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PREFACE

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THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT–A SURVEY*

By Captain Philip J. Bagley, III**

This article is a brief survey of the provisions of the Soldiers' and Sailors' Civil Relief Act. The author concentrates on those sections designed to mitigate the deleterious financial effects of military service upon the incoming serviceman.

I. INTRODUCTION

The Soldiers' and Sailors' Civil Relief Act of 1940[1] is one of the most misunderstood statutes ever passed by Congress and signed into law by the President. Too often a "soldier or sailor" finds himself in a financial or legal quandary after having acted on some false or misleading information about the Act. The Act is not a panacea for all the problems that an individual faces when he serves in the armed forces, Rather the Act merely permits the serviceman the chance to adjust to the armed forces without having to face legal and financial problems which may arise as a result of military service. The Act itself states that its purpose is to provide "for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons"[2] in the armed forces. The Act then does not extinguish any right, but merely suspends legal proceedings and transactions regarding such rights.

II. APPLICABILITY OF THE ACT

A good start in examining the Act might be to see what persons are protected by the Act. Section 101 of the Soldiers' and Sailors'

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

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[1] 50 U.S.C. App. §§ 501–48, 560–90 (1964) [hereafter called the Act and cited as SSCRA]. The Act has been extended until such time as it is "repealed or otherwise terminated" by Act of Congress. 50 U.S.C. App. § 464 (1964).

[2] SSCRA § 511(1). The sections cited herein relate to 50 U.S.C. App., *supra* note 1; sections cited in the text refer to the Act of 1940, itself.

Civil Relief Act of 1940[3] applies to "persons in the military service of the United States" whether entrance into such service was voluntary or involuntary. No distinctions are made among officers, warrant officers, and enlisted men. All are protected by the Act. Although protected persons sometimes include a civilian who stands behind a serviceman through privity of contract, such as a guarantor or an accommodation maker, or who is joined in a suit as a co-defendant with a service member, or who holds a dependent relationship to the serviceman, it may be said as a generalization that the Act affords benefits primarily to the individual on active duty in the military service. Such persons normally include all persons on full-time federal active duty, serving with the Army, Navy, **Air** Force, Marine Corps, Coast Guard, and all officers of the Public Health Service detailed for duty with the military services.[4]

Thus, a frequent threshold question with which courts are confronted in cases involving the Soldiers' and Sailors' Civil Relief Act is whether the party seeking the benefits of the Act is a "person in the military service of the United States." Let us examine more closely what this phrase means.

In addition to being a member of the branches of service listed above, a person seeking the benefits of the Act must also, pursuant to the second sentence of § 101(1), be either on "active duty" or engaged in "training or education under the supervision of the United States preliminary to induction into the military service."[5] This latter phrase refers to a situation that prevailed in the Second World War where officer candidates undergoing training prior to commissioning were not yet considered to be in military service.

The terms "active duty" and "active service" are synonyms. The term "active duty" is defined as "full-time duty in the active military service of the United States."[6] It includes duty on the active list, full-time training duty and annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned.[7]

"Full-time duty in the active military service" is clear and unambiguous language, It does not include retired military person-

[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] 10 U.S.C. § 101 (22) (1964).
[7] See JAGA 1953/7116, 9 Sep. 1963.

nel not on active duty, nor service in the reserve components while not on active duty. Members of the Army and Air National Guards of the United States are entitled to the benefits of the Soldiers' and Sailors' Civil Relief Act while performing full-time duty in their status as members of the Army and Air National Guards if they are entitled to pay from the United States for such duty.[8] Therefore, you must be a person in the military service, *i.e.*, Army, Air Force, Navy, Coast Guard or Marines, and you must be on active duty to claim the benefits of the Act.

Assuming you are on active duty and seemingly fall within one of these groupings, is it possible for an individual soldier to lose the ability to make use of the various provisions of the Act? Section **101(1)** states that active duty includes the period during which a person in military service is absent from duty because of sickness, wounds, leave or other lawful cause.[9] What then if his absence is due to an *unlawful cause?* In the case of *Mantz* v. *Mantz,*[10] the court held that a soldier who was confined by a general court-martial for a period of five years with a dishonorable discharge at the termination of confinement had, by his actions, removed himself from active duty and could not claim the protection of the Act. There was dictum in that case to the effect that not all confinements will divest the soldier of his rights under the Act. You must look at each case and examine' **(1)** the gravity of the offense and **(2)** the sentence given. Deserters do lose the Act's protection,[11] but a serviceman who is AWOL may or may not, depending on the fact in each case.[12]

It was stated above that as a general rule the Act does not apply to dependents of military personnel. However, these dependents do receive certain limited protection. Section **306**[13] of the Act extends the benefits of all the sections of Article III[14] of the Act to dependents of servicemen, if such dependents apply to a court for coverage of a section in Article 111, and if the court finds that the ability of the dependent to comply with the terms of any obligation for which relief is sought is materially impaired by reason of military service of the person upon whom the appli-

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[8] 10 U.S.C. §§ 3686, 8686 (1964).
[9] SSCRA § 511(1).
[10] 69 N.E.2d 637 (Ohio C.P. 1946).
[11] JAGA 1952/3654, 22 Apr. 1962
[12] See Shayne *v.* Burke, 158 Fla. 61, 27 So.2d 751 (1946), which held that the Act should be liberally construed when dealing with a serviceman who is AWOL.
[13] SSCRA § 536.
[14] SSCRA §§ 530–35.

cant is dependent. This section is frequently invoked when a service member has, before entrance upon active duty, contributed substantially to the support of some other family member. If his service income is small in comparison to his former civilian salary, the chances are good that he won't be able to provide the same amount of support. If the dependent has civil obligations such as installment contracts or a mortgage, that he has based on the amount of support he formerly received from the service member, there may be a default and subsequent enforcement proceedings by the dependent's creditors, In such a case, upon proper showing, the dependent may be given the same benefits listed in Article III as the serviceman could get were he liable on the obligation. For example, a court may grant to the defendant a stay in enforcement proceeding under sections 301 or 302.[15]

The Act does not provide any guidelines as to who is considered a "dependent" for purposes of section 306.[16] It is suggested that the definition of "dependent" as stated in the Army Regulation on Legal Assistance [17] be used to supply a definition of "dependent" as contemplated by section 306.[18]

Having examined what persons may, in appropriate cases, claim the Act's protection. the question arises as to whether the Act's provisions are binding upon state as well as federal courts. The answer is in the affirmative. As can be seen from reading section 102,[19] the Act has application to "the United States, the several States and Territories, the District of Columbia . . . and to proceedings commenced in any court therein."[20] The term "court" means any court of competent jurisdiction, whether or not a court of record.[21]

Federal and state courts, then, are clearly within the reach of the Act. The question arises, however, as to whether the Act applies to administrative proceedings. There is very little authority on this point but the answer is probably in the negative. For example, in *Polis* v. *Creedon*,[22] it was held that a proceeding before an area rent director was not a proceeding before a "court,)' and that a landlord in military service was not allowed the Act's protection in this situation.

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[15] SSCRA §§ 531–32.
[16] SSCRA § 536.
[17] Army Reg. No. 608–50, paras. 5a(1)–(3), (5)–(6) (28 Apr. 1965).
[18] SSCRA § 536.
[19] SSCRA § 512(1).
[20] *Id.*
[21] SSCRA § 511(4).
[22] 162 F.2d 908 (Em .App. 1947).

It should be noted that section *205* of the Act,[23] which suspends the running of the statute of limitations while a member is in military service, does provide that statutes of limitations having application to administrative proceedings are also suspended. Therefore, the Act does apply to administrative proceedings to this extent.

What if the United States wished to sue a service member to collect back taxes or for some other civil matter? Could the service member claim the protection of the Soldiers' and Sailors' Civil Relief Act?

The Attorney General of the United States at an early date opined that the Soldiers' and Sailors' Civil Relief Act of 1940 was applicable to all agencies of the Federal Government.?' In so doing. the Attorney General applied the rule that where the subject matter of a statute is such that the sovereign is the chief party in interest, the statute binds the sovereign as well as private parties. This was recognized by the Attorney General as an exception to the general rule of statutory construction that the sovereign is not bound by its own statutes.

The courts have applied the provisions of the Act to the United States without question.?' The Act has also been held to apply to state governments,[26] and to municipal governments.[27] It, of course, applies to corporations and individuals.

Having examined what persons are protected by the Act, the tribunals to which the Act's jurisdiction extends, and what plaintiffs and defendants are bound by the Act, it might be well to determine at what point in time the Act's protection begins. Section 101 states that protection begins on the date that a serviceman enters active service.[28] The Act's protection ends on the date of discharge or death while in active service. The period between these two dates is labeled the "period of military service."[29]

At this point, it would be pertinent to examine section 106 of the Act.[30] This section has an effect on the "period of military service" as defined above. Section 106 extends the protections

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[23] SSCRA § **525.**

[24] **40 OP. ATTY. GEN. 97 (1941).**

[25] ***See*** Edmonston v. United States, 126 F. Supp. **190** (Ct. Cl. **1957).**

[26] Parker v. State, **185** Misc. **584, 57 N.Y.S.2d 242** (Ct. Cl. **1945).**

[27] Calderon v. City of New York, **184** Misc. **1057, 55** N.Y.S.2d **674 (Sup.** Ct. **1945).**

[28] SSCRA § 511(2).

[29] *Id.*

[30] "SSCRA § **516.**

listed in Articles I, II and III of the Act[31] to certain persons as soon as they receive orders to report for inductions.[32] Thus, the period of military service, as used in Articles I, II and III, is expanded to include the date upon which orders for induction are received. Normally. these orders are received several weeks before a person enters military service.

It is important to notice that section 106 extends the protection of Articles I, II and III to two and only two classes of persons: (1) a person who is drafted and (2) an enlisted member of the reserves who is called to active duty.[33]

It can be seen that officers are not included in section 106, and neither are enlisted men in the Regular Army. It is suggested that if you volunteer for the draft, you are within the protective ambit of section 106 because you are merely moved up on the draft list. If you enlist, as distinguished from volunteering for the draft, whether or not you are covered depends upon whether such enlistment is in a Regular or reserve component (usually the reservist is a "six-month person," but he can be in for a longer period).

111. THE "STAY" SECTIONS

One of the most important provisions of the Act from the point of view of the serviceman-debtor is section 700.[34] Under this section a court may. upon application by a serviceman, suspend enforcement of (1) any civil obligation which arose prior to his entrance into military service, or (2) any tax or assessment whether falling due prior to or during his period of military service. It is essential, however, that it be demonstrated that the ability of the applicant to comply with the terms of his obligation or to pay his taxes has been "materially affected by reason of his military service."[35] There are several notable aspects of section 700. First, the serviceman often takes the initiative himself, goes to court, and seeks a stay in the enforcement of his obligations. It is possible, however, to invoke section 700 as a defensive plea ; but whatever the serviceman's posture, he must ask the court to stay enforcement of his obligations. The court *cannot* grant relief on its own motion. Second, the serviceman may apply for relief under this section, even though no judicial proceeding is pending

[31] SSCRA §§ 510–36.
[32] SSCRA § 516.
[33] *Id.*
[34] SSCRA § 590.
[35] SSCRA § 590(1).

which relates to the obligations involved, or even if there has been no default in meeting the obligation. Thus, he can use this section to prevent financial problems that are imminent. Third, under sectior **700,** the serviceman has the burden of proving that his ability to pay has been materially affected by the military service.[36] An examination of other "stay" sections of the Act will show that this burden of showing material effect is not always on the serviceman, but rather the other pary to the suit may have the burden of showing the absence of material effect before he can prevail.[37] Fourth, the relief granted the serviceman under this section may extend after his period of military service. This is accomplished by giving the serviceman, who has been granted relief while in the service, a certain period of time after discharge to make up back payments. Fifth, the court may suspend enforcement of the entire obligation, or it may decree that the member make partial payment as a condition to the stay of enforcement. The authority for this is found in those parts of section 700 which use the words "[S]ubject to such other terms as may be just."[38]

Assume for the moment that the court grants a stay in enforcement of the serviceman's obligations pursuant to section **700**[39] (or, for that matter, pursuant to section **201,**[40] section **301,**[41] or section **302**[42]) which lasts for the period of military service. It is apparent that during the period of this stay there will occur a buildup of arrears in both interest and principal. This follows, since the Act does not extinguish obligations, but only suspends them. As the immediate payment of arrears upon re-entering civilian life would present an almost impossible burden, section **700 (1)** permits the serviceman to apply for the privilege of postponing payment of arrears until the burden would be lightened. He may make an application for an orderly liquidation of his arrears anytime during the period of military service, or as late as six months after the termination of his service.

In permitting a stay under section **700** to be effective after **the** debtor's military service, the drafters of the Act drew a distinction between two different groups of obligations, Debts for the

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[36] See **Application** *of* **Mark, 181** Misc. **497, 46 N.Y.S.2d 755 (Sup. Ct. 1944).**

[37] "See **Boone** *v.* **Lightner, 319 U.S. 561 (1943).**

[38] "SSCRA § 590(1)(a)-(b).

[39] "SSCRA § 590.

[40] **SSCRA § 621.**

[41] **SSCRA § 531.**

[42] **SSCRA § 532.**

purchase of or secured by real estate or obligations secured by a "mortgage or other instrument in the nature of a mortgage upon real estate" comprise one category. All other types of obligation make up the other group.[43]

"After-service extensions" for both types of obligations take effect upon the date of the serviceman's discharge (or from the date of the application for relief if the serviceman asks for relief after the termination of his active service) and may run for a period of time equal to the time the debtor has spent in military service. While the after-service extension for an obligation not involving realty can never exceed a period equal to the time the debtor has spent in the service, obligations secured by realty may be subject to an extension equal to the time spent in military service plus the time yet to run on the obligation at the date of the debtor's discharge or application. In other words, the maximum time of the extension for the payment of arrears on real property obligations is calculated by adding the time equal to that spent in the military service to the time remaining on the obligation at the date of discharge (or the date of application to the court, if such application comes after discharge).

The way in which section 700 operates can be understood more readily by the use of an example. Suppose A enters military service in 1960 with two outstanding obligations, both of which are to run for fifteen years. One obligation is a debt secured by **a** mortgage on the new serviceman's home; the other is a liability on a conditional sales contract for the purchase of an airplane. Realizing that his military pay and allowances are not sufficient to allow him to continue payments on these two obligations, he goes to court under one of the "stay" sections and is granted a full stay on these obligations for his term of military service—a period of five years. During this time he pays nothing on either obligation, As A nears discharge, he realizes that he will not be able to make a full lump sum payment of these arrears when he leaves military service. Upon A's application for a stay under section 700(1),[44] a court has the power to permit A to repay in equal installments over a period of fifteen years the interest and principal on the home mortgage debt which accrued during his five years of service. The maximum permissible period of this stay is calculated by adding the ten years remaining on the obligation at the date of discharge to the five years A has spent in

[43] SSCRA § 590(1) **(a)-(b).**
[44] *Id.*

service. As far as arrears under the conditional sales contract for the airplane are concerned, A may be allowed to repay the arrears which accumulated during his years of military service in equal installments over a period of time equal to his term of service, *i.e.*, five years.

It should be noted that the after-service extensions or stays under section 700 relate only to the payment of *arrears,* and the serviceman-debtor must start to meet normal payments on the obligations which fall due after he has completed his military service. In the case of the airplane, A must meet current payments, and also meet and complete his arrears payments during the first five years after service, In the case of the house, he must begin making his normal house payments after termination of service as well as pay off the arrears over the 15-year period.

It should be remembered that the above examples are used to explain the "outer reaches" of section 700. The court, for example, may grant less relief, *i.e.*, allow a lesser time for repayment of the arrears.[45] The court can also impose other terms and conditions "subject to such other terms as may be just."[46]

The creditor who has a section 700 stay obtained against him by his debtor does receive certain considerations under this section. First of all, the debtor must make the repayment of the arrears in equal installments. For instance in the examples used above. he could not wait until the end of the five year extension on the airplane or the fifteen year extension on the house and pay the arrears in one lump sum. He must pay the arrears in equal or periodic installments during the five or fifteen year period.[49] At the court's discretion the creditor may also be granted additional interest at the contract rate on the accumulated arrears during the period of the after-service extension.[48] As noted earlier, the court is given great discretion in this area by the presence of the language, "subject to such other terms as may be just."[49] The court is thus given the ability here to dispose of a section 700 situation in a way that will be most equitable to all parties.

Since the other "stay" sections of the Act have been mentioned parenthetically in the discussion of section 700,[50] it would be well to consider these sections at this point. Sections 301 and 302 gov-

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] SSCRA § 590. *See supra* notes 40, 41, and 42.

ern the creditor's enforcement of secured obligations of servicemen. Section 301 of the Act[51] applies to installment contracts for the purchase of real or personal property. These are two requisites for a serviceman's contract to fall within the ambit of section 301. First, the contract must have been entered into prior to the period of military service. Second, the serviceman must have paid a deposit or made at least one installment payment prior to his period of military service.[52] If the serviceman-buyer defaults in his payments or breaches any other of the terms of his contract the seller, or his assignee, may not exercise any right or option under the contract "except by action in a court of competent jurisdiction."[53] In other words, the seller is told that he must enforce his rights through a judicial proceeding. If he enforces the obligation, for instance, by repossession without first getting a court order, he is guilty of a misdemeanor punishable by a $1000 fine, a year in jail, or both.[54]

Once the seller decides to go to court and enforce his rights under the installment contract, the court sitting in judgment of his claim is not bound by his prayer, The court may do one of several things. It may order a repayment of prior installments, or any part thereof, as a condition to allowing termination and repossession, or it may order a stay of enforcement proceedings. The stay may be unconditional, or it may be conditioned upon partial payment of the obligation. The court may even order the property sold and the proceeds of the sale divided between the parties in such proportion as the court deems fair, or make any other equitable disposition.[55]

It is important to observe several aspects of section 301. First, notice the posture of the serviceman here. He is the defendant in an action under section 301, and has normally breached his contract. Second, the court has a great deal of power and may choose one of a number of discretionary remedial action. Nevertheless, there is some mandatory language in section 301, and it states that if the serviceman, or his agent or attorney, asks for a stay in enforcement proceedings, that stay *must* be granted "unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such [military] service . . ."[56] The court *may* also grant

[51] SSCRA § 531.
[52] SSCRA § 531(1).
[53] *Id.*
[54] SSCRA § 531(2).
[55] SSCRA § 531(3).
[56] *Id.*

such a stay on its own motion if it finds the requisite material effect.[57]

It would be well here to consider the question: Who has the burden of proving "material effect"? Must the plaintiff show that military service has not materially affected the defendant-serviceman's ability to comply with the contract, or must the defendant-serviceman show that the military service has materially affected his ability to comply with the contractual terms?

In **Boone v. *Lighter,*** the court stated:

> The act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come.[58]

The burden of proof, then, is determined on a case-by-case approach, and no rigid rule can be extracted.

Section **302**[59] contains wording very much like section **301**[60] and applies to obligations secured by a mortgage, trust deed, **or** other security in the nature of a mortgage upon real or personal property. It limits the power of a creditor to foreclose, sell, or seize a debtor-serviceman's property for nonpayment or other breach of an obligation which arose prior to the military service. Notice that section **302,** like section **301,** applies only to pre-service obligations.[61] One notable difference between the two sections, however, is that section **302** says nothing about the necessity of **making a** deposit or payment prior to service. Again the creditor is told to move against his security only through court action. In order to foreclose or sell, the creditor must seek and **obtain** a court order permitting him to do so.[62]

Notice that a foreclosure or sale in violation **of** section **302** is not only a misdemeanor, but also invalid.[63] Any person knowingly making a sale, foreclosure or seizure without court order commits a criminal offense.[64]

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[57] SSCRA § 531(3).
[58] **319** U.S. **561, 569 (1943)** (per Mr. Justice Jackson).
[59] SSCRA § **532.**
[60] SSCRA § **531.**
[61] SSCRA § **532(1).**
[62] Id.
[63] SSCRA § **532(4).**

Entitlement to a determination of section **302** relief is predicated upon the proof of four elements: **(1)** the relief is sought on an obligation secured by a mortgage, trust deed. or other security in the nature of a mortgage on either real or personal property; **(2)** the obligation originated prior to the involved serviceman's period of military service; **(3)** property was owned by the serviceman prior to military service; and **(4)** property was owned by the service member at the time relief is sought.[65]

The court has been given a great amount of discretionary power under this section. The court may grant a stay on its own motion if it finds that the serviceman's ability to comply with the terms of the obligation has been materially effected by his military service.[66] The court may also "make such other disposition of the case as may be equitable to conserve the interests of all parties."[67] As in section 301,[68] the court *must* grant a stay if the serviceman or his attorney requests it, unless in the courts' opinion the ability of the service member to comply with the terms of the obligation has not been materially affected by reason of his military service.[69]

Although section 201[70] of the Act is a "stay" section in the same generic sense as those considered to this point, it is based on considerations different from those mentioned in section 301, **302,** and 700.[71] For the most part in these earlier three ('stay" sections, the situation involves pre-service obligations. The court makes substantive determinations about the nature of the obligation (*i.e.*, whether it falls within one of these sections) and the serviceman's ability to meet the obligation (*i.e.*, the presence or absence of material effect). If the court finds that the serviceman's ability to comply with the terms of his obligation is materially effected by military service, the court may order a stay.

Section 201[72] of the Act, however. applies to both pre-service and in-service obligations. In deciding whether to grant a stay under this section, a court does not look to the nature of the obligation at all. What the court does examine is whether the ability of the serviceman to *participate* in a judicial action has been materially affected by military service.

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[65] SSCRA § **532(1).**
"SSCRA § 532(2) (a).
[67] SSCRA § **532(2)**(b).
[68] SSCRA § **531.**
"SSCRA § 532(2) (a).
[70] SSCRA § **521.**
[71] SSCRA §§ **531-32, 590.**
[72] SSCRA § **521.**

This section provides that at any stage in an action in which a person in military service is involved, either as plaintiff or defendant, occuring during the period of his service or within sixty days thereafter, a stay may be granted. The central question then in section **201** [73] is whether or not the soldier is prejudiced in his present judicial posture. **As** in sections **301** and **302,**[74] the stay may be granted by the court on its own motion, if the court finds that military service has materially affected the ability of the service member to prosecute or defend the judicial proceeding involved. Also, as with most other stay sections of the Act, the service member, or someone on his behalf, may move for a stay; and it must be granted unless the court finds an absence of material

Section **203** of the Act [76] provides that in any case where a plaintiff gets a judgment or order against a serviceman-defendant, a court may, either on its own motion or on motion of the defendant, stay the execution of the judgment or order and vacate any garnishment or attachment. Necessary to the granting of such a stay is a finding that the ability of the serviceman to comply with the judgment or order has been materially affected by military service. It should be noted that the suit giving rise to the judgment may have been commenced prior to, during or within 60 days after military service. If the judgment or order from such a suit is lodged and unsatisified at a time while the serviceman-defendant is in service, or within sixty days after his release, section **203** [77] protection may be granted. Again, as in sections **201,301** and **302,**[78] the court is empowered to order a stay on its own motion if it finds material effect and must grant the stay on the serviceman's motion unless it finds an absence of material effect.[79]

With the exception of section **700,**[80] all the stay sections considered so far do not contain a clause specifally setting forth the duration of the stay. Therefore, absent such a clause, section **204** [81] of the Act applies and provides that the maximum limit of the stay of any "action, proceeding, attachment or execution" is the

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[73] *Id.*
[74] **SSCRA §§ 531–32.**
[75] **SSCRA § 521.**
[76] **SSCRA § 523.**
[77] *Id.*
[78] **SSCRA §§ 531–32, 590.**
[79] **SSCRA § 523.**
[80] **SSCRA § 590.**
[81] **SSCRA § 524.**

period of military service plus three months. It should also be observed that section **204** allows a litigant to proceed against a service member's eo-defendant even though a stay has been granted as to the service member, provided the plaintiff gets the court's permission.[82]

There is an additional stay section that is concerned with the collection of income taxes from service members. Section **513**[83] of the Act states that the collection of any income tax falling due prior to or during military service shall be deferred for the period of military service plus six months if the service member can demonstrate that his ability to pay such a tax has been materially impaired by reason of military service. No interest or penalties may accrue on the collection of a tax deferred by this section.[84] The governmental unit concerned is also protected by this section because the running of the statute of limitations against the collection of such a tax is tolled for the period of military service plus nine months.'' Unlike the other "stay" sections, no mention is made in section 513[85] regarding who is to determine the presence or absence of material effect. but by analogy to the other stay sections, it appears that this is a matter to be decided by the courts.

Another section relevant to taxes is section 500,[87] which relates to property lien foreclosure sales and redemptions. This section applies to any tax or assessment (other than income taxes) falling due prior to or during military service in respect of any personal property or real property owned and occupied for dwelling or business purposes by a person in military service or his dependents at the beginning of military service and still so occupied on the "due" date. No sale or foreclosure of such property to enforce the collection of a property tax in respect of such property may be made except by leave of court.[88] If the court finds that military service has materially affected the service member's ability to meet such a tax or assessment, it can grant a stay of the enforcement proceedings or the sale for the period of military service plus six months.[89] Even if a sale is allowed the person in military service is given the right to redeem the property up to six months after the end of his military ser-

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[82] *Id.*
[83] SSCRA § **573.**
[84] *Id.*
[85] ***Id.***
[86] *Id.*
[87] SSCRA § **560.**
[88] SSCRA § 560(2).
[89] *Id.*

vice.[90] The governmental unit concerned here is given certain rights, however, because the tax or assessment that is not paid because of the stay bears interest at the rate of six per cent per year during the period of the stay.[91]

It should be recalled at this point that section **700** of the Act[92] applies to any tax or assessment, and permits a court to allow the soldier a period for the orderly liquidation of his back taxes after he is discharged,

IV. DEFAULT JUDGMENTS

Consider the following hypothetical : There is an automobile accident involving A and X. A is convinced the X is at fault and brings suit for $20,000. The day that X is served with the complaint he enters military service and is sent to a distant state for basic training. Trial is held and, there being no appearance by **X,** A moves for a default judgment. X knew nothing of the Soldiers' and Sailors' Civil Relief Act, and the judge was unaware that X was in the service. A default judgment is rendered and judgment entered for A against X. Does the Act afford X any protection?

Section **200** of the Act[93] provides that in any action or proceeding commenced in any court, state or federal, if there shall be a default of any appearance by any defendant, the plaintiff shall file an affidavit or other declaration setting forth facts concerning the military status of the defendant. The affidavit should indicate whether the defendant is or is not in military service, or that the plaintiff is unable to ascertain any facts regarding his military status. This section contains mandatory language requiring that such an affidavit be filed in every civil action where there is a default. Failure to file the affidavit does not create a jurisdictional defect, however, and a person not in military service (*e.g.*, a co-defendant or a non-military defendant) may not object to non-compliance with section 200.

Section **200**[94] provides that unless it is shown by affidavit or other declaration that the defendant is not in military service, no default judgment should be entered until after the court appoints an attorney to represent the absent defendant. Such an attorney has no power to waive any right of the person for whom he is

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[90] SSCRA § 560(3).
[91] SSCRA § 560(4).
[92] SSCRA § **590.**
[93] *Id.*
[94] SSCRA § 520(1).

appointed, or to bind the service member by his acts.[95] The attorney may, however, make an investigation and take any steps which are clearly in the defendant's interest. Further, the court may require, as a condition to the entry of a default judgment, that the plaintiff file a bond, the face amount of which may be used to indemnify the defendant, if he is in the military service, against any loss or damage that he may have suffered if the judgment is later set aside.[96] The court is also given the power to make such further order or enter such judgment as in its opinion may be necessary to protect the defendant's rights.[97]

Subsection four of section 200 contains provisions for setting aside default judgments against servicemen.[98] A serviceman may apply to a court to set aside its default judgment and re-open the case if: (1) he was prejudiced by reason of military service in making his defense; (2) he has a meritorious or legal defense for the action or some part thereof; and (3) he makes application for setting aside the judgment and re-opening the case not later than 90 days after the termination of military service.[99]

Several other observations about section 200(4) should be made. It is noteworthy that subsection (4) may be used to set aside a default judgment even if there has been full compliance with the requirements of the Act—that is, the filing of an affidavit and the appointing of an attorney—provided there exists a meritorious defense, there would have been prejudice in defending, and the application for reopening occurs within 90 days after service. Section 200(4) also states that the vacating or setting aside of such a default judgment shall not impair any right or 'title acquired by a bona fide purchaser for value under the judgment.[100] This would be the only remaining stumbling block for a serviceman to contend with in setting aside or reopening a default judgment, assuming he can meet the three requirements stated above.

One very important and frequently overlooked point about section 200 is that it applies only in the absence of "any appearance" by the defendant. The term "any appearance" as used in section 200 means even a special appearance made for the purpose of asserting rights under the Act or to contest the jurisdiction of the

[95] SSCRA § 520(3).
[96] SSCRA § 520(1).
[97] *Id.*
[98] SSCRA § 520(4).
[99] *Id.*
[100] *Id.*

court.[101] Informal communications to the judge, such as a telegram, are not generally construed to constitute an appearance before the court, but are deemed to be communications to the judge personally and not in his judicial capacity.[102]

When the defendant has made an appearance, thus removing the case from the purview of section **200,** and then subsequently defaults, it is of course unnecessary to comply with the requirements of section **200** for entering a default judgment. More important, it is suggested that subsection four, which provides for setting aside a default judgment, would no longer be available to the serviceman-defendant. It appears wise, therefore, that once an appearance is made, the serviceman should move for a stay or be prepared to defend at every stage of the trial.

V. MISCELLANEOUS PROVISIONS

Section 103[103] affords limited protection to a civilian who stands in privity of contract with a serviceman. This would include sureties, guarantors, endorsers, accommodation makers and others, whether primarily or secondarily liable on the obligation or liability. Any relief that may be granted to the service member in the nature of a stay of an obligation, proceeding or judgment may be extended to the civilian as well. Thus, a father who, prior to his son's military service, co-signs a sales contract and loan application with his son for the purchase of an automobile may under this section receive the same relief in the nature of a stay that his son could get when the son is unable to keep up the payments because of a substantially reduced income resulting from military service. Such relief is, however, in the discretion of the court. It should also be noted here that section **204**[104] must be considered along with section **103.**[105] In addition to the protection just noted in section 103, when relief in the nature of a stay is granted a service member, a plaintiff, under section **204,** is allowed to proceed against a civilian co-defendant only by leave of court.[106]

Section 103[107] also affords relief to a criminal bail bond surety where surety is prevented from enforcing the attendance of his

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[101] **Reynolds v. Reynolds, 21 Cal. 2d 580, 134 P.2d 251 (1943).**
[102] *See* **Rutherford** *v.* **Bentz, 345 Ill. App. 532, 104 N.E.2d 343 (1952).**
[103] **SSCRA § 513.**
[104] **SSCRA § 524.**
[105] **SSCRA § 513.**
[106] **SSCRA § 524.**
[107] **SSCRA § 513(3).**

principal by reason of the latter's military service. In this event, no forfeiture of bail will take place. This relief is not available where the principal-soldier is stationed at a place accessible to trial and would have been granted pass or leave to attend the trial.[108]

Section 206 of the Act[109] affects debts incurred *prior to* military service, and provides that the rate of interest on such debts during the period of military service shall not exceed six per cent per annum, unless on application of the creditor a court determines that the ability of the serviceman to pay more than six per cent has not been materially affected by reason of military service. "Interest" includes service and carrying charges and probably means the effective, rather than the nominal interest rate. Notice that this section is self-executing and automatically cuts down interest unless the creditor goes to court and demonstrates that the service member could pay more.

One of the most important aspects of the Act is its effect in tolling the statute of limitations. Section 205[110] provides that the period of military service shall not be included in computing the period in which statutes of limitations have been running. In other words, statutes of limitations do not run during the period of military service. It should be emphasized, however, that this section applies to actions brought both by and *against* the serviceman, Additionally, the statutes of limitations are tolled by virtue of military service alone; nothing is said about material effect. The statutes are tolled regardless of whether the causes of action accrued *prior to* or *during* the period of military service. There is very broad coverage under this provision in that the section provides for the tolling of any period "limited by any law, regulation or order" and specifically includes periods relating to administrative proceedings and any period for redemption of real property sold or forfeited to enforce any tax, obligation or assessment.[111] Since sections **207** and 513[112] deal with income taxes and more specifically federal income taxes, however, section 205 has no application to any period of limitation prescribed in the internal revenue laws of the United States."'

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[108] *See* **Ex parte Moore, 244 Ala. 28, 12 So.2d 77 (1943).**
[109] **SSCRA § 526.**
[110] **SSCRA § 525.**
[111] **Id.**
[112] **SSCRA §§ 527, 573.**
[113] **SSCRA § 527.**

The Act also affords relief to those who are lessees and subsequently are called to active duty. Section 304 [114] provides a method for the premature termination of a lease by a lessee who, subsequent to the execution of the lease, enters military service. It applies to any lease covering premises actually occupied for dwelling, professional, business, agricultural, or similar purposes.[115] Termination must be made by delivered written notice, but the use of the regular mail is authorized.[116] There is no material effect requirement for termination of a lease under this section. It is important to keep in mind that only pre-service leases are able to be terminated under this section. There is no provision under the Act for terminating leases entered into after military service has begun. The section also states that the process of termination may take place at any time following the date of the beginning of military service. It should be remembered that since the lease termination section is contained in Article III of the Act, the period of military service begins for draftees and enlisted reservists upon receipt of orders and consequently they can terminate a lease from the date they receive their orders of induction. The manner in which a lease calling for monthly payment of rent may be terminated can be demonstrated by an example. X pays rent on a monthly basis, payments due on the 15th of each month. He enters active service on the 10th of June, and immediately effects delivered written notice of termination. The termination becomes effective 30 days after his next rental payment is due subsequent to the date when such notice is delivered or mailed. The lessee must make the June 15th rental payment, but the lease is terminated as of July 15. If notice had not been given until June 16, the lease would not have been terminated until August 15.

Leases other than those which provide for monthly payments are treated slightly differently under the Act. Consider this example. X pays rent on a quarterly basis, payments being made at the beginning of the months of January, April, July, and October. On January 30, X enters active duty and immediately gives written notice of termination. The termination becomes effective on the last day of the month following the month in which notice is given. In this case, termination becomes effective on the last day of February. Since the rent for March was included in the quar-

[114] SSCRA § 634.
[115] SSCRA § 534(1).
[116] SSCRA § 534(2).

terly payment made in January, X is entitled to a refund for the month of March.

If the lessor feels that the provisions of section 304 will impose a particular hardship on him, he may apply to the court, which is given the power to make such modifications and restrictions as may be dictated by justice and equity. The lessor must, however, make application to the court prior to the termination of the lease.[117]

A complementary section to the provision for lease termination is section 300[118] dealing with eviction and distress. Its effect is limited to premises for which the agreed rent does not exceed $150 per month and which are occupied chiefly for dwelling purposes by the serviceman, his wife, and children or other dependents.[110] The section provides that no eviction or distress from covered premises shall be made during the period of military service except by leave of court. The court is authorized to stay the eviction or distress for a period of three months. The court may grant the stay on its own motion and must grant it upon application of the serviceman or his family unless it finds that military service has not had a material effect on the ability to pay rent.[120] The court is also given the ability to "make such other order as may be just." [121] Failure to effect eviction or distress of a serviceman or his family covered by this section in the manner described above will result in the commission of a misdemeanor punishable by fine, imprisonment or both.[122]

There are two other important considerations in the application of section 300. It is immaterial whether the dwelling involved was rented before or after military service began. Also by its express terms this section extends its protection to the dependents of servicemen.

The landlord is also given certain protection under section 300. If the court refuses to let him evict the serviceman or his family, he is then extended the protection of sections 301, 302, and 500 of the Act [123] and may claim such protection in the same manner as a serviceman as to the premises involved in the attempted eviction.[124] Therefore, the lessor can make application to the court

[117] *Id.*
[118] SSCRA § 530.
[119] SSCRA § 530(1).
[120] SSCRA § 530(2).
[121] *Id.*
[122] SSCRA § 530(3).
[123] SSCRA §§ 531, 532, 560.
[124] SSCRA § 530(2).

to grant a stay running in his favor which would prevent his creditors, such as a mortgagee, from foreclosing on the premises. His creditors also could not foreclose on such premises except by leave of court. The court may grant the stays allowed the landlord "to such extent and for such period as appears to the court to be just." [125]

The last section to be considered is one that deals with the serviceman's ability to waive his benefits under the Soldiers' and Sailor's Civil Relief Act. Section **107** [126] is really an attempt to induce servicemen and their creditors to adjust their rights privately. It simply provides that nothing in the Act shall prevent the service member and his creditor, either during or after military service, from modifying or cancelling an obligation by executing a written agreement. Further, a serviceman and his creditor may, in writing, agree to a repossession or foreclosure of the serviceman's property without the creditor having first to go to court as directed by the Act. It should be specifically noted that the waiver allowed under this section may take place only *after* military service has begun. Thus, any pre-service waiver of rights granted by the Act is ineffective. It is important that any such waiver be in writing. It is suggested that such a written waiver be supported by consideration. The consideration aspect should present no problem because an offer by a creditor to change the terms of an obligation, such as by reducing the payments, should constitute a detriment to the creditor and a benefit to the serviceman; likewise, the serviceman's waiver of his rights under the Act is a detriment to him and consequently a benefit to the creditor. It is also suggested that any waiver of rights under this section will be closely scrutinized and strictly construed.[127]

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[125] *Id.*

[126] **SSCRA § 517.**

[127] **An examination of section 514 of the Act, dealing with the state's right to tax service members, is beyond the scope of this article and is covered in detail in an article by Graham C. Lilly in 36 MIL. L. REV. 123 (1967).**

IMMUNITY OF THE UNITED STATES FROM SUITS ABROAD*

By Edmund H. Schwenk**

This article examines the doctrine of sovereign immunity as it applies to United States agencies, particularly those related to the military, and their activities in other countries. Various theories of sovereign immunity, and how they are interpreted by courts around the world, are discussed. The author concludes that these theories are unsatisfactory, and that a final solution to the problem may require an international convention.

I. INTRODUCTION

Even in normal times, the United States Government extends its governmental and non-governmental activities beyond its territorial limits. Its embassies and consulates must purchase or lease real estate, employ local personnel and buy goods and materials in local markets. In addition, the United States Government carries on such additional activities as attendance at fairs, establishment of "America Houses," maintenance of travel information bureaus, foreign lending, disposal of surplus commodities, distribution of foreign aid, operations of the merchant marine, and others. Unfortunately, we do not live in normal times. The cold war has brought about an enormous expansion of United States Government activities abroad. United States forces are stationed in many countries of the world. In order to accomplish their mission, they must obtain accommodations, employ local workers and employees, buy goods and materials, sell surplus property, maintain clubs, messes, radio and television stations, entertain troops, and establish recreation centers. That the number of disputes arising out of United States Government activities abroad is comparatively small[1] speaks for the efficiency and

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

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[1]Leonard, *The United States as a Litigant in Foreign Courts*, **1958** PROC. AM. SOC. INT'L L. **96** states: "At the present time, the United States is suing or being sued in 13 countries. There are **74** foreign suits, **58** of which are against the United States and 16 of which the United States has instituted in various foreign courts."

high quality of the United States personnel, particularly for that of the judge advocates of the military services. Nevertheless, from time to time, disputes are unavoidable. If they cannot be disposed of by amicable settlement, they result in litigation. In such litigation, the United States Government is more often than not the defendant.'

Many times, suit is brought against an agency or instrumentality of the United States Government, rather than the United States itself. Whether the defendant has judicial personality is a matter of procedure and, therefore, resolved by the *lex fori.*[3] Whether the question pertains to foreign judicial personalities, however, pertinent principles of conflict of laws refer the matter to the law of the country in which the personality has been established. Consequently, whether an agency or instrumentality of the U.S. Government, such as Army, Navy, and Air Force bases, missions and units, post and naval exchanges, clubs and messes, embassies, consulates, and the like, may be used in a foreign country depends on whether they are suable in the United States. They are not legal persons under United States law, and thus such suits are in reality against the U.S. Government.[4]

Likewise, the question of service of process upon the U.S. Government, being a matter of procedure, is governed by the *lex fori.*[5] Unfortunately, the local law of most countries makes no provision for service upon a foreign government. Rule **4** of the Federal Rules of Civil Procedure is likewise silent on this point.[6] The lack of specific provisions gives rise to much speculation.[7] Thus, in actions against the United States in foreign courts, service of process has been made upon the Department of Justice, the Department of State, U.S. embassy, consulate, local office of

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[2] Doub, ***Experiences*** of ***the United States in Foreign Courts,*** 48 A.B.A.J. 63 (1962) states: "In June 1960, the United States had 288 civil cases, involving more than $18,000.00, pending in the courts of thirty-two countries throughout the world. Of these, fifty-nine are claims on behalf of the United States and 229 are suits against the United States and its agencies." Thus, it would appear that the number of suits in foreign courts by or against the United States are increasing.

[3] H. GOODRICH, CONFLICT OF LAWS § 82 (3d ed. 1949).

[4] Dep't of State Instruction No. CA–10922 (16 Jun. 1961), app. to Army Reg. No. 27–40 (25 May 1967], us ***noted in*** 56 **AM J.** INT'L L. 532 (1962).

[5] GOODRICH, ***supra*** note ***3;*** RESTATEMENT OF CONFLICT OF **Laws** § 589 (1934).

[6] Purdy Co. **v.** Argentina, 333 F.2d 95 (7th Cir. 1964).

[7] Griffin, ***Adjective Law and Practice in Suits Against Foreign Governments, 36*** TEMP. L. &. 1 (1962) ; Note, ***Sovereign Immunity,*** **74** YALE L. J. 902 (1965).

the U.S. agency concerned, or local U.S. officers or employees.* In the case of *Oster v. Dominion of Canada,*[9] it was held that service of process by the delivery of a copy of the summons and complaint to the Consul General of Canada or someone connected with his office in New York City was insufficient to obtain jurisdiction in personam over the State of Canada. In the absence of specific provisions, the question arises whether service of process could be made upon the foreign state's diplomatic representative.[10] In this connection, however, Judge Lauterpacht inquired: "If the diplomatic representative is to be the proper recipient of the writ in his capacity as the representative of the state, how can any such innovation be reconciled with the existing law prohibiting the service of a writ upon a foreign minister?"[11] Moreover, the question arises whether diplomatic representatives of foreign governments are generally authorized to accept service of process on behalf of their government. Both questions have been answered by the Department of State in the negative.[12]

If service of process has been properly made, two questions arise: *(a)* whether the U.S. is immune from the jurisdiction of foreign courts, and *(b)* how this immunity should be asserted. Question *(a)* must be considered in the light of pertinent treaty provisions and, in the absence of treaty provisions, in the framework of general principles of international law; question *(b)* under the law of the forum (*lex fori*).

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[8] Doub, *supra* note 2 at 65, stating: "The courts of Italy have held that service of process upon almost any official of a foreign governmental agency is a valid one and on several occasions the French courts have met the legalistic difficulty in the same way. In Greece service on a foreign sovereign is assimilated to its requirement for proper service upon the local sovereign. In other words, the method of service of process in the United States or any other foreign government is valid if it would be a lawful service under Greek law upon the Government of Greece."

[9] 144 F. Supp. 746 (N.D. N.Y. 1956), *aff'd sub nom.*, Clay v. Canada, 238 F.2d 400 (2d Cir 1956), *cert denied*, 353 U.S. 936 (1957). *See also* 56 AM. J. INT'L L. 530–1 (1962), reporting a letter dated 12 May 1961, wherein the Department of State declined to make a decision regarding sovereign immunity of the United Arab Republic in view of the fact that service of process was effected upon its Consul General and there was pending before the Court an application for holding that the purported service of process was ineffective.

[10] In the case of Mrs. J. W. v. Republic of Latvia, 4 *Rechtsprechung zum Wiedergutmuchungsrecht* 368 (1953), *as noted in* 48 AM. J. INT'L L. 161 (1954), it was held that service on the Ambassador or his representative in Germany was sufficient.

[11] Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 1951 BRIT. Y.B. INT'L L. 245.

[12] Letter from the Acting Legal Advisor, Leonard C. Meeker, to the Assistant Attorney General, John W. Douglas, 10 August 1964, 59 AM. J. INT'L L. 110 (1965).

11. TREATY PROVISIONS

In the 1948–1958 decade, the Department of State negotiated 14 treaties containing a provision obligating each contracting party to waive sovereign immunity for state-controlled enterprises engaged in business activities within the territories of the other.[13] A typical immunity provision appears in paragraph 2 of article XVIII of the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America, providing :

> No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

To apply the above-quoted waiver provision properly, it must be understood that "Party" within the meaning of the quoted provision is the United States on the one hand, and the Federal Republic of Germany (or any other counutry, with which the Treaty of Friendship, Commerce, and Navigation has been concluded) on the other. It has been suggested that the quoted provision is not identical with the "restrictive theory" adopted in the Tate letter,[14] but has a more limited and specific objective than the letter.[15] In support of this proposition, it has been submitted that the term "enterprise" in the quoted provision applies only to "entities of the character of enterprises in a free-enterprise economic system"; that the work "including" is equivalent to "in the form of"; and that the quoted waiver provision is applicable only in the event an "enterprise" is engaged in business activities, *i.e.*, activities for profit or gain.[16] While this interpretation may be accepted by American courts, it is doubtful whether it will be

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[13] Setser, *The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties,* 1961 PROC. AM. SOC. INT'L LAW 89, (hereafter cited as Setser).

[14] Letter from the Department of State's Acting Legal Advisor, Tate, to the Acting Attorney General, Perlman, 26 DEP'T STATE BULL. 984 (1952). *See also* Bishop, *New United States Policy Limiting Sovereign Immunity,* 47 AM. J. INT'L L. 96 (1953); Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court,* 67 HARV. L. REV. 608 (1954).

[15] Setser 92–93.

[16] Setser 97–99.

adopted by foreign courts, The proponent of this interpretation suggests that military post exchanges in foreign countries are not barred by the quoted treaty provision from claiming or enjoying immunity from suit in view of the fact that "there is no parallelism between the governmental organizations carrying on these activities and the economic enterprises carrying on business activities for gain, which are the subject matter of the commercial treaty," and "this is the case even when the government agency assesses charges to cover the cost of goods or services furnished in connection with the supply, subsistence, and maintenance of the well-being of military and attached civilian personnel."[17] From actual experience, however, it must be concluded that it is difficult to convince foreign courts that post exchanges differ from department stores when it must be admitted that they operate on a profit basis. In this connection, it appears that, contrary to wide-spread opinion, the case of *Standard Oil* Co. *of California* v. *Johnson*[18] does not constitute a proper authority for the proposition that the functions of post exchanges are "governmental" rather than "commercial" or "proprietary." While it is true that in this case the U.S. Supreme Court held that "post exchanges as now operated are arms of the government deemed by it essential for the performance of governmental functions," this ruling pertained to the question whether the military post exchanges in the State of California were exempt from the provisions of the California Motor Vehicle Fuel License Tax Act in view of section 10 of the Act, which made the tax inapplicable "to any motor vehicle fuel sold to the Government of the United States or any department thereof." Therefore, this case does not involve the distinction between governmental and proprietary acts under the restrictive theory of immunity of states from the jurisdiction of foreign courts. Finally, the Department of State itself indicated in instructions dated 15 September 1961,[19] that "it is not the practice of the Department to claim sovereign immunity in behalf of nonappropriated fund activities of the military services, such as post exchanges, commissaries, clubs, etc.," that "the Department is aware that attorneys representing defendants in such cases have sometimes asserted sovereign immunity in their behalf," and that "this has not been done with the Department's approval and this practice is under review." Under these circumstances, it can be assumed that the

[17] Setser 101-02.
[18] 316 U.S. 481 (1942).
[19] 56 AM. J. INT'L L. 533 (1962).

narrow interpretation of the waiver provision in the Treaties of Friendship, Commerce and Navigation will hardly be accepted by foreign courts. Moreover, the practice of including waiver provisions in the treaties was discontinued in 1958.[20] Contrary to the aforementioned Treaties of Friendship, Commerce, and Navigation, most of the so-called "Offshore Procurement Agreements'' between the United States and foreign countries[21] expressly provide for immunity from jurisdiction and from legal process.

111. GENERAL PRINCIPLES OF INTERNATIONAL LAW

The question whether in the absence of pertinent treaty provisions, a foreign state is immune from the jurisdiction of courts is a matter of international law. However, in international law, this question is highly controversial.[22] Under the absolute theory of

[20] Setser 90: "It must be noted, of course, that the practice of including these provisions in treaties was discontinued in 1958 for the reason that they were considered objectionable in certain quarters as endangering the ability of the Government to utilize the defense of sovereign immunity in suits in foreign courts against the United States."

[21] Agreements and Memoranda of Understanding between the United States of America and foreign countries (Belgium, Denmark, France, Luxembourg, Netherlands, Norway, Italy, Greece, Spain, Turkey, United Kingdom, Yugoslavia). Thus, for example, the Memorandum of Understanding between France and the United States, 12 June 1953, provided: "The two Governments agree that offshore procurement contracts do not have a commercial character as regards the United States Government but are undertaken within the framework of the Mutual Defense Assistance Agreement of January 27, 1950, between the United States and France. Consequently, the United States Government in carrying out the offshore procurement program is entitled to the immunities from jurisdiction and legal process extended by French jurisprudence to foreign governments acting in their sovereign capacity." *(As noted in* Setser 89, *et seq.)*

[22] Fairman, ***Some Disputed Applications of the Principle of State Immunity,*** 22 AM. J. INT'L L. **566 (1928)**; Hervey, ***Immunity of Foreign States When Engaged in Commercial Enterprises,*** 27 MICH. L. REV. **751 (1929)**; Brinton, ***Suits Against Foreign States,*** 25 AM. J. INT'L L. **50 (1931);** Fitzmaurice, ***State Immunity from Proceedings in Foreign Courts,*** 1933 BRIT. Y.B. INT'L L. 101; GMUR, GERICHTSBARKEIT UEBER FREMDE STAATEN **(1948)**; Lauterpacht, ***The Problem of Jurisdictional Immunities of Foreign States,*** 1951, BRIT. Y.B. INT'L L. **220;** Freyria, ***Les limites de l'immunite de jurisdiction et d'execution des etats etrangers,*** 40 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE **209, 449 (1951);** Carabiber, ***Is a Revision of the Concept of Immunity from Legal Process Opportune and if So What Sense?,*** 79 JOURNAL DU DROIT INTERNATIONAL (Clunet) **441 (1952);** Lalive, ***L'immunite de jurisdiction des etats et des organisations internationales, Hague Academy of International Law,*** 84 RECUEIL DES COURS **205 (1953-111)**; Brandon, ***The Case Against the Restrictive Theory of Sovereign Immunity,*** 21 INS. COUNSEL J. **11 (1954)**; Garcia-Mora, ***Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications,*** 42 VA. L. REV. **335 (1956);** Note, ***Immunity of Foreign Governmental Instrumentalities,*** 25 U. CHI. L. REV. **176 (1957);** Lyons, ***Avoidance of Hardships Resulting from the Doc-***

sovereign immunity, states are always exempt from the jurisdiction of foreign courts, regardless of whether the lawsuit involves governmental (acts *jure imperil)* or proprietary (acts *jure gestionis*) acts, whereas under the restrictive theory, states are not immune from the jurisdiction of foreign courts if the lawsuits involve proprietary acts (acts *jure gestionis).* The application of this doctrine requires a proper distinction between "acts *jure imperii"* and "acts *jure gestionis."* The tendency of those countries in which the restrictive theory of sovereign immunity prevails is clearly to consider any commercial dealings as "acts *jure gestionis,"* even if they are incidental to the exercise of governmental functions.[23]

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trine of Sovereign Immunity, 42 TRANSACT. GROT. Soc. 61 (1957) Leonard, *The United States as Litigant in Foreign Courts,* 52 PROC. AM. Soc. INT'L. 95 (1958); Schmitthoff, *The Claim* of *Sovereign Immunity in the Law of International Trade,* 7 INT'L & COMP. L. Q. 462 (1958); Setser, *The Immunities of the State and Government Economic Activities,* 24 LAW & CONTEMP. PROB. 291 (1959); SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959). *See also* Panel Discussion, *Current Developments in the Law of Sovereign Immunity,* 1961 PROC. AM. SOC. INT'L L. 89.

[23] In a case decided on 10 February 1960 (55 AM. J. INT'L L. 167 (1961)), involving a claim for rentals for the lease of real estate to the Egyptian Minister in Austria, the Swiss Supreme Court stated: "In order to distinguish between private acts and governmental acts, the judge must look, not to the purpose of the acts involved but to their nature, and examine whether the particular act is within the exercise of public power or whether it is like an act which could be done by any private individual."

In an unpublished case decided on 11 January 1963, involving a contract by the U.S. Forces in Italy for the construction of certain sewers in the Tombolo military installation in Leghorn, Italy, the Supreme Court of Italy rejected the U.S. Government's argument that the contract constitutes an act *jure imperii.* The U.S. Government asserted that it had entered into the contract as a member of NATO and, furthermore, that the contract contained provisions (*e.g.,* the disputes clause) clearly showing that it acted in its sovereign capacity in concluding the contract. The translation of the Italian Supreme Court's holding is as follows:

"None of these arguments is well-founded. There is no doubt, and the Supreme Court proclaimed it recently in its decision No. 3160 of 28 October 1959, that the activities pursued by the American base in Livorno come within the scope of the NATO Treaty as ratified by the Italian Law No. 4464 of 1 August 1949. Under that Law, such activities must be regarded as governmental activities and exempt from any interference by the receiving State and its courts provided, however, such activities are governmental, reflecting the sovereign character of the government involved. This, however, does not mean that all military activities are essentially governmental, reflecting the sovereign character of the government involved, and that any act performed by the sending States, related to the operations of its agency in Italy, should be considered as acts 'jure imperii.'. .. Only international activities of the military establishment which have a direct, immediate connection with the performance of the proper functions of the North Atlantic Organization can be considered as governmental ; such activities are accord-

A former U.S. Department of Justice official voiced the following view :[24]

> The rather extensive literature on the subject of sovereign immunity by non-litigating commentators will stress with relative unanimity that the absolute theory is an older and thoroughly outmoded Concept in modern law. If the writers on the subject are to be believed, the newer, so-called restrictive theory, is of vigorous growth throughout the world. Yet when one comes down to actual decisions in the field which will constitute the primary defense of an actual case, it is found that of some hundred odd sovereignties in the world today, only four countries have any substantial body of decisions which could be said to support the restrictive theory.

Judge Lauterpacht, however, had stated in 1951:

> The estimate generally accepted of judicial practice on the subject is that while in a small number of states courts have acted upon the distinction between acts jure imperii and acts jure gestionis the courts of the majority of states are still wedded to the principle of absolute immunity. *That estimate is believed to be inaccurate.* As will be shown in the survey which follows, in the great majority of states in which there is an articulate practice on the subject, courts have declined to follow the principle of absolute immunity.[25]

What he said about the great majority of states adhering to the restrictive theory of immunity from jurisdiction applies likewise to NATO countries. It is true that Great Britain has not yet abandoned the absolute theory of sovereign immunity.[26] In the Federal

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ingly exempt from the jurisdiction of Italian courts. However, contracts which have been entered into with private parties and which, like the contract under consideration, have nothing to do with the concept of sovereignty, are not immune from the jurisdiction of local courts. . . . .

"The contention which is predicated on clause 6 of the contract, under which disputes between the parties were to be determined by the US Commanding Officer with a right of appeal to the Department of Defense in Washington, D.C., is not well-founded. . . . Regardless of the interpretation of the clause, it does not follow that such a clause could be enforced as valid under Italian law, and entitle the U.S. Government to claim immunity from jurisdiction. . . . In reality, by conferring jurisdiction upon one of the parties, this clause denies jurisdiction to the regular courts. . . . Agreements conferring exclusive jurisdiction upon one of the parties to a dispute are null and void as a matter of public policy."

See also decision of the Cour de Cassation of France, 19 December 1961, involving a suit against the State of Turkey based upon guaranty for bonds and a suit against Vietnam for the purchase price for tobacco furnished the Vietnamese Armed Forces (56 AM. J. INT'L L. 1112 (1962)).

"Leonard, *The United States as a Litigant in Foreign Courts,* 1958 PROC. AM. SOC. INT'L L. 95.

[25] Lauterpacht, *supra* note 22 at 243 (emphasis added).

[26] Compania Naviera Vascongada *v.* Cristina [1938] A.C. 458; Dollfus Meig et Cie. *v.* Bank of England [1950] 1 Ch. 333; Duff Development Co. *v.* Government of Kelantan [1924] A.C. 797; Kahan *v.* Federation of Pakistan [1951] 2 K.B. 1003. Turkey likewise has not abandoned the absolute theory of sovereign immunity from suit, *see* TEKS Insaat ve Sanayi Ltd. and Byrne

Republic of Germany, the so-called *Bundesverfassungsgericht* (Federal Constitutional Court) overruled on 30 April 1963 German Supreme Court decisions reflecting the absolute theory.[27] Previously, the Italian Supreme Court had embarked on a course of adopting the restrictive theory distinguishing between "public law" and "private law" activities.[28] Similarly, the French courts have drawn a distinction between *"fonctions étatiques de gestion publique"* and *"fonctions étatiques de gestion privée."* On 19 December 1961, the *Cour de Cassation* held that the State of Vietnam was exempt from the jurisdiction of French courts in a case involving the enforcement of a contract between the plaintiff and the State of Vietnam for the supply of cigarettes to the Vietnamese forces.[29] In the opinion of the *Cour de Cassation,* this contract constituted a *"fonction etatique de gestion publique"* (governmental act). The Belgian Supreme Court[30] abandoned the absolute theory in decision of 11 June 1903. The Dutch and Greek courts[31] have indicated a definite tendency towards the restrictive theory.

In the United States, the U.S. Supreme Court made a dent into the absolute theory in *National City Bank v. Republic of China*[32] by holding that a counterclaim of the National City Bank against the Republic of China was not barred by the doctrine of sovereign immunity. Furthermore, in the *Victory Transport* case,[33] the United States Court of Appeals for the Second Circuit held that the defendant, a branch of the Spanish Ministry of Commerce,

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International Inc. *v.* United States, No. 68/921 (High Court of Cassation, Commercial Division, 16 Feb. 1968).

[27] 16 BVerfGE 27, 63 NEUE JURISTISCHE WOCHENSCHRIFT 1732, *as noted in* 59 AM. J. INT'L L. 654 (1965).

"Decisions of 12 May 1947, [1948] Ann. Dig. 141; 14 Aug. 1953, I.L.R. 235 (1953); 17 Oct. 1955, I.L.R. 201 (1956); 24 May 1956, I.L.R. 203 (1956); 17 Oct. 1956, I.L.R. 211 (1957); 13 May 1957, I.L.R. 214 (1957); 8 Jun. 1957, I.L.R. 209 (1957).

[29] 66 REVUE GENERAL DE DROIT INTERNATIONAL PUBLIC 654 (1962). *See also* Societe Immobiliere v. Etats-Unis, 89 Clunet 132 (1962), and Epoux Martin v. Banque d'Espagne, 42 Revue Critique de Droit International Prive 425 (1953).

[30] Societe Anonyme des Chemins de Fer Liegois-Luxembourgeois *v.* Etat Neerlandais, 31 Clunet 417 (1904).

[31] As to the Dutch courts, see Lauterpacht, *The Problem* of *Jurisdictional Immunities* of *Foreign States,* 1951 BRIT. Y.B. INT'L L. 220, 263; as to Greek courts, see Lauterpacht, *id.* at 256.

[32] 348 U.S. 356 (1955). *See also* Comment, *The Jurisdictional Immunity of Foreign Sovereigns,* 62 YALE. L. J. 148 (1954).

[33] Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *noted in* 59 AM. J. INT'L L. 388 (1964); 60 MICH. L. REV. 1142, 1147 (1962).

could be sued under Section 4 of the United States Arbitration Act to compel arbitration in accordance with the arbitration clause agreed upon between the parties. Relying on the Tate letter, the United States Court of Appeals distinguished between a sovereign's private and public acts and reached the conclusion that the defendant's chartering of plaintiff's ship to transport a purchase of wheat constituted a private, commercial rather than a public, political act.

Finally, in *Ocean Transport* Co. v. *Republic of Ivory Coast,*[34] in which the plaintiff sued the government of the Republic of Ivory Coast for breach of contract, the court held that under the restrictive theory laid down in the Tate letter, the defendant was not entitled to immunity from suit, after the State Department had declined to recommend immunity and plaintiff had obtained jurisdiction by the attachment of defendant's property. Half a year later, a Federal District Court in New York reached a contrary conclusion in *Hellenic Lines, Ltd.* v. *The Embassy of South Viet Nam,*[35] involving a suit for recovery of damage for delay in unloading plaintiff's vessel in Saigon, after the plaintiff had obtained jurisdiction over the defendants by causing a process of maritime attachment and garnishment to be issued on the First National City Bank of New York and the State Department had, through the Attorney General, filed a suggestion of immunity from suit and from execution or attachment. Apparently, the State Department's different attitude in this latter case resulted from the fact that the case did not involve an act *"jure gestionis."* The court's rationale disregarded this criterion, however, and relied entirely on the principle that "courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the government in conducting foreign relations."

IV. ASSERTION OF IMMUNITY OF U.S. FROM JURISDICTION UNDER FOREIGN LAW

Little attention has been devoted heretofore to the question of how sovereign immunity must be asserted if the United States is a defendant in foreign courts. The U.S. Supreme Court held in *Ex parte Peru* (The Ucayali)[36] that the Department of State's certi-

[34] 269 F. Supp. 703 (E.D. La. 1967), *noted in* 62 AM. J. INT'L L. 197 (1968).

[35] 275 F. Supp. 860 (S.D. N.Y. 1967), *noted in* 62 AM. J. INT'L L. 783 (1968)

[36] 318 U.S. 578 (1943). *See also* Republic of Mexico v. Hoffman, 324 U.S.

fication, and the request that the vessel be declared immune, must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. In *National City Bank* v. ***Republic*** *of* ***China,***[37] the question of foreign immunity was considered upon a plea of sovereign immunity filed with the Federal District Court. In this case, the U.S. Supreme Court stated that "as the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit" and that "its failure or refusal to suggest such immunity has been accorded significant weight by this court." Thus, the U.S. Supreme Court considers the defense of sovereign immunity to be primarily a question for the executive branch of the Government (*i.e.*, the State Department). This view has been criticized on the ground that the Supreme Court did not attempt to discover whether any rule of customary law exists which would throw light on the doctrine of sovereign immunity as well as on its exceptions.[38] In addition, it would appear that the "implied consent" theory, which forms the basis for the Supreme Court's approach towards the question of sovereign immunity[39] and, hence, for the weight given to the Department of State's certificate, is in conflct with international law.[40] Even if the United States would decline to consent to the immunity, the court might still lack jurisdiction over foreign states as a matter of international law.

Assuming, however, that "implied consent" constitutes the pro-

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30 (1945), Berizzi Bros. v. S. S. Pesaro, 271 U.S. 562 (1921), and Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966), *noted in* 60 AM. J. INT'L L. 838 (1966).

[37] 348 U.S. 356 (1955).

[38] Schlechter, *Towards A World Rule of Law—Customary International Law in American Courts.* 29 FORDHAM L. REV. 316 (1960).

[39] Thus, the U.S. Supreme Court stated in National City Bank *v.* Republic of China, 348 U.S. 356, 362 (1955): "As expounded in The Schooner Exchange, the doctrine is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign."

[40] *See* Justice Musmanno's dissent in Chemical Natural Resources, Inc. *v.* Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966); Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168 (1946); Note, *Judicial Deference to the State Department on International Legal Issues*, 97 U. Pa. L. REV. 79 (1948). *See abo* Feller, *Procedure in Cases Involving Immunity of Foreign States in Courts of the United States*, 25 AM. J. INT'L L. 83 (1931); Note, *Immunity from Suit of Foreign Sovereign Instrumentalities and Obligations*, 50 YALE L. J. 1088 (1941).

per basis for the disposition of the defense of sovereign immunity, it does not follow that the executive branch (*i.e.*, the State Department) has the authority to influence the court's determination.[41] The theory of "implied consent'' is a matter of law rather than policy. Recent cases have, therefore, departed from the US. Supreme Court's attitude towards sovereign immunity of foreign states from jurisdiction of American courts. Thus, in *Puente* v. *Spanish National States*[42] and, more recently, in *Petrol Shipping Corp.* v. *Kingdom* of *Greece*,[43] the court held that the claim of sovereign immunity of a foreign state may be presented through a letter of the ambassador or through his special appearance in court suggesting want of jurisdiction to sue a sovereign state in the absence of its consent.

In the *Puente* case, the plaintiff sued for legal fees. No appearance was entered for defendant, but the Spanish Ambassador to the United States submitted to the clerk of the district court a letter which stated that ('under prevailing principles of international law, the Spanish Government, as a sovereign State, is not subject to suit in your Court without its consent, which in this case it declines to accord." In a well-reasoned and lucid opinion, in which Judge L. Hand and Judge Chase concurred, Judge Clark pointed out that the question for decision was "how the conceded immunity of a friendly foreign state from suit without its consent is to be presented to the Court." The Ambassador's letter was held sufficient.The opinion emphasizes the distinction between actions in personam and actions in rem involving vessels over which the district court has already acquired jurisdiction.

In the *Petrol Shipping Corp.* case, the petitioner filed a motion with the U.S. District Court for an order directing the Greek Ministry of Commerce to proceed to arbitration in regard to damage arising out of respondent's charter of petitioner's tanker. The Greek Ambassador to the United States, appearing specially, suggested want of jurisdiction to sue a sovereign state without its

"*See* Moore, *The Role of the State Department in Judicial Proceedings*, 31 FORDHAM L. REV. 277 (1962) ; Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168 (1946); Note, *Procedural Aspects of a Claim of Sovereign Immunity by a Foreign State*, 20 U. PITT. L REV. 126 (1958) ; Note, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 YALE L. J. 1148 (1954) ; Note, *Judicial Deference to the State Department on International Legal Issues*, 97 U. PA. L. REV. 79 (1948).

[42] 116 F.2d 43 (2d Cir. 1940), *cert. denied*, 314 **U.S.** 627 (1941).

[43] 326 F.2d 117 (2d Cir. 1964), *amended en banc*, 332 F.2d 370 (2d Cir. 1964), on remand, 37 F.R.D. 437 (S.D. N.Y. 1965), *aff'd*, 360 F.2d 103 (2d Cir 1966), *cert. denied*, 385 **U.S.** 931 (1966).

consent. The U.S. District Court so held, and the Second Circuit affirmed, relying on the *Puente* case.

Finally, in the *Victory Transport* case,[44] the Second Circuit held that while the foreign sovereign may request its claim of immunity be recognized by the State Department, which will normally present its suggestions to the court through the Attorney General or some law officer acting under his direction, alternatively, the accredited and recognized representative of the foreign sovereign may present the claim of sovereign immunity directly to the court. In that case, the court must decide for itself whether it is the established policy of the State Department to recognize claims of immunity of this type,

The question of presenting the defense of sovereign immunity to the court does not arise in countries in which the immunity of foreign states from the jurisdiction of local courts constitutes a matter of law rather than policy.[45] In those countries, any suggestion by the executive branch of the government would be an unwarranted interference with the independence of the judiciary.

In sum, it would appear that the **U.S.** Government's immunity from suit in a foreign country is primarily a matter of pertinent treaty provisions and, in the absence of such treaty provisions, a matter of general principles of international law as adopted by the courts of the country concerned. Where such country adopts the restrictive theory of immunity from suit, the problem arises whether the action involved in a lawsuit constitutes an act ***jure*** *imperii* ***or jure*** *gestionis.* Again, the criteria for this distinction must be sought in the decisions of the country concerned. Fnally, the question how the immunity from suit, if any, should be asserted depends on whether, under domestic law, the defense of sovereign immunity is a matter of law or policy.

V. RECOGNITION OF FOREIGN WRITS OF GARNISHMENT AGAINST THE **U.S.** GOVERNMENT

Quite frequently, upon motion of judgment-creditors, foreign courts issue writs of attachment and garnishment involving the judgment-debtor's claim against the **U.S.** Government, or any of its agencies or instrumentalities, for payment of wages and salaries of soldiers or employees, or compensation for goods furnished or services rendered. Are those writs subject to recognition?

[44] **232 F.** Supp. **294 (S.D.N.Y.** 1963), *aff'd,* **336** F.2d **354** (2d Cir. **1964**), *cert. denied,* **381** U.S. **934 (1965).** *See also* Pan American Tankers Corp. v. Republic of Viet Nam, **291** F. Supp. **49 (S.D.**N.Y. 1968), *as noted in* **63 AM. J. INT'L L. 343 (1969).**

[45] *E.g.,* in the Federal Republic of Germany.

The general rule is that the United States cannot be summoned as garnishee in any action without statutory authorization, consent, or waiver.[46] One reason given for this rule is that the process of garnishment is substantially the prosecution of an action by the defendant (judgment-debtor) in the name of the plaintiff (judgment-creditor) against the garnishee, and as a sovereign state is not liable to be sued in its own courts except by express statutory authorization, the courts will not allow this to be accomplished indirectly. Another reason stated is the fact that monies sought to be garnished, as long as they remain in the disbursing office of the government, belong to the latter, although the defendant in garnishment, may be entitled to a specific portion thereof, so that they cannot, in the legal sense, be considered a part of his effects. Still another reason commonly given in support of the rule is that public policy demands the exemption of the government and its agents from liability as garnishees.

The leading authority denying recognition of such writs of attachment and garnishment is the case of *Buchanan* v. *Alexander*.[47] In this case, a number of U.S. boarding-house keepers obtained judgments against certain seamen of the frigate *Constitution* and subsequently obtained writs of attachment from the justice of the peace of the county of Norfolk involving the pay of the seamen, In disregard of the attachment, the monies were paid to the seamen by the purser. The boarding-house keepers then brought suit against the purser for the payment of the monies attached by the writs. The U.S. Supreme Court held that the purser properly disregarded the writs :

> The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by State process or otherwise, the functions of the government may be suspended. So long as money remains in the hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury, Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects. The purser is not the debtor of the seamen.
>
> It is not doubted that cases may have arisen in which the government, as a matter of policy or accommodation, may have aided a creditor of one who received money for public services; but this cannot have been under any supposed legal liability, as no such liability attaches to the government, or to its disbursing officers."

*Federal Housing Administration v. Burr, 309 U.S. 242 (1940); Buchanan v. Alexander, 4 How. (45 U.S.) 20 (1846).

"4 How. (45 U.S.) 20 (1846).

[48] *Id.*

In *Federal Housing Administration* v. *Burr*,[49] Burr had obtained final judgment against Brooks, an employee of the Federal Housing Administration, and, thereafter, a writ of garnishment for monies due to Brooks by the Federal Housing Administration. He brought suit against the Federal Housing Administration, a government corporation endowed with the capacity to sue and to be sued. The Supreme Court held that, since in enacting the National Housing Act, Congress waived immunity of the Federal Housing Administration from suit, the Federal Housing Administration could be sued and judgment entered against it, even though it was predicated upon a writ of garnishment. Nevertheless, the U.S. Supreme Court added the following dictum: "That does not, of course, mean that any funds or property of the United States can be held responsible for the judgment. , , ." It is doubtful whether the rule in *Buchanan* v. *Alexander* and the dictum in *Federal Housing Administration* v. *Burr* are sound. In *Buchanan*, the rationale for the Supreme Court's denial of recognizing the writ of attachment and garnishment is based upon public policy. In repudiating the doctrine of public policy, at least one court declared that the public's business was not in any danger of derangement by garnishment, that the government's only duty in such a case was to act as temporary stakeholder to wait determination of a court, and that the duty of debtors to pay their debts should not be impaired.[50] The rationale of *Buchanan* is based upon the assumption (1) that the writ of attachment and garnishment makes the United States a defendant in a U.S. court and (2) that such a writ is in violation of the principle that the U.S. Government cannot be sued in its own courts without its consent. Both assumptions are erroneous. Contrary to a writ of garnishment issued *pending* determination of the merits of a forthcoming judgment, a writ of attachment and garnishment initiated *after* judgment, properly termed "attachment execution," constitutes no more than a court order assigning the judgment-debtor's claim against the garnishee to the judgment-creditor. In such a situation, the garnishee becomes a defendant only if he is sued by the judgment-creditor for failure to honor the writ. In any event, the doctrine of the U.S. Government's (internal) immunity from jurisdiction in its own courts is

[49] 309 U.S. 242 (1940).

[50] Waterbury v. Deer Lodge County, 10 Mont. 515, 26 Pac. 1002 (1891). In repudiating the "unsatisfactory doctrine of public policy," the court declared that the public's business was not in any danger of derangement by garnishment and that the duty of debtors to pay their debts should not be impaired.

not applicable where writs of garnishment are issued by foreign courts. In those cases, the question arises whether writs against the US. Government are compatible with the (external) immunity of the U.S. Government from the jurisdiction of foreign courts. The question must be answered in the negative. However, this result is bound to encourage judgment-debtors to disregard their legal obligations towards judgment-creditors. It is for this reason that the United States Department of Justice indicated in a letter of 31 May 1966 to the Department of the Army that:

> In the light of the continuing trend abroad toward restricting sovereign immunity, the Department feels that it should refrain from asserting immunity in situations (1) where the liability of the instrumentality involved is established or acknowledged; (2) where compliance with local law can be had with little or no inconvenience; (3) where there is no possibility of double liability; and (4) where no sovereign activity of the United States Governmentas that term is understood in civil law countries — is involved.[51]

VI. SUITS AGAINST INDIVIDUALS: ARTICLE VIII, NATO SOFA

A somewhat different situation arises where suit is brought in foreign courts against U.S. soldiers, government officials, or government employees.

a. If such suits are based upon the defendant's ***private*** act, the suits are of no interest to the U.S. Government, unless the defendants are members of the armed forces or civilian employees of a military department stationed in a NATO country and the suits are based upon tort. In the latter case, the claimants will be, as a rule, better off by filing claims for "ex gratia" payment under the provisions of the Foreign Claims Act,[52] as reflected in paragraph 6, article VIII, of NATO SOFA. Pursuant to paragraph 6(d), however, the filing of claims does not affect the jurisdiction of the foreign courts to entertain an action against the members of the force or civilian component unless and until there has been payment in full satisfaction of the claims. In fact, such legal action may be the claimant's only remedy if he failed to file his claim within the two-year statute of limitations prescribed by the Foreign Claims Act.

b. On the other hand, if such suits are predicated upon the defendant's official act, immunity from jurisdiction should be a pro-

[51] Letter of John W. Douglas, Ass't Attorney General, Civil Division, to Colonel William M. Meyers, Chief, Litigation Division, Office of The Judge Advocate General, Department of the Army, 31 May 1966.

[52] 10 U.S.C. §§ 2734, 2735 (1964).

per defense. While there appears to be an increasing trend toward recognition of limited immunities of this group of persons, clearly distinguished from diplomatic immunities, however, this trend has not yet developed into any clear customary rule of international law applicable to foreign government agents.[53] As far as such suits are directed against the *official* acts of members of the force or civilian component stationed in NATO countries, it is explicitly provided in paragraph 9 that "the sending State shall not claim immunity from the jurisdiction of the courts of the receiving State for members of a force or civilian component in respect of the civil jurisdiction of the courts of the receiving State except to the extent provided in paragraph 5(g) . . . ." However, paragraph 5(g) prescribes that "a member of a force or civilian component shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties." Consequently, in cases involving official acts of a member of the force or civilian component, judgments may be rendered against the member of the force or civilian component, even though such judgments are not enforceable. In view of the fact that in cases of this type claims will be filed administratively against the U.S. Government under paragraph 5, rather than suit brought against the members of a force or civilian component, the provision of paragraph 5(g) is mainly a matter of theoretical, rather than practical, significance.[54] The possibility to sue the member of a force or civilian component for damages arising out of official acts may be of value, however, where the death statute of the receiving State provides that the claim survives only if filed in court prior to the death of the claimant (*e.g.*, claim for pain and suffering under Section 8.47, German Civil Code).

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[53] W. **BISHOP,** INTERNATIONAL LAW 613 (2d ed. 1962).

"Summary Records of Meetings of the Working Group on Drafting NATO Status of Forces Agreement, MS-(j)-R(51)8, para. 4, and MS-R(51)11, para. 6, indicate the following:

"The Belgian representative asked for clarification of this, and the Chairman explained that it was put in to make it quite clear that, even if an individual member of a force had to appear in a court case arising out of his official duties and was ordered to pay costs, any further action must be against the sending State and the judgment could not be pressed against the individual. It was intended purely as a safeguard . . . .

"It was pointed out in discussion that in the majority of cases it would be necessary for the defendant to attend the Court in order to testify, as he would probably be the individual responsible for the damage. It was true that in cases of this kind the government authorities of the State concerned would stand behind the individual and, in order to protect him, provision had in fact been made in the agreement to the effect that no judgment could be enforced against the individual."

VII. SUMMARY

It appears that the filing of suits against the US. Government in foreign countries raises a considerable number of international law problems. The most important one remains the problem of immunity from jurisdiction. In those cases in which the U.S. Government is sued in foreign countries, the absolute theory of sovereign immunity will usually be interpreted as a shield designed to evade justice. The restrictive theory has also been criticized, because it requires the distinction between acts *jure imperii* and acts *jure gestionis.* Therefore, new solutions have been suggested.

a. Judge Lauterpacht proposed that a defendant state's exemption in foreign courts should be dependent on whether the state in which the forum is located provides for its own immunity in similar cases, so that, for example, the English Crown Proceedings Act would govern the question of exemption of foreign states in English courts.[55]

b. Another proposal is that the immunity of a defendant state from the jurisdiction of foreign courts be governed by the legislation by which suits are permitted against the state within its own jurisdiction.[56] As a result of this theory, for example, the exemption from immunity under the Crown Proceedings Act would govern the defense of sovereign immunity in cases in which the United Kingdom is sued in the United States, and the exemption provided in the Federal Tort Claims Act would be applicable in suits in which the U.S. Government is sued abroad.

Both suggestions are objectionable. First, if these suggestions were accepted, the immunity of foreign states would be governed by local, rather than international, law. Secondly, they disregard the fact that the question of *internal* sovereign immunity, as reflected in British Crown Proceedings Act or the U.S. Federal Tort Claims Act, is separate and distinct from the question of *external* sovereign immunity. The internal sovereign immunity originates from the doctrine that "the King can do no wrong," whereas the doctrine of external sovereign immunity is based on the principle of equality of states. This distinction has been emphasized by the U.S. Supreme Court in the case of *National City Bank v. Republic* of *China:*

> Unlike the special position accorded **our** States as party defendants by the Eleventh Amendment, the privileged position of a foreign

[55] *Supra* note **22,** at **236.**

[56] **Leonard,** ***The*** *United States as a Litigant in* ***Foreign*** *Courts,* **1958** PROC. AM. SOC. INT'L L. **103.**

> state is not an explicit command of the Constitution. It rests on considerations of policy given legal sanction by this Court. To be sum, the nonsuability of the United States without its consent is likewise derived from considerations of policy. But these are of a different order from those that give a foreign nation such immunity."

Another approach to the problem as to how much immunity is to be accorded the foreign sovereign would be predicated upon an implied waiver of immunity or, phrased alternatively, consent to jurisdiction.[58] Aside from the fact that some states do not recognize a waiver prior to judicial proceedings,[59] however, it appears that in most instances it would be an open question whether the defendant state has in advance waived immunity.[60] A final solution of the problem may very well be reached through an international convention prepared by the United Nations Law Commission.

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[57] 348 U.S. 356, 358-59 (1955).

[58] Comment, *Sovereign Immunity—Waiver and Execution: Arguments from Continental Jurisprudence,* 74 YALE L. J. 887 (1965).

[59] *E.g.,* England. See Kahan *v.* Federation of Pakistan, 2 K.B. 1003 (1951), *noted in* 1 INT'L & COMP. L. Q. 103 (1952), and 68 L. Q. REV. 11 (1952). *See also* Cohn, *Waiver of Immunity,* 34 BRIT. Y.B. INT'L L. 260 (1958).

[60] Thus, in Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1954), the court considered an agreement to arbitrate a consent to service of process. *Contra,* Duff Development Co. *v.* Kelantan, [1924] A.C. 797, 829.

THE MILITARY ORAL DEPOSITION AND MODERN COMMUNICATIONS*

*By Lieutenant Peter J. McGovern***

This article deals with the problems in obtaining depositions and having them admitted into evidence, when the parties involved are apart due to circumstances beyond their control. The author covers the procedures in taking depositions, and then delves into areas of modern communications which could facilitate the taking of depoistions, while retaining the right of confrontation, when the parties are apart. The individual judge advocate, it is concluded, must be ingenious in requesting new ways of taking depositions, so that such modern methods will be accepted by the courts.

I. INTRODUCTION

Within the scope of this article, it is intended to discuss the present and possible future role of the oral deposition in military law. The first part of the presentation will be devoted to establishing the present legal position of the oral deposition. All the minute and various legal questions that have arisen with respect to the contents of depositions are beyond the scope of this discussion, as are the historical aspects of the use of depositions. These problems have been developed elsewhere.[1] It is intended to develop here a practical dissertation on what legal criteria must be met in order to pave the way for the taking of an oral deposition, and then show step by step what must be done in order to take a procedurally correct oral deposition. The main thrust of Part II is directed toward the development of a practical syllabus of

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[1] See Burke, *Depositions* (unpublished thesis in The Judge Advocate General's School library, Charlottesville, Va.) ; McCarthy, *Depositions in Courts-Martial* (unpublished thesis in The Judge Advocate General's School, Charlottesville, Va.) ; Everett, *The Role of the Deposition in Military Justice*, 7 MIL. L. REV. 131 (1960). Stubbs, *Depositions*, JAG J., Sep. 1957, p. 3. Milius, *Depositions in Court-Martial Trials*, JAG J., Oct. 1957, p. 5; JAG J., Apr. 1958, p. 7; JAG J., Sep. 1958, p. 13.

deposition requirements, and workable answers to the evidential and procedural problems are proposed.

Part III is devoted to a re-evaluation of the use and role of an oral deposition in light of the ever-increasing technological changes in the field of electronics and telecommunications. Our society is developing new and ever better means of recording and presenting the testimony of an absent witness to the triers of fact. Are these new means of communication applicable and legally sufficient to stand and be admissible under the rules of evidence? Part III seeks to explore and answer this and the many associated questions.

II. THE ORAL DEPOSITION

A. THE DEPOSITION

The threshold inquiry is: "What is a deposition?" Wigmore, in his treatise on Evidence, states :

> The term "deposition" . . . is now confined in meaning exclusively to testimony delivered in writing, *i.e.*, testimony which in legal contemplation does not exist apart from a writing made or adopted by the witness?

Corpus Juris Secundum relates that a deposition is:

> [T]he testimony of a witness, taken in writing, under oath or affirmation, before some judicial officer, in answer to interrogatories, oral or written, and with the opportunity of cross-examination."

Depositions are authorized for use by both the Federal Rules of Civil and Criminal Procedure.[4] The use of depositions in American military law has a long judicial history,[5] since it was first specifically authorized in 1779.[6] The military use of depositions is authorized by statute[7] and implemented by paragraphs 114, 117, and 145*a* of the *Manual* for *Courts-Martial, United States,* 1969 (Revised edition).[8] The Manual defines a deposition as:

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[2] III J. WIGMORE, EVIDENCE § *802* (3d ed. *1940).*
[3] 26*A* C.J.S. *Depositions* § 1 *(1966).*
[4] Fed. *R.* Civ. P. *26–33;* Fed. R. Crim. P. *15.*
[5] United States v. Sutton, *3* U.S.C.M.A. *220, 11* C.M.R. *220 (1953).*
[6] *Id.* at *223, 11* C.M.R. at *223. See also* Melnick, *The Defendant's Right to Obtain Evidence: An Examination of the Military Viewpoint, 29* MIL. L. REV. 1, 19 *(1965).*
[7] UNIFORM CODE OF MILITARY JUSTICE art. *49a* [hereafter called the Code and cited as UCMJ].
[8] Hereafter called the Manual and cited as MCM, *1969.*

> [T]he testimony of a witness in response to questions submitted by the party desiring the deposition and by the opposite party which is reduced to writing and taken under oath before a person empowered to administer oaths?

The Manual provides for both oral and written deposition,[10] and both the Government and the defense may take and use them.[11] The military use of depositions has been upheld as a legitimate statutory tool for the administration of justice, and depositions are within the framework of constitutional and military due process.[12] The United States Court of Military Appeals, in the case of *United States* v. *Jacoby*, held that:

> The correct and constitutional construction of the Article in question [UCMJ, art. 49] requires that the accused be afforded the opportunity . . . to be present with his counsel at the taking of written deposition."

In effect the prosecution's right to use a deposition upon written interrogatories without the express consent of the accused has been extinguished by case law and this rule now appears in paragraphs 117*b*(2) and 145*a* of the Manual. As a result of the *Jacoby* decision the use of written interrogatories has been virtually eliminated, and the military practice now centers almost exclusively upon the taking and use of oral deposition.

B. *THE PRESENT STATE OF THE LAW*

In 1969 and for the foreseeable future, the deposition's importance as a tool for the administration of true justice will continue to increase. It is likely that the United States Armed Forces will remain committed throughout the world, and now even space has been made accessible. The present hostilities in Vietnam and the resulting difficulties encountered in obtaining witnesses has reaffirmed the need for the deposition.

There are several criteria of constitutional and military due process which must be examined in order to place in proper perspective the present day use of a deposition. Under military law, the accused has, in general, the right to confront and cross-exam-

[9] MCM, 1969, ¶ 117*a*.

[10] *Id.*

[11] United States *v.* Valli, 7 U.S.C.M.A. 60, 64, 21 C.M.R. 186, 190 (1956).

[12] United States *v.* Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); United States *v.* Ciarletta, 7 U.S.C.M.A. 606, 23 C.M.R. 70 (1957); United States *v.* Valli, 7 U.S.C.M.A. 60, 21 C.M.R. 186 (19561; United States *v.* Sutton, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1963); United States *v.* Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

[13] 11 U.S.C.M.A. 428, 433, 29 C.M.R. 244, 249, (1960).

ine witnesses against him. The accused has the right to have witnesses material to his defense present in court, to testify on the merits, and if he is found guilty, to present mitigation and extenuation evidence. Where a deposition is used, the accused has, in almost all cases, the right to be represented by lawyer counsel at the taking thereof.[14] Where a deposition is received in evidence against the accused, he has the right to have the court receive proper and correct instruction on the consideration and weight to be given to testimony by deposition.

1. *The Right of Confrontation and Cross-Examination.*

As recently as *Barber* v. *Page*,[15] the United States Supreme Court reaffirmed the right of a defendant to confront a government witness against him. The court said :

> Many years ago this Court stated that "[t]he (sic) primary object of the [Confrontation Clause of the Sixth Amendment] . . . was to prevent depositions or ***ex parte*** affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox *v.* United States, **156** U.S. **237, 242–243** (1895). More recently, in holding the Sixth Amendment right of confrontation applicable to the States through the Fourteenth Amendment, this Court said, "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." ***Pointer*** v. *Texas*, **380** U.S. **400, 405 (1965).**[16]

Within the military law of the United States there is the right of "Military Due Process." In *United States* v. *Clay*,[17] the United States Court of Military Appeals laid down the basis of the concept. The court stated :

> There are certain standards in the military accusatorial system which have been specifically set by Congress and which we must demand be observed in the trial of military offenses. . . . We conceive these rights to mold into a pattern similar to that developed in federal civilian cases. For lack of a more descriptive phrase, we label the pattern as "military due process". . . .

[14] MCM, **1969,** ¶ **117b(2).**
[15] **390 U.S. 719 (1968).**
[16] *Id.* at **721.**
[17] **1** U.S.C.M.A. **74,** 1 C.M.R. **74** (1951).

> . . . [W]e believe Congress intended, in so far as reasonably possible, to place military justice on the same plane as civilian justice . . . A cursory inspection of the Uniform Code of Military Justice . . . discloses that Congress granted to an accused the following rights which parallel those accorded to defendants in civilian courts: To be informed of the charges against him; to be confronted by witnesses testifying against him; to cross-examine witnesses for the government; . . . .

In *United States* v. *Sutton,* [19] in a vigorous dissent Chief Judge Quinn stated :

> I have absolutely no doubt in my mind that accused persons in the military service of the Nation are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication by the provisions of the Constitution itself."

Chief Judge Quinn continued: "Among the rights and privileges protected by the Constitution, and which are not directly or indirectly inapplicable to the military, is the right of an accused 'to be confronted with the witness against him.' " [21]

The Court of Military Appeals overruled *Sutton,* and affirmatively adopted the position of Chief Judge Quinn in the case of *United States* v. *Jacoby.*[22] The court said:

> [I]t is apparent that the protection in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces . . . . Moreover, it is equally clear that the Sixth Amendment guarantees the accused the right personally to confront the witnesses against him.[23]

2. *The Right to Material Witnesses.*

Article 46 of the Code states: "The . . . defense counsel . . . shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."[24] The President has prescribed such regulations in paragraph 115 of the Manual, which states: "The trial counsel will take timely and appropriate action to provide for the attendance of those witnesses who have personal knowledge of the facts at issue in the case for both the prosecution and the defense." [25] The Manual further states, however, that the testimony of the

[18] *Id.* at 77, 1 C.M.R. 77.
[19] 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1963).
[20] *Id.* at 228, 11 C.M.R. 228.
[21] *Id.* at 229, 11 C.M.R. 229.
[22] 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).
[23] *Id.* at 430–31, 29 C.M.R. 246–47.
[24] UCMJ art. 46.

witness must be "material and necessary." [26] The force of the Manual language has been strengthened by vigorous decisions of the United States Court of Military Appeals. In *United States* v. *Thornton*. the court safeguarded the right of the accused when it said :

> An accused cannot be forced to present the testimony of a material witness on his behalf by way of stipulation or deposition. On the contrary, he is entitled to have the witness testify directly from the witness stand in the courtroom.?'

Again in *United States* v. *Sweeney*, the Court said:

> Under the Sixth Amendment to the Constitution, one accused of crime is guaranteed the right to compel the attendance of witnesses. Who these witnesses shall be is a matter for the accused and his counsel. He may not be deprived of the right to summon to his aid witnesses who it is believed may offer proof to negate the Government's evidence or to support the defense.[28]

The Court in *Sweeny* did acknowledge the Manual conditions for this request for witnesses,[29] and stated that since the Government bore the cost of the litigation,[30] the discretion on whether to grant the accused's request for witnesses is upon the convening authority or the trial court itself. The Court said :

> This opinion is not to be construed as granting *carte blanche* authority for the issuance of subpoenas in all cases. Each request should be carefully considered to prevent a useless or abusive issuance of process . . . . Each case must be decided on an ad hoc basis in which the materiality of the testimony and *its relevance to the guilt or innocence of* ***the*** *accused,* together with the relative responsibilities of the parties concerned, is weighed against the equities of the situation."

In the case of *United States* v. *Manos*,[32] this right to witnesses for the accused was carried over to and applied to pre-sentencing activities, *i.e.*, witnesses in extenuation and mitigation.

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[25] MCM, 1969, ¶ **115.**

[26] *Id.* It should be noted that if there is disagreement between trial and requesting defense counsel as to whether the testimony of a witness is material and necessary, the matter is referred for decision to the convening authority before trial or to the military judge or president of a special court-martial, without a military judge, if the trial has commenced. However, after 1 August **1969,** if a military judge has been appointed, he may hear the matter in a UCMJ article 39*a* pretrial hearing.

[27] 8 U.S.C.M.A. **446, 449, 24** C.M.R. **256, 259 (1957).**

[28] 14 U.S.C.M.A. **599, 602, 34** C.M.R. **379, 382 (1964).**

[29] MCM, **1969** ¶ 117*b* (1).

[30] United States *v.* Sweeny, **14** U.S.C.M.A. at **602, 34** C.M.R. at **382.**

[31] *Id.* at **605–06, 34** C.M.R. at **385–86.**

[32] 17 U.S.C.M.A. 10, **37** C.M.R. **274 (1967)**

3. *Except*ions.

It must be recognized that practice often must depart from theory. Thus as a practical matter it is not always possible to provide the complete fulfillment of the "spirit of the law." The Government's witness may be physically unable to appear at the trial. The needed and material witness for the defense may be unwilling to come, or unavailable due to illness or military necessity. The Supreme Court, in *Barber* v. *Page*,[33] acknowledged this situation. The Court said :

> It is true that there has traditionally been an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant, . . . This exception has been explained as arising from necessity and has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purpose behind the confrontation requirement."

Under military law, if a government witness is unable to appear at trial, and the situation fits the statute,[35] the Government may introduce the testimony of the absent witness (in a non-capital case) by use of a deposition. The right of confrontation would be satisfied, provided the accused had been given legal representation and reasonable time to prepare and appear at the deposition.[36] On occasion, the accused's requested witnesses will be unavailable. The Government may be unable to compel the defense witness to appear,[37] or the military judge or convening authority "weighing the materiality of the testimony" and "its relevance to the guilt or innocence of the accused" with the "relative responsibility of the parties concerned" against the "equities of the situation" [38] may deny the defense's request and not abuse his discretion in doing so,[39] especially if granting such request would result in "manifest injury to the service."[40] Where these factors are appropriately applied, the accused must look to the use of a

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[33] **390** U.S. **719 (1968).**

[34] *Id.* at **722** *(citations omitted).*

[35] UCMJ art. **49.**

"United States v. Jacoby, **11** U.S.C.M.A. **428, 433, 29** C.M.R. **244, 249 (1960).**

[37] Where the witness refuses service of process or because the witness, being a foreign national in a foreign territory, is not subject to United States process.

[38] United States v. Sweeny, **14** U.S.C.M.A. at **606, 34** C.M.R. at **386.**

[39] *Id.* at **604, 34** C.M.R. at **384.**

"United States v. Manos, **17** U.S.C.M.A. at **15, 37** C.M.R. at **279.**

deposition in order to preserve and present valuable defense testimony to the court.[41]

4. ***Use*** *of a Deposition Where the Unavailability Requirements Are Met.*

If the circumstances are such as to permit the use of a deposition either by the accused or the Government, the procedural, evidentiary, and statutory rules must be strictly followed.[42] This is especially true for the Government.[43] In almost all instances, the accused must be represented by legal counsel.[44] When a deposition is received in evidence against the accused, the military judge or president of a lesser court must, prior to findings, instruct the members of the court on the consideration and weight to be given the deposition. In *United States* v. *Griffin,* the United States Court of Military Appeals ordered a rehearing in the case because the law officer had instructed :

> In the present case, certain testimony has been read to you by the way of a deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. *It is entitled to the same consideration, the same rebuttal, the presumption that the witness speaks the truth and the same judgment on your part with reference to its weight as is the the testimony of witnesses who have confronted you on the witness stand.*[45]

The Court held this instruction to be prejudicially erroneous. The instruction directed the trial court "to treat the deponent's credibility as if he had appeared before it in open court." [46] The deponent had, of course, not appeared in court, and one consideration of a witness's credibility is the opportunity for the court to "observe the demeanor and behavior of the witness." [47] Again, the Court found fault with the "presumption that the witness speaks the truth, "'as if he had actually testified in court."' [48] The Court found no such unexplained use of such a presumption in the criminal law.[49] The Court suggested that at the very least, the mili-

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[41] *Id.* at 16, 37 C.M.R. at 280.

[42] MCM, 1969 ¶¶ 117, 145*a*; UCMJ art. 49.

[43] United States *v.* Valli, 7 U.S.C.M.A. 60, 64, 21 C.M.R. 186, 190 (1956).

[44] MCM, 1969 ¶ 117*b*(2).

[45] 17 U.S.C.M.A. 387, 388, 38 C.M.R. 185, 186 (1968) *(emphasis added by the Court).*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 389, 38 C.M.R. at 187.

tary judge should instuct the court that "the jury is free to determine the credibility of the witness." [50]

C. *TAKING AN ORAL DEPOSITION*

Acknowledging the fact that an oral deposition has a valid and necessary place in military law, and that its use in courts-martial is legally permissible and constitutional, how does one go about taking a procedurally correct deposition?

The taking, use and admissibility of military depositions are regulated by article 49 of the Code, paragraphs 113, 117, and 145 of the Manual, and the many and varied decisions of the United States Court of Military Appeals and the courts of military review.[51] The following is intended to be a step-by-step approach to the taking of an oral deposition.

1. *Requesting the Deposition.*

When an incident has arisen wherein it is foreseeable that a court-martial will result or possibly has been already authorized, counsel to the proceedings may wish to take an oral deposition of an intended witness, A request for an oral depostion may be made at any time after charges have been signed.[52] If the charges have not yet been signed, a deposition is not permissible.[53] If the request is made after charges have been signed, but before the commencement of the trial, the request is made to the convening authority.[54] If the request is made after the commencement of the trial, the request must be directed to the military judge or if no military judge is sitting, to the president of the special court-martial.[55] It appears also that a valid deposition can be taken without the approval of the convening authority, but under such

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[50] *Id.* The government used the deposition against the accused. Would not the same rule apply for the defense in its use of a deposition?

"Formerly called the boards of review, now changed by the MILITARY JUSTICE ACT OF 1968, Pub. L. No. 90–632, 82 Stat. 1335, amending UCMJ art. 66, 10 U.S.C. § 866.

[52] UCMJ art. 49*a*.

[53] MCM, 1969, ¶ 117*b*(1); UCMJ art. 49a; ACM S-21875, Burnom, 35 C.M.R. 908, 912 (1965). If such is the case, at this point, it may be advisable for counsel, if the witness may depart the area before the charges are signed, to take a sworn statement from the witness in order to preserve his testimony and to substantiate any later request for a deposition or the actual presence of the witness.

[54] MCM, 1969, 117*b*(1).

[55] *Id.* It must be noted here that the Manual does not define what is meant by the "commencement of a trial,'' nor has the Manual been changed to reflect the amendment of the UCMJ art. 39 by the "Military Justice Act

a situation it must appear that all parties to the deposition consented to such a procedure.[56]

2. *The Request Itself.*

Under the Manual,[57] all requests for a deposition must include:

(1) the reasons for taking the deposition;

(2) the point desired to be covered within the deposition;

(3) the name (if known) of the person whose deposition is desired; and

(4) all accompanying papers.

When making the request, counsel must insure that the evidence sought by the deposition is "material and otherwise admissible.'' [58]

3. *Objections to the Deposition Request.*

When the request for a deposition occurs after the commencement of a trial, the Manual states that the request will be submitted to the law officer [59] or the special court-martial.[60] The Manual also requires that the request and the accompanying papers will be offered for inspection by opposing counsel.[61] This gives the opposing counsel the opportunity to object at the initiation of the request and insures that opposing counsel's demand for the actual presence of a witness is heard. It also appears that a request for a deposition made after the signing of charges but before the commencement of trial must be communicated to opposing coun-

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of 1968" in which now under UCMJ art. 39*a*, the military judge can call the "court into session without the presence of the members'' for the purpose of hearing and determining motions, Does the "commencement of a trial" mean calling the "court into session"? It appears from the language of the Manual and the permisive language of UCMJ art. 39*a* that if a case has been referred to a court-martial and a military judge is detailed to the case, the judge has the discretion of hearing the request for an oral deposition or if he does not wish to hear the matter, the requesting counsel must address his request to the convening authority.

"See the language of MCM, 1969, para. 117*a*, the comments of the drafters of MCM, 1969 (Office of The Judge Advocate General, U.S. Army), and the case of United States *v.* Ciarletta, 7 U.S.C.M.A. 606, 611-12, 23 C.M.R. 70, 75-76 (1957). If funds are necessary in order to take the deposition, recourse will have to be made to the convening authority for his approval to obligate the necessary money. [In civil matters in Federal District Courts, parties may take a deposition without permission from the court. Fed. R. Civ. P. 26(a), 29.1

"MCM, 1969, ¶ 117*b*(1).

"United States *v.* Murphy, 13 U.S.C.M.A. 629, 631, 33 C.M.R. 161, 163 (1963).

[59] Now designated the military judge by the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, amending UCMJ art. 26, 10 U.S.C. § 826.

[60] MCM, 1969, ¶ 117*b*.

[61] *Id.*

sei, so that opposing counsel may inspect the accompanying papers and make his objections known to the convening authority. [62]

4. *Action Upon the Deposition Request.*

When a request for a deposition is made to the convening authority of the pending Court-martial, the convening authority may deny the request for "good cause only." [63] When the request is denied by the convening authority, it may again be made at trial as a motion to the military judge or special court-martial. [64]

When the request is made after the commencement of the trial to the military judge or special court-martial the same standard applies, and, further, that ruling is final on the request. [65]

5. *Ordering the Deposition.*

When it has been decided that a deposition will be taken, the convening authority, if trial has not commenced, or the military judge or special court-martial, where the trial has commenced, will order the taking of the deposition. [66]

If the order for the taking of a deposition is given before the commencement of the trial, the convening authority will designate the deposing officer and detail counsel for the accused and the government. [67] The designated counsel should normally be trial and defense counsel of an existing court. [68] If prior to commencement of trial, the accused has secured independent military or civilian counsel, then these counsel must by necessity be designated in the deposing order. If a deposition is ordered after the commencement of the trial, [69] the military judge or, if none, the special court-martial will normally request the convening authority to appoint a deposing officer, use existing counsel, and, if required, commit the necessary funds. [70]

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[62] United States *v.* Valli, 7 U.S.C.M.A. 60, 66, 21 C.M.R. 186, 192 (1966)

[63] MCM, 1969, ¶ 117*b*(3).

[64] *Id.*, ¶ 66*b*.

[65] *Id.*, ¶ 117*b*(3); see United States *v.* Murphy, 13 U.S.C.M.A. 629, 33 C.M.R. 161 (1963).

[66] MCM, 1969, ¶ 117*b*(3). There does not appear to be any requirement that such order be oral or written in form.

[67] UCMJ art. 49*a*.

[68] MCM, 1969, ¶ 117*b*(2).

[69] *Supra* n. 66.

[70] Two problems arise under this situation. First, neither the Code nor the Manual expressly states or describes a procedure by which a deposing officer is designated to take a deposition. The customary practice has been for the convening authority to appoint a qualified deposing officer. Paragraph 117 of the Manual for Courts-Martial, United States, 1961 (hereafter called the 1961 Manual and cited as MCM, 1951), expressly covered the

With respect to the qualification of counsel and the rights of the accused in a deposition, such qualification and rights will be "the same as those prescribed for trial by the type of court-martial before which the deposition is to be used."[71]

With respect to the qualifications of the deposing officer, he must be "any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths."[72]

6. Notice.

The Manual requires that "the party at whose instance a deposition is to be taken *shall* give to every other party reasonable written notice of the time and place for taking the deposition."[73]

If the deposition is being taken at the request of the prosecution, notice may be given to the accused, or to his civilian or military counsel.[74] If the deposition is to be taken at defense request, notice may be given to the convening authority, trial or assistant trial counsel.[75]

It should be noted here that particularly with respect to trial counsel the failure to meet the requirement for reasonable *written* notice has given rise to issues of prejudicial error.[76]

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matter. It appears from the language of UCMJ art. **49** and the Manual that, by inference, the military judge or special court-martial could, after the commencement of the trial, appoint the deposing officer.

The second problem arises when the military judge or court-martial decides that a deposition should be taken, but the convening authority decides that a deposition *should not* be taken and thereafter refuses to appoint a deposing officer or allow travel funds to be obligated or witness fees to be paid. The military judge or court-martial cannot force the convening authority to act; consequently, the military judge or court-martial must employ the only remedy it has, that is to dismiss the charges against the accused.

[71] MCM, **1969,** ¶ 117*b*(2) ; **see** United States *v.* Drain, **4** U.S.C.M.A. **646,** 16 C.M.R. **220 (1954).** It appears that the Manual provision is in accord with the Military Justice Act of **1968,** Pub. L. No. **90–632, 82** Stat. **1335.**

[72] UCMJ art. 49*a.*

[73] MCM, **1969,** ¶ 117*b*(4) *(emphasis added).*

[74] *Id.*

[75] *Id.* Note here the possibility that defense counsel, having knowledge of command structure and the administrative procedures, may serve notice on the convening authority, and, consequently, the trial counsel may receive a delayed notice and be caught unprepared at the hearing. If the trial counsel requests a delay because of the above, would not a speedy trial issue possibly result? Would the government's delay be reasonable?

[76] *See* United States v. Donati, **14** U.S.C.M.A. **235, 34** C.M.R. **15** (1953), where the defense was given an hour and forty-five minutes' notice; United States *v.* Brady, **8** U.S.C.M.A. **456, 24** C.M.R. **266** (1957), where there were **six** possible government witnesses, and defense counsel was not given their names, and did not have time to interview them.

7. *Witnesses.*

When witnesses are to be examined by deposition, who is responsible for securing their presence? Under both the 1951 Manual and the 1969 Manual, the deposing officer is responsible for securing the attendance of witnesses. If the witness is a civilian and it is necessary that he be subpoenaed, the deposing officer will do so. A duplicate subpoena will be personally served upon the witness and the original will be returned to the trial counsel [77] with an endorsement stating that the duplicate has been delivered.'* If the witness is in military service, the deposing officer or the appropriate military authority shall direct the witness to appear at the proper time and place.[79]

8. ***Taking*** *the Oral Deposition.*

Presumably, the parties are now ready to take an oral deposition. Deposing officer, counsel, the accused, the witness, the interpreter, if necessary, and the reporter are present and ready to proceed.

a. Recording the Deposition. The manual provides that the entire deposition proceedings be recorded verbatim, and that the oral questions and answers are to be reduced to writing or other verbatim record.[80]

b. The Opening. The deposing officer will open the deposition proceedings. He should have the appointing order (if written) available for inspection [81] and, for convenience, serve the counsel, the accused and the reporter with a copy, preferably in advance. The deposing officer should open the deposition, read his appointing order, note the time, date and place of the hearing and record who is present and absent.[82] The deposing officer should swear the reporter and the interpreter, if any,[83] using the proper respective oaths,[84] and the form of the oath given should be recorded verba-

[77] MCM, 1969, ¶ 117*b*(5). It appears that where an oral deposition is taken before the charges are referred for trial, counsel representing the government will be "trial counsel" within the meaning of the Manual.

[78] *Id. See also* MCM, 1951, ¶ 117*b*. See MCM, 1969, ¶ 115*d* for details for service of process on civilian witnesses.

[79] MCM, 1969, ¶ 117*b*(5). *See* United States *v*. Valli, 7 U.S.C.M.A. 60, 66, 21 C.M.R. 186, 192 (1956).

"MCM, 1969, ¶ 117*d*. But note the definition of "writing" in MCM, 1969, ¶ 143*d*.

[81] How often has the deposing officer been furnished with a mere unsigned copy? The presence of the original written order or a certified true copy will establish jurisdiction and authority.

"United States *v*. Valli. 7 U.S.C.M.A. 60, 66, 21 C.M.R. 186, 192 (1956).

"MCM, 1969, ¶ 117*b*(7).

[84] *Id.*, ¶¶ 114*d*, e; UCMJ art. 42*a*.

tim.[85] The deposing officer should instruct the members present as to his responsibility and authority. The deposing officer is responsible for recording or having recorded the verbatim testimony and proceedings. Objections and motions made during the taking of the deposition shall not be ruled on, but shall be recorded in the deposition; evidence submitted and objected to shall be received and recorded. The deposing officer is responsible for maintaining order during the taking of the deposition and for protecting counsel and the deponent from annoyance, embarrassment, or oppression. The deposing officer may adjourn the proceedings and report the circumstances of adjournment to the military judge, court-martial, or convening authority, as appropriate, when conduct of counsel or deponent is improper and such conduct prevents an orderly and fair proceeding.[86]

c. ***Preliminaries.*** It would be appropriate, at this time, for the deposing officer, after he has read his authority, to call upon counsel for present motions or objections to the present taking of the deposition. The deposing officer will note the motions and objections on the record.[87] It would appear that this would be a proper time, when grounds exist, to challenge the qualifications or appointment of this deposing officer, to claim a denial of reasonable or written notice of the deposition hearing, to request a continuance, to claim that the accused is not represented by counsel of his choice or that counsel is not properly prepared to represent the accused, to note adequately on the record again that accused objects to the deposition to be 'taken of the witness, or to renew a request that the witness be present at trial.[88]

If the accused or his civilian or military counsel is not present at the deposition, this would be the appropriate time to establish whether the accused consents to the taking of the deposition in his or his counsel's absence.[89]

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[85] United States *v.* Valli, 7 U.S.C.M.A. 60, 66, 21 C.M.R. 186, 192, (1956); MCM, 1969, ¶ 117*d*.

[86] MCM, 1969, ¶ 117*b*(7).

[87] *Id.*

[88] Some of these issues were raised in United States *v.* Ciarletta, 7 U.S.C.M.A. 606, 612, 23 C.M.R. 70, 76 (1957). United States v. Brady, 8 U.S.C.M.A. 456, 460, 24 C.M.R. 266, 270 (1957); see topic, "The Doctrine of Waiver," *infra* p. 58.

"MCM, 1969, ¶ 117*b*(2). For problems encountered when the accused is on leave, see United States *v.* Miller, 7 U.S.C.M.A. 23, 21 C.M.R. 149 (19561. What happens when the accused is on unauthorized absence (AWOL)? Case law has not decided the point, but may not the situation be analogous to where the accused voluntarily absents himself after arraignment? MCM, 1969, ¶ 11c. If the accused absents himself after having received notice of taking a deposition, he forfeits his right of confrontation.

d. The Deposition Itself. The deposing officer shall swear the witness,[90] administering the appropriate oath,[91] and the oath should be recorded verbatim.[92] The manner of examining the witness is the same as in courts-martial. The requesting party directly examines the witness, and the opposing party cross-examines the witness. The deposing officer will note for the record all objections to the testimony. If during the course of the testimony real or documentary evidence is sought to be introduced, the deposing officer shall accept the evidence, mark it as an appropriate deposition exhibit and note all objections to the evidence on the record.[93]

When examining the witness it would be wise for each party to lay the proper foundation for his particular use of the deposition at the future trial. The requesting party should clearly establish the competency of his witness, attempt to establish, if presently possible, the facts which permit the testimony by deposition to fall within one of the statutory rules of admissibility[94] and, lastly, secure the direct and relevant testimonial facts from his witness with as few legally objectional questions as possible.[95] Opposing counsel will naturally seek to impair the credibility of the witness and to establish sufficient facts, if available, to show that this witness will not meet the criteria of Article 49(d) or that, in fact, on the proper tender of witness fees the deponent will be willing to appear at trial. Where requesting or opposing counsel actually wants the witness present at trial, he must obtain sufficient facts from the witness to show definitely that he, the witness, is material and necessary to counsel's case, that in

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[90] *Id.*, ¶ 117*b*(7).

[91] *Id.*, ¶¶ 113, 114*k*.

[92] United States *v.* Valli, 7 U.S.C.M.A. 60, 65, 21 C.M.R. 186, 191 (1956); MCM, 1969, ¶ 117*d*.

[93] MCM, 1969, ¶ 117b(7). ***See*** Milius, ***Depositions in Court-Martial Trials,*** JAG J., April 1958, p. 7 at 11. Note that there is an exception to the "best evidence rule" with respect to a business entry for depositions. MCM, 1969, ¶ 145*a*, provides that a copy of the business entry, which has been identified by the deponent, may be submitted for an authenticated original, and when such copy is marked by the deposing officer and accompanies the deposition, it is admissible in evidence equally with the original.

"UCMJ art. 49d; MCM, 1969, ¶ 145*a*. An example would be where the deponent testifies that he is under orders to a new duty station, that he is about to be discharged or that he is a foreign national and will refuse to appear at the trial in his foreign country.

[95] If counsel asks a legally objectionable question, a leading question for example, and opposing counsel objects to the questions on the record, then counsel would be wise to take note and rephrase his question for the objection may be sustained at trial and the answer not admitted into evidence.

fact there was an abuse of discretion by proper authority, and that the denial for the witness was without good cause.[96]

When each party has in turn finished examining the witness, and there are no further questions, the testimony shall be concluded and the witness excused by the deposing officer.[97]

When the witness has been excused, it would again appear to be an appropriate time for the deposing officer to determine if there are any further objections and motions to the deposition.[98] After all objections have been noted for the record, the deposition should be closed.

9. *The Doctrine* of *Waiver.*

Is it really necessary for requesting or opposing counsel to raise objections[99] to the taking of the deposition or the deposition itself at the deposition hearing? The Manual states:

> If the ground of an objection to the use of a deposition or a part thereof is one which might have been obviated or removed, either in connection with the deposition itself or by retaining the deposition . . . a failure to have made the objection at that time is a waiver of the objection.[100]

The writer suggests that with the advent of increased representation by counsel, attorney counsel will be held to a strict compliance with the Manual provision.[101]

10. *Authentication.*

When the deposition is over, the entire proceedings will have

[96] *See* language in MCM, 1969, ¶ 117*b* (3).

[97] Is the deposing officer permitted to ask questions of the deponent in order to clarify points of deponent's testimony? The Manual makes no provisions for such questions by the deposing officer. The deposing officer, it would appear, would be exceeding his authorized role and would be meddling in the duties of counsel.

[98] *E.g.*, the deposing officer improperly conducted the hearing; or proper procedures have not been followed, *i.e.*, the oaths were not given, the witness was sworn by the trial counsel, the hearing was not recorded verbatim.

[99] Note the objections raised *supra.*

[100] MCM, 1969, ¶ 145*a*. *See* language in United States *v*. Ciarletta, 7 U.S.C.M.A. 606, 612, 23 C.M.R. 70, 76 (1957). This rule is followed in the federal courts, *e.g.*, Fed. R. Crim. P. 15(*d*) and 15(*f*) refer to Fed. R. Civ. P. 30. *See also* Gore *v.* Maritime Overseas Corp., 256 F. Supp. 104, 119 (E.D. Penn. 1966), *aff'd in part, rev'd in part on other grounds, 378* F. 2d 584 (3d Cir. 1967); Cox *v.* Commonwealth Oil Co., 31 F.R.D. 583, 584 (S.D. Tex. 1962). 26A C.J.S. *Depositions* § 105 (1956).

[101] "It must be noted that military counsel should avoid being caught in the civilian practice of stipulating to the waiver of objections at the deposition itself in the beginning of the deposition hearing. Counsel may be caught with an inadmissible deposition at trial because of his leadnig and objectionable questions.

been recorded verbatim. Under the Manual, the record of the proceedings need not be signed by the witness but will normally be certified by the deposing officer.[102] The Manual does not have an appendix 18 as did the 1951 Manual; the writer suggests, however, that certification required of the deposing officer must, at least, be as legally sufficient as the one in the 1951 Manual.[103]

11. *Action Upon Receipt of the Completed Deposition.*

When the deposition has been completely reduced to writing or other verbatim record, it will be delivered to the trial counsel. The trial counsel must notify the accused or his counsel of the receipt of the deposition and must afford the defense counsel an opportunity to examine the deposition. The trial counsel is required to be the legal custodian of the deposition and is charged with the responsibility that no alteration whatever is made therein.[104] After the defense has been initially allowed to examine the original, and in order to avoid possible complaints of non-access to or of alteration in the deposition, it is advisable for trial counsel to furnish a certified copy of the deposition to the defense. This practice will allow the defense counsel to have personal, continued access to the deposition in his preparation for trial and will avoid the possibility of objection at trial.

III. THE MODERN ORAL DEPOSITION

A. *TECHNOLOGICAL DEVELOPMENTS*

Lawyers as well as business and management executives, police officials and ordinary individuals are aware that we are living in a time of increasing science and technology, especially in the area of communications. Science and industry are arriving at ever

[102] MCM, 1969, ¶ 117*d*. Since the language of the Manual is permissive, there would appear to be no reason why requesting or opposing counsel could not have the deponent sign his deposition.

[103] "I certify that the above deposition was duly taken by me, and that the above-named witness, having been first duly sworn by me, gave the foregoing answers to the several questions [substituted for interrogatories] and subscribed the foregoing deposition in my presence at ————, this ——— day of ———— 19—.

———————————
Signature of person taking deposition

———————————
Typed name of person taking deposition

———————————
Grade and organization

———————————
Official Charter

[104] MCM, 1969, ¶ 117*b*(10).

better means to transmit and present audio, visual and documentary information. There have been increasing developments in transmissions and preservation of radio, telephone, television, facsimile and computer data. The United States is presently pursuing a policy which will establish a global system of communication via satellites which will serve the needs of the United States and other nations.[105] Communication satellites, both passive and active,[106] medium altitude or synchronous,[107] are being orbited and can be used to transmit communications by means of telephone, television, telex, teleprinter, facsimiles and other high speed data transmissions.[108] Terrestrially speaking, transistorized land and ocean cables are being developed, some capable of carrying 722 two-way voice circuits.[109] There have been continued advances of ground relayed communication, channeled by ground based microwave relay systems, waveguides [110] and laser pipes. According to one author, the waveguide is capable of carrying up to 100,000 voice circuits,[112] and a laser pipe up to 100 million voice channels.[113] Closed circuit and cable television are already in wide use. Presently video tape and the video tape recorder make possible the recording of all television broadcast material. There are more than 20,000 closed circuit, video tape recorders in use today.[114] Video tape makes it possible to hold, retain and then communicate audio-visual information. The video tape recorder will fit easily into the most complex communication

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[105] Segal, ***Communications Satellites Progress and the Road Ahead,*** **17** VAND. **L.** REV. **677 (1964);** ***see*** COMMUNICATIONS SATELLITE **ACT OF 1962, 47 U.S.C.§ 701 (1964).**

[106] *Id.* at 680–81. **A** passive satellite is one which acts as a reflector. An active satellite is one which receives, amplifies and transmits back.

[107] *Id.* at **681–82. A** medium altitude satellite is one which is in orbit at about **5,000** to 10,000 miles above the earth. **A** synchronous satellite is one which is fixed in an altitude of about **22,300** miles above the earth, and its speed and orbit match the earth's rotation and it appears fixed in the sky.

[108] *Id.* at **679.**

[109] *Id.*

[110] Waveguides: normally a waveguide consists of a hollow cylinder of an arbitrary cross-section which will propogate electromagnetic radiation. **A** waveguide offers lower attenuation, greater power-carrying capacity and more mechanical simplicity than a transmission line. Johnson, ***New Technology: Its Effect on Use and Management*** *of* ***the Radio Spectrum,*** **1967 WASH. U.** L. Q. **536,** n. **45.**

[112] *Id.* at **536.**

[113] *Id.* at **537.**

[114] Informational material supplied by Ampex Corp., **401** Broadway, Redwood City, California **94063.**

applications.[115] By a combination of these various means of communication, the home, law office, library and courtroom will be able to send, receive and retain upon a verbatim record all means of personal communication.

B. *A NEW DEPOSITION?*

The traditional and perhaps best method for presenting elements of proof to the trier of fact is to call a human, live witness for recitation of his observations and information. Thus, the triers of fact actually see and hear the witness. They can watch him speak, observe his movements, sense his presence, feel his tension and if necessary touch his person. What happens, however, when the witness is unavailable to appear at trial? The law allows a deposition to be taken and used. As seen from Part 11, depositions are vital and acceptable instruments in military law. But what does the law presently offer the triers of fact, in deposition form, as against the live person of the witness? Customarily, the requesting counsel reads the questions and answers contained in a formal written transcription of the witness' testimony.[116] What the triers of the fact hear is often a long, cold and sterile transcription, read and intoned by an attorney. There is no sense of the presence or person of the absent witness. Did the witness raise his voice, did he stutter and stammer; did he pause or halter in his speech; did he shift around or squirm in the witness chair; did he appear worried or afraid; was he perspiring; did his voice and tone of speech indicate confidence and lend credibility to his words; is there anything in his physical makup which sheds light on is ability to oberve, recall and describe? The trier of fact cannot and will not ever know. They have been deprived of the personal presence of the witness. The defendant and/or the government has been denied the full force of its presentation of the facts.[117] The military judge and the members of court live and work in a modern, technical and scientific society. If they, in their important but nonjudicial functions wished to encounter and experience a relationship with a person or event not physically present, even if at great distances or

[115] *Id.*

[116] MCM, 1969, ¶ 145*a*.

[117] "Note the language in Mattox *v.* United States: "There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of he advantage of that personal presence of the witness before the jury which the law has designed for his protection." 156 US. 237, 243 (1895).

across the world, they will turn to the radio, the telephone or the television. Man can revive sounds and scenes by means of the tape recorder, closed circuit television, video tape, and motion pictures. Are these devices capable of being adapted to the deposition? Should they be used? Wigmore has stated that "the administration of justice should make use of all advances of science wherever feasible."[118] It is submitted that these devices can and should be used.

The taking of a deposition is customarily conducted in such a manner that the deposing officer, counsel, the accused, the reporter and witnesses are all physically located in the same room. The testimony is spoken, recorded and transcribed on paper, thereafter received into evidence as a written document, and read to the Court. These are the three separate, unique and distinct elements to the deposition; *(a)* the presence of the parties; *(b)* the verbal and visual testimonial evidence; and *(c)* the method of recording, preserving and presenting the testimony in court. I propose that through technological advances a good and admissible deposition, one which fully preserves and protects the rights of the accused, can be taken in variance of the customary procedure. **A** deposition should be taken, when all the parties are present together, by video tape or movie film. Here the court and the triers of the fact can see and hear the absent witness and truly judge his credibility.[119] In the area of sound recording, it is possible to have an audio-magnetic tape recorder to take a fully accurate deposition and also to allow the court to hear the actual testimony from the witness' own mouth.[120] These concepts are not

[118] III J. WIGMORE, **EVIDENCE** § 809 (3d ed. 1940).

[119] Under such a deposition technique, the witness would still be compelled "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox *v.* United States, 156 U.S. 237, 242-43 (1895). ***Accord,*** United States v. Griffin: "[O]ne of the first considerations in credibility is the opportunity for the finders of fact to observe the demeanor and behavior of the witness who appears before them." 17 U.S.C.M.A. 387, 388, 38 C.M.R. 185, 186 (1968).

[120] In United States v. McKeever, 169 F. Supp. 426 (S.D. N.Y. 1958), District Judge Herlands said: "Current advances in the technology of electronics and sound recordings make inevitable their increased use to obtain and preserve evidence possessing genuine probative value. Courts should deal with this class of evidence in a manner that will make available to litigants the benefits of this scientific development. Safeguards against fraud or other abuse are provided by judicial insistence that a proper foundation for such proof be laid." 169 F. Supp. at 431. Note also the language in United States *v.* Griffin, where the court stated: "[W]e referred at length therein to the value of having the court itself hear the witness." 17 U.S.C.M.A. 387, 389, 38 C.M.R. 185, 187 (1968). In Griffin, the court

unique.[121] During January 1968, the United States Steel Corporation attempted to take a video tape deposition, but was prevented from doing so by objection of the United States under the Federal Rules of Civil Procedure.[122] The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has approached the problem and recommended that the rules be changed to allow such new deposition.[123] In addition, by means of confrontation and cross-examination through the use of live television, radio or telephone conference methods, it is believed possible to take a valid deposition where one or more of the parties are absent from each other. Under such a technique, a deponent can be examined when by the necessities of events he is found to be ill, in another state or country, or aboard ship on extended deployment. In the words of *United States* v. *Flemming,* "There is no logical reason why the benefits of scientific development should be denied access to the courtroom so long as the rights of the accused are fully protected." [124] Each of these developments will be examined by manner of possible taking, and in the light of the rules of evidence and the rights of the rights of the accused.

C. *ON TAKING A MODERN ORAL DEPOSITION* [125]

1. *Preliminaries.*

When counsel wishes to take a modern deposition, he will follow substantially the procedure set forth in Part I. However, when requesting counsel wishes to take a deposition by a special method, *i.e.*, videotape, movie, etc, the specific method should be

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referred back to the case of United States *v.* Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 ('1960).

[121] With respect to magnetic tape, *see* Schmertz, *Oral Depositions: The Low Income Litigant and the Federal Rules,* 54 VA. L. REV. 391, 417 (1968); Peterfreund and Schneider, *New York Survey: Civil Practice,* 33 N.Y.U.L. REV. 1263, 1276 (1958); Note, *Tape Recording Pretrial Examinations,* 6 SYR. L. REV. 209 (1954). With respect to motion pictures, *see* 4 AM. JUR. TRIALS, DISCOVERY § 43 (1966). With respect to video tape, see Kane, *Videotape Recording,* 50 J. AM. JUD. SOC'Y 272 (1967); Note, *Evolving Methods of Scientific Proof,* 13 N.Y.L.F. 717 (1967); TIME MAGAZINE, 22 Dec. 1967, p. 49.

"'United States Steel Corp. *v.* United States, 43 F.R.D. 447 (S.D. N.Y. 1968).

[123] *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts Relating to Depositions and Discovery,* published as a Special Release to FEDERAL RULES SERVICE, 2nd SERIES, p. 45 (1967).

[124] 7 U.S.C.M.A. 543, 563, 23 C.M.R. 7, 27 (1957).

[125] Problems of admissibility will be discussed *infra.*

noted and described in the request itself.[126] Under this procedure, opposing counsel would be able to register an objection to requesting counsel's method and specify his own method. The matter would then be decided by the convening authority, military judge, or special court-martial as the case may be. On the other hand, counsel may agree from the beginning on the manner in which the deposition shall be taken, and then no problem will arise.[127]

2. ***Where*** *All Parties Are Physically Present.*

a. Using Audio-Magnetic Tape. Presently in the military, depositions are recorded by a reporter using a stenograph machine or a stenomask connected to a "Gray" or other suitable recorder, or by using a series of microphones connected to a tape recorder.[128] It is presently possible then to take and record, either on a multichannel recorder [129] or good quality single track recorder, the deposition of a witness. The procedural matter discussed under Part I will be followed. All the parties will be present together. The deposition reporter will take down the proceedings by the use of his tape recorder. Under this method counsel can examine and cross-examine the deponent and object to any questions by opposing counsel. The deposing officer will note all objections [130] for the record and receive and note for the record all submitted real or documentary evidence. At the conclusion of the hearing, the record of the proceedings will be recorded on the magnetic tape. It is advisable at the end of the deposition hearing to have the tape re-played in order to verify what was said and to correct any errors in sound or recording. At this point, the deposing officer can certify and authenticate the verbatim deposition contained on the reel of tape.[131] The tape can then be turned over to the custody of the trial counsel. Requesting or opposing counsel may wish a copy of the deposition by tape or by written transcript. Trial counsel

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[126] This procedure was advocated with respect to the possible amendment of the Federal Rules of Civil Procedure. *See* rule 30(*b*)(4) and Advisory Committee notes, ***supra*** note 123. *See also* United States Steel Corp. *v.* United States, 43 F.R.D. 447 (S.D.N.Y. 1968).

[127] Fed. R. Civ. P. 30(c) already has provided for this situation. In the military legal practice the parties stipulate.

[128] The tape is transcribed by the reporter to a typewritten deposition and then submitted to counsel.

[129] Martin, *Electronic Courtroom Recording*, 50 *J. AM. JUD. SOC'Y* 262, 263 (1967).

[130] Especially any objection to the accuracy, reliability and mechanical condition of the recording machine, the tape used or the competency of the reporter to operate the equipment.

[131] MCM, 1969, ¶¶ 117*b*(8), 117*d*.

may then have the qualified reporter make a duplicate tape or a written transcript made.

At trial, when the deposition has been ruled admissible, requesting counsel will have the tape played in court in the presence of the trier of the facts. If the case is appealed, the tape recording does not present a problem, The tape as an admissible document will be submitted with the record of trial, and in addition a certified transcript of the recording can be appended to the

b. Sound Photography. It is quite possible to film a deposition by motion pictures. In certain instances this technique has been already advocated.[133] To take the deposition of a witness by movies you need a good quality motion picture camera, lights, sound recording equipment and a qualified operator or operators. There is no reason why a local motion picture studio or facility cannot be used. In the deposition itself, the camera and sound recording operators will be sworn in as the reporter. A film of the entire deposition will be taken, and the camera can be placed on the deponent. The deposition will proceed as normal, but now the whole demeanor and testimony of the deponent will be recorded on film. During the deposition, the deposing officer will note all objections for the record.[134] At the conclusion of the deposition, the reporter will insure the proper processing of the film into a finished product. When the record has been processed into a completed film, the film will be run or shown in the presence of the deposing officer so he may properly certify and authenticate the record-film. The film will then be turned over to the trial counsel for custody. The trial counsel can have a duplicate film made and a typewritten transcript of the deposition made for the use of counsel. During the trial, when the film deposition has been admitted into evidence, the film will be shown to the triers of the fact. The film deposition as a document will be made a part of the record of trial in the same manner as the audio-magnetic tape recording.[135]

c. Videotape. When authorized, a deposition can easily be taken by videotape. The minimum equipment needed is a video-camera,

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'"United States *v.* Thomas, 6 U.S.C.M.A. 92, 98, 19 C.M.R. 218, 224 (1955), citing People *v.* Feld, 305 N.Y. 322, 113 N.E. 2d 440 (1963). *See also* United States *v.* Hall, 342 F. 2d 849 (4th Cir. 1966); Chavez *v.* Dickson, 280 F. 2d 727 (9th Cir. 1960); People *v.* Mulvey, 196 Cal. App. 2d 714, 16 Cal. Rptr. 821 (2d Dist. Ct. App. 1961).

[133] 4 AM. JUR TRIALS, *Discovery* § 43 (1966).

[134] Here the counsel may wish to object *to* the equipment, film or qualification of the operator-reporter.

[135] *See* C.2*a*, "Using Audio-Magnetic Tape," *supra p*. 64.

microphones, a videotape recorder, a television set for viewing and a qualified operator. The use of a videotape for a deposition is akin to a motion picture film, however, the videotape itself is in effect more parallel to the audio-magnetic tape. The ease and convenience of taking and procesing a videotape deposition makes such a deposition very practical. Here, again, the deposition is taken in the same manner as a film. After the conclusion of the testimony and all objections[136] have been noted, the tape can be replayed in the presence of all the parties, and any corrections for technical errors can be made. The deposing officer can certify and authenticate the document videotape, and the tape will be placed in the custody of the trial counsel, With respect to duplicating the tape, transcribing the hearing into a written transcript and attachment to the record of trial, the same procedure as followed in magnetic tape and film can be followed.[137] During the trial, when the videotape has been admitted into evidence, the deposition can be shown to the triers of the fact on a television screen.

3. *Where One of the Parties to a Depositions is in another Location.*[138]

a. Phone Conference. Under present day communications it is possible to conduct a business, military or legal conference by means of a telephone conference hookup. A deposition theoretically can be taken in the same manner. Under such a situation one or more of the parties to an oral deposition will be physically apart from the other. Now, conceivably, there are various combinations of this method which can be employed, but the particular situation where the deponent is in another location and the **re**maining members of the deposition are present together in the same room will be discussed. At a given time, a phone circuit will be connected and opened between the parties. The deposing officer will open the hearing. and determine the presence and identity of the parties. The court reporter will be sworn and shall record the deposition verbatim by means of stenograph, stenomask or tape recorder, connected directly to the conference area and the phone circuit. The deposing officer will swear the deponent over the phone, and the deposition will begin. The deponent will be examined in the normal manner of depositions. Counsel will make all objections to the testimony and the manner of taking during the

[136] Again objections to the equipment and operator can be made.

[137] *See* C.2.*a*. "Using Audio-Magnetic Tape," *supra* p. 64.

[138] There is an unstated premise here that normally before such a deposition will be attempted, the counsel and the accused will have had an opportunity to interview the deponent.

deposition.[139] At the conclusion of the hearing, the circuit will be closed and the deposition ended. The reporter's record of the hearing, its custody and availability will be handled in the same manner as before. At trial, the deposition will be presented to the triers of fact in written transcript or by tape recording. The appellate problems will be handled as with the procedures above.[140]

b. ***Live Television.*** Perhaps a better technique will be the taking of a deposition of a witness by live, closed circuit television and recording the hearing by videotape for later use at trial. Under this method, the parties will be visibly present to each other by a television circuit. A television camera, operator, and sound recording will be needed at both locations, and each party can view the other by means of a monitor, The deponent will be seated in one television studio, and the remaining parties in another. The deposing officer will swear the deponent and all operators of the equipment. A videotape recorder will be connected to the circuit, and all verbal sound and the television picture of the deponent will be videotape-recorded. The deposition would then proceed as normal and be the same as other depositions. At trial, the triers of the fact would see and hear the testimony of the deponent played back and shown on a television screen.[141]

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[139] *E.g.,* manner of taking, accuracy of the equipment, identity of deponent.

[140] *See* C.2*a,* "Using Audio-Magnetic Tape,'' *supra.* p. ***64.*** It should be noted that when military units are aboard ship or located in remote areas, communication facilities may be limited to radio or radio-telephone. The method described in the body of this article can be used with radio **or** radio-telephone, but the deposition will be more laborious. It should be noted also that a combination of videotape recording and a phone conference hookup is possible. Here a phone circuit on a conference line will be opened up between the parties and the deponent. A closed circuit television system will be set up to record on videotape the deposition of the deponent and the phone conference line will be connected to the videotape recorder. When the deposition is finished, the certified tape will be sent to the trial counsel. Under this method problems of swearing the videotape recorder operator and of authenticating the tape arise. The cooperation of both counsel and the accused by way of stipulation would be needed to make this an acceptable deposition.

[141] Matters of record of trial and appeal will be the same as that described under C.2*a,* Using Audio-Magnetic Tape, *supra* p. 64. Under this technique, a video-phone is being developed by phone companies and would be adaptable to such use. Since February 1969, a six month trial of forty PICTURE-PHONE (R) sets have been in use between Westinghouse Electric Corporation offices in Pittsburgh and New York.

It should be noted, here, that outside the area of depositions, this method has valid applications to the presentation of a witness and his testimony in an actual trial. Through communication media and closed circuit TV, it is possible to have a witness in a remote locality testify before the triers of fact. By watching a live television broadcast on a television screen in the

D. *QUESTIONS OF ADMISSIBILITY* [142]

1. *Where All Parties Are Present.*

When requesting counsel wishes to take a deposition by audio, magnetic tape, videotape or by motion picture and all the parties are present together at the deposition hearing, the traditional questions of admissibility must be satisfied before the triers of the fact will be exposed to the deposition. First, the accused's right to confrontation and cross-examination must be satisfied. There appears to be no problem here. The only distinction between this deposition form and the customary procedure lies in the manner in which the deponent's testimony is recorded and presented. In defining a deposition the Manual states that it is the testimony of a witness reduced to writing.[143] The Manual further provides that an oral deposition is one taken on oral examination, that the deponent's answers are to be reduced to a writing or other verbatim record,[144] and, further, that the entire proceeding is to be recorded verbatim.[145] The evidence chapter contains the following definition of a writing:

> The word "writing" . . . means every method of recording data upon any medium. For example, it includes handwriting, typewriting or other machine writing, printing, and all documentary, pictorial, photographic, chemical, mechanical, or electronic recordings or representations of facts, events, acts, transactions, communications, places, ideas, or other occurrences or things, whether expressed by words, letters, numbers, pictures, signs, symbols, marks, or chemical, mechanical, or electronic media, including all types of machine, electronic, or coded records, memoranda, or entries.'"

Consequently, it appears that a deposition recorded verbatim by means of audio, magnetic tape, videotape or movie film would be as admissible as the traditional method. If the deposition by

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courtroom, the jurors can see and hear the witness; the judge can rule on objections and the judge or members of the court can ask the witness questions and resolve doubts which the ingenuity of counsel by deposition never could.

[142] This chapter begins with an underlying assumption that the criteria for taking a deposition discussed in Part II have been met, and that the deposition will meet the statutory criteria of UCMJ art. *49* at the trial.

[143] **MCM,** *1969,* ¶ 117*a.*

[144] *Id.,* ¶ 117*d.*

[145] *Id.*

[146] *Id.,* ¶ 143*d; see also* drafters' comments in the analysis to MCM, *1969* (Office of The Judge Advocate General, Washington, D.C.); *Cf.* definitions contained in the Model Evidence Codes: National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Evidence,* Rule 1(13), and American Law Institute, *Model Code* of *Evidence,* Rule 1(17).

audio, magnetic tape, videotape or motion picture is a writing, the ***best evidence rule*** will have application to such a deposition.[147] "The ***best evidence rule*** provides that, in proving the contents of a writing, the 'original' of the writing is the best evidence of its own contents and must, therefore, be introduced . . . ."[148] Consequently, not only is a deposition under such new methods valid, but the "original" tape or film will constitute the best evidence over any written transcription of the verbatim recording;[149] and requesting counsel must be prepared to present the "original" tape at trial or, through an exception to the best evidence rule, to account for the original.

Once counsel has overcome the obstacle of being able to take such a deposition, he must be prepared to meet the objections of opposing counsel by showing that the reporter taking the deposition by tape or film was qualified and competent to do so. Counsel must also be able and prepared to prove the scientific accuracy of the tape or film, and the accuracy and mechanical ability of the recording device to record a verbatim record. Counsel can overcome this obstacle either by securing a stipulation from opposing counsel and the accused, if appropriate, as to the above facts, or, if this fails, by asking the court to take judicial notice of such matters.[150] Finally, if none of the above avail, counsel must be prepared to establish the accuracy of the recording machine and its verbatim product by an expert witness.

Upon seeking to introduce the deposition into evidence, requesting counsel must properly authenticate this unique writing. Again, if opposing counsel and accused, if appropriate, will stipulate as to the authenticity of the writing, there will be no problem. However, where no stipulation will be forthcoming, requesting counsel must authenticate the writing, either by calling the deposing officer and having him testify as to the genuineness of the writing, or by requesting the court to take judicial notice of the deposing officer's signature and enter the writing by way of

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[147] MCM, 1969, ¶ 143*a*.

[148] *Id.*

"Note also that MCM, 1969, ¶ 143*a* continues on to state: "The term 'original' in this rule, in addition to its ordinary meaning, includes a carbon copy of a writing, as complete as the ribbon copy in all respects, including relevant signatures, if any, and includes *an identical copy made by photographic or other duplicating process for use as an original as one of a number of originals." (Emphasis added.)* Under this language a duplicate audio tape or video tape, made simultaneously by a proper device, would appear to constitute a duplicate original.

[150] *See* Note, *Tape Recording Pretrial Examinations*, 6 SYR. L. REV. 209 (1954).

the deposing officer's authenticating certificate. If neither the deposing officer is available to testify, nor the attesting certificate is correct or legally sufficient, then requesting counsel must call upon the deposition reporter and have him testify as to the genuineness of the writing. If a question arises as to chain of custody, it appears that trial counsel, as official custodian, would be able to give an oral affidavit as to the writing's custody, without disqualifying himself at trial.[151]

With respect to presenting the deposition to the court, article 49f of the Code states: "[A] deposition may be read in evidence. . . ."[152] and again paragraph 145*a* of the Manual states: "A deposition will ordinarily be read to the court . . ."[153] Does this mean that a deposition in form other than words on paper is inadmissible? When consideration is given to the fact that the Code language is permissive and that the definition of a writing is all embracive, then it appears that the audio or videotape os film can be "read" to the court by properly replaying the tape or film.

Now when requesting counsel goes to present the deposition to the court, he must be prepared to overcome any objection by opposing counsel as to the competency of the operator to operate the playback equipment and the accuracy of the mechanical equipment in reproducing the original deposition. Again, if a stipulation cannot be arrived at, and after qualifying the operator, counsel must request the court to take judicial notice of the accuracy of the device; and if the court will not do so, counsel must have an expert witness testify as to the playback device.

When requesting counsel is ready to present the deposition to the court, he must then be prepared to meet any objection by opposing counsel as to the admissibility of the testimonial evidence itself. The Manual provides that objections may be made to the evidence contained in a deposition in the same manner as if the evidence were offered in the usual manner.[154] However, with the advent of motion practice before trial under the Justice Act of 1968, it appears the question of objectionable material in the deposition can be resolved before the court presentation.[155] Because of the nature of the recording medium, it is quite a simple process

[151] See United States *v.* McKeever, 169 F. Supp. 426, 430 (S.D. N.Y. 1958); MCM, 1969, ¶ 117b(10).

[152] UCMJ art. 49*f*.

[153] MCM, 1969, ¶ 145*a*.

[154] *Id.*

[155] If not resolved before trial, resolution can be had at an "out of court" hearing. Where a special court-martial is held without a military judge, the

to have the tape of film erased or cut, under the court's direction and supervision,[156] prior to the presentation to the triers of the fact; and, consequently, the court will only see or hear the full, admissible testimony of the deponent. If real or documentary evidence was introduced into evidence at the deposition, then counsel will introduce this evidence in the same manner as the deposition; and counsel must be prepared to meet any objections on the matter.[157]

Now, when the trial is over, the deposition, being admitted as a writing, will be made a part of the record of trial.[158] For appellate purposes, a certified, written transcript of the deposition can be submitted in addition to the tape or film.[159] Even at the trial itself, a properly authenticated transcript of the recorded deposition would be admissible.[160] Under this procedure, then, those conducting the post trial review and appeal could read, see and hear, if they wished, the deposition introduced at trial.

2. *Where Parties Are Apart.*[161]

When the parties to a deposition are not in the same location, and requesting counsel wishes to take a deposition by phone conference or by a videotape recording of a live television interview, the problems of the admissibility of such a deposition greatly increase. Here the traditional nature of a deposition changes, and the idea is new and unique. It appears that the law has not, as of yet, adjusted to this concept. Problems arise in the area of confrontation, examination, identification of the parties and reduction of the deponent's testimony to an admissible verbatim record.

With respect to the accused's right of cross-examination, there

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problem must be ruled upon by the president and an instruction given to disregard any inadmissible evidence which may have come before the court.

[156] Conrad, *Magnetic* Recordings *in Court,* 40 VA. L. REV. 23, 34–35 [1954).

[157] MCM, 1969, ¶ 145*a.*

[158] This presumes that the accused has been found guilty.

[159] United States *v.* Hall, 342 F. 2d 849 (4th Cir. 1965); Chavez *v.* Dickson, 280 F. 2d 727 (9th Cir. 1960); and People v. Mulvey, 196 Cal. App. 2d 714, 16 Cal. Rptr. 821 (2d Dist. Ct. App. 1961).

[160] United States v. Thomas, 6 U.S.C.M.A. 92, 98, 19 C.M.R. 218, 224 (19551; United States v. Jewson, 1 U.S.C.M.A. 652, 658, 5 C.M.R. 81, 86 (1952). See N. Y. TIMES, Jan. 7, 1969, at C-27, col. 4, where the Justice Department, in the appeal of Dr. Spock, showed film clips for one and a half hours to the First Circuit Court of Appeals.

[161] The underlying presumption here is that the accused and his counsel will always be present together. The situation described will be where the deponent is apart and the deposing officer, counsel, the accused and the reporter are present together. It is also possible, however, to have the trial counsel, deposing officer and reporter apart from each other, but though the legal problem is about the same, the technical problems are greater.

does not appear to be a problem. Here the interposition of electronic media will not prevent the accused and his counsel from *personally* cross-examining the deponent. The accused can hear or see and hear the deponent and test his veracity and credibility in the same manner as if they were present in a courtroom.

Where the deponent is apart from the accused and his counsel, the accused's right of confrontation poses a special problem. There is no longer actual physical presence. The deponent can only be said to be *electronically* present, The deponent can be heard, or seen and heard as the case may be, but there is a definite, real communication medium, whether radio, telephone or television, between the parties. Will this medium render such a deposition legally impossible? It is submitted that such a deposition is and should be admissible. The whole purpose of confrontation is served by such a deposition, In light of modern experience, is "electronic presence" any less actual or real than physical presence? Does not modern man continually rely on such presence to carry on a normal life? It does not appear necessary or desirable that legal concepts of practice and procedure should remain wed to the past while technical society forges on. There is no reason why the concept of confrontation cannot be expanded to encompass electronic confrontation effectively.

The issue of presence again arises under language of the statute and the Manual. The Code specifies that: "Depositions may be taken *before* . . ." any authorized civilian or military officer.[162] The Manual specifies that the deposing officer "shall administer the appropriate oath to the witnesses . . . and in the *presence* of the witness shall record . . . the testimony of the witness."[163] The Manual does not appear to treat the concept of presence of the witness, nor does it envision the concept of administering an oath over an electronic medium. Nevertheless, the entire spirit of the Code and the Manual is one of providing modern and effective justice while at all times preserving the dignity and rights of the individual. For the purposes of a deposition, presence can mean "electronic presence," and an oath over a communication circuit is no less real than one taken before the deposing officer. Several courts in the United States have upheld this concept, and acknowledgments to deeds and leases taken over a telephone have been held acceptable.[164] Under such instances the courts have re-

[162] UCMJ art. 49*c*.

[163] MCM, 1969, ¶ 117b(7).

[164] Abernathy *v.* Harris, 183 Ark. 22, 34 S.W.2d 765 (Sup. Ct. 1931); Wooten *v.* Farmer's Merchants Bank, 158 Ark. 179, 249 S.W. 568 (Sup. Ct.

fused to void the acknowledgment, absent a showing of fraud, duress, accident or mistake. In those instances where the acknowledgments were voided, upon application to a court, the courts have relied upon a strict construction of the particular statute covering acknowledgements and personal appearances, and there appeared a clear possibility of abuse or fraud.[165]

Where the deposition is taken by phone conference,[166] the problem of the identity of the deponent or of the speaker on the other end of the circuit becomes a real issue. Where counsel and the accused will not stipulate to the identity of the deponent, requesting counsel must by affirmative means show the true identity of the witness.[167] Where the deposition is taken by television, however, the problem will not arise.[168]

With respect to the verbatim record of the deposition, the manner of recording the hearing will not differ.[169] It appears that the addition of an electronic medium between the deponent's words and the reporter will not affect the concept of a "writing" under the Manual, and the best evidence rule still applies.

When attempting to introduce the deposition into evidence at trial, requesting counsel must be prepared to meet the objections of opposing counsel. Requesting counsel must be able to show the competency of the reporter in recording the deposition, the scientific accuracy of the mechanical equipment, the recording medium, *i.e.*, tape, or film or written transcription, the play back medium, and now the scientific accuracy and reliability of the electronic media interposed between the parties and the deponent. Again, requesting counsel can do so by stipulating with opposing

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1923) ; Banning *v.* Banning, **80** Cal. **271, 22** Pac. **210** (Sup. Ct. **1889)** ; Logan Gas Co. v. Keith, **117** Ohio St. **206, 158** N.E. **184** (Sup. Ct. **1927).**

[165] Myers *v.* Eby, **33** Idaho **266, 193** Pac. **77** (Sup. Ct. **1920)** ; Roach v. Francisco, **138** Tenn. **357, 197** S.W. **1099** (Sup. Ct. **1917)** ; Wester v. Hurt, **123** Tenn. **509, 130** S.W. **842** (Sup. Ct. **1910)** ; Charlton v. Richard Gill Co., **285 S.W.2d 801** (Tex. Civ. App. **1955).** *Cf.,* United States v. Mitchell, **274** Fed. **128, 131** (N.D. Cal **1921),** wherein the court rejected a search warrant amended by the commissioner over the telephone where the affidavit requesting the search was not amended. Would not the administration of justice be better if search warrants and arraignments could be handled over a video-phone or closed circuit television?

[166] Radio and radio telephone are also included.

[167] By either establishing the deponent's identity by stipulation, or having deponent mail a registered letter to his address directing him to be at a certain phone at a particular time and place. See MCM, **1969, ¶ 138***a,* on inference of identity.

[168] It is presumed that counsel has seen the witness before or has established his identity.

[169] "See discussion "On Taking a Modern Deposition," *supra* p. **63.**

counsel, and if necessary the accused; by requesting the court to take judicial notice of the scientific facts, devices and accuracy; or by calling expert witnesses.[170]

Problems of authenticating the deposition can be solved in the same manner as discussed above.[171] If opposing counsel objects to material within the testimony of the deponent, this situation can also be solved as previously noted.[172]

With respect to real or documentary evidence to be admitted in the deposition, the problem becomes acute. It is suggested that counsel will be able to get only testimonial evidence in the deposition, where the deposition is taken by telephone, radio or radio telephone. Where television is used, however, it is possible that if the deponent can see and identify, or authenticate, a particular document or exhibit, there may be sufficient grounds for its admissibility.

For the purposes of the record of trial and for appellate review, a deposition taken where the parties are apart will be appended to the record of trial in the same manner as one taken where the parties are present.[173]

E. *COMMUNICATION SYSTEMS PRESENTLY AVAILABLE IN THE MILITARY*

From information received from the Defense Communications Agency, the Department of the Army and the Department of the Navy,[174] it appears that military commanders have at their disposal the following communication capabilities: telephone systems world-wide;[175] radio communications world-wide;[176] closed circuit television, with videotape recording; photographic media, both motion picture and still photography, with appropriate processing facilities; audio recording, with playback capability; facsimile teletype; and automatic digital network[177] for computer

[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] Letter from Chief, Networks Division, Defense Communications Agency, 15 Nov. 1968; Letter from Director, Tactical Systems, Office of the Assistant Chief of Staff for Communications-Electronics, Department of the Army, 2 Dec. 1968; Letter from Chief of Staff, Naval Communications Command, Department of the Navy, 3 Dec. 1968; (all letters on file at The Judge Advocate General's School, U.S. Army, Charlottesville, Va.).
[175] Commonly called, Automatic Voice Network (AUTOVON), both secured and non-secured.
[176] Both secured and non-secured.
[177] Called AUTODIN.

data transmission. With respect to television, it appears that within the Continental United States closed circuit television is available on a limited capability; and on a world-wide basis, the capability and availability is even more limited. Under unusual circumstances, however, the communication system is quite capable of setting up a closed television circuit in most parts of the world, World-wide television is just a matter of time and money.

It will be up to individual judge advocates and civilian defense counsel to ascertain what communications media are available to their particular military commander and to request the needed authorization to use the media. It will be for the individual judge advocate to ascertain the feasibility and possibility of implementing the theories and ideas of this article into the practical application for better and more substantial military justice.

F. CONCLUSION

The oral deposition is a real and vibrant procedural tool for obtaining and presenting facts to the court. The opportunity to use an oral deposition is within the discretion and judgment of counsel. Whether the procedure for taking an oral deposition, as discussed in Part II, or the theory of the use and admissibility of modern oral deposition, whether'by video tape or by other means, as discussed in Part 111, will ever come into acceptance depends upon the progessiveness of counsel. The age of modern communications is here and now. It is the individual responsibility of each judge advocate to see that our system of military justice functions ever more fully, and that our legal methods of procedure keep pace with and indeed, if possible, keep in advance of our contemporary civilian system.

THE MILITARY JUSTICE ACT OF 1968*

By Sam J. Ervin, Jr.**

I. INTRODUCTION

It has been charged recently that military courts are to justice what military bands are to music. This was unquestionably true prior to enactment in 1950 of the Uniform Code of Military Justice,[1] and was to some extent true under the Uniform Code. However, upon enactment last year of the Military Justice Act of 1968,[2] the first major reform of the military justice system in almost two decades, military justice attained virtual parity with civilian criminal justice. This article will discuss the major provisions of that Act, their background, and the promise they hold for significant improvements in the brand of justice afforded by military criminal courts.

11. BACKGROUND

Prior to 1960 the American in uniform had been at the mercy of legal procedures little changed since before the Revolutionary War, procedures originally designed for mercenaries — not for citizen soldiers loath to give up the rights they were defending. So antiquated and unjust was the system that after World War II a great protest came from returning veterans demanding reforms which would guarantee to servicemen basic principles of due process of law. This outcry resulted in the adoption of the Uniform Code.[3] It represented a revolution in military law, and in many respects contained due process safeguards not then guaranteed in civilian courts. For example, the right to legally qualified counsel was made mandatory in general court-martial cases[4] thirteen years before the Supreme Court's famous *Gideon*[5]

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[1] Uniform Code of Military Justice Act, 10 U.S.C. §§ 801 *et seq.* (1964) [hereafter cited as UCMJ].

[2] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968) [hereafter cited as MJA] (effective 1 Aug. 1969; see note 57 *infra*).

[3] Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953); White, *The Uniform Code of Military Justice; The Background and the Problem*, 35 ST. JOHN'S L. REV. 197, 198-209 (1961)

[4] UCMJ art. 27.

[5] Gideon *v.* Wainwright, 372 U.S. 335 (1963).

ruling in 1963 extended this right to state court felony trials. Servicemen under investigation for criminal offenses under the Code were entitled to be informed of the nature of the suspected offense, and to be advised that they need not make a statement, and that any statement made might be used in evidence against them[6] fifteen years before the *Miranda*[7] ruling secured these rights to suspects in state criminal proceedings.

During the eighteen years between the effective date of the Uniform Code and the enactment of the 1968 Act, however, many advances were made in the administration of criminal justice by civilian courts that were not reflected in similar advances in military court proceedings. In addition, extended experience with the Uniform Code had revealed defects and made apparent the need for its modification and reform. To correct those deficiencies and return military justice to the leading position in American law it had attained in 1950 with enactment of the Uniform Code, Congress enacted the Military Justice Act of 1968.

III. LEGISLATIVE HISTORY

When the President signed the Military Justice Act on October 24, 1968, the legislation had been the subject of two rounds of hearings in the Senate and one in the House of Representatives and intensive study and investigation by the Subcommittee on Constitutional Rights over a period of almost ten years. In spite of the controversial nature of many of the reforms and concerted resistance to some or all of them by the armed services virtually until the eve of enactment, the bill passed unanimously in both the Senate and the House. The progress of the legislation from idea to enactment is an interesting story; it may shed some light on why it did not happen earlier and why it happened so smoothly when it did.

In 1962, following hundreds of complaints from servicemen and their families and an intensive field investigation, the Subcommittee on Constitutional Rights held its first hearing on military justice.[8] Testimony was received from witnesses with a wide range of experience in military law, both within and outside of the military. After the hearings a comprehensive ques-

[6] UCMJ art. 31.

[7] Miranda *v.* Arizona, 384 U.S. 437 (1966).

[8] *Hearings on the Constitutional Rights of Military Personnel Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary,* U.S. Senate, 87th Cong., 2d Sess. (1962).

tionnaire was sent to each of the services which developed additional information on particular problem areas in military law highlighted by the hearings. The published hearings consisted of almost 1,000 pages. A summary report of the hearings published in 1963[9] presented the Subcommittee's conclusions and recommendations.

Based upon this groundwork, I introduced on August 6, 1963, eighteen separate legislative proposals designed to protect the constitutional rights of servicemen and to perfect the administration of justice in the armed forces.[10] On September 25, 1963, Representative Victor Wickersham of Oklahoma introduced identical bills in the House of Representatives.[11] During the succeeding months these proposals were subjected to intensive study by both military and civilian experts. Alternative suggestions and revised language were submitted from many sources.

On January 26, 1965, shortly after the 89th Congress convened, I again introduced the eighteen proposals of the prior Congress[12] and later, on February 9, 1966, I introduced two much less inclusive proposals drafted and supported by the Department of Defense and introduced previously in the House of Representatives by Congressman Charles E. Bennett of Florida, who had long been interested in the rights of servicemen.[13] All of the Senate bills providing for changes in military law and administrative discharge proceedings were referred to the Senate Armed Services Committee, of which I am a member. Although there was no disposition to have Committee hearings on the bills, upon my urging the Committee Chairman agreed to appoint a special subcommittee of the Armed Services Committee to join the Subcommittee on Constitutional Rights in joint hearings on the bills, under my chairmanship, with the understanding, of course, that the bills could be reported to the Senate floor only by vote of the Armed Services Committee.

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[9] Senate Committee on the Judiciary, 88th Cong., 1st Sess., Report on Constitutional Rights of Military Personnel — Summary-Report of Hearings by Subcommittee on Constitutional Rights (Comm. Print 1964). The hearings and this summary report covered many areas in the administration of justice in the Armed Services other than the operation of the court-martial system, including administrative discharges, a JAG Corps for the Navy, and modernization and streamlining of the Boards for the Correction of Military Records.

[10] S. 2002 through S. 2019, 88th Cong., 1st Sess. (1963).

[11] H.R. 8506 through H.R. 8582, 88th Cong., 1st Sess. (1963).

[12] S. 745 through S. 762, 89th Cong., 1st Sess. (1965).

[13] S. 2906 and S. 2907, 89th Cong., 2d Sess. (1966).

The joint hearings were held in January and March of 1966." The Subcommittees received testimony from twenty-eight witnesses, including Assistant Secretary of Defense Thomas Morris, the Judge Advocate General of each of the military services, the judges of the Court of Military Appeals, law professors, and private practitioners of military law. The record extended over 1000 pages, including an extensive appendix, and over 200 pages of data submitted by the services in response to two additional detailed questionnaires.

In the months following these hearings, I drafted a bill to combine in one comprehensive package those proposed changes in military law which, over the course of the entire study, had proved to be necessary and beneficial. The result was that on June 26, 1967, I introduced an omnibus military justice bill, S. 2009 of the 90th Congress, consisting of five titles, title III of which was concerned with revisions of the court-martial system. Since most of the proposed revisions, including amendments to the Uniform Code to increase the right to legally qualified defense counsel and to provide lawyers as presiding officers in courts-martial, were extremely controversial within the armed services and were opposed by the Department of Defense, it proved impossible during the remainder of the first session of the 90th Congress to gather enough support on the Armed Services Committee to get the bills reported.

Subsequently, on March 14, 1968, Congressman Bennett introduced H.R. 15971, a bill supported by the Department of Defense designed to make a few non-controversial changes in court-martial procedures, but containing few of the more extensive reforms embodied in S. 2009. The House Committee on Armed Services favorably reported the bill, with minor amendments,[15] and it passed the House of Representatives on June 3,1968.

"Joint Hearings on S. 745 through S. 762, S. 2906, and S. 2907, Bills to Improve the Administration of Justice in the Armed Services, Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary and a Special Subcommittee of the Committee on Armed Services, U.S. Senate, 89th Cong., 2d Sess. Pts. 1–3 and Addendum to Pt. 3 (1966) [hereafter cited as Joint Hearings].

[15] The Report of the House Committee on Armed Services, H.R. REP. NO. 1481, 90th Cong., 2d Sess. (1968), states: "In order to be sure that the bill would be uncontroversial, letters were sent to many organizations and individuals, asking their opinions. In general, the bill was favored without comment. Where there were comments which were acceptable, the bill was altered slightly to accommodate the suggestions. There were some suggestions, however, which were outside the limited scope of the bill. These will have to be considered when the Subcommittee gives further consideration to the major problems of the Uniform Code of Military Justice

The bill, as passed by the House and sent to the Senate, in my view did not contain the minimum reforms necessary in any meaningful military justice legislation. However, because the bill did contain some revisions in court procedures desired by the Department of Defense, I was hopeful that it could be used as the vehicle for a more extensive reform bill. Because of the lateness of the second session of the 90th Congress it was apparent that passage of any bill at all might be jeopardized by Senate amendments objectionable to the Department of Defense. I therefore arranged several conferences with representatives of the Department of Defense, including Major General Kenneth J. Hodson, the Judge Advocate General of the Army, who was informally authorized to negotiate for all of the services, with a view toward reaching agreement on incorporating into the legislation the most essential provisions which had been recommended by the Constitutional Rights Subcommittee and included in S. 2009, and which I considered indispensable, but which were not contained in the House-passed bill. As a result of these conferences, I drafted a series of amendments to the bill. These amendments were carefully studied and discussed by each of the armed services and informally approved by them. On the basis of this informal service approval, the amendments were adopted by the Armed Services Committee; and the bill as reported by the Committee was then officially approved by the Department of Defense.

On October 3, 1968, the Senate unanimously passed the bill as reported.[16] Upon the urging of Congressman Bennett[17] and

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when it takes the balance of the provisions of H.R. 226 under consideration." H.R. 226 was an omnibus bill introduced by Congressman Bennett which provided for reforms in the Uniform Code, somewhat similar to S. 2009.

The House Armed Services Committee approved two amendments to the bill as introduced. One of the provisions of the original bill would permit the accused to waive trial by a full court-martial and have the trial by the law officer alone. In United States *v.* Jackson, 290 U.S. 570 (1968), the provision of the Federal Kidnapping Act which provided for the death penalty by jury verdict was declared unconstitutional as interfering with the right to trial by jury. The Committee amended that section so that the jurisdiction of a law officer sitting alone would be limited to cases rendered noncapital before reference to trial. The second amendment removed the "in time of war" exception from the provision rquiring legal counsel to represent an accused in a special court-martial where a bad conduct discharge may be adjudged.

[16] 114 CONG. REC. 12032 (daily ed. Oct. 3, 1968).

[17] When the House considered the Senate amendments, Representative Bennett commented: Most of the Senate amendments are taken from legislation Senator Ervin, of North Carolina, and I have had pending for years. On January 10, 1967, I introduced H.R. 226, an omnibus bill of amendments

others, the House of Representatives unanimously accepted the Senate amendments on October 10, 1968.[18] Thus, the Military Justice Act of 1968, the first major revision of the military court-martial system since 1950, containing controversial amendments that many members of Congress had pressed for unsuccessfully for almost a decade, was passed by both Houses of the Congress without a single dissenting vote.

IV. COURT-MARTIAL STRUCTURE UNDER THE UNIFORM CODE

Before discussing the changes in the court-martial system made by the 1968 Act, it may be helpful to describe briefly the three military criminal courts provided for by the Uniform Code: the general court-martial, the special court-martial and the summary court-martial.

The general court-martial, the highest military trial court, consists of not less than five members and a legally-trained law officer. This court is the court of general criminal jurisdiction which is normally used to try serious crimes and is empowered to adjudge all sentences authorized by the Uniform Code of Military Justice including life imprisonment and death. The law officer advises the court on legal matters and performs some of the functions performed by a judge in civilian criminal trials, although one of the non-lawyer members of the court is the presiding officer. Both the government and the accused are represented by legally qualified counsel and several levels of appellate review are provided. A verbatim transcript of the proceedings is made for review purposes.

The special court-martial, consisting of not less than three members, has jurisdiction over all noncapital offenses under the Uniform Code, but is limited to adjuding a maximum punishment of a bad conduct discharge, forfeiture of two-thirds pay per month for six months, or confinement for six months. **A**

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to the Uniform Code of Military Justice. Five months later, Senator Ervin introduced his omnibus bill, S. 2009. These bills differed, but what Senator Ervin and **I** both were, and still are, striving for, where much needed reforms in the Uniform Code.

H.R. 15971 represents a culmination of Senate and House efforts to get these needed reforms enacted, The Senate studied legislation in this field for 8 years and held exhaustive hearings, and the Senate amendments, on the whole, are a product of those hearings. The House held hearings last year on the House version of this bill. The provisions of this bill, as amended, are, therefore, not new to the Congress and most of them have been under consideration for years. 114 CONG. **REC.** 9718 (daily ed. Oct. 10, 1968).

[18] 114 CONG. **REC.** 9717 (daily ed. Oct. 10, 1968).

bad conduct discharge may not be adjudged unless a verbatim transcript of the proceedings and testimony has been made. The accused is not entitled to government appointed legal counsel and in most cases he is defended by non-lawyer "counsel." No law officer is detailed to the trial and, except in bad conduct discharge cases, no verbatim record is kept; hence, appellate review is severely limited by the haphazard and scanty nature of the record.

The summary court-martial consists of one non-lawyer commissioned officer who acts as prosecutor, defense counsel, judge and jury. The maximum punishment imposable by this court is reduction in rank, confinement for one month and forfeiture of two-thirds of one month's pay.

V. MAJOR AMENDMENTS MADE BY THE MILITARY JUSTICE ACT OF 1968

In general terms the Military Justice Act of 1968 makes nine major changes in the Uniform Code of Military Justice :

(1) It provides that legally qualified counsel must represent an accused before any special court-martial empowered to adjudge a bad conduct discharge; in other special courts-martial, legally qualified counsel must be detailed to represent the accused unless unavailable because of military conditions. In addition, a military judge must preside over a special court-martial empowered to adjudge a bad conduct discharge unless unavailable because of military conditions,

(2) It creates an independent judiciary for the armed services, composed of military judges who are insulated from control by line commanders and who will now preside over military trials with functions and powers roughly equivalent to those exercised by federal district court judges.

(3) It modernizes outmoded and cumbersome military trial procedures to conform more closely with federal court practices.

(4) It permits an accused to waive trial by the full court and to be tried by a military judge sitting alone, much as a civilian defendant can waive a jury trial and be tried by the judge alone.

(5) It strenghtens the bans against command interference with military justice.

(6) It bars trial by summary court-martial — where there is

no right to defense counsel, no independent judge, and no jury — if the accused objects.

(7) It transforms the intermediate appellate bodies from "Boards of Review" into "Courts of Military Review" with independent military judges.

(8) It authorizes for the first time a military form of release from confinement pending appeal.

(9) It extends the time limit for petitioning for a new trial from one to two years, and strengthens other post-conviction remedies available to servicemen.

A. *LEGALLY QUALIFIED DEFENSE COUNSEL*

Perhaps the most important provisions of the Act are those that increase the availability of legally qualified counsel to represent defendants before special courts-martial. For this reason, I shall discuss these provisions in somewhat more detail than the other provisions of the Act.

As noted above, the special court-martial is the intermediate military court, between the general court-martial which tries serious offenses and can impose heavy sentences and the summary court-martial which tries very minor offenses and is empowered to impose only minor punishments. Although the Uniform Code originally provided that an accused in a general court-martial must be represented by lawyer counsel,[19] it provided that an accused in a special court-martial may be represented by his own hired civilian lawyer or by a military lawyer of his selection "if reasonably available," or, otherwise, by an appointed non-lawyer counsel.[20] Since most servicemen cannot afford to hire a civilian lawyer and since the services (with the exception of the Air Force) have generally taken the position that military lawyers are "unavailable" for assignment as defense counsel in special courts-martial,[21] the overwhelming majority of servicemen tried by special courts are represented by non-lawyer officers who know next to nothing about military law. Since the special court-martial is the most used of the three military courts,[22] the absence of a requirement for lawyer defense counsel in these tribunals is particularly significant.

[19] **UCMJ** art. **27.**
[20] *Id.* arts. **27**(c) and **38**(b).
[21] ***Joint Hearings*** at **912.**
[22] ***Id.*** at **912,937, 963.**

The justification for the failure of Congress in 1950 to require lawyer counsel in special courts-martial was that such courts were then considered to be in the nature of "disciplinary" proceedings without complicated legal procedures, empowered to try only less serious offenses and to adjudge limited punishments. Moreover, the military right to counsel in general courts-martial exceeded the right to counsel provided in most state and federal courts at the time of the enactment of the Uniform Code. Neither of these justifications is valid today. The special court-martial has evolved into a complicated legal proceeding, purporting to provide a full jury trial and to insure due process, and bound by legal statutes and precedents. Complex legal problems of admissibility of evidence, interpretation of laws and regulations, and instructions and charges arise frequently in these courts. Although the majority of special courts-martial involve such less serious and "non-civilian" offenses as **AWOL,** drunkenness, breaking restriction and destruction of government property, special courts have jurisdiction to try all noncapital offenses under the Uniform Code and do often try such felonious crimes as manslaughter, grand larceny and aggravated assault. Moreover, although the six-months maximum confinement authority of such courts is not particularly great, they are empowered to adjudge **a** bad conduct discharge which is a lifetime liability since it carries a stigma equivalent to that of a dishonorable discharge adjudged by a general court-martial.[23] There is little question, then, that most special courts-martial are complex and serious enough proceedings to warrant a requirement that the accused be represented by a lawyer who understands the role of statutes and precedents, is familiar with legal defenses and the rules of evidence, and knows at least the basic concepts of constitutional law. It is sheer fantasy, in my view, to contend that a veterinary officer or a transportation officer who has read a few pages of the Uniform Code and the *Manual for Courts-Martial* can adequately represent a defendant in such a proceeding.

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[23] **The Subcommittee on Constitutional Rights conducted a survey in 1966** of **employers and personnel managers in the metropolitan Washington, D.C., area, and found that no distinction is made by such persons between bad conduct discharges, dishonorable discharges, and undesirable discharges. The concensus was that so many job applicants generally are available who have honorable discharges that there is no need to be concerned about the nature and circumstances** of **the various kinds of less than honorable discharges. Consequently, an honorable discharge is almost always required and any other discharge renders the applicant unacceptable.**

In addition, the right to counsel in civilian courts has greatly increased in the eighteen years since enactment of the Uniform Code. Under the decision in *Gideon v. Wainwright*[24] and related decisions, indigents in state and federal civilian courts are now entitled to free legal counsel in felony cases, and some federal and state courts have extended the right to nonfelony trials. Since the military has taken the position that the *Gideon* rule does not apply to courts-martial and has made no move to provide lawyer counsel in all special courts, the military now finds itself lagging far behind the civilian courts in respect to this vital constitutional guarantee. In fact, under a 1967 decision by the Court of Military Appeals applying the *Miranda* principles to military interrogation procedures,[25] the military is now in the anomalous position of providing a serviceman a lawyer during interrogation but not during his trial, if trial is by special court-martial.

I have long been of the opinion that lawyer defense counsel should be provided in all special courts-martial. I recognize that such a requirement would greatly increase the manpower needs of the JAG Corps in the services, and that there would be difficulty, in the Navy in particular, in providing lawyer defense counsel in special courts in geographically isolated commands and in ships at sea. However, I believe these logistical problems can be solved with enough effort and imagination,[26] and the manpower problems can be dealt with by expanding the JAG Corps and by using non-JAG military lawyers to serve as defense counsel in special courts-martial.?'

Although the armed services for many years resisted any proposals for requiring lawyer defense counsel in special courts-martial, they finally agreed to support a proposal limited to special courts-martial empowered to adjudge bad conduct discharges. The House-passed bill contained such a provision. I felt,

[24] 372 U.S. 335 (1963).

[25] United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

[26] Two feasible methods of providing lawyer counsel for ships which do not carry a lawyer have been used in recent years: establishment of "dockside courts" on larger ships with adequate court-martial personnel, and the use of "circuit-rider" lawyers assigned to larger commands who go to the smaller ships by boat or helicopter. The latter method would be useful for any kind of isolated command, as would the practice of transporting the accused, the witnesses, and other necessary personnel to commands where lawyers are present.

[27] Each year there are more than ten times as many JAG applications by graduating law students as the services can accept. Most unsuccessful applicants go into the military in non-legal capacities. In the past, only the Navy has used non-JAG lawyers in courts-martial. This practice should be expanded in all the services.

however, that such a limited requirement would not substantially remedy the serious problems posed by special courts-martial without lawyer defense counsel. It would not affect the Army at all, since the Army does not permit its special courts to adjudge bad conduct discharges.[28] The Air Force claims already to provide lawyers for the defense in all special courts.[29] Only the Navy would be affected, and the effect could be avoided altogether by not referring bad conduct discharge cases to special courts, as in the Army. I therefore found the House provision unacceptable. However, because of the admittedly serious manpower problems that would arise from a blanket requirement of defense lawyers in all special courts-martial, and because of the need to avoid a provision that would be flatly resisted by the armed services and might jeopardize passage of a military justice bill, I sought a compromise solution that would offer the most improvement possible under the circumstances. That compromise was agreed upon in the sessions with General Hodson and was embodied in the bill that was reported by the Senate Armed Services Committee and eventually was enacted into law.

The provision that lawyer defense counsel be mandatorily required only in special courts-martial empowered to adjudge bad conduct discharges was retained.[30] In all other special courts-martial lawyer defense counsel must be provided, unless waived by the accused, except when such counsel "cannot be obtained on account of physical conditions of military exigencies,'' in which case the commander ordering the trial in the absence of a defense lawyer must make "a detailed written statement, to be appended to the record, stating why [lawyer defense counsel] could not be obtained."[31] The Senate Report on the bill makes it clear that the requirement for lawyer defense counsel in special courts-martial not empowered to adjudge punitive discharges is intended to be mandatory except in the most unusual cases of genuine unavailability because of such things as geographical isolation or combat conditions.[32] The requirement that a written statement of the circumstances justifying unavailability be appended to the

[28] Reporters may not be provided in Army special courts-martial without approval from the Secretary of the Army. AR 27–145. Since a special court-martial cannot adjudge a bad conduct discharge unless a verbatim transcript is made, virtually all Army special courts are disabled from adjudging bad conduct discharges.

[29] *Joint* ***Hearings*** at 963.

"MJA § 2(5).

[31] *Id.* § 2(10) (B).

[32] S. REP. No. 1601, 90th Cong., 2d Sess. 8 (1968).

record is intended to subject command decisions not to detail lawyers to special courts to critical appellate scrutiny with a view to developing a line of decisions severely restricting resort to the unavailability exception.

It should'be kept in mind that the exception in cases of unavailability and the provision for waiver by the accused do not apply in special courts-martial empowered to adjudge bad conduct discharges. In such trials, legally qualified counsel must be detailed to represent the accused without exception and with no provision for waiver by the accused. Many young servicemen are too immature to appreciate the value of legal counsel or to comprehend the permanent stigma of a punitive discharge, and should not be permitted to make a possibly unwise waiver under such circumstances, in my opinion.

I am hopeful that these provisions will substantially increase defense representation by lawyers in all kinds of special courts-martial while allowing the flexibility necessary to permit the armed services to build up their reservoirs of defense lawyers and solve their logistical problems. The Subcommittee on Constitutional Rights will monitor closely the manner in which these provisions are enforced over the next year or so to assure that the armed services endeavor to effectuate the intended reforms rather than evade them.

B. *MILITARY JUDGES*

Clearly the next most important changes made by the Act are those that increase the participation of law officers in courts-martial, enhance their prestige, and further safeguard their independence from unlawful command influence.

To increase the prestige of these legal officers who preside over courts-martial and to reflect more accurately their increased powers and functions under other provisions of the Act, the old designation of "law officer'' is changed to "military judge'' wherever it appears in the Uniform Code or elsewhere in the law.[33] These military judges will be commissioned officers who are members of the bar of a federal court or of the highest court of a state and who are certified for duty as military judges by the appropriate Judge Advocate General.[34] They will preside over courts-martial to which they are assigned much as a federal dis-

[33] MJA §§ 2(1), 2(2), 3.
[34] *Id.* § 2(9).

trict court judge does, with roughly equivalent powers and functions. They will, for example, rule with finality on all questions of law, decide on requests for continuances, rule on challenges to members, instruct the members on the applicable law, and under new provisions discussed below, conduct pretrial sessions without the attendance of members of the court for the purpose of ruling on preliminary matters and performing generally the functions performed in pretrial sessions conducted by federal district court judges.

As noted above, the Uniform Code has always required that a law officer be detailed to a general court-martial but not to a special court-martial. For the same reasons that I have felt legally qualified counsel to be necessary in special courts-martial, I have felt that law officers should be detailed to such courts, especially when they are empowered to adjudge bad conduct discharges. The armed services have opposed any such requirement, for the same reasons that they have opposed a requirement that lawyer defense counsel be detailed to all special courts-martial. However, in recent years, the Department of Defense has supported a proposed amendment to the Uniform Code to permit the trial to accused servicemen by general and special courts-martial consisting of a law officer sitting alone much as a federal district court judge may conduct a trial without a jury, The House-passed bill contained an amendment authorizing such trials (discussed below) and also contained a provision permitting the detailing of a law officer to a special court-martial for that purpose. Consequently, the bill provided the vehicle for a more extensive reform of the Uniform Code with respect to the assignment of law officers to special courts-martial; but, again, any amendments to that effect would need to be more or less acceptable to the armed services to avoid seriously diminishing the likelihood of eventual passage of the bill. This problem was the subject of extended discussion during the sessions with General Hodson and his associates. Again, we were able to agree on a compromise which was supported eventually by the Department of Defense and was included in the bill as passed by both houses and enacted into law.

The provisions of the Act relating to this subject require the assignment of a military judge to any special court-martial empowered to adjudge a bad conduct discharge, except when one is unavailable because of physical conditions or military exigencies, in which case a written explanatory statement by the con-

vening commander must be appended to the record.[35] The Senate Report emphasizes that military judges must be assigned to all such courts, if at all possible, because of the seriousness of a punitive discharge, and particularly since, under other provisions of the Act, both the government and the defense will now be represented by lawyers in such trials.[36] It is contemplated that, as in the case of assignment of lawyer defense counsel to special courts-martial other than those empowered to adjudge punitive discharges, the unavailability exception will be reserved for cases of legitimate impossibility and that the appellate decisions on this provisions will so insure.

In all other special courts-martial, military judges *may* be detailed, but need not be.[37] Although this is left to the unfettered discretion of convening authorities, I believe the use of military judges in all special courts-martial will greatly increase in the years ahead, particularly for the trial of cases involving factual and legal problems probably too difficult for a legally untrained special court-martial president to handle, and particularly since, under the provisions of the Act increasing the availability of lawyer defense counsel, most special courts-martial will now have lawyers representing both sides,

The stature and independence of military judges is sought to be enhanced by another provision of the Act which in effect enacts into law the general principles of the "independent field judiciary."[38] This system, which has already been adopted administratively by some of the armed services, involves the assignment of military judges in each service to a separate unit under the command of The Judge Advocate General of that service. The intent is to provide for the establishment within each service of an independent judiciary composed of experienced judge advocates certified for duty as military judges on general courts-martial, who are assigned directly to The Judge Advocate General of that service and responsible only to him for direction and fitness ratings, and who perform only judicial duties. Rules for designating and detailing military judges for duty on special courts-martial are left subject to regulations to be promulgated by the Secretaries of the services, thus permitting the establishment of special lists of junior judge advocates who can be utilized for other legal duties while serving as military judges of special

[35] *Id.* § 2(5).
[36] S. REP. No. 1601, 90 Cong., 2d Sess. 5–6 (1968).
[37] MJA § 2(9).
[38] *Id.*

courts-martial in preparation for later assignment to general courts-martial, I believe this system will greatly increase the quality and prestige of military judges and will further insure their independence from improper command influence by removing them from the normal chain of command.

C. *IMPROVEMENTS IN MILITARY COURT PROCEDURES*

The Act reforms military trial procedures in a number of ways to streamline the heretofore cumbersome and unwieldly court-martial proceeding and bring it more nearly into line with criminal proceedings in federal district courts. A number of the changes are designed to reduce delay and unnecessary formalities. They include a requirement that a request by an enlisted defendant for non-officer members on the court must generally be made prior to the convening of the members,[39] a requirement that members be sworn in before the court convenes,[40] elimination of the troublesome and litigation-producing practice of permitting the military judge to confer in closed session with the members concerning the form of the findings,[41] authorization for the military judge or member-president of a court-martial to accept a plea of guilty and enter judgment thereon without the necessity of a vote by members,[42] changes in the method of record authentication,[43] and provision for a summarized record of some general courts-martial.[44] However, by far the most important provision, aside from the authorization of a single-officer trial without members (discussed in the next section), is the provision amending the Uniform Code to authorize the convening by the military judge of a pretrial session without the attendance of members for the purpose of disposing of interlocutory motions raising defenses and objections, ruling upon other matters that may legally be ruled upon by the military judge, holding the arraignment and receiving the pleas of the accused if permitted by regulations of the Secretary concerned, and performing other procedural functions which do not require the presence of court members.[45] The effect of the amendment, generally, is to conform military criminal procedure with the rules of criminal procedure

[39] *Id.* § 2 (7).
[40] *Id.* § 2(18).
[41] *Id.* § 2(9).
[42] *Id.* § 2(22).
[43] *Id.* § 2(23).
[44] *Id.*
[45] *Id.* § 2(15).

applicable in the United States district courts and otherwise to give statutory sanction to pretrial and other hearings without the presence of the members concerning those matters which are amenable to disposition on either a tentative or final basis by the military judge.

A typical matter which could be disposed of at a pretrial session is the preliminary decision on the admissibility of a contested confession. Under present practice, an objection by the defense to the admissibility of a confession on the ground that it was not voluntary frequently results in a lengthy hearing before the military judge from which the members of the court are excluded, although they must still remain in attendance. By permitting the military judge to rule on this question before the members of the court have assembled, the members are not required to spend considerable time merely waiting for a decision of the military judge. If the military judge sustains the objection, the issue is resolved, and the fact and innuendoes surrounding the making of a confession will not reach the members by inference or otherwise. If the military judge determines to admit the confession, the issue of voluntariness will normally, under civilian and military federal practices, be relitigated before the full court.

This amendment merely provides a grant of authority to the military judge to hold sessions without the attendance of the members of the court for the purposes designated in the amendment and does not attempt to formulate rules for the conduct of these sessions or for determining whether or not particular matters not raised at such sessions shall be considered as waived. These are questions more appropriately resolved under the authority given to the President in article 36 of the Uniform Code to make rules governing the procedure before courts-martial.

D. *TRIAL BY MILITARY JUDGE ALONE*

Perhaps the most innovative and potentially beneficial provision of the Act is the one amending the Uniform Code to permit the convening of a general or special court-martial consisting of a military judge sitting alone much as a federal district court judge may try a case without a jury.[46] The armed services, which vigorously supported this provision, anticipate that this new procedure will result in a great reduction in both the time and manpower normally expended in trials by court-martial. For

[46] *Id.* § 2(3).

example, the vast majority of cases in which the accused wishes to plead guilty will probably be tried by these single-officer courts.

The amendment provides that a case may be referred to a single-officer court if the accused, before the court is assembled, so requests in writing, and the military judge approves. Before he makes such a request, the accused is entitled to know the identity of the military judge and to have the advice of counsel. The election is available in the case of a special court-martial, of course, only if a military judge has been detailed to the court.

This provision is modeled generally after rule 23(a) of the Federal Rules of Criminal Procedure. It differs in a major respect, however, in that it does not require the consent of the convening authority to refer a case to a single-officer court, whereas rule 23(a) requires that both the court and the government must consent to waiver by the defendant of trial by jury. There are significant differences between the military community and the civilian community which seemed to me to make such an exact parallel in procedures inadvisable. In federal civilian criminal trials the jury is selected from a broad base of eligible persons pursuant to a detailed federal statute designed to insure complete impartiality.[47] There are no such safeguards in the selection of the members of a court-martial. Furthermore, the command structure in the military presents a possibility of undue prejudicial influence over the 'court by commanding officers that is not present in civilian administration of justice. It would thus seem unwise to limit the election of the accused to avoid trial by a court-martial whose members he might consider to be prejudiced against him. In any case, the military judge, after having heard arguments from both trial counsel and defense counsel concerning the appropriateness of trial by a military judge alone, will be in the best position to protect the interests of both the government and the accused.

E. *PROTECTIONS AGAINST COMMAND INFLUENCE*

One of the most troublesome problems in the administration of criminal justice in the military is that of improper command influence exerted directly or indirectly, intentionally or inadvertently, by line commanders against members and legal officers assigned to courts-martial. It is perhaps also the problem less amenable to solution. The Uniform Code presently contains provisions designed to reduce such command interference by pro-

[47] Act of March 27, 1968, Pub. L. No. 90–274, 82 Stat. 53.

hibiting convening authorities and other commanding officers from attempting to improperly coerce or influence the action of a court-martial or any reviewing authority, and prohibiting commanding officers from censuring or reprimanding the court or its members with respect to the action of the court.[48] These prohibitions have proved not to be sufficient, however, and the Act supplements them in several ways. It adds a provision that the performance of a serviceman as a member of a court-martial may not be evaluated in preparing an effectiveness, fitness of efficiency report on him or in determining his fitness for promotion, transfer, or retention in the service, nor may a serviceman be given a less favorable rating or evaluation because of his zeal in acting as defense counsel in a court-martial.[49] In addition, the "independent field judiciary'' system, discussed above, should insure the freedom of military judges from pressure by line commanders since they will be assigned to and responsible only to The Judge Advocates General of the services.

F. *LIMITATION ON TRIAL BY SUMMARY COURT-MARTIAL*

An additional provision added to the Act by the Senate Armed Services Committee at my urging amends the Uniform Code to assure that a serviceman may not be tried over his objection by a summary court-martial, which, as noted above, consists of one commissioned officer and which affords literally no safeguards to the accused. Under the applicable provision of the Uniform Code as originally enacted,[50] a serviceman initially offered trial by summary court-martial for an alleged offense could refuse such trial and demand trial by special or general court-martial. On the other hand, if his commanding officer initially offered him nonjudicial punishment ("company punishment") for the offense and he elected to be court-martialed instead, he could not then refuse trial by summary court-martial if his commander decided to refer his case to such a court. The Act amends the Uniform Code to provide that a serviceman offered trial by summary court-martial for an alleged offense may demand trial by a special or general court-martial instead (where his rights will be better protected) without regard to whether or not he has first been offered company punishment for the alleged infraction.[51]

[48] **UCMJ art. 37.**
[49] **MJA § 2(13).**
[50] **UCMJ art. 20.**
[51] **MJA § 2(6).**

This provision is a compromise between those who favor retention of the summary court-martial as under present law and those, including myself, who would abolish it altogether. This compromise is no expression of confidence in the summary court, which I consider to be an inferior court in concept and procedure and in the quality of justice it dispenses. Until such time as the summary court-martial can be eliminated from the court-martial system, the amendment removes the present restriction on the right of a serviceman to refuse trial by such court.

G. REVIEW AND POST-CONVICTION PROCEDURES

In addition to the above changes in trials by court-martial, the Act makes a number of changes in the post-conviction remedies and protections afforded to servicemen and in the review structure. For example, it provides for the first time a form of release on bail after conviction pending appeal. For the convicted military accused, no practical provision for release during the period of appellate review now exists, The Uniform Code provides that a sentence to confinement begins to run from the date it is adjudged by the court, with the exception that periods during which it is suspended are to be excluded in computing the term of confinement.[52] The Court of Military Appeals has held that a suspension of a sentence makes the accused a probationer as to the part suspended, and that the suspension may not thereafter be vacated except after a hearing to establish that the accused has violated his probation.[53] Suspension of sentence cannot, therefore, be used effectively as a means of release pending appeal. In consequence, a convicted military prisoner must begin serving his sentence to confinement from the date it is adjudged, even though it ultimately may be reversed on appeal. If it is reversed by the Court of Military Appeals after undergoing the full range of intermediate review, the prisoner probably will have served the entire sentence by the time a decision is rendered. If reversal comes earlier, at the court of military review level, he will at least have served several months of the sentence before reversal.

The Act amends the Uniform Code to correct this situation by permitting the convening authority or certain higher com-

[52] UCMJ art. 57(b).

[53] United States v. May, 10 U.S.C.M.A. 358, 27 C.M.R. 415 (1959).

manding officers, upon the application of the accused, to defer the service of a sentence to confinement pending appeal.[54] The deferment would be terminated and the sentence would begin to run automatically when the sentence is approved upon review and ordered executed. The discretion exercised would be very broad and would be vested exclusively in the convening authority or the officer exercising general court-martial jurisdiction. Such officers would take into consideration all relevant factors in each case and would grant or deny deferment based upon the best interest of the individual and the service. The officer granting the deferment or, if the individual is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the individual is currently assigned, would have discretionary authority to rescind it at any time.

The Act also extends the time within which an accused may petition The Judge Advocate General for a new trial from one year to two years, and extends the right to all cases, not just those involving sentences to death, dismissal, a punitive discharge, or a year or more confinement, as under the present Code.[55]

Finally, the Act amends the provisions of the Uniform Code establishing boards of review to review court-martial cases by redesignating the boards as "Courts of Military Review" and by directing the establishment of a single Court of Military Review for each armed service to replace the several boards of review now existing in each of the services.[56] The amendment also provides that each Court of Military Review shall be composed of one or more panels and that each panel shall be composed of not less than three appellate military judges. In reviewing court-martial cases, the Courts of Military Review may sit as a whole or in panels, in accordance with uniform rules of procedure to be prescribed by The Judge Advocate General. Qualifications of the appellate military judges who may be assigned to the courts remain the same as the present qualifications for members of boards of review. Under the amendment, each Judge Advocate General will designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge will determine on which of the panels of the court the appellate military judges assigned to the court will

[54] MJA § 2(24).
[55] *Id.* § 2(33).
[56] *Id.* § 2(27).

serve and which appellate military judge assigned to the court will act as the senior judge on each panel.

This amendment will, I believe, significantly enhance the prestige and independence of these appellate bodies, and will promote uniformity of decision and sound internal administration within the intermediate appellate structure of each service.

VI. CONCLUSION

The Military Justice Act of 1968 represented unquestionably the most significant advance in military justice in almost two decades. When the reforms made by the Act are instituted on the effective date of the legislation later this year,[57] the brand of criminal justice administered by military courts will be equal to that of federal and state civilian courts in most respects. Of course, much will depend upon the good faith of the armed services in seeking to effectuate the reforms fully. From my discussions with representatives of the Department of Defense, particularly with General Hodson, whom I consider to be an excellent lawyer and a most enlightened administrator, I am convinced that we shall see great improvements in military justice in the years ahead in the areas affected by the Act. The Subcommittee on Constitutional Rights will be watchful to assure that this is so.

There is one major area of great concern to me, however, which the Military Justice Act does not touch at all. I refer to the procedures before "administrative discharge boards,'' which are established within the armed services ostensibly for administrative rather than disciplinary purposes, but which are empowered to adjudge punitive ("undesirable") discharges for acts or omissions which could—and often should, in my opinion—be the subject of courts-martial. The procedures before such boards are in perhaps greater need of reform than the court-martial structure. Because of the lateness of the Congressional session when the Senate began consideration of the House-passed military justice bill last year, I did not insist on inclusion of such reforms in the Military Justice Act of 1968. However, in light of the fact that the American Bar Association has recommended legislation to establish minimum due process standards in administrative dis-

[57] MJA § 4 provides that the major amendments shall become effective "on the first day of the 10th month in which it is enacted," which will be August 1, 1969.

charge proceedings [58] and the fact that there have been assurances from the Department of Defense that some desired reforms in such proceedings may be obtained without opposition, I believe that legislation can be enacted this year in this vital area. I have reintroduced my earlier proposals on this subject,[59] and I intend to press for enactment of them or some reasonably similar reforms at the earliest possible time. Until we can assure our servicemen that they will not be discharged from the service and branded "unfit" or "unsuitable" or "undesirable" after a board proceeding in which they have no right to counsel, no right to confront their accuser and no right to review of the proceedings by someone trained in the law, we have not fully guaranteed them the basic rights that they are fighting to secure for us.

[58] Resolution approved by the House of Delegates of the American Bar Association, Philadelphia, Pa., Aug. 5–8, 1968. A bill embodying these recommendations has been introduced in the House of Representatives by Congressman Bennett. H.R. 943, 91st Gong., 1 Sess. (1969).

[59] S. 1266, 91st Gong., 1st Sess. (1969).

COMMENT

A NEW APPROACH IN DISSEMINATING THE GENEVA CONVENTIONS*

I. INTRODUCTION

On the screen, a pajama clad GI prisoner snakes along on his belly, squirming closer, closer to the enemy sentry. Suddenly, the prisoner springs to his feet, and leaps at the sentry with a hunting knife in his hand. Just like dozens of war movies since the early 1940's—but this one is different. Before the knife can strike, the action freezes on the screen and a voice asks, "Is this statement true or false?" The voice goes on to ask a question about the rights of a prisoner who commits a capital crime. The scene then changes, and we are watching a classroom full of GI's taking a test. The narrator who asked the question is the officer administering the test.

It is all part of "PW," a film produced for the Department of Defense, Office of Information for the Armed Forces by Audio Productions, Inc., in answer to one of the grave problems facing our servicemen, indeed our civilization. This film marks the culmination of an extensive effort by the Department of Defense to ensure that our armed forces personnel are fully aware of their obligations and their rights under the 1949 Geneva PW Convention.

The four Geneva Conventions for the Protection of War Victims have been ratified or adhered to by most nations of the world, includng the Soviet Union, Red China and other Communist countries.[1] The basic principle underlying the Conventions is that persons taking no part in the hostilities, including members of the armed forces who are "out of the fighting" because of wounds, sickness, shipwreck, capture or surrender, must be respected and humanely treated. They have been in force for the United States since February **2,** 1956; yet it wasn't until fairly recently that, through radio, TV, and news reports from Viet-

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

[1] See **6** U.S.T. **3114–3696,** T.I.A.S. **3362–3365.** Both North and South Vietnam are also parties.

nam, the general public became even vaguely aware of the existence of these important international agreements. Even today, detailed knowledge as to all their provisions is limited to a relatively small group of international lawyers, law professors, and members of the International Committee on the Red Cross (CRC).

II. GENEVA CONVENTION INSTRUCTION REQUIRED BY INTERNATIONAL LAW

If the Geneva Conventions are to succeed in preventing unnecessary suffering during hostilities, their provisions must be known to everyone having an obligation to carry them out. The drafters at Geneva in 1949 were well aware of this. In each of the four conventions they very wisely included an article requiring each contracting government to instruct its armed forces and its general population in the humanitarian rules laid down in these treaties.[2] The United States armed services have, since 1950, included in their training and command information programs considerable instruction on the present Geneva Conventions.

111. EDUCATIONAL INNOVATION ESSENTIAL IN TODAY'S ELECTRONIC WORLD

It is no easy task to communicate with a member of today's younger set[3]—the first generation to be reared in an electronic culture. The gap between the classroom and the outside world and the gap between the last two generations is wider than ever before. As one IBM executive puts it, "My children had lived several lifetimes compared to their grandparents when they began grade one."[4] The modern serviceman, whose psyche is being programmed for tempo, information, and relevance by an electronic environment created by television and other new communications media, cannot continue to be processed in classrooms operating on the postulates of another day.[5] New ways must be found to reach

[2] Articles **47, 48,** 127, and **144,** respectively.

[3] "Communications is a funny business, There isn't much of it going on as most people think. Many feel it consists in saying things in the presence of others. Not so. It consists not in saying things but having things heard." Culkin, *A Schoolman's Guide to Marshall McLuhan,* SATURDAY **REVIEW, 18** Mar. 1967, p. 71.

[4] M. MCLUHAN, UNDERSTANDING MEDIA ix (Signet Ed. 1964).

[5] '"Today's six-year-old has already learned a lot of stuff by the time he shows up for the first day of school. Soon after his umbilical cord was cut he was planted in front of a TV set 'to keep him quiet.' He liked it enough there to stay for some 3,000 to **4,000** hours before he started the first

him, to motivate him properly, and to help him learn. It was with this basic idea in mind that "PW," the new Department of Defense film, was made.[5]

IV. AUDIENCE PARTICIPATION — A KEY CONCEPT IN EDUCATION FILMS

"PW" requires its viewers to participate, and thus become personally involved, in situations which require application of the 1949 Geneva Convention Relative to the Treatment of Prisioners of War. An on-screen instructor presents a true-false-multiple choice test. Viewers mark their answers on forms supplied for that purpose. This results in better overall alertness, better learning, on the part of the audience simply because its members have had a greater opportunity to participate in the experience being portrayed to them visually.

The picture opens with a documentary film tracing the historical development of the treatment of prosioners of war from early times through the Korean conflict. This introduction provides general information which can be used later during the test phase. At the conclusion of the introduction, it is revealed that a studio audience in the film has been watching the documentary, preparatory to taking the same test which is to be presented to the viewing audience.

V. IMPORTANCE OF CONVENTION TO FIGHTING MAN

The on-screen instructor, a major in the Army Judge Advocate General's Corps, quickly relates the subject to his serviceman audience when he says :

> The Convention is important to you for several reasons. First, because it is the law and you are charged with the duty of living up to its requirements. During hostilities when you capture enemy personnel, you must know the standards of treatment to which your prisoners are entitled, so that you may abide by the terms of the

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grade. By the time he graduates from high school he has clocked 16,000 hours of TV time and 10,800 hours of school time. He lives in a world which bombards him from all sides with information from radios, films, telephones, magazines, recordings, and people. He learns more things from the windows of cars, trains, and even planes. Through travel and communications he has experienced the war in Vietnam, the wide world of sports, the civil rights movement, the death of a President, thousands of innocuous shows. . . ." *Id.* at 71-72.

[5] Although "PW" is a film used in teaching servicemen their rights and obligations under the Geneva PW Convention, the particular method of audience participation employed, and the rationale behind its use, are equally applicable to the teaching of a wide variety of other subjects.

Convention and thus uphold the dignity and honor of our country. Secondly, any soldier, including yourself, may become a prisoner of war and therefore you should be fully aware of your rights under the Convention. This knowledge could have a lot to do with your own well-being and the security of your outfit. Today we are going to see how much you know about this important document.

VI. THE TEST

A series of film sequences is used, one for each factual situation covered in the test question. The first takes place in Vietnam, showing a VC prisoner being questioned by a group of Americans using a Vietnamese interpreter. The major says:

> We'll suppose you are interrogating a prisoner. Under the Geneva PW Convention what information is he required to give you?
>
> The alternate answers are:
>
> a. Name, Rank and Service Number.
>
> b. Name, Rank, Service Number and Place of Birth . . . .
>
> c. Name, Rank Service Number and Date of Birth.
>
> Think each choice over carefully and mark your selection in the appropriate place on your form.

He asks three more questions in this section, and then goes back and repeats the first question—"What information is a prisoner of war required to give his captors?"—and gives the correct answer, "c." He then elaborates as to why this particular answer is the correct one.

> The Convention states that a PW need only tell his captors his Name, Rank, Service Number and Date of Birth.[1] This is a crucial point. Every fighting man possesses some information of potential value to the enemy. No matter how inconsequential it may seem to you it might be an important bit of knowledge that could complete a composite intelligence picture for the enemy. Also, if you in any way volunteer or make it easy for the enemy to get information other than Name, Rank, Service Number and Date of Birth, you indicate to the enemy that you might be a good subject for intensive interrogation. This, as you might imagine, could be rough.
>
> However, in order to restrain overzealous interrogators, the Convention, in article 17, specifically provides: " . . . No physical or mental torture, nor any form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind . . . ."

[1] Art. 17, GPW.

The next three questions are presented in a similar manner. Questions two and three relate respectively to permissible religious activities and the type of work that may be performed by prisoners. Question four brings out a most important provision of the Convention: "Prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention."[8]

At this point, the men taking the test correct their own papers and total up their scores for Section A. The on-screen instructor injects an element of competition by announcing the scores previously made on this same section by another group of servicemen.

The test is divided into three sections of four questions each. Sections B and C, the last two sections, are handled in a fashion almost identical to that followed for Section A. The questions in Section B cover the most important Convention rules relating to penal and disciplinary actions.

Section C contains a miscellaneous group of questions designed to correct some of the more common mistaken ideas about the Geneva Conventions. Many people have the impression that the Geneva Conventions apply only to cases of formally declared war. Hence, they suppose that since the United States has not formally declared war against North Vietnam, the Geneva Conventions of **1949** are not applicable to the Vietnamese conflict. This is not true. The Geneva Conventions do apply in Vietnam. All four Conventions have a common article stating that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[9] This is why we and our allies are applying the provisions of the Geneva Conventions in our military operations in Vietnam.

The last question highlights the fact that the Geneva Convention protects a prisoner of war from the very moment of his capture until his final release and repatriation. In discussing this question, the instructor stresses that the Convention is a document for both captor and captive, stating:

> Remember this provision and all other provisions in the Convention are not only for your protection, but for the protection of any member of the enemy's forces you might capture. **You** must treat them in

[8] Art. 7, GPW.
[9] Art. **2** of each Convention.

> the same way you would expect to be treated . . . Captives must be disarmed, thoroughly searched and carefully guarded. Under all circumstances, they are to be treated humanely, without distinction as to race, color or religious belief. Prisoners must be protected from torture, humiliation, degrading treatment, reprisals or any act of violence. They must be given adequate medical treatment and moved out of the combat zone as quickly as possible.

When the movie is over the members of the audience have completed their scoring, the questions and answers provide a. basis for a group discussion.

VII. CONCLUSIONS

The 1949 Geneva Convention relative to the treatment of prisoners of war represents the highest humanitarian ideals of enlightened governments. The standards set forth in the Convention are not automatic guarantees that can be obtained by pounding on the table. Like any other international agreement, the Convention depends for its effectiveness on the willingness of governments and their citizens to abide by its provisions, and on the strength of world opinion as an influence over those who violate it.

Many violations of the Convention are due primarily to ignorance. The movie "PW" should prove to be an effective means of reducing this type of breach. But this is only the first step. The other three Geneva Conventions for the protection of war victims are even less known to the general public. The same is true of the Hague Convention No. IV Respecting the Laws and Customs of War on Land.[10] Now that the United States Department of Defense has '(broken the ice," other films employing the same audience participation technique used in "PW" should be made, in order to ensure that all of these great humanitarian treaties are better understood and respected.[11]

GEORGE F. WESTERMAN**

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[10] 36 Stat. 2277, T.I.A.S. 539 (1907).

[11] The Judge Advocate General's School, U.S. Army, is presently working with the U.S. Army Pictorial Center on the production of such a film.

**Colonel, JAGC; Chief, U.S. Army Judiciary; formerly Chief, International Affairs Division, Office of The Judge Advocate General, Department of the Army; served as the Department of Defense Technical Advisor during the production of the film discussed in this article; B.S. (Elec. Engr.), University of Wisconsin, 1939; LL.B., University of Wisconsin, 1941; Hague Academy of International Law, 1957; member of the Bar of Wisconsin, the U.S. Supreme Court, U.S. Court of Claims, U.S. Court of Customs and Patent Appeals, and the U.S. Court of Military Appeals.

WARNING

In order to have an effective presentation, the instructor presenting the film PW *must* complete the following steps ***before*** any scheduled showing of this film:

1. Obtain Armed Forces Film Information Guide on PW, AFIF–166, and study it carefully.

2. Preview the film.

3. Reproduce, in sufficient quantities for the expected audience, the test form shown on page ***5*** of the film guide.

4. Distribute copies of test form just ***before*** commencing the film.

By Order of the Secretary of the Army:

W. C. WESTMORELAND,
General, United States Army,
Chief of Staff.

Official:

KENNETH G. WICKHAM,
Major General, United States Army,
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