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PREFACE

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THE "CUSTODY" REQUIREMENT FOR HABEAS CORPUS"

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The degree of restraint necessary for a court to entertain a petition for a writ of habeas corpus is the subject of this article. The definition of custody is the primary issue which the writer examines, particularly where it concerns a person either before or after entry on active duty in the military service. The conclusion emphasizes the difficulty of defining "custody" for the purpose of entertaining a habeas petition, But states that such definition has been greatly expanded, and will most likely continue to expand far beyond the limitations of "physical restraint."

I. THE FUNCTION OF HABEAS CORPUS

Habeas corpus, we have all been told, is a "discretionary writ, extraordinary in nature, issued by a civil court to inquire into the legality of any restraint upon the body of a person."[1] Historically, the writ served the function of affording the prisoner a judicial inquiry into the validity of his pretrial restraint.[2] In 1830, the Supreme Court put it this way:

> The Writ of Habeas Corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause.[3]

More recently, Mr. Chief Justice Warren expressing the unanimous view of the Supreme Court in *Peyton V. Rowe*[4] stated:

> The Writ of Habeas Corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scru-

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1 Manual for Courts-Martial, United States, 1951, para. 214*a*.

2 *See generally* Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U.L. REV. 26 (1945).

3 *Ex parte* Watkins, *28* U.S. (3 Pet.) 193, 201 (1830).

4 391 U.S. 54 (1968).

> tiny. Where it is available, it assures among other things that a prisoner may require his jailer to justify the detention under law.[5]

It is apparent that the writ lies to enforce the right of personal liberty with the remedy being "some form of discharge from custody."[6] However, it is submitted and recent case law suggests that habeas relief is not limited to judicial inquiry to test the legality of a petitioner's current detention.

Consider, for example, the following cases. In *Walker v. Wainwright*,[7] the Supreme Court in a per curiam opinion granted habeas relief in order to allow a prisoner serving a life sentence to challenge the legality of his current imprisonment, even though a subsequent sentence for another crime would be imposed if the petitioner should successfully establish the illegality of his confinement and the unconstitutionality of the underlying conviction.

Furthermore, lower federal courts have fashioned appropriate conditional habeas corpus orders as a vehicle for post-conviction process. In *Davis v. North Carolina*,[8] the Supreme Court ordered the release of a petitioner on habeas corpus in a coerced confession case to be postponed in order to allow "the State a reasonable time in which to retry petitioner."[9] The Supreme Court, in *Jackson v. Denno*,[10] reversed a lower federal court decision denying habeas relief and remanded the case to the district court with instructions to release the petitioner if after a "reasonable time"[11] the state fails to afford the applicant a hearing on his claim of an involuntary confession or retry him. More recently, in *Shepard v. Maxwell*,[12] the Supreme Court held that since the state trial judge did not fulfill his duty to protect the petitioner from the "inherently prejudicial publicity which saturated the community"[13] the case was remanded to the district court "with instructions to issue the writ and order that Shepard be released from custody unless the State puts him to its charges again within a reasonable time."[14]

These decisions aptly illustrate the fact that habeas relief is substantially broader than merely ordering the immediate release of an applicant from unlawful detention. Furthermore, it is submitted that habeas relief operates not only on the body of the

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[5] *Id.* at 58.
[6] Fay v. Noia, 372 U.S. 391, **427** n. 38 (1963).
[7] 390 U.S.335 (1968).
[8] 384 U.S. 737 (1966); ***accord,*** **Rogers** v. Richmond, **365** U.S. **534** (1960).
[9] *Id.* at 753.
[10] 378 U.S. 368 (1964).
[11] *Id.* at 396.
[12] 384 U.S. 333 (1966).
[13] *Id.* at 363.
[14] *Id.*

petitioner, but on the underlying conviction. By ordering the applicant's release, the court's order precludes the custodian or warden from thereafter detaining the applicant under the invalidated conviction. However, in these latter cases where the petitioner was able to show to the satisfaction of the court that the basis for his present confinement is unlawful, his release was postponed and conditioned on the state's retrying him within a specified period of time. Such conditional orders have, in recent times, become quite common in habeas cases:[15]

> Courts finding in favor of applicants are frequently reluctant to order them immediately discharged from custody, where there is no bar to the re-prosecution of the charges against them. A device sometimes used is the conditional order, providing for release at the end of six months (or some similar and extensive period) unless a new conviction is obtained within that time.[16]

Since the extent of judicial inquiry by habeas corpus is beyond the scope of this article, reference to the contemporary function of habeas corpus is made in this article insofar as it involves the court's discussion and disposition of the statutory requirement of "in custody."

The Federal Habeas Corpus Statute, which codifies the common law writ,[17] is set forth in sections 2241–2254 of chapter 153, title 28, of the United States Code. The jurisdiction of a district court to grant a writ of habeas corpus is governed by 28 U.S.C. section 2241 (1964),[18] which makes the writ available only when a peti-

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[15] AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES § 4.7 (Tent. Draft, 1967).

[16] *Id.* at 80.

[17] See *generally* ***Ex parte*** Bollman, 8 U.S. (4 Cranch) 75, 93–101 (1807); McNally v. Hill, 293 U.S. 131, 136 (1934).

[18] 28 U.S.C. § 2241 (1964), provides in relevant part as follows:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

"(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of United States or is committedfor trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment of decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; . . . .

tioner is "in custody." One writer observed that the "overwhelming bulk"[19] of habeas petitions filed in the federal courts are brought under section 2241(c)(3) of title 28, United States Code (1964), which provides: "The writ of habeas corpus shall not extend to a prisoner unless . . . *[inter alia]* he is in custody in violation of the Constitution or laws or treaties of the United States. . . ."

Although the federal habeas corpus statute explicitly prescribes that the petitioner must be "in custody" before the writ will lie, the drafters did not attempt to define the term. Accordingly, the question of what kind of restraint or detention constitutes custody is not a problem of statutory construction, but of judicial definition. To determine whether a particular petitioner is "in custody," the Supreme Court has looked to the "common law usages, and the history of habeas corpus both in England and in the United States."[20]

An examination of the habeas corpus legislation in the United States reveals that several terms have been used to limit the availability of the writ. The origin of the writ of habeas corpus in this country can be traced to the Federal Judiciary Act of 24 September 1789,[21] which authorized federal judges to issue writs of habeas corpus on behalf of persons in federal custody. In section 14 of the Act, the "cause of commitment" was made the "purpose of the inquiry." The word "custody" was used only to limit jurisdiction to prisoners in federal custody. Thereafter, in anticipation of Scuthern resistance to the legal measures following the Civil War,[22] Congress enacted the Federal Habeas Corpus Act of 1867,[23] which extended the availability of the writ to state prisoners. Furthermore, the scope of the writ was expanded to include "all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States." The only reference to "custody" is found in the provision requiring that the writ "shall be directed to the person in whose custody the party is detained. . . ." The scope of this Act was recognized by the Supreme Court in Fay *v. Noia*[24] as being " 'to enlarge the privilege of the writ. . . and make the jurisdiction of the courts and judges of the United States coextensive with all the

19 R. SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS 10 (1965).
20 Jones v. Cunningham, 371 U.S. 236, 238 (1963).
21 Act of 24 Sep. 1789, ch. 20, § 14, 1 Stat. 81–82.
22 H. M. HART AND H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1236 (1953).
23 Act of 5 Feb. 1867, ch. 28, § 1, 14 Stat. 385.
24 372 U.S. 391 (1963).

powers that can be conferred upon them. It is a bill of the largest liberty.' "[25] In **1874,** the jurisdictional grants of earlier legislation were consolidated in section **753** of title **13** of Revised Statutes of **1874.26** Section **753** provides :

> The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States . . . or is in custody in violation of the constitution or of a law or treaty of the United States. . . .[27]

Here, in section **753,** the clause governing the issuance of the writ, the expression "in custody" was substituted for the phrase "restrained of his or her liberty." Except for minor changes in phraseology, our current federal habeas corpus legislation is a codification of this **1874** Act. The phrase "in jail" has been omitted, but the reviser's notes indicate that "changes in phraseology [were] necessary to effect the consolidation."[28] Also, the words "for the purpose of an inquiry into the cause of the restraint of liberty" in title **13** of Revised Statutes of **1874,** section **752,** were deleted because they were considered to be "merely descriptive of the writ."[29]

As a corollary of the custody requirement, the common law required that if the petitioner's detention is in violation of the "fundamental requirements of law, the individual is entitled to his immediate release."[30] Nevertheless, it is submitted that our current federal legislation and its substantially identical forerunners were so written as to authorize flexible relief. However, until recently, these statutes have been construed strictly to require the petitioner seeking habeas relief to be subject to an immediate and confining restraint of his liberty.[31] A close reading of the current federal habeas corpus statute suggests that relief need not be limited to discharge from all custody. Today, the relief authorized is to discharge the writ "as law and justice require."[32] Furthermore, the **1867** Act provided that "if it shall appear that the petitioner is

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[25] *Id.* at **417,** *quoting* Rep. Lawrence of Ohio, CONG. GLOBE, 39th Cong., 1st Sess. **4151.**

[26] Rev. Stat. §§ **751–53** (1874), **13** Stat. 142.

[27] *Id.* at § **753.**

[28] Reviser's note, 28 U.S.C. § **2241 (1964).**

[29] H. R. REP. No. 308, 80th Cong., 1st Sess. **A–169 (1947).**

[30] Fay v. Noia, **372** U.S. **391, 402 (1963).**

[31] In *In re* Rowland, 85 F. Supp. **550** (W.D. **Ark.** 1949), the court concluded that since the habeas statute used the words "prisoner" and "custody," actual confinement was a necessary prerequisite to the issuance of the writ. Accordingly, the court refused to entertain a petition where the applicant had been released on bail.

[32] 28 U.S.C. § **2243 (1964).**

deprived of his or her liberty, in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty."[33] See also section 14 of the Judiciary Act of 1789 which authorized the issuance of the writ "agreeable to the principles and usages of law" and "for the purpose of an inquiry into the cause of commitment."[34]

The Supreme Court has recently said of the Great Writ:

> Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve it grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.[35]

Accordingly, the nature and function of the writ of habeas corpus is not limited to reviewing judicially the legality of iron-bar confinement, but is a procedural device for providing "a prompt and efficacious remedy for whatever society deems to be intolerable restraints."[36] Therefore, the writ of habeas corpus has developed into a dynamic remedy which may, in the proper case, issue to provide post-conviction relief, to adjudicate promptly the validity of the challenged restraint, and to determine on the merits the allegation of deprivations of constitutional rights.[37]

In summary, it can be said that these descriptions of the modern function of habeas corpus indicate to this writer that the lower federal courts have the power to fashion appropriate relief to petitioners whenever it appears that there has been a violation of constitutional due process or statutory rights.

II. THE MEANING OF CUSTODY

A United States district court has jurisdiction under the federal habeas corpus statute to grant a writ of habeas corpus to a prisoner "in custody in violation of the Constitution or laws or treaties of the United States. . . ."[38] However, before the writ will issue the court must first be satisfied that the petitioner is "in custody" within the meaning of this section. Therefore, the threshold question which must be resolved is whether the degree of restraint

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33 Act of 5 Feb. 1867, ch. 28, 14 Stat. 384–85.
34 Act of 24 Sep. 1789, ch. **20, 1** Stat. 81–82.
35 Jones v. Cunningham, **371** U.S. 236, 243 (1963).
36 Fay v. Noia, 372 U.S. 391, 401–02 (1963).
37 Peyton v. Rowe, 391 U.S. 54, 59 (1968).
38 28 U.S.C. § 2241(c) (3) (1964).

upon one's personal liberty is sufficient "custody)' to warrant the issuance of the writ.

In 1885, Mr. Justice Miller speaking for the Supreme Court in *Wales* v. *Whitney*[39] stated that the scope of habeas corpus encompasses :

> Confinement under civil and criminal process. . . . Wives restrained by husbands, children withheld from their proper parent or guardian, persons held under arbitrary custody by private individuals, as in a madhouse, as well as those under military control. . . .[40]

Furthermore, Mr. Justice Miller acknowledged the difficulty of judicially defining the ambiguous meaning of the word "custody" for purposes of habeas corpus when he observed: "Obviously, the extent and character of the restraint which justifies the writ must vary according to the nature of the control which is asserted over the party in whose behalf the writ is prayed."[41] Unfortunately, this problem of definition continues to plague the jurist and frustrate the petitioner.

Recent case law suggests that the federal courts are departing from the requirement that the petitioner be in actual confinement and are considering milder forms of restraint sufficient to invoke the writ of habeas corpus. In *Jones v. Cunningham*,[42] the Supreme Court held that the conditions and restrictions of parole were a sufficient restraint of liberty to satisfy the statutory requirement of custody. Jones was convicted and confined in a Virginia prison for ten years as a habitual offender. While serving sentence, he petitioned to a federal district court for a writ of habeas corpus alleging he was being held in custody in violation of his constitutional rights by having been denied counsel at his first trial in 1946. This petition was dismissed. While Jones' appeal was pending in the Fourth Circuit Court of Appeals, Jones was paroled. Thereafter, the Court of Appeals dismissed the petition as moot inasmuch as Jones was not in actual physical confinement. The Supreme Court reversed and held that a state prisoner on parole is in the control of the parole board and therefore in custody for purposes of federal habeas corpus. In holding that the status of parole is sufficient custody, the court equated the requirement of

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39 **114** U.S. **564 (1885).**
40 *Id.* at **571.**
41 *Id.*
42 **371 U.S. 236 (1963).** Prior to ***Jones*** only two states, Florida and California, had held the status of parole to be a sufficient restraint upon liberty to constitute custody. Sellers v. Bridges, **153** Fla. **586, 15** So.2d **293 (1943) ;** ***In re*** Marzec, **25 Cal. 2d 794, 154** P.2d **873 (1945).**

"in custody" with any "restraint of liberty" and rejected the Fourth Circuit's contention that a writ may issue only when the petitioner is in actual physical custody :

> [W]hat matters is that [the status of parole] significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. . . . While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; that is enough to keep him in the "custody" of the members of the Virginia Parole Board within the meaning of the habeas corpus statute. . . .[43]

This reasoning is supported by 18 U.S.C. § 4203 (1964), which places a federal parolee in the "legal custody and under the control cf the Attorney General until the expiration of the maximum term or terms for which he is sentenced."[44] Because the status of parole is considered to be part of the sentence,[45] the restraints and conditions of parole may be equated to service of sentence. Since the rationale of *Jones* is premised on the assumption that the parolee is "in custody" of his parole board,[46] it should make no difference whether the petition for habeas relief is filed before or after release from physical confinement.

Although *Jones v. Cunningham* held that habeas relief was available to the parolee, the Supreme Court did not spell out with specificity what restraints were necessary to satisfy the custody requirement. It has been suggested, however, that the only distinction between parole and probation is that the parolee serves a period of time in confinement whereas the probationer or defendant whose sentence has been suspended never enters a jail.[47] In all instances, the individual may have conditions placed on his associations, travels and activities. Further, the defendant on probation or at liberty under a suspended sentence is in custody of the court

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[43] *Id.* at 243.

[44] 18 U.S.C. § 4203 (1964).

[45] ***See*** Anderson v. Corall, 263 U.S. 193, 196 (1923), where the Court stated, "While [parole] is an amelioration of punishment, it is in effect punishment."

[46] The conditions and restrictions in Jones' parole agreement were as follows: **(1)** parolee is confined to a particular community, house and job; (2) parolee cannot drive an automobile without permission ; **(3)** parolee must periodically report to his parole officer, permit the officer to visit his home and job at any time; (4) parolee must keep good company, work regularly, and live a clean, honest, and temperate life; (5) parolee can be rearrested at any time the board or parole officer believes he has violated any term of condition of his parole. The Court in a footnote indicates that the restrictions placed upon Jones by his parole agreement "appears to be the common ones." 371 U.S. at 243 n.20.

[47] D. DRESSLER, PROBATION AND PAROLE 13 (1951).

which tried and convicted him just as much as the prisoner on parole is in the legal custody of the parole board or the attorney general. Of course, there is always the threat of incarceration for violation of any of the imposed conditions. Since these restraints and conditions **are** so similar, it is submitted that the probationer and the individual under a suspended sentence should be able to seek habeas relief. However, the cases are not unanimous.

The Ninth Circuit in *Benson v. California*[48] relying on *Jones* held that probation constitutes sufficient "custody)' for issuance of the writ. In *Arketa v. Wilson*,[49] a prisoner whose adjudication as an habitual criminal resulted in his ineligibility for probation was entitled to habeas relief to attack the validity of a prior conviction on federal constitutional grounds. Arketa, who had been convicted on twc occasions, asserted that if his first conviction were declared void he would be entitled to probation on the second conviction instead of confinement. Though not relevant to its decision the Ninth Circuit Court of Appeals stated that a "convict who is on probation is as much in custody as one who is on parole; he remains subject to the control of the probation officer and the court."[50]

However, there are two conflicting decisions involving suspended sentences. In *Walker v. North Carolina*,[51] a habeas petition was entertained to attack a 30-day suspended sentence for violating a building code regulation. The court held that a petitioner under a suspended sentence is in custody so long as the convicting court has the power to vacate the suspension and order it into execution. In reaching this decision, the court reasoned that the expectation of future imprisonment is a sufficient restraint of liberty to invoke the writ. However, in *Green v. Yeager*[52] the petitioner had been convicted of armed robbery and carrying a concealed weapon, but was given a suspended sentence on the latter charge. In entertaining the writ the court stated it would consider only the robbery conviction since a suspended sentence is not such a restraint of liberty as to warrant habeas corpus consideration. Although the decisions are not uniform, there appear to be few substantial differences between the status of parole which has been expressly held by the Supreme Court in *Jones v. Cunningham* to be a sufficient restraint of liberty to invoke the aid of habeas corpus

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[48] 328 F.2d 159 (9th Cir. 1964); **see Garnick** v. Miller, 81 Nev. 372, 403 P.2d 850 (1965).

[49] 373 F.2d 582 (9th Cir. 1967).

[50] *Id.* at 583.

[51] 262 F. Supp. 102 (W.D.N.C. 1966), *aff'd* 372 F.2d 129 **(4th** Cir. 1967).

[52] 223 F. Supp. 554 (D.N.J. 1963), *aff'd* 332 F.2d 794 (3d Cir. 1964).

and the restrictions and conditions of probation and a suspended sentence.

Another area where judges have displayed differing attitudes towards the custody requirement is in regard to the restraints surrounding the petitioner at liberty on bail. Because the writ of habeas corpus was originally a device to secure a judicial inquiry into pretrial imprisonment,[53] petitions have been denied if the detention involved a lesser form of restraint of liberty. Thus, the restraint imposed upon an applicant at liberty on bail before commencing the service of his sentence was considered insufficient. For purposes of this discussion, the word "bail" is defined as a means "to procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the court."[54] Practically speaking, the refusal of a court to entertain habeas corpus on behalf of a defendant on bail because of insufficient restraint of liberty is normally not prejudicial, since the applicant within a short period of time will most likely be confined and can then, most certainly, petition the court for appropriate relief. Furthermore, the legal consequences flowing from a refusal to entertain the petition are not significant since, in most cases, the convicted defendant has not, as yet, exhausted his appellate remedies. For example, in *Duncombe* v. *New York*,[55] habeas relief was refused a convicted defendant on bail for failure to exhaust state judicial remedies notwithstanding the court's finding that a person released on bail is legally in custody for purposes of the federal habeas corpus statute.

In an early Seventh Circuit decision the court held in *Mackenzie* v. *Barrett*[56] that a petitioner who after his arrest was released on bail into the custody of his sureties was sufficiently restrained of his liberty to seek habeas corpus since "it restrained the party of the right to go without question."[57] Thereafter the Supreme Court of the United States on two occasions[58]held that a person at liberty on bail awaiting trial is only morally restrained and, therefore, not entitled to test the validity of his indictment by habeas corpus. In

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[53] ***See*** *generally* H. M. HART AND H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1236 (1953).

[54] BLACK'S **LAW** DICTIONARY 177 (4th ed. 1951).

[55] 267 F. Supp. 103 (S.D. N.Y. 1967).

[56] 141 F. 964 (7th Cir. 1905), *cert* ***denied*** 203 US. 588 (1906).

[57] *Id.* at 966.

[58] Stallings v. Splain, 253 U.S. 339 (1920) ; Johnson v. Hoy, 227 U.S. 245 (1912).

Johnson V. Hoy,[59] the Court reasoned that since the applicant was at liberty on bond no further relief could be granted by habeas, while in *Stallings V. Splain*,[60] habeas relief was denied on the theory that an applicant on bond is not actually restrained of his liberty. Accordingly, most courts have held that the restraint of liberty on an individual free on bail is insufficient to invoke the habeas jurisdiction of a federal court.[61] Although the Supreme Court in *Johnson* and *Stallings* held that an individual is not in custody when he is at liberty on bail, the precedent value of these decisions is questionable when considered in light of *Jones V. Cunningham* which held that a petitioner on parole is "in custody'' for purposes of habeas. It is submitted that the limitations placed upon an individual released on bail or bond and the parolee are not so dissimilar as to warrant different results, since both restraints "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do."[62]

It is suggested that since the function of the writ is to allow judicial investigation into "the legality of the detention of one in the custody of another,"[63] the test as to what constitutes sufficient custody should be the same for the petitioner at liberty on bail regardless of the posture of his case. To require the individual at liberty on bail or bond to surrender himself for physical detention in order to obtain a factual determination of an alleged deprivation of constitutional rights is inconsistent with the function of habeas corpus which is to adjudicate promptly the validity of a challenged restraint.[64] Postponement of this hearing may, in many cases, result in the loss of evidence. Furthermore, should the applicant prevail and obtain the relief requested, the state would be in a better position to reprosecute if a retrial is deemed necessary. If the function of the writ is to protect "individuals against erosion of their right to be free from wrongful restraints upon their liberty,"[65] habeas relief should be available at the earliest possible time notwithstanding the point in time of criminal prosecution. Accordingly, habeas corpus ought to be available in those situations where the petitioner has exhausted all other remedies.

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59 227 U.S. 245 (1912).
60 253 U.S. 339 (1920).
61 Allen v. United States, 349 F.2d 362 (1st **Cir.** 1965); Matysek v. United States, 399 F.2d 389 (9th Cir. 1964); Moss v. Maryland, 272 **F.** Supp. 371 (D. Md. 1967).
62 Jones v. Cunningham, 371 U.S. 236, 243 (1963).
63 McNally v. Hill, 293 U.S. 131, 136 (1934).
64 Peyton v. Rowe, 391 U.S. 54, 59 (1965).
65 Jones v. Cunningham, 371 U.S. 236, 243 (1963).

Recently several courts, relying on *Jones v. Cunningham,* have entertained habeas petitions on behalf of individuals restrained by forms milder than actual physical control. *Duncombe v. New York*[66] held that a criminal defendant who was at liberty on bail pending appeal following a conviction based on a plea of guilty is legally in custody for purposes of habeas corpus. In June 1968, the Court of Appeals for the Seventh Circuit held, in *Burris v. Ryan,*[67] that a petitioner free on bond following a mistrial and pending a retrial was entitled to challenge the legality of the second indictment by habeas corpus. The court in *Burris* relied on *Jones* v. *Cunningham* and *Mackenzie V. Barrett* in holding that bail is a sufficient restraint of liberty to constitute custodv. It should be observed that *Burris* appears to overrule *United States V. Tittemore,*[68] which denied a petition for habeas brought by an individual on bail. In *Tittemore* the court without mentioning its decision in *Mackenxie* adopted the reasoning of *Stallings V. Splain* for the authority that before a petition will be entertained the petitioner must show that he is actually restrained.

Matzer V. Davenport[69] held that a petitioner who had been released from physical confinement into the custody of his attorney was sufficiently restrained of his liberty to question the delay of the state in bringing his case to trial. The applicant in this case had been indicted for murder. In *Foster V. Gilbert*[70] the court, relying on *Jones v. Cunningham,* stated that "while petitioner has been released into the custody of his attorney, and such release frees him from immediate physical confinement, it imposes conditions which significantly confine and restrain his freedom. This is enough to constitute custody."[71]

This trend of taking more seriously any restraints that are imposed on an individual's liberty as a basis for granting habeas petitions is evident in deportation cases, where habeas corpus has been utilized by aliens who seek judicial review of their deportation orders. In *Varga V. Rosenberg*[72] the court held that an individual under a deportation order free on bond awaiting execution of the order was subject to such restraint as to permit a habeas attack. Relying on *Jones,* the court stated that "the fact petitioner

66 267 F. Supp. 103 (S.D.N.Y.) 1967.
67 397 F.2d **553** (7th Cir. 1968).
68 61 F.2d 909 (7th **Cir.** 1932).
69 288 F. Supp. 636 (D.N.J. 1968).
70 264 F. Supp. 209 (S.D. Fla. 1967).
71 *Id.* at 212.
72 237 F. Supp. 282 (S.D. Cal. 1964).

has actual freedom of movement pending deportation does not deprive this court of jurisdiction to grant habeas corpus relief."[73] The court reasoned that since Varga could be ordered to appear for actual deportation at any time, his liberty was sufficiently restrained for purposes of issuing the writ. To the same effect see *United States ex rel. Martinez-Angosto v. Mason,*[74] where the court issued the writ to attack the legality of a deportation order where the petitioner, who was a Spanish seaman, had been released into the custody of his wife and local parish priest, pending a final decision on his petition.

The Supreme Court has repeatedly granted habeas corpus to determine the validity of an alien's exclusion from the United States.[75] Furthermore, since the Immigration Act of 1961,[76] the only procedure by which an alien can test an order of exclusion is by habeas corpus. Suffice it to say, the current trend in case law is to construe the phrase "in custody') broadly and allow habeas attacks on a wide variety of legal impairments for which no other remedy lies.

Although *Jones v. Cunningham* constituted a significant departure from the requirement of actual confinement by stating that an individual is "in custody" if he is restrained of his liberty "to do those things which in this country free men are entitled to do,"[77] it was not until *Peyton v. Rowe*[78] that a prisoner could obtain a habeas corpus review of a sentence he was not then serving.

In *Peyton,* Chief Justice Warren, speaking for a unanimous Supreme Court, held that a prisoner serving the first of two consecutive sentences may challenge the validity of the second by habeas. Accordingly, habeas corpus is available to a petitioner even though he is not presently serving the sentence upon which the habeas petition is premised. In deciding *Peyton,* the court overruled *McNally v. Hill,*[79] which held that a federal prisoner cannot attack by habeas corpus a sentence which he is not then serving and that habeas is not available to secure a judicial decision on a question which will not result in the petitioner's immediate release. McNally alleged that an unconstitutional sentence was being taken into account in computing his eligibility for parole. He further

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73 *Id.* at 285.
74 344 F.2d 673 (2d Cir. 1965).
75 Brownell v. Tom We Shung, 352 U.S. 180 (1956) ; Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).
76 8 U.S.C. § 1105a(b) (1964).
77 371 U.S. 236, 243 (1963).
78 391 U.S. 54 (1968).
79 293 U.S. 131 (1934).

alleged that if only his valid sentence were considered he would be eligible for parole. In rejecting this argument, the court reasoned that the writ would only issue under the statute "for the purpose of inquiring into the cause of restraint of liberty"[80] and that a "sentence which the prisoner has not yet begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry."[81] Although the Court rejected McNally's petition as premature, it did suggest that mandamus of the parole board would be the appropriate method to secure relief.[82]

In *Peyton* the Court reviewed *McNally* and concluded that it was inconsistent with the purpose of the writ of habeas corpus, which is "to provide for swift judicial review of alleged unlawful restraints on liberty."[83] Mr. Chief Justice Warren also pointed out the three characteristics of habeas corpus: (1) to provide post-conviction relief; (2) to adjudicate promptly the validity of the challenged restraint; and (3) to determine, on the merits, the alleged deprivation of constitutional rights.[84] Thereafter, the Court, quoting from *Jones v. Cuningham*, reaffirmed that the "grand purpose" of the writ of habeas corpus is "the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty"[85] and held that "in common understanding 'custody' comprehends . . . the entire duration of . . . imprisonment."[86] Thus, a prisoner is "in custody" in violation of the Constitution if any consecutive sentence he is scheduled to serve was imposed as a result of a deprivation of constitutional rights.

However, even before *Peyton* several lower federal courts had refused to adhere strictly to the *McNally* rule.[87] In *Martin v. Virginia*,[88] the Fourth Circuit rejected the McNally definition of custody and held that a "denial of eligibility for parole is a restraint of liberty no less substantial than the technical restraint of parole."[89] The court then reasoned that habeas relief is available to challenge the legality of a future sentence which the petitioner has not yet begun to serve.[90]

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80 *Id.* at 135.
81 *Id.* at 138.
82 *Id.* at 140.
83 391 U.S. 54, 63 (1968)
84 *Id.* at 59.
85 *Id.* at 66.
86 *Id.* at 64.
87 *See, e.g.*, Arketa v. Wilson, 373 F.2d 582, 584 (9th Cir. 1967); United State *ex rel.* Burke v. Mancusi, 276 F. Supp. 148, 150–53 (E.D.N.Y. 1967); Martin v. Virginia, 349 F.2d 781, 783–84 (4th Cir. 1965).
88 349 F.2d 781 (4th Cir. 1965).
89 *Id.* at 784.
90 *Id.*

Recently, the United States Court of Appeals for the Fourth Circuit extended the scope of *Peyton v. Rowe* by granting relief to a Virginia prisoner who was attempting to challenge a North Carolina conviction in a North Carolina federal district court.[91] In holding that habeas is the proper procedural remedy for a state prisoner to attack, on constitutional grounds, a conviction in another state, the court found sufficient restraint in the North Carolina detainer which was filed with the Virginia prison officials and the Virginia commitment, The court noted that the "prisoner has no hope of release until both authorizations are ended, for if either is withdrawn or expires, the warden will continue to hold him under the other."[92] However, in *Van Scoten v. Pennsylvania,*[93] the Third Circuit Court of Appeals held that a Pennsylvania district court was without jurisdiction to entertain a New Jersey prisoner's habeas corpus petition challenging the validity of a Pennsylvania state court sentence which was scheduled to commence upon completion of the applicant's New Jersey imprisonment. The court reasoned that notwithstanding *Peyton,* the federal habeas corpus statute limits the power of the federal court to issue habeas petitions to persons detained within its territorial jurisdiction.[94] Therefore, the Pennsylvania district court had no jurisdiction to entertain the habeas petition on behalf of a New Jersey applicant.

The requirement that the petitioner be "in custody)' in order to seek habeas relief is most significant when the applicant seeks to challenge a sentence which he has already served. Zimmerman *v. Walker*[95] held that habeas relief was not available to a petitioner who had been released from military detention. In Zimmerman, the Supreme Court in denying a writ of certiorari stated in a per curiam opinion that since the petitioner had been released from the custody of the respondents the case was moot. However, if the prisoner is in custody when his petition is filed, his subsequent release from confinement will not render moot his application for federal habeas corpus. In *Carafas v. LaVallee,*[96] a unanimous Supreme Court overruled *Parker v. Ellis,*[97] which had held that expiration of a prisoner's sentence terminated federal jurisdiction for

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91 Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969).

92 *Id.* at 355.

93 404 F.2d 767 (3d Cir. 1968).

94 *Id.* 28 U.S.C. § 2241(a) (1964), provides in part: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . ."

95 319 U.S. 744 (1943).

96 391 U.S. 234 (1968).

97 362 U.S. 574 (1960).

purposes of seeking habeas corpus relief, and held that if the petitioner is in custody at the time he initiates his application, jurisdiction has attached notwithstanding the prisoner's subsequent release. It is clear that the rationale of *Carafas* is limited to those situations where the applicant is "in custody" when the petition is filed, since the federal habeas corpus statute[98] expressly requires that the petitioner be in custody when the writ is issued. In discussing the statutory requirement of custody, the Court stated that the province of the writ "is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person."[99] Yet, as one writer aptly observed:

> If . . . [this] statement is taken at face value, however, it is difficult to see what justification there is for continuing the habeas proceeding when the prisoner has been released from the detention which is the subject of inquiry.[100]

In *Carafas*, the Court adopted Chief Justice Warren's dissent in *Parker*, which emphasized that the statutory requirement for the petitioner to be in custody applies only to the issuance of the writ and not at the time relief is granted.[101] The Chief Justice in *Parker* also noted that the relief in habeas cases is not limited to release from custody, but the statute directs the judge to "dispose of the matter as law and justice require. 28 U.S.C. § 2243."[102] Therefore, by relying on the statutory requirement to "dispose of the matter as law and justice require,'' the Court retained the power to declare that the applicant's detention was unlawful, even though he is released from all restraint before the court takes action.

Nevertheless, the courts are uniform in holding that habeas is not the appropriate procedural remedy to attack the legality of a fine. But, if the non-payment of a fine is punishable by confinement and the applicant is incarcerated, then habeas relief would be available to attack the validity of the penalty.[103] If the fine and confinement are separate punishments, however, the petitioner has no standing for habeas corpus. In ***Bledsoe v. Johnson***,[104] the petitioner had been convicted and sentenced to confinement and to pay a file. He then made application for habeas corpus, alleging that the imposition of the fine was excessive punishment and, therefore, unlawful. In refusing to entertain the writ, the court held that

98 *See* 28 U.S.C. § 2241(c) **(3)** (1964).
99 391 U.S. 234, 238 (1968).
100 ***The Supreme Court 1967 Term,*** 82 HARV. L. REV. 63, 251 (1968).
101 362 U.S. 574, 582 (1960).
102 *Id.* at 582.
103 Cahill v. Biddle, **13** F.2d 827 (8th Cir. 1926).
104 61 F. Supp. **707** (N.D. Cal., 1945); ***aff'd*** 154 F.2d **458** (9th Cir. 1946).

habeas corpus is not available to attack the legality of the imposition of the fine which does not provide for confinement in lieu of default in payment, Habeas is also unavailable to aid a petitioner in recovering a partially paid fine.[105] These holdings are consistent with the traditional function of the writ, which is to secure a judicial inquiry into the legality of detention. Since a fine without a provision for punishment for non-payment imposes no restrictions or conditions upon the liberty of the defendant, there is no detention upon which habeas can attach. Therefore, so long as habeas corpus is exclusively a remedy for unlawful and illegal detention, an unlawful fine or forfeiture is not a proper subject for inquiry.

III. MILITARY STATUS AND THE CUSTODY REQUIREMENT

As early as 1866 the Supreme Court acknowledged that civil courts have the power to entertain writs of habeas corpus for military prisoners.[106] More recently, in *Burns* v. *Wilson*[107] the Court stated:

> The statute which vests federal courts with jurisdiction over applications for habeas corpus from persons confined by the military courts is the same statute which vests them with jurisdiction over the applications of persons confined by the civil courts.[108]

Accordingly, the first concern of the court is to determine whether the petitioner is "in custody" for purposes of habeas corpus relief. Thus, the threshold question is how much restraint on one's liberty is necessary before the writ will issue?

In the early case of Wales v. Whitney,[109] the Surgeon General of the Savy sought habeas corpus relief from an order of the Secretary of the Navy who had placed Wales under arrest and ordered him to remain within the limits of Washington, D. C., pending his court-martial. In denying the writ, the Court noted that Wales was required by his military duties to remain within the District of Columbia irrespective of his status of arrest. In holding that this restraint was not the type of "restraint or imprisonment suffered by a person applying for a writ of habeas corpus,"[110] the Court

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105 Waldon v. Swope, 193 F.2d 389 (9th Cir. 1951).
106 *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).
107 346 U.S. 137 (1953).
108 Id. at 139.
109 114 U.S. 564 (1885).
110 Id. at 571.

stated that "something more than moral restraint is necessary. . . there must be actual confinement or the present means of enforcing it. . . ."[111] Nevertheless, *Wales* does not stand for the proposition that a petitioner is not in "custody" if a person is confined to a city. An alternative ground for decision can be seen in the following passage:

> [A]s Medical Director, he was residing in Washington and performing there the duties of his office. It is beyond dispute that the Secretary of the Navy had the right to direct him to reside in the city in performance of these duties. . . . It is not easy to see how he is under any restraint of his personal liberty by the order of arrest, which he was not under before.[112]

The point of the case is that since he was subject to military orders, the order confining Wales to the limits of the District of Columbia subjected him to no more restraint than before. Therefore, since the restraint was lawful, the Supreme Court correctly ruled that petitioner was not "in custody" for purposes of habeas corpus.[113]

In *Wales*, the Court declared, "There must be actual confinement or the present means of enforcing it."[114] This requirement of "actual confinement" is not limited to actual physical restraint such as detention in jail. Habeas relief was entertained on behalf of three American servicemen who were retained in Japan beyond their rotation dates to the United States.[115] Petitioner Cozart had been indicted under Japanese law for criminal negligence in the operation of a privately owned motor vehicle. Cozart's enlistment had not expired, but he was retained in Japan by military authorities past the effective date of his rotation to the United States. Petitioners Germait and Maharenho were awaiting retrial by the Japanese authorities for rape. For the purpose of retrial they were retained in the service and in Japan beyond the expiration of their tours of obligated service. In granting their petitions to allow the petitioners to attack the constitutionality of the "Status of Forces" agreement between the United States and Japan, the court noted that "since the petitioners were not at liberty to leave Japan, they were sufficiently restrained for purposes of habeas corpus."[116]

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111 *Id.* at 572.
112 *Id.* at 569–70.
113 United States **ex *rel.*** Altieri **v.** Flint, **54** F. Supp. 889 (D. Conn. 1943). ***See*** R. SOKOL, **A** HANDBOOK **OF FEDERAL** HABEAS **CORPUS** 26–28 (1965).
114 **114** U.S. **564,** 572 (1885).
115 Cozart v. Wilson, 236 F.2d **732** (D.C. Cir. 1956).
116 *Id.* at 733.

Moreover, in *Girard v. Wilson*,[117] habeas relief was held available to a soldier who was "administratively restricted" to the limits of his military installation.

Accordingly, as these decisions indicate actual physical restraint is not necessary, it is sufficient if the restraint deprives the individual of going when and where he pleases. These decisions are consistent with the historical function of the writ.[118] It is the physical power which controls the petitioner's freedom of movement which determines the availability of the writ.

However, the writ will not lie if the petitioner is not restrained of his liberty.[119] If the writ were issued in the absence of detention, the only effect of the ruling would be to render an advisory opinion. In *Hooper v. Hartman*,[120] a retired officer of the Regular component of the United States Navy was convicted by general court-martial and sentenced to dismissal from the service and to forfeit all pay and allowances. In holding that habeas relief would not be granted to challenge the jurisdiction of the court-martial the court stated: "The court has no power to issue a writ of habeas corpus . . . where it appears plaintiff is neither under any form of custody or personal restraint, nor liable to be under same in the circumstances."[121] Accordingly, since Hooper was not actually confined or restrained of his liberty by arrest or restriction he was not considered "in custody." *Kanewske v. Nitze*[122] held that a petitioner who had completed the serving of his general court-martial sentence and was unconditionally discharged from his enlistment and service status had no standing to attack the legality of his punitive discharge by habeas corpus, In dismissing Kanewske's petition as moot, the court adhered to the traditional function of habeas as extending to custody and detention and refused to consider the possible disabilities flowing from a bad conduct discharge.

In *Jones v. Cunningham*,[123] Mr. Justice Black stated: "Habeas corpus has also been consistently regarded by lower federal courts as the appropriate procedural vehicle for questioning the legality

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[117] 152 F. Supp. 21 (D.D.C. 1957), *rev'd on other grounds*, 354 U.S. 524 (1957); *see In re* McDonald, 16 Fed. Cas. 17 (No. 8741) (E.D. Mo. 1861), where the writ was granted to allow a petitioner to attack his confinement to a military arsenal.

[118] *See* F. FERRIS & F. FERRIS, JR., THE LAW OF EXTRAORDINARY LEGAL REMEDIES 32–33 (1926).

[119] Wales v. Whitney, 114 U.S. 564, 570 (1884).

[120] 163 F. Supp. 437 (S.D. Cal. 1958), *aff'd*, 274 F.2d 429 (9th Cir. 1959).

[121] *Id.* at 440.

[122] 383 F.2d 389 (9th Cir. 1967).

[123] 371 U.S. 236 (1963).

of an induction or enlistment into the military."[124] The question that must be answered is: At what stage in the induction process may a military draftee petition the federal district court for a writ of habeas corpus? The Military Selective Service Act of 1967[125] contains a provision concerning the availability of judicial review for attacking a selective service classification or the administrative procedures followed within the Selective Service System. The 1967 Act provides :

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the president, except as a defense to a criminal prosecution instituted under section 12 of this title . . . after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form. . . .[126]

Earlier military selective service acts did not contain this amendment, although these draft laws did provide that decisions of local and appeals boards were "final."[127] However, a body of case law subsequently developed concerning judicial review of draft classifications. As a result of these decisions, a registrant who presents himself for induction may challenge his classification by petitioning for a writ of habeas corpus after his induction or he can obtain judicial review by raising his classification as a defense in a criminal prosecution.[128] Accordingly, this amendment to the 1967 Act does not alter the existing law, but merely enunciates the existing rule regarding the judicial review of the civilian selective service system prior to induction.[129]

Notwithstanding the statutory prohibition against a judicial review of a draft clasification by habeas corpus prior to induction, the Supreme Court in *Oestereich v. Selective Service System Local Board No. 11*[130] held that a pre-induction review of a selective service reclassification in the case of a registrant who had a clear statutory exemption is not precluded by section 10(b)**(3)** of the Military Selective Service Act of 1967. Oestereich, a theological student, was reclassified 1–A for failvre to have his "registration

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124 *Id.* at 240.

125 50 U.S.C. App. §§ **431 *et. seq.*** (Supp. IV, 1969).

126 *Id.* § 460(b) (3).

127 Act of 16 Sep. 1940, ch. 720, § 10(a) (2), 54 Stat. 893; Act of 18 Map 1917, ch. 1.5, § **4,** 40 Stat. 80.

128 Witmer v. United States, **348** U.S. 375, 377 (1955); Estep v. United States, *327* U.S. 114, 123–25 (1946).

129 ***See*** Comment, *Judicial* ***Review*** *of* ***Selective Service*** *Action: A* ***Need for*** *Reform,* ***56*** CALIF. L. REV. 448 (1968).

130 393 U.S. 233 (1968).

certificate in his possession, and for failure to provide the Board with notice of his local status."[131] The petitioner had returned his draft card to the Government "for the sole purpose"[132] of expressing his dissent over the United States involvement in the Vietnam conflict. The Court reasoned that to limit judicial review to a defense in a criminal prosecution or to habeas proceedings after induction would lead to "unnecessary harshness."[133] Thus, pre-induction judicial review is authorized in those instances where a "person registers and qualifies for a statutory exemption" and the local board deprives him of that exemption "because of conduct or aciivities unrelated to the merits of. . .that exemption."[134]

Furthermore, the case of *Ex parte Fabiani*,[135] which was cited with approval by the Supreme Court in a footnote in *Jones v. Cunningham*,[136] allowed a petitioner to challenge his classification by habeas corpus even though he had not yet reported for his pre-induction physical examination nor had been inducted. Fabiani was an American studying medicine in Italy. He was ordered to report for induction or be indicted after his draft board had rejected his claim for a statutory exemption as a medical student. In discussing the propriety of entertaining the writ, the court stated:

> The court is of the opinion that the petitioner is presently in constructive custody of the government by reason of the United States Attorney's direction to him to return to the United States by February 15 or be indicted. He is not free to go where he pleases; in a sense, he is enjoying jail liberties.[137]

This theory of "constructive custody" was initially advanced in *Collins v. Biron*,[138] where under similar facts sufficient restraint of liberty was found so as to entitle the petitioner to a hearing on his petition for a writ of habeas corpus. The court noted that "assuming that one may be restrained of his liberty though not held in physical confinement, the court cannot escape the conviction that if the petitioner must obey the final order of the board or go to the penitentiary, his liberty is restrained. . . ."[139] Nevertheless, this reasoning was rejected on appeal, and the decision was overruled because according to the Court of Appeals for the Fifth Circuit,[140]

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131 Id. at 234.
132 *Id.*
133 Id. at 406.
134 Id.
135 105 F. Supp. 139 (E.D. Pa. 1952).
136 371 U.S. 236, 240 n.11 (1963).
137 105 F. Supp. 139, 148 (E.D. Pa. 1952).
138 56 F. Supp. 357 (S.D. Ala. 1944).
139 Id. at 361.
140 145 F.2d 758 (5th Cir. 1944).

this concept deviated from the traditional definition of habeas corpus and the weight of authority.[141] But in *Ex parte Stewart*,[142] the court entertained a writ of habeas corpus questioning a selective service classification where the petitioner had been arrested for failing to report for induction and was taken into custody by the United States marshal. The court stated:

> [I]f an inductee is restrained of his liberty, in consequence of what he alleges to be the arbitrary action of a selective service board, no matter at what state he is restrained, he may, by writ of habeas corpus, question whether there was evidence to sustain the action by the board.[143]

Although *Fabiani* was cited with approval in *Jones v. Cunningham*, lower federal courts have consistently refused to entertain petitions for habeas relief unless the petitioner has been, in fact, inducted into the armed forces and becomes subjected to military jurisdiction and discipline.

DeRozario v. Commanding Officer[144] held that a petitioner who had not submitted to induction was not in custody for purposes of habeas relief. The court reasoned that since the writ's function is to test the legality of detention, "[I]t hardly seems burdensome to require that appellant submit to induction in order to test the validity of that detention."[145] DeRozario alleged he was being unlawfully detained of his liberty because he had been reclassified 1–A (available for military service) by his local draft board. Furthermore, in *McDowell v. Sacramento Local Board Group, Boards 21, 22 and 23, Selective Service System*,[146] the court held that the mere receipt of an induction notice does not, in and of itself, constitute sufficient restraint for a petition for habeas corpus to lie. The court recognized that the definition of custody had been broadened in recent years to include restraints of liberty other than actual physical confinement, but refused to liberalize the definition of custody further to allow a registrant, by petitioning for habeas relief, to escape the choice between entering military service and defending in a criminal prosecution for refusal to submit to induction.[147] In denying the writ to McDowell, the district court

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141 *Id.* at 759.
142 **47** F. Supp. 410 (S.D. Cal. 1942).
143 *Id.* at **414; *see*** Goodwin v. Rowe, 49 F. Supp. 703 (D. D.C. 1943).
144 390 F. 2d **532** (9th Cir. 1967).
145 *Id.* at **535.**
146 **264** F. Supp. **492** (E.D. Cal. 1967).
147 *Id.* at **495.**

agreed with the analysis of the District of Columbia Circuit, which, when presented with the identical question in *Lynch v. Hershey*,[148] stated:

> The case differs in no essential respect from any criminal case in which prosecution is threatened for failure to obey a lawful statutory command. If habeas corpus was [sic] the applicable remedy here the writ would of necessity have to be made available to every person who anticipates prosecution for violation of the law.[149]

Although the *Fabiani* doctrine of "constructive custody" has not been followed by the lower federal courts, it is submitted that fundamental concepts of due process appear to be violated when a registrant is required to undergo criminal prosecution in order to obtain judicial review of his classification or in the alternative to submit to induction and thereafter petition for habeas corpus. Nevertheless, the courts have adhered to the traditional function of habeas corpus, which was concerned only with the status of the petitioner, and have rejected the *Fabiani* approach on the grounds that until the petitioner is subject to military control, he has no standing to question his detention. However, to require the registrant to submit to the humiliation of being indicted and tried for a felony before he can raise the issue of the legality of his classification as a defense to prosecution for failure to submit to induction would in most cases result in social and economic embarrassment. Also, to require the applicant to submit to induction before petitioning for the writ causes unnecessary inconveniences and hardships. Thus, as Mr. Justice Murphy stated:

> [I]f a person is inducted and a quest is made for a writ of habeas corpus, the outlook is often bleak. The proceedings must be brought in a jurisdiction in which the person is then detained by the military which may be thousands of iniles from his home, his friends, his counsel, his local board, and the witnesses who can testify in his behalf.[150]

Furthermore, a registrant by being required to enter the armed forces to obtain judicial review of a board classification must, by necessity, leave his occupation for an uncertain amount of time.[151]

It is submitted that since "a principal aim of the writ is to provide for swift judicial review of alleged unlawful restraints on

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148 208 F. 2d 523 (D.C. Cir. 1953), ***cert. denied,*** 347 U.S. 917 (1954).
149 *Id.* at 524.
150 Estep v. United States, 327 U.S. 114,130 (1946) (concurring opinion).
151 ***See*** Note, ***Habeas Corpus and Judicial Review of Draft Classifications,*** 28 IND. L.J. 244,252–53 (1953).

liberty,"[152] review by habeas corpus prior to induction of an alleged erroneous classification would be not only a practical solution but consistent with the nature and function of habeas corpus. Furthermore, entertaining habeas petitions of selective service registrants prior to induction would relieve the armed forces of the problems, both administrative and disciplinary, created by these individuals.

Although *Jones v. Cunningham* represented a significant departure from the traditional definition of "custody," habeas relief was already available for military inductees challenging the legality of their inductions. Thus, once the inductee submits to military jurisdiction he can obtain judicial review of his classification by habeas corpus. Sufficient restraint of liberty has been found to justify the issuance of the writ by virtue of being subject to military jurisdiction and control. For example, in *United States ex rel. Steinberg v. Graham*,[153] the court entertained a habeas petition brought by an inductee's father on behalf of his son for an alleged arbitrary reclassification and induction. Although the inductee was under "no more restraint than any other soldier on active duty, who is subject to all the orders of his superiors, both general orders and those directed to him personally,"[154] the court found sufficient restraint of liberty to warrant the issuance of the writ.

At least one federal court has extended the definition of "custody" to include the military status of an enlisted inactive reservist in the United States Navy Reserve who was merely in receipt of orders to report for active duty.[155] In *Hammond*, the petitioner challenged the present legality of restraint to which he was subjected after having received orders to report for active duty for failure to attend regularly scheduled reserve meetings. In entertaining Hammond's petition for habeas corpus to obtain judicial review of an administrative decision which denied his request for discharge, the Court of Appeals for the Second Circuit, relying upon their earlier decisions in *Altieri* and *Jones*, rejected the argu-

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[152] Peyton v. Rowe, 391 U.S. 54, 60 (1968).

[153] 57 F. Supp. 938 (E.D. Ark. 1944).

[154] *Id.* at 941; *see* United States *ex rel.* Altieri v. Flint, 54 F. Supp. 889 (D. Conn. 1944), where the court granted the writ to review judicially an arbitrary classification of an inductee, who after reporting for induction was assigned to the enlisted reserve for a specified period in order to arrange his personal and business affairs before reporting to the reception center for active service. The court rejected the argument that Altieri was not actually confined and held that although Altieri "is physically at large, he is subject to military call and hence subject to a restraint upon the otherwise unrestricted course of conduct open to him." *Id.* at 892.

[155] Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968).

ment that Hammond was not "in custody'' because he is subject to no more restraint than other persons under military orders and stated :"[I]t is the validity of that very restraint which his petition has brought into question."[156] Therefore, even though Hammond was an inactive reservist in receipt of orders to report for active duty, he was able to attack by habeas corpus the validity of what had become an "in custody" restraint on his liberty. Although not on active duty, Hammond by virtue of his reserve status was subject to military jurisdiction and control.

Habeas corpus was also entertained on behalf of a reservist, called to active duty, who challenged the order ordering him to active duty. Unlike Hammond, the petitioner in United States ex rel. Schonbrun *v.* Commanding *Officer*[157] did not seek to be discharged entirely from the military, but attacked his call-up to active duty on grounds of ((extremepersonal and community hardship."[158] In both Hammond and *Schonbrun*, sufficient restraint of liberty was found in their status as members in the armed forces. For purposes of habeas corpus it is submitted that a transfer from a reserve status to active duty is analogous to parole or suspended sentence to imprisonment, since in these situations the applicant's freedom of movement is subject to the control and discipline by the military in the former, and by the probation officer and the court in the latter. This type of status should be distinguished from and compared with the inductee in receipt of an induction notice to report for active duty. In this instance, habeas relief is not generally available on the theory the inductee is not, as yet, subject to the restraint which he is attacking as unlawful. This is logical, since the inductee does not acquire a military status which subjects him to the control and discipline of the armed forces until he submits to the induction ceremony.

However, if the military has no power to subject an individual to military jurisdiction without his consent the petition will fail for lack of custody. In United States *v. Eichstaedt,*[159] the petitioner after voluntarily enlisting in the United States Army Reserve became conscientiously opposed to war and, after being unsuccessful in obtaining a discharge, petitioned for habeas relief. In refusing to entertain the writ, the court held that an enlistee in the Army Reserve who is not subject to '(anypre-emptory orders or to any actual detention by the Army Reserve without his consent nor

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156 *Id.* at **712.**
157 **403** F. **2d 371 (2d** Cir. **1968).**
158 *Id.* at **371.**
159 **285 F. Supp. 476 (N.D. Cal. 1967).**

. . . subject to any discipline by the Army Reserve arising out of his refusal to consent to active duty training"[160] is not in custody for habeas jurisdiction. However, had the applicant petitioned for habeas relief after he had reported for his tour of active duty for training, the court would have entertained his petition. As a practical matter, the court in *Harnrnond* was more realistic in their approach to the problem of when the writ should issue when they stated: "We fail to perceive how the interests of justice would be served or the question . . . would be meaningfully different had Hammond first reported for active duty and then applied for the writ."[161] To require the applicant to wait until he reports for active duty for training or until he is inducted for not fulfilling his reserve commitment merely postpones a hearing on the merits.

Several lower federal courts have granted habeas petitions on behalf of enlistees on active duty, who have questioned the present legality of their continued detention in the armed forces though subject to only normal military control and supervision. *Gann v. Wilson*[162] held that habeas relief was available to an enlistee on active duty in the Army after his request for discharge as a conscientious objector had been denied. And in *Crane* v. *Hedrick,*[163] the court, faced with identical facts, allowed a Navy apprentice seaman on active duty to challenge the lawfulness of his detention for religious reasons which developed subsequent to entry into the service. In rejecting the argument that Crane was not "in custody'' the court noted: "While there is some support for this contention, the overwhelming weight of authority is to the contrary."[164] Furthermore, the court reasoned that if the applicant is being detained in violation of his constitutional rights, any distinction between an attack on the validity of an induction or enlistment and the validity of continued detention is not persuasive for purposes of whether an applicant is "in custody."[165]

On the other hand, *United States ex vel. McKiever v. Jack*[166] held that habeas corpus was not available to determine whether a Navy steward had been induced to enlist on false statement made to him. Without citing any authority, the court stated : "It is clear that the normal restraint upon an individual's free movement incident to service in the Armed Forces is not such restraint that one may

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160 *Id.* at 126.
161 398 F.2d 705, 711 (2d Cir. 1968).
162 289 F. **Supp.** 191 (N.D. Cal. 1968).
163 284 F. Supp. 250 (N.D. Cal. 1968).
164 *Id.* at 251.
165 *Id.* at 252.
166 351 F.2d 672 (2d Cir. 1965).

predicate a petition for habeas corpus relief thereon."[167] However, this decision was not followed by the same court in *Hammond*. Accordingly, it is believed that had the petitioner exhausted his administrative remedies prior to seeking judicial relief the court might have entertained the writ. One line of cases has held that habeas relief is not available to an individual in the Armed Forces who is serving a tour for which he voluntarily enlisted.[168] The rationale of these decisions is based on the fact that since the detention complained of results from a valid enforceable contract, there is no restraint of liberty upon which habeas jurisdiction can attach. For example, in an early World War II Fifth Circuit decision, the court held in *McCord v. Page*[169] that an enlisted soldier "engaged in serving the period in the Army for which he voluntarily enlisted cannot obtain his release from the military service by writ of habeas corpus [since] his detention results from the enforcement of a valid contract and is not unlawful."[170] McCord had attempted to avoid completing his enlistment on the ground that his religious tenets were incompatible with his military duties.

Since habeas relief is available to test the validity of a deprivation of liberty, the presence of an enlistment contract should not preclude a petitioner from challenging his present status. Consider the analogous situation of a patient in a hospital. In *Hammond v. Lenfest*,[171] Judge Kaufman pinpointed the problem with the following illustration :

> A person who voluntarily commits himself to the care of a hospital or other institution is obviously not "in custody" so long as it is his desire to remain. But it cannot be doubted that if he wishes to leave and is prevented from doing so, he can petition for a writ of habeas corpus to test the validity of what has become an "in custody" restraint on his liberty.[172]

Habeas corpus is the proper remedy for a patient in a mental

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[167] *Id.* at 653.

[168] *See In re* Grimley, 137 U.S. 147 (1890), where the Supreme Court said of the enlistment contract: "Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of contract destroys the new status or relieves [one] from the obligations its existence imposes." *Id.* at 151. *Accord, In re* Green, 156 F. Supp. 174 (S.D. Cal. 1957). However, *Green* seems to have been overruled in a subsequent decision by the same court. *In re* Phillips, 167 F. Supp. 139 (S.D. Cal. 1958), which held that an enlisted member of the armed forces on active duty is "in custody" for habeas corpus.

[169] 124 F.2d 68 (5th Cir. 1941).

[170] *Id.* at 70.

[171] 398 F.2d 703 (2d Cir. 1968).

[172] *Id.* at 712 n.lO.

institution to challenge his continued confinement after having recovered his sanity.[173] The rationale underlying the issuance of the writ in this situation is that since the patient has regained his sanity, the purpose for his detention has ended and his confinement is invalid.

Though McCord had voluntarily enlisted in the Armed Forces, he claimed his subsequent religious affiliation as an ordained minister in the Watch Tower Bible and Tract Society was incompatible with his military duties to salute superior officers and the United States flag.[174] A recent case[175] suggests that where there are "competing policies and when . . . a serious threat to the exercise of First Amendment rights exists, the policy favoring the preservation of these rights must prevail."[176]

It is submitted that this theory of denying habeas corpus to a petitioner who voluntarily entered into a contract with the Government ignores the function of the writ which is designed to afford a remedy for inquiring into the legality of detention. The fact that an enlistment contract was valid when executed does not mean that the status of enlistment cannot be challenged by habeas attack for subsequent events.

IV. HABEAS CORPUS AND THE MILITARY PRISONER

In 1953, the Supreme Court indicated in *Burns v. Wilson*[177] that court-martial proceedings could be challenged in the federal courts by habeas corpus. Notwithstanding article 76 of the Uniform Code of Military Justice which provides that the judgments of military tribunals shall be "final and conclusive" and "binding upon all . . . courts . . . of the United States,"[178] a court-martial prisoner has a statutory right to petition for habeas corpus relief.[179] Furthermore, the legislative history of the provision makes clear that habeas relief was an implied exception to that finality clause.[180]

Recent Supreme Court decisions reveal that lower federal courts have broad powers to make independent fact determinations on

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[173] *See* Lake v. Cameron, 364 F.2d 657, 662 (D.C. Cir. 1966); Miller v. Overholser, 206 F.2d 415, 421 (D.C. Cir. 1953).

[174] 124 F.2d 68, 69 (5th Cir. 1941).

[175] Wolff v. Selective Service Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967).

[176] *Id.* at 825.

[177] 346 U.S. 137 (1953).

[178] UNIFORM CODE OF MILITARY JUSTICE, art. 76, 10 U.S.C. § 876 (1964) [hereinafter referred to as the Code and cited as UCMJ].

[179] 28 U.S.C. § 2241 (1964).

[180] S. REP. NO. 486, 81st Cong., 1st Sess. 32 (1949); H.R. REP. NO. 491, 81st Cong., 1st Sess. 35 (1949).

allegations by civilian prisoners of constitutional due process violations during their trials.[181] However, this expansion of the writ to include the overturning of state convictions which were obtained without affording the accused his constitutional guarantees has not generally been extended to military courts.[182] Yet, the federal courts might very well reject the argument that military law is "separate and apart"[183] frcm federal law and exercise civilian judicial control over the military establishment. It should be noted that Winthrop did not consider the independence of military tribunals to be based on the constitutional principle of separation of powers:

> [T]he court-martial being no part of the Judiciary of the nation, and no statute having placed it in legal relation therewith, its proceedings are not subject to be directly reveiwed by any federal court, either by certiorari, writ of error, or otherwise. . . .[184]

As Mr. Chief Justice Warren stated,

> When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishnient as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.[185]

Nevertheless, the military petitioner has the statutory right to petition for habeas corpus and is subject to the same limiting devices on the issuance of the writ as is the state applicant.

Since the decision in *Jones v. Cunningham*,[186] federal courts in civilian habeas cases have extended the concept of custody to encompass restraints on a person's liberty not involving physical confinement. These holdings which recognize the milder forms of restraint, such as parole, bail, or suspended sentence, as sufficient to invoke the writ are consistent with the expanding function of the writ. Accordingly, the subtle restraints which can be imposed under the Code on a soldier's liberty can equaliy serve as the basis for a habeas corpus attack on an alleged unlawful detention. *Hammond* v. *Lenfest*[187] is an example of this, where the court held that

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[181] *See. e.g.,* Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953).

[182] *See* Katz and Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO ST. L.J. 193, 211–17 (1966).

[183] Burns v. Wilson, 346 U.S. 137, 140 (1953).

[184] W. WINTHROP, **MILITARY** LAW AND PRECEDENTS 50 (2d ed. 1896, 1920 reprint).

[185] Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 188 (1962).

[186] 371 U.S. 236 (1963).

[187] 398 F.2d 705 (2d Cir. 1968).

the Navy's exercise of jurisdiction over the petitioner and its right to subject him to orders were sufficient restraint to constitute the jurisdictional prerequisite of "custody," regardless of the absence of physical confinement.[188] It is submitted that in order "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints,"[189] the federal courts will entertain habeas petitions on behalf of military petitioners who are challenging those same types of restraints of liberty for which petitions lie to accommodate civilian petitioners.

Recently, the Court of Military Appeals has held that in the proper case it possesses the power to issue writs of habeas corpus to test the legality of an applicant's restraint.'"' In *Jones v. Ignatius*,[191] the Court granted the writ of habeas corpus to review a record of trial where the convening authority utilized the bad conduct discharge part of a special court-martial sentence to increase the period of confinement beyond which the court could legally adjudge. And in *Lowe v. Laird*,[192] a petition for habeas relief was entertained to inquire into the legality of a soldier's pretrial confinement. In neither of the above cases did the Court discuss the degree of physical control requisite for the issuance of the writ. It should be noted that both *Jones* and *Lowe* involved the legality of iron-bar physical confinement. However, in *Levy v. Resor*,[193] the writ was granted, following trial and conviction by general court-martial. to a petitioner who was detained in a military hospital room under guard, awaiting action by the convening authority under article 64 of the Code.

It is believed that the number of habeas petitions filed by military personnel with the Court of Military Appeals will substantially increase with the passage of time. Furthermore, it is submitted that our Court will reject the traditional view requiring actual physical confinement as a prerequisite to habeas relief and adopt

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[188] *Id.* at 711.

[189] Fay v. Noia, 372 U.S. 391, 405 (1963).

[190] Levy v. Resor, 17 U.S.C.M.A. 133, 37 C.M.R. 399 (1967). *See* United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. *306*, 308 (1966), where Chief Judge Quinn, speaking for **a** unanimous court, stated that the Court of Military Appeals is a "court established by act of Congress within the meaning of the All Writs Act"; United States v. Augenblick, 393 U.S. 348 (1969), where the Supreme Court acknowledged that the Court of Military Appeals has the power to fashion an appropriate remedy "to accord relief to an accused who has palpably been denied constitutional rights in any court-martial . . ." (*quoting* United States v. Bevilacqua, 18 U.S.C.M.A. 10, 12, 39 C.M.R. 10,12 (1968)).

[191] 18 U.S.C.M.A. 7, 39 C.M.R. *7* (1968).

[192] Lone v. Laird. 18 U.S.C.M.A. 131, 39 C.M.R. 131 (1969).

[193] 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967).

the modern view that besides physical detention there are other kinds of restraints that warrant habeas relief.

V. CONCLUSION

Unfortunately, any attempt to define the contemporary meaning of the phrase '(in custody" is analogous to Humpty Dumpty's response to Alice on the meaning of a word: "When I use a word . . . it means just what I choose it to mean — nothing more nor less."[194] Recent decisions reveal that the courts have liberalized the definition of "in custody') and are "taking more and more seriously any restraints that are imposed on a person's liberty."[195] Perhaps the traditional requirement that the applicant must be in actual confinement before he could petition for habeas relief was appropriate in an age when the only alternatives were imprisonment and freedom. However, in a society which makes sophisticated distinctions in types and forms of punishment such a strict rule thwarts the function of habeas which is designed "to remedy any kind of government restraint contrary to fundamental law."[196] This is particularly true in an age when our courts are concerned with individual rights and constitutional due process. Accordingly, as the scope of federal habeas corpus expands to search out and discover violations of constitutional due process in trial court proceedings, milder forms of custody will be deemed sufficient restraint to support a habeas petition.

It can be argued that if the court's disposition of the custody issue is extended to its logical conclusion, the end result might well be to issue the writ where the only restraints on liberty are the collateral consequences flowing from a conviction such as disfranchisement or the inability to engage in a business or join certain organizations. However, congressional concern[197] over the expanding function **and** scope of habeas inquiry has led one writer to suggest that the language used by the Supreme Court in *Carafas v. LaVallee*, emphasizing the importance of the custody requirement and equating custody with detention,[198] '(seems to serve no purpose other than to prevent speculation that the case will be extended to turn habeas into a general post-conviction remedy."[199]

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194 L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND LOOKING THROUGH THE LOOKING GLASS 228.

195 R. SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS 29 (1965).

196 Fay v. Noia, 372 U.S. 391, 405 (1963).

197 S. REP. NO. 1097, 90th Cong., 2d Sess. 10, 63–66, 233–34 (1968); 114 CONG. REC. S5915–22, S5924–26 (daily ed. 20 May 1968).

198 391 U.S. 234, 238 (1968).

199 ***The Supreme Court 1967 Term, 82*** HARV. ***L.*** REV. 63, 254 (1968).

In 1967, the American Bar Association Advisory Committee on Sentencing and Review recommended the abandonment of the custody requirement in order to provide the applicant with a general post-conviction remedy.[200] By eliminating the custody requirement, petitioners would be able to challenge sentences of imprisonment already served; concurrent sentences or other unchallenged sentences; or sentences of fine, probation, or suspended sentences[201] without regard to the individual judge's definition of restraint of liberty.

Although the courts have liberalized the definition of custodv by judicial definition, any abandonment of the statutory "in custody" requirement must come from the legislature. Until the Congress acts, a petitioner could be denied an appropriate remedy because of the technical statutory "in custody'' requirement. Possibly, Mr. John S. Wise, Jr., arguing on behalf of prisoner Charles L. McNally befcre the Supreme Court summed it **all** up:

> The argument that the subject cannot be brought up on habeas corpus is specious, for it involves the liberty of a citizen which cannot be disposed of by the refinements of procedure.[202]

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[200] AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES § 2.3 (Tent. Draft, 1967).

[201] *Id.* at 43.

[202] McNally v. Hill, 293 U.S. 131, 132 (1934).

TORT LIABILITY OF NONAPPROPRIATED FUND ACTIVITIES*

By Major Richard K. Dahlinger**

This article covers the tort liability of certain morale, recreation, and welfare activities of the Army. Nonappropriated funds and private associations are discussed, with emphasis on the individual liability of officers, employees, members, and guests of these activities. It is concluded, at the very least, that individuals should insure themselves against possible pecuniary liability.

I. INTRODUCTION

One sunny Sunday morning, Baker was teeing-off on the first hole of the Fort Blank golf course. The ball took off like a shot, screaming down the fairway about five feet off the ground. Abruptly, it sliced to the right, sailed over the out-of-bounds fence and struck Abbot directly on the temple, killing him instantly. Abbot, not a member of the military forces, had been strolling along the left shoulder of an adjacent state highway. This article will examine the legal aspects of tort liability which can arise as a result of incidents just such as this.

The following perplexing problem areas are presented in question form as a means of introduction to the subject matter:

Must Abbot's next of kin rely solely on the assets or insurance coverage, if any, of Baker?

Can the United States Government be joined as a party defendant?

If the golf course was operated as a nonappropriated fund, is the fund subject to suit or payment of a claim?

What difference would it make if Baker were the military golf

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professional for the club and was giving a playing lesson at the time of the incident?

What tort liability results if the golf course was being utilized for a tournament by an authorized private association?

When it appears that a government employee or a government agency is involved in an incident, an injured party has three possible avenues of approach toward recovery for his damages. As will be seen, some remedies are exclusive ; some remedies are dependent upon strict compliance with administrative prerequisites ; some remedies work to the advantage of the claimant whereas others are to the benefit of the tortfeasor; and in some cases the claimant loses completely if he chooses the wrong remedy. The first available remedy is a civil suit against the individual tortfeasor. However, in many cases a plaintiff will find this remedy unavailable or extremely cumbersome. A second possible remedy is to file an administrative claim against the United States Government. It will be seen that the agency for which an employee-tortfeasor worked, or where the tortfeasor was a member or guest, will affect the recovery. A third avenue toward recovery is a civil suit against the United States Government under the Federal Tort Claims Act. In general, the Federal Tort Claims Act permits payment by the Government for injuries caused by the wrongful or negligent acts of its employees while acting within the scope of their employment.

Although a great number of books and articles discuss the liability of the Government for the torts of military personnel and civilian employees paid from appropriated funds, there is a paucity of material related to liability for torts of employees, members and guests of nonappropriated funds and private associations. This article discusses these activities, and possible tort liability generated therefrom, with recommendations on improving the system and clarifying certain areas of confusion.[1]

II. IDENTIFICATION AND CLASSIFICATION OF ACTIVITIES

Prior to examining possible tort liability of the United States Government, a nonappropriated fund, a private association, or an employee, member or guest of one of these activities, it is appropriate to define just what these organizations and activities are. There are four types of morale, recreation and welfare activities.

[1] This article will not delve into the complicated area of whether a claimant is barred from recovery by the "incident to service" rule because he is a member of the military or a civilian employee. However, on occasion some reference to this situation will be made since the nature of the cases examined required consideration of the matter. Legal analysis of this subject is well covered in L. JAYSON, HANDLING FEDERAL TORT CLAIMS, ch. 5 (1967).

It will be observed that the claims and judicial procedures, as well as ultimate responsibility, are greatly affected by the type of activity which is involved.

A. *STATUTORY ORGANIZATIONS*

Certain organizations which perform morale, recreation or welfare activities on and around military installations are established and operated pursuant to United States or State statutes. These organizations perform an important function for the military, are almost always found existing on an installation, and are most frequently considered as part of the military establishment. Although many of these organizations are authorized space on a military installation[2] and logistic support,[3] they are neither military organizations nor instrumentalities of the Government within the purview of the Federal Tort Claims Act.

Title **36** of the United States Code lists patriotic societies authorized and recognized by the United States Government. The Boy Scouts of America,[4] for example, operates at virtually every U.S. military post in the world, yet few people understand its status. The Boy Scouts of America is a charitable institution. Its existence is authorized by federal statute, and it is not liable for negligence of its agents unless negligent in selecting those agents.[5] Other similar organizations are: the American National Red Cross,[6] the American Legion,[7] the Big Brothers of America,[8] and the Civil Air Patrol,[9] to name a few.

In *Pearl v. United States*,[10] the court held that the Civil Air Patrol was not a corporation primarily acting as an instrumentality of the United States. The court stated: "The control of Congress over this corporation is only such as is common to virtually **all** private corporations granted federal charters — merely requiring the transmittal to Congress each year of a report of its proceedings and activities for the preceding calendar year."[11] A suit

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2 Army Reg. No. 210–55, para. *7g* (15 May 1969), and Army Reg. No. 230–1, para. 1–32 (Change No. **1**, 31 Jan. 1969) [hereinafter cited as AR 230–1].

3 Army Reg. No. 930–5 (19 Nov. 1969), Red Cross [hereinafter cited as AR 930–5], and Army Reg. **No.** 930–1 (28 Mar. 1969), USO [hereinafter cited as AR 930–1].

4 36 U.S.C. §§ 21–29 (1964).

5 Young v. Boy Scouts of America, 9 Cal. App. **2d** 760, 51 P.2d 191, (1935).

6 36 U.S.C. §§ 1–17 (1964).

7 *Id.* §§ 41–51.

8 *Id.* §§ 881–898.

9 *Id.* §§ 201–208.

10 230 F.2d 243 (10th Cir. 1955).

11 *Id.* at 244.

will therefore not lie against the Government for torts of the Civil Air Patrol or its employees. The claimant must seek redress against the agency or the individual employee-tortfeasor.

Similarly, the Red Cross provides many general welfare and recreation services to military personnel and their families. They are also entitled to many benefits from the military, *e.g.*, office space, supplies and equipment, communications facilities, transportation, subsistence, quarters, medical care, commissary, exchange, and Army Post Office privileges.[12] In spite of the foregoing, Red Cross personnel are salaried by the Red Cross, are subject to the control and immediate reassignment by the Red Cross and are in all other respects independent contractors not in the employ of the United States Government. Accordingly, torts committed by Red Cross personnel cannot be considered as committed by employees of the United States Government within the purview of the Federal Tort Claims Act.[13]

Another statutory organization which serves the religious, spiritual, social, welfare, and educational needs of the armed forces is the United Service Organization (USO).[14] The USO is a private association chartered under the laws of the State of New York and primarily serves members of the armed forces and their dependents outside of military reservations when such personnel are off duty or on leave. This organization is also recognized as the principal civilian agency for the procurement of live entertainment for showing to the armed forces. However, even though the USO performs services at the request of the military, and USO personnel are authorized certain logistical support, such as commissary and exchange privileges,[15] this does not alter the fact that the USO is a private statutory organization, similar to the Red Cross, and its services to the Government are as a private contractor for which the United States assumes no liability.[16]

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[12] AR 930–5, ch. 3.

[13] United States *ex rel.* Salzman v. Salant & Salant, 41 F. Supp. 196 (S.D.N.Y. 1938). "The Red Cross is not a part of the government, nor is it a department or officer of the government." *Id.* at 197. ***See*** 10 U.S.C. § 2602(e) (1964).

[14] AR 930–1.

[15] *Id.*, para. 10.

[16] Gradall v. United States, 329 F.2d 960 (Ct. Cl. 1963); Pulaski Cab Co. v. United States, 157 F. Supp. 955 (Ct. Cl. 1958). ***See*** *also* Scott v. U.S.O. Camp Shows, Inc., **274** App. Div. 862, 82 N.Y.S.2d 118 (1948); Polsky v. U.S.O. Camp Shows, Inc., 272 App. Div. 1094, 74 N.Y.S.2d 667, (1947), holding entertainers of USO performing overseas at request of military to be in scope of employment of USO when injured. It can be assumed such employees would likewise be held to be USO employees and not U. S. Government employees should such individuals injure a third party.

Based on the foregoing discussion, it is important to remember that torts committed bv employees of these types of organizations do not subject the United States to suit under the Federal Tort Claims Act and are not covered by the Army Claims System. An injured party should be advised to seek recovery against the organization itself, or the individual tortfeasor.

The only exception thereto is the American Battle Monuments Commission.[17] The acts of incorporation for this organization provide that claims for loss or destruction of real or personal property, personal injury or death of any person caused by the negligent or wrongful act or omission of any officer or civilian employee of the commission while acting within the scope of his office or employment may be considered and settled under the Foreign Claims Act.[18] This Act, however, limits recovery to incidents arising in a foreign country and concerning foreign claimants.

B. *SPECIAL SERVICES*

Another type of activity which provides morale, recreation, and welfare services to the military command is Special Services :

> "Special Services" embraces those personnel services established and controlled by military authorities and designed to contribute to the physical and mental effectiveness of military personnel and authorized dependents and civilian employees.[19]

The mission of Special Services is to stimulate, develop, and maintain the mental and physical well-being of military personnel through their participation in planned recreation and morale activities.[20] Appropriated funds are used for employment and utilization of civilian personnel at all echelons ; procurement of necessary supplies, equipment, furniture, furnishings and fixtures ; and the construction, modification and maintenance of facilities.21 Nonappropriated funds may be used to supplement aipropriated funds to support Special Services.[22]

Major programs of Special Services are the Army Library program, the Army Sports program, Army Service Clubs, and the

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17 36 U.S.C. §§ 121–138 (1964).
18 10 U.S.C. §§ 2734, 2735 (1964), as implemented by Army Reg. No. 27–28 (20 May 1966).
19 Army Reg. No. 28–1, para. 2a (15 Sep. 1964) [hereinafter cited as AR 28–11.
20 Id. para. 3.
21 *Id*. para. 9*a*.
22 *Id*. para. 9*b*.

Army Dependent Youth Activities program. In addition, Special Services can establish and operate rest and recuperation areas, as well as golf courses, swimming pools and bowling alleys.[23]

Special Services activities and facilities are therefore appropriated fund activities of the United States Government. All employees are either full-time military personnel or civilian employees paid from appropriated funds. Accordingly, torts committed by any of these employees while acting within scope of employment are processed as normally required under the Federal Tort Claims Act and implementing Army regulations.[24]

C. *NONAPPROPRIATED FUNDS*

A nonappropriated fund is an entity established by authority of the Secretary of the Army for the purpose of administering monies not appropriated by the Congress for the benefit of military personnel or civilian employees of the Army.[25] Nonappropriated funds are instrumentalities of the federal government and as such are entitled to all the immunities and privileges which are available under the Constitution and statutes of the departments and agencies of the Government.[26] Further, such funds are established and supervised as a command function by officers or employees of the Government acting within the scope of their official capacity.[27] Individuals, installations, organizations, and units have no proprietary interest in the funds, and profits, if any, do not accrue to any individual.[28]

Three general types or categories of nonappropriated funds are authorized by regulations. Revenue-producing funds are self-sustaining funds established to sell merchandise and services.[29] Examples are exchanges, motion picture theaters and post restaurants. Welfare funds are established and maintained by income derived primarily from dividends from revenue-producing activities.[30] Examples are Central Welfare funds, Unit funds, Central Post funds, and Commandants' Welfare funds. Sundry funds pertain to self-sustaining funds and to associations whose active membership, composed of limited groups of military members and eligible civil-

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[23] *Id.* paras. 17, 18.
[24] Army Reg. No. 27–22 (18 Jan. 1967) [hereinafter cited as **AR** 27–22].
[25] AR 230–1, para. 1–3*a*.
[26] *Id.* para. 1–4*d*.
[27] Id. para. 1–4*d*(1).
[28] *Id.* para. 1–4d(2).
[29] *Id.* para. 1–3b.
[30] Id. para. 1–3*c*.

ian employees, support the fund.[31] Examples are the Central Mess funds; Officers', Noncommissioned Officers' and Warrant Officers' open messes; and other association funds considered essential for the morale, recreation and welfare of the command and organized pursuant to the nonappropriated fund regulations, such as golf courses, hunting clubs, fishing clubs and flying clubs.[32]

D. *PRZVATE ASSOCIATZONS*

Private associations are organized, established, and operated by individuals acting *not* within the scope of their official capacity as officers, employees, or agents of the Government, are not established to provide *essential* morale and recreational facilities and services, and are not subject to the requirements of the nonappropriated fund regulations.[33] These organizations exist on a military installation only with the written consent of the installation commander, which consent can be withdrawn at any time if deemed necessary in the interest of the Government.[34] Some of the other requirements of private associations, in order to be permitted to operate on an installation, are that the nature and authorized functions of the organization be established in a constitution and by-laws, charter, or articles of agreement; that neither the Army, nor a nonappropriated fund assert claim to the assets of the organization; that neither the Army nor any nonappropriated fund assume any of the obligations of the association;[35] and that such association not engage in activities which are in conflict with authorized activities of nonappropriated funds.[36]

Examples of private associations are wives' clubs, hunting and fishing clubs, skeet shooting clubs, flying clubs, and parachute clubs. It should be noted that in some instances a particular form of morale, recreation or welfare activity is conducted as a nonappropriated fund, and in other instances as a private association. It will be seen that whether an activity is organized as a nonappropriated fund or a private association will have a significant bearing upon the remedies available to an injured claimant.

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[31] *Id.* para. 1–3*d*.

[32] The historical background and legal aspects of nonappropriated funds are discussed at length in Kovar, *Nonappropriated Funds*, 1 MIL L. REV, 95 (1958).

[33] AR 230–1, para. 1–3f.

[34] *Id.* para. 1–2c.

[35] *But cf.* JAGA 1961/5437, 24 Oct. 1961, expressing no legal objection to establishing a private association to support an existing sundry fund.

[36] AR 230–1, para. 1–20(4).

III. TORT LIABILITY RELATING TO NONAPPROPRIATED FUND ACTIVITIES

To return to the example incident which was related in the introduction, let us assume that the golf course at Fort Blank was operated as a nonappropriated fund and that a claim has been presented by Abbot's next-of-kin. Assuming further that the next-of-kin is a proper claimant and that negligence is provable, whether the United States Government is subject to payment of damages depends upon three important considerations:[37] whether a nonappropriated fund is an instrumentality of the United States; whether the individual tortfeasor was an employee, member or guest of the nonappropriated fund; and whether his tortious act was committed within the scope of his employment or within the scope of the authorized activities of the nonzppropriated fund.

There are two avenues toward recovery against the United States Government for the tortious acts of an employee of a nonappropriated fund. First, is an administrative claim against the nonappropriated fund itself.[38] For many years prior to 1958, the Secretary of the Army provided that nonappropriated funds would carry public liability insurance to protect the assets of such activities from possible loss through civil suit. Since 1958 nonappropriated funds no longer carry liability insurance, but they are protected by a self-insurance system.[39] The extent of protection remains the same under either system; employees of nonappropriated fund activities are protected from civil liability for torts committed while acting within the scope of their employment.[40] Pursuant to this self-insurance system meritorious claims against the nonappropriated fund are paid from nonappropriated funds.

In 1946, the Federal Tort Claims Act provided another avenue of recovery. This waiver of sovereign immunity permitted a claimant to file a claim against the Government or file suit directly. This right of election was subsequently precluded by an amendment to

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[37] These considerations are the initial requirements for a claim or suit, but are not meant to preclude consideration of defenses which could bar recovery, such as the "incident to service" rule, an intentional tort, contributory negligence, or the statute of limitations.

[38] Army Reg. No. 230–8, para. 14 (27 Aug. 1958) [hereinafter cited as AR 230–8]; Army Reg. No. 27-20, ch. 12 (19 Aug. 1969) [hereinafter cited as AR 27–201.

[39] AR 230–8, para. 13.

[40] Sections E and C of this chapter will indicate that this protection is not absolute except when the employee was operating a vehicle in the scope of his duties, or when the claimant accepts an administrative settlement from the Government.

the Act.[41] Under the present law, if a claim is filed and denied, or the settlement offered is considered insufficient by the claimant, suit can be filed in the federal courts against the Government. Although in most instances the basis for recovery under an administrative claim is exactly the same as that which would prevail in litigation pursuant to the Federal Tort Claims Act, because of the special nature of nonappropriated fund claims and the expanded coverage which is offered in regard to members and guests of such funds, the basic discussion of tort liability will be divided into two sections within this chapter : first, the basis of recovery under the Federal Tort Claims Act; and, second, the requirements and basis for recovery under military claims regulations, A third section will discuss individual tort liability.

A. *LIABILITY OF THE UNITED STATES UNDER FEDERAL TORT CLAIMS ACT*

In **1946,** the Federal Tort Claims Act was enacted into law.[42] The importance of this legislation was its sweeping waiver of the Government's sovereign immunity from suit. Under the provisions of the Act, money damages can be paid by the United States for injuries to property or persons caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[43] The Act defines an employee of the Government to include officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.[44] **A** federal agency is defined as follows : " 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States."[45] In order to determine whether a nonappropriated fund and its employees come within

[41] **A** request for administrative settlement (claim) must be made prior to institution of suit. 28 U.S.C. § 2675(a) (Supp. IV, 1969) ***amending*** 28 U.S.C. § 2675 (1964).

[42] Act of'2 **Aug.** 1946, ch. 753, 60 Stat. 842; 28 U.S.C. §§ 1346, 2671–2680 (1964).

[43] 28 U.S.C. § 1346(*b*) (1964).

[44] 28 U.S.C. § 2671 (1964), ***as amended,*** 28 U.S.C. § 2671 (Supp. IV, 1969).

[45] 28 U.S.C. § 2671 (Supp. IV, 1968), ***amending*** 28 U.S.C. § 2671 (1964).

these definitions, thereby subjecting the Government to payment of damages for their negligent acts, the discussion will be divided into several areas: whether a nonappropriated fund employee is a government employee; whether he is employed by or acting on behalf of a federal agency; and whether he was acting in the scope of his employment at the time of the incident. A final subsection will discuss the case law concerning suits against the Government for torts of members and guests of nonappropriated funds.

1. *Government Employees.*

All nonappropriated fund activities are created and governed by carefully detailed regulations prescribed by the Secretary of the Army.[46] Nonappropriated funds have been recognized as governmental activities by Congress,[47] the courts and the Comptroller General;[48] and they are controlled and directed in their day-to-day operations by members of the military services in the course of their military duties. Despite these elements of control and the obvious principal-agent relationship between the Secretary of the Army and the activities which these elements represent, there has been a division of opinion in the federal ccurts and the military departments as to the legal rights and liabilities of the United States for the torts of employees of these activities. Some courts have adopted the view that nonappropriated fund activities are arms of the federal government, so as to make the United States liable for claims sounding in tort arising out of their activities, to the same extent that the United States has consented generally to be sued in such matters.[49] Other courts have held that even though nonappropriated fund activities are instrumentalities of the United States, the general waivers of sovereign immunity by the Congress do not extend to them.[50] Some courts have even held that nonappropriated fund activities are not agencies or instrumentalities of the federal government.51 A closer examination of the more recent court decisions and Army regulations will shed some light in this area.

The leading case in defining the status of nonappropriated funds

[46] AR 230–1; Army Reg. No. 230–117 (10 Nov. 1967) [hereinafter cited as AR 230–1171.

[47] 5 U.S.C. §§ 8171–8173 (1966), formerly 5 U.S.C. § 150k (1952).

[48] 24 COMP. GEN. 771 (1945), and cases cited therein.

[49] Daniels v. Chanute Air Force Base Exchange, 127 F. Supp. 920 (E.D. Ill. 1955).

[50] Pulaski Cab Co. v. United States, 157 F. Supp. 955 (Ct. Cl. 1958); Borde v. United States, 126 Ct. Cl. 902, 116 F. Supp. 873 (1953); Edelstein v. South Officers' Club, 118 F. Supp. 40 (E.D. Va. 1951). In each of these cases the court granted the Government's motion to dismiss, which was grounded on sovereign immunity and the consequent lack of jurisdiction of the court.

[51] Faleni v. United States, 126 F. Supp. 630 (E.D.N.Y. 1949).

is *Standard Oil of California* v. *Johnson*.[52] This case involved an appeal from the decision of the Supreme Court of California upholding a license tax which has been levied by California tax authorities on a distributor who sold gasoline to the United States Army post exchanges in California. Section 10 of the California Motor Vehicle Fuel License Tax Act stated that the Act was inapplicable to any motor vehicle fuel sold to the Government of the United States or any department thereof for official use of said Government. The California Supreme Court had decided that a post exchange was not a part of the Government of the United States for this purpose.

The Supreme Court of the United States reversed, holding that the question of whether post exchanges were instrumentalities of "the Government of the United States or department thereof" was a matter controlled by federal law, and that as a matter of federal law post exchanges were integral parts of the War Department. The Court stated :

> From all of this, we conclude that post exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes. In concluding otherwise the Supreme Court of California was in error.[53]

Subsequently, one of the Army regulations concerned with fund activities was revised to contain for the first time the following provision : "Activities and funds authorized by these regulations are government instrumentalities and are entitled to the immunities and privileges of such instrumentalities."[54] Yet in spite of the *Johnson* case, deciding that nonappropriated funds are agencies of the United States Government, the Secretary of the Army's recognition of this fact by so stating in his regulation immediately after the *Johnson* case, and the obvious principal-agent relationship which exists between the Secretary and the nonappropriated fund activities concerned, a great deal of controversy over this point was generated after the passage of the Federal Tort Claims Act.

The first case of major importance to reach the federal courts on this matter was *Faleni v. United States*.[55] This case involved a suit under the Federal Tort Claims Act to recover damages for personal injuries sustained by the plaintiff as the result of the negli-

[52] 316 U.S. 481 (1942).
[53] *Id.* at 485.
[54] Army Reg. No. 210–50, para. 5h (1 Jun. 1944).
[55] 125 F. Supp. 630 (E.D.N.Y.1949).

gence of an employee of the United States Government. Faleni was employed by the Ship's Service Department of the Floyd Bennett Field Naval Air Station in New York City (the Ship's Service Department was a nonappropriated fund). Faleni was returning home after work on a Navy bus owned and controlled by the United States, and operated by one of its employees in the regular course of employment. The complaint alleged that the operator managed the bus in such a reckless and careless manner as to cause the plaintiff's injuries. The Government defended on the ground that the Ship's Service Department was an agency of the United States and, hence, the plaintiff was an employee of the United States; that the plaintiff was injured in the course of her employment; and that the plaintiff was covered by Workman's Compensation, had filed a claim thereunder, and thus was barred from recovery. The Government cited the *Johnson* case in support of its position that the plaintiff was an employee of the United States. In denying the Government's motion for summary judgment to dismiss the complaint the court stated :

> Granting that [post exchanges are arms or instrumentalities of the Government as stated in the *Johnson* case], it does not necessarily follow that the plaintiff was an employee of the defendant. That is much too nebulous a basis on which to establish a relationship of employer and employee. The plaintiff's salary was not paid from funds appropriated by the Congress. The defendant made no grant or appropriation from the merchandise or services sold at the Ship's Service Department or the recreational facilities furnished by it. All of its income is derived from purchases made by naval personnel and its own civilian employees. It pays its own obligations for maintenance and upkeep, including heat, light, power and other services. . . .
>
> The foregoing facts . . . satisfy me that the Ship's Service Department is merely an adjunct of and a convenience furnished by the Navy Department, and that an employee thereof is not an employee of the United States of America.[56]

Based on this expressed reasoning the court reached the conclusion that the plaintiff was not an employee of the United States, the Ship's Service not being a "federal agency," and that the *Johnson* case was interpreted as standing only for the proposition that instrumentalities of the Government cannot be taxed by the states.[57]

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[56] *Id.* at 632.

[57] There was no question of the status of the tortfeasor as an employee of the Government and that liability would lie under the Tort Claims Act if the plaintiff were a proper party. The case is cited for the Government's argument that an employee of a nonappropriated fund, regardless of whether he be a claimant or tortfeasor, is a government employee.

In 1952, The Judge Advocate General of the Army, adopting the theory of the *Faleni* case, conclnded that a nonappropriated fund was not a "federal agency" within the meaning of the Federal Tort Claims Act, and that an employee, paid from nonappropriated funds, could not be an employee of the United States Government as that term is defined in the Federal Tort Claims Act. The opinion states: "[N]onappropriated fund instrumentalities being mere adjuncts of the Department of the Army are not federal agencies within the meaning of the Act . . . ."

> [P]ersons working for nonappropriated fund instrnmentalities are not employees of any federal agency within the meaning of the Act.[58]

The effect of this opinion was to convey the position of the Department of the Army to the Justice Department, which is responsible for defending suits against the United States, that nonappropriated fund activities are not "federal agencies" and employees of such activities are not "federal employees." Thereafter, the Justice Department began defending suits against the Government on the grounds that liability under the Federal Tort Claims Act should not lie for negligent acts of employees of nonappropriated funds.

Late in **1952,** the District Court in Georgia had little difficulty in deciding that the Government was liable for negligently causing death at a nonappropriated fund activity.[59] In this case, an umbrella had been negligently fastened to a lifeguard stand at a civilian swimming pool operated by the Air Force. The umbrella fell off during a small whirlwind, killing a boy who was standing nearby. The Government asserted that the civilian swimming pool was not a governmental agency. No authorities were cited to support this conclusion. Likewise, without citing authority, the court stated:

> I have no serious difficulty in reaching the conclusion that the civilian pool was **a** governmental agency, for the reason that the same was constructed, maintained and operated by Government agents and was under their direct supervision and control; that Government agents, and particularly Major McWaters, was directly in charge of the pool, visited it daily, superintended its activities, promulgated rules and regulatons for the operation of the pool, and that if any injury was suffered by the negilgent operation thereof, the defendant [United States] would be liable.[60]

In 1954, an action for damages was brought under the Tort Claims Act to recover for personal injuries and property damage sustained in a collision between the plaintiff's automobile and a

[58] JAGL 1952/1906, 2 Feb. 1952, *as digested* in **1 DIG. OPS. 53** (1952).
[59] Brewer v. United States, 108 **F. Supp.** 889 (M.D. Ga. 1952).
[60] *Id.* at 891.

truck which was negligently driven by an Air Force enlisted man who was assigned to the Air Force Base Exchange on permanent duty status.[61] The Government defended on the ground that the enlisted man was an employee of the Base Exchange, a nonappropriated fund instrumentality, and so was not an employee of the Government within the meaning of the Federal Tort Claims Act. The Government cited *Faleni* in support of its assertion. The court distinguished the *Faleni* case from the one at bar basically because in *Faleni* the employee was a civilian employee paid from nonappropriated funds and no more, whereas in this case the enlisted man wore a uniform of the Air Force, was on call twenty-four hours a day, and his pay was drawn from the United States Government. The court relied heavily on the *Johnson* case and stated:

> [T]he fact that the maintenance of a Post Exchange has been held to be an integral part of the War Department by the Supreme Court and that, in this case, military personnel have been utilized in its operation, would certainly seem to indicate that the operaton of the Post Exchange is the business of the Air Force and that it had the right to supervise and control the duties of servicemen assigned to it.[62]

The court cited the *Brewer* case in support of its holding.

In **1955,** in *Daniels v. Chanute* ***Air*** *Force Base Exchange*,[63] this matter was again litigated, The plaintiff, a civilian employee of the Chanute Air Force Base Exchange, brought his action under the Federal Tort Claims Act to recover for personal injuries received in the course of employment as the result of negligence of the United States. The court dismissed the complaint as to the Exchange itself, on grounds not relevant to this article. As to the suit against the United States, the Government maintained that a post exchange was not an agency of the United States and the suit therefore should not come within the Federal Tort Claims Act. The Government relied upon two cases: *Faleni v. United States* and *Keane v. United States*.[64] The court cited the *Johnson* case as clearly showing that an exchange is an instrumentality of the United States and the United States is therefore subject to suit under the Federal Tort Claims Act. In support of this position the court cited several other cases which held that nonappropriated

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[61] Roger v. Elrod, **125** F. Supp. 62 (D.C. Alas. 1954).
[62] *Id.* at 65.
[63] 127 F. Supp. 920 (E.D. Ill. 1955).
[64] 272 F. *577* (4th Cir. **1921),** holding ***a*** conspiracy to defraud a post exchange not a conspiracy to defraud the United States.

fund activities were agencies of the federal government.[65] The court also took particular note of the fact that in the *Faleni* case the Government took exactly the opposite position — that the nonappropriated fund employee was an employee of an agency of the United States and could not recover for the negligence of a fellow employee. The court refused to accept the *Faleni* rationale, holding it clearly erroneous vis-a-vis the ***Johnson*** case. In rejecting the *Keane* case, cited as authority by the Government for its position, the court stated: "This case was decided prior to the Johnson case, and there is a strong dissenting opinion with which this court is in accord."[66]

In *Aubrey v. United States*,[67] the plaintiff was the assistant manager of the Officers' Open Mess at the Naval Gun Factory in Washington, D. C. The Mess was a nonappropriated fund activity, and Aubrey's salary as an employee of the Mess was paid from the proceeds of the sale of food and beverages. On the day in question the club's hall was being waxed by Navy enlisted men acting within the scope of their employement, when Aubrey, in the course of his duties as assistant manager, slipped on the newly-waxed floor, fell and broke his ankle. The Mess, as required by statute,[68] had provided workmen's compensation insurance and Aubrey had collected under it. He then sued under the Federal Tort Claims Act. His wife joined in the complaint as a plaintiff for loss of consortium. The interesting point in this case was the fact that the plaintiff and the Government stipulated that the plaintiff was not a government employee on the night of the accident. Although no explanation was provided as the basis for this stipulation, plaintiff used it in support of his contention that even though he had received compensation benefits, since he was not a government employee he was not barred from bringing suit under the Federal Tort Claims Act.

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[65] United States v. Query, 37 F. Supp. 972, *aff'd*, 121 F.2d 631 (4th Cir. 1941) (exchange was "federal instrumentality"); Borden v. United States, 116 F. Supp. 873, 126 Ct. Cl. 902 (1953) (Army Exchange Service was an agency of the U. S. and could not be sued on a contract of employment without its consent); and Edelstein v. South Post Officers' Club, 118 F. Supp. 40 (E.D. Va. 1951) (Army officers' club was an agency of the United States and could not be sued for breach of contract without its consent). It is noted that these cases involved contracts, which are not the subject of suit under the Federal Tort Claims Act.

[66] 127 F.Supp. at 924.

[67] 254 F.2d 768 (D.C. Cir. 1958).

[68] 5 U.S.C. § 8171 (Supp. IV, 1969), ***formerly*** 66 Stat. 138 (1952), 5 U.S.C. § 140k–1(a) (1964).

The court rejected this argument, holding that the compensation provided by the Officers' Mess was Aubrey's exclusive remedy :

> By enacting a statutory system of remedies for injuries in the course of employment by these government instrumentalities, Congress has limited the remedy available against the United States by civilian employees of such instrumentalities to workmen's compensation, the cost of which is borne by the self-supporting instrumentalities themselves.[69]

The court indicated there was little doubt that nonappropriated funds are instrumentalities of the Government, citing the *Johnson* case. Based on the close relationship between such nonappropriated fund instrumentalities as officers' open messes and the military establishment of which they form an arm, continued the court, Congress was justified in its legislative control over such instrumentalities. By such legislation Congress had directly regulated the conduct of these activities to the extent of requiring them to provide workmen's compensation protection for their civilian employees.

Accordingly, the court dismissed Aubrey's complaint. Since **Aubrey** was an employee of an agency which was required by statute to provide compensation benefits, and he had recovered thereunder, he had no other remedy. However, because the parties stipulated that Aubrey was not an employee of the Government, a cause of action was created for the wife's damages for loss of consortium.[70] Immediately thereafter legislation closed this loop-hole by providing that the liability of the United States or of a nonappropriated fund regarding the disability or death of an employee would be exclusive, where insurance protection is provided, as to the employee or any other person entitled to recover.?'

The final two cases to be considered in this area are *United States v. Forfari*[72] and *Holcombe v. United States*.[73] In the *Forfari* case, the plaintiff was a civilian chef in the Commissioned Officers' Mess at Mare Island Naval Shipyard, Vallejo, California. While so employed, he slipped and fell down a flight of stairs which led from the kitchen to the employees' washroom. The lower court found

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69 **254** F.2d at 770.

70 The husband's recovery under District of Columbia Workmen's Compensation Act was exclusive and bars claim by wife against that employer. 33 U.S.C. § 905 (196.1). But since wife is suing a third party, the Government, she is not barred and is a proper party-plaintiff, since Aubrey was not employed by the Government.

71 5 U.S.C. § 150k–1(c) (1964), *as amended*, 5 U.S.C. § 8173 (Supp. IV, 1969).

72 268 F.2d 29 (9th Cir. 1959), ***cert. denied,*** 361 U.S. 902 (1959).

73 176 F. Supp. 297 (E.D. Va. 1959), *aff'd*, 277 F.2d 143 (4th Cir. 1960).

that the injuries were proximately caused by the negligence of the United States and entered judgment for the plaintiff. The Government appealed, asserting that Forfari was an employee of the United States and was therefore barred frcm bringing an action under the Federal Tort Claims Act, and that as he was an employee of a nonappropriated fund instrumentality of the United States, he was precluded from bringing this action because of his recovery under the California Workmen's Compensation Act. The plaintiff countered these arguments on the ground that even though a nonappropriated fund is a federal instrumentality, as decided in the *Johnson* case, this does not make him a federal employee, citing the ***Faleni*** case.[74]

The court rejected this assertion, stating that the rationale of *Faleni* appeared to be wholly inconsistent with the reasoning and decision in *Johnson*.[75] The court was quite emphatic in its decision that Forfari was at the time of his injury a federal employee. He was precluded from bringing an action under the Federal Tort Claims Act since a system of simple, certain, and uniform compensation for injury or death was provided for through workmen's compensation.[76] This case can therefore be cited as authority for the proposition that nonapprcpriated fund employees will be recognized as federal employees, but that they are not proper plaintiffs under the Federal Tort Claims Act when they are themselves injured incident to their employment, since they are covered by workmen's compensation.

Whether their torts generate government liability still remained as an issue. In the ***Holcombe*** case, the plaintiff, a civilian employee manager of an officers' open mess, instructed another employee to proceed in the plaintiff's personal automobile to the post commissary to pick up some salad dressing. His car was destroyed in an accident. In the district court, the complaint was dismissed, holding that the employee, Miss Roller, was not within the scope of her employment. On appeal the judgment was vacated, as under Maryland law she was acting within the scope of her employment. The case was remanded to the district court, which awarded for the plaintiff **$1,325,** the value of his automobile and its destroyed contents.

The Government appealed and stood on the sole contention that the United States had not waived immunity for torts of civilian

[74] *Supra* note **55** and accompanying text.
[75] *Supra* note **52** and accompanying text.
[76] In so holding the court cited Aubrey v. United States, **254** F.2d 768 (D.C. Cir. 1958).

employees of "nonappropriated instrumentalities," as such instrumentalities are not "federal agencies" within the meaning of the Federal Tort Claims Act and the fund is not supported by appropriations out of the national treasury, but is financed by its own operations. The court rejected this argument and in affirming for the plaintiff relied on the *Johnson* case. The court stated :

> An Officers' Mess being an integral part of the military establishment, and an agency of the Government according to the usual meaning of the word, and having been held to be such in other contexts, it is difficult to escape the conclusion that the Federal Tort Claims Act encompasses it, The policy of the Act is to fix Government liability under the doctrine of respondeat superior just as if the United States were a private employer. In the absence of any restriction in the statute, a court cannot read into it the exception contended for.[77]

Thus nonappropriated fund employees can subject the United States Government to liability for negligent or wrongful acts cammitted in the scope of their employment, as such employees are considered "federal employees."

As can be seen from the examined cases, the Government asserted every possible defense to avoid subjecting itself to responsibility for injuries to or caused by nonappropriated fund employees. For the most part, the courts refused to adopt any of them. The continuance of this dispute over the status of nonappropriated funds for over ten years, as of the date of the *Holcombe* decision, prompted the Assistant Attorney General of the United States to write a letter, on **14** July 1960, to The Judge Advocate General of the Army.[78] The letter stated that through the years the three military departments have urged the Department of Justice to dispute liability in cases relating to nonappropriated fund activities on the ground that nonappropriated fund employees were not "employees of the Government" and that a nonappropriated fund instrumentality was not a "federal agency'' within the definition of these terms in the Federal Tort Claims Act. The Justice Department had consistently advanced the views of the military departments before the courts, but without success. The *Holcombe* case, which was the first appellate court decision on point, as well as the other cases which rejected the Justice Department's contentions, demonstrated the futility of pressing the point any further. Based on full consideration of the matter, continued the letter, the Solici-

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77 277 F.2d at 146.

78 This letter is filed in the Tort Claims Branch, Litigation Division, Office of The Judge Advocate General.

tor General had decided not to seek Supreme Court review of the *Holcombe* decision, and the Justice Department would no longer contend that nonappropriated fund instrumentalities are not federal agencies within the meaning of the Federal Tort Claims Act.

Hence the United States is liable under the Federal Tort Claims Act for the negligent or wrongful conduct of nonappropriated fund employees, whether paid from appropriated or nonappropriated funds,[79] assuming all other elements of liability under the Federal Tort Claims Act are present. Later court decisions have consistently followed this view.[80]

The administrative regulations of the Department of the Army have likewise been amended to accept this conclusion. For example, until 1964, Army regulations provided :

> The United States is not responsible for contract, tort and compensation claims against the Army and Air Force Exchange Systems and has not waived its immunity from suit on those claims. Any claim arising out of the activities of A&AFES shall be payable solely from nonappropriated funds.[81]

In 1964, this regulation was amended to conform to the case law interpretation of the relationship between nonappropriated funds as "federal agencies" and the Federal Tort Claims Act. The regulation now reads as follows :

> The AAFES is an instrumentality of the United States. . . . Suits by or against the AXFES or individual exchanges are in legal effect suits by or against the United States. However claims and judg-

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[79] The courts make no distinction in regard to the class of tort-feasor, although present Army regulations do. For example, AR 27–20, paras. 2–26, 27, *supra* note 38, provide that claims resulting from acts or omissions of military personnel while performing assigned military duties, and acts or omissions of civilian employees paid from appropriated funds, will be paid from appropriated funds. Claims resulting from acts or omissions of civilian employees of nonappropriated funds will be paid from nonappropriated funds. The Federal Tort Claims Act offers no basis for this distinction, and the courts have likewise failed to make any differentiation. Accordingly, although a distinction is present as to the accounting principles by which a claim may be paid because of the class of tortfeasor, a suit may be instituted under the Federal Tort Claims Act regardless of the type of nonappropriated fund employee.

[80] Tempest v. United States, 277 F. Supp. 59 (E.D. Va. 1967) (vessel owned and operated for recreational purposes by NAF is public vessel and subjects United States to liability for negligent operation) ; Fraley v. United States, 232 F. Supp. 491 (D.C. Mass. 1964) (ownership of vehicle by NAF is ownership by Government) ; Fournier v. United States, 220 F. Supp. 752 (S.D Miss. 93) (United States liable for negligence of officers' club in serving drinks to intoxicated person who then fell down stairs).

[81] Army Reg. No. 60–10, **Air** Force Reg. No. 147–7A, para. 1(7) (Change No. 2, 2 **Aug.** 1960).

ments, including compromise settlements of court actions, against the United States arising out of exchange activities are payable solely out of **AAFES** funds.[82]

The effect of this change is to clarify the fact that the Exchange Service is liable for the tcrts of its employees, but that the Exchange itself may not be sued in its own name.[83]

2. Employee of a Federal Agency.

Whether the tortfeasor is an employee of a federal agency is of crucial significance in all cases under the Federal Tort Claims Act, for the liability assumed by the United States under the Act is in the nature of respondeat superior. If there is no master-servant relationship between the United States and the tortfeasor, there can be no liability. The Federal Tort Claims Act provides that the term "employees of the Government" *includes* "officers or employees of any federal agency," "members of the military or naval forces of the United States," and "persons acting on behalf of any federal agency in an official capacity."[84] It is apparent that the Act's definition of "employee" contemplates a much broader category than those who comprise our federal civil service or members of the military. The use of the word "includes" suggests that persons who do not clearly fall within one of the three categories menioned in the definition may nevertheless be covered by the term. In this connection, the primary consideration would seem to be the extent of control, or the right of control, which the Government exercises over the tortfeasor in the performance of the activities giving rise to the claim or suit.

Thus, the employees of a private firm under contract with the United States to act as a managing agent of a public housing project may be held to be employees of the Government for liability purposes under the Federal Tort Claims Act,[85] although such employees are not federal civil service employees in the popular conception of that phrase. An extension of this interpretation is possible from cases such as *Messig V. United States.*[86] There a bystander who was directed by government fire fighters to assist in

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[82] Army Reg. No. 60–10, Air Force Reg. No. **147–7,** para. *7* (25 Mar. 1969).

[83] Goddard v. District of Columbia Redevelopment Land Agency, 287 F.2d 343 (D.C. Cir. 1961), ***cert.*** *denied,* 366 U.S. 910 (1961).

[84] 28 U.S.C. § 2671 (1964).

[85] State of Maryland *ex rel.* Pamphrey v. Manor Real Estate & Trust Co., 176 F.2d [redacted] (4th Cir. 1949), and Shetter v. Housing Authority of the City of Erie, 132 F. Supp. 1-19 (W.D. Pa. **1955).**

[86] 129 F. Supp. 571 (D.C. Minn. **1955).** ***See*** *also* L. JAYSON, HANDLING FEDERAL **TORT** CLAIMS § 203.01 (1967).

fighting the fire did not thereby become a federal employee so as to become eligible for compensation under the Federal Employees Compensation Act for his own injuries. It is likely, however, that if such a bystander, while assisting government employees. were negligently to injure a third person, the courts would hold the United States liable.

In short, the presence of those characteristics which traditionally determine the existence of the common-law relationship of master and servant will generally determine whether the wrongdoer is an employee of a federal agency for whose torts the United States must respond. Nevertheless, the employment relationship is only one of several elements which must be established by the claimant in order to recover under the Federal Tort Claims Act. Scope of employment must also be shown.

3. *Scope of Employment.*

It is not intended to provide a comprehensive study of all the factors which are entailed in determining whether a nonappropriated fund empioyee was acting within the scope of his employment at the time of a tortious incident, but to point out the basic considerations relevant to such determination.[87] The Federal Tort Claims Act provides that the Government is liable for negligence when the employee of the Government is acting within the scope of his office or employment.[88]

Acting within scope of office or employment, in the case of members of the military or naval forces of the United States, means acting in line of duty.[89] It is now firmly established that insofar as the Federal Tort Claims Act is concerned, the phrase "line of duty," when applied to military personnel, has no broader significance than "scope of employment" as used in master and servant cases.[90] Liability for the wrongful acts of servicemen, in other words, is determined by reference to the liability of a private employer under the doctrine of respondeat superior in like circumstances.

Scope of employment is essentially a factual issue involving a great many elements. Thus, in determining whether an act was

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[87] For an analysis of "scope of employment," *see* Seibert, *When is Operation of Motor Vehicles Activity "Within Scope of Employment" Under the Federal Tort Claims Act?,* 20 FED. B. J. 416 (1960).

[88] 28 U.S.C. § 1346(b) (1964).

[89] 28 U.S.C. § 2671 (1964).

[90] Williams v. United States, 350 U.S. 857 (1955); Bissell v. McElligott, 369 F.2d 115 (8th Cir. 1966); Cobb v. Kunn, 367 F.2d 132 (7th Cir. 1966); Farmer v. United States, 261 F. Supp. 750 (S.D. Iowa 1966).

within the scope of employment, the following are among the factors that may be relevant: the time, place and purpose of the act, and its similarity to what is authorized; whether it is one commonly done by such servants; the extent of departure fram normal methods; the previous relations between the parties; whether the master had reason to expect that such an act would be done; and other considerations dependent on the particular circumstances, the relationship and the incident. "In general, the servant's conduct is within the scope of his employment if it is of the kind which he is authorized to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a desire to serve the master."[91] For example, servicemen assigned to full-time duty at a post exchange are within their scope of employment as members of the armed forces while perfarming such duties,"[92] and federal employees charged with the maintenance of a swimming pool located at a naval station for the benefit of servicemen and their families and guests were acting within the scope of their employment when they failed to warn of a dangerous condition in the pool.[93]

It is therefore important to realize that the question of federal employment is entirely different from that of scope of employment. An individual can be a federal employee because he is employed by a ncnappropriated fund, but his tortious acts will not subject the United States to liability under the Federal Tort Claims Act if he has acted outside the scope of his authorized duties."[94] Likewise, an individual could subject the Government to liability under the Federal Tort Claims Act even though he was not a regularly salaried employee of the Government or one of its instrumentalities. This result would follow if he were directed to perform a function which would ordinarily be perfcrmed by an employee, or if the scope of the activity performed was authorized and of such benefit to tne Government as to be considered as having been performed by an employee. Under this framework, there would appear to be little doubt that the actions of members of a board of governors of an officers' open mess, or individuals whom they designate to perform certain tasks, would subject the Government to liability under the Federal Tort Claims Act should such performance be

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91 W. PROSSER, TORTS 352 (2d ed. 1958). *See also* **RESTATEMEKT** OF AGENCY §§ 228, 229 (1958).

92 Roper v. Eliod, 125 F. Supp. 62 (D.C. Alas. 1954).

93 Brown v. United States, 99 F. Supp. 685 (S.DW.Va. 1951).

94 Further, the Tort Claims Act retains immunity from suit for certain intentional toi ts iegardless of the tortfeasor's scope of employment (28 U.S.C. § 2680(h) (1964)).

negligent, even though the tortfeasor would not be an employee within the specified terms of the Act.

4. *Torts of Members and Guests.*

Although case law interpreting the relevant provisions of the Federal Tort Claims Act has determined that nonappropriated funds are "federal agencies" and employees of nonappropriated finds are "government employees" whether paid from appropriated or nonappropriated funds, the courts have not gone so far as to include members and guests of such funds as subjecting the Government to liability for their actions even though directly connected with military activities. Only two cases are directly in point.

The first case is *United States v. Hainline.*[95] The plaintiff sued under the Federal Tort Claims Act when her car was struck by an airplane which was approaching an airfield to land. The plane was being piloted by an Air Force officer who was a member of the Aero Club at McConnell Air Force Base, Kansas (a nonappropriated fund). The trial court concluded :

> A "member" [of the Aero Club] is to be considered as an "employee" within the meaning of the Federal Tort Claims Act when such member is engaged in the activities and pursuits provided for in the constitution of the club, and that when **a** member of the club is engaged in activities and pursuits provided **for** in the constitution of the club, he is acting within the scope of his employment, thus subjecting the United States to liability under the Act.[96]

Judgment was thereafter rendered for the plaintiff.

In reversing, the appellate court pointed out that the pilot rented the plane from the club; he was off duty and could utilize this time as he saw fit; and that he was not accountable to the Air Force or anyone else as to the flying of the plane. The court found no basis to establish an employer-employee relationship, as the Government had no right to direct and control the pilot's activities and derived no benefit from his activities. Therefore, he was not within the scope of his employment as an Air Force officer. The trial court had erroneously relied upon an Air Force regulation which stated that for purposes of the regulation "employees" is interpreted to include members or authorized "participants" or "users" of nonappropriated fund airplanes. The appellate court stated that

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[95] 315 F.2d 163 (10th Cir. **1963).**
[96] ***Id.*** at 154.

this regulation deals only with the administrative investigation, settlement and payment of claims, and does not purport to, nor could it enlarge the liability of the United States under the Federal Tort Claims Act, or create any new or different definition of the word "employee" as used in the Act. The court concluded: "ET]here is no federal rule to the effect that a club member is an 'employee' under the Federal Tort Claims Act."[97]

In *Brucker v. United States*,[98] the plaintiff was a member of the Castle Air Force Base Aero Club (a nonappropriated fund) and was injured in a plane which was being piloted by a lieutenant, another club member. The plaintiff alleged that the lieutenant should be considered a servant or employee of the Club, since he was a "check pilot" and "flight instructor," that regulations required that members complete a "check flight" with a "check pilot," and that the plaintiff had paid the normal three dollars an hour for such services. However, the facts disclosed that no contractual arrangement existed between the Club and the lieutenant for such services. He was not paid by the Club, and the Club neither possessed nor exercised any power to control the conduct of the flights. The court held that the pilot had not been acting as an agent of the Club and hence not as an agent of the Government. The court also stated: "[L]iability could not be imposed upon the United States for acts of persons not its servants simply because the government encouraged the activity and derived benefit from it."[99]

Although no other cases have reached the courts on this matter, the cases cited are considered sufficiently recent and succinct to merit the conclusion that the actions of a member or quest of a nonappropriated fund cannot subject the United States to liability under the Federal Tort Claims Act. However, classification as a member of a nonappropriated fund, in itself, will not preclude a suit under the Federal Tort Claims Act if the member's actions were directed and controlled in such a manner as to be considered the actions of an employee. For instance, the actions of the president of a flying club who directs a member to move an airplane from one end of a sunway to the hangar, a job which normally is performed by an employee, could subject the Government to liability when another plane is negligently struck during the course of that movement. The basis for such liability is that the member is

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97 *Id.* at 156.
98 335 F.2d 427 (9th Cir., *cert. denied,* 381 U.S. 937 (1965).
99 *Id.* at 430.

acting as an employee of the Government, at the direction of a supervisor of a federal agency and for the sole benefit of the Club, a government instrumentality.

However, even if a member of a nonappropriated fund is not acting in the capacity of an employee so as to subject the United States to liability under the Federal Tort Claims Act, the injured party might still recover under military claims regulations. This matter will be discussed in the next section.

B. *CLAIMS AGAINST NONAPPROPRIATED FUNDS*

Tort liability of nonappropriated funds is determined generally by the same substantive rules and procedures as applicable to claims and suits under the Federal Tort Claims Act.[100] Hence, reference must be made to the provisions of the Federal Tort Claims Act,[101] and the implementing regulations,[102] to determine if liability exists.

Prior to 1958, nonappropriated funds were required to procure public liability insurance adequate to indemnify nonappropriated fund assets and the United States against tort claims for personal injury, death, or property damages arising from acts or omissions of employees of such nonappropriated funds.[103] In 1958, the requirement that nonappropriated fund activities maintain liability insurance was terminated,[104] and provision was made for the payment of tort claims arising out of their activities frcm nonappropriated funds themselves,[105] except as provided otherwise in Army regulations.[106]

Although the aforementioned regulations referred only to liability for acts or omissions of employees of nonappropriated funds, *Department of the Army Circular 230–10*[107] explained the scope of the self-insurance provisions of AR 230–8 in these words:

> While it is the policy of the Department of the Army to provide adequate liability protection for all nonappropriated fund employees

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100 AR 230–8, para. 14*a*.

101 28 U.S.C. §§ 1346, 2671–2680 (1964).

102 Army Reg. No. 27–22 (18 Jan. 1967), Claims Based on Negligence of Military Personnel or Civilian Employees Under the Federal Tort Claims Act.

103 AR 230–8, para. 14.

104 Dep't of Army Circular No. 230–7 (26 Aug. 1958).

105 AR 230–8, para. 13.

106 Army Reg. No. 25–20 (1 Oct. 1959) (superseded 20 May 1966), was amended to provide that claims arising from acts or omissions of military personnel in the performance of assigned military duties for the fund would be paid from appropriated funds.

107 22 Jan. 1959 (expired).

> through means of self-insurance, it is also recognized that the same measure of protection must be provided to authorized members of those nonappropriated fund activities whose operations are conducted on a membership basis. The provisions of DA Circular 230–7 and Section IV, AR 230–8 are, therefore, interpreted as being equally applicable to both employees and authorized members of nonappropriated activities.[108]

Hence, the self-insurance plan was intended to cover members of nonappropriated funds as well as its employees. This interpretation can be reached through an extension of the definition of the coverage provided in the basic Army regulation. AR 230–8 provides that it is the policy of Department of the Army to settle all tort claims arising "out of the operations of nonappropriated fund activities."[109] By this language, the scope of potential tort liability is not defined exclusively by whether or not the tortfeasor is an "employee," a "member" **or** otherwise related to a nonappropriated fund activity, but is determined in regard to whether or not the tortious act or omission is incident to the operation of the activity. Accordingly, members and guests can be furnished the same protection under administrative procedures as "employees."

Furthermore, this interpretation is not changed by the court's decision in *United States v. Hainline.*[110] The *Hainline* case was decided under the Federal Tort Claims Act and specifically ruled that members of nonappropriated funds cannot be considered "employees" for Tort Claims Act purposes, even though military regulations define them as such. However, there is no requirement that that scope of the Government's liability under administrative procedures be coextensive with that under the Federal Tort Claims Act. Accordingly, the interpretation provided by ***DA Circular 230–10*** of the word "employee," as used in AR 230–8, is not changed by the court's interpretation of that term in *Hainline.*

In 1969, AR 27–20[111] specifically provided that the scope of administrative settlement in regard to torts of nonappropriated funds goes beyond the coverage of the Federal Tort Claims Act. The principal area of expansion is that the nonappropriated fund *will* be liable administratively for the torts of members and guests of such fund activities,"[112] as well as for the torts of its employees. The obvious purpose of this expanded protection was to encourage

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[108] *Id.*
[109] AR 230–8, para. 13.
[110] 315 F.2d 153 (10th Cir. **1963).** ***See*** *also* ch. IV ***infra.***
[111] AR 230–8, para. **14;** AR 27–20, ch. 12.
[112] AR 27–20, para. 12–2.

military personnel and civilian employees and dependents to make full use of such facilities without fear of subjecting themselves to personal liability in the event they injure an innocent third party.

The foregoing discussion of the basis for permitting compensation to claimants who were injured by the negligent acts of members and guests of nonappropriated funds only afforded protection to the tortfeasor when the injured party filed an administrative claim. Members were not furnished the same protection in those cases where the injured party elected to file suit against the member individually in a civilian court, because there was no authorization for using nonappropriated funds for the defense of such suits or for the payment of compromises or judgments arising from such suits. To remedy this situation, AR 230–8 was amended in 1963 to provide as follows:

> b. If a member, employee, or other authorized user of nonappropriated fund property is sued individually, as the result of an alleged act or omission committed by him while he was using nonappropriated fund property, and it appears that the property was being used in the manner and for the purpose authorized, nonappropriated funds may be used to pay expenses incident to the suit, judgments, and compromise settlements.[113]

The intent of this change was to provide the same protection for members and guests of nonappropriated funds when the injured party elects to bring suit in a civilian court as they have when the party files an administrative claim. However, only "employees" have full judicial protection under most circumstances, since if a suit is filed against a military member or civilian employee while operating a vehicle while in the scope of his duty, he may have the case removed to a federal court and defended by the Department of Justice,[114] or if a plaintiff desires to joint the Government as a party defendant, the Department of Justice will defend the suit and the employee-tortfeasor cannot later be sued individually. On the other hand, if a member or guest of a nonappropriated fund is sued, not having any of these protections, and a judgment is rendered against him, it is possible that he alone would bear the financial risk where it was determined not to afford him the relief authorized under AR 230–8 of paying the judgment."'

Based upon this latter possibility, individual members of nonap-

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[113] AR 230–8, para. 14.3*b* (Change No. 7, 14 Jan. 1963).

[114] 28 U.S.C. § 2679 (1964) (Government Drivers' Act).

[115] The Judge Advocate General or his designee certifies when payment of attorneys fees, litigation expenses, compromises, and judgments is proper. AR 230–8, para. 14.3*b* **(4)** (Change No. 7, **14** Jan. 1963).

propriated funds would be wise to consider the advisability of covering their personal liability with private insurance.

C. INDIVIDUAL TORT LIABILITY

Since the dawn of our Republic the courts have consistently held that government employment is no cloak of immunity from suit.[116] With the passage of the Federal Tort Claims Act in 1946, a great deal of the Government's sovereign immunity from civil suit was abandoned. However, this waiver of immunity did not act to bar suits against individual employees for their own acts of negligence, even though committed in the course of their employment.

In general, an injured plaintiff may proceed against the individual, the United States, or both at the same time,[117] although he would be entitled to but one satisfaction.[118] The Federal Tort Claims Act did, however, limit the scope of certain actions and remedies. In 1961, Congress provided that for personal injury or death resulting from the operation by any employee of the Government of *any motor vehicle* while acting within the scope of employment, the exclusive remedy is against the Government, and the individual employee or his estate may not be sued. Further, when an injured plaintiff sues a government employee in a state court, and the Attorney General certifies that the employee was acting within the scope of his employment at the time of the incident, the action will be removed to the Federal District Court and deemed an action against the United States under the Federal Tort Claims Act.[119] However, this judicial protection for employees is limited to tort claims arising out of the operation of motor vehicles.[120]

Congress also specifically provided that a judgment against the Government constitutes a complete bar to any later action against the employee of the Government.[121] When the judgment has been paid by the Government, no recourse is permitted against the employee.[122] Further, Congress provided that the acceptance by a

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[116] Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851); Bates v. Clark. 95 U.S. 204 (1877): 6 C.J.S. *Army & Navy* § 37 (1955); 36 AM. JUR. *Military Law* § 116 (1941); L. WRIGHT, THE FEDERAL TORT CLAIMS ACT 77 (1957).

[117] Munson v. United States, 380 F.2d 976 (6th Cir. 1967).

[118] Moon v. Price, 213 F.2d 794 (5th Cir. 1954).

[119] 28 U.S.C. § 2679 (1964) (Government Drivers' Act).

[120] Gurzo v. Gregory Park, Inc., 99 N.J. Super. 355 (1968), 240 A.2d 25: Ray v. Harris, 275 F. Supp. 110 (D.C. Md. 1957); Whealton v. United States, 271 F. Supp. 770 (D.C. Va. 1967).

[121] 28 U.S.C. § 2676 (1964); Satterwhite v. Bocelato, 130 F. Supp. 825 (E.D.N.C. 1965).

[122] United States v. Gilman, 347 U.S. 507 (1954); Adams v. Jackel, 220 F. Supp. 764 (D.C.N.Y. 1963).

claimant of any award, compromise, or settlement of an administrative claim is final and conclusive on such claimant and is a complete release of any claim against the United States and the employee.[123]

As can be visualized, in spite of these limitations, there still exists numerous areas where individual tort liability can result. For instance, when an employee is sued individually in a state court and the action is then removed to a federal court upon certification by the United States Attorney General that the employee was operating a vehicle in the scope of his employment, and upon hearing the facts it is determined that the United States could not be liable under the Federal Tort Claims Act as the employee was not within the scope of his employment as that term is defined under the controlling state law, the case would be remanded to the state court for trial against the individual.[124] On the other hand, should the United States have the case removed to a federal court and defend the action solely on the ground that the action is barred against the United States as it was not filed within the two-year statute of limitations,[125] the issue of noli-scope of employment not being raised, and the motion is granted, no action can then be initiated against the individual employee in the state courts, even though the state statute of limitations has not expired.[126] The reasoning behind this result is that the remedy provided in title **28,** United States Code, section **2679** is exclusive as against the United States; that the United States has admitted responsibility for the actions of the driver-employee by certifying that he was in scope of employment; and since the action was not brought within the two-year statute of limitations, the Government is entitled to dismissal of the complaint.

Another interesting variation of this remedy is that if the action were initially brought against the United States in **a** federal district court under section 1346(b) of title 28, United States Code,[127] instead of against the employee in a state court, and the court

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[123] **28** U.S.C. § 2672 (1964).

[124] 28 U.S.C. § 2679(d) (1964). Bissell v. McElligott, 248 F. Supp. 219 (W.D. Mo. 1966); Tavolieri v. Allain, 222 F. Supp. 756 (D.C. Mass. 1963).

[125] 28 U.S.C. § 2401 (1964).

[126] Reynaud v. United States, 259 F. Supp. 945 **(D.C.** Mo. 1966); Hoch v. Carter, **242** F. Supp. 863 (D.C.N.Y. 1965); Fancher **v.** Baker, **240** Ark. 288, 399 S.W.2d 280 (1966), with a strong dissent that court should have heard issue of scope of employment as statute of limitations should not apply if the employee was outside scope of his employment.

[127] *Supra* note 43 and accompanying text.

renders a judgment in favor of the defendant-United States because the employee was found not to have been driving the vehicle in scope of employment,[128] such judgment would act as a bar to any subsequent action against the employee individually, as he would be protected by section 2676 of title 28, United States Code.[129] For this reason, it would appear better to join the employee or officer as a party defendant, rather than to find, after suit against the United States has been dismissed, that it is too late to sue him. Such was the result in *United States* v. *Eleazer*,[130] where the plaintiff won a $20,000 verdict against the United States in the trial court, but was reversed on appeal because it was not proved that the officer was acting within the course of his employment at the time of the injury. Judgment was for the defendant-United States, and no action could thereafter be brought against the employee individually.

In sum, an individual can be personally sued for his own acts of negligence when an injured plaintiff decides not to file a claim or sue the Government under the Federal Tort Claims Act. If such individual suit is initiated, the officer-employee is responsible for defending himself whether the employee was acting within or outside the scope of his employment; the only exception is under the Government Drivers' Act, where the Government is required to defend and pay the judgment if the employee was driving a vehicle in the scope of his employment. Although an officer sued individually in a state court for a negligent act when he was acting under "color of office" may have the action removed to a federal court,[131] this is only for the convenience of military personnel, as they are generally unfamiliar with state procedures, and there is no authority or reason for the Government to defend the suit or pay any judgment rendered against the officer.

However, if a civilian employee or military member is sued individually in a state court and it is found tnat he was acting within the scope of his office or employment, and the acts are considered as within his discretionary powers or are ministerial in nature, the

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[128] Sievers v. United States, 194 F. Supp. 608 (D.C. Ore. 1961), (vehicle accident caused by airman driving to next PCS).

[129] 28 U.S.C. § 2676 (1964), provides: "The judgment in an action under 1346(*b*) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

[130] 177 F.2d 914 (4th Cir. 1949).

[131] 28 U.S.C. § 1442(a) (1964).

courts have adopted a doctrine of immunity from liability.[132] The scope of this doctrine of protection for government employees is far too broad to be discussed any further herein, but it is mentioned for purposes of continuity and completeness of discussion. It should be mentioned that this doctrine would likewise be available as a defense by employees of nonappropriated funds who were acting within their scope of employment.

IV. LIABILITY OF PRIVATE ASSOCIATIONS

To return to the example incident cited in the introduction, it should be assumed for purposes of this chapter that the golf course was being utilized by an authorized private association, such as the wives' club, and that the tortfeasor was an employee, member or invited guest of the association.

As will be recalled from the explanation and discussion of the various types of morale, recreation and welfare activities, private associations are not subject to nonappropriated fund regulations, and in general are authorized to function as they desire, so long as the post commander approves of their general operating procedures and they refrain from violating other prescribed post regulations and applicable civil and criminal laws. However, command approval does not in any manner indicate approval of a particular action or function so as to subject the United States to liability under the Federal Tort Claims Act.

Private associations, their employees, members and guests subject themselves to personal liability for negligence in the same manner as any other private group or individual. The fact that they operate on federal reservations with the approval of the commander does not transform these associations into government instrumentalities. Accordingly, suit can be instituted against the private association in its own name,[133] or against the individual tortfeasor. However, a claim cannot be submitted through military channels against the association or any individual employee, member, or guest thereof.[134]

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[132] Barr v. Matteo, 360 U.S. 564 (1959); Garner v. Rathburn, 346 F.2d 55 (10th Cir. 1965); Bailey v. Van Buskirk, 345 F.2d 928 (9th Cir. 1965); Eggenberger v. Jurek, 253 F. Supp. 630 (D. Minn. 1966). *See* McKay, *The Serviceman and the Law: Personal Liability for Acts and Omissions While Acting in Performance* of *Official Duties,* unpublished thesis presented to The Judge Advocate General's School (1964).

[133] United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884 (5th Cir. 1966).

[134] JAGA 1960/4870, 18 Oct. 1960, *as digested in* 57 JALS 15 (claims against private associations cannot be paid from either appropriated or nonappropriated funds).

The essential problem is to be able to identify the activity as either a nonappropriated fund or a private association, since ultimate responsibility depends upon this very distinction. The leading case in this area is *Scott v. United States*,[135] which arose because of this very problem of mis-identification. In *Scott*, the Fort Benning Hunt Club was an association composed of military personnel and their families who owned horses and were interested in the equestrian art and the activities associated therewith. The post commander had approved the existence of the club and allowed it to use some land in a remote area of the Fort Benning military reservation. The dependent wife and daughter of a member of the Club were injured when a hitching post which had been erected and maintained by the club fell on the plaintiffs. The plaintiffs alleged that the Club was a nonappropriated fund activity, an instrumentality of the Government, and therefore the United States Government was liable for the torts of the activity and its employees. The plaintiffs cited *United States v. Hainline*[136] (involving an Aero Club which was held to be a nonappropriated fund), to support their position.

The court distinguished the *Hainline* case as being one where military regulations specifically authorized such activities to operate as nonappropriated funds, whereas in this case the Club began its operation as a private association, and there was no directive of any nature issued which changed that status. Since no direct supervision or control over the Club was exercised by the Government, no liability could be assumed for acts of negligence of the Club or any of its members. The Club was not a nonappropriated fund and therefore not a federal agency.

In affirming the judgment in favor of the Government, the appellate court pointed out that although the Hunt Club was located on the Fort Benning military reservation, its membership consisted primarily of military personnel and their dependents, and permission to establish the Club had been granted by Fort Benning's Commanding General, the Club was a self-supporting organization receiving no appropriations from the United States Treasury, it maintained a small civilian staff paid entirely out of funds collected from the members, its normal activities were overseen by a board of governors elected from its membership, and its constitution provided that it was a private association which was not operating as an instrumentality of the federal government.

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135 226 F. Supp. 864 (M.D. Ga. 1963), *aff'd* 337 F.2d 471 (5th Cir. 1964), *cert. denied*, 380 U.S. 933 (1965).

136 315 F.2d 153 (10th Cir. 1963).

Analysis of the court's reasoning reveals that only the last statement actually differentiates a private association from a nonappropriated fund — that its constituion provided it was a private association. The other points of apparent distinction can be attributed to both types of activities : both are self-supporting; both maintain civilian staffs paid from fund monies; both are overseen by a board of governors; and neither are directly supported by appropriated funds. Accordingly, the only valid distinction between a nonappropriated fund and a private association is that the post commander has authorized the activity to operate in one form or another. An examination of the constitution or by-laws of the organization will normally immediately identify the status of the activity.

There do not appear to be any other cases with fact situations similar to the *Scott* case. Neither could any cases be found where a military private association had been sued by an injured individual.[137] However, there are many cases where non-military private associations, including women's clubs, have been sued.[138]

It is noteworthy that in spite of the numerous private associations in existence and the wide scope of their authorized activities, to the writer's knowledge virtually none carry liability insurance. This appears to be a gross error on the part of the association and its members, for neither have any protection.

V. CONCLUSIONS

The preceding chapters of this article discussed the legal aspects of tort liability of certain morale, recreation and welfare activities. As will be recalled, the initial step is to identify and classify the organization as one of the four types of morale, recreation or welfare activities ; a statutory organization, special services, a nonappropriated fund, or a private association. Thereafter, an in-depth analysis was presented regarding two of these activities : nonappropriated funds and private associations. The thrust of this analysis was to determine under what circumstances the United

[137] *But cf.* United States **v. Fort** Benning Rifle and Pistol Club, 387 F.2d 884 (5th Cir. 1966), where a private association **was** sued by the Government to recover for medicare.

[138] Gaddis v. Ladies Literary Club, **4** Utah 2d 121, 288 P.2d 785 (1955); Fishman v. Brooklyn Jewish Center, 234 App. Div. 319, 255 N.Y.S. 124 (1932), *appeal dismissed,* 263 N.Y. 685, 189 N.E. 757 (1932) ; Kitchen **v.** Women's Liability Club, 267 Mass. 229, 166 N.E. 554 (1929). *See generally,* Annot., *Liability of Social Club for Injury to or Death of Nonmember,* 15 ALR 3D 1013 (1967); Annot., *Recovery by Member from Unincorporated Association for Injuries Inflicted by Tort of Fellow Member,* **14** ARL 2D **473 (1950).**

States Government, an activity, or the individual tortfeasor can be held pecuniarily responsible for tortious conduct.

Nonappropriated funds comprise the largest group of morale, recreation and welfare activities, and, perhaps because of this fact, are the least understood and the most difficult to handle regarding tort liability. There is little doubt that the present state of the law is that Federal Tort Claims Act liability does exist when a negligent act is committed by a nonappropriated fund employee acting in the scope of his employment, whether he is paid from appropriated or nonappropriated funds. This result is based on the courts' conclusions that nonappropriated funds are "federal agencies'' and that their employees are "government employees'' for purposes of the Federal Tort Claims Act. The only distinction is that the military departments, through their nonappropriated fund reserves, will reimburse the Government for any claims or judgments which result from an act of an employee paid from nonappropriated funds. Although this reimbursement is not required by law, it maintains the self-supporting aspect of nonappropriated funds.

Negligent acts of members and guests of nonappropriated funds do not subject the Government to suit under the Federal Tort Claims Act, as such individuals are not '(federalemployees" as that term is defined in the Act. However, claims and judgments can be paid for the torts of such individuals from the self-insurance reserves of such nonappropriated funds, because the military regulations have so authorized. This permits freer participation by all members and guests, be they military, civilian employees, or dependents, in the excellent and extensive programs which these organizations provide to the entire military community.

It was also learned that an individual tortfeasor, military and civilian, can be subjected to suit and personal liability for their negligent acts, except for certain statutory and judicial protections. In general, an individual can be held personally responsible for his own acts of negligence if he was an employee of the Government but was acting outside the scope of his employment, or if he was a member or guest of a nonappropriated fund and the fund or The Judge Advocate General declines to pay the claim or judgment.

To return once again to the incident related in the introduction, the facts as described are similar to those in *Gleason v. Hillcrest Golf Course.*[139] In that case, the plaintiff was injured when a golf ball driven from a course adjacent and parallel to the road hit the

[139] **148 Misc. 246,** *266* **N.Y.S. 886 (1933).**

windshield of the car in which the plaintiff was a passenger. The owner of the golf course and the player who struck the ball were found jointly and severally liable to the plaintiff on the theory that if there were a possibility of danger, and if the doing of a lawful act would naturally and probably result in harm, though unintended, there was an actionable wrong. This accident could have been prevented, in all likelihood, if a fence had been installed along the course boundaries by the owner, and his failure to do so was negligent.

Relating the *Gleason* case to the example incident, the following results are apparent:

A. Baker, the player, is negligent and subject to civil suit no matter who owns or operates the golf course, and regardless of whether Baker is an employee of the Government or a member or guest of a nonappropriated fund or private association.

B. If the golf course were run as a nonappropriated fund, the Government could be sued under the Federal Tort Claims Act for the negligence of its employees (nonappropriated fund employees) in failing to construct a fence. The fund could avoid the suit by paying a claim from its self-insurance reserves, provided the claimant were willing to accept the amount offered.

1. If Baker were the golf professional under the control of the nonappropriated fund and were giving a playing lesson at the time, the Government could be sued under the Federal Tort Claims Act for his act of negligence in the scope of his employment. The fund could avoid suit by paying the claim.

2. If Baker were a member or guest of the fund, he could be sued individually, but a submitted claim could be paid from nonappropriated funds. If Baker is sued, the judgment could be paid from nonappropriated funds upon certification by The Judge Advocate General. However, even if a claim were paid this would not bar a suit against Raker individually under the present wording of the federal statutes.

C. If the golf course were being utilized by a private association, the Government could still be sued under the Federal Tort Claims Act for failure to put up the fence, unless the private association actnally owned or operated the golf course so as to subject itself to liability.

1. If Baker were an employee of the association, the association and Baker could be sued as joint tortfeasors. The employer would be held liable in this instance on the basis of respondeat

superior as the employee would be under the direct control and supervision of the employer-association and Baker was acting within the scope of his employment.

2. If Baker were only a member or guest of the association, he would be subject to individual suit and personal liability. The association would probably not be liable for Baker's acts under these circumstances as there would be insufficient nexus between Baker as a member or guest and the association.

Based on the material discussed in the preceding chapters, it appears that several changes could be made in the law and military regulations to clarify certain areas and rectify certain inadequacies.

First, section 2672 of title 28, United States Code, which bars suits against employee,., if a settlement or compromise of a claim is reached with the Government, should be amended to include *any* claim settled or compromised with any federal agency, including nonappropriated funds. As the statute now reads, only claims paid in behalf of employees bars a later suit against the employee. If a claim is paid by a nonappropriated fund for the negligence of a member or guest of such fund, a civil suit can still be instituted against the individual.

Second, section 2679 of title 28, United States Code, which provides an exclusive remedy against the United States Government for the negligence of an employee while driving any vehicle in the scope of his employment, and provides that the Attorney General will defend the suit, should be amended to provide this procedure for the exclusiveness of the remedy and defense by the Attorney General for any federal employee when he acts within the scope of his employment, whether he is driving a vehicle or not. As the law now reads, if the employee were not driving a vehicle, he must defend the suit himself and prove that he was acting within the scope of his employment and was performing a discretionary or ministerial act to invoke the court's doctrine of immunity for governmental functions. At the present time he receives no federal assistance in this matter. It is interesting to note, however, that an employee, member or guest of a nonappropriated fund may be provided a defense counsel at the expense of the fund if The Judge Advocate General certifies this payment,[140] whereas no similar provision protects appropriated fund employees.

Third, and perhaps most important, is that members of nonappropriated funds and private associations should be required, or at

[140] AR 230–8, **para.** 14.3*b* (Change No. **7, 14** Jan. 1963).

least strongly encouraged, to purchase public liability insurance for their own protection. In fact, such insurance is highly desirable even for civilian employees and military personnel, because if **a** court should determine that scope of employment is not proved, or is disproved, personal liability could result, Since scope of employment is determined by state law, and since such laws vary greatly from state to state, it is virtually impossible for an employee or military member to be sure whether his actions are within a particular state's statutory definition or judicial interpretation of scope of employment. To insure protection from an adverse ruling in this regard, personal liability insurance should be purchased either by the individual, or by the Government or association for the individual.

PRETRIAL RESTRAINT IN THE MILITARY*

By Major Richard R. Boller**

Unnecessary pretrial confinement wastes human resources, as well as creating needless hardship and, for the lawyer, intensifies speedy trial problems, The author describes the history, standard practices, experiments, and recent developments relating to pretrial release in both military and civilian settings. He examines the concepts of "due process" and "probable cause" as applied to bail, and suggests procedural reforms which would make military practices more consistent with these concepts.

I. INTRODUCTION

Restraint prior to trial in the military is basically a matter for command discretion,[1] The *Uniform Code of Military Justice* and the *Manual for Courts-Martial, United States, 1969 (Revised edition)*, establish no comprehensive guidelines regarding the placement of personnel subject to military law in pretrial confinement. Rather, commanders are merely urged to exercise discretion in determining whether pretrial confinement is warranted in each case. In some instances, commanders are required to obtain the approval of the staff judge advocate prior to confining persons, or are furnished in regulatory form local guidelines which are to be employed in determining the necessity of pretrial confinement.

The purpose of this article is to examine the real and possible effects of pretrial restraint, to review the history of restraint prior to trial in both the civilian and military setting, to discuss some of

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[1] *See* UNIFORM CODE OF MILITARY JUSTICE art. 9 [hereinafter cited as USMJ]; Horner **v.** Resor, Misc. Doc. No. 70–11, (C.M.A. **11** Mar. 1970), *as* ***digested in*** 70–3 JALS 11; United States v. White, 17 U.S.C.M.A. 211, **38** C.M.R. 9 (1967); United States v. Gray, 6 U.S.C.M.A. 615, 20 C.M.R. 331 (1956).

the more recent innovations which have found their way into the civilian forum, and to determine whether these innovations may be applied to the military. To assist the reader in understanding the ideas expressed herein, the following assumptions of the author are declared :

(1) Unwarranted pretrial confinement is detrimental to the interests of both the Government and the accused.

(2) Means other than pretrial confinement may be employed to deter flight prior to trial.

(3) Objective evaluation, rather than plenary discretion, should be employed in determining the appropriateness of pretrial restraint.

These assumptions are made with full realization that the paramount mission of the Army is not rehabilitation of offenders, but the maintenance of the ability to wage war effectively. It is further assumed that justice and fairness have an effect upon morale and discipline in a command, but of far greater effect is the motivation inspired by the commander.

As its title indicates, this article is principally concerned with restraint *prior* to trial. It will be sufficient to note that the military services now have a provision for post trial release involving deferment of the confinement portion of a sentence by the convening authority. The deferring of a sentence to confinement is discretionary and is not a right which the accused may enforce.[2] More than any other factor, it was probably the decision in the case of ***Levy*** *v. Resor*[3] which sparked Congress to modify article *57* of the *Uniform Code* of *Military Justice*, thereby applying bail principles to the period *subsequent* to conviction.

In the military, pretrial confinement is subject to abuse, because it may be ordered on the basis of a mere allegation of wrongdoing,

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2 UCMJ art. 57(d) provides:

"On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general Court-martial jurisdiction over the command to which the accused is currently assigned."

Although the Government has argued that the decision to defer confinement is not subject to review, the Court of Military Appeals has assumed that "such a decision is reviewable for abuse of discretion . . . ." Dale v. United States, Misc. Doc. So. 69–55 **(C.M.A.,** *27* Feb. 1970), *as digested in* 70–2 JALS **11.**

3 17 U.S.C.M.A. **135,** 37 C.M.R. 399 **(1967).**

which order is not governed by any definitive regulations or guidance. Prior to trial no judicial tribunal has passed upon the guilt or innocence of the accused ; although he is presumed innocent, he may be confined for months. Moreover, the time he spends in pretrial confinement is not credited[4] to the sentence he receives. Of paramount importance, however, is that pretrial confinement, in and of itself, may affect the accused's ability to defend himself properly at trial.

11. EFFECTS OF PRETRIAL RESTRAINT

A. *MANPOWER*

During fiscal year 1968 the Army tried **2,375** persons by general court-martial. The average elapsed time from charges or confinement to trial was **62.2** days.[5] Assuming that seven out of ten persons tried by general court were confined prior to trial, the Army lost the services of the combat fcrces of an infantry battalion for a period of six months as a result of general court-martial pretrial confinement.

B. *ECOMOMIC*

The costs of detaining an accused have been estimated at between $56 and **$77** a day. At **$5** a day, confinement before trial costs the government nearly a half-million dollars each year. Each soldier confined prior to trial is entitled to his full pay and allowances.[8] Assuming that each soldier is paid **$150** a month, the government pays another half-million dollars for services which it does not receive.

C. APPELLATE

Although pretrial release would not obviate the problem of

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[4] Courts are usually advised of the amount of pretrial confinement, if significant, and may consider this in determining the sentence. However, they are not compelled to do so.

[5] 1968 ANN. REP. OF U.S. COURT OF MILITARY APPEALS 23.

[6] *Hearings on S. 1357, S. 647, and S. 648 Before a Subcomm. on Constitutional Rights and the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 89th Cong., 1st Sess. 197 (1965).

[7] *Hearings on S. 1357, supra* note 6, at 264.

[8] Dep't of Defense Military Pay and Allowances Entitlements Manual, para. 10316(a) (1 Jan. **1967).**

speedy trial in the military, it would certainly help in doing so.[9] The problem is compounded because there are no rehearings on cases reversed for failure to afford an accused a speedy trial. The result is inevitably a dismissal of charges[10] which results in a waste of time and money expended to try the case and take it through the appellate channels.

D. *SUBTLE EFFECTS*

The subtle effects of pretrial confinement are incapable of strict proof. They involve questions of human reaction. Statistics, although furnishing some authority for the propositions involved, would not establish a causal relationship between the confinement and the proposed effect thereof.

1. *Pleas and Pretrial Investigations.*

Does lengthy confinement prior to trial have an effect on an accused's plea in court. Does the fact that he gets no credit for his pretrial confinement[11] make him more amenable to forego a possible defense because of the time it would take to perfect it? Is he more prone to prevail upon his counsel to expedite the pretrial investigation so that he can begin serving his sentence? Does the confinement atmosphere, in and of itself, contribute toward a breakdown of an accused's will to contest the charges against him?[12]

2. *Appearance of the Accused.*

An accused tried before a court-martial is entitled to wear his decorations and to be presented as favorably as possible to the court members.[13] Not uncommonly, accused persons confined prior to trial are not arrayed with the medals and decorations to which

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[9] *See generally* United States v. Wilson, **10** U.S.C.M.A. **337, 340, 27** C.M.R. **411, 414 (1959).** ("[T]he period of confinement before trial must be considered in determining whether the case proceeds to trial with reasonable dispatch.") Under article **10,** UCMJ, if the accused is confined, ***immediate steps*** must be taken to inform him of the specific wrong of which he is accused and to try him.

[10] *See, e.g.,* United States v. Lipovsky, **17** U.S.C.M.A. **510, 38** C.M.R. **308 (1968).**

[11] UCMJ art. **57**(b). See note **4,** *supra.*

[12] *See generally Hearings on S. 1357, supra* note **6,** at **175; R.** EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 119 **(1956)**; R. GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM **40 (1965).**

[13] United States v. Scoles, **14** U.S.C.M.A. **14, 33** C.M.R. **226 (1963)**; United States v. West, **12** U.S.C.M.A. **670, 31** C.M.R. 256 **(1962);** MANUAL FOR COURTS-MARTIAL, UNITED STATES, **1969** (REVISED EDITION), para. 60 [hereinafter cited as MCM, **1969** (Rev.)].

they are entitled. Dress uniforms may look less than acceptable because they have been inaccessible to the accused. One authority has noted that: "The appearance and demeanor of a man who has spent days or weeks in jail reflects his recent idleness, isolation, and exposure to the jailhouse crowd."[14]

3. *The Effective Assistance of Counsel.*

To what extent an accused in pretrial confinement is denied the effective assistance of counsel can only be a matter of supposition. It would seem to be true beyond cavil that the most effective assistance can be rendered when the accused and his counsel are free to talk over the case and exchange views whenever the need arises. The fact that an accused is incarcerated many miles from the point where his counsel is located would seem to derogate from this effectiveness. Additionally, there are instances when an accused can be a valuable instrumentality in the pretrial discovery process and can assist in the questioning of a witness prior to trial.[15]

4. *Other Effects.*

To what extent court members are influenced by the presence of armed guards in or out of the courtroom is incapable of proof.[16] Similarly, the effect upon an accused confined prior to trial of the forced association with convicted persons is a matter for speculation.[17] Assuming that an accused is innocent of any wrongdoing, and we presume as much, will the experience of spending two or more months in jail tend to improve his attitude toward the Army or society in general? Is it the type of experience

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[14] ***Hearings on S. 1357, supra*** note **6,** at **85–86.** Because of this tendency, defense counsel should make a particular effort to advise the accused about the importance of a good appearance, and to insure that he has an opportunity to prepare himself and his uniform.

[15] "[A]n accused held in pretrial confinement is severely handicapped in preparing his defense.'' *Id.* at **2.** The Ninth Circuit recently ordered a juvenile defendant released from a detention home in order to help prepare his defense. The court was impressed that the white lawyers of the defendant, a black, "would . . . have great practical difficulty in interviewing and lining up the witnesses, and that appellant is the sole person who can do so." Kinney v. Lenon, **7 CR. L. REP. 2154** (9th Cir., **21** Apr. **1970).**

[16] In United States v. West, **12 U.S.C.M.A.** 670, **674, 31 C.M.R. 256, 260 (1962),** the court held that the unusual security precautions employed in the trial courtroom were an important factor in depriving the accused of an impartial trial.

[17] "Presumably, innocent persons can hardly be expected to remain impervious confined with convicted criminals. This could have a particularly **significant** and damaging impact upon young persons, and might easily reinforce—rather than diminish—any disposition they have for criminal activity." ***Hearings*** *on* ***S. 1357,*** *supra* note **6,** at **12.**

which will better enable him to become a good citizen upon his release from active duty?

111. EVOLUTION OF THE CONCEPT OF PRETRIAL RELEASE

A. *CIVIL LAW*

1. *England.*

During the 12th Century, it was uncommon in England to imprison an accused before trial. Imprisonment was costly and an added responsibility for the sheriff, who was content to discharge himself from this responsibility by releasing accused persons to the custody of their friends. It is thought, however, that had the prisons been more secure perhaps the pretrial release of accused persons would have been curtailed.[18] Additionally, during this period arrest meant imprisonment without benefit of a preliminary hearing. Serious cases were tried by the justices whose arrival might be delayed for years. It was thus imperative that some form of pretrial release be effected.[19] At one time, even those charged with homicide or treason were releasable,[20] but those imprisoned by the special command of the King or his Chief Justiciar were not.[21]

Before 1275 the discretionary powes of the sheriff regarding release and detention of prisoners before trial were ill-defined and led to abuses which were dealt with by the Statute of Westminster 1.[22] The statute chastised the sheriff for releasing persons who should not have been released and for detaining persons who should have been released. Furthermore, it defined for the first time which persons were eligible for release. The criteria for release were generally the character of the offense and the certainty of conviction.[23] In order to assure the accused's appearance, a surety had to assume personal responsibility for him. Since the failure of the accused to appear could result in forfeiture of the surety's property, local landowners were preferred as sureties.[24]

By 1444 the major powers exercised by the sheriff involving

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[18] 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 584 (2d ed. reissued 1968).
[19] 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 534 (1883).
[20] 2 F. POLLOCK & F. MAITLAND, *supra* note 18, at 584.
[21] Id. at 585.
[22] 3 Edw. I, c. 15 (1275).
[23] 1 J. STEPHEN, supra note 19, at 235.
[24] 2 F. POLLOCK & F. MAITLAND, supra note 18, at 590.

release before trial had been effectively transferred to the justices of the peace.[25] This was a natural step for it was at the preliminary hearing, which had evolved in the interim period and was presided over by the justice, where the accused was first exposed to the judicial machinery of the state.

During the 17th Century it was not uncommon for the crown to imprison political opponents arbitrarily. This practice led to the passage of the Habeas Corpus Act of 1679.[26] James II resented the act and though unsuccessful in his attempts to have it repealed, he was able to prevail upon his justices to set bail in unreasonably high amounts thus avoiding the requirements of the act. This practice of setting high bail led to the provision in the English Bill of Rights of 1689[27] proscribing the requirement of excessive bail.[28] This prohibition was incorporated into many colonial constitutions29 and the Northwest Ordinance30 before finding its way into the Constitution of the United States.[31]

2. *American Colonial Implementation.*

Before the eighth amendment to the United States Constitution was adopted on 15 December 1791,[32] similar provisions had been incorporated into the constitutions of many of the colonies. The first colony to include a provision for bail was Massachusetts which did so in 1641,[33] 48 years before the promulgation of the English Bill of Rights. That state provided for presentence release contingent upon the giving by the accused of sufficient security, bail, or mainprise to assure his presence and good behavior. Exempted from the section were capital crimes, contempts, and cases where an express act of court allowed confinement. William Penn included a provision guaranteeing bail in his first Frame of Gov-

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25 1 J. STEPHEN, *supra* note 19, at 236.

26 R. PERRY & J. COOPER, SOURCES OF OUR LIBERTIES 193 (1959).

27 "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." 1 W. & M., 2d Sess., ch. 2, preamble, para. 10.

28 R. PERRY & J. COOPER, *supra* note 26, at 194.

29 *Id.* at 235.

30 "All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great." Art. 11, Northwest Ordinance, 13 Jul. 1787, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 398, 69th Cong., 1st Sess. 51–52 (C. Tansill ed. 1927).

31 "Excessive bail shall not be required. . . ." U. S. CONST. amend. VIII.

32 R. PERRY & J. COOPER, *supra* note 26, at 246.

33 Mass. Body of Liberties § 18 (1641), in THE COLONIAL LAWS OF MASSACHUSETTS 5 (W. Whitmore ed. 1890).

ernment of Pennsvlvania in 1682.[34] Excepted were capital crimes "where the proof is evident or the presumption great." Virginia[S5] and Delaware36 incorporated the exact language of the English Bill of Rights into their constitutions. The Maryland proviso was similar to Virginia's but prohibited the setting of excessive bail "by the courts of law."[37] Vermont38 and New Hampshire39 proscribed excessive bail in their constitutions. The constitution of North Carolina contained language identical to that later incorporated into the eighth amendment to the United States Constitution.[40]

The Northwest Ordinance of 1787 was important because it guaranteed to settlers the same rights they had as inhabitants of the United States. In addition to constituting the first bill of rights enacted by the federal government,[41] it set out what on its face was a more liberal interpretation of bail than is contained in the eighth amendment: "All persons shall be bailable, unless for capital offenses, where the proof shall be evident, or the presumption great."

3. *The Eight Amendment to the United States Constitution.*

The Judiciary Act which became law on 24 September 1789 provided that bail was to be granted in all criminal cases, except those in which the punishment may be death.[42] The eighth amendment guarantee prohibiting excessive bail was approved by a joint Senate-House Committee on 25 September 1789, the day following the passage of the Judiciary Act. Although the eighth amendment and the Judiciary Act have coexisted for over 175 years, such coexistence, as will be explained later, has not always been peaceful.[43]

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34 Laws Agreed Upon in England, Frame of Government of Pennsylvania § XIX (1682).

35 VA. CONST. § 9 (1776), in THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, ASD OTHER ORGANIC LAWS (F. Thorpe ed. 1909) [hereinafter cited as THE FEDERAL AND STATE CONSTITUTIONS].

36 Delaware Declaration of Rights § 17 (1776), in I Laws of the State of Delaware (1816), appendix, 79–81.

37 MD. CONST. § XX (1776), in THE FEDERAL AND STATE CONSTITUTIONS.

38 VT. CONST. § XXV (1777), in THE FEDERAL AND STATE CONSTITUTIONS.

39 N. H. CONST. § XXXIII (1784), in THE FEDERAL AND STATE CONSTITUTIONS.

40 N. C. CONST. § X (1776), in THE FEDERAL AND STATE CONSTITUTIONS.

41 R. PERRY & J. COOPER, *supra* note 26, at 387.

42 "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death . . . ." An Act *to* Establish the Judicial Courts of the United States, ch. 20, § 33, 1 Stat. 73 (24 Sep. 1789).

43 R. PERRY & J. COOPER, *supra* note 26, at 425.

The difference in terminology between the Judiciary Act and the eighth amendment is important because under the former bail was to be admitted upon all arrests in criminal cases, except those capital; under the latter it is merely the setting of excessive bail which is prohibited. The argument may be made that a federal magistrate who does not allow bail at all is not violating the amendment, however, one who allows bail but sets it ('excessively'' high is violating it.[44]

4. *The Federal Rules of Criminal Procedure.*

These rules make bail mandatory only before the conviction and when the offense charged is not capital.[45]

5. *Judicial Interpretations.*

a. Nature of the right. Whether the eighth amendment guarantees the right to bail in non-capital criminal cases or merely guarantees that if granted bail will not be excessive has long been the subject of argument.[46] The short answer appears to be that the type of non-capital case may be a prime factor in making this determination. The strongest language indicating that the right to bail exists independent of the question of excessiveness is contained in *Stack* v. *Boyle.*[47] In that case Chief Justice Vinson said:

> From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91 to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail.[48]

Judge Holtzoff has opined that the eighth amendment guarantees the right to bail by necessary implication in cases not capital.[49] An eminent scholar has concluded that the excessive bail provision of the amendment "was meant to provide a constitutional right to

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44 Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention,* 55 U. VA. L. REV. 1223 (1969).

45 FED. R. CRIM. P. 46 (a) (1).

46 Mitchell, *supra* note 44. *Compare* Hudson v. Parker, 156 U.S. 277 (1895), *with* Mastrian v. Hedman, 326 F.2d 708 (8th Cir.), *csrt. denied,* 376 U.S. 965 (1964); *see also Hearings on S. 1357, supra* note 6, at 174.

47 342 U.S. 1 (1951).

48 *Id.* at 4 (emphasis original).

49 "The right to bail before trial, except in capital cases, is guaranteed by the Bill of Rights. The Eighth Amendment to the Constitution of the United States, which is part of the Bill of Rights, provides that 'excessive bail shall not be required.' This clause has invariably been construed as guaranteeing the right to bail by necessary implication and not merely meaning that when allowed bail shall not be excessive.'' Trimble v. Stone, 187 F. Supp. 483, 484 (D.D.C. 1960).

bail and that the inadequacy of the form adopted for this purpose was the result of inadvertence."[50]

b. Conditional factors relating to release before trial. Two conditions relating to release prior to trial are immediately apparent. First, the right to bail is not absolute in a capital case[51] and, second, before 1966 release was generally contingent upon the pledging of something of value.[52]

Other limitations have been imposed on pretrial release. Release has been denied in the public interest.[53] Under federal law,[54] belief in the accused's mental incompetency is a ground for his commitment notwithstanding the right to bail. This procedure has been reviewed and approved by the United States Supreme Court which found the commitment to "involve an assertion of authority [on the part of the federal government], duly guarded, auxiliary to incontestable national power."[55]

In *Carbo v. United States*,[56] Justice Douglas, as Circuit Justice for the Ninth Circuit, was called upon to review an order denying bail. The defendant had been convicted of the Anti-Racketeering Act, extortion, and conspiracy. In denying bail the Justice relied upon the defendant's alleged leadership of the conspiracy, a criminal record extending back nearly forty years, a conviction for first degree manslaughter and a twenty-year-old trial for murder which ended in a hung jury. The murder case was not retried because of the death of one prosecution witness and the disappearance of another. The bail hearing contained considerable evidence of threats made to the Government's principal witness. Restating the proposition that the denial of bail should not be used to sentence an accused for an unproved crime, Justice Douglas went on to state:

> Yet what Judge Boldt said at the hearing on bail pending review bothers me greatly. He concluded that there was "a strong likelihood that witnesses in this case will be further molested and threatened and perhaps even actually harmed." In my view the safety of the witnesses, should a new trial be ordered, has relevancy to the bail issue. . . . *Keeping a defendant in custody during the trial "to ren-*

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50 Foote, *The Coming Constitutional Crisis in Bail: I, 113* U. PA. L. REV. 959, 987 (1965).

51 FED. R. CRIM. P. 46(a)(1); Stack v. Boyle, 342 U.S. 1 (1951).

52 *See, e.g.*, Pilkinton v. Circuit Ct., 324 F.2d 45 (8th Cir. 1963).

53 Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962).

54 18 U.S.C. § 4244 (1964).

55 Greenwood v. United States, 350 U.S. 366, 375 (1956).

56 82 S. Ct. 662 (Douglas, Circuit Justice, 1962).

> *der fruitless" any attempt to interfere with the witnesses or jurors ... map, in the extreme or unusual case, justify denial of bail.*[57]

The proposition espoused by Justice Douglas is termed preventive detention, *i.e.*, detention to prevent further misconduct on the part of the accused. Although bail has been set at a high level in order to effect detention,[58] the better view is that the setting of excessive bail or its outright denial is prohibited unless danger to the public interest is imminent, The danger was described by Justice Jackson in a much-quoted sentence :

> Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it. ...[59]

c. When is bail excessive? The purpose of bail is to provide additional assurance that an accused will be present at his trial and submit to the jurisdiction of the court. "Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[60] The fact that the defendant is impecunious or is unable to post bail in the amount set does not automatically indicate excessiveness.[61]

The case of *Bandy v. United States*,[62] which may have played a part in the liberalized approach to bail effected during the early 1960's, questioned the requirement of bail for indigents as a possible violation of due process and equal protection of the laws :

> "The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court." ... It is assumed that the

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[57] *Id.* at 668–69 (citations omitted) (emphasis added). *See* Rehman v. California, 85 S. Ct. 8 (Douglas, Circuit Justice, 1964), wherein bail of $500,000 was challenged as excessive upon the conviction of certain non-capital offenses. After a hearing the judge who originally set the bail revoked it and remanded the defendant to custody stating "to permit Dr. Rehman to remain on bail pending appeal constitutes an immediate, clear and present danger imperiling, jeopardizing, and threatening the health, safety, and welfare of the community." Justice Douglas denied bail notwithstanding the fact that he could not term the appeal frivolous. *See also* United States v. Rice, 192 F. 720 (C.C. S.D.N.Y. 1911) (defendant jailed during his trial to prevent him from tampering with or intimidating the jury) ; People v. Melville, 6 CR. L. REP. 2442–2443 (S.D.N.Y. 11 Mar. 1970), discussed in text at note 109 *infra*.

[58] *E.g.*, Mastrian v. Hedman, 326 F.2d 708 (8th Cir.), *cert. denied.* 376 U.S. 965 (1964).

[59] Williamson v. United States, 184 F.2d 280, 282 (2d Cir. 1950) (in this case government attorneys feared that the defendants would make speeches and write articles for the Communist *Daily Worker*).

[60] Stack v. Boyle, 342 U.S. 1, 3 (1951).

[61] Hodgdon v. United States, 365 F.2d 679 (8th Cir. 1966); White v. United States, 330 F.2d 811 (8th Cir. 1964).

[62] 82 S. Ct. 11 (Douglas, Circuit Justice, 1961).

> threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release.
>
> But this thory is based upon the assumption that the defendant has property. To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law.
>
> . . . Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release.
>
> . . . Further reflection has led me to conclude that no man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on "personal recognizance" where other relevant factors make it reasonable to believe that he will comply with the orders of the Court.[63]

6. *The Reform Movement.*

a. The problems. The systems of bail in both England and the United States evolved to achieve the same result: to insure the presence of the defendant at his trial without undue deprivation of his freedom. However, the means of effecting the system had always been different in America than in England. While the English relied, and still do, on the private surety or the friend of the defendant who would guarantee the latter's presence as a matter of accommodation, the professional bondsman fulfilled this function in the United States.

> In America . . . emphasis on the individual's absolute right to bail led to practical difficulties in a large country whose frontier territories beckoned invitingly to those with a dim view of their chances of acquittal. The initial judicial reaction was to remind the party furnishing bail that he was a quasi-judicial officer with powers of a jailer, and that he was responsible for procuring the accused's attendance at trial.
>
> But since private sureties could not effectively conduct nationwide searches for their itinerant charges, their promise to produce the accused gradually became a promise merely to pay money should the accused fail to appear. This development ushered in the professional bondsman who saw an opportunity for financial gain. In return for the payment of a fee, the bondsman would post a bond on behalf of the accused.[64]

It is therefore apparent that one without money or property will fare badly under the American system in the event he is required to post bond. Mr. Jack T. Conway, Deputy Director of the Office of Economic Opportunity, told the Senate Subcommittee conducting

[63] *Id.* at 12–13.
[64] Comment, **70 YALE L. J.** 966, 967–68 (1961) (footnotes omitted).

hearings on remedial legislation about some of the problems inherent in the then existing system:

> Thirty-five million "hard core" poor, one-fifth of our nation, live on family incomes of less than $60. a week. The minimum bail is usually set at $500. requiring a **$50.** or **$75.** premium for securing bond from a professional bondsman; bail of **$2500.** or $5000. is not infrequent. Consequently, the poor generally cannot make bail . . . [and] prior detention hobbles adequate preparation for trial. When a person of very small means can post bond, this is usually done by borrowing at exhorbitant interest rates and cutting deeply into an already marginal standard of living. When he cannot post bond, the accused generally loses his job. . . . Loss of personal income results in a loss of spending power and tax revenue.[65]

Pretrial restraint of persons charged with federal crimes has cost the government over $2,000,000 yearly.[66] Apart from economic considerations, "the accused who is unable to post bond, and consequently is held in pretrial confinement, is severely handicapped in preparing his defense";[67] young persons especially are adversely affected by the prison atmosphere;[68] and the appearance arid demeanor of the prisoner readily indicate his status before trial.[69]

b. The Vera Foundation (now the Vera Institute of Justice). Any inquiry into the reform of bail procedures must begin with the Vera Foundation's Manhattan Bail Project. This project was based upon the premise that judges would release defendants on their own recognizance if they were furnished verified information about them tending to indicate that the defendant was a good risk.

Release on recognizance was no innovation.[70] However, it was not used to a great extent because generally insufficient background' information about a defendant was available to make a risk evaluation based upon relevant factors. The Manhattan Bail Project furnished this information. Mrs. Marion Katzive of the Vera Foundation explained to a House Subcommittee how the system works :

> When a prisoner is brought to the detention pen prior to his first court appearance, a law student checks his previous record and current charge with the arresting officer to see if he is bailable in the criminal court. Under the original project the law student determined whether the defendant had been charged with homicide, a narcotics offense, or a sex crime. In the beginning these were excluded from the

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65 ***Hearings*** *on* S. *1357, supra* note 6, at 85.
66 *Id.* at **2.**
67 *Id.*
68 *Id.* at **12.**
69 *Id.* at 85–86.
70 "[I]n proper cases no security need be required." FED. R. CRIM. P. 46(d).

experiment because of the special problems they seemed to present. As the project is now run by the office of probation only the homicide charge warrants immediate exclusion. Time and staff permitting, defendants charged with all other crimes will be interviewed. The interview is geared to determine whether the defendant has roots in the community. He is asked whether he is working, how long he has held his job, whether he supports his family, whether he has contact with relatives in the city, whether he receives unemployment insurance or welfare relief, etc.

After the interview the defendant is scored according to a point-weighted system. If the interview indicates that the accused would be a good risk for release on recognizance the interviewer obtains written permission from the prisoner to get in touch with a friend, relative, or employer for the purpose of verifying the information. Verification is done either by telephone or in the visitor's section of the courtroom. An interview generally takes about 10 minutes and verification less than an hour.

If the case is still considered a good risk after verification, a summary of the information is sent to the arraignment court. Copies of the recommendation and supporting information are given to the judge, the district attorney, and counsel for the accused.

Now let me translate the system into a typical case history.

Walter Layne is charged with felonious assault. His prior criminal record consists of a felonious assault charge which was reduced to simple assault, for which he received 30 days suspended sentence in 1952. In 1957 he was convicted of driving while intoxicated and his sentence was $100 fine or **30** days. He couldn't post the fine, and went to jail. In 1961 he was convicted on a disorderly conduct charge, and got a suspended sentence.

He is 35 years old, has been living at his present residence for **6** months with his wife and child and had a verified previous l-year residence in Manhattan. He has been working as a counterman in a restaurant for the past **3** months, and his previous job has been verified as lasting 3 years. His current employer says he is a good worker. If released on recognizance, the employer volunteers to help him get to court.

Should Mr. Layne be recommended for release on recognizance? Well, this is how we calculate his score: —1 point for three misdemeanor convictions, +2 points for a stable residence, +2 points for family ties, +2 points for good ratings on present and prior jobs. Mr. Layne receives a total of **5** points.

Although this is a minimum score, he is recommended for release on recognizance.[71]

During the three-year period preceding August **1964,** 3,505

[71] *Hearings on H.R. 3576, H.R. 3577, H.R. 3578, H.R. 5923, H.R. 6271, H.R. 6934, H.R. 10195, and S. 1357 Before Subcomm. No.* 5 *of the Comm. on the Judiciary*, 89th Cong., 2d Sess. 86–87 (1966).

accused persons were released upon the recommendation of the Vera Staff. Of these, 98.4 per cent appeared for trial; the remainder willfully failed to appear. Initially the staff was recommending release only for misdemeanors, but later during the period they broadened the releasable offenses to include all but homicide and certain narcotics offenses.[72]

c. The Department of Justice. In March 1963 the Department of Justice urged all United States Attorneys to take the initiative in recommending release on recognizance when they were satisfied that there was no substantial risk of non-appearance. Before the inception of the program, this type of release was practiced in six percent of the cases; by March 1964 the percentage had climbed to **17.4** percent; and by March of 1965 release on recognizance was practiced in 39 percent of the cases tried.[73]

The then Deputy Attorney General, Ramsey Clark, reported to the Senate Subcommittee that in the Eastern District of Michigan, which had practiced release on recognizance for the longest period cf time, 84 percent of the defendants were released during the period March 1964–March 1965. Only one defendant out of 711 defaulted on his promise to appear. In the district of Connecticut the default rate was one out of 99.[74]

*d. **Other** projects.* **As** of 15 June 1965 it was estimated that **33** states were involved in some type of bail reform movement.[75] The "Illinois Plan" was devised in order to "regain from professional bondsmen the control of bail releases and to restore such control to the courts . . . ."[76] To do this the state adopted the "ten percent provision." For all bailable offenses, the accused could obtain his release by executing a bond in the amount of the bail set and depositing ten percent of the amount with the Clerk of Court. Compliance with all the conditions of his bond would entitle the defendant to a refund of 90 percent of his cash deposit.[77] Although

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72 *Hearings on* S. *1357, supra* note 6, at 51.

73 *Id.* at 21.

74 *Id.* at **23.**

75 *Id.* at 40.

76 *Id.* at 190.

77 To meet **a** bond set at $1000, the defendant executes a bond for $1000 and deposits $100 (10 percent of the face amount of the bond) with the Clerk of Court. After satisfying the conditions of the bond, $90 (90 percent of the deposit) is refunded. The cost of the defendant's freedom is $10. Were a professional bondsman to have furnished the bond, the cost would have been $100 (10 percent of the bond). *Id.* at 190–91.

the program is said to be operating satisfactorily,[78] there is some disagreement.[79]

The District of Columbia Bail Project was modeled after the Manhattan Project,[80] that is, project personnel recommended release of accused persons on their own recognizance where strong community ties indicated they would appear for trial as promised. "Once the court released a recommendec! defendant, a staff member advised the releasee to stay out of trouble, and warned him of the penalties for failure to appear."[81] Accused persons who had previously been convicted of certain felonies, violations of probation or parole, escape from a penal or mental institution, or bail jumping, were not interviewed.[82] During the period January 1964 to July 1966, 19 percent of all persons charged with offenses were interviewed; 49 percent of the interviewees were recommended for release and of those recommended, the courts released 85 percent. The default rate during this period was three percent.[83]

Under the Tulsa Plan a defendant may be released to the custody of his attorney prior to trial in certain cases. A list is maintained of all attorneys desiring to participate in the program. To have his name retained on the list, the attorney must fulfill the terms of an agreement entered into with the court. The agreement generally provides that the attorney will be responsible for his client's appearance and that he will not knowingly request the release of a previously convicted felon. In the two-year period following the inception of this program in 1963, nearly half of the members of the Tulsa County Bar were participating in the program and over 2,500 defendants had availed themselves of the release provisions.[84]

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[78] ***See generally, Hearings*** *on S. 1357, supra* note 6, at 189–193.

[79] Chicago American, 12 Oct. 1964.

"State Takes Beating from Bail Jumpers."

"Just over 500 persons exercised the 10-percent option through September 15 of this year.

"Under the 10-percent provision 46 bonds totaling $126,000 have been ordered forfeited. In 30 cases, 65.2 percent the defendants have not been located, and only $8,000 of their total of $80,000 in bonds was posted with court clerks.

"Illinois notifies all its law enforcement agencies and other States of wanted fugitives, but many bondsmen offer the added inducement of rewards for information leading to an arrest, and they will pay the cost of having the persons returned if necessary."

[80] R. MOLLEUR, BAIL REFORM IN THE NATION'S CAPITAL 22–23 (1966).

[81] Id. at 24.

[82] Id. at 25.

[83] *Id.* at 31.

[84] ***See generally,*** R. GOLDFARB, RANSOM : A CRITIQUE OF THE AMERICAN BAIL SYSTEM 203–12 (1965).

7. *The Federal Rail Reform Act of 1966.*[85]

a. General. The Bail Reform Act furnishes courts and magistrates with specific criteria for release of persons charged with non-capital offenses prior to trial, for release of persons charged with capital offenses or non-capital offenders after conviction, and for determining the processing of appeals from the conditions of release. In defining the word "offenses" the act excludes offenses triable by courts-martial.[86]

b. Release in non-capital cases prior to trial.[87] The statute provides that a defendant be released on his own recognizance or upon execution of an unsecured bond unless the judicial officer determines that such release will not assure the appearance of the defendant. If the judicial officer determines that release on recognizance or release on an unsecured bond will not assure the defendant's appearance, he may either substitute for, add to, or combine with the above, the first of the following conditions which will assure his presence :

(1) place the accused in the custody of another,

(2) place restrictions upon the accused's travel, associations, or place of abode,

(3) require the accused to execute a bond secured by a sum not to exceed ten percent of the face value thereof, which will be returned upon performance of the conditions of release,

(4) require a bail bond with sufficient sureties, and/or

(5) impose any condition reasonably necessary to assure appearance, including a return of the accused to custody after specified hours.

In making a determination as to which condition or conditions will assure the defendant's presence, the judicial officer is to consider, in addition to the traditional factors,[88] accused's family ties, employment, financial resources, character and mental condition ; his length of residence in the community; his record of convictions; and his record of appearance at prior court proceedings.[89]

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[85] Pub. L. No. 89–465, 80 Stat. 214, codified at 18 U.S.C. §§ 3141–3152 (Supp. IV, 1969). Section 2 states that the purpose of the act "is to revise the practices relating to bail to assure that all persons, regardless of their financial status shall not be needlessly detained pending their appearance to answer charges, to testify, or pending appeal, where detention serves neither the ends of justice nor the public interest.'' 80 Stat. at 214.

[86] 18 U.S.C. § 3152(2) (Supp. IV, 1969).

[87] 18 U.S.C. § 3146 (Supp. IV, 1969).

[88] 18 U.S.C. § 3146(b) (Supp. IV, 1969) (the nature and circumstances of the offense charged and the weight of the evidence against the accused).

[89] *Id.*

The judicial officer is required to inform the accused of the conditions imposed and the penalties for violations thereof.[90]

An accused who, after **24** hours from the hearing, is unable to meet the conditions of release set by the judicial officer or who is released on condition that he return to custody after specified hours is entitled, upon application, to have the conditions reviewed by the judicial officer who imposed them, The judicial officer may either amend the conditions and release the accused, or set forth the reasons, in writing, for requiring the conditions.[91]

e. Release in capital cases or after conviction. Defendants charged with capital offenses or who have previous convictions shall be released "unless the court or judge has reason to believe that no one or more of the conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. . . or if it appears that the appeal is frivolous or taken for delay. . . ."[92] There is no appeal under the terms of the act itself from detention under this section; however, other rights to judicial review are not affected.[93]

d. Appeal from conditions of release in noli-capital cases before trial. **A** defendant who is detained or who is released on condition that he return to custody after specified hours may, after seeking review by the judicial officer who imposed the conditions, move that the order be amended by the court having original jurisdiction over the case. This is so *unless* those conditions were imposed by the judge of the court of original jurisdiction, a judge of a United States court of appeals, or a Justice of the United States Supreme Court.[94] Appeals may be taken to courts having appellate jurisdiction over the courts imposing or refusing to modify the conditions of release. Orders which are supported by the proceedings below are to be affirmed; in those cases in which the orders are not supported, the appellate tribunal may remand for further hearing or order the defendant released.[95]

8. The Aftermath of Reform.

a. General. Release prior to trial is the cornerstone of bail reform. Problems arise when one charged with a crime is released

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90 18 U.S.C. § 1346(c) (Supp. IV, 1969).
91 18 U.S.C. § 3146(d) (Supp. IV, 1969).
92 18 U.S.C. § 3148 (Supp. IV, 1969).
93 *Id.* Such other rights are, for example, habeas corpus or mandamus.
94 18 U.S.C. § 3147(a) (Supp. IV, 1969).
95 18 U.S.C. § **3147** (b) (Supp. IV, 1969).

and not tried for an appreciable length of time. If the accused is a professional criminal, it is not unlikely that he will commit further crimes between initial release and trial. The longer the period between release and trial, the more opportunity exists for commission of crimes.

b. The administration stand. Eleven days after the Nixon Administration took office, the President sent this message to the Congress:

> Problems arising out of the operation of the Bail Reform Act of 1966 are now being considered by the Congress. But substantial changes in this area are needed quickly. Increasing numbers of crimes are being committed by persons already indicted for earlier crimes, but free on pre-trial release. Many are now being arrested two, three, even seven times for new offenses while awaiting trials. This requires that a new provision be made in the law, whereby dangerous hard core recidivists could be held in temporary pre-trial detention when they have been charged with crimes and when their continued pre-trial release presents a clear danger to the community.
>
> Additionally, crimes committed by persons on pre-trial release should be made subject to increased penalties.
>
> Insufficient staffing of the Bail Agency is one of the contributors to crime by those on pre-trial release. I support immediate lifting of the ceiling that now constricts the Agency's funding. I will seek appropriations for an initial expansion of the agency from 13 to 35 permanent positions. If the pre-trial release system is to protect the rights of the community, the agency must have the capacity for adequate investigation and supervision.96

Nine months subsequent to his inauguration, the President proposed legislation to the Congress in these words:

> Crime in the District of Columbia continues to rise to new records each month. We cannot contain or control it with existing resources; we need more men and money; we need a speedier trial system and, as important as any other measure, the power to keep hard-core criminal repeaters in the District of Columbia off the streets, so they are not committing five and six crimes before they are even brought to trial. The Congress should act now.97

Administration concern culminated in proposed amendments to the Bail Reform Act of 1966.98 Instead of authorizing release in all non-capital cases, the amendments would provide that four catego-

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96 Crime in the District of Columbia, 31 Jan. 1969, reprinted in U.S. CODE CONG. & AD. NEWS 192 (1969).

97 The President's Legislative Proposals, 13 Oct. 1969, reprinted in U. S. CODE CONG. & AD. NEWS 1453 (1969).

98 H.R. 12806, 91st Cong., 1st Sess. (1969).

ries of defendants may be detained for up to 60 days.[99] The proposed legislation provides for a detention hearing presided over by a judicial officer.

c. Some judicial attitudes. The Bail Reform Act diminished the discretion which could be exercised by the committing magistrate. Some of the problems involved in administering the act are pointed out by a District of Columbia Court of General Sessions Judge.

> For the most part, the reports prepared by the District of Columbia Bail Agency reflect little more than a defendant's current address, the length of time he has lived in the District of Columbia, and a brief notation of the name of his employer and the length of time he has been employed. The extent to which the information is, or is not, verified is frequently never disclosed. The information itself is usually of the sketchiest sort. In fact, it has been this Court's experience that in several cases information put in the supposedly verified reports frequently turns out to be in error. The shortage of personnel, the lack of experience, and the press of time makes the so-called verified report a mere shadow of the report apparently envisaged by the Crime Commission Report. The judge sitting in the Assignment Branch of the Court of General Sessions frequently has over one hundred cases to deal with each day. He must, of necessity, rely upon the Bail Agency, the prosecutor, and defense counsel for information. By and large, very little is forthcoming from those sources. . . . It would seem that the Act contemplates lengthy and extensive investigation of a defendant, possibly coupled with a full hearing where testimony may be elicited. Such investigation takes time—often several days. . . .
>
> In most cases the Court is placed in an untenable situation. On he one hand the defendant is now presumed to be entitled to release on personal bond, unless factors appear which reasonably suggest that such a procedure would not assure the appearance of the accused at trial. On the other hand, the burden is placed on the Court to justify any condition other than personal bond. In order to do this, the Court must point to reasons why it acts, but because of the totally inadequate information-gathering technique provided for by the statutory scheme the Court is usually without sufficient information to make any informed decision, or to point to reasons for denying personal bond. The less the Judge knows about a defendant, the higher the risk in placing him on personal bond. Yet, the less the Judge knows, the more difficult it is to justify any condition other than personal bond.[100]

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[99] The four categories are: (1) a defendant charged with a specifically designated "dangerous crime"; (2) repeat offenders who have been charged with two or more "crimes of violence"; (3) narcotics addicts who are charged with crimes of violence; and (4) those persons who, irrespective of the offense charged, obstruct justice by threatening witnesses or jurors.

[100] United States v. Penn, 2 CR. L. REP. 3139 (D.C. Ct. Gen. Sess. 1968).

There is respectable authority for the proposition that pretrial detention for the safety of the community, as well as to avoid flight from prosecution, is constitutionally justifiable in extraordinary cases.[101] In these rare and extraordinary cases it must be established that evidence of guilt is clear and convincing, the peril must be apparent, and the Government must be prepared to afford the accused a speedy trial.[102]

Judge Hoffman of the Pennsylvania Superior Court would, in addition to meeting these standards, require the Government to show that less restrictive alternatives to pretrial detention would be ineffective.[103] The determination can only be made by a court after a full and complete hearing wherein the accused is given the rights to counsel, confrontation of the witnesses against him, and presentation of evidence in his own behalf.[104]

Those members of the judiciary who oppose the amendments to the Bail Reform Act base it in part on the fact that evidence offered at the detention hearing need not conform to the rules of evidence applicable at trial. Thus, under the amendments there is no right of confrontation.[105]

B. *MILITARY LAW*

1. *The Articles* of *War*.

The first American Articles of War were enacted on 30 June 1775 and, insofar as they related to confinement prior to trial, were a duplication of the British Articles of War of 1765.[106] Upon the commission of an offense an officer was to be placed in arrest ; a noncommissioned officer or a soldier was to be imprisoned until tried by court-martial or discharged from confinement by proper authority.[107] No officer or soldier placed in arrest or confinement was to remain in that state for more than eight days or until a

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101 People v. Melville, 6 CR. L. REP. 2442–43 (S.D.N.Y. 11 Mar. 1970) (a revolutionary bombing defendant).

102 Id.

103 Ford v. Hendrick, 6 CR. L. REP. 2044–45 (Pa, Super. Ct., 11 Sep. 1969).

104 Id.

105 Stztement of Hon. Edward F. Bell, Judge, Wayne County (Mich.) Circuit Court, and President, National Bar Association, before Subcommittee No. 4 of the House Judiciary Committee, on H.R. 12806, reported in 6 CR. L. REP. 2111 (1969).

106 British Articles of War of 1765, § XV, Arts, XVII–XXII, W. WINTHROP, MILITARY LAW AND PRECEDENTS 931, 944–45 (2d ed. 1896, 1920 reprint).

107 American Articles of War of 1775, Art. XLI, W. WINTHROP, *supra* note 106 at 956.

court-martial could be "conveniently" assembled.[108] Persons to whose charge a prisoner was committed were required to notify the prisoner's unit within 24 hours of commitment or when relieved from guard.[109] If an officer broke arrest before properly being set at liberty, he was to be dismissed.[110] In the Articles of War of 1786, officers and enlisted men were treated in separate articles for purposes of determining what form of restraint was to be employed.[111] In addition the word "conveniently" was omitted so that arrest or confinement was to continue for no more than eight days or until a court-martial could be assembled.[112] The word was omitted in order to preclude protracted arrests and confinements and to secure prompt trials.

A further measure to secure prompt trials for officers was enacted on 17 July 1862 and became Article 71 in the Articles of War of 1874.[113] This article provided that officers arrested for purposes of trial, except at remote stations, were to be served charges within eight days of arrest and brought to trial within 10 days of service or not later than 40 days after service when justified by necessity. If the charges were not served within eight days, the arrest ceased. If after having been duly served, the officer was not brought to trial within 10 days or, when necessity dictated it, within 40 days, the arrest ceased. Officers released from arrest under this article could be tried within 12 months of release.

In 1917 the provisions of the articles relating to pretrial restraint were extensively revised. Officers and enlisted men, as well as "other persons subject to military law," were dealt with in the same article.[114] Although the officer charged with crime or a serious offense was to be placed in arrest, he could "in exceptional cases" be confined. A soldier was to be confined but when charged with a minor offense, could be placed in arrest. "Other persons subject to military law" could be arrested or confined as circumstances required, but when charged with a minor offense, could be placed in arrest.

The release provisions of Article 71 of the Articles of 1874 which related solely to officers were changed by the substitution of

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108 American Articles of War of 1775, Art. XLII, *id.* at 956.

109 American Articles of War of 1775, Art. XLV, *id.* at 957.

110 American Articles of War of 1775, Art. XLVI, *id.* at 957.

111 American Articles, Enacted 31 May 1786, Arts. 14 & 15, *id.* at 972, 973.

112 American Articles, Enacted 31 May 1786, Art. 16, *id.* at 973.

113 *Id.* at 992.

114 The Articles of War, 1917, art. 69, ch. 418, § 3, 39 Stat. 650, 661 (enacted 1916, effective 1917).

the word "person" for "officer"[115] and redesignated as Article **70** in the Articles of War of **1917.** The release provisions related solely to arrest, not confinement. Although The Judge Advocate General of the Army did not distinguish between arrest and confinement, thus declaring Article **70** applicable to an enlisted man in pretrial confinement,[116] it is concluded that few enlisted men benefited from the change in wording because confinement was, for the enlisted man, the traditional mode of pretrial restraint.[117]

The Articles of War of 1917 were revised by legislation enacted on **4** June 1920[118] largely because of the Army's experience in World War I. The Judge Advocate General of the Army cited two major changes in the new law.

> Unnecessary delay on the part of an officer in investigating charges or carrying a case to a final conclusion is made an offense punishable by trial by court-martial. (A. W. 70).
>
> Resort to arrest instead of confinement pending trial in the cases of enlisted men charged with minor offenses is prescribed instead of merely being authorized. This places enlisted men upon the same footing as officers in respect of such offenses. **(A.** W. 60).[119]

It was also apparent that Congress was concerned over the extensive pretrial confinement of enlisted men.[120]

The "unnecessary delay'' provision was probably added because the provision for mandatory release from arrest had been deleted. In the **1920** legislation we see for the first time a requirement to

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115 *Id.* art. 70.

116 2 Op. JAG 1918 126–28 (25 Feb. 1918).

117 The medium of arrest was not generally contemplated for the enlisted man. This is indicated by the fact that he was not specifically mentioned in the classes of persons punishable for a breach thereof in article 69. Additionally, paragraph **54,** A Manual for Courts-Martial, 1917, restricted the application of article *70* to officers by the following language:

"The fact that cases of officers put in arrest 'at remote military posts or stations' are excepted from the application of A. W. [Article of War] **70** does not authorize an abuse of the power to arrest in these cases. . . . Though an officer, in whose case the provisions of A. W. **70** in regard to service of charges and trial have not been complied with, is ***entitled*** to be released from arrest, he is not authorized to release himself therefrom." (Emphasis original.)

118 Act of 4 Jun. 1920, ch. 227, 41 Stat. 759.

119 A Manual for Courts-Martial, 1921, at IX.

120 "The chief object of Congress in changing, by the Code of 1920, the provisions of A. W. 69 relating to arrest and confinement was to lessen resort to confinement, particularly of enlisted men, in cases where the restraint is not a necessity, either to prevent the escape of the accused or to restrain him from further violence or for other like reasons. No soldier or officer will be ordered into, or retained in, confinement prior to trial by court-martial except where confinement is necessary for one of the reasons indicated." **A** Manual for Courts-Martial, 1921, Note to para. 52.

forward charges within eight days to the officer exercising general court-martial jurisdiction when the accused is being held for trial by that forum,

Article of War 69 did not change until it evolved into article 10, *Uniform Code of Military Justice.* However, *A Manual for Courts-Martial, 1928,* contained a provision stating that confinement before trial was not a mandatory requirement and that "Arrest or confinement may, in the interest of the Government, be deferred until arraignment. . . ."[121] This is the first and the last time the phrase "in the interest of the Government'' appears in the *Manual for Courts-Martial.* With the advent of the **1949** Manual, the commander was advised to utilize his discretion in determining the necessity for pretrial confinement.[122]

2. *The Uniform Code of Military Justice and the Manual for Courts-Martial.*

a. The Uniform Code of Military Justice. By an act of 5 May 1950 Congress unified, revised, and consolidated the military laws which, in the past, had been applicable to each service individually. In the Code, articles 9(d), 10, **13** and **33** relate to pretrial restraint.

Article 9(d) prohibits arrest or confinement without probable cause.

Article **10** provides that persons subject to the Code and charged with an offense under the Code "shall" be ordered into arrest or confinement as circumstances require. The accused, when charged with an offense normally tried by a summary court-martial, shall not "ordinarily" be placed in confinement. Immediate steps are required to inform the prisoner of the charge against him and to try him or release him.

Article 13 delineates in statutory form the heretofore well-recognized rule[123] that confinement is not to be any more rigorous than that required to insure the prisoner's presence at trial. Punishments, other than those administered for disciplinary infractions, are prohibited before trial.

Article **33** states that the commanding officer of an individual arrested or confined for trial by general court-martial shall, if practicable, within eight days after arrest or confinement, forward charges, completed investigation, and allied papers to the officer exercising general court-martial jurisdiction over the case. If such

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[121] **A Manual for Courts-Martial, U.S. Army, 1928, para. 19.**
[122] **Manual for Courts-Martial, U.S. Army, 1949, para. 19***a.*
[123] **W. WINTHROP, supra note 106, at 124.**

action is not practicable, the commander is required to report the reasons for delay.

b. *The Manual for Courts-Martial.* The *Manual for Courts-Martial, United States, 1951,* was promulgated to implement provisions of the Code, which was enacted in 1950. A new Manual was promulgated in 1969 and became effective on 1 August 1969. In the area of pretrial restraint, no substantive changes were affected by the latter document. For this reason, all citations will be to the *Manual for Courts-Martial, United States, 1969 (Revised edition).*

The Manual provides that the provisions of article 10 relating to the type offenders to be confined are not mandatory but discretionary: "No restraint need be imposed in cases involving minor offenses."[124] Confinement before trial is warranted in two situations: first, to insure the presence of the accused at trial and, second, because of the seriousness of the offense.[125]

Article 13 of the Code is implemented by paragraphs 18*b*(3) and 125 of the Manual. In addition to proscribing punishment (other than that administered for disciplinary infractions) before trial or before approval and execution of the sentence, prisoners being held for trial or awaiting action on their sentences are not required to perform punitive labor, observe duty schedules devised as punitive measures, or wear other than the uniform prescribed for unsentenced prisoners.

3. *The Practice of Pretrial Restraint in the Military.*

a. The historical practice. The Articles of War provided for different treatment in the cases of officers and enlisted personnel. The enlisted man was generally confined prior to trial,[126] the officer was generally placed in arrest.[127] The justification for this difference in treatment is enunciated by Colonel Winthrop.

> A theory which has Seen advanced to explain the practice of thus permitting an arrested officer to be at large is that the possession by him of a commission, which would be in danger of being forfeited if he violated his parole and escaped, is a sufficient security, answering to bail at the criminal law, for his not withdrawing himself from

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[124] MCM, 1969 (Rev.), para. 18*b*(1). Whether an offense is minor depends upon the circumstances surrounding its commission. It generally includes misconduct not involving any greater degree of criminality than the average offense tried by summary court-martial. It ordinarily does not include an offense for which a dishonorable discharge or confinement for over one year may be imposed. *See* para. 128*b*.

[125] MCM, 1969 (Rev.), para. 20*c*.

[126] W. WINTHROP, *supra* note 106, at 124.

[127] *Id.* at 110; Wales v. Whitney, 114 U.S. 664 (1885).

> military custody and for his appearance before the court for trial at the appointed time.
>
> The officer gives bail in the value of his commission. This affords one great reason for the distinction taken between a commissioned officer and a soldier, in the circumstances of the arrest. . . . In all cases where the alleged crime, if proven, could not endanger more than the officer's commission, it may be said that this is a sufficient guarantee for the appearance of the accused, and that no other precautionary measure for that purpose would appear demandable.[128]

Certainly, not all enlisted men were confined prior to trial. Only those charged with "crimes"[129] were generally confined. Winthrop used the words "substantial offense" as analogous to the word "crime."[130] A substantial offense was something other than a "trifling irregularity" or a "petty dereliction."[131] Some leniency was exercised by General Order 21 in 1891. This order prohibited the confinement of enlisted men charged for trial by summary court-martial unless it was deemed necessary in particular cases.'[2]

Arrest or confinement prior to trial was to a great extent a matter of command discretion[133] and very few guidelines were in effect which would aid the commander in making his determination. Neither a commander nor a provost marshal was free to impose punishment upon officers or enlisted men prior to trial;[134] and an arrest, where the officer properly conducted himself, was not to be so severe as to prevent the due preparation of a defense.[135]

b. Present practices. During the 1962 hearings before the Senate Subcommittee on Constitutional Rights, the Assistant Judge Advocate General of the Army for Military Justice made the following statement regarding pretrial confinement.

> Such confinement may not be imposed unless actual restraint is deemed necessary to insure the presence of the accused at the court-martial or the offense allegedly committed was a serious felony.[136]

When no right to bail or release on recognizance exists, it is imperative that trials be held promptly and that pretrial confinees be

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128 W. WINTHROP, *supra* note 106, at 114.
129 Articles of War of 1874, art. 66.
130 W. WINTHROP, *supra* note 106, at 123.
131 Id.
132 Id. at 124.
133 Id. at 114, 117.
134 Id. at 112, 124.
135 Id. at 112.
136 ***Hearings*** Pursuant *to S. Res. 260* ***Before the*** *Subcomm. on Const.* ***Rights of the*** *Comm.* ***of the Judiciary on Constitutional Rights of Military Personnel,*** 87th Cong., 2d Sess. 100 (1962).

kept at a minimum. For this reason, the majority of commanders require that pretrial confinement be kept to an absolute minimum.[137] "To enforce this policy, army commanders publish orders to the effect that no personnel will be placed in pretrial confinement wihout the approval of the staff judge advocate."[138] Indeed, at some installations regulations are in effect which make pretrial confinement the exception, rather than the rule.[139] Also, most staff judge advocates, at all levels, do their best to keep the population of the stockades to an absolute minimum.[140]

The restriction by a senior commander of the power of his subordinates to confine is a legal one, and a violation of the restriction vitiates the legality of the confinement.[141] Other protections are afforded one who is placed in pretrial confinement. He may not be ordered to perform hard labor as punishment,[142] and some distinction must be afforded him in relation to the treatment of *sentenced* prisoners.[143] When the conditions of confinement are more rigorous than necessary to insure the presence of the accused, the eventual outcome of the trial may be affected by the exclusion of a confession made during the period of confinement144 or by a violation of military due process which will require reversal.[145] Additionally, a pretrial confinee punished for infractions of discipline under article 13 of the Code may not be tried by court-martial for that

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137 *See, e.g.*, Headquarters, 9th Inf. Div., U. S. Army, Memo No. 12, para. 19 (25 Jun. 1954), quoted *in part in* United States v. Gray, 6 U.S.C.M.A. 615, 618, 20 C.M.R. 331, 334 (1956) : "It is the policy of the Division Commander that confinement of personnel be kept to a minimum consistent with the circumstances in each case."

138 Hearings Pursuant *to* S. Res. *260,* supra note 136, at 847; see Headquarters, 9th Inf. Div., U. S. Army, Memo No. 12, supra note 137.

139 *E.g.*, Fort Riley Headquarters Reg. 22–2 (24 Mar. 1965), reprinted *in* part *in* United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967).

140 Comment 2, Disposition Form, JAGS/AJ, 25 Aug. 1969, from LTC Hugh R. Overholt, Chief, Military Justice Division, The Judge Advocate General's School.

141 *See* United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967); United States v. Gray, 6 U.S.C.M.A. 615, 20 C.M.R. 331 (1956).

142 UCMJ art. 13; United States v. Nelson, 18 U.S.C.M.A. 177, 39 C.M.R. 177 (1969) ; United States v. Bayhand, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956).

143 United States v. Nelson, 18 U.S.C.M.A. 177, 39 C.M.R. 177 (1969); United States v. Bayhand, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956).

144 See United States v. O'Such, 16 U.S.C.M.A. 537, 37 C.M.R. 157 (1967) (confinement conditions rendered pretrial confession inadmissible).

145 *E.g.*, United States v. West, 12 U.S.C.M.A. 670, 31 C.M.R. 256 (1962) (mode of restraining the accused prior to and during trial violated military due process).

offense.[146] The Congress, in promulgating article 13, sought to provide for the punishment of infractions "not warranting trial by court-martial."[147]

Under present concepts, pretrial confinement which is imposed lawfully is not rendered unlawful merely because it is not fully justified.[148] If an accused is confined under intolerable conditions, his right to military due process of law is violated.[149] If conditions are satisfactory, he still may have a remedy if the Government fails to afford him a speedy trial.[150] The concept of speedy trial is not predicated upon the accused's status of arrest or pretrial confinement alone. Restriction to an entire post has been held to impose upon the Government the duty to proceed with greater dispatch.[151] Indeed, a speedy trial issue may arise notwithstanding the absence of any restraint.[152]

Any remedy for unwarranted restraint prior to trial must be speedy if it is to be effective.[153] The remedy afforded an accused under article 98, *Uniform Code of Military Justice, viz.*, preferring charges against the officer responsible for his confinement, has been termed hollow by the Court of Military Appeals.[154] The motion to the convening authority[155] or the military judge[156] to release an accused from pretrial confinement must necessarily be made *after* the case is referred to trial. Although action under article

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146 United States v. Williams, **10** U.S.C.M.A. **615, 28** C.M.R. **181 (1959)**; United States v. West, **35** C.M.R. **639** (A.B.R. **1965).**

147 *Hearings on H.R. 2498 Before the House Armed Services Committee*, 81st Cong., 1st Sess. **916 (1949).**

148 *Cf.* United States **v.** White, **17** U.S.C.M.A. **211, 38** C.M.R. **9 (1967);** Gagnon v. United States, Misc. Doc. No. **70–2** (A.F.C.M.R. **14** Apr. **1970)** (pretrial confinement is discretionary and reviewable only for abuse thereof).

149 *Cf.* United States v. Hangsleben, 8 U.S.C.M.A. **320, 24** C.M.R. **130 (1957).** The relationship between speedy trial and due process, and between pretrial confinement and other factors considered in finding a denial of speedy trial, are considered in Comment, 18 JAG **J. 290 (1964)**; Ross, *Avoiding the Speedy Trial Issue*, **21** JAG **J.** 101 **(1967).**

150 United Stares v. Hounshell, 7 U.S.C.M.A. 3, **21** C.M.R. **129 (1956).**

151 United States v. Smith, **17** U.S.C.M.A. **427, 38** C.M.R. **225 (1968)** (an Army board of review determined that restriction to the limits of Fort Hood, Texas, was arrest "in fact").

152 *See* United States v. Williams, **12** U.S.C.M.A. **81, 30** C.M.R. **81 (1961)** (in determining the period of time for which the Government is accountable, confinement or the formal presentment of charges, whichever occurs first, marks the beginning of the period).

153 Stack v. Boyle, **342** U.S. **1, 4 (1951).**

154 United States v. West, **12** U.S.C.M.A. **670, 673, 31** C.M.R. **256, 259 (1962).**

155 MCM, **1969** (Rev.), para. **67b.**

156 UCMJ art. 39(a); Zamora v. Woodson, Misc. Doc. No. **70–22** (C.M.A., **4** May 1970), *as digested in 70–6* JALS **5.**

138 of the Code[157] may be proper,[158] such action is time consuming because no effective guidelines have been established for its employment.[159] Habeas corpus or mandamus to the Court of Military Appeals, although a possible remedy,[160] suffers from a similar impediment. Action by a federal district court is complicated by the exhaustion of remedies problem.[161]

The Chief of Naval Operations recognized the problems inherent in pretrial confinement, at least from the Government's point of view, when he stated that "unjustified pretrial confinements deny the service the most effective use of manpower, [result in] overcrowded brigs, and hamper the corrections program for rehabilitation of convicted offenders."[162]

The Army position has been that the formalization of control over pretrial confinement presently exercised by the staff judge advocate is undesirable for two reasons. First, "[t]he determination is a matter of discretion properly lying within the province of the commander . . . [and] is not judicial in nature" and, second, "[t]here are numerous posts and units that do not have the services of a staff judge advocate or other judge advocate personnel immediately available."[163]

A recent Department of Defense instruction permits pretrial confinement in excess of **30** days only when approved in each instance by the officer exercising general court-martial jurisdiction over the command which ordered the investigation of the alleged offenses.[164]

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157 "Any member of the armed forces who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to any superior officer who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. That officer shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department concerned a true statement of such complaint, with the proceedings had thereon."

158 Dale v. United States, Misc. Doc. No. 69–55 (C.M.A., 27 Feb. 1970), *as digested in* 70–2 JALS **11** (complaint under art. 138 can properly be made by convicted person whose sentence has been deferred pending appeal); DIG. OPS. JAG 1912–1940 § 427**(1)** (28 Sep. 1928), and § 479 (1932).

159 *See generally*, Nemrow, *Complaints of Wrong Under Article 138*, 2 MIL. L. REV. 43 (1958).

160 Levy v. Resor, 17 U.S.C.M.A. 135, 37 **C.M.R.** 399 (1967).

161 Owens v. Hinds, 189 F.2d 518 (10th Cir. 1951); Barrett v. Hunter, 180 F.2d 510 (10th Cir. 1950).

162 OPNAV Message 2814272 (Nov. 1966).

163 *Hearings Pursuant to S. Res.* 260, *supra* note 136, at 873.

164 *See* Dep't of Defense Instruction No. 1325.4, para. III A.2 (7 Oct. 1968).

IV. CONSTITUTIONAL IMPLICATIONS OF THE MILITARY PRACTICE OF PRETRIAL RESTRAINT

A. *GENERAL*

It has been noted that the military commander's decision to restrain a serviceman before trial has traditionally been a matter of discretion.[165] On the other hand, federal commissioners, magistrates, and judges are now restricted in the restraints they impose in non-capital cases before trial and, to a lesser extent, after trial. The impact of the United States Constitution upon the civilian practice has been scrutinized. To what extent constitutional safeguards apply to personnel in the military generally and in the area of pretrial restraint specifically will be examined in this section.

During the first century and a half of our existence as a nation, the courts were loath to impose constitutional restrictions upon the military. There was deemed to be no connection between the powers that the Constitution gave the Congress relating to control over the military in article I, section 8, on the one hand, and article 111, section 2, concerning the trial of crimes, on the other.[166] It was said that "the two powers are entirely independent of each other."[167] Although courts-martial proceedings were generally recognized as being judicial in nature, their validity was determined not by constitutional, but by statutory standards.[168] One United States Supreme Court opinion went so far as to state that military law was

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165 Unless the confinement is arbitrary, unreasonable, or capricious, the commander has not abused his discretion. Kline v. Resor, Misc. Doc. No. 70–10 (C.M.A., 11 Mar. 1970) (no relief afforded one restricted to company area pending trial by special court-martial) ; Horner v. Resor, Misc. Doc. No. 70–11 (11 Mar. 1970), *as digested in 70–3* JALS 11 (charges against accused held serious enough to warrant pretrial Confinement notwithstanding referral to special court-martial. Pretrial confinement authorized even though Lt Galley, who faces over one hundred charges for murder, is not in restraint; equal protection of the law arguments dismissed as frivolous); Dexter v. Chaffee, Misc. Doc. No. 7–17 (C.M.A., 11 Mar. 1970), *as digested in* 70–3 JALS 11 (charge of possession of marihuana, referred to a special court-martial, held to be a serious charge justifying pretrial Confinement when a bad conduct discharge can be adjudged) ; Smith v. Coburn, Misc. Doc. No. 70–18 (C.M.A., 11 Mar. 1970), *as digested in* 70–3 JALS 11 (Table of Maximum Punishments used to determine the serious nature of offenses). *See also* note 148, *supra.*

166 Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).

167 *Id.* at 79.

168 *Cf.* United States *ex rel.* Creary v. Weeks, 259 U.S. 336 (1922); Runkle v. United States, 122 U.S. 543 (1887).

the equivalent of due process to military personnel,[169] the fifth amendment notwithstanding.

It has long been recognized that one cannot read the Constitution *in vacuo*. The object of the document was to guarantee then-existing rights as they were recognized at the common law, not to extend guaranties to cases in which it was well understood the right could not be demanded.[170] Utilizing this approach, a federal district court interpreted the fifth and sixth amendments as being totally inapplicable to cases arising in the land or naval forces.[171]

In more recent times, it is clear that the courts[172] and members of Congress[173] feel that certain fundamental guaranties of the Constitution which affect the basic fairness of a trial are applicable to the military.

B. *THE TRADITIONAL APPROACH — RIGHT TO BAIL*

In 1951, shortly after being established by the United States Congress, the Court of Military Appeals opined that the rights of the serviceman are not derived from the Constitution, but from

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[169] Reaves v. Ainsworth, 219 U.S. 296, 304 (1911). It should be noted that this was not a criminal proceeding, but one wherein plaintiff alleged he had been deprived of a property right (his commission) in violation of the fifth amendment due process provision.

[170] Ex *parte* Quirin, 317 U.S. 1, 39 (1942). For instance, trial by jury and presentment by grand jury are unknown in military tribunals.

[171] Ex *parte* Benton, 63 F. Supp. 808 (N.D. Cal. 1945).

[172] *E.g.*, Wade v. Hunter, 336 U.S. 684 (1949). Accused was tried for the rape of a German woman during the period when our Armies were invading Germany. At his first trial, all evidence on both sides had been submitted to the court-martial and argument had been presented when the court members requested the appearance of two more witnesses. Because they were sick and the Army to which accused was attached was advancing rapidly, the Commanding General withdrew the case from the court-martial. The accused was tried by another court-martial and was convicted, his plea in bar of trial having been denied. The European Theater Board of Review found that retrial was precluded based upon former jeopardy, but the case was approved. The District Court granted habeas corpus, the Court of Appeals reversed the District Court and the Supreme Court affirmed.

The Court did not hold that the fifth amendment did not apply to the military. It did hold that the situation here was not one encompassed by that amendment and went on to state that a literal reading of the amendment would preclude a rehearing when a trial judge discovered that a juror was prejudiced against either the Government or the accused or in a case where the jurors were unable to agree on a verdict. They held that the record in this case was complete enough to show that miliary necessity was in fact the reason for the retrial of the accused.

See also Burns v. Wilson, 346 U.S. 137 (1953); Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952).

[173] *E.g., Report of the Comm. on the Judiciary, U. S. Sen. Subcomm. on Const. Rights, Pursuant to S. Res. 260,* 87th Cong., 2d Sess. 36–37 (1963).

laws enacted by the Congress.[174] Less than two years later,[175] the court sustained article 49, *Uniform Code of Military Justice*, which provided for depositions by written interrogatories thereby depriving an accused of the rights guaranteed a civilian to confront the witnesses against him under the sixth amendment. In justification of its stand, the writer of the majority opinion stated:

> Surely we are seeking to place military justice on the same plane as civilian justice but we are powerless to do that in those instances where Congress has set out legally, clearly, and specifically a different level. [176] . . . Moreover, in view of the fact that there are no satisfactory methods of permitting accused persons to be free on bond or on their own recognizance, it would be impossible for an accused to be present unless he was transported at the expense of the United States Govern-ment and under appropriate guard.[177]
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> This [deprival of a military accused of the right of physical confrontation] is a penalty which Congress has said he must pay because of the limitations inherent in the military system. . . . What may be desirable must give way to the absolute necessities of the services.[178]

The dissenter made these observations:

> I have absolutely no doubt in my mind that accused persons in the military service of the nation are entitled to the rights and privileges secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself. . . .[179] I cannot disregard a Constitutional safeguard for reasons of expediency.[180]

By 1960, the position of the dissenter had become that of the majority of the court. In holding that article 49 of the Code, as it related to written interrogatories, conflicted with the sixth amend-

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174 United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951). "For our purposes and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges upon the Constitution. We base them on the laws enacted by Congress." *Id.* at 77, 1 C.M.R. at 77. "True, we need not concern ourselves with the constitutional concepts . . . ." *Id.* at 79, 1 C.M.R. at 79. "It was for Congress to set the rules governing military trials." *Id.* at 80, 1 C.M.R. at 80.

See also Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953).

175 United States v. Sutton, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953).

176 Id. at 223, 11 C.M.R. at 223 (Latimer, J.).

177 Id. at 225, 11 C.M.R. at 225.

178 Id. at 226, 11 C.M.R. at 226.

179 Id. at 228, 11 C.M.R. at 228 (Quinn, C.J., dissenting).

180 Id. at 231, 11 C.M.R. at 231. The evidence admitted was particularly darnaging to the accused because he was charged with malingering. Accused contended that he had been shot when a weapon discharged accidentally. The prosecution entered into evidence the written interrogatories which showed chat the accused had told the deponent he was going to get out of the Marine Corps and had asked what would happen if he were to shoot himself.

ment, the court utilized a rationale which was to appear in many subsequent cases dealing with constitutional cases:

> [I]t was provided in Art. 10, Articles of War, 1786, that depositions might be taken in cases not capital, "provided the prosecutor and person accused are present at the taking of the same." Similarly, Art. 74, Articles of War, 1806, permitted the taking of depositions "provided the prosecutor and person accused are present at the taking of the same, or are duly notified thereof." See Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, pages 973, 983. The existence of such legislation at the time of the adoption of the Sixth Amendment is strong evidence that a military accused's right is satisfied by the opportunity to be present at the taking of depositions. Indeed, it has been said that the contemporaneous legislative exposition of the Constitution by its framers fixes the construction of its provisions. Myers v. United States, 272 US 52 . . . (1926).[181]

The argument proceeds in the following manner:

(1) We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted. Rather than reaching out for new guarantees, the Constitution was meant to secure for the future rights which were already possessed.[182]

(2) A most reliable means for determining both what the law was at the time of the adoption of the Constitution and what the framers of the Constitution intended is to study legislation contemporaneous with its adoption.[183]

(3) The Articles of War, being legislation of the Congress in existence before and after the adoption of the Constitution and the Bill of Rights, are effective indicators of the intent of the Congress and the framers of the Constitution.

Using this logic the Court of Military Appeals has decided that the sixth amendment does not guarantee to military personnel the right to legally trained counsel before a special court-martial,[184] and that the first amendment does not allow an Army officer to blaspheme the President of the United States.[185] On the other hand, expansion by the United States Supreme Court of concepts which were recognized in military law at the time of the adoption of the Constitution and the Bill of Rights will be applicable to the military.[186]

Applying these principles to the matter of release before trial it

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[181] United States v. Jacoby, 11 U.S.C.M.A. 428, 433, 29 C.M.R. 244, 249 (1960).
[182] Mattox v. United States, 156 U.S. 237 (1895).
[183] Myers v. United States, 272 U.S. 52 (1926).
[184] United States v. Culp, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).
[185] United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).
[186] United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

is evident, at least in relation to enlisted personnel, that any notion of release was negated by the early Articles of War. Enlisted men were required to be confined, and arrest was so much a part of the military practice regarding officers that its omission was prejudicial to discipline and the due administration of justice.[187]

Accordingly, there is legal merit to the proposition that in the military, the right to bail or release before trial does not exist.[188] Two relatively current writers have addressed themselves to the subject; one stated that the requirement of bail in the military was inappropriate,[189] and the other concluded that bail was never intended to apply to the soldier.[190]

C. *DUE PROCESS—STATE OF THE LAW*

Only one reported military case can be found wherein it was alleged that confinement prior to trial constituted a violation of due process under the fifth amendment.[191] The accused was confined prior to trial for nearly five months. The court noted that at no time did he complain that his confinement was illegal or not justified by probable cause and cited article 9(d) of the *Uniform Code of Military Justice*. That article provides that "No person shall be ordered into arrest or confinement except for probable cause." Probable cause to arrest or confine exists when the known or reported facts are sufficient to furnish reasonable grounds for believing that the offense has been committed by the person to be restrained.[192] After a brief survey of bail in the federal system, the court concluded that there is no right to bail in the military courts. The accused has three remedies: first, he may move for a speedy trial ; second, he may seek habeas corpus in the event a speedy trial is not afforded him; and, third, he may institute charges under article 98, *Uniform Code of Military Justice*.[193] The commander's

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187 W. WINTHROP, *supra* note 106, at 114.

188 United States v. Vissering, 184 F. Supp. 529 (E.D. Va. 1960); *cf.* Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967) ; United States v. Wilson, 10 U.S.C.M.A. 337, 27 C.M.R. 411 (1959) ; United States v. Hangsleben, 8 U.S.C.M.A. 320, 24 C.M.R. 130 (1957); United States v. Bayhand, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956); *Hearings Pursuant to S. Res. 260, supra* note 136, at 99, 190, 194, and 847; Weiner, *Courts-Martial and The Bill of Rights; The Original Practice II*, 72 HARV. L. REV. 266, 284–85 (1958); DIG. OPS JAG 1912, para. 1*c* at 481.

189 Henderson, *Courts-Martial and The Constitution; the Original Understanding*, 71 HARV. L. REV. 293, 316 (1957).

190 Weiner, *supra* note 188, at 286.

191 United States v. Wilson, 10 U.S.C.M.A. 337, 27 C.M.R. 411 (1959).

192 MCM, 1969 (Rev.), para. *20d* (1).

193 United States v. Wilson, 10 U.S.C.M.A. 337, **340,** 27 C.M.R. 411, 413 (1959).

nearly complete discretion to confine is restricted only by the requirement of probable cause. Such confinement does not violate "military due process," which has been defined as a denial of "fundamental fairness, shocking to the universal sense of justice."[194]

D. *DUE PROCESS AND ARTICLE 9d— A PROPOSED INTERPRETATION*

But under our concept **of** justice, which has been based upon the presumption of innocence until an accused has been adjudged guilty, can there be anything more shocking than confinement before trial which is not fully justified? In the words of Caleb Foote:

> There is almost universal recognition of the impropriety of punishing —and custody is punishment no matter what its name—one who is merely accused and has not been and may never be *convicted.*[195]

Two arguments are proposed as to why pretrial confinement, even though accomplished by the proper official and based upon probable cause that the confinee committed an offense gainst the Code, may be a violation of military due process.

First, when speaking of confinement before trial, probable cause should be expanded to include not only whether the offense was committed, but whether there is reason to believe, based upon the nature of the offense itself and/or any manifestations on the part of the accused, that he will not in fact appear for trial. If confinement is not necessary to assure the accused's presence, it is punishment. In the words of Judge Latimer, "[C]onfinement itself [is] a form of penal servitude and. . .if the restraint imposed [is] more than that needed to retain safe custody, the unnecessary restrictions [are] in the nature of punishment."[196] It may indeed be argued that unjustified "detention before trial is equivalent to pretrial punishment."[197]

Second, the commander under the Uniform Code performs many judicial functions. Even though the Federal Rules of Criminal Procedure do not apply to military personnel,[198] the Court of Military Appeals has equated the commander's functions to those of federal judicial officers.[199] The court has suggested that a request for a speedy trial be made to the accused's commanding officer in that he

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194 United States v. Culp, 14 U.S.C.M.A. 199, 206, 33 C.M.R. 411, 418 (1963).

195 Foote. *The Comparative Study of Conditional Release, 108* U. PA. L. REV. 290, 292 (1960).

196 United States v. Bayhand, 6 U.S.C.M.A. 762, 766, 21 C.M.R. 84, 88 (1956).

197 *Hearings on S. 1357, supra* note 6, at 15.

198 Boeckenhaupt v. United States, 392 F.2d **24** (4th Cir. 1968).

199 United States v. Nix, 15 U.S.C.M.A. **578,** 36 C.M.R. 76 (1965).

acts in a "military justice capacity."[200] Similarly the court has equated the commander's role to that of a federal judge in the area of an accused's suspected mental disorders[201] and for determination of the existence of probable cause to justify a search of an accused's person or belongings.[202] Confining an accused for an appreciable time[203] prior to a finding of guilt can be no less a judicial act than those enumerated. Therefore, the same considerations which are required of a committing magistrate should be required of a military commander. For a number of years now, the Court of Military Appeals has adhered to the view that the protections in the Rill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of the armed forces.[204]

Since pretrial release is not expressly inapplicable, it must by necessary implication be inapplicable. The necessary implications are that mandatory release is incompatible with the commander's complete control over his persvnnel and would result in an even greater derogation of his authority. There are two answer to these objections. First, the very idea of military law and regulation is a limitation upon the absolute nature of command power[205] and, second, the entire concept of discipline has changed with the advent of newer weaponry. **S.** L. **A.** Marshall put it this way :

> The philosophy of discipline has adjusted to changing conditions. As more and more impact has gone into the hitting power of weapons, necessitating ever widening deployment in the field of battle, the quality of the initiative in the individual has become the most praised of the military virtues.[206]

V. XPPLICATTOS OF RELEASE PRISCIPLES TO THE MILITARY

A. *THE NECESSITY FOR A NEW APPROACH*

Comments of the United States Court of Military Appeals in two

[200] United States v. Wilson, 10 U.S.C.M.A. 398, 27 C.M.R. 472 (1959).
[201] United States v. Nix, 15 U.S.C.M.A. 578, 36 C.M.R. 76 (1965).
[202] United States v. Hartsook, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965); United States v. Brown, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).
[203] *See, e.g.*, United States v. Snook, 12 U.S.C.M.A. 613, 31 C.M.R. 199 (1962) (4 mos); United States v. Davis, 11 U.S.C.M.A. 410, 29 C.M.R. 226 (1960) (144 days); United States v. Wilson, 10 U.S.C.M.A. 398, 27 C.M.R. 472 (1959) (379 days); United States v. Wilson, 10 U.S.C.M.A. 337, 27 C.M.R. 411 (1959) (5 mos); United States v. Eounshell, 7 U.S.C.M.A. 3, 21 C.M.R. 129 (1956) (10 mos).
[204] United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).
[205] *See generally*, M. JANOWITZ, THE PROFESSIONAL SOLDIER, ch. 3 (1960).
[206] S. MARSHALL. MAN AGAINST FIRE 22 (1947).

recent cases involving lengthy pretrial detention provide the best argument for a change in the policy in the military:

> Once again we are faced with the vexatious problem . . . because of . . . failure by military authorities to comply with Articles 10 and 33 of the Code. . . .[207] [T]he facts and circumstances of the present case demonstrate another instance of a prejudicial invasion of the accused's rights.[208]

Just as it takes longer today to complete the proceedings in a court-martial than it did 15 years ago, pretrial processing time has risen commensurately.[209] This rise is in part due to more careful preparation of cases by lawyers and to refinements in the courts-martial pretrial procedure. With the advent of more lawyers in the special court-martial, it may be anticipated that a similar rise in pretrial processing time will occur in that forum.[210] This is particularly true because the vast majority of administrative case processing will still be accomplished by the special court-martial convening authority's staff which will probably continue to perform military justice functions as an additional duty.

With more emphasis being placed upon affording an accused a speedy trial, it is clear that either the proceedings must be expedited or that some form of pretrial release be instituted. Judge Ferguson of the Court of Military Appeals has stated that "[S]peed, particularly where there is no bail, is a very important element."[211] Were an accused free from restraint prior to trial, it would be proper to require him to show that he has been prejudiced by any excessive delay.[212] With restriction to a company area[213] or even to an entire military installation[214] being termed arrest in fact thereby bringing into operation articles 10 and 33 of

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[207] United States v. Parish, 17 U.S.C.M.A. 411, 412, 38 C.M.R. 209, 210 (1968) (conviction of robbery and attempted robbery was set aside and charges ordered dismissed).

[208] United States v. Weisenmuller, 17 U.S.C.M.A. 636, 639, 38 C.M.R. 434, 437 (1968) (conviction for possession and use of marihuana set aside and charges ordered dismissed).

[209] "REPORT TO THE HONORABLE WILBUR M. BRUCKER, SECRETARY OF THE ARMY, BY THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY, 18 Jan. 1960, at 286–87. Pretrial processing times in general courts-martial cases are as follows: 1954: 26.5 days; 1955: 26.75 days; 1956: 43.75 days; 1957: 46.8 days; 1958: 54.6 days; 1959 (Jan.–Jun.) : 57.5 days.

[210] REPORT OF THE FORT LEWIS PILOT PROGRAM, MILITARY JUSTICE ACT OF 1968, 20 Jan. 1969, at 13, 16.

[211] *Hearings Pursuant to S. Res. 260, supra* note 136, at 194.

[212] United States v. Feinberg, 383 F.2d 60 (2d Cir. 1967).

[213] United States v. Williams, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967).

[214] United States v. Smith, 17 U.S.C.M.A. 427, 38 C.M.R. 225 (1968).

the Code, the need for an effective alternative to pretrial restraint is even more compelling.

B. *THE NECESSITY OF PRETRIAL RESTRAINT*

1. Measured by the Nature of the Offense.

The basis for pretrial restraint is to assure the presence of the accused at his trial. Traditionally we have denied bail for offenses for which the ultimate penalty might be adjudged. Therefore, the concept has evolved that the seriousness of the offense is relevant only in that the greater the possible penalty, the more the reason to flee in order to avoid its imposition. The human instinct for survival being what it is, there should be a greater urge to flee in a capital case "where the proof is evident or the presumption great" than there is in a capital case in which the evidence does not weigh as heavily against the accused. The greater the predictability of conviction, the greater the risk of flight.

Because it is so deeply rooted in our history,[215] there should be no objection to the confinement before trial of an alleged capital offender. This would be particularly true in the case where the evidence weighs heavily against him. Those charged with offenses against the security interests of the state should not be released before trial. This is not because the tendency toward flight is any greater, but simply because weighing the interests of the nation against those of the individual accused, the former must prevail in this sensitive area.

It would be a rare misdemeanor which would justify restraint prior to trial.[216] Similarly, there seems to be little rationale behind confining one charged with a non-capital, non-violent felony on that basis alone prior to trial.[217]

When charged with a non-capital violent felony, an accused's propensity to commit further acts of misconduct must be objectively analyzed in view of his prior record and present attitude.

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[215] Mass. Body of Liberties § 18 (1641) in THE COLONIAL LAWS OF MASSACHUSETTS 6 (W. Whitmore ed. 1890).

[216] However, assuming that a strong disposition toward flight is evinced, confinement would be proper.

[217] The writer is personally convinced that confinement before trial is not warranted for any offense, based solely upon the nature of the offense, to be tried before a special court-martial not empowered to adjudge a discharge. In other words, a soldier who is worth keeping is worth trusting. One who is incapable of this trust should be eliminated from the service. However, to advocate adoption of a firm policy prohibiting pretrial Confinement for soldiers tried by special courts-martial might result in commanders recommending general courts-martial simply to avoid the prohibition.

Because of the inherent difficulty in predicting human conduct,[218] certain procedural safeguards should be followed in these cases. If an accused is detained before a finding of guilt because we fear that he will commit subsequent acts of misconduct, either of two approaches should be followed. First, either the accused's case is placed on a separate docket and given priority treatment in terms of expediting his trial or, second, he should be afforded a hearing within five days of his confinement at which he is represented by counsel. The hearing officer would be required to find that the confinement would not materially hamper the defendant's ability to prepare his case, that the Government has a prima facie case, and that there is a reasonable likelihood that, if released, the defendant will commit a serious crime involving violence against the person of another. Regardless of which of the above courses of action is followed, some limiting period of pretrial confinement, excluding defense requested delay, should be established and the accused released at the expiration thereof.

2. *Reducing the Risk of Flight Before Trial.*

The risk of flight in the military may be reduced by employing these principles :

First, release only those individuals who desire to be released. An accused who is just as content to languish in the stockade as he is to be at liberty should categorically be adjudged a bad risk. Additionally, he should be required to affirm not only his intention to remain present for his trial, but his intent to stay out of trouble and perform all assigned tasks in a commendable manner.

Second, release of those individuals apprehended in an absent without leave status should be effected only in exceptional cases. A situation in which the condition which motivated the absence no longer exists might qualify as an exceptional case.

Third, provide criminal sanctions for those individuals who flee or otherwise violate the conditions of their release. Other than outright imprisonment, criminal penalties should be one of the more effective deterrents to flight. Former Attorney General Ramsey Clark has commented :

> Efforts to improve the bail system by increasing pretrial release are justifiable only if the releasees return. This objective can be promoted by tightening up the criminal penalty provisions.[219]

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[218] *Hearings on* S. *1357, supra* note 6, at 177. [W]ith the exception of extreme cases, which defendants will commit serious, subsequent offenses is difficult to predict."

Fourth, an accused who is released before trial should be made aware of not only the criminal penalties involved in breaching his release agreement, but of the possibility of administrative discharge. It should be emphasized that one who is discharged with less than an honorable discharge faces very real problems in securing employment in civilian life.[220]

Fifth, if future behavior is predictable at all it must be on the basis of past behavior and a present situational analysis. It will be remembered that the success of the Manhattan Bail Project was founded upon the furnishing of information to a committing magistrate so that the latter could objectively measure the accused's propensity to flee or remain present for trial. The fact gathering process should be easier in the military where access to an accused's records and associations is generally good. Some factors which would assist in "risk analysis" might be: character and efficiency reports rendered in the past; present evaluation based upon written statements of superiors and subordinates; grade or rank; dependents who reside in the area and rely upon the defendant for support; civil and military disciplinary record; and an accused's espoused career aspirations. To gain the benefit of an objective evaluation, the accused should be assessed without regard to the offense with which he is charged. The evaluation should be in writing and a point value attached to each risk factor.[221]

Sixth, during the period of pretrial release, the accused must be made aware of the fact that someone cares about his case. This expression of interest on the part of the attorney representing the accused might well be a reason for the success of the Tulsa Plan. For this reason, the military defense counsel assigned to the accused's case should be readily available, not only to assist in case preparation but to assist in other legal or quasi-legal matters which may build up in an accused's mind with the result that he is less inclined to adhere to the release provisions.

Seventh, in the final analysis we must to a great extent rely upon self-discipline and a desire on the part of the individual soldier to do the right thing. The factors of self-respect, leadership,

[220] *See generally, Hearings Pursuant to S. Res. 260, supra* note 136, at 315, 328, 331, 335 and 366 (***Quaere:*** Were the enlisted man, in a proper case, to pose his honorable discharge as security for release before trial, would the situation be comparable to the officer of Colonel Winthrop's day giving bond in the value of his commission?).

[221] *E.g., Hearings on* S. *1357, supra* note 6, at 57. Systems like the Manhattan Bail Project which utilize objective standards by employing a point system experience a higher rate of favorable recommendations and good records of appearance. Projects whose evaluations are subjective have a generally lower rate.

efficiency, motivation, productivity, loyalty, morale, esprit de corps, and concept of mission can only be imbued by the commander and his staff. These intangible but extremely important factors could contribute more than any other single factor to a successful pretrial release program.

C. *PROPOSED PROCEDURAL STEPS*

1. *Background.*

Sufficient probable cause exists to believe that a member of A Company has committed an offense. The commander's task at this point is to charge the man and then determine what to do with him pending trial. Whatever decision is reached by the commander, it is important that it be sustainable if subjected to attack. A decision to impose no restraint on a man with prior convictions who has voiced an intent to do away with the prospective witnesses against him is just as faulty as a decision to confine a remorseful first offender for a minor offense. The commander should realize that he has vast discretion in determining the propriety of pretrial confinement and that confinement will be deemed unlawful only when he has abused his discretion.[222] If the commander is conversant with recent Court of Military Appeals opinions, he will realize that his decision to confine will be sustained if the offense charged is serious. The seriousness of an offense is determined by at least two tests. First, does the Table of Maximum Punishments provide a stiff penalty for its commission?[223] Second, is it to be referred to a special court-martial authorized to impose a bad conduct discharge?[224] The commander must also realize that pretrial confinement is valid only when its purpose is to "insure the continued presence of the accused" or "where the seriousness of the offense alleged is likely to tempt him to take leave of his surroundings."[225]

The commander should at this point realize that no matter what criteria are utilized, the only valid purpose of pretrial confinement under the *Bayhand* test is insuring the presence of the accused at trial. That commander may wince at realizing that a mad bomber, an intra family child molester, or an accused bent on suborning

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[222] Smith v. Coburn, Misc. Doc. No. 70–18 (C.M.A., 11 Mar. 1970), *as digested in 70-3* JALS 11.

[223] *Id.*

[224] Dexter v. Chaffee, Misc. Doc. No. 7–17 (C.M.A., 11 Mar. 1970), *as digested in 70-3* JALS 11.

[225] United States v. Bayhand, 6 **U.S.C.M.A.** 762, 21 **C.M.R. 84** (1956).

perjury may not be legally confined before his trial under this standard.

Whether an accused person will present himself for trial is only one question that the commander is in fact interested in. Other questions are: (1) If he is not confined or restricted, will the accused get into more trouble? (2) Will he perform duty adequately, or will the fact that charges have been preferred against him keep him from doing so? *(3)* Is confinement necessary to show other members of the command that any challenge to military authority will be treated with swift retribution?

Questions (1) and (2) are valid. Question *(3)* is generally invalid, If we are interested in making an example of one who challenges authority, preferring of charges and trial by court-martial should suffice. Other members of the command must be made aware of the fact that just because an offender was disrespectful to his superiors and is still around, it does not mean he has escaped his just deserts.

2. Determining the Issue of Pretrial Confinements.

Step 1. This step involves the gathering of information. A form should be utilized which contains much of what is currently listed on DA Form 20, *i.e.*, name, grade, date of rank, date of birth, duty MOS, marital status and number of dependents, whether enlisted, inducted, or extended, physical status and assignment limitations, security clearance, MOS evaluation scores, aptitude test scores, training received, civilian education, and appointments and reductions. Further, the form should contain a record of convictions, the substance thereof and any nonjudicial punishment administered. Career aspirations, length of service, decorations and awards, and an impartial evaluation (excluding the offense charged) by an accused's supervisors in the chain of command are certainly relevant.

Step 2. This step invclves a personal interview of the accused by the commander. At this point the commander should make **known** to the accused the commander's power to confine prior to trial. As indicated earlier, if the accused does not value his freedom, the pretrial confinement issue is moot as it relates to him. If, on the other hand, the accused expresses a desire to be free of restraint prior to trial, the commander must insure that the accused understands his obligations, *viz.*, to remain for trial, to maintain high soldierly standards, and to avoid further difficulty. An accused should be made aware of criminal sanctions imposable by the mili-

tary if he violates the conditions of his release.[226] If the commander determines that pretrial confinement is warranted, he should succinctly state his reasons for ordering it on the form.

Step 3. This step involves an administrative hearing.[227] As soon as the accused is confined he should be offered the opportunity to appeal his confinement. He should be provided with a lawyer and the hearing before an associate military judge[228] would be held within five days of confinement. Rules of evidence would be relaxed, but the Government would still be required to obtain the personal presence of necessary witnesses if they are available. The question of the necessity of pretrial confinement, be it on the basis of ssriousness of the offense, propensity to flee, or anticipated criminal conduct would be thoroughly documented and determined by preponderance of the evidence.

The military judge's decision should be final. If he finds a failure on the part of the Government to substantiate the need for confinement, he should be empowered to order release.[229] The hearing, even though nonjudicial, should be summarized and appended to the record of trial as an allied document.

This hearing could also serve another purpose. The Supreme Court, in *O'Callahan v. Parker*,[230] limited the jurisdiction of domestic courts-martial to "service-connected)' offenses. The test of service connection is a vague one, even to lawyers.[231] It is expecting too much to make the commander consider this test in deciding whether an accused should be court-martialed. The hearing, before a judicial officer,would provide a convenient forum to establish the facts needed to decide the issue of service connection.

Of course, if an accused is not confined or restricted prior to

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226 These sanctions would require new legislation by the Congress. An order to remain with the unit and to avoid further difficulty is subject to attack and is within the gamut of footnote 5, Table of Maximum Punishments. ***See*** United States v. Bratcher, 19 U.S.C.M.A. 125, 39 C.M.R. 125 (1969); United States v. Gentle, 16 U.S.C.M.A. 437, 37 C.M.R. 57 (1966); United States v. Haynes, 15 U.S.C.M.A. 122, 35 C.M.R. 94 (1964).

227 A judicial hearing under article 39(a), UNIFORM CODE OF MILITARY **JUSTICE,** is infeasible in that the hearing may not take place before the case is referred to trial.

228 See UCMJ art. 26.

229 Although a military judge may have, under recent decisions, powers heretofore undreamed of, his authority to release an accused from confinement should be provided for in statutory form. ***See*** United States v. Calley, 19 U.S.C.M.A. 96, 41 C.M.R. 96 (1969).

230 395 U.S. 258 (1969).

231 *E.g., id.* at 284 (Harlan, J., dissenting); Comment, **3** LOYOLA U. OF L. **A.** L. REV. 188, 198 (1970).

trial, the service connection issue can be decided at trial with no prejudice or inconvenience to him.

VI. SUMMARY AND CONCLUSION

The preceding principles are espoused with full realization that there are significant differences between the administration of justice in the military and civilian communities.[232] The object of the civil law is to create the greatest benefit to all in a peaceful community; the object of military law is to govern armies with a view toward maintaining an effective fighting force. Even critics of military law recognize that an undue diversion of energy in the areas of administration of military justice may have an adverse effect upon prime military goals.[233] Today military law is utilized to perform a dual function: to insure discipline and to administer justice. The theory in vogue before the First World War was that the service volunteer entered into a contract with the Government under which he waived all his rights under the Constitution. The theory is no longer tenable because of the evolution in the composition of the Army. The Army is no longer a small band of volunteers content to serve for bed, board, and **$5** a month. The Selective Service System has made the Army a representative part of the community. As the community attains greater rights and freedoms, demands for similar rights will be made in the military community. The fact that these demands are heeded is evidenced by the *Uniform Code* of *Military Justice* and the Military Justice Act of 1968.

In these times when the very basis of military jurisdiction is being attacked because of divergence of miliary and civilian standards of justice,[234] it would seem reasonable to provide the military man "the protections he would have if he were a civilian, as nearly as possible. . . ."[235]

Under the concepts of pretrial release which have been enumerated, the majority of persons charged would be released before

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[232] Senator Sam J. Ervin, Jr., recognized this difference:

"The administration of justice is one of the primary functions of any civil government and may be classified as perhaps its most sacred function. . . . [T]he administration of justice in the armed services is designed to be disciplinary in purpose or to lay down the basis for separation of pereons unsuitable or unfit for military service from the armed services." *Hearings Pursuant to S. Res.* 260, *supra* note 136, at 349.

[233] *Id.* at 253.

[234] O'Callahan v. Parker, 395 U.S. **258** (1969).

[235] *Hearings Pursuant to S. Res. 260, supra* note 136, at **204.**

trial. In most instances the commander would be required to evaluate "objectively" each man's propensity to flee. This should not be a time consuming procedure. If he is satisfied that the accused will remain present and perform his duties in a military manner, an agreement can be entered into between the commander and the accused. A violation of the agreement will cause revocation of release and pretrial restraint will result. If the accused absents himself before trial he is almost sure to be apprehended[236] and his flight prior to trial may be considered in determining a consciousness of guilt of the offenses charged.[237]

If the accused is confined before trial by the immediate commander, he should be afforded the opportunity for a hearing. If the determination of the commander is substantiated by evidence in the file, it should not be disturbed. If, on the other hand, the determination cannot be substantiated, the accused should be released 2nd the aforementioned agreement entered into between the accused and the commander.

By employing the foregoing principles we not only afford an accused an opportunity for a fairer determination of the need to confine him before trial, but we act in the best interests of the Government by allotting manpower to the purpose for which it was intended. Hopefully, the adoption of these proposals will not only obviate the situation where one convicted of a serious felony will gain his freedom simply because the Government was unable to prove that it acted diligently in the prosecution of his case, but will avert the long and ofttimes unnecessary restraint of one merely accused of an offense.

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[236] *Hearings on H.R. 3576, H.R. 3577, H.R. 3578, H.R. 5923, H.R. 6271, H.R. 6934, H.R. 10195, and S. 1357 Before Subcomm. No.* 5 *of the Comm. on the Judiciary,* 89th Cong., 2d Sess. 21 (1966). Ramsey Clark told the House Subcommittee that "in the history of The Federal Bureau of Prisons, there have been only 12 individuals, out of hundreds of thousands incarcerated, who have escaped and not thereafter been accounted for by either apprehension or recovery in some fashion."

[237] *Cf.* United States v. Johnson, 6 U.S.C.M.A. 20, 19 C.M.R. 146 (1955).

COMMENTS

"...IN THE LINE OF HIS DUTY.""

The liberalization of "line of duty" criteria is reflected in this comment, which compiles current and historical opinions on specific line of duty issues.

I. INTRODUCTION

Few expressions in the JAGC lexicon are as commonplace as the phrase "line of duty." Use of this term in Army conversation or communication normally conjures the mental image of an incident involving injury to a soldier either performing his duties or engaged in acts not clearly incompatible with or unrelated to such duties, To be sure, that image would be incomplete if it did not also include the inevitable report of investigation and successive reviews by various echelons of command.'

Routine disposition of line of duty reports frequently does not reflect the broad spectrum of potential after-effects. In some instances, lack of readily available information at subordinate organization levels may lead to misunderstanding concerning some of the purposes and ultimate application of line of duty reports. For an illustrative sampling of statutory applications, a table of selected statutes pertaining to Army personnel has been included as an appendix.

It is primarily in the context of entitlement to medical care and related benefits, including compensation for survivors, that this comment will project a summary of conceptual changes which have affected the administration of matters requiring official interpretation of "line of duty" (and its derivations). In addition, an appendix furnishes a digest of selected opinions noting recent Army application of the basic principles involved. No effort will be made to delineate basic procedures surrounding the mechanics of line of duty determinations, since the ABC's of LOD reports, investiga-

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

1 Generally an Adjutant General function, the reports frequently are coordinated with command judge advocates (especially if adverse findings are indicated) for review of legal sufficiency, etc. ; and final approving authorities are required to coordinate with their staff judge advocate, or other appropriate legal adviser, tentative adverse decisions. Army Reg. No. 600–10, para. 5–14*a*(3) (7 Jun. 1968) [hereinafter referred to and cited as AR 600–10].

tions, review and other administrative features are set forth in much detail in the applicable regulations and related handbooks.[2]

11. THE CHANGING CONCEPT

The fundamental problem at the core of a "line of duty" determination plainly is whether the incident giving rise to the disability under examination occurred within reasonably broad hounds of the concept of the term. Although there has been for many years almost universal agreement that the term line of duty, though closely related to performance of duty, was not inextricably bound to an *act* of duty, early determinations manifested a more restrictive interpretation, notwithstanding that statutes of a beneficial character were involved. Efforts to establish the distinct limits beyond which a line of duty "status" may not be considered to extend have generated many official opinions, and it is in this area of more or less uncertainty that the judge advocate performs his traditional role as adviser to the commander responsible for making the determination.3

One of the early provisions of a line of duty requirement in military administration appears in the characteristically plain and expressive language of the 17th Century British Articles of War:

> If any soldier be sick, wounded, or maimed *in his **Majesties Service,*** he shall be sent out of the Camp to some fit Place for his Recovery, where he shall be provided for by the Officer appointed to take care of sick and wounded Soldiers, and his Wages or Pay shall go on and be duly paid tiil it do's appear that he can be no longer serviceable in the Army, and then he shall be sent by Pass to his Countrey, with Money to bear his Charges in his Travel, or such other Provision shall be made for him, as his Majesty shall direct.4

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[2] AR 600–10, ch. *5;* U. S. DEP'T OF ARMY, PAMPHLET No. 27–6, PRINCIPLES GOVERNING LINE OF DUTY AND MISCONDUCT DETERMINATIONS IN THE ARMY (1968) [hereinafter referred to and cited as **DA** Pam 27–61. The pamphlet includes certain "rules" which have evolved for convenient application to recognizable patterns of behavior and familiar factual situations. (Although the described factual situations appear to be based on JAG opinions, they are no longer keyed to specific opinions, as in an earlier (1953) edition. ***See** also* U. S. DEP'T OF ARMY, PAMPHLET No. 27–187, MILITARY AFFAIRS, ch. 10 (1966) [hereinafter referred to and cited as DA Pam 27–187], for a more legalistic treatment.

[3] Within the Army (as in the case of the other military and naval forces), LOD determinations are binding only as to statutes and regulations administered by the Army; frequently, however, the reports of investigations and determinations made thereon are furnished as information to other agencies (*e.g.*, the Veterans Administration) charged with administering particular benefits arising out of service-connected incidents.

An early federal statute[5] authorizing placement upon a "list of invalids of the United States," at pay and under regulations directed by the President, of personnel *who shall be disabled by wounds or otherwise while in the line of his duty in public service* provided Attorney General Richard Rush with the opportunity in 1815 to emphasize what he perceived to be the "benignant intentions of law" at the time.[6] Responding to a request by the Secretary of War[7] for advice, the Attorney General observed that coverage would extend to "accidents or inflictions from the hand of God or men, happening to the party while in the immediate and obvious discharge of his duty."

While Attorney General Rush found it relatively easy to perceive that the term "wounds" could be enlarged upon so as to embrace hidden "seeds of disease, which finally prostrate the constitutiori," it was more doubtful to fix "by any undeviating standard, what is meant **by being in** the **line** of duty." He **duly** presumed that military personnel available for duty—but not on furlough—were obliged to hold themselves *detached from other pursuits,* so as to be ready at a moment to answer any call emanating from those who may be authorized to command them. On the other hand, accident or sickness palpably proceeding from causes while away on a voluntary absence "too long continued . . . might form an exception." Additional premises included :

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4 Articles of War of James II (1688), art. **XXXVI,** *as set* **forth** *in* W. WINTHROP'S MILITARY LAW AND PRECEDENTS **925 (2d** ed. **1896, 1920** reprint) (emphasis added). An earlier usage in marine history was recently recalled, under which hired mariners of a vessel, wounded or otherwise hurt "in the service of the ship," would be "cured and provided for" at the costs and charges of the shipowner. Laws of Oleron, art. **VI** (*circa* 1266 **A.D.**), *reprinted at 30* F. Cas. *1174, cited in* Bostow, ***Some*** *Considerations in Determining Line of Duty/Misconduct Status,* **23** JAG J. **27 (1968).**

5 Act of 16 Mar. **1802,** § **14, 2** Stat. **132, 135** (fixing the "military peace establishment" of the U. S. and providing for a pension list). Other early congressional employment of the phrase "line of duty" (or substantially analogous language) appears in the following statutes: Act of **2** Mar. **1799,** § 8, **1** Stat. **709,** 716 (an act for the government of the Navy) ; Act of **20** Jan. 1813, **2** Stat. **790, 791** (an act providing Navy pensions) ; Act of **4** Mar. 1814, § **2, 3** Stat. 103 (an act giving pensions) ; Act of **3** Mar. **1817, 3** Stat. 373 (amendment to the **1814** Act) ; and Act ***of*** **30** Jun. **1834, 4** Stat. **714** (an act concerning naval pensions). For an interesting treatment of a naval officer's view of line of duty origins, see Roberts, *Line of Duty Status—Part I,* JAG J. (Dec. **1949) 10.**

6 1 OP. ATTY. GEN. 181 **(1815).**

7 With reference to advice rendered to the Secretary by the Attorney General during this era, it will be recalled that Congress in 1802 abolished the Office of Judge Advocate to the Army. Although judge advocates were appointed from time to time for divisions of the Army, there was no Judge Advocate *or* Judge Advocate General ***for*** the entire **Army** until **1849,** when the office of Judge Advocate of the Army was revived. DA Pam 27–187, para. **2.2.**

> If the loss of health should have proceeded from careless or irregular habits in the party — much more if from vicious ones; **or** if **he** brought to the service or ranks of his country a constitution already impaired . . . these will form occasions for caution, or **for** an entire exclusion from the bounty. . . . **A** claimant who was suspected not to stand in lights altogether meritorious or innocent, must expect that his application would meet a severe scruiny, and certain rejection at the discovery of anything that could taint it with unfairness or imposition.

For further justification of principles attributed to the congressional purpose, the Attorney General noted the following extract from the Digest of Justinian, that "he who has hired his services is to receive his reward for the whole time, if it has not been his fault that the service has not been performed.'' He also relied on traditional maritime practices :

> [I]f sickness or disability overtake a seaman, which was not brought on by vicious or unjustifiable conduct, he is entitled to his full wages for the voyage. Nor does it make any difference whether it come on during the time he was on actual duty, or was merely accidental while he continued in the service.

An interesting example of the "liberal" construction thought to be justified in the case **of** "benevolent" pension statutes is found in Attorney General Benjamin F. Butler's **1833** opinion[8] that a "strict" construction would perhaps exclude all disabilities arising from assaults committed on a member by persons belonging to the same service. Thus, he indicated, injury to a sergeant who was assaulted by an officer of the guard (without provocation, according to the sergeant) when the sergeant attempted to pass **a** guard under the sanction of a permit granted by his commanding officer could come "[with]in the line of duty in the public service" if the War Department were satisfied that:

1. The wounds were given without sufficient justification (for if the assault were brought by claimant's own misconduct, he could not have been disabled while in the line of duty) ; and

2. The permit were given to the claimant and he was passing the guard for some purpose growing out of the public service (for if the pass were given to enable him to attend to private affairs and when injured he was going about his private business, he could not be considered in the public service).

As subsequently noted in a 1918 Judge Advocate General opinion,[9] Attorney General Caleb Cushing in 1855 construed the exist-

[8] 2 OP. **ATTY. GEN. 589 (1833).**

[9] **JAG 220.46, 22** Nov. 1918, *as* ***digested in*** **DIG. OPS. JAG 1912–40,** Part **11,** ***Line*** of *Duty,* at **952.**

ing pension laws to require that a qualifying disability must have a logical correlation with military duty, including only such acts as would constitute official and professional obligations of a man as a soldier and sailor (as distinguished from such as would be referrable to his simultaneous life as a man and a citizen).[10] In support of that view, he defined "line of duty" as an apt phrase "to denote that an act of duty performed must have relation of causation, mediate or immediate, to the wound, the casualty, the injury, or the disease, producing disability or death."

The exclusion at this point of injuries incurred while pursuing nonmilitary matters is still patent. From here on, however, minor nuances gradually affected the concept of line of duty, so that the stricter view gradually (but not in every case) gave way, in practice. An 1866 enactment declared the true intent of the phrase "in line of duty" (appearing in an 1865 statute providing for benefits to persons discharged for wounds received in line of duty)

> requires that the benefit . . . shall be extended to any . . . person entitled by law to bounty who has been or may be discharged by reason of a wound received while actually in service under military orders, not at the time on furlough **or** leave of absence, nor engaged in any unlawful or unauthorized act or pursuit.[11]

A series of reported digests of opinions in this period indicates intermittent expanding and contracting coverage. Thus, a soldier in confinement would not be excluded because it was part of his military duty to submit to disciplinary measures,[12] following but enlarging upon the established premise of construing beneficial laws so as to advance, and not restrict, the benefit.[13] And, in a like vein, a soldier accidentally injured while on furlough was determined to be in the line of duty.[14] On the other hand, a disability resulting from accidental discharge of firearms while **(1)** handling a weapon (in violation of an order forbidding non-governmental weapons) and **(2)** engaged in rough play **or** scuffling **was** not in the line of duty but "grew out of a purely private and personal

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[10] 7 OP. ATTY. GEN. 149 (1855). Of interest, in passing, was the Attorney General's tart observation (in respect **of** argument that precedents existed in the files of the Pension Office of pensions allowed in cases of disability not attributable to public duty) that "decisions in the public offices of the Government are facts, not rules of law."

[11] See Card 2658, Oct. 1896, DIG. OPS. JAG 1901, ***Line of*** *Duty*, § 1623, at **444–46.**

[12] DIG. **OPS.** JAG 1901, ***Line of*** *Duty*, § 1617, at **442.**

[13] ***Id.***

[14] DIG. OPS. JAG 1901, ***id.,*** § 1620, at **443.**

transaction'' or was "something quite unconnected with duty and inconsistent with . . . proper military function."[15]

An 1896 opinion[16] noted the issuance in 1893 of a pronouncement by the Surgeon General, approved by the Secretary of War, establishing a proper assumption that injuries or diseases incurred in the military service occur in the line of duty unless :

1. Existing prior to service ;

2. Occurring while absent from duty on furlough or otherwise: or

3. Resulting from willful neglect or immoral conduct.

The opinion, in passing, observed the lack of a rule concerning injury received through "carelessness" and indicated that the degree of carelessness reflected by a failure to unload a carbine before attempting to clean it (during which process the weapon was accidentally discharged) did not require an adverse determination. And, with respect to contributory negligence: "[I]t is not safe to attempt to lay down any rule but best to leave each case to be determined upon its own facts."

Additional selected opinions of the period indicate a continuing trend toward equating line of duty with military service, except for specific circumstances of misconduct (including culpable contributory negligence).[17]

On the other hand, the Cushing rationale of 1855 was expressly adopted by the United States Court of Appeals for the Eighth Circuit in 1897[18] as a proper construction to support the charge by a trial court (in an action instituted by the United States to recover a pension allegedly fraudulently procured) that for a disease to have been contracted in the line of duty, "the service must have been the cause of the disease, and not merely coincident with it in time." Adherence by the Congress to the Cushing view, despite repeated revision of the pension laws during the intervening years. demonstrated to the satisfaction of the Court of Appeals that Mr. Cushing and the court below had properly interpreted the meaning of "line of duty." *Rhodes* was relied upon as late as 1959 by the Court of Claims in denying recovery of retirement pay because of

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[15] Id., §§ 1618–1619, at 442–43.

[16] Id., § 1622, at 443–44.

[17] Id., § 1623, supra note 11, at 444–46 (soldier returning to Army, killed aboard government transport by boiler explosion); § 1624, at 446 (soldier awaiting sentence of general court-martial, injured while chopping wood under guard) ; and § 1625, at 446 (soldier regarded in line of duty while on hunting pass).

[18] Rhodes **v.** United States, 79 F. 740 (8th Cir. 1897).

insufficient evidence to establish that the claimed disability arose within the line of duty.[19]

Despite ***Rhodes,*** however, more liberal construction generally became apparent after the United States Court of Claims in **1913** (without specific reference to *Rhodes* or the Cushing opinion, or, for that matter, to any other prior construction of "line of duty") allowed recovery of benefits based on the death of an officer who died in a military hospital from typhoid fever contracted while returning to duty from leave.[20] In a relatively short exposition, the court adopted a "reasonable construction" to the effect that benefits accrued under the "line **of** duty" provision

> whenever the soldier dies while in the service generally, and submitting to its rules and regulations, from wounds or disease not the result of his own misconduct. . . . The soldier in this case died while on his way under orders to rejoin his command, and this was in the line of duty; and . . . we do not think we are called upon to decide when and where he contracted typhoid fever, the disease of which he died.

In 1918, a JAG opinion expressly disavowed the "narrow" Cushing construction in favor of the "liberal" construction advanced by the Court of Claims in *Moore.*[21] The opinion indicated that Cushing's view was contrary also to determinations by the Bureau of War Risk Insurance and of The Judge Advocate General of the Army.[22]

Further progress toward reducing the basis for adverse determinations can be noted, as additional administrative precedents became available. Thus, a presumption appeared to have become established that injuries were received in line of duty and not the result of misconduct in the absence of proof of disobedience of instructions, and that mere negligence would not remove an individual from line of duty.[23]

In response to a request by the Navy for advice concerning certain cases requiring a line of duty determination, Attorney Gen-

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19 Lemly v. United States, 91 F. Supp. 743 (Ct. Cl. 1950).

20 Moore v. United States, 48 Ct. Cl. 110 (1913). The statute involved included an amendment substituting the words "not the result of his **own** misconduct" for "contracted in the line of duty," the amendment having been enacted after the officer's death. Since the court generally limited consideration to the original text, the amendment was not a primary factor, although the court employed "misconduct" language to explain the meaning of "line of duty."

21 **JAG** 220.46, *supra* note 9.

22 Presumably the **JAG** opinions, though not identified, were of the type cited *supra* notes 12–17.

23 **JAG** 220.46, 8 Apr. 1919, *as **digested** in* **DIG.** OPS. **JAG** 1912–40, *supra* note 9.

eral A. Mitchell Palmer in 1920 supplemented a proposition (partially formulated in an earlier opinion) to the effect that an injury received while a soldier is in active service and submitting to its regulations mould be incurred in the line of duty unless actually caused by something for which he is responsible which intervenes between his service or performance of duty and the injury.[24] Under the Palmer theory, he would be responsible for an intervening cause if it:

1. Consists of his own willful misconduct : or

2. Is something done in pursuance to some private avocation or business ; or

3. Grows out of relations unconnected with the service or is not the logical incident or provable effect of duty in the service.[25]

A JAG opinion followed the Palmer intervening cause doctrine by indicating that injury while engaged in employment not incident to military status would be regarded as incurred not in the line of duty. though not necessarily the result of one's own misconduct.[26]

A 1931 opinion by Attorney General W. D. Mitchell emphasized that proximate cause was an essential ingredient of a line of duty determination involving the factor of misconduct.[27] In construing a statutory requirement that loss from duty of more than a day because of disease or injury the result of misconduct be made good, the Attorney General stated that the word "result" indicates a necessary relation of cause and effect. Accordingly, accidental in-

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[24] 32 OP. ATTY. GEN. 193 (1920).

[25] Under the announced formulation, the following results were stated for the submitted cases :

a. Female yeoman killed by her husband while en route to her home after completing her duty for the day: NLOD — because death grew out of her domestic relations separate and distinct from her relations to the Government or the service.

b. Yeoman killed by motor bus in immediate vicinity of duty station three hours after he had completed his duties for the day: ILOD — no cause for which he was responsible having intervened.

c. Naval reservist killed while on "liberty" in train-car accident: ILOD — no intervening cause, as in *b* (case distinguished from that of furlough for purpose of private avocation or business).

d. Soldier on leave from ship at Brest, France, injured en route to Paris, through no fault of his own: ILOD, as in ***b*** and **c.**

e. Officer on leave injured while attempting to help woman in distress: NLOD — cause not growing out of his relation to the service.

f. An additional case was returned without opinion because **of** insufficiency of factual basis for consideration.

[26] JAG 210.46, 10 Sep. 1931, *as* ***digested*** *in* DIG. OPS. JAG 1912–40, *supra* note 9.

[27] 36 OP. ATTY. GEN. 478 (1931).

jury to two enlisted men while returning to their station after the expiration of their passes was not the result of their tardiness and therefore not due to misconduct.

In 1933, The Judge Advocate General restated the principles which had evolved in these terms :

> 1. A finding that death or injury is the result of misconduct is proper and sustainable only when, by a fair preponderance of the evidence, it has been established that such misconduct was the proximate cause of the death or injury. By "proximate cause" is meant the moving or direct cause,
>
> 2. Negligence which contributes to or causes death or injury does not constitute misconduct unless of such gross character as to amount in itself to misconduct.
>
> 3. When misconduct is a contributory cause of the death or injury, but is not the proximate cause, the death or injury cannot be held to be the result of the misconduct.[28]

The foregoing is the basis for the current basic presumption that injury or disease will be presumed to have been incurred in line of duty and not because of a member's own misconduct. As provided in current regulations,[29] the conditions which remove a member from the line of duty and the nature and quantum of evidence required to rebut the favorable presumption are stated in these terms :

> 1. *Line of duty.* The presumption favoring line of duty may be overcome only by substantial evidence that injury or disease or condition causing injury or disease was—
>
> a. Proximately caused by intentional misconduct or willful gross neglect of the individual.
>
> b. Incurred or contracted during a period of unauthorized absence.
>
> c. Incurred or contracted while neither on active duty nor engaged in authorized training in an active or Reserve duty status and was not aggravaed by he service.
>
> 2. *Misconduct.* The presumption against misconduct may be overcome only by substantial evidence that the injury or disease, or condition causing injury or disease, was proximately caused by the intentional misconduct or willful gross neglect of the individual.

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[28] JAG 220.46. 6 Jul. 1933. *as digested in* DIG. OPS. JAG 1912–40, *supra* note 9 at 953.

[29] AR 600–10, para. 5–18 (7 Jun. 1968). "Substantial evidence" is defined as such evidence which a reasonable mind can accept as adequate to support a conclusion. Army Reg. No. 15–6, para. 20 (12 Aug. 1966) [hereinafter referred to and cited as AR 15–61. Additional presumptions pertaining to conditions having their inception prior to a member's service are set forth in AR 600–10, para. 5–19*c*.

III. STATUTORY AND POLICY CHANGES

A chronicle of the changing concept of line of duty would be incomplete without a brief mention of a number of other statutory **or** policy changes that have affected line of duty determinations in special circumstances only. Accordingly, there follows a sort of postscript to this portion of the discussion, primarily to provide a convenient repository for subjects which may perhaps serve as a reminder of some of yesterday's problems which have preceded the principles in use today.

A. *DEATH GRATUITY*

A formerly significant application of line of duty determinations was eliminated in 1956 following the enactment of a comprehensive revision of survivor benefits. As revised, the new provisions authorized the payment of a death gratuity and related benefits on a broadened basis, unconditioned by requirements pertaining to line of duty and misconduct.[30] As a consequence, the customary specific LOD "findings" are no longer required in the investigation of death cases, though the investigative reports (less findings) are still continued under current regulations,[31] presumably to furnish information for appropriate determination at the Department of the Army level.

B. *EXCEEDING LIMITS OF PASS*

An early view that violation of authority to be absent (*e.g.*, by going beyond geographical limits of pass) removed the offender from the line of duty was rescinded by a policy statement in 1950.[32] Present regulations provide that a member granted a pass will not be considered absent without leave merely because, *inter alia*, he was in an area beyond the geographic limits specified in his pass.[33]

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[30] Servicemen's and Veteran's Survivor Benefits Act, § 301, 1 Aug. 1956, 10 U.S.C. §§ 1475–1488 (1964). Previous laws precluded payment of death gratuity in the case of all persons whose death was the result of "willful misconduct" and all reservists and National Guardsmen whose deaths were not "in line of duty." ***See*** U. S. CODE CONG. & AD. NEWS 3976, 3990, 84th Cong., 2d Sess. (1956). An act of 17 Dec. 1919, §§ **1, 2,** 41 Stat. 367, provided for allowance on death not the result of misconduct of members of the Regular Army only. Note certain continuing statutory requirements of death due to disability in line of duty as a prerequisite for special death compensation benefits administered by VA, *e.g.*, under **38** U.S.C. §§ 321, 341, and 410 (1964).

[31] ***See*** DA Pam 27–6, para. 10*d*; AR 600–10, para. 5–11*k*.

[32] ***See*** CSJAGA 1950/2368, 14 Apr. 1950, 9 BULL. JAG 114 (1950).

[33] AR 600–10, para. 5–19*b* **(3).**

C. GOVERNMENT VEHICLE USED WZTHOUT A UTHORZTY

The former rule that use of a government vehicle without authority removed the offender from the line of duty[34] was changed in 1960 by a regulation indicating that unauthorized use of a government conveyance would not be sufficient ***in itself,*** without other evidence of misconduct, to sustain a finding of not in line of duty, but that such unauthorized use should be viewed as a violation of orders and evaluated with other evidence in determining misconduct status.[35]

D. *MALUM IN SE*

Another long existing policy that disease or injury incurred during an act of commission or omission which is wrong in itself *(malum* ***in se)*** should be considered as having resulted from misconduct was discontinued in 1964.[36] Thereafter, line of duty determination was to be made in conformity with the rules applicable to all line of duty findings, even when a *malum* ***in se*** act was involved.

E. MILITARY SAFETY STANDARDS

The earlier rule that violation of military regulations, orders, or instructions was sufficient *per se* to establish misconduct was modified in 1945, at least in the case of prescribed military safety standards, to conform with the rule applied in line of duty cases involving violations of state and local laws. Accordingly, the violation of a prescribed safety standard was thenceforth to be regarded merely as one factor to be examined and weighed with all other circumstances and such violation, in the absence of a further showing, would be deemed to establish only simple negligence.[37]

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[34] *E.g.*, JAG 220.46, 8 Dec. 1932, *as* ***digested*** *in* DIG. OPS. JAG 1912–40, *supra* note 9 at 962; SPJGA 1943/16421, 11 Nov. 1943, 2 BULL. JAG 407 (1943).

[35] Former Army Reg. No. 600–140, para. 19*c*(2) (Change No. 1, 7 Nov. 1960). The modified rule continues in effect, as provided in **AR** 600–10, para. 5–19*a*(2) ***(b).*** Note, however, that if the driver of **a** government vehicle on an authorized trip is injured during an unjustified material deviation from his assigned route, he should be considered absent without authority for line of duty purposes. *Id.* para. 5–19*b*(5).

[36] See JAGA 1964/5041, 21 Dec. 1964, 14 DIG. OPS. 98, for reference to intentional deletion of provision from applicable regulations as of 8 Jul. 1964.

[37] SPJGA 1945/7233, 10 Sep. 1945, 4 BULL. JAG 413 (1945). Note that the rule subsequently applied and presently provided by **AR** 600–10, para. 5–19a **(2)** *(a)*, pertaining to violation of military regulations, is not limited to cases involving merely prescribed safety standards, but applies to "miliary regulations, orders, or instructions," etc.

F. *OUTSIDE ACTIVITIES*

Under a long series of opinions and regulations implementing such opinions, injury as a result of outside activities not of a class authorized or encouraged by the Army was deemed to be not in line of duty, though misconduct determinations were dependent upon specific facts involved. For example, the accidental injury of a soldier, while on authorized leave, as a result of private commercial employment was held to be not in line of duty as late as March of 1951.[38] However, the use of "outside activities" as a special basis for removing a member from line of duty was terminated with the issuance in June of that year of regulations deleting the applicable provisions.39

G. *SIGNED STATEMENTS AGAINST INTEREST*

Section 105, Servicemen's Readjustment Act of 1944[40] provided :

> No person in the Armed Forces may be required to sign a statement of any nature relating to the origin, incurrence, or aggravation of any disease or injury he may have, and any such statement against his own interest signed at any time, shall be null and void and of no force and effect.[41]

A 1949 opinion of The Judge Advocate General cautioned that pending a definite federal court interpretation of the provision, any written statement against interest in cases involving line of duty determinations should be considered null and void, even if voluntarily offered.[42] It was later concluded, however (especially in view of the legislative history of the provision indicating that it was designed specifically to prevent the procurement of such statements as a prerequisite for discharge) that such statements were acceptable for line of duty purposes, if voluntarily made and if the member expressly had been warned that he need not make such a statement. Regulations implemented the latter view in 1953,[43] and current regulations contain this later rule.[44]

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38 JAGA 1951/1651, 9 Mar. 1951, 10 BULL. JAG 184 (1951). This opinion cites several of the earlier precedents in this area.

39 *See Ed. Note,* 10 BULL. JAG 184 (1951), *calling attention to* Army Reg. No. 600–140 (29 Jun. 1951).

40 The famous GI Bill of Rights of another era, Act of 22 Jun. 1944, 58 Stat. 284.

41 This section was subsequently re-enacted in substantially the same form and now appears as 10 U.S.C. § 1219 (1964).

42 CSJAGA 1949/2960, 15 Mar. 1949, 8 BULL. JAG 26.

43 Army Reg. No. 600–140 (12 Feb. 1953), superseding former Army Reg. No. 600–140 (29 Jun. 1951).

44 AR 600–10, para. 5–10*a*.

H. *VENEREAL DISEASE*

For a number of years prior to **1944,** absence from duty by a member for more than a day because of venereal disease due to misconduct resulted in forfeiture of pay for such period.[45] In **1944** the provision was repealed and another enacted under which venereal disease would not be presumed to be due to willful misconduct if the member complied with regulations requiring him to report and receive treatment for such disease.[46] Doctors had discovered that the earlier provision was self-defeating by deterring members from reporting that they had contracted the disease.[47] The present forfeiture provision applies only to absence of more than a day because of intemperate use of alcohol or drugs.[48]

IV. CONCLUSION

The original practice of considering within the line of duty only essentially military activities has graduallv evolved into a broader concept, embracing other than purely military pursuits. Thus **an** evolutionary process has bridged the gap from the time when a soldier, injured while on pass attending to personal matters, was beyond the line of duty to now, when such soldier would qualify for disability benefits, provided his injury were not caused by his misconduct. In short, we perceive a shift of emphasis from the single requirement of "line of duty" to the inclusive test of "line of duty" coupled with absence of misconduct, which posits a more reasonable standard by which to determine entitlement for disability benefits arising from injury or disease incurred during a period of military service.[49]

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[45] *E.g.*, Act of 17 May 1926, 44 Stat. 557. For additional background, see Caveneau, *Some Consequences of Wrongful* ***Absence*** *From Duty,* **23** JAG J. 81 (1968).

[46] Act of 27 Sep. 1944, 58 Stat. 752.

[47] Caveneau, *supra* note 45, at 82.

[48] **37** U.S.C. § 802 (1964).

[49] In sharp contrast to the broad LOD concept for disability benefits, etc., the judge advocate in the federal tort claims area must confine military line of duty (under 28 U.S.C. § 2671 (1964)) to the narrower concept of scope of employment as used in master and servant cases. ***See,*** *e.g.*, L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 204 (1964), and cases cited theiein. If this were not the rule, the Government would be subjected to fantastic claims of liability; **see** United States v. Campbell, 172 F.2d 500, 503 (5th Cir.), ***cert.*** *denied,* 337 U.S. 957 (1949). In practice, the issue is resolved under the doctrine of respondeat superior of the state law involved. Williams v. United States, 350 U.S. 857 (1955). This equates the Government's liability to that of a private person in like circumstances — a rule which has generated special problems because of the inherent difficulty of finding and applying normal

(Footnote 49 continued on page 130)

Two following appendices reflect (a) a compendium of selected published digests of opinions noting comparatively recent application of basic principles to illustrative factual situations and (b) a table of selected U.S. Code sections affecting a variety of circumstances which ultimately could be relevant to a particular line of duty determination.

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precedents under local law to unique military situations, as considered in N.C. State Highway Comm'n. v. United States, 288 F. Supp. 757 (E.D.N.C. 1968). As a result, there is no necessary correlation between line of duty for disability benefits and for tort claims purposes.

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APPENDIX A

The following digests have been summarized to conserve space. The customary caveat accompanying digests of opinions in the military affairs category is extremely pertinent in the case of line of duty determinations: Frequently military affairs oponions hinge on the particular facts of the case at hand and because of space limitations it is not always possible to restate all of the operative facts in a digest. Accordingly, judge advocates should exercise caution in applying to other factual situations decisions digested herein.

Absence Without Authority.

A duty-status certificate reflecting absence without authority at the time of the injury, executed by a proper officer, is substantial evidence that the injury occurred during a period of unauthorized absence, when there is no evidence to the contrary.[50] Absence without leave removes the member from a line of duty status, regardless of whether such absence is from scheduled duty or restriction.51

Mere failure to "sign out," or to pick up a pass upon departure, however, does not constitute unauthorized absence for line of duty purposes.[52]

A constructive return to duty status from absence without leave is noted in the case of a sergeant who (by reason of his status as a noncommissioned officer) undertook to quell an affray between some of his men and a party of civilians and was fatally injured by a civilian after the soldiers had stopped fighting pursuant to his direction.[53]

Affray.

Wrongful aggression or voluntary participation in a fight in which the member was at least *pari delicto* with his adversary in

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[50] JAGA 1965/4993, 26 Nov. 1965, as *digested in* 66–5 JALS 12.

[51] JAGA 1961/4435, 8 Jun. 1961, as *digested in* 76 JALS 10. (Information concerning scheduled duties, etc., required of commanding officers under the regulations, is primarily for Veterans Administration purposes; see 38 U.S.C. § 105 (1960).)

[52] JAGA 1960/4630, 14 Sep. 1960, as *digested in* 52 JALS 9.

[53] JAG 42–310, 30 Nov. 1912, as *digested in* DIG. OPS. JAG 1912–40, at 972.

starting or continuing is evidence of misconduct. Such participation is equated with reckless and wanton disregard for one's personal safety.[54]

Use of provocative actions or language when a reasonable man would anticipate retaliation is evidence of misconduct. There is an exception for dangerous-weapon injuries when the member cannot possibly have foreseen that his actions will cause someone to use a dangerous weapon in the affray, but this exception does not apply when the member is aware his opponent is so armed.[55]

One persisting in a fight after he is aware that a dangerous weapon is produced acts in wanton disregard of his safety and is grossly negligent.[56]

If the extent and force of retaliation far outweigh the provocation, it cannot be said that the provoking party should be held to anticipate such circumstances, but provocation from which retaliation can be anticipated constitutes misconduct.[57]

Alcoholism; consequent diseases.

In the case of certain diseases frequently associated with alcoholism, the term "alcoholic" appended to such conditions as gastritis and encephalopathy represents merely a diagnostic determination made by the attending medical official or physician that the condition is the result of the use of alcoholic beverages. For line of duty purposes, it is necessary further to determine whether the condition is the result of (1) *intemperate* use of alcoholic beverages or (b) alcoholism. In the case of the former, the condition is due to misconduct; in the case of the latter, a finding of "not line of duty — not due to own misconduct" (NLD — NDOM) is appropriate. If it cannot be determined whether the condition resulted from either cause and no other element of negligence or misconduct is present, the presumption of line of duty must prevail.[58]

Arrest.

Evidence of injury while resisting arrest is sufficient to support determination of misconduct.[59]

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54 JAGA 196514863, 15 Oct. 1965, *as digested in* 66–1 JALS 12.

55 *Id.* (An interesting example of the foreseeability doctrine is found in an Air Force opinion concerning the inherent danger of pursuing a clandestine rendezvous with another's wife on a golf course. UP. JAGAF 1956/52, 19 Dec. 1956, *as digested in* 6 DIG. OPS. 322).

56 JAGA 1965/4993, 26 Nov. 1965, *as digested in* 66–5 JALS 12.

57 JAGA 1965/3789, 9 Apr. 1965, *as digested in* 65–14 JALS 11.

58 JAGA 1968/3536, 19 Mar. 1968, *as digested* in 68–12 JALS 16.

59 JAGA 1965/4178, 10 Jun. 1965, *as digested in* 65–22 JALS 7.

Burns.

Sunburn usually involves no more than simple negligence (except when deliberately incurred to avoid duty or as a result of gross negligence), especially when there is no indication that climatic conditions are unusually conducive to sunburn or that the skin of the individual involved was particularly sensitive.[60]

Severe burns about the face resulting from attempt to perform a trick, consisting of taking a mouthful of cigarette lighter fluid and blowing it across a lighted cigarette lighter, were obviously due to misconduct, *i.e.*, gross negligence.[61]

Drowning.

Ordinarily, cases of drowning involve no more than simple negligence, such as violation of standing orders against swimming in particular bodies of water or failure to take ordinary care in swimming.[62] Thus, drowning while swimming in waters designated "off limits" was held to be due to simple negligence only and therefore in line of duty.[63]

Evidence; general; doubtful circumstances.

Evidence may be adequate to support a misconduct finding and still not require such determination.[64]

If, after investigation, facts are substantially unknown or in irreconciliable conflict, the presumptions provided by the applicable regulations must prevail.[65]

Safeguarded accident reports specified in applicable regulations may not be used as evidence or to obtain evidence in determining line of duty status of personnel, but such limitation does not extend to civilian police reports. The official operator's report of motor vehicle accident (SF 91) is admissible as evidence, subject to the limitations with respect to signed statements against inter-

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[60] JAGA 194717650, 29 Sep. 1947, *as digested at* subpara. 15*d*, DA Pam 27–6.

[61] CSAGA 1949/5752, 16 Aug. 1949, *as digested at* subpara. 15*a*, DA Pam 27–6.

[62] Para. 19, former DA Pam 27–6 (1953).

[63] CSJAGA 1949/6487, 16 Sep. 1949, *as digested in 8* BULL. JAG 214; *cf.* CSJAGA 1949/6114, 14 Sep. 1949, *as digested in 8* BULL. JAG 219; and SPJGA 1945/7233, 10 Sep. 1945, as *digested in* 4 BULL. JAG 413.

[64] JAGA 1966/3613, 5 Apr. 1966, *as digested in* 66–16 JALS 10.

[65] JAGA 195514265, 29 Apr. 1955, and JAGA 195513963, 21 Apr. 1955, *as digested in 5* DIG. OPS. 404, 405; JAGA 1952/6498, 22 Aug. 1952, *as digested in* 2 DIG. OPS. 505.

est relating to the origin, incurrence, or aggravation of any injury or disease, made by the individual concerned.[66]

Court-martial findings are not conclusive on line of duty determinations arising out of the conduct upon which trial was based.[67]

Firearms and Explosives.

Firearms are inherently dangerous weapons requiring a high degree of care in the use and handling. Causing the discharge of a weapon, either negligently or deliberately, while consciously pointing the weapon at one's self is gross negligence, and hence misconduct. Failure to check weapon properly, together with other circumstances, may support a finding of misconduct.[68]

Injury by discharge of weapons resulting from "horseplay" or a game of draw constitutes misconduct.[69]

Unexploded ammunition and duds are inherently dangerous objects, the handling of which can reasonably be foreseen as likely to result in injury. A member voluntarily handling such an object without authority, and not in the course of military duty, requiring such handling, is grossly negligent. Specific tests to be applied are noted herein.[70]

Inactive Duty Training.

General reference to views that a member is not in a reserve duty status while traveling to or from inactive duty training, but that Army determinations would not preclude award of statutory benefits administered by the Veterans Administration.[71]

Injury incurred during a noon hour period *between* two four-

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[66] JAGA 1961/5511, 18 Dec. 1961, *as digested in* 90 JALS 9; DA Pam 27–187, at 106 n.77.

[67] JAGA 1958/6936, 13 Oct. 1958, *as digested in 8* DIG. OPS. 182; JAGA 1954/6928, 24 Aug. 1954, *as digested* in 4 DIG. OPS. 373; CSJAGA 1950/2006, 12 Apr. 1950, *as digested in* 9 **BULL.** JAG 112.

[68] JAGA 1966/3380, 9 Feb. 1966, *as digested in* 66–9 JALS **11.**

[69] JAGA 196113829, **28** Mar. 1961, *as digested in* **73** JALS **13;** JAGA 195216149, 22 Jul. 1952, *as digested* in 2 DIG. OPS. 498.

[70] JAGA 196014254, 8 Jul. 1960, *as digested in* 48 JALS **1.**

[71] JAGA 1965/5282, 6 Jan. 1966, *as digested in* **66–5** JALS **11.** ***Cf.*** Meister v. United States, 319 F.2d 875 (Ct. Cl. 1963), which the Comptroller General has stated should not be used for favorable administrative action in any similar case but that such cases should be forwarded to his office for direct settlement. 43 COMP. GEN. 412 (1963). Statutory benefits relating to duty performed by reservists frequently hinge on whether the reservists were disabled in line *of* duty, from injury "while so employed." See DA Pam 27–187, para. 10.7*g*, for an informative résumé of precedents in this problem area.

hour multiple drills under National Guard regulations did not require a line of duty determination but if one were to be made, it should be NLD — NDOM; case is distinguished from those in which injury occurs in a break from training but *during* the scheduled assembly period and before dismissal.[72]

Injuries sustained by a National Guard member while playing as a member of a softball team of his unit were incurred not in line of duty, where the members of the team were not credited with training time while participating in such athletic activity during other than drill hours.[73]

Injury to National Guard member in basketball game prior to scheduled drill was incurred not in line of duty.[74]

Intoxication; proof.

Attending physician's unsupported entry on statement of medical examination that serviceman was under the influence of alcohol, without a blood alcohol test or further amplification, does not constitute substantial evidence upon which to base a finding of misconduct due to intoxication.75

The presence of .15 or more per cent blood alcohol is substantial evidence of intoxication.76

Blood test could be considered as evidence of intoxication, notwithstanding there was no indication that individual consented to the blood alcohol test, where he did not assert that the sample was taken against his will.[77]

A blood alcohol test reflecting percentage of alcohol content commensurate with state statutory presumptions of intoxication is substantial evidence of intoxication. Prior rule that finding of intoxication should not be based entirely upon the results of a blood alcohol test overruled.[78]

Driving in a reckless manner, while under the influence of intoxicants, constitutes misconduct.[79]

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[72] **JAGA 1961/4541, 14 Jun. 1961,** *as digested in* **76 JALS 11; JAGA 1952/5057, 12 Jun. 1952, as** *digested in* **2 DIG. OPS. 573.**

[73] **JAGA** 1955/3620, 11 **Apr. 1955,** *as digested in* 5 **DIG. OPS. 404.**

[74] **JAGA 1954/6927, 20 Aug. 1954,** *as digested in* **4 DIG. OPS. 424.**

[75] **JAGA 1968/3984, 17 Jul. 1968,** *as digested in* **68–23 JALS 24.**

[76] **JAGA 1966/3512, 3 Mar. 1966,** *as digested in* **66–11 JALS 14.**

[77] *Id.*

[78] **JAGA 1965/3786, 15 Apr. 1965,** *as digested in* **15 DIG. OPS. 591.**

[79] *Id.*

Investigation; procedure.

Individual subject to line of duty determination must be notified of the investigation and permitted to submit evidence in his own behalf.[80]

Member was not entitled as a matter of right to have counsel in the investigation, under applicable regulations.[81]

Joint Venture.

Merely being a guest in a car does not make the trip a joint venture for the purpose of imputing negligence of the driver to a passenger. Thus the presence of a passenger asleep in the car, without more, is an insufficient basis upon which to impute the negligence of the driver.[82]

Where there is no evidence generally that the passenger and driver were engaged in a joint enterprise, misconduct of the driver may not be imputed to the passenger.83

A driver's gross negligence may be imputed to a passenger under circumstances warranting a conclusion that the latter condoned, if not actually encouraged, reckless and wanton conduct of the driver, especially where the evidence did not indicate that the passenger objected to the driver's operation of the vehicle, tried to control its operation, or was so drunk as to be unable to express his will.[84]

Malum in Se.

Deletion from regulations of prior ***malum in se*** rule was intentional and thereafter misconduct determinations are warranted only if based on sufficient evidence that intentional misconduct or gross negligence was the proximate cause of the injury.[85]

Motor vehicles; drivers.

State police report containing notation of "speeding," without evidence of driver's actual rate of speed, statements of witnesses, or any other basis therefor, is insufficient to support a conclusion of speeding.[86]

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80 **JAGA 1965/4081, 14 Jun. 1966, *as digested in* 66–23 JALS 9.**
81 **JAGA** 1946/7585, **8 Jan. 1947,** *as* ***digested in*** **6 BULL. JAG 43.**
82 **JAGA 196514178, 10 Jun. 1966, *as digested in* 65–22 JALS *7*.**
83 **JAGA** 1962/4664, **14** Nov. **1962,** *as* ***digested in*** **114 JALS 12.**
84 **JAGA** 1954/7006, **31 Aug. 1954,** *as* ***digested in*** **4** Dig. **Ops. 383.**
85 **JAGA** 1964/5041, **21 Dec. 1964, as *digested in* 65–3 JALS 10.**
86 **JAGA** 1966/3611, **6 Apr. 1966, *as digested in* 66–16 JALS 10.**

Notation in police report that "drinking" was a cause of the accident and medical report indicating that driver was under the influence of alcohol and mentioning a "definite odor" of alcohol on his breath upon admission to hospital, in the absence of a blood alcohol test, constituted insufficient evidence of intoxication in the absence of a *combination* of specific elements of proof (*e.g.*, physical appearance, heavy staggering, blood-shot eyes, slurred speech, loud and boisterous conduct, and smell of alcohol on breath).[87]

While speed alone generally is evidence of only simple negligence, surrounding circumstances indicating that a member was driving at such excessive speed as to evidence a willful disregard for the consequences thereof may establish gross negligence. Darkness, rain, slippery driving conditions, defective vehicle equipment, and evidence of alcohol present driving conditions requiring a degree of care commensurate with the hazards involved. Thus evidence of speeding on a wet and slippery stretch of road resulting in loss of control of a vehicle and presence of alcohol reflecting a failure to observe minimal degree of care under the circumstances supported a finding of gross negligence.[88]

Speed in excess of posted limit is not sufficient in itself to constitute gross negligence; however, the combination of speed and other factors (*e.g.*, driving at night at high speed toward a known curve to outdistance another car which appeared to be in a speed contest with the member) may constitute gross negligence.[89]

Driving in a reckless manner, while under the influence of intoxicants, constitutes misconduct.[90]

Continuing to drive after "dozing off" a number of times while aware of extreme fatigue constitutes willful gross neglect under applicable regulations.[91]

Unauthorized use of government vehicle, in itself, is insufficient to support a finding that injury resulting from such use was due to misconduct.[92]

Narcotics and Poisons.

Deliberate ingestion of excessive number of capsules containing barbiturates, in intentional act of self-destruction, constituted misconduct.[93]

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87 *Id.*
88 JAGA 1966/3516, 8 Mar. 1966, *as digested in* 66–12 JALS 8.
89 JAGA 1965/4887, 18 Oct. 1965, *as digested in* 66–1 JALS 13.
90 JAGA 1965/3786, *supra* note 78.
91 JAGA 1960/4456, 9 Aug. 1960, *as digested in* 51 JALS 4.
92 JAGA 1954/7956, 5 Oct. 1954, *as digested in* 4 DIG. OPS. 383.
93 CSJAGA 1949/8897, 27 Dec. 1949, *as digested in* former DA Pam 27–6, subpara. 31e (1963).

Procedure.

Even though the applicable regulations do not require a line of duty determination, there is no legal objection to making such determination in order to preserve a record of the incident.[94]

Although line of duty determinations once made by the Secretary of the Army may be changed by him, when such a determination is adapted to a statutory use (*e.g.*, retirement), the power to make such a determination for purposes of the statute, once exercised, is deemed exhausted and cannot be exercised again, *i.e.*, is subject to the doctrine of ***functus officio.***[95]

Self-InflictedInjuries.

Under applicable regulations, mental unsoundness was presumed if the self-inflicted wound was fatal; however, if it was not fatal, no presumption existed because the victim was available for psychiatric examination.[96]

[94] JAGA 1954/7956, ***supra*** note **92.**

[95] JAGA 1953/3705, 24 Jun. 1953, ***as digested in 3*** **DIG. OPS. 530;** ***cf.*** JAGA 1966/3613, 5 Apr. 1966, as ***digested in*** 66–16 JALS 10, indicating that original final determinations can be modified only by The Adjutant General or the Secretary of the Army.

[96] JAGA 1961/4216, 17 May 1961, 77 JALS 15.

APPENDIX B

SELECTED U.S. CODE SECTIONS CONTAINING "LINE OF DUTY" REQUIREMENTS FOR ARMY PERSONNEL

U.S. Code citation	Subject
5 U.S.C. 3501	Employment retention preference for personnel retired because of injury or disease in line of duty as result of armed conflict or caused by instrumentality of war.
5 U.S.C. 5532	Exemption from dual compensation limitation for officers retired as in 5 U.S.C. 3501.
5 U.S.C. 6303	Credit for years of active military service (as basis for annual leave for civilian employment) if retired therefrom as in 5 U.S.C. 3501.
5 U.S.C. 8140	Compensation for members of R.O.T.C. for disability in line of duty while engaged in certain authorized flights.
10 U.S.C. 507	Extension of enlistment for members needing medical care or hospitalization for disease or injury incident to service and not due to misconduct.
10 U.S.C. 972	Provision to make up time lost from duty by enlisted personnel resulting from intemperate use of drugs or alcoholic liquor or disease or injury due to misconduct.
10 U.S.C. 1201-1204, 1206-7	Retirement, separation, etc., because of disability as affected by intentional misconduct or willful neglect.
10 U.S.C. 1521-22	Posthumous commissions and warrants authorized when acceptance of normal appointment was not possible because of death in line of duty.
10 U.S.C. 3687	Compensation for non-Regular members of Army when on active duty for more than 30 days and while so employed disabled in line of duty from disease, or for any period of time and disabled in line of duty from injury.
10 U.S.C. 3721	Hospitalization under conditions as in 10 U.S.C. 3687.
10 U.S.C. 3722	Benefits of 10 U.S.C. 3721 extended to certain other non-Regular Army members.
24 U.S.C. 49	Entitlement to benefits of Soldiers' Home of soldier by reason of disease or wounds incurred in the line of his duty, if not occasioned by his own misconduct.

U.S. *Code* citation	Subject
36 U.S.C. 90e	Eligibility for membership in Disabled American Veterans of any person disabled during wartime in line of duty.
37 U.S.C. 204	Entitlement of non-Regular members to basic pay as in 10 U.S.C. 3687.
37 U.S.C. 802	Forfeiture of pay during absence from duty due to disease from intemperate use of alcohol or drugs.
38 U.S.C. 101	Definition of various terms, including "Service-connected," "Non-Service-Connected," and "Active . . . Service," involving injury in line of duty.
38 U.S.C. 106	Line of duty and misconduct defined for veterans' benefits.
38 U.S.C. 106	Certain service involving disability incurred in line of duty deemed to be active service for laws administered by VA.
38 U.S.C. 321	Wartime death compensation for certain surviving kin because of disability in line of duty.
38 U.S.C. 341	Peacetime death compensation as in 38 U.S.C. 321.
38 U.S.C. 410	Dependency and indemnity compensation for service-connected disability.

ROBERT EDWARD LEE—NU CITIZEN HE*

In this comment the writer suggests that in view of Robert E. Lee's significant contribution to his country, and in view of the amnesty given to other principals in the Confederacy after the Civil War, General Lee should be restored posthumously to full citizenship.

I. INTRODUCTION

Born on 19 January 1807 at "Stratford," the family estate in Westmoreland County, Virginia, Robert E. Lee graduated second in his class from the United States Military Academy in 1829. He served in the Mexican War as a captain, distinguishing himself and winning the esteem and admiration of General Winfield Scott, USA, and later became the ninth Superintendent of his alma mater at West Point.

On 18 April 1861, Francis Preston Blair, who had been authorized by President Abraham Lincoln to "ascertain [Lee's] feelings and intentions," offered him the field command of the United States Army, which he declined.[1] Resigning his commission two days later as "Colonel of the 1st Regt. of Cavalry," U.S. Army, he became on 6 February 1865 Commander of the Army of Northern Virginia,[2] which he commanded ably and valiantly in a losing cause. He surrendered his command to General U.S. Grant at Appomattox Court House on 9 April 1865.

11. LOSS OF CITIZENSHIP

Despite being indicted on 7 June of the same year for treason against the United States,[3] he applied six days later for a pardon as had been specified in President Andrew Johnson's amnesty proclamation of 29 May 1865.[4] The letter of application reads:

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

1 RECOLLECTIONS AND LETTERS OF GENERAL ROBERT E. LEE 27–28 (1924).

2 F. B. HEITMAN, HISTORICAL REGISTER OF THE UNITED STATES ARMY 406.

3 IV D. S. FREEMAN, R. E. LEE 202 n.38 (1934).

4 II–8 OFFICIAL RECORDS OF THE WAR OF THE REBELLION 578–80 (1899). *See also* VI J. D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 310–12 (1897).

Richmond, Virginia, June 13, 1865

His Excellency Andrew Johnson,
President of the United States.

Sir: Being excluded from the provisions of the amnesty and pardon contained in the proclamation of the 29th ult., I hereby apply for the benefits and full restoration of all rights and privileges extended to those included in its terms. I graduated at the Military Academy at West Point in June, 1829; resigned from the United States Army, April, 1861; was a general in the Confederate Army, and included in the surrender of the Army of Northern Virginia, April 9, 1865. I have the honor to be, very respectfully,

Your obedient servant,
R. E. Lee.[5]

The individual pardon was never granted, and on 15 February 1869 it was made a matter of record that no further action would be taken in the treason indictment of General Robert Edward Lee.[6] "The Gray Fox" died on **12** October 1870, disbarred from full citizenship.'

III. SUBSEQUENT VENERATION OF GENERAL LEE

Twelve states of the Union have made the anniversary of the birth of Robert E. Lee a legal holiday.8 After his death, Washington College, by vote of its trustees, changed its name to Washington and Lee. The Commonwealth of Virginia has placed a statue of him in Statuary Hall in the National Capitol, and another statue adorns the rotunda of the State House in Richmond. **A** stained glass window in his honor has been placed in Saint Paul's Episcopal Church in Richmond, Virginia, and astride his famous war horse "Traveller" he views the ground over which Pickett made his famous charge at the battle of Gettysburg in July 1863.

On 19 January 1952 the second major event of the Sesquicentennial of the Military Academy at West Point honored "one of its most distinguished graduates,"[9] when a portrait of Robert E. Lee in his Confederate uniform as the head of the Confederate Armies was unveiled in the Main Room of the Military Academy Library

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[5] D. S. FREEMAN, *supra* note **3,** at 204.
[6] *Id.* at 381.
[7] *Id.* at 382.
[8] G. W. DOUGLAS, THE AMERICAN BOOK OF DAYS 43 (1948). The states are: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.
[9] C. L. FENTON, CHAIRMAN, THE SESQUICENTENNIAL OF THE UNITED STATES MILITARY ACADEMY **38** (1953).

beside one of General U.S. Grant to "symbolize the end of sectional differences in our country. . . ."[10] "In a sense, the ceremony was to represent West Point's welcoming home of one of its favorite sons."[11]

In honoring this famous man, the United States Navy named one of its nuclear powered fleet ballistic missile submarines, the SSBN 601, the ***Robert E. Lee.*** This despite the fact that President Abraham Lincoln, on 12 June 1863, in a letter to "Erastus Corning and Others," wrote: "Gen. Robert E. Lee [and other general officers **of** the Confederacy] now occupying the very highest places in the rebel war service, were all within the power of the government since the rebellion began, and were nearly as well known to be traitors then as now. . . ."[12] Today, the *Robert* E. ***Lee*** sails in defense of the security of America in company with another such submarine, the SSBN 602, christened the ***Abraham Lincoln.***[13]

Yet authorities still say Lee is barred from full citizenship.

IV. ATTEMPTS TO RESTORE GENERAL LEE TO CITIZENSHIP

On **17** January 1957, nearly 88 years after the death of General Lee, Senator Homer E. Capehart of Indiana, in discussing the status of the citizenship of R. E. Lee, remarked on the floor of the Senate of the United States on a joint resolution to commemorate the 150th anniversary of the birth of General Lee: "He died October 12, 1870, still denied the right to hold office either civil or military, the right to serve on any jury, and certain other rights inherent in American citizenship. . . ."[14] Senator Capehart then proceeded to present the following historical outline of the citizenship status of Robert E. Lee :

A REQUEST FOR SENATORIAL RESOLUTION TO CORRECT THE CIVIL STATUS OF ROBERT E. LEE AT THE TIME OF HIS DEATH OCTOBER 12,1870

After the close of the war of 1861–65, Robert E. Lee was the outstanding figure in the South. His attitude and opinions were more generous and farsighted than the belligerent and antagonistic feelings then existing in the South. His plea in brief:

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[10] *Id.*
[11] *Id.* at **40.**
[12] VI THE COLLECTED WORKS OF ABRAHAM LINCOLN 265 (1953).
[13] JANE'S FIGHTING SHIPS 1969–1970 390 (R. Blackman ed.) (a picture of the Lees appears at 387 and the Lincolns at 391).
[14] S.J. RES. **34,** 85th Cong., 1st Sess., 103 CONG. REC. 723 (1957).

"The issue between the States has been decided by war. Let us abide by that decision.

"I believe it to be the duty of every man to unite in the restoration of the country and the reestablishment of peace and harmony. These considerations governed me in the counsels I gave to others, and induced me on the 13th of June to make application to be included in the terms of the amnesty proclamation."

Lee did not apply for full pardon after President Johnson's first amnesty proclamation of May 29, 1866 *[sic,* 1865] . . . . Generals Grant and Meade, both recognizing Lee's influence throughout the South, urged him to do so. On June 13, 1866 [sic, 1865] . . . Lee's application was sent to General Grant who forwarded it to President Johnson — "With the earnest recommendation that this application . . . be granted him." No action, however, was ever taken.

Lee's situation during the four proclamations of President Johnson

"Proclamation I (May 29, 1866) *[sic]*

"To all persons engaged in rebellion, amnesty and pardon, with restitution of property, except slaves, provided they took the oath prescribed. Except—

1. Civil or diplomatic officers of the Confederacy who left judicial stations under the United States.

2. Officers above the rank of colonel.

3. United States Congressmen who left their seats in Congress.

4. Those who resigned the United States Army or Navy.

5. Those who treated prisoners unlawfully.

6. Those absent from the United States aiding rebellion.

7. Military and naval officers educated at West Point.

8. Governors of seceding States.

9. Citizens who left the United States and went into the Confederacy to aid rebellion.

10. Those destroying commerce on the seas or making raids in the Confederacy to aid rebellion.

11. Prisoners of war or under bonds as such.

12. Those voluntarily participating in rebellion and the estimated value of whose property is over $20,000.

13. Those who have not kept their former amnesty oath."

Appendage: Special application may be made to the President by persons belonging to the excepted classes and clemency will be liberally extended.

Lee's situation [was] entirely excluded.

"Proclamation II (September 7, 1866) *[sic,* 1867] . . . .

"Full pardon and amnesty to all, except:

1. President, Vice President, heads **of** departments, foreign agents, those above the rank of brigadier general, those above the naval rank of captain, State governors.

2. **All** persons who in any way treated otherwise than as prisoners of war persons who in any capacity were employed in the military or naval service of the United States.

3. All who were actually in civil, military, or naval confinement, or legally held to bail, either before or after conviction."

The above left Lee and some 300 other persons excluded.

"Proclamation III (July **4,** 1868)

"Universal amnesty and pardon, without oath, to all except such persons as may be under presentment or in indictment in any court of the United States having competent jurisdiction upon a charge of treason or other felony.

"To all others — unconditionally and without reservation, a full pardon and amnesty, with restoration of all civil rights or property, except as to slaves, and except also as to any property of which any person may have been legally divested under the laws of the United States."

The above left R. E. Lee, Jefferson Davis, John C. Breckenridge, Simon B. Buckner, and a few others unpardoned.

"Proclamation IV (December 25, 1868)

"Unconditionally and without reservation, to all and to every person, who directly or indirectly, participated in the late insurrection or rebellion, a full pardon and amnesty **for** the offense of treason against the United States.''

The above would have retored full right and privilege to Robert E. Lee had not the 14th amendment to the Constitution been passed on July 21, 1868.

The 14th amendment to the Constitution (July 21, 1868) :

"SEC. 111. No person shall be a Senator, or Representative in Congress or elector of President or of Vice President, or hold any office, civil or military under the United States, or under any State, who, having previously taken an oath as a Member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection **or** rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by **a** vote of two-thirds of each **House,** remove such disability.''

> Lee did not live to be completely restored to full rights of citizenship under the amnesty bill, passed by Congress June 8, 1898, which repealed section III of the 14th amendment. At the time of his death, October 12, 1870, his situation was as follows: He could vote. He could not hold any civil or military office, serve on any jury, serve as administrator of the Custis estate of Arlington to which he was appointed before the war.
>
> Since the entire Nation, North, East, West, and South, does now honor and respect Robert E. Lee as one of the finest of American gentlemen and is proud to have produced a man of such lofty character, we do therefore entreat that the Senate of the United States, in commemoration of the 150th anniversary of Robert E. Lee's birth, January 19, 1807, resolve to extend posthumously, full rights of citizenship, without exception, to Robert E. Lee and to make such resolution retroactive to the date of his application for pardon, June 13, 1866 *[sic]*.
>
> We then, in all parts of the Nation, can claim him as one of our own and, in all honor, pay him this tribute.
>
> THE CIVIL WAR ROUND TABLE
>
> INDIANAPOLIS, IND.[15]

This joint resolution failed of enactment in the Congress of the United States.

Six years went by without apparent effort by anyone to clarify his citizenship status. Then, on 21 March 1963, Representative James H. Quillen of Tennessee introduced H.R. 5089 in an effort to grant, posthumously, to the late General Robert E. Lee of Virginia, restoration to full rights of United States citizenship.[16] This resolution, which was referred to the Judiciary Committee of the House, died there.

Another seven plus years have rolled by, and research reveals that the status of General Lee's United States citizenship still remains unsettled. He is still barred from full citizenship.

V. CONCLUSION

In concluding his remarks, on 17 January 1957, in the U.S. Senate, Senator Capehart stated in pertinent part as follows:

> As I say, I was amazed that General Lee had not had his citizenship restored. Since General Lee's time we have had four wars, the Span-

[15] *Id.* at 724.

[16] U. S. LIBRARY OF CONGRESS, LEGISLATIVE REFERENCE SERVICE, DIGEST OF PUBLIC GENERAL BILLS AND SELECTED RESOLUTIONS, 88th Cong., 1st Sess. E–268 (col. 2) (1963).

> ish-American War, World War I, World War II, and the Korean War. [Now the fifth — Vietnam.]
>
> I have been in the United States Senate for 12 years, and during that time I have heard speeches lauding persons from foreign countries, who had been enemies of the United States, and the Senate applauded those persons when they visited the Chamber. I am not complaining about that. I want that definitely understood. However, I could not understand it when I was told that General Robert E. Lee had not had his right restored, including the right to hold office and the right to serve on a jury; and I felt that something ought to be done about it.[17]

I do, too.

THOMAS H. REESE*

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[17] *Supra* note 15.

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REAL COST CONTRACTS*

This comment offers a new proposal to control cost overrun. The writer follows his explanation with a mathematical analysis.

I. INTRODUCTION

Whenever "cost plus" contracting has to be employed to induce contractors to produce for a purchaser, the purchaser must base selection of a producer at least in part on the cost estimates of each bidder. Evaluation of such estimates is tricky. Once employed, a contractor is not strictly bound to his earlier estimates.

As a result of these deficiencies, the phenomenon of cost overrun is observed in non-fixed price contracts. The purpose of this comment is to propose a method of contracting which would control this phenomenon. First, however, we will review some of the existing strategies for controlling the phenomenon in the public sector, and, particularly, in military procurement.

II. CURRENT METHODS OF CONTROLLING COST OVERRUN

There are some four methods used presently.

A. *Existing types of contracts.* Fixed-price contracts make no guarantee of cost recovery.[1] Incentive contracts guarantee cost recovery, but decrease unit fees as costs increase.[2] Both types of contracts are used in military procurement.

B. *System contracting.* System contracting is the technique of contracting with one firm for a whole program, including provision of many individual items. The contractor is then expected to subcontract on various terms with others and control cost overrun with them.[3] System contracting relocates the cost overrun problem,

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

[1] **Armed Services Procurement Reg. § 3–404 (1 Jan. 1969) [hereinafter cited as ASPR].**

[2] **ASPR §§ 3–404.4, 3–405.4.**

[3] **ASPR §§ 23–100 to 23–204.**

but does not always eliminate it. The problem is given to the system contractor for a large fixed price.

C. *Criminal sanctions.* When the purchaser is the Government, criminal law may be invoked in some cost overrun situations. The United States Code provides a fine and imprisonment for knowingly and willfully falsifying a material fact "in any matter within the jurisdiction of any department."[4] The applicability of this section to false cost and price statements in contract bids has not been tested. That is, the writer has not discovered any reports of prosecution under this law on account of inaccurate cost and price proposals. Conviction under the act has resulted, however, for a false statement made in applying to purchase government surplus property.[5]

D. *Renegotiation.* A provision, passed in September 1962, required two special features in military procurements in excess of $100,000.[6] First, the contractor must certify in a separate document that cost and pricing data submitted in a proposal are correct and current to the best of his knowledge. Second, a clause contained in ASPR[7] must be placed in all contracts. The clause reads in part:

> If the contracting officer determines that any price, including profit or fee, negotiated in connection with this contract was increased by any significant sums because the contractor . . . furnished incomplete or inaccurate cost or pricing data **or** data not current as certified in the contractor's certificate of current cost or pricing data, then such price shall be reduced accordingly and the contract shall be modified in writing to reflect such adjustment.

Under the usual disputes clause[8] any such finding by the contracting officer can be reviewed by the Armed Services Board of Contract Appeals (ASBCA). To recover, the Government must show that inaccurate data was submitted, and that the inaccuracy caused the price to be increased by the amount the Government wishes to withhold or recover, but need not show subjective intent by the contractor to mislead.[9]

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4 18 U.S.C. § 1001 (1964).

5 Todorow v. United States, 173 F.2d 439 (9th Cir. 1949), *cert. denied,* 337 U.S. 975 (1949).

6 10 U.S.C. § 2306(f) (1964).

7 ASPR § 7–104.29.

8 ASPR § 7–203.12.

9 American Bosch Arma Corp., ASBCA No. 10305, 65–2 B.C.A. para. 5280 (1965). *See also* FMC Corp., 66–1 B.C.A. para. 5483 (1966), and Defense Electronics, Inc., 66 B.C.A. para. 5604, 5608 (1966).

111. PROPOSED NEW METHOD

What purchasers desire is a method of contracting which controls cost better than incentive contracting, but does not involve the evidentiary problems of the existing criminal law and renegotiation remedies. What is needed is a type of contract which simplifies evaluation of cost estimates by the purchasing officer, and which largely retains cost recovery guarantees, but more strongly commits a contractor to his estimates than do present methods of contracting. One way to do these things is a method which the author calls Real Allowable Cost Objectivity Selection Technique (Real-Cost). The method can be explained most easily in three steps: (1) the bid stage, (2) administration, and (3) selection and award.

A. *Bids.* Invitations for bids will require a responsive bidder to divide his total cost estimate into segments (say, $10,000 segments, for example) and to assign a per cent (a number from zero to one) to each segment which shows for each segment the probability, as the bidder sees it, that total cost will be less than or equal to the upper limit of that segment. (Cumulative subjective probability function.)

B. *Administration.* We jump ahead to the post award stage. (We will return to selection and award in a moment.) Having a contractor "on board," how do we pay him under real-cost? The answer is in three steps. Step three is the key step.

1. Administrative contracting officer (ACO) determines total costs under standards, similar to section 15 of the Armed Services Procurement Regulations for defense suppliers.

2. ACO divides total actual costs into the same size segments used in invitations for bid.

3. This is the key. The ACO multiplies each segment of actual cost by ***one*** *minus* the percent figure for that segment proposed by the contractor in his bid. The sum of such products is the portion of cost the contractor will receive in payment, plus whatever fixed fee he had bid.

C. *Selection.* The purchasing contracting officer under real-cost will use a five-step method of selection and award of contracts.

1. By mathematical methods the ACO translates the percent figures offered by the contractor in his bid into other percent figures for the various segments of cost such that the size of a seg-

ment (all but perhaps the last segment will be of the same size—$10,000, for example) multiplied by the new percent figure equals the probability actual total cost will fall into that segment. That is, the ACO must use mathematics to find what the various probabilities are that total actual cost will fall in various segments. (For mathematical readers, what is done is to derive the probability density function from the cumulative probability function proposed by the contractor by differentiation.)

2. For each contractor proposal, the purchasing contracting officer (PCO) will do the following: Using the *new* percent figures derived from the bid percent figures, the PCO will multiply each segment of conceivable cost by the appropriate "new" percent figures. The sum of each such products will, for each contract, be a sort of expected or "average long run" cost if the contractor's percents are correct.

3. The PCO will then do the following to each such "long run expected cost.)' For each such amount, the computation described in paragraph III B **3,** *supra,* under *Administration,* will be performed. That is, the PCO will divide a bid proposal's expected cost into segments and multiply each segment by one minus the relevant percent figures quoted by the contractor in his bid. For any bid, the sum of such products is what we might call the long run expected non-fee cost to the purchaser of the proposal. This is, of course, less than the long run average cost to the contractor computed in step **2,** *supra.*

4. The sum of expected non-fee cost to the purchaser plus fee is the total expected cost to the purchaser of a bid proposal.

5. *Selection.* The proposal with the lowest total expected cost to the purchaser is the **winner.**

D. *Mathematical treatment.* Addendum one explains real-cost in mathematical terms.

IV. COMPARISON TO OTHER METHODS

A. While no other method is like it, those cost plus incentive fee (C plus IF) contracts which have a possibility of a negative fee are most like this method.

B. C plus IF contracts usually have a fixed percent cost recovery (viz., 100%) with variable fee. The new method instead has a fixed fee, but variable percentages of cost recovery for different segments of cost.

V. PREFERABILITY OF PROPOSED NEW METHOD

A. Cost reduction psychology dominates the new scheme. Instead of feeling they are losing only profits, operators will feel they are failing to recover costs when they perform poorly. This psychology will operate at all ranges of cost and not only past target costs (when negative incentive would operate, if at all, in incentive fee contracts).

B. No "penalty" (as with negative fee) notion is found in the new scheme. This makes the new scheme legally and politically preferable to cost plus incentive fee (with negative incentive features) contracts.

C. Selection is streamlined. Nothing whatsoever is negotiated bi-laterally. Selection is by bid and comparison. Contractors bid their expectations in quantified form and selection is made. This saves administrative time and makes everything more objective and above-board. The discretion of contracting officers is reduced and objective factors become more important.

D. The concept of segmentalized bidding on cost (*i.e.*, bidding on costs by increment) by way of proposing a set of probabilities to determine expectations as to cost increments could be extended or reapplied to incentive fee contracts. Application of segmentalized bidding is the heart of real-cost.

VI, COST INCENTIVE AND OPTIMUM COST UNDER REAL-COST

An interesting question under real-cost as under any bidding system is this. What is the optimum cost of the contractor selected? Under real-cost the contractor will attempt to minimize cost for any given output and for any given product specifications. Minimum cost is his optimum cost.

To understand this effect of real-cost to minimize costs, recall that a real-cost supplier is only paid a portion of each segment of cost and that the percentage size of the portion paid him is smaller for successive increments of cost. The share of cost paid by the purchaser is larger for small total costs than it is for larger total costs. The greater total costs are, the greater the relative and, of course, the absolute dollar amount of costs which the ***seller*** must finance.

The real-cost system might be called variable cost sharing plus

fixed fee. The cost share recovered by the seller varies downward with increases in total cost. For example, consider bidder #1 in the example at VIII, *infra*. If selected he would recover all his first $1.00 of cost but only 75 percent of his second dollar of cost, only 50 percent of his third dollar of total cost, and a meager 25 percent of his fourth dollar of cost, while he gets absolutely *none* of his incremental costs past that point. With a fixed fee of **$1.55,** his break-even cost is $4.05 per widget. The farther below that figure his costs are, the more he profits ; the farther above that point, the more his loss on the contract. In a nutshell, under real-cost, optimum cost for any given output and quality is minimum cost.

VII. THE PROBLEM OF SECOND GUESSING

An important problem presented by all other types of bidding is also presented by real-cost. That is the problem of "second guessing the other bidders." Under a fixed price invitation to bid for production of 100 widgets the following might happen. Company **A** thinks its break-even price for a widget is $5.00. Unless it has other opportunities to use its production capacity, it would be willing to undertake widget production for $5.01. But Company A thinks a competitor's break-even point is $6.00. What that means is that Company **A** thinks it can bid a price of $5.99 and still get the contract for making 100 widgets.

The same sort of thing, unfortunately for purchasers, will happen under real-cost. For example, a supplier who thinks he can make 100 widgets for less than $5.00 one hundred percent of the time but thinks his closest competitor can only stay below $5.00 ninety percent of the time, may, in his response to an invitation to bid, say he can produce for less than $5.00 only ninety-five percent of the time. That way he still gets the contract, but gets something of value above his break-even point, in this example a five percent insurance policy for the event of a cost overrun past $5.00. Thoughtful critics will rightly call real-cost to task on this point. Real-cost's only defense is the weak but equitable one that "other methods of bidding have the same problem.''

VIII. HYPOTHETICAL EXAMPLE OF REAL-COST

Invitation for bidding. Imagine the following :

> Bids are requested for making widgets in **a** Government-owned plant, payment to **be** made by the **REAL-COST** method defined in

ASPR XXX/X. Bid will segmentalize cost into $1.02) segments and assign a percent value to each segment, such percent figures to be used in all REAL-COST computations explained in ASPR XXX/X. Selection will be by the REAL-COST method defined in ASPR XXX/X.

A. *Bid #1 and evaluation.* Number 1 says he can make widgets for less than $1.00 zero percent of the time, for less than $2.00 twentv-five percent of the time, for less than $3.00 fiftv percent of the time, for less than $4.00 seventy-five percent of the time, and for less than $5.00 one-hundred percent of the time. Say he bids a fee of $1.55; the long run expected cost to the contractor will be, if he is right, **$3.00** (para. III C **2,** *supra).* The expected non-fee cost to the Government is $2.25 (para. III C 3, *supra).* The total expected cost to the Government is $2.25, plus fee of $1.55, or $3.80.

B. *Bid #2 and evaluation.* Number 2 says he can produce widgets for less than $1.00 zero percent of the time; for under $2.00 twenty percent of the time ; under $3.00 forty percent of the time; under $4.00 sixty percent of the time; under $5.00 eighty percent of the time; under $6.00 one-hundred percent of the time. He bids a fee of $1.00; the long run expected cost for this contractor is $3.50. The expected non-fee cost to the Government is $2.90. The total expected cost to the Government is $2.90 plus $1.00 fee or $3.90.

Bidder #1 would get the job under this hypothetical. If #1's actual costs were $4.00 per widget, then #1 would get $2.50 of his costs, plus his $1.55 fee or $4.05 (para. III B **3,** *szcpra).* Profit to #1 would be $.05 per widget. Addendum two shows a mathematical treatment of the hypothetical example.

IX. SUMMARY AND CONCLUSIONS

More information is required from bidders in the form of *segmentalixed cost estimates.* This is the heart of the proposal. Remuneration is strongly related to the cost-estimated bid so that bidding should be sincere and realistic, Selection is by comparison of the sums of expected cost and fee, for each contractor, appropriately adjusted in each case for the fact that not all of the expected cost is actually remunerated.

The basic concept of segmentalized cost estimating and bidding could be applied to other types of contracts. Selection would be accomplished by a competitive, systematic, quantified method, so related to subsequent administration that bidding estimates will be sincere and realistic. Administration will be systematic and so re-

lated to the selection process that rewards to a contractor will be determined by both the ambitiousness of his undertaking and, more importantly, by actual performance ; that is, remuneration will be determined by performance *relative to performance expectations* established by the selection process. Selection and administration features together should lead to choice of contractors, such that total resources used for a given output will be minimized. The plan as a whole is also calculated to distribute the gains from such savings between contractor and purchaser, in a flexible way.

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ADDENDUM I REAL-COST MATHEMATICS

1. *PURPOSE.* This addendum suggests that a bidding system using segmentalized cost expectations be adopted to select suppliers. The goal is introduction of more competition to cost-plus-fixed fee contracting. More information will be solicited from bidders than is presently required.

2. *BASIC CONCEPTS.*

a. The key concept is greater information for selection decision making in bidding and selection, The information is cost estimate segments.

b. Remuneration will be determined by the segmentalized cost estimates presented by the contractor selected.

c. Fixed fees will be used.

d. No ceiling price will necessarily be established.

3. *NOTATION.*

a. $x =$ Unit Cost.

b. $C =$ Cumulative subjective probability of x; *i.e.*, probability that actual total cost will be less or equal to x, if contractor's estimate is correct (para. III of text).

c. $C'(x) = p(x)$ (para. III C **1** of text).

d. $E(x) = \int_0^{oo} xp\text{-}(dx)$ (para. III C **2** of text). **p** here means $\mathbf{p}(x)$.

e. $1\text{–}C(x) = K(x)$ (para. III B **3** of text).

f. $P(x) = \int_0^x K(x)dx$ (para. III B **3** of text).

g. $C =$ Contractor.

h. $S(c) = P(e(x)) + Fee$ (para. III C 3 of text).

i. $F =$ Fee.

j. $S(c)$ is the Selection Function.

4. *PROPOSAL FOR SELECTION.* Select contractor c′ such that $S(c') = \text{Min } S(c)$ (para. III C **5** of text).

5. ADMINISTRATION. Having selected c', remunerate him as follows :

Remuneration = P(x) + Fee (para. III B 3 of text).

ADDENDUM II HYPOTHETICAL

1. *#1 BIDDER.*

a. $C(x) =$ 0 for x less than 1
1 for x greater than 5
.25x — .25 for x between 1 and 5

b. $p(x) =$ .25 for x between 1 and 5
0 for other x

c. $E(x) = \left(\frac{.25}{2}\right)(x^2)_1^5 = \frac{.25}{2}(25-1)$
$= 3$

d. $K(x) =$ 1 for x less than 1
0 for x greater than 5
1 — .25 (x — 1) for x between 1 and 5

e. $P(E(x)) = P(3)$
$= 1(1) +$
$(1.25 — .25(2)) +$
$(1.25 — .25(3))$
$= \$2.25$

f. Fee $= \$1.55$

g. Total expected cost to the Government, **$3.80.**

2. *#2 BIDDER.*

a. $C(x) =$ 0 for x less than 1
1 for x greater than 6
.2x — .2 for x between 1 and 6

b. $p(x) =$ .2 for x between 1 and 6
0 for other x

c. $E(x) = \left(\frac{.2}{2}\right)(x^2)_1^6 = .1(36-1)$
$= \$3.50$

d. $K(x) = 1.25 — .25x$ for x between 1 and 6

e. $P(E(x)) = P(\$3.50)$
$= 1 +$
$(1.2 — .2(2)) +$
$(1.2 — .2(3)) +$
$(1.2 — .2(3.5)) +$
$= 1 + .8 + .6 + .5$
$= \$2.90$

f. Fee $= \$1.00$

3. *Administration.*

a. **Actual** Costs **are $4.00 (for #1).**

b. **P(4) =**

$$(1.25 - .25(1)) + (1.25 - .25(2)) + (1.25 - .25(3)) + (1.25 - .25(4))$$

$$= \$2.50$$

c. Fee = **$1.55**

d. Total = **$4.05**

e. **$4.05** minus **$4.00 actual** cost **equals $.05.**

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