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MILITARY LAW REVIEW

Articles

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PREFACE

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

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MILITARY LAW REVIEW

MILITARY LAW IN THE UNITED KINGDOM*

By BRIGADIER RICHARD C. HALSE**

I. INTRODUCTION

It is impossible in this article to trace the history of United Kingdom military law, or, for the reasons explained later, to deal with the law pertaining to the navy or air force of the United Kingdom. In this article, therefore, "military law" means the law relating to the army, as opposed to the law pertaining to the other armed services of the Crown, and military law in its wider sense, including martial law and the law imposed in occupied territory.

The writer has had an opportunity of reading the article on Canadian military law[1] and has adopted the format of that article so that readers can compare the differences between the United States, Canadian and United Kingdom systems, and, as in the case of that article, no attempt has been made to draw comparisons between the three systems.

United Kingdom military law can be said to be the ancestor of military law in the English speaking races, and a comparison between the Uniform Code of Military Justice in the United States,[2] the Canadian National Defence Act[3] and the Army Act, 1955,[4] will show, for example, that they all contain an article or section making "conduct to the prejudice of good order and military discipline"[5] an offense.

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* This is the fourth in a series of articles to be published periodically in the *Military Law Review* dealing with the military legal systems of various foreign countries. 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 or any agency of the United Kingdom.

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1 Hollies, *Canadian Military Law*, Mil. L. Rev., July 1961, p. 69. Other articles which have already been published in this foreign law series are: Moritz, *The Administration of Justice Within The Armed Forces of The German Federal Republic*, Mil. L. Rev., January 1960, p. 1; and *The Military Legal Systems of Southeast Asia* (The Philippines, Republic of China, and Thailand), Mil. L. Rev., October 1961, p. 151.

2 10 U.S.C. §§ 801-934 (1958).

3 Can. Rev. Stat. c. 184 (1952).

4 3 & 4 Eliz. 2, c. 18 (hereinafter referred to as A.A., 1955, § ____).

5 *Id.* § 69.

II. SOURCES OF MILITARY LAW

It is impossible to trace the history of United Kingdom military law in an article of this nature, and, if readers are interested in a more detailed study, they are referred to Section I of Part II of the Manual of Military Law,[6] which deals with United Kingdom military law from its earliest days. As stated in that pamphlet, until 1879, the law relating to the discipline of the army was contained in the Articles of War, which were effective only in wartime. Later, the Mutiny Acts and the Articles of War, which were initially promulgated under the Royal prerogative and later under the Mutiny Acts, governed the army.

The year 1879 saw the military code embodied in an Act of Parliament known as the Army Discipline and Regulation Act, 1879.7 Two years later that Act was repealed and the substance of it re-enacted with some amendments in the Army Act of 1881.[8] This latter Act was not part of the permanent statute law of the United Kingdom, but it was kept in force from year to year. This was done by means of annual Acts of Parliament; these annual Acts, also made such amendments to the Act of 1881 as Parliament thought necessary. Unfortunately, the amendments were of a piecemeal nature and in many cases did not keep up with the times.

During the passage of the bill which was to be the Annual Act of 1952, so many amendments to the Act of 1881 were offered in the House of Commons, that the Government agreed to the appointment of a Select Committee of the House of Commons to draft a new bill. As a result of the work of that committee, the House of Commons was presented with a report which included the form of a bill which eventually became the Army Act, 1955.9 This Act came into force on January 1, 1957. Like its predecessor of 1881, it was not part of the permanent statute law of the United Kingdom but expired at the end of 12 months from the date it came into operation, unless it was extended by an Order in Council, the draft of which had to be approved by both Houses of Parliament. Furthermore, under no circumstances could the Act remain in force for more than five years unless reenacted by another Act.[10]

Last year (1961), therefore, Parliament had to consider a further bill, in order that the Act of 1955 could be continued in force after December 31, 1961. Accordingly, a bill which in due

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6 War Office Code No. **10225** (Section I).
7 **42 & 43** Vict., c. **33.**
8 **44 & 45** Vict., c. **58.**
9 Report, Select Committee on the Army Act and Air Force Act, H.C. Session **1953–54.**
10 A.A., **1955, § 226.**

course became the Army and Air Force Act, 1961,[11] was presented to Parliament. This Act has extended the life of the Act of 1955 for another five years, subject always to the provision that it expires at the end of each calendar year, unless both Houses of Parliament approve a draft Order in Council continuing its life. The Act also makes amendments to the Act of 1955, and in this article the law is as of January 1, 1962, and takes into account the amendments to the Act of 1955.

Because the law relating to the three services differs, it is impossible to deal in this article with the law relating to the navy, contained in the Naval Discipline Act[12] and later in the Naval Discipline Act, 1957,[13] or the law relating to the air force which was contained in the Air Force Act[14] and is now contained in the Air Force Act, 1955,[15] as amended by the Act of 1961.[16] Suffice it to say that the law regarding the air force is similar to the law regarding the army, and the Air Force Act, 1955, like the Army Act, 1955, is not part of the permanent law of the United Kingdom, and it has to be kept in force by subsequent enactments. The Naval Discipline Act, 1957, on the other hand, is part of the permanent statute law of the United Kingdom, and the provisions as to the administration of discipline are substantially different,

III. JURISDICTION

A. *OVER SERVICE PERSONNEL*

The Army Act, 1955, deals with enlistment into and discharge from the regular forces; the creation of offenses which can be dealt with, and the punishments which can be awarded, by military tribunals; the jurisdiction of those tribunals; the powers of arrest of the military; post-trial matters dealing with findings and sentences; and other matters pertaining to the maintenance of an army in peace and war. In other words, as its long title indicates, it "makes provision with respect to the army."

Military law is applicable to all officers and soldiers of the regular forces at all times;[17] to officers and men of the reserve when called out on permanent service, for training or in aid of the civil power;[18] to active officers of the Territorial Army[19] (which in some

11 **9 & 10 Eliz. 2, c. 52.**
12 **29 & 30 Vict. c. 109.**
13 **5 & 6 Eliz. 2, c. 53.**
14 **Air Force (Constitution) Act, 1917, § 12.**
15 **3 & 4 Eliz. 2, c. 19.**
16 **9 & 10 Eliz. 2, c. 52.**
17 **A.A., 1955, § 205 (1) (a) and (f).**
18 **Id. § 205 (1) (a) and *(g)*.**
19 **Id. § 205 (1) *(e)*.**

ways corresponds to the National Guard of the United States) at all times; and to men of the Territorial Army when embodied, called out on home defense service, or doing training.20

Officers and men of colonial forces are subject to military law under the Army Act, **1955,** if an ordinance or other local enactment so makes them; if the law of the colony does not otherwise provide for their government and discipline; or while they are serving with the regular army outside their colony of origin.[21]

Officers and ratings of the navy and officers and airmen of the air force are subject to military law under the Army Act, **1955,** with certain modifications, if they are or are deemed to be attached to the army.[22]

Members of a Commonwealth force are subject to military law in certain circumstances when made available for service with the regular army.[23]

B. *OVER CIVILIANS*

Under the Army Act of **1881,** civilians in time of peace were never subject to military law, but on active service, civilians were made subject to military law if they were "followers" of a force.[24]

The Army Act, **1955,** provides that civilians who are "followers" of a force on active service are subject to Part II of that Act, which deals with discipline, etc., wherever they may be with the force, even in the United Kingdom.25

With the coming into force of the status of forces agreements that were brought into being as a result of the stationing of United Kingdom forces in Libya, the formation of NATO, and the stationing of United Kingdom forces elsewhere in foreign countries, provision had to be made for the trial by military tribunals of the civilian component of the United Kingdom forces in foreign countries, Those agreements contain provisions allowing military tribunals to have primary jurisdiction over the forces, including the members of the civilian component, rather than having the civilian courts of the country in which the force is serving try these persons. Special provision, therefore, has been made in the Army Act, **1955,** to make certain classes of civilians serving with a force out of the United Kingdom, whether that force is on active service or not, liable to be tried by military tribunals for

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20 **Id. § 205(1)(h).**
21 **Id. § 207.**
22 **Id. § 208 and Schedule** 6.
23 **Id.** § 206.
24 **Army Act, §§ 175(7) and** 176(9) **and (10).**
25 **A.A., 1955, § 209(1).**

certain specified offenses. These include offenses against the English criminal code and breaches of military standing orders and other offenses against military discipline, such as giving false evidence at a court-martial.[26]

In connection with the offense of a breach of standing orders, it is interesting to note that the section of the Army Act, 1955,[27] which creates the offense provides that the offense is committed if the order which the accused is alleged to have violated was an order "known to him or which he might reasonably be expected to know." There is, therefore, no need to prove that the accused knew of the order, so long as it is shown by the prosecution that he might reasonably be expected to know of it; that is to say, that it had been posted in a place where orders which he ought to see are normally posted and that he was in station at the time when the order was posted.

C. LIMITATIONS OF TIME

In general it can be said that once a person has ceased to be subject to military law for three months, he is free from trial under military law, although there are certain exceptions, namely, desertion, mutiny and civil offenses committed outside the United Kingdom.[28]

The Army Act, **1955,** provides that an accused may not be brought to trial for an offense committed more than three years before the date of trial. However, in computing the three years, time spent in illegal absence or as a prisoner of war does not count. Furthermore, this limitation does not apply to the offenses of desertion, mutiny or civil offenses committed outside the United Kingdom, so long as, in the latter case, the consent of the Attorney-General of England has been obtained for trial.[29]

IV. JURISDICTION OVER OFFENSES

The offenses which can be committed by persons subject to military law created by the Army Act, **1955,** fall into three main categories. First, there are those offenses such as misconduct in the presence of the enemy, insubordination, desertion, absence without leave, disobedience of orders, stealing public property and property of other persons subject to military law, etc.[30] The second category consists of those offenses charged under the

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[26] *Id.* § 209 (2).
[27] *Id.* § 36.
[28] *Id.* §§ 131(1) and 132(3).
[29] *Id.* § 132(1).
[30] *Id.* §§ 24-68.

omnibus provision which prohibits "an act, conduct or neglect to the prejudice of good order and military discipline."[31] The third category, "civil offenses," comprises all the offenses which are punishable by the law of England, wherever they may be committed.[32]

It is interesting to notice here that, as the criminal code of Scotland and Northern Ireland frequently differs from the criminal code of England and Wales, it is the law of England which every soldier carries with him wherever he goes, even though he may be a Scotsman serving in a Scottish regiment in Scotland,

The Army Act, 1955, also creates a fourth category of offenses, which are civil as opposed to military offenses, and which can be committed by any person. Such an offense would be assisting desertion.[33]

Whereas it is true in general to say that a person subject to military law can be charged before a military tribunal with committing a civil offense against the law of England anywhere in the world, there are five exceptions to this rule; namely, the offenses of murder, manslaughter, rape, treason and treason-felony, which cannot be dealt with under military law if committed in the United Kingdom.[34]

Conviction or acquittal by a civil court in the United Kingdom or a colony bars a subsequent trial for the same offense under military law.[35] On the other hand, an acquittal or conviction by a military tribunal does not bar subsequent trial for the same offense by a civilian tribunal,[36] subject always to the provision that if the finding of a court-martial has been quashed by the Courts-Martial Appeal Court, the accused cannot be tried again by any court for the same offense.[37]

There have been few cases where a civil court has tried a soldier for an offense after he has been acquitted or convicted by a military tribunal, but where a civil court does so act after a conviction by a military tribunal, it must take into account the punishment which the military tribunal has awarded.[38]

Special provisions are made in the regulations defining the jurisdiction of the civil and military tribunals, and generally it can be said that in the United Kingdom where an offense could be tried

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31 *Id.* § 69.
32 *Id.* § 70.
33 *Id.* §§ 191–197.
34 *Id.* § 70(4).
35 *Id.* § 134(1).
36 *Id.* § 133(1).
37 **Courts-Martial (Appeal) Act,** 1951, § 16.
38 **A.A.,** 1955, § 133(2).

either by a civil or a military tribunal, decision as to who will try rests with the local civil authorities.39

The position in foreign countries where British forces are stationed, so far as jurisdiction is concerned, is governed by the relevant status of forces agreement; for example, the NATO Status of Forces Agreement and the Bonn Conventions in Germany.

V. SUMMARY TRIALS

A person subject to military law who commits an offense against the Army Act, **1955,** can be tried either summarily or by court-martial, depending on the gravity of the offense and the rank of the offender. As will be seen later in this article, trial by court-martial can also occur in cases where the accused has elected to be tried by that tribunal rather than being dealt with summarily.[40]

A. *TYPES OF OFFENSES AND PUNISHMENTS*

A non-commissioned officer or soldier may be tried summarily by the commanding officer of the unit in which the accused is serving or to which he is attached, either temporarily or simply for the purposes of trial.[41] Such commanding officer will normally be of the rank of lieutenant-colonel, but in certain circumstances an officer of lower rank may be a commanding officer.

The commanding officer is prohibited from punishing an offender if he is alleged to have committed an offense contrary to one of the sections of the Army Act, **1955,** which is not prescribed in the Army Summary Jurisdiction Regulations, These are statutory regulations made under the Act which limit commanding officer's summary powers.[42] For example, he cannot punish a soldier for theft. He has, however, an inherent power to dismiss a charge under any section of the act against an offender of whatever rank.[43]

As to punishments, a commanding officer is able, as of January **1, 1962,** to award to a non-commissioned officer the maximum punishment of a forfeiture of a sum from pay not exceeding 14 days pay. Before that date his powers of punishment over non-commissioned officerswas limited to severe reprimand and deprivation of acting rank or, if the offense involved a loss or damage,

39 Queen's Regulations for the Army, **1955,** para. **734.**

40 A.A., **1955,** § 78(5), and, in the case of officers and warrant officers, § 79(6).

41 *Id.* § **78.**

42 See *id.* § 83(1) and Army Summary Jurisdiction Regulations, **1956,** R. **11,** as amended.

43 A.A., **1956,** § 77(4).

stoppages as compensation, The maximum punishment which he can award to a soldier is 28 days detention.[44]

In any case, where, as a result of a finding by a commanding officer that the accused is guilty of the offense, pay may be forfeited, or in any case where the punishment involves a loss, or deprivation, of pay, the commanding officer must give the offender the option of trial by court-martial.[45]

A commanding officer may delegate to his subordinate commanders the power to try summarily a soldier charged with any offense which he himself can try,[46] but the powers of such a subordinate commander are limited to minor punishments which do not involve loss of pay.[47] A subordinate commander is the equivalent of a company commander.

Officers in command of formations and certain staff officers of the rank of brigadier and above (called appropriate superior authorities)[48] have the power to try summarily officers of the rank of major and below and warrant officers, but the maximum punishment which can be awarded is forfeiture of a sum from pay not exceeding 14 days.[49]

In any case where an appropriate superior authority is going to award a punishment which will involve loss of pay or make a finding which may involve forfeiture of pay, he must give the accused the option of trial by court-martial.[50]

An appropriate superior authority, like a commanding officer, is prohibited from trying a person for certain offenses. He cannot, for example, try a warrant officer for theft.[51]

Officers of the rank of lieutenant-colonel and above cannot be tried summarily but must be tried by court-martial, although a charge against them can be dismissed by a commanding officer.[52]

Civilians who are liable to be dealt with under the Army Act, 1955, are dealt with in the same way as officers of the rank of major and below and warrant officers by an appropriate superior authority. The only punishment which can be awarded is a fine, the maximum being ten pounds, and the accused must be given the option of trial by court-martial before the punishment is awarded.[53] As in the case of officers and warrant officers, an appropriate

44 Id. § 78, as amended by Army and Air Force Act, 1961.
45 Id. § 78(5).
46 Id. § 82(3), and Army Summary Jurisdiction Regulations, 1956, R. 8.
41 Army Summary Jurisdiction Regulations, 1956, R. 16.
48 A.A., 1955, § 77(1).
49 Id. § 79.
60 Id. § 79(6).
51 Army Summary Jurisdiction Regulations, 1956, R. 18.
52 A.A., 1955, § 77(4).
63 Id. §§ 209(3)(b), (d) and (e).

superior authority is limited in the offenses with which he can deal.[54]

B. *PROCEDURE AT SUMMARY TRIALS*

While the procedure before an appropriate superior authority[55] is more formal than that before a commanding officer, the general rules are the same. The accused has the charge laid against him read out; he is not asked to plead; the evidence against him is heard and the accused can cross-examine the witnesses if he wishes to do so; and he can demand that the evidence of the witnesses be given on oath before a commanding officer. Before an appropriate superior authority, evidence, if oral, must be given on oath. The accused is entitled to make a statement or give evidence on oath and call witnesses.[56] No advocate appears on his behalf or on behalf of the prosecution, although a commanding officer is, by administrative regulations, bound to ensure that an accused is advised by a person of his own choice, subject to military law in certain circumstances.57 Summary trials are not governed by the rules of evidence;[58] notwithstanding this, the authority trying the case summarily is careful to ensure that he does not hear prejudicial evidence.

Where the case is one which a commanding officer cannot try summarily in view of regulations or where a commanding officer is of the opinion that the case should be tried by court-martial, or where an appropriate superior authority while trying a case comes to the conclusion it should be tried by court-martial, the necessary steps must be taken to see that it is so tried.[59]

VI. PRELIMINARIES TO COURT-MARTIAL

A. *PRETRIAL INVESTIGATION*

Before an accused is brought to trial by court-martial, the evidence against him must be recorded in writing either by way of a summary of evidence,[60] which is taken upon oath in the presence of the accused, or by way of an abstract of evidence,[61] which is a collection of statements compiled and put together in the absence of the accused.

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54 Army Summary Jurisdiction Regulations, 1956, R. 20.
55 Rules of Procedure (Army), 1956, R. 20 (hereinafter referred to as R.P.).
56 In the case of commanding officers, R.P. 7 and 8.
57 Queen's Regulations for the Army, 1955, para. 711.
58 The Rules of Procedure under § 99 of the Army Act, 1955, are not applied.
59 A.A., 1955, §§ 77 and 79.
60 R.P. 9.
61 R.P. 10(1).

At a summary of evidence, after the evidence against the accused has been given, he has an opportunity of making a statement after being cautioned that he need not say anything unless he wishes to do so. He also has an opportunity of calling witnesses in his defense in addition to making a statement himself. The accused can elect to make either a sworn or unsworn statement.[62]

In the case of an abstract of evidence the accused, when handed a copy of it by an officer as required by the rules, is cautioned that he need not say anything unless he wishes to do so but that he can make a statement if he so desires.[63]

In both the case of the summary of evidence and the abstract of evidence, the accused is informed that any statement he makes may be used in evidence at his trial.

B. *CHARGE-SHEETS*

Up to this point in the investigation a commanding officer has before him only a statement of the offense or offenses which are alleged against the accused, set out in an army form, and it is not until after he has considered the written evidence that he causes a formal charge-sheet to be prepared. This document is similar to the bill of indictment in a civil criminal court in England and may contain one or more charges but they must, in general, all be based on facts of a similar nature.[64] The charge-sheet will, if the convening officer approves it, be the document upon which the accused is arraigned at his trial. After the charge-sheet has been prepared, the accused is again brought before his commanding officer for formal remand for trial and the accused then has a second opportunity, if he so desires, of making any statement relating to the charges.[65] After remand, application for trial is made by the commanding officer.

The accused is entitled, at least 24 hours before trial, to a copy of the summary of evidence or, as the case may be, the abstract of evidence, including a copy of any statement he has made after being given the abstract. Special provision is made for his defense. He can be defended either by a defending officer, whom he may select and who is usually an officer of his own unit without legal qualification, or he can employ his own counsel, either a solicitor or a barrister or both, or he can, if eligible, apply for legal aid, In the latter event he is required to make a contribution towards the cost commensurate with his rate of pay, following

62 R.P. 9.
63 R.P. 10.
64 R.P. 14.
65 R.P. 8.

which a solicitor or barrister is employed to defend him at the public expense.[66]

The Rules of Procedure made under the Army Act, 1955, make special provisions with regard to obtaining witnesses on behalf of the accused.[67]

C. *CONVENING-OFFICERS*

Under the Army Act, 1955, there are three types of court-martial ; namely, general, district and field general court-martial.[68]

The officer who convenes a court-martial is known as the convening officer. He is normally the commander of a formation and he either obtains authority to convene general and district courts-martial directly from the Sovereign by means of a sign-manual warrant or indirectly from the Sovereign by delegation from the holder of a sign-manual warrant.[69] In the case of a district court-martial, however, a commander of the rank of brigadier and above and anyone acting in his stead has, by virtue of statute, power to convene such a court.[70] In the case of a field general court-martial, any commander, even the accused's commanding officer, can convene it if he can give the necessary certificate that a district or general court-martial cannot be convened.[71]

The convening officer may (1) direct trial by court-martial;[72] (2) direct that the accused be tried summarily by an appropriate superior authority, if the accused is of the appropriate rank;[73] or (3) remit the case to the commanding officer for dismissal of the charges74 or for summary trial on a new set of charges.[75]

A court-martial comes into being by virtue of an order issued by the convening officer, known as a convening order.

VII. COURTS-MARTIAL

A. *COMPOSITION*

A general court-martial has the power to try any person subject to military law and any civilian who is liable to be tried by the military authority for any offense and has full powers of punish-

66 R.P. 25.
67 *Ibid.*
68 A.A., 1955, § 84.
69 *Id.* § 86(1) and (2).
70 *Id.* § 86(2).
71 *Id.* §§ 84(2) and 86(3).
72 *Id.* § 84.
73 *Id.* §§ 77 and 79.
74 *Id.* § 80.
75 *Id.* § 78(6).

ment.[76] It must consist of not less than five officers, all of whom must have had at least three years commissioned service.[77] These officers are either named or a commanding officer is detailed to nominate an officer to be a member in the convening order, and all those who are named or nominated must sit unless they are excused either because they have an interest in the case or they are objected to by the accused. In the case of a successful objection, the place of the officer is taken by a waiting member.[78] A general court-martial is always advised by a judge advocate.[79] This type of court-martial invariably tries officers and all serious offenses.

A district court-martial consists of at least three officers, all of whom must have at least two years commissioned service.[80] A judge advocate may be appointed, if necessary, to advise a district court-martial, but the majority of district courts-martial do not have the benefit of the advice of a lawyer.[81] This type of court is prohibited from trying officers and has limited powers of punishment in the case of warrant officers. Furthermore, it can never impose a sentence greater than two years imprisonment.[82]

A field general court-martial can only be held when the force is on active service. It normally consists of three officers, and generally it has the same powers of punishment and the same power over personnel as a general court-martial. It can, however, in certain circumstances, consist of two officers, in which case its powers of punishment are limited to two years imprisonment. In view of the provisions of the Army Act, 1955, which provide that a convening officer will have to certify that he cannot arrange for the accused to be tried by general or district court-martial without serious detriment to the public service, trial by the field general court-martial in the future will be the exception rather than the rule, whereas during the First and Second World Wars trial by such a court was the rule rather than the exception.[83] This type of court is in effect an emergency court-martial.

After the Second World War a committee was set up to consider the administration of justice in the army and air force. Among other matters the committee considered whether enlisted soldiers should be made members of courts-martial to try other soldiers. The majority of the committee were of an opinion that such a course would not be a desirable amendment although one member

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76 *Id.* § 85(1).
77 *Id.* § 87.
78 *Id.* § 92.
79 R.P. 23(1)(f).
80 A.A., 1955, § 88.
81 R.P. 23(1)(f).
82 A.A., 1955, §§ 85 and 88.
83 *Id.* §§ 84, 85 and 89.

did submit a minority report recommending that this course be adopted. No amendment was made.

In every case an officer is appointed to conduct the prosecution for the convening officer. He is normally a regimental officer, but in complicated cases an officer with legal qualifications from the Directorate of Army Legal Services is appointed. On very rare occasions the convening officer may authorize the employment of counsel to appear on behalf of the prosecution.

The defense of the accused is conducted either by a regimental officer, who normally has no legal qualifications, or by counsel, that is to say, a solicitor, or a barrister and a solicitor, who would be instructed by the accused, or, if legal aid has been granted, a solicitor or barrister instructed by the Director of Army Legal Services. Unlike the procedure in the United States and Canada, neither the Director of Army Legal Services nor the Judge Advocate General's office provide officers to defend an accused, although the Director of Army Legal Services does instruct counsel to appear if legal aid is granted.

B. PROCEDURE IN A COURT-MARTIAL

The Rules of Procedure [84] made under the Army Act, 1955, contain detailed provisions as to the procedure which is to be adopted in a court-martial and follow as closely as possible the procedure in civil criminal courts in England. Certain exceptions have to be made, however. For example, in the case of a trial before a criminal court in England, the judge is the judge of law and the jury is the judge of fact, whereas in a court-martial the members of the court are judges both of law and fact, although they may be, in the case of a district court-martial, and are in the case of a general court-martial, advised by a judge advocate, whose functions can be likened to those of the law officer in the case of a court-martial in the United States. He has, however, no vote, and subject to what will be said later, is merely an adviser on the law to the court.

Prior to 1948 the judge advocate, when appointed, sat with the members of the court when they were deliberating on the findings and sentence. Among the other recommendations made by the committee set up after the Second World War was one that the judge advocate should not be present when the court was deliberating on its findings. This recommendation was adopted, and now the judge advocate does not retire with the court when considering findings, although he still remains with the court members at any other time when they are in closed court.

[84] Stat. Instr., 1956, No. 162.

As soon as a court is assembled and before it is sworn to try him, the accused has an opportunity of objecting to being tried by any of the officers of the court, and he may so object for any reasonable cause. Detailed provisions are made as to the procedure in the event of an objection.[85] Such objections are, however, seldom made in courts-martial.

After the court is sworn, the accused is arraigned upon the charges in the charge-sheet. If there is more than one charge-sheet, he is not arraigned on the second until the court has come to a finding on the charges contained in the first.[86] Before he is arraigned, however, he has an opportunity of objecting to the trial proceeding on the grounds that the court has no jurisdiction; or on the basis of *autrefois acquit* or *autrefois convict;* or on the ground that the offense has been condoned87 or for some other reason;[88] or that he is no longer liable to trial by court-martial in view of the provisions as to limitation of time.[89] He has also the right to apply to be tried separately with respect to any of the charges contained in the charge-sheet on the grounds that he may be embarrassed if all the charges are tried together [90] or, if he is being tried jointly with another accused, to apply to be tried separately from that accused.[91]

If no objection or application is made on any of the grounds mentioned in the last paragraph, or, if one is made, and it has been disposed of, the accused is called upon to plead to each of the charges contained in the charge-sheet.92 He must plead to each charge separately. Special provisions are made in the Rules of Procedure for the action to be taken where an accused pleads guilty to one charge and not guilty to a charge which is laid in the alternative and is placed lower in the list of charges.[93]

Where the accused pleads not guilty to some charges and guilty to others not laid in the alternative, the court proceeds to deal with

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85 A.A., 1955, § 92, and **R.P.** 27.

86 **R.P.** 35.

87 At one time condonation had a very wide meaning. For example, the Duke of Wellington said that in his opinion "the performance of **a** duty of honour or of trust after the knowledge of a military offence committed ought to convey a pardon." The Army Act, 1955, has considerably reduced the number of occasions on which a plea of condonation can be made, and section 134(2)(d) provides that an offense shall not be condoned unless the commanding officer of the accused with full knowledge of all the relevant facts informs the accused that he will not be charged with it.

88 **R.P.** 36 and 37.

89 **R.P.** 38.

90 **R.P. 40.**

91 **R.P.** 39.

92 **R.P. 41.**

93 **R.P.** 43.

the pleas of not guilty before finally finding the accused guilty of the charges to which he has pleaded guilty.[94]

If the accused pleads guilty to a charge, the court, before accepting the plea, must explain to him the nature of the charge and the effect of his plea of guilty in great detail in order to ensure that he fully understands what he is doing. If the court is not satisfied that he fully understands, it is required to enter a plea of not guilty.[95] There are special provisions dealing with situations where the accused is found unfit to plead.[96]

Procedure on a plea of not guilty follows procedure which is common to all countries where the law is based on the common law of England; namely, the prosecution calls its witnesses and the accused then makes his defense,[97] the onus of proof being on the prosecution.

VIII. RULES OF EVIDENCE IN COURTS-MARTIAL

As the rules of evidence in Scotland and Northern Ireland in criminal cases differ in certain respects from those in England and Wales, and in order to ensure uniformity, the Army Act, 1955, specifically provides that the rules as to the admissibility of evidence in English criminal courts will apply to proceedings before courts-martial,[98] and for the assistance of members of courts-martial, these rules are set out in the Manual of Military Law, 1961.[99]

In cases where there is a judge advocate special provision is made in the Army Act, 1955, and in the Rules of Procedure for him to consider, in the absence of the court, the admissibility of a statement made by the accused and to hear evidence with regard to the issue. After he has made his ruling, his decision is binding on the court. Similar provisions apply where questions arise as to the joinder of charges and to the trial of persons jointly or separately.[100]

The provisions as to admissibility of statements made by an accused person in the English criminal courts are contained in a set of rules known as the "Judges' Rules." These rules were made by the judges of the High Court of Justice for the guidance of police officers, and although they do not have the force of statute law, they are followed. If they are not complied with, it may well render an admission or confession inadmissible in evidence. In

94 R.P. 44.
95 R.P. 42.
96 R.P. 89.
97 R.P. 47–63.
98 A.A., 1955, § 99(1).
99 Pt. I, ch. V.
100 A.A., 1955, § 104(2), and R.P. 81.

general terms, these rules provide that the prosecution must show that the statement was freely and voluntarily made, without inducement, threat, or favor; that after the decision to charge an offender has been made, no question may be asked unless the offender has been cautioned that he need not say anything; and that no question may be asked during the making of a statement, unless it is necessary to clear up an ambiguity. These rules, being made for the guidance of police officers, do not always fit in to the scheme of things in a service inquiry, but they are followed in courts-martial.[101]

The rules relating to the giving of evidence as to the character of the accused or attacking his character follow the rules in the civil criminal courts of England.[102]

After the conviction of the accused, evidence is called not only as to the service character of the accused but also as to his general character and background, and evidence may be given of other offenses, whenever committed, of which the accused has been found guilty by a civil court and which are of the same nature as the charges of which the accused has been found guilty by the courts-martial.[103]

IX. PUNISHMENTS BY COURTS-MARTIAL

The punishments which can be awarded by a court-martial are set forth in the Army Act, 1955,[104] and to set out a list of them would be inappropriate. It should, however, be noted that before January 1, 1962, a court-martial, like a commanding officer, could not sentence an offender (except fines, for drunkenness in the case of soldiers,[105] and for civilians[106]) to a monetary punishment, other than stoppages to make good loss or damage.[107]

X. CONFIRMATION AND PROMULGATION

The finding (other than a finding of not guilty) and sentence of a court-martial are not treated as a finding or, as the case may be, a sentence until confirmed by a confirming officer,[108] who is normally the same person who convened the court,[109] and promulgated to the accused.[110]

101 Manual of Military Law, 1961, Pt. I, ch. V, para. 89.
102 Id. para. 20 et seq.
103 R.P. 71.
104 A.A., 1955, § 70 (officers), and § 72 (soldiers).
105 *Id.* §§ 71(1)(k) and 78(3)(d).
106 Id. § 209(3)(a).
107 Such a stoppage can only be imposed if the loss or damage is alleged in the charge. See R.P. 15(5)(c).
108 A.A., 1955, § 107(2).
109 *Id.* § 111.
110 *Id.* § 140.

Promulgation is effected by the reading of the finding and sentence of the court to the accused, normally in an orderly room. The practice of reading out the finding and sentence of a court-martial in public, has, to all intents and purposes, ceased.

In the interests of natural justice an officer, who has been the commanding officer of the accused during the investigation of the charges, who has investigated the case as an appropriate superior authority, or who has been a member of the court-martial, is prohibited, except in the case of a field general court-martial, from confirming the findings and sentence of the court.[111]

The confirming officer has wide powers to substitute findings of courts-martial where the court could have made such a finding in the first instance. For example, if the court convicts an accused of desertion, he can substitute a finding of guilty of absence without leave. He also has power to remit, commute or vary the punishment awarded, but he cannot increase it.[112] Finally, he has power to refuse to confirm the finding of the court, and, if he does so, the accused may be re-tried, but such a re-trial must be ordered within 28 days of the promulgation of the non-confirmation.[113] A confirming officer may, if he is in doubt, or must, if his powers of confirmation are limited by the wording of the warrant authorizing him to convene, reserve confirmation to higher authority.[114]

XI. PETITIONS AND APPEALS

A. *COURTS-MARTIAL APPEAL COURT*

An accused who feels himself aggrieved by the finding and sentence of a court-martial may petition the confirming officer before promulgation or within six months after promulgation.[115] However, if he wishes to take steps to have the finding considered by the Courts-Martial Appeal Court, he must present an appeal petition to the Army Council within a prescribed period, which varies depending on where the court was held but which is less than the six months referred to above.[116] There is no appeal to the court as to the sentence of a court-martial.

If the accused fails in his appeal petition to the Army Council, he is entitled to apply for leave to appeal to the Courts-Martial Appeal Court, within a limited time which can be extended, and if such an application for leave to appeal is granted, his appeal is

111 *Id.* § 111(2).
112 *Id.* § 110.
113 *Id.* §§ 110(8) and 134(3).
114 *Id.* §§ 110(1) and 111(3).
115 *Id.* § 108, and R.P. 101.
116 Courts-Martial (Appeal) Act, 1951, § 3, hereinafter referred to as C.M. (A) Act, 1961, § ----).

heard by that court.[117] Special provisions are made to expedite the appeal where the accused has been sentenced to death and that sentence has been confirmed.[118]

The Courts-Martial Appeal Court is a civil court created by the Courts-Martial (Appeal) Act, 1951,[119] and hears appeals from courts-martial of the navy and air force as well as the army.[120] It normally sits in the Royal Courts of Justice, Strand, London, although it can sit anywhere in the world.[121] The court is not in permanent session and is only assembled if there are cases to be heard.

The judges of the court may be selected from the judiciary of England, Scotland or Northern Ireland, and in certain circumstances the judges need not belong to the judiciary at all.[122] Normally, however, the judges are selected from the puisne judges of the High Court of Justice of England.

The court has the same powers of substituting findings as a confirming officer[123] but has no jurisdiction to interfere with the sentence of a court-martial, unless this is necessary because a finding has been substituted by the court and such substituted finding would warrant a lesser sentence.[124]

In order to reduce the load on the full court, which must consist of at least three members, applications for leave to appeal may be considered by a single judge.[125] If the applicant is dissatisfied with the decision he can appeal to the full court.

An application for leave to appeal is normally considered *ex parte*, but the appeal itself is argued by a barrister-at-law who is, in the case of the appellant, normally instructed by the Registrar of the Court, and, in the case of the Army Council as respondent, by the Director of Army Legal Services. Officers of that directorate do not appear before the court to argue a case. There is no appeal to the Courts-Martial Appeal Court by the prosecution.

When the Courts-Martial Appeal Court was formed, it was thought that it might well be inundated with appeals from courts-martial, and it was for this reason that the "sieve" of an "appeal petition" to the Army Council was introduced. Facts, however, have shown that this apprehension was ill-founded ; since the court

117 *Ibid.*
118 C.M.(A) Act, 1951, § 3(2).
119 14 & 15 *Geo.* 6, *c.* 46.
120 C.M.(A) Act, 1951, § 1.
121 *Id.* § 2(3).
122 *Id.* § 1(1).
123 *Id.* § 5.
124 *Id.* § 6.
125 *Id.* § 21.

first sat in 1952 to the present day, only 48 persons have been given leave to appeal to the court and of these only seven have been successful. As it is not the policy of the War Department to publish statistics of courts-martial, it is impossible to give any figures to show the proportion of the number of persons who were granted leave to appeal to the number of persons who were convicted by court-martial; suffice it to say that the proportion is infinitesimal.

If either the Army Council or the accused considers that the decision of the Courts-Martial Appeal Court is wrong, an application can be made to that court by the Army Council, or, as the case may be, by the accused, for a certificate for leave to appeal to the House of Lords, which is the final appellate tribunal in the United Kingdom, on the grounds that the case is one of general public importance. If the application is refused by the court, application can be made to the House of Lords for leave to appeal, but only the Courts-Martial Appeal Court can certify that the case is one of general public importance.[126]

B. REVIEW OF PROCEEDINGS AND SENTENCES

Even if the accused does not petition or apply for leave to appeal, the proceedings of all courts-martial, where the accused has been convicted, have to be reviewed by a military authority higher than the confirming officer,[127] and ultimately they are all legally reviewed in the Office of the Judge Advocate General. If the Judge Advocate General is of opinion that the finding and sentence of the court should be quashed, he advises the appropriate reviewing authority to do so. The Judge Advocate General, however, has no jurisdiction as to the *quantum* of the sentence which is passed, though he may advise as to the legality of it.

Every sentence of imprisonment or detention passed by a court-martial has to be reconsidered at intervals fixed by enactments.[128] Elaborate provisions are also made in the Army Act, 1955, to enable a sentence of imprisonment or detention passed on a soldier to be suspended to give the man an opportunity to prove that he has learned his lesson.[129]

XII. ADMINISTRATION OF MILITARY LAW

Reference has been made in this article to the Office of the Judge Advocate General, the Director of Army Legal Services

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126 Administration of Justice Act, 1960, § 1, as applied to courts-martial by § 10.
127 A.A., 1955, § 113.
128 *Id.* § 114.
129 *Id.* § 120.

and the duties of a judge advocate, and the article would not be complete without describing the functions of the two former offices.

The Office of the Judge Advocate General or, to give the full title, the Advocate General or Judge Martial of all Her Majesty's regular, auxiliary and reserve land and air forces, is an office of great antiquity, and at one time the holder of it was a Cabinet Minister. Prior to 1914 the Judge Advocate General had a purely civilian staff, but during the First World War a number of army officers were employed, ***inter alia***, as reviewers of courts-martial.

After that war, a military and air-force department of the Judge Advocate General's Office was formed and this department was responsible for prosecuting cases before courts-martial and giving pre-trial advice thereon. The civil staff continued to supply judge advocates at courts-martial.

As a result of a committee which was set up after the Second World War, the military and air-force components of the office split away therefrom and became the Directorate of Army Legal Services and Directorate of Legal Services, Air Ministry.

The present duties of the Judge Advocate General are to give advice to the Secretary of States for War and Air and the Army Council and Air Council on matters of military and air-force law; to supply judges advocate to sit with courts-martial to perform duties as described earlier in this article; to give post-trial advice on courts-martial and to make a final review of the proceedings of such courts.

The Director of Army Legal Services is responsible for advising on matters of military law of a general nature, and in particular advising on pre-trial matters with regard to courts-martial; he supplies prosecutors whose duties are similar, perhaps, to those of a trial judge advocate in a United States court-martial, although, as prosecutor, he does not have anything to do with the administering of the oath to the court or witnesses.

Neither the Judge Advocate General nor the Director of Army Legal Services is responsible for appearing on behalf of the War Department in cases in the civil courts, nor for drafting legislation; these duties are carried out by the Treasury Solicitor and through him by Parliamentary Counsel to Her Majesty's Treasury.

XIII. CONCLUSIONS

The readers of this article may agree that, although the United Kingdom military law may be the ancestor of the military law of English speaking countries, some of its offspring have improved upon their forebear; and that the Uniform Code of Military Justice in the United States and the National Defence Act of Canada under

which members of all three services are subject to the same code of military discipline are an improvement on the United Kingdom system which has three major acts dealing with discipline in the services and yet other legislation dealing with the reserves and auxiliaries of these services. Furthermore, the practice in Canada of having a unified legal service for the three services probably effects a considerable saving in manpower, compared with the practice in the United States and the United Kingdom.

On the other hand, some readers may well come to the conclusion that the United Kingdom practice of having one authority responsible for pre-trial advice and another responsible for judicial and post-trial matters, is the better system. Frequent comment was made in the past in the United Kingdom that the judge advocate and prosecutor who came from the same office and arrived at a court-martial in the same car were "hunting in couples." This practice, however, was not so strange in view of the concept of the bar in England where frequently the counsel for the prosecution and counsel for the defense in a civil case come from the same set of chambers (offices) in one of the Inns of Court.

Probably the best solution would be a mixture of all three systems, with a Judge Advocate General providing for judicial and post-trial advice and a Director of Legal Services dealing with the pre-trial work under the Minister responsible for the co-ordination of defense.

THE MILITARY OFFENSE OF COMMUNICATING A THREAT*

MAJOR HEYWARD G. JEFFERS, JR.**

I. INTRODUCTION

The *Manual for Courts-Martial, United States, 1951*,[1] presents to the casual reader an appearance of being inconsistent in its attitude toward the use of threatening words. It seems to minimize and belittle the offensiveness of such language. In speaking of the assault offense, it states, "the mere use of threatening words" does not constitute the offense.[2] The other side of the coin is found in the Table of Maximum Punishments. There the offense of communicating a threat is specifically listed as an offense under Article 134 and provides for a maximum authorized punishment of dishonorable discharge, total forfeiture of pay and allowances, and confinement at hard labor for a period of three years.[3] Certainly this is no belittling attitude.

While the listing of communicating a threat under the general article appears for the first time in the present Manual, and is "new" in the sense that it has now been individually selected for a specific punishment, it is not a new offense. The misconduct involved in this offense finds legal support under the broad language of the general article, which makes punishable those acts not specifically mentioned in other articles of the Uniform Code of Military Justice which are "disorders and neglects to the prejudice of good order and discipline in the armed forces'' and "con-

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1 U.S. Dep't of Defense, Manual for Courts-Martial, United States, 1951 (hereinafter referred to as the Manual and cited as MCM, 1951, para. _____). The Manual was prescribed by Presidential Executive Order, Exec. Order No. 10214, February 8, 1951, in implementation of the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1958). Like the UCMJ, it is applicable to all the services.

2 MCM, 1961, para. 207*a*, at p. 370.

3 *Id*. para. 127*c*, § A, at p. 227.

duct of a nature to bring discredit upon the armed forces."[4] Identical language was used in the general article of past military laws for the Army, Navy and Air Force.[5] Furthermore, certain types of threats have in the past been given particular attention under specific Articles of War and Articles for the Government of the Navy.[6]

The major change in the offense of communicating a threat introduced by the present Manual is in the amount of punishment now provided. As an offense under the general article, the 1949 Manual considered the offense a disorder for purposes of punishment and provided a maximum permissible sentence of confinement at hard labor for four months and forfeiture of two-thirds pay per month for four months.[7]

Under present law, the offense has been elevated to the status of a felony. This drastic increase in punishment, plus the fact it was specifically listed under Article 134, has focused attention upon what previously had been a rather obscure offense.

The President, under the authority given him by Congress, has seen fit to particularize this aspect of misconduct under the general article, describe it as communicating a threat, and then place it for purposes of punishment on an equal footing with the offense

4 Uniform Code of Military Justice, art. 134, 10 U.S.C. § 934 (1958) (hereinafter referred to as the Code or UCMJ and cited as UCMJ, art. ---------). The UCMJ was enacted by the Act of May 5, 1950, ch. 169, § 4, 64 Stat. 108 (effective May 31, 1951). It was reenacted in 1956 as 10 U.S.C. §§ 801-940. Act of August 10, 1956, ch. 1041, § 4, 70A Stat. 1, 36-79 (effective January 1, 1957).

5 Article of War 96, Act of August 29, 1916, ch. 418, § 1342, 39 Stat. 666; Article 22(a), Articles for the Government of the Navy, Rev. Stat. § 1624 (1875); for the Air Force, which was made independent of the Army after World War II, Congress provided that the Army's Articles of War, as adapted to fit the needs of military justice in the Air Force, were applicable and Article of War 96 was retained by that service. 62 Stat. 1014 (1948).

6 Article of War 65, Act of August 29, 1916, ch. 418, § 1342, 39 Stat. 658, prohibited threatening to strike or otherwise assault, or using other threatening language toward a warrant officer or a noncommissioned officer in the execution of his office and permitted a punishment of confinement at hard labor for four months and forfeiture of two-thirds pay per month for four months; Article of War 68, Act of August 29, 1916, ch. 418, § 1342, 39 Stat. 659, prohibited threatening a warrant officer or noncommissioned officer quelling a quarrel, fray, or disorder and permitted punishment of confinement at hard labor for six months and forfeiture of two-thirds pay per month for six months; Article of War 96, Act of August 29, 1916, ch. 418, § 1342, 39 Stat. 666, in regulating offenses against a sentinel, prohibited threatening to strike, or otherwise assault, or using other threatening language toward such a person in the execution of his duty and permitted a punishment of confinement at hard labor for four months and forfeiture of two-thirds pay per month for four months. Article 4 (Third), Articles for the Government of the Navy, Rev. Stat. § 1624 (1875), prohibited threats to strike or assault a superior officer while in the execution of the duties of his office.

7 MCM, U.S. Army, 1949, para. 117c, § A, at p. 139.

of extortion. What type of threats calling for such severe sanctions were contemplated by the President? Was it intended to apply to a threat made in moments of anger, frustration, or intoxication, where no intent to execute the threat is present? Why was such an extreme penalty provided for this offense and what evil did it intend to prohibit? Was its purpose the prevention of the threat or the ultimate execution of the threatened harm?

The answer to these and other questions could have been furnished by a Manual discussion of the actual coverage contemplated. This was not done. The sole reference to this offense found in the Manual appears in the listing under the general article in the Table of Maximum Punishments and a sample form specification in the appendix to the Manual which is set out to aid the pleader in alleging the offense.[8] These offer little or no assistance to the lawyer and legal scholar interested in knowing what the law is or should be. By this very scheme of things, the decisions of the United States Court of Military Appeals,[9] therefore, take on added significance.

What interpretation has the Court given to this offense and what has been their source as to the law they believe should be applied in threat cases? Readily apparent to the reader is the freedom of the Court in dealing with this broadly stated, undefined and unregulated offense, to give it that meaning and effect they so choose.

The purpose of this article is primarily to present a critical study of the reported cases of communicating threats. While some consideration will be given to the origin of this offense, particular emphasis will be placed on its development, present content, and the legal problems encountered in interpreting this offense by the military appellate bodies. Incident to this examination will be an inquiry into the need of the military services for the threat offense in its present judicially developed form based on experience gained during the decade it has so existed. In this connection, consideration will be given to any problems it may have created in the military justice system and whether or not it can blend harmoniously with those other provisions of law specifically defined by Congress if it is retained in future military law.

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8 MCM, 1951, app. 6c, at p. 494: "171. In that . . . did, (at) (on board) . . . , on or about . . . . 19 . . , wrongfully communicate to . . . . a threat to (injure. . . . by . . . .) (accuse . . . . of having committed the offense of . . . .) (. . . .)."

9 The United States Court of Military Appeals (hereinafter referred to as the Court of Military Appeals or the Court) was created pursuant to UCMJ, art. 67(a).

11. THE THREAT OFFENSE

A. *JUDICIAL DEVELOPMENT*

The offense of extortion was recognized by Congress by way of a specific article in the Uniform Code of Military Justice,[10] and a discussion of that offense is set forth in the Manual.[11] This offense requires communication of a threat to another with the intention thereby to obtain anything of value, or any acquittance, advantage, or immunity of any description. It is significant to note that without the intent to influence there remains a simple communication of a threat.

This simple threat offense was not an offense at common law.[12] However, it has been recognized by statute in some jurisdictions.13 Could this be the offense the present Manual contemplated? Having excluded extortion, which is specifically recognized by a codal article, and considering the bare words listed of communicating a threat, the logical answer would appear to be an affirmative one.

The Court of Military Appeals' initial consideration of the term "threat" was in *United States* v. *Sturmer*.[14] That case was not involved with the present Manual offense but was a consideration of whether an offense was properly alleged under Article 4 (Third), Articles for the Government of the Navy, and the element of threat as set forth therein. In deciding the meaning to be given to this term, the Court declared :

> 'A threat is an avowed present determination or intent to injure presently or in the future.' [15]

This definition was adopted from a federal court decision, *United States* v. *Metzdorf*,[16] where the threat undergoing legal consideration was one made against the President of the United States. It remains as the meaning to be applied to the present threat offenses

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10 UCMJ, art. 127.

11 MCM, 1951, para. 207, at p. 369.

12 Ballentine, Law Dictionary 1281 (2d ed. 1948): "Mere verbal threats were not an indictable offense at common law, but statute has sometimes made it a crime to threaten another in a manner to amount to a disturbance of the public peace. To amount to such a disturbance, it is usually held that a threat must be of some grievous bodily harm, must be put forth in a desperate and reckless manner, accompanied by acts showing a formed intent to execute them, must be intended to put the person threatened in fear of bodily harm, and must produce that effect, and must be of a character calculated to produce that effect upon a person of ordinary firmness.''

13 *E.g.*, 18 U.S.C. § 871 (1958) prohibits threats against the President, Vice-president, or President-elect; Texas Penal Code, Art. 1267 (1875) prohibits threats to take the life of another; 22 D.C. Code § 507 (1951) prohibits threats to do bodily harm.

14 1 USCMA 17, 1 CMR 17 (1951).

15 *Id.* at 18, 1 CMR at 18 (emphasis added).

16 252 Fed. 933 (D.C. Mont. 1918).

and is the appropriate definition furnished to the court-martial in the instructions given by the law officer.[17]

In United States v. *Holiday*,[18] the Court considered for the first time the offense of communicating a threat. There, the accused, a stockade prisoner, was being returned to his cell by his guard who grasped his arm to expedite his progress. At this action, the accused declared, "If I'm not walking fast enough for you, don't push me or I'll knock your . . . teeth down your throat." In sustaining the conviction, a majority of the Court relied upon its former definition and held that communicating a threat to any person in the military establishment is directly and palpably prejudicial to good order and discipline of the armed forces. As this offense was not provided for elsewhere in the Code, the allegation under Article **134** was proper. Recognizing the severity of the punishment provided, the opinion holds that there was no abuse of discretion by the President in establishing this penalty, even though the actual commission of the conduct threatened may call for a lesser punishment. The reasoning used was that elimination of the threat which precedes the assault in such cases effectively eliminates the assault itself.

In an apparent attempt to justify the lending of support to this offense, Chief Judge Quinn, writing for the majority, stated:

> Such conduct, if committed in the civilian community, might result in a criminal proceeding in which the guilty party would be required to furnish bond, or be imprisoned, in default thereof. Obviously no such sanction is put upon innocent actions. In the military service, the communication of a threat to injure is certainly no less serious. However, it cannot be treated in the manner generally provided for in the civilian sphere, for no procedure is available to the services for requiring one subject to the Code to post a bond. The *only* course open to a commander is the invocation of the punitive sanctions provided by Article 134.[19]

In his dissent, Judge Brosman expressed as "downright ridiculous" the idea of providing judicial support for this offense which permitted twelve times as much confinement for a threat to assault as for the assault itself. He showed a more thorough knowledge of a commanding officer's prerogatives in such a situation than the Chief Judge in his answer to the above statement. He pointed out that the commander could lawfully order the aggressor to remain apart from the person threatened. The willful violation of such an order would certainly provide more protection than the peace bond of the civil system, inasmuch as it permits a punishment of dishonorable discharge, forfeiture of all pay and allow-

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17 U.S. Dep't of Army, Pamphlet No. 27–9, Military Justice Handbook—The Law Officer **123** (App. I, Instruction No. 171) (1958).
18 4 USCMA 454, 16 CMR 28 (1954).
19 *Id.* at 457, 16 CMR at **31** (emphasis added).

ances with confinement at hard labor for five years.[20] It is also submitted that the possibility of such a punishment would provide an answer to what the Chief Judge asserted was the purpose in punishing for a threatened assault, that is, the elimination of the assault itself.

Decided the same day as *Holiday* was *United States* v. *Rutherford,*[21] again by a divided Court, with Chief Judge Quinn speaking for the majority and Judge Brosman concurring in the result. In this case the accused refused to return to his unit from an overnight lockup, stating that if he did he would kill his company commander. After uttering the alleged threat, he added, "you heard me. I am making a threat." The majority opinion was not in agreement with the accused's opinion and reversed his conviction on the grounds that the evidence was insufficient to show that any threat was made. The Chief Judge declared:

> Rather than demonstrating an avowed present determination or intent to injure presently or in the future, the accused's words and actions reveal a fixed purpose to avert such a result.[22]

In his dissenting opinion, Judge Latimer found no basis for distinguishing the present case from *Holiday.* Any problem as to sufficiency of evidence he felt had been resolved by the assertion of the accused that he was making a threat.

Considering the words and actions insofar as they reveal this accused's purpose in uttering the declaration, this case would seem to present a much stronger one of present "determination or intent" to injure than *Holiday.* Both threats were based on a condition. Here the condition being that if he were returned to his unit he would kill his company commander. In *Holiday* the condition asserted was that if his guard pushed him, certain action would be taken. There the majority of the Court held that the condition did not negate a present determination to injure; the condition, if any, being one the accused had no right to impose. The Court cited *Metzdorf* and other federal cases dealing with threats made against the President of the United States[23] for this proposition.

In *Holiday,* no consideration was given to the evidence that the victim was physically present and susceptible to immediate attack and that the accused implied that no action would be taken if he were not pushed. While it is true that a guard may be permitted to exercise some physical persuasion over one who is in the status of a prisoner and who further shows a reluctance to return to his cell, the condition asserted in *Holiday* may in future cases be restricted

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20 MCM, 1951, para. 127*c*, § A, at p. 220.
21 4 USCMA 461, 16 CMR 35 (1954).
22 *Id.* at 463, 16 CMR at 37.
23 United States v. Stickrath, 242 Fed. 151 (S.D. Ohio 1917); United States v. Jasick, 252 Fed. 931 (E.D. Mich. 1918).

to facts similar to that case. To issue a warning to another that an assault and battery will be committed in retaliation for such an offense being committed upon him is not so unreasonable as to constitute criminal conduct.

While the two cases give the appearance of being in conflict, the results may be reconciled by examining the condition asserted by the accused at the time of the threat. In *Holiday* the condition did not negate the determination to injure and was held to be one the accused had no right to make. In *Rutherford* the majority opinion finds the condition to have effectively negated any determination to injure and therefore no threat was present. The reversal is then based on insufficiency of evidence which is reached by subjective examination of the condition asserted. The opinion does not reach the question as to whether the threat was one the accused could properly make under the circumstances, although such a conclusion might be said to be implied from the decision reached. An analysis of the two cases indicates that the condition accompanying a threat will be considered by the Court from two aspects. First, the Court will consider whether the condition was one the accused had the right under the circumstances to impose, and, secondly, the Court will consider the condition as bearing on the determination to injure expressed by the accused.

Perhaps in resolving the question of sufficiency of evidence, or the lack of it, some difference of opinion is to be expected in those cases where the Court engages in a weighing of the evidence. Suffice it to say that these two initial opinions by the Court, treading on virgin soil as it were, are important in paving the way for the threat cases to follow. It is important to note that in these initial opinions, the Court has chosen to ignore preceding military cases as a source of law in threat offenses, and instead looked to federal cases interpreting a statute designed to afford protection from threats to the President of the United States.

B. *ELEMENTS OF THE OFFENSE*

The bare words "communicating a threat'' offer little assistance to those charged with the duty of determining with specificity the particular conduct it was intended to prohibit. After being furnished a definition as to what is meant by the word threat, there remains the further problem of deciding what the government will be required to prove to establish all elements of the offense. What instructions must be given by the law officer to the court-martial?

It was not until *United States* v. *Davis* [24] that the Court, of Military Appeals gave particular consideration to the elements re-

[24] 6 USCMA 34, 19 CMR 160 (1955).

quired in threat offenses. This case was brought about by the instructions given at the trial by the law officer. He had refused a defense request to instruct the court-martial that it must find that the threats were earnest and not mere idle talk or jest. The Court unanimously upheld the law officer's ruling, and expressed the opinion that there was no evidence in the record to support the request made by the defense.

In considering the instructions given by the law officer, Judge Latimer, speaking for the Court, held them to be sufficient to meet the "minimal standards'' of military law when they required the court-martial to find :

1. That the threat was without justification or excuse.
2. That it was wrongful.
3. That it was made known to the victim.
4. That within its language the accused declared his purpose or intent to do an act which was wrongful, to wit: kill the victim.[25]

This opinion presented the views of Judge Latimer alone, the other judges concurring only in the result. The reason for this divergence of opinion rested in the instructional field. Judge Latimer was of the opinion that if the court-martial concluded the acts of the accused were wrongful, they necessarily found the words were not spoken in jest or idle banter. The other two judges felt that if the issue were raised, the law officer had a duty to instruct the Court that the threat must have been made in earnest and was not mere idle talk or jest. They did not feel the element of wrongfulness was sufficient to exclude instructions as to an affirmative defense of jest or idle banter. Whether or not the Chief Judge has altered his views to Judge Latimer's way of thinking will be considered later.

The elements set forth by Judge Latimer are those now being used by law officers in instructing the member of courts-martial in threat offenses.[26]

In *O'Neal,* an Air Force board of review rejected, as an essential instruction, the first element set forth by Judge Latimer in *Davis,* to the effect that the threat must be made without justification or excuse.[27] An instruction as to this element was not given by the law officer. In rejecting the arguments of prejudicial error urged by the defense, the board expressed its belief that justification or excuse was an affirmative defense, and particularized instructions were not necessary unless reasonably raised by the evidence. They were of the opinion that the evidence contained in the record did not suggest any type of threat other than a wrongful one. In

[25] *Id.* at 37, 19 CMR at 163.
[26] U.S. Dep't of Army, ***op. cit. supra*** note 17.
[27] ACM 15332, O'Neal, 26 CMR 924 (1958), ***pet. denied,*** 10 USCMA 668, 27 CMR 512 (1958).

further support of their holding, the board relied on the court-martial's finding of wrongfulness which they contended necessarily embraced a lack of justification or excuse.

It should be noted that in *Davis*, no mention is made of the requirement that the Court must find that, under the circumstances, the conduct of the accused was prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. While the allegation under Article **134** need not contain these words, being regarded as "nothing more than traditionally permissible surplusage,"[28] it is not the same with instructions to the court-martial. The prejudicial or discrediting effect of the conduct remains an element of the offense under Article **134,** and the Court must be provided with instructions to this effect by the law officer.[29]

C. *THE SPECIFIC INTENT PROBLEM*

A question of paramount interest to the appellate bodies has been whether specific intent is an essential element in threat offenses. If considered an element of the offense, those affirmative defenses of intoxication, knowledge, and mental capacity are available to an accused and must be instructed on by the law officer when raised by the evidence. In *Calo*[30] an Air Force board of review faced with this problem relied upon the definition of the Court of Military Appeals that a threat was "an avowed present determination or intent to injure presently or in the future.'' Utilizing this definition they held that a specific intent to injure was an essential ingredient of the offense. Accordingly, the failure of the president of the court to instruct the other members that they could consider the accused's mental deficiency in determining whether the accused had the capacity to entertain the specific intent involved necessitated reversal.

The *Calo* opinion was adhered to by another Air Force board of review in *Noriega,*[31] in which a majority held that a specific intent was an essential element of threat offenses. In reaching this result, the board relied on the language of the Court of Military Appeals in *Davis* :

> In the Davis case, *supra*, it was recognized that a "communication" of **a** threat could be made in jest or in idle banter, for the court held that "the evidence did not reasonably raise the issue that the accused intended the utterance **as** a joke." From this it is clear that an assertion that

[28] United States v. Marker, **1** USCMA **393,400;3** CMR **127,134 (1952).**

[29] United States **v.** Williams, 8 USCMA **325, 327, 24** CMR **135, 137 (1967).** *Cf.* United States v. Grosso, 7 USCMA **566, 23** CMR **30 (1957).**

[30] ACM **S-11036,** Calo, **19** CMR **903 (1955).**

[31] ACM **S-11683,** Noriega, **20** CMR **893 (1955),** ***rev'd on other grounds,*** United States v. Noriega, 7 USCMA **196, 21** CMR **322 (1956).**

> intent is not an element is unsound. Were the gravamen of the offense the "declaration or avowal," without an intent to do harm, the question of jest, idle banter, or joke could never arise.[32]

Finding specific intent to be an element of the offense, the board held there was prejudicial error in the president's failure to instruct the court on the effect of intoxication, an issue which had been reasonably raised.

This belief as to the element of specific intent appeared on its way to becoming fairly well established in the law after the decision in *Humphreys*.[33] There, a majority of the board held that specific intent being an essential element, failure of the law officer to instruct on the issue of intoxication as affecting the accused's ability to entertain this intent necessitated reversal of the conviction. The case was then certified to the Court of Military Appeals to determine whether specific intent was an essential element. This question was answered by the Court in the negative. Chief Judge Quinn, writing for the majority, gave this explanation:

> The point which seems to need emphasis is that proof of a declaration of intent is different from proof of the intent itself. To establish the threat, the prosecution must show that the declaration was made. However, it is not required to prove that the accused actually entertained the stated intention. True, the surrounding circumstances, or the accused himself may show that the declaration was made in jest or for some other innocent and legitimate purpose. These circumstances would not affect the declaration element of the offense. Instead they relate to whether the statement was made wrongfully and without justification or excuse. Consequently, a specific intent on the part of the accused is not itself an element of the offense.[34]

The brief explanation set forth by the Chief Judge is not completely satisfying considering the difficulties experienced by the lower appellate bodies in dealing with the problem. This is especially true when it is recalled that it was his language and opinions from prior cases that were relied on to support the board holdings that specific intent was an element of the offense.

In *Sturmer*,[35] after defining the term "threat," Chief Judge Quinn asserted:

> As long as the triers of fact are satisfied that the avowal of threatened injury was made ***willfully and intentionally,*** it is not necessary that it involve immediate injury.[36]

Moreover, the Chief Judge adopted the definition of threat from *Metzdorf*,[37] and cited that federal holding with approval.[38] That

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32 *Id.* at 898.
33 ACM 11745, Humphreys, 21 CMR 760 (1955).
34 United States v. Humphreys, 7 USCMA 306, 307–08, 22 CMR 96, 97–98 (1956).
35 1 USCMA 17, 1 CMR 17 (1951).
36 *Id.* at 18, 1 CMR at 18 (emphasis added).
37 252 Fed. 933 (D.C. Mont. 1918).
38 1 USCMA at 18, 1 CMR at 18.

case held that specific intent to execute the threat was a required element of the offense.

And finally, in *Rutherford,*[39] he was of the opinion that the accused's statement that he would kill his company commander if sent back to his unit did not demonstrate "an avowed present determination or intent to injure presently or in the future." He believed instead that "the accused's words and actions reveal a fixed *purpose* to avert such a result." [Emphasis supplied.] To arrive at this conclusion, it seems necessary to determine that specific intent is an element of the offense.

It appears that the position formerly taken by the Chief Judge has undergone a change. Any attempt to logically reconcile his present belief on specific intent with his opinion in *Rutherford* results in a play on words. To support the belief that the position of the Chief Judge has not remained constant in this area of the law, recourse should be made to the decision in *Davis.*[40] In expressing concern with the four requirements set forth by Judge Latimer in the principal opinion, as they related to the issue of jest or idle banter, Chief Judge Quinn stated:

> The principal opinion implies that the elements of the offense charged are the exact converse of jest or idle banter. I do not agree with that conclusion. Consequently, if the evidence reasonably showed that the threat was uttered in jest or banter, I would hold that the law officer erred in refusing to give the requested instruction.[41]

In rejecting specific intent as an element of threat offenses, the opinion of the Chief Judge remains confusing. He first emphasized the proof required to establish the case for the prosecution and held specific intent was not required. He then spoke of those instances where "the declaration is made in jest or for some other innocent and legitimate purpose." These he said were related to the elements of "wrongfulness" or "without justification or excuse." It appears that he has reversed his thinking on jest and idle banter as requiring specific instructions when raised. It was on this point that he differed with Judge Latimer in ***Davis*** and prompted his concurring opinion.

In *Humphreys* he has aligned himself with Judge Latimer, holding that the offense is complete upon its declaration, and that any surrounding circumstances showing that the declaration was made in jest or for some other innocent purpose concern the question of whether the statement was made wrongfully and without justification or excuse.

Judge Latimer's lengthy concurring opinion in *Humphreys* seems designed to clarify his views on specific intent while at-

[39] 4 USCMA 461, 16 CMR 35 (1954).
[40] 6 USCMA 34, 19 CMR 160 (1955).
[41] *Id.* at 38, 19 CMR at 164.

tempting to weave a pattern of consistency into the prior holdings of the Court. He reasoned that specific intent was not without difficulty because it concerned an offense not defined by military law and the language of the Court in prior opinions on this issue was susceptible of different interpretations. In reaching his conclusion that specific intent to execute was not an element of threat offenses, he announced his departure in this respect from *Metzdorf*. For authoritative support he relied on other federal court cases interpreting the Presidential threat statute.[42] *United States* v. *Stickrath*,[43] cited by Judge Latimer, would seem to support a requirement of specific intent, and would hold that "the subsequent abandonment of the bad intent with which the threat was made does not obliterate the crime." The other cases relied on reject specific intent for policy reasons peculiar to the purpose behind the Presidential threat statute.

In *United States* v. *Jasick*,[44] a federal court case interpreting the purpose behind the Presidential threat statute, it was announced:

> The purpose of the statute was undoubtedly, not only the protection of the President, but also the prohibition of just such statements as those alleged in this indictment. The expression of such direful intentions and desires not only indicates a spirit of disloyalty to the nation bordering upon treason, but is, in a very real sense, a menace to the peace and safety of the country.[45]

In view of this stated purpose on specific intent, complete adherence to those cases does not appear warranted in interpreting the simple threat offense found in military law.

Should specific intent be a required element of the threat offense? In view of the definition of threat adopted by the Court of Military Appeals, an affirmative answer to this question would seem to be indicated. The words "avowed present determination or intent," given their natural meaning, are understood as an avowal of present purpose or intent. Stated another way, it is an expressed purpose or intent. There should then be two elements present. One, the purpose or intent, and these two terms seem to be synonymous. The other is the expression of this purpose or intent. The *Metzdorf* opinion, from which the definition was taken, gave this meaning to threats and held that a specific intent to execute was a required element of threat offenses.

The language of the individual judges on the Court of Military Appeals strongly supports the contention that they originally be-

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42 United States v. Humphreys, *supra* note 34, at 309-10, 22 CMR at 99-100.

43 242 Fed. 151 (S.D. Ohio 1917).

44 252 Fed. 931 (D.C. Mich. 1918).

45 *Id.* at 933.

lieved specific intent was required in threat cases in the military. Although not faced with the question directly until ***Humphreys,*** their language in the original cases and the result reached in ***Rutherford*** convinced three Air Force boards of review to hold specific intent was necessary for conviction of communicating a threat.

It could be argued that the three year punishment applicable was intended to apply to those threats made with the intent to execute them. Certainly, this extreme penalty should have been intended to cover something more than threats made in moments of anger or by an intoxicated person where the spoken words are not given serious and sober thought. In other words, should the threat be so seriously considered for purposes of punishment when it is not seriously made, that is, where there is no intent to execute.

It may be said that this maximum punishment must be viewed as a maximum only, one which is reserved for the most aggravated form of threat, as a threat to kill or inflict great bodily harm. However, would not the same argument hold true? Is such a threat really so aggravated if there is no intent to execute it?

Another aggravated form of threat calling for a greater punishment may be said to exist where the threat is against a certain class of military persons, as officers, But this thinking is dispelled when it is realized that the threat to injure an officer would constitute disrespect of a superior officer in violation of Article 89 and is subject to a severe penalty.[46] Article 91 provides similar protection to warrant officers and noncommissioned officers in the execution of their office, with a lesser degree of punishment.[47] While no protection under Article 91 is provided when those persons are not in the execution of their office, it would be illogical to say the threat offense penalty was intended to afford them protection under such circumstances. It would result in affording more protection to this class when not engaged in military duties than when in the execution of their offices.

Another reason why specific intent should be a necessary element of the three year offense is that without it the threat communicated in the presence of the victim would amount to nothing more than provoking words and gestures.[48] This was demonstrated in ***United***

46 UCMJ, art. **89;** MCM, **1951,** para. **127c, § A,** at p. **220,** permits a bad conduct discharge, forfeiture of all pay and allowances and confinement at hard labor for six months.

47 UCMJ, art. **91;** MCM, **1951,** para. **127c, § A,** at p. **221,** permits a maximum punishment of bad conduct discharge, confinement at hard labor for six months and forfeiture of all pay and allowances where the victim is a warrant officer and a permissible punishment of confinement at hard labor for three months and forfeiture of two-thirds pay for a like period when the victim is a noncommissioned or petty officer.

48 UCMJ, art. **117;** MCM, **1951,** para. **196,** at pp. **350-51.**

States v. *Hazard* [49] where the Court held that since the threat involved could have caused the victim to invite the accused to proceed with his avowed declaration, the words had a tendency to induce a breach of the peace, and, therefore, the lesser included offense of provoking words and gestures was in issue. Would not threats in all cases, where made in the presence of the victim, be susceptible of producing an invitation from the victim to the accused to proceed with the threat, and thus in reality be provoking words and gestures? If a specific intent to execute the threat was a required element of the three year offense, there would be a distinction between the two offenses which would merit the imposition of this greater punishment. Without specific intent, there is no distinction between the offenses which permit such a disparity of punishment.

Argument that specific intent should be required in the threat offense may also be supported by considering the offense of extortion.[50] The two offenses are given identical treatment for purposes of punishment. Extortion requires the communication of a threat with a specific intent to obtain anything of value, or any acquittance, advantage, or immunity of any description. With specific intent required in that threat offense, is it logical to permit identical punishment for the threat where no specific criminal intent is present? Other things being equal, the actor possessing a specific criminal intent should be considered a greater offender to society and subject to greater penal sanction than one committing a similar act while possessing only a general criminal intent.

The Court of Military Appeals has ignored the basic problem in the threat offense under Article **134,** which is this: What specific type of threat did the President intend to single out for such severe punishment? Did he in fact intend all threats under the general article to be covered by this maximum penalty or did he intend only to cover the more serious ones with the remainder punishable as before as disorderly conduct?

D. *THE COMMUNICATION REQUIREMENT*

In *United States* v. *Davis,*[51] Judge Latimer, speaking for the Court, announced that one of the essential elements of a threat offense was "that it was made known to the victim." This decision was subsequent to the Court's announcement in *Rutherford* that there was no requirement placed on the Government to prove the accused communicated the determination directly to the person

[49] **8 USCMA 530, 25 CMR 34 (1957).**
[50] **UCMJ, art. 127; MCM, 1951, paras. 206 at p. 369, and 127c, § A, at p. 224.**
[51] **6 USCMA 34, 37, 19 CMR 160,163 (1955).**

threatened. Although it is not clear that the Court as a whole has adopted Judge Latimer's views in *Davis*, the logical deduction of a rule drawn from these two cases would be that the threat is impotent unless made known to the alleged victim, although there is no requirement that he hear of it directly from the accused. This contention was rejected in *O'Neal*[52] where the evidence clearly established the victim had no knowledge of the threat. The law officer denied a defense request to instruct that the threatened person must know of the threat before such an offense could be legally supported by the court-martial. In support of the law officer's ruling, the board of review relied on the following language of the Chief Judge in *Rutherford:*

> . . . The purpose of imposing a penalty upon the communication of threats in the military service is *to prevent the ultimate harm* which such threats foretell. Consequently, once it clearly appears that a person subject to the Code has announced an avowed present determination or intent to injure presently or in the future, the offense is complete . . .[53]

The board then held that it was not essential to the offense that the person threatened know of the threat, and the crime is fully committed when the threat is "communicated" to anyone.

While the Court of Military Appeals' denial of review[54] seems to lend support to the board's holding, such a position does not appear to be consistent with Judge Latimer's announcement in *Davis* that the threat must be made known to the victim. Further support for the board's ruling is found in the holding announced in *United States* v. *Stickrath*.[55] However, the federal court there rejected the requirement that the threat be communicated to the President, reasoning that such a prerequisite of proof would defeat the purpose of this particular statute. The Court said :

> Considering the magnitude of the country and his remoteness in point of distance from the great majority of its inhabitants, to require as a prerequisite to conviction the communication to him of such threats, would operate to defeat almost entirely the purpose of the law . . . .[56]

The federal courts have reasons for not requiring proof of communication in the Presidential threat cases which are peculiar to that statute because of the status of the person being protected. The military do not have any such reasons for rejecting the requirement in their threat cases. The purpose of the military threat offense would not be defeated by any requirement as to knowledge by the victim of the threat.

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52 ACM 15332, O'Neal, *supra* note 27.
53 United States v. Rutherford, *supra* note 39, at 462, 16 CMR at 36 (emphasis added).
54 United States v. O'Neal, 10 USCMA 668, 27 CMR 512 (1958).
55 242 Fed. 151, 154 (S.D Ohio 1917).
56 *Id.* at 152.

When the question is presented to the Court of Military Appeals, it would appear doubtful that they would not require knowledge by the victim of the threat being made against him. This conclusion is based primarily on the Court's previous announcement in *Davis* that this was a required element to meet the "minimal standards" in the military offenses.

Further argument to support this belief is found in the Manual discussion pertaining to the offense of extortion.[57] That offense is defined as "the communication of threats to another with the intent thereby to obtain anything of value, or any acquittance, advantage, or immunity of any description." Leaving aside the specific intent of the definition, the remainder of the offense is the communication of the threat and the Manual then provides :

> A threat may be communicated by word of mouth or in writing, *the essential element of the offense being the knowledge of the victim.*[58]

It is significant to note that the words "communicating a threat," as used here, originate from the same source as do the words in the three year offense under Article **134.** This would furnish the strongest indication that, where identical language has been used, what was intended for the one offense must have been intended for the other. This is especially true where one element of an offense is discussed and this one element is punished as a separate offense under another article.

E. *NATURE OF THE INJURY THREATENED*

Because of the nature of the injuries involved in previously decided cases and the definition of threat as involving an injury, it was generally assumed that threat offenses contemplated only physical injury. This was true even though the Manual's form specification apparently contemplated other forms of injury. Such an assumption has been dispelled by the Court's holding in *United States* **v.** *Frayer.*[59] There the threat involved was one to injure the reputation of a noncommissioned officer. The accused threatened the victim with false accusations of acts of misconduct if he testified unfavorably against the accused at an impending investigation. In upholding the conviction of communicating a threat, the Court accepted the following definition of "injury" :

> To do harm to; to hurt; damage; impair; to hurt or wound, as the person; to impair the soundness of, as health; to damage or lessen the value of, as goods or estate; to slander, tarnish, or impair, as reputation or character; to give pain to, as the sensibilities or the feelings.[60]

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57 MCM, 1951, para. 206, at p. 369.
58 *Zbid* (emphasis added).
59 11 USCMA 600, 29 CMR 416 (1960).
60 *Id.* at 604, 607, 29 CMR at 420,423.

The precise holding of the case is clear. The problem presented is in future application to particular fact situations. Obviously apparent is the increased scope the definition gives to an offense previously broadly stated and presently broadly applied. Recognizing this feature, the Chief Judge remarked :

> For present purposes, we need not consider whether a threat to injure a person's feelings is included within the scope of the military offense.[61]

One element of threat offenses which would have a bearing on the type of threat posed by the Chief Judge and the question of whether it would be an offense, is that the conduct must be prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces, If the injury threatened is remote and of a minor nature, it may not, under some circumstances, be considered as prejudicial or service discrediting conduct. This broad element of Article **134** offenses may be the sole foreseeable restriction as to the scope of future threat offenses.

F. *THE DOCTRINE OF PRE-EMPTION*

In enacting the Code, Congress created specific offenses from acts which had previously been punished under the general article.[62] By so doing did Congress signify its intent to preclude further resort to Article **134** in those areas where it had so acted? The Court of Military Appeals felt that it did and gave judicial recognition to this legislative doctrine in ***United States*** v. ***Norris*** [63] by holding :

> We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.64

In the threat cases the argument has been consistently advanced that Congress has shown its intent to pre-empt this area of the law by denouncing under a particular article the offense of extortion which contains the element of specific intent to influence the actions of the person threatened. Accordingly, by eliminating this element from a common law crime and punishing the remnants under Article **134,** violence is done to both the intent of Congress and the doctrine announced in *Norris.* This attack is further buttressed with the argument that if the extortion offense alone does not completely pre-empt the area, and there are other areas in which the threat offense could operate, those areas have been sufficiently blanketed by other specifically defined crimes. Re-

61 ***Id.*** at 604, 29 CMR at 420.
62 ***Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services,*** 81st Cong., 1st Sess. 1230 (1949).
63 *2* USCMA 236, 8 CMR 36 (1963).
64 ***Id.*** at 239, *8* CMR at 39.

liance here is based principally upon Article 117 prohibiting provoking words and gestures. It was the latter argument which found favor with the late Judge Brosman in his dissenting opinion in *United States* v. *Holiday* [65] where pre-emption was rejected by a majorityof the Court. A thorough examination into the history of military law revealed to him no prior recognition of communicating a threat as such. He found, instead, that threatening to strike had been considered along with reproachful and provoking words or gestures as conduct inducing a breach of the peace. **As** this conduct was presently punishable under Article 117, he concluded that this article had pre-empted the field of threat communication. Assuming this article alone did not embrace the entire threat area, he felt other provisions of the Code dealing with assaults, extortion, disorderly conduct and disrespect were sufficient to do so.

The pre-emption theory endorsed by Judge Brosman was expressly rejected by the other members of the Court. Speaking for the majority, the Chief Judge considered and rejected the argument of the defense that all aspects of threats were included within Articles 89, 91, 117, 127 and 128 of the Code.[66] His opinion fails to answer the precise question he proposed to consider. While distinguishing the particular articles either as to the elements involved or the purpose they served, he remains aloof to the proposition urged that the misconduct under consideration is made punishable by those offenses. For example, in distinguishing extortion from simple threats on the ground that the former requires proof of a motivating intent, the Chief Judge fails to reconcile his reasoning with the "Norris doctrine" which clearly prohibits this very act of omitting an element of the specific crime denounced by Congress and punishinp the remnants under the general article.

Judge Ferguson, as a successor to Judge Brosman, has adopted the pre-emption theory with certain limitations.[67] In his dissents in *United States* v. *Frayer* [68] and *United States* v. *Sulima*,[69] he has announced his view that Article 127 denouncing extortion is preemptive of Article **134** with regard to threats made for the purpose

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[65] United States v. Holiday, ***supra*** note **18,** at **458, 16** CMR at **32.**

[66] UCMJ, art. **89,** prohibits disrespect towards a superior officer; UCMJ, art. **91,** prohibits insubordinate conduct toward a warrant officer, noncommissioned officer, or petty officer while such officer is in the execution of his office; UCMJ, art. **117,** prohibits the use of provoking words and gestures towards another person subject to the Code; UCMJ, art. **127,** prohibits communication of threats with the intent to obtain anything of value or any acquittance, advantage, or immunity; UCMJ, art. **128,** punishes assaults.

[67] Judge Ferguson succeeded the late Judge Brosman on the Court. The first threat case he participated in was United States v. Humphreys, ***supra*** note **34.**

[68] United States v. Frayer, ***supra*** note **59,** at 610, 29 CMR at **426.**

[69] **11** USCMA **630, 635, 29** CMR **446, 451 (1960).**

of extorting anything of value or any acquittance, advantage, or immunity. Where the purposes of the threat were to prevent unfavorable testimony at an impending investigation or to collect a debt owed, he was of the opinion there was no offense under Article 134.

In *Sulima* the threat consisted of the words "we will get the money one way or another," spoken by the accused, a bill collector. They were spoken to another person during a telephone conversation but in the presence of the victim, In upholding a conviction of communicating a threat, the majority relied upon the words stated, together with the inference suggested by the accused's display of a knife.[70] If such evidence is considered to constitute a threat, then it might also be concluded that these acts amounted to an assault as well.[71] Judge Ferguson's opinion does not consider this aspect of pre-emption by merger with assault. However, his reasoning should prove as applicable to one specifically defined crime as another. Therefore, there would not seem to be any logical reason for holding that Article 134 was not pre-empted where the conduct showed an offense such as disrespect to a superior officer or assault.

Despite its rejection by a majority of the present Court, pre-emption remains a factor to consider in the disposition of future threat cases by the Court.[72] A firm belief by one member of a three judge court must be taken into account. Where the others fail to agree, Judge Ferguson and his view as to pre-emption may control the final result. Not to be overlooked is the fact that two of the four members who have been appointed to the Court have adopted pre-emption. A replacement to the present Court may likewise accept it in threat cases.

G. LESSER INCLUDED OFFENSES

Communicating a threat under Article 134 is a lesser included offense of extortion under Article 127, the distinction being that the latter offense requires proof of a specific intent to obtain something of value or an advantage.[73] If an issue is raised in the extortion case as to whether an accused possessed the necessary intent, the law officer should instruct the court-martial on the lesser included offense of communicating a threat. One writer has suggested the legal impropriety of approving such a lesser included offense on review where conviction was had under one of the

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70 Id. at 630, 29 CMR at 446.

71 UCMJ, art. 128; MCM, 1951, para. 207, at pp. 369-70.

72 See Meagher, *The Fiction* of *Legislative Intent: A Rationale of Congressional Pre-emption in Courts-Martial Offenses,* Mil. *L.* Rev., July, 1960, p. 69.

73 MCM, 1961, para. 158, at p. 304.

specific articles.[74] The theory advanced is that the Article 134 offense requires an additional element not found in the specific articles, that is, that the conduct be service discrediting or prejudicial to good order and military discipline. The Court of Military Appeals has recognized this additional element requirement of offenses under the general article, but a majority of the Court supported a finding of guilty under that article after a court-martial conviction under a specific article.[75]

Provoking words and gestures in violation of Article 117 is a lesser included offense of communicating a threat.[76] In *United States* v. *Hazard* [77] the accused, a stockade prisoner, was on a work detail outside the stockade when, after some difficulty with his guard, he stated, "I'd better not catch you outside." A defense request for instructions as to the lesser offense of provoking speech was denied by the law officer. In holding the law officer's denial constituted reversible error, the majority opinion stated :

> The words used by the accused could evoke from the guard an invitation to assume that the parties were already "outside" and that the accused should proceed with the avowed declarations. Accordingly the words had at least a tendency to induce a breach of the peace. Therefore the lesser offense was in issue and should have been submitted to the Court for its consideration.78

From the language cited, it would appear that the issue of provoking words is sufficiently raised so as to require instructions thereon when the words uttered have "a tendency to induce a breach of the peace." The result is that in those threat cases where the threatened words are uttered to the victim, the issue is raised and instructions are required. Although the opinion is based on the denial of defense request, mere failure to instruct when the issue is properly raised should effect a similar result unless the trial tactics of the defense have foreclosed his right to complain.79 In considering the lesser offense of provoking words and gestures, it should be noted that this offense requires the acts be committed in the presence of the victim and that he be a member of the armed forces.[80] If these elements are not present in the threat situation, the lesser offense cannot be found.

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74 See Hagan, *The General Article—Elemental Confusion,* Mil. *L.* Rev., October, 1960, p. 63.

76 United States v. Thorpe, 9 USCMA 705, 707, 26 CMR 485,487 (1958).

76 United States v. Hazard, 8 USCMA 530, 25 CMR 34 (1957).

77 *Ibid.*

78 Id. at 533, 25 CMR at 37.

79 United States v. Wilson, 7 USCMA 713, 716, 23 CMR 177,179 (1957).

80 MCM, 1951, para. 196, at pp. 350–51.

H. *MERGER*

If, at the time the accused utters the threat, he immediately follows with the actual attack threatened, the question is presented as to whether the threat merges and becomes part of the assault and battery that follows. This question has not yet received the attention of the Court of Military Appeals but has been the subject of consideration in two board of review opinions.[81]

In *Fishwick,*[82] the accused expressed his annoyance at the victim's noisy playing of a hi-fi set by dashing into the room armed with a revolver, Shoving the weapon into the victim's ribs, he stated, ". . . turn that . . . music off and leave it off, do you understand, do you understand."

The board refused to sustain the court-martial conviction of both the communication of a threat and the assault and battery. It held that there was no threat because there was no oral or written declaration of the intent to injure. The board went on to say that even if it were concluded that the utterance was threatening, "a threat made at the time of an assault constitutes a part thereof."[83]

The dictum in *Fishwick* concerning the merger of the threat with an immediately consummated assault has recently been rejected by an Army board of review holding in *Alexander.*[84] In the latter case the accused had been directed by the sergeant victim to desist his scuffling with another soldier. The accused followed the sergeant from the room, uttered a threat to kill him and then immediately launched his attack. He was convicted of assault against a non-commissioned officer and communication of a threat. Citing *Holiday,*[85] the board held a simple threat to be distinguishable from an assault and that it was a completed offense when announced. The board felt that the completed offense could not then merge with the related assault, whether it was uttered before or during the actual assault.[86]

The ***Alexander*** case appears to be the sounder of the two opinions on the question of merger based on the language of the Manual and past practice thereunder. While the Manual provides that what is one transaction or substantially one transaction should not be made the basis for an unreasonable multiplication of charges, it recognizes there may be occasions when the facts of law will justify charging the transaction under more than one

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81 ACM 14824, Fishwick, 25 CMR 897 (1957) ; *cf.* CM 403528, Alexander, 29 CMR 616 (1959).
82 ACM 14824, Fishwick, *supra* **note 81.**
83 25 CMR at 900.
84 CM 403528, Alexander, *supra* **note 81.**
85 4 USCMA 454, 16 CMR 28 (1954).
86 CM 403528, Alexander, *supra* **note 81, at 617.**

offense.[87] This provision seems to be advisory when considered in connection with paragraph 74*b*(4) of the Manual which permits a court-martial to find the accused guilty of two or more offenses arising out of the same transaction, without regard to whether the offenses are separate.[88]

In United States v. *Drexel*[89] the Court announced that where changes are multiplicious, an accused should move for dismissal of one or more of them. While this may seem to indicate the Court is prepared to consider multiplicity as applying to matters other than sentence, it is suggested that the Court may only be interested in having the problem of multiplicity removed by the law officer at the trial level and thus afford some measure of relief to the appellate bodies.

In Alexander the board felt it unnecessary to decide if the threat and the assault were merged for purposes of punishment. Concerning this question, the Manual provides that if the offenses are separate, an accused may be punished for any number of offenses arising out of the same act or transaction. The Manual test for determining separateness is whether one offense requires proof of an element not required to prove the other.[90]

Relying on the test, it had become common practice for the military pleader to allege as many offenses as the factual situation permitted. If each contained an element not required in the others, it was felt punishment could be had as to each offense. This manner of "shotgun pleading'' protected the pleader from possible failure of proof in some instances, while granting him additional control over the sentence an accused would receive.

The Court of Military Appeals has generally applied the Manual test to determine if offenses arising from the same transaction are separate.[91] However, the Court recognized that the test might not serve accurately and safely in all situations. The result is that the Court has rejected the separate element test "when its use would violate the cardinal principle of law that a person may not be twice punished for the same crime."[92]

How the Court would answer the question of multiplicity left unanswered in Alexander, where the threat was made at the be-

87 MCM, **1951,** para. 26*b*, at p. **29.**
88 MCM, **1951,** para. **74b**(4), at p. **116.**
89 **9** USCMA 405, 26 CMR **185 (1958).**
90 MCM, **1951,** para. 76*a*(8), at p. **123.**
91 *E.g.*, United States v. Williams, **9** USCMA **400, 26** CMR **180 (1958);** United States v. Helfrick, **9** USCMA **221, 25** CMR **483 (1958);** United States **v.** Wallace, **2** USCMA **595, 10** CMR **93 (1953);** United States **v.** Soukup, **2** USCMA **141, 7** CMR **17 (1953);** United States **v.** Yarborough, **1** USCMA **678,** 5 CMR **106 (1952).**
92 United States v. McClary, **10** USCMA **147, 151, 27** CMR **221, 225 (1959).**

ginning of the assault, is not known, The Court has found multiplicity as to sentencing to exist where one criminal act or transaction has resulted in two offenses.93 They have not found multiplicity to exist when the offenses are prescribed by separate articles of the code and where a different standard is being protected by each offense.[94] Whether they will apply either of these doctrines or simply apply the separate element test of the Manual is difficult to forecast.

The Court has announced in past threat cases that the offense is complete upon its declaration.[95] They have also held the overt act in the assault offense is the feature which distinguished it from the threat offense.[96] Where this overt act is committed at the time the threat is uttered, as was the case in ***Alexander,*** the Court might very well say there was only one criminal transaction, the two offenses having merged and permit punishment for the most serious, that is, the one that carries the greater punishment.[97]

III. NEED FOR THE OFFENSE

Does a need exist in the military services for the simple threat offense?

A majority of the Court of Military Appeals answered this question in the affirmative in the *Holiday* opinion.[98] They found the offense was needed as a substitute for the peace bond procedure which was not available to the military. The only course open to the military commander was to invoke the punitive sanction of Article **134.** While it is true that the services have no peace bond provisions in its law, the reason for its omission was obvious to the late Judge Brosman.[99] It was not needed. He found other effective means were available to the military commander in administering discipline within his command. He believed an effective instrument of control was the military order. The commander responsible for discipline could simply order the offender to refrain from molesting the person threatened. A willful violation of the order would subject the offender to possible punishment **of** dishonorable discharge, total forfeiture of pay and confinement at hard labor for five years.[100] Certainly this is an effective method

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93 **United States v. Brown, 8 USCMA 18, 23 CMR 242 (1957).**
94 **United States** v. **Beene, 4 USCMA 177, 15 CMR 177 (1954).**
95 **United States** v. **Humphreys, 7 USCMA 306, 22 CMR 96 (1956) ; United States v. Holiday, 4 USCMA 454, 16 CMR 28 (1954).**
96 **United States** v. **Holiday, *supra* note 95.**
97 **United States** v. **Morgan, 8 USCMA 341, 24 CMR 151 (1957).**
98 **4 USCMA 454, 16 CMR 28 (1954).**
99 ***Id.* at 460, 16 CMR at 34 (dissenting opinion).**
100 **MCM, 1951, para. 127*c*, § A, at p. 220.**

of control. The control is tetained by the commander without having to resort to a court-martial in his initial handling of the problem. Compliance with the order maintains discipline within the unit. No one has a criminal record. If the order is violated, the offender has been given the opportunity to fashion his future conduct and is in no position to complain of the severity of disciplinary action which may be taken against him for violating the order. There is no need to adopt a substitute for the civil peace bond. The military, by its very nature of command, has an ideal remedy available.

Let us assume, however, that some offense must be resorted to in punishing a member of the military who threatened another. While arguments urging pre-emption have not met with complete success, they have shown that there are other offenses made available by Congress for punishing the misconduct involved in threat offenses without the need for creating a new one. If the threat is made with the intent to obtain anything of value or any acquittance, advantages, or immunity, it is punishable under the Code as extortion.[101] If it is made under the circumstances set forth in *Sulima*,[102] it constitutes an assault. In any event, if the threats are directed toward a victim, it will most likely be considered a violation of Article 117, provoking words and gestures. The punishment provided for this latter offense is confinement at hard labor for three months and forfeiture of two-thirds pay per month for a similar period.[103] Use of this offense to punish the misconduct would appear to be the preferred solution because of the close relationship between the simple threat and provoking words. The latter offense is considered offensive in that it tends to produce a breach of the peace and threats have a tendency to produce such a result.

Some instances may be envisioned where the specific articles fail to provide the answer, but the cases reveal instances where the offender escapes punishment even when the threat offense is available.

The disturbing problem created by this offense is its failure to fit into the framework of the Code. This is true both as an offense and as punishment. As an offense, it has been so broadly defined by the judiciary as to invade and render ineffectual areas of the law where Congress has expressly acted. The cases discussed reveal it is possible to do away entirely with the extortion offense by alleging the mere threat and nothing more. Certainly this re-

101 UCMJ, art. 127.
102 11 USCMA 630, 29 CMR 446 (1960).
103 MCM, 1951, para. 127*c* § A, at p. 223.

sult is not compatible with the legislative intent in defining the offense of extortion.

The punishment provided for this offense is equally alarming. The penalty of dishonorable discharge, total forfeiture of pay, and confinement at hard labor for three years fails to fit into the punishment framework of the law. This is what Judge Brosman found disturbing to him when he recognized an offender could receive twelve times the punishment for a threat to assault as he could receive for the completed assault.[104] An appropriate answer to the question being considered was given by him when he said such an extreme penalty must be regarded as "downright ridiculous."

In determining the need in the military services for this offense, consideration should be given to the possible adverse criticism this offense may generate from the civilian public. Justice in the military service has been attacked in the past, and there is nothing to indicate that critical charges will not be made in the future. Many changes have been made in the military legal system to prevent such unfavorable public criticism. Efforts are continually being made in striving to place military justice above reproach. Viewed in this perspective, is it worth the risk involved to attempt to support an offense such as the simple threat with the amount of punishment permissible for the violation thereof? In this regard, it should be recalled that this is an offense unknown to most jurisdictions and calling for minor punishment in those recognizing it as a breach of the peace or disorderly conduct. Not being so recognized, the offense becomes more prone to this public criticism and more difficult to support and justify. If any need were felt for this offense, it must be recognized as being slight, while the adverse effect it may create can become much greater.

Any study of a need for particular punitive articles should not fail to consider that they are intended for periods of war as well as peace. With this in mind, would there exist a greater need for the threat offense because of wartime conditions? Do the services need this offense to protect those persons engaged in enforcing the higher state of discipline required during such emergencies? As previously discussed in this chapter, such threats would constitute disrespect, and protection for these persons is covered by Articles 89 and 91.

The one area not protected by Article 91 is where the threat is not made in the presence of the noncommissioned or warrant officer to whom it was directed. Should the threat offense under

[104] United States v. Holiday, *supra* note 98, at 460, 16 CMR at 34 (dissenting opinion).

Article 134 be retained for the protection afforded in this limited area of misconduct? The answer should be obvious. This offense should not be retained and enforced during periods of peace because of the slight protection it will afford to one class of individuals during an emergency.

The solution would appear to come not from creating a new offense, but through congressional action in enlarging those it had previously created. This could be done by extending the coverage of Article 91 to include the disrespectful language of threats where they are made outside the presence of the noncommissioned or warrant officer.

There appears to be no reason why these persons, who, like officers, are engaged in maintaining and enforcing discipline in the services, should not be furnished with similar protection under similar circumstances. If protection for these persons is desired, coverage by extension of the present articles would seem more appropriate than application of the threat offense which has created more problems than it has solved.

IV. CONCLUSION

The cases studied in this article reveal how the opinions of the Court of Military Appeals established the three year offense of simple threats in the military system. It must be concluded that, however inconspicuous was its entry into the military justice system, the offense of communicating a threat has now become firmly established in military law. Not only has the offense been recognized by the judiciary, but it has been given legal stature far beyond what would have been imagined. Lacking the authority of common law offenses and congressional recognition, the simple threat is now considered, for punishment purposes, on the same level with the historically supported offense of extortion.

Supported by the broad definitions furnished it by the Court of Military Appeals, unrestricted by Manual or codal language, and because of its ease of proof, the simple threat offense now threatens to completely overshadow the extortion offense. This trend is shown in the recent cases where extortion offenses were alleged and supported as simple threats. Why should the pleader burden himself with additional requirements of proof when there is no need to do so? The obvious answer is that he will select the offense which presents less problems. By alleging the threat under the general article, he eliminates the specific intent required to be shown in the extortion offense and suffers no reduction in permissible punishment.

The criticism which may be directed at the threat offense is that it does not fit into the framework of the present Code. It engulfs and overlaps other offenses specifically defined by Congress. From the standpoint of punishment, it permits a felon type sentence for committing an act which tends to produce a breach of the peace.

It is significant to note that communicating a threat is truly a ***tri-partite*** offense. Introduced by the executive branch, under the general article enacted by the legislative, it has received its legal definition from the judiciary. Its failure to fit neatly into the military legal system may be explained as a failing in the meeting of the minds of these branches of Government.

FORMER JEOPARDY—A COMPARISON OF THE MILITARY AND CIVILIAN RIGHT*

By LIEUTENANT COLONEL ROBERT C. KATES**

I. INTRODUCTION

The practical application of the doctrine of former jeopardy in both the federal civilian and military jurisdictions is substantially identical. Three of the same problem areas occur with the same relative frequency in each sphere: **(1)** When does jeopardy bar a rehearing; **(2)** When does the declaration of a mistrial cause jeopardy to attach; and **(3)** Is the later trial for the "same offense?"[1]

Each jurisdiction can learn from the precedents of the other, for the doctrine of former jeopardy in each hierachy has substantially the same legal basis. As a matter of fact, one of the most important civilian decisions on the question of when the declaration of a mistrial does not cause jeopardy to attach is the decision of the United States Supreme Court in ***Wade*** v. *Hunter*,[2] in which the prisoner was convicted by a pre-Code court-martial. In the following discussion emphasis will be put on the military decisions. They in turn rely almost exclusively on civilian concepts. Their number has increased in the last few years due to the creation of the law officer in the image of federal judges, with the judicial discretion of the latter both to declare mistrials and to deny them. Because this is a fairly recent development in a comparatively new, but huge criminal jurisdiction, the Court of Military Appeals has approached the problems critically, with the desire of not only building the military law in accordance with good civilian precedent, but also making it adaptable to the military needs. Whether there is any inconsistency in these two aims can best be ascertained by examining the nature of the military right against double jeopardy.

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* 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 The limitations of this article do not permit discussion of this vital, additional problem': where the accused has been acquitted at the first trial, to what extent will collateral estoppel prevent trial on a related offense that is not the "same offense" within the meaning of the jeopardy protection?

2 **336** U.S. **684 (1949).**

II. ORIGIN OF THE MILITARY RIGHT

The predecessor to the Uniform Code,[3] the Articles of War, contained provisions incorporating the old common law concept of former jeopardy.[4] Under them an accused could plead the equivalent of the old special pleas of ***autre fois acquit*** and ***autre fois convict,*** in order to be protected from successive trials for the same offense. This required, however, a completed trial.[5] Article of War 40 therefore did not prevent the withdrawal of charges before verdict and reference of the charges to another court-martial where the plea of former jeopardy — under the Article, at least — was unavailable to the accused. This shortcoming was brought to the attention of the drafters of the Code through the military case of ***Wade*** v. ***Hunter,***[6] decided by the Supreme Court while the Uniform Code was being considered. In ***Wade,*** it was assumed, but not decided, that the Fifth Amendment protection applied to the military; that even under the Fifth Amendment, for urgent tactical reasons of combat, a trial could be terminated before verdict without jeopardy attaching, provided the case was not withdrawn in bad faith or to save a possible acquittal. In ***Wade*** the majority opinion pointed out that even in Federal courts, mistrials may be declared "where the end of public justice would otherwise be defeated,"[7] and that in such cases jeopardy does not attach. The opinion did not, however, indicate that a convening authority would have all the mistrial powers of a federal judge, but only that for urgent military necessity he could terminate the trial.

The Congress intended that the convening authority have such power;[8] at the same time the drafters of the Code added what was intended to be a protection against the abuse of unwarranted withdrawal of charges by either the prosecutor (who under the Manual may so act only by direction of the convening authority) or the convening authority:

> A proceeding which, subsequent to the introduction of evidence but prior to a finding is dismissed or terminated by the convening authority

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3 The Uniform Code of Military Justice, also known as the Act of 5 May 1950, § 1, ch. 169, 64 Stat. 108 (effective May 31, 1951). Reenacted in 1956 as 10 U.S.C. §§ 801-940. Act of August 10, 1956, § 1, ch. 1041, 70A Stat. 1, 36-79 (effective Jan. 1, 1957). (Hereinafter referred to as the Code and cited as UCMJ, art. ---------.)

4 *Hearings on S. 857 Before a Subcommittee of the Senate Committee on Armed Services,* 81st Cong., 1st Sess. 321-25 (1949).

5 Article of War 40, Manual for Courts-Martial, U. S. Army, 1949.

6 336 U.S. 684 (1949).

7 *Ibid.* The Court cited United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824), as support for this proposition.

8 See note 4 *supra.*

or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused shall be a trial in the sense of this article.[9]

The wording pertaining to ('failure of available evidence . . . without any fault of the accused" is identical to the stricter prohibition against retrial as set forth in *Cornero* v. United *States,*[10] an appellate decision considered by the rafters of the Code, but rejected in Wade. Subsequent decisions of the Court of Military Appeals, however, have apparently approved withdrawal of charges by the law *officer,*[11] under the broader test of "manifest necessity in the interest of justice," as adopted in Wade, for judges.

Another statutory change relating to former jeopardy was that imposed by the limitation on authority to order rehearings.[12] This was necessary because of the then existing federal law relating to former jeopardy. Under that concept, once convicted, an accused could not be retried unless he appealed his conviction, thereby "waiving" his right to assert a former conviction at a rehearing.13 But the drafters of the Code feared that the Code's automatic appeal provision in cases going to the boards of review would preclude the application of such ('waiver" theory and place the military accused in a less advantageous position than his civilian counterpart who might be content with his first conviction.[14] Congress intended that the military accused have all the protections of the Fifth Amendment against former jeopardy, whether or not the Amendment applied, of its own force, to the military.[15] Therefore, to compensate16 for the fact that the military accused really could not "waive" the protection against a second trial when he did not appeal his first conviction, Congress gave the military accused two safeguards not then enjoyed by the civilian: (1) It forbade rehearings unless a "prima facie" case had been made at

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9 UCMJ, art. 44(c).

10 48 F.2d 69 (9th Cir. 1931).

11 In the earlier and leading case, United States v. Stringer, 5 USCMA 122, 17 CMR 122 (1954), Judge Brosman stated that only the convening authority had such power. Judge Quinn believed that only the law officer had such "mistrial powers," while Judge Latimer would allow either officer to so act. Apparently all the present judges now agree that the law officer has this power. Significantly, since ***Stringer,*** there are no reported cases where the convening authority has declared a mistrial. *Cf.* United States v. Ivory, 9 USCMA 516, 26 CMR 296 (1958).

12 UCMJ, art. 63.

13 United States v. Ball, 163 U.S. 662 (1896).

14 See note 4 ***supra.***

15 ***Ibid.*** See separate opinions in United States v. Ivory, 9 USCMA 516, 26 CMR 296 (1958); Quinn, ***The United States Court*** *of* ***Military Appeals and Military Due Process,*** 35 St. John's L. Rev. 225, at 234 (1961).

16 S. Rep. No. 486, 81st Cong., 1st Sess. 19 (1949).

the first trial;[17] **(2)** It prohibited a rehearing of an offense for which he was acquitted at the first trial;[18] and **(3)** It prohibited a sentence in excess of that adjudged at the original trial.[19]

III. TIME JEOPARDY ATTACHES

The Code provides that "No person shall without his consent, be *tried* a second time for the same offense."[20] Thus jeopardy attaches when there has been a ('trial." But has there been a "trial" if the proceedings are terminated: (a) before plea, (b) between the pleadings and the findings, or (c) after the findings, but before sentencing?

A. *BEFORE PLEA*

"A proceeding which subsequent to the introduction of evidence, but prior to a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused shall be a *trial* in the sense of this article."[21] Under this provision, except where ('manifest necessity" justifies the declaration of a mistrial by the law officer, jeopardy attaches only upon receipt of evidence on the merits.[22] Thus jeopardy does not attach when preliminary evidence on pre-plea motions is received,[23] although once the court is convened the accused may be entitled to a rehearing if the prosecution does not show "good cause" for withdrawing the case from that particular court-martial and referring it to another for trial.[24]

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17 *Zbid.* UCMJ, art. 63(a), requires ((sufficient evidence in the record to support the findings" as a prerequisite to a rehearing. There is no apparent limitation in federal courts; once a civilian accused appeals a conviction on a charge for which he should have been acquitted, he can be retried regardless of the state of the evidence, provided such rehearing is "just." Bryan v. United States, 338 U.S. **552 (1950),** discussed in Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions,* **74** Harv. **L.** Rev. **1, 13 (1960).**

18 UCMJ, art. **63(b).** At the time of the enactment of the Code a civilian who appealed his conviction of a lesser included offense in a federal court on rehearing could be convicted of the principle offense of which he had been acquitted originally, on the theory that he had "waived" the right to object to retrial on the offense of which he had been acquitted. Trono v. United States, **199** U.S. **521 (1905);** United States v. Ball, **163** U.S. **662 (1896).** *Trono* was in effect overruled by Green v. United States, **355** U.S. **184 (1957).**

19 UCMJ, art. **63**(b).

20 UCMJ, art. **44** (emphasis added).

21 UCMJ, art. **44(c)** (emphasis added).

22 United States v. Wells, 9 USCMA **509, 26** CMR **289 (1958).**

23 *Ibid. Quere:* Has jeopardy attached when a disputed fact question is raised by receipt of preliminary evidence on a pre-plea motion in bar of trial'!

24 United States v. Williams, **11** USCMA **459, 29** CMR **275 (1960).** See discussion of this case in Comment, *Limitations on Power of the Convening Authority to Withdraw Charges,* Mil. L. Rev., April **1961,** p. **275.**

B. AFTER PLEA, BEFORE VERDICT

When the trial is terminated before verdict, after receipt of evidence on the merits, the basic questions are: *"Was the case terminated for 'manifest necessity in the interest of justice' or was it withdrawn to save an acquittal?"* If the answer to the first of these questions is "yes," then the answer to the second must be "no," and vice-versa. For instance, if a mistrial were declared obviously for the purpose of saving a "weak" case, then the case would not have been withdrawn for "manifest necessity in the interest of justice."[25] At the second trial, therefore, the accused could successfully plead former jeopardy citing Article 44(c), UCMJ, to the effect that he has already been "tried," since the former proceeding was terminated "for failure of available evidence . . . without any fault of the accused."

This Code provision was designed to protect the accused from a second trial following an unwarranted withdrawal of charges.[26] Although not clearly set out in the legislative hearings on the enactment of the Code, there is some indication that Congress intended that former jeopardy apply when the convening authority withdrew the charges, except in the case of an urgent combat situation,[27] such as was the basis for the decision in *Wade* v. *Hunter*.[28] The drafters of the Manual nevertheless construed Article 44(c) to allow retrial of a case withdrawn by the convening authority not only for such "urgent and unforseen military necessity"[29] but also when "inadmissible information, highly prejudicial to either the Government or the accused, has been brought to the attention of the court, and it appears to the convening authority that the members of the court cannot be reasonably expected to remain uninfluenced thereby."[30] This wording apparently adopts the rationale of that part of the *Wade* opinion referring to the mistrial powers of a civilian judge. *Wade,* however, was not decided on this basis, but on reasons of "urgent military necessity."

The Court of Military Appeals has never, in a square holding, decided if the convening authority has or has not this additional

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25 ACM 8951, Flegel, 17 CMR 710 (1964).

26 *Ibid.* The opinion cited *Hearings on H.R. 4080 Before a Subcommittee of the House Committee on Armed Services,* 81st Cong., 1st Sess. 802, 1047 (1949); *Hearings on S.* **857,** *supra* note 4, at 170, 186, 323; and S. Rep. No. 486, *supra* note 16.

27 See legislative history cited in note 26 *supra.*

28 Note 6 *supra.*

29 U.S. Dep't of Defense, Manual for Courts-Martial, United States, 1951, para. 56b (hereinafter referred to as the Manual and cited as MCM, 1951, para. _____).

30 *Ibid.*

withdrawal power. In *United States* v. *Stringer*[31] a divided Court found that both the law officer and the convening authority had 'mistrial' powers. If Judge Ferguson agrees that only the law officer may declare mistrials,[32] than that will be the law in view of Judge Quinn's previous announcement to the same effect.

C. *AFTER VERDICT, BEFORE SENTENCE*

A literal interpretation of Article 44(c) of the Code would seem to make the plea of former jeopardy unavailable if the charges were withdrawn after findings, but before sentence:

> A proceeding which . . . *prior* to a finding . . . is . . . terminated . . . shall be a trial in the sense of this Article. [Emphasis added.]

Such an interpretation, as Judge Latimer observed in *United States* v. *Ivory*,[33] could not prejudice the accused, because, "Pretermitting the safeguards cloaking sentences . . . . if an accused is initially found guilty, he can never be convicted of a degree of an offense greater than that returned by the original court-martial."[34]

This makes sense if the criteria for ordering a second trial is the same as ordering a rehearing — a test not necessarily applied when a mistrial is declared before finding.[35] If the Code rehearing safeguards were applied, then a legally insufficient record could not be saved by declaring a mistrial after findings. Further, and even assuming a legally sufficient record of trial, if the record indicated the case was withdrawn because of the lenient disposition of the members perhaps a plea of former jeopardy should be considered on the second trial on the theory that even an "automatic appeal" should not be taken where a very light sentence was assured.[36]

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31 5 USCMA 122, 17 CMR 122 (1954). Judges Latimer and Quinn found such power in the law officer from UCMJ, art. 51, giving the law officer the power and the duty to rule finally on interlocutory questions and also from the inherent power of a judge. Judge Brosman, on the other hand, maintained that Article 44 made no mention of withdrawal of charges by the law officer.

32 An indication that Judge Ferguson will side with Judge Quinn in allowing only the law officer declare a mistrial is found in United States v. Williams, 11 USCMA 459, 29 CMR 275 (1960), wherein he expressed doubt as to the validity of the former jeopardy provisions of paragraph 66b of the Manual.

33 9 USCMA 516, 26 CMR 296 (1968). Judge Quinn affirmed on the basis of estoppel and Judge Ferguson on the basis of a material variance.

34 *Id.* at 520, 26 CMR at 300.

35 See NCM 56-03467, Reese, 24 CMR 467, at 495–96 (1957).

36 Absent a defense request for mistrial after conviction, or an appeal, at civilian law, a defendant could successfully plead *autre fois convict* at a second trial. *Cf.* United States v. Ball, 163 U.S. 662 (1896). *But see* Crawford v. United States, 285 F.2d 661 (D.C. Cir. 1960).

IV. MISTRIALS

A. *GENERAL*

When error has been committed at the trial, which is manifestly prejudicial to the accused—or to the government—and it cannot be cured by cautionary instructions, challenges, or other trial procedures, a mistrial may be declared as a last resort.[37] Where the prejudice is readily apparent, this may be done even over the objection of the accused,[38] who should not be able to exercise a veto power over the proceedings and thus obtain two bites at the apple in the form of a rehearing in case he is convicted.

The law officer possesses great discretion in determining when the extraordinary relief of a mistrial is necessary. On a second trial, when the mistrial is attacked collaterally by a motion to dismiss for former jeopardy in which it is asserted that there was no need to declare a mistrial, the law officer's former ruling will not be disturbed absent a showing of an abuse of discretion.[39] The law officer has as a basis for his decision the actual viewing of the events of the trial. The convening authority has no such intimate connection with the trial and therefore, according to Chief Judge Quinn, should not have the same powers to declare a mistrial for events occurring in the court-room.[40]

B. *DENIAL OF MOTION FOR MISTRIAL*

The Court of Military Appeals has been most generous in upholding the law officer's decision to deny a motion for a mistrial, finding that the law officer in most cases can cure the effect of the error by (1) striking objectionable evidence,[41] (2) cautionary instructions,[42] and (3) by removing an objectionable member in an appropriate case.[43] Where, however, inadmissible and incriminating evidence of a particularly damaging nature has been received (such as a confession or admission of an accused), the law officerwill usually err if he fails to grant a mistrial.44

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37 **See United States v. Shamlian, 9 USCMA 28, 25 CMR 290 (1958).**

38 **See United States v. Schilling, 7 USCMA 482, 22 CMR 272 (1957); nor is express consent required in federal criminal procedures. United States v. Gori, 282 F.2d 43 (2d Cir. 1960), *aff'd*, 364 U.S. 917 (1961).**

39 **The fact that alternative courses of action are available-declaring a mistrial or giving curative instructions-does not require that the law officer choose the best one, but only that he have some reason for his particular course of action. United States v. Johnpier, 12 USCMA 90, 30 CMR 90 (1961).**

40 **United States v. Stringer,** *supra* **note 31.**

41 **United States v. Shamlian,** *supra* **note 37.**

42 ***Ibid.***

43 **United States v. Batchelor, 7 USCMA 354, 22 CMR 144 (1956).**

44 **The doctrine of "general prejudice" is applied in the case of confessions or admissions. United States v. Grant, 10 USCMA 585, 28 CMR 151 (1959).**

1. *No Abuse to Deny*

In *United States* v. *Shamlian,*[45] the accused was sentenced to a bad conduct discharge, six months confinement and partial forfeitures for being drunk on guard duty. Prior to pleading, the defense, in open court, made a motion to dismiss on the grounds that the pretrial advice did not inform the convening authority that the accuser had recommended trial by special court-martial. The trial counsel, in open court (and thus improperly) and before he was stopped by the law officer, implied that the decision to try the case by a general court-martial had been influenced by ". . . the man's previous convictions and . . . his attitude toward the service. . . ." The law officer denied the defense motion for a mistrial, but instructed the court to disregard trial counsel's remarks. He repeated this admonition three times, the last being in his final instructions to the court members.

The court held, with Judge Ferguson dissenting, that the law officer did not abuse his discretion even though it was within his discretion to declare a mistrial as an alternative remedy.

The court stated :

> Recently, in United States v. Patrick, 8 USCMA **212, 24** CMR **22,** this Court had occasion to re-emphasize the role of the law officer when acting upon a motion for mistrial. We there said:
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> 'It is now well established that the law officer has the same discretion as a civilian trial judge to declare a mistrial. United States v. Stringer, **5** USCMA **122, 17** CMR **122;** United States v. Richard, **7** USCMA **46, 21** CMR **172.** But the remedy is **a** drastic one. Dolan v. United States, **218** F 2d **454** (CA 8th Cir) **(1955).** Ordinarily an error in admitting evidence can be cured by striking it and instructing the court members to disregard it. Only in the extraordinary situation, where the improperly admitted testimony is inflammatory or highly prejudicial to the extent that its impact cannot be erased reasonably from minds of an ordinary person, is there occasion for the law officer to grant a motion for a mistrial. An appellate court is detached from the courtroom drama and therefore, the law officer's ruling on such a motion will not be disturbed on review unless there was a clear abuse of discretion on his part.'
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> * * * * * * *
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> . . . [T]he law officer was faced with one of two curative methods, and he has some discretion in his selection. We cannot say **as** a matter of law that he was required to discharge the court to purge the error, and, accordingly, we will not invade the province of his discretion.[46]

2. *Abuse to Deny*

Where it appears improbable that the members can remain uninfluenced by the error, the law officer on his own motion, or on that of defense, must declare a mistrial. Certain errors, such as

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45 Note **37** ***supra.***

46 9 USCMA at **30, 32, 25** CMR at **292, 294.**

the introduction of an inadmissible confession, create a presumption of incurable prejudice leaving the law officer no discretion in the matter.[47] Here it would seem immaterial that the defense counsel opposed the declaration of a mistrial if, as a matter of law, the conviction would have to be reversed. It would be a useless, one-sided procedure to proceed with a trial that at the very worst for the accused would result in a rehearing with an alternative, outside chance for an acquittal.[48] Of course, if the prosecution deliberately introduced error in the expectation of obtaining a mistrial and having a better prepared case at the second trial, former jeopardy might lie.[49] Here the mistrial would be granted not for "manifest necessity" in the interest of justice, "but rather to save an acquittal."[50]

In *United States* v. *Grant*,[51] the accused, on trial for larceny and making a false official statement, testified on cross-examination that he had not confessed to Colonel F. This officer was then called as a prosecution witness and on direct examination (1) testified, without a predicate being laid under Article 31, that the accused confessed to him, and (2) volunteered that accused had committed "rubber check" offenses and was a "psychopathic liar." The law officer denied a motion for a mistrial, but struck all the witness' testimony and twice admonished the court members to disregard it.

On appeal, the Court of Military Appeals reversed the law officer's ruling and authorized a rehearing. While recognizing that motions for mistrial are within the sound discretion of the law officer and that reversal will only follow where a clear abuse of that discretion is indicated, the Court distinguished this situation from the facts in the *Shamlian* case. The opinion related this case to the facts in *United States* v. *Richard*,[52] in which the Court of Military Appeals held that the law officer was required to grant a mistrial where a court member, during the challenge procedure, revealed certain aspects of accused's prior misconduct and the results of certain polygraph tests.

The opinion went on to state :

> The court members were confronted with the testimony of a witness who was not only a senior Army officer but also the Commanding Officer of the garrison forces at the post at which the court met and to which

47 See note 44 *supra*.
48 See note 38 *supra*.
49 United States v. Gori, note 38 *supra* (dissenting opinion). This would most certainly be true if the defendant objected to the declaration of a mistrial under such circumstances.
50 See text accompanying note 25 *supra*.
51 10 USCMA 585, 28 CMR 151 (1959).
52 7 USCMA 46, 21 CMR 172 (1956).

its members were assigned as personnel of lodger units. Not only was he permitted to testify concerning accused's confession of guilt to him without the necessary predicate of a warning being shown, but he also 'improperly depicted the accused as "a despicable character" unworthy of belief by the court-martial' . . . . It is difficult to see how the members could erase from their minds the damning effect of Colonel Flemming's vituperative declarations and accord to the accused the fair trial to which he is entitled.

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The Government argues, however, that any prejudice inherent in the denial of the motion was overcome by the compelling nature of the evidence of accused's guilt. Assuming *arguendo* that the proof of guilt is compelling, the short answer to the government's contention is that the accused is entitled to a fair hearing . . . . And we have unhesitatingly rejected the idea that compelling evidence has any curative effect when a confession has been introduced without showing compliance with Code, supra, Article **31** , . . .[53]

C. *GRANT OF MOTION*

As has been seen, the law officer has a wide degree of discretion in deciding whether or not a mistrial, should be declared. In borderline cases he might well, therefore, consider the practical, as well as the legal consequences of his granting such a motion. Some important factors to be considered are the source of the error complained of and the stage of the trial. Also to be considered is the possible defense of former jeopardy at a second trial, which is not a practical concern if the motion is denied.

1. *Time*

If the occasion for declaring a mistrial arises before jeopardy attaches — such as when a highly inflammatory remark is made by a member during challenging procedures[54] — no improper motive could be attributed to the law officer's granting a mistrial. The discretion to declare a mistrial during the period between plea and verdict however, will be examined more closely when the issue is raised on a second trial, and it is argued that the mistrial was declared to save a weak case. Practically, in doubtful cases, the law officer would do well to reserve ruling until *after* ***finding.*** If the accused is acquitted the case is of course finally terminated. On the other hand if he is convicted, the law officer could grant the motion without his decision later being attacked collaterally on the

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53 **10** USCMA at **590–91, 28** CMR at **156–57.** Note that, in *Grant,* the Court expressly applied the doctrine of "general prejudice" to confessions or admissions improperly received for the first time. Before this decision the Court had purported to find an abuse of discretion in denying the mistrial because of the specific prejudice caused by the improperly admitted evidence. United States v. Harris, **8** USCMA **199, 24** CMR **9 (1957)** ; United States v. Diterlizzi, **8** USCMA **334, 24** CMR **144 (1957).**

54 United States v. Richard, **7** USCMA 46, **21** CMR **172 (1956).**

ground that the trial was terminated to save the Government's case.[55]

If the error occurs after verdict and could effect only the sentence, then perhaps the law officer could declare a mistrial as to the sentence only.[56] Such a limited decision has not as yet been defined by judicial opinion and in most cases would seem to be an impractical procedure for the reason that little saving in time would be effected; the convening authority could immediately order a "split rehearing"[57] on the sentence, in which case the accused would be afforded the benefit of a sentence limitation which he would not have if the trial were terminated before sentence.

2. *Party Making Motion*

a. *Accused*

If the accused makes the motion for mistrial and it is incorrectly denied, a rehearing may be ordered in event of conviction. If it is improperly granted, he should be estopped from pleading former jeopardy at a subsequent trial for the same offense.[58]

A different situation might arise, however, where the error calling for a mistrial was generated by the Government to save a weak case. If the error hopelessly prejudiced the accused's cause, through no fault of his own, he is faced with an unjustified dilemma of the Government's creation: to save a sure conviction he must ask for a mistrial and be estopped from claiming former jeopardy at a subsequent trial where the Government will put on a better case. Under these circumstances the fact that the accused was the party who moved for the mistrial should not raise estoppel.[59]

b. *Prosecution*

The fact that the Government asked for the mistrial, over the objection of the accused, should be a factor in determining—objectively—the motive of the law officer in declaring the mistrial. It usually would be a factor indicating that the mistrial was de-

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55 See text accompanying note 33 *supra* and United States v. Ivory, 9 USCMA 516, 26 CMR 296 (1958). In this respect the law officer has some of the power of a federal judge to grant a "new trial in the interest of justice." Fed. R. Crim. P. 33.

56 United States v. Lynch, 9 USCMA 523, 26 CMR 303 (1958), is not authority to the contrary. In that case a motion for mistrial was improperly denied during the challenging procedures and the accused pleaded guilty. A complete rehearing was ordered because the members of the court were so prejudiced as to become "incapable of receiving a plea of either guilty or not guilty."

57 United States v. Miller, 10 USCMA 296, 27 CMR 370 (1959).

58 *Cf.* concurring opinion of Chief Judge Quinn in United States v. Ivory, 9 USCMA 516, 26 CMR 296 (1958).

59 See Gori v. United States, 364 U.S. 917 (1961).

cleared to "save an acquittal."[60] On the other hand, if prejudicial error occurred, which was not induced by the prosecution, the defendant should not be allowed to insist on proceeding with a trial that eventually will be reversed. In this situation particularly, the law officer should insure that the record reflects, with great detail, the defense's reasons for resisting the declaration of a mistrial,

V. *SAME OFFENSE*

Assuming a completed "trial," resulting in a conviction approved on review, the accused cannot be tried, over his objection, a second time "for the same offense."[61] The definition of the term "same offense" requires solving the perplexing problem of whether a single act or transaction violating two or more different statutes can result in the commission of two or more separate crimes, the trial of one of which will not bar trial for the other.

A. *MULTIPLE TRIALS* vs. *MULTIPLE PUNISHMENTS*

As of yet neither the constitutional nor the statutory doctrines of former jeopardy have been applied to determining the maximum punishment at a single trial on conviction for two or more offenses arising out of the same transaction.[62] As a matter of fact, in dictum, the Court of Military Appeals has stated that merely because — in the same trial — two offenses might be limited by one punishment does not necessarily mean that they are not separate offenses.[63] The basis of deciding maximum punishment at the same trial involves the determination of legislative intent apparently unfettered by any constitutional limitation, provided the total punishment is not too harsh.[64] Nevertheless, up until the present, the United States Supreme Court has given such offenses the same effect whether they are joined in one trial or convictions are obtained in consecutive trials. As Justice Black pointed out in his dissent in Gore v. United *States*,[65] what difference does it make if an accused receives three consecutive sentences of five

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60 See note 25 *supra*.

61 UCMJ, art. 44(a).

62 The problem of the maximum punishment at a single trial is beyond the scope of this article. See MCM, 1951, para. 76*a*(8).

63 United States v. Oakes, 12 USCMA 406, 30 CMR 406 (1961). See also United States v. Sabella, 272 F.2d 206 (2d Cir. 1959); Gore v. United States, 357 U.S. 386 (1958), a 5–4 decision reaffirming the decision in Blockburger v. United States, **284** U.S. 299 (1932), with Justices Black and Douglas dissenting on the issue of former jeopardy.

64 Blockburger v. United States, *supra* note 63, distinguished in United States **v.** Sabella, *supra* note 63.

65 357 U.S. 386 (1958).

years each at separate trials or a single sentence of fifteen years at one trial.

But if an earlier decision were followed, the doctrine of former jeopardy would have allowed Gore to be convicted and sentenced in separate trials. In Gavieres v. United *States,*[66] decided in 1911, the accused was first convicted for being disorderly in a public place and in another trial for insulting a public officer in the execution of his office. The Court, conceding that the same evidence proved the different statutory elements, nevertheless held that to be the "same offense" within the proscription of former jeopardy, not only must the facts be the same, but also the law. Accordingly, it found that the Fifth Amendment did not bar the second trial or its separate sentence. This decision, which stresses rather formalistically the allegations rather than the proof in support thereof, was handed down at a time when the complexity and scope of purely statutory offenses was triflng when compared to that of the vast matrix of today. Significantly, in recent times, a Gavieres situation has not been reaffirmed by the Court. It has been rejected by at least one federal circuit court.[67] It is fair to apply the Gavieres requirement of sameness in both fact and law when the consequences of the act or transactions are different — such as when there are multiple victims or distinct consequences.[68] But when the act produces substantially only one result, then it would seem that not only should the punishment be limited as for a single offense, but even more so that future trial should be barred, even

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66 **220 U.S. 338 (1911).**

67 United States v. Sabella, note **63** ***supra.*** The decision did not mention ***Gawieres,*** but expressly rejected applying the ***Gore*** decision to multiple trials. See also the dissent of Justices Douglas and Black in Hoag v. New Jersey, **356** U.S. **464 (1958)**: "But it, ***[Gawieres]*** like other cases under the laws of the Philippine Islands . . . has not been deemed an authoritative construction of the constitutional provision. See Green v. United States, supra **(355** U.Y. at **194–198)."** **356** U.S. at **478, n.3.** In *Hoag* even the majority opinion admitted: "But even **if** it was constitutionally permissible for New Jersey to ***punish*** petitioner for each of the four robberies as separate offenses, it does not necesarily follow that the State was free to ***prosecute*** him for each robbery at a different trial." **356** U.S. at **467.**

68 Ciucci v. Illinois, **356** U.S. **571 (1958):** Accused burned his family to death in one fire and was tried consecutively for the murder of his wife and one child, a second child, and a third child. Although each conviction was supported by the same evidence, the State did not obtain the death penalty until the last trial. In a **5–4** decision, this was held not to violate the 14th Amendment "due process," although at the time of the decision, the 5th Amendment former jeopardy protection was not considered part of such "due process.'' Palko v. Connecticut, **302** U.S. **319 (1937).** It might be now. See Mapp v. Ohio, **367** U.S. **643 (1961);** Hoag v. New Jersey, **356** U.S. **464 (1958),** where the Court upheld, in a **5–4** decision, consecutive trials where the victims of the robbery were different.

though at a second trial different statutory words are alleged.[69] Former jeopardy is aimed at unwarranted harassment of the accused—to prohibit the prosecution from wearing "the accused out by a multitude of cases with accumulated trials."[70] Successive trials entail liabilities and expenses not usually involved at a single trial of several offenses. For that reason it seems not unlikely that in the future civilian appellate courts will be more prone to find the "same offense" (and thus former jeopardy) at a second trial than they would if the offenses were joined at the same trial.

The Court of Military Appeals has not yet been presented with the Gavieres-type situation where the accused is tried consecutively for violation of separate statutes, all based on the same act and proved by the same evidence, and involving only one victim or substantial consequence. When it does, the Court will have an additional factor to consider: the Manual "injunction" that all known offenses be joined at a single trial.[71] Even if the Court will not choose a more liberal view of the former jeopardy protection, it is still conceivable that it might use its administrative powers[72] to dismiss the second charge. In doing so, it might find support, in an appropriate case, in the constitutional and codal guarantees of a speedy trial.[73] Under this latter rationale it could be held that the accused was prejudiced by not having his second charge tried at the first trial.

B. *SAME SOVEREIGN*

To be the "same offense" within the protection of former jeopardy, the offense must violate the law of only one sovereign.[74] Thus where a single act violates a State and Federal statute, the accused may be convicted first by the State, then by the federal

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69 *Contra,* United States v. Gavieres, *supra* note 66.

70 Hoag v. New Jersey, *supra* note 67, at 467.

71 "Subject to jurisdictional limitations, charges against an accused . . . should be tried at a single trial." MCM, 1951, paras. 30*f*, 33h. Although these words appear directory, rather than mandatory, they have been held to be an "injunction." See United States v. Davis, 11 USCMA 407, 409, 22 CMR 223, 225 (1960). The federal rule concerning joinder of related offenses is permissive only. Fed. R. Crim. P. 7. By 1956, 15 states had enacted legislation making it mandatory to join known offenses in enumerated circumstances, on pain of bar of second trial. This accords with the view of the American Law Institute. See Model Penal Code § 1.08(2) (1956).

72 Compare the Court's action in prohibiting the use of the Manual at trial. United States v. Rinehart, 8 USCMA 402, 24 CMR 212 (1957).

73 United States v. Hounshell, 7 USCMA 3, 21 CMR 129 (1956); U.S. Const. amend. VII; UCMJ, arts. 10, 33.

74 MCM, 1951, para. 68*d*.

government,[75] and vice-versa.[76] Because federal civilian courts and courts-martial each derive their sovereignty from the United States, a trial by one of these two tribunals bars subsequent trial in the other for the same offense. In this respect the Manual provides:

> *The same acts* constituting a crime against the United States cannot, after acquittal or conviction of the accused in a civil or military court deriving its authority from the United States, be made the basis of a sncond trial of the accused for that *crime* in the same or another such court without his consent.[77]

The cited words seem to conflict with the decision in *Gavieres* v. *United States,*[78] decided four years after *Grafton* v. *United States,*[79] where the same act was the basis of multiple prosecutions in courts deriving their jurisdiction from the United States. Indeed, the *Gavieres* argument was anticipated, but rejected in *Grafton.* Later, in *Gavieres* the Court, with questionable logic, strained to distinguish its decision in *Grafton.*

In *Grafton* the court-martial had acquitted the accused of the noncapital offense of homicide, and he was then, over his protest, convicted by a federal territorial court for the offense of "assasination," based, of course, on the same act of killing. On appeal the Government urged that two different crimes were involved: "One against military law and discipline, the other against civil law."[80] The Court refused to accept this proposition and observed that the civilian court could have assumed jurisdiction first. Since the "same acts" were the foundation of each charge, it found former jeopardy. It is submitted that *Grafton,* as adopted in the Manual, is the appropriate interpretation of the law unless the same act produces distinct consequences, as, for example, a felony murder of a mailman. There, not only is homicide committed, but federal mail is interfered with and the deliveryman killed.

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75 Abbate v. United States, 359 U.S. 187 (1959). After this decision the then U.S. Attorney General issued a policy directive prohibiting a second trial by federal authority, unless in each instance authority was obtained from the Attorney General. See also Army Regs. No. 22-12 (April 24, 1958) prohibiting the exercise of court-martial jurisdiction, as well as Article 15 punishment, after civilian trial without first securing the permission of the officer exercising general court-martial jurisdiction.

76 Bartkus v. Illinois, 359 U.S. 121 (1959).

77 MCM, 1951, para. 68*d*, at p. 103 (emphasis added). This wording follows that in Grafton v. United States, 206 U.S. 333 (1907).

78 220 U.S. 338 (1911).

79 206 U.S. 333 (1907).

80 Zbid. This argument was apparently based on an earlier decision of a lower court. *In re* Stubbs, 133 Fed. 1012 (D.C. Wash. 1905). There a soldier, acquitted by a State jury of a murder charge, was subsequently convicted by a court-martial of the same homicide, it being alleged as "conduct to the prejudice of good order and discipline." The court found that this additional element made it a different offense.

C. *FOREIGN AGREEMENTS*

Under certain treaties with the foreign governments of the countries wherein our troops are stationed, a single act may constitute a violation of the law of both the United States and of the foreign country. The two countries then agree who shall first try the military accused. Thereafter, the country which did not first try him may not try the accused, in the same territory, for the same offense, although he may be tried subsequently for an offense against discipline even if it arises from the same act.[81] A Canadian contempt-of-court committment for refusing to testify at a coroner's inquest was held not to be a "trial" within the sense of the applicable treaty so as to bar a subsequent court-martial in Canada for service-discrediting conduct in refusing to testify.[82]

VI. CONCLUSION

The effect of a declaration of mistrial on the accused's right against being put in jeopardy twice is about the same in both the military and the federal civilian jurisdictions, Both jurisdictions give their judicial officers a tremendous amount of discretion in deciding the necessity for a mistrial, thereby disallowing a subsequent defense claim of abuse of this discretion as a bar to a second trial. The Court of Military Appeals will probably put *some* limitation on the exercise of discretion, while the majority of the present United States Supreme Court have clung to the ancient saw of an 1824 decision[83] to the effect that a judge can do no wrong:

> '. . . [C]ourts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office . . . .' [84]

The Court of Military Appeals will probably put some restraints on the law officer's exercise of discretion for at least two reasons. First, even though he is generally separated from the control of the convening authority under the present military administra-

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[81] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, Aug. 23, 1953, art. VII, para. 8 [1951] 4 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67.

[82] United States v. Sinigar, 6 USCMA 330, 20 CMR 46 (1955). Chief Judge Quinn dissented. Accused's conviction was set aside, however, because of insufficient proof.

[83] United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

[84] *Id.* at 580, quoted in the majority opinion in United States v. Gori, 364 U.S. 917, 921 (1961).

tion,[85] the law officer lacks the complete immunization from public or official pressures that is assured the federal judge through his life tenure. Secondly, the Court is aware that even judges are subject to human impulses and sometimes, even though rarely, may become "prosecution-minded" and unconsciously arbitrary to the prejudice of the accused.

Perhaps the second factor is the one that is the most important and should call for the identical limitation on both the military and civilian jurisdictions. As the author of the dissenting opinion in *Gori* stated:

> The policy of the Bill of Rights is to make rare indeed the occasions when the citizens can for the same offense be required to run the gantlet twice. *The* ***risk*** of *judicial arbitrariness rests where, in my view, the Constitution puts it—on the Government.*[86]

The rule against ordering rehearings could bear more reexamination in the civilian than in the military sphere. A civilian accused is faced with an unreasonable alternative in case of an inept or even unjustified prosecution. If he is convicted on insufficient evidence, he can keep quiet, fail to appeal, and serve out his sentence in jail; or, he can appeal with the dead certainty that the best "remedy" he can get will be a rehearing where he may receive a more severe sentence. His only hope is the outside one that the appellate court will, in the exercise of its unlimited discretion, find that it is "just" not to order a rehearing but instead to enter a judgment of acquittal.[87] The civilian accused is placed in this dilemma by the apparent failure to distinguish between the situation where a case is unfairly terminated before verdict and one where the accused is unjustly convicted on insufficient evidence (as distinguished from the conviction that is improper solely because of procedural error). In each case the accused is harassed by a second trial, although he may escape the harassment in the first instance by pleading former jeopardy. Is there *any* less compelling reason why this same protection should not apply with even more force in the second instance?

Perhaps it will, even without legislative change. The discretion to order a rehearing from an appeal from an improper denial of a judgment of acquittal was based on the "complete waiver" doctrine of *Trono* v. *United States,*[88] which has recently been sub-

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[85] In the Army, law officers are now appointed from the Office of The Judge Advocate General in Washington, D.C. The Navy has instituted a pilot program of a similar nature.

[86] United States v. Gori, *supra* note 84, at 923 (dissent) (emphasis added).

[87] See Bryan v. United States, 338 U.S. 552 (1950); 28 U.S.C. § 2106 (1968): "[A]ny appellate court of jurisdiction . . . may . . . direct the entry of such appropriate judgment . . . as may be just under the circumstances."

[88] 199 U.S. 521 (1905).

stantially overruled by ***Green*** v. ***United States.***[89] In ***Green*** the accused was held not to have waived his constitutional right against being tried again for the most serious offense, of which he was "acquitted," when he appealed his conviction for the lesser included offense. This restriction on the time-honored "complete waiver" doctrine was based on the constitutional protection against double jeopardy. The same reasoning should apply to the second trial of a civilian accused, who should not have been convicted in the first place, but who has "waived" his constitutional protection by appealing from the injustice.

Finally, the federal civilian courts should reexamine the question of what is the "same offense'' and decide exactly to what extent one crimina1 transaction can result in two or more criminal trials without violating former jeopardy. It is more than likely that the Supreme Court will not reaffirm the doctrine of ***Gavieres*** if presented with that situation again. The modern social and legal approach which has been given effect by the Court in recent years is designed to afford the criminal accused the opportunity to defend himself without undue harassment, and successive trials based on one criminal transaction inevitably have the effect of badgering the accused in an attempt to secure the most severe sentence possible.

[89] *355* U.S. **184** (1957).

OVERFLIGHT DAMAGE: LIABILITY OF PRIVATE AND FEDERAL GOVERNMENT AIRCRAFT OPERATORS FOR FLIGHTS OVER LAND INTERFERING WITH USE AND ENJOYMENT*

By CAPTAIN **RICHARD** J. GLASGOW **

I. INTRODUCTION

The advent of jet aircraft[1] and the continued growth of both civilian and military aviation have rendered more acute the existing conflict of interests between the operators of aircraft and the owners of the land over which they fly. This continued growth of aircraft operations has been accompanied by a clarification of some of the more basic legal principles applicable to aircraft activities. For example, the *ad coelum*[2] theory of land ownership has definitely been laid to rest;[3] it has been made clear, moreover, that both aircraft operators and landowners possess certain interests in and rights to the superjacent air space;[4] and that low flights alone may violate a landowner's rights as well as instances in which an aircraft, or a part of it, comes into physical contact with the landowner's property.[5] However, many troublesome questions remain.

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1 The peculiar legal significance, if any, of "sonic boom" and so-called "sonic boom damage" is not separately considered in this article. However, depending upon the type damage that results, *i.e.*, cracked walls and broken windows or the mere annoyance of the noise, the principles applicable to other cases of overflight damage, as defined herein, should be held to apply.

2 The complete statement of the doctrine as quoted by most commentators is "cujus est solum ejus est usque ad coelum." Literally the statement means that he who owns the soil also owns upward to heaven and also downward to perdition.

3 United States v. Causby, 328 **U.S.** 256 (1946).

4 Every state in the union by express terms or clear implication has given legal force to the concept of right of flight. "Navigation of the airspace is an absolute existing right. The right of flight is an inherent natural right. Aerial navigation is universally recognized and practiced. Its very existence is for the general enrichment of mankind and the development and advancement of civilization." Eubank, ***The Right of Air Flight,*** 58 Dick. L. Rev. 141, 144 (1954).

5 United States v. Causby, ***supra*** note 3.

The purpose of this article is to ascertain what substantive law governs the liability of aircraft operators, both private and governmental, for flights over private property which interfere with the use and enjoyment of such property (hereinafter referred to as overflight damage).[6] Differences in the law applied to the private operator and the federal government operator will be noted where they exist. Consideration will also be given to the means available for resolving or minimizing the various areas of conflict between the interest of the owner of land in the full use and enjoyment of his property and the interest of the public, the nation, and those who would engage in aircraft operations in the conduct of such operations in an atmosphere that is free of unnecessary and unreasonable restrictions.

II. LIABILITY OF THE GOVERNMENT UNDER THE FIFTH AMENDMENT

A. *THE CAUSBY DECISION*

The leading case dealing with the question of liability of the federal government for damages to land resulting from air flights is *United States* v. *Causby*,[7] decided in 1946. An understanding of the Court's holding in this case is essential to the present inquiry. Therefore, it must be considered in some detail.

The ultimate question for decision in the case was whether the Causbys' property had been taken within the meaning of the fifth amendment by frequent and regular flights of army and navy aircraft over their land at low altitudes. The Causbys owned 2.8 acres of land near an airport outside Greensboro, North Carolina. In 1942 the federal government leased a non-exclusive right of use of the airport for a term commencing 1 June 1942 and ending 30 June 1942, with provision for renewals until 1967 or six months after the end of the national emergency, whichever was later. One of the runways used resulted in flights directly over the Causby property which was utilized as a family residence and as a chicken farm. Beginning in May 1942, heavy military aircraft and fighter planes began to fly over the property. The end of the runway was some 2,220 feet from the house and 2,275 feet from the barn so that the applicable 30 to 1 safe glide angle prescribed by the Civil Aeronautics Administration (CAA) permitted planes to fly over the Causby property at a height of 83 feet (67 feet above the house and 18 feet above the highest tree). Previous flights by lighter

[6] A problem of like importance and magnitude, although not as unsettled in the legal sense, the liability of the private operator and the federal government as an operator of aircraft for flights which result in *ground damage* to privately owned property, is not discussed herein.

[7] 328 U.S. 256 (1946).

craft had not unduly interfered with the Causbys' use and occupation of the premises. The noise and glare from plane lights made sleeping difficult; the family became nervous and frightened. As a result of the noise a number of chickens killed themselves by flying into the walls due to fright. Production fell off. The end result was the effective destruction of the use of the property as a commercial chicken farm.

The Court of Claims found that the military flights had rendered the property useless as a commercial chicken farm, seriously interfered with its use as a home and substantially diminished its value. The court concluded that a servitude had been imposed upon the property and awarded the Causbys judgment in the amount of $2,000.[8] The Supreme Court reversed the judgment and remanded the case to the Court of Claims because of the requirement for additional findings of fact as to the precise nature and duration of the easement found to have been taken.[9] However, the Court, with Justices Black and Burton dissenting, held that a servitude had been imposed on the property for which compensation was due under the fifth amendment.[10] In substance the Court, speaking through Mr. Justice Douglas, made the following important pronouncements:

a. The common law doctrine that ownership of land extends upward to the periphery of the universe will not be applied to adjudge the respective rights of landowner and aircraft operator in airspace.[11]

b. The character of the invasion, not the amount of damage, is the controlling factor in determining whether a taking has occurred; a partial taking can occur, *e.g.*, a servitude in the nature of an easement of flight.[12]

c. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land; the fact that he does not occupy it in a physical sense is not controlling.[13]

d. Flights over private land are not a taking, unless they are so low and so frequent as to constitute a direct and immediate interference with the enjoyment and use of the land; if the frequency and altitude of flights wholly deprive a landowner of the use of his land a taking occurs even though no entry is ever made upon the surface of the land.[14]

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8 60 F. Supp. 751 (Ct. C1.1945).
9 328 U.S. at 268.
10 Id. at 261–62.
11 Id. at 261.
12 Id. at 262.
13 Id. at 264.
14 Id. at 266.

e. The airplane is a part of modern life, and the inconveniences which it causes are normally not compensable under the fifth amendment; airspace apart from the immediate reaches above the land is a part of the public domain.[15]

B. *WHAT CONSTITUTES A TAKING?*

In concluding in *Causby* that there was a taking for which compensation must be paid the Court noted that the path of glide taken by the planes which caused the damage was not a part of the navigable airspace that Congress had placed in the public domain, *i.e.*, "airspace above the minimum safe altitudes of flight" prescribed by CAA.[16] Subsequently the Civil Aeronautics Board included within its definition of the minimum safe altitudes of flight that airspace which was necessary for take-off and landing.[17] The Board considered this glide path to constitute a part of navigable airspace.[18] Whether the Board's interpretation of the effect of the regulations was proper may be debated. However, the intent of Congress in this regard is now perfectly clear. In the Federal Aviation Act of 1958, Congress defined navigable airspace as including the airspace needed to insure safety in take-off and landing of aircraft.[19]

Since, under the rationale adopted in *Causby*, airspace necessary for landing and taking off now constitutes a part of the public domain the question arises as to whether this fact should alter the rule of recovery in cases like *Causby*. Nowhere in Causby does the Court state that flights in airspace constituting a part of the public domain may never form the basis for an action under the fifth amendment. Moreover, it was precisely as to that airspace forming the "immediate reaches" over property, which fell within the path of glide taken by the government aircraft pursuant to the CAA approved glide angle, that the Court expressly recognized ownership in the landowner and permitted recovery under the fifth amendment. Therefore, it is submitted that a cause of action for

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15 ***Ibid.***

16 Act of May 20, 1926, ch. 344, § 10, 44 Stat. 574; Act of June 23, 1938, ch. 601, § 1107(i)(1), (8), 52 Stat. 1028. These acts, which were sections of the Air Commerce Act of 1926, defined the term "navigable airspace." This definition is now covered by the Act of Aug. 23, 1958, tit. I, § 101, 72 Stat. 737, 49 U.S.C. § 1301(24) (1958). At the time the minimum safe altitudes prescribed by the CAA pursuant to the statute were 500 feet during the day and 1000 feet at night for air carriers, and from 300 feet to 1000 feet for other aircraft depending upon the type of plane and the character of the terrain.

17 "*Minimum safe altitudes.* Except when necessary for take-off or landing no person shall operate an aircraft below the following altitudes . . . ." 14 C.F.R. § 60.17 (1957).

18 Civil Air Regulations, Interpretation No. 1, 19 Fed. Reg. 4603 (1954).

19 Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. § 1301(24) (1958).

an unauthorized taking still exists in favor of the landowner in cases like *Causby* despite the declaration of Congress that those portions of the lower reaches necessary for landing and taking off now form a part of navigable airspace.[20]

The Court of Claims, speaking through Justice Reed, has expressed this view in a recent case involving flights below the then existing minimum altitudes of flight.[21] The court noted that the new definition of airspace includes the area necessary for landing and taking off but concluded this does not prevent the landowner from recovering from the Government for a taking of an interest in his property by virtue of such flights.

The remaining question as to when a taking occurs, in the case of the Government, lies at the opposite end of the legal spectrum, namely, may a taking occur in the sense of the fifth amendment as the result of flights over property at altitudes *above* the "immediate reaches" of the land?

As was the case with *Causby* and Matson, again a decision by the Court of Claims suggests the probable answer. The case is that of Highland Park, Inc. v. United *States*.[22] The suit was for compensation for the alleged taking of plaintiff's property due to the flight of heavy bombers. The plaintiff was developing a subdivision in the vicinity of Hunter Field near Savannah, Georgia. B-47 stratojet bombers commenced flying over plaintiff's property at a rate of 30 to 60 times a day at altitudes averaging 325 to 375 feet over that part of the property nearest the airport and 325 to 425 feet on the opposite side. When they passed over, conversation had to cease, radio and television reception was disrupted, windows shook, dishes rattled, sleep was disrupted, and the noise was so great as to be painful to the ears. House and lot sales dropped steadily until none were sold in 1955. The permissible glide angle for jets was 100 feet at the northern boundary of plaintiffs property and 150 feet at the eastern boundary.[23]

The decision of the court that plaintiff's property had been taken in the sense of the fifth amendment is of particular significance for two reasons. First, the Government conceded that a taking had occurred as a result of its aircraft operations. It merely contended that the taking occurred immediately after its acquisition of Hunter Field at the time its propeller driven planes began to fly over

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20 *Ibid.*

21 Matson v. United States, 171 F. Supp. 283 (Ct. Cl. 1959). The action was to recover compensation for the taking of plaintiff's property by government flights through the airspace above plaintiff's land at elevations below the minimum altitudes of flight between January 1952 and June 1956.

22 142 Ct. Cl. 269 (1958).

23 Id. at 271.

the property.[24] Secondly, in holding a taking had occurred, the court's decision was not based upon an invasion of the immediate reaches of the airspace above plaintiff's land; in fact, as the summary of facts discloses, the court found, on the contrary, that the flights had all been at heights above **200** feet. Nevertheless a taking was found to have occurred. The court cited *Causby* as the basis for its holding and declared the applicable rule of liability to be that ". . . the airspace over the land is a part of the public domain, which may be used with impunity so long as the flights do not substantially interfere with the use and enjoyment of the surface of the ground." [25] The court found such interference to have occurred with the commencement of flights over plaintiff's property by jet bombers in 1953.

It would appear, therefore, that the *Highland Park* decision may be cited for the proposition that it is the nature and extent of the interference with the landowner's use and enjoyment of his property which controls and not the height of the particular flight or the arbitrary characterization by Congress of airspace above a certain level as being within or without navigable airspace. Certainly this should be the test, and it is felt that the Supreme Court will ultimately affirm this interpretation as constituting a correct and logical construction (or extension) of the rule previously announced in *Causby*.

C. *THE MEASURE* OF *DAMAGES*

The Government can acquire interests in property in one of several ways. It may purchase a specific interest for an agreed price by means of an ordinary bargain and sale transaction. It may condemn in the exercise of its power of eminent domain. It may also acquire interests in property by what has come to be known as inverse condemnation, *i.e.,* a taking compensable under the fifth amendment which is the manner by which the Government acquired its easement in the *Causby* case. Regardless of the manner of acquisition, ultimately the Government receives a particular interest in property for which it is obligated to pay. In the case of property acquired by purchase neither the extent of the interest acquired nor the purchase price is ordinarily subject to dispute. The exact interest involved is described in the deed, and the purchase price is that which was agreed upon. **As** will be discussed below, in cases of condemnation and inverse condemnation both the question of the precise nature of the interest acquired and the value thereof are often subject to dispute. However, the

[24] *Id.* **at 272–73.**
[25] ***Id.* at 273.**

basic principles governing entitlement to compensation are themselves quite clear.

In condemnation proceedings the property owner is entitled to recover just compensation but only for the exact estate condemned. The Government acquires only what is expressly taken and is thus limited in its requirement to pay.[26] It is submitted that the same basic principles should and do apply with equal force in cases of acquisition by inverse condemnation?' If this conclusion requires any justification, it exists by virtue of the basic similarity of the two concepts. Both formal condemnation and inverse condemnation are based upon and involve the exercise of the power of eminent domain. Both are recognized means of governmental acquisition of property. The only major difference between the two is that condemnation is begun by the institution of a formal proceeding to acquire the desired property interest, whereas, in the case of inverse condemnation, an accomplished taking by the Government is confirmed after the fact, as it were, in a suit by the injured landowner for compensation.

In the usual overflight case the court describes the interest taken as an "easement" or an "easement of flight". For example, in a comparatively recent case the Court of Claims so concluded and stated in its judgment that:

> . . . defendant is vested with a perpetual easement of flight over plaintiff's property at an elevation of 100 feet or more above the ground, with airplanes of any character.[28]

To those concerned with the problem of the measure of damages in such cases the question arises as to precisely what has been taken.

It is well settled that the federal government can effect a "partial taking" of property and that, in such cases, the fee simple title to the land involved remains in the owner, subject to the easement acquired by the Government.[29] In ***Causby*** the Supreme Court agreed with the Court of Claims that an easement had been taken. Unfortunately, however, the Court did not state whether the easement taken was, in fact, an easement on the ground, created by virtue of the extensive interference with the use and enjoyment

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26 Olsen v. United States, 292 U.S. 246 (1934); United States v. 2,648 Ac. of Land, 218 F.2d 518 (4th Cir. 1955).

27 Thus, in ***Causby,*** after expressing agreement with the Court of Claims that a servitude had been imposed upon the respondent's land by the offending flights, the Supreme Court concluded that the findings of fact were inadequate to describe the precise nature and duration of the easement which had been taken and remanded the case to the Court of Claims so that the necessary findings could be made. 328 U.S. at 268.

28 Highland Park v. United States, 142 Ct. Cl. 269, 293 (1968).

29 United States v. Cress, 243 U.S. 316 (1907).

of the land itself, or whether it was a mere easement in the air.[30] But it would appear that the decision of the Court in *Causby* involved a finding that there was a taking of an interest in the land itself and a taking also of a certain interest in the airspace above the land.[31]

In subsequent cases dealing with the measure of damages this dual aspect of the taking which occurs in overflight cases has not led to any apparent difficulty in determining the measure of damages. Conceivably, an ingenious attorney might argue for an award of extra damages based on the taking of the interest in airspace, considered separately or in addition to the value of the interest taken in the subjacent land. However, research fails to disclose a single case in which such a claim has been asserted. As in formal condemnation proceedings, the critical line of inquiry, is the value of the land in the traditional sense, *including* within the meaning of that term, the value of the airspace immediately above the land that is necessary for the use and enjoyment of the land itself.

It is generally held that the taking by inverse condemnation occurs on the date of the first substantial interference with the use and enjoyment of the landowner's property.[32] The rules which govern the valuation of easements generally are also applied by the courts in determining the measure of damages in cases of inverse condemnation resulting from overflights. The measure of damages is the amount by which the fair market value of the property has been diminished as a result of the easement.[33] Included as a proper element of this valuation is the highest and best use to which the land, together with its superjacent airspace, is adapted, but only if the prospective use in question is reasonably probable as distinguished from merely possible.[34] If the overflights did, in fact, totally destroy the landowner's right of use and enjoy-

30 Clearly in Anglo-American law the concept of an easement has traditionally been considered as descriptive of an interest in real property rather than in airspace.

31 Although the Court emphasized in its decision the fact that a landowner owns at least some airspace immediately above his property, it also concluded that ". . . a servitude has been imposed on the land." 328 U.S. at 267. However, it cited with approval Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922), wherein the Court found a taking because of damage to surface interests despite the fact that the land was never actually invaded by the Government.

32 United States v. Dickinson, 331 U.S. 745, 748 (1957).

33 United States v. Causby, 328 U.S. 256, 261 (1946); United States v. 27.07 Ac. of Land, 126 F.Supp. 374 (E.D.N.Y. 1954).

34 See Olsen v. United States, 292 U.S. 246, 255–56 (1934).

ment, the value of the easement could conceivably equal the value of the fee itself.[35]

III. LIABILITY OF THE PRIVATE OPERATOR

In the situation where a private operator of an aircraft interferes with a landowner's use and enjoyment of his property, there appears to be no readily available remedy against the private operator. But perhaps the landowner can recover from the state or a municipality. If, for example, the offending flights by a private operator originate from a state or municipal airport, isn't it possible for the injured landowner to recover from the state or municipality concerned?

The state or municipality's liability could be based on either of two theories. First, it is clear that private property taken by a state for public use, without compensation to the owner, is violative of the due process clause of the fourteenth amendment of the Constitution in exactly the same manner as such a taking by the federal government is violative of the fifth amendment.[36] Secondly, most state constitutions also contain prohibitions against taking private property for public use without the payment of just compensation.[37]

Under either course of action, the theory would be simply that the taking involved is actually effected by the state or municipality from whose airport (which is operated in the public interest) the offending flights originate. A recovery has been recently allowed by the supreme court of the state of Washington in just such a case.[38] The suit was against the Port of Seattle, as operator of a public airport, by nearby landowners to recover for diminution in the market value of their land caused by the activities of airlines operating out of the airport. On appeal from the trial court judgment sustaining a demurrer to the complaint, the Washington court held that plaintiffs were entitled to recover for a taking of

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35 The theoretical validity of this conclusion was expressly recognized by the Supreme Court in ***Causby.*** 328 U.S. at 261–62.

36 "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States . . . ." Chicago, B & Q R. Co. v. Chicago, 166 U.S. 226, 241 (1897). ***Accord,*** Panhandle E. Pipe Line Co. v. State Highway Comm., 294 U.S. 613 (1935), ***rehearing denied,*** 295 U.S. 768 (1936); 12 Am. Jur. ***Constitutional Law*** § 658 (1938). For the historical development of this principle, see Legis. Ref. Serv., Library of Congress, Constitution of the United States of America, Revised and Annotated 1062–63 (Corwin ed. 1953) (S. Doc. No. 170, 82d Cong., 2d Sess.).

37 *E.g.,* Ill. Const. § 13; N.Y. Const. art. 1, § 7; Va. Const. §§ 6, 58.

33 Ackerman v. Port of Seattle, 348 P.2d 664 (Wash. 1960).

easements over their land and that the port would be liable for any taking *although the port itself operated no airplanes.*

This case could be of tremendous importance if the underlying theory of liability announced by the Washington court were to be adopted literally and applied by the federal courts in future suits against the Government. The basic question involved is simply this : who does the taking in the innumerable instances of offending overflights by private operators? Most airspace, including that part down to the ground which is necessary for landing and take-offs, is declared to be a part of navigable airspace.[39] In those instances where utilization of this airspace results in a taking of private property, adopting the rationale of the *Ackerman* decision, can it not be argued with considerable logic that it is the federal government which is the actual taker? It would seem so, for it is the Government which has actually "taken" the airspace within which these landings and take-offs occur. It is the Government which has prescribed the flight patterns and safety regulations directing how such landing and take-offs will be effected. As to such flights, therefore, why is it not the Government that is liable? If this rationale is accepted by the federal courts, the responsibility for compensating the injured landowners in such cases may ultimately be determined to rest with the Government. At present there are no federal decisions which appear to have considered the point. Only future decisions by the federal courts, and ultimately by the Supreme Court, will afford a definitive answer.

IV. TYPES OF RELIEF

The *Causby* decision recognizes the right of a landowner to recover compensation from the Government in a suit under the fifth amendment when recurring low flights by government aircraft substantially interfere with the use and enjoyment of his land. If the precedent established in *Causby* is properly construed as extending to flights which result in substantial interference with land use and enjoyment, regardless of the height of the flight or characterization by Congress of the airspace in which the injuring flights occur, the adequacy of the remedy thereby afforded is certainly less subject to criticism. Nevertheless in the *Causby* type proceeding the "taking" by the Government is simply confirmed by the decree of the court, and the landowners' only right is to receive "just compensation'' for the servitude placed upon his land.

From the standpoint of the injured landowner compensation for a taking of property may be entirely unsatisfactory. He may not

39 See statute cited in note 19 ***supra.***

wish to have a servitude imposed upon his land regardless of the price paid for it by the Government, Also, it should be remembered that a valid taking necessarily presupposes existence in the taker of the power of eminent domain. Therefore, recovery of compensation on the theory of a taking may not be available to the landowner who is injured by the flight activities of a private operator, for ordinarily the eminent domain power is not conferred upon such persons under state law.[40]

For these reasons the question of the availability of other remedies is of considerable importance, especially to the injured landowner. Two additional possible theories of liability and one possible affirmative remedy warrant discussion. The latter will be considered first.

A. *INJUNCTIVE RELIEF*

1. *Availability of Injunction Against the Government*

Can the United States be enjoined from conducting flights over private property which are so low and so frequent as to substantially interfere with the use and enjoyment of the premises? Or, indeed, can it be enjoined from operating an air base from which such offending flights originate?

a. *Sovereign Immunity*

These precise questions have not, as yet, been authoritatively answered. However, considering the effect of certain decisions by the Supreme Court with regard to other governmental activities, it is concluded that the doctrine of sovereign immunity is applicable to such flight operations, provided they are properly authorized and are conducted in accordance with currently applicable flight regulations and traffic rules prescribed by the federal government.[41] The Supreme Court has pointed out that only in three situations may restraint be obtained against government officials: first, where the suit is against action which the officer purports to take as an individual, such as a sale of his own personal property; second, where the officer's powers are limited by statute, his

[40] The right of eminent domain does not exist as to private persons or corporations in the absence of statute. See 29 C.J.S. *Eminent Domain* § 27 (1941), and cases cited therein.

[41] See Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949), in which a private company sought to enjoin the Administrator of War Assets from selling surplus coal to others than the plaintiff, who had originally purchased the coal, with a subsequent cancellation of the sale by the Administrator for an alleged breach of contract. The Court held that the suit must fail since it was, in effect, against the United States. It reiterated the rule that "the action of an officer of the sovereign . . ." can be actionable "only if it is not within the officer's statutory powers, or, if within those powers, only if the powers or their exercise in the particular case, are constitutionally void." 337 U.S. at 701–02.

actions beyond those limitations are considered individual and not sovereign, *i.e.,* ultra vires acts; and third, where the statute or order conferring power upon the officer to act in the sovereign's name is itself claimed to be unconstitutional.[42] Therefore, unless the Federal Aeronautics Act is declared unconstitutional it would appear that flights in navigable airspace, conducted in accordance with the rules established at the direction of the Administrator, cannot be enjoined.

b. *Balancing the Equities*

Assuming the jurisdictional hurdle of sovereign immunity could be successfully negotiated, it is nevertheless extremely doubtful that present day courts would enjoin airport or air flight operations by the federal government. As will be developed in considerably greater detail below, in deciding the question of entitlement to injunctive relief in the case of civilian activities, the courts have been extremely hesitant to enjoin aircraft operations of any type in recognition of the general public interest therein. *A fortiori,* where government air operations are involved, it is considered improbable that an injured landowner will be able to convince the courts that the national interest (and in many instances the national security) should be relegated to second place in the judicial scale of values when weighed against the rights of private individuals to the use and enjoyment of their property free from interference.

2. *Availability of Injunction Against the Private Operator*

Although the question is far from settled, it is felt that serious doubt exists as to the right of a state court, or a federal court applying state law,[43] to enjoin the operation of aircraft over private property, even though such flights are conducted by private

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[42] Larson v. Domestic & Foreign Corp., *supra* note **41,** at **697–702.** *Compare* United States *ex rel.* Goldberg v. Daniels, **231** U.S. **218 (1914)** and Perkins v. Lukens Steel Co., **310** U.S. **113** (1940), *with* Goltia v. Weeks, **271** U.S. **536 (1926).** In *Goldberg,* plaintiff's bid for the sale of government property was highest, but the Secretary of the Navy did not accept it and refused to deliver the property. Though recognizing that the Secretary's act was wrongful, the suit was disallowed by the Court on the basis of sovereign immunity. *Perkins* held that prospective bidders for contracts derive no enforceable rights against a federal official for an alleged misinterpretation of the government's authority. In *Goltia,* on the other hand, a suit to enjoin repossession of certain barges which had been leased to the plaintiff was allowed, on the theory that the action of the government officials was in the nature of trespass, and, hence, the suit was not against the United States. *Larson* appears to have overruled *Goltia.*

[43] The right to injunctive relief based upon the theory of trespass or nuisance, being a local action which is governed by the law of the state wherein the affected land lies, would therefore be governed by the local law. See Ellenwood v. Marietta Chair Co., **158** U.S. **105 (1895)** ; **2** Bouvier, Law Dictionary **3317** (Rawle ed. **1914).**

operators, provided that such operations are conducted in accordance with federal flight regulations and traffic rules.

a. Pre-emption *of* the Regulatory Field *by* Congress

This opinion is based upon the belief that, by virtue of the provisions of the Federal Aeronautics Act of 1958, the federal government has pre-empted the regulatory field in the area of air traffic regulation so as to preclude, at the very least, issuance of injunctive relief based on the existence of a cause of action under state law.[44]

The theory of pre-emption is not new. It is a familiar concept to the lawyer who is accustomed to dealing with questions concerning the regulation of interstate commerce. Indeed, there is nothing new in the concept of the right of Congress to exercise broad, regulatory powers in the field of commerce.[45] The theory of pre-emption is based on the established principle that Congress has the primary right to regulate commerce. It is a corollary of this principle and simply says that, in those instances in which Congress has pre-empted regulation of the subject matter, inconsistent regulatory action by state or local governmental bodies or the courts is prohibited.[46]

Thus, in Garner v. Teamsters *Union*,[47] the Supreme Court held that a state court could not grant injunctive relief against peaceful pickets on the ground that Congress had conferred upon the National Labor Relations Board the power to deal with this type controversy to the end that uniformity might be assured. The Court, speaking through Mr. Justice Jackson, stated:

> We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine

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44 If the federal government has pre-empted the regulatory field in this area, it follows that similar efforts to regulate or control air flights by means of state or municipal legislation are also invalid.

45 Historically, judicial recognition (or extension) of the broad powers possessed by Congress in the commerce field began with the decision of the Supreme Court in Gibbons v. Ogden, **22 U.S. (9** Wheat.) **1 (1824). For** those who have followed the progress of the law through the **1930's** to date, it is clear that operation of the commerce power has been steadily extended until today most aspects of business activity and transportation are subject to some federal regulation under the commerce clause.

46 **For** an excellent discussion of the doctrine and the leading cases which have applied it, see Note, ***Congressional Pre-emption*** by ***Silence of the Commerce Power,*** **42** Va. L. Rev. **43 (1966).** As the cited comment points out, where there is **a** direct conflict between state and national legislation concerning the same subject matter, the Supreme Court has never hesitated to invalidate the state regulation. Even where the conflict is indirect, the federal legislation may prevail. See Pennsylvania v. Nelson, **360 U.S. 497 (1966);** Amalgamated Ass'n. Street, Electric Ry. & **Motor** Coach Emp. v. Wisconsin Emp. Rel. Bd., **340 U.S. 386 (1961).**

47 **346 U.S. 486 (1963).**

> of private right. To the extent that the private right might conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded. * * * [48]

Moreover, as pointed out by the Court in *Weber* v. *Anheuser-Busch, Inc.*,[49] the fact that the state action may have been addressed to implementing an entirely different policy from that to which the federal regulation is directed cannot operate so as to permit a state court to enjoin action by the federal government in an area pre-empted by Congress.

Applying the rationale adopted by the Supreme Court in such cases to the question of the right to regulate that portion of airspace which both Congress and the Court have recognized as being properly regarded as a part of navigable airspace (and, therefore, within the public domain), there would seem to be no doubt but that the doctrine of pre-emption is applicable. This is particularly true in view of the wording of the Federal Aviation Act of 1958 which expressly confers upon the Administrator the power to ". . . assign by rule, regulation or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace * * * * *".[50] The fact that the act contains a provision purporting to preserve existing common law and statutory remedies[51] is not controlling in view of the pervasiveness of the federal regulatory scheme spelled out in the other operative provisions of the statute.[52] The courts have repeatedly held that a "savings clause" of this type will not be given effect where the other provisions of the statute are clearly indicative of a pervasive federal regulatory scheme.[53]

It would seem to follow that any attempt to enjoin air flights over private property below those altitudes set by the Administrator would constitute a direct interference and conflict with the power now vested by Congress in the Administrator. This result finds added support in the case of flights above the minimum altitudes of flight, as they existed at the time of the *Causby* decision, since the Court therein expressly approved the congressional pronouncement that airspace above those heights was a part of the pubic domain.

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[48] *Id.* at 500–01. See also International Union of UAW, CIO v. O'Brien, 339 U.S. 454 (1950), wherein the Court held the strike vote provision of a state statute conflicted with the NLRA, as amended.

[49] 348 U.S. 468 (1955).

[50] 72 Stat. 749 (1958), 49 U.S.C. § 1348**(a)** (1958).

[51] 72 Stat. 798 (1958), 49 U.S.C. § 1506 (1958).

[52] The act is discussed in detail at the text accompanying note 93 ***infra.***

[53] Adams Express Co. v. Croninger, 226 U.S. 491 (1913); City of Newark v. Eastern Airlines, 159 F.Supp. 750 (D.N.J. 1958).

Are the same principles applicable to flights in the "lower reaches'' of airspace necessary for use in aircraft landings and take-offs? In holding that flights within this latter area which interfere with the normal use of property constituted a taking so as to entitle property owners to compensation under the fifth amendment the Court in *Causby* stated:

> The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 USCA sec. 180, 10 AFCA title **49,** sec. 180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace.* * * [54]

In attempting to arrive at some readily ascertainable dividing line between those flights which would and those which would not constitute a taking of property within the meaning of the fifth amendment, the Supreme Court in *Causby* seized upon the "airspace above the minimum safe altitudes of flight", as then prescribed by the CAA under congressional sanction, as the convenient dividing line. This was unfortunate for two reasons. First, it tends to divert the attention of litigants and judges from the critical to a noncritical aspect of air flight. Second, it has led to confusion and misunderstanding as to just what is the critical factor in these cases.

It must be remembered that the *Causby* decision dealt with but one basic question, namely, whether the flights there involved were so low and so frequent *as* to *result in a taking* under the fifth amendment. The opinion contains not the slightest suggestion that the Court doubted the right of Congress to regulate the entire field of aircraft flights and air safety. On the contrary, the Court recognized the authority of congressional pronouncements in this field and concerned itself only with determining what Congress had intended navigable airspace to include under the law then in effect. If anything, the decision offers strong support for the contention that the Court recognized, even in **1946,** that Congress had pre-empted the regulatory field of air flight operations.

It should be noted that recognition of the fact that Congress has pre-empted the field of air traffic and air flight regulation does not result in any conflict with the constitutional provision that property rights may not be taken by the Government without making just compensation to the owner. The effect of the doctrine

54 **328** U.S. at 263.

of pre-emption in aircraft damage cases will not be to preclude such compensation. Rather it will limit the landowner's remedy to the recovery of such compensation. No provision of the Constitution requires that the equitable remedy of injunction be made available to injured landowners. All the Constitution requires is the payment of just compensation for property rights which are taken.

As yet the theory of pre-emption remains largely untested in the aviation field. In *Gardner* v. *Allegheny County*,[55] the Supreme Court of Pennsylvania, in effect, rejected the full import of the theory and held that the Government did not have exclusive control of airspace so as to preclude a state court from awarding compensation for a taking. On the other hand, in *City* of *Newark* v. *Eastern Airlines*,[56] a federal district court dismissed an action seeking injunctive relief from the adverse effects of low aircraft flights on the ground that Congress had intended that the Civil Aeronautics Board have *exclusive* control over navigable airspace. The same result was reached by the Circuit Court of Appeals for the Second Circuit in *Allegheny Airlines* v. *Village* of *Cedarhurst*,[57] wherein a village ordinance which was passed in an attempt to regulate flight activity, was invalidated. Again the court reasoned that Congress had intended that the Board have exclusive regulatory jurisdiction in this field.

Accordingly, at least in the federal courts, the doctrine appears to have been accepted, as applied to aviation operations. Only a definite pronouncement by the Supreme Court will remove all doubt.

b. *Balancing the Equities*

Assuming the doctrine of pre-emption is not applied so as to preclude, as a matter of law, the availability of injunctive relief to protect an individual's property rights against aircraft flights by civilian operators, what are the chances of securing such relief from present-day courts? As already noted [58] the customary practice of balancing the equities in determining entitlement to injunctive relief has been utilized by the courts in cases involving airport and aircraft operations. Although the factors which the courts have traditionally considered in other cases involving entitlement to injunctive relief have all received consideration in the aircraft cases, there is one possible distinction. In most recent aircraft cases involving applications for an injunction the courts

[55] **382 Pa. 88, 114 A.2d 491 (1955).**
[56] **159 F.Supp. 750** (D.N.J. **1958).**
[57] **238 F.2d 812 (2d** Cir. **1956).**
[58] **See text at section IV (A) (1)** (b) *supra.*

have placed particular emphasis upon the public and national interest, They are attaching increasing importance to the idea that it is deemed in the interest of the public and the nation that these activities be permitted to function without undue restriction, at least from the judiciary,[59] insofar as large-scale, commercial flight operations, conducted in accordance with applicable federal rules and regulations are concerned. Therefore, it is considered doubtful that injunctive relief can be legally justified.

B. *TRESPASS*

The common law action for trespass is intended to protect the interest of the owner of land[60] in his exclusive possession. It is to be distinguished from an action for nuisance in that it is based on an interference with the possessor's interest in ***exclusive possession*** of the premises, whereas, nuisance involves, and is based upon, an interference with the use and ***enjoyment*** of land.[61] Liability for trespass is based on possession and has traditionally been recognized without any requirement for a showing of improper motive or negligence ; it is, in effect, a rule of strict liability. Accordingly, the courts have generally recognized a right to maintain the action without proof of any actual damages, the rationale being that, in the eyes of the law, some damage is presumed solely on the basis of a showing that a trespass took place. In such cases the plaintiff would receive an award **of** nominal damages.[62]

Certainly from the standpoint of the injured party in overflight damage cases, an action for trespass has much to commend it.[63] He would not need to prove actual damage and could rely on the rule of strict liability which applies to trespass actions. It is important to determine, therefore, whether and under what circumstances an action for trespass may be utilized in such cases.

At the outset it should be noted that comparatively few courts have ever permitted a recovery in overflight cases solely on the

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59 See, *e.g.*, Kuntz v. Werner Flying Service, Inc., 267 Wis. **406, 43** N.W.2d **476 (1950).**

60 This concept also includes his lessee or such other person as is lawfully in possession of the property.

61 Prosser, Torts **409** (2d ed. **1955).**

62 **As** Dean Prosser points out the action is directed at the vindication of a legal right, without which, the trespass, if repeated, might in time ripen into a prescriptive right; there is, therefore, no occasion for application of the ***de minimis*** rule. ***Id.*** at **57.**

63 Assuming the conclusion reached in the preceding section **is** correct (that injunctive relief cannot or should not be granted in overflight damage cases), the value of the trespass action is somewhat diminished; traditionally injunctive relief, in addition to money damages, has been an allowable remedy in trespass cases.

basis of a technical trespass committed by the passage of an aircraft through the airspace above privately owned land. Even in the pre-*Causby* era most courts required a showing of some substantial damage to the landowner's interest in the use and enjoyment of his property.[64]

The hesitancy of the courts to grant relief in the absence of substantial damage has become more pronounced as the aircraft industry has continued to grow in size and importance to the nation. In fact, the courts have quite generally refused to grant relief where interferences with the landowner's rights are relatively minor as compared with the public interest in the continued progress of aviation.[65]

However, entirely aside from considerations of appropriateness, it is believed that an action for trespass, as previously defined, may no longer be relied upon in the great majority of cases as a basis for recovery by injured landowners in overflight damage cases against either the Government or the private operator.

1. Availability *of* Trespass Theory Against the Government

It is doubtful for several reasons that recovery may properly be had against the Government on the basis of the common law action for trespass. The action is not based on negligence. On the contrary it is based on a rule of strict liability. The Federal Tort Claims Act permits recovery for injury caused by the ". . . negligence or wrongful act or omission . . ." **of** the Government or its employees.[66] The Supreme Court has indicated in dictum in the Dalehite case that recovery under the act would seem to require some form of misfeasance.[67] If this dictum is followed in future cases, the strict liability rule of the trespass action may not be utilized as a basis for suits against the Government.

Also an action for trespass, as to offending flights which **are** above the minimum safe altitudes of flight or within those parts of the lower airspace necessary for landing and take-offs, would

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64 As a practical matter, in most instances, the plaintiff actually alleged a right to recover both for nuisance and trespass. Consequently it is often difficult to determine by precisely what rule the court acted in granting or denying relief. However, an examination of the cases discloses that in most of the cases wherein recovery was allowed there existed, in fact, some substantial interference with the landowner's use and enjoyment of his property.

65 Hinman v. Pacific Air Transp., 84 F.2d 755 (9th Cir. 1936) (low flights held lawful where no substantial interference with possession or beneficial use of land); Smithdeal v. Am. Airlines, Inc., 80 F.Supp. 233 (N.D. Tex. 1948) (noise and vibrations); Antonik v. Chamberlain, 81 Ohio App. 465, 78 N.E.2d 752 (1947) (noise, dust, fear); Batcheller v. Commonwealth, 176 Va. 104, 10 S.E.2d 529 (1940) (noise, fear).

66 28 U.S.C. § 1346(b) (1958).

67 Dalehite v. United States, 346 U.S. 15, 45 (1953) (dictum).

appear to be precluded by the provisions of the Federal Aeronautics Act of 1958,[68] by which Congress has declared such airspace to be a part of navigable airspace. In the traditional action for trespass the requirement is that there be an actual intrusion upon the plaintiffs land or that airspace above it which is owned or possessed by the landowner. It would seem that, however much flights within navigable airspace may interfere with the use and enjoyment of a landowner's property, they cannot be considered to involve the commission of a trespass upon the land or "upon" any other possessory interest of the landowner.

In view of the language utilized by the Supreme Court in *Causby*,[69] moreover, landowners can no longer be regarded as having any such possessory or proprietary rights in airspace sufficient to permit recovery on a theory of trespass (or taking for that matter) for occasional overflights which do not result in some substantial damage to their property. The consequences of such flights are *damnum absque injuria.*

2. *Availability of Trespass Theory Against the Private Operator*

With the exception of the strict liability objection (which is applicable only in the case of suits against the Government) all of the objections to the trespass action discussed in the preceding subparagraph also apply with equal force in the case of suits against private operators.

For these reasons it is concluded that the theory of the traditional trespass action is no longer properly applicable as the basis for a cause of action either against the Government or a private operator of aircraft in overflight damage cases. Although, under the foregoing rationale, trespass may still be utilized, in theory, as a basis for suit in the case of those occasional flights which occur within non-navigable airspace,[70] a recovery even of nominal damages would not be allowed by most courts today unless some actual damages to the plaintiffs property could be shown.

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68 72 Stat. 737 (1958), 49 U.S.C. § 1301(24) (1958).

69 "It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus* est solum ejus est usque *ad* coelum. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." 328 U.S. at 260-61.

70 For example, a case in which an aircraft, during flight across country, strays below the prescribed flight level so as to be guilty of a technical trespass.

C. *NUISANCE*

Assuming that aircraft have a right of transit through navigable airspace and that neither an action for trespass (whether or not injunctive relief is sought) nor injunctive relief (regardless of the theory upon which sought) is available to injured property owners in cases involving flights conducted within navigable airspace,[71] what rights are left to the landowner over whose property such flights occur? Certainly, under the rationale adopted by the Court in *Causby*, if government flights are involved which completely deprive a landowner of the use and enjoyment of his property, he is entitled to compensation up to the full value of his property, including improvements. As *Causby* demonstrates he is also entitled to compensation on this theory where a lesser interest is effectively taken within the meaning of the fifth amendment. Suppose, however, that the landowner prefers instead to seek his recovery in the form of money damages upon the theory of nuisance for the interference with the use and enjoyment of his property. May he do so where the degree of interference might properly be asserted to constitute a taking under the fifth amendment? Moreover, does a cause of action on the theory of nuisance exist in favor of the injured landowner in those overflight cases wherein the degree of interference falls short of a taking? If the nuisance theory is available in such cases, is it an effective remedy? These are some of the questions which will be explored in the present section.

A number of relevant factors must necessarily be considered in arriving at any tentative answers to the foregoing questions. Some of them bear upon the ultimate question of the availability and effectiveness of the nuisance theory in overflight cases generally. Others relate primarily to the question of its availability and effectiveness if asserted against the Government. For purposes of discussion the two groupings will be considered separately.

1. *Availability of Nuisance Theory Generally*

Pending development of a more complete body of case law on the subject, the availability of the nuisance theory as a basis for suit in overflight damage cases must be regarded as subject to dispute. One principal difficulty stems from the question of the ap-

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71 This space has been declared by Congress to include that part of the lower reaches necessary for landings and take-offs. Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. § 1301(24) (1958).

plicability to overflight cases of the so-called legalized nuisance doctrine.[72]

The doctrine was early recognized by the Supreme Court as applicable in the field of railroad operations. In the case of *Richards* v. *Washington Terminal Company*,[73] the landowner plaintiff sued to recover for damages to his property resulting from smoke, noise, and vibrations caused by trains controlled or operated by the defendant railroad. Except for a portion of the total damages which was attributable to the gases and smoke emitted from locomotives while in defendant's tunnel (which were, by means of a fanning system, forced out of the tunnel at its mouth near plaintiffs property) the Supreme Court held plaintiff's damages to be *damnum absque injuria*. In support of its conclusion the Court noted that the tunnel and tracks involved were located and maintained under the authority of certain specified acts of Congress in accordance with specifications approved by those acts. After noting the absence of any contention by the plaintiff that the tunnel or tracks, or the trains operating thereon, were constructed, operated or maintained in a negligent manner, the Court observed pertinently :

> Such being the essential facts deduced from the evidence, we have reached the conclusion, for reasons presently to be stated, that with respect to most of the elements of damage to which the plaintiff's property has been subjected, the courts have correctly held them to be ***damnum absque injuria;*** but that with respect to such damage as is attributable to the gases and smoke emitted from locomotive engines while in the tunnel, and forced out of it by means of the fanning system through a portal located so near to plaintiff's property that these gases and smoke materially contribute to injure the furniture and to render the house less habitable than otherwise, there is a right of recovery.
>
> The acts of Congress referred to, followed by the construction of the tunnel and railroad tracks substantially in the mode prescribed, had the effect of legalizing the construction and operation of the railroad, so that its operation, while properly conducted and regulated, cannot be deemed to be a public nuisance. Yet it is sufficiently obvious that the acts done by defendant, if done without legislative sanction, would form the subject of an action by plaintiff to recover damages as for a private nuisance.[74]

The Court then characterized as "generally recognized" the fact that ". . . the constitutional inhibition against the taking of private property for public use without compensation does not confer a right to compensation upon a landowner, no part of whose prop-

[72] As noted by Dean Prosser, within constitutional limitations, legislative sanction may justify activities which would otherwise constitute a nuisance. Prosser, Torts 409 (2d ed. 1955). The rule that what the legislature has authorized cannot be a nuisance operates to prevent abatement and criminal liability. However, due compensation must be made to the injured party. See generally 66 C.J.S. ***Nuisance*** § 17b (1941).

[73] 233 **U.S.** 546 (1913).

[74] *Id.* at 651.

erty has been actually appropriated, and who has sustained only those consequential damages that are necessarily incident to proximity to the railroad. . . .'' [75] The Court observed that the practical result of a contrary rule would be to bring railroad operations to a standstill but added the caveat that the doctrine of immunity from liability for incidental injuries ". . . being founded upon necessity, is limited accordingly." [76]

In reading the facts of the *Washington Terminal* case one is impressed by the striking similarity between the type of damage involved therein and that involved in the usual overflight damage case, *i.e.,* noise and vibrations. Moreover, as was the case with the railroad activities in question, air flight activity is expressly authorized within navigable airspace, and the public right of transit therein has been specifically declared by Congress.[77]

If the rationale adopted by the Court in *Washington Terminal* is held applicable in overflight damage cases, the result would be to relieve the aircraft operator from liability for those interferences with the use and enjoyment of property which are attributable to ordinary flight activity conducted within navigable airspace in accordance with federal flight regulations and traffic rules.[78] Admittedly, the doctrine has not been adopted in the several recent federal decisions which have dealt with the question of overflight damage, but neither has its applicability been repudiated.[79] Until and unless it is so rejected, the prospective litigant, in overflight damage cases would do well to consider its potential implications in determining upon what theory to bring his lawsuit.

Additional reasons exist for questioning the reliability of the nuisance theory as the basis for a cause of action in overflight damage cases. For example, in those cases in which the nuisance

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75 *Id.* at **554.**

76 *Id.* at **555.**

77 "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." Federal Aviation Act of **1958,** 72 Stat. **740, 49** U.S.C. **§ 1304 (1958).**

78 If Congress has effectively pre-empted the regulatory field of flight activity and has declared that a right of transit exists through navigable airspace, it would seem to follow that the courts should be precluded from holding that flights within the navigable airspace defined by Congress constitute a nuisance so long as they are conducted in accordance with the regulations prescribed by the Government. This is not to say that, when the degree of interference from such flights amounts to a taking, the injured landowner should not be entitled to the payment of just compensation.

79 One obvious reason why the doctrine has not received more extensive consideration in recent cases is because other bases have existed for disposing of the particular controversy. See, *e.g.,* Allegheny Airlines v. Village of Cedarhurst, *supra* note **57,** and City of Newark v. Eastern Airlines, *supra* note **53.**

action is based on alleged acts of negligence by the operator [80] in conducting the damaging air flights, if it can be shown that such operations conform in all material respects to the requirements of pertinent laws and regulations it is doubtful that negligence has, in fact, been established.

Still other difficulties will plague the injured landowner who seeks to recover for overflight damage on the nuisance theory because of the well established requirement, both as to public and private nuisances, that some substantial interference with the landowner's interests must be established.[81] This will often prove to be a difficult task.[82] Does the plaintiff have a sufficient interest in the premises over which the offending flights were made to give him standing to sue? Were the questioned flights within navigable airspace? Whose planes were involved? Did the defendant's planes alone engage in a sufficient number of flights over plaintiffs land to constitute a nuisance?[83] Substantially the same type of proof difficulties also confront the individual who sues for trespass.

If the suit is against the Government or a state or municipality possessing eminent domain powers and if, for whatever reason, such defendant decides that it is necessary or desirable to continue the particular offending flights, it may properly argue that a taking has, in fact, occurred and that the plaintiff's remedy must, therefore, be an action for a taking under the fifth amendment or the applicable state constitutional equivalent, as appropriate. Another possible course open to the federal government, a state, or a municipality possessing the power to do so, would be simply to institute formal condemnation proceedings against the property concerned and thereby acquire the interest it deems necessary for aircraft operations.

Certainly an awareness on the part of injured landowners who are considering resort to suit on the basis of the nuisance (or trespass) theory to avoid having their property "taken" that the

80 This must be distinguished from cases brought upon a theory of strict liability pursuant to which some courts allow recovery in nuisance actions as to activities regarded as ultra-hazardous or inherently dangerous.

81 For a reference to numerous cases which recognize the existence of this requirement, see Prosser, Torts 395 (2d ed. 1955).

82 As Dean Prosser points out, where the alleged nuisance is based upon personal discomfort and annoyance, as distinguished from invasions which actually affect the physical condition of plaintiffs' land, the substantial interference requirement demands proof of more than mere interferences with the personal tastes, susceptibilities or idiosyncracies of the particular individual. ". . . The standard must necessarily be that of definite offensiveness, inconvenience or annoyance to the normal person in the community — the nuisance must affect 'the ordinary comfort of human existence as understood by the American people, in the present state of enlightenment.' . . ." *Id.* at 396.

83 For a case illustrating the type problems relating to proof which face an individual suing in trespass or nuisance for overflight damage, see City of Newark v. Eastern Airlines, *supra* note 53.

federal, state, or municipal defendant can secure that result in any event pursuant to one or the other of the procedures just discussed is likely to discourage widespread resort to these theories in overflight damage cases. Also, the fact that the federal, state, or municipal government may be (or is in fact) prepared to take such action, if necessary, to secure the interest it desires, can be utilized as a powerful inducement during negotiations with potential plaintiffs who desire to maintain ownership of their property to grant leases or easements for necessary aircraft and airport activities. Moreover, if it is desired to acquire a permanent in. terest, these same considerations may encourage the landowner to sell the needed interest without resort to costly, and possibly useless, litigation. During either type of negotiation these factors should operate also to insure a more reasonable attitude on the part of landowners concerning the question of price.

Substantially the same deterrent to nuisance and trespass actions, as distinguished from suits brought on the theory of a taking, can often be asserted for the benefit of the private operator as well, If the offending flights are those of large commercial companies whose passenger and freight services are deemed in the public interest, the state may either condemn (or threaten to condemn) the necessary land interests to permit such flights, provided they are being conducted from state or municipal airports, In the case of commerical flights emanating from federally operated airports, the federal government could follow the same procedure.

Assuming the foregoing considerations are not sufficient to disenchant the injured landowner with the nuisance theory, there are still other reasons to question its effectiveness. The great weight of judicial authority requires that, in order to constitute a nuisance, the interference with a landowner's interest must be unreasonable as well as substantial.[84] This is also the view adopted by the Restatement of Torts which, although it recognizes that an action for damages can be maintained for a non-trespassory invasion of an individual's interest in the use and enjoyment of property, would nevertheless require that the invasion be substantial *and* unreasonable.[85] Here, as is the case wherein injunctive relief is sought, the courts adopt the procedure of "balancing the equities." Invariably in such cases the courts can be expected to give great weight to the community and national interest in commercial aviation.

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84 For a general discussion of this particular requirement and an enumeration of cases which recognize its validity, see Prosser, Torts 398 (2d ed. 1955).

85 Restatement, Torts **§ 822** (1939).

2. *Availability* of *Nuisance Theory Against the Government*

As previously noted, tort liability in the case of the United States is governed by and is subject to the provisions of the Federal Tort Claims Act.[86] A number of problems operate to cast doubt upon the utility of the nuisance theory as a basis for recovery under the FTCA for overflight damage.

Thus, in cases in which governmental liability for nuisance is asserted on the basis of strict liability rather than on the basis of negligence, recovery may possibly be denied on the ground that the Government has not consented to subject itself to liability without fault. Conversely, in suits founded on negligence, if the offending flights occur within navigable airspace, as defined by current federal legislation, the courts may well conclude that negligence has not been shown. Moreover, in any case in which the sole basis for suit is a series of flights conducted within navigable airspace in accordance with applicable federal laws and flight regulations it is possible that the suit under the FTCA may be barred by the discretionary function exception.[87] As in the case of other suits under the FTCA, there would be available to the Government in cases founded upon nuisance, all common law remedies which might be asserted in similar cases by a private party under the local law.

For these reasons (many of which are also applicable to the trespass theory) an action for nuisance is not as attractive as it might at first seem to the would-be plaintiff in overflight damage cases. It is considered likely that the taking theory, which was approved by the Supreme Court in *Causby,* will remain the surest and most widely used basis for landowner suits in cases involving overflight damage.

V. MEANS OF AVOIDING OR MINIMIZING THE PROBLEMS OF OVERFLIGHT DAMAGE

It has been seen that if aircraft overflights interfere sufficiently with the use and enjoyment of private property the federal government (as to government flights or flights from airports controlled or operated by it) or states or municipalities (in the case of offending flights from airports controlled or operated by them) may be liable for the payment of just compensation for the property interests that are taken. Yet to be considered and assessed for effectiveness are the several means which appear capable of possible use by federal and state authorities in dealing with the

[86] Federal Tort Claims Act, ch. **753,** 60 Stat. **842** (1946) (codified in scattered portions of Title 28, United States Code).

[87] **28** U.S.C. § 2680(a) (1958).

problem of objectionable flight activity. As a matter of emphasis primary consideration will be given here to those measures which may possibly be of use in protecting the legitimate interests of aviation in maintaining adequate airports and engaging in necessary flight activity.

The problem area is fairly well defined. For all practical purposes it is restricted to that privately owned land which is located in close proximity to airports and to their runway approaches.[88] It is within this relatively limited area of entry and exit of planes from airports at the low levels required for landings and take-offs that the vast majority of our overflight problems arise.

A, *CONDEMNATION AND LAND PURCHASES*

Perhaps the most effective, as well as the most obvious, possible solution to the overflight problem is to follow the old "ounce of prevention" caveat and acquire, either by free negotiation and purchase or by condemnation, sufficient land at the time an airport is constructed or enlarged to insure adequate approaches and runways. The difficulty here is twofold. First, the continued trend toward larger and heavier aircraft and the advent of jet propulsion systems have resulted in radical increases in the length required for airport runways. These developments have also produced planes with substantially longer and shallower glide angle characteristics;[89] the result is that airports which were once adequate to accommodate even the largest aircraft are now obsolete. Second, the financial burden of acquiring outright the amount of property necessary for adequate approaches and runways is often beyond the limited means available to state and municipal governments. An added problem in the case of widespread use of condemnation is the amount and the cost of the litigation that is necessary to acquire the various properties desired.

B. *EASEMENTS*

Another and often less expensive possibility is to acquire necessary flight easements from affected landowners through voluntary negotiation. A major difficulty here is in determining the value of the rights acquired. Also, the individual landowner may be unwilling to cooperate in granting the desired easement.

[88] As far as high level flights are concerned, not since the *Causby* decision has anyone seriously contended that such flights, unless accompanied by substantial damage to property, give rise to a cause of action by underlying landowners. Nor, in the absence of an ensuing crash, does the occasional low flight by a plane that strays off course cause any real problem.

[89] This simply means that the area within which planes fly at relatively low levels in landings and take-offs has substantially increased with a resulting increase in the "complaint area" of affected landowners.

C. *ZONING*

A third possible solution to some of the problems of the airport approach area is the passage of zoning legislation designed to restrict the height of structures within such approach areas that might interfere with aircraft landings and take-offs. Such legislation is highly desirable, if it can be effectively utilized, since otherwise necessary limitations on construction within the area would have to be obtained at considerable expense by resort to condemnation or the acquisition of obstruction easements.

Through the years a number of states have enacted zoning statutes for this purpose. However, whether they are sufficient to meet the requirements of the federal and state constitutions is a question which, as yet, remains largely unanswered.[90]

Regardless of the language of the particular statute or ordinance, however, serious constitutional questions are presented by any zoning legislation which is directed toward the regulation of property surrounding airports. The particular difficulty with airport zoning lies in the basic purpose and effect of its use. As one commentator has aptly observed,[91] in the ordinary zoning case the landowner is simply denied a particular use, but not only is the landowner denied this use, so is the general public. On the contrary, in airport zoning the result is much broader in that the basic purpose is not solely to impose height restrictions, but likewise to ***confer*** a privilege upon the airport and aircraft operators. In reality the right of beneficial use of the unrestricted airspace directly above the landowner's property is taken from him and conferred upon those utilizing aircraft. Without the airport zone the landowner would have the benefit of the substantial right of constructing buildings on his property that would increase its basic worth. Absent the zoning statute the airport would be required to purchase these valuable property rights.

Since the basic purpose of the zoning statute, as applied to the regulation of airport approaches, is to ***secure the use*** of an un-

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90 One of the few reported cases which appears to have passed directly upon the constitutionality of such zoning legislation arose in Maryland. In that case a zoning ordinance was struck down on the ground that the height restrictions prescribed by the ordinance were unreasonable and constituted a confiscation of private property, and also on the ground that zoning of airport areas is for the benefit of a restricted group, namely, those who desire to use aerial transportation, rather than for the benefit of the general public. Mut. Chem. Co. of America v. Baltimore, 1 Av. Cas. 804 (Md. Cir. Ct. 1939). *Contra*, United Airports Co. of Cal. v. Hinman, 1 Av. Cas. 823 (D.C.S.D. Cal. 1939).

91 See the remarks of Harold Kennedy, county counsel for Los Angeles County, The *County Viewpoint*, delivered at "A Conference on Control and Protection of Airport Approaches," reported in 24 J. Air L. & Com. 169, at 183, 191 (1957).

obstructed flightway it is felt that such statutes constitute an invalid exercise of the police power which is violative of the fourteenth amendment to the Constitution.

Such zoning statutes are subject to question for the additional reason that the benefits thereunder are conferred on the users of aircraft and airports rather than upon neighboring landowners. It can be argued that this particular type of restriction is analogous to so-called "spot zoning'' statutes which are often declared invalid as a taking of property without compensation.92

If the foregoing analysis proves incorrect, however, and prospective zoning legislation regulating airport approaches is upheld as a valid exercise of the police power, there are two added considerations which will limit its usefulness. First, clearly, it can only be used prospectively. It cannot be used retroactively as a substitute for condemnation so as to require property owners to remove or modify structures which were already in existence at the time of enactment of the particular zoning statute. Second, the fact that the purpose of zoning statutes is to facilitate flights through the maintenance of unobstructed approaches to airports and the fact that the affected landowners' use of their property is thus limited to the extent that they may not erect structures above cerain prescribed heights does not operate to confer upon the airport or its users the right to place yet additional restrictions upon the use and enjoyment of the affected lands. Thus, if low flights are made over such land which further limit its use or enjoyment this additional interference, if substanial, would constitute a taking for which compensation would be due.

VI. THE FEDERAL AVIATION ACT OF 1958—PROGRESS TOWARD AN ADEQUATE NATIONAL REGULATORY PROGRAM

Used intelligently, land purchases, condemnation, and easements 93 are all helpful working tools in dealing with the problem of minimizing the conflict of interests between aircraft and airport operations and the interests of private landowners. However, they are, at best, mere working tools. Yet, deficient as they may be to resolve a particular dispute, the problem of adequate working tools has not been the principal stumbling block to progress in

92 Possibly this is the concept that the court had in mind in Mutual Chem. Co. of America **v.** Baltimore, note 90 *supra,* when it commented upon the fact that zoning of areas around airports is rather for the benefit of those who use aerial transportation than for the benefit of the general public. For a general discussion of spot zoning, see 101 **C.J.S.** ***Zoning*** **§ 34 (1958).**

93 Zoning must be omitted from the list until its constitutionality, as applied to the regulation of airport areas, is more definitely settled.

resolving the over-all problem of aviation — landowner conflicts. The most serious deficiency has been the consistent failure to develop uniform, permanently administered policies and programs at the national level to deal with the various problems incident to the control and regulation of aviation. In the past this latter deficiency has been evidenced by the failure of federal legislation to provide centralized responsibility and authority in any single individual or agency for the development and implementation of such regulatory measures.

In August of 1958 Congress rectified this situation by the enactment of sweeping new legislation, entitled the "Federal Aviation Act of 1958" (referred to hereafter as the FAA), which provides necessary machinery for the development and implementation of specific programs and policies by the federal government to deal with the aviation — landowner problem.[94] Those portions of the act which appear to be of especial utility in dealing with the problems of overflight damage are discussed below.

In enacting the FAA Congress clearly intended to create an independent air agency and to centralize in its head (referred to hereafter as the Administrator) responsibility for the development of air safety, including the promulgation of air safety regulations and the control of the use of navigable airspace for both civilian and military purposes.[95] The act retains the Civil Aeronautics Board (hereafter referred to as the Board) which is given responsibility for investigating aircraft accidents. However, the Board's regulatory functions have been limited to the economic regulation of air transportation and to the issuance of certificates of convenience and necessity and permits authorizing commercial aircraft operations. The power of the Board to prescribe air traffic rules has been taken away and vested in the Administrator. Also transferred from the Board to the Administrator is the enforcement jurisdiction to amend, suspend, modify, or revoke safety certificates. The Board, like the Administrator, has been made independent of the executive branch of the government.

Subchapter III of the act[96] establishes the Federal Aviation Agency (hereafter referred to as the Agency) and sets forth the powers and duties of the Administrator. Pursuant to the declaration of policy97 and various specific provisions of the act, the Administrator is charged with the responsibility for carrying out

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94 **Enacted as Public Law 85-7261, 72 Stat. 731 (1958), 49 U.S.C. §§ 1301–1542 (1958).**

95 **72 Stat. 740 (1958), 49 U.S.C. § 1303(c) (1958).**

96 **72 Stat. 744–754 (1958), 49 U.S.C. §§ 1341–1355 (1958).**

97 **72 Stat. 740 (1958), 49 U.S.C. § 1303 (1958).**

the following activities and programs which appear to be of specific value in solving the problems resulting from aircraft flights over private property :

1. Control of Airspace. The Administrator is empowered to formulate rules and regulations governing the use of navigable airspace [98] and to prescribe such limitations on its use as he deems necessary to insure aircraft safety; [99] he is further empowered to prescribe air traffic rules and regulations governing aircraft flights, including rules as to safe altitudes of flight, and is charged with the specific duty of adopting air traffic rules which will protect persons and property on the ground.[100] Clearly, therefore, whenever feasible, the Administrator may prescribe flight patterns which are calculated to avoid or minimize the possible adverse effects of air flights upon the use and enjoyment of subjacent property; he may modify existing flight patterns for the same purpose. He may also use his power to regulate the height of flights and the angle of climb and descent of aircrart in effecting landings and take-offs with a view to avoiding overflight damage. Moreover, insofar as is consistent with performance limications of aircraft and the requirements of safety, he can make specific exceptions to or modify existing flight patterns or angles of climb and descent to meet the problems existing at a particular airport.

2. *Control of Flight Activity and Airport Construction.* Of great importance to the development of an effective national regulatory scheme is the fact that the powers of the Administrator to prescribe traffic regulations applies to both military and civilian aircraft, except during periods of military emergency or urgent military necessity.[101] Also, no military airport or rocket site may be acquired, constructed or the runway layout thereof substantially altered, without prior coordination with the Administrator.[102] The act contemplates that the Administrator must actually approve such acquisitions, construction, or modifications, for, in case of disagreement on the part of the Administrator with a particular project, the act provides for the final decision to be made by the President.[103] The act also prohibits construction or alteration of airports *not* involving expenditures of federal funds

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98 Navigable airspace, when referred to in the act, means airspace above the minimum altitudes of flight prescribed by regulations issued under the act, and includes airspace needed to insure safety in landings and take-offs of aircraft. 72 Stat. 737 (1958), 49 U.S.C. § 1301(24) (1958).

99 72 Stat. 740 (1958), 49 U.S.C. § 1303 (1958).

100 72 Stat. 749 (1958), 49 U.S.C. § 1348(c) (1958).

101 72 Stat. 749 (1958), 49 U.S.C. § 1348(f) (1958).

102 72 Stat. 760 (1958), 49 U.S.C. § 1349(b) (1958).

103 *Ibid.*

without prior notice to the Administrator in order that he may ". . . advise as to the effects of such construction on the use of airspace by aircraft."[104]

Pursuant to these provisions the Administrator has the necessary authority to monitor and exercise substantial control over both civilian and military airport construction with a view to avoiding, insofar as is possible, inadequate runways and approaches which are a major source of overflight damage litigation.

3. *Research and Development Planning.* Extensive powers and duties are conferred upon the Administrator in the field of research and development. The scope of permissible action and the potential of the act in this area, as aids to the development of effective national aviation policies and programs, are tremendous. Section **312** provides as follows :

> (a) The Administrator is directed to make long range plans for and formulate policy with respect to the orderly development and use of the navigable airspace, and the orderly development and location of landing areas, Federal airways, radar installations and all other aids and facilities for air navigation, as will best meet the needs of, and serve the interest of civil aeronautics and national defense, except for those needs of military agencies which are peculiar to air warfare and primarily of military concern.
>
> (b) The Administrator is empowered to undertake or supervise such developmental work and service testing as tends to the creation of improved aircraft, aircraft engines, propellers, and appliances. For such purpose, the Administrator is empowered to make purchases (including exchange) by negotiation, or otherwise, of experimental aircraft, aircraft engines, propellers, and appliances, which seem to offer special advantages to aeronautics.
>
> *(c)* The Administrator shall develop, modify, test, and evaluate systems, procedures, facilities, and devices, as well as define the performance characteristics thereof, to meet the needs for safe and efficient navigation and traffic control of all civil and military aviation except for those needs of military agencies which are peculiar to air warfare and primarily of military concern, and select such systems, procedures, facilities, and devices as will best serve such needs and will promote maximum coordination of air traffic control and air defense systems. Contracts may be entered into for this purpose without regard to section **529** of Title **31.* * *** [105]

Unquestionably, the Administrator has the power to undertake almost any type research or development program that he considers of potential value in dealing with important aviation problems. For example, he could initiate research programs to develop aircraft or aircraft appliances designed to enable planes to land and take-off in shorter distances, utilizing steeper angles of ascent and descent. He could undertake research work in the

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[104] **72** Stat. **751** (1958), **49** U.S.C. § **1350** (1958).
[105] **72** Stat. **752** (1958), **49** U.S.C. § **1353** (1958).

development of silencing equipment for jet aircraft. If successful, such measures would substantially reduce overflight damage litigation and claims.

To summarize: If properly implemented the **FAA** will enable the federal government to solve, insofar as they are capable of solution, many of the current problems incident to the protection of landowners from unnecessary overflight damage while, at the same time, foster the development of a reasonable national regulatory scheme for the control of aircraft operations. For example, in those cases where suits of the *Causby* type can be avoided by intelligent guidance and regulation in the field of airport construction and the promulgation of inoffensive, yet adequate] flight patterns and traffic regulations, the Administratar should not hesitate to utilize his powers to do so. His authority in the field of research and development should also be fully utilized to improve our aircraft and airports. In the relatively few instances in which essential flight activity from a particular airport cannot be regulated in a manner that will avoid a taking of nearby property interests, then the Administrator should require the Government, or the state or municipality whose airport is involved, to take action either to eliminate or re-route the offending flights or to acquire (by lease, purchase, condemnation or easements) the needed property interests.

The foregoing examples are illustrative, but by no means exhaustive, of the scope of permissible action under the Federal Aeronautics Act. Its enactment is a milestone in the history of federal aviation legislation. Only time will tell whether its full potential will be realized.

VI. CONCLUSION

In the past few years there has been extensive discussion of the various problems which can be expected to arise as the result of contemplated future developments in the field of aviation, such as the formulation of legal concepts to govern travel in outer space and the ownership of outer space. Unquestionably, these are important problems for a nation that stands at the very threshold of the beginning era of manned space travel. It is desirable that attorneys begin thinking now in terms of possible solutions for these problems.

Nevertheless, the law governing the less glamorous subject of conventional aircraft operations is itself a highly important matter, as are the current problems of aviation. The private operator of aircraft, the federal government (in its capacity as an operator of aircraft and as protector of the public and national

interest) and the private landowner whose rights may be adversely affected by flight activity, are all vitally interested in current aviation law and current aviation problems.

These are matters of great importance which should not be ignored by the legal commentator. The present article is the outgrowth of this conviction. In it an attempt has been made to fill what research discloses is a specific gap in current legal writing on the subject of aviation, namely, an up-to-date analysis of the substantive law governing liability in cases of governmental and civilian aircraft flights which result in damage to privately owned property.

As a result of this study, certain conclusions may be drawn with a degree of certainty.

Initially, it is clear that both the federal government and a local governmental authority may be liable for interference with a person's use and enjoyment of his land under the fifth and the fourteenth amendments, respectively.

Secondly, it is the nature and extent of the interference with the landowner's use and enjoyment of his property which determines liability and not the height of the particular flight or the arbitrary characterization by Congress or some other legislative body or agency of navigable airspace as being above a certain level.

In regard to the types of relief available to the injured landowner, the remedy of "just compensation'' is not always adequate. Moreover, the various other types of relief — injunction, trespass, and nuisance — are all restricted by rules of interpretation which make these remedies less than satisfactory.

In regard to the various methods advanced in attempts to minimize the problems of overflight damage — condemnation, easements, and zoning — it has been seen that none of these proposed solutions are particularly effective.

Finally, an examination of the Federal Aviation Act of 1958 has revealed that a start has been made towards the goal of a uniform national program of aviation control and regulation. The FAA has set up a system providing for centralized responsibility, authority and administration in the fields of control of airspace, control of flight activity and airport construction, and research and development planning.

It is hoped that the full impact of this broad act can be brought to bear on the aviation industry. If it can, many of the current problems relating to overflight damage can be solved.

AN INTRODUCTION TO THE LAW OF PATENTS*

By LIEUTENANT COLONEL GEORGE F. WESTERMAN**

I. INTRODUCTION

The strength of our American way of doing things has derived, in large part, from the fact that it has provided powerful incentives to all persons to invent products for the common good. The patent system is an important part of this overall scheme. Reduced to its lowest terms, the patent system is a means of stimulating, not only the making of inventions, but also discovering methods for their practical utilization. Although this sounds disarmingly simple, if you were to make a quick review of American progress, you would be amazed by the fact that most of our advancement and well-being originated with invention and its practical utilization for the common good.

Reflection of this progress in the field of national defense is obvious from such patents as those granted on Colt's Six-Shooter,[1] the Gatling Machine Gun,[2] Bell's Telephone,[3] Marconi's Wireless Telegraph,[4] the Wright Brothers' Airplane,[5] and countless other implements essential to the conduct of war. Consequently, it is important that all Army personnel, particularly those dealing with research and development or procurement, acquire an understanding of a few basic principles of patent law.

II. HISTORICAL BACKGROUND

During the classic period in ancient Greece and Rome, the useful arts were regarded more or less with contempt, and although a few rugged individualists like Archimedes made inventions, they were looked on as mere frivolities, scarcely befitting a philosopher. Nevertheless, in the fifth and sixth centuries B. C., the Greek city of Sybaris held cooking contests in which the inventor of a new

* The opinions or 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 U. S. Patent granted S. Colt on Feb. 25, 1836.

2 U. S. Patent No. 36,836 granted to R. J. Gatling on Nov. 4, 1862.

3 U. S. Patent No. 174,465 granted to Alexander Graham Bell on March 7, 1876.

4 U. S. Patent No. 586,193 granted to G. Marconi on July 13, 1897.

5 U. S. Patent No. 821,393 granted to Orville and Wilbur Wright on May 22, 1906.

dish was given an exclusive right to prepare it during one year.[6] This was probably the earliest patent system, anticipating our own by about 26 centuries. It worked so well that people of Sybaris achieved immortality as connoisseurs in the art of eating and to this day, the word "sybarite" is a synonym for epicure.

Long before 1400, the Government of Venice was interested in inventions and officials were appointed to examine inventors' projects. After 1450, the grant of patents became quite systematic in that country. The main craft of Venice was glass-making, the secrets of which were so jealously guarded that the death penalty awaited Venetian glass-blowers who tried to practice their art abroad. However, glass was then so precious that in spite of this danger many Venetian artists took the risk of establishing works abroad and, being familiar with the Venetian patent system, the first thing they sought in foreign countries was a monopoly for the new methods they brought with them. In this way, patent systems were introduced in various countries during the 16th century. Consequently, many of the early patents were granted for glass manufacture and numerous Italians were among the first patentees in a number of different countries.'

During the Middle Ages it was common practice in England and in various countries of Western Europe for the sovereign to grant to individuals, monopolies of the right to make or sell specified commodities throughout the kingdom.[8] Sometimes, as in the case of the Venetian glass-blowers, these monopolies were given to artisans from abroad to induce them to migrate to England and to introduce there an art that had been developed in a foreign country.[9] Occasionally, they were granted to inventors within the realm as reward for their inventive efforts and as incentive to others to make similar contributions to technological advance. At other times, and with increasing frequency, they were bestowed on court favorites or were sold to provide funds for the royal treasury. These grants were evidenced by open letters or "letters patent" from the king; by association, the term "patent" came to signify the grant itself.

The practice of granting monopolies was so abused in England that eventually many of the necessities of daily life were controlled by the holders of Letters Patent. Iron, oil, vinegar, coal, lead, yarn, leather, glass, salt, and paper were but a few of the com-

6 Frumpkin, *The Origin of Patents,* 27 J. Pat. Off. Soc'y 143 (1945).
7 Frumpkin, *op. cit. supra* note 6, at 144.
8 Walker, Patents 2 (Deller ed. 1937).
9 The earliest known instance of a royal grant to foreigners is the letters of protection given to John Kempe and his company, Flemish weavers, by King Edward III of England in 1331. 18 J. Pat. Ob. Soc'y 20 (1936) (Centennial Number).

modities which had been appropriated to monopolists and could be bought at only exorbitant prices.[10] The situation became so bad that in 1623, Parliament passed an act declaring all monopolies void.[11] In this Statute of Monopolies, however, specific exception was made to permit the granting of monopolies for limited times, for the "sole working or making of any manner of new manufacturers within this realm to the true and first inventor or inventors of such manufactures . . . ." This enactment provides the basis for the British Law of Patents.

At that time patents were also granted in Germany and France. Henry II of France introduced a novelty which still remains a basic principle of patent law, namely, that an inventor must fully disclose his invention so that the public may benefit from it after the patent has expired.[12]

The American colonists chose to follow the English system, and several of the colonies and states issued patents in their own names long before the Declaration of Independence.[13]

It is not surprising with this historical background that when the final draft of the Constitution was adopted in September 1787, it contained the specific provision that:

> Congress shall have the power . . . to promote the progress of science and useful arts, by securing for limited times to . . , inventors the exclusive right to their . . . discoveries.[14]

On April 10, 1790, President George Washington signed the bill which laid the foundations of the modern American patent system, and Samuel Hopkins of Philadelphia on July 31, 1790 received the first United States patent for a new process and apparatus for "Making Pot-ash and Pearl-ash". Since that time, a series of statutes have implemented the constitutional provision, the latest being Title 35 of the United States Code which became effective January 1,1953.

During the Civil War, the Confederate States of America established a Patent Office which granted 266 patents, about one-third of which concerned implements of war.[15] The Republic of Texas also issued patents prior to joining the Union.[16]

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10 Walker, ***op. cit. supra*** note 8, at 8.

11 Statute of Monopolies, 1623, 21 Jac. 1, c. 3.

12 Frumpkin, ***op. cit. supra*** note 6, at 145.

13 The first patent granted in America was issued by the General Court of Massachusetts in 1641 to Samuel Winslow for a novel method of making salt. For a further discussion of the early history of patents in this country, including colonial and state patents, see 18 J. Pat. Off. Soc'y 35–54 (1936) (Centennial Number).

14 U. S. Const. art. I, § 8, cl. 8.

15 U. S. Dep't of Commerce, The Story of the American Patent System, 1790–1952, at 12 (1953).

16 Federico and Nunn, ***A Fragment*** of ***Texas History,*** 18 J. Pat. Off. Soc'y 407 (1936).

111. NATURE OF PATENT RIGHTS

A United States Patent is a grant from the Government to an inventor of "the right to exclude others from making, using or selling the invention throughout the United States" for a period of seventeen years from the date the patent issues." In return, the inventor must make a complete public disclosure of his invention, thereby enabling other individuals and the public in general to benefit from it, perhaps through stimulation of new ideas from its disclosure and in any event by use of the invention after the patent expires. In other words, the deal between the Government and the patentee is simply this: The Government agrees to give a seventeen year right to exclude others in exchange for the inventor's disclosure of his invention to the public. The patentee must also clearly define the scope of the invention he claims,[18] a necessary requirement to enable the Patent Office to state just what he is getting by his patent and to acquaint others with the exact boundaries of the field to which the "no trespassing" sign applies. To give teeth to the right to exclude, the law permits the patentee to enjoin use of his invention by those not authorized by him to do so[19] and to sue for damages,[20] just as one might sue any trespasser upon one's property. Unfortunately, the patentee often finds his right of exclusion illusory, for it is dependent upon the patent's validity which is subject to attack in court on numerous grounds. Although a patent is, *prima facie*, valid when issued,[21] a very large proportion of patents which are litigated are eventually held to be invalid.[22] Most patents, however, never get into litigation, either because they are not infringed, because the patentee does not attempt to enforce them against infringers, or because settlements are reached with users and would-be users by the grant of licenses or other means.[23]

Contrary to a popular misconception, the protection afforded by a United States patent extends only throughout the United States, its territories and possessions and is not operative in a foreign country. Consequently, an inventor must file a separate patent application in each country in the world where he wants patent protection.

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17 **35 U.S.C.§ 154 (1958).**
18 **35** U.S.C. § **112 (1958).**
19 **35 U.S.C.§ 283 (1958).**
20 **35 U.S.C.§ 284 (1958).**
21 **35 U.S.C.§ 282** (1958).
22 Evans, *Disposition of Patent Cases by the Courts,* **24 J. Pat. Off.** *Soc'y* **19 (1942).**
23 **Stedman,** *Invention and Public Policy,* **12 Law and** Contemp. **Prob. 651 (1947).**

Another prevalent misconception is that a patent grants the inventor an exclusive right to make, use and sell his patented invention. This idea is inaccurate. The patent gives to its owner *the right to exclude others* from making, using, or selling the patented invention, but the mere issuance of a patent carries with it no assurance that the inventor, or anyone else, has a right to practice the invention. The reason that the patent cannot guarantee the right to use the invention is simply that someone else may own a prior patent on some essential part of the invention. To illustrate this point, let's go back to the days before there were any chairs. Jones, while sitting on a somewhat cool and damp spot of ground, is suddenly inspired to build the first chair. Even though Jones then obtains a basic patent covering his chair, it is still possible at some later date for Brown to be granted a patent covering a chair mounted on rockers. However, Brown cannot make his rocking chair until after the expiration of the patent on the first chair unless he comes to some agreement with Jones. As a practical matter, what usually happens in this situation is that Brown sells Jones a license, or trades him a license to make rocking chairs in exchange for a license under Jones' patent. In this way, either one or two manufacturers of the improved chair are set up and the public gets the benefit of both inventions. The patent system must operate in this manner, otherwise Jones' rights would have vanished in thin air as soon as Brown made his improvement on Jones' invention. Thus, we see that all a patent really does is give the patentee the right to exclude, or to try to exclude, others from the enjoyment of the invention during the term of the grant, except under such conditions as the patentee may dictate.

A patentee's right to use his own invention is not only dependent upon the patent rights of others but also on whatever general laws might be applicable.[24] For example, an inventor of a new automobile, simply because he has obtained a patent, would not be entitled to use it in violation of the laws of a state requiring a license. Neither may a patentee, by virtue of his patent, violate the Federal anti-trust laws by conspiring with his competitors to fix prices or by engaging in other practices which are banned by those laws.[25]

IV. WHAT CAN BE PATENTED

Title 35 of the United States Code specifies the general field of subject matter capable of being patented and the conditions under

[24] Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912).
[25] *Ibid.*

which a patent may be obtained. In order to be patentable, an invention must fall in one of six statutory classes. Thus, a patent can be issued on a "process, machine, manufacture, or composition of matter,"[26] an ornamental design[27] and certain kinds of plants.[28]

A. *PROCESS*

In the patent sense, a process is an operation or series of operations performed on matter to effect a desired change in form, proportions, or composition, It may be a method involving successive physical or mechanical steps, such as are employed in the slitting and stretching of sheet metal to make the familiar expanded metal or metal lath used as a support for plaster in building construction.[29] Or the process may be purely chemical, as in Goodyear's vulcanizing of rubber by heating it in the presence of sulphur.[30] Or it may be a combination of physical and chemical steps as in the invention of Bakelite.[31]

To be patentable, a process must be associated with some tangible means for operating it. It is for this reason that methods for performing a mental operation or for doing business or for keeping accounts are not patentable, as contrasted with mechanical means for conducting these operations such as electrical computers and various types of business machines.[32]

B. *MACHINE*

A machine is a combination of mechanical elements acting on matter to produce a desired result. A good example of this statutory class of inventions is Eli Whitney's cotton gin[33] which made possible the great textile industry of later years. If there is any doubt whether or not a thing is a machine, it usually can be termed an article of manufacture, which is the next classification of invention.

C. *MANUFACTURE*

"The term 'manufacture,' as used in the patent law, has a very comprehensive sense, embracing whatever is made by the art of

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[26] 35 U.S.C. § 101 (1958).
[27] 35 U.S.C. § 171 (1958).
[28] 35 U.S.C. § 161 (1958).
[29] See U. S. Patent No. 527,243, Golding, Oct. 9, 1894.
[30] See U. S. Patent No. 3,633, Goodyear, June 15, 1844.
[31] See U. S. Patent No. 942,809, Baekeland, Dec. 7, 1909.
[32] Walker, *op. cit. supra* note 8, at 69.
[33] U. S. Patent granted to Eli Whitney on March 14,1794. Later, Whitney introduced the first modern machine tools and his factory was the first to use mass-production techniques. He used power-driven machine tools to make interchangeable gun parts for the U. S. Government. Wilson, American Science and Invention 83 (1954).

industry of man, not being a machine, a composition of matter, or a design." [34] It could be a building structure, a screw driver, a collar button, or an electric circuit.

D. *COMPOSITION OF MATTER*

Many substances or materials, regardless of the form of the articles made from them, may be the subject of patents. These constitute the fourth category or class of inventions, namely, compositions of matter. A composition of matter is a chemical substance or combination of substances, examples of which are endless.[35] Glass, the great variety of things encompassed by the popular term "plastics," alloys, paints, explosives—all are compositions of matter.

E. *IMPROVEMENTS*

The statute also specifies that patents may be issued on new and useful improvements of the foregoing classes,[36] thereby providing for "Improvement Patents'' as well as "Basic Patents".

F. ATOMIC ENERGY ACT EXCLUSIONS

The above classes of subject matter, taken together, include practically all things made by man and the processes for making them. The Atomic Energy Act of 1954,[37] however, prohibits the patenting of inventions useful solely in the utilization of special nuclear material or atomic energy in a military weapon.[38]

G. *DESIGN PATENTS*

With the advance of industry in this country, it was discovered that a pleasing appearance increased the consumer appeal of almost any item of merchandise. To protect and promote advances in this field, laws were enacted which provide for the granting of a special type of patent to any person who has invented a new, original and ornamental design for an article of manufacture.[39] A design patent protects only the appearance of an article, and not its structure or utilitarian features. The procedure for obtaining a design patent is substantially the same as that relating to other patents. A patent for a design may be issued for a term

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34 **Walker, op. *cit.* supra note 8, at 52.**
35 **See *id.* at 55.**
36 **35 U.S.C. § 101 (1958).**
37 **Act of August 1, 1946, § 1, ch. 724, 68 Stat. 921–960, as amended, 42 U.S.C. §§ 2011–2281 (1958).**
38 **Act** of **August 30, 1954, § 1, ch. 1073, 68 Stat. 943, 42 U.S.C. § 2181 (1958.)**
39 **35 U.S.C. § 171 (1958).**

of 3½, 7 or 14 years, at the applicant's election,[40] with a sliding scale of fees which increase with the lengthening of the term.[41]

H. *PLANT PATENTS*

In order to promote new developments in the agricultural field, legislation was passed in 1930 to create another type of special patent. A plant patent may be granted to anyone who has invented or discovered an asexually reproduced, distinct and new variety of plant, other than a tuberpropagated plant.[42] Asexually propagated plants are those that are reproduced by means other than from seeds, such as by the rooting of cuttings, by layering, budding, grafting, etc. A tuber is a short, thickened section of an underground stem, as in the potato or the Jerusalem artichoke. This exception is made because this group alone, among asexually reproduced plants, is propagated by the same part of the plant that is sold as food. Most of the plants that have been patented are new varieties of fruit trees, bushes, vines and ornamental flowering plants.

V. LIMITATIONS IN FIELD OF PATENTABLE SUBJECT MATTER

Interpretations of the statute by the courts have defined certain limitations in the field of patentable subject matter. Thus, it has been held that abstract ideas and mere mental theories or plans of action cannot be patented.[43] It is the means, or method by which they may be accomplished that is within the law. The courts have also consistently held that the discovery of scientific principles or laws of nature or the inherent properties of matter may not be made the subject of a patent.[44]

VI. UTILITY, NOVELTY AND OTHER CONDITIONS FOR OBTAINING A PATENT

A. *UTILITY*

To be patentable an invention must be both new and useful. A useful device is one intended for a purpose that is neither frivolous nor contrary to the well-being and best interests of society, A new gambling device or a new method for disguising adulteration in a food product would not be considered useful and therefore would

40 35 U.S.C. § 173 (1958).
41 35 U.S.C. § 41 (1958).
42 35 U.S.C. § 161 (1958).
43 Detmold **v.** Reeves, Fed. Cas. No. 3831 (C.C.A. Pa. 1851); Measuregraph Co. v. Grand Rapids Show Case Co., 29 F.2d 263, 275 (8th Cir. 1928).
44 See discussion contained in Walker, ***op. cit. supra*** note 8, § 19.

not be patentable. In a similar case, a court ruled that a new method for treating inferior tobacco leaf to give it the appearance of a better and more expensive leaf is not patentable.[45]

The mere fact that the new device might be used for an improper purpose is not a bar to patentability, so long as the invention has also a legitimate and proper use.[46] Thus, the revolver and machine gun, although often used anti-socially, are patentable because of their value to the army and various law enforcement agencies. Neither would a new game for the purpose of providing recreation and amusement be declared unpatentable merely because it might also be used for gambling.

The term "useful" also includes operativeness, that is, a machine which will not operate to perform the intended purpose would not be called useful. Alleged inventions of perpetual motion machines are commonly refused patents on this ground.

B. *NOVELTY*

Insofar as novelty is concerned, the statute provides that an invention cannot be patented if it was:

(1) Known or used by others in this country before the date of invention by the applicant; or

(2) Patented or described in any printed publication in this or any foreign country before the date of invention or more than one year prior to the filing of the patent application; or

(3) In public use or on sale in this country for more than one year prior to the filing of the application.[47]

The reason for these requirements is clear. If the invention has been known or used in this country before the date of invention by the applicant, if it was previously patented or described in a printed publication, or if it had been an article of commerce or in commercial use for a considerable length of time before the filing of the application, there is a strong presumption that the invention would become a matter of common knowledge without the disclosure in the patent. Therefore, the Government would have little to gain by the granting of the patent.

Thus, if the inventor (or anyone else) describes his invention in a printed publication or uses it publicly, or places it on sale, he must apply for a patent within one year; otherwise his right to a patent will be lost. The patent on the well-known "Mason Jar" was held invalid by the Supreme Court because Mr. Mason waited

45 Rickard v. DuBon, 103 Fed. 868 (2d Cir. 1900).
46 Walker, *op. cit. supra* note 8, at 317–21.
47 35 U.S.C. § 102 (1958).

nearly nine years after his first jars had been sold before filing a patent application.[48]

C. INVENTION

Even if the subject matter sought to be patented is not exactly similar to a prior invention, and involves one or more differences over the most nearly similar thing already known, a patent may still be refused if the differences would be obvious. The subject matter sought to be patented must be sufficiently different from what has been used or described before it may be said to amount to invention over the prior art. Small advances that would be obvious to a person having ordinary skill in the art are not considered inventions capable of being patented.[49] For example, the substitution of one material for another, or changes in size, are ordinarily not patentable.[50]

VII. WHY GET A PATENT?

Ordinarily, when a man makes an invention, there are three courses of action he may take. He may (1) keep his invention secret, (2) make it available to the public by writing or any other suitable means, or (3) file a patent application. This raises the question that many people often ask: "Why bother getting a patent?"

In the event the inventor elects to keep the secret, some other person may come along even at a later date and, having independently made the same invention, may patent it or make it public, and receive full credit. The inventor who keeps his own secret can rarely establish that he thought of the idea first. It is obvious that today when so many thousands of researchers are on the hunt in all fields, secrecy offers poor protection.

The altruistic inventor may publish his invention, and one might think that sufficient. However, another independent inventor may file a patent application within a year of the publication, "swear back of the publication date" under the Rules of Practice of the United States Patent Office[51] and obtain a patent. There is also the possibility that a dishonest person may appropriate the invention and improperly obtain a patent. In either case, the holder of the patent can keep the public, including our friend, the altruistic inventor, from practicing the invention for the period

[48] Consolidated Fruit Jar Co. v. Wright, 94 U.S. 92 (1877).

[49] 35 U.S.C. § 103 (1958).

[50] The courts have handed down innumerable other rules to determine the presence or absence of invention, an excellent discussion of which may be found in Walker, op. *cit. supra* note 8, ch. 3.

[51] U.S. Pat. Off. Rules Prac. 65.

of the patent. Of course, the patent might be proven invalid, but normally this would be a very troublesome and expensive procedure. *The best protection is to have a patent application filed promptly, in the name of the first inventor, before publishing a description of the invention.* Thus, we see that the patent is a form of insurance preventing latecomers from appropriating an invention which the patent owner has previously put into use.

There are additional considerations when the inventbr is a Government employee for, in such an instance, patenting protects the Government against unjustified payment of royalties. Every time such an application is filed a potential lawsuit against the Government may be prevented. Therefore, it is a well established policy of the Department of the Army to apply for patents on inventions made by its employees.

VIII. HOW CAN AN INVENTOR PROTECT HIS INVENTION PRIOR TO PATENTING?

The law recognizes only the first inventor.[52] Since it is not at all unusual for two or more persons to approach the solution of a problem simultaneously and independently make the same invention, it is very important to be able to prove you were first. Here, in brief is the appropriate procedure :

To fix the time the invention was conceived, prepare a clear and complete written description of it, telling how it works and discussing its particular points of novelty or superiority as compared with existing devices or practices. Sketches or drawings should also be included where helpful. Then dated signatures of two or more competent witnesses on the description and the drawings should be obtained. These should be honest and convincing persons that may be called upon later to say under oath that on a particular day the invention was described to them in detail, that they clearly understood everything that was told to them about it, that they recall the written record and that they signed and dated it.

In addition to the description, the records should also include shop notebooks, models, letters, sales slips showing when materials were bought or labor paid for, and any othar corroborating papers. When the device has actually been built and operated, it should be shown to witnesses who will sign a statement that they saw it work satisfactorily on a given date.

Some agencies have adopted a standard, permanently bound laboratory invention notebook form with instructions for its use. Such record books are highly desirable since they provide space for written descriptions, sketches and witnesses' signatures, as well as avoiding possible loss of loose sheets. Army regulations require laboratory notebooks to be kept at each Army Research and Development Laboratory.[53]

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[52] 35 U.S.C. § 102 (1958).
[53] Army Regs. No. 70–12 (March 5,1957).

These precautions do not guarantee that your invention cannot be developed and exploited by someone else, but they may be valuable evidence to the Patent Office, or to the courts, if some other inventor also attempts to patent the same invention at about the same time.

IX. OBTAINING A PATENT

The policy of the Department of the Army with respect to inventions made by military personnel and civilian employees under its jurisdiction is expressed in **AR 825–20.54** These regulations provide that a service inventor who desires to have the Department of the Army prepare and prosecute a patent application covering his invention should send drawings and a written description of the invention to the Chief of the Technical Service to which the invention relates. In case of doubt as to the proper technical service, the invention disclosure should be forwarded to The Judge Advocate General, ATTN : Chief, Patents Division, Department of the Army, Washington **25,** D. C.

Army patent lawyers will receive the invention and investigate its suitability and potential importance to the service. Once it is established that the invention might be used by the Government, trained patent searchers will make a novelty search of prior patents and publications relating to its subject matter. Such a search enables the patent lawyer to say whether, in his opinion, the situation warrants the filing of an application. A novelty search is not an absolute requirement, but since more than three million patents have already been granted, the invention in question may well have been previously patented by another person. And, of course, the cost of filing an application will be saved if the search shows that the invention has already been patented.

When the search indicates that the invention is likely to be patentable, the material of the inventor is transformed into a technical description of the invention called the "specification." If the invention lends itself to illustration, a specially trained draftsman makes drawings and relates them to the specification by numerals appearing both on the drawing and in the specification.

At the end of the specification are a series of numbered paragraphs, called the "claims", which define the precise extent of the inventor's contribution. If these claims are expressed in terms broad enough to embrace what has been done before, they will be rejected by the Patent Office. If by chance a patent is granted with claims too broad, such claims will probably be found invalid in case of any test in court. On the other hand, if the claims are

54 **Army Regs.** No. **825–20 (Oct. 23,1951).**

drawn in too narrow terms, they will give the inventor no real protection against a competitor who can make slight changes and thereby avoid the coverage of the claims. In a sense, these claims are equivalent to the metes and bounds set forth in a deed of land. In drawing claims, the use of the proper language may often make the difference between a valuable patent and a worthless piece of paper.

In addition to the drawings, specification, and claims, a patent application includes an oath signed by the inventor and a petition addressed to The Commissioner of Patents identifying the invention with a title and requesting that a patent be granted.[55] The Patent Office is divided into examining divisions, each staffed with experts handling one or more segments of industrial activity—chemical, electronics, mechanical devices, etc. When an application is filed, it is assigned to the appropriate division for examination, although it may be examined by other divisions too if the invention falls within more than one technical field.

When an examiner begins consideration of an application, he first makes certain that he understands it fully. Then he begins his own patent search to determine if the invention was anticipated by previous inventions.

The examiner may conclude that some of the claims listed by the inventor on the application are allowable, while others are not. If some are not allowable, he notifies the attorney, stating the reasons therefor. The attorney may then amend the application seeking to overcome the examiner's objection. Any amendment must be submitted within six months from the date of the examiner's letter. This process is repeated until a final decision is reached to grant a patent or reject the application.

If the application is finally rejected, provision is made for appeal to a Board of Appeals in the Patent Office[56] and ultimately to the Federal courts.[57]

X. RIGHTS IN INVENTIONS MADE BY SERVICE PERSONNEL AND GOVERNMENT EMPLOYEES

In return for the preparation and prosecution of his patent application, the service inventor is required to give to the Government a nonexclusive, royalty-free license under his invention.[58]

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55 **35 U.S.C. § 111 (1958).**

56 **36 U.S.C. § 134 (1958).**

57 **If the Board of Appeals upholds the examiner, the inventor may further appeal to the U. S. Court of Customs and Patent Appeals under 35 U.S.C. § 141 (1958), or, if he prefers, may bring an original suit in the U. S. District Court for the District of Columbia seeking to compel The Commissioner of Patents to issue the patent under the provisions of 35 U.S.C. § 145 (1958).**

58 **35 U.S.C. § 266 (1958).**

There is no other charge for this service. However, if an inventor was either a member of the military service or a Government employee at the time the invention was made, the Government may already own or have an interest in his invention as a result of the circumstances of his duties. This is true whether he obtains a patent at Government expense or through the efforts of a privately retained patent attorney.

The rights of the Government and the inventor in inventions made by Government employees are determined in accordance with Executive Orders 10096 and 10930.69 The Department of the Army makes the Determination of Rights for its employees, subject to approval, in most cases, by The commissioner of Patents. Broadly speaking, determinations are made in accordance with the following rules :

If the employee's duties or work projects—	*Then—*
1. Were directly related to the invention,	**1.** The Government obtains complete title.
2. Were not directly related to the invention, but the employee used Government time, facilities, materials, etc.,	**2.** The employee keeps title, subject to a royalty-free license in the Government.
3. Were not directly related to the invention and there was no Government contribution,	**3.** The employee keeps all rights.

In order that there will be no uncertainty as to the legal rights in a given invention, it is important to have this matter definitely settled. The best way to do this is through the regular procedure for determination of rights which is described in the Army regulation on the subject.[60] A questionnaire eliciting information for determination of rights will be forwarded to an individual after it has been determined that the invention disclosure may be patentable or upon receipt of information that the individual wishes to retain a private patent attorney.

XI. INFRINGEMENT

Infringement of a patent consists in the unauthorized making, using or selling of a patented invention within the territory of the United States during the term of the patent. If a patent is infringed, the patentee may sue for relief in the appropriate Federal

59 Exec. Order No. 10096 (Jan. 23, 1950); Exec. Order No. 10930 (March 24, 1961).
60 Army Regs. No. 825-20 (Oct. 23, 1951).

court. He may ask the court for an injunction to prevent continuation of the infringement,[61] and he may also ask for an award of damages[62] because of the infringement. However, in the event an invention covered by a patent is "used or manufactured by or for the United States," no suit lies against the manufacturer, but the patentee's sole remedy is a suit in the Court of Claims against the United States.[63] This is to prevent patent owners from interfering with production by the Government or under Government contracts. In an infringement suit, the defendant may generally raise the question of validity of the patent which is then decided by the court. The defendant may also assert that what he is doing does not constitute infringement. Infringement is decided primarily by the language of the claims of the patent and, if what the defendant is making does not fall within the language of any of the claims of the patent, he does not infringe, Thus, if a claim were to read:

> A fountain pen comprising a hollow handle, a writing-fluid receptacle integral therewith, a ball-shaped writing point fixedly associated with one end of the handle opposite the receptacle, and an automatic fluid-control tube leading from the receptacle to the ball-shaped writing point,

no infringement could possibly result unless the fountain pen had a ball-shaped point. It is fundamental patent gospel that each physical structure described in the patent claim actually exist in the article to be manufactured; otherwise there is no infringement.

Accordingly, infringement is determined by the precise language of the patent claims and not by a comparison of articles made by the patentee and a possible infringer. If one is able to make the patented device or to practice the invention with the omission of any element of the claim, he avoids infringement. This leads to "designing around" or the development of equivalent inventions which avoid the claims of the patent. Some people cite this as a fringe benefit of the patent system, that it stimulates additional inventions in the effort to design around existing patents. The Patent Office has no jurisdiction over questions relating to infringement of patents. In examining applications for patent no determination is made as to whether the invention sought to be patented infringes any prior patent. As previously pointed out, an improvement invention may be patentable, even though it might infringe a prior unexpired patent for the invention improved upon,

XII. PATENT MARKING

A patentee who makes or sells patented articles, or a person who does so under him, is required to mark the articles with the word

[61] 35 U.S.C. § 283 (1958).
[62] 35 U.S.C. § 284 (1958).
[63] 28 U.S.C. § 1498 (1958).

"Patent" and the number of the patent. The penalty for failure to mark is that the patentee may not recover damages from an infringer unless the infringer was duly notified of the infringement and continued to infringe after the notice.[64]

The marking of an article as patented when it is not in fact patented is against the law and subjects the offender to a penalty.[65]

Some persons mark articles sold with the terms "Patent Applied For" or "Patent Pending." Neither of these phrases has any legal effect, but serves to notify competitors that if the patent is granted they will have to cease their use of the invention. It is not likely that producers will make use of an invention involving a costly outlay of tools and machinery, if the operation must cease as soon as the patent is issued. To this extent, the inventor may find the terms useful. False use of these phrases or their equivalents is prohibited.[66]

XIII. COPYRIGHTS AND TRADEMARKS

Some persons occasionally confuse patents, copyrights, and trademarks. Although there may be some resemblance in the rights of these three kinds of intangible property, they are completely different and serve different purposes.

A. *COPYRIGHTS*

A copyright protects the works of an author against copying. The scope of the copyright law includes all kinds of writings, musical compositions, works of art, and similar subject matter. The copyright simply prevents others from copying the creation of the author and goes only to the form of expression rather than to the subject matter of the writing. For example, a description of a machine could be copyrighted as a writing, but this would only prevent others from copying the description and would not prevent them from writing a description of their own or from making and using the machine. There is no provision in the copyright law, as there is in the patent law, for scrutiny of applications to determine questions of originality or authorship.

A statutory copyright for twenty-eight years, with a right to renew for another like term, is acquired simply by publication of the work with a notice on the title page or page immediately following.[67] In the case of published literary works, this notice consists of the word "Copyright," the abbreviation "Copr," or the

64 35 U.S.C. § 287 (1958).
65 35 U.S.C. § 292 (1958).
66 *Ibid.*
67 17 U.S.C. § 10 (1958).

symbol "©," followed by the name of the copyright owner and the year date of publication.[68] On maps, photographs and works of art, a special form of notice is permissible. This may consist of the symbol "©," accompanied by the initials, monogram, mark, or symbol of the copyright owner, if the owner's name appears upon some accessible portion of the work.[69] However, a suit for copyright infringement cannot be brought until the work is properly registered with the Register of Copyrights in the Library of Congress.[70]

For another to practice, without permission, any of the exclusive legal rights granted to the copyright proprietor, such as copying, reproducing, translating, publishing, etc. is an infringement of the copyright and is punishable at law by award of damages to the copyright proprietor.[71] A recent amendment of the applicable laws now permits suit against the Government for copyright infringement.[72] Prior to this time, several employees of the Government had been held personally liable for their infringements, even though such infringements were done in the course of their official duties.[73]

B. *TRADEMARKS*

A trademark is a distinctive word, emblem, symbol, or device, or any combination of these, used to indicate or identify the manufacturer or distributor of a particular product. To be valid it must be used on goods actually sold in commerce or on display associated with the goods or on tags and labels fixed to the goods. Rights in a trademark are acquired only by use and the use must ordinarily continue if the rights so acquired are to be preserved.

The primary function of a trademark is to indicate origin. However, trademarks also serve to guarantee the quality of goods bearing the mark and, through advertising, serve to create and maintain a demand for the product. In the hands of a skillful advertiser a trademark becomes an assurance to the buyer that he is getting what he wants. A trademark is a valuable piece of property. In many cases a company's greatest asset may be the trademark identifying its product. Good will built through effective advertising and longstanding use of a trademark would soon be lost through imitation and downright piracy if it were not protected by the courts. Trademark rights will prevent others from using the same name on the same goods, but do not prevent

68 17 U.S.C. § 19 (1958).
69 *Ibid.*
70 17 U.S.C. § 13 (1958).
71 17 U.S.C. § 101 (1958).
72 28 U.S.C. §§ 1498 (b) & (c) (1958).
73 Towle v. Ross, 32 F. Supp. 125 (D.C. Ore 1940).

others from making the same goods without using the trademark. Trademarks which are used in interstate or foreign commerce may be registered in the Patent Office. The Lanham Act of 1946[74] recodified previous trademark acts and added certain substantive rights.

C. *SUPPLEMENTARY NATURE OF PROPRIETARY RIGHTS*

Patents and the other forms of protection for industrial property rights often supplement each other. Thus, a single product, such as a radio, might have novel structural features which could be protected by one or more patents. It might be sold under a trade name, such as "Saturn," to aid in its identification, and such name, if not previously used on such goods, could be registered as a trademark by the manufacturer. In addition, the advertising copy, instruction manual, or other written material relating to the radio could be copyrighted to prevent any substantial portion thereof from being copied by competitors.

XIV. CONCLUSION

This rather brief summary of the main aspects of patent law is not intended to cover the entire field. As in most areas of law, beyond the basic principles lie problems of considerable difficulty. For example, the problem of enumerating a truly workable definition of "invention" has plagued the courts for over a century. The proper relation between patent law and antitrust law is a problem currently in a considerable state of flux in the courts. The intricacies of the problems relating to patents and other proprietary rights in connection with defense procurement are, perhaps, all too familiar to many military personnel. This summary will have served its purpose if it provides sufficient understanding of the basic aspects of patent law to kindle an interest in patents.

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74 Act *of* **July 5, 1946,** tit. **I, § 1,** ch. **540, 60** Stat. **427, 15 U.S.C. § 1051 (1958).**

BY ORDER OF THE SECRETARY OF THE ARMY:

G. H. DECKER,
General, United States Army,
Chief of Staff.

Official:

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