DEPARTMENT OF THE ARMY PAMPHLET 27-100-31

MILITARY LAW REVIEW

Vol. 31

Articles

HEADQUARTERS, DEPARTMENT OF THE ARMY
JANUARY 1966

PREFACE

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

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This Review may be cited as 31 MIL. L. REV. (number of page) (1966) (DA Pam 27–100–31, 1 January 1966).

For sale by the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402, Price: $.75 (single copy). Subscription price: $2.50 a year; $.75 additional for foreign mailing.

MAJOR GENERAL GEORGE B. DAVIS

Judge Advocate General
1901–1911

George Breckenridge Davis was appointed the tenth Judge Advocate General of the Army. His appointment followed that of Thomas F. Barr of Massachusetts and John W. Clous, a native of Germany, each of whom served as Judge Advocate General for one day in May of 1901 in order to retire with the rank of Brigadier General.

Davis was born at Ware, Massachusetts, on February 13, 1847. In 1863, at the age of 16 years, he finished high school and enlisted in the 1st Massachusetts Volunteer Cavalry. As a cavalryman and later a 2d Lieutenant of Volunteers, he served in 25 battles and engagements during the War Between the States.

Appointed to the United States Military Academy two years after the War, Davis graduated in 1871 and was commissioned a 2d Lieutenant of the 5th **U.S.** Cavalry.

Immediately after his marriage to Ella Prince of West Springfield, Massachusetts, in July of 1871, Lieutenant Davis spent two years on the Wyoming and Arizona frontiers with the 5th Cavalry. His next tour was at West Point, where he served for five years as Assistant Professor of Spanish, teaching French, geology, chemistry and mineralogy as well.

Promotion to 1st Lieutenant in 1878 brought with it another five-year tour on the Western frontier. The return to West Point in 1883 gave Davis a chance to head the History Department as Principal Assistant Professor, and to serve as Assistant Professor of Law, instructing also in geography and ethics. During this tour he completed his ***Outline*** of ***International*** *Law.* Simultaneously with his promotion, Captain Davis was rotated to the Western Territory in August 1888.

Only four months later, however, Davis's professional abilities were recognized and required in Washington. He was appointed a Major, Judge Advocate General's Department, and transferred to the Office of the Secretary of War. Davis took advantage of the Washington tour to obtain his LL.B. and LL.M. degrees at Columbian (now George Washington University) Law School.

He was made Lieutenant Colonel and Deputy Judge Advocate General in 1895, but left Washington the next year to serve as Professor of Law at West Point.

It was during the next few years that Davis completed his major publications. His *Elements* of *Law* and *Elements* of *International Law* (1897) were followed by his definitive *Treatise on the Military Law* of *the United States* in 1898. In addition, Davis authored several historical and professional works on the tactical use of cavalry. *The War* of *the Rebellion,* a 70-volume compilation of the official records of the Union and Confederate Armies, was principally his work and was published in his name in 1880–1901.

Davis was promoted to Colonel in 1901, and a few months later became a Brigadier and Judge Advocate General—a post he was to occupy for a decade. General Davis guided his Department through the Spanish-American War, and handled the investigation and trial of the notorious cases arising out of that war. He also represented the United States as Delegate Plenipotentiary to the Geneva Conventions of 1903 and 1906, and the Hague Convention of 1907.

On February 14, 1911, General Davis retired with a promotion to Major General. He died on December 16, 1914.

PAMPHLET
NO. 27-100-31

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, D.C., 1 *January* 1966

MILITARY LAW REVIEW—VOL. 31

FORMER TESTIMONY*

By Major Joseph E. Donahue**

The purpose of this article is to present a discussion of the use of former testimony under the Uniform Code of Military Justice. Emphasis will be placed on its historical antecedents, its relationship to usages in civilian criminal jurisdictions together with an analysis of the terminology of paragraph 145b, Manual for Courts-Martial, United States, 1951.

I. INTRODUCTION

A. *DEFINITION*

"Former testimony" is a term of art that has a common meaning whether it is used in civil or criminal trials, Federal or State trials, or military or civilian trials.[1] It is testimony, made under oath, at an earlier judicial proceeding, at which the party against whom it is sought to be used, if he is the accused, was present and had an opportunity to cross-examine the witness who is unavailable for the subsequent proceedings. Although the term is sometimes applied to impeachment testimony, to admissions and confessions, to testimony used to refresh recollection[2] or as past recollection recorded: to testimony which in itself is criminal (perjury), and to testimony showing motive for a crime by the accused: it is used in this article, unless otherwise indicated, only

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

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[1] *But see* MODEL CODE OF EVIDENCE rule 511 (1942) and UNIFORM RULE OF EVIDENCE 63(3) which substantially change many of the traditional characteristics of former testimony.

[2] See Hale, *The Missouri Law Relative to the Use of Testimony Given at a Former Trial*, 14 ST. LOUIS L. REV. 375 (1929).

[3] See 3 WIGMORE, EVIDENCE § 737(1) (3d ed. 1940).

[4] See MCCORMICK, EVIDENCE 481 (1954).

in reference to testimony introduced to prove the facts contained in that testimony, both during the case in chief and during sentencing proceedings, which otherwise would be hearsay.[5] The extent to which former testimony requires identity of issues and parties is discussed under separate headings.

All case law under the *Uniform Code* of *Military Justice*[6] has focused on the use of former testimony by the prosecution. As it is believed that this will continue to be the only area creating significant problems, such use is considered unless otherwise indicated.

B. *THE MANUAL RULE*

In United States district courts and in most state courts the admissibility of former testimony is governed by case law. The military rule for the use of former testimony, set forth in paragraph 145*b* of the Manual by the President acting pursuant to his authority under Article 36, UCMJ, is:

> *b. Former testimony.* —When at any trial by court-martial including a rehearing or new trial, it appears that a witness who has testified in either a civil or military court at a former trial of the accused in which the issues were substantially the same (except a former trial shown by the objecting party to be void because of lack of jurisdiction) is dead, insane, too ill or infirm to attend the trial, beyond the reach of process more than one hundred miles from the place where the trial is held, or cannot be found, his testimony in the former trial, if properly proved, may be received by the court if otherwise admissible, except that the prosecution may not introduce such former testimony of a witness unless the accused was confronted with the witness and afforded the right of cross-examination at the former trial and unless, in a capital case, the witness is dead, insane or beyond the reach of process. Cases considered "not capital" in 145*a* are also considered "not capital" with respect to the admissibility of former testimony. A failure to object to the introduction of testimony given at a former trial of the accused on the ground that the accused was not confronted with the witness and afforded the right of cross-examination at the former trial, or on the ground that it does not appear that the witness is now unavailable, may be considered a waiver of that objection.
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> The testimony of a witness who has testified at a former trial may be proved by the official or other admissible record of former trial, by an

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[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 139*c* [hereinafter cited as MCM, 1951, and referred to as the Manual]. Some authorities do not regard former testimony as an exception to the hearsay rule on the rationale that testimony which has already been subjected to cross-examination is not hearsay. 5 WIGMORE, *op. cit. supra* note 3, § 1370. However the Manual classification appears to be more common. For a discussion of the two classifications see MCCORMICK, *op. cit. supra* note 3, at 480.

[6] Hereinafter cited as UCMJ.

admissible copy of so much of such record as contains the testimony, by an official or otherwise admissible stenographic or mechanical report of the testimony, or by a person who heard the witness give the testimony and who remembers all of it, or the substance of all of it, that is relevant to the topic in question. See 141 as to proving former testimony given through an interpreter.

If otherwise admissible, a deposition taken for use or used at a former trial by court-martial is admissible in a subsequent trial of the same person on the same issues.

The limitations upon the use of former testimony noted above do not apply with respect to statements made at a former trial, or at any trial, which are admissible under some rule of evidence other than that authorizing the introduction of former testimony. Any such statement, for instance, a voluntary confession or admission of the accused or an inconsistent statement of a witness, may be proved by an admissible record or report of the trial at which it was made or by any other competent evidence.

As to the use of a record of the proceedings of a court of inquiry, see Article 50. The effect of the words "not capital and not extending to the dismissal of an officer" as used in Article 50 is that if the prosecution uses the record of a court of inquiry to prove part of the allegations in a specification, neither death nor dismissal may be adjudged as a result of a conviction under that specification, but other lawful punishment may be. The introduction of the record of a court of inquiry by the defense shall not affect the punishment which may be adjudged. A person's "oral testimony cannot be obtained" in the sense of Article 50 if the person is dead, insane, too ill or infirm to attend the trial, beyond the reach of process, or cannot be found.[7]

C. THE PRINCIPLES INVOLVED

Underlying the use of former testimony are principles and policies, not necessarily either reconcilable or apparent. Indeed some are extralegal and should be sought in the collective unconscious of the society rather than within the conscious framework of the legal system. It may be helpful for the reader to bear in mind a few of the more obvious principles and policies as he considers the uses and possible misuses of former testimony.

Plato dubbed necessity the mother of invention; from the same matrix came former testimony. Fundamental to the use of former testimony is the fact that in cases of actual unavailability, there is often the problem of whether there will be a trial involving the use of former testimony or no trial. Such is the case when a vital witness is dead or incurably insane. On the other hand, the demands of necessity are far less imperative when the witness is "unavailable" merely because he is more than one hundred miles from the place of trial.

[7] MCM, 1951, para. 145*b*.

Necessity has probably been allowed to prevail because society cannot or will not tolerate a guilty man to escape conviction n-hen the evidence needed to prove his guilt has been before a competent tribunal but the witness is no longer available to repeat it at a subsequent proceeding. Lest society appear harsh it should be recognized that society would find equally disturbing the conviction of an accused whose innocence would have been estabiisned but for the exclusion of former testimony.

It is not only a principle relating to the use of former testimony, but also a constitutional requirement that an accused be confronted by the witnesses against him. In Part III it will be shown that this requirement is satisfied if an accused confronted the witness at a previous proceeding at which he had an opportunity to cross-examine the witness as to substantially the same issues. Nevertheless, use of former testimony deprives the accused of an opportunity for the court to observe the demeanor of the witness.[8] In view of the importance appellate courts customarily attribute to the fact that the trial court or jury observed the witnesses, it is strange how both courts and text writers summarily dismiss his loss of opportunity when considering the use of former testimony.? One must conclude that necessity has more weight than the opportunity for the accused to have the court observe the witness. However, he should ask whether this must be so when the witness is merely unavailable under one of the provisions of the Manual rather than truly unavailable as would be, for instance, a dead witness.

The admissibility of former testimony against an accused should, and to a large extent does, depend on whether he has had a fair opportunity to face the issues at stake in the later proceeding. The requirement of paragraph 145*b* that the former testimony be the product of "a former trial of the accused in which the issues were substantially the same" helps to assure that the accused had a fair opportunity at the earlier proceeding to develop the issues he must face at the later one. Conversely, the Court of Military Appeals' holding in *United States v. Eggers*[10]

[8] Cee McBride v. State, 368 P.2d 925 (Alaska 1962), ***cert. denied,*** 374 U.S. 811 (1963), for an instance where former testimony was used while preserving some aspects of the witness' demeanor through presentation by tape recorder. In Alaska electronic recording devices are the exclusive means of recording trials.

[9] See, *e.g.*, WIGMORE, *op. cit. supra* note 3, § 1395: "The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, . . ."

[10] 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953).

that an investigation conducted under the provisions of Article 32, UCMJ, was a former trial for the purpose of admission of testimony of a subsequently unavailable witness,[11] makes it less likely that the accused had a fair opportunity to develop the issues he must face if the former testimony is offered in evidence. More detailed discussion of when the issues are the same and of the types of proceedings that generate former testimony is contained in Part III.

The evidence used to prove former testimony should have a high degree of reliability. It is difficult to justify the use of other evidence of the former testimony when an original or a copy of an official record of trial is available and unchallenged as to accuracy.[12] Despite the fact that the record of the former trial probably will always be available at a subsequent rehearing,[13] under the 1951 Manual this highly reliable evidence enjoys no preferred status over the oral testimony of a witness who heard the former testimony, even though under both the 1928[14] and 1949[15] Manuals the records of trial did enjoy preferential status. Greater reliability of former testimony could be assured by requiring the use of the official record of trial in cases recorded verbatim but allowing the testimony of witnesses who heard the former testimony in other cases. This subject is discussed in greater detail in Part IV.

The goal of simplicity of legal administration may have influenced the rules of former testimony. It is, for instance, much simpler to label as unavailable a witness who is more than one hundred miles from the place of trial than it is to expend the time, expense and effort necessary to produce him at the trial. In such an instance simplicity rather than necessity has dictated the legal rule. One might ask whether simplicity has then been achieved at the expense of justice.

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[11] *Id.* at 194, 11 C.M.R. at 194.

[12] See ACM 5570, Lindner, 7 C.M.R. 560, 567 (1952), *petition for review denied,* 2 U.S.C.M.A. 687, 7 C.M.R. 84 (1953), where, in connection with the prosecution's reliance upon the memory of a witness to establish former testimony, the board stated: "Although such procedure is now permissible (MCM, 1951, para. 145*b*), its use is fraught with danger and it ought not to be employed where, as here, the official record of the former trial was readily available at the rehearing."

[13] See NCM 202, Eastman, 9 C.M.R. 584 (1953).

[14] Manual for Courts-Martial, U.S. Army, 1928, para. 117*b* [hereinafter cited as MCM, 1928, and referred to as the 1928 Manual].

[15] Manual for Courts-Martial, U.S. Army, 1949, para. 131*b* [hereinafter cited as MCM, 1949, and referred to as the 1949 Manual].

D. *FORMER TESTIMONY'S UNIQUE IMPORTANCE IN THE MILITARY COURT SYSTEM*

A combination of circumstances causes the military court system to be more reliant on the use of former testimony than is any civilian court system. Not only are military personnel stationed throughout the world, but they move from one location to other often distantly removed ones at relatively frequent intervals. The military appellate system with its provision for automatic appeal and free counsel produces a large number of rehearings. Frequently these rehearings take place thousands of miles from the original place of trial. If the original trial was held in a foreign country and the rehearing in the United States, there is no power to compel the attendance of foreign witnesses at the rehearing. Furthermore, it is obvious that a higher mortality rate is to be expected of witnesses within the military court system in wartime than would ordinarily be encountered by a civilian court system.

E. *RELATED TOPICS*

In the absence of rehearings there would be relatively little need to use former testimony in the military court system. An excellent treatment of that topic is to be found in "Rehearings Today In Military Law"[16]

Another subject closely related to former testimony is depositions. The only reliable current treatment of that subject as it applies to courts-martial is to be found in the evidence textbook used at The Judge Advocate General's School.[17]

F. *PROBLEMS CONSIDERED*

In the following part a short excursion will be made into the historical development of the rules of former testimony in both England and the United States. The early development of former testimony is of considerable importance because in it lies the answer to related constitutional problems. Attention is also devoted to developments in civilian courts because the military rules relating to former testimony are closely related to the civilian ones.

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[16] *See* Clausen, *Rehearings Today in Military Law,* 12 MIL. L. REV. 145 (1961).

[17] See U. S. DEP'T OF ARMY, PAMPHLET NO. 27-172, MILITARY JUSTICE—EVIDENCE 282-308 (2d ed. 1962).

In the light of historical developments consideration will be given to the kinds of proceedings that generate former testimony in the military court system, the procedural problems raised thereby, some special types of former testimony, the effect of the failure of the counsel at the former trial to make objections, and the jurisdictional status of former trials.

II. BACKGROUND

A. *HISTORICAL*

1. *England.*

English case law during the century and a quarter preceding the adoption of the United States Constitution clearly established the use of former testimony in both civil and criminal hearings. There emerged a right by the party against whom former testimony was used to have an opportunity to cross-examine the witness at some stage of the proceedings. A brief consideration of a few of the more significant English cases between 1666 and 1790 gives an adequate, albeit incomplete, indication of the law of former testimony in England at about the time of the adoption of the Sixth Amendment of the United States Constitution.

In ***The*** *Trial of Lord Morley*[18] the Solicitor General desired to read the former testimony (called depositions by the reporter) of three witnesses who had testified before a coroner and subsequently died. Although it was properly established that the witnesses were dead, that the testimony had been under oath, and the written evidence of it unaltered, Lord Morley objected because he was denied a face-to-face encounter with the witnesses. Nevertheless, the evidence was admitted.[19] On the other hand, when the Solicitor General attempted to introduce the former testimony of a witness who was absent but not dead, the court ruled that because there was no evidence that the witness' absence had been procured by the accused the evidence must be excluded.[20]

From ***The*** *Trial of Lord Morley* it can be concluded that by 1666 the use of former testimony in criminal cases was well established in England when a witness was either dead or absent

[18] How St. Tr. 770 (1666).

[19] Id. at 776.

[20] See *id.* at 776–777. Accord, The Trial of Henry Harrison, 12 How St. Tr. 834 (O.B. 1692). The former testimony was admitted in evidence upon proof that the witness' absence was procured by the accused. *Id.* at 852.

by procurement of the accused. An inchoate right to confrontation is also apparent, In the cases that follow this right becomes fully established and upon these cases rests the extent of the accused's right to confrontation under both the Sixth Amendment and most state constitutions.

Ordinarily, the English courts did not permit the use of former testimony from the trial of another individual, although, as **a** discretionary act, the court might allow the accused this privilege. In *The Second Trial of Titus Oakes* [21] the accused, on trial for perjury, proposed to use the testimony given at the trial of Sir George Wakeman by a witness who was absent from the Oakes trial. The following pithy exchange took place :

> Oakes: Will what he said at any other trial be evidence here?
>
> Lord Chief Justice: Look you, though in strictness, unless the party be dead, we do not use to admit of any such evidence; yet if you can prove anything he swore at any other trial, we will indulge you so far.[22]

Although in *The Proceedings Against Sir John Fenwick Upon a Bill* of *Attainder for High Treason* [23] the former testimony of a witness, whose absence may have been procured by Sir John's wife, was admitted in evidence, it is significant that a substantial minority of the House of Lords condemned such use on the ground that similar testimony would not have been admissible in courts of law because the accused had been denied the right to encounter the witness face to face so as to have the advantage of cross-examination. Unfortunately for Sir John the majority was not convinced that it was bound by the rules of **a** court of law and soon thereafter he was beheaded.[24]

In *Rex v. Baker* [25] a conviction for maintaining a lottery was affirmed despite the accused's objections to the denial of the right to cross-examine witnesses whose former testimony before two justices of the peace had been admitted in evidence. However, in *Rex V. Vipont* [26] it was stated that the *Baker.* case was not a precedent for the proposition that the accused could be denied the opportunity to be present when the testimony was given because in the latter case the court had supposed that the accused was present when the witness testified at the former proceeding.[27] In

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[21] 10 How. St. Tr. 1228 (K.B. 1685).
[22] *Id.* at 1286.
[23] 13 How. St. Tr. 538 (H.C. 1696).
[24] See *id.* at 756–58.
[25] 2 Strange 1240, 93 Eng. Rep. 1136 (K.B. 1746)
[26] 2 Burr. 1163, 97 Eng. Rep. 767 (K.B. 1761).
[27] See *id.* at 1165, 97 Eng. Rep. at 768.

Vipont Lord Mansfield stated: "In a Conviction, the Evidence must be set out: that the court may judge it: And it must be given in the Presence of the Defendant, that he may have an Opportunity of Cross-examining." [28] The conviction of Vipont and others for unlawful combination of workmen in the woolen industry was reversed because they had been denied the right to cross-examine.[29]

The English case law during the period of more than a century preceding the adoption of the United States Constitution bears out Dean Wigmore's assertion that confrontation and cross-examination are the same right under different names.[30] Awareness of these antecedents gives a better understanding of the scope and limitations on the use of former testimony. It does not, of course, answer the question of whether restrictions should be put on its use by prosecutors even though the use is within constitutional bounds.

2. *United States.*

a. *Federal.* The Sixth Amendment of the United States Constitution guarantees that: "In *all* criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." (Emphasis added.) On its face this provision would appear to be a bar to the use of former testimony against the accused. That it has not, has been for reasons primarily historical. Courts and text writers considering the problem have concluded that the constitutional guarantee was not intended to create a new right but to assure the continuation of what had become by 1789 a fairly entrenched common law right. Today Wigmore's interpretation of that right is widely accepted:

> There never was at common law any recognized right to an indispensable thing called Confrontation *as distinguished from Cross-examination.* There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the

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[28] *Id.* at **1165, 97** Eng. Rep. at **768.**

[29] *Id.* at 1166, 97 Eng. Rep. at **769.** ***But see*** King v. Eriswell, **3** T.R. **707, 103** Eng. Rep. 815 (K.B. **1790).** In a civil suit an equally divided court upheld the admission of the former testimony of a witness who became insane before the trial even though the opposing party had had no opportunity for cross-examination. *Id.* at **726,** 100 Eng. Rep. **825.** Two of the justices would have reached opposite results because the evidence was hearsay and there had been no opportunity for cross-examination. *Id.* at **712, 726, 100** Eng. Rep. **818, 825.** However, this case was overruled within a few years and appears to be a sport in the development of the right of an opportunity to cross-examine. See R. v. Ferry Frystone, **2** East **54** (K.B. 1801).

[30] See **5** WIGMORE, *op. cit. supra* note 3, §§ **1395–96.**

> same right under different names. . . . It follows that, if the accused has had the benefit of cross-examination he has had the very privilege secured to him by the Constitution.[31]

To put it another way, the Sixth Amendment really means: In *one* criminal prosecution the accused shall enjoy the right to be confronted with the witnesses against him.[32] The federal courts have not excluded the former testimony of unavailable witnesses given at the original trial and certain other proceedings and neither have most state courts.

There is a surprising paucity of significant decisions within the federal court system on former testimony as compared to the number of state court decisions on the subject.[33]

The seminal case involving the use of former testimony in the federal courts is *United States v. Macomb.*[34] The scholarly opinion of the trial judge in that case appears to have been adopted, with somewhat less than due credit, by the Supreme Court in the landmark case a *Mattox v. United States.*[35] This latter case marked the first time that the Supreme Court in a criminal case, other than when the absence of the witness had been procured by the accused,[36] ruled on the admissibility of former testimony.

Former testimony is admissible in federal criminal trials if the original proceeding was conducted under oath in the presence of the accused, provided he had an opportunity to cross-examine the witness, and the witness is unavailable at the subsequent proceedings.[37] Novel issues as to the use of former testimony in federal courts arising today would "be governed . . . by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[38] This broad mandate, within constitutional limitations, provides the courts with what amounts to a carte blanche in this

[31] 5 WIGMORE, *op. cit.* **supra** note **3,** § 1397. *But see* **2** WHARTON, CRIMINAL EVIDENCE § **670** (11th ed. **1935)** where the author casts doubt on how firmly established the right to cross-examination was in England at the time of the adoption of the United States Constitution.

[32] *Contra*, Blackwell **v.** State, **79** Fla. **709,** 756, **86 So. 221,** 238 (1920) (Browne, C. **J.,** dissenting).

[33] ***See*** Michelson v. United States, **335 U.S. 469, 486** (1948), for probable reasons.

[34] **26** Fed. Cas. **1132** (No. 16,702) (C.C.U. Ill. **1851).**

[35] **156 U.S. 237 (1895).**

[36] See Reynolds v. United States, **98 U.S. 145 (1878).**

[37] See **31A** C.J.S. **EVIDENCE** §§ **384–402 (1964)** for a current summary of federal cases involving former testimony. No one case sets forth all requirements for admissibility.

[38] FED. **R.** CRIM. **P.** 26.

area. Currently under consideration by the United States Supreme Court is the adoption of the *Uniform Rules of Evidence.*[39] Should these uniform rules be adopted it is unlikely that Rule 63(3) pertaining to former testimony would be adopted in its present form which appears to be unconstitutional insofar as it applies to criminal cases.[40]

b. *State.* There are numerous decisions relating to the use of former testimony in state courts. In general, these cases set forth rules for the use of former testimony similar to those in federal courts. However, there are variations from state to state, which often can be traced to statutes rather than interpretation of the common law from state to state. Sometimes these statutes have been passed in specific response to court decisions relating to former testimony which a legislature thought to have been wrongly decided.[41] Distinctions are commonly made between the use of former testimony in civil suits and criminal trials.

It is beyond the scope of this article to enter the labyrinth of state rules relating to the use of former testimony.[42] Before leaving this subject, however, recognition should be made of the fact that in most, if not all, states there is a constitutional guarantee of the right of the accused to confront witnesses that is either worded similarly to the Sixth Amendment or, frequently, as a right to meet all witnesses "face to face." Interestingly, after a few false starts[43] state courts have reached the same conclusion as the federal courts—the right to confrontation must be interpreted by looking at the practices under the English common law. As in many other areas of evidence, Wigmore's vigorous treatment of the law of former testimony has probably influenced judicial acceptance.[44]

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[39] See *Rules of Evidence: A Preliminary Report on the Advisability and Feasibility* of *Developing Uniform Rules* of *Evidence for the United States District Courts,* 30 F.R.D. 73 (1962).

[40] See *Uniform Rule* of *Evidence* 63(3) which would authorize the admission in evidence of former testimony even though the accused had no opportunity for cross-examination at the earlier proceeding. In a comment following the rule the drafters note that there is a constitutional problem but do not attempt to resolve it.

[41] Glicksberg, *Former Testimony Under the Uniform Rules of Evidence and in Florida,* 10 U. FLA. L. REV. 269, 283 (1957).

[42] See generally Hale, *supra* note 2, for an excellent summary of such rules in a particular jurisdiction and Annot., 15 A.L.R. 495 (1921), as supplemented by Annot., 159 A.L.R. 1240 (1945), for a summary of the use of former testimony in all states.

[43] *Compare* Finn v. Comm., 5 Rand. 701 (1827), *with* 5 WIGMORE, *op. cit. supra* note 3, § 1398.

[44] See generally 5 WIGMORE, *op. cit. supra* note 3, §§ 1360–1420.

c. *Military.* Prior to 1920, when Article of War 50½ [45] authorized rehearings, there were relatively few occasions for the use of former testimony.:" However, opinions of The Judge Advocate General written as early as 1865 and 1868 set forth rules for those occasions when former testimony from an earlier trial or investigation was admissible. Such testimony, other than the proceedings of some courts of inquiry, could be introduced only with the cnnsent of the opposite party.':

The proceedings of courts of inquiry probably were the primary source of former testimony prior to the promulgation of Article of War 50½. Originally courts of inquiry could be ordered only when demanded by the accused.+ However, Article 92 of the Articles of War of 1806 [49] made provision for ordering courts of inquiry upon direction of the President.

Article 115 of the American Articles of War of 1874 [50] contained substantially the same provisions as the 1806 act. Once **a** court of inquiry had been held, under all three versions of the Articles of War (1786, 1806 and 1874) the proceedings of the court of inquiry were admissible before a court-martial if the witness was unavailable and the case was neither capital nor extended to the dismissal of an officer. The term "proceedings" apparently meant "testimony." [51]

Between 1920 and 1951 the former testimony from the proceedings of a court of inquiry was admissible only with the consent of the accused."

Depositions taken before justices of the peace in the presence of the accused became a source of a form of former testimony as early as 1786.[53]

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[45] Act of June 4, 1920, ch. 227, subch. **2,** § 1, 41 Stat. 787, 797.

[46] See generally Clausen, *supra* note 16, for an extensive treatment of the subject of rehearings.

[47] See DIG. OPS. JAG 1912 *Discipline* para, XI A 13 (Oct. 1868). See also IVES, A TREATISE ON MILITARY LAW 310–11 (2d ed. 1881).

[48] Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96. This statute adopted the American Articles of War of 1776, as amended, American Articles of 1786. Article 26 of the 1786 amendment sets forth the rules governing courts of inquiry.

[49] Act of April 10, 1806, ch. 20, art. 92, 2 Stat. 359, 370.

[50] Act of June 22, 1874, ch. 5, § 1342, art. 115, Rev. Stat. 228, 240 (1875).

[51] See WINTHROP, MILITARY LAW AND PRECEDENTS 532 & n. 87 (2d ed. 1920 Reprint).

[52] See Act of June 4, 1920, ch. 227, subch. 2, § 1, 41 Stat. 787, 792.

[53] Act of Sept. 29, 1789, ch. 25, § 4, 1 *Stat.* 96 adopting American Articles of War of 1776, as amended, American Articles of 1786, art. 10.

The 1928 Manual [54] provided for the use of former testimony in trials by courts-martial and substantially the same provision was contained in the 1949 Manual.[55]

The 1951 Manual purports to follow the 1949 Manual's provisions as to former testimony.[56] However its provisions vary from those of the 1949 Manual: The 1951 Manual specifically provides for confrontation by the accused; it renders harmless testimony otherwise admissible if the accused fails to object; it provides that limitations on the admission of former testimony do not apply if the testimony is admissible under some other evidentiary rule; it excludes former testimony at a trial that was void for lack of jurisdiction; and it eliminates the preferred status of records of trial and stenographic reports over testimony of witnesses in proving former testimony.

B. *CIVIL-CRIMINAL DISTINCTIONS IN FEDERAL AND STATE COURTS*

Discrimination must be exercised in evaluating the comments of text writers and courts deciding issues pertaining to former testimony. Although, in many instances, the rule might be the same whether a civil action or a criminal trial was involved; in other instances the rule, often for constitutional reasons, is different between the two types of trials. Some jurisdictions allow former testimony to be introduced in evidence in a civil suit, even though the party against whom it is introduced never had an opportunity to cross-examine the witness. This might occur because the present party is either a successor in interest to a party who had the opportunity to cross-examine or because a party who for some other reason had a motive similar to the party against whom the former testimony is introduced had an opportunity to cross-examine.[57] Under no circumstances would a rule denying the accused an opportunity to cross-examine the absent witness be applied in a criminal case.

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[54] MCM, 1928, para. 117*b*.

[55] MCM, 1949, para. 131*b*.

[56] LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, at 232–33.

[57] *But see* MODEL CODE OF EVIDENCE rule 511 (1942) which would abolish the requirements for identity of parties and issues and would make the former testimony admissible when relevant in both civil and criminal cases.

111. TYPES OF PROCEEDINGS THAT GENERATE FORMER TESTIMONY

A. *GENERAL PRINCIPLES*

Not every prior trial is a source of former testimony, even though some of the testimony at a prior trial might be highly relevant to the proof of an offense involved in a later proceeding.

1. *Sameness of Party.*

Paragraph 145*b* of the 1961 Manual requires that former testimony, to be admissible, must have been generated at a former trial of the accused or at a court of inquiry [58] at which the accused was a party (or consents). There is no requirement that the other party to the former trial, the United States, be the same. It is unclear as to whether the former trial must have been a criminal trial although "a former trial of the accused" (emphasis added) and a requirement that the issues must have been substantially the same tends to indicate that it must have been. The 1928 [59] and 1949 [60] Manuals imposed the same requirements. However, the Articles of War during the period between 1920 and 1951 required the consent of the accused prior to making use of former testimony given before courts of inquiry.[61]

The requirement that the accused must have been the accused at the former trial is a means of guaranteeing his constitutional right of cross-examination [62] (i.e., confrontation) and may be waived by his failure at the former trial to object.[63] However, in no published case under the UCMJ has the accused claimed he was not the accused at the former trial.

The Manual rule requiring the testimony to have been generated at a former trial of the accused is substantially identical to the rule in every criminal jurisdiction in the United States, both Federal [64] and State.[65] The rule for civil suits in American courts

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[58] See UCMJ art. 50.

[59] See MCM, 1928, para. 117*b*.

[60] See MCM, 1949, para. 131*b*.

[61] See Act of June 4, 1920, ch. 227, subch. 2, § 1, 41 Stat. 787, 792. Article 27 was not amended by act of June 24, 1948.

[62] See GILBERT, EVIDENCE 68 (1726) (quoted in 3 WIGMORE, EVIDENCE § 1386 (3d ed. 1940)).

[63] MCM, 1951. para. 145*b*.

[64] See United States v. Concepcion, 31 Philippines 182 (1916); United States v. Remegio, 35 Philippines 719 (1916).

[65] See 20 AM. JUR. *Evidence* § 689 (1939).

is less consistent and sometimes merely requires substantial identity of parties or a substantial identity of interest.[66]

One of the more startling proposals of the *Model Code* of *Evidence* was the elimination of the requirement that the former testimony have been given at a former trial of the accused.[67] The *Uniform Rules* of *Evidence* have the same effect; the drafters recognized the constitutional problem but decided to make no attempt to resolve it.[68] One commentator has expressed the belief that the Constitution does not bar the testimony, if someone "situated similarly to the present opponent" had an opportunity to cross-examine the witness at the former proceedings.[69] However, the contrary view is nearly unanimous. Should the Uniform Rules be adopted for use by the United States District Courts as has been proposed,[70] the rule as to former testimony would have to be modified. Any revision of the Manual made to bring it in conformity with new rules of evidence in the United States District Courts could be expected to retain the requirement that the testimony have been given at a former trial of the same accused.[71]

The fact that the accused was tried jointly with another at the original trial and is tried alone at the rehearing would not appear to affect the admissibility of former testimony from the joint trial at the rehearing."

It should be noted that paragraph **145b** of the Manual imposes identical requirements as to the same accused when depositions taken for use or used at a former trial are used at a subsequent trial.

2. *Sameness* of *Issues.*

a. *Same offenses involved.* Paragraph 145*b* of the Manual requires not only that the witness, whose former testimony is sought to be used, has been a witness at a former trial of the accused

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[66] See Lyon v. Rhode Island Co., 38 R.I. 252, 94 A. 893 (1915); Comment, *Former Testimony as Evidence,* 25 YALE L. J. 405 (1916).

[67] MODEL CODE OF EVIDENCE rule 511 (1942).

[68] See UNIFORM RULE OF EVIDENCE 63(3), and the comment following it.

[69] See Falknor, *Former Testimony and the Uniform Rules: A Comment,* 38 N.Y.U.L. REV. 651, 659–60 (1963).

[70] See *Rules* of *Evidence: A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts,* 30 F.R.D. 73 (1962).

[71] *Compare* Army Act, 1955, 4 Eliz. 2 § 200 whose apparent effect is to make admissible former testimony from proceedings in which the accused was not a party *with* MCM, 1951, para. 145*b*.

[72] See Commonwealth v. Gallo, 275 Mass. 320, 175 N.E. 718 (1931).

but that at that trial the issues have been "substantially the same,"[73] This requirement is another approach to guaranteeing the accused's constitutional right of cross-examination (confrontation).:' It is apparent that if the core of confrontation is the opportunity to cross-examine,[75] the lack of a requirement of substantial identity of issues would make this right a hollow one indeed. In practice, the right is so basic that it has not been in issue in any published case under UCMJ.[76]

Acceptance of this principle by civilian criminal jurisdictions is co-extensive with the acceptance of the rule that the testimony must have been generated at a former trial of the accused.:' The same problems are posed by the *Model Code* of *Evidence* and the *Uniform Rules* of *Evidence.*

The Manual provides no standard for measuring whether or not the issues are in fact substantially the same at the two trials. The typical case probably is clear from the charges and specifications. In a case where there is doubt as to whether the issues are substantially the same it might be possible to resolve the doubt by applying the standards developed to measure former jeopardy and *res judicata.*

b. *Same theory of prosecution as at the earlier trial.* Thus far, "issues" has been treated as being synonymous with "offense." Would the issues be substantially the same if the offense remained the same but the theory of prosecution changed? It would seem that any change of theory which was objectionable because the accused had not had an opportunity to cross-examine the witness as to the particular theory at the earlier trial might be inadmissible. However, dicta in *United States v. Eggers*[78] indicate that an objection to admissibility on this ground might not re-

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[73] MCM, 1951, para. 145*b*, used the phrase "in which the issues were *substantially the same*" (emphasis added) in reference to former testimony and "on the same issue" in reference to dispositions taken for use or used at an earlier trial. In contrast, MCM, 1928, para. 117*b* and MCM, 1949, para. 131*b* both use the phrase "where the issues were the same" in reference to former testimony, whereas they use the same phraseology as MCM, 1951, para. 145*b* in the ref-rence tu depositions. It is suggested that in all of these instances the requirement is that the issues he substantially the same.

[74] See Hale, *The Missouri Law Relative* to **the** *Use* of Testimony *Given at a Former Trial,* 14 ST. LOUIS L. REV. 375, 383 (1929).

[75] See 5 WIGMORE, *op. cit. supra* note 62, § 1396–97.

[76] *But* ***see*** Cnited States v. Johnson, 76 F. Supp. 542 (M.D. Pa. 1947), *aff'd* 165 F.2d **42** (3d Cir. 1948), *cert. denied,* 332 U.S. 852 (1948), *rehearing denied,* 333 U.S. 834 (1948).

[77] See generally 3 WIGMORE, *op. cit. supra* note 62, §§ 1386–88.

[78] 3 U.S.C.M.A. 191, 193–94, 11 C.M.R. 191, 193–94 (1953).

ceive serious consideration. In some instances, the earlier testimony under a different theory of prosecution probably might be excluded upon a timely objection as to its relevancy.

B. *FORMER COURT-MARTIAL*

An analysis of the origin of the former testimony in cases raising the issue before the Court of Military Appeals and boards of review and published in volumes 1–33 of the *Court-Martid Reports* reveals that in approximately 84 percent of the cases at both appellate levels the original hearing of the same case generated the former testimony used at a rehearing.[79]" Other sources included proceedings under Articles 32[80] and 50,[81] UCMJ, and testimony given earlier during the same trial at an out of court hearing. The most likely explanation for the preponderance of this source is that, usually, there is a relatively long lapse of time between the original trial and a rehearing of the same case. During this interval it is more likely that the accused will be transferred, die or otherwise become unavailable more frequently than is likely during the usually shorter interval between an investigation or inquiry and a trial. It was stated in Part II that former testimony would be used very infrequently within the military court system if there were no rehearings. The statistics set forth above give some indication of this, and in all probability, the use of former testimony in rehearings accounts for a much greater percentage of its total use than the 84 percent appellate figure indicates. Probably a smaller percentage of the former testimony used at rehearings results in appellate decisions than former testimony generated by other sources. This is because the law is better established as to the use at rehearings of testimony from the original hearing than it is as to the use of former testimony from other sources.

C. *TOTALS BY OTHER COURTS OF COMPETENT JURISDICTION*

The 1928 Manual[82] made former testimony before a "Federal or State court or before a court-martial" admissible before a

[79] Eleven cases decided by the Court of Military Appeals were rehearings as were sixteen cases (including two later decided by the Court of Military Appeals) in which boards of review opinions were published. In two Court of Military Appeals cases and in three from boards of review, proceedings under articles 32 and 50, UCMJ, and an out of court hearing, generated the former testimony.

[80] UCMJ art. 32.

[81] UCMJ art. **50.**

[82] MCM, 1928, para. 117*b*.

court-martial, if it was otherwise competent. The 1949 Manual [83] contained similar provisions but changed the terminology to "civil or military court" and the same terminology is contained in the 1951 Manual.[84] It is probable, but by no means certain, that no change from the provisions of the 1928 Manual was intended and that the drafters of the 1949 Manual merely were attempting to achieve conciseness.

A possible explanation of the change could be that the drafters of the 1949 Manual concluded that there never could be former testimony before a federal court which would qualify as former testimony without the military trial being objectionable on grounds of former jeopardy. However, one would have to conclude that they failed to consider the possibility of using former testimony given at a preliminary hearing.

The meaning of the changed terminology could become crucial in connection with possible use of former testimony from a trial in a foreign court. It is the opinion of the writer that such testimony would be inadmissible because "civil . . . court" means "Federal or State court."

No published decision since the inception of the UCMJ has raised any issue relating to the use of former testimony before a nonmilitary tribunal. In view of this and current restraints on the retrial of individuals tried in state courts,[85] it is believed unlikely that this provision of paragraph 145*b* will be used. However, it should be noted that there is nothing to preclude the use of former testimony given at a state preliminary hearing, by either the government or the accused, and that regulations do not preclude, but merely render less likely a trial for an offense that has already resulted in trial by a state court.

D. *MILITARY PROCEEDINGS IN OTHER THAN TRIAL COURTS*

In addition to former testimony generated at earlier trials by courts-martial, there are at least two other types of military proceedings with a potential for generating former testimony. Both can result in the production of a verbatim record of sworn testimony taken in the presence of an accused represented by counsel, who had an opportunity to cross-examine the witnesses. First,

[83] MCM, 1949, para. 131*b*.
[84] MCM, 1951, para. 1450.
[85] See Army Regs. No. **22–12 (24** April 1938).

Article 50, UCMJ [86] and paragraph 145*b*, MCM, 1951, specifically authorize use of the proceedings of a court of inquiry as former testimony. Judicial interpretation of paragraph 145b by the Court of Military Appeals in *United States* v. *Eggers* [87] has resulted in the admissibility of testimony taken during an investigation under Article **32,** UCMJ.[88]

Secondly, hearings conducted under the provisions of AR 15–6,[89] sometime generate testimony which fulfills many of the criteria for the admission of former testimony. However, the plain meaning of paragraph 145*b*'s phrase "testified in either a civilian or military *court* at a former *trial* of the accused'' (emphasis added) would seem to preclude use of testimony generated by AR 15–6 proceedings as former testimony. Superficial comparison of an Article 32 investigation with a proceeding under AR 15–6 in which the testimony was recorded verbatim, under oath, on issues substantially the same as at the later trial, in the presence of an accused represented by counsel who had sufficient opportunity to conduct cross-examination, might suggest, in view of the holding in *Eggers*, that testimony generated at the AR 15–6 inquiry was admissible as former testimony despite the apparent plain meaning of the Manual. Such a conclusion would be erroneous. An Article **32** investigation, unlike a proceeding under AR 15–6, closely resembles the preliminary hearing common to most civilian criminal jurisdictions. Hundreds of years of precedent within the Anglo-American legal systems [90] have made routine in most jurisdictions the use of former testimony generated at preliminary hearings when the usual requirements as to the administration of oaths, the unavailability of the witness, and the rights of the accused to cross-examine [91] have been fulfilled.[92]

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[86] UCMJ art. 50.

[87] 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953). *Contra* ACM 5619, Woodworth, 7 C.M.R. 582, 585 (1952) : "It is thus readily apparent that the investigative process under Article 32 partakes of few, if any, of the fundamental characteristics of a *judicial* proceeding, nor can it be considered an adversary proceeding of any kind, and we must conclude that testimony received during such an investigation, even though apparently the requirements of confrontation, oath, and cross-examination have been met, is inadmissible during the trial of the case."

[88] UCMJ art. 32.

[89] Army Regs. No. 15–6 (3 Nov 1960).

[90] See 5 WIGMORE, *op. cit. supra* note 62, § 1375 and n. 1–5 (Supp. 1962).

[91] See People v. Sperduto, 221 App. Div. 577, 224 N.Y.S. 529 (S. Ct. App. Div. 1927).

[92] However, pre-1951 military cases excluded evidence of former testimony generated at the pretrial investigation as incompetent. See DIG. OPS. JAG 1912–1940, § 395(6) (1924).

Insofar as the Court of Military Appeals, in *United States v. Eggers*,[93] carefully limited the effects of its holding to the facts of that case. it is important to know that in that case: a. the unavailable witness was dead; b. the Article *32* investigation was recorded verbatim; c. the accused was present with counsel; d. the accused and his counsel subjected the witness to searching cross-examination; e. the former testimony was proved by the verbatim transcription of the testimony at the investigation. At least one commentator [94] has concluded that testimony generated at an Article **32** investigation should be used with great caution. The Court left for "future consideration questions involving pretrial testimony less thoroughly sifted than was involved there —or wholly uncross-examined, although an opportunity for such testing has been afforded." [95] In the eleven years subsequent to this decision the Court has had no opportunity to decide the questions left open.'" Thus, it is by no means certain that if in the future a case "involving pretrial testimony less thoroughly sifted," such as in ACM 5619, *Woodworth*,[97] were to be decided that the results would be different from those handed down by a board of review in *Woodworth* prior to *Eggers*.

The appellate defense counsel in *Eggers* urged the Court to bar the use of former testimony generated by an Article 32 investigation on the ground that the motives of defense counsel are different at the investigation (discovery) as opposed to the trial (testing).[98] The Court treated this argument somewhat cavalierly as "a right unguaranteed to defense counsel." [99] One can concede the soundness of the Court's decision in view of the im-

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[93] 3 U.S.C.M.A. 191, 194, 11 C.M.R. 191, 194 (1953).

[94] See LARKIN & MUNSTER, MILITARY EVIDENCE 271 (1959).

[95] United States v. Eggers, 3 U.S.C.M.A. 191, 194, 11 C.M.R. 191, 194 (1953).

[96] Compare NCM 36 01660, Finch, 22 C.M.R. 698, 701–04 (1936) where the accused was represented at a pretrial investigation, not under Article 32, UCMJ, by lay counsel. The board held that the testimony at the investigation met the test of Article 50(a), UCMJ, and was admissible if it met the tests of *Eggers* and of United States v. Drain, 4 U.S.C.M.A. 646, 16 C.M.R. 220 (1954) (deposition was not admissible in a general court-martial if accused not represented by qualified counsel at its taking). The Court found that the testimony did not meet the *Drain* test and, therefore, its admission was error, although nonprejudicial. The board did not decide whether the testimony met the test of *Eggers* but the thrust of the opinion indicates that it probably did in its opinon.

[97] 7 C.M.R. 582 (1952).

[98] See United States v. Eggers, 3 U.S.C.M.A. 191, 193, 11 C.M.R. 191, 193 (1953).

[99] See *id.* at 194, 11 C.M.R. at 194.

pressive civilian precedents [100] and, nevertheless, regret that the Court did not take a position that would have safeguarded the accused from having to choose between tipping his hand to the government at the investigation or risking the serious consequence of not having tested the evidence by cross-examination in the event the witness is not available at the time of trial. Even though the absence of further cases since 1953 indicates that trial personnel have been extremely cautious in attempting to extend the precedent beyond the narrow limits of *Eggers,* a prudent defense counsel, nevertheless. should weigh the risks before deciding during an Article 32 investigation to forego until trial a thorough cross-examination of an elderly or sickly witness or even one who is likely to be unavailable at trial for reasons other than death.

The authority to use testimony generated before courts of inquiry as former testimony extends back to 1786 in the United States Army.[101] However, courts of inquiry have been an insignificant source of former testimony under the UCMJ.[102]

E. *CONSIDERATIONS WHEN THE PROPONENT IS THE DEFENSE RATHER THAN THE PROSECUTION*

There are four logical possibilities that could provide bases for raising objections to the admission of former testimony: the prosecution objected to admission of defense testimony and was overruled; the defense objected to the admission of prosecution testimony and was sustained; the prosecution objected to the admission of defense testimony and was sustained; the defense objected to the admission of prosecution testimony and was overruled, The first two possibilities, of course, do not present legally appealable issues. All of the published opinions under the UCMJ raising the issue of admissibility of former testimony deal with the fourth possibility. The complete absence

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[100] See 6 WIGMORE, *op. cit. supra* note 62, § 1375 and nn 1–5 (Supp. 1962).

[101] See American Articles of War of 1776, as amended, American Articles of 1786, art. 26 (re-enacted by Act of Sept. 29, 1789, ch. 26, § 4, 1 Stat. 96).

[102] See United States v. Sippel, **4** U.S.C.M.A. 30, 15 C.M.R. 50, 55 (1954) where the accused, a lawyer, announced to a court of inquiry that he knew his testimony could not be used before a court-martial. **A** defense of ignorance by Colonel Sippel might have been more in point as the testimony was successfully used before a court-martial by being admitted under the confession-admission exception to the hearsay rule. Its status as former testimony was irrelevant. See NCM 56 01660, Finch, 22 C.M.R. 698 (1956), where the testimony at an investigation mas categorized as being within the purview of art. 50(a) UCMJ.

of a published appeal over the exclusion of defense-offered former testimony would seem to justify a conclusion that law officers have been quite liberal in admitting former testimony offered by the defense.

Paragraph **145b** of the Manual makes three distinctions between prosecution and defense-offered former testimony. Only the prosecution is bound by the rule that the accused must have confronted, with an opportunity for cross-examination, the witness whose former testimony is offered. This additional burden on the prosecution is required by the Sixth Amendment. There is no requirement that the United States have been a party to the former trial but that trial must have been of the accused and the issues substantially the same.

The second distinction is that only the prosecution, not the accused, in a capital case is limited to introducing the former testimony when the witness is dead, insane, or beyond the reach of process.[103] The accused may introduce the former testimony in a capital case for these reasons and, in addition, if the witness is too ill or infirm to attend the trial, more than 100 miles from the place where the trial is held, or cannot be found.

The final distinction is that the introduction of the record of the proceedings of a court of inquiry by the prosecution in a capital case or a case extending to the dismissal of an officer prevents either death or dismissal from being adjudged as the result of a conviction under the specification to which the evidence related. No such result follows from the introduction of the record of the proceedings of a court of inquiry by the defense.

IV. THE PROCEDURAL PROBLEM

A. *PROVING FORMER TESTIMONY THROUGH A FORMER RECORD OF TRIAL*

Paragraph 145*b* of the Manual provides: "The testimony of a witness who has testified at a former trial may be proved by the official or otherwise admissible record of a former trial, by an admissible copy of so much of such record contains the testimony. . . ." The proponent should comply with the provisions of

[103] See MCM, 1928, para. 117*b*, where such testimony was limited to when the witness was "dead or beyond the reach of process." The language of the current Manual first appeared in MCM, 1949, para. 131*b*.

paragraph **143b(2)** of the Manual which specifies the method of authenticating official records. Of course, a stipulation between the parties as to the authenticity of the former record of trial precludes the need for compliance with paragraph **143b(2).**

Despite the rather simple requirements of proof of the authenticity of the former record of trial the several cases of defective authentication discussed in the next paragraph reached boards of review and the Court of Military Appeals during **1953** and **1954.** A **1961** case, United States v. *Stivers,*[104] also contained such a defect, but the case was decided on other grounds and no holding was made by the Court in connection with the defective authentication. However, in this regard, the Court stated: "Suffice it to say that a mere unsworn declaration by the trial counsel concerning the identity of the otherwise unidentified exhibit cannot serve that purpose." [105]

CM **353019,** *Phillips,*[106] CM **351138,** *Niolu,*[107] and CM **350060,** *Fox,*[108] all involved situations in which the parties stipulated as to unavailability of witnesses, but not as to the authenticity of the unauthenticated records of trial. All three cases were set aside because the former testimony under these circumstances was mere hearsay. In CM **362713,** *Ray,*[109] there was neither a stipulation nor proper authentication of the record of the former trial but the board of review held that in the absence of objection there was a waiver. In CM **349776,** *Stein,*[110] the record was properly authenticated but there was no authentication of the attesting certificate and the defense objected because the prosecution had presented no evidence that the record had not been altered. Both grounds received quick disposition: The law officer could take judicial notice of the signatures on the attesting certificate;[111] if the defense had any knowledge of an alteration of the record it should have come forward with it.

In **1954** United States v. *Niolu,*[112] after an additional rehearing, reached the Court of Military Appeals. The Court, after in-

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104 12 U.S.C.M.A. 315, 30 C.M.R. 315 (1961).
105 *Id.* at 318, 30 C.M.R. at 318.
106 12 C.M.R. 265 (1953).
107 13 C.M.R. 189 (1953), *rev'd,* 15 C.M.R. 18 (1954).
108 13 C.M.R. 350 (1953).
109 13 C.M.R. 428 (1953).
110 14 C.M.R. 376 (1954).
111 MCM, 1951, para. 147*a*: "The principal matters of which a court may take judicial notice are as follows: . . . the signatures of persons authenticating records of the proceedings of military courts and commissions of the armed forces of the United States."
112 4 U.S.C.M.A. 18, 15 C.M.R. 18 (1954).

dorsing the general principle of using former testimony,[113] reversed the board of review's reversal of the conviction at the rehearing.[114] At that rehearing the trial counsel had announced to the court that it had been stipulated that the absent witnesses were more than one hundred miles from the place of trial and therefore, he was going to read "from the official record of the former trial as provided by paragraph 145*b*, Manual for Courts-Martial, United States, 1951."[115] The record was not introduced in evidence and the defense had ambiguously stated that he agreed "to the stipulation as to the present whereabouts of the witness."[116] The Court concluded that the obvious intent of the defense was to stipulate to the testimony.[117]

B. *PROVING FORMER TESTIMONY THROUGH A WITNESS*

Paragraph 145*b* of the Manual provides:

> The testimony of a witness who has testified at a former trial may be proved . . . by a person who heard the witness give the testimony and who remembers all of it, or the substance of all of it, that is relevant to the topic in question.

This represents a departure from the provisions of the 1928 and 1949 Manuals, both of which provided:

> If in any case other competent proof is not a:-ailable the former testimony of such a witness may be proved by any person who heard the same being given and who remembers all or substantially all of it."[118]

The change appears to have been an attempt to make the military rule as to mode of proof of former testimony consistent with the federal rule and the rule in all but a few states.",[119]

In approximately seven states the best evidence rule is applied to exclude parol proof in favor of the written record.'"[120] Despite the fact that only a small minority of jurisdictions apply the rule, it appears to be far superior for proving former testimony in trials

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[113] See *id.* at 20, 15 C.M.R. at 20.
[114] *Id.* at 22, 15 C.M.R. at 22.
[115] See *id.* at 19, 13 C.M.R. at 19.
[116] *Id.* at 19, 15 C.M.R at 19.
[117] See *id.* at 22, 15 C.M.R. at 22.
[118] MCM, 1928, para. 117*b*; MCM, 1949, para. 131*b*.
[119] See LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES. 1951, at 232: "[I]t has been indicated that former testimony may be proved by any person who heard it being given, even when the record of former trial is available to prove the testimony. The best evidence rule does not apply with respect to proving former oral testimony. See Meyers v. United States, 171 F.(2d) 800, 812; [4] WIGMORE, sec. 1330—the fact that stenographer is official does not make transcript preferred mode of proof."
[120] See Annot.. 11 A.L.R. 2d 30, 51–53 (1950).

by general courts-martial than the federal rule and the rule adopted by the 1951 Manual.[121] If the former testimony occurred at an earlier hearing of the case the record probably will always be available. Indeed, if it is not, the validity of the rehearing is extremely doubtful.[122] If the former testimony was given before a court of inquiry it is read into evidence from the duly authenticated record of the proceedings.[123] If the former testimony occurred during an Article 32 investigation, dicta in *United States v. Eggers*[124] suggest the conclusion that only an Article 32 hearing which results, among other things in a verbatim record of the witness' testimony, will be recognized as admissible former testimony.

Not only, as indicated, would the party offering former testimony almost always have access to the official record containing the former testimony but the recorded testimony should be favored because it is more trustworthy than the memory of a witness. A board of review in ACM 5570, *Linder*,[125] recognized the dangers of using a witness in lieu of the record and stated:

> Although such procedure is now permissible (MCM 1951, para. 145*b*), its use is fraught with danger and it ought not to be employed, where, as here, the official record of the former trial was readily available at the rehearing.[126]

In *United States* v. *Howard*[127] the Court of Military Appeals affirmed a case in which the president of a special court-martial testified as to the testimony the accused gave at the trial of another. Of course, the accused's former testimony was in the nature of a judicial confession and was before a tribunal that did not prepare a verbatim record of trial. Reported military cases indicate that the former testimony is usually proved by the record of the former proceedings.

Civilian jurisdictions allowing proof of former testimony through a witness require proof that the witness had an opportunity to hear the former testimony and that he remembers its

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[121] But *see* Hale, *supra* note 74, at 392.

[122] *See* NCM 202, Eastman, 9 C.M.R. 584 (1953).

[123] "[T]he sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry . . . may . . . be read in evidence. . . ." UCMJ art. 50(a).

[124] 3 U.S.C.M.A. 191, 194, 11 C.M.R. 191, 194 (1953).

[125] 7 C.M.R. 560 (1952).

[126] *Id.* at 567.

[127] 5 U.S.C.M.A. 186, 17 C.M.R. 186 (1954).

substance.[128] To test the witness" competency in these respects an out of court hearing should be requested.[129]

C. UNAVAILABILITY

> When . . . it appears that a witness who has testified . . . at a former trial . . . is dead, insane, too ill or infirm to attend the trial, beyond the reach of process, more than one hundred miles from the place where the trial is held, or cannot be found, his testimony in the former trial, if properly proved, may be received by the court if otherwise admissible, except that the prosecution may not introduce such testimony unless, in a capital case, the witness is dead, insane, or beyond the reach of process.[130] . . . A failure to object . . . on the ground that it does not appear that the witness is now unavailable, may be considered as a waiver of that objection.[131]

These provisions of the 1951 Manual are substantially the same as those contained in the 1928[132] and 1949[133] Manuals. However, insanity was not among the reasons authorizing introduction of former testimony in a capital case without the permission of the accused under the 1928 Manual.

In civilian courts there is some variation between jurisdictions as to what types of unavailability are sufficient to permit the use of former testimony. They tend to be broader grounds in civil than in criminal cases and, as under the Manual, the rules tend to be more liberal when the proponent is the accused.[134] The Manual's dichotomy of capital and noncapital cases is not typical of the rules determining the admissibility of former testimony in civilian jurisdictions.

The most widespread ground for the admissibility of former testimony in civilian jurisdictions is death of the witness. Even the jurisdiction's procurement of the witness' death will not necessarily bar the former testimony.[135] Imprisonment is not

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[128] See Annot., 11 A.L.R. 2d 30, 41–42 (1950).

[129] Compare State v. Ortego, 22 Wash. 2d 552, 157 P.2d 320 (1945).

[130] *Contra*, Clausen, *Rehearings Today in Military Law*, 12 MIL. L. REV. 147, 168 (1961): "What has been said about depositions in a capital case rehearing applies with equal force to use of former testimony." This is erroneous.

[131] MCM, 1951, para. 145*b*.

[132] MCM, 1928, para. 117*b*.

[133] MCM, 1949, para. 131*b*.

[134] See Hale, *The Missouri Law Relative to the Use of Testimony Given at a Former Trial*, 14 ST. LOUIS L. REV. 375, 380 (1929).

[135] See Abston v. State, 139 Tex. Crim. Rep. 416, 141 S.W.2d 337 (1940) (former testimony of an executed prisoner).

usually a ground for admission of former testimony in civilian jurisdictions.[136] Some jurisdictions permit introduction by the prosecution of former testimony when the witness' absence was procured by the accused.[137] Under the Manual the prosecution could achieve similar results in a noncapital case by showing the witness cannot be found. However, in a capital case the former testimony of the witness whose absence was procured by the accused would be admissible only if he were also dead, insane or beyond the reach of process.

Both civilian jurisdictions and the Manual place the burden on the proponent to establish the Unavailability of the witness.[138] The *Model Code* of *Evidence* would permit use of the evidence by the proponent in the absence of a finding by the judge that the witness was available and that the evidence, at his discretion, should be rejected.[139] Thus, not only is it necessary for the party favoring exclusion to show that the witness is available, but he must also convince the judge to reject the former testimony.

Most military cases raising the issue of whether the proponent had properly established the unavailability of the witness involve witnesses located over 100 miles from the place of trial. Only two of these cases were decided by the Court of Military Appeals.

In *United States v. Jester*[140] the Court held that there was no presumption, which could be substituted for proof, that two American soldiers who were in Korea at the time of the original trial still were there when their former testimony was introduced **at** a rehearing in California eleven months later.[141]

In *United States V. Johnson,*[142] a Marine Corps special court-martial, the trial counsel offered no explanation for the absence of witnesses, Despite the failure of the defense counsel to object

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[136] *Compare* 20 **AM. JUR.** Evidence § 708 (1939), *with* UCMJ art. 49(d)(2).

[137] See Cagle v. State, 147 Tex. Crim. Rep. 354, 180 S.W.2d 928 (1944).

[138] See Smith v. United States, 106 F.2d 726 (4th Cir. 1939) for an instance where the proponent failed to carry this burden.

[139] MODEL CODE OF EVIDENCE rule 511 (1942).

[140] 4 U.S.C.M.A. 660, 16 **C.M.R.**234 (1954).

[141] Compare CM 400641, Story, 28 C.M.R. 492, 496 (1959), petition *for* review denied, 10 U.S.C.M.A. 697, 28 C.M.R. **414** (1959), where it was held that once it was established that a witness was on official orders to report to a distant installation at a date prior to the rehearing, there was a presumption of a continuance of the unavailability. Compare also CM 347000, Nelson, 3 C.M.R. 165, 171 (1952), *petition for* review denied, **1 U.S.C.M.A.**718, 4 C.M.R. 173 (1952), where it was held that unavailability was proved at a rehearing in the United States when it was established that the absent witnesses were Korean nationals last seen in Korea.

[142] 14 U.S.C.M.A. *75,* 33 C.M.R. 287 (1563).

the Court did not invoke the waiver provisions of paragraph 145*b* because unqualified counsel were involved.[143] At a general court-martial failure to object would be held to be a waiver.[144]

A mere showing that the witness is not at the place of trial is not an adequate substitute for proof that the witness is at a place more than one hundred miles from the place of trial.[145]

D. *FORMER TESTIMONY OF AN AVAILABLE WITNESS*

> The limitations on the use of former testimony . . . do not apply with respect to statements . . . which are admissible under some rule of evidence other than that authorizing the introduction of former testimony.[146]

This statement and a similar one pertaining to depositions[147] were placed in the Manual "to obviate the confusion which often exists with respect to this matter."[148]

Former testimony is inadmissible unless it is admissible for the reasons discussed in the preceding paragraph or because a witness is unavailable for one of the six reasons specified in paragraph 145*b*. Therefore, it could not be introduced in evidence if, for example, the witness wrongfully refused to testify after being sworn.[149] A contrary rule exists in some civilian criminal jurisdictions.[150] If a witness testifies at a rehearing differently than at the original trial and the defense makes little or no effort to impeach him, an appellate body will not go beyond the record of trial at the rehearing.[151]

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[143] See *id.* at 76, 33 C.M.R. at 288.

[144] See United States v. Vanderpool, 4 U.S.C.M.A. 561, 570, 16 C.M.R. 135, 144 (1954).

[145] NCM 56 09221, Crosby, 21 C.M.R. 562, 565 (1956).

[146] MCM, 1951, para. 145*b*. See United States v. Nix, 11 U.S.C.M.A. 691, 693–94, 29 C.M.R. 507, 509–10 (1960), where former testimony given by the witnesses at his own trial was used as past recollection recorded. The Court did not rule on the objection to this use of the testimony because it was merely cumulative to that given by other witnesses.

[147] See MCM, 1951, para. 145*a*.

[148] LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, at 232.

[149] See United States v. Barcomb, 2 U.S.C.M.A. 92, 93, 6 C.M.R. 92, 93 (1952) where it was held to be reversible error to have admitted in evidence the deposition of a witness after she wrongfully refused to testify.

[150] See, *e.g.*, People v. Pickett, 339 Mich. 294, 63 N.W.2d 681 (1954).

[151] See NCM 328, Palmer, 16 C.M.R. 401, 403–04 (1954).

E. SOFA AND AVAILABILITY

The former testimony of a witness who is beyond the reach of process is admissible before a court-martial.[152] Does this mean that the former testimony of a foreign witness at an earlier court-martial can be used in a court-martial subsequently held in the foreign country where the witness is located? The answer depends upon agreements between the United States and the foreign country and upon that country's internal law.

If the particular foreign country has laws similar to United States statutes, which permit friendly foreign states to apply to United States District Courts for issuance of orders compelling witnesses to testify before that nation's courts-martial held in the United States,[153] the witness cannot be said to be beyond the reach of process for purposes of using the former testimony. However, in 1957 none of the NATO receiving states where United States troops were stationed had domestic legislation enabling United States courts-martial to obtain compulsory attendance of witnesses, although in Japan the authorities would issue a subpoena upon appropriate request.[154]

The NATO Status of Forces Agreement [155] contained no guarantee by the receiving states to obtain compulsory process for the sending states' courts-martial. However, Article **37,** paragraph 2 of the Supplementary Agreement with Germany provided:

> Where persons whose attendance cannot be secured by the military authorities are required as witnesses or experts by a court or a military authority of a sending State, the German Courts and authorities shall, in accordance with German law, secure the attendance of such persons before the court of military authority of that State.[156]

It is concluded that a witness is not beyond the reach of process in countries such as Germany where the Germans have agreed to secure the attendance of witnesses before courts-martial. Neither is a witness beyond the reach of process if a country's domestic laws, in the absence of a treaty, provide means of securing the attendance of witnesses. On the other hand, if **a** witness' attendance cannot be secured by any means, including voluntary ap-

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[152] MCM, 1951, para. 145*b*.

[153] 58 Stat 643–45 (1944), **22** U.S.C. § 701–06 (19.58). There is no implementing Executive Order currently in effect.

[154] See Rouse & Baldwin, *The Exercise* of *Criminal Jurisdiction Under the NATO Status of Forces Agreement,* 51 AM. **J.** INT'L L. 29, 60 (1937).

[155] June 19, 1951 [1953], **4** U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846.

[156] Aug. 3, 1959 [1963], 14 **U.S.T.**& O.I.A. 531, 568 T.I.A.S. No. 5351.

pearance,[157] he is beyond the reach of process in the sense of paragraph 145*b* and the former testimony of the witness can be used.

F. *FORMER TESTIMOSY AND IXTERPRETERS*

The Manual rule as to use of former testimony which was given through an interpreter is that it is admissible without either the witness or the interpreter becoming a witness at the later proceedings only when both are unavailable.[158] If the interpreter, only, is available he must be called as a witness. In testifying "he may use the record of the former trial as an aid to his memory." [159]

The authors of the Manual adopted Wigmore's position on the use of interpreters.[160] He reasoned that the interpreter was a witness to the principal witness' testimony and must be called, if available, when the principal witness was unavailable.[161]

If the Manual had adopted a rule that the best evidence of the former testimony was the official transcript of the former hearing the rule requiring the testimony of an available interpreter presumably would not have been adopted. The procedure that was adopted appears to be useless at best and apparently it could lead to the nonsensical result that an uncooperative interpreter could effectively block the use of the former testimony of the unavailable principal witness.[162] Certainly the issue of whether or not former testimony is to be used in a case should not be decided on such irrational grounds.

The issue of the admissibility of former testimony given through an interpreter has been considered in only one case reported under the UCMJ. There, the issue was the verbatim testimony of two French nationals given through an interpreter at an Article 3%investigation at which the accused was present, represented by qualified counsel, and afforded the opportunity to cross-examine. The testimony was received in evidence when the witnesses refused to testify at the trial. This was so even though

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[157] See United States v. Stringer, 5.U.S.C.M.A. 122, 135–36, 17 C.M.R. 122, 135–36 (1954).

[158] MCM. 1951. para. 141.

[159] LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, at 218.

[160] *Ibid.*

[161] See 6 WIGMORE, *op. cit. supra* note 62, § 1810(1).

[162] Compare United States v. Barcomb, 2 U.S.C.M.A. 92, 6 C.M.R. 92 (1952).

the defense argued that the interpreter was not sworn. However, there was no claim that the interpreter was incompetent or that he failed to translate accurately.[163]

V. SOME SPECIAL TYPES OF FORMER TESTIMONY

A. *BY THE ACCUSED*

1. *Before Findings.*

Frequently, a counsel is faced with the problem of whether or not to have the accused testify when he believes the case will be set aside in the event of a conviction. Possibly, the accused's testimony will bring about an acquittal; however, it may merely result in making available to the prosecution, at a rehearing, valuable former testimony.[164]

At a rehearing, the erroneous admission of former testimony may be held nonprejudicial, if the defense has the accused testify and a judicial confession results.[165] However, the admissions of an accused at an out-of-court hearing held by the law officer to determine the providence of a guilty plea, cannot be used during a rehearing at which the accused pleads not guilty.[166]

2. *After Findings.*

The risks inherent in the accused's testimony prior to findings do not exist in regard to testimony during the sentencing proceedings. In 1956, in CM 389689, *Riggs*,[167] an Army Board of Review reversed the case because the government used at a rehearing the former testimony given in extenuation and mitigation of the accused to establish an absence without leave. This problem was not raised again during the following five years and in April 1961 the author of an article on military rehearings concluded that the decision was based on a misconstruction of the law by the board.[168] However, later in the same month the Court

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[163] CM 411999, Burrow (28 May 1965), digested in 65–16 JALS 5 (1965).

[164] See CM 363944, Rodison, 15 C.M.R. 466, 467 (1954), *petition for review denied*, 4 U.S.C.M.A. 735, 16 C.M.R. 292 (1954).

[165] See United States v. Jester, 4 U.S.C.M.A. 660, 664, 16 C.M.R. 234, 238–39 (1954).

[166] United States v. Barben, 14 U.S.C.M.A. 198, 33 C.M.R. 410 (1963).

[167] 22 C.M.R. 598, 600–01 (1956).

[168] See Clausen, *supra* note 130, at 167.

of Military Appeals in *United States v. Stivers*[169] reached the same result as the board of review in *Riggs.*

> [A]n accused's statement in mitigation and extenuation is made for such a purpose and under such circumstances that it may not subsequently be used by the Government to establish his guilt at a rehearing.[170]

The policy of encouraging the submission of evidence in extenuation and mitigation outweighs any need the prosecution might have of such evidence. In *Sticers* the Court pointed out that a stipulation made in connection with a guilty plea[171] and a guilty plea itself, although the ultimate in judicial confessions, could not be used in a full rehearing.[172]

B. *USE OF A FORMER GUILTY PLEA AT A REHEARING*

Often there will be a plea of not guilty at the full rehearing of a case that was originally tried upon a plea of guilty. This is so because the accused usually has nothing to gain by pleading guilty when the sentence on rehearing is limited to the approved sentence in the original case. Furthermore, a full rehearing of a guilty plea case is frequently due to some question of the providence of the original plea. Pleading not guilty at the rehearing would be a futile act if the prosecution could introduce in evidence the former plea of guilty as a judicial confession. No reported military case has involved this particular problem although the decision in *United States v. Kercheval*[173] and dicta in *United States v. Stivers*[174] make it clear that the introduction in evidence of the former guilty plea would be reversible error. Although in the few cases where it has arisen in State courts the results have been mixed, the statement of the Supreme Court in *Kercheval* is worth noting:

> Courts frequently permit pleas of guilty to be withdrawn and pleas of not guilty to he substituted. We have cited all the decisions state and Federal, which have come to our attention, that pass on the question here presented. The small number indicates that in this country it has not been customary to use withdrawn pleas as evidence of guilt. Counsel have cited no case, and we have found none, in which the question has been considered in English courts.[175]

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[169] 12 U.S.C.M.A. 315, 30 C.M.R. 315 (1961).
[170] *Id.* at 318, 30 C.M.R. at 318.
[171] Citing United States v. Daniels, 11 U.S.C.M.A. 52, 28 C.M.R276 (1959).
[172] Citing United States v. Daniels, *supra* note 170 and Kercheval v. United States, **274** U.S. 220 (1927).
[173] **274** U.S. 220, 225 (1927).
[174] 12 U.S.C.M.A. 315, 318, 30 C.M.R. 315, 318 (1961).
[175] Kercheval v. United States, **274** U.S. 220, 225 (1920).

In view of the dicta in *Stivers* one can equate the order of a full rehearing as being tantamount to permission to withdraw a plea of guilty and substitute a plea of not guilty. The prosecution should never attempt to introduce such a former guilty plea in evidence at the rehearing.

C. *STIPULATIONS*

1. *Fact.*

A somewhat different twist to the problem of whether the prosecution is to be allowed to take advantage of the accused's withdrawn guilty plea at a rehearing is presented by the military practice of using stipulations of fact in connection with negotiated guilty pleas. Can the prosecution use such a stipulation of fact, which was made evidence of record at the former trial, even though it is precluded from using the guilty plea itself at a contested rehearing? In *United States v. Daniels*[176] the stipulation was introduced subsequent to the findings at the original trial and was used for impeachment during the case in chief at the rehearing. The Court of Military Appeals held this to be prejudicial error.[177] There is no reason to conclude that the results would have been any different if the stipulation had been introduced prior to findings at the original trial, although the precise point has not been decided and is unlikely to be tested in view of the inferences that should be drawn from *Daniels.*

The rationale for condemning the subsequent use of stipulations of fact made in connection with guilty pleas does not exist in connection with stipulations of fact made during the case in chief of a contested case (except when reversal is due to an improvident defense). The Judge Advocate General of the Air Force has expressed the opinion that stipulations voluntarily entered into at the original trial are admissible evidence during rehearings.[178] The accused in his opinion would have a right to submit impeaching or contradictory evidence. Although this opinion is limited by the holding in *Daniels* it is believed that it correctly states the military law as to stipulations of fact entered into during the case in chief of the former trial of a contested case. There are no military cases in point,

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[176] 11 U.S.C.M.A. 52, 28 C.M.R. 276 (1959).

[177] See *id.* at 55, 28 C.M.R. at 279.

[178] Op. **JAGAF** 1955/32, 11 Oct. 1955, as digested in 5 DIG. OPS. 623 (1956).

In civilian courts:

> The general rule is that where a stipulation is distinctly and formally made for the express purpose of relieving the opposing party from proving some fact or facts, or where a formal admission of facts is made by counsel and becomes part of the record, such as a stipulation or admission, provided it is not by its terms limited to a particular occasion, or a temporary object, can be introduced in evidence and is available as proof of the facts admitted upon a subsequent trial of the same action, unless the court permits its withdrawal upon proper application therefor.[179]

A counsel who intends to limit the use of his stipulation to the particular hearing probably can accomplish the intended result by making the limitation an explicit part of the stipulation.

2. *Testimony.*

No reported case under the UCMJ has considered whether the accused is bound at a rehearing to stipulations of testimony made at the original trial. If the witness was available for the original trial and the accused chose to enter into the stipulation he should be bound if that witness became unavailable prior to the rehearing.[180] If the witness is available for the rehearing the stipulation probably cannot be used over the accused's objection. In view of the absence of dependable guideposts, a counsel should be cautious in entering into stipulations of testimony unless either the prosecution specifically stipulates that its use is limited to the particular hearing or no disadvantage could result in its use as former testimony at a rehearing.

VI. THE FAILURE OF COUNSEL AT THE FORMER TRIAL TO OBJECT

When former testimony is introduced at a rehearing, to what extent is counsel bound by the failure of the counsel at the original proceedings to object? The issue was raised in *United States v. Johnson.*[181] On appeal the Government conceded that the law officer erred by taking the position that objections not made at the original trial could not be raised upon a rehearing. The

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[179] Annot., 100 A.L.R. 775, 776 (1936). See LeBarron v. Harvard, 129 Neb. 460, 262 N.W. 26 (1935).

[180] *Compare* Fortunato v. New York, 74 App. Div. **441,** 77 N.Y.S. 575 (Sup. Ct. App. Dir. 1902), *modified on other grounds*, 173 N.Y. 608, 66 N.E. 1109 (1903) (admitted), *with* Kelly v. Kipp, 77 Mont. 110, 250 P. 819 (1926) (not admitted).

[181] 11 U.S.C.M.A. 384, 29 C.M.R. 200 (1960).

Court of Military Appeals ruled that, assuming the law officer erred, there was no risk of prejudice to the accused.[182] *Johnson* has since been cited by a board of review for the proposition that the accused at a rehearing can make timely objections to former testimony not previously objected to.[183]

Most civilian courts and text writers take the position that former testimony to which no prior objection was made can be objected to on substance (hearsay, etc.) but not form (leading questions, etc.).[184] However some courts have taken the position that the former testimony is open to all proper objections and exceptions.[185]

Although the Court of Military Appeals did not settle the issue in *Johnson*, it would seem unlikely that it would reach a conclusion contrary to its assumptions in that case or one less liberal than the majority rule in civilian jurisdictions. The real issue is whether it would go further and rule that objections as to form can be made initially at the rehearing. A weighing of interests indicates there is no strong interest in allowing objections to form that would outweigh the problems thereby created. It is believed that the Court of Military Appeals would go no further than to allow objections as to substance.

Rulings of the law officer at the former trial excluding former testimony ordinarily will be omitted from the former testimony read to the court at the rehearing. Often, as a result of agreement between counsel, unsuccessful objections at the former trial will also be omitted.[186]

VII. WHEN IS FORMER TESTIMONY A NULLITY?

Former testimony is not admissible in evidence when a former trial is "shown by the objecting party to be void because of lack of jurisdiction."[187] "The reason for this is that the oath upon which the so-called testimony was given was void and there really

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[182] See *id.* at 386–88, 29 C.M.R. at 202–4.

[183] See ACM 17070, Moore, 33 C.M.R. 868, 877 (1963), *petition for review denied*, 14 U.S.C.M.A. (14 Oct 1963), 33 C.M.R. 436 (1963).

[184] See, *e.g.*, MCCORMICK, *Evidence* 497 (1954); Annot., 159 A.L.R. 119 (1945).

[185] See Calley v. Boston & Maine, 93 N.H. 359, 42 A.2d 329 (1945); Aetna Ins. Co. v. Koonce, 233 Ala. 265, 171 So. 269 (1936).

[186] See United States v. Johnson, 11 U.S.C.M.A. 384, 385, 29 C.M.R. 200, 201 (1960).

[187] MCM, 1951, para. 145*b*.

has been no former testimony." [188] Prior Manuals were silent on this point but an Army Board of Review had held that the testimony given at a perjury trial was null and void when there was a failure to prove the court had jurisdiction over the accused or the offense.[189] In 1950 The Judge Advocate General of the Air Force took the position that:

> The dismissal of a case for lack of jurisdiction of the court before which the case was heard does not render inadmissible before a court having jurisdiction of the parties to the litigation and of the subject matter the sworn testimony given by a witness in the first proceedings.[190]

Under the UCMJ many cases submitted to rehearings have been reversed on what might be termed quasi-jurisdictional grounds. Typical are cases involving extra-judicial acts by the law officer and inadequate representation by the defense counsel. Are the former proceedings in such cases null and void, and if not, can the former testimony be used at a rehearing?

Military appellate bodies have been hesitant to find any military trial completely null and void due to the jeopardy implications for an acquitted accused.[191] Arguments favoring reversal of rehearings on jurisdictional grounds when former testimony from an earlier trial, set aside due to denial of adequate representation by the defense counsel, was used have been rejected.[192] However, it does not follow that such former testimony was admissible evidence if objections were made at the rehearing.[193]

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. *CONCLUSIONS*

Knowledge of the status of former testimony under the English common law prior to the adoption of the United States Constitution is necessary to a proper understanding of the constitutional limitations on the use of former testimony under the *Uniform Code of Military Justice.* This knowledge established that the constitutional right to confrontation is a means of assuring

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[188] LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, at 232.

[189] See CM 321643, Rowell, 70 B.R. 327 (1947).

[190] See ACM 3129, Haley, 3 C.M.R. (AF) 812, 817 (1950); *accord,* ACM 2413, White, 4 C.M.R. **(AF)** 201, 209 (1950).

[191] See United States v. Padilla, 1 U.S.C.M.A. 603, 5 C.M.R. 31 (1952).

[192] See United States v. Vanderpool, 4 U.S.C.M.A. 561, 567, 16 C.M.R. 135, 141 (1954).

[193] See *ibid.*

a right to cross-examination, Denial of the right of cross-examination is a denial of an accused's constitutional right to confrontation. On the other hand if the opportunity to cross-examine has been provided at a former proceeding the former testimony of an unavailable witness may be used at a subsequent proceeding involving the same accused and issues.

Rehearings are the only type of proceeding making substantial use of former testimony and the former testimony used at rehearings is ordinarily generated at the original trial. The use of former testimony given before courts of inquiry and at pretrial investigations is rare. Apparently there is no use whatsoever of former testimony from trials by civil courts.

The former testimony of a witness who is present at a subsequent hearing cannot be used even though that witness refuses to testify at the subsequent hearing. This is contrary to the law of some civilian criminal jurisdictions.

Military appellate bodies have usually prevented novel extensions of the established uses of former testimony. Consequently the use of former guilty pleas and stipulations of fact connected with them has been condemned. The use of pretrial testimony is permitted under limited circumstances but this is somewhat less than a novel extension in view of the established civilian practice.

B. *RECOMMENDATIONS*

Although the present military law of former testimony represents a reasonably satisfactory balance between the needs of society and justice to accused persons, it is believed that two specific changes would represent a substantial improvement:

1. Official verbatim records of trial should be given a preferred status over other means of proving the former testimony, including former testimony given through an interpreter, by amendment of paragraph. **145b** of the Manual. The present rule giving equal status to other means of proof is archaic and senseless.

2. Paragraph **145b** of the Manual should be amended to eliminate the use of testimony at Article **32** investigations as former testimony. It is believed that the limited usefulness of such testimony is outweighed by the detriment to an accused that

is caused by having to choose between losing spontaneous, untailored testimony at the trial by some witnesses or risking subsequent use of the testimony without proper cross-examination of such witnesses.

THE INTERRELATIONSHIP OF THE UNITED STATES ARMY AND THE NATIONAL GUARD*

By Colonel William L. Shaw**

When the Secretary of Defense announced that Army reserve units would become a part of the Army National Guard, many questions were raised concerning the Guard. What has been its role and function? How well has the National Guard been able to fulfill its purpose? What are its achievements? While the restructuring of the Army reserve was rejected by Congress in 1965, the plans of the Administration to introduce another reorganization proposal to Congress in January 1966 indicate that the questions asked about the National Guard are still pertinent. It is the purpose of this article to provide information to explain these questions of the functions and goals of the National Guard.

I. INTRODUCTION

On December 11, 1964, Secretary of Defense Robert S. McNamara electrified the personnel of the Armed Forces by a semi-official announcement. The Secretary declared in effect that the Army National Guard would absorb the organized units of the Army Reserve by a process of alignment of the Reserve into the existing structure of the Army National Guard.[1]

In the language of laymen, this seems to indicate that within the short span of two years, the Army National Guard will become the sole reserve component of the United States Army in the matter of identified units such as divisions, brigades, or companies. The present Army Reserve would cease to contain numbered units, but would include individual reservists in a manpower pool. The process of consolidation presumably will not stop with the Army National Guard. It is foreseeable that the Air

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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.

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[1] See New York Times, Dec. 13, 1964, § 1, p. 1, col. 8.

National Guard may become the unit reserve component of the Air Force and the present so-called Air Reserve may be reconstituted into the Air National Guard.

On September 15, 1965, a joint House and Senate conference committee rejected the reserve merger plan.[2] The administration, however, is planning to introduce another merger plan in January 1966, when Congress reconvenes.[3]

The purpose of this study is to trace the inception and the course of development of the National Guard from an early day Militia. The historical development of the National Guard under the United States Constitution is a necessary basis of our study. In order to understand the present federal-state balance of the Army and the National Guard under the Constitution, we must go back to the formative period of the Federal Government, and even prior to that time, consider the colonial beginnings of what became the Organized Militia.

II. HISTORICAL BACKGROUND UNTIL 1787

A. THE COLONIAL PERIOD

After George Washington took command of the colonial forces at Cambridge on July 3, 1775, the strength of the ready American militia in various stages of training was about 17,000 men, of whom 15,000 were present for duty.[4] Gradually a Continental Army was formed by the addition of new regiments raised from the militia of the various colonies, following the English practice of a regiment composed of ten companies of 59 men each.[5]

The first Continental Army was comprised of volunteers from the militia of the 13 states. At the outset, the militiamen were recruited for one year. "Continental Army" was something of a generic expression and referred to the available men under Army command, inclusive of militia units added to the Army as needed. The starting point of the Continental Army is generally regarded as occurring on June 14, 1775, when Congress authorized one regiment of ten companies of riflemen recruited for one year from Pennsylvania, Virginia, and Maryland.[6]

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[2] See New York Times, Sept. 16, 1965, p. 1, col. 2, and p. 19, col. 3.

[3] *Ibid.*

[4] SPAULDINC, THE UNITED STATES ARMY IN WAR AND PEACE 36 (1937).

[5] See *id.* at 30.

[6] See 2 JOURNALS OF THE CONTINENTAL CONGRESS 89–90 (Worthington ed. 1905) [hereinafter cited as JOURNALS].

On July 18, **1775,** Congress adopted what has been called the "first military service act of a national American deliberative assembly . . . ." [7] Congress proposed to all the colonies that able-bodied males, aged 16–50 years, be formed into regular companies of militia. The measure stated that minute-men could "be relieved by new *draughts. . .* from the . . . *militia,* once in four months." This was a proposal that the colonies draft militiamen to meet the quotas suggested to them by Congress. During the war, at least nine of the colonies drafted men from the untrained militia in order to meet quotas set by Congress.[8]

During the Revolutionary War, Congress regarded all volunteers as militiamen. The militia levies by Congress during the eight years of the War reached the number **164,087** militia.[9] It should be understood that what may seem to be a very large force of militiamen extended to the total number of militiamen, in all stages of training, under military control for varying periods of time which might be as little as sixty days. Washington was never able to raise an army composed of more than 20,000 men at any one time, and usually he had about one-half of that number under his command.

B. *THE CONFEDERATION,* 1777–1787

At the close of the War for Independence, the State Constitutions in nine states authorized compulsory military service.[10] The New **York** Constitution of 1777 said that the militia of the state, "in peace as in war, shall be armed and disciplined, and in readiness for service." [11]

The Articles of Confederation were ratified by all the states by 1781. The Articles stated:

> IV. Every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accautered . . . nor shall any body of forces [apart from the trained militia] be kept up by any in time of peace.

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[7] DUGGAN, LEGISLATIVE AND STATUTORY DEVELOPMENT OF FEDERAL CONCEPT OF CONSCRIPTION FOR MILITARY SERVICE 3 **(1946).**

[8] BEUHLER, COMPULSORY MILITARY SERVICE, in 8 DEBATERS' HELP **BOOK** 8 **(1941).**

[9] Cutler, History of Military Conscription with Especial Reference to United States **39 (1922)** (unpublished. doctorate thesis in Clark University Library). This is a most informative work.

[10] LEACH, CONSCRIPTION IN THE UNITED STATES: HISTORICAL BACKGROUND ix **(1952).**

[11] 5 THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS **2637 (1909).**

VIII. All charges of war . . . for the common defense . . . shall be allowed by the United States in Congress assembled . . . out of the common treasury. . . .

IX. The United States [will exercise the] appointing of all officers in the land forces in the service of the United States, excepting regimental officers . . . the United States shall agree upon the number of the land forces and make requisitions from each state for its quota . . . .

The essential feature demonstrated by the Articles of Confederation was that a well-regulated militia was to be kept up in each state and was subject to requisition by the United States. All general officers were to be appointed by the United States Government, and Congress had sole power to make rules for the government of the land forces and to direct their operations. When Congress requisitioned men from the states, all expenses were to be met by the United States Government.

C. *THE INFLUENCE OF WASHINGTON, VON STEUBEN AND JEFFERSON*

In May 1783, George Washington wrote his "Sentiments on a Peace Establishment" suggesting a military policy for the United States. In his writing, Washington stressed the need for a "well organized Militia; upon a Plan that will pervade all the States, and introduce similarity in their Establishment Maneuvres, Exercises and Arms." [12]

General Washington further proposed a regular army to be used for garrison purposes on the frontiers, the introduction of one or more academies for instruction in the military arts, the creation of arsenals for materiel stores, and the establishment of factories of materiel stores. He recommended a national force of no less than 2,631 officers and men. In substance, Washington called for a small standing army plus a well-organized militia to receive definite training under uniform supervision.

Baron Friedrich von Steuben had been Inspector General in the Continental Army. In 1784, von Steuben formulated a comprehensive plan for an "Established Militia." He proposed that a total force of 25,000 men include 21,000 well-disciplined militia. The militiamen should receive 31 days annual training. The

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[12] Letter from George Washington to Alexander Hamilton, May **2,** 1783, in PALMER, WASHINGTON-LINCOLN-WILSON THREE WAR STATESMEN 375–76 (1930) ; PALMER, AMERICA IN ARMS 12 (1941).

country would be divided into three geographical military departments, and there should be a military academy in each department. The three schools would train leaders for the citizen army which would be enlisted for three years service.[13]

The proposals of Washington and von Steuben envisioned a military organization remarkably similar to the United States Army and the Army National Guard of the present day. The National Guard of **1965** constitutes a well-organized, uniformed, trained reserve component created through volunteer enlistment stimulated by the impact of Selective Service. When a national emergency should arise, the trained National Guard units promptly are absorbed into a vastly expanded national army.

Thomas Jefferson recognized the "necessity of obliging every citizen to be a soldier . . . we must train and clarify the whole of our male citizens, and make military instruction a regular part of collegiate education." [14]

The paradox of the colonial concept of a militia is disclosed in Jefferson's words. Jefferson regarded every man as a likely soldier, and, of necessity, training would be subordinate to the enrollment of vast numbers of men. Von Steuben, with greater wisdom, saw that a smaller "established militia" with definite periods of annual training was preferable. Von Steuben said the notion that every man is a soldier was "'flattering but . . . a mistaken idea . . . . It would be as sensible and consistent to say every Citizen should be a Sailor.' " [15]

III. **1787**: The UNITED STATES CONSTITUTION

A. *APPLICABLE CONSTITUTIONAL PROVISIONS*

The new constitution, formulated in 1787 and effective in 1789, was a compromise in military matters between the federal and the state concepts. The militia system of the states was recognized while at the same time the new federal government could raise and support armies.

The Constitution provides that:

> The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . . [article II, section **2**, clause 1]

[13] *See* PALMER, *op cit. supra* note **12**, at **29-30**. See also **LEACH**, *op. cit. supra* note **10**, at 46.
[14] **WOOD**, AMERICA'S **DUTY 60-61 (1921)**.
[15] **LEACH**, *op. cit. supra* note **10**, at **6**, quoting von Steuben.

Congress was authorized:

To raise and support Armies, . . . [the "Army Clause"; article I, section S, clause 12]

To make Rules for the Government and Regulation of the land and naval forces; [article I, section 8, clause 14]

To provide for calling forth the Militia to execute the Laws of the Union, suppress insurrections, and repel Invasions; [article I, section 8, clause 15]

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, . . . [article I, section 8, clause 16. Clauses 15 and 16 are commonly designated together as the "Militia Clause"]

Among the Bill of Rights were the following:

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed [amendment II]

No person shall he held *to* answer . . . except in cases arising in the land or naval forces, *or* in the Militia, when in actual service in time of war or public danger; . . . [amendment V]

B. *DEFINITIONS OF THE MILITIA*

The term "Militia" has had at least two different meanings. One refers to all citizens and resident aliens who may be called in an emergency. These comprise the unorganized militia which is a reservoir of all able-bodied manpower without individual classification. The second meaning is the modern-day sense most commonly considered in the United States. It refers to those male citizens and/or resident aliens, generally 18–45 years, who are individually enrolled in regularly organized, uniformed, equipped, and trained National Guard units. A majority of the State Constitutions or general statutes embody this distinction.[16]

When the Constitution was adopted the term militia was generally used in the first sense. The individual militiaman was enrolled by name, but was untrained, lacked a uniform, and received no arms or accouterments from the state or any other source.

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[16] For example, § 120 of the ***California Military and Veterans*** *Code*, as amended, sets forth that "The militia of the State shall consist of the National Guard, State Military Reserve and the Naval Militia—which constitute the active militia — and the unorganized militia." CAL. MIL. & VET. **CODE** § 120 (West, 1964 Pocket Part).

C. *THE KNOX PLAN, 1790*

General Henry Knox, Secretary of War from **1785–1795,** prepared for President Washington a militia plan which was submitted with a special message to Congress on January **21, 1790.**[17]

The Knox Plan contemplated a "national militia'' in which trained militiamen were divided into three classes:

(1) 18–20 years, the Advanced Corps; trained **30** days annually in state camps (except those **20** years old whose training is only **10** days), clothed, fed, and armed by the United States: **32,500** men.

(2) 21–45 years, **a** Main Corps; mustered and trained four days annually: **211,250** men.

(3) 46–60 years, the Reserve Corps ; mustered twice yearly : **81,250** men.

The number of men involved in the three classes as estimated by Secretary Knox totaled **325,000** officers and men.[18]

The Knox Plan contemplated that when the national government might require men, the enrollees in the Corps would be drafted for not more than three years service at any one time. If necessary, the state could likewise draft to support a trained militia within the state. This was a form of peacetime universal military training, and recognized the mutual integrity and responsibility of state governments and of the United States to keep up a trained, immediately available force of men. The Knox Plan was introduced in Congress as "an Act more effectually to provide for the national defense by establishing a uniform militia throughout the United States." The bill passed to Committee of the Whole, and then to Special Committee. Protests were received from the Quakers of New England, and Congress adjourned without action.[19]

On November 21, **1791,** the bill was again read and substantially amended. But the Knox Plan, although supported by President Washington, was not carried into legislation.

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[17] **See 16 U.S. CONGRESS, AMERICAN STATE PAPERS—1 MILITARY AFFAIRS 6–13 (1832) [hereinafter cited as STATE PAPERS].**

[18] **See** *ibid.*

[19] **LOGAN, VOLUNTEER SOLDIER OF AMERICA** 153–55 **(1887).**

IV. FORMATIVE FEDERAL LEGISLATION

A. *THE MILITIA ACTS OF 1792*

The creation of a federal military establishment and the regulation of the militia was a first concern of the new government. George Washington was inaugurated on April 30, 1789, and on August 7, 1789, Congress adopted an act "to establish an Executive Department to be denominated the Department of War.')[20] The Department was headed by Secretary Knox, who was also made responsible for naval affairs;?' Indian affairs and land grants. On August 8, 1789, Secretary Knox reported that from a total authorized strength of 840 men, the Army contained 672 men of whom 76 were at the Springfield and West Point arsenals and the remainder were in the Ohio Valley? The first general military law of Congress was adopted on April 30, 1790, and created an army of 1,273 officers and men engaged to serve for three years, and provided that the President might call out the militia "as he may judge necessary . . . ,,[23]

An Act of May 8, 1792,[24] has proved to be one of the most controversial pieces of legislation in our history. The measure reflected a compromise of conflicting federal-state interests. Adopted under the militia clause, the statute showed the intent of Congress that the states should continue to control the militia system. The bill essentially provided:

(1) All able-bodied white males, 18–45 years, were to be individually enrolled locally for militia duty.

(2) Each militiaman was to provide his own musket, bayonet, belt, knapsack and other vital equipment.

(3) The state should organize and train the militia according to standards set by the state.

(4) There were exempted from service, certain specific federal employees, including congressmen, mariners, postmen, etc.

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[20] See Act of August 7, 1789, ch. 7, 1 Stat. 49.

[21] A Department of the Navy was formed by the Act of April 30, 1798, ch. 35, 1 Stat. 553.

[22] See 16 STATE PAPERS 6.

[23] See U.S. DEP'T OF ARMY, PAMPHLET NO. 20–212, HISTORY OF THE MILITARY MOBILIZATION IN THE UNITED STATES ARMY 1775–1945, at 26 (1955) [hereinafter cited as DA PAM 20–212].

[24] Ch. 33, 1 Stat. 271.

(5) The states could add their own exemptions which usually included teachers, students, clergymen, and state and local officials.

(6) Each state was to have an Adjutant General and a Brigade Inspector of troops.

(7) Apart from the untrained militia, the states could authorize organized, trained, uniformed military companies.

The 1792 Act has been termed the eighteenth century version of universal military training.[25]

Within this study, we shall stress that the most significant feature of the Act of 1792 proved to be that which permitted a state to recognize a company of trained, uniformed militiamen. In time, these local company units of trained men became the basis of the organized militia.

An Act of May 2, 1792,[26] provided that in order to call forth the militia, the President had first to be notified by an Associate Justice of the Supreme Court or by a local district judge that obstructive combinations in disregard of law could not be suppressed in the ordinary course by the federal marshal or through judicial proceedings. The Whiskey Rebellion in Pennsylvania was suppressed under the authority of this particular 1792 statute.

An Act of February 28, 1795,[27] overhauled the cumbersome procedure for calling forth the militia whenever United States law was opposed or could not be executed. From that time the President could act on his own initiative to suppress local disorders without any requirement of notice to him from a federal judge or other officer.

B. *LEGISLATION, 1794–1820*

The first federal use of the militia power available under the militia clause occurred in 1797 when Congress authorized 80,000 militia to be "detached" for possible military use against France.[28] Our international relations with the Revolutionary Government in power in that strife-ridden nation had deteriorated, but no militia were trained as the emergency did not continue.

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[25] RIKER, SOLDIERS OF THE STATES: THE ROLE OF THE NATIONAL GUARD IN AMERICAN DEMOCRACY 21 (1957).

[26] Ch. 28, 1 Stat. 264, reprinted in S. Doc. No. 263, 67th Cong., 2d Sess. 24–25 (1922).

[27] Ch. 36, 1 Stat. 424.

[28] See BERNARDO & BACON, AMERICAN MILITARY POLICY: ITS DEVELOPMENT SINCE 1775, at 85 (1955); ch. 4, 1 Stat. 522.

The first tendency toward any degree of federal centralization in the control of the militia may be found in an Act in 1798 which authorized the states to purchase muskets for the state militia at national arsenals.[29]

In 1806, the Governors of the various states were authorized by the President to take steps to organize 100,000 militia. Approval was given to the states to accept any corps of volunteers for service up to six months duration.[30] Actually, this militia force never came into existence. The significant feature is that a six-month period of service was regarded as the maximum extent of active military duty by the militia units.

Until 1807, the United States had relied upon the use of specially-called militia units in order to execute federal laws. In 1807, this situation was altered as Congress designated the Regular Army as the military force which could execute federal law.[31] This was a significant declaration of self-reliance by the central federal government. Since 1792, state militia had been subject to call by the President when necessary to enforce federal law.

In 1808, there was enacted by Congress the first grant-in-aid in our federal-state history. Congress adopted what has been termed "the most important military legislation of this period''[32] and provided for an annual appropriation of $200,000 to be expended to arm the state militia.[33] This was probably a recognition by Congress that it owed an obligation to the states to arm the militia which was subject to federal call when needed.

An Act of April 20, 1816,[34] prescribed the number and rank of the field grade officers of militia regiments.

In 1820, Congress required that the militia throughout the United States should follow the discipline and exercises of the Regular Army.[35] Before that time, most of the states used General von Steuben's "Rules of Discipline'' which had been approved by the Continental Congress in 1779.[36] The von Steuben Rules had become outmoded, and the use of the Regular Army system assured uniformity throughout the federal-state military sphere.

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29 Act of July 6, 1798, ch. 65, 1 Stat. 576.
30 Act of April 18, 1806, ch. 32, 2 Stat. 383.
31 See Act of March 3, 1807, ch. 39, 2 Stat. 443.
32 BERNARDO & BACON, *op. cit. supra* note **28,** at 107.
33 Act of April 23, 1808, ch. 60, 2 Stat. 490.
34 Ch. 64, 3 Stat. 295.
35 See Act of May 12, 1820, ch. 97, 3 Stat. *577.*
36 See 13 JOURNALS 384–85.

C. THE MONROE PLAN

In **1814,** Secretary of War James Monroe proposed a plan designed to raise federal troops by a federal draft to mount a military offensive against the British. The proposal stressed a call of men from enrolled classes of **100** each.[37] The draft plan was to be executed through county courts or by militia officers in each county or by other persons named to conduct the draft in each county. The Monroe Plan was designed to create a fixed force of 40,000 men for the duration of the war. Secretary Monroe recognized that the prevailing military system in effect from **1812–1814** had failed to raise men either through volunteering for the Regular Army or by being called through state militia drafts. If adopted, the plan would have established a direct contact between the federal government and the individual citizen who could be called to United States military service without first going through a state militia route. The Monroe Plan was based upon both the militia clause and the army clause of the Constitution. The Monroe Plan was eventually tabled in the Senate on December 28, **1814,** by a **14–13** vote. The two Houses of Congress could not agree upon the term of service of militiamen who would be drafted directly into the federal ranks. The Monroe proposal is significant because of the close vote in Congress where a federal draft failed of passage by only one vote. This was the first suggestion that the United States could directly draft men into the Army.[38] Of course, the states could and did draft militiamen for state service.

D. *CALHOUN AND THE "EXPANSIBLE STANDING ARMY"*

John C. Calhoun was Secretary of War, **1817–1825,** under President Monroe. Although a staunch opponent of federalism, Secretary Calhoun on December **12, 1820,** directed to Congress a State Paper,[39] designed to reorganize the concept of the structure of the Regular Army. Secretary Calhoun urged an "expansible standing army" which meant that the Regular Army would expand in time of emergency by the absorption of volunteer recruits into regular army units. The Calhoun Plan was intended to:

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[37] See 16 **STATE PAPERS 514–16,**

[38] See BERNARDO **& BACON,** *op. cit. supra* note 28, **at 138–40.**

[39] **17 STATE PAPERS 188.**

(1) Expand the Regular Army from a 6,000 limit in **1820** to a force of at least **19,000** men. The Regular Army would act directly against a foe through field operations.

(2) The militia in an emergency would man fixed fortifications, and act as light support troops in the field. No planning was given to any preliminary training of the militia.

Congress disregarded the Calhoun Plan, and in **1821** set the army strength at **6,183** men,[40] of whom only **5,211** were ever present for duty. In **1845,** shortly before the outbreak of hostilities with Mexico, the authorized army strength was 8,613.[41]

E. *LITIGATION*

In **1812,** Governor Caleb Strong of Massachusetts had refused to comply with the call by President James Madison for militia units to be furnished from Massachusetts. The Governor posed to the Supreme Judicial Court of Massachusetts the question whether a governor as commander-in-chief of the militia of the state had a right to determine whether any of the exigencies set forth in the United States Constitution had arisen so as to require that the state militia be placed in the service of the United States. On August **1, 1812,** the three Supreme Judicial Court Judges answered the question in the affirmative. While recognizing that state militia might be employed in the service of the United States, the court concluded that a determination as to the need for such federal service rested in the governor of the particular state involved. While the President was commander-in-chief of the United States forces, he received his state troops only when furnished voluntarily by the states.[42] The decision, now overruled, showed the lack of federal-state planning at the outset of the War of **1812.**

In *In the Matter of Stacy*,[43] Chief Justice Kent of the New York Supreme Court granted a writ of habeas corpus to one Samuel Stacy who was detained by the United States troops at Sackett's Harbor near the Canadian line. Stacy had been arrested by a United States Naval officer on suspicion of espionage. The Chief Justice utilized minor procedural defects to free Stacy against whom there was strong proof of spying against the United States.

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[40] See **DA PAM 20–212, at 61.**

[41] **SPAULDING, op. *cit.* supra note 4, at 174.**

[42] **Opinion of the Judges, 8 Mass. 548 (1812).**

[43] **10 Johns. R. 336 (2d ed. N.Y. 1813).**

The case is vital to show the open resentment of the New England states to the War of 1812.

In *Martin v. Mott,*[44] the Supreme Court, in an opinion by Mr. Justice Story, held that the President was the sole judge of the necessity or expediency for calling out the militia, a judgment which is not subject to judicial review. The Court interpreted the Act of February 28, 1795,[45] and held a militiaman was subject to court-martial where he failed to enter the service of the United States when called. The Court stated:

> We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopardize the public interests.[46]

In *Houston v. Moore,*[47] the Court interpreted the militia clause, and held that the power in Congress to provide for disciplining the militia is not an exclusive federal authority. There is a concurrent power in the states to discipline state militiamen. Mr. Justice Bushrod Washington, who wrote the opinion of the Court, pointed out that the militia called into the service of the United States were not in actual federal service until their arrival at the place of rendezvous. Mr. Justice Story dissented, and would have disallowed the Pennsylvania statute which created a state system of courts-martial for state militiamen who failed to respond to a draft into federal military service.

The result in *Houston* is that the authority of Congress over the militia is of a limited nature and confined strictly to the objects specified in the militia clause. In all other respects, the militia are subject to the control of the state authorities.

Luther v. *Borden*[48] is in accord with the decision in *Martin v. Mott, supra.* In an opinion by Chief Justice Taney, the Court upheld a Rhode Island statute which had declared martial law

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[44] 25 U.S. (12 Wheat.) 19 (1827).
[45] Ch. 36, 1 Stat. 424.
[46] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827).
[47] 18 U.S. (5 Wheat.) 1 (1820).
[48] 48 U.S. (7 Howard) 1 (1849).

throughout the entire state. Although no state may establish a permanent military government, the state may use its military authority to put down an armed insurrection which is too widespread to be controlled by the civil authorities. The state must determine for itself what degree of force the crisis demands. After martial law was declared by the state, a militia officer could arrest anyone whom he reasonably believed was engaged in the insurrection, or he might order a house to be forcibly entered.

Also in accord with *Martin v. Mott* is *Vanderheyden v. Young.*[49] This was a proceeding by a militiaman of New York, who had been engaged in the service of the United States, against the president of a court-martial which had imposed a sentence upon him. The New York appellate court perceived that a court-martial for an offender while in federal service had jurisdiction over a militiaman who has pleaded guilty as charged. Subsequently, the accused cannot allege that the court-martial lacked jurisdiction, although he might apply for redress to the commanding officer who was reviewing the court-martial record. Although decided prior to *Martin v. Mott,* the New York court upheld the exercise of discretion by the President in calling forth a portion of the New **York** militia into active service, and the court-martial members are not put to the test to prove that the President acted properly under the Act of February 28, 1795,[50] in calling forth the particular militia units involved. Nor need it be shown that the United States was in imminent danger of invasion in order to justify the President's call of the militia. Lastly, courts-martial, for the trial of militia officers or enlisted men were to be composed of militia officers, and the court should not be composed of officers permanently in the service of the United States.

In *Mills v. Martin,*[51] a New York court was concerned with an Act of Congress, April 18, 1814,[52] which provided for a system of courts-martial. The plaintiff, a militiaman, failed to report at the place of rendezvous in response to an order which issued in compliance with a requisition of the President calling militiamen to service. The defendant was a federal deputy-marshal who took the plaintiff into custody in response to a summons from

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[49] **11** Johns. **R. 164** (2d ed., **N.Y. 1814).**

[50] See ch. **36,** 1 Stat. **424.**

[51] **19** Johns. R. 7 (2d ed. N.Y. **1821).**

[52] Ch. **82, 3** Stat. **134.**

the president of a general court-martial. The court-martial in May 1818, composed of New York militia officers in the service of the United States, convicted the plaintiff for failing to report as a militiaman for federal military service. The Court held that the Act of Congress of 1814 had expired by its own time limitations, and thereafter the state militiaman was only subject to prosecution by what would be in effect a state court-martial and not by a court-martial composed of officers in federal service. The Court recognized that the militia, as state citizens, were under the protection of state sovereignty, and they should not be subjected to federal military tribunals unless there was a clear presence of jurisdiction in the latter tribunals. The Court distinguished ***Vanderheyden*** v. ***Young***[53] and ***Houston*** *v. Moore.*[54]

V. THE ORGANIZED MILITIA

A. *THE VOLUNTEER COMPANIES*

Section 8 of the Militia Act of **1792**[55] permitted the states to incorporate private companies of men which could be attached to the militia. This was authority for the states to permit military companies to function either as a part of or separate from the untrained militia. There may have been a purpose in Congress to foster certain old, select companies which had served with distinction through the Revolutionary War. In England, independent companies traced back to at least the sixteenth century. In 1638, in Massachusetts the "Ancient and Honorable Artillery Company" was established, as were other similar trained bands throughout the colonies.

The volunteer companies were uniformed, trained, and armed at the expense of the members, and the total number of such companies steadily increased. By **1804,** it has been estimated that there were about *25,000* members of independent, organized companies throughout the United States.[56] In New York City by 1808, there were three regiments of light artillery, one of infantry, a squadron of cavalry, two companies of heavy artillery, and several unattached rifle units.[57]

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[53] 11 Johns. R. 164 (2d ed., N.Y. 1814).

[54] 18 U.S. (5 Wheat.) 1 (1820).

[55] See ch. *33,* 1 Stat. 271.

[56] Todd, *Our National Guard,* 5 J. AM. MIL. INST. 80 (1941) [now called MILITARY AFFAIRS].

[57] See *id.* at 156.

The organized companies flourished in the larger cities of the country, and tended to supplement the inadequate police systems of the early nineteenth century. The organized companies would be called into state or local service to maintain law and order during fires, floods, and civil tumults.

As an aftermath of the War of 1812, the concept of the utility of the untrained militia declined throughout the nation because the War showed the error of matching untrained militiamen against regular troops or organized militia. By 1826, the organized companies personnel comprised almost 15 percent of the total militia and had replaced the untrained militia for most of the purposes of the Act of 1792.[58] The course of events during the first half of the nineteenth century aided the development of the organized, trained, uniformed state militia units.

In 1810, a training school functioned in Massachusetts for the officers of the organized companies.[59] In 1840, in Massachusetts, the untrained militia system was abolished in effect and the organized militia became the state military forces.[60] In New York in 1847, the inactive militia was taxed to buy equipment and arms for the organized state troops.[61] Many states required training by the organized militia, often on an annual basis.[62] As one writer has stated: "Criticism of them [organized companies] appears impertinent if we remember that it was they who were footing the bill of 'preparedness.'" [63]

B. *DERIVATION OF THE NAME "NATIONAL GUARD"*

The origin of the term "National Guard" stems from the first quarter of the nineteenth century. General Lafayette had brought the name "National Guard" to the United States in connection with his visit to this country in 1824.[64] During the French Revolution, General Lafayette had been commander of a French trained-volunteer force which had assumed the designation "national guard," and as a unit had defeated Duke Charles of Brunswick at Valmy in 1792.[65] Duke Charles was the same prince who

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[58] RIKER, *op. cit. supra* note 25, at 42-43.
[59] Cutler, *op. cit. supra* note 9, at 58.
[60] See Act of March 24,1840, Mass. Laws 1840, ch. 92, at 233–40.
[61] Act of May 13, 1847, N.Y. Laws 1847, ch. 290.
[62] See House Comm. on the Militia, *Efficiency* of the *Militia,* H.R. REP. No. 754, 52d Cong., 1st Sess. 26–28 (1892).
[63] Todd, *supra* note 56, at 83.
[64] See Cutler, *op. cit.* supra note 9, at 54.
[65] See *id.* at 22.

had hired his subjects as mercenary troops to King George III during the American Revolution, The triumphal tour of the United States by Lafayette in 1824–1825 induced the members of an organized, trained militia battalion in New York City to assume the appellation of "National Guards." The term captured the public interest and from **1825** onward "National Guard" was applied to all state troops in America.

VI. STATE DRAFT: FEDERAL DRAFT

A. *THE STATE DRAFT IN AMERICA*

Previously, it has been pointed out that from the earliest colonial times the states drafted men from the militia to raise troops, usually to campaign against the Indians. During the Revolutionary War, at least nine of the states drafted men from the militia to meet the quotas of men imposed by the Continental Congress, The instance of New York will suffice to show the reliance of a state upon a draft or conscription of militiamen.

On September **26, 1814,** Governor Daniel **D.** Tompkins called the New York Legislature into extra session. On October **12, 1814,** approval was voted for the creation of a corps of **20** militia companies for purposes of coast defense.[66] On the same day, the Governor of New York was authorized under the "Classification Law" to raise by draft **12,000** troops from the untrained militia for two years service. All militiamen were to be classified, and men were to be inducted from the various classes.[67]

After the War of **1812,** the state draft fell into disuse as hostilities diminished with Indian tribes in eastern United States. However, the state draft was employed in southeastern United States as a result of the Florida Indian wars. A Congressional Act in **1834** provided, in part, for the payment of the claims of a "volunteer or draughted militiaman'' in the military service of the United States.[68] Congress added **5,341** men to the Regular Army, and called **28,307** militia and volunteers [69] before the Florida tribes were subdued.

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[66] 1 HAMMOND, THE HISTORY OF POLITICAL PARTIES IN THE STATE OF NEW YORK 379 (1852).

[67] See *id.* at 381.

[68] See Act of June 30,1834, ch. 153, § 2, 4 Stat. 726.

[69] MENEELY, WAR DEPARTMENT 1861, at 16–17 (1928).

The Mexican War of 1846–1848 was mainly a campaign distant from the continental United States. In general, militia were not used directly in foreign service as the militia clause restrictions applied. There was neither execution of the laws, suppression of insurrections nor the repelling of invasions. By the Act of May 13, 1846,[70] Congress, under the army clause, approved the raising and use of units of national volunteers. Organized militia units were received into service as units of volunteers.

B. *THE STATE-FEDERAL DRAFT SYSTEM IN THE UNION DURING THE CIVIL WAR*

Under the authority of the Act of March 3, 1803,[71] the President could call out the militia for the preservation of law and order. Under this authority, President Abraham Lincoln called ten companies of trained militia on April 9, 1861, five companies on April 13, one company on April 15, and eight companies on April 16, 1861.[72] Additional authority in the President existed under the Act of February 28, 1795,[73] which empowered the President to call the state militia when the laws of the United States should be opposed or obstructed in any state. A limitation was that no militiaman was to serve longer than three months in any one year after his arrival at the place of rendezvous. The call by the President for 75,000 men in April 1861 was under the authority of the 1795 Act and gained trained militia for a three-month period of service.[74] Literally, the state organized militia were the only troops readily available as the numerical strength of the Regular Army was 16,367,[75] most of whom were scattered on the frontiers of the nation. From this number deduct 313 officers who resigned to go South.[76]

For the first two years of the Civil War, the Lincoln Administration relied mainly upon the state militia system, and the Act of 1792[77] was in effect for all purposes in the Union states.

Innumerable organized, trained state militia units "volunteered" for war service and the organized militia companies were

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[70] See DA PAM 20–212, at 70.
[71] See DA PAM 20–212, at 37–38.
[72] See 51 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES ser. I, part 1 supp., at 321–25 (various dates) [hereinafter cited as OFFICIAL RECORDS]. See also 1 OFFICIAL RECORDS, ser. 111, at 75.
[73] Ch. 36, 1 Stat. 424.
[74] See 1 OFFICIAL RECORDS, ser. 111, at 68–69.
[75] UPTON, THE MILITARY POLICY OF THE UNITED STATES 225 (3d imp. 1912).
[76] RANDALL, THE CIVIL WAR AND RECONSTRUCTION 406 n. 4 (1937).
[77] Ch. 33, 1 Stat. 271.

accepted as "United States Volunteers." [78] An Act of July 17, 1862,[79] amended the Militia Act of 1795 [80] and as an aid to recruitment within the states approved a militia draft and sought to create a measure of uniformity in the state standards of evaluating men. Marking an innovation in American history, the President received statutory authority to invoke a Presidential Draft to compel the service of state militia where a state did not adhere to a state militia draft system. The method followed was that the President should provide regulations for a state draft to apply in a state which did not have a state draft system. However, the states sought to gain men through volunteering hastened by the payment of the excessive bounties. In other words, a state would avoid a draft of the militia by encouraging volunteering in response to heavy bounty payments. It has been estimated that 87,000 drafted militia were obtained through the workings of the Act of July 1862.[81] On August 4, 1862, the President called for a draft of 300,000 state militia to serve for nine months. Governors could meet their quotas either by volunteers or by resort to a special draft upon the militia.[82] Provost marshals came into use in Army military history on August 9, 1862, when one was appointed by the President for each congressional district on nomination of the state governor in order to enforce the militia draft.[83] As the state draft of militia did not prove successful in obtaining the great numbers of men required by the Union Army, there was adopted on March 3, 1863, an "Act for enrolling and calling out the national Forces, and for other Purposes," commonly known as the Enrollment Act.[84] This law was the first federal draft or conscription upon a nation-wide basis in the United States.[85] In the federal-state area of military affairs, the Enrollment Act made a reference to "National Forces'' with regard to men drafted directly by the Army from the manpower of the nation without first passing through state channels.

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[78] RIKER, *op. cit. supra* note 25, at 41.
[79] Ch. 201, 12 Stat. 597.
[80] Ch. 36, 1 Stat. 424.
[81] Cutler, op. *cit. supra* note 9, at 41.
[82] See 2 OFFICIAL RECORDS, ser. 111, at 333.
[83] See UPTON, op. *cit. supra* note *75*, at 442.
[84] See Act of March 3, 1863, ch. 75, 12 Stat. 731.
[85] For a discussion of the Enrollment Act, see SHAW, *Civil War Federal Conscription and Exemption System*, Judge Advocate *J.*, Feb. 1962, p. 1.

C. THE CONFEDERATE CONSCRIPTION AND EXEMPTION ACTS

Essentially, the first Confederate forces were gained through the acquisition of state militia units obtained under a quota system set by the Provisional Government at Montgomery and recognized by the seceded states. After secession, most of the southern states mobilized a considerable part of their organized militia.[86] In the main, each state that joined the Confederacy had a well-organized militia of several thousand zealous troops. President Jefferson Davis in his Inaugural Address asked the Provisional Confederate Congress to employ the state militia as the nucleus for the army of the new central government.[87]

On January 29, 1862, the Provisional Confederate Congress authorized the states to draft from the militia men who would be turned over to the central government for three years.[88] Virginia exercised this authority from February 1862.[89]

Because of the great need for manpower in a total war, practically all men were called from the unorganized militia which ceased to exist and there was in effect in a state only an organized militia of men in various stages of training. For example, in Louisiana, on September 28, 1861, Governor Thomas O. Moore issued an order for the complete enrollment and organization of all the militia. A census of all persons, 18-45 years, was made, and any person neglecting to perform any ordered militia duty was deemed "suspicious" and fined." In 1863, a militiaman's period of active duty was increased to six months service "or for as much longer as may be necessary."[91] The average time of active service of a Louisiana militiaman was at least 16 months.[92] One-half of the state militia was ordered into what became permanent active service from February 25, 1863.[93]

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[86] PROVOST MARSHAL GENERAL, 1 FINAL REPORT TO THE SECRETARY OF WAR ON THE OPERATIONS OF THE BUREAU OF THE PROVOST MARSHAL GENERAL OF THE UNITED STATES 115–16.

[87] See 1 *Journal* of *the Congress of the Confederate States*, S. DOC. No. 234, 58th Cong., 2d Sess. 65 (1904).

[88] See 1 OFFICIAL RECORDS, ser. IV, at 891.

[89] Cutler, *op. cit. supra* note 9, at 70.

[90] See 1 OFFICIAL RECORDS, ser. IV, at 753.

[91] See La. Acts 1862–1863, § 21, at 18–20, 36-40.

[92] See LIVERMORE, NUMBERS AND LOSSES IN THE CIVIL WAR IN AMERICA, 1861–1865, at 60 (2d ed. 1901).

[93] See *id.* at 61.

On April **16, 1862,** the Congress at Richmond adopted a national conscription measure. All white men, **18–35** years, were to be called to a military duty for three years. Men within the army were to continue to serve without interruption for an additional two years. Draftees were to be assigned to units from their home states if practicable. All enrollees not immediately called became the "reserve" subject to call when needed.[94] The Act of April **16, 1862,** was the first national conscription law in America.[95]

D. *LITIGATION*

A leading case is *Lanahun* v. *Birge*[96] holding that the state may enforce compulsory military service from its citizens as an incident of state sovereignty. A minor, aged eighteen years, was held subject to "military duty and military draft."

In *In re Griner,*[97] the Wisconsin Supreme Court upheld the Militia Act of July **17, 1862,**[98] and in the absence of a Wisconsin state militia draft system, the Presidential draft system was applied. Where the President by proclamation established regulations for the drafting of the militia, there was no improper delegation of legislative authority to the Chief Executive. The court saw that the President should rely on federal draft authority only when the state failed to provide its own draft system. The authority in the President was viewed to vest by the Act of February **28, 1795,**[99] for calling forth the militia to execute the laws of the Union.

In *In re Wehlitz,*[100] the same court held that a resident alien who becomes a state citizen and who votes locally may be drafted into federal military service under the Act of July **17, 1862.**[101]

In *In the Matter of Spangler,*[102] the Michigan court was confronted with regulations issued by the Adjutant General to implement a call by the President on August **4, 1862,** for **300,000**

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[94] The Act of April 16, 1862, was included as part of General Order 30, printed at 1 OFFICIAL RECORDS, ser. IV, at 1095–97.

[95] COULTER, THE CONFEDERATE STATES OF AMERICA, 1861–1865, at 314 (1950). As to the Confederate System, consult Shaw, Confederate Conscription and Exemption Acts, 6 AM. J. LEGAL HIST. 368 (1962).

[96] 30 Conn. 438 (1862).

[97] 16 Wis. 423 (1863).

[98] Ch. 201, 12 Stat. 597.

[99] Ch. 36, 1 Stat. 424.

[100] 16 Wis. 443 (1863).

[101] Ch. 201, 12 Stat. 597.

[102] 11 Mich. 298 (1863).

militia. The draftees were held to be liable to the federal officials and not to state authorities, even though the draftees had not yet been mustered into United States service. Federal authority over the militia draftees began from the date of the Presidential call for militia and not from the date of state muster.

The Wisconsin court was concerned in *Druecker v. Salomon* [103] with an action for false imprisonment ddting back to 1862. The defendant. as Governor of Wisconsin, alleged that in November 1862, in connection with a federal call for state troops, the plaintiff was arrested in the suppression of a riot protesting the state-federal draft. The court held that the state governor did not exceed his powers in arresting the plaintiff and keeping him in close custody for 12 days. The state court recognized that the President is the exclusive judge when he might call forth state militia under the Act of July 17, 1862.[104] Where draft commissioners are appointed by the Governor from the State citizenry, such officials are United States officers enforcing a federal form of draft.

The Enrollnient Act of 1863 [105] was never. interpreted by the United States Supreme Court. However, on November 9, 1863, in *Kneedler v. Lane*,[106] the Supreme Court of Pennsylvania upheld the constitutionality of the Enrollment Act by a 3–2 decision. It reasoned that Congress, under the army clause, had authority to raise armies by conscription, if necessary. Congress had concurrent power along with the states over men who comprise the state militia. While all able-bodied men, either organized or unorganized, were state militiamen, the power of the state over them was subordinate to the authority of Congress to raise armies in time of war. The enactment of a direct federal military draft of men was not an infringement of the reserved powers of the state. National supremacy could not be upheld if the federal government could only obtain militia from and through the states. When the Constitution was formulated, the method of a conscriptive draft of men was as well known as that of voluntary enlistment. The founders at Philadelphia gave Congress an unqualified power to raise armies. The dissenting opinion in *Kneedler* stressed the necessity of a call for militia through the states before the federal government could obtain men by draft.

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[103] 21 Wis. 621 (1867).
[104] See ch. 201, **12** Stat. 597.
[105] **Act** of March 3, 1863, ch. *75,* 12 Stat. 731.
[106] **45** Pa. 238 (1863).

In Kerr v. *Jones,*[107] it was held that the office of Colonel of the Union Volunteers, although organized on the militia regimental pattern, with officers commissioned by the states, is not an office of the state militia.

In September **1863,** in *Antrim's Case,*[108] the Enrollment Act of **1863** was upheld in a federal district court in Pennsylvania. A draftee had reported for duty, received a uniform, obtained a leave of absence, and, while on leave, initiated habeas corpus to be released from the army, The local Enrollment Board had previously denied him exemption. The court held that while a local draft board ruling was subject to judicial review, a national military force could be raised by a federal draft independent of any state militia methods or organizations. Under the Army clause, Congress could raise armies by federal draft.

The militia of the District of Columbia for a time had a peculiar status which was neither federal nor state. Winthrop has concluded that District of Columbia militia were only a form of local police beyond the scope of the Constitution.[109] However, today the National Guard of all states, territories and the District of Columbia, is equal without distinction.[110]

The Confederate statutes gave rise to numerous cases which have aided our legal thinking in the matter of distinguishing state militia from national troops. In *Ex* parte *Coupland,*[111] the constitutionality of the Conscription Act of April 16, 1862,[112] was upheld in a **2-1** decision. The Texas court held that the war-making power was committed to Congress by the Confederate Constitution which also empowers that body "to raise and support armies." It should be noted that the constitutional provisions of the Confederate States were almost identical with those of the United States Constitution of **1787** in the phases here involved.[113] The Congressional authority over the creation of armies was without any limitation. The court saw no interference with the rights of the states over their militia because the "general government"

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[107] **19 Ind. 351 (1862).**

[108] **1 Fed Cas. 1063 (No. 495) (E.D. Pa. 1863) ;** ***accord,*** **McCalls Case, 15 Fed. Cas. 1225 (No. 8669) (E.D. Pa. 1863).**

[109] **See WINTHROP, MILITARY LAW AND PRECEDENTS 55 n.67 (2d ed., reprint 1920).**

[110] ***See*** **32 U.S.C. § 101 (1964).**

[111] **26 Tex. 387 (1862).**

[112] **See 1 OFFICIAL RECORDS, ser. IV, at 1095.**

[113] **See CURRY, CIVIL HISTORY OF THE GOVERNMENT OF THE CONFEDERATE STATES 274 (1901), which sets forth the Confederate and United States Constitutions.**

took an enrollee in his capacity of citizen and not in the capacity of a militiaman.

In *Jeffers v. Fair*,[114] a Georgia case, the court declared that the circumstance that a man might be enrolled with the state militia did not exempt him from military duties and liabilities as a citizen of the central Confederate government. In *Barber v. Irwin*,[115] the same court, after recognizing the need of the central government to raise men for the army, declared that men exempt under the Conscription Act were subject to Georgia militia service.

In *Burroughs v. Peyton*,[116] the highest Virginia court recognized that men called by the Confederate government for military duty were not militia in rendering service to the central government. The authority rested in Congress to call men into service under the Army clause. The court stated: "[I]t cannot be supposed that it was intended, under our system of government, to confer the right upon Congress to strip themselves of their power, [to raise armies] and trust to the irregular, uncertain and tardy action of the several states to bring out the military force of the country."[117]

Toward the close of the Civil War hostilities, it was held in *Simmons v. Miller* [118] that Mississippi could not retain in active militia service men who were otherwise liable for Confederate service under the Conscription Act.[119] The power of the state was subordinate to that of the central government, as the war power in Congress was exclusive in the field of military manpower procurement,

VII. THE NATIONAL GUARD, 1865–1902

A. *REORGANIZATION OF THE ACTIVE MILITIA AFTER THE CIVIL WAR*

The Civil War brought an end to the organized militia companies, as the hundreds of thousands of men raised by both the Union and the Confederacy gave permanence to regimental units. The War had given an acceptance to the terms "Organized Militia" and "National Guard." [120] In 1878, General George McClellan

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[114] 33 Ga. 347 (1862).
[115] 34 Ga. 28 (1862).
[116] 57 Va. (16 Gratt.) 470 (1864).
[117] *Id.* at 488.
[118] 40 Miss. 19 (1865).
[119] See 1 OFFICIAL **RECORDS**, ser. IV, at 1095.
[120] Todd, *supra* note 56, at 158.

stated to the Burnside Committee which was studying the national military establishment:

> All of our experience has shown that in the event of war, we cannot rely upon the militia as such, but upon such individual members of that vast body as offer to serve and form corps of volunteers, and upon regiments of national guards, The great nursery of these volunteers (is) the corps of "national guard." I would earnestly commend . . . the formation of such corps in the various States, and assisting them as much as possible.[121]

Less than six months after the War's end, the military forces were reduced from **1,052,038** men to 210,000.[122] General U. S. Grant concluded that the United States should maintain a Regular Army of at least 88,000 men.[123] However, the Regular Army was slashed to **37,313** men in **1869.** Thereafter, the actual strength was around **25,000** men.[124] Army expenditures reached a dangerous low of **$29,000,000** in **1880,** The Army was compelled to use smooth-bore cannon for years after foreign nations had armed their artillery with rifled cannon. Only with difficulty could it assemble more than one battalion of troops at any one time.[125]

By **1892,** the National Guard had a total strength of **109,674** uniformed, equipped, trained men throughout the various states.[126] Taking the figure **25,000** men as the total strength of the Army, it is readily apparent that the National Guard was over four times as large as the Army itself.

B. *THE POSSE COMITATUS ACT OF 1878*

It has been stressed previously that the Act of March **3, 1807,**[127] legislated that the Regular Army was to function to execute the laws of the United States which before that time had been enforced under the militia clause by the President calling militia units to active service to execute the laws.

An Act of June **18, 1878** (the Posse Comitatus Act),[128] prohibited the use of members of the Regular Establishment including the Army to aid in the enforcement of the laws. However, as

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[121] Joint Comm. of Cong., *Reorganization* **of** *the* **Army,** *S.* **REP.** No. **555, 45th** Cong., 3d Sess. **458 (1878).**
[122] **LEACH,** *op. cit. supra* note 10, at **444.**
[123] 5 **OFFICIAL RECORDS,** ser. **111,** at **126–27.**
[124] DA **PAM** 20–212, at **141 n.3.**
[125] See **HUNTINGTON, THE SOLDIER AND THE STATE 228 (1957).**
[126] Greene, *The New National Guard,* **43 CENTURY MAG. 483, 488 (1892).**
[127] Ch. **39, 2** Stat. **443.** See note **31** and accompanying text.
[128] Section **15,** 20 Stat. **154 (1878).** This Act has since been codified and enacted into law as **18** U.S.C. § **1385 (1964).**

the Act states, it does not replace other specific statutory authority for the use of federal troops for local law enforcement.[129]

C. *THE ACT OF 1887*

It has been noted that in 1808,[130] Congress adopted the first federal grant-in-aid by appropriating $200,000 annually to be expended to arm the militia. The $200,000 maximum continued as the grant although the nation had tremendously expanded in size after 1808. In 1887, Congress increased the grant to the states for the organized militia support to $400,000.[131] The grant to the states applied only for the benefit of the organized, trained militia who were generally designated as the "National Guard" by 1887.

The National Guard troops before and after the Civil War received no pay from state or federal sources. The individual guardsman or militiaman often contributed to the company fund of his unit. The regimental officers donated generously on a planned basis to the defrayment of battalion and regimental expense.[132]

D. *THE SPANISH-AMERICAN WAR, APRIL 1898*

The strength of the Regular Army on April 1, 1898, was 28,183 officers and men.[133] The National Guard strength totaled 115,627 officers and men.[134] Congress on April 22, 1898, adopted an act "to provide for temporarily increasing the military establishment of the United States in time of war, . . ." [135] The army was to be composed of the Regular Army and the Volunteer Army which would include the National Guard. President William McKinley on April 23, 1898, called for 125,000 volunteers to be allocated by quotas among the states.[136] The men who comprised the 125,000 came mainly from those already in National Guard units of the states, although in the organized militia units, these men had to volunteer as individuals and lost their National Guard status. A second call for 75,000 volunteers allocated among the states was made by the President on May 25, 1898.[137]

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[129] See 16 OPS. ATT'Y GEN. 162 (1878); 19 OPS. ATT'Y GEN. 570 (1890).
[130] Act of April 23, 1808, ch. 60, 2 Stat. 490.
[131] Act of February 12, 1887, ch. 129, 24 Stat. 401.
[132] See generally Smith, *Militia of the United States from 1846 to 1860,* 15 IND. MAG. HIST. 20 (1919).
[133] DA PAM 20–212, at 150.
[134] *Ibid.*
[135] Ch. 187, 30 Stat. 361.
[136] See Proclamation of April 23, 1898, 30 Stat. 1770.
[137] See Proclamation of May 25, 1898, 30 Stat. 1772–73.

Congress declared War on April 25, 1898.[138] Telegrams were dispatched by the Secretary of War on April 25, 1898, to all of the state governors on the subject of "Mobilization of Volunteers.'' The wires stated: " 'It is the wish of the President that the regiments of the National Guard or State militia shall be used as far as the numbers will permit, for the reason that they are armed, equipped and drilled.' " [139]

As an example of the working of the mobilization, the total quota of volunteers allocated to California was 5,181, divisible to 3,238 on the first call and 1,943 on the second call. These were met by 5,653 National Guardsmen received as "volunteers." [140]

Designations of the National Guard regiments were changed. For example, the 1st Regiment, California National Guard, became the 1st Regiment, Infantry, California Volunteers, although the regiment of 1,250 trained officers and men was received intact into federal service on May 6, 1898.[141]

One reason for the change of name of the National Guard units to those of "Volunteers" was that it was believed that foreign service could not be authorized with regard to the restrictions in the militia clause. The Act of April 22, 1898,[142] permitted members of a National Guard regiment to enlist in a body in the Volunteer Army. Eventually, the "volunteer" regiments made up the bulk of the expanded army.[143] An Act of May 28, 1898,[144] permitted Regular Army officers to hold commissions in the volunteers without prejudice to their regular status.

The Army reached a maximum total strength in August 1898 of 11,108 officers and 263,609 enlisted men.[145] A major lesson of the conflict was that foreign service should be permitted by law for National Guard troops as the conversion of guard regiments to new units of volunteers destined for foreign service was time consuming and ineffective. This lesson was remembered in the adoption of corrective legislation during the first decade of the twentieth century.

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138 Act of April 25, 1898, ch. 189, 30 Stat. 364.
139 DA PAM 20–212, at 158–59.
140 1898 CAL. ADJUTANT-GENERAL BIENNIAL REP. 6.
141 See GANOE, HISTORY OF THE U. S. ARMY 379, 389,402 (1924).
142 Ch. 187, 30 Stat. 361.
143 Wiener, *Militia Clause* of the *Constitution,* 54 HARV. *L.* REV. 181, 193 (1940).
144 Ch. 367, 30 Stat. 421.
145 See DA PAM 20–212, at 164.

E. *LITIGATION*

In *In the Matter* of *Dassler* [146] and in *People ex rel. The German Ins. Co. v. Williams,* [147] the Kansas and Illinois courts reaffirmed that a state may exact compulsory service from a state citizen.

In *Tarble's Case,* [148] it was resolved that a state court has no jurisdiction to order the release through habeas corpus of a voluntarily enlisted soldier in the Regular Army.

A leading case is *People v. Campbell,* [149] which recognized the concurrent jurisdiction in the state and federal governments arising from the militia clause. Under the facts, a regiment of state organized militia when mustered into the service of the United States, did not cease to be a part, though detached, of the militia of the state although the regiment was serving the federal government and was subject to the regulations and discipline of the Regular Army. An officer of the regiment was exempt from civil arrest under a state law of 1858 which exempted any person in state military service from civil process, [150] even though he was in active federal service while his regiment was still quartered within New York.

In *Presser v. Illinois,* [151] it was recognized that a state could restrict the organization, drilling, and parading of military units provided the restrictions did not conflict with the militia laws of the United States.

In *Dunne v. People,* [152] the Illinois court reasoned that the National Guard members are not federal troops, but rather are citizen-soldiers. An Illinois statute could excuse a National Guardsman from jury duty, and he could not be prosecuted for failure to report for jury service.

Johnson v. Sayre [153] was concerned with the Fifth Amendment reference to "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. . . ." The United States Supreme Court held that the provision

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[146] 35 Kans. 678, 12 Pac. 130 (1886).

[147] 145 Ill. 567, 33 N.E. 869 (1893); *accord,* Lanahan v. Birge, 30 Conn. 438 (1862).

[148] 80 U.S. (13 Wall.) 397 (1872).

[149] 40 N.Y. 133 (1869).

[150] See New York Laws 1868, ch. 129 § 17, at **241.**

[151] 116 U.S. 252 (1886).

[152] 94 Ill. 120 (1879); *accord,* State *ex rel.* Madigan **v.** Wagener, 74 Minn. 618, 77 N.W. 424 (1898); Smith v. Wanser, 68 N.J.L. 249, 52 Atl. 309 (1902).

[153] 158 U.S. 109 (1895).

of "actual service'' qualifies militia only and did not also qualify for the words "naval forces." This case was a habeas corpus proceeding by Sayre who was facing a general court-martial for embezzlement. When the trial opened, counsel for the accused objected to the jurisdiction of the court upon the ground that Sayre, being a paymaster's clerk, was a civilian, and, hence, subject to federal criminal procedure. The Court sustained the jurisdiction of the court-martial to proceed against Sayre, even though he did not possess militia status, because he was found to be within the statutory definition of "naval service" and thus could be tried by court-martial.

In *Robertson* v. *Baldwin,*[154] the Supreme Court, by way of dicta, stated that the Second Amendment provision that "a well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed,'' did not restrict Congress from prohibiting the indiscriminate carrying of concealed weapons.

VIII. THE MILITIA ACT OF 1903

A. *THE SIGNIFICANCE OF THE ACT*

A monumental instance of what is regarded as vital Congressional legislation may be found in the Act of January 21, 1903.[155] This legislation, commonly called the "Dick Act," was introduced by Representative George F. Dick, Chairman of the House Committee on Military Affairs. Elihu Root, Secretary of War from 1899 to 1904, had been active in furthering the **Army** Reorganization Act of 1901,[156] and the establishment of an Army General Staff.[157]

The Dick Act brought about a much needed overhauling of the Militia Act of 1792.[158] From it some of the following changes resulted :

(1) "National Guard" became the official designation for all State Organized Militia.

(2) Annual drills of *5* days at camp and 24 drills at home armory were required from each guardsman.

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[154] 165 U.S. 275, 281–82 (1897).
[155] Ch. 196, 32 Stat. 775.
[156] For a summary of the Reorganization Act, see DA PAM 20–212, at 179.
[157] See *id.* at 178–79.
[158] Ch. 33, 1 Stat. 271.

(3) Guard officers might attend the Army Service Schools.
(4) Regular Army instructors could be provided at training camp in response to the request of a Governor.
(5) Written reports on field training could be made to a Governor.
(6) The Guard could be called to active service not to exceed nine months duration.
(7) Guard officers would comprise the members of courts-martial dealing with offenses of guardsmen in federal service.
(8) The National Guard would conform to the Regular Army organization and would be equipped from federal funds.
(9) Each state had five years to adhere to the statutory provisions. (This was subsequently extended in 1908 to seven years in which to conform.)[159]

As a result of the Dick Act, the organized militia, known as the National Guard, assumed a definite role in the entire national defense structure. The National Guard became in law what it had been in fact, namely, the military reserve of the Army.

B. *LENGTH OF SERVICE IN THE MILITIA*

Gradually, the duration of active federal service by the militia was extended from a starting point of three months under the Act of February 28, 1795,[160] to the nine months specified in the Dick Act.[161]

On April 15, 1861, in order to avoid a 90 day restriction, President Lincoln called the militia into service for an unspecified time which could give rise to more than three months active duty.[162] Congress ratified the presidential action.[163]

In calling for "volunteers," President Lincoln set three years as the time of service for men in this category.[164] In July 1861, active federal service of the militia was prescribed to extend to 60 days after commencement of the next regular session of Congress, and this achieved something of an indefinite period free from any number of months limitation.[165] In another instance, a

[159] See Joint Resolution of January 16, 1908, 35 Stat. 566.
[160] Ch. 36, 1 Stat. 424.
[161] Ch. 196, 32 Stat. 775.
[162] See Proclamation of April 15, 1861, 12 Stat. 1258.
[163] See Act of August 6, 1861, ch. 63, § 3, 12 Stat. 326.
[164] See Proclamation of May 3, 1861, 12 Stat. 1260.
[165] See Act of July 29, 1861, ch. 25 § 3, 12 Stat. 281, 282.

period of nine months service was specified for the militia in 1862.[166]

The Dick Act of 1903, in clearly specifying nine months, extended the time of federal service for the National Guard apart from war or other emergency legislation.

C. THE TRIAL OF MILITIA OFFICERS: *McCLAUGHRY V. DEMING*

In 1902, the well-known case of *McClaughry v. Deming*[167] held that a general court-martial composed of Regular Officers could not try an officer of the volunteers even though he pleaded guilty to charges of embezzlement and made no objection to the composition of the court. The matter arose in a petition for habeas corpus by Deming after he began serving his sentence in Fort Leavenworth Prison. The Supreme Court perceived "a tendency on the part of the regular, whether officer or private, to regard with a good deal of reserve . . . the men composing the militia as a branch not quite up to the standard of the Regular Army. . . ."[168] Quoting *Runkle* v. *United States*,[169] the Court indicated there was noncompliance with the four "indispensable requisites" of any court-martial: (1) that it be convened by an officer empowered to appoint it; (2) that the members of the court be legally competent; (3) that the court as constituted be invested by Congress with power to try the person and the offense charged; and (4) that the sentence be in accord with the law.

1. *The Act of May 27, 1908.*

The Act of 1903[170] did not alter the result in *McClaughry v. Deming*.[171] The Act of May 27,1908, provided that in the instance of the court-martial of officers or men of the militia a majority only of the court need be composed of militia officers.[172]

2. *The Act of April 25, 1914.*

Congress finally corrected the unique situation of who comprised the personnel of courts-martial by providing in 1914 that

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166 See Act of July 17, 1862, ch. 201, 12 Stat. 597.
167 186 U.S. 49 (1902), affirming 113 Fed. 639 (8th Cir. 1902).
168 Id. at 56.
169 122 US. 543, 556 (1887).
170 Ch. 196, 32 Stat. 775.
171 186 U.S. 49 (1902).
172 See Act of May 27,1908, ch. 204, § 6, 35 Stat. 399,401.

all officers whether Regulars, Militia or Volunteers without distinction or difference were eligible to serve upon courts-martial.[173]

The National Defense Act of 1916[174] purported to confer court-martial jurisdiction upon tribunals of the National Guard not in federal service. It may still be an open question whether the court-martial system provided in the Act of 1916 for the National Guard not in federal service is superseded by the systems which have been created in all the states for military courts for their particular State National Guard. There is concurrent authority over the militia by the federal and the state governments.[175] The primary responsibility for the militia formerly was in the state unless and until the militia was called to federal service.[176]

The Act of 1916, in reference to courts-martial of the National Guard not in the service of the United States, provides:

> They shall . . . have cognizance of the same subjects, and possess like powers, except as to punishments, as similar courts provided for by the laws and regulations governing the Army of the United States.[177]

IX. 1904–1916

A. *ACT OF MAY 27, 1908*

Many of the errors or weaknesses affecting the militia which dated back to 1792 were corrected by the Act of 1903[178] discussed above, The Act of May 27, 1908,[179] further improved the situation and provided :

(1) the period of federal service by the National Guardsmen was extended from the former nine months maximum through the term of enlistment or commission;

(2) there was to be complete standardization of arms, equipment and discipline with that of the Regular Army ;

(3) the restriction on foreign service by the National Guard outside of the United States was removed;

(4) arms, materiel, and ammunition were to be issued to the National Guard by the federal government ;

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[173] See Act of April 25, 1914, ch. 71, § 4, 38 Stat. 347, 348.

[174] See Act of June 3, 1916, ch. 134, § 102, 39 Stat. 166, 208. This Act is similar to the one enacted into law as 32 U.S.C. § 326 (1964).

[175] See Houston v. Moore, 118 U.S. (5 Wheat.) 1 (1820).

[176] See People *ex rel.* Leo v. Hill, 13 N.Y.S. 637, *aff'd*, 126 N.Y. 497, 27 N.E. 789 (1891).

[177] Act of June 3, 1916, ch. 134, § 102, 39 Stat. 166, 208. See also note 174.

[178] Ch. 196, 32 Stat. 775. See note 155 and accompanying text.

[179] Ch. 204, 35 Stat. 399, 400.

(5) there was enforced the compliance with a required amount of training of a prescribed nature annually;

(6) periodic inspections were to be made;

(7) the President through the Governors might call the National Guard into federal service for such a term as the President specified.

Major General Leonard Wood, who became Chief of Staff in April 1910, reorganized the General Staff into four divisions, one of which was termed "Militia" and dealt as, the name suggests, with problems of the National Guard.[180]

B. *OVERSEAS SERVICE*

The Act of 1908 was intended to remove any existing limitations upon the use of the National Guard for overseas or foreign service. However, in 1912, an opinion of the Attorney General to the Secretary of War purported to declare that the organized militia could not be employed beyond the territory of the United States.[181] The Attorney General stated that the Act of 1908 [182] must be interpreted with regard to the constitutional limitations upon the use of militia solely to suppress insurrections, repel invasions or execute the laws of the Union.

It should be noted that in 1912, there were efforts made to achieve something of a Reserve for the Regular Army. An Act of 1912 permitted a Reserve membership to be created based upon a furlough from the Army to the so-called Reserve.[183] This system was suspended by the Secretary of War in May 1916 when only sixteen men had transferred to the Reserve after three years of operation.[184] Perhaps unfairly, the conclusion has survived that the Attorney General Opinion of 1912 negativing foreign service for the National Guard may have been motivated in part to assist the development of a "Reserve."

C. *NATIONAL DEFENSE ACT OF 1916*

Adopted June 3, 1916,[185] the Hay Act devoted considerable detail to the internal structure and operations of the National

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[180] See DA PAM 20–212, at 181.
[181] See 29 OPS. ATT'Y GEN. 322 (1912); *accord,* DIG. OPS. JAG 1912–1940 § 1295 (20 Dec. 1911).
[182] See Act of May 27, 1908, ch. 204, 35 Stat. 399.
[183] See Act of August 24, 1912, ch. 391, § 2, 37 Stat. 569, 590-91.
[184] See DA PAM 20–212, at 185–86.
[185] Ch. 134, 39 Stat. 166.

Guard. The act dealt with (1) the National Guard, (2) the Regular Army, and (3) the Reserve. The statute achieved the following results:

(1) The National Guard was made subject to overseas or foreign service beyond the territorial limits of the United States.

(2) Further, "federalization" of the Guard ensued as the President could prescribe the type of organizational units for each state, and federal pay was available for armory drills, administrative work, and field training.

(3) Qualifications for enlistment in the Army and in the National Guard were identical.

(4) A dual oath was sworn by a guardsman to both the United States and the particular State involved :—to the President and to the Governor.

(5) Pay of enlisted personnel was contingent upon faithful attendance at 48 armory drills and 15 days summer field training.

(6) An Officers' Reserve Corps (ORC) and an Enlisted Reserve Corps (ERC) were created.

(7) The states could not maintain troops other than as Congress permitted and the President should direct.

(8) The states would continue to construct and maintain armories in key communities and state military staffs would continue in the states.

(9) Upon a definite basis, the Army would inspect and supervise the National Guard whose strength was set at 457,000 men.

(10) A kind of National Military Code was in some degree substituted for state military statutes.

(11) Regular Army officers could serve as Chiefs of Staff of National Guard divisions.

(12) Regular Army personnel could be commissioned in the National Guard without prejudice to their Regular commissions and status.

(13) A National Guard Reserve was approved.

(14) Qualifications of National Guard officers were prescribed, and federal recognition of commissioned status was indispensable. National Guard officers of declining efficiency were subject to termination of status.

A sense of conformity to federal military standards became prevalent through the states. For example, an Act of May 10,

1917, in California abolished the then system of state courts-martial and adopted the system created by Congress.[186]

In 1912, Secretary of War Henry Stimson had declared: "[T]he military establishment in time of peace is to be a small Regular Army . . . the ultimate war force of the Nation is to be a great army of citizen soldiers. . . . But reliance upon citizen soldiers is subject to the limitation that they cannot be expected to meet a trained enemy until they, too, have been trained. . . . The problem is one of expansion . . . to a great war force." [187]

D. *THE MEXICAN BORDER, 1916*

At the end of 1915, the strength of the National Guard was 127,410.[188] Hostilities occurred from March 1916 on the international border with Mexico. On June 18, 1916, for service near the border, the President called 156,414 men for nine months duty,[189] of whom approximately 110,000 were National Guard.[190]

The Mexican Border situation was a forecast of difficulties to be experienced in 1917–1918. Volunteer recruitment for the National Guard for service on the border was attempted, but the results were not satisfactory in point of numbers of men gained.[191] From March–December 1916, it became apparent that voluntary enlistment would not increase appreciably either the Army or the National Guard, and a form of compulsory military service was needed to achieve a general mobilization. General Leonard Wood stated on April 15, 1915: "The voluntary system failed us in the past, and will fail us in the future." [192]

The eventualities with Mexico influenced the Act of June 3, 1916.[193] The National Guard was placed under fuller federal control and the use of the Guard in foreign service was authorized.

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[186] **Cal. Stats.** 1917, **ch. 207, at 302–19, There had been operative Section 2018** of **the Political Code, now § 450,** *Mil. & Vets. Code.* Sec. 451, *Mil. & Vets. Code* **now provides that the** *Uniform Code* of *Military Justice* **is applicable in all respects.**

[187] **See U.S. WAR DEP'T, 1 ANNUAL REPORT 76 (1912).**

[188] **See GANOE,** *op. cit. supra* **note 141, at 453.**

[189] **Todd,** *supra* **note 56, at 166.**

[190] **See DA PAM 20–212, at 199.**

[191] **See** *id.* **at 200.**

[192] **WOOD, THE MILITARY OBLIGATION OF CITIZENSHIP 33 (1915).**

[193] **Ch. 134, 39 Stat.** 166.

E. *LITIGATION*

Sweetser v. Emerson[194] involved the issue of foreign service by a National Guardsman. Emerson had been enlisted in the Massachusetts National Guard before the enactment of the National Defense Act of 1916.[195] Although he did not take a new oath to obey the orders of the President, he could not voluntarily terminate his enlistment contract with the State of Massachusetts and was held to military service on the Border with regard to an enlistment under the Dick Act of 1903,[196] as amended.

X. WORLD WAR I

A. *COMPLETE USE OF THE NATIONAL GUARD*

Because of the vast extent of the world-wide conflict, the Army made maximum use of the National Guard in **1917–1918.** From a total of **42** Army divisions sent overseas, **17** were National Guard divisions.[197] Of **9,000** officers in the Army in April **1917, 5,791** were Regulars and **3,709** were National Guard.[198]

An Act of May **18, 1917,** "to increase temporarily the Military Establishment of the United States" [199] placed reliance upon three sources of national manpower which were:

(1) The Regular Army increased to a potential **488,218** officers and men.

(2) The National Guard increased to a potential **470,177** from a strength of **111,000.**

(3) A National Army to be raised by Selective Service to total an additional **1,000,000** men.

However, a single selective draft system was utilized to meet the quotas for all three sources.[200] The strength of the Army of the United States was **3,670,888** men on November **11,** 1918.[201]

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[194] **236 Fed. 161** (1st **Cir.** 1916), *petition for cert. withdrawn,* **243 U.S. 660** (1917).

[195] **Ch. 134, 39 Stat. 166.**

[196] **Ch. 196, 32 Stat. 775. See** Ansell, *Legal Aspects* **of** *the Militia,* **26 YALE** L. **REV. 471 (1917).**

[197] **Todd,** *supra* **note 56, at 167; BERNARDO & BACON,** *op. cit. supra* **note 32, at 364.**

[198] **BERNARDO & BACON, op.** *cit. supra* **note 32, at 363.**

[199] **Ch. 15, 40 Stat. 76.**

[200] **See US. WAR DEP'T, 1 ANNUAL REPORT 14–20 (1917).**

[201] **See GANOE,** *op. cit. supra* **note 141, at 482.**

By mid 1919, 2,723,515 citizen-soldiers had been returned to private life with a minimum of dislocation.[202]

The basic lesson learned from 1917–1918 was that the creation of a vast Army to fight a global conflict required enforcement of a compulsory military obligation common to all men physically qualified to serve and not otherwise deferred or exempted to meet the convenience of the government. The Act of May 18, 1917, was better known as the Selective Service Act of 1917.[203] For the first time, the differences of federal military service versus state military service in time of war were nonexistent. The Act was not an incentive to volunteering. Rather, it established a compulsory obligation for military duty in order to raise an army and a navy under the Army clause. About 67 percent of the men serving in the Army of the United States were brought in via the Selective Service Act. Over 2,800,000 men were registered, selected and turned over to the Army in less than 18 months.[204]

B. *CALLS OF THE NATIONAL GUARD INTO FEDERAL SERVICE*

The word "call" is used in the sense of referring to the transition into the federal service by National Guard who have not been in federal service, The term "call" thus indicates the translation of National Guard units and personnel into federal service following a summons from the United States.

Some of the proclamations by which National Guard units were called were :

(1) July 3, 1917,[205] applying to continental United States.
(2) May 28, 1918,[206] in Hawaii.
(3) November 18, 1918,[207] in the Philippines affecting one division for one month under the specific authority of an Act of January 26, 1918.[208]

An unforeseen result of World War I calls upon the National Guard was the renumbering and the organization of old National Guard units. For example, the First Troop, City of Philadelphia Cavlary, which traced back to 1774, was reconstituted as the 103d

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202 *Ibid.*
203 Ch. 15, 40 *Stat.* 76.
204 U. S. DEP'T OF ARMY, ROTC MANUAL 145–20, AMERICAN MILITARY HISTORY, 1607–1953, *at* 339 (1959).
205 40 *Stat.* 1681.
206 40 *Stat.* 1785.
207 40 *Stat.* 1890.
208 Ch. 11, 40 *Stat.* 432.

Trench Mortar Battery,[209] and rendered outstanding service in this capacity.

The Act of May 18, 1917,[210] permitted the President through the agency of the General Staff to create new organizations within the Army. Many National Guard units found a new placement as a result of the workings of this statute. For example, the 42d Rainbow Division was created in 1917 after the outbreak of war and contained National Guard units from over twenty-five states.[211] This was a realistic adjustment of the National Guard to meet changing Army requirements of the twentieth century.

One criticism of World War I policy was that after National Guardsmen had been called to federal service, and were subsequently discharged upon completion of the particular mission, their National Guard status was lost, and they no longer were in the National Guard. In many states, after all the National Guard had been called to federal service, the National Guard had literally ceased to function for any purposes within the state.

C. *STATE TROOPS OTHER THAN NATIONAL GUARD*

Article I, section 10, of the United States Constitution provides: "No State shall, without the Consent of Congress, . . . keep Troops, or Ships of War in time of Peace. . . ."

During World War I, state guards were formed in twenty-seven states and reached a total strength of 79,000 men.[212] Equipment and supplies were made available by Congress in an Act of June 14, 1917,[213] which remained the property of the United States and were to be accounted for by the states.[214]

An Act of March 2, 1867, during the Reconstruction era, had restrained ten former Confederate States from maintaining an organized militia.[215] This restriction had ended by 1878.

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209 OFFICIAL NATIONAL GUARD REGISTER 1084 (1939).

210 Ch. 15, 40 Stat. 76.

211 See REILLY, AMERICANS ALL: THE RAINBOW AT WAR 25–30, 38–48 (1936).

212 See Senate Committee on Military Affairs, *The Home Guard,* S. REP. NO. 2138, 76th Cong., 3d Sess. 3 (1940).

213 See ch. 28, 40 Stat. 181.

214 See *ibid.*

215 See ch. 153, 14 Stat. 428 (by implication).

D. *LITIGATION—ARVER V. UNITED STATES*

Involving six cases consolidated on appeal and called the Selective Draft Law Cases, the result in *Arver v. United States*[216] upheld the constitutionality of the Selective Service Act of May 18, 1917.[217] By virtue of the Army clause and the necessary and proper clause,[218] Congress had power to require military duty at home or abroad from all citizens and resident aliens. Although the military draft was administered by a state selective service system, there was no illegal delegation of federal authority to state officials. The Supreme Court distinguished the operation of the militia clause within its proper field from the sphere of the Army clause:

> There was left, therefore, under the sway of the states, undelegated, the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the potentiality of the right to exert it, but left an area of authority requiring to be provided for (the militia area) unless and until, by the exertion of the military power of Congress, that area had been circumscribed or totally disappeared. ...[219]

In *United States v. Sugar,*[220] a federal district court sustained a conviction for conspiracy to aid persons to violate the "Conscription Act" otherwise known as the Selective Service Act of May 18, 1917.[221] In upholding the constitutionality of the basic statute, the court recognized that the law does not purport to call out the militia, but, rather only to summon the members of the National Guard to active federal service.

XI. 1920–1945

A. *ARMY REORGANIZATION ACT OF 1920*

Also known as the National Defense Act of 1920,[222] the statute was a comprehensive military organization plan. The act fixed

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[216] 245 U.S. 366 (1918).
[217] Ch. 15, 40 Stat. 76.
[218] U.S. Const. art. I, § 8, cl. 18.
[219] United States v. Arver, 245 U.S. 366, 383 (1918). The briefs of the Government in *Arver* are particularly instructive and trace the history of the militia—organized and unorganized—in the United States.
[220] 243 Fed. 423 (E.D. Mich. 1917), *aff'd*, 252 Fed. 79 (6th Cir. 1918), *cert. denied,* 248 U.S. 578 (1918).
[221] Ch. 15, 40 Stat. 76. *See* also Shaw, *Selective Service A Source of Military Manpower*, 13 MIL. L. REV. 35 (1961); Shaw, *Selective Service Litigation Since 1960*, 23 MIL. L. REV. 101 (1954); Shaw, *Selective Service Ramications in 1964*, 29 MIL. L. REV. 124 (1965).
[222] Act of June 4,1920, ch. 227, 41 Stat. 759.

the strength of the National Guard at 435,000 men to be recruited by June 30, 1924. The Act corrected errors that had resulted from the administration of the Act of 1916[223] during World War I. The main features of the 1920 Act were:

(1) States could require that at the termination of any federal military service, the National Guardsman would resume his status in State Service.

(2) The Militia Bureau within the War Department was reorganized.[224]

(3) The Army of the United States was to consist of the Regular Army, the National Guard in the service of the United States, and the ORC and the ERC.

(4) The nation was divided into nine corps areas serving three tactical armies, Each corps area was to contain one Regular Army division and two National Guard divisions and three reserve divisions.

(5) ROTC programs were established; CMT Camps were initiated.

(6) The militia was specified to consist of (1) the National Guard, (2) the Naval Militia, and (3) the Unorganized Militia.

(7) National Guard officers might accept Reserve commissions without prejudice to their Guard status.

B. *ACT OF JUNE 15, 1933*

Under the Army clause, the 1933 Act constituted the National Guard as a reserve component of the Army of the United States.[225] While in federal service, the component was to be named "National Guard of the United States." At the termination of federal service, all NGUS units and their members reverted to State National Guard status. An Inactive National Guard replaced the former National Guard Reserve.

C. *THE NATIONAL GUARD BUREAU*

An Attorney General opinion at the beginning of the Civil War had declared that a separate bureau within the War Department could not be established by the President to handle

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[223] Ch. 134, 39 Stat. 166.
[224] See notes 226–232, infra, and accompanying text.
[225] *See* Act of June 15, 1933, ch. 87, § 5, 48 Stat. 153.

state militia matters without an enabling act of Congress. The President, however, could detail officers on active duty to transact all business of the militia.[226]

The Division of Militia Affairs had been created in 1908 as a part of the General Staff and to it were transferred all organized militia records from the Office of the Adjutant General.[227]

A National Militia Board of five members was formed in 1908.[228] This was replaced in 1916 by the Militia Bureau.[229]

The Army Reorganization Act of 1920 [230] reorganized the Militia Bureau within the War Department and provided that the Chief of the Bureau and any Acting Chief should be National Guardsmen. Further, all matters relating to the National Guard should be considered by General Staff committees composed at least in part of National Guard personnel detailed to the General Staff.

The 1933 Act [231] specified the name "National Guard Bureau" and also extended the supervision of the Army Chief of Staff to the National Guard as a whole. In 1935, Congress voted approval for the Chief of the National Guard Bureau to succeed himself.[232]

D. *1938–1940*

In a message to Congress on January 28, 1938, President Franklin D. Roosevelt mentioned the "beginning of a vast program of rearmament" because of the gravity of the world crisis. Much of the message was then given to increased naval armament.[233] In a message of January 12, 1939, the President termed the armed forces to be inadequate,[234] and Congress voted appropriations of $1,631,181,900.

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226 See 10 OPS. ATT'Y GEN. 11 (1861) rendered April 18, 1861.

227 See GANOE, *op. cit. supra* note 141, at 433.

228 Act of May 27, 1908, ch. 204, § 11, 35 Stat. 399, 403.

229 See Act of June 3, 1916, ch. 134, § 81, 39 Stat. 166, 203.

230 Act of June 4, 1920, ch. 227, 41 Stat. 759.

231 See Act of June 15, 1933, ch. 87, § 16, 48 Stat. 153, 159.

232 See Act of June 19, 1935, ch. 277, § 5, 49 Stat. 391. The present Chief is Major General Winston P. Wilson of the Air National Guard.

233 See 7 ROSENMAN, PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 68–71 (1941) [covering 19381.

234 8 *id.* at 71–72 [covering 19391.

On September 8, 1939, the President proclaimed a status of "limited" national emergency. The Regular Army was to be increased to 227,000, and the National Guard to 235,000 men.[235]

On May 31, 1940, the President sought authority from Congress to call the National Guard to active service. On August 27, 1940, approval was voted by Congress,[236] and the first units were inducted on September 16, 1940. On the same day, there was approved the Selective Service and Training Act.[237] The Army of the United States was to be composed of 500,000 in the Regular Army, 270,000 in the National Guard, and 630,000 Selective Service enrollees, or a total 1,400,000.[238] However, the service of the selectees and the National Guard was restricted to the Western Hemisphere and United States possessions.[239] By Resolution of August 18, 1941, Congress extended the federal service of the National Guard beyond an initial one year.[240] Shortly thereafter, geographical limitations were also removed.[241]

In 1940, the states were permitted to create state troops while any part of the National Guard was in federal service. These special units, as such, could not be called to federal service, but were armed and equipped by the War Department.

E. *LITIGATION*

A novel issue was presented in *United States v. Miller*[243] with regard to a well-regulated militia and the application of the Second Amendment of the Constitution. The U.S. Supreme Court determined that Congress by means of the National Firearms Act[244] may tax shotguns which are not per se necessary to a well-regulated militia.

In *Hamilton v. Regents of the University of California*,[245] compulsory military instruction was upheld in a state university. The Court, in an opinion by Mr. Justice Butler, concluded that a

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235 WATSON, WAR DEPARTMENT—CHIEF OF STAFF: PREWAR PLANS AND PREPARATIONS 157 (1950).
236 See Joint Resolution of August 27, 1940, ch. 689, 54 Stat. 858.
237 See Act of September 16, 1940, ch. 720, 54 Stat. 885.
238 See BERNARDO & BACON, *op. cit. supra* note 32, at 409.
239 WATSON, *op. cit. supra* note 235, at 218–31.
240 See Joint Resolution of August 18, 1941, ch. 362, 55 Stat. 626.
241 See Joint Resolution of December 13, 1941, ch. 571, 55 Stat. 800.
242 See Act of October 21, 1940, ch. 904, 54 Stat. 1206.
243 307 U.S. 174 (1939).
244 Act of June 26, 1934, ch. 756, 48 Stat. 1224.
245 293 U.S. 245 (1934), *rehearing denied*, 293 U.S. 633 (1935).

state may train its able-bodied male citizens to serve in the state militia or in the United States Army or as members of local constabulary forces. To accomplish this result, the state may utilize the services of Army officers and equipment from the federal military establishment. Every citizen must be prepared to defend the government, federal and state, against all enemies.

A leading case is *United States v. Bethlehem Steel Corp.*[246] The Court stated that as Congress can draft men for battle service, "its power [under the Army clause] to draft business organizations to support the fighting men who risk their lives can be no less." [247]

In *Martin v. Riley,*[248] a California case, the court upheld the organization of a state guard which did not encroach upon the authority of the Governor as Commander-in-Chief of the state militia.

XII. THE ARMY NATIONAL GUARD AFTER WORLD WAR II

At the same time that the demobilization began after the cessation of hostilities during World War 11, the reconstitution of the National Guard occurred. An Act of July **16,** 1946,[249] appropriated funds for National Guard personnel to participate in field exercises and in aerial flights and other activities on an ordered duty status. A similar appropriation resulted from the Act of July **30,** 1947,[250] which in addition provided for the preservation and the extension of training sites, including buildings and facilities. Extensive supplies and equipment were issued and attendance was authorized at Service Schools. An Act of October **12,** 1949,[251] developed in fuller detail the matter of extending temporary recognition to National Guard officers.

1947 was a year of major Army reorganization and vitally affected the National Guard. The National Security Act created a National Military Establishment within which were the separate Departments of the Army, Navy, and Air Force.[252] The same statute sets forth that the National Guard Bureau is charged to perform any functions and duties for the Department of the

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246 **315** U.S. **289 (1942).**
247 *Id.* at **305.**
248 **20** Cal. **2d 28, 123** P.2d **488 (1942).**
249 Ch. **583, 60** Stat. **541, 542.**
250 Ch. **357, 61** Stat. **551.**
251 Ch. **681,** § **530, 63** Stat. **802, 837.**
252 See Act of July **26, 1947,** ch. **343, 61** Stat. **495, 500.**

Air Force (and for the Department of the Army) and is the "channel of communciation between the Department of the Air Force and the several states on all matters pertaining to the Air National Guard." [253]

The workings of the Act of **1947** are now evident in retrospect. The National Guard Bureau centralizes the direction of the functions of the Army National Guard and of the Air National Guard. In each state, the Adjutant General of that state heads the Air National Guard and the Army National Guard. The integrity and the autonomy of the two separate reserve components, the Army National Guard and the Air National Guard, are preserved.

The Selective Service Act of **1948** [254] specifically referred to National Guard personnel. It provided that persons who were members of organized units of the federally recognized National Guard, Army and Air, were exempt from training and service by induction through Selective Service into the Army or the Air Force so long as they satisfactorily participated in scheduled drills and training periods prescribed by the Secretary of Defense.

The pressing matter of disability benefits for National Guard personnel was met by an Act of June **20,** 1949,[255] which extended benefits for members who suffered disability or death from injuries while engaged in active duty training for periods of less than thirty days or while in active duty training. The operative effect of the statute was dated retroactively to August **14, 1945.**

By an Act of March **16,** 1950,[256] section **81** of the National Defense Act of **1933** [257] was amended to provide for additional officers of the National Guard of the United States and of the Air National Guard of the United States on active duty at the National Guard Bureau. A restriction was imposed that the number of additional NGUS officers and those of ANGUS ordered to duty should not exceed forty percent of the number of officers of their respective services authorized in each grade for duty at the Bureau.

Subsequent to the beginning of hostilities in Korea, the National Defense Act was amended in September **1950** to permit the states to organize military forces other than as parts of

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253 See Act of July **26, 1947,** ch. **343,** 61 Stat. **495, 503.**
254 Act of June **24, 1948,** ch. **625,** § 6, **62** Stat. **604,** 610.
255 **32** U.S.C. §§ **318, 321.**
256 Ch. 60, **64** Stat. **19.**
257 Act of June **15, 1933,** ch. **87, 48** Stat. **153.**

their National Guard units, to serve for two years while the State National Guard was in active federal service.[258]

In 1950, the procedure for calling into federal service the Army National Guard as part of the militia of the United States was clarified. Appropriate Army Regulations set forth that the Department of the Army would utilize a Presidential call in all circumstances where Congress has not declared a national emergency but in which the President deems it necessary to use troops of the Regular Army. The call by the President was the only official action required.[259]

The Servicemen's Indemnity Act of 1951 granted automatic life insurance coverage in the amount of $10,000 to the National Guard and all other reserve components called to active duty or training for fourteen days or more, effective from June 27, 1950.[260] On the same day, Congress passed the Universal Military Training Act which provided, in part, that an enlisted member of any reserve component for active service for twenty-four months and "his application shall be accepted," if his services are needed, and he is physically fit.[261]

The Armed Force Reserve Act of 1952[262] was adopted in order to define the status of all reserve components. It is specified that the ARNGUS and the ANGUS are reserve components of the Army and of the Air Force, respectively. The statute goes on to define federal recognition, appointment, temporary recognition, transfers, active duty and inactive duty training, etc.

The present basic law since 1956 which governs the National Guard is contained in Title 32 of the United States Code under the caption "National Guard.'' Title 10 relates to the "Armed Forces" with chapter 11 covering "Reserve Components," including the National Guard of the United States, and chapter 13 which covers "The Militia.''

XIII. CONCLUSION

The Acts of Congress and the case authorities show that from the colonial period until 1789, the militia was under State con-

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[258] See Act of September 27,1950, ch. 1059, 64 Stat. 1072.

[259] Army Regs. No. 130–10, paras. 2, 7 (19 Oct. 1950). This regulation has since been superseded several times. The present regulation in effect is Army Regs. No. 135–300 (22 March 1965).

[260] See Act of April 25, 1951, ch. 39, 65 Stat. 33.

[261] Act of April 25, 1951, ch. 144, § 1, 65 Stat. 75, 78.

[262] See Act of July 9, 1952, ch. 608, 66 Stat. 481.

trol for all purposes. After the Act of 1792, under the militia clause, the militia in time of peace continued under state control, but with an increasing measure of federal supervision and assistance. After 1792, in time of war, the militia was subject to a dual control, federal and state. Since 1916, in time of war, federal control has been almost entirely predominant.

The state has drafted men from the militia for compulsory service before and after 1792. The state draft has fallen into disuse since the Civil War. The Monroe Plan of 1814 first discussed a federal draft of men from the citizenry. The Enrollment Act of 1863 was the first federal draft of men from the citizenry without going through state channels.

The Act of 1792 made possible the functioning of the organized Volunteer Companies of State Militia. After 1815, these companies became the framework of the Organized Militia of trained, uniformed, equipped state troops which gave meaning to the "well-regulated militia" specification within the Second Amendment. The unorganized militia fell into disuse by 1840. After 1865, regiments of organized militia constituted the National Guard within the states. The Act of 1903 achieved long awaited changes of National Guard organization and structure and pointed the way to increasing federalization. Since 1916, overseas or foreign service of National Guard troops has been regularized. Since 1933, under the Army clause, the National Guard, while in federal service, is known as the "National Guard of the United States." The National Guard Bureau coordinates all activities of the National Guard, and since 1947, the Bureau is the channel of communication between the several states and the Departments of the Army and of the Air Force in matters pertaining to the National Guard. Today, the National Guard has a dual status of (1) Organized State Troops under the militia clause and the Second Amendment, and of (2) a Reserve Component of the Army under the Army clause.[263]

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[263] On September 29, 1966, Secretary McNamara ordered a major reorganization of the Army National Guard and the Army Reserve. The Secretary ordered the dissolution of 751 units of the Army Reserve, including its entire six divisions. The Secretary stated that he had conferred in advance with key members of the Senate and House Armed Services Committees and he believes they favor the proposed changes. There are disbanded low priority Reserve units, including 65.000 trained men who face reassignment to remaining high priority Reserve Units, or who may volunteer for the Army National Guard, or go into a manpower pool to be assigned where needed. In addition, three National Guard Divisions and six brigades to be created from the Guard will undertake accelerated training of the week-end drill nature and may expect early field training in 1966. The purpose is to bring the select Guard force to the "highest possible state of combat readiness." See New York Times, October 1, 1965, p. 1; Miami Herald, October 1, 1965, p. 1, col. 1.

THE CODE OF CONDUCT IN RELATION TO INTERNATIONAL LAW*

By Major Elizabeth R. Smith, Jr.**

This article analyzes the conduct required by American prisoners of war by the United States domestic law (Code of Conduct, Departments of Defense and the Army implementing regulations, and the Uniform Code of Military Justice) and the Geneva Convention Relative to the Treatment of Prisoners of War, 1949, with the purpose of considering whether the Code is compatible with the Geneva Convention. Brief comments are made concerning the applicability of the Code in situations when the Geneva Convention is not in effect.

I. INTRODUCTION

In the almost ten years since President Eisenhower issued his Executive Order [1] prescribing the Code of Conduct for all members of the Armed Forces, there has been little reason to consider the effect of the Code in practice, and its compatibility with the Geneva Convention of August **12,** 1949 Relative to the Treatment of Prisoners of War.[2] However, in light of the extensive role the United States military forces are now playing in Southeast Asia and the potential there for expansion of the conflict into a war in which the United States might be a participant, it seems timely to examine the Code of Conduct in relation to the GPW.

The Code was drafted by a Defense Advisory Committee on Prisoners of War following the Korean War. Its provisions re-

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

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[1] Exec. Order No. 10631, **20** Fed. Reg. 6057 (1955). The Executive Order containing the Code of Conduct is set forth in full in Appendix **1.**

[2] 6 U.S.T. & O.I.A. 3316, T.I.A.S. No. 3364 [hereinafter cited as GPW]. The GPW was ratified by the United States on July 14, 1955, and became effective for the United States on Feb. **2,** 1956. See 33 DEP'T STATE **BULL.** 123 (1955).

flect the experiences of American prisoners of war (PW's) in that conflict.[3] Examination of the Report of the Committee makes it evident that the Committee was thinking of "prisoners of war" in the international law context.[4] For that meaning one must look to articles **2** and **4.** The GPW applies to all cases of declared war or of any other armed conflict which may arise between two or more of the parties to the GPW, even if the state of war is not recognized by one of them. Members of the United States Armed Forces who fall into the power of the enemy in the course of a war are PW's and entitled to the protection accorded by the GPW. While none of the major parties of the Korean War (United States, Communist China, North and South Korea) had ratified the GPW at the outbreak of that War, all announced an intention to adhere to it.[5] The Code is actually a product of the failure of the Chinese Communists to live up to the letter and spirit of the GPW. Their exploitation of the PW's for propaganda purposes provided the United States with a blueprint of what to expect in future conflict with them and the sort of training American soldiers should receive to counter such efforts.

Since the Korean War, all the major participants therein have ratified the GPW and thus are parties to it, as are North and South Vietnam, Cambodia, Thailand, Laos, and Soviet Russia.[6]

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[3] During the period from April 1951 until the cessation of hostilities, the Chinese Communists were in control of the PW's. The Chinese sought to obtain propaganda materials for psychological warfare efforts, to extract valuable military information from the PW's, to convert the PW's to Communism as a way of life, and to undermine the American PW's faith and trust in his country, his government and political leaders, and his fellow PW's. See Senate Comm. on Govt. Ops., *Communist Interrogation, Indoctrination and Exploitation* of *American Military and Civilian Prisoners,* S. REP. No. 2832, 84th Cong., **2d** Sess. 8–9 (1956) [hereinafter cited as S. REP. NO. 28321; U.S. DEP'T OF ARMY, PAMPHLET NO. 30–101, COMMUNIST INTERROGATION, INDOCTRINATION, AND EXPLOITATION OF PRISONERS OF WAR 15, 37 (1956). Two books which discuss PW conduct in Korea and provide contrasting views of the nature of that conduct are: KINKEAD, IN EVERY WAR BUT ONE (1959), and BIDERMAN, MARCH TO CALUMNY (1963). For a discussion of the Code of Conduct and the GPW in connection with the conduct of American PW's in Korea, see Prugh, *The Code* of *Conduct for the Armed Forces,* 56 COLUM. L. REV. 678 (1956).

[4] See DEFENSE ADVISORY COMM., REPORT ON PRISONERS OF WAR, POW—THE FIGHT CONTINUES AFTER THE BATTLE (1955) [hereinafter cited as POW REPORT].

[5] See 25 DEP'T STATE BULL. 189–90 (1951); U.N. DOC. NO. S/2232 (1951); S. REP. No. 2832, at 2.

[6] As of January 1, 1965, 109 nations were parties to the GPW. For a list of all parties, see U.S. DEP'T OF STATE, TREATIES IN FORCE, 1965—A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1965, 278 (1965).

In his Executive Order prescribing the Code of Conduct, the President directed the Secretary of Defense to take such action as he deemed necessary to implement the Order and to disseminate and make the Code known to all members of the Armed Forces of the United States. The Secretary's latest implementation of the Code is Department of Defense Directive Number 1300.7, Training and Education Measures Necessary to Support the Code of Conduct (8 July 1964).[7] In his Directive the Secretary set forth the policies which should govern all Code of Conduct instruction and instructional material. He directed the Secretaries of the Military Departments to develop training programs and instructional materials in support of this Directive and ordered copies of their implementing instructions to be forwarded to him within ninety days. In compliance, the Secretary of the Army issued Army Regulations Number 350-30, Education and Training—Code of Conduct (12 November 1964).[8] Throughout this article the Directive and Regulation will be referred to collectively as the "departmental regulations." Consideration will not be given to regulations issued by the Departments of the Air Force and Navy.

This article shall analyze the conduct required of American PW's by the United States domestic law (Code of Conduct, departmental regulations, and the *Uniform Code* of *Military Justice*[9]) and the GPW, with the purpose of considering whether the Code is compatible with the GPW. Brief consideration shall be given to the application of the Code of Conduct in a conflict which is less than a declared or recognized war, wherein the GPW in full might not be applied.

Article II of the Code of Conduct does not concern conduct of prisoners of war, but relates to surrender. This article will not be discussed herein,

11. AN AMERICAN FIGHTING MAN, RESPONSIBLE FOR HIS ACTIONS

Article I, Code of Conduct: 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.

Article VI, Code of Conduct: I will never forget that I am an American fighting man, responsible for my actions, and dedicated to the

[7] Hereinafter cited as DOD Directive 1300.7.
[8] Hereinafter cited as AR 350–30, para. ____.
[9] Hereinafter cited as UCMJ art. ____.

principles which made my country free. I will trust in my God and in the United States of America.

Articles I and VI of the Code of Conduct emphasize that the American soldier is a fighting man, responsible for his actions, and dedicated to guarding his country and to the principles and way of life for which his country stands. These articles are of primary importance because of two implications: first, the military personnel to whom the Code applies, and, second, accountability for failure to adhere to the Code. Examination will be made of these two implications as affected by United States domestic law and the GPW, and of the compatibility of the two bodies of law. This pattern will be followed in each chapter devoted to consideration of the Code articles.

A. *UNITED STATES DOMESTIC LAW*

Included in the phrase "United States Domestic Law" are the President's Executive Order, the departmental regulations implementing the Code, and the *Uniform Code of Military Justice.*

The Executive Order and departmental regulations implementing the Code are "law" for all military personnel.[10] One usually conceives of "law" as a rule or rules issued by a legislative body or a sovereign who can also provide the sanction for violation of the "law." However, the President has no authority on his own initiative to prescribe sanctions for violation of his orders. This fact has not deterred courts and writers from labelling Presidential orders and regulations as ''law."

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[10] See U.S. CONST. art. I, § 8, cl. 14, which grants to Congress the power to make rules for the government and regulation of the land and naval forces; however, as the Commander in Chief of the Armed Forces, the President has the power to issue directives and regulations to members of the Armed Forces either directly or through his military department heads rising out of his power to employ the Armed Forces in a manner deemed most effectual by him. See Kurtz v. Moffitt, 115 U.S. 487, 503 (1885); Gratiot v. United States, 45 U.S. (4 How.) 80 (1846); United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842); Nordmann v. Woodring, 28 F. Supp. 573 (W.D. Okla. 1939); WINTHROP, MILITARY LAW AND PRECEDENTS, 27, 32 (2d ed. 1920); LIEBER, REMARKS ox THE ARMY REGULATIONS ASD EXECUTIVE REGULATIONS IN GENERAL 19, 49 (1898). The restrictions placed on the President's ordinance-making power are that his rules and regulations must not contravene a statute enacted by Congress or the provisions of the Constitution. See United States v. Symonds, 120 U.S. 46 (1887); WINTHROP, *op. cit. supra* at 33, 40; HART, THE ORDINANCE MAKING POWER OF THE PRESIDENT OF THE UNITED STATES 240 (1925).

For sanctions to punish violations of the Code and departmental regulations one must look to the UCMJ.[11] To the extent that no sanctions exist in the UCMJ, then there may be unenforceable provisions in the Executive Order and the departmental regulations. Such provisions then may exert only a moral force.[12]

1. *To Whom the Code* ***Applies.***

Although the Code of Conduct begins with the words "I am an American fighting man," the President made clear in his Executive Order that it applies to every member of the Armed Forces. The Secretaries of Defense and the Army have also declared that the Code is applicable to all members of the Armed Forces at all times.[13]

No doubt the drafters chose the phrase "I am an American fighting man" to emphasize that the reason for the existance of soldiers is to fight the country's enemies rather than to limit the application of the Code to combat men, eliminating members of the administrative services who may not reach a combat zone. The

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[11] Indicative of the fact that this was recognized by the Defense Advisory Committee when it drafted the Code of Conduct is the explanation of Article VI on p. 23 of the *POW* ***Report:*** "The provisions of the Uniform Code of Military Justice whenever appropriate continue to apply to members of the Armed Forces while they are prisoners of war. The conduct of prisoners is subject to examination as to the circumstances of capture and through the period of detention with due regard for the rights of the individual and consideration for the conditions of captivity." In 56 COLUM. L. REV. 676 (1956), in *Prisoners of War: Foreword,* Carter L. Burgess, Assistant Secretary of Defense for Manpower, Personnel and Reserve, who was Chairman of the Defense Advisory Committee on Prisoners of War which formulated the Code of Conduct said: "The purpose of the Code of Conduct is to provide our fighting forces with a standard of conduct direct from the Commander-in-Chief, who is also one of the great military leaders in American history. It is designed to aid the fighting men of the future, if ever they fall into such an enemy's hands, in the fight for their minds, their loyalty, and their allegiance to their country . . . . 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." See also JAGJ 1960/8387, 18 May 1960: "Conduct in contravention of the Code of Conduct can only be punished if the conduct also violates some provisions of the Uniform Code of Military Justice. The Code of Conduct is not intended to be a penal code. It is, rather, a moral guide for conduct while a prisoner of war. The Code of Conduct does not direct the members of the armed forces to measure up to the standards of the Code of Conduct, and it contains no language indicating punitive consequences for its disregard." ***Accord,*** JAGW 1961/1140, 23 June 1961; JAGJ 1961/8391, 6 June 1961.

[12] To the effect that the Code of Conduct is a moral guide or code only and that it was not meant to be a penal code are three unpublished opinions of The Judge Advocate General of the Army: JAGJ 1960/8387, 18 May 1960; JAGW 1961/1148, 5 June 1961; JAGJ 1961/8391, 6 June 1961.

[13] DOD Directive 1300.7, para. 11; AR 350–30, para. **1.**

use of the phrase is clearly a dramatic device, since the Executive Order is directed to "Members of the Armed Forces of the United States." The departmental regulations also clearly indicate the application of the Code to all military personnel.

2. *Accountability for Fuilure to Adhere to the Code.*

Departmental regulations implementing the Code and prescribing training guidance assert that the UCMJ applies to military personnel at all times." That it is applicable to American military personnel even while held by an enemy as PW's was affirmed by an Army Board of Review in its decision upholding the conviction of a repatriated American PW for misconduct while a PW during the Korean War.[15] This is not a new principle. One may look to Winthrop's *Military Law and Precedents*[16] and to *United States ex. rel. Hirshberg v. Malanaphy*[17] for earlier affirmation of the principle that a repatriated PW may be held liable for offenses he commits during captivity against his country and his fellow PW's.

B. *GPW*

1. *Armed Forces Personnel to Whom Applied.*

Article 4A(1), GPW, provides that members of the armed forces of a party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces are PW's. Thus the GPW applies to all members of the United States Armed Forces captured by the enemy in a declared or recognized war or any other armed conflict between the United States and one or more of the parties to the GPW, even if the state of war is not recognized by one of them,

2. *Disciplinary Authority in PW Camps.*

Article **39,** GPW, provides that every PW camp shall be under the immediate authority of a responsible commissioned officer of

[14] See DOD Directive 1300.7, inclosure 2, p. 3; AR 350–30, para. 11*b*(7).

[15] See CM 377832, Batchelor, 19 C.M.R. 452, 503–04 (1955). Of the 3,973 Army PW's repatriated after the Korean War, the conduct of only 426 was initially questioned; only fourteen were charged and tried for misconduct in the PW camps, of which eleven were convicted. See POW REPORT 80, 82; Dep't of Army Letter, AGAM–P (M), 19 March 1963, CINFO–TI, subject: Code of Conduct Training, 21 March 1963.

[16] WINTHROP, *op. cit. supra* note 10, at 91, 92.

[17] 73 F. Supp. 990 (E.D.N.Y. 1947). At p. 992, Judge Galston said: "He seems to believe that he was either a prisoner of war or a member of the Navy personnel, and that he could not be both at the same time. The fallacy is manifest, for one is not exclusive of the other."

the regular armed forces of the Detaining Power. Article **82,** GPW, provides that while in Captivity the PW is subject to the laws, regulations and orders of the Detaining Power. PW's who violate such laws, regulations and orders may be the subject of judicial or disciplinary measures.

C. *COMPATIBILITY OF ARTICLES I AND VI WITH THE GPW*

The Code reminder to members of the Armed Forces of the United States that they are responsible for their actions, and the clear warning of amenability to provisions of the UCMJ given in the departmental regulations, are not incompatible with the declaration of the GPW that PW's are subject to the laws, regulations and orders of the Detaining Power while in captivity.

> Although the legislation of the Detaining Power is applicable to him during his captivity, he remains subject to the military laws of his State of origin, as a member of its armed forces. He may therefore be made answerable before the courts of his country for his acts, and cannot plead in defense that national legislation is inapplicable because it is suspended by Article 82.[18]

The GPW does not contain any provision attempting to prohibit a party to the conflict from applying its domestic law to a repatriated PW for misconduct while a PW in a PW camp. It is simply that the domestic law of the PW's country cannot be enforced within the PW camp; enforcement must await return of American PW's to United States control. In the PW camp only the discipline of the Detaining Power may be enforced.

111. RESISTANCE, ESCAPE, NO PAROLE OR SPECIAL FAVORS

> Article III, Code of Conduct: 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.

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[18] 3 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR **408–09** (Pictet ed. **1960)** [hereinafter cited as **3** COMMENTARY]. In CM **377832,** Batchelor, **19** C.M.R. **452 (1955),** the Army Board of Review rejected the accused's argument that the Geneva Convention Relative to the Treatment of Prisoners of War **(1929)** placed all authority over PW's in the captor power and withdrew such power from the United States so that a general court-martial is without jurisdiction to try a repatriated PW for PW camp misconduct. The Board noted that the GPW **(1949)** was also adopted for application by the opposing forces in the Korean War, but this did not alter its rejection of the asserted defense.

A. *RESISTANCE*

1. *United States Domestic Law.*

Indicative of the meaning of "resist" as intended by the drafters of the Code and the President is the language in the Executive Order which says that "to better equip him to counter and withstand all enemy efforts against him" is the aim of training and instructions to be provided each member of the armed forces liable to capture. It would seem that the drafters and the President had in mind that the PW should react defensively to enemy efforts to exploit him. "Counter" and "withstand" are words which imply a *defensive* reaction.

However, further light is shed on the type of resistance which American PW's are expected to employ by the departmental regulations issued to implement and give guidance for training military personnel in the Code's requirements. These requirements state that "all training programs will impress upon every man that prisoner of war compounds are but an extension of the battle-field, and that . . . the duty to defeat any enemy of our country [is] paramount under all conditions at all times," [19] and that, "[t]he basic policy governing all Code of Conduct instruction . . . will be to develop in every member of the Armed Forces a positive attitude that he can and must oppose and defeat absolutely, mentally, and physically, any enemy of his country." [20] Thus, the resistance envisioned by the Departments of Defense and Army seems to include PW-initiated offensive physical violence, not just resistance by spirit and mind to enemy efforts to exploit the PW's.

Following the Korean War, five repatriated American PW's were charged and tried under Article **104***(2)*, UCMJ,[21] for unauthorized communication or intercourse with the enemy. Certain of their activities which fell within the prohibition of Article 104(2) would seem to reflect a violation of the Code's requirement that a PW resist by all available means; for instance: voluntary participation in enemy conducted discussion groups in which they discussed and reflected views and opinions that the United States conducted bacteriological warfare in Korea; that the United States was an illegal aggressor; and that PW's should

[19] DOD Directive 1300.7, para. VB; **AR** 350–30, para. **8.**
[20] DOD Directive 1300.7, para. **VA; AR** 350–30, para. 7.
[21] See appendix 2 for the full text of UCMJ article 104.

embrace communism.[22] One who engages in such activities is certainly not resisting enemy indoctrination efforts by all available means. A PW would be unsuccessful in attempting to defend his intercourse or communication with the enemy in such case on the ground that he acted as he did in order to improve the lot of his fellow captors.[23] Nor would it help to assert that such discussions were permissible because the GPW authorizes communication by the PW's with their captors concerning "intellectual pursuits" (reference to the provision in Article 38, GPW, that the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits). Such intercourse or communication attributed to the repatriated PW's, described above, was held not to fall within the authorized communications under the GPW by the United States Court of Military Appeals in the *Batchelor* case.[24]

2. *GPW.*

While in captivity PW's are "subject to the laws, regulations and orders in force in the armed forces of the Detaining Power." Any resistance efforts which violate them may subject PW's to judicial or disciplinary punishment.[25]

In *3 Commentary,* Pictet expresses the purpose of the disciplinary power placed in the hands of the Detaining Power:

> The prime purpose of measures of discipline is to ensure that the prisoner of war remains in the hands of the Detaining Power, so that he can neither do any harm to that Power within the camp, nor by escaping be enabled to take up arms again. It must not be forgotten that his life has been spared only on condition that he is no longer a danger to the enemy.
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> It should also be realized, however, that the Detaining Power can carry out its duty to treat prisoners of war in accordance with the Con-

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[22] See United States v. Batchelor, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956); United States v. Dickinson, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955); CM 388545, Bayes, 22 C.M.R. 487 (1956), *petition for review denied,* 7 U.S.C.M.A. 798, 23 C.M.R. 421 (1957).

[23] In United States v Batchelor, *supra* note 22, at 150, such a defense was rejected.

[24] See United States v. Batchelor, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956). The possibility that the Detaining Power might be tempted to misuse the provision in Article 38, GPW, which says the Detaining Power "shall encourage the practice of intellectual, educational, and recreational pursuits" was recognized in *3 Commentary* 237: ". . . propaganda is nevertheless usually dangerous for prisoners of war and contrary to the Conventions, since it may be inconsistent with equality of treatment, respect for honour and, in particular, the present provision which affirms the right of prisoners to use their leisure time according to their own preferences."

[25] GPW art. 82.

ventions only if it ensures that discipline is maintained in prisoner-of-war camps.

. . . .

To the extent **that** the Convention must be operative in the normal way there is no doubt that prisoners of war are legally required to respect the rules set forth in it. This is indisputable if captivity is to be bearable for prisoners of war and they are to receive humane treatment. Otherwise, the Detaining Power would have no alternative but to resort to force in order to overcome lack of cooperation on the part of the prisoners. It is therefore essential for the implementation of the Convention that prisoners of war should be subject to military discipline.[26]

3. *Compatibility* of *the "Resistance" Clause* of *Article III With the GPW.*

Mental and moral resistance to the Detaining Power's efforts to "brainwash," indoctrinate, and demoralize in order to win converts, obtain intelligence, or exploit the PW's for propaganda purposes is necessary and certainly does not conflict with the purpose of the GPW. However, the provision of the Code to "resist by all means available" as implemented by the departmental regulations, requires American PW's to extend the battlefield into the PW camp and defeat the captors, not only mentally but physically, even in captivity. This requirement seems to conflict with the spirit and purpose of the GPW.

Pictet points out that the fundamental principle underlying the GPW is humane treatment.'; In discussing Article **13's** requirement that PW's be humanely treated at all times he says: "With regard to the concept of humanity, the purpose of the Convention is none other than to define the correct way to behave towards a human being; each individual is desirous of the treatment corresponding to his status and can therefore judge how he should, in turn, treat his fellow human beings."[28] It does not

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[26] 3 COMMENTARY **238.**

[27] See 3 COMMENTARY 38. **At** p. **140** of *3 Commentary* it is stated: "The requirement that protected persons must at all times be humanely treated is the basic theme of the Geneva Conventions." **At** p. 39, Pictet comments: ". . . a man who has surrendered individually is entitled to the same humane treatment as he would receive if the whole army to which he belongs had capitulated. *The most important thing is that the man in question will be taking no further part in the fighting."* (Emphasis added.) The latter comment seems to be the underlying theme of the entire GPW — that PW's are no longer a part of the conflict and are entitled **to** humane treatment as "help-, less" persons.

See also DRAPER, THE RED CROSS CONVENTIONS **51 (1958).** and Lauterpacht, *The Problem of the Revision* of *the Law* of *War,* **29** BRIT. YB. INT'L L. **360, 363 (1952).**

[28] 3 COMMENTARY 140.

seem consistent for a country which has signed and ratified a treaty [29] providing for the humane treatment of its military personnel who may become PW's to issue subsequent instructions to its military personnel that, while expecting humane treatment from their captors, they must convert the PW camp into a battlefield.[30] Thus, there would seem to be little difference between the conditions of captivity and combat. The purpose of the GPW

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[29] Indicative of the views of the State Department and Department of Defense concerning the Geneva Conventions, 1949, in general and the GPW in particular, are excerpts from *Hearings Before the Senate Committee on Foreign Relations on the Geneva Conventions for the Protection of War Victims* (Executives D, E, F and G, 82d Cong., 1st Sess.), 84th Cong., 1st Sess. (1955) [hereinafter cited as *Senate Hearings on GC]*.

At p. 68 of the *Senate Hearings on GC* appears a letter from the Secretary of State to the Chairman of the Foreign Relations Committee, March 29, 1955, urging favorable consideration by the United States Senate of the Geneva Conventions, 1949: "United States ratification of the Geneva Conventions, by lending further support to their standards, should influence favorably future behavior toward prisoners of war. In short, the legal and psychological sanctions by which inhumane treatment may be minimized or prevented should be strengthened by extending the binding character of these conventions."

At p. 5, Mr. Robert Murphy, Deputy Under Secretary of State, said to the Committee: "The Geneva Conventions are another long step forward toward mitigating the severities of war on its *helpless victims* . . . . Our own conduct has served to establish higher standards." (Emphasis added.)

At p. 6, Mr. Wilbur Brucker, General Counsel, Department of Defense, said: "Since that time [1863, when the United States issued the General Orders 100, Rules for the Government of Armies of the United States in the Field] the United States has been a party to virtually every important treaty regarding the protection of prisoners of war . . . . The Armed Forces have always attempted to comply scrupulously with these important humanitarian treaties."

For comments of Senators during the Senate Debate on the Geneva Conventions, 1949, see 101 CONG. REC. 9958–9973 (1955). Some pertinent remarks concerning the humanitarian purpose of the Conventions are: Senator Mansfield at pp. 9958–9959: "They have but one purpose, to relieve mankind from suffering and the physical and moral degradation which in the past have so often been experienced by the victims of war"; Senator Barkley at p. 9961: "So these conventions incorporate very largely the humane principles which the United States has practiced over a long period of years"; and, Senator Knowland at p. 9961: "But in the event there should ever be another war, it is only common sense to take action which will make available to us some devices to protect those of our Armed Forces and those American civilians who may fall into the hands of the enemy. That is the purpose of these conventions. . . ."

[30] That the Department of Defense did not consider the Geneva Conventions to be deleterious to prosecution of a war may be seen in the testimony of Mr. Wilbur Brucker, General Counsel of Department of Defense in *Senate Hearings on GC* 6–12. At p. 10, he said: "The Department of Defense would be failing in its duty if it had neglected to give consideration to the impact of these admittedly humanitarian provisions on the operations of the Armed Forces. We have subjected the four conventions to the most careful examination with this end in view, and we have encountered nothing which would prejudice the success of our arms in battle."

could be destroyed by such conduct. The consequence of extending the battlefield into the PW camp would be inevitable diminution, if not elimination, of the prospects of humane treatment contemplated by the GPW.[31]

B. *ESCAPE*

1. *United States Domestic Law.*

The requirements that an American soldier make every effort to escape and aid others to escape from the hands of an enemy is an American military tradition.[32] Thus it is not surprising to find it in the Code of Conduct. The departmental regulations implementing the Code do not elaborate on the requirement, other than to say that a PW is to escape "if able to do so." [33]

This qualification would seem to mean that the PW should make reasonable efforts to escape when success seems possible. The same qualification would seem to apply to the requirement to aid others to escape. Failure to make an effort to escape when "able to do so" and failure to assist in an escape plan would constitute conduct to the prejudice of good order and discipline under the General Article, Article **134,** UCMJ, as a breach of a custom of the service.[34]

2. *GPW.*

The GPW recognizes the obligation many countries impose on their military personnel to escape from PW camps if possible,

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[31] For a brief discussion of the GPW in the Korean War, see U.S. DEP'T OF ARMY, PAMPHLET No. 27–161–2, 2 *International Law* 93–95 (1962) [hereinafter referred to as **DA** PAMPHLET 27–161–2]. At p. 95, para. E, are these comments concerning Communist PW's in American PW camps: "A new and disturbing aspect of the handling of prisoners of war was encountered in that Communist soldiers, even after capture, continued by intrigue and open violence to fight against their captors . . . . International law, as represented by the 1949 Geneva PW Convention, did not contemplate an openly hostile contest between the captor and the captive. If such practice should continue in any future war, many of the humanitarian provisions of the 1949 Convention would become difficult to implement."

[32] Winthrop, *op. cit. supra* note 10, at 793, remarks that "escape by a prisoner of war is not an offence for which he is liable to punishment . . . ." and in the accompanying footnote 28 quotes Gen. Order 207 of 1863: "It is the duty of a prisoner to escape if able to do so."

[33] See DOD Directive 1300.7, inclosure 2, p. 1; AR 350–30, app. I, p. 8.

[34] See appendix 2 for the full text of **UCMJ** art. 134. The MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 213a, discusses breach of a custom of the service, and says in part: "Custom arises out of long established practices which by common consent have attained the force of law in the military or other community affected by them."

and that there may be damage to or loss of property of the Detaining Power inevitably occasioned by an escape or escape attempt. Article 91, GPW, provides that there shall be no punishment of one who successfully escapes but is again captured, and under Article **92,** GPW, one who does not succeed in his attempt to escape shall be liable only for disciplinary punishment.[35] Offenses committed by PW's in attempting or effecting an escape which do not entail violence against life or limb will be punishable only by disciplinary measures.[36] Violence to life and limb of members of the Detaining Power occurring incidental to an escape or escape attempt is not countenanced by the GPW and may be punished by judicial measures by the Detaining Power under its applicable laws and regulations.

3. *Compatibility of the "Escape" Clause* of *Article III With the GPW.*

Application of the Code requirement to "make every effort to escape" to medical personnel and chaplains conflicts with the special status accorded them by the GPW and the purpose of their retention.[37] They are not PW's; they are "Retained Personnel"

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[35] In his general remarks on Article **91,** GPW, concerning successful escapes, Pictet says in *3 Commentary* **445:** "A prisoner of war can legitimately try to escape from his captors. It is even considered by some that prisoners of war have a moral obligation to try to escape, and in most cases such attempts are of course motivated by patriotism." In his general remarks on Article **92,** GPW, concerning unsuccessful escapes he says in *3 Commentary* **449,** that making PW's who unsuccessfully attempt an escape liable only to disciplinary punishment "was based on the idea that attempts to escape should be considered as a demonstration of patriotism and of the most honourable feelings."

[36] GPW art. 93(2). See also 3 COMMENTARY **453;** 2A FINAL **RECORD** OF THE DIPLOMATIC CONFERENCE OF GENEVA OF **1949, 491–92** [hereinafter cited as 2A FINAL RECORD]. See GPW article 89 for permissible disciplinary punishments. These punishments are minor in nature, hence the restriction on the type of imposable punishment, for acts not entailing violence to life or limb during an escape, to disciplinary punishments is a valuable PW right.

[37] See JAGW 1961/1148, 5 June **1961:** "It is not intended that the provisions [of the Code of Conduct] would be construed in a manner which would deprive medical personnel and chaplains of their special status under the GPW, **1949.** The Code of Conduct is not binding on medical personnel and chaplains to the extent that compliance therewith would be inconsistent with the special status under the Geneva Conventions." Unfortunately, this opinion is not reflected in the departmental regulations implementing the Code.

whose status and duties are described in Article 33, GPW.[38] Medical personnel and chaplains are to be "retained only in so far as the state of health, the spiritual needs and the number of prisoners of war requires."[39] Retention of such personnel must be justified by a real and pressing need for their services.[40] Personnel whose retention is not indispensable shall be returned to their own armed forces as soon as a road is open for their return and military requirements permit."

The only reason for retention of such personnel is to utilize their medical and religious services in the care of the physical and religious needs of the PW's.[42] It is inconsistent and improper for the United States to agree that such personnel may be re-

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[38] GPW article 33 provides that: "Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war shall not be considered as prisoners of war. They shall, however, receive as a minimum the benefits and protection of the present Convention, and shall also be granted all facilities necessary to provide the medical care of, and religious ministration to prisoners of war.

"They shall continue to exercise their medical and spiritual functions for the benefit of prisoners of war, preferably those belonging to the armed forces upon which they depend, within the scope of the military laws and regulations of the Detaining Power and under the control of its competent services, in accordance with their professional etiquette. . . .

". . . .

"(b) The senior medical officer in each camp shall be responsible to the camp military authorities for everything connected with the activities of retained medical personnel. . . .

"(c) Although they shall be subject to the internal discipline of the camp in which they are retained, such personnel may not be compelled to carry out any work other than that concerned with their medical or religious duties."

[39] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, art. 28, 6 U.S.T.& O.I.A. 3114, T.I.A.S. No. 3362 [hereinafter referred to as GWS].

[40] 1 COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 241 (Pictet ed. 1952) [hereinafter cited as 1 COMMENTARY]. In 3 *Commentary* 219, with reference to GPW, article 33(2), (see *supra* note 39), Pictet says: "The words 'shall continue' bring out the fact that although the capture and subsequent retention of medical personnel places them in a new environment and under a different authority, their functions remain unchanged and should continue without hindrance, and practically without a break. *It* is *in fact only because of these functions that they are retained."* (Emphasis added.)

[41] GWS art. 30.

[42] In *Senate Hearings on GC,* at 19, Mr. Wilbur Brucker, General Counsel, Department of Defense, responded to a Senator's inquiry concerning how medical personnel are treated under the new 1949 convention as follows: "And instead of having the medical personnel and chaplains, because they are in the same bracket, sent back or turned over pending the continuance of the holding of prisoners of war, it was felt that the Detaining Power should have the right to continue to detain the medical personnel so that the individual soldier, sailor, marine or airman would receive proper medical attention; humanitarian, I think is the reason why he should be retained."

tained in order that their professional services may be utilized for the benefit of PW's, primarily American PW's, and then require them to make every effort to escape and thus "desert" those who need them. The United States made no reservation to this provision in the GPW, thus completely agreeing to permit these personnel to be retained as needed, rather than insisting upon wholesale return to United States control.

With the exception of the application of the escape requirement to medical personnel and chaplains as noted above, the requirement that American soldiers make every effort to escape and aid others to escape is compatible with the GPW.

C. *ACCEPT NO PAROLE, NO SPECIAL FAVORS*

1. *United States Domestic Law.*

The departmental regulations describe parole agreements as "promises given the captor by a prisoner of war upon his faith and honor, to fulfill stated conditions, such as not to bear arms or not to escape, in consideration of special privileges, usually release from captivity or a lessened restraint,'' and declare that a captured American soldier "will never sign or enter into a parole agreement.''[43] This is a clearly stated prohibition against the acceptance of parole. However, in paragraph 187b, of its Field Manual on *The Law of Land Warfare,*[44] issued subsequent to the issuance of the Code, the Department of the Army authorizes the acceptance of temporary parole under the circumstances and within the limitations described therein:

> A member of the United States Army may be authorized to give his parole to the enemy that he will not attempt to escape, if such parole is authorized for the specific purpose of permitting him to perform certain acts materially contributing to the welfare of himself or of his fellow prisoners. Such authorization will extend only for such a short period of time as is reasonably necessary for the performance of such acts and will not normally be granted solely to provide respite from the routine rigors of confinement or for other purely personal relief. A parole of this nature may be authorized, for example, to permit a prisoner to visit a medical establishment for treatment or to allow a medical officer or chaplain to carry out his normal duties. A member of the United States Army may give a parole of this nature only when specifically authorized to do so by the senior officer or non-commissioned officer exercising command authority.

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[43] DOD Directive 1300.7, inclosure 2, p. 1; AR 350–30, app. I, p. 8.

[44] U.S. DEP'T OF ARMY, FIELD MANUAL NO. 27–10, THE LAW OF LAND WARFARE (1965) [hereinafter cited as FM 27–10].

Since the Field Manual was issued in July 1956, it would appear that subsequently issued Army Regulations (such as the 30 December 1957 edition of the regulations and the current 12 November 1964 edition) which implement the Code and provide training guidance on the Code have impliedly superseded the quoted portion of the Field Manual. It is curious that such a conflicting provision has been permitted to remain unchanged for some seven years.

The prohibition against acceptance of special favors from the enemy is evidently aimed at efforts the enemy might make to influence and manipulate PW's and compromise them into cooperating in exchange for a special favor, such as extra rations, less onerous labor, or extra cigarettes. It is unlikely that captors would gratuitously confer upon a PW some special favor without expecting to reap some benefit, even such indirect benefit such as sowing seeds of distrust and suspicion of each other among the PW's. An appropriate set of circumstances involving the acceptance of special favors might well subject a repatriated PW to a charge under Article 104(2), UCMJ, for unauthorized intercourse or communication with the enemy. Whether a PW could be convicted of the mere acceptance of a special favor without any "collaboration" or other wrongful acts on his part in exchange is questionable.

The acceptance of parole without official authorization may subject a repatriated PW to a charge under Article 134 for breach of a custom of the service. One can look to Winthrop for evidence of such custom: "Paroles tendered or taken without authority are of no validity and not entitled to be respected, and the permitting of or subscribing to such paroles is a punishable offense." [45]

2. *GPW.*

Article 21(2), GPW, provides: "Prisoners of war may be partially or wholly released on parole or promise, insofar as is allowed by the laws of the Power on which they depend. Such measure shall be taken particularly in cases where this may contribute to the improvement of their state of health. No prisoner of war shall be compelled to accept liberty on parole or promise." Article 21(3), GPW, provides: "Upon the outbreak of hostilities, each Party to the conflict shall notify the adverse Party of the laws and regulations allowing or forbidding its own national to ac-

[45] WINTHROP, *op. cit. supra* note 10, at 795.

cept liberty on parole or promise." Pictet sheds some further light on the thinking behind these provisions:

> In principle, a prisoner of war who is offered the possibility of liberty on parole is supposed to know the corresponding laws and regulations of the Power on which he depends. Such laws and regulations may either forbid prisoners of war to accept release on parole in any circumstances, or may allow them to do so subject to certain conditions. It may be, however, that a prisoner of war is not acquainted with these laws and regulations, if only because they have been promulgated since the beginning of his captivity. The Detaining Power has no such excuse, since the third paragraph of this Article [21] expressly states that each Party to the conflict must notify the adverse Party of its laws and regulations in this regard . . . . The Detaining Power may not therefore offer release on parole to prisoners of war if the laws and regulations of the Power on which they depend forbid them to accept. . . . The Detaining Power is in a way responsible for the application of these laws and regulations, and is not allowed to make any proposals to prisoners of war in its hands which would be inconsistent with such laws and regulations.[46]

The privileges to be accorded to PW's under provisions of the GPW would not fall under the category of "special favors" as used in the Code, since they are not dependent upon the PW's "collaboration" with the Detaining Power but arise from PW status. Some privileges to be afforded to PW's are: completion of a capture card to be sent to family and the Central Prisoners of War Agency immediately upon capture or very soon thereafter (Article **70,** GPW) ; freedom to send and receive letters *(Article 71, GPW)*; exercise of religious duties (Article **34,** GPW); medical care (Article **30,** GPW).

3. *Compatibility* of *the "No Parole" Clause of Article III With the GPW.*

There is no direct conflict between the Code's prohibition of acceptance of parole and special favors and the GPW. As previously noted, the parole laws of the power in whose service the PW was at the time of capture must be observed by the Detaining Power. A parole given in excess of that allowed is not binding on the parolee.

However, the very nature of their duties and accompanying professional privileges prescribed by Article **33,** GPW, create situations where acceptance of parole by medical personnel and chaplains would be appropriate, perhaps necessary, for it might in fact facilitate their performance of professional duties to the benefit of the PW's. Under Article **33,** GPW, '(they shall be au-

[46] **3 COMMENTARY 179.**

thorized to visit periodically prisoners of war who are situated in working detachments or in hospitals outside the camp" and shall be provided the necessary means of transport. Unless they are able to accept parole they will probably not be trusted by the camp authorities to go outside the camp unaccompanied by a guard. If the camp commander cannot spare personnel to accompany chaplains or medical personnel then PW's may very well be without adequate physical care or the spiritual guidance which might help them bear the strain of captivity and resist indoctrination efforts better. True, it is the responsibility of the Detaining Power to provide the physical and spiritual care required by the GPW;[47] however, their medical personnel may be very limited in number and ability and they may have no counterpart of the chaplain. Such considerations as these were evidently in the minds of the drafters of FM 27–10 for in paragraph 187b therein it was indicated that a temporary parole agreeing not to attempt to escape might be authorized to allow a medical officer or chaplain to carry out his normal duties.[48] However, this provision is impliedly superseded by the subsequently issued departmental regulations indicating an unqualified prohibition of the acceptance of parole by any member of the armed forces.

Hence, while no direct conflict exists between the Code and the GPW provisions on the point of "no parole," it seems to conflict with the spirit and purpose of the provisions for retaining medical personnel and chaplains that they may be prevented from fully performing in some situations where, without parole, the camp commander cannot permit them to leave the camp to minister to PW's in other hospitals, camps and labor detachments.

It is possible that, in the case of medical personnel and chaplains, any effort to charge them with unauthorized acceptance of parole, might be successfully defended on the basis of their special status under the GPW and the fundamental reason for their existence which, in the described circumstances, could only be executed by parole. It is unlikely that non-medical and non-chaplain PW's could successfully assert such a defense. In the cases of repatriated PW's following the Korean War who attempted to excuse their contributions to indoctrination and propaganda efforts of their captors on the basis of benefiting fellow PW's, such defense was rejected."[49] But those PW's occupied no special GPW status

[47] GPW art. **33.**

[48] See *supra* note **44** and accompanying **text** for FM 27–10, para. 187b.

[49] See United States v. Fleming, 7 U.S.C.M.A. **543, 23** C.M.R. *7* (1957), and United States v. Batchelor, *7* U.S.C.M.A. **354, 22** C.M.R. **144** (1956).

and had no professional duties to be carried out—any benefit accruing to their fellow PW's was incidental; their own benefit was paramount.

IV. KEEP FAITH, TAKE COMMAND, OBEY ORDERS

Article IV, Code of Conduct: 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 a 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.

A. *KEEP FAITH WITH FELLOW PRISONERS*

1. *United States Domestic Law.*

The thrust of the first two sentences of Article IV of the Code is reflected in the explanation of the Article found in the departmental regulations implementing the Code: "Informing or any other action to the detriment of a fellow prisoner is despicable and is expressly forbidden. Prisoners of war must avoid helping the enemy identify fellow prisoners who may have knowledge of particular value to the enemy, and may therefore be made to suffer coercive interrogation." [50] Articles 104(2) and 105(1), UCMJ,[51] are applicable to the type of conduct prohibited by this Code article.

Following the Korean War, three repatriated American PW's were convicted for various acts of informing on fellow PW's under Article 105(1), UCMJ. One accused reported to the enemy that a PW was preparing to escape; as a result of the report the PW was severely beaten, placed before a mock firing squad on three occasions and confined for about seven months.[52] Another accused reported to camp authorities that a fellow PW had a camera with which he was taking pictures of atrocities committed by his captors; the fellow PW was placed in solitary confinement as a result of being reported.[53] The third accused reported that an entire squad of American PW's was resisting the Communist indoctrination program and that the squad was threatening PW's who wanted to collaborate with the enemy; as a result of his report the squad was subjected to special scrutiny, harassment and discriminatory treatment.[54] One PW was con-

[50] DOD Directive 1300.7, inclosure 2, p. 2; AR 350–30, app. I, p. 8.
[51] *See* appendix 2 for the full text of UCMJ articles 104, 105.
[52] United States v. Dickenson, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955).
[53] United States v. Batchelor, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).
[54] CM 386668, Gallagher, 23 C.M.R. 591, *petition for review denied,* 8 U.S.C.M.A. 776, 24 C.M.R. 311 (1957).

victed of similar conduct under Article 104(2), UCMJ. He reported fellow PW's who criticized him for talking about the United States' germ warfare, who mimicked their guards, and who threatened to "take care of" him after repatriation.[55] Informing on fellow PW's thus may be charged as unauthorized intercourse or communication with the enemy under Article 104(2), UCMJ, or acting without proper authority in a manner contrary to law, custom, or regulation, to the detriment of fellow PW's for the purpose of securing favorable treatment from his captors, under Article 105(1), UCMJ. The latter article requires proof of two elements which are not required by Article 104(2): acted as he did (1) to secure favorable treatment, and (2) to the detriment of others. It may be difficult if not impossible to prove the existence of both elements, thus an informing charge may be made under Article 104(2), UCMJ, for it certainly is not an authorized communication between a PW and his captor.

One of the accused who was convicted under Article 105(1), UCMJ, for informing on his fellow PW, contended that a PW who informs on a comrade for the purpose of ameliorating the conditions of all other prisoners, including himself, does not violate the Article, no matter how hard the lot which may befall his betrayed fellow PW. The United States Court of Military Appeals rejected the contention saying:

> Clearly implicit within that phraseology is the concept that a prisoner of war must, at all costs, avoid the act of informing voluntarily concerning another prisoner. And if he, without being compelled, informs for his own preferment, even if it is only by being a member of the class to whom benefits are extended, and he who was betrayed suffers harm because of the disclosure, the Article is violated. This Nation cannot permit any one prisoner of war to exercise a free choice as to who he will destroy merely to benefit the class to which he belongs. . . . When a prisoner voluntarily trades the life or liberty of a comrade for his own good, he cannot aid himself by contending that his doings also benefited a group of persons."[56]

2. *GPW.*

The GPW does not have any provision bearing directly on "informers." The laws, regulations or orders of the Detaining Power might very well have some provisions which would require their own military personnel to report certain matters. Thus, only indirectly may the GPW affect "informers," since it makes the Detaining Power's laws, regulations and orders apply to the PW's in captivity.

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[55] United States v. Dickenson, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955).
[56] United States v. Batchelor, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956).

3. *Compatibility of the "Keep Faith" Clause of Article IV With the GPW.*

There does not seem to be any conflict between the Code's requirement that the American PW's keep faith with each other and neither do or say anything harmful to each other, and the provisions of the GPW.

B. *TAKE COMMAND*

1. *United States Domestic Law.*

In his implementing regulations the Secretary of Defense has defined the term "senior" to mean the "senior line officer or noncommissioned officer.?[57] In his implementing regulations the Secretary of the Army has defined "senior" to mean "senior officer, noncommissioned officer, or private" and has said that the responsibility to assume command cannot be evaded, except when an individual is prohibited by service regulations from assuming command.[58]

Army regulations which state Army command policy provide that in the event of death, or absence of all officers of a unit normally commanded by a commissioned officer, pending assignment and arrival of the new commander? the senior warrant officer, noncommissioned officer, specialist or private will exercise temporary command. In the event of emergency, as when troops are separated from their parent units under battlefield conditions or in PW status, the senior commissioned officer, warrant officer, cadet, noncommissioned officer, specialist or private present will exercise control or command of the military personnel present.[59]

All of the command policies expressed in those Army regulations apply equally to all classes of military personnel, and one primary policy is that every Army commander has two basic responsibilities in the following priority : accomplishment of his

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[57] See DOD Directive 1300.7, inclosure *2*, p. *2*.

[58] See AR 350–30, app. I, p. 8. Army Regs. No. 600–20, para. 23*d*, *e*, *g* (3 July 1962) [hereinafter cited as AR 600–20], provides that chaplains cannot exercise command; Women's Army Corps officers can only command members of that Corps; Army Nurse Corps and Medical Specialist Corps personnel car exercise command only over members of their Corps; other officers of the Army Medical Service cannot generally exercise command over personnel not in that Service.

[59] AR 600–20, paras. 16, **17.**

mission, and the care of his personnel and property.[60] Thus, Department of Defense and Department of the Army regulations clearly indicate that in every PW camp where American military personnel are located, someone will be senior and that senior one *will* take command, even though he may be a Private First Class, age **21,** and only a high school graduate.

Since the GPW only requires the enemy captor to permit PW's to retain their effects and articles of personal use,'" it is unlikely that the captor will permit the PW's to retain any other property owned by the PW's government. Hence, the Senior in Command will normally not have the responsibility of caring for property other than his own.

And now, what mission must the Senior in Command accomplish? Certainly his mission will not be a conventional one, such as "take Hill 103 and proceed to Hill 105." It is believed that the mission of the Senior in Command is to endeavor to enforce compliance with the Code of Conduct. His second responsibility will be to the welfare of his men.

As to the accomplishment of his mission, it must be remembered that even "though he be deprived of the means and opportunity to exercise his command or authority and from taking appropriate disciplinary action in instances where it may be called for," the Senior cannot be deprived of his military status and rank by any act of any enemy power when he is detained of such power as a PW.[62] He must take such actions as are available to him to counsel, advise, and, where necessary, order his men to conduct themselves in keeping with the standards of conduct traditional to American servicemen[63] and in keeping with the provisions of the Code of Conduct. The *Uniform Code* of *Military Justice* applies

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[60] See AR 600–20, para. 10. U.S. Dep't of Army, Pamphlet No. 600–2, The Armed Forces Officer 8 (1950), states that it is a paramount and overriding responsibility of every officer to take care of his men before caring for himself. This would seem to apply by analogy to the noncommissioned officer Senior in Command.

[61] See GPW art. 18(1).

[62] See CM 374314, Floyd, 18 C.M.R. 362, 366, *petition for review* ***denied.*** 6 U.S.C.M.A. 817, 19 C.M.R. 413 (1955). ***Accord,*** JAGW 1955/6567, 26 July 1965; 3 COMMENTARY 406. Several articles of the GPW indicate that a PW's military status and **rank** is not disturbed by his status as a PW; for example' Article 43 (recognition of promotions of PW's by Detaining Power) ; Articles 44 and **45** (officers and non-officers shall be treated with the regard due to their rank and age) : Article 87(4) (PW's may not be deprived of rank by the Detaining Power as a penalty) ; Article 40 (PW's may wear badges of rank).

[63] Floyd, *supra* note 67, at 366.

to military personnel even though they may be in the hands of the enemy. The Senior may deem it advisable to remind his men of their amenability to disciplinary action upon their repatriation. He must use every means available, short, of course, of maltreatment of his men,[64] to maintain discipline and strengthen the resolve of his men to comply with the Code. He himself must be an example in word and deed.[65] Whatever he is asking of his men, they must know he himself can do, will do, and is doing. His examples may have far more effect than the threat of future and uncertain punishment. Accomplishment of his mission is inextricably tied to his responsibility for the care of his men. He must take such actions as are available to him to help maintain their morale, to ensure that they receive all the benefits and protections of the GPW, to maintain their health and strength, and to occupy their time and thoughts with useful activities when they are not required to be at work by their captors. He cannot do all of this alone. He will need the assistance of equally dedicated men. He will select as his assistants those among the men in whom he sees leadership qualities, for they must reflect and carry out his instructions. He and his assistants will probably form a covert organization, if an overt command organization cannot be formed, to accomplish necessary activities. Such committees might relate to personal hygiene, camp sanitation, care of sick and wounded, supplies, escape, entertainment, education, physical training, morale, etc.

Failure of the Senior to take command may be charged as dereliction of duty under Article 92(3), UCMJ, or as a violation of Article 92(1), UCMJ,[66] for failing to assume command as required by **AR** 600–20, paragraph **17.** Following the Korean War, in affirming the conviction of a repatriated PW for striking a superior officer while in the execution of his office in a PW

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[64] UCMJ article 105(2) would be applicable to the Senior in Command who maltreats his fellow PW's without justifiable cause. For the full text of article **105** see appendix **2.**

[65] In United States v. Fleming, 7 U.S.C.M.A. **543, 23** C.M.R. **7, 28** (1957), there is pertinent language from the majority opinion confirming the conviction of a repatriated officer PW who was charged under Articles of War **95** and 96 (now UCMJ arts. **133, 134)** with various acts of unlawful intercourse and communication with his captors in a PW camp during the Korean War: "War is a harsh business and Col. Fleming was a field grade officer in the United States Army. He was senior to most of the other prisoners of war in his group and acted as a group leader. The exigencies of the situation called upon him to be an example to his men. If anything, due to his superior rank and senior position, he was called upon to exercise a conduct more exemplary than the other prisoners."

[66] See appendix **2** for the full text of UCMJ article **92.**

camp, the Army Board of Review made some pertinent remarks concerning the duty of an American officer in a PW camp:

> As a commissioned officer of the United States Army, Colonel Keith, whether the senior American officer present in the particular camp or not, and although deprived of many of the functions and prerogatives of his office by his Communist captors, had the responsibility and duty 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. It is our opinion that this was what Colonel Keith was endeavoring to do and while so doing he was unquestionably acting in the execution of his office.[67]

While it was the duty of a commissioned officer which was being discussed by the Board of Review it would seem applicable by analogy to whomever has the responsibility *to* assume command and execute the office of Senior in Command.

2. *GPW.*

Article 79, GPW, provides for recognition or election of a Prisoner of War Representative (PW Representative) in all places where there are PW's. In officer camps and in mixed camps[68] the senior officer will be recognized as the PW representative; in non-officer camps the PW's shall elect by secret ballot a PW representative every six months from among themselves. An officer will be stationed in each labor camp for the purpose of carrying out the camp administration duties for which the PW's are responsible. The PW's in the labor camps *may* elect the officer as their PW Representative but are not required to do so. In any case, PW's in labor camps shall elect a PW Representative.

Generally, the PW Representative shall further the physical, spiritual and intellectual well-being of the PW's.[69] He will represent the PW's with the military authorities of the Detaining Power, the Protecting Powers, the International Committee of the Red Cross, and any other organizations which may assist them.[70] The specific duties of the PW Representative are listed in various articles throughout the GPW. These specific duties are:

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[67] CM 374314, Floyd, 18 C.M.R. 362, 366, *petition for review* ***denied,*** **6** U.S.C.M.A. 817, 19 C.M.R. 413 (1955).

[68] "Mixed" refers to camps comprising both officers and othei ranks. See 3 COMMENTARY 392–93; 2A FINAL RECORD 289.

[69] GPW art. 80.

[70] GPW art. 79(1).

a. In relations with the Detaining Power:

Collaboration in management of camp canteen and fund of profits therefrom.[71]

Entitled to receive copies of regulations, orders and publications of the Detaining Power relating to the conduct of PW's.[72]

Right to advise the camp commander on measures to ensure the transport of PW community property and PW luggage in event of transfer of the PW's.[73]

Items entered in the financial account of a PW shall be initialed by him or by the PW Representative on his behalf.[74]

Decisions to institute judicial proceedings shall be announced to the PW Representative.[75]

Sentence pronounced upon a PW shall be communicated to the PW Representative.[76]

Notification of money sent by PW's to their own country shall be countersigned by the PW Representative.[77]

b. In relations with Protecting Powers:

Right to send periodic reports to the Protecting Power on the situation in camp and needs of the PW's.[78]

Right to speak privately with delegates of the Protecting Power.[79]

Unrestricted right to transmit to the Protecting Power the complaints of the PW's concerning conditions of captivity. Even a PW undergoing confinement as a disciplinary or judicial punishment retains his right to complain through his PW Representative.[80]

c. In relation with fellow PW's:

Right to remain in communication with the PW's working for private employers.[81]

Responsible for any system of mutual assistance organized by the PW's themselves.[82]

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[71] GPW art. 28(2).
[72] GPW art. 41(2).
[73] GPW art. 48(3).
[74] GPW art. 65(1).
[75] GPW art. 104(3).
[76] GPW art. 107(1).
[77] GPW annex V(2).
[78] GPW art. 78(4).
[79] GPW art. 126(1).
[80] GPW arts, 78(2), 98(1), 108(3). See also 2A FINAL RECORD 494–95.
[81] GPW art. 57(2).
[82] GPW art. 80(2).

Right to visit premises where PW's are detained.[83] The word "detained" may be understood as referring to all PW's, even those undergoing detention. The premises which may be visited will include the kitchen, infirmary and other annexes. This right to visit premises implies a sort of right of inspection granted to the PW Representative and recognized by the Detaining Power.[84]

Every PW has the right to consult freely with his PW Representative.[85]

Right to hold in trust parcels and money withheld from PW's serving sentences to confinement.[86]

Right to present wounded and sick for examination by the Mixed Medical Commission.[87]

Right to be present at the examination of PW's conducted by the Mixed Medical Commission.[88]

d. In relief activities:

Right to take possession and distribute collective relief shipments intended for the PW's.[89]

Upon receipt of shipments of relief supplies PW Representative shall sign receipt therefor which shall be forwarded to the sending relief societies.[90]

Further specific duties and rights of the PW Representative concerning collective relief are set forth in Annex 111, Articles 1–7, GPW.

As a consequence of his status as PW Representative, he shall not be required to perform any other work, if the accomplishment of his duties is thereby made more difficult.[91] **All** material facilities shall be granted to him, particularly a certain freedom of movement necessary to the accomplishment of his duties, such as inspection of labor camps and receipt of supplies.[92] The Detaining Power must furnish all facilities €or communication by the PW Representative with the Detaining Power, Protecting Power, International Committee of the Red Cross and the Mixed Medical Commissions.[93]

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[83] GPW art. 81(3).
[84] 3 COMMENTARY 402–03.
[85] GPW art. 81(3).
[86] GPW art. 98*(5)*.
[87] GPW art. 113(1).
[88] GPW art. 113(3).
[89] GPW art. 73(2).
[90] GPW art. 125(4).
[91] GPW art. 81(1).
[92] GPW art. 81(4).
[93] GPW art. 81(2).

The GPW provides in Article 79(2), (3), that PW Representatives shall have advisers or assistants. In officer camps the PW Representative shall be assisted by one or more advisers chosen by officers. In mixed camps his assistants shall be elected by the PW's from among the non-officer PW's. In labor camps his assistants shall be chosen from among the non-officer PW's. (Since officers cannot be compelled to work,[94] it is not likely that officers, other than the one assigned for administrative duties, will be in the labor camp, hence the assistants could only come from the non-officer PW's. In any case, it would not be appropriate for an officer to be chosen as assistant to a non-officer).

Since Article 81(2), GPW, provides that the PW Representative may appoint from among the PW's such assistants as he may require, it would seem that in addition to the advisers or assistants chosen or elected, the PW Representative may himself choose some assistants.

It is clear from the foregoing examination of the duties of the PW Representative that he does not have any command-type relationship with his fellow PW's. His responsibilities and authority are derived solely from the provisions of the GPW; he is not in any sense in a chain of *command* between the PW's and the Detaining Power. He is what his title implies, a *representative* of the PW's, whose duty is to see that the humanitarian purposes of the GPW as spelled out in its provisions are accomplished for the benefit of his fellow PW's and himself.

No provision of the GPW requires the Detaining Power to deal with any PW other than the PW Representative concerning the application of the GPW, except to receive an individual's complaints concerning the conditions of captivity as they apply to him.[95] Hence, in non-officer and labor camps, there is no requirement that the Detaining Power deal with the senior PW unless that senior PW is the recognized or duly elected PW Representative. And, since in non-officer and labor camps the senior PW is not automatically the PW Representative (as he is in officer and mixed camps) the Detaining Power may exercise its prerogative under Article 79(4), GPW, of refusing an approval of the Senior PW's election as PW Representative. While such disapproval must be communicated to the Protecting Power together with the reason for such refusal, the GPW does not pro-

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[94] GPW art. 49(3).

[95] See GPW article 78 concerning complaints of prisoners of war relating to the conditions of captivity.

vide for a reversal of the disapproval. Pictet says that "if the Protecting Power considers the reasons valid, it can so inform the prisoners of war who can then advisedly elect another candidate." [96] He does not elaborate with an explanation of the alternative if the Protecting Power should consider the reasons for disapproval invalid. It would seem to follow that the Protecting Power could then only attempt to persuade the Detaining Power of its error. Success is not likely.

As far as the GPW and the Detaining Power are concerned, the only one in command in the PW camp is the commissioned officer designated by the Detaining Power as Camp Commander in accordance with Article 39(1), GPW; the officer so designated must be a member of the regular armed forces of the Detaining Power. Disciplinary punishment may be ordered only by an officer having disciplinary powers in his capacity as Camp Commander, or by a responsible officer who replaces him or to whom he has delegated his disciplinary powers. In no case can such powers be delegated to a PW or be exercised by a PW.[97]

3. *Compatibility* of *the "Take Command" Clause* of *Article IV With the GPW.*

In officer and mixed camps, the positions of PW Representative and Senior in Command will be occupied by the same PW. In non-officer and labor camps the same PW *may* occupy the two positions. There seems to be conflict between the Code and departmental regulations and the GPW in two instances when the two positions are occupied by the same man.

First, under the Code and implementing regulations, his command responsibilities — enforcement of the Code and the duty to defeat the enemy — are paramount under all conditions at all times; [98] yet, under the GPW his responsibility to further the welfare of his fellow PW's is paramount. Thus, a treaty to which this Country is a party, and which is made part of the law of the land by Article VI, Section 2 of the Constitution of the United States, is confronted by an Executive Order from the Commander in Chief and regulations implementing the Order issued by military department heads deriving their authority from the Commander in Chief. Which shall prevail, which duty is paramount? The PW occupying both positions must give

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[96] **3 COMMENTARY 394.**
[97] GPW art. 96.
[98] See DOD Directive 1300.7, para. VB; **AR** 350–30, para. 8.

priority to his GPW duties. The treaty must take precedence. It is Congress who has been given the primary legislative power to establish rules and regulations for a government and regulation of the land and naval forces.[99] But, the President, as Commander in Chief, has the power to establish rules and regulations for the government of the Armed Forces, derived from his power to employ the Armed Forces in a manner deemed most effectual by him. However, his "ordinance-making" power is limited, by judicial interpretation, by the restriction that his rules and regulations must not contravene a statute created by Congress or the provisions of the Constitution.[100] The Constitution declares, in Article VI, Section **2,** that the Constitution and the laws of the United States made in pursuance of the Constitution, and all treaties made under the authority of the United States shall be the supreme law of the land. It follows that the President's Executive Order is subordinate to the Treaty (GPW) requirements when there is a conflict.

The second conflict which may arise when the two positions are occupied by the same PW springs from the requirement of the Code and its implementing departmental regulations that the enemy be physically defeated in the PW camp and the battlefield be extended into the PW camp.[101] If the Senior, in compliance with the Code, incites his men to initiate physical violence against their captors (unrelated to self-defense or the violence necessitated by an escape effort), the inevitable result will be repressive measures and diminution of the humane treatment and the privileges provided by the GPW. Self-defense, retaliation, necessity to maintain order, perhaps limited quantity of guard personnel—all would motivate the Detaining Power to severely limit many of the protections and privileges accorded the PW's by the GPW and could result in injury or death to many PW's. Thus the PW holding both positions *would not have performed* his paramount responsibility under the GPW, that of furthering the welfare of his fellow PW's. His status and privileges as PW Representative (*e.g.*, assistants, freedom from work, certain freedom of movement, material facilities),[102] *can* facilitate the accomplishment of his other Senior in Command responsibilities, under the Code, particularly those related to physical and mental

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[99] See U.S. CONST. art. I, § 8, **cl. 14.**

[100] United States v. Symonds, 120 U.S. 46 (1887); WINTHROP, *op. cit. supra* note 10, at 33, **40; HART,** *op. cit. supra* note 10.

[101] See DOD Directive 1300.7, para. **VA,** B; **AR** 350–30, paras. *7,* 8.

[102] See GPW art. 81.

welfare of the PW's, morale, formulation of escape plans, advising and counseling, and adjuration to the PW's to comply with the Code, short of incitement to physical violence, of course.

In non-officer and labor camps, the PW Representative and Senior in Command may be two different PW's. The Senior's command responsibilities include the welfare of his men, yet it is the PW Representative who has the title, status, and privileges needed to accsmplish the responsibility of furthering the welfare of the PW's. When there is disagreement between the two PW's, there is no GPW provision recognizing the authority of the Senior in Command The Detaining Power need only deal with the elected PW Representative. Ultimate legal resolution of the conflict between the two men can only be accomplished upon repatriation by proceedings under the UCMJ to determine if the PW who was PW Representative did or did not conduct himself properly. In the PW camp, the Senior will be limited to such passive measures as verbal pressure, orders, ostracism by the group, and persuasion, as well as threat of future criminal liability for misconduct. Since there are elections every six months, the group may choose not to re-elect an ineffective or seemingly treacherous PW as their Representative.

One writer has asserted that in non-officer and labor camps it is a Code duty on the part of the PW's to elect as their Representative the senior PW.[103] While it may be more convenient if the PW's elect the Senior as PW Representative in order that there may be only one person "in charge" of PW welfare and in order that conflict of views on how to conduct relations with the captors may be avoided, there is no requirement that the PW's elect the Senior. Since Article **79 (1),** GPW, provides that the "prisoners shall freely elect by secret ballot," it would be improper for the Senior to "order" his own election.[104] Disobedience of such an order would not subject the PW's to court-martial upon repatriation, for the order would not be a lawful one, the legality of the order in this case being determined by a provision of the GPW, Article 79.

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[103] See Manes, *Barbed Wire Command: The Legal Nature* of *the Command Responsibilities* of *the Senior Prisoner in a Prisoner of War Camp,* 10 MIL. L. REV. 1, 16, 44 (1960).

[104] In his *3 Commentary* 389–90, in discussing GPW article 79(1), Pictet says: "The present text [as opposed to the 1929 GPW, Article 43(1)] is more specific and implies that prisoners of war must hold such elections in order not to lose some of the advantages and safeguards which the Convention affords. . . . [The Detaining Power] must, however, see that no pressure is brought to bear on prisoners of war. . . ."

In their regulations implementing the Code of Conduct and describing the nature of the training which should be given military personnel in the Code, both the Secretaries of Defense and Army have indicated that the elected PW Representative system as provided for in Articles 79–81, GPW, would be formed *only* if the Senior in Command organization (under Article IV, Code of Conduct) cannot be effected.[105] This is in conflict with the GPW. The provisions for the recognition of the senior officer in officer and mixed camps and the acceptance of elected PW Representatives in non-officer camps contained in Articles 79–81 are not phrased in permissive terms, nor are they meant to be permissive. Pictet says that Article 79, GPW, text is more specific than the 1929 Geneva Convention Relative to the Treatment of Prisoners of War and implies that PW's must hold such elections in order not to lose some of the advantages and safeguards which the Convention affords.[106] Perhaps the Departments of Defense and the Army are attempting to impose on military personnel a *duty* to elect the senior PW as the PW representative in non-officer camps, since in officer and mixed camps the senior officer *will* be the PW Representative in accordance with Article 78, GPW. If this is the aim, it would seem that clearer language could be used to get this point across. As it is now phrased, one cannot be sure exactly what is intended, and if such *is* the aim, it would seem to conflict with the requirement for a free, secret election required by Article 79 (1), GPW, referred to above.

C. *OBEY LAWFUL ORDERS*

1. *United States Domestic Law.*

It has already been noted in this article that the UCMJ continues to apply to American soldiers in PW camps and that capture by the enemy and application of enemy laws, regulations

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[105] DOD Directive **1300.7,** inclosure **2,** p. **2;** AR **350–30,** app. I, p. 8.

[106] 3 COMMENTARY **389.** It should be noted that the United States offered an amendment to Article **79,** GPW, to provide that officer PW's in labor camps for enlisted men should act as spokesmen, that is PW Representative, for the men. See 3 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF **1949,** p. **78,** No. **141.** This was not accepted. Pictet observes that it **was** contrary to the general spirit of the Chapter in the GPW on Prisoners Representatives and conflicted with the idea that PW Representatives should be elected. See **3** COMMENTARY **393.** The United States did not make a reservation to the requirement in Article **79,** GPW, that in non-officer camps (including labor camps) the PW Representative must be elected, when it ratified the GPW.

and orders to the PW's in captivity as provided by the GPW do not prevent the application of the UCMJ to repatriated PW's for misconduct in PW camps. Thus, there is no doubt that American soldiers who become PW's are still subject to the lawful orders of those appointed over them.[107] Violation of lawful orders may be charged under Articles 90(2), 91(2), or 92(2), UCMJ.[108] Further, disrespect toward superior, commissioned, warrant, or noncommissioned officers is punishable under Articles 89 and 91(3), UCMJ.[109]

Lest there be any doubt that an American Senior in Command can exercise command authority, and that other senior personnel can also exercise prerogatives of their rank, here is language from an Army Board of Review affirming the conviction of a repatriated PW following the Korean War for striking an officer in the execution of his office:

> We cannot and do not concur with any view advanced by 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 opportunity to exercise his command or authority and from taking appropriate disciplinary action in instances 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 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.[110]

[107] See JAGW 1955/6567, 26 July 1955, which said, *inter alia:* "The obligation to obey the proper mandate of a superior officer can exist in the absence of the power to exert disciplinary sanctions, just as the obligation to abide by international law exists though there may be a deficiency in its sanctions. A superior officer in a prison camp would be remiss in his duties if he did not to the best of his ability, exercise the prerogatives of his rank to insure compliance by soldiers in their duties toward their country . . . . Since the Geneva Conventions preclude the deprivation of the prisoners' military status . . . it would appear to follow that those attributes inherent because of a soldier's military status may not be removed. These qualities include loyalty to country, and obedience to lawful orders of a superior."

[108] See appendix 2 for full text of UCMJ articles 90, 91, 92.

[109] See appendix 2 for full text of UCMJ articles 89, 91.

[110] CM 374314, Floyd, 18 C.M.R. 362, 366, *petition for review denied,* 6 U.S.C.M.A. 817, 19 C.M.R. 431 (1955).

2. *GPW.*

It is evident from examination of Articles **39** and 96, GPW, that the only recognized command structure is that of the Detaining Power. No provision is made in the GPW, and it is not likely any would be made in the laws of the Detaining Power, for enforcing obedience among the PW's of orders issued by PW's to PW's. While the senior officer shall be recognized as PW Representative in officer and mixed camps, the status thereby acquired by the Senior under the GPW is not that of a commander authorized to give orders. He is authorized to represent the PW's, not command them.

3. *Compatibility of the "Obey Lawful Orders" Clause of Article IV With the GPW.*

There does not seem to be conflict between the Code and the GPW on the point of obedience to orders. There is no means for the Senior to punish PW's who refuse to obey his lawful orders; [111] punishment, if appropriate, must await repatriation. PW's are subjected by Article 82, GPW, to the laws, regulations and orders in force in the armed forces of the Detaining Power and by Article **39,** GPW, to the authority of the Camp Commander. Means for enforcing the Camp Commander's orders and other orders, laws and regulations of the Detaining Power exist. Further, the departmental regulations implementing the Code of Conduct acknowledge that Article 82, GPW, applies to PW's.[112]

V. LIMITED ANSWERS, REMAIN LOYAL

Article V, Code of Conduct: 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 statement disloyal to my country and its allies or harmful to their cause.

A. *LIMITED ANSWERS*

1. *United States Domestic Law.*

An American serviceman must give his name, rank, service number and date of birth when questioned after capture. Beyond

[111] GPW article 96(3) prohibits delegation of disciplinary authority to a PW. *3 Commentary* 460 mentions that "during the Second World War, some camp commanders permitted disciplinary powers to be exercised [in cases of offenses committed by one prisoner of war against his fellow prisoners of war] by the prisoners' representatives or even by a tribunal composed of prisoners of war. This practice is now forbidden."

[112] DOD Directive 1300.7, inclosure **2,** p. 1; **AR** 350–30, app. **I, p.** 8.

that he must not go, on pain of future court-martial upon repatriation. The words, "to the utmost of my ability," indicate the limit to which he must go before he may avoid criminal liability for giving information helpful to the enemy. He will have to show that any harmful or useful information he gave, allegedly involuntarily, was caused by a well grounded apprehension of immediate and impending death or of immediate, serious, bodily harm in order to defend successfully his actions on the ground of coercion or duress.[113] Violation of this provision of the Code of Conduct would fall under Article 104(2), UCMJ, as unauthorized giving of intelligence to, or communication, or correspondence with the enemy.

The departmental regulations provide that each serviceman will be instructed that adherence to the requirement of giving no more than name, rank, service number and date of birth may be accomplished by dogmatically refusing to answer any question beyond that seeking to elicit the authorized answers, and by saying "I will not answer your questions; I will not say anymore; my orders are to give my name, rank, service number, and date of birth ; I will not give you anything else" ; or by claiming inability to think, claiming ignorance, claiming inability to talk, and claiming inability to comprehend.[114]

The departmental regulations do explain that a PW may communicate with the enemy regarding his individual health or welfare as a PW and, when appropriate, on routine matters of camp administration.[115]

2. *GPW.*

Article 17, GPW, requires that, when questioned on the subject, every PW must give only his name, rank, service number, and date of birth, or failing that, equivalent information. No physical

[113] This standard was declared in several cases of repatriated PW's following the Korean War who were convicted of misconduct in PW camps: *e.g.*, United States v. Fleming, 7 U.S.C.M.A. 543, 23 C.M.R. 7 (1957) ; United States v. Olson, 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957) ; CM 388545, Bayes, 22 C.M.R. 487 (1956), *petition* for *review denied*, 7 U.S.C.M.A. 798, 23 C.M.R. 421 (1957).

[114] DOD Directive 1300.7, inclosure 1, p. 1 : AK 350–30, para. 11*b* (3) (c).

[115] See DOD Directive 1300.7, inclosure 2, p. 2; AR 350–30, app. I, p. 9. See also United States v. Batchelor, 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956); United States v. Dickenson, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955); CM 377832, Batchelor, 19 C.M.R. 452 (1955). These three cases reflect the recognition that not *all* intercourse or communication by a PW with his captors is prohibited but only that which is unauthorized, such as voluntary participation in enemy propaganda and indoctrination activities.

or mental torture or any other form of coercion may be used against the PW's to secure from them any additional information.

Article **70,** GPW, requires that every PW be permitted, immediately upon capture or at least within one week after arrival at a PW camp, to send a Capture Card to his family and to the Central Prisoner of War Agency. The suggested form of the Capture Card is prescribed in Annex IV to the GPW. It provides for giving **13** items of information: name, power on which the PW depends, first name of father, date of birth, place of birth, rank, service number, address of next of kin, when taken prisoner, health status, present address, date. Also, the PW must be permitted to send such a card in the event of sickness, transfer to a hospital, or transfer to another camp. Pictet notes that pursuant to Article **17,** GPW, the PW's are free *not* to give all the information for which space is provided on the model card shown in Annex IV, GPW; PW's may, if they wish, merely fill in name, rank, service number and date of birth.[116]

B. *REMAIN LOYAL*

1. *United States Domestic Law.*

The departmental regulations elaborate on the last sentence of Article V:

> Oral or written confessions true or false, questionnaires, personal history statements, propaganda recordings and broadcasts, appeals, self criticism or any other oral or written communications on behalf of the enemy or critical or harmful to the United States, its allies, the Armed Forces or other prisoners are forbidden. . . .
>
> It is a violation of the Geneva Convention to place a prisoner of war under physical or mental torture or any other form of coercion to secure from him information of any kind. If, however, a prisoner is subjected to such treatment, he will endeavor to avoid by every means the disclosure of any information, or the making of any statement or the performance of any action harmful to the interests of the United States or its allies or which will provide aid or comfort to the enemy.":

The above-quoted language reflects the types of oral and written statements which some American PW's in the Korean War made and for which they were punished upon repatriation. The PW's were charged and convicted under Article 104(2), UCMJ, and the former General Article, Article of War 96 (AW), which is now Article **134,** UCMJ. The language of AW 96 and Article **134,**

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[116] 3 COMMENTARY **343.**
[117] DOD Directive 1300.7, inclosure 2, p. 3; AR **350–30,** app. I, p. 9.

UCMJ, is almost identical; any difference is immaterial to this discussion. Some examples of the oral and written statements made by those repatriated PW's may be of interest: voluntary participation in enemy conducted discussion groups discussing the reflecting views and opinions that the United States conducted bacteriological warfare in Korea, was an illegal aggressor, and urging fellow PW's to embrace Communism;[118] recording a speech against the United States purportedy aimed at his parents intended for radio broadcast;[119] writing articles against United States' interests for the PW camp newspaper;[120] making speeches to fellow PW's praising the captors for good treatment of PW's, asserting that the Korean War was a millionaire's war and that the PW had innocent blood on their hands, asserting that escape would be impossible and that the PW's should cooperate with the Communists to improve their lot in the camp;[121] preparing Communist-sponsored documents and circulating them among the PW's, which documents alleged the Air Force indiscriminately bombed North Korea, that the United States was an aggressor in Korea and that the Korean War was caused by those Americans who profit from war;[122] writing a letter to a newspaper in the United States intending to promote disloyalty and disaffection among the people there, in which the PW asserted the United States was guilty of germ warfare and that he had seen evidence of this practice himself;[123] broadcasting appeals for the Five Great Powers to sign a peace pact, urging the President and General MacArthur to withdraw United Nations forces from Korea and appealing to the United Nations troops to surrender.[124]

In order to defend such actions as described above, and as condemned by the Code of Conduct, on the ground of coercion or duress, the accused would have to show that he acted as he did under a well-grounded apprehension of imminent death or serious bodily injury.'?'

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[118] United States v. Batchelor, 7 U.S.C.M.A. 354, 22 C.M.R. **144** (1956); United States v. Dickenson, 6 U.S.C.M.A. **438,** 20 C.M.R. **154** (1955); CM **388545,** Baves, **22** C.M.R. **487** (1956), *petition for review denied.* 7 U.S.C.M.A. 798, **23** C.M.R. **421** (1957).

[119] United States v. Dickenson, *supra* note 118.

[120] United States v. Olson. 7 U.S.C.M.A. 460, **22** C.M.R. 250 (1957); United States v. Dickenson, 6 U.S.C.M.A. **438,** 20 C.M.R. **134** (1955).

[121] United States v. Olson, *supra* note 120.

[122] CM **388545,** Bayes, **22** C.M.R. **487** (1956), *petition for* ***review denied,*** **7** U.S.C.M.A. 798, 23 C.M.R. **421** (1957.)

[123] United States v. Batchelor, **7** U.S.C.M.A. **354,** 22 C.M.R. **144** (1956).

[124] United States v. Fleming, 7 U.S.C.M.A. 543, **23** C.M.R. 7 (1957).

[125] See note 113 *supra* and accompanying text.

The protection of free speech given by the First Amendment would not protect a PW accused of making oral or written statements harmful to the United States and its allies or disloyal to the United States. In rejecting such a defense asserted by a repatriated **PW** following the Korean War, an Army Board of Review [126] quoted from an earlier decision of United States Court of Military Appeals:

> "Time after time the Supreme Court of the United States has stated that the right to speak freely must be considered in the light of attending facts and circumstances. That principle seems to me implicit in the 'clear and present danger' concept. If such is the case then the rights of the man in service must be proportioned by a more refined measuring rod than are those belonging to the man in the street. ***What may be questionable behavior in civilian life, and yet not present any danger to our form of government, may be fatal if carried on in the military community. . . .***
>
> "[I]f every member of the service was, during a time of conflict or preparation therefor, permitted to ridicule, deride, deprecate, and destroy the character of those chosen to lead the armed forces, and the cause for which this country was fighting, then the war effort would most assuredly fail. . . .
>
> "If it is necessary for survival that this country maintain a sizeable military establishment, ***. . . then I have a great deal of difficulty in following an argument that those who serve should be entitled to express their views, even though*** by so ***doing they may destroy the spirit and morale of others which are vital to military preparedness and success."*** [127]

Article V of the Code of Conduct reflects the possibility that future warfare may not be limited to physical combat on a battlefield, but that the enemy may very well seek to use propaganda warfare in an effort to gain favorable world opinion, win new allies and undermine the war effort of the United States and its allies. Thus the potential PW is warned of this danger and directed not to take part in it, directly or indirectly.

2. *GPW.*

There is nothing in the GPW designed to promote disloyalty among the PW's or to require a PW to be disloyal to the country in whose armed forces he was serving at the time of capture. The **GPW** has numerous provisions reflecting the prohibition against the use of mental or physical torture or inhumane measures against the PW's.[128]

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[126] See CM **388545,** Bayes, **22** C.M.R. **487 (1956), *petition for review denied,*** **7** U.S.C.M.A. **798, 23** C.M.R. **421 (1957).**

[127] CM **388545,** Bayes, ***supra*** note **126,** at **490–91,** quoting from United States v. Voorhees, **4** U.S.C.M.A. **509, 16** C.M.R. **83 (1954).**

[128] See **GPW** arts. **13, 14, 17, 87, 98.**

The *opportunity* for a PW to be disloyal occurs in relation to his correspondence privileges. Article 71, GPW, provides that PW's shall be allowed to send and receive letters and cards. Pictet says "this sentence states a basic principle of the Convention" in that "it recognizes the right of PW's to maintain relations with the exterior to a certain extent." [129] If it is necessary for the Detaining Power to limit the amount of correspondence sent by the PW's, the PW's must be permitted to send at least two letters and four cards monthly. Only the Power on whom the PW's depend can limit the correspondence addressed *to* PW's, although the Detaining Power may request that such correspondence be limited. There is no requirement that the PW correspond only with family or close relatives. Herein lies the opportunity for the PW to write disloyal letters to newspapers, national and world leaders, friends, etc. However, this was not the purpose of the GPW. The purpose was to permit outside contact for the benefit of the PW, not for the disadvantage of the PW's country.

C. *COMPATIBILITY OF ARTICLE V, CODE OF CONDUCT, WITH THE GPW*

The requirements of the Code that answers to questions put to a PW by the Detaining Power must be limited to name, rank, service number, and date of birth, that the PW must evade answering further questions to the utmost of his ability, and that the PW must not make oral or written statements disloyal or harmful to his country, its allies, or his comrades need not conflict with the provisions of the GPW.

However, departmental regulations may produce conflict arising from application of the Code restraints to use of the Capture Card and personal correspondence of the PW's to the "outside." Conflict may arise from omission of clarifying remarks specifically exempting the Capture Card from Article V restrictions or permitting its partial completion, and failure to discuss personal correspondence.

It would seem that the PW must limit the information placed on the Capture Card to the four permissible items of name, rank, service number and date of birth. However, to send the Capture Card requires placement thereon of someone's name and address which, of course, exceeds the permissible information. The departmental regulations do not indicate that the Capture Card is

[129] 3 COMMENTARY 343.

exempt from the restrictions regarding permissible information. By restricting the PW to the four permissible items of information in his use of the Capture Card, he is in effect denied its use —for he must address it for mailing. The purpose of the Capture Card is to permit the PW to let his family know he is alive, he is a PW, and whether his health is adversely affected by injuries or disease—a purpose compatible with the overall humanitarian purpose of the GPW. Unless departmental regulations specify the permissibility of at least partial completion of the Capture Card, it would seem that service personnel may be instructed and may believe, from reading departmental regulations, that even the Capture Card is subject to the Article V limitations. Thus, a conflict may arise through omission of clear guidance in the training to be given on the Code provisions.[130]

A similar conflict may arise concerning the private correspondence the PW is privileged to engage in under Article 71, GPW. Such correspondence is subject to censorship by the Detaining Power.[131] In this way, the names and addresses of family members and friends, information concerning family and personal problems, comments concerning incidents of his past life, references to former civilian employment and education may come to the attention of the PW's captors from perusal of his personal correspondence. Such information is similar to information which one might expect to find in questionnaires and personal history statements. The departmental regulations do not provide guidance in this area. They are subject to the interpretation that personal correspondence from the PW to the "outside" may fall within the unqualified prohibition of no written statements harmful to the cause of the United States.[132] Why? Because any information about the private life of an American PW may be usable in a propaganda campaign by an enemy, and may be used by the enemy in attempting to exploit a PW's personal problems in an indoctrination program.

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[130] JAGW 1961/1140, 23 June 1961, says that Article V, Code of Conduct, does not prohibit PW's who are United States citizens from executing and signing the Capture Card provided for in GPW article 70 (and Annex IV), nor does it prohibit sending and receiving letters. Unfortunately this opinion is not reflected in the departmental regulations implementing the Code.

[131] GPW art. 76.

[132] See 3 COMMENTARY 345.

VI. CONCLUSION

A. *ENFORCEMENT OF THE CODE OF CONDUCT*

One who examines the Code of Conduct may become excessively preoccupied with the means of enforcement of the Code. While it is intriguing to consider whether a violation of a Code provision could be charged under Article 92(2), UCMJ, as a failure to obey a lawful order of the Commander in Chief, such consideration has more academic interest than practical value. As demonstrated in the foregoing chapters, in the references to convictions of repatriated PW's following the Korean War for PW camp misconduct, violation of the Code will fall under specific articles of the UCMJ. The Code of Conduct actually reflects the type of conduct by PW's which resulted in convictions by general court-martial following the Korean War. There is no indication in the *POW Report* that the drafters of the Code believed they were creating a penal code. Their efforts were obviously airned at providing military personnel with a standard by which they might guide themselves when thev fall into the hands of an enemy during an armed conflict. It need not be memorized word for word to be effective. The major warnings contained in it come easily to mind and are no doubt stressed during instruction on the Code: resist; escape; no parole or special favors : remain loyal to comrades and country ; take command if senior ; obey senior and other. leaders : give only name, rank, service number, date of birth: beware of speaking or writing harmful or useful statements for the enemy; remember one can be court-martialed for PW camp misconduct when returned to United States control. Such a Code is memorable and therefore a good training device. There seems to be no need to wring one's mental hands because it would be difficult if not impossible successfully to charge someone with an Article 92(1), UCMJ, violation of the literal terms of the Code.

B. *REMOVAL OF IYCOMPATIBILITY BETWEEN THE CODE AND THE GPW*

The conflicts between the Code of Conduct and the GPW which have been discussed in preceding chapters arise essentially from the humanitarian purpose of the GFW and the assumption therein that the PW is no longer a danger to the enemy because he is removed from the fight, and the directly contrary instructions contained in the departmental regulations implementing the Code which direct the American soldier to continue the battle in the

PW camp and physically defeat the enemy even there. The Code of Conduct need not be and should not be interpreted in a manner inconsistent with the GPW.[133] The conflicts can be removed easily by issuing certain qualifications to a few absolute instructions contained in the implementing departmental regulations.

"Resist by all means available" should be qualified by indicating that this does not mean the initiation of unwarranted physical violence. When the Senior in Command is also the PW Representative, he must give precedence to his duties as PW Representative; his duty to obey the provisions of the Code of Conduct and enforce them to the extent possible are subordinate to the GPW duties given the PW Representative. He surely must not be required to incite his men to the unwarranted physical violence seemingly required by the Code as implemented by the departmental regulations. To do so would undoubtedly result in diminution of the protections and privileges accorded to the PW's by the Code and the Senior would not be properly performing his primary duty as PW Representative. He must further the physical, spiritual and intellectual well-being of the PW's. The well-being of all the PW's could be adversely affected by any concerted effort, directed by the Senior (who is also PW Representative), to physically injure or kill camp authorities wantonly.

The mandate to make every effort to escape and aid others to escape, and the prohibition against acceptance of parole should be qualified to exempt chaplains and medical personnel from adherence thereto. These personnel do not have the status of PW's, but are "Retained Personnel." The only reason for their retention in captivity is to perform medical and religious duties on behalf of the PW's. They are to be retained only to the extent they are needed to perform those duties. Therefore, they should have maximum freedom of movement; acceptance of parole for such purpose is in keeping with the purpose of their retention. Requiring such personnel to escape if possible is directly contrary to the purpose of their retention. Requiring them to "desert" the very people to whom they are meant to minister is in direct conflict with the reason for their existence. Requiring these personnel to involve themselves in escape plans and efforts would jeopardize their positions and impede, if not prevent, their performance of, and opportunities to perform, their medical and religious duties.

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[133] "It was not intended that the Code of Conduct contravene the provisions of the Geneva Conventions." JAGW 1961/1140, 23 June 1961.

The indication that the PW Representative system prescribed by Articles 79–81, GPW, should be formed only *if* the Senior in Command organization cannot be effected should be deleted from departmental regulations. The PW Representative system is not permissive, it is mandatory, The United States lost its fight at the Geneva Conference to have the Senior recognized as PW Representative even in enlisted and labor camps, and did not make any reservations at the time of ratification of the GPW to the provision for election of PW Representatives in non-officer camps. It is improper to attempt to circumvent the GPW provisions by departmental regulations. There is no Code duty to elect the Senior as PW Representative. The Senior cannot legally order his own election. The GPW specifically provides for free, secret elections.

The departmental regulations should specify that the Capture Card may be completed fully without fear of violating the prohibition against giving information beyond name, rank, service number and date of birth. Further, they should affirm the right of the PW to engage in personal correspondence as permitted by Article 71, GPW, without fear of violating the prohibition against giving personal history statements and making written communications which might be harmful to the United States, It would certainly be appropriate to direct that military personnel be warned that personal correspondence sent by the PW to the "outside" cannot be used with impunity by him to convey propaganda-type statements adverse to United States interests, and that they should also be conscious of the fact that their captors would be seeking information in their letters useful in "blackmailing" PW's into collaboration or useful in their propaganda efforts similar to that which a personal history statement might reveal.

C. *APPLICABILITY OF THE CODE IN NON-WAR SITUATIONS*

DOD Directive 1300.7, paragraph 111, declares that "the Code of Conduct is applicable to all members of the Armed Forces at all times." AR **350–30,** paragraph **1,** is even more explicit, for it declares that the Code:

> applies at all times to all members of the United States Armed Forces; including those who are forceably detained by a foreign state or entity for their participation, actual or alleged, in military operations dnring foreign internal conflicts, international armed conflicts, or in other belligerent hostilities in which the United States may be involved.

By its regulations the Department of the Army is extending the Code's application to types of conflict less than a declared or recognized war.

Both departmental regulations seek to make the Code applicable to all service personnel wherever they are located and in whatever situation they may find themselves, *e.g.,* in South Vietnam in the hands of the Viet cong, in North Vietnam in the hands of the North Vietnamese, or in East Germany in an East German jail, as well as in the hands of an enemy in a declared or recognized international war.

In the case of a declared or recognized international was, the GPW would apply in full and would give protection and rights to American PW's. In such cases, the conflicts between the GPW and the Code of Conduct discussed previously in this article are material.

"In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum," the provisions of Article 3, GPW.[134] In such a situation, unless the parties agree to apply the full or major portion of the GPW, the conflicts between the GPW and the Code of Conduct are not material.

In the case of the American soldier who inadvertently strays or voluntarily goes into East Germany and is incarcerated in an East German jail or prison, the GPW is inapplicable and the conflicts between the GPW and the Code of Conduct are not material.

Is the Code applicable to all service personnel wherever they are located and in whatever situation they may find themselves? Yes, but in varying degrees. The literal language of the Code reflects the circumstances which gave rise to the need for the Code: American soldiers held as prisoners of war by an enemy who declared its intention to adhere to the GPW and that enemy's exploitation of the PW's to further its war effort. Article III, Code of Conduct, refers to "capture" and the "enemy"; Article IV refers to "prisoner of war"; Article V refers to "prisoner of war" and indicates the information a PW is bound to give under

[134] For text of GPW article 3, see appendix 3. While factually there seems to be an international conflict in being in Vietnam, none of the parties have recognized it as such nor demanded application of the full GPW. At least GPW article 3 is applicable there. For a discussion of such a situation as Vietnam see Kelly, "Legal Aspects of Military Operations in Counterinsurgency," 21 Mil. L. Rev. 95 (1963).

Article **17,** GPW. The *POW* ***Report*** [135] and subsequent comments made by the Chairman of the Defense Advisory Committee [136] bear out the fact that the Code was drafted to provide a guide and standard of conduct for servicemen of the future who might find themselves in a Korean War-type situation. Because the nature of the conflict in Vietnam closely resembles a war similar to the Korean War, it is apparent that the Code is applicable fully to military personnel there. The drafters of the Code obviously did not contemplate the application of the Code to American military personnel who might be incarcerated in a jail or prison in one of the Iron Curtain countries. It would be impractical and probably impossible to attempt literal enforcement of every provision of the Code via the UCMJ against an American soldier who returns from an East German or Russian jail, *e.g.,* if he failed to attempt to escape from such a jail.

However, that does not mean the Code is not a valuable guide to a military person who finds himself a prisoner of East German or Russian authorities. Certainly the Code tells him that he should resist all efforts to indoctrinate him in Communist ideology, to obtain military intelligence, to exploit his written or spoken words for propaganda purposes. The Code tells him not to accept favors from his captor or freedom of movement in exchange for some act or promise beneficial to his captor or harmful to his fellow prisoners or country; that if he and one or more American servicemen are fellow prisoners, then the senior one of them must exert his authority as senior and the junior ones must obey lawful orders of that senior one; that he should give at least his name, rank, service number and date of birth and avoid giving further information as far as possible. The Code also tells him he should make no oral or written statement or perform acts which are disloyal to comrades and the United States; and that he is responsible (*i.e.,* subject to court-martial if appropriate) for his actions and words no matter where he is. Acts contrary to these provisions of the Code would violate Articles 89–92, UCMJ, or Article **134,** UCMJ, as conduct prejudicial to good order and discipline, or conduct discrediting to the armed forces.

While Article **104,** UCMJ, might apply to military personnel engaged in the Vietnamese conflict, it is probably not applicable to military personnel imprisoned in Russia or an Iron Curtain country. Application of Article 104 in Vietnam would be based

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[135] See note **4** *supra* and accompanying text.
[136] See note **11** *supra* and accompanying text.

on a definition of "enemy" as given to "enemy" in Article 99, "Misbehavior Before the Enemy," found in paragraph 178*a* of the Manual. There "the enemy" is said to include not merely the organized forces of the enemy in time of war, but also imports any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades. The portions of the Code which would not seem strictly applicable to the soldier who is incarcerated in an East German or Russian jail or prison are the requirements that he make every effort to escape and aid others to escape, and that he give no information other than name, rank, service number and date of birth under any circumstances. In the case of the soldier who has inadvertently strayed over a border into a forbidden zone and as a result has been placed in jail or prison, it would seem appropriate for him to make a clear, prompt, and sincere explanation of his inadvertent entrance into the forbidden area. This, together with efforts of American military authorities and diplomatic officials, might result in a fairly prompt release and a minimum of international repercussions. On the other hand, literal compliance with the mandate of the Code to make every effort to escape, resistance that amounts to unwarranted physical violence, and stubborn refusal to explain his mistaken entrance into the forbidden area could have adverse effects, not only on his prospects for release and physical safety, but on his country's political and diplomatic activities in relation to the country whose authorities have incarcerated him.

APPENDIX 3

Executive Order 10631 Code of Conduct for Members of the Armed Forces of the United States

By virtue of the Authority vested in me as President of the United States, and as Commander in Chief of the Armed Forces of the United States, I hereby prescribe the Code of Conduct for the Armed Forces of the United States which are attached to this order and hereby made a part thereof.

Every member of the Armed Forces of the United States is expected to measure up to the standards embodied in this Code of Conduct while he is in combat or in captivity. To ensure achievement of these standards, each member of the Armed Forces liable to capture shall be provided with specific training and instruction designed to better equip him to counter and withstand all enemy efforts against him, and shall be fully instructed as to the behavior and obligations expected of him during combat or captivity.

The Secretary of Defense (and the Secretary of the Treasury with respect to the Coast Guard except when it is serving as part of the Navy) shall take such action as is deemed necessary to implement this order and to disseminate and make the said Code known to all members of the Armed Forces of the United States.

THE WHITE HOUSE

August 17, 1955

/s/ Dwight D. Eisenhower

I.

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.

II.

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.

III.

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.

IV.

If I become a prisoner of war, I will keep faith with my fellow prisoners. I will give no information nor 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.

V.

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.

VI.

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.

APPENDIX 2

Selected Articles from the Uniform Code of Military Justice

Article 89 Disrespect Toward Superior Commissioned Officer

Any person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct.

Article 90 Assaulting or Willfully Disobeying Superior Commissioned Officer

Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

Article 91 Insubordinate Conduct Toward Warrant Officer, Noncommissioned Officer, or Petty Officer

Any warrant officer or enlisted member who—

(1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office;

(2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or

(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office;

shall be punished as a court-martial may direct.

Article 92 Failure To Obey Order or Regulation

Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.

Article 93 Cruelty and Maltreatment

Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

Article 104 Aiding the Enemy

Any person who—

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors, protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial commission may direct.

Article 105 Misconduct as Prisoner

Any person subject to this chapter who, while in the hands of the enemy in time of war—

(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

(2) while in a position of authority over such persons maltreats them without justifiable cause;
shall be punished as a court-martial may direct,

Article 133 Conduct Unbecoming an Officer and a Gentleman

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

Article 134 General Article

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which per-

sons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

APPENDIX 3

Article 3, Geneva Convention Relative to the Treatment of Prisoners of War, August 12,1949

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

MILITARY JUSTICE IN THE REPUBLIC OF VIETNAM*

By Colonel George F. Westerman**

As the American commitment in Vietnam increases, contacts with the Vietnamese military and its system of military justice also grow. The author of this article presents a discussion of military justice in Vietnam and compares that system with the Uniform Code of Military Justice.

I. INTRODUCTION

On 14 May 1951, His Majesty Bao-Dai,[1] in the cool mountain town of Dalat, 175 miles northeast of hot, humid Saigon, signed Ordinance No. 8 promulgating the Vietnamese *Code of Military Justice*[2] *(Bộ Quân luật)*.[3] Despite the many violent changes which have taken place in Vietnam since that time, this Code is still in effect and its amendments have been remarkably few.

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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.

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[1] Prior to the end of World War II, Bao Dai was Emperor of Annam, then a protectorate of France. He ascended the Imperial throne of Annam in 1926 at the age of 12. In 1945 Bao Dai abdicated the throne, and the Empire of Annam became extinct as a political entity. For a few months in 1945 and 1946 Bao Dai served as "Supreme Advisor" for the government of Ho Chi Minh, then established in Hanoi, but in the spring of 1946 he went to Hong Kong where he remained for several years in exile. In 1949 he concluded an agreement with France to establish the State of Vietnam, of which he was sovereign, ruling with the title of Chief of State at the time he signed Ordinance No. 8. See U.S. DEP'T OF ARMY, AREA HANDBOOK FOR VIETNAM 7-29 (1962).

[2] A Vietnamese and French edition of this code was published in the *Journal Official du Vietnam du 16 Juin 1951* (No. 24 bis-P. 478-501) [hereinafter cited as CMJ].

3For the convenience of those readers who may serve in Vietnam at a future date, the Vietnamese equivalents of some of the more frequently used terms will be shown in parenthesis.

Although the last direct, participation by France in the Vietnamese judiciary system ended on 16 September 1954,[4] the legal procedures and, with relatively few exceptions, the legal concepts presently in force in the Republic of Vietnam remain essentially French. This is also true of Vietnamese Code *of Military* Justice which bears a close resemblance to the French Codes de Justice *Militaire.*[4a]

It is the purpose of this article to offer an excursion through the most important provisions and concepts of the Vietnamese Code of Military Justice. Where it is thought to be useful, a comparative analysis of the correlative philosophy, if any, of the United States Uniform *Code of* Military Justice will be included. However, to a large extent, the reader will be asked to draw upon his own knowledge of the fundamentals of United States criminal law.

II. THE CODE OF MILITARY JUSTICE AND OTHER APPLICABLE LAWS

A. *CLASSIFICATION OF OFFENSES*

In order to have a proper basis for understanding the Vietnamese system of military justice, one must first become familiar with the classification of offenses. The course of the preliminary proceedings, as well as the trial and the functions of the particular officials involved, is determined to a considerable extent by the grade of the offense under consideration. Grading is based entirely on the character and extent of the punishment for an offense, as provided by the appropriate penal code. In Vietnam, as in France, offenses are ranked roughly in three classes:

(1) less serious criminal offenses (contraventions de simple police — French ; *tôi vi* canh — Vietnamese), punishable by a fine and a maximum of ten days in jail;

(2) offenses of moderate gravity (*délits*—French; *khinh tôi* — Vietnamese),punished by a fine and a sentence of imprisonment, as a rule not exceeding five years ; and

(3) the most serious offenses (*crimes*—French ; *trong tôi*— Vietnamese), which are punishable by death, or imprisonment at hard labor for more than five years.

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[4] *Organization Judiciare du Vietnam, Publications du Department de la Justice, Republic du Vietnam,* **p. 3** (1962).

[4a] **On 8 July 1965, the French Parliament voted to repeal this Code as well as the *Maritime Code* of 1938 governing the Navy. It is to be replaced by a uniform code for all the armed services effective 1 January 1966.**

Only the last two classes are mentioned in the Code *of Military* Justice. Later, it will be shown how the particular class into which an offense falls largely determines the procedures which will be utilized.

B. *THE* CODE

The Code *of* Military Justice is divided into two parts: Title I, entitled "The Judgment of Offenses Committed by Military Personnel or Assimile's," [5] and Title 11, "Military Offenses Committed by Military Personnel and Assimile's and the Penalties Applicable to Them."

Title I has thirteen chapters, the first two of which cover the organization and jurisdiction [6] of military courts. Other chapters describe in some detail the various procedures for the preliminary investigation,' the investigation by the examining magistrate,[8] referral for trial and the procedures followed during the trial [9] itself. Provisions are also included for appeals,[10] requests for rehearings [11] and execution of judgments.[12]

Title II has two chapters, the first of which deals exclusively with punishments. Article 104 of this chapter provides that the punishments for ordinary crimes are those set forth in the applicable civilian penal laws. Punishments for military offenses are found in the specific article dealing with each particular offense.

Military courts may, in addition to the punishments specified by the civilian penal law for crimes (trong *tôi*) not of a purely military nature, and by the Code *of* Military Justice for military offenses, impose accessory punishment known in French as de'-gradation militaire (tuoc *doat* binh *guyên*—Vietnamese).[13] This punishment includes :

(1) deprivation of grade and the right to wear the uniform and insignia ;

(2) expulsion from the armed forces and loss of civic, civil and family rights (This exclusion extends as well to the enjoyment of pension rights and other benefits author-

[5] Civilians who have been assimilated or ranked as military personnel.
[6] See CMJ tit. I, chs. I, 11.
[7] See CMJ tit. I, ch. IV.
[8] See CMJ tit. I, ch. VI.
[9] See CMJ tit. I, ch. VIII.
[10] See CMJ tit. I, ch. IX.
[11] See CMJ tit. I, ch. XI.
[12] See CMJ tit. I, ch. X.
[13] See CMJ art. 104.

ized by legislation on pensions; the loss of family rights involves deprivation of the right to be legal head of the family, to serve on the family council, and to share in the disposition of family property.) ; and

(3) deprivation of the right to wear any decorations.

All sentences involving *dégradation militaire* are published in the orders of the day.

In the case of *délits* (*khinh tôi*), military courts may impose the following punishments:

(1) *"la destitution"* (*bãi-miễn*—Vietnamese) (This involves deprivation of grade and rank and the right to wear the uniform and insignia and, under certain circumstances, the right to receive a pension.) ;

(2) loss of grade (This punishment has the same effect as *destitution* except it does not effect the right to a pension and to recompense for past services.); and

(3) imprisonment.

The various military offenses are defined in the second chapter of Title 11. Most of these offenses have a familiar ring to anyone who has ever been associated with the military. Heading the list, in Section I, are "failure to report for duty" and "desertion." Section II deals with such offenses as military revolt, rebellion, insubordination, and acts of violence, assaults and insulting behavior toward superiors. Other offenses covered in this section include abuse of authority," robbing military wounded and dead," the selling, buying, misappropriation, waste, loss pawning, receiving and concealing of government property,[16] pillage,'; voluntary self-mutilation,[18] and infractions of military orders."'

Articles 146 through 151 of the Code covering espionage and treason were rescinded and replaced by Ordinance No. **47** issued by President Diem on 21 August 1956. Ordinance No. 47 not only covers espionage and treason in greater detail than they were previously covered by the Code but also provides for the punishment of various other crimes against the external security of the State.

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[14] See CMJ tit. **11,** ch. **11,** § III.
[15] See CMJ art. 128.
[16] See CMJ tit. **11,** ch. **11,** § **V.**
[17] See CMJ art. **133.**
[18] See CMJ art. **142.**
[19] See CMJ tit. **11,** ch. II, § **VII.**

C. *OTHER PERTINENT LAWS*

The *Code* of *Military Justice* specifically provides that a military court must apply all the rules of ordinary criminal law of the region where the court is sitting which are not directly contrary to the code.[20] This is true with respect to certain offenses,[21] punishments generally [22] and questions of procedure.[23] In order better to understand what law is applicable where, let's delve into a little history.[24]

During the period of French rule, all of Vietnam, together with Cambodia, Laos and the French leasehold in China, was placed in an Indo-Chinese Federation under a French Governor-General. At that time Vietnam had three major regions: Tonkin (now North Vietnam) ; Annam (the central portion of Vietnam) ; and Cochin China (the southern part of Vietnam which includes Saigon and the Mekong delta area). Each of these three regions was treated differently from an administrative point of view.

Tonkin was made a protectorate, administered by mandarins responsible to French residents, and used modified French legal codes. However, since Tonkin is now the Peoples Republic of Vietnam, a discussion of the administration of military justice there today is beyond the scope of this article.

While royal authority was preserved in Annam where imperial rule had long prevailed, it was also made a protectorate under the close watch of a French resident superior. Nevertheless, Annam was allowed to use a modified version of a code of law promulgated by the Emperor Gia-Long in 1815. The then new criminal code for Annam, known officially as the *Code Pénal du Centre Viet-Nam* (*Hoáng-Viêt Hinh Luât*) which became effective 4 July 1933, is still applied in appropriate cases by Vietnamese military courts sitting in the ancient capital city of Hue.

Cochin China became an assimilated colony under French law and sent its own delegate to the French National Assembly in Paris. Consequently, for points of law not covered by the *Code of Military Justice*, Vietnamese military courts sitting today in Saigon must look to the French *Code Penal Modifié* (*Décret du* 31 décembre 1912).

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[20] See CMJ art. 19.
[21] See CMJ arts. 154, 157, 158.
[22] See CMJ arts. 104, 168.
[23] See CMJ arts. 165, 166, 170.
[24] A brief history of Vietnam is found in U.S. DEP'T OF DEFENSE PAMPHLET, No. 2–22, REPUBLIC OF VIETNAM COUNTRY STUDY 21 (1960).

III. ORGANIZATION OF THE VIETNAMESE SYSTEM OF MILITARY JUSTICE

A. *GENERAL*

The administration of military justice in Vietnam is highly centralized. Article 20 of the Code charges the Minister of Defense with the responsibility for investigating all offenses falling under military jurisdiction and delivering the offenders to competent military tribunals for trial. Although Article 20 has always provided for the delegation of this function to regional commanders, it was not until 1964 that any action was taken to implement this provision of the Code. On July 27th of that year, the Minister of Defense authorized commanders of Corps Tactical Zones "to order the prosecution of civilians and enlisted personnel of the regular and regional forces before military courts for offenses committed in their respective Corps Tactical Zone." [25] Approximately six months later, by Decree Law No. 001-QT/SL of 17 January 1965, the Commander-in-Chief of the Republic of Vietnam Armed Forces (RVNAF) was also delegated authority to order prosecutions. However, the Minister of Defense retained the power to order the prosecution of commissioned officers before military courts.[26] The chief military figure in the administration of military justice is the Director of Military Justice (*Giam-Dôc Quâ-Phap*), who reports directly to the Minister of Defense rather than to the Commander-in-Chief of the RVNAF. The Director's mission, as set forth in Presidential Decree No. 332/QL, 11 November 1964, is to advise the Minister of Defense on all legal matters,[27] to study and implement the organization, operation and administration of military tribunals, to recommend necessary amendments to the *Code of Military Justice,* to study all problems of national or international law concerning the RVNAF, and to provide legal assistance. It is not yet entirely clear what the exact division of responsibility will be between the

[25] Ministry of Defense Order No. 1415/QP/ND, art. 2, 27 July 1964. Decree Law No. 001-QT/SL, 12 January 1965, later amended Article 20 to read: "The power to initiate criminal action before Military Tribunals may be delegated to the Commander-in-Chief of the RVNAF and the Commanders of the Corps Tactical Zones. This power may not be subdelegated to other persons."

[26] Ministry of Defense Order No. 1415/QP/ND, art. 3, 27 July 1964. The Commander-in-Chief of the Armed Forces also has this power.

[27] However, claims, procurement, litigation and what might be called military affairs cases are handled in the Finance and Military Expenditure Control Directorate rather than by the Director of Military Justice.

Director of Military Justice and the Judge Advocate, High Command (*Phong Quân-Phap/Tông Tu Lênh*), a position established by Ministry of Armed Forces Directive No. **1752, 11** November 1964. According to this directive, the Judge Advocate advises the Commander-in-Chief on all legal affairs, provides technical assistance in the preparation of documents, plans, and programs, recommends amendments to the *Code of Military Justice,* controls judicial matters, conducts judicial investigations and prepares documents recommending prosecution.

Most of the business of administering the Code is done by an autonomous corps of military justice officers, bailiffs, and clerks.[28] The Vietnamese Military Justice Corps (*Ngãnh Quân Phap Viêt Nam*) is roughly the equivalent of the U.S. Army Judge Advocate General's Corps but performs its functions on a defense-wide basis for all the armed forces. It has approximately **44** officers ranging in rank from First Lieutenant to Colonel (the rank held by the Director). These men are generally law school graduates although some have not passed the probationary period required for admission to the bar as fully qualified lawyers.'"[29]

Among the key jobs held by Military Justice Corps officers are those of *commissaire du Gouvernement* (French), *uy viên Chinh-Phu* (Vietnamese) and *juge d'instruction militaire* (French), *du-thâm quân su* (Vietnamese). The commissaire du Gouvernement may be considered as the counterpart of our trial counsel or public prosecutor.[30] The U.S. Article **32** investigating officer is somewhat analogous to a *juge d'instruction militaire.* However, the *juge d'instruction* is not a layman but rather a professional jurist with more extensive powers than our pretrial investigating officer. Perhaps the most aptly descriptive English title for this

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[28] See CMJ art. 12, as amended by Ordinance No. 15, **23** Feb. 1955.

[29] A Vietnamese law school graduate, in addition to passing a bar examination, must serve a three year apprenticeship as an avocal *stagiaire* in a lawyer's office before being admitted to the bar as a fully qualified lawyer.

[30] There are, however, certain basic differences. An essential concept of American justice is that the functions of the public prosecutor and those of the judge be completely separated and performed by two different corps of public officers, one belonging to the executive branch of government and the other to the judiciary. In Vietnam, as in France, prosecutors are members of the magistracy because the position of prosecutor is regarded as nonpartisan. An indication of the position of judicial prosecutors is the fact that they are described as magistry (standing magistracy (magistrature debout — French) in contrast to those acting as judges who constitute the sitting magistracy (magistrature assise)). A further indication of their position is that in military, as well as civilian, trials, he is seated on a bench the same height, although separate from that of the judges.

officer is "examining magistrate." His precise status will become more readily apparent after a detailed description of his duties during the pretrial procedures.

At each military tribunal are a government prosecutor who may have one or more assistants, an examining magistrate, and a chief clerk aided by one or more assistant clerks and process servers are bailiffs. The process server, in addition to serving various papers for the court, also assists the court president in maintaining order when the court is in session.

No military defense counsel is provided for under the Code. However, an accused has the right to hire civilian counsel of his own choosing. If an accused does not have the means to pay for counsel, a civilian lawyer is designated by the head of the local bar association to defend him.[31]

The Vietnamese place great stress on pretrial investigation and procedures. Only "judicial police" [32] may conduct investigations of offenses preliminary to trial. This is true under the procedures followed by civilian as well as military courts. Within the Department of Defense authority to act as judicial police has been given to officers, noncommissioned officers and squad leaders of the Military Police Criminal Investigation Service.[33] Until 1 January 1965, this had been a function of the Vietnamese National Gendarmarie which was abolished on that date. The Gendarmarie personnel, cases, and equipment were then divided between the National Police and the Military Police. About 300 Gendarmes went to the Military Police, where for the most part, they now constitute the Criminal Investigation Service. The net

[31] Unfortunately, no provision is made for the payment of such counsel. As we have found out in the United States, the unpaid lawyer cannot be expected to donate the same amount of time to a case as a defense attorney receiving legal fees. Vietnamese lawyers point out that the protection of indigent dependents can be a great hardship on both the attorney and his client. When the appointed counsel becomes involved in a long case and is taken away from his office for a great length of time, it obviously results in a considerable sacrifice on his part. In any event, a compensated attorney is more likely to spend the time necessary to dig out the evidence, find the witnesses and research the law for a full defense.

[32] Investigation privileges are not given to all police, only to *judicial* police, who may, in fact, not be policemen at all. For example, mayors and their deputies, public prosecutors and their assistants, justices of the peace and examining magistrates are all judicial police under French and Vietnamese law.

[33] Decree Law. No. 322/QP, 7 November 1964. This power has also been given to military prosecutors, military examining magistrates and certain commanders.

result of this change is to give the Military Police fairly broad authority to make investigations, particularly in cases involving offenses against the security of the state.[34]

B. *VARIOUS TYPES OF MILITARY COURTS*

Vietnamese law now provides for only two types of military courts:[35]

(1) Regular Military Courts; and

(2) Field Courts.

Both of these courts are more or less comparable to the United States general court-martial, particularly insofar as the punishment they may adjudge. The Vietnamese have no counterparts to the American summary and special courts-martial.

The Republic of Vietnam is divided into four corps tactical zones and the Capital Military District at Saigon. Military courts usually sit in Hue for cases arising in I Corps, in Nha Trang for II Corps cases, and in Saigon for cases from the remaining areas, except for those cases referred to the IV Corps Field Court which sits at Can Tho.

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34 The duties and authority of military police personnel in criminal investigation are set forth in some detail in Republic of Vietnam Ministry of Armed Forces Directive No. 546 QL/HC/1/2, 20 January 1965.

35 In addition to these two types of military courts, there was in operation, between October 1959 and November 1963, a rather controversial court known as the Special Military Tribunal. This court was established under the provisions of Law 10/59, 6 May 1959, to deal with certain crimes committed by the Viet Cong against (a) the security of the State (including espionage and treason) ; (b) the lives and property of the people; and (c) the national economy. Although its headquarters was in Saigon, the court was ambulatory in nature and could, if it so chose, hold its sessions in the particular province where the crime was committed. In cases where the death penalty was awarded, provision was also made to carry out an "on-the-spot" execution by means of a portable guillotine. This was the Diem government's answer to the widespread acts of terrorism which the Viet Cong directed primarily against village officials—the theory being that the villagers would be more likely to rally on the government's side if they could see for themselves that such acts on the part of communist terrorists met with swift and severe punishment. The court consisted of two Military Justice Corps officers, one of whom acted as the presiding judge, and a representative of the chief of the province or mayor of the locality where the court was sitting. All of the court personnel were appointed by order of the Minister of Defense. There was no appeal from a sentence by the Special Military Tribunal but an accused was permitted to petition the President of the Republic for clemency. In other respects, the procedure was, for the most part, the same as before the ordinary and field military courts which are in operation today. In fact, these courts had concurrent jurisdiction with the Special Military Tribunal and probably tried the majority of the less spectacular cases involving Viet Cong activities. Shortly after the overthrow of the Diem regime in November of 1963, the Special Military Tribunal was finally phased out of existence.

Contrary to the practice in Vietnamese civil courts of trying criminal and civil actions simultaneously, civil actions cannot be brought before military courts in Vietnam.[36] However, after the military court has rendered its decision, a suit for damages may be adjudicated in the appropriate civilian court.[37]

1. *Regular Military Courts.*

A regular military tribunal is composed of a civilian president and four military members.[38] The president is a civilian judge from the local court of appeals who has been assigned to duty with the military court, usually for a period of six months. However, on **30** March **1964,** Decree Law **5/64** amended Article 9 of the *Code of Military Justice* to provide for two alternate presiding judges for each military tribunal, who may be selected from the field grade officers of the Military Justice Corps. The military members are selected from a roster of officers and noncommissioned officers from various units stationed in the area of operations where the court is sitting, and are placed on call for such duty for six months. These personnel, who may be from any of the armed services (Army, Air Force, Navy or Marines), are recommended for this assignment by the military commander of the area. Generally, as in the case of **U.S.** courts-martial, the grade of the military members selected to hear a particular case will exceed that of the accused. Furthermore, if the accused is an enlisted man, or civilian, one of the four military members must be a noncommissioned officer.[39] As has been previously pointed out, each military court has a chief prosecutor and an examining magistrate both of whom have one or more assistants, plus a number of clerical personnel to carry on the day to day administration.

2. *Military Field Courts.*

The essential and most characteristic feature of the Field Courts is that they may try only *flagrante* ***delicto*** [40] cases arising during a period of emergency which involve:

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[36] See CMJ art. **7.**
[37] See *ibid.*
[38] CMJ art. 9.
[39] CMJ art. 10.
[40] The Vietnamese apply the French concept *en flagrant delit (quá tang)* which has a somewhat wider application than *flagrante delicto* in Anglo-American law. Thus, under Vietnamese law, *quá tang* includes an offense which, (a) is in the process of being committed; (b) has just been committed; (c) has caused a public clamor in the close vicinity of the crime; or (d) an offense where the suspect has been found in possession of weapons, papers, or other evidence that raises a presumption that he participated in the crime.

a. personnel of the Republic of Vietnam Armed Forces or the Regional Force charged with committing offenses denounced by the *Code* of *Military Justice*, the Penal Code or any other current law; or

b. civilians charged with committing offenses against the national security as stipulated in the Penal Code, Ordinance No. **47,** 21 August 1956, and Law 10/59, *6* May 1959, and certain other offenses set forth in the *Code* of *Military Justice* where it is explicitly prescribed that civilian perpetrators are subject to military jurisdiction."

Those involving desertion are by far the greatest number of cases, falling in any one category, which are tried by the Field Courts.

With the exception of the President, who is a military officer instead of a civilian judge, the composition of a Field Court is the same as that of a Regular Military Court.[42] As will be seen later, the procedure in a case going before a Field Court, particularly prior to trial, is considerably simplified and abbreviated. A sentence pronounced by a Field Court is final. No appeals are authorized,[43] but a death sentence imposed by the court will not be executed without the approval of the President of the Republic.[44]

IV. PROCEDURES FOLLOWED DURING THE INVESTIGATION AND TRIAL OF AN ALLEGED OFFENSE

Punishment of an offense by a Military Court usually goes through three stages:

1. opening of the case by the filing of a complaint or accusation ;
2. preliminary investigation ;
3. trial; and possibly a fourth stage, that of appeal.

However, in those cases where a Field Court is utilized, stage two, the preliminary investigation, is considerably abbreviated and since there is no appeal, the fourth stage is eliminated.

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[41] See Republic of Vietnam Decree Law 11/62, art. **11, 21** May 1962 [hereinafter cited as Decree Law 11/62] .

[42] See Decree Law 11/62, arts. 2–6.

[43] Decree Law **11/62,** art. 12.

[44] Decree Law 11/62, art. **13.**

A. *PRETRIAL PROCEDURES*

1. *General.*

When, through various public officials, witnesses, victims, or others, it is learned that an alleged offense has been committed, the nearest Criminal Investigation Service office or judicial police official is notified and an investigation begins immediately. If the investigation produces evidence leading to the conclusion that a particular individual has committed the offense, a report is made to the nearest military justice officer who may be located at Saigon, Nha Trang, Can Tho, or Hue, as the case may be. There the report is examined to determine if there is proper legal basis for a trial, and if so, whether the accused should be confined or released to an administration company pending trial. Both are important decisions because in some cases a very lengthy period may elapse prior to trial. In any event, an offender destined for trial usually is transferred from his unit and will await trial either in prison or in an administration company located near the military court which will eventually hear his case.

When the appropriate military justice personnel have examined the file and determined that the evidence contained therein is sufficient to warrant trial, the case is forwarded to the Minister of Defense, if the accused is an officer.[45] If an enlisted man or a civilian is involved, the case goes to the Commander of the Corps Tactical Zone where the accused is located.[46] Depending upon the particular circumstances, the Minister or the Corps Commander will either order the case placed on the docket for direct trial or sign an "Order for Investigation" granting the accused a hearing before an examining magistrate. In time of war, provided an investigation has been made by an official having judicial police powers, any offender can be ordered directly before a court, without a preliminary investigation by an examining magistrate.[47] In time of peace, this abbreviated procedure is permissible only in those cases involving offenses in which the maximum punishment is a fine or imprisonment not exceeding five years.[48] The case is sent first to the Prosecutor who is a Military Justice Corps officer, usually holding the grade of Major. If an "Order for Direct Trial" is involved, he arranges for the case to be placed on the docket for trial. When he receives an "Order for Investigation"

[45] See note **26** *supra* and accompanying text.
[46] See note **25** *supra* and accompanying text.
[47] CMJ art. **26.**
[48] *Ibid.*

he forwards the case directly to the examining magistrate. As a matter of practice, however, even in time of war, most cases involving serious offenses, other than those classified as *en flagrant delit,*[49] are referred to an examining magistrate for a preliminary hearing.

2. *Part Played By The Examining Magistrate.*

a. *General.* One of the characteristic features of Vietnamese criminal procedure, civilian as well as military, is the investigation by an examining magistrate. In marked contrast to Anglo-American practice, the Vietnamese system of proof in criminal affairs allows the parties little or no control over the presentation of evidence. Thus in Vietnam, the evidence is led not by advocates representing the prosecution and defense, but by the president of the court, in the interest of abstract justice alone. This makes it essential that the president be well informed, not only of the charges against the accused, but also of the evidence which points to his culpability. If the president's interrogation of witnesses is to be at all fruitful, he must be thoroughly familiar with every aspect of the case, It is virtually indispensable, therefore, that the facts be fully investigated before the trial and the results of the investigation presented to the president in a manner which, as far as possible, insures their accuracy. This is the job of the examining magistrate. It is up to him to conduct a very patient preliminary examination of all the evidence, sifting and studying, hearing and rehearing it, until as many as possible of the inconsistencies have been eliminated and those remaining, thrown into sharp relief. He has wide powers to call as a witness any person whose testimony might throw light on the case.[50] If portions of the testimony should prove to be contradictory, the witnesses are reheard and asked to explain the contradictions. All of this time, the witnesses are under oath, but if inconsistencies still remain, the examining magistrate is likely to resort to a "confrontation." In other words, he arranges for the persons giving contradictory testimony to be confronted with each other as he questions them, in the hope that one or the other will give way. He may also proceed to a "reconstitution of the crime,'' which often demonstrates to the accused or a witness the futility of maintaining a false version of the facts and so leads him to admit the truth. Each bit of testimony heard during the investiga-

[49] These cases, in which the accused has usually been "caught in the act" of committing the offense, are brought directly to trial before a Field Court.

[50] See CMJ art. 37.

tion is reduced to writing and placed in a file or dossier in which all papers relating to the case are assembled. By the time the examining magistrate has completed his investigation, the dossier will contain **a** complete record of the events leading up to and constituting the crime, as well as all subsequent steps taken by the authorities in bringing the offender to justice. Thus, by studying the dossier prior to the trial, the president is in a position to question the witnesses effectively and, when they depart from their previous testimony, to challenge any apparent contradictions.

b. *Rights of the Accused.* The examining magistrate, at the initial hearing, informs the accused of the charges against him, of his right to remain silent and that he may, at his own expense, retain counsel of his own choosing:' If the accused is unable to afford counsel, the examining magistrate will ask the head of the civilian bar association to designate a lawyer to defend the case.[52] Unfortunately, in actual practice, these lawyers, who are not paid for their service, often fail to appear at the hearing. While these absences are tolerated at the proceeding before the examining magistrate, the appointed counsel is required to appear and represent his client at the actual trial.

Although the writ of habeas corpus does not exist in Vietnam, nevertheless, an accused in custody may request a provisional release.[53] It is then up to the examining magistrate, after consulting with the prosecutor, to approve or disapprove this request.[54] Even though the accused makes no such request, the examining magistrate may, early in the proceedings, decide whether the accused is to be kept in confinement or released pending completion of the investigation and trial.[55] The Vietnamese *Code* of *Military Justice* also permits the examining magistrate to require bail.[56] However, inasmuch as bail is not commonly used, provisional liberty is generally based on the mere word of the accused that he will subsequently appear. In any event, an appeal from the examining magistrate's decision may be made by either the accused or the prosecutor to the indictment chamber of the local civilian court of appeals.[57]

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[51] CMJ art. 30.
[52] *Ibid.*
[53] ***See*** CMJ art. **41.**
[54] ***See*** CMJ art. **43.**
[55] CMJ art. 40.
[56] ***See*** *ibid.*
[57] CMJ art. **42.**

The accused generally is not entitled to be present during the interrogation of witnesses by the examining magistrate. However, the latter must make available to the accused for his information, all evidence which might serve to convict him. In fact, Article 45 of the Code requires that upon completion of an investigation during which an accused was not represented by counsel, the examining magistrate read to the accused the entire report of investigation. The accused is permitted, at all times, to communicate freely with his counsel[58] and may not be interrogated or confronted with witnesses against him, except in the presence of his counsel, unless he expressly renounces this right.[59] The day prior to an interrogation of the accused, his counsel is given access to the dossier and is brought up to date by the clerk on all orders or instructions issued thus far by the examining magistrate.[60] When an interrogation is ended, the accused is entitled to review any statement made by him to ensure its accuracy and truth. The transcripts of such statements must be signed by the accused, the examining magistrate, and his clerk.[61] If the accused refuses, or is unable, to sign, this fact must be reflected in the record.[62] The Code also provides that an accused may, during the investigation, produce all evidence which he believes material to his defense.[63]

c. ***The Examining Magistrate's Decision.*** When his investigation is completed, the examining magistrate transmits the dossier to the prosecutor, who has three days to return his recommendations in the matter to the examining magistrate.[64] The latter, who is not bound by the prosecutor's recommendations, has several possible courses of action open to him. If he determines that the offender is not subject to military jurisdiction, he will return the dossier to the authority who issued the Order of Investigation for transfer of the case to a civilian court competent to hear it.[65] The examining magistrate may, in another instance, find that the facts do not constitute a punishable offense or that the evidence is insufficient to justify prosecution of the alleged offender; whereupon he will order the case dismissed.[66] On the other hand, if he

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[58] CMJ arts. 30, 31.
[59] CMJ art. 33.
[60] See *ibid.*
[61] CMJ art. 35.
[62] *Ibid.*
[63] See *ibid.*
[64] CMJ art. 46.
[65] CMJ art. 47.
[66] *Ibid.*

concludes that an offense subject to military jurisdiction has been committed and that there is sufficient evidence to warrant prosecution, he refers the case to a military court for trial.[67]

Either the accused or the prosecutor may appeal from a decision of the examining magistrate to the indictment chamber of the local civilian Court of Appeals. Such appeals are quite common, particularly in cases involving suspected Viet Cong and other persons accused of offenses against the security of the State.

B. *TRIAL PROCEDURE*

Once a case finally has been referred to a military court for trial, it is up to the government prosecutor to take all the administrative steps necessary to get the proceedings underway.[68] He prepares the charges,"!'arranges for the time and place of trial, summons the witnesses and notifies the members of the court. At least three days before the trial, he must furnish the accused a copy of the charges against him, the text of the applicable law and a list of prosecution witnesses. He also must inform the accused that if he does not select his own counsel, the president of the court will designate one for him.[70] The counsel may read the entire dossier in the clerk's office or, if he so desires make copies of it at his own expense. The accused may have any witnesses he chooses called simply by giving their names to the clerk of the court.;' All sessions of military courts ordinarily are open to the public. However, if an open session might endanger public order or morality, the court may sit in closed session. In any event, the verdict of the court must be publicly announced.[72]

A Vietnamese military court in session is quite impressive to watch. At a signal from the bailiff, an honor guard snaps to "present arms" and everyone stands as the court enters the room. The members take their places behind an elevated bench, with the black-robed civilian president in the center, flanked on either side

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[67] *Ibid.* This is the present procedure in view of the war in Vietnam. In time of peace, Article **49** of the Code requires that a case involving a serious offense be sent to the indictment chamber of the local civilian court of appeals for a decision as to whether it should be referred to a military court for trial.

[68] See CMJ art. **50.**

[69] *Ibid.*

[70] CMJ art. 53.

[71] *Ibid.*

[72] CMJ art. **54.**

by two military members. The prosecutor sits at an elevated table on the court's right. Directly across from the prosecutor, at a similarly elevated table, is the clerk of the court. An enlisted bailiff, who sits immediately in front of the court, is responsible for announcing each case as it comes up on the docket, ushering witnesses in and out of the courtroom, helping maintain order and such other duties as the president may direct him to perform. In the front center of the courtroom is a bar before which the accused or the witnesses stand while being arraigned or giving testimony. At other times, the accused sits on a bench at the front of the room. Directly behind him are several benches reserved for defense counsel, although more often than not, particularly in cases provoking wide public interest, occupied by members of the press. The Vietnamese press seem to enjoy more freedom in a military courtroom than their American counterparts. As a general rule, photographs are permitted and as long as **a** newsman is not unduly noisy or does not otherwise create a disturbance, he is relatively free to do as he chooses. Spectators are admitted freely and, not infrequently, trials draw capacity crowds reminiscent of those at a criminal case being tried some years ago at **a** small town American county seat.

From beginning to end, the president is in complete charge of the proceedings. An invaluable aid to him in this task is the dossier prepared by the examining magistrate, which he has given careful previous study. His first official act after opening the court is to swear in those members who have not already been sworn. He then calls the accused before the bar and asks his name, age, profession, residence and place of birth.[73] 'Standing beside the accused is his defense counsel, wearing a long black robe with a white ermine tassel hanging over one shoulder. Not infrequently, rather attractive women lawyers appear before military courts as defense counsel.

Next, the president directs the clerk to read the orders conveying the court and referring the case for trial, the charges drawn by the prosecutor and such other information in the case that he thinks necessary to be brought to the attention of the court. When the clerk has finished reading, the president reminds the accused of the offense for which he is being tried, pointing out that the law gives him the right to say everything that is useful in his defense. The president also advises the defense

[73] CMJ **art. 56.**

counsel that he cannot say anything contrary "to his conscience or against a due respect for laws') and that he must express himself with "decency and moderation." [74]

At this time, the accused is afforded an opportunity to make a statement in his own behalf, after which the president questions him. If the other members of the court or the defense counsel have any questions, they cannot ask them directly but must have them relayed through the president. This is true in the case of other witnesses as well as the accused.

When the accused leaves the stand, the clerk shouts out the names of all the witnesses, prosecution and defense alike, who then come to the front of the courtroom and await further instruction~.'When the roll call of witnesses has been completed, the president directs them to go to the witness room and remain there until they are called upon to testify. Each witness before testifying is sworn by the president to "speak without hatred nor fear, to tell the truth and nothing but the truth." [76] One after another, the president questions the witnesses — a white uniformed policeman, a company commander, a barefoot peasant in his black pajama-like costume — until all the prosecution witnesses have been called. In formulating his questions, the president relies heavily on the dossier prepared by the examining magistrate, going through a similar process of sifting and winnowing to arrive at the facts of the case, On occasion, a witness may deviate from the testimony he gave before the examining magistrate. Whenever this happens, the president is quick to point out the discrepancy and demand an explanation. In the event of conflicting testimony by several witnesses on a particular point, the president may order a "confrontation," which can be a very effective means in arriving at the truth.

In the statement he makes at the conclusion of the government's case, the prosecutor does not take the aggressive, adversary approach familiarly associated with United States criminal proceedings. He simply summarizes the facts and the law on which the prosecution is based, and, more often than not, asks for a fair and equitable sentence giving the accused the benefit of any mitigating circumstances which are present in his case.

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[74] CMJ art. 60.
[75] *See* CMJ art. 61.
[76] CMJ art. 63.

Now reached is the stage of the trial where the defense presents its side of the story. The accused may call sucn witnesses or present such evidence as he deems useful in his defense. This includes matters in mitigation or extenuation of the offense as well as evidence on the merits. At the conclusion of the defense's case, the prosecutor may make a reply, but in the event he does so, the accused and his counsel are always given an opportunity to have the last word.[77]

The honor guard then presents arms and everyone stands as the court leaves the room to go into closed session to deliberate on the findings and sentence. Voting is by secret written ballot and a majority vote is required for a conviction [78] as well as in arriving at a particular sentence.[79] If convicted, the accused is ordered by the court to pay the costs of the trial. The court also, in certain cases provided for by law, orders the confiscation, or return to the government or other owner, of all items seized or produced as evidence in the case.[80] The judgment, which is quite lengthy compared to the findings and sentence of a United States court-martial, is prepared by the court clerk and signed by him as well as the president and the other court members.[81]

An indication that the court has arrived at its findings comes when the honor guard again snaps to "present arms," shortly after which the court re-enters the courtroom. If the accused has been found not guilty, the court will announce his acquittal and the president will order his release, if he is not detained for some other cause.[82] When the accused has been found guilty, his sentence is announced by the court clerk and the prosecutor advises him that he has three days in which to appeal to the Court of Cassation,[83] the highest civilian court of appeals in Vietnam. The prosecutor may also submit an appeal within the same three day period.[84] As has been previously pointed out, there is no appeal from a decision of a Military Field Court.[85] However, in a case involving a death sentence, the accused always has a right to

[77] CMJ art. 73.
[78] CMJ art. 76.
[79] CMJ art. 77.
[80] CMJ art. 81.
[81] CMJ art. 82.
[82] CMJ art. 79.
[83] CMJ art. 83.
[84] CMJ art. 86.
[85] See note 43 *supra* and accompanying text.

petition for amnesty. even when he has no right of appeal or even after his appeal has been rejected."

The record of trial, being a summarized rather than verbatim record of the proceedings, is quickly and easily prepared. When the time limit for an appeal has passed or appellate procedures have been completed, the record is transmitted to the Director of Military Justice. Provision in appropriate cases is also made for suspension of a sentence or remission of the unexecuted portion.[86]

V. NONJUDICIAL PUNISHMENT

The Vietnamese *Code of Military Justice* makes no mention of nonjudicial punishment. Nevertheless, this form of disciplinary action has long been authorized by various directives and orders of the Ministry of Defense.[88] Provision is made for a variety of punishments, the permissible type and amount depending generally upon the grade of the offender and the grade of the person imposing the punishment. Types of punishment which may be imposed include admonition, reprimand, restriction *to* certain specified limits and confinement. The place of confinement is specified, *i.e.,* the unit guardhouse, post stockade, or in the most severe cases, solitary confinement in a detention cell in a disciplinary barracks.

In contrast to the provisions of Article 15 of the United States *Uniform Code* of *Military Justice,* the Vietnamese regulations do not provide for forfeiture of pay. **A** further difference in the two systems lies in who may impose nonjudicial punishment. Under the *Uniform Code* of *Military Justice,* only a "commanding officer" has this authority. This term includes a warrant officer but not a noncommissioned officer or civilian. On the other hand, the lowest grade Vietnamese punishing authority is a corporal who may impose a maximum of two days restriction on enlisted men under his command. The amount and variety of punishments which may be awarded a member of the Vietnamese Armed Forces increase with the grade of the punishing authority, finally reaching a peak with the Minister of Defense who may impose penalties ranging from an admonition to sixty days solitary confinement. The Vietnamese accused has no right to elect trial by

[86] CMJ art. 96.
[87] See CMJ art. 97.
[88] The most current of these directives is RVN Ministry of Defense Letter Order No. 4843/QP/DI/5, 1 June 1963, subject: Jurisdiction of Punishment According to Military Discipline.

court-martial in lieu of nonjudicial punishment but is permitted to present to the punishing authority matters in mitigaton, extenuation **or** defense.

VI. CONCLUSION

It is always difficult for a people to accept a system of justice other than the one to which they have become accustomed, especially with regard to the process of establishing criminality. The fact that South Vietnam and the United States utilize considerably different systems of criminal procedure could give rise to much misunderstanding on this subject unless the two systems are examined carefully, keeping in mind the peculiar pattern of history each has witnessed. South Vietnamese jurists have adopted the French concept that the essential purpose of criminal justice is to arrive at the truth.[89] Great stress is placed on the pretrial phase of the procedure. There is also a tendency to place greater faith in the integrity of the men who administer the procedure than in the procedure itself.[90] And these men are sometimes inclined to feel that justice is served when the truth is uncovered no matter what means are used to uncover it. Protection of society is the paramount concern. In contrast, United States criminal justice, military as well as civilian, is designed to protect the accused at every stage of the proceedings against the enormous police power of the state. This design injects into the proceedings an element of fairness which is deemed indispensable. It is said to matter little that this will occasionally permit a criminal to escape the law, for the system is itself more precious than the result in a particular case. However, there is little or no dispute as to what the machinery of justice in both systems is trying to accomplish. Americans and Vietnamese alike believe that criminals should be punished and that the burden of proving the guilt of an accused is on the state. It is only in the manner of going about this proof that the two systems differ.

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[89] For an excellent explanation of French criminal justice see Vouin, The Protection of the Accused *in French* Criminal *Procedure*, 5 INT'L & COMP. L.Q. 1 (1956).

[90] During the period August 1962 to September 1965, the author has had many discussions with prominent Vietnamese jurists, all of whom laid great stress on this point. From such discussions and from attending a number of trials by different military and civilian courts in Vietnam, one gains the distinct impression that Vietnamese judges are a competent, conscientious, hard-working group.

Furthermore, the civil law system, which is now utilized in the Republic of Vietnam, is followed by a vast number of enlightened and prosperous states throughout the world. There is little or no convincing evidence that the South Vietnamese would be any more content or better served under a system of law more akin to our own. However, two specific modifications in their judicial system should be carefully considered by South Vietnamese officials: provision for appeal from a conviction by a field military court and the provision of military defense counsel by expansion of the Military Justice Corps[91] rather than continued reliance upon the local civilian bars to provide this vital service, With the implementation of the two foregoing reform, one could come to a far more confident conclusion about the evenness of the delicate balance required between wartime military discipline and military justice.

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[91] Subsequent to the writing of this article information was received from Vietnam of the promulgation Decree Law **11086 QP-HC-1-2.** This Decree Law provides for a reorganization of the military court system including, inter ***din:*** (a) the replacement of the Military Tribunals and Military Field Tribunals with Corps Military Tribunals: (b) the establishmei . of a mili-appellate body to perform the functions presently assigned to the Civilian Court of Appeals: and (c) the appointment of military defense counsel to represent all accused before the Corps Military Tribunals as well **as** on appeal. However, according to a message from the Staff Judge Advocate. U.S. Military Assistance Command, Vietnam, dated **10** December **1963,** this decree had not been implemented and was still completely inoperative and without effect. As of that date. the Vietnamese Government was studying methods of the implementation.

By Order **of** the Secretary of the Army:

HAROLD K. **JOHNSON,**
General, United States Army,
Chief of Staff.

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