY, *supra* note 4, at 132.

[296]I.C.R.C.L.W.R., *supra* note 10, at 67.

[297]*Id.*

[298]*Id.*

[299]Staples, *Intervention—Time Delay Weapons, in* U.S. DEPT OF STATE, REPORT OF THE UNITED STATES DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS 110 (G. Aldrich, Chmn. 1974), copy on file in the International Law Division of The Judge Advocate General's School [hereinafter cited at II Staples, U.S.L.W.R.]. Mr. Staples commented on the military utility of scatterable mines:

> A scatterable landmine system adds a new dimension to the field of mine warfare. Properly employed, scatterable landmines, both AP and antimateriel, provide the commander with a rapid, flexible, and

use adheres to the principle of economy of force, in that commanders may readily deploy them with little drain on combat troop strength,[300] and they operate to equalize the combat power of defending forces faced with numerically superior enemy forces.[301]

V. CONCLUSIONS AND RECOMMENDATIONS

> . . . And from the prophet even unto the priest everyone dealeth falsely.
>
> They have healed also the hurt *of the* daughter of my people slightly, saying, Peace, peace; when *there is no peace.*[302]

Many conclusions may be reached on the basis of the previous section. Two, however, stand out as fundamental to any conclusions which may reasonably be drawn pertaining to legal criteria appropriate to determine the legitimacy of modern conventional weaponry in war, existent or proposed.

Inevitably, the first of these must be that any legal criteria relied on to regulate weaponry must not operate to deny the underlying reality of war necessitating the acquisition and development of effective weaponry. The fact that *"there is no peace,"*[303] cannot be ignored.

The second initial conclusion, necessarily drawn from the first, is that no state confronted with possible involvement in the conduct of hostilities can reasonably afford to adhere to legal criteria regulating weaponry which would require that war be fought with obsolete weapons out of an overriding concern for human suffering or destruction of property. Quite simply, the law of war is not subordinate to the law of humanity, nor is it likely that it would long retain its effectiveness as law if an attempt were made to make it so.

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effective means for disrupting the movement of enemy ground forces while simultaneously reducing the significant manpower and materiel requirements previously associated with the employment of landmines.

Whereas ground emplacement of mines permits some control over the enemy's forward movement, techniques of scatter mining allow lateral and rearward control as well. The quick response inherent in the scatterable mine system allows areas to remain mine-free for friendly maneuvers until the last possible moment at which time mines can be employed where the enemy threat appears imminent or is actually present. Fire and surveillance coverage of a mine field in enemy controlled areas may not be continuous, but is can be provided periodically by aerial support, to include remining of areas when necessary.

[300] *Id.* I.C.R.C.L.W.R., *supra* note 10, at 67.

[301] II Staples, U.S.L.W.R., *supra* note 299.

[302] *Jeremiah* 6:13-14 (King James).

[303] *Id.*

A. PROPOSED LEGAL CRITERIA: THE SUBORDINATION OF THE PRINCIPLE OF MILITARY NECESSITY TO THAT OF HUMANITY IN THE PROPORTIONALITY EQUATION

In this regard, Colonel G.I.A.D. Draper, the distinguished British international law scholar, recently expressed the hope that peace on earth will one day be achieved as a result of the subordination of the law of war to the law of humanity. He wrote that

> (1) The regime of human rights will come in time to be the normal ordering in civil society, if war breaks out, inter- or intra-state, that regime does not dissipate. First it is there waiting in the background the whole time to take over once the conflict abates. Second, a lower level of that regime then comes into play by way of derogation made strictly necessary by the emergency situation. That lower regime is the Law of Armed Conflicts. Third, the Law of Armed Conflicts must be reviewed and revised in light of the two preceding propositions. That review will go in two main directions: (1) *That which cannot be strictly allowed by the Law of Armed Conflicts stands to be condemned if it violates the Law of Human Rights;* *(2) that part of the Law of Armed Conflicts which is humanitarian in character,* quite a large part, today, *needs overhaul to lift it up to the closest proximity to the normal operation of Human Rights.*[304]

Notwithstanding Colonel Draper's comments, the question remains, can the law of humanity reasonably be relied on to civilize the reality of war? McDougal and Feliciano have cautioned that "individuals of one age who seek to control posterity by misplaced faith in the omnipotence of words of infinite abstraction are frequently to be disappointed."[305] This admonition becomes particularly relevant when the subordination of the law of war to the law of humanity is, in effect, proposed with respect to the law of war regulating weaponry.

In this regard, adoption of such proposals to modify the law of war regulating weaponry as have been the subject of this article would work just such a result, rendering most modern conventional weapons inadmissible in war. In particular, proposed modifications to the law of war regulating weaponry—new legal criteria and factors deemed determinative of existent criteria—if adopted, would operate to subordinate the principle of military necessity to that of humanity in the proportionality equation.

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[304] Draper, *supra* note 78, at 181 (emphasis added).
[305] MCDOUGAL & FELICIANO, *supra* note 104, at 664.

As a result, such proposals would tend in their application to require the prohibition of effective weapons without appropriate regard for legitimate military requirements which might otherwise permit their use. In consequence, states, still burdened with legitimate military requirements for effective weaponry, would be left with essentially two options: (1) the development of effective substitute weaponry whose specifications were not yet directly prohibited, or (2) open violation of the rules regulating weaponry. In either event the purpose of the law of war regulating weaponry would have been wholly frustrated.

Finally, even assuming that the subordination of the principle of humanity is not deemed objectionable, a further impediment to successful adoption of such proposals remains. This is true simply because, as the Lucerne Weapons Conference amply demonstrated, a paucity of definitive technical data presently exists to establish the degree of suffering or indiscriminateness that a given weapon might inflict. Therefore, until more is known about the actual effects of weapons, proposals to modify the rules of war regulating weaponry are singularly without the necessary capacity to garner the shared interpretation of the states whose weapons they would seek to regulate. Without agreement as to that which was to be prohibited, binding law could not result.

In light of these factors, it is submitted that proposals to modify the law of war regulating weaponry should not be adopted. Adoption of such proposals would restrict twentieth century warfare to the weapons of wars past, and insure, as a result, not peace on earth, but continued warfare without benefit of effective rules regulating weaponry.

B. EXISTENT LEGAL CRITERIA: UNNECESSARY SUFFERING AND INDISCRIMINATE ATTACK

In view of the foregoing analysis, existent legal criteria regulating weaponry, though admittedly imperfect, remain the most appropriate means of regulating the violence incident to the use of modern implements of war in combat. These criteria have achieved the status of customary international law and are, as such, binding on all states. Moreover, in contrast to proposed legal criteria, existent legal criteria wisely do not pretentiously attempt to legislate an end to violence in war. Rather, the proportionality equation operating within each preserves the traditional dominance of the principle of military necessity as against that of humanity. Accordingly, a legitimate level of violence results incident to the use of weapons for permissible military purposes, and

effective regulation of conventional weaponry by law is achieved. The reality of war, in essence, is recognized and accounted for.

In particular, existent legal criteria regulating weaponry permit the employment of any weapon in combat, provided that such use is not otherwise prohibited by international law and does not inflict excessive suffering and destruction when weighed against the legitimate military advantage accruing to the user of the weapon pursuant to the weapon's use. In essence, existent legal criteria operate to balance humanitarian concerns for suffering and destruction on the one hand, against legitimate military requirements on the other. The result is a legitimate level of violence in war.

Importantly, military advantage as used above, is derived upon a determination of the weapon's military utility, *i.e.*, its effectiveness, and upon a determination of the military necessity occasioning its use. Therefore, as the legitimate requirements of the military situation vary with the ebb and flow of the tactical situation, so too the military advantage reasonably foreseeable as accruing to the user of the weapon will vary. This relationship results in fluctuating levels of permissible violence on the battlefield. Existent legal criteria take this into consideration and operate to render inadmissible in war only those conventional weapons which inflict suffering or damage to property, which is "clearly"[306] needless, superfluous, or disproportionate to the military advantage sought to be gained. Inclusion of the modifier "clearly" is necessary to insure that a shared consensus may be more attainable in applying the legal standard.

In conclusion, a number of recommendations are in order. First, continued efforts to develop more knowledge pertaining to the effects of conventional weaponry are justified. At the very least, such efforts will result in increased technical knowledge of the effects conventional weaponry. Perhaps this knowledge will enable the adoption of prohibitions or restrictions on conventional weaponry now criticized as causing unnecessary suffering or having indiscriminate effects. Perhaps it will not. In any event, man will possess a weapons technology more capable of producing militarily effective weaponry, engineered at the same time to mitigate human suffering and damage to property to a greater degree than is now possible.

Secondly, every effort should be made to find new means to enhance the operation of the existent rules regulating weapons. In this regard, the new DOD Instruction requiring a legal review of

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[306]Bettauer, U.S.L.W.R., *supra* note 10, at 23.

weaponry prior to acquisition and development affords an excellent example. Very simply, a legal review for compliance with existent rules regulating weaponry is made mandatory at the optimal time for the objective application of law, — before vast sums of money have been invested in the research and development of a weapon or weapons system. This allows for the fullest operation of the principle of economy of force implied in the principle of military necessity, and serves to reinforce the operation of the proportionality equation.

Finally, diplomatic efforts towards the adoption of uniform rules of engagement and/or unilateral adoption of the same, together with intensified military training in such rules would offer another viable alternative through which to achieve a more humane battlefield.

In the last analysis, however, man's struggle to restrain or prohibit weaponry on the battlefield by law must never operate to emasculate the capacity of existent criteria regulating weaponry to permit necessary violence in war incident to legitimate military requirements. Similarly, man must never permit any law regulating weaponry to ignore the practices of states, as such practices represent the best evidence of what reasonable men believe to be lawful and necessary weapons in war. Quite simply, until man learns to live with his fellow man in peace and harmony, the right to permissible violence must be preserved if there is to be any expectation of peace or humanity in war under the operation of law.

EVIDENTIARY STANDARDS AND THE RIGHT TO CROSS-EXAMINE WITNESSES IN ADMINISTRATIVE ELIMINATION HEARINGS*

Captain Thomas G. Tracy**

I. INTRODUCTION

In late 1973, the United States Court of Appeals for the Fifth Circuit struck down a municipal ordinance which barred veterans with other than honorable discharges from holding city employment.[1] Such a statute, the court held, was repugnant to the fourteenth amendment's guarantees of due process and equal protection of the laws.

In striking down the ordinance of Plaquemine, Louisiana, the appeals court may have opened the door to veterans of the Vietnam War to get jobs, schooling, and other benefits that have been denied them as a result of an undesirable discharge. The decision, although not particularly startling, is unprecedented; and it would appear to reject the characterization of an individual's discharge from military service as an acceptable basis for arbitrarily refusing him employment—at least by the government.

This judicial viewpoint represents a significant departure from the time-honored conclusion that a soldier should expect to encounter "substantial prejudice" in civilian life if he receives a less than honorable discharge,[2] and perhaps a reevaluation of the inferences society should draw from the nature of a serviceman's dis-

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[1]Thompson v. Gallagher, 489 F.2d 443 (5th Cir. 1973).

[2]Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1 (1973).

charge.[3] For years, it was an accepted fact that the military services would be allowed a free hand in eliminating from their ranks those found to be unamenable to the requirements of military duty and in characterizing their service by the type of discharge awarded. Such "internal" actions by the military were not considered subject to judicial review.[4]

Today, however, the venerable system of eliminating soldiers by administrative action and classifying their discharges as either "good" or "bad" has sailed into rougher waters. Beginning in the early 1960's, congressional concern over the administrative elimination system prompted the issuance of a Department of Defense Directive[5] which added certain important procedural rights for respondents,[6] and constituted a significant change in the direction of the administrative system. But even with this greater degree of protection, attention is still focused on the administrative discharge; and today some federal courts are applying constitutional standards to administrative proceedings.

The increased attention accorded administrative discharges by the federal courts has no doubt been prompted by what some commentators and judges perceive as inherent weaknesses in the system. Critics of the system do not question the military's right to eliminate ineffective personnel, but rather challenge the procedures under which servicemen receive certain types of discharges, and as the Fifth Circuit decision elaborates, the effect the discharge has on a serviceman after he leaves the military.

Criticisms of the Army's administrative discharge system, a system which often stigmatizes an individual by the characterization which it gives his service, can best be analyzed by comparing its evidentary and procedural rules to the standards mandated for civilian proceedings which have the potential for inflicting similar

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[3]"Numerous factors which have absolutely no relationship to one's ability [to work in a given occupation] may lead to other than honorable discharges from the military, including security considerations, sodomy, homosexuality, financial irresponsibility and bed-wetting." 489 F.2d at 449.

[4]In an early decision, Reaves v. Ainsworth, 219 U.S. 296 (1911), the Supreme Court took the position that courts had no power to review administrative discharges. That attitude was changed, however, in Harmon v. Brucker, 355 U.S. 579 (1958), which opened the door for judicial review of the military administrative action.

[5]In January 1966, shortly before the Senate hearings on administrative discharges reopened, the Department of Defense issued Department of Defense Directive 1332.14, dated December 1965, which provided several new procedural protections for the serviceman [hereinafter referred to as DOD Dir. 1332.14].

[6]Besides prohibiting the consideration of certain types of evidence, such as preservice activities, and making the grounds for elimination more specific, the Directive also broadened the rights to a board hearing and to legally trained counsel in connection with the hearing. The Directive also added the requirements for counselling prior to the initiation of any administrative action.

disabilities. Should such a comparison find that the rules governing administrative discharge proceedings afford respondents inadequate protection in view of the potential harm, the particular needs of the military must be analyzed to determine whether they justify such differences. Only by creating such a framework for the analysis and then evaluating the procedures of the Army's administrative elimination system can one adequately assess the legality and fairness of such a system.

II. THE ADMISSIBILITY OF EVIDENCE AT AN ADMINISTRATIVE DISCHARGE PROCEEDING

Generally speaking, judicial rules of evidence do not apply to administrative proceedings. This is also true in the case of the administrative elimination actions for "unfitness" and "unsuitability" whose body of law is contained in Army regulations.[7]

These regulations provide rather broad guidelines for the introduction of evidence at the administrative discharge hearing. The board of officers may consider "any oral or written matter, including hearsay, which in the minds of reasonable men is relevant

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[7]*See* Army Regulations 15-6 (27 Feb. 1975) [hereinafter cited as AR 15-6] and 635-200 (27 Aug. 1975) [hereinafter cited as AR 635-200]. The "unfitness" and "unsuitability" actions are the two primary administrative elimination actions for enlisted men. While it is true that both types of soldiers have characteristics which make them undesirable for further retention on active duty, the "unfit" soldier may be distinguished from his counterpart in that his undesirable characteristics were basically caused through his own intention or design. The "unsuitable" soldier, on the other hand, may be undesirable for any number of reasons, many of which do not amount to intentional wrongdoing. With this distinction in mind, the "unfitness" action has seven grounds for elimination: (1) frequent incidents of a discreditable nature with civil or military authorities, (2) sexual perversion, (3) drug abuse, (4) an established pattern of shirking, (5) an established pattern showing dishonorable failure to pay just debts, (6) an established pattern showing dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents, and (7) homosexuality (limited to active engagement in homosexual acts while in military service). The "unsuitability" action has five grounds for elimination: (1) inaptitude, (2) character and behavior disorders, (3) apathy, (4) alcoholism, and (5) homosexuality (limited to tendencies toward homosexual behavior without actual engagement in homosexual acts while in military service). *See generally* AR 635-200, para. 13-5. If a soldier is found to be "unsuitable" he may be either retained on active duty, or discharged and furnished an honorable or general discharge certificate. If a soldier is found "unfit," on the other hand, he could in addition to the above be furnished an undesirable discharge certificate. Thus the "unfitness" action is the more serious of the two, because the soldier faces the possibility of receiving a less than honorable discharge. *See generally* AR 635-200, para. 13-23.

and material";[8] but whenever possible, the "highest quality of evidence obtainable and available will be considered."[9] In most cases, the admissibility of evidence will be determined by these two standards.

However, the regulations impose other "general constraints" on the use of the administrative discharge action, which may also have the effect of limiting the use of certain types of evidence in special situations, such as those involving pre- and prior service activities and situations raising questions of double jeopardy.

In general, the character of a serviceman's discharge shall be based solely on the member's military record during his current enlistment.[10] So although any convictions or other evidence showing preservice or prior service activities can be considered by the board for the limited purpose of determining whether to discharge the soldier or retain him in service, such evidence cannot be used to arrive at an appropriate characterization of the discharge unless the individual consents. No member will be considered for administrative discharge because of conduct which has been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof.[11] No member will be considered for ad-

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[8]AR 15-6, *supra* note 7, at para. 10. This provision is based upon para. IX(B) of DOD Dir. 1332.14 (Aug. 1969) which states: "The board functions as an administrative rather than a judicial body. Strict rules of evidence need not be observed. However, the chairman may impose reasonable restrictions as to relevancy, competency, and materiality of matters considered."

[9]AR 15-6, *supra* note 7, at para. 9.

[10]AR 635-200, *supra* note 7, at paras. 1-7 & 1-9. The rationale behind these provisions of the regulation is based on the decision in Harmon v. Brucker, 355 U.S. 579 (1958), where the U.S. Supreme Court held that, despite a statutory pattern which confers discretionary authority upon the Secretary of the Army to prescribe the type of certificate to be given upon discharge, a discharge certificate based upon preservice activities of a serviceman is not authorized. This principle was reaffirmed in para. V(B), DOD Dir. 1332.14 (Dec. 1965) by the requirement that prior service and preservice activities not be considered in determining the type of discharge certificate. However, this requirement does not apply to the decision of whether to retain the serviceman or to separate him; in making that decision, military authorities may consider activities antedating the current period of service. *See* para. V(C), DOD Dir. 1332.14 (Dec. 1965). Army regulations also reflect this position in AR 635-200, para. 1-14 which states: "In determining whether a member should be retained or administratively separated the individual's entire record, including records of non-judicial punishment imposed during a prior enlistment or period of service, all records of conviction by court-martial and any other factors which are material and relevant may be considered." This exception substantially diminishes the effectiveness of this provision in the regulation.

[11]If the service member has been tried and found not guilty, this determination is easy. However, determination of whether an action has the effect of an acquittal is more difficult, and will be made solely by Headquarters, Department of the Army. AR 635-200, *supra* note 7, at para. 1-13*a*. The general rule has been that jeopardy attaches only after the evidence has been introduced on the merits of the case. Thus, it has been held that no jeopardy attached where charges were dismissed on the

ministrative discharge because of conduct which has previously been considered by an administrative board which recommended retention of the serviceman,[12] unless a second board action is warranted by "unusual circumstances."[13] No member may be administratively discharged for conduct which was previously considered by a court-martial empowered to adjudge a punitive discharge unless "unusual circumstances" exist in the case, and Headquarters, Department of the Army grants an express exception.[14]

Taken together, these guidelines and general restraints offer the soldier facing administrative elimination, at best, only minimal due process protections. This will become more apparent when the evidentiary guidelines are examined.

Generally, in order for evidence to be relevant, it must have a logical tendency to prove or disprove the alleged acts which would render the soldier either "unfit" or "unsuitable" for further retention on active duty. How does this definition apply to the "scope" of the evidence which may be presented at an administrative hearing? The answer is best illustrated by an actual case. A soldier was recommended for discharge for "character and behavior" disorders, but on a subsequent review of the case, it appeared that a question arose during the original hearing on whether the introduction of certain exhibits concerning housebreaking (for which the respondent was never tried) would be prejudicial to his rights. However, it could not be ascertained from the submitted file

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recommendation of the Article 32 investigating officer, DAJA-AL 1973/3564; where trial was barred by the statute of limitations, JAGA 1964/1517; or where a motion to dismiss for lack of speedy trial was granted by the military judge, DAJA-AL 1970/5046.

[12]AR 635-200, *supra* note 7, at para. 1-13*a*(2). This prohibition resulted from the issuance of DOD Dir. 1332.14 (Dec. 1965), which prohibited a member from being subjected to a second board action for the same conduct, unless there had been legal prejudice to the rights of the respondent. In other words, only if action was taken at the first board which was unfavorable to the respondent; and in the course of that board his rights were substantially prejudiced, could a second board on the same facts be held.

[13]AR 635-200, *supra* note 7, at para. 1-13*b*(3). The "unusual circumstances" exception has been interpreted to apply to the limitations enumerated in paragraph 1-13*a*(1)-(3) of AR 635-200. DAJA-AL 1975/3084, 10 Jan. 1975. This interpretation is in accord with paragraph V(A)7 & 8 of DOD Directive 1332.14 (19 Jan. 1966) and overrules the position taken in DAJA-AL 1973/5082, 8 Nov. 1973, which held the "unusual circumstances" exception to apply only to paragraph 1-13*a*(3) of AR 635-200. This latest opinion reaffirms the position of JAGA 1969/4132, 31 July 1969.

[14]AR 635-200, *supra* note 7, at para. 1-13*a*(3) & *b*(3). Unusual circumstances should be something more than the nature of the member's conduct, DAJA-AL 1972/3805, 30 Mar. 1972. It should be noted, however, that if an express exception is granted by Headquarters, Department of the Army, it would appear that there would be no further prohibition and the board would then be able to consider all the evidence, including that previously considered by the military judge or court members.

whether the exhibits in question were in fact presented to the board. In an opinion by The Judge Advocate General of the Army, the point of relevancy was clearly set out:

> However, the introduction of the exhibits involving housebreaking charges would have prejudiced the rights of the respondent, if they were, in fact, introduced as evidence and considered by the board. Although the file contained sufficient evidence to support the findings and recommendations of the board without the exhibits in question (*i.e.* the housebreaking charges), if the board did consider these exhibits they may have influenced the characterization of discharge recommended. The rules of evidence in administrative proceedings are not rigid, but any evidence submitted must be relevant and material. Allegations of larceny and housebreaking were neither material nor relevant to the question of unsuitability based on alcoholism. Accordingly, if the exhibits were considered, the recommendations of the board must be disapproved to the extent that they provide for less than an honorable discharge.[15]

It would be logical to assume that the requirement of relevancy would limit the introduction of evidence to that relating to the specific grounds for discharge, but as the above opinion indicates, the military position is even more liberal. If the evidence submitted is relevant to the *issue* submitted, then it is relevant and admissible evidence.[16] Under this definition, two or more grounds for discharge need not be specified to allow the introduction of evidence showing several unrelated acts. So in the case of the alcoholic, the evidence of housebreaking is relevant to the issue of "unfitness,"[17] and as such, could not be used in an "unsuitability" action. But nothing would prevent an administrative board, in an "unfitness" action for "drug abuse," for example, from considering other infractions—because both types of evidence would be relevant to the general issue of unfitness.[18]

So in practice, relevancy is not a limiting factor in an administrative discharge action. Besides the liberal viewpoint taken

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[15]JAGA 1967/4739, 11 Jan. 1968. In that case, the soldier had originally received a general discharge.

[16]In an officer elimination action, the question was posed whether the evidence cited for substandard performance of duty (one of the grounds for elimination) could be submitted to a board considering elimination for moral or professional dereliction (another ground for elimination). AR 15-6, para. 10, requires that the evidence submitted must be relevant to the issue presented. The view was expressed in an opinion by The Judge Advocate General of the Army that improper supervision and failure to report for duty on time were relevant to both elimination grounds. JAGA 1968/3589, 20 Mar. 1968, *citing* JAGA 1967/4570, 13 Nov. 1967 & JAGA 1962/3683, 28 Mar. 1962.

[17]Housebreaking would fall within "frequent incidents of a discreditable nature with civil or military authorities" which is one of the grounds for an "unfitness" action. *See* note 7 *supra*.

[18]Both "drug abuse" and "frequent incidents of a discreditable nature with civil or military authorities" are grounds for an unfitness action. *See* note 7 *supra*.

by the military, the two most common grounds for discharge[19] are broad enough to allow the introduction of almost every conceivable type of evidence.

The other general "guideline" requires the administrative board to consider the "highest quality of evidence obtainable and available." In determining what type of evidence should be considered, the regulation lists the following priorities on the quality of evidence: (1) stipulations, (2) views and inspections, (3) sworn testimony by witnesses appearing before the board of officers, (4) depositions taken upon due notice to, and if feasible, in the presence of all parties, (5) affidavits, (6) original or properly identified copies of records and documents, and (7) other writings and exhibits.[20]

In the case of witnesses, there are no fixed distances or other standards which determine availability. The regulation only speaks of a "substantial distance":

> However, in the event a material witness resides or is on duty at a substantial distance from the installation at which the hearing is conducted, his evidence may be obtained by deposition, affidavit, or written statement.[21]

Thus military witnesses who are not a "substantial distance" away from the hearing can be ordered to appear. Determination as to what constitutes "substantial" would rest with the person having the authority to order the appearance. Although the regulation does not mention who this person would be, it can be presumed that it would be either the appointing authority[22] or the president of the administrative board.

This procedure can work to the distinct advantage of the Government. Determination of the materiality and availability of a witness rests with the Government. And if a witness is determined to be either "not material" or located at a substantial distance from the installation, his or her presence is not required at the administrative hearing (even though the witness may be under military control) and testimony could be introduced in the form of an unauthenticated,[23] unsworn,[24] written statement.

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[19]The two most common grounds for discharge are "frequent incidents of a discreditable nature with civil or military authorities" (listed as a ground for an "unfitness" action) and "character and behavior disorders" (listed as a ground for an "unsuitability" action). *See* note 7 *supra*. By definition, it is obvious that both grounds are extremely broad.

[20]AR 15-6, *supra* note 7, at para. 9.

[21]*Id.* at para. 13*b*.

[22]The appointing authority is the commander who has the authority to appoint the board of officers. *See* AR 635-200, *supra* note 7, at para. 13-4*b* & *c*.

[23]In case of documentary evidence, the regulations only require authentication in the case of copies of official records and documents. *See* AR 15-6, *supra* note 7, at para. 13*b*. There is no requirement to authenticate other affidavits or written statements of witnesses.

[24]There is no requirement in the regulations that written statements be sworn to

It should also be noted that the "substantial distance" test only applies to military witnesses. The administrative board has no subpoena powers over civilian witnesses, and can only invite them to appear at the hearing. Therefore, if a witness refuses, the Government must normally accept inferior evidence, usually in the form of a written statement.

Thus the regulations offer no absolute right of confrontation and cross-examination. Whatever right a soldier has to confront and cross-examine adverse witnesses is determined by the quality of evidence presented at his administrative hearing. Even if the soldier is able to overcome the lack of confrontation and cross-examination, which in itself may present a difficult barrier to preparing his defense, he may be faced with several other problems at the hearing. For example, the regulations provide that both the respondent and other witnesses shall be afforded fifth amendment protection against self-incrimination at the hearing;[25] but this protection only extends to testimony presented before the board of officers, and does not apply to prehearing statements.[26] There is also no limitation on the use of evidence obtained as the result of an illegal search or seizure,[27] and hearsay, opinion and conjecture may be freely considered.[28]

III. AN ANALYSIS OF PROCEDURAL DUE PROCESS

Even keeping the distinction between criminal prosecutions and administrative actions clearly in mind, certain of the evidentiary rules which apply to administrative discharge proceedings appear more troublesome than others. The absence of an absolute right for the serviceman to confront and cross-examine all adverse

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before a person authorized to administer oaths. For that matter, the statements do not even have to be notarized.

[25]AR 15-6, *supra* note 7, at para. 13.

[26]Pre-hearing statements are not protected by the fairness concept. JAGA 1969/3370.

[27]The regulations are silent on the treatment of this type of evidence. One of the few courts to hold that such evidence should not be allowed at an administrative hearing was a federal district court in Crawford v. Davis, 249 F. Supp. 943 (E.D. Pa.), *cert. denied*, 393 U.S. 921 (1966). In that case substantial evidence was offered to establish the fact that a search of the plaintiff's desk was effected without probable cause. On those facts, the court held that the product of the search should not have been presented to the board of officers. *Id.* at 949. However, the court refused to apply the "fruit of the poisonous tree" doctrine and hold that the illegality of the original search permeated all subsequent proceedings.

[28]AR 15-6, *supra* note 7, at para. 10 allows the introduction of hearsay. The only apparent limitation placed on conjecture is the general requirement that the findings

witnesses, recognized in criminal proceedings,[29] appears to violate fundamental conceptions of due process of law.[30] It therefore is important to consider whether this right, under current constitutional interpretation, adheres to persons involved in administrative hearings generally, and more particularly to individuals undergoing administrative discharge procedures.

A. DEVELOPING CASE LAW

Since early times, it has been a well established principle that an individual has no constitutionally protected right to government employment[31] or to military status.[32] Because of this, courts were reluctant to interfere with government dismissal actions. However, in a landmark case, the U.S. Supreme Court in *Greene v. McElroy*[33] held that Greene's security clearance should not have been revoked without affording him the right to examine the derogatory information used against him.

Greene was an engineer, employed as manager of a private corporation which was engaged in developing and producing classified goods for the military. He was deprived of his security clearance by procedures which denied him access to much of the information adverse to him, and which afforded him no opportunity to confront and cross-examine witnesses against him. As the result of the loss of his clearance, the corporation discharged him and he was unable to obtain further employment as an aeronautical engineer.

Although the ruling was narrowly applied to the "security" area, the Supreme Court, by way of dicta, implied that traditional rights of confrontation and cross-examination (guaranteed to an accused at a criminal proceeding) should be applied in those situations where government action seriously injures the individual[34] and

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of the board be based substantially on fact and not rumor. However, this does not prevent its introduction per se.

[29]Bruton v. United States, 391 U.S. 123 (1968); Pointer v. Texas, 380 U.S. 400 (1965).

[30]For a general discussion of compliance with procedural due process in administrative hearings, see Smalkin, *Administrative Separations: The Old Order Changeth*, THE ARMY LAWYER, May 1974, at 8.

[31]Bailey v. Richardson, 182 F.2d 46 (D.C. Cir.), *aff'd per curiam*, 341 U.S. 918 (1951).

[32]Reaves v. Ainsworth, 219 U.S. 296, 304 (1911); Beard v. Stahr, 200 F. Supp. 766 (D.D.C. 1961), *vacated per curiam with directions to dismiss as premature*, 370 U.S. 41 (1962); *cf.* Creary v. Weeks, 259 U.S. 336 (1922).

[33]360 U.S. 474 (1959).

[34]*Id.* at 496-97. The Court stated that "[W]here governmental action injures an individual, and the reasonableness of the action depends on fact findings, the

Congress (or the President if he is the sole authority) has not *expressly* legislated to the contrary.[35]

The idea that "injury" must be present is important. In *Cafeteria and Restaurant Workers Union v. McElroy*,[36] a post-*Greene* decision, the Supreme Court held that a short-order cook employed by a concessionaire on a government installation had no due process right to disclosure of the reason for the withdrawal of her security badge, even though such loss resulted in unemployment. However, the two cases are not inconsistent. In the *Cafeteria Workers* case there was no "badge of disloyalty or infamy, with attendant foreclosure from other employment."[37] So unless injury is a factor, due process is not normally required in a dismissal action.

The first court to consider *Greene* in a military situation was the U.S. Court of Appeals for the District of Columbia Circuit. In companion cases,[38] the court narrowly applied the ruling in *Greene* to a similar factual situation involving inactive reservists. In both cases, the reservists, who had received discharges under less than honorable conditions for engaging in subversive conduct while in an inactive status, were denied access to certain classified information that was used against them. The court refused to accord the Secretary of the Navy the right to issue a punitive discharge to an inactive reservist on the basis of secret information merely by fair implication from general statutes or the nature of the military establishment.

Using the rationale of *Greene* as the underlying basis for its decision, the court implied through dicta that traditional due process requirements should be afforded a military respondent in any ad-

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evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show it is untrue." *Id.* at 496. This is obviously the "narrow" part of the ruling. Here, the Court was concerned about the government's failure to show Greene much of the evidence because it was classified. However, the Court went on to say "we have formalized these protections in the requirements of confrontation and cross-examination. . . . not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny" *citing* Southern R. Co. v. Virginia, 290 U.S. 190 (1933); Ohio Bell Telephone v. Public Commission, 301 U.S. 292 (1937); Morgan v. United States, 304 U.S. 1 (1938); Carter v. Kubler, 320 U.S. 243 (1943); Reilly v. Pinkus, 338 U.S. 269 (1949).

[35]360 U.S. at 500-07. The decision implies that where traditional rights should be afforded the respondent in a specific action, denial of these rights must be explicitly spelled out, *i.e.*, ". . . they must be made explicitly to assure that individuals are not deprived of cherished rights under procedures not actually authorized." 360 U.S. at 507. *See also* Peters v. Hobby, 349 U.S. 331 (1955).

[36]367 U.S. 886 (1961).

[37]*Id.* at 898.

[38]Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961); Davis v. Stahr, 293 F.2d 860 (D.C. Cir. 1961). Both cases were decided on June 15, 1961.

ministrative action which could result in the issuance of an undesirable discharge:

> [I]t must be conceded that any discharge characterized as less than honorable will result in serious injury. . . .[W]e seriously doubt that the Constitution would condone the infliction of such injury, in the service of an interest so relatively weak, without the protection of the right of confrontation.[39]

In *Greene*, the U.S. Supreme Court was primarily concerned with the disruption of Greene's employment process and his inability to obtain further employment. Thus, it was the establishment of actual damages to Greene himself that formed a basis for its opinion. The appeals court, on the other hand, appeared to be more concerned with the *entire system* which could result in the issuance of a derogatory discharge.[40] In this respect, the decisions seem to go beyond the holding in *Greene* by questioning the Navy's right to "punish or label"[41] individuals, rather than the effect of a procedure on a particular appellant.[42]

The question of the applicability of *Greene* with respect to military discharge proceedings did not reach the Supreme Court until May 1962. In *Beard v. Stahr*,[43] a board of inquiry and the board of review had recommended that the petitioner be administratively dismissed and furnished a general discharge certificate.[44] However, before the final determination was made, the

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[39]293 F.2d at 858.

[40]The appeals court did not question the procedures followed for elimination and issuance of a non derogatory discharge. "What is challenged is the right of the service to introduce the element of punishment or 'labeling' into the involuntary separation, by characterizing the discharge derogatorily." *Id.* at 858. The court distinguished the facts in *Bailey v. Richardson* and *Greene v. McElroy* where the chief injury lay in the disruption of the employment relationship. "Unlike the above, this case presents a situation in which the Government can effect separation without injury to the person discharged." *Id.*

[41]293 F.2d at 858.

[42]In an "unfitness" action, the respondent can be discharged with a less than honorable discharge. But the board has other options available to it. It can either retain the serviceman on active duty or discharge him with a general or honorable discharge. Applying the *Greene* rationale, the serviceman would have to show actual receipt of a less than honorable discharge in order to have standing to argue that due process rights were denied him. However, the appeals court seems more inclined to require due process at any "unfitness" action because of the serviceman's possibility of receiving a less than honorable discharge. Practically speaking, there is no real difference. The District of Columbia Circuit normally requires the military petitioner to "exhaust his administrative remedies" before seeking relief from the court. Sohm v. Fowler, 365 F.2d 915 (D.C. Cir. 1966). Therefore, the serviceman would have had to have received a discharge and have exhausted his administrative remedies before the court would entertain the petition.

[43]370 U.S. 41 (1962)

[44]In a case involving an officer, field boards have no power to discharge the individual. The board of inquiry considers the evidence and makes recommendations

officer petitioned the court to enjoin the Secretary from determining that he should be removed. He contended that the proceedings were unconstitutional because they deprived him of office and retirement benefits without due process of law.

A divided court held that the action was premature and dismissed it on procedural grounds, thus leaving the constitutional question unanswered.[45] But the dissenting views of Justices Black and Douglas are noteworthy. Feeling that the case was ripe for review,[46] both Justices would have applied *Greene* to the military situation[47] because of the "stigmatic" effect of a less than honorable discharge.[48]

The rationale of the minority becomes confusing on this point. Common military usage of the term "less than honorable" discharge implies an undesirable discharge. But in the *Beard* case, the officer was contesting receipt of a general discharge, which is normally considered to be under honorable conditions. Interpreting the rationale in light of the factual situation leads to the conclusion that the minority were referring to any discharge other than honorable per se. If this conclusion is true, then the dissenting opinion has been the most liberal interpretation of *Greene* to date.

Reluctance by the majority of the Court to rule on the constitutional issue in *Beard* did not seem to undermine the general rationale of *Greene* with respect to administrative discharges, but

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to the Service Secretary. The file is reviewed by the board of review before the Secretary takes any action on the case.

[45]The Court reasoned that because the Secretary had not made an actual determination, there was no actual damage to the petitioner. And even if such a determination had been made, the petitioner had certain appellate procedures available to him. Thus the Court applied the "ripeness" and "exhaustion of administrative remedies" doctrines to skirt the constitutional issue.

[46]"If declaratory relief will be accorded [*citing* Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1951)] this action for an injunction is timely to prevent an injustice." 370 U.S. at 43.

[47] Confrontation and cross-examination rights are vital when one's employment rights are involved [*citing Green v. McElroy*]. . . . Faceless informers are often effective if they need not take the stand. A fair hearing requires the production of the accuser so that cross-examination can test his character and reliability

Id. A year later, in Williams v. Zuckert, 371 U.S. 531 (1963), the petitioner was held to have lost his confrontation and cross-examination rights by waiting too long to call witnesses for cross-examination. Again, Justices Black and Douglas dissented, stating that they would hold that there is a constitutional right of cross-examination because of the "stigma" of a less than honorable discharge.

[48] We think that it must be conceded that *any* discharge characterized as less than honorable will result in serious injury. It not only means the loss of numerous benefits in both the federal and state systems, but it also results in an unmistakable social stigma which limits the opportunities for both public and private employment.

370 U.S. at 44, *quoting* Bland v. Connally, 293 F.2d 852, 858 (D.C. Cir. 1961).

the lack of clear guidelines has caused a diversity of opinion in the lower federal courts. In 1961, the U.S. Court of Appeals for the Fourth Circuit considered the issue in *Reed v. Franke.*[49] In that case, Reed had been eliminated from the service for unsuitability because of alcohol problems, and he challenged the discharge on the ground that his due process rights had been violated. Relying on the ruling in *Greene,* Reed argued that the regulations governing administrative discharges, which do not provide for full due process rights, were not valid without the *express* authority of either the President or Congress.

After considering the issue, the court held that *Greene* did not apply because Congress had impliedly approved the lack of due process features by establishing an adequate appellate procedure.[50] In its decision, the court stated:

> A fact finding hearing prior to discharge is one way to protect plaintiff's rights, but it is not the only means of protection, and Congress has provided other ways of preventing injustices and correcting errors in connection with military discharges. By statute, Reed is provided an opportunity to avoid the injury he claims he will suffer when the discharge becomes effective.[51]

In reaching this decision, the court avoided the constitutional issue,[52] and seemed to disregard the constitutional implications of *Greene.* In this respect, the rationale of the appeals court seems faulty. Despite *Greene*'s intimation that due process rights are triggered at the moment the "injury" occurs (*i.e.*, in a military situation, when a person receives a derogatory discharge), the court of appeals indicated that due process will be satisfied if an actual "injury" can subsequently be corrected by administrative proceedings. The court could have easily avoided its difficulty in reconciling its decision with *Greene* by dismissing the action on procedural grounds. Since Reed's case had not yet been reviewed, the court could have dismissed the action as "premature," relying on the "exhaustion of administrative remedies" doctrine. This position has been taken by the U.S. Courts of Appeals for the Third,[53]

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[49]298 F.2d 17 (4th Cir. 1961).

[50]"We do not find *Greene* controlling here." *Id.* at 26.

[51]*Id.* at 27.

[52]"[W]e follow the accepted judicial practice of avoiding the resolution of constitutional issues where an alternative ground for disposing of the case is present." *Id.*

[53]In Nelson v. Miller, 373 F.2d 474 (3d Cir. 1967), an electrician's mate sought an injunction to restrain the Navy from discharging him for homosexuality. Although he received an honorable discharge, there was considerable testimony to the effect that he would receive substantial prejudice because of the homosexual taint, even though the discharge was honorable. The court found that since it was honorable, damage to Nelson was minimized. The fact that Nelson was not "stigmatized" by a less than

Fifth,[54] and Tenth Circuits.[55]

In 1967, the U.S. Court of Appeals for the District of Columbia Circuit took a different approach. In *Brown v. Gamage*,[56] an Air Force officer who had been discharged from active duty for falsifying official weather reports challenged his separation on the ground that he had been denied the opportunity to confront and cross-examine adverse witnesses. The court ruled that sixth amendment rights of confrontation and cross-examination did not apply to administrative proceedings, since by specific language, they applied "in all criminal proceedings," and then reversed the district court's ruling that the lack of confrontation and cross-examination had denied Gamage a "fair hearing." The facts revealed that his removal from the service was based in part on affidavits from four former servicemen who stated that Gamage had ordered them to falsify certain weather reports.

At first glance, the decision appears to be markedly inconsistent with the court's earlier ruling in *Bland*.[57] But it should be pointed out that Gamage received an honorable discharge, which would not create the "stigma" that concerned the court in the earlier case. Therefore, the decision does not seem to overrule the court's earlier view that due process requirements should apply where a serviceman could receive a less than honorable discharge.

Two other courts, the Second Circuit and the Court of Claims have followed this viewpoint, and have implied that *Greene*'s logic would apply when the "stigma" of an undesirable discharge is involved.

The Second Circuit in *Birnbaum v. Trussel*[58] held that a sufficient "injury to a public employee" existed to require due process protections where a physician was discharged for alleged anti-Negro bias. The court, citing *Greene v. McElroy*, stated that "whenever there is a substantial interest, other than employment

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honorable discharge could have had a bearing on the court's ultimate decision, but invocation of the "failure to exhaust administrative remedies" doctrine becomes clear where the court states that "constitutional inquiry into these matters may be made unnecessary by answers at a military level." 373 F.2d at 480.

[54]McCurdy v. Zuckert, 359 F.2d 491 (5th Cir.), *cert. denied*, 385 U.S. 903 (1966); Standford v. United States, 413 F.2d 1048 (5th Cir. 1969); Tuggle v. Brown, 362 F.2d 801 (5th Cir.), *cert. denied*, 385 U.S. 941 (1966).

[55]Bard v. Seamons, 507 F.2d 765 (10th Cir. 1975).

[56]377 F.2d 154 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 858 (1968).

[57]In the earlier case, the D.C. Circuit stated: "[W]e seriously doubt that the Constitution would condone the infliction of such injury in the service of an interest so relatively weak, without the protection of the right of confrontation." Bland v. Connally, 293 F.2d 852, 858 (D.C. Cir. 1961).

[58]371 F.2d 672 (2d Cir. 1966).

by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds exist."[59] The court then noted that most of the cases had involved security classifications and accusations of disloyalty, however, "the principle announced is applicable . . . because the potential injury to the public employee is similar."[60]

The Court of Claims has broadly read *Greene* as providing that the Government

> cannot, without permitting cross-examination and confrontation of adverse witnesses, take detrimental action against a person's substantial interests on loyalty or security grounds—unless, at the least, Congress [or the President] has expressly authorized the lesser procedure.[61]

In *Garrott* a postal employee who was being removed on the basis of certain allegations concerning his loyalty to the United States waived appearance at the board hearing. When he later applied for his annuity at age 62 (he had accumulated enough time for an annuity at the time of his dismissal) it was denied on the grounds that he had either given false information or had concealed material facts with respect to his association with subversive organizations and activities at the time of his employment. The court awarded the plaintiff summary judgment, entitling him to his annuity.

Then in *Conn v. United States*,[62] the court discussed the stigma attached to a less than honorable discharge. Conn was discharged from the Marines with an undesirable discharge as the result of an accident in Haiti, where a pedestrian was killed. At his administrative hearing, only the *ex parte* statement of the investigating officer, containing the unsworn statements of witnesses, was considered. The court noted that

> to the public generally, a less-than-honorable discharge carries the damaging implication that an individual has been declared unfit for retention in the Armed Forces . . . . [T]o the individual himself . . . [it] constitutes a blemish which will forever attach to his record of performance.[63]

The court then added: "All of this demands that judicial review focus with scrupulous care upon severance from the armed services

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[59] *Id.* at 678.

[60] *Id.* at 678-79. Applying this principle to the military administrative discharge system might be more difficult though. The appellate court has required a military petitioner to exhaust his administrative remedies before seeking relief from the federal courts. *See* Michaelson v. Herren, 242 F.2d 693 (2d Cir. 1957).

[61] Garrott v. United States, 340 F.2d 615, 618 (Ct. Cl. 1965).

[62] 376 F.2d 878 (Ct. Cl. 1966).

[63] *Id.* at 881.

with a less-than-honorable administrative discharge . . . [T]he fundamentals comprising due process must be honored both in letter and spirit."[64]

The U.S. Court of Appeals for the Ninth Circuit, on the other hand, has adopted the more restrictive "fundamental fairness" concept in applying *Greene* to the military situation. In *Grimm v. Brown*,[65] the appellate court upheld a lower court's determination that the officer involved was denied a "fair and impartial" hearing.[66] Grimm's administrative discharge was based substantially on an *ex parte* report of investigation, conducted by the Air Force's Office of Security Investigation, which concluded that he had breached security regulations by discussing classified information with unauthorized personnel. At the hearing, he was neither provided a copy of the investigation nor informed of the source of information it contained. In declaring the proceedings a nullity, the district court elaborated on the principles of fundamental fairness:

> In administrative hearings, the primary concern of the courts has been to guarantee the element of *fairness* which is involved in a full disclosure of charges and adverse statements with the identification of the sources, so that the accused may effectively prepare an adequate defense.[67]

The doctrine of "fundamental fairness" can be traced back to the Supreme Court's decision in *Burns v. Wilson*,[68] where the Court held that the due process clause of the fifth amendment protects military personnel from "crude injustices" and "lack of rudimentary fairness" in courts-martial proceedings. Since then, the doctrine has been applied by some federal courts to the administrative area.[69]

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[64] *Id.*

[65] 449 F.2d 654 (9th Cir. 1971). The appellate court reaffirmed this principle in Denton v. Secretary of the Air Force, 483 F.2d 21 (9th Cir. 1973). In that case, one finding of the board was based entirely on the *ex parte* statement of a witness (Wyse). The court stated: "[I]f the finding stood alone, we might reverse because Denton had no chance to cross-examine Wyse [*citing Greene*]." 483 F.2d at 28.

[66] The lower court's decision is reported at 291 F. Supp. 1011 (N.D. Cal. 1968).

[67] *Id.* at 1014 (emphasis added). The court cited *Greene v. McElroy* and *Brown v. Gamage* for this proposition.

[68] 346 U.S. 137 (1953).

[69] The "fundamental fairness" doctrine is best illustrated by the district court's opinion in Gamage v. Zuckert, Civil No. 1124-64 (D.D.C., Nov. 9, 1965). Judge Holtzoff held that the requirements of a "fair hearing" barred the use in evidence of *ex parte* accusatory statements of witnesses who are not produced to testify orally or by deposition. The statute under which the separation had been initiated required a "fair and impartial hearing" (10 U.S.C. § 8782 (b) (1964)), and the court concluded that confrontation of witnesses is a vital part of a "fair hearing." But note that this

Rights afforded to servicemen under this doctrine however, appear to be more restricted than the broad rights of confrontation and cross-examination implied by *Greene*. In most cases where the respondent was denied a "fair and impartial" hearing, the Government either considered "secret" evidence which was not furnished to the serviceman,[70] or affidavits of witnesses who could have been present at the board hearing.[71] Therefore, the doctrine of "fundamental fairness" does not propose to guarantee an *absolute* right of confrontation and cross-examination of witnesses, even if the government action could seriously injure the individual. It appears to be limited to those situations where the Government could either turn over the documentary evidence or require the presence of the witness at the board hearing.[72]

Case law in the early 1960's led earlier writers to conclude that the federal courts were shifting away from the general concept of "fundamental fairness" to the more specific constitutional provisions.[73] However, it now appears that the doctrine of "fundamental fairness" is the rationale most used by the courts in granting equitable relief to the military petitioner, and will play a significant role in future administrative law decisions. Today, the main proponents of this doctrine appear to be the U.S. Court of Appeals for the Ninth Circuit and perhaps the U.S. Court of Claims.[74]

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holding was not accepted by the U.S. Court of Appeals for the District of Columbia Circuit, and that court overruled the decision in *Brown v. Gamage*.

[70]Grimm v. Brown, 449 F.2d 654 (9th Cir. 1971). *See also* Glidden v. United States, 185 Ct. Cl. 515 (1968) (undesirable discharge for fellatio). In *Glidden* the respondent was fortunate enough to get a summary of the investigative report.

[71]In Cason v. United States, 471 F.2d 1225 (Ct. Cl. 1973), the petitioner alleged procedural mishandling and noncompliance with regulations in effecting his discharge. At the hearing, the only evidence presented by the Navy and considered by the board consisted of uncorroborated written statements of his accusers who were not made available for cross-examination, despite their presence in the local area on active duty, and the introduction of a transcription of a tape recording, although the respondent demanded that the complete tape be produced. The court held that the Navy violated its own regulations (*see* 32 C.F.R. § 730.15 (1962)) which gave the respondent at an administrative hearing the right to examine all witnesses.

[72]"Fundamental fairness" apparently would not bar the use of an affidavit containing the testimony of a witness who could not be produced to testify at the hearing. This would be the main difference between an absolute right of confrontation and cross-examination and the somewhat "limited" right under the "fundamental fairness" doctrine.

[73]*See, e.g.*, Lane, *Evidence and the Administrative Discharge Board*, 55 MIL. L. REV. 95, 113 (1972).

[74]In examining *Cason v. United States*, *Glidden v. United States*, and Clackum v. United States, 148 Ct. Cl. 404 (1960) (discharge for homosexualty) one must dis-

The most conservative position taken by an appellate court has been in the Sixth Circuit. In *Crowe v. Clifford*,[75] a Captain petitioned the court after receiving a less than honorable discharge for alcohol abuse. In reaching its decision, the court held that rights of confrontation and cross-examination were not applicable to administrative proceedings.

> And appellant's suggestions that these procedures do not comport with federal constitutional provisions requiring confrontation of witnesses, and federal court rulings strictly limiting the admissibility of hearsay evidence miss the point that these principles which govern criminal trials are not applicable to administrative discharge proceedings of the nature of the present case.[76]

The appeals court missed the point, however, when it cited *Brown v. Gamage* as controlling authority for the above proposition. An analysis of that decision reveals that Gamage had received an honorable discharge and was entitled to his retirement pay; and the decision to be based upon the fact that no "stigma" had attached to Gamage's separation. In a situation involving a less than honorable discharge (such as Crowe received), the D.C. Circuit would be more inclined to require full due process.[77] Also, in limiting itself to the provisions of the sixth amendment, the U.S. Court of Appeals for the Sixth Circuit seems to have ignored the broader application of due process rights under the fifth amendment which were outlined by the Supreme Court in *Greene*.

Analysis of these appellate decisions cannot dissolve the confusion or propose any controlling axioms of administrative law with respect to discharge proceedings. One unescapable but unfortunate conclusion is that the quantum of equity, or lack thereof, provided a petitioner depends upon the judicial forum or circuit in which he brings suit. For example, soldiers stationed in certain judicial circuits could expect to fare much better than servicemen in the Sixth Circuit, should they choose to petition the federal courts for review.

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tinguish between government conduct in violation of constitutional rights and government conduct which violates fairness. At least one writer has concluded that the latter would be more prevalent in these cases. *See* Lane, *supra* note 73. The court's language in the *Conn* case strongly indicates that the U.S. Court of Claims could require full due process rights in cases where the serviceman receives a less than honorable discharge. *See* note 67 *supra*. Therefore, it is difficult to judge whether the U.S. Court of Claims has adopted the "fundamental fairness" concept, or would require full due process. For a recent case not related to the issue of confrontation and cross-examination, but involving a "stigmatic" discharge, *see* Carter v. United States, 509 F.2d 1150 (Ct. Cl. 1975).

[75] 455 F.2d 945 (6th Cir. 1972).

[76] *Id.* at 947.

[77] *See* note 57.

To make matters worse, there are also varying procedural requirements, ranging from full exhaustion of administration remedies[78] to perhaps no exhausiton requirement at all.[79]

In light of this, national standards would certainly be desirable. But even assuming that such standards could be established, one central question still remains. Should a military respondent be entitled to an absolute right of confrontation and cross-examination of government witnesses?

B. ARGUMENT FOR FULL DUE PROCESS

Despite the fact that the reluctance of the Supreme Court to decide the issue has caused a diversity of opinion in the lower federal courts, there is still a logical argument that full due process should be applied to the administrative proceeding, assuming that civilian standards can be applied to the military situation.

Past decisions support the inference that the courts will "balance" the respective interests whenever the governmental interest in a summary-type administrative adjudication clashes with the respondent's interest in avoiding resultant "injury."[80] In this balancing process, however, the extent of such "injury" to the individual appears to be the most important factor in determining both "standing" to seek judicial relief, and ultimately the extent to which due process should be applied.[81] It is also clear from the decisions that if the administrative action involves an adjudication of fact, one of these due process considerations is the right of confrontation and cross-examination of witnesses.[82]

In applying this "balancing" test to civilian cases, the Supreme Court has held that confrontation and cross-examination should be afforded where there is a quasi-criminal adjudication,[83] or where

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[78]*See* Standford v. United States, 413 F.2d 1048 (5th Cir. 1969); Tuggle v. Brown, 362 F.2d 801 (5th Cir.), *cert. denied*, 385 U.S. 941 (1966); McCurdy v. Zuckert, 359 F.2d 491 (5th Cir.), *cert. denied*, 385 U.S. 903 (1966); Michaelson v. Herren, 242 F.2d 693 (2d Cir. 1957); Marshall v. Wyman, 132 F. Supp. 169 (N.D. Cal. 1955).

[79]Ogden v. Zuckert, 298 F.2d 312 (D.C. Cir. 1961).

[80]The balancing test is clearly formulated in Goldberg v. Kelly, 379 U.S. 254 (1970). *Accord, Cafeteria & Restaurant Workers Union v. McElroy* where the Court stated: "Consideration of what procedures due process may require must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the government action." 367 U.S. at 895.

[81]Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951).

[82]Greene v. McElroy, 360 U.S. 474 (1959). *Cf.* Willner v. Committee on Character & Fitness, 373 U.S. 96, 103-04 (1963); ICC v. Lousiville & N.R. Co., 227 U.S. 88, 93-94 (1913).

[83]Jenkins v. McKeithen, 395 U.S. 411 (1969) (labor-management investigations to determine whether criminal activity had taken place).

the action could either substantially deprive an individual of the opportunity to seek employment in his chosen field[84] or to receive statutory benefits which he would otherwise be entitled to receive under public law.[85]

In the military situation, it is easy to visualize an administrative board acting as a quasi-criminal adjudicatory body. Certain grounds for discharge can also constitute criminal conduct. For example, homosexuality and sexual perversion, both grounds for administrative discharge,[86] are considered crimes in many state jurisdictions. And certainly, early release from the service will deprive an individual of statutory benefits which would otherwise be available to him under public law. But perhaps the most viable argument is the alleged "stigmatic" effect of a less than honorable discharge, which invariable impedes the opportunity to gain any worthwhile civilian employment.[87] In view of these facts, the "injury" criterion seems to be satisfied.

C. BALANCING OF INTERESTS: THE DOCTRINE OF MILITARY NECESSITY

However, in order to achieve a proper "balancing" effect, the interest of the Government must also be examined. Just as minimal due process cannot adequately serve the needs of the individual soldier, full due process cannot adequately serve the needs of the military.

The most serious flaw would be the effect of depriving the military, in certain situations, of the ability to eliminate people unsuited to its needs. For example, a situation could arise where a soldier has dishonorably refused to pay his just debts. If evidence of this fact were totally based upon written communication with out of state businesses, then the requirement of full confrontation and cross-examination could seriously impede the elimination process.

Other problems are also attendant upon incorporating full due process into administrative proceedings. In many cases, such a procedure would be counterproductive because of the substantial increase in the processing time. This would have the effect of destroying the concept of an easy elimination process, which is a fundamental military necessity. From the military's point of view,

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[84] *See* cases cited note 82 *supra*.

[85] Goldberg v. Kelly, 379 U.S. 254 (1970); *accord*, Sherbert v. Verner, 374 U.S. 398 (1963) (disqualification for unemployment compensation); Speiser v. Randall, 357 U.S. 513 (1958) (denial of tax exemption).

[86] *See* note 7 *supra*.

[87] *See* Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1 (1973).

an administrative proceeding should be completed as fast as possible. Aside from tying up administrative resources, a long administrative proceeding is not fair to the individual concerned. Another unfavorable side effect could be the overloading of an already crowded judicial docket. As requirements for administrative discharges become more stringent, commanders might become more inclined to look to courts-martial as a possible remedy.

The above examples are by no means comprehensive. But they serve to form a basis for the traditional military argument for a relatively easy process to facilitate the discharge of undesirable members. However, such an argument, in and of itself, has little substantive merit. An easier method of elimination could be achieved by ceasing to characterize discharges. If no real "injury" occurs, due process is not required in a governmental dismissal action.[88] And with the "all volunteer" concept currently in effect, the classification of discharges is the least necessary feature of the administrative system, and could be eliminated without irreparable harm to the military. But as one writer states, the military is not likely to change the present method of characterizing discharges: "It currently appears that, as a matter of policy, the Department of Defense will adhere to published guidelines calling for, and defining the parameters of, discharge characterization for the foreseeable future."[89]

Thus the issue turns to the argument for retaining the less than honorable discharge. The main reason appears to be the need to maintain high standards and discipline in the armed forces. This need for discipline constitutes the basic foundation for the doctrine of "military necessity" which has traditionally relaxed due process requirements in the military area. The doctrine evolved from the Supreme Court decision in *Orloff v. Willoughby*[90] which stands for the proposition that curtailment of personal freedoms in the military would not be unconstitutional if justified by military reasons: "The military has always occupied a special position and courts have been reluctant to interfere or take over the job of 'running the Army.'"[91] Consequently, the military is allowed a certain latitude and discretion in order to properly train and discipline its members.[92]

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[88]Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

[89]Smalkin, *supra* note 30, at 8.

[90]345 U.S. 83 (1953).

[91]*Id.* at 93; *accord,* Robinson v. Rand, 340 F. Supp. 37, 38 (D. Colo. 1972).

[92]Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972); Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971); Raderman v. Kaine, 411 F.2d 1102 (2d Cir.), *cert. dismissed,* 396 U.S. 978 (1969)

Although the military may occupy a "special position," the doctrine of "military necessity" is not unique, because it can be compared to similar situations where a conflict between governmental and private interests may exist. In all these cases, it is clear that the courts have applied a "balancing" test comparing the interests of the Government and the private rights of the individual.

But the question of what standard should be applied in balancing these respective interests is less clear. In recent years, the Supreme Court has applied a two-tier test in determining whether a certain legislative classification has violated constitutional rights.[93] The "strict scrutiny" test has been applied when either private rights are classified as "fundamental"[94] or the classification is predicated upon certain "suspect" classifications such as race, alienage or national heritage.[95] Under this test, the burden is on the Government to demonstrate that the classification is necessary to promote a "compelling governmental interest"[96] and that there is no reasonable way to achieve the goals with a lesser burden on the constitutionally protected activity.[97]

If neither a "fundamental" right nor a "suspect" classification is involved, the statute or regulation is presumptively valid, and will not be disturbed unless it bears no reasonable relation to a valid governmental interest.[98] This latter standard has been referred to as the "rational relationship" test, *i.e.*, there must be a "rational" basis for the regulations.

Herein lies the crux of the problem. If the "strict scrutiny" test were applied to the administrative discharge area, the regulations would obviously fail to meet constitutional standards; whereas it would not be difficult to establish a rational basis for the administrative action under the "rational relationship" test. Unfortunately, recent writers have only casually referred to this difficult question. Smalkin, for example, recognizes that judicial change may take place in the future, but he does not speculate on the nature or reasons for such change.

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[93]This test is most frequently used in situations involving "equal protection"; however, it has also been applied in the "due process" area. *See* Frontiero v. Richardson, 411 U.S. 677 (1973). Even though the test was applied in *Frontiero*, a question still remains whether the variable standards employed in reviewing violations of the equal protection clause will be read into the due process clause in all situations. *See* Vlandis v. Kline, 412 U.S. 441 (1973).

[94]Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote).

[95]Loving v. Virginia, 388 U.S. 1 (1967) (race); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Hernandez v. Texas, 347 U.S. 475 (1954) (national origin).

[96]Shapiro v. Thompson, 394 U.S. 618 (1969).

[97]Dunn v. Blumstein, 404 U.S. 330 (1972).

[98]McGowen v. Maryland, 366 U.S. 420 (1961).

> Although the "balancing test" in *Goldberg* provides a basis for argument that the individual's interest in a hearing is outweighed by the Government's interest in speedy separation of individuals without the tremendous costs in time, personnel and paperwork attendant upon furnishing a hearing in these traditionally discretionary cases, it is noted that in the *Goldberg* case itself, the Court held that a state's interest in conserving similar resources must give way to the individual's interest in receiving procedural due process protection. The next few years will tell us with certainty what the answer to these questions must be. If the courts do not first invade this heretofore sacrosanct area, Congress may well act sua sponte in enacting some broad reforms in the entire panoply of administrative discharge procedures.[99]

Lunding, on the other hand, was specific in concluding that full due process rights should be afforded military respondents at administrative hearings. However, he did not provide a rational basis for his conclusion. In his article, he spoke of the balancing of respective interests:

> The services' interests in effecting speedy discharges and in providing performance incentives and disincentives must be balanced against individual interests if a proper standard of due process is to be formulated. Giving due consideration to military interests need not prevent a court from striking a balance which allows confrontation and cross-examination of witnesses by the dischargee. Courts have deemed important government interests insufficient to preclude the right of confrontation in other contexts [*citing Goldberg*]. And significantly, in the specific context of administrative discharges, some courts have required that proceedings conform to normal due process standards, despite clear countervailing military interests.[100]

In support of his position, Lunding relies upon three decisions of the Court of Claims—*Clackum v. United States*,[101] *Middleton v. United States*,[102] and *Cole v. United States*.[103] However, all three cases focused upon specific facts rather than the broad constitutional question of whether due process should be afforded a respondent at an administrative hearing. In *Clackum*, an Air Force enlisted woman had received an undesirable discharge which was based upon a confidential investigative report. In voiding the discharge, the court was more concerned with the narrow concept of "fundamental fairness" than the broad constitutional rights under

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[99]Smalkin, *supra* note 30, at 9.

[100]Lunding, *Judicial Review of Military Administrative Discharges*, 83 YALE L.J. 33, 53 (1973).

[101]148 Ct. Cl. 404 (1960). The Court of Claims has consistently applied the "fundamental fairness" doctrine when the military could have called the witnesses but chose not to do so. *See also* Glidden v. United States, 185 Ct. Cl. 515 (1968); Cason v. United States, 471 F.2d 1225 (Ct. Cl. 1973).

[102]170 Ct. Cl. 36 (1965).

[103]171 Ct. Cl. 178 (1965).

the fifth or sixth amendments.[104] The other two cases focused upon specific practices on the part of the military rather than constitutional deficiencies in the regulations. In *Middleton,* an Air Force enlisted man resigned for the good of the service after being threatened with court-martial, and *Cole* dealt with the problem of command influence. So although the cases dealt with certain problems which could arise at an administrative hearing, they certainly do not stand for the general proposition that due process should be afforded at *every* administrative hearing.

It is clear that the requirements of the armed services do not override individual rights in every situation. In *Frontiero v. Richardson,*[105] the Supreme Court considered the question of the right of a female member to claim her spouse as a dependent for the purpose of obtaining increased quarters allowance and medical and dental benefits, which if provided, would place her on an equal footing with male members. Four members of the Court applied the "strict scrutiny"[106] test because the classifications were based on sex, and as such were "inherently suspect"; while four other members[107] grounded their opinions on *Reed v. Reed.*[108] But would the test be similarly applied if individual rights were classified as "fundamental"? In the recent "hair cases," the "rational relationship" test was applied by all courts considering the issue, although there was a split of opinion on whether such regulations had a legitimate or rational military basis.[109] However, it is interesting to note from these decisions that the right to wear one's hair at a chosen length (or a wig) was referred to as a "lesser" constitutional right. Does this classification of rights imply that courts may be willing to apply a higher standard if the right is classified as "fundamental"? In 1974, the U.S. District Court for the District

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[104]The difference between "fundamental fairness" and full protection under the fifth or sixth amendments was clearly spelled out by the court in Grant v. United States, 162 Ct. Cl. 600, 608 (1963), where the court stated: "[S]afeguards of the Fifth and Sixth Amendments do not come into the picture in an administrative discharge hearing."

[105]411 U.S. 677 (1973).

[106]"And when we enter the realm of *strict judicial scrutiny* there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality."

[107]Justices Stewart (concurring in the judgment), 411 U.S. at 691; and Powell (concurring in the judgment), with whom Blackmun and the Chief Justice joined. *Id.*

[108]404 U.S. 71 (1971).

[109]The Second, Fifth, Seventh, and Ninth Circuits found a rational basis, whereas the First Circuit did not. Raderman v. Kaine, 411 F.2d 1102 (2d Cir.), *cert. dismissed,* 396 U.S. 978 (1969); Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972); Anderson v. Laird, 437 F.2d 912 (7th Cir. 1971); Agrati v. Laird, 440 F.2d 683 (9th Cir. 1971). *But see* Friedman v. Froehlke, 470 F.2d 1351 (1st Cir. 1972).

of Columbia did classify the "right to privacy" as a "fundamental" right. In *Committee for GI Rights v. Callaway*,[110] the court applied what appears to be a "strict scrutiny" test in declaring certain regulations unconstitutional:

> The doctrine of military necessity does not embrace everything the military may consider desirable. One does not automatically forfeit the protections of the Constitution when he enters military service . . . . The constitutional rights of a GI, including his privacy, may not be infringed except to the extent that the military can demonstrate by concrete proof *urgent necessity* to act unconstitutionally in order to preserve a *significant* aspect of discipline or morale.[111]

On appeal, the District of Columbia Circuit Court of Appeals reversed the district court and validated the drug inspections, holding them to be "reasonable."[112] This characterization would seem to indicate that actions taken to protect military "readiness and efficiency"[113] must be justified by a "reasonable relationship" to the end desired rather than by the more arduous "strict scrutiny" standards. Whether the same test would be utilized with respect to the characterization given an administrative discharge is open to question.

The standard to be applied is dependent upon the nature of the individual right in question and upon the nature of the governmental interest in question. If the right is considered of "lesser" constitutional stature, such as found in the "hair length" cases, the "rational relationship" test will probably be applied in balancing the respective interests. On the other hand, if it rises to the level of a "fundamental" right, a higher standard could be applied by the courts. Of course the correct standard to be applied is not unrelated to the governmental interest involved.[114] For example, the government's interest in directly preserving military readiness and effectiveness should be viewed as more important than stigmatizing individuals it has eliminated from the armed forces[115] or its need to conserve administrative resources.[116]

Where does the right of confrontation and cross-examination fall within this spectrum of individual rights and governmental interests? *Greene v. McElroy* is generally acknowledged to be the

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[110]370 F. Supp. 934 (D.D.C. 1974).

[111]*Id.* at 940 (emphasis added).

[112]518 F. 2d 466 (D.C. Cir. 1975).

[113]*Id.* at 477.

[114]*Cf. Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1120 (1969).

[115]*See* Bland v. Connally, 298 F.2d 852, 858 (D.C. Cir. 1961).

[116]Frontiero v. Richardson, 411 U.S. 677 (1973).

basic Supreme Court decision in the area, and is often cited for the proposition that due process requires the right of confrontation and cross-examination where serious injury to the individual results from the government's action. But before such a conclusion is logically accepted, certain important questions must be resolved.

The Court's decision in *Greene* was designed to protect an individual from government use of "secret" or classified evidence, when such use could result in injury to the individual. In this respect, the ruling was narrowly confined to the specific facts presented in the case:

> . . . [W]here Government action injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has the opportunity to show it is untrue.[117]

However, the Court went on to imply by way of dicta that the traditional rights of confrontation and cross-examination should be applied to all administrative actions where serious injury could result to the individual:

> . . . [W]e have formalized these protections in the requirements of confrontation and cross-examination . . . not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny.[118]

Does this use of the term "scrutiny" refer to the "strict scrutiny" test? If so, the *Greene* decision did not generate a new judicial proposition for due process, as concluded by some writers; but rather, it merely restated the Court's position when "suspect" classifications or "fundamental" rights are involved. Is a "fundamental" right involved in the administrative discharge of a soldier? If not, would any subsequent injury to the soldier in the form of a less than honorable discharge create a "fundamental" right?

It has long been held that an individual has no constitutionally protected right to military status.[119] So "status" per se has not been construed as a "fundamental" right by the courts. For example, in a recent "status" case,[120] the U.S. District Court for the Eastern District of New York applied the "rational relationship" test in holding

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[117]360 U.S. at 496-97.

[118]*Id.*

[119]Reaves v. Ainsworth, 219 U.S. 296 (1911); Beard v. Stahr, 200 F. Supp. (D.D.C. 1961), *vacated per curiam with directions to dismiss as premature,* 370 U.S. 41 (1962); *cf.* Creary v. Weeks, 259 U.S. 336 (1922).

[120]Rohe v. Froehlke, 368 F. Supp. 114 (E.D.N.Y. 1973).

that full due process was not required to recall a reservist to active duty. In its decision, the court stated:

> To paraphrase the principle, due process must be tailored to the contextual background and the necessities of the situation. Thus, military personnel are not in a position to evoke the same range of rights enjoyed by civilians.[121]

Only one court to date has chosen to consider the possibility of personal injury creating a fundamental right at the administrative hearing. In the *Bland* case, the D.C. Circuit did not question the procedures followed for elimination,[122] but did challenge the "right of the service to introduce the element of punishment or 'labeling' into the involuntary separation, by characterizing the discharge derogatorily."[123] Because of the stigmatic effect of the discharge, the court would apply the "strict scrutiny" test and require full due process rights.[124]

However, even the D.C. Circuit chose to make its broad pronouncements by way of dicta only. No court has specifically ruled that the regulations governing administrative discharges are constitutionally deficient. And with the exception of the D.C. Circuit, no court has chosen to address the issue of balancing the respective interests in the specific situation.

At present, the tests the federal courts are willing to utilize when evaluating administrative discharges are not consistent. Apparently military status per se is not enough to constitute a "fundamental" right, and most courts are reluctant to "bridge the gap" by subjecting all administrative sanctions to the full panoply of due process rights. However, the courts appear to have embraced a general sense of justice and fair play,[125] and therefore have been inclined to grant relief to the military petitioner where the proceedings disclose some element of fundamental unfairness.[126]

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[121] 368 F. Supp. at 119 *citing* O'Mara v. Zebrowski, 447 F.2d 1085 (3d Cir. 1973).

[122] This would be a logical conclusion because "status" per se is not a fundamental right.

[123] 293 F.2d at 858.

[124] *Id.* The "strict scrutiny" test is a two-part test. There must be a "compelling governmental interest," and no alternative way to accomplish the end result with a lesser burden on the constitutionally protected activity. The D.C. Circuit addressed both parts of the test. "We seriously doubt that the Constitution would condone the infliction of such injury, in the service of an interest so relatively weak." The court went on to distinguish the military situation from *Greene* by the fact that the military could accomplish the same result without issuing a derogatory discharge.

[125] Smalkin, *supra* note 30, at 9.

In this respect, the decisions seem to have carved an exception to the general balancing of interests test.

IV. CONCLUSION

At the present time, there is no constitutional requirement that an absolute right of confrontation and cross-examination be afforded a military respondent at an administrative discharge hearing, and it is unlikely that such a requirement will be affixed by the courts in the near future. The rationale for this conclusion stems from the fact that military status per se has not been traditionally found by the courts to be a "fundamental" right; and absent such a fundamental right, military necessity will prevail unless there is no rational basis for the regulations.

However, there is emerging judicial support for the argument that the quantum of injury attaching to an undesirable discharge places the "unfitness" action in the realm of strict judicial scrutiny. The injury argument has led some writers to argue that full due process rights should be afforded a military respondent where serious injury could result from the issuance of an undesirable discharge. But at the present time, only a small minority of the courts has accepted this position. The U.S. Court of Appeals for the District of Columbia has indicated that the "unfitness" action should be subject to strict judicial scrutiny, but it did so by way of dicta only, following the lead of the dissenting opinions of Justices Black and Douglas in *Greene v. McElroy*. The great majority of cases granting relief to respondents in administrative elimination actions has involved situations where the Government had control of either witnesses or documentary evidence, and refused to make it available to the respondent. In deciding these cases, the courts have displayed a greater concern for the fact that the Government

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[125]A review of the cases indicates that some unfairness has been present when relief has been granted to the petitioner. *See* Greene v. McElroy, 360 U.S. 474 (1959) (use of classified material not available to defense); Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961) and Davis v. Stahr, 293 F.2d 860 (D.C. Cir. 1961) (use of classified evidence); Conn v. United States, 376 F.2d 878 (Ct. Cl. 1966) (use of an *ex parte* investigating report—respondent not present during questioning of witnesses—statements unsworn); Grimm v. Brown, 449 F.2d 654 (9th Cir. 1971) (use of an *ex parte* report of investigation—respondent not provided a copy of the investigation); Glidden v. United States, 185 Ct. Cl. 515 (1968) (use of an *ex parte* report of investigation—respondent only provided a summary of the report); Cason v. United States, 471 F.2d 1225 (Ct. Cl. 1973) (use of uncorroborated written statements of witnesses who were not made available despite their presence in the local area on active duty); Clackum v. United States, 148 Ct. Cl. 404 (1960) (use of a confidential investigating report).

abused a superior position than the broad constitutional question.

The fact that a majority of the courts has either avoided the constitutional issue or has narrowly ruled on the individual facts indicates a general reluctance to either establish an absolute right or deny the very existence of a right to confrontation and cross-examination. Rather, the courts have looked at administrative proceedings with the idea that a fundamental sense of justice and fair play should prevail. Thus it appears that a military respondent has at least a limited right of confrontation and cross-examination. Under this limited right, if a witness or documentary evidence is under the control of the Government, and the Government intends to make use of it, then the concept of "fundamental fairness" will require the Government to make the witness or evidence available to the respondent. However, if the witness cannot be produced because of lack of subpoena powers, then the Government will not be precluded from using the best evidence available.

Although the constitutional issue is by no means dead, there has been a general reluctance on the part of the courts to adjudicate it; and in recent years, there has been little activity in the area. For all practical purposes, the lack of absolute confrontation and cross-examination rights is not a *material* flaw in the administrative process, and the issue should be put to rest. Although the "fundamental fairness" doctrine is not the most ideal safeguard from a respondent's point of view (because of the fact that "fairness" is a somewhat vague guideline compared to a clearcut rule of absolutely requiring the presence of a requested witness), nevertheless, it requires the availability to both sides of whatever evidence is considered at the hearing, and in this sense both sides are on an equal footing.

In general, equity at an administrative hearing is determined not by the nature of the regulations themselves, but rather by how the regulations are used. Therefore, the greatest weakness in the administrative discharge area is not a deficiency in the respondent's rights, but rather the opportunity to abuse the spirit of the law through an "unfair" board hearing. In this respect, more attention should be placed on educating commanders in the proper use of the discharge action, which if accomplished, should alleviate much of the criticism.

By Order of the Secretary of the Army:

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