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PREFACE

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MILITARY LAW REVIEW

BARBED WIRE COMMAND: THE LEGAL NATURE OF THE COMMAND RESPONSIBILITIES OF THE SENIOR PRISONER IN A PRISONER OF WAR CAMP"

BY LIEUTENANT COLONEL DONALD L. MANES, JR.**

I. INTRODUCTION

"Woe is me!
To none else can they lay it,
This guilt, but to me?"***

Two thousand seven hundred and thirty Americans died as prisoners of war of the Communist forces during the Korean Conflict. This astonishing death toll was thirty-eight per cent of the total captured.[1] Was this just another unavoidable tragedy of war, or is there a lesson to be learned? To answer this requires a search—a careful look—for the causes of these deaths. First to provoke suspicion are enemy atrocities. Though it is true that miserable hardship prevailed and true also that many prisoners died victims of savage atrocities in Korea, the experiences related by the survivors raise some doubt that atrocities and murders alone, even substantially, account for this death rate. For example, three-fourths of the repatriated prisoners from North Korea reported that they personnally were not individually "mistreated," and ninety-four per cent experienced no incidents considered by

*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Eighth Advanced Class. 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 nor any other governmental agency.

**Office of The Judge Advocate General, U.S. Army, Washington 25, D.C.; member of the Colorado State Bar; graduate of the University of Denver Law School.

***Sophocles, Antigone, Act IV *(Circa* 400 B. C.)

[1]DOD Pam 1-16, The U.S. Fighting Man's Code 82 (1959) [hereinafter cited DOD Pam 1-16]: Prugh, *The Code of Conduct for the Armed Forces,* 56 Colum. L. Rev. 678, 687 (1956).

them to be war crimes or atrocities.: It would be quixotic to conceive that all evidence of an atrocious massacre of almost half of the prisoners could be concealed from three-fourths of the surviving half. The Communist captors carefully spread rumors of atrocities for the purpose of instilling fear for their own political purposes.[3] But, manifestly, fear in itself is not fatal.[4]

Those political designs of the Communists did not go fully unrealized as was painfully evident throughout the 1953 repatriation process of United Nations prisoners of war at Panmunjon when dismal reflection of disloyalty were cast generally upon the repatriate~. But, you well might ask: "Were these defections of such a scale so as to give rise to an association between the loyalty of the prisoners in general and the sobering casualty rate?'' Apparently not, for a special committee of the Secretary of Defense mas later to report that only 192 of the 4,428 repatriated prisoners (1 in 23) were found to be chargeable with serious misconduct. To demonstrate that the scale of disaffections had been distorted, the committee compared this actionable misconduct rate with the one in fifteen of Americans who, according to Federal Bureau of Investigation reports, have records of alleged misconduct of

[2]Segal, *Factors Related to the Collaboration and Resistance Behavior of U.S. Army Prisoners of* War *in Korea*, Tech. Rep. No. 33, Human Resources Research Office 84 (G. W. Univ. 1956). During the early stages of the conflict, prior to the overt entry of Red Chinese troops into Korea, North Korean treatment of prisoners could be characterized as sadistic and uncivilized brutality. Hundreds perished and many were deliberately slain during savagely enforced "death marches" to the rear toward the Yalu. But after the Chinese Reds took control of the operations in October 1950, deliberate restraint was exercised in the treatment of prisoners, and vicious brutality was generally replaced with a policy of political indoctrination implemented with the psychological techniques as contrasted to physical abuse. Even under the Chinese, however, the prisoners were on meager diet and lived under miserable circumstances. DA Pam. 30-101, Communist Interrogation, Indoctrination and Exploitation of Prisoners of War 15 May 56, pp. 16-20.

[3]DOD Pam. 1-16, 34.

'Though when fear contributes to the prisoner of war disease, sometimes called "Barbed Wire Syndrome," it may indirectly threaten the health, even the life, of the prisoner. "Barbed Wire Syndrome" is discussed in Ch IV, infra.

[5]*Cowardice in Korea*, Time, 2 Nov. 1953, p. 31; *How U.S. Prisoners Broke Under Red "Brainwashing,"* Look, 2 June 1953, pp. 80–83; Fay, *It's Easy to Bluff Americans*, Colliers, 16 May 1953, p. 20; Note, *Misconduct in the Prison Camp*, 56 Colum. L. Rev. 709 (1956); *Germ Warfare: The Lie That Won*, Fortune, Nov. 1953, p. 48.

sufficient gravity to have occasioned fingerprinting.[6] Was there then a distinction in the experiences among the several services which would provide a clue? The Army was the only service to bring alleged offenders to trial by court-martial, which, on its face, seems to be a source of some satisfaction to the other services. But any indulgence in such satisfaction would fail to appreciate the Army's singularly dominant burden of combat in Korea. Illustrative of the comparative roles of the various services, and directly related to the problem at hand, is the simple mathematical fact that, of the 4,428 prisoners repatriated at Panmunjon, only five per cent were Air Force, four per cent were Marine Corps, and one per cent were Navy, but ninety per cent were Army.[7] Manifestly, it would be idle to attempt to make any valid service comparisons based upon such unrepresentative samples of the other services. Were there national differences that might suggest a solution? Much has been said and written of the commendable manner in which the Turks acquitted themselves in the North Korean prisoner of war camps, although these commentators are prone to overlook the fact that one member of a particularly objectionable group, generally recognized as the very core of prisoner collaborationist propaganda activities, was a Turk.[8] But, and here the critic may find some light, quite apart from the political aspects, the Korean experience established the Turks capacity for physical survivorship to be distinctly superior to that of their United Nations allies.[9] Whether the alleged disloyalties, to list some of the sundry theories advanced, were precipitated by decaying morals, defective education, military unpreparedness, or none of these, are intrinsically debatable issues unnecessary to decide or even discuss here. The foregoing rudimentary discussion, nevertheless, presages engagement of an allied but more materialistic sphere — human survival. In that sphere, the survivorship of the Turkish prisoners in the midst of wholesale allied fatalities is patently demonstrable of weakness on the part of the other prisoners. As previously mentioned, of 7,190 United Nations prisoners captured by the Communist forces, 2,730 died during their captivity, which in most cases was less than two years. But, strikingly, of the 229 Turks taken captive, not a single one died during

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[6] **A Report by the Secretary of Defense's Advisory Committee on Prisoners of War, July 1955 [hereinafter cited as Prisoner Report] at vi.**

[7] **Prugh,** *The Code of Conduct for the Armed Forces,* **56 Colum. L.** Rev. **687 (1956) ; Kinkead,** In **Every War But** One **39 (1959).**

[8] **See Kinkead,** *op. cit. supra* **note 7, at 166.**

[9] **DOD Pam. 1–16,** *op. cit. supra* **note 1, at 74.**

captivity, although they experienced exactly the same treatment and further notwithstanding the fact that more than half mere wounded on capture.[10] If the Turks had experienced the same death rate as their allies, 87 Turks would have perished. What spared the lives of these statistical 87 Turks? There is evidence now that it may simply have been a question of prisoner organization patterned to challenge and contain the hostile environment which enveloped them. The senior Turk took care to inform the captors that he was in charge of the other Turks — that if he were to be removed the next senior mould assume charge and so on down to the last two privates and, between them, the senior private would be in charge.[11] When a Turk became ill, he was nursed back to health by the group and supplied with extra food and clothing sacrificed by the group; when hospitalized, two Turks mere detailed by the senior Turk to go along and remain with the patient as chambermaid and champion until he recovered. They shared clothing and food as need required and attended to hygenic policing, all under supervision of the senior Turk. The sanitation and other orders of the senior were rigidly enforced by the entire group.[12] You might validly ask: "But were not these same basic health precautions, social decencies and military fundamentals followed by the other allies?" The aforementioned committee appointed by the Secretary of Defense was later to report of conditions among American prisoners of war in Korea in the following language :

> By design and because some officers refused to assume leadership responsibility, organization in some of the POW camps deteriorated to an every-man-for-himself situation. Some of the camps became indescribably filthy. The men scuffled for their food. Hoarders grabbed all the tobacco. Morale decayed to the vanishing point. Each man mistrusted the next. Bullies persecuted the weak and sick. Filth bred disease and contagion swept the camp. So men died from lack of leadership and discipline.[13]

Violating perhaps already the previous resolution to avoid loyalty evaluations, it is nevertheless worthy here to mention incidentally that the Turks also scored a better record for resistance to political indoctrination.[14] Constance in political allegiance would seem, therefore, to be an automatic benefit incidentally associated with a proper and purposefully directed struggle to survive.

Serious and exhaustive studies of disloyalty among American repatriates in Korea were undertaken by individuals as well as by

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[10] *Ibid.* See also Kinkead, *op. cit. supra* note **7,** at 159.

[11] Kinkead, *op. cit. supra* note **7,** at 166.

[12] ***Ibid.***

[13] Prisoner Report, **12.**

[14] Kinkead, *op. cit. supra* note 7, at 165.

generously endowed and well qualified institutional groups in order to probe into the behavior of prisoners of war and to formulate enlightened conclusions. Attention was given to the question at Columbia University and an extensive research project engaged the problem at George Washington University.[15] Probably the most significant of all, however, was the appointment by Secretary of Defense Wilson of the aforementioned Defense Advisory Committee on Prisoners of War, whose mission it was to study the problem for possible past errors and to formulate future preventatives. One of the products of that committee was the promulgation by the President of the now widely known "Code of Conduct."[16] Article IV of that Code provides that a prisoner of war if "senior will take command.'' "If not," the Code continues, "I will obey the lawful orders of those appointed over me and will back them in every way." Examination closely into the legal significance of this provision of the Code provides the mission of this writing.

The aforementioned Columbia University report, with ample company, concerns itself primarily with the political collaboration and loyalty issues.[17] Yet, it would be a mistake to base future training along purely patriotic lines. Everyone considers himself a patriot. But, when placed upon the dramatic balance of human survival, it would be a rare man, indeed, who would turn a deaf ear to preguidance in matters involving his earthly departure. The effort here is to direct focus upon the person who is senior in a group of prisoners of war, and to examine critically the legal problems associated with him. That personage has been thrice afflicted, for, in addition to the misery of capture, he suffered from the doubtfulness of his peculiar role as military senior, aggravated by a lack of preparation to assume so precipitously the responsibilities of that nebulous task. Heretofore, little note has been given to his very existence.

Although the Korean action has most recently precipitated critical analyses of prisoner of war conduct, it is not generally known to us all that similar events occurred during previous conflicts, though perhaps not to the same degree. In World War 11,

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[15]Note, ***Misconduct in the Prison Camp***, 56 Colum. L. Rev. 709 (1956); Segal, ***Factors Related to the Collaboration and Resistance Behavior of U.S. Army Prisoners of War in Korea,*** Tech. Rep. No. 33, Human Resources Research Office (G. W. Univ. 1956).

[16]See Prisoner Report, ***op. cit. supra*** note 6, at 19, and Executive Order 10631, 17 Aug. 1965. The entire Code of Conduct is set forth in an Appendix hereto.

[17]Examples are Prisoner Report, ***ibid.;*** Segal, ***supra*** note 15, and cited materials, ***supra*** note 6.

for example, there were several American prisoners of war of the Japanese whose conduct brought about trials upon their repatriation.[18] During the Mexican War the Mexican captors of United States prisoners of war were so effective with their propaganda that many took up arms on the side of the Mexicans. A battalion of the Mexican Army was made up principally of United States deserters.[19] There was soul-searching after the Civil War regarding alleged misconduct of prisoners.[20] Even the American Revolution did not go untainted.[21] It follows that disciplinary standards among prisoners of war are not problems unique to the Korean Conflict. Nor is this problem recognized in the United States

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[18]United States *ex rel* Hirshbeig v. Cooke, 336 U.S. 210 (1949); United States v. Provoo, 215 F.2d 531 (2d Cir. 1954). Cases involving trials of American civilians for misconduct while in the hands of the enemy were Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied* 336 U.S. 918 (1948); D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950). All the civilians were tried for propaganda broadcasting. Both Hirshberg and Provoo were military prisoners charged with mistreatment of fellow prisoners of war, though Provoo was also charged with propaganda broadcasts from Tokyo.

[19]Fooks, Prisoners of War 84 (1924). Fooks indicates that it was the Mexican utilization of the psychological weapons of wine, senoritas and song that were the primary contributing causes to these defections.

[20]It has been reported that over 3,000 Union soldiers enlisted in the Southern cause after capture. About 5,450 Confederates changed allegience to the North. A company of Confederate prisioners manned a frontier outpost in order to relieve Union troops for the front. These Confederates were dubbed "reconstructed Rebs." See Prisoner Report, *op. cit. supra* note 6, at 51.

[21]In Republica v. M'Carty, 2 U.S. (2 Dall.) 86 (1781) the defendant was convicted of treason for entering the service of the British after he had been captured. His defense of coercion was rejected as not being based on fear of "immediate death." This rule remained the legal test until after World War II when the courts began to apply to treason the standard test of coercion, i.e., immediate death or *serious bodily harm*. D'Aquino v. United States, 192 F.2d 338, 357 (9th Cir. 1961); Gillars v. United States, 182 F.2d 962, 976 (D.C. Cir. 1950). Defendants D'Aquino and Gillars were known as "Tokyo Rose" and "Axis Sally," respectively.

alone. Even the Russians have recently found occasion to legislate on the subject.[22]

The preceding discussion answers the "why" of prisoner of war self-organization, and next deserving of consideration is the "what"—what is it, and what are its problems. The prisoner of war, particularly the leader among prisoners, is an individual subject to mandates from diverse directions—the operation of the law of the captor, international law and the law of his own country. When does each come into play? Does the play produce conflicts? Are conflicts reconcilable? If not, what *must* the American soldier do, and what *may* he do? In his elective areas, how may the history of former experiences serve him? The lawful extent of authority of a senior prisoner seems not to have been defined. This, then, is an effort to do so.

11. BASIS FOR RANK OR PRECEDENCE AMONG PRISONERS

Is it true, as was asserted by counsel in one World War II case, that there is no rank among prisoners of war?[23] Does not an officer on capture "deliver up his sword" and with it his right to command?[24] Is not a prisoner of war in a status comparable to

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[22] Apparently impressed by the American experiences in the North Korean prisoner of war camps, Soviet Russia on 25 Dec. 1958 enacted as part of its military law a statute similar to Art. 105, Uniform Code of Military Justice. The provisions of the Russian statute are:

"*Sec. 29. Crimes of servicemen taken prisoners* of *war.*

a. The voluntary participation by a serviceman, held as a prisoner of war by the enemy, in works of war significance or on any project which he knows may result in prejudice to the Soviet Union or its allies, if it lacks the elements of treason against one's country, shall be punished for from *three* to *ten years.*

b. Violence to fellow prisoners of war or cruel treatment of them, if committed by a prisoner in the position of a superior, shall be punished by confinement from *three* to *ten years.*

c. The commission by a serviceman who is a prisoner of war of acts intended to harm other prisoners of war, for mercenary motives or in order to secure benevolent treatment for himself by the enemy, shall be punished by confinement for from *one* to *three years.*" *Law on Criminal Responsibility for Military Crimes,* Sec. 29, Dec. 25, 1958, *Vedomosti,* 1959, Item No. 10, translated in 7, Nos. 2, 3, Highlights of Current Legislation and Activities in Mid-Europe, Library of Congress Mid-European Law Project, 66 (1959).

[23] CM 374314, *Floyd,* 18 CMR 362, 366 (1955), *petition denied* 6 USCMA 817, 19 CMR 413 (1955). The Board of Review rejected this theory of counsel in affirming the conviction.

[24] Davis, in his early 20th Century treatise, in referring to practices after capture, states: "Officers, *who are no longer permitted to exercise command,* are separated from the enlisted men." Davis, *Prisoners of War,* 7 Int'l L. Rev. 521, 536 (1913). (Underscoring supplied.)

arrest and thus powerless to perform any military duty, including command?[25] Not eschewing categorical response to such level questions, these queries are here answered with a simple "No," as the following discourse will attempt to explain.

The Uniform Code of Military Justice and the *Manual for Courts-Martial, 1951,* obviously contemplate authority of one prisoner of war over another by virtue of rank. Article 105b, Uniform Code of Military Justice, makes punishable any prisoner of war who maltreats another over whom he occupies *a position* of *authority.* Paragraph 184b, *Manual for Courts-Martial, 1951,* in discussing Article 105b, states:

> The source of the authority is not material. It may arise *from the military rank of the accused,* through designation by the captor authorities, or from voluntary election or selection by other prisoners for their self-government. (Underscoring supplied.)

It should be observed that Article 105b does not limit "position of authority" to officers and, accordingly, would apply equally to enlisted "positions of authority'' as well.

As mentioned previously, Article IV of the Code of Conduct provides that the senior prisoner will take command, and no distinction is made as to whether the senior is an officer or enlisted man, But what other precedents exist for such a rule requiring assumption of command? In France, a decree of 1891 forbade French officer prisoners from separating themselves from their men—on the theory that it was an officer's responsibility to guide and care

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"Para. 8, Army Regulations 600–20, 15 Feb. 1957, provides: "An officer in arrest . . . . cannot exercise military command of any kind or perform any duty involving the exercise of command." In the unreported general court-martial trial of Major Ambrose H. Nugent held at Fort Sill, Okla., in January and February 1955, it was urged by the *prosecution* that "upon capture an officer delivers up his sword and with it his right to command." The prosecution there faced a difficult task of overcoming defense evidence that Major Nugent was ordered by Lt Col Liles, a fellow prisoner of war, to do the disloyal acts charged. Nugent was acquitted.

for his subordinate after capture.[26] An American Marine Corps officer, Colonel James P. S. Devereux, prisoner of the Japanese in China during World War 11, applied similar reasoning in determining that it would be improper for him to escape and leave his men.[27] The conflict between Colonel Devereux's philosophy and Article III of the Code of Conduct, which provides for a prisoner of war making every effort to escape, is discussed *infra*. Various early writers on the subject of prisoners of war, by indirection, appear to recognize, though not circumscribe, the responsibility of senior prisoners of war toward subordinates. It had been suggested that captivity does not alter the reasons for saluting customs.[28] Several writers have cited the rule that an enlisted man may give his parole only upon consent of an officer, thus recognizing some nature of command in a captive officer.[29] In 1870, during the

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[25] Spaight, War Rights on Land 290 (1911). This author also cites similar restrictions once placed upon Russian officers by the Czar. This, together with like restrictions upon British and Austrian officers, was probably precedent for the former American policy that U.S. officers could give their parole only upon consent of their "superior." The Code of Conduct, Art. 111, now prohibits all American prisoners of War from giving their parole under any circumstances. [There is a minor conflict here with an Army directive permitting parole for a short period to do acts "materially contributing to the benefit of himself or his fellow prisoners," but only upon approval of the senior prisoner. FM 27-10 at 73 (1956).] In this regard, see also Flory, Prisoners of War 119 (1942), citing criticism of the parole system on the grounds that it eliminates officer leadership from the camp. The surrender agreement between Generals Grant and Lee at Appomattox on 19 April 1866 provided for parole of all Confederate officers to be accepted by each officer in giving his solemn oath that he would never again provide military service to the Confederacy. Those officers who were in command of troops and who were then prisoners of war gave their oaths on behalf of the men under their command. 1 and 2 Winthrop, Military Law and Precedents 794 (Reprint 2d. Ed., 1920). But here a different philosophy pervaded. The capitulation of Lee was tantamount to a conclusion of the conflict. Parole in this instance was merely an expedient pending technical formalization of termination to hostilities.

"Devereux, The Story of Wake Island 211 (1947). Colonel Devereux points out, however, that a Navy officer, senior to him, did attempt an escape but was captured within 24, hours implying that partially, at least, his decision was based on practicalities.

[28] Fooks, Prisoners of War 206 (1924). The Geneva Prisoners of War Convention of 1949 requires saluting by prisoners of war of senior captor officers and the camp commander regardless of seniority. Art. 18 of the Convention authorizes a Prisoner of war to wear a "badge of rank." Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. & O.I.A. 3316, 1949 [1956], T.I.A.S. No. 3364 [hereinafter cited GPW (1949)].

[29] Hall, International Law 432 (7th Ed., 1917). See also the comment *re* Lee's surrender, *supra* note 26.

Franco-German War, the German captors punished insubordination by French prisoners of war even among the French prisoners themselves.[30] It is clear, then, that a distinguishable seniority status was recognized among prisoners of war prior to the Hague Regulations of 1907 and the Geneva Conventions of 1929 and 1949. During World War I, German prisoners of war habitually organized themselves under senior commanders, including organized staffs and subordinate groups.[31] German prisoners in World War II were similarly organized.[32] The Hague Regulations of 1907 made no reference to the rank of prisoners of war except with regard to pay. The Geneva Prisoner of War Convention of 1949, however, contains numerous references to privileges and responsibilities of rank. It provides for the right to wear insignia of rank, recognition by the detaining power of promotions, treatment with due regard to rank, prohibition against requiring labor by officers or work other than supervisory work by noncommissioned officers, right of the senior officer prisoner to be the "prisoners' representative," the rights and duties of "prisoners) representative," and a prohibition against punishment entailing deprivation of "prerogatives of rank.[33] Obviously, therefore, the parties to the convention attached to rank among prisoners of war something more than mere passing significance. Organization among prisoners of war is recognized as customary and captors generally have displayed a recognition of such a custom in the past. When faced with an enemy made up of political zealots, race or religious prejudiced individuals or sadists, however, the reasonableness of expecting such a captor to recognize "gentlemen's rules" may be somewhat visionary. It might better serve the purpose of such an enemy if, as was asserted by the defense in the *Floyd* case, there is no rank among prisoners of war. In that case, an Army Board of Review had this to say with regard to that argument :

> We cannot and do not concur with the defense that an American officer may be deprived of his office by any act of an enemy power while he is detained by such power as a prisoner of war. It is true that he can be deprived of the means and opportunities to exercise his command or authority and from taking appropriate disciplinary action in instances

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[30] Spaight, War Rights on Land 286 (1911). The Allies gave disciplinary powers to Italian officer prisoners in North Africa during World War 11. See Lewis and Mewha, History of Prisoner of War Utilization by the U.S. Army, 1776-1945, 186 (1955) [DOD Pam. 20-213 (June 1955)].

[31] Lunden, *Captivity Psychoses Among Prisoners of War*, 39 J. Crim. L. C. and P. S. 721, 724 (1949).

[32] Mason, *German Prisoners of War in the U.S.*, 39 Am. J. Int'l L. 198, 207 (1945); Rex v. Werner, 2 So. Afr. L. Rep. 829, 833 (1947); CM 248793, *Beyer*, 50 BR 21 (1944).

[33] Arts. 18. 43. 44, 49, 79, 80, *81*, 88, 98, GPW (1949).

where it may be called for. In fact, the detaining power may, as was apparently done here by the Communist captors, subject the officer to indignities, humiliations and degradations, in violation of all the principles and precepts of international law relating to the treatment to be accorded prisoners of war, and ordinarily adhered to by all civilized nations whether parties *to* prisoner of war treaties and conventions or not. But we know of no principle or precept in international law, or of any treaty or convention provision, which provides that a commissioned officer of one belligerent power may be or is deprived of his office by reason of capture by the forces of another enemy belligerent power. . . . Colonel Keith, whether the senior American officer present in the particular camp or not . . . had the responsibility to take such actions as were available to him (and if the senior officer present to exercise such command as he was able) to assist his fellow prisoners, to help maintain their morale, and to counsel, advise and, where necessary, order them to conduct themselves in keeping with the standards of conduct traditional to American servicemen."

Probably of equal concern, however, is a sizeable segment of American legal thought which would make the rules of warfare applicable to "aggressors" only, and would permit a defender to pick and choose from among those rules.[35] But, apprehension that a future enemy will not accord recognition to such "gentlemen's rules" should not deter careful attention to the administration of prisoner organization, for bitter experience has shown such organization is the key to life for the prisoner, *particularly* when the captor rejects the rules.

From the foregoing discussion, it is concluded that an officer does not unqualifiedly "give up his sword" upon capture, nor does he thereby become relieved of all command responsibilities. Authoritative direction and representation of the other prisoners is

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"CM 374314, *Floyd,* **18** CMR **362, 366,** *petition denied* **6** USCMA **817, 19** CMR **413 (1955).** Irrational white-race hatred and resentment of Caucasians for past slights and prejudices such as that exhibited by great numbers of the Japanese military during World War II are also immeasurables of the type which cannot be ignored in expecting "gentlemen's rules" to be followed. See Brines, Until They **Eat** Stones **33 (1944),** for a discussion of Japanese gendarmarie brutality in the Philippines and Singapore. See also *Re* Yamashita, **327 U.S. 1 (1946),** for a summary of the violations of the laws of war by the Japanese in the Philippines.

[35]See *Report on Study of Legal Problems of the United Nations,* **1952** Proceedings **of** Am. Soc. Int'l Law **216 (1952).** But see Lauterpacht, *The Limits* of *the Operation of the Law of War, 30* Brit. Yb. Int'l L. **206, 242–43 (1953),** in which Professor Lauterpacht concludes that such rejection **of** the rules cannot be based upon legal principles and criticizes a Committee Report to the Am. Soc. of Int'l Law, which concludes that the UN action in Korea was *sui generis* and that its forces in Korea were not bound by the laws of war except as to those which UN so chose. For a more detailed criticism of that report, see Baxter, *The Role* of *Law in Modern War,* **1953** Proceedings, Am. Soc. Int'l L. **90 (1953).** However, for an apparent adoption of the philosophy of the committee report, see Wright, *The Outlawry* of *War and the Law* of *War.* **47** Am. J. Int'l L. **365, 374 (1953).**

contemplated by at least three positive sources: the Geneva Conventions, the Uniform Code of Military Justice, and the Code of Conduct. All three of these sources impose command status on the senior regardless of whether he is an officer or enlisted man. In addition to such positive sources of law, historical customs also demonstrate recognition of authoritative status in senior prisoners.

III. IDENTIFICATION OF THE "SENIOR" PRISONER OF WAR

Article IV of the Code of Conduct requires the senior to take command. How is the senior to be identified, and how is he distinguished from the "prisoners' representative" referred to in the Geneva Conventions? The original implementing material promulgated by the Defense Department with the Code of Conduct would limit leadership qualifications to "line" officers and noncommissioned officers.[36] The **1949** Geneva Prisoners of War Convention relating to eligibility for prisoners' representative is not so limited and makes rank alone the critical factor in determining which officer has the treaty right to the function as prisoners' representative.[37] The Department of Defense, of course, could not unilaterally alter the terms of a treaty, But, by limiting the leadership responsibilities to "line" officers, the Defense Department could create an organizational problem not contemplated, for such a limitation could well invite a disparity between the Code responsible leader and the treaty specified leader. There are no prospects of command functions falling upon medical or religious personnel because doctors and chaplains, though "detained," are expressly denied status as "prisoners of war" by the **1949** Geneva Convention~.~~

The most recent Department of Defense implementation of the Code of Conduct appears to abandon the "line" officer terminology,

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[36] Prisoner Report, *op. cit. supra* note **6,** at 21.

[37] Art. 79, GPW (1949). In the event no officer is present. the prisoners' representative is determined by vote of the enlisted men.

[38] Art. **33,** GPW (1949). It is interesting to note that during the American Civil War neither doctors nor chaplains were even held as prisoners of war but were immediately released upon capture. **1** and 2 Winthrop, Military Law and Precedents 789 (Reprint, **2d** Ed., 1920). The senior medical officer has a treaty obligation to assume command of all "detained" medical personnel, regardless of nationality, and is responsible **for** their professional activities to the captor. Art. **28,** Geneva Convention for the Amelioration **of** the Condition **of** the Wounded and Sick in Armed Forces in the Field **of** Aug. 12, 1949 [hereinafter cited GWS (1949)]. 6 U.S.T. & O.I.A. 3114, 1949 (1957) : T.I.A.S. **No.** 3362.

but in turn requires the senior officer or enlisted man "eligible to command'' to assume command "according to rank (or precedence.)"[39] The qualifications of persons "eligible to command'' vary within the various services. In the Army, difficulty which might have been contemplated within the commissioned ranks because of the "line officer" terminology is largely eliminated by the change to the "eligible to command'' wording. Army Regulations prohibit an officer of one branch from assuming command of a unit of another branch without specific Presidential designation.[40] But, even if any group of prisoners of war could be considered to be a "unit," it manifestly would not be an "infantry" unit or "artillery" unit or one attributable to any particular branch of the service. The Army prohibits the assumption of command by Womens Army Corps personnel over other than Womens Army Corps personnel.[41] Army medical personnel are prohibited by regulation from assuming command of other than medical units, but, as stated previously, medical officers and chaplains assume special "detained" status on capture different from "prisoners of war."[42] Therefore, among Army prisoners of war, if a commissioned officer is present, he assumes command regardless of his branch so long as he is not a doctor, chaplain or female. But what if the senior is not commissioned or if he is of another service?

This "eligible to command" language creates little difficulty in so far as the Air Force, Navy and Marine Corps are concerned. In the Air Force, command devolves upon him with the highest rank except that a flying unit must be commanded by a rated pilot.[43] A prisoner of war camp patently cannot be a "flying unit," therefore, only a simple question of chronological seniority is involved. In the Navy, special command requirements are prescribed for various types of commands, none of which involve a prisoner of war camp situation. But Naval Regulations provide

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[39] DOD Pam. 1–16, *op. cit. supra* note 1, at 124.

[40] Par. 5*e*, AR 600-20, 15 Feb. 1957.

[41] Par. 5*g*, AR 600-20, 15 Feb. 1967.

[42] Par. 5*d*, *AR* 600-20, 15 Feb. 1957, providing that medical officers, dental officers, or veterinary officers will not assume command of other than units of the Medical Service. Art. 33, GPW (1949), provides that "members of the medical personnel and chaplains . . . shall not be considered as prisoners of war." Art. 28, GWS (1949), also makes similar provisions. Art. 32, GPW (1949), also makes special provisions for the utilization of the talents of prisoners of war with medical, nurse, or medical orderly training who were not "attached to the medical service of their armed forces."

[43] Par. 32, AFR 35–54, 1956.

that *in circumstances not otherwise provided for* in the Regulations the senior naval officer "at the scene" shall assume command.[44] As a prisoner of war camp is a circumstance "not otherwise provided for," again only simple chronological seniority is involved. In the Marine Corps, any commissioned warrant or noncommissioned officers, "unrestricted in the performance of duty," is eligible to command. The officers "restricted in the performance of duty" are those detailed to supply duties, but even such officers may command as provided in Chapter 13 of United States Naval Regulations. It would only be sensible to conclude that capture would *ipso facto* terminate any limited supply detail; but, even assuming that it does not, Chapter 13, Naval Regulations, contain the "circumstance not otherwise provided for" language, *supra,* and as thus activated for Marine Corps officers as well as naval officers, a simple chronological determination of seniority by rank again results.

But a matter of some concern is the Army enlisted structure in which a pay grade is divided into two separate categories — the noncommissioned status and the specialist status. All noncommissioned officers down through Corporal in the Army hold precedence of rank over all specialist grades regardless of the specialist pay grade.[46] Therefore, a Corporal of the Army has precedence and rank over a Master Specialist, even though the latter is five pay grades higher than a Corporal. Although this is fairly well understood within the Army, it must be recognized that it is unlikely that any prisoner of war camp would be made up entirely of Army personnel. This could precipitate real uncertainty in a camp where the three candidates for seniority are, for instance, an Army Master Specialist, an Air Force Staff Sergeant (E–5), and an Army Corporal (E–4). The Air Force Staff Sergeant could certainly object to command by his subordinate, the Army Corporal. The Army Master Specialist could validly object to command by the Air Force Staff Sergeant on the grounds that the same regulation which subordinates him to the Army Corporal elsewhere therein establishes his Master Specialist status as comparable to that of an Air Force Master Sergeant.[47] The Army Corporal could properly object to command by the Army Master Specialist by pointing to the Army Regulation which establishes him as senior in rank to all Army specialists. It is extremely

[44] NAV REG 1332 (1948).
[45] Par. 1004, Marine Corps Manual (1949).
[46] Par. 3b, AR 600–15, 14 Apr. 1955.
[47] Par. 4, AR 600–15, 11 Apr. 1955.

doubtful that the Army contemplates that an Air Force Airman First Class radio technician would take command precedence over an Army Master Specialist radio technician. The **1949** Geneva Prisoners of War Convention provides that, upon the outbreak of hostilities, the parties to the conflict shall communicate to one another the titles and ranks of all combatants.[48] In order to comply with this treaty requirement, some careful thought to this problem by the Department of Defense will be required in order to eliminate this uncertainty. Unless the senior is easily identified by the prisoners, the requirement that the senior take command is a cry to the winds.

The status of the senior prisoner of war is set forth in two basic documents: the Code of Conduct and the Geneva Conventions of **1949.** In some respects, they are not in harmony. Those duties set forth in the Code of Conduct are simply stated as "taking command." Those set forth in the **1949** Geneva Prisoner of War Convention are incidental only and attach to him in his capacity as the "prisoner representative." For the purpose of clarity in defining rights and duties, the source of the right or duty will be reflected by the qualifying word, "treaty," meaning **1949** Geneva Prisoner of War Convention, and "Code," meaning Code of Conduct.

If he is the senior *commissioned* officer, he has an absolute treaty right to perform the function of "prisoner representative.'' The Convention does not confer this right if the senior in the camp is not commissioned but, in such cases, provides for election through secret ballot by the prisoners every six months.[49] In camps containing enlisted personnel only, it is conceivable within the ambit of the **1949** Geneva Prisoner of War Convention, then, that a prisoner other than the senior might become the prisoners' representative.[50] The prisoners' representative has some leadership functions which are compatible only with that of a camp prisoner leader or "commander." Would there, then, be a code duty upon

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[48] Art. 43, GPW (1949).

[49] Art. 79, GPW (1949).

[50] A frequent occurrence in prisoner of war camps in North Korea. Corporal Claude J. Batchelor was prisoners' representative at Camp Number 5 at Pyoktong, North Korea, from about mid-July 1951 to September 1953. There were many prisoners in Camp 5 senior to Batchelor, many of whom had grievances against him. His conduct eventually resulted in his trial by court-martial at Fort Sam Houston, Texas, after repatriation. Batchelor was convicted of several offenses, essentially of holding unlawful intercourse with the enemy relative to the Communist plot to rule the world and of acting as an informer for the Red Chinese. He was sentenced to life by the court, but the sentence was later reduced to 10 years. United States v. Batchelor, 7 USCMA 354, 22 CMR 144 (1956).

each of the other prisoners to vote for the senior? Clearly, if the senior has a code duty to "take command," and if deprivation to him of the status of "prisoners' representative" would, in turn, deprive him **of** any command function which he might otherwise have if elected, there must logically be a corresponding code duty on the part of his fellow prisoners to exercise their vote in his favor. The Geneva Convention provides one further qualification upon the selection of a "prisoners' representative." It provides the detaining power with a veto right to disapprove of any ***elected*** representative. However, where the detaining power refuses to approve, that fact, together with reasons therefor, must be supplied to the protecting power.[51] But the detaining power's authority to refuse to approve is limited to ***elected*** representatives. No veto power exists where a commissioned officer is a captive in that camp. The commissioned senior is always entitled to act as prisoners' representative regardless of the approval or disapproval of the detaining power.

The Convention places no requirement upon the detaining power to distribute commissioned officers throughout various camps. In fact, it is quite common to separate officers from enlisted personnel.[52] On the other hand, paradoxically, with regard to "labor

[51] Art. 79, GPW (1949).

[52] During World War II it was the practice of the United States to separate captured German officers from the enlisted men and to detain them in separate camps. Officers were provided with enlisted orderlies, however. Quarters in size and quality varied as to rank. Mason, *German Prisoners of War in the United States*, 39 Am. J. Int'l L. 198, 207 (1945). As to similar practice prior to World War I, see Davis, *Prisoners of War*, 7 Int'l L. Rev. 536 (1913). The Red Chinese and North Korean captors separated United Nations officer prisoners from enlisted men during the Korean conflict. Segal, *Initial Psychiatric Findings of Recently Repatriated P.O.W.*, 111 Ani. J. Psych. 358, 362 (1954). During the Revolutionary War, British officers were not confined with their men, but were generally paroled and lived so well in the local taverns at crown expense that their plush living became a colonial scandal. Flory, Prisoners of War 52 (1542). Similar cries of the people of Ohio were raised in Congress during the Civil War. The Ohio Legislature adopted a joint resolution expressing "outrage" at a local officer's camp and by the appearance on the streets of Columbus of captured rebel officers in uniform. Some effort was made by Ohioans to convince Congress that luxuriously maintained captive officers were being permitted to bring their colored slaves into captivity with them to act as personal servants, but proof of this apparently failed or was abandoned as Congress appears to have dropped the matter. Cong. Globe, 37th Cong., 2d Sess. 1831 (25 Apr. 1862), and 1862 (28 Apr. 1862). For a contrary philosophy, see Lewis and Mewha, *op. cit. supra* note 30, at 186, in which it is observed that Italian prisoners in North Africa were not only supervised by Italian officer prisoners, but the captive officers were given powers to administer command disciplinary punishment under Articles of War 104. Such delegation would presently violate Art. 96, GPW (1949).

camps," Article 79 states that the detaining power "shall" station in such labor camps officer prisoners "for the purpose of carrying out the camp administration duties for which the prisoners of war are responsible." In *labor camps,* however, the commissioned officer is not entitled as a matter of treaty right to be recognized *ipso facto* as the prisoners' representative, although he "may" be elected by secret written ballot.[53] In such a case, the detaining power would then also have the treaty authority to reject him for that function even though elected.

It is conceivable that the senior prisoner might not be an American at all. If he is a commissioned member of an allied belligerent, he would be entitled to automatic designation *ex officio* as prisoners' representative. The Code of Conduct and its implementing directives do not seem to give cognizance to this eventuality. The tenor of those directives, however, appears clearly to contemplate a distinct American organization. Thus, the senior American would still be under an obligation to assume separate authority over his fellow Americans, and, conversely, his American subordinates would be duty bound to recognize this authority. But the senior American, in paying due respect to the Geneva Convention, would be bound to defer to the prisoners' representative in those areas in which the Convention affixes responsibility upon the prisoners' representative, so long as such deference does not derogate a Code duty. No such derogation can be perceived if the prisoners' representative properly executes his duties as provided in the Convention. Formulation and dissemination of a Defense Department policy applicable in the cases of the senior prisoner being a member of an allied power would be a valuable addition to existing Defense Department policies and directives.

It appears, then, if the senior in camp is an American, that the only instances wherein a person other than the senior prisoner might properly be the prisoners' representative (assuming full compliance with the Geneva Convention by the detaining power and full compliance with the Code of Conduct by the prisoners) would be in labor camps or in camps with no officer prisoners detained. But, even then, in either instance, if the senior has been elected as required by the Code, that result would be reached only by exercise of veto power by the detaining power in accordance with the provisions of Article 79 of the Convention. In such

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[53] Art. 79, GPW (1949). A labor camp is a physically separated detachment of a parent prisoner of war camp. It is within the over-all sphere of responsibility of the prisoners' representative of the parent camp. See Arts. 56 and 81, GPW (1949).

circumstances, it seems that Article IV of the Code of Conduct would nevertheless require the prisoner who finally is accepted as the prisoners' representative to become the agent of the senior and to the latter's bidding. Unless otherwise stated herein, therefore, a single identity is presumed as the senior prisoner and the prisoners' representative.

It is worthwhile to clarify the concept of the general nature of this command within the fence. It is doubtful that a "command" in the normal structural sense of military organization is contemplated. It would be ridiculous to conclude that all the regulations pertinent to command would be applicable — for instance, preparation of morning reports, maintenance of unit fund accounts, keeping of service records and posting of nonjudicial punishment records. The Judge Advocate General of the Army has ruled that an officer prisoner of war does not have authority to impose a grade reduction upon a subordinate in the camp.[54] It is concluded, therefor, that the organization contemplated is one based upon seniority between individuals, much the same as would be contemplated at an emergency or where an officer observes service subordinates engaging in an affray and he steps in, as it is his duty to do, to quell the disturbance.[55] But something more than sporadic meeting of problems as they arise is clearly contemplated by the Code of Conduct and its implementing materials. The organization called for is *sui generis* and contemplates authoritative direction, by delegation or otherwise, of such vital prisoner of war activities as health, security, education, athletics, information,

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"In holding unlawful a purported reduction to private of a prisoner of war by his senior officer who was also a prisoner of the Japanese during World War II, The Judge Advocate General of the Army held that it was not intended that this power be exercised during such a commander's internment as a prisoner of war. SPJGA 1945/3761, 18 Jan. 3946; 5 Bul. JAG 58 (1946).

[55]Art. 7c, UCMJ, provides "all officers, warrant officers, petty officers and noncommissioned officers shall have authority to quell all quarrels, frays, and disorders among persons subject to this code and to apprehend persons subject to this code who take part in the same." Art. 94, UCMJ, provides that "any person subject to this code . . . who fails to do his utmost to prevent and suppress an offense of mutiny . . . shall be punished by death or such other punishment as a court-martial may direct." Navy Regulations provide for the senior officer "at the scene" to take command. NAV REG 1332 (1548). But most pertinent here is a recent Army directive which seems clearly to contemplate the senior's command capacity as one of the "emergency" type as contrasted to the functional organizational type. That regulation, published as Change No. 3, dated 4 Jan. 1960, to par. 13, AR 600–20, 15 Feb. 1557, provides. "In the event of an emergency, the senior officer, noncommissioned officer. *specialists* or private, among troops at the scene of an emergency will exercise control or command of military personnel present. These provisions are also applicable to troops separated from their parent unit under battlefield conditions *or in prisoner of war status."* (Latter underscoring supplied)

supplies, mail, counter-intelligence, escape, resistance to unlawful solicitations by the captor, and discipline.[56]

In summary, the senior for the purposes of command under the Code of Conduct is that individual who is senior among those "eligible to command." Because of curious command eligibility requirements when members of various services are involved, some centralized Department of Defense clarifying action is desirable. The simplest, and probably the most sensible, clarifying technique would be to abandon the "eligibility to command" phraseology and replace it with a strict grade and date of rank criteria. This would also eliminate any problem of identification by the captor of the senior as the prisoners' representative. The "prisoners' representative" differs from the "POW commander" only in title and source of responsibility. The Code of Conduct and the Geneva Convention, if both are fully operative, forge the responsibilities of both into a single individual.

IV. RESPONSIBILITIES OF THE SENIOR PRISONER OF WAR

The responsibilities of a senior prisoner of war may be divided roughly into four categories. First are those placed upon him by treaty in the role of "prisoners' representative." The other three are encompassed within, although not necessarily arising from, the Code of Conduct. They are prisoner organization, welfare, and escape.

The responsibilities as "prisoners' representative," as set forth in the 1949 Geneva Prisoner of War Convention, are, *seriatim,* the right and duty to remain in contact with all prisoners, including those in employ of private parties (Art, **57)**; receive and relay periodic reports to the protecting power (Art. 78); safeguard spiritual and intellectual well-being of the prisoners together with responsibility to control prisoner organization (Art. 80); freedom from other duties, right to appoint assistants, freedom to inspect all prisoners and areas of the camp, freedom to be consulted by all other prisoners, postal rights to communicate with the detaining power, protecting power, International Red Cross and mixed medical commissions, right to brief successors (Art. 81); right to secure property and receive perishable parcels for prisoners undergoing punishment or while hospitalized (Art. 98); the right to be notified three weeks in advance of any judicial proceedings against

[56] Suggestions as to how these measures may be accomplished are contained in the materials implementing the Code of Conduct in DOD Pam. 1–16.

any prisoner in the camp (Art. 104), and immediate notice of the results (Art. 107); and the right and responsibility to sign for relief supplies (Art. 125).

As prisoners' representative, he is a spokesman for the prisoners, not a functionary of the captor. He is not to be used by the captor as an enforcement of its regulations except to the extent that the function of prisoners' representative is involved, and, perhaps, to the extent that the senior might be willing to undertake such obligations as a beneficial adjunct to his Code of Conduct responsibilities. Article 80 prohibits the captor from holding him responsible for the misconduct of the other prisoners.

The second sphere of his required activities is that of prisoner organization. Although Article 80 of the 1949 Geneva Prisoner of War Convention provides that "where the prisoners decide to organize amongst themselves a system of mutual assistance, this organization will be within the province of the prisoners' representative," the Code of Conduct allows no election to decide, but requires such organization. The discussion in Chapter III demonstrates how the "prisoners' representative" and the senior prisoner must, by application of the Code of Conduct, be the same individual. He has, then, both the Code duty and the treaty responsibility for prisoner organization. But such organization is a natural development without resort to treaty or Code. Germans have demonstrated themselves to be particularly adept at such organization[57]—so adept that they at times have carried it to excess with dire consequences.[58] Professor Lunden states, in referring to German prisoners of war of the Allies during World War 11: "With few exceptions the internal affairs of the war prisons are managed by the captured officers and men within the enclosures. In most installations, the captor guards deal only with the superior or ranking enemy officer."[59] This same author describes the pro-

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[57]Dillon, *Development of Law Relative to Treatment of Prisoners of War*, 5 Miami L. Q. 40, 57 (1950); Tollefson, *Enemy Prisoners of War*, 32 Iowa L. Rev. 51, 52 (1947).

[58]Three courts-martial for murder were conducted in the United States based on the killing of German prisoners by their fellows who believed them to be guilty of disloyalty to the fatherland. CM 248893, *Beyer*, 50 BR 21 (1944); CM 259228, *Gauss*, 50 BR 211 (1944); CM 260781, *Yenschner*, 50 BR 237 (1944). The British also tried a group of German prisoners for the murder of a fellow prisoner in which the defense was based upon disaffection to the German cause. Rex v. Werner, 2 So. Afr. L. Rep. 828 (1947). See also Prugh, *The POW Battleground*, 60 Dick. L. Rev. 123, 129 (1956), referring to kangaroo courts set up by German prisoners of war, and the American reaction.

[59]See Lunden, *supra* note 31, at 724. Lunden was a U.S. Army prison officer in England, France and Germany during World War II, but more recently a professor of sociology at the University of Iowa.

found effect of prisoner leadership on newly captured personnel. Regardless of how hopeless the military situation might have been, capture always came as a surprise, a strange psychological experience, best described as shock. The prisoners are often docile and move blindly and silently as if in a stupor. After the initial shock wears off, there is a tendency for them to blame their superiors for the poor strategy which allowed their capture. The next step is the development of a morbid "fear of the unknown." Still later, personal and group antagonisms develop, Although Professor Lunden refers to the "fear of the unknown" in his published writing of 1949, this term was repeatedly to come from the lips of scores of repatriates of the Korean conflict some three years later. At this stage, Lunden wrote, a rare type of leadership is required. "The mentality of the captive depends upon the quality of their leadership. If officers are separated from the enlisted men, the situation is much more serious. An alert officer or enlisted man may be able to orient his comrades to their new situation and maintain a degree of confidence or morale. This requires a rare type of leadership found only in highly integrated platoons or companies of soldiers who have had much combat experience together." He further states, "Prisoner of war camps rarely have sufficient food, water or medical services as war pressures give first choice of these vital services to our own forces." He also mentions that the forced marches of newly captured men to the rear are commonly referred to as "Death Marches."[60] This is discussed here to point up the universality of this critical combat phenomenon and the importance of careful early organization — first responsibility of senior prisoners. Further, it demonstrates that a failure to exercise such leadership is devastating to the well-being of the prisoners. Later herein it will be shown that failure to promptly exercise this leadership is, because of the profound physical and mental consequences of such failure, a most serious offense against both the positive and natural law for which those derelict can be expected to be held strictly accountable by their government.[61]

This projects into the third category of the senior's responsibilities — the welfare of the prisoners. Lunden refers to the lack of leadership which leads to what he refers to as "Barbed-wire Madness."[62] It is interesting to compare the conclusions of other observers in other conflicts whose observations and conclusions

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[60] *Id.* at 725–27.

[61] The applicable legal sanction and the moral law or ***jus naturale*** as it **here** applies are discussed subsequently in this chapter.

[62] See Lunden, *supra* note **31,** at **726–30.**

parallel those of Lunden. These commentators observed different nationals at different parts of the world during different conflicts.

It appears that the first examination into the phenomona was by Dr. A. L. Vischer, a Swiss physician, who had occasion to observe prisoners of both Germany and the Allies during World War I.[62a] His brief but surprisingly thorough thesis in 1919 described accurately the symptoms separately reported by other observers later in World War II and the Korean conflict. He referred to the ailment as "Barbed Wire Disease" but disclaimed authorship of the term, ascribing it to an unknown French source labeling it as "psychose du fil de fer."[62b] He reported that the term "Barbed Wire Disease" was used in a 1917 agreement at the Hague between Great Britain and Germany.[62c] He comments on the discovery of a severe form of "neurasthenia" among Austrian prisoners which was reported in a Swiss medical journal in 1917, and a "traumatic neurosis" reported in a Munich medical journal by a German physician at approximately the same time.[62d] He even points out a passage from the autobiography of the American explorer, Henry Stanley, which, in describing experiences as a prisoner of war of the Union in Chicago during the Civil War, contains a hint of "Barbed Wire Disease."[62e] The prologue to the English translation of Dr. Vischer's essay by the British physician, S. A. Kinnier Wilson, listed numerous reports by British doctors and prisoners of war which lend support to Dr. Vischer's findings. Of prime import among his findings is the observation that "cruel brutal treatment does not produce the disease, neither does good treatment prevent it.[62f] Compare this with the widespread belief that the prisoners in North Korea were "brainwashed." Is it not more logical to conclude that they were merely suffering, as in any other war, from the effects of "Barbed Wire Disease"? The symptoms of the "brainwashed" appear also to be the symptoms of prisoners of war of prior time and place. Dr. Vischer noted that "the most favorable conditions are certainly those of the labor camps where the men are not so thickly aggregated and are engaged in agriculture." He attributed their well-being chiefly to the fact that

[62a] Vischer, Barbed Wire Disease; A Psychological Study of POW (1919)

[62b] *Id.* at 52.

[62c] He ascribes the following language to the treaty: "Prisoners of war who have been at least 18 months in captivity and who are suffering from "barbed wire disease" shall for the future be recognized as suitable for internment in Switzerland." *Id.* at 53.

[62d] *Id.* at 23, 24.

[62e] *Id.* at 61. Stanley, My Life (1911).

[62f] Vischer, *supra* note 62a at 57.

they are engaged in productive work.[62g] In the prologue by Dr. Wilson, a former British prisoner of the Germans was quoted as saying: "Looking back on my prison life I am convinced that I was kept mentally fresh by the constant planning to effect my escape." Another British officer was reported to have written that "a holder of the King's Commission must carry out the spirit in which the Commission is given, even unto death, in whatever circumstances that path may be. . . . It is the duty of each able bodied officer and man to carry out the offensive spirit in every way possible.[62h]

Several British doctors and psychiatrists had occasion to write of the prisoners' mental disturbances during World War II, and, although each was an independent observer of British prisoners, the symptoms were surprisingly similar. Each affixed his own title to the malady ranging from "POW Syndrome" to "Caisson Disease."[63] An American physician, Dr. Philip Bloesma, who was a prisoner of the Japanese in Eangkok from 1942 to 1945, became familiar with the mental process of prisoners of war from a general observation of about 15,000 prisoners of varied nationalities. He described the same symptoms and affixed the title "Fence Complex Syndrome" to the mental condition. He estimated that 99 per cent of the prisoners suffered from it to some degree.[64] Based upon observations by American medical officers who were engaged in the medical processing of prisoner repatriates from North Korea, similar symptoms were assigned the coined term of "give-up-itis."[65] Major Clarence L. Anderson, an American medical officer who was himself a captive of the North Koreans and Chinese during the Korean conflict, stated that "in the first five months of captivity we lost 1,500 Americans. Certainly it was lack of discipline. . . . If things had been done right, the men in a squad or a platoon would have got up at a specified time in the morning at an order from their senior member, washed, and lined

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[62g] *Id.* at 56.

[62h] *Id.* at 18.

[63] "*Acute Gefangenitis,*" Cochrane, *Notes on Psychology of P.O.W.,* 1946 Royal Army Med. Corps J. 282 (23 Feb. 1946); *"Caisson Disease,"* Newman, *P.O.W. After Repatriation,* 1944 Brit. Med. J. 8 (June 1944); *"Rip Van Winkle Attitude,"* Whiles, *Neurosis Among Repatriated P.O.W.,* 1945 Brit. Med. J. 297 (17 Nov. 1945); *"POW Syndrome,"* Strassman, *A Prisoner of War Syndrome: Apathy as a Reaction to Severe Stress,* 112 Am. J. Psych. 998 (1956); *"Barbed Wire Disease,"* Vischer, Barbed Wire Disease; A Psychological Study of POW (1919).

[64] See summary of Dr. Bloesma's testimony in CM 377832, *Batchelor,* 19 CMR 452, 491 (1954), which sets forth Dr. Bloesma's analysis in detail.

[65] DOD Pam. 1–16, 69.

up for chow."[66] He would further prescribe lice control by detail and compulsory organized exercise, sports and games. These activities then are the welfare responsibilities of the senior prisoner.

What are the symptoms of this many labelled malady; this "Fence Complex Syndrome," "Barbed-Wire Disease," or "Give-up-itis"?

First, it should be distinguished from the malady known as "prison psychosis," often referred to as "stir craze." It is distinctly different from prison psychosis which is based in part on a guilt complex.[67] The criminal prisoner knows the probable duration of his confinement, but one of the most difficult mental problems for the prisoner of war is that of adjusting himself to the dark uncertainty of his future. "Fear of the unknown" is constantly pressing upon him deterring his rational behavior.[68] This fear, coupled with oppressive hardship, starvation diet, low rung in the captor's society, unhealthy living conditions, physical discomfort, filth, disease, worry about his family, lack of pursuit, loneliness and idleness, all combine to develop a feeling of inadequacy, lack of self-respect and ultimate despair. He becomes a "self-centered animal" and loses orientation with his surroundings. He experiences "brain fag," an inability to concentrate, a loss of memory, the past fades and the prisoner is often more tired in the morning than he is at night, and he is suspicious of everyone.[69] Finally, he undergoes a steady retreat into himself, refusing to speak or eat, and eventually sits in a corner, head in his arms, until he dies.[70] The malady and its side effects are often fatal and apparently it is one of the deadliest diseases the prisoner can contract. Dr. Vischer concluded that "perhaps the power of the different influences varies individually. For one it may be the coercion, for another the uncertainty and for a third the herded existence that causes the mischief. But all three cooperate in producing the peculiar psychoneurotic symptom complex of the prisoner of war."[70a] A preventative is selfless activity. But, once

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[66] Kinkead, In Every War But One 149, 156–57 (1959).

[67] Lunden, *supra* note 31, at 722.

[68] See DOD Pam. 1–16 describing "fear of the unknown" in POW camps of Korea. See Lunden describing the "fear of the unknown" among German prisoners of the Allies during World War 11. Lunden, *supra* note 31, at 726.

[69] Lunden, *supra* note 31, at 731; HumRRO Report *op. cit. supra* note 2, at 89; Strassman, *supra* note 62, at 999. Both Admiral Byrd and Dr. Alain Bombard, experienced scientific explorers, found idleness and boredom brought about insane fancies and loss of self-control. This is compared with the Korean prisoners of war who "were in their own life raft," Solomon, *Sensory Deprivation,* 114 Am. J. of Psych. 357, 359 (1958).

[70] Strassman, *supra* note 63, at 998.

[70a] Vischer, *supra* note 63, at 80.

incurred, only care and attention by his fellows can save him. Activity can only be imposed by leadership within a military type organization. Even civilians who have never known military organization find desperate need of organization once they become prisoners.[71] Basically, the need is to combat self-pity and self-centeredness. Psychologically, this is done by mutual contribution to a common welfare.[72] The very essence of military organization is selflessness, and, therefore, organization's role as both preventative and treatment is evident. Accordingly, a death in a prisoner of war camp due to this affliction can be reasoned to be a reflection upon the camp prisoner of war organization and particularly upon its leadership. One cannot help but wonder had each prisoner during the Korean conflict been aware of these experiences of former prisoners as outlined by Lunden and others if not another story would have been written of those camps and if many of those who perished would not still be alive and happy today. Every potential senior prisoner of war should be aware of the disease and its symptoms. He should further be aware that upon repatriation he may lawfully be required to account for his stewardship toward his fellows, including those responsibilities which go along with rank. Special responsibility attaches to him who is senior as a legal consequence of a fair and liberal interpretation of both the Geneva Conventions and the Code of Conduct, as will be later discussed. He can, therefore, expect to be held *in delicto* accountable

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[71] For an example of this, see Keith, Three Came Home **104** (1947), in which Mrs. Keith, an American wife of a British colonial official imprisoned in Borneo by the Japanese during World War II, describes how she was impressed by the strength provided the prisoners of war by a military type organization of Roman Catholic nuns. The Mother Superior of the nuns did an excellent job as prisoners' representative for the women's camp. Exemplifying the similarity **of** the problems with those faced by our soldiers, Mrs. Keith states in describing conditions in another camp: "Some people ate in corners stuffing themselves secretly while others starved. There was one thing I learned then: no meal on earth was worth losing self respect for." Prisoners in Santo Tomas in Manila were organized by civilians under the camp leadership of a former Manila insurance manager. See Brines. Until They Eat Stones **132 (1944).**

[72] Newman, *The **POW** Mentality,* **1944** Brit. Med. J. 8 (Jan. **1944).** Doctor Newman, himself a prisoner of the Germans throughout most of World War 11, also describes the course of the disease in stages quite similar to those described by Lunden. It appears then that Germans and British responded alike to their respective captivities. He found that mental balance could be maintained only by a consuming dedication to one or all **of** three projects: work, welfare or escape. Captain Deucquer reported that an entire group of 600 prisoners of war imprisoned in Italy avoided the disease altogether. At that prison camp, group organization and solidarity distinguished it from the others. Deucquer, *Experience* of *A Medical Officer in Italy and Germany,* **1945** Royal Army Med. Corps J. **282 (23** Feb. **1946).**

upon repatriation for the proper execution of those responsibilities.[73]

This brings about discussion of the fourth and last listed category of the senior's responsibilities—those with regard to the formulation of escape plans—the only phase of his responsibilities which derives no support from the Geneva Conventions. Such activities are secretive in nature and obviously must always be of a covert nature.[74] First, let us examine the senior's own personal duty to escape. Article III of the Code of Conduct clearly places upon every prisoner of war a duty to escape. But how does this compare with his responsibility to care for his subordinates? In 1891 the Government of France prohibited French officers from accepting parole, admonishing them that it was their duty to remain with and care for their men.[75] That decree was not in contemplation of escape, but was intended only as a prohibition against officers accepting parole. However, this is not a significant difference, but merely a distinction, for the French decree set forth as its purpose the responsibility of the officer to remain with and care for his men. Marine Colonel James P. S. Devereux, who was captured at the surrender to the Japanese of Wake Island in World War II and who was thereafter interned at a prisoner of war camp in China, in his book describing his captivity, relates:

> I did not consider myself justified in making an attempt to escape since I was one of the senior Marine officers. I considered it my duty to stay with my men as long as I could to maintain discipline and morale, to represent them to the Japanese authorities and to keep as many of them as I could alive until the war was over.[76]

But if the senior should escape, the senior of those remaining would immediately become obliged to undertake the same responsibilities and fill the vacated shoes, and so, like the Turks, on down to the last two privates. Colonel Devereux's doctrine, if extended to its full extent, could be equated to the ancient tradition of the

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[73]Negligent or deliberate failure to act is contemplated here. Any deliberate maltreatment of a prisoner by a senior is punishable under Article 105, UCMJ, and it is immaterial whether the position of authority is derived from his own notion or is conferred by the enemy. The legal basis of this responsibility and the legal sanctions applicable upon a failure to carry out this responsibility are discussed later in this chapter.

[74]As a practical matter, it would be somewhat utopian to expect that all the other functions could always be accompiished with full knowledge and cooperation of the captor. A substantial degree of organization in all areas can be expected to be carried out covertly.

[75]Spaight, War Rights on Land 250 (1911). But in the United States War Department General Order No. 207 (July 1863) it was provided that it was the duty of all prisoners of war to escape.

[76]Devereux, The Story of Wake Island 211 (1947).

sea which contemplates that the captain is the last to leave the sinking ship. When considered in this light, is Article III (requiring escape) of the Code of Conduct inconsistent with Article IV (requiring exercise of command)? It seems that the senior prisoner is free to adopt either theory within his own discretion. Does his special status as senior require something more of him than other prisoners in helping others to escape? Article III of the Code of Conduct requires of all prisoners the rendering of aid to others in effectuating escape. His special status as camp leader surely requires of him the exercise of that leadership in execution of the prescribed duty of all prisoners to escape as pronounced in Article 111. But how far may he go in directing participation in such escapes? May he, for instance, provide for the slaying of another prisoner who threatens to disclose an escape plan or who is acting as an informer for the enemy? May he order a guard killed to make possible an escape. May he order any particular prisoners to escape? May he order them *not* to escape? This is not an ethereal hypothesis. In the unreported general court-martial trial of Major Ambrose H. Nugent, tried at Fort Sill, Oklahoma, in 1955, one of the charges was that he wrongfully ordered subordinate prisoners not to attempt an escape. In that case, a witness testified that he, together with Major Nugent, was tied with ropes to other prisoners being marched to the rear by enemy captors when one prisoner suggested that they try to escape at dusk by bolting through the rice paddies. The witness claimed (denied in testimony by Nugent) that Major Nugent directed them not to try and threatened to call out to the enemy armed guard following them if such an attempt was made. There was evidence in the record upon which it could be concluded that such an attempt would have been foolhardy and that the prisoners all would have been gunned down in their tracks as the rice paddy afforded no concealment for such a flight. Would such an order be a lawful order? Would it have been an offense against the United States for Major Nugent to issue such an order? As Nugent was acquitted by the court-martial of this and all other charges against him, no law was there defined. On the surface, it would appear that ordering a fellow prisoner not to escape would be an order prohibiting an act which the subordinate has a duty to do under the Code of Conduct. It seems obvious that, no other factors involved, such an order would be unlawful. But if the order was founded upon proper concern for other prisoners for which the senior is responsible, the question cannot be answered so categorically. Two conflicting duties are thus involved: the

duty to assist in escape, and the duty to care for the well-being of the group. In other phases of law, to theorize, where there are conflicting rights and duties, one generally cannot exercise a right which directly infringes upon the right of another.[76a] But, in some instances, he may exercise that right if the infringement is only indirectly consequential." To apply such a rule, for instance, if his only grounds for prohibiting an escape was a fear of unlawful reprisals by the captor, such injury might only be indirectly consequential, and thus he could not lawfully prohibit the escape attempt. But if the escape itself involved a direct infliction of injury *ex natura rei* to an unwilling non-participant prisoner, the senior could lawfully prohibit the escape to prevent harm to that prisoner.[78] But it would be far less than skeptical to gainsay that the answer is not that simple, and, except by analogy, that it is without support. Involved here are right and duty to escape as opposed to right and duty to command. But rights do not exist in

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[76a] For instance, consider the tort maxim "sic *utere fuo ut alienum non laedas*." See also Fletcher v. Rylands. 1 Exch. 265 (1865). Article 2 of the Code Civil provides "every person is bound to exercise his rights and to fulfill his obligations according to the principles of good faith. The law does not protect the manifest abuse of a right." Gutteridge, Abuse of Rights, 5 Camb. L. J. 22 (1933).

[77] Hadley v. Baxendale, 9 Exch. 341 (1854), was a landmark case in the field of contracts holding that a carrier could not be held responsible for consequential damages due to late delivery occasioned by the carrier exercising its right to deviate. In the field of criminal law, too, a similar analogy may be drawn in balancing conflicting rights. An offense is legally justified if it is committed under a fear of immediate death or serious bodily harm. But it is not a defense if such fear was of a later, remote or indirertly consequential harm or death. Thus. an infringement upon the rights of another (the crime) is legally permissible if the failure to infringe would immediately result in death or serious bodily harm to the infringer, but *not* if only a remote injury or death is involved.

[78] In balancing rights and duties, *jus naturale* should not be overlooked. For instance, consider a recent Minnesota case in which the court, balancing rights, applied moral law to create a "constructive trust" in order to prevent a murderer from inheriting from his victim. Anderson v. Grasbeg, 247 Minn. 538, 78 N.W.2d 450 (1956). *Contra* Ohio case held "this is a court of law and not a theological institution" and stated that "property rights are too sacred" in permitting a murderer to take title to property held jointly with his victim. Oleff v. Hodapp, 129 Ohio 432, 195 N.E. 838 (1935). A critic of the *Oleff* case has commented that "apparently if property rights were less sacred, or the right to life more sacred, the court might have decided the case against the murderer. . . ." Cohen, *Judicial Ethics*, 12 Ohio St. L. J. 3, 4 (1951). On natural law, its history, and its present place in jurisprudence, see Note, *Natural Law for Today's Lawyer*, 9 Stanford L. Rev. 455 (1956–57); Kotz, *Natural Law and Human Nature*, 3 U. Chi. L. School Rec. No. 3 at p. 1 (1954); Wu, *Jurisprudence as a Cultural Study*, 33 Detroit L. J. 277 (1956); Oppenheim, *The Natural Law Thesis: Affirmation or Denial?* 51 Am. Pol. Sci. Rev. 41 (1957); Curtis, A *Natural Law for Today and the Supreme Court as Its Prophet*, 39 B. U. L. Rev. 1 (1959).

a vacuum and seldom are they absolute. Even the sacred right of free speech is not an indiscriminate right. "Instead, it is qualified by the requirement of reasonableness in relation to time, place and circumstance."[79] In resolving conflicting rights, therefore, is not the test then more one of reasonableness than it is of directness of injury? A candid realist is constrained to hold that it is. "In a primitive society morals are the sole medium of social control, but international society was and remains primitive for fixed methods of ascertaining legal rights have not yet been created by positive law"[80] If, therefore, an attempted escape is believed, upon reasonable grounds by the senior prisoner, unreasonably to expose other prisoners to an unreasonable risk of harm, he may, in execution of his office, lawfully interfere with such plans. Otherwise, he may not. The proximity of the harm as related to the attempted escape is a critical, but not necessarily determinative, factor in evaluating such reasonableness.

With regard to violence in connection with escape, observe that, in *Rex* v. *Werner,* it was held that a senior prisoner of war had no authority to order the assassination of a fellow prisoner of war who threatened to expose a hidden German officer who was directing camp activities including escape plans.[81] It further flatly held that those complying with such an instruction to kill a fellow prisoner were guilty of murder and subject to punishment by the captor. Query: Would the German Government, upon termination of hostilities, have viewed compliance with such an assassination instruction as violative of German national law? If so, would prosecution under German national law have resulted in conviction and matching punishment? It is significant to observe here that

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[79] United States v. Voorhees, 4 USCMA 509, 16 CMR 83, 95 (1954), holding that an order to military personnel to submit for prior military examination and approval writings and public statements was a legal order, a violation of which is punishable by court-martial. In the *Schenck* case Justice Holmes stated that the "question in every case is whether the words used are used in such circumstances and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 54 (1919); Dennis v. United States, 341 U.S. 494 (1951) (Smith Act conviction in which the court holds free speech subject to "clear and present danger'' limits). It has recently been held that an American citizen does not have an absolute right to travel. Worthy v. Herter, 270 F.2d 905 (D.C. Cir. 1959).

[80] Brown, *A Scholastic Critique of Case Law,* 12 Ohio St. L. J. 14, 22 (1951).

[81] *Rex* v. Werner, 2 So. Afr. L. Rep. 827 (1947). "No voluntary associations of individuals unknown to the constitution have a right to make or execute the laws, or to judge, condemn, or punish those whom they deem to be offenders, and to punish those whom they may suppose the law to inadequate to, however pure or holy may be their motive." United States v. Fenwick, 25 Fed. *Cas.* 1062, 1065 (No. 15086) (D.C. Cir. 1836).

after World War I the Allies agreed to Germany exercising jurisdiction over some 1,000 German nationals accused of war crimes. Only **12** were actually tried and of those half were acquitted. Of those convicted, marked compassion for the unfortunates before the bar was reflected in the sentences imposed. For instance, convicted of firing upon helpless survivors in lifeboats of a torpedoed hospital ship, the offenders were sentenced to four years' imprisonment.[82] It is always necessary to remember what tribunal is involved. But regardless of how patriotic his motives may be, the prisoner of war is left to the untender mercies of the captor's courts for any acts of violence. His conduct must be guided with this knowledge.

Some discussion is due to the senior's responsibility with regard to collaborationist activities. Circumstances comparable to that in the North Korean camps may never again be experienced, but they cannot be ignored. The captors in Korea exerted untiring industry in obtaining captive signatures to treasonous "peace petitions," and false biological warfare "confessions." They acted as puppeteers to parrotted propaganda broadcasts by prisoners and gave by-line "credit" to harrassed "authors" of party-line publications. Such products to a future enemy may be as worthless as silk gloves on a gopher. However, there were instances of informing upon fellow prisoners, offenses which might be encountered in any conflict. No more need can be perceived for a senior prisoner expressly prohibiting treasonous activities than it would be for him to prohibit rape or mayhem. The prohibited nature of such activities is inherent. But may he authorize participation in treasonous activities so that such acts might be performed with impunity by a subordinate? On its face, this appears to be a ridiculous hypothesis, but it occurred in Korea, and it became **a** critical point of law in the *Nugent* trial, *supra.* Part of Nugent's defense was that he was directed by his superior officer to make treasonous broadcasts and write treasonous articles for the Communist press. The senior concerned testified that he had indeed commanded Nugent to do these things, but that this was only a part of his master plan to effect a mass escape. The court was instructed as a matter of law that such an order was unlawful but that if it did not appear on its face to a person of ordinary sense and understanding to be patently unlawful Nugent could not be convicted of acts committed in good faith compliance with it. Nugent was acquitted and consequently the answer must be looked to elsewhere. But what is the law as to such an order? Is **a** sub-

[82] Mullins, The Leipzig Trials 156 (1921).

ordinate justified in complying with such instructions? War places a cloak of legality over many acts which would be crimes if committed in time of peace. But war does not transplant for all civilized norms a brigand's code of the end justifying the means. It has been held that making propaganda broadcasts for Nazi Germany by an American who, conceding *arguendo,* honestly believed that in the long run this was best for his country is nevertheless treason, and that the individual citizen has no authority to evaluate the ultimate benefit to his country in performing acts manifestly prejudicial to its aims.[83] Although the rigid "fear of immediate death" rule of *Republica* v. *McCarty* has been now somewhat relaxed, it has not been so relaxed as to condone a treasonable act merely to avoid future imprisonment by the enemy.[84] Though many other standards of morals may well be subject to debate, it is beyond cavil, particularly when no urgency of immediate death or immediate grievous injury is involved, that no citizen may order or authorize a disloyal act regardless of the sanctity of his motive. It follows, therefore, that a senior may not engage in games of intrigue involving activities themselves inimical to his country's interest, even though his purpose is to secure benefits, including escape, for himself or his subordinates. This is not to say that he may not engage in deceptions or deceit, but quite clearly

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[83] Chandler v. United States, 171 F.2d 921 (1st Cir. 1948).

[84] D'Aquino v. United States, 192 F.2d 338, 357 (9th Cir. 1951); Gillars v. United States, 182 F.2d 962, 976 (D.C. Cir. 1950); United States v. Fleming, 19 CMR 438, 450 (1955), *aff'd* 7 USCMA 543, 23 CMR 7 (1957). Difficulty can be expected in applying the coercion test to prisioner of war camp conditions. For instance, prisoners are often already suffering serious bodily harm. Would a threat of depriving a man of a single meal be a threat of serious bodily harm if the prisoner is already in the throes of starvation? If a person is already suffering serious bodily harm, would a threat of anything which might aggravate that harm in any way be a sufacient basis for a reasonable fear of immediate bodily harm? This basic problem was recognized by the 17th Century philosopher, Thomas Hobbes, who wrote: "Where a man is captive, or in the power of the enemy . . . if it be without his own fault, the obligation of the law ceases; because he must obey the enemy or die: and consequently such obedience is not crime, for no man is obliged (when the protection of the law failed) not to protect himself, by the best means he can." Hobbes, Leviathon 231, (Smith's ed. 1947). But to add the idea that different principles would apply to a prisoner who is captured through his own fault would be to create chaos in attempting to establish legal order in an already uncertain area.

[85] United States v. Fleming, 19 CMR 438, 446 (1955), *aff'd* 7 USCMA 543, 23 CMR 719 (1957). In defending a charge of collaborating with enemy while a prisoner of war in Korea, defense urged that the acts were justifled as done to preserve the lives of subordinates. Laudable motives were rejected as a defense, citing Werner v. United States, 183 F.2d 184, 185 (9th Cir. 1950); United States v. Dennett, 39 F.2d 564, 568 (2d Cir. 1930); United States v. Schneideman, 106 F Supp. 906 (S.D. Cal. 1952); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948); and United States v. Batchelor, 7 USCMA 354, 22 CMR 144 (1956).

such deceptions or deceit may not take the form of treason any more than they may take the form of rape or murder. Therefore, in carrying out his leadership mission, the senior prisoner of war is responsible criminally to the captor under the laws of war for any acts of violence provided for in such escape attempts — and to his own country for any acts of disloyalty provided for in planning the escape. He obviously must, therefore, avoid both in his escape plans. Except for these two restrictions, he is free to use his own sound discretion in devising and directing escapes.

V. NATURE OF APPLICABLE LAW

It may be asked what "law" is actually involved? Does the senior officer truly commit a crime or violate any "law" by failing to exercise the command functions outlined here? Here arises a basic question of what constitutes "law."[86] It could be argued that the Geneva Conventions are mere agreements between nations providing for humane treatment by these nations of victims of war, not an exercise of regulatory powers in the sense that a sovereign regulates its subjects. It may further be argued that treaties are not self-executing but require implementation by the national government before application can reach the individual. Two judges of the Court of Military Appeals seem to agree that treaty obligations (status of forces agreements, at least) do not criminally bind individuals without national implementation.[87] But this need not detain us here because the Geneva Conventions are important from the prisoner of war viewpoint only as to the rights and privileges afforded to the individual. They are significant only as to the obligation of the captor toward the prisoner and, as this is the very subject of the treaty, it is manifest that those rights must reach the prisoner directly. Otherwise, the entire purpose of the treaty would be defeated.

Further, you might argue, the Code of Conduct has not been adopted as law by the Congress, the only body with the power to legislate it into law. In addition, the Code is worded in the first person, similar to the "Pledge of Allegiance," yet can it seriously be contended that the wording of a pledge constitutes a "law"?

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[86] For an imaginative look at what is "law" (for those who think "law" has a definite meaning), see Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L. J. 1087, 1111-20 (1956); see also Kantorowicz, Definition of Law (1958).

[87] United States v. Ekenstam, 7 USCMA 168, 21 CMR 294 (1956); United States v. Curtin, 9 USCMA 427, 26 CMR 207 (1958). For a practical evaluation of such agreements involving warfare see also Lauterpacht, *The Limits* of *the Operation of the Law of War*, 30 Brit. Yb. Int'l L. 206 (1953).

Carter L. Burgess, then Assistant Secretary of Defense, has said of the Code of Conduct: "However the Code provides no penalties. It is not definitive in its terms of offenses; rather, it leaves to existing laws and the judicial processes the determination of personal guilt or innocence in each individual case."[88] In implementing the Code of Conduct by executive order, the President used this language: "Every member of the Armed Forces of the United States is expected to measure up to the standards embodied in this Code of Conduct."[89] Soldiers are familiar with the principle that the words "I desire," when used by a superior, are tantamount to "I order." If "I desire" can be equated to "I expect," then a *fortiori* it is tantamount to "I order.'' Thus interpreted, the Code might become a general order of universal application throughout the armed services, a violation of which would be punishable under Article 92(1), Uniform Code of Military Justice.[90] But the conclusion that a failure to exercise the command is a violation of law need not rest on such an argument. Article 92(3), Uniform Code of Military Justice, makes punishable any act constituting a dereliction of duty.[91] The mere absence of a specific penalty or sanction does not prevent a prescribed norm of conduct from becoming a legal duty.[92] The Code of Conduct, acting independently, at least purports to establish a "duty." The Geneva Convention similarly purports to establish a duty with regard to the function of "prisoners' representative," If they succeed, and it is believed that they do, it may logically follow that a dereliction thereof would constitute dereliction of

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[88] Prologue by Carter L. Burgess to Prugh, *The Code* of *Conduct for the Armed Forces*, 56 Colum. L. Rev. 678 (1956).

[89] Executive Order 10631, August 17, 1955.

[90] But this interpretation might have some difficulty in acceptance by the Court of Military Appeals. That court has held, for instance, that an instruction which merely purports to interpret a postal law is not itself an order cognizable under Article 92, UCMJ. United States v. Hogsett, 8 USCMA 681, 25 CMR 185 (1958). It could convincingly be argued that the indorsement by the President is merely a vehicle for dissemination as contrasted to an order as contemplated by Article 92, UCMJ.

[91] Article 92(3) providing that any person subject to the Code who "is derelict in the performance of his duties: shall be punished as a court-martial may direct."

[92] In a criminal trial for assault aboard an airplane over the high seas between Puerto Rico and New York, a federal court convicted the defendant but did not impose sentence because of doubtfulness of applicable sanction. This would support the proposition that a duty may exist apart from sanction. United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950). See State v. United States Express Co., 164 Iowa 112, 145 N.W. 451 (1914), in which a state court enjoins interstate liquor shipment into Iowa prohibited by an act of Congress but not provided with criminal sanction.

military duty and thus be violative of Article 92(3).[93] But there is still another aspect which should not be overlooked in determining if an official duty has been created. If leadership becomes a matter of life and death to the members of the prisoner community, and past experience has shown this fairly well to be the case, does not *jus naturale*, the "natural" or "moral" law, become operative to establish this duty? Modern courts have been governed by moral law and have labelled it as "law which courts of all ages have recognized."[94] Moral law has been defined as the law of conscience, "the aggregate of those rules and principles of ethics which relate to right and wrong conduct and prescribe the standards to which actions of men should conform in their dealings with each other."[95] But whether the charge is based upon Article 92 of the Uniform Code of Military Justice, or under a moral law concept within the scope of Article 134,[96] it is concluded that a

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[93]The punishment provided for a dereliction of duty in violation of Article 92 (3), however, is only three months' confinement at hard labor. MCM 1951, par. 127c. Some consideration should be given to legislation or executive action suspending the limitation on the punishment for a violation of Article 92(3) as to derelictions occurring in prisoner of war camps. This can be done by executive order. For example, the limitations upon the maximum punishment for offenses in violation of Articles 58, 59, 61, 64, 65 and 86 were suspended during the Korean conflict by Executive Order No. 10149, 8 August 1950.

[94]*In re* Snodgrass, 166 Okla. 156, 20 P.2d 756 (1933), a disbarment proceeding in which the court applies "moral law" to determine the time period for application by a disbarred lawyer for reinstatement to practice. See also Anderson v. Grosberg, 247 Minn. 538, 78 N.W.2d 450 (1956), in which natural law is applied to create a constructive trust. But natural law has a more fertile field in the arena of international law. For example, see United States v. The Schooner La Jenne Eugenie, 2 Mason 409 (1822), in which a circuit court holds African slave trade engaged in by seized French vessels to be "repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice." But see also The Antelope, 23 U.S. (10 Wheat.) 66 (1825), in which Chief Justice Marshall struggles with this same international slavery problem. See also Lauterpacht. *The Limits of Operation of the Laws of War*. 30 Brit. Yb. Int'l L. 206, 213 (1953), in which iti s stated: "It is probably true to say that the humanitarian sphere constitutes the bulk of the law of war."

"Moore v. Strickling, 46 W. Va. 515, 33 S.E. 274 (1899) (A case involving removal from office of a district attorney for patronage of a bawdy house. Citing Blackstone, the court ordered his removal on the basis of moral law.).

[96]In Smith v. Whitney, 116 U.S. 167, 183 (1886), the United States Supreme Court said: "Under every system of military law for the government of either land or naval forces, the jurisdication of courts-martial extends to trial and punishment of acts of military or naval officers which tend to bring discredit or reproach upon the service of which they are members, whether such acts are done in the performance of military duties or in a civil position, or in a social relation, or in private business." Certainly the status of prisoners of war is included in that broad area and certainly death of a soldier due to neglect of a duty by an officer brings "reproach" upon the service.

failure to assume and properly perform these duties is an offense punishable by "law."

If the senior is punishable for failure to assume command, is a subordinate punishable for not recognizing such command? This question is easier to answer, but generally the same arguments are applicable. Article IV of the Code of Conduct provides that prisoners will obey the senior and back him in every way. But, quite independent of the Code, violations of lawful instructions issued by the senior are punishable under Article **92.** What instructions are lawful? Those within the scope of his authority. The general scope of the authority of the senior, as elsewhere herein discussed, includes the welfare of the prisoners, the avoidance of giving aid to the captor in accomplishing his hostile mission, and escape. Therefore, so long as his instructions bear upon these general responsibilities and do not appear to be patently unlawful to a person of ordinary intelligence, the subordinate has a duty to obey under the sanctions of Article **92.** A refusal to obey or otherwise do his duty in concert with others with intent to override or usurp the authority of the senior would constitute the more serious offense of mutiny in violation of Article **94,** Uniform Code of Military Justice, for which the death penalty could lawfully be imposed upon repatriation.[97]

In considering the rights and duties of prisoners of war, much reliance is placed herein upon the Geneva Conventions. It would be proper to ask if such reliance is realistic. First, not all nations are signatories to those conventions ; and, secondly, even if signatories, there is no assurance that all adversaries would live up to convention provisions even if they were.[98] This latter observation would seem to be particularly appropriate where the execution of the treaty occurred during a prior regime which has been overturned by internal upheave1 or by popular rejection. There is no answer to this except to say that these matters can only be discussed with the reserved awareness that there is no international police force equipped to enforce what is here and elsewhere concluded to be the "law" involved. The practical value of discussing the subject is the establishment of what nations in fact do. The fact is that nations do not ignore the Geneva Conventions, though they may endeavor to rationalize away their recognized responsi-

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[97] Article 94(b), UCMJ, constitutes mutiny as a capital offense.

[98] As of 1 Jan. 1959 there were 83 nations which had become signatories to the Geneva Conventions. U.S. Dep't of State, Pub. No. 6762, Treaties in Force (1959).

bilities under them.[99] Such rationalizations were engaged in by North Korea. The Soviet Union became a signatory to the Geneva Conventions only upon insertion of a reservation to the effect that "war criminals" would not be entitled to prisoner of war status as set forth in the Conventions.[100] Communist North Korea and China, during the Korean conflict, though recognizing that they were bound by the Geneva Conventions, sought to deny prisoner of war privileges by rationalizing that the United Nations participants were "war criminals" and thus not entitled to those privileges. This was usually accomplished by use of an admission by the prisoner to "convict" him of some act which the Red Chinese labelled as a "war crime."[101] This emphasizes the peril of the prisoner who varies from the name, rank and serial number prescription.

The first branch of the query can be answered simply by stating that the Geneva Conventions have established rules of international law which may well be "binding" on all nations whether

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[99] At the beginning of the World War II conflict with Japan, it was announced in Tokyo that Japan agreed to abide by the Geneva Conventions, even though it was not a signatory. But Japanese civilian officials were obviously unable to convince the Japanese militarists of this for the brutalities in the Japanese prison camps were enough to shock the world. Japanese authorities in the camps advised the prisoners that any privileges were due to Japanese generosity, not to international obligation. For fuller discussion of this and other Japanese dealings with the Red Cross and Swiss officials, see Brines, Until They Eat Stones 125 (1944). Notwithstanding the fact that Japan was not a signatory to the 1929 Geneva Conventions, Japanese officials were nevertheless later tried upon charges of mistreatment of prisoners of war as violations of the laws of war. See *Re* Yamashita, 327 U.S. 1 (1946).

[100] The wording of the Russian reservation is as follows: "The Union of Soviet Socialist Republics does not consider itself bound by the obligation, which follows from Article 85, to extend the application of the Convention to prisoners of war who have been convicted under the law of the detaining power, in accordance with the principles of the Nuremberg Trials, for war crimes and crimes against humanity, it being understood that persons convicted of such crimes must be subject to the conditions obtaining in the country in question for those who undergo their punishment."

[101] DOD Pam. 1-16, 92.

they are signatories or not.[102] A rule of international law, in one basic sense, is a rule to which civilized nations have demonstrated that they feel themselves bound.[103] Admittedly, this feeling on the part of nations is ordinarily established by a demonstration of past conduct over long periods of time.[104] One treaty between two nations, or even a custom which has existed for a long time between two nations, does not establish a rule of international law, but merely a "local custom'' or rule of conduct for those two nations to follow.[105] But if many treaties between other nations can be shown to exist with the exact or similar provisions and that these treaties are entered into with the understanding that they are declaratory of accepted international practice, then a rule of generally accepted international law is established. When virtually all the civilized nations of the world agree upon a single rule, such as that accomplished at Geneva, it would seem that a rule of accepted international practice is *ipso facto* created.[106] By becoming signatories, the nations thereby demonstrate that they feel themselves bound by the rule, thus satisfying that requirement.[107] In any event, most of the provisions pertaining to

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[102] See Pollock, ***The Sources of International Law,*** 2 Colum. L. Rev. 511, 512 (1902), citing an instance in which both the United States and Spain, during the War of 1898, adhered strictly to the anti-privateering provisions of the 1856 Declaration of Paris, though neither was signatory thereto and the United States had, in fact, refused to become a party. But see Bishop, International Law 23 (1953), for a discussion of this theory and citation to a U.S. State Department memorandum proposing a reply to Great Britian advocating a contrary approach. The forward to DA FM 27-10, The Law of Land Warfare (1956), states in part: "Moreover, even though States may not be parties to, or strictly bound by, the 1907 Hague Conventions and the 1929 Geneva Convention relative to the Treatment of Prisoners of War, the general principles of these conventions have been held declaratory of the customary law of war to which all States are subject. For this reason, the United States has adopted the policy of observing and enforcing the terms of these conventions in so far as they have not been superseded by the 1949 Geneva Convention.. .."

[103] The Paquette Habana, 175 U.S. 677 (1900).

[104] See The Scotia, 81 U.S. (14 Wall.) 170 (1871), for a detailed discussion of the development of international law by custom.

[105] Brierly, The Law of Nations 68 (3d Ed. 1942).

[106] Notwithstanding Japan's contentions that they were not parties to the Geneva Conventions, they nevertheless stood condemned for their conduct in Nanking. For a description of events at Nanking and what may occur when the laws of war are ignored, see Shuhsi Hsu, The War Conduct of the Japanese 67 (1938).

[107] But see the State Department memorandum, Bishop, ***op. cit. supra*** note 102, at 24, in which a distinction is drawn between a treaty which merely is declaratory of international custom and one which is entered into in order to establish a rule notwithstanding international custom. The Geneva Conventions are better characterized in the former category, that is, as declaratory of already existing custom.

prisoners of war in the Convention amounted to agreed interpretations of that which was already generally accepted international practice anyway. They were influenced by Lieber's Code,[108] which, in turn, purported to be an *ex more* expression of the then existing rules followed by civilized nations. Thus, the Geneva Conventions can be looked to as an authoritative interpretation of longstanding international rules of conduct. When rules are adopted by convention, something more than a mere local rule emerges where that convention involves agreement of virtually all civilized nations of the world. The test of age would add little to the dignity of such a widely accepted rule. Therefore, even if it promulgated an entirely new concept, such a rule can be expected to obligate all. The space age and the problem of accommodating all nations to a new dimension should prove within a short time whether this observation is well founded.

In discussing possible conflict of interest and laws, it is always necessary to bear in mind what tribunal is involved. National courts apply only national law. They apply international law only in so far as such international law has been adopted as national law.[109] In examining the cases of German prisoners of war in American hands in World War 11, it appears that punishment by the captor was based entirely upon consideration of the national law of the captor. The national law of the captives was considered only incidentally and then only within the frame of reference of the law of "all civilized nations.'' There were three American cases worthy of note. The first was the general court-martial trial of a German noncommissioned officer who was the senior prisoner of war at a camp in Oklahoma. He summoned a meeting of prisoners in a mess hall and "exposed" a fellow prisoner of war, one Kunze, as an American informer. Kunze was beaten to death by the 200 men gathered in the mess hall. In affirming the conviction of murder, a Board of Review said, "Whether Kunze was a 'traitor'to Germany is not at issue. The point is that neither

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[108] Lieber, *Instructions for the Government of Armies of the United Btates* (1863). President Lincoln commissioned Professor Francis Lieber, an expert in international law, to prepare a set of rules for the treatment of prisoners of war based on existing international practice. Doctor Lieber's efforts were published as Army General Orders 100, 24 Apr. 1863, and became known as Lieber's Code. The Confederacy later agreed to the Code which was already in effect in the Union Army by virtue of cited GO 100. An international classic in the field of warfare, it formed a basis for the Congress of Brussels of 1874, Hague Regulations of 1907, and all subsequent Geneva Conventions up to the present 1949 model. Dr. Lieber based his work chiefly on the provisions of the Treaty of Berlin, which itself was designed to be declaratory of existing civilized custom.

[109] For a clear expansion of this idea, see Wright, *Treaties as Law in National Courts with Especial Reference to the United Btates,* 32 Ind. L. J. 1 (1956).

our own soldiers nor prisoners of war have any authority as self-constituted judges to sit in judgment and to impose punishment upon one of their number for any cause. To contend otherwise is absurd."[110] The second case was a similar general court-martial trial of German prisoners of war accused of murdering a fellow prisoner of war at a camp in South Carolina. Rejected again was the defense of asserted propriety based upon alleged treason to Germany by the victim.[111] The third case was also a World War II general court-martial involving a hooded "goon squad" assault on a suspected collaborator at a camp in Georgia with the same result.[112] In ***Rex*** v. ***Werner,*** a similar charge was disposed of in accord with the American cases. The British, however, used their civilian judicial system rather than military commission or court-martial. The ***Werner*** case involved the trial of German prisoners of war in a British camp in North Africa for the execution of an alleged informer fellow prisoner of war on the orders of a German officer within the camp. The court held that such an order was illegal on its face and compliance therewith was illegal and manifestly unjustified.[113] In all four cases no questions of law other than the national law of the forum were considered.

But what legal recourse is available to the senior who is aware of an informer among his subordinates as in ***Rex*** v. ***Werner?*** Quite clearly, kangaroo courts and strong-arm methods are not within his authority to direct. It appears that he may only order the individual to desist, but if the offender fails to do so, only the courts of the prisoner's sovereign may exact punishment upon repatriation. It must be admitted that such sanction *in* ***pendente*** is far from an effective device, but, nevertheless, it is the only judicial means in evidence. Of course, the other prisoners might voluntarily, or could be ordered to, turn their backs on the offender and, by social ostracism, possibly accomplish a repentence. But even if the activities of a collaborator should threaten the lives of the prisoners, unless the normal self-defense situation is involved, the senior has no legal authority to eliminate the offender.

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[110] CM 248793, *Beyer,* 50 BR 21 (1944).

[111] CM 259228, ***Gauss,*** 50 BR 211 (1944).

[112] CM 260781, *Menschner,* 50 BR 237 (1944).

[113] Rex v. Werner, 2 So. Afr. L. Rep. 827, 828 (1947).

For precedence, one has only to consider the lifeboat-cannibalism cases in which the courts have universally rejected the taking of life to preserve life.[114]

The prisoner of war is subject to legal proscriptions which may be initially contradictory to each other in certain respects. Consider, for instance, the hypothetical question raised above involving the question of whether the senior prisoner may order the killing of an informer if necessary to effect an escape? Such an order, based upon intrinsic nationalistic loyalty, might not be considered to be a crime by his own nation. It is abundantly clear, however, that it would be violative of the law of the detaining power and punishable with death by the captor. Even the attempted escape alone is recognized by international standards to be a violation of the law of detaining power for which the detaining power may lawfully exact punishment.[115] It should be noted that the rule, as thus stated, is that the attempted escape is considered to be a violation of the law of the *detaining power.* The Geneva Prisoner of War Convention condones, but limits, the right of the detaining power to punish the act as violation of *its,* the captor's, law. The treaty provision accepts without question the detaining power's pre-existing right to punish an attempted escape, but is designed to limit the amount of punishment the detaining power may lawfully impose for an attempted escape. This limitation on punishment to disciplinary punishment for attempted escape also encompasses any nonviolent crimes against the law of the detaining power committed with the sole intention of facilitating an escape.[116] The only limitation upon the detaining power's right to punish a crime of violence incident to an escape is the general limitation that the punishment will not exceed that imposable upon a member of its own forces for such an offense.[117] The "right" to attempt an escape, therefore, is obviously not a right requiring recognition by the detaining power, nor is it an unrestricted right under international law. The law

[114]Regina v. Dudley, 14 Q. B. Div. 273 (1884); United States v. Holmes, 26 Fed. Cas. 360 (No. 15, 383) (C.C.E.D. Pa. 1842). In the *Holmes* case there was some suggestion *in dicta* that it might have been lawful to take life to save life in the lifeboats if the victims were chosen by lot, but the English *Dudley* case rejected that suggestion in *Holmes.* Judge Cardozo appears to support the British view. Cardozo, Law and Literature 113 (1931). See also Hall, General Principles of Criminal Law 378 (1947), re moral obligations in *extremis.* For an imaginative collection of ideas, moralistic, idealistic and legalistic, in this area, see Fuller, *The Case of the Speluncean Explorers,* 62 Harv. L. Rev. 616 (1949).

[115]Article 92, GPW (1949). A *successful* escape is expressly made nonpunishable by the detaining power in event of recapture. Article 91, GPW (1949).

[116]Article 93, GPW (1949).

[117]Article 87, GPW (1949).

of the prisoner's own nation elevates the qualified and partially protected international "right" of the prisoner to attempt to escape to the level of a "duty." It is here, perhaps, that the theory at the root of the international rule emerges. On the one hand, the international viewer sees that the prisoner is duty bound to attempt an escape and, on the other hand, that he is ***extra legem*** and thus subject to punishment for carrying out that duty. International compromise is apparent, therefore, in Article 93 of the 1949 Geneva Prisoner of War Convention, which recognizes both the duty and the consequence but imposes a substantial limit on the punishment imposable by the captor.[118] The judicial practice as established in United States courts is to attempt to construe national and international norms so that no conflict exists, and, in any event, an attempt will be made to construe the domesticly established rule to have been adopted with the express intent of conforming to the then existing international rule.[119] The prisoner of war, therefore, must recognize his duty to escape, but he must further recognize that, if he engages in violence to effect his escape, he will be held strictly accountable before the captor's judicial bodies. No principles of the law of warfare or international law may be marshaled in his favor if his escape plan involves violence, notwithstanding how laudatory his attempt may be in the eyes of his countrymen. A senior prisoner, then, in directing escape attempts, should be careful to exclude violence from such plans unless all participants, including himself, are willing to undertake the risk. Violence would not only subject the participants to heavy penalties in the event of failure of the plan, but, if the plans as participated in by the senior contemplated violence, he also is rendered personally amenable *in pari delicto* to such punishment as a principal or aider and abettor.[120]

The Code of Conduct, in setting forth the duty to carry on the fight after capture, contemplates continuance of the battle only by legitimate means. It does not advocate, for instance, riots,

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[118] The punishment for attempted escape is limited by the Convention to a fine of 50 per cent of one month's pay, suspension of non-convention required privileges for one month, fatigue duties of two hours per day per month and confinement for one month, any or all (to be served concurrently). Articles 89, 90, GPW (1949).

[119] The Over The Top, 5 F.2d 838 (D. Conn. 1925), in which the court held: "In other words, unless it unmistakably appears that a congressional act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it. . . ." Cases in accord are John T. Bill Co., Inc. v. United States, 104 F.2d 67 (1939); Cook v. United States, 288 U.S. 102, 120 (1933).

[120] Aiding or abetting an escape is punishable to the same extent as an attempted escape, Art. 93, GPW (1949).

strong-arm squads, kangaroo courts, and executions such as those engaged in by the Communist prisoners at the Koji-do compounds in 1951.[121] The senior prisoner is a commander of an organization dependent not on violence, but upon a clear understanding by all that such organization is the individual's best protection. The senior prisoner has virtually all the responsibilities of any other commander but virtually none of the means of enforcement of his authority. He cannot convene a court-martial, impose nonjudicial punishment, or impose an administrative grade reduction.[122] His only immediate source of power is in the uniting of his subordinates behind him and, through disciplined cohesion, effecting the equivalent of compulsion. Each of his subordinates has a duty to see that the authority of the senior is given the support of all. Any prisoner who fails to do his utmost to prevent and suppress any mutiny against the senior or fails to notify the senior immediately of any known danger of mutiny is guilty of a capital offense under the Uniform Code of Military Justice.[123] Each prisoner, then, has a strict and affirmative duty, individually and collectively, to overcome any defiance of the senior's authority. A failure to do all possible to overcome such defiance subjects him to trial and possible penalty of death upon repatriation. The threat of such eventual judicial sanctions also provides some force to the senior's authority. But, in the final analysis, the quality of leadership and the state of military responsibility among the prisoners in general will be the critical determining factors of how well the organization functions and, in turn, how well the prisoners survive their captivity.

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[121] For a careful and thoughtful examination of the limits of the prisoner of war fight after battle, see Prugh, *The POW Battleground*, 60 Dick. L. Rev. 123 (1950). Lt Col Prugh examines German prisoner of war kangaroo courts and the Koji-do riots and finds that both would be unjustified if done by our own personnel in the hands of the enemy. He concludes that, if the Geneva Conventions are to be anything but a "pious declaration," prisoners of war must be kept out of either "aggressor" or "victim" status.

[122] The Judge Advocate General of the Army has held that a senior officer in a prisoner of war camp cannot impose a reduction upon subordinates during internment. SPJGA 1945/13761, 18 Jan. 1946, 5 Bul. JAG *58* (1946). Notwithstanding that he does not fall within any of the jurisdictional requirements for the convening of court-martial, the convening of such a court in a prison camp would have all the appearances of a star chamber proceedings or a kangaroo court, a decidedly undesirable circumstance to add to the already critical atmosphere of a prison camp. See UCMJ, Art. 22, for jurisdictional requirements for courts-martial.

"Article 94(3), UCMJ. Any person subject to UCMJ, "who with intent to usurp or override lawful military authority refuses, in concert with any other person or persons, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny." Article 94(1), UCMJ.

VI. CONCLUSION

To sum up, therefore, some of what has been set forth here, Article IV of the Code of Conduct, which envisages a command organization among prisoners of war, is not a new concept, but merely a restatement of lessons learned and put to limited application in previous conflicts by prisoners of diverse nationalities. This organization, as presently conceived, has two legal countenances—one overt and one covert. The overt visage only has international legal recognition, and it is circumscribed by the Geneva Convention through the creation of the "prisoners' representative." In the execution of these duties, the prisoners' representative is an instrument of humane attainments of international concern—the health and welfare of the prisoners. The covert organizational leadership is concerned with a nationalistic continuation of the battle against the enemy—a battle by no means of unlimited scope. That battle may lawfully be pursued in an affirmative tactical sense only by nonviolent attempted escape. The covert mission is lawfully carried out in a passive sense by organized resistance to efforts by the captor to enlist the aid of prisoners incident to the accomplishment of the captor's hostile mission, In this passive area, it is performed by gathering intelligence data, resisting indoctrination and implementing group security. Non-defensive acts of violence by a soldier, although perfectly lawful under the rules of warfare when performed during hostilities prior to capture, if performed after capture, become crimes under the international rules of warfare and criminally punishable by the law of the captor. Therefore, the duty to "carry on the battle" after capture is hedged with internationally recognized legal sanctions which effectively eliminate violence as a tool of the prisoner's battle. But, within the missions to escape and to provide resistance to unlawful pressures of the captor, there exists another vital mission of the prisoner of war, and it is this mission which is the most neglected—the task of keeping each other alive. In this area, involving both the overt and covert phases, the senior prisoner finds his foremost challenge. Dedicated attention to the spirit and health of his subordinates are as much of the military senior's nationalistically inspired responsibilities as they are of his internationally negotiated humanitarian responsibilities. A failure to exercise this leadership is punishable upon repatriation in the courts of the prisoner's sovereign. A failure of the subordinate prisoner to pay due respect to the command relationship of the senior is also a violation of law for which the same legal sanctions are available upon repatriation,

For Americans, the punishment vehicle is the application of the legal sanctions contained in Articles **92, 94, 104, 105** and **134,** Uniform Code of Military Justice.

The identification of the senior is not without complications. Clearer Department of Defense pronouncements are needed to **fix** rank and precedence among the services. But at the present posture, disregarding the Army's "specialist" difficulty, the senior is the person in the highest grade with the oldest date of rank in that grade. The Geneva Prisoner of War Convention of **1949** created a right *ex officio* in the senior commissioned officer in any camp to be its prisoners' representative. Where no commissioned personnel are present, the prisoners' representative is elected by secret ballot, but the Code of Conduct imposes a duty on all prisoners to vote for the senior among them. If the senior is thus elected, the captor may, under the treaty, nevertheless reject him, requiring another election. In that event, the prisoners would still be duty bound to vote for the senior. If for any reason a person other than the senior is recognized by the enemy as prisoners' representative, it would be encumbent upon that individual to carry out his duties in accordance with directions of the senior.

History has demonstrated that cohesive prisoner organization is essential to the physical and mental survival of prisoners of war as well as to furthering the best interests of their nation, Such organization has now been elevated to the stature of a legal norm which an American prisoner of war ignores at his peril. The senior prisoner finds himself in the unenviable status of responsibility without corresponding means to enforce his authority. He has, nevertheless, a duty to make every effort to implement that authority, and his subordinates have an equal duty to accede to it. Any deviation from those duties are punishable by court-martial upon repatriation. The likely punishment vehicles for subordinates is a simple judicial application of Articles **92** and **94,** Uniform Code of Military Justice — noncompliance with lawful orders of a superior and mutiny. But the vehicle for punishment of a senior who fails in his command responsibilities is not so simple, It seems clear that he could be tried for dereliction of duty in violation of Article **92,** Uniform Code of Military Justice; but the maximum punishment for that offense, as presently provided, is confinement for but three months — hardly commensurate with the gravity of the offense under prisoner of war camp circumstances. Therefore, some consideration is due to legislation or executive action to suspend or increase the present limitations on Article 92(3) for offenses committed in a prisoner of war camp.

Further Department of Defense policy as to duties and responsibilities of American prisoners when the senior prisoner is of an allied power would be a valuable addition to existing materials implementing the Code of Conduct.

It is impossible to devise rules which can be expected to act as a panacea for the prisoner of war in all the primitive circumstances in which he may find himself. Reason and wisdom must, in great part, be his guides. An enemy may be encountered who is so mean and low that no recourse whatsoever can save his captives. Those *in extremis* must undertake measures *in extremis.* But this need not deter planning future measures to meet circumstances we have known. The boundaries here between real and fancy, naivete and sophistication, or law and mere rationalization become indistinct. A critic so disposed should encounter little difficulty in justifying any strident discord he finds with much of what has been said here. But to be constructive, such a critic should be ready with an alternate solution. In prisoner of war camps dwell divers masters, and balancing the tribute due to each may vary with the weighmaster. An effort has been made here to balance that scale.

This discourse was begun with an ancient Grecian quote, and, therefore, little more harm can be added by ending it with another, No apologies are made for any absolutism adopted in defining specific "rights and wrongs" herein. Distinguished support is provided by Aristotle, who, citing with approval the ethics of a day even earlier than his own, ascribed to an ancient poet the observation that ''Men may be evil in many ways but good in one alone."[124] Time has well served that concept.

*Quoted in Cross, World Literature **199 (1935)**.

APPENDIX

CODE OF CONDUCT

For Members of the Armed Forces of the United States

1. I am an American fighting man. I serve in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

2. I will never surrender of my own free will. If in command I will never surrender my men while they still have the means to resist.

3. If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy.

4. If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information or take part in any action which might be harmful to my comrades. If I am senior, I will take command. If not, I will obey the lawful orders of those appointed over me and will back them up in every way.

5. When questioned, should I become a prisoner of war, I am bound to give only name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful to their cause.

6. I will never forget that I am an American fighting man, responsible for my actions, and dedicated to the principles which made my country free. I will trust in my God and in the United States of America.

COURT-MARTIAL JURISDICTION IN FUTURE WAR

BY MAJOR JOHN JAY DOUGLASS*

Preparation of the Armed Forces for future war has become a subject of intensive study and discussion not only within the Department of Defense by military professionals but by other branches of the Government and by private institutions and organizations. The military, long embarrassed by the charge that they always prepare to fight the last war, has made great effort to develop forward looking concepts of strategy and tactics. Mr. Hanson Baldwin in discussing recent Seventh Army maneuveurs in Germany said, "The Army is certainly not preparing to fight World War II over again. It can rather, be charged with reaching too far into the future and trying to develop battle tactics that it has neither the equipment nor the experience to implement."[1]

Hand in hand with the deficiencies of equipment it may also be questioned whether the Army has advanced the administrative techniques of warfare to fit contemplated battle tactics of the future. It is an axiom of the profession of arms that administration and logistics are essential to success in battle. Success in battle demands the solution of the hum-drum problems of day to day administration which must be geared to tactical developments. Unfortunately, students of military science do not find the study of administrative improvements as interesting or as intriguing as the more exciting and necessary tactical planning for the future. The administrative experts more often are totally unaware of tactical developments and their studies are conducted in a tactical vacuum. The improvements or suggestions developed by the professional administrators are designed for internal administrative advantages unrelated to military operations. A review of the professional military literature reveals few discourses on specific recommendations for increasing administrative efficiency in future combat. The administrators have become parochial in their viewpoint not understanding the necessity for coordination with tactical thinkers.

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*JAGC, Litigation Division, Office of The Judge Advocate General, U.S. Army.

[1] "Winter Shield—I" (H. Baldwin, New York *Times*, 9 February 1960, p. 10, Vilseck, Germany, February 8.

This lack of coordination and adaptation to military requirements runs throughout each of the administrative areas and certainly no less in the administration of military justice in future warfare. The pessimists say that administrative planning for the future is futile for the war will be won or lost before administrative or logistical operations begin. There are those who say that any statutory code and particularly the present one is so cumbersome that it cannot be revised or administered to fit the exigencies of possible future warfare. Such defeatism ill becomes the military forces of the United States. All students of the problem would agree that discipline will become an even more important factor in battle success on the nuclear battlefield than it was in the pre-nuclear area. The little red push-button will not replace the ground combat soldier but will emphasize his role.[2] Discipline will become more important as an aid to effective leadership as men are physically separated from one another by vast distances. The day of the "follow me" commander leading troops by virtue of his own personality will be diluted by distance and the requirement to stay under cover. The effect of dynamic personality which lead men into the face of danger must be replaced by an effective disciplinary tool in the hands of the leader. This tool must be effective and efficient and suitable for operation in the nuclear era.

We should take the time now to consider a more efficient administration of military justice. This paper does not propose any magic cure-all for every problem but proposes one change for administrative military justice within the Army to fit what is believed by most experts to be the nature of future combat considering a major nuclear ground war.

Any system of military justice must be capable of maintaining military discipline. Likewise such a system must remain consistent with the American regard for the rights of the individual. It is a contradiction of the very purpose for which we might fight to say that in time of war we can ignore the rights of individuals. Such an outlook makes the reason for the battle futile. It is assumed that any battle in which we might become engaged is designed primarily to sustain our system of government. Nonetheless we must not forget the words of General William Sherman who said, "The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest

[2] McGarr, Lionel C., Major General, U.S. Army, "Fort Leavenworth Develops the Complete Man", *Military Review*, October 1958, Volume XXXVIII, No. 7, p. 8.

measure of force at the will of the Nation". Within these two requirements, discipline and individual justice, we should then look for more efficient methods of administration. Efficiency includes the maximum utilization of available personnel. Within the field of military justice this means the maximum utilization of personnel while at the same time complying with the requirements of the law. Efficiency is the administration of justice with speed and dispatch by trials free of error of law or judgment. Efficiency includes the availability of essential witnesses at trial and the presentation of proper documentary evidence. Efficiency will be found by administering a military justice program which does not interfere with tactical operations but instead contributes to the mission of the Army in the field.

The United States Army has entered a new era—the pentomic era which calls essentially for small, mobile ground forces. Troops will be widely separated, fast-moving, covering miles in the period that our Armies of the past covered yards. It will be an Army designed to move quickly for great distances and remain separated from large logistical concentrations for long periods of time. Units will not be shoulder to shoulder but separated for nuclear safety. Coordinate with these new concepts of battle is the idea of rearward concentration of administration functions. It is no longer conceived that the operating administrative agencies will be scattered throughout the tactical organization but there will be concentration of these operations. Current thinking provides for a pooling of resources at higher levels of functions formerly performed at the lowest echelon. Aircraft, vehicles and special type units are held in pools to be used where required rather than being available only on a decentralized basis. It is within these concepts that we may seek a basis for change or revision in past concepts of the administration of military justice, as well as the other logistical and administrative operations.

In considering any plans for improvement of efficiency in the administration of military justice under future combat conditions, there are a number of assumptions which can be made. Delinquency will continue. This is an unfortunate truth that whereas the Army may enlist the cream of American manhood, it can only reflect a cross section of our community. In a full scale mobilization, the rise in delinquencies and crimes in civil society can be expected to be transferred to the military community. The recent decline in disciplinary problems which appear to have resulted from higher enlistment standards could not be expected to continue under the demands for manpower created by a major war.

It may further be assumed that the administration of military justice will continue under the present Uniform Code of Military Justice.[3] There have been and will continue to be numerous recommendations for legislative changes in the Code. It seems safe nonetheless, to assume that there will be no fundamental change in the framework. As a corollary to this assumption is the further assumption that the troop strength of the Army under any wartime situation will come largely from the drafted civilian community. As a consequence, military justice will be subject to the continued scrutiny of the courts, the Congress and the press. The present Code was the result of alleged evils of the military justice system of World War II and in large part resulted from the public demand to safeguard the rights of service personnel. It was hoped to provide a justice system with the rights and privileges of our civil system, subject to the requirements of military discipline.

In the past there has always been a shortage of legally trained personnel to manage and administer the military justice system of the Armed Forces.[4] This was the experience in World War II and under the more rigid legalistic requirements of the Uniform Code of Military Justice, the shortage is likely to become accentuated. This post-World War II Code requires the use of legally trained personnel at all stages of the general court-martial particularly. The comprehensive review procedure will add to the military personnel legal requirement. The average civilian practitioner cannot be transformed overnight into a military lawyer in the justice field and begin immediate practice before a court-martial. The threatened shortage of civilian practitioners will require rigid conservation of the available personnel trained in law. Equally critical in the personnel area will be the shortage of court-reporter personnel.[5] This shortage exists both in military and civil practice even now. Such a shortage will become an even more desperate problem when the reporter is expected to operate not in the quiet of a court-room but under fast-moving combat conditions. A third area of personnel shortages will undoubtedly exist in the interpreters required for trials.[6] It is to be expected that much of the military justice work would be in overseas areas where such interpreters are essential to the effective conduct of a court.

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[3] Uniform Code of Military Justice, 10 U.S.C. §§ 801–940 (1958).

[4] General Board, United States Forces, European Theater, Study Number 82, *The Judge Advocate Section in the Theater of Operations*, 1945, par. 56b.

[5] *Ibid*, par 58.

[6] General Board, United States Forces, European Theater, Study Number 83, *Military Justice Administration in the Theater of Operations*, 1945, par 68.

COURT-MARTIAL JURISDICTION IN FUTURE WAR

The personnel shortage will be problem number one confronting those responsible for the operation of a world wide military justice system in the period of future full scale nuclear combat. Any proposal to improve the efficiency of the system must consider this problem and attempt to provide a solution for it or at the least to alleviate it.

In the past the difficulty of holding court near the scene of the offense has been a major problem. The reasons for this are so obvious as to require little explanation. Suffice to say that civilian witnesses cannot be expected to keep up with fast-moving troop units and military witnesses cannot be easily transferred from one area to another in derogation of their essential mission of fighting the enemy. In Europe during World War II, it was command policy that offenses involving civilians would be tried within 100 miles of the scene of the offense.[7] This was frequently difficult due to the speed with which our forces were moving.[8] In any future conflict, the fluidity of the battlefield will require far more rapid and extensive movement. The present infantry division is completely motorized. In the future our planners look for the combat forces to be completely air transportable within organic transportation of the flying jeep variety. The depth of movement under such conditions is difficult to comprehend. Within hours a unit can be expected to have moved many miles from the scene of an offense. Allied to this problem is the difficulty which a unit may experience in physically trying their court-martial cases.[9] Organizations preparing for large scale amphibious onerations have their equipment and records water-proofed and packed for some period before embarkation.[10] This would be equally true of units preparing for large scale airborne orerations. An airborne unit could not afford the luxury of general court-martial military justice facilities in the airhead in a short term operation, no matter how simple the case might be.

Another problem which commanders have exgerienced in administering military justice under wartime conditions is a result of the transient nature of personnel. Members of the organization appear to be constantly on the move away from the unit either on a duty or a leave status. Even more disconcerting are the prob-

[7] First United States Army, *Report of Operation,* 20 October 1944—1 August 1944, Annex 20.

[8] Twelfth Army Group, *Final After Action Report,* Volume 10, Judge Advocate Section.

[9] First United States Army, *Report of Operation, op. cit. supra* note 7.

[10] General Board, Study Number 83, *op. cit. supra* note 6.

lems which result from offenses committed while absent without leave. The practice of the U.S. Army and the nature of the American soldier has directed him on leave to large metropolitan centers. Any veteran of World War II or of Korea can testify to the situation in London, Paris or Tokyo, where soldiers were free of command authority and subject to the temptations of a large foreign city. In such cities major military justice problems are created and these problems are particularly troublesome when unloaded on tactical organizations separated many miles from the scene of an offense.[11]

A significant factor in determining the efficiency of the military justice system may well be the facilities available within the forward areas under austere conditions of combat. This should not be misinterpreted. No one argues for the panelled court-room and soft benches. On the other hand, when the facilities are too austere, they do not lend themselves to considered judgments either of facts by the courts or of law by the counsel and law officer. The tools of the military lawyer are his books and to send him to his personal battlefield without them is like sending an infantryman forward without his rifle. In this whole area of facilities we have come to realize in recent years that even in combat, men function best when given the best of what is available. We try to furnish soldiers hot meals and warm clothes. Shower and laundry units are not luxuries but are designed for the more efficient operation of the troops. In a like fashion, the ends of justice may be more nearly served under a situation lending itself to contemplation.

The Judge Advocate General's School has devoted much thought to these problem areas. The School has come forward with the concept of providing cellular units for utilization in the specialized legal fields in a theater of operations to supplement the staff judge advocate TOE authorizations.[12] These units have been authorized for activation in the Ready Reserve.[13] There will be for example, trial teams, claims teams, war crimes teams, procurement teams and the like. In the military justice area the variable work load in any particular jurisdiction makes this team concept particularly effective. In Korea, for example, the Second Division varied from a high of 47 general court-martial cases in one month to a low of

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[11] *Ibid*, par 62.

[12] Table of Organization and Equipment Analysis Sheet, TOE Number 27-500D, Proposed, *Judge Advocate General Service Organization.*

[13] TOE 27-500D, *Judge Advocate General service Organization*, 17 October 1958 (Department of the Army, 1957).

one case.[14] Any practicing judge advocate who has served in an active general court-martial jurisdiction can draw similar examples from his own experience. And all too often, this variation in case load is unexplainable. Those who have been required to provide program review and analyses for the comptrollers have been required to draw on their vivid imagination to explain the convolutions of a chart of court-martial cases. This proposed school solution, however, does not solve all of the problems which may be foreseen. These teams cannot assist in setting the trial closer to the scene of the offense. It will not affect delays due to combat functions required of court members and others involved in the administration of military justice. And this system does not contribute to the concept of pooling or austerity in combat units which is required under the pentomic concept.

Consideration has been given also to the concept of a Legal Operations Center (LOC) to complement the Logistical Operations Center and the Logistical Control Center. Within any particular organization whether it be division, corps or Army, this center would be the hub of all legal activity for the troops of that organization. That is, the general and special court-martials would be handled from the Center and all legal personnel would operate from the Center or be physically located there. This center would be organizational in nature and would stay in the rear area of the units of which it was a part.

It is submitted that the solution to the problems which will be presented by future combat conditions and one which will be effective in advancing administration efficiency is the same solution or a variation of one utilized in the past and particularly in the European Theater of Operations in World War 11. Individuals and units were attached for court-martial jurisdiction to administrative and logistical type organizations. This attachment for court-martial jurisdiction may have been the only attachment or tie involved and for all other purposes the organizations were independent, even in command matters. The attachments were accomplished by design as a result of orders and directives and by mutual agreements or arrangements made by the organizations. A somewhat analagous arrangement is to be found in the Army today where several major organizations are combined solely for the purpose of court-martial jurisdiction usually for the purpose of saving legal personnel or because the same general officer wears two or more hats and commands both organizations. The system is to be found particularly where numerous organizations or non-

[14] Table of Organization and Equipment Analysis Sheet, *op. cit. **supra*** note 12.

tactical units are combined for special court-martial jurisdiction.[15] It has, however, been found equally well suited for jurisdictions with general court-martial authority. Late in the Korean War, personnel of the Far East Command headquarters, the senior headquarters in that area located in Tokyo were placed under the Commanding General, Central Command, an administrative headquarters also located in Tokyo. Such attachment was obviously only for court-martial jurisdiction and was effective even though Central Command was a subordinate command of Army Forces Far East which was a subordinate of Far East Command. When in the past it has been found to be practicable and efficient to make such arrangements, it has been done. Coordinate, subordinate and superior organizations may all be combined for general court-martial jurisdiction with authority to act in such matters placed in the hands of a single commander.

This writer recommends that consideration be given to taking the responsibility for the administration of general court-martial jurisdiction from the combat units. That means that the fighting forces would not be required to try cases, prepare records, maintain large legal staffs, review records of trial, consider clemency or psychiatric matters or the other odds and ends concerned with administration of a large general court-martial jurisdiction. This responsibility would be transferred to the major administrative commands within a particular theater of operations. Thus if the Field Army were the senior administrative unit in a small theater of operations, the Field Army Commander could exercise general court-martial jurisdiction for all troops within the Field Army. A better solution might be for the jurisdiction to be given to the Field Army Service Command. Within a larger theater, all general court-martial jurisdiction would be administered by administrative or logistical organizations under the Theater Administrative Zone (TAZ). Theater Army Logistical Command, Advance Sections, Base Sections, Area Commands and even the Theater Army Replacement Training Command should exercise court-martial jurisdiction for all troops within certain specified geographical limits. Such jurisdiction would apply not only to the soldiers and units attached to the particular administrative unit but also to all troops within that geographical area irrespective of the organization or assignment of the individuals including those from the Field Army area or combat zone.

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[15] Hodson, Kenneth S., Major, US Army JAGC, "The Convening Authority and His Staff Judge Advocate," *Military Review*, December 1950, Volume XXX, Number 9, page 15.

Would such a transfer of general court-martial jurisdiction to the administrative organization commanders result in increased efficiency? Such a system, of course, envisions the pooling of legal personnel at one echelon and such a system lends itself to more efficiency though such a pool would be resisted by all organizations presently assigned legal talent. Each commander wants his own vehicles, medics, lawyers, artillery, etc. but pooling ordinarily lends to more efficient utilization of the available supplies (or manpower). In ETO during World War II there were 148 general court-martial jurisdictions with varying case loads. Each was required to have a full legal staff capable of handling a full case load. Each jurisdiction had a library, administrative assistants, and the usual paraphernalia required to process a general court-martial.[16] Under the proposed system legal personnel and court reporters working in teams from a central pool could be more efficiently utilized; the latest decision of the Court of Military Appeals and Board of Review would be more readily available at central libraries more adequately equipped ; fewer legal and factual errors could be expected and thus fewer rehearings required. Most significant perhaps in the projected war of movement of the future would be the fact that the tactical unit would not run away from the witnesses. Fewer delays would be necessary while commanders were involved in the more important and urgent business of fighting the enemy. Offenses committed in large metropolitan areas would be tried at the scene, thus emphasizing to soldiers that they must behave whether or not under the eye of their company or battery commander. It should be well recognized that the place of the commission of an offense does not involve jurisdiction in the system of court-martial nor does the duty assignment of the individual limit the jurisdiction of another organization to proceed with trial for a military crime.[17]

Other advantages will accrue in the centralization of guardhouses and more effective use of criminal investigation agencies. Such pooling has been already accomplished in part. The present pentomic division does not have sufficient military police strength to maintain a division stockade or guardhouse without depleting the combat forces. During World War II in ETO arrangements were made by combat divisions to leave prisoners behind in base section stockades.[18] In Korea, a system not unlike the medical evacuation system was utilized to move military prisoners to the

[16] General Board, Study Number 83, *op. cit. supra* note 6, Appendix 1.
[17] Hodson, "The Convening Authority and His Staff Judge Advocate," *op. cit. supra* note 15.
[18] Twelfth Army Group, Final After Action Report, *op. cit. supra* note 8.

rear progressively depending upon the length of time they were required to be absent from their unit for confinement and this confinement pipeline extended to the Big Eight in Tokyo on back to Lompoc and Leavenworth.

Such a revision of general court-martial jurisdiction will result in the combat commander being released from time consuming military justice functions which by law he cannot delegate. General Eisenhower, while commander in the European Theater, is said to have spent most of every Sunday on military justice matters.[19] This would appear to an unnecessary imposition on the time and energy of a commander involved in combat with the enemy. Our entire staff system is presently being reorganized to satisfy the demands for the time of the commander and the administration of military justice should likewise be tailored to fit the military needs of the future. Since by law the convening authority cannot delegate his responsibilities under the Code, we must utilize the provisions of the Code to meet our needs.

The real test of any change in the system is whether military discipline will be maintained as required under combat conditions while at the same time protecting the legal rights of the accused. It goes almost without saying that a system of military justice conducted in the relative calm of the administrative area can as effectively concern itself with the legal rights of an accused as can a court within range of enemy fire. Probably more significant is the fact that by removing individuals from the jurisdiction of a combat command to an administrative command that the complaint of command influence which resulted in so much criticism following World War II will be abated.[20]

A more important test is whether such a system will serve to assist in the maintenance of military discipline. It should be noted at the outset that this change presupposes no deviation from the present inferior court procedure. This is of significance as it is in these courts that the disciplinary powers of the command are most effectively exercised. These courts are close to the unit, whereas under any conditions, the influence of the general court-martial upon the troops is doubtful. Cases tried by general court-martial tend to become separated in time and distance from the troop units. There is a great gulf between the infantry company and division headquarters far greater than the linear distance might indicate. Time passes in the preparation for trial of a general court-martial

[19] General Board, Study Number 83, *op. cit. supra* note 6, par 48.

[20] Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, 81st Congress, H.R. 2498, *Uniform Code of Military Justice*, Washington, D. C., Government Printing Office, 1949.

and the incident which gave rise to the matter is forgotten by the troops, particularly those engaged in combat operations. In ETO, the average trial time was 98 days from forwarding of charges to action by the convening authority and this was under the 1928 Manual for Courts-Martial.[21] Under the Uniform Code of Military Justice, the period can hardly be expected to be less under the same combat conditions. Because no change is contemplated in the inferior court scheme which are the courts whose decisions affect the troops, one can conclude that the removal of the general court-martial to a rear administrative command should have little practical effect on the maintenance of discipline.

In determining the effect of this proposed change in jurisdiction upon the problem of maintaining discipline, consideration should be given to the type of offenses tried by general court-martial. In ETO from which the only readily available information has been published, there were 10,672 general court-martial cases.[22] Of these cases, 8,695 could be considered military offenses which include such crimes as AWOL, desertion, misbehavior before the enemy, sentinel cases, mutiny and sedition.[23] All other cases fall in the category of civilian type felonies with little or no relation to troop discipline as it relates to military operations in the field. This is not to say that murder and robbery are not of concern to the overall management of a military organization but such offenses do not affect the direct mission of achieving success in battle. What then were what we call military cases? The great majority were AWOL and desertion cases, many of which came from absences of individuals from rear area administrative units. Unfortunately the records have not been analyzed to break down the types of offenses by type unit. At the least we can say that accused can be assumed to have been apprehended or returned voluntarily to military control far from their parent organization. It would undoubtedly also be proper to say that the proportion of combat troops returning to military control in the rear area was proportionately higher than the number of administrative troops returning to military control in the combat area. Under current regulations absentees are tried where apprehended and such arrangement would make for easier administration and more efficient administration of military justice even in time of conflict. There might well be situations in which it would be desirable to return an absentee to his own unit for trial, i.e. desertion in the face of

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[21] General Board, Study Number 82, *op. cit. supra* note 4, par 105.

[22] General Board, Study Number 83, *op. cit. supra* note 6, par 3.

[23] *Ibid*, par 5–25.

the enemy, but overall the trial where found seems preferable, At least under present circumstances when it is often necessary to take all steps possible to maintain discipline, the trial where apprehended is not believed to so adversely affect military discipline as to change this procedure.[24]

Those who oppose this plan will open with the argument that such a proposal will take away a fundamental prerogative of a division commander. Though such an argument begs the question it should be examined. The real question is whether this is a power he requires to perform his mission and whether the function can be better performed elsewhere. General Gavin has said: "In the nuclear age, the division cannot continue its present form as an administrative unit."[25] What change in the authority of the division commander will this proposal then entail? He and his staff and his subordinates may still prefer charges and forward such charges with recommendation for trial by general court-martial. Within the division there will be numerous inferior courts which as indicated heretofore are more responsive to the disciplinary needs of a troop unit. Taken from the division will be the responsibility for conducting a trial, preparing records, reviewing the court-martial and supporting administratively the activities including lawyers, court members and stockades connected with military justice.

There is nothing magic in the grant of general court-martial jurisdiction to division sized units. During the Civil War, division commanders were first given this authority and responsibility as commanders of a unit of convenient size and administrative ability to perform this function. Further the division was granted this responsibility because it was a unit of a size which generated sufficient cases to justify the establishment of a general court. In this connection it should be noted that general court-martial jurisdiction for the Confederate forces was limited to Corps. Civil War divisions were small. Then the much larger World War I square division of 24,000 men had this authority. The responsibility remained with the 17,000 man triangular division and now the much smaller pentomic divisions retain this responsibility. It should be noted that there are many commanders of the rank of major general and even above who do not have general court-martial jurisdiction. These commanders still remain capable of sustaining

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[24] AR 630-10, *Personnel Absences, Absence Without Leave, and Desertion.* 14 July 1958, as changed (Department of the Army, 1958).

[25] Gavin, James M., Lieutenant General, USA, Retired, *War and Peace in the Space Age*, 304 (1958).

military discipline over the troops under their command. This capability is retained in part by the ability to forward charges to an appropriate convening authority to which the troops may be attached for general court-martial jurisdiction.

In opposition to the proposal will be the argument that rear echelon courts and commanders are too lenient with offenders and particularly for offenses committed in combat situations. This is really a canard without basis in fact. It can be said that from statistics gathered by the General Board of the European Theater this is not the case but rather that the reverse is true. The figures gathered by the General Board indicated that logistical command courts tended to impose harder punishments upon soldiers committing military offenses than did the combat commander courts.[26] Factually it would be difficult to prove a case one way or the other. It can be said that within the logistical commands or the rear area commands the court members and the commanding generals are soldiers and required to perform their duties in accordance with the oaths they have taken.

From the foregoing it may well be stated that logic indicates that this proposed system will be more efficient while at the same time maintaining discipline with due regard for the rights of the accused. What can be determined about this proposal from experience? Though there has been no general application of the proposed changes we can find numerous historical examples from which we can draw analogies. Most of these involve the attachment of units to other organizations for court-martial jurisdiction but many involved the attachment of individuals. In ETO, General Order 130 gave the base sections in London and Paris general court-martial jurisdiction over all soldiers who committed offenses within these geographical areas. The Order further provided for the transfer of individuals to jurisdiction upon the request of another convening authority "when such action will further the efficient administration of military justice."[27] As an example of this latter justification for exercise of jurisdiction over non-assigned troops, the Western Base Section tried 3 general court-martial cases from First United States Army units just prior to D-Day.[28] These trials were handled by the base section because the units to which the individuals were assigned were unable to try their own cases due to the imminence of their departure for the

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[26] General Board, Study Number 83, *op. cit. supra* note 6, par 56.

[27] General Order 130, Headquarters European Theater of Operations, U.S. Army, 26 December 1944.

[28] General Board, Number 83, *op. cit. supra* note 6, par 63.

invasion of Normandy. Even after the invasion, such transfers were common particularly for trials involving civilians. The General Board concluded, "Generally the transfer of cases was recognized as a sound policy for expediting trial without inconveniencing units committed to combat or civilian witnesses some distance from the accused's command area."[29] Nor was this system of attachment limited to Europe for the Army forces in the Kwajalein action, although commanded by a lieutenant general, did not have general court-martial jurisdiction. Rather they were attached to the Air Force for this purpose and as the report of action explains the absence of an Army general court-martial jurisdiction "a general court had been established in the area by Seventh Air Force."[30]

It would be foolish for one to contend that such a proposal would provide a panacea for all the problems of administration of military justice. It seems likely that new problems would be generated by such a change. The teams of law officer, counsels and reporters would be required to travel to forward areas to investigate and prepare for trial. Oftimes it would be more suitable for such teams to conduct the trial in the forward area and perhaps the use of court-members locally available would be more advantageous. These administrative difficulties labor the real point. "his proposed change would make the administration of military justice responsive to the problems of the combat units without involving such organizations in the onerous chores connected with military discipline for the more serious crimes.

What we conceive to be the nature of future war requires that the administration of military justice be as efficient as possible. It is submitted that the establishment of general court-martial jurisdiction based upon a geographic area within the theater of operations and made a responsibility of the commander of an administrative command will provide that efficiency. Such concern for efficiency will not sacrifice the maintenance or military discipline which will become even more vital in future war. Nor will this proposal adversely affect the rights of the accused. Our review shows that history supports such a change. We are fortunate, too, in that we have an opportunity to test this concept under field conditions now, either in Europe or preferably in Korea. The adoption of this proposal as a field test would undoubtedly uncover many difficulties. It is believed that the advantages would justify

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[29] *Ibid*, par 62.

[30] "Report, "Participation in the Kwajalein and Eniwetok Operations by United States Forces in the Central Pacific."

its use. Such changes should not be opposed merely on the basis of misguided ideas of the authority of a combat commander. His concern in any future conflict will be the direction of the fighting team, a task which will require his entire physical and intellectual effort. The main object of an Army is victory, not trials. The foregoing proposal will enable him more fully to devote his attention to that problem with one less administrative diversion.

THE GENERAL ARTICLE— ELEMENTAL CONFUSION"

BY CAPTAIN JAMES A. HAGAN**

I. INTRODUCTION

To provide for the government of the armed forces of the United States, Congress enacted what is euphemistically entitled the "Uniform Code of Military Justice.'' The euphemism in the appellation is demonstrated by the existence of two articles in the Code which provide punishment for conduct which is not definitely proscribed.' The latter of these, Article 134, operated as the medium through which various acts not denounced in the specific penal articles were made punishable by establishing what can be imperfectly analogized to a "common law" of crimes for the military. In some civil jurisdictions, absent appropriate legislation, resort has been had to the common law as a source for determining whether certain conduct is punishable as a crime.[2] What conduct is punishable by this unwritten law is determined by usage and tradition as evidenced by records of trials, books of reports, digests, and treatises of the sages, from all of which applicable principles are derived.[3] It has been said that the doing of an act, or omitting its performance where a legal duty to act is present, is a crime at common law if it injures or tends to injure the community at large.[4] Resolution of the question is the function of the judiciary. In the corresponding military area, much the same approach had been taken, at least until 1957.

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**Staff Judge Advocate Office, Schofield Barracks, Hawaii; member of the Texas State Bar; graduate of the University of Texas Law School.

[1] Art. 133, UCMJ, 10 USC 933; Art. 134, UCMJ, 10 USC 934.

[2] Clark, Marshall, A Treatise on the Law of Crimes, Sec. 10 at 9 (5th ed., 1952).

[3] *Id.*, Sec. 13, at 23-24.

[4] *Id.*, Sec. 15, at 25.

By a series of recent decisions, commencing in 1957,[5] the United States Court of Military Appeals has raised doubt as to whether bigamy, adultery, assault with intent to commit certain felonies, indecent assault, possesison of habit forming drugs and other commonly recognized offenses[6] are necessarily punishable as crimes within the purview of Article 134 of the Uniform Code of Military Justice.

That assertion is based on the holdings, by majority decision, that the conviction of a sailor for willfully and maliciously libelling an officer of the Navy in a letter to the Federal Bureau of Investigation,[7] the conviction of a soldier of the wrongful and unlawful use of habit forming narcotic drug,[8] and of soldiers for an assault on a military policeman[9] in the execution of his duties and on a civilian policeman[10] in the execution of civil law enforcement duties could not be sustained on appeal where the court-martial members were not instructed that they had to find, as a matter of fact, that such conduct was either prejudicial to good order and military discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

The statute under which the acts were charged reads as follows:

> Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and military discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.[11]

The decisions relate to the first two clauses of this article, and do not entail consideration of the clause pertaining to "crimes and offenses not capital".[12] To serve brevity, these first clauses will be

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[5] United States v. Grosso, 7 USCMA 566, 23 CMR 30 (1957); United States v. Williams, 8 USCMA 325, 24 CMR 135 (1957); United States v. Gittens, 8 USCMA 673, 25 CMR 177 (1958); United States v. Lawrence, 8 USCMA 732, 25 CMR 236, (1958); *cf.*, United States v. Grimes, 9 USCMA 272, 26 CMR 52 (1958).

[6] See par. 127 c, Sec. A, MCM, 1951, 224-227 for a listing of offenses and their punishments, among which are included adultery, assaults of various grades, bigamy, drunkenness, false swearing, unlawfully discharging a firearm, fleeing the scene of an accident, negligent homicide, indecent exposure and others.

[7] United States v. Grosso, supra, note 1.

[8] United States v. Williams, supra, note 1.

[9] United States v. Gittens, supra, note 1.

[10] United States v. Lawrence, supra, note 1.

[11] Art. 134, UCMJ 10 USC 934.

[12] The phrase, "crimes and offenses not capital" relates only to offenses denounced by federal statute, and does not apply to foreign or state laws, Par. 213 *c*, MCM, 1951, 383-384.

referred to collectively as the "terminal clause", or separately as "clause (1)" or "clause (2)", respectively, where not spelled out for clarity.

In finding prejudicial error in the failure of the law officer to submit the terminal clause as an element of the conduct charged as a violation of Article 134, the majority of the court, composed of Chief Judge Quinn and Judge Ferguson, rejected the contention that proof of the conduct alleged in the specification established, as a matter of law, an offense punishable under the statute.[13] This action laid to rest a concept which had long found expression in prior decisions of boards of review. Antecedent decisions in this area of the Code turned either expressly or impliedly, in many cases, on the proposition that proof of the commission of a "crime" as to which the President of the United States had declared the maximum punishment or provided a form specification in the Manual for Courts-Martial was sufficient under Article 134 or its predecessors. Boards of review did not uniformly require a specific finding by the court-martial members, as triers of facts, that the offense denounced by such specifications or for which punishments were expressed did, in fact, equate to a standard of conduct punishable under the article.

These prior authorities apparently considered that the statute established a legal standard against which conduct was to be tested in view of precedent and Presidential declaration. Colonel Winthrop, writing on the question as to whether crimes committed by soldiers against civilians could be viewed as affecting the discipline of the command and so be triable as offenses under the then applicable general article, stated that the question should be left to the decision of the department or commander, in each instance.[14] Boards of review did not recognize that any such distinct element existed. In a case where an officer had been convicted of a violation of Article 134, it was held to be unnecessary to submit to the court-martial the question of whether his acts were violative of clauses (1) or (2), the board of review commenting that his conduct was clearly and directly prejudicial to good order and military discipline.[15] A like result obtained on a conviction of being drunk and disorderly on base, the board concluding that drunkenness

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[13] United States v. Williams, 8 USCMA 325, 327, 24 CMR 135, 137 (1957).

[14] Winthrop, Military Law and Precedent, at 75 (2d ed., 1920 reprint) [hereinafter cited as Winthrop].

[15] CM 348951, Lee, 4 CMR 185, 191 (1952), *pet. denied*, 1 USCMA 712, 4 CMR 173 (1952); ACM 5615, Sippel, 8 CMR 698, 758 (1953), *aff'd* 4 USCMA 50, 15 CMR 50 (1954) (point not in issue).

was, per se, an offense.[16] Where the law officer instructed the court-martial that the offense of indecent exposure constituted a disorder as a matter of law, no error was found.[17] Likewise, the offenses of false swearing,[18] carnal knowledge under Article of War 96,[19] negligent homicide, [20] and bigamy [21] had previously been defined as violations of the statute without inclusion of the terminal element. In a case involving conviction of fleeing the scene of an accident and negligent homicide, where the concluding instruction was omitted, no prejudicial error was found, although the board of review commented that such an instruction would have been proper.[22] In fact, as late as 1956, omission of the terminal instruction was not noted as error.[23] This result apparently flowed from the belief that the inclusion of a form specification in the Manual constituted an "executive pronouncement'' that such conduct was an offense cognizable by a court-martial and that all of its elements were contained in the specification.[24] Language of the United States Court of Military Appeals in several decisions, or its inaction, undoubtedly contributed to the perpetuation of this concept, and suggests the court, in fact, embraced it.

In ***United States V. Marker,*** the court, unanimously overruling the contention that a specification under the general article which failed to aver that the conduct was of a nature to bring discredit upon the military service did not state an offense, declared :

> In truth, we believe the suggested language to be nothing more than traditionally permissible surplusage in specifications laid under Article of War 96, supra. Its use therein can add nothing of legal effect to an allegation of conduct not of such a discrediting nature — and its omission detracts not at all from conduct which clearly is.[25]

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[16] ACM 5289, Wahl, 5 CMR 733, 737 (1952), *pet. denied,* 2 USCMA 677, 6 CMR 130 (1953).

[17] CM 355119, Anderson, 8 CMR 212, 214 (1952), *pet. denied,* 2 USCMA 675, 8 CMR 178 (1953) ; see also, as to false swearing, CM 363654, Long, 12 CMR 420, 429 (1953), *pet. denied,* 3 USCMA 838, 13 CMR 142 (1953).

[18] CM 353607, Galloway, 8 CMR 323 (1952), *aff'd* 2 USCMA 433, 9 CMR 63 (1953).

[19] ACM 2693, Deese, 3 CMR A F 307, 313 (1950).

[20] CM 359117, Johnson, 9 CMR 421, 427 (1953); ACM 6585, Robinson, 12 CMR 860, 869 (1953), *pet. denied,* 3 USCMA 839, 14 CMR 228 (1953).

[21] CM 366280, Weber, 13 CMR 176,177 (1953).

[22] ACM 9450, Boone, 18 CMR 572,575 (1954).

[23] ACM 11615, Hoke, 21 CMR 681, 684 (1956), *pet. denied,* 7 USCMA 765, 21 CMR 340 (1956).

[24] ACM 2927, Jaekley, 4 CMR A F 130, 138 (1950), but see the "Indorsement of The Judge Advocate General of the Air Force", contra.

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

The majority opinion of the court, in *United States* v. *Williams*, indicated that the phrase "traditionally permissible surplusage"[26] as it applied to a specification did not extend to a declaration that proof of the service discrediting nature of the conduct was not an element of an offense under the article. It is obvious that boards of review had interpreted that phrase as meaning that such effect had neither to be pleaded nor proved. Language of the court, in other cases, though not directed particularly to the issue of whether factual proof of the terminal element was required, must certainly have been treated by the boards of review as sanctioning the theory that certain conduct amounted in law to a crime and hence violated the article, without a factual finding by the court-martial on the question.

In *United States v. Clark,* the accused was convicted of negligent homicide on a charge of involuntary manslaughter under Article 119 of the Code. The majority of the court, after determining that the offense of negligent homicide was in issue on the facts, reversed the conviction for the law officer's failure to instruct the court-martial members as to this offense. Chief Judge Quinn, dissenting, stated that it was doubtful that the offense of negligent homicide was in issue, but that if it were, sufficient instruction was given:

> The law officer mentioned the offense of negligent homicide. The *name of* the *crime* supplies *its own* definition—an unlawful killing coupled with simple negligence. It is difficult to say that this court did not have available for its deliberation a legal standard of guilt for this offense. (Emphasis added.)[27]

And in *United States* v. *Simmons,* the accused was convicted, among others, of a specification alleging "wrongful" discharge of a firearm under circumstances such as to endanger human life. The instructions given by the law officer were:

> That on the date and under the circumstances alleged, the accused did wrongfully discharge a firearm, to wit: a carbine, under circumstances such as to endanger human life.

After noting that willful discharge of a firearm under circumstances endangering human life and careless discharge of a firearm were both listed as offenses in violation of Article 134, the former allowing a much greater punishment than the latter, the court reversed the finding of guilty because the distinguishing element of willfullness was not submitted to the court-martial. The court declared:

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[26] United States v. Williams, 8 USCMA 325, 327, 24 CMR 135, 137 (1957).

[27] United States v. Clark, 1 USCMA 201, 207, 2 CMR 107, 113 (1952).

> There being a reasonable probability that the petitioner was found guilty of a greater offense on the *elements* of a lesser, it is obvious that prejudice is apparent. (Emphasis added).[28]

It is, of course, glaringly obvious that the terminal element was not submitted in the *Simmons* case, and that the language of the Chief Judge in his dissent in the *Clark* case, supra, did not comprehend clause (1) or (2) as an element of negligent homicide. In subsequent cases, the court either defined offenses violative of Article 134 in terms of elements not inclusive of the terminal element, or quoted, without noticing the defect, instructions given at the trial which omitted it.[29]

Recognition of the prior treatment by the court and boards of review of convictions under Article 134 is important and must be borne in mind in contemplating whether the later decision in *Grosso, Gittens, William,* and *Lawrence* may not have a greater impact than merely requiring the law officer to instruct the court-martial on the terminal element.

Whatever validity these expressions and decisions may have had as indicating that the court shared the viewpoint followed by the boards of review, the decisions in *Grosso* and related cases destroy any vestiges of that concept. In dissenting from the holding in the *Grosso* case, Judge Latimer urged at least a limited form of this concept. He iterated.[30]

> There is, however, a wide range of offenses which may be punished under the general Article, and when we reach the more serious ones, they, by their very nature, affect adversely tranquility, security, discipline, and good government of the military service. . . . However, as we leave that area and proceed down the scale of seriousness, we approach offenses which are more nearly akin to petty crimes. On the lower end of the measuring

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[28] United States v. Simmons, 1 USCMA 691, 697, 5 CMR 119, 125 (1952).

[29] United States v. Patrick, 2 USCMA 189, 191, 7 CMR 65, 67 (1953), defining the elements of bigamy as being " . . . that the accused entered into marriage, having at the time a lawful spouse then living . . ."; United States v. Russell, 3 USCMA 696, 700, 14 CMR 111, 118 (1954), defining negligent homicide as " . . . an unlawful killing resulting from simple negligence . . ."; United States v. Bull, 3 USCMA 635, 637–38, 14 CMR 53, 55 (1954), instruction of law officer as to negligent homicide set out in opinion, terminal element not included; United States v. Eagleson, 3 USCMA 685, 689, 14 CMR 103, 107 (1954), instructions of law officer as to fleeing the scene of an accident reproduced in opinion, omitted terminal element: United States v. Shelton, 4 USCMA 116, 119, 15 CMR 116, 119 (1954), " . . . The essential elements of the offense charged [assault with intent to commit murder] are that the accused, intending to kill, committed an assault upon a certain person. . . ."; United States v. Doctor, 7 USCMA 126, 136, 21 CMR 252, 262 (1956), the court states that paragraph 213 d (4), MCM, 1951 " . . . discusses the elements which must be proven to support a charge of false swearing . . .", but the terminal element is not included in the cited paragraph.

[30] United States v. Grosso, 7 USCMA 566, 573, 23 CMR 30, 37 (1957).

rod, we And some transgressions which, as a matter of law, do not constitute military offenses. Between the two limits are certain delicts which are in an area of doubt such that reasonable men would not be compelled to reach unanimity on their deterimental impact on military discipline **or** good order. In these instances, a factual issue arises and it is necessary that the court-martial members determine whether the commission of the crime had that effect.

In his dissent in the *Gittens* case, after commenting that the conviction of assault on an air policeman in the execution of his duties under Article **134** included the lesser offense of assault under Article 128, Judge Latimer asserted:[31]

It seems to me that when Congress proscribed an assault consummated by a battery, it concluded that offenses of that type were inimical to good order and discipline of any service. I, therefore, have no difficulty in concluding that the offense in an aggravated form has a greater impact than one of the simple variety. But strangely enough, this decision affirms a conviction on a [distinct] simple assault specification where, of course, the court members were not informed that the conduct had to be prejudicial to the good order and discipline of the armed services, but reverses the findings on the aggravated form for a failure on the part of the president of the court to require a finding on that ingredient.

And in commenting on the effect of the instructional deficiency, he stated:

As Article 59, Uniform Code of Military Justice, 10 USC 859, allows reversal only when the accused is materially prejudiced, I must assume that my associates believe that reasonable minds could find that a battery upon two air policemen is not conduct prejudicial to the good order and discipline of the armed forces."

The majority opinion of the court inferentially disclaimed that it was overruling prior cases. Apparently only the *Marker* case was called to its attention. The court disposed of the argument that *Marker* stood for the proposition that the article erected a standard legal in nature so as to obviate any necessity that the court-martial find the ultimate element of service discredit or impact on good order and discipline. It explained that surplusage differed in meaning when applied to averments in an accusation than from its consequence when applied to an element of proof. Yet the manner in which boards of review, and apparently the court, treated offenses under Article **134** as being defined in the traditional terms of elements raises questions as to the ramifications of the decisions in *Grosso, Gittens, Williams,* and *Lawrence.*

Among these are:

1. Do clauses **(1)** and **(2)** of the article really constitute an element of the offenses charged under the article, or do they

[31] United States v. Gittens, 8 USCMA **673,** *674,* **25** CMR **177, 178 (1958).**

[32] *Id.*

establish a standard to be applied by the court-martial without regard to the element concept of offenses?

2. If the court-martial is the judge of both law and facts, as an original matter, how far does its determination that certain conduct is an offense bind appellate tribunals in applying a legal standard to the conviction?
3. Are clauses (1) and (2) of sufficiently different content to raise instructional difficulties?
4. What are the criteria to be applied by the court-martial in determining whether and when conduct is either a disorder or neglect to the prejudice of good order and military discipline or is of a service discrediting nature?
5. May defenses inadmissible under the concept that Article 134 made certain conduct punishable as a matter of law properly be urged under the article as showing that the conduct does not rise to the standard made criminal because it does not have a prejudicial impact on good order and discipline, or is not of a nature to bring discredit upon the armed forces, such as contributory negligence in a negligent homicide situation, honest but negligent mistake of fact in a bigamy prosecution, or oral provocation in assaults under the article?
6. Does the fact that clauses (1) and (2) have been recognized as an element of an offense under the article cast doubt on the validity of precedent allowing convictions of lesser included offenses under Article 134 where the original charge was under a specific article?

A brief review of the history of the article, and the haphazard manner in which it grew and was applied is appropriate to illuminate the inconsistences logically inherent in resolving any of the questions posed.

II. HISTORICAL DEVELOPMENT OF THE STATUTE

The immediate predecessors of Article 134 were Article of War 96, which read substantially the same as the present article, and Article 22 (a) of the Articles for the Government of the Navy. While the former had been interpreted in numerous decisions and its coverage had been stated in four Army Manuals for Courts-Martial, the House Hearings and the Senate Report reflect a basic misconception as to the actual coverage of the article, and a misunderstanding as to the effect of its clauses, as previously applied by the Army boards of review. During the course of the hearings in

the House, the following response was given to a question asked as to what the phrase, "crimes and offenses not capital", meant:

> Mr. Larkin. It has been construed to be the offenses which are not spelled out but which are offenses under the Federal law. Also, as Colonel Dinsmore reminds me, it may be an offense under a State law where the accused commits such an offense in that State.

After some discussion as to whether violation of an ordinance would constitute such an offense, the following comment was made:

> Mr. Larkin. The construction as to State laws should be clarified to this extent: I believe a violation of a State Law would be punishable under the code to the extent it is construed as conduct to the prejudice **of** good order and discipline but not to the extent of State law itself. We purposely want to avoid trying personnel who happen to commit an offense under the State law, by virtue **of** the tremendous variations between State laws and by virtue of the necessity that would fall upon the court of trying them according to the procedural practices and perhaps even the substantive **provisions** of one State against another. But, if the act is to the prejudice of good order and discipline, the fact that it also incidentally is a State law violation as well would bring it under this jurisdiction but not triable as the State would try it.[33]

The Senate Report reaches a different conclusion:

> Article of War 86 and **AGN,** Article 22(a), are both general articles. These provisions have been retained in Article 134 of this code. This will permit the punishment **of** "disorders and neglects to the prejudice **of** good order and discipline in the armed forces, and all conduct **of** a nature to bring discredit upon the armed forces." It will also authorize trial by court-martial *for violation* of *State* and Federal crimes which are not enumerated as offenses under this code. (Emphasis added).[34]

So far as the legislative history shows, Mr. Larkin was **of** the impression that offenses against State laws were punishable under the first clause of the article if the act charged prejudiced good order and discipline, while the Senate Committee concluded that the State law was applicable without limitation. Both **of** these constructions run contrary to the interpretation **of** the article's forerunners, and Mr. Larkin's view expresses pre-1916 law on the subject. This indistinction is illustrative of the confusion which has attended the development and interpretation of the antecedent articles.

For present purposes, it is sufficient to note that the Army's general article, taken originally from the British military law, remained substantially unchanged from 1775 to 1916.[35] In 1874, it read:

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[33] Hearings Before a Subcommittee of the Committee on Armed Services on H.R. 2498, 81st Cong., 1st Sess., 1238–1239 (1949).

[34] S. Rep. No. 486, 81st Cong., 1st Sess., 32 (1949).

[35] Snedeker, Military Justice Under the Uniform Code, Sec. 2103 **(d),** 477–79 (1963) [hereinafter cited as Snedeker].

> All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field-officer's court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.[36]

Under the Articles of War of **1874,** the offenses made the subject of specific articles were those peculiar to the military status or community with but two exceptions. One was the commission of waste or spoilage involving property of inhabitants of the United States[37] and the second made punishable, in time of war, insurrection, or rebellion, the crimes of larceny, burglary, robbery, arson, mayhem, manslaughter, assaults and rape. The minimum punishment for these offenses was that provided by the laws of the State, territory, or district in which the offenses occurred.[38] In peacetime, those officers and soldiers accused of capital crimes or offenses against the person or property of United States citizens were to be delivered to the civil authorities, when requested.[39] Common law crimes were not within the jurisdiction of courts-martial except in time of war, insurrection, or rebellion, unless covered by the general article. Writing of charging **a** soldier with the commission of such a crime under the general article, Colonel Winthrop stated :

> It is now the accepted construction that the words "to the prejudice of good order and military discipline", are of general application, and qualify not only the term "disorders and neglects" but the designation "crimes" as well. . . . A crime, therefore, to be cognizable by a court-martial under this Article, must have been committed under such circumstances as to have directly offended against the government and discipline of the military state. Thus, such crimes as theft from or robbery of an offlcer, soldier, post trader or camp follower; forgery of the name of an offlcer . . . , manslaughter . . . , assault with intent to kill, mayhem, or battery . . . , committed upon a military person: inasmuch as they directly affect military relations and prejudice military discipline, may properly be—as they have been . . .—the subject of charges under the present Article. . . . On the other hand, where such crimes are committed upon or against *civilians*, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offenses.. . .
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> A strict rule on this subject, however, has not been observed in practice; and, especially as the civil courts do not readily take cognizance of crimes when committed by soldiers, military commanders lean to the sustaining of

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[36] Article of War **62,** Rev. Stat., Sec. **1342 (1874).**

[37] "Article of War **65,** Rev. Stat., Sec. **1342 (1874).**

[38] Article of War **58,** Rev. Stat., Sec. **1342 (1874).**

[39] Article **of** War 69, Rev. Stat., Sec. **1342 (1874).**

jurisdiction of courts-martial in cases of crimes so committed against civilians, particularly when committed on the frontier, whenever the offense can be viewed as affecting, in any material though inferior degree, the discipline of the command.[40]

This interpretation of the clause was carried in the various Manuals for Courts-Martial from 1896 to, but not including, 1917, as follows:

At to whether an act which is a civil crime is also a military offense no rule can be Iaid down which will cover all cases, for the reason that what may be a military offense under certain circumstances may lose that character under others. For instance, larceny by a soldier from a civilian is not always a military crime, but it may become such in consequence of the particular features, surroundings, or locality of the act. What these may be cannot be anticipated with a sweeping rule, comprehensive enough to provide for every possible conjunction of circumstances. Each case must be considered on its own facts. But if the act be committed on a military reservation, or other ground occupied by the army, or in its neighborhood, so as to be in the constructive presence of the army; or if committed while on duty, particularly if the injury be to a member of the community whom it is the offender's duty to protect; or if committed in the presence of other soldiers, or while in uniform: or if the offender use his military position, or that of another, for the purpose of intimidation or other unlawful influence or object such facts could be sufficient to make it prejudicial to military discipline within the meaning of the 62d Article of War.[41]

This construction of the clause was also enunciated by the United States Supreme Court:

But when the act charged as "conduct to the prejudice of good order and military discipline" is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear that a court-martial is authorized to inflict that kind of punishment. The act done is a civil crime, and the trial is for that act. The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction, and what he did was not only criminal according to the laws of the land, but prejudicial to the good order and discipline of the army to which he belonged. . . .[42]

And in ***Carter*** v. *McClaughry*, the following was said:

The reference is to crimes created or made punishable by the common law or by the statutes of the United States, when directly prejudicial to good order and military discipline."

Limitation of the phrase "crimes not capital" to federal offenses came about as a result of a later Supreme Court decision, a revi-

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Winthrop, Sec. 1124, at 732–35.

[41] Manual for Courts-Martial, Murray, at 16–17 (1896); A Manual for Courts-Martial, Courts of Inquiry, and Retiring Boards, and of Other Procedure Under Military Law, at 17–18 (1901); *Id.*, (1907); *Id.*, (1908).

[42] Ex Parte Mason, 105 US 696 (1881).

[43] Carter v. McClaughry, 183 US 365, 397 (1901).

sion of the article, and administrative interpretation of the revised statute, according to one writer.[44] In *Grafton v. United States,* the accused had been acquitted by a general court-martial of unlawful homicide under the 62d Article of War in 1904. He was thereafter convicted, on the basis of the same homicide of assassination in violation of Phillipine law, over his plea of former jeopardy. In sustaining his contention that the second trial was barred by the acquittal, despite the fact that the name of the offense was different, the Supreme Court said:

> The crimes referred to in that article manifestly embrace those not capital, committed by ofacers or soldiers of the Army in violation of public law as enforced by the civil power. No crimes committed by ofacers or soldiers of the Army are excepted by the above article from the jurisdiction thus conferred upon the court-martial, except those that are capital in nature. While, however, the jurisdiction of general courts-martial extends to all crimes, not capital, committed against public law . . . within the limits of the territory in which he is serving, this jurisdiction is not exclusive, but only concurrent with that of the civil courts.[45]

Snedeker comments that the Court, in reading the article, excised the commas after the words "disorder and neglects" and "may be guilty of" so as to limit the application of the words "to the prejudice of good order and military discipline" to disorders and neglects, with the result that the holding allowed jurisdiction over all crimes regardless of their prejudicial impact on good order and discipline.[46]

In 1916, Article of War 96 was enacted, reading as follows:

> Though not mentioned in these articles, all disorders and neglects to the prejudice to good order and discipline, *all conduct of a nature to bring discredit upon the military service,* and all crimes and offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense and punished at the discretion of such court. (Emphasis added to indicate new matter)."

Additionally, courts-martial were given jurisdiction in the cases of manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, and assault with intent to do bodily harm without conditioning its exercise on the existence of war, insurrection, or rebellion.[48] Murder and rape became triable in courts-martial, except when

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[44] Snedeker, *op. cit. supra* note 35, Sec. 2103 (e) at 483.

[45] United States v. Grafton, 206 US 333, 348 (1907).

[46] Snedeker, *op. cit. supra,* note 44.

[47] Article of War 96, Act of August 29, 1916, ch. 418, Sec. 1342, 39 Stat. 666.

[48] Article of War 93, Act of August 29, 1916, ch. 418, Sec. 1342, 39 Stat. 664–65.

committed in the geographical limits of the United States and the District of Columbia in peacetime.[49]

The purpose of the new addition to the general article was expressed by the then Judge Advocate General of the Army as follows:

> I want to explain that. That was inserted for a single purpose. We have a great many retired noncommissioned officers and soldiers distributed throughout the body of our population and a great many retired officers. If the retired officer does anything discreditable to the service or to his officer position we can try him . . . for "conduct unbecoming an officer and a gentleman." We cannot try the noncommissioned officer or soldier under that article, nor can we try him for conduct prejudicial to the good order and military discipline; because the act of a man on the retired list, away from the military post, cannot be reasonably said to affect military discipline. I threw in that language to cover the cases of those men. (Revision of the Articles of War, 1912-1920, p. 83). (Emphasis Added).[50]

The limited purpose of the clause was expanded in the 1917 Manual, which explained:

> "Discredit," as here used means to injure the reputation of.
>
> The principal object of including this phrase in the general article was to make military offenses those acts or omissions of retired soldiers which were not elsewhere made punishable by the Articles of War but which are of a nature to bring discredit on the service, such as a failure to pay debts.
>
> There is, however, a limited field for the application of this part of the general article to soldiers on the active list in cases where their discreditable conduct is not punishable by any specific article or by the other parts of the general article. (Emphasis added).[51]

In 1921, the narrow limits were further expanded:

> Instances of such conduct on the part of persons subject to military law are unlawful violations of local State statutes (not enacted by authority of any law of the United States), or municipal ordinances or regulations, or of the law of friendly foreign countries; or where they are guilty of any other discreditable conduct not made punishable by any specific articles, or by the other parts of the ninety-sixth (the general) article.
>
> *Another* principal object of including this phrase in the general article was to make military offenses those acts or omissions of retired soldiers which were not elsewhere made punishable by the Articles of War but which are of a nature to bring discredit on the service, such as a failure to pay debts. (Emphasis added).[52]

The 1928 Manual restricted the broad declaration that violations of local law were instances of such conduct:

> "Discredit" as here used means "to injure the reputation of". Instances of such conduct on the part of persons subject to military law *may* include

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[49] Article of War 92, Act of August 29, 1916, ch. 418, Sec. 1342, 39 Stat. 664.

[50] CM 276559, Francis, 48 BR 369, 373 (1945).

[51] Para. 446, MCM, U.S. Army, 1917, 283.

[52] Para. 446, MCM, U.S. Army, 1921, 462-63.

acts in violation of local law committed *under such circumstances as to bring discredit* upon the military service. So also is punishable under this clause any discreditable conduct not elsewhere made punishable by any specific Article of War or by one of the other clauses of A. W. 96.

One object of including this phrase in the general article was to make military offenses those acts or omissions of retired soldiers which were not elsewhere made punishable by the Articles of War but which are of a nature to bring discredit on the service, such as failure to pay debts. (Emphasis added).[53]

Reference to the original purpose of the phrase in the various Manuals thus transformed the "single" purpose to the "principal object", the "principal object" to "another principal object", and the last to "one object". By positioning, the "limited field" applicable to soldiers on the active duty list assumed prominence, and reference to retired soldiers was not made in the Manuals of 1949 or 1951. The extended coverage afforded the second clause in 1921 was undoubtedly caused by the change in wording in that Manual as to the coverage of the clause relating to "crimes and offenses not capital". The following shows the interpretation of this clause in the 1917 Manual, positioned with the added language of the 1921 Manual, as indicated by the underscoring:

The crimes referred to in A.W. 96 manifestly embrace those not capital committed in violation of public law as enforced by the civil power. (U.S. v. Grafton, 206 U.S. 348) . . . *the "public law" here in contemplation being that of the United States; that is, enacted or adopted by the authority* of *the Government of the United States. This includes the laws of the District of Columbia and of the several territories and possessions of the United States as well as all laws* of *the United States: but it excludes city ordinances and regulations and State statutes, as well as the laws of friendly foreign countries (violations of which are, however, chargeable as conduct of a nature to bring discredit upon the service)* . . .

All crimes or offenses wherever committed that are not made punishable by death are included, except such as are specifically included in some other article and (in view of the ninety-second article) except murder or rape committed in time of peace within the geographical limits of the States of the Union and the District of Columbia.[54]

Addition of the underscored words in 1921 made it obvious that the broad language of the Supreme Court in the ***Grufton*** case, *supra*, was not to be utilized to render the violation of local law an offense under the third clause. The authority under which civilian type crimes were formerly tried by the military was thus deleted from the article, and, by interpretation, these became chargeable as conduct of a nature to bring discredit upon the service.

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[53] Para. 162 *b*, MCM, U.S. Army, 1928, 188.

[54] Para. 446, MCM, U.S. Army, 1917, 282; para. 446, MCM, U.S. Army, 1921, 463.

The framers of the present Manual recognized that the latter phrase had been extended far beyond its orginial purpose :

> By judicial interpretation these "vague words" have since been expanded from the narrow construction placed on them by their author to the point where they have been used as the legal justification to sustain convictions **for** practically any offense committed by one in the military service which **is** not either specifically denounced by some other article, or is not a crime or offense not capital or a disorder or neglect to the prejudice **of** good order and discipline. It has been said, however, that an act which may be considered a violation **of** this clause must be one which, because *of* its nature and the circumstances under which it was committed, directly affected the reputation or credit **of** the military service. CM **276559,** Francis, **48** BR **373,** dissenting opinion.[55]

The development of the article prior to and after the revision in 1916 to the present, as evidenced by the applicable interpretive Manual provisions, allows the following conclusions to be drawn :

1. The "disorders and neglects" clause was orginally limited to offenses primarily military in nature.
2. The "crimes not capital" clause permitted trial, prior to 1916, of those civil type offenses committed by persons subject to the Articles of War, when the commission of the crimes had a direct and substantial impact on the government of the military unit.
3. The "discrediting conduct'' clause was originally intended to cover delicts of retired enlisted men, and was not meant to embrace offenses formerly covered by either of the other two clauses, so far as military personnel on active duty were concerned.
4. Decisions sustaining military jurisdiction under the general article of crimes, when found to be prejudicial to good order and military discipline by a court-martial, recognized the applicability of the "crime" or element concept, prior to 1916, because crimes were made punishable by the direct language of the statute, when prejudicial to good order and discipline.
5. Subsequent to 1921, the "crimes and offenses not capital" clause was limited, by Manual definition, to those offenses which violated geographically applicable federal law, or federally enforced law, and did not permit general jurisdiction over crimes in contravention of state and other non-federal local law.

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[55] Legal and Legislative Basis, Manual **for** Courts-Martial, United States, **1951,** (**1958** Reprint) **295.**

6. Between 1921 and 1928, the Manual language relating to the "discrediting conduct'' clause seemingly equated violations of local State statutes, municipal ordinances or regulations, or the law of friendly nations to conduct of a nature to bring discredit upon the service, from the fact only of their commission.

7. In 1928, the Manual changed the former language seemingly making violations of local law punishable as violative of the second clause, by providing that the clause "may include acts in violation of local law committed under such circumstances as to bring discredit upon the military service," thus apparently requiring a showing of more than a violation of local law to make the act criminal under the article.

From this background it is appropriate to proceed to consideration of what conduct has been found to be an offense under the article, what criteria have been applied, and what body has actually performed the function.

III. THE APPELLATE BODIES USURPATION OF THE COURT-MARTIAL FUNCTION

The difficulty in dealing logically with the question of by what criteria conduct may properly be regarded as punishable under the article relates back to the concept that crimes, with all of their traditional elements and defenses, were punishable under the general article and that the President of the United States could, without express statutory authority and merely by listing violations in the Table of Maximum Punishments, establish offenses with definite elements and defenses. When the majority of the United States Courts of Military Appeals held that an instruction that the accused's conduct was prejudicial to good order and military discipline in the armed forces or was of a nature to bring discredit was required because this was an "element" of the "offense" of wrongfully possessing marijuana,[56] it apparently perpetuated the notion that *offenses* as such, when their commission resulted in the prescribed effect, were covered by the article. The article does not, in express wording, make any specific crime or offense punishable under either of the first two clauses. It purports to make punishable only "disorders and neglects" and "conduct". The Uniform Code of Military Justice does not, in

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Wnited States v. Williams, 8 USCMA 325, 327, 24 CMR 136, 137 (1957), " . . . It is an element of the offense and must be instructed on . . ."

any explicit provision, give the President, a board of review, or the United States Court of Military Appeals the duty of defining, in terms of "elements", what *conduct* amounts to a violation of the article. By its terms, the article sets up standards to be applied in the first instance by the court-martial to determine whether the accused has violated the article. This is without regard to whether the conduct alleged is a commonly recognized civil crime. It is not the disorder, neglect, or conduct which is supposedly punishable, but the actual or potential effect thereof.[57]

Utilization of the nomenclature descriptive of a given crime, *eo nomine,* is probably attributable to federal decisions dealing with the general articles of the Navy and the Army without distinction as to their wording, and to the fact that the President, in various Manuals from 1917 to the present, sought to define crimes under the general article by executive proclamation and made applicable to undefined, but specified "crimes", certain punishments.

One of the early cases to reach the Supreme Court of the United States with respect to the general article dealt with that of the Navy, which read :

> All crimes committed by persons belonging to the Navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea.[58]

Commenting on the contention that attempted desertion was not covered by the article, the Court stated :

> When offenses and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d Article of the rules for the government of the navy, which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses by the usages in the navy of all nations. , . . Notwithstanding the apparent indeterminateness of

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[57] *Cf.,* The British view under Article 69, Army Act, 1955, providing for the punishment of any act, conduct, or neglect to the prejudice of good order and military discipline. "Before an accused can be convicted of an offense against this section, the court must not only be satisfied that the accused was guilty of the act, conduct or neglect alleged in the particulars but that the act, conduct or neglect of which the accused is guilty was to the prejudice of both good order and military discipline. Even if the allegations in the particulars are proved, the court must acquit if it is not satisfied on this last matter. In this connection it should be noted that the words are 'to the prejudice of,' etc., which means that the prosecution do not have to show that good order and military discipline were actually affected, but only that the act, conduct, or neglect of which the accused is guilty was calculated to prejudice good order and military discipline." Manual of Military Law, Part I, 1956, 289.

[58] Article 32, Articles for the Government of the Navy, Act of 23 April 1800, ch. 33, Sec. 1, 2 Stat. 45.

such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and the army, and by those who have studied the law **of** courts-martial, and the offenses of which different courts-martials have cognizance.'

In ***Ex*** *Parte Mason,*, the Court, holding it to be within the jurisdiction of an Army general court-martial to try, under Article of War **62,** a guard who shot at a prisoner in a Washington, **D.C.** jail, and to adjudge penitentiary confinement, declared :

But when the act charged as "conduct to the prejudice of good order and military discipline" is actually a crime against society which is punishable by imprisonment in the penitentiary, it seems to us clear that a courts-martial **is** authorized to inflict that kind of punishment. The act done is a civil crime, and the trial is for that act [under, "All crimes not capital . . . to the prejudice of good order and military discipline"]. The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction, and what he did was not only criminal according to the laws of the land, but prejudicial to the good order and discipline **of** the army to which he belonged.[60]

In both these cases, the Court was dealing with statutes which made punishable "crimes". In *Swaim* v. *United States,* it was urged that a sentence imposed by an Army court-martial under the **62d** Article of War was void, on the basis that no offense was alleged within the compass of the article. The Court asserted:

This is the very matter that falls within the province of courts-martial, and in respect to which their conclusions cannot be controlled or reviewed **by** the civil courts. **As** was said in Smith v. Whitney, 116 U.S. 178, **"of** questions not depending upon the construction of statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law."[61]

In *Carter v. McClaughry,* after observing that the phrase "all crimes not capital" referred to crimes created or made punishable by the common law or by federal statute, when their commission was directly prejudicial to good order and military discipline, the Supreme Court stated :

We should suppose that embezzlement would be detrimental **to** the service within the intent and meaning of the article, but it is enough that it was peculiarly for the court-martial to determine whether the crime charged was "to the prejudice of good order and discipline.""[62]

Thus it is seen that when the Supreme Court ruled that courts-martial had jurisdiction over crimes, the holdings were based on

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[59]Dynes v. Hoover, 61 US (20 How) 65, 82 (1857).

[60]Ex Parte Mason, supra, note 42.

[61]Swaim v. United States, 165 US 553, 562 (1897).

[62]Carter v. McClaughry, ***supra,*** note 43, at **400.**

the fact that crimes, as such, were punishable when their commission was prejudicial to good order and discipline, because of the jurisdiction expressly conferred by the statute. Crimes are subject to definition in terms of their elements, and a court-martial, properly instructed,' can determine whether the facts proved meet the legal requirements for conviction. Superimposition of the additional requirement, that the commission of the crime be found to be directly prejudicial to good order and military discipline constituted a recognition that the military function was not that of unburdening the dockets of civil courts with criminal jurisdiction. The structure of the Articles of War prior to 1916 did not cover crimes except to the extent that they offended, directly or indirectly, against the gocd order and discipline of the military service. Whether the required nexus was present, under the circumstances, was the function of the court-martial to ascertain, based on the training and experience of the officers who comprised the court. After 1917, awareness of the fact that a crime was not an offense under military law unless the connection was found between its commission and a prejudicial impact on discipline was blunted, probably because of the positioning of the phrase "crimes and offenses not captial" and the interpretation given it in the 1917 Manual.

Few cases are to be found in which boards of review indicated recognition of the fact that where a "crime" was charged, under the general article, the members of the court-martial were to determine whether the conduct alleged violated clause (1) or clause (2). In 1932, an Army board of review observed:

> In cases where the specifications allege conduct such as that charged in the instant case, it is peculiarly for the court-martial to determine whether the evidence establishes the offense; in other words, whether the conduct charged and the evidence in support thereof show a breach **of** that part **of** Article of War **96** which denounces "all disorders and neglects to the prejudice **of** good order and military discipline" and "all conduct of a nature to bring discredit upon the military service", and the approved findings of the court in that respect may not properly be disturbed by The Judge Advocate General or the Board of Review where there is substantial evidence to support the findings and no error was committed during the trial which injuriously affected the substantial rights **of** the accused."

The proposition was more succinctly stated in 1943 by a board of review in affirming the conviction on multiple specifications under Article of War 96 for abusing authority and gambling with subordinates:

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[68] CM 199391, Klima, 4 BR 45, 46 (1932).

> The Judge Advocate General has also held "that the chief, if not the sole purpose of bringing an officer to trial under the sixty-first article . . . (conduct unbecoming an officer) . . . is to obtain the judgment of the court upon the character of his acts or conduct from the point of view of that article." (Sec. II D 19, p. 489, Dig. Ops. JAG 1912). There is no reason why the same consideration should not apply where the charge characterizes the conduct as prejudicial to good order and military discipline.[64]

If recognition had been afforded to the fact that the Supreme Court decisions dealt with that portion of the article making crimes punishable as such, and that the revision in **1916,** limited by interpretation, removed the basis for holding crimes, per se, punishable, the idea that the court-martial determined whether conduct amounted to an offense probably would have prevailed. Had the development been logical, court-martial members, relying on their experience and acquaintance with the needs of the military community, would have had the primary function, with appellate bodies being concerned only with whether the determination was reasonable, under the evidence. That did not occur.

Decisions subsequent to the revision continued to treat the question as being whether the conduct proved amounted to a commonly recognized crime, or was proscribed by the President. In essence, the approach on appellate review was not whether the court-martial had grounds for concluding that the conduct was punishable, but whether the determination had been made elsewhere that the conduct amounted to a "crime". An example of this is found in the approach to the question of whether carnal knowledge was an offense. It was not specifically denounced under any of the Articles of War prior to the 1951 Code. In 1939, a board of review had before it a case in which the accused was charged with carnal knowledge in violation of a federal statute, under Article **96.** The United States had no legislative jurisdiction over the area in California where the act occurred. The age of consent under the federal statute was **16,** under the State law, 18. The girl involved was **14.** In affirming the conviction, the board declared the allegation of federal law was surplusage, and continued:

> It is unnecessary for the Board of Review to decide whether every instance of sexual connection out of wedlock between a soldier and a girl under the age of consent [where found, not indicated"] would constitute conduct of a nature to bring discredit upon the military service, but it is of the opinion that the accused's act was such under the circumstances

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[64] CM 238266, Campbell, 24 BR 215, 219 (1943).

[65] In 1917, intercourse, by consent, with a female of 10 years of age or over was not rape. Par. 442, MCM, United States Army, 1917, 252.

disclosed by the evidence in the present case. Accused was known to the girl's parents to be a soldier and was admitted by them to their home and to the company of their fourteen year old daughter. He took advantage of their confidence in him and of her youth and inexperience. The ***Board*** therefore *concludes* that the act of the accused constituted an offense cognizable by court-martial . . . being conduct **of** a nature to bring discredit upon the military service. (Emphasis added.)"

Notice that even in this case, the board did not seek to discover whether the court-martial's finding of service discredit was supported by the evidence, but made its own conclusion as to service discredit, emphasizing facts which permitted it to do so. In the ***Ritchie*** case,[67] the accused was prosecuted under a specification alleging carnal knowledge in violation of Article of War **96.** The trial proceeded on the erroneous assumption that the federal statute applied, until a court-member asked what the age of consent in the state was, and was informed that it was 16. In affirming the conviction the board of review merely declared that the penetration had been admitted, age had been established, and that neither consent on the part of the girl nor her misrepresentation as to her age was material. The board treated the case as if it involved solely proof of the facts required to establish the elements under the inapplicable federal statute or the equally inapplicable Oregon statute, without discussing the question of whether the conduct was service discrediting or a disorder or a neglect. Nor did it spell out the theory under which it pronounced that mistake of fact or misrepresentation as to age was not a bar to a finding that the conduct was an offense under Article **96.** Obviously the board imported into its consideration of the case concepts of criminal jurisprudence applicable under the State law. The contrast between this case and the case quoted immediately prior to it is self-evident. In **1949,** a form specification for carnal knowledge was added under the sample specifications in the Manual for Courts-Martial, **U.S.** Army, 1949.[68] Thereafter, Air Force boards of review were confronted with the problem of whether conduct violating the allegations of the form specification, prescribing the age as sixteen, operated in areas where the age might be lower under local law. The boards concluded that the guilt or innocence of alleged military offenders was to be determined by "American standards" and not by those of the

[66] CM **211420,** McDonald, **10 BR 61, 63 (1939).**

[67] CM **234110,** Ritchie, **20 BR 237 (1943).**

[68] App. **4,** MCM, **U.S.** Army, **1949,** Form **188,** at **333.**

country where the offense allegedly occurred.[69] When these cases are viewed together it is apparent that the boards were applying a standard which was not necessarily that utilized by the court-martial in convicting. Little effect was given to any supposed factual finding by the court-martial,

In 1946, the contention was urged in the *Mellinger* case that Article of War 96 was void because of vagueness. After noting that the Supreme Court had upheld the validity of the Navy article in *Dynes* v. *Hoover* and that no attacks had been made on the article on the grounds of vagueness since the change in the 1916 revision, the board declared :

> In the opinion of the Board of Review, there has been no change in the 96th Article of War which would alter that rule. Not only "do practical men in the army" know what offenses are punishable under the 96th Article of War, but those offenses are described in the Manual for Courts-Martial and maximum punishments therefore are set forth in paragraph 104c of the Manual. The principal of condemning, in general language, acts which would prejudice or discredit the military service was approved by the United States Supreme Court. . . . [citing cases] . . .[70]

The language of the decision demonstrates that the board recognized no distinction between the fact that the Supreme Court was interpreting the "crimes not capital" clause and that the "crimes" language was no longer applicable. Nor was the board aware of the basic conflict in the statement that "practical men" know what the offenses are and that the Manual describes them and lists punishments. The language suggests that offenses exist which, when factually established as to their elements as defined or suggested in the Manual, establish the requisites for conviction. This is the approach that has been taken most frequently on review.

Blackmail, as defined by the District of Columbia Code, although committed in Flordia was, by reason of precedent, held to violate Article of War 96.[71] Wrongful cohabitation has been held to be an offense, because of long recognition afforded to it as being conduct of a nature to bring discredit on the service.[72] Wrongfully drinking intoxicants with enlisted men, and fraternization by an officer, when conducive to undue familiarity, have been held to violate custom.[73] That it is prejudicial to good order

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[69] ACM 2693, Deese, 3 CMR AF 307, 313 (1950); ACM 3008, Parkman, 4 CMR AF 270, 280–81 (1951).

[70] CM 307097, Mellinger, 60 BR 199, 213 (1946).

[71] ACM 847, Soulier, 1 CMR AF 246 (1949).

[72] ACM 6105, Andrews, 9 CMR 667, 674, (1953).

[73] CM 356027, Livingston, 8 CMR 206, 210 (1952), *pet. denied*, 2 USCMA 676, 8 CMR 178 (1953).

and discipline for an officer to borrow money from an enlisted man in the same organization has been supported by adversion to numerous precedents,[74] as has conviction of an officer under Article 134 for soliciting an enlisted man to go absent without leave.[75] Existing service customs and usages and the listing of punishment in the Table of Maximum Punishments aided the Court of Military Appeals to determine that negligent homicide was an offense under Article 134.[76] Because of the provisions of the Manual, the existence in many States of legislation limiting the rights to carry concealed weapons, and the fact that "hidden lethal weapons are the tools of men who deal in crimes of violence", the court concluded that carrying a concealed weapon violated the second subdivision of the article.[77] Because the "codifiers of the Manual" made no change in the 1951 Manual respecting the offense of wrongfully and knowingly possessing a false pass as it existed prior to 1951, and because the offense was well known, the court concluded that such an offense existed under Article 134 as a disorder.[78] Although bigamy is not the subject of a specific article, its elements could be found by looking at the form specification.[79] Ancient practice of both civilian and military courts compelled the court to conclude that an honest, but not reasonable, mistake as to a divorce was not a defense to bigamy charged under the article.[80] The fact that, in civil life, a peace bond could be required of one who threatened to harm another, and that under the Code assaults were punishable according to their severity permitted the court to hold that communicating a threat to any person in the military was palpably and directly prejudicial to good order and discipline.[81] In holding that discreditably failing to pay debts and discreditably failing to maintain funds for the payment of issued checks were not offenses under Article 134, although the conduct was concededly discrediting, the court noted that the offense was not referred to in the Manual or in the Table of Maximum Punishments; that while a few boards of review

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[74] CM 275535, Wilson, 48 BR 71, 75 (1945); CM 353607, Galloway, 8 CMR 323, 327 (1952), *aff'd*, 2 USCMA 433, 9 CMR 63 (1953).

[75] CM 356538, Jackson, 8 CMR 215, 218 (1953), *pet. denied*, 2 USCMA 677, 8 CMR 178 (1953).

[76] United States v. Kirchner, 1 USCMA 477, 4 CMR 69 (1952).

[77] United States v. Thompson, 3 USCMA 620, 14 CMR 38 (1954).

"United States v. Blue, 3 USCMA 550, 13 CMR 106 (1953).

"United States v. Patrick, 1 USCMA 201, 7 CMR 65 (1953).

[78] United States v. Bateman, 8 USCMA 88, 23 CMR 312 (1957); United States v. McCluskey, 6 USCMA 545, 20 CMR 261 (1955).

"United States v. Holiday, 4 USCMA 454, 16 CMR 28 (1954).

decisions existed recognizing the offense, there was no clear acceptance of these decisions by other boards of review, that generally ordinary negligence was not the subject of criminal sanction, and that the majority of prior decisions on the question required a dishonorable evasion, bad faith, or gross indifference as an element of the offense of dishonorably failing to pay debts. It declared:

> We cannot hold in the absence of clear Code authorization or long established custom that a negligent omission in this respect rises to the type of dishonorable conduct which is gravamen of the offense in question.[82]

In declaring that a specification alleging the unlawful and wrongful opening by the accused of a package addressed to another before its delivery did not constitute an offense, the court emphasized that the Government could cite no case in military law to the contrary.[83] And in declaring that it was no offense under Article 134, dishonorably to fail to maintain funds to cover checks given during a poker game, the majority decision of the court countenanced the fraud on the basis that gambling is generally considered to be illegal.[84] A Coast Guard board of review, determining that a specification alleging the wrongful possession of a hypodermic needle, bent spoon, and an eye-dropper for the purpose of injecting a habit forming drug (heroin) did not state an offense stated:

> Article 134 . . . is not a catch-all. Its phraseology follows earlier law. It does not confer general criminal jurisdiction upon courts-martial. . . . The coverage of Article 134 is, of course, not limited to those offenses heretofore recognized in reported cases. The law is not static. New and different offenses may become established as triable under Article 134. There was a time when the possession of narcotics was not so recognized. The time may come when the possession of the implements of their usage may be deemed to warrant court-martial cognizance. It is not yet here.[85]

The reluctance to test the finding of the court-martial against the question of whether there is a reasonable relationship between the conduct proved and the conclusion that it violated the article's provisions, save in cases where the conduct has been punished before, with some exceptions, is sharply emphasized in the case of *United States* v. *Gillin.* The accused was convicted of a specification alleging the unlawful entry of an automobile under

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[82]United States v. Kirskey, 6 USCMA 556, 561, 20 CMR 272, 277 (1955); United States v. Downward, 6 USCMA 538, 20 CMR 254 (1955); cf., United States v. Manos, 8 USCMA 734, 25 CMR 238 (1958), holding that there is no offense of negligent indecent exposure, because of the absence of a mens rea.

[83]United States v. Lorenzen, 6 USCMA 512, 20 CMR 228 (1955).

[84]United States v. Lenton, 8 USCMA 690, 25 CMR 194 (1958).

[85]CGCM 9813, Lefort, 15 CMR 596, 597 (1954).

Article **134.** In holding that there was no such offense, the court looked to the form specification provided for the offense of unlawful entry of a dwelling house, garage, warehouse, vegetable garden, orchard, and stateroom[se] and noted that an automobile was not listed therein. It then contrasted the coverage afforded the offense of housebreaking, under Article **130,** 10 USC **930,** which limits the subject of that offense to a building or structure. Thereafter, it turned to the comparable unlawful entry provision of the District of Columbia Code and ascertained that an automobile was not covered by that statute. It then continued :

> It is of particular interest to note that, in spite of the care with which the property subject to housebreaking or unlawful entry is enumerated in the Code and the Manual, not once is **an** automobile mentioned. . . . It would, therefore, appear that Congress and the framers of the Manual deliberately excepted automobiles?'

and later concluded :

> No doubt the drafters of the Manual were following generally the District of Columbia Code, and it seems highly improbable that Congress and these individuals interpreting the Code would inadvertently overlook property in such common use as an automobile. . . . To extend the coverage to personal property not within the mentioned classes would be judicial legislation and beyond the powers conferred upon us by Congress.[88]

Nowhere does the court, in its decision, consider that Congress gave the court-martial the power of initially determining, and apparently without limitation to any previously recognized and punishable offenses under the article, whether the conduct was of a nature to bring discredit upon the armed forces, or offended against the disorder and neglect clause. The question, it would seem, was not whether the court was being asked to embark upon a course of judicial legislation, but whether there was a reasonable connection between the fact that the car had been entered without the consent of the owner and the finding that such conduct was a service discredit or a disorder or neglect.

These decisions disclose a search by the appellate bodies into prior practice, custom, state law, and common law concepts of crimes and defenses, or a reliance on the Manual provisions, to ascertain whether the conduct amounts to a violation of the article, The fact that the court-martial supposedly found sufficient nexus between the conduct and its effect to characterize it as a "disorder and neglect" or a "service discredit" has been of little or no importance in determining whether the conduct amounted to an offense.

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[86] App. 6, MCM, 1951, Form 173, at 494.

[87] United States v. Gillin, 8 USCMA 669, 671, 25 CMR 173, 175 (1958).

[88] *Id.*, at 672, 25 CMR 176.

To read the cited cases for the bare proposition that the appellate bodies were concerned with deciding whether the court-martial's finding on this issue (if any) was supported by the evidence is to ignore the fact that, theoretically, each conviction must be tested by the facts and circumstances proved at the trial. To use precedent, the Table of Maximum Punishments, custom or any other criteria to uphold the conviction is to ignore the action of the court-martial which is charged with the determination. Necessarily, the determination of prior courts-martial in separate cases is of little value in assessing the validity of a finding in a distinct case, for the facts are rarely the same. These decisions allow no other conclusion than that, in practice, courts-martial were not charged with the duty of applying any other criteria to ascertain guilt than that the conduct proved satisfied the requirements of what had previously been designated an offense, or satisfied the allegations in the specification. The language of the United States Court of Military Appeals, in *United States* v. *Frantz,* holding the present article to be sufficiently certain and definite to withstand an attack for vagueness, demonstrates this :

> That the clauses under scrutiny have acquired the core of a settled and understandable content of meaning is clear from the no less than *forty-seven different offenses* cognizable thereunder explicitly *included in the Table* of *Maximum Punishments* . . . Accordingly, we conclude that the Article establishes a standard well enough known to enable those within . . . [its] reach to correctly apply them. (Emphasis added)[89]

As to the function of the court-martial itself, there has been some obeisance to the proposition that the court-martial is charged with making a supported factual finding as to whether the conduct proved amounted to a "disorder and neglect" or constituted service discrediting conduct.[90] Thus, in *United States* v. *Herndon,* a board of review reversed the conviction of an officer on a specification which omitted from the allegation of the receipt of stolen property an averment that the accused intended to convert the property to his own use. In reversing the board of review and upholding the conviction, the Court of Military Appeals said:

> The court-martial . . . could well have determined, and doubtless did, that his actions , . . constituted . . . either immorality, dishonesty, fraud, falsification, or irregular conduct, or all of them, and hence a disorder prejudicial to good order and discipline. Certainly we cannot find otherwise as a matter of law.[91]

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[89] United States v. Frantz, 2 USCMA 161, 163, 7 CMR 37, 39, (1953).

[90] E.g., United States v. Leach, 7 USCMA 388, 22 CMR 178 (1956); United States States v. Thompson, 3 USCMA 620, 14 CMR 38, (1954); United States v. Alexander, 3 USCMA 346, 12 CMR 102 (1953).

[91] United States v. Herndon, 1 USCMA 465, 469, 4 CMR 53, 57 (1952).

These latter decisions are not reflective of the prior general practice, however, which can be gleaned from reading the elements of proof set out in the Manual for Courts-Martial, United States, 1951, at pages 382 and 383, which required, for conviction under either clause, proof:

> (a) That the accused did or failed to do the acts, as alleged: and (b) that circumstances as specified.

Even for those offenses which are specifically discussed in the section of the Manual relating to the 134th Article, the terminal element is not set out in the listing of the proof required.[92] In cases where the above-quoted language was given verbatim as an instruction on the elements of the offense, boards of review, at first, held it to be sufficient.[93] Although the United States Court of Military Appeals finally granted a petition for review in a case where this type of instruction was given and affirmed by a board of review, the reversal was not because the court-martial was not told that it had to find service-discrediting conduct or a disorder or neglect but because :

> The instruction was particularly inadequate here since the accused was charged with feloniously stealing a package from the mails. The law officer did not inform the court of the elements required to establish larceny.[94]

The decision of the Court of Military Appeals in *Gittens, Grosso, Lawrence,* and *Williams* undoubtedly recognize that the court-martial must, in the first instance, make a factual determination as to the culpability of the conduct alleged to offend against the article. The dissent in the *Williams* case called the requirement that an instruction be given that the act of possessing marijuana had to be found to be an act prejudicial to good order and military discipline or service discrediting one of "sheer futility",[95] and commented that the majority, in view of the harmless error statute, must have been of the belief that the court-martial could have found the acts were not prejudicial to good order and military discipline. As will appear later, there is no doubt that had the instruction been given, the convictions would have been sustained on proof of the ordinary elements of the offenses charged. In view of the reversals, despite the appeal of the dis-

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[92] Para. 213, MCM, 1951, 384–87.

[93] CM 350639, Brussow, 3 CMR 290, 298 (1951), *pet. denied,* 1 USCMA 722, 4 CMR 173 (1952); ACM-S Eberhart, 3 CMR 800, 801 (1952); ACM 4652, Whitney, 3 CMR 714, 717 (1952); CM 351163, Day, 4 CMR 278 (1952); CM 351646, Halliwill, 4 CMR 283 (1952); CM 351631, York, 4 CMR 293 (1952); CM 351492, Powers, 5 CMR 207 (1952); CM 354355, Piercey, 5 CMR 260 (1952).

[94] United States v. White, 2 USCMA 439, 439–40, 9 CMR 69, 69–70 (1953).

[95] United States v. Gittens, 8 USCMA 673, 674, 24 CMR 177, 178 (1957).

senting Judge that the court rule as a matter of law that the act was violative of the statute as being one which dispensed with the requirement that the court-martial pass on the question[96] and his attempted use of the harmless error rule, the results argue that there is a unique, undefined, and perhaps indefinable, standard to be applied by the court-martial, which may or may not be coterminous with that applied by appellate tribunals.

IV. THE APPELLATE TEST

Before embarking upon an analysis or discussion of the content given the phrases on appeal, disposition of the question of whether the article establishes three separate offenses should be effected. The Manual's discussion of the second clause states :

> "Discredit" as here used means "to injure the reputation of". Examples of this conduct on the part of persons subject to military law may include acts in violation of local law of a nature to bring discredit upon the armed forces. So also any discreditable conduct not elsewhere made punishable by *any specific article or* by *one of* the other *clauses of* Article *134* is punishable under this clause. (Emphasis added)[97]

This language indicates that conduct contravening any of the specific articles is not punishable under the second clause, and merely carries forth the proposition that conduct proscribed by any specific article does not fall within the statute's coverage. Interpreting the article, the Court of Military Appeals has held that enaction by Congress of the specific articles has pre-empted the area covered by each so that conduct which amounts to less than the specific crime proscribed cannot ordinarily be made punishable under the general article, by the simple expedient of deleting a traditional element of the specific crime, where what remains partakes of the nature of the specific crime, and is not a lesser included or commonly recognized offense.[98] The underscored portion of the quoted Manual provision would likewise seem to suggest that the three clauses of the article are mutually exclusive. Contentions based on this premise have been unsuccessful. In *United States v. Herndon*, the court rejected this argument after observing that offenses under the Article could fall under one or more of the clauses :

> We are unable to accept the view of appellate defense counsel—if, in fact it is his position—that if a certain act of misconduct *may* be charged *as*

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[96] United States v. Grosso, *supra*, note 30.

[97] Para. 213 b. MCM, 1951, 382.

[98] United States v. Hallett, 4 USCMA 378, 15 CMR 378 (1954); United States v. Norris, 2 USCMA 236, 8 CMR 36 (1952).

a 'crime or offense not capital,' then the charge must be so laid. (Italics in original)[99]

It held that the specification was sufficient to allege an offense under the article, even though it did not include an element necessary for conviction of the offense of receiving stolen United States property under federal law. In so doing, it commented:

The "discredit" and "disorders and neglects" categories have been used, we believe, confusingly, and at times interchangeably, by the services. However, in view **of** the fact that the accused's misconduct in this case transpired in the semi-privacy of a military reservation and without foreclosing ourselves in the matter we shall concern ourselves . . . only with the first clause.[100]

This holding was presaged by the decision in *United States v. **Marker*** that the specification need not allege the terminal element to state an offense under the article.[101] It has been followed even where the specification contained an allegation of the federal statute allegedly violated, and the sufficiency of the evidence to establish the elements of the federal offense charged was challenged :

Counsel for petitioners have assumed that the offense charged in the specification must be limited to clause **(3)** of Article **134,** as a 'crime or offense not capital'; and that in construing the specification and determining the elements to be established we must be controlled by the Federal statute and the holdings of the Federal civilian courts. We do not accept this argument. We are of the opinion that crimes and offenses not capital, as defined by Federal statutes, may be properly tried as offenses under clause **(3) of** Article **134,** but that if the facts do not prove every element of the crime set out in the criminal statutes, yet meet the requirements of clause **(1)** and **(2),** they may be alleged, prosecuted and established under one of those. Clearly, if the acts and conduct complained of are disorders to the prejudice of good order and discipline in the armed forces, the fact that they do not establish a civilian offense does not prevent prosecution by the military.[102]

In *United States v. Blevens,* the specifications omitted an allegation that the accused's act in affiliating with a group advocating the overthrow of the United States Government was done with the specific intent to overthrow the United States Government by force and violence. At the trial, judicial notice was taken of the Smith Act and the law officer referred to it in his instructions. On appeal, the specification was challenged as failing to state an offense in violation of the Smith Act. The Government conceded that proposition, but successfully urged that

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[99] United States v. Herndon, 1 USCMA **461, 464, 4** CMR **53, 55–56 (1952).**

[100] *Ibid.*

[101] United States v. Marker, 1 USCMA **393, 3** CMR **127 (1952).**

[102] United States v. Long, **2** USCMA **60, 65, 6** CMR **60, 65 (1952).**

the specification charged an offense under Article **134,** as service discrediting conduct. Rejecting the defense argument that the Government was changing the theory of prosecution on appeal, the court found that there was a mere misdescription of the offense, and that the accused was not prejudiced.[103] Because this conduct was found to be a service discredit by the Court of Military Appeals, without consideration first as to whether it was a disorder or neglect, it necessarily follows that the Manual provision reserving the second clause for conduct which is not chargeable under the first or third establishes no theory of preemption in favor of the latter clauses. Precedence has been given, on appeal, to an evaluation of the conduct as **a** "disorder and neglect" where the violation involves the accused in his military capacity or environment, as in the wrongful possession of a liberty pass,[104] the communication of a threat within the confines of a military reservation,[105] the receipt of stolen property on a military post,[106] and soliciting others to have intercourse with a female on post.[107] On the other hand, rigging a bingo game,[108] wrongful cohabitation.[109] assaulting policemen in the execution of their duties,[110] and possession of marijuana[111] have been indicated as being violative of either or both clauses. In finding it an offense under the article for an accused to carry a concealed weapon in a bus station, the court declined to consider whether the first clause had been violated, in view of its consideration that commission of the crime mas conduct of a nature to bring discredit upon the services.[112]

What the court has done is to give the general article an overall coverage extending to conduct which may violate any one of the three clauses, none of which needs to be alleged, and none of

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[103]United States v. Elevens, 5 USCMA **480, 18** CMR **104, (1955);** cf., United States v. Bey, **4** USCMA **665, 16** CMR **239** (1954), holding, where the specification fell short of charging bribery by failing to allege that the money was received with intent to influence the recipient's official action, that a disorder was proved under the general article, and that the accused was not prejudiced in his defense.

[104]United States v. Frantz, **2** USCMA **161, 7** CMR **37 (1953).**

[105]United States **v.** Holiday, **4** USCMA **454, 16** CMR **28 (1954).**

[106]United States v. Herndon, *supra,* note **99.**

[107]United States v. Snyder, **1** USCMA **423, 4** CMR **15 (1952).**

[108]United States v. Holt, **7** USCMA **617, 23** CMR **81 (1957).**

[109]United States **v.** Leach, *supra,* note **90.**

[110]United States v. Lawrence, 8 USCMA **732, 25** CMR **236 (1958);** United States v. Gittens, 8 USCMA **673, 25** CMR **135 (1957).**

[111]United States **v.** Williams, **8** USCMA **325, 24** CRlR **135 (1957).**

[112]United States v. Thompson, *supra.* note **77.**

which, if alleged, limits the prosecution. As a consequence, the article now may be said to create something similar to a common law norm for conduct, the violation of which may fall under any of its clauses. By analogy to offenses which may be committed in one or more ways, it can be said that there is only one offense, i.e., a violation of Article 134. Therefore, instructions in the alternative, permitting conviction on proof of any of the clauses, would probably be unassailable, as a general proposition.[113] A bona fide claim of prejudice would be hard to sustain, since only the facts necessary to establish what the appellate bodies conclude is violative of the article need be proved, and additional matter is treated as surplusage.[114]

Indeed, in view of the overlap of the clauses, allowing appellate declarations that conduct violates either or both phrases, it is doubtful that they are ever mutually exclusive. Acts which prejudice good order and military discipline would seem invariably to be of a nature to bring discredit upon the armed services. Actions tending to show that the armed services lack discipline and good order would surely affect the reputation of the armed services adversely, for good order and discipline are the attributes of an effective military organization, without which efficiency cannot be maintained. Conversely, actions injurious to the good name of the services, and calculated to bring them into disrepute, would necessarily affect good order and discipline, for esprit de corps cannot be generated in a military organization held in disrepute by its members or the community which it is required to protect. Thus, the British, in interpreting their general article,[115] assert that the soldier has a duty of maintaining the good name of the military service, and that the commission of any act which sullies that good reputation constitutes a neglect of duty which is prejudicial to military discipline.[116]

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[113] *Cf.*, CM 351606, Riggins, 8 CMR 496 (1952), *aff'd*, United States v. Riggins, 2 USCMA 451, 9 CMR 81 (1953), allegation of robbery by force and violence and by putting in fear proper, and instructions in the alternative not error, as the modes of committing the offense may be so submitted, since proof of any one establishes the offense.

[114] United States v. Leach, *supra*, note 90, an allegation of the Arizona statute violated held to be surplusage and content of words derived therefrom in specification, immaterial, one Judge dissenting.

[115] Article 69, Army Act, 1965, 6 May 1955.

[116] Manual of Military Law, Part I, 1956, 288: "It is the duty of all ranks to uphold the good reputation of the service. Any act . . . therefore which amounts to a failure in that duty by an individual may well prejudice military discipline although it has no direct bearing on the discipline of the unit to which the offender belongs."

Turning to the question of what must be shown to establish a violation of the first two clauses of the article, one is met with a welter of conflicting and misleading language, and some subjective applications by appellate bodies. The confusion may be traceable in part to the different provisions of the various Manuals since 1917. The 1921 Manual flatly stated that instances of conduct violative of the second clause were offenses against State law.[117] In 1928, this flat assertion was qualified by the declaration that such instances ". . . may include acts in violation of local law committed under such circumstances as to bring discredit upon the military service."[118] This same language was carried in the 1949 Manual,[119] but the phrase was changed to read, ". . . may include acts in violation of local law of a nature to bring discredit upon the armed forces", in the 1951 Manual.[120] The writers of the present Manual did not intend, by substituting for the words, "under such circumstances as to bring discredit", the phrase, "of a nature to bring discredit", to reflect a correction or a basic change in the coverage of the second clause, or to indicate that an injury to reputation need not in fact occur:

> There are, of course, few wrongful acts which may not, in some wise, be thought to injure the reputation of the service if a subjective test alone is used. . . . [It] would appear that the facts and circumstances must be viewed objectively to determine whether there has been, in fact, a direct injury to the reputation of the armed forces, rather than a remote injury which might conceivably have resulted.[121]

This language, "under such circumstances as to bring discredit", imports a different test than does the phrase that the conduct must be "of a nature to bring discredit", where it is not limited to the circumstances surrounding the commission of the act. It has been the approved practice for law officers, in instructing the court-martial as to Article 134 offenses under clause (1) or (2), to delineate for the court-martial members the basic elements of the "crime" charged, and to conclude that they must find additionally :

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[117] See note 52, *supra.*

[118] See note 53, *supra.*

[119] Para. 183b, MCM, U.S. Army, 1949, 256.

[120] Para. 213b, MCM, 1951, 382.

*Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, (1958 Reprint) 295.

That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[122]

The instruction is, at best, ambiguous. It lacks the certainty of the Manual provision of 1928 that the conduct must have been committed under such circumstances as to bring discredit upon the military service. It likewise renders amorphous the statutory language that the conduct need only be "of a nature to bring discredit upon the armed forces". The qualification, "under the circumstances", suggests that the circumstances under which the conduct is committed are controlling as to whether the statute has been violated. It is this ambiguity which has given rise to two separate theories for the application of the article. The first is that the commission of the offense itself is not sufficient to predicate criminality, but that the attendant circumstances must be such as to identify te accused as being in the military and also cause an actual injury to the reputation of the armed forces. The second is that the conduct itself is punishable, without regard to the notoriety at the time of the commission of the act of the accused's military connection, and without regard to any actual injury to the reputation of the armed forces in the minds of those acquainted with the alleged violation. This bifurcation runs through various decisions under the article, and is exemplified by the majority and dissenting opinions in the *Francis* case, which involved the question of whether an officer could be punished under Article of War 96 for what amounted to ecclesiastical adultery committed in a hotel room in Texas, when the incident was discovered after the act solely by reason of the misconduct of a third person who was sought in the accused's room. Those searching removed the blankets covering a female who was lying on a bed and discovered her to be disrobed. The State of Texas did not make a single act of intercourse between persons, one of whom was married to another, criminal adultery. The majority opinion concluded that the accused had committed an act punishable under the article on the following rationale:

He unquestionably committed an act of adultery in a room in a public hotel, and in doing so was guilty of misconduct that has been denounced since the proclamation of the Ten Commandments. That adultery offends

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Wnited States v. Richards, 10 USCMA 475, 478, 28 CMR 41, 44 (1959); United States v. Gittens, *supra*, note 95; United States v. Lawrence, *supra*, note 110; United States v. Reese, 5 USCMA 560, 562, 18 CMR 184, 186 (1955); ACM 9467, Blair, 18 CMR 581, 586 (1954); ACM S-9781, Bryant, 17 CMR 896 (1954); ACM S-9000, Hughes, 16 CMR 559, 561 (1964); Department of the Army Pamphlet 27-9, 30 April 1958, paragraph 74 d.

> the public morals is probably best indicated by the fact that in almost every State in the Union it affords grounds for divorce to the spouse who has been sinned against, and that in many states a single act of marital infidelity is made a criminal offense. So serious is this transgression considered by the Congress of the United States that it has made the commission of adultery punishable by imprisonment for a period not in excess of three years.[123]

The dissenter traced the origin of the second clause back to its purpose of making retired enlisted men amenable to courts-martial when their acts paralleled those for which a retired officer would be charged with conduct unbecoming an officer and a gentleman. He declared that it was properly applied to cases of conviction for any recognized common law crime, statutory offenses such as bigamy, and acts of a disorderly, dishonest, or indecent nature when committed under circumstances such as to bring discredit upon the military service. Thereafter, he continued:

> When interpreted in the manner indicated by the foregoing such is a reasonable, understandable and commendable interpretation. The acts committed by one in the military service clearly injured the reputation or credit of the military service. If the act was a crime or violated a state statute and involved a disorder or moral turpitude, no further proof of bringing discredit upon the service than that the accused was obviously **or** known to be in the military service should be required. But where the act complained of is not a criminal offense and did not violate a state penal statute of the nature described, then, in my opinion, it should be incumbent upon the prosecution not only to show that the accused was obviously (in uniform) [sic] or known to be in the military service at the time he committed the act but that the act itself because of its nature and the circumstances under which it was committed directly affected the reputation **or** credit of the military service.[124]

The dissent's expostulation with the majority decision is understandable when it is recalled that the **1928** Manual provision, then in force, apparently required that discredit actually result from the commission of the act. The majority opinion stands for no more, as written, than that what many States recognized as adultery was, per se, an offense, because it violated one of the Ten Commandments and was considered morally wrong, as evidenced by divorce statutes. It is likely that the conviction resulted solely because the facts alleged in the specification were established. The court-martial, at the time, was in possession of the 1928 Manual which required no more for proof, under the discussion of the article, than that the accused did the acts alleged.[125] There was no form specification provided in that Manual

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[123] CM 276559, Francis, 48 BR 359, 367 (1945).

[124] *Id.*, at 373.

[125] Para. 152b, MCM, U.S. Army, 1928, 254-57.

for adultery, nor was there a punishment therefore in the Table of Maximum Punishments.[126]

Echoes of the dissenter's theory are found in subsequent cases. Thus, as late as 1958, a Navy board of review, setting aside a conviction of five specifications of wrongfully and dishonorably failing to pay debts based on improvidence in the accused's entry of a plea of guilty, stated:

> The conduct must be of a nature to reflect discredit on the armed service to which the accused belongs. Para. 213b, MCM, 1951. Discredit encompassing the accused alone is not sufficient. His entire service's reputation must be injured. Also, when the transaction which gave rise to the debt is an ordinary or business transaction, the entertaining of the discredit must extend beyond the disgruntled creditor, or its agents. It must be shown to be held by or created in others because of the accused's conduct.. .
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> All three elements, particularly the last, are essential to a conviction for these offenses in violation of Article 134, UCMJ. See U.S. v. Williams (No. 9646), 8 USCMA 325, 24 CMR 135; U.S. v. Grosso (No. 8341), 7 USCMA 566, 23 CMR 30.[127]

In 1952, setting aside a conviction for issuing checks with fraudulent intent and without thereafter maintaining funds for their payment because of the instruction that the elements of the offenses were, "That the accused did or failed to do the acts alleged", an Air Force board of review commented:

> To constitute an offense under the discreditable conduct clause of Article of War 96, an act must be one which because of its nature and the circumstances under which it was committed, directly affects the reputation or credit of the service . , . The discreditable circumstances under which the act was committed, therefore, is the very gravamen of the offense and unless this is alleged and proved a finding of guilty cannot stand.*

Expressions in other cases, though not dealing with the question of whether the effect must be immediate and arise out of the circumstances directly attending the commission of the act, and while perhaps merely loose language, indicate that the injury must be direct and actual. Thus, in *United States v. Lowe,* a case of drunkenness in a public place the Court of Military Appeals observed:

> We are satisfied that drunkenness under "such circumstances as to bring discredit upon the military service" is punishable whether it occurs in a private residence or on a public street. The gravamen of the offense is not the locus as such, but the discrediting circumstance. We think it indisputable that drunkenness by military personnel in the presence of citizens of a foreign country is discrediting to the service.[129]

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[126] Para. 104c, MCM, U.S. Army, 1928, 100–01.

[127] NCM 57–03236, White, 25 CMR 733 (1958).

[128] ACM S–2006, Myers, 2 CMR 767 (1952).

[129] United States v. Lowe, 4 USCMA 654, 658, 16 CMR 228, 232 (1954).

In United States *v. French,*[130] Judge Latimer commented that a plan to violate the Atomic Energy Act was punished under clause (2) "for its discrediting effect". The conviction in a case of a plea of guilty to a specification alleging the carrying of a concealed weapon, a straight razor, was sustained on the basis that the prosecution could have shown that the razor was carried as a weapon "under circumstances reflecting discredit upon the armed services."[131] Where an accused refused to testify before a Coroner's Inquest in Canada upon a good faith belief that the question called for an irrelevant answer, the court reversed his conviction stating, "We therefore hold that the evidence is insufficient to establish that the act of the accused in refusing to testify was such reprehensible conduct as to bring discredit on the Army."[132] Reflected in the decisions are such statements as that the conduct prescribed by Congress is, "...that which 'brings discredit upon the armed forces' . . .",[133] that rigging a bingo game is conduct of ". . .the type reflecting discredit on the armed forces . . .,[134] that fleeing the scene of an accident is ". . . conduct which discredits the military service. . . .",[135] that, under the factual situation, violation of Japanese custom laws "... operated 'to injure the reputation of' the United States Armed Forces . . .",[136] and that uttering worthless checks with intent to defraud, under Article 96, ". . .was an act which must be deemed to have discredited him in the eyes of the bank and was therefore conduct discreditable to the military service . . ."[137] In cases involving drunk and disorderly conduct, boards of review have emphasized, in upholding convictions, the fact that the conduct occurred while the accused was in uniform[138] or, if not in uniform, that he was known to be in the service by others present, whether military or civilians.[139] And Judge Latimer, concurring in the result in a case holding that the driver, but not a passenger in a vehicle, was guilty of fleeing the scene of an accident, stated:

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[130] United States v. French, 10 USCMA 171, 184, 27 CMR 245, 258 (1959).

[131] United States v. Bluel, 10 USCMA 67, 27 CMR 141 (1958).

[132] United States v. Sinigar, 6 USCMA 330, 340, 20 CMR 46, 56 (1955).

[133] United States v. Downard, *supra*, note 82, at USCMA 640, CMR 256.

[134] United States v. Holt, 7 USCMA 617, 620, 23 CMR 81, 83-84 (1957).

[135] United States v. Waluski, 6 USCMA 724, 731, 21 CMR 46, 53 (1956).

[136] ACM 8289, Peterson, 16 CMR 565 (1954).

[137] CM 220160, Faulkner, 12 BR 335, 338 (1942).

[138] CM 257015, Reid, 36 BR 391, 395 (1944); *cf.*, NCM 5502038, Elmore, 19 CMR 545, 548 (1955).

[139] CM 224465, Moore, 14 BR 152 (1942); CM 216707, Hester, 11 CMR 145, 154 (1941); CM 202846, Shirley, 6 BR 337, 352 (1935).

> It is doubtful that there are many acts in the minor crime field which are more likely to bring justifiable discredit upon the military service than the act of fleeing the scene of an accident by a member of the armed forces when he is in uniform, on an official mission, or using a Government vehicle.[140]

There are, on the other hand, decisions which indicate that the test is not whether, under the circumstances of the commission of the act, the conduct must bring discredit on the service, but whether the commission of the act, without regard to the circumstances, has the potential to bring the service into disrepute. Thus, in *United States V. Thompson,*[141] it was held to be enough to satisfy the article's second clause in a prosecution for carrying a concealed weapon to prove that the act of carrying the concealed weapon "would bring discredit upon the military service." Of a specification alleging the sale of counterfeit Federal Reserve note with intent to defraud, but without an allegation of knowledge of its counterfeit nature, it was held, ". . . the specification properly alleges an offensewhich tends to lower the armed services in public esteem . . .".[142] In a situation where an officer was convicted of a violation of the article because of his use, during duty hours, of an enlisted man's labor in building a fireplace in his home, the board commented, ". . . It brings discredit in that an airman may be seen publicly working on a personal project of an officer at a time when he is being paid for duties he should be rendering to the service. . . .".[143] Of Specifications alleging the uttering of worthless checks under Article of War **96,** it was said, ". . . The gist of such military offenses is . . . , the tendency to discredit the military service . . ."[144]

What then are the criteria of the test on appeal of whether the conduct is of a nature to bring discredit upon the armed forces?

The dissent in the Francis case, *supra,*[145] suggested that public knowledge of accused's status as a soldier, in those cases where he committed a common law or statutory crime, or violated an ordinance was a prerequisite to a finding that his conduct, under the circumstances, brought discredit upon the services. Some decisions have emphasized that the accused was in uniform, or otherwise known to be a soldier or connected with the military at

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[140] United States v. Waluski, *supra,* note **135.**

[141] United States v. Thompson, **3** USCMA **620, 622, 14** CMR **38, 42 (1954).**

[142] **CM 365669,** Grillo, **13** CMR **179 (1953).**

[143] **ACM 2074,** Allen, **3** CMR A F **33, 39 (1949).**

[144] **ACM 3477,** Adams, **4** CMR A F **644, 671** (1951).

[145] **CM 276559,** Francis, *supra,* note **124.**

the time he committed the act.[146] It is doubtful, however, that such proof will be required, as a matter of law, unless the "crime" requires it apart from the content of clause (2). Thus, the contention that drunkenness in a public place was not within the proscription of the article when the accused was not known to be a soldier was rejected by a board of review on the following rationale:

> Lying in a drunken condition in a public place is an act discreditable to the individual involved and when it becomes known that the individual is a member of the services is not material in reaching a determination that the act committed was service discrediting but, as in this case, the fact that few people would know of the accused's connection with the service because he was not in uniform, would be a factor to be considered in determining the appropriate action to be taken, or the punishment to be imposed.[147]

In the more sophisticated type of crime, the identity of the perpetrator as being a soldier may not always appear during the perpetration of the act. So, in an arson case, where the burning of the building is done by a soldier acting for the owner, for the purpose of defrauding an insurance company, the fact of arson and identity of the arsonist may not be disclosed until after investigation, when the crime is already complete, yet conviction of the accused under Article 134 is proper.[148]

Somewhat related to the question of whether the accused's status need be known to observers at the time of the commission of the offense to allow an appellate determination that his conduct violates the article is the question of whether the conduct must, under the immediate circumstances of its commission, give rise to an actual injury to the reputation of the armed services. Some of the confusion in this area emanates from the practice of treating precedent as the test of the accused's culpability so that the "crime" concept has become almost inflexibly fixed. There are some offenses listed in the Table of Maximum Punishments which require, as one of their elements, notoriety in the conduct. Thus, drunkenness in command, quarters, station, camp or on board ship is punishable by one month's confinement and forfeiture of pay, while drunkenness under such circumstances as to bring discredit upon the military service is punishable by three month's confinement and forfeitures for a like period.[149] When

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[146]United States v. Marker, 1 USCMA 393, 398, 3 CMR 127, 132 (1952); and see note 138, *supra*.

[147]ACM S-1547, McMurty, 1 CMR 715, 720 (1951).

[148]United States v. Fuller, 9 USCMA 143, 25 CMR 405 (1958).

[149]Para. 127c, MCM, 1951, 225.

a soldier is involuntarily brought into the station in a drunken condition, a conviction for being drunk on station cannot be sustained, nor, on such a charge, can a conviction of the more serious offense be approved, absent proof of discrediting circumstances.[150] So also, it is an offense for an officer to associate publicly with a notorious prostitute to the disgrace of the armed forces, but a specification of which the court-martial convicts, excepting the word "notorious", has been held to state no offense.[151] The theory on which this conduct was made punishable is that the discredit results from the unfavorable reaction by those who observe the association with an awareness of the character and reputation of the woman.

Similarly, the offense of wrongful cohabitation requires proof, in addition to its other elements, that the association in the relationship as husband and wife be open and notorious.[152] The openness and notoriety of the association, however, and not community knowledge of the meretricious relationship, is the gist of the offense.[153] Apparently it is not material whether the purported relationship, as distinguished from the illicit nature, becomes known at the time of its existence or subsequent to its termination. Thus, in a case where the accused rented a hotel room, falsely introduced a woman as his wife, and maintained the room for 25 days, a board of review rejected the contention that the offense was not committed because there was no evidence that anyone but the woman knew that the accused had cohabitated with her :

> The Board of Review is satisfied that accused lived from 3 December to 28 December 1943 openly and publicly with a woman not his wife in a manner such that the discovery later that he had done so was calculated to bring the military into discredit and disrepute.[154]

The words "open and notorious" received attention in another case involving a claim that the same principle was involved, i.e., that absent proof of circumstances such as to bring discredit, fornication was not an offense. Two soldiers in Berlin made the acquaintance of two German women, and during the course of their association, took them to a single hotel room where the intercourse took a physical turn, each soldier experiencing the sex act with both women during the night. One of the females,

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[150] United States v. Bailey, 10 USCMA 95, 96, 27 CMR 169, 170 (1958).

[151] CM 374664, Mallory, 17 CMR 409, 410 (1954).

[152] United States v. Leach, 7 USCMA 388, 22 CMR 178 (1956).

[153] *Id.*, at 407, 22 CMR 197.

[154] CM 254722, Grimstad, 35 BR 341, 355 (1944).

after suffering heart spasms which she attributed to smoking what were, in all likelihood, marijuana cigarettes, reported the night's activities to the police. The soldiers were tried and convicted on specifications alleging that each, in the presence of the others, fornicated. On appeal it was contended that the services had never considered fornication an offense, unless attended by open and notorious circumstances. Assuming, without deciding, that the military rule was as stated by the defense, the United States Court of Military Appeals treated the question of whether the conduct violated the Code by the common law standard that to be punishable the act must be open and notorious, and declared:

> In our opinion, the act is "open and notorious", flagrant, and discrediting to the military service when the participants know that a third person is present.[155]

and in responding to the assertion that because the parties were indulging in the same acts, the conduct was not service discrediting, the court declared:

> In a situation of this kind we are concerned with the effect of the act on persons of average sensibilities and habits, not with its effect on individuals whose attitudes and habits are such as to make them insensible to the situation.[156]

So also, where a retired officer was convicted of public association with known homosexuals to the disgrace of the armed forces, the contention that the conduct was not service-discrediting because it was known only to the sexual deviates was rejected by the court, which pointed out that the conduct was observed by the intelligence agent who conducted the surveillance and by the woman from whose house he spied. Additionally, the court cited the ***Berry*** case, supra, as disposing of this contention, assuming that only the homosexuals knew of the association.[157]

What can be seen from the court's treatment of the question in the ***Berry*** case is that it is not, as held in the *Mallory* case,[158] the disgust occasioned by the viewers of the association which is the gist of the offense, but the fact that the conduct would offend a person of average sensibilities, if he knew about it.

If the military connection of the accused, as a general matter, need not be known at the time of the allegedly criminal acts, and the immediate circumstances surrounding the commission of the offense need not occasion a direct injury to the reputation of the

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[155] United States v. Berry, 6 USCMA 609, 614, 20 CMR 325, 330 (1956).

[156] *Id.*

[157] United States v. Hooper, 9 USCMA 637, 647, 26 CMR 417, 427 (1958).

[158] CM 374664, Mallory, ***supra,*** note 151.

armed services, what circumstances are required to predicate a finding of service discredit? The answer, or a portion of it, is found in the *Leach, Berry,* and *Hooper* cases, *supra.* Any conduct which would offend the sensibilities of the average person, and partakes of a moral deviation, without regard to its actual effect on public opinion as to the reputation of the armed forces, violates the article, under the appellate standard. The approach of the Court of Military Appeals in the *Thompson* case furnishes a further clue as to what, on appeal, will be held sufficient to meet the requirements of the statute.

In this case, the accused was tried for several offenses in addition to the carrying of a concealed weapon. His apprehension in a bus station at El Paso, Texas was caused by an informant's disclosure. The circumstances of the apprehension were not reflected in the decision, and it is not shown that the accused, who was in mufti, sought to use his concealed weapon or that it was displayed during the apprehension. In finding the service discredit the court made no allusion to observation of the weapon by on-lookers. What it did was to declare that bad men who commit violent crimes often carry concealed weapons, and that the potential for harm to the public was as great when a bad soldier carried a concealed weapon as when a bad civilian carried one. Then the court continued:

> For the foregoing reasons, and in view of widespread local legislation, the provisions of the present Manual [form specification and listed punishment], the lack of any real necessity for carrying a weapon concealed, the reduction in opportunities to commit crimes of violence when weapons are not present, the manner in which the rights of the individual are trampled on by one armed with a gun, and the knowledge of the means by which murders and robberies are accomplished, we have no hesitancy in concluding that the carrying of a concealed weapon is an offense which offends against the second subdivision of Article 134. If large numbers of servicemen were roaming the streets armed with concealed weapons, the civil population would justly fear, regard with suspicion, and distrust them. If it were to become known that the military services did not consider stealth and furtiveness when they were coupled with the capabilities of hand weapons as being inimical to public welfare, there would be an impact on society which would reflect severely on the whole military system.[150]

Denuded of the hyperbole, the decision shows that the conduct was found to be of a nature to bring discredit upon the services because it was conduct denounced by State legislatures and by the President in the Manual for Courts-Martial, as in the case of most crimes, to protect society. Attributing the conduct of this accused to all members of the armed forces, so as to have them

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[150] United States v. Thompson, 3 USCMA 620, 623, 14 CMR 38, 41 (1954).

carrying concealed weapons without fear of punishment, and concluding that the civilian populace would be apprehensive in the presence of soldiers roaming the streets, some of whom might be murderers or robbers, or even murderous robbers, does not appear to have much to do with deriving the content of the statutory language "of a nature to bring discredit" as limited by the instructional phrase, "under the circumstances". This decision is the direct reflection of the concept that conduct is punishable because it is a crime, and not because of any peculiar circumstances surrounding its commission. It follows, without citing, those decisions which held that the commission of an offense denounced by the various States is conduct which brings discredit on the service, such as the treatment afforded bigamy.[160] Decisions of this type show that the words "of a nature to bring discredit" mean no more than that the act is one customarily regarded as reprehensible, and that they no longer, if they ever did, require a finding of actual discredit or injury to reputation. Projection, as in the *Thompson* case, of the crime to all members of the military, with imputation to the community of knowledge of the conduct, and inaction by the military assumed, would render any act generally denounced by State statutes violative of Article 134, except those misdemeanor offenses not involving moral turpitude which are purely regulatory in nature, such as driving without a license,[161] or purchasing intoxicants when not of age.[162] Of violation of State law, not reflected in a form specification or in the Table of Maximum Punishments, it has been said:

> A violation of a state statute does not by itself constitute a violation of Article 134 . . . The violation must, in fact and in law, amount to conduct to the discredit of the Armed Forces. Not every violation of a state statute is discrediting conduct.'"

The statement is not particularly enlightening, inasmuch as *any* conduct punishable under the second clause must be "of a nature to bring discredit". The existence of a local statute denouncing certain conduct as criminal is one factor which the boards of review have considered in determining whether the conduct is service discrediting.[164] Proof of the existence of the

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[160] CM 262206, Peck, 41 BR 19, 21 (1944); CM 253604, Mann, 35 BR 1, 5 (1944); CM 245510, Carusone, 29 BR 195, 199 (1944); CM 233132, Larch, 19 BR 323, 326 (1943).

[161] ACM 5636, Hughes, 7 CMR 803, 811 (1952).

[162] NCM 58–00264, Grose, 26 CMR 741 (1948), holding based on the "disorders and neglect" clause.

'United States v. Grosso, 7 USCMA 566, 571, 23 CMR 30, 35 (1957); United States v. Leach, 7 USCMA 388, 404, 22 CMR 178, 194 (1956).

[164] ACM 8037, Freeman, 15 CMR 639, 643 (1954); ACM 9763, Brown, 18 CMR 709, 713 (1955).

statute, then, may be of some value in showing the attitude of the local populace toward the commission of such acts as are denounced as criminal, but if the conduct is otherwise of a nature to bring discredit upon the services, as involving fraud, dishonesty, disorderly conduct, or other moral turpitude, it will be punishable regardless of the fact that it does not meet the requirements of the local statute, as is shown by analogy to those cases where the conduct was held to be punishable even though it did not meet the requirements of a federal statute, or was provable by a quantum of evidence less than that required by local law. If the statute denounces as criminal conduct that which is not clearly reprehensible more will be required to be proved than the violation of the statute.

The absence of applicable statutory law, or a form specification in the Manual, will not preclude punishment for conduct involving fraud, such as the burning of the property of another with his connivance to defraud an insurance company,[165] or moral deviation such as the keeping of a bawdy house regardless of whether compensation is received by the possessor of the premises.[166] Then, too, if the conduct alleged violates a custom of the services, it may provide the basis for a charge under this wing of the Article.[167]

As to the first clause of the statute, little purpose would be served with an extensive compilation of what acts have been held, on appeal, to violate its provisions, and what acts have been held not to do so. Any act which would be held to be within the coverage of the second clause, if committed on a military reservation, would, of course, offend against the first clause. As in the case of the second clause, the disorder and neglect need not have an immediate and prejudicial impact on good order and military discipline, despite the provisions of the article, and the language of the Manual that:

> "To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. An irregular or improper act on the part of a member of the military service can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing discipline, but the article does not contemplate such distant effects and is confined to cases in which the prejudice is reasonably direct and palpable.[168]

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[165] United States v. Fuller, *supra*, note 148.

[166] United States v. Mardis, 6 USCMA 624, 20 CMR 340 (1956).

[167] United States v. Waluski, ***supra,*** note 135, at USCMA 731, CMR 53; United States v. Marker, *supra,* note 146, at USCMA 399, CMR 133.

[168] Para. 213a, MCM, 1951, 381.

Of this section of the article, the Court of Military Appeals has said:

> Any irregular or improper act on the part of a member of the armed services which directly affects adversely the discipline or good order of the service may be made the subject of a charge. We, therefore, look to those acts enumerated in the instruction to determine if they are wrong and if they *would* have any appreciable and adverse impact on order or discipline. (Emphasis added).[169]

The decisions reflect the same approach of projecting the irregular conduct of the accused to all members of the military as a consequence of finding it to be no offense. Thus, holding it to be a violation to impersonate an officer, despite the absence of an allegation of a fraudulent gain or intent to deceive, the court declared:

> The gravamen of the military offense of impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, but rather upon whether the acts and conduct *would* influence adversely the good order and discipline of the armed forces. It requires little imagination to conclude that a spirit of confusion and disorder, and lack of discipline in the military would result if enlisted personnel were permitted to assume the role of officers and masquerade as persons of high rank. (Emphasis added).[170]

The answer to whether the acts are wrongful is found in the determination of the question of whether the acts involve dishonesty, fraud,[171] immorality,[172] misuse of government property for a consideration,[173] use of position to extract consideration for the performance of a military function, as in receiving money in connection with the issuance of passes,[174] have the potentiality of disrupting the good government of the military community, as in the wrongful possession of a false pass with intent to deceive,[175] or are among those minor military infractions such as appearing in improper uniform, wrongful and abusive use of government property, careless discharge of a firearm, and so forth.[176]

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[169] United States v. Alexander, 3 USCMA 346, 348, 12 CMR 102, 104 (1963).

[170] United States v. Messenger, 2 USCMA 21, 24-25, 6 CMR 21, 24-26 (1962); *cf.*, United States v. Blue, 6 USCMA 660, 13 CMR 106 (1953); CM 373956, Brothers, 17 CMR 396 (1954).

[171] United States v. Holt, *supra*, note 108; United States v. Herndon, 1 USCMA 466, 4 CMR 63 (1962).

[172] United States v. Brown, 8 USCMA 256, 24 CMR 65 (1957); United States v. Mardis, *supra*, note 170; United States v. Snyder, 1 USCMA 423, 4 CMR 16 (1952).

[173] United States v. Alexander, 3 USCMA 346, 12 CMR 102 (1953).

[174] United States v. Bey, 4 USCMA 666, 16 CMR 239 (1964).

[175] United States v. Frantz, 2 USCMA 161, 7 CMR 37 (1963).

[176] Para. 213a, MCM, 1951, 381–82.

V. THE COURT-MARTIAL'S FUNCTION

In Chapter II the conclusion was reached that a failure to distinguish between the wording of the general article prior to and after the revision in 1916 caused an unwarranted reliance on the assumption that the second clause of the article embraced, full-blown, crimes regardless of their prejudicial impact. While it is true that they had been covered under the "crimes not capital" clause formerly, it was only when the crime was committed under circumstances prejudicial to good order and military discipline. The growth of this "crime" concept was obviously encouraged by the fact that the President defined various crimes in the Manuals from 1921 to the present Manual, and the boards of review, as well as the Court of Military Appeals, sought to affix a standard and fixed content to the crimes and offenses charged under the article in either of its first two clauses as if they were testing a common law indictment. This extended not only the legal element test to the specifications, but limited defenses to those recognized in civil jurisdictions. By this process, the words "of a nature to bring discredit" lost all meaning at the appellate level. They were never given the life that was originally intended, that is, that they covered acts so disgraceful and scandalous as to equate to those for the commission of which officers were to be dismissed for conduct unbecoming an officer and a gentleman. The proposition that the circumstances under which the conduct was performed must have been such as to bring actual, and not potential or constructive discredit, was submerged by the legalistic approach, as is shown in Chapter III. With the advent of the decisions in *Grosso, Williams, Gittens,* and *Lawrence,* the majority of the Court of Military Appeals returned to the proposition that no conduct charged under either of the two clauses was, per se, a violation of the article, but required the determination of the court-martial affirmatively to make it so. This is the position presently taken by civilian courts in applications for writs of habeas corpus:

> **It is for the court-martial to determine whether the facts charged in the specification and shown by the proof constitute the crime of acts to the prejudice of good order and Naval discipline. Any act by one subject to court-martial, even while in a civilian capacity, likely to bring disgrace upon the Naval service may be held such an offense.[177]**

[177] United States v. Fenno, 76 F. Supp. 203, 208 (1947), *aff'd* 167 F. 2d 693 (2nd Cir., 1948), *cert. granted* 334 US 867 (1948), *writ dismissed by stipulation,* 336 US 806 (1948).

After the decisions which returned the function to the court-martial to declare whether the conduct should be punished as a violation of Article 134, at least one board of review equated the terminal element to a requirement that proof of actual discredit flowing from the accused's conduct was necessary, and that this discredit be general enough to injure reputation, in the normal connotation of that word.[178] That the majority opinions of the court in *Grosso, Gittens, Williams,* and *Lawrence* did not mean to resurrect, as an appellate standard, the idea that actual discredit must flow from the conduct under the circumstances of its performance is shown by the decisions in two possession of marijuana cases.

In *United States v. Alvarez,*[179] a total quantity of less than one gram of marijuana was recovered from the pockets of five garments belonging to the accused. Appealing from the conviction, the accused contended that the quantity found was so small as to preclude use or transfer, and therefore was not within the purview of the offense of wrongfully possessing marijuana. In a unanimous decision, the court held that the amount of marijuana possessed was immaterial, so long as it was knowingly possessed and capable of being identified. To reach this result, the court relied on federal cases affirming the convictions of conspiring to conceal and unlawfully concealing narcotics on evidence that the scales that the accused had used to weigh the substance and the instruments which he used in cutting it had traces of the narcotic on them sufficient for analysis, even though consumed by the process. No mention was made in the opinion that concealment or transfer of a narcotic was not an offense unless the narcotic was imported into the United States illegally and the fact of such illegal importation was known to the defendant. In making its analogy to the federal cases, the court started with the proposition that possession of marijuana was an offense under the Uniform Code of Military Justice, and then determined that the federal cases supported the holding that possession of the trace amounts satisfied the requirements of proof. The court did not concern itself with the distinction that federal law made the concealment criminal only when the importation was unlawful, nor did it comment on how the possession of an unusable and untransferrable amount of marijuana could be found to be a discredit or a disorder or neglect.

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[178] NCM 57-03236, White, 25 CMR 733 (1958).

[179] United States v. Alvarez, 10 USCMA 24, 27 CMR 98 (1958).

In *United States* v. *Nabors,* the accused, who had been interrogated on 15 August 1957 in connection with a narcotics investigation, confessed to having had some marijuana cigarettes in his possession in the latter part of 1956 or early 1957. About four weeks later, a search was made of his quarters during which the investigator seized clothing which was sent to a crime laboratory for examination. From the pockets of two suits there was collected an amount of identifiable marijuana sufficient to cover about one-half of a fingernail, 100 to 300 milligrams. The accused contended on appeal from his conviction that the amount possessed was too insignificant to amount to an offense, because it could not constitute conduct of a nature to bring discredit upon the armed forces, or amount to a disorder and neglect. The majority opinion of the court, after declaring that wrongful possession of marijuana had previously been held to be an offense under Article 134, commented :

> The line of reasoning advanced by appellate defense counsel to escape these holdings fails to take into account the reasonable inferences that the court members could make once they had determined that accused's possession was conscious and knowing. . . . Certainly, it ignores the obvious fact that the particles found were remnants which had separated from larger quantities of the drug accused had handled and that the contraband was found in different articles of his clothing. Accused's pretrial statement and his in-court testimony admitted the prior possession of a number of cigarettes packed with the drug. Therefore, whether his conduct in the light of this record was a disorder or discrediting to the military was a question of fact to be determined by the court.[180]

Judge Ferguson, concurring in the result, refused to accept that portion of the majority opinion which to him indicated that the accused was convicted for the past possession of the larger amount and not the possession of the quantity found, which he held constituted an offense citing the ***Alvarex*** case as dispositive. [181]

From the decisions in the ***Alvarez*** and *Nabors* cases, it is ascertainable that the court is not requiring a factual predicate for the determination of the court-martial that the offense, under the circumstances of its commission, must bring actual injury to the reputation of the armed forces. It is still applying the ordinary legal test of whether there is substantial evidence to support the findings of the elements of the offense charged by name, and assuming that such an offense exists by reason of prior case holdings.

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[180] United States v. Nabors, 10 USCMA 27, 29-30, 27 CMR 101, 103-04 (1968).

[181] *Id.*, at USCMA 30, CMR 104.

Enucleation from the body of the modern case law of a guiding and set standard for the court-martial to apply in deciding whether the evidence adduced in a given case satisfies the requirements of the terminal element of an offense charged under the general article is not possible. So far as the process of appeal is concerned, any conduct satisfying the "crime" concept, or previously held to be an offense by the appellate tribunals, will be considered an offense in violation of the article, as will those delicts involving fraud or moral turpitude which are not denounced elsewhere in the Uniform Code. All that the majority has done is to return to the court-martial the function of making the first determination as to whether the conduct amounts to an offense. In this regard, it is following the declarations of the Supreme Court of the United States that what is punishable under the general article is peculiarly within the province of the members of the court-martial to decide as "practical men".[182] This practice accords with that of the British under their general article,[183] and with their view of the function of the court-martial under Article 66 of the Army Act of 6 May 1955. This article provides that a person guilty of disgraceful conduct of a cruel, indecent or unnatural kind is liable to punishment. Of this article, it has been said:

> It will be open to the court in each case to say whether the accused's acts amount to disgraceful conduct of the kind specified. . . . Conduct may be disgraceful within the meaning of this section although it does not constitute an offense known to the civil law.[184]

Under this hypothesis, the triers-of-fact are not bound to adjudge guilt merely because the conduct proved amounts to a violation of the common law, statutory law, a Presidentially specified crime or offense, or satisfies the factual allegation of the specification. While the law, for the purposes of appellate consideration of the sufficiency of the evidence, has solidified into the precedent-bound crime concept, and while the instructions of the law officer may take their content from these judicial declarations, it remains for the court-martial in the first instance to determine whether the conduct alleged and proved violates the article, regardless of he fact that the conduct so proved amounts to a "crime". There are areas in which the members of a court-martial, considering themselves bound by the instructions of the law officer and unaware of their power to make this determination, if the

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[182] Dynes v. Hoover, *supra,* note 59; Swaim v. United States, *supra,* note 61; Carter v. McClaughry, *supra,* note 62.

[183] See note 57, *supra.*

[184] Manual of Military Law, 1956, Part I, 286.

facts proved satisfy the "crime" requirement, would be, by conscience, compelled to return a finding of guilt. Those which immediately suggest themselves as being in this category are bigamy, where there is an actual though unreasonable mistake as to the existence of the first marriage, indecent acts with a child under the age of 16 where there is a mistake as to age based on reasonable grounds, and negligent homicide, where the attendant facts are not such as to outrage reasonable men, though probative of the "crime". If the court-martial in this limited area be made fully aware, through argument of counsel, that they have the right to decide, without violating their oaths, whether the conduct offends against the article, regardless of what the instructions as to the traditional elements of and defenses to the "crime" are, an acquittal may result. Such an approach, while not novel, now has the legal sanction of the *Gittens, Lawrence,* and *Williams* cases. It deserves re-emphasis inasmuch as these cases overruled, *sub silentio,* prior practice which had treated the standard created by Article **134** as legal rather than factual. Though not successful before the court-martial, it proved fruitful in one case on appellate review.

In the retrial of a negligent homicide case caused by faulty instructions, there was, as on the first trial, sharp conflict in the evidence as to which of the two vehicles involved was travelling north, and therefore at fault in the collision causing the deaths of the passengers riding in each car. The military status of the accused was not known to anyone who observed the vehicles before the accident, or to anyone who witnessed the accident. Disinterested witnesses on each side corroborated the claim of the driver of each of the two vehicles involved that his was the car travelling south on the road. It was not until after the accident occurred, and the accused was removed from his vehicle, that his fatigue uniform was observed. The position of the vehicles after the collision was such that it could not be determined by the highway patrolman who investigated which car had arrived from the south. In presenting its case, the defense, in addition to defending on the merits, offered evidence to show that the reputation of the armed services had not suffered because of the accident.[185] On appeal, the majority opinion of the board of review held:

> As to the fourth element of each alleged offense, namely, that under the circumstances, the conduct of the accused was "of a nature to bring dis-

[185] CM 397481, **Hunt,** (original record),

> credit upon the armed forces", there was in the record of trial simply no evidence, other than the evidence relating to the accident itself which we do not believe is sufficient in law or fact to prove this fourth element.[186]

Refusing to accept the Government's argument that the convictions should be approved because the commonly accepted elements of the offense of negligent homicide had been established, and that the court-martial had found the fourth element, the opinion continued:

> We . . . think that there may well be a substantial difference between offenses involving moral turpitude on the one hand . . . and an offense such as negligent homicide, which was based here upon simple negligence of the accused in the off-duty operation of a motor vehicle upon a rural road, and under circumstances such that the accused's military status was not at all apparent. In any event, we are simply not convinced beyond a reasonable doubt of the accused's guilt of the offenses charged.[187]

The concurring opinion, joining in the reversal of the conviction on the basis of a factual conclusion that guilt was not established beyond a reasonable doubt, commented on the unusual function of the court-martial with regard to the fourth element:

> In effect, when we submit the question of whether the accused's conduct was service discrediting to the court as an element of the offense, we are reverting to the practice of an earlier time when the members of a court-martial were the judges of both the facts and the law of a case arising under either of the general articles. Under such a doctrine an act is service discrediting whenever a court-martial and a convening authority consider it so. . . . [citing cases] . . . However, in the absence of an objective legal standard, the finding of the court on the issue would be no more than an expression of opinion reflecting the personal prejudice and predilections of the members.[188]

With this conclusion the author is in partial agreement. There has been an elastic interpretation of the article, so as to include offenses which were obviously not a part of any "common law of the military" in 1916. Custom and usage could not be invoked to justify its application to such crimes as burning a building with intent to defraud an insurer, or any other offense particularly civilian in definition and import, for there was no jurisdiction over this type offense before 1916.

Enough has been set out to show that the second clause has been twisted and expanded far beyond its original purpose. The appellate tribunals, in purporting to apply a test for this clause, are in reality doing no more than to contribute to this expansion, by adopting, not any "common law of the military" as it existed

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[186] CM 397481, Hunt, 27 CMR 557, 558 (1958).

[187] *Id.*, at 559.

[188] *Id.*, at 660.

prior to 1916, but the common law concept that any act, or omission to act where required by duty, which is likely to result in harm to the community is a crime punishable under the article. There is no attempt to limit the phrase as the phrase "crimes not capital" was limited prior to 1916. By decision, appellate bodies have emasculated the theory that conduct of the military not related to military status or directly connected with and harmful to the military environment should be punished, if at all, by civilian authorities except where proscribed by a specific article. In so doing, these bodies have created an anomaly which Congress has perpetuated.

Today the court-martial members, except for such anachronisms as having the power to overrule the law officer's decision on a motion for a finding of not guilty, his determination as to sanity at the time of trial, and to rule on challenges,[189] are treated as members of a jury. They are not presumed to know the law. They must take their instructions solely from the law officer, and not consult outside sources.[190] They are not permitted to utilize the Manual for Courts-Martial in their deliberations.[191] The basis on which the Supreme Court decided *Dynes v. Hoover*,[192] has been nullified by legislation of Congress in requiring as participants to the trial a qualified law officer performing the function of a judge and qualified attorneys as counsel in general courts-martial cases.[193] No longer are "practical men" presumed to know what the offenses under Article 134 are. Necessarily, if the court-members cannot consult treatises, reports, and the "living oracles'' as to what the "common law of the military" is, they must decide subjectively whether the conduct which gives rise to the "crime" is so reprehensible and so service-connected in its impact as to be punishable. With the right factual situation and a proper presentation, this power of determining what is an offense cannot but redound to the benefit of the accused, so long as the appellate bodies afford the court-martial's finding so little effect, and independently determine whether the acts involve such aspects of criminality as are customarily found in the definition of a crime as including a criminal intent and an act demonstrative of it.

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[189] Article 51, UCMJ, 10 USC 851.

[190] United States v. Lowry, 4 USCMA 448, 16 CMR 22 (1954).

[191] United States v. Rhinehart, 8 USCMA 402, 24 CMR 212 (1957).

[192] Dynes v. Hoover, 61 US (20 How.) 65 (1857).

[193] Articles 26, 27 UCMJ, 10 USC 826, 827.

VI. CONCLUSION

The return by the Court of Military Appeals to the proposition that the members of the courts-martial have the function of deciding whether conduct is to be punished as violative of either of the first two clauses of the general article constitutes **a** belated recognition of the original legislative intent in re-enacting the article in light of the early Supreme Court decisions. For most of the offenses under the article, the requirement that the court-martial impose its imprimatur in the form of an instructed finding on this element will have little effect. In rare cases, peculiar facts may allow an accused who would otherwise be punished to convince a court-martial that even though his conduct constituted **a** common law or statutory crime, it does not offend against the article. Some question now exists as to the legality of a board of review or the United States Court of Military Appeals curing error by affirming what has previously been considered to be a lesser included offense of the one of which the accused was convicted by the court-martial, in view of the cases demonstrating that the terminal element under Article **134** is not included in the specific articles. So long as conduct recognizably within the coverage of offenses malum in se, or recognized by precedent, or listed in the Table of Maximum Punishments, or denounced by a form specification is found by the court-martial to be violative of the article, little likelihood exists that this determination will be disturbed on appeal.

Many offenses have graduated from the listing in the Table of Maximum Punishments under prior general articles to **a** place of pre-eminence as a specific article. To prevent inconsistent treatment by different courts-martial as to whether certain conduct is punishable, and to limit the accused to legally recognized defenses, it would seem advisable to denounce in specific articles those more serious offenses listed in the Table of Maximum Punishments or reflected in decisions since 1951.

CIVIL AFFAIRS— A SUGGESTED LEGAL APPROACH"

BY MAJOR HAROLD D. CUNNINGHAM, JR.**

I. INTRODUCTION

On 9 June 1959, the Commanding General U.S. CONARC announced that the deletion of the term "military government" had been approved by the Department of the Army.[1] This development had been anticipated, but its realization had been resisted.[2] The initial reaction of lawyers, military and civilian, when informed of this change has been one of protest.[3] It is felt that

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

**B.A., LLB, LLM, BCL (Oxon.); Member, Staff and Faculty, The Judge Advocate General's School, U.S. Army, Charlottesville, Va.; member of the Massachusetts Bar, the Bars of the United States Court of Military Appeals and the United States Supreme Court; formerly legal instructor, U.S. Army Civil Affairs School, Fort Gordon, Ga.

[1] "1. The elimination of the term 'Military Government' from U.S. Army terminology has been approved by the Department of the Army. This provides the authority to delete the term 'Military Government' from the overall Civil Affairs Military Government function. This decision was based on the fact that the term has an unpleasant connotation to free people, especially our European allies, and that it is doubtful if the U.S. Army will ever find it feasible or practical to assume the degree of control the term implies."

Ltr. Hq. USCONARC, Fort Monroe, Va., Subject: "New Title for Civil Affairs Military Government." File: ATTNG-D&R 312.7/42 (9 June 1959).

[2] Earlier, the Civil Affairs School had been asked to consider in its doctrinal study of the Theater Army Civil Affairs Command, whether the term should be deleted and had recommended against any change. See letter U.S. Army War College, Carlisle Barracks, Pa., Subject: "Doctrinal Study on the Theater Army CAMG Command (U)," File: AICWCF (8 January 1959). *Unnumbered Study Project, Doctrinal Study on the Theater Army Civil Affairs Military Government Command,* 1 April 1959, prepared by the U.S. Army Civil Affairs, Fort Gordon, Ga. A later study by the Civil Affairs School did incorporate the change in doctrine. See *Final Draft Report, Unnumbered Study Project, Doctrinal Study on the Theater Army Civil Affairs Command,* dated 15 August 1959, p. 2, U.S. Army Civil Affairs School.

[3] Mr. Eli Nobleman, past president of the Military Government Association in addressing the first class to take a course, recently inaugurated at The Judge Advocate General's School, Charlottesville, Va., to train lawyers concerned with civil affairs, intimated that that association's name will remain unchanged despite the deletion of the term "military government" from Army doctrine.

the term "military government" has an established meaning in international and municipal law of which lawyers must take account in rendering opinions on the legality of official action.[4] This, of course, is true, but the military lawyer is now faced with a *fait accompli*,[5] and he must find a new orientation, a new perspective from which to evaluate the legal incidents of the civil-military relation because his clients will not be satisfied with advice couched in terms expressive of the former usage and because, in a larger legal context, older concepts may lack jural consistency.

It is the purpose of this essay to suggest such a perspective. The reader must be willing to make a shift in the emphasis of his thinking or the orientation herein proposed will not be meaningful. This is said by way of caveat for this approach to the legal basis for civil affairs will appear strange to the lawyer accustomed to thinking in terms of concepts having stable and predictable meanings.

By way of background, it should be mentioned that the deletion of the term military government was not accomplished as a result of a lawyer's suggestion. The seeds of this doctrinal change were sown, it is submitted, in a penetrating analysis of the civil affairs activity — prepared by a gifted scholar whose *forte* appears to be public administration rather than law.[6] Mr. King argued:

> In each and every experience the degree of *control* we exercized was determined, not by the status of the territory — whether it was "liberated" or ''occupied'' — but by the existence or absence of an acceptable and effective local government. In Germany, with local government institutions whose origins were deep in the Middle Ages, and which never ceased to function until we told them to cease, we found the government unacceptable and liquidated it. Elsewhere, whether in ex-enemy and co-belligerent Italy, in prostrate France, our ally, or in inexperienced Korea, we engaged in

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'Prof. Baxter of the Harvard Law School, wrote the author pointedly as follows:

> If lawyers are forbidden to use the word, how can they analyze the concept. I also suspect that the sweeping of this fact of life under the rug may not deter courts from thinking about this subject — presumably without very much help from the lawyers who have been kept ignorant of this subject. (Reprinted with permission.)

[5]At least for the Army; the term "military government," has been deleted from the AR 320–5, *Military Terms Abbreviations and Symbols, Dictionary* of *United States Army Terms*, see C–1, 11 Sept 1959, but it continues in AR 320–1, *Dictionary of United States Military Terms for Joint Usage*, 31 May 1955.

[6]King, *Civil Affairs: The Future Prospects* of *a Military Responsibility*, CAMG Paper No. 3, June 1958 (Staff Paper ORO-SP-55) prepared for the Operations Research Office, The Johns Hopkins University, pursuant to a contract with the Department of the Army.

"military government" wherever it was necessary, though: in France we deemed it expedient to employ another term for it.

The lesson of all this experience is that the distinction between "military government" and something else that is "military" but not "government," is not one that can be made solely as between friend and enemy. We proved we could use military government as a tool of reform—some would say retribution—in those occupied areas where local authorities did not measure up to our standards. But we also found we *had* to use it in other areas for whose people we had only the most compassionate feelings.'

Using this approach, Mr. King was led to evaluate civil affairs in terms of a new dimension. No longer should it be linked with the term, "military government'' or thought of in the ambiguous sense in which it was used in successive editions of the **now** obsolete, FM 27–5.

This field manual nourished several generations of civil affairs officers. When first published in 1940[8] its tone was reminiscent of Lieber's *Instructions* and its utility was aimed at a post-hostilities occupation of captured enemy territory. The **1943** edition,[9] reflected a concern for the civilian control problem as a means of furthering the combat effort, to the neglect of the implications of post-hostilities control.[10] The **1947** and final edition,[11] exemplified a more balanced approach, but its language perpetuated a tendency towards legal imprecision that originated when civil affairs doctrine departed from the classic terminology of the **1940** edition of the manual.[12] FM 41–5[13] represents a

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[7]Ibid, p. 7.

[8]FM 27–5, *Basic Field Manual-Military Government,* 30 July 1940.

[9]FM 27–5, *United States Army and Navy Manual of Military Government and Civil Affairs,* 22 December 1943.

[10]See Friedrich and Associates, *American Experiences in Military Government in World War II* (1948), p. 31.

[11]FM 27–5, *United States Army and Navy Manual of Civil Affairs Military Government,* 14 October 1947 and C–1, 19 June 1956 (reflecting the coming into force of the 1949 Geneva Civilian Convention, hereinafter cited as GC).

[12]"Note the variations in definitions in the successive editions of FM 27–5:

FM 27–5 (1940) "3. DEFINITION.—Military government is that form of government which is established and maintained by a belligerent by force of arms over occupied territory of the enemy and over the inhabitants thereof. In this definition the term *territory* of *the enemy* includes not only the territory of an enemy nation but also domestic territory recovered by military occupation from rebels treated as belligerents."

FM 27–5 (1943) "1. MILITARY GOVERNMENT—CIVIL AFFAIRS. a. Military Government. The term 'military government' is used in this manual to describe the supreme authority exercised by an armed force over the lands, property, and the inhabitants of enemy territory, or allied or domestic territory recovered from enemy occupation, or from rebels treated as belligerents. It is exercised when an armed force has occupied such territory, whether by force or by agreement, and has substituted its authority for that of the sovereign or a previous govern-

ment. Sovereignty is not transferred by reason of occupation, but the right **of** control passes to the occupying force, limited only by international law and custom. The theater commander bears full responsibility for military government. He is, therefore usually designated as military governor, but may delegate both his authority and title to a subordinate commander.

b. Occupied Territory. The term 'occupied territory' is used to niean any area in which military government is exercised by an armed force. It does not include territory in which an armed force is located but has not assumed supreme authority.

c. Civil Affairs. The term 'civil affairs' is used to describe the activities of the government of the occupied area and of the inhabitants of such an area except those of an organized military character. 'Civil affairs control' describes the supervision of the activities of civilians by an armed force, by military government, or otherwise. The term 'civil affairs officers' designates the military officers, who, under the military governor, are engaged in the control of civilians."

FM 27–5 (1947) **"1.....**

....

"b. Definitions, **(1)** ***Civil*** *affairs/military government (CA/MG).* CA/MG encompasses all powers exercised and responsibilities assumed by the military commander in an occupied or liberated area with respect **to** the lands, properties, and inhabitants thereof, whether such administration be in enemy, allied, or domestic territory. The type of occupation, whether CA or MG, is determined by the highest policy making authority. Normally, the type of occupation is dependent upon the degree **of** control exercised by the responsible military commander.

(2) ***Military*** *government.* The term 'military government' as used in this manual is limited to and defined as the supreme authority exercised by an armed occupying force over the lands, properties, and inhabitants of an enemy, allied, or domestic territory. Military government is exercised when an armed force has occupied such territory, whether by force or agreement, and has substituted its authority for that of the sovereign or previous government. The right of control passes to the occupying force limited only by the rules of international law and established customs **of** war.

(3) ***Civil*** *affairs.* The term 'civil affairs' as used in this manual is defined as the assumption by the responsible commander of an armed occupying force of a degree **of** authority less than the supreme authority assumed under military government, over enemy, allied, or domestic territory. The indigenous governments would be recognized by treaty, agreement, or otherwise as having certain authority independent of the military commander.

(4) *Occupied territory.* The term 'occupied territory' as used in this manual means any area in which CA/MG is exercised by an armed occupying force. It does not include territory in which an armed force is located but has not assumed authority.

(5) *Liberated territory.* The term 'liberated territory' as used in this manual denotes a specific form of occupied territory, and is defined **as** allied or domestic territory which has been recovered by action of an armed occupying force from enemy occupation or from rebels treated as belligerents."

Cf. the definitions contained in paras. 13, **354,** FM 27–10, *The* ***Laic*** *of Land Warfare,* 18 July 1956.

[19] *Joint Manual of* **Civil** *Affairs—Military Government,* 17 November **1958** (also cited as OPNAVP 21–1, AFM 110–7, NAVMC 2500).

transitional stage between FM 27–5 and the current doctrine.[14]

In Mr. King's view, civil affairs should be regarded as a phrase descriptive not of ***power*** but of a *relation.* It simply means the sum total of the relationship between a military and a civilian community. Wherever there is a military-civilian nexus, there is the possibility of civil affairs problems. Essentially these problems are problems of communication. They subsist at home and abroad; in peace, in war and the jural paradise in between. In their simplest form, the problems generated by the interaction of the civil-military regimes can be solved by the commander personally, where the areas of interaction are more manifold and complex, it may be necessary to augment the commander's staff by the assignment of an additional staff officer whose duties would involve, *inter alia,* advising the commander on the responsibilities incident to the civil-military nexus.[15] Where this nexus entails the assumption of governmental functions by the military or elaborate arrangements for the coordination of civil-military

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[14] Cf. the following definition:

FM 41-5 "2. Definitions

a. *Civil Affairs-Military Government (CAMG).* A grouping of terms employed for convenience to refer to either Civil Affairs or Miiltary Government, depending upon the context.

". . . .

b. *Civil Affairs.* Matters concerning the relationship between military forces located in a friendly country or area and the civil authorities and people of that country or area usually involving performance by the military forces of certain functions or the exercise of certain authority normally the responsibility of the local government. This relationship may occur prior to, during, or subsequent to military action in time of hostilities or other emergency and is normally covered by a treaty or other agreement, express or implied.

. . . .

c. *Military Government.* The form of administration by which an occupying power exercises executive, legislative, and judicial authority over occupied territory.

. . . .

d. *Occupied Territory.* Territory under the authority and effective control of a belligerent armed force. The term is not applicable to territory being administered under a civil affairs agreement or pursuant to peace terms."

Published before the deletion of the term, "military government", FM 41-5 is compatable with current doctrine, but appears to be in need of revision for legal consistency and precision.

[15] This is the G–5. Present doctrine calls for the assignment of G–5's to field armies and comparable commands in peace time. At division level in peace time the functions of the G–5 are to be assumed by the G–3, on mobilization, there will be a G–5 at division level.

activities, the services of civil affairs operational units will be called upon.[16]

The civil affairs activity then, may embrace any civil-military relation, from furnishing a band for a local 4th of July celebration to controlling every facet of government normally the province of civilian agencies. King rejects attempts to classify the varying ambits of this relation by the term "military government" or even by the term "civil affairs" as previously understood. He suggests, instead, the single term, "civil affairs,'' which he uses in a new context. His views have evidently been persuasive within the Department of the Army. Witness the new definition of civil affairs :

> Civil affairs — Those phases of the activities of a commander which embrace the relationship between the military forces and the civil authorities and people in a friendly or occupied area when military forces are present. In an occupied country or area this may include the exercise of executive, legislative, and judicial authority by the occupying power.''

If we are to reject for the purpose of legal analysis, an approach to an understanding of the civil affairs activity which utilizes such traditional legal terms as "military government" how are we to keep our inquiry on a legal plane? The task is not easy; one must resist the tendency to regard current civil affairs doctrine as extra-legal, or to assume those concerned with civil affairs no longer think in terms of law. If this tendency exists, it is due to the rigidity of law and the reluctance of lawyers to recast their ideas, or to characterize the issues in terms of a different view of the facts and thus reach a common basis for communicating ideas with laymen concerned with civil affairs.

The new approach to the civil affairs activity is functional. Civil affairs functions have a legal basis which may change though the function remains relatively constant.

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[16] Civil affairs operational units are organized on a cellular basis in TOE-500D, 3 October 1958. They consist of headquarters teams (platoon, company, and group) capable of functioning at division, corps and army level and several types of functional teams. In addition there are larger area headquarters units which are designed to function above army level. For the capabilities of these units see FM 41-15, Civil Affairs Military Governmental Units, (1954); FM 41-10, Civil Affairs Military Government Operation (1957); FM 41-5, Joint Manual *of* Civil *Affairs/Military* Government (1958), (rescinding FM 27-5, supra).

[17] C–1 to AR 320–5, supra. This definition is still far from satisfactory as an accurate statement of the civil affairs relation because it purports *to* carry forward a needlessly restrictive conception of "occupation" and a test of governmental power based purely on Anglo-American theories of the doctrine of the separation of powers.

This approach is more readily understandable if it is expressed in terms of a simple example. The care of displaced persons and of refugees is a major civil affairs function.[18] Those concerned with guiding, feeding, clothing, and housing refugees will face the same problems, assuming the same degree of devastation and dislocation, whether the people are friendly or hostile, whether the territory is "occupied" or not. Of course, there may be a variation in the degree of control exercised, or in the security measures taken, and the relocation and repatriation policies instituted in handling the refugee problem. But essentially the task is to relieve human misery and the problem one of planning and logistics.

The legal basis for the assumption of responsibility for the care of refugees may, however, change. It may be bottomed on the letter of a multilateral treaty,[19] on a dictate of humanity that has been elevated to a provision of customary international law, or on a bilateral agreement between the United States and the host nation wherein the care of refugees is assigned as a responsibility of the United States forces. One may also cite a policy pronouncement of the United States such as a statute, joint resolution, judicial precedent, executive order or departmental directive, as a possible basis for regarding the care of refugees in the area in question as a responsibility of the United States armed forces.[20] Finally, there is the possible application of a provision of the municipal law of the state in which the military force is deployed. One or more of these bases may apply either concurrently or in sequence with reference to any civil affairs function. It is the task of the lawyer to discern them and appreciate their significance for the civil affairs function to which they relate.

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[18] See para. 27b, FM 41–5, *supra.*

[19] E.g., Art. 49 G.C., para. 382, FM 27–10.

[20] "[I]n July 1944 SHAEF placed three questions before the CCS. First, did it have any responsibility for planning relief supplies for Germany and Austria if such were necessary to prevent disease and unrest? Second, if so, did this responsibility extend to the entire population? Third, what standards and categories were to be applied? On 20 August the CCS made SHAEF responsible for planning for civilian relief in Austria for the period of combined command. This responsibility was to cover only the population in the combat zone and in line-of-communication areas during the period prior to enemy defeat or surrender, but it was to extend to all of the population in areas occupied by SCHAEF forces thereafter."
Komer, ***Civil Affairs and Military Government in the Mediterranean Theater,*** (Office of the Chief of Military History, Department of the Army (1960) Chapter 24, p. 33).

II. ANALYSIS ON THE BASIS OF FUNCTIONS

Several attitudes towards functions are possible. To persuade or control may be regarded as the possible alternative functions which pertain to the civil affairs activity. Or one may delineate civil affairs functions in terms of the ultimate objectives of the civil affairs activity in a particular area. Neither of these attitudes is initially helpful because each implies a substrata of numerous facts which themselves require further analysis. It is rather more profitable to consider as civil affairs functions those essential tasks, the execution of which is relatively uniform regardless of the territory involved or the racial, political, religious, and economic background of its inhabitants. No novel classifications are involved in this approach. The list of civil affairs functions set forth in FM **41-5** follows traditional patterns and is as adequate a guide as some that may be suggested and perhaps better than most.[21]

Discharge of these functions requires an expertise and an awareness of the reason for the function and its legal basis. The latter two requirements for the lay civil affairs officer in the field appear in the form of specific directives or policy guidance which are either of general or particular application. Usually, he is not interested in carefully analyzed legal opinions as to why or how a particular activity is his responsibility; he is content to take his guidance from a statement in a field manual, an Army regulation, or circular, or in an annex to an operation or administrative order.[22]

But the military lawyer, particularly one assigned to civil affairs units or called upon to furnish advice on the legal aspects of civil affairs, must ground his rationale on a firmer legal basis. He must seek the rule and the reason for the rule. For that

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[21]Para. 23c. The functions listed are: a. Governmental Functions: **(1)** Legal, **(2)** Public Safety, **(3)** Public Health, **(4)** Public Welfare, *(5)* Public Finance, (6) Public Education, (7) Labor; b. Economic Functions: **(1)** Economics, **(2)** Commerce and Industry, **(3)** Food and Agriculture, **(4)** Price Control and Rationing, **(5)** Property Control, (6) Civilian Supply; c. Public Facilities Functions: **(1)** Public Works and Utilities, (2) Public Communications, (3) Public Transportation: d. Special Functions: (1) Civil Information, **(2)** Displaced Persons, (3) Arts, Monuments, and Archives. "The listing of particular items under each functional specialty is for the purpose of illustration and is not intended to be all-inclusive." Ibid.

[22]Illustrative of this attitude is the very helpful policy checklist appearing at Appendix V, FM 41–10, *Civil Affairs Military Government Operations,* 2 May 1957.

reason, it is necessary to postulate norms by means of which, given the factual data, the legal basis for the function in question may be deduced.

Jurists have not been unmindful of the import of the factual content of legal relations.[23] All too often, however, the terms used to signify legal consequences have been generalized and reified to the extent that they are regarded as having a self-subsisting efficiency. This has resulted from the failure of lawyers to notice that many of the terms they are using are really only shorthand expressions descriptive of relevant subsidiary facts. The word, "occupation" is a case in point. The traditional legal approach to the problem of what governmental functions devolve upon a military commander has been to ask: "Is the territory *occupied* by the military force in question? Has authority to govern been relinquished by agreement?" If the answer to the first question is affirmative, then all governmental responsibility is said to be thrust upon the military commander in control.[24] A negative reply means the law of belligerent occupation does not apply in the circumstances either because the territory has not been reduced to military control[25] or because the status of the military force in the area is dependent upon the consent of the host sovereign, in which event an affirmative answer to the second question must be assumed.[26] This hypostatization stultifies analysis and forces the lawyer to look for an all or nothing basis for his rationale, an approach that is questionable in view of the complexion of modern warfare. When, however, the term "occupation" is stripped of its alleged factual self sufficiency, it is found to be a legal conclusion, a symbol, whereby one may communicate an understanding of a number of relevant subsidiary facts, such as

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[23] See Patterson, *Jurisprudence, Men and Ideas of the Law*, pp. 135, 568–570.

[24] Cf., HR 43, para. 363, FM 27-10, *supra*.

> "The status of an occupant of the territory of the enemy having been achieved, international law places the responsibility upon the commanding general of preserving order, punishing crime, and protecting lives and property within the occupied territory. His power in accomplishing these ends is as great as his responsibility. But he is definitely limited by recognized rules of international law, particularly the Hague Regulations of 1907."

U.S. v. *List et al.* (The Hostage Case) 11 *Trial of War Criminals before the Nuerenberg Military Tribunals* (1948) 757, 1244.

[25] See para. 352, FM 27-10, *supra*, in which an invasion is distinguished from an occupation.

> ""Territory subject to civil affairs administration is not considered to be occupied," para. 354, FM 27-10, *supra*. See fn 12, *ante*.

presence of an effective military force in control of territory, and the displacement of the local sovereign and his means of control.[27]

The proper approach, it is submitted, is to isolate each function in its own factual milieu and to apply to it the test suggested by King, namely :

> Is there an acceptable and effective local governmental agency which can exercise the function in question?"

If there is an acceptable and effective local governmental agency which can exercise the function in question, in all probability that agency will perform the function. There will still be the communications problem because there is the ever present military-civil nexus, but it will be resolved by liaison and co-ordination, persuasive rather than control devices.

On the other hand, if the local agency is deficient in one or the other of these attributes of acceptability or effectiveness, or if it is non-existent, the function will be thrust upon whatever agency is capable of discharging the function. Thus, if a military commander has forces deployed in the area equipped to discharge the function concerning which the normal civil agencies are powerless to act, performance of that function will become a responsibility of that military force.

In general, previous rationale of this problem have recognized this responsibility as arising only where the control of the military force over the land was *total*, either because the territory had been seized by force or because the local government had, with reference to the portion of its territory affected, consented to measures necessary to secure the liberation of the territory from a common enemy, These criteria will always be valid and significant, but they tend to force attention of the legitimacy of the

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[27] See para, 355, FM 27–10. To regard "occupation" as a question of fact is poetic license. The facts questioned are the facts presupposed. "Occupation" as used in the Hague Regulations and subsequent conventional international law is a strictly "civil law" concept, signifying the seizure of possession from a "nonowner." In Roman law it was limited to cases of acquisition of wild animals, abandoned property and property captured from the enemy. Because the thing had or was regarded as having no owner, ownership was acquired by the first taker. See *Dig. 41, 1, 3; Inst. 2. 1. 58.* Buckland, *A Text Book of Roman Law* (1950) p. *205,* 206. At first, international law regarded the victorious military commander as the "owner" of the territory he seized from the enemy. TJAG Text No. 11, *Law of Belligerent Occupation, supra,* p. 27. Later, the occupant came to be regarded as a mere temporary possessor and in no sense a "sovereign," though he could and perhaps must exercise certain of the attributes of sovereignty. See *Thirty Hogshead* of *Sugar* v. ***Boyle;*** 9 Cranch 191 (1815); *United States* v. *Rice* 4 Wheat 246 (1819); *Fleming* v. *Page,* 9 How 603; (1850).

[28] See fn 7, *ante.*

presence of the military force in the area and not upon the duty of that force to exercise governmental functions.[29]

The functional approach accepts the presence of the military force in the territory as a fact and is concerned with the extent to which action must be taken by that force with respect to particular functions normally the responsibility of civil agencies of government. This approach is compatible with the fluidity and mobility of modern war. It rejects, as inadequate as a basis for determining what civil affairs functions are necessary, a conception of governmental responsibility in the military that requires total control of territory by an armed force. It insists only on the capacity of the military force to exercise responsibility for the function in question and the absence of a capacity for a like responsibility in the normal agencies of government. It assumes that in modern atomic warfare, the instances of lightning thrusts into the territory in question, during which troops will be deployed in depth and for a duration only as extensive as is necessary to attain specific tactical objectives, will be more usual than unusual. The responsibility of a military commander to perform civil affairs functions under atomic conditions would appear to be directly related to the local necessities of the case and the time and space factors pertinent to the presence of his troops in the area.

Thus, a brief raid, comparable in scope and duration to the Dieppe raids of World War II, would thrust upon the military commander few civil affairs functions. There would be no time to establish courts, repair and operate such public facilities as transportation, communication, water, power, and sewerage systems, or perform similar functions that require stable and continuous action for their discharge. But emergency measures to maintain law and order, care for refugees, provide food and medical supplies to the inhabitants and the like, would be necessary,

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[29] Cf H R 43.

"At the outset, we desire to point out that international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject."

U.S. v. *List et al.*, supra, 1247 (1949); also reported in 8 *Law Reports* of *Trials of War Criminals* 69 (hereinafter LRTWC). See Greenspan, *Modern Law of Land Warfare*, 216.

and the chances are that only the military force would be in a position to perform these essential services.

Between a raid of this sort and complex of major thrusts designed to neutralize the enemy's retaliatory power, there is a difference in degree not in kind. The ultimate objective in a nuclear war is less likely to be phrased in terms of gaining physical control of land masses and more in terms of destruction of enemy weapons systems. It is only after the latter objectives have been accomplished that so called "total" occupancy of territory will be possible, Such a war contemplates no gradually unrolling carpet on which the previously committed furniture of civil affairs can be placed. Rather, a nuclear war envisions a flexible mesh of self-sustaining islands of armed forces separating which may be the spent waste-lands of atomic holocaust or large masses of uncontested land through which competing hostile forces, including guerrillas, may move without contact. Within these islands, the crucial issue will be who can (and therefore, must) perform the governmental services essential to the preservation of order. Responsibility for the exercise of a given civil affairs function may fall to the military commander even though he is not technically "in control" and capable of jailing those who oppose him.[30]

In this fluid tactical environment, the basis of military governmental responsibility will hardly rest on an "occupation" in the classical sense.[31] The possession of territory will be firm only in a very limited sense and the requisite intention may well be lacking. If the concept, "occupation," is to have any value as a predicate for the assertion of governmental prerogatives by the military in the type of war envisioned above, it will be by analogy.[32] The military forces "occupy" certain spheres of governmental activity, rather than segments of the earth's surface over which some state claimed sovereignty. Are we left, then, with no rules by which the validity of governmental action by the military may be determined? Indeed not. The assertion of the civil preroga-

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[30] Cf. Dillard, *Power and Persuasion: The Role of Military Government,* 42 Yale Review 212, 219 (1953).

[31] **"Territory is considered occupied when it is actually placed under the authority of the hostile army.**

"The occupation extends only **to the territory where such authority has been established and can be exercised." H R 42, para. 351, FM 27–10. "Occupation , . . is invasion plus taking firm possession of enemy territory for the purpose of holding it." Para. 352*a*, FM 27–10.**

[32] **"The rules set forth in this chapter [Chapter 6, Occupation] apply of their own force** only **to belligerently occupied areas, but they should, as a matter of policy, be observed as far as possible in areas through which troops are passing and even** on **the battlefield." Para. 352*b*, FM 27–10.**

tives of government by a military commander is an exercise of coercion. Without adequate justification, such military action would be unlawful even if directed against the civil institutions of hostile belligerent.[33] There are at bottom only two possible grounds of justification for the exercise of a governmental function by a military force, *consent* and *necessity.* Consent can serve as a basis for the exercise of the function in question only where a friendly foreign sovereign has either expressly or impliedly permitted the military forces of another sovereign to assume on the former's territory the exercise of the particular governmental function. The states in question must be foreign to each other, because a state cannot conclude an international agreement with itself or its political subdivision. Also, the states must be friendly to one another. Obviously, a state will not consent to the exercise of hostile control of its territory. Finally, the consenting state must have the capacity to consent or the continued legal right to withdraw its consent. In short, consent as a basis for the military exercise of a local governmental function assumes that the local government in question is acceptable but not effective with reference to the particular function thrust upon the military force.

Assuming such consent, what funds of law govern the relationship of the parties? Basically, the agreement which incorporates the terms of consent is law for the parties. If this agreement is express and detailed, there is no problem. However, if the agreement, or certain of its terms, is implied, a host of interpretive problems arise to which are applicable well established canons of construction.[34] These in turn assume that the states in question had capacity to contract in international law and would have consented to the interpretation urged had their minds met on the subject.

In addition to these interpretive canons, certain cardinal principles applicable to friendly dealings between states will usually apply. Military forces permitted to assume and exercise civil affairs functions in friendly territory will not employ coercive devices against the local population to the same extent as might be necessary with reference to a hostile population. In other words, a state should treat its friends better than its enemies. On the other hand the mantle of the law of war is designed to

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[33]The laws of Australia, The Netherlands and China make usurpation of sovereignty during military occupation a crime. See 15 LRTWC 131, Greenspan, *op. cit.* 216.

[34]These rules are generally an extension of Roman Law canons of constructions. See I Oppenheim, International Law (8th ed.) 950.

cover individuals who have lost the protection and mediation of their own government.[35] By definition, this rule has no application where the basis of the pertinent civil affairs function is the consent of the host sovereign. It follows that the prohibitory effect of the law of war provides no restraints upon the measures which the military force permitted to exercise governmental prerogatives in the territory of the host state may take against the local population. The only restraints are those contained in or inferred from the agreement between the two governments concerned. This means that the customary protection accorded private property,[36] restrictions on labor,[37] freedom of movement,[38] punitive sanctions,[39] etc., have no express application to a civil affairs operation based on consent.

In point of fact, the military force discharging the pertinent civil affairs function or functions will seldom if ever fail to respect the humanitarian principles embodied in conventional and customary international law. It will exercise a self-imposed restraint if no consensual restrictions can be prescribed.[40]

This self-imposed restraint can in turn be predicated on the application of customary international law by analogy or derivatively through the sanction of the municipal law of the military commander exercising the function in question. Also, provisions of the local municipal law may be operative upon the agents of the guest state, through incorporation by reference in the agreement, or by reason of an applicable rule of international law.

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[35] The 1949 Geneva Civilian Convention protects:

> " . . . [T]hose who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
>
> "Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."

G. C. Art. 4, para. 247, FM 27-10. The Civilian Convention is residual, it does not protect those covered by the other three 1949 Geneva Conventions, *ibid.* For an analysis, see International Committee of the Red Cross, ***Commentary: IV Geneva Convention Relative to the Protection*** of ***Civilian Persons in Time*** of ***War***, ed. by Pictet (Geneva, 1958), 45-51.

[36] See paras. 393-417, FM 27-10, which by their terms relate to "enemy" property.

[37] See paras. 412, 418-424, FM 27-10.

[38] G. C. Art. 78, para. 433, FM 27-10.

[39] See paras. 434-448, FM 27-10.

[40] See fn 1, *ante*.

Consent then, for those concerned with civil affairs is nothing more than a source of law. The parties may agree that one state may exercise all the incidents of sovereignty in the territory of the other, subject, at least in theory, to the right to revoke the grant at any time. At the other extreme, the authority granted may consist simply of the right to station friendly forces in the territory to perform missions in keeping with global collective defense commitments. Agreements called "status of forces agreement~' which define the relationship between the visiting force and its members and the local authorities and inhabitants belong in this category. Or the agreement may call for some specialized military aid or assistance such as training and logistical aid by the armed forces of one nation to corresponding agencies of the host government; for example, the various MAAG agreements to which the United States is a party.[42] Both types may be grouped loosely under the rubric "civil affairs'' agreements.[43] How will these agreements operate in the event of a general or even limited war? They do not make any provision for the emergency exercise of governmental prerogatives by the visiting force. Pending their renegotiation and augmentation by "civil affairs agreements" in the traditional sense,[44] it would seem that the only legal norm upon which the assumption of civil affairs responsibility can be based in *necessity.*

Necessity as a justification for the exercise of a given function is relevant where a host state otherwise acceptable, becomes in-

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[42]The principal agreement of this type is the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces (4 UST 1792), popularly known at NATO SOFA.

"MILITARY AID AND ASSISTANCE GROUP. There are several such agreements.

[43]Because they generate a military-civilian nexus.

[44]In the case of NATO SOFA, renegotiation is authorized by Art. XV, as follows:

> **"1.** Subject to paragraph 2 of this Article, this Agreement shall remain in force in the event of hostilities to which the North Atlantic Treaty applies, except that the provisions for settling claims in paragraphs 2 and 5 of Article VIII shall not apply to war damage, and that the provisions of the Agreement, and, in particular of Articles III and VII, shall immediately be reviewed by the Contracting Parties concerned, who may agree to such modifications as they may consider desirable regarding the application of the Agreement between them.
>
> "2. In the event of such hostilities, each of the Contracting Parties shall have the right, by giving 60 days' notice to the other Contracting Parties, to suspend the application of any of the provisions of this Agreement so far as it is concerned. If this right is exercised, the Contracting Parties shall immediately consult with a view to agreeing on suitable provisions to replace the provisions suspended."

effective with reference to some or all of its governmental functions and has made no agreement concerning functions the assumption of which by the military force may be deemed expedient. Of course, time and other conditions permitting, the states concerned could provide by agreement that the guest military commander might take such measures with respect to governmental functions in the host state as may be necessary. However, in so doing, the states would merely be incorporating into their agreement a provision which would otherwise be implied. This would appear to be the legal effect of the following provision of the 1944 US-French civil affairs agreement:

> In emergencies affecting military operations or where no French authority is in a position to put into effect the measures deemed necessary by the Supreme Allied Commander under paragraph (i) of this Article, the latter may, as a temporary and exceptional measure. take such measures as are required by military necessity.[45]

The necessity in question does not give the military commander a carte blanche. His authority is circumscribed by the realities of the situation and is limited to the functions which the local government cannot effectively perform. These may, of course, embrace all of the functions enumerated in paragraph 23c, FM 41–5.[46] Or they may include only the more obvious emergency type functions.[47] In any event the manner of discharge of the function, whether by coercive or persuasive means, as well as the ultimate responsibility for the function is determined by the test of necessity. Prudence dictates that as early as practicable, the responsibilities of a military commander should be defined by specific agreement and not left to be determined by the test of necessity.[48]

Necessity also serves as a justification for the exercise of governmental functions where the local government lacks both the qualities of acceptability and effectiveness. By definition, a hostile government would not be acceptable, nor, if defeated, effective. *A fortiori*, if, be the people friendly or hostile, there is no local government *in esse* capable of exercising the particular function, necessity would serve as a predicate for the military exercise of the function.

""Civil Administration and Jurisdiction in Liberated French Territory". T.I.A.S. 2313, 25 August 1944.

[46] See fn 21, *ante.*

[47] Cf. the "initial tasks" listed in para. 83, FM 41-10, *supra.*

[48] "A civil affairs agreement should, however, be concluded with the lawful government at the earliest possible opportunity". Para. 354, FM 27–10.

This rationale may also be applied to evaluate the legal aspects of a given civil affairs function in the domestic as well as the international scene. Here, however, the issue of consent will not be relevant, at least under the United States Constitutional scheme, because the authority of the President as Commander-in-Chief cannot be enlarged by grant of civil power by the States. Moreover, the acceptability of the local government may be assumed with reference to civil-military relationships in the domestic territory of the United States.[49] But a local or state government or a civil agency of the Federal government may have been rendered powerless to discharge its particular governmental function as a result of some civil emergency. In such instances, only *necessity* may be asserted in justification of the assumption by the military arm of the nation of the prerogatives of the civil agencies of government.

It has been traditional for lawyers to classify temporary governmental action by the military in domestic territory prompted by necessity as *martial law*.[50] That term has not lost its legal significance, but reduced to its essential content it is found to be nothing more than a common law conception of the same criterion of necessity which justifies the assumption by the military of governmental functions in foreign territory where, with reference to the functions in question, there is absent an acceptable and effective local government. In both cases, the machinery of local government has broken down. In both, military control fills the vacuum of anarchy.

There is, it is submitted, only the following differences between the necessity tests applicable in the two situations. In the case where the exercise of the civil function of government is asserted on the authority of martial law, the necessity for such action is determined solely by reference to the domestic law of the state concerned. However, in the case where a military force of a sovereign asserts governmental authority in the territory of an-

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[49] Exceptions would be where a local insurrection against the authority of the state or the United States is in progress. Cf. para. 12, FM 27-10, *supra*. Semble, domestic territory recovered from rebels treated as belligerents is taken out of the domestic law realm because by recognition as belligerents, the insurgent regime acquires an international status.

[50] The literature on martial law is extensive. Standard works include: Winthrop, *Military Law and Precedents* (1920), pp. 817-830, Weiner, *A Practical Manual of Martial Law* (1940), Fairman, *Law of Martial Rule* (1943). For a consideration of the civil affairs role in domestic emergencies, see Thurmond, *The Mission of the Civil Affairs Division*, 10 Army 48 (Nov. 1959); para. 48, FM 20-10, *Civil Defense*, (30 Dec. 59).

other state, the necessity for such action must be construed in the light of three possible legal systems. First, there is the legal system of the state in which the foreign military force is deployed. Secondly, there is the legal system of the state whose armed forces are exercising the governmental function in question. Finally, there is international law which serves as a bridge between the two domestic law systems. The interaction of these three legal systems may be analyzed as follows:

The legal system of the state in which a foreign military force is deployed prescribes basic civil relationships, delineates what are locally regarded as functions appropriate to the civil or military arm of the state and molds the political, economic, and social character of the inhabitants. On the most fundamental of legal principles, that legal system continues to exist so long as the state has legal personality. Any assertion of local governmental prerogatives by the foreign military force must take account of the local system. The authority of the local sovereign is displaced in relation to the function exercised, but the legal system still exists, preserving the rights of the inhabitants and the basic legal character of the state. Since no change in sovereignty is contemplated by a civil affairs operation, it is unnecessary to distinguish the public and private aspects of the local law.[51] The local law subsists in its entirety so long as the provisional military regime continues, and its provisions may be suspended during this interval only in accordance with more paramount legal norms, e.g., consent or a rule of international law.[52]

The municipal law of the military force conducting a civil affairs operation in foreign territory applies to define the authority of a military commander to act for his government. The manner in which this fund of law applies extraterritorially has

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[51] See O'Connel, *The Law* of *State Succession*, (1956), p. 211.

[52] Unless by agreement, the local law is regarded as conferring authority on the military commander, its force and effect is negative; if it fails to provide adequate machinery for essential governmental functions, the necessities of the case will prompt the military commander to take appropriate measures. In *Public Prosecution* v. *X* (Eastern Java) Netherlands Indies Temporary Court Martial at Suraboyo (1948) Annual Digest (1948) Case No. 176, an ordinance banning the possession of unlicensed arms by civilians, promulgateed by the Allied Commander in Javanese territory liberated on Japan's unconditional surrender, was upheld as resting on generally recognized principle of war, which empower those who exercise *de facto* authority to promulgate necessary regulations, despite a lack of authority for the ordinance in the local law. See Greenspan, *Modern Law of Land Warfare* (1959), p. 212.

not been fully appreciated.[53] Certainly, in the case of the United States, the Constitution does not prescribe a rule for foreign populations. But the Constitution is a rule for the agents of the United States who purport to act for the United States in its foreign relations.[54] It follows that acts of branches of the United States Government may have, according to their context, extra-territorial application to prescribe what may or may not be done by the United States military authorities. In like manner, the municipal law of allied States prescribes in accordance with the constitutional forms of the states concerned, how allied military commanders may act for their sovereigns.

International law provides the norms whereby the assertion of governmental prerogatives by a military force may be classed as other than a municipal law problem. Its facets are manifold and it has application in a variety of modes. For example, it is relevant to determine who can be parties to international agreements. As indicated above, it provides canons of construction whereby the provisions of such agreements may be interpreted.[55] It contains rules that apply of their own force[56] or by analogy.[57] And it enunciates emerging principles reflecting humanitarian considerations which, because of their universality and pervasiveness, compel adherence by states in their conduct of civil affairs activities.[58]

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[53] *Johnson* Eisentrager, 339 U.S. 763 (1950), Hohi *Hirota* v. *MacArthur*, 338 U.S. 197 (1948), Flick v. *Johnson*, 174 F. 2d 983 (C.A.D.C.) (1949) cert. den. 338 U.S. 879 (1949), reh. den. 338 U.S. 940 (1949), announced as unnecessarily restrictive doctrine. See Baxter, Constitutional Forms and Some Legal *Prob*lems of International Military Command, 29 B.Y.I.L. 325 (1952); O'Brien, The Constitution of the United States and the Occupation of Germany, 1 World Polity 61.

[54] "Governmental action abroad is performed under both the authority and the restrictions of the Constitution—for example, proceedings before American military tribunals, whether in Great Britain or in the United States, are subject to the applicable restrictions of the Constitution," per Frankfurter, J., concurring in Reid v. Covert, 354 U.S. 1, 56 (1957)."

[55] See fn 34, ante.

[56] E.g., the customary law of war. See para. 8, FM 27-10.

[57] See fn 32, ante.

[58] "The law of war places limits on the exercise of a belligerent's power in the interests mentioned in paragraph 2 and requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry."

Para. 3*a*, FM 27-10. For a careful analysis of the concent *of* military necessity see O'Brien, The Yeaning of Military Necessity in International Law, 1 *World Polity* 109.

The test of necessity that brings these legal systems into play, elusive though it may be, nevertheless provides a useful criterion for determining the legal basis for civil affairs functions whenever authority for the exercise of such functions cannot be predicated on consent. The decision as to whether a given function should be asserted by the military, and if so, the manner of performance, i.e. directly, or through local officials,[59] would appear to rest with the responsible military commander.[60] He will be the one called to account after the fact for failing to act where there was a duty to act, or for acting improperly or in excess of his authority.[61]

In utilizing the test of necessity, the first task is to decide upon the possible ends to be served by the military assertion of a local governmental function. Conceivably, necessity as a justificative norm has two interrelated but not necessarily equivalent ends. The immediate and obvious end is that directly related to the military mission. This has a respectable history as the familiar term *military necessity.* Military necessity, as an end, however, is relative, since military force can never be justified as an end in itself. For this reason, in the precise language of FM 27–10,

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[59] The principle of economy of personnel, a cardinal norm of civil affairs doctrine, urges that the duties of civil affairs peisonnel should be confined wherever possible to supervision over existing or reestablished civilian authorities. The direct assumption of the operational tasks of civilian agencies is to be avoided wherever possible. See para. 6*i*, FM 41–5, *supra.*

[60] The military nature of civil affairs operations requires that responsibility and authority for the establishment and conduct of those activities be vested in the senior commander. See para. *Ge,* FM 41–5, *supra.*

[61] "The law of war is binding not only upon States as such but also upon individual and, in particular, the numbers of their armed forces." Para. *3b,* FM 27–10. "Every violation of the law of war is a war crime," para. 499, FM 27–10. In the Italo-Abyssinian war, deplorable conditions of looting, pilage, and rioting followed the flight of the Emperor from Adis Ababa. These depredations were committed by mobs of natives including disorganized Abyssinian troops and extended over three days. In the meantime, Marshal Badoglio was advancing on the captial by forced march over tortuous terrain. The French Government urged the Italian Government to speed its troops to Adis Ababa since there was no other authority that could restore order. By 4 May, advanced elements of the Italian forces were camped in view of the city. The main body, headed by Marshal Badoglio did not enter the city until late afternoon on 5 May. Perhaps anticipating criticism that his entry had been delayed until it could be made in triumph, Marshal Badoglio stated that "the march, which had been carried through by iron will-power, had lasted ten days: ten days of passionate determination and unheard-of effort." Badoglio, *The War in Abyssinia* (1937), 163. See also, Martelli, *Italy Against the World* (1938), 275-277. Undoubtedly, a military commander will be given wide latitude in determining the action he is capable of taking under the circumstances. Cf. *The High Command Case (United States* v. *von Leeb, et al.* (1948) (Case No. 12) 11 *Trials of War Criminals before the Nuernberg Military Tribunals* 641.

"the prohibitory effect of the law of war is not minimized by 'military necessity.' "[62] Within its limitations, military necessity is permissive; it confers rights upon a military commander to apply those measures not forbidden by international law "which are indispensable for securing the submission of the enemy as soon as possible."[63]

Considered in its military aspects, therefore, necessity is not a complete justificative guide. It assumes a higher criterion of necessity which circumscribes military necessity and which, to that extent, may be said to be absolute. This criterion of necessity may for purposes of analysis be described as *civil necessity*.[64] It is articulated in the fund of law in deference to which the concept of military necessity has been developed, and is inextricably bound up in the nature of civil society. Civil necessity is an affirmation of the rule of law, proclaiming that the peace must be kept, law and order must be maintained. If the civil agencies of government cannot preserve order, an order preserved by the military authorities is to be preferred to disorder.

These two ends or aspects of necessity are always present whenever there is a military-civilian nexus. Of the two, civil necessity is ultimately paramount though its pre-eminent position in the hierarchy of legal values may be obscured by the immediacy of the problem facing the military commander.

Translating these jurisprudential postulates into terms found in civil affairs doctrine, military necessity justifies measures not otherwise prohibited which are designed to promote the security of the military forces and the furtherence of the combat mission. These measures include maintenance of law and order, circulation control, prevention of disease, mobilization of local resources and similar control objectives, which, if not vigorously pursued would impair the health and safety of the troops and prejudice the attainment of the military mission.

On the other side of the coin, civil necessity may prescribe these same measures, not because they are conducive to the success of the military effort but because they are indispensible social ends in themselves. Thus, civil necessity requires that law and order be maintained, that refugees and evacuees be cared

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[62] Para. *3a*, FM **27-10**, *supra*.

[63] Ibid.

[64] The term is merely a suggestion prompted by a desire to find **a** term which would summarize the governmental duties imposed by **a** military commander in contrast to the permissible discretion authorized by military necessity. Cf. O'Brien, *The Meaning of Military Necessity in International Law*, *supra*.

for and kept clear of military operations, that disease be minimized and that the inhabitants be provided with the essentials of life, because failure to take such measures will result in the collapse of civil society and the substitution of anarchy for order. It follows that as hostilities diminish or terminate in the area in which military forces are deployed, the military commander may not abandon the exercise of the civil affairs functions, he earlier found it necessary to assume (which, semble, he could do if his norm of justification had been simply military necessity). The duties imposed upon a military commander by civil necessity require that the exercise of governmental functions be continued by the responsible military commander until such times as they can be entrusted to an acceptable and effective local government.

111. SUMMARY

The deletion of the term "military government" from civil affairs doctrine may cause military lawyers some initial embarrassment, but it will not present an insurmountable obstacle to legal analysis. The term is not sacrosanct despite its venerable use and is meaningful only so long as the facts for which it supplies a legal norm are of political and military significance. The posture of nuclear warfare may suggest a different characterization of the facts, one geared to specific governmental functions rather than the issue of total military control of land masses.

The villain in the piece appears to be the concept, "occupation." Hypostatized by a nineteenth century conceptualism and anchored to the notion of total control of territory, the term, "occupation" is inadequate as a predicate for civil affairs operations in an atomic era, It must be rendered more fluid and elastic if it is to be of guidance in situations where the military exercise of governmental responsibilities is necessary but where, in the traditional technical sense, the responsible military commander is not an "occupant."

This article has suggested a conception of occupation related to specific civil affairs functions. **An** area of governmental service may be "occupied" to the extent that the normal agencies of government are unacceptable or ineffective, or both, with reference to the governmental function in question.

The legal bases for the military exercise of a governmental function where the local agencies of government are not acceptable or effective may be either consent or necessity. Consent to the military exercise of a prerogative of civil government implies acceptability but not effectiveness on the part of that government,

Necessity, as a predicate for military action with reference to a specific governmental function, implies the absence of an agreement, the nonexistence of a local government, or the nonacceptability and ineffectiveness of the local government. Where consent is present, it is the ultimate source of law for the parties, subject to international law norms of an interpretive nature and those rules determinative of international jural capacity. Where necessity provides the test of military responsibility and authority, the factual milieu is illuminated by the data of three possible systems of law: the municipal law of the state within whose borders the governmental function is being exercised; the municipal law of the state whose military forces are exercising the function in question; and international law which bridges the two municipal law systems.

It is submitted that there are two sides to this necessity coin. Viewed as an aspect of military expediency, necessity permits a military commander to employ measures not prohibited by international law which will further the military mission. This military necessity is only part of the story, however, as the complexion of the modern law of war is such that affirmative governmental duties may fall to a military commander. Whenever the collapse of civil society can be avoided only by the military assumption of governmental functions, the miltary commander in a position to perform the functions must assume them. The term suggested for the necessity which prompts governmental action by the military in the interest of civil order, is *civil necessity.* It is a functional delineation of the fund of law that circumscribes military necessity. It is nothing more than an affirmation of respect for the rule of law called into being whenever, absent any acceptable and effective civil agency of government, there is present a military agency capable of, and therefore bound to, assume responsibility for the maintenance of governmental services essential to the fabric of civil society.

THE TERMINATION OF JURISDICTION OVER THE PERSON AND THE OFFENSE*

BY CAPTAIN WILLIAM A. ZEIGLER**

I. INTRODUCTION

Courts-martial are created and empowered by express statute and "... can exercise jurisdiction over such persons and offenses only as are constitutionally brought by statute within their cognizance."[1] Articles 2[2] and 3[3] of the Uniform Code of Military Justice[4] are congressional statutory grants of courts-martial jurisdiction over certain stated clauses of persons. A literal reading of these articles, however, will not always answer the question whether a court-martial has jurisdiction to try the accused person.

For example—a soldier steals $25 from a fellow soldier. Several days later the perpetrator of the offense completes his term of enlistment and is honorably discharged, without his crime having been discovered. A few days later he re-enlists in the Army and is returned to the post at which he was discharged. The commission of the offense is then discovered.

Article 2(1) of the code provides that a person "belonging to a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment ... is subject to the code.

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**JAGC, U.S. Army; member of the Bar of the Supreme Court of Pennsylvania; graduate of the Dickinson School of Law.

[1] Winthrop, *Military Law and Precedents* (2d Ed., 1920 reprint) 86.

910 U.S.C. 802.

[3] 10 U.S.C. 803.

[4] Uniform Code of Military Justice, Act of 5 May 1960, 10 U.S.C. 801–940. Hereinafter this statute will be referred to as the "code" unless otherwise indicated in the context.

The soldier described above was subject to the code when he committed the offense. He is presently a membr of a "regular component." The provisions of Article 2(1) would seem to indicate that a court-martial would have jurisdiction to try the accused for the offense committed in the prior enlistment. Certainly no provision of the code by its express terms would dictate a conclusion that the court-martial does not have jursdiction. Although this matter will be covered in Chapter 11, it is appropriate to state here that the general rule contained in paragraph 11 of the Manual for Courts-Martial, United States, 1951,[5] would require a finding that a court-martial had no jurisdiction to try the accused for the larceny committed during his prior enlistment.

In the succeeding paragraphs the author has propounded certain questions, the answers to which will be found in the final chapter.

A person enlists in the military service for a period of three years. Prior to the expiration of that term of service he requests and is granted a discharge for the convenience of the government for the purpose of immediate re-enlistment. Is he subject to court-martial jurisdiction for an offense committed prior to the honorable discharge?

A serviceman is serving under an indefinite term enlistment. After serving the minimum three years he requests discharge for the purpose of immediate reenlistment. If discharged and immediately re-enlisted, is he subject to court-martial jurisdiction for an offense committed prior to the disharge?

The same serviceman submits an unqualified resignation after serving three years. The resignation is accepted and he is honorably discharged. Immediately after being handed his discharge certificate he has a change of heart concerning military service and re-enlists. Is he subject to court-martial jurisdiction for an offense committed prior to the honorable discharge?

A person enlists in the Army for three years. He completes the three years' service on 30 November. After receiving his honorable discharge certificate, he also has a change of heart and re-enlists as soon as the recruiting office opens on 1 December. Is he subject to court-martial jursidiction for an offense committed prior to discharge? Suppose prior to discharge he made known to the military authorities his intention to re-enlist and was, there-

[5] Manual for Courts-Martial, United States, 1951, was promulgated by Executive Order 10214, 8 February 1951, and will hereinafter be referred to as the "manual" unless otherwise indicated in the context.

fore, processed through an abbreviated discharge procedure and did not actually receive the discharge certificate until after re-enlisting. Do these factors bear on the question of court-martial jurisdiction over an offense committed in the prior enlistment?

Article 2(7) of the code states that a person "in the custody of the armed forces serving a sentence imposed by a court-martial'' *is subject* to the code.[6] (Emphasis added.) Paragraph 11b of the manual provides that such a person *remains subject* to military jurisdiction. (Emphasis added.) Are these provisions in conflict? Is a person who has been dishonorably discharged from the military service and who is confined in the custody of the armed forces as a general prisoner subject to trial by court-martial for an offense committed while on active duty prior to such discharge?

A serviceman overseas commits murder. Prior to his discovery as the perpetrator, he returns to the United States and is honorably discharged because of expiration of his term of enlistment. He returns to his home town and secures employment when he is apprehended by military police for the murder. Is he subject to court-martial jurisdiction? Suppose that this ex-serviceman tries for several weeks to secure civilian employment but is unable to find a suitable position. One month after discharge he re-enlists in the Army. Is he subject to court-martial jurisdiction for a murder or any offense committed prior to his discharge?

Another patriotic individual enlists in the Army for a period of three years. After completing eight weeks of basic training, he makes a judicial determination that he and the Army are incompatible and deserts. Still being patriotic, he enlists in the Navy for four years and finds service therein more palatable. In fact, he serves with such distinction that the end of the four years he is honorably discharged in the grade of chief petty officer. As he is leaving the naval base with the discharge in his hand he is apprehended by agents of the Federal Bureau of Investigation as a deserter from the Army, Does the honorable discharge from the Navy preclude the Army from exercising jurisdiction and trying the man by court-martial for desertion?

Another man enlists in the Army for three years. After completing eight weeks of basic training he, too, decides that his desire for civilian life is greater than his desire to complete his enlistment. Not wishing to desert, he prepares affidavits allegedly

[6] 10 U.S.C. § 802 (1958).

from third parties supporting his request for a hardship discharge. In fact, he is single and with no one dependent upon him for support. Because of these misrepresentations he receives an honorable discharge. A year later The Adjutant General receives an anonymous letter stating in substance that the "ex-serviceman" secured his discharge by falsifying the basis therefor. He is apprehended and returned to the military authorities. Can he be tried by court-matrial for having secured his discharge by fraud? Suppose he had committed larceny prior to his discharge. Can he now be tried for that offense? If so, when? Can the offense of effecting a fraudulent separation and the offense of larceny be tried by a single court-martial proceeding? Following the fraudulent discharge and prior to apprehension and return to military control, he commits robbery. Does a court-martial have jurisdiction to try him for the robbery? If the court-martial found him guilty of having fraudulently secured his discharge was he not a person subject to the code when he committed the robbery?

Another man is inducted into the Army for two years. On 30 November, the day he is to be separated from active duty, he commits an assault and battery. His company commander places him in arrest of quarters on 30 November pending trial by court-martial. As a result of this action he is not separated although his period of obligated active duty has expired. On 1 December he brings an action for a writ of habeas corpus in a federal district court alleging that the military authorities have no jurisdiction over him because his obligated term of service has expired. Can he be held past the date of separation and subsequently tried by court-martial?

Articles 2 and 3 of the code will answer some of the foregoing questions. It must be remembered, however, that any statutory enactment by the Congress is subject to the safeguards of the Constitution and interpretation by the courts. For example, in *United States ex rel Toth* v. *Quarles*[7] the United States Supreme Court invalidated Article 3(a)[8] of the code at least insofar as it purported to preserve jurisdiction of courts-martial over persons who had severed all connection with the military. The possible remaining effectiveness of Article 3(a) will be considered in Chapter IV.

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[7] 350 U.S. 11 (1955)

[8] 10 U.S.C. 803(a).

THE TERMINATION OF JURISDICTION

The provisions of paragraph 11 of the manual must also be considered in some jurisdictional questions. This paragraph states a general rule regarding termination of jurisdiction and then enumerates certain exceptions thereto, some of which are based on the code, some of which are not.

In this connection the exact status of the manual and its provisions must be clearly understood. Article 36 of the code authorizes the President of the United States to prescribe "the procedure, including modes of proof, in cases before courts-martial . . . which shall not be contrary to or inconsistent with this code."[9] Pursuant to the authority of Article 36 and as President, the President of the United States has prescribed the Manual for Courts-Martial, United States, 1951.[10] It is important to realize also that the manual has stature as evidence of custom and practice (where it is such) known to Congress and sanctioned by subsequent legislation not altering the practice. The effect and standing of the manual have been described in various ways. "The Manual is the 'Bible' for the military lawyers. . . ."[11] The manual and the code are on the same level.[12] A board of review has written:

> The authority of the President under Article 36 of the code is limited to the extent that its exercise must be *consistent with and not contrary to* the Act of Congress. Within these bounds the acts of the President (the Manual, Executive Orders) are on the same level of authoritativeness as the Act of Congress (the Code) and full force and effect will, where possible, be given to both. (Emphasis in original.)[13]

The foregoing quotations do not mean that the President can by an executive act grant jurisdiction to a court-martial in those instances where the code is silent. Only Congress has been given the power "to make Rules for the Government and Regulation of the land and naval Forces."[14] In those instances where the provisions of paragraph 11 of the manual are not based on Articles 2 and 3 or the code, they are in actuality re-statements of historical concepts of military jurisdiction. These concepts have been given recognition by the failure of Congress to legislate to the contrary, knowing of the existence of such concepts.

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[9] 10 U.S.C. 836.

[10] See, note 5, *supra.*

[11] United States v. Hemp, 1 USCMA 280, 285, 3 CMR 14, 19 (1952). United States v. Lucas, 1 USCMA 19, 22, 1 CMR 19, 22 (1951).

[12] ACM 7944, *Bridges*, 15 CMR 731, 734 (1954).

[13] U.S. Const. Art. I, § 8.

This thesis, therefore, is devoted to an examination and evaluation of the provisions of paragraph **11** of the manual in the light of subsequent case law. The answers to some of the questions propounded above will be found in the code. These must be tested against judicial pronouncement where possible. Other answers will be found in paragraph **11** of the manual. However, they, too, must be viewed in the light of judicial review. To a few of the questions there are no clear-cut answers. One can only speculate and reason by analogy to decide cases. Throughout this thesis, the historical background of certain concepts has been examined where the author feels this knowledge is a prerequisite to a complete understanding of the issues involved.

Let us examine the general rule of termination of jurisdiction.

11. GENERAL RULE

Paragraph **11,** Manual for Courts-Martial, United States, **1951,** at page **14** states the general rule of termination of jurisdiction in the following words :

> a. General rule.—The general rule is that court-martial jurisdiction over officers, cadets, midshipmen, warrant officers, enlisted persons, and other persons subject to the code ceases on discharge from the service or other termination of such status and that jurisdiction as to an offense committed during a period of service or status thus terminated is not revived by re-entry into the miiltary service or return into such status.

Thus, one who is discharged from the service or who otherwise terminates his status as a person subject to the code may not be tried by court-martial for an offense committed prior to discharge or termination of status if he should at a later time again become subject to the code.

This concept of termination of jurisdiction is not stated for the first time in the **1951** manual. Colonel William Winthrop writing prior to the turn of the century stated the proposition thusly:

> In other words, the general rule is that *military persons*—officers and enlisted men—are subject to the military jurisdiction, so long only as they remain such; that when, in any of the recognized legal modes of separation from the service, they cease to be military and become *civil persons*, such jurisdiction can, constitutionally, no more be exercised over them than it could before they originally entered the army, or than it can over any other members of the civil community. (Original emphasis.)"

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[15]Winthrop, *Military Law and Precedents* (2d Ed., 1920 reprint) 89. **One** must, of course, realize that at the time Colonel Winthrop was writing he **was** not faced with the "uninterrupted status'' doctrine which has become an approved concept in present day military law.

The honorable discharge was deemed to have released the soldier from amenability for all offenses charged against him within the particular term to which it related, including that of desertion, except as to certain types of fraud.[16]

The early opinions recognized that a re-entry into the service did not revive jurisdiction as to offenses committed during a term of service from which the person had been separated.[17]

The Manuals for Courts-Martial of 1917,[18] 1928[19] and 1949[20] stated the general rule in substantially the same terms.

In *United States* v. *Clark*[21] the accused allegedly committed certain offenses on 25 October 1929. He was honorably discharged on 2 January 1930 from the enlistment under which he was serving at the time of the alleged commission of the offenses without any action having been taken concerning the alleged commission. Sometime later he re-enlisted and was tried by court-martial on 20 May 1930 for the offenses committed during the prior enlistment. Relying on the general rule as stated in paragraph 10 of the 1928 manual, the board of review held that the court-martial lacked jurisdiction.

A hiatus of two days between discharge and re-enlistment necessitated the application of the general rule in *United States* v. *Preston.*[22]

In *United States* v. *Allen*[23] the accused, an officer, allegedly committed certain offenses not involving fraud against the government on 19 March 1944. He was relieved from active duty and reverted to inactive status on 15 November 1944. He remained in inactive status until recalled to active duty on 17 September 1945. It was during this latter tour of active duty that he was tried by court-martial for the offenses allegedly committed during the prior tour of active duty. A board of review, citing the general rule in paragraph 10 of the 1928 manual declared the court-martial jurisdiction over the offenses committed on 19 March 1944 had ceased upon the officer's relief from active duty and was not revived by his subsequent re-entry.

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[16] Record card 2041 (May 1894) Dig Op JAG 1912, p 462.

[17] Records of Bureau, Vol V, p. 314, Vol XXXV, p 649, Dig Op JAG 1880, p 209.

[18] Paragraph 38, Manual for Courts-Martial, U.S. Army, 1917.

[19] Paragraph 10, Manual for Courts-Martial, U.S. Army, 1928.

[20] Paragraph 10, Manual for Courts-Martial, U.S. Army, 1949.

[21] CM 192335, *Clark,* 1 BR 355 (1930).

[22] CM 204194, *Preston,* 7 BR 321 (1936). *Accord,* CM 312874, *Randolph,* 62 BR 315 (1946).

[23] CM 307101, *Allen,* 60 BR 237 (1946).

An interesting factual situation is presented in *United States* v. *Santiago*.[24] The accused was tried on two specifications of desertion from 9 August 1948 to 6 June 1950 and from 5 September 1950 to 23 February 1951. In September 1949 the proper official of the Army prepared and executed a Certificate of Undesirable Discharge based upon a criminal conviction of the accused by a civil court. In October of that year, two agents of the Federal Bureau of Investigation attempted to deliver the discharge certificate to the accused. However, the accused was not at his home and the agents displayed the certificate to the accused's wife informing her that the accused could request a copy be sent to him by mail. In December 1949, The Adjutant General ruled that the discharge was not effective inasmuch as the accused had not received notice of the discharge and ordered that the certificate be marked void. Later the accused was apprehended and returned to military control. Thereafter the accused again absented himself on 5 September 1950 and remained absent until apprehended on 23 February 1951. At trial the defense counsel moved to dismiss the charge and specifications for lack of jurisdiction. The mention was denied and the accused was convicted of both specifications and the charge. On appeal the board of review reversed the conviction and dismissed the charge on the ground the findings and sentence were void as the court-martial lacked jurisdiction. The board found that under then existing regulations the undesirable discharge was effective and stated, "Except as provided in Article of War 94 (frauds against the government), a discharge releases a soldier from liability to trial by court-martial for an offense committed during the term of enlistment. (MCM, 1949, par. 10, in effect at the time here in question)."[25]

The basis of the general rule is the concept that military jurisdiction over members of the armed forces exists only while such persons remain military persons and terminates when by any legal method of separation, they cease to be military persons.[26]

It can be stated with certainty that there is presently an effective general rule regarding termination of jurisdiction.[27] Further, mere expiration of term of service is not sufficient to terminate jurisdiction. A person remains subject to military law until discharged through one of the recognized legal modes of separation,[28]

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[24] CM 346819, *Santiago*, 1 CMR 365 (1951).

[25] *Id.* at 368.

[27] ACM 11650, *Bean*, 21 CMR 699 (1956), *petition denied.* 6 USCMA 848, 21 CMR 340.

[28] United States v. Downs, 3 USCMA 90, 92, 11 CMR 90, 93 (1953).

although a writ of habeas corpus may be sought to order the discharge.

However, application of the general rule is limited by the exceptions thereto. In any given factual situation where the issue involved is whether the court-martial has jurisdiction to try the accused (provided the accused was at one time a person subject to the code), we must first determine whether any exception to the general rule is applicable. If the facts of the case fall within the provisions of an exception, the court-martial will have jurisdiction. The general rule, therefore, is meaningless unless the full scope and effect of the exceptions thereto are fully understood.

111. DISCHARGE AND IMMEDIATE RE-ENLISTMENT

There are three possible factual situations in which a serviceman may be discharged and immediately re-enlist. First, where a serviceman who is serving a definite term enlistment requests discharge prior to the expiration of the term of enlistment for the purpose of immediate re-enlistment.[29] Second, where a person on an indefinite enlistment requests discharge after he has completed the required period of service for the purpose of immediate re-enlistment. Third, where a serviceman completes a definite term enlistment, is discharged and immediately re-enlists.

Perhaps the most definitely established rule is that pertaining to the first category stated above. Colonel Winthrop stated, "To the general rule above indicated, that the military jurisdiction ends with the discharge, &c., of the officer or soldier, there are several ***exceptions***, created by or held to result from certain express statutory provisions. These are the Sixtieth Article of War (frauds against the government), and Secs. **1230, 1361, 4824,** and **4835,** Rev, Sts."[30] The cited sections deal with, respectively, the right of a dismissed officer to request trial by court-martial, jurisdiction over persons confined in the Military Prison, Fort Leavenworth, inmates of the "Soldiers' Home" and inmates of the "National Home for Disabled Volunteer Soldiers."

Winthrop further states that at the time of the writing of his volumes (about 1896), he had been unable to discover any judicial opinion concerning the effect of a subsequent enlistment upon amenability to trial for an offense committed prior to discharge.[31]

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[29] In this category, also, are those servicemen who are serving on an indefinite term enlistment and request discharge prior to the minimum obligated period of service for the purpose of immediate re-enlistment.

[30] Winthrop, *Military Law and Precedents* (2d Ed. 1920 reprint) 92.

[31] *Id.* at 93.

Winthrop stated:

> (I)t is the opinion of the author that, in separating in any legal form from the service an officer or soldier or consenting to his separation therefrom, and remanding him to the civil status at which the military jurisdiction properly terminates, the United States . . . must be deemed in law to waive the right to prosecute him before a court-martial for an offense previously committed but not brought to trial. In this view, a subsequent. . . re-enlistment into the army would not revive the jurisdiction for past offenses, but the same would properly be considered as finally lapsed."

A. Discharge Prior to Expiration of Term of Service

The earliest reference discovered by the author to jurisdiction continuing after a discharge was in the Digest of Opinions of The Judge Advocate General of the Army, 1912–1940 wherein it is stated that an enlisted man who is discharged for the purpose of accepting a commission is subject to trial by court-martial for an offense committed while an enlisted man. The opinion was expressed that the discharge and acceptance of the commission merely constituted a change from one type of military status to

This concept of continuing status was followed in the case of an emergency officer who was discharged for the sole purpose of enabling him to accept a commission in the Regular Army. Because there was no interruption of his service or his pay, it was held that court-martial jurisdiction did not terminate and he could be prosecuted for offenses committed prior to discharge.[84]

The concept received recognition in paragraph 10 of the Manual for Courts-Martial, U.S. Army, 1928, where it is stated:

> In certain cases, where the person's discharge or other separation does not interrupt his status as a person belonging to the general category of persons subject to military law, court-martial jurisdiction does not terminate. Thus, where an officer holding an emergency commisison was discharged from said commission by reason of acceptance of a commission in the Regular Army, there being no interval between services under the respective commissions, it was held that there was no termination of the officer's military status, but merely the accomplishment of a change in his status from that of a temporary officer to that of a permanent officer, and that court-martial jurisdiction to try him for an offense (striking enlisted men) committed prior to the discharge was not terminated by the discharge.

[82] *Ibid.*

[83] CM 121586 (1918), Dig Op JAG 1912-40, p 181. A commissioned officer may be tried by court-martial for misconduct committed while a cadet at the United States Military Academy as cadets are not discharged upon graduation but promoted to second lieutenant. Record card 22457 (Mar. 1907), Dig Op JAG 1912, p 515–516.

[84] CM 145710, 149318, 149937, Dig Op JAG 1912-40, p 181.

The foregoing provision is re-stated in paragraph 10, Manual for Courts-Martial, U.S. Army, **1949.**

The problem thus presented in any given case is whether there is a termination of status or merely a change in status.

In *United States* v. *Sebastian,*[35] the accused, a commissioned officer, was tried for offenses committed while a cadet at the United States Military Academy. The board of review held the transition from cadet to commissioned officer was merely a change in status within the military service and did not interrupt his service as he had not received a discharge as a cadet.

In *United States* v. *Johnson,*[36] the accused was discharged prior to the expiration of his term of service and re-enlisted the next day. The discharge certificate was withheld from the accused until after the oath of re-enlistment had been given. He was later tried by general court-martial for an offense committed prior to the honorable discharge. In holding that the court-martial had jurisdiction, the board of review stated that a discharge does not necessarily terminate jurisdiction over an accused for an offense committed prior to such discharge unless following the discharge there has been a complete release from the military service and return to the status of a civilian. The board continued:

> In the instant case there was no such complete release from military jurisdiction as the certificate of discharge was not delivered to the accused until after his reenlistment. . . . . (T)herefore, there being no ***hiatus*** in his military status, his military service was continuous and uninterrupted from the date of the commission of the offense alleged until the date of trial.[37]

In **1943** a board of review had the opportunity to consider a case somewhat factually similar to that in *United States* v. *Sebastian, supra.* In *United States* v. *Claybourn,*[38] the accused, a commissioned officer, was tried for an offense he committed while an aviation cadet. The board, citing paragraph 10 of the 1928 manual as authority ruled, "There was no termination or interruption of his (accused's) military status and consequently no loss of jurisdiction over his person respecting the . . . (offense) . . . when later, during his term of service as a commissioned officer he was charged with the offense."[39]

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[35] CM 203457, *Sebastian,* 7 BR 199 (1935).

[36] CM 212084, *Johnson,* 10 BR 213 (1939).

[37] *Id.* at 218.

[38] CM 235407, *Claybourn,* 22 BR 1 (1943).

[39] *Id.* at 35. Accord, CM 236819, *Solander,* 23 BR 141 (1943) (Accused appointed a commissioned officer from Officer Candidate School).

A few years later a board of review again had the opportunity to examine the effect of a discharge prior to expiration of term of service followed by immediate re-enlistment. In *United States* **v.** *Aikens & Seevers,*[40] accused were honorably discharged prior to the expiration of the term of their enlistments and immediately re-enlisted. The discharge certificates were withheld from the accused until after the oath of re-enlistment had been accomplished. They were later tried for offenses committed prior to their discharge. It was held that the court-martial had jurisdiction. Under the factual situation presented the board found, ". . . there was no break or hiatus in their military status and their military service was continuous and uninterrupted from the date of the commission of the offenses in question until the date of trial."[41]

The concept of "uninterrupted status" was, therefore, firmly entrenched prior to the enactment of the Uniform Code of Military Justice. Perhaps the last pronouncement of this rule prior to the effective date of the present code is found in *United States* **v.** *Butcher*[42] wherein it is stated at page **232,** ". . . (U)nless the discharge given has for its intendment the termination of the 'dischargee's' military service and his return to civilian life, to which type of discharge a military person is entitled as a matter of right at the termination of a contractual term of service, there is in fact no discharge from the military service."

The Court of Military Appeals which had been established by Article **67** of code[43] had occasion in *United States* v. *Solinsky*[44] to review the applicable law concerning the effect of a discharge prior to completion of term of service and immediate re-enlistment. In *Solinsky,, supra,* the accused had enlisted in the Army in August **1947.** On **5** September **1949** while in Germany, and prior to the expiration of the term of enlistment, the accused was given an honorable discharge for the convenience of the government in order that he might re-enlist. The discharge was dated **5** September **1949.** Re-enlistment was effected on 6 September **1949.** The offenses for which the accused was tried were committed during the period April to June **1948.** The trial was held in April **1951.** Judge Latimer wrote the opinion upholding jurisdiction in which

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[40]CM **337089,** ***Aikens*** *and Seevers,* **5** BR–JC **331 (1949),** *aff'd* **by** the **Judicial** Council, **5** BR–JC **375 (1949).**

[41]*Id.* at **358.**

[42]CM **344522,** *Butcher,* **10** BR–JC **223 (1951).**

[43]10 U.S.C. 867.

[44]United States v. Solinsky, **2** USCMA **153,** 7 CMR **29 (1953).**

the late Judge Brosman concurred. The majority opinion is especially interesting in that it recognizes that the provisions of 1949 manual control the issues involved but states, "We, therefore, believe the 1951 Manual is declaratory of what the law has been since this type of discharge (discharge prior to expiration of term of service for purpose of immediate re-enlistment) came into existence."[45]

The main issue in the *Solinsky* case, *supra,* was whether the decision in the ***Hirshberg*** case[46] was controlling. The majority opinion carefully reviewed the facts involved paying particular attention to what, in the court's opinion was the intention of the parties, i.e., to facilitate and effectuate a continuous term of service. Judge Latimer stated at page 35.

> (I)t is intended that the military status be not interrupted. The whole complexion of the proceedings argue against an interrupted status. The discharge was not delivered until the re-enlistment had been accomplished; there was no break in service or pay; the accused could have been ordered to perform a special mission covering that period: he was entitled to every benefit incidental to membership in the armed forces; there was not a fraction of a second that he was not subject to military control: and every fact and all circumstances point to a situation where the discharge and reenlistment were to be simultaneous events for the sole purpose of preventing a hiatus or break in the service.

The opinion in *Solinsky, supra,* traces the past decisions upholding court-martial jurisdiction under the facts involved here, and states that Congress had not, except in a limited field (frauds against the government), granted jurisdiction to try persons who had reverted to a civilian status. The court found a Congressional grant of jurisdiction under the facts of this case. Congress, stated the court, had authorized the President to promulgate rules to govern the administration of military justice. As early as 1928 the President had prescribed that so long as the accused's status as a person subject to military law was not interrupted by a discharge, court-martial jurisdiction continued. By failing to legislate to the contrary the Congress gave tacit approval to this exercise of jurisdiction.[47]

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[45] *Id.* at 156, 7 CMR at 32.

[46] United States ex rel Hirshberg v. Cooke, 336 U.S. 210 (1949). This case will be fully discussed later in the chapter in connection with discharge at expiration of term of service and immediate re-enlistment. Suffice it to say for the present that the decision held that absent statutory authority a discharge upon completion of an obligated period of service terminated jurisdiction over a pre-discharge offense where the person re-enlisted following a short hiatus.

[47] United States v. Solinsky, ***supra,*** note 44, at 160, 7 CMR at 36.

B. Current Status

Paragraph 11b of the present manual in enumerating certain exceptions to the general rule concerning termination of jurisdiction[48] states:

> In those cases when the person's discharge or other separation does not interrupt his status as a person belonging to the general category of persons subject to the code, court-martial jurisdiction does not terminate. . . . Similarly, when an enlisted person is discharged for the convenience of the Government in order to re-enlist before the expiration of his prior period of service, military jurisdiction continues provided there is no hiatus between the two enlistments. . . .

The case of *United States* v. *Isidore*[49] was the first decision by a military appellate tribunal applying the provisions of the code and the manual to a factual situation involving an immediate re-enlistment following a discharge prior to expiration of term of service. In *Isidore, supra,* the accused had enlisted on 1 March 1949 for three years. Because of an executive order of the President, this enlistment was extended one year, expiring 28 February 1953. Pursuant to his request the accused was granted a "short" discharge on 2 March 1952 and on 3 March 1952 re-enlisted for six years. He was tried by court-martial in June 1952 for offenses committed in October and November 1951. In holding that the court-martial had jurisdiction to try the accused for offenses committed prior to the discharge, an Air Force Board of Review based its decision on a finding that the accusd at no time was absolutely free to terminate his service obligation. He had merely the "privilege to *substitute, during a continuation* of his service"[50] a new definite term enlistment in lieu of the one-year extension. (Emphasis in original.)

The significant points in the decisions thus far are (1) the intention of the parties to continue the status and (2) the lack of right in the accused to terminate his service obligation.

These two factors were given recognition by the Court of Military Appeals in *United States* v. *Johnson.*[51] In sustaining jurisdiction over an offense committed prior to a "short" discharge, the court enphasized the intention of the parties (the accused and the government) that the accused should not revert to a civilian status because of the discharge but should continue his military status. This decision further emphasizes the point

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[48] See page 144, *supra.*

[49] ACM 5625, *Isidore,* 7 CMR 595 (1952), *petition denied,* USCMA 689, 7 CMR 84.

[50] *Id.* at 599. *Accord,* ACM 7944, *Bridges.* 15 CMR 731 (1954).

[51] 6 USCMA 320, 20 CMR 36 (1955).

that the accused was at no time afforded an opportunity to alter his status as a member of the service. A recent board of review decision[52] adheres to the views expressed **above.**

At this point the Court of Military Appeals was presented with **a** slightly different situation. The decisions thus far cited in this chapter all concern a factual situation wherein a serviceman was discharged for the purpose of immediate re-enlistment prior to the time he had a right to the discharge, that is, before the expiration of his term of service.

However, in *United* States v. *Martin*[53] the accused was serving on an indefinite term enlistment entered into on 27 December 1950. On **13** June 1955, he presented a claim for travel expenses allegedly incurred by his dependents. On **4** January 1957 the accused submitted **a** request for discharge under the provisions of AR 635–225 and immediate re-enlistment to fill his own vacancy. The accused was discharged on 9 January 1957 and re-enlisted **on** 10 January 1957.[54] He was subsequently tried and convicted of presenting a false claim in violation of Article 132 of the code. An Army Board of Review affirmed the conviction and the Acting The Judge Advocate General certified the following question to the Court of Military Appeals :

> Was the Board **of** Review correct in determining that the court-martial had jurisdiction to try the accused for . . . (presenting a false claim) . . ., an offense committed during the accused's prior, indefinite enlistment, where the accused had been entitled to secure his unconditional resignation from the Army but chose instead to resign and effect an immediate reenlistment?

Unfortunately the decision presents no clear, well-established point of law on which the result was reached. Although basing their opinions on different grounds, Chief Judge Quinn and Judge Latimer affirmed the decision of the board of review. Judge Ferguson dissented.

In an opinion, which does not clearly state the basis for the holding, the chief judge, in the author's opinion, apparently sustained jurisdiction under Article 3(a) of the code, even though the government did not argue the applicability of that article.

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[52] CM **396576,** *Waymire,* **26** CMR **658 (1958).**

[53] 10 **USCMA 636, 28 CMR 202,** (1959).

[54] Army records disclose the discharge was pursuant to **AR 635-220,** dated **4** June **1956,** paragraph **3** of which authorized the commanding officer "of any unit, activity, or station having the facilities to effect discharge . . . to accept the resignation of an individual who has served a minimum of *6* full years in an unspecified period of enlistment for the purpose of immediate re-enlistment for a specified period to fill his own vacancy."

While Article 3(a) will be discussed in a subsequent chapter, it must be stated here that the article provides for continuing jurisdiction over certain offenses not triable "in the courts of the United States or any State or Territory thereof or of the District of Columbia." It would seem clear beyond argument that Article 3(a) is not applicable where a federal civilian court would have jurisdiction. The offenses charged were triable in the federal court as a violation of 18 U.S.C. 287 or 1001. The chief judge overcomes this seemingly insurmountable obstacle to the application of Article 3(a) by stating at page 205, "The argument disregards the fundamental purpose of the Article. The Article was intended to enlarge jurisdiction, not restrict it." Chief Judge Quinn further stated that frauds against the government were the basis of continuing court-martial jurisdiction as early as 1863 and that Congress did not intend to change it. This conclusion overlooks the fact that such continuing jurisdiction in fraud cases was based upon specific statutory authority[55] which was repealed by and not incorporated into the Uniform Code of Military Justice.

A second interpretation of Chief Judge Quinn's opinion is possible, although the author does not subscribe to this latter interpretation. It may be argued that he is not actually relying on Article 3(a) as a basis of jurisdiction, that he could not do so since the offenses were triable in a federal court. His remarks concerning the applicability of Article 3(a) may have been made in response to the contention that Article 3(a) prohibited exercise of jurisdiction in this case. What he may be saying is that Article 3(a) does not deny jurisdiction where it has been exercised historically and that historically courts-martial have exercised jurisdiction over cases involving frauds against the government. If the chief judge's opinion is not based on a finding that Article 3(a) is applicable, the remaining language in his opinion tends to lead one to believe he is advocating a natural law approach to a jurisdictional question, that is, that a man should be punished if he deserves to be punished and since he was subject to the code when he committed the offense and at the time of trial, a courts-martial may punish him. Such a pronouncement is seemingly inconsistent with his dissent in the *Solinsky* case, *supra*.

Although Judge Latimer expressed reservations concerning the applicability of Article 3(a), he concurred in the finding that the court-martial had jurisdiction. This concurrence was based on

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[55] See, e.g., Article of War 94 (1920), 41 Stat. 787.

the thesis that the factual situation here involved fell within the "uninterrupted status" exception contained in paragraph 11b of the manual. The issue in Judge Latimer's opinion was whether the accused's discharge interrupted his military status. The judge conceded the accused could have terminated his term of service by submitting and having accepted an unconditional resignation. However, Judge Latimer states, the accused never attempted to do this, but rather, "submitted a conditional resignation for the express purpose of continuing his military status. , . ."[56] The controlling factor in Judge Latimer's view was apparently the intention of the parties, for he stated at page 207, ". . . (I)t is clear to me that accused's discharge did not interrupt his military status. It was not intended by either party that the accused become a civilian and thereafter once more a soldier. Quite to the contrary, it was the desire and purpose of both parties that his military status be uninterrupted. . . ." Judge Latimer finds this factual situation quite similar to that presented in Solinsky, *supra,* and applies to this case the rationale of that decision.

Judge Ferguson, who dissented, states the accused's discharge was not conditional, and that the accused at the time of his discharge was in the same position as a person who had completed a definite term enlistment and had been discharged. He stated the issue in this manner :

> (T)he issue presented by the certified question is narrowed to the single inquiry whether one who has completed his obligated term of service is discharged; and contemporaneously re-enlists, remains amenable to trial by court-martial for an offense committed during his prior enlistment?'

Judge Ferguson states that Judge Latimer's conclusion from the facts (that accused was granted a "short" discharge in order to re-enlist) is erroneous in that it fails to take into consideration that the accused had completed his obligated service, had requested discharge and had received it.

The dissenting judge is of the opinion that this case is governed by the decision of the United States Supreme Court in *United States ex rel Hirshberg* v. *Cooke,*[58] to be discussed fully, *infra,* and, therefore, the court-martial lacked jurisdiction.

Judge Ferguson finds support for his view in an Air Force Board of Review decision.[59]

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[56] United States v. Martin, ***supra,*** note 53 at 614, 28 CMR at 207.

[57] *Id.* at 643, 28 CMR at 209.

[58] 336 U.S. 210 (1949).

[59] ACM 10047, *Lucas,* 19 CMR 613 (1955), wherein the factual situation was similar to that in the *Martin* case. In a 2-1 decision the board held the court-martial did not have jurisdiction.

C. *Discharge Upon Expiration of Term of Service Followed by Immediate Re-Enlistment*

The one case which highlights this problem is *United States ex rel Hirshberg* v. *Cooke.*[60] In **1942** Hirshberg was serving an enlistment in the United States Navy. He became a prisoner of war upon the surrender of the United States forces on Corregedor. He was liberated in September **1945,** returned to the United States, and after hospitalization was restored to duty in January **1946.** On **26** March **1946** he was granted an honorable discharge because of the expiration of his term of service. He re-enlisted in the Navy **27** March **1946.** Approximately one year later he was tried by general court-martial for offenses allegedly committed while a prisoner of war. He filed a petition for writ of habeas corpus in the federal district court alleging the court-martial conviction was void because of want of statutory power to convict him for an offense committed during a prior enlistment. The district court granted the writ, On appeal the circuit court reversed, one judge dissenting. The basis of one of the charges against Hirshberg was Article 8 (Second) of the Articles for the Government of the Navy.[61] This article provided in pertinent part that "such punishment as a court-martial may adjudge may be inflicted on any person in the Navy . . . guilty . . . (of) maltreatment of, any person subject to his orders." The government contended the above statutory language given its literal meaning authorized the court-martial to try Hirshberg, arguing he was "in the Navy" when the offense was committed and when he was tried by ceurt-martial. The government further argued in aid of the foregoing interpretation that during the whole period of time involved Hirshberg was continuously "in the Navy" *except for a few hours between his discharge and re-enlistment.* (Author's emphasis.) In commenting upon this argument the Supreme Court stated at page **213,** "This latter circumstance we think cannot justify the statutory interpretation urged. For if that interpretation is correct court-martial jurisdiction would be satisfied if a sailor was merely 'in the Navy' when the offense was committed and when brought before the court-martial, regardless of the duration of any interim period out of naval service, provided the prosecution was not barred by . . . (the statute of limitations). . . ."

[60] *Supra*, note **46.**

[61] Rev Stat. § **1624 (1875).**

The government also argued that Congress by enacting Article of War 94[62] did not intend to cover the situation presented in *Hirshberg.* To this the court replied on pages 215–216:

> But the fact remains that in 1863 Congress did act on the implicit assumption that without a grant of Congressional authority military courts were without power to try discharged or dismissed soldiers for any offenses committed while in the service. Acting on this assumption, Congress granted such a power to courts-martial but only in the very limited category of offenses there (Article of War 94) defined. . . . Since the 1863 act, Congress has not passed any measure that directly expanded court-martial powers over discharged servicemen, *whether they re-enlisted or not.* (Emphasis added.)

The court noted that the Navy prior to 1932 and the Army consistently adopted the view that a court-martial lacked the jurisdiction to try personnel for offenses committed prior to an honorable discharge where proceedings had not been instituted before discharge. The government argued that the Navy had acquired the necessary jurisdiction by virtue of a Congresionally authorized regulation which provided in part ". . . the Navy Department has passed cases as legal in which enlisted men have been convicted by court-martial of offenses committed in a previous enlistment, although such offenses were not provided for in Article 14, A.G.N."[63] The Supreme Court did not decide whether the quoted language was sufficiently precise to endow it with the force of law, but stated at page 218, ". . . (W)e are not able to agree that the Navy could in this manner acquire the expanded court-martial jurisdiction it claimed. For we cannot construe 34 U.S.C. § 591[64] as permitting the Navy to extend its court-martial jurisdiction beyond the limits Congress had fixed."

The court in commenting on the revised naval interpretation of 1932 concerning jurisdiction over prior enlistment offenses stated at page 218, "Before that time (1932), both Army and Navy had for more than half a century acted on the implicit assumption that discharged servicemen, whether re-enlisted or not, were no longer subject to court-martial jurisdiction."

The *Hirshberg* decision may be summarized by noting that for many years prior to 1932 both the Army and the Navy treated an honorable discharge as terminating jurisdiction over an offense

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[62] This article subjected to court-martial jurisdiction discharged service personnel who committed certain types of fraud. 41 Stat. 787 (1920), as amended.

[63] 1937 Naval Courts and Boards 334.

[64] This statute (now 10 U.S.C. § 6011 (1958)) authorized the Secretary of the Navy, with the approval of the president to adopt and alter regulations and orders for the control of the Navy.

committed prior thereto even though the serviceman re-enlisted, where a hiatus existed between discharge and re-enlistment. Throughout the passage of these years Congress had tacitly given approval to this assumption by failing to legislate otherwise. The service could not by regulation, in the absence of Congressional enactment, enlarge its jurisdiction.[65]

One of the earliest expressions of opinion on this point is by Colonel Winthrop who stated :

> It remains to refer to the effect, per se, of a subsequent appointment or enlistment of an officer or soldier, (once duly dismissed, resigned . . , or discharged), upon his amenability to trial for an offense committed prior to such discharge . . . (and within two years,) but not yet made the subject of a charge or trial. Upon this point there is not known to have been any adjudication. Putting out of the question the class of offences, the amenability for which is expressly defined by the 60th article, (frauds against the government) it is the opinion of the author that in separating in any legal form from the service an officer or soldier or consenting to his separation therefrom, and remanding him to the civil status at which the military jurisdiction properly terminates, the United States . . . must be deemed in law to waive the right to prosecute him before a court-martial for an offense previously committed but not brought to trial. In this view, a subsequent re-appointment or re-enlistment into the Army would not revive the jurisdiction for past offenses, but the same would properly be considered as finally lapsed.@

A search of the reported court-martial cases has failed to reveal any decision sustaining jurisdiction over an offense committed prior to discharge when a serviceman was discharged upon expiration of term of service and immediately re-enlisted. In *United States* v. *Africa*[67] the accused committed certain offenses in October 1931 and January 1932. He was honorably discharged on 4 February 1932 at the expiration of his term of enlistment and re-enlisted on 5 February 1932. Charges were preferred on 27 June 1932 and the trial was held on 21 July 1932. On appeal, the board of review held the court-martial had no jurisdiction, citing paragraph 10 of the 1928 Manual for Courts-Martial.[68] In *United States* v. *Mackiewicz*[69] the accused allegedly committed certain offenses on 19 February 1933. He was honorably discharged on 9 March 1933 upon expiration of his term of service

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[65] See, Snedeker, *Jurisdiction of Naval Courts Martial Over Civilians*, 24 Notre Dame Law. 490 (1949).

[66] Winthrop, *Military Law and Precedents* (2d Ed., 1920 reprint) 93.

[67] CM 199117, *Africa*, 3 BR 329 (1932).

@Accord, CM 198340, *Convers*, 3 BR 227 (1932), CM 199072, *Hewitt*, 3 BR 327 (1932).

[68] CM 200925, *Mackiewicz*, 5 BR 9 (1933). Accord, CM 217842, *Sierer*, 11 BR 325 (1943) (citing paragraph 10, Manual for Courts-Martial, U.S. Army, 1928).

and re-enlisted on **10** March **1933.** He was subsequently tried by court-martial for the offenses committed on **19** February **1933.** Again the board of review applied the general rule of termination of jurisdiction and held that the court-martial lacked jurisdiction.

An interesting case in which the board of review found it necessary to apply both the general rule of termination of jurisdiction and an exception thereto is *United States* v. *Butcher.*[70] The accused was charged with and convicted of non-support of his wife from October **1949** through October 1950. On **29** March **1950** the accused was relieved from active duty as a commissioned officer. On **30** March 1950 he enlisted in the Regular Army for three years. By Department of the Army Special Orders dated **7** September **1950,** the accused, with his consent, was appointed and commissioned a first lieutenant in the Army of the United States effective upon entry on active duty **21** September **1950.** He was discharged from enlisted status on **20** September **1950.** On **21** September 1950 he entered active duty as a commissioned officer and was subsequently tried by court-martial. The issue involved was whether the changes in the accused's status from officer to enlisted man and from enlisted man to officer served to interrupt his status as a person subject to military law. The board of review relying on the general rule concerning the effect of discharge and the "uninterrupted status" exception thereto found that the court-martial had no jurisdiction over that portion of the offense which occured on and prior to **29** March, the date the accused was relieved from active duty as an officer. The board held the enlistment on **30** March did not revive jurisdiction over offenses committed during such prior service.[71] With reference to the discharge from enlisted status prior to expiration of term of service on **20** September the board found jurisdiction was not terminated, that the discharge had merely terminated the accused's enlisted status but not his military service.

In *United States* v. *Crespo*[72] the accused was discharged upon expiration of term of service and re-enlisted the next day. He was later tried for offenses committed prior to discharge. The board of review citing the *Hirshberg* case, *supra,* and paragraph 10 of the **1949** Manual for Courts-Martial held the court-martial was without jurisdiction to try an enlisted man for an offense other than one denounced by Article of War **94** (frauds against the government) committed in a prior enlistment at the expiration

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[70] CM 344522, Butcher, 10 BR–JC 223 (1951).

[71] *Id.* at 232-233.

[72] CM 339452, *Crespo,* 5 BR–JC 93 (1950).

of which he was discharged.[73] The board stated at page 96 that an honorable discharge at the expiration of a term of service is distinguishable from "those cases where because of a mere change in status effected by discharge and immediate reenlistment or appointment, there is no interruption or 'hiatus' of service."

What changes in this area, if any, have been brought about by the enactment of the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1951?

Paragraph 11a of the manual states that generally a discharge or separation from the service terminates court-martial jurisdiction and that such jurisdiction is not revived by a re-entry into military service.

Paragraph 11b of the manual lists certain exceptions to this general rule, one of which is as follows: "In those cases when the person's discharge or other separation does not interrupt his status as a person belonging to the general category of persons subject to the code, court-martial jurisdiction does not terminate.'' It is interesting to note that although several examples of this "uninterrupted status" exception follow, the situation of the discharge upon expiration of term of service and immediate re-enlistment does not appear included therein.

In order to have a complete understanding of the next problem to be considered, it is necessary that the provisions of Article 3(a) of the code[74] be mentioned. This article provides:

> (a) Subject to the provisions of article 43 (statute of limitations), any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by court-martial by reason of the termination of said status.

A discussion of the remaining effectiveness of this article appears in Chapter IV.

Let us suppose, however, the following factual situation. Corporal Brown is assigned to Company A, 2d Armored Rifle Battalion, 36th Infantry. On 1 February he steals $40.00 from a

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[73] *Accord*, CM 347931, *Fleming*, 2 CMR 312 (1951) (wherein the accused was honorably discharged on 30 July 1950 upon expiration of term of service, reenlisted 31 July 1950, and it was held that discharge barred trial for violation of the Articles of War occurring in the prior enlistment. In this case, however, jurisdiction was sustained on the basis of a violation of the law of occupied territory (Japan)).

[74] 10 U.S.C. 803.

member of his squad. On 2 February Brown completes his three-year enlistment and on that date is honorably discharged. After receiving the discharge, he spends several hours at a local bar and then goes to the re-enlistment office and re-enlists for three years. After whatever processing may be required he is assigned to his former organization. Several weeks later he is interrogated and confesses to having committed the larceny. Can he be tried by court-martial for the offense committed prior to discharge? (For the purpose of this discussion it will be assumed that Article 3(a) is inapplicable.)

There have been relatively few decisions on this point since the effective date of the code. In *United States* v. *Pitts*[75] the accused enlisted in the United States Marine Corps on 5 October 1950 and was honorably discharged, apparently at the espiration of his term of enlistment, on **4** October 1953. He re-enlisted on **5** October 1953. In December 1953 he was tried for offenses allegedly committed on 2 May 1952. A Navy Board of Review held that the court-martial lacked jurisdiction, stating that at the time the accused was discharged he was unconditionally released from the military service and occupied the status of a civilian. In this case the board refused to apply the "uninterrupted status" exception. The decision was not certified to the Court of Military Appeals and apparently has not been cited in any later cases.

The absence of any judicial authority on the point now under consideration is illustrated by the statement of a board of review in *United States* v. *Lucas*.[76] ". . . (W)e have found no military decisions involving situations in which the accused was discharged at the *expiration of his enlistment* wherein it was held that court-martial jurisdiction as to offenses committed prior to discharge was not terminated by the discharge, even though the accused may have immediately re-enlisted."[77]

In 1955 The Judge Advocate General, United States Air Force was requested to render an opinion as to whether an airman who re-enlists after discharge because of an unconditional resignation is subject to court-martial jurisdiction for an offense committed prior to discharge. The opinion rendered[78] concluded that the discharge because of an unconditional resignation is in the same category as a discharge because of the expiration of an enlistment.

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[75] NCM 294, *Pitts*, 14 CMR 522 (1954).

[76] ACM 10047, *Lucas*, 19 CMR 613 (1955).

[77] *Id.* at 619.

[78] Op JAGAF 1955/8, 17 February 1955.

The opinion next considered the effect of such discharge followed by re-enlistment without a break in service upon jurisdiction for offenses committed prior to discharge. In holding that a court-martial would have no jurisdiction over such an offense, the opinion states on page **3,** "No statutory exception has been found which provides for a continuation of jurisdiction if there is no break in service between discharge because of an unconditional resignation or discharge upon expiration of the enlistment and subsequent re-enlistment."

One of the latest cases involving discharge and re-enlistment is *United States* v. *Gallagher.*[79] The accused was captured by the Communist forces in Korea on **2** November **1950.** He was returned to American control on **27** August **1953.** Gallagher's enlistment, as extended by executive order of the President, had expired on **12** October **1951.** However, he remained subject to military jurisdiction while in enemy hands and at least until discharge from his then current enlistment on **27** October **1953.** Accused re-enlisted at **0900** hours, **28** October **1953.** The honorable discharge certificate was withheld from Gallagher's possession until after he had re-enlisted. On **22** October **1955** charges were preferred alleging commission of offenses while a prisoner of war. The Army Board of Review considered the applicability of Article 3(a) and the "uninterrupted status" exception and determined the court-martial lacked jurisdiction. Although the decision was later reversed by the Court of Military Appeals on the basis that Article **3**(a) sustained jurisdiction, the decision of the board of review pertaining to the "uninterrupted status" is pertinent. The board found the primary purpose of the accused's discharge to be termination of his service upon expiration of the term of enlistment, and stated at pages **448–449 :**

> (W)e have found no military decisions involving situations in which the accused was *discharged at the expiration of his enlistment* wherein it was held that court-martial jurisdiction as to offenses committed prior to discharge was not terminated by the discharge, even though the accused may have immediately re-enlisted. Boards of Review have consistently held the general rule to be applicable in that factual situation and that court-martial jurisdiction as to prior offenses is terminated by the discharge. (Original emphasis. Citations omitted.)

Many of the cases in applying the "uninterrupted status" exception stress the presence or absence of a hiatus in the service, i.e., an actual break in time between periods of service. Various factual situations may be hypothesized wherein the application of

[79] CM 386668, *Gallagher,* 21 CMR **435 (1956),** *rev'd,* United States v. Gallagher, **7** USCMA 506, **22** CMR **296 (1957).**

the "hiatus doctrine" is difficult, confusing and illogical. The tendency to rely on this and other mental crutches is illustrative of the need for positive statutory pronouncement. The board in the *Gallagher* case, *supra,* remarked at page 450, "However, never has it been held that the absence of a hiatus in service is the basis for retention of military jurisdiction after discharge upon expiration of term of service where the serviceman is entitled to the discharge at the time as a matter of right.'' The accused also argued before the Court of Military Appeals that the concept of hiatus was inapplicable where the term of service had expired.[80] Unfortunately, the court did not decide this point. The board concluded the opinion by stating no statute expressly granted jurisdiction (the board had previously held Article 3(a) inapplicable) and jurisdiction had never before been exercised under the "uninterrupted status" exception in the factual situation of this case. The board felt it was bound to adopt the long standing interpretation denying jurisdiction ". . . particularly in view of the fact that Congress had tacitly approved the administrative construction by failing to make any substantial changes over the years."[81]

A recent Army Board of Review decision[82] has indicated that the decision of the Supreme Court in the *Hirshberg* case, *supra,* would govern the situation where a serviceman was discharged upon expiration of term of service and re-enlisted the next day.

Further support for this view is found in the opinion of one author that a discharge upon expiration of term of service terminates jurisdiction even though re-enlistment immediately follows and the discharge certificate is not delivered to the serviceman until after he has re-enlisted.[83]

Let us return now to the hypothetical situation involving Corporal Brown. The offense with which he is charged is not punishable by confinement for five or more years. Therefore, the crime does not fall within the provisions of Article 3(a) of the code. At the time the discharge certificate was delivered neither Brown nor the government intended that Brown's military service should continue. At the time of discharge it was the understanding of

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[80] **Brief for Appellee, p 12,** *United Btates* **v.** *Gallagher, supra,* **note 79. The Court of Military Appeals did not decide the question, but based its decision** on **the provisions of Aricle 3(a) of the code.**

[81] **CM 386668,** *Gallagher, supra,* **note 79.**

[82] **CM 396576,** *Waymire,* **26 CMR 658 (1958).**

[83] **Everett,** *Persons Who Can Be Tried by Court-Martial,* **5 J. Pub. L. 148, 163 (1956).**

all concerned that Brown was being returned to the status of a civilian. It is, therefore, the opinion of the author that a court-martial lacks jurisdiction over the offense.

How would the Court of Military Appeals rule? Judge Ferguson would in all probability follow his views set forth in his dissenting opinion in *United States* v. *Martin, supra.* He stated therein at page 210, "As it is my view that the accused occupies the same position as one who has completed an enlistment for a term certain, has been discharged, and has re-enlisted, I believe that we are faced with a situation identical to that confronting the United States Supreme Court in *Hirshberg* v. *Cooke* . . . ." In the *Hirshberg,* case, *supra,* as previously noted, the Supreme Court held the court-martial lacked jurisdiction. One can be less certain of the viewpoint of Judge Latimer who has always wherever possible sustained jurisdiction. Certain passages from his concurring opinion in the *Martin* case, *supra,* however, shed light on the view he will probably adopt. In speaking of the *Hirshberg* case, *supra,* Judge Latimer noted Hirshberg's discharge was given after the expiration of the term of service when Hirshberg had no right to remain in the service and the Navy was bound to discharge him. Judge Latimer stated at pages 206–207 of the *Martin* case, *supra,* "Thus it is clear that Hirshberg's separation interrupted his military status even though he re-enlisted. His subsequent term of service was an entirely new one as opposed to a negotiated extension of his military status." In the *Hirshberg* case, however, the government conceded there was a brief hiatus. In view of the fact that Judge Latimer concedes a discharge upon expiration of term of service and re-enlistment, in the *Hirshberg* type situation, interrupts military status, this author submits that Judge Latimer would logically be required to find a court-martial lacked jurisdiction over the offense committed by Corporal Brown in his prior enlistment. Thus, at least two members of the Court of Military Appeals would probably agree.

A slight change in the facts of the hypothetical Brown case may call for a different conclusion. Let us suppose the same factual situation except that a week prior to the date of termination of enlistment Corporal White notifies his commanding officer that he wishes to re-enlist and the commanding officer recommends approval of this request.

Paragraph *3b,* Change 8, AR 635–205 dated 25 April 1958 provides:

> The commanding officer of any unit, activity or station having facilities to effect discharge is authorized to order discharge of enlisted personnel

for the convenience of the Government, for the reasons set forth in (1), (2), (3), and (4) below. Individuals being discharged from their present enlisted status as provided in this paragraph will be reenlisted on the day following discharge. The discharge certificate will not be delivered to the individual until after reenlistment is effected.

(1) To permit immediate reenlistment in the Regular Army for a term of 3 years or more, as authorized, of individuals currently serving in the Regular Army who apply for, and are qualified for, such reenlistment—

(a) At any time during the last 90 days of current enlistment. . . .

Paragraph 5, Change 1, AR 601–215, dated 13 February 1959 provides:

Reenlistment for own vacancy. Enlisted personnel of all components may enlist or reenlist to fill their own vacancy or any vacancy for which qualified . . . at the station to which assigned at time of separation provided enlistment or reenlistment is accomplished within 24 hours and the unit for which enlisted is under the jurisdiction of the same major commander.. . .

Paragraph 19, AR 635–61 dated 13 February 1956 provides that certain personnel records shall be retained and carried over to the new enlistment. The only forms that must be executed anew are DD Form 98 (Armed Forces security questionnaire), DD Form 114 (Military pay order), and an appropriate discharge certificate. The records retained and carried over to the new enlistment includes record of emergency data, dental record, enlistment qualification record, service record, report of medical examination, military pay record, military leave record.

The personnel section of White's battalion prepares the necessary forms and transmits them to the division adjutant general, White continues performing duty in his company through 2 February (the date of expiration of his term of enlistment). He spends the night of 2–3 February on post and sleeps in the barracks regularly assigned to him. He retains possession of all equipment issued to him by his organization. After eating breakfast in the company mess hall, at 0800 hours 3 February he reports to the proper authority, is re-enlisted, and given an honorable discharge certificate for his prior period of service. One half hour later he is back in Company A performing his routine duties. In the normal course of events he receives a copy of a special order announcing his discharge, re-enlistment and assignment to Company A.

Under these circumstances may White be tried for the larceny committed on 1 February? It is the author's opinion that a court-martial would have jurisdiction over the offense and that White could be tried for the larceny. There are no reported cases or opinions directly on point. It is submitted, however, that reason-

ing by analogy to reported decisions requires a finding that the present hypothetical case falls within the "uninterrupted status" exception previously discussed. It might be well to emphasize again that this exception was firmly established in military law at the time Congress was considering the Uniform Code of Military Justice and that the exception was tacitly approved by Congress when it failed to legislate to the contrary.

The decisions applying the "uninterrupted status" exception have been discussed earlier in this chapter. With one exception to be discussed, all that has been said in the opinions of the Court of Military Appeals and the various boards of review regarding the effect of a "short" discharge and immediate re-enlistment is applicable to the present situation. A board of review stated in the *Johnson* case, *supra,* that a discharge terminates jurisdiction only when, following the discharge, there has been a complete release from military service and return to the status of a civilian. The *Solinsky* case, *supra,* emphasized the intention of the parties (the individual and the government) to facilitate and effectuate a continuous term of service. In the present hypothetical case it was clearly the intention of the parties that the accused should not revert to a civilian status but that his military service should continue uninterrupted. It is true that the accused had a right to be discharged finally and completely when his period of service expired. The point to be emphasized, however, is that he did not choose to exercise such right. On the contrary, he and the Army negotiated for a continuation of his military service. It must be remembered that mere expiration of term of service is not sufficient to terminate military jurisdiction and that one's amenability to the code ceases only when there is a discharge or other separation returning the individual to a status in which he is not subject to the code.

Paragraph 17*a*(1), AR 635–200 dated 8 April 1959 provides, "The discharge of an enlisted person by reason of expiration of time of service, or for the purpose of continuing on active duty in the same or another status, is effective at 2400 hours on the date of notice of discharge, and the enlisted person will be so notified upon delivery to him of his discharge certificate." According to this regulation, therefore, White's discharge would be effective **2400** hours **3** February. He re-enlisted at 0800 hours **3** February. Some persons may argue it is impossible for an individual to be serving under two enlistments at the same time, that the first enlistment had to terminate prior to the time the second enlistment was effective and at least for an infinitesimal period of time White

was not in the military service and had reverted to the status of civilian. Thus, they argue, this hiatus would call for the application of the *Hirshberg* decision, *supra.*

I submit this argument and conclusion are incorrect for several reasons. A close reading of the *Hirshberg* decision reveals a concession by the government of a hiatus of a few hours. The facts as reported in the Supreme Court opinion do not indicate the presence of any facts to sustain a finding of an intention of the parties to facilitate and effectuate a continuous period of service. The ruling of the Supreme Court must be read in the light of the facts presented to the court. Secondly, a finding of a break in service would be contrary to the clear intention of the parties to effectuate continuous, uninterrupted military service. Thirdly, conceding for the purpose of argument only that an individual cannot serve under two enlistments simultaneously, in the present hypothetical situation the first enlistment would terminate an instant before the second enlistment became effective. In this situation there has never really been a complete release from military service and return to civilian status. Furthermore, the manual impliedly recognizes in paragraph 11b that there may be a discharge and re-enlistment without a hiatus occurring by stating, "Similarly, when an enlisted person is discharged for the convenience of the Government in order to re-enlist before the expiration of his prior period of service, military jurisdiction continues *provided there is no hiatus between the two enlistments."* (Emphasis added.)

The fact that the board of review in the *Gallagher* case, *supra,* found no decisions applying the "uninterrupted status'' exception to the present factual situation does not militate against the application of that exception. As Judge Latimer stated in *United States* v. *Gallagher:*

> Laying aside the statute of limitations, there is no good reason why prosecution should be barred so long as the person committing the offense never really severed his relationship with the service for any practical purpose, whether or not a short hiatus appears as a matter of record.[84]

Thus it appears that Brown in the first hypothetical situation escapes prosecution for the larceny while White in the second hypothetical situation may be tried by court-martial.

D. *Conclusion*

In at least two actual situations a court-martial clearly will have jurisdiction over an offense committed in a prior enlistment,

[84] 7 USCMA 506, 511, 22 CMR 296, 301 (1957).

First, if an individual is serving on a definite term enlistment and prior to the expiration thereof secures a discharge for the purpose of re-enlisting and does in fact immediately re-enlist, a court-martial will have jurisdiction over an offense committed prior to the discharge.

Second, if an individual is serving on an indefinite term enlistment and after serving the minmum required period of years is discharged for the purpose of re-enlisting for a definite term, and the offense involves fraud against the government and is punishable by confinement for five or more years, the court-martial will have jurisdiction. *(Martin* case, *supra.)* If the elements of fraud and confinement for five years or more are absent, it is possible that Chief Judge Quinn would find the court-martial had jurisdiction on the basis of his "natural law" approach. In the *Martin* case, *supra,* Judge Latimer concurred in the result on the basis that the facts more nearly comported to those presented in the *Solinsky* case, *supra.* The Chief Judge, who apparently sustained jurisdiction on the basis of Article 3(a) of the code or in a "natural law" approach dissented in the *Solinsky* case. It is open to question whether the viewpoint expressed by the chief judge in the *Solinsky* case, *supra,* has changed and whether he is expounding a new theory in the *Martin* case, *supra.* Obviously the chief judge holds the deciding vote.

Since the decision of the United States Supreme Court in the *Hirshberg* case, *supra,* and the enactment of the code there has been no opinion by the Court of Military Appeals concerning the continuation of jurisdiction in those cases where an individual is discharged upon expiration of term of service and immediately re-enlists, other than those opinions finding Article 3(a) of the code applicable. The need for such jurisdiction is readily apparent, as evidenced by the results in the Brown and White hypothetical cases. Morale and discipline in the armed forces will certainly suffer if the military establishments are precluded from trying by courts-martial those individuals who are presently in the service and who have committed offenses in a prior enlistment. There is no constitutional proscription to trial by court-martial of a person presently in the service for an offense committed in **a** prior enlistment even though a period of time intervenes between discharge and re-enlistment.

In order to remedy this situation and to set at rest any doubt as to the amenability of Corporal White to trial by court-martial, the author has proposed in the last chapter an amendment to Article **3** of the code.

IV. JURISDICTION UNDER ARTICLE 3(a) OF THE CODE

It may be of historical interest to the reader that the Massachusett's Articles of War of 5 April 1775, The American Articles of War of 1775 (enacted 30 June 1775), The American Articles of War of 1776 (enacted 20 September 1776), The American Articles of 31 May 1786, The American Articles of War of 1806 (enacted 10 April 1806) contain no reference to continuing court-martial jurisdiction over discharged persons.[85]

The earliest statutory pronouncement of continuing court-martial jurisdiction in the Articles of War is found in Article 60 of the American Articles of War of 1874,[86] pertaining to frauds, embezzlement and conversion of government property, which concludes:

> And if any person, being guilty of any of the offenses aforesaid, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

The constitutionality of the foregoing provision was apparently not seriously questioned in a judicial proceeding until 1922. In *Ex parte Joly*,[87] the district court refused as a court of original jurisdiction to hold unconstitutional a statute of so long a standing. In a later case before a federal district court, counsel specifically stated he was not questioning the constitutionality of Article of War 94,[88] formerly Article of War 60.

Winthrop, however, questioned the constitutionality of this provision insofar as it purported to extend jurisdiction over civilians who were formerly in the Army.[89]

The frequency with which Article 60 and its successor Article 94 were the basis for prosecution is illustrated by the fact that a digest covering a period of almost thirty years contains only three opinions relative to the exercise of jurisdiction under Article 94.[90]

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[85] *See,* Winthrop, ***Military Law and Precedents,*** (2d Ed. 1920 reprint) Appendices VIII through XII.

[86] Rev Stat. 1342.

[87] 290 Fed. 858 (S.D.N.Y. 1922). ***Accord,*** Terry v. United States, 2 F.Supp. 963 (W.D. Wash. 1933).

[88] Marino v. Hildreth, 61 F.Supp. 667 (E.D.N.Y. 1945).

[89] Winthrop, ***op. cit. supra,*** note *1* at 93 and 107. ***Accord,*** Record Books, vol 42, p 250 (Apr 1879); Record Card 20120 (Jul 1906), Dig Op JAG 1912, p 513.

[90] Dig Op JAG 1912–40, p 334. Winthrop in speaking of Article 60 states: "Instances of trial under it (Article 60) have been unfrequent (sic) in practice. None have occurred in the army for more than twenty years." Winthrop, ***op. cit. supra,*** note 1, at 92.

Article 60 was substantially re-enacted as Article 94 by the Act of 4 June 1920 (41 Stat. 787) and appeared in its amended form in the Articles of War[91] contained in the Manual for Courts-Martial, U.S. Army, 1949. The unconstitutionality of a statute subjecting to court-martial jurisdiction discharged persons who are civilians at the time of trial was further predicted in 1949.[92]

However, Article 94 remained part of the statutory law until the enactment of the Uniform Code of Military Justice. Disturbed by the effect of the decision of the United States Supreme Court in the *Hirshberg* case, *supra,* Congress was determined to prevent a recurrence by granting to the military jurisdiction to try certain individuals who had been discharged from the service.

The following discussion is found in the House Hearings on the Uniform Code (Hearings before House Armed Services Committee, 81st Congress, 1st Session, on H.R. 2498, page 617) :

Mr. Elston. I would like to ask you this question. I think it was since you completed your hearings that a case has been decided by the Supreme Court of the United States.

Dr. Morgan. The Hirshberg case?

Mr. Elston. Yes. To the effect that a person who has left the service, that is, who has been separated from the service, cannot be tried subsequently by a military court for an offense committed prior to such separation.

Mr. Kilday. Even though he has reenlisted?

Mr. Elston. Even though he has reenlisted.

Dr. Morgan. That is right.

Mr. Elston. Now, you have not anything in your bill covering that?

Dr. Morgan. One thing we have about that is in the case of desertion. If he has deserted in the earlier service, then the fact that he has been discharged from a later service does not deprive the court of jurisdiction.

Mr. Elston. Yes. He may have even committed a murder within 3 days of his separation from the service.

Dr. Morgan. That is right. We have not covered that.

Mr. Elston. He reenlists and cannot be tried for it.

Dr. Morgan. That is right.

Mr. Elston. I think this committee can write something into the law that will take care of that ridiculous situation.

Dr. Morgan. Of course, the Supreme Court put it on the basis of the interpretation of the present statute, as I remember it, and that is that Congress did not intend to have the jurisdiction exercised over the man after he has once been discharged.

Mr. Elston. Well, I do not think Congress ever intended anything of the kind.

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[91] Section 1, Chapter II, Act of 4 June 1920 (41 Stat 787) as amended by the Act of 24 June 1948, P.L.759, 80th Congress (62 Stat. 641).

[92] Snedeker, *Jurisdiction of Naval Courts-Martial Over Civilians,* 24 Notre Dame Law. 490, 528-529 (1949).

Dr. Morgan. I know, but that is what they said. There was not anything in the statute which saved the jurisdiction, and, of course, they interpreted it that way.

The Armed Services Committee of the House of Representatives considered the proposed Uniform Code of Military Justice article by article. The following remarks pertaining to Article 3(a) are taken from the House Hearings, *supra*, page 1262:

Mr. Smart (reading): Subject to the provisions of article 43—this will be too long to write down, Mr. Chairman—any person charged with having committed an offense against this code punishable by confinement for 5 years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia while in a status in which he was subject to this code shall not be relieved from amenability to trial by court-martial by reason of the termination of such status.

Now, that will get the Hirshberg case where he reenlisted. It would get Hirshberg even though he had not reenlisted.

Mr. Brooks. That will close up that loophole?

Mr. Smart. In my opinion it will, sir.

Mr. Brooks. What is your opinion?

Mr. Elston. I am inclined to feel it would.

Mr. Brooks. All right, if there is no objection, then, we will adopt that language.

Article 3(a) thus became a grant of authority to the military to exercise jurisdiction over discharged personnel provided two prerequisites were met. First, the offense must be punishable by confinement for five or more years. Second, the offense must not be triable in a civilian court of the United States, its territories, any state or the District of Columbia. The article does not require that the accused be a person subject to the code at the time of trial by court-martial.

In *United States ex rel Toth* v. *Quarles*[98] the Supreme Court of the United States in a *6–3* decision declared Article 3(a) unconstitutional insofar as it purported to subject to court-martial jurisdiction ex-service personnel who had severed all connection with the armed forces.

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[98] 350 U.S. 11 (1955). This decision has been the subject of numerous articles. *See*, 44 Ill. B.J. 643 (1956), 7 Mercer L.Rev. 385 (1956), 44 Geo. L.J. 518 (1956), 8 Ala. L.Rev. 351 (1956), 58 W. Va. L.Rev. 293 (1956), 24 U. Kan. City L.Rev. 160 (1955-56), 7 W. Res. L.Rev. 191 (1956), 40 Minn. L.Rev. 705 (1956), 22 Brooklyn L.Rev. 318 (1956), 18 Ga. B.J. 364 (1956), 7 Syracuse L.Rev. 326 (1956), 16 Md. L.Rev. 143 (1956), 5 Utah L.Rev. 128 (1956), 12 N.Y.U. Intra. L.Rev. 273 (1957), 9 Vand. L.Rev. 534 (1956), 1 S.D.L.Rev. 147 (1956), 46 A.B.A.J. 67 (1956), 41 Cornell L.Q. 498 (1956), 3 Crim. L.Rev. 83 (1956), 70 Harv. L.Rev. 107 (1956), 55 Mich. L.Rev. 114 (1956), 51 Nw. U. L.Rev. 474 (1956), 10 Sw. L.J. 198 (1956), 3 U.C.L.A. L.Rev. 279 (1956), 2 Wayne L.Rev. 205 (1966).

To what extent, then is Article 3(a) applicable to those persons who have received a discharge from one of the armed forces but who have not severed all connection with the military?

Although the United States Supreme Court has not had occasion to speak on this subject, The Court of Military Appeals in *United States* v. *Gallagher*[94] held Article 3(a) constitutional and applicable in the situation where a serviceman re-enlisted after discharge upon expiration of term of service and was tried by court-martial for offenses committed prior to discharge. Chief Judge Quinn in his concurring opinion apparently adopts the view that Article 3(a) grants to the military the authority to try any person presently in the service for any offense committed in a previous enlistment, subject only to the statute of limitations, regardless of the time interval between discharge and re-enlistment. He specifically states that the general rule of termination of jurisdiction as announced in paragraph 11a of the manual is incorrect. This statement is subject to two interpretations. First, the general rule stated in paragraph 11a is incorrect only to the extent it conflicts with the jurisdiction constitutionally granted by Article 3a. I agree with this. A second possible interpretation is that the general rule is in all respects incorrect insofar as it pertains to persons who re-enlist following a discharge upon expiration of term of service where there is a definite hiatus between discharge and re-enlistment. If this is the meaning intended by the Chief Judge, I submit it is in error.

Paragraph 11a states a historical concept of termination of jurisdiction which is controlling in the absence of express congressional enactment to the contrary. Such an enactment is Article 3(a) of the code, which as narrowed by the *Toth* decision, *supra,* restricts the applicability of the general rule to those cases wherein the accused has not severed all connection with the armed forces and the offense is not punishable by confinement for five or more years and for which the accused cannot be tried in a civilian court.

Judge Ferguson in a short concurring opinion states that, subject to the statute of limitations, since the accused was within the jurisdiction of the military both at the time of the commission of the offense and at the time of trial, the court-martial had jurisdiction. The exact rationale for this opinion is not set out with clarity, except that mention is made of the fact that the *Toth* decision, *supra,* applied only to civilian ex-servicemen. If Judge Ferguson means that a court-martial has jurisdiction over any pre-

[94] 7 USCMA 506, 22 CMR 296 (1957).

discharge offense merely because the accused is presently in the service, I submit such an interpretation is erroneous. However, Judge Ferguson in the *Martin* case, *supra,* indicates he did not intend the result which would flow from a literal interpretation of this language. He stated therein :

> I particularly desire to disassociate myself from any construction of our decision in . . . [the *Gallagher* case, *supra*] . . . which sustains continuing jurisdiction over a member of the armed forces unless all of the prerequisites set forth in Code, supra, Article 3(a) are met.

This author knows of no statutory basis for ruling that in all cases a court-martial has jurisdiction over a pre-discharge offense merely because the accused is presently in the service. I submit that Article **3(a)** cannot be so construed.

In the *Gallagher* case,[95] *supra.,* the accused was a member of an armed force on active duty at the time of committing the offense and at the time of trial. The *Toth* case, *supra,* held that Congress could not constitutionally subject to trial by court-martial a person who had committed a serious offense while on active duty but who at the time of trial had severed all connection with the armed forces. Suppose, however, an individual commits an offense defined in Article **3**(a) while on active duty, but at the time of trial is no longer on active duty although he has not severed all connection with the military service.

Such a situation was presented to the Court of Military Appeals in *United States* v. *Wheeler.*[96] In this case the accused while in Germany awaiting transportation to the United States murdered a German national. Upon his return to the United States he was relieved from active duty, not discharged, and transferred to the Air Force Reserve for completion of his military service obligation under the Universal Military Training Act.[97] Approximately five months later the accused was apprehended and confessed to the crime. The Secretary of the Air Force directed the accused's apprehension and return to military control. While a prisoner in a civilian confinment facility, the accused executed an application for immediate recall to active duty, stating thereon he (the accused) understood that if the application were accepted he would be subject to court-martial charges. The accused was ordered to active duty and the same day confined in an Air Force Stockade.

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[95] For further discussion of this case see 6 Am. L. Rev. **121** (1957), **26** Fordham L.Rev. **359** (1957), **46 Geo.** L.J. **193** (1957), 35 Texas L.Rev. **715** (1957), **11** Vand. L.Rev. **249 (1957).**

[96] 10 USCMA **646, 28** CMR **212 (1959).**

[97] 10 U.S.C. **651.**

Prior to trial, however, the accused filed a petition for a writ of habeas corpus alleging the military authorities lacked jurisdiction over him because he was an inactive reservist and because his recall to active duty had been involuntary. The district court dismissed the petition on the basis that jurisdiction under Article 3(a) had not been terminated.[98] The principal opinion for the Court of Military Appeals was written by Judge Latimer. Chief Judge Quinn and Judge Ferguson concurred in the result only. In Judge Latimer's opinion, the accused remained a member of the Air Force upon his transfer to the reserve since he had remaining an unfulfilled service obligation. The accused had not severed all relationship with the military. He was, therefore, not a "civilian like Toth" and the Supreme Court decision in the *Toth* case, *supra,* was not dispositive of the issue. Judge Latimer concluded that in the situation of this case Article 3(a) was constitutional and the court-martial had jurisdiction. He did not decide whether the accused's recall to active duty had been voluntary or not. Chief Judge Quinn concurred in the finding of jurisdiction on the basis that the accused's recall to active duty had been voluntary, and relied on his concurring opinion, in the *Gallagher* case, *supra.* He would express no opinion as to the applicability of Article 3(a) over persons in a reserve component for the purpose of completing their military obligation. Judge Ferguson also concurred in the result on the basis that the accused was subject to military jurisdiction when he committed the offense and at the time of trial since, in the judge's opinion, the accused had voluntarily returned to active duty. On the issue of the applicability of Article 3(a), Judge Ferguson expressly states Article 3(a) may not be constitutionally utilized to exercise jurisdiction over a member of the reserve not on active duty for an offnese committed while on active duty.

In the author's opinion a correct interpretation of Article 3(a) is found in *Martin* v. *Young.*[99] In this case the accused petitioned the court for a writ of habeas corpus while confined under military jurisdiction awaiting trial by a general court-martial on a charge of violation of Article 104 of the code, aiding the enemy, On 25 November 1947 the accused enlisted in the Army for three years. By executive order the enlistment was extended one year. On 27 November 1950 the accused was captured and confined as a prisoner of war by the Chinese Communists in Korea. He was returned to United States military control on 21 April 1953. On 3

[98] Wheeler v. Reynolds, 164 F.Supp. 951 (N.D. Florida 1958).

[99] 134 F.Supp. 204 (N.D. Calif. 1955).

August 1953 he was honorably discharged, his enlistment having expired while he was a prisoner. The following day he re-enlisted in the Army. The district court remarked that prior to the code the military had no jurisdiction to court-martial persons for offenses, other than fraud, committed during a term of enlistment from which they had been discharged, and that this was so even though the offender had re-enlisted and was in the military service when the charges were preferred. The court after quoting Article 3(a) continued :

> The Congress did not intend Article 3(a) to be a general grant of court-martial jurisdiction over persons who had been discharged from the armed forces. The legislative history of this statute makes it clear that the Congress meant what the plain language of the statute says — that the armed forces should have court-martial jurisdiction over persons charged with committing serious offenses during a term of enlistment which had terminated if, and only if, such persons could not be tried in the civil courts.[100]

The district court further stated that the acts charged in the specification violated at least three criminal statutes under which accused could be tried in a United States District Court — treason (18 U.S.C. 2381), private correspondance with a foreign government (18 U.S.C. 953), and activities affecting the armed forces generally (18 U.S.C. 2387). The government argued that the offense charged (violation of Article 104 of the code) did not measure up to the offenses embraced by the foregoing three statutes because proof of criminal intent was not required under Article 104 and thus the offense charged was not triable in the civilian court The district court rejected this argument saying at page 208, "For, the character of the offense charged does not depend primarily upon the particular article under which it is laid, but rather on the facts alleged.'' The court further stated at page 208, "Consequently it is clear that the charge as specified states an offense triable in the civil courts." The district court ordered the release of the accused.

Because of the apparent conflicting and confusing views of the members of the Court of Military Appeals concerning the applicability of Article 3(a) of the code, one is indeed hard pressed in presenting a satisfactory conclusion concerning the present status of that article. Judge Latimer has indicated a tendency to construe strictly the provisions of the article but to bring within its purview persons who have not severed all connection with the military. On the other hand, Chief Judge Quinn and Judge Ferguson have indicated that, subject to the statute of limitations,

[100] *Id.* at 206.

they are willing to sustain jurisdiction so long as the accused was in the military service at the time of committing the offense and at the time of trial. It is true that in the particular cases involved the offenses were punishable by confinement for five or more years. However, the extremely broad language used by Chief Judge Quinn might easily lead one to conclude the five-year confinement requirement is not controlling. I submit that a strict interpretation of Article 3(a) precludes the trial by court-martial of a person in the armed forces for a pre-discharge offense unless that offense is punishable by Confinement for five or more years and not triable in a civilian court. In other words, a person in the armed forces may be tried under the authority of Article 3(a) by court-martial for an offense committed in a prior enlistment only if three prerequisites are fulfilled—first, the statute of limitations must not bar prosecution; second, the offense must be punishable by confinement for five or more years; third, the offense must not be triable in a civilian court. Unless *all* the foregoing requirements are satisfied, the jurisdiction conferred by Article 3(a) may not be exercised.

I wish to emphasize that this conclusion is dictated by the current state of the statutory grant of court-martial jurisdiction. I am wholeheartedly in agreement with the view that one presently in the service should be subject to court-martial jurisdiction for an offense committed in a prior enlistment regardless of the time intervening between discharge and re-enlistment, subject only to the provisions of the statute of limitations. I further adopt the view that unless the particular offense is punishable in a civilian court, the statute of limitations should be tolled during the period the accused has no connection with the armed forces. To accomplish the foregoing, however, express statutory authority is required.

V. JURISDICTION OVER PERSONS IN CUSTODY OF THE ARMED FORCES SERVING SENTENCE IMPOSED BY COURT-MARTIAL

Article 2(7) of the code[101] states that "all persons in the custody of the armed forces serving a sentence imposed by court-martial" *are* subject to the code. (Emphasis added.) Paragraph 11b of the manual contains the following: "All persons in the custody of the armed forces serving a sentence imposed by a court-martial *remain subject to military jurisdiction* (Art. *2*(7))." (Emphasis

[101] 10 U.S.C. 802.

added.) Is this difference in phraseology material? Can a general prisoner who has been dishonorably discharged be tried by court-martial for an offense committed after such discharge, but while in confinement? Can he be tried for an offense committed prior to such discharge?

Section 1361, Revised Statutes, provided that all prisoners under confinement in the Leavenworth Military Prison were subject to court-martial jurisdiction for offenses committed during their confinement. Early opinions of The Judge Advocate General held the act was unconstitutional as applied to prisoners who had been dishonorably discharged.[102] In speaking of section 1361, Winthrop stated that dishonorably discharged prisoners in confinement are really civilians and that in his opinion any act which purported offenses committed during their confinement was constitutional.[104]

The matter was soon before a federal district court. The court held that the statute subjecting to military jurisdiction all prisoners in a military prison serving sentence of courts-martial for offenses committed during their confinement was constitutional.[104]

The Act of 18 June 1898[105] granted jurisdiction to general courts-martial over offenses committed by general prisoners during confinement as such. It was held that this act was not intended to make any other changes in existing law and should not be so construed.[106] It was further held that the Act of 18 June 1898 did not confer upon courts-martial jurisdiction as to offenses committed by such prisoners prior to their dishonorable discharge.[107]

The first reference in the Articles of War to prisoners being subject to the jurisdiction of the military appears in Article of War 2e of the Code of 1916[108] which states that "all persons under sentence adjudged by courts-martial" are subject to the Articles of War. The identical provision is found in Article 2e of the Code

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[102] Record Books vol XXXVII, p 214, vol XLI, p 293, 322, vol XLII, p 132, 155, 249, Dig Op JAG 1895, pp 326–327.

[103] Winthrop, ***Military Law and Precedents,*** (2d Ed. 1920 reprint) 93, 105–107.

[104] ***In re Craig, 70*** Fed. 969 (C.C.A. Kan. 1895). This decision was cited with approval by the United States Supreme Court in Kahn v. Anderson, 255 U.S. 1 (1921). ***Accord,*** Carter v. McClaughry, 183 U.S. 365, 383 (1901).

[105] 30 Stat. 483.

[106] Record Cards 5589 (Dec 1898), 10003 (Apr 1901), 13926 (Jan 1903), 16220 (Apr 1904), Dig Op JAG 1912, p 513–514.

[107] Record Cards 7762 (Mar 1900), 8051 (Apr 1900), 9406 (Dec 1900), Dig Op JAG 1912, p 515.

[108] 39 Stat. 619.

of 1920[109] as amended by the Act of 24 June 1948.[110] Except for the insertion of the phrase "in the custody of the armed forces" in the article of the present code, the provision relating to prisoners serving sentences has remained substantially the same since first enacted.

It is further to be noted that the manual discussion of this grant of jurisdiction has consistently remained the same, i.e., the prisoners *"remain"* subject to military law.[111]

The manuals of 1928 and 1949 contain statements[112] to the effect that a dishonorable discharge terminates all subsisting enlistments and that a soldier thus discharged cannot be tried by court-martial for an offense committed during any such enlistment except as provided in Article of War 94 (frauds against the government) and "as stated in the next subparagraph." This subparagraph reads as follows:

> In certain cases, where the person's discharge or other separation does not interrupt his status as a person belonging to the general category of persons subject to military law, court-martial jurisdiction does not terminate. . . . So also where a dishonorably discharged general prisoner was tried for an offense committed while a soldier and prior to his dishonorable discharge, it was held that such discharge did not terminate his amenability to trial for the offense.[113]

Several federal court decisions have upheld the validity of Article of War 2e insofar as it granted jurisdiction over offenses committed during confinement.[114] And in *United States* v. *Barnes*,[115] an Army Board of Review states at page 240:

> Proof that the accused were in confinement at the United States Disciplinary Barracks in the status of general prisoners necessarily implies that they were military prisoners undergoing punishment for previous offenses, and even if their discharge as soldiers had resulted from the previous sentences which they were serving, they remained military prisoners and were subject to military law and trial by court-martial for offenses committed during such confinement.

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[109] 41 Stat. 787.

[110] 62 Stat. 642.

[111] Paragraph 38(c), Manual for Courts-Martial, U.S. Army, 1917; paragraph 38(c), Manual for Courts-Martial, U.S. Army, 1921; paragraph 10, Manual for Courts-Martial, U.S. Army 1928; paragraph 10, Manual for Courts-Martial, U.S. Army. 1949.

[112] Paragraph 10, Manual for Courts-Martial, US. Army, 1928; paragraph 10, Manual for Courts-Martial, U.S. Army, 1949.

[113] This holding is apparently based upon the decision in CM 156977 (1923), Dig Op JAG 1912–40, p 167–168.

[114] Kahn v. Anderson, 255 U.S. 1 (1921); Mosher v. Hunter, 143 F.2d 746, 746 (10th Cir. 1944).

[115] CM 339254, *Barnes*, 8 BR-JC 219 (1950).

Except for the reference contained in note **113** of this chapter, the author was unable to discover any case prior to the present code involving the exercise of court-martial jurisdiction over a dishonorably discharged prisoner for a pre-discharge offense. Such absence of authority may be explained in part by the general practice of boards of review during this period of time of writing opinions only in those cases where the findings of the court-martial were disapproved.

Paragraph 11b of the present manual in citing examples of the "uninterrupted status" exception to the general rule states, "So also a dishonorably discharged prisoner in the custody of an armed force may be tried for an offense committed while a member of the armed forces and prior to the execution of his dishonorable discharge."

The only decision discovered by the author involving a pre-discharge offense is *United States* v. *Macaluso*.[116] In this case the accused, while serving an enlistment in the Air Force was tried, convicted and sentenced by a court-martial to confinement, forfeitures and dishonorable discharge. On 19 November **1954,** while the accused was serving his confinement, the dishonorable discharge was executed. Shortly thereafter it was discovered that the accused had committed certain other offenses while serving in the same enlistment from which he had been dishonorably discharged. He was tried and convicted of these offenses. Before the board of review, the accused contended he was not subject to trial by court-martial for the pre-discharge offenses. The board in holding the court-martial had jurisdiction cited the "uninterrupted status" exception contained in paragraph 11b of the manual and stated the only issue involved was whether from the time of commission of the offense until the time of trial an interruption was effected in accused's status as a person subject to the code. The board found no interruption or hiatus. "While his discharge effected a change in his status from that of an airman to civilian, it did not, in any sense, alter his other, continuing and uninterrupted status as a person subject to the Code . . . ."[117]

The *Macaluso* case, *supra,* is particularly interesting because of the fact the decision is based upon the applicability of the "uninterrupted status" exception but no reported cases are cited applying this exception to the factual situation involved.

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[116] ACM 10196, *Macaluso,* 19 CMR 626 (1955).

[117] *Id.* at 628.

A strong argument can be made in support of the validity of the board's decision. At no point of time was the accused a person not subject to the code. For a period of time while in confinement the accused was subject to the code in a dual capacity — as a member of an armed force *and* as a prisoner in the custody of an armed force serving a sentence imposed by court-martial. The dishonorable discharge terminated his status as a member of an armed force but such discharge in no way affected jurisdiction based upon the accused's prisoner status which became effective prior to his discharge and which continued thereafter.

It is the opinion of the author that the foregoing analysis is a proper application of the "uninterrupted status" exception which has been part of the military law for years, and which has received the tacit approval of Congress.

The constitutionality of the statute subjecting prisoners in the custody of an armed force to court-martial jurisdiction was attacked in ***Lee*** v. *Madigan.*[118] In this case, the petitioner was tried by court-martial for an offense committed after his dishonorable discharge but while a prisoner in the custody of an armed force. The circuit court, in upholding the constitutionality of the statute, stated at page **786** of its opinion :

> Accordingly, the military was exercising jurisdiction over the petitioner when he committed the instant offense and when he was tried. The technical dishonorable discharge constituted a severance from the military for certain purposes, including the deprivation of various benefits, but it is unthinkable to regard it as a vitiation of all military authority over the petitioner.[119]

On appeal, the United States Supreme Court reversed the lower court without deciding the constitutionality of the statute. The offense for which Lee was tried had been committed after the cessation of World War II hostilities but prior to a formal declaration of peace. The court found the offense had been committed in time of peace and, under Article of War 92,[120] the court-martial lacked jurisdiction. Mr. Justice Harlan and Mr. Justice Clark dissented stating that "in time of peace" meant peace in the complete sense, officially declared. The two dissenting justices also

[118] 248 F.2d 783 (9th Cir. 1957), rev'd, 358 U.S. 228 (1959).

[119] *Accord*, McDonald v. Lee, 217 F.2d 619 (5th Cir. 1955); United States v. Burney, **6** USCMA **776,** 21 CMR 98 (1956) (citing with approval Kahn v. Anderson, ***supra*** note 114); ACM 12320, *Hunt*, 22 CMR 814 (1956), pet. denied, **7** USCMA 789, 22 CMR 331 (1956); ACM 5213, *Drummond*, 5 CMR 400 (1952).

[120] Art. 92. Murder — Rape " . . . Provided, that no person shall be tried by court-martial for murder or rape committed within the geographical limits **of** the States of the Union and the District of Columbia in time of peace."

stated that Lee as a dishonorably discharged general prisoner serving a sentence imposed by court-martial was constitutionally subject to trial by court-martial. Mr. Justice Frankfurther took no part in the consideration or decision of the case.

It is the conclusion of the author, therefore, that a dishonorably discharged prisoner in the custody of an armed force may be tried by court-martial for an offense committed while on active duty prior to such discharge as well as for offenses committed during such confinement, subject to the provisions of the statute of limitations. In order to preclude a finding to the contrary in the future, however, I recommend an amendment to the present code which is set forth in the concluding chapter.

VI. OTHER EXCEPTIONS

This chapter includes a rather brief discussion of three exceptions to the general rule of termination of jurisdiction—jurisdiction attaching prior to discharge, jurisdiction where the discharge has been secured by fraud, and jurisdiction over deserters honorably discharged from a term of service subsequent to the desertion.

A. *Jurisdiction Attaching Prior to Discharge*

Paragraph 11d of the manual provides:

> Jurisdiction having attached by commencement of action with a view to trial—as by apprehension, arrest, confinement, or filing of charges—continues for all purposes of trial, sentence and punishment. If action is initiated with a view of trial because of an offense committed by an individual prior to his official discharge—even though the term of enlistment may have expired—he may be retained in the service for trial to be held after his period of service would otherwise have expired. See Article 2(1).[121]

Winthrop states this concept in the following words:

> (I)f before the day on which his service legally terminates and his right to discharge is complete, proceedings with a view to trial are commenced against him,—as by an arrest or the service of charges,—the military jurisdiction will fully attach, and once attached may be continued by a trial by court-martial ordered and held after the end of the term of enlistment of the accused.[122]

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[121] 10 U.S.C. 802. Article 2 of the code provides, "The following persons are subject to this code: (1) All persons belonging to a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; all volunteers from the time of their muster or acceptance into the armed forces of the United States; all inductees from the time of their actual induction into the armed forces of the United States, and all other persons lawfully called or ordered into, or to duty in, the armed forces, from the dates they are required by the terms of the call or order to obey the same: ...."

[122] Winthrop, *Military Law and Precedents* (2d Ed. 1920 reprint) 90.

The rule that jurisdiction attaching prior to separation or discharge continues for purposes of trial, judgment, and sentence is well established in military law.[123] Paragraph 38 of the Manual for Courts-Martial 1917 and 1921 contains a note setting forth this rule which is reiterated in paragraph 10 of the 1949 manual. Furthermore, the rule has consistently been followed in cases arising under the present code.[124]

In *United States* v. *Mauerer*[125] the accused, a reserve officer, departed Fort Rucker on 22 October 1956 pursuant to orders releasing him from active duty effective 2400 hours, 25 October 1956. Later in the afternoon of 22 October a shortage in a fund of which the accused had been custodian was discovered. On 23 October 1956 an order was published revoking that part of the previous order which released the accused from active duty. Military police investigators contacted by telephone the civilian police in the accused's home town and ask that he be apprehended and held for the authorities on a charge of larceny. The accused was apprehended by the civilian police on 24 October and informed by them that he would be returned to Fort Rucker by military authorities. Military investigators arrived at police headquarters in the accused's home town about 2030 hours, 25 October. They conferred with the officer in charge and requested the accused be held

[123] *See*, e.g., Barrett v. Hopkins, 7 Fed. 312 (C.C.A. Kan. 1881); Record Books vol 5, p 313 (Nov 1863), vol 7, p 24 (Jul 1864), vol 12, p 352 (Feb 1865), vol 14, p 229 (Mar 1865), vol 16, p 562 (Sep 1865), vol 27, p 559 (Apr 1869), Record Cards 2011 (Jan 1896), 13016 (Jul 1902), 15133 (Aug 1903), 17022 (Oct 1904), 17380 (Jan 1905), Dig Op JAG 1912, p 511; *CM* 202601, *Sperti*, 6 BR 171 (1935), CM 202770, *Cooley*, 6 BR 259 (1935) (confined and charges served prior to expiration of term of service); CM 203393, *Little*, 7 BR 145 (1935) (accused placed in arrest and charges served prior to expiration of voluntary tour of active duty); CM 203869, *Lienhard*, 7 BR 289 (1935); CM 206323, *Schneider*, 8 BR 265 (1937); CM 208545, *Polk*, 9 BR 15 (1938) (accused arraigned five days prior to expiration of tour of duty); CM 210678, *Sharp*, 9 RR 305 (1939) (accused placed in arrest prior to termination of period of service); CM 211095, *Lichtblau*, 10 BH 13 (1939); CM 318342, *Irvin*, 67 BR 239 (1947) wherein the board stated at page 247, "It is well settled that where a soldier is *arrested* for a crime prior to the termination of his enlistment, and where the term of his enlistment expires before his trial and conviction by court-martial, military jurisdiction, having once attached by the arrest, is continued for all purposes of trial, judgment, and execution."); Mosher v. Hunter, 143 F.2d 745, 746 (10th Cir. 1944); United States ex rel Mohley v. Handy, 176 F.2d 491 (5th Cir. 1949), *cert. denied*, 338 U.S. 904 (1949).

[124] *See*, e.g., ACM 7395, *Westergren*, 14 CMR 560 (1953); ACM 7574, *Brown*, 13 CMR 856 (1953); United States v. Sippel, 4 USCMA 50, 15 CMR 50 (1954); ACM 10045, *Estrada*, 18 CMR 872 (1955), pet. *denied*, 6 USCMA 810, 19 CMR 413 (1955); CM 384814, *Xansbarger*, 20 CMR 449 (1955); United States v. Rubenstein, 7 USCMA 523, 22 CMR 313 (1957); CM 398147, *Gould*, 26 CMR 551 (1958); *In Re Taylor*, 160 F.Supp. 932 (W.D.Mo. 1958).

[125] CM 393845, *Mauerer*, 23 CMR 503 (1967).

until the weather cleared to permit air travel. They neither saw nor spoke to the accused until they were ready to depart on 27 October. The board of review held that the court-martial had jurisdiction since the civiiian police were acting as agents for the military authorities and the apprehension and detention by such agents constituted the initiation of action to attach jurisdiction prior to **2400** hours **25** October 1956.

What steps must be taken prior to discharge or other separation in order that jurisdiction will attach? Quite clearly arraignment of the accused at a court-martial is sufficient. as is arrest, confinement or preferring of charges. Will any procedure less than the foregoing suffice? In *United States* v. *Rubenstein*[126] the accused was a civilian employee of a non-appropriated fund activity in Japan. He was interrogated on two occasions by agents and was informed he was suspected of the offenses later charged against him. When he informed the agents that he intended to leave Japan within a few days, he was directed to report to the agent's office daily. Two days later, without informing anyone, the accused flew to the United States. Approximately a year later the accused went to Korea as a commercial entrant. He was apprehended by military authorities, returned to Japan and tried by court-martial. Judge Latimer, with Judge Ferguson concurring, held that the interrogation by investigators, informing the accused he was suspected of the offenses, and placing him under restraint by the order to report daily constituted a first step toward prosecution and jurisdiction attached. Chief Judge Quinn dissented on the ground that mere interrogation and direction to report daily did not constitute formal proceedings with a view to trial so that jurisdiction did not attach. The chief judge would require at least an arrest.

At the present time, therefore, apparently all that would be required in order that jurisdiction attach is informing the accused of the offense of which he is suspected plus a directive not to remove himself from the immediate area.

Separation of accused from active military service by operation of law[127] or by administrative action of military authorities[128] does not divest military appellate bodies of jurisdiction to review the case, provided jurisdiction properly attached while the accused was subject to military law.

[126]7 USCMA 523, 22 CMR 313 (1957).

[127]United States v. Sippel, 4 USCMA 50, 15 CMR 50 (1954).

[128]United States v. Speller, 8 USCMA 363, 24 CMR 173 (1957).

B. *Jurisdiction Where Discharge Has Been Secured by Fraud*

As previously observed, the general rule regarding termination of jurisdiction is that military jurisdiction ends upon discharge or other separation from the service. In order to terminate military status, however, the discharge must not be fraudulently obtained.[129]

Paragraph 38(d) of the 1917 and 1921 manuals provide that, "Where a soldier obtains his discharge by fraud, the discharge may be cancelled and the soldier arrested and returned to military control. He may also be required to serve out his enlistment and be tried for his fraud." Paragraph 10 of the 1928 and 1949 manuals contain the same provisions. As early as 1866, it was held that a discharge secured by fraud might be legally revoked and the soldier tried by court-martial.[130]

Although the services have consistently asserted the authority to try by court-martial a person who has secured his separation by fraud,[131] the author has been unable to discover any reported case between 1921 to date where the offense charged was securing a fraudulent separation.

The custom of the services in asserting such jurisdiction was given statutory recognition in Article 3(b)[132] of the present code which provides.

> (b) All persons discharged from the armed forces subsequently charged with having fraudulently obtained said discharge shall, subject to the provisions of article 43, (statute of limitations) be subject to trial by court-martial on said charge and shall after apprehension be subject to this code while in the custody of the armed force for such trial. Upon conviction of said charge they shall be subject to trial by court-martial for all offenses under this code committed prior to the fraudulent discharge.

At least one author has expressed doubts concerning the constitutionality of this provision in the light of the *Toth* case, *supra*.[133]

Two interesting problems are presented by this provision. Let us suppose a soldier commits a robbery on an army post, and without having been prosecuted therefore, fraudulently secures his discharge. He then commits another robbery in a nearby

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[129] Winthrop, *Military Law and Precedents* (2d Ed. 1920 reprint) 89 n. 46.

[130] Record Books, vol 21, p 390 (May 1866), Dig Op JAG 1912, p 457.

[131] *See*, Snedeker, *Jurisdiction of Naval Courts-Martial Over Civilians*, 24 Notre Dame Law. 490, 529 (1949).

[132] 10 U.S.C. 803.

[133] Everett, *Persons Who Can Be Tried by Court-Martial*, 5 J. Pub. L. 148, 164 (1956).

town. Subsequently he is apprehended by the military authorities. Before the military can try him for the first robbery, a court-martial must find him guilty of having violated Article 83(2), having fraudulently procured his separation. However, Article 3(b) does not specify what type court-martial must try the accused for the fraudulent separation. A literal interpretation of the statute would be satisfied by a conviction by a summary court-martial. Furthermore, once the accused is convicted of having fraudulently secured his separation, he is deemed never to have been separated, In the above hypothetical situation, therefore, the accused was still a member of the Army when he committed the second robbery. Can he be tried by court-martial for this second robbery? It is important to note that Article 3(b) expressly provides that the individual is subject to the code after apprehension and while in the custody of the armed forces awaiting trial. By implication, therefore, the individual is not subject to the code during the interim period between his fraudulent separation and apprehension. In the opinion of the author a court-martial would not have jurisdiction to try the accused for the second robbery, the general grant of jurisdiction contained in Article 2(1) notwithstanding, as the specific statutory provision in Article 3(b) must be given preferential effect.

The failure of jurisdiction in this instance is of little import as the accused can always be turned over to civilian authorities for prosecution.

C. Jurisdiction Over Deserters Honorably Discharged From A Term of Service Subsequent to the Desertion

As early as 1775, the offense of desertion was recognized in military law.[134] The termination of the period of service while the individual was in desertion did not cause the military to lose jurisdiction over the offender who could be apprehended and tried for the desertion after the term of his enlistment had expired.[135] Enlistment in the Army without having been legally discharged from a prior enlistment in the Army has always been considered desertion from the first enlistment.[136] Furthermore, an honorable discharge from one enlistment is said not to relieve a soldier from the consequences of a desertion committed during a prior enlistment.[137]

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[134] Article 8, American Articles of War of 1775.

[135] Article 48, American Articles of War of 1874, Rev. Stat. § 1342 (1875). Winthrop, *Military Law and Precedents* (2d Ed. 1920 reprint) 652-653.

[136] Letter Press Books, vol 49, p 442 (Oct 1891), vol 53, p 179 (Apr 1892), vol 69, p 86 (Apr 1893), Dig Op JAG 1912, p 515.

This historical concept was embodied in paragraph 10 **of** the 1928 and 1949 manuals wherein it is stated :

> **A** discharge, other than dishonorable, releases only from the particular contract and term of enlistment to which it relates, and therefore does not terminate other subsisting enlistments or relieve the soldier from liability to trial by court-martial for an offense committed during any such enlistment.

Apparently all went well until the decision in ***Ex parte*** *Drainer.*[138] Drainer enlisted in the United States Marine Corps on 8 August 1940. He deserted therefrom one month later. On 27 July 1943 he enlisted in the United States Navy and received an Honorable Medical Discharge on **1** November **1944.** On 7 November 1945, he was apprehended and tried for desertion from the United States *Naval* Service during the period 8 September 1940 to 27 July 1943. The district court held the court-martial lacked jurisdiction. The court stated an honorable discharge was a formal final judgment passed by the government on the entire military record of the discharge. However, in the opinion of the court, ". . . an Honorable Discharge from the U.S. Naval service would not be a 'formal, final judgment' upon the person's service record with the Army . . ." as they are two separate branches of military service. The court concluded by holding that since the Marine Corps was not a separate branch but **a** part of the Navy, an honorable discharge from the naval service bars prosecution of a discharged person for desertion from the Marine Corps.[139]

Although the Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, fails to so indicate, the *Drainer* decision, *supra,* probably caused the enactment of Article **3(c)** of the code which provides :

> (c) Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of the code by virtue of a separation from any subsequent period of service.

Under the present code, therefore, any type separation from any armed force will not bar prosecution for an earlier desertion from any armed force.

In *United States* v. *Huff*[140] the accused deserted from the Coast Guard and fraudulently enlisted in the Army. Shortly thereafter he revealed his true status and was administratively separated

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[138]65 F.Supp. 410 (N.D. Calif. 1946), *aff'd sub nom per curiam,* Gould v. Drainer, 158 F.2d 981 (9th Cir. 1947).

[139]*Id.* at 412.

[140]CGCM 9837, *Huff,* 19 CMR 603 (1955), *rev'd* on *other grounds,* 7 **USCMA 247, 22** CMR 37 (1956).

from the Army with an undesirable discharge. He was then tried by the Coast Guard for desertion. The accused contended the court-martial lacked jurisdiction because of the undesirable discharge issued by the Army. The board of review cited Article **3**(c) as a "sufficient answer" to this contention. The Court of Military Appeals, without considering the effect of the discharge on jurisdiction, reversed on other grounds.

VII. CONCLUSIONS

The questions propounded in the introductory chapter may now be answered. A conclusion that a person is amenable to trial by court-martial is, of course, subject to the applicability of the statute of limitations, Article **43** of the code.

A person who enlists in the military service for a definite period and who is discharged prior to the expiration of that period and immediately re-enlisted IS SUBJECT to court-martial jurisdiction for an offense committed prior to the discharge, provided no hiatus occurs between the discharge and re-enlistment.[141]

A person serving under an indefinite term enlistment who requests discharge for the purpose of re-enlistment and who is thus discharged and immediately re-enlisted IS SUBJECT to court-martial jurisdiction for an offense committed prior to discharge, provided no hiatus occurs between the discharge and re-enlistment.[142]

A person who re-enlists following a discharge upon the expiration of his term of enlistment IS NOT subject to court-martial jurisdiction for an offense committed prior to the discharge when at the time of discharge there existed no intention of the parties (individual and government) to effectuate a continuous period of service.[143]

In those instances where an individual immediately re-enlists following discharge upon expiration of term of service and where there are sufficient facts to find an intention of the parties to effectuate a continuous, uninterrupted period of service, the individual IS SUBJECT to court-martial jurisdiction for an offense committed prior to discharge.[144]

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[141] See pp. 17–26, *supra.*

[142] See pp. 27–31, *supra.*

[143] See pp. 37–47, *supra.*

[144] See pp. 47–53, *supra.*

A person who immediately re-enlists following a discharge from an indefinite enlistment upon approval of an unqualified resignation IS NOT subject to court-martial jurisdiction for an offense committed prior to discharge.[145]

A person who has been dishonorably discharged from the service and who is a prisoner in the custody of an armed force IS SUBJECT to court-martial jurisdiction for an offense committed during confinement and for offenses committed while on active duty prior to the discharge.[146]

A person who is discharged from the armed forces and who severs all connection with the armed forces IS NOT AMENABLE to trial by court-martial for an offense committed prior to dis-

A person who is discharged from the armed forces at the expiration of his term of enlistment and who subsequently re-enlists IS AMENABLE to trial by court-martial for a pre-discharge offense provided the prerequisites of Article 3(a) of the code are fulfilled.[148]

A person who deserts from an armed force MAY BE TRIED by court-martial for that desertion even though he has been honorably discharged from a subsequent enlistment in any branch of an armed force.[149]

A person who has fraudulently secured his separation from an armed force MAY BE APPREHENDED AND TRIED for that offense. Following conviction for having fraudulently secured his separation he IS AMENABLE to trial by court-martial for an offense committed prior to the separation or after apprehension. During the interim period between discharge and apprehension, he IS NOT SUBJECT to military jurisdiction.[150]

Jurisdiction attaching prior to discharge or separation continues for all purposes of trial, judgment and execution of sentence.[151]

VIII. RECOMMENDATIONS

There is no logical reason why a person presently in the armed forces should escape prosecution for an offense committed in a

[145] See pp. 27-31, *supra*.

[146] See pp. 69-77, *supra*.

[147] United States ex rel Toth v. Quarles, 350 U.S. 11 (1955).

[148] See pp. 60-68, *supra*.

[149] See pp. 85-88, *supra*.

[150] See pp. 83-85, *supra*.

[151] See pp. 78-83, *supra*.

prior enlistment, absent any consideration of the statute of limitations. In the opinion of this author, the so-called general rule of termination of jurisdiction as it applies to those in the service at the time of trial is archaic and illogical. Morale and disciplne will certainly suffer if those who serve honorably are forced to live and work side by side with individuals who have violated the code and who escape punishment therefor. The armed forces cannot by regulation and the president cannot by executive order grant jurisdiction to military tribunals where historically none has existed. Only congressional enactment can cure this deficiency. It is, therefore, recommended that the present code be amended in the following respects.

1. By adding a sub-paragraph (d) to Article 3 which reads as follows:

> Subject to the provisions of Article 43, any person subject to this code charged with having committed, while in a status in which he was subject to this code, any offense against this code shall not be relieved from amenability to trial by court-martial for such offense by reason of a termination of said status following the commission of said offense.[152]

Such an amendment would grant jurisdiction over all persons who are discharged upon completion of term of service and subsequently re-enlist, those who re-enlist following an unqualified resignation from an indefinite term enlistment, and, if there is any question concerning the matter, those prisoners who committed offenses for which they were not tried prior to dishonorable discharge.

2. By adding the following to the present Article 43(d):

> Article 43(d) . . . In addition to the periods of time otherwise excluded under this subsection, where the offense charged is not triable in the courts of the United States, or any State or Territory thereof or of the District of Columbia, the period of time in which the accused was in a status in which he was not subject to this code shall be excluded in computing the period of limitation prescribed in this article.

The foregoing amendments to the code would necessitate rewriting paragraph 11 of the manual. It is recommended that the new paragraph 11 read as follows:

> 11. TERMINATION OF JURISDICTION.—a. Courts-martial have no jurisdiction over individuals who, though formerly in a status in which they were subject to the code, have severed all connection with the armed forces.

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[152] The author has purposely chosen not to limit the type offenses which would fall within the scope of the amendment. In the author's opinion the statutory grant of jurisdiction should cover all offenses under the code, leaving to the commander concerned the feasibility of referring the case to trial. If such a broad grant of jurisdiction would meet with Congressional resistance, the amendment might be worded to restrict its application to offenses other than minor offenses as deflned in paragraph 128b of the manual.

b. Persons presently in a status in which they are subject to the code, may, subject to Article **43,** be tried by court-martial for offenses committed at a time when they were subject to the code. Court-martial jurisdiction is not lost by reason of the fact a discharge or other termination of such status intervenes between the time of the offense and the time of trial. (Article 3(d)).

All persons in the custody of the armed forces serving a sentence imposed by a court-martial remain subject to military jurisdiction. (Article **2**(7)). Such prisoners who have been dishonorably discharged from an armed force may be tried by court-martial for an offense committed while on active duty and prior to the discharge.

If a person in the military service obtains his discharge from an armed force by fraud, he may be apprehended and tried by court-martial for a violation of Article 83(2). See 162. Upon conviction of said charge, such person shall be subject to trial by court-martial for any offense committed prior to the fraudulent separation or following apprehension. (Article 3b).

Any person who has deserted from the armed forces shall not be relieved from amenability to the jurisdiction of the code by virtue of a separation from any subsequent period of service regardless of the type of discharge under which such separation was accomplished.

Paragraphs 11c and 11d would remain unchanged.

COMMENTS

THE SEVERIN DOCTRINE. The citizens of Rochester, New York, may never have been aware of the partnership of Nils P. Severin and Alfred N. Severin, who, under the name and style of N.P. Severin Company, constructed their Post Office during the years **1932** to **1934.** However, the name of these gentlemen will probably be long remembered in Government contracting circles, particularly among subcontractors.

For many years prior to the decision in the case of ***Severin*** v. *United States,*[1] the Court of Claims uniformly permitted a contractor to bring suit for himself and his subcontractor for loss occasioned to either by acts of the Government under the contract, apparently without questioning the right of the subcontractor to recover from the contractor.[2] In the ***Severin*** case, the Court of Claims, for the first time, took cognizance of a provision of the subcontract[3] in denying the plaintiffs a recovery for loss suffered by their subcontractor. Plaintiffs sought recovery for the failure of the Government to furnish certain models within the time provided by the contract, the court holding such to have been a breach of contract. Plaintiffs proved that they personnally suffered actual damages in the form of extra overhead for the period of delay, **for** which the court allowed a recovery. Insofar as the damages suffered by the subcontractor were concerned, the court's opinion, written by Judge Madden, was based upon the following reasoning:

> Plaintiffs therefore had the burden of proving, not that someone suffered actual damage from the defendant's breach of contract, but that they, Plaintiffs, suffered actual damages. **If** Plaintiffs had proved that they, in the performance of their contract with the Government became liable to their subcontractor for damages which the latter suffered, that liability,

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[1] 99 Ct. Cl. 436 (1943), *cert. den.* 322 U.S. 733 (1944).

[2] See Whaley, Chief Justice, dissenting, *Id.* at 444, citing *stout, Hall and Bangs* v. *United states,* 27 C. Cls. 385 *Consolidated Engineering Company* v. *United states,* 98 Ct. Cl. 256.

[3] "21st. The Contractor or Subcontractor shall not in any event be held responsible for any loss, damate (sic), detention or delay caused by the Owner or any other Subcontractor upon the building: or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, **or** by any other cause beyond the control of Contractor or Subcontractor, **or** in any event **for** consequential damages."

> though not yet satisfied by payment, might well constitute actual damages to plaintiffs, and sustain their suit.'

The Court went on to say that the proof was just the opposite, the 21st clause of the subcontract effectively protecting plaintiffs from any damage for breach of the contract by the Government. Chief Justice Whaley dissented, noting that the defendant was not a party to the subcontract, paid no consideration for the protection given the contractor in the subcontract, and stated that it was a travesty of justice to allow plaintiff overhead on the losses suffered by the subcontractor and to deny the plaintiff recovery of the amount admittedly due the subcontractor.

Following the *Severin* case in point of time was the case of *James Stewart & Company* v. *United States.*[5] As in the *Severin* case, plaintiff was seeking, on behalf of a subcontractor, damages for an unreasonable delay amounting to a breach of contract. Again the court took cognizance of a provision of the subcontract[6] to deny a recovery to the plaintiff, stating:

> If plaintiff is not liable to its subcontractor for damages for delay, defendant is not liable to plaintiff therefor. *Severin* v. *United States,* 99 C. Cls. 435, 442.

In between the time the Court of Claims considered the *Severin* case and *Continental Illinois National Bank and Trust Company, et al.* v. *United States,*[7] hereinafter discussed, the Supreme Court considered the case of *United States* v. *Blair*[8] on certiorari from

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[4] Severin v. United States, *supra* note 1 at 443.

[5] 105 Ct. Cl. 284 (1946).

[6] "Clause VIII. It is further agreed that time is of the essence of this contract, and the sub-contractor, in agreeing to complete the work within the time mentioned, has taken into consideration and made allowances for the ordinary delays and hindrances incident to such work, whether growing out of delays in securing material or workmen, slight changes, omissions, alterations, or otherwise however; but, should the sub-contractor be substantially delayed in the work by any changes, omissions or additions, by fire or other unavoidable casualty or by strikes or lock-out not caused by the acts of the sub-contractor — or by reason of the acts of the owner or the Contractor in providing materials and performance of labor for parts of such work not included in this contract in such a manner as to unreasonably delay the material progress of the work, then the sub-contractor shall, within 24 hours after the occurence of the cause of the delay for which it claims allowance, notify the Contractor in writing, and the sub-contractor shall be allowed such additional time for the completion of the work as the Architect shall award in writing, whose decision shall be final and conclusive upon the parties, and the sub-contractor further agrees that the allowance of additional time for the completion of the work precludes, satisfies, and concedes any and all other claims by it of whatever nature on account of such delay."

[7] 112 Ct. Cl. 563 (1949).

[8] 321 U.S. 730 (1943).

the Court of Claims. The *Blair* case involved an award made to a contractor on behalf of a subcontractor, in which the Court of Claims had made no finding, While the decision does not set forth the exact nature of the claim, it was stated to be a claim based upon extra labor costs incurred by the subcontractor under conditions erroneously exacted by the Government superintendent. The Court, in holding for the respondent contractor, stated:

> Respondent was the only person legally bound to perform his contract with the Government, and he had the undoubted right to recover from the Government the contract price for the tile, terrazzo, marble and soapstone work, whether that work was performed personally or through another. This necessarily implies the right to recover extra costs and services wrongfully demanded of respondent under the contract .... Respondent's contract with the Government is thus sufficient to sustain an action for extra costs wrongfully demanded under that contract.[9]

Following the *Blair* case, an action was filed in the Court of Claims by the executor of the will of one of the Severin partners who was the authorized liquidator of the partnership, and the case, *Continental Illinois Bank and Trust Company, et al.* v. *United States,*[10] has thus been commonly referred to as the second *Severin* case. Here, the Court had before it the identical clause of the subcontract that it had considered in the first *Severin* case.[11] After citing the first *Severin* case and the *Stewart* case, the court stated:

> The reasoning behind these decisions is that the contractor is not damaged regardless of any hardship suffered by the subcontractor and that the subcontractor may not sue because there is no privity of contract between him and the Government."

The Court therefore granted the motion of the defendant for an order directing the commissioner of the court to omit from his report any findings of fact relating to claims on behalf of any subcontractor. It should be noted that plaintiff's suit not only involved subcontractors' claims arising out of a breach of contract but, as stated in the Court's opinion, was "to recover on behalf of the subcontractors for alleged extra work". It is interesting to note that Judge Madden, who was the author of the opinion in the first *Severin* case, wrote a strong dissenting opinion in this case, urging that the first *Severin* and *Stewart* cases be overruled. Judge Madden felt that the Supreme Court decision in the *Blair* case was contrary to those cases and laid down a better rule,

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[9] *Id.* at 737.
[10] *Supra* note 7.
[11] *Supra* note 3.
[12] Continental Illinois Bank and Trust Company, et al. v. United States, *supra* note 7 at 565.

Judge Madden reasoned as follows:

> I think that in most of the suits involving wrongs committed by Government agents to the harm of subcontractors, there would be no ground on which the prime contractor would, in fact, be liable to the subcontractor. Yet we consistently allow recovery in such cases, without first trying the hypothetical suit of the subcontractor against the prime contractor. We do not (sic) allow recovery because we presume the existence of such liability. Such a presumption would, I think, be contrary to the truth in most cases.[13]

Judge Madden went on to state that the distinction depended upon the presence or absence of language in the subcontract which had no other practical utility than making it impossible for a subcontractor to be compensated for wrongs at the hands of the Government in the same circumstances in which other subcontractors, absent the language, are given relief.

Subsequently the executor of the will of one of the Severin partners and authorized liquidator of the partnership brought two more suits in the Court of Claims, *Continental Illinois Bank and Trust Company* v. *United States*[14] and *Continental Illinois Bank and Trust Company* v. *United States*,[15] which have been commonly referred to as the third and fourth *Severin* cases. The Court, while allowing a recovery to the plaintiff for the damages it suffered as a result of the Government's breaches of contract, again, on the identical provision of the subcontract considered in the first and second *Severin* cases,[16] denied a recovery for the damages suffered by the subcontractors.

Following the second *Severin* case, the Court of Claims considered the case of *Pearson, Dickerson, Inc., et al.* v. *United States.*[17] This involved a breach of contract action in which plaintiff sought damages for a subcontractor. Even though the Court found that there was no breach of contract and that plaintiffs had executed an unconditional release, it further found that under the

[13] *Id.* at 568.

[14] 121 Ct. Cl. 203, 244 (1952), *cert. den.* 343 U.S. 963 (1952).

[15] 126 Ct. Cl. 631, 639 (1953).

[16] *Supra* note 3.

[17] 115 Ct. Cl. 236 (1950).

terms of the subcontract[18] plaintiffs were not liable to the subcontractor, citing the first and second *Severin* cases and the *Stewart* case.

In the case of *Warren Brothers Roads Company* v. *United States,*[19] which followed the first *Severin* case, plaintiff made claim on behalf of its subcontractor for a breach of contract by the Government which caused the subcontractor to be delayed. The Court of Claims, following the precedent of the *Blair* case, stated:

> A prime contractor's contract with the Government has been recognized as being sufficient to sustain an action by the prime contractor for the extra costs incurred by his subcontractor as a result of wrongful conduct of the Government. . . . plaintiff in the instant case is entitled to recover the damages resulting from idleness, irrespective of whether such damages were incurred personally or through a subcontractor.[20]

The Court went on the state that its conclusion was not contrary to the *Severin* cases and the *Stewart* case, in that the subcontract here did not absolve plaintiff of liability to the subcontractor.

The decisions of the Court of Claims in the *Severin* cases and the *Stewart* case, insofar as they pertain to breaches of contract, do not appear to be open to question. The reasoning of the court upon which the decisions were based is sound, but that reasoning should be carefully noted. It will always apply in a breach of contract action, but may be limited when applied to other types of action for recovery under Government contracts. In the first *Severin* case, the court clearly discussed a matter of evidence in the trial of a breach of contract action. The Court first pointed out that a plaintiff in a breach of contract action against the Government has the burden of proving that he suffered actual damages as a result of the breach, having excluded the possibility of

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[18] *Id.* at 243:

"However, the performance of the items sublet to second party under the terms of this contract shall be the sole responsibility of said second party, and in the event said first party is unable to assist second party in procuring equipment from the said railroad company, such failure to assist shall not relieve the second party from its duties to perform said contract."

In open court the parties made the following stipulation:

"Mr. Keating (attorney for Defendant). Plaintiffs are not liable to the subcontractor, W.E. Orr and W.E. Orr, Jr., for the claim involved herein except for payment to them of any amount that may be recovered in this action which has been agreed to by plaintiffs."

"Mr. Jennings (Attorney for Plaintiffs). The foregoing facts are stipulated to as correct, but I do not waive any question as to the legal relationship between the plaintiffs and the subcontractors, W.E. Orr and W.E. Orr, Jr., arising out of the terms of the contract between plaintiffs and defendant."

[19] 123 Ct. C1.48 (1952).

[20] *Id.* at 84.

a recovery of nominal damages by noting that a contractor cannot sue the United States for such damages, in that the United States has not consented to be so sued.[21] The decision was bottomed on the fact that plaintiffs had not met this burden of proof, because a provision of the subcontract precluded plaintiff from having suffered any actual damages as a result of the Government's breach, insofar as the losses suffered by the subcontractor were concerned. The case stands for that proposition and nothing else. The same reasoning when applied to the *Stewart* case and the third and fourth *Severin* cases fully supports those decisions. However, there is one facet of the second *Severin* case, in which this reasoning has absolutely no application. In that case, as noted before, it was not only an action by the contractor to recover damages for breaches of contract on behalf of the subcontractors but, as stated in the opinion, was "to recover on behalf of the subcontractors for alleged extra work". Therefore, it would appear that plaintiff might have been able to prove, not that it was damaged by breaches of contract, but that extra work had been ordered by the Government under the terms of the contract and that the contractor was therefor entitled to an equitable adjustment for the value of that work, whether he performed it himself or whether it was performed by others. If the contractor had been so ordered to perform extra work under the terms of the contract, and had in turn passed the extra work on to his subcontractor under a provision of the subcontract or under another express or implied contract, the contractor would not have been relieved by the provision of the subcontract absolving him from damages for breaches of contract by the Government.

The foregoing conclusion receives support from the *Blair* case. It is obvious from the Supreme Court's opinion in that case that the action was not for a breach of contract between the contractor and the Government, in which the contractor was seeking damages, but was in fact an action to recover money due under the terms of the contract for extra work ordered by the United States. This is clear from the Court's language stating that the contractor "had the undoubted right to recover from the Government the

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[21] 99 Ct. Cl. 435, 443 (1943):

"Plaintiffs did have a contract with the Government. That contract was breached. That breach might, if the contract had been one between private persons, have given rise to a right to win a suit, and to recover nominal damages, even if no actual damages resulted from the breach. But the futile exercise of suing merely to win a suit was not consented to by the United States when it gave its consent to be sued for its breaches of contract. *Nortz* v. *United States,* 294 U.S. 317, 327; *Great Lakes Construction Co.* v. *United States,* 95 C. Cls. 479, 502."

contract price" for the work performed. The Supreme Court was thus not faced with the problem of determining whether the contractor had met the burden of proving actual damages for a breach of contract, as was the Court of Claims in the *Severin* cases. Under the "Changes and Extras'' Article[22] of Government construction contracts, it does not appear that there is any requirement upon the contractor to prove other than that extra work was ordered by the Government, that it was performed, whether by the contractor or a subcontractor, and the cost of the extra work, whether the cost was paid by the contractor or by a subcontractor. It would appear that the Supreme Court in the *Blair* case was stating exactly this, and that any arrangement between the contractor and the subcontractor would be immaterial to the rights of the contractor. If there is no burden upon the contractor in such a case to prove that the money to perform the extra work came or might come out of his funds, then the doctrine laid down by the *Severin* cases has no application, The language used by the Supreme Court in the *Blair* case to the effect that the contractor was the only person legally bound to perform and had the right to recover for the work, whether he did the work personally **or** through another, leads to no other logical conclusion, It follows that the principles laid down in the *Blair* case have no application in an action for breach of contract, in that the contractor must prove actual damages in such an action, but that they are limited to other actions for recovery under the terms of the contract, which may or may not require that the contractor prove **a** loss or expense to himself. While the result in the *Warren Brothers Roads Company* case may be correct, the citation of the *Blair* case by the Court of Claims in support thereof, the action being for breach of contract, cannot lend support thereto. It is believed that the Court overlooked the fact that, despite the absence of **a**

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[22] "3. CHANGES AND EXTRAS.—The contracting officer may at any time, in writing, and without notice to the sureties, order extras **or** make changes in the drawings and/or specifications of this contract providing such extras **or** changes are within the general scope thereof. **If** any such extra or change causes an increase **or** decrease in the amount due under this contract, **or** in the time required **for** its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim **of** the contractor for adjustment under this Clause must be asserted in writing within **30** days from the date of receipt by the contractor **of** the notification of extra or change: PROVIDED, however, That the contracting officer, **if** he decides that the facts justify such action, may receive, and act upon any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Clause 6 hereof. But nothing provided in this clause shall excuse the contractor from proceeding with the prosecution of work as changed."

provision of the contract absolving plaintiff of liability to the subcontractor, plaintiff, as the Court held in the *Severin* case, would still be required to prove actual damages to itself for any losses suffered by the subcontractor. Again, such is not true under the principles of the *Blair* case.

The proposition that the principles laid down in the *Severin* cases are limited to breach of contract actions, or actions under the contract which require the contractor to prove an actual loss or expense to himself, receives further support from the holding of the Court of Claims in *Callahan Walker Construction Company* v. *United States*[23] which was decided prior to the first *Severin* case. In the *Callahan Walker* case, the contracting officer had ordered the prime contractor to perform extra work, stating that "payment for additional yardage would be made at the contract price per yard". Thereafter, the contracting officer refused to issue a change order to pay the prime contractor for the extra work, and the prime contractor brought suit in the Court of Claims on behalf of the subcontractor who had actually performed the extra work, The Government defended on the ground that a provision of the subcontract made the prime contractor's payment to the subcontractor contingent upon recovering from the Government for the extra work, and that the contractor was not therefore damaged. While the Court held that the contracting officer's refusal to issue the necessary change to pay the contractor for the extra work was a breach of the original contract, it allowed a recovery under an implied contract, stating:

> We do not believe that the agreement between the plaintiff and the subcontractor is any defense. The defendant's liability was contractual. Its implied agreement was to pay the reasonable value of the extra work, and if the subcontractor had agreed with plaintiff to pay nothing we do not think it would have invalidated this agreement. Certainly it would not have followed that the plaintiff could get nothing for the work from the defendant. The implied contract between defendant and plaintiff, and the contract between plaintiff and the subcontractor are two entirely separate contracts, and in **our** opinion the latter had no effect on the obligation of the former.[24]

Here, as in the *Blair* case, the contractor had no burden of proving actual damages for breach of contract, but merely had to prove that extra work was ordered, was performed, and that it was entitled to the cost of the work under a contract, either express or implied, whether the extra work was performed by the contractor or not.

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[23] 95 Ct. C1.314 (1942), *reversed* on other grounds, 317 U.S. 56 (1942).

[24] *Id.* at 331.

Judge Madden, in his dissent in the second *Severin* case, indicated that the Court of Claims allows recovery in breach of contract actions on the presumption of liability between the prime and subcontractor in the absence of a clause such as the Court there considered. If such is correct, the result in the *Warren Brothers Roads Company* case would be supported by that presumption. However, it would appear that the better rule in breaches of contract actions would be to require, as indicated in the *Severin* case, that the plaintiff prove actual damages to itself, even though actual payment may not have been made to the subcontractor. Such would be more in conformance with what would be required in establishing actual damages in a breach of contract action between private persons.

The principles of the *Severin* cases have been considered by the Armed Services Board of Contract Appeals on a few occasions. In the case of *General Installation Company,* ASBCA No. 2061 **(1954),** although not raised by the Government, the Board considered the question, inasmuch as the subcontractor had borne the expense involved and was actually prosecuting the appeal in the name of the prime contractor. The expense involved was extra work found to be erroneously ordered by the Government in connection with a guarantee. While there was no exculpatory clause involved, it was apparent that the prime contractor had suffered no loss or extra expense. The Board did not clearly state the distinction advocated herein between the proof required to sustain a breach of contract action, involved in the *Severin* cases, and the proof required to sustain an action for extra work ordered under the contract, involved in the *Blair* and *Callahan Walker Construction Company* cases ; however, the Board certainly recognized the distinction in the following language from the opinion:

> In directing the repair of the damage to the heater and ducts the contracting officer ordered extras for which appellant is entitled to compensation under the 'Extras' clause (Article 3) of the contract in an amount representing the costs of complying with that order, whether those costs be appellant's or those of its suppliers or subcontractors, plus a reasonable profit.

The decision of the Board is in complete harmony with the *Blair* and *Callahan Walker Construction Company* cases, and had there been an exculpatory clause in the subcontract, it would not have any effect upon the burden of appellant to prove that extra work was ordered, was performed, and the costs of complying with the order. In such a case, as the Court of Claims stated in the *Callahan Walker Construction Company* case, the contract of the prime contractor with the subcontractor would have no effect upon the obligation of the Government.

It does not appear that the Armed Services Board of Contract Appeals has considered any other appeal before it in the light of the above discussion. If the so-called ***Severin*** doctrine involves, as has been urged hereinbefore, a consideration of the proof required to recover under a particular provision of the contract, it would appear that the Board should first determine what the contractor would be required to prove, and then examine the provisions of the subcontract to ascertain whether any provision thereof would preclude him from being able to meet such burden of proof. If the contractor, under the particular provision of the contract under which he is seeking additional compensation, is not required to prove a loss or expense to himself, certainly no provision of the subcontract would preclude him from presenting other evidence that would establish his claim. On the other hand, if the particular provision of the contract under which additional compensation is sought, requires proof that he suffered a loss or additional expense himself, and it is shown by a provision of the subcontract that he could not have suffered such loss or additional expense, his proof would simply fail. In ASBCA No. 2661, *Charles H. Tompkins Company* (1955), the contractor sought recovery on behalf of its subcontractors for delay under the GOVERNMENT FURNISHED PROPERTY and SUSPENSION OF WORK clauses, which state:

GOVERNMENT-FURNISHED PROPERTY

(a) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described in the Schedule or specifications, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as 'Government-furnished Property'). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished Property suitable for use will be delivered to the Contractor at the times stated in the Schedule or, if not so stated, in sufacient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-furnished Property is not delivered to the Contractor by such time or times, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination **of** the delay occasioned the Contractor thereby, and shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by such delay, in accordance with the procedures provided for in the clause of this contract entitled 'Changes'. In the event the Government-furnished Property is received by the Contractor in a condition not suitable for the intended use the Contractor shall, upon receipt thereof, notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either (i) return such property at the Government's expense or otherwise dispose of the property, or (ii) effect repairs or modifications. Upon the completion of (i) or (ii) above, the Contracting Officer upon written request of

the Contractor shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by the rejection or disposition, or the repair or modification, in accordance with the procedures provided for in the clause of this contract entitled 'Changes'. The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government-furnished Property or delivery of such property in a condition not suitable for its intended use.

GC–11 SUSPENSION OF WORK:

The Contracting Officer may order the contractor to suspend all or any part of the work for such period of time as may be determined by him to be necessary or desirable for the convenience of the Government, Unless such suspension unreasonably delays the progress of the work and causes additional expense or loss to the contractor, no increase in contract price will be allowed. In the case of suspension of all or any part of the work for an unreasonble length of time causing additional expense or loss, not due to the fault or negligence of the contractor, the Contracting Officer shall make an equitable adjustment in the contract price and modify the contract accordingly. An equitable extension of time for the completion of the work in the event of any such suspension will be allowed the contractor, provided, however, that the suspension was not due to the fault or negligence of the contractor. Provided, further, that no suspension will be ordered or adjustments made under this paragraph for delays arising as the result of changes ordered or as the result of changed conditions encountered under the respective articles relating to changes and changed conditions or as the result of any delays for which an extension of time may be granted under the delays-damages article of this contract.

In each of the contractor's contracts with its subcontractors, a clause was inserted absolving the contractor from liability to the subcontractors for suspensions of work or delay, stating:

ARTICLE V.

* * * The Contractor shall have the right, at any time, to delay or suspend the whole or any part of the work herein contracted to be done without compensation to the Subcontractor, other than extending the time for completing the whole work for a period equal to that of such delay or suspension. No delay, suspension, or obstruction beyond the reasonable control of the Contractor, shall serve to terminate this Contract or increase the compensation to be paid to the Subcontractor.

The Board did not discuss the burden of proof the contractor would be required to meet under the provisions of the contract under which the extra compensation was sought, and, in denying the appeal, stated:

It now seems well settled that a prime contractor may not maintain an action for additional expense or loss to its subcontractors, if the subcontracts or general or special releases contain clauses waiving claims against the prime from expense or loss, or releasing such claims generally.

Among the cases the Board cited were the *Severin* case, the three *Continental Illinois National Bank* cases (second, third, and fourth *Severin* cases), and the *Stewart* case. The Board cited the

Warren Brothers Roads Company case for the proposition that the *Blair* case did not overrule the *Severin* cases. Examination of the particular clauses of the contract under which appellant in this case was seeking compensation would lead to the conclusion that the result is probably correct, in that those clauses appear to place a requirement upon the contractor to prove loss or extra cost to himself, in which the contractor would fail because of the provisions of the subcontract absolving him from liability. However, it does not appear that the proposition quoted above can be supported from the cases cited by the Board. The decision would be much clearer had the Board, as the Court of Claims did in the *Severin* case, found that the contractor had the burden of proving actual loss or expense to himself, and had failed to sustain that burden of proof because of the subcontract provision. The *Severin* doctrine is simply a matter of proof and a failure thereof because of a provision of a subcontract that conclusively indicates the contractor must fail.

Examination of the *Severin* case and subsequent cases in the Court of Claims leads the author to the following conclusions concerning its application :

1. The principles of the *Severin* case will always apply in a breach of contract action wherein the contractor is seeking damages on behalf of a subcontractor, and a provision of the subcontract absolves the contractor from liability for such damages.

2. The principles of the *Severin* case will apply in those actions wherein the contractor seeks to recover extra compensation under a term of a contract on behalf of a subcontractor, and under such contract term? or by the rules of evidence, the contractor must prove actual loss or expense to himself, and a provision of the subcontract absolves the contractor from liability to the subcontractor for the loss or expense involved.

3. The principles of the *Severin* case will not apply in those actions wherein the contractor seeks to recover extra compensation under a term of a contract on behalf of a subcontractor when the contract term under which recovery is sought does not place a burden upon the contractor of proving an actual loss or expense to himself.

Insofar as raising the principles of the *Severin* cases by motion is concerned, it seems obvious that the defense is not jurisdictional, when the prime contractor is the appellant. It is well settled that the subcontractor has no standing to sue or be the named appellant

in an appeal to the Armed Services Board of Contract Appeals. If the principles of the *Severin* cases are applicable in an appeal before the Board, the provisions of the subcontract absolving the appellant from liability to the subcontractor should be set forth in the Government's answer as an affirmative defense. If the provisions of the contract under which the prime contractor is seeking extra compensation, and the provisions of the subcontract absolving appellant from liability for the particular compensation sought, are clear and unambiguous, it would be obvious that appellant's proof of loss or expense to himself would be bound to fail, and the appeal would be vulnerable to a motion under Rule 11 of the Rules of the Armed Services Board of Contract Appeals, which states:

> 11. Failure *to state* a case.—In the event, after completion of the pleadings, the Board finds that appellant has failed to state a case on which any relief could be granted by the Board, the Board may give notice to appellant to show cause why the appeal should not be dismissed on the ground that no useful purpose would be served by setting the case for oral hearing on the merits. Appellant, in such event, will be afforded the opportunity to be heard orally for the purpose of showing cause why the appeal should not be dismissed on that ground, and if appellant so desires to move to amend the complaint, within the proper scope of the appeal. If the Board thereafter finds appellant has failed to show cause, and finds that the complaint, with such amendments as may be offered by appellant, fails to state a case on which the Board could grant relief, the appeal shall be dismissed.

In such a case, the pleadings would establish that appellant has failed to state a case on which any relief could be granted by the Board. In the *Charles H. Tompkins Company* case, the Board disposed of the appeal on the Government's motion to set aside and render null and void an allowance that the contracting officer had made by Change Order, the appellant having appealed from the amount granted thereby. The Board there termed the motion before them as one in the nature of a demurrer.

The Government has, by legislation and regulation, encouraged subcontracting, particularly in the small business field, and the principles of the ***Severin*** cases may continue to arise with frequent regularity. Although the result, when the principles are applied, may sometimes seem harsh, relief for subcontractors from the application of those principles must, as noted by the Court of Claims in the second *Severin* case,[25] come from the legislative branch of the Government.

JACK A. HUBBARD*

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[25] *Supra* note 7.

*Major, JAGC, U.S. Army, assigned as Trial Attorney, Contract Appeals Branch, Procurement Law Division, Office of The Judge Advocate General, Department of the Army.

MILITARY LAW REVIEW

FEDERAL TORT LIABILITY FOR NONAPPROPRIATED FUND ACTIVITIES. Recent judicial determinations regarding tort liability of the United States[1] for the negligent acts of employees of nonappropriated fund activities of the armed services such as officers clubs and messes, ships service stores and exchanges, cafeterias, swimming pools, etc., appear to warrant a restatement of the pertinent law, in view of some of the earlier conclusions in this area.[2]

The determination of liability has rested primarily upon interpretation of the terms "Federal Agency" and "Employee of the Government," and the application thereof to various activities of the armed forces which do not depend for financial support upon appropriations out of the national treasury but are largely self-supporting.

The federal district courts have exclusive jurisdiction of claims against the United States for money damages for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any "employee of the government" while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[3]

Pertinent statutory definitions provide:

"Employee of the government" includes officers or employees of *any federal agency,* members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation. [Underscoring supplied] "Federal Agency" includes the executive departments and independent establishments of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.[4]

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[1] See Federal Tort Claims Act, initially a composite enactment, 60 Stat. 842–847 (1946), now scattered throughout the Judicial Code. See esp. 28 U.S.C. 1346(b), 2671–2680 (1958 and Supp. I, 1959). For a recent overall view of the Act, see Hunt, The Federal Tort Claims Act: Sovereign Liability Today, Mil. L. Rev., April 1960 (DA Pam. 27–100–8, 1 Apr 60), p. 1.

[2] For an informative account of the history and nature of nonappropriated fund activities, as well as the blurred image of such agencies caused by legal ramifications, see Kovar, Legal Aspects of Nonappropriated Fund Activities, Mil. L. Rev., September 1958 (DA Pam. 27–100–1, 1 Sept 1958), p. 96.

[3] 28 U.S.C. 1346(b) (1958).

[4] 28 U.S.C. 2671 (1968).

The Army early recognized potential governmental liability for tort claims arising out of acts of personnel associated with nonappropriated funds as, for example, in the case of a Chaplains Fund.[5] However, subsequent consideration crystallized into a position to the effect that persons working for nonappropriated fund employees are *not* employees of the government and that Congress had "not manifested an intent that nonappropriated fund instrumentalities are to be a burden on the public purse" for purposes of federal tort liability.[6]

The latter opinion was rooted in precedents antedating the 1946 tort statute. In 1942, the Supreme Court defined the status of Army post exchanges as "arms of government"[7] but added that "The government assumes none of the financial obligations of the exchange."[8] The premise that nonappropriated fund workers were not to be deemed federal employees under the Act stemmed from a variety of earlier rulings pertaining to application of personnel law, i.e., formal appointment and removal of officers of the government, as well as routine civil service procedures and related benefits.[9]

Until the effective date of regulations issued 27 August 1958, Army policy required "nonappropriated fund instrumentalities of the United States" to procure public liability or products liability insurance to indemnify nonappropriated fund assets and the United States against tort claims for personal injury, death or property damages arising from acts or omissions of employees of such instrumentalities.[10] Army regulations issued in August of 1958 implemented revised Army policy to settle administratively all tort claims arising out of nonappropriated fund operations, and authority to purchase liability insurance was withdrawn.[11]

Other Army regulations dealing with the general nature and legal status of nonappropriated funds (as distinguished from "private associations and funds" which do not provide essential facili-

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[5] JAGA 1950/6252, 31 October 1950, 9 Bull. JAG 263.

[6] JAGL 1952/1906, 2 February 1952, 1 Dig Ops., Claims, § 33.1.

[7] And as such partake of whatever immunities the Department of the Army (at that time, the War Department) may have under the constitution and federal statutes, as, e.g., with respect to state privilege or sales taxes imposed on gasoline.

[8] Standard Oil Company of California v. Johnson, 316 U.S. 481 (1942).

[9] See, e.g., Burnap v. United States, 252 U.S. 612 (1920) and other authorities cited, JAGL 1952/1906, *supra* note 6.

[10] See, e.g., para. 14, *AR* 230–8, dated 2 August 1957.

[11] Sec. IV, *AR* 230–8, dated 27 August 1958.

ties and services and exist on a military installation only by express consent of the installation commander) have long provided that such fund entities are "instrumentalities of the Federal Government and as such are entitled to all the immunities and privileges which are available under the Federal Constitution and statutes to the departments and agencies of the Federal Government."]?

In an early FTCA suit involving a ship's service department, government counsel argued that the Navy equivalent of an Army PX *was* an agency and instrumentality of the United States; hence the plaintiff, an employee of the store injured by the negligent act of a fellow-employee and who was covered by workmen's compensation, was barred from recovery. The court, looking to the absence of direct financial support of the activity by the federal government, found that the ship's service department was "merely an adjunct of and a convenience furnished by the Navy Department" and determined that the plaintiff was not a federal employee and was thus not barred from suing under the Act.[13]

In 1952, the United States defended a tort suit on the ground that a "civilian" swimming pool located on the dormitory area of an Air Force base (where a minor patron was fatally injured when struck by the piercing rib of an umbrella blown over by a whirlwind) was *not* a governmental agency. The court disagreed, having found that the pool was constructed, maintained and operated by government agents and was under their direct supervision and control, holding the defendant liable for demonstrated negligence.[14]

Relying strongly on the Supreme Court's classification of post exchanges as "arms of the Government,"[15] another district court *rejected* the government's contention that the tortious act of a PX representative (in this case an enlisted serviceman detailed to the exchange as a courier) could not subject the United States to liability for personal injury or property damage as the agency was a "non-funded instrumentality," and thus the tort-feasor could

[12] For current provisions, see, e.g., paras. 2*b*, 4*d*, **AR 230–5**, dated 18 July 1956, and para. **2, AR** 230–60, dated **26 July** 1956.

[13] Faleni v. United States, 125 F. Supp. 630 (E.D. N.Y. **1949).**

[14] Brewer v. United States, 108 F. Supp. 889 (M.D. Ga. 1952).

[15] Standard Oil Company v. Johnson, 316 **U.S.** 481 (1942).

not be considered to be an employee of the government within the meaning of the Act.[16]

An exchange was again held to be a federal agency, despite a contrary assertion upon a motion for dismissal by the defendant, when a civilian employee of the exchange sought recovery for personal injuries allegedly caused by negligence of defendant's employees. The court expressly declined to follow *Faleni, supra,* and also indicated, over the government's opposition, that workmen's compensation, if available to the plaintiff, would not bar tort suit relief.[17]

A suit by the injured user of an unlit stairway produced reaffirmation of the status of a ship's service store as a governmental activity, the negligent operations of which will subject the United

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[16]Roger v. Elrod, 125 F. Supp. 62 (D. Alaska. 1554. *Faleni, supra* note 13, was distinguished on the facts. Tentative conclusions (not expressly endorsed by Dept. of the Army) drawn from initial judicial considerations under the Act (i.e., *Faleni and Elrod*) indicated that the United States was subject to tort liability for the negligent or wrongful acts of *military* personnel assigned to nonappropriated fund organizations but that such liability would not attach for the acts of similarly assigned *civilians.* See, e.g., comment, Special Text 27-152, The Judge Advocate General's School, U.S. Army, 1959, p. 418. *Cf.* earlier comment of the writer in 24 Tennessee L. Rev. 301 (1956), at p. 314. By 1954, the Navy had indicated the futility of requiring the execution of a waiver to defeat potential liability of the United States under the Act for actionable wrongs committed by a civilian athletic association. Op JAGN 1954/248, 1 Sept. 1554, 4 Dig. Ops. Claims, § 49.11.

[17]Daniels v. Chanute Air Force Base Exchange, 127 F. Supp. 920 (E.D. Ill. 1955). *Johnson, supra* note 8, was again cited, together with non-FTCA cases: United States v. Query, 37 F. Supp. 572 (E.D. S.C. 1941), *aff'd* 121 F. 2d 631 (4th Cir. 1941), holding a PX to be a federal instrumentality not subject to state license tax; Borden v. United States, 116 F. Supp 873 (Ct. Cl. 1953) and Edelstein v. South Post Officers Club, 118 F. Supp. 40 (D.C. 1951), holding that the United States could not be sued in cases arising under contracts between plaintiffs and, respectively, a PX and an officers club. Other non-FTCA cases applying the federal instrumentality concept to nonappropriated funds include Nimro v. Davis, 204 F. 2d 734 (D.C. Cir. 1953), concerning a naval gun factory lunchroom committee contract, and Pulaski Cab Company v. United States, 157 F. Supp. 955 (Ct. Cls. 1958), involving a PX contract. Note dictum to the same effect, American Commercial Co. v. United States Officers, 187 F. 2d 91 (D.C. Cir. 1951), an officer club contract suit. See also a similar state court determination in a tort action against an officers mess, Brame v. Garner, 101 SE2d 292 (S.C. 1957).

States to tort liability.[18] In so deciding, the court concluded that *Faleni* did not compel it to hold that the activity was of a non-governmental nature.

In a suit against the United States for negligence attributed to a Navy Officers mess causing injury to a mess employee, counsel for both parties stipulated in pretrial proceedings that the plaintiff, who had been reimbursed under workmen's Compensation coverage, was not a government employee. Upon appeal from summary judgment for the defendant, plaintiff argued that even if workmen's compensation were his exclusive remedy, he was not barred from suit in view of the stipulation. The appellate court disagreed and, in reliance upon Supreme Court decisions barring suits against the United States where other suitable remedies existed for occupational injuries, held that plaintiff was precluded from maintaining suit under the Act.[19]

When an employee of a Navy officers mess obtained judgment for injuries negligently caused by governmental employees, despite an award under an applicable compensation statute, the government on appeal insisted that plaintiff *was* a federal employee and was therefore barred from invoking the Act and/or that as a nonappropriated fund employee he was likewise precluded from bringing suit under the Act because of recovery under workmen's compensation. The Court agreed, following *Aubrey,* and reversed the judgment of the district court.[20]

In still another variation of the theme, a civilian manager of a Navy officers mess sued the United States to recover damages for the loss of his own automobile which he had authorized a subordinate to use in connection with mess business. Upon appeal

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[18]Grant v. United States, 162 F. Supp. 689 (E.D. N.Y. 1958). On appeal of issues not directly relevant to this discussion, the appellate court affirmed judgment for appellant but also reversed the trial court's judgment in favor of an insurer, holding that the policy which insured the ship's service officer also covered the United States as an "additional insured," thus allowing the United States to recover from the insurer, notwithstanding United States v. Gilman, 347 U.S. 507 (1954), to the effect that the government has no right of recovery against a negligent employee. Grant v. United States, 271 F. 2d 651 (2nd Cir. 1959). In the appellate proceedings, the status of the store as a government instrumentality was not questioned.

[19]Aubrey v. United States, 254 F. 2d 768 (D.C. Cir. 1958), citing Feres v. United States, 340 U.S. 135 (1950) and Johansen v. United States, 343 U.S. 427 (1952). An interesting aside to the case was the appellate court's ruling that plaintiff's wife was not precluded from instituting proceedings under the Act for loss of consortium, a liability not covered by the applicable compensation statute.

[20]United States v. Forfari, 268 F. 2d 29 (9th Cir. 1959), *cert. denied,* 361 U.S. 902 (1959).

of judgment for the plaintiff, the government rested on the sole contention that the United States is not liable for torts committed by civilian employees of nonappropriaed funds because the activity was "not supported by approriations out of the national treasury)) but was "financed by its own operations." The Court found no warrant "for interpolating such a restriction into the statute," nor did it read the dictum of *Standard Oil Company* v. *Johnson, supra,*[21] as affecting "the express language in the statute subjecting the Government to liability for torts committed by servants of federal agencies." Judgment for plaintiff was affirmed.[22]

The preponderence of judicial authority thus far indicates that there is little question but that nonappropriated fund activities are to be considered as government instrumentalities so as to subject the United States to tort liability under the provisions of the Federal Tort Claims Act. It further appears that if the plaintiff is also an employee of the activity responsible for the tort and has been provided another remedy against the activity, he is precluded from maintaining a suit under the Act for injuries otherwise compensable.

ROBERT GERWIG*

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[21] Government assumes no financial obligations *of* exchange.

[22] United States v. Holcombe, 277 F. 2d **143** (4th Cir. 1960): **for** an earlier phase **of** litigation in this case, see Holcombe v. United States, 259 F.2d 505 (4th Cir. 1958).

*Attorney, Judge Advocate Section,
Hq. Third **U.S.** Army, **Ft** .McPherson,
Ga.; Member **of** the Federal, Georgia and
Atlanta Bar Associations.

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