

MILITARY LAW
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VOL. 54

Articles

FEDERAL COURT REVIEW OF COURTS-MARTIAL PROCEEDINGS:
A DELICATE BALANCE OF INDIVIDUAL RIGHTS AND
MILITARY RESPONSIBILITIES
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MILITARY LAW REVIEW

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FEDERAL COURT REVIEW OF COURTS-MARTIAL PROCEEDINGS: A DELICATE BALANCE OF INDIVIDUAL RIGHTS AND MILITARY RESPONSIBILITIES*

By Donald T. Weckstein**

Finality in the criminal law has become an increasingly less precise term. Within the military today, the "final" review of a court-martial may not come until the United States Supreme Court has reviewed a soldier-defendant's habeas corpus application. The author examines the increasingly significant topic of federal civilian court review of court-martial proceedings. Among topics discussed are the type of action brought, the nature of the challenge to the military proceeding, and the extent to which potential military relief must be exhausted. In concluding, the author offers his solution to the difficult question: Under what circumstances should a civilian court interfere with a military criminal determination?

I. THE SITUATION

Upon graduation from college, Charles Able Baker was accepted to attend graduate school. But his draft board did not concur, and he soon found himself as Private Charles A. Baker, United States Army. His already existing doubts about American foreign and military policy were deepened by his basic training experience and he became convinced that the road to peace was not a military highway. Accordingly, he spent a good many of his off-duty hours with FARCE (Free American Riflemen for the Cause of Eros) trying to live up to their motto: "Make love not war!" On one Saturday afternoon he participated, in uniform, in a "peace-parade" on post and carried a sign that read: "Get the U.S. Imperialists Out of Viet Nam!" That evening the military police found Baker smoking marihuana in his barracks. When apprehended, Baker did not resist but instead kissed the M.P. on the ear.

Private Baker was charged with (1) violation of Article 92 of the Uniform Code of Military Justice (UCMJ)¹ in that he

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

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¹Art. 92, UNIFORM CODE OF MILITARY JUSTICE [hereafter cited as UCMJ]. The UCMJ is codified in 10 U.S.C. §§ 801-940 (Supp. IV, 1969).

failed to obey a lawful general order prohibiting military personnel from participating in demonstrations while in uniform; (2) violations of Article 134, UCMJ, in that (a) he uttered statements which were disloyal to the United States,² (b) he possessed and used marihuana,³ and (c) he committed an indecent assault on the M.P.⁴

After an Article 32 investigation, the commanding general referred the charges for trial by a general court-martial. Private Baker requested that he be represented by a Private Oliver Ames, a recent graduate of Harvard Law School who also had been drafted and at the time was undergoing basic training at Fort Mudd. The commanding general determined that Private Ames was not available to serve as counsel, and appointed Captain Novice from the post staff judge advocate's office to serve as defense counsel. Captain Novice was himself a recent law school graduate who had never before tried a case, civilian or military. Baker testified in his own defense, and on cross-examination, the trial counsel, in order to impeach Baker's testimony, inquired whether or not it was true that Baker had engaged in several acts of fornication with various females during the past six months. There was no objection and Baker answered that it was true.

The court-martial found Baker guilty of all charges and specifications and sentenced him to two years confinement at hard labor, forfeiture of all pay and allowances and a dishonorable discharge.

Before a court of military review appellate-defense counsel⁵ contended that the findings and sentence were erroneous because: (1) Article 134 was unconstitutionally vague; (2) Baker's First Amendment rights to freedom of speech and expression were violated by (a) the order prohibiting participation of uniformed military personnel in public demonstrations, and (b) the prohibition of statements critical of the United States government or its policies; (3) Kissing a male on the ear did not constitute indecent assault; (4) It was prejudicial error to admit impeachment evidence concerning Private Baker's sexual misconduct; (5) The sentence was too severe. The court of military review approved the findings and sentence rejecting all conten-

² Art. 134, UCMJ; MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION) [hereafter cited as MCM, 1969], p. A6-21, Specification 139.

³ *Id.* at p. A6-22, Specifications 144, 145.

⁴ *Id.* at § 213f(2), pp. 28-76; A6-20, Specifications 128.

⁵ Pursuant to Art. 70, UCMJ.

tions on their merits with the exception of number **(4)** which they refused to consider because trial defense counsel had not objected to the evidence. No further military appellate review was requested by the Judge Advocate General or Private **Baker**.⁶

After Baker served eighteen months of his sentence, he was released from confinement. He then brought an action in the United States Court of Claims for back pay and allowances on the ground that the findings and sentence adjudged in his court-martial were erroneous and void. In support of his contention, his civilian counsel alleged the same five errors that appellate defense counsel had urged before the court of military review, and added: **(6)** The court-martial lacked jurisdiction over the offenses charged because they were not service connected; **(7)** Baker was denied his constitutional right to counsel by **(a)** the refusal to grant Baker's request to permit Private Ames to act as defense counsel at the court-martial, and **(b)** the inadequacy and incompetence of Captain Novice, the appointed defense counsel.

The questions raised by Baker's suit are illustrative of the many problems confronting the courts in their attempt to safeguard rights of individual servicemen without unduly interfering with the special requirements of military service. Among the issues are: **(1)** What jurisdiction, if any, do the civil courts have to review military proceedings? **(2)** What civil remedies may be invoked to obtain such review? **(3)** What military remedies must be exhausted before relief may be sought from the federal courts? **(4)** What types of errors committed by military tribunals are subject to civil court review? **(5)** What is the scope of such review by the civil courts? **(6)** To what extent are the constitutional rights of servicemen limited because of their military status? The importance of these issues to our legal order and to the nation has become increasingly apparent with the continued conscription of large numbers of our youth in order to fight an unpopular war and support questioned foreign and domestic policies. This concern has manifested itself in a rash of recent court adjudications and legislative and executive actions concerning the rights and obligations of selective service registrants and military personnel. This article will explore the law, policies, and developments regarding a number of these issues with the objective of formulating appro-

⁶Additional review was possible by a petition to the Court of Military Appeals. See Art. 67(b)(c), UCMJ.

appropriate standards for their resolution in cases like that of Charles Able Baker and thousands of citizen-soldiers like him.

11. THE NATURE AND STATUS OF THE MILITARY JUSTICE SYSTEM

The American soldier from the Revolution to the present has been subject to a system of rules and regulations administered by military authorities to maintain discipline, honor and security within the armed forces.⁷ The American adaptation of the Articles of War, largely based on international custom and British precedent, was contributed to by many of our leading patriots and statesmen including George Washington, John Adams, and Thomas Jefferson.* From the beginning it included the institution of the courts-martial to exercise criminal jurisdiction over those subject to the Articles. The present Uniform Code of Military Justice evolved in response to the criticisms and experience of the large, predominantly civilian recruited and conscripted, modern armed forces of World War II.⁹

The aim of the UCMJ was to balance maximum military performance with maximum justice.¹⁰ But because of the need to achieve the former, it has often been thought necessary to sacrifice a degree of the latter. Thus, Justice Black has stated that military law "emphasizes the iron hand of discipline more than it does the even scales of justice"¹¹ and that "[i]n the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the indi-

⁷ W. AYCOCK & S. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 9-15 (1955); 1 MOORE'S *FEDERAL PRACTICE* Para 0.5 [1] (2d ed.); J. SNEDEKER, *A BRIEF HISTORY OF COURTS-MARTIAL* (1954); W. WINTHROP, *MILITARY LAW & PRECEDENT* 21-24 (2d ed. 1920); Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U. L. REV. 861-64 (1959).

⁸ AYCOCK & WURFEL, *supra*, note 7, at 10-11 (also noting that John Marshall served as a Deputy Judge Advocate in the Revolutionary War); WINTHROP, *supra*, note 7, at 21-22. See Sherman, *The Civilization of Military Law*, 22 MAINE L. REV. 3, 8-15 (1970).

⁹ See *Burns v. Wilson*, 346 U.S. 137, 140, *reh. den'd.* 844 (1953); AYCOCK & WURFEL, *supra*, note 7, at 14-15; SNEDEKER, *supra*, note 7, at 64-65; Sherman, note 8, *supra*, at 28-49.

¹⁰ J. SNEDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE* 4 (1953); Walker & Niebank, *The Court of Military Appeals—Its History, Organization and Operation*, 6 VAND. L. REV. 228, 239 (1953); Brosman, *Foreword to the Symposium on Military Justice, the Court: Freer than Most*, 6 VAND. L. REV. 166, 167 (1953).

¹¹ *Reid v. Covert*, 354 U.S. 1, 38 (1967).

vidual.”¹² The special needs of the military were accorded constitutional recognition in the Fifth Amendment exemption of the land and naval forces from the requirement of a grand jury indictment,¹³ and in the implied non-applicability of the right to a petit jury trial which is probably the primary difference today between a court-martial and a civilian court criminal trial.¹⁴ Given these asserted differences and recognizing the tradition of judicial self-government and specialized knowledge of the military, the civil courts have generally maintained a hands-off policy toward military trials.

The judicial restraint also has roots in the separation of powers doctrine. Authority over the military has been vested by the Constitution in Congress and the President. Congressional powers to “provide and maintain a Navy”, and to “make Rules for the Government and Regulation of the land and naval Forces”¹⁵ provide the authority for the UCMJ. In addition, the President as “Commander in Chief of the Army and Navy”,¹⁶ and pursuant to statutory authorization, exercises important functions in the military justice system such as prescribing the rules of procedure and modes of proof set forth in the Manual for Courts-Martial,¹⁷ establishing maximum punishments for offenses under the Code,¹⁸ and approving sentences of death and those involving a general or flag officer.¹⁹

The provisions of the Constitution, according to an early Supreme Court case,

¹² *Id.* at 39. See also *O’Callahan v. Parker*, 395 U.S. 258, 265–266 (1969); Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 182 (1962); Fratcher, *supra*, note 7, at 868–69; Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 174 (1953) 174; Comment, 13 VILL. L. REV. 170 (1967).

¹³ *Id.* at 22; *Johnson v. Sayre*, 158 U.S. 109, 113–15 (1895); see *Kurtz v. Moffitt*, 115 U.S. 487, 500 (1885). See *Ex parte Quirin*, 317 U.S. 1, 39–45 (1942).

¹⁴ *Reid v. Covert*, 354 U.S. 1, 21–32 (1957); *Whelchel v. McDonald*, 340 U.S. 122, 126–27 (1950); see *Ex parte Quirin*, 317 U.S. 1 (1942).

¹⁵ U.S. CONST. Art. I, § 8, cls. 1, 12, 13, 14. Congress is also given the power in Article I, Section 8 to define and punish felonies committed on the high seas and offenses against the law of nations (cl. 10), to declare war and make rules concerning captures on land and water (cl. 11), to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections and repel invasions (cl. 15), and to provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the service of the United States (cl. 16).

¹⁶ U.S. CONST. Art 11, § 2. See generally Fratcher, note 7, *supra*, on the extent of the President’s power over military justice.

¹⁷ UCMJ, Art 36.

¹⁸ MCM, 1969, Para 127, UCMJ, Art. 56.

¹⁹ UCMJ, Art. 71.

show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other?’

Accordingly, it is generally recognized that courts-martial are not courts exercising judicial power of the United States under Article Three of the Constitution,²⁰ but are tribunals created under Article I and under control of the political branches of government, Congress and the President.’²¹ Consequently, the Supreme Court and other Article III courts traditionally have not exercised any supervision or review over the decisions of military tribunals acting within their jurisdiction.’²² The Supreme Court stated in 1885 that:

Courts-martial form no part of the judicial system of the United States, and their proceedings, within the limits of their jurisdiction, cannot be controlled or revised by the civil courts.²³

In 1953, Chief Justice Vinson, supported by at least a plurality of the members of the Court,²⁵ reiterated that:

Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development: we have exerted no supervisory power over the courts which enforce it: the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

²⁰ *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857).

²¹ *See Kurtz v. Moffitt*, 115 U.S. 487, 500 (1885); *Altmayer v. Sanford*, 148 F. 2d. 161, 162 (5th Cir. 1945); *United States v. Long*, 2 U.S.C.M.A. 60, 6 C.M.R. 60 (1952); 1 MOORE'S FEDERAL PRACTICE Para 0.5 [1], [2] (2d ed.).

²² *See Whelchel v. McDonald*, 340 U.S. 122, 127 (1950); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82 (1857); Comment, 13 VILL. L. REV. 170, 176-77 (1967).

²³ *See Gusik v. Schilder*, 340 U.S. 128, 132 (1950); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *United States v. Grimley*, 137 U.S. 147, 150 (1890). *See also* S. REP. No. 806, 90th Cong., 1st Sess. 2 (1967): The Court of Military Appeals is intended to be "the civilian supervisor of the administration of military justice and the final interpreter of the requirements of military law."

²⁴ *Kurtz v. Moffitt*, 115 U.S. 487, 500 (1885).

²⁵ Three judges concurred in the Chief Justice's opinion, *Burns v. Wilson*, 346, U.S. 137, 138, *reh. den'd*, 844 (1953). Two judges concurred in the result, *id.* at 146, two dissented, *id.* at 150, and Justice Frankfurter declined to adjudicate the merits and urged reargument, *id.* at 148, 844. None of the separate opinions took explicit exception to the part of the Court's opinion quoted in the text.

Indeed, Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights?'

Nevertheless, the status of the Court of Military Appeals²⁷ may necessitate some modification of the traditional view. Although for purposes of convenience and economy the CMA is located in the Department of Defense,²⁸ that court is now recognized as a "court established by Act of Congress" within the meaning of the All Writs Act,²⁹ and thus able to grant extraordinary writs necessary or appropriate in aid of its jurisdiction.³⁰ Congress, in 1968, amended the Code to specifically provide that the Court of Military Appeals was "established under article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense."³¹ The purpose of this provision was to make it abundantly clear that the CMA was a court, and not an administrative agency, and that it had the power to determine the constitutionality of provisions of the Manual for Courts-Martial or other executive regulations.³² Whether these developments will induce the Supreme Court to exercise supervisory power over the CMA remains to be seen, but, as matters presently stand, the separate and autonomous nature of the military system of justice continues to be recognized and guides the extent to which federal civil courts inquire into the propriety of military proceedings.

111. METHODS AND NATURE OF CIVIL COURT REVIEW

After providing a carefully constructed system of courts-martial and appellate review, the Uniform Code of Military Justice states in Article 76 that:

²⁶ *Burns v. Wilson*, 346 U.S. 137, 140, *reh. den'd*, 844 (1953).

²⁷ Art. 67, UCMJ.

²⁸ *Id.*

²⁹ 28 U.S.C. § 1651 (1964).

³⁰ *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966). *Accord*, *Gale v. United States*, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967); *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); *cert. den'd*, 389 U.S. 1049 (1968); *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968). The CMA has been stated to be a special legislative court and not an administrative agency. *Shaw v. United States*, 209 F.2d 811, 813 (D.C. Cir. 1954). See notes 31, 32 and 55 *infra*.

³¹ Art. 67, UCMJ, as amended by Public Law 90-340 § 1, 82 stat. 178 (June 15, 1968).

³² H. Rep. No. 1480 to accompany S. 2834, Armed Services Committee, 90th Cong. 2d Sess. (1968), 2 U.S. CODE CONG. & ADM. NEWS 2053, 2054 (1968). An attempt to grant the judges life tenure was rejected by the Senate. *Id.* at 2054-55.

54 MILITARY LAW REVIEW

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, . . . are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings are binding upon all departments, courts, agencies, and officers of the United States. . . .³³

The United States Court of Claims recently concluded in respect to Article 76 of the UCMJ that:

The "finality" provision of the Uniform Code . . . does not make the military appellate court truly final."

Humpty Dumpty has said that:

"When I use a word, . . . [i]t means just what I choose it to mean,— neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question *is,*" said Humpty Dumpty, "which is to be master—that's all." =

Since the Supreme Court is right because it is final (not necessarily final because it is right), it follows that on questions concerning the meaning of statutory standards of reviewability of court-martial proceedings, that Court is to be master, subject, of course, to further congressional enactments, which, in turn will be subject to interpretation by the Court.

It is apparent that the conclusions of the Court of Claims regarding the lack of conclusiveness of the "finality" provisions of Article 76 and previous similar statutes is well supported by legislative history and a long line of Supreme Court and other federal decisions. I shall attempt to trace the history of the judicial refinements and exceptions to the concept of military finality, to examine their current status, and to evaluate their future role in military and federal jurisprudence.

A. DIRECT REVIEW

A succinct observation of Colonel Winthrop continues to correctly express both the law regarding direct reviewability of courts-martial proceedings and its rationale :

[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 reviewed by any federal court, either by certiorari, writ of error, or otherwise³⁶

³³ Art. 76, UCMJ.

³⁴ *Augenblick v. United States*, 377 F.2d 586, 593 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969). *See also Burns v. Wilson*, 346 U.S. 137, *reh. den'd*, 844, 849–850 (1953) (opinion of J. Frankfurter).

³⁵ L. CARROLL, ALICE THROUGH THE LOOKING GLASS 114.

³⁶ W. WINTROP, MILITARY LAW AND PRECEDENT 50 (2d ed. 1920).

Thus, as we have seen, the creation of a system of military justice separate and apart from the Judicial Article of the Constitution excludes military tribunals from the supervisory authority which the Supreme Court exercises over the federal judicial system. Since Congress has not conferred any power on the Article Three courts to review the determination of military tribunals, it has been generally recognized that the Supreme Court will not directly review a decision of a court-martial or other military tribunal.³⁷ An 1864 Supreme Court opinion, noting that it had only such original jurisdiction as was vested by Article Three of the Constitution and that its appellate jurisdiction was subject to the exceptions and regulations enacted by Congress, concluded that it lacked original jurisdiction to issue a writ of habeas corpus and possessed neither original nor appellate jurisdiction to issue a writ of certiorari to review or revise the proceedings of a military commission.³⁸ In a subsequent case, however, the Court clearly held that it had authority, in aid of its appellate jurisdiction, to issue a writ of habeas corpus, aided by a writ of certiorari in review of a lower court's denial of habeas corpus relief sought by a petitioner in military custody.³⁹ While this holding supports the Court's jurisdiction to review *collateral* attacks upon courts-martial proceedings,⁴⁰ there has been no retreat from the Court's refusal to entertain a petition for a writ of certiorari to *directly review* decisions of military tribunals."

Congress has given the Supreme Court, as well as the lower Federal courts, authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to

"See *In re Yamashita*, 327 U.S. 1, 8 (1946); *In re Vidal*, 179 U.S. 126 (1900); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 251, 253 (1864); *Gallagher v. Quinn*, 363 F.2d 301, 304 (D.C. Cir.), *cert. den'd*, 385 U.S. 881 (1966); *United States v. Ferguson*, 5 U.S.C.M.A. 68, 17 C.M.R. 68 (1954); W. AYCOCK & S. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 15 (1955); B. FELD, *COURTS-MARTIAL PRACTICE AND APPEAL* 162 (1957); 1 MOORE'S *FEDERAL PRACTICE* Para 0.5 [2] (2d ed.) [hereinafter cited as MOORE]. See also *Smith v. Whitney*, 116 U.S. 167, 177 (1886).

³⁷ *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 249-253 (1864).

³⁸ *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869). See Aycock, note 37, *supra*, at 317-325 for an extensive discussion of this and related cases.

³⁹ Habeas corpus as a method of collateral attack upon the judgment of a military tribunal is discussed *infra*.

⁴⁰ *In re Vidal*, 179 U.S. 126 (1900); *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964), *motion for leave to file petition for writ of certiorari denied*, 380 U.S. 970 (1965); see *In re Yamashita*, 327 U.S. 1, 8 (1946); *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967), *cert. den'd*, 389 U.S. 1049 (1968).

the usages and principles of law.”⁴² Pursuant to this “All Writs Statute,” the Court may issue such extraordinary writs as mandamus, prohibition, and common law certiorari.⁴³ While such authority includes the power to review a judicial determination not otherwise made reviewable by statute,⁴⁴ it has not been exercised where the lack of an express review provision was due to an intentional policy of Congress rather than to a failure to anticipate the need for review.⁴⁵ Accordingly, the Court has declined to employ the common law writ of certiorari to directly review decisions of the Court of Military Appeals or other military tribunals.⁴⁶ Likewise, the Court of Appeals for the District of Columbia, a court possessing judicial power under both Article Three and Article One,⁴⁷ has disclaimed jurisdiction to directly review decisions of the Court of Military Appeals.⁴⁸

Nevertheless, as indicated in the quotation from Winthrop, the nonreviewability of military judicial decisions is in part based upon the failure of Congress to provide otherwise. By virtue of its authority over the military justice system, as well as its power to vest the jurisdiction of inferior federal courts and regulate the appellate jurisdiction of the Supreme Court, Congress could provide for direct appeal to such courts from a military tribunal.⁴⁹ While it is true that a military court does not exercise judicial authority under Article Three of the Constitution and that the Supreme Court may not take jurisdiction of any case beyond Article Three,⁵⁰ it is also true that the Court can and does review judicial determinations of non-Article Three courts.⁵¹ Review of state court decisions are the most ob-

⁴² 28 U.S.C. § 1651 (a) (1964).

⁴³ *E.g.*, *In re Chetwood*, 165 U.S. 443, 461–62 (1897). *See* *United States v. Beatty*, 232 U.S. 463, 466–68, (1914); 6 MOORE Para 54.10 [2], [3]. *See* *Smith v. Whitney*, 116 U.S. 167 (1886) leaving open the question of whether a writ of prohibition may issue to a court-martial.

⁴⁴ *See* authorities cited note 32, *supra*.

⁴⁵ *See* 6 MOORE Para 54.10[2], [3], and authorities cited at 67, and notes 41, 42, 68–69, and notes 54–55.

⁴⁶ *See* authorities cited notes 37 and 41 *supra*.

⁴⁷ *O'Donoghue v. United States*, 289 U.S. 516 (1933); *see* *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949); 1 MOORE Para 0.4; C. WRIGHT, FEDERAL COURTS § 11 (1963).

⁴⁸ *Shaw v. United States*, 209 F.2d 811 (D.C. Cir. 1954).

⁴⁹ *See* 1 MOORE Para 0.5[2]; MILITARY JUSTICE JURISDICTION OF COURTS-MARTIAL, DEPT OF THE ARMY PAMPHLET NO. 27-174 (1965), 20.

⁵⁰ *Muskrat v. United States*, 219 U.S. 346 (1911); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809); 1 MOORE Para 0.4[1], 0.7[2]; C. WRIGHT, FEDERAL COURTS §§ 7-8, 10-15 (1963).

⁵¹ *E.g.*, *Pope v. United States*, 323 U.S. 1 (1944) (Court of Claims); *Durousseau v. United States*, 12 U.S. (6 Cranch) 307 (1810) (territorial

vious example.⁵² Consequently, to the extent that a military tribunal performs judicial, rather than administrative, executive, political, or legislative functions, Congress could make its determinations subject to direct review by the Supreme Court.⁵³

That Congress has not expressly so provided is presently clear. Statutes providing for review by certiorari, appeal, and certified questions do not apply to the Court of Military Appeals or other military tribunals.⁵⁴ Nor is a military court an administrative tribunal subject to judicial review under the Federal Administrative Procedure Act.⁵⁵ Whether the recent recognition of the Court of Military Appeals as a legislative court created under Article I⁵⁶ will effect the direct reviewability of its decisions is a question which cannot now be answered with certainty. But it may be that the upgrading of the court will bring it a step closer to the scope of the supervisory authority of the Supreme Court.

B. OTHER AVENUES OF ATTACK

1. In General

Direct review or appeal, while a common method of challenging the correctness and validity of a judicial determination, is not the exclusive remedy. Other avenues of attack are frequently available. Strictly construed, a collateral attack seeks a declara-

court; before it was constituted as an Article III court); 1 MOORE Para 0.4[1], p. 59, Para 0.7[2], pp. 260-61; C. WRIGHT, FEDERAL COURTS § 11 (1963); *cf.*, National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 682 (1949).

⁵² *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); 1 MOORE Para 0.6[6], 0.7[2]; C. WRIGHT, FEDERAL COURTS § 107 (1963).

⁵³ It is assumed that courts-martial proceedings are potentially within the limits of federal court jurisdiction specified in Article Three as "Controversies to which the United States shall be a Party"; and it is possible that they may become, "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."

⁵⁴ 28 U.S.C. §§ 1252-1258 (1964).

⁵⁵ *Shaw v. United States*, 209 F.2d 811, 813 (D.C. Cir. 1954); *Goldstein v. Johnson*, 184 F.2d 342, 343 (D.C. Cir.), *cert. den'd*, 340 U.S. 879 (1950); *Brown v. Royall*, 81 F. Supp. 767, 768 (D.D.C. 1949), *aff'd*, (D.C. Cir. 1949), *cert. den'd*, 339 U.S. 952 (1950). See also AYCOCK & WURFEL, note 37, *supra*, at 15; MOORE Para 0.5[2], 5 U.S.C. §§ 551 et. seq. and 5 U.S.C. §§ 701 et. seq. (Supp V 1970), formerly the Administrative Procedure Act provides for judicial review of final agency actions unless statutes preclude judicial review or the action is by law committed to agency discretion. UCMJ Art. 67 now expressly provides that the CMA is a legislative court; Art. 76, precludes direct judicial review; and section 2(a)(2) of the Act excludes from the operation of the Act "courts-martial and military commissions."

⁵⁶ See notes 31-32, *supra*, and accompanying text.

tion of the invalidity of a judgment as a necessary incident to some other requested relief.⁵⁷ Thus, the specific remedy sought by a petition for a writ of habeas corpus is the release of one person from the restraint of another; but the request is based upon the alleged invalidity of the cause for restraint, for example a void court-martial judgment. Likewise, an action in the Court of Claims is nominally concerned with an asserted right to back pay and allowances, but again the claim is based upon an allegedly void court-martial adjudged discharge or forfeiture.

There are other methods of attack which are sometimes referred to as collateral but also have elements of directness.⁵⁸ An independent proceeding brought for the express purpose of attacking a judgment or the right to issue one, such as an equity bill for injunctive relief or a writ of prohibition or mandamus, is of this nature. Such actions directly attack a court's proceedings but sometimes have been considered collateral because they are normally commenced in a court other than that which rendered the judgment under attack. In addition, they share with true collateral attacks similarly limited grounds for overturning the judgment, which do not include "mere error" in the prior proceedings.⁵⁹ To the extent that civil court remedies are only available to attack a void judgment, there is no conflict with the provision making courts-martial findings, sentences, and proceedings reviewed pursuant to the Code final and binding.⁶⁰ Such a provision can only refer to actual proceedings and judgments and not to void ones, which presumably are of no effect whatsoever.⁶¹ Thus, it is useful to consider together the various avenues of attack available in civil courts whether they are truly collateral or involve independent proceedings directly attacking a court-martial judgment, as long as such remedies are only available to attack void or otherwise fundamentally defective convictions.⁶²

2. *Civil Trespass and Related Actions*

The Supreme Court's earliest consideration of a collateral attack on a court-martial conviction occurred in 1806 in *Wise v.*

⁵⁷ See F. JAMES, JR., CIVIL PROCEDURE § 11.5 (1965); RESTATEMENT OF JUDGMENTS § 11, Comment a (A.L.I. 1942).

⁵⁸ James, *supra*, note 57, at § 11.5.

⁵⁹ *Id.* See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 153-55 (Stu. ed. 1965)

⁶⁰ UCMJ, Art. 76.

⁶¹ See *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 80-83 (1857).

⁶² See RESTATEMENT OF JUDGMENTS § 11 (A.L.I. 1942) defining a void judgment as one subject to collateral attack.

Withers.⁶³ Wise, a federal justice of the peace had been convicted by a court-martial and ordered to pay a fine. Withers, a collector of military fines, had seized certain goods of Wise to satisfy the fine. Wise brought an action of trespass against him for entering Wise's house and removing his goods. In an opinion by Chief Justice Marshall, the Court held that Wise, as a federal officer, was exempt from militia duty and the jurisdiction of the court-martial over him, and concluded that:

it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers."⁶⁴

In three subsequent cases, the Court took jurisdiction of similar collateral attacks but denied the requested relief.⁶⁵ The last of these cases, *Dynes v. Hoover*,⁶⁶ decided in 1857, involved a trespass action for assault and battery and false imprisonment against a federal marshal who had placed the plaintiff in confinement pursuant to an order of the President executing a navy court-martial sentence. Although the Court, with one dissent, denied relief to the plaintiff upon a finding that the court-martial had jurisdiction and that it was regularly convened and conducted, its opinion clearly reaffirmed the principle announced in *Wise v. Withers*. The Court stated that:

When [a court-martial sentence is] confirmed, it is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had not jurisdiction over the subject matter or charge, or one in which, having jurisdiction over the subject matter, it has failed to observe the rules prescribed by the Statute for its exercise. In such cases, . . . all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he may recover damages from them on a proper suit in a civil court, by the verdict of a jury.

Persons, then, belonging to the army and the navy are not subject to illegal or irresponsible courts-martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases everything which may be done is void—not voidable, but void; and civil courts have never failed upon a proper suit to give a party redress, who has been injured by a void process or void judgment."⁶⁷

It is questionable whether the Court's dicta regarding the tort liability of the parties to a court-martial without jurisdic-

⁶³ 7 U.S. (3 Cranch) 331 (1806).

⁶⁴ *Id.* at 337.

⁶⁵ *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820).

⁶⁶ 61 U.S. (20 How.) 65 (1857).

⁶⁷ *Id.* at 81.

tion would be good law today. The modern trend is to afford immunity from civil liability to court officers executing orders of a court which, although in excess of the court's jurisdiction, appear fair and regular on their face.⁶⁸ If the order is not obviously beyond the jurisdiction of a special and limited tribunal such as a court-martial, and is of the type that the court has general authority to issue, the officer serving or enforcing it should be immune from civil liability unless there was something on the face of the order which should have put the officer on notice of the jurisdictional defect of the court.⁶⁹ The argument in favor of immunity for the members of the court-martial is even stronger. The need for protecting judges from civil liability for their acts taken in a judicial capacity should apply to errors of judgment in determining their jurisdiction as well as to other errors of law or fact. For this reason it is often held that a judge can be liable only if there is a clear absence of jurisdiction.⁷⁰ It has been stated that this principle only applies to judges of courts of general and superior jurisdiction, and that judges of limited and inferior courts, such as courts-martial, do not enjoy immunity unless acting within their actual jurisdiction." Yet the policy would seem to be as valid in either case,⁷¹ with the limited nature of the inferior court's jurisdiction mainly relevant to the allocation of the burden of showing the lack of even colorable jurisdiction. Immunity of court-martial members can also be supported on analogy to those cases denying a right of action to servicemen seeking redress for injuries allegedly caused by other servicemen acting in the line of duty.⁷²

⁶⁸ See RESTATEMENT OF TORTS 2d §§ 122-124, 145, 266 (A.L.I. 1965); W. PROSSER, THE LAW OF TORTS 130-31, 1017-18 (3d ed. 1964).

⁶⁹ See RESTATEMENT OF TORTS 2d §§ 124, 145, 266, and Comments thereto (A.L.I. 1965).

⁷⁰ *E.g.*, *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-354 (1872); *Pierson v. Ray* 386 U.S. 547, 553-55 (1967) (Judges enjoy absolute immunity for acts within their judicial jurisdiction even under the Civil Rights Act, 42 U.S.C. §§ 1983). See *Grove v. Van Duyn*, 44 N.J. L. 654 (1882); PROSSER, note 68, *supra*, at 1014.

⁷¹ See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872).

⁷² See E. SUNDERLAND, JUDICIAL ADMINISTRATION 85 (2d ed. 1948). See also *Barr v. Matteo*, 360 U.S. 564, 569-575 (1959) holding that the reasons supporting immunity for judicial officers also apply to executive officers acting in line of duty.

⁷³ *E.g.*, *Baily v. Van Buskirk*, 345 F.2d 298 (9th Cir. 1965); see *Feres v. United States*, 340 U.S. 135 (1950); *cf.*, *Barr v. Matteo*, note 72, *supra*; see also Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2680(a)(h) (1964) exempting the United States from liability for discretionary functions, false imprisonment or arrest, malicious prosecution, or abuse of process. *But see McLean v. United States*, 73 F. Supp. 775 (W.D.S.C. 1947) allowing redress

Therefore, although a tort action against the members of a court-martial or the officers enforcing its orders would probably not be an effective method of collateral attack today, at least in the absence of a clear lack of jurisdiction, the statements in these earlier cases have provided the foundation for determining the availability of other methods of attack currently being employed.⁷⁴

3. Habeas Corpus

The most common form of collateral attack on a court-martial judgment is a petition for a writ of habeas corpus to test the legality of confinement imposed pursuant to the order of the court-martial. The "Great Writ" has long been regarded as one of the primary safeguards against an arbitrary and overreaching government.⁷⁵ The Constitution assumed the availability of the remedy in America and simply provided that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."⁷⁶ It was not until after the Civil War that the Supreme Court had its first opportunity to consider an application for habeas corpus to test the legality of a detention imposed by a military tribunal. In the classic case of *Ex parte Milligan*,⁷⁷ although differing in their rationale, all the justices of the Court agreed that the military commission lacked proper authority to try the petitioner, a civilian, and sentence him to death. The Court ordered him discharged from custody. A few years later, in *Ex parte Yeger*,⁷⁸ the Court issued a writ of certiorari to review a lower court decision which had refused to give habeas corpus relief to a civilian being held for trial by a military commission on a murder charge. The high Court held that it could consider the case and grant the writ of habeas corpus under its appellate jurisdiction as long as a lower federal court had inquired into the legality of the confinement even though the writ was directed to the military and not to a civil authority subject to the federal courts.⁷⁹

for unjust conviction and imprisonment [now 28 U.S.C. §§ 1495, 2513 (1964)] based upon a court-martial sentence.

⁷⁴ See *Gusik v. Schilder*, 340 U.S. 128, 132-33, n.3 (1950) ; *Aycock*, note 37, *supra*, at 325-29; 1 MOORE Para 0.5[4].

⁷⁵ See *Fay v. Noia*, 372 U.S. 391 (1963) ; *Aycock*, note 37, *supra*, at 315-17.

⁷⁶ U.S. CONST., Art. I, § 9, cl. 2. See *Aycock*, note 37, *supra*, at 317.

⁷⁷ 71 U.S. (4 Wall.) 2 (1866).

⁷⁸ 75 U.S. (8 Wall.) 85 (1869).

⁷⁹ *Id.* at 98-103.

In 1879, in *Ex parte Reed*,⁸⁰ the Supreme Court heard its first case involving a habeas corpus attack upon a military court-martial. Although it denied the requested relief, the Court exhibited no difficulty in fitting the case into the pattern established by other habeas corpus cases and the early trespass actions collaterally attacking court-martial judgments. It was noted that "every act of a court beyond its jurisdiction is void" and subject to collateral attack but that in this case the navy court-martial had jurisdiction of the person and the case and could not be so impeached for mere errors or irregularities committed within its authority.⁸¹

Although the granting of habeas corpus relief in attacks on court-martial judgments has been relatively rare, the Supreme Court has done so where the military court has been found to be lacking in jurisdiction.⁸² Thus in the 1902 case of *McClaghry v. Deming*,⁸³ relief was granted to a petitioner who had been tried by an illegally constituted court-martial. More recently, petitioners have successfully maintained that their convictions were void because the courts-martial lacked jurisdiction of their person⁸⁴ or the offenses with which they were charged.⁸⁵ Both the Congress⁸⁶ and the Supreme Court⁸⁷ have recognized that the finality provision of the UCMJ⁸⁸ does not bar such actions.

While the power of the federal civil courts to grant habeas corpus relief to military prisoners is no longer open to question, controversy still exists regarding the scope of inquiry and the requisites for entitlement to the relief.⁸⁹ One general limitation on the availability of the writ has been that the petitioner be in custody or have his liberty or freedom of movement otherwise restrained.⁹⁰ Recent Supreme Court decisions, however, have rec-

⁸⁰ 100 U.S. 13 (1879).

⁸¹ *Id.* at 23.

⁸² See Part IV *infra*.

⁸³ 186 U.S. 49 (1902).

⁸⁴ *E.g.*, *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

⁸⁵ *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Lee v. Madigan*, 358 U.S. 228 (1959).

⁸⁶ S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess. 35 (1949). See Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO S.L.J. 193, 213 (1966).

⁸⁷ *E.g.*, *Burns v. Wilson*, 346 U.S. 137, 139, 142, *reh. denied*, 844 (1953); *Gusik v. Schilder*, 340 U.S. 128, 132-33 (1950); *In re Yamashita*, 327 U.S. 1, 8 (1946); see *United States v. Augenblick*, 393 U.S. 348, 349-50 (1969).

⁸⁸ UCMJ, Art. 76.

⁸⁹ Other aspects of these issues are discussed *infra* at Parts IV and V.

⁹⁰ *Zimmerman v. Walker*, 319 U.S. 744 (1943); *Wales w. Whitney*, 114 U.S. 564 (1885); *Brown v. Reaves*, 388 F.2d 682 (5th Cir. 1968); *Kanewske v.*

ognized that habeas corpus is not a “static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.”⁹¹ Thus the Court has entertained writs from a parolee of a state institution,⁹² a petitioner who was released outright from state custody after his writ had been filed but while his case was still pending on appeal,⁹³ and a prisoner attacking a state conviction for which he was not yet serving the sentence.⁹⁴ Some other courts have permitted habeas corpus attacks on criminal proceedings by petitioners on probation, under suspended sentences, or free on bail.⁹⁵ While the force of these decisions in military habeas corpus is yet to be finally determined, there seems little reason not to so apply them.⁹⁶ In one recent case, a federal court entertained a writ of habeas corpus from a state prisoner attacking a court-martial conviction for which the sentence had already

Nitze, 383 F.2d 388 (9th Cir. 1967); *see* Hooper v. Hartman, 163 F. Supp. 437, 440 (S.D. Cal. 1958), *aff'd*, 274 F.2d 429 (9th Cir. 1959); Ruby v. United States, 341 F.2d 585 (9th Cir. 1965); AYCOCK, note 37, *supra* at 354–65. The specific holdings in some of the cited cases may now be subject to question in light of the text accompanying notes 91–94, *infra*.

The action must be brought in a district in which the “custodian” is subject to jurisdiction, Schlanger v. Seamans, 91 S. Ct. 995 (1971), and the petitioner may have to be in custody in such district. *See id.*; Ahrens v. Clark, 335 U.S. 188 (1948).

⁹¹ Jones v. Cunningham, 371 U.S. 236, 243 (1963). *See* Cushman, *The “Custody” Requirement for Habeas Corpus*, 50 *MIL. L. REV.* 1 (1970); Note, 83 *HARV. L. REV.* 1038, 1072–79 (1970).

⁹² *Id.*

⁹³ Carafas v. Lavallee, 391 U.S. 234 (1968), overruling Parker v. Ellis, 362 *U.S.* 574 (1960).

⁹⁴ Peyton v. Rowe, 391 U.S. 54 (1968), overruling McNally v. Hill, 293 *U.S.* 131 (1934).

⁹⁵ *E.g.*, Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968) (bail); Benson v. California, 328 F.2d 159 (9th Cir. 1964) (probation); Walker v. State of North Carolina, 262 F. Supp. 102 (W.D.N.C. 1966), *aff'd*, 372 F.2d 129 (4th Cir. 1967) (suspended sentence); *see* Duncombe v. State of New York, 267 F. Supp. 103, 109 (S.D.N.Y. 1967) (bail pending appeal). *Contra*, Stallings v. Splain, 253 U.S. 339 (1920) (bail); Johnson v. Hoy, 227 U.S. 245 (1912) (bail); Green v. Yeager, 223 F. Supp. 544, 548 (D.N.J. 1963), *aff'd*, 332 F.2d 794 (3d Cir. 1964) (suspended sentence). The current validity of these latter decisions may be questioned in light of the text accompanying notes 91–94, *supra*.

⁹⁶ *See* Levy v. Parker, 396 U.S. 1204, 1205 (1969) (opinion of J. Douglas as Circuit Justice); Cushman, *The “Custody” Requirement for Habeas Corpus*, 50 *MIL. L. REV.* 1, 29–32 (1970); Note, 83 *HARV. L. REV.* 1038, 1230 (1970). *Cf.*, Kauffman v. Secretary of the Air Force, 415 F.2d 991, 996 (D.C. Cir. 1969).

been served where the prisoner maintained that the state court took the military conviction into account in sentencing him.⁹⁷

The American Bar Association, in its study of criminal justice, has recommended that "the availability of post-conviction relief should not be dependent upon the applicant's attacking a sentence of imprisonment then being served or other present restraint."⁹⁸ Nevertheless, as things presently stand, habeas corpus is inadequate to afford such uniformly broad relief to civil or military offenders, and resort to other remedies must be sought by those not in "custody".

4. *Claims for Pay and Allowances*

In 1950, the Court of Appeals for the District of Columbia Circuit, in commenting on a provision in the then Articles of War which, like Article 76 of the UCMJ, made court-martial sentences, as approved and confirmed within the military system, final and binding on all courts of the United States, stated :

While it is well established that the writ of habeas corpus is not suspended by such a provision, it is equally well settled that in the absence of physical confinement the courts cannot interfere with nor in any way review court-martial proceedings?

While such absolute statements are occasionally volunteered, it is apparent that they are too broad to be accurate. The early cases allowing civil suits for trespass and replevin against officers executing court-martial orders have already been noted, and other methods of attack have been recognized by both the Supreme Court and lower federal courts. The most common of these are suits in the U.S. Court of Claims for back pay and allowances.

In the above cited District of Columbia Circuit case, the court supported its conclusion by a quotation from an 1885 Supreme Court case¹⁰⁰ refusing to consider a habeas corpus attack upon

⁹⁷ *Robson v. United States*, 279 F. Supp. 631 (E.D. Pa. 1968). See also *Harris v. Ciccone*, 417 F.2d 479 (8th Cir. 1969) (release on parole does not moot petition); *cf.*, *Cozart v. Wilson*, 236 F.2d 732 (D.C. Cir. 1956) (habeas corpus allowed to attack jurisdiction of Japanese court by servicemen retained in Japan beyond their obligated tours of duty); *Hammond v. Lenfest*, 398 F.2d 705, 710-12 (2d Cir. 1968) (writ available to reservist not on active duty to test validity of denial of administrative discharge); *contra United States v. Eichstaedt*, 285 F. Supp. 476, 479-80 (N.D. Calif. 1967) (reservist not in custody for purpose of seeking habeas corpus relief from denial of administrative discharge).

⁹⁸ A.B.A. Project on Minimum Standards for Criminal Justice, Post-Conviction Remedies, Standard 2.3 (Approved Draft, 1968). See Commentary, *id.* at 40-45.

⁹⁹ *Goldstein v. Johnson*, 184 F.2d 342, 343 (D.C. Cir.), *cert. denied*, 340 U.S. 879 (1950).

¹⁰⁰ *Wales v. Whitney*, 114 U.S. 564, 570 (1885).

the jurisdiction of a pending court-martial because the petitioner was not in custody nor had his liberty been restrained. But another part of the opinion, not quoted by the circuit court, shows that the Supreme Court had no intention of foreclosing other remedies to the petitioner. The Court observed that if the petitioner should be tried by court-martial, despite his plea of no jurisdiction, and

if that court finds him guilty, and imposes imprisonment as a part of a sentence, he can then have a writ to relieve him of that imprisonment. If he should be deprived of office, he can sue for his pay and have the question of the jurisdiction of the court which made such an order inquired into in that suit. If his pay is stopped, in whole or in part, he can do the same thing. In all these modes he can have relief if the court is without jurisdiction¹⁰¹

That this dictum was an accurate statement of the law can be shown by other Supreme Court cases, both before and after the decision. In 1883, the Court took jurisdiction of an appeal from the Court of Claims dismissing the petitioner's claim for back pay.¹⁰² The claim was based in part on the asserted invalidity of a court-martial judgment. The dismissal was affirmed on the basis that the alleged error did not make the proceedings void and that jurisdiction of the accused and the charge were the only questions open for consideration in such collateral attacks,¹⁰³ citing the habeas corpus case of *Ex parte Reed*.¹⁰⁴ Four years later, in another appeal from the Court of Claims,¹⁰⁵ the Supreme Court ordered that the petitioner be paid longevity pay which had been denied him on the basis of a court-martial sentence found to be invalid because of the failure of the President to approve it as required by law. Citing the early trespass cases, the Court stated that the judgments of a court-martial were subject to collateral attack unless it affirmatively appears that the court-martial was legally constituted, had jurisdiction, and that the proceedings and sentence conformed to the requirements of the law.¹⁰⁶ Another back pay claim was approved by the high Court in 1907 on the basis of a collateral attack on an

¹⁰¹ Id. at 575.

¹⁰² *Keyes v. United States*, 109 U.S. 336 (1883).

¹⁰³ Id. at 339.

¹⁰⁴ 100 U.S. 13 (1879). See text accompanying notes 80, 81 *supra*.

¹⁰⁵ *Runkle v. United States*, 122 U.S. 543 (1887).

¹⁰⁶ Id. at 556.

invalidly constituted court-martial,¹⁰⁷ and other such claims have been considered by the Court but denied on their merits.¹⁰⁸

Since World War II the Court of Claims has continued to collaterally review court-martial convictions in suits for pay and allowances. The present approach of the court began with *Shapiro v. United States*¹⁰⁹ in 1947. Relying upon the earlier Supreme Court cases, the Court of Claims, with one judge dissenting, held that it had the power in considering a salary claim to determine whether a court-martial sentence asserted as a defense to such claim was void.¹¹⁰ It then concluded that the court-martial in question had denied the claimant his constitutional rights and that this deprived the tribunal of jurisdiction, and entitled the claimant to relief.¹¹¹

Subsequent cases in the Court of Claims have made it clear that the creation of the Court of Military Appeals and the enactment of the finality provision in Article 76 of the Uniform Code do not preclude the consideration of the validity of courts-martial convictions in suits for back pay and allowances.¹¹² In *Augenblick v. United States*,¹¹³ the court rejected a many-pronged attack on its jurisdiction to scrutinize a court-martial conviction, and observed that :

There is no adequate reason for looking to habeas corpus alone, or for thinking that Congress limited its exception from "finality" to that specific proceeding. Liberty is of course important, so are

¹⁰⁷ *United States v. Brown*, 206 U.S. 240 (1907).

¹⁰⁸ *Swaim v. United States*, 165 U.S. 553 (1897); *United States v. Fletcher*, 148 U.S. 84 (1893); see *Mullan v. United States*, 140 U.S. 240 (1891) (alternative ground).

¹⁰⁹ 69 F. Supp. 205 (Ct. Cl. 1947).

¹¹⁰ *Id.* at 207.

¹¹¹ It was noted, but not as a basis for the holding, that the President had granted the claimant a full pardon in order that his civil rights "may be restored and the effect of the court-martial proceedings nullified so far as possible." *Id.* at 208. This was referred to as a basis for distinguishing the instant case from a suit in the nature of mandamus to order the Chief of the U.S. Army Finance Center to disburse the plaintiff's military salary and allowances denied him on the basis of an allegedly invalid court-martial. *Alley v. Chief, Finance Center, United States Army*, 167 F. Supp. 303 (S.D. Ind. 1958). It would have been more appropriate to simply regard such a claim as being asserted in the wrong manner and in the wrong court.

¹¹² *E.g.*, *Juhl v. United States*, 383 F.2d 1009, 1019 (Ct. Cl. 1967) *rev'd. on other grounds*, 393 U.S. 348 (1969). *Augenblick v. United States*, 377 F.2d 586, 591-93 (Ct. Cl. 1967); *rev'd on other grounds*, 393 U.S. 348 (1969). See *Shaw v. United States*, 357 F.2d 949, 953-54 (Ct. Cl. 1966). *But cf.* *Gallagher v. United States*, 423 F.2d 1371, 1378-79 (Ct. cl. *cert. den'd.*, 91 S.Ct. 58 (1970) suggesting that the finality clause may limit the scope of review.

¹¹³ 377 F.2d 586 (Ct. Cl. 1967), *redd. on other grounds*, 393 U.S. 348 (1969).

a man's career, his livelihood, his rights as a veteran, his status as a convicted criminal, and his reputation. To deny collateral attack to one not in confinement—the consequence of saying that habeas corpus is the only remedy—would be to deny the possibility of review by a constitutional court, and ultimately by the Supreme Court, of the constitutional claims of servicemen like plaintiff who have not been sentenced to jail or who have been released.”

The Supreme Court granted certiorari in *Augenblick*¹¹⁵ and another case raising similar issues¹¹⁶ “because of the importance of the question concerning the jurisdiction of the Court of Claims to review judgments of courts-martial.”¹¹⁷ After acknowledging the precedents authorizing collateral review of courts-martial by back-pay suits prior to the enactment of UCMJ Article 76, and the theory supporting the Court of Claims’ continued exercise of such jurisdiction,¹¹⁸ the Court elected not to reach the question of the validity of this practice because the facts of the present cases did not raise a defect in the military proceedings of a nature which would justify a collateral attack, assuming *arguendo* that such attack could be entertained by the Court of Claims.¹¹⁹

While the Supreme Court did not expressly approve of the Court of Claims’ collateral review of courts-martial decisions, it did pass up an opportunity to order a halt to the practice, and it continues today with little basis in precedent or policy for its disapproval.¹²⁰

5. Injunctions, Mandamus, Declaratory Judgments and other Possible Remedies

A variety of other remedies have occasionally been asserted in attempts to invoke the jurisdiction of the civil courts to inquire

¹¹⁴ *Id.* at 592.

¹¹⁵ 390 U.S. 1038 (1968).

¹¹⁶ *United States v. Juhl*, 383 F.2d 1009 (Ct. Cl. 1967) *cert. granted*, 390 U.S. 1038 (1968).

¹¹⁷ *United States v. Augenblick*, 393 U.S. 348, 349 (1969).

¹¹⁸ *Id.* at 350–51.

¹¹⁹ *Id.* at 351–52. The Court likewise left unresolved the question of whether the federal district courts would have jurisdiction of back-pay and allowances suits for less than \$10,000 under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1967 Supp.). *Id.* See H.R. Rep. No. 1604, 88th Cong., 2d Sess., 2 (1956); McLean v. United States, 73 F. Supp. 775, 777 (W.D.S.C. 1947). See 34 Mo. L. REV. 619 (1969). See also the discussion at Part IV, B, *infra*.

¹²⁰ *Cf.* *Burns v. Wilson*, 346 U.S. 137, *reh. den'd.* 844, 847 (1953) (opinion of J. Frankfurter); *Gallagher v. United States*, 423 F.2d 1371 (Ct. Cl. 1970); *Gearinger v. United States*, 412 F.2d 862, 864 (Ct. Cl. 1969) (reaffirming jurisdiction in *Shaw v. United States*, 357 F.2d 949, (Ct. Cl. 1966) and noting that there is nothing in *Augenblick* “which compels us to withhold our hand.”); *Monett v. United States*, 419 F.2d 434, 435–36 (Ct. Cl. 1969).

into the validity of courts-martial proceedings. The Supreme Court considered one such remedy in *Smith v. Whitney* in 1886.¹²¹ The lower court had denied, for lack of jurisdiction, a petition for a writ of prohibition directed to a Navy court-martial to prevent it from trying the petitioner. The high Court stated that it had appellate jurisdiction of the case, on writ of error, and that prohibition was an appropriate remedy against a court which clearly lacks jurisdiction. But the Court further noted that it was unnecessary to decide whether such a writ may be issued by a federal court to a military court-martial since in this case the jurisdiction of the court-martial was not clearly lacking. Despite this equivocal beginning, until recently, federal court decisions have uniformly denied the availability of prohibition and analogous remedies.¹²²

In *Brown v. Royall*,¹²³ a suit was brought in the federal district court for the District of Columbia seeking a declaratory judgment that a court-martial which convicted the plaintiff was without jurisdiction and that its orders and the conviction were void. The suit further requested that the adjutant general be directed to reform and correct the military records of the plaintiff and that the court grant such injunctive and other relief necessary to enforce such a judgment. The court acknowledged that habeas corpus and claims for pay had been used to collaterally attack the validity of a court-martial, and then noted:

But, in no instance, so far as the authorities submitted, or any which I have been able to discover, disclose, has a civil court undertaken to pass upon and determine the validity of a court-martial in a proceedings [sic] for a declaratory judgment, or to order and direct the officials of the War Department to alter its records, or issue new ones pursuant to the court's judgment with respect to such court-martial action."¹²⁴

The district court's denial of the requested relief for lack of jurisdiction was affirmed by the circuit court of appeals and certiorari was denied by the Supreme Court.¹²⁵

Another suit for a mandatory injunction and declaration that a court-martial conviction was null and void met a similar fate in *Goldstein v. Johnson*.¹²⁶ The circuit court noted, as had

¹²¹ 116 U.S. 167 (1886).

¹²² See MILITARY JUSTICE, JURISDICTION OF COURTS-MARTIAL, DEP'T OF THE ARMY PAM NO. 27-174, p. 18 (1965); notes 123-134, *infra*, and accompanying text.

¹²³ 81 F. Supp. 767 (D.D.C.), *aff'd.* (D.C. Cir. 1949), *cert. den'd*, 339 U.S. 952, *reh. den'd*, 991 (1950).

¹²⁴ *Id.* at 768.

¹²⁵ *Brown v. Royall*, *cert. den'd*, 339 U.S. 952 (1950).

¹²⁶ 184 F.2d 342 (D.C. Cir.), *cert. den'd*, 340 U.S. 879 (1950).

the *Brown* court, that the Federal Declaratory Judgment Act¹²⁷ did not enlarge the jurisdiction of the federal courts over courts-martial but merely provided an alternate remedy in cases where jurisdiction had previously existed.¹²⁸

Other dismissals for lack of jurisdiction occurred in a suit for an injunction to restrain a court-martial sentence alleged to be in excess of the confirming board's authority,¹²⁹ and an action seeking a declaration of the invalidity of a court-martial sentence and an order directing the Army Chief of Finance to disburse the plaintiff's salary and allowances, which the court characterized as a writ of mandamus in substance, and which it said it lacked the power to issue.¹³⁰ In another case, a retired admiral (1) sought a writ of prohibition and mandatory injunction against a court-martial conviction while his direct appeal was pending, and (2) requested a three-judge district court¹³¹ hearing to declare unconstitutional and enjoin the enforcement of Article 2(4) of the UCMJ which extended court-martial jurisdiction to certain retired personnel. The district court held it had no power to issue a writ of prohibition except in aid of jurisdiction otherwise acquired and that any consideration of the jurisdiction of the court-martial must await the exhaustion of military review remedies and the commencement of a proper civil action such as habeas corpus, if confinement occurs.¹³² Jurisdiction was taken of the second count but it was dismissed without convening the three-judge court because the Act was held to be clearly constitutional.¹³³ The dismissal was affirmed by the Court of Appeals for the Ninth Circuit on the basis of the failure to exhaust military remedies.¹³⁴

A number of actions, however, have been more hospitably received by the lower federal courts. In two opinions growing

¹²⁷ 28 U.S.C. §§ 2201-02 (1964).

¹²⁸ See *Goldstein v. Raby*, 184 F.2d 342-343 (D.C. Cir. 1950). See also *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). But see *E. Edelman & Co. v. Triple-A Specialty Co.*, 88 F.2d 852 (7th Cir. 1937); *Serio v. Liss*, 300 F.2d 386 (3d Cir. 1961). See generally, 6A MOORE 757.23; C. WRIGHT, FEDERAL COURTS § 18 (1963).

¹²⁹ *Stock v. Department of the Air Force*, 186 F.2d 968 (4th Cir. 1950). The Court, however, did discuss the merits of the alleged claim of invalidity and rejected it.

¹³⁰ *Alley v. Chief, Finance Center, U.S. Army*, 167 F. Supp. 303 (S.D. Ind. 1958). See text of note 111, *supra*.

¹³¹ Pursuant to 28 U.S.C. § 2282 (1964).

¹³² *Hooper v. Hartman*, 163 F. Supp. 437 (S.D. Cal. 1958), *aff'd*, 274 F.2d 429 (9th Cir. 1959).

¹³³ *Id.* at 437, 441, 442.

¹³⁴ *Hooper v. Hartman*, 274 F.2d 429 (9th Cir. 1959).

out of the same suit, different judges of the district court for the District of Columbia sustained jurisdiction of a declaratory judgment action seeking a declaration that a court-martial was improperly convened and that the conviction and sentence should be vacated.¹³⁵ Relief was denied on the merits, however, in the latter decision.¹³⁶

In 1962 Congress enacted a statute giving all the federal district courts authority to grant relief in the nature of a writ of mandamus (a power formerly limited to the federal courts of the District of Columbia)¹³⁷ to compel an officer or employee of the United States to perform a duty owed to the plaintiff.¹³⁸ While this Act was designed to make administrative action more easily and fairly subject to judicial review,¹³⁹ it was relied upon by the Court of Appeals for the First Circuit, in *Ashe v. McNamara*,¹⁴⁰ to permit the indirect review of the validity of a court-martial conviction. The plaintiff had been sentenced to confinement and to be dishonorably discharged. After completing his imprisonment, he petitioned the Board for Correction of Naval Records to change his discharge to an honorable one on the ground that the court-martial had violated his constitutional rights. This petition was denied and the action approved by the Secretary of the Navy. The Court of Military Appeals also dismissed his petition for review. He then brought a mandamus action in the district of Massachusetts to compel the Secretary of Defense to grant his petition to change the nature of his discharge. The district court dismissed for lack of jurisdiction,¹⁴¹ but the First Circuit reversed. The court noted that the Secretary, acting through a civilian correction board, had the power to change the kind of discharge received by a former serviceman in order "to correct an error or remove an injustice" and that this power extended to discharges ordered in court-martial sentences.¹⁴² Observing that federal court review of correction board actions was authorized and that the Supreme Court had

¹³⁵ *Jackson v. Wilson*, 147 F. Supp. 296 (D. D.C. 1957) (J. Morris, the same judge who decided *Brown v. Royall*); *Jackson v. McElroy*, 163 F. Supp. 257, 258-59 (D. D.C. 1958) (J. Christenson).

¹³⁶ *Jackson v. McElroy*, 163 F. Supp. 257 (D. D.C. 1958).

¹³⁷ See *Kendal v. United States*, 37 U.S. (12 Pet.) 524 (1838); *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.10 (1958); MOORE ¶¶0.6[5], 81.07.

¹³⁸ Pub. L. 87-748, 76 Stat. 744 (1962), 28 U.S.C. § 1361 (1964).

¹³⁹ Sen. Rep. No. 1992, 87th Cong., 2d Sess. (1962), 2 U.S. CODE CONG. & ADM. NEWS 2784,2785 (1962).

¹⁴⁰ *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965).

¹⁴¹ *Ashe v. McNamara*, 243 F. Supp. 243 (D. Mass. 1965).

¹⁴² *Ashe v. McNamara*, 355 F.2d 277,280 (1st Cir. 1965).

reviewed a military department's refusal to correct an administrative discharge alleged to be **illegal**,¹⁴³ the court could find no ground for a distinction in its jurisdiction based on the source of the challenged discharge—whether pursuant to administrative or court-martial **proceedings**.¹⁴⁴ Upon finding that the uncontroverted facts established that the plaintiff had been denied effective assistance of counsel at his court-martial, and that therefore the dishonorable discharge sentence was invalid, the court held that a mandatory injunction should issue directing the Secretary, as a matter of plain duty and not subject to the exercise of administrative discretion, to order the correction board to reconsider and grant appropriate **relief**.¹⁴⁵

The Ashe case was given a restrictive reading by the First Circuit in *Davies v. Clifford*.¹⁴⁶ The petitioner had successfully sought correction of his records by the Army Board on the basis that he was in fact innocent of the crime for which he had been court-martialed and served a sentence. Upon the Board's recommendation, the bad conduct discharge previously imposed was changed to an honorable one, but the Court of Military Appeals denied his coram nobis petition in which he sought to have the court-martial conviction vacated. He then petitioned a federal court for a declaratory judgment or coram nobis to declare the conviction void. The district court denied relief, distinguishing those cases which had taken jurisdiction to collaterally review courts-martial proceedings by other than habeas **corpus**.¹⁴⁷ In affirming the dismissal for lack of jurisdiction, the Court of Appeals expressed its agreement with the lower court that Ashe involved a review of "administrative" action of the military department and not of the court-martial **conviction**.¹⁴⁸ In *Davies* the administrative relief had already been accomplished, and the court could not review the decision of the Court of Military Appeals either because the federal courts had no direct jurisdiction over military convictions or because, in the absence of a current disability or restraint of the petitioner, there was no present **controversy**.¹⁴⁹

Where the Ashe-type situation has been presented, other federal courts have indicated a willingness to exercise jurisdiction

¹⁴³ *Harmon v. Brucker*, 355 U.S. 579 (1958).

¹⁴⁴ *Ashe v. McNamara*, 355 F.2d 277, 281-82 (1st Cir. 1965).

¹⁴⁵ *Id.* at 279-280, 282.

¹⁴⁶ 393 F.2d 496 (1st Cir. 1968).

¹⁴⁷ *Davies v. McNamara*, 275 F. Supp. 278 (D. N.H. 1967).

¹⁴⁸ *Davies v. Clifford*, 393 F.2d 496, 497 (1st Cir. 1968).

¹⁴⁹ *Id.*

and grant relief. Thus the Tenth Circuit Court of Appeals, citing the Court of Claims cases and *Ashe*, concluded "that the trial court had jurisdiction to review by mandamus, as in habeas corpus, the final-court martial decision even though . . . [the petitioner] had completed the term of imprisonment imposed as a result of that conviction."¹⁵⁰ Despite this broad statement, the review here, as in *Ashe*, was of a denial of relief by the Secretary of Defense acting through a board for the correction of military records. A District of Columbia federal court granted relief on similar facts noting that: "It is beyond question that this Court has jurisdiction to review actions of that Board [for the Correction of Military Records]"¹⁵¹

Another case, in the District of Columbia circuit court, while denying relief on the merits, held that the federal courts have jurisdiction of a mandatory injunction action to determine the constitutionality of an article of the Uniform Code, and if appropriate, to compel the Court of Military Appeals to review a court-martial conviction.¹⁵² The court noted that the right to due process of law would be lost to a person deprived of it by a court-martial if civil court review were denied to persons not in confinement, on the basis that habeas corpus was the only available avenue of attack.¹⁵³

These sentiments were endorsed by the same court of appeals in *Kauffman v. Secretary of the Air Force*,¹⁵⁴ an action to have a court-martial conviction and sentence declared void on the ground that they violated the plaintiff's constitutional rights. While exhausting his military remedies, the plaintiff completed his period of confinement but a discharge under less than honorable conditions and a total forfeiture of pay and allowances remained in effect. The court acknowledged that "deprivation of liberty under an invalid conviction is a grievous injury, but a military discharge under less than honorable conditions imposes a life-long disability of greater consequence. . . ." ¹⁵⁵ Noting that for reasons of efficiency, the military may prefer to discharge, rather than imprison, an offender, the court concluded :

¹⁵⁰ *Smith v. McNamara*, 395 F.2d 896,899 (10th Cir. 1968).

¹⁵¹ *Owings v. Secretary of the United States Air Force*, 298 F. Supp. 849, 852 (D. D.C. 1969).

¹⁵² *Gallagher v. Quinn*, 363 F.2d 301 (D.C. Cir.), *cert. den'd*, 385 U.S. 881 (1966).

¹⁵³ *Id.* at 303-04. *See also* *Moylan v. Laird*, 305 F.Supp. 551, 553 (D. R.I. 1969) taking jurisdiction to enjoin a court-martial alleged to lack jurisdiction over the offense.

¹⁵⁴ 415 F.2d 991 (D.C. Cir. 1969), *aff'g.* 269 F. Supp. 639 (D. D.C. 1967).

¹⁵⁵ *Id.* at 995.

To hold that collateral review is contingent on confinement in every case would arbitrarily condition the serviceman's access to civilian review of constitutional errors upon a factor unrelated to the gravity of the offenses, the punishment, and the violations of the serviceman's rights.'**

Although denying relief on the merits, the court indicated that its conclusion on the viability of other methods of collateral attack on courts-martial, in addition to habeas corpus, was not rejected by the Supreme Court in *Augenblick*¹⁵⁷ and may have been given some support by the opinion in that case.¹⁵⁸

6. *Recapitulation*

It is apparent that one convicted by a court-martial such as our hypothetical Charles Able Baker, is not completely shut off from seeking civil court review of his allegations of errors in the military proceedings. While, at least at present, there is no direct review of the military justice system, collateral attack is available by habeas corpus and probably by other means as well. It is difficult to contend with any fair logic that one who is convicted by a court-martial may seek collateral review in a civil court if he is in confinement but that another person with the same basis for attack on his conviction should be without a remedy because he was dishonorably discharged without confinement or has already completed his term of imprisonment. Thus, ex-Private Baker, by his suit for back pay and allowances, should be able to invoke the jurisdiction of the Court of Claims to collaterally review his court-martial conviction. Indeed, it can persuasively be contended that his remedies should not be limited to such a suit even though he is no longer in confinement. The policy which justifies the determination by a single court of all substantial¹⁵⁹ financial claims against the United States, whatever its merits, has no application in determining the appropriate forum for judging the validity of courts-martial proceedings. It seems entirely sound that the district courts which hear such issues in petitions for writs of habeas corpus, and which may be more conveniently available to the plaintiff than would be the Court of Claims, should have jurisdiction to review a court-martial conviction by other appropriate remedies, whether

¹⁵⁶ *Id.* at 996.

¹⁵⁷ See text accompanying notes 117-119, *supra*.

¹⁵⁸ See *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 995 (D.C. Cir. 1969).

¹⁵⁹ See note 132, *supra*, concerning the possibility that district courts may be able to hear pay claims of not more than \$10,000.

mandamus, declaratory judgment, or some form of injunctive relief.¹⁶⁰

Nevertheless, there are other requirements which must be contended with before our Charles Baker, and others like him, will be entitled to the judicial relief that they may seek.

IV. SCOPE OF REVIEW

Collateral review of court judgments is an extraordinary remedy and not just another opportunity to reargue claimed errors that may have taken place in the trial court. Consequently the permitted scope of review in collateral attacks has always been more narrow than that available on direct appeal.¹⁶¹ There have been suggestions that the scope of inquiry in habeas corpus attacks on courts-martial convictions may be broader than that available with other remedies.¹⁶² But in relation to the general categories of errors discussed here, the proposition has little support in logic or precedent.¹⁶³ Without attempting to foreclose the question, the following survey will discuss cases involving all applicable remedies although most of the principles have been developed in the course of habeas corpus litigation.

A. JURISDICTION

In determining the legality of detention of military as well as state and federal prisoners, the "Great Writ" has traditionally permitted an inquiry into the "jurisdiction" of the committing official or tribunal to order the restraint of the petitioner.¹⁶⁴

¹⁶⁰ See POST-CONVICTION REMEDIES, American Bar Association Project on Minimum Standards for Criminal Justice 40-45 (Approved Draft, 1968); text accompanying notes 112-114, 120, 152-156, *supra*, *cf.*, *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958); *McGrath v. Kristensen*, 340 U.S. 162, 168-171 (1950); *Everett, Military Administrative Discharges — The Pendulum Swings*, 1966 DUKE L.J. 41, 50, 96.

¹⁶¹ See F. JAMES, JR., CIVIL PROCEDURE § 11.5 (1965); *cf.* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 153-54 (Stu. Ed. 1965).

¹⁶² *E.g.*, *Davies v. McNamara*, 275 F. Supp. 278, 282 (D. N.H. 1967), *aff'd sub. nom. Davies v. Clifford*, 393 F.2d 496 (1st Cir. 1968).

¹⁶³ *See e.g.*, *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 994 (D.C. Cir. 1969); *Smith v. McNamara*, 395 F.2d 896, 899 (10th Cir. 1968) quoting from *Ashe v. McNamara*, 355 F.2d 277, 280, 282 (1st Cir. 1965); *Juhl v. United States*, 383 F.2d 1004, 1019 (Ct. Cl. 1967) *rev'd on other grounds*, 343 U.S. 348 (1969); *Augenblick v. United States*, 377 F.2d 586, 591-92 (Ct. Cl. 1967), *rev'd. on other grounds*, 393 U.S. 348 (1969); *Comment*, 69 COLUM L. REV. 1059, 1072 (1969).

¹⁶⁴ *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *In re Yamashita*, 327 U.S. 1, 8 (1946); *Collins v. McDonald*, 258 U.S. 416 (1922); *Givens v. Zerbst*, 255 U.S. 11, 19-22 (1921); *Carter v. McClaughry*, 183 U.S. 365, 381, 401 (1902); *Swain v. United States*, 165 U.S. 553, 561 (1897); *Johnson v. Sayre*, 158

If such jurisdiction was lacking, the proceedings would be considered "void because of an absolute want of power, and not merely voidable because of the defective exercise of power possessed."¹⁶⁵ As such there would be no basis on which to justify the restraint of the petitioner and habeas corpus would be granted or another method of collateral attack permitted.

To constitute a jurisdictional defect, it has been held that a court-martial or other military tribunal must be found to (1) have been improperly appointed or composed;¹⁶⁶ (2) lack jurisdiction or authority over the person of the accused;¹⁶⁷ (3) lack jurisdiction or authority over the offense charged;¹⁶⁸ or (4) lack the power or authority to impose the sentence adjudged.¹⁶⁹ Since the enactment of the Uniform Code of Military Justice,¹⁷⁰ the Supreme Court has held that, despite attempted authorization therein,¹⁷¹ courts-martial may not exercise jurisdiction over civilians, at least in time of peace,¹⁷² whether they are ex-service-

U.S. 109, 118 (1895); *United States v. Fletcher*, 148 U.S. 84 (1893); *United States v. Grimley*, 137 U.S. 147, 150 (1890); *Keyes v. United States*, 109 U.S. 336, 339 (1883); *Ex parte Reed*, 100 U.S. 13, 23 (1879); *Williams v. Heritage*, 323 F.2d 731, 732 (5th Cir. 1963), *cert. den'd.* 377 U.S. 945 (1964); AYCOCK & WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 314-329; 365-66, 377-78.

¹⁶⁵ *Carter v. McClaughry*, 183 U.S. 365, 401 (1902). *See also* *Fowler v. Wilkinson*, 353 U.S. 583, 584 (1957); *Ex parte Reed*, 100 U.S. 13, 23 (1879).

¹⁶⁶ *E.g.*, *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1, 7-13 (1940), *Kahn v. Anderson*, 255 U.S. 1 (1921); *United States v. Brown*, 206 U.S. 240 (1907); *McClaghry v. Deming*, 186 U.S. 49, 69 (1902); *Keyes v. United States*, 109 U.S. 336 (1883).

¹⁶⁷ *E.g.*, *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *United States v. Grimley*, 137 U.S. 147 (1890).

¹⁶⁸ *E.g.*, *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Lee v. Madigan*, 358 U.S. 228 (1959); *In re Yamashita*, 327 U.S. 1, 11-16 (1946); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82 (1857).

¹⁶⁹ *E.g.*, *Jackson v. Taylor*, 353 U.S. 569 (1957); *Carter v. McClaughry*, 183 U.S. 365, 394 (1902); *Powers v. Hunter*, 178 F.2d 141, 145 (10th Cir. 1949), *cert. den'd.* 339 U.S. 986 (1950).

¹⁷⁰ Act of 5 May 1950, 64 Stat. 108 (1950), as amended, 10 U.S.C. §§ 801-940 (1969 Supp.). The Act became effective on 31 May 1951.

¹⁷¹ Arts. (11), 3 (a), UCMJ.

¹⁷² *See* *Latney v. Ignatius*, 416 F.2d 821 (D.C. Cir. 1969) refusing to extend court-martial jurisdiction to a merchant seaman employed on a ship docked in a South Vietnam harbor at the time of the alleged crime; even assuming that this is a time of undeclared war, the seaman did not work in sufficiently close proximity to the armed forces. As noted in this case, some doubt has been cast upon the provision in the UCMJ extending jurisdiction in time of war over persons serving with or accompanying an armed force in the field [Art. 2(10), UCMJ] by the broad language of Justice Douglas in *O'Callahan v. Parker*, 395 U.S. 258, 267 (1969). This dicta, however, should not prove persuasive. *See* Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian Offenses"*: *An Analysis of O'Callahan v. Parker*,

men being tried for crimes allegedly committed while in service,¹⁷³ dependents of military personnel,¹⁷⁴ or employees accompanying the military overseas.¹⁷⁵

In June of 1969, the Supreme Court decided *O'Callahan v. Parker*,¹⁷⁶ a case involving courts-martial jurisdiction over civilian-type offenses. The dust has not yet begun to settle from this far-reaching decision.¹⁷⁷ In 1956, the petitioner had been convicted of attempted rape, housebreaking, and assault with intent to rape, all offenses under the UCMJ,¹⁷⁸ by a court-martial sitting in the then territory of Hawaii. The offenses were committed while the petitioner was on an evening pass,¹⁷⁹ in civilian clothes, and in a Honolulu hotel away from his military post. The opinion of Justice Douglas, joined by four of the other members of the eight-man Court, concluded: "that the crime to be under military jurisdiction must be service-connected. . . ." ¹⁸⁰

In reaching this conclusion, the Court rejected the long-held

54 MINN. L. REV. 1, 52-55 (1969). See also *United States v. Averette*, 19 U.S.C.M.A. 263, 41 C.M.R. 363 (1971) (no jurisdiction over a civilian employee accompanying the armed forces in Vietnam because there was no declaration of war by congress); Weiner, *Courts Martial for Civilians Accompanying the Armed Forces in Vietnam*, 54 A.B.A.J. 24 (1968); Keeffee, *Practical Lawyer's Guide to the Current Law Magazines*, 53 A.B.A.J. 961 (1967); Note, 67 MICH. L. REV. 841 (1969); Comment, 45 DENVER L.J. 797, 806-07 (1968).

¹⁷³ *United States ex. rel. Toth v. Quarles*, 350 U.S. 11 (1955). See also Bishop, *Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317 (1964).

¹⁷⁴ *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957).

¹⁷⁵ *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960). See generally F. WIENER, *CIVILIANS UNDER MILITARY JUSTICE* (1967); Everett, *Military Jurisdiction over Civilians*, 1960 DUKE L.J. 366; Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces - A Preliminary Analysis*, 13 STAN. L. REV. 461 (1961).

¹⁷⁶ 395 U.S. 258 (1969).

¹⁷⁷ See e.g., Everett, *O'Callahan v. Parker - Milestone or Millstone in Military Justice?*, 1969 DUKE L.J. 853; Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian Offenses": An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1 (1969); and commentaries listed in Relford v. Commandant, 28 L. Ed. 2d 102, 104-06 and footnotes 1-8 (1971).

¹⁷⁸ Arts. 80, 130, 134, UCMJ.

¹⁷⁹ Originally characterized by the Court as "on leave", *O'Callahan v. Parker*, 89 S. Ct. 1683, 1685, 1691 (1969), but in the subsequently published official report each one of these references was corrected to "on an evening pass", 395 U.S. 258 at 259, 261, and "properly absent from his military base". *Id.* at 273.

¹⁸⁰ *Id.* at 272. Justice Harlan, joined by two justices, filed a vigorous dissent. *Id.* at 274.

assumption, based on dicta in prior decisions¹⁸¹ as well as common practice, that jurisdiction of military courts-martial over such offenses depended upon the military status of the accused. The majority reasoned that while military status was essential in all cases, it was not sufficient in some. While the Court attempted, with mixed success,¹⁸² to dress its staggering decision in the pages of English and early-American history,¹⁸³ its most telling blows were directed at the capacity of the military system to administer justice. Placing great weight on the right in a civilian court to trial by jury and a grand jury indictment, as the opinions striking down jurisdiction over civilians had done,¹⁸⁴ the Court observed that

A court-martial is tried not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers¹⁸⁵ empowered to act by a two-thirds vote. The presiding officer at a Court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but by a military law officer." Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of

¹⁸¹ See, e.g., *Kinsella v. Singleton*, 361 U.S. 234, 243 (1960); *Reid v. Covert*, 354 U.S. 1, 19-20, 22-23 (1957). See also *O'Callahan v. Parker*, 395 U.S. 258, 275-76 (1969) (dissenting opinion); Nelson & Westbrook, note 177, *supra*, at 23-24. Just a few months earlier, in *United States v. Augenblick*, the Court disposed of another collateral review of a court-martial without mention of the fact that the offenses may well have been non-service-connected. See *petition for cert. filed*, 38 USLW 3164 (1969).

¹⁸² Justice Harlan's dissenting opinion read the history to support the contrary view. *O'Callahan v. Parker*, 395 U.S. 258, 276-80 (1969) (dissenting opinion). See Nelson & Westbrook, note 177, *supra*, at 6-19. But see Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 441-53, 456-57 (1960).

¹⁸³ The "Warren Court" has been criticized for its often unconvincing and unnecessary use of history as a tool of advocacy. See e.g., Weckstein, *Comment on Powell v. McCormack*, 17 U.C.L.A. L. REV. 73, 74 (1969).

¹⁸⁴ See *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

¹⁸⁵ "Under Art. 25 (c) of the Uniform Code of Military Justice, at least one-third of the members of the court-martial trying an enlisted man are required to be enlisted men if the accused requests that enlisted personnel be included in the court-martial. In practice usually only senior enlisted personnel, i.e., noncommissioned officers, are selected. See *United States v. Crawford*, 15 U.S.C.M.A. 31 (1964), motion for leave to file petition for certiorari denied, 380 U.S. 970. See generally, Schlessler, *Trial by Peers: Enlisted Members on Courts-Martial*, 15 CATH.U.L.REV. 171 (1966)," *O'Callahan v. Parker*, 395 U.S. 258, 263 n. 2 (1969).

¹⁸⁶ ". . . The Military Justice Act of 1968, Pub. L. 90-632, 82 Stat. 1336, establishes a system of 'military judges' intended to insure that where possible the presiding officer of a court-martial will be a professional military judge, not directly subordinate to the convening authority." *O'Callahan v. Parker*, 395 U.S. 258, 264, n.3 (1969).

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influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.

A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty

A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while the military trial is marked by the age-old manifest destiny of retributive justice . . . “[m]ilitary law has always been and continues to be primarily an instrument of discipline, not justice.”¹⁸⁷

Thus convinced that “the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to ‘*the least possible power adequate to the end proposed*’ ”¹⁸⁸ the Court concluded that the petitioner’s crimes were not service connected and “he could not be tried by court martial but rather was entitled to trial by the civilian courts.”¹⁸⁹ In this way, observed the Court, the “power of Congress to make ‘Rules for the Government and Regulation of the land and naval Forces’ . . . is to be exercised in harmony with express guarantees of the Bill of Rights.”¹⁹⁰

Aside from the disappointment of the military and other commentators¹⁹¹ in this harsh condemnation of military justice which neglected to take fair account of recent significant reforms,¹⁹² the decision was all the more frustrating because of its failure

¹⁸⁷ *Id.* at 263-65, 266. The last quotation of the Court is from Glaser, *Justice and Captain Levy*, 12 COLUM. FORUM 46, 49 (1969).

¹⁸⁸ *Id.* at 265, quoting from *Toth v. Quarles*, 350 U.S. 11, 23 (1965). (Emphasis the Court’s).

¹⁸⁹ *Id.* at 274.

¹⁹⁰ *Id.* at 273, quoting from U.S. CONST., Art. I, § 8, cl. 14.

”*See, e.g.*, *United States v. Borys*, 18 U.S.C.M.A. 545, 550, 559-60, 40 C.M.R. 257 (1969) (dissenting opinion); Everett, note 177, *supra*; Ervin, Address, 25 June 1969, printed in 69-20 JALS 28, DA PAM 27-69-20; Comment, 21 S. CAR. L. REV. 781, 787-89, 794-95 (1969).

¹⁹² *E.g.*, Military Justice Act of 1968, Pub. L. 90-632, 82 Stat. 1335 (1968); *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968); *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966). *See also* Quinn, *Some Comparisons Between Court-Martial and Civilian Practice*, 46 MIL. L. REV. 77 (1969); Erwin, *The Military Justice Act of 1968*, 45 MIL. L. REV. 77 (1969).

to shed any significant guiding light on the many new questions it had raised, such as, the meaning of "service-connected", whether the newly-discovered right applies retroactively, or whether it is subject to any limitations or waiver.¹⁹³ In its only post-O'Callahan holding, the Supreme Court side-stepped some of these issues and merely upheld jurisdiction over crimes committed on-post by a serviceman.¹⁹⁴

B. CONSTITUTIONAL AND OTHER CLAIMS

In the absence of a claimed lack of jurisdiction or denial of constitutional rights, the federal courts generally have refused to consider the merits of alleged errors committed in courts-martial proceedings. Thus collateral attacks have not been sustained where allegations have been made that the evidence did not support the conviction,¹⁹⁵ that there was an error in the admission of evidence,¹⁹⁶ that the law officer erred in his instructions to the court,¹⁹⁷ that the trial counsel made prejudicial comment, that the pleadings were defective,¹⁹⁸ that the pretrial

¹⁹³ See, e.g., *O'Callahan v. Parker*, 395 U.S. 258, 283-84 (1969) (dissenting opinion); Everett, note 177, *supra*; Nelson & Westbrook, note 177, *supra*; Rice, *O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman*, 51 MIL. L. REV. 41 (1971); Comment, 83 HARV. L. REV. 212-20 (1969); Comment, 21 S. CAR. L. REV. 781, 791-94 (1969); Comment, 19 CATH U.L. REV. 101 (1969); Comment, 18 J. PUB. L. 471 (1969); Comment, 22 VAND. L. REV. 1377 (1969).

¹⁹⁴ *Relford v. Commandant*, 91 S. Ct. 649 (1971); Recent Development, 52 MIL. L. REV. 169 (1971).

¹⁹⁵ E.g., *Whelchel v. McDonald*, 340 U.S. 122, 124 (1950); *Hiatt v. Brown*, 339 U.S. 103, 100-11 (1950); *Humphrey v. Smith*, 336 U.S. 695, 696, 698 (1949); In re *Yamashita*, 327 U.S. 1, 8, 17 (1946); *White v. Humphrey*, 115 F. Supp. 317, 322-23 (M.D. Pa. 1953), *afd*, 212 F.2d 503 (3d Cir. 1954).

¹⁹⁶ E.g., *United States v. Augenblick*, 393 U.S. 348, 352-56 (1969); In re *Yamashita*, 327 U.S. 1, 18-19, 23 (1946); *Collins v. McDonald*, 258 U.S. 416 (1922); *Narum v. United States*, 287 F.2d 897, 151 Ct. Cl. 312 (1960), *cert. den'd*, 368 U.S. 848 (1961); *Thomas v. Davis*, 249 F.2d 232, 235 (10th Cir. 1957), *cert. den'd*, 355 U.S. 927 (1958); *Day v. Davis*, 235 F.2d 379, 385 (10th Cir.), *cert. den'd*, 352 U.S. 881 (1956).

¹⁹⁷ E.g., *Kubel v. Minton*, 275 F.2d 789 (4th Cir. 1960); *Day v. McElroy*, 255 F.2d 179 (D.C. Cir. 1958) (concurring opinion); *Day v. Davis*, 235 F.2d 379, 384-85 (10th Cir.), *cert. den'd*, 352 U.S. 881 (1956); see *White v. Humphrey*, 212 F.2d 503 (3d Cir. 1954).

¹⁹⁸ E.g., *Thomas v. Davis*, 249 F.2d 232, 235 (10th Cir. 1957), *cert. den'd*, 355 U.S. 927 (1958); Ex parte *Joly*, 290 Fed. 858, 860 (S.D. N.Y. 1922).

¹⁹⁹ E.g., *Powers v. Hunter*, 178 F.2d 141, 144 (10th Cir. 1949), *cert. den'd*, 339 U.S. 986 (1950), 15 A.L.R.2d 381 (1951); *Bigrow v. Hiatt*, 70 F. Supp. 826, 828-830 (M.D. Pa. 1947), *afd per curiam*, 168 F.2d 992 (3d Cir. 1948); Ex parte *Dickey*, 204 Fed. 322, 325 (D. Maine 1913); see In re *Yamashita*, 327 U.S. 1, 17 (1946).

investigation was inadequately performed,²⁰⁰ that the court members or law officer were not impartial,²⁰¹ that the sentence (although legal) was too severe,²⁰² or that other non-constitutional procedural errors or irregularities by a court-martial acting within its jurisdiction were present.²⁰³ One court of appeals, however, recently recognized the possibility that any error of federal law, including alleged misapplications of the Uniform Code of Military Justice, may be reviewable under the language of the habeas corpus statute.²⁰⁴ There seems to be little judicial support or justification for this extension of the traditional scope of collateral review.²⁰⁵

There is considerable uncertainty regarding the extent to which, if at all, a federal court may collaterally consider whether a court-martial has deprived the prisoner of due process of law or other constitutional right. The argument in favor of such review draws an analogy to the developments concerning federal habeas corpus relief for state prisoners. When the remedy was extended to state prisoners after the Civil War,²⁰⁶ the federal courts limited their inquiry to questions of jurisdiction,²⁰⁷ as they had been doing in habeas corpus applications by federal civil²⁰⁸ as well as military prisoners. By 1915, however, the

²⁰⁰ *Hiatt v. Brown*, 339 U.S. 103, 110 (1950), *overruling* 175 F.2d 273 (5th Cir. 1949); *Humphrey v. Smith*, 336 U.S. 695 (1949); *Jacobi v. United States*, 257 F.2d 184 (10th Cir. 1958); *Schilder v. Gusik*, 195 F.2d 657, 659 (6th Cir. 1952), *cert. den'd*, 344 U.S. 844 (1952).

²⁰¹ *E.g.*, *Swaim v. United States*, 165 U.S. 553 (1897); *Keyes v. United States*, 109 U.S. 336 (1883); *Carter v. Woodring*, 92 F.2d 544 (D.C. Cir.), *cert. den'd*, 302 U.S. 752 (1937).

²⁰² *E.g.*, *Fowler v. Wilkinson*, 353 U.S. 583, 584 (1957); *Swaim v. United States*, 165 U.S. 553, 566 (1897); *Kuykendall v. Hunter*, 187 F.2d 545, 547 (10th Cir. 1951), *see note* 169, *supra*.

²⁰³ *See* discussion in Aycok, note 164, *supra*, at 371-75; Annot., *Review by Civil Courts of Court-Martial Convictions*, 15 A.L.R.2d 387 (1951). Procedural errors may of course take on constitutional dimensions in which case the courts may or may not review their merits depending upon the attitude of the court, the scope of review it thought applicable at the time, and the nature and frequency of the alleged errors.

²⁰⁴ *United States v. Augenblick*, 393 U.S. 348 (1969); Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 68-69 (1961). *Allen v. Van Cantfort*, 436 F.2d 625, 628-29 (1st Cir. 1971) construing 28 U.S.C. § 2241(c) (3) (1969).

²⁰⁵ *See United States v. Augenblick*, 393 U.S. 348 (1969); Note, 83 HARV. L. REV. 1038, 1227-29 (1970).

²⁰⁶ Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (1867).

²⁰⁷ *E.g.*, *Harkrader v. Wadley*, 172 U.S. 148 (1898); *Andrews v. Swartz*, 156 U.S. 272 (1895); *see Fay v. Noia*, 372 U.S. 391, 450-55 (1963) (dissenting opinion); *Pettibone v. Nichols*, 203 U.S. 192 (1906).

²⁰⁸ *Ex parte Parks*, 93 U.S. 18 (1876); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1829); *see Burns v. Wilson*, 346 U.S. 137, *reh den'd*, 844, 845-46 (1953) (separate opinion of J. Frankfurter); *Matter of Moran*, 203 U.S. 96

Supreme Court in *Frank v. Mangum*²⁰⁹ recognized that a habeas corpus petitioner was entitled to a hearing on his claim that he had been denied due process of law because the state court proceedings were dominated by a mob, but held that such a hearing had been afforded by the state supreme court. A few years later, in *Moore v. Dempsey*,²¹⁰ the Court held that a state habeas corpus petitioner had a right to a federal court hearing on the question of mob domination of his trial.

A similar expansion of the scope of inquiry had been taking place in habeas corpus proceedings involving federal prisoners. In one such case, *Johnson v. Zerbst*,²¹¹ a serviceman who had been convicted by a federal district court of possessing and uttering counterfeit money petitioned for a writ of habeas corpus on the ground that he had been denied legal counsel in violation of the Sixth Amendment. The lower courts denied the writ on the basis that the alleged error could not be inquired into in a habeas corpus proceeding, but the Supreme Court, in an opinion by Justice Black, reversed and stated that

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of Counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal Court's authority A court's jurisdiction at the beginning of a trial may be lost 'in the course of the proceedings' due to the failure to complete the court . . . by providing Counsel for an accused who is unable to obtain Counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake [citing *Frank v. Mangum, supra*].²¹²

Subsequent decisions involving both state and federal prisoners have recognized, without giving lip service to the "loss of jurisdiction", that habeas corpus extends to cases "where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights."²¹³

(1906) (territorial court); *Ex parte Belt*, 159 U.S. 95 (1895); (District of Columbia court); *Re Schneider*, 148 U.S. 162 (1893) (same).

²⁰⁹ 237 U.S. 309 (1915).

²¹⁰ 261 U.S. 86 (1923). There is some dispute as to whether or not *Moore* overruled *Frank* or was consistent with it in theory. There is also disagreement concerning the time of the onset of the broadened scope of review in habeas corpus cases. Compare *Fay v. Noia*, 372 U.S. 391 at 420-23 (1963) with *id.* at 456-460 (dissenting opinion of J. Harlan); see Note, 76 YALE L.J. 380, 383 n. 20 (1966).

²¹¹ 304 U.S. 458 (1938).

"*Id.* at 467, 468.

²¹³ *Waley v. Johnson*, 316 U.S. 101, 105 (1942). *Accord*, *White v. Ragen*, 324 U.S. 760 (1945); *House v. Mayo*, 324 U.S. 42 (1945); see also *Fay v. Noia*, 372 U.S. 391 (1963); *Brown v. Allen*, 344 U.S. 443 (1953); *Allen v. Van Cantfort*, 436 F.2d 625, 628 (1st Cir. 1971).

Encouraged by such developments and discouraged by the harsh "justice" meted out to some of the citizen-soldiers of World War II, several circuit and district courts, as well as the Court of Claims, began collaterally reviewing alleged denials of constitutional rights in military courts-martial.²¹⁴ In one such case, *Hiatt v. Brown*,²¹⁵ the Fifth Circuit affirmed the granting of a writ of habeas corpus to a soldier who had been convicted of murder while serving as a sentry with the American forces in Germany. The Court of Appeals held that the writ was properly granted both because a failure to name an "available" judge advocate as law member of the court-martial divested the tribunal of jurisdiction, and because the record was "replete with highly prejudicial errors and irregularities which have manifestly operated to deprive this petitioner of due process of law."²¹⁶ According to the court, these included erroneous interpretations and applications of military law, a grossly incompetent law member, an incompetent defense counsel who made only a token defense, and a total lack of a pre-trial investigation. The court concluded that the cumulative effect of these errors denied petitioner a fair trial. "Otherwise," said the court, "the constitutional guaranty of due process of law under the Fifth Amendment, as applied to habeas corpus applications from court-martial convictions, no longer obtains in the federal courts. In the absence of a plain pronouncement to that effect from our Court of Last Report, it is not our province to so declare the law."²¹⁷

²¹⁴ *E.g.*, United State *ex rel* Innes v. Hiatt, 141 F.2d 664, 665-66 (3d Cir. 1944); Schita v. King, 133 F.2d 283 (8th Cir. 1943), *cert. den'd*, 322 U.S. 761 (1944); Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947); Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946). Other cases are collected and discussed in Burns v. Lovett, 202 F.2d 335, 340-41 (D.C. Cir. 1952), *id.* at 348, 352-53 (dissenting opinion), *aff'd sub nom.* Burns v. Wilson, 346 U.S. 137 (1953); Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO S. L.J. 193, 200-202 (1966); Pasley, *The Federal Courts Look at the Court-Martial*, 12 U. PITT. L. REV. 7 (1950); Note, 76 YALE L.J. 380, 383-84 (1966); Note, 64 COLUM. L. REV. 127, 131-32 (1964).

To some extent this development might have been encouraged by *Wade v. Hunter*, 336 U.S. 684, 690 (1949) which considered a claim that the court-martial proceedings had violated the constitutional prohibition on double jeopardy but rejected it on the merits in light of the military situation. *Compare Humphrey v. Smith*, 336 U.S. 695 (1949) decided the same day and limiting the inquiry to a jurisdictional one.

²¹⁵ 175 F.2d 273 (5th Cir. 1959), *reud*, 339 U.S. 103 (1950).

²¹⁶ *Id.* at 277.

²¹⁷ *Id.*

The “plain pronouncement” was not long in coming. On the government’s petition for certiorari, the circuit court’s decision was reversed by the Supreme Court which stated:

We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate’s report, the sufficiency of the evidence to sustain respondent’s conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel It is well settled that “by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial The single inquiry, the test, is jurisdiction.” In re Grimley, 137 US 147, 150 (1890). In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision.“

This 1950 opinion of Justice Clark was the last “plain pronouncement” of the Supreme Court on the subject although subsequent Court decisions have managed to muddy its clarity. Just two years later, in *Burns v. Lovett*,²¹⁹ the Court of Appeals for the District of Columbia Circuit was able to squeeze enough flexibility out of the quoted language to cite it as *support* for the proposition “that due process applies to courts-martial.”²²⁰ The court noted, however, that due process of law in the armed forces is different than due process under civil authority. The petitioners had claimed that they had been illegally detained, that their confessions had been coerced, that they had been denied effective counsel, that the prosecution had used perjured testimony and had suppressed evidence favorable to the defense, and that the trials were conducted in an atmosphere of hysteria. The court concluded, after detailed consideration of the petitioners contentions and in light of the exhaustive reviews by the military authorities, that the petition for habeas corpus had

²¹⁸ *Hiatt v. Brown*, 339 U.S. 103, 110–111 (1950). The Court also held that the circuit court erred in reviewing the military determination of the “availability” of a Judge Advocate officer to serve as law member.

²¹⁹ 202 F.2d 335 (D.C.Cir. 1952), *af’d sub nom.*, *Burns v. Wilson* 346 U.S. 137, *reh. den’d*, 346 U.S. 844 (1953).

²²⁰ *Id.* at 341. The court seemed to suggest that *Hiatt v. Brown* had only condemned the particular inquiry made by the circuit court in that case, but not all inquiries into due process violations. It was also noted that the reference to “acted within its lawful powers” in *Brown* seemed to imply a scope of review broader than technical “jurisdiction.” *Id.* at 339. Additional support was claimed from *Whelchel v. McDonald*, 340 U.S. 122 (1950) which suggested that a denial of the opportunity to raise the issue of insanity would go to the question of jurisdiction of the court-martial, but found no such denial in the case. *Id.* at 124.

been properly denied. In dissent, Judge Bazelon argued that the totality of errors alleged in the petitions "constitute the very antithesis of fairness."²²¹

The Supreme Court granted certiorari to review the "important problems concerning the proper administration of the power of a civil court to review the judgment of a court-martial in a habeas corpus proceeding" where the petitioners assert "that they have been imprisoned and sentenced to death as a result of proceedings which denied them basic rights guaranteed by the Constitution."²²² Although a majority of the Court agreed that the decision below to deny habeas corpus relief should be affirmed, they could not agree on the reasons why. In the disposition of the case, now styled *Burns v. Wilson*, Chief Justice Vinson, joined by Justices Burton, Clark (the author of the *Hiatt v. Brown* opinion), and Reed, favored affirmance because the military authorities had given adequate consideration to the petitioners' constitutional claims.²²³ Justice Jackson concurred in the result without a statement of his reasons.²²⁴ Justice Minton rested his concurrence on the express understanding that the civil courts "have but one function, namely, to see that the military court has jurisdiction, not whether it has committed error in the exercise of such jurisdiction."²²⁵ Justices Douglas and Black dissented on the ground that the petitioners were entitled to a judicial hearing on the circumstances surrounding their confessions in light of Supreme Court opinions on coerced confessions and that the military authorities had not afforded such a hearing.²²⁶ They also noted that it was clear that such habeas corpus review was "not limited to questions of 'jurisdiction' in the historic sense."²²⁷ Justice Frankfurter urged reargument of the case because there had not been an adequate opportunity to review the record or consider all the important questions involved.²²⁸ In objecting to a denial of a rehearing, he made clear his view that civil court review of court-martial proceedings should take account of the developments in the expansion of collateral review of state and federal convictions.²²⁹ He also

²²¹ *Burns v. Lovett*, 202 F.2d 335, 348 (D.C. Cir. 1952).

²²² *Burns v. Wilson*, 346 U.S. 137, 139, *reh. den'd.*, 844 (1953).

²²³ *Id.* at 138-146.

²²⁴ *Id.* at 146.

²²⁵ *Id.* at 146-48 (relying on *Hiatt v. Brown*, 339 U.S. 103 (1950)).

²²⁶ *Id.* at 150-55.

²²⁷ *Id.* at 152.

²²⁸ *Id.* at 148-150.

²²⁹ 346 U.S. 844-852 (1953).

revealed that this matter was not considered by the Court in *Hiatt v. Brown* nor argued by counsel there (except inferentially on behalf of the prisoner after the case had gone against him).²³⁰

Although one leading military law authority has suggested that the plurality opinion of Chief Justice Vinson in the 1953 *Burns* case has no precedential value because of its failure to gain majority support,²³¹ the fact is that it has been relied upon by most lower federal courts in their review of military conviction—and it is regarded as having provided the current (even though not uniformly interpreted) standard for such review.²³² Thus an analysis of the opinion and its premises is still in order.

The opinion set out four general and significant propositions: (1) The constitutional guarantee of due process of law protects soldiers—as well as civilians—from trials that dispense with rudimentary fairness. (2) Nevertheless, the law applied in habeas corpus review of state and federal convictions cannot simply be incorporated by reference into military collateral reviews. (3) The scope of inquiry in military habeas corpus is more narrow than in civil cases since the Constitution has entrusted to Congress, and not to the federal courts, the task of balancing the rights of men in the military with the overriding demands

²³⁰ *Id.* at 848. See also Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 295 (1957).

²³¹ Wiener, *Courts-Martial and the Bill of Rights: The Original Practice, Pts. I & II*, 72 HARV. L. REV. 1,266 at 297 (1958).

²³² *E.g.*, Kennedy *v.* Commandant, 377 F.2d 339, 342 (10th Cir. 1967); “If *Burns v. Wilson* . . . accomplished nothing else, it ‘conclusively rejected the concept advocated by Justice Minton that habeas corpus review should be restricted to questions of formal jurisdiction.’ *Gibbs v. Blackwell*, 5 Cir., 354 F.2d 469. Where the constitutional issue involves a factual determination, our inquiry is limited to whether the military court gave full and fair consideration to the constitutional questions presented.” See also *Shaw v. United States*, 357 F.2d 949, 954 (Ct. Cl. 1966); *Swisher v. United States*, 326 F.2d 97, 98 (8th Cir. 1964); *Sunday v. Madigan*, 301 F.2d 871, 873 (9th Cir. 1962); *Begalke v. United States*, 286 F.2d 606, 608, 610 (Ct. Cl.), *cert. den’d*, 364 U.S. 865 (1960); Katz & Nelson, note 214, *supra*, at 203–211; Note, 76 YALE L.J. 380, 387–88 (1966).

²³³ “*Burns* is the law of the land. That case and its rationale was followed in *Fowler v. Wilkinson*, 353 U.S. 383 . . . a comment [such as that of Justice Black noting that it has not been clearly settled to what extent the Constitution applies to military trials] does not change the controlling effect of *Burns* . . .” *Swisher v. United States*, 237 F. Supp. 921, 928–29 (W.D. Mo. 1965), *affd*, 354 F.2d 472 (8th Cir. 1966). See also *McKinney v. Warden*, 273 F.2d 643, 644 (10th Cir. 1959), *cert. den’d*, 363 U.S. 816 (1960); *Bennett v. Davis*, 267 F.2d 15, 17 (10th Cir. 1959); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 295 (1957); Katz & Nelson, note 214, *supra*, at 206; Comment, 69 COLUM. L. REV. 1259,1262 (1969); note 232 *supra*.

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of discipline and duty. (4) Since Congress has provided elaborate safeguards and review procedures to secure the rights of servicemen and has decreed that the military determinations shall be final and binding, when denials of such rights are alleged in a habeas corpus petition, "[i]t is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims."²³⁴ In other words, "when a military decision has dealt fully and fairly with an allegation raised in . . . [a petition for habeas corpus], . . . it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."²³⁵ Chief Justice Vinson concluded that the petitioners did receive from the military authorities the required fair consideration of their allegations of constitutional denials or had had an opportunity to present their claims for such review, but cautioned that "[h]ad the military courts manifestly refused to consider such claims, the District Court was empowered to review them *de novo*."²³⁶

Significantly, it should be noted that seven justices (Vinson, the three who joined in his opinion, plus Douglas, Black, and Frankfurter) agreed on the first proposition, that due process of law does apply to the military, although, at least some of these, also agreed with the second proposition, that it applied in an attenuated form. While five members of the Court (the Vinson opinion plus Minton) accepted the third assertion that the scope of inquiry in military cases is more narrow than in civil ones (although Justice Frankfurter took strong exception to the accuracy of this as an established proposition)²³⁷ they were not in agreement on just where the line should be drawn. It was only the fourth proposition which failed to command a majority vote. There was no agreement by any five of the justices, and certainly no holding, that the civil court's function was limited to inquiring whether the constitutional claims of the petitioner had received full and fair consideration by the military. Yet it is this part of the Vinson opinion which is usually cited and often followed as the rule of *Burns v. Wilson*.²³⁸ As the Court of Military Appeals has correctly recognized :

The impact of *Burns v. Wilson* . . . is of an unequivocal holding by the Supreme Court that the protections of the Constitution are available to servicemen in military trials. The issue on which the

²³⁴ *Burns v. Wilson*, 346 U.S. 137, 144, *reh. den'd* 844 (1953).

²³⁵ *Id.* at 142.

²³⁶ *Id.*

²³⁷ *Id.* at 844.

²³⁸ See notes 232-33, *supra*; Note, 76 YALE L.J. 380, 387-88 (1966).

Court divided was not the applicability of constitutional rights but the scope of collateral review by the Federal Courts—the manner in which the Court should proceed to exercise its power.²³⁹

Supreme Court opinions since *Burns* have done little to clarify the law. In two cases in 1957,²⁴⁰ attacks were made on the severity of court-martial sentences and on the legality of the military sentencing procedure. Consistent with pre-*Burns* concepts of the scope of review, the majority, in opinions by Justice Clark, held (1) that the former issue could not be collaterally considered by the civil courts and (2) that the sentences were legal, and therefore, the jurisdiction of the military tribunals was not destroyed. The opinions observed, however, that there were no claims of deprivation of constitutional rights.²⁴¹ Chief Justice Warren and Justices Black and Douglas joined in a dissenting opinion by Justice Brennan²⁴² which claimed that the sentencing was illegal and endorsed language in a circuit court opinion²⁴³ to the effect that the court-martial, although it had jurisdiction of the accused, did not fully and fairly deal with him.

Most subsequent decisions of the Court have been concerned with traditional jurisdictional questions.²⁴⁴ A series of cases established that civilians were not subject to trial by courts-martial in time of peace,²⁴⁵ and in so holding emphasized that trial by

²³⁹ *United States v. Tempia*, 16 U.S.C.M.A. 629, 634, 37 C.M.R. 249 (1967). See also Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962): "the Supreme Court indicated in *Burns v. Wilson* that court martial proceedings could be challenged through habeas corpus actions brought in civil courts, if those proceedings had denied the defendant fundamental rights. The various opinions of the members of the Court in *Burns* are not, perhaps, as clear on this point as they might be. Nevertheless, I believe they do constitute recognition of the proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."

²⁴⁰ *Fowler v. Wilkinson*, 353 U.S. 583 (1957); *Jackson v. Taylor*, 353 U.S. 569 (1957). See Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 59-60 (1961).

²⁴¹ *Fowler v. Wilkinson*, 353 U.S. 583, 585 (1957); *Jackson v. Taylor*, 353 U.S. 569, 572 (1957).

²⁴² *Id.* at 581, 585 (dissenting opinions).

²⁴³ *De Coster v. Madigan*, 223 F.2d 906, 909-910 (7th Cir. 1955). The petitioner in this case had been a co-defendant of the petitioners in the *Fowler* and *Jackson* cases, but the government failed to appeal although the writ of habeas corpus had been granted on substantially the same grounds that were subsequently rejected in the latter cases. See Bishop, note 240 *supra*, at 40-43; Comment, 56 CALIF. L. REV. 379, 430-31 n. 230 (1968).

²⁴⁴ One case involved questions of exhaustion of remedies and confinement pending appeal. *Noyd v. Bond*, 395 U.S. 683 (1969), discussed in Part V, *infra*.

²⁴⁵ See text and accompanying notes 73-75, *supra*.

jury and some other procedural safeguards of the Bill of Rights did not apply in courts-martial.²⁴⁶ Similarly, *O'Callahan v. Parker*,²⁴⁷ relied upon such distinctions between civilian and military practice to deny military jurisdiction over non-service-connected offenses.

One recent Supreme Court case, *United States v. Augenblick*,²⁴⁸ promised to provide considerable enlightenment regarding the extent of civil court review of courts-martial proceedings. The Court of Claims had ordered that back pay and allowances be paid to a former naval officer, Augenblick,²⁴⁹ and an Air Force sergeant, Juhl,²⁵⁰ because their courts-martial convictions were found to be invalid. In the former case the claims court held that (1) it had jurisdiction to collaterally review courts-martial convictions in suits for back pay; (2) the scope of inquiry into "jurisdiction" included claimed deprivations of constitutional rights; (3) full and fair consideration of the case was not afforded by the military tribunals since the Court of Military Appeals did not consider the merits but denied a petition for review, and because the alleged errors involved the application of erroneous standards and did not call for a reassessment of particular evidence or circumstances examined by the military; and (4) the court-martial proceedings violated the Jencks Act²⁵¹ in denying the defense access to certain "statements", which error was of a constitutional nature in that it deprived the accused of a fair trial. The *Juhl* case involved a failure by a court-martial to abide by a provision of the Manual for Courts-Martial which stated that "a conviction cannot be based upon . . . the uncorroborated testimony of a purported accomplice in any case, if such testimony is self-contradictory. . . ." ²⁵² The court regarded such error as "jurisdictional", The Supreme Court granted cer-

²⁴⁶ *E.g.*, *Reid v. Covert*, 354 U.S. 1, 21-32 (1957).

²⁴⁷ 395 U.S. 258 (1969). *Lee v. Madigan*, 358 U.S. 228 (1959) also granted a habeas corpus petition upon finding that the court-martial lacked jurisdiction over the offense charged.

²⁴⁸ 393 U.S. 348 (1969).

"*Augenblick v. United States*, 377 F.2d 586 (Ct. Cl. 1967), *reversed*, 393 U.S. 348 (1969).

"*Juhl v. United States*, 383 F.2d 1009 (Ct. Cl. 1967), *reversed*, 393 U.S. 348 (1969).

²⁵¹ 18 U.S.C. § 3500 (1964), passed in response to, and adopting some of the principles of, *Jencks v. United States*, 353 U.S. 657 (1957). The Act generally requires that prior statements of a government witness which may be relevant to his testimony can be required to be produced for inspection, initially by the trial judge, to determine their impeachment value.

"MANUAL FOR COURTS-MARTIAL 1951 ¶ 153, a, p. 289 [MCM 1969 para 153 a.].

tiorari in both cases to consider whether the Court of Claims, in actions for back pay, is empowered to review the validity of court-martial convictions, and, if so, what is the proper extent of such review.²⁵³ The decision, rendered January 14, 1969, copped out on both issues.²⁵⁴ The unanimous opinion delivered by Justice Douglas, while recognizing the importance of the issues and the confusion surrounding their resolution, reversed the judgments of the Court of Claims because the alleged errors in both cases were not considered to be of constitutional dimensions. The Court noted that it was not clear that the Jencks Act had been violated in *Augenblick*, and that in any event "our *Jencks* decision and the Jencks Act were not cast in constitutional terms. . . . They state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials."²⁵⁵ While agreeing with the lower court that some Jencks Act violations might rise to constitutional levels, this was not such a case. The alleged error in *Juhl* regarding the violation of the Manual provision concerning accomplice testimony was likewise considered to involve a rule of evidence short of denying procedural due process. While the Court did not discuss the possibility that the violation deprived the court-martial of jurisdiction, it must be taken as having rejected *sub silentio* this theory of the Court of Claims.

To the extent that the availability of collateral review of alleged constitutional denials involves a "constitutional question," the Supreme Court's opinion in *Augenblick* is consistent with the policy of avoiding such questions when another basis of decision is present. On the other hand, if the Court was so inclined, without departing from that policy, it could have reversed the Court of Claims by denying its power to collaterally review courts-martial convictions, or by reiterating the "jurisdictional only" scope of review. In other words, the Court could have easily confronted those questions which it granted certiorari to review and thus resolved some important problems and avoided needless future litigation. Its failure to do so may suggest that it is still true that the Justices are "no more harmonious among themselves than the lower federal judges and, indeed, that some of them have yet to make up their minds."²⁵⁶ In any event, the Court's unwillingness to consider these questions, and their

²⁵³ 390 U.S. 1038 (1968). See 36 U.S.L.W. 3411 (1968).

²⁵⁴ 393 U.S. 348 (1969).

²⁵⁵ *Id.* at 356.

²⁵⁶ Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 43 (1961).

willingness to “assume *arguendo* that a collateral attack on a court-martial judgment may be made in the Court of Claims through a back-pay suit alleging a ‘constitutional’ defect in the military decision”²⁵⁷ continues to leave such a line of attack open. It may also be significant that the Court chose to point out that its finding that the alleged Jencks Act violation was not of constitutional dimensions was consistent with its review of state criminal trials. Thus, the application to military trials of the broadened scope of review developed in collateral reviews of civilian cases was not negated and still remains a possibility.

In view of the relative lack of enlightenment from recent Supreme Court cases on issues of collateral review of court-martial convictions, it is probably just as accurate today to state, as Professor Bishop did in 1961, that *Burns v. Wilson* “still stands as the principal lighthouse in these trackless waters, however low its candle power”.²⁵⁸ The extent of illumination furnished by lower court cases since *Burns* hardly makes for safe passage. The vast majority of the cases have but two factors in common: they give lip-service to the “full and fair consideration” test of *Burns*; they deny the requested relief. Beyond this they have been found to be conflicting—even within the same circuit and sometimes within the same opinion—and capable of supporting a variety of interpretations of the *Burns* standard.²⁵⁹ For example, a few cases have been unable to discern any significant movement away from the strict jurisdictional scope of inquiry;²⁶⁰ while others have extended their review to the merits of asserted constitutional errors, especially on questions of law,²⁶¹ either openly²⁶² or as alternative support for their conclusion that

²⁵⁷ 393 U.S. 348, 351–52 (1969).

²⁵⁸ Bishop, note 256, *supra*, at 51.

²⁵⁹ See *e.g.*, Bishop, note 256, *supra*, at 60–67; Katz & Nelson, note 214, *supra*, at 206–211; Comment, *Civilian Court Review of Court-Martial Adjudications*, 69 COLUM. L. REV. 1259, 1262 (1969); Note, *Servicemen in Civilian Courts*, 76 YALE L.J. 380,387–88 (1966).

²⁶⁰ See *e.g.*, *Williams v. Heritage*, 323 F.2d 731, 732 (5th Cir. 1963), *cert. den'd*, 377 U.S. 945 (1964); *LeBallister v. Warden*, 247 F. Supp. 349, 352 (D. Kan. 1965). See also AYCOCK & WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 365–371, 377–78 (1955).

²⁶¹ See *e.g.*, *Harris v. Ciccone*, 417 F.2d 479, 481–85 (8th Cir. 1969); *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969); *Augenblick v. United States*, 377 F.2d 586, 593 (Ct. Cl. 1967), *redd. on other grounds*, 393 U.S. 348 (1969); *Gallagher v. Quinn*, 363 F.2d 301, 304 (D.C. Cir.), *cert. den'd*, 385 U.S. 881 (1966); *Shaw v. United States*, 357 F.2d 949, 954 (Ct. Cl. 1966); *Gibbs v. Blackwell*, 354 F.2d 469, 471 (5th Cir. 1965).

²⁶² See *e.g.*, *Heilman v. United States*, 406 F.2d 1011, 1013–14 (7th Cir. 1969); *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965); *Swisher v. United*

the military tribunals had fully and fairly considered the claims.²⁶³ The largest number of cases, however, appear limited to determining whether the military afforded the petitioner an opportunity to present his constitutional claims.²⁶⁴ Several cases in the Tenth Circuit, where both the United States Disciplinary Barracks and the Leavenworth Federal Penitentiary are located, provide an illustration of an approach of this nature. Since 1953 that court has consistently: (1) recognized that *Burns v. Wilson* broadened the scope of review "somewhat" beyond traditional concepts of jurisdiction to include alleged deprivations of constitutional rights, (2) purported to limit its review of such allegations to whether the military tribunals gave them full and fair consideration and (3) denied relief upon finding either that such consideration was given or that the questions were not raised before the military authorities so that they could not be said to have refused to fairly consider them.²⁶⁵

The practical effect of this approach has been to withdraw with one hand what has been offered by the other. The court states: "Yes, Mr. Serviceman, you are entitled to the protection of the Constitution and you are welcome to come to us whenever

States, 354 F.2d 472 (8th Cir. 1966) *aff'g*, 237 F. Supp. 921 (W.D. Mo. 1965); *Burns v. Harris*, 340 F.2d 383, 385 (8th Cir.) *cert. den'd*, 382 U.S. 960 (1965); *Hooper v. United States*, 326 F.2d 982 (Ct. Cl. 1964); *Gordon v. Willingham*, 294 F.2d 575 (3d Cir. 1961); *Owings v. Secretary of United States Air Force*, 298 F. Supp. 849, 853 (D.D.C. 1969); *In re Stapley*, 246 F. Supp. 316 (D. Utah 1965); *Sweet v. Taylor*, 178 F. Supp. 456, 458 (D. Kan. 1959); *see also* note 261, *supra*.

²⁶³ *See e.g.*, *Allen v. Van Cantfort*, 436 F.2d 625, 629-30 (1st Cir. 1971); *Gibbs v. Blackwell*, 354 F.2d 469 (5th Cir. 1965); *Palomera v. Taylor*, 344 F.2d 937 (10th Cir.) *cert. den'd*, 382 U.S. 946 (1965); *Rushing v. Wilkinson*, 272 F.2d 633, 642 (5th Cir.), *cert. den'd*, 364 U.S. 914 (1959); *Monett v. United States*, 419 F.2d 434, 435-36 (Ct. Cl. 1969); *Richards v. Cox*, 184 F. Supp. 107 (D. Kan. 1960). *See also* *Bishop*, note 256, *supra*, at 60-61; *Note*, 76 *YALE L.J.* 380, 388 (1966). *Compare* *Katz & Nelson*, note 214, *supra*, at 206, 209-210, 211 n. 108.

²⁶⁴ *See e.g.*, *Sunday v. Madigan*, 301 F.2d 871, 873 (9th Cir. 1962); *Mitchell v. Swope*, 224 F.2d 365, 367 (9th Cir. 1955); *Bourchier v. Van Metre*, 223 F.2d 646 (D.C. Cir. 1955); *Dennis v. Taylor*, 150 F. Supp. 597 (M.D. Pa. 1957); *Bokoros v. Kearney*, 144 F. Supp. 221 (E.D. Tex. 1956); cases cited at note 265, *infra*. *See also* notes 232, 233, *supra*.

²⁶⁵ *E.g.*, *Kennedy v. Commandant*, 377 F.2d 339 (10th Cir. 1967); *Palomera v. Taylor*, 344 F.2d 937 (10th Cir. 1965), *cert. den'd*, 382 U.S. 946 (1965); *Gorko v. Commanding Officer*, 314 F.2d 858 (10th Cir. 1963); *McKinney v. Warden*, 273 F.2d 643 (10th Cir. 1959), *cert. den'd*, 363 U.S. 816 (1960); *Bennett v. Davis*, 267 F.2d 15 (10th Cir. 1959); *Thomas v. Davis*, 249 F.2d 232 (10th Cir. 1957), *cert. den'd*, 355 U.S. 927 (1958); *Dickerson v. Davis*, 245 F.2d 317 (10th Cir. 1957); *Suttles v. Davis*, 215 F.2d 760 (10th Cir.), *cert. den'd*, 348 U.S. 903 (1954); *Easley v. Hunter*, 209 F.2d 483 (10th Cir. 1953); *see* *Smith v. McNamara*, 395 F.2d 896, 899-900 (10th Cir. 1968); *see also* *Bacon v. United States*, 262 F. Supp. 650 (D. Kan. 1966).

you claim that a court-martial has deprived you of due process of law. However, you must realize that if you presented your claim before a military tribunal and they considered it but rejected it, we cannot override their informed discretion; and, if you failed to present your claim to the military, we cannot hear it unless and until you have given them a chance to consider it." Consequently, in these days of multiple opportunities for review within the military, it will be a rare—if not unknown—case when the military authorities will have manifestly refused to consider a claimed constitutional deprivation and thus opened the door to a federal court review of the merits.²⁶⁶ As a result of such a "good faith" approach to review of military decisions, Professor Bishop was able to assert in 1961 that the lower court cases since *Burns* have only '(one striking common feature; in not one of them did a soldier-petitioner succeed in obtaining his liberty.'²⁶⁷ While this is no longer completely accurate,²⁶⁸ it still gives a realistic view of the burden facing the victim of an alleged military injustice. This paucity of successful collateral attacks on military convictions may in part be due to the conscientious efforts of Congress, the Court of Military Appeals, the armed services judge advocates, and others to make courts-martial proceedings at least as fair, in most regards, as civilian criminal trials.²⁶⁹ This development has been noted by former Chief Justice Warren,²⁷⁰ Melvin Belli,²⁷¹ and many other commentators.?:'

²⁶⁶ See *Burns v. Wilson*, 346 U.S. 137, 142 (1953); Bishop, note 256, *supra*, at 58-59; 41 ST. JOHNS L. REV. 114, 119 (1966). The various military review remedies are identified in Part V, *infra*.

²⁶⁷ Bishop, note 256, *supra*, at 60.

²⁶⁸ Application of Stapley, 246 F. Supp. 316 (D. Utah 1965), Notes, 79 HARV. L. REV. 1302 (1966), 2 CAL-WEST. L. REV. 121 (1966); 17 SYR. L. REV. 536 (1966); 13 U.C.L.A. L. REV. 1419 (1966), broke the barrier by granting a writ of habeas corpus to a petitioner held to have been denied of his right to counsel under the Sixth Amendment. The Court of Claims and the lower federal courts have also granted appropriate relief to non-incarcerated petitioners when their court-martial convictions have been found to be invalid. See Part 111., B, 4 and 5, *supra*.

²⁶⁹ See text accompanying note 192, *supra*; notes, 270-72, *infra*; Douglass, *The Judicialization of Military Courts*, 22 HAST. L.J. 213 (1971).

²⁷⁰ Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188-89 (1962).

²⁷¹ Belli, *Belli Praises New Approach of Military Justice Code*, Baton Rouge Morning Advocate, Aug. 8, 1968, p. 9-F (United Press International); "I report unhesitatingly to civilian and lawyer alike that the American military services have the finest and most individually protective system of justice and trial procedure in the civilized world, not excluding American civilian law."

²⁷² See, e.g., Labar, *The Military Criminal Law System*, 50 A.B.A.J. 1069 (1964); see Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 46 MIL. L. REV. 77 (1969), 15 U.C.L.A. L. REV. 1240 (1968);

On the other hand, if the "spirit" of *O'Callahan*²⁷³ proves to be pervasive, we may experience an increased receptivity by the federal courts of attacks on military judicial proceedings.²⁷⁴

In any event, it has been disturbing to some that an "ad hoc" military tribunal, without benefit of the presumption of regularity attaching to the proceedings of courts of general jurisdiction, should receive greater deference from the federal courts than the regularly constituted criminal courts of the states.²⁷⁵ Despite the disclaimer by Chief Justice Vinson in *Bum v. Wilson*,²⁷⁶ it is not apparent that similar standards cannot be applied to federal habeas corpus applications from both state and military prisoners.²⁷⁷ At least, in the absence of a Supreme

Quinn, *The United States Court of Military Appeals and Individual Rights in the Military Service*, 35 NOTRE DAME LAW. 491 (1960); Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1961); Hodson, *Military Jurisprudence*, 31 TEXAS B.J. 638 (1968); McCoy, *Due Process for Servicemen — The Military Justice Act of 1968*, 11 WM. & MARY L. REV. 66, 69, 103-04 (1969); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 MAINE L. REV. 105 (1970), 51 MIL. L. REV. 1 (1971); Bishop, *The Quality of Military Justice*, N.Y. TIMES MAG., Feb. 22, 1970, p. 32; Notes, 36 G. WASH. L. REV. 435, 446 (1967); 79 HARV. L. REV. 1302, 1303 (1966); 76 YALE L.J. 380, 389-91 (1966); see also *United States v. Tempia*, 16 U.S.C.M.A. 629, 642-43, 37 C.M.R. 249 (1967) (concurring opinion); L. B. Johnson, Remarks, 68-26 JALS, p. 10, DA PAM. 27-68-26 (13 Nov. 1968). But see Sherman, *Military Injustice*, THE NEW REPUBLIC, Mar. 9, 1968, p. 20; see generally Symposium, *Is There Justice in the Armed Forces?*, TRIAL, Feb-March 1968, pp. 10-23; Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3 (1970).

²⁷³ See *Latney v. Ignatius*, 416 F.2d 821, 823 (D.C. Cir. 1969), reading the "spirit of *O'Callahan*" as precluding an expansive view of military jurisdiction over civilians in a combat area.

²⁷⁴ See *Harris v. Ciccone*, 417 F.2d 479, 481 (8th Cir. 1969) denying habeas corpus relief but noting, in reviewing the merits of the constitutional claims, that *O'Callahan* stated that courts-martial were inept in deciding such questions. See also *Moylan v. Laird*, 305 F. Supp. 551 (D.R.I. 1969), granting relief against a pending court-martial on the basis of *O'Callahan*, although the Court of Military Appeals would have found jurisdiction over the marihuana offense charged.

²⁷⁵ See, e.g., *Burns v. Wilson*, 346 U.S. 137, reh. denied, 844, 851 (1953) (opinion of J. Frankfurter); *Givens v. Zerbst*, 255 U.S. 11, 19 (1921); *Runkle v. United States*, 122 U.S. 543, 556 (1887); *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 996-97 (D.C. Cir. 1969); *Weiner*, note 231, *supra*, at 302; *Katz & Nelson*, note 214, *supra*, at 212; *Bishop*, note 256, *supra*, at 51.

²⁷⁶ 346 U.S. 137, 139 (1953), see the discussion in text at notes 234-37, *supra*.

²⁷⁷ See *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 996-97 (D.C. Cir. 1969), 19 AMER. U. L. REV. 84 (1970); *Katz & Nelson*, note 214, *supra*, at 212, 217; Comment, 69 COLUM. L. REV. 1259, 1273-74 (1969); Note, 83 HARV. L. REV. 1038, 1216-1225 (1970); cf., *Shaw v. United States*, 357 F.2d 949, 954 (Ct. Cl. 1966).

Court elaboration of the meaning of the *Burns*' requirement of "full and fair" consideration by the military, it may be that some useful analogies can be drawn on the basis of civilian habeas corpus cases. The scope of matters open for review in military cases has not "always been more narrow than in civil cases."²⁷⁸ In the early days, both reviews were limited to questions of jurisdiction,²⁷⁹ and there was civilian precedent for the "full and fair consideration" criterion of *Burns*.²⁸⁰ In addition since *Burns* involved contested factual allegations, it would not preclude independent review of questions of law, which was then—as now—the rule in state habeas corpus.²⁸¹

In 1963 the Supreme Court reviewed for the first time since before the decision in *Burns*²⁸² the considerations which should govern the grant or denial of an evidentiary hearing in federal habeas corpus proceedings initiated by state prisoners. In *Townsend v. Sain*,²⁸³ Chief Justice Warren, speaking for five members of the Court, articulated a general standard outwardly similar to that suggested by Chief Justice Vinson in *Burns v. Wilson*. After observing that in the typical habeas corpus case, constitutional claims turn on the resolution of contested factual issues, Justice Warren stated that:

Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding.²⁸⁴

²⁷⁸ See *Burns v. Wilson*, 346 U.S. 137, reh. denied, 844 (1953) (opinion of Justice Frankfurter); Katz & Nelson, note 214, *supra*, at 212. The textual quote is from the Vinson opinion in *Burns*, *supra*, at 193.

²⁷⁹ See *Burns v. Wilson*, 346 U.S. 137, reh. denied, 844, 845-46 (1953); notes 164-69, 206-08, *supra*, and accompanying text. In *Allen v. Van Cantfort*, 436 F.2d 625, 628 (1st Cir. 1971), it is suggested that in military, as well as civilian habeas corpus cases, there is no longer a need for the "fictional approach to describe as 'jurisdictional' errors not strictly so. . . .

²⁸⁰ See *Ex parte Hawk*, 321 U.S. 114, 118 (1944); Note, 76 YALE L.J. 380, 392-93 (1966).

²⁸¹ See note 286, *infra*, and accompanying text; *Brown v. Allen*, 344 U.S. 443, 458, 497-513 (1953) (opinions of Justices Reed and Frankfurter); Note, 83 HARV. L. REV. 1038, 1217-1220, 1225-26 (1970); Note, 76 YALE L.J. 380 394-95 (1966). The Yale Note, while consistent with the text, seems to place too much significance on Justice Vinson's subjective intent in *Burns*. The questions, rather, should be: What was in fact decided, *i.e.*, not precluded as a rationale in future cases? How have the courts been handling the questions since *Burns*? How should the issues now be determined?

²⁸² The previous detailed discussion of the question was contained in *Brown v. Allen*, 344 U.S. 443 (1953) decided four months before *Burns v. Wilson*.

²⁸³ 372 U.S. 293 (1963).

²⁸⁴ *id.* at 312.

In particularizing this test, the Chief Justice stated that an evidentiary hearing must be granted :

If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.”

After explaining in greater detail the meaning of these criteria, the opinion emphasized that an evidentiary hearing in each of these instances was mandatory but that the district judge had discretion to order such a hearing in other cases. The Court then added :

Although the district judge may . . . defer to the state court’s findings of fact, he may not defer to its findings of law. It is the district judge’s duty to apply the applicable federal law to the State court fact finding independently. The state conclusions of law may not be given binding weight on habeas.²⁶⁶

In the absence of a showing of peculiar military needs, it is difficult to understand why “full and fair” consideration should mean something different in a military court than in a state court or why decisions of federal constitutional law made by such tribunals should be accorded different weights by a federal court in its collateral review of convictions adjudged by the respective tribunals.”; In a recent suit seeking a declaration that a court-martial conviction of the plaintiff was void because his constitutional rights were violated, the Court of Appeals for the District of Columbia, although denying relief on the merits, stated :

”*Id.* at 313. These criteria with the exception of (4) regarding newly discovered evidence were substantially adopted by Congress in 1966. Pub. L. 89-711, § 2, 80 Stat. 1105 (1966), 28 U.S.C. § 2254 (d). *See also* Sanders v. United States, 373 U.S. 1 (1963), pronouncing criteria for determination of when a new hearing will be required on successive motions by federal prisoners under 28 U.S.C. § 2255 (1964), and including therein that a hearing be granted if the applicant shows that the “hearing on the prior application was not full and fair. . . .” *Id.* at 16-17. *See also* 28 U.S.C. § 2244, as amended (1966), applying similar standards for state habeas corpus cases, and Thompson v. Parker, 308 F. Supp. 904, 906-07 (M.D.Pa. 1970), applying these standards to a military habeas corpus case.

²⁶⁶ Townsend v. Sain, 372 U.S. 293, 318 (1963).

²⁶⁷ *See* Note, 83 HARV. L. REV. 1216-1226 (1970) and the extensive discussion of the scope of factual inquiry in habeas corpus proceedings, *id.* at 1113-45.

We think it is the better view that the principal opinion in *Burns* did not apply a standard of review different from that currently imposed in habeas corpus review of state convictions. The Court's denial of relief on the merits of the serviceman's claims can be explained as a decision based upon deference to military findings of fact, similar to the general non-reviewability of state factual findings prevailing at the time. *But cf.* *Townsend v. Sain*, 372 U.S.293, 311, 83 S.Ct. 745, 9 L.Ed. 2d 770 (1962). . . .

The District Court below concluded that since the Court of Military Appeals gave thorough consideration to appellant's constitutional claims, its consideration was full and fair. It did not review the constitutional rulings of the Court of Military Appeals and find them correct by prevailing Supreme Court standards. This was error. We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule. The military establishment is not a foreign jurisdiction; it is a specialized one. The wholesale exclusion of constitutional errors from civilian review and the perfunctory review of servicemen's remaining claims urged by the government are limitations with no rational relation to the military circumstances which may qualify constitutional requirements. The benefits of collateral review of military judgments are lost if civilian courts apply a vague and watered-down standard of full and fair consideration that fails, on the one hand, to protect the rights of servicemen, and, on the other hand, to articulate and defend the needs of the services as they affect those rights.:"

Other courts and commentators have agreed that the application of the civilian habeas corpus precedents to military cases cannot be rejected outright and have suggested that the "full and fair consideration" standard of *Burns* be more flexibly applied.²⁵⁹ A popular—and sensible—approach is to separate the types of questions under consideration. Classifications may be analytical, *e.g.*, fact or law, or functional, *e.g.*, military or non-military. In either case, the purpose is to take into account the relative competence of each type of tribunal to decide the question at hand. The assumptions are that the military tribunals are in the better position to determine factual questions (being closer

²⁵⁸ *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969). *See also* *Heilman v. United States*, 406 F.2d 1011, 1015 (7th Cir. 1969) denying habeas corpus relief to a military prisoner and citing "*cf.* *Townsend w. Sain*" to support its conclusion that an evidentiary hearing was not required.

²⁵⁹ *See e.g.*, *Shaw v. United States*, 357 F.2d 949 (Ct. Cl. 1966); Bishop, note 256, *supra* at 51, 58-59, 66-71; Katz & Nelson, note 214, *supra*, at 194, 211-218; Comment, *Civilian Court Review of Court-Martial Adjudications*, 69 COLUM. L. REV. 1259, 1273-79 (1969); Note, *Servicemen in Civilian Courts*, 76 YALE L.J. 380, 392-98 (1966).

to and more familiar with the evidence and witnesses)²⁹⁰ and questions involving a judgment of military necessity, discipline, convenience, or knowledge of military life and circumstances;²⁹¹ whereas the federal courts are better or at least equally equipped to determine questions of law as applied to undisputed facts, questions of constitutional, and, perhaps, statutory interpretation,²⁹² and other issues not requiring an expertise in or great familiarity with the military. It is generally agreed that great deference should be afforded to the military authorities on questions calling for their special expertise,²⁹³ but it has also been stressed that the federal courts are the experts and final arbiters on constitutional rights and they should not so indulge the military as to abdicate this important role.²⁹⁴ Justice Douglas expressed this thought—perhaps too strongly, but nevertheless accurately in a comparative sense—when he stated in *O'Callahan*:

While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law.²⁹⁵

²⁹⁰ See e.g., *Kennedy v. Commandant*, 377 F.2d 339, 342-43 (10th Cir. 1967); *Shaw v. United States*, 357 F.2d 949, 954 (Ct. Cl. 1966); Bishop, note 256, *supra*, at 66; Henderson, note 230, *supra*, at 295; Note, 76 YALE L.J. 380, 392-94 (1966).

²⁹¹ See e.g., Bishop, note 256, *supra*, at 66-67; Comment, 69 COLUM. L. REV. 1269, 1277-78 (1969); Note, 13 U.C.L.A. L. REV. 1419, 1425-26 (1966); Note, 76 YALE L.J. 380, 396-403 (1966).

²⁹² See e.g., *Kauffman v. Secretary of the Air Force*, 415 F.2d 991, 997 (D.C. Cir. 1969); *Kennedy v. Commandant*, 377 F.2d 339 (10th Cir. 1967); *Shaw v. United States*, 357 F.2d 949 (Ct. Cl. 1966); *Gallagher v. Quinn*, 363 F.2d 301, 304 (D.C. Cir.), *cert. den'd*, 385 U.S. 881 (1966); *Gibbs v. Blackwell*, 354 F.2d 469, 471 (5th Cir. 1965); Bishop, note 256, *supra*, at 66; Henderson, note 230, *supra*, at 295; Comment, 69 COLUM. L. REV. 1259, 1278-79 (1969); Note, 67 HARV. L. REV. 479, 486 (1954); Notes, 76 YALE L.J. 380, 392-94 (1966); 41 ST. JOHNS L. REV. 114, 119 (1966); *cf.*, *Harris v. Ciccone*, 417 F.2d 479, 481 (8th Cir. 1969); *Owing v. Secretary of the United States Air Force*, 298 F. Supp. 849, 853-54 (D.D. C. 1969).

²⁹³ See Bishop, note 256, *supra*, at 66-67; Weiner, note 231, *supra*, at 303-04; Henderson, note 230, *supra*, at 295; Note, 67 HARV. L. REV. 479, 486 (1954); Note, 13 U.C.L.A. L. REV. 1419, 1425-26 (1966); Note, 76 YALE L.J. 380, 396-404 (1966).

²⁹⁴ See *Burns v. Wilson*, 346 U.S. 137, 149, 154 (1953) (dissenting opinions); *Gallagher v. Quinn*, 363 F.2d 301, 304 (D.C. Cir.), *cert. den'd*, 385 U.S. 881 (1966); *Moylan v. Laird*, 305 F. Supp. 551, 554 (D.R.I. 1969); Bishop, note 256, *supra*, at 58; Weiner, note 231, *supra*, at 302-03; Henderson, note 230, *supra*, at 295; Katz & Nelson, note 214, *supra*, at 215-16; Notes, 67 HARV. L. REV. 479, 486-87 (1954); 19 AMER. L. REV. 84, 93-94 (1970).

²⁹⁵ *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969). See also Comment, 69 COLUM. L. REV. 1259, 1275-77 (1969); note 274, *supra*. The attitude of the Court regarding its obligation as the ultimate interpreter of constitutional rights should not be regarded as demeaning to the military; it applies to

A more moderate approach would increase the degree of federal court responsibility for resolving constitutional claims without denying all competence to the military tribunals. For example, the federal courts might insist that the government show that the military authorities did consider—perhaps by pointing to such tribunal's discussions of record or citation of reasons or precedents—not merely *hear* the claim of constitutional deprivation,²⁹⁶ that such consideration be by qualified legal reviewing authorities and not merely by laymen constituting a court-martial,²⁹⁷ that the military authorities prove that their rejection of the constitutional claim was justified, not merely in good faith²⁹⁸ or that greater attention be given to the *fairness of the result* in addition to the fullness and fairness of the *means* of consideration.²⁹⁹

Another factor which is relevant to the scope of inquiry, although it basically involves the merits of a constitutional claim, is that due process of law may well have a different content in a military context than in a civilian one.³⁰⁰ “[T]he narrower scope of habeas corpus review of courts-martial . . . rests on the flexibility of the concept of due process itself. What constitutes due process for an individual varies with the conditions that are present in the specific case.”³⁰¹ What may be fundamentally fair in a civilian setting may be inappropriate in a military one. What is merely an inconvenience to the civilian police may be a dangerous obstruction to a military mission. On the other hand, some of the rights enjoyed by military accused may be out of place or unnecessary luxuries in a civilian court. As Chief Judge

other tribunals and governmental bodies, *e.g.*, Congress. See *Powell v. McCormack*, 395 U.S. 486 (1969); Weckstein, *Comment on Powell v. McCormack*, 17 U.C.L.A. L. REV. 73, 80-94 (1969).

²⁹⁶ See *Narum v. United States*, 287 F.2d 897, 907 (Ct. Cl. 1960), *cert. den'd*, 368 U.S. 848 (1961) (J. Whittaker dissenting).

²⁹⁷ *Id.*

²⁹⁸ Bishop, note 256, *supra*, at 66, 70; see also Note, 67 HARV. L. REV. 479, 486 (1954) suggesting that the military finding be rejected if clearly erroneous.

²⁹⁹ See *In re Stapley*, 246 F. Supp. 316 (D. Utah 1965); *Sweet v. Taylor*, 178 F. Supp. 456, 458 (D. Kan. 1959); Bishop, note 256, *supra*, at 58-59, 66-68, 70; Note, 67 HARV. L. REV. 479, 486 (1954); *cf.*, *Gibbs v. Blackwell*, 354 F.2d 469 (5th Cir. 1965).

³⁰⁰ See *Burns v. Wilson*, 346 U.S. 137, 149, *reh. den'd*, 844 (1953) (opinion of J. Frankfurter); Bishop, note 256, *supra*, at 51; Katz & Nelson, note 214, *supra*, at 215; Note, 76 YALE L.J. 380, 403 (1966); 34 MO. L. REV. 619, 628-29 (1969); notes 301-02, *infra*.

³⁰¹ Note, 13 U.C.L.A. L. REV. 1419, 1426 (1966).

Quinn of the Court of Military Appeals has stated: "Military due process is, thus, not synonymous with federal civilian due process. It is basically that, but something more, and something different."³⁰² It may also be something less, especially in time of war.³⁰³ While it may or may not be appropriate to incorporate the Bill of Rights *verbatim* as the due process of law made applicable by the Fourteenth Amendment to the states, it would be clearly inappropriate to do so in military trials.³⁰⁴ What is proper and desirable is that servicemen be given as fair an adjudication as is consistent with the legitimate needs of the military situation.³⁰⁵ In some cases, this balance can be best determined by the military authorities, and the Court of Military Appeals has conscientiously undertaken this task.³⁰⁶ These factors, plus the fact that the Constitution assigns the primary responsibility for regulation of the military to Congress and the

³⁰² Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHNS L. REV. 225, 232 (1961). See also Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice*, 46 MIL. L. REV. 77 (1969), 15 U.C.L.A. L. REV. 1240 (1968); Warren, note 270, *supra*, at 183, 188-190.

Earlier cases indicated that "what is due process of law must be determined by circumstances. To those in the military . . . the military law is due process." *Reeves v. Ainsworth*, 219 U.S. 296, 304 (1911); see also *United States ex rel. French v. Weeks*, 259 U.S. 326, 335, 343 (1922); *Thomas v. Davis*, 249 F.2d 232, 235 (10th Cir. 1957), *cert. den'd*, 355 U.S. 927 (1958). It is probably more accurate to say today that "Although it is clear that Congress may set standards of military due process in view of military necessity, such standards as are adopted must conform to minimal requirements of constitutional due process." *Unglesby v. Zimny*, 250 F. Supp. 714, 718 (N.D. Cal. 1965). It is clear that due process now applies to the military but, as it is consistent with its nature, it varies in its application in light of the military requirements. See *United States v. Tempia*, 16 U.S.C.M.A. 629, 633, 37 C.M.R. 249 (1967); *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963); Bishop, note 256, *supra*, at 56, 65-66; Note, 67 HARV. L. REV. 479, 484 (1954); see also *Reid v. Covert*, 354 U.S. 1, 38-39 (1957).

³⁰³ See Warren, note 270, *supra*, at 191-193; Bishop, note 256, *supra*, at 57-58; cf., 79 HARV. L. REV. 1302, 1303 (1966).

³⁰⁴ See *Reid v. Covert*, 354 U.S. 1, 22, 38-39 (1957); *Gallagher v. Quinn*, 363 F.2d 301, 303-04 (D.C. Cir.), *cert. den'd*, 385 U.S. 881 (1966); Note, *Constitutional Rights of Servicemen before Courts-Martial*, 64 COLUM. L. REV. 127, 130-31, 142-47 (1964); Comment, 13 VILL. L. REV. 170 (1967); 21 S.W. L.J. 697 (1967); cf. *United States v. Tempia*, 16 U.S.C.M.A. 629, 634, 37 C.M.R. 249 (1967). *But see id.* at 641 (J. Kilday concurring).

³⁰⁵ Bishop, note 256, *supra*, at 70-71; Note, 67 HARV. L. REV. 479, 485 (1954); see Henderson, note 230, *supra*, at 295; Note, 76 YALE L.J. 380, 397-403 (1966).

³⁰⁶ See e.g., Comment, 69 COLUM. L. REV. 1259, 1263-68, 1275-79 (1969); Note, *The Court of Military Appeals and the Bill of Rights: A New Look*, 36 G. WASH. L. REV. 435 (1967). See also note 302, *supra*.

Executive, have induced most federal courts to be hesitant in substituting their judgment for that of the military.³⁰⁷

Since the bulk of the habeas corpus applications from military prisoners seem to involve convictions for non-military offenses,³⁰⁸ *O'Callahan v. Parker's* exclusion of these cases from military jurisdiction may prove to be a most efficacious means of safeguarding the constitutional rights of servicemen without drastically altering the scope of review in those remaining cases where the military situation may be of greater relevance. Nevertheless, some further refinement of the *Burns v. Wilson* "full and fair consideration" standard is needed. It should properly take account of developments in civilian habeas corpus cases, particularly the *Townsend v. Sain* decision and its legislative adoption,³⁰⁹ the comparative competences of military and federal tribunals, and the chameleonic qualities of due process of law. An attempt will be made to articulate such a standard, and apply it to the Baker hypothetical, after the requirements of exhaustion of remedies are considered.

V. EXHAUSTION OF REMEDIES

It is generally required that one who claims to be injured by official action first attempt to get it rectified by the authority that took or threatened the action and by any other persons or tribunals that are directly responsible for such authority's supervision or review. Thus, a state prisoner must pursue all available remedies under state law before a federal court will entertain his petition for a writ of habeas corpus.³¹⁰ Likewise, a court will usually refuse to consider an attack upon an order of an administrative agency until all the available avenues of review within the agency have been traveled.³¹¹ A similar doctrine applies to courts-martial proceedings, and is usually employed in three different situations: (1) When an objection is made to a pending

³⁰⁷ "See *Burns v. Lovett*, 202 F.2d 335, 341-42 (D.C. Cir. 1952), *aff'd sub. nom. Burns v. Wilson*, 346 U.S. 137 (1953); Bishop, note 256, *supra*, at 68; Note, 64 COLUM. L. REV. 127, 148-49 (1964); Note, 76 YALE L.J. 380, 396-97 (1966); Note, 13 U.C.L.A. L. REV. 1419, 1426 (1966).

³⁰⁸ See Katz & Nelson, note 214, *supra*, at 216, reporting that "only three of the military habeas corpus cases arising in the last decade [ending in 1966] involved offenses which were of a peculiarly military nature."

³⁰⁹ "See note 285, *supra*.

³¹⁰ 28 U.S.C. § 2254(b)(c); *Fay v. Noia*, 372 U.S. 391 (1963).

³¹¹ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); see JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424 (Stu. ed. 1965).

court-martial;³¹² (2) When collateral federal court review of a court-martial proceeding is sought before the petitioner has pursued all his military appellate remedies;³¹³ (3) When an issue is raised in a collateral review proceeding which had not been raised before the military authorities.³¹⁴ Similar rationale in varying degrees, support all of these applications.³¹⁵ The federal courts are sensitive about interfering with the operations of the military department. To prematurely review an alleged error might express a lack of confidence in the military tribunals' ability or willingness to rectify any such error. The exhaustion of military remedies may make further review unnecessary if the error is corrected or if relief is granted on another basis. The military authorities may clarify the issue or develop helpful considerations for its resolution. Finally, there may be a need for the informed and specialized judgment of the military on the issues raised. It is apparent that these policies will justify the exhaustion doctrine in most cases. But there may be situations where one or more of these policies is not applicable or where they are outweighed by competing considerations. Accordingly, some illustrative cases will be examined within each of the three suggested categories.

A. ATTACK ON A PENDING COURT-MARTIAL

Although the availability of habeas corpus or other collateral relief against a pending court-martial has been extremely limited, the door is not completely closed. In the 1886 case of *Smith v. Whitney*,³¹⁶ a writ of prohibition was sought to prevent a Navy court-martial from trying the petitioner for a second time. The Supreme Court acknowledged that prohibition would be an appropriate remedy against a court which clearly lacked jurisdiction but determined that since such was not the case here, it need not decide whether a federal court could issue a writ of prohibition to a military court-martial. Just a year earlier, however, the

³¹² *E.g.*, *Wales v. Whitney*, 114 U.S. 564 (1885); see *Noyd v. McNamara*, 378 F.2d 538 (10th Cir. 1967), *cert. den'd.*, 389 U.S. 1022 (1967).

³¹³ *E.g.*, *Gusik v. Schilder*, 340 U.S. 128 (1950); see *Noyd v. Bond*, 395 U.S. 683 (1969).

³¹⁴ *E.g.*, *Branford w. United States*, 356 F.2d 876, 877 (7th Cir. 1966); *Suttles w. Davis*, 215 F.2d 760, 763 (10th Cir.), *cert. den'd.*, 348 U.S. 903 (1954).

³¹⁵ See DAVIS, ADMINISTRATIVE LAW TEXT §§ 20.02, 20.03, 20.06 (1959); JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424-26, 454-56 (Stu. ed. 1965); Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483, 496-504, 520-26 (1969). See also *Craycroft w. Ferrall*, 408 F.2d 587, 594-95 (9th Cir. 1969).

³¹⁶ 116 U.S. 167 (1886).

Court had denied habeas corpus relief prior to a court-martial to a petitioner who was not "in custody" or under restraint,³¹⁷ noting that relief for lack of jurisdiction would be available after conviction and affirmance, and that

the inquiry into that jurisdiction will be more satisfactory after the court shall have decided on the nature of the offense for which it punishes him, than it can before. And this manner of relief is more in accord with the orderly administration of justice and the delicate relations of the two classes of courts, civil and military, than the assumption in advance by the one court that the other will exercise a jurisdiction which does not belong to it.³¹⁸

Nevertheless, these considerations should not preclude federal court intervention where the lack of jurisdiction is clear, or at least substantial arguments are presented which would deny military jurisdiction, and there is no need to obtain the specialized judgment of the military tribunals on the issues in question."³¹⁹ This would be the case, for example, regarding an attempt to court-martial a civilian in time of peace. Thus, in *Toth v. Quarles*,³²⁰ an ex-serviceman was ordered released from military custody after charges had been filed but apparently before the court-martial took place. In *Reid v. Convert*,³²¹ habeas corpus relief was granted to a serviceman's wife whose court-martial conviction had been reversed by the Court of Military Appeals on another ground and who was being held for re-trial. In another case,³²² the Court of Appeals for the District of Columbia expressly rejected the application of the exhaustion of remedies doctrine to the question of courts-martial jurisdiction over civilian employees accompanying the military overseas but also noted that relief would probably be futile since the CMA had recently upheld such jurisdiction in several other cases. This same court of appeals, without discussion of the exhaustion requirement, has also granted habeas corpus relief to a civilian merchant seaman serving aboard a ship under charter to the Navy in Vietnam."

³¹⁷ See text accompanying notes 90-97, *supra*.

³¹⁸ *Wales v. Whitney*, 114 U.S. 564, 575 (1885).

³¹⁹ See *Noyd v. Bond*, 395 U.S. 683, 696 n. 8 (1969); *United States ex rel. Norris v. Norman*, 296 F. Supp. 1270, 1271-72 (N.D. Ill. 1969).

³²⁰ 350 U.S. 11 (1955).

³²¹ 354 U.S. 1 (1957).

³²² *United States ex rel. Guagliardo v. McElroy*, 259 F.2d 927, 928-29 (D.C. Cir. 1958), *aff'd sub. nom. McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960). There had been a court-martial conviction and partial exhaustion of military review remedies in *Kinsella v. Singleton*, 361 U.S. 234 (1960) and companion cases. See also note 319, *supra*.

³²³ *Latney v. Ignatius*, 416 F.2d 821 (D.C. Cir. 1969).

The petitioner had unsuccessfully sought habeas corpus prior to his trial both from the CMA and the federal district court but had already been convicted by the court-martial at the time the court of appeals came to his rescue.

The applicability of the exhaustion requirement to *O'Callahan* claims that the offenses charged are not service-connected³²⁴ is not free from doubt. One district court has held that exhaustion should not be required because the claim "goes to the very power of the military over [a defendant] as a constitutional jurisdictional matter"³²⁵ and because the application of *O'Callahan* "to variant fact-patterns is not a function which requires any special military expertise."³²⁶ Upon concluding that off-post possession of marihuana was not service-connected, the court enjoined the military authorities from court-martialing the plaintiff for such offense. Another district court, while more sympathetic to the exhaustion requirement, was convinced by the exigencies of the particular case to render judgment on the merits, but denied a petition for habeas corpus on the ground that on-post possession and use of marihuana, the offenses charged, were service connected.³²⁷ Factors favoring exhaustion, according to the court, were the willingness of the Court of Military Appeals to consider *O'Callahan* claims and reverse convictions for non-service-connected offenses, the power of a court—even a special court-martial—to determine its own jurisdiction in the first instance, and the availability of military appellate remedies. Considered of greater weight in this case, however, were the facts that (1) the military had already held such offenses to be within their jurisdiction whereas no federal court had ruled on the question, (2) the petitioner, a policeman in civilian life, would suffer irreparable harm if convicted even though a federal court might later grant him collateral relief, (3) the court had held a hearing on the merits and therefore exhaustion would not serve judicial efficiency, and (4) the government did not urge that exhaustion be applied and seemed to welcome the court's interpretation, which, combined with the inclination of the court to

"See discussion of *O'Callahan v. Parker*, 395 U.S. 258 (1969) at Part IV, A, *supra*. The exhaustion problem is discussed in Everett, *O'Callahan v. Parker — Milestone or Millstone in Military Justice?*, 1969 DUKE L.J. 853, 894-95; Nelson & Westbrook, *Court-Martial Jurisdiction over Servicemen for "Civilian Offenses": An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1, 47-52 (1969).

³²⁵ *Moylan v. Laird*, 305 F. Supp. 551, 554 (D. R.I. 1969).

³²⁶ *Id.*

³²⁷ *Diorio v. McBride*, 306 F. Supp. 528, 531-33 (N.D. Ala. 1969).

sustain military jurisdiction, avoids any friction between the civil and military tribunals.

In light of the probably discretionary nature of the exhaustion requirement,³²⁸ this balancing of equities approach of the second district court seems preferable to the first court's conclusion that the doctrine is totally inapplicable. In view of the many factors relevant to determining service-connection, particularly the effect on good order and discipline, it would be beneficial to have the informed judgment of the military tribunals regarding the military significance of many offenses.³²⁹ On the other hand, when the CMA has already determined that a particular offense committed under similar circumstances is service-connected, it would seem unfair and inefficient to require future offenders in that category to go through the motions of exhausting likely futile remedies before receiving their day in a federal civil court.³³⁰

Pre-trial intervention by a federal court is more likely to be justifiable when the petitioner denies the right of the military to try him at all, as is the case with civilians and non-service-connected offenses, than when other constitutional claims, not going to the court-martial's jurisdiction, are raised.³³¹ In one such case,³³² although an army private claimed to have acquired conscientious objector views after his voluntary entry onto active duty, his application for a discharge on such basis was rejected. He was subsequently court-martialed on two occasions for failing to obey lawful orders which instances arose from his asserted religious beliefs. When threatened with a third court-martial for a similar incident, he petitioned the federal district court for a declaratory judgment of his conscientious objector status and an injunction of the pending court-martial, claiming that

³²⁸ See *Fay v. Noia*, 372 U.S. 391, 418-420 (1963); *Craycroft v. Ferrall*, 408 F.2d 587, 594-95 (9th Cir. 1969); *In re Kelly*, 401 F.2d 211, 213 (5th Cir. 1968); *Hammond v. Lenfest*, 398 F.2d 705, 714 (2d Cir. 1968); *Smith v. United States*, 199 F.2d 377, 381 (1st Cir. 1952); *Davis*, note 315, *supra*, at § 20.03; *Jaffe*, note 315, *supra*, at 424-26, 432-37; *Sherman*, note 315, *supra*, at 497-98, 503; *Note*, 20 C.W.R.U. L. REV. 677, 682, 686 (1969).

³²⁹ See *Nelson & Westbrook*, note 324, *supra*, at 50-52.

³³⁰ See *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817, 835 (2d Cir. 1967). *But cf.*, *Davis*, note 315, *supra*, at § 20.07; *Jaffe*, note 315, *supra*, at 446-49.

³³¹ See *Noyd w. Bond*, 395 U.S. 683, 696 n. 8 (1969); *Allen v. Van Cantfort*, 420 F.2d 525 (1st Cir. 1970); *United States ex rel. Norris v. Norman*, 296 F. Supp. 1270, 1272 (N.D. Ill. 1969).

³³² *Chavez v. Fergusson*, 266 F. Supp. 879 (N.D. Cal. 1967), dismissed as moot [after court-martial and subsequent discharge], 395 F.2d 215 (9th Cir. 1968). See also *Gorko v. Commanding Officer*, 314 F.2d 858 (10th Cir. 1963); text accompanying notes 352, 354, *infra*. *But see Note*, 67 HARV. L. REV. 479, 487 (1954).

he would be placed in multiple jeopardy and that he was being unlawfully detained in the service. The court denied the relief because there was no contention that the court-martial would lack jurisdiction, his claims could be used as defenses before the court-martial, and his attempt to raise them in an injunctive proceeding was premature and misplaced. The court stated that "it has become well established that a Federal Court will not issue a writ of prohibition, or otherwise review the acts of a court-martial unless it appears that the military tribunal is acting in excess of its jurisdiction."³³³

Nevertheless, the possibility of pre-trial relief cannot be foreclosed where it is claimed that a pending court-martial threatens the exercise of certain rights protected by the First Amendment. In *Dombrowski v. Pfister*,³³⁴ the Supreme Court approved the enjoining of a threatened state criminal prosecution for violation of statutes which were alleged to be vague and unconstitutional on their face and which were being employed in such a manner as to harass the plaintiff-civil rights organization and inhibit its freedom of expression. This case was subsequently relied upon by the Second Circuit Court of Appeals in *Wolff v. Local Board No. 16*,³³⁵ a pre-induction challenge to a selective service classification. In this area the federal courts have generally followed a hands-off attitude similar to that regarding courts-martial, and have held that the decisions of local draft boards and administrative review authorities are final within their respective jurisdictions. They are not directly judicially reviewable and can only be attacked by a habeas corpus petition after induction or in defense of a criminal charge for refusing induction.³³⁶ Thus the Second Circuit's opinion by Judge Medina observed that:

Irrespective of the existence of the power to do so, the courts . . . have been extremely reluctant to bring any phase of the operation of the Selective Service System under judicial scrutiny. . . . The very nature of the Service demands that it operate with maximum efficiency, unimpeded by external interference. Only the

³³³ *Chavez v. Fergusson*, 266 F. Supp. 879, 880 (N.D. Cal. 1967).

³³⁴ 380 U.S. 479 (1965). Cf. *Zwickler v. Koota*, 389 U.S. 241 (1967) holding that a three-judge district court should not have abstained from deciding an injunction and declaratory action against enforcement of a New York criminal statute alleged to be unconstitutional on its face for overbreadth in restricting free expression. See Annot., 8 A.L.R.3d 301 (1966); Comment, 56 CALIF. L. REV. 379, 441 n. 290 (1968); but see *Younger v. Harris*, 91 S. Ct. 746 (1971) and companion cases.

³³⁵ 372 F.2d 817 (2d Cir. 1967).

³³⁶ *Estep v. United States*, 327 U.S. 114 (1946).

most weighty consideration could induce us to depart from this long standing policy.³³⁷

Yet in this case where the plaintiffs' classification had been changed from deferred students to I-A after they had participated in an anti-Viet Nam War demonstration at a local draft board, the court upheld jurisdiction of a suit to compel a reclassification because :

Of all the constitutional rights, the freedoms of speech and assembly are the most perishable, yet the most vital to the preservation of American democracy. . . . Here it is the free expression of views on issues of critical current national importance that is jeopardized. On such topics perhaps more than any other, it is imperative that the public debate be full and that such segment of our society be permitted freely to express its views. Thus the allegations of the complaint in this case that the draft boards have unlawfully suppressed criticism must take precedence over the policy of non-intervention in the affairs of the selective Service.³³⁸

In regard to the government's contention that the plaintiffs should be required to exhaust their administrative remedies before seeking judicial relief, the court noted that the *Dombrowski* rationale was not limited to a statute which was unconstitutional on its face, but also could be relied upon where a statute was being applied in an unconstitutional manner with a chilling effect on the exercise of First Amendment rights.³³⁹ Thus, whether the plaintiffs would in fact be inducted was not relevant, since "the effect of the reclassification itself is immediately to curtail" them and others similarly situated from "voicing dissent from our national policies."³⁴⁰ Finally, it was noted that there was no need to require the plaintiffs to follow the same "futile path" of administrative review that others under similar circumstances had trod before without success.³⁴¹

Subsequent to the *Wolfs* case, and perhaps because of it,³⁴² Congress amended the Selective Service Act to provide that before an affirmative or negative response to induction "no judicial review shall be made of the classification or processing of any

³³⁷ *Wolff v. Local Board No. 16*, 372 F.2d 817 (2d Cir. 1967).

³³⁸ *Id.*

³³⁹ *Id.* at 824, relying on *Cameron v. Johnson*, 381 U.S. 741 (1965). *Cf.*, *Sobal v. Perez*, 389 F.2d 392, 400 (5th Cir. 1968); *Wills v. United States*, 384 F.2d 943, 945 (9th Cir. 1967).

³⁴⁰ *Wolff v. Local Board No. 16*, 372 F.2d 817, 823 (2d Cir. 1967).

³⁴¹ *Id.* at 835.

³⁴² *See Oestereich v. Local Board No. 11*, 393 U.S. 233, 244-45 n. 7 (1968) (concurring opinion), *id.* at 247-48 (dissenting opinion).

registrant. . . .”³⁴³ Nevertheless, when a draft board reclassified a ministerial student as I-A after he returned a registration certificate in order to express “dissent from the participation by the United States in the war in Vietnam,” the Supreme Court held that the federal district courts had jurisdiction of a suit to restrain this allegedly “clear departure by the Board from its statutory mandate” to grant exemptions to ministerial students.³⁴⁴

Of course, judicial intervention policy in selective service cases is not *per se* transferable to the administration of military justice, but the strong analogies should prove persuasive in pre-court-martial judicial challenges involving a substantial claim of a “chilling effect” upon protected rights of expression.³⁴⁵ Two celebrated Vietnam War protestors, however, were unsuccessful in their attempts to invoke the *Dombrowski* doctrine in defense of their antiwar beliefs and activities. Army Captain Howard Levy was charged with violations of Articles 133 (“conduct unbecoming an officer and a gentlemen”) and 134 (“disorders and neglects to the prejudice of good order and discipline . . . , all conduct of a nature to bring a discredit upon the armed forces”) for expressing his strong, if not intemperate, criticism of United States foreign policy to other members of the military, and violation of Article 90 for willfully disobeying a command concerning his duties as a medical instructor. His action for mandamus and a stay of his pending court-martial was dismissed by the district court. The Court of Appeals for the District of Columbia affirmed *per curiam* with one judge dissenting, and the Supreme Court twice declined to take jurisdiction.³⁴⁶ Each member of the court of appeals panel filed a separate opinion. Judge Tamm could find no imminent irreparable injury and regarded the military remedies and possible collateral relief in the federal courts in the event of conviction as adequate to protect Levy’s rights.³⁴⁷ Judge

³⁴³ Military Selective Service Act of 1967 § 10(b) (3); 81 Stat. 100 (1967), 50 App. U.S.C. § 460(b) (3) (Supp. 1968).

³⁴⁴ *Oestereich v. Local Board No. 11*, 393 U.S. 233 (1968). *See also* *Breen v. Local Board No. 16*, 396 U.S. 460 (1970). *Compare* *Clark v. Gabriel*, 393 U.S. 256 (1968).

³⁴⁵ *See* *Sherman*, note 315, *supra*, at 501-02, 538; cf. *United States ex rel. Chaparro v. Resor*, 412 F.2d 443 (4th Cir. 1969); *Dash v. Commanding General, Fort Jackson, S. C.*, 307 F. Supp. 849, 851-52 (D.S.C. 1969).

³⁴⁶ *Levy v. Corcoran*, 389 F.2d 929 (D.C. Cir.), *stay denied*, 387 U.S. 915, *cert. denied*, 389 U.S. 960 (1967). For subsequent proceedings, *see* notes 381-82, *infra*. *See also* *Locks v. Commanding General, Sixth Army*, 89 S. Ct. 31 (1968) (single justice lacks authority to issue habeas corpus to petitioners claiming military infringement of their first amendment rights).

³⁴⁷ *Levy v. Corcoran*, 389 F.2d 929, 930 (D.C. Cir. 1967) (concurring opinion).

Leventhal acknowledged that there might be some merit in the contention that the charges under the broad Articles 133 and 134 have a chilling effect on speech. Nevertheless, he found the arguments in favor of the application of *Dombrozski* outweighed by the long tradition of judicial non-intervention with pending courts-martial and by the less extensive free speech rights enjoyed by military personnel.³⁴⁸ Dissenting Judge Bazelon thought that Levy's claims that these articles were unconstitutional, that the charge for disobeying a lawful order was being applied to suppress First Amendment rights, that *Dombrozski* applied to military courts, and that there was irreparable injury were not frivolous and that a three-judge district court should have been convened to hear them.³⁴⁹

Captain Noyd also failed in his attempt to convince the federal courts to require the Air Force to assign him to duties compatible with his conscientious objector views or accept his resignation.³⁵⁰ The Tenth Circuit rejected his reliance on *Dombrozski* to protect his first amendment right to religious freedom as an unjustified extension of that case which would contravene the long standing policy in favor of exhaustion of military remedies.³⁵¹ In response to Noyd's contention that he would be forced to disobey military orders and be subject to court-martial, the court of appeals said that it cannot anticipate that such process will be inadequate to protect his constitutional rights.³⁵² In similar circumstances some other federal courts have not required a purported in-service conscientious objector to exhaust his military "judicial" remedies in addition to his "administrative" ones.³⁵³ But where court-martial proceedings are already pending, the tendency is to require that the constitutional claims first be

³⁴⁸ *Id.* at 931 (concurring opinion).

³⁴⁹ *Id.* at 932-33 (dissenting opinion).

³⁵⁰ *Noyd v. McNamara*, 267 F. Supp. 701 (D. Colo.), *aff'd*, 378 F.2d 538 (10th Cir.), *cert. denied*, 389 U.S. 1022 (1967). For subsequent proceedings, see text accompanying notes 369-80, *infra*.

³⁵¹ *Noyd v. McNamara*, 378 F.2d 538, 540 (10th Cir.), *cert. denied*, 389 U.S. 1022 (1967).

³⁵² *Id.* at 539-40. See also *United States ex rel O'Hare v. Eichstaedt*, 285 F. Supp. 476, 482 (N.D. Cal. 1967); *Petition of Green*, 156 F. Supp. 174, 181 (S.D. Cal. 1967).

³⁵³ *Hammond v. Lenfest*, 398 F.2d 705, 713-14 (2d Cir. 1968); *Crane v. Hendrick*, 284 F. Supp. 250, 252-53 (N.D. Cal. 1968). See *Pitcher v. Laird*, 421 F.2d 1272, 1276-77 (5th Cir. 1970); *Sherman*, note 315, *supra*, at 517-20, 523-26; Note, 1969 UTAH L. REV. 328, 338-39. But see *United States v. Noyd*, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969). The Department of Justice no longer contends that such judicial remedies be exhausted by an in-service conscientious objector. See *Quinn v. Laird*, 421 F.2d 840, 841 n.1 (9th Cir. 1970).

pursued through the military justice system.³⁵⁴ This conflict was noted but left unresolved in a Supreme Court decision dealing with another issue subsequently raised by Captain Noyd.³⁵⁵

The utility of the *Dombrowski* case to the potential court-martial defendant is also limited by the recent decision in *Younger v. Harris*³⁵⁶ which put a chill on the "chilling effect" doctrine. Relying upon equitable principles restricting the use of injunctions, the nature of our constitutional federalism, and the place of the federal courts in this system, the Court held that a pending state prosecution will not be enjoined by a federal court in the absence of irreparable injury beyond that of defending a single prosecution, or proof of bad faith, harassment, or other extraordinary circumstances. The possibility that a challenged statute is vague or over-broad is not by itself sufficient to justify the intervention of the federal courts in the orderly proceedings of a state court. Similar considerations would seem to justify the application of this restrained approach to military cases as well.

B. FAILURE TO EXHAUST MILITARY REVIEW REMEDIES

Congress has provided a detailed military appellate system for the direct review of criminal convictions. Moreover, there are other reviews within the military which may be considered collateral in nature. A petition for a new trial may be made to the appropriate Judge Advocate General within two years after the approval of a sentence on the basis of newly discovered evidence or fraud on the court.³⁵⁷ In addition, the Legislative Reorganization Act of 1946 authorized the Secretary of a military department, acting through a civilian board, to "correct any military record of that department when he considers it

³⁵⁴ See *Craycroft v. Ferrall*, 408 F.2d 587, 589, 596 (9th Cir. 1969); *In re Kelly*, 401 F.2d 211 (5th Cir. 1968); text accompanying note 332, *supra*; *cf.*, *Brown v. McNamara*, 387 F.2d 150, 152-53 n. 5 (3d Cir. 1967), *cert. denied*, *sub. nom. Brown v. Clifford*, 390 U.S. 1005 (1968). *But see* *Sherman*, note 315, *supra*, at 538.

³⁵⁵ *Noyd v. Bond*, 395 U.S. 683, 685 n. 1 (1969).

³⁵⁶ 91 S. Ct. 746 (1971). *Cf.*, companion cases and *Cameron v. Johnson*, 390 U.S. 611 (1968).

³⁵⁷ Art. 73, UCMJ; MCM, 1969, para 109-110. The Military Justice Act of 1968 liberalized this provision by removing its limitation to cases involving at least one year's confinement and by extending the time for filing from one year to two. Pub. L. 90-632 § 2 (33), 82 Stat. 1335 (1968). See McCoy, *Due Process for Servicemen — The Military Justice Act of 1968*, 11 WM. & MARY L. REV. 66, 100-102 (1969). For a discussion of the former provision, see W. AYCOCK & S. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 167-68 (1955).

necessary to correct an error or remove an injustice.”³⁵⁸ Under this authority, boards for correction of military records have reviewed records resulting from courts-martial convictions to determine whether an error or injustice has been committed and if so, what relief should be recommended to remedy it.³⁵⁹ Finally, the Court of Military Appeals has held, with the approval of the Supreme Court,³⁶⁰ that, as a court established by Act of Congress,³⁶¹ it has the authority to review cases on petitions for writs of habeas corpus and coram nobis.³⁶² Such authority, however, is only in aid of its established appellate jurisdiction,³⁶³ and therefore does not extend to cases in which the approved sentence is less severe than one year’s confinement unless a Judge Advocate General has directed review of a general court-martial by a Court of Military Review, or the conviction is of a flag or general officer.³⁶⁴

In light of the safeguards against error and injustice that this system provides and in view of the frequent need for the specialized judgment of the military, it is not surprising that the federal courts almost uniformly require that a convicted serviceman exhaust his military remedies before seeking collateral judicial review.¹⁶⁵ Indeed, the exhaustion requirement has been held

³⁵⁸ § 207, 10 U.S.C. § 1552 (1964). See *Craycroft v. Ferrall*, 408 F.2d 587, 592-93 (9th Cir. 1969); Jones, *Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges*, 57 COLUM. L. REV. 917, 967-971 (1957).

³⁵⁹ See *Ashe v. McNamara*, 355 F.2d 277, 280-282 (1st Cir. 1965); B. FIELD, COURTS-MARTIAL PRACTICE AND APPEAL 160 (1957); MILITARY JUSTICE, JURISDICTION OF COURTS-MARTIAL, DEP'T OF THE ARMY PAM NO. 27-174 pp. 18-19 (1965); Note, 41 ST. JOHN'S L. REV. 114, 116 (1966).

³⁶⁰ See *Noyd v. Bond*, 395 U.S. 683, 695 n. 7 (1969); *cf.*, *United States v. Augenblick*, 393 U.S. 348, 350 (1969).

³⁶¹ See 28 U.S.C. § 1651 (1964). See also Art. 67, UCMJ.

³⁶² *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); *Gale v. United States*, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966); see *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968).

³⁶³ See Arts. 66, 67, 69, UCMJ.

³⁶⁴ *United States v. Snyder*, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969), restricting the apparent scope of *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968). See also *United States v. Homey*, 18 U.S.C.M.A. 515, 40 C.M.R. 227 (1969), denying jurisdiction to issue extraordinary writs in cases decided prior to the effective date of the UCMJ. See also Comment, 69 COLUM. L. REV. 1259, 1266-68 (1969); *cf.*, Note, 20 C.W.R.U. L. REV. 677, 683-86 (1969). The Military Justice Act of 1968 provided for review by the Judge Advocates General of any general court-martial conviction for which another review is not available. Art. 69, UCMJ.

³⁶⁵ *E.g.*, *Allen v. Van Cantfort*, 420 F.2d 525 (1st Cir. 1970); *Branford v. United States*, 356 F.2d 876, 877 (7th Cir. 1966); *Gorko v. Commanding Officer*, 314 F.2d 858, 860 (10th Cir. 1963); *Hooper v. Hartman*, 274 F.2d 429 (9th Cir. 1959); see *Noyd v. Bond*, 402 F.2d 441, and cases cited at 442, n. 2

to include not only direct appellate remedies but collateral reviews available within the military system. In the leading case on the point, *Gusik v. Schilder*,³⁶⁶ a habeas corpus petitioner had exhausted all his post-conviction remedies which existed at the time. The district court granted the writ both because of an alleged jurisdictional defect and a denial of procedural rights. The Court of Appeals reversed on the ground that since the filing of the habeas corpus petition Congress had made available the new remedy of application to the Judge Advocate General for a new trial.³⁶⁷ In affirming this conclusion, but ordering the district court to hold the case pending exhaustion of the new remedy rather than dismissing it, the Supreme Court stated:

An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. . . . The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgments is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. That policy is well served whether the remedy which is available was existent at the time resort was had to the federal courts or was subsequently created. . . .³⁶⁸

The Supreme Court recently reaffirmed these sentiments in the case of *Noyd v. Bond*.³⁶⁹ After the failure of his efforts to obtain a transfer or discharge based on his objections to the Vietnam War,³⁷⁰ Captain Noyd was court-martialed for refusal to obey an order and was sentenced to confinement. While his appeal within the military system was pending, Noyd was ordered transferred to a disciplinary barracks. He then filed a petition for a writ of habeas corpus in a federal district court. This was

(10th Cir. 1968), *aff'd*, 395 **U.S.** 683 (1969); Aycock & Wurfel, note 357, *supra*, at 344-54; Comment, 69 **COLUM. L. REV.** 1259,1279 (1969).

³⁶⁶ 340 **U.S.** 128 (1950).

³⁶⁷ 180 F.2d 662 (6th Cir. 1950).

³⁶⁸ *Gusik v. Schilder*, 340 **U.S.** 128, 131-32 (1950). A procedure similar to that ordered by the Supreme Court was employed by the court of appeals in *Whelchel v. McDonald*, 340 **U.S.** 122, 125-26 (1950). *See also* *Easley v. Hunter*, 209 F.2d 483, 485 (10th Cir. 1953); *Goldstein v. Johnson*, 184 F.2d 342, 343 (D.C. Cir. 1950), *cert. denied*, 340 **U.S.** 879 (1950); *McMahon v. Hunter*, 179 F.2d 661 (10th Cir.), *cert. denied*, 339 **U.S.** 968 (1950).

³⁶⁹ 395 **U.S.** 683 (1969).

³⁷⁰ *See* text accompanying notes 350-52, *supru*.

granted to the extent of barring his transfer on the grounds that that would constitute execution of Noyd's sentence before completion of appellate review in violation of the Uniform Code of Military Justice.³⁷¹ This decision was reversed by the Tenth Circuit Court of Appeals because of Noyd's failure to exhaust his military remedies.³⁷² Justice Douglas then granted a temporary stay which required Noyd to be placed in a non-incarcerated status until the full Court could dispose of his petition for certiorari.³⁷³ The Court granted his petition³⁷⁴ but affirmed the court of appeals on the exhaustion question.³⁷⁵ The opinion by Justice Harlan emphasized the need for deference to military tribunals in interpreting "a legal tradition which is radically different from that which is common to civil courts."³⁷⁶ He stated that although this appeal concerned the ancillary matter of the legality of the petitioner's confinement and not the merits of his case, all the reasons supporting the decision in *Gusik v. Schilder* were applicable. These included the possibility of obviating the need for a civil court decision, avoiding friction with the military, and the desirability of having the military courts first "interpret extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence. . . ." ³⁷⁷ The Court noted that the Court of Military Appeals had held that it would grant the type of relief sought by Noyd in an appropriate case,³⁷⁸ and that the necessity of traveling to Washington, D.C. and securing a lawyer there to prosecute such a remedy was not so onerous as to make it inadequate.³⁷⁹ Accordingly, the Court affirmed the denial of habeas corpus relief, but continued the stay of execution of the sentence, which then had only two more days to run, in order to give Noyd an opportunity to present his claims to the CMA.³⁸⁰

³⁷¹ Noyd v. Bond, 285 F. Supp. 785 (D. N.M. 1968), interpreting Art. 71 (c), UCMJ.

³⁷² Noyd v. Bond 402 F.2d 441 (10th Cir. 1968), noted, 20 C.W.R.U. L. REV. 677 (1969).

³⁷³ Noyd v. Bond, 89 S. Ct. 478 (1968).

³⁷⁴ Noyd v. Bond, 393 U.S. 1048 (1969). Justice White thought that the writ should have been dismissed as improvidently granted. Noyd v. Bond, 395 U.S. 683, 699-700 (1969) (dissenting opinion).

³⁷⁵ Noyd v. Bond, 395 U.S. 683 (1969).

³⁷⁶ *Id.* at 694.

³⁷⁷ *Id.* at 696, see also U.S. ex rel. Chaparro v. Resor, 298 F. Supp. 1164 (D. S.C. 1969) vacated, 412 F.2d 443 (4th Cir. 1969).

³⁷⁸ Noyd v. Bond, 395 U.S. 683, 695-96 (1969).

³⁷⁹ *Id.* at 696-98.

³⁸⁰ The Court of Military Appeals subsequently affirmed Noyd's conviction on the merits thus presumably mooted the issue regarding his right to be

Similar attempts by Captain Levy to be released on bail and prevent his transfer to a disciplinary barracks pending appeals from his court-martial conviction have also been rejected by the military and federal courts,³⁸¹ although he was successful in obtaining bail, on order of Justice Douglas, after exhausting his military remedies and while pursuing habeas corpus relief in the federal civil courts.³⁸² While these cases may be consistent with the exhaustion doctrine, they point-up the need for more realistic and fair procedures for the release from custody of those court-martial defendants whose liberty constitutes little threat to the military or public community or to their continued availability for further proceedings or execution of their sentences.³⁸³

The Supreme Court's opinion in the *Noyd* case gave express recognition to the power of the Court of Military Appeals to issue extraordinary writs, such as habeas corpus and coram nobis, in aid of its jurisdiction, and indicated that such relief should have been sought by Captain Noyd before he came to the federal courts for aid.³⁸⁴ While this remedy is not a substitute for direct review on the merits,³⁸⁵ it would probably be required to be exhausted by any petitioner whose claim was within the general appellate jurisdiction of the CMA and had not been timely passed upon or rejected by that court. This requirement would be consistent with state habeas corpus practice and with the policy of section **2255** of the Judicial Code which, while probably not directly applicable to courts-martial convictions,³⁸⁶

free of disciplinary confinement pending such CMA adjudication. *United States v. Noyd*, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969).

³⁸¹ *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967); *Levy v. Resor*, 384 F.2d 689 (4th Cir. 1967), *cert. den'd*, 389 U.S. 1049 (1968); *Levy v. Dillon*, 286 F. Supp. 593 (D. Kan. 1968), *aff'd*, 415 F.2d 1263 (10th Cir. 1969).

³⁸² *Levy v. Parker*, 396 U.S. 1204 (1969).

³⁸³ The Military Justice Act of 1968 § 2(24) authorizes the convening authority or certain higher commanders to defer service of a sentence pending appeal. Art. 57(d), UCMJ. See Ervin, *The Military Justice Act of 1968*, 45 MIL. L. REV. 77, 95-96 (1969). A denial of an application for "bail" under this provision may be subject to review under Article 138, concerning wrongs by commanding officers, which may, in turn, be an additional remedy to exhaust prior to seeking federal court review. See *Levy v. Dillon*, 286 F. Supp. 593, 595 (D. Kan. 1968), *aff'd*, 415 F.2d 1263 (10th Cir. 1969). See also *United States ex rel. Chaparro v. Resor*, 412 F.2d 443 (4th Cir. 1969).

³⁸⁴ *Noyd v. Bond*, 395 U.S. 683, 695, 696, 698 (1969). See *United States v. Augenblick*, 393 U.S. 348, 350 (1969). See also text accompanying notes 360-64, *supra*.

³⁸⁵ *Allen v. Van Cantfort*, 420 F.2d 625, 626-27 (1st Cir. 1970).

³⁸⁶ See *Palomara v. Taylor* 344 F.2d 937, 938 (10th Cir. 1965); *Kent v. Taylor*, H.C. No. 4088 (D. Kan. Aug. 12, 1966).

provides that "a prisoner in custody under sentence of a court established by Act of Congress" must apply for relief by motion to the court which sentenced him before seeking habeas corpus in the district of his confinement.³⁸⁷

Another military remedy which may have to be exhausted is a request to the appropriate board for correction of military records³⁸⁸ although there is some indication that this is not an absolute requirement. In reviewing a lower court's dismissal of a challenge to an administrative discharge because of a failure to exhaust such remedy, the Court of Appeals for the District of Columbia Circuit pointed out that (1) the executive department correction of records remedy was created as a substitute for private bills in Congress and thus was not a part of the military judicial process,³⁸⁹ (2) the Secretary of a department, in his discretion, can take final action on a military record without a Board decision, (3) a Board's decision when made is not final and binding on the Secretary (although he cannot arbitrarily disregard it), and (4) neither statute nor regulation requires resort to the Board as a prerequisite to judicial relief.³⁹⁰ The court added, however, that since the remedy was available, and is ordinarily useful and salutary, the case should be remanded to the district court to determine whether as a matter of discretion it should abstain from judicial review pending a ruling by the Board.³⁹¹ Where applicable, it would be consistent with good and safe practice, as well as the decisions of other courts,³⁹² to exhaust this collateral military remedy before seeking civil court relief.

³⁸⁷ 28 U.S.C. § 2255 (1964).

³⁸⁸ 10 U.S.C. § 1552 (1964); see notes 368-69, *supra*, and accompanying text.

³⁸⁹ See also *Ashe v. McNamara*, 355 F.2d 277, 280 (1st Cir. 1965); *Goldstein v. Johnson*, 184 F.2d 342, 343-44 (D.C. Cir.), *cert. denied*, 340 U.S. 879 (1950); FELD, note 359, *supra*, at 160.

³⁹⁰ *Odgen v. Zuckert*, 298 F.2d 312 (D.C. Cir. 1961); see also *Packard v. Rollins*, 307 F. Supp. 1388, 1389-92 (W.D. Mo. 1969), *aff'd*, 422 F.2d 525 (8th Cir. 1970).

³⁹¹ *Odgen v. Zuckert*, 298 F.2d 312, 316-17 (D.C. Cir. 1961).

³⁹² See *Craycroft v. Ferrall*, 408 F.2d 587, 592-94, 597 (9th Cir. 1969) and cases cited therein; *Morbeto v. United States*, 293 F. Supp. 313, 321-22 (C.D. Cal. 1968); FEW, note 359, *supra*, at 161; *cf.*, *United States v. Augenblick*, 393 U.S. 348, 349 n. 1 (1969). But see *Pitcher v. Laird*, 421 F.2d 1272, 1276-77 (5th Cir. 1970); *Unglesby v. Zimny*, 250 F. Supp. 714, 717 (N.D. Cal. 1965); *Packard v. Rollins*, 307 F. Supp. 1388, 1389-92 (W.D. Mo. 1969), *aff'd*, 422 F.2d 525 (8th Cir. 1970); *Sherman*, note 315, *supra*, at 502-03, 524-25; Note, 83 HARV. L. REV. 1038, 1237-38 (1970). The Department of Justice no longer contends that a petitioner whose in-service conscientious objection claim has been denied is required to exhaust the remedy of applying for a correction of military records. See *Pitcher v. Laird*, *supra*, at 1276 n. 6; *Quinn v. Laird*, 421 F.2d 840, 841 n. 1 (9th Cir. 1970).

Although the Supreme Court in *Noyd v. Bond* stated that “the principles of federalism which enlighten the law of federal habeas corpus for state prisoners are not relevant to the problem before us . . .,”³⁹³ the Court recognized that other considerations lead to the application of a similar policy of exhaustion of remedies. The statutory authority for federal habeas corpus of both state and military prisoners comes from the same section of the Judicial Code,³⁹⁴ and it would seem that, absent some peculiar military consideration, exhaustion policies developed in cases involving state prisoners should provide, at a minimum, guidelines for military habeas corpus petitions.

In the 1948 revision of the Judicial Code, Congress provided in section 2254 that an application for habeas corpus from state custody shall not be granted unless “the applicant has exhausted the remedies available in the courts of the State, or that there is . . . an absence of available” effective remedies, and that he shall not be deemed to have complied with this requirement “If he has the right under the law of the State to raise, by any available procedure, the question presented.”³⁹⁵ In 1963, the exhaustion of state remedies requirement was extensively considered in *Fay v. Noia*.³⁹⁶ The petitioner and two co-defendants had been convicted of murder on the basis of signed confessions. The co-defendants’ appeals were initially decided adversely to them, but subsequent habeas corpus proceedings resulted in a holding that the confessions were coerced and their convictions were vacated. Noia, however, declined to appeal probably out of fear that a retrial might bring the death sentence. After the release of his two co-defendants, Noia sought collateral relief in the state courts. It was denied because he had failed to pursue a timely direct appeal, and was considered to have waived any error in admission of his confession. The federal district court dismissed his habeas corpus petition because he had failed to exhaust his state remedies, but the court of appeals reversed because of the exceptional circumstances of the case.³⁹⁷ The Supreme Court affirmed the granting of the writ but on broader grounds. After a detailed review of the development and importance of the federal writ of habeas corpus, the majority opinion observed that the rule that the federal courts will decline to review federal issues if there is an independent and adequate

³⁹³ 395 U.S. 683,694 (1969).

³⁹⁴ 28 U.S.C. § 2241 (a), (c) (1964).

³⁹⁵ 28 U.S.C. § 2254 (1964).

³⁹⁶ 372 U.S. 391 (1963).

³⁹⁷ 300 F.2d 345 (2d Cir. 1962).

state ground for affirmance was not based upon a lack of power but on sound judicial discretion and that it had more application to direct rather than collateral reviews and to state substantive rather than procedural grounds.³⁹⁸ After also noting that “[t]he rule of exhaustion ‘is not one defining power but one which relates to the exercise of power,’ ”³⁹⁹ the Court concluded that:

What we have said substantially disposes of the further contention that 28 U.S.C. § 2254 embodies a doctrine of forfeitures and cuts off relief when there has been a failure to exhaust state remedies no longer available at the time habeas is sought. This contention is refuted by the language of the statute and by its history. It was enacted to codify the judicially evolved rule of exhaustion. . . . Very little support can be found in the long course of previous decisions by this Court elaborating the rule of exhaustion for the proposition that it was regarded at the time of the revision of the Judicial Code as jurisdictional rather than merely as a rule ordering the state and federal proceedings so as to eliminate unnecessary federal-state friction. . . . We hold that § 2254 is limited in its application to failure to exhaust state remedies *still open to the habeas applicant at the time he files his application* in federal court.⁴⁰⁰

The Court then held that relief could be denied at the discretion of the federal judge to a petitioner who had understandingly and knowingly relinquished or abandoned a known right or available procedure, but that there was no such intended waiver in this case.⁴⁰¹

To the extent that the exhaustion requirement rests upon the same or similar grounds in state and military habeas corpus, as acknowledged in *Gusik v. Schilder*,⁴⁰² it is at least arguable that the limitations placed upon the application of the doctrine in *Fay v. Noia* should also apply to military cases.⁴⁰³ The Fifth Circuit Court of Appeals has so held in considering a habeas

³⁹⁸ *Fay v. Noia*, 372 U.S. 391, 415-34 (1963).

³⁹⁹ *Id.* at 420.

⁴⁰⁰ *Id.* at 434-35 (emphasis added).

⁴⁰¹ *Id.* at 438-40.

⁴⁰² 340 U.S. 128 (1950). See also text accompanying notes 366, 368, *supra*. *Accord*, *Noyd v. Bond*, 402 F.2d 441, 442 (10th Cir. 1968), *aff'd*, 395 U.S. 683 (1969): “The policy underlying the requirement of exhaustion of state remedies applies with equal force to attacks upon the propriety of military confinement. Military law and state law both exist substantially independent and apart from the law governing the federal courts. All three separate judicial establishments necessarily reflect the effects of diverse functions.”

⁴⁰³ See Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO S. L.J. 193, 218 (1966); Note 83 HARV. L. REV. 1038, 123 2-33 (1970); Note, 76 YALE L.J. 380, 403 (1966); *cf.* *Allen v. Van Cantfort*, 420 F.2d 525, 527 (1st Cir. 1970).

corpus application from a petitioner convicted by a court-martial who failed to timely petition to the Court of Military Appeals for review or to the Judge Advocate General for a new trial, and thereby lost such remedies.⁴⁰⁴ However, the court denied the writ upon finding that the court-martial had jurisdiction, which was viewed as the limit of the federal court's inquiry. Similarly a district court in the District of Columbia took jurisdiction of a suit to declare the plaintiff's court-martial void after his release from custody, even though he let the time for petitioning for a new trial lapse.⁴⁰⁵ Relief was also denied here upon finding that the court-martial had jurisdiction and that the plaintiff's claims had been fully considered by the military authorities or were available for consideration by them.

C. RAISING OF A NEW ISSUE ON COLLATERAL REVIEW

The final aspect of exhaustion of remedies relates to the requirement that a claim first be presented to the military before it can be raised in a collateral review. It is certainly sound policy that before a tribunal is accused in another forum of having committed an error it should have an opportunity to hear the arguments or evidence pro and con and to remedy the matter itself or at least explain the basis for its ruling. This would apply a *fortiori* in a collateral review of a tribunal with a special expertise and one subject to checks by various appellate tribunals. Moreover, in applying the "full and fair consideration" standard of judicial review of courts-martial, as the Tenth Circuit has recognized: "[o]bviously, it cannot be said that they have refused to fairly consider claims not asserted."⁴⁰⁶ Accordingly, most courts have declined to review the merits of claims asserted for the first time in collateral attacks on courts-martial judgments,⁴⁰⁷ although a number have gone on to note the lack

⁴⁰⁴ *Williams v. Heritage*, 323 F.2d 731, 732 (5th Cir. 1963), *cert. den'd*, 377 U.S. 945 (1964).

⁴⁰⁵ *Kauffman v. Secretary of the Air Force*, 269 F. Supp. 639, 642, 646 (D.D.C. 1967), *aff'd*, 415 F.2d 991 (D.C. Cir. 1969).

⁴⁰⁶ *Suttles v. Davis*, 215 F.2d 760, 763 (10th Cir. 1954), *cert. den'd*, 348 U.S. 903 (1954).

⁴⁰⁷ *Id.*; *United States ex rel. O'Callahan v. Parker*, 390 F.2d 360, 363 (3d Cir. 1968), *rev'd on other grounds*, 395 U.S. 258 (1969); *Branford v. United States*, 356 F.2d 876, 877 (7th Cir. 1966); *Gorko v. Commanding Officer*, 314 F.2d 858, 860 (10th Cir. 1963); *Narum v. United States*, 287 F.2d 897, 901-02 (Ct. Cl. 1960), *cert. den'd*, 368 U.S. 848 (1961) (concurring opinion); *Bennett v. Davis*, 267 F.2d 15, 17 (10th Cir. 1959); *LeBallister v. Warden*, 247 F. Supp. 349, 352 (D. Kan. 1965); *Swisher v. United States*, 239 F. Supp. 182, 184 (W.D. Mo. 1965), *aff'd*, 354 F.2d 472 (8th Cir. 1966); *see*

of foundation for the tardy claim.⁴⁰⁸ Since the only claims which may be considered in collateral proceedings relate to a defect in jurisdiction or a denial of constitutional rights on the part of the court-martial, the refusal to hear the claim because of the procedural default is of great significance. This is especially so since, unlike other applications of the exhaustion doctrine, there will probably be no other opportunity to raise the issue.⁴⁰⁹ As Justice Black has observed in regard to the question of whether judicial review of administrative action may include a claim not presented to the agency:

Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.⁴¹⁰

Of course the special nature of the military justice system which justifies the "full and fair consideration" standard cannot be ignored. In order to minimize interference with the military mission and take advantage of their informed judgment, it will be appropriate in most cases for a civil court to refuse to consider issues which were not presented to the court-martial or at least to the reviewing authorities. Nevertheless, this rule should not require a court to turn its back on a clear injustice, especially where there is a reasonable excuse for the failure to raise the issue sooner.⁴¹¹ For example, the courts might consider an apparently good faith claim of a denial of constitutional rights where the constitutional issue had not been settled by the Supreme

Givens *v.* Zerst, 255 U.S. 11, 22 (1921); Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 62-63 (1961).

⁴⁰⁸ See *e.g.*, *Narum v. United States*, 287 F.2d 897, 901 (Ct. Cl. 1960), *cert. den'd.*, 368 U.S. 848 (1961); *Bennett v. Davis*, 267 F.2d 15, 17 (10th Cir. 1959); Bishop, note 407, *supra*, at 62-63.

⁴⁰⁹ See JAFFE, note 315, *supra*, at pp. 450-58. Consider also this comment from a case challenging an administrative discharge: Where there is a "substantial constitutional challenge . . . , the administrative machinery established by the department of defense has neither the authority nor the experience to resolve constitutional questions." *Unglesby v. Zimny*, 250 F. Supp. 714 717 (N.D. Cal. 1965), in evaluating the desirability of requiring exhaustion of remedies before the Navy Board for Correction of Records and the Navy Discharge Review Board. See also Sherman, note 315, *supra*, at 524-25.

⁴¹⁰ *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

⁴¹¹ *Id.*; JAFFE, note 315, *supra*, at 455-56; see DAVIS, note 315, *supra*, at 367.

Court or Court of Military Appeals until after the opportunity for review by the military authorities had expired,⁴¹² or where a substantial claim of inadequate representation is presented. Despite the fact that there are several cases applying the exhaustion doctrine to the latter claim,⁴¹³ it appears unjust and unrealistic to require an accused to bear the burden of procedural defaults which may be due to the very lack of informed counsel which he asserts deprived him of a fair trial.⁴¹⁴

It has also been suggested that since a lack of jurisdiction implies a lack of power, any proceedings taken under such circumstances are void, and the defect can be raised at any time.⁴¹⁵ However, as Justice Frankfurter has remarked: "‘jurisdiction’ . . . is a verbal coat of too many colors."⁴¹⁶ Thus, some "jurisdictional" defects may not in fact destroy all power in a tribunal to proceed, and may be waived by the failure to raise them.⁴¹⁷ Even in regard to jurisdictional claims, however, it sometimes may be desirable to give the military the initial opportunity to consider them. But the failure to do so should not preclude a subsequent attack on subject-matter jurisdiction.⁴¹⁸

Another alternative which would avoid injustice and permit application of the exhaustion as well as the "fair and full consideration" doctrine, would be to provide a belated opportunity to the claimant to present his constitutional or jurisdictional

⁴¹² *Id.*; JAFFE, note 315, *supra*, at 454-57; Note, 83 HARV. L. REV. 1038, 1230-32 (1970).

⁴¹³ *E.g.*, Harris v. Ciccone, 417 F.2d 479, 484 (8th Cir. 1969); United States ex rel. O'Callahan v. Parker, 390 F.2d 360, 363 (3d Cir. 1968), *rev'd. on other grounds* 395 U.S. 258 (1969); McKinney v. Warden, 273 F.2d 643, 644 (10th Cir. 1959), *cert. den'd*, 363 U.S. 816 (1960); Suttles v. Davis, 215 F.2d 760, 761-63 (10th Cir.), *cert. den'd*, 348 U.S. 903 (1954).

⁴¹⁴ "[I]t seems quixotic to refuse to hear because that counsel failed to urge upon the military authorities his own stupidity, ignorance, or laziness." Bishop, note 407, *supra*, at 63. *See also* Johnson v. Zerbst, 304 U.S. 458 (1938); Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947); Palomera v. Taylor, 344 F.2d 937, 939 (10th Cir.), *cert. den'd*, 382 U.S. 946 (1965); Rushing v. Wilkinson, 272 F.2d 633, 635-38 (5th Cir. 1959), *cert. den'd*, 364 U.S. 914 (1959); Note, 13 U.C.L.A. L. REV. 1419, 1425 (1966); Note, 76 YALE L.J. 380, 403 (1966).

⁴¹⁵ *See* Givens v. Zerbst, 255 U.S. 11, 19 (1921); Deming v. McClaughry, 113 Fed. 639 (8th Cir. 1902), *aff'd, sub nom. McClaughry v. Deming*, 186 U.S. 49 (1902); notes 319-23, *supra*, and accompanying text; *see also* United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952); DAVIS, note 315, *supra*, at 367.

"United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 39 (1952) (dissenting opinion).

"*Id.*; Givens v. Zerbst, 255 U.S. 11, 22 (1921). Compare JAMES, CIVIL PROCEDURES § 12.1 (1965).

⁴¹⁸ *See* O'Callahan v. Parker, 395 U.S. 258 (1969); Harris v. Ciccone, 417 F.2d 479, 488 (8th Cir. 1969); note 415, *supra*.

claim to the military authorities. There has been some suggestion that a remand to the court-martial or to a newly convened one, or a referral of the question to the Court of Military Appeals would be possible and desirable.⁴¹⁹ However, such a potential recourse should no longer be necessary in view of the Court of Military Appeals' holdings that it has jurisdiction to collaterally consider such claims on a petition for an extraordinary writ.⁴²⁰ This practice should prove quite salutary, although it may also necessitate an increase in the number of CMA judges—a change which may be desirable in any event.

VI. A PROPOSED RESOLUTION

In light of the considerations which have been reviewed in the prior sections, including the facts that (1) the Constitution has committed the government of the armed forces to Congress and the President, (2) they have provided the military with a Code and a procedural manual which realistically attempt to balance the rights of the individual with the requirements of the national defense, and (3) the military judicial system has in fact been operated in such a way as to safeguard the rights of the accused in all but the exceptional cases, it would appear unwise and unnecessary for the federal courts to drastically depart from their historic "hands-off" approach to review of courts-martial proceedings within their appropriate jurisdiction. On the other hand, it is also important, especially in these days of vast armed forces consisting largely of civilians-at-heart, that the federal courts maintain their equally historic role as guardians of the constitutional right of individuals. It appears that the "full and fair consideration" test of *Burns v. Wilson* supplies the structure on which to elaborate more detailed criteria to balance these two general objectives. My proposed formula would provide a somewhat greater opportunity for review of courts-martial convictions by the federal courts, but it would still require that one collaterally attacking such judgments undertake a substantial burden.

To obtain a federal court determination of the merits of a collateral attack on courts-martial proceedings there must be a substantial allegation that: (1) the court-martial lacked the power to conduct the proceedings or pronounce the questioned

⁴¹⁹ See Note, 67 HARV. L. REV. 479, 485 (1954); Note, 76 YALE L.J. 380, 403-04 (1966); *cf.*, Sunday v. Madigan, 301 F.2d 871, 873 n. 5 (9th Cir. 1962).

⁴²⁰ See text accompanying notes 360-64, *supra*.

judgment and sentence, *i.e.*, it did not have subject-matter jurisdiction in the strict sense; *or* (2) the military authorities deprived the complaining party of a constitutional right or liberty in that: (a) an erroneous conclusion of constitutional law or an unconstitutional legal standard was applied which it would be unreasonable to justify on the basis of military necessity or relevant differences between military and civilian living conditions; *or* (b) the constitutional deprivation depends upon a finding of disputed fact which was not resolved on the merits, is not fairly supported by the record as a whole, was determined by a factfinding procedure that was not adequate to afford a full and fair hearing, may be substantially affected by newly discovered evidence, was not adequately developed in a military hearing, or for any other reason was not based upon a full and fair fact hearing; *and* (c) all adequate military remedies for the correction of errors alleged under (a) or (b) have been exhausted or there are none presently available and the error has not been knowingly and voluntarily waived.

Thus relief from a court-martial conviction will only be available when the federal court finds that the court-martial lacked subject-matter jurisdiction or deprived the petitioner of a constitutional right. To find such a deprivation the military must have made an interpretation of constitutional law which was unreasonable if claimed to be peculiar to military circumstances, or simply erroneous if no such justification is asserted, or the court must determine that a factual question, on which the constitutional error depends, was not fully and fairly considered (as defined in *Townsend v. Sain*)⁴²¹ and should be found in favor of the petitioner. Finally, the military authorities must have been given an opportunity to remedy such constitutional deprivation in the course of the court-martial proceedings, on appeal, or by collateral review, or it must be shown that the error has not been waived and no such military remedies are presently available.

The application of these criteria can be illustrated and tested by briefly discussing them in light of the hypothetical case of Private Charles Able Baker.

Three of the alleged errors in the court-martial proceedings can be disposed of summarily since they do not involve any constitutional deprivation or cause any jurisdictional defect. This disposition is consistent with established law as well as the proposed standards. Whether or not kissing a male on the ear

⁴²¹ 372 U.S. 293 (1963); see notes 283-86, *supra*, and accompanying text.

constitutes indecent assault is a question of law but it is certainly not of constitutional dimensions. The fact that the Manual for Courts Martial confines indecent assault under Article 134 to assaults on a female⁴²² does not entitle the federal courts to substitute their judgment for that of the military. The Manual is an executive order, deviations from which do not, *per se*, destroy the jurisdiction of the court-martial.⁴²³ Likewise, the admission of impeachment evidence concerning Baker's sexual misconduct, although also arguably inconsistent with a Manual provision,⁴²⁴ does not involve constitutional or jurisdictional defects. The failure of the Board of Review to consider this question on its merits because of the lack of an objection by counsel at trial is consistent with good appellate practice⁴²⁵ and the doctrine of exhaustion of remedies. But, even if the waiver doctrine be deemed inapplicable because of the alleged incompetence of counsel, it is sound law that errors in the admission of evidence (not involving constitutional deprivations such as the right to confrontation or demonstrating the incompetency of counsel, are not collaterally reviewable.⁴²⁶ Finally, the severity of the sentence, in the absence of allegations of illegality going to jurisdiction—or to cruel and unusual punishment under the Constitution, is a matter for the military authorities on which the federal courts will not and should not substitute judgment.⁴²⁷

The possibility of relief on the basis that the court-martial lacked jurisdiction because the offenses were not service-connected is unlikely in light of the *Relford* case⁴²⁸ and the Court of Military Appeals interpretations of *O'Callahan*.⁴²⁹

The charge that Article 134 is unconstitutionally vague should be reviewable in a federal court. Questions of the unconstitutionality of Code provisions have been determined on their merits

⁴²² MCM, 1969, para 213f(2). Compare *United States v. Adams*, 18 U.S.C.M.A. 310, 40 C.M.R. 22 (1969), *reconsidered and rev'd. on other grounds*, 19 U.S.C.M.A. 75, 41 C.M.R. 75 (enticing males to engage in prostitution is a punishable offense); *United States v. Snyder*, 1 U.S.C.M.A. 423, 4 C.M.R. 15 (1952).

⁴²³ See *e.g.*, *United States v. Augenblick*, 393 U.S. 348, 352 (1969). See also discussion at notes 248–55, *supra*, and accompanying text.

⁴²⁴ MCM, 1969, para 153 b(2) (b).

⁴²⁵ See MCCORMICK, EVIDENCE §§ 52, 55 (1954j).

⁴²⁶ See *United States v. Augenblick*, 393 U.S. 348, 352–56 (1969). See also discussion at notes 248–55, *supra*, and accompanying text.

⁴²⁷ See notes 202, 240–42, *supra*.

⁴²⁸ See, *Relford v. Commandant*, 91 S. Ct. 649 (1971) and *Recent Development*, 52 MIL. L. REV. 169 (1971).

⁴²⁹ *Id.* at 652 n.8.

by the courts;⁴³⁰ moreover, the invalidity of a punitive article would destroy the court-martial's jurisdiction over that offense.⁴³¹ The standard of what constitutes impermissible vagueness should be determined by the federal court in accordance with established constitutional doctrine. But the application of that standard to Article 134 may well involve a question of law peculiar to military jurisprudence. That is, the long established understanding within the military as to meaning of the General Article and the inclusion in the Manual of detailed specifications of offenses under the Article,⁴³² may support the reasonableness of a military interpretation that the Article is constitutional.⁴³³ A federal court could afford relief to Baker, however, if the military authorities employed a standard of vagueness inconsistent with that articulated by the Supreme Court or if considerations of military necessity and experience could not reasonably be held to justify the degree of indefiniteness and broadness of Article 134. Admonishing soldiers to refrain from "disorders and neglects to the prejudice of good order and discipline . . . [and] all conduct of a nature to bring discredit upon the armed forces . . ." ⁴³⁴ may be appropriate in a code of honor or conduct but it leaves much to be desired as a criminal statutory prohibition.⁴³⁵ It is possible, however, that one or more of Baker's of-

⁴³⁰ *E.g.*, *Kennedy v. Commandant*, 377 F.2d 339, 342-43 (10th Cir. 1967); *Gallagher v. Quinn*, 363 F.2d 301 (D.C. Cir.), *cert. den'd*, 385 U.S. 881 (1966); *Hooper v. United States*, 326 F.2d 982 (Ct. Cl. 1964); *see Levy v. Corcoran*, 389 F.2d 929, 932-33 (D.C. Cir.) (dissenting opinion), *stay den'd*, 387 U.S. 915, *cert. den'd*, 389 U.S. 960 (1967); cf. authorities cited notes 292, 294-95, *supra*; *see also Hooper v. Hartman*, 163 F. Supp. 437, 441-42 (S.D. Cal. 1958), *aff'd*, 274 F.2d 429 (9th Cir. 1959).

⁴³¹ *See O'Callahan v. Parker*, 395 U.S. 258 (1969); notes 168, 176-190, *supra*, and accompanying text.

⁴³² MCM, 1969 para 213, appendix 6c, A6-20 to A6-26.

⁴³³ *See United States v. Frantz*, 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953); *United States v. Amick*, CM 418868 (Bd. Rev. 16 May 1969); Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A. J. 357 (1968); Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 *HAST. L.J.* 259 (1971) *cf.*, *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1965); *United States v. Giordano*, 15 U.S.C.M.A. 163, 168, 35 C.M.R. 135 (1964). *But see Levy v. Corcoran*, 389 F.2d 929, 932-33 (D.C. Cir.) (dissenting opin.), *stay den'd*, 387 U.S. 915, *cert. den'd*, 389 U.S. 960 (1967) (suggesting that the Manual specifications are illustrative of the Article's overbroad quality).

⁴³⁴ Art. 134, UCMJ.

⁴³⁵ *See O'Callahan v. Parker*, 395 U.S. 258, 265-66 (1969); *Levy v. Corcoran*, 389 F.2d 929, 932-33 (D.C. Cir.) (dissenting opin.), *stay den'd*, 387 U.S. 915, *cert. den'd*, 389 U.S. 960 (1967); Everett, *Article 134, Uniform Code of Military Justice - A Study in Vagueness*, 37 *N. CAR. L. REV.* 142 (1959) (suggesting that a limiting construction or amendment may be

fenses—the marihuana charges, for example—were so clearly within the proscribed conduct that he could be held to lack standing to attack the general vagueness and broadness of the

These questionable qualities of the General Article would bolster Baker's claim that the charge for uttering disloyal statements was an unconstitutional limitation on freedom of expression.⁴³⁷ This claimed violation of First Amendment rights, as well as that directed at the Article 92 charge for disobeying an order restricting military participation in demonstrations, would clearly be cognizable in a federal court on collateral review. That free expression is being infringed by prosecution for such offenses cannot be denied. Nevertheless, this may well be an area where the constitutional rights of the military may be subject to greater restriction because of military necessity or relevant differences between civilian and military life.⁴³⁸ The right to protest governmental policy is valued and essential in a democracy. But it may seriously interfere, particularly if carried out in a disruptive manner, with the maintenance of the discipline necessary in a force pledged to carry out the policies being attacked and the orders of the persons who formulate those policies. Moreover,

necessary to save the Article from constitutional attack). *See also* United States v. Barker, 26 C.M.R. 838 (Treas. Dept. G.C. 1958).

⁴³⁶ The marihuana offenses may also be covered by that part of Article 134 proscribing "crimes and offenses not capital. . . ." Assimilative crimes provisions of this nature are probably constitutional. *Compare* 18 U.S.C. § 13 (1964). *See* United States v. Sharpnack, 355 U.S. 286 (1958); *Grafton v. United States*, 206 U.S. 333, 348 (1907). The military recognizes limits on the scope of the article. *See* United States v. Sadinsky, 14 U.S.C.M.A. 563, 564-65, 34 C.M.R. 343 (1964); *United States v. Rio Poor*, 26 C.M.R. 830 (CGBR 1958).

⁴³⁷ *See* *Zwickler v. Koota*, 389 U.S. 241 (1967); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *cf.*, *United States v. Bradley*, 418 F.2d 688, 691 (4th Cir. 1969); *Levy v. Corcoran*, 389 F.2d 929, 932-33 (D.C. Cir.) (dissenting opin.) *stay den'd*, 387 U.S. 915, *cert. den'd* 389 U.S. 960 (1967). *See also* notes 334-39, *supra*, and accompanying text.

⁴³⁸ *See* *Levy v. Corcoran*, 389 F.2d 929, 931 (D.C. Cir.) (concurring opin.), *stay den'd*, 387 U.S. 915 *cert. den'd*, 389 U.S. 960 (1967); *Dash v. Commanding General, Fort Jackson, S.C.*, 307 F. Supp. 849, 852-57 (D. S.C. 1969); *United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1965); *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954); Wiener, note 433, *supra*, at 361-64; Brown, *Must the Soldier Be a Silent Member of Our Society?*, 43 MIL. L. REV. 71 (1969); Lewis, *Freedom of Speech—An Examination of the Civilian Test for Constitutionality and Its Application to the Military*, 41 MIL. L. REV. 55 (1968); Rothschild, *The Case for Discipline*, A.C.L.U. CIVIL LIBERTIES, Oct. 1968, p. 6; Jordan, *The Balancing Test*, A.C.L.U. CIVIL LIBERTIES, Oct. 1968, p. 7. *See also* Note, 36 G.W. L. REV. 435, 436-39 (1967); note, 76 YALE L.J. 380, 397-98 (1966).

the cherished safeguard of civilian (executive and legislative) control over the military may be compromised if members of the military publicly criticize their civilian leadership. On the other hand, the military should not be permitted to suppress or punish dissent on a pretext of military necessity when nothing more than embarrassing or irksome non-conforming behavior is involved.⁴³⁹ In any event, regardless of the ultimate resolution of the merits, it should be clear that the question appropriate for decision by the federal courts is not merely whether the military authorities have restricted freedom of expression but whether such restrictions are justified by the nature of military life. On this question, the military judgment should not be displaced unless it is unreasonable.

The final error, belatedly alleged by Baker, claims a deprivation of the right to counsel. The merits of the charges, that Private Ames should have been found available to serve as court-martial defense counsel and that the appointed defense counsel, Captain Novice, was incompetent, depend upon subsidiary questions of law and of fact. The standard of "availability" no doubt involves matters peculiar to military life and necessity. Therefore the military authorities interpretation should be accepted unless it is unreasonable.⁴⁴⁰ By contrast the standards of competency of counsel, as a constitutional matter, are not unique to a military setting and could be as well determined by a civil court.⁴⁴¹ De-

⁴³⁹ See *United States v. Roberts*, 18 U.S.C.M.A. 42, 39 C.M.R. 42 (1968); Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697 (1968); Sherman, *Military Injustice*, NEW REPUBLIC, March 9, 1968, p. 20, 21-22; Ennis, *The Clear & Present Danger Test*, A.C.L.U. CIVIL LIBERTIES, Oct. 1968, p. 7; Tigar, *The Case for Free Speech*, A.C.L.U. CIVIL LIBERTIES, Oct. 1968, p. 6; *Seaman Priest*, NEW REPUBLIC, Feb. 14, 1970, p. 12; *Soldiers on the War*, NEW REPUBLIC, Dec. 6, 1969, p. 5; *GI Communication*, *id.* at p. 29; *Cf.*, *Schacht v. United States*, 398 U.S. 58 (1970); *United States v. Bradley*, 418 F.2d 688 (4th Cir. 1969); *United States ex rel. Chaparro v. Resor*, 412 F.2d 443 (4th Cir. 1969); *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969).

⁴⁴⁰ *Cf.*, *Hiatt v. Brown*, 339 U.S. 103, 108-110 (1950). The determination cannot be arbitrary and the convening authority must have actually exercised his discretion. See *United States v. Cutting*, 14 U.S.C.M.A. 347, 34 C.M.R. 127 (1964); *cf.*, *United States v. Williams*, 18 U.S.C.M.A. 518, 40 C.M.R. 230 (1969).

⁴⁴¹ See *Application of Stapley*, 246 F. Supp. 316, 320-21 (D. Utah 1965); Notes, 2 CAL. WEST. L. REV. 121 (1966); 2 JOHN MAR. J. PRAC. & PROC. 326 (1969); 17 SYR. L. REV. 536 (1966); *cf.*, *Kennedy v. Commandant*, 377 F.2d 339, 342-43 (10th Cir. 1967); *Gibbs v. Blackwell*, 354 F.2d 469 (5th Cir. 1965); *Schilder v. Gusik*, 195 F.2d 657, 659-60 (6th Cir.) *cert. den'd*, 344 U.S. 844 (1952). See also *United States v. Shaffer*, 40 C.M.R. 794 (ABR 1969) rejecting a failure of a tactical decision as proof of inadequacy of counsel.

termining the factual situations to which these standards shall be applied would be subject, under the proposed criteria for collateral review, to the "full and fair consideration" formula as elaborated in *Townsend v. Sain*.⁴⁴² It should be noted that under this standard, not only must the means of determining the facts be full and fair but the facts found must be supported by the record as a whole. This does not, however, permit reweighing of the evidence, and inferences drawn from basic facts, especially in areas of military expertise, should be accepted unless unreasonable.⁴⁴³

Since there is almost no evidence concerning the factual circumstances of the alleged availability of Ames or the incompetency of Novice, and these claims were not presented to the military authorities, these authorities cannot be faulted under the proposed standard until they have been given an opportunity to provide a full and fair fact determination hearing. Accordingly, under the exhaustion of remedies doctrine, the claim should not be dismissed, since the asserted inadequacy of counsel itself should excuse a failure to raise the claim sooner,⁴⁴⁴ but the court should hold the matter in abeyance until Baker seeks collateral relief before the Court of Military Appeals.⁴⁴⁵ In the event that Court refuses to provide for a full and fair hearing on the claimed deprivation of counsel, or such a hearing fails to be full and fair in fact. Baker should be entitled to return to the federal court to have it take evidence and determine the merits of the claim.

Although the disposition of Baker's other claims have been treated for the sake of discussion as if all the military remedies in regard thereto had been exhausted, it should be recalled that such was not the fact. Rather, Baker failed to timely petition the Court of Military Appeals to review the action of the Board of Review and he made no attempt to petition the Judge Advocate General for a new trial or apply for relief to the Board for Correction of Military Records. The failure to pursue the first remedy should not defeat his otherwise judicially cognizable claims, under the doctrine of *Fay v. Noia*, unless he has intentionally and understandingly waived this review.⁴⁴⁶ That may in turn depend upon whether he was in fact represented by in-

⁴⁴² 372 U.S. 293 (1963).

⁴⁴³ See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); DAVIS, ADMINISTRATIVE LAW TEXT §§ 29.02-.03 (1959).

⁴⁴⁴ See note 414, *supra*.

⁴⁴⁵ See notes 360-64, 384, *supra*, and accompanying text.

⁴⁴⁶ See notes 396-405, *supra*, and accompanying text.

competent counsel, although it should be noted that the fact situation makes no complaint concerning the competency of appellate defense counsel. Since, however, Baker may still seek collateral relief from the Court of Military Appeals, the federal court should insist that he exhaust such remedy before his constitutional claims can be considered. It is also likely that petitions to the Judge Advocate General and the Army Board for Correction of Military Records will still be timely.⁴⁴⁷ The civil court may likewise require the exhaustion of those remedies. In making this determination regarding resort to the latter board, a court ought to consider the nature of the issues to be determined, whether resort to the corrections board would be useful or futile in regard to such issues, and the harm, if any, that would be caused by delaying the court determination pending such remedy's exhaustion. In this case, since it is evident that the court should stay its hand for other reasons, there would be little harm and there might be some benefit in requiring exhaustion of this military remedy along with the other available ones.

VII. CONCLUSION

Federal court confidence in the military justice system is probably more justified today than ever before in our history, but it is also under greater stress than ever before. The Court of Military Appeals has ably attempted to conform the actual administration of courts-martial proceedings to the paper rights afforded in the Uniform Code of Military Justice and the Constitution without materially sacrificing the legitimate needs of the military. The civilian-type who reluctantly dons a military uniform for a few years need not fear that he simultaneously sheds his basic rights as a citizen and human being. And, if perchance, a local commander or isolated court-martial oversteps the bounds and the error is not caught in the comprehensive military review system, the federal civil courts will be available, not to interfere with, but to assure the application of justice in the military.

⁴⁴⁷ See notes 357-59, 368, 388-92, *supra*, and accompanying text. An application to correct military records must be filed within three years of discovery of the alleged error, unless the board excuses a later filing in the interests of justice, 10 U.S.C. § 1552 (1964), and a petition for a new trial must be filed with the Judge Advocate General within two years of approval of the sentence by the convening authority, Art. 73, UCMJ.

RECENT TRENDS IN SEARCH AND SEIZURE*

By Captain David McNeill, Jr.**

Few topics have so divided the Supreme Court as the interpretation of the fourth amendment commands concerning search and seizure. The standards of "reasonableness" have vexed military authorities no less than their civilian counterparts. Focusing on the reasonable concept, the author reviews the significant recent developments in several search related areas, including vehicle searches, foreign searches, probable cause, and stop and frisk. Of particular interest to judge advocates is the discussion of the proposed change in Army Regulations to allow the military judge to act as a civilian magistrate in issuing search warrants upon probable cause shown.

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹

Interpretation of the fourth amendment has presented ever-recurring problems to the courts. In recent years the law of search and seizure has been in a state of constant flux. This is in part caused by new problems in the field of criminal justice and in part by the increasing number of searches and seizures made by law enforcement officers.

The basic thrust of the fourth amendment is that actions of government authorities that result in an intrusion upon the privacy of the citizen, must be based upon reasonable grounds and be carried out in a reasonable manner. The Supreme Court has consistently held that search and seizure issues are to be

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¹ U.S. CONST. amend. IV.

decided as the amendment itself requires: on the basis of the reasonableness.²

In understanding the reasonableness test, it must be realized that the paramount consideration under the fourth amendment is that the privacy and integrity of the citizen be protected to the maximum extent consistent with what is necessary to enforce the law. In applying this principle, one must remember that the fourth amendment was drawn with the purpose of prohibiting the abhorrent search and seizure practices used by the British before the Revolution. This thought is threaded throughout the decisions of the courts in this area.

Like their civilian counterparts the military courts have adopted the rule that search and seizure is a question of reason and not of technicality.³ Furthermore, the Court of Military Appeals has held that Supreme Court decisions in this area are binding upon the military.⁴

This article will discuss recent developments in several areas of search and seizure. It will examine these developments in light of the reasonableness test as that term is viewed by the federal and military courts. The article will be divided into a number of topical areas of search and seizure for easier analysis. However, these areas frequently overlap and difficulty may be encountered when attempting to determine which set of standards to apply to a given situation.

I. PROBABLE CAUSE

A. GENERAL

Probable cause to search exists when there is reason to believe that the objects sought are located in the place or on the person

² See, e.g., Frankfurter, J., in his dissent in *United States v. Rabinowitz*, 339 U.S. 56, 83 (1950).

³ *United States v. Decker*, 16 U.S.C.M.A. 397, 399, 37 C.M.R. 17, 19 (1966): "Search and seizure present 'recurring questions' to the courts. . . . This is so because the Fourth Amendment does not prohibit all searches and seizures, but only such as are 'unreasonable.' The constitutionality of a particular search depends 'upon the facts and circumstances—the total atmosphere of the case.'" See also *United States v. Weshenfelder*, 20 U.S.C.M.A. 416, 43 C.M.R. 256 (1971). In *United States v. Holler*, _____ C.M.R. _____ (ACMR 3 Nov. 1970), and *United States v. Davis* _____ C.M.R. _____ (ACMR 12 Nov. 1970), the court stated: "We deal with a 'practical, nontechnical conception.' *Beck v. Ohio*, 379 U.S. 89, 91 (1964). In our view it is the reasonableness of the officer's conduct not the label placed upon it by the officer or the court below which dictates the result. [Holler, at 5, and Davis, at 6, of slip opinions.]"

⁴ *United States v. Penn*, 18 U.S.C.M.A. 194, 39 C.M.R. 194 (1969); *United States v. Garlich*, 15 U.S.C.M.A. 362, 35 C.M.R. 334 (1965).

to be searched.⁵ The requirement of probable cause is essentially an attempt to balance the necessity for police investigation of crime and the right of the citizen to have his privacy uninterrupted. The Supreme Court expressed the philosophy of the probable cause requirement in *Brinegar v. United States*:⁶

These long prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

Clearly then, the officer does not have to prove his case beyond a reasonable doubt to establish probable cause. More than mere suspicion⁷ or good faith on his part, however, will be required.⁸ In determining whether probable cause exists in a given case, all of the circumstances must be considered.⁹

While the thrust of this discussion of probable cause is directed at obtaining a warrant, it must be remembered that the probable cause requirements apply to warrantless searches as well. For example, there is no warrant requirement for a search conducted incident to arrest or to prevent destruction of evidence. Yet before those searches may be conducted there must be probable cause for the arrest or probable cause to believe that the suspect has the evidence in question and is about to destroy it. Thus, deciding what is and what is not probable cause extends to many more areas than search warrant practice. This is extremely important because, though exceptions to the requirement of obtaining a warrant are numerous, stop and frisk is the only exception to the requirement that there be probable cause for the search.

⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION), para 152. The differing standard of probable cause to arrest is articulated in *Henry v. United States*, 361 U.S. 98, 102 (1959). This definition is frequently quoted in federal and military decisions. *See, e.g.*, *United States v. Elwood*, 19 U.S.C.M.A. 376, 41 C.M.R. 376, 377 (1970).

⁶ 338 U.S. 160, 176 (1949).

⁷ *Id.*

⁸ *Henry v. United States*, 361 U.S. 98 (1959).

⁹ *Brinegar v. United States*, 338 U.S. 160 (1949).

B. SEARCH WARRANTS

While there are situations which prevent the officer from obtaining a warrant before making an arrest or search, the Fourth Amendment requires that warrants be obtained if at all practicable. Federal as well as military courts recognize and strongly enforce this requirement. The courts have frequently stated that even though practical exceptions to the warrant requirement exist, searches made pursuant to a warrant are preferred. In a close case, a warrant search may be upheld whereas a non-warrant search under the same circumstances would not be.¹⁰ While warrant practice in the military and Federal systems differ¹¹ the requirements for probable cause and what must be shown are the same.¹²

The basic rules regarding the procurement of the warrant were laid down in *Aguilar v. Texas* and *Spinelli v. United States*. Recently the rules were re-examined in *United States v. Harris*.¹³ In *Aguilar*¹⁴ two city policemen applied for a warrant to search defendant's home based upon "reliable information from a credible person." They stated that this information caused them to believe that Aguilar had numerous narcotics and drugs in the home. The warrant was issued and upon its execution defendant was caught in the act of attempting to dispose of the contraband. The Court found that the affidavit in support of the warrant failed to set out any of the "underlying circumstances" necessary for an independent determination by the magistrate that the informant's conclusion concerning the location of the contraband was valid. Secondly, the Court held, the officers did not attempt to support their claim that the informant was credible or that

¹⁰ See, e.g., *Spinelli v. United States*, 393 U.S. 410 (1969); *United States v. Ventresca*, 380 U.S. 102 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Jones v. United States*, 362 U.S. 257 (1960); *United States v. Riga*, _____ C.M.R. _____ (AFCMR 30 Oct. 1970).

¹¹ In the Federal practice the request for a warrant must be in writing and supported by sworn affidavits. The warrant must also be in writing. FED. R. CRIM. PROC., 41 (1968). In the military a commander may receive evidence of probable cause orally and without placing the party under oath. His authority to search may also be oral. Such practice has been severely criticized by the United States Court of Military Appeals. *United States v. Penman*, 16 U.S.C.M.A. 67, 36 C.M.R. 223 (1966); *United States v. Davenport*, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963). In the Army, at least, serious consideration is being given to bringing warrant practice in line with that of the Federal courts. See II, *infra*.

¹² *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965). See also, *United States v. Riga*, _____ C.M.R. _____ (AFCMR 30 Oct. 1970), and cases cited therein.

¹³ 39 USLW 4835 (28 June, 1971).

¹⁴ *Aguilar v. Texas* 378 U.S. 108 (1964).

his information was reliable. The warrant thus failed to meet the requirement for an independent review of all the facts by the magistrate.

*Spinelli*¹⁵ involved an affidavit submitted by the FBI to obtain a warrant for the search of an apartment used by a bookmaker. In the affidavit the agents stated that they had maintained surveillance on the defendant for a period of five days in the month of August. On four of these days he had crossed the bridge joining East Saint Louis, Illinois and Saint Louis, Missouri. He was seen to park his car in a lot used by occupants of an apartment house and on one occasion was followed to an apartment in the building. That apartment had two phones listed under an alias. Finally, the agents stated that defendant was known to them and other law enforcement officers as a bookie and gambler and that a "confidential and reliable informant" had told them Spinelli was using the phones in the apartment for bookmaking purposes. Pursuant to a warrant issued on the basis of the affidavit, defendant's apartment was searched and incriminating evidence found. The Court held the magistrate lacked sufficient information to independently evaluate the reliability of the alleged informant. Accordingly, since the other information in the affidavit did not *per se* indicate criminal activity, the Court held there had been no showing of probable cause.

Some backing away from the *Aguilar* and *Spinelli* cases is found in *United States v. Harris* decided by the Supreme Court on June 28, 1971.¹⁶ There a law enforcement officer sought a warrant to look for evidence of Harris' violation of liquor regulations. The affidavit stated the officer's knowledge of Harris' reputation as a bootlegger and that illegal liquor apparatus had previously been found on Harris' property. The officer made reference to information received from an informant that he had on numerous occasions purchased illegal liquor from Harris at the place to be searched. The most recent instance had occurred within two weeks of the request for warrant. The officer's affidavit further stated that he found the informant to be a "prudent" person.

Chief Justice Burger, writing for a four man plurality of the Court, approved the affidavit despite the fact that no showing was made as to the prior reliability of the informant. The Chief Justice noted that the officer's knowledge of Harris' criminal reputation and the informant's admission of personally making

¹⁵ *Spinelli v. United States*, 393 US. 410 (1969).

¹⁶ 39 USLW 4835.

illegal liquor purchases bolstered the reliability of the affidavit. Chief Justice Burger's opinion expressly did not overrule either *Aguilar* or *Spinelli*. Justices Black and Blackmun, joining in the result, urged an overruling of one or both cases. Similarly, the four dissenters suggested that the Burger opinion substantially undercut prior precedent.

These cases delineate the general guidelines for demonstrating probable cause for searches. The authorizing officer, be he magistrate or commander, must be able to make a wholly independent judgment as to the existence of probable cause based upon his own knowledge and the information provided by the officer requesting authority to search. He may not merely rely upon the conclusions of the officer.¹⁷ As expressed by one Court of Military Review :

He must be apprised of and act upon a sufficiency of information which would lead a prudent person to conclude that contraband or evidence of a crime is at that time in possession of the individual or is on the premises to be searched."

This rule places a requirement for particularity in the affidavit. The officer may not merely rely upon what he knows or believes; he must state the basis for that belief and what results he expects to obtain. In *United States v. Hartsook*¹⁹ the Court of Military Appeals stated that the requirement of particularity is distinct from that of probable cause. While the facts in search cases generally satisfy both requirements, the government must nonetheless demonstrate both particularity and probable cause before the search and seizure will be accepted by the court. Thus, CID agents seeking evidence that accused had altered a bingo card to obtain a \$1,000 prize did not meet the particularity requirement when they asked permission to search accused's belongings to "see what we could determine." Probable cause was present in the form of accused having been identified as the person submitting the altered card; but a clear delineation of what the agents sought in their search was lacking.²⁰ Similarly, where

¹⁷ *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Giordenello v. United States*, 357 U.S. 480 (1958); *United States v. Dollison*, 15 U.S.C.M.A. 595, 36 C.M.R. 93 (1966); *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965); *United States v. Tuckman*, 39 C.M.R. 873 (CGCMR 1968).

¹⁸ *United States v. Riga*, _____ C.M.R. _____ (AFCMR 30 Oct 1970), at pp 5 & 6 of slip opinion.

¹⁹ *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

²⁰ *Id.*

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agents searching for evidence in a murder case stated they were looking for "any type of weapon, sharp instrument, particularly a knife," a bloody towel found in the course of the search was ruled inadmissible. This was so even though the agents had probable cause to search for this item. Their failure to list it for the commander violated the rule of particularity.²¹

Minor or insubstantial inaccuracies in the affidavit will not, however, be fatal. Thus, an inaccuracy in the name of an accused's coactor²² or statements of "only peripheral relevancy to the showing of probable cause" will not cause suppression of evidence seized as the result of a warrant issued upon an otherwise accurate and proper affidavit.²³

In light of the above requirements, what may be used to support a request for a search warrant? It is clear that hearsay information may be used in the affidavit. However, the affidavit must contain some substantial basis for crediting the veracity of the hearsay declarant.²⁴ If the hearsay relied upon is information received from other police officers, it has a greater degree

"United States *v.* Schultz, 19 U.S.C.M.A. 311, 41 C.M.R. 311 (1970). The court found that

[T]he descriptive phrase clearly limits and gives meaning to the preceding portion of the quoted sentence. A request had been made and permission granted on the basis of a search for the murder weapon. Seizure of the towel from the wall locker thus went beyond this well-defined limit. *Id.* at 314, 41 C.M.R. at 314.

This ruling poses a problem for those acting on a search warrant. Can evidence not listed in the request or warrant, but which is found in the course of the search, be seized? While the courts are careful to prohibit general searches, and the rule that the officer executing the warrant is not to be left to his own discretion (*Marron v. United States*, 275 U.S. 192 (1927)) is still valid, an exception allowing seizure of evidence found in the course of the search is finding some support. *E.g.* *United States v. One 1965 Buick*, 392 F.2d (C.A. 6th Cir. 1968); *Johnson v. United States*, 293 F.2d 539 (D.C. Cir. 1961); *see generally*, *Coolidge v. New Hampshire*, 39 USLW 4795 (21 June 1971). Dicta in *Coolidge* suggests that the towel in *Schultz* would be admissible. Whether or not the exception applies in the military is not clear, however, there is some authority to indicate that despite *Schultz* it may. *See*, *United States v. Goldman*, 18 U.S.C.M.A. 389 40 C.M.R. 101 (1969); *United States v. Simpson*, 15 U.S.C.M.A. 18, 34 C.M.R. 464 (1964).

"United States *v.* Riga, _____ C.M.R. _____ (AFCMR 30 Oct. 1970).

²³ *Rugendorf v. United States*, 376 U.S. 528, 532 (1964).

"*Jones v. United States*, 362 U.S. 257 (1960); *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964); *United States v. McFarland*, 19 U.S.C.M.A. 356, 41 C.M.R. 356 (1970); *United States v. Penman*, 16 U.S.C.M.A. 67, 36 C.M.R. 223 (1966); *United States v. Riga*, _____ C.M.R. _____ (AFCMR 30 Oct. 1970); *United States v. Armstrong*, _____ C.M.R. _____ (ACMR 1970). This is because evidence used to establish probable cause need not be admissible in court. *Brinegar v. United States*, 338 U.S. 160 (1949).

of reliability. This is especially so where the informing officer is engaged in a common investigation with the affiant.²⁵

Greater problems are involved in dealing with the typical "underworld figure" informant. Often little in his background suggests a propensity for telling the truth. Yet under certain circumstances hearsay statements from such individuals can be taken as truthful for purposes of issuing a warrant.

A showing that an informant incriminated himself in giving the facts used to show probable cause renders his statements more credible." Where the informer was a coactor with the accused or his statement is supported by the statement of another coactor, their information may be sufficient to establish probable cause without other verification.²⁷ More often, however, the informant is seeking to avoid criminal sanctions by cooperating with the police, who are not anxious to reveal his identity. The reliability of such an informant may be established over a period of time. Thus, where the informant has given accurate information in past cases, he attains a certain amount of inherent reliability." Based on this prior accuracy, a magistrate is asked to assume the truth of the informant's current statements. As noted *Harris* leaves uncertain the extent to which a criminal informant may be credited where he has no past reputation for providing accurate information.

Once the informant's reliability is established, the nature of his information must be assessed. The reliable informant's conclusion cannot be the basis for a search warrant unless his facts offer the magistrate a basis upon which to make an independent determination that the informant's conclusion is probably correct.

²⁵ *United States v. Ventresca*, 380 U.S. 102 (1965); *Rugendorf v. United States*, 376 U.S. 528 (1964); *United States v. Herberg*, 15 U.S.C.M.A. 247, 35 C.M.R. 219 (ACMR 1965); *United States v. Greenup*, 40 C.M.R. 668 (ACMR 1969). See generally, *Whiteley v. Warden*, 39 USLW 4339 (U.S. 29 March 1971).

²⁶ *United States v. Harris*, 39 USLW 4835 (28 June 1971); *United States v. McFarland*, 19 U.S.C.M.A. 366, 41 C.M.R. 356 (1970); *United States v. Holler*, _____ C.M.R. _____ (ACMR 3 Nov. 1970):

It is true that the information was uncorroborated and unverified and that there was no reason based upon past dealings to clothe T with any mantle of special reliability. . . . Here, even though the officer was not advised as to how T knew there was a forbidden substance in his car and there was no corroboration of his information, we believe that the incriminatory nature of the declaration against interest is sufficient to justify the search. [pp 6 & 7, slip opinion].

²⁷ *United States v. Clifford*, 19 U.S.C.M.A. 391, 41 C.M.R. 391 (1970); *United States v. Goldman*, 18 U.S.C.M.A. 389, 40 C.M.R. 101 (1969);

²⁸ *E.g. McCray v. Illinois*, 386 U.S. 300 (1967) (informant had worked for one officer 2 years and assisted in securing 20-25 good arrests; he worked for the second officer one year and assisted him in 15-16 good arrests).

Where the informant makes predictions concerning expected activity of the suspect, the fruition of those predictions will provide the supporting evidence for the conclusion, establishing probable cause.²⁹ Similarly, observation of the suspect by police after his identification by an informant will provide probable cause if the suspect's activities support the information relayed by the informer.³⁰ The informant's statements may be verified by checking a part of his information to insure his reliability and accuracy.³¹

The courts have been forced to formulate and apply these rules on informants because frequently the authorities feel they cannot reveal the identity of the informant. This reluctance is created by a number of factors: possible elimination of a source of further information; jeopardy to the life of the informant or his family; and possible prejudice to the investigation of other cases still in progress.

The courts have long recognized these facts and have sustained the so-called "informers privilege" for many years.³² Nonetheless, defendants almost always request the name of the informant so that they may contest the search warrant or raise other defenses such as entrapment. The question of the informer's privilege is generally raised at either a hearing on a motion to suppress evidence or at trial on the merits. The rules applying to these two situations are slightly different. In the case of a suppression hearing, the defense has a harder time obtaining the identity of the informant where that information goes only to the legality of the search. The reasoning behind this general rule has been stated thus:

"Draper v. United States, 358 U.S. 307 (1959) (defendant was on train, wore certain clothes, carried bag and walked distinctly, all as predicted by informer); United States v. McFarland, 19 U.S.C.M.A. 356, 41 C.M.R. 356 (1970) (accused appeared at air passenger terminal with fellow suspect and attempted to obtain seat on flight to Hawaii, all as predicted by informer).

"McCray v. Illinois, 386 U.S. 300 (1967) (officers observed defendant at location indicated by informant); United States v. Ventresca, 380 U.S. 102 (1965) (lengthy observation of defendant's activities).

"United States v. Bunch, 19 U.S.C.M.A. 309, 41 C.M.R. 309 (1970) (CID agent verified location of suspects, description of auto used for crime, and location of car. This lent credibility to other information given by informer); United States v. Unverzagt, 424 F.2d 396 (1970) (unknown person who refused to identify himself informed postal inspectors defendant was selling money orders in bar. They verified this through interviews with others).

²⁹ McCray v. Illinois, 386 U.S. 300 (1967); Aguilar v. Texas, 378 U.S. 108 (1964); Rugendorf v. United States, 376 U.S. 528 (1964); Scher v. United States, 305 U.S. 251 (1938); *In re* Quarles and Butler, 158 U.S. 532 (1895); Vogel v. Guaz, 110 U.S. 311 (1884).

³¹ McCray v. Illinois, 386 U.S. 300 (1967).

We must remember also that we are not dealing with the trial of the criminal charge itself. There the need for a truthful verdict outweighs society's need for the informer privilege. Here, however, the accused seeks to avoid the truth. The very purpose of a motion to suppress is to escape the inculpatory thrust of evidence in hand, not because its probative force is diluted in the least by the mode of seizure, but rather as a sanction to compel enforcement officers to respect the constitutional security of all of us under the Fourth Amendment. . . . If the motion to suppress is denied, defendant will still be judged upon the untarnished truth."

At a trial on the merits the informer's privilege rule still obtains unless it can be shown that his identity is essential to the defense. The Supreme Court has held that where:

the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.³⁵

Each case must, however, be decided individually.³⁶ Nonetheless, it appears that if the defense suspects or knows the identity of the informant no prejudicial error is committed by refusing to order revelation of his identity even though he is essential to the defense theory of the case.³⁷ The basis for this holding is that if the accused knows or suspects the identity of the putative informant, he may subpoena him and determine his part in the case. Even where the identity of the informant cannot be discovered through a proper motion, the defense is not always without recourse.³⁸

³⁵ *Id.* at 307, quoting from *State v. Burnett*, 42 N.J. 377, 201 A.2d 39, 43-45.

³⁶ *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). *See also*, *McCray v. Illinois*, 386 U.S. 300 (1967).

³⁷ *McCray v. Illinois*, 386 U.S. 300 (1967).

³⁸ *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968).

³⁹ In one case the defense was able to successfully defeat the government's case by showing that the police had improperly used the informer privilege to obtain warrants. In this instance a study of search warrants issued in a large Eastern jurisdiction was conducted. The practice in that jurisdiction was to use police undercover agents and to identify them for the purposes of showing probable cause by shield or badge number. (The names of officers and their shield numbers could not be obtained from the police and motions for the identity of the agents had been denied.) The defense study showed that over a six-month period the police would use the same shield number to indicate the source of information for all narcotics warrants based upon information obtained from undercover agents in a given month. Each month a new number would be used in a sort of "informer of the month plan." By showing this practice to the court, the defense was able to successfully defeat a number of warrants issued on the basis of information supplied by undercover agents since it was impossible for the same agent to have obtained all of the evidence used to request the search warrants issued

In the last few years, use of dangerous drugs and narcotics has become widespread. Since a number of these substances are smoked, the agent's nose is rapidly becoming a means of establishing probable cause. Thus, where an officer experienced in narcotics cases states that he smelled the odor of burning marijuana, or other illegal substances, it may be considered a strong factor in establishing probable cause for a **search**.³⁹

The fact that the same method of operation, or *modus operandi*, was used in several crimes may provide probable cause to believe that an accused committed those crimes and a search of his belongings would produce incriminating **evidence**.⁴⁰ In fact, the authorizing officer may rely upon the opinion of a police officer that the method of operation in the cases was **similar**.⁴¹

A showing that accused was in possession of contraband in one location will not of itself provide probable cause to believe he possesses it elsewhere. This is a frequent problem in the military since information is often received by the military police that civilian police have arrested a soldier for possession of contraband. Searches based solely upon this information have universally been declared **invalid**.⁴² The same principle applies to roommates in a barracks. Possession by one, without more, will not furnish probable cause for a search of the other's **property**.⁴³

The evidence establishing probable cause must exist at the time the warrant is requested. That is, the information must be current and show that the suspect is probably in possession of the evidence sought at the time the warrant is **requested**.⁴⁴

during the month in question. Address by Joseph S. Oteri, Esquire, at American Law Institute Course of Study on Defense of Drug Cases, New York City, 13 Nov. 1970.

³⁹United States *v.* Ventresca, 380 U.S. 102 (1965) (fermenting mash); Johnson *v.* United States, 333 U.S. 10 (1948) (burning opium); United States *v.* Davis, _____ C.M.R. _____ (ACMR 12 Nov. 1970) (burning marihuana).

⁴⁰United States *v.* Martinez, 16 U.S.C.M.A. 40, 36 C.M.R. 196 (1966) (accused caught red handed in larceny. His MO matched that used in three other larcenies; *held* sufficient evidence for probable cause).

⁴¹*Id.*

⁴²United States *v.* Moore, 19 U.S.C.M.A. 586, 42 C.M.R. 188 (1970); United States *v.* Elwood, 19 U.S.C.M.A. 376, 41 C.M.R. 376 (1970); United States *v.* Clifford, 19 U.S.C.M.A. 391, 41 C.M.R. 391 (1970); United States *v.* Penman, 16 U.S.C.M.A. 67, 36 C.M.R. 223 (1966); United States *v.* Ferrel, 41 C.M.R. 452 (ACMR 1969).

⁴³United States *v.* Aloyian, 16 U.S.C.M.A. 333, 36 C.M.R. 489 (1966).

⁴⁴United States *v.* Crow, 19 U.S.C.M.A. 384, 41 C.M.R. 383 (1970); United States *v.* Britt, 17 U.S.C.M.A. 617, 38 C.M.R. 415 (1968); United States *v.* Mitchell, 425 F.2d 1353 (8th Cir. 1970) (opinion by Blackmun, J.); United States *v.* Carver, 37 C.M.R. 610 (ACMR 1967).

Evidence that accused continually used marijuana over a period of months will not constitute probable cause where the last reported date of use was fifty days prior to the request for authorization to search.⁴⁵

C. CONCLUSION

Before any search warrant may be obtained, the requesting officer must show that he has probable cause to believe that the items he seeks are in the place or on the person to be searched. While the military and civilian practices differ procedurally, the substantive rules for establishing probable cause are the same. The information provided the authorizing officer must be sufficient in detail and particularity to give him a basis for independent determination that probable cause exists. The information used may come from a number of sources, but the underlying basis for any conclusions reached by the person seeking authority to search must be shown.

The cases indicate the importance of the applicant for the warrant being able to show he has probable cause, not by his own yardstick, but by that established in the decisional law. Generally, these requirements are not overly strict and follow reasonable and nontechnical lines.

11. SHOULD MILITARY JUDGES AUTHORIZE SEARCHES IN THE MILITARY?

A. NEW REGULATORY PROVISIONS

The Department of the Army is presently studying a revision of Army procedure with respect to authorization of searches. Under present law, commanding officers⁴⁶ have the power to authorize searches of military property, personnel, or property under military control." The intent of the recommended change

⁴⁵ United States v. Carver, 37 C.M.R. 610 (ACMR 1967); United States v. Britt, 17 U.S.C.M.A. 617, 38 C.M.R. 415 (1968).

⁴⁶ Commanders of company size or larger units.

⁴⁷ Para 152, MANUAL FOR COURTS-MARTIAL, 1969 (REV. ED.) [hereafter cited as MCM]; para 2-1, Army Reg No. 190-22, (12 Jun. 1970). United States v. McFarland, 19 U.S.C.M.A. 356, 41 C.M.R. 356 (1970). The MCM provision is as follows:

A search of any of the following three kinds which has been authorized upon probable cause by a commanding officer, including an officer in charge, having control over the place where the property or person searched is situated or found or, if that place is not under military control, having control over persons subject to military law or the law of war in that place:

(1) A search of property owned, used, or occupied by, or in the possession of, a person subject to military law or the law of war, the property being situated in a military installation, encampment, or vessel or some other place under military control or situated in occupied territory or a foreign country.

is to place the military judge in a position similar to that of the civilian magistrate who issues search warrants upon a proper showing of probable cause.

The proposal⁴⁸ first states that military judges designated by the Judge Advocate General of the Army or his designee may, upon a proper showing, issue search warrants with respect to property, persons, or military property in their judicial circuits.⁴⁹ The showing of probable cause must be by affidavit and the warrant must meet the usual requirements of particularity.⁵⁰ The proposal specifically states what property and persons are subject to searches authorized by military judges.⁵¹ There is also a requirement that the persons executing the warrant notify the commanding officer of the person to be searched, unless the military judge specifically finds that to do so would "impede the orderly execution of the warrant."⁵² The warrant is to be executed either by a military policeman or an investigator belonging to the Criminal Investigation Division.⁵³ The warrant is good for five days.⁵⁴ Any property taken must be inventoried and receipted.⁵⁵ Finally, the warrant and any inventory will be returned after execution to the military judge who is responsible for maintaining these records.⁵⁶

B. PRESENT PRACTICE AND PROBLEMS

The present practice of using commanders to authorize searches creates a number of problems for both the commander and those attempting to enforce the law. First, from the point of view of the commander, there is the question of jurisdiction to authorize the search. He must have control over the place or person to

(2) A search of the person of anyone subject to military law or the law of war who is found in any such place, territory, or country.

(3) A search of military property of the United States, or of property of nonappropriated fund activities of an armed force of the United States.

⁴⁸ Hereafter, Chapter 14, Change 8, AR 27-10, 7, Sep. 1971 will be referred to as Chapter 14. While this article was being set in type the proposal was promulgated as Chapter 14, Ch. 8, AR 27-10, 7 Sep. 1971.

⁴⁹ Para 14-2, chapter 14.

⁵⁰ Para 14-3a, 14-4, and 14-5, chapter 14. As to the requirements of particularity see I, *supra*.

⁵¹ Para 14-3b, chapter 14. The language used in paragraph 14-3b is the same as that contained in the numbered subparagraphs of paragraph 152, MCM. See *supra*, note 47.

⁵² Para 14-3c, chapter 14.

⁵³ Para 14-5, chapter 14.

⁵⁴ Para 14-6, chapter 14.

⁵⁵ *Id.*

⁵⁶ Para 14-8, chapter 14.

be searched.⁵⁷ In some situations it is not immediately clear to the commander whether a certain area is subject to his jurisdiction or whether the authority to search must come from a superior commander.

The commander may, of course, delegate his authority to search.⁵⁸ However, even where there is no delegation, the next person in the unit's chain of command may act if the commander is absent.⁵⁹ The commander, however, must be actually absent and not temporarily unavailable or in a place where it is inconvenient to reach him.⁶⁰

Second, commanders are themselves not infrequently investigating the alleged crime at the same time they authorize the search. If, in the course of the investigation, a commander decides that a search is in order, he may, under present rules, determine whether he has probable cause to search. If he believes he does, he may then search without obtaining authority from anyone else. This immediately raises the question of whether the commander is functioning as a magistrate or as a policeman. Even though commanders may act in good faith in conducting such searches, the United States Supreme Court has condemned similar practices by investigators in civilian life. There are a multitude of cases in which the Court has noted that the Fourth Amendment requires the independent judgment of a qualified person before an investigator may act to search a person or his property.⁶¹ These holdings would seem to cut to the heart of the present practice of commanders authorizing their own searches.⁶²

The Court has held that when a search is based upon the judgment of a magistrate who found probable cause, the reviewing courts will accept evidence of "less judicially competent or

⁵⁷ Para 152, MCM; *United States v. Crawford*, 41 C.M.R. 649 (ACMR 1969).

⁵⁸ Para 152, MCM.

⁵⁹ Para 3-4, Army Reg. No. 600-20 (28 Apr. 1971).

⁶⁰ *United States v. Gionet*, 41 C.M.R. 519 (ACMR 1969) (company executive officer authorized search where commander was at a meeting 100 yards away; **held**: authorization invalid since commander had not delegated authority and commander could easily have been reached). *See also* *United States v. Crawford*, 41 C.M.R. 649 (ACMR 1969).

⁶¹ *See* *Coolidge v. New Hampshire*, 39 USLW 4795 (U.S., 21 Jun. 1971); *Sibron v. New York*, 392 U.S. 40 (1968); *Johnson v. United States*, 333 U.S. 10 (1948); and *United States v. Lefkowitz*, 285 U.S. 452 (1932).

⁶² The court's holding in *Coolidge v. New Hampshire*, 39 USLW 4795 (U.S., 21 Jun. 1971) that a state law enforcement official was disqualified from issuing a warrant in a case that he was investigating leaves military search practice on shaky constitutional grounds.

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persuasive character” than they will require where an investigator proceeds without a warrant.⁶³ It can thus be seen that where a commander acts on his own to conduct a search, his actions will be closely scrutinized at trial.

Even where the commander does not search on his own, but acts instead as the independent magistrate authorizing a search at the request of the police, a number of major legal problems arise. The commander with no legal training or experience is held to the same rules as the civilian magistrate who is either a lawyer or a layman with experience in the determination of probable cause.⁶⁴ As a practical matter this places the commander in an impossible situation. As a non-lawyer he cannot reasonably be expected to know or understand the legal principles involved in a determination of probable cause. Two recent cases demonstrate the unfortunate results that obtain by placing laymen in the position of magistrates. In the first,⁶⁵ the CID had obtained information from an officer that he had seen the accused, another officer, in possession of and using hashish and opium. The court found that at this point there was probable cause for a search. The information was relayed to the Provost Marshal who called the Chief of Staff⁶⁶ to obtain authority to search the accused’s quarters. The Chief of Staff, in giving the authorization, relied solely upon his confidence in the ability of the Provost Marshal and his expectation that the Provost Marshal would verify all of the facts before asking permission to search. The Chief of Staff was not informed of the source of the information or why it should be considered reliable. In short, the authority was given upon the conclusory statements of the Provost Marshal. In reversing, the court held that the requirements for an independent determination of probable cause had not been met.

In another case⁶⁷ the CID received information from the civilian police that the accused had been arrested by them on suspicion of possession of marijuana. This information was conveyed to the accused’s commander along with a request for authority to search accused’s on-post belongings. The authority

⁶³ *Aguilar v. Texas*, 378 U.S. 108 (1964).

⁶⁴ *United States v. Armstrong*, _____ C.M.R. _____ (ACMR 5 Aug. 1970); *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965).

⁶⁵ *United States v. Armstrong*, _____ C.M.R. _____ (ACMR 5 Aug. 1970).

⁶⁶ The Chief of Staff had been properly delegated authority to authorize searches.

⁶⁷ *United States v. Johnston*, _____ C.M.R. _____ (ACMR 5 Jul. 1969).

was granted and the search revealed marijuana. At the trial, the commanding officer testified that he assumed without inquiring that the CID's information was correct. Based upon this he believed that the accused would have marijuana in his on-post possessions. The Court of Military Review found that there was no probable cause in the first place and that the search was invalid.

In the first case, had the request for authority to search been directed to a military judge he would have known and understood the requirements for probable cause. By asking the proper questions he would have been able to issue a search warrant that would have been sustained by the court. In the second case, there was no probable cause, and accordingly, no warrant should have been issued. Had the facts been presented to a military judge, he would have recognized this and denied the request for permission to search, thus saving the accused the trauma of a trial and conviction and the government the expense of a trial and litigation of the issues on appeal. Possibly the denial of a warrant would have caused the Military Police to obtain more facts thus saving the case.

There are other reasons for giving military judges the power to authorize searches. Congress, in amending the *Uniform Code of Military Justice* in 1968, "sought to create the military judge in the likeness of the United States District Judge."⁶⁸ Empowering military judges to issue warrants would make them more akin to district court judges.⁶⁹ Use of military judges in this function will also standardize procedures used in obtaining warrants and help ensure searches based upon probable cause. Furthermore, the use of written affidavits and warrants will eliminate the difficulties presently encountered by the use of oral requests and authorizations.⁷⁰

C. POTENTIAL PROBLEMS WITH MILITARY JUDGE ISSUED WARRANTS

As presently drawn, the proposed chapter 14 does not specifically prohibit the authorization of searches by commanders.;

⁶⁸ *United States v. Holler*, _____ C.M.R. _____ (ACMR 3 Nov. 1970).

⁶⁹ See Rule 41 (a) FED. R. CRIM. PROC.

⁷⁰ See note 11, *supra*.

⁷¹ In fact chapter 14 is not intended to replace the commander as an authorizing officer. Rather it is offered as another method of obtaining authority to search. Address by Major General Lawrence Fuller, The Judge Advocate General's School, 29 Jan. 1971.

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sired effect of this provision is to be achieved, it is essential that only military judges have the power to issue search warrants. The necessity of this was recognized by the Supreme Court when it stated that the reasons for the rule that only magistrates can authorize searches

. . . go to the foundation of the Fourth Amendment. A contrary rule "that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant **will** justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson v. United States*, 333 U.S. 10, 14 Under such a rule "resort to [warrants] would ultimately be discouraged." *Jones v. United States*, 362 U.S. 257, 270.⁷²

Even though, for the purpose of authorizing searches, commanders are magistrates, the same rationale applies to them.

Certainly, where commanders retain the power to authorize searches, they would see no reason to seek authority from someone else, no matter what his qualifications. By the same token, the military police would attempt to obtain permission to search from whomever was most accessible. Since most searches are conducted in unit areas, it is clear that the commander would be more accessible. Furthermore, there is no affidavit requirement nor any requirement for a written warrant if the search is authorized by a commander. The military police, not unreasonably, would go to the commander rather than expend the time and work necessary to prepare affidavits and have the warrant issued by a military judge. Finally, if the military police or a commander are disappointed by the refusal of a military judge to issue a warrant, chances are they will not hurry back to him the next time if they have an alternative. Thus, if military judges are to be given the power to issue search warrants and if the goals for giving them this power are to be realized, it must be an all or nothing proposition. It is imperative, then, that the proposal include a provision that subject to certain limitations discussed below, only military judges may authorize searches of military personnel or property.

Some Army units are isolated and do not have the services of a military judge readily available. This would seem to militate against the proposition that only military judges be empowered to authorize searches. The problem, however, can be met while at the same time achieving the goal of independent judicial review of requests for authorization to search. This is accom-

⁷² *Aguilar v. Texas*, 378 U.S. 108, 111 (1964).

plished by including in chapter 14 a provision allowing issuance of search warrants by other than permanent military judges where such judges are not readily accessible. The following persons could be used in their stead:

- a. A designated part time military judge;
- b. A senior judge advocate officer experienced in military justice matters ;
- c. Where only one judge advocate officer is available, then that officer ;⁷³
- d. Finally, in the rare instance that none of the above officers are available, then the commander.

Whether any of these alternate choices is necessary should be determined by The Judge Advocate General or his designee.

Almost certainly, this proposal will not be popular with commanders. Nonetheless, the attitude of the Supreme Court is clear, and the necessity for professional and informed decisions in this important area of the law dictates such a rule.

Another problem that is likely to appear if military judges begin authorizing searches is whether in issuing a search warrant they will bar themselves from sitting on the case at trial. The question is critical for there are many places in which there are not sufficient military judges to afford the luxury of one to authorize the search and another to hear the case. The *Manual for Courts-Martial, 1969 (Rev.ed.)*, provides that a military judge is subject to challenge for cause if he acted as an investigating officer in the same case." An investigating officer is defined as a person who investigated the charges under the provisions of Article 32,⁷⁴ or a person who has conducted a personal investigation of the case.⁷⁵ A military judge who only hears the evidence necessary to show probable cause for a search is not likely to become an investigating officer within the meaning of the above provision. His "investigation" in a probable cause hearing will be limited to those facts necessary to establish that a warrant should issue. Furthermore, there is no reason to believe that a military judge will not be able to maintain an objective view of a case even where he has issued a warrant. First, the integrity of the judiciary prohibits anything less. Second, the military judge will

⁷³ Naturally, this officer and the one mentioned in paragraph b would not be able to act in the event of a conflict of interest. In such a situation they would have to declare themselves unable to act and resort would be had to the commander as recommended in paragraph d.

⁷⁴ Para 62f(5), MCM.

⁷⁵ Art. 32, UNIFORM CODE OF MILITARY JUSTICE; para 34, MCM.

⁷⁶ Para 64, MCM.

realize that a probable cause hearing is *ex parte*. Therefore when the case comes to trial he will understand the nature of the challenge to his authorization and in the light of the adversary proceeding he will realize he should get the complete view of the facts. If he finds that the information he received in the probable cause hearing was invalid," he should have no hesitation in ruling that there was no probable cause. Finally, courts themselves are not bound by their decisions in other areas where it is clear that they acted erroneously. In such cases they review their own determinations. In substantiation of this point, one need only look at the number of times courts grant rehearings and reverse previous rulings.⁷⁸

Where a military judge is sitting in a case in which he issued a search warrant, he should state for the record that he did so⁷⁹ and allow any *voir dire* by the defense. This should clarify whether or not he will be able to sit on the case impartially. If a military judge were to improperly deny a challenge for cause, his action would be subject to review by appropriate authority.

The last problem to determine in this area is how military judges may be made the sole authority for the issuance of search warrants in the Army. Chapter 14 is based upon the *Manual for Courts-Martial* provisions that "searches" conducted in accordance with the authority granted by a lawful search warrant⁸⁰ are lawful.⁸¹ There is another provision in the *Manual* which

⁷⁸ For example, that he was misled by evidence presented him, or that he was not made aware of facts indicating lack of probable cause.

⁷⁹ *E.g.*, *Henry v. Hodges*, 171 F.2d 401 (2d Cir. 1948), *Cert. denied*, 336 U.S. 968 (1949) :

There is no inherent reason to deny power to a judicial officer to review his own judgments, even though they be final and decide the very merits of the cause: at common law this was permissible. True, it has long been the custom to forbid it by statute and there are good grounds for so doing: but it still persists in the practice of bringing on a motion for a new trial for errors of law before the judge who made the original decision. Rightly or wrongly, judges are credited pro tanto with enough detachment to be able to reexamine impartially what they have done; at least when, as here, the final disposition will in the end be determined by others. [at 402]

It is worthy of note that in *Henry* the court held that where there is no evidence showing unfairness or partiality, the equivalent of an article 32 investigating officer (art. 32, UCMJ, 10 U.S.C. § 832) under article 70 of the Articles of War could review his own report of investigation made before being appointed to investigate under article 70. *See also*, *Priest v. Koch*, 19 U.S.C.M.A. 293, 41 C.M.R. 293 (1969) :

"Judicial authorities are not disqualified from reconsidering a question of law previously presented to them." 19 U.S.C.M.A. 293, 297, 41 C.M.R. 293, 297 (1969).

⁸⁰ *See* MILITARY JUDGES' GUIDE, para 9-2, DEPARTMENT OF THE ARMY PAM 27-9, May 1969.

⁸¹ Para 152, MCM.

"Address by Major General Lawrence J. Fuller, USA, The Judge Advocate General's School, 29 Jan. 1971.

further supports the use of the military judge authorized search warrants. It states that

[t]he examples of lawful searches set forth above are not intended to indicate a limitation upon the legality of searches otherwise reasonable under the circumstances.⁸²

In view of the pronouncements of the Supreme Court and the problems attendant with laymen issuing search warrants, what could be more reasonable, from the judiciary's point of view, than a directive by the Secretary of the Army⁸³ requiring all search warrants to be issued by military judges?

111. SEARCHES INCIDENT TO ARREST

In 1969 the United States Supreme Court radically altered the law of searches incident to arrest. The Court held in *Chimel v. California*⁸⁴ that upon the arrest of a suspect, it is reasonable for a policeman to search the arrestee for weapons, including the areas within his reach. The Court then stated:

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well recognized exceptions, may be made only under the authority of a search warrant. The “adherence to judicial process” mandated by the Fourth Amendment requires no less.”

Prior to the decision in *Chimel* it had been common practice for arresting officers to search not only the person of the arrestee, but also the place where he was arrested.⁸⁵ *Chimel* now limits such searches to the person and the area within his immediate control. Even other parts of the same room are out of bounds unless the officers can show some other reason for extending the search.⁸⁷ The *Chimel* rule applies to the military;⁸⁸ however, it is not retroactive.⁸⁹

⁸² Para 152, MCM.

⁸³ This directive would be chapter 14.

⁸⁴ 395 U.S. 752 (1969).

⁸⁵ *Id.* at 763.

⁸⁶ *E.g.*, his house or car.

⁸⁷ Some of these reasons are discussed subsequently in this chapter.

⁸⁸ Para 152, MCM; para 2-2a, Army Reg No. 190-22 (12 Jun. 1970).

⁸⁹ *United States v. Bunch*, 19 U.S.C.M.A. 309, 41 C.M.R. 309 (1970). *Accord*, *Lyon v. United States*, 416 F.2d 91 (5th Cir. 1969); *United States v. Bennett*, 415 F.2d 1113 (2d Cir. 1969); *Williams v. United States*, 418 F.2d 159 (9th Cir. 1969); *United States v. Schartner*, 426 F.2d 470 (3d Cir. 1970); *Turner v. United States*, 426 F.2d 480 (6th Cir. 1970).

During the short period *Chimel* has been in existence, it has raised a number of questions and problems in application. The more important of these will be considered here.

The rules on incidental searches constitute an exception to the general rule that a search warrant is required prior to a search.⁹⁰ The incident-to-arrest rule is grounded in the authority of an arresting officer to insure that the person arrested does not have a weapon within his reach with which he could effect an escape or harm the officer or others and to insure that he will not be able to destroy any evidence that may be used against him. The right to make an incident-to-apprehension search applies equally to felony⁹¹ and misdemeanor⁹² cases. In addition, an officer taking custody of an already arrested person from another officer may conduct an incidental search.⁹³

Before an incidental search may be held to be valid, and the fruits thereof admitted in evidence, it must be shown that there was a lawful arrest. The arrest must be based upon probable cause.⁹⁴ If the arrest is unlawful then the incidental search will also be held unlawful.⁹⁵ If the search is to be incident to the arrest, then the arrest and search must be contemporaneous in time and place.⁹⁶ The arrest must precede the search.⁹⁷

As early as 1925 the Supreme Court held that a valid arrest in one place does not give the police a license to search a physically remote place.⁹⁸ This is the rule under *Chimel* and more recent

⁹⁰ See generally, the Court's extensive discussion in *Coolidge v. New Hampshire*, 39 USLW 4795 (U.S., 21 Jun. 1971).

⁹¹ *Chimel v. California*, 395 U.S. 752 (1969).

⁹² *Davis v. United States*, 328 U.S. 582 (1946).

⁹³ The reasons for such a search are to insure that the transferring agency made an adequate search and to insure the prisoner did not obtain a weapon after the prior search. Manual on the Law of Search and Seizure, U.S. Department of Justice (1970).

⁹⁴ *United States v. Martinez*, 41 C.M.R. 467 (ACMR 1969). This discussion is limited to the legality of the search and will not discuss the law of arrest. For an excellent discussion on the law of arrest, see B. J. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES, 21-43 (1969).

⁹⁵ *Wong Sun v. United States*, 371 U.S. 471 (1963).

⁹⁶ *United States v. Decker*, 16 U.S.C.M.A. 397, 37 C.M.R. 17 (1966); *Price v. United States*, 348 F.2d 68 (D.C. Cir. 1965), cert. denied, 382 U.S. 888 (1965).

⁹⁷ *Beck v. Ohio*, 379 U.S. 89 (1964). But see *United States v. Davis*, C.M.R. _____ (ACMR 12 Nov. 1970);

Once there is probable cause for an arrest or apprehension without warrant or authorization, it is immaterial that a search without a warrant or authorization precedes the arrest. [p 8 of slip opinion].

Of course, the search cannot be used as a basis for a subsequent arrest. *Sibron v. New York*, 392 U.S. 40 (1968).

⁹⁸ *Agnello v. United States*, 269 U.S. 20 (1925).

cases.⁹⁹ It appears, however, that a limited exception to this rule, at least as regards the time of the search, is growing in both the Federal and military courts. In *United States v. DeLeo*¹⁰⁰ the defendant was arrested in a drug store pursuant to a warrant. He was searched at that time for a weapon. Approximately forty minutes later at the FBI office he was again searched more thoroughly. The second search revealed several items of evidence connecting defendant with a bank robbery committed the previous day. In ruling that the second search was valid, the court stated:

The difference between the situation in *Chimel* and that in the case before us is this: the arrest of the suspect in a particular place—be it his apartment, office, or house—has no such nexus with that place as, without more (i.e. a valid search warrant), would justify searching the premises; but the fact that a suspect, arrested in a public place, has been subjected only to a hasty search for obvious weapons has a reasonable nexus with the necessity of conducting a more deliberate search for weapons or evidence just as soon as he is in a place where such a search can be performed with thoroughness and without public embarrassment to him. . . . While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape and evidence. Were this not to be so, every person arrested for a serious crime would be subjected to thorough and possibly humiliating search where and when apprehended. . . . We see no constitutional mandate for such a practice.¹⁰¹

It is important to note that this exception does not give the police *carte blanche* to search an arrestee any time after his arrest. The search must be within a reasonable time after the arrest.¹⁰² A reasonable amount of force may be used in conducting the search.¹⁰³

Chimel held that the general search of an entire house ex-

⁹⁹ *E.g.*, *Vale v. Louisiana*, 399 U.S. 30 (1970) (search of defendant's house after his arrest outside).

¹⁰⁰ 422 F.2d 487 (1st Cir. 1970).

¹⁰¹ *Id.* at 493. *Accord.*, *United States v. Mitchell*, _____ C.M.R. _____ (ACMR 13 Nov. 1970); *United States v. Davis*, _____ C.M.R. _____ (ACMR 12 Nov. 1970).

¹⁰² *Brett v. United States*, 412 F.2d 401 (5th Cir. 1969) (warrantless search of prisoner's clothing three days after arrest and incarceration held unreasonable). There seems little logic in this case since if the thrust of the Fourth Amendment is to protect the individual's privacy, Brett's privacy had already been violated by his arrest and the limited search conducted at that time. Moreover, Brett did not have the clothes on at the time of the second search. He was in a prison uniform and the clothes searched had been placed in a bag under the control of the prison authorities.

¹⁰³ *See e.g.*, *Costner v. United States*, 252 F.2d 496 (6th Cir. 1958).

ceeded the reasonable bounds of the incidental search exception to the requirement for a warrant. There are, however, a number of cases which somewhat narrow this principle. These cases set out certain exceptions to both the warrant requirement and the limitation on the scope of the incidental search. The Supreme Court summarized these exceptions in *Vale v. Louisiana* as follows:

[O]ur past decisions make clear that only in "a few specifically established and well-delineated" situations, *Katz v. United States*, 389 U.S. 347, 357, may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it. . . .

There is no suggestion . . . that any one consented to the search. *Cf. Zap v. United States*, 328 U.S. 624, 628. The officers were not responding to an emergency. *United States v. Jeffers*, . . . 342 U.S. 48 at 52; *McDonald v. United States*, . . . 335 U.S. 451 at 454. They were not in hot pursuit of a fleeing felon. *Warden v. Hayden*, 387 U.S. 294, 298-299; *Chapman v. United States*, 365 U.S. 610, 615; *Johnson v. United States*, 333 U.S. 10, 15. The goods ultimately seized were not in the process of destruction. *Schmerber v. California*, 384 U.S. 757, 770-771; *United States v. Jeffers*, *supra*; *McDonald v. United States*, *supra*, at 455. Nor were they about to be removed from the jurisdiction. *Chapman v. United States*, *supra*; *Johnson v. United States*, *supra*; *United States v. Jeffers*, *supra*."

Additionally, an officer making an arrest in a home or office may inspect or tour the rest of the house to insure that no one else is present who might attempt to assist the suspect or destroy suspected evidence after the officers have left.¹⁰⁵ Assuming the authorities may conduct such an inspection, may they seize contraband or other evidence in open view? In *Katz v. United States*¹⁰⁶ the Court stated that

the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protection."¹⁰⁷

Furthermore, contraband or other evidence found in open view

¹⁰⁴ *Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970). See also *State v. Gosser*, 50 N.J. 438, 236 A.2d 377 (1967) (defendant stated he had killed his wife. Police ran through house to see if she were alive. Held, weapon and bloody clothing they saw enroute to the body was admissible). *Gosser* extended the emergency rule stated in *Warden v. Hayden*, 387 U.S. 294 (1967), to emergencies occurring after the accused is in custody.

¹⁰⁵ *Bridle v. United States*, _____ F.2d _____, 8 CRIM. L. REP. 2147 (8th Cir. 4 Nov. 1970). *Vale v. Louisiana*, 399 U.S. 30, 34 (1970), hints that the Supreme Court would approve such an inspection.

¹⁰⁶ 389 U.S. 347 (1967).

¹⁰⁷ *Id.* at 351.

would tend to lend weight to a request for a search warrant for the entire premises based upon probable cause. The evidence may be seized even though related to a crime other than that for which accused was arrested.¹⁰⁸

In summary, *Chimel* has had a far reaching effect upon incidental searches, though its rule has been limited by a number of exceptions, primarily related to emergency situations where rapid police action is necessary. It is clear, however, that the courts expect the authorities to limit the area of their searches to what is absolutely necessary. Where a broader search is required a warrant should be obtained unless the exigencies of the situation prevent doing so.

IV. VEHICLE SEARCHES

The courts have long recognized that there is

a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motorboat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."¹⁰⁹

This recognition has formed the basis for the rule that no warrant need be obtained for the search of an automobile or other vehicle if there is probable cause for the search."¹¹⁰ Of course, the vehicle search rule does not apply if the vehicle is immobilized.¹¹¹

¹⁰⁸ In *Bridle v. United States*, _____ F.2d _____, 8 CRIM. L. REP. 2147 (8th Cir. 4 Nov. 1970), defendant was arrested in the hall of his apartment. An FBI agent checking the bedroom for other persons that might be present found a sawed off shotgun lying in open view. *Held*: the weapon was immediately seizable as contraband. In comparing *Chimel v. California*, 395 U.S. 752 (1969), the court stated:

The distinguishing and controlling fact, as we view the case before us, is that the shotgun, was not discovered as a result of any search whatsoever. Rather it was discovered by being in plain view in the bedroom which Special Agent Hancock entered in the exercise of his conceded right to conduct a quick and cursory viewing of the apartment area for the presence of other persons who might present a security risk.

. . . [When] Special Agent Hancock observed in plain view an illegally possessed sawed off shotgun (contraband) he had the right to seize it, and in doing so he did not violate any Fourth Amendment right of *Bridle*. [8 Cr. L. R. at 2147]. See also, *Coolidge v. New Hampshire*, 30 USLW 4793 (U.S., 21 June 1971).

¹⁰⁹ *Carroll v. United States*, 267 U.S. 132, 153 (1925).

¹¹⁰ There are some instances in which even the probable cause requirement for the search is waived, e.g. incident to arrest searches.

¹¹¹ E.g., *United States v. Garlich*, 15 U.S.C.M.A. 362, 35 C.M.R. 334 (1965) (engine removed from automobile). However, a vehicle impounded by the police is not considered immobilized for the purpose of this exception to the warrant requirement. *Chambers v. Maroney*, 399 U.S. 42 (1970). See generally, *Coolidge v. New Hampshire*, 39 USLW 4795 (U.S., 21 June 1971).

Before the warrantless search of a vehicle may be made, there must be probable cause to suspect that contraband or evidence of a crime will be found **therein**.¹¹² Furthermore, if the purpose of the search is to find contraband in the **car**, and the probable cause stems from information connecting the vehicle with the contraband, the vehicle itself must be essential to the shipment of the contraband and not merely useful to the person carrying it.¹¹³

The incident-to-arrest exception is applicable to vehicle search cases, The Supreme Court stated in *Chimel*¹¹⁴ that its holding was

entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be **sought**.¹¹⁵

The *Chimel* limitation on the area to be searched is, however, applicable to vehicle searches.¹¹⁶ Accordingly, in most cases, only that portion of the car accessible to the arrestee may be searched. In the case of the driver this might include under the front seat and possibly the glove compartment. However, if the person has left the vehicle, there seems little reason for a thorough search of the **interior**.¹¹⁷ However, assuming probable cause to search, the police may search the entire vehicle. In such an instance, they need not rely on the incident-to-arrest doctrine.¹¹⁸

The relatively new stop and frisk type searches have somewhat enlarged the vehicle search rules. Thus, where an officer has stopped a vehicle, he may order the occupants out and frisk them if he has reason to apprehend danger from **them**.¹¹⁹ Certainly, the officer may look into the automobile as he approaches it and may act if he sees weapons or contraband in full view **inside**.¹²⁰ He may even shine a flashlight in the car if it is **dark**.¹²¹ He must, however, see contraband or a weapon. He may not, for example, force the occupant from the car and then seize and look into a closed

¹¹² *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968).

¹¹³ *Brinegar v. United States*, 338 U.S. 160 (1949); *United States v. DiRe*, 332 U.S. 581 (1948).

¹¹⁴ *Chimel v. California*, 395 U.S. 752 (1969).

¹¹⁵ *Id.*, note 9 at 764.

¹¹⁶ *E.g.*, *United States v. Pullen*, 41 C.M.R. 698, A.C.M.R. (1970) (accused had dismantled from car but trunk was searched).

¹¹⁷ *Id.* This would not be so where the suspect could re-enter and escape or obtain a weapon.

¹¹⁸ *Chambers v. Maroney*, 399 U.S. 42 (1970).

¹¹⁹ See general discussion of stop and frisk, VII, *infra*.

¹²⁰ *United States v. Carter*, 275 F. Supp. 769 (D.D.C. 1967).

¹²¹ *United States v. Callahan*, 256 F. Supp. 739 (D. Minn. 1964).

brown paper bag, which he has no reasonable grounds to suspect.'??

The ordinary stopping of an automobile (for example, for a traffic violation) in most cases will not in itself give sufficient cause for the officer to frisk the occupant or to arrest and search him.¹²³ Nonetheless, subsequent events may provide probable cause for an arrest and subsequent incidental search."¹²⁴

There are a number of situations in which the occupants of a vehicle may come under the initial scrutiny of a police officer. Some examples would be minor traffic violations, stopping vehicles at the entrance to military installations to determine their business, vehicle inspections at state borders, and roadblocks for license checks. Apparently, routine searches in these situations will not survive constitutional examination."¹²⁵ However, as pointed out above, if the stop further develops into a situation giving the officer reason to suspect the occupant is armed or giving him probable cause for an arrest, then a frisk or search is permissible.

As in the incident-to-arrest searches, it has been held that if the vehicle was improperly stopped, a search incident thereto will be invalid.¹²⁶ On the other hand, if there is probable cause for the search, independent of the arrest or stopping, the search will be upheld.¹²⁷

The question of who in the car may be searched has produced conflicting results. For many years the rule was that without independent grounds, a search of the occupants, other than the driver, was illegal."¹²⁸ Recent cases have, however, cast doubt upon this rule. In *Hurst v. United States*¹²⁹ it was held that where the police stopped an automobile to serve an arrest warrant, but were not able to immediately identify which of the two people in the

¹²³ *United States v. Martinez*, 41 C.M.R. 467 (ACMR 1969).

¹²⁴ *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968); *Grundstrom v. Beto*, 273 F. Supp. 912 (N.D. Tex. 1967).

¹²⁵ *E.g.*, an attempt to flee; statements made to the policeman during his conversation with the occupants; refusing to stop at the officer's direction. Each of these situations will depend upon the facts of the individual case and the above examples may not be sufficient, without more, to furnish probable cause.

¹²⁶ *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968); *Grundstrom v. Beto*, 273 F. Supp. 912 (N.D. Tex. 1967). Each case must, however, rest upon its own facts.

¹²⁷ *Henry v. United States*, 361 U.S. 98 (1959).

¹²⁸ *Chambers v. Maroney*, 399 U.S. 42 (1970). The court noted that in *Chambers*

as will be true in many cases, the circumstances justifying the arrest are also those furnishing probable cause for the search. [note 6 at 471.]

¹²⁹ *United States v. DiRe*, 332 U.S. 581 (1948).

¹²⁰ 425 F.2d 177 (9th Cir. 1970).

car was to be served, they could search both men incident to the arrest. The Army Court of Military Review has considered the problem of vehicle occupants on two occasions. In the first case,¹³⁰ accused was an occupant in a car driven by a person sought by the military police for possession of marijuana. The car was stopped at the gate as it was attempting to leave post. Accused was frisked by the police, as was the driver. The frisk of accused revealed nothing. Accused was then taken to the guard shack and required to submit to a thorough wall search which revealed marijuana. In reversing the conviction, the court noted that the only information the military police had regarding the accused was that he was a passenger in the car.

This information does not, of itself, give rise to an inference that the appellant, in the circumstance of this case, was participating in the commission of an offense involving marijuana.¹³¹

Since the frisk had revealed nothing incriminating, there was no valid reason for the second search.

The second case¹³² arose in Vietnam. There a military police officer was on routine patrol on the Fourth of July. He was on the lookout for persons who had been setting off pyrotechnics to celebrate the holiday. The accused was riding in a jeep that passed the officer heading in the other direction. The officer decided to stop the jeep because its occupants were not in proper uniform and they had come from an area where pyrotechnics had been set off earlier. As he approached the jeep he smelled the odor of burning marijuana. The driver and all occupants, including accused, were frisked. The frisk search revealed a hot pipe in the pocket of one of the occupants, not the accused. Thereupon, all persons in the jeep were transported to the military police station where they were strip searched. The latter search revealed traces of marijuana in accused's clothing. The court held the search to be legal and affirmed the conviction. It considered the search to be reasonable under the circumstances of the case.

The facts of these two cases are hardly distinguishable; surely they conflict. Thus, the military rule as to searches of occupants of vehicles is unclear.

On 22 June 1970 the Supreme Court decided the case of *Chambers v. Maroney*.¹³³ That decision modified the rules con-

¹³⁰ United States v. Mehalek, _____ C.M.R. _____ (ACMR 27 Aug. 1970).

¹³¹ Id., at p 3 of slip opinion.

¹³² United States v. Davis, _____ C.M.R. _____ (ACMR 12 Nov. 1970).

¹³³ 399 U.S. 42 (1970).

cerning searches of vehicles. Chambers was arrested with several other persons on suspicion of robbery in a car that had been identified by several witnesses, Defendant and the car were taken to the police station where the car was thoroughly searched without a warrant. Evidence found in the car connected defendant and his companions with two robberies. The Court held that the search was not incident to arrest, but that there was probable cause to support the police action at the station. In holding that no warrant was necessary in this case the Court stated :

For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.”

Earlier decisions¹³⁵ had indicated to most courts that warrantless searches conducted “incident to arrest” after the vehicle and occupants were taken into police control were unreasonable. The Court in *Chambers*, however, ruled that the mobility of the automobile is the primary consideration in such searches. If the search is preceded by probable cause, it will be held valid, and the evidence seized will be admissible.

Earlier in *Cooper v. California*,¹³⁶ the Court had similarly extended the power of the police to search a vehicle without a warrant. In *Cooper* the auto in question was being held by the police for forfeiture proceedings as required by a state statute.¹³⁷ The Court ruled that since the car was already in the lawful custody of the police there was no requirement to obtain a warrant (even though the search of the vehicle took place one week after its seizure), since it would be unnecessary to require a second judicial authorization under these circumstances.

V. FOREIGN SEARCHES

With the large number of American servicemen stationed overseas, the problem of searches and seizures conducted in foreign countries is of great importance to military lawyers. The term “foreign searches” in this article relates to any one of three possible types of search conducted in a foreign nation. First, searches may be conducted by agents of the United States acting

¹³⁴ *Id.* at 52.

¹³⁵ *E.g.*, *Preston v. United States*, 376 U.S. 364 (1964); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968).

¹³⁶ 386 U.S. 58 (1967).

¹³⁷ CAL. HEALTH AND SAFETY CODE § 11610 (West 1964).

on authority given them by military commanders. Second, the foreign authorities, entirely on their own, may conduct searches of persons or property subject to their jurisdiction. This frequently includes servicemen and their personal property located off of military posts. Finally, there are instances in which both United States agents and agents of the foreign nation work together. The law as to each type of foreign search is distinct. Further complicating the problem is the fact that the limited number of Federal cases in point do not fully agree with rulings by the military courts. Moreover, the military cases are themselves not entirely clear.

A. UNITED STATES SEARCHES

The least complicated of the foreign searches, and the one causing the fewest problems, is the strictly American search. In the typical case the military police or CID conduct a search of a suspect's person or property under authorization from an appropriate commander.¹³⁸ It is clear that where the entire search and seizure is conducted by United States agents under authority of the United States, Fourth Amendment requirements apply.¹³⁹

B. JOINT SEARCHES

Searches conducted by United States and foreign authorities acting together raise a number of problems. The general rule is that where the Federal authorities instigate or participate in the search, it will be treated as though it was a Federal search and Fourth Amendment rules apply.¹⁴⁰ There are some exceptions, however. In *United States v. Thompson*,¹⁴¹ the board of review found that the military authorities had sufficient grounds to arrest the accused. However, they could not do so themselves because of an international agreement between Japan and the United States. The board held the fact that they asked the Japanese authorities to arrest him did not render inadmissible the

¹³⁸ Other searches are also proper, *e.g.*, incident to arrest, stop and frisk.

"Para 152, MCM; *United States v. Clifford*, 19 U.S.C.M.A. 391, 41 C.M.R. 391 (1970); *United States v. Maher*, 5 C.M.R. 313 (NCMR 1952).

"Para 152, MCM; *United States v. Price*, 17 U.S.C.M.A. 566, 38 C.M.R. 364 (1968); *United States v. Rogers*, 32 C.M.R. 623 (ACMR 1962); *United States v. Stonehill*, 405 F.2d 738 (9th Cir. 1968) *cert. denied*, 395 U.S. 960 (1968), and cases cited therein. Paragraph 152, MCM, provides in part:

Evidence is inadmissible against the accused:

If it was obtained as a result of an unlawful search [under the Fourth Amendment] of the person or property of the accused conducted, instigated, or participated in by an official or agent of the United States, . . . who was acting in a Governmental capacity: . . .

¹⁴¹ 32 C.M.R. 776 (ACMR 1962).

results of the incriminating search conducted by the Japanese even though the actions of the foreign officers did not meet Fourth Amendment standards.¹⁴² In another case¹⁴³ the board found that the military authorities had some evidence to suspect the accused had taken a classified document to his home, located off-post in England. After accused denied them permission to search his quarters, they asked the English authorities for assistance. An English constable thereupon obtained a search warrant which, while valid under English law, did not comport with United States constitutional requirements.¹⁴⁴ It was held that since the search was valid under British law, the results thereof were admissible at accused's court-martial.

The degree of participation by United States officials in the search itself will frequently determine whether it will be considered a strictly foreign search or an American one. In deciding this issue, the Federal courts have looked to Supreme Court cases decided when the "silver platter" doctrine was alive.¹⁴⁵ Those cases held that participation in the state search by Federal officers turned the search into a Federal one subject to the Fourth Amendment.¹⁴⁶ The same rule applies to combined foreign searches:

When a federal agent participates in such a joint endeavor "the effect is the same as though he had engaged in the undertaking as one exclusively his own."¹⁴⁷

What degree of participation will make a combined search an American one? "Clearly, the giving of information, without more, does not amount to participation or make a later search a joint venture."¹⁴⁸ Mere presence at the scene of the search, without more, will not make the Federal officer a participant to the extent

¹⁴² See also *Autry v. Hyde*, 19 U.S.C.M.A. 433, 42 C.M.R. 35 (1970).

¹⁴³ *United States v. Whitler*, 5 C.M.R. 458 (ACMR 1952).

¹⁴⁴ "The affidavits in support of the statement of probable cause were not presented to the magistrate.

¹⁴⁵ This doctrine held that Federal courts could admit evidence turned over to Federal officers by state authorities, even though the state officers had obtained the evidence in violation of state law. The doctrine was struck down in *Elkins v. United States*, 374 U.S. 206 (1960).

¹⁴⁶ See e.g., *Lustig v. United States*, 338 U.S. 74 (1949); *Bryars v. United States*, 273 U.S. 28 (1927); *Sloane v. United States* 47 F.2d 889 (10th Cir. 1931).

¹⁴⁷ *United States v. Stonehill*, 405 F.2d 738, 745 (9th Cir. 1968), quoting *Corngold v. United States*, 367 F.2d 1, 6 (9th Cir. 1966). See also *United States v. Price*, 17 U.S.C.N.A. 566, 38 C.M.R. 364 (1968):

Not only did the American authorities instigate the investigation and search, but the Vietnamese inspector testified that an OSI agent 'came to our station and to request [sic] us to cooperate with him to make a search of one airman's house.' [17 USCMA at 569, 38 C.M.R. at 367, emphasis supplied by court].

¹⁴⁸ *United States v. Stonehill*, 405 F.2d 738, 746 (9th Cir. 1968); *Shurman v. United States*, 219 F.2d 282 (5th Cir. 1955).

that it becomes a Federal search.¹⁴⁹ The fact that mere presence at the scene is insufficient to make the search a Federal one is important to the Army. Army regulations require the presence of United States authorities at the scene of foreign searches if the foreign power consents.¹⁵⁰ The reasons for this requirement were stated in *United States v. DeLeo*. There the court found that the presence of a CID agent at the scene of a search conducted by French authorities benefitted the accused since it provided him with the company of a fellow countryman who could explain to him the procedures involved in the search and who could inform the military authorities of his status with the foreign nation. Furthermore, the presence of the CID agent provided the United States with an independent observer who could report any irregularities in the treatment of the accused by the French.

The outer limits of cooperation by American agents in a foreign search, not amounting to participation sufficient to make the search an American one, are best illustrated by *United States v. Stonehill*.¹⁵¹ There defendants were convicted of tax evasion by the United States. The evidence used to obtain the conviction was given to the American authorities by the Philippine police. The Philippine investigation began when Chandler, an American tax investigator, turned information he had obtained over to Philippine authorities.¹⁵² The National Bureau of Investigation (NBI) in the Philippines used Chandler to get further information and received his cooperation in planning raids on the defendant's establishments. Meetings were held in the American's home be-

¹⁴⁹ *Symons v. United States*, 178 F.2d 615 (9th Cir. 1949); *United States v. Stonehill*, 405 F.2d 738 (9th Cir. 1968). In *United States v. De Leo*, 5 U.S.C.M.A. 148, 17 C.M.R. 148 (1954), accused was convicted of forgery. He was originally implicated by another suspect arrested by the French police. The French pursuant to "letters rogatory" determined they should search accused's belongings. They requested the assistance of the Army CID. CID agents apprehended the accused and accompanied the French police to his French quarters to observe the search. While there Inspector Lestrade of the French Surete discovered some papers on accused's bed. He looked at them and replaced them. The CID agent then saw them and recognized the name of an officer who had been implicated and later cleared of several offenses. He examined the papers more closely and realized that the accused had committed the crimes originally attributed to the officer. He seized the papers and they were used to convict accused. The Court of Military Appeals found the seizure valid.

¹⁵⁰ Para 2-1b, Army Reg No. 190-22 (12 Jun. 1970), provides:

When the person or property is located in a foreign country, commanders will direct military personnel to accompany civil police in the execution of a search warrant when such action is consented to by the foreign country or is authorized by a treaty, agreement, or policy agreement.

¹⁵¹ 405 F.2d 738 (9th Cir. 1968).

¹⁵² His previous attempts to interest his superiors in Washington in the result of his inquiry had produced no results.

tween informers and the NBI. The tax agent was told when the raids would take place. He asked that they be delayed. The request was denied, and the raids took place as planned. As the raids were almost completed, Chandler asked permission to copy seized documents. This request was eventually granted. While the raids were in progress, Chandler visited the scene and upon the request of an NBI agent, showed him which accounting books were important. In another of defendant's establishments, where he had casually dropped by to observe the progress of the raid, he indicated the position of a suspected storage room at the request of the Philippine investigators. The Court of Appeals for the Ninth Circuit held that these activities did not constitute participation in the Philippine raids and that the evidence could be used against the defendants at their American trial. From these facts it can be seen that Chandler came very close to "participation" in the activities of the foreign agents. Had he volunteered to examine the books or pointed out the location of the storage room without being asked, he probably would have taken a sufficiently active part in the search to make it an American search. Had he attended the search to see what items of interest to American authorities would turn up, he similarly would have made his presence sufficiently official that the search would be subject to Fourth Amendment rules."¹⁵³

The test for participation by United States officials in a combined search situation then, depends upon the totality of the circumstances :

The acts of participation must be such that the search and seizure can be said to be a joint . . . venture between the United States and the State or foreign government. Whether the search does become a joint venture can be determined only by a comparison of what the Federal agent did in the search and seizure with the totality of the acts done in the search and seizure.¹⁵⁴

C. PURELY FOREIGN SEARCHES.

1. *The Federal Court Rule*

The third type of search—the strictly foreign search conducted by foreign officials under foreign law—is the most puzzling. The reason is that the Federal and military courts are in disagreement as to what rules apply. Federal courts hold that strictly foreign searches are not subject to the Fourth Amendment and consequently the exclusionary rule will not be invoked against them

¹⁵³ Compare with *Stonehill*, *Bryars v. United States*, 273 U.S. 28 (1927), and *Lustig v. United States*, 338 U.S. 74 (1949).

¹⁵⁴ *United States v. Stonehill*, 405 F.2d 738, 744 (9th Cir. 1968).

even where the search was a clear violation of Fourth Amendment rules.¹⁵⁵ This is so even where the search is illegal under foreign law.¹⁵⁶

In order to understand these rulings, it is necessary to first understand the function and purpose of the exclusionary rule. The Fourth Amendment was intended only to prevent illegal activity by governmental officials. It is not applicable to the acts of private individuals.¹⁵⁷ “The traditional view is that the fact that the government later makes use of the fruits of tortious or criminal misconduct on the part of the private citizen does not mean that there is a Fourth or Fourteenth Amendment violation.”¹⁵⁸ As pointed out in *Brulay v. United States*, the exclusionary rule is not demanded by the Constitution :

The Fourth Amendment does not, by its language, require the exclusion of evidence and the exclusionary rule announced in *Weeks*¹⁵⁹ is a court-created prophylaxis designed to deter federal officials from violating the Fourth Amendment. Neither the Fourth nor the Fourteenth Amendments are directed at Mexican officials and no prophylactic purpose is served by applying an exclusionary rule here since what we do will not alter the search policies of the sovereign Nation of Mexico.¹⁶⁰

¹⁵⁵ *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967); *cert. denied*, 389 U.S. 986 (1967). In *Brulay* the Mexican authorities became suspicious of defendant when they saw him driving what appeared to be a heavily laden car. Defendant was stopped for questioning and when he appeared nervous was ordered to open his trunk. Contained therein were 297 pounds of amphetamine tablets. Further questioning of defendant at police headquarters caused him to lead the Mexican police to a cache of 1980 more pounds of amphetamines. American authorities took no part in these activities, although they had warned the Mexicans that they were suspicious of defendant. At his trial in the United States, for conspiracy to smuggle drugs into this country, the evidence obtained by the Mexican police was admitted. On review, *held*: the Mexican police were not acting for the United States; thus, the fact that they did not comply with Fourth Amendment requirements did not render the evidence inadmissible.

¹⁵⁶ *United States v. Stonehill*, 405 F.2d 738 (9th Cir. 1968), the Supreme Court of the Philippines had ruled the evidence was seized contrary to Philippine standards of search and seizure and that it was therefore not admissible in Philippine courts. It is interesting to note that the Philippine constitution has a provision exactly like the Fourth Amendment.

“*See e.g.*, *Burdeau v. McDowell*, 256 U.S. 465 (1921); *Barnes v. United States*, 373 F.2d 517 (5th Cir. 1967); and, *Watson v. United States*, 391 F.2d 927 (5th Cir. 1968).

¹⁵⁸ B. J. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES, 108 (1968).

“*Weeks v. United States*, 232 U.S. 383 (1914).

¹⁶⁰ *Brulay v. United States*, 383 F.2d 345, 348 (9th Cir. 1967); *accord*, *Commonwealth v. Wallace*, _____ Mass. _____, 248 N.E.2d 246 (1969) (arrest, search and interrogation of defendant by Canadian authorities); *Robinson v. United States*, 279 F. Supp. 631 (E.D. Pa. 1968) (Court refused

2. *The Military Rule.*

Thus, in Federal courts at least, where the search is entirely foreign in nature, the courts need not look to the Fourth Amendment or the foreign law. The exclusionary rule simply is not applicable in such cases. The position of the military courts, however, is not at all clear. It has been held in a number of cases that the foreign law must have been followed by the foreign authorities if the evidence is to be admissible. In the absence of a showing that the foreign officials complied with their own law, or a showing of what the foreign law is, the military courts have applied Fourth Amendment tests.¹⁶¹ That this is an absolute rule in the military is open to question.¹⁶² In *United States v. Price* and *United States v. Rogers* other facts would have led to the same result as in *United States v. DeLeo*. In the first two cases, the actions of the foreign officials were instigated by United States authorities. Moreover, the American agents participated in, if not conducted, the searches in both cases. The language in these cases, on the other hand, is quite strong. For example, in ruling that the evidence seized in *Price* should not have been admitted, the Court of Military Appeals stated:

The record is devoid of any information relative to the Vietnamese law applicable to search and seizure, with the exception of the inspector's affirmative reply when asked whether he was authorized to search under the circumstances relayed to him by OSI and/or CID agents. . . .

We hold, therefore, that there is insufficient evidence in the record to sustain a finding that the search in question was a Vietnamese search or that it was validly conducted under the laws of that country.¹⁶³

Apparently then, the military rule is that strictly foreign searches will yield admissible evidence for court-martial purposes if there is no question about American participation in the conduct of the search. If *DeLeo* is still valid, then it will not make any difference whether the foreign officials obeyed their own law or not. On the other hand, the military courts seem to have decided that if there is any doubt as to American participa-

to reverse defendant's sentence where it was increased by consideration of a court-martial conviction based upon evidence taken by English authorities),
¹⁶¹*United States v. Price*, 17 U.S.C.M.A. 566, 38 C.M.R. 364 (1968);
United States v. Rogers, 32 C.M.R. 623 (ACMR 1962).

¹⁶² See *United States v. DeLeo*, 5 U.S.C.M.A. 148, 155, 17 C.M.R. 148, 155 (1954):

It is a well-established rule of Federal law that the Government may use evidence obtained through an illegal search effected by . . . foreign police—unless Federal agents participated to some recognizable extent therein.

¹⁶³ *United States v. Price*, 17 U.S.C.M.A. 566, 570, 38 C.M.R. 364, 368 (1968).

tion or instigation in the search, the prosecution will have to prove the foreign law and show that it was complied with. In the absence of such a showing, the evidence will be inadmissible if it does not meet Fourth Amendment standards. The mere statement of a foreign policeman that he complied with the law of his nation will not suffice for a showing of what that law is.¹⁶⁴

Such a rule is unsupportable and illogical. If the American agents participate in the search to such an extent that it is no longer strictly foreign, then Fourth Amendment principles are applicable. The question of what the foreign law holds is, in this situation, totally inapposite. If the court cannot decide whether the search was American or strictly foreign, it may apply Fourth Amendment principles. However, where the search is strictly foreign the *Stonehill* and *Brulay* doctrines are certainly the most reasonable.

It is submitted, then, that the *Stonehill-Brulay* rule should be made applicable to the military if the question of a strictly foreign search again arises. This, as has been noted, is the logical approach and the one that will most likely result in a just determination of the case.

VI. MERE EVIDENCE

Prior to 1967, the general rule concerning real evidence in criminal cases was that only contraband, stolen property, or the fruits or instrumentalities of a crime were admissible. On 30 June 1967 the Supreme Court in *Warden v. Hayden* decided that what was termed "mere evidence" could also be admitted and used against an accused at trial.¹⁶⁵ In *Hayden* clothing which was found in the accused's house was used to help identify him as the person seen leaving the scene of a robbery. The decision provided the prosecutor with virtually a new tool in prosecution. Theretofore, evidence which would help identify a suspect was used by the police in conducting investigations on the reasonable theory that such evidence would logically lead them to the perpetrator of an offense. Yet that same evidence could not be used at trial. The Supreme Court recognized this anomaly, stating that the distinction between "mere evidence" and other evidence was "wholly irrational."¹⁶⁶ The Court found that there was no basis in

¹⁶⁴United States v. Price, 17 U.S.C.M.A. 566, 38 C.M.R. 364 (1968); United States v. Rogers, 32 C.M.R. 623 (ACMR 1962).

¹⁶⁵Warden v. Hayden, 387 U.S. 294 (1967).

¹⁶⁶*Id.* at 302.

the Fourth Amendment for the mere evidence rule.¹⁶⁷ The decision was quickly adopted by the Court of Military Appeals¹⁶⁸ and codified in the *Manual for Courts-Martial, 1969 (Rev. ed.)*.¹⁶⁹

Under the rule set forth in *Hayden* there is a two-fold test for the admissibility of mere evidence. First, it must be shown that the search which produced the evidence was lawful. Second, the authorities must have had the requisite probable cause to justify the seizure of the evidence.¹⁷⁰

Mere evidence has been held to be clothing worn by the suspect at the time of the crime and which has been described by witnesses¹⁷¹ or which shows traces of blood or other chemicals connecting the suspect with the crime.¹⁷² Photographs and photographic equipment, slides, rubber stamps, and customers' orders and order forms were held to be admissible mere evidence in a case involving obscenity through the mails.¹⁷³ Sunglasses worn during a bank hold-up are admissible.¹⁷⁴ Other examples might include blank checks or forms taken in relation to a forgery or false documents case.

Prior to the *Hayden* decision, documents written by criminals as a part of their criminal acts or to further their conspiracies were inadmissible unless they could be shown to be instrumentalities of the crime.¹⁷⁵ Not infrequently, the definition of instrumentalities was stretched to admit a writing that the courts felt should be considered, but which was, strictly speaking, mere evidence.¹⁷⁶

The *Hayden* decision made this unnecessary since courts may now admit evidence which helps identify the criminal or aids in

¹⁶⁷ The Court also found that the contention that such evidence was "communicative in nature" and therefore violative of the Fifth Amendment was without merit.

¹⁶⁸ *United States v. Whisenant*, 17 U.S.C.M.A. 117, 37 C.M.R. 381 (1967).

¹⁶⁹ To be lawful even under circumstances that would permit a lawful search, searches by United States or other domestic authorities of a person's house, dwelling, automobile, effects, papers or person without his freely given consent must be for instrumentalities or fruits of crime, things which might be used to resist apprehension or to escape, property the possession of which is itself a crime, or evidence which there is reason to believe will otherwise aid in a particular apprehension or conviction. para 152, MCM.

¹⁷⁰ *Warden v. Hayden*, 387 U.S. 294 (1967); *Clarke v. Neil*, 427 F.2d 1322 (6th Cir. 1970).

¹⁷¹ *Warden v. Hayden*, 387 U.S. 294 (1967).

¹⁷² *Frazier v. Cupp*, 394 U.S. 731 (1969); *Clarke v. Neil*, 427 F.2d 1322 (6th Cir. 1970).

¹⁷³ *United States v. Wild*, 422 F.2d 34 (2d Cir. 1969).

¹⁷⁴ *United States v. De Leo*, 422 F.2d 487 (1st Cir. 1970), *cert. denied*, U.S. _____, 40 S. Ct. 1355 (1970).

¹⁷⁵ *United States v. Boyette*, 299 F.2d 92 (4th Cir. 1962).

¹⁷⁶ *Id.*

his prosecution.¹⁷⁷ An example of the new view held by the courts can be found in *United States v. Bennett*,¹⁷⁸ where agents executing a valid search warrant for heroin found a letter linking several of their suspects to a narcotics conspiracy. The letter had not been written in furtherance of the conspiracy, but it did show a connection between three members of the ring. In ruling the letter admissible, the court considered two problems. First, it ruled that the letter was mere evidence, but admissible under *Hayden*. Second, it found that while the letter was communicative in nature, it was not protected by the Fifth Amendment.

From the above it can be seen that the list of items which can constitute admissible mere evidence is indeed a broad one. It must be remembered, however, that the rules of search and seizure are as applicable to mere evidence as they are to searches for other types of evidence and, further, that such evidence, if it is to be considered by the court, must meet the twofold test set forth in *Hayden*.

VII. STOP AND FRISK

A. STOP AND FRISK AND THE FOURTH AMENDMENT.

Perhaps the most important development in the law of search and seizure as far as law enforcement authorities are concerned has been the determination by the Supreme Court that they may "stop and frisk" certain people. For years police officers have stopped persons who for some reason aroused their suspicion. In such situations they were not illogically concerned that the person they had stopped might react violently. Thus, the officer who feared the possibility of violence would "frisk" or "pat-down" the detainee for weapons. Until recently, this was done without any statutory or decisional authority. Some states, however, concerned for the safety of their policemen, began to enact so-called stop and frisk acts.¹⁷⁹

The constitutional validity of such statutes was questioned

¹⁷⁷ *Warden v. Hayden*, 387 U.S.294 (1967).

¹⁷⁸ 409 F.2d 888 (2d Cir. 1969).

¹⁷⁹ The New York statute (N.Y. CODE CRM. PROC. § 180-a) is typical:

1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any other of the offenses specified in section five hundred fifty-two in this chapter, and may demand of him his name, address, and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person. [Quoted in *Sibron v. New York*, 392 U.S. 40, 43-44 (1968)].

by those who contended that they allowed the police virtually free license to search any person who aroused their suspicion or hostility. Soon the question of the police right to stop and examine suspicious persons under the stop and frisk statutes was before the Supreme Court. In three cases¹⁸⁰ decided on the same day, the Court set out the guidelines for proper stop and frisk action by the police.

Terry v. Ohio originated when a detective walking a beat observed defendant and others walking back and forth in front of a store, apparently casing it. The detective suspected they were planning a robbery. After they left the area and gathered a short distance away, he approached the men and asked their names. Receiving no response, he patted down the outer clothing of all three men. He found loaded weapons on Terry and one other." Terry was convicted of carrying a concealed weapon.

Sibron v. New York arose after a uniformed patrolman on his beat observed defendant in the company of several known narcotics addicts. The observation of Sibron occurred over a period of eight hours. Nothing was seen to pass between Sibron and his associates, however. Sibron later entered a restaurant and spoke to another group of known addicts. Nothing was seen to pass between them either. While Sibron was eating, the officer approached him and said, "You know what I am after." As Sibron mumbled something, the officer reached into Sibron's coat pocket and grabbed several glassine envelopes. These were later determined to contain heroin, resulting in Sibron's conviction for possession of narcotics.

In the third case, *Peters v. New York* a police officer at home in his apartment, heard a noise at his door. Before he could investigate he was interrupted by a phone call. When he was able to look into the hall, he saw two men tiptoeing from door to door whom he knew did not live in the building. He phoned the police and then went into the hall slamming the door behind him. The two men ran down the stairs and the officer gave chase. He collared Peters partway down. When asked why he was in the building, Peters said he was visiting a girlfriend whom he refused to identify. The officer frisked Peters and upon feeling something hard in his pocket, extracted a set of burglar's tools.

¹⁸⁰*Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, and *Peters v. New York*, 392 U.S. 40 (1968).

¹⁸¹The pat down consisted of the detective running his hands over the outer clothing of the suspects. When he felt a hard object in their coats, he reached in and seized the weapons.

In considering these cases, the Court stated from the beginning that stop and frisk is a form of seizure and search, and therefore, subject to constitutional limitations. It quickly dismissed any illusions that it would accept any other characterization of stop and frisk activity.

It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search'. Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."¹⁸²

Thus, stop and frisk cases must be evaluated in light of Fourth Amendment standards. As will be demonstrated, however, the standards involved are not the same as apply to other search and seizure areas; for example, those based upon probable cause.

Turning to the individual cases, the Supreme Court found that the detective in *Terry* had conducted a proper stop and frisk search of his suspects. In *Sibron*, however, the Court ruled that the officer had acted without sufficient cause when he stopped defendant and reached in his pocket.¹⁸³ *Peters*, the court ruled, presented an entirely different problem. The acts of the officer and the defendant gave sufficient basis for a probable cause arrest of Peters. Thus when the officer frisked Peters, it was actually a search incident to arrest and not a stop and frisk situation at all.

Prior to an in depth study of stop and frisk and its relation to search and seizure law, a preliminary note on terminology is in order. In both *Terry* and *Sibron* the Court criticized the use of the term "stop and frisk." The Court viewed stopping and frisking as seizing (the person) and searching (for weapons). While this is certainly an accurate picture of what takes place, the criticism of separate terminology to describe this activity is not well placed. The Court properly refused to be led into characterizing stops and frisks as a separate area of the law. Nonetheless, such activities by the police, according to the Court's own ruling, are not governed by the same standards as other searches. In spite of the Court's dislike for the term "stop

¹⁸² *Terry v. Ohio*, 392 U.S. 1, 16-17 (1968).

¹⁸³ At trial the officer admitted he reached into *Sibron's* pocket expecting to find narcotics and that he had no fear defendant would harm him.

and frisk", there is a valid reason for using it since it is a convenient and descriptive way of referring to a special set of circumstances and standards to be applied thereto. Accordingly, the term stop and frisk will be used in this discussion to refer to the act of a police officer detaining a person for questioning (short of actual arrest) and searching (frisking or patting down) his outer clothing to determine the presence of a weapon.

B. STOP AND FRISK REQUIREMENTS

1. *The Stop.*

The stop must be based upon reasonable grounds giving the officer sufficient basis to suspect that the person stopped has committed, is committing, or is about to commit a crime.¹⁸⁴ Just any engagement between a policeman and a citizen will not constitute a stop within the meaning of the Fourth Amendment:

Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred."

Furthermore, up until the point of actual seizure of the person, no intrusion upon the constitutionally protected rights occurs.¹⁸⁶

In making the determination whether to stop a person, the officer may consider more than just the visible activity of the individual. He may consider the area of activity, time of day, his knowledge of the person to be stopped, hearsay information, or other facts in his possession.¹⁸⁷ However, where the suspect's activity has been entirely consistent with innocent activity, a stop is unreasonable.¹⁸⁸ The test for a constitutionally valid stop is not probable cause; but a reasonably based suspicion on the part of the officer that the person stopped may be involved in criminal activity is needed.

Once the officer attempts to make a stop, he may, of course, use reasonable force to detain a rebellious person. This force, however, may not extend to use of force likely to produce grievous bodily injury unless necessary for the protection of the officer or some other person. Once a person has been stopped, his detention may last only as long as is reasonably necessary to clear up the matter. Once the business of the person has been de-

¹⁸⁴ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁸⁵ *Id.* at 19, note 16.

¹⁸⁶ *Id.*

¹⁸⁷ *E.g.*, *United States v. Dowling*, _____ F.2d _____, 8 CRIM. L. REP. 2209 (D.C. Cir. 30 Dec. 1970).

¹⁸⁸ *Sibron v. New York*, 392 U.S. 40 (1968).

terminated by the officer, he must either release or arrest **him**.¹⁸⁹ Finally, the policeman may move the detainee a short distance from the place of the stop in order to conduct his questioning or to take any other appropriate **action**.¹⁹⁰ Again, the test is reasonableness. Consequently, unnecessarily long trips or unnecessary inconvenience to the detainee would be prohibited.

2. *The Frisk.*

The test for the frisk is also one of reasonableness. The frisk is designed to determine whether the suspect has a weapon on his person which he might obtain and use to injure the officer or someone else. This being the case, it is not a complete search of everything the detainee may have on his person:

The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police **officer**.¹⁹¹

The Supreme Court ruled in *Terry* that when the officer is justified in believing the individual may be armed, it would be unreasonable to deny him the power to take necessary steps to protect himself. Nonetheless, these steps constitute a search of the person and must, therefore, be reasonably limited to the purpose for which conducted.

In the case of the self-protective search for weapons, he [the police officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and **dangerous**.¹⁹²

The frisk must be limited strictly to the outer portions of the individual's **clothing**.¹⁹³ If the pat down reveals something which the officer believes may be a weapon, he may reach inside the clothing to get it. The reason for this rule is that the frisk is an intrusion upon the citizen's right of privacy and in some cases his dignity. The courts will, therefore, closely examine such intrusions to insure there is no abuse. Thus, it has been held that

. . . an officer who exceeds a pat-down without first discovering an object which feels reasonably like a knife, gun or club must be able to point to specific and articulable facts which reasonably sup-

¹⁸⁹ *Id.*, *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁹⁰ *E.g.*, to a phone or police car radio to check identity, status or automobile registration, or to a nearby area which is less congested or which is less likely to cause an explosive situation. In *Terry* the officer completed part of his frisk inside a drug store after stopping the subject on the street.

¹⁹¹ *Terry v. Ohio*, 392 U.S. 1, 29 (1968).

¹⁹² *Sibron v. New York*, 392 U.S. 40, 64 (1968).

¹⁹³ *Terry v. Ohio*, 392 U.S. 1 (1968).

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port a suspicion that the particular suspect is armed with a typical weapon which would feel like the object felt during the pat-down.¹⁹⁴

Since weapons are generally hard objects like guns, knives, or clubs, the courts are extremely suspicious about frisks that result in the discovery of soft items such as packets of marijuana or narcotics. The general rule is that the

[f]eeling [of] a soft object in a suspect's pocket during a pat-down, absent unusual circumstances does not warrant an officer's intrusion into a suspect's pocket to retrieve the object.¹⁹⁵

Thus, where an officer believes that the soft object felt in the suspect's pocket is a weapon such as a sand-filled sock, he should, according to the courts, conduct a more extensive exploration of the object from the outside of the clothing before reaching into the pocket.¹⁹⁶

The problem with this rule is that frequently officers will in the course of a frisk feel a soft object which, while clearly not a weapon, may appear to be a packet of narcotics. Based upon this the officer will reach into the pocket and take the object. Such procedure, while logical to the officer, is not in conformance with the strict limitations on frisk searches. The proper, if somewhat troublesome, approach is for the officer to examine the article through the clothing as best he can. If this examination, coupled with whatever other facts he may have at the time, gives him probable cause to believe the object is narcotics, he may arrest the suspect and conduct a full blown personal search incident to that arrest.¹⁹⁷

As in the case with other permissible searches, the officer may use whatever reasonable force is necessary to conduct the frisk once he has determined he has reasonable grounds to search the suspect for a weapon. The use of force here is strictly limited to controlling the suspect for the purpose of conducting the frisk and may go no further than is absolutely necessary to accomplish that purpose.

Where the frisk turns up an object, the possession of which is criminal, or which indicates criminal activity on the part of the

¹⁹⁴ *People v. Collins*, 83 Cal. Rptr. 179, 182, 463 P.2d 403, 406 (1970). **Compare** *Terry v. Ohio*, 392 U.S. 1 (1968) with *Sibron v. New York*, 392 U.S. 40 (1968).

¹⁹⁵ *People v. Collins*, 83 Cal. Rptr. 179, 182, 463 P.2d 403, 406 (1970).

¹⁹⁶ *People v. Collins*, 83 Cal. Rptr. 179, 463 P.2d 403 (1970). **Compare**, *United States v. Dowling*, _____ F.2d _____, 8 CRIM. L. REP. 2209 (D.C. Cir. 3 Dec. 1970).

¹⁹⁷ *People v. Collins*, 83 Cal. Rptr. 179, 463 P.2d 403 (1970).

suspect, probable cause will exist for an arrest.¹⁹⁸ Once the arrest is made, of course, a more complete search incident thereto is authorized.¹⁹⁹

From the above discussion it is clear that while stop and frisk actions are subject to the Fourth Amendment, they are based upon something less than probable cause. The Supreme Court so ruled when it stated that

the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger . . . due weight must be given, not to his inchoate and unparticularized suspicion or "hunch", but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.²⁰⁰

The reason that probable cause is not the test in stop and frisk is that the question is one of degree. Stops and frisks are simply not full searches of the person and "[t]he degree of justification will vary according to the degree of intrusion occasioned."²⁰¹

The fact that there has been a stop will not, however, give automatic right for a frisk. The purpose of the frisk is protection of the policeman and those around him. Thus, he must have reasonable grounds²⁰² to fear danger to himself or others from the suspect before he may pat down his clothing.²⁰³

In the course of his frisk the officer may encounter a hard object which he reasonably believes to be a weapon; but upon seizing it, he finds that it is some other illegal item such as burglar's tools.²⁰⁴ As in the case in other types of searches, reasonably encountered objects that are contraband or evidence of a crime may be seized.²⁰⁵ The courts will closely scrutinize such seizures, however.

¹⁹⁸ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁹⁹ See section III on searches incident to arrest, *supra*.

²⁰⁰ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

²⁰¹ *United States v. Pullen*, 41 C.M.R. 698, 700 (ACMR 1970).

²⁰² This does not mean probable cause.

²⁰³ *Terry v. Ohio*, 392 U.S. 1 (1968); *Sibron v. New York*, 392 U.S. 40 (1968). The tenor of recent military cases is to the effect that the *Terry* reasonableness test, and not probable cause, is the test in the military. *United States v. Martinez* 41 C.M.R. 467 (ACMR 1969); *United States v. Mehalek*, _____ CMR _____ (ACMR 27 Aug. 1970). It would be preferable to refer to the test as one of reason and not as some form of probable cause. This is the test set forth in para 2-5, Army Reg. No. 190-22 (12 June 1970), which is the authority for stop and frisk in the Army. That regulation applies the *Terry* requirements of reasonableness and limitation on the scope of the frisk.

²⁰⁴ See, *Peters v. New York*, 392 U.S. 40 (1968).

²⁰⁵ *But see*, discussion concerning soft objects encountered during a search, note 20 and accompanying text.

C. THE REASONABLENESS TEST

In judging the reasonableness of a stop and frisk, the courts apply a twofold test to the activities of the police. First, the officer's action must be justified at its inception. Second, the frisk must be reasonably related in scope to the circumstances justifying the original action.²⁰⁶ The totality of the circumstances, as well as the officer's actions, will be considered in light of this objective test.²⁰⁷ For example, the pat-down wall search of accused conducted after a preliminary frisk had revealed nothing, was found to be based solely upon the discovery of contraband in the possession of his companion and, therefore, unreasonable.²⁰⁸

Not infrequently, it is difficult to determine whether a situation is an arrest and incidental search or a stop and frisk. The distinction between the two lies in the fact that there is no arrest which precedes the frisk and the frisk is limited strictly to a pat-down of outer clothing for weapons. Incidental searches, on the other hand, must be preceded by an arrest and may be for weapons or evidence.²⁰⁹ That these distinctions may become blurred in a fast moving situation is demonstrated in *United States v Unverzagt*.²¹⁰ There a postal inspector received word from an unidentified informer that a man was selling postal money orders at a bar. The man was described to the inspector. He decided to check on the information and proceeded to the bar with some fellow officers. After talking to several people in the bar, the inspectors decided to interview the suspect Unverzagt. They had been told that he was carrying a gun by two people, one of them Unverzagt's girl friend. Since he was at this time in the washroom, the agents drew their weapons and ordered him out. As he exited the washroom, Unverzagt had his hands in his pocket. Upon being ordered to remove them, he did so withdrawing his gun. He was thereupon arrested and searched. Stolen postal money orders were found in his possession. The court ruled that the postal authorities acted reasonably in checking out the informant's story. Furthermore, the facts elicited by their preliminary discussions with people in the bar gave them a right to interview (stop) defendant and in effect seize him for that purpose because of their reasonable suspicion that he was armed.

²⁰⁶ *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

²⁰⁷ *Id.*, at 19 and 21.

²⁰⁸ *United States v. Mehalek*, _____ C.M.R. _____ (ACMR 27 Aug. 1970); *United States v. Leyva-Barragan*, 423 F.2d 669 (9th Cir. 1970).

²⁰⁹ See discussion of incident to arrest searches, in IIII, *supra*.

²¹⁰ 424 F.2d 396 (8th Cir. 1970).

Finally, the drawing of the weapon showed defendant had been carrying a concealed weapon. This being a felony under the state law, he was subject to arrest and the incidental search revealing the money orders was valid.

When cases such as this arise, the courts can only look to the totality of the circumstances and determine whether the officers acted reasonably. Moreover, if the facts show that there is no stop and frisk, they might still be sufficient to show an arrest and incidental search.²¹¹ Each case must be decided on its own facts.

The concluding paragraph of the majority opinion in *Terry* is an apt summary of the rules discussed above:

We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous; where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries; and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapon seized may properly be introduced in evidence against the person from whom they are taken.²¹²

VIII. CONCLUSION

In this discussion of search and seizure, it has not been possible to consider all facets of the problem. The areas that have been covered are those considered to have undergone the most radical or important changes in recent times. It should be apparent from this discussion that the facts of each case will determine what rules will be applied. Granted, there are general principles of law to be considered in all search and seizure cases; it is the facts to which they are applied that will, in the final analysis, develop the law of search and seizure.

In this regard, one should consider the decisions of the courts and the doctrine of reasonableness. As was pointed out at the beginning of this article, the courts universally hold that technicalities are not governing. The reasonableness of the acts of the

²¹¹ *Peters v. New York*, 392 U.S. 40 (1968).

²¹² *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

police are determinative. Nonetheless, it is also apparent that reasonableness is a question of how one views a case. The courts have the benefit of hindsight when considering these questions and, therefore, tend to develop the doctrine of reasonableness on the basis of what happened as well as what should have happened; a sort of "technical reasonableness." The courts frequently contend that they view the facts and circumstances through the eyes of the authorities; their decisions and rules, however, indicate a more pragmatic approach.

While it is true that many search and seizure issues would not have been brought to the courts had some thought and caution been used in a given situation, one cannot place all the blame upon the authorities. They are not attorneys or judges. They are laymen in the law, acting in a field in which everything they do has legal overtones. Perhaps the best advice they can be given is to act in all cases with a sense of caution. This is not to say that they should thoroughly research the law of search and seizure before acting. Rather, they should consider what it is they are attempting to accomplish and ask the question, "Should we get a warrant?" If there is any reasonable way in which the warrant can be obtained, it would be wiser to do so than to rely on essentially technical exceptions to the requirements of the Fourth Amendment.

The courts, on the other hand, must take care to avoid over-strictness in this area. The law requires only probable cause before a search can be made, not proof of the case beyond a reasonable doubt. The latter is a matter for the trier of fact.

On the whole, if one considers the historical basis for the Fourth Amendment and the importance placed upon it by the courts, the development of the law of search and seizure has been reasonable. There are exceptions, of course, but in an area where the problems and possible solutions are infinite, interpretation of the law is bound to be subject to some uncertainty, variance, and criticism.

CIVIL DISTURBANCE, JUSTIFIABLE HOMICIDE, AND MILITARY LAW*

By Major Charles R. Murray””

Recent civil disorders have illustrated the grim dangers of the use of federal troops to restrain their fellow citizens. In addition to his more obvious difficulties, the soldier on riot duty is faced with a variety of ill-defined legal rules to govern his use of non-lethal and lethal force. The author examines the state of the law in this highly sensitive area with an eye toward defining the defenses a soldier may offer at a court-martial. Particular emphasis is given to the defenses of obedience to orders, mistake of fact and mistake of law.

I. INTRODUCTION

The modern involvement of the United States Army in curbing domestic disorders began with the dispatch of federal troops to Detroit in 1967. The following year saw thousands of U.S. soldiers deployed to the riot-torn streets of Chicago, Baltimore, and Washington, D.C. As recently as May 1971 federal troops were on duty in Washington, D.C., in connection with anti-war demonstrations.¹ During the same years the deaths of students at Kent State from Ohio National Guard gunfire² and the unfolding of the My Lai “incident” have separately focused public concern on domestic disturbance and the responsibility of the soldier for the use of lethal force.

Having flown into Andrews Air Force Base during the April 1968 disturbances in the Nation’s Capitol as the judge advocate of a provisional brigade of federal troops, the importance of the

* This article was updated from a thesis presented to The Judge Advocate General’s School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Seventeenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General’s School or any other governmental agency.

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¹ TIME, 7 May 1971, at 13–15.

² This article will not examine the liabilities of National Guardsmen acting in non-federal roles. However, many of the conclusions drawn may have relevance to State Guardsmen.

Army's role in civil disturbance matters has been of more than theoretical interest. Fortunately, no serious criminal action has yet been brought against an active duty Army person for acts arising during civil disturbances.² The times, however, do not yet indicate a return to domestic tranquility and contingency planning on the part of the military continues.³ At some future date a staff judge advocate may be confronted with a situation involving the killing of civilians by members of his organization on civil disturbance duty.

This article will focus on some of the consequences arising from a soldier's decision to resort to lethal force in a civil disturbance. Although primarily limited to the homicide offenses, the legal principles involved should be equally applicable to lesser assault offenses. Further, while it is recognized that prosecution in non-military fora is possible problems will be evaluated primarily in terms of court-martial proceedings under the Uniform Code of Military Justice.⁴ Civil damage suits and criminal offenses against property will be left for evaluation by others.

²Per contact by the author with various staff judge advocates of previously deployed field commands and personnel within the Office of The Judge Advocate General, Department of the Army.

⁴Note, for example, the existence of the United States Army Directorate for Military Support, Office of the Chief of Staff of the Army.

⁵The soldier who commits an act of homicide during civil disturbance duty might be prosecuted in the state courts or federal district courts. Soldiers brought before state courts may seek removal to a federal district court based on a claim of having acted under color of federal authority when the alleged crime took place. 28 U.S.C. § 1442a (1964) applies to both criminal and civil actions. See *Tennessee v. Davis*, 100 U.S. 257 (1880), upholding the constitutionality of such a removal statute. The Supreme Court in *Willingham v. Morgan*, 395 U.S. 402 (1969), has established that the test for removal under this statute is broader than the test for official immunity. The soldier may also seek a federal court determination that the state is without jurisdiction under the theory of executive immunity. This remedy would be sought by a petition for habeas corpus. 28 U.S.C. § 2241 (1964). See *In re Neagle*, 135 U.S. 1 (1889), the landmark case in this area. Also see *Hunter v. Wood*, 209 U.S. 205 (1907), upholding federal intervention by statute in such circumstances. *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965), is an example of the modern application of executive immunity in a civil case, while *In re McShane*, 235 F. Supp. 262 (N.D. Miss. 1964) is an example of its application in a criminal case. Both removal under 28 U.S.C. § 1442a (1964) and executive immunity by habeas corpus exists independently of each other.

If removal is granted, the soldier would be tried under state substantive law and federal procedural law. See FED. R. CRIM. P. 54(b)(1). Habeas corpus subjects the soldier only to federal law.

Mention must also be given to the jurisdictional effect of *O'Callahan v. Parker*, 395 U.S. 258 (1969). There the Supreme Court required a "service connection" before the military could try a serviceman. In my opinion an offense arising out of a serviceman's performance of official duties during

Throughout the article extensive use will be made of state criminal law precedents. Necessity demands such investigation as many of the areas studied have not been examined by military courts. In resolving such questions of first impression the military courts would undoubtedly draw on the available civilian precedents.

11. BACKGROUND

A. *HISTORICAL USE OF FEDERAL TROOPS TO SUPPRESS CIVIL DISORDERS*

It is in keeping with this country's tradition of civilian control over the military that the military has generally been restricted from exercising authority or responsibility in the realm of civil order and discipline. Yet in spite of this fact there is a long historical precedent for the use of the military to restore internal order. The use of federal troops in suppressing civil disorder and enforcing federal law is nearly as old as the United States itself.

The earliest instance of employment of federal troops in the domestic sphere was the Whiskey Rebellion of 1794. Large numbers of individuals in western Pennsylvania had refused to pay a federal excise tax on whiskey; expressing their refusal in forming into mobs, mistreating federal tax officials and damaging government property. President Washington responded by dispatching the militia of several states to the troubled areas. The rebellion collapsed before the troops arrived.⁶ Two more recent occasions of federal troops being dispatched to enforce federal law were Little Rock, Arkansas, in 1957 and the University of Mississippi in 1962.⁷

The furnishing of federal troops to assist a state in suppressing internal disorder is also not new to this country. There have been many requests by various states for such assistance and on sixteen

civil disturbances, even though carried out in a criminal manner, would be service-connected. Certainly, in most instances an accused would argue on the merits that his actions were not only legal, but arose out of the performance of his official duties, and hence, were service connected. The issue will probably arise only in a situation where the accused, though present for civil disturbance duty, was clearly acting in a private capacity at the time of the alleged offense. Whether mere presence at a geographic location, due to military duties, would be sufficient to show service connection is unknown.

⁶ See B. RICH, *THE PRESIDENTS AND CIVIL DISORDER*, 2-20 (1941) [hereinafter cited as RICH].

⁷ See Pres. Proc. No. 3,204; 22 Fed. Reg. 7628 (1957); Exec. Order No. 10,730; 22 Fed. Reg. 7628 (1957); Pres. Proc. 3,497; 27 Fed. Reg. 9681 (1962); Exec. Order No. 11,053; 27 Fed. Reg. 9681 (1962).

occasions they have been granted.' In 1874 the Governor of Louisiana requested and received federal troops to restore order in New Orleans after mobs of over 10,000 persons compelled the surrender of the local police and were joined by the state militia in an orgy of racial violence.' Two years later the Ku Klux Klan riots occurred in several counties of South Carolina. Again, federal troops were dispatched at state request.'@ The Railroad Strike Riots of 1877¹¹ generated various state requests for help. Federal troops went into West Virginia,¹² Maryland,¹³ and Pennsylvania¹⁴ to assist the local governments in restoring order. Next came the Idaho Mining Riots when, at state request, federal troops were dispatched on three different occasions: 1892, 1894, and 1899.¹⁵ During that same period, federal troops were also used in 1894 at Montana's request to suppress a 600 man portion of Coxey's Army which had stolen a train to aid them in their march to Washington, D.C.¹⁶ Mining riots in Nevada (1907),¹⁷ Colorado (1914)¹⁸ and West Virginia (1921)¹⁹ also occasioned state requests for aid and dispatch of federal troops. In 1943 race riots rocked Detroit and federal troops were employed at state request.²⁰ Recent examples of federal assistance to the states are Detroit in 1967, and Chicago and Baltimore in 1968. A survey of these instances discloses that federal troops were dispatched to assist the various states upon their request whenever governmental control was lost over at least a large portion of a city or county despite employment of all available state law enforcement resources, including the National Guard.

⁸ Examples of when state requests for federal troops were refused are the Buckshot War, Pennsylvania, 1838; Dorr Rebellion, Rhode Island, 1842; San Francisco Vigilance Committee, 1856; Chicago Railroad Riots, 1877. See RICH at 51-54, 54-66, 66-71, and 79-80, respectively. Conversely, federal troops were used in Chicago in 1893 during the Pullman strike over the objection of the Illinois Governor. *Id.* at 91-104.

⁹ See FEDERAL AID IN DOMESTIC DISTURBANCES, S. Doc. No. 19, 67th Cong., 2d Sess. 120-139 (1922) [hereinafter cited as FEDERAL AID].

¹⁰ *Id.* 156-57.

¹¹ RICH at 72-86.

¹² FEDERAL AID at 164-65.

¹³ FEDERAL AID at 164-65.

¹⁴ FEDERAL AID at 166-70.

¹⁵ FEDERAL AID at 190-91, 199-200, 210-13.

¹⁶ RICH at 88-89.

¹⁷ FEDERAL AID at 311.

¹⁸ FEDERAL AID at 312-15.

¹⁹ FEDERAL AID at 320.

²⁰ See A. LEE & N. HUMPHREY, RACE RIOT (1943).

JUSTIFIABLE HOMICIDE

B. LEGAL BASIS FOR EMPLOYMENT OF FEDERAL TROOPS

The United States Constitution's preamble sets forth as one of its basic purposes: ". . . insure domestic Tranquility. . . ." Article IV of the Constitution provides that "The United States shall guarantee to every State . . . a Republican Form of Government, and *shall protect each of them . . . against domestic violence.*"²¹ The XIV amendment of the Constitution prohibits any state from depriving "any person of life, liberty, or property, without due process of law" or denying "any person within its jurisdiction the equal protection of the laws." To implement these guarantees Congress is charged with providing for the general welfare of the United States²² and for calling the militia to execute the laws of the Union and to suppress insurrections.²³ The President, in turn, is responsible for the execution of the law²⁴ and is the Commander-in-Chief of the Army, the Navy, and the Militia when called into federal service.²⁵

Within the constitutional framework Congress established the rules under which federal troops might be committed.²⁶ Today these rules provide for the President's use of the militia and armed forces to suppress insurrections upon proper request by the states; to enforce the laws of the United States or suppress rebellion when ordinary judicial proceedings are impracticable; and to suppress insurrection or domestic violence which results either in a state denial or equal protection of the laws guaranteed by the Constitution to its citizens or an obstruction of the execution of the laws of the United States.²⁷ Coupled with these authorizations is the proscription of the so-called Posse Comitatus Act which prohibits the use of the Army or Air Force to execute the law except when expressly authorized by the Constitution or Act of Congress.²⁸

²¹ U.S. CONST. art. IV, sec. 4 (emphasis added).

²² *Id.* art. I, sec. 8, cl. 1.

²³ *Id.* art. I, sec 8, cl.15.

²⁴ *Id.* art. 11, sec. 3.

²⁵ *Id.* art. 11, sec. 2, cl. 1.

²⁶ Act of 28 Feb. 1795, ch. 36, 1 Stat. 424, provided for calling the militia to execute the laws of the Union, suppress insurrections, and repel invasions; Act of 3 Mar. 1807, ch. 39, 2 Stat. 443, allowed the President to also use the Army and Navy.

²⁷ See 10 U.S.C. §§ 331-333 (1964).

²⁸ 18 U.S.C. § 1385 (1964).

III. LEGAL JUSTIFICATION AS DEFENSE TO MURDER

A. THE GENERAL NATURE OF LEGAL JUSTIFICATION

The *Manual for Courts-Martial, United States, 1969 (Revised edition)*,²⁹ specifically recognizes justification as an affirmative defense³⁰ to murder." The Manual provision is in accord with the general state of the law in this country that when necessary, a killing is justifiable in the performance of a legal duty.³² However, it neglects to include the second half of justifiable homicide, concerning those situations in which a person has a legal right to kill.³³ This latter half is broad enough to include self-defense, but encompasses much more. Although not contained in the 1951 or 1969 Manuals, the right of a private citizen to use deadly force under circumstances not involving self-defense has been recognized to a certain degree in the military."

Before going further, several other related legal concepts should be considered and distinguished. The first is *excusable homicide*. In the military excusable homicide can be raised by the various defenses of accident or misadventure, self-defense, obedience to apparently lawful orders, entrapment, and coercion or duress.³⁵ Of particular interest in the concept of self-defense. As shall be seen later some of the elements required in self-defense are applicable in justifiable homicide while others are not. The primary difference is that the person availing himself of the defense of

²⁹ Para 216a.

³⁰ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION), para 214 [hereinafter cited as MCM, 1969 (REV. ED.) 3]; and *United States v. Schreiber*, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955); *United States v. Lee*, 3 U.S.C.M.A. 501, 13 C.M.R. 57 (1953); *United States v. Weems*, 3 U.S.C.M.A. 469, 13 C.M.R. 25 (1953), which hold that justifiable homicide is an affirmative defense to be raised by the accused.

"MCM, 1969 (REV. ED.), para 197, discusses the offense of murder in the military.

³² *Stinnett v. Commonwealth*, 55 F.2d 644 (4th Cir. 1932); *Dyson v. State*, 28 Ala. App. 549, 189 So. 784 (1939); *State w. Smith*, 127 Iowa 534, 103 N.W. 944 (1905); *Wimberly v. City of Paterson*, 75 N.J. Super. 584, 183 A.2d 691 (1962).

³³ See *Viliborgh v. State*, 45 Ariz. 275, 43 P.2d 210 (1935); *Williams v. State*, 70 Ga. 10, 27 S.E.2d 109 (1943); *State w. Fair*, 45 N.J. 77, 211 A.2d 359 (1965); *McKee v. State*, 118 Tex. Crim. 479, 42 S.W.2d 77 (1931); *Dodson v. Commonwealth*, 159 Va. 976, 167 S.E. 260 (1933).

³⁴ *United States v. Hamilton*, 10 U.S.C.M.A. 130, 27 C.M.R. 204 (1959), held that a serviceman, acting as a private citizen, could use force to prevent a felony committed in his presence. In the particular case only a misdemeanor had been committed and Hamilton was not entitled to that defense to a charge of assault with a dangerous weapon.

³⁵ MCM, 1969 (REV. ED.), para 216b-f.

justifiable homicide may be the aggressor³⁶ either by duty or right. The reasonableness of the force he uses to accomplish his legitimate goal will, however, be subject to scrutiny. Certain jurisdictions divide self-defense into two categories, justifiable and excusable, depending upon what is being defended. The former eliminates the proscription of non-aggression.³⁷

The defenses of mistake of fact and mistake of law also enter into the area of justifiable homicide. Further entwined in this area is the concept, peculiar to the military, of obedience to orders.

B. JUSTIFIED USE OF DEADLY FORCE

1. Prevention of Criminal Offenses.

The rule at common law and in most jurisdictions today is that deadly force may be used when necessary to prevent a forcible or atrocious felony from being committed by violence or surprise.³⁸ This rule has been adopted by the military with minor variance in the adjectives used from case to case.³⁹ Three elements must be present: a forcible or atrocious felony, an attempt or commission by violence or surprise, and a necessity for deadly force to terminate or prevent it.⁴⁰ Of particular importance concerning courts-martial is that the United States Court of Military Appeals in *United States v. Hamilton*,⁴¹ when applying the general rule, defined a felony as being an offense punishable by more than one year's imprisonment under the *Manual for Courts-Martial*.

³⁶ "Unless the accused had withdrawn in good faith, he is generally not entitled to this defense [self-defense] if he was an aggressor. . . ." *Id.* para 216c. See *United States v. Sandoval*, 4 U.S.C.M.A. 61, 15 C.M.R. 61 (1954).

³⁷ See *Dodson v. Commonwealth*, 159 Va. 976, 167 S.E. 260 (1933).

³⁸ *Gill v. Commonwealth*, 235 Ky. 351, 31 S.W.2d 608 (1930); *State v. Fair*, 45 N.J. 77, 211 A.2d 359 (1965); *Dodson v. Commonwealth*, 159 Va. 976, 167 S.E. 260 (1933); *State v. Nyland*, 47 Wash. 2d 240, 287 P.2d 345 (1955); see *In re Neagle*, 135 U.S. 1 (1889), which supports such a conclusion without discussing this particular rule.

³⁹ *United States v. Hamilton*, 10 U.S.C.M.A. 130, 27 C.M.R. 204 (1959); *United States v. Lee*, 3 U.S.C.M.A. 501, 13 C.M.R. 57 (1953); *United States v. Weems*, 3 U.S.C.M.A. 469, 13 C.M.R. 25 (1953).

⁴⁰ The term "absolute necessity" has been used by some courts: *State v. Nodine*, 198 Ore. 679, 259 P.2d 1056 (1953); *State v. Beal*, 55 N.M. 382, 234 P.2d 331 (1951), while other courts use such terms as "apparent necessity"; *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1948), and "reasonable necessity"; *State v. Sorrentino*, 31 Wyo. 129, 224 P. 420 (1924). The use of these adjectives in these and other cases have not been to modify the word "necessity" but only to reenforce its normal meaning, thus precluding convenience being used as the standard.

⁴¹ 10 U.S.C.M.A. 130, 27 C.M.R. 204 (1959).

The right to use deadly force to prevent a violent felony is not restricted to law enforcement officers. In most jurisdictions a private citizen may resort to deadly force under the same circumstances as a peace officer.⁴² The right of a serviceman to so act as a private citizen has been recognized in the military.⁴³

Closely akin to prevention of violent felonies is the justified use of deadly force in the protection of a person's home.⁴⁴ The offenses of arson and robbery, whether committed in a person's home or elsewhere, would be covered by the general rule governing violent or forcible felonies.

Defense of others against criminal attack will justify the use of deadly force when necessary to repel the attack.⁴⁵ This particular rule of law is important to the serviceman on riot control duty. If, however, he mistakenly comes to the defense of the wrong party he may find himself in legal difficulty. *State v. Fair*⁴⁶ sets forth the majority and minority tests for criminal liability. The former protects the honest and reasonable, though mistaken, rescuer while the latter does not.

As violent felonies may be prevented by deadly force, conversely non-violent felonies⁴⁷ and misdemeanors⁴⁸ may not. Not all cases are in agreement, however. In the California case of *People v. Siler*⁴⁹ the court, based on statute, extended justifiable homicide to include the prevention of all felonies. The opposite conclusion

⁴² *State v. Fair*, 45 N.J. 77, 211 A.2d 359 (1965); *Commonwealth w. Emmons*, 157 Pa. Super. 495, 43 A.2d 568 (1945); *McKee v. State*, 118 Tex. Crim. 479, 42 S.W.2d 77 (1931); *State v. Nyland*, 47 Wash.2d 240, 287 P.2d 345 (1955).

⁴³ *United States v. Hamilton*, 10 U.S.C.M.A. 130, 27 C.M.R. 204 (1959). See Army Reg No. 633-1 (13 Sep. 1962).

⁴⁴ See generally *Viliborghi v. State*, 45 Ariz. 275, 43 P.2d 210 (1935); *State v. Fair*, 45 N.J. 77, 211 A.2d 359 (1965); *State v. Couch*, 52 N.M. 127, 193 P.2d 331 (1951); *Moore w. State*, 91 Tex. Crim. 118, 237 S.W. 931 (1922).

⁴⁵ *Williams v. State*, 70 Ga. 10, 27 S.E.2d 109 (1943); *Gill w. Commonwealth*, 235 Ky. 351, 31 S.W.2d 608 (1930); *State w. Fair*, 45 N.J. 77, 211 A.2d 359 (1965); *Dodson v. Commonwealth*, 159 Va. 976, 167 S.E. 260 (1933).

⁴⁶ 45 N.J. 77, 211 A.2d 359 (1965). *Accord*, *Williams v. State*, 70 Ga. 10, 27 S.E.2d 109 (1943); *State v. Robinson*, 213 N.C. 273, 195 S.E. 825 (1938). See *McIntire v. Commonwealth*, 191 Ky. 299, 230 S.W. 41 (1921), for the minority view. See *Dodson v. Commonwealth*, 159 Va. 976, 167 S.E. 260 (1933), which uses both rules depending on the person being defended.

⁴⁷ *Commonwealth v. Beverly*, 237 Ky. 35, 34 S.W.2d 941 (1931); *State v. Turner*, 190 La. 198, 182 So. 325 (1938); *Commonwealth v. Emmons*, 157 Pa. Super. 495, 43 A.2d 568 (1945); *State w. Nyland*, 47 Wash.2d 240, 287 P.2d 345 (1955).

⁴⁸ *Viliborghi v. State*, 45 Ariz. 275, 43 P.2d 210 (1935); *State v. Turner*, 190 La. 198, 182 So. 325 (1938).

⁴⁹ 6 Cal.2d 741, 108 P.2d 4 (1940).

was reached by the Oregon⁵⁰ and Washington⁵¹ courts when interpreting statutes apparently covering all felonies. In these two cases the courts simply wrote in the common law requirement that the felony be violent or forceful.

A problem will arise, however, when the slayer turns out to be mistaken either in his belief that a violent felony was in process or that deadly force was necessary to prevent it. Under state law his mistaken acts will usually be excused if he acted in good faith upon an honest and reasonable belief.⁵² Should he, however, act unreasonably, dishonestly, or in ignorance of the law, the criminal charge may vary from murder to manslaughter.⁵³

2. Arrest and Prevention, of Escape.

Under common law and statute both a peace officer and a private citizen⁵⁴ may arrest or prevent the escape of a felon. When he is without a warrant, the peace officer, in a majority of jurisdictions, must be acting upon a reasonable belief that a felony has been committed and that the person to be arrested committed it.⁵⁵ Some states additionally require that a felony actually has been committed.⁵⁶ For the private citizen attempting

⁵⁰State v. Nodine, 198 Ore. 679, 259 P.2d 1056 (1953).

⁵¹State v. Nyland, 47 Wash.2d 240,287 P.2d 345 (1955).

⁵²Viliborghi v. State, 45 Ariz. 275, 43 P.2d 210 (1935); Williams v. State, 70 Ga. 10, 27 S.E.2d 109 (1943); State v. Beal, 55 N.M. 382, 234 P.2d 331 (1951). *But see* State v. Law, 106 Utah 196, 147 P.2d 324 (1944), which held that state statute applied the honest and reasonable test to protecting oneself and certain relatives, but in all other cases the person slain must have actually attempted to inflict great bodily harm upon the person being protected.

⁵³For the varying results for those who acted *so* unwisely *see* United States v. Hamilton, 10 U.S.C.M.A. 130, 27 C.M.R. 204 (1959); United States v. Lee, 3 U.S.C.M.A. 501, 13 C.M.R. 57 (1953); United States v. Weems, 3 U.S.C.M.A. 469, 13 C.M.R. 25 (1953); Commonwealth w. Beverly, 237 Ky. 35, 34 S.W.2d 941 (1931); Commonwealth v. Emmons, 157 Pa. Super. 495, 43 A.2d 568 (1945); State v. Nyland, 47 Wash.2d 240, 287 P.2d 345 (1955).

⁵⁴A state may require that the felony be committed in the presence of the citizen before he may make a citizen's arrest. *See* People v. McGurn, 341 Ill. 632, 173 N.E. 754 (1930); State v. Parker, 355 Mo. 916, 199 S.W.2d 338 (1947); Martin v. Houck, 141 N.C. 317, 54 S.E. 291 (1906).

⁵⁵Martyn v. Donlin, 151 Conn. 402, 198 A.2d 700 (1964); State v. Autheman, 47 Idaho 328, 274 P. 805 (1929); Palmar v. Maine Cent. R. Co., 92 Me. 399, 42 A. 800 (1889); Martin v. Houck, 141 N.C. 317, 54 S.E. 291 (1906); Allen v. Lopinsky, 81 W. Va. 13, 94 S.E. 369 (1917).

⁵⁶The courts in Adair v. Williams, 24 Ariz. 422, 210 P. 853 (1922); People v. McGurn, 341 Ill. 632, 173 N.E. 754 (1930); Kennedy v. State, 139 Miss. 579, 104 So. 449 (1925), discuss their state statutes which vary from the common law by requiring that the felony actually have been committed if the peace officer attempts to arrest without warrant for an alleged felony committed out of his presence.

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to apprehend a felon, the minority view becomes for him the majority rule, requiring that a felony actually has been committed.⁵⁷

Once the peace officer or private citizen legally attempts to effect an arrest of a "felon," deadly force may be used if no other reasonable means are available to effect it.⁵⁸ Thus, a fleeing felon may be shot when no other method is available to prevent his escape.⁵⁹

A contradiction occurs as to the private citizen. If his property is being stolen, assuming the criminal act amounts to a felony, he may not use deadly force to prevent the theft. But if he attempts to arrest the felon who flees, he may slay him if no other reasonable means are available to prevent escape. This dilemma has seldom been squarely faced by the courts,⁶⁰ perhaps due to the lack of imagination by defense counsel.⁶¹ Since the case law forbidding deadly force to prevent non-violent felonies

⁵⁷ *People v. Score*, 48 Cal. App.2d 495, 120 P.2d 62 (1941); *Crocker v. State*, 114 Ga. App. 492, 151 S.E.2d 846 (1966); *Pilos v. First Nat. Stores*, 319 Mass. 475, 66 N.E.2d 576 (1946); *Ross v. Leggett*, 61 Mich. 445, 28 N.W. 695 (1886); *Commonwealth v. Burke*, 378 Pa. 344, 106 A.2d 587 (1954); *Martin v. Castner-Knott Dry Goods Co.*, 27 Tenn. App. 421, 181 S.W.2d 638 (1944).

Peace officer: *Wiley v. State*, 19 Ariz. 346, 170 P. 869 (1918); *Martyn v. Donlin*, 151 Conn. 402, 198 A.2d 700 (1964); *Lee v. State*, 179 Miss. 122, 174 So. 85 (1937); *Wimberly v. Paterson*, 75 N.J. Super. 584, 183 A.2d 691 (1962); *Askay v. Maloney*, 85 Ore. 333, 166 P. 29 (1917); *Hendricks v. Commonwealth*, 163 Va. 1102, 178 S.E. 8 (1935). *Private citizen*: *Crawford v. Commonwealth*, 241 Ky. 391, 44 S.W.2d 286 (1931); *State v. Parker*, 355 Mo. 916, 199 S.W.2d 338 (1947); *State v. Nodine*, 198 Ore. 679, 259 P.2d 1056 (1953); *Scarborough v. State*, 168 Tenn. 106, 76 S.W.2d 106 (1934).

⁵⁸ In *Hendricks v. Commonwealth*, 163 Va. 1102, 178 S.E. 8 (1935), the court adhered to the rule that deadly force may be used if it is the only effective way to stop a fleeing felon, but held that the jury could find that the evidence did not reasonably support the need to kill in effecting the arrest of the suspected felon in a moving automobile.

⁶⁰ In *Williams v. Clark*, 236 Miss. 423, 110 So.2d 365 (1959), the court was faced with a proprietor attacking a person he suspected of earlier stealing over \$300.00 from his cash box. After the assault and retrieval of some \$70.00 the proprietor turned the suspect over to the police. The appellate court upheld a lower court declination to instruct on citizen's arrest, based on two grounds: that the proprietor's sole purpose (as he had earlier stated) was to reclaim his money; and that he did not inform the suspect of the object and cause of the arrest. Although in this case the application of an "intent" rule proved satisfactory, it is not hard to imagine that in most instances the only real evidence as to intent would be the in-court testimony of the assaulter, which is not particularly reliable.

⁶¹ In *Commonwealth v. Emmons*, 157 Pa. Super. 495, 43 A.2d 568 (1945), it was held that a woman had no right to shoot a person fleeing with her automobile because the felony was not violent or atrocious. The result might have been in doubt had her counsel raised the issue of attempting to arrest a fleeing felon.

is firmly established, it is likely that a similar theory concerning arrests would govern when the actual issue arises.

In the area of misdemeanors, the use of deadly force to effect an arrest is severely curtailed. Both peace officer⁶² and private citizen⁶³ may arrest without a warrant for a misdemeanor amounting to a breach of the peace committed in their presence, but neither may use deadly force to arrest or prevent escape.⁶⁴ The common law restrictions that neither could arrest without a warrant for a misdemeanor which was not a breach of the peace⁶⁵ or for any misdemeanor committed out of their presence⁶⁶ have been eliminated by statute and judicial decision in various states. At least in the case of a peace officer, resistance to legal arrest may be overcome by any degree of force reasonably necessary.⁶⁷ The peace officer so engaged has a *duty* to overcome the resistance and need not retreat.⁶⁸ Thus, a peace officer is legally the aggressor and may use deadly force to overcome resistance even in the case of a misdemeanor. If the peace officer, however,

⁶² *Adair v. Williams*, 24 Ariz. 422, 210 P. 853 (1922); *Commonwealth v. Gorman*, 288 Mass. 294, 192 N.E. 618 (1934); *State v. Lutz*, 85 W. Va. 330, 101 S.E. 434 (1919); *Allen v. State*, 183 Wis. 323, 197 N.W. 808 (1924).

⁶³ *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 42 A. 800 (1889); *Fitscher v. Rollman & Sons Co.*, 31 Ohio App. 340, 167 N.E. 469 (1929); *Radloff v. National Food Stores, Inc.*, 20 Wis.2d 224, 123 N.W.2d 570 (1963).

⁶⁴ *State v. Smith*, 127 Iowa 534, 103 N.W. 944 (1905); *Siler v. Commonwealth*, 280 Ky. 830, 134 S.W.2d 945 (1939); *People v. Cash*, 326 Ill. 104, 157 N.E. 77 (1927); *Durham v. State*, 199 Ind. 567, 159 N.E. 145 (1927); *Wimberly v. Paterson*, 75 N.J. Super. 584, 183 A.2d 691 (1962).

⁶⁵ Peace officer's right to arrest for any misdemeanor is set out in *Crocker v. State*, 114 Ga. App. 492, 151 S.E.2d 846 (1966); *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 42 A. 800 (1889); *City of St. Paul v. Webb*, 256 Minn. 210, 97 N.W.2d 638 (1959). *People v. Score*, 48 Cal. App.2d 495, 120 P.2d 62 (1941), extends the right to arrest without warrant to *anyone* for a "public offense" committed in his presence, while in *People v. Santiago*, 53 Misc.2d 264, 278 N.Y.S.2d 260 (1967), the right was extended to a "crime." *Martin v. Castner-Knott Dry Goods Co.*, 27 Tenn. App. 421, 181 S.W.2d 638 (1944), allows a citizen's arrest for a public offense committed in one's presence. *Malley v. Lane*, 97 Conn. 133, 115 A. 674 (1921), allows a citizen's arrest for any misdemeanor.

⁶⁶ *Reasonable grounds to believe* a misdemeanor has been committed on the part of a peace officer was substituted for the *in his presence rule* in *Smith v. State*, 228 Miss. 476, 87 So.2d 917 (1956); *Taylor v. Commonwealth*, 274 Ky. 702, 120 S.W.2d 228 (1938); *People v. McGurn*, 341 Ill. 632, 173 N.E. 754 (1930).

⁶⁷ *People v. Cash*, 326 Ill. 104, 157 N.E. 77 (1927); *Durham v. State*, 199 Ind. 567, 159 N.E. 145 (1927); *State v. Smith*, 127 Iowa 534, 103 N.W. 944 (1905); *Siler v. Commonwealth*, 28 Ky. 830, 134 S.W.2d 945 (1939); *State v. Ford*, 344 Mo. 1219, 130 S.W.2d 635 (1939); *Broquet v. State*, 118 Neb. 31, 223 N.W. 464 (1929); *Wimberly v. Paterson*, 75 N.J. Super. 584, 183 A.2d 691 (1962); *State v. Vargas*, 42 N.M. 1, 74 P.2d 62 (1937); *State v. Murphy*, 106 W.Va. 216, 145 S.E. 275 (1928).

⁶⁸ *Id.*

lacks authority to effect the arrest, his duty does not exist and in all likelihood neither does his shield of legal justification.⁶⁹ Whether a private citizen may use deadly force to overcome resistance when legally attempting to arrest for a misdemeanor is an open question.⁷⁰

One final area in the law of arrest which could affect the serviceman is the manner and procedure required to make an arrest. When possible under the circumstances, a person attempting to make an arrest should announce his official capacity (a uniform will put one on notice),⁷¹ and cause for the arrest.⁷² Failure to comply with the above, however, is not usually fatal to the arrest's legality.⁷³ It may, however, give a suspect the right to resist an arrest which appears to be an unexplained assault.⁷⁴

C. THE MILITARY POSITION

As previously pointed out, the justifiable use of force has been recognized by the military courts. They allow the use of force to prevent violent crimes, two of which the serviceman on riot control duty is likely to encounter: arson and assault with a firearm. Further, whatever the legal status of the serviceman while on such duty (peace officer, private citizen, or special status), his right of action in the prevention of crimes is generally the same. The primary problem area will be whether the force used, including deadly force, was reasonably necessary to prevent the crime.

Greater in complexity for the serviceman is the subject of arrest. In *United States v. Evans*⁷⁵ the United States Court of

⁶⁹ See *Taylor v. Commonwealth*, 274 Ky. 702, 120 S.W.2d 228 (1938).

⁷⁰ Courts have in the past by way of dicta stated a private citizen, unlike a peace officer, may rely only upon the doctrine of self-defense (which should include the duty to retreat when practicable) and may not be an aggressor. See *State v. Smith*, 127 Iowa 534, 103 N.W. 944 (1905); *State v. Stockton*, 97 W. Va. 46, 124 S.E. 509 (1924); *Mercer v. Commonwealth*, 150 Va. 588, 142 S.E. 369 (1928).

⁷¹ *State v. Evans*, 161 Mo. 95, 61 S.W. 590 (1901).

⁷² *Presley v. State*, 75 Fla. 434, 78 So. 532 (1918); *Kennedy v. State*, 139 Miss. 579, 104 So. 449 (1925); *Bennett v. State*, 136 Tex. Crim. 192, 24 S.W.2d 359 (1939).

⁷³ *Elliott v. Haskins*, 20 Cal. App.2d 591, 67 P.2d 698 (1937).

⁷⁴ *Presley v. State*, 75 Fla. 434, 78 So. 532 (1918).

⁷⁵ 17 U.S.C.M.A. 238, 38 C.M.R. 36 (1967). The case involved the apprehension of a Marine deserter in Vietnam by the accused. No issue of citizen's arrest was raised as the court found the accused was lawfully authorized to apprehend by reason of his company commander's orders and his being a noncommissioned officer; the court citing 10 U.S.C. § 807 (1964). See *Brown v. Cain*, 56 F. Supp. 56 (E.D. Pa. 1944), where the Federal District

Military Appeals specifically recognized that deadly force, when necessary, may be used to overcome forcible resistance by one being arrested or to prevent the escape of a felon. Not resolved in the *Evans* case is whether a serviceman may make a citizen's arrest, to include all the rights and liabilities incurred while engaged in such an endeavor. The very concept of citizen's arrest has yet to be recognized by the Manual or military appellate courts.

A fair reading of articles 7 and 9 of the *Uniform Code of Military Justice*⁷⁶ and paragraph 19 of the Manual could lead to the conclusion that there is no such thing as a citizen's arrest of one serviceman by another. As a policy matter it is a prudent conclusion. The Military would not be enhanced by the spectacle of a company commander being arrested by his enlisted men for public drunkenness at a company party.

Army Regulation No. 633-1⁷⁷ reinforces the conclusion that the right of citizen's arrest does not generally exist intra-service, and that the authority to apprehend (military equivalent to civil arrest) is restricted to those categories of personnel enumerated in the Manual and the Code. Paragraph 8 of that Regulation does purport to establish when military personnel may "apprehend" (arrest) persons not subject to the Code. The question raised by the regulation's language is whether a felony must be committed in the serviceman's presence before he may attempt to arrest.

After consideration of the law of arrest and prevention of crimes, the next question is whether a federal soldier on riot control duty enjoys the status of a civilian peace officer, a private citizen, or a special status under the law. The latitude of justifiable action would appear to vary to a certain extent with the status conferred.

IV. LEGAL STATUS OF THE SOLDIER

A. THE STATE LAW POSITION

If the serviceman were to be completely cast adrift upon the sea of state law to justify his acts during civil disturbance duty, he would find it extremely important whether he was classified as equivalent to a peace officer or to a private citizen. Due to

Court found that a serviceman had the right to arrest a civilian in the performance of his duties as a naval yard guard.

⁷⁶ The Code Appears at 10 U.S.C. §§ 801-940 (Supp. IV 1970).

⁷⁷ 13 Sep. 1962, *Apprehension and Restraint*.

the lack of federal cases on point, state law is of further importance to him as a court-martial may look to either the particular state law or the general law of the states to determine his status.

As has been seen, there is remarkably little difference between the rights of a peace officer and a private citizen in many areas of law enforcement. But those areas which are distinguished can be of vital importance. In apprehending or preventing the escape of a felon, the law is unclear as to whether a private citizen may resort to any reasonable degree of force, particularly deadly force, to effect apprehension or prevention of escape. Of equal importance is the question of whether a private citizen may, as the peace officer, use deadly force to overcome the resistance of a felon or misdemeanor in making a citizen's arrest.

Specifically as to the offense of riot itself no case law or specific statutory authority authorizes the private citizen to act on his own in a law enforcement capacity. It could be legitimately argued that he still possessed the common law right to prevent violent felonies and make certain citizen's arrests. The trouble with this concept is twofold. First, there is a strong policy argument against any private citizen acting on his own in attempting to quell a riot and thereby adding to the confusion. Second, and of greater importance, is the fact that nearly all the state justifiable homicide statutes dealing with riot suppression refer to the private citizen only when he is directly assisting the law enforcement authority.⁷⁶ From the statutes at least, it cannot be said with any certainty that private citizens, acting on their own, except in self-defense, have any right to engage in law enforcement activities in a riot. A serviceman on riot control duty who stood no better than a private citizen would be in a very uncomfortable position.

Because of the lack of federal cases on point it is well worthwhile to investigate the views of the various states as to the status of their militia (National Guard) while on duty to suppress riots and insurrections, or otherwise enforce state law. An

⁷⁶ CONN. GEN. STAT. ANN. sec. 53-171 (1960); FLA. STAT. ANN. sec. 870.05 (1965); MASS. ANN. LAW ch. 296, sec. 6 (Supp. 1966); NEB. REV. STAT. sec. 28-807 (1947); N.J. STAT. ANN. sec. 2A:126-6 (1952); OHIO REV. CODE ANN. sec. 3761.15 (page 1953); R.I. GEN. LAWS ANN. sec. 11-38-2 (1956); VT. STAT. ANN. tit. 13, sec. 904 (1959); VA. CODE ANN. sec. 18.1-254.9 (Supp. 1968); WASH. REV. CODE sec. 9.48.160 (1961); W.VA. CODE ANN. sec. 15-1D-5, 61-6-5 (1961). However, ME. REV. STAT. ANN. tit. 17, sec. 3357 (1964), and MO. REV. STAT. sec. 559.040(3) (1959), apparently do not require that the citizen be assisting or under the direction of official law enforcement personnel.

analysis of state court decisions produces two conflicting theories, neither of which can be said to be prevailing.

The first group of decisions support the conclusion that the militia has the same status as a peace officer. The Michigan Supreme Court held that the militia has no more power than the civil authorities when called out to enforce the law.⁷⁹ The court found that the manner in which the guardsmen executed their duties in apprehending bootleggers exceeded the authority that peace officers would have had under the same circumstances and thus subjected the guardsmen to civil damages. The Michigan court left two distinct questions open in its decision: whether guardsmen had the status of peace officers and whether their status and authority would change in the event of a domestic disturbance requiring martial rule. In *State v. McPhail*⁸⁰ the Mississippi Supreme Court apparently conferred peace officer status upon guardsmen called up to enforce state anti-gambling and liquor laws. Two cases which unequivocally state that the guardsman has the status of peace officer are *Commonwealth v. Shortall*⁸¹ and *Frank v. Smith*.⁸² In the *Shortall* case⁸³ the court's rationale is founded upon the theory of self-defense by the state coupled with the *duty* of the militia to effect that goal. The court in the *Frank* case,⁸⁴ on the other hand, concluded the guardsman had peace officer status based both on the common law and Kentucky statute.

The second line of decisions gives the guardsman a greater latitude of action than normally attributed to the peace officer. *In re Moyer*⁸⁵ arose out of the Colorado Mining Strikes at the turn of the century. Moyer brought suit for damages against the former governor for his lengthy "preventive" detention without charges by state troops under the direction of the governor. The suit was dismissed on appeal by the Colorado Supreme Court. The United States Supreme Court rejected an appeal on constitutional grounds.⁸⁶ Both courts believed that since the militia had the authority to use deadly force to suppress armed riots and insurrections, it was fully justified in the less severe action of detaining a leader and incitor of the rioters. In another western

⁷⁹*Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924).

⁸⁰182 Miss. 360, 180 So. 387 (1938).

⁸¹206 Pa. 165, 55 A. 952 (1903).

⁸²142 Ky. 232, 134 S.W. 484 (1911).

⁸³206 Pa. 165, 55 A. 952 (1903).

⁸⁴142 Ky. 232, 134 S.W. 484 (1911).

⁸⁵35 Colo. 159, 85 P. 190 (1904).

⁸⁶*Moyer v. Peabody*, 212 U.S. 78 (1909).

case, *Herlihy v. Donohue*⁸⁷ the Montana Supreme Court opinion appears to give the guardsman greater latitude when overriding necessity requires it." The most sweeping standard for judging a guardsman's conduct during great internal disorder was announced by the Iowa Supreme Court, which held that liability would attach only if the acts were done with malice, or wantonly and without any belief that such acts were necessary or appropriate to accomplish the object which the officer was under a duty to attain.⁸⁹

B. THE FEDERAL VIEW

Although various Army publications stress the military's assistance to civil authorities,⁹⁰ this concept can be misleading. It can confuse the means with the end and give the false impression that federal troops engaged in riot control duty are enforcing state law. One of the purposes of our federation is to insure domestic tranquility,⁹¹ and it is the federal government's responsibility to protect the states against domestic violence.⁹² Through Congressional action the President is empowered to use the armed forces to suppress insurrections in the states and enforce the laws of the United States.⁹³ It is not difficult to conclude that armed forces personnel when so employed are enforcing *federal* law based on constitutional rights and duties. It is true that the mechanism for restoring order is enforcement of state law, but this is simply the means to the end of enforcing federal constitutional law. The end is preserving for the state its republican form of government!" Attaining this goal by assisting in the enforcement of local law is the most facile way to obtain that end.

The soldier on a civil disturbance mission is engaged in the enforcement of federal law. He is so engaged not as a volunteer or

⁸⁷ 52 Mont. 601, 161 P. 164 (1916).

⁸⁸ In this case the court could find no overriding necessity to destroy the liquor of a saloon which stayed open past closing hours. In my opinion, a different result should occur under the *overriding necessity* rule when the problem of quickly disposing of unsecured liquor in package goods stores occurs during riots similar to the recent ones. The Montana court indicated a similar opinion.

⁸⁹ *O'Connor v. District Court*, 219 Iowa 1166, 260 N.W. 73 (1935).

⁹⁰ U.S. DEP'T OF ARMY, PAM No. 360-81, TO INSURE DOMESTIC TRANQUILITY (1968); U.S. DEP'T OF ARMY, PAM NO. 27-11, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (1966).

⁹¹ U.S. COSST., Preamble.

⁹² *Id.* art. IV, sec. 4.

⁹³ See 10 U.S.C. §§ 331-334 (1964).

⁹⁴ As provided for in U.S. CONST. art. IV, sec. 4.

interloper but as a soldier under orders. He is under a duty to so act and his failure to do so in a proper manner may subject him to the penalties of the *Uniform Code of Military Justice*.⁹⁵ There is no compelling reason why a statute would be required to insure the serviceman the same protections as a peace officer while performing his law enforcement duties. The fact that the serviceman is enforcing the law and has a duty to do so should be sufficient. On riot control duty he is a federal law enforcement officer in every sense of the word.

C. OBSERVATIONS AND CONCLUSIONS

The conclusion that the United States soldier on civil disturbance duty is a law enforcement officer does not settle whether his latitude of action will be restricted to that of a civilian peace officer. Once again state authorities must be resorted to because of the lack of federal and military cases on point.⁹⁶ What few state cases there are fall at first glance into three categories. The first, as announced by the Kentucky Supreme Court in *Frank v. Smith*,⁹⁷ would strictly limit the serviceman to the role of civilian peace officer, with all its rights and restrictions. The second would limit the serviceman to the role of civilian peace officer except during time of martial rule.⁹⁸ The third would limit the serviceman only to those means necessary to obtain the ends desired.⁹⁹ In applying this test, the courts split on whether it requires objective (reasonable) necessity¹⁰⁰ or subjective (honest belief without malice) necessity.¹⁰¹ Perhaps both views apply the objective test as to legality, but the latter will excuse illegal acts done honestly and without malice. It should be noted that in each instance a court has announced the necessity doctrine the governor had declared martial rule or a state of insurrection.¹⁰²

⁹⁵ Among the offenses he might commit under the Code are disobedience of orders, articles 90, 91 or 92, and dereliction of duty, article 92.

⁹⁶ Permissible latitude of action in line of duty has been reviewed by the federal courts, but these cases normally deal with intra-service actions. See chapter VI, section A2, *infra*.

⁹⁷ 142 Ky. 232, 134 S.W. 484 (1911).

⁹⁸ *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924).

⁹⁹ See *In re Moyer*, 35 Colo. 159, 85 P. 190 (1904); *O'Connor v. District Court*, 219 Iowa 1165, 260 N.W. 73 (1935); *Herlihy v. Donohue*, 52 Mont. 601, 161 P. 164 (1916). *Commonwealth v. Shortall*, 206 Pa. 162, 15 A. 952 (1903), appears to support this approach with the court's talk of quasi-martial law.

¹⁰⁰ *Herlihy v. Donohue*, 52 Mont. 601, 161 P. 164 (1916).

¹⁰¹ *O'Connor v. District Court*, 219 Iowa 1165, 260 N.W. 73 (1935).

¹⁰² See discussion at note 99, *supra*.

It is submitted that the above categories are artificial and misleading. They really stand for a completely different proposition in the law. When considered, it is inconceivable that the Colorado court deciding *In re Moyer*¹⁰³ would have held that state militia acting under the direction of the governor could implement preventive detention while state police under similar direction could not. The distinction would make no sense. It is more likely that the mantle of legal justification was cast over the acts of these guardsmen because guardsmen happened to have been involved, rather than because they were guardsmen.¹⁰⁴ Conceding this observation, another rationale must be sought to explain the extended latitude of action upheld by various state courts. Perhaps the answer lies in the situation giving rise to these cases: riot.

V. RIOT

A. THE LEGAL NATURE OF RIOT

1. *Its Definition.*

Riot is a common law offense¹⁰⁵ incorporated into statute in most states. Being a common law offense, courts look to the great body of the common law when interpreting a particular state statute, particularly when the term "riot" is used as a statutory word of art.¹⁰⁶ Riot has been defined as a tumultuous disturbance of the public peace by an assembly of three or more persons in the execution of some objective. If the objective itself is lawful, but carried out or attempted in a violent and turbulent manner to the terror of the people, the offense of riot occurs.¹⁰⁷ If the objective is unlawful, it need be executed only in a violent or turbulent manner.¹⁰⁸ A slightly different definition requires an assembly of three or more persons with the intent to forcibly and violently disturb the peace and to mutually assist one another

¹⁰³ 35 Colo. 159, 85 P. 190 (1904), *affirmed*, *Moyer v. Peabody*, 212 U.S. 78 (1909).

¹⁰⁴ See notes 98, 99, and 103 *supra*, for those cases dealing with the state militia. See *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), and *In re McShane*, 235 F. Supp. 262 (N.D. Miss. 1964), for federal approval of civilian law enforcement authority's actions during a riot situation in excess of normal latitude of action.

¹⁰⁵ *Symonds v. State*, 66 Okla. Crim. 49, 89 P.2d 970 (1939); *Commonwealth v. Hayes*, 205 Pa. Super. 338, 209 A.2d 38 (1965); *State v. Woolman*, 84 Utah 23, 33 P.2d 640 (1934).

¹⁰⁶ *Symonds v. State*, 66 Okla. Crim. 49, 89 P.2d 970 (1939).

¹⁰⁷ *State v. Abbadini*, 38 Del. 322, 192 A. 550 (1937); *Commonwealth v. Hayes*, 205 Pa. Super. 338, 209 A.2d 38 (1965); *State v. Woolman*, 84 Utah 23, 33 P.2d 640 (1934).

¹⁰⁸ *Id.*

against any who oppose them in the execution of their purpose. The assembly must be forceful, violent, and tumultuous, to the terror of the people.¹⁰⁹ Both definitions arise from the common law. The latter, however, appears to place more stress on mutual intent and requires public terror in all instances. Again, it is cautioned that the riot statute of the particular state involved must be checked to ascertain the statutory definition, if any.

Closely related to riot is the misdemeanor offense of breach of the peace. The difference between it and riot is in part one of degree; riot requiring three or more participants, plus in certain jurisdictions the acts of the mob must be such as would cause public terror. Additionally, some common purpose must be intended by the rioters. Thus it has been held that a public fight between members of two rival work gangs was a breach of the peace and not a riot.¹¹⁰

As noted, riot requires some common purpose or intent by its participants. The immediate question which comes to mind is what is the legal nature of the intent and to what extent are we dealing with a legal fiction? The language used by the courts does not prove particularly helpful. It has been said that riot involves execution of an express or implied agreement,"' that conspiracy is not required¹¹² but there must be the intent to join or encourage the acts constituting the riot."?"

Except in cases of overt agreement, the riot can often only be viewed in retrospect to discover some general purpose, effect or result. In my opinion, the specific intent held by one member of the mob may vary considerably from those of other members, and perhaps all vary from the particular result which occurs. An attempt to apply a specific intent standard is not workable. Specific intent in an individual is a tangible thing, though difficult to prove. Common intent or purpose of a mob is an abstract concept or conclusion. Though its acceptance is quite doubtful, riot should be a general intent offense, complete after the mob action moves towards effecting some purpose by violent disorderly means. The actions of a particular member should be held to contribute toward that purpose unless his motive is pure and his acts based upon honest, reasonable assumptions which later prove false. Therefore, a person who runs along with a mob out

¹⁰⁹"United States v. Fenwick, 25 F. Cas. 1062 (No. 15,086) (D.C. Cir. 1836).

¹¹⁰"Plaza v. Government of Guam, 156 F. Supp. 284 (D.C. Guam 1957).

¹¹¹Perkins v. State 35 Okla. Crim. 279, 250 P. 544 (1926).

¹¹²Trujillo v. People, 116 Colo. 157, 178 P.2d 942 (1947).

¹¹³People v. Bundte, 87 Cal. App.2d 735, 197 P.2d 823 (1948), *cert. denied*, 337 U.S. 915 (1949).

of curiosity, but whose mere presence encourages or assists the mob in its objective, would be a rioter unless he was acting reasonably upon his specific intent to extricate one of his relatives who had joined the mob.

The above argument does not square with the present rule of law that mere presence at the scene of a riot does not make one a rioter¹¹⁴ although presence may give rise to the inference of participation."¹¹⁵ Only one state by statute makes an individual a rioter as a matter of law after remaining on the scene after an official call to disperse.¹¹⁶

The problem of who is a rioter is raised here not for the purpose of prosecuting rioters, but to clarify the position of a soldier claiming to have justifiably killed a rioter. The solution to this problem probably lies in the defense of mistake upon the part of the soldier¹¹⁷ and the procedural requirement of burden of proof. As to the latter, once evidence has been introduced tending to establish that a riot occurred and that the deceased was killed in the vicinity of the riot, then the burden of proving the deceased was not a rioter should fall upon the government. If the government should prove beyond a reasonable doubt that the deceased was not a rioter, perhaps a mere spectator, this should not deprive the defense of the second string to its bow.

B. FELONY OR MISDEMEANOR

The importance of whether participation in a riot constitutes a felony or misdemeanor cannot be underrated. Unless there is an exception to the general rule, the categorizing of this offense by a court could largely determine the legal bounds within which a serviceman being tried for murder committed during riot control duty may effectively raise the defense of justifiable homicide. As will be remembered, deadly force is not authorized to prevent the commission of a misdemeanor.¹¹⁸ On the other hand a forcible *felony* committed by violence may be prevented by deadly force when necessary."¹¹⁹ As riot by its very nature is forcible and

¹¹⁴ *Id.*; State *w. Moe*, 174 Wash. 303 24 P.2d 638 (1933).

¹¹⁵ *State v. Abbadini*, 38 Del. 322, 192 A. 550 (1937); *Commonwealth v. Brletic*, 113 Pa. Super. 508, 173 A. 686 (1934).

¹¹⁶ **FLA. STAT. ANN.** sec. 870.04 (Supp. 1968). Two states make a person present at a riot a felon if he refuses to help disperse the rioters: **S.D. CODE** sec. 34.0201-0201 (1939); **UTAH CODE ANN.** sec. 77-5-3 (1953). West Virginia makes an original rioter a felon if he refuses to help disperse fellow rioters: **W.VA. CODE ANN.** sec. 15-1D-4 (1961).

¹¹⁷ See discussion in chapter VI, section S, *infra*.

¹¹⁸ See discussion in chapter 111, subsection B1, *supra*.

¹¹⁹ *Id.*

violent, the question is whether it is a felony. Likewise in arrest, disregarding for the moment the serviceman's legal status during such duty, the nature of the offense is of great importance. Neither peace officer nor private citizen is privileged to use deadly force to arrest for a misdemeanor,¹²⁰ unlike a felony,¹²¹ and should the serviceman enjoy only the status of a private citizen his right to use force to overcome resistance is quite questionable.¹²²

All but four states have statutes prohibiting the offense of riot.¹²³ Using the standard that only offenses which carry a maximum penalty of over one year's imprisonment are felonies,¹²⁴ only eight states classify riot as a felony.¹²⁵ Therefore, what shall be called simple riot is a misdemeanor in an overwhelming number of jurisdictions.

In twenty-one jurisdictions the offense of aggravated¹²⁶ riot has been created by statutes which all carry penalties of over one year imprisonment and up to as much as twenty years.¹²⁷ Certain states provide for increased punishment if the particular accused committed certain acts during the rioting: carrying a weapon,¹²⁸ encouraging or soliciting others to commit violence,¹²⁹ wearing a mask or disguise.¹³⁰ Others provide increased penalties for participation in riots where certain offenses occur: destruction

¹²⁰ See discussion in chapter 111, subsection B2, *supra*.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Four states, Maryland, Michigan, Mississippi, and North Carolina, do not have anti-riot statutes or their equivalent. Riotous behavior is apparently prosecuted under the common law.

¹²⁴ The military standard as announced in *United States v. Hamilton*, 10 U.S.C.M.A. 130 27 C.M.R. 204 (1959).

¹²⁵ ARIZ. REV. STAT. ANN. sec. 13-631 (1956); CAL. PEN. CODE sec. 405 (West 1956); HAWAII REV. LAWS, sec. 305-2 (1955); KY. REV. STAT. sec. 437.012 (Supp. 1968); MONT. REV. CODE ANN. sec. 94-35-182 (1947); PA. STAT. ANN. tit. 18, sec. 4401 (1957) (although referred to by the statute as a misdemeanor); UTAH CODE ANN. sec. 76-52-3 (1953); WYO. STAT. ANN. sec. 6-18 (1957).

¹²⁶ For lack of a better term.

¹²⁷ OKLA. STAT. ANN. tit. 21, sec. 1312(4) (1961).

¹²⁸ ALASKA STAT. sec. 11.45.010(2) (1962); MINN. STAT. ANN. sec. 609.71 (1963); N.Y. PEN. LAW ANN. sec. 2091(1) (McKinney 1967); OKLA. STAT. ANN. tit. 21, sec. 1312(3) (1961); ORE. REV. STAT. sec. 166.050(2) (1960); S.D. CODE sec. 13.1404(3) (1939); WASH. REV. CODE sec. 9.27.050(1) (1961).

¹²⁹ ALASKA STAT. sec. 11.45.010(2) (1962); N.Y. PEN. LAW ANN. sec. 2091(2) (McKinney 1967); OKLA. STAT. ANN. tit. 21, sec. 1312(4) (1961); ORE. REV. STAT. sec. 166.050(2) (1960); WASH. REV. CODE sec. 9.27.050(2) (1961).

¹³⁰ IND. ANN. STAT. sec. 10-1506 (1956); MINN. STAT. ANN. sec. 609.71 (1963); N.Y. PEN. LAW ANN. sec. 2091(1) (1961); OKLA. STAT. ANN. tit. 21, sec. 1312(3) (1961); S.D. CODE sec. 13.1404(3) (1939).

of property or personal injury,¹³¹ destruction or damage to buildings,¹³² or looting.' Four states prescribe additional penalties when the purpose of the riot is to resist the execution of state or federal law.¹³³ Finally, three states provide by statute that a person participating in a riot where such offenses as murder, maiming, robbery, rape, and arson are committed shall be treated as a principal to these offenses,¹³⁴ while two others simply make one a principal to any felony or misdemeanor committed during the riot.¹³⁵ All statutes referred to above carry a penalty in excess of one year imprisonment.

C. USE OF DEADLY FORCE TO SCPPRESS RIOTS

In a riot situation it could be concluded from the previous discussion of justifiable homicide that deadly force may be used only when necessary to overcome resistance to arrest, and possibly only then when the arrest is attempted by a peace officer. The basis for this conclusion lies in the legal fact that in most jurisdictions riot is only a misdemeanor. Precedent, however, questions this conclusion.

Various state courts have by dicta announced the principle that deadly force may be used when necessary to suppress a riot.¹³⁶; In upholding preventive detention of a civilian by the Colorado militia, the United States Supreme Court, in a decision written by Justice Holmes, went on to declare that there was immunity to fire into a mob during an insurrection.¹³⁷ Legal authorities such as *Warren on Homicide*¹³⁸ have announced similar propositions.

¹³¹ ILL. ANS. STAT. ch. 38, sec. 25-1(c) (Smith-Hurd 1961); IOWA CODE sec. 743.9 (1966); N.H. REV. STAT. ANN. sec. 609.A:3 (Supp. 1965); N.J. STAT. ANN. sec. 2A:126-3 (1952); N.Y. PEN. LAW sec. 2091.1 (McKinney 1944); N.D. CENT. CODE sec. 12-19-04(3) (1960); TEXAS PEN. CODE art. 466a (Supp. 1968-69).

¹³² ALA. CODE tit. 14, sec. 409 (1958); FLA. STAT. ANN. sec. 870.03 (1965); MICH. COMP. LAWS ANN. sec. 750.527 (1967); VT. STAT. ANN. tit. 13, sec. 905 (1959); W.VA. CODE ANN. sec. 61-6-6 (1961).

¹³³ TENN. CODE ANN. sec. 39-5105 (1955).

¹³⁴ N.Y. PEN. LAW ANS. sec. 2091(1) (McKinney 1967); OKLA. STAT. ANN. tit. 21, sec. 1312(2) (1961); VA. CODE sec. 18.1-254.2b (Supp. 1968); WASH. REV. CODE sec. 9.27.050 (1) (1961).

¹³⁵ OKLA. STAT. ANN. tit. 21, sec. 1312(1) (1961); N.D. CENT. CODE sec. 12-19-04(1) (1960); S.D. CODE sec. 13.1404(1) (1939).

¹³⁶ ALASKA STAT. sec. 11.45.010(1) (1962); ORE. REV. STAT. sec. 166.050(1) (1960).

¹³⁷ *Mitchell v. State*, 43 Fla. 188, 30 So. 803 (1901); *State v. Smith*, 127 Iowa, 534, 103 N.W. 944 (1905); *State v. Turner*, 190 La. 198, 182 So. 325 (1938); *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1948).

¹³⁸ *Moyer v. Peabody*, 212 U.S. 78 (1909), *affirming In re Moyer* 35 Colo. 159, 85 P. 190 (1905).

¹³⁹ I WARREN, HOMICIDE sec. 146 (Perm. ed. 1938).

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Cases on point are few and often decided in part on other grounds. In an early Michigan case¹⁴⁰ the accused, his family, and servants were set upon in a building by three violent men. In reversing the accused's conviction the court enumerated three separate theories upon which he could rely in defense to murder. First was the defense of the building containing himself and family from violent attack; second was prevention of a felony; third was suppression of riot. The court specifically recognized that riot was not necessarily a felony but the terror it generated and the number of people it involved made it an exception to the general rule regarding misdemeanors and deadly force. The facts of the case, however, more closely correspond to the other two defense theories.

In *Goins v. State*¹⁴¹ the right of collective self-defense against a mob far superior in number was recognized. No mention of riot and its suppression was made by the court, and understandably so as the pistol shots were clearly fired with self-preservation in mind rather than law enforcement. The decision does infer that a misdemeanor may rise to the intensity of threatened felonious assault and in such a situation deadly force may be used.

In *Higgins v. Minaghan*¹⁴² the defendant was sued by a rioter he had shot after his house had been surrounded for three nights by a mob. The court held that good faith, coupled with reasonable apprehension of a felony or great personal harm by one who cannot otherwise defend himself, may authorize the use of deadly force. The court further held that the jury should have been instructed that "a riot is regarded in law, always as a dangerous occurrence . . ." ¹⁴³ because of its normally violent consequences.

During the year 1901 a National Guardsman of Pennsylvania shot a civilian during a violent strike. The guardsman was a member of a detail sent to a previously dynamited house to protect its occupants, a mother and four children, from further violence. The detail was under orders to use their weapons to deter prowlers. As fate would have it, the accused shot and killed a civilian who came into the yard at night after being called upon several times to halt. No evidence indicated any criminal purpose on the part of the deceased. The accused was freed by writ of habeas corpus by the Pennsylvania Supreme Court, which held, as a matter of law, that insufficient evidence existed to

¹⁴⁰ *Pond v. People*, 8 Mich. 150 (1860).

¹⁴¹ 46 Ohio St. 457, 21 N.E. 476 (1889).

¹⁴² 78 Wis. 602, 47 N.W. 941 (1891).

¹⁴³ *Id.*, 47 N.W. at 943.

support any criminal charge.¹⁴⁴ From the decision it is unclear as to the exact basis the court used to reach its conclusion. The court stated that when a riot reaches such proportions that it cannot be quelled by ordinary means, a militiaman has the same right as a peace officer to subdue it by deadly force. The court also stated that a soldier acting under military orders is immune from prosecution if he did not, and a man of ordinary understanding would not, know the act of killing in compliance with orders was illegal. In the instant case it is unknown if the killing was justified in and of itself or merely excused by reason of a not so apparent illegal order. The court held at a minimum that under certain circumstances use of deadly force is justified in suppressing a riot.¹⁴⁵

There are sixteen states which by statute authorize the use of deadly force when suppressing a riot. Nine such states justify killing in overcoming resistance to dispersement or apprehension.¹⁴⁶ Of these nine, three require that the killing be necessary and proper; whatever that means. Three states justify the killing of rioters after a declaration to disperse.¹⁴⁷ Three states justify killing while lawfully suppressing riot.¹⁴⁸ Two other states justify such force after every effort consistent with the preservation of life has been used to induce or force rioters to disperse.¹⁴⁹

Two distinct and opposing rules can be formulated to justify

¹⁴⁴ *Commonwealth v. Shortall*, 206 Pa. 165, 55 A. 952 (1903).

¹⁴⁵ Although the cases cited pertain to both criminal and civil actions, nothing in their opinions leads one to conclude that the law would vary as to the type legal action involved. If an individual is legally justified in committing a certain act that justification will immunize him equally from criminal or civil process. Somewhat on point are *In re McShane*, 235 F. Supp. 262 (N.D. Miss. 1964), and *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964). It is in the area of legal excuse that a distinction arises. Legal excuse in the criminal sphere may encompass acts committed under a belief in erroneous facts, which, if true, would legally justify the acts committed. Whether this mistake would satisfy the *reasonable man standard* in a civil law suit is another question. The criminal law aspect of legal excuse rising out of legal justification will be discussed in chapter VI.

¹⁴⁶ CONN. GEN. STAT. ANN. sec. 53-171 (1960); MICH. COMP. LAWS ANN. sec. 750.527 (1967); NEB. REV. STAT., sec. 28-807 (1943); N.J. STAT. ANN. sec. 2A:126-6 (1952); OHIO REV. CODE ANN. sec. 3761.15 (Page's 1953); R.I. GEN. LAWS ANN. sec. 11-38-2 (1956); VT. STAT. ANN. tit. 13, sec. 904 (1959); VA. CODE ANN. sec. 18.1-254.2 (Supp. 1968); W.VA. CODE ANN. sec. 15-1D-5 (1961).

¹⁴⁷ FLA. STAT. ANN. sec. 870.05 (1965); ME. REV. STAT. ANN. tit. 17, sec. 3357 (1964); MASS. ANN. LAWS ch. 296, sec. 6 (Supp. 1966).

¹⁴⁸ MO. REV. STAT. sec. 559.040(3) (1959); WASH. REV. CODE sec. 9.48.160 (1961); W.VA. CODE ANN. sec. 61-6-5 (1961).

¹⁴⁹ MONT. REV. CODE ANN. sec. 94-5311 (1947); N.D. CENT. CODE sec. 12-19-22 (1960). It is uncertain whether "consistent with the preservation of life" refers to the lives of the rioters or others.

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deadly force to suppress riot and insurrection. The first, and more conservative view, would allow for its use when necessary to suppress a riot in which felonies, perhaps only violent felonies, are being perpetrated. Grafted onto this rule would be the normal rules of prevention of violent felonies, apprehending felons, and overcoming resistance to arrest. It is hardly more than a restatement of well established law with one possible major exception which will be discussed later in this chapter. The second rule would allow such force to be used when necessary to suppress *any* riot in addition to incorporating the normal rules relating to prevention of offenses, apprehension, and overcoming resistance to arrest.

Before discussing the merits of each formulation one element must be discussed which bears upon both: necessity. Naturally the use of any degree of force must be reasonably necessary to effect the object to be obtained. But what is the object to be obtained? Is it the suppression of the individual rioters or the riot itself? If it is the individual rioter, law enforcement personnel in a large riot are faced with the near impossible task of attempting to cull out the rioter from the camp follower. If the first formulated rule is applied, are law enforcement personnel to be doubly harassed by the requirement of differentiating the felonious rioter from the misdemeanant? To argue for the individual approach is to ignore the corporate identify which a mob assumes and place upon its suppressors either an insurmountable task or one filled with very real legal liabilities. It is not the individual troublemaker, whether a shouter or an arsonist, who presents the great threat to society, but the collective action of all. One may at one moment be only a shouter and the next an arsonist. To treat a riot in terms of individual components does not recognize its nature nor contemplate its suppression.

Neither of these two formulated rules best rationalize the various court decisions. The courts have tended to be conservative in conferring justification upon law enforcement acts during minor disturbances,¹⁵⁰ and liberal during riots and insurrections of great magnitude.¹⁵¹ There are various problems engrained in this approach. For one, there is no readily perceptible line which separates the minor riot from the aggravated riot. The seriousness of the riot not only depends upon its numbers, but also on the

¹⁵⁰;"See *Frank v. Smith*, 142 Ky. 232, 134 S.W. 484 (1911); *Bishop v. Vandercook*, 228 Mich. 299 200 N.W. 278 (1924).

¹⁵¹ *In re Moyer*, 35 Colo. 159, 85 P. 190 (1904), *affirmed*, *Moyer v. Peabody*, 212 U.S. 78 (1909); *Herlihy v. Donohue*, 52 Mont. 601, 161 P. 164 (1916); *Commonwealth v. Shortall*, 206 Pa. 165, 55 A. 952 (1903).

forces available to combat it. Additionally, the so-called simple riot is quite capable of turning into an aggravated one within a very brief time span.¹⁵² Because of riot's inherently dangerous nature, its suppression by deadly force should be justified in law when such force is *necessary* to obtain that end. This rule harmonizes well with most of the court decisions investigated above.¹⁵³ It does not mean that small riots may be quelled in blood; it means that in determining necessity the size and degree of violence of the riot are only two of several factors to be weighed. They go not to the consideration of whether this is conduct so intolerable that it must be quelled by any means available, but whether it is of such magnitude that the available means of suppression can only be successful if deadly force is used.

The above conclusions on the use of deadly force during riot and insurrection do not make irrelevant the various rules already discussed concerning use of force in preventing criminal offenses or effecting arrests. After commitment of federal troops the mob in the street often reduces itself to smaller groups, at times individuals, committing individual acts of lawlessness. Will these individuals be considered rioters? Despite a Presidential proclamation to disperse as required by statute¹⁵⁴ it appears prudent to conclude that the serviceman may have to rely on the more common legal rules relating to prevention of crimes, arrests, and resisting arrest to justify his actions.;

Does justifiable homicide include only absolute objective hindsight or does it extend to honest and reasonable action on the part of the officer? Is the latter only some form of excusable homicide? In my opinion this is a question of categorization, the results being the same whichever method is selected. This is best reserved for discussion, however, in the following chapter.

VI. OBEDIENCE TO ORDERS AND MISTAKE

The defense of obedience to orders is peculiar to the military. It involves the commission of an illegal act in compliance with

¹⁵² As the court pronounced in *Higgins v. Minaghan*, 78 Wis. 602, 47 N.W. 941 (1891), a riot is always a dangerous occurrence because of its often violent consequences.

¹⁵³ For the soldier on riot control duty this problem is probably moot because of the level and magnitude of violence required before federal troops are dispatched.

¹⁵⁴ 10 U.S.C. § 334 (1964).

** *Commonwealth v. Shortall*, 206 Pa. 165, 55 A. 952 (1903), suggests a broader application of justification.

military orders believed to be valid. Ordinarily, this would sound in mistake of law and at times mistake of fact, but the legal standards are applied differently, As will be seen, the subordinate carrying out the order may rely on the defense of obeying orders while the person issuing them must rely on the more hazardous defenses of mistake of law or fact.

Two distinct problem areas are encountered in the doctrine of obedience to orders. The first, as noted above, is the defense raised when one carries out an order and commits an illegal act. The second presents a more unusual problem. It is best stated in an example. The soldier on riot control duty has the legal right to resort to deadly force to prevent arson when no other reasonable means are available.¹⁵⁶ Supposing a soldier under orders *not* to shoot arsonists disobeys those orders. Among the questions raised is whether he has committed murder or only the military offense of disobedience.¹⁵⁷

A. THE DEFENSE OF OBEDIENCE TO ORDERS

1. *The State View.*

Before directing our attention to the military practice, a brief look at the status of this defense in the state and federal courts is worthwhile. Though not binding upon the military, those decisions may be looked to for clarification of points not previously disposed of by military appellate decisions.

Three state courts have specifically established tests for legal liability for obeying illegal military orders during times of domestic unrest. The first would require the order to be *palpably illegal or without authority*.¹⁵⁸ The second would require a man of ordinary sense and understanding to know the order to be illegal.¹⁵⁹ The third state decision, however, which is in direct conflict with the other two, holds that military orders, no matter how reasonable, will not protect the soldier who commits an unlawful act in compliance with those orders, at least in a civil suit.¹⁶⁰ Military orders were held to be illegal when they attempted to give the soldier more authority than a peace officer. The

¹⁵⁶ See discussion at chapter III, section B1, and chapter IV, section B, *infra*.

¹⁵⁷ Depending on the facts, a violation of either article 90, 91 or 92 of the Code.

¹⁵⁸ *Herlihy v. Donohue*, 52 Mont. 601, 161 P. 164 (1916). Although the court sustained the civil judgment against the officer ordering the liquor supply destroyed, it reversed the judgment against the enlisted men carrying out the destruction under the officer's orders and supervision.

¹⁵⁹ *Commonwealth v. Shortall*, 206 Pa. 165, 55 A. 952 (1903).

¹⁶⁰ *Frank v. Smith*, 142 Ky. 232, 134 S.W. 484 (1911).

decision specifically recognized the dilemma the soldier was in, even conceding he might be court-martialed for disobeying the "illegal" order. This did not sway the Kentucky court although this exact reasoning was the basis for the exculpatory rules in the *Herlihy*¹⁶¹ and *Shortall*¹⁶² cases. Perhaps the state courts are only split on the applicability of this defense in civil actions, but would allow it in any criminal action,

The fact that an order may be legal does not give a serviceman immunity to carry it out in an illegal manner."¹⁶³ Neither is the person issuing the orders immune.¹⁶⁴ There is a separate issue involving persons in authority which revolves around the means they may use to effect a legitimate end or duty."¹⁶⁵

2. *The Federal View.*

The defense itself of obedience of orders has been recognized early in the federal courts. In *McCall v. McDowell*¹⁶⁶ the Circuit Court found that a Captain Douglas, acting under the specific orders of Major General McDowell, was immune from suit for damages arising out of the false arrest of one McCall. The court applied the test of whether the order was illegal "at first blush,"¹⁶⁷ whether it was *apparently and palpably illegal to the commonest understanding*. This approach was further supported by the subsequent case of *In re Fair*.¹⁶⁸ The court held that the order to shoot an escaping prisoner had to be so illegal "as to be apparent and palpable to the commonest understanding."¹⁶⁹

Federal decisions have also ventured into the scope of permissible acts and orders designed to carry out a legitimate purpose. Unfortunately, they deal almost exclusively with intra military matters and it is difficult to assess the weight they would be given in a situation involving civilians.¹⁷⁰ In *McCall v. McDowell*¹⁷¹ the court, without real discussion, concluded that the general's order to arrest civilians expressing approval of

¹⁶¹ *Herlihy v. Donohue*, 52 Mont. 601, 161 P. 164 (1916).

¹⁶² *Commonwealth v. Shortall*, 206 Pa. 165, 55 A. 952 (1903).

¹⁶³ *See* *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924).

¹⁶⁴ *Herlihy v. Donohue*, 52 Mont. 601, 161 P. 164 (1916).

¹⁶⁵ See chapter IV, section C, and chapter V, section C, *supra*.

¹⁶⁶ 15 F. Cas. 1235 (No. 8,673) (C.C.D. Cal. 1867).

¹⁶⁷ *Id.* at 1240.

¹⁶⁸ 100 W. 149 (C.C.D. Neb. 1900).

¹⁶⁹ *Id.* at 155.

¹⁷⁰ *See* *United States v. Bevans*, 24 F. Cas. 1138 (No. 14,589) (C.C.D. Mass 1816, *reversed for lack of jurisdiction*, 16 U.S. (3 Wheat.) 336 (1818); *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89 (1849); *United States v. Carr*, 25 F. Cas. 306 (No. 14,732) (C.C.S.D. 1872).

¹⁷¹ 15 F. Cas 1235 (No. 8,673) (C.C.D. Cal. 1867).

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President Lincoln's assassination was illegal. This finding of illegality subjected him to damages for false arrests carried out in compliance with his order. Coupled with the decision that one who gives an order to kill is guilty of murder as an accomplice,¹⁷² it could be concluded that an illegal general order to resort to deadly force under certain circumstances could subject the officer to a charge of murder for every killing done. Although *McCall* is a civil case, this should not affect its application to criminal prosecutions except that the particular criminal intent required or a defense based upon mistake might change the resultant liability.

3. *The Military View.*

An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable.¹⁷³

is the current Manual definition of obedience to apparently lawful orders. It varies only slightly from the 1951 Manual¹⁷⁴ definition which also contained the test of a *man of ordinary sense and understanding*. This is of particular importance because the principal court-martial decisions were decided under the older Manual.

One unfortunate occurrence in Korea gave rise to two cases in the military which reestablished in modern military law the scope and limitations of this defense. An Air Policeman had apprehended a Korean, probably a civilian, in an Air Force bomb dump and transported him to the Air Police Station. Evidence tended to show that at the station the Air Policeman's superior officer, Lieutenant Schreiber, ordered the Korean taken out and shot. The Air Policeman, Kinder, did just that. In *United States v. Kinder*¹⁷⁵ the accused Air Policeman specifically raised the issue of obedience to orders on appeal. The board of review decided first that the order was illegal.¹⁷⁶ Next, the board applied the 1951 Manual provisions to the issue raised by the

¹⁷² *United States v. Carr*, 25 F. Cas. 306 (No. 14,732) (C.C.S.D. Ga. 1872; under military law the person giving the order would be termed a principal. See article 77 of the Code. *United States v. Schreiber*, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955).

¹⁷³ MCM, 1969 (REV.ED.), para 216d.

¹⁷⁴ Manual for Courts-Martial, 1951, para 197b, discussing the offense of murder.

¹⁷⁵ 14 C.M.R. 742 (AFBR 1954).

¹⁷⁶ Citing U.S. War Dep't, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE (1940).

accused, holding that a good faith compliance with orders would be a defense, but not when it involved an order that a man of ordinary sense and understanding would know to be illegal. The board found that the order was so palpably unlawful that no reasonable doubt as to its illegality could be raised on the part of an ordinary man. The trial of the lieutenant was reviewed by the United States Court of Military Appeals which upheld his conviction for murder based on his issuance of the fatal order.¹⁷⁷

On 4 April 1967 events near Bong Son, South Vietnam, produced the next significant military case involving obedience to orders as a defense to murder.¹⁷⁸ During the course of providing security for an engineer element in an unsecured area, members of an Army platoon captured an unarmed Vietnamese male. According to the accused, a staff sergeant, his company commander by telephone and his platoon leader in person ordered the prisoner killed. The witnesses varied as to substantiating the accused's assertion. Regardless, the accused and another soldier took the prisoner, his hands tied behind his back, to an embankment and shot him. The accused asserted the defense of obedience to orders to the charge of unpremeditated murder. The board of review, in upholding the conviction, found the order, if given, to be so obviously beyond the scope of authority and so palpably illegal on its face that a man of ordinary sense and understanding would have had no doubt as to its unlawfulness.¹⁷⁹

In recent months the defense of obedience to orders has been raised in the *Calley* trial arising out of the killings of civilians at My Lai. This case and others involving alleged war crimes may produce further military appellate guidance as to the scope of the obedience defense.

The opinions in the *Kinder*¹⁸⁰ and *Griffen*¹⁸¹ cases, though in places not as clear as might be desired, when coupled with the cases from state and federal jurisdictions,¹⁸² do produce certain valid conclusions. It would appear that the defense of obedience to orders can be an exception to the general rule that ignorance of the law is no defense.¹⁸³ It is the mistake as to whether the

¹⁷⁷ United States *v.* Schreiber, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955).

¹⁷⁸ United States *v.* Griffen, 39 C.M.R. 586 (ABR 1968), *petition denied*, 39 C.M.R. 293 (1968).

¹⁷⁹ The board held that the facts did raise the issue of whether the order was palpably illegal. This issue was to be submitted to the triers of fact.

¹⁸⁰ 14 C.M.R. 742 (AFBR 1954).

¹⁸¹ 39 C.M.R. 586 (ABR 1968), *petition denied*, 39 C.M.R. 293 (1968).

¹⁸² See subsections A1 and 2, this chapter.

¹⁸³ See section C, this chapter.

killing is legal, a mistake as to the law of murder, that raises this defense. This, and the consequences of disobeying a legal order provide more than a hint as to the rationale behind this exception.

The more important question involving obedience to orders is whether the test for this defense roughly corresponds to or departs from the more common reasonable man test in torts. The answer is not certain from the two military boards of review decisions, primarily because of the extreme situations involved in each case. A closer look at the tests applied to the defense of obedience of orders discloses certain probable differences from the reasonable man test. To begin with, the mythical man in one test is reasonable and prudent, in the other he is ordinary, possessing common understanding. With a knowledge of the results in tort cases you could conclude that an *ordinary man* is often negligent when the reasonably prudent man is not. Neither does *common understanding* appear sufficient to keep one out of tortious activities. The language of the board in *Kinder*¹⁸⁴ applies a negative test. It does not require that the subordinate reasonably believes the order to be legal before he acts, but that he has no reasonable doubt as to its legality before he acts. The board in the *Griffen* case¹⁸⁵ denied use of the defense because a man of ordinary sense and understanding would have had no doubt of the order's unlawfulness. In *McCall v. McDowell*¹⁸⁶ the order must have been palpably illegal at first blush to deprive the military subordinate of this defense. Similarly, in *In re Fair*¹⁸⁷ obedience to an order was a bar to prosecution unless the order was palpably illegal to the commonest understanding. This is not the language normally associated with the reasonable man test.

Considering the above decisions it is impossible to conclude that this defense is reserved only to situations where a reasonably prudent man would erroneously conclude that the order was legal. If there is something akin to the law of torts it would be the reasonable man caught up in a sudden emergency, without opportunity for calm reflection, with the duty to obey unless the order is illegal at first blush. Still, if it is a reasonably prudent man the courts are talking about, why is the term "man of ordinary sense and understanding" used; a term not found

¹⁸⁴ 14 C.M.R. 742 (AFBR 1954).

¹⁸⁵ 39 C.M.R. 586 (ABR 1968), *petition denied*, 39 C.M.R. 293 (1968).

¹⁸⁶ 15 F. Cas. 1235 (No. 8,673) (C.C.D.Cal. 1867).

¹⁸⁷ 100 F. 149 (C.C.D. Neb. 1900).

in any other area of the law? The *ordinary* meaning of the terms suggests a lower standard of required conduct on the part of the man of ordinary sense and understanding.

B. *DISOBEDIENCE OF ORDERS OR MURDER*

The problem raised here is one unfettered by case law, statute, or scholarly commentary. May a serviceman subject himself to a murder charge by 'killing a rioter or arsonist he might otherwise have slain except for military orders not to fire on rioters? The importance to the serviceman is obvious: the difference between a possible five-year or less maximum imprisonment and death.¹⁸⁸

There is no argument that the military may restrict an individual from doing what he might normally do in civilian life. It is therefore not questioned that the serviceman could be tried by court-martial for disobedience of orders. It does not necessarily follow that this takes away from him his shield of justifiable homicide. Or does it?

Assuming for the moment that the disobedience of orders does not preclude the defense of justifiable homicide, does the standard for assessing it undergo a change? Although far from conclusive, the more logical answer would appear to be yes. Much of the reasoning behind giving a serviceman on riot control duty the status of a law enforcement officer is based on the concept of the serviceman's duty, plus to a lesser extent the consequences of failing to perform that duty.¹⁸⁹ Under the circumstances of this particular problem the soldier had a specific duty to not do the act committed. Removing this strut should reduce his status to that of a private citizen. As discussed in chapter III, there are areas in which the law enforcement officer has a greater freedom of action than the private citizen.

One certain consequence is the effect on the soldier's ability to remove a state prosecution to a federal district court for trial or have it dismissed for lack of state jurisdiction. *In re Fair*¹⁹⁰ resulted in removal of a homicide case to the federal courts on the theory that when an officer or agent of the United States acts within the authority conferred upon him by the laws of the United States it is a matter solely for the concern and control of the United States. This reasoning is basically the same as the

¹⁸⁸ See MCM, 1969 (REV. ED.), para 127c, Table of Maximum Punishments, to compare Code articles 90, 91, and 92 (disobedience of orders) with article 118 (murder).

¹⁸⁹ See chapter V, *supra*.

¹⁹⁰ 100 F. 149 (C.C.D. Neb. 1900).

United States Supreme Court's in *In re Neagle*.¹⁹¹ A much later federal district court decision, *Brown v. Cain*,¹⁹² stressed the point that a coast guardsman must have been acting in line of duty, *i.e.*, within his military authority, to arrest persons. A soldier who committed homicide in violation of competent orders, no matter how justified, would have a near insurmountable task in removing his case from a state court or seeking a dismissal under either of these two theories.

This brings us back to the original problem. Does the soldier before a court-martial lose his right to the defense of justifiable homicide simply because he disobeyed an order? I think not, for two reasons: First, the soldier by his act of disobedience forfeits certain substantial rights; his freedom, if convicted of disobeying an order, his status as a law enforcement officer by which his acts would have been judged in determining justifiable homicide, and his right of removal or dismissal of a state prosecution.¹⁹³ Second, in weighing the equities, the possibility of a death penalty appears to be a high price to pay for disobeying an order, particularly when only that order bars a full defense. When taken together, the better result appears obvious.

C. MISTAKE OF FACT—MISTAKE OF LAW

The obvious conclusion, after reading the current Manual provisions on mistake of fact and mistake of law as defense,¹⁹⁴ is that they are not meant to be a definitive restatement of the law or a definitive statement of new legal standards, but rather a general reference to and incorporation of existing military law. Because of the broad expanse of the topic of mistake in military law, no attempt will be made to effect an exhaustive study.¹⁹⁵

With the above in mind, the following general rules are set forth. First, ignorance or mistake of fact, to be a defense, need only be honest for a specific intent crime,¹⁹⁶ but both honest and reasonable for a general intent crime.¹⁹⁷ Second, ignorance of the

¹⁹¹ 135 U.S. 1 (1889).

¹⁹² 56 F. Supp. 56 (E.D. Pa. 1944).

¹⁹³ See note 5, *supra*.

¹⁹⁴ MCM, 1969 (REV. ED.), para 154a(4), (5).

¹⁹⁵ For an in-depth study of the subject in the military, see Manson, *Mistake as a Defense*, 6 MIL. L. REV. 63 (1959), reprinted in MIL. L. REV., VOL. 1-10 SELECTED REPRINT 151 (1965).

¹⁹⁶ *United States v. Holder*, 7 U.S.C.M.A. 213, 22 C.M.R. 3 (1956); *United States v. Taylor*, 5 U.S.C.M.A. 775, 19 C.M.R. 71 (1955); *United States v. Rowan*, 4 U.S.C.M.A. 430, 16 C.M.R. 4 (1954).

¹⁹⁷ *United States v. Pruitt*, 17 U.S.C.M.A. 438, 38 C.M.R. 236 (1968); *United States v. Holder*, 7 U.S.C.M.A. 213, 22 C.M.R. 3 (1956); *United States v. Mardis*, 6 U.S.C.M.A. 624, 20 C.M.R. 340 (1956).

law is generally no defense,¹⁹⁸ but an honest mistake or ignorance of some law other than that charged may be a defense to a specific criminal intent offense.¹⁹⁹ Logically, but without case authority, it may be concluded that an honest and reasonable mistake of some law other than that charged is a defense to a general intent offense.

With the above general rules in mind an attempt will be made to apply them to the offense of murder in the military, in situations typical of those that could arise during civil disturbance duties. The conclusions are my own, derived from theoretical application except when legal authority is cited. This approach is necessitated by the lack of military cases on point. The discussion will concern itself with a serviceman using illegal means in good faith to comply with a legal order or carry out a legal duty.

Let us suppose during an urban riot that a soldier has been posted to guard an abandoned package goods store against theft of the liquor and damage to the building. While discharging his duties a civilian approaches and attempts to throw a rock through the store window. The soldier calls out for the civilian to stop but his order goes unheeded. He then shoots and kills the man just before the rock is thrown. For the purposes of this discussion it will be assumed that the act of throwing the rock through the window does not constitute a felony under state law and that the soldier intended to kill or inflict great bodily harm upon the rock thrower. The facts as stated raise the possibility of premeditated or unpremeditated murder.²⁰⁰ The next step is an inquiry into the mistakes of fact and law which could favorably affect this possibility as far as the soldier is concerned. If the soldier believed that the man he shot was about to throw a fire bomb rather than a rock a completely new element is introduced, for if arson were actually being attempted the soldier could have resorted to deadly force if no other means of prevention were available.²⁰¹ This honest mistake of fact would be a defense to either of the specific criminal intent offenses of premeditated or

¹⁹⁸ *Reynolds v. United States*, 98 U.S. 145 (1878); WINTHROP, *MILITARY LAW AND PRECEDENTS* 291 (ed ed. 1920 reprint).

¹⁹⁹ *United States v. Sicley*, 6 U.S.C.M.A. 402, 20 C.M.R. 118 (1955); PERKINS, *CRIMINAL LAW* 816 (1957).

²⁰⁰ Premeditated murder in the military requires both a premeditated design and a specific intent to kill. *See* article 118(1) of the Code and MCM, 1969 (REV. ED.), para 197*b*. Unpremeditated murder requires the specific intent to kill or inflict great bodily harm. *See* article 118(2) of the Code and MCM, 1969 (REV. ED.), para 197*c*.

²⁰¹ *See* chapter III, section B1, *supra*.

unpremeditated murder.²⁰² As voluntary manslaughter requires the same specific intent as unpremeditated murder,²⁰³ the only lesser included offenses left would be involuntary manslaughter²⁰⁴ or negligent homicide,²⁰⁵ depending upon the degree of negligence involved in the soldier's mistake. If the soldier's mistake was not only honest, but reasonable, that reasonableness would rebut either of the degrees of negligence required in involuntary manslaughter or negligent homicide. Although easy to state, the specific intent and mistake of fact, if they exist, are contained within the mind of the soldier and make for thorny problems for the finders of fact.

A more difficult area of mistake is mistake of law. In addition to determining whether the mistake exists, it must be determined whether or not it is a mistake of law as to the offense charged. It seems clear that if our soldier was acting under the mistaken belief that deadly force could be used when necessary to prevent a violent misdemeanor his mistake was of the law of the offense charged: murder, and hence no defense. If on the other hand he believed that throwing the rock constituted a forcible felony, it may be argued his mistake did not concern the law of murder, but instead what constitutes a felony. If the latter conclusion is accepted the legal consequences of the mistake would be the same as the mistake of fact previously discussed.

There is one other consideration which must be taken up before discussion of this area of mistake of law or fact is complete. In the past the United States Court of Military Appeals has displayed a susceptibility in specific intent offenses to allow what it considers a *non-criminal* purpose to negate the criminal intent required and thus rise to the status of a defense.²⁰⁶ Thus, an accused who takes a friend's wallet to teach him not to leave

²⁰² The conclusion that unpremeditated murder is a specific criminal intent offense is based on an analysis of the following cases: *United States v. Ferguson*, 17 U.S.C.M.A. 441, 38 C.M.R. 239 (1968); *United States v. Mathis*, 17 U.S.C.M.A. 205, 38 C.M.R. 3 (1967); *United States v. Thomas*, 17 U.S.C.M.A. 103, 37 C.M.R. 367 (1967).

²⁰³ UCMJ art. 119(a).

²⁰⁴ *Id.* at 119(b).

²⁰⁵ MCM, 1969 (REV. ED.), para 213f(12), charged under UCMJ art. 134.

²⁰⁶ See *United States v. Roark*, 12 U.S.C.M.A. 478, 31 C.M.R. 64 (1961), and *United States v. Caid*, 13 U.S.C.M.A. 348, 32 C.M.R. 348 (1962), where the Court dealt with the specific intent offense of wrongful appropriation and an accused who, if believed, had in the court's opinion a wholly innocent, non-criminal, non-evil purpose. *But see* *United States v. Stinson*, 35 C.M.R. 711 (1964), *petition denied*, 35 C.M.R., 478, for a different result. *Also see* *United States v. Heagy*, 17 U.S.C.M.A. 492, 38 C.M.R. 290 (1968), for a similar application of the "non-criminal purpose" doctrine.

his possessions unsecured in the barracks does not commit either larceny or wrongful appropriation, both specific intent offenses.²⁰⁷ Although this approach may prevent what a judge considers an unjust result, it does not produce a very discernible rule of law and in effect stands for the proposition that crime is in the eye of the judicial beholder based on deeply buried moral value judgments unsusceptible to objective ascertainment. Regardless, the possibility of its application in a particularly sympathetic murder case cannot be overlooked.

When dealing with justifiable homicide the universal rule that deadly force may only be used when *necessary* to effect a legal result²⁰⁸ must always be kept in mind. The question is whether mistake of fact or law has any relevance as a defense in this rule. Suppose the soldier decides that to prevent arson to the building it is necessary to shoot all unidentified persons who come within ten feet of the building. Is this a mistake of fact, though perhaps unreasonable, in regard to what is necessary? If the soldier decides on 100 feet, does it become now a mistake of law and more specifically, of the offense charged: murder? Does it make any difference that he never heard of the doctrine of necessity?

A consideration of these hypotheses results in the conclusion that some difficulty is encountered in applying the doctrine of mistake in this area. The difficulty is that these situations actually raise two issues: First, do the facts disclose imminent danger? Second, what degree of force is necessary to overcome that danger? Concerning both issues, will the standard to be applied be honest belief on the part of the soldier, or an honest *and* reasonable belief? Solutions come in pairs, without military cases to furnish positive guidance. The law of mistake could be applied as previously discussed. In that case it would depend upon whether the offense charged required specific criminal intent or general criminal intent; the former requiring honest belief, the latter requiring honest and reasonable belief. Another approach would be to apply by analogy the law of self-defense. The latter solution would require an honest and reasonable belief that the arson was imminent, but only an honest belief that the degree of force was *necessary*.²⁰⁹ Both solutions have their merit, the former doing less violence to established legal rules.

²⁰⁷United States *v.* Roark, 12 U.S.C.M.A. 478, 31 C.M.R. 64 (1961).

²⁰⁸See chapter 111, section B, *supra*.

²⁰⁹MCM, 1969 (REV.ED.), para 216c.

Finally, the possible effect of the following Manual provision must be considered: "An act performed manifestly beyond the scope of authority . . . or in a wanton manner in the discharge of a lawful duty, is not excusable."²¹⁰ It is conversely true that an act not manifestly beyond the scope of authority or committed in a wanton manner in the performance of a lawful duty *is* excusable?²¹¹ Before the converse proposition is accepted as a legal defense, its consequences as to firmly established existing law should be examined. First of all, "manifestly beyond the scope of authority," at least in the executive immunity sense, refers much more to the ends to be accomplished rather than the means in which they are accomplished.²¹² Secondly, the only leash placed on the soldier in accomplishing the mission would be the prohibition of wantonness. It is not difficult to conclude that much of the law as regards mistake of fact, mistake of law, use of force to prevent criminal offenses, arrest, and other areas would have to be abandoned in many instances, substituting therefor a much looser standard of criminal liability. The converse does, on the other hand, provide a judicial tool for correcting what one might conclude to be an unjust result if the more conventional rules of law were applied. The effect, if any, of this Manual provision must be left to future developments.

VII. CONCLUSION

After a journey through the trees it is profitable to stand back and examine the forest. This is particularly important in this paper as it has developed from topic to topic based in large part on conclusions of its author which, though founded upon legal principles, are far from conclusive.

Unresolved problem areas exist which interact upon each other. However, intelligent analysis can lead to some relatively firm conclusions. One is that military law will confer the status of law enforcement officer, or its equivalent, upon the soldier engaged in riot control duties. This status can be of particular

²¹⁰ MCM, 1969 (REV. ED.), para 216d.

²¹¹ There are no military appellate decisions which cast substantial light on this question. *United States v. Griffen*, 39 C.M.R. 586 (ABR 1968), *petition denied*, 39 C.M.R. (1968), does touch on the area. There are state cases which seem to espouse the Manual statement to some degree. *See, e.g.*, *O'Connor v. District Court*, 219 Iowa 1165, 260 N.W. 73 (1935); *Commonwealth v. Shortall*, 206 Pa. 165, 55 A. 952 (1903).

²¹² *See Norton v. McShane*, 332 F.2d 855 (5th Cir 1964), *cert. denied*, 380 U.S. 981 (1965).

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importance in certain areas of prevention of criminal offenses and arrest.

The fact that justifiable homicide is a recognized doctrine in the military as well as in every state is of limited assistance. As has been seen, military law is practically devoid of applications of this doctrine and the law of the various states varies considerably on many specific issues. In the military the areas of justifiable prevention of criminal offenses and arrest will require instant development if and when cases involving these situations arise. Fortunately there is a well developed body of civil law, though in conflict on certain points, to select from. Whether the riot/insurrection situation creates a set of standards for justifiable use of force, broader than the normal legal standards, will also have to be resolved. If the soldier is given even greater latitude of justifiable action in the suppression of riot and insurrection, extending beyond more established legal limitations, a new area of law will be created, relying on assistance and precedent from the handful of court decisions which have confronted this problem.

As the military law of murder and various assault type offenses is well established, the military law of what may be called imperfect justifiable homicide is not. The term imperfect justifiable homicide refers to those instances in which the person resorting to deadly force is operating under a mistaken belief that, if true, would justify his actions. This includes all the various mistakes of law and fact discussed in the preceding chapter. Only the special mistake of law labeled obedience to orders is somewhat charted out by past military precedent. Whether the military courts will apply the well established civilian rules relating to mistake to the well established military rules of murder and its lesser included offenses is open to some question. The particular fact situations arising from civil disturbance duties will provide difficulties, not to mention the possible inequities of holding an honestly motivated soldier to legal standards he is untrained in but forced by duty to obey.

Regardless of which standards may be selected the hardest nut to crack is the concept of necessity, a prerequisite to the use of force. In a situation where the law allows the use of deadly force when necessary, it must first be determined whether the force used was necessary and by what standard this is determined. Only after there is a determination that the degree of force used was not necessary does one arrive at the problem of determining what sort of mistake, if any, will excuse the excess. No

application of excusable mistake can be applied until it has been determined that a mistake has been committed.

Perhaps the most perplexing problem for the military establishment is that of variant standards for measuring the legality of conduct between state and military law. The present Army standard of reviewing riot control action in the light of necessity²¹³ may appear prudent but is not entirely satisfactory. As has been seen, the necessity rule does not solve all problems. Various states forbid the accomplishment of certain legal objectives if only certain means are available.²¹⁴ Admittedly, the Army has defined "necessity" in terms of prudence,²¹⁵ but this could just as easily place extra legal restraint on accomplishing the mission.

This paper offers no perfect solutions to the problems raised. The problems, if and when they arise, will be solved by judicial development. The quality of this evolutionary development will depend to a large extent upon the approach of the judicial officials involved : counsel, staff judge advocates, and appellate personnel. It is to them, this article is submitted as a hopefully useful tool.

²¹³ See the discussion at pages 25 and 29, U.S. DEP'T OF THE ARMY PAM NO. 27-11, MILITARY ASSISTANCE TO CIVIL AUTHORITIES (1966).

²¹⁴ An example is that deadly force may not be used to prevent the escape of a misdemeanant as discussed in chapter III, section B2, *supra*.

²¹⁵ MILITARY ASSISTANCE TO CIVIL AUTHORITIES, *supra* note 213, and U.S. DEP'T OF THE ARMY PAM NO. 360-81, TO INSURE DOMESTIC TRANQUILITY (1968), plus personal experience of the author during civil disturbance mission briefings.

LEGAL RULES AFFECTING MILITARY USES OF THE SEABED*

By Captain Robert W. Gehring**

To many, the deep seabed raises visions of Jules Verne and Jacques Costeau. However, in recent years military and economic exploitation of the deep oceans has become a pressing topic of world order. The author examines some of the military considerations involved in regulating the use of the seabed. After discussing international law precedents in the field, he examines the provisions of the proposed International Seabed Area Convention and the Nuclear Seabed Treaty.

I. INTRODUCTION

Beneath the sometimes placid, sometimes tempestuous surface of the seven seas lies a strange and wonderful world more ancient than the land but almost wholly new to man. Long has man hunted blindly for fish in its depths and transported his goods across its surface, but only in the last few years has a new technology awakened a growing interest in the resources of the deeper waters, seabed and subsoil. No longer is the deep seabed thought to be an endless plain of mud as barren economically¹ as

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"In view of a certain fear of an ever outwards-moving boundary line of the legal 'continental shelf' an inquiry was also made into the question whether the ocean floor contains any exploitable minerals. The answers indicate that the sediment carpet covering most parts of the ocean floor does not contain minerals in any concentrations worthwhile exploiting.

"In one place manganese ore has been found, but since this is available on land in sufficient quantity, exploitation from the ocean bottom is not necessary and would not pay. The sediment carpet, being extremely thick will in most places make exploitation of layers underneath impossible. In the few places where the sediment is thinner or non-existent formations may be found with the prospect of exploitation. Intrusions, such as the Mid-Atlantic Ridge, might have mineral deposits associated with them. Depth will, however, be an insurmountable obstacle for exploitation for a long time to

it was believed to be biologically. The newly discovered wonders of life thriving on and above the deep seabed² are matched by the discoveries of abundant mineral wealth on and below it.

Beneath the oceans extends a topography as varied as any on emerged earth." From the mean low water line, the continental shelf gradually descends to a depth usually between 400 and 600 feet. There the decline abruptly increases, marking the upper edge of the continental slope. The continental shelf and continental slope together comprise the continental terrace. The slope, frequently scarred by great canyons, drops until its seaward boundary is traced either by a trench, beginning as deep as 8,000 feet and plunging still further, or by the edge of the continental rise between 1200 and 5,000 feet deep. The continental rise continues a much more gradual decline until the abyssal or deep ocean floor. At a usual depth of between 3,300 and 5,500 feet, rolling plains extend for thousands of square miles, scarred by deep gorges and studded with mountains called sea mounts. Some mountains even break through the surf to become islands. High plateaus are sometimes found, called banks if they rise within 200 meters of the surface. The ocean floors themselves are bisected by mid-ocean ridges comprising the longest continuous mountain chains in the world. Rift valleys split the middle of these ridges along most of their lengths.

In this submerged world human concerns can be grouped in four main areas: (1) economic, primarily fishing, petroleum drilling, and mining of other minerals; (2) scientific research, both basic and applied; (3) environmental protection; and (4) military activity and its regulation.

Fishing, the most historic use of the sea, normally does not involve contact with the seabed at any great depth. Trawling

come, quite apart from the commercial prospects which seem non-existent." *Recent Developments in the Technology of Exploiting the Mineral Resources of the Continental Shelf* 24, U.N. Doc. A/Conf. 13/25 (1958), quoted in Robertson, *A Legal Regime for the Resources of the Seabed and Subsoil of the Deep Sea: A Brewing Problem for International Lawmakers*, 21 NAVAL WAR COLLEGE REVIEW 61, 62 (1968).

² Pictures taken at depths to 4,000 feet appeared in Church, *Deepstar Explores the Ocean Floor*, NATIONAL GEOGRAPHIC 110 (Jan. 1971).

³ This description of the seabed is gathered from FYE, MAXWELL, EMERY, & KETCHUM, OCEAN SCIENCE AND MARINE RESOURCES, USES OF THE SEAS 17, 18-19 (1968); Glossary of Geomorphic and Geologic Terms from the NPC Report, printed in *Hearings on S. Res. 33 Before the Subcom. on Ocean Space of the Senate Comm. on Foreign Relations*, 91st Cong., 1st Sess., 202-03 (1969); Report of the Economic and Technical Working Group, *Report of the Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction* 21, 23 U.N. GAOR.

is done most frequently over banks; other fishing either does not involve bottom contact or is limited to sedentary fisheries on shallow portions of the continental shelf. However, some new techniques currently under study depart radically from traditional methods. In Australia fish may be herded by sonar to a control collection point and then transferred via pipeline to the processing plant.⁴ Other seabed installations to aid in the harvest of free swimming fish may also be used.; The aquaculture made possible by confining fish within a given area sometimes yields astounding increases in productivity, vastly exceeding animal production on land.⁶

Petroleum is the overwhelmingly dominant economic interest in the seabed, its production representing nearly 90 percent of subsea mineral production⁷ and 16 percent of the world petroleum production.⁴ Yet this is but a small portion of the future.

⁴*Hearings on S. Res. 33 Before the Subcomm. on Ocean Space of the Senate Comm. on Foreign Relations, 91st Cong., 1st Sess., 58-59 (1969) [hereinafter cited as S. HEARINGS 33].*

⁴Craven, *Technology and the Law of the Sea*, CONFERENCE ON LAW, ORGANIZATION AND SECURITY IN THE USE OF THE OCEAN 1, 24 (17-18 Mar 1967 [hereinafter cited as CRAVEN]).

⁴*Uses of the Seas, supra note 3, at 61.* A serious question may arise concerning the regulation of fisheries conducted with techniques involving use of the seabed. The 1958 Convention on Fishing and Conservation of Living Resources of the High Seas (29 Apr. 1958, 17 U.S.T. 138, T.I.A.S. 5639, 516 U.N.T.S. 205, (effective 20 Mar. 1966) provides in Art. 13 "1. The regulation of fisheries conducted by means of equipment embedded in the floor of the sea in areas of the high seas adjacent to the territorial sea of a State may be undertaken by that State where such fisheries have long been maintained and conducted by its nationals, provided that non-nationals are permitted to participate in such activities on an equal footing with nationals except in areas where such fisheries have by long usage been exclusively enjoyed by such nationals. Such regulations will not, however, affect the general status of the areas of high seas." Para 2 defines "fisheries conducted by means of equipment embedded in the floor of the sea" as "those fisheries using gear with supporting members embedded in the sea floor, constructed on a site and left there to operate permanently or, if moored, restored each season on the same site."

Several questions occur concerning the language. May any state regulate such fisheries in areas of the high seas not adjacent to its territorial sea? May the coastal state regulate the fishery when the fishery has not been long maintained by nationals, but came into existence with new seabed techniques? May the coastal state regulate the fishery when it is one of long standing, but the techniques are new? Does the definition of "fisheries conducted by means of equipment embedded in the floor of the sea" include aquaculture made possible by bubble fences laying on the seabed but with a reaping of the harvest done from the surface?

⁴SEN. COMM. ON INTERIOR AND INSULAR AFFAIRS, 91st Cong., 1st Sess., *Selected Materials on the Outer Continental Shelf* 44 (Comm. Print 1969).

⁴*Hearings on Issues Related to Establishment of Seaward Boundary of United States Outer Continental Shelf Before the Special Subcomm. on Outer*

The discovery of many more deposits in the continental slope and the continental rise is anticipated.⁹ Estimates of the petroleum recoverable on the continental shelf exceed the total recovered in land operations throughout history.¹⁰ The division of such economic and strategic wealth will obviously raise serious problems, not always capable of being settled as peacefully as those in the North Sea.¹¹ Oil deposits in the East China Sea are fueling a growing controversy between Japan, Nationalist China and Communist China.¹²

A wide variety of minerals are found on the continental shelf and continental slope." Besides petroleum, there are deposits of limestone, sand and gravels, iron ore, coal, sulphur, barite, bauxite, phosphorite, and placer deposits of diamonds, gold, platinum, titanium minerals, tin, chromite, and zircon. Brine pools discovered at the bottom of the Red Sea and suspected in other locations contain highly concentrated quantities of silver, copper, zinc, and lead. Elsewhere on the seabed beyond the continental slope, vast beds of manganese nodules offer the greatest economic potential, not so much for their manganese content but for the higher-priced copper, nickel, and cobalt associated with the manganese.

Scientific research involving the seabed and the deep sea is winning ever greater expenditures, spurred only in part by the growing economic interest in this area. The United Nations recently agreed to sponsor an International Ocean Decade, long advocated by the United States. The freedom from local jurisdictions on the high seas has assisted research beyond the continental shelf, but research on the continental shelf itself requires the permission of the coastal state.¹³ Delay in granting permission and the need for compliance with varying national regulations

Continental Shelf of the Sen. Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess., pt. 2, at 309 (1970) [hereinafter cited as INTERIOR COMM.].

⁹ *Id.* at 311; *Uses of the Seas*, *supra* note 3, 41-45.

¹⁰ *Selected Materials*, *supra* note 7, at 44.

¹¹ North Sea Continental Shelf Cases, [1969] I.C.J. 1

¹² Washington Post, 14 Oct. 1970, at A12, col. 1, and 30 Dec. 1970, at A13, col. 1.

¹³ The following discussion is based on *Uses of the Seas*, *supra* note 3, at 32-5; ; UN Ad Hoc Comm, *supra* note 3, at 23-30; INTERIOR COMM. pt. 2, at 310-12; Mero, *A Legal Regime for Deep Sea Mining*, 7 SAN DIEGO L. REV. 488, 495-96 (1970); Mero, THE MINERAL RESOURCES OF THE SEA 55-83, 106-241 (1965).

¹⁴ Convention on the Continental Shelf, 29 Apr. 1958, art. 5, para 8, 15 U.S.T. 471, T.I.A.S. 5578 499 U.N.T.S. 311 (effective 10 Jun. 1964) [hereinafter cited as Con Shelf Conv].

frequently inhibits research severely.¹⁵ Consequently, there has been pressure for any new seabed legal regime to lessen present restrictions on continental shelf research and insure such restrictions are not extended to deeper waters.

Environmental protection concerns both present and future activity in the oceans and on the seabed. Pollution is a growing international concern.¹⁶ The United States decision to dump warheads containing poison gas into 16,000 feet of water off Cape Kennedy caused international protest," though some scientists believe that dumping such materials in the deep ocean may be safer than getting rid of them on land or in the atmosphere.¹⁸ Oil spills from ship collisions and ship discharges, and leaks from oil wells frequently appear on today's front pages with accompanying background articles explaining the damage wrought to the entire ecology from the seabed to the seabirds.¹⁹ A recent United Nations Food and Agriculture Organization conference in Rome was most concerned about industrial and human sewage.²⁰ Thor Heyerdahl's *Ra II* expedition encountered masses of asphalt-like sludge, soapy foam and oily liquids floating on the Atlantic.²¹ Present and future exploitation of minerals from the seabed raises problems ranging from suffocating sedentary organisms with the tailings dumped from processing of the minerals to the release of hydrogen sulfide produced in buried marine

¹⁵ United Nations Educational Scientific and Cultural Organization—Intergovernmental Oceanographic Commission, Working Group on Legal Questions Related to Scientific Investigations of the Ocean, printed at S. HEARINGS 33, at 52; statement of John A. Knauss, S. HEARINGS 33, at 107, 109.

¹⁶ Illustrative statements by different nations are at 5 *UN Monthly Chronicle* 29-30 (Jan. 1968); 5 *UN Monthly Chronicle* 54-55, 57 (Dec. 1968); *Chronicle* 99 (Aug-Sep 1968); 5 *UN Monthly Chronicle* 54-55, 57 (Dec 1968); 6 *UN Monthly Chronicle* 56, 59-60 (Jan. 1969); 7 *UN Monthly Chronicle* 77 (Jan. 1970).

"Reported in *New York Times*, 4 Aug. 1970, at 1, col. 4; 7 Aug. 1970, at 11, cols. 1, 3; 8 Aug. 1970, at 8, cols. 4-6; 16 Aug. 1970, at 1, col. 6; 18 Aug. 1970, at 7, col. 1; 19 Aug. 1970, at 1, col.; 21 Aug. 1970, at 1, col. 1; 25 Aug. 1970, at 4, col. 1.

"UN FAO Conference at Rome, reported in *Washington Post*, 14 Dec. 1970, at A 14, col. 1.

¹⁹ *The New York Times* Index lists 209 articles during 1970 related to oil pollution and its control.

²⁰ *Washington Post*, *supra* note 18. More recently Jacques Piccard raised the possibility that all life on earth may suffocate if continued pollution by man destroys the algae in the ocean. *Washington Post*, 23 Jan 1971, at A16, cols. 1 & 2.

²¹ Heyerdahl, *The Voyage of Ra II*, NATIONAL GEOGRAPHIC 44, 55 (Jan. 1971); *New York Times*, 10 May 1970, at 8, col. 1.

sediments.²² Because of the impact of these events, any new legal regime for the seabed is likely to include some provisions to protect the environment.

The growing military interest in the seabed is examined in the next chapter. Accompanying this military interest, there has been increasing pressure to isolate the seabed from the arms race. United Nations concern with arms control on the seabed began in 1967 when Malta requested the inclusion in the United Nations General Assembly's agenda of an item entitled "Declaration and Treaty concerning the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, Underlying the Seas Beyond the Limits of Present National Jurisdiction and the Use of Their Resources in the Interests of Mankind."²³ The General Assembly set up an Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction.²⁴ In 1968 the Ad Hoc Committee was raised in status to a permanent committee and increased in membership from thirty-five states to forty.²⁵ It was to this Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction that the United States submitted its Draft United Nations Convention on the International Seabed Area (hereinafter referred to as ISA Convention) in August 1970.²⁶

Meanwhile the Eighteen Nation Disarmament Committee (hereinafter referred to as ENDC) meeting in Geneva had been considering arms control on the seabed. The result was a joint U.S.S.R.-U.S. Draft Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof (hereinafter referred to as the Nuclear Seabed Treaty). The ENDC approved the latest draft of 4 September 1970²⁷ and sent it to the United Nations General Assembly which endorsed it

²² Effect of the Exploitation of Mineral Resources on the Superjacent Waters and on Other Uses of the Marine Environment, U.N. Doc. A/AC.135/15 (1968).

²³ Note Verbale dated 17 Aug. 1967 from Permanent Mission of Malta to United Nations addressed to Secretary General, 22 U.N. GAOR A6695 (1967).

²⁴ G. A. Res. 2340 (XXII), cited in 5 UN *Monthly Chronicle* 28 (Jan. 1968).

²⁵ G. A. Res. 2467 (XXIII), cited in 6 UN *Monthly Chronicle* 56 (Jan. 1969).

²⁶ A summary of the provisions of the ISA Conv. appears at 63 DEPT STATE BULL. 213. The full text of the Convention appears at INTERIOR COMM. pt. 3, at 71.

²⁷ 63 DEPT STATE BULL. 362 (1970). The text is printed in the same article at 365.

in December 1970.²⁸ Sixty-two nations signed the treaty on 11 February 1971.²⁹

The activities in each of these four areas—economic exploitation, scientific research, environmental protection, military activity and arms control—are interrelated. Progress in each affects the others, and all must be considered in varying degrees in any new legal regime that is applied to the seabed. This article focuses on the legal rules affecting military uses of the seabed. After a brief survey of present and possible future military uses of the seabed, the article will discuss those rules presently affecting military uses of the seabed. Then it will analyze the recently signed Nuclear Seabed Treaty and the ISA Convention to anticipated what changes they may make in the present rules.

11. MILITARY USES OF THE SEABED

As knowledge grows of how man can work in the ocean depths, so also will grow man's submerged activities.³⁰ The military activities have been grouped into four main categories: (1) a sea-based strategic deterrent; (2) warning and surveillance systems; (3) the deployment of units on the seabed for a variety of purposes, such as inspecting for mines or other impediments to the free use of the seas; and (4) the protection of nationals engaged in sea floor activities." In addition, seabed activities may be useful for maintaining control of the surface of the sea as the air and subsurface are used today."

The oceans now shelter and conceal submarines carrying Polaris and Poseidon ballistic missiles—a significant element of the United States strategic deterrent system. The future will probably see more reliance placed on submarine based missile systems as land-based missiles become increasingly vulnerable to attacking missiles.³¹

²⁸ *Washington Post*, 17 Dec. 1970, at A21, col. 1.

²⁹ *Washington Post*, 12 Feb. 1971, at A1, col. 1 at A22, col. 1.

³⁰ An interesting discussion of the possible far ranging strategic consequences of the developing deep sea technology is presented in Craven, *Sea Power and the Sea Bed*, 92 U.S. NAVAL INSTITUTE PROCEEDINGS 36 (Apr. 1966).

³¹ Frosch, *Military Uses of the Ocean*, Address at the Second Merston-Carnegie Conference on Law, Organization and Security in the Use of the Ocean at Columbus, Ohio, 7 Oct. 1967, quoted in Robertson, *Legal Regime*, *supra* note 1 at 74.

¹ Martin, *The Sea*, *supra* note 3, at 97.

¹³ *Washington Post*, 22 Oct. 1970, at A1, A29, col. 1. The article reports that DOD approved requesting an increase in the budget for design of ULMS by a factor of three in the next fiscal year, partly from fear that

Portions of the warning and surveillance system for detecting submarines are based on the seabed. The East Coast of the United States is guarded, in part, by a hydrophone network strung along the 600 foot line and connected to landbased computers to monitor and process information received.³⁴ The seabed also serves as a quiet resting place for submarines assigned to surveillance duty.³⁵

In the future military uses of the seabed should multiply far beyond the present concentration on submarines and their detection.³⁶ In addition to basic research aimed at a better understanding of the ocean environment, other research directly seeks better means for man to function in the pressure of the deep ocean and seabed. Advances are being made in the vehicles which carry man, the buildings that shelter him, and in his own ability to survive and work at great depths and at ambient pressure. Large manned installations may be closer than is normally thought. Besides the research use of underwater habitats in such efforts as the Navy's Man in the Sea program, mines have extended far under the sea for many years. While present mine entrances are located on land, only the problems of entrance and exit underwater need be solved before manned installations are immediately available.³⁷ A nuclear power plant, oxygen obtained from seawater by electrolysis, and food acquired from the sea could make the installations largely self-sufficient. While underwater manned installations may be expensive to construct, they will

by the late 1970s, Russian ICBMs may be able to destroy most of the land-based Minutemen force.

³⁴ Hessman, *Progress and Setbacks in the Navy's ASW Battle*, 108 ARMED FORCES J. 26 (19 Oct. 1970); Nihart, *MSS: ASW Breakthrough*, 108 ARMED FORCES J. 11 (25 Jul. 1970); Brown, *The Legal Regime of Inner Space: Military Aspects*, 22 CURRENT LEGAL PROBLEMS 181, 182 (1969); L. MARTIN, *THE SEA IN MODERN STRATEGY* 98-100 (1967). A new system has recently been developed for locations where a permanent system is not needed or not feasible. Hessman, *supra*.

³⁵ *Washington Post*, 15 Feb. 1971, at A1, at A8, col. 1. Seabed hydrophone systems determine the general location of a submarine and its course. When its precise location is needed for further surveillance, identification or action, surface sonar buoys linked to ships and aircraft can be dispatched in accordance with the information received from the stationary systems. Andrews, *Navy Gears Up ASW Capabilities to Meet Soviet SLBM Threat*, 106 ARMED FORCES J. 16 (19 Jul. 1969).

³⁶ "Presently 50 to 60% of the funds spent by the United States Government on ocean research are spent by the Navy. Hearings on S.J. Res. 111, S. Res. 172, and S. Res. 186 Before the Senate Comm. On Foreign Relations, 90th Cong., 1st Sess. 39 (1969) [hereinafter cited as S. HEARINGS 111]. Naturally seabed and deep ocean research is only a part of this total.

³⁷ CRAVEN at 31-32.

minimize the number of trips that need to be made to the surface with time-consuming and expensive decompression.³⁸

Major advances in the construction of submersible vehicles are expected in the near future. Such vehicles will include both bottom crawlers and swimming vehicles free from any connection, either physical or logistical, to surface ships, unlike most research submersibles today. As long ago as 1960, the manned bathyscaph Trieste reached the deepest point on earth—35,800 feet down in the Marianas Trench.³⁹ Today research is devoted to developing submersibles of less expensive materials and constructions, improving their maneuverability and versatility, and decreasing their dependence on surface support."

Placing ballistic missile silos on the seabed has been considered as an addition to the strategic deterrent system." Such a system could probably be more accurate than submarine based missiles since it would eliminate error due to ship drift. It would retain the advantage of placing the strategic deterrent system some distance from population centers. A seabed based system also has

"Man can live underwater by breathing air fed to him at a pressure equal to the surrounding water pressure. But when air is breathed under pressure, the gases dissolve in the bloodstream. The gases leave the bloodstream as the pressure is reduced with a return to the surface. The rate at which a diver returns to surface pressure must be carefully regulated so that the gas coming out of solution in the bloodstream does not form bubbles sufficiently large to cause a variety of painful, and possibly permanently disabling or fatal maladies.

Once a diver becomes saturated with air at a depth of 300 feet, 2% days are required to decompress him. Those 2% days for decompression remain the same whether he stays at a depth of 300 feet for one day or 30. *Man-in-the-Sea*, 1 FACEPLATE 14 (Winter, 1970). Thus, the economics of maintaining a habitat for the diver at working depth are evident. One alternative is to maintain a pressurized environment for him aboard ship and raise and lower him in a similarly pressurized container. This is feasible only if a ship can be spared to station itself above the working location.

³⁸ *New York Times*, 24 Jan. 1960, at 1, col. 6; 19 Feb. 1960, at 13, col. 1.

³⁹ Submersibles may be built more cheaply, and thus be more widely used, if it is not necessary to build into them the structural strength necessary to withstand the shock of waves in a heavy sea or the shock of being slammed against a mother ship. Glass and ceramics are being explored as low cost building materials for hulls. In recent tests the Navy's "Nemo"—a 66" sphere of clear acrylic plastic successfully carried two men several times to a depth of 500 feet. Nemo, ALL HANDS 13 (Nov. 1970). Finally, the development of reliable free-flooding machinery (not requiring shelter from the salt water) will complete the possibilities opened by the other fields for research. All these factors are discussed in Craven, *Sea Power*, *supra* note 1; CRAVEN, and Cohen, *The Deep Questions*, 95 U.S. NAVAL INSTITUTE PROCEEDINGS 27 (Jan. 1969).

⁴⁰ Unless otherwise indicated, the following discussion of possible future uses of the seabed is drawn from U.N. Secretariat, *Military Uses of the Seabed and the Ocean Floor Beyond the Limits of Present National Jurisdiction*, U.N. Doc. A/AC.135/28 (1968).

faults. No nation would be willing to leave a nuclear missile untended on the seabed because of the great problems this would pose for programming the missile's target, insuring continued maintenance and readiness, and preventing sabotage. Seabed missiles would probably be clustered in manned installations. However, the larger the installation, the greater the risk of discovery. Also, the more traffic to and from an installation, the greater the risk of its discovery. Once discovered, the installation becomes a fixed target unprotected by the sovereign borders which hold trespassers away from land installations. Rather it is surrounded by the high seas on which all nations enjoy freedom of navigation.

Nuclear missiles might also be based on bottom crawling mobile platforms to regain concealing mobility.⁴³ However, once mobility again becomes necessary, it would seem that the submarine, mobile in three dimensions, is preferable to the bottom crawler limited to two.

Anti-ballistic missiles could be housed in seabed installations for concealment. If the ABMs were located on the continental shelf of the nation launching the ballistic missiles, the offensive missile might be destroyed before its multiple warhead separated.

Nuclear mines could be moored to the bottom in enemy shipping lanes, remaining at a depth calculated to aid concealment until activated to rise and seek a prey. Command and control, maintenance, and prevention of sabotage raise similar problems for nuclear mines as for missiles. A nonnuclear mine, codenamed "Captor", and designed to home in on enemy submarine propellers, was recently publicized by the Navy. If present research and development is successful, it might reduce the need for the more expensive submarine hunting submarines.⁴⁴

"Throughout this paper I assume that "bottom crawler" will be the legal equivalent of "warship" for jurisdictional purposes, if the bottom crawler otherwise meets the criteria set forth in Art. 8 of the 1958 Geneva Convention on the High Seas: "a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline." The choice is to treat the bottom crawler as a warship immune from any jurisdiction but its flag, as a military airplane which lacks this immunity. It is recognized that both military airplanes and military bottom crawlers could meet all the criteria of Article 8 except for being "ships." I believe it is desirable to assimilate bottom crawlers to warships because of the environment in which they will operate, and the grave danger involved in trying to assert jurisdiction over them in the depths of the ocean.

⁴³ *Washington Post*, 30 Mar 1971, at A3, col. 1.

Missile bases on the seabed are but one example of the possible uses for manned installations. Others include submarine supply depots and repair facilities extending the period of time a submarine can remain submerged, research laboratories and base camps, and equipment testing ranges. In all cases the ability to maintain personnel at working depths for extended period of time would reduce the expense of maintaining the facility by reducing the number of trips to the surface.

Present surveillance and detection systems appear inadequate for area defense against ballistic missile-firing submarines, though they are more successful in point defense of a convoy.⁴⁴ But this balance may be changed in the future. Huge sonar antennas may be suspended from grandiose ocean platforms to flood entire oceans with sonar energy to locate concealed submarines.⁴⁵ Even lacking any such expensive systems for defense purposes, sonar navigational beacons will probably be constructed to aid exploitation of the seabed and traffic beneath the surface. It should not be difficult to analyze echoes from the signals transmitted by such beacons for their revealing information on ship position as well as using them for navigational assistance. Sonar navigational beacons would be located only in areas of relatively dense traffic, but they could effectively close these areas to covert military operations.⁴⁶

III. LEGAL RULES AFFECTING MILITARY USES OF SEABED

The sea is geographically divided into three jurisdictions: internal waters, territorial sea, and the high seas. Additionally, legal significance is given to the "contiguous zone" and the "continental shelf."

Internal waters include such salt water bodies as harbors, inlets and some bays. More precisely internal waters are those

⁴⁴ 106 ARMED FORCES J. 20 (12 Oct. 1968); Brown, *Legal Regime*, *supra* note 3, at 82.

⁴⁵ *Washington Post*, 2 Sep 1970, at A2, col. 1. The disclosure was made at the annual International Pugwash Conference on Science and World Affairs. There was also some discussion of a treaty to ban such a development so that it could *not* upset the balance of power.

⁴⁶ Of course, this assumes that continued progress will be made in the ability to identify the type and purpose of the vessel whose presence is disclosed by sonar. It has been reported that each submarine makes a slightly different sound underwater. Sometimes American submarines on surveillance missions are able to identify a particular Russian submarine by this characteristic. *Washington Post*, 15 Feb. 1971, at A1, A8, col. 1.

reaching shoreward on the base line, the point from which a coastal state measures its territorial sea.⁴⁷

The territorial sea is a belt of water adjacent to the coast under the sovereignty of the coastal state.⁴⁸ The sovereignty “extends to the air space over its territorial sea as well as to its bed and subsoil.”⁴⁹

The continental shelf is legally defined as:

The seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coast of islands.”

The high seas are “all parts of the sea that are not included in the territorial sea or in the internal waters of a State.”⁵¹ The term deep seabed refers to that portion of the seabed beneath the high seas but not included in the legal continental shelf.

Finally, the contiguous zone is a “zone of the high seas contiguous to” the territorial sea in which :

The coastal state may exercise the control necessary to: [a] Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; and (b) Punish infringement of the above regulations committed within its territory or territorial sea.”

While most restraints upon military activity⁵³ depend on the jurisdictional status of the water and seabed, one prohibition, the 1963 Nuclear Test Ban Treaty, applies universally. No “nuclear weapon test explosion, or any other nuclear explosion” may be

⁴⁷ CON. SHELF CONV., art. 5.

⁴⁸ Convention on the Territorial Sea and the Contiguous Zone, 29 Apr. 1958, 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205, art. 1 (effective 10 Sep. 1964) [hereinafter cited as TERR. SEA CONV.].

⁴⁹ *Id.*, art. 2.

⁵⁰ CON. SHELF CONV., art. 1.

⁵¹ Convention on the High Seas, 29 Apr. 1958, art. 1, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82 (effective 30 Sep. 1962) [hereinafter cited as HIGH SEAS CONV.].

⁵² TERR. SEA CONV., art. 24.

⁵³ Treaties relevant in time of war include: Rights and Duties of Neutral Powers in Naval War, 18 Oct. 1907, 36 Stat. 2415, T.S. 545, (effective 1 Feb. 1910); Convention Relative to the Laying of Automatic Submarine Contact Mines, 18 Oct. 1907, 36 Stat. 2332, T.S. 541 (effective 26 Jan. 1910); Convention Concerning Bombardment by Naval Forces in Time of War, 18 Oct. 1907, 36 Stat. 2351, T.S. 542 (effective 26 Jan. 1910); Convention Relative to Certain Restrictions With Regard to the Exercise of the Right of Capture in Naval War, 18 Oct. 1907, 36 Stat. 2396, T.S. 544 (effective 26 Jan. 1910); Convention on Maritime Neutrality, 20 Feb. 1928, 47 Stat. 1989, T.S. 845, 135 I.N.T.S. 187 (effective 22 Mar. 1932).

carried out at any place under a Party's "jurisdiction or control . . . underwater, including territorial waters or high seas. . . ." ⁵⁴

May a nuclear explosion be carried out in the subsoil of the seabed? Nuclear explosions are prohibited "in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted." ⁵⁵ The sovereignty of a coastal state extends to the bed and subsoil of its territorial sea, which is a part of its territory." An underground nuclear explosion located in the subsoil of the territorial sea should be acceptable under the treaty so long as no radioactive debris traveled beyond the territorial sea. If this condition is met, the explosion would be categorized as an underground explosion, which is permitted by the treaty.⁵⁷ That water surmounts the seabed should be no more significant than the atmosphere surmounting the land in which a normal underground test is conducted.

A coastal state also possesses over its continental shelf "sovereign rights for the purpose of exploring it and exploiting its natural resources." ⁵⁸ However, these rights are limited in scope and certainly not sufficient to consider the continental shelf or the underlying subsoil within the territorial limits of the coastal state. Hence, any subsoil nuclear explosion in the continental shelf would be outside the coastal state's territorial limits and would violate the convention.⁵⁹

"Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 5 Aug. 1963, 14 U.S.T. 1313, T.I.A.S. 5433, 480 U.N.T.S. 43 (effective 10 Sep. 1963) [hereinafter cited as NUCLEAR TEST BAN TREATY]. Nuclear explosions are also prohibited in the internal waters of a state since territorial waters and high seas are listed as inclusive rather than exclusive, and because internal waters are a location "underwater" within a state's "jurisdiction and control." Sometimes "territorial waters" is understood as including both the territorial sea and internal waters. 2 Y.B. INT'L L. COMM'N 256 (1956), quoted in 4 WHITEMAN, DIGEST OF INT'L L. 1-2 (1965 [hereinafter cited as WHITEMAN]). If the phrase was so used in this case, then nuclear explosions would be banned from internal waters as well. Finally, the Legal Adviser of the State Department has stated that inland waters are included within the scope of "underwater." *Hearings on the Treaty Banning Nuclear Weapons Test in the Atmosphere, Outer Space and Under water before the Senate Comm. on Foreign Relations*, 88th Cong., 1st Sess., 61-62, quoted in 11 WHITEMAN 790-91 (1968).

⁵⁴ NUCLEAR TEST BAN TREATY, art. I, para 1.

⁵⁶ TERR. SEA CONV., art 2; Restatement of Foreign Relations Law of the U.S., pt. 1, at 37 (1962 draft), quoted in 4 WHITEMAN 13.

⁵⁷ *Legal Adviser, Senate Comm., supra* note 54

⁵⁸ CON. SHELF CONV., art. 2.

⁵⁹ This is less clear for those nations which, as part of their continental shelf claim, include sovereignty over the shelf and the superjacent waters. Nicaragua, Panama, and South Korea all make such claims and have deposited ratifications to the Nuclear Test Ban Treaty. Alexander, *Breadth of*

A. INTERNAL WATERS AND TERRITORIAL SEA

Aside from the Test Ban Treaty exception, different restraints are placed on military activities depending on the jurisdictional status of their situs. A nation's jurisdiction within its internal waters is the same as on the land of its own territory.⁶⁰ Our military activities within our internal waters are limited only by United States domestic law and those rules of international law which govern the relationship between two sovereigns within one of their territories. We have no right to conduct any military activities in the internal waters of another state except with its permission.

The situation is almost the same with respect to the territorial sea and the seabed and subsoil beneath it. The doctrine of innocent passage is the single exception to a state's exclusive jurisdiction over its territorial sea.⁶¹ Ships of other states may cross the coastal state's territorial sea either to enter or exit its internal waters or to traverse without entering internal waters.⁶² Passage is innocent only so long as it is not prejudicial to the peace, good order or security of the coastal state, and conforms with international law. Foreign ships exercising their right of innocent passage must comply with the transport and navigation laws of the coastal state.⁶³

Whether warships have a right of innocent passage is not completely clear.⁶⁴ Many years ago the United States argued that there was no right of innocent passage for a warship⁶⁵ since warship's military character represents a potential threat to the security of the coastal state. We argued that the coastal state will al-

Territorial and other Offshore Zones, THE LAW OF THE SEAS INTERNATIONAL RULES AND ORGANIZATION FOR THE SEA 313, 314-17 (1969); *Treaties in Force: A List of Treaties and other International Agreements of the U.S. in Force on January 1, 1970*, at 329.

⁶⁰ A state's rights even over its territorial sea do not differ in nature from the sovereign rights it exercises over other parts of its territory. 2 Y.B. INT'L L. COMM'N 256 (1956), *supra* note 54.

⁶¹ A right of innocent passage is also given through waters which become internal waters when a baseline is drawn in accordance with art. 4 of the TERR. SEA CONY., TERR. SEA CONV., art. 5.

⁶² *Id.*, art. 14.

⁶³ *Id.*, art. 17.

⁶⁴ See Lawrence, *Military—Legal Considerations in the Extension of Territorial Seas*, 29 MIL. L. REV. 47, 74-81 (1965), and authorities cited therein. This article is also an excellent discussion of the military effects of extending the territorial sea.

⁶⁵ Oral argument of Elihu Root on behalf of the U.S. in the North Atlantic Coast Fisheries Arbitration, 11 *Proceedings in the North Atlantic Coast Fisheries Arbitration* 2007 (1912), quoted in 4 WHITEMAN 416.

ways have discretion whether or not to allow a foreign warship to transit its territorial sea.

Both the structure of the 1958 Territorial Sea Convention and its preparatory work support the opposite conclusion—that warships do have a right of innocent passage, at least in time of peace and in accordance with coastal regulations under Article 17 of the Convention. Section III of the Territorial Sea Convention sets forth the rules governing innocent passage. Sub-section A is entitled “Rules Applicable to All Ships” and paragraph six thereunder specifies that “Submarines are required to navigate on the surface and to show their flag.” At the time of the drafting of the Convention, all submarines were presumed to be warships. The clear implication is that warships have a right to innocent passage so long as they are navigating on the surface. Sub-section B deals with “Rules Applicable to Merchant Ships”; Sub-section C sets forth “Rules Applicable to Government Ships Other than Warships”; and Sub-section D sets forth “Rules Applicable to Warships.” Sub-section D consists only of Article 23 saying “If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance with it made to it, the coastal State may require that warship to leave the territorial sea.”

The Convention appears to assume warships have a right of innocent passage. Article 23 merely prescribes the remedy of the coastal state when the transiting warship fails to comply with the local laws and regulations as it is bidden to do by Article 17. Since a warship, as a general rule, is immune from the exercise of the coastal state’s jurisdiction,⁶⁶ an article expressly stating the remedy when a warship violates the coastal state’s regulations regarding innocent passage is useful.

The innocent passage issue was apparently decided by vote at the pre-convention Conference on the Law of the Sea. The draft treaty presented to the delegates contained an article expressly providing that “the coastal state may make the passage of warships through the territorial sea subject to previous authorization or notification. This article was rejected by the Conference.⁶⁷ It appears, therefore,

⁶⁶ See authorities quoted in 6 *WHITEMAN* 498–501, 611–16 (1968).

⁶⁷ 2 *U.N. Conference on the Law of the Sea* 67–68, quoted at 4 *WHITEMAN* 416. The authorization and notification requirements were defeated in two separate votes. This fact and the differing opposition to each term lead McDougal and Burke to conclude that a majority of states participating in the Conference favored a right of innocent passage for warships, subject to a requirement of notification. *MCDUGAL AND BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 219–20 (1962) [hereinafter cited as *MCDUGAL*]. On the other hand, art. 16 of the

that during peacetime, warships have a right of innocent passage through territorial seas, or at least through territorial seas belonging to parties to the Convention who have not deposited a reservation to the contrary.⁶⁸

While warships generally enjoy a right of innocent passage, submarines share that right only when navigating the surface and showing their flag.⁶⁹ Prior law also required submarines to navigate on the surface.⁷⁰ The clandestine nature of a submerged submarine makes it difficult to ascertain its true identity and whether its passage is truly innocent; hence, the requirement that a submarine navigate only on the surface while in the territorial sea of another state or run the perhaps fatal risk of having its passage considered not innocent.⁷¹ Until it is possible to ascertain the identity and purpose of submerged vessels as easily as vessels navigating on the surface, the requirement for surface navigation is likely to remain.⁷²

The breadth of the territorial sea is an unanswered question. Neither the 1958 Conference nor a special conference called in 1960 were able to reach agreement on this subject.” The United States

Terr. Sea Conv. permits a coastal state temporarily to suspend the right of innocent passage “in specified areas of its territorial sea if such suspension is essential for the protection of its security.” There may not be discrimination among foreign ships and innocent passage may not be suspended “through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state.” A coastal state may be able to suspend temporarily innocent passage for warships as a class if the prohibition on discrimination applies only to discrimination among nations but not to discrimination among classes of ships.

“Reservations to this effect were made by the U.S.S.R., Bulgaria, Byelorussian S.S.R., Czechoslovakia, Hungary, Rumania, and Ukranian S.S.R. The text of some of the reservations is at 4 WHITEMAN 416.

⁶⁹ TERR. SEA CONV., art. 14.

⁷⁰ Report of the Second Comm. (Territorial Sea) of the 1930 Hague Conference for the Progressive Codification of International Law, quoted at 4 WHITEMAN 410.

⁷¹ “The reasonableness of this rule is challenged in Lawrence, *supra* note 64 at 67–68.

⁷² “This requirement is likely to pose a more severe problem in the future than it does now. Submersibles will be designed for sustained operation at great depths on or near the bottom independent of the surface. They may be capable of surfacing only in sheltered waters because of the savings that result from eliminating a heavy superstructure designed to withstand the pounding of heavy waves on the surface. Increasing numbers of submersibles will be designed not as fighting ships, but for research or other functions. Many will be civilian owned and operated. Requiring some of these vessels to navigate on the surface will be very time consuming and, in some cases, dangerous. See discussion in CRAVEN at 13–18.

⁷³ This subject is discussed by Arthur Dean, Chief of the U.S. Delegations to each conference in: Dean, *The Geneva Conference on the Law of the Sea*:

still recognizes three miles as the territorial sea, though she is calling for an international treaty to extend the limit to twelve miles with freedom of transit through and over international straits.⁷⁴ Meanwhile, claims for territorial seas vary in breadth from three miles to 200 miles with the greatest number of states claiming twelve miles.⁷⁵ For our purposes, the breadth of the territorial sea is important because within the territorial sea only the coastal state has the right of transit beneath the surface or on the seabed. Also, since innocent passage is the only right possessed within the territorial sea by foreign navies, no foreign installation would be permitted on the seabed since its presence is not passage and may not be innocent. Naturally it is not on the surface either.

B. *THE HIGH SEAS*

The high seas are open to all nations, and:

no State may validity purport to subject any part of them to its sovereignty. Freedom of the high seas. . . . comprises, inter alia . . . : (1) Freedom of navigation; (2) Freedom of fishing; (3) Freedom to lay submarine cables and pipelines; (4) Freedom to fly over the high seas. These freedoms and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.⁷⁶

The military use of submersibles and bottom crawlers comes within the traditional freedom of navigation. The only question arises over the placing of installations on the seabed or otherwise asserting control over an area for some exclusive use. Traditional schools of legal thought have disagreed as to whether the high seas legal regime of “free use for all with exclusive use for none” applies to the seabed and subsoil beneath the high seas. Those supporting this *res communis* regime argue that, with the exception of historically sanctioned situations, no part of the seabed underlying the high seas can be taken by any state for its exclusive use.⁷⁷

What Was Accomplished, 52 AM. J. INT'L L. 607 (1958); Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L L. 751 (1960).

⁷⁴Stevenson, *International Law and the Oceans*, 62 DEP'T STATE BULL. 339, 341 (1970).

⁷⁵*Id.*, Alexander, *supra* note 5.

⁷⁶*High Seas Conv.*, art. 2.

⁷⁷The fear has been that appropriation of the seabed would eventually interfere with freedom of navigation on the surface. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 67-69 (6th ed. 1967). If the seabed is *res nullius*, there could be national claims to specific areas for the purpose of constructing installations for military purposes. Unilateral assertions of national jurisdiction over strategic areas of the seabed and the superjacent waters

The competing school regards the seabed as *res nullius* — subject to acquisition in the same way as territory on land.⁷⁸ As has been pointed out, the debates between the two schools are largely sterile.⁷⁹ That portions of the seabed beneath the high seas can be appropriated for one use to the exclusion of others was demonstrated in the practice leading to the Continental Shelf Convention. An oil rig certainly interferes with the high seas freedom of fishing and navigation. As technology develops, it is likely that the same sort of appropriation will occur on the deep seabed. Yet the appropriation which occurs is of a much more limited nature than are the claims to territory on land, which form the basis of the *res nullius* school. International practice has not recognized claims to sovereignty over portions of the seabed below the high seas, only the exercise of certain rights. Both schools fail by trying to categorize the entire seabed on an all or nothing basis, while practice reflects a pragmatic, topic by topic approach.

Seabed installations are permitted for nonmilitary purposes, such as petroleum drilling and scientific research by civilians. Present controversy over mineral exploitation of the deep seabed assumes the right to use seabed installations if desirable ; contro-

and their concomitant interference with navigation and fishing was one of the fears inspiring the Malta Proposal to the United Nations in 1967. See address of Ambassador Arvid Pardo, 22 U.N. GAOR, 1st Comm., U.N. Doc. A/C.1/PV. 1515 (1967), at 36-41.

In my opinion such fears misunderstand the military utility of the seas. The most important military uses of the sea rely on the freedom of navigation so important for fleet movements, or cloak themselves in the sea's concealing depths, as do the strategic deterrent submarine-missile systems. Both of the two superpowers place much reliance on submarines. Future military uses of the seabed probably will not depart substantially from these principles for various reasons. First, nothing must be done which might hazard those principles of freedom of movement and concealment on which depend present naval strength. Second, those military uses of the seabed aimed at possible combat—such as seabed missiles or submarine surveillance systems—also would depend on concealment which is incompatible with national claims. Other military uses not requiring concealment could not be allowed to jeopardize the status of these principles. Rather an accommodation would be reached with competing civilian and foreign uses, as is done today. Frosch, *National Security and National Jurisdiction*, 21 NAVAL WAR COLLEGE REVIEW 53, 56-57 (1968). Military uses of the seabed may contribute to some future congestion of the seabed, but they are far less likely to inspire unilateral claims of semi-permanent national jurisdiction over the deep seabed than is economic exploitation of resources.

⁷⁸ A discussion of discovery, occupation, and prescription may be found at 2 WHITEMAN 1028-83.

⁷⁹ HENKIN, LAW FOR THE SEAS MINERAL RESOURCES 29. This monograph also contains an excellent summary of the arguments thrown by each school against the other, at 25-29.

versy instead revolves around who can control the exploitation for conservation purposes and how to prevent two or more from mining the same site. Lacking any separate disarmament agreements with relevant provisions, one must conclude that military installations are also allowed, whether they be designed for possible combat use (such as a missile silo or a submarine surveillance sensor) or other purposes with both military and civilian benefits (such as a navigational aid or a research station).

Assertion of control over an area for exclusive use may arise for some forms of underwater and seabed maneuvers, weapons testing or practice, or other activities. These claims are not new in international law.⁸⁰ At the 1958 Conference on the Law of the Sea, a proposal to exclude "naval or air ranges or other combat training areas limiting freedom of navigation . . . in the high seas near foreign coasts or on international sea routes" was rejected.⁸¹ In practice there is an accommodation between military activities requiring exclusive use of an area for a period of time and civilian activities.⁸² There seems to be no reason why accommodation could not be reached on the seabed as well, nor any reason that activities permitted on the surface should be denied in the seabed.

C. THE CONTIGUOUS ZONE

The contiguous zone is superimposed on a narrow margin of the high seas to assist the coastal state in enforcing its customs, fiscal, immigration and sanitary regulations.⁸³ Effective enforcement of these policies in the future probably will require the coastal state to act on the seabed as well. There seems to be no problem in recognizing the coastal state's authority to act below the surface and on the seabed as well as on the surface.

However, the contiguous zone retains its character as high seas for all purposes other than the enforcement of coastal regulations on certain specified topics.⁸⁴ Thus, military vessels of other nations

⁸⁰ MCDUGAL at 768-73 contains a brief history.

⁸¹ *Id.* at 770.

⁸² Frosch, *supra* note 77 at 56-57.

⁸³ TERR. SEA CONV., art. 24.

⁸⁴ "The Commission did not recognize special security rights in the contiguous zone. It considered that the extreme vagueness of the term 'security' would open the way for abuses and that the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State. In so far as measures of self-defense against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the Charter of the United Nations." 2 Y.B. OF INT'L L. COMM'N 251, 294-95, quoted at 4 WHITEMAN 483.

as well as those of the coastal state are free to navigate in the contiguous zone, through the subsurface, and on the seabed itself.⁸⁵

Logical consistency would seem to permit the placing of military installations by other nations on the seabed within the coastal state's contiguous zone. If manned and unmanned installations may be placed in the deep seabed, may they also be placed within the contiguous zone since the purpose for which it is authorized does not include security? While there is no definite law on this question because of the paucity of practice, I believe that in the future installations will not be permitted to be placed by other states within reasonable proximity to the coast.

Interference with warships, submarines and bottom crawlers of other nations within the contiguous zone would be interference with the most venerable of the high seas freedoms — navigation and the general interests in freedom of communication and transportation. Besides placing a limitation on the freedom of movement of warships such interference raises a question of what restrictions the coastal state can place on other navigation as well. The same considerations do not apply to seabed installations. They are not navigating anywhere, but are fixed in location. Coastal state regulation of them can more successfully be presented as nothing more than an extension of the regulatory power it already has over installations designed for economic exploitation of resources. Moreover, this extension of authority is directly related to the coastal state's supreme interest in its own defense.

While international law does not permit a state to interfere with navigation beyond its territorial sea, it does permit it to affect some activities. The rationale for the contiguous zone is to prevent activities which may have an inimical effect on specified policies of the coastal state. There is also precedent for some control of military activities beyond the territorial sea which have an effect within the coastal state's territory. In 1885, the Solicitor of the State Department concluded a coastal state could exercise police jurisdiction over a foreign warship outside the territorial sea which was using a point on shore as a target for gunnery practice.⁸⁶ A collective right to prohibit hostile acts within several hundred

⁸⁵ This discussion assumes that the deep seabed underlies the contiguous zone. Later I shall discuss the problem of military activity on the continental shelf.

⁸⁶ 4 WHITEMAN 496. However, arts. 8 and 9 of the HIGH SEAS CONV. gives warships and other ships "owned or operated by a State and used only on government non-commercial service . . . complete immunity from the jurisdiction of any State other than the flag State" while on the high seas.

miles of the American continent was asserted by the American Republics in the 1939 Declaration of Panama.⁸⁷

While such assertions of jurisdiction as this can expect to meet protest when they involve vessels, they may be better founded when applied to seabed installations. At the ENDC during discussion of the Nuclear Seabed Treaty, there was considerable support for control of seabed installations. Canada proposed a 200 mile wide security zone in which only the coastal state could carry out these defense activities not prohibited by the Nuclear Seabed Treaty.⁸⁸

D. THE CONTINENTAL SHELF

The key consideration in this area is not continental shelf resources or geological continuity with the land, but proximity to the land. The presence of a shelf is significant only in that technology may delay the construction of an installation operational at the greater depths prevailing where there is no shelf. The coastal state's interest is the same whether it has a shelf or not, and is determined by the proximity of the installation to its borders.

The limits of proximity cannot now be determined. Neither the varying width of a continental shelf, nor the twelve mile contiguous zone decreed for other purposes is determinative. However, the Nuclear Seabed Treaty chose the contiguous zone as the limit in which a coastal state could place prohibited weapons on the seabed;⁸⁹ so it might be a precedent for a possible immunity zone from military installations of noncoastal states. Also relevant to the width of a proximity zone is the nature of the installation and the range over which it is effective. Any definite limit for the defensive proximity zone can only be set after some experience is gained from national claims.

A state's legal continental shelf extends outward from the edge of the territorial sea so that it is wholly surmounted by high seas. Consequently, the rules governing military activity on the continental shelf are the same as those governing the deep seabed except insofar as they are affected by other particular rules relating to the continental shelf.

⁸⁷ The text is at 4 WHITEMAN 509. In a panel at the 1969 Annual Meeting of the American Society of International Law, it was suggested that North Korea might make a similar argument against the Pueblo, though in fact North Korea chose to assert the Pueblo was within territorial waters. AM. SOC'Y OF INT'L L. PROC. 8-10 (1969).

⁸⁸ Statement by Canadian Representative to ENDC on 31 Jul. 1969, U.S. Arms Control and Disarmament Agency, DOCUMENTS ON DISARMAMENT 377 (1969) [hereinafter cited as D ON D].

⁸⁹ NUCLEAR SEABED TREATY, art. 11.

There is no question that a coastal state may exercise the normal high seas freedom over its own continental shelf. Thus, no problem is posed for its operation of warships, submarines and bottom crawlers on its own continental shelf. There has been some dispute concerning the placing of military installations on the continental shelf. During the 1958 Conference on the Law of the Sea, India proposed an additional article to the Continental Shelf Convention reading "The continental shelf adjacent to any coastal State shall not be used by the coastal State or any other State for the purpose of building military bases or installations".⁹⁰ They argued that the construction of military installations was a violation of international law as well as a violation of the United Nations Charter.⁹¹ This proposal was defeated. McDougal and Burke conclude the Indian proposal was rejected because of (1) a disinclination of the Conference participants to prohibit this particular use in a natural resources convention that left untouched other uses of the continental shelf, (2) a belief that the coastal state's interest in security outweighed any slight impediment to the freedom of the seas, and (3) a conclusion that military installations were a permissible use of the continental shelf. At any rate, the Convention and its preparatory work neither grant nor deny military use of the continental shelf by the coastal state.⁹²

Some commentators support a coastal state's placing of military installations on its continental shelf on a *res nullius* theory. They contend that title to specific areas of the seabed underlying the high seas may be acquired by effective control and consolidated by recognition and acquiescence, so long as there is reasonable regard for the other uses of the high seas.⁹³ Others have argued a test of reason be applied to each particular use, and that it is reasonable for a coastal state to place military installations on its

⁹⁰ Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf*, 52 AM. J. INT'L L. 629, 644-48 (1958), quoted in 4 WHITEMAN 902. This proposal replaced a poorly drafted Bulgarian proposal stating "The coastal state shall not use the continental shelf for the purpose of building military bases or installations. 4 WHITEMAN 901. This language forbade military use of the continental shelf by the coastal state while allowing its military use by other states.

⁹¹ McDOUGAL at 716.

⁹² *Id.* at 717.

⁹³ Brown, *supra* note 34 Ch. 11, 186-87. Note this theory would seem to permit a state to acquire title to a part of the seabed adjacent to but outside the territorial sea of another state. The authors rule out this possibility by arguing military installations by any other state on the coastal state's continental shelf would be an impermissible impediment to the coastal state's rights of exploration and exploitation of its continental shelf. *Id.* 186. This argument does not solve the problem when the area adjacent to the territorial sea lacks a continental shelf.

continental shelf, so long as interference with navigation is relatively slight.⁹⁴ Still another commentator proceeds step by step from the reasonableness under the Continental Shelf Convention of installing a radar antenna on an oil drilling platform to assure its safety to the establishment of defense installations elsewhere on its continental shelf which have no connection with natural resources installations.⁹⁵ Additionally, the same commentator supports the coastal state's right to construct military installations on its continental shelf as an exercise of the inherent right of self-defense.⁹⁶

I find most persuasive an argument founded on the reasonableness of this use of the continental shelf. Military use of the superjacent waters is well established in the international law of the sea, subject only to specific limitations stemming from agreements restraining use of certain types of force or use of force in certain situations, and to the general requirement of a reasonable regard for other users of the high seas. Placing military installations on the continental shelf and asserting exclusive use of bordered areas for some period of time present the most difficult problem because they represent the greatest potential interference with other uses of the continental shelf. Yet seabed installations are permitted for other purposes of the coastal state, for example, the exploitation of resources. Also, cables and pipelines may be laid on the seabed.⁹⁷ Certainly military installations and limited areas of exclusive use can be just as important as mineral deposits and their exploitation. Temporary exclusive use of the superjacent waters is also permitted, and there seems no reason not to permit it on the seabed.⁹⁸ Such uses are reasonable uses of the seabed, subject to the same restrictions of reasonable regard for other uses.

May the continental shelf be used for military purposes by other than its coastal state? Certainly the coastal state can enter an agreement permitting another state to use its continental shelf as an exercise of collective self-defense. But what if the shelf is being used by another state contrary to the wishes of the coastal state? The installations might be aimed at the coastal state with the intention of monitoring its communications or the entrance and exit from harbors of its submarines. In the extreme case an

⁹⁴ MCDUGAL at 724.

⁹⁵ Franklin, *The Law of the Sea: Some Recent Developments*, 53 INTERNATIONAL LAW STUDIES 1959-1960 66 (1961).

⁹⁶ *Id.* at 67.

⁹⁷ HIGH SEAS CONV., art 2.

⁹⁸ See text accompanying notes 80-82.

installation might house missiles aimed at targets within the coastal state. Or the installations might not be aimed at the coastal state at all, but merely by taking advantage of a convenient location to monitor the activities of, or mount a threat against, a third state, Does the coastal state have a legal right to halt the undesired activity?

Let us first address the last situation, in which the coastal state's continental shelf happens to be a strategic location for furthering the struggle between two other states. This obviously raises a question of neutral rights and duties under the law of war. The Hague Convention of 1907 on Rights and Duties of Neutral Powers in Naval War⁹⁹ contain the following relevant provisions :

Article 1

Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power constitute a violation of neutrality.

Article 2

Any act of hostility, including capture and the exercise of the right to search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.

Article 5

Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.

Article 25

A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters.

From the above provisions it can be seen that the key question is whether a coastal state's continental shelf is part of its "territory" or "waters". In a somewhat similar hypothetical to that given above, the safety zone provided by the Continental Shelf Convention around installations built upon the continental shelf was regarded not as part of the neutral waters of the coastal state, but rather as a separate category of "protected high seas."¹⁰⁰ Here we are dealing not with a portion of the high seas surrounding an installation on the continental shelf, but with the installation itself in contact with the continental shelf. The

⁹⁹ "Rights and Duties of Neutral Powers in Naval War, 18 Oct. 1907, 36 Stat. 2415, T.S. 545 (effective 1 Feb. 1910).

¹⁰⁰ Franklin, *supra* note 95 at 67-8.

question is whether the seabed of the continental shelf is part of the coastal state's territory for determining neutral rights and duties. If so, the installation would fall into the prohibited class of "any apparatus for the purpose of communicating with belligerent forces on land or sea", the use of neutral waters "as a base of naval operations", or an "act of hostility."

The coastal state certainly has greater rights over the seabed and subsoil of its continental shelf than it does in the superjacent waters, even those waters within a safety zone around an installation. The coastal state lacks any exclusive or paramount authority over the natural resources to be found in the superjacent waters or the safety zone,¹⁰¹ yet it has that authority on the continental shelf itself. The coastal state cannot interfere with oceanographic research undertaken in the waters above its continental shelf,"¹⁰² but its permission is a prerequisite for any research concerning the continental shelf itself.¹⁰³

On the other hand, it was pointed out earlier that the Continental Shelf Convention is concerned primarily with natural resources and their exploitation. It is concerned with other uses of the continental shelf and superjacent high seas only on the question of minimizing the interference that exploitation of natural resources might cause them.¹⁰⁴ Therefore, one cannot draw from the Continental Shelf Convention all the exclusive jurisdiction implicit in the term "territory." Lacking such exclusive jurisdiction, the coastal state cannot argue its neutral rights are violated by foreign military installations on its continental shelf.¹⁰⁵

In addition, only a few of the many states with continental shelves have the capability to carry out any extensive submerged operations, particularly of the extent and sophistication necessary reasonably to insure that their continental shelves were not the subject of violations of their neutral rights. It does not seem reasonable to charge states generally with a task that so few could carry out.

¹⁰¹ "The coastal state does have a duty within the safety zone to protect the living resources of the sea from harmful agents. CON. SHELF CONV., art. 5, para 7.

¹⁰² *Id.*, art. 5, para 1.

¹⁰³ *Id.*, art. 5, para 8.

¹⁰⁴ See note 92 and accompanying text.

¹⁰⁵ I do not regard this conclusion as inconsistent with my earlier finding of a proximity zone in which the coastal state could demand the removal of foreign military installations. Rather it follows from the concept that security is related to proximity of the installation rather than its location on a continental shelf.

The better conclusion is that the coastal state is not obligated under international law to take steps to insure its continental shelf is not used by a noncoastal power against a third state. But the fact remains that such activity would be seriously embarrassing to the coastal state, and could endanger its own security by drawing it into the conflict against its wishes. While the coastal state has no duty to protest foreign military use of its shelf, does it have a legal basis to protest and take steps to eliminate the activity if necessary?

Beginning with the Truman Proclamation on the Continental Shelf in 1945,¹⁰⁶ national security has played an important role in continental shelf claims along with the desire to regulate exploitation of the continental shelf's natural resources. "Our primary concern was to assert the necessary control over such operations off the coasts of the United States to guard against the depletion of our mineral resources and *to regulate, from point of view of security, the activities of foreigners in proximity to our coast.*" (emphasis added)¹⁰⁷ Under the Continental Shelf Convention, the coastal state must consent before there may be any research concerning the shelf. This requirement is not limited to research concerning natural resources, and appears designed in part with national security in mind.¹⁰⁸ Certainly it would be

¹⁰⁶ Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, 28 Sep. 1956, 3 C.F.R., 1943-1948 Comp., at 67, quoted in 4 WHITEMAN 756.

¹⁰⁷ Dep't State Memorandum 15 Jun. 1945, quoted at 4 WHITEMAN 754. Additional statements indicating a similar concern with security are at 755-64. Note also the emphasis on the proximity to the coast rather than mere location on an extension beneath the sea of the land above it.

¹⁰⁸ CON. SHELF CONV. art 5, para 8. While the CON. SHELF CONV. is primarily concerned with natural resources, another possible argument can be drawn from textual analysis of the Convention. Article 2 of the CON. SHELF CONVENTION declares that "the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." It further provides that these rights are "exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State." The final draft of the International Law Commission offered to the Conference read: "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources." 4 WHITEMAN 843. Apparently the Conference added the pronoun "it" after "exploring." The addition of "it" may indicate that the sovereign and exclusive right of exploration is not limited to mere exploration for natural resources, but includes exploration of the continental shelf for all purposes, including military. The requirement to obtain the consent of the coastal state before performing any research involving the continental shelf is consistent with this broad interpretation of the coastal state's power to control exploration of its continental shelf. Such a broad power would

ironic to conclude that an innocent, peaceful research venture requires the consent of the coastal state, but that a potentially hostile power can place its military installations on the continental shelf with impunity.

Concern over security has been a sufficient element in the forming of the continental shelf doctrine to conclude the coastal state has a legal basis for appropriate action when it discovers another nation has placed military installations on its shelf. Since proximity to the coast has played such an important role in this concern for security, it is possible that some limit might be reached on a very broad shelf beyond which no legal basis for protest on the ground of national security would exist. If any danger were posed to exploration and exploitation, however, this would be a separate legal basis for protest and action.

As in the earlier discussion of the contiguous zone, this legal basis for protest and appropriate action applies only to installations placed on the shelf, not to ships, submersibles, or probably even bottom crawlers exercising their freedom of navigation. When the freedom of navigation is added to the scale, I believe the balance then tips in favor of the general community interests favoring freedom of navigation rather than the coastal state's interest in controlling all potentially inimical activity. Despite the foregoing, some seabed installations probably will be placed on the continental shelf when and where they are technologically feasible. The advantages to be gained from placing hydrophones

be useful not only to handle invasion of the coastal state's jurisdiction over the resources, but also as a legal basis for action to prevent such foreign military activity as chart-making and other reconnaissance measures.

Possibly militating against this textual argument is the choice of the term "sovereign rights" instead of "sovereignty" to describe the coastal state's rights on the continental shelf. Arguments for "sovereignty" included Argentina's brief that coastal state interests in the shelf include preventing its use by foreign submarines, and Ceylon's brief that coastal state interests included prohibiting installations designed for purposes other than resource exploitation. McDOUGAL at 699-700. Rejection of the term "sovereignty" may have been a denial to the coastal state of such a broad right of self-defense. However, McDougal and Burke believe concern over the effects on the legal status of the superjacent waters and airspace was more important in the choice of language. *Id.*

The most telling argument against a broad interpretation of the addition of "it" is the lack of evidence or discussion of the point by those commentators who have winnowed the entire records of the Convention. Such an interpretation could be a severe limitation on the activities of military warships and submersibles which are exercising their freedom of navigation on or through the high seas. It is unlikely that the **U.S.** for one example, would silently consent to such a limitation. Yet I have found no discussion of this question, which probably indicates a much more innocuous explanation for the change in language.

or other sensing devices close to the ports and submarine pens of potential enemies are just one strong inducement. However, the placing state cannot expect such activity to be protected legally from interference by the coastal state when it is discovered.

The location of the outer limit of the continental shelf and the legal rules outlined above is uncertain. The key concepts in the definition of the continental shelf are "adjacency", "200 meters", and "admits of exploitation."¹⁰⁹ 200 meters is no longer a viable limit for the continental shelf since exploitation has now exceeded that limit. The outer limit has become a problem of balancing the relative importance of adjacency and exploitability. In the years immediately after the Continental Shelf Convention was signed, it was sometimes suggested that the outer limit of the continental shelf would continue to march with technology across the ocean depths until it met the similarly advancing line from the opposite side of the ocean.¹¹⁰ Today there seems to be general agreement that such a definition is not appropriate under the present Convention. Controversy instead centers on where the line should be drawn between the 200 meter limit and the foot of the continental slope or on the continental rise.¹¹¹

I do not propose at this time to offer an answer to this problem, unanswered since 1958. However, military interests should be among those factors considered in determining the United States position. If one believes a legal right to protest subsurface and seabed incursions is of great defensive value, then one would naturally prefer as wide a continental shelf as possible. My own preference is for a continental shelf as narrow as possible to reduce the legal problems caused by military activities of the United States off the coasts of other nations.

¹⁰⁹ A review of the factors resulting in the exploitability test is presented at MCDUGAL 669-87 and 4 WHITEMAN 829-42. MCDUGAL, at 687-91, takes a more sanguine attitude than most do today on this question, but he was writing back in 1962.

¹¹⁰ This is the "international lake" theory mentioned and discarded at HENKIN, LAW FOR THE SEA'S MINERAL RESOURCES 17-18. It was mentioned as a possible outcome shortly after the Convention was signed by Shigeru Oda at ODA, INTERNATIONAL CONTROL OF SEA RESOURCES 167 (1963).

¹¹¹ The literature in this field is vast. In addition to a summary in Henkin *supra* note 110, there is an interesting and short summary of the major arguments in two back to back articles in the American Journal of International Law: Finlay, *The Outer Limit of the Continental Shelf: A Rejoinder to Professor Louis Henkin*, 64 AM. J. INT'L. 42 (1970); Henkin, *A Reply to Mr. Finlay*, 64 AM. J. INT'L L. 62 (1970).

IV. THE NUCLEAR SEABED TREATY

Despite earlier consideration that seabed based missiles might be desirable,¹¹² by 1969 the United States Government favored arms control of nuclear missiles and other weapons of mass destruction on the seabed. On 18 March 1969 the Soviet Union laid before the ENDC a "Draft Treaty on Prohibition of the Use for Military Purposes of the Seabed and the Ocean Floor and the Subsoil Thereof."¹¹³ The United States responded on 22 May with its own "Draft Treaty Prohibiting the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor."¹¹⁴ By 7 October 1969 the United States and its allies, and the USSR, agreed on a joint draft. After revision through three more drafts in accordance with the suggestions of other members of the ENDC, and one unsuccessful submission to the United Nations General Assembly, the treaty was finally approved by the ENDC and went to the General Assembly of the United Nations on 4 September 1970.¹¹⁵ The General Assembly endorsed the treaty in December 1970, and it was signed by the representatives of 62 nations on 12 February 1971.¹¹⁶

Parties to the Treaty "undertake not to emplant or emplace on the seabed and the ocean floor and in the subsoil thereof beyond the outer limit of a seabed zone" (twelve miles wide) "any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons." Only the coastal state is allowed to place such weapons within the seabed zone or beneath its territorial waters. The parties also agree not to "assist, encourage or induce" other states to place such weapons."

¹¹² Testimony of Dr. Robert A. Frosch, Assistance Secretary of the Navy for Research and Development. S. HEARINGS 111, at 39.

¹¹³ Conference of the Eighteen-Nation Committee on Disarmament Doc, ENDC/240 of 18 Mar 1969.

¹¹⁴ The text is printed at DEP'T. STATE BULL 523 (16 Jun. 1969). Two years earlier, during the 1st session of the 90th Congress, Senator Claiborne Pell offered a comprehensive "Declaration of Principles Governing Activities in the Exploration and Exploitation of Ocean Space", which included a ban on the placing of nuclear weapons and other weapons of mass destruction on or in the seabed or subsoil of ocean space. S. Res. 186, S. HEARINGS 111, at 6.

¹¹⁵ Successive drafts and the statements presented with them appear at DEP'T STATE BULL 365 (3 Nov 1969), 480 (1 Dec 1969); 62 DEP'T STATE BULL 663 (1970); 63 DEP'T STATE BULL 362 (1970); D ON D 749.

¹¹⁶ *Washington Post*, 12 Feb. 1971, at 1, col. 1, at A22, col. 1.

¹¹⁷ NUCLEAR SEABED TREATY, art. I.

Article III of the Treaty provides for “verification through observation” of the activities discovered on the seabed, “provided that observation does not interfere with such activities.” This procedure requires no change in existing international law since it is nothing more than the exercise of the traditional freedom of the high seas. Doubts about an activity give rise to a right and a duty to consult between the doubter and the party responsible for the activity. If doubts persist after consultation, there shall be cooperation “on such further procedures for verification as may be agreed, including appropriate inspection . . .” If doubts remain after consultation and cooperation, the article recognizes a party may refer the matter to the UN Security Council. A party may also withdraw from the Treaty on three months notice” if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized the supreme interests of its country.”¹¹⁸ The verification article also provides for the situation when the state responsible for the suspicious activity cannot be identified, permits verification procedures by a party’s own means or with assistance from another party of the United Nations, and declares verification “shall not interfere with activities of other States Parties and shall be conducted with due regard for rights recognized under international law including the freedoms of the high seas and the rights of coastal States with respect to the exploration and exploitation of their continental shelves.”

There is a disclaimer clause to preclude the Treaty’s use to support or prejudice any state’s position with regard to such matters as the territorial sea, contiguous zone, and continental shelf.¹¹⁹ Five years after the Treaty enters into force, there shall be a conference to review the operation of the Treaty and take into account any relevant technological developments.¹²⁰

Two major issues in the ENDC during the negotiation of the Treaty were: (1) the military activities prohibited on the seabed, and (2) the method of verification.

A. PROHIBITED MILITARY ACTIVITIES

The scope of the Treaty was determined during discussions between the U.S.S.R. and the United States and her NATO allies during August and September 1969. The original drafts of the two powers could not have been further apart. The Soviet

¹¹⁸ *Id.*, art. VIII.

¹¹⁹ *Id.*, art. IV.

¹²⁰ *Id.*, art. VII.

draft of 18 March 1969 prohibited "the use for military purposes of the seabed and ocean floor and the subsoil thereof," and specifically prohibited placing on the seabed nuclear weapons and other types of weapons of mass destruction, and setting up military bases, structures, installations, fortifications, and other objects of a military nature."¹²²

When the Soviets first presented this draft, they announced it "precluded all forms of military activity on the seabed"¹²³ and unconditionally prohibited any military activity by states on the seabed."¹²⁴ These drastic steps were supported as necessary to attain a goal of reserving the seabed exclusively for peaceful purposes.¹²⁴ Fairly soon, this interpretation was clarified to permit use of military personnel and equipment for peaceful scientific research," and the use of communications and navigational aids by both civilian and military personnel for non-military purposes. But the draft was never extended sufficiently to permit submarine surveillance devices beyond the twelve mile limit."¹²⁵

Many of the other members shared the same ideal of reserving the seabed exclusively for peaceful purposes and favored the almost total demilitarization of the seabed.¹²⁷ Others adopted a more intermediate view, favoring the prohibition of many military uses, but allowing defensive devices such as surveillance and detection instruments.¹²⁸

The United States draft prohibited only the placing on the seabed of "fixed nuclear weapons or other weapons of mass destruction or associated fixed launching platforms."¹²⁹ Follow-

¹²² ENDC Doc., *supra* note 113 art. 1.

¹²³ Statement on 18 Mar. 1969, D ON D 119.

¹²⁴ Statement on 3 Apr. 1969, D ON D 152.

¹²⁵ "Statement on 18 Mar. 1969, D ON D 114. The goal of reserving the seabed exclusively for peaceful purposes was borrowed from the title of the 1967 Malta Resolution in the United Nations General Assembly. *See* chapter I and text accompanying note 23.

¹²⁶ Statement on 3 Apr. 1969, D ON D 155.

¹²⁷ *Id.*; Statement on 8 May 1969, D ON D 201-02.

¹²⁸ D ON D 199, 487; S. HEARINGS 33, at 8.

¹²⁹ "Statements by Japanese Representative on 3 Jul. 1969, D ON D 312; statement by Canadian Representative on 31 Jul. 1969, D ON D 375; statement by Canadian Representative on 13 May 1969, S. HEARINGS 33, at 17.

¹³⁰ U.S. draft of 22 May 1969, art. I, DEP'T STATE BULL 523 (16 Jun. 1969). In support of this limited scope for the treaty the U.S. argued: (1) Banning nuclear weapons would prevent an arms race and remove the major threat to reserving the seabed exclusively for peaceful purposes; (2) It was unlikely for many years that conventional military uses of the seabed could constitute a threat to any nation's territory or trigger an arms race; (3) Limiting the scope of the ban to nuclear weapons and other weapons of mass

ing a Soviet initiative in late August and subsequent consultation between the United States and her NATO allies, a joint proposal of the United States and the U.S.S.R. was offered on 7 October 1969 limiting the scope of the Treaty to "objects with nuclear weapons or any other types of weapons of mass destruction" and their associated facilities. This language remained substantially unchanged during the following committee negotiations.¹³⁰

In some cases the Treaty language is ambiguous. It is uncertain which delivery systems are prohibited and which are not. Nuclear weapons may be contained in a missile placed on the seabed, located aboard a submarine resting or anchored to the bottom, or in a missile attached to a bottom-crawling mobile platform. A nuclear mine may be anchored to the bottom but float in the water.¹³¹

As late as 25 March 1969, the United States believed "careful consideration" had to be given to the question whether any treaty should "also apply to containers or carriers whose principal mode of deployment or operation requires physical contact with the seabed."¹³² The United States chose to ban only fixed installations and not mobile platforms in her draft proposal of 22 May 1969.¹³³ The commentary offered with the draft also spoke only of prohibiting "implanting or emplacing fixed nuclear weapons or other weapons of mass destruction . . . (and) fixed launching platforms associated with nuclear weapons and other weapons of mass destruction. . . ." ¹³⁴

destruction reduced the verification problem to manageable proportions; (4) The seabed was coterminous with the sea which has always been used for military action. Under these conditions, total demilitarization of the seabed is neither practical nor attainable; (4) Such a scope limitation is more consistent with the security interests of coastal nations. D ON D 206, 213, 214, 331.

The Soviet Union replied: (1) Total demilitarization will make verification easier by reducing the total number of objects on the seabed; (2) If the scope is limited, a nation complying with the treaty may still hesitate to grant inspection for fear of disclosing military secrets. Total demilitarization removes that worry. D ON D 155-56.

¹³⁰ Text at DEP'T STATE BULL 367 (3 Nov 1969).

¹³¹ Unanchored contact mines are prohibited by the Convention Relative to the Laying of Automatic Submarine Contact Mines unless "so constructed as to become harmless one hour at most after the person who laid them ceases to control them." art. 1, para 1. However, nuclear mines need not await contact for detonation.

"Statement of Ambassador Smith at ENDC, 60 DEP'T STATE BULL 336 (1969); statement by U.S. Representative to U.N. Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction, 60 DEP'T STATE BULL 343 (1969).

¹³³ Art. I, para 1, DEP'T STATE BULL 523 (16 Jun 1969).

"*Id.* at 521.

This language apparently would permit nuclear missile submarines resting on the bottom, and ground-crawling missile platforms. It is unclear whether or not the language would ban a nuclear mine which retained some mobility around the point on the seabed to which it was mechanically or electronically tethered. In testimony before the Senate Foreign Relations Committee, the General Counsel of the Arms Control and Disarmament Agency indicated that the United States draft would not apply to a weapon designed to move across the floor or in the water above it, whether it involved movement "by rolling across, or jumping across, leaping from point to point in the ocean" because of difficulty in verification."

The language in the 7 October joint U.S.S.R.-U.S. draft was broadened slightly. That draft undertook not to "emplant or emplace on the seabed and the ocean floor and in the subsoil thereof . . . any objects with nuclear weapons or any other types of weapons of mass destruction, as well as structures, launching installations, or any other facilities specifically designed for storing, testing or using such weapons."¹³⁶ That some broadening of the language was intended is shown by the United States comments accompanying the draft.¹³⁷

The first paragraph of article I would prohibit any party from emplanting or emplacing on the seabed, beyond a 12-mile wide contiguous zone, any objects with nuclear weapons or any other types of weapons of mass destruction. This prohibition, like the Outer Space Treaty, would thus cover in particular nuclear weapons and also any other weapons of mass destruction, such as chemical or biological weapons. This paragraph would also ban structures, launching installations, or any other facilities specifically designed for storing, testing, or using such weapons. The treaty would therefore prohibit, *inter alia*, nuclear mines that were anchored to or emplaced on the seabed. The treaty would not, however, apply to facilities for research or for commercial exploitation that might somehow be able to accommodate or contain a nuclear weapon. . . . Since this is a treaty regarding uses of the seabed, vehicles which can navigate in the water above the seabed, that is, submersible vehicles, should be viewed in the same way as any other ships; they would therefore not be violating the treaty if they were either anchored to or resting on the seabed. I would also like to point out that this treaty would in no way impede peaceful uses of nuclear energy. Thus, the prohibitions of the treaty are not intended in any way to affect applications of nuclear reactors, scientific research, or other nonweapons applications of nuclear energy.

¹³⁵ S. HEARINGS 33 at 25.

¹³⁶ Art. I, para 1, DEP'T STATE BULL 368 (3 Nov 1969).

¹³⁷ *Id.* at 365.

Anchored mines are now included within the treaty's prohibition by intent, though the language itself is still not clear, while anchored or resting submersibles are specifically excluded.¹³⁸ Bottom crawlers were not mentioned, and their legality remains uncertain. "Fixed" has been dropped from the original U.S. draft but "emplant or emplace" was retained. "Emplace" is defined as "to put into position," while "emplant", a variant of implant, is defined as "to fix or set securely or deeply."¹³⁹ Both definitions have an aura of permanence about them hardly in keeping with a vehicle's mobility. Yet "emplace" or "put into position" does not completely exclude the possibility of the weapon's subsequently moving to a new position under its own power. So long as the language remains ambiguous, a serious problem could arise from rival interpretations if bottom-crawling mobile military platforms become technologically feasible and militarily desirable.¹⁴⁰

The types of weapons prohibited are also not clearly defined. While nuclear ballistic missiles are certainly prohibited, what about nuclear tipped anti-ballistic missiles? If "other types of weapons of mass destruction" refers to the purposes for which a weapon is designed, and if it modifies nuclear weapons as well, then ABMs would be permissible since they are designed to incapacitate an enemy missile rather than destroy groups of people. However, the definitions given for "weapons of mass destruction" have emphasized *capability* for widespread destruction of human life and property rather than designed purpose. All nuclear weapons, including nuclear-tipped ABMs, would be included within this definition.¹⁴²

Finally, there is little guidance as to what constitutes "other weapons of mass destruction." Examples given included chemi-

¹³⁸ The U.S. Navy has consistently opposed any prohibitory language that might include a submarine while anchored or resting on the bottom, or stationed in the sense of cruising around a designated point. Testimony of Dr. Frosch, *supra* note 112, S. HEARINGS 33 at 32.

The original U.S. draft would have permitted nuclear missiles for submarines to be stored in seabed submarine supply depots. The language of the joint draft would not permit this since it also prohibits the storage of nuclear weapons on the seabed.

¹³⁹ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 743, 1134 (Unabridged ed., 1966).

¹⁴⁰ Gorove also concludes that anchored mines are prohibited while mobile platforms are permitted. Gorove, *Toward Denuclearization of the Ocean Floor*, 7 SAN DIEGO L. REV. 504, 508-09 (1970).

¹⁴¹ Testimony of Mr. Hancock, *supra* note 135 at 20-22.

¹⁴² *Id.*

cal, biological, and radiological weapons.¹⁴³ Not all such weapons are capable of mass destruction, but there is little discussion of what level of casualties and property damage must be within the weapon's potential before the threshold of "mass destruction" is achieved. The phrase could cause as much controversy as does the use of tear and nausea gases with regard to the Geneva Protocol banning gas warfare.

B. THE VERIFICATION PROVISIONS

The verification provisions in the 7 October 1969 joint draft were substantially affected by subsequent negotiations among the members of the ENDC and by the comments received during the first unsuccessful submission of the treaty to the General Assembly. The original Soviet draft provided that "all installations and structures on the seabed and the ocean floor and the subsoil thereof shall be open on the basis of reciprocity. . . ." ¹⁴⁴ The Soviets argued that access to suspicious installations was necessary for effective verification. "This procedure was supported by the precedents established in treaties governing Antarctica and outer space."¹⁴⁵

The United States originally flirted with verification by reciprocal rights of inspection,"; but instead decided to rely on observation supported by consultations if suspicions were aroused.¹⁴⁶ The United States foresaw political and legal difficulties in transplanting the principle of free access from the moon, where all national claims have been renounced,"" to the

¹⁴³ *Id.*; Testimony of Dr. Froesch, *supra* note 112, S. HEARINGS 33, at 36-38; Statement of U.S. Representative, *supra* note 136 at 365.

"Art. 2, *supra* note 113.

¹⁴⁵ Statement of 29 Jul. 1969, D ON D at 347.

¹⁴⁶ Statement of 3 Apr. 1969, D ON D at 156.

"Statement of Ambassador Smith, *supra* note 132 at 337; statement by U.S. Representative, *id.* at 343-44.

¹⁴⁷ [T]he Parties . . . shall remain free to observe activities of other States on the seabed and ocean floor, without interfering with such activities or otherwise infringing rights recognized under international law including the freedoms of the high seas. In the event that such observation does not in any particular case suffice to eliminate questions regarding fulfilment of the provisions of the treaty, parties undertake to consult and to cooperate in endeavoring to resolve the questions." Art. 111, para 1, U.S. draft of 22 May 1969, *supra* note 114.

¹⁴⁸ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art. 11, 27 Jan. 1967, 18 U.S.T. 2410, T.I.A.S. 6347 (effective 10 Oct. 1967) [hereinafter cited as OUTER SPACE TREATY]. Consistent with this position it may be noted that art. IV, para 2 of the Antarctic Treaty, 1 Dec. 1959, 12 U.S.T. 794, T.I.A.S. 4780. 402 U.N.T.S. 71 (effective 23 Jun. 1961)

seabed where there already existed many claims of national jurisdiction since the territorial scope of the treaty includes the continental shelf.¹⁵⁰ It was also feared that access to installations would prove impractical in view of the growing number of scientific and commercial uses of the seabed.¹⁵¹ Immense technical problems were anticipated in providing unqualified entry to an installation for an observer under conditions of extreme depth and pressure.¹⁵² Probably there was concern also that access would compromise the security of military installations.¹⁵³ Since the United States draft banned only nuclear and other weapons of mass destruction and their associated equipment emplaced or emplaced on the seabed, a wide range of military installations remain permitted by the treaty which the United States would not want exposed to foreign eyes.

The United States argued that observation could provide effective verification because the construction and maintenance of a substantial installation adequate to house a complex missile would require extensive activity unlikely to escape the notice of other maritime powers.¹⁵⁴ Once attention was attracted to the particular installation, observers could look for a number of telltale signs of nuclear weapons—such as hatches through which the weapon could be launched, sophisticated communications systems, or large elements detachable for maintenance or containing airlocks for entry of maintenance personnel.¹⁵⁵ As assurance for the integrity of this observation system, the United States promised that if it should request consultations it did not propose to let them drop "until its questions were satisfactorily resolved."¹⁵⁶

[hereinafter cited as ANTARCTIC TREATY] precludes anything in the Treaty, or any action or activities while the Treaty is in force, from supporting or prejudicing any national claim or any recognition or nonrecognition of such a claim. Lacking the disclaimer clause, it could be argued that an obligation to permit free access to an installation was inconsistent with the concept of sovereignty and prejudiced the national claim to the area on which the Antarctic installation was located.

¹⁵⁰ One difficulty with the U.S. argument is that the Nuclear Seabed Treaty contains a disclaimer clause similar to that in the Antarctic Treaty.

¹⁵¹ Statement of U.S. Representative, *supra* note 133, at 522; the same statement is also printed in D ON D at 213, 216–17.

¹⁵² *Id.*

¹⁵³ Statement of Hon. Paul C. Warnke, Asst. Secretary of Defense, International Security Affairs, 29 Nov. 1967, S. HEARINGS 111 at 36.

¹⁵⁴ Statement of 15 May 1969, D ON D at 206–07; statement of 22 May 1969, D ON D at 216.

¹⁵⁵ Statement of U.S. Representative, *supra* note 133, at 522, also at D ON D 216–217.

¹⁵⁶ *Id.*

The operative paragraph of the verification article in the joint draft of 7 October 1969 declared that parties had "the right to verify the activities" of other parties "if these activities raise doubts"), but "without interfering with such activities or otherwise infringing rights recognized under international law, including the freedoms of the high seas."¹⁵⁷ Verification procedures were not detailed, but it was assumed that observation would be the method rather than access.¹⁵⁸ Despite their initial advocacy of verification through reciprocal access, the Soviet Union agreed that this joint article insured effective verification.¹⁵⁹ The other members of the ENDC were harder to persuade. The result was extensive modification of the verification article, but observation remained the primary method. Inspection was permitted only after consultation with and receiving the consent of the party responsible for the suspicious activity.¹⁶⁰

Whether these verification procedures will be adequate to maintain the confidence of the parties in their effectiveness can only be determined with experience. If this treaty enters into force, it will be a significant step in arms control even though it merely forestalls a possible future system of armaments rather than controlling an existing system. But if a state feels compelled to withdraw from the treaty because of fears of violation by

¹⁵⁷ Art. 111, DEP'T STATE BULL 368 (3 Nov. 1969).

¹⁵⁸ Statement of U.S. Representative to Conference of the Committee on Disarmament of 16 Oct. 1969, D ON D at 491, 492-93.

¹⁵⁹ Statement on 7 Oct. 1969, D ON D at 477.

¹⁶⁰ See text accompanying note 118 for a summary of the verification article. There appeared to be two major criticisms advanced against the joint draft verification article: (1) Verification could not be effective without close physical inspection. This criticism also applied to the original U.S. draft. Statement of Canadian Representative on 31 July 1969, D ON D 380; statement of Canadian Representative on 9 Oct. 1969, D ON D 485; statement of Swedish Representative on 16 Oct. 1969, D ON D 490. On 9 Oct. 1969, two days after the joint U.S.S.R.-U.S. draft was presented to ENDC, Canada offered a detailed verification article which provided for these problems. The verification article in the present treaty appears to be a compromise between the joint draft article and the Canadian proposal. Inspection is not an assured right, but it is specifically mentioned in such a context that refusal would be difficult for anyone but a party guilty of violations. (2) Some provision must be made so that those states lacking a technical verification capability could participate in the verification process. This criticism was particularly applied to the original Soviet draft which conditioned inspection on reciprocity. Statement of Canadian Representative on 31 Jul. 1969, D ON D 378-79; statement of Canadian Representative on 9 Oct. 1969, *supra*; statement of Swedish Representative, *supra*. In the final article the superpowers do not promise to assist any other party who requests assistance every time some activity arouses suspicion, but the treaty does specifically permit full or partial assistance on verification, and provides that any party requesting can participate in the verification proceedings.

another party,¹⁶¹ the resulting increase in world tension would far outweigh the possible relaxation from the treaty entering into force. Such a momentous step would hopefully be made only after a full and careful review of evidence that could persuade most other nations as well of the necessity of the withdrawal. The question which cannot be answered without both technical knowledge and experience is whether observation alone can provide evidence of this calibre.

V. THE CONVENTION ON THE INTERNATIONAL SEABED AREA

The United States-proposed Draft United Nations Convention on the International Seabed Area¹⁶² offers a comprehensive legal regime for the exploitation of the natural resources of the seabed and subsoil. Though primarily concerned with the development of the seabed's natural resources, the draft also has implications for military use of the seabed and deep sea.

The Convention establishes an International Seabed Area comprising "all areas of the seabed and subsoil of the high seas seaward of the 200 meter isobath adjacent to the coast of continents and islands" which is declared to be "the common heritage of all mankind."¹⁶³ Some of the other basic principles outlined in Chapter I of the Convention are:

Article 2

1. No State may claim or exercise sovereignty or sovereign rights over any part of the International Seabed Area or its resources. . . .

2. No State has, nor may it acquire, any right, title, or interest in the International Seabed Area or its resources except as provided in this Convention.

Article 3

The International Seabed Area shall be open to use by all States, without discrimination, except as otherwise provided in this Convention.

Article 4

The International Seabed Area shall be reserved exclusively for peaceful purposes.

¹⁶¹ Withdrawal is permitted under art. VIII upon three months advance notice to the other parties and the UN Security Council accompanied by a statement "of the extraordinary events it considers to have jeopardized its supreme interests."

¹⁶² A summary of the provisions is at **63 DEP'T STATE BULL 213 (1970)**. The complete text may be found at **INTERIOR COMM.**, pt 3, at 71.

¹⁶³ **ISA CONV.**, art. 1.

Article 5

1. The International Seabed Resource Authority shall use revenues it derives from the exploration and exploitation of the mineral resources of the International Seabed Area for the benefit of all mankind, particularly to promote the economic advancement of developing States Parties to this Convention, irrespective of their geographic location.

Article 6

Neither this Convention nor any rights granted or exercised pursuant thereto shall affect the legal status of the superjacent waters as high seas, or that of the air space above those waters.

Article 7

All activities in the marine environment shall be conducted with reasonable regard for exploration and exploitation of the natural resources of the International Seabed Area.

Article 8

Exploration and exploitation of the natural resources of the International Seabed Area must not result in any unjustifiable interference with other activities in the marine environment.

The margin from the 200 meter isobath beginning the International Seabed Area [hereinafter referred to as ISA] seaward to a line to be negotiated on the continental rise is declared to be the International Trusteeship Area [hereinafter referred to as ITA] over which the Trustee Party (the coastal state) is given special rights and powers to control the exploration and exploitation of the natural resources.¹⁶⁴ The remainder of the ISA comes under the jurisdiction of the International Seabed Resource Authority¹⁶⁵ [hereinafter referred to as ISRA], a complex international agency whose structure is obviously designed to allow tremendous functional growth.

The principal organs of the ISRA are the Assembly, the Council, the Tribunal, and three Commissions. All contracting parties are members of the Assembly, each having one vote.¹⁶⁶ The

¹⁶⁴ *Id.*, arts. 26–30.

¹⁶⁵ *Id.*, arts. 31–65.

¹⁶⁶ *Id.*, art. 34.

Article 35

The powers and duties of the Assembly shall be to:

- a. Elect its President and other officers;
- b. Elect the members of the Council in accordance with Article 36;
- c. Determine its rules of procedure and constitute such subsidiary organs as it considers necessary or desirable;
- d. Require the submission of reports from the Council;
- e. Take action on any matter referred to it by the Council;
- f. Approve proposed budgets for the Authority, or return them to the Council for reconsideration and resubmission;
- g. Approve proposals by the Council for changes in the allocation

Council is composed of twenty-four states divided into two groups, a permanent group of the six most industrially advanced contracting parties and a rotating group of eighteen contracting parties. Decisions by the Council require a majority vote of each group.¹⁶⁷ The Tribunal is composed of five, seven, or nine in-

of the net income of the Authority within the limits prescribed in Appendix D, or return them to the Council for reconsideration and resubmission;

h. Consider any matter within the scope of this Convention and make recommendations to the Council or Contracting Parties as appropriate;

i. Delegate such of its powers as it deems necessary or desirable to the Council and revoke or modify such delegation at any time.

j. Consider proposals for amendments of this Convention in accordance with Article 76.

¹⁶⁷ *Id.*, arts. 36 & 38.

Article 40

The powers and duties of the Council shall be to:

a. Submit annual reports to the Contracting Parties;

b. Carry out the duties specified in this Convention and any duties delegated to it by the Assembly;

c. Determine its rules of procedure;

d. Appoint and supervise the Commissions provided for in this Chapter, establish procedures for the coordination of their activities, and determine the terms of office of their members;

e. Establish other subsidiary organs, as may be necessary or desirable, and define their duties;

f. Appoint the Secretary-General of the Authority and establish general guidelines for the appointment of such other personnel as may be necessary;

g. Submit proposed budgets to the Assembly for its approval, and supervise their execution;

h. Submit proposals to the Assembly for changes in the allocation of the net income of the Authority within the limits prescribed in Appendix B;

i. Adopt and amend Rules and Recommended Practices in accordance with Chapter V, upon the recommendation of the Rules and Recommended Practices Commission;

j. Issue emergency orders, at the request of any Contracting Party, to prevent serious harm to the marine environment arising out of any exploration or exploitation activity and communicate them immediately to licensees, and Authorizing or Sponsoring Parties, as appropriate;

k. Establish a fund to provide emergency relief and assistance in the event of a disaster to the marine environment resulting from exploitation or exploitation activities;

l. Establish procedures for coordination between the International Seabed Resource Authority, and the United Nations, its specialized agencies and other international or regional organizations concerned with the marine environment;

m. Establish or support such international or regional centers, through or in cooperation with other international and regional organizations, as may be appropriate to promote study and research of the natural resources of the seabed and to train nationals of any Contracting Party in related science and the technology of the exploration and exploitation, taking into account the special needs of developing States Parties to this Convention.

n. Authorize and approve agreements with a Trustee Party, pur-

dependent judges, and is empowered to decide disputes and render advisory opinions.¹⁶⁸ The three commissions are a Rules and Recommended Practices Commission,¹⁶⁹ an Operations Commission,¹⁷⁰ and an International Seabed Boundary Review Commission." In addition, there is a Secretariat.

Several questions arise concerning this draft and its possible impact upon military uses of the seabed area. The most crucial question, the meaning of the reservation of the seabed for "peaceful purposes", is reserved for a separate chapter. My earlier discussion concluded that other states were legally limited in their military activities on a coastal state's continental shelf. However, the outer limit of the legal continental shelf was uncertain because of the vagueness of the adjacency and exploitability criteria.¹⁷¹ The ISA starts at the 200 meter isobath¹⁷² and does not recognize any claims of sovereignty, or any right, title or interest in the seabed or its resources beyond that point except as provided in the Convention.¹⁷⁴

Let us examine briefly the ITA before turning to the ISA as a whole. The trustee party lacks sovereignty over the ITA. Besides the declarations of Article 2 that no claims of sovereignty will be recognized oceanward of the 200 meter isobath, article 27

suant to Article 29, under which the International Resource Authority will perform some or all of the Trustee Party's functions.

¹⁶⁸ *Id.*, art. 46.

¹⁶⁹ *Id.*, art. 43.

¹⁷⁰ *Id.*, art. 44

Para 2.

The Operations Commission shall:

- a. Issue licenses for seabed mineral exploration and exploitation, except in the International Trusteeship Area;
- b. Supervise the operations of licensees in cooperation with the Trustee or Sponsoring Party, as appropriate, but shall not itself engage in exploration or exploitation;
- c. Perform such functions with respect to disputes between Contracting Parties as are specified in Section E of this Chapter;
- d. Initiate proceedings pursuant to Section E of this Chapter for alleged violations of this Convention, including but not limited to proceedings for revocation or suspension of licenses;
- e. Arrange for and review the collection of international fees and other forms of payment;
- f. Arrange for the collection and dissemination of information relating to licensed operations;
- g. Supervise the performance of the functions of the Authority pursuant to any agreement between a Trustee Party and the Authority under Article 29;
- h. Issue deep drilling permits.

¹⁷¹ Its duties are outlined in art. 45, *id.*

¹⁷² See text accompanying notes 109-111.

¹⁷³ ISA CONV., art. 1, para 2.

¹⁷⁴ *Id.*, art. 2.

specifies that “Except as specifically provided for in this Chapter, the coastal State shall have no greater rights in the ITA off its coast than any other contracting Party.” The coastal state is given only those responsibilities and powers directly related to the exploration and exploitation of the ITA’s natural resources.¹⁷⁵ The coastal state must cooperate with the Operations Commission in supervision of its licensees,¹⁷⁶ and is bound by Appendices A and C to the Convention in the general scope of the terms and procedures it can set in its licenses to explore or exploit its ITA.¹⁷⁷ Finally, the superjacent waters retain their status as high seas.¹⁷⁸

¹⁷⁵ *Id.*, art. 27, para 2 “with respect to exploration and exploitation of the natural resources of that part of the International Trusteeship Area in which it acts as trustee for the international community, each coastal State, subject to the provisions of this Convention, shall be responsible for:

- a. Issuing, suspending and revoking mineral exploration and exploitation licenses;
- b. Establishing work requirements, provided that such requirements shall not be less than those specified in Appendix A;
- c. Ensuring that its licensees comply with this Convention, and, if it deems it necessary, applying standards to its licensees higher than or in addition to those required under this Convention, provided such standards are promptly communicated to the International Seabed Resource Authority;
- d. Supervising its licensees and their activities;
- e. Exercising civil and criminal jurisdiction over its licenses, and persons acting on their behalf, while engaged in exploration or exploitation;
- f. Filing reports with the International Seabed Resource Authority;
- g. Collecting and transferring to the International Seabed Resource Authority all payments required by this convention;
- h. Determining the allowable catch of the living resources of the seabed and prescribing other conservation measures regarding them;
- i. Enacting such laws and regulations as are necessary to perform the above functions.

3. Detailed rules to implement this Chapter are contained in Appendix C.

Article 28: In performing the functions referred to in Article 27, the Trustee Party may, in its discretion:

- a. Establish the procedures for issuing licenses;
- b. Decide whether a license shall be issued;
- c. Decide to whom a license shall be issued, without regard to the provisions of Article 3;
- d. Retain [a figure between 33 1/3% and 50% will be inserted here] of all fees and payments required by this Convention;
- e. Collect and retain additional license and rental fees to defray its administrative expenses, and collect, and retain [a figure between 33 1/3% and 50% will be inserted here] of, other additional fees and payments related to the issuance or retention of a license, with annual notification to the International Seabed Resource Authority of the total amount collected;
- f. Decide whether and by whom the living resources of the seabed shall be exploited, without regard to the provisions of Article 3.

¹⁷⁶ *Id.*, art. 44, para 2.b; art. 52, para 3; art. 69; art. 13.

¹⁷⁷ *Id.*, art. 27.

¹⁷⁸ *Id.*, art. 6.

The limitation on the rights of the Trustee Party, the declaration against recognition of claims of sovereignty, and the supervisory powers retained by ISRA over the Trustee Party evidence an intent not to permit any evolution of the ITA into an extension of the continental shelf. However, it is also clear that the legal regime governing the entire ISA is not the same as the high seas above. Since the legality of our military activities is largely dependent on the freedom of the high seas, the new legal regime obviously calls for closer inspection.

A reading of Articles 7 and 8 of the ISA Convention demonstrate that the unilateral control of interference rule of the Continental Shelf Convention¹⁷⁹ is transformed into a bilateral rule. Not only must exploration and exploitation of natural resources not unjustifiably interfere with other activities in the marine environment, those other activities must also show reasonable regard for exploration and exploitation activities. This bilateral rule probably does no more than codify existing law of the sea. Exploration and exploitation of the seabed's natural resources would now be numbered among the other freedoms of the high seas "recognized by the general principles of international law" mentioned in Article 2 of the High Seas Convention. They have achieved this status both via customary law and through the 1958 Continental Shelf Convention. As freedoms of the high seas they are entitled to the same reasonable regard granted to all other freedoms of the high seas by Article 2 of the High Seas Convention. Military uses of the high seas and deep seabed would also be included within those freedoms through customary international law.

The "reasonable regard" standard sets no priority among users, but presumably leaves the reconciliation of competing uses to the peculiar facts and circumstances of the time and place

¹⁷⁹ "The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication." CON **SHELF** CONV., art. 5, para 1.

"Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables or pipe lines on the continental shelf." CON **SHELF** CONV., art. 4.

Nowhere in the CON **SHELF** CONV. is there any obligation laid on the other users of the high seas to have a reasonable regard for the exploration and exploitation of the continental shelf.

I assume "marine environment" encompasses seabed, subsoil and superjacent waters, but I have found no discussion of this.

where the competition arises. For example, Captor mines are placed in a strategic underwater strait beneath which a huge oil deposit is discovered. The deposit cannot be safely drilled so long as the mines are present. "Reasonable regard" does not indicate which of the competing and exclusive uses has the better legal right to exploit this valuable location. However, the the ISA Convention introduces one more consideration. Article 4 declares that "the International Seabed Area shall be reserved exclusively for peaceful purposes." The next chapter will discuss the meaning and application of "peaceful purposes", but assuming it is applicable to this situation, the oil drillers now have a stronger legal case.

Looking at Articles 4, 7 and 8 of the ISA Convention in the context of a competition between military and natural resource exploitation interests, a vital question concerns who has the power of authoritative interpretation of the treaty and authoritative decision of disputes under the treaty. Each sovereign state has the competence unilaterally to interpret its agreements and the obligations it has undertaken in those agreements.¹⁸⁰ A state may also submit to the jurisdiction of an international agency, court, or tribunal for an interpretation of the agreement, and can agree that the decision of such a body will be binding.¹⁸¹ For example, Article 94 of the United Nations Charter states "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." An agreement to regard as binding the judgment of an international court merely moves the state's decision one step back. The sovereign state still determines which disputes it is willing to submit to such a binding judgment. Thus, Art. 36 of the Statute of the International Court of Justice declares "The jurisdiction of the Court comprises *all cases which the parties refer to it* and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force,"¹⁸²

The last half of Article 36 states an alternative method to case by case submission for conferring jurisdiction on a court; that is, agreement within a treaty that a court shall have juris-

¹⁸⁰ McDUGAL, LASSWELL, & MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE* 28 (1967).

¹⁸¹ HARV. RESEARCH IN INT'L L., *DRAFT CONV. ON THE LAW OF TREATIES*, Comment, 29 AM. J. INT'L L. 975-76 (1935), quoted at 14 WHITEMAN 361.

¹⁸² 26 Jun. 1945, 59 Stat. 1031, T.S. 933, 3 Bevans 1153 (effective 24 Oct. 1945) (emphasis added).

diction over all disputes arising under the **treaty**.¹⁸³ A state can agree in advance to waive its unilateral competence of interpretation, and submit all disputes under the treaty to a body with the power of authoritative decision. This appears to be the course taken in the ISA Convention. Article 46 of the ISA Convention states in part "The Tribunal shall decide all disputes and advise on all questions relating to the interpretation and application of this Convention *which have been submitted to it in accordance with the provisions of this Convention.*" (emphasis added). Article 50 states in part "Any Contracting Party which considers that another Contracting Party has failed to fulfill any of its obligations under the Convention may bring its complaint before the Tribunal." Finally, Article 12 states as a basic principle "All disputes arising out of the interpretation or application of this Convention shall be settled in accordance with provisions of Section E of Chapter IV." Section E of Chapter IV contains Articles 46–60 setting forth the powers and functions of the Tribunal. Under this language it does not appear that a separate agreement between the parties for the submission of each dispute is required before the Tribunal has jurisdiction to decide a case. Any party to the treaty can bring a dispute under the treaty before the Tribunal whether or not the other party desires the case to come before the Tribunal. The reluctant party consents to jurisdiction when it deposits its ratification of the Convention.

The only argument remaining to the reluctant party is that the dispute does not involve the interpretation and application of the Convention, and therefore does not come within the jurisdiction conferred on the Tribunal by the Convention. I expect that the Tribunal would find in itself sufficient authority to decide whether the dispute involved the interpretation or application of the ISA Convention.¹⁸⁴

¹⁸³ *Id.*

¹⁸⁴ Before a Contracting Party institutes proceedings before the Tribunal it shall bring the matter before the Operations Commission. After each party has submitted its case and replied to the other's, the Operations Commission delivers a reasoned opinion in writing. Only if the party accused of a violation fails to comply with the opinion within the period set by the Commission, or if the Commission does not give an opinion within three months after the matter was brought before it, may the matter be brought before the Tribunal. The Operations Commission may also deliver an opinion on its own initiative or the request of a licensee and, in the event the party concerned does not comply within the terms of the opinion, bring a complaint before the Tribunal.

It may be asked whether the **ISRA** could act as an inspection agency to enforce any seabed disarmament agreement. If any organ of ISRA were to do this, it would be the Operations Commission. The Commission is required

If a Contracting Party fails to perform the obligations incumbent upon it under a judgment rendered by the Tribunal, the other Party to the case may have recourse to the Council, *which shall decide upon measures to be taken to give effect to the judgment*. When appropriate, the Council may decide to suspend temporarily, in whole or in part, the rights under this Convention of the Party failing to perform its obligations. . . . (emphasis added)

ISA Convention, Art. 58

Sanctions can be imposed to enforce the judgments of the Tribunal. It is interesting to compare the underscored language of the ISA Convention with the similar provision from the United Nations Charter for the enforcement of the judgments of the International Court of Justice.

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

United Nations Charter, art. 94, para 2. The discretion of the ISRA Council is limited to determining what sanctions should be applied. Unlike the United Nations Security Council, it lacks the authority to determine whether or not sanctions are necessary.

The hypothetical given earlier assumed competing exclusive military and natural resource exploitation uses requiring a decision as to priority. However, the question of compliance with the basic principle stated in Article 4 of the ISA Convention could also be raised without a direct competition for a particular seabed location. Any military use of the seabed might furnish the basis for a complaint by another Contracting Party. If the Tribunal decided in the absence of competing uses, that there was no justiciable controversy, it still could render an advisory opinion as to the meaning of Article 4.

Finally, because of Article 7, a dispute involving priority of uses could arise even if the military use did not involve the

to have expertise in the operation of marine installations, and its duties require supervision of licensees implying some capability for conducting inspection trips to and on the seabed. The Commission itself is forbidden to engage in exploration or exploitation. However, nothing expressly gives the Operations Commission authority to inspect military installations. The question of power to inspect military installations would be most likely to arise when a complaint involving competing uses, one of which is military, is brought before the Commission, and there is a disputed question of fact. If the Operations Commission or some earlier decision of the Tribunal found that Art. 4 was an obligation enforceable under the Convention, it might be inferred that the Operations Commission had the authority to inspect the installation in question to assist in determining the facts on which to base its reasoned opinion.

seabed. Assume the same strategic underwater strait with its oil or mineral deposit. Killer submarines are assigned to cruise underwater in that area to foreclose or monitor the passage by enemy submarines. Or, alternatively, it is a desirable area for surface maneuvers of the fleet. One writer has pointed out the danger to any seabed activity from passage of a ship overhead. The diver cannot risk any explosive detonations, pollution, or jettisoned debris. Similarly, the ships overhead may be endangered by the sudden rise of buoyant articles from the bottom. Safety, proclaimed a basic principle by Article 9 of the ISA Convention, may eventually require control of the entire water column, from seabed to surface.¹⁸⁵

While the military activity given above does not itself involve physical contact with the seabed, it would foreclose the use of the seabed to civilian use. In such a situation there is again a risk that the Tribunal might find Article 4 relevant to assist in establishing a priority among the competing activities.

How does the discussion above of the ISA affect the rights of both the coastal state Trustee Party and other states in the ITA. It could be argued that the Trustee Party is free to install any system of surveillance devices, mines and fortifications it believes necessary to defend the operations of its licensees, and incidently, its own security. But if Article 4 is given a substantive interpretation approaching demilitarization (a question discussed in the next chapter), then military activity by the Trustee Party or anyone else would appear to be a violation of Article 4. Additionally, the coastal state is to have no greater rights in the ITA than any other state with the exception of those rights granted under the Convention to a Trustee Party. Defense is not enumerated among those rights.¹⁸⁶ It was the intention of the drafters that the Trustee Party should have no

¹⁸⁵ CRAVEN at 23-24. It may fairly be asked how such control of the water column can be reconciled with the preservation of the status of the superjacent waters as high seas in Article 6 of the ISA Convention. Referring again to Article 2 of the High Seas Convention, we find that high seas status merely requires that those exercising the various freedoms of the high seas show a reasonable regard for others. This principle of "reasonable regard" is adopted by Article 7 of the ISA Convention. Some resolution of conflicts between competing uses is still necessary. It is my contention that Article 7 of the ISA Convention confers jurisdiction upon the Tribunal, as an organ of ISRA, to decide such conflicts in accordance with the principle of "reasonable regard." I would also contend that the Rules and Recommended Practices Commission has authority to bring before the Council rules and recommended practices concerning the resolution of such conflicts.

¹⁸⁶ ISA CONV., art. 27.

authority other than that delegated to it in the treaty.¹⁸⁷ Explaining the choice of the term “trustee, Elliot Richardson, Under Secretary of State, said :

[W]e were searching for a way of recognizing a broad and international interest on the one side and the opportunity to dedicate resources to all mankind, while on the other recognizing that there are very real and very legitimate interests on the part of the coastal states in the water off their shores.

The concept of trusteeship is intended to reflect a sense of responsibility of the coastal states toward the nations of the rest of the world, and pursuant to the rules and regulations of an international regime, while recognizing on the other hand a scope for their own legitimate exercise of responsibility.

* * * * *

The term “trusteeship” implies a responsibility entrusted, and here the coastal state would be entrusted by the rest of the world through the international regime with responsibilities, and so, therefore, we thought it was a descriptive word in the sense that it carried connotations of a responsibility, exercised for the benefits of all mankind.’=

The defense interests of the coastal state within the ITA are recognized by granting it the discretion to decide to whom an exploration or exploitation license will be issued without regard to the nondiscrimination provision of Article 3.¹⁸⁹

Within the ITA the right of the Trustee Party coastal state and the right of all other states to conduct military activity on the seabed do not differ. The sole concession to the coastal state is the control of exploration and exploitation licenses, Military activities on both the ITA and the ISA are to be regarded as another exercise of the freedom of the high seas. The crucial difference between the new high seas regime and the old is that the Tribunal may have jurisdiction to determine priorities among competing uses if one of the competing uses involves exploitation or exploration of seabed resources.

VI. PEACEFUL PURPOSES

As observed arms control has frequently been an important consideration in the various plans advanced for a new seabed legal regime. This sentiment was embodied to differing degrees in Article 4 of the ISA Convention and in the various interpreta-

¹⁸⁷ Statement of Elliot Richardson, Under Secretary of State at INTERIOR COMM., pt 2, at 434, 454.

¹⁸⁸ *Id.* at 434.

¹⁸⁹ ISA CONV., art. 28.

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tions given to peaceful purposes by the ENDC.¹⁹⁰ The best summary of the competing views was furnished in 1968 by the Chairman of the United Nations Ad Hoc Committee:¹⁹¹

Two approaches to the military aspects of this item and to the concept of exclusive reservation of the area for peaceful purposes became evident. One was that peaceful use completely excluded all military use. The other was that a positive approach required the affirmation and acceptance of the principle that the area be used exclusively for peaceful purposes and that military activities in pursuit of peaceful aims or in fulfilment of peaceful intents, consistent with the United Nations Charter and the obligations of international law, should not be banned. The general aim should be to stop the spread of the armaments race to the seabed and the ocean floor.

The United States has stated its official position:

We understand that the test of whether an activity is "peaceful" is whether it is consistent with the U.N. Charter and other international law obligations, and that accordingly such a resolution does not preclude military activities generally.¹⁹²

The United States has further stated that

specific limitations on certain military activities will require the negotiation of a detailed arms control agreement. Military activities not precluded by such agreement would continue to be conducted in accordance with the principle of freedom of the seas and exclusively for peaceful purposes.¹⁹³

The second statement follows from the first. If "peaceful purposes" permit all military activities not inconsistent with existing international law, then only new international law in the form of a treaty can ban some otherwise legal military use of the seabed.

The ENDC disagreement over the proper scope of the Nuclear Seabed Treaty may be interpreted as nothing more than a disagreement over the proper scope of a separate "detailed arms control agreement" under the U.S. formulation of peaceful purposes. However, several of the nations participating in the ENDC probably would reject this interpretation. Many of their arguments in favor of a broader treaty were cast not only in terms of its desirability, but also with the assumption that "reserving

""See text accompanying notes 121-29.

""23 U.N. GAOR. Ad Hoc Committee, U.N. Doc. A/AC.135/32, at 6 (23 Aug. 1968).

¹⁹² Statement by John R. Stevenson, Legal Adviser to State Dep't, 20 Aug. 1968, reprinted in *Selected Materials*, *supra* note 7, at 45-46.

""Statement by U.S. Rep. to U.N. Gen. Ass'y. on 29 Oct. 1968, 59 DEP'T STATE BULL 556 (1968).

the seabed exclusively for peaceful purposes” required complete demilitarization of the seabed.¹⁹⁴

There has been very little public discussion by the United States of the meaning of peaceful purposes in the context of Article 4 of the ISA Convention.¹⁹⁵ During hearings on the Convention before a subcommittee of the Senate Committee on Interior and Insular Affairs, Under Secretary of State Richardson did state that the ISA Convention “would not, as we visualize it, purport to restrict other uses”, than exploitation of mineral resources, and that any restriction on military use of the seabed would have to be accomplished by a separate treaty such as the Nuclear Seabed Treaty.¹⁹⁶ Thus, it appears that the United States intended to incorporate its interpretation of “peaceful purposes” into Article 4 of the ISA Convention.

As previously observed the Tribunal of the ISRA might be called upon to interpret Article 4, and might find it had jurisdiction to do so. How viable would they find the United States interpretation of “peaceful purposes” which permits any military activity legal under international law.

The Antarctic Treaty and the Outer Space Treaty have been used on both sides of the argument.¹⁹⁷ Their relevant provisions require :

The Antarctic Treaty

Article I

1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.

2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose.

¹⁹⁴ *E.g.*, Statement of Swedish Rep. 16 Oct. 1969, DON D 487; Statement of Russian Rep. 18 Mar 1969, DON D 119.

¹⁹⁶ Neither “peaceful purposes” nor arms control is mentioned in the President’s statement of 23 May 1970 announcing the U.S. seabed proposal. Neither are they included in Under Secretary of State Richardson’s statement of 27 May 1970. 62 DEP’T STATE BULL 737, 738 (1970). Nor was any more attention paid to “peaceful purposes” and arms control when the ISA Convention was actually presented to the United Nations Seabed Committee on 3 August 1970. Neither the statement to the UN Committee by U.S. Representative Christopher H. Phillips, the statement released by State Department Legal Adviser John R. Stevenson, nor the summary of the provisions of the Convention prepared by Mr. Stevenson discuss the question. 63 DEP’T STATE BULL 209–13 (1970).

¹⁹⁷ *Supra* note 187, at 455.

¹⁹⁷ 24 U.N. GAOR Supp. 22, at 19–20, U.N. Doc. A/7622 (1969).

Article V.

1. Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.

The Outer Space Treaty

Article III

States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.

Article IV

States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purpose shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited,

It could be argued that the additional language beyond peaceful purposes in each of these treaties constitutes the separate detailed agreement on arms limitation required by the United States interpretation. Every activity mentioned in the treaty is banned ; every activity not mentioned and otherwise legal under international law is permitted. That argument certainly fails, however, with respect to the Antarctic Treaty. Article I, paragraph 1 prohibits "any measures of a military nature." The introduction of the ensuing list by the words "such as" indicates the list is not exclusive but merely illustrative. The "*inter alia*" preceding the ban on military measures indicates that unspecified non-military measures are also prohibited if they are inconsistent with the use of Antarctica exclusively for peaceful purposes. One example of an unlisted non-military activity, which would certainly be prohibited, would be the storage of nuclear weapons at a location in Antarctica guarded by civilian employees of the Atomic Energy Commission. All of this suggests that the Antarctic Treaty does not represent the detailed agreement sought by the United States. The language in the Treaty admits of too many activities not specifically mentioned in the text but which

would be prohibited as inconsistent with the use of Antarctica only for peaceful purposes.

At first glance, the Outer Space Treaty appears more compatible with the United States position because it lacks the terms "such as" and "*inter alia*" which raise such a problem in the Antarctic Treaty.¹⁹⁸ Further analysis does raise questions. Article III requires the parties' activities in Outer Space to be conducted "in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding." But only the moon and other celestial bodies are required to be used exclusively for peaceful purposes. No such reservation is announced for outer space as a whole. From this I infer that "peaceful purposes" and "international law," etc., are not one and the same thing. "Peaceful purposes" is more restrictive in nature. Returning to the sea, Polaris missiles on nuclear submarines are presumably designed to maintain international peace and security via deterrence, but many of the nations at ENDC would dispute that they have a peaceful purpose. Their purpose is to maintain peace through the threat of destruction. Many military activities may be legal under international law, but may not be consistent with "peaceful purposes" unless that term is defined so broadly as to include all measures to assist military preparedness and therefore deterrence.¹⁹⁹

In summary, "peaceful purposes" as used in the Antarctic and Outer Space Treaties does not support the United States present interpretation of permitting any military activity otherwise permissible under international law. However, the use of peaceful purposes in past treaties is not necessarily conclusive of the parties intent for its use in this treaty. Article 31 of the Vienna Convention on the Law of Treaties states, "A treaty shall be interpreted in good faith in accordance with the ordinary mean-

¹⁹⁸ The U.S. Rep. to the U.N. Seabed Comm. referred to the U.N. discussions leading to the Outer Space Treaty and the provisions of the Treaty as precedent for the U.S. interpretation of "peaceful purposes." "The Space Treaty carefully delineated what specific military activities are prohibited in order to ensure that the moon and other celestial bodies will be utilized only for peaceful purposes. Other military activities are clearly not incompatible with the reservation of space for peaceful purposes." 60 DEP'T STATE BULL 343 (1969).

¹⁹⁹ It must also be pointed out that activities may be conducted by military personnel using military equipment and still be consistent with peaceful purposes. Both treaties specifically mention scientific research as one such activity. Others include logistics functions and rescue missions.

ing to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 32 permits recourse to supplementary means of interpretation, including the preparatory work and the circumstances of the treaty's conclusion to determine the meaning if interpretation according to Article 31 leaves the meaning ambiguous or obscure. While the United States interpretation of "peaceful purposes" does not appear adequate, no other interpretation is clearly correct either. The meaning of "peaceful purposes" is "ambiguous or obscure", permitting the use of preparatory work to aid interpretation. The United States has established a consistent stand for its interpretation of "peaceful purposes" with regard to the seabed. I assume future negotiations concerning this Convention would be used to build a case demonstrating the United States understanding of this phrase. However, other nations are likely to build just as effective a case for their rival interpretations, resulting in each cancelling the other out when the future requires a definitive interpretation of Article 4.

I believe the possible interpretations of Article 4's "peaceful purposes" are a threat to future United States military activity on the seabed and perhaps even in the superjacent waters. How serious a threat depends on whether or not the ISRA Tribunal would find it had jurisdiction over the question. But even if the Tribunal declined jurisdiction, Article 4 could be a serious diplomatic embarrassment to the United States, impeding our influence within the ISRA—an arena of potentially great importance.

VII. CONCLUSION

The Nuclear Seabed Treaty appears to have a good chance of entering into force, though it must still survive the ratification process. Its language is set. Ratification may result in some changes by reservations or interpretations submitted along with the deposited ratifications, but major disagreements will probably cause rejection rather than modification of the treaty. Thus, those questions I have raised are not so much suggestions for improvement as predictions of future disputes.

The prospect for the ISA Convention or a treaty resembling it are far less certain. Even the United States presented it only as a "working paper for discussion purposes" which does "not necessarily represent the definitive views of the United States Government." The ISA Convention is one of the most ambitious proposals for international organization that has been presented

since the United Nations was founded. Its success may vary in inverse proportion to its ambition. I have sought only to discuss it in the context of seabed military activities, which admittedly ignores its basic motivation of setting up a legal regime to facilitate the peaceful exploitation of the natural resources of the seabed.

Assuming that some agreement like the ISA Convention is possible, what alternatives may be considered to lessen the risk concerning Article 4. Two areas of remedial action appear. The ISRA machinery, primarily the Tribunal and Council, could be weakened so that under no circumstances could it interpret Article 4 or, alternatively, its interpretation would have no practical effect. To do this however, may be the equivalent of using a sledge hammer to swat the fly on the procelain vase. Weakening the Tribunal and Council may render the ISRA ineffective in its area of primary concern—the exploitation of natural resources. Alternatively, Article 4 and its peaceful purposes reservation is susceptible to remedial action. Three approaches suggest themselves. The most obvious is to delete Article 4. However, diplomatic realities probably preclude this. As outlined in Chapters I and VI, arms control has been too intimately associated with the international organization wing of the seabed movement for a new seabed regime based on international organization to ignore it.

Article 4 may be moved to a Preamble where it would join those other noble sentiments which may, in part, motivate a treaty but which would be uncomfortable for the parties if treated as strict legal obligations. A pledge could be added to continue negotiations towards reserving the seabed exclusively for peaceful purposes.²⁰⁰ This alternative would be most consistent with the past United States position. It enables a pragmatic approach to seabed arms control in which each different activity can be considered and its retention determined on the merits. The third approach is to retain Article 4 but to add language permitting those military uses of the seabed the United States considers vital. This was the alternative chosen by Senator Pell

²⁰⁰ Such a pledge was contained in the Nuclear Seabed Treaty, art. 5. "The Parties to the Treaty undertake to continue negotiations in good faith concerning further measures in the field of disarmament for the prevention of arms race on the seabed, the Ocean floor, and the subsoil thereof." The inclusion of this pledge resulted from a Swedish initiative caused by the limited scope of the treaty agreed to by the two superpowers. D ON D at 486, 487.

in his draft treaty.²⁰¹ The result would appear similar to the arms control provisions in the Antarctic and Outer Space Treaties, but would likely be much less successful. In Antarctica and thus far in outer space, there has been no great incentive for one power to engage in activity which either directly violated the treaty or was inconsistent with its spirit. The seabed is much more important to the security interests of the major powers than Antarctica and outer space. The submarines which pass above the seabed and the submarine detection devices which monitor their passage are both vital elements in the present balance of power. Differences between the powers as to which military uses should be permitted would make any agreement exceptionally difficult. The rapid advance of technology opening new uses and rendering old ones obsolete would multiply still further the difficulty of reaching agreement.²⁰² My own pre-

²⁰¹ S. RES. 33, "IV—Use of Seabed and Subsoil of Ocean Space for Peaceful Purposes Only

1. The seabed and subsoil of submarine areas of ocean space shall be used for peaceful purposes only.

2. The prohibitions of this Article shall not be construed to prevent—

(a) the use of military personnel or equipment for scientific research or for any other peaceful purpose;

(b) the temporary use or stationing of any military submarines on the seabed or subsoil of ocean space if such submarines are not primarily designed or intended for use or stationing on the seabed or subsoil of ocean space; or

(c) the use or stationing of any device on or in the seabed or subsoil of ocean space which is designed and intended for purposes of submarine or weapons detection, identification, or tracking.

3. All States shall refrain from the emplacement or installation on or in the seabed or subsoil of ocean space of any objects containing nuclear weapons or any kinds of weapons of mass destruction, or the stationing of such weapons on or in the seabed or subsoil of ocean space in any other manner.

4. All States shall furthermore refrain from causing, encouraging, or in any way participating in the conduct of the activities described in paragraph 3 of this Article.

5. All stations, installations, equipment, and sea vehicles, machines, and capsules, whether manned or unmanned, on the seabed or in the subsoil of ocean space shall be open to representatives of other States on a basis of reciprocity, but only with the consent of the State concerned. Such representatives shall give reasonable advance notice of a projected visit in order that appropriate consultations may be held and that maximum precautions may be taken to assure safety and to avoid interference with normal operations in the facility to be visited. All such facilities shall be open at any time to the Sea Guard of the United Nations referred to in Article VII of this Declaration, subject to the control of the Security Council as set forth in such Article." S. HEARINGS 33, 13.

"For example, the status of the recently announced Captor mine program (see text accompanying note 43) is unclear under Art. IV of the Pell Treaty. The mines are stationed on the seabed, and are not for peaceful purposes as that term has been used in past treaties, and are not included

ference is the second alternative of moving Article 4 into a ~~Pre~~amble; however, I recognize that diplomatic pressure may require a stronger commitment to arms control.

A few last words regarding the ISRA concept are in order. It appears that the future will see more limitations placed upon seabed military activity. As man's activity grows on the seabed, there will occur more frequent instances of competition for the same area. Conflict will be resolved in some manner, whether by negotiations between the nations involved or by adjudication of an international organization. The old regime of freedom of the high seas is passing and will be no more. The question is not whether change should be permitted, but which change is most advantageous or least harmful.²⁰³

The alternative to international organization appears to be the assertion of national claims to the deep seabed, a sure way to provoke conflict. An international registry which determines priority of national claims on a first recorded basis, but lacks the adjudicatory and policy-making powers of the ISRA, might solve the problem of conflicting national claims for resource exploitation. But, it would leave unresolved a great many other issues—standards for safety, conservation of resources, pollution control, conflicts between resource exploitation and other uses of the seabed, and the expectations of poor nations expecting to finance their development from the seabed's resources.²⁰⁴

Whether to restrain military activity on the seabed is not the question. Rather the question is how the restraints will be determined. The legal rules can be left to evolve out of the clash of interests in particular incidents, or they can be reached by negotiation in an international context designed to facilitate their reconciliation with other uses of the seabed. I believe the

within the list of specific military activities permitted. However, the mines do not contain nuclear weapons.

²⁰³ The various alternatives for a new legal regime are succinctly and ably described with their advantages and disadvantages in a statement of Francis T. Christy, Jr., before the Senate Foreign Relations Comm. Mr. Christy sees the alternatives as (1) the division of the sea floor among coastal nations; (2) the application of the law of the discovering nation; (3) an international registry office to decide priority on a first to register basis; (4) an international authority. S. HEARINGS 111, at 55. An analysis of several of the different proposals for an international authority is presented in Brooks, *International Organization for Hydrospace, THE LAW OF THE SEA: INTERNATIONAL RULES AND ORGANIZATION FOR THE SEA* 371 (1968).

"While introducing the Maltese Proposal to the General Assembly in 1967, Ambassador Pardo estimated that if an international agency were created in 1970, by 1975 the agency should receive annual gross revenues of \$6 billion. After payment of expenses, there would be \$5 billion left to aid the development of poor countries.

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latter offers the best chance for peace. My criticisms of the **ISA** Convention are not a rejection of international organizational regulation of the seabed. Rather they reflect a hope that the Convention can be restructured to better protect legitimate United States security interests.

COMMENTS INSPECTIONS*

By Major Dennis R. Hunt**

Ah, yes, those Saturday morning inspections. Shoes polished, socks and shorts and shaving gear arranged properly in footlockers, and then the long wait for the inspection and then for the review before some general or other. We well knew the reasons for the wait. The general says 11 o'clock; the colonel says 10, fearing tardiness; the major says 9 for the same reason; the captain, 8; the lieutenant, 7. And at 10:30 three privates fall on their faces from exhaustion and hunger, and the gnats swarm in the heat of the day, and after it's all over, what have you got? Three-point-two beer at the enlisted men's club and another week shot. Editorial: That Old Army of Ours, Chicago Daily News, Oct. 19, 1970, at 10, col. 1.

The soldier's dislike for inspections may be exceeded by the military lawyer's dismay at the question of whether evidence from such inspections is admissible in courts-martial. Long a troublesome and uncertain facet of the military law of search and seizure, inspections have received increasing attention in civilian courts, and military appellate decisions frequently invoke the muse of civilian case law.⁷ A comparison of the civilian and military law of inspections is the subject of this paper.

I. IN CIVILIAN COURTS

Presently civilian case law seems to distinguish three categories of inspection intrusions: home inspections, inspections within governmental facilities, and business or commercial inspections. Recent litigation concerning home inspections began

*This paper was written while the author was a student at Northwestern Law School. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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⁷See, e.g., *United States v. Welch*, 19 U.S.C.M.A. 134, 41 C.M.R. 134 (1969) (citing *Camara v. Municipal Court*, 387 U.S. 523 (1967)), and *See v. Seattle*, 387 U.S. 541 (1967)); *United States v. Kazmerczak*, 16 U.S.C.M.A. 594, 37 C.M.R. 214 (1967) (citing *Frank v. Maryland*, 359 U.S. 360 (1959)).

in 1950 with *District of Columbia v. Little*,² a legal fracas resulting from a Washington householder's refusal to unlock her door for a warrantless city health inspector.³ Mrs. Little's misdemeanor conviction under an ordinance penalizing obstruction of health inspections was overturned in a vituperative opinion by Judge Prettyman of the Court of Appeals. Reasoning that the fourth amendment⁴ protection of privacy exists regardless of the non-prosecutorial purposes of a public health inspector's intrusion into a home, the court concluded that an ordinary search warrant was required to legitimate a health inspection of a non-consenting home owner's premises and a punishment for the owner's refusal: "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection is a fantastic absurdity."⁵

Fantastic or not, *Little* was eclipsed in 1959 by *Frank v. Maryland*,⁶ by a bare majority of the Supreme Court. In *Frank*, neighbors' complaints and his personal observations caused a Baltimore health inspector to request admission without warrant, as permitted in city law.⁷ Defendant refused admittance and was fined \$20 in police court. Mr. Justice Frankfurter, tracing the substantial history of warrantless public health inspections and the fourth amendment, concluded that the latter provided both a right of privacy and, more importantly, protection against unauthorized entries aimed at securing incriminating evidence. In Frankfurter's view, the latter was only peripherally involved since the requested admission was not to gather evidence for a criminal prosecution but to determine if the health code was violated and to initiate

² 178 F.2d 13 (D.C. Cir. 1950).

³ The inspector sought to view the interior of the house because of neighbors' complaints that the occupants disdained use of the toilet facilities and allowed garbage accumulation.

⁴ "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

⁵ *District of Columbia v. Little*, 178 F.2d 13, 17.

⁶ 359 U.S. 360 (1959).

⁷ The Baltimore City Code required that dwellings be kept clean and free of vermin. "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars." BALTIMORE CITY CODE, § 120, Art. 12. Upon detection of a nuisance, the Commissioner of Health was authorized to serve the occupant with a notice to abate, and failure to comply could result in criminal prosecution.

remedies through non-criminal **processes**.⁸ Citing an urgent **need** in public health for “preventive inspections”, the Court reasoned that the sacrifice of privacy to warrantless health searches was legitimate under the provisions of the Baltimore law.

The *Frank* “no warrant” rule was repudiated by the Supreme Court eight years later in *Camara v. Municipal Court*.⁹ In *Camara* the defendant sought a writ of prohibition while waiting trial on a charge of refusing a city building inspector access to his **residence**.¹⁰ Mr. Justice White wrote for the majority that *Frank* was overruled insofar as it approved non-consensual inspections of private dwellings without a search warrant. Answering the *Frank* argument that such intrusions corroded only the peripheral fourth amendment privacy right and not the central self-incrimination right, the Court found that the amendment’s protection of privacy is as important as its protection from unauthorized quests for criminal evidence, and that criminal self protection is at stake at any rate since violations discovered by “inspection” can lead to criminal prosecution. The Court was particularly apprehensive of placing the home owner’s privacy at the discretion of the warrantless field enforcement official—rather than the disinterested magistrate. Concluding that a warrant was required for non-consensual home inspections, the Court described the nature of the administrative warrant process :

There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures. It is here that the probable cause debate is focused, for the agency’s decision to conduct an area inspection is unavoidably based on its appraisal of con-

⁸ Usually in such regulatory schemes, enforcement of the civil remedies depends on sanctions at criminal law.

⁹ 387 U.S. 523 (1967).

¹⁰ A city building inspector had learned from the building manager that the defendant, a lessor, was maintaining a private residence in a portion of a multi-unit structure where a residence was forbidden by law. On several occasions, without a court warrant, the inspector demanded admission and was refused. San Francisco law provided: “Authorized employees of the City departments . . . so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code.” **SAN FRANCISCO HOUSING CODE, § 503**. “Any person . . . [who] refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code . . . shall be guilty of a misdemeanor . . . [punishable] by a fine not exceeding . . . (\$500.00) or by imprisonment, not exceeding six . . . months or by both . . ., and shall be deemed guilty of a separate offense for every day such violation . . . or refusal shall continue.” *Id.* at § 507.

ditions in the area as a whole, not on its knowledge of conditions in each particular building. . . .¹¹

[I]t is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but will not necessarily depend upon specific knowledge of the condition of the particular dwelling."

The Supreme Court contemplated that such a diminished warrant would be necessary only on the occasion of a home owner's refusal to consent to inspection.

Recently *Camara's* diminished warrant requirement for home inspections was restricted by a 6-3 Supreme Court opinion in *Wyman v. James*,¹³ a decision examining the New York requirement that the householder allow initial and periodic home inspections by a caseworker in order to qualify for assistance under the federal Aid to Families with Dependant Children program. Recognizing that the caseworker was obliged by law to report child neglect or fraud of the welfare program found during such visits, Mr. Justice Blackmun nevertheless wrote for the majority that the intrusions were not searches in fourth amendment terms¹⁴ because their purpose was rehabilitative and the home owner's refusal to allow inspection was no crime." Even if the intrusion were categorized as a search, the majority found that the caseworker's inspection of the home was "reasonable" in the fourth amendment sense because the intrusion was motivated by a benevolent interest in the child, because the public is entitled to assurance that its funds are properly used, because the visit was unobtrusive and "friendly", because there was no other way to acquire the necessary information,¹⁶ and finally :

¹¹ *Camara v. Municipal Court*, 387 U.S. 523, 535-36 (1967).

¹² *Id.* at 538

¹³ 400 U.S. 309 (1971), *rev'g James v. Goldberg*, 303 F. Supp. 935 (S.D.N.Y. 1969).

¹⁴ Mr. Justice White, otherwise concurring with the majority, disassociated himself from the view that the caseworker's visit was not a "search." 400 U.S. at 326.

¹⁵ ". . . If a statute made her refusal [to submit to the welfare home inspection] a criminal offense, and if this case were one concerning her prosecution under that statute, *Camara* . . . would have conceivable pertinency." *Id.* at 325.

¹⁶ Mr. Justice Marshall in his dissenting opinion (*Id.* at 342) and the district court below (*James v. Goldberg*, 303 F. Supp. 935, 943-44) concluded that the desired information could be obtained without a home intrusion.

The home visit is not a criminal investigation, does not equate with a criminal investigation, and despite the announced fears of Mrs. James . . . is not in aid of any criminal proceeding. If the visitation serves to discourage misrepresentation or fraud, such a byproduct of that visit does not impress upon the visit itself a dominant criminal investigative aspect. And if the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow, then, even assuming that the evidence discovered upon the home visitation is admissible, an issue upon which we express no opinion, that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct.”

The impact of *James* on civilian home inspection is unclear. While the Court’s rationale for distinguishing *Camara* seemingly limits *James* to cases in which the defendant’s complaint is loss of government benefits for refusal to sacrifice fourth amendment rights,¹⁸ the *James* conclusion that a caseworker’s intrusion is not a search or “unreasonable” in fourth amendment terms has broad sweep. One wonders if the *James* majority could not have held on *Little* or *Camara*’s facts that the building inspector’s proposed intrusion was “not in aid of any criminal proceeding” and without a “dominant criminal investigative aspect”. It seems disingenuous to distinguish *Camara* on the notion that Mr. Camara’s potential misdemeanor penalty for refusing to sacrifice his fourth amendment rights is any more onerous than Mrs. James loss of support for her child for the same reason—particularly since the loss falls on the unerring child.¹⁹ But even had the Supreme Court required a *Camara* warrant before refusal of inspection could lead to AFDC cancellation, it is doubtful that Mrs. James’ right to privacy and freedom from intrusions for criminal evidence would have been significantly enhanced, for the facts possessed by the New York welfare authorities seem to satisfy the *Camara* criteria for a diminished warrant. Indeed, both the health and building inspectors in *Little* and *Camara* probably had enough information to secure a diminished warrant. In seeking to compromise fourth amendment rights with the need for health and safety home inspections, perhaps the Supreme Court in *Camara* fashioned warrant standards so generous as to merely require an additional *pro forma* step in

¹⁸ 400 U.S. at 323.

¹⁹ See note 15, *supra*.

²⁰ How curious that the Court in terminating child support for the James infant rationalized that to recognize the mother’s fourth amendment interests would elevate her rights over the interests of the child. *Wyman v. James*, 400 U.S. 309, 318.

the home inspection process without creating any more actual protection for privacy than existed under the *Frank* rule.²⁰

A second category of civilian inspections appears in a very limited line of decisions from lower federal courts. These cases recognize an abridgement of fourth amendment protections when the government acts to maintain discipline and security within government facilities. Thus in *Moore v. Student Affairs Committee of Troy State University*,²¹ a civil suit for reinstatement, an Alabama Federal District Court considered the legality of a warrantless and non-consensual seizure by university officials of marijuana in the plaintiff's dormitory room. The university authorities had learned of the presence of the contraband from local police. Citing the responsibility of college authorities to maintain an educational environment,²² the court denied relief, holding :

[If] . . . , the action of the college authorities . . . is necessary in aid of the basic responsibility of the institution regarding discipline and maintenance of an "educational atmosphere", then it will be presumed facially reasonable despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of students.

. . . The constitutional boundary line between the right of school authorities to search and the right of a dormitory student to privacy must be based on a reasonable belief on the part of the college authorities that a student is using a dormitory room for a purpose which is illegal or which would otherwise seriously interfere with campus discipline.^[23]

²⁰ See, Comment, *The Fourth Amendment and Housing Inspections*, 77 YALE L. J. 521,526-30 (1968).

²¹ 284 F. Supp. 725 (M.D. Ala. 1968).

²² "College students who reside in dormitories have a special relationship with the college involved. Insofar as the Fourth Amendment affects that relationship, it does not depend on either a general theory of the right of privacy or on traditional property concepts. The college does not stand, strictly speaking, *in loco parentis* to its students, nor is their relationship purely contractual in the traditional sense. . . . A student naturally has the right to be free of unreasonable search and seizures, and a tax-supported public college may not compel a 'waiver' of that right as a condition precedent to admission. The college, on the other hand, has an 'affirmative obligation' to promulgate and to enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process. The validity of the regulation authorizing searches of dormitories thus does not depend on whether a student 'waives' his right to Fourth Amendment protection or whether he has 'contracted' it away; rather, its validity is determined by whether the regulation is a reasonable exercise of the college's supervisory duty. . . ." *Id.* at 729.

²³ *Id.* 729-30. With regard to its requirement that college officials have a "reasonable belief" in order to intrude, the court explained, "This standard of 'reasonable cause to believe' to justify a search by college administrators—even where the sole purpose is to seek evidence of suspected violations of

Assuming that the Fourth Amendment applied to college disciplinary proceedings, the search in this case would not be a violation of it. It is settled law that the Fourth Amendment does not prohibit reasonable searches when the search is conducted by a superior charged with a responsibility of maintaining discipline and order or of maintaining security.”

Similarly in *United States v. Coles*²⁵ a Maine Federal District Court upheld a warrantless search of a trainee in a Job Corps Center as “a constitutional exercise of . . . [the] authority . . . [of] the Administrative Officer of the . . . Center, to maintain proper standards of conduct and discipline at the Center.”²⁶ In *United States v. Donato*²⁷ the same theory was held to justify a warrantless search of a federal mint worker’s locker, and in

law—is lower than the constitutionally protected criminal law standard of probable cause. . . .” *Id.* at 729–30. This standard for intrusion resembles the tests for “stop and frisk” (*see, Sibron v. New York*, 392 U.S. 40 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968)) and is significantly more individualized and demanding than the diminished warrant criteria in *Camara*.

²⁴ *Id.* at 730–31. Recent decisions have significantly qualified the scope of the *Moore* holding. In *Commonwealth v. McCloskey*, 217 Pa. Super. 432, 272 A.2d 271 (1970), an appeal from a conviction for possession of marihuana based upon a warrantless intrusion into the dormitory room by college and police officials, the court reversed the conviction on fourth amendment grounds and reasoned that *Moore* applied only to internal college disciplinary proceedings. More recently, in *Watkins v. Piazzola*, 9 Cr. L. REP. 2139 (5th Cir. Apr. 27, 1971), the Fifth Circuit examined another warrantless dormitory room search at Troy State University which resulted in a conviction for marihuana possession. Finding the search unconstitutional, the court held: “[T]he University retains broad supervisory powers which permit it to adopt the regulation [permitting non-consensual searches of dormitory rooms without a warrant] . . . provided the regulation is reasonably construed and limited in its application to further the University’s function as an educational institution. The regulation cannot be construed or applied so as to give consent to a search for evidence for the primary purpose of criminal prosecution. . . .” *Id. Moore, McCloskey* and *Watkins* may jointly represent the proposition that warrantless intrusions into college dormitory rooms may yield evidence for expulsion proceedings but not for criminal prosecutions. If so, the result resembles the *Camara-James* semantic compromise: “government benefits”—here an education—may be withheld on the basis of constitutionally improper “inspection” evidence, but the same evidence may not sustain “criminal” penalties.

²⁵ 302 F. Supp 99 (N.D. Me. 1969).

²⁶ *Id.* at 101. The court observed that at any rate, the administrative officer’s intrusion would not taint the evidence seized because he acted as a private citizen, not as a federal or state law enforcement officer. Curiously then, though federal law (42 U.S.C. § 2720 (Supp IV, 1969)) gave him power to search and discipline Job Corps trainees, his exercise of those powers is the act of a private citizen. Military law rejects such nonsense; “official” searches subject to the exclusionary rule may be conducted by law enforcement agents or persons having disciplinary powers over the defendant. *United States v. Rogan*, 8 U.S.C.M.A. 739, 25 C.M.R. 243 (1958).

²⁷ 269 F. Supp 821 (E.D. Pa. 1967, *af’d*, 379 F.2d 288 (3d Cir. 1968).

*United States v. Collins*²⁸ the search of a postal employee's jacket. Curiously, all four of these decisions, in asserting a diminution of the fourth amendment protection within government facilities, looked to the military law for precedent and cited *United States v. Grisby*.²⁹ *Grisby*, a decision upholding the probable cause search of a Parris Island marine's quarters which was properly authorized by his commanding officer, is *not* a precedent for the abridgement of fourth amendment protections in government facilities—but of the amendment's application by the issuance of a warrant based on probable cause. Perhaps an aberration, the inspections within government facilities tolerated in these civilian decisions exceed by far the inspection intrusions allowed in courts-martial."³⁰

The third category of civilian inspection powers, inspection of business property, was described by the Supreme Court in *See v. City of Seattle*,³¹ decided the same day as *Camara*. Defendant See was sentenced to a \$100 fine for refusing to allow a warrantless fire inspector to enter his business warehouse,³² an area not open to the public. Rejecting the proposition that the fourth amendment does not protect commercial enterprise and property, the Court held that "the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field."³³

We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure. We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product."

²⁸ 349 F.2d 865 (2d Cir. 1965).

²⁹ 335 F.2d 652 (4th Cir. 1964).

³⁰ In *Moore, Donato and Collins* the inspection power was used in direct support of a criminal investigation undertaken against the defendants; military law prohibits such a use of the inspection power. *United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965).

³¹ 387 U.S. 541 (1967).

³² "It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this Title, and of any other ordinance concerning fire hazards." SEATTLE FIRE CODE, § 8.01.050.

³³ See *v. City of Seattle*, 387 U.S. 541, 545

³⁴ *Id.* at 545-46.

Responsibility for interpreting and applying the See holding devolved to inferior courts. Limited by its own language to intrusions “upon the portions of commercial premises which are not open to the public”, See’s warrant requirement has been discounted in cases where the questioned evidence was derived from observations made in the public salesroom of a **store**³⁵ or the public portion of a private convalescent **home**.³⁶ Less clear is the limiting import of See’s holding that the warrant is required for administrative entries made “without consent”. Various courts have suggested that “consent” in this context might be found in a clear, intentional and unequivocal **waiver**,³⁷ assent indicating more than acquiescence to **authority**,³⁸ or a verbal expression of assent, less demanding than the tests traditionally employed in the criminal law of consensual **searches**.³⁹ Disagreement is sharp regarding the meaning of the Supreme Court’s words in See: “nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product.” Some courts have utilized this language to rule that the taking of a license is consent to all regulatory inspections associated with the business, and no warrant is thereafter **required**.⁴⁰ However, See’s imprimatur for licensing programs extended only to required “inspections *prior* to operating a business”, and Mr. Justice Douglas, dissenting in *James*, commented, “There is not the slightest hint in See that the Government could condition a business license on the ‘consent’ of the licensee to the administrative searches we held violated the Fourth **Amendment**.”⁴¹ In view of the great spectrum of regulatory laws requiring periodic business inspections, the license-is-consent theory is sure to be litigated before the Supreme Court.

With conflicting results, two post-See decisions have probed the permissible scope of licensed business inspections. In *Clark v. State*,⁴² a conviction for receiving and concealing stolen property, the contraband was found during a search made under the

³⁵ *United States v. Golden*, 413 F.2d 1010 (4th Cir. 1969).

³⁶ *See, People v. White*, 65 Cal. Rptr. 923 (Ct. App. 1968).

³⁷ *United States v. Stanack Sales Co.*, 387 F.2d 849 (3d Cir. 1968).

³⁸ *United States v. Kramer Grocery Co.*, 418 F.2d 987 (8th Cir. 1969).
³⁹ *Biswell v. United States*, 9 CRIM. L. REP. 2217 (10th Cir. May 18, 1971).

⁴⁰ *United States v. Thriftmart*, 429 F.2d 1006 (9th Cir. 1970).

⁴¹ *People v. White*, 65 Cal. Rptr. 923 (Ct. App. 1968); *United States v. Sessions*, 283 F. Supp. 746 (N.D. Ga. 1968).

⁴² *Wyman v. James*, 400 U.S. 309, 331 (1971).

⁴³ 445 S.W.2d 516 (Tex. Crim. App. 1969).

authority of the Texas liquor regulatory scheme.⁴³ In this case a Dallas policeman learned that the defendant liquor store operator had stolen property on his business premises. The officer went to the store and without court warrant pryed open the door of a storeroom and there discovered the stolen property. At trial, the policeman conceded that he had no knowledge of any violation of the liquor regulations at the store. On appeal, the court approved the search, finding that acceptance of the liquor license gave consent to any search of the premises for any investigative purpose. New York has taken a far more restrictive view of the permissible scope of an administrative liquor inspection. In *Finn's Liquor Shop v. Liquor Authority*⁴⁴ investigators suspected that the plaintiff had violated state regulations by selling booze on credit. The investigators were given permission to enter plaintiff's storeroom, and there they seized certain documents from the pockets of an anonymous jacket hanging in the room. These documents became the source of proof of the forbidden credit transactions. Denying the validity of the search, the court commented on the government's theory that the intrusion into the jacket was authorized by the liquor regulatory scheme or plaintiff's license:

[A]lthough the . . . hearing officer declined to suppress the evidence he recognized that the search in this case for evidence far exceeded the scope of the normal administrative inspection, stating that he was "flabbergasted that this investigator should go into property and search a coat, whether it is on a hanger or a person's back . . . , without permission or without color of right or without a search warrant."⁴⁵

Moreover, it is highly doubtful that an inspection of the 'premises' [allowed in the liquor regulatory scheme] would include an article

⁴³ "It is expressly provided that the acceptance of a permit or license issued under either Article I or Article II of this Act shall constitute an express agreement and consent on the part of the permittee or licensee that the Board, any of its authorized representatives, or any peace officer shall have at all times the right and privilege of freely entering upon the licensed premises for the purpose of conducting any investigation or for inspecting said premises for the purpose of performing any duty imposed by this Act upon the Board, its representative, or any peace officer." VERNON'S ANN. P.C., Art. 666-13(d). Other sections of the regulatory scheme declare that a warrant is unnecessary for a peace officer entering such premises.

⁴⁴ 24 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584 (1969). This litigation questioned penalties in administrative proceedings of the State Liquor Authority. Interestingly, the court ruled that the fourth amendment exclusionary rules applied to the Liquor Authority's administrative hearings. Moreover, prior determinations in criminal courts that certain evidence was constitutionally prohibited were held controlling in ensuing administrative proceedings.

⁴⁵ 249 N.E.2d at 445, n.4.

of personal property (here, the coat)—not used in the conduct of the business and whose ownership was not known.”

Also included in the gaggle of **See** interpretations, but destined to go further, was **Colonnade Catering Corp. v. United States**.⁴⁷ Here “revenueurs” suspected the appellee of refilling liquor bottles, and acting without a court warrant they asked permission to search the business premises. Denied access to a storeroom, the agents broke through the door and inside seized refilled bottles. Reversing the district court’s order to suppress the evidence, the circuit court distinguished **See** and **Camara**⁴⁸ and held the warrantless intrusion proper because the taking of a license—at least in the liquor business—constituted consent to regulatory inspection.⁴⁹ The Supreme Court, without denying this rationale, pivoted its decision⁵⁰ on the question of whether warrantless federal liquor inspectors might *break* into a premises after being refused admission. Commenting that Congress has very extensive powers to regulate the liquor industry—the power to keep exciseable and dutiable items under observation and “drag” them from concealment if necessary⁵¹—the Court found this liquor inspection outside the **See** requirement that non-consensual entry upon closed commercial premises may only

⁴⁶ *Id.* at 444–45.

⁴⁷ 410 F.2d 197 (2d Cir. 1968).

“The court stressed five distinguishing features: (1) The **Camara** and **See** inspection ordinances authorized very broad inspections whereas the federal liquor inspectors are confined to a look at the licensee’s “bottled goods” and “books”; (2) In **Camara** and **See** the subjects of the inspections were unfamiliar with the existence and scope of the inspection power, but liquor licensees well know that they are subject to such intrusions; (3) The liquor inspection statute so narrowly focuses the occasion and purpose for inspection that requiring a warrant would constitute no additional protection for the licensee; (4) Revenue purposes require surprise visits which a warrant requirement would make impossible; (5) The dealer who acquires state and federal licenses and stamps for liquor sales, unlike the unlicensed business man, knows he is entering a business which is closely regulated through inspections, and his very entry into it and acceptance of a license constitutes a waiver of privacy and an implied consent to business inspections.

““The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.” 26 U.S.C. § 5146(b) (1964). “Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit \$500.” *Id.* at § 7342.

⁵⁰ **Colonnade Catering Corp., Inc. v. United States**, 397 U.S. 72 (1970).

⁵¹ *Id.* at 76.

be compelled through prosecution or physical force within the framework of a warrant procedure.⁵² However, construing the federal inspection statute's authorization very narrowly, the Court ruled that: "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow the Fourth Amendment and its various restrictive rules apply."⁵³ Because Congress had not authorized forcible entry without warrant in sufficiently explicit terms, the seizure was held illegal. The decision implies that had Congress explicitly authorized it, breaking to enter without warrant would have been permissible. *Colonnade* does not answer the broader question of when a licensing program or special governmental interest may except a business unrelated to the liquor industry from the *See* warrant requirement. Treading bravely, the Arizona Appellate Court has held⁵⁴ that a local public health inspection of a butcher shop fits within the *Colonnade* no warrant rule, and that when a warrantless health inspector properly demands admission, the butcher

... has the option to refuse to admit the inspector and suffer the penalty for such a refusal [fine and loss of business license] or he can admit the inspector and be guilty of such violations or infractions as the inspector may find."

11. ON THE MILITARY FRONT

The military rule regarding inspection searches falls within a developed law of search and seizure—a structure substantially similar to that of civilian criminal law.⁵⁶ In military law, as in civilian practice, the most frequent counterpoise to the "inspection" search is the search authorized on a showing of probable cause. The power to make such a determination in military law is presently reposed in the commanding officer (or his delegate) having control over the place where the pro-

⁵² *Id.*

⁵³ 397 U.S. at 77.

⁵⁴ *State v. Phelps*, 12 Ariz. App. 83, 467 P.2d 923 (1970).

⁵⁵ 467 P.2d at 927. More recently, in *Biswell v. United States*, 9 CRIM. L. REP. 2217 (10th Cir. May 18, 1971), the federal court refused an expansion of *Colonnade*'s implied warrantless search powers beyond the area of liquor regulation. Holding unconstitutional the Federal Gun Control Act's inspection provision (18 U.S.C. § 923(g)) purporting to allow warrantless entry of a retailer's gun storeroom, the court suppressed non-consensual inspection evidence even though there had been no forceful entry.

⁵⁶ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION), para 152.

perty or person is located.”; For the Army, this “commanding officer” is usually a company commander or his superior in command. In the exercise of his power to authorize probable cause searches, the commanding officer acts substantially as a federal magistrate in civilian practice,⁵⁸ and his decisions authorizing such searches are reviewed under the same standards and case law that control in civilian courts.⁵⁹ Unfortunately, this military magistrate also may order or undertake an “inspection” without probable cause, and ensuing litigation may turn upon the question of which power he was exercising when certain evidence was seized.

Any discussion of military inspections requires a brief explanation of their use.⁶⁰ The inspection is generally limited to the garrison barracks and its residents. The life style there is spare: most frequently a barracks is a long room with a row of bunks or single beds on both sides of a central aisle. For his personal property, each man generally has an upright metal locker and a wooden footlocker, the latter often at the end of the bed next to the aisle and the former standing against the wall in the space between beds. All enlisted men live in such barracks during their initial military training. Thereafter, if circumstances permit, married enlisted men move into private quarters, and all commissioned officers and most senior enlisted men similarly live in more private housing—all ordinarily not subject to the classic form of inspection. Consequently, the subject of the inspection power is likely to be a young, unmarried enlisted man, relatively new to military life. Inspections are usually performed by a commissioned or non-commissioned officer who orders barracks occupants to open all containers of personal property—lockers, footlockers, suitcases and the like. Because of the superior-subordinate relationship, compliance is

⁵⁸ *Id.* In legislation offered by Senator Bayh, the military judge would become solely responsible for authorizing searches based on probable cause. S. 1127, 92d Cong., 1st Sess., § 846(b) (1971).

⁵⁹ *United States v. Hartsook*, 15 U.S.C.M.A. 291, 35 C.M.R. 263 (1965). Not infrequently this commanding officer also directs or participates in the criminal investigation in the same case in which he acts as “magistrate.” This dual role is probably not constitutionally permissible (see *Coolidge v. New Hampshire*, 9 CRIM. L. REP. 3208, 10-11, (U.S. Jun. 21, 1971)), promises a flurry of military litigation, and gives urgency to the Bayh proposal (n. 57 *supra*) to repose search authorization responsibility in military judges.

⁶⁰ See, e.g., *United States v. Moore*, 19 U.S.C.M.A. 586, 42 C.M.R. 188 (1970).

⁶¹ The ensuing observations in the text are founded on the author’s knowledge of Army practices. Hopefully with few qualifications, these views are descriptive of the situation in the other services.

assured, and the ensuing probe into personal property cannot be justified as a consensual search.

The concern of military courts adjudicating motions to suppress illegally seized evidence has been whether the inspector was merely conducting an inspection, or whether he was searching for criminal evidence—the latter requiring probable cause. The rationale for separating “searches” from “inspections” seems to turn on the inspector’s purpose. In *United States v. Coleman*⁶¹ the defendant and his barracks mates were ordered to empty their lockers and report to their unit office with their personal possessions. The defendant reported, but a sergeant, later “inspecting” the barracks to verify compliance with the orders, noted that appellant’s footlocker was still locked and apparently contained personal property. The defendant was called back and ordered to open the locker. A stolen electric razor was found which resulted in a larceny conviction. Rejecting the argument on appeal that probable cause was required for this intrusion, the Army Board of Review wrote:

[T]he facts of record . . . clearly reveal that the purpose of the sergeant’s actions was not directed toward discovering evidence to be used in a criminal proceedings. He did not suspect the appellant or any other person of crime when he ordered him to open the locker; he merely wanted to assure that the locker was unlocked, empty, clean, and in readiness for the next trainee. The presence of a locked footlocker required immediate attention and appropriate action before the former occupant departed the unit.”

[W]e are convinced that an inspecting sergeant conducting a routine military inspection of lockers . . . with no purpose in mind to seek out or locate a specific item of stolen property, is not engaged in a “search” in violation of the Fourth Amendment guarantees. . . .

If an offense is suspected and the investigation is designed toward discovery of evidence, no one would dispute the applicability of the constitutional guarantees provided by the Fourth Amendment. . . .⁶³

Essentially the same test was applied, but with opposite result, by the United States Court of Military Appeals in *United States v. Lange*.⁶⁴ There an Air Force squadron commander told his executive officer to conduct monthly general inspections—“shakedowns”—of the unit barracks “for the health, welfare and morals of the individual and also to see that his belongings

⁶¹ 32 C.M.R. 522 (ABR 1962).

⁶² *Id.* at 523.

⁶³ *Id.* at 524.

⁶⁴ 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965).

are clean, properly kept and maintained, uniforms are right, and if there's any property in his possession that does not belong there.”⁶⁵ The executive officer made no inspections until he later learned of a watch theft from a squadron member. Then recalling the order to conduct shakedowns, he ordered an inspection of the billet to check for cleanliness, government property and recently stolen property—and ordered that the inspection begin with the individuals, including the appellant, living closest to the watch theft victim. Inspection of the defendant's locker disclosed not the watch but three wallets which had been stolen some months before. Reversing the conviction, the court majority concluded that the whole inspection was tainted because the executive officer's purpose was to seek out the stolen watch, and cited with approval the following :

Comparing “search” with “inspection,” we find that a search is made with a view toward discovering contraband or other evidence to be used in the prosecution of a criminal action. In other words, it is made in anticipation of prosecution. [citations omitted] On the other hand, an inspection is an official examination to determine the fitness or readiness of the person, organization, or equipment, and, though criminal proceedings may result from matters uncovered thereby, it is not made with a view to any criminal action. It may be a routine matter or special, dictated by events, or any number of other things, including merely the passage of time. . . .⁶⁶

Dissenting in *Lange*, Chief Judge Quinn wondered whether the majority meant that after an officer learned of a theft in his unit he would be unable to have any inspection productive of admissible evidence.⁶⁷ That question was partially resolved in *United States v. Grace*⁶⁸ where the defendant, along with all other members of his unit, was subjected to a locker inspection “to check living conditions” and to determine whether unauthorized weapons were present. Before the inspectors reached defendant's locker, they received information that the defendant was keeping marijuana in the barracks. Nevertheless, the commander ordered the search continued. The defendant's conviction followed from the discovery of marijuana in his locker. Distinguishing *Lange* because the inspector there sought criminal evidence from the outset, the court held that the *Grace* inspection was valid at the outset—even though it was a quest for contraband weapons—because there was no specific suspicion

⁶⁵ 35 C.M.R. at 460.

⁶⁶ *Id.* at 461.

⁶⁷ *Id.* at 463.

⁶⁸ 19 U.S.C.M.A. 409, 42 C.M.R. 11 (1970).

of criminal misconduct. The suspicion which developed later did not invalidate the inspection of the defendant's locker because the intrusion into it was no more extensive than intrusions into other lockers.⁶⁹

111. A COMPARISON

There are great differences between what surfaces in civilian and military criminal law under the name "inspection". However, each represents an abridgement of the fourth amendment right, and each is justified as compelled by necessity. On the military side it is argued that the exigencies of military life and mission require a total destruction of the right of privacy and an incidental, but substantial, minimization of the right against self-incrimination.⁷⁰ Though the use in courts-martial of evidence derived from such intrusions may be limited, the

⁶⁹ "An inspection valid at its inception is not transformed into an illegal proceeding simply because one of the persons subject to inspection becomes the subject of a criminal investigation. Suspicion of involvement in misconduct may perhaps bring about an impermissible expansion of the scope of the inspection, but we are not confronted with that question. The record indicates that the examination of the accused's locker was no more extensive than the examination of the other lockers. On the evidence, therefore, the inspection did not become an illegal search of the accused's effects." *Id.* at 411, 42 C.M.R. at 13.

⁷⁰ The argument is most resonately made by Hamel, *Military Search and Seizure—Probable Cause*, 39 MIL. L. REV. 41, 81-82 (1968): "Common knowledge within the military recognizes that shakedown inspections serve many purposes. While they certainly are to maintain the orderliness and cleanliness of the barracks, as well as to insure the preparedness of the individual soldier, another purpose is served by enforcing the regulatory proscriptions against certain forbidden items, such as weapons, ammunition, liquor, and others. Such items are either inherently dangerous in themselves or of a nature to create a breakdown in military discipline by their presence. . . . The use of alcohol in a barracks is disruptive of discipline and, when coupled with access to weapons, increases the likelihood of serious offenses against the persons. It may be said with some degree of certainty that the majority of a soldier's barracks mates would prefer to have the prohibition of such items strictly enforced. . . . Therefore the commander must, for the protection of his personnel, enforce these regulatory proscriptions, not as a means of discovering crime but as a prophylactic measure.

"The discovery of these items may lead to punitive or non-punitive measures against the possessor, or it may result in nothing more than removal of the item from the barracks. There is, then, a 'grey area' which neither fits a true search for evidence nor is a true inspection. . . . Further, there is little reason to believe that a regularly scheduled inspection, not prompted by a report of specific criminal activity, would be condemned. . . . However, any prior knowledge of an offense, or a report of an offense, places the motivation for subsequent actions in the area where punitive consequences may be expected, and any subsequent quest for a specific item necessarily must be categorized as a search, which carries with it all the individual constitutional protections."

intrusion power is unlimited. On the civilian side, *Frank*, *Camara* and *See* also build upon the premise that abridgement of fourth amendment rights is unavoidably necessary, but the argument and result is sharply focused in each case by a particular statute and social purpose. The degree of abridgment—ranging in a continuum from *Camara's* semi-probable cause and warrant requirement, to *See's* less demanding warrant, to *Colonnade's* unlimited power to intrude on the liquor business—represents a calculation as to what is necessary in each particular law enforcement problem. However, “necessity” is a rather intangible test on which to base an abridgement of a constitutional right, its resolution is not clear nor free from dispute—as in *James*,⁷¹ and it is easily subject to overstatement.⁷² What compelling necessity exists to abridge the fourth amendment within the walls of the post office or mint, as in *Collins* and *Donato*, when private financial institutions survive without disturbing employees’ constitutional protections? When the pious phraseology is swept from *Moore*, little remains to explain why the academic society requires an especial abatement of the individual’s right to be secure in his person and property. If abatement of fourth amendment rights is unavoidably necessary for public health, welfare and security, how can it be that full probable cause existed, merely awaiting a warrant request, in *Frank*, *Camara*, *Clark*, *Colonnade*, *Moore* and *Collins*?

The military justifications from necessity arise from different considerations. Historically, the military was considered immune to fourth amendment requirements; its application there is recent.”⁷³ Though the right of privacy to which the Supreme Court addressed itself in *Camara* presumes an arms-length society, the military barracks is not such a place—there is no social privacy, life is communal. The basic fact of human proximity in the military barracks adds substance to the “necessity” arguments which civilian law recognizes in health and safety matters. From the barracks resident’s point of view, this physical

⁷¹ See, note 16, *supra*.

⁷² The Hamel observations (note 70, *supra*) regarding the necessity of inspecting barracks to remove alcohol are an excellent example of how the “necessary” may be confused with the “customary.” This pre-Zumwalt “necessity” is belied by the beer dispenser, increasingly a *de rigueur* part of barracks life.

⁷³ Weiner, *Courts-Martial and The Bill of Rights*, 72 HARV. L. REV. 1, 266 (1958); compare, Manual for Courts-Martial, United States, 1951, para 152, and United States v. Turks, 9 C.M.R. 641 (AFBR 1953), with MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION), para 152, and United States v. Dollison, 15 U.S.C.M.A. 595, 36 C.M.R. 93 (1966).

proximity and its limitations on privacy suggest that a man ought to have some enclave quite his own—his locker, for example. Contrawise, some believe that the diminution of personal privacy and the loss of a sense of individuality enhance the military elan. Except for the latter purpose, some of what is done under the name of inspection in the military seems far from compelled by necessity. It is difficult to understand what necessity is served by looking at someone's collection of underwear and socks every Saturday morning. Inspections for military preparedness make a great deal more sense in Viet Nam than in a barracks of finance clerks at a stateside post. But if military preparedness is the real purpose of the quest is it really necessary to go through all an individual's personal property—would not a glance at his military equipment suffice?

The second justification offered by both military and civilian courts for "inspection" searches founded on less than full probable cause is that they are unrelated to the criminal law. Sometimes the argument takes the form of a definition of the word "search" or a semantic inquiry into the differences between "search" and "inspection". Elsewhere the argument is that the inspector was really not out to discover crime. This justification, at the outset, misapprehends the fourth amendment. The amendment does not in itself establish an exclusionary rule of evidence in criminal law but a limitation on the power of government to intrude. The exclusionary rule is a judicial device which discourages the prohibited intrusion by making its fruits inadmissible in criminal court." The fourth amendment protects personal privacy.'; Obviously, whether the intruder is "inspecting" or "searching" privacy is lost. Second, these inspections are unavoidably part of the criminal law and are designed to produce evidence of violations of the law. Behind all inspection intrusions is a legal norm for individual conduct and usually a sanction at criminal law for noncompliance. The inspection enforces the norm (1) by discovering actual violations and (2) by intruding into the privacy in which violations might occur and thus demonstrating to the individual that violations will not go undetected and unpunished. Thus, even the "preventive" aspect of the intrusion depends for its effectiveness upon the potential of criminal punishment. The various civilian health or regulatory laws inevitably include a criminal sanction for noncompliance. What the health inspector first finds either re-

⁹ *Mapp v. Ohio*, 376 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949).

¹⁰ *Katz v. United States*, 389 U.S. 347 (1967).

sults in an immediate sanction or justifies further enforcement proceedings with a criminal sanction at the end. In either event, what the inspector sees will be the proof of the crime. One commentator has suggested that evidence discovered by inspection of residences not be admissible in a criminal action,⁷⁶ but even here, in the end, enforcement depends upon contempt proceedings for refusal to abate. On the military side, every inspection is designed to enforce existing norms by ferreting out and destroying violations. Indeed, the immediate reason, to intrude is to insure that rules are being obeyed. Each inspection is a search for violations of the law, and even that Saturday morning military underwear inspector is looking for the man who has stacked his shorts contrary to regulation.

But incredibly, in military law the question of whether inspection evidence is admissible in court hinges upon the fiction of an intrusion free from suspicion of misconduct. Precisely what state of mind in the inspector will fatally taint inspection evidence is not clear from the few reported military inspection cases. In *Grace* the United States Court of Military Appeals accepted evidence from an inspection designed to uncover prosecutable contraband, but there was no indication that the inspection was actuated by knowledge of specific criminal activity, and the evidence used against the defendant was not 'sought in the inspection. Similarly in *Lange* inspectors discovered evidence outside the defined purpose of their inspection, but the court excluded it because the inspection was a response to other reported criminal activity. If, as these cases suggest, prior knowledge or a report of *any* offense which motivates an inspection will taint resulting evidence, the question becomes *how much* knowledge or suspicion is necessary to disqualify the evidence.' Probably there is no military commander who does not,

⁷⁶ Comment, *Administrative Inspections and the Fourth Amendment—A Rationale*, 65 COLUM. L. REV. 288 (1965). Some courts and legislatures have attempted to rationalize diminution of fourth and fifth amendment rights by limiting the uses which may be made in criminal law of the evidence so discovered. See, e.g., *Byers v. Justice Court*, 71 Cal.2d 1039, 458 P.2d 465 (1969), *redd on other grounds*, 9 CR. L. REP. 3151 (U.S. May 17, 1971) (judicially created use restrictions on evidence given in compliance with "hit and run" statute); ILL. REV. STAT. ch. 38, §§ 84-1 to 84-7 (1969) (boarding search required for aircraft passengers but evidence discovered usable only in misdemeanor prosecution for carrying dangerous weapon on aircraft).

"In *United States v. Weshenfelder*, 20 U.S.C.M.A. 416, 43 C.M.R. 256 (1971), the United States Court of Military Appeals accepted evidence from an inspection of the defendant's desk in an Army office. The inspection was motivated by specific knowledge of the defendant's wrongdoing. The court's

without some justification, suspect that at least one of his enlisted men has marijuana in his personal property. *Lange* suggests that such suspicions alone are enough to taint an ensuing inspection and disqualify it as a source of criminal evidence. This "tainted purpose" rule, if candidly applied, would make most military inspections impermissible sources of criminal evidence. For example, in *Coleman*, evidence of the contents of the defendant's locker might have been excluded on the theory the sergeant inspecting it suspected that appellant was guilty of failure to obey the order to clear the barracks.

As a practical matter, the "tainted purpose" rationale of military inspections has an almost perverse result upon the privacy of barracks residents and rational law enforcement. A "know-nothing" rule results: the less specific, justifiable cause a commander has for intruding into the property of his troops, the more productive such intrusions may become of criminal evidence. Conversely, the sounder his reasons for intruding, the less admissible the results of the inspection. The inspection power does not protect the military community when the inspecting authority has suspicion of wrongdoing not amounting to probable cause—a protection available in the civilian community through the application of *Camara* and *See*. Very frequently commanders find themselves in this legal no-man's-land, and decide that it is better to seize contraband and forego action at criminal law than run the risks inherent in waiting for probable cause to develop. Such a course has obvious advantages: the necessities of the circumstance are answered, the individual's fourth amendment right of self protection is observed, and the limited sanctions of confiscation and, perhaps, social opprobrium are applied. Contrariwise, the more effective sanctions of the criminal law are unavailable, privacy is sacrificed, and the criminal law proves inadequate to meet social requirements. Finally, basing the admissibility of inspection evidence on a state of mind standard invites uncertainty and lack of candor.⁷⁸

In sum, military and civilian law started from very different foundations and have built their legal concept of "inspection" in different directions. From the individual's point of view in the civilian community, the basic rule is no intrusion upon privacy but for a warrant based upon probable cause, and *Camara*

decision seems to turn upon the authority of the defendant's supervisor to invade the office desk and the defendant's lack of a privacy right in it. Seemingly, the decision has little bearing on barracks inspections.

⁷⁸See *e.g.*, *United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965).

and *See* are minor exceptions to this rule. The exclusionary rule protects the fourth amendment by rendering inadmissible, evidence gathered by the government in violation of the privacy rule. For the individual serviceman, military law does not recognize the privacy of his person or possessions, however, the exclusionary rule to some extent prohibits exploitation of this lack of privacy for criminal legal purposes. Thus, military criminal law partially enforces measures designed to compel obedience to the fourth amendment—without enforcing the amendment itself. From civilian society's point of view, there is no right or power to intrude upon the individual except in narrowly defined circumstances. However, when such requirements are satisfied, then civilian criminal law will support the intrusion. In military society, there is an unlimited right to intrude, but military criminal law may only utilize the fruits of intrusion if probable cause existed or the purpose of the intrusion was unrelated to specific law enforcement. In civilian law enforcement the probable cause threshold for intrusion has been breached by *Camara* and *See*, but only with regard to particular statutory crimes carrying comparatively minor sanctions.⁷⁹ On the military side, the power to breach the probable cause standard cannot, in theory, be used in support of law enforcement—except by accident.

IV. SOME IMMODEST PROPOSALS

Because the “necessities” which justify government intrusion into individual privacy are more acute in the military environment, the right to privacy in military law will never be as pervasive as the civilian right. But having espoused the fourth amendment, military law ought to respond affirmatively to concepts and techniques suggested by *Camara* and *See*. These decisions proffer as constitutionally desirable an inspection process whereby “the decision to enter and inspect will not be the product of the unreviewed discretion of the law enforcement

⁷⁹ The diminished warrant requirements of *Camara* and *See* may assume increasing significance in more traditional criminal law areas. *Camara* was relied on in *Terry v. Ohio*, 392 U.S. 1 (1968) to justify stop and frisk on less than full probable cause. *Id.* at 21, 27. In *Davis v. Mississippi*, 394 U.S. 721 (1969), the Supreme Court cited *Camara* for the proposition that a diminished probable cause finding might sustain detention for fingerprinting. *Id.* at 727. The Colorado Supreme Court has instituted such a provision (Colorado Rules of Criminal Procedure, Rule 41.1), and the District of Columbia Court of Appeals, citing *Camara*, has approved detention for lineups on diminished probable cause. *Wise v. Murphy*, 8 Cr. L. REP. 2455 (D.C. Cir. March 16, 1971).

officer in the field.”⁸⁰ The United States Court of Military Appeals has not passed on the question of who may authorize an inspection, but its leading decisions concern fact situations in which the commanding officer has, at least indirectly, made the decision.⁸¹ Inferior military tribunals have affirmed inspections made at the discretion of those lower in the chain of command.⁸² While the company commander is a good deal closer to law enforcement than is the civilian magistrate, his existing role as arbiter of probable cause suggests his capacity to preside somewhat impartially over the inspection power. For these reasons, the power to inspect ought to be vested in the commanding officer of the place or person to be inspected.⁸³

The rationale of *Camara* and *See* suggest new standards for evaluating the admissibility of military inspection evidence. At the outset, there should be greater emphasis on defining the precise purpose of an inspection and determining the items to be viewed. This done, it becomes possible to discover whether a particular inspector is acting within the scope of the intrusion authorized⁸⁴ and whether the purpose of the inspection is in support of military business. Like the previous suggestion to confine the inspection authorizing power, these standards imply a narrowing of the exercise of the inspection power. But if the power to intrude arises from the necessities of military life, then it ought to be exercised no further than those necessities require. Too often the military inspection power is exercised by persons who are without a particular purpose and are “just looking”, by others whose purpose is not proper military business, or by those whose motive is purely ceremonial. The law should require better reasons than these.

Perhaps it is paradoxical to suggest such limitations of the

⁸⁰ See *v. City of Seattle*, 387 U.S. 541, 545 (1967).

⁸¹ *United States w. Weshenfelder*, 20 U.S.C.M.A. 416, 43 C.M.R. 256 (1971); *United States w. Grace*, 19 U.S.C.M.A. 409, 42 C.M.R. 11 (1970); *United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965).

⁸² *United States v. Barker*, 35 C.M.R. 779 (AFBR 1965); *United States v. Coleman*, 32 C.M.R. 472 (ABR 1962).

⁸³ The Court of Military Appeals might respond affirmatively to such an argument. In dicta the court has observed: “Both the generalized and particularized types of searches are not to be confused with inspections of military personnel entering or leaving certain areas, or those, for example conducted by a commander in furtherance of the security of his command. These are wholly administrative or preventive in nature and are within the commander’s inherent powers.” *United States w. Gebhart*, 10 U.S.C.M.A. 606, 610, n.2, 28 C.M.R. 172, 176, n.2 (1959) (emphasis added). *But cf.*, n. 58, *supra*.

⁸⁴ See *e.g.*, *Finn’s Liquor Shop, Inc. v. State Liquor Authority*, 24 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584 (1969).

military inspection power at a time when civilian intrusions on privacy are expanding. But the latter are a response to an increasing number of circumstances which necessitate a diminution of individual privacy. In the military, the necessity of unlimited intrusion powers has seemingly been assumed by military law. The time may be ahead in military courts when, on defense objection to "inspection evidence," that assumption will have to be proved.

DEFAULT OF INDEFINITE QUANTITY TYPE SERVICE CONTRACTS*

By Major Curtis L. Tracy**

I. INTRODUCTION

The United States Government contracts for a variety of services ranging from technical scientific studies to janitorial service. As is the case with all Government procurement the type of contractual instrument employed also runs the gamut from cost plus award fee to firm fixed price. Each type has its particular use and presents problems peculiar to itself. This comment will deal with indefinite quantity contracts and generally will be limited to problems relating to default termination of indefinite quantity contracts for services.

The Armed Services Procurement Regulation (hereafter referred to as ASPR) classifies an indefinite quantity contract under the general heading of "Indefinite Delivery Type Contracts."¹ ASPR further describes the indefinite quantity contract in this manner:²

This type of contract provides for the furnishing of an indefinite quantity, within stated limits, of specific supplies or services, during a specified contract period, with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class.

The indefinite quantity contract proves useful when the requiring activity is unable to determine in advance the exact quantities that will be needed during the contract period, desires to limit its commitment, or does not want to limit itself during that period to one source for all of its needs of a particular

*This comment is adapted from a paper prepared at the George Washington University. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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¹Armed Services Procurement Regulation [hereafter cited as ASPR] § 3-409 (Rev. No. 6, 31 Dec. 1969). This same classification is used by the Commerce Clearing House GOVERNMENT CONTRACTS REPORTER at para 5435. See also, 2 MCBRIDE & WACHTEL, GOVERNMENT CONTRACTS, LAW-ADMINISTRATION-PROCEDURE section 21.10 [hereafter cited as MCBRIDE].

² ASPR 3-409.3(a) (Rev. No. 9, 30 Apr. 1971).

supply or service. The Department of Defense directs that it should only be used when the "item or service is commercial or modified commercial in type and when a recurring need is anticipated."³ The author recently observed the wide usage of this type of contract by the Department of the Army in Vietnam. The extensive use was partially due to the inability in a combat situation to know the needs of an activity during any yearly period. Further, the indefinite quantity contract provides the flexibility to either switch sources or discontinue ordering from a source without the more involved termination for convenience procedure. Thus, when an Army division moves from one location to another the troops will be able to obtain laundry services without interruption as the contracting agency merely executes a new contract at the new location and ceases to order from the previous source. Also, when a division is withdrawn and the need for logistical support decreases orders for the handling of supplies by stevedoring and trucking contractors can be decreased without breaching the contract.

Although the indefinite quantity contract has great utility it also presents some unique problems. Initially, is this type of contract enforceable in any or all of its forms? McBride and Wachtel in Volume 2 *Government Contracts, Law-Administrative — Procedure* claim that in the case of the usual government indefinite quantity contract, the government may not be able to compel performance if the contractor, finding the arrangement no longer attractive, formally disavows the arrangement before receipt of additional orders.⁴ This raises the issue as to the applicability of the standard termination for default clause used by the Government.⁵ Simply stated, you must have a valid contract before it can be terminated for failure of the contractor to perform. Even if the validity of this type of contract is assumed, the question arises as to whether the contract can be default terminated in its entirety or whether the Government is limited to a default termination of those orders placed by the proper requiring activity and improperly or untimely performed or completely unperformed. In addition, service contracts of the indefinite quantity type present the contracting officer with close judgmental decisions when contemplating a default termination. Ordinarily the contractor does not just abandon the contract. The usual situation is where daily services are required and performed

³ *Id.* at 3(b).

⁴ MCBRIDE at section 21.10.

⁵ ASPR 7-103.11 (Rev. No. 6, 31 Dec. 1969 (Aug. 1969 clause)).

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but their quality is questioned. For example, the laundry is considered by the using activity or the inspector as below the standard of cleanliness or sanitation specified in the contract. Further, the contracting officer and his attorney will have to consider whether an immediate termination for default is justified under paragraph a(i) of the ASPR default clause or whether a 10-day cure notice under paragraph a(ii) is required;⁶ stated another way, whether the failure to get the red Mekong delta mud out of the 9th Infantry Division troopers' socks is a failure to timely deliver or perform or a failure to make progress.

If the contracting officer gets by hurdle 1 (validity of contract) and hurdle 2 (proper default termination) he is immediately confronted with a question of damages. The standard default clause allows the Government to reprocure, making the defaulted contractor bear the burden of excess costs incurred when the Government repurchases. But the question the contracting officer faces is whether the Government is limited to excess costs incurred on reprocurement of (1) only those delivery orders upon which the contractor was delinquent, or; (2) on the reprocurement of the amount stated as estimated in the contract, or; (3) that amount specified as the "maximum", or; (4) the actual "needs" of the Government for the period of the defaulted contract, or; (5) some other amount.

The remainder of this comment will treat the problems suggested above, which may be categorized broadly as enforceability, application of the standard default clause, and reprocurement and excess costs. The emphasis in treatment will be upon service contracts but the nature of the subject and state of the law will require broad reference to supply contracts for comparison and analogy.

11. ENFORCEABILITY

A. LACK OF MUTUALITY

That the Government has been utilizing indefinite quantity

"The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(i) if the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(ii) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure." *Id.*

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supply contracts for many years is evidenced by the case of *Willard, Sutherland and Company v. United States* decided by the United States Supreme Court in 1923.⁷ It involved a Navy contract for the purchase of coal "to be delivered . . . at such times and in such quantities as may be required during the fiscal year ending 30 June 1917." The contract also provided that "the contractor shall furnish and deliver any quantity . . . irrespective of the estimated quantities stated, the government not being obligated to order any specific quantity. . . . Deliveries to be made promptly, and . . . on call. . . ."⁸

The contract was held unenforceable because of a lack of mutuality since the Government had a unilateral right to terminate or cancel. The Court of Claims considered the same type of contract in 1930, calling it a "wish, want, or will" contract, and also held the contract unenforceable. The court said.⁹

If the contract merely binds one party to furnish whatever the other party may desire with respect to certain articles, one is bound and the other is not, and no enforceable contract results.

The court went on to make it clear it was not including requirements contracts within the classification of "wish, want or will" contracts. In the words of the court:¹⁰

"On the other hand, if one party agrees to furnish and the other to take whatever the latter may need or require for a certain purpose and those needs or requirements can be definitely ascertained, such a contract is binding and enforceable.

The holdings of the *Willard* and *Updike* cases have been followed by the Court of Claims and the Armed Services Board of Contract Appeals in more recent cases. In *Tennessee Soap Company v. United States*,¹¹ *Willard* was cited as authority to hold a Government contract unenforceable to the extent it had not yet been performed. That contract obligated the Government to order not less than \$10 worth of soap supplies. The contractor was obligated to make delivery at such times and in such quantities as ordered by the Government. The contractor failed to deliver an order for 10,000 pounds of soap and the contracting officer terminated the entire contract for default. He then reprocured by a similar contract, purchased 82,350 pounds

⁷ 262 U.S. 489 (1923).

⁸ *Id.* at 490-91.

⁹ *Updike v. United States*, 69 Ct. Cl. 394, 401-02 (1930).

¹⁰ *Id.*

¹¹ 130 Ct. Cl. 154, 126 F.Supp. 439 (1954).

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of soap under that contract and withheld the excess cost of \$2,046.31 from the funds due the defaulted contractor. The court held the contractor was obligated to deliver the 10,000 pounds which had been ordered and no more. The delivery order did constitute an enforceable obligation, since the Government obligated itself to accept and pay for a definite amount in relation to the delivery order. Thus, there was no lack of mutuality. However, the court emphasized that the contract was "clearly a separable contract, enforceable only to the degree that it was performed or that the soap was ordered"¹² and the executory part failed for lack of mutuality. In 1964 the ASBCA cited both the *Willard* and *Tennessee Soap* cases as authority for holding an Air Force indefinite quantity contract for language training services unenforceable except to the extent that calls had been issued and accepted.¹³ The contract stated that "[i]t is understood and agreed that the Government undertakes no obligation hereby to issue Calls here under."

Commentators have seized upon the broad language of the cases discussed above to declare that all indefinite quantity contracts are enforceable only to the extent of orders placed. It previously has been mentioned that McBride and Wachtel have evaluated the cases to allow a contractor who no longer finds the arrangement attractive to disavow formally the contract before receipt of additional orders without penalty.¹⁴ Also at Section 7.18, Navy Contracts Law (2d ed. 1959) the broad declaration is made that ". . . the indefinite quantity contract is enforceable against a contractor only to the extent of its defaults on orders placed." The *Tennessee Soap* case is cited as authority. If the broad conclusions of the cases and commentators were accepted without further analysis the Government would lose most of the value of the indefinite quantity contract. For example, the United States Army Procurement Agency Vietnam has procured trucking services from a contractor utilizing Government furnished trucks. The contractor's investment is minimal, as land and facilities are also Government furnished. If the contractor, with impunity, can disavow the contract before receipt of additional orders and pack up and leave, the health, morale, and lives of many soldiers will be threatened. The indefinite quantity contract was utilized because

¹² *Id.* at 159, 126 F. Supp at 442.

¹³ Sanz School of Languages, ASBCA Nos. 9571, 9572, 28 May, 1964. 64 BCA para 4257.

¹⁴ See note 1, *supra*.

of the inability to predict requirements, which can fluctuate greatly in a combat situation. To avoid such contractor action the Department of Defense uses a contractual device which will be referred to hereafter as a specified minimum Government obligation.

The Armed Services Procurement Regulation requires that indefinite quantity contracts "provide that during the contract period the Government shall order a stated minimum quantity . . . and that the contractor shall furnish such stated minimum and, if and as ordered, any additional quantities not exceeding a stated maximum which should be as realistic as possible. . . . To assure that the contract is binding, the minimum must be more than a nominal quantity. . . ." ¹⁵ This ASPR provision is further implemented by a prescribed "Indefinite Quantity" clause which provides in part as follows: ¹⁶

This is an indefinite quantity contract for the supplies or services specified in the Schedule and for the period set forth therein. Delivery or performance shall be made only as authorized by orders issued in accordance with the 'Ordering' clause of this contract. The quantities of supplies or services specified herein are estimates only and are not purchased hereby.

The contractor shall furnish to the Government, when and if ordered, the supplies or services set forth in the Schedule up to and including the quantity designated in the Schedule as the 'maximum'. The Government shall order the quantity of supplies or services designated in the Schedule as the 'minimum'.

As indicated in the "Indefinite Quantity" clause, elsewhere in the contract a minimum Government obligation is specified. Obviously, the ASPR directive to specify a minimum Government obligation in indefinite quantity contracts is an attempt to avoid having a tribunal find a lack of mutuality. The extent to which the device has cured the problem will next be considered under the heading; Adequacy of Consideration.

B. ADEQUACY OF CONSIDERATION

The doctrine of consideration does not require or imply an equal exchange between the contracting parties. Professor Corbin expresses it this way: ¹⁷

That which is bargained for by the promisor and given in exchange for the promise by the promisee is not made insufficient as a consideration by the fact that its value in the market is not

¹⁵ ASPR 3-409.3 (Rev. No. 9, 30 Apr. 1971).

¹⁶ ASPR 7-1102.3(b) (Rev. No. 1, 31 March 1969).

¹⁷ 1 CORBIN, CONTRACTS § 127.

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equal to that which is promised. Consideration in fact bargained for is not required to be adequate in the sense of equality in value.

The rule generally obtains today in federal and state courts.¹⁸ In the case of *In re American Coils Company*¹⁹ the court stated that the "extent to which [claimant] benefited is immaterial. A very slight advantage to one party or a trifling inconvenience to the other is a sufficient consideration to support a contract when made by a person of good capacity, who is not at the time under the influence of any fraud, imposition or mistake. . . . Legally, sufficiency does not depend upon the comparative economic value of the consideration and of what is promised in return." An early United States Supreme Court case upheld the validity of an agreement to guarantee payment of all credit extended to a third party for the consideration of \$1. The Court said that "a valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract, and this is equally true as to contracts of guarantee as to others."²⁰

That this is not followed today in a Government contract context is evident from the *Tennessee Soap* case where the Court of Claims refused to enforce an indefinite quantity contract as to unordered supplies even though a minimum of \$10 was specified.* It is also evident that the drafter of ASPR 3-409.3 was not convinced that any consideration specified as a minimum would make the contract enforceable. That ASPR section requires "more than a nominal quantity." Apparently, adequacy of consideration cannot be completely ignored. Adequacy is an equit-

*"The New York Court of Appeals has said that "it is commonplace, of course, that adult persons, suffering from no disabilities, have complete freedom of contract and that the courts will not inquire into the adequacy of consideration." *Mandel v. Liebman*, 303 N.Y. 88, 100 N.E.2d 149, 152 (1951). In *Nathan v. Leopold* the Illinois Supreme Court stated that "the inadequacy [of consideration] is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced." 108 Ill.App.2d 160, 247 N.E. 2d 4, 8 (1969).

¹⁸ 187 F.2d 384, 386-87 (3d Cir. 1951).

¹⁹ *Lawrence v. McCalmont*, 43 U.S. (2 How.) 426 451-2 (1844). See also, *Clark v. McGinn*, 105 So.2d 668 (Ala. 1958) which held \$1 sufficient to support a guaranty agreement. But see, *Sloan v. Sloan*, 66 A.2d 799 (Mun. Ct. of Appeals for D.C., 1949) which held that the exchange of \$1 for \$2,250 was "grossly inadequate".

²⁰ See also, *In re Greene*, 45 F.2d 428 (S.D. N.Y. 1930) where a federal district court stated at 429, that "it cannot be seriously urged that \$1 recited but not even shown to have been paid, will support an executory promise to pay, hundreds of thousands of dollars." It is noted that no cases were cited as authority. The contract considered was one between a bankrupt and a claimant who had lived in adultery with the bankrupt.

able doctrine cropping up in cases where specific performance or rescission of a contract is under review. As recently expressed, by a federal district court in South Carolina) “[c]ourts of equity have uniformly refused to enforce) or have given affirmative relief against contracts so unequal and unconscionable as to shock the sense of right of reasonable men.)”²² The New York Court of Appeals has stated:²³

Despite the general rule, courts sometimes look to the adequacy of the consideration to determine whether the bargain provided for is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms.

But what is “unequal” or “unconscionable”? The courts look for more than mere disproportionate amounts. Many use variations of the phrase “so disproportionate to value as to offend the normal sense of fair dealing which should characterize business transactions.”²⁴ Fraud, action amounting to fraud, coercion, superior advantage, and undue influence constitute grounds for rescission of contracts.²⁵

What then is the status of the type of indefinite quantity contract used by the Department of Defense today? There appears to be no room for dispute that where the contracting officer makes a reasonable) good faith estimate of the minimum needs and the contract obligates the government to order that amount, the consideration is both sufficient and adequate. The cases in point are few and often skirt the exact issues involved here. The contract in the *Willard* case did not obligate the Government in any way. It was a true “wish, want or will”, “option” or “open-ended”) contract. This is also true of the contract in the *Sanz School* appeal decided by the ASBCA. A number of cases deal with basic ordering agreements or basic purchasing agreements such as Department of Defense marine vessel repair contracts. ASPR admits these are not contracts²⁶ and requires the issuance

²² *Humble Oil and Refining Co. v. DeLoache*, 297 F. Supp. 647 (D. S.C. 1969).

²³ *Mandel v. Liebman*, 303 N.Y. 88, 100 N.E.2d 149, 152 (1951).

²⁴ *See, Shepard v. Dick*, 203 Kan. 164, 453 P.2d 134 (1969) at 138. In that case the Kansas court refused an action for specific performance of a contract to sell a farm valued at \$63,975 for a price of \$21,000. The seller was found sick, physically and mentally at the time of sale; *Sutherland v. Sutherland*, 187 Kan. 599, 358 P.2d 776, 781-82 (1961).

²⁵ *Id.*; *Osborne v. Larke Steel Co.*, 153 Conn. 527, 218 A.2d 526 (1966); *Stoner v. Stcner*, 351 Ill.App. 304, 115 N.E.2d 103 (1953) (note dicta in this case that a superior cash position by a debtor can give rise to an unconscionable bargain).

²⁶ ASPR 3-410.1(a) (Rev. No. 9, 30 Apr. 1971); ASPR 3-410.2(a)(1)

of job orders or purchase orders to constitute a binding contractual document. In fact the ASBCA has on at least one occasion cited the *Willard* and *Sanz School* cases as authority for holding that a basic purchasing agreement only obligates the Government for those calls issued under the agreement.²⁷ In that case, of course, the Board recognized that “nothing either in the terms of the BPA itself, or from the circumstances . . . obligated [the Government] to order from appellant all or any of its requirements for such [laundry] services.” However, several cases have been decided which have involved contracts which did specify a minimum and contained the **ASPR** indefinite quantity clause.

The *Tennessee Soap* case found that a minimum of \$10 was inadequate. The opinion does not indicate the amount of soap the Government estimated it would order nor does it discuss “unconscionability,” “disproportionateness,” or any of the other magic words or phrases of the cases in equity. The result of the case cannot be quarreled with, but the treatment of the issues is shoddy, Commentators and practicing lawyers would be well to beware of its generalities.

In *E. H. Sales, Inc. v. United States* the issue of adequacy of a stated minimum was considered but the holding of the case hinged on the fact that the contract required both definite items for which the Government was obligated and indefinite items. The Court of Claims decided that the obligation under the definite portion was enough to enforce the contract *against the Government*.²⁸ The case involved a contract for office machine repair services and listed **183** machines “to be furnished” for repair by the government. A minimum payment of \$100 was specified. The estimated cost of the work was \$50,000 and later increased to \$125,000. The contractor brought suit against the Government for a price increase as an equitable adjustment under the changes clause. The government defended on the grounds that it was obligated only for the \$100 minimum. The court held that the \$100 minimum provision conflicted with other contractual provisions showing an intent that all **183** listed machines were to

(Rev. No. 4, 29 Aug. 1969). See *United States Lines v. United States*, 223 F. Supp. 838 (S.D. N.Y. 1963).

²⁷ Myosook H. Whitcomb, ‘ASBCA No. 12744, 16 Jan. 1969, 69-1 BCA para 7473. See also, *Lowell C. West Lumber Sales v. United States*, 160 F. Supp. 429 (N.D. Cal. 1958) where the federal court found a “call” type contract (actually a basic ordering agreement) where the ASBCA had found a requirements contract.

²⁸ *E. H. Sales, Inc. v. United States*, 169 Ct. Cl. 269, 340 F.2d 358 (1965).

be serviced by the contractor. In dicta the court expressed its view that for the government to be obligated only for \$100 and the contractor to be required to keep facilities available to make repairs at a cost of \$50,000 ((would have been a one-sided bargain, bordering upon a lack of mutuality under the facts of this case.” Also in dicta the court said that the \$100 limitation is applicable and entirely proper in a contract where the Government does not know what its requirements will be, but it clearly has no place in a contract calling for the furnishing of specifically described

Subsequent to the decision in *E. H. Sales* the ASBCA considered the appeal of *Federal Electric Corporation*,³⁰ which involved an indefinite quantity contract for 5 sizes of generator sets. The contract obligated the government for a minimum of 453 sets and specified a maximum of 3600 sets. The total price of the minimum number of sets was \$2,893,884 which was 12.5 percent of the maximum. The Board found that the minimum constituted a (‘substantial order in itself which any manufacturer of generator sets might well desire to fill, even if standing alone.” The Board rejected the *Willard, Updike*, and *Sanz* cases as authority to hold the Federal Electric Corporation contract unenforceable as to goods yet unordered. It also considered the *Tennessee Soap* case inapplicable because the minimum there of \$10 was clearly unsubstantial. The Board further noted that neither party had cited any decision holding an indefinite quantity contract unenforceable as to goods yet unordered where the minimum was substantial.

In November 1969 the ASBCA handed down a decision in the appeal of *American Stevedores, Inc.*³¹ The stevedore contractor asked for an equitable adjustment under the changes clause, because orders for services ceased with the closing of the Brooklyn Army Terminal. In commenting on the indefinite quantity type contract the Board stated, when (‘something

“In the appeal of the New Orleans Stevedoring Company, ASBCA No. 7483, 25 Apr. 1962, BCA para 3382, the ASBCA considered a claim for increased rates for stevedoring services already ordered. The contract specified a \$100 minimum and, although the adequacy of this was not directly in issue, the Board emphasized that in a case where the volume of services actually required is much lower than the estimated amount there is no breach of contract by the Government where there was no evidence of bad faith on its part.

“ASBCA No. 11726, 11918, 12161, at 26 Jan. 1968, 68-1 BCA para 6834; see also, Redlands Oasis Trust, ASBCA No. 13979, 20 Nov. 1969, 69-2 BCA para. 7990 (Air Force contract for billeting services).

“ASBCA No. 10979, 26 Nov. 1969, 69-2 BCA para 8048.

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more than a nominal minimum is prescribed in such agreements, sufficient consideration is present, and a binding contract ensues, obligating the Government to order the specified minimum, while the contractor must, in return, respond to any Government orders, if and when issued, over the period of the contract.” This case leaves hanging the further questions as to what is “more than a nominal minimum” and what is “sufficient consideration” but it does demonstrate that the present position of the Board is that indefinite quantity contracts are enforceable as to orders not issued if *adequate* consideration is **found**.³² However, the Court of Claims has indicated that it will not favor the boiler plate “Indefinite Quantity” clause if some specific clause gives the least hint of a Government intent to contract for the Government’s requirements. In addition, if the indefinite quantity contract form proves to be an awkward procurement device under all the circumstances, that court will likely consider it as strong evidence that the parties did not intend its use. These conclusions are derived from *Goldwasser v. United States*,³³ where the price schedule of a Navy contract for printing services stated that the “[m]inimum numbers of copies to be printed . . . shall be 10,000 per issue . . .” and described the job in terms that evidenced an intent to order 50 issues. Although the contract contained an “Indefinite Quantities” clause which attempted to limit the Government obligation to \$100 the Court of Claims found the parties intended a requirements contract and in dicta took a swipe at the \$100 consideration by stating that it bordered upon lack of mutuality under the facts of the case.

It seems clear that no categorical statement can be made nor any formula advanced to measure the adequacy of a stated minimum. A minimum of \$1 or \$10 quite surely would be inadequate. One federal court indicated \$100 might be adequate in the proper fact situation. What the courts will look to is the bargaining position of the parties and the ability or inability of contracting officials to predict minimum needs. The *Federal Electric Corporation* case indicates the ASBCA might find a percentage comparison between the minimum and maximum as significant and might also see if the minimum standing alone is such that contractors would desire to bid on that amount if

³² The minimum obligation of the Government in the *American Stevedores Inc.* case was a fixed monthly charge of \$22,500 or \$270,000 annually without regard to services rendered which was to cover salaries and benefits of fixed indirect labor, depreciation of gear, and **GSA** expenses.

³³ 163 Ct. Cl. 450, 453, 325 F.2d 722, 723 (1963).

purchased as a definite quantity. It is likely the courts will also contrast the amount of the Government estimate used to evaluate bids with the amount actually ordered. The latter would be of some evidentiary weight on the issue of good faith. In short, a court or board would apply presently formulated rules of equity concerning adequacy of consideration.

111. METHOD OF DEFAULT

The standard ASPR "Default" clause³⁴ provides for administrative settlement of actions by contractors which amount to a breach of contract and would otherwise be handled by judicial tribunals. It allows the Government to terminate "the whole or any part of" the contract if (i) the contractor fails to make delivery or perform the services within the time specified or (ii) the contractor fails to perform any other provision of the contract or so fails to make progress as to endanger performance. Under the default clause someone must determine what constitutes a failure timely to perform services, and whether the particular failure requires or does not require a cure notice. Once it has been determined that there is a default under the clause, can the entire contract be terminated or is the default termination limited to those orders that have been issued?

In relation to default termination of individual orders vis à vis default termination of the entire contract, McBride and Wachtel, on the basis of the *Tennessee Soap* case, have concluded that "[the contractor] cannot be held in breach for the unordered portion of the contract as he has no legal obligation to deliver unless ordered to do so."³⁵ They add the comment that:

Proponents of this type of contract argue that there is a continuing offer on the part of the contractor to supply any quantity that the Government may order up to the stated maximum, and that this offer is irrevocable where the contract contains a stated minimum. The difficulty with this theory is that the Government has given no promise to order more than the minimum and, since the employment of the minimum to sustain a promise, the extent of the promise will effect the sufficiency of the consideration. In other words, there is no consideration for a nonexistent promise.

It is submitted that these commentators make at least two mistakes. First, they lump together all indefinite quantity contracts regardless of whether a minimum is specified. Second, it appears that the commentators place unjustified emphasis on

³⁴ ASPR 8-707 (Rev. No. 7, 27 Feb. 1970) (supply type contracts).

³⁵ 2 McBRIDE at section 21.10 (4).

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the language of *Tennessee Soap* concerning the separability or severability of this type of contract.

As to the first issue, the *Federal Electric Corporation* and *American Stevedores, Inc.* appeals clearly set forth the ASBCA position that indefinite quantity contracts which specify an adequate minimum are enforceable as to unordered amounts. Consequently, the contractor does not have the option to refuse orders even though the contractor gives the Government notice of nonacceptance of further orders. In the words of the ASBCA in the *American Stevedores, Inc.* case, "the contractor *must*, in return, respond to Government orders, if and when issued, over the period of the contract." The ASBCA is not alone in its position. A 1966 General Services Board of Contract Appeals case,³⁶ *Bi-State Packing Corporation*, supports the theory that the entire indefinite quantity contract can be default terminated. The appeal involved an indefinite quantity contract for packing of Government property for shipment. Initially the contracting officer issued a default termination letter on three orders which were not performed. Later when the contractor was delinquent on 14 orders the contracting officer issued a 10-day cure notice relating to the entire contract. The contract was subsequently terminated and the Board upheld the default termination. Unfortunately, the contractor elected not to make an appearance at the hearing and the matter was submitted on the record. However, the fact remains that the Board did fail to find anything defective in the method of default. Accordingly, it is clear that contrary to the assertion of McBride and Wachtel the contractor under an indefinite quantity type contract does have a legal obligation to deliver when ordered to do so when an adequate minimum is specified.

In relation to the severability issue, McBride and Wachtel apparently look at each order as a separate contract which must be supported by adequate consideration. This is a valid approach with basic ordering agreements and basic purchasing agreements: The intent of the parties in such arrangements clearly is to treat each order as a separate contract. Severability is a question of the intention of the parties. The single fact that several deliveries are required under the contract is not enough to conclude that the parties intended that a contract be treated as severable. The indefinite quantity clause which requires the contractor to deliver or perform up to the specified maximum

³⁶ *Bi-State Packing Corporation*, GSBGA No. 1922, 5 May 1966, 66-1 BCA para 5565.

evidences the intent of the parties that the contract not be treated as severable as to obligation. The ASBCA specifically rejected a severability argument in the *Federal Electric Corporation* appeal and found no intent by the parties to treat each order as a separate contract requiring separate consideration. It is submitted that in the absence of special circumstances the courts and boards will find that the parties to an indefinite quantity contract with the ASPR prescribed clauses have no intent that the contract be treated as severable.

A valid analogy can be made to requirement type contracts. There is little serious contention that the requirements contract cannot be default terminated as a whole. This is true in spite of the fact that under the requirements type contract, as under indefinite quantity contracts, the quantity to be purchased is indefinite and the individual order device is used to effect delivery. The consideration for the contractor's promise to perform all the Government's requirements is the reciprocal promise of the Government to purchase all its requirements from the contractor. The adequacy of this consideration, looked at from the vantage point of an executory contract, may be as doubtful as a stated minimum. The contractor must maintain a performance posture whether he receives orders or not. The risk to the contractor may be as great. But even if it is not as great, the same treatment should be accorded once the board or court decides the indefinite quantity contract does not fail for lack of mutuality. At that point the two types of contracts should be on equal footing. The *Lucas Aircraft Supply Company*³⁷ appeal is illustrative of the cases upholding a default termination of an entire requirements contract. The contractor argued in that case that he could only be held for excess costs on the amount of orders outstanding at the time of default. The ASBCA held that the contractor was liable for excess costs figured on actual procurement up to the maximum limitation in the contract. The similarity of the indefinite quantity contract to the requirements contract is so close there appears no logical basis for different treatment on the issue of default. The much more difficult problem is whether the analogy of a requirements contract to an indefinite quantity contract breaks down when the problem of computation of damages is confronted. This will be discussed in the next section entitled Recprocurement.

Once the contracting officer has been assured by his attorney that he can terminate an indefinite quantity service contract in

³⁷ASBCA No. 11167, 30 June 1966, 66-1 BCA para 5671.

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its entirety he often faces the more ticklish problem of determining whether the service contractor has failed to perform within the time specified or failed to make progress or perform some other condition. Seldom does the contractor just abandon the job. More often the services are performed but the results are not satisfactory. The problem often arises in custodial service contracts. For example, the state of cleanliness of the floors does not meet the inspector's approval or some slats of the venetian blinds remain dirty. Can the contractor be defaulted under paragraph a(i) of the default clause or is a cure notice necessary under paragraph a(ii)? The cases hold that no cure notice is necessary if a daily requirement is missed.³⁸ It would do no good to "cure" the next day as the same work has to be repeated that day. If the service is required weekly some time to cure may be necessary but it is unlikely that a court would require 10 days under a(ii). Much would depend on how many warnings had previously been given and how many infractions had gone uncorrected.

The issue that demands even more careful consideration by the contracting officer is whether what he considers unsatisfactory performance will be so considered by the Board. The **ASBCA** acknowledges that under a service contract, opinions can honestly differ as to what constitutes satisfactory work. In one appeal it said that "in order to support a termination, failures must be more than *de minimis* and be reasonably substantial."³⁹ In the appeal of *Floors, Inc.*⁴⁰ the **ASBCA** spoke in terms of substantial performance. It looked to see if a substantial amount of work had been done or whether a substantial amount of the work accomplished was below a reasonable standard. Accordingly, the test applied to service contracts seems to parallel the "substantial compliance" test applied to the supply contract in the *Radiation Technology* case⁴¹ decided by the Court of Claims in 1966. In that case the court interpreted paragraph a(i) of the Default clause as not to require strict conformance to specifica-

"Giltron Associates Inc., ASBCA Nos. 14561, 14589, 28 May 1970, 70-1 BCA para 8316; San Antonio Construction Co., ASBCA No. 8110, 29 Sept. 1964, 1964 BCA para 4479; Machelor Maintenance and Supply Corp., ASBCA No. 7789, 9 July 1962, 1962 BCA para 3411.

"Giltron Associates Inc., ASBCA Nos. 14561, 14589, 28 May 1970, 70-1 BCA para 8316; San Antonio Construction Co., ASBCA No. 8110, 29 Sept. 1964, 1964 BCA para. 4479; Rosemont Knitting Mills, Inc., ASBCA No. 6006, 28 Mar. 1961; BCA para 2986.

"Floors, Inc., ASBCA No. 5469, 3 Nov. 1960, 61-1 BCA para 2856.

"Radiation Technology v. United States, 177 Ct. Cl. 227, 366 F.2d 1003 (1966).

tions nor on the other hand to allow delivery of substantially defective goods. Therefore, a shipment or delivery of goods which is in substantial compliance with contract specifications will amount to a delivery, and the contractor must be given an opportunity to cure the nonconformity.

The *Radiation Technology* case supports an immediate termination of service contract under paragraph a(i) of the Default clause when services are rendered in a timely fashion but do not substantially comply with contract standards. If the criteria for a finding of substantial compliance utilized in *Radiation Technology* are applied to service contracts the courts will look to the nature of the services, the urgency of the Government's needs and whether extensive correction is necessary.⁴² If, after application of these factors, substantial compliance is not found, the contracting officer can default terminate immediately without issuance of a 10-day cure notice.

IV. REPROCUREMENT

Paragraph (b) of the Default clause prescribed by ASPR for service contracts provides :

In the event the Government terminates this contract in whole or in part . . . the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs. . . .

When an indefinite quantity service contract is terminated for default in its entirety the Government has to decide whether excess costs can be assessed on (1) those orders which were delinquent, (2) the minimum stated in the contract, (3) the maximum stated in the contract, or (4) the actual amount reprocured but no more than the specified maximum.

There is no doubt that the Government can reprocure to the extent of orders issued and charge excess costs to the defaulted contractor. The *Tennessee Soap* case is sufficient authority for that proposition. Such a reprocurement can be made by use of a definite quantity contract as long as the requirement of similarity is met.

It is the position of McBride and Wachtel that the Government is limited to excess costs based on reprocurement of items (or services) ordered but not delivered. They state:⁴³

⁴² See *Giltron Associates, Inc.*, Nos. 14561 and 14589, 28 May 1970, 70-1 BCA para 8316.

⁴³ MCBRIDE at section 21.10(4).

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If the contractor fails to deliver the supplies or furnish the services ordered by the Government, and the contract is then terminated for default, the liability is limited to the excess of the repurchase cost of the items ordered and not delivered. He cannot be held in breach for the unordered portion of the contract as he has no legal obligation to deliver unless ordered to do so.

The *Tennessee Soap* case is cited in support of this position. However, as noted in that case the \$10 minimum was held to be inadequate consideration. Therefore, the contract failed for lack of mutuality. The default only applied to those orders issued and excess costs were allowed only on reprocurement of the amount represented by orders issued. Accordingly, the case doesn't support the broad conclusion of McBride and Wachtel but is limited to arrangements such as basic ordering and basic purchasing agreements and situations where lack of mutuality is found.

The next proposition to consider is whether the Government can reprocure the stated minimum amount and charge excess costs based on such reprocurement. At the outset it should be noted that in assessing excess costs the Government cannot stand "merely on . . . proof that a reprocurement contract was awarded in an amount such that if performed there would be excess costs in a certain amount."¹⁴ The Government must prove that excess costs have actually been incurred. Also, previously it has been observed that the ASPR prescribes an "Indefinite Quantity" clause which obligates the Government to purchase the stated minimum. Inasmuch as there is no indefiniteness concerning that amount, under the principles enunciated, a contracting officer could reprocure by indefinite quantity contract and assess excess costs up to the stated minimum if in fact that amount is ordered by the Government. In addition, there appears to be no reason why the contracting officer could not reprocure with a definite quantity contract for the difference between the amount delivered or performed by the defaulting contractor and the minimum specified in the contract in default. In other words the indefinite quantity contract is actually a definite quantity, indefinite delivery contract up to the specified minimum and can be treated the same for purposes of default, reprocurement, and assessment of excess costs. No cases have been found which support or reject such a theory.

The much more difficult question is whether the Government can reprocure by use of either an indefinite quantity or definite quantity contract up to the stated maximum and assess excess

¹⁴ *Whitlock Corporation v. United States*, 141 Ct. Cl. 758 (1958). See also *Rimcco*, ASBCA No. 14386, 14 May 1970, 70-1 BCA para 8290.

costs based on that amount. In this case even use of the term "reprocure" is questionable. What did the Government "procure" initially? Is there any way of knowing what the Government would actually have ordered in excess of the minimum but for the default? The burden will be on the Government to prove that excess costs have been incurred due to the default of the contract. If this burden can be sustained there appears no reason why excess costs should not be based on the maximum stated in the contract limited to that amount actually ordered on the replacement contract. The theory of damages is based on making the claimant "whole." The contractor agrees to furnish supplies or services up to the maximum if ordered. His price is based on the possibility of the Government ordering up to the maximum and considers the risk that only the minimum might actually be ordered. In effect then the Government pays for the option to order any amount between the minimum and the maximum. The loss of this right should be compensated. It is submitted that under certain circumstances the Government could sustain the burden of proving that what was actually ordered under a replacement contract would have been ordered under the defaulted contract. For example, the defaulted contract may be the only contract processed to procure the requirement of a particular requiring activity evidenced by a purchase request document. This is a typical situation. It would be easy to show that the defaulted contract had been used for all prior requirements of that activity or activities reflected on the purchase request for the particular supply or service during the period of that contract. There also may be a prior history of such dealing on predecessor contracts with the defaulted contractor. Accordingly, if a replacement contract is secured to fulfill the needs of the requiring activity or activities as evidenced by the original purchase request, which in the case of the Department of the Army makes a definite commitment of funds, and orders are actually placed to satisfy those needs, the Government has shown that the supplies or services ordered would have been ordered under the defaulted contract.

Another situation may arise where a requirement is consolidated on one purchase request. This was done in the case of laundry services for the United States Army Vietnam. In that case many contracts are processed for the consolidated requirement. There may be one contract for one using activity, *e.g.*, a certain battal-

¹Stevens Manufacturing Co., ASBCA No. 3428, 58-2 BCA para 1984 (1958).

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ion. That unit would be specified in the contract and its needs would be ordered from the one contractor. Here again the contract, purchase request, prior purchase orders, and past history would be sufficient to sustain the Government's burden of proving that the amount ordered under a replacement contract would have been ordered under the defaulted contract. Of course, that unit's requirements might have been combined with that of other units and several contracts processed with different contractors at the approximate same location. This would occur if the facility of the low offeror was insufficient to satisfy the entire requirement. In such a case where one contractor defaults the orders are ordinarily placed under one of the other existing contracts. The duty to mitigate damages would require placing the order with the lowest priced contract. This, of course, might be limited by an often used clause which limits the amount of any single order. While it is not the purpose of this comment to explore all the problems and situations that might arise,⁴⁶ it has sufficiently been demonstrated that the Government could in many cases sustain its burden of proving that what actually was ordered under a replacement contract would have been ordered under the defaulted contract.

It should be noted here that there are no cases that meet the problem of excess costs upon default of an indefinite quantity contract in its entirety. Unfortunately the GSBCA decision in *Bi-State Packing* only determined that complete default of an indefinite quantity contract, as opposed to orders issued, was permissible. The issue of excess cost was not raised.

Several collateral matters should be mentioned before leaving this topic. First, under certain circumstances a careful and persuasive attorney might be able to convince a court or board that although a contract is labelled indefinite quantity it actually is a requirements contract. When a requirements contract is default terminated, excess costs can be assessed on the basis of amounts actually ordered under the replacement contract.⁴⁷ Secondly, because of the indefiniteness of the actual damage sustained by

⁴⁶ Placing orders on existing contracts to satisfy a requirement that would ordinarily have been ordered under a defaulted contract raises the issue of reprovements prior to default. It could be argued that the reprovement occurred when the initial contract was executed and not when the order was placed.

⁴⁷ Lucas Aircraft Supply Co., ASBCA No. 11167, 30 June 1966, 66-1 BCA para 5671; ABC Mechanical Maintenance Co., Inc., ASBCA No. 8670, 27 Nov. 1963; 1963 BCA para 3972; Eastern Realty and Construction Co., ASBCA No. 8066, 18 Jan. 1963, 1963 BCA para 3636; Bronze Marker Corp., ASBCA No. 5650 and 6201, 30 Sept. 1960, 60-2 BCA para 2811.

the Government upon default of an indefinite quantity contract, a liquidated damage provision might be appropriate. Thirdly, a default clause specifically designed for service contracts might be helpful. It might not be feasible to draft a clause that would assist the Government in sustaining its burden of proving excess costs but it might clarify those circumstances which trigger a default termination and also eliminate issues concerning the 10-day cure notice. Lastly, the use of troop labor might become an issue in certain default termination cases. Such use has been sanctioned." Assessment of excess costs in such cases is generally fraught with special problems but the author's opinion is that the same evidentiary methods could be utilized that were mentioned in connection with replacement contracts.

V. CONCLUSIONS

The indefinite quantity contract serves a definite need in the procurement of services. There are many circumstances where the needs of an activity cannot be determined with any degree of accuracy. The combat situation is only one illustration. The requirements contract is not always the best tool in such cases. Often it is not to the Government's advantage to be tied to one source during the contract period. One source may not be able to handle the requirement. This is often true in Vietnam where small entrepreneurs are the rule. The indefinite quantity contract provides flexibility with less obligation. Although the specified minimum should be realistic, it need not equal the estimated needs of the Government but merely approach a conservative estimate of the lower limit of that requirement. There is little doubt that such a minimum established in good faith will be considered adequate consideration for an enforceable contract. Once a valid contract exists there is no reason why a default termination of the entire contract, as opposed to individual delivery orders, cannot be accomplished. In order to make the Government whole, excess costs computed on the basis of actual procurement up to the stated maximum should be allowed conditioned on the Government's showing that the reprocured amounts would have been ordered under the defaulted contract "but for" the default. In many cases this burden can be sustained by resort to such evidence as the purchase request, the contract past history, and circumstances such as the location of the required activity and the contractor.

"See, *e.g.*, *Datronics Engineers Inc.*, ASBCA No. 10355, 66-2 BCA para 6069.

INDEFINITE QUANTITY CONTRACTS

In arriving at these conclusions the words of the Court of Claims in the *Tennessee Soap* case have been considered :

However, for the Government to undertake to charge the plaintiff with the excess cost of procuring **82,350** pounds of replacement soap which had not even been ordered and which, because of the termination of the further performance of the contract, plaintiff was not even given a chance to deliver, is too much like exacting the pound of flesh.⁴⁹

In view of the holdings in requirements contract cases the expressed horror appears a little overdramatic. Is not the defaulted contractor on a definite quantity contract in as difficult a position when he fails to make the first of many specified deliveries? Such a contractor well might be able to meet future delivery dates; but that does not prevent the Government from placing the entire contract in default and collecting excess costs based on procurement of the entire remaining contract amount.

However, the above quoted expression of the Court of Claims is not to be disregarded. It should serve as a caveat to the arbitrary selection of a minimum to be specified in an indefinite quantity contract. Such minimums should be well founded and good faith estimates of the lower limit of the requiring activity's needs for the contract period. Failing such a minimum a lack of mutuality may be found so the tribunal can avoid sticking the contractor.

Many contracting officers issue a cure notice under paragraph a(ii) of the "Default" clause when none is required. Where services (such as custodial services) are required on a daily basis and are repeated each day, a substandard performance is a failure to perform which cannot be corrected. A cure notice is not required. Where services are on a weekly or monthly basis, the 10-day cure notice still is not required to default because of sub-standard performance. The contractor is obligated to perform according to the specifications (standards) of the contract by the date specified. However, often the prudent course of action is to give the contractor some chance to correct the deficiencies. Otherwise the Board might find a substantial compliance, to prevent an unjust result. What is sub-standard or on the other hand, substantial compliance, is a pure judgmental decision. Certainly, the defects must be more than *de minimus*. Some contracts at least partially avoid this problem by a deduction from the contract price for sub-standard performance as well

⁴⁹*Tennessee Soap Co. v. United States*, 130 Ct. Cl. 154, 159, 126 F. Supp. 439, 442 (1954).

as performance failure. This affords a means of settlement short of the disputes procedure following default.

Indefinite quantity contracts are widely used for the procurement of services today. The fact that few cases can be found considering default procedures and assessment of excess costs perhaps is evidence that certain of the issues discussed herein are of small import. Hopefully, however, some clarification has been accomplished, something which has not always been done by the tribunals and commentators considering the cases.

BOOK REVIEWS

Nineteen Stars

Dr. Edgar F. Puryear

A study of the military leadership of Generals Eisenhower, Marshall, MacArthur and Patton.
Coiner Publications Ltd., 1971

I find *Nineteen Stars* as absorbing as any treatise I can recall having read on “successful military leadership.”

In fact, its final chapter—“The Pattern”—is a comprehensive treatise on that subject in itself.

I knew all four of the book’s characters well, though I knew General Marshall best of all. Criticism of them, or of the author’s treatment of them could, I feel, deal only with trivia, and to all four of these great military leaders trivia were anathema.

I do have the impression, however, that moral courage has been insufficiently emphasized. And, although the penultimate chapter deals with “luck,” “Fate,” “Providence,” or whatever one chooses to term that factor, I think it might well have been stressed again in the first paragraph of that splendid final chapter.

Other than that, I can only add that with Puryear’s simply stated basic conclusion concerning his four characters, that they were made, not born military leaders, I am in full accord.

GENERAL M. B. RIDGWAY*

Military Government Journal: Normandy to Berlin

By Major General John J. Maginnis, USA Retired
Robert A. Hart, Editor, The University of Massachusetts Press, 1971, 351 pp. \$9.50

The Army’s function of governing civilians in recently occupied or defeated nations began formally with the invasion of Normandy in **1944**. Major General (then Major) John J. Maginnis was an integral part of that beginning. Two days after D-Day, he and the Civil Affairs unit he commanded landed in Normandy and followed the combat troops to Carentan, France. From then until March **4, 1946**, when he boarded an airplane at Tempelhof Airport in Berlin to return to the United States as a

* USA, Retired, former Chief of Staff, United States Army.

Colonel, General Maginnis served successively in four different types of administrative positions that covered the breadth of the Civil Affairs field: in a small Normandy town, in a mainly rural department in northeastern France, in a large industrial province of Belgium, and in the metropolitan capital of Germany. The day-to-day experiences of General Maginnis are the substance of his book. The roles that the Civil Affairs officers assumed—as bankers, newspaper editors, coal miners, firemen, judges, public relations experts, civil engineers, procurement specialists, educators, welfare administrators, and above all, diplomats—are developed through a series of human-to-human experiences revolving around the solution of numerous major and minor problems. Intermingled with the problems and their solutions are interesting vignettes of Generals Lucius Clay and Maxwell Taylor, Lieutenant Colonel (now Senator) Strom Thurmond who was then a Civil Affairs officer, and dozens of French, Belgian, English, German, and Russian officers, bureaucrats, and civilians.

The limitations of General Maginnis' book are the limitations of General Maginnis, which he recognizes in his own introduction—"the account of a single individual . . . cannot describe all of the problems and conditions that arose in this specialized field of military operations. It does, however, reflect many of the situations common to all personnel who served at field levels of Civil Affairs and Military Government." Professor Hart, the Editor, puts the value of the book more succinctly—"Flexibility was the key to the Maginnis operation, and for that reason his memoir becomes an excellent instruction manual for all field-level diplomats."

The timeliness of this volume is, unfortunately, also its primary weakness. This book could have directly provided some techniques and general principles that would be useful in the pacification efforts that have been in operation in South Vietnam for the past few years. The reader, however, is left to determine for himself what conclusions or recommendations may be drawn from the experiences of the Maginnis operation and what guidelines might be useful in the future or what techniques might be avoided. Although any guidelines or generalizations must be their very nature by broader than a single experience may dictate and thus open to criticism, the reader cannot help feeling that some conclusions, recommendations or results would have made the book more meaningful at a time when the modern-day version of the Maginnis Civil Affairs unit is seeking so desperately to bring

some order and stability to the war-ravaged countryside of South-east Asia.

The technical excellence of this volume is not diminished by its lack of conclusions; in fact, it is to be hoped that a similar work will result from the latest phase of the Army's Civil Affairs efforts and that the two works together can provide some guidance for future Civil Affairs personnel.

CAPTAIN WILLIAM R. ROBIE*

Military Justice and the Right to Counsel

By S. Sidney Ulmer

University of Kentucky Press, 1970

Because of its brevity and relative narrowness of topic, it would probably be best to consider this writing an article in book form. Tracing the development of military justice from England to the United States, the writer places particular emphasis on comparing the development of the right to counsel in the military and civilian spheres.

By way of introduction, the writer opines that the military remakes men, as evidenced by the Code of Conduct, which attempts to fix certain behavior under certain conditions. The Pueblo Inquiries, the writer claims, indicate the possible obsolescence of the Code of Conduct. It was only public opinion, he continues, which saved the Pueblo crew from courts-martial. The writer asserts that public opinion is the primary force in effecting increased rights for servicemen, and that the public reaction to the Pueblo Inquiries indicates the public's lack of faith in the fairness of the military justice system.

Part of the public opinion problem, states the writer, is that contrary to stated constitutional norms, history does not tend to create a military establishment subordinate to the civilian establishment. The focus of public opinion on the proper status of the military establishment and respect of individual rights in the military is concentrated in wartime, moreover, when the ranks are swollen with civilians who do not understand the concept of "military offenses," and when justice tends to be more arbitrary because of the lack of time available. The public fear, and hence distrust of the military, however unwarranted, is thus understandable.

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The right to counsel evolved very slowly in British law. The sixth amendment to the United States Constitution was a definite break from British legal tradition. The American serviceman of the day, however, did not yet enjoy the right to counsel. Legal officers of the day performed both prosecution and defense functions, and command control was evident. In the nineteenth century, according to the writer, the right to counsel lagged behind other individual rights in both the military and the civilian spheres.

The first specific grant of the right to counsel in the Army was in 1916, when a military accused could be represented by retained counsel before courts-martial. The swift justice wrought against World War I soldiers led to the 1920 reforms, which introduced the board of review and a unanimous vote for the death sentence, but no increase in the right to counsel. World War II justice resulted in the 1948 reforms, which provided, *inter alia*, that if the trial counsel is a lawyer, the defense counsel must also be one. The writer notes, however, that during this time civilians, although they could have always retained counsel, were appointed counsel only when indigent and facing the death penalty.

The progression of right to counsel cases in the civilian sphere, through *Miranda*, is traced by the writer. Similarly covered are the reforms of the UCMJ, and the progression of Court of Military Appeals cases, such as *Gunnels* and *Tempia*, which followed the lead of the Supreme Court. He does not neglect to mention, moreover, that article 31, UCMJ, gave to servicemen these warnings of the right to keep silent long before the Supreme Court gave them to civilians. Considering the 1968 amendments to the UCMJ and the consistency between Supreme Court and Court of Military Appeals decisions, he concludes that in the United States an accused serviceman has a right to counsel commensurate with that of an accused civilian.

There are portions of this book that are quite noteworthy. Chapter 11, for example, contains an excellent capsule rundown of the Supreme Court's right-to-counsel decisions during the middle 1960s, from *Hamilton* through *Miranda*.

Furthermore, the writer notes with approval that military appellate courts examine the behavior and performance of defense counsel at the trial level to a greater extent than do civilian appellate courts. Chapters 13 and 14 of the book contain several military appellate decisions involving the adequacy of counsel in courts-martial. Additionally, the writer finds that the military lacks sufficient attorneys to give every accused adequate legal

counsel and suggests career retention and incentive legislation, such as bonus or professional pay, to alleviate this problem.

Unfortunately, there are aspects of the book with which one has to take issue. First, the writer begins on the premise that the military society is "a distinct subculture," and on the assumption that military justice is not liberal. It is submitted that the military has never been a distinct subculture, any more than other agencies of the federal government; and one should start out on a study with an open mind about that which one is studying.

Secondly, there are some factual errors in the book. At page 81, for example, the writer states that a counsel before general courts-martial must be a member of the Judge Advocate General's Corps, and either a graduate of an accredited law school, or a member of the bar. In fact, such counsel must be a member of the bar of his state in any case.

Most importantly, the writer notes with great disapproval the possibility that non-lawyer counsel may participate in some special courts-martial. The writer apparently does not realize that legally trained counsel must be provided in every special court-martial absent exigent circumstances, which must be appended to the record, and in which case no discharge and no more than six months' confinement may be adjudged. Moreover, the writer neglects to mention that the Supreme Court has not yet guaranteed legally trained counsel to civilians facing no more than six months' confinement, which means that they are far less likely to be provided counsel than their military counterparts. Furthermore, the writer implies that the increases in the right to counsel before special courts-martial, effected by the 1968 Justice Act, are due mostly to civilian pressure. Nowhere is there mentioned similar pressure in the Judge Advocate General's Corps, or the *Stapley* and *LeBallister* cases, which really pointed out the pitfalls of the lack of legally trained counsel in special courts.

Nevertheless, it is believed that the book is interesting and well worth reading. Despite the factual errors and misleading implications noted above, the book conveys to the public a fair account of the current status of the right to counsel in the military justice system.

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*Mention of work in this section does not preclude later review in the *Military Law Review*.

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