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# MILITARY LAW REVIEW

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HEADQUARTERS, DEPARTMENT OF THE ARMY  
APRIL 1963



## PREFACE

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

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# THE SOVIET STATUS OF FORCES AGREEMENTS: LEGAL LIMITATIONS OR POLITICAL DEVICES?\*

BY LIEUTENANT COLONEL GEORGE S. PRUGH\*\*

## I. INTRODUCTION

In the late months of 1956 and during 1957 the USSR negotiated agreements with four other Communist states,<sup>1</sup> agreements which at first blush describe a new relationship<sup>2</sup> between the Communist bloc leadership and those bloc states where Soviet troops are stationed and which have obligations of mutual defense and collective security. Taken together and with their supplemental agreements these pacts weave a neat pattern of legal formality, a tightly wrapped ball of clearly stated principles with a consistency disturbed by only a few visibly loose ends. These agreements, the Soviet status of forces documents, or more accurately called base rights treaties, remain in comparative obscurity, possibly belying their true importance. It is the purpose of this study to endeavor to unravel the loose ends, to search out whatever substance the documents may contain, and to put in proper perspective the agreements and what they represent.

Ten years after the end of fighting in World War II, the USSR had troops stationed in four foreign states—Poland, Hungary, Rumania, and East Germany (the "German Democratic Republic" or GDR). With the exception of East Germany, the several

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<sup>1</sup> Agreement on the Legal Status of Soviet Troops Temporarily Stationed in Poland, Dec. 17, 1956, 266 U.N.T.S. 179; Agreement Concerning Questions Connected With the Presence of Soviet Forces in the Territory of the German Democratic Republic, March 12, 1957, 285 U.N.T.S. 105; Legal Status of Soviet Forces Temporarily Stationed in the Territory of Rumania, April 15, 1957, 274 U.N.T.S. 143; Agreement on the Legal Status of the Soviet Forces Temporarily Present on the Territory of The Hungarian People's Republic, May 27, 1957, in 52 Am. J. Int'l L. 215 (1958).

<sup>2</sup> For a current review of the bloc organization, see Brzezinski, *The Organization of the Communist Camp*, 13 *World Politics* 1, 175-209 (1961).

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People's Republic were bound together with the USSR in a tight network of bilateral treaties of "friendship, cooperation, and mutual assistance," providing in general for mutual security and varying from each other in only slight degree.<sup>3</sup> In reality, the concept of mutual security was hinged upon the right and obligation of the Soviet Army to enter the territories of the People's Republics and to remain there in case of war or threat of war.<sup>4</sup> In 1955 there was superimposed over these bilateral treaties a multilateral one, popularly called the Warsaw Pact,<sup>5</sup> a counterpart to the North Atlantic Treaty Organization.

The Warsaw Pact contained no provision concerning the exercise of jurisdiction, that is, the right to try and determine legal issues arising from the stationing of troops of one state in the territory of another. In truth, no need for such an agreement appeared necessary. The bloc nations, each being under Communist Party domination, following a philosophy of law similar to that of the Soviet Union, and actively courting Soviet friendship, simply exercised no jurisdiction over the Soviet forces stationed there. Instead, the Soviets applied to their own troops abroad the principle of extraterritoriality, which is to say that Soviet law followed the troops wherever they were stationed so that they continually remained subject to that law, and only that law was permitted to be applicable to them.

Almost a year and a half passed after the signing of the Warsaw Pact, during which no publicity concerning any need for a base rights or status of forces agreement disturbed the apparent calm of relations between the USSR and its satellite states. Then, rapidly, within less than six months, four bilateral nonreciprocal status of forces agreements were signed by plenipotentiaries of

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<sup>3</sup> E.g., Treaty of Friendship, Mutual Aid and Post-War Co-operation Between Poland and U.S.S.R., April 21, 1945, 12 U.N.T.S. 391; Treaty of Friendship, Co-operation and Mutual Assistance Between Romania and U.S.S.R., Feb. 4, 1948, 48 U.N.T.S. 189; Treaty of Friendship, Co-operation and Mutual Assistance Between Hungary and U.S.S.R., Feb. 18, 1948, 48 U.N.T.S. 163; Treaty of Friendship, Co-operation and Mutual Aid Between Poland and Hungary, June 18, 1948, 25 U.N.T.S. 319; Treaty of Friendship, Co-operation and Mutual Assistance Between Poland and Romania, Jan. 26, 1949, 85 U.N.T.S. 21.

<sup>4</sup> Brakas, *Legal Status of Soviet Troops in Central and Eastern Europe* 6 (1959) (Draft, Legal Committee, Assembly of Captive European Nations).

<sup>5</sup> Treaty of Friendship, Co-operation and Mutual Assistance, May 14, 1955, 219 U.N.T.S. 3. This treaty was signed by Albania, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania, and the U.S.S.R. See Gavrilovic, *The Warsaw Treaty Organization: Brief Data on Its Significance, Status, Constitution, Purpose, and Operations* (1960) (Unpublished manuscript, Dickinson College).

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the USSR each with a bloc state where Soviet troops were stationed.<sup>6</sup>

There instantly arises a question as to why the agreements were entered into to begin with and what purposes they were expected to serve. Do these agreements in fact establish a formula for the exercise of jurisdiction to resolve military related legal questions arising between the nations concerned, thus creating at least some degree of legal limitation upon the USSR? Or are these agreements merely political tools, performing political tasks under cover of a treaty of apparent binding force? Are these treaties intended to be realistic statements of effective law? Or do they accomplish some symbolic purpose far more useful to the Soviets than mere regularization of previously established legal relationships?

### II. BACKGROUND TO THE TREATIES

#### A. THE DEVELOPMENT OF THE MODERN STATUS OF FORCES TREATIES

The stationing of troops of one sovereign nation, usually called in modern terms the "sending state," on the territory of another, the "host state" or the "receiving state," for substantial periods of peacetime, presents a galaxy of problems which inevitably find their way, in one form or another, into courts of law.<sup>7</sup> The underlying question in the legal solutions to these problems is the choice of law to apply, for there is far less difficulty in determining whether a particular act or omission is legal within the laws of a certain state. The choice of law is restated as an aspect of the problem of jurisdiction, that is, who has the right under the circumstances to try and determine the issue.

The basic rule to determine choice of law involving foreign persons in courts of a host state hinges upon the doctrine of territorial sovereignty.<sup>8</sup> That is to say that the host state normally has exclusive jurisdiction over all things and persons within its own territory, subject only to certain exceptions.<sup>9</sup> Under tradi-

<sup>6</sup> See Bykov, *Arguments on the Legal Status of Soviet Troops Temporarily Quartered Abroad*, 1958 Soviet Yb. Int'l L. 381-86 (1959). An English summary accompanies the Russian text.

<sup>7</sup> For a general review of the problems, see Snee and Pye, *Status of Forces Agreements: Criminal Jurisdiction* (1957).

<sup>8</sup> *Hearings on House Joint Resolution 309 Before the House Committee on Foreign Affairs*, 84th Cong., 1st Sess. 100 *et seq.* (1955, 1956).

<sup>9</sup> See Ass'n of the Bar of the City of New York, *Comm. on Int'l L., Report on Status of Forces Agreements* (1958).

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tional international law the host state, in the absence of a special agreement, has a strong claim to exclusive jurisdiction over members of visiting forces stationed within its territory, at least for offenses other than those offenses arising out of any act or omission done in the performance of official duty.

To insure the maximum legal protection possible for its forces stationed overseas in the territory of other sovereign states, the United States took the lead shortly after World War II to work out a series of understandings, now commonly referred to as status of forces treaties or agreements. The forerunner of all such treaties is the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOF), a reciprocal, multilateral treaty entered into in London on June 19, 1951, by twelve signatory nations, including the United States. On July 15, 1953, the United States Senate rendered its advice and consent to ratification of the treaty, including therein certain provisions aimed at safeguarding the constitutional rights of servicemen subjected to a foreign court's jurisdiction.<sup>10</sup>

The NATO SOF, and a subsequent similar agreement operable in Japan,<sup>11</sup> have since their inception permitted the relatively smooth functioning of legal processes for thousands of cases. The success of the general SOF scheme is attested to by the small amount of friction that has developed in this area usually marked by great sensitivity.

The SOF covers a wide variety of legal problems, but the most controversial by far is the provision dealing with the exercise of criminal jurisdiction.<sup>12</sup> A formula is established to determine

<sup>10</sup> Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951 [1953] 4 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2848, 199 U.N.T.S. 67 (hereinafter referred to and cited as NATO SOFA). There were earlier U.S. treaties dealing with jurisdiction over troops abroad, but none which employed a formula such as in the NATO SOFA treaty. Examples of earlier treaties are: Agreement With The Philippines Concerning Military Bases and Exchange of Notes, March 14, 1947, 61 Stat. 4019, T.I.A.S. No. 1775, 43 U.N.T.S. 271; Agreement Concerning A Long-Range Proving Ground for Guided Missiles To Be Known As "The Bahamas Long Range Proving Ground" and Exchange of Notes, July 21, 1950, 1 U.S.T. & O.I.A. 545, T.I.A.S. No. 2099, 97 U.N.T.S. 193; Agreement With Saudi Arabia Relating to the Use of Facilities and Services at Dhahran Airfield by the Transient and Supporting Aircraft of the United States [Exchange of Notes], June 18, 1951, 2 U.S.T. & O.I.A. 1466, T.I.A.S. No. 2290, 102 U.N.T.S. 73.

<sup>11</sup> Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, With Agreed Minutes and Exchange of Notes, Jan. 19, 1960, 11 U.S.T. & O.I.A. 1652, T.I.A.S. No. 4510.

<sup>12</sup> NATO SOFA, art. VII.

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whether the host state or the military courts of the sending state have the right to proceed in a particular case. A "waiver" provision permits either state to yield its right to exercise the jurisdiction. Another important provision is concerned with the settlement of claims by persons of one side against those of the other.<sup>13</sup> Yet others deal with problems of entry and exit, use of realty and facilities, vehicle licensing, taxation, customs laws, currency, and exchange regulations.

### B. SOVIET RELAXATION OF CONTROLS

In 1955 the Soviet Union relaxed their stringent controls over the satellites in what has been called a decompression,<sup>14</sup> or a gradual release of pressure within the restricted bloc area. Others have referred to this change in attitude as the thaw in solid bloc relations. In any event, that year saw a serious effort by the Soviets to find a new formula for relationships within the bloc, to give greater authority to each satellite in solving internal problems with diminished Soviet interference, while at the same time preserving bloc solidarity.

The Soviets inaccurately measured the "head of steam" that had collected within the bloc. The relaxation of controls was answered by increasing clamor for greater internal freedom, by the voicing of dissident policies, and by revisionism. "The thaw was turning into a deluge."<sup>15</sup> By mid-1956 the Soviets were confronted in several key areas with resistance unlike anything they had experienced since the early days of the bloc.

Soviet response took several forms. Military power was used to crush or to persuade by intimidation. Political maneuvers were employed to remove ineffective or unreliable satellite leaders, substituting in their place obedient servants or at least acceptable and cooperative followers, albeit of a nationalistic stripe. Finally, the Soviets made certain concessions in the form of promises and

<sup>13</sup> NATO SOFA, art. VIII.

<sup>14</sup> Dallin, *The Soviet Stake in Eastern Europe*, 317 Annals 138-45 (1958).

<sup>15</sup> Brzezinski, in his valuable book, *The Soviet Bloc, Unity and Conflict* (1960), wrote: "The Soviets, conscious of their power position, yet wanting to place their leadership on a more reliable basis, were not primarily interested in a division of power, but in a *voluntary* acceptance of their primacy. To Moscow, a common core and center was a requirement dictated by the instability of the East European regimes and by the hostility of the non-Communist world. . . . Alas, by September 1956, Soviet redefinitions could no longer contain the developments nurtured by the dissipation of Stalinism and crystallized by the reconciliation with Belgrade. The thaw was turning into a deluge." *Id.* at 206.

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agreements, the latter category including the status of forces agreements of this study.

### III. THE CONTENT OF THE SOVIET STATUS OF FORCES TREATIES

#### A. THE FORMAL STATEMENT

The first agreement, dated in December 1956, was with Poland.<sup>16</sup> The other three quickly followed, using similar format. Each employed a remarkably similar pattern of a preliminary joint statement to the effect that the respective governments decided to conclude the agreement and for that purpose had appointed plenipotentiaries, who were in each case the officials heading the ministries of foreign affairs and defense.

##### 1. *Similarities*

All four treaties recognize the stationing of Soviet troops as being only temporary, reaffirm the sovereignty of the satellite, and announce that the troops may not interfere in the internal affairs of the bloc members concerned.<sup>17</sup> None of the four treaties refers to the permission for Soviet troop presence being thereby granted, but each presumes such presence.

Each of the agreements provides for consultation or agreement between the satellite and the USSR regarding strength and places of stationing of the Soviet troops. The satellites are permitted some voice regarding military maneuvers of Soviet troops.

In each agreement, using almost identical language, the Soviet force personnel and members of their families are declared obliged to respect and abide by the local satellite law, and no distinction is made between civil or criminal laws.

The wearing of the military uniform and the carrying of arms by Soviet personnel is authorized in accordance with the provisions

<sup>16</sup> Legal Status of Soviet Forces Temporarily Stationed in Poland, Dec. 17, 1956, 266 U.N.T.S. 179. For a chronological table of the Soviet treaties concerning the status of their forces and representative extracts of these agreements, see the Appendix to this article.

<sup>17</sup> These principles were breached early. Imre Nagy, deposed as premier in Hungary when the Soviet Army suppressed his government on November 4, 1956, sought refuge in the then-friendly Yugoslavian Embassy. Under false pretences he was enticed to leave the Embassy, arrested by Soviet soldiers, taken across the border to Romania, and subsequently, without any sort of extradition proceedings, returned to Hungary for trial. His execution was announced in June 1958. At the time of the execution Soviet troops maneuvered around Budapest. Assembly of Captive European Nations, *A Few Facts on the New Colonialism* 24 (1960).

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of the Soviet regulations. The treaties require Soviet registry and marking of military vehicles, notice of the markings to the local satellite, and recognition of the validity of the Soviet vehicular licenses without further examination or fee.

A formula for the determination of jurisdiction in criminal matters provides for application of local law generally, except where the alleged offense is committed when official duties are being carried out or if the accused committed his offense against the USSR exclusively or the parties concerned are Soviet force personnel or their families. Soviet law applies in the case of these "exceptions," but there remains an area of concurrent jurisdiction not clarified by this formula. All four treaties are silent regarding the matter of former jeopardy or the disposition of the cases which are mixed, that is, where there are two or more victims or two or more accused, at least one of each being Soviet and one being a satellite citizen. Recognition is given to the exercise of jurisdiction in the satellite state by a Soviet military court in certain instances. Finally, in the criminal matters there is a provision for the making of a request for transfer or jurisdiction (similar to the "waiver" procedure in the NATO SOF).

Mutual assistance in the performance of certain legal tasks is promised and to be implemented in supplementary agreements.

All four treaties provide for recall, upon request of the bloc member state, of Soviet force personnel convicted of violating the local law. Such recall presupposes conviction of the accused, without regard to nationality of the forum, and request by the competent authorities.

The satellites undertake to hold persons, committing offenses against the Soviet troops or members of their families, responsible in the same fashion as if the offense had been committed against members of the armed forces of the satellite concerned.

Soviet use of certain realty and services requires supplemental agreement of the satellite government. Provisions covering claims arising on either side, individually or in the governmental capacity, are quite similar to one another. Also similar are provisions for the return without indemnification of certain facilities by the Soviets when no longer needed.

An article concerns itself with definitions of who is to be considered a member of the Soviet forces and what is meant by the term describing the place of stationing of Soviet troops. In all cases Soviet army servicemen and civilians who are Soviet citizens employed with the forces are included in the term "members of the Soviet forces."

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### 2. *Essential Differences*

Scrutiny reveals marked differences which conceivably reflect disparity in the Soviet relationship and the varied circumstances of each satellite.<sup>15</sup>

#### a. *The preamble*

The most striking difference is found in the preamble. The Polish treaty has no language purporting to give the reasons for the execution of the treaty, although at the time of the Soviet declaration of October 30, 1956, the Polish press stated the reasons for the Soviet troop presence in language similar to that employed in the preambles of the other three treaties.<sup>17</sup> The other three treaties note that the Soviet troops' presence is necessary in the respective areas to strengthen peace in Europe, and because of the remilitarization of West Germany and the stationing of NATO troops in Western Europe. All three of these preambles are replete with phrases designed to show the desire of the Soviet Union and the bloc members to bring about peace but that this desire has not been fulfilled because of the presence in Europe of aggressive military blocs (NATO), that the presence of the Soviet troops is in the interests of both the USSR and the satellite, as well as other European nations, and finally, emphasized with repetition, that the Soviet troops' presence is temporary.

These preambles, each a little different but enough alike to be dealt with together, endeavor like the entire treaty itself to instill belief in the sovereignty of the satellite concerned by showing its capacity to enter into formal agreements with the senior member of the bloc, to offer a favorable explanation for Soviet troop presence, to give added legal basis for the Soviet troop presence, to capitalize on the satellites' fear and distrust of a remilitarized unfriendly Germany, to place a great share of the blame for the state of things upon NATO, and in general to cast the Soviets in a favorable light with their satellites (and quite possibly in the eyes of so-called neutrals).<sup>20</sup> The preambles to the three SOF's with East Germany, Hungary, and Rumania appear

<sup>15</sup> See Malone, *A Comparative Study of the NATO SOFA and the Warsaw Pact SOFA* (1959) (Unpublished manuscript, Columbia University). See also Croan and Friederich, *East German Regime and Soviet Policy in Germany*, in *The Soviet Satellite Nations 44-63* (Hallowell ed. 1958); Brzezinski, *supra* note 2, at 186 *et seq.*

<sup>17</sup> See National Communism and Popular Revolt in Eastern Europe 274-275 (Zinner ed. 1956), in which press accounts and a speech made by Wladyslaw Gomułka in Warsaw on October 24, 1956, before a citizens' rally, are quoted.

<sup>20</sup> These are among the several criteria established by Peter Grothe in his book, *To Win the Minds of Men* (1958), as the broad tasks of Soviet propaganda in East Germany.

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to be modeled along lines appealing to their audience, both internal and external.

### *b. Consultation regarding Soviet troop strength and dispositions*

Here is found a sharp distinction between the agreements entered into with Poland, Hungary, and Rumania from that with East Germany. In the case of the three, Soviet troop strength and area of stationing are to be defined in a separate agreement, but East Germany merely has the right of consultation. Similarly, troop movements outside the area of stationing require consent of the proper authorities of the satellite, except that East Germany is given no such prerogative. Training and maneuvers outside of the area of stationing must, in the case of the three, be on the basis of agreed plans but East Germany has only the right to agree upon terrain to be used for the maneuvers.

### *c. Traffic and safety regulations*

Except for the East German agreement, the treaties are silent regarding the responsibility for transportation safety and the applicability of traffic regulations. In the East German case the Soviet authorities are charged with safety supervision of the transportation means employed by their forces, and the German traffic regulations are made applicable. It does not seem that these constitute important concessions to the East German authorities.

### *d. Criminal jurisdiction*

There are no important differences in the four treaties in this regard, each one being substantially the same formula, that is, satellite law is applied as a general rule in cases of crimes or offenses committed by persons forming part of the Soviet force or members of their families. Satellite military courts may deal with Soviet military personnel in such cases. This general rule does not apply, however, where the crime or offense is against only the Soviet Union or persons forming part of the Soviet force or their families, nor does the rule apply when the crime or offense is committed while carrying out service duties by persons forming part of the Soviet forces. A waiver request may be made in any case.

### *e. Crimes against the Soviet personnel*

The Polish, Hungarian, and Rumanian treaties refer in this regard to offenses committed against the Soviet forces and soldiers and servicemen forming part of these forces. The East German treaty, however, refers to offenses committed against the Soviet forces and their members. The distinction would seem to be negligible, however, under these circumstances. Local satellite

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law properly requires that perpetrators of crime against persons be punished, regardless of the identity of the victim.<sup>21</sup>

### *f. Soviet use of facilities and realty*

These provisions result in some special advantages for the Polish side, slightly less for the East German than for the others. In the Polish treaty reference is made to terms of Soviet payment for the transit of troops and supplies across and within Poland.<sup>22</sup> A special proviso includes application of the treaty in its key aspects (jurisdiction, claims, use of facilities and realty) to troops passing through as well as to troops stationed within Poland. These are omitted in the other three treaties. The Hungarian and Rumanian agreements refer to previously existing arrangements regarding Soviet utilization of facilities and realty, and they require that these arrangements be re-examined and brought up to date. The East German agreement, however, guarantees to the Soviets the use of facilities and realty they presently use. In short, the German agreement assures the Soviets of the continued use of such facilities as the Soviets require, only the conditions and methods of use to be subject to further agreement. There is no declared undertaking by the USSR to pay East Germany for such use.

### *g. Entry and exit*

Only the Polish treaty has a special provision requiring a separate agreement to define the mode of entry and exit and the documentation of Soviet military units, force members, and members of their families. Presumably in East Germany, Hungary, and Rumania the satellite governments are given no such opportunity.

### *h. Taxes, customs, currency, import, and export*

Unique in the Polish agreement is a provision requiring a separate agreement subsequently to be executed to deal with these matters insofar as they relate to Soviet troops stationed within the country. The language of the provision is not applicable to Soviet troops passing through en route to Germany. Omission of such matters from the Hungarian, Rumanian, and East German

<sup>21</sup> Even before the agreement came into effect, East Germany tried a man for spying upon the Soviet troops in March 1957 for which he was sentenced to 6 years' confinement. *New York Times*, March 25, 1957, p. 8, col. 3. It is not known what offense he could have committed against East Germany prior to the effective date of the treaty.

<sup>22</sup> In June 1957, the Poles presented a bill for \$75 million to the Soviets for post-war costs connected with the transportation of Soviet troops across Poland to Germany. No payment of this demand has ever been reported, and it is known that at the time the Soviets were cool to the request. *New York Times*, June 17, 1957, p. 1, col. 8.

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treaties leaves a hiatus which would, in the normal application of legal principles, subject the Soviet personnel in such countries to satellite taxes, duties, customs, and currency regulations, just as would be a citizen of the satellites. Considering the number of Soviet persons affected in East Germany<sup>23</sup> the omission in that treaty seems especially odd. In any event, it appears the Polish treaty gives the Poles an advantage not extended to the other three satellites, and certainly it is a further recognition of the stated regard of the USSR for Poland's sovereignty and internal independence.

### i. *Claims against the Soviets*

In general the Soviets undertake to pay claims for material damage caused by the Soviet forces or individuals forming part of these forces, whether the injury or damage was incurred by act or omission in connection with official duty or not. In official duty cases the amount is determined by a Mixed Commission applying local satellite law. If injury or damage was caused by a force member not in connection with his official duties, or if it was caused by a member of the family of such personnel, the value of the compensation is to be fixed by a local satellite court.<sup>24</sup> An important difference arises in connection with claims in East Germany. In that instance application is not made to the Mixed Commission or to the East German courts unless the amount of the damages cannot be fixed by agreement between the "interested parties." There is thus imposed in East Germany the added requirement that the injured party first endeavor to obtain an agreement with the tortfeasor for the amount of the damages and then show inability to come to an agreement as a prerequisite to the Mixed Commission or the court obtaining any jurisdiction in the matter. Such a provision should encourage early settlement of many claims before they become matters of official recognition.<sup>25</sup>

The Polish, Hungarian, and Rumanian treaties provide that the indemnification funds be delivered (within three months after

<sup>23</sup> Latest reports indicate that there are about 400,000 Soviet military personnel in East Germany. New York Times, Sept. 10, 1961, p. 6, col. 1. Soviet civilians are estimated to number about 80,000.

<sup>24</sup> A special agreement concerning claims activities was entered into between East Germany and Russia on December 27, 1957. Also of application is Article 25 of the U.S.S.R.-East Germany "legal assistance" treaty of August 2, 1957. See note 33 *infra*. Damages caused by vehicles of the Soviet Army are adjusted under contracts by the German Insurance Institute without appeal.

<sup>25</sup> Maneuver claims are a frequent source of requests for indemnification in any army. It is known that Soviet and other Warsaw Pact troops, when operating over farm areas, for example, publish leaflets to ask the farmers not to be unhappy at the ruined realty because the tanks operated there, but to think instead of the need for such a maneuver against the West.

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the finding of responsibility becomes binding) to the satellite authorities and that such authorities must then disburse the funds to the persons or institutions suffering the damage. In the East German treaty there is a similar operation, except that there is no specific requirement that the East German authorities pass the indemnity received from the Soviets to the injured party.

Outstanding unsettled claims for compensation arising before the execution of the treaties are in all cases referred to the Mixed Commission, but in each instance there is a different cut-off date. The East German treaty considers only claims arising subsequent to the effective date (October 6, 1955) of the Treaty of September 20, 1955; the Hungarian and Rumanian treaties only those subsequent to the Treaty of Peace (February 10, 1947). The Polish treaty is without any limitation as to time.

### j. *Claims in favor of the Soviets*

Each of the treaties includes a provision whereby the satellite state agrees to indemnify the USSR for damage caused to the Soviet forces, force personnel, or members of their families, by satellite institutions or as a result of actions or negligence of satellite citizens.

A distinction exists in the East German treaty provision in that, once again, as in the case of claims against the Soviets, the Mixed Commission of the East German courts are not appealed to until it is first determined that there can be no agreement between the interested parties concerning the fixing of damages.

There is no express provision in the Polish treaty for claims in favor of the Soviets outstanding and unsettled at the time of the execution of the treaty. Presumably the claims provision would have no retroactive effect unless so stated, thus the treaty machinery would not be employed for cases arising prior to the treaty. The Rumanian, Hungarian, and East German treaties do have retroactive effect, however, thus making it possible, for example, for the Soviets to obtain compensation from the Hungarian state for injuries and damages incurred by the Soviet Army and military personnel during the October 1956 uprisings.<sup>26</sup> The concession to the Poles is in this case a dramatic and real one.

<sup>26</sup> The Hungarian government is required to repay the Soviet Union for credit extended to repair the damages inflicted by Soviet tanks and bombers in Budapest during the 1956 revolution, according to Assembly of Captive European Nations, *Hungary Under Soviet Rule V*, p. 18 (1961). The New York Times reported that the Soviets ordered East Germany to pay the full costs incurred by the Soviet Army in crushing the anti-Soviet riots of 1953. The total was not announced, but \$1,260,000 was said to have been paid. Oct. 20, 1953, p. 8, col. 6.

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### k. *Termination of use of facilities and realty*

While each of the four treaties has a provision dealing with the return of facilities and realty by the Soviets to the satellite concerned, each is worded slightly differently. For example, the Polish treaty speaks of requiring return to the Polish authorities "in a state fit for use" when the facility is vacated by the Soviets. No mention is made of indemnification. A separate agreement will define matters connected with the transfer of such facilities, including those constructed by the Soviet troops.<sup>27</sup>

The East German treaty speaks only of return of such facilities when no longer needed, and specifically disclaims any obligation by East Germany to indemnify the Soviet for construction, repair, or adaptation. No mention is made of the condition required of the property on its return. A separate agreement will deal with problems connected with the return of these facilities.<sup>28</sup>

The Rumanian treaty states merely that in case of release by the Soviets of a facility it shall be returned to the Rumanian authorities. A special convention will regulate problems in connection with such transfer. The Hungarian treaty has like language.

### l. *Resolution of problems arising in connection with troop stationing*

The Polish, Hungarian, and Rumanian treaties each contain a provision requiring the appointment of plenipotentiaries by each side, the Soviet and the satellite concerned, to solve current problems linked to the stationing of Soviet troops on the satellite territory. No such provision exists in the East German treaty. There is instead, however, a unique and important provision reading:

In case of threat to the security of the Soviet forces on the territory of the GDR, the High Command of the Soviet Forces in the GDR may, in appropriate consultations with the Government of the GDR and having regard to the situation and to the measure adopted by the authorities of the GDR, take steps to remove such threat.<sup>29</sup>

<sup>27</sup> An agreement was entered into between Poland and the U.S.S.R. on June 18, 1958, concerning such matters, among others. See *Pravda* and *Izvestia*, June 20, 1958.

<sup>28</sup> On February 21, 1958, the U.S.S.R. and East Germany entered into an agreement involving the transfer of the Schoenfeld Airport back to East Germany after use by the Soviet forces. Another agreement on March 6, 1958, dealt with the return of an automobile factory in Erfurt to the East Germans, after management by the Soviet forces. See *Pravda* and *Izvestia*, Feb. 22, and March 8, 1958.

<sup>29</sup> Quoted in Croan and Friederich, *supra* note 18, at 62. See also the *New York Times*, March 14, 1957, p. 7, col. 3, for further details on this point.

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Consultation, of course, does not give the East German authorities any right of control or veto over the Soviet force commander. There is no limitation upon him in the action he may take to remove the threat to the security of his forces. Every military commander would deem it his responsibility to take action necessary to eliminate a threat to the security of his forces stationed abroad, but omission of any such statement in three of the treaties and specific inclusion of it in the East German treaty points to its emphasis in the latter connection. It should also be noted that this carefully lays a treaty foundation for unilateral action by the Soviet commander, thus obviating a situation such as that which confronted the Soviet commander in the days of the Hungarian uprising and which subsequently became so controversial in the halls of the United Nations and elsewhere.<sup>30</sup>

### m. *Definitions*

The terms defined in the several agreements substantially parallel each other except that inexplicably the Hungarian and Rumanian treaties do not define the phrase, "members of the families of members of the Soviet forces," although the phrase is used in the text of the treaties and defined in the other two.

It should be noted that the military members of the Soviet forces, as the term is used in the treaties, includes in all cases only soldiers or servicemen of the Soviet Army and not members of the Soviet Navy. Supposedly air force personnel, being part of the Soviet Army, are included within the provisions of the treaties.

### n. *Modification of the agreements*

In each treaty, modification is permitted with the consent of the contracting parties, but the East German treaty adds the word "unanimous." In substance, the effect of this provision, read together with that pertaining to duration ("in force as long as Soviet forces are stationed on the territory of . . ." or words to that effect) is to retain the current agreement for as long as Soviet troops are on the satellite territory, and the agreement cannot be changed without Soviet consent. The options to act conclusively to change the agreement in any way remain solely with the Soviets, although the modification provision appears at first glance to give some prerogative to the satellites.

<sup>30</sup> See Ripka, *Eastern Europe in the Postwar World* 153, 163 *et seq.* (1961). General Thikonov, commanding Soviet forces in Budapest, was perplexed at the time as to the limit of his authority, and Moscow also appears to have been unsure. The resolutions adopted by the UN General Assembly concerning Soviet intervention in Hungary are set forth in *Assembly of Captive European Nations, Hungary Under Soviet Rule V*, pp. 60-73 (1961).

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### *o. Mixed Commission*

Each of the treaties provides for a Mixed Commission to be appointed, three representing each side to the treaty. The Mixed Commission is to settle questions arising from the interpretation or application of the agreement, except that the East German treaty omits the function of interpretation. The Mixed Commission is to function under its own rules, but the East German treaty adds one unique clause to require that decisions of the Mixed Commission be based on the principle of unanimity. Questions unresolved by the Mixed Commission are referred in any case through diplomatic channels. Here again, then, the East German treaty imposes restrictions upon East Germany and extends to the Soviets additional safeguards not found in the other treaties. The East German treaty is not open to local interpretation and the act of but one Soviet or German member can take the question of application out of the hands of the Mixed Commission and place it in diplomatic channels.<sup>31</sup>

### B. THE PRACTICAL CONTENT

The treaties impose the following principal obligations upon the Soviets:

a. To undertake another agreement with each satellite concerned regarding:

- (1) Troop strength and location of forces.<sup>32</sup>
- (2) Movement of Soviet forces within the territory.
- (3) The rendering of legal assistance in certain matters related to the exercise of satellite jurisdiction.<sup>33</sup>

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<sup>31</sup> It is known that the Mixed Commission of the Soviet Union and East Germany met on November 21, 1958, to deal with questions concerning the presence of Soviet forces in East Germany. *Pravda* and *Izvestia*, Nov. 23, 1958.

<sup>32</sup> These are undoubtedly secret annexes. This information does not appear in any published agreement. See *New York Times*, Dec. 18, 1956, p. 1, col. 8, reporting anticipation of such agreement.

<sup>33</sup> "Legal assistance" is apparently intended to mean that mutual assistance furnished between courts, procurators, and other judicial officials. A series of bilateral agreements were executed between the U.S.S.R. and Poland, Hungary, and East Germany in 1957 and 1958 to implement this requirement, the treaties having the same duration as the basic status of forces treaty. These treaties are concerned primarily with criminal matters contemplated in the status of forces treaties.

The Soviet Union has also entered into a series of bilateral reciprocal treaties concerning legal assistance in civil, family, and criminal matters, supplementing the foregoing treaties. See, e.g., Treaty Between U.S.S.R. and The German Democratic Republic Concerning Legal Assistance in Civil, Family and Criminal Cases, Nov. 28, 1957, 305 U.N.T.S. 113; Treaty Between

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(4) Construction of facilities, utilization of additional facilities or services, and the return of facilities or areas.<sup>34</sup>

b. To indemnify the satellite governments concerned for damages caused by acts or neglects of the Soviet forces or accompanying personnel.

c. To cause Soviet force members and families to respect local law in the satellites.

d. Under certain conditions, to permit Soviet force members and accompanying personnel to be subjected to the jurisdiction of the satellite's criminal courts.

e. To appoint representatives to a Mixed Commission to deal with problems connected with the treaty.

The only real limitations, in a juridical sense, are with respect to the payment of claims for damages and the grant of a form of criminal jurisdiction.<sup>35</sup>

On the other hand, the Soviets obtained in these treaties the following "concessions" from the satellites:

a. Legal recognition of the right to station Soviet troops in the bloc member's territory.

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U.S.S.R. and The Romanian People's Republic Concerning the Provision of Legal Assistance in Civil, Family, and Criminal Cases, April 3, 1958, 313 U.N.T.S. 167; Treaty Between The Polish People's Republic and U.S.S.R. Concerning Legal Assistance and Relations in Civil, Family and Criminal Cases, Dec. 28, 1957, 320 U.N.T.S. 3; Treaty Between U.S.S.R. and The Hungarian People's Republic Concerning the Provision of Legal Assistance in Civil, Family and Criminal Cases, July 15, 1958, 322 U.N.T.S. 3.

<sup>34</sup> The U.S.S.R. and Poland entered into a treaty concerning these matters on June 18, 1958, reported in *Pravda* and *Izvestia*, June 20, 1958.

<sup>35</sup> Some other concessions appear to have been made in connection with the execution of these agreements or subsequent thereto but having an intimate connection therewith. For example, it was reported in the *New York Times*, Nov. 19, 1956, p. 1, col. 8, at the time of the announcement of the Polish-USSR treaty, that Soviet troops would be stationed only in Western Poland. The treaty, however, omitted any such provision. It was also mentioned, at the time the treaty was signed in Dec. 1956, that the payment of goods by the Soviets in Poland would be at "normal export prices." *New York Times*, Dec. 18, 1956, p. 1, col. 8. This fact does not appear in the treaty. The Joint Polish-Soviet Declaration of Nov. 18, 1956, refers, *inter alia*, to a cancellation of Polish debts as they existed on Nov. 1, 1956, to the delivery of 1,400,000 tons of Soviet grain on credit, to a new long term loan of 700 million rubles, and to the repatriation of some Polish persons "detained in places of isolation."

In East Germany in June 1958 the Soviets agreed to lower the costs charged against that state for the temporary stationing of Soviet troops there, and on Dec. 1, 1958, Moscow determined to relieve the East German government of that financial responsibility altogether. See *New York Times*, June 25, 1958, p. 5, col. 3; July 6, 1958, p. 3, col. 5; and Dec. 2, 1958, p. 2, col. 5. This financial remission took place just after the meeting of the USSR-East German Mixed Commission, referred to in note 31 *supra*.

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b. Legal recognition of the continued use of certain facilities and realty by the Soviet forces.

c. Legal recognition of the right of Soviet forces to move and maneuver within the satellite territory.

d. Recognition of the right of the Soviet forces to exercise legal jurisdiction in the satellite territory over Soviet forces stationed there.

e. The right to receive indemnification from the satellite concerned for damages caused to Soviet forces or personnel by satellite institutions or citizens.

f. Assurance of the continuation of the existing legal basis for so long as the Soviet troops remain in the satellite's territory, their removal being effected only with Soviet concurrence.

While the distinction between a *base rights treaty* and a status of forces treaty is of no great moment, in the interest of accuracy it seems plain that these Soviet treaties are more properly agreements concerning base rights, in which the legal status of force personnel is but incidentally mentioned. The formal recognition of the Soviet right to station troops in a satellite area fills a gap which existed after the conclusion of the peace treaties and the end of the occupation following World War II. Additionally, these treaties stabilize the status of the presence of Soviet troops, for unilateral action by a satellite is not permitted under the terms of the agreement.

It is significant that these treaties are only with states where Soviet troops are stationed, in other words, where there are Soviet bases, as distinguished from those where Soviet troops may maneuver or be present only temporarily.<sup>36</sup>

Because the treaties are not reciprocal, they have no application to the status of satellite forces which might be in Soviet territory or in the territory of another satellite, as when Polish troops maneuver in East Germany.<sup>37</sup>

The right of the Soviet commander to intervene unilaterally in East Germany when his discretion so indicates is an important provision.

<sup>36</sup> At the time of the treaty with Romania there were five Soviet divisions reported in that country, but indications are that no Soviet units are now stationed there. *New York Times*, May 27, 1958, p. 1, col. 2; June 27, 1958, p. 2, col. 6.

<sup>37</sup> Mr. David Binder, Berlin correspondent, reported in the *New York Times*, Oct. 11, 1961, that 10,000 Poles, an undisclosed number of Czechs, and 50,000 Soviet combat troops moved into East Germany to conduct Warsaw Pact war games with 400,000 Soviet troops stationed there and some 160,000 East German troops.

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Another feature, important from a practical point of view, is that the local commander of the Soviet forces is furnished, by these treaties, a shield against local satellite pressures, for the satellite government has in each case consented to the presence of the Soviet forces and agreed to the general conditions of their operations. Furthermore, machinery is established to take up matters of importance in connection with the troops' presence, thus freeing the Soviets from the hitherto complete responsibility.

### C. CONTRAST WITH THE NATO STATUS OF FORCES AGREEMENT

The essential differences between the Soviet treaties and the NATO formula are not so much in the mechanics of solving particular problems mentioned in each as they are in Soviet omissions and the very fundamental fact that the Soviet agreements are not intended to be reciprocal, whereas the NATO treaty form is useful regardless of the identity of the sending or receiving states.

The Soviet treaties are *ad hoc*, designed for application in a particular situation, the stationing of Soviet troops in the territory of another state. This, of course, suggests that the Soviet treaties are formalizing that which has already been accomplished informally.

The NATO SOF grants no authority for the presence or movement of troops of one state in the territory of another and guarantees no particular facility or area, as in the East German treaty, for troop use.

The NATO SOF is politically neutral, whereas the Soviet agreements use (in three of the four cases) the preamble to carry important political messages and incorporate in each instance express Soviet recognition of the sovereignty and internal independence of the satellite concerned. The NATO SOF exhorts members of the sending state to abstain from any political activity in the receiving state. Such a provision is absent from the Soviet agreements.

In the omissions from the Soviet treaties, as contrasted with the NATO SOF, there is particular significance. Some of the omissions are supplied in the supplementary agreements (as indicated hereinafter), but many matters are just ignored. The following lists some of the items dealt with in the NATO SOF but omitted from any of the Soviet SOF's:

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a. The requirement that the sending state (USSR) take necessary measures to ensure compliance with local satellite law (subject of a supplementary agreement).

b. Right of the receiving state to apprehend, arrest, or restrain pending charges the person of members of the Soviet forces (subject of a supplementary agreement).

c. A provision for notification by the receiving state of the disposition of any particular case tried (subject of a supplementary agreement).

d. Limitation on the form of punishment.

e. Limitation upon double jeopardy.

f. Whether Soviet military police are authorized to function in any capacity outside their own stations or to arrest, detain, or question citizens of the receiving state.

g. Whether the receiving state has any right to exercise police jurisdiction within the troop area of the sending state.

h. Whether presence of a Soviet person in the receiving state vests in him any right of legal residence or domicile, or whether such persons are required to register or otherwise subject themselves to control as other aliens would be.

i. Whether there is a right of the receiving state to remove from its territory a Soviet person who, although not convicted of violating local law, is otherwise undesirable to the receiving state.

j. Any protection against application of local taxes upon members of the sending state's forces.<sup>32</sup>

k. Any special protection for official documents and seals of the sending state.

l. Any authorization to transport into the receiving state without special duty or charges the household furniture and effects of members of the Soviet forces serving there.

m. The right to search and examine for compliance with local customs laws (subject of a supplementary agreement).

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<sup>32</sup> Taxes are apparently paid by the Soviet Army Exchange service in East Germany to the East German Government. This "PX" system operates a "Konsum Spezial" in East Germany, under the Soviet Army Trading Organization. The "Konsum" enters into contracts with German and other firms for the supply of goods and services, and it negotiates as to price and quality. The "Konsum" is permitted to sell to German civilians, outside the Soviet bases, at German prices.

In Hungary the Soviet forces also have a special store, reserved in Budapest for their exclusive use. Hungarian goods are sold there at substantially lower costs than elsewhere, suggesting no payment of tax to the Hungarian government. There is reportedly much resentment against this store by the Hungarians. Assembly of Captive European Nations, *Hungary Under Soviet Rule V*, p. 2 (1961).

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n. The determination of rates of exchange for application in claims matters.

o. Exemption of war or combat connected damage from operation of the claims procedures.

p. Application of the terms of the treaty to Navy personnel of the sending state.

q. Application of the terms of the treaty to civilian employees who are citizens of a third state but accompanying the Soviet forces in the receiving state (*e.g.*, a Hungarian employed by the Soviet forces in Rumania).

r. Authorization of the sending state authorities to employ labor and contract for services, and the method of applying regulations and resolving differences in these areas of interest.

s. Effect of hostilities on the treaty provisions.

t. Any guarantees by the receiving state of entitlement of members of the sending state's force to basic legal rights, such as a prompt and speedy trial, to be informed in advance of trial of the nature of the charges against him, to be confronted by the witnesses against him, to have the benefit of compulsory process to obtain the presence of witnesses in his own behalf, to have counsel of his own choosing or to have counsel furnished him, to have the services of an interpreter, or to have the opportunity to consult with representatives of his own government when he is held by the receiving state to answer for an alleged violation of the local law.

In the matter of claims the Soviet treaties apparently do not limit application of the claims procedures to non-contractual disputes. On the face of the treaties a contract dispute which resulted in material damage could be made the subject of the claims procedures of the treaties.

The NATO SOF would exempt government-to-government claims from the claims procedures and would use an arbitration system binding upon the sending state, the receiving state, and other parties concerned. Under the Soviet system, as mentioned above, there is no authority having binding power.

### IV. THE EXERCISE OF SATELLITE JURISDICTION OVER SOVIET PERSONNEL

#### A. *THE GRANT OF JURISDICTION*

Each of the four treaties under study here enjoins the Soviet force members and accompanying personnel to respect and observe the local satellite law. Where violations of that law result

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in the commission of crimes or offenses by Soviet force members and those accompanying them, the accused will be dealt with by the competent satellite authorities, and presumably they will be tried and on conviction punished under satellite law.<sup>39</sup> If the offender is a Soviet serviceman the appropriate forum could be the satellite military court.

On the surface this grant of jurisdiction appears as a substantial concession, quite similar to that employed in the NATO area today. That this concession is not substantial, however, becomes apparent when the influences of the Communist Party of the Soviet Union and of the Soviet Army upon the satellites are considered.

### B. SOVIET INFLUENCE ON THE SATELLITE LEGAL INSTITUTIONS

The rulers of the satellites are first of all Communists, members of the Communist Party of the specific satellite, a subordinate unit of the international communistic movement, and subject to the rules and standards of the conduct of the party. Complete allegiance and absolute obedience to the Communist ideology, as announced by the Communist Party of the Soviet Union, is undisputed standard practice.<sup>40</sup> All important functionaries of the satellite administration, including the components of the legal institutions, are necessarily Communists, owing an allegiance to the party as well as to their government. Paralleling the governmental structure is the party framework, permitting a chain of influence apart from the formal one and probably more effective. In each instance the party controls the state and governs it in a manner consistent with the aims of international communism. The officials hold their power more at the instance of the party than of the satellite state.

At present all of the states of the Soviet orbit follow the lead of the Soviet Union in legal theory, with only minor exceptions found in actual practice.<sup>41</sup> This reflection of the Soviet view is frequently found in the criminal and civil procedural codes which are largely satellite restatements of the Soviet procedures.<sup>42</sup>

<sup>39</sup> Exceptions to this general rule have already been noted. See Sections III-A (1), and III-A (2) (d) *supra*.

<sup>40</sup> Brakas, *supra* note 4, at 4.

<sup>41</sup> Kerner, *Sovietization of the Military Laws of the Soviet Satellite Countries in Central Europe* 8 *et seq.* (1955), in Library of Congress, Mid-European Studies Center, National Committee for Free Europe.

<sup>42</sup> 1 Gsovski and Grzbowski, *Government, Law and Courts in the Soviet Union and Eastern Europe* 839 (1959).

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Communism has, in the past, viewed the law more as a matter of efficient administrative practice than a body of rules and rights granted by the community.<sup>43</sup> While some erosion of the old view may now be taking place, it is so slow as to be hardly significant. Socialist legality appears to consist primarily of a recognition of those legal guarantees or rights that the Communist Party chooses to grant.<sup>44</sup> Socialist law is to protect the state's activity rather than to control impartially the relationships between the state, the society, and the individual.<sup>45</sup>

In the Soviet Union, the Chief Procurator controls not only the prosecutions but participates, along with the Supreme Court of the USSR, in the administration of justice as well. In each satellite the Chief Procurator has a similar function. Procurators, of course, are unlikely to be anything but Communists.<sup>46</sup>

It is clearly unlikely, in such circumstances, that a satellite state would undertake a prosecution of a Soviet citizen, a member of the Soviet forces or accompanying personnel, unless such a prosecution was approved by the party. If the Soviet commander preferred instead to exercise his jurisdiction it is inconceivable that the satellite Procurator would deem it proper to initiate criminal proceedings in the satellite court.

In the satellite military tribunals there is likewise substantial Soviet influence, so that certainly no greater assurance of satellite action is found in the courts-martial than in the civilian proceedings.<sup>47</sup> Military tribunals in all Communist countries have jurisdiction over disciplinary matters and any offense that affects the combat ability of the forces, regardless of whether the offense was committed by a military person or a civilian.<sup>48</sup> Military courts also have jurisdiction over espionage.<sup>49</sup> Except for that offense, however, the military tribunal does not now exercise jurisdiction over civilians, even outside the Soviet Union.<sup>50</sup> In general the

<sup>43</sup> *E.g.*, Kiralfy, *Recent Legal Changes in the USSR*, 9 *Soviet Studies* 1 *et seq.* (1957); Schlesinger, *The Practice of Soviet Justice*, 9 *Soviet Studies* 200, 206, 308 (1958); 2 Gsovski and Grzbowski, *op. cit. supra* note 42, at 296.

<sup>44</sup> See generally Kelsen, *The Communist Theory of Law* (1955).

<sup>45</sup> Schlesinger, *supra* note 43, at 299, 401.

<sup>46</sup> Gledhill, *The Rule of Law and Communist Legality*, 8 *Indian Yb. Int'l Affairs* 186 *et seq.* (1959).

<sup>47</sup> See Kerner, *supra* note 41.

<sup>48</sup> See, *e.g.*, Draper, *An Outline of Soviet Military Law*, *Mil. L. Rev.*, July 1959, p. 1, 12; 1 Gsovski and Grzbowski, *op. cit. supra* note 42, at 839.

<sup>49</sup> *E.g.*, McMahon, *Military Discipline of the US and USSR*, *Army*, Jan. 1962, p. 45 *et seq.*

<sup>50</sup> Section 9, Statute of Dec. 25, 1958 (Courts-Martial), in 7 *Library of Congress Mid-European Law Project 100-101* (1959) (Appendix VII).

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military criminal codes are merged with the civilian criminal codes. The military tribunals function in complete secrecy, however, except for "show-trials," and the sentences are seldom published except when potential offenders are to be warned.<sup>51</sup>

The military law of the satellites has itself been subjected to sovietization.<sup>52</sup> The Soviet system of the military procuracy has been adopted throughout the bloc; Soviet schools, manuals, regulations, and instructors are employed by the satellites; the satellite military oath now parallels the oath of the Soviet soldier; the usual party controls exist (that is to say, the political commissars and the security forces of the ministry of internal affairs exercise close supervision of even the military personnel); and there still remains considerable Soviet leadership in several satellite forces.<sup>53</sup> The Soviets have had about 16 years to complete their process of achieving conformity, or *gleichschaltung*, in reshaping the forces of their satellites.<sup>54</sup>

### C. PRACTICAL EFFECTS OF RECENT SOVIET LEGISLATION ON THE EXERCISE OF SATELLITE JURISDICTION

As if the foregoing was not enough to assure that a case involving Soviet personnel would never come before a satellite court without Soviet concurrence, the "comradely court" and the power of the Soviet military tribunal to decree indemnification, in a manner similar to a civil court judgment in Anglo-Saxon law, serve to dispose of cases before they can become jurisdictional problems with the satellite concerned.

<sup>51</sup> Mr. Arthur J. Olsen, Warsaw correspondent for the New York Times, wrote in a letter to the author on Nov. 9, 1961, that troop incidents and related matters are considered to be classified information in Poland. Text writers on Soviet military law have noted that the military trials are not usually public. Dr. A. I. Lebed, Institut zur Erforschung der UdSSR, Munchen, Germany, in a letter to the author, Jan. 3, 1962, stated that such matters are not reported in the Soviet or satellite press or legal journals.

<sup>52</sup> See Kerner, *supra* note 41. The classic volume on Soviet military law is Berman and Kerner, *Soviet Military Law and Administration* (1955). Since publication of that book, however, there have been important amendments. See Draper, *An Outline of Soviet Military Law*, *supra* note 48, and Jacobs, *The Red Army's Role in Building Communism*, *Military Review*, Sept. 1961, p. 10 *et seq.*

<sup>53</sup> de Sola Pool, *Satellite Generals* (1955).

<sup>54</sup> *Id.* at 15-16. Following the October 1956 revolts, many top Soviet officers left the Polish Army, but it appears that several minor staff officers may remain. The Chief of Staff of the Hungarian Army was a Soviet colonel. Assembly of Captive European Nations, *Hungary Under Soviet Rule IV*, p. 18 (1960).

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In the 1958 reform of law in the Soviet Union the "comradely courts" were established, with counterparts of the civilian system found in the military. These are extra-legal in nature, having a right to try and punish offenders without recourse to legal codes. These "courts" act on relatively minor infractions, which are considered to be deviations from the communal norm. Improper public behavior, drunkenness, plundering, first offense hooliganism, and the operation of illicit stills are examples. There is no provision for counsel or appeal in such cases.<sup>55</sup>

Also permitted since the 1958 reform is the exercise by the military tribunal of the authority to adjudicate compensation (to act upon contested claims) for civilians who suffer losses as a consequence of the acts or neglects of military personnel. This supplies a military forum as a substitute for the civilian judicial process suggested in the claims portions of the treaties.

Troops having little contact with the civilian population of a bloc state are unlikely to be involved in cases where the satellite jurisdiction might be applied. Principal areas of conflict might occur in vehicular offenses, but few Soviet personnel have private vehicles in satellite states and Soviet soldiers operating military vehicles would be "in line of duty" and thus subjected to Soviet law. The Soviet criminal legislation of 1958 includes a category of offenses for serious traffic or vehicular infractions where a life is lost or there are other "grave consequences." The nationality of the victim is, of course, immaterial. Thus presumably a Soviet court-martial may properly punish Soviet military personnel for such offenses (either on or off duty) committed in a satellite state against a satellite citizen and at the same time the military court could decree indemnification for the victim. If the offense was not serious enough to warrant punitive action by the court-martial the matter could be disposed of in the comradely court. There is no real hiatus, then, and a waiver of satellite jurisdiction in the off-duty cases would probably be invariably requested and favorably acted upon.

### D. DISCIPLINARY CONTROL EXERCISED BY THE SOVIETS

As might be anticipated, accurate and reliable information concerning practices currently employed in the operation of the Soviet status of forces agreements is exceedingly rare. Soviet

<sup>55</sup> Jacobs, *supra* note 52, at p. 15; and McMahon, *supra* note 49.

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disciplinary matters are treated in a confidential fashion and there is no public information concerning the volume of cases, types of offenses, or disposition. Reports of formal proceedings are not made available to the public.<sup>56</sup>

Despite the absence of evidencing crime statistics, crime does exist in the Soviet Union and there are occasional incidents known to occur among Soviet forces stationed within the satellite countries.<sup>57</sup> There is reason to expect that criminal cases differ little in number or type from those found in the non-Communist areas, except that political and "economic" crimes are probably more frequent in the Communist world.

Except in certain cities in East Germany, as a general proposition the Soviet troops are not stationed in major satellite population centers, but are instead located in outlying surrounding areas.<sup>58</sup> The troops are kept isolated from the indigenous people and are only infrequently seen in public places.<sup>59</sup> Senior officers are usually permitted to have their families with them and if the families do not live within the Soviet bases or in special developments then requisitioned quarters are found. Junior officers and

<sup>56</sup> Moseley, *Soviet Myths and Realities*, Foreign Affairs, April 1961, p. 341, 345.

<sup>57</sup> Assembly of Captive European Nations, *Hungary Under Soviet Rule IV*, p. 17 (1960), reports that during the Soviet Army maneuvers in Hungary there is a good deal of violence in the countryside, none of which finds its way into the Communist press. It has been noted that occasional acts of violence toward the civilian population by Army personnel have brought severe retaliation, but that nevertheless there are frequent reports of accidents caused by drunken Russian soldiers at the expense of Hungarian lives and goods. The SOF treaty "has never been implemented, and offending soldiers are currently taken into custody by the Soviet military authorities and sent home from Hungary." Assembly of Captive European Nations, *Hungary Under Soviet Rule V*, p. 2 (1961). Except for occasional incidents, however, it appears that the Soviet soldier in garrison in a satellite country is well behaved. See Hauser, *The Submission of Hungary*, Saturday Evening Post, Feb. 25, 1961, p. 25 et seq.; and *The Military Establishments*, East Europe, May 1958, p. 5.

<sup>58</sup> The Red Army 185, 400-415 (Hart ed. 1956).

<sup>59</sup> Assembly of Captive European Nations, *Hungary Under Soviet Rule IV* (1960), states that the "Soviet command continues to make every effort to isolate its soldiers from the Hungarian populace, which makes its hostility known in no uncertain terms. Many reliable reports indicate that what few contacts exist between the people and the Soviet soldiers are characterized, at the very least, by a frigid aloofness on the part of the people; most interested and revealing are the descriptions of the way people walking the street regard Soviet soldiers as 'invisible men'—they look straight through them or above them or beside them as if they were not there. Thus the contacts between the Soviet army and the Hungarian people are minimal, or even non-existent. The Soviet soldiers live in barracks outside the urban centers, so as to minimize the impression of their presence—and are allowed out of their camps only on supervised group tours."

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enlisted men are quartered on the bases.<sup>60</sup> Discipline is exceedingly rigid for all enlisted men and officers, especially in the junior grades.<sup>61</sup>

Troop training is designed to keep the men fully occupied and to leave them to their own devices a minimum of time. The official non-fraternization policy in Germany was relaxed after the death of Stalin in 1953, but there is still very little association by the troops with the block citizens.<sup>62</sup> Leave is difficult for the men to obtain, and when allowed on pass (usually on a Sunday) the Soviet soldier is accompanied by one or two others. A curfew requires the troops to be in quarters at an early hour. Overstaying a leave or pass results in extremely harsh punishment. Passes are used to visit sports and cultural activities, theaters and cinemas, but not bars or restaurants.<sup>63</sup>

The public manners of Soviet officers have reportedly markedly improved in recent years.

Politeness and at least surface respect are now the rule, and any table pounding orders from Soviet military men are currently delivered in private. This new "correctness" has been especially manifest since the events of October of 1956 and is, as might be expected, nowhere more apparent than in Poland. Under Marshal Rokossovsky, the Polish officers were a caste apart and below the Soviets, subject at any time to disdainful commands and rebuffs.<sup>64</sup>

It is reported that the conduct of the Soviet soldiery has much improved since the Hungarian uprising of 1956.

### E. SUMMARY

Taking into account all of the foregoing, the numbers of troops involved,<sup>65</sup> the party controls, the influence of the Soviet military

<sup>60</sup> The Red Army, *op cit. supra* note 58. See also Dep't of State, Office of Intelligence Research, *The Soviet Union As Reported By Former Soviet Citizens*, Report No. 19, Sept. 1957, concerning a former Soviet officer who defected from East Germany.

<sup>61</sup> See McMahon, *supra* note 49.

<sup>62</sup> *The Military Establishments, supra* note 57, at p. 5.

<sup>63</sup> Walter Sullivan remarked in the New York Times, March 19, 1956, p. 5, col. 1, that despite an easing of restrictions on the troops, they were seldom seen in public in Germany, rarely in a "night spot." The Russians have almost no private vehicles in Germany.

<sup>64</sup> *The Military Establishments, supra* note 57, at p. 5.

<sup>65</sup> Reports concerning strength of Soviet troops in the satellites vary considerably, but it is estimated that the following are fairly accurate current figures: East Germany—400,000 troops, 80,000 civilians; Hungary—from about 80,000 troops and 20,000 civilians right after the 1956 uprisings to about 45,000 troops and 10,000 civilians now; Romania—no troop units; Poland—about 30,000 troops and 5,000 civilians.

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over the satellite military and of Soviet legal thought procuracy over the satellite procuracy, the special legislation recently enacted which gives the Soviet military tribunals the opportunity to obviate many jurisdictional problems that could conceivably arise with the satellites, and finally the strict Soviet discipline which keeps the troops from contact with the indigenous civilian population, it is not difficult to understand that there are no reported instances of the satellites ever exercising criminal jurisdiction over Soviet military personnel or those who accompany them.<sup>66</sup>

### V. CONCLUSIONS

From the foregoing it must be concluded that these agreements are only secondarily realistic statements of effective law and they impose only incidental legal limitations upon the Soviets. The true worth of the agreements must be sought elsewhere and, as is so frequently the case with Communist activities, it is in the political utility that the agreements earn their way.

In Communist contemplation, treaties have always been regarded as extraordinary tools of policy and primary sources of international law.<sup>67</sup> The USSR, prolific in treaty-making, has executed over 2000 treaties in its 44 years—more than 1800 were bilateral.<sup>68</sup> The formal treaty has, in Soviet hands, become a useful expedient and a highly important weapon in its struggle for world communism. It provides at one time a respectably covered propaganda vehicle. It cloaks in an acceptable form a subjective device reflecting, evidencing, and supporting Soviet policy. The Soviets are aware of the skillful use of the treaty form, with its accompanying rationale of international law, in the struggle for political allegiances.

<sup>66</sup> Assembly of Captive European Nations, *Hungary Under Soviet Rule V*, p. 2 (1961), reports that the SOF has never been implemented in Hungary. Recent specific inquiry to Polish authorities by the author has similarly failed to reveal any such cases under the Polish treaty. The Commission of Inquiry of Free Jurists, Berlin, wrote to the author in a letter dated Dec. 1, 1961, that "we do not know of any criminal cases against Soviet soldiers before the courts of the so-called DDR (East Germany). Also we do not believe that such practices have been carried out so far." There is simply no record that any Soviet soldier has been tried by any satellite court under the Soviet status of forces treaties.

<sup>67</sup> Triska and Slusser, *Treaties and Other Sources of International Relations: The Soviet View*, 52 *Am. J. Int'l L.* 699 (1958).

<sup>68</sup> *Id.* at 721. The Soviet usage of the term "treaty" covers all agreements between governments, except oral ones. During the first two years of Khrushchev's administration the Soviets concluded over 300 treaties with some 40 partners. 90% of the treaties were bilateral.

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Ideologically, international law presents the Communists with certain problems, primarily the reconciliation of the concept of the transitional national state, permitting in the long run no supranational authority over the Communist society, as opposed to the position that international law is an objective system of control only within which may sovereign states operate.<sup>69</sup>

The Communists have rationalized their way, however, at first accepting and now championing, the concept of respect for state sovereignty, as an interim measure on the road to socialism.<sup>70</sup> Furthermore, the Communists, unwilling to forego the use of international law and treaties as weapons,<sup>71</sup> have endeavored to master the techniques of application in order to obtain concessions, impose limitations, and create binding obligations upon other states, while at the same time avoiding corresponding restrictions disadvantageous to themselves.

It is clear, then, in summary, that the Soviets interpret international law in a fashion to be consistent with the traditional interests of the Soviet Union, the nature of the Soviet political system, and Communist ideology. International law is used by the Soviets to serve a political function, as propaganda, and to facilitate relations with other states.<sup>72</sup>

These particular status of forces or base rights treaties have, above all else, special political ramifications. They were executed when the Soviet prestige was low, following the October revolu-

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<sup>69</sup> Polovny, *The Basic Assumptions of the Soviet Doctrine of International Law* (1950). See also Kelsen, *General Theory of Law and State* (1945); Kelsen, *The Communist Theory of Law* (1955); Snyder and Bracht, *Coexistence and International Law*, 7 *Int'l & Comp. L. Q.* 54 (1958); Corbett, *Law in Diplomacy* 83 *et seq.* (1959).

<sup>70</sup> "Soviet foreign policy is, of course, subject to constant change . . . at times of crisis, the progressively more flexible, temporary, and expedient factors of the policy spectrum tend to predominate; conversely at times of relative security the permanent and rigid ideological content of policy rules the show." Triska, *Model for Study of Soviet Foreign Policy*, 52 *Am. Pol. Sci. Rev.* 64 *et seq.* (1958).

<sup>71</sup> Triska and Slusser, *supra* note 67, quote Professor Ratner of the Soviet Union, writing an article translated as "International Law in the Marxist Tradition," in *Sovetskoe gosudarstvo i pravo*, No. 6 (1935), as follows:

"Our task is not the creation of some new system of international law, but simply the application, the employment, and, if necessary, the advancement of those concepts of international law which objectively aid the USSR in its struggle for peace and for the realization of great goals concerning the building of socialism. We will utilize even the old concepts of international law which will serve these goals. Let us take, for example, the principle of sovereignty, which is not at all a socialist principle, but which we nevertheless support because it helps us mobilize the strength of the oppressed peoples for a joint struggle against imperialism and is an important slogan in the national liberation struggle in the East."

<sup>72</sup> Kelsen, *op. cit. supra* note 44, at 148 *et seq.*

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tion of 1956.<sup>73</sup> The first one, with Poland, reflects the growing strength of certain nationalistic forces within that country. The issue of national communism was hovering in the wings, influencing each of the treaties. Finally, the Soviets had recognized the need for regularizing the relationships of the bloc members with the USSR. It seems, then, not so much what the treaties say or seem to say, but rather the conditions under which they were executed and their consequent political meaning that are really important.<sup>74</sup>

### VI. APPENDIX

#### EXTRACTS OF SOVIET STATUS OF FORCES AGREEMENTS AGREEMENT ON THE LEGAL STATUS OF SOVIET TROOPS TEMPORARILY STATIONED IN POLAND

*Signed at Warsaw, December 17, 1956; in force February 27, 1957*

##### Article 1

The temporary stationing of Soviet military units in Poland may in no way

<sup>73</sup> Letter from Dr. Grzybowski, Oct. 10, 1961.

<sup>74</sup> The clearest summary of the political implications of the Soviet status of forces treaties is by Hubert Ripka in his book, *Eastern Europe in the Postwar World* (1961):

"The Russians learned a lot from the Polish and Hungarian risings. The swiftness with which they made use of the knowledge acquired should be a lesson to the West. One of the first Soviet moves was to make new agreements about stationing Red Army units in the enslaved countries: A new arrangement, necessary after the treaty with Poland signed in December 1956, showed some respect for Polish sovereignty. Ostensibly, Soviet troops could be stationed in Poland only by the consent of the Warsaw government. Similar agreements with East Germany, Rumania, and finally Hungary stressed that the presence of Russian units on the territory of these countries in no way affected their sovereignty. In reality the agreements gave these governments even less authority than was granted the Poles. But in Poland, as everywhere else, everything depends on the willingness of the Soviet government to fulfill its contractual obligations. The presence of Russian troops in these countries may constitute a constant danger but it also facilitates Red Army intervention if there is trouble among the people. All the satellite governments, with the possible exception of that of Poland, would anyway ask for Soviet intervention should they find themselves threatened by internal unrest. Or at least the Russians would soon be able to find a Gero or Kadar to ask for help. Because at that time the Russians felt the situation in East Germany to be particularly delicate, they stipulated in their agreement with Ulbricht that the Russian commander could, if the security of his troops was endangered, take all necessary steps to avert this danger. This clause reveals the true meaning of Moscow's efforts to strengthen the Warsaw Pact. . . . In an emergency the Russians have the 'legal' pretext they needed to intervene against anti-Communist upheavals. This put them in the right with the United Nations (another lesson they had learned). Finally, the Russians, under pressure from liberalizing forces, made the Warsaw Pact a valuable political instrument in bargaining with the Western Powers. In this manner, the Russians, in the first half of 1957, restored their domination of the captive nations, and by deft diplomacy and even shrewder pressure, maintained considerable influence, even in Poland." *Id.* at 219.

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infringe upon the sovereignty of the Polish State and may not lead to their interference in the internal affairs of the Polish People's Republic.

### Article 2

1. The strength of the Soviet troops temporarily stationed on the territory of the Polish People's Republic and the areas where they are stationed shall be defined on the basis of separate agreements between the Government of the Polish People's Republic and the Government of the Union of Soviet Socialist Republics.

2. Soviet troop movements on the territory of the Polish People's Republic beyond the areas where they are stationed shall in each case require the consent of the Government of the Polish People's Republic or of the Polish authorities authorized by it.

3. Soviet troop exercises or maneuvers outside the areas where they are stationed shall take place on the basis of plans agreed with the Polish authorities or with the consent of the Government of the Polish People's Republic in each case or with the Polish authorities authorized by it.

### Article 3

Soviet troops stationed on the territory of the Polish People's Republic and persons forming part of these troops as well as members of their families are obliged to respect and observe the provisions of Polish law.

### Article 9

Problems of jurisdiction connected with the stay of Soviet troops on the territory of the Polish People's Republic shall be regulated in the following manner:

1. As a rule, Polish law shall apply and Polish courts, the prosecutor's office as well as other competent Polish authorities dealing with crimes and offenses shall act in cases of crimes and offenses committed by persons forming part of the Soviet troops or members of their families on the territory of the Polish People's Republic.

The military prosecutor's office and the military courts of the Polish People's Republic shall be the competent authority to deal with cases of crimes committed by Soviet soldiers.

2. The provisions of Paragraph 1 of this Article shall not apply:

- (a) in cases when crimes or offenses have been committed by persons forming part of the Soviet troops or by members of their families only against the Soviet Union and also against persons forming part of the Soviet troops or members of their families;
- (b) in cases when crimes or offenses have been committed by persons forming part of the Soviet troops while carrying out service duties.

In the cases defined in sub-paragraphs (a) and (b) Soviet courts as well as other organs acting in accordance with Soviet law shall be competent.

3. The competent Polish and Soviet authorities may request each other to transfer or accept jurisdiction in individual cases provided for in this article. Such request shall be examined in a spirit of friendliness.

### Article 10

In cases when crimes have been committed against the Soviet troops stationed on the territory of the Polish People's Republic as well as against

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soldiers forming part of these troops, the perpetrators shall bear the same responsibility as in the case of crimes committed against the Polish armed forces and Polish soldiers.

### Article 11

1. The competent Polish and Soviet authorities shall grant each other all assistance, including legal assistance dealing with crimes and offenses listed in Articles 9 and 10 of this Agreement.

2. The principles and modes of granting the assistance mentioned in Point 1 of this Article shall be defined in a separate agreement between the Contracting Parties.

### Article 12

On the motion of the competent Polish authorities a person forming part of the Soviet troops, guilty of a breach of the regulations of Polish law, shall be recalled from the territory of the Polish People's Republic.

### Article 13

1. The Government of the Soviet Socialist Republics agrees to pay compensation to the Government of the Polish People's Republic

for material damage which may be caused to the Polish State by the action or failure to act by Soviet military units or individual persons forming part of these units, as well as

for damage which may be caused to Polish institutions and citizens or citizens of other states staying on the territory of the Polish People's Republic by Soviet military units or persons forming part of these units while carrying out service duties

in both cases to the amount fixed by a Mixed Commission set up in accordance with Article 19 of this Agreement on the basis of submitted claims in accordance with the provisions of Polish law.

Disputes that may arise from the commitments of Soviet military units shall come within the terms of reference of the Mixed Commission on the same principles.

2. The Government of the Union of Soviet Socialist Republics also agrees to pay compensation to the Government of the Polish People's Republic for damage caused on the territory of the Polish People's Republic to Polish institutions and citizens, or citizens of other states as a result of action or failure to act by persons forming part of the Soviet troops not while fulfilling service duties, as well as a result of action or failure to act by members of the families of persons forming part of the Soviet troops—in both cases to the value fixed by the competent Polish courts on the basis of claims submitted in relation to those responsible for the damage.

3. The Soviet side shall effect the payment of compensation within three months counting from the day the Mixed Commission has issued its findings or the court verdict has become binding.

The competent Polish authorities shall pay the persons and institutions having suffered damage the sums fixed in the decision of the Mixed Commission or court.

4. Outstanding claims for compensation for damage at the moment this Agreement comes into force, shall be considered by the Mixed Commission.

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### Article 18

Under this Agreement: "a person forming part of the Soviet troops" shall be:

- (a) a soldier of the Soviet Army,
- (b) a civilian who is a Soviet citizen employed in the Soviet units in the Polish People's Republic;

the "area where Soviet troops are stationed" is an area placed at the disposal of Soviet troops covering the place of stationing of military units including training grounds, firing ranges, firing ground and other objects used by these units.

### Article 19

To settle problems arising in connection with the interpretation and implementation of this Agreement and the agreements provided for in this Agreement, a Polish-Soviet Mixed Commission is hereby appointed to which each of the Contracting Parties shall appoint three of its representatives.

The Mixed Commission shall act on the basis of rules adopted by it.

The seat of the Mixed Commission shall be in Warsaw.

In cases when the Mixed Commission is unable to settle a question referred to it, this matter shall be settled through diplomatic channels in the shortest possible time.

## AGREEMENT CONCERNING QUESTIONS CONNECTED WITH THE PRESENCE OF SOVIET FORCES ON EAST GERMAN TERRITORY

*Signed at Berlin, March 12, 1957; in force April 27, 1957*

The Government of the Soviet Union and the Government of the German Democratic Republic, declaring that up to now, despite the efforts of the Soviet Union, the German Democratic Republic, and other peace-loving nations, neither a peace settlement with Germany nor an agreed solution which would give adequate guarantees of peace and security to the European nations has been reached;

Considering that foreign troops are stationed on the territory of the Federal German Republic and military bases of the nations which are members of the aggressive North Atlantic Bloc are set up there;

Recognizing that the rebirth of German militarism in West Germany constitutes a threat to peace;

Agreed that, based on international treaties and agreements, the temporary presence of Soviet troops on the territory of the German Democratic Republic is indispensable and is in the interests of peace and of the Soviet and German as well as other European nations;

Have decided in accordance with the Treaty on Relations between the Union of Soviet Socialist Republics and the German Democratic Republic of September 20, 1955, and with the Joint Declaration signed in Moscow on January 7, 1957, to conclude the present agreement . . .

### Article 1

The sovereignty of the German People's Republic is not affected by the temporary presence of the Soviet forces on the territory of the German Democratic Republic; Soviet forces will not interfere with the internal affairs of the German Democratic Republic and in its social and political life.

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### Article 2

1. Changes in the strength and stationing of the Soviet forces, temporarily present on the territory of the German Democratic Republic, shall be subject to consultation between the governments of the German Democratic Republic and of the U.S.S.R.

2. The terrain for the maneuvers of the Soviet troops outside their places of stationing shall be agreed upon with the competent authorities of the German Democratic Republic.

### Article 3

Soviet forces, present on the territory of the German Democratic Republic, members thereof, and members of their families must respect and observe the laws in force in the German Democratic Republic.

### Article 5

As a general rule the authorities of the German Democratic Republic shall apply German law to criminal acts committed by the members of the Soviet forces or members of their families on the territory of the German Democratic Republic.

### Article 6

The provisions of Article 5 of the present agreement shall have no application

- (a) when members of the Soviet forces or members of their families commit punishable acts against the U.S.S.R. or against other members of the Soviet forces or members of their families;
- (b) when members of the Soviet forces commit punishable acts while discharging their official duties.

In cases listed in points (a) and (b) Soviet law shall be applied by the authorities of the U.S.S.R.

### Article 7

Competent Soviet and German authorities may request each other to transfer or accept jurisdiction in individual cases defined in Articles 5 and 6. Such requests shall be given favorable consideration.

### Article 8

Persons responsible for punishable acts committed against Soviet forces on the territory of the German Democratic Republic, and against their members, shall bear, before the courts and other competent authorities of the German Democratic Republic, a similar responsibility as for punishable acts committed against the armed forces of the German Democratic Republic and their members.

### Article 10

On the request of the government authorities of the German Democratic Republic a member of the Soviet forces guilty of a violation of German law shall be recalled from the territory of the German Democratic Republic.

### Article 11

The Government of the U.S.S.R. agrees to indemnify the Government of the German Democratic Republic for material damages which may be caused by acts or omissions of the Soviet military units, their individual members

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or members of their families to the institutions and citizens of the German Democratic Republic or to the citizens of third states present on the territory of the German Democratic Republic. The amount of damage which cannot be fixed by agreement between the interested parties shall be established:

(A) by members of the Mixed Commission on the basis of submitted claims and on the basis of German law in case this damage is caused by actions or omissions of the Soviet military units or their members while discharging their official duties;

(B) by the courts of the German Democratic Republic on the basis of submitted claims and of German law in case this damage is caused by actions or omissions of the members of the Soviet forces while not discharging their official duties or by actions or omissions of the members of their families.

### Article 12

The Government of the German Democratic Republic agrees to indemnify the Government of the U.S.S.R. for material damages which may be caused to the Soviet forces, their members and members of their families present on the territory of the German Democratic Republic by actions and omissions of the institutions or citizens of the German Democratic Republic. The amount of damages, which cannot be agreed upon between the interested parties, shall be established by the same procedure as that of Article 11 of the present agreement.

### Article 13

The contracting parties shall disburse the indemnification described in Articles 11 and 12 within three months from the decision of a Mixed Commission or the final decision of the competent court of the German Democratic Republic.

### Article 14

The provisions of Article 11, 12 and 13 are also applicable to unsettled claims for indemnification which originated after the agreement on the relations between the Union of the Soviet Socialist Republics and the German Democratic Republic of September 20, 1955, went into force.

### Article 18

In case of threat to the security of the Soviet forces on the territory of the German Democratic Republic, the General Command of the Soviet forces in the German Democratic Republic may, in consultation with the Government of the German Democratic Republic, apply measures for the elimination of such threat, taking into account the actual situation and the measures adopted by the Government of the German Democratic Republic.

### Article 19

To settle questions arising from the application of the present agreement a Mixed Soviet-German Commission shall be set up, to which each of the Contracting Parties shall delegate three representatives and which will make its decisions on the principle of the unanimity of both Parties.

The Mixed Commission shall determine its own procedure.

The Mixed Commission shall have its headquarters in Berlin.

In case the Mixed Commission is unable to settle a question submitted to it, that question shall be settled through diplomatic channels as soon as possible.

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### Article 20

1. "Members of the Soviet Forces" are:
  - (A) servicemen of the Soviet Army,
  - (B) civilians, Soviet citizens employed in the units of the Soviet forces in the territory of the German Democratic Republic.
2. "Members of the families of members of the Soviet Forces" are:
  - (A) spouses,
  - (B) unmarried children,
  - (C) near relatives supported by these persons, inasmuch as the above-mentioned spouses, children and relatives are citizens of the Soviet Union.

3. "The place of stationing" is the territory allotted to the Soviet forces, including districts for quartering military units, with drill grounds, firing ranges, firing grounds and other objects in the use of those units.

### AGREEMENT BETWEEN THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS AND THE GOVERNMENT OF THE ROMANIAN PEOPLE'S REPUBLIC CONCERNING THE LEGAL STATUS OF SOVIET FORCES TEMPORARILY STATIONED IN THE TERRITORY OF THE ROMANIAN PEOPLE'S REPUBLIC

*Signed at Bucharest, April 15, 1957; in force June 4, 1957*

The Government of the Union of Soviet Socialist Republics and the Government of the Romanian People's Republic,

Being determined to make every effort to preserve and strengthen peace in Europe and throughout the world,

Taking into consideration the fact that the existence of aggressive military blocs directed against peace-loving States, the remilitarization of West Germany and the maintenance by the United States of America and other Parties to the North Atlantic Treaty of numerous forces and military bases near the Socialist States create a threat to the security of those States,

Considering that in these circumstances it is desirable for the purpose of joint defence against possible aggression, and in conformity with international treaties and agreements, that Soviet forces should be temporarily stationed in the territory of the Romanian People's Republic, and

Being desirous of settling questions relating to the temporary presence of Soviet forces in the territory of the Romanian People's Republic,

Have resolved to conclude this Agreement . . .

#### Article 1

The temporary presence of Soviet forces in the territory of the Romanian People's Republic shall in no way affect the sovereignty of the Romanian State; the Soviet forces shall not intervene in the domestic affairs of the Romanian People's Republic.

#### Article 2

1. The strength and the duty stations of Soviet forces temporarily stationed in the territory of the Romanian People's Republic shall be determined

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by special agreements between the Government of the Union of Soviet Socialist Republics and the Government of the Romanian People's Republic.

2. The movement outside their duty stations of Soviet forces in the territory of the Romanian People's Republic shall be subject in each case to the consent of the Government of the Romanian People's Republic or of the Romanian authorities appointed by that Government.

3. The training and manoeuvres of Soviet forces outside their duty stations shall be carried out either on the basis of plans agreed upon with the competent Romanian authorities or with the consent in each case of the Government of the Romanian People's Republic or of the Romanian authorities appointed by that Government.

### Article 3

Soviet forces stationed in the territory of the Romanian People's Republic, individuals serving with those forces and members of their families shall be under a duty to respect and comply with the provisions of Romanian law.

### Article 5

Questions of jurisdiction relating to the presence of Soviet forces in the territory of the Romanian People's Republic shall be settled as follows:

1. Any individual serving with the Soviet forces or any member of the family of such individual who commits a serious or lesser offence in the territory of the Romanian People's Republic shall as a general rule be subject to Romanian law and to the jurisdiction of the Romanian courts, procurator's office and other Romanian organs having competence in matters relating to the prosecution of persons who have committed serious and lesser offences.

Serious offences committed by Soviet military personnel shall be investigated by the military legal authorities and tried by the military tribunals of the Romanian People's Republic.

2. The provisions of paragraph 1 of this article shall not apply:

(a) In the event that an individual serving with the Soviet forces or a member of the family of such individual commits a serious or lesser offence solely against the Soviet Union or against an individual serving with the Soviet forces or a member of the family of such individual;

(b) In the event that an individual serving with the Soviet forces commits a serious or lesser offence in the performance of his official duties.

The cases referred to in sub-paragraphs (a) and (b) shall be subject to the jurisdiction of the Soviet courts and other agencies administering Soviet law.

3. The competent authorities of one Party may, at the request of the competent authorities of the other Party, transfer or accept jurisdiction in specific cases covered by this article. Such requests shall receive sympathetic consideration.

### Article 6

Any person convicted of a serious offence against the Soviet forces stationed in the territory of the Romanian People's Republic or against military personnel thereof shall be liable before the courts of the Romanian People's Republic to the same penalty as if the offence had been committed against the Romanian armed forces or Romanian military personnel.

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### Article 8

At the request of the competent Romanian authorities any individual serving with the Soviet forces who is convicted of an offence under Romanian law shall be withdrawn from the territory of the Romanian People's Republic.

### Article 9

1. The Government of the Union of Soviet Socialist Republics agrees to compensate the Government of the Romanian People's Republic for any material damage which may be caused to the Romanian State by any act or omission of Soviet military units or individuals serving therewith and for any damage which may be caused to Romanian institutions and citizens or to citizens of any third State in the territory of the Romanian People's Republic by Soviet military units or individuals serving therewith in the performance of their official duties. The amount of such compensation shall be determined in either case by the Mixed Commission established under article 17 of this Agreement, on the basis of the claims filed and in conformity with the provisions of Romanian law.

Any dispute arising out of the obligations of Soviet military units shall likewise be examined by the Mixed Commission in accordance with the same principles.

2. The Government of the Union of Soviet Socialist Republics likewise agrees to compensate the Government of the Romanian People's Republic for any damage which may be caused to Romanian institutions and citizens or to citizens of any third State in the territory of the Romanian People's Republic by any act or omission done by individuals serving with the Soviet forces otherwise than in the performance of their official duties or by any act or omission of members of the families of such individuals. The amount of such compensation shall be determined in either case by the competent Romanian court, on the basis of the claims filed against the persons who have caused the damage.

### Article 11

1. The compensation for damage referred to in articles 9 and 10 shall be payable by the Soviet Party or the Romanian Party, as appropriate, within three months after a decision has been taken by the Mixed Commission or after the judgement of the court has entered into force.

The sums awarded to the injured persons and institutions shall be payable, in the cases referred to in article 9 of this Agreement, directly to the competent Romanian authorities and, in the cases referred to in article 10 of this Agreement, directly to the competent Soviet authorities.

2. Any claims for compensation in respect of the damage referred to in articles 9 and 10 which have arisen since the entry into force of the Treaty of Peace with Romania and have not been settled before the entry into force of this Agreement shall be examined by the Mixed Commission.

### Article 16

For the purposes of this Agreement:

The expression "individual serving with the Soviet forces" shall mean:

(a) A person in military service in the Soviet Army, or

(b) A civilian Soviet citizen in the employ of units of the Soviet forces in the Romanian People's Republic;

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The expression "duty station" shall mean an area placed at the disposal of Soviet forces, including places where military units are quartered, together with training grounds, rifle and artillery ranges and other installations used by these units.

### Article 17

A Soviet-Romanian Mixed Commission, to which each Contracting Party shall appoint three representatives, shall be established in order to settle questions relating to the interpretation or application of this Agreement and of the supplementary agreements provided for herein.

The Mixed Commission shall adopt its own rules of procedure.

The headquarters of the Mixed Commission shall be Bucharest.

In the event that the Mixed Commission is unable to settle a question referred to it, the said question shall be settled through the diplomatic channel as soon as possible.

## AGREEMENT ON THE LEGAL STATUS OF THE SOVIET FORCES TEMPORARILY PRESENT ON THE TERRITORY OF THE HUNGARIAN PEOPLE'S REPUBLIC

*Signed at Budapest, May 27, 1957*

The Government of the U.S.S.R. and the Government of the Hungarian People's Republic,

Imbued with the desire to spare no effort to preserve and strengthen peace and security in Europe and throughout the world,

Considering the fact that in the contemporary international situation in which the aggressive North Atlantic Bloc exists, and West Germany is being re-militarized and the forces of revenge [for the lost war] are being reactivated in her, when the U.S.A. and other members of the North Atlantic Bloc maintain their numerous armies and military bases in proximity to the socialist countries, there exists a danger for the security of those countries.

Considering that under these conditions the temporary presence of the Soviet forces on the territory of the Hungarian People's Republic would serve the purpose of guaranteeing a joint defense against possible aggression and is in accordance with international agreements, and

Desiring to settle questions connected with the temporary presence of Soviet forces on the territory of the Hungarian People's Republic,

Have decided in accordance with the Declaration of the Governments of the U.S.S.R. and of the Hungarian People's Republic of March 28, 1957, to conclude the present agreement . . . .

### Article 1

The temporary presence of the Soviet forces on the territory of the Hungarian People's Republic shall in no way affect the sovereignty of the Hungarian State. Soviet forces shall not interfere in the internal affairs of the Hungarian People's Republic.

### Article 2

1. The strength of the Soviet forces, temporarily present on the territory of the Hungarian People's Republic, and their places of stationing shall be determined on the basis of a special agreement between the Government of the U.S.S.R. and the Government of the Hungarian People's Republic.

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2. The movements of the Soviet forces on the territory of the Hungarian People's Republic outside their places of stationing shall require in each case the agreement of the Government of the Hungarian People's Republic or of the agencies authorized by it.

3. The training and maneuvers of the Soviet forces on the territory of the Hungarian People's Republic outside their places of stationing shall take place either on the basis of plans agreed upon with the agencies of the Hungarian Government, or in each case on the basis of an agreement with the Government of the Hungarian People's Republic or with agencies authorized by it.

### Article 3

Soviet forces present on the territory of the Hungarian People's Republic, members thereof and members of their families must respect and observe the rules of Hungarian legislation.

### Article 5

Problems of administration of justice arising from the presence of Soviet forces on the territory of the Hungarian People's Republic shall be determined as follows:

1. As a general rule, in cases of crimes and misdemeanors committed by members of the Soviet forces, or members of their families on the territory of the Hungarian People's Republic, Hungarian law shall apply and Hungarian courts, public prosecution agencies and other Hungarian agencies charged with prosecuting crimes and misdemeanors shall have jurisdiction.

Cases of crimes committed by Soviet soldiers shall be investigated by the military prosecution and examined by agencies of the military administration of justice of the Hungarian People's Republic.

2. Provisions of the first section of the present article shall not apply to:

(a) cases of crimes and misdemeanors committed by members of the Soviet forces, or members of their families exclusively against the Soviet Union, members of the Soviet forces, or members of their families;

(b) cases of crimes and misdemeanors by members of the Soviet forces while discharging their official duties.

In cases enumerated in points (a) and (b) Soviet law shall apply and Soviet courts and public prosecution and other Soviet agencies charged with the prosecution of crimes and misdemeanors shall have jurisdiction.

3. Competent Soviet and Hungarian agencies may request each other to transfer or accept jurisdiction over individual cases provided for in the present article. Such requests shall be given favorable consideration.

### Article 6

In case of offenses committed against Soviet forces present on the territory of the Hungarian People's Republic and their servicemen, guilty persons shall bear, before the courts of the Hungarian People's Republic, the same responsibility as that for offenses committed against the Hungarian armed forces or their servicemen.

### Article 8

On the request of competent Hungarian authorities a member of the Soviet forces guilty of violating the Hungarian legal order shall be recalled from the territory of the Hungarian People's Republic.

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### Article 9

1. The Government of the U.S.S.R. agrees to indemnify the Government of the Hungarian People's Republic for material damage which may be caused to the Hungarian State by the actions or neglect of Soviet military units or individual members thereof, as well as damage which may be caused by Soviet military units or their members while discharging their duties to Hungarian institutions and citizens or to citizens of third states present on the territory of the Hungarian People's Republic—in both cases to the extent fixed by the Mixed Commission set up according to Article 17 of the present Agreement on the basis of claims submitted, taking into consideration the provisions of Hungarian legislation.

Disputes which may arise from the obligations of the Soviet military units are also subject to examination by the Mixed Commission in accordance with the same principles.

2. The Government of the U.S.S.R. also agrees to indemnify the Government of the Hungarian People's Republic for damage to Hungarian institutions and citizens, or citizens of third states present on the territory of the Hungarian People's Republic, resulting from the actions or neglect of the members of the Soviet forces at a time when they were not discharging their official duties, as well as that resulting from the actions or neglect of the members of families of the members of the Soviet forces—in each case to the extent established by competent Hungarian courts on the basis of claims made against persons responsible for the damage.

### Article 11

1. The indemnification provided for in Articles 9 and 10 shall be disbursed by the Soviet Party and the Hungarian Party respectively within three months from the date of decision of the Mixed Commission or the date of final decision of the court.

Payment of sums due to injured persons or institutions shall be made by competent Hungarian agencies in cases provided for in Article 9 of the present Agreement, and by the competent Soviet agencies in cases provided for in Article 10 of the present Agreement.

2. Claims for damages under Articles 9 and 10 which have been made since the Peace Treaty with Hungary went into force but which were not settled before the present Agreement went into force shall be examined by the Mixed Commission.

### Article 13

In interpretation of the present Agreement:

"a member of the Soviet forces" is

- (a) a serviceman of the Soviet Army;
- (b) a civilian who is a Soviet citizen employed by a military unit of the Soviet forces in the Hungarian People's Republic.

"A place of stationing" is the territory placed at the disposal of the Soviet forces, including the quarters of the military units with training grounds, firing ranges and grounds and other objects used by these units.

### Article 17

To settle problems pertaining to the interpretation or application of the present Agreement and supplementary agreements envisaged by it a Soviet-

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Hungarian Mixed Commission shall be set up, and to it each Contracting Party shall delegate three representatives.

The Mixed Commission shall act on the basis of the rules it shall adopt.

The Mixed Commission shall have its headquarters in Budapest.

In case the Mixed Commission is unable to settle a question submitted to it, that question shall be settled through diplomatic channels as soon as possible.



# THE LAW OF OBSCENITY AND MILITARY PRACTICE\*

BY CAPTAIN HARVEY L. ZUCKMAN\*\*

## I. INTRODUCTION

In recent years, problems surrounding the law of obscenity have become increasingly important and this development has resulted in a corresponding awareness of these problems by the courts, both state and federal. This awareness is now being extended into the military legal field. Two recent decisions, one by the United States Court of Military Appeals<sup>1</sup> and the other by an Army board of review,<sup>2</sup> have focused attention on the military's handling of obscenity problems under the Uniform Code of Military Justice.<sup>3</sup> These recent decisions encompass issues occurring in civilian practice as well as issues peculiar to the military. Before any analysis of these and related decisions can be undertaken, however, it would be well to investigate the legal and practical tests for determining obscenity in order to avoid the error committed by one international convention. In the 1930's this convention met in Geneva to discuss the common problem of controlling the publication and dissemination of obscenity. Even after prolonged and heated debate the convention was unable to agree on a working definition of obscenity. But, as one noted author put it,<sup>4</sup> after concluding that they didn't know what they were talking about, the convention members settled down to discuss the subject.

## II. WHAT IS OBSCENITY?

The question posed by the title of this section had long perplexed American courts as well as the aforementioned interna-

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\* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency. None of the factual material herein relating to trials by court-martial has been drawn from privileged documents.

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<sup>1</sup> United States v. Holt, 12 USCMA 471, 31 CMR 57 (1961).

<sup>2</sup> CM 405791, Ford, 31 CMR 353 (1961), *pet. denied*, 31 CMR 314 (1962).

<sup>3</sup> Act of May 5, 1950, § 1, ch. 169, 64 Stat. 108 (effective May 31, 1951). Reenacted in 1956 as 10 U.S.C. §§ 801-840. Act of Aug. 10, 1956, § 1, ch. 1041, 70A Stat. 1, 36-79 (effective Jan. 1, 1957) (hereinafter referred to as the UCMJ or the Code and cited as UCMJ, art. --).

<sup>4</sup> Huxley, *Vulgarity in Literature* (1930).

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tional convention when the case of *United States v. Roth*<sup>5</sup> was presented to the United States Supreme Court. Roth was a leading publisher and seller of erotic literature and other materials who had made the mistake of sending certain of his material through the mail. He was convicted in the Southern District of New York for violating the federal mail obscenity statute<sup>6</sup> and his conviction had been affirmed by the United States Court of Appeals.<sup>7</sup> Because the delicate and far-reaching constitutional question of whether obscene expression is protected by the First Amendment was involved in the case, the Supreme Court granted review. The Court held that obscenity is not expression protected by the First Amendment and affirmed Roth's conviction. Then, to insure that protectible expression was not mistaken for that which was not, the Court attempted to define precisely what obscenity was. In so doing the Court substantially adopted the American Law Institute's view that "a thing is obscene if, considered as a whole, its predominant appeal is to prurient interest."<sup>8</sup> The rationale for the Court's holding that obscenity was not protected expression under the First Amendment was that obscenity did not have "the slightest redeeming social importance." Thus, in effect, the Court said that material may only be condemned as obscene which has for its chief purpose the appeal to man's baser instincts since such appeals have no redeeming social importance.

The narrowness of this standard is illustrated in part by the possibility that some material may be so vile or repulsive as not to appeal to the prurient interest of the average person in the community and therefore be within the ambit of constitutional protection.<sup>9</sup>

Thus, unless the Supreme Court chooses to broaden its test for determining obscenity, and there appears to be no disposition

<sup>5</sup> 354 U.S. 476 (1957).

<sup>6</sup> 18 U.S.C. § 1461 (1958).

<sup>7</sup> 237 F.2d 796 (2d Cir. 1956).

<sup>8</sup> Model Penal Code § 207.10 (Tent. Draft No. 6, 1957). The Court in turn relied upon Webster's Dictionary to define "prurient interest" as "itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity or propensity, lewd." Webster, *New International Dictionary* 1996 (2d ed. unab. 1949).

<sup>9</sup> That Henry Miller's *Tropic of Cancer* represents such material has been suggested. Clayton, "Maryland 'Tropic' Ruling Faces Test," *The Washington Post*, Dec. 25, 1961, § B, p. 16, cols. 1-3. Mr. Clayton, the Washington Post legal writer, reported that Justice Department lawyers discovered that many people found Miller's writings, which also include *Tropic of Capricorn* and *Quiet Days at Clichy*, disgusting and shocking but not sexually exciting. For this and other reasons "there was remarkable agreement that the Government could not win if it charged that Miller's work is obscene." Shortly after this conclusion was reached the Post Office and Customs Bureau bans on *Tropic of Cancer* were lifted.

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on the part of the Court to do so at this time,<sup>10</sup> obscenity prosecutions, both military<sup>11</sup> and civilian should be limited to the condemnation of the publication or the dissemination of pornography,<sup>12</sup> *i.e.*, material designed to arouse and excite the immature, base and unnatural sexual instincts of the recipients.<sup>13</sup> More specifically, pornography is material "which is designed to act upon the reader as an erotic psychological stimulant" or "aphrodisiac."<sup>14</sup> Definitions in this area are woefully inadequate to convey precise meanings because words are used to explain other words or concepts that have little or no concreteness. It is enough to say, however, that whether obscenity is a broader concept than pornography or is synonymous with it, prosecutions should be limited to the publication and dissemination of materials *obviously* produced to exploit the sexual nature of men and women.<sup>15</sup>

<sup>10</sup> If anything, the trend of thinking on the Court would seem to be in the direction of narrowing the test for obscenity. At least two justices would tighten the standard for condemning obscenity by requiring that the condemned material be both appealing to prurient interest and patently offensive to the sensibilities. *Manual Enterprises v. Day*, 370 U.S. 478 (1962) (opinion by Harlan, J., concurred in by Stewart, J.).

<sup>11</sup> It is settled that individuals in the armed services are entitled to the constitutional protections of the Bill of Rights except those which are expressly or by necessary implication inapplicable to the defense establishment. *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960); *Burns v. Wilson*, 346 U.S. 137 (1953). Therefore, trial counsel are apparently bound by the First Amendment rulings of the Supreme Court and in preparing to prosecute "obscenity" cases would be well-advised to scrutinize the material in question closely, even to the point of submitting it officially to other individuals for their reactions before proceeding to trial.

<sup>12</sup> In *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961), a majority of the New York Court of Appeals, in two separate opinions, decided that in conformity with the Supreme Court's decision in *Roth*, the prohibitions of New York's criminal obscenity statute must be limited to "hard-core pornography." See Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 60 (1960). But see *Monfred v. State*, 266 Md. 312, 173 A.2d 173 (1961) (majority and dissenting opinion). While Justice Harlan's opinion in *Manual Enterprises v. Day*, *supra* note 10, left open the question whether anything other than "hard-core pornography" may be condemned constitutionally, it is submitted that the only material meeting the two-fold test for obscenity laid down in the opinion is "hard-core pornography."

<sup>13</sup> The Kronhausens, *Pornography and the Law* 18, 178-244 (1959); Lockhart & McClure, *supra* note 12, at 62-66.

<sup>14</sup> The Kronhausens, *op. cit. supra* note 13, at 178.

<sup>15</sup> A valuable study providing an interesting guide for the determination of material constructed to exploit the prurient interest of individuals is that conducted by Drs. Eberhard and Phyllis Kronhausen and reported in their book, *Pornography and the Law*. They isolate the main characteristic of pornography as the "buildup of erotic excitement." *Op. cit. supra* note 13, at 178. It is interesting to note that the Government appended this work to its appellate pleading before the Army board of review in CM 405791, Ford, *supra* note 2, as an aid to the board in determining whether *Helen and Desire* by Frances Lengel was obscene.

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In summary, then, when we talk about obscenity we do not refer to erotic material in its entirety<sup>16</sup> but rather to that material which deliberately exploits sex in such a way as to arouse and excite the sex instincts and drives of persons who are exposed to the material.

### III. COMMON OBSCENITY QUESTIONS IN CIVILIAN AND MILITARY PRACTICE

The two recent Army obscenity cases raise many questions which also confront the civilian bench and bar. Discussion of these common questions will be followed by a separate discussion of obscenity problems particularly relevant to military practice.

The first significant obscenity case to reach the United States Court of Military Appeals is that of *United States v. Holt*<sup>17</sup> in which the accused, a thirty-two year old sergeant, wrote a series of "love letters" to a young under-age girl with whom he was having a sexual affair. The girl saved the letters which were subsequently discovered by her mother. The sergeant was charged with carnal knowledge in violation of Article 120 and three specifications of mailing obscene letters in violation of Article 134.<sup>18</sup> He pleaded guilty to all charges and specifications, but as a matter in aggravation the trial counsel introduced the sergeant's letters after the findings. On appeal to an Army board of review, the accused contended that his plea of guilty to the mail offenses was improvidently entered since the letters were not obscene. Without

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<sup>16</sup> As Justice Brennan said in his opinion for the Court in the *Roth* case, ". . . [S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." 354 U.S. at 487.

<sup>17</sup> 12 USCMA 471, 31 CMR 57 (1961).

<sup>18</sup> While the obscenity specifications gave no indication under which clause of Article 134 they were laid, appellate counsel for both the defendant and the Government assumed that the federal mail obscenity statute, 18 U.S.C. § 1461 (1958), had been incorporated in the prosecution under the "crimes and offenses not capital" clause of the general article. 12 USCMA at 472 n. 1, 31 CMR at 58 n. 1. For a thorough discussion of the history and legal problems surrounding the federal mail obscenity statute, see Paul & Schwartz, *Federal Censorship: Obscenity in the Mail* (1961); Paul, *The Post Office and Non-Mailability of Obscenity: An Historical Note*, 8 U.C.L.A. L. Rev. 44 (1961); Paul & Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*, 106 U. Pa. L. Rev. 214 (1957); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960); Zuckman, *Obscenity in the Mails*, 33 So. Cal. L. Rev. 171 (1960).

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ruling on the precise question presented, the board, one member dissenting, held the sergeant's plea inconsistent with his testimony on sentence that he "intended the letters only as 'love letters.'" The Judge Advocate General then certified to the Court of Military Appeals the broad question whether the board of review was "correct in holding that the plea of guilty . . . was improvident." As a result of The Judge Advocate General's action several important questions of obscenity law confronted the Court.

The first of these questions was whether a letter writer's subjective intent has any relevance to a prosecution for sending obscene matter through the mail. If the answer was in the affirmative, the sergeant's protestations that the letters were intended by him as nothing more than letters of affection to a loved one would clearly be inconsistent with his plea of guilty. Several years earlier in the landmark case of *United States v. Dennett*<sup>19</sup> the United States Court of Appeals was faced with a similar problem. In that case the defendant, a woman of unimpeachable character, had mailed copies of a pamphlet which she had written for the purpose of instructing her two sons on "The Sex Side of Life." While the court reversed the woman's conviction for violating the federal mail obscenity statute on the ground that the pamphlet was not obscene, Judge Augustus Hand, speaking for the court, clearly rejected the woman's defense of good motives as irrelevant.<sup>20</sup> In effect, the case ruled that violation of the mail obscenity statute required only *general intent*.<sup>21</sup> It would be enough to ground a conviction under the statute for the Government to show that the defendant mailed legally obscene matter knowing simply the contents of that matter.<sup>22</sup> The "whys" and "wherefores" of the mailing were of no consequence.

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<sup>19</sup> 39 F.2d 564 (2d Cir. 1930).

<sup>20</sup> "It is doubtless true that the personal motive of the defendant in distributing her pamphlet could have no bearing on the question whether she violated the law. Her own belief that a really obscene pamphlet would pay the price for its obscenity by means of intrinsic merits would leave her much as ever under the ban of the statute." 39 F.2d at 568. *Accord*, *Verner v. United States*, 183 F.2d 184 (9th Cir. 1950). See *Grove Press, Inc. v. Christenberry*, 175 F.Supp. 488, 501-02 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433 (2d Cir. 1960).

<sup>21</sup> See also *Magon v. United States*, 248 Fed. 201 (9th Cir. 1918), *cert. denied*, 249 U.S. 618 (1919); *Knowles v. United States*, 170 Fed. 409 (8th Cir. 1909).

<sup>22</sup> But, of course, there would be no need for the Government to show that the accused knew or even suspected that the matter was obscene. *Rosen v. United States*, 161 U.S. 29 (1896); *Magon v. United States*, *supra* note 21; see *Burton v. United States*, 142 Fed. 57 (8th Cir. 1906).

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In arguing to the Court of Military Appeals that Sergeant Holt's testimony was not legally inconsistent, the Government urged the Court to follow federal precedent in order to assure development of obscenity law under Article 134 of the Uniform Code consistent with settled federal law. This the Court did. In stating that "purity of motive is no defense to impurity of writing," the tribunal clearly held that a writer's subjective intent in writing and mailing material later adjudged to be obscene is immaterial. Thus, testimony by an accused as to his subjective intent or motive in mailing a letter cannot be legally inconsistent with his guilty plea.

Because of the broad nature of the certified question, the Court was also presented with the issue originally raised by the accused before the board of review, namely, whether the letters were actually obscene. The Court refused to meet this issue head-on because it was of the belief that the question of obscenity was for the triers of fact, with review limited to the question of the legal sufficiency of the findings.<sup>23</sup> The Court said that had the accused not pleaded guilty and had the court-martial returned findings of guilty on the merits, it would be compelled to hold the evidence (the letters) sufficient to support the conviction. This approach would involve only the same scope of appellate review accorded all criminal prosecutions by the Court.

It is submitted that the Court of Military Appeals may be taking too restricted a view of its powers of review in obscenity cases. If the determination of what is and what is not obscene is purely an ordinary factual question, then the Court was, of course, correct in refusing to examine the letters for any purpose other than to uphold the legal sufficiency of the court-martial's determination that the letters were obscene. But there is much respectable authority for the proposition that the determination of what is and what is not obscenity is something more than an ordinary factual matter to be left in the exclusive control of the finders of fact.<sup>24</sup> Under this proposition, even the fact that the accused pleads guilty in an obscenity prosecution would not alter the appellate court's duty to go beyond the question of legal sufficiency.

<sup>23</sup> See *United States v. Wheatley*, 10 USCMA 539, 28 CMR 105 (1959), affirming CM 401092, *Wheatley*, 28 CMR 28 CMR 461 (*semble*).

<sup>24</sup> See *Manual Enterprises v. Day*, *supra* note 10; *Capitol Enterprises, Inc. v. City of Chicago*, 260 F.2d 670 (7th Cir. 1958); *People v. Richmond County News, Inc.*, *supra* note 12; *Monfred v. State*, 226 Md. 312, 173 A.2d 173 (1961) (dissenting opinion by Hammond, J.); *Commonwealth v. Moniz*, 388 Mass. 442, 155 N.E. 2d 762 (1959); *Lockhart & McClure*, *supra* note 18, at 114-120.

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The theory behind this somewhat unique proposition is that the question of what may be suppressed as obscene through criminal prosecution is a constitutional matter which appellate courts have a solemn duty to consider.<sup>25</sup> This constitutional consideration amounts to a *de novo finding* on the question of whether the material alleged to be obscene by the prosecution and found to be obscene by the triers of fact is obscene. Such a determination goes beyond the determination whether a reasonable trier of fact could find the material in issue obscene and represents justifiable "second-guessing" by the appellate courts.

The best judicial exposition of the theory to date may be found in Judge Fuld's opinion in *People v. Richmond County News, Inc.*<sup>26</sup> In that case the defendant corporation had been found guilty in the trial court of distributing an obscene magazine in violation of section 1141 of the New York Penal Code, the state's criminal obscenity statute. The conviction was reversed by the state's intermediate appellate court on the ground that the proof failed to establish the defendant's knowledge of the magazine's obscene character.<sup>27</sup> The state appealed, and by a narrow margin of four to three, the New York Court of Appeals held that the magazine in question was not obscene, regardless of the finding below. Judge Fuld minced no words in declaring the appellate court's power to make this determination:

The courts below have characterized the magazine as "obscene," but whether that finding is justified requires us . . . to make an independent constitutional appraisal of the magazine. This court, as the State's highest tribunal, no less than the United States Supreme Court, cannot escape its responsibility in this area "by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as 'obscene,' for, if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind." *Roth v. United States*, 354 U.S. 476, 497-498 . . . [Harlan, J., concurring]. . . .<sup>25</sup>

If a state appellate court can be so certain that the question of what is and what is not obscene involves constitutional judg-

<sup>25</sup> See *Manual Enterprises v. Day*, *supra* note 10; *Roth v. United States*, *supra* note 5, at 497-498 (concurring opinion); *People v. Richmond County News, Inc.*, *supra* note 12; *Lockhart & McClure*, *supra* note 18, at 114-120.

<sup>26</sup> 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961). While Judge Fuld's opinion was concurred in by only one other judge, two more judges of the seven-man New York Court of Appeals agreed in a separate opinion that the highest appellate court of the state of New York had the power to make an independent judgment as to what was and what was not obscene.

<sup>27</sup> See *Smith v. California*, 361 U.S. 147 (1959).

<sup>28</sup> 9 N.Y.2d at 580, 175 N.E.2d at 681-82, 216 N.Y.S.2d at 370. See *Commonwealth v. Moniz*, *supra* note 24; *Lockhart & McClure*, *supra* note 18, at 114-120, for very nearly the identical judgment.

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ment which it must exercise independently of the lower courts,<sup>29</sup> then surely a *federal court*,<sup>30</sup> such as the Court of Military Appeals, would be hardpressed to find substantial grounds for abdicating this judgment to the triers of fact.<sup>31</sup> This is particularly true in light of the Court's recently pronounced intention to champion the constitutional rights of military personnel against all encroachments.<sup>32</sup> Since it seems clear that before criminal prosecutions for the publication, dissemination or communication of obscenity will be sanctioned, the material in question must be found to be of such character, *i.e.*, obscene, as to be beyond the pale of First Amendment protection, the Court may well have erred in failing to make an independent appraisal of Sergeant Holt's letters, despite his plea of guilty.

Perhaps the most significant question raised in *Holt* was the standard to be utilized by triers of fact and, assuming they have the power to make independent determinations, the appellate courts, in finding obscenity. This question more than any other has preoccupied the courts over the years. Until the Supreme Court's decision in *United States v. Roth*, many American courts applied the harsh and confining standard enunciated in *Regina v. Hicklin*<sup>33</sup> that material could be adjudged obscene by the effect of an isolated excerpt upon particularly susceptible persons. Rigid application of this rule would undoubtedly result in forcing down the level of American literature. At least one federal trial court

<sup>29</sup> *But see* *Monfred v. State*, *supra* note 24.

<sup>30</sup> Two federal appellate courts have now taken it upon themselves to make independent judgments as to the character of allegedly obscene material. See *United States v. Keller*, 259 F.2d 54 (3d Cir. 1958); *Capitol Enterprises, Inc. v. City of Chicago*, *supra* note 24. While a majority of the United States Supreme Court have not ruled expressly on this question of independent review by appellate tribunals, certain of the Court's *per curiam* decisions suggest that such procedure is also followed by the Court itself. See *Times Film Corp. v. City of Chicago*, 355 U.S. 35 (1958); *reversing* 244 F.2d 432 (7th Cir. 1957); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958), *reversing* 249 F.2d 114 (D.C. Cir. 1957); *One, Inc. v. Olesen*, 355 U.S. 371 (1958), *reversing* 241 F.2d 772 (9th Cir. 1957).

<sup>31</sup> The Court's statutory jurisdiction limiting review to the law should prove no bar since this judgment involves no more than the application of constitutional legal standards to the material in issue. The Court has already held that it has the power to decide mixed questions of law and fact. See *United States v. Flagg*, 11 USCMA 636, 29 CMR 452 (1960).

<sup>32</sup> See *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960), in which the Court stated, in upholding the right of accused service personnel to personal confrontation of witnesses as guaranteed by the Sixth Amendment, that ". . . [I]t is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication, inapplicable, are available to members of our armed forces." 11 USCMA at 430-31, 29 CMR at 246-47. See also Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181 (1962).

<sup>33</sup> [1868] 3 Q.B. 360.

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revolted against this existing standard in the early 1930's,<sup>34</sup> but it was not until the *Roth* case that a more liberal standard was made the law of the land. The Supreme Court rejected the *Hicklin* test as unconstitutional in that it condemned material which had legitimate claim to protection under the First Amendment. In its place the high court substituted the test that material was obscene and beyond constitutional protection only if, when *judged as a whole*, it appealed to the prurient interest of *the average person* in the community.<sup>35</sup> No longer could lawful criminal prosecutions be based on isolated passages of otherwise reputable literary works.<sup>36</sup>

Once the Supreme Court had spoken it might seem that the Court of Military Appeals and all other federal and state courts would have merely to apply this new obscenity standard in all cases. But it must be remembered that *Roth* involved the mailing of mass circulation publications to all sorts of persons throughout the United States. Therefore, in *Holt* the Government questioned whether the standard enunciated in *Roth* was the appropriate one to be applied in the case of private handwritten letters mailed to one specific individual. While arguing that the letters were obscene under the *Roth* standard, the Government contended alternatively that in personal letter cases, mail matter should be declared obscene if it appealed merely to the *recipient's* prurient interest in the case of one addressee and the prurient interest of the average person in a *limited* audience if the mail matter is directed to a specialized group.<sup>37</sup> Essentially what the Government was con-

<sup>34</sup> *United States v. One Book Called "Ulysses,"* 5 F.Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

<sup>35</sup> Inasmuch as only two justices have spoken in favor of narrowing this obscenity standard by adding the requirement of "patent offensiveness," see note 10 *supra*, it must be assumed that this standard remains unchanged as the basic yardstick for measuring obscenity.

<sup>36</sup> For the opinion that the *Roth* decision will have a beneficial influence on American letters, see Lewis, "Power to Censor Is Still Unclear," *New York Times*, Dec. 20, 1959, § 4, col. 5, p. 8E.

<sup>37</sup> Brief for the United States, p. 13, *United States v. Holt*, 12 USCMA 471, 31 CMR 57 (1961). In support of its position the Government relied principally on the case of *United States v. 31 Photographs*, 156 F.Supp. 350 (S.D.N.Y. 1957). In that case the Government sought to confiscate certain materials which the Institute for Sex Research, Inc. (the "Kinsey Institute") sought to import into the United States. In releasing the material to the Institute, Judge Palmieri held that a proper determination of obscenity required looking to the impact of the questioned material upon those whom it is likely to reach. Since those whom the foreign pornography was likely to reach were all objective scientists devoted to the serious study of sex in all of its manifestations, the judge could not hold the material obscene as to the receiving group involved. The Government in *Holt* also relied upon the more recent case of *Manual Enterprises, Inc. v. Day*, 289 F.2d 455 (D.C. Cir. 1961), which involved administrative action by the post office barring certain

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tending for was a *variable* standard of obscenity as opposed to the rigid constant standard of *Roth*.<sup>38</sup> This approach takes into consideration the actual audience to whom allegedly obscene material is communicated and would allow material to be condemned as obscene if it appealed to the prurient interest of those to whom it is directed, even though it had no such appeal to the average person in the community.<sup>39</sup> This standard can be a double-edged sword as far as the Government is concerned since it is possible for material to be considered obscene under the constant standard of *Roth* and yet not be obscene in relation to the audience or receiving group to which the material is directed.<sup>40</sup> The Government subsequently was made fully cognizant of this fact in the *Ford* case.<sup>41</sup> In *Holt* the Court felt it unnecessary to decide what standard would be applicable to private personal letters because the letters there could be found to be obscene, regardless of the standard utilized. But the Court, while leaving the question open, did note that the Government had "conceded" that the *Roth* standard was inapplicable.<sup>42</sup>

allegedly homosexual periodicals from the mail. The United States Court of Appeals found that the publications were such that the "average man in the community" would be an atypical reader, not likely to be affected by the publications, and, therefore, the impact of the publications had to be tested by the average member of the audience to which the materials were directed, i.e., the average homosexual. This decision was reversed by the Supreme Court, 370 U.S. 478 (1962), but the issue of variable obscenity was never reached by the Supreme Court nor was any law fixed by the decision. Two of the justices, Harlan and Stewart, decided that the Post Office Department and the Court of Appeals had relied on an erroneous standard for determining obscenity, i.e., the *Roth* standard alone, and proceeded to find the magazines in question not obscene under the standard set forth in their opinion. Justices Brennan, Warren and Douglas held only that Congress had given the Post Office Department no authority to withhold allegedly obscene material from the mails by administrative action and hence, reversal of the ban was required. Justice Black concurred solely in the result. The only other Justice to take part in the decision was Justice Clark who dissented, saying, "While those in the majority, like ancient Gaul, are split into three parts, the ultimate holding of the Court today . . . requires the United States Post Office to be the world's largest disseminator of smut and Grand Informer of the names and places where obscene material may be obtained." 370 U.S. at 519.

<sup>38</sup> The leading proponents of the variable obscenity standard are Professors William B. Lockhart and Robert C. McClure of the University of Minnesota Law School. They make a persuasive argument for this more flexible approach to obscenity in their leading article *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 77-88 (1960).

<sup>39</sup> See *Manual Enterprises, Inc. v. Day*, *supra* note 37.

<sup>40</sup> See *United States v. 31 Photographs*, *supra* note 37.

<sup>41</sup> CM 405791, *Ford*, 31 CMR 353 (1961), *pet. denied*, 31 CMR 814 (1962).

<sup>42</sup> 12 USCMA at 472, n. 2, 31 CMR at 58, n. 2. The Court's understanding that the Government had conceded this point is apparently erroneous for the Government argued alternatively in its brief that even were the variable standard not applicable the appellant's letters should still be condemned as obscene under the *Roth* standard. Brief for the United States, p. 14.

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Grasping firmly to the Government's theory in *Holt*, the appellant Ford insisted that his letters to a pornography peddler describing in lurid detail the kinds of pornographic photographs he desired could not be considered obscene. The peddler was simply in the business of filling such orders and would be left unaffected by the letters.<sup>43</sup> The Government's embarrassment at finding its own theory being used against it points up the problem of attempting to use one obscenity standard to cover all or even a large number of cases. Obscenity cases have too many unique facets to be comfortably categorized and ruled by *stare decisis*. What standard should be used to govern private personal mailings is still open to the inventiveness of counsel and court, whether military or civilian.<sup>44</sup>

If, however, one uniform standard is to be chosen by the courts, then it is submitted it should be the variable standard with its emphasis on the audience to whom questioned material is directed. This standard has the advantage of flexibility which the fixed standard of *Roth* does not possess. Under the variable standard the mailing of hard-core pornography to an organization like the Kinsey Institute would not be a violation of law because intended for scientists whose primary interest in the material would be serious.<sup>45</sup> Under the unbending standard of *Roth* the sender of this same material, though his motives be pure, would have to be held in violation of federal law since the material would appeal to the prurient interest of the average person in the community even though not intended for his eyes. On the other hand, the variable standard can be employed to strike at the vile profiteers whose market is the youth of the country or other groups which are particularly susceptible to erotic excitement. Their mailings, frankly appealing to adolescent or aberrant curiosity, would be condemned under the variable standard even though the mailings are adjudged as failing to arouse the prurient interest of the average person in the community. So long as the prurient interest of the average child or deviant of the group to which the material is directed is appealed to, the sender would be subject to the sanctions of the law.

<sup>43</sup> Brief for Appellant, p. 16, CM 405791, Ford, *supra* note 41. The Government answered this contention by suggesting that smut peddlers are sick individuals themselves, particularly susceptible to the excitation of "dirty" letters. Brief for the United States, p. 6. In this connection, see Caprio & Brenner, *Sexual Behavior: Psycholegal Aspects* 260-61 (1961).

<sup>44</sup> One federal court, however, in a decision subsequent to *Holt*, has held that the constant standard of *Roth* applies to private personal letters as well as to mass circulation distributions. *United States v. Ackerman*, 293 F.2d 449 (9th Cir. 1961).

<sup>45</sup> *Cf. United States v. 31 Photographs*, *supra* note 37.

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Thus, the flexibility of the variable standard of obscenity provides a basis for judging the true character of the conduct of the sender by looking at the nature of the audience to whom the material is directed. And certainly the law should distinguish between the sender who directs material through the mail for scientific or educational purposes and the sender who seeks only to line his pockets by corrupting a segment of the normal population or preying upon the deviations of abnormal groups within society.

The final question raised in *Holt* was whether the federal mail obscenity statute<sup>46</sup> covers the obscene private letters of persons having a close personal relationship. Appellate defense counsel contended that the fact that Sergeant Holt and his girl friend were lovers exempted them from the prohibitions of the statute. The Court had little trouble disposing of this contention since the legislative history of the present statute clearly indicated the act's all-inclusive nature.<sup>47</sup>

In *Ford* the most important question of obscenity law raised was that involving scienter or guilty knowledge. The accused officer was a collector of pornography who, in addition to mailing several obscene letters to a pornography merchant, also exhibited and disseminated certain obscene material to friends. In one instance the accused loaned a bartender in a bar frequented by him a copy of the book *Helen and Desire*.<sup>48</sup> The evidence of record did not establish that the accused had any knowledge of the contents of the book which he loaned to the bartender. During an out-of-court hearing the law officer *sua sponte* brought up the question of scienter and concluded that lack of knowledge of the contents of the book was not an element of the Article 133 offense of conduct unbecoming an officer and gentleman but that such lack of knowledge could be raised by the accused as a complete defense under the label of "mistake of fact."<sup>49</sup> The law officer also ruled

<sup>46</sup> 18 U.S.C. § 1461 (1958).

<sup>47</sup> See 1955 U.S. Code Cong. & Ad. News 2210; *Thomas v. United States*, 262 F.2d 844 (6th Cir. 1959). See also *United States v. Musgrave*, 160 Fed. 700, 706 (E.D. Ark. 1908) (construing predecessor statute, Rev. Stat. § 3893 (1875)); *United States v. Stickrath*, 242 Fed. 151 (S.D. Ohio 1917). There seems little doubt but that a husband would be criminally liable under the statute for mailing an obscene "love letter" to his own wife. However, the wisdom of prosecuting such cases seems highly questionable.

<sup>48</sup> Published by the Olympia Press of Paris, which *Time Magazine* has described as "the world's most notorious publisher of English language pornography." *Time*, "Shy Pornographer," Nov. 3, 1961, p. 88.

<sup>49</sup> The instruction on scienter was as follows: ". . . [K]nowledge by the accused that the material, which was in fact lewd and lascivious, was contained in or appeared upon the item exhibited or loaned to another, is not an essential element of the offense . . . ; however, the facts and circumstances,

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that the only knowledge the accused had to possess was that of the actual contents of the book in question. The accused's *belief* as to the nature and quality of the material was irrelevant.<sup>50</sup> On appeal to the Army board of review the accused officer contended that the law officer erred in instructing the court-martial that knowledge was not an element of the offense. Prejudice would arise from shifting the burden of coming forward with the evidence from the Government to the accused. The board agreed with the accused and held that scienter was an element of the offense. However, the board refused to reverse the finding of guilty of conduct unbecoming an officer. In construing the law officer's instruction the board found that the law officer had actually informed the court-martial that knowledge was an element of the Government's case; hence the accused had not been prejudiced.

Whatever the relative merits of the board's construction, the decision is significant because it clearly holds that guilty knowledge is an element of the offense of conduct unbecoming an officer when the conduct condemned is the dissemination of obscenity.<sup>51</sup> It would also seem that the decision is authority for the proposition that the degree of scienter required is only that of knowledge of the contents of the allegedly obscene material. The board of review at least talked in those terms in its opinion.

In the author's opinion the decision in *Ford* is sound and should be adopted by the Court of Military Appeals in the event that tribunal is faced with the issue of scienter. First, from a procedural

as shown by the evidence, indicate the possibility from which the court might generate a reasonable doubt as to whether the accused might have made a mistake of fact. If the court, in considering the evidence, does not exclude beyond a reasonable doubt the possibility on the circumstantial evidence in this case that the accused did not know of the contents of the document or photograph at the time it was shown or released by him to another, . . . then that the fact will relieve the accused of all responsibility, . . . and he must be acquitted. With respect to this evidence, the court is advised that if the accused was laboring under such a mistake, and if his mistake was honest and reasonable, he cannot be found guilty; however, such mistake must be both honest and reasonable in order to justify an acquittal. . . . [I]f the accused was not aware that he was presenting the matter . . . to another person, then he cannot, if that belief was honest and reasonable, . . . be found guilty of this offense, and that is so even though his knowledge is not a fact that must be proved by the prosecution as an essential element . . ." CM 405791, *Ford*, *supra* note 41, at 355.

<sup>50</sup> For support on this ruling the law officer might turn by way of analogy to the federal mail obscenity statute which requires only knowledge of the contents of the mail matter alleged to be obscene. See note 22 *supra*.

<sup>51</sup> Several service boards of review have also taken this position on scienter in cases involving the striking of superior commissioned or non-commissioned officers. CGCMS 21251, *Gill*, 30 CMR 740 (1961); ACM 16234, *Castro*, 28 CMR 760 (1959); CM 860874, *Murphy*, 9 CMR 473 (1953); CM 359569, *Moffet*, 9 CMR 343 (1953).

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standpoint it seems desirable to require the Government to plead and prove guilty knowledge and to allow the accused to contest this element by pleading not guilty and by coming forth with evidence of his lack of knowledge of the material. This approach, inherent in *Ford*, is less complicated than one requiring the accused to plead and prove an affirmative defense of lack of knowledge, with the Government then being required to rebut the affirmative defense. This raising of the question of scienter by way of affirmative defense entails several shifting of the burden of coming forward with the evidence, and it would be well to avoid this. The *Ford* approach has the added virtue of being consonant with the existing federal procedure in mail obscenity prosecutions.<sup>52</sup>

From a substantive standpoint the *Ford* holding that scienter is an element of the Government's case is also sound. It avoids a possible constitutional infirmity present in the affirmative defense approach to raising the issue of scienter. Certainly, a compelling argument can be made that when a democratic sovereign curtails freedom to publish and disseminate written and pictorial matter by instituting criminal prosecutions, the sovereign should be the party burdened with pleading and coming forward, in the first instance, with evidence of scienter. To place this burden on the accused might have a decisive effect on the outcome of the trial. Where there is a lack of evidence on a given issue, the party having the burden of coming forward with the evidence loses on that issue. A procedural rule favoring the prosecution and making the defense against obscenity prosecutions more difficult could intimidate publishers and disseminators of written and pictorial material to curtail the publication and dissemination of some material which may be within the protection of the First and Fourteenth Amendments. This possible indirect effect of a procedural rule of law might be enough to condemn the rule as infringing on constitutional rights.<sup>53</sup>

An important point to note with regard to the issue of scienter is that very little law in this area is settled. Trial counsel preparing to prosecute obscenity cases under Articles 133 and 134 would be well-advised, then, to introduce on their own initiative as much circumstantial and direct evidence of guilty knowledge as is reasonably available. Failure to consider the question of scienter carefully could well result in settling the law at the expense of the Government's case.

<sup>52</sup> See text accompanying notes 68-79 *infra*.

<sup>53</sup> *Cf. Smith v. California*, 361 U.S. 147 (1959) (the leading federal decision holding for the requirement of scienter in obscenity prosecutions).

IV. OBSCENITY PROBLEMS OF SPECIAL CONCERN  
TO THE MILITARY

## A. SUBSTANTIVE QUESTIONS

The standard for condemning material as obscene is whether the material appeals to the prurient interest of the average person in the contemporary community.<sup>54</sup> A question relative to the *Roth* standard which has particular relevance to the military is the definition of "community." Is the relevant community geographic in nature or institutional? Or is the concept of "community" really rather meaningless? If, in *Roth*, the Supreme Court was referring to a grouping of people in a particular space, courts-martial would have to take into consideration the location of the Army post wherein the alleged obscenity offense occurred together with the mores of the civilian and military communities in that locale. If, on the other hand, the Supreme Court was speaking generally of the present day over-all American cultural society, as Justices Harlan and Stewart suggest in their opinion in *Manual Enterprises v. Day*,<sup>55</sup> the location of the alleged offense would be immaterial. From the viewpoint of those interested in uniformity throughout the military establishment, the less geographical in nature the concept the more desirable it will be. Material which is obscene at one Army installation should be obscene at any other installation, whether that installation be located on the plains of Kansas or at Governor's Island, New York.

Finally, a more practical but no less important question for military justice is the conduct which may be condemned under Articles 133 and 134 of the Uniform Code. There is no question that the sending of obscene letters and other material through the mail is violative of the Code.<sup>56</sup> So is the making of obscene phone calls to unconsenting women<sup>57</sup> and the exhibiting of obscene

<sup>54</sup> *United States v. Roth*, 354 U.S. 476 (1957).

<sup>55</sup> 370 U.S. 478 (1962). Two Justices, Harlan and Stewart, have already stated their belief that the relevant community is national in scope. "There must first be decided the relevant 'community' in terms of whose standards of decency the issue must be judged. We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency." 370 U.S. at See also Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 113-14 (1960).

<sup>56</sup> *United States v. Holt*, 12 USCMA 471, 31 CMR 57 (1961); CM 405791, Ford, 31 CMR 353 (1961), *pet. denied*, 31 CMR 314 (1962).

<sup>57</sup> CM 400786, Simmons, 27 CMR 654, *pet. denied*, 10 USCMA 679, 27 CMR 512 (1959).

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motion pictures for profit in a government-owned building.<sup>58</sup> While there are few reported military obscenity cases, and generalization can be hazardous, it would seem that any open and notorious communication or dissemination of obscene language or material would be conduct unbecoming an officer and gentleman, conduct to the discredit of the service, or conduct prejudicial to good order and discipline. But the trend of the military cases is opposed to the idea that mere possession of obscene matter is violative of either Article 133 or 134 of the Uniform Code.<sup>59</sup> And in the *Ford* case an Army board of review held that the exhibition of obscene pictures by an officer to another while in his own quarters during a social occasion did not constitute conduct unbecoming an officer and gentleman. It has been suggested that to punish mere possession of obscenity would be a violation of First Amendment guarantees.<sup>60</sup>

Under present interpretations of the general articles only those acts involving obscenity which have a decided tendency to degrade or corrupt servicemen or civilians, bring discredit upon the service, destroy discipline and respect for rank are condemned. Certainly, the sale of salacious material or the exhibition of salacious shows or films for a price is corrupting and degrading to both seller and purchaser. Commercial transactions involving obscene matter should not be tolerated. Nor should the notorious exhibition of obscenity to those of lower military status by men of greater status be tolerated. Such exhibition would cause, if nothing else, contempt toward the exhibitors, which contempt could be easily translated into disciplinary problems. Although the possession of obscenity and the limited dissemination of such material in social situations must be condemned in a moral sense,

<sup>58</sup> CM 364954, *Cowan*, 12 CMR 374 (1953).

<sup>59</sup> CM 400388, *Schneider*, 27 CMR 566 (1958); CM 405791, *Ford*, *supra* note 56.

<sup>60</sup> In *State v. Mapp*, 170 Ohio St. 427, 166 N.E.2d 387 (1960), four judges of the seven-judge Ohio Supreme Court held an Ohio statute imposing criminal penalties for the bare possession and control of obscene material to be in contravention of the First and Fourteenth Amendments to the United States Constitution. However, since the state constitution of Ohio prohibits the state supreme court from striking down legislation unless at least six of the seven justices concur in the decision, the Ohio high court was compelled to affirm the conviction of Miss Mapp for doing nothing more than knowingly safekeeping certain pornography belonging to a former boarder in her home. The court's majority opinion, in effect, invited the United States Supreme Court to reverse the decision on appeal by striking down the statute as unconstitutional on its face. The Supreme Court did reverse the conviction but on the ground that the evidence upon which the conviction was based was secured by the Cleveland police in violation of the Fourth Amendment and was therefore inadmissible, *even in a state prosecution*. *Mapp v. Ohio*, 367 U.S. 643 (1961), *overruling Wolf v. Colorado*, 338 U.S. 25 (1949).

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such conduct is not, in and of itself, violative of Articles 133 and 134. The Army boards of review have made a distinction between a soldier's military life and his private life in this area of the law.

### B. PROCEDURAL QUESTIONS

The first important procedural question in obscenity prosecutions under the Uniform Code is how alleged offenses are to be pleaded. Most of the important issues are well handled in the *Simmons case*.<sup>61</sup> In that case the accused was found guilty of communicating telephonically obscene language to a female under a specification which detailed the language used and labeled this language as obscene.<sup>62</sup> The accused contended that because the words used were open to a possible innocent interpretation, and "were not obscene per se," the specification did not state an offense. In order to state an offense, according to the accused, the Government had to further allege that the accused used the words in an obscene manner and that they were so understood by the female to whom they were addressed. In affirming the findings of guilty, an Army board of review held that a specification which made a bare allegation that an accused uttered obscene language to a female would be legally sufficient. The board found support for its holding in the modern practice of avoiding the pleading of evidentiary facts.

The board's decision, based as it is on the modern practice of notice pleading, is applicable to every type of obscenity offense. Thus, in the case of mail offenses it would only be necessary in the specifications to identify the objectionable letters by postmark and to characterize the letters as obscene.<sup>63</sup> The same is true of obscene publications and motion pictures. All that is required is that the material be identified by title, that the time and place of the offense be alleged, and that the material be characterized as obscene.<sup>64</sup> Because of the rule that allegedly obscene matter must

<sup>61</sup> CM 400786, *Simmons*, *supra* note 57.

<sup>62</sup> See 27 CMR at 656 for the language of the specification.

<sup>63</sup> Section 1461 of the Criminal Code of the United States talks in terms of "lewd, lascivious, obscene," and if the federal mail obscenity statute is specifically incorporated in the pleading, it is advisable to characterize the mail matter in this fashion. Otherwise, a characterization that the mail matter is "obscene" is sufficient since the words used in section 1461 are synonymous, and use of more than one of them would be surplusage.

<sup>64</sup> In the case of prosecutions under Article 134 it is unnecessary to allege that the particular conduct was to the prejudice of good order and discipline or that it was to the discredit of the service. *United States v. Marker*, 1 USMA 393, 400, 3 CMR 127, 134 (1952); *ACM 14661, French*, 25 CMR 851 (1958), *aff'd in part and rev'd in part*, 10 USMA 171, 27 CMR 245 (1959). But, of course, an instruction to the court-martial on this element is required. *United States v. Williams*, 8 USMA 325, 24 CMR 135 (1957); *United States v. Gittens*, 8 USMA 673, 25 CMR 177 (1958).

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be judged as a whole, it would be unwise in drafting specifications to pick out particular written passages or visual scenes for inclusion in the pleadings. Specifications quoting such passages or describing such scenes would be subject to attack on appeal on the ground that improper standards had been utilized by the Government, and therefore the charges and specifications did not allege offenses. In the case of untitled photographs or motion pictures, however, a simple allegation that the film or photograph is obscene would likely not withstand a motion to make more definite and certain. In such case, the specification should contain a general, over-all description of the material.

Another question with regard to pleading is under what clause of Article 134 should obscenity offense be brought. The general article has three clauses under which specifications may be laid: (1) disorders and neglects to the prejudice of good order and discipline in the armed forces; (2) conduct of a nature to bring discredit upon the armed forces; and (3) federal crimes and offenses not capital.<sup>65</sup> Mail offenses may fall within any one or more of these categories and can always be alleged under the third clause of Article 134. But is it wise to specify that certain conduct violates a particular enumerated federal statute? The answer, from the prosecution's point of view, is decidedly not. The federal statute may require a particular mode or element of proof that would not be required by alleging the offense generally under the first or second clause or both of these clauses of Article 134. Furthermore, the fact that the specification does not designate the particular federal statute upon which the prosecution is based does not necessarily mean that the specification is insufficient to show a violation of that federal statute.<sup>66</sup> Thus, by refraining from designating a particular federal statute, the Government may very well be able to prosecute its case under any one or all of the clauses of Article 134. On the other hand, by designating the particular federal statute violated, the Government may restrict itself unduly to the theory embodied in the third ("crimes and offenses not capital") clause of the general article. This is so because in such prosecutions the law officer need not instruct the court-martial that the alleged misconduct is either prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces or both. The absence of such instructions would

<sup>65</sup> See generally *United States v. Dicario*, 8 USCMA 353, 24 CMR 163 (1957); *United States v. Herndon*, 1 USCMA 461, 4 CMR 53 (1952); Ackroyd, *The General Articles, Articles 133 and 134 of the Uniform Code of Military Justice*, 35 St. John's L. Rev. 264 (1961).

<sup>66</sup> Cf. *United States v. Herndon*, *supra* note 65.

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necessarily limit the Government to a theory of the case controlled solely by the third clause of the general article.<sup>67</sup> Such practice, while advantageous to the Government, is subject to the criticism that it violates the spirit of modern notice pleading in that it avoids giving the accused notice of the precise theory of the Government's case. However, as long as the general article affords the Government the opportunity to proceed with its case on more than one theory, neither ethics nor law requires the prosecution to limit itself by giving notice of its choice of theories.

Turning now to questions of proof in obscenity cases, the Government's burden is met in much the same way as it would be in prosecutions in federal civil courts. For mail offenses, the proof required is almost identical to prosecutions under Section 1461.<sup>68</sup> The Government must show that the accused (a) knowingly deposited in the mail (b) obscene matter.<sup>69</sup> In the case of private letters the burden of showing a knowing deposit is met by proof, including the expert testimony of handwriting or typewriter analysts, that the accused wrote the letter in question. In cases involving other than privately written material, the knowing deposit can only be established by circumstantial evidence. The obscenity of the mailed matter is generally established by its bare introduction; however, testimony by experts on literary pornography that the material is pornographic would also likely be admissible.<sup>70</sup> This opinion testimony would not violate the so-called "ultimate issue" doctrine since it represents only a *literary* judgment as to the nature of the material and does not "usurp" the court-martial's responsibility to determine the *legal* nature of the material. But the literary judgment is relevant, since it is a factor bearing on the question of whether the material has redeeming social value.<sup>71</sup>

For other than mail offenses, the Government must introduce the material alleged to be obscene and, to overcome the present rule that bare possession of pornography does not violate the Uniform Code,<sup>72</sup> should show that the material was openly and

<sup>67</sup> *United States v. Dicario*, *supra* note 65. See *United States v. Holt*, 12 USOMA 471, 21 CMR 57 (1961).

<sup>68</sup> CM 400388, *Schneider*, *supra* note 59 (prosecution under 18 U.S.C. § 1462 (1958), failed because statute held not applicable to domestic transportation of pornographic materials but only to importation of such materials from abroad).

<sup>69</sup> See note 22 *supra*.

<sup>70</sup> *Cf.* note 79 *infra* and accompanying text.

<sup>71</sup> See *United States v. Smith* 361, U.S. 147, 160 (1959) (concurring opinion by Frankfurter, J); *cf.* *Grove Press, Inc. v. Christenberry*, 175 F.Supp. 488 (S.D.N.Y. 1959), *aff'd*, 276 F.2d 433 (2d Cir. 1960).

<sup>72</sup> See notes 59 and 60 *supra* and accompanying text.

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notoriously disseminated or communicated. In most instances proof of open and notorious communication will be readily available.<sup>73</sup>

The defense can, of course, content itself with a general denial and need not introduce any evidence. But the defense may wish to assert either a lack of guilty knowledge on the part of the accused or the non-obscenity of the material. On the question of scienter, defense proof will usually be in the form of testimony by the accused, should he be willing to take the stand, that he was unaware of the contents of the material in issue. A more complex question of proof is presented when the defense chooses to defend on the ground that the material is not obscene, judged by contemporary standards. The defense has two options. First, it may wish to show that the conduct for which the accused is being prosecuted is prevalent in the military and is tolerated by the contemporary military community, assuming that the concept of the contemporary community does have legal significance.<sup>74</sup> This would require testimony as to both the prevalence and general acceptance of the alleged misconduct. While testimony by military personnel on the prevailing moral climate in the military may well be relevant,<sup>75</sup> admissibility of such evidence is questionable on two grounds. First, there would seem to be no real need for this type of testimony since the members of a court-martial would have as much knowledge of the prevailing mores of the military community as would any witnesses whom the accused might be able to secure.<sup>76</sup> Second, and more basic, such testimony, particularly

<sup>73</sup> In the case of CM 405791, Ford, *supra* note 56, however, the Government only became aware of the accused's conduct when New York police and postal inspectors discovered certain of Ford's letters in the files of a New York pornography peddler. Subsequent investigation by military police criminal investigators turned up the fact that the accused had loaned the book *Helen and Desire* to a civilian and had shown a pornographic picture to a fellow officer.

<sup>74</sup> Some support for such a defense might be gleaned from the case of CM 401092, Wheatley, 28 CMR 461, *aff'd*, 10 USCMA 539, 28 CMR 105 (1959). In that case the accused, a company commander, was convicted of maltreatment of subordinates in that he permitted members of his cadre to require trainees to respond to the order to "sound off" by repeating certain "four-letter" words a dozen times. An Army Board of review, while finding the response obscene and crude, also found that the response "could not be considered unduly shocking to the sensibilities of those who heard it in the milieu in which it was used." 28 CMR at 463 (emphasis added). The Army board found some support in the testimony of one trainee who considered the required response to be nothing more than a mild and somewhat humorous form of hazing.

<sup>75</sup> See note 79 *infra*.

<sup>76</sup> It is highly unlikely that an accused in an obscenity prosecution could secure the favorable testimony of the only recognized experts in the field of military morals—military chaplains.

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in officer cases, appears to go to an ultimate issue in obscenity prosecutions, *i.e.*, whether the conduct engaged in is unbecoming to an officer and gentleman or is prejudicial to good order and discipline.<sup>77</sup> Whatever the objection, one Army board of review has already held such evidence to be inadmissible.<sup>78</sup>

The other option would be to show that the material has redeeming social value. This can be established either through the positive testimony of literary experts that the material has literary value or the negative testimony of experts on pornography such as psychologists that the material is not pornographic. Again, as with expert testimony for the Government, this evidence is relevant and does not conflict with the "ultimate issue" limitation on expert opinion testimony. Therefore, there should be no question as to its admissibility.<sup>79</sup>

### V. CONCLUSION

In examining this article the reader must inevitably become aware of the many unresolved questions in the field of criminal obscenity law. Some of these questions may in time be answered by federal, state and military tribunals. Many others, because of the deeply conceptual nature of obscenity law, may never be subject to the type of final resolution favored by practicing counsel. But the military lawyer interested in military justice and the protection of the legitimate interests of a civilized society such as our own should not be discouraged by the often nebulous consistency of the law. Rather, he should be encouraged to lend his talents to making sharper and more precise the available tools of legal analysis in this field, for though there may be no empirical proof to establish that the unrestrained dissemination of pornography has a deleterious effect upon a society, common sense tells

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<sup>77</sup> A different situation would seem to exist where the conduct is alleged to be service discrediting. If the activity charged is in relation to civilians, whether or not the activity is prevalent and accepted in the military community would be only one factor in determining the ultimate issue of whether or not it represents service discrediting conduct.

<sup>78</sup> CM 405791, Ford, *supra* note 56.

<sup>79</sup> *Yudkin v. State*, 182 A.2d 798 (Md. 1962) (unanimous opinion); see *Grove Press, Inc. v. Christenberry*, *supra* note 71, in which District Judge Bryan, in authorizing for mailing the book *Lady Chatterley's Lover* by D. H. Lawrence, relied heavily upon the expert opinion of noted literary critics. While the case came before the United States District Court on appeal from an administrative decision of the Post Office Department, Judge Bryan held that he had the duty to determine the question of obscenity *de novo*. See also *Smith v. California*, 361 U.S. 147, 160 (1959) (concurring opinion by Frankfurter, J.).

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us that such traffic may lead to the perversion of normal healthy sex attitudes of young people and may also result in overt sex offenses. Society should be protected against this form of corruption. One way in which this can be accomplished is through the continued enforcement of our criminal obscenity law, no matter how difficult it may sometimes prove to be.

This is not to say, however, that the civilian and military police and prosecutors should become latter day Anthony Comstocks. Intelligence and discrimination are required if enforcement is to have a salutary effect. A free society must protect itself against harmful sexual deviation and yet not lose its precious freedom of expression.

While the difficulties in creating precise legal doctrine and concepts in this field are necessarily great, the military lawyer has a responsibility to make the effort because a rational, workable, but properly circumscribed, obscenity law is needed to protect society.

## COURT-MARTIAL APPEALS IN ENGLAND\*

BY DELMAR KARLEN\*\*

In England as well as in the United States, the ultimate review of court-martial cases is in civilian rather than military hands. Vast differences exist between the two nations, however, not only in the foundation upon which such review rests, but also in the manner of its exercise.

It is the purpose of this article to describe the English system of review insofar as it pertains to cases tried by courts-martial in the Army and Air Force. No attempt is made to describe the markedly different system of the Navy. Neither is any attempt made systematically to compare English with American procedure.

### I. BACKGROUND OF THE PRESENT SYSTEM

The present English system came into effect in 1950 and 1951 after public criticism had been directed against the system in use during and following World War II. The old system was claimed to be unsatisfactory in two principal respects. First, the function of prosecuting was not sufficiently separated from the functions of judging and reviewing. Men from one office performed all of those functions, although care was taken that the same man would not perform more than one of them in any given case. Second, servicemen were not given the same quality of justice as civilians. Unduly great differences were thought to exist between civilians and military justice with respect to personnel and procedure.

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As a result of such criticisms, three major changes were made:

1. Judicial functions were completely separated from prosecuting functions;
2. Agencies were established in the Army and Air Force to take over from the office of the Judge Advocate General prosecuting and other non-judicial functions; and
3. Ultimate review of court-martial cases was merged into the civilian system of justice through the establishment of the Courts-Martial Appeal Court.

### II. THE JUDGE ADVOCATE GENERAL'S OFFICE

The office of the Judge Advocate General is now wholly civilian in its personnel, and it has been relieved from any duties in connection with the prosecution of court-martial cases. During World War II it had contained, in addition to a judicial department composed of civilians, an army and an air force department composed of military officers who gave commanders pretrial advice and who acted as prosecutors at courts-martial. These two service departments ceased to be the responsibility of the Judge Advocate General, and became the two Directorates of Legal Services, about to be described.

The judicial officers who serve in the Judge Advocate General's office are remarkably few in number, considering the amount of work they do. At their head is the Judge Advocate General himself, appointed by the Crown and responsible to the Lord Chancellor.<sup>1</sup> In addition to superintending the total operation of his office, he advises the Secretaries of State for War and Air and the Army and Air Force Councils on all types of legal problems, some pertaining to military justice, others pertaining to military matters unrelated to courts-martial. Next in authority is the Vice-Judge Advocate General, whose duties include administration, in addition to advice on matters pertaining to military justice. Under him are ten Assistant Judge Advocates General. These are senior men who perform a variety of duties. Sometimes they sit as judge advocates at important court-martial trials; sometimes they serve as Deputy Judge Advocates General in charge of the three branch offices of the department, located in Germany, the Near East and the Far East, where they review records of trial, including some conducted by judge advocates. Next come

<sup>1</sup> Courts-Martial (Appeals) Act, 1951, § 29 (hereinafter referred to as C.M.(A) Act, 1951, §....).

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eleven Deputy Judge Advocates (not to be confused with the "Deputy Judge Advocate General" in charge of branch offices overseas). These are somewhat younger men who spend most of their time sitting as judge advocates at trials and, when not so engaged, reviewing records of trial, sometimes in cases conducted by their colleagues. Thus, the total roster of the Judge Advocate General's Office, exclusive of clerks and stenographers, consists of 23 men.

All judicial officers on the staff of the Judge Advocate General are barristers who have been appointed by the Lord Chancellor. They may be removed by him only for inability or misbehaviour, and they are subject to retirement at age 65.<sup>2</sup> Their status is roughly equivalent to that of judges in the civilian courts of England, and they are in no sense members of the armed forces.

To each branch office overseas is assigned one Deputy Judge Advocate General, who is in overall charge of the office, usually one Assistant Judge Advocate General and two or three Deputy Judge Advocates. The remainder of the personnel are in London. Assignments are rotated from time to time so that a man will spend part of his time at the head office in London, and then part of his time at one of the branch offices in Germany, the Near East or the Far East.

### III. THE DIRECTORATES OF LEGAL SERVICES

Some of the functions formerly performed by the office of the Judge Advocate General are now vested in two Directorates of Legal Services—one in the Army, the other in the Air Force. These organizations, which are staffed by military personnel, advise commanders on the framing of charges; conduct investigations in advance of trial; administer legal aid, both with respect to military justice and with respect to advice on matrimonial matters, wills, and the like; and furnish officers to act as prosecuting attorneys at courts-martial.<sup>3</sup> Such officers are men who have been trained as barristers or solicitors in civilian life. The Directorates of Legal Services have nothing to do with the appointment of judge advocates to preside at trials, and they have nothing to do with reviewing cases after they have been tried. Those matters are exclusively within the province of the Judge Advocate General's Office.

<sup>2</sup> *Id.* § 30.

<sup>3</sup> Queen's Regulations for the Army, 1955, para. 219.

## IV. THE COURTS-MARTIAL APPEAL COURT

This court, which is part of the regular civilian machinery of justice, has no judicial personnel of its own. Its judges are drawn in practice from the Queen's Bench Division of the High Court, although certain other persons, including judges in Scotland and Northern Ireland and special appointees of the Lord Chancellor, are also eligible to sit.<sup>4</sup> They devote only a small proportion of their time to the hearing of court-martial appeals. This is true even of the person who normally presides, namely the Lord Chief Justice of England. He also administers the Queen's Bench Division, sitting in it as a trial judge when time permits, and he spends most of his time in presiding over two other appellate tribunals made up of judges from the Division. These are the Court of Criminal Appeal, which hears appeals from serious criminal cases tried in civilian courts, and the Divisional Court, which hears appeals in minor criminal cases tried by Magistrates, and which reviews, by means of the prerogative writs, quasi-judicial determinations of administrative tribunals.

Most of the energies of the judges who sit with the Lord Chief Justice are devoted to civilian trial work; while in London they are engaged mainly in trying civil cases, and while traveling on the Assize circuit they are engaged more than half their time in trying civilian criminal cases.<sup>5</sup> They sit on the Courts-Martial Appeal Court only when designated for such service by the Lord Chief Justice, just as they might be assigned by him to any other type of service, trial or appellate, within the Queen's Bench Division.

The Court does not sit *en banc*, but in panels. The usual number of judges is three, but it can be increased at the discretion of the Lord Chief Justice for especially important or difficult cases to five, seven or even more. The only person likely to be a regular member of the Court is the Lord Chief Justice, who ordinarily participates in the hearing of all court-martial appeals. When he sits, he invariably presides and generally delivers the first, and almost always the only, opinion.

To be eligible for appointment as a Queen's Bench Judge and thus a potential member of the Courts-Martial Appeal Court, a man must be a barrister of at least ten years standing; for appointment

<sup>4</sup> C.M.(A) Act, 1951, § 1.

<sup>5</sup> Williams, *The Administration of Justice Act, 1960*, 1961 *Crim. L. Rev.* (Eng.) 87; Devlin, *Statutory Offenses*, 4 *J. Soc'y P.T.L.* (n.s.) 206.

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to the post of Lord Chief Justice, he must be an existing High Court judge or a barrister of at least fifteen years standing. The Lord Chief Justice is appointed by the Crown on the advice of the Prime Minister after he has consulted with the Lord Chancellor. The other judges are appointed by the Crown on the advice of the Lord Chancellor alone. All of the offices carry tenure during good behaviour until retirement on pension at age 75 (although there is no compulsory retirement age for those appointed before 1960). Not only in terms of salary, but also in terms of prestige and power, the Lord Chief Justice is the second highest ranking judicial officer of the realm, standing next to the Lord Chancellor.<sup>6</sup> He is a peer, and thus anomalously but in common with other highly placed members of the British judiciary, a legislator as well as a judge, and he is a member *ex officio* of the other principal appellate courts as well as head of the Courts-Martial Appeal Court, the Court of Criminal Appeal, the Divisional Court and the Queen's Bench Division.

### V. THE FOUNDATION OF REVIEW

#### A. THE TRIAL PROCESS

Appellate review is superimposed upon a system which relies heavily upon civilian participation in trials at first instance. The officials who exercise functions corresponding to those of American law officers are the civilian judges described above, called "judge advocates." They travel on a circuit from one court to another to act as judge advocates at trials. Instead of uniforms, they wear judicial robes; and instead of caps, wigs.

Similarly defense counsel in England are ordinarily civilian lawyers—either barristers or solicitors—again not in uniform, but in the traditional robes and wigs of their profession. When a barrister participates, it is because he has been retained by a solicitor, who, in turn, has been employed by the serviceman being tried. When a solicitor participates, again he is employed by the serviceman. Expenses are defrayed out of the accused's own pocket if he has the money, or if not, through a legal aid system which functions in much the same manner as that operating in the civilian courts of England.

Military control over court-martial proceedings is limited to the following:

<sup>6</sup> Jackson, *The Machinery of Justice in England* 231 *et seq.* (3d ed. 1960).

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1. A court-martial is convened by a military commander. He determines not only the composition of the court, but also what charges are to be brought for trial.

2. Members of the court are military officers. Their functions correspond to those of members of an American court-martial (and are not unlike those performed by a jury in a civilian court). They decide guilt or innocence and they also impose sentence.

3. Prosecuting attorneys are military officers. Almost always they are from the Directorate of Legal Services (the legal branch of the Army or Air Force, as the case may be), and they have been trained in civilian life as either solicitors or barristers.

4. The initial review of court-martial proceedings is conducted by commanders and military officers in superior authority. Ultimate review, as will be explained later, is in the Courts-Martial Appeal Court, a purely civilian agency.

Except in the respects already indicated, a British court-martial at the trial level is not greatly different from an American court-martial. The only other difference worthy of special mention concerns the function of the judge advocate. The British judge advocate, unlike the American law officer of today (but like his predecessor, the law member, in the days before the Uniform Code of Military Justice), does not sit apart from the court, but on the right hand of the President, other members being arranged around them in order of seniority. At the close of the case, he sums up the evidence and instructs the members of the court in open session prior to their retiring to deliberate on the findings. He does not retire with them at that point. When the time comes for sentencing, however, he participates in their deliberations in the sense that he retires with the members of the court and advises them, although he has no vote.<sup>7</sup>

### B. PRELIMINARY REVIEW

The initial stage of review of court-martial proceedings is automatic and within military channels. After trial, the first step is confirmation.<sup>8</sup> This is the responsibility of the military commander who appointed the court.<sup>9</sup> If trial was by general court-martial, the confirming officer first receives the advice of the Judge Advocate General, or, if the trial was in a place remote from England,

<sup>7</sup> Army Act, 1955, § 94(5) (hereinafter referred to as A.A., 1955, § ----).

<sup>8</sup> *Id.* §§ 107-110.

<sup>9</sup> *Id.* § 111.

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that of the Deputy Judge Advocate General for the area.<sup>10</sup> If trial was by district court-martial for less serious offenses (such as those tried by special court-martial in the United States), legal advice need not be sought unless the confirming officer is in doubt.<sup>11</sup> Ordinarily it is not sought if the trial was held within the United Kingdom, but is if the trial was held overseas. The Judge Advocate General or the Deputy Judge Advocate General, as the case may be, or one of his assistants reviews the record of the trial (sometimes a stenographic transcript, but often notes of the testimony written in longhand) and prepares a written advice to the commander indicating whether the charges were proper, whether the evidence was sufficient and whether the sentence was legal. If everything is in order, he recommends that the conviction and sentence be confirmed. If not, he recommends that the conviction be quashed or that other appropriate action be taken. The commander is not bound to follow the recommendation, but he almost invariably does on questions of law, for any departure is likely to involve him in embarrassing censure. On discretionary matters, as for example on the question of reducing a legal sentence, he exercises his own independent judgment.

After confirmation, further review takes place automatically. The record of trial is forwarded to a "reviewing authority," who is ordinarily an officer superior in command to the confirming officer.<sup>12</sup> If there is no such person, the Army or Air Force Council acts as reviewing authority.<sup>13</sup> These are bodies of high ranking non-legal officials in the two services. The reviewing authority, acting with or without legal advice, may set aside the conviction, reduce the sentence or take any other action which the confirming authority might have taken initially.<sup>14</sup>

Thereafter the papers go to the Judge Advocate General's office (in London if the trial was held in the United Kingdom, otherwise to one of the overseas branch offices). If the case is one where legal advice was previously given either at the confirming or reviewing stage, the papers are scrutinized by a different member of the staff than the one who examined them earlier. If not, they are subjected to legal review for the first time. Should any corrective action be found necessary, the papers are returned to the reviewing authority to take whatever steps may be appropriate.

<sup>10</sup> Queen's Regulations for the Army, 1955, para. 819.

<sup>11</sup> *Ibid.*

<sup>12</sup> A.A., 1955, § 113.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

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When legal review takes place in one of the branch offices of the Judge Advocate General overseas, the record of trial is subsequently forwarded to the home office in London, and is there examined again. Thus a case can be and not infrequently is reviewed by several different members of the Judge Advocate General's staff. At least one such review of every case is mandatory, but the system is extremely flexible in allowing commanders to secure legal advice at virtually any stage of post trial proceedings.

Furthermore, at any time between the pronouncement of his sentence and six months after its promulgation by the confirming authority, the accused may present a petition (called a "prerogative" petition to distinguish it from the "appeal" petition about to be discussed), pointing out why he thinks that the findings or sentence or both in his case are improper.<sup>15</sup> He may question not only the legality of the proceedings, but also the severity of a sentence which is within the legal limits. If such a petition is presented before the sentence has been formally promulgated, it goes to the confirming authority, otherwise to the reviewing authority. That authority considers the petition against the record of trial and takes whatever action he deems proper. If any question of law is involved, the matter is presented to the Judge Advocate General or the Deputy Judge Advocate General for advice.

### C. APPEAL

Superimposed on the system of review just described is the procedure for appealing to the Courts-Martial Appeal Court.

If the accused contemplates going to that tribunal, he must first seek relief within military channels by means of an "appeal petition." This petition must, however, be directed to the Army or Air Force Council, and must be presented within 40 days of the promulgation of the findings and sentence if the court-martial was held within the United Kingdom, or within 60 days if it was held overseas.<sup>16</sup> The Army Council (if the case arose in the Army) or the Air Force Council (if the case arose in the Air Force) then has an equal amount of time within which to act on the petition.<sup>17</sup>

The petition goes to the Judge Advocate General's Office (not to a branch office), where it is considered against the record of the

<sup>15</sup> *Id.* § 108; Rules of Procedure (Army), 1956, R. 101.

<sup>16</sup> Rules of Procedure (Army) 1956, R. 101; C.M.(A) Act, 1951, § 22; Courts-Martial Appeal Rules, 1952, R. 6 (hereinafter referred to as C.M.(A) R.P.).

<sup>17</sup> *Ibid.*

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accused's trial. The Judge Advocate General renders his advice (usually prepared by one of his assistants but reviewed by himself) to the Army Council or the Air Force Council, which considers the petition, the advice thereon and the record of trial. It has power to set aside the conviction, reduce the sentence, or take any other action which the confirming officer might have taken initially.<sup>18</sup>

If the Council does not act within the time allowed (40 or 60 days) or if its decision does not satisfy the accused, he may apply for leave to appeal to the Courts-Martial Appeal Court. He must do so within 10 days after being notified of an adverse decision, or in the case of failure to act on it within the prescribed period, within 10 days after the expiration of that period.<sup>19</sup>

### D. DEATH SENTENCES

Different rules apply where a death sentence has been imposed and confirmed (always after receiving legal advice). If the confirming officer certifies that "it is essential in the interests of discipline and for the purpose of securing the safety of the force with which the accused is present that it should be carried out forthwith," the sentence may be carried out without delay.<sup>20</sup> This provision obviously is intended to take care of exceptional situations which might conceivably arise in time of war.

If, as the confirming officer does not so certify, execution of the sentence must be delayed long enough to allow the accused to apply to the Courts-Martial Appeal Court.<sup>21</sup> He need not then present an appeal petition to the Army or Air Force Council, but may immediately present an application for leave to appeal to the Court.<sup>22</sup> This must be done within 10 days after the promulgation of the sentence.<sup>23</sup> The Court will then proceed to hear the appeal on the merits as expeditiously as possible.<sup>24</sup>

### E. RIGHT AND SCOPE OF APPEAL

Within the limits of its jurisdiction, the Courts-Martial Appeal Court controls its own docket. Except in death cases, which are

<sup>18</sup> A.A., 1955, § 113.

<sup>19</sup> C.M.(A) R.P. 6.

<sup>20</sup> Manual of Military Law, 1961, Pt I, ch. IV, para. 12.

<sup>21</sup> *Ibid.*

<sup>22</sup> C.M.(A) Act, 1951, §§ 3, 14.

<sup>23</sup> C.M.(A) R.P. 6.

<sup>24</sup> *R. v. Houghton*, 36 Crim. App. R. 98 (1952).

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handled in the manner just described, it must grant leave to appeal before any case can be brought to it. This can be done only if the conviction is challenged. If there has been an acquittal, or if the accused is only complaining about the harshness of a legal sentence imposed on him, no appeal is possible.<sup>25</sup>

With respect to sentence, the Court's jurisdiction is less extensive than that of its sister tribunal, the Court of Criminal Appeal. That court (composed of the same judges, but hearing appeals from civilian tribunals) can revise legal sentences upwards or downwards as a matter of discretion.<sup>26</sup> Despite the fact that the Courts-Martial Appeal Court lacks equivalent power, it has on at least one occasion exercised effective moral suasion to the same end. A soldier had been convicted of murder and sentenced to death by a court-martial for an offense committed under extenuating circumstances. Upon review in the Army Council, the sentence was reduced to 10 years imprisonment. Then the accused applied for leave to appeal to the Courts-Martial Appeal Court. It refused leave, but in announcing the decision, the Lord Chief Justice stated that if he and his colleagues had possessed power to review the sentence, they would have cut it to 18 months. This was reported in the daily papers, and a short time later the Army Council reconsidered the case and cut the sentence drastically (far beyond the reduction it had already allowed, but not quite to the 18 months that had been suggested).

Except in the respect just indicated, the Courts-Martial Appeal Court follows substantially the same pattern of operations as prevails in the Court of Criminal Appeal.

Review of convictions extends to questions of fact as well as to questions of law.<sup>27</sup> The Court, however, is extremely reluctant to interfere with determinations of fact, since in all cases they have been made by bodies which are considered roughly the equivalent of juries. The Court is more circumscribed in its review of factual determination than are the tribunals in England which hear appeals from civil cases (these for the most part are tried before judges alone). Provided that the judge advocate's summing-up to the members of the court-martial contains no misdirection as to law or fact, and provided there is sufficient evidence to support the verdict rendered, the Courts-Martial Appeal Court will not interfere with a judgment of conviction.

<sup>25</sup> C.M.(A) Act, 1951, § 3.

<sup>26</sup> Criminal Appeal Act, 1907, § 4.

<sup>27</sup> *Id.* § 5.

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In dealing with questions of law, the Court feels less rigidly bound by precedent than courts of civil jurisdiction, and more free to overrule its own prior decisions if convinced that they are mistaken or outmoded. Realizing that it is dealing with the liberty of the people, that appeals to the House of Lords are exceedingly rare, and that Parliamentary changes in the law are only prospective in operation, it would feel free to depart from the strict doctrine of *stare decisis* if such a course seemed necessary to prevent injustice in a particular case.<sup>28</sup> This has not yet happened, perhaps because the Court is relatively new, having been in operation only ten years.

The Court is not empowered to grant a new trial,<sup>29</sup> presumably because of the fear that another trial would violate the principle against double jeopardy. Hence, if it finds that an error was committed, it has to choose between setting the accused free or affirming his conviction on the ground that the error did not result in a substantial miscarriage of justice. It cannot follow a middle course of ordering another trial which would be free of the error which infected the first. The result is that some guilty persons may be turned loose without punishment for no other reason than that errors were committed in their trials. The governing principle on appeal is that the Court will affirm only if it is convinced, after reviewing all the evidence or acting with the concurrence of counsel for the prisoner, that the members of the court-martial would have come to the same conclusion if the error had not occurred.

### F. APPLICATIONS FOR LEAVE TO APPEAL

Most applications for leave to appeal are prepared by the prisoners themselves (on official forms furnished by the jail authorities). That is because in most cases they have been advised by counsel not to appeal, because of the very slight likelihood of success (as is shown by the statistics about to be given). As might be expected, the reasons given in support of the self-drafted and frequently hand-written applications are not likely to be impressive, running often to nothing more than a renewed protestation of innocence. The task of screening worthy applications from unworthy ones therefore falls heavily upon the judges and other officials of the court.

<sup>28</sup> *R. v. Taylor*, [1949], 2 K.B. 363; Stone, *Stare Decisis*, 14 Modern L. Rev. 219 (1951).

<sup>29</sup> C.M.(A) Act, 1951, § 16.

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The application goes to the Register of the Court. It is accompanied by the record of trial, by the earlier petition for review in the Army or Air Force Council, and by the order of that body showing the action taken by it. There may be also an expression of opinion by the Judge Advocate General that the case is a proper one for appeal, but not his opinion on the merits.<sup>30</sup>

The papers are then sent to one of the judges assigned to the Courts-Martial Appeal Court. If he decides to grant leave, the case is scheduled for hearing before the Court.<sup>31</sup> If he decides against it, that fact is communicated to the prisoner, who may and occasionally does drop any further attempt to secure review.

Usually, however, a prisoner, upon being notified of the denial of his application by a single judge, insists upon his application being considered by a full panel of the Court. When this happens each judge on the panel receives a set of the papers already described, and one of them is assigned responsibility for announcing the decision the next time they sit in open court.<sup>32</sup> This is done on a rotational basis, with court-martial applications being considered along with applications in civilian cases. Since the same judges are likely to be serving on both the Courts-Martial Appeal Court and the Court of Criminal Appeal, they handle applications in both types of cases together.

It is the practice of the judges to announce their decisions each Monday morning when the Court of Criminal Appeal is sitting, civilian cases first, then court-martial cases, if any. Each judge by that time has individually considered all of the applications and has met with his colleagues for a very brief conference immediately before the opening of court. If any one of the judges is in favour of granting leave to appeal (not necessarily the one to whom the case was assigned for reporting), leave is granted.

Over its entire ten year history, the Courts-Martial Appeal Court has received 275 applications for leave to appeal, granting 52 of them and denying the remainder. In the appeals heard on their merits, 10 convictions were quashed, the remainder affirmed. The figures for 1961 were as follows: 21 applications submitted; 17 denied; 4 heard on their merits; and 1 conviction quashed. The averages have been as follows: about 1 application for leave to appeal out of 6 granted; and about 1 conviction out of 5 considered on the merits quashed. To put it in another way, only one application in 28 is ultimately successful.

<sup>30</sup> *Id.* § 4.

<sup>31</sup> *Id.* § 21.

<sup>32</sup> *Ibid.*

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### G. THE HEARING

Court-martial appeals are usually heard as soon as the civilian appeals on the calendar of Court of Criminal Appeal have been heard. The judges then figuratively change their hats and then proceed to the hearing of the military cases. Sometimes for the civilian appeals an additional panel of the Court of Criminal Appeal is in operation. The Courts-Martial Appeal Court as such sits only about ten times a year, usually for only an hour or two. During such sitting, it announces its decisions upon applications for leave to appeal and hears arguments in cases where leave has been granted.

The Courts-Martial Appeal Court is authorized to sit anywhere in the world in the discretion of the Lord Chief Justice.<sup>33</sup> However, except on one occasion when it sat in Edinburgh and was staffed by Scottish judges, it has sat only in London in the building on the Strand which houses the Royal Courts of Justice. Its courtroom is the same one used by the Court of Criminal Appeal.

### H. ORAL ARGUMENT

As in the other appellate courts of England, oral argument is the central feature of a court-martial appeal. There are no written briefs such as are used in the United States. The only papers before the judges are the same ones which were submitted in connection with the application for leave to appeal, namely, the record of trial and supporting documents.

Cases are argued before the Courts-Martial Appeal Court for both sides by barristers. These civilian lawyers (relatively few in number, there being less than 2,000 in all of England) are specialists in litigation, able to communicate effectively and economically with the judges. They are not necessarily specialized in court-martial work, but their expertise ordinarily lies in the field of criminal law. Since there are no professional prosecutors even in civilian cases (what in the United States are called "district attorneys"), a man who appears for the prosecution one day may appear for the defense the next. The barrister who represents the accused at the trial ordinarily also argues his appeal, but this is not necessarily the case, for new counsel may be retained. As for the prosecution, that is handled by a barrister briefed for the particular case by a solicitor acting on behalf of the Army or

<sup>33</sup> *Id.* § 2.

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Air Force Council.<sup>34</sup> The military officers from the Directorate of Legal Service who appeared for the prosecution at the trial have no connection with the appeal. Furthermore, the Judge Advocate General is neither heard nor represented.

Before starting the oral hearing, all of the judges have read the record. Unlike the judges of most of the courts which hear civil appeals in England, they never approach a case "cold." Thus they are spared one of the features of the procedure of those courts—having to listen to counsel read the record at length. The only reading that is likely to take place is from legal authorities cited by counsel—an almost inescapable procedure since there are no briefs and since the decision ordinarily is rendered immediately upon the close of oral argument.

Seldom are more than one or two cases cited to the Court, frequently none. Counsel ordinarily may take it for granted that the judges are familiar with the governing legal principles—an assumption justified not only by the specialization of the judges in criminal work, but also by the small bulk of reported cases. For reasons about to be explained, there are very few reported court-martial cases, and very few reported civilian criminal cases either. Unnecessary citations are explicitly discouraged by the judges.

The consequence of dispensing with as much reading as possible is that oral argument tends to be relatively short in duration, averaging not more than about 20 or 30 minutes per case. More lengthy arguments occasionally take place, but they are exceptional. It is not uncommon for the Court to dispense with oral argument by the respondent. If the judges are satisfied after hearing counsel for the appellant that the judgment should be affirmed, they see no point in wasting time listening to the other side.

### I. NEWLY DISCOVERED EVIDENCE

An unusual feature of the Court's procedure concerns its power to hear evidence.<sup>35</sup> This power has not thus far been used in the Court's brief history, and would be used only if the evidence offered were not available to counsel for the accused (acting with due diligence) at the time of trial. If the Court heard such evidence, it would not only hold the line against retrials in criminal cases, but also would save the time which, in the United States,

<sup>34</sup> *Id.* § 12.

<sup>35</sup> *Id.* § 8.

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would have to be consumed in rehearing the case in its entirety. On the other hand, it would be confronted with the difficult and delicate task of deciding what effect the new evidence would have had on the members of the court-martial if they had been able to hear it.

### J. THE DECISION

As in the Court of Criminal Appeal, so also in the Courts-Martial Appeal Court, the judges usually render their decision immediately upon the close of oral argument. Very rarely indeed is decision reserved. Hence there is little time for discussion between the judges and no time for the drafting of opinions. Decisions are delivered orally and extemporaneously. The judge who is presiding almost invariably delivers the only opinion in the case, unless (as conceivably might happen) the Court should make an explicit finding that the case involved a question of law of substantial importance. If upon a quick conference of the judges on the bench it should appear that one of them was likely to dissent, the case would probably be rescheduled for argument before a larger panel, consisting of five, seven or more judges. This has not happened so far, and is unlikely to happen in the future, judging by the history of the Court of Criminal Appeal.

### K. PUBLICATION OF DECISIONS

Not all of the opinions of the Courts-Martial Appeal Court are published. In 1961 when four cases were decided by it, only one opinion found its way into the Criminal Appeal Reports, which is the most comprehensive collection of criminal cases. During the entire history of the Court, only 28 of its opinions have been so published, although almost twice that number of cases have been decided on the merits.

This is in accordance with the prevailing English philosophy that only a small proportion of the total number of opinions rendered are worthy of publication. Only about 10 percent of the opinions of the Court of Criminal Appeal, the basic appellate court of England for criminal cases coming from civilian courts, are published. Even the House of Lords and the Privy Council, which are the ultimate tribunals for the Kingdom and the Commonwealth, do not have all of their decisions published. Because of this philosophy, the bulk of English case law is very slight compared to the bulk of American case law, not only with respect to court-martial matters but also with respect to civilian matters.

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The English theory is that only decisions which enunciate principles of law have precedent value. Ones which only apply well settled principles to specific fact situations are considered important only to the parties directly involved. The selection of cases to be published is made primarily by the law reporters and their editors. These men (who are barristers) also edit the opinions. Since, as noted above, the opinions are ordinarily delivered orally and extemporaneously, their textual form is subject to alteration prior to publication.

Two important consequences follow from the system of publishing decisions just described. One is that relatively few precedents are available to be cited in future cases. This saves the time of judges and lawyers. The other is that the judges have reasonably clean slates upon which to write. They are not hemmed in by masses of cases whose fact situations have to be minutely compared with the case at hand. They have only general principles, broadly stated, to apply. As a consequence they enjoy a large measure of freedom to decide cases as they feel that justice demands.

### L. FINALITY

After a case has been decided by the Courts-Martial Appeal Court, one further step of review is possible. That is an appeal to the House of Lords. It can be taken by either the prosecution or the defense, but only if leave is granted.<sup>36</sup>

Immediately upon announcement of the decision of the Courts-Martial Appeal Court, losing counsel may apply orally to that Court for permission to appeal to the House of Lords. The case is fresh in the minds of the judges, so that they can decide the application summarily. Leave cannot be granted unless the judges certify that the case involves a point of law of general public importance. If they refuse to so certify, that is the end of the case. If they so certify and grant leave, the application is disposed of without any paper work, and the case goes up. If they so certify but refuse leave, a written petition may be presented to the House of Lords itself. Then counsel for the prospective appellant is allowed to appear before the Appeal Committee of the House of Lords, consisting of three of the regular judges of that court (called "Law Lords"), to argue orally why leave should be granted. If the judges hearing the application feel that it may have some merit, they will ordinarily allow counsel for the other side to

<sup>36</sup> Administration of Justice Act, 1960, § 1.

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argue in opposition. Such arguments are likely to take ten or fifteen minutes. Upon their conclusion, the judges announce their decision to grant or refuse leave.

Very few appeals indeed can be expected to reach the House of Lords. Thus far, only one has gone up in the ten years that the Courts-Martial Appeal Court has been in operation. This is consistent with the general practice of the House of Lords to entertain very few appeals in criminal cases of any type, civilian or military. In the last fifty years, the average has been only one criminal case every other year. In the year 1959, the House of Lords did not hear a single criminal case. In 1960 it heard only two.

## VI. CONCLUSION

While the English system for reviewing the decisions of courts-martial bears some resemblance to the American system, differences between them are substantial. The main ones may be summarized as follows:

(1) Whereas judge advocates in England are civilians, performing solely judicial functions, those in the United States are military officers, performing not only judicial functions, but those of prosecutors and defense counsel as well.

(2) Whereas the United States Court of Military Appeals is a separate judicial establishment, having its own personnel, sitting frequently, processing a large volume of cases and producing a substantial body of judge-made law, its counterpart in England is an *ad hoc* tribunal, drawing its personnel from the judges of other courts, sitting infrequently, hearing few cases, and producing a relatively small body of judge-made law.

These differences do not in any sense demonstrate the superiority of one system over the other. They do, however, stimulate reflection and introspection, posing the question of whether either nation might borrow something of value from the other.



# MILITARY JUSTICE IN BELGIUM\*

BY JOHN GILISSEN\*\*

## I. INTRODUCTION

Belgium, a small country of Western Europe with about 9,000,000 inhabitants, has armed forces which took a relatively prominent part in both World Wars. Attacked by Germany on August 4, 1914, and again on May 10, 1940, Belgium was on the side of the Allied Nations until V-Day. A member of NATO since the creation of this organization, Belgium has, at the present time, an army of about 150,000 men, most of whom are stationed in West Germany.

Military justice in Belgium is quite different from that of most other countries. More particularly, it is different from the military justice system of the United States, although certain principles of law are the same.

Historically, Belgian military justice is based on the organization of the armed forces in the Belgian provinces in the 16th, 17th, and 18th century, when these countries belonged to the Spanish, later to the Austrian crown. From 1794 until 1814, these provinces were incorporated into France, *i.e.*, into the French revolutionary Republic and into the Empire of Napoleon. Belgian law, as a whole, remained under the influence of French law, even after 1814.

From 1815 to 1830, the Belgian provinces formed with the Dutch provinces the Kingdom of the Netherlands. The Belgian revolution against King William I in 1830 brought Belgium the independence which the country enjoys today.

Belgian military law is still, for the most part, similar to the military law of the kingdom of the Netherlands, particularly in questions involving procedure. Criminal law for the army was adopted in 1870, under French influence. Military jurisdiction and

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

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judicial organization were reshaped in 1899, on more specific Belgian principles.<sup>1</sup>

If one compares Belgian military law with the military law of the United States, the most important differences seem to be the following:

(1) Independence of the criminal action, which belongs to the judicial authorities, and the disciplinary action, which belongs to the military authorities.

(2) Criminal law, either military or civil, is merely statutory, *i. e.* only statutes enacted by the legislative branch may determine what is a punishable offense and what punishment may be pronounced by the courts, *Nullum crimen sine lege; nulla poena sine lege.*

(3) The public prosecutor, called an "auditeur," is a magistrate; he belongs to the judicial branch of government. He plays a prominent part in the preliminary investigation. He may thus be compared with the American judge advocate; but, even though his part in the criminal military organization is seemingly more important than that of an American judge advocate, he has no other military legal activities.

(4) The initiative of the prosecution rests nearly entirely on the auditeur; the military authorities may only give notice of offenses to the auditeur, just as may be done by any other plaintiff.

<sup>1</sup> No up-to-date book on Belgian military justice is available. The last survey is found in 7 *Repertoire pratique de droit belge* (Practical Encyclopedia of Belgian Law) in a section entitled "Justice militaire," but this was written in 1935, and important modifications have been effected since then. In more recent years several studies have been written on certain questions of military law. See Van der Straeten, *A propos de la reforme de la procedure penale militaire* (With Respect to the Reform of Military Criminal Procedure), 1948-49 *Revue de droit penal et de criminologie* 217-56; Danse, *Esquisse de la competence, de l'organisation et de la procedure des juridictions militaires en droit belge* (Outline of the Jurisdiction, the Organization and the Procedure of Military Jurisdictions in Belgian Law), 1958 *Revue internationale de droit penal* 261-304; Bosly, *Propos sur la procedure penale militaire* (Discourse on Military Criminal Procedure), in *En hommage a Leon Graulich* 435-455 (1957); Gilissen, *Droit penal et procedure penale militaire* (Criminal Law and Military Criminal Procedure), in "Cinquante ans de droit penal et de criminologie" (Fifty Years of Criminal Law and Criminology), 1957 *Revue de droit penal* 343-47; Elens and Compagnion, *Les vols et detournements militaires* (Military Larcenies and Embezzlements), 1951-52 *Revue de droit penal et de criminologie* 997-1015. The precedents of military law have been analyzed annually since 1955 in the *Revue de droit penal et de criminologie*. See Gilissen, *Chronique annuelle de jurisprudence militaire* (Annual Chronicle of Military Jurisprudence), *Revue de droit penal et de criminologie*, 1954-55, pp. 912-936; 1955-56, pp. 1056-1108; 1957-58, pp. 211-236 and 378-424; 1958-59, pp. 163-188 and 269-290; 1959-60, pp. 286-316; 1960-61, pp. 279-308; 1961-62, pp. 513-553.

(5) Sentences of the court-martial do not have to be approved by military authorities; but appeal is always possible before the Military Court of Appeal and even before the civilian Supreme Court, the "Cour de Cassation."

(6) There is only one military judicial organization, the same for the Army, the Navy,<sup>2</sup> the Air Forces and the "Gendarmerie."

Because of the important differences between American and Belgian military justice, it would be impossible to go into a detailed description of the latter in a few pages. Therefore, the present article will only give a short account of the chief rules of law, with appropriate discussion of applicable Belgian institutions. Generally, the exceptions to these rules will not be mentioned.<sup>3</sup>

Another difficulty in an article of this type consists in the terminology. Most of the institutions of European continental law, and more especially Belgian law, do not exist in Anglo-Saxon law, and vice-versa. The French terminology will, therefore, generally be indicated, followed by an English translation.

## II. CODES AND STATUTES UPON MILITARY JUSTICE

The Belgian Constitution, in force since 1831, provides for military jurisdiction. In Chapter III, concerning the judicial power, article 105 prescribes that particular statutes will fix the organization of the military courts, their jurisdiction, the rights and duties of their members, and the duration of the functions of these members.

Accordingly, the military justice system may not be abolished without changing the Constitution, and the process of amending the Constitution is a very complicated affair; since 1831, there have been only two amendments, the first in 1893, the second in

<sup>2</sup> The Belgian Navy, which has never been important, was suppressed in 1862. So, when the Military Codes of 1870 and 1899 were enacted, there existed no Navy. In 1945, the Belgian units of the British Royal Navy were maintained as a new Belgian Navy, but the special codes of 1814 passed for the Navy were not brought into operation again. The Navy is now subject to the same military law as the Army. *Cour de Cassation*, March 16, 1959, and June 22, 1959, in [1959] *Pasicrisie belge* I. 720, 1087 (Bel.); Gilissen, *Chronique annuelle de jurisprudence militaire, 1959* (Annual Chronicle of Military Jurisprudence, 1959), 1959-60 *Revue de droit penal et de criminologie* 303-308.

<sup>3</sup> A general survey of military justice, for use by Belgian officers, was published in 1957 by the Ministry of National Defence, entitled "Instruction sur le service judiciaire." The most important statutes on military justice may be found in another publication of the ministry entitled "Recueil de lois a l'usage des forces armees" (1960).

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1920-1921. A few propositions to abolish the military justice system have been made by members of Parliament, but they have never asked for an amendment of the Constitution and their propositions have always been rejected.

The principal statutes concerning military justice are: (1) the Military Criminal Code (Code penal militaire), 1870; (2) the Code of Military Criminal Procedure (Code de Procedure penale militaire), 1899; (3) the Code of Procedure for the Army (Code de Procedure pour l'armee de terre), 1814; and (4) the Regulations for Military Discipline (Reglement de discipline), 1815.<sup>4</sup>

### A. MILITARY CRIMINAL CODE (1870)

This Code is nearly a century old and was passed to complement the general Criminal Code (Code Penal), which has been in force since 1867. Therefore, the Military Criminal Code only contains regulations about military criminal law, while all the rules of general criminal law, which are not directly contrary to military laws, also have to be applied by the military courts.

The Military Criminal Code is divided into two parts: a short one (14 articles) about military punishments and a longer one (arts. 15-57(a)), setting forth the military crimes and offenses, which are principally: treason and espionage (arts. 15-18); surrender or leaving post (arts. 19-26); insubordinate conduct or wilfully disobeying (art. 28); revolt and mutiny (arts. 29-32); violence against a superior or a sentry (arts. 33-41); disrespect towards a superior (art. 42); desertion (arts. 43-52); larceny, selling or otherwise disposing of military property (arts. 54-57); and breach of some foreign legal regulations (art. 57(a)).

The Military Criminal Code has been amended often, particularly in 1923 when some punishments were changed, but no basic principles have been changed.

### B. CODES OF MILITARY CRIMINAL PROCEDURE (1899 and 1814)

The Code of June 15, 1899, is incomplete, inasmuch as it contains only two parts, the first part (arts. 1-34) dealing with military jurisdiction, *i.e.*, who is, and which offenses are, sub-

<sup>4</sup> The following abbreviations will be used hereinafter in discussing these statutes: C.P.M., Military Criminal Code, 1870; C.P.P.M., Code of Military Criminal Procedure, 1899; C.P.A.T., Code of Procedure for the Army, 1814; and R.D., Regulations for Military Discipline, 1815.

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mitted to the jurisdiction of military courts, and the second part (arts. 35-153) dealing with the organization of military justice.

No question of procedure is regulated by this Code, because the Parliament did not pass in 1899, or anytime thereafter, the last five parts of the project. Procedure is therefore still regulated by the old Code dating from the Dutch procedure, the Code of Procedure for the Army of 1814.<sup>5</sup> A few parts of it have been amended by statute in 1916, 1921, and 1954.

When any question of procedure is left unsolved by these Codes and statutes, military courts apply the rules of ordinary criminal procedure, as they are fixed by the French Code of Criminal Instruction of 1808 and other statutes.

Belgian codes and statutes on military justice are thus rather old; in fact, the "jurisprudence," *i.e.*, the holdings of the military courts, made it possible to apply old regulations to a modernized army.

### III. JURISDICTION

The jurisdiction of courts-martial is generally penal in nature rather than disciplinary,<sup>6</sup> but the courts also have the power to adjudge the payment of damages, when the sufferer of an offense asks for it, and civil actions may be brought concurrently with the criminal action before the court-martial.<sup>7</sup> Actually, this happens very often now, especially in traffic accident cases.

Courts-martial have exclusive jurisdiction for all offenses committed by persons subject to military law. Thus, jurisdiction is extended not only to military offenses, but also to all other offenses mentioned in the ordinary criminal Code and other criminal laws.

There exists, however, a few exceptions to this general rule, but only when the offense has been committed in Belgium. Persons

<sup>5</sup> This Code, with six other military Codes, was enacted before the Belgian countries were united with the Netherlands; it is thus Dutch law, which was introduced in the Belgian countries in 1815. See Gilissen, *Historische schets van de militaire strafwetgeving in België sedert 1814*, 50 *Militair-rechtelijk tijdschrift* 3-33 (1957).

<sup>6</sup> Certain offenses are punishable by disciplinary punishments (C.P.M. 1870, arts. 24, 25, 59); but, in these cases, the disciplinary punishments, such as open or closed arrest, are legally criminal punishments (*peines correctionnelles*). The repeal of this anomaly has been proposed. See Cassiers, *De la suppression des peines disciplinaires militaires du Code pénal militaire* (On the Repeal of Military Disciplinary Punishments of the Military Criminal Code), 1952-53 *Revue de droit pénal* 363-376.

<sup>7</sup> C.P.P.M. 1899, art. 33.

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subject to military law are tried by civilian law courts for offenses in matters regarding taxes, hunting, fishing, etc., and, what is in fact the most important exception, traffic offenses. But, in traffic offenses, a court-martial does have jurisdiction if the offense has been committed by a military person on duty, or belonging to a unit in the field; there may also be jurisdiction when the victim of the traffic offense has suffered corporal damage.<sup>8</sup>

Those individuals who are subject to military law, and thus are tried by courts-martial, include all persons belonging to the armed forces, whether they be officers, warrant officers, or enlisted persons, and all other military personnel. Only military personnel on indefinite leave (*en conge illimite*), i.e., reserve personnel, are excepted; they are only subject to a few military laws for a small number of offenses (treason, spying, violence or outrage against a superior or a sentry, etc.).

In time of war, the courts-martial also have jurisdiction over all persons serving with, or accompanying, an armed force, and, even in time of peace, when a part of the armed forces remains in a foreign country, the persons serving with, or accompanying, this part of the forces are subject to court-martial.<sup>9</sup>

Prisoners of war are subject to the jurisdiction of the military for all offenses committed after their apprehension. This includes not only offenses provided for in the ordinary criminal Code and laws, but also for certain military offenses, such as treason, spying, violence against or disrespect towards members of the Belgian armed forces with higher rank, and violence, disrespect or injury against a superior of their own forces, etc.

Refugees, i.e., civilian foreigners, are subject to the jurisdiction of the military only for a small number of military offenses. In time of war, the military also has jurisdiction over all persons, civilian or military, committing offenses against the "external safety of the State." These offenses are described in the ordinary Criminal Code, articles 113-123(10). The principal offenses are: (a) spying; (b) taking up arms against Belgium (art. 113) or against its allies (art. 117); (c) helping the enemy by all means, especially by furnishing it with men, money, supplies, arms or ammunition (art. 115); (d) helping the enemy by changing the

<sup>8</sup> As a rule, the civilian law courts have jurisdiction in these cases, but if the public prosecutor does not retain the specific traffic offense, the court-martial has jurisdiction for the general offense of manslaughter or involuntary injury.

<sup>9</sup> C.P.P.M. 1899, art. 19, as amended by Statutes of Nov. 25, 1948, and Feb. 27, 1958.

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national institutions or organizations, *i.e.*, lending support to the political aims of the enemy; and (e) reporting real or false accusations to the enemy, so that somebody is exposed to being prosecuted (art. 121(a)). In the years 1944-1947, the Belgian military justice authorities tried a great number of civilians, more than 50,000, for aiding the enemy during the last World War.<sup>10</sup>

### IV. ORGANIZATION OF THE MILITARY JUSTICE SYSTEM

The ordinary law courts in the military justice system are the "conseils de guerre," *i.e.*, war councils, and these are quite similar to the American courts-martial. All decisions of courts-martial may be submitted to a court of appeal, called "Cour militaire," *i.e.*, a Military Court. The public prosecutors are named "auditeurs militaires," and they serve under the direction of the "auditeur general." Preliminary investigations are conducted by the auditeurs or by the "commission judiciaire," a judicial commission composed of an auditeur and two officers.

#### A. "CONSEILS DE GUERRE" (COURTS-MARTIAL)

Courts-martial are classified into permanent and field courts-martial. At present there are three permanent courts-martial in Belgium, one at Ghent, Liege and Brussels; the latter also has chambers at Antwerp. Field courts-martial exist in Germany and in Africa (Rwanda-Burundi). In each court-martial, there are at least two chambers, one for French trials, one for Dutch ones, and oftentimes more chambers are created, especially in the permanent courts-martial. Each chamber of the court-martial is composed of five members, four officers and a civilian judge. The president usually is a colonel, lieutenant colonel or major; the other officers are two captains and one first lieutenant. These officers are appointed for one month and the appointments rotate among the officers on duty residing in the town or garrison of the seat of the court-martial. The civilian judge on the permanent courts-martial is appointed by the King<sup>11</sup> for a term of three

<sup>10</sup> See Gilissen, *Etude statistique de la repression de l'incivisme* (Statistical Study of the Repression of Unpatriotism), 1950-51 *Revue de droit penal et de criminologie* 513-628; Ganshof van der Meersch, *Reflexions sur la repression des crimes contre la surete exterieure de l'Etat belge* (Reflexions on the Repression of Crimes Against the External Security of the Belgian State), 1946-47 *Revue de droit penal et de criminologie* 97-182.

<sup>11</sup> When, under one of the Codes, a power is attributed to the King, it means the King as head of the executive power in the State; in fact, this power belongs to the government, and more particularly to the Minister of Justice or the Minister of National Defence.

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years, and he has to be chosen from among the judges of the ordinary law courts (*tribunaux de premiere instance*). In the field courts-martial he is appointed by the King for a term of six months from among the judges or doctors of laws more than 25 years of age. In special circumstances, he may be appointed by the commanding officer of the part of the armed forces for which the court-martial was created. A diagram of a typical Belgian court-martial is included in the Appendix, *infra*.

### B. "COUR MILITAIRE" (MILITARY COURT)

There is only one Military Court in Belgium. It has at least two chambers, one for French trials and one for Dutch trials. At the present time ten chambers are established, but only two work permanently.

The First President of the Military Court is a civilian magistrate. He is appointed for life by the King, but must retire when he reaches the age of 72. He is chosen from among the members of the civilian courts who have been a magistrate for at least ten years. Although he remains a civilian judge, he wears the military uniform of a general and receives the honors prescribed for a general of the army. He may have one or more deputy presidents; at this moment, there are two deputies.

Each chamber of the Military Court is composed of the first president or a deputy president and four officers, a general, a colonel or lieutenant colonel, and two majors. Each officer is drawn by lot, for one month, from among the officers on duty and the officers of the reserve of the same rank, residing in the town where the Military Court is sitting. The court normally sits at Brussels. In wartime, the King may fix the seat elsewhere. When a part of the army is staying in a foreign country, the King may also decide that one or more temporary chambers of the Military Court will sit in that country.

The Military Court has a two-fold jurisdiction. It is, first, the court of appeal for all sentences of the courts-martial. It also has original and sole jurisdiction for all offenses committed by an officer of the rank of major or above.<sup>12</sup> When the Military Court has to sit in judgment on an officer of a higher rank than one of its members, a special panel of judges is fixed.

<sup>12</sup> The Military Court also has original jurisdiction for offenses committed on duty by members of a court-martial.

### C. TRIAL OF OFFENSES AGAINST THE EXTERNAL SAFETY OF THE STATE

The statute of May 26, 1944, provided for special military law courts for trying offenses committed during the war years of 1940-1944 against the external safety of the State, and this specialized court still exists. In these cases, each chamber of a court-martial is composed of two civilian judges and three officers. More specifically, such a chamber consists of: (a) a president, who is a civilian judge, usually a president or vice-president of a "tribunal de premiere instance"; (b) a high-ranking officer (colonel, lieutenant colonel or major); (c) a second civilian judge, who may be a judge of a civilian law court or even a doctor in law, who is not yet a judge; (d) a captain; and (e) a first lieutenant. On appeal from this sort of trial to the Military Court, the latter consists of: (a) the first president or another president; (b) a general; (c) a second civilian judge, who has been appointed from among the judges of the courts of appeal or the "tribunaux de premiere instance"; (d) a colonel or lieutenant colonel; and (e) a major.

### D. THE "AUDITEURS"

One of the main elements of military justice in Belgium is the *auditeur militaire*. He is, first of all, the public prosecutor in all military affairs; he is also president of the "commission judiciaire," which has to make the preliminary investigation of charges; and he may also arrest and confine all persons subject to military jurisdiction.

There is one "auditeur militaire" near each permanent or field court-martial. He may have one or more "substituts de l'auditeur militaire" or deputy auditeurs, who have the same rights and the same duties as their chief. Some of the "substituts de l'auditeur militaire" may be promoted to "premier substitut de l'auditeur militaire" (first deputy auditeur).

The chief of all the "auditeurs militaires" is the "auditeur general" (general auditeur), and he is assisted by two "premiers substituts de l'auditeur general" (first deputy general auditeurs) and three or more "substituts de l'auditeur general" (deputy general auditeurs). The "auditeur general" and his deputies are the public prosecutors before the Military Court, just as the auditeurs militaire and his deputies are the public prosecutors before the courts-martial.

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At the present time the organization of the auditeurs is as follows:

General auditeur			
2 first deputy general auditeurs		6 deputy general auditeurs	
3 Permanent military auditeurs (Brussels, Ghent and Liege) <sup>13</sup>		3 Field military auditeurs (two in Germany, one in Rwanda-Burundi)	
13 first deputy auditeurs	13 deputy auditeurs	5 first deputy auditeurs	8 deputy auditeurs

All the auditeurs are nominated by the King, on recommendation of the Minister of Justice. To be appointed deputy auditeur, one must have received the degree of doctor of laws at a university. No military qualification is legally required; but, in fact, most of the auditeurs have been reserve officers. It is even not legally required that they be a member of the bar, but nearly all of them are. The general auditeur must be more than 35 years old; the deputy general auditeur and the auditeurs 30 years; the deputy auditeur 25 years.

The auditeurs are not solely military nor civilian; their status is mixed. They belong to the juridical power of the State, the same as any other magistrate. They are under the authority of the Minister of Justice, but only for administrative purposes, not for decisions in juridical questions. They owe no obedience to military authorities or to the Minister of National Defense. But, as they have a post and duties in the army, they have the rank of an officer (colonel or major, the general auditeur that of general), and they wear a military uniform and receive the honors of their rank.

The general auditeur may thus be compared to the American judge advocate general. But his powers are not entirely the same. The Belgian auditeurs are especially competent for the preliminary investigations, prosecutions before the courts, and the execution of the sentences. Compared to the civilian juridical organization in Belgium and in France, it may be said that the auditeur is at the same time the "procureur du Roi," *i.e.*, the public prose-

<sup>13</sup> The "auditorat" of Brussels is divided into two sections, one at Brussels and one at Antwerp. The chief of the Antwerp section is a field-auditeur.

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cutor, and the "juge d'instruction," *i.e.*, the examining magistrate. The general auditeur is assisted in his office, called "auditorat general," by secretaries and, in some circumstances, by clerks. The "auditeur militaire" is usually assisted in his "auditorat militaire" only by clerks.

### E. THE CLERKS

At the Military Court and in each court-martial, there is a chief clerk ("greffier en chef"), assisted by one or more clerks ("greffiers, commis-greffiers"), all of whom are appointed by the King. They must take the minutes of all sittings of the court, keep all records of the investigations and write down all judgments. They are allowed to deliver copies of the judgments in a few types of cases fixed by the law, and also when authorized by the general auditeur. In the courts-martial, the clerks are simultaneously registrar of all that has been done in the court and secretary to the auditeur and his deputies.

### F. "COMMISSION JUDICIAIRE" (JUDICIAL COMMISSION)

The written preliminary investigation (known in France as the "instruction") of each case is made by the judicial commission (commission judiciaire), which is organized in each seat of a court-martial. Each judicial commission is composed of three members: (a) an auditeur militaire (or a first deputy or deputy auditeur); (b) a captain; and (c) a first lieutenant.<sup>14</sup>

The commission is assisted by a clerk of the court-martial. The two military members are appointed for a month by the commanding officer of the territory, in turn among the officers of the garrison. The auditeur is the president of the commission. He alone conducts the investigation; if the military members of the commission do not agree with him, they may not prevent him from making the decision. The military members are actually technical advisors and help the auditeur make up his mind concerning typical military questions.

When an investigation is being made of a charge against a high ranking or general officer, who is to be tried by the Military

<sup>14</sup> If the accused is a first lieutenant or captain, the judicial commission will have a special composition, composed of individuals with a higher rank than that of the accused.

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Court, a special judicial commission is created, composed of the general auditeur (or one of his deputies) and two officers, one of a rank immediately superior to that of the offender, and the other of the same rank as the offender, but senior in grade.

### G. DEFENSE COUNSEL

An accused who is to be tried by a court-martial must be defended by counsel. He may choose his defense counsel from among the members of a bar or even among the officers of the armed forces. If he has not chosen a counsel or if he informs the court-martial that he cannot pay for a barrister, the court-martial appoints a counsel from among the members of the bar or, in exceptional cases, among the officers of the armed forces. The auditeurs may never act as defense counsel.

## V. THE PRELIMINARY INVESTIGATION

### A. INFORMATION ABOUT OFFENSES

The auditeur is the only public prosecutor in the armed forces. Therefore, it is the duty of any person who has knowledge of a suspected offense committed by a person subject to military law to give information of it to the auditeur. The auditeur receives information about offenses: (a) from military authorities, particularly from the commanding officers; (b) from police officials, such as the "gendarmierie," the municipal or country police officials or even the judicial police officials, *i.e.*, the auxiliaries of the civilian public prosecutor; (c) from the "procureur du Roi," *i.e.*, the civilian public prosecutor, when the civilian law courts do not have jurisdiction over the offenses; and (d) from all other persons, both military personnel and civilians.

### B. INVESTIGATION BY MILITARY AUTHORITIES

When an offense has been committed in the armed forces, particularly when it is a military offense, the commanding officer of the unit must immediately make a summary investigation. He may conduct it personally or entrust an officer of his unit with this task. In special cases, the military police may be entrusted with the job. These summary investigations must normally be done within three days.

When it appears to the commanding officer that an offense subject to the military or ordinary criminal law has been committed, he is obliged to transmit his written summary to the auditeur. However, when it appears that no offense has been committed, but only a disciplinary fault, he may impose non-judicial punishment. (See Section VII, *infra*.)

### C. DECISION OF THE AUDITEUR

When the auditeur receives such a summary or any other information concerning an offense, he can deal with the case in one of the following ways:

(a) "Classer sans suite," *i.e.*, take no further judicial action, dropping the case without any judicial punishment. The auditeur will make such a decision only in the event that it seems, on the basis of all available evidence, that no charges exist against the suspected offender, or that, even if there are punishable charges, it is not necessary to require a court-martial to punish these offenses.

(b) "Transmission au procureur du Roi." If it appears that the court-martial has no jurisdiction because the offender is not subject to military law or because the offense is to be tried by a civilian law court for any other reason, the auditeur must transmit the brief to the civilian public prosecutor.

(c) "Information." This is a request for more information about the case, especially from police officials, who can investigate more fully in an attempt to supply answers to questions raised by the auditeur. When the auditeur has received this information, he may "classer sans suite," or begin an "instruction," or even decide that the offender must be court-martialed.

(d) "Instruction," *i.e.*, a written criminal investigation about the charges. This investigation has to be made by a judicial commission.

A judicial commission must necessarily intervene: (a) when the auditeur considers it necessary to make certain special investigations such as examining a witness on oath, visiting the scene where the offense has been committed, or asking an expert opinion; (b) when the preliminary investigation has been made by a military authority and the suspected offender has been apprehended; and (c) when the auditeur considers it necessary to confine the suspected offender.

D. APPREHENSION AND PROVISIONAL DETENTION<sup>15</sup>

All persons subject to military law may be apprehended either by military or by civilian authorities. When the circumstances require it, any officer or non-commissioned officer has the power to arrest any other member of the armed forces, of inferior rank than himself.<sup>16</sup> He is even obliged to apprehend a member of the forces of lower rank who has committed a serious crime.<sup>17</sup>

A member of the forces may also be apprehended by civilian police authorities such as judicial, municipal or country police officials, within the limit of their own powers. The apprehended person must be brought before the auditeur within 24 hours following his apprehension. According to the Belgian constitution, an order to confinement may only be delivered by a judge; if it has not been delivered within 24 hours after apprehension, the apprehended person must be released. In the civilian justice system, it is the investigating magistrate ("juge d'instruction") who delivers such an order; in the military justice system, this function belongs to the judicial commission.

The decision of the civilian investigating magistrate is effective for five days; a chamber of the law court may prolong the detention for one month; at the end of each month, a new detention for the same amount of time may be ordered. In the military system, such delays do not occur; the decision of detention is effective until the apprehended person is released or until he appears before a court-martial. It is necessary, however, that the judicial commission examine the opportunity of maintaining the detention each time it interrogates the accused. As it is a basic principle of military justice that the preliminary investigation should be quick, detention before appearance will very often be short. If it lasts more than two months—which would be rather exceptional—the accused may request, by writing to the general auditeur, that he be released.

In the case of members of the forces apprehended by their military superiors, an important distinction must be made between judicial and disciplinary action. If the apprehended person has committed an offense, which is punishable by confinement

<sup>15</sup> See Velden, *De la detention preventive et de la mise en liberte en matiere militaire* (On Provisional Detention and Apprehension in Military Matters), 1960-61 *Revue de droit penal et de criminologie* 824-842.

<sup>16</sup> C.P.A.T. 1814, art. 4; R.D. 1815, art. 38; R.D. 1959, art. 36.

<sup>17</sup> In Belgian criminal law, a crime is an offense punished by death or a confinement of at least five years.

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under the criminal law, he must be brought before the auditeur, as explained above; but if he has only committed a disciplinary offense, he may be punished immediately by the competent military authority. This punishment has to be pronounced as quickly as possible, but a delay of 24 hours is not unusual and provisional arrest may continue, in special cases, for more than 24 hours.

### *E. INVESTIGATION BY THE JUDICIAL COMMISSION*

The judicial commission must make a written investigation of the case. It must interrogate the accused person and, if necessary, the witnesses. It may decide to cross-examine the accused and the witnesses. The statements of the accused and the witnesses are taken down by the clerk under the direction of the auditeur. All declarations are signed by the accused or the witness, the auditeur, the officers and the clerk. Witnesses are interrogated on oath. The accused is not present during the interrogation of the witness, except if he is cross-examined with him. If it is necessary to search a house, even a military office, the decision is made by the auditeur alone, without intervention of the judicial commission, and he may give instructions to police officials to make the search.

The judicial commission may ask for an expert opinion, when technical difficulties arise in the examination of the case. As a rule, experts are appointed from among members of the armed forces, but it is always possible to appoint a civilian expert, if necessary. The expert opinion must be given and written on oath.

### *F. END OF THE PRELIMINARY INVESTIGATION*

When all the information has been collected about a case, the preliminary investigation is closed by a last interrogation of the accused. If it seems to the auditeur, after discussion with the military members of the judicial commission, that there are not enough charges against the accused, he will make a written decision not to prosecute ("decision de ne pas suivre"). This decision is generally equivalent to a decision discharging the accused. If the auditeur thinks that the accused must be court-martialed, he will write charges and specifications, following the form of each offense in the legal texts. These charges and specifications are read to the accused, who may request, once more, the interrogation of new witnesses or other investigations. Thereafter, the brief, containing all the pieces of the written preliminary investigation, is transferred to the court-martial. The members

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of the court and the accused and his counsel may consult the brief during the days before the trial of the accused.

### VI. TRIAL PROCEDURE IN COURTS-MARTIAL

#### A. CONDUCT OF THE TRIAL

*Swearing of the Court.* When the court-martial first assembles, the military members of the court swear that they will faithfully perform their duties, keep secret the deliberations and judge the accused without hatred, without fear, and without complaisance, but only according to the law. The civilian judge, the auditeur, and the clerk have all been sworn when they accepted their position, and the barrister was sworn when he was admitted to the bar. Accordingly, they are not sworn again each month.

*Arraignment of Accused.* When the accused has been introduced, the auditeur makes an opening address, briefly explaining the charges and outlining the facts. He relates everything that has been done during the preliminary investigations and exposes all relevant facts. He must not only expose the charges, but also all that can be said in defense of the accused.

*Interrogation of the Accused.* Thereafter, the president or the civilian judge examines the accused about the charges and specifications. The accused is not entitled to plead guilty or not guilty. Even if he acknowledges his guilt, the evidence of the offense has to be brought out by the auditeur. During the examination, the accused personally answers every question of the president. Other members of the court and the auditeur may ask the president for permission to interview the accused on various points.

*Witnesses.* Witnesses are excluded from the courtroom except when they testify. After being introduced and sworn, the witness may be examined by the president, members of the court, the auditeur and counsel for the defense. The witness may be cross-examined at the same time as the accused or other witnesses who are being questioned. There are no special rules about direct examination and cross-examination; the president organizes the examination so as to obtain the truth as well as possible. Experts may also be interrogated and cross-examined.

*Second Examination of the Accused.* At the end of the examination of the witnesses, the accused may be, and generally will be, re-examined on all the charges.

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*Claiming Damages.* When the examination of the accused and the witnesses is finished, the plaintiff may bring a civil action, concurrently with the criminal one, against the accused. While in the United States courts-martial have no power to decide on payments of damages, in Belgium they may do so when the damages were caused by an offense subject to the jurisdiction of the military. Any person who suffered such a damage may request reparation of the loss.

*Charges of the Auditeur.* Thereafter, the auditeur, as public prosecutor, concludes the case. He reminds the court of all the elements of the offense and the evidence establishing the guilt of the accused. He concludes by asking for a precise punishment, such as death, confinement for a specific length of time, or a fine in a specific amount. If the auditeur thinks there is not enough evidence, he asks the court to discharge the accused person.

*Pleading of the Counsel for the Defense.* Counsel for the accused is always the last person who addresses the court. In his speech for the defense, he will try to show that the accused is not guilty, either by telling the court no offense has been committed, or that there is no evidence of the accused having committed the offense. If the accused has pleaded guilty, he will try to obtain the lightest punishment by asserting the accused's youth, irresponsibility, insanity,<sup>18</sup> etc.

### B. SENTENCING

After the address of the defense counsel, the court will be closed. The military members of the court and the civilian judge retire from the courtroom to a convenient retiring room to deliberate and vote on the findings.

Each member will give his vote on each charge separately, commencing with the junior member. As a rule, unanimity is not needed, and decisions are reached by a majority vote.

The president or the civilian judge will pronounce the sentence. Each sentence must include the identity of the accused, the specifications of the offenses, the grounds of the judgment, the articles of the criminal code or statutes involved, and the punishment. The grounds of the judgment are prepared by the civilian judge after deliberating with the military members.

<sup>18</sup> When insanity is proved, a special measure, called "internement," may be pronounced by the court-martial. It is not a punishment, but only a measure of social defense. It is pronounced for a term of five, ten or fifteen years; but a psychiatric commission can release the man earlier, when he is no longer insane.

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If the accused was *not* present during the trial, the sentence is pronounced by default. The accused may then "faire opposition," *i.e.*, appeal the decision, not before the Military Court of Appeal, but before the same court-martial.

This appeal is heard ten days from the day the accused was personally notified of the sentence, or from the day that the accused was informed that the sentence had been pronounced.

If this kind of appeal is accepted, the court-martial is obliged to begin the whole trial again, particularly by re-examination of the witnesses.

### C. APPEAL

If the accused has been present during the trial, or even if he has not, he is allowed to appeal to the Military Court of Appeal all sentences of a court-martial. Under the statute of January 27, 1916, the following persons may appeal: the accused who has been convicted, the auditeur, and persons who have claimed damages. An appeal must be lodged at the clerk's office within ten days, with the exception of an appeal by the general auditeur, who has fifteen days within which to file his appeal.

During the appellate process, the sentence may not be executed, but, if the accused is confined, he will remain in confinement.

If the military situation makes it necessary, appeals from sentences of *field* courts-martial may be temporarily suspended, either by a royal decree, by a decision of the commanding officer of an invested place or of a part of the armed forces whose communications have been cut by the enemy, or under exceptional circumstances. Such was the case during some periods of the First World War and also for the field court-martial in Korea in 1951-1954.

*Procedure in the Military Court.* When the Military Court judges an accused directly, in first and last instance, for example a high ranking officer or a general, the trial procedure is the same as in the courts-martial. But, when the Military Court hears an appeal, the procedure is quite different. The general principle is that the Court judges by reviewing the records of trial of the court-martial. The Court may, however, decide to call the accused. As a rule, there is no new investigation before the Court and no witnesses are heard, unless the Court orders it.

The accused, whether or not he is present in person, must always be represented before the Military Court by counsel. If he has not chosen a counsel, the Court will grant one *ex-officio*.

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The only exception to this practice is when the accused appears personally before the court and renounces the assistance of a counsel.

*Cour de Cassation.* All sentences of the Military Court may be submitted to the "Cour de Cassation," supreme court for all the courts in Belgium, civilian as well as military. In wartime, the King may suppress this appeal if communications between the Supreme Court and the Military Court are interrupted.

This Supreme Court is not a fact-finding court. It may only annul a sentence when it decides that there has been a violation of law or procedure. The Supreme Court may not investigate the facts or the evidence. When the Supreme Court annuls a sentence of the Military Court, the case is sent back to that court, but the case may not be re-tried by the same members. The delay on appeal to the Supreme Court is ten days; in wartime, it may be reduced to five days.<sup>19</sup>

*Petition for Mercy.* According to the Constitution (art. 73), the pardoning power belongs to the King. In fact, however, it is the Minister of Justice or, for the members of the armed forces, the Minister of National Defense, who examines the appeals to remit or commute the punishment fixed by a sentence.

The convicted individual may always address a petition for mercy or pardon to the King. Before taking a decision, however, the Minister asks for the opinion of the auditeur.

### D. EXECUTION OF SENTENCES

All sentences of courts-martial or of the Military Court are carried out by the auditeur militaire, under control of the general auditeur. No approval of the sentence by the King, by a minister, or by a military authority is required.

The execution of a sentence of death is effected by shooting. The place of the execution is fixed by the court in its sentence. The time will be fixed by the auditeur, after having received and notified the accused of the rejection of any appeal for mercy; normally, it will be fixed at two days after this notification.

There are no special prisons for members of the armed forces. In Belgium, military prisoners are detained in the ordinary prisons, together with the civilian prisoners. In a foreign country,

<sup>19</sup> See Gilissen, *Le recours en cassation contre les décisions de la juridiction militaire* (Appeal to the Supreme Court From Decisions of the Military Court), 1954-55 *Revue de droit penal et de criminologie* 251-286.

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as in Germany, there exist provostal prisons, where very short punishments to confinement may be executed.

In certain circumstances a prisoner can be discharged before the end of the pronounced punishment. When he is not a recidivist, he may be released after serving a third of the sentence or at least three months. Such a discharge is conditional, and if he is punished again, he will have to serve the rest of the sentence.

### VII. NON-JUDICIAL PUNISHMENT<sup>20</sup>

Non-judicial punishment is not considered to be under the jurisdiction of the military justice system, but is treated as a purely military function. Such punishments are awarded by military authorities, and, since 1916, appeal to the Military Court is no longer possible.

The regulations governing this kind of punishment are found in the "Reglement de discipline." The authorities who are entitled to award such punishment are: (1) the generals, for all members of the armed forces; (2) the commanding officers, *i.e.*, the officer commanding an army corps, a division, a brigade, a regiment, a battalion or a company, each of them for the members of the units he commands; and (3) the commanding officers of a military district, province or place, but only for the offenses committed in their territory by members of the armed forces stationed outside this territory.<sup>21</sup>

A punished person may always appeal to the superior of the officer who pronounced the punishment. This superior may modify or suppress the punishment, and he may also inflict another punishment, if the appeal was made with disrespect or in an unfair way.

Disciplinary punishment is possible for all acts which are not offenses mentioned in the Criminal Code or statutes. The "Regle-

<sup>20</sup> See Bosly, *Des rapports entre l'action penale et l'action disciplinaire en droit militaire belge* (Some Relationships Between the Criminal Action and the Disciplinary Action in Belgian Military Law), 1958-59 *Revue de droit penal* 827-845; Maes, *Militair tuchtrecht—Militair strafrecht*, 1958 *Rechtskundig Weekblad* 337-351. A study concerning the criminal action and the disciplinary action in the United States, Great Britain, Canada, France, Germany, Italy, Spain, Brasil, Denmark, Norway, the Netherlands and Belgium may be found in the reports of the First International Congress on Military Criminal Law and the Law of War, held in Brussels in 1959, entitled "Action penale et action disciplinaire" (1960). This study includes the above-mentioned article by Bosly at pp. 35-50 and a comparative study of the different national systems by Gardon and Gilissen at pp. 5-34.

<sup>21</sup> R.D., art. 35.

ment de discipline" gives a few examples of acts which have to be punished disciplinarily, such as absence without leave (but not desertion), and being under the influence of drink (but not drunkenness). Article 27 of the "Reglement de discipline" also makes provisions for all disciplinary faults, i.e., any action contrary to military regulations or acts incompatible with military discipline.

While no offense exists if it is not defined by a statute enacted by the legislative branch (*nullum crimen sine lege*), the acts which are disciplinarily punishable are not defined by the statutes. These acts are only defined by the customs and habits in the army.

In exceptional cases, criminal offenses may be punished disciplinarily. When the civilian law court or the civilian public prosecutor has jurisdiction over a member of the armed forces, they may decide to send him back to his commanding officer to be punished disciplinarily.<sup>22</sup> The Military Court and the courts-martial may not do this, but the auditeur, before submitting the case to the court-martial, may decide not to prosecute ("Classer sans suite") and thus give the commanding officer an opportunity to award disciplinary punishment.

Disciplinary punishments are as follows: for all military personnel—a reprimand; for officers only—open arrest, for a period not exceeding 21 days, or close arrest, for a period not exceeding 14 days; and for non-commissioned officers, corporals and soldiers—arrest in the quarters, not exceeding 21 days, arrest in the room, not exceeding 14 days, or close arrest, not exceeding 8 days.

Apart from these disciplinary punishments, some disciplinary measures or provisions may be ordered by the Minister of National Defense. These kinds of disciplinary measures are very numerous and differ for each class and rank. The most important include the admonition, the reprimand, the deprivation of office, the compulsory resignation, etc.

#### VIII. AN EXAMPLE OF THE MILITARY OFFENSE: DESERTION

It is impossible in this short review of Belgian military law to offer explanation about all the military offenses. As an example, this article will discuss one of the most important military offenses, desertion, how it is defined and punished in Belgian law.<sup>23</sup>

<sup>22</sup> C.P.P.M. 1899, art 24.

<sup>23</sup> Statistics of military offenses and a short survey on military criminology may be found in Glissen, *Criminologisch onderzoek inzake militaire delinquentie*, 1 *Revue de droit penal militaire et droit de la guerre* (Military Law and Law of War Review) (1962).

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Any member of the armed forces who is absent without leave for a certain number of days is guilty of desertion. Accordingly, this offense exists with or without intent to remain away from the place or service where the member of the forces is required to be; to be a deserter, it is only required that the man remain voluntarily absent without leave during the number of days fixed by the military criminal code (art. 43-45); no other elements must be proved by the auditeur.

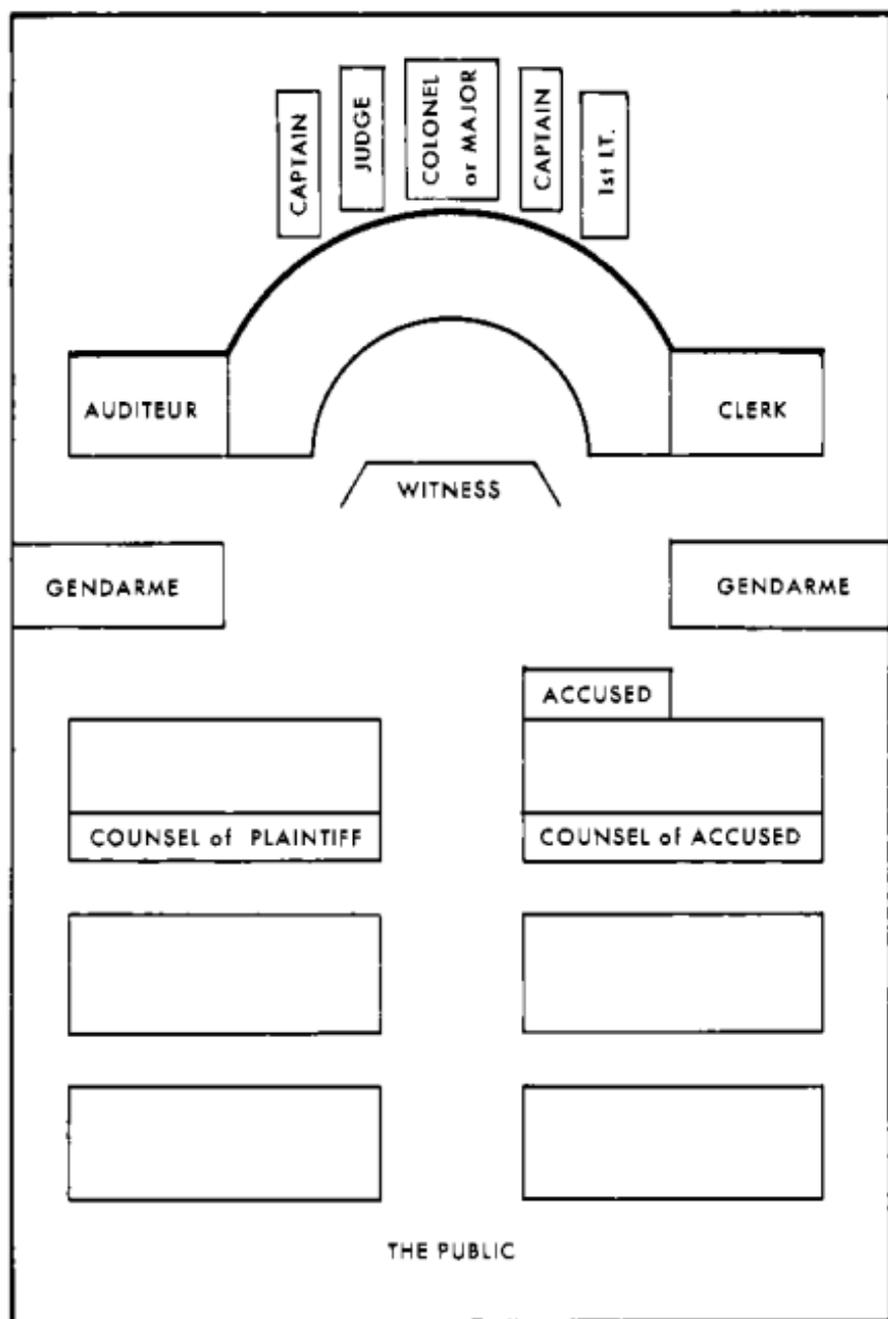
The duration of the absence without leave, necessary to make the offense desertion, is different in time of war and in time of peace. In wartime, desertion begins after three days absence without leave. In time of peace, it begins after eight or fifteen days, depending upon the following circumstances. The offense of desertion will be committed where there has been an unauthorized absence for eight days by officers who left the kingdom without authority and by other members of the armed forces, who absent themselves from their unit or organization without authority.

Desertion is presumed where there has been an unauthorized absence for fifteen days by officers who absent themselves from their unit or residence without authority; by officers and all other members of the armed forces, who, being on leave, fail to return to their unit at the end of the leave; and by members other than officers, who, traveling alone, did not arrive at their place of duty.

The punishments are different for officers and for the other members of the armed forces. Officers shall be dismissed without confinement. Other members of the forces shall be punished by military confinement from a minimum period of two months to a maximum period of two years. Confinement of between three months and three years will be given when one of the following aggravating circumstances exists (art. 47): the deserter has previously been punished for desertion, the accused deserted together with another member of the forces, the deserter carried away his firearms, the deserter was at post at the moment of leaving the service, the deserter went out of the kingdom, the deserter made use of a false permission, or the accused deserted for more than six months.

Certain other types of desertion receive more stringent punishments. A planned desertion is punished by confinement for five or ten years (arts. 49-50). Desertion in the face of the enemy is punished by ten to fifteen years confinement if the deserter is an officer, otherwise by five to ten years. Finally, desertion to the enemy is punished by death (art. 52).

IX. APPENDIX  
 DIAGRAM OF BELGIAN COURT-MARTIAL





# A SUPPLEMENT TO THE SURVEY OF MILITARY JUSTICE\*

BY

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AND

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## I. FOREWORD

This survey represents the fifth of its kind to appear in the *Military Law Review*.<sup>1</sup> The authors of this survey have continued the practice employed in the prior two supplements<sup>2</sup> of considering the work of the Court on a court term rather than on a fiscal year basis. Accordingly, the cases considered by this supplement will include those decided during the October 1961 term (1 October 1961 through 30 September 1962). It should be noted that at the inception of this term Judge Paul K. Iday took his seat on the Court as the successor to Judge Latimer. The objective of this supplement, like that of those previously published in the Review, is to present a concise survey of the principal questions considered by the United States Court of Military Appeals during the last term. Not every question or case will be noted, but when it is deemed pertinent, attention will be drawn to opinions of the new member which are reflected by a modification or noteworthy re-emphasis of the Court's previous position. *In toto* it is intended that this survey reflect Judge Learned Hand's comment respect-

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

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<sup>1</sup> The original survey of military justice, *The Survey of The Law—Military Justice: The United States Court of Military Appeals—29 November 1951 to 30 June 1958*, Mil. L. Rev., January 1959, p. 87, and the first supplement to the Survey, Fischer and Sides, *A Supplement to The Survey of Military Justice*, Mil. L. Rev., April 1960, p. 113, were written by officers assigned to the Government Appellate Division, Office of the Judge Advocate General.

<sup>2</sup> Davis and Stillman, *A Supplement to The Survey of Military Justice*, Mil. L. Rev., April 1961, p. 219; Croft and Day, *A Supplement to The Survey of Military Justice*, Mil. L. Rev., April 1962, p. 91.

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ing the law, "Though severally we may perhaps be paltry and inconsequent, for the present it is we who are charged with its maintenance and its growth. Descended to us, in some sort moulded by our hands, passed on to the future with reverence and with pride, we at once its servants and its masters, renew our fealty to the Law."<sup>3</sup>

### II. JURISDICTION

#### A. JURISDICTION OF ACCUSED, OFFENSE, AND COURT

During the 1961 term the Court of Military Appeals had occasion to consider the question of jurisdiction over the person of an accused who had enlisted in the service at age seventeen and was tried before he had reached eighteen. The military status of this accused in *United States v. Bean*<sup>4</sup> was challenged by the defense on the ground that enlistment had been entered into without parental consent and that accused's parents had learned of his enlistment about two weeks before his trial and had requested his immediate release from the service. The Government maintained exercise of military jurisdiction was proper because a Mrs. Turner, who by arrangement with accused's divorced mother, had cared for him during the eight years prior to his enlistment, had signed as his legal guardian, listing her legal relationship as "loco parentis." The Court did not find it necessary to decide that Mrs. Turner was qualified to give the consent necessary, pursuant to Title 10, United States Code, section 3256, to enlist under the age of 18. It was held that the enlistment of a minor of the statutory age (17), even though without the required consent, is valid, and he thereby becomes *de jure* and *de facto* a soldier, subject to military jurisdiction. A nonconsenting parent is not entitled to the custody of the minor prior to the expiation of the latter's crime, when the parent has not sought his discharge until after commission of an offense triable by court-martial and punishable by military law. The parent's right to the minor's custody and service under these circumstances is subordinate to the right of military authorities to hold the minor soldier to answer for his crime and consequently military jurisdiction is not defeated.

In *United States v. Schafer*,<sup>5</sup> a challenge to court-martial jurisdiction over the offense was raised. The accused had been

<sup>3</sup> Hand, *The Spirit of Liberty: Papers and Addresses* 69 (Dilliard ed. 1959).

<sup>4</sup> 13 USCMA 203, 32 CMR 203 (1962).

<sup>5</sup> 13 USCMA 83, 32 CMR 83 (1962).

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charged with a premeditated murder committed at a base in New Jersey in 1960. It was argued that the court-martial was without jurisdiction to try a capital offense committed in the United States during time of peace. Acknowledging that this issue was not considered when the Court last affirmed a death penalty for a peacetime murder perpetrated in the United States,<sup>6</sup> no constitutional prohibitions to court-martial trials of capital offenses of this type were found. Judge Kilday, speaking for the Court, said that in the case of an accused serving in the armed forces, court-martial jurisdiction of capital offenses in peacetime under Article 118, Uniform Code of Military Justice, is unaffected by the "time of war or public danger" restriction mentioned in the Fifth Amendment to the United States Constitution since it is settled that that restriction regarding military trials applies only to the militia. Further, in conclusively putting the instant jurisdiction issue to rest,<sup>7</sup> the Court concluded that neither the locus of the crime, nor the penalty therefor, make any difference, for those amenable to military justice under Article 2 of the Code are subject thereto in all places under the clear extraterritorial applicability prescribed for the Uniform Code in Article 5 thereof. The test for jurisdiction of courts-martial is one of *status*, namely, whether the accused is a person who can be regarded as falling within the term "land and naval forces."<sup>8</sup>

A third jurisdictional question was presented regarding a court-martial's jurisdiction to try the charges before it. In the absence of anything in the trial record contradicting the presumption of regularity, the absence of a formal order withdrawing charges from a court-martial to which previously referred does not deprive the court-martial that actually disposed of the charges of jurisdiction.<sup>9</sup> This conclusion is in accord with the Court's willingness to waive certain procedural irregularities in the appointment of courts-martial and referral of charges as illustrated by their prior sanction of an oral referral of charges for trial.<sup>10</sup>

### B. TERMINATION OF JURISDICTION

In *United States v. Brown*,<sup>11</sup> orders were validly issued on 9 January terminating accused's active duty and transferring him

<sup>6</sup> *United States v. Henderson*, 11 USCMA 556, 29 CMR 372 (1960).

<sup>7</sup> See *Burns v. Taylor*, 274 F.2d 141 (10th Cir. 1959); *Owens v. Markly*, 289 F.2d 751 (7th Cir. 1961).

<sup>8</sup> *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

<sup>9</sup> *United States v. Griffin*, 13 USCMA 213, 32 CMR 213 (1962).

<sup>10</sup> *United States v. Emerson*, 1 USCMA 43, 1 CMR 43 (1952).

<sup>11</sup> 12 USCMA 693, 31 CMR 279 (1962).

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to inactive duty in the Naval Reserve effective on the date of issuance. Accused received the orders on 9 January and formalities attendant upon his relief from active duty were completed. He had departed for his home when it was ascertained that he had committed the offense for which he was here tried. His orders were then cancelled and he was apprehended before midnight on the date the orders were issued. The Court held that delivery of competent orders served to end jurisdiction to try accused by court-martial just as if his entire service obligation had been completed by delivery of a valid discharge.<sup>12</sup> The only distinction found between this case and *United States v. Scott*,<sup>13</sup> where accused's status as a person on active duty was terminated by a discharge certificate, was the manner of terminating jurisdiction, not the fact that such jurisdiction had been terminated. It was recognized in *Brown* that accused's receipt of orders was the only means by which a member whose reserve obligation continued was entitled to have his active duty ended. Jurisdiction depended on his continued service on active duty rather than upon lack of discharge and membership in the inactive reserve. As in *Scott*, the Court in *Brown* further held that the existence of a service regulation provision purporting to delay the effectiveness of separation until midnight on the day of the order's issuance did not delay the separation beyond the moment of receipt. Chief Judge Quinn, in his dissent, was of the view that service regulations purporting to delay the effectiveness of orders terminating the active duty of reservists are of effect. He pointed out that the precedents for the effect of delivery of a discharge certificate to the person to be discharged, here relied upon by the Court, were based on a "jurisdictional statute."<sup>14</sup> With *Brown*, unlike *Scott*, it is the Universal Military Training and Service Act, under which the member was enlisted, that is determinative. This act<sup>15</sup> does not spell out procedures by which release will be accomplished. Instead, said Chief Judge Quinn, Congress gave the service secretaries specific authority to promulgate regulations to carry out the provisions of this act. Neither this act nor any established policy forbids the service from regulating the precise moment of release from active duty and transfer to the reserves.

Later in the term, the Court considered the case of *United States v. Griffin*<sup>16</sup> where the accused's challenge of military juria-

<sup>12</sup> *Id.* at 695, 31 CMR at 281.

<sup>13</sup> 11 USCMA 646, 29 CMR 462 (1960).

<sup>14</sup> 10 U.S.C. § 8811 (1958), cited in *Brown*, note 11 *supra*.

<sup>15</sup> 10 U.S.C. § 280 (1958).

<sup>16</sup> 13 USCMA 213, 32 CMR 213 (1962).

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diction, on the ground that he was legally discharged before court-martial proceedings were initiated, put in issue the prerequisites for the effective termination of military jurisdiction. Griffin based his claim on the fact that the necessary discharge papers and orders for his release had been lawfully prepared prior to his arrest and on the concomitant presumption that the notice required for termination of military status had been given him. Reiterating the principle that a discharge is not effective until the member receives actual or constructive notice thereof,<sup>17</sup> the Court said that even assuming the creation of the presumption relied upon by accused, it is clear that neither he nor anyone acting on his behalf received the discharge certificate itself, or actual notice of it. The advance preparation of his orders, relied upon as evidence of discharge, was in accord with a policy of speeding up discharge proceedings; however, these proceedings were never completed and orders providing for the discharge were revoked while accused was in confinement. Even assuming that while accused was in military custody he was an absentee within the meaning of Army Regulations 635-200<sup>18</sup> on whom constructive delivery of his discharge was made, the Court held there was no constructive notice sufficient to terminate his military status and deprive the court of jurisdiction. Despite the delivery of the necessary papers to the accused's transfer station, during his absence, it is clear no immediate termination of his military status was intended by the Government. That such delivery be intended is but one required step in a series of steps for the discharge to be completed and take effect according to its legal tender.

### III. PRETRIAL AND TRIAL PROCEDURES

#### A. CHARGES AND SPECIFICATIONS

##### 1. Sufficiency

Several cases presenting questions concerning the sufficiency of charges were decided during the period under consideration. Two allegations of insufficiency of the charges were considered in *United State v. Crooks*.<sup>19</sup> In the first instance a challenged specifi-

<sup>17</sup> *Id.* at 215, 32 CMR at 215.

<sup>18</sup> Para. 17 of Army Regs. No. 635-200 (April 8, 1959), provides in part ". . . (a discharge) is effective at the time of notice to the enlisted person of discharge. . . (notice may be) . . . actual (or) constructive. . ."

<sup>19</sup> 12 USCMA 677, 31 CMR 263 (1962).

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cation alleged violation of a general regulation.<sup>20</sup> The allegation of wearing a field uniform in a public establishment was held insufficient to show a violation of a regulation where that directive provided that the field uniform will not be worn "outside of military installation, except as provided for the work uniform or when performing duty in field exercises outside of military installations." The phrase, "public establishment," does not without further description indicate directly or by fair implication that the particular public establishment was outside a military installation. A specification of perjury at issue in *Crooks* was claimed to be legally insufficient because its subject matter involved the purportedly false testimony given by accused during the Article 32 investigation of that general regulation charge, just noted. This claim was denied by the Court. In the majority opinion, Chief Judge Quinn reaffirmed that an Article 32 investigation was a judicial proceeding or in the course of justice within the meaning of Article 131 and found that false testimony given by accused during the investigation of the purported infraction of a general regulation would support the charge of perjury. While the false testimony here proved immaterial to the matter under investigation and a miscarriage of justice did not follow, the federal prohibition against perjury is directed not so much at its effects as its perpetration. Concluding on this issue, Chief Judge Quinn said, "the perjury specification here alleges an offense, notwithstanding that on this appeal we sustain the accused's challenge to the legal sufficiency of the offense which was the subject of the investigation."<sup>21</sup>

A specification alleging attempted larceny of "personal property of some value" belonging to a named person was alleged in *United States v. Williams*.<sup>22</sup> In considering the law officer's denial of a motion by defense to make that specification more definite with regard to the nature of the property involved, the Court acknowledged the "modern tendency . . . toward allowing the pleading of legal conclusions . . ." and stated, "In light of this trend, use of no descriptive averment beyond 'personal property' may well suffice to allege the subject of an *attempted* larceny. . . . But resort to such pleading is always subject to a motion for further particularization."<sup>23</sup> In a case of attempted larceny, where the Government is aware of the property involved, it is error to

<sup>20</sup> Para. 8e, U.S. Army Europe Circular 670-5 (Feb. 16, 1959).

<sup>21</sup> 12 USCMA at 680, 31 CMR at 266.

<sup>22</sup> 12 USCMA 683, 31 CMR 269 (1962).

<sup>23</sup> *Id.* at 685, 31 CMR at 271.

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deny a defense motion for a more specific description of the property.<sup>24</sup>

A challenged specification in *United States v. Reid*,<sup>25</sup> alleged that accused ". . . did . . . conspire with [T] . . . to commit an offense . . . : selling the contents of the . . . 1960 Service Wide Competitive Examination for advancement to the rate of chief, boatswain's mate, the property of the U.S. . . . and . . . did sell said [examination] to [M], boatswain's mate, first class. . . ." Accused maintained that this specification is defective because it failed to allege that the charged acts were *without proper authority*, an element of the offense of attempted sale or conspiracy. The Court re-examined the issue in light of *United States v. Fout*<sup>26</sup> and *United States v. Julius*<sup>27</sup> and found that neither of these cases held that lack of authority, where such is an element of the offense, need be *expressly* averred if the necessary elements of the offense charged can at least be found by fair implication from the language of the specifications. It is necessary only that the specifications exclude the accused's innocence. The statement here that the accused attempted to and conspired to sell competitive examinations to a customer who would normally be interested in advancing to the grade covered by the examination was sufficient to exclude innocence.

### 2. Multiplicity

When the Court concluded in *United States v. Means*<sup>28</sup> that it is proper to allege the commission of a crime over a period of time or between specific dates, it was also noted there that a necessary corollary to the use of such pleadings is the fact that an accused may thereafter plead former jeopardy to any specific act involved in the general count. This corollary was found applicable in *United States v. Maynazarian*.<sup>29</sup> There the Government charged the accused with stealing a sum, property of the United States, during the period of 26 December 1959 to 5 May 1960, and a second offense of stealing a lesser sum, also property of the United

<sup>24</sup> See *United States v. Autrey*, 12 USCMA 252, 30 CMR 252 (1961). The Court here concluded that the averment that accused took money and or property was indefinite, in part because "it contained no intimation of the nature of the items taken." The tenor of *Williams*, *supra* note 22, suggests that the specification there, while it did not go beyond the term "personal" in specifying the nature of the allegedly stolen goods, would have stood had defense counsel not made a motion for further particularity.

<sup>25</sup> 12 USCMA 497, 31 CMR 83 (1961).

<sup>26</sup> 3 USCMA 565, 13 CMR 121 (1953).

<sup>27</sup> 8 USCMA 523, 25 CMR 27 (1957).

<sup>28</sup> 12 USCMA 290, 30 CMR 290 (1961).

<sup>29</sup> 12 USCMA 484, 31 CMR 70 (1961).

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States, on or about 20 April 1960. The record contained no evidence that the offenses charged were separate, and apart from the purely multiplicitous aspect of the specifications, the Court held it was improper to charge the accused with a general course of misconduct over a stated period of time and to select from that conduct a specific act to be alleged as a separate offense. The Court found this procedure to be as inappropriate here as it would be were the Government to try accused in a subsequent proceeding for a single taking within a blanket allegation previously tried.

### B. PRETRIAL ADVICE TO ACCUSED AND CONVENING AUTHORITY AND APPOINTMENT AND COMPOSITION OF COURTS-MARTIAL

#### 1. Accused's Pretrial Advice

On two occasions in the last term, the Court gave emphasis to an accused's pretrial rights. Article 10 of the Code provides in part that when an accused is in arrest or confinement "immediate steps will be taken to inform him of the specific wrong of which he is accused." And, in *United States v. Snook*,<sup>30</sup> the Court found compliance with Article 10 where the accused was informed at 4:25 of the morning of 27 November 1959 that he was "under apprehension" on suspicion of "murder," was confined the afternoon of the same day, and on the following day was served with formal charges of unpremeditated murder, although on 21 January 1960 a new charge of premeditated murder was prepared, and on 22 January he was advised of the new charge. The Court found that Snook was kept sufficiently informed of the specific wrongs of which charged. The apparent point of the Court's judicial focus was on the time lapse between the actual preparing of charges and notice thereof to accused, rather than on the period of nearly three months which elapsed before he was advised of the actual charge for which he was tried. In addition to the questioned timeliness of pretrial counsel, the Court also considered the requisite qualification of those persons giving legal advice to the accused. If in the course of pretrial investigation proceedings an accused requests legal advice or counsel, not only is it error to misadvise him of his right to consult with an attorney and force him to submit to questioning without a lawyer,<sup>31</sup> but the Court

<sup>30</sup> 12 USCMA 613, 31 CMR 199 (1962).

<sup>31</sup> See *United States v. Gunnels*, 8 USCMA 130, 135, 28 CMR 354, 359 (1957).

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concluded in *United States v. Brown*<sup>32</sup> that it is also error to refer the accused to an officer detailed as "Battalion Legal Officer," who, unbeknown to accused, was not in fact a lawyer. Inasmuch as accused believed the officer counseling him was a lawyer, error was committed, even if inadvertently, notwithstanding the fact that the advice given may have been correct.

### 2. Pretrial Advice to Convening Authority

In *United States v. Foti*,<sup>33</sup> the Court pointed out that a *pro forma* pretrial advice which simply invites the convening authority's attention to the investigating report is not adequate inasmuch as the convening authority should be appraised of facts that may have a substantial influence on his decision. The pretrial review considered by the Court in *United States v. Brown*<sup>34</sup> was but sixteen lines long and allegedly as inadequate as the review in *Foti*, because, among other failings, it did not summarize the expected evidence or apprise the convening authority of the accused's prior clean record. In reaffirming *Foti*, *supra*, the Court found the staff judge advocate's advice in *Brown* was not legally deficient inasmuch as the review alone did not, as in the *Foti* case, embody the whole of the advice. That document in *Brown* also referred to the appended recommendations for trial, the report of investigation, the charge sheet, and other items making up the case file. Where the convening authority does not consider the advice in a "vacuum," any material prejudice to accused caused by omissions in the advice itself may be overcome by making the file and charge sheet available to the convening authority for inspection.<sup>35</sup>

### 3. Composition and Attendance of Court-Martial Members

It is within the broad discretion of a convening authority in selecting and appointing persons to sit as court members to select a court to hear only the case of a particular accused where, under the circumstances, defense counsel's *voir dire* examination reveals no broad basis for challenge and in fact none are leveled at the court.<sup>36</sup> The composition of the court-martial was challenged in *United States v. Wood*,<sup>37</sup> where *voir dire* examination of a court member trying a master sergeant for larceny by check and absence without leave indicated that as a general matter one mem-

<sup>32</sup> 13 USCMA 14, 32 CMR 14 (1962).

<sup>33</sup> 12 USCMA 303, 30 CMR 303 (1961).

<sup>34</sup> 13 USCMA 11, 32 CMR 11 (1962).

<sup>35</sup> *Id.* at 13, 32 CMR at 13.

<sup>36</sup> *United States v. Kemp*, 13 USCMA 86, 32 CMR 89 (1962).

<sup>37</sup> 13 USCMA 217, 32 CMR 217 (1962).

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ber believed the amount of responsibility expected of an individual is determined by his position and rank and a violation of that responsibility by a sergeant should be considered greater than a violation of responsibility by an individual of a lesser stature. The Court held that this belief did not require that member's disqualification as a matter of law where he indicated he did not consider it an inflexible rule, and that he would evaluate the accused's case on the whole of the attendant facts.

With regard to an unexplained absence of a court member, the Court in *United States v. Greenwell*,<sup>38</sup> citing Article 29 of the Code,<sup>39</sup> denied the Government's claim that in absence of a contrary showing a presumption of regularity operates to establish that the absent member was excused from further attendance for good cause by the convening authority. On the contrary, the absence of a court member after arraignment unqualifiedly places the duty upon the United States to demonstrate in the record the reason for the member's absence. "The rule for which the government contends is applicable only to absences *before* arraignment when there is no objection by the accused."<sup>40</sup>

### C. COMMAND INFLUENCE

During the 1961 term, the Court was presented with several trial records and courses of conduct on the part of installation personnel which raised questions of improper command influence. The effect of a convening authority's consideration of an administrative policy which the Court had considered before, impugned lectures on military justice, and a "private" survey pertaining to sentencing procedures within the command, were all brought under consideration by the Court. For the third time in recent years, SECNAV Instruction 1620.1, a directive that known homosexuals "must be eliminated from the service," was in issue before the Court.<sup>41</sup> In *United States v. Rivera*,<sup>42</sup> accused alleged that the

<sup>38</sup> 12 USCMA 560, 31 CMR 146 (1961).

<sup>39</sup> 10 U.S.C. § 829 (1958).

<sup>40</sup> 12 USCMA at 562, 31 CMR at 148.

<sup>41</sup> In *United States v. Doherty*, 5 USCMA 287, 17 CMR 287 (1954), the Court held that there was a risk that the convening authority was of the belief that SECNAV Instruction 1620.1 was mandatory and that this belief prompted the affirmation of the punitive discharge adjudged. His court-martial function being circumscribed, the Court determined that the case record required reconsideration. Over Judge Ferguson's dissent, the Court later held in *United States v. Betts*, 12 USCMA 214, 30 CMR 214 (1961), that SECNAV Instruction 1620.1 did not compel the convening authority to approve a punitive discharge. There, following the trial, accused submitted a petition for probation to the convening authority. Attached to the petition was an indorse-

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referenced Naval policy instruction deprived the convening authority of discretion to dismiss the charges or to refer them to other than a general court-martial for trial. Though the staff legal officer's advice pointed out that the provisions of the instruction provided that homosexuals shall either request an administrative separation, or be recommended for trial by general court-martial, and that the accused had refused to resign, this reference to the instruction did not intimate that the convening authority was bound by the instruction to abdicate his responsibilities. As in *United States v. Betts*,<sup>43</sup> the Court was able to conclude from the advice of the staff legal officer that the convening authority fully understood the weight of the instruction and his overriding discretion with respect to his authority to dispose of the case. He was aware that as a policy declaration affecting good order and discipline the terms of the instruction did not necessarily require him to abdicate his independent judgment in the performance of his court-martial functions. The fact that the advice made reference to paragraph 35 of the Manual for Courts-Martial,<sup>44</sup> coupled with the additional fact that the convening authority dismissed one of the specifications because of insufficient evidence, said the Court, "reflect an independence of thought and conduct which is inconsistent with a claim of blind obedience to a mistaken interpretation of the commands of the instruction."<sup>45</sup>

In *United States v. Davis*,<sup>46</sup> the Court was confronted again with the same orientation lectures and court members to whom they had been given as had been of concern in *United States v. Danzine*.<sup>47</sup> In the *Danzine* case, Judge Latimer spoke for the

ment referring to the SECNAV Instruction here in issue. The petition was denied, and the Court held that any improper effects of the instruction were believed to be corrected by the advice of the staff judge advocate to the convening authority.

<sup>43</sup> 12 USCMA 507, 31 CMR 93 (1961). Judge Kilday concurred without opinion. Judge Ferguson dissented on the basis of *United States v. Doherty*, note 41 *supra*, and *United States v. Jamison*, 10 USCMA 472, 28 CMR 98 (1959), on the ground that the legal officer's advice established a fair risk that the convening authority was improperly influenced by the instruction.

<sup>44</sup> 12 USCMA 214, 30 CMR 214 (1961). See note 41 *supra*.

<sup>45</sup> Hereinafter referred to as the Manual and cited as para. \_\_\_\_, MCM, 1951. In part, para. 35 of the Manual states: ". . . he (convening authority) is empowered . . . to refer them (charges) for trial to a general court-martial . . . to authorize the trial of certain capital offenses by inferior courts-martial. . . . [H]e may take any action on the charges the immediate commander (32) or the officer exercising summary court-martial jurisdiction (33) is authorized to take."

<sup>46</sup> 12 USCMA at 509, 31 CMR at 95.

<sup>47</sup> 12 USCMA 576, 31 CMR 162 (1961).

<sup>48</sup> 12 USCMA 350, 30 CMR 350 (1961); see discussion in Croft and Day, *supra* note 2, at pp. 96-97.

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Court with Chief Judge Quinn's concurrence. There it was held that the lectures did not constitute unlawful command influence. Judge Kilday's majority opinion in *Davis, supra*, reconsidered this question and agreed with Chief Judge Quinn, that considering the plain language of Article 37 in the context of the Uniform Code as a whole, orientation lectures or other instructions pertaining to military justice, emanating from the convening authority and given to the court-martial personnel, are not *per se* outlawed by the Uniform Code and therefore *per se* prejudicial. Significantly, the statute does not proscribe any and all participation by the "command" in this phase of military justice. It is "unlawful influence," coercive and unauthorized in effect which, according to Judge Kilday, Article 37 forbids. The subject matter, rather than who gives lectures on military justice or to whom they are given, is determining. In any event, pretrial lectures or conferences should, said the Court, "be carefully limited to general orientation on the operation of court-martial procedures and the responsibilities of court members."<sup>48</sup>

On the same day as the *Davis* case was decided, the Court also considered *United States v. Kitchens*,<sup>49</sup> and the case of two of that accused's companions,<sup>50</sup> in the commission of the offenses there in issue. The purport of the Court's unanimous holding is to emphasize that personnel charged with the supervision and administration of the system of military justice, despite what may be the honorable motives with which they may act, may enter into no course of conduct that will raise a suggestion or ground for suspecting improper impact on the exercise of court members' judicial functions. In *Kitchens, supra*, those in charge of administering military justice had not limited their "education and training" activities in the field of military justice to general orientation and lectures on that subject as the Court in *Davis*<sup>51</sup> intimated they should. *Kitchens* had been convicted and sentenced in a civil court for housebreaking and larceny. His immediate commander undertook to effect accused's administrative separation but after that officer had received a telephone call from the Staff Judge Advocate of the command, the Commanding Officer initiated general court-martial proceedings and referred them to an Article 32 investigating officer. That officer determined that the accused had been

<sup>48</sup> 12 USCMA at 581, 31 CMR at 167.

<sup>49</sup> 12 USCMA 589, 31 CMR 175 (1961).

<sup>50</sup> *United States v. Smith*, 12 USCMA 594, 31 CMR 180 (1960); *United States v. Barrett*, 12 USCMA 598, 31 CMR 184 (1961). In these cases the Court, citing *Kitchens*, unanimously reached a similar decision.

<sup>51</sup> 12 USCMA 576, 31 CMR 162 (1961).

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adequately punished by the civil court and recommended administrative separation. The Staff Judge Advocate disagreed and the convening authority referred the trial to a general court-martial. At about this same time, a letter from the Office of the Staff Judge Advocate, signed by the Assistant Staff Judge Advocate, was circulated to Army officers assigned to the post including all of the members of the court which tried the accused. The letter purported to be a personal request for information which would be used for instructional purposes and for guidance of those involved in the administration of military justice. It set out a listing of charges, and sentences imposed by general courts-martial within the command in two different time periods. Comment was solicited as to why sentences currently being adjudged, as reflected by one of the groups of cases cited, were more lenient than those adjudged during the earlier of the two periods. Special attention was drawn to the fact that a punitive discharge was imposed in only one of the more current cases. During *voir dire* examination, defense counsel raised the question of illegal command influence induced by this survey, and at the trial the members of the court were then given a second letter, also signed by the Assistant Staff Judge Advocate, reiterating that the first letter was a personal request for information. Each court member had received the initial letter but indicated he would not be influenced by it in adjudging sentence. Pointing out that the court-martial imposed a punitive discharge upon Kitchens, exactly meeting the criticism of general court-martial sentences leveled in the Assistant Staff Judge Advocate's letter, Chief Judge Quinn, in speaking for the Court, concluded that the letter was prompted by something more than personal interest. Rather it was motivated by official concern by those responsible with the administration of military justice in the "change in approach" to general courts-martial as purportedly reflected by the less severe punishments being imposed by general courts-martial in the command. Chief Judge Quinn stated: "The letter is a manifest criticism of the supposed inadequacy of the sentences imposed in recent cases . . . specifically directed at the failure of general courts-martial to adjudge a punitive discharge."<sup>62</sup> The second letter was considered to have aggravated, rather than alleviated, the problem caused by sending the first letter. Under the facts on which the *Kitchens* case was based, the apparent ability of the court members to carry out their judicial functions was disclosed by *voir dire* examination, but this disclosure was not deemed sufficiently

<sup>62</sup> United States v. Kitchens, *supra* note 49, at 592-93, 31 CMR at 179-80.

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reliable to remove the possibility that the court member's deliberations and findings were tainted by improper command influence. However, in *United States v. Wood*,<sup>53</sup> the circumstances elicited by the *voir dire* in large part relieved the threat and suspicion of the presence of any prohibited command influence. There certain court members were among those officers of a subordinate command that had circulated a communication some eighteen months prior to the trial which included erroneous advice concerning sentencing, as well as the comment that court members should not interfere in the area of rehabilitation. In addition, other command directives known to court members, which concerned the seriousness of charges referred to general courts-martial, dishonored checks and financial responsibility, were pointed out by counsel. The Court held it was not error for the law officer to reject the challenge for cause to the two members who admitted to knowledge of the referenced command directives. During *voir dire* examination the challenged members indicated a willingness to follow the law officer's instruction without regard to possible outside influence and revealed only a slight recall of the command communication which had been mailed to him over a year and a half prior to this trial. Also, the fact situation did not otherwise show "the court-martial . . . to be unfit to sit dispassionately but, to the contrary, [that it] could and would decide the matter before them wholly without regard to any outside considerations."<sup>54</sup>

### D. PLEAS AND MOTIONS

#### 1. *Pleas of Guilty*

Several questions considered in the 1961 term required the Court to examine evidence presented in mitigation in view of which accused's plea of guilty was allegedly inconsistent or improvident. Should a dishonorable failure to pay debts be alleged, a showing in mitigation and extenuation that the accused has made arrangements with his creditors for payment of his debts and that the creditors are satisfied with the arrangements, is inconsistent with a plea of guilty to such a charge, and the concomitant idea that accused's failure to pay was fraudulent, de-

<sup>53</sup> 13 USCMA 217, 32 CMR 217 (1962).

<sup>54</sup> *Id.* at 224, 32 CMR at 224. Judge Kilday, speaking for the Court, noted initially that the problem presented involves merely application of settled rules to the facts (issues of command influence) of the instant case. In his dissent, Judge Ferguson maintained that the decision ran counter to "clear cut recognition of the barrier which Congress sought to erect between military judicial process and the interference of command."

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ceitful or evasive.<sup>55</sup> However, a plea of guilty to a specification of a charge of being an accessory after the fact to a larceny is not inconsistent with accused's statement in mitigation that he took no part in the actual theft and that he believed himself guilty as charged because of his drinking liquor obtained by pledging the stolen property. Inasmuch as accused admitted to having received a benefit from the sale of the stolen goods and had himself advised the thief to get rid of the stolen property, any question of inconsistency in the accused's plea and statement is removed.<sup>56</sup>

The obligations of the defense counsel and the president of the special court-martial with regard to guilty pleas were also the subject of some consideration. In *United States v. Henn*,<sup>57</sup> the accused entered a plea of guilty on the advice of his non-lawyer counsel, but he had never admitted his guilt on the charges of uttering the worthless checks in issue to counsel before trial, and insisted he honestly believed the checks would be paid when presented. The Court concluded that the advice given by defense counsel was based upon the erroneous belief that the checks had been written on a closed account and that under the circumstances it was improvident for the president of the court to accept the guilty plea. In contrast, should the president of a special court-martial at the outset of the trial and in the presence of the court members *reject* accused's attempted plea of guilty to the lesser included offense of wrongful appropriation and enter a plea of not guilty, this would not necessarily be prejudicial to accused's rights. On these facts the Court in *United States v. Shaw*<sup>58</sup> held that even assuming the rejection of accused's plea was arbitrary and erroneous, prejudice was avoided because the president's action on the plea was before the court members, and the value of the attempt to enter the plea of guilty as a factor in mitigation was available for the court's consideration and was in fact considered by the board of review in its reassessment of the sentence.

### 2. Speedy Trial

The accused's right to a speedy trial was closely examined in *United States v. Snook*.<sup>59</sup> In this case of premeditated murder, 180 days had elapsed between accused's arrest and the first day of trial. On noting that the defense had at one time requested a three-week postponement of the trial date because it needed addi-

<sup>55</sup> *United States v. Schneiderman*, 12 USCMA 494, 31 CMR 80 (1961).

<sup>56</sup> *United States v. Marsh*, 13 USCMA 252, 32 CMR 252 (1962).

<sup>57</sup> 13 USCMA 124, 32 CMR 124 (1962).

<sup>58</sup> 13 USCMA 144, 32 CMR 144 (1962).

<sup>59</sup> 12 USCMA 613, 31 CMR 199 (1962).

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tional time for preparation, the Court concluded that the accused was not denied a speedy trial. In its unanimous opinion, the Court sustained the law officer's ruling denying the motion to dismiss the charge and stated:

Considering the serious nature of the charge and the steps taken to prosecute it, and the admitted general unreadiness of the defense, the law officer did not abuse his discretion in concluding that the accused was brought to trial with "reasonable dispatch."<sup>60</sup>

Later in the term, the Court considered *United States v. Brown*<sup>61</sup> wherein the delay between the time Brown and his companion in crime<sup>62</sup> were restricted to the limits of their post and brought to trial was approximately 190 days. In considering the law officer's denial of accused's motion for dismissal, the Court held that the law officer did not err in his action on the motion inasmuch as the record did not show any willful or oppressive delay by the Government. "The right [to a speedy trial] is relative and must be determined in light of all the circumstances. . . . [A]fter the defense raised the issue, the prosecution fulfilled its responsibility of spreading before the law officer the full circumstances of the delay. And there is no intimation that the latter misplaced upon the defense any burden of showing prejudice."<sup>63</sup>

It would appear from *Brown* that, though the Court is favorably impressed by a positive showing in the record that trial counsel presented a full explanation before the law officer of any delay in bringing the case to trial, it did not state that the prosecution shall be required to show due diligence should accused move to dismiss for denial of a speedy trial. In the absence of a showing of due diligence by trial counsel, as in the records of *Snook, supra*, and *United States v. Davis*,<sup>64</sup> the Court was willing to conclude that if from the whole record of trial and its allied papers, and trial counsel's explanation of the delay, there was no oppressive design or lack of reasonable diligence, the law officer has great discretion in denying a motion to dismiss charges on the ground of an alleged denial of accused's right to a speedy trial.

<sup>60</sup> *Id.* at 619, 31 CMR at 205.

<sup>61</sup> 13 USCMA 11, 32 CMR 11 (1962).

<sup>62</sup> *United States v. Brown*, 13 USCMA 14, 32 CMR 14 (1962).

<sup>63</sup> 13 USCMA at 13, 32 CMR at 13. As Judge Kilday observed, short periods of delay were chargeable of defense, most of the time was spent correcting deficiencies in the original investigation "to insure that the accused's rights were fully protected," and accused was not in confinement during the period before trial and did in no way show the delay operated to his prejudice.

<sup>64</sup> 11 USCMA 410, 29 CMR 226 (1960). See discussions in *Davis and Stillman, supra* note 2 at p. 237; and *Croft and Day, supra* note 2, at pp. 97-98.

## E. CONDUCT OF TRIAL

## 1. Law Officer and Staff Judge Advocate

Whether the triers of the facts should be kept together after the case has been submitted to them for verdict is a matter within the sound discretion of the law officer. So long as the record does not show that this authority is abused by employing it as a means of compelling a verdict, no harm can be seen in the law officer's statement that he would keep the court members together overnight if they wanted to recess until morning before deliberating on the findings.<sup>65</sup> However, in the interest of the accused's right to a trial free from any possible improper influence of the convening authority, the Court in *United States v. Huggins*,<sup>66</sup> held that in ruling on the request by defense counsel for a continuance, it was improper for the law officer to precede his ruling by a private conference with the convening authority on the matter. The accused has a right to know and to have the opportunity to rebut the matters presented by the convening authority to the law officer.

If the law officer is confronted with a situation such as in *United States v. Butler*,<sup>67</sup> where a member of the court conducted an "unseemly" as well as improper attempt to revive his disagreement with a ruling made by the law officer in closed session and insisted that the record reflect his disagreement with the law officer's ruling, any prejudice arising from these circumstances may be avoided if the law officer "retains control of the situation" and instructs the court to disregard the matter. If necessary, the law officer might, as in *Butler*, "voir dire" the court to ascertain and relieve the damage induced by the dispute, if any, in addition to insisting that his ruling be followed.<sup>68</sup> Under the somewhat analogous circumstances in *United States v. Erb*,<sup>69</sup> a court member cross-examined witnesses aggressively and at length and accused

<sup>65</sup> See *United States v. Snook*, *supra* note 59, where the Court found that, contrary to any suggestion of coercion by the law officer, the record showed that the president of the court concurred in the law officer's opinion on the advisability of keeping the court members together.

<sup>66</sup> 12 USCMA 686, 31 CMR 272 (1962).

<sup>67</sup> 13 USCMA 260, 32 CMR 260 (1962).

<sup>68</sup> After thoroughly chastising the court-martial president for his interference with the functions of the law officer, Judge Kilday, in addition to approving the means used by the law officer to maintain control of the trial proceeding, also pointed to the relatively mild sentence as evidence that the law officer had taken appropriate measures to remove the possibility of prejudice.

<sup>69</sup> 12 USCMA 524, 31 CMR 110 (1960).

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claimed prejudice. Chief Judge Quinn simply observed that it is not the number of questions asked, but the fact of partisanship that is the fundamental issue. The showing in *Erb* of extensive but balanced concern for the testimony of psychiatrists called by both prosecution and defense as witnesses gives no indication that the member failed to remain an impartial fact finder and became a partisan advocate of the Government's cause. In this case, there was also alleged to be prejudicial error induced by a private conversation between a court member and one of the expert witnesses. The Court held the presumption of prejudice resulting from the conversation between the court member and expert witnesses was rebutted by a showing by the Government that what was said in the prohibited exchange was not detrimental to the accused. It was enough for the Government to show that the topic of the private discussion was some of the technical aspects of the witnesses' testimony in which the court member, who had a background in drugs and chemicals of medical application, had a personal interest and which had no bearing on the issue before the court.<sup>70</sup>

The Court had occasion to reiterate that included in the law officer's diverse responsibilities is the duty imposed by Article 51 of the Code to instruct the court members *sua sponte* on the elements of lesser included offenses in those offenses charged if there appears in the record some evidence from which the fact finder could reasonably infer guilt of the inferior crime.<sup>71</sup> Thus, in *United States v. Moore*,<sup>72</sup> where accused was charged with the unpremeditated murder of his adopted daughter by administering a severe beating, the parent-child relationship with the attendant privilege of the parent to administer reasonable punishment as a disciplinary measure and evidence that accused had been devoted to the child and had treated her kindly, raised the law officer's duty to instruct *sua sponte* with regard to the lesser included offense of involuntary manslaughter. The doctrine of waiver to this requirement was not invoked or deemed applicable, inasmuch as the record did not demonstrate an affirmative, calculated, and designed course of action by defense counsel that could be said to have led the law officer to believe he did not desire instructions on lesser offenses.<sup>73</sup> The Court concluded that the fact that accused's entire strategy was to place the guilt charged to him on another did not appear to contribute to the law officer's failure to

<sup>70</sup> *Id.* at 533, 31 CMR at 119.

<sup>71</sup> *United States v. Clark*, 1 USCMA 201, 2 CMR 107 (1952).

<sup>72</sup> 12 USCMA 696, 31 CMR 282 (1962).

<sup>73</sup> *Id.* at 700, 31 CMR at 286.

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instruct on the lesser offense or cause a waiver of that instruction which an examination of the evidence revealed to be required.

Turning from questions of the law officer's duties, the Court, in the *Kitchens* case,<sup>74</sup> commented on the exercise of supervisory functions by a staff judge advocate and his office over the military justice system within a military command. The court referred to information that the Assistant Staff Judge Advocate, in *Kitchens*, who had conducted a survey on the general court-martial sentencing practices in the command, had threatened to "deal" with *Kitchens*' and his co-accused's appointed defense counsel if that officer did not give up the allegation that the sentence survey constituted command influence. Not long thereafter, defense counsel purportedly received an efficiency rating that was substantially lower than the two previously received from the same Assistant Judge Advocate. In condemning this reported coercion of defense counsel and attempted interference in the performance of his official duties, Chief Judge Quinn considered the inference that such reduction of rating to be a form of pernicious command influence.

### 2. *Conduct and Argument of Counsel*

On three occasions in the last term, the Court examined circumstances where trial counsel had concurrently served in a dual role in the court-martial system but in each case it was concluded that a prejudicial conflict in functions, violative of the Code, had not been incurred. In *United States v. Erb*,<sup>75</sup> a staff legal officer had advised the convening authority that further psychiatric examination of the accused was required and inquired into the availability of doctors as witnesses. This officer was subsequently appointed trial counsel. Though he continued as Chief of the Military Justice Division in the convening authority's judge advocate office while serving as trial counsel, there was no improper merger of prosecutorial and judicial functions in the same individual which could constitute an implied violation of the Code. "His eligibility to serve in the two capacities must be judged by the test of incompatibility between his functions as trial counsel and his action as chief of military justice."<sup>76</sup> Any inference that the trial counsel as the convening authority's chief of military justice had "hand picked" the court members and thereby lacked the required impartiality was rebutted by evidence that he had chal-

<sup>74</sup> 12 USCMA 589, 31 CMR 175 (1961).

<sup>75</sup> Note 69 *supra*.

<sup>76</sup> 12 USCMA at 532, 31 CMR at 118.

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lenged several court members at the trial. The Court further held there was no express violation of Article 6(c) of the Code which specifically prohibits trial counsel from later acting as a staff judge advocate upon the same case. The Court commented that this article has the function of precluding situations which impair or destroy the fairness or impartiality of the proceeding against the accused, and since the trial counsel was not also the staff judge advocate he did not fall within this express prohibition of Article 6. It is also not improper for trial counsel to have served at the pretrial investigation as *counsel for the Government*.<sup>77</sup> In *United States v. Young*,<sup>78</sup> assigned trial counsel had been made available to a non-lawyer conducting the Article 32 investigation, rather than counsel for the Government as in *United States v. Weaver*,<sup>79</sup> to "assist that officer and be present for any procedures or technical points that he might advise the pretrial investigating officer at the pretrial." The Court denied accused's allegations that the trial counsel's participation in the pretrial investigation proceedings made that officer in fact an associate investigating officer disqualifying him, under the terms of Article 27(a) of the Code from later acting as trial counsel. It was determined that the Article 32 investigating officer had himself, and not the assigned legal adviser, conducted and properly fulfilled his Article 32 functions, removing the possibility that accused may have been prejudiced by the dual role in which trial counsel had served.

Though the duties and capacity of the trial counsel of the special court-martial have been referred to by the Court of Military Appeals as that of "legal adviser" of the trial court, his trial duties do not require him to furnish instructions to the court-martial. That duty rests on the president of the court, and though that member may and should seek assistance from the trial counsel in performing his instructional tasks, the ultimate responsibility in that respect rests firmly upon him.<sup>80</sup> However, because the full function of the president includes that of both judge and juror, and that officer lacks the service of a law officer, and is generally not himself a qualified lawyer, it behooves the counsel in special courts-martial to use caution to see that inadmissible matters are not brought to the president's attention.<sup>81</sup>

<sup>77</sup> *United States v. Weaver*, 13 USCMA 147, 32 CMR 147 (1962).

<sup>78</sup> 13 USCMA 134, 32 CMR 134 (1962). Judge Ferguson dissented, stating: "This decision . . . means the end of the investigation under . . . Article 32 . . . as the impartial devise designed by Congress. . ."

<sup>79</sup> Note 77 *supra*.

<sup>80</sup> *United States v. Quesienberry*, 12 USCMA 609, 31 CMR 195 (1962).

<sup>81</sup> *United States v. McDowell*, 13 USCMA 129, 32 CMR 129 (1962).

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After trial counsel has concluded his final argument in a case of premeditated murder, the law officer's denial of defense counsel's request to make a one sentence reply to the prosecutor is not necessarily an abuse of the law officer's discretion. Despite the seriousness of the case, if there is no contention that trial counsel introduced new matters in his closing argument, the law officer may in his discretion deny this request.<sup>52</sup> In a second case where argument by counsel was subjected to scrutiny, remarks which otherwise may have been improper were permissible under the special circumstances presented. Defense counsel, in *United States v. Neal*,<sup>53</sup> in his closing argument on charges of stealing government carbines, stated that accused received nothing in return for the weapons and aided in their recovery, and since they were recovered there was no chance anyone would be hurt by them. By putting this interpretation of the facts in issue, trial counsel was within the bounds of reasonable argument and construction of defense counsel's statement when in reply he commented that accused's "unsuccessful . . . attempt to sell the weapons 'was' probably the reason . . . why they were recovered," and that accused was a purveyor of arms to "the two most serious internal menaces to the United States, gangsters and communists."

### 3. General

In but one case was the principal issue confronting the Court that of the over-all fairness and propriety of the proceedings. In *United States v. West*,<sup>54</sup> the accused was held prior to trial in what amounted to solitary confinement and while so confined was denied, among other things, light and warm meals. When his trial commenced he was conveyed to court in a box, surrounded by armed guards, who were permitted to patrol the courtroom. Notwithstanding a ruling of the law officer made on defense counsel's request at the inception of trial that accused be allowed to shave and dress in proper uniform prior to appearing before the court, the accused appeared unshaven and was required to wear prisoner's wear for part of the trial, and in fatigues for the remainder, clothes into which he had to change within view of the court members. Under these facts, the Court, in addition to condemning the punishment aspects of accused's pretrial confinement, held that aside from any coercive effect which this pretrial treatment

<sup>52</sup> *United States v. Snook*, 12 USCMA 613, 31 CMR 199 (1962). Para. 72a, MCM, 1951.

<sup>53</sup> 12 USCMA 723, 31 CMR 309 (1962).

<sup>54</sup> 12 USCMA 670, 31 CMR 256 (1962). Chief Judge Quinn dissented.

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may have had on the accused's pretrial statements, in light of the most unusual security measures taken at the court-martial, "it is chiefly important as a framework adding depth and color to subsequent events transpiring in connection with the actual trial."<sup>85</sup> Focusing directly on the trial procedure itself, the Court found that more than a fair risk existed that the security measures employed contributed in no small part to deprive accused of an opportunity to be heard impartially. Denial of appropriate uniforms and grooming operated to accused's prejudice and further contributed to the denial of a fair and impartial trial. The Court pointedly avoided reading a conclusion as to the need for the security measures taken during West's trial, but noted that when an issue of such improper trial measures is raised by the record, as here, the record must show the need for the measures. This record did not.

### IV. MILITARY CRIMINAL LAW

#### A. SUBSTANTIVE OFFENSES

##### 1. *Conspiracy, Article 81*

The rule enunciated during the previous term in *United States v. Nathan*<sup>86</sup> that where a co-conspirator is acquitted of the offense of conspiracy, it is error to try the accused for that offense, was again upheld in *United States v. Kidd*.<sup>87</sup> In that case the specification charging the conspiracy of which the accused was convicted was amended to allege different overt acts from those allegedly committed by his co-conspirator who had been subsequently acquitted. Following its reasoning in *Nathan*, the Court of Military Appeals held in *Kidd* that the object of a conspiracy may be a number of wrongful acts, rather than a single wrongful act, but if there is only one agreement to combine there is only one conspiracy even though there may be many objects thereof. The alternative argument that the accused was convicted prior to his co-conspirator's acquittal could not sustain the conviction in view of the rule that one cannot conspire with himself. Accordingly, when the record shows affirmatively that the sole other alleged co-conspirator has been acquitted on the merits, although subse-

<sup>85</sup> *Id.* at 673, 31 CMR at 259.

<sup>86</sup> 12 USCMA 74, 30 CMR 74 (1961). See Croft and Day, *A Supplement to the Survey of Military Justice*, Mil. L. Rev., April 1962, p. 100.

<sup>87</sup> 13 USCMA 184, 32 CMR 184 (1962).

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quent to the accused's conviction, reversal of the accused's conviction must follow.

In *United States v. Reid*<sup>88</sup> the board of review had set aside and dismissed the charge and specification in which the substantive offense was averred on the basis that the evidence was factually insufficient. The act of the offense was also the overt act required to establish the conspiracy. On petition of the accused, the Court of Military Appeals pointed out that proof of an overt act must be held insufficient when, in connection with a separate charge, the board of review finds the evidence insufficient in fact to establish that same act. Furthermore, substitution at the board of review level of a new overt act for that alleged in the specification was not permitted, since to hold otherwise would have allowed the Government on appeal and before a different judicial body to rummage through the record and to select some other act on the part of the accused or his co-conspirator upon which then to predicate guilt.

### 2. *Accessory After the Fact, Article 78*

In contrast to the result mandated when a co-conspirator is acquitted, the Court arrived at an opposite conclusion when a principal and accessory are involved. In *United States v. Marsh*,<sup>89</sup> a case of first impression, the accused pleaded guilty to being an accessory after the fact in violation of Article 78 of the Uniform Code of Military Justice. Noting the paucity of authority in the Federal judicial scheme, Judge Ferguson, writing the opinion for a unanimous Court, quoted Blackstone for the principal that:

By the old common law, . . . the accessory could not be arraigned till the principal was attainted . . . [since] it might so happen that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd.<sup>90</sup>

In construing the legislative intent in enacting the offense of accessory as distinct from the principal offense, the Court concluded that Congress intended to abrogate the common-law requirement of antecedent conviction of the principal in order to permit the unrelated trial and sentencing of one who subsequently assisted him. Accordingly, the Court held that an accused may be punished for a violation of Article 78, "without regard to the separate conviction or acquittal of the principal offender."<sup>91</sup>

<sup>88</sup> 12 USCMA 497, 31 CMR 83 (1961).

<sup>89</sup> 13 USCMA 252, 32 CMR 252 (1962).

<sup>90</sup> Ewell, A Review of Blackstone's Commentaries 763 (2d ed.), quoted in *United States v. Marsh*, 13 USCMA 252, 256, 32 CMR 252, 256 (1962).

<sup>91</sup> *United States v. Marsh*, *supra* 89, at 258, 32 CMR at 258.

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### 3. Failure To Obey Order or Regulation, Article 92<sup>92</sup>

The validity of a particular regulation as applied to all military personnel rather than only to installation commanders was questioned in *United States v. Wilson*.<sup>93</sup> Army Regulations 600-101<sup>94</sup> were promulgated to establish uniform policy and procedures governing solicitation of military personnel on Army installations for the purchase of commercial life insurance under appropriate safeguards to insure there was no interference with any military duty. The accused was convicted under the subparagraph which proscribed the offer or acceptance of "financial benefit or other valuable consideration . . . by military or Department of the Army civilian personnel by representatives of commercial life insurance companies to facilitate life insurance transactions."<sup>95</sup> While admittedly, the provision standing alone could be construed as operating directly upon all individual members of the Army, it had to be read in the context of what precedes it and what follows. The preceding and following paragraphs were specifically directed to installation commanders. Considering the pertinent subparagraph as a part of the whole regulation, the Court concluded "it unmistakably appears as one of the general criteria that commanders are required to consider in the promulgation of local regulations to control solicitation of commercial life insurance within the installation. It does not itself regulate the conduct of all military personnel."<sup>96</sup>

### 4. Forgery, Article 123

In *United States v. Davis*,<sup>97</sup> the accused was convicted of uttering a forged instrument in violation of Article 123 of the Uniform Code.<sup>98</sup> Defense counsel contended that the evidence was insufficient to show an intent to defraud. This argument was based principally upon the accused's insistence that when he presented an agreement to purchase a car for \$500.00 which bore a forged endorsement indicating payment in full he did so merely "to stall for time." The Court, in reaching its determination, observed that

<sup>92</sup> During the October 1961 term the Court reaffirmed its earlier holding in *United States v. Wheeler*, 12 USCMA 387, 30 CMR 387 (1961), that a military commander, in foreign areas, may impose reasonable restrictions on the right of military personnel of his command to marry. *United States v. Smith*, 12 USCMA 564, 31 CMR 150 (1961). See also the discussion of these cases in Croft and Day, *supra* note 86, at pp. 101-02.

<sup>93</sup> 12 USCMA 690, 31 CMR 276 (1962).

<sup>94</sup> January 30, 1958.

<sup>95</sup> Para. 6b, Army Regs. No. 600-101 (Jan. 30, 1958).

<sup>96</sup> 12 USCMA at 692, 31 CMR at 278.

<sup>97</sup> 12 USCMA 576, 31 CMR 162 (1961).

<sup>98</sup> 10 U.S.C. § 923 (1958).

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a writing acknowledging receipt of the payment of money may be the subject of forgery. If such receipt is uttered with the intent to postpone or defer the prescribed or regular time of payment, there is an intent to defraud. It does not matter that, at the time of issuance, the debtor intends ultimately to pay the debt since a good intention cannot cancel out his coexisting evil intent. "Even in the light most favorable of the accused," the Court concluded, "there is sufficient evidence to support the findings of guilty of uttering a known forged instrument with the intent to defraud."<sup>99</sup>

In *United States v. Jackson*,<sup>100</sup> the accused pleaded guilty to, and was convicted of, larceny of a postal money order; forgery, in the uttering, of the same money order; and larceny by false pretenses from a telephone company, utilizing that money order. The accused's roommate had purchased the money order but had not filled in the purchaser or payee blanks nor detached the purchaser's receipt stub. The accused stole the money order and asked M to fill it out so that he could cash it. M wrote in his own name as purchaser and accused's name as payee. The accused then presented the money order, endorsing it with his own name and correct organization on the reverse, to the telephone company in payment of a long-distance call, and received a cash difference. The board of review held the plea to be improvident in that the offense of larceny by false pretenses was not made out because the money order was negotiable in fact, if not in law, and the company acquired lawful title to a bearer instrument when the accused endorsed the instrument with his own name. On certification from The Judge Advocate General of the Air Force the United States Court of Military Appeals reversed the board of review holding that a postal money order is simply not a negotiable paper and that when the telephone company acquired the falsely-made money order it obtained no right to recover the proceeds from the Post Office Department.<sup>101</sup> Resolution of the question whether the entry of M's name as purchaser and the accused's name as payee constitutes a false making or alteration of the money order was required to establish the criminal utterance.

<sup>99</sup> 12 USCMA at 581, 31 CMR at 167.

<sup>100</sup> 13 USCMA 66, 32 CMR 66 (1962).

<sup>101</sup> Title 39 of United States Code, section 723, provides, *inter alia*: "The payee of a money order may, by his written endorsement thereon, direct it to be paid to any other person, and the postmaster on whom it is drawn shall pay the same to the person thus designated, provided he shall furnish such proof as the Postmaster General may prescribe that the indorsement is genuine, and that he is the person empowered to receive payment. . . ." (Emphasis added.)

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The Court determined the issue in the affirmative, concluding that ". . . an instrument is falsely made when, though genuinely executed, blanks therein are filled in by another without authority or contrary to the authority given."<sup>102</sup> Since the accused had stolen the instrument in this case, there was no question that he caused to it be altered without any authority.

### 5. *Larceny, Article 121*

Whether to promise to perform what one does not intend to do is a statement of a present intention to defraud within the statutes which prohibit larceny remains a hotly contested issue.<sup>103</sup> A divided Court in *United States v. Culley*<sup>104</sup> held that it is. The accused contended at his trial and on appeal that a false statement of present intention is not a statement of an existing fact; and, therefore, even if it be conceded he obtained the money by means of false promise to repay, his conduct does not constitute a violation of Article 121.<sup>105</sup> The Court of Military Appeals pointed with approval to the distinction made by the Supreme Court in *Evans v. United States*<sup>106</sup> which noted that:

If a person buys goods on credit in good faith knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offense even if he be disappointed in making such payment. But if he purchases them, knowing that he will not be able to pay for them, and with an intent to cheat the vendor, this is a plain fraud, and made punishable as such by statutes in many of the States.<sup>107</sup>

The approval of this language, together with an affirmance of the earlier decision of *United States v. Cummins*,<sup>108</sup> clearly justify the conclusion that obtaining money or other property by means of a false statement of present intention is a "plain fraud" and support the accused's conviction.<sup>109</sup>

<sup>102</sup> 13 USCMA at 69, 32 CMR at 69.

<sup>103</sup> See the dissenting opinion of Judge Ferguson in *United States v. Crimmins*, 9 USCMA 669, 676, 26 CMR 449, 457 (1958).

<sup>104</sup> 12 USCMA 704, 31 CMR 290 (1962) (Ferguson, J., dissenting).

<sup>105</sup> 10 U.S.C. § 921 (1958). There was no evidence as to the truth or falsity of the accused's statement but the court-martial must have found the accused knew it to be false.

<sup>106</sup> 153 U.S. 584 (1894).

<sup>107</sup> *Id.* at 592, quoted in *United States v. Culley*, 12 USCMA 704, 709, 31 CMR 290, 295 (1962).

<sup>108</sup> 9 USCMA 669, 26 CMR 449 (1958).

<sup>109</sup> Note that in this case, the accused's point that his sentence exceeded the maximum for a "closely related" offense provided for under 18 U.S.C. § 661 (1958). The Court observed that "when an act violates two or more statutes, the accused cannot select the statute under which he will be prosecuted; he cannot, therefore, complain if he is prosecuted for violating the statute that carries the higher penalty." *United States v. Culley*, *supra* note 104, at 707, 31 CMR at 293.

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### 6. AWOL and Desertion

Clearly, a member of the armed services who is formally surrendered to civilian authorities, pursuant to the terms of Article 14 of the Code,<sup>110</sup> is not absent without leave for the period he remains in the latter's hands. In *United States v. Northrup*,<sup>111</sup> the accused was not formally surrendered. Instead, he was granted special liberty by his commander to answer the civilian charges. This distinction is not enough upon which to predicate criminal liability. The casual relation between the civilian offense and the AWOL was broken by the accused's voluntary return to his station and his subsequent surrender to the civil authorities with the authority of his superiors. Therefore, the accused cannot be held guilty of absence without leave as a result of a period spent in the hands of civil authorities. This case presents a slight extension and modification of the exception to the usual rule that confinement by civil authorities is no defense to absence without leave.

*United States v. Fields*,<sup>112</sup> on the other hand, involved a service member who was apprehended by the civil authorities while absent without leave. During an inquiry into his identity, the accused said he was in the Army. He told the civilian police officer he was "glad that he was taken into custody," and he "wanted to get things straightened out with the Army."<sup>113</sup> Before his trial by court-martial for his military offenses, the accused was convicted by a civilian court and served a three month sentence in a civilian confinement facility. The accused argued that the term "apprehension" as a basis for increased punishment could only apply (1) if he were actually picked up for desertion by the military authorities or by the civilian authorities on behalf of the military,<sup>114</sup> or (2) if he were apprehended by civil authorities for a civil offense and revealed his military status "for the sole purpose of avoiding prosecution for the civil offense by the civilian authorities."<sup>115</sup> The Court concluded this reasoning was based upon too narrow a reading of the Manual's punishment provision. There was clear and substantial evidence to support the court-martial's finding that the accused's absence was terminated, not by his own willing act, but "under the compulsions" of his arrest.

<sup>110</sup> 10 U.S.C. § 814 (1958).

<sup>111</sup> 12 USCMA 487, 31 CMR 73 (1961).

<sup>112</sup> 13 USCMA 193, 32 CMR 193 (1962).

<sup>113</sup> *Id.* at 195, 32 CMR at 195.

<sup>114</sup> Arts. 6 & 7, UCMJ, 10 U.S.C. §§ 806-07 (1958).

<sup>115</sup> See *United States v. Nickaboine*, 3 USCMA 152, 11 CMR 152 (1953); *United States v. White*, 3 USCMA 666, 14 CMR 84 (1954).

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### 7. *Obstruction of Justice, Article 134*

In *United States v. White*,<sup>116</sup> the accused was convicted of obstructing the administration of justice, in violation of Article 134 of the Uniform Code of Military Justice.<sup>117</sup> The charge was based upon the crimes and offenses not capital section of that Article.

No specific punishment was prescribed by the Table of Maximum Punishments so reference had to be made to paragraph 127c of the Manual which provides:

Offenses not listed in the table, and not included within an offense listed, or not closely related to either, remain punishable as authorized by the United States Code . . . or the Code of the District of Columbia, whichever prescribed punishment is the lesser, or as authorized by the custom of the service.<sup>118</sup>

The applicable section of the United States Code which prohibited the conduct of which the accused was convicted<sup>119</sup> makes no mention of penalties beyond confinement and a fine, and, therefore, defense counsel argued, a dishonorable discharge was not an authorized punishment. The Court reasoned that the President in this Manual provision made reference to the United States Code only for the purpose of setting a maximum limitation on those portions of a sentence relating to confinement and fine. Imposition of a sentence to punitive discharge comes within the category "authorized by the custom of the service" and has long been recognized in military law as a permissible penalty. Accordingly, its adjudgment was not illegal.

### 8. *Perjury, Article 131*

In *United States v. Crooks*,<sup>120</sup> the accused had falsely testified under oath before an Article 32 investigating officer. The specification which was the basis of the investigation failed to state an offense and, therefore, defense counsel urged, the accused's testimony before the Article 32 investigating officer, to whom the charge had been referred for investigation, was immaterial and did not amount to perjury. The United States Supreme Court has held that the fact that the trial court or an appellate court determined the charge does not constitute a crime does not mean the judicial proceedings in which the determination was made were null and void so as to preclude prosecution of a witness or a party

<sup>116</sup> 12 USCMA 599, 31 CMR 185 (1962).

<sup>117</sup> 10 U.S.C. § 934 (1958).

<sup>118</sup> Para. 127c, MCM, 1951, cited in *United States v. White*, 12 USCMA 599, 601, 31 CMR 185, 187 (1962).

<sup>119</sup> 18 U.S.C. § 1503 (1958).

<sup>120</sup> 12 USCMA 677, 31 CMR 263 (1962).

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who gave false testimony therein.<sup>121</sup> The Article 32 investigation is fundamentally a part of a general court-martial case and a "judicial proceeding or in a course of justice" within the meaning of Article 131.<sup>122</sup> Therefore, the Court of Military Appeals concluded that the perjury specification alleged an offense, notwithstanding the accused's successful challenge to the legal sufficiency of the offense which was the subject of investigation.

### 9. *Assault With a Dangerous Weapon, Article 128*

In *United States v. Cook*,<sup>123</sup> the accused was convicted, pursuant to his plea of guilty, of assault with a means likely to produce grievous bodily harm, in violation of Article 128 of the Uniform Code.<sup>124</sup> The means used was a "key chain" about thirty-six inches in length which the accused took out of his pocket and used during an altercation with some other soldiers outside a beer hall. A member of the court-martial requested inspection of the chain which the law officer denied because "you have already found that the chain used in this case . . . is one which could have committed grievous bodily harm."<sup>125</sup> In a *per curiam* decision, the Court of Military Appeals noted that a chain may be an inherently lethal weapon or it may be a completely harmless instrument, depending upon its size and the material it is made of and the manner in which it is employed. From the description in the record of trial, the Court ruled, the chain in question did not appear to be a dangerous weapon *per se*.

### 10. *Unlawful Confinement, Article 97*

The degree of intent involved in an unlawful confinement was questioned in *United States v. Lord*.<sup>126</sup> The accused had unlawfully entered the home of a married couple and held them at knife point for some time before being overpowered. Defense counsel at the trial requested an instruction on specific intent. The Court of Military Appeals upheld the law officer's denial because Article 97<sup>127</sup> which defines the offense does not refer to any specific state of mind on the part of the person accomplishing the confinement. Specific intent, in the strict sense, is not an essential element of the offense; and the mere conscious or intentional performance of the proscribed act is a violation of the Article. It is sufficient if

<sup>121</sup> *United States v. Williams*, 341 U.S. 58 (1951).

<sup>122</sup> 10 U.S.C. § 931 (1958).

<sup>123</sup> 12 USCMA 518, 31 CMR 104 (1961).

<sup>124</sup> 10 U.S.C. § 928 (1958).

<sup>125</sup> 12 USCMA at 519, 31 CMR at 105.

<sup>126</sup> 13 USCMA 78, 32 CMR 78 (1962).

<sup>127</sup> 10 U.S.C. § 897 (1958).

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the act is knowingly and deliberately performed by one who is aware that the person who is being "confined" is deprived of his freedom of movement.

### B. DEFENSES

#### 1. *Honest Mistake*

The defense of honest mistake came into issue in several cases during the term of the Court. In *United States v. Ebarb*,<sup>128</sup> the accused was charged with forgery by endorsing the payees' names to two checks which he negotiated. He claimed he won the checks in a barracks gambling game and, therefore, considered them his property. The Court noted that the case did not present a novel issue. The intent to defraud is "the essence of forgery" and Article 123 punishes the false making of the signature of another to a writing which, if genuine, would apparently impose a legal liability upon him or change his legal right or liability to his prejudice, provided such false making is done with an intent to defraud. The case at bar was analogous to the defense of honest mistake in a larceny case in which an accused takes the property of another under the mistaken impression that he had a legal right to do so.<sup>129</sup> Therefore, the Court concluded, there was sufficient evidence from the accused's own testimony which would permit the members of the court-martial reasonably to infer the lack of an intent to defraud on the basis that the accused honestly believed he was entitled to the proceeds of the checks.

*United States v. Roberson*<sup>130</sup> involved the identical issue as applied to the wrongful withholding of the property of another. The evidence at the accused's trial for larceny showed that items of personal property had been taken without permission and that most of the items were recovered from the pawnshops where they had been pledged either by the accused or someone acting for him. The accused denied the theft claiming he had obtained them from G who he believed had a legal right to them. The Government contended that erroneous "honest and reasonable" instructions on mistake, given at defense counsel's request, were not prejudicial because the evidence did not raise an issue of mistake of fact and, in any event, proof of the accused's guilt was compelling. Pointing to the accused's testimony, the United States

<sup>128</sup> 12 USCMA 715, 31 CMR 301 (1962).

<sup>129</sup> Para. 200a, MCM, 1961.

<sup>130</sup> 12 USCMA 719, 31 CMR 305 (1962).

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Court of Military Appeals determined that the issue actually raised by the evidence was not mistake but whether the accused in fact "took" the items and on this issue the honesty of his belief as to the entitlement of G to the items would be immaterial. Considering the instructions in the light of the issue actually raised, prejudice is apparent since, when the advice concerning honest and reasonable belief was added to previously given instructions on the inferences to be drawn from possession of recently stolen property, the accused's explanation of his possession of the property was improperly circumscribed by permitting the court-martial to weigh it in the light of whether he knew or should have known that G had stolen it.

In *United States v. Davis*,<sup>131</sup> the accused, in response to a charge of larceny of a motorcycle, denied taking it and testified it had been given to him to repair and that he had no "true knowledge" that it was stolen, although he did notice an insignia which led him to associate it with another and he finally "took it for granted" it might be stolen. The Court held it was error to instruct that one can commit larceny of property which was lawfully obtained if he withholds it with the intent to steal and that a finder of lost property can be guilty of larceny if there is a clue to the owner and he withholds it with the intent to steal. The accused's testimony was not incredible or improbable as a matter of law and, if believed, he could not be convicted of larceny but the instructions would permit the court to believe the accused and nonetheless find him guilty because he withheld the motorcycle from the true owner after he "took it for granted" that it was stolen.

In a prosecution for wrongful appropriation of an automobile, the accused in *United States v. Hill*<sup>132</sup> raised the defense of honest mistake. He had accompanied the owner and another man to town in the car. The owner drank heavily and turned his keys over to the accused, as the sober member of the group, to drive back to their station. The men then parted after making arrangements to meet later at the lot where the car was parked. The accused and the other man testified that as they parted the accused called out that he might use the car during the evening and the owner looked back and appeared to understand and the accused also testified he believed the owner had authorized him to use the car. This evidence was sufficient to raise an issue requiring instructions on the defense of honest mistake, even though

<sup>131</sup> 13 USCMA 125, 32 CMR 125 (1962).

<sup>132</sup> 13 USCMA 158, 32 CMR 158 (1962).

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the accused had made no such claim in a pretrial statement and the owner denied giving permission to use his car beyond driving it back to the station, and the court might not ultimately entertain a reasonable doubt concerning the accused's intent in taking and using the car.

### 2. *Self-Defense*

The test used to determine whether an instruction on self-defense need be given is whether the record contains some evidence from which a reasonable inference can be drawn that the affirmative defense was in issue. In *United States v. Black*,<sup>133</sup> the accused was found guilty of unpremeditated murder. The victim had a reputation for being "very good" with his fists and being able to "take care of himself." He shoved the accused, demanding that the accused fight him. Black seized a bayonet and stabbed him. The Court ruled that whether an accused, by resorting to a weapon, uses excessive force in repelling an assault upon him is dependent upon all of the circumstances and is essentially an issue of fact to be determined by the court-martial. The evidence to the effect that the accused had attempted to walk away from the victim during their argument but that the victim followed him, repeatedly pushing him and urging him to fight and that the accused was afraid of the victim and had wielded the bayonet only to scare him, was sufficient to raise an issue of self-defense and required instruction thereon.

## V. EVIDENCE

### A. *SEARCH AND SEIZURE*

*United States v. Ness*<sup>134</sup> presented the issue whether a grant of authority to conduct a search which in its inception may have been without probable cause can be justified by subsequent corroborating circumstances. Two agents of the Office of Special Investigations relying on a "very reliable confidential informant" obtained written authority to effect a search into black-market activities.<sup>135</sup> The agents then proceeded to corroborate most of

<sup>133</sup> 12 USCMA 571, 31 CMR 157 (1961).

<sup>134</sup> 13 USCMA 18, 32 CMR 18 (1962).

<sup>135</sup> The Court questioned the propriety of a blanket delegation of authority to order searches to a police officer such as the provost marshal because such authority should remain "judicial" and not become confused with a "police" attitude in examining the operative facts. It relied, however, on evidence that the officer had in fact obtained the approval of his actions from his commanding officer in its determination that the accused had not been prejudiced.

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the details of the informant's report by following the car described by him, observing the black-market operator enter it at the time and place mentioned and then observing it proceed along the expected route. The Court found under the rule in *Draner v. United States*<sup>136</sup> that a police officer had received information from an informant of proven reliability and had "personally verified every facet of the information given him" by the informant. The accused argued additionally that he had been denied the right to assert a possible defense of entrapment so long as the identity of the informant remained a secret. In balancing the Government's interest in protecting the source of its information against the accused's entitlement to prepare his defense, the majority of the court rejected this contention on the grounds that all facts presented by the Government "compellingly establish the absence of any basis of entrapment and any basis for a claim of innocent involvement in the commission of the offense."<sup>137</sup>

In a vein similar to probable cause for search lies the issue of reasonableness of that search once initiated. In two separate cases involving the same homicide the Court found as a matter of law that the search although "somewhat generalized" was not unreasonable under the circumstances. In *United States v. Schafer*<sup>138</sup> and *United States v. Kemp*,<sup>139</sup> the victim's corpse was discovered in the darkened hallway of the "26th area" of the base. Bloodstained clothing of the deceased was recovered in that area, and a trail of blood led from the body toward the barracks in that area. With all these facts before him, the base commander authorized a complete search of the 26th area—a block in which some twenty barracks, three mess halls, and two other structures were located—and the seizure of items "pertinent to investigation of the murder." The Court found the search, although quite extensive and lacking specificity, proper within paragraph 152 of the Manual since "the factors available to the commander's consideration fairly dictated a search of the area embraced in the authorization."<sup>140</sup>

### B. ARTICLE 31, CONFESSIONS AND SELF-INCRIMINATION

*United States v. Plante*<sup>141</sup> involved the proposition that the Government cannot use civilian police as an instrument of the

<sup>136</sup> 358 U.S. 307 (1959).

<sup>137</sup> 13 USCMA at 25, 32 CMR at 25.

<sup>138</sup> 13 USCMA 83, 32 CMR 83 (1962).

<sup>139</sup> 13 USCMA 89, 32 CMR 89 (1962) (rev'd on other grounds).

<sup>140</sup> 13 USCMA at 87, 32 CMR at 87.

<sup>141</sup> 13 USCMA 266, 32 CMR 266 (1962).

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military to avoid warning the accused of his rights pursuant to Article 31.<sup>142</sup> Although the facts of the case were disputed, it clearly appears that, at the minimum, and Army investigator had turned the accused over to French authorities in connection with their investigation into the identical subject matter which formed the basis of the instant charge.<sup>143</sup> The investigator specifically avoided warning the accused of his rights under Article 31 before interrogation by the French since prior experience had indicated strong French objections against interference with their criminal investigatory procedures. As a result of the interrogation and in the presence of the investigating agent, the accused made an incriminating statement substantially the same as a confession which formed the basis for his court-martial. The confession was made following the questioning by the French and only after the accused had rested and been warned of his rights under Article 31. The Court observed that neither Congress nor the Executive have seen fit to include within the purview of the required statutory warning persons not subject to the Code or those acting in concert with them and it expressly declined to legislate judicially any new requirement. The significance of this decision rests on the refusal of a unanimous Court, in the absence of an unlawful concert between the military and civil authorities, to exclude a confession properly obtained although the deliberate failure to advise an accused of Article 31 prior to turning him over to civil authorities may have resulted in a subsequent confession.

In considering the sufficiency of the evidence to raise an issue of whether the accused had been denied access to legal advice prior to the time of making a confession, the Court of Military Appeals ruled in *United States v. Odenweller*<sup>144</sup> that the law officer should have instructed the court-martial on the voluntariness of the accused's confession. In that case, the accused was properly advised on his rights under the Code and thereafter made an oral and a written confession. Testifying to the circumstances under which both confessions were obtained, the accused declared that upon being warned he immediately "asked for legal counsel" and was told he could get counsel only after signing a statement. The Government witness, on the other hand, stated that the accused had not requested counsel until after making his oral confession at which time counsel was refused. The law officer admitted the

<sup>142</sup> 10 U.S.C. § 831 (1962).

<sup>143</sup> As provided under the NATO SOFA Agreement, primary jurisdiction in such matters rests in the host state. Art. VII, para. 5(5), NATO SOFA, Aug. 23, 1953, 4 U.S.T. & O.I.A. 1792, 1800, T.I.A.S. No. 2845.

<sup>144</sup> 13 USCMA 71, 82 CMR 71 (1962).

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oral confession in evidence but excluded the written statement. He then instructed the court members that:

If you find that, under these circumstances, such request was made and denied, you must refuse to consider the oral statement as evidence in this case.<sup>145</sup>

The clear import of such language, the Court felt, shifted the burden of proof in a factual determination onto the accused and was violative of the well-established evidentiary principle that once an issue is raised "concerning the voluntariness of a confession, [the Government] must affirmatively overcome the evidence of involuntariness and present proof sufficient to convince the court members that the accused's statement was in fact voluntarily made."<sup>146</sup> The evidence presented by the testimony of the accused was sufficient to require appropriate and proper instructions and therefore it was incumbent upon the law officer to submit the question to the court-martial in a manner similar to an issue of voluntariness.

An earlier decision had presented a similar issue of voluntariness when no Article 31 warning had been given. In *United States v. Gorko*,<sup>147</sup> the accused admittedly shot his victim so the only point of issue involved was the intent with which he committed the slaying. Apart from a pretrial statement by the accused that "I told him I was going to shoot him. I pulled my weapon and shot him,"<sup>148</sup> there was no further evidence on the issue of premeditation. A Sergeant to whom the accused had reported shooting the deceased rushed to the scene and asked the accused "What happened?" This inquiry elicited the highly incriminating extrajudicial statement in question. No warning had been given. The law officer, nevertheless, admitted the statement without instructing on voluntariness. The board of review set aside the findings and sentence and ordered a rehearing, noting that the question of whether the Sergeant suspected the accused was posed by the evidence and should have been factually considered by the court-martial. The Court of Military Appeals affirmed the decision of the board of review on the ground that the evidence was sufficient to raise the issue whether the accused was in fact a suspect. Such a consideration is markedly similar to a determination of voluntariness and should have been submitted by the law officer to the court-martial for their ultimate resolution.

<sup>145</sup> *Id.* at 74, 32 CMR at 74.

<sup>146</sup> *Ibid.*

<sup>147</sup> 12 USCMA 624, 31 CMR 210 (1962).

<sup>148</sup> *Id.* at 626, 31 CMR at 212.

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In a brief opinion, a unanimous Court in *United States v. Mahumphy*<sup>149</sup> considered whether the warning requirement extends to psychiatrists who examine an accused in the course of their duties. Although the doctors did not testify to any statements made by the accused, their evaluations of his sanity were apparently based on information obtained during their interviews with him. It was clear that the accused was not, in the eyes of the psychiatrists, a suspect within the purview of Article 31 at the time they saw him. Their interviews with him were with a mind toward medical diagnosis to ascertain whether he was a sick man mentally, possibly in need of care, and not, at the time, concerned with determining his mental capacity and criminal responsibility. The Court held no warning was required.

In the law of confessions, a statement that is inadmissible because not made or acknowledged by the accused is entirely different from a statement made by him that was in fact not true. While the former constitutes inadmissible hearsay, the latter raises no issue of admissibility but only one of credibility. Thus, in *United States v. Cotton*,<sup>150</sup> when the law officer, at an out-of-court hearing, permitted full examination as to "brow-beating" and other matters affecting voluntariness, and the accused did not deny authorship, his confession was admissible. Whatever the accused may say about events cited in the confession and, therefore, implying that the confession is not true, goes only to the issue of credibility, especially since no attempt was made to deny the actual making.

Two unrelated cases involving sexual offenses considered the Manual requirement of corroboration that:

... [A] conviction cannot be based upon the uncorroborated testimony of an alleged victim in a trial for a sexual offense, or upon the uncorroborated testimony of a purported accomplice in any case, if such testimony is self-contradictory, uncertain, or improbable.<sup>151</sup>

*United States v. Bennington*<sup>152</sup> involved an issue of "fresh complaint." Acknowledging that the "complaint" need not have been made under conditions which would render it a spontaneous exclamation, the Court found the statement of an accomplice inadmissible where there was no showing that the communication was occasioned by shock, outrage, resentment or even disgust and also found that its admission was prejudicial error where the com-

<sup>149</sup> 12 USCMA 639, 31 CMR 225 (1962), petition for new trial denied, 13 USCMA 60, 32 CMR 60 (1962).

<sup>150</sup> 18 USCMA 176, 32 CMR 176 (1962).

<sup>151</sup> Para. 153a, MCM, 1951 (emphasis supplied).

<sup>152</sup> 12 USCMA 565, 31 CMR 151 (1961).

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plainant's testimony was self-contradictory and there was no other persuasive corroboration. In *United States v. Zeigler*,<sup>153</sup> on the other hand, the law officer directed the court-martial to examine the victim's testimony and instructed that "if the testimony . . . is not self-contradictory, uncertain, or improbable . . . you may convict on the basis of such testimony." The Court found that although the instruction lacked "preciseness," it was a correct statement of the Manual requirement that a conviction for a sexual offense can be based on the uncorroborated testimony of the *victim* "but the fact the testimony is uncorroborated requires that it be carefully considered."<sup>154</sup>

### C. WITNESSES

#### 1. Impeachment

Impeachment of a witness may amount to attacking the character of an accused. In *United States v. Grady*,<sup>155</sup> the trial counsel was permitted to cross-examine a defense witness as to a possible homosexual relationship with the accused. The immediate effect of such questioning was to discredit an otherwise beneficial defense witness by a showing of possible bias or prejudice. Appellate defense counsel urged, however, that, as a matter of law, this type of evidence must be barred because the proof of such an illicit relationship shows reprehensible conduct that could possibly be inflammatory. This argument the Court rejected because "to bind the hands of a law officer with a flat prohibition would be to place a premium on illicit relations directly proportional to the gravity thereof."<sup>156</sup> So long as the law officer admonished the members of the court-martial that the evidence that the accused might also be guilty of a crime not charged may not be considered on the issue of guilt of the offenses for which he was on trial, the manner of impeachment was permissible within the normal limits of cross-examination.

In addition to this indirect form of attack on the character of an accused, it is hornbook law that once a defendant in a criminal prosecution puts in issue the truthfulness of some statement made by him whether by personally testifying or by the use of witnesses, he has opened the door to permit the prosecution to show that his general reputation for truth and veracity in the

<sup>153</sup> 12 USCMA 604, 31 CMR 190 (1962).

<sup>154</sup> *Id.* at 606, 31 CMR at 192.

<sup>155</sup> 13 USCMA 242, 32 CMR 242 (1962).

<sup>156</sup> *Id.* at 245, 32 CMR at 245.

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community is bad.<sup>157</sup> *United States v. Griggs*<sup>158</sup> involved the additional factor that the witness testified to specific incidents underlying his opinion. The Court of Military Appeals agreed that opinion evidence of this nature must be statements of general reputation by witnesses who are first shown to have enjoyed a sufficiently close acquaintance or relationship with the accused to justify the formation of a reliable judgment. It found no error in admitting evidence of a bad reputation notwithstanding the fact that there was some recitation of details of specific incidents of lack of truthfulness on the accused's part, since there was no objection raised by the defense counsel, witnesses were cautioned not to go into details, and most of the details were, in fact, elicited by the defense counsel.

In *United States v. Hoy*,<sup>159</sup> evidence of other prior acts of misconduct was introduced to refute the accused's contention of honest mistake. The evidence disclosed that the trio who assaulted and robbed the victim had dispersed just as the victim started across an empty field and that two of them then converged on the victim. His escape was thwarted by the accused who ran to the scene. All three then departed the scene together. The accused denied any knowledge of the criminal intent of his two associates, contending instead that he was a mere bystander innocently drawn to the scene by curiosity. The record of trial, however, contained evidence that the accused an hour before the crime of which he was convicted and near its scene had fled with one other of the trio when the latter had assaulted another unsuspecting individual. The Court of Military Appeals considered the general rule requiring exclusion of evidence of other offenses or acts of misconduct not charged where its only relevance is to show the accused's criminal dispositions or propensities.<sup>160</sup> This rule, however, the Court found was subject to the limitation that "relevant and competent evidence of guilt is not rendered inadmissible because it also proves that the accused committed another offense."<sup>161</sup> The pattern of a similar criminal association and conduct among the trio on the night of the robbery served to fix the accused's participation in the crime as an aider and abettor,<sup>162</sup> and

<sup>157</sup> See, e.g., discussion of materials in 20 Am. Jur. *Evidence* §§ 25-26 (1939).

<sup>158</sup> 13 USCMA 57, 32 CMR 57 (1962).

<sup>159</sup> 12 USCMA 554, 31 CMR 140 (1961).

<sup>160</sup> Para. 138g, MCM, 1951.

<sup>161</sup> 12 USCMA at 566, 31 CMR at 142.

<sup>162</sup> No allegation was made that this evidence was being introduced to show a common plan or scheme which is another exception to the general rule. 20 AM. Jur. *Evidence* §§ 303, 313-14 (1939).

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was "but a single faggot in a bundle of incriminating circumstances upon which the triers of fact could properly rely."<sup>163</sup>

### 2. Experts

An expert witness' opinion may often be based on facts to which he would not be competent to testify because of lack of personal observation. Both *United States v. Heilman*<sup>164</sup> and *United States v. Walker*<sup>165</sup> considered the problem of admission of such evidence where the opinion is partly based on inadmissible hearsay. In neither case was the expert asked his opinion in the form of a hypothetical question but was permitted "to state his relevant opinion . . . based on his personal observation. . . ." <sup>166</sup> In *Heilman*, the expert admitted that he had received information from others and that his opinion was based in part on such information. The Court, however, found in explicit statements of the witness and from his whole testimony that he had formed his own professional and expert opinion. The extent of his examination, his opportunities to observe the accused, the degree to which he was informed of the accused's condition, and other matters in connection therewith were proper subjects of inquiry on cross-examination, from which the court-martial might determine the weight to be accorded his testimony. In *Walker* the defense established that certain psychiatric tests referred to by an expert witness had not been administered or interpreted by him. Nevertheless, the expert could properly testify as to his evaluation of the accused's mental condition once he testified the tests mentioned were used only for a limited purpose and he detailed the extent thereof and it was established that he had personally observed and interviewed the accused for such time as was necessary to form his own personal opinion of the accused's condition.

### D. DOCUMENTARY EVIDENCE

*United States v. Stone*<sup>167</sup> involved the novel contention by Government appellate counsel that trial counsel, by possession of documentary evidence, became its custodian within the meaning of paragraph 143b of the Manual and could properly authenticate such writing. The term "custodian of an official record" is defined as:

<sup>163</sup> *United States v. Hoy*, *supra* note 159, at 557, 31 CMR at 557.

<sup>164</sup> 12 USCMA 648, 31 CMR 234 (1962).

<sup>165</sup> 12 USCMA 658, 31 CMR 244 (1962).

<sup>166</sup> Para. 138e, MCM, 1951.

<sup>167</sup> 13 USCMA 52, 32 CMR 52 (1962).

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... [A] person who has custody thereof by authority of law, regulation, or custom, that is, a person in whose office the record is officially on file.<sup>168</sup>

It was clear, the Court found, that the trial counsel could not come within this definition by mere possession but he could testify as authenticating witness that he obtained the record from the proper officer and has personal knowledge that it is an official document or an exact copy thereof.<sup>169</sup>

In addition to reemphasizing the Manual prohibition against introducing into evidence writings or records made principally with a view to prosecution, *United States v. Exposito*<sup>170</sup> questioned the admission of testimony of a prosecution witness who saw the master log for the base motor pool. The witness had made none of the entries himself, there was no evidence that he was on duty on the day in question and his incriminatory testimony was later found to be inaccurate when the log itself was introduced by the defense. The log was of doubtful accuracy since it also contained entries which were patently impossible. The sum total of these errors required a reversal of the conviction under a rule well-established in the Court because of the highly prejudicial effect of such cumulative error.

### E. HUSBAND AND WIFE PRIVILEGE

The accused in *United States v. Seiber*<sup>171</sup> argued that the Court should exclude incriminating evidence which was uncovered by the Government on the ground that it had resulted from a breach of confidence by his ex-wife and, as such, was an improper disclosure and inadmissible. Certain statements and documents submitted by the accused to the Department of the Army in the course of his application for a commission as a Regular Army officer were false. The Government learned of this only because the accused's estranged wife disclosed the information concerning his wrongdoings to the authorities. She did not testify at the trial and no alleged confidential marital communication ever came before the triers of fact. The Court noted that:

Although the wife may indeed voluntarily have "put the hounds on the scent," none of the evidence introduced by the Government was obtained from her and, admittedly, none constitutes either a verbal or written marital communication.<sup>172</sup>

<sup>168</sup> Para. 143b, MCM, 1951.

<sup>169</sup> Para. 143b (2) (f), MCM, 1951.

<sup>170</sup> 13 USCMA 169, 32 CMR 169 (1962).

<sup>171</sup> 12 USCMA 520, 31 CMR 106 (1961).

<sup>172</sup> *Id.* at 522, 31 CMR at 108.

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The husband-wife privilege is essentially a testimonial privilege<sup>173</sup> and in the extra-judicial investigation of crimes, information of this type from a witness who is incompetent to testify at a trial is not a violation of the privilege. Noting that the exclusionary rule as applied to primary and derivative evidence when Government agents are guilty of misconduct was calculated to deter wrongful activity by the Government, and to keep the judiciary, as an arm of the Government, from becoming accomplices to such impropriety, the Court reasoned such exclusion was not here mandated.

### VI. SENTENCE AND PUNISHMENT

#### A. INSTRUCTIONS ON MAXIMUM PUNISHMENT

The fact that the maximum punishment authorized for a court-martial offense based on the United States Code includes no punitive discharge does not prevent a court-martial from adjudging such punishment. In *United States v. White*,<sup>174</sup> accused was convicted under Article 134 for the offense of obstructing the administration of military justice and his approved sentence included a dishonorable discharge. White maintained that since the Table of Maximum Punishments<sup>175</sup> contained no limitation for the offense charged, the sentence was limited by punishment not extending beyond the fine and confinement prescribed by Title 18, United States Code, section 1503, as adopted into military law by Article 134. The Court held that the presidential regulation set forth in paragraph 127c of the Manual which provides that reference shall be made under conditions there stated to the penalty set forth in the appropriate section of Title 18, United States Code, and the District of Columbia Code is intended only to prescribe a maximum limitation on the amount of confinement or fine which may be adjudged by a court-martial and does not limit the *kind* of punishments imposable. The types of different classes of punishment, including the punitive discharge, which may be imposed, otherwise remains unlimited except by prohibition provided in the Uniform Code against cruel and inhuman punishment, the death penalty, except where specifically authorized, the jurisdictional limit of the court, and punishments expressly prohibited by Article 55.<sup>176</sup> Later in the term, the Court further

<sup>173</sup> Para. 151b(2), MCM, 1951.

<sup>174</sup> 12 USCMA 599, 81 CMR 185 (1962).

<sup>175</sup> Para. 127c, MCM, 1951.

<sup>176</sup> 10 U.S.C. § 855 (1958).

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delineated the relationship between a maximum sentence implemented under the Uniform Code and the maximum sentence authorized under the United States Code. A sentence prescribed in the Table of Maximum Punishments for an offense charged under Article 121, and approved in *United States v. Culley*,<sup>177</sup> was not invalidated because it exceeded the maximum set out in the United States Code for larceny offenses committed within the special maritime and territorial jurisdiction of the United States.<sup>178</sup> Though the accused service member's conduct may violate two or more statutes, the Court held he could not choose the statute under which he would be prosecuted. Congress, said the Court, can provide different punishment for different areas under Federal jurisdiction and reference to the United States Code for the appropriate punishment for a violation of the Uniform Code is permissible only when the penalty for the offense found is not listed in the Table of Maximum Punishments or closely related to a listed offense. However, the Court did observe that the United States Code punishment provision may be considered by the court-martial in assessing an appropriate sentence even though it does not arbitrarily fix its maximum limits.

In *United States v. Thomas*,<sup>179</sup> it was simply held that it was prejudicial error for the law officer to instruct that the death sentence may be imposed for the offense of unpremeditated murder, and that the error cannot be cured by appellate reassessment of the sentence. The Court expressly overruled *United States v. Williams*<sup>180</sup> insofar as that case is contrary authority for the latter proposition. Finally, the maximum sentence which may be imposed for a finding of guilty on a charge of failure to obey a lawful order restricting accused to his battery area is that maximum prescribed for breach of restriction rather than that for a violation of Article 92.<sup>181</sup>

### B. EVIDENCE AND INSTRUCTIONS PERTAINING TO SENTENCE

Noting the Manual provision authorizing the relaxation of the strict rules of evidence during the sentence procedure,<sup>182</sup> the Court

<sup>177</sup> 12 USCMA 704, 31 CMR 290 (1962).

<sup>178</sup> 18 U.S.C. § 861 (1958).

<sup>179</sup> 12 USCMA 583, 31 CMR 169 (1961).

<sup>180</sup> 4 USCMA 69, 15 CMR 69 (1954), a wartime case in which the law officer failed to advise the court that the convening authority had directed that the case be treated as non-capital, and informed the members that the Table of Maximum Punishments had been suspended with respect to the offense charged. It was held that reassessment of the sentence purged the error.

<sup>181</sup> *United States v. Hofmiller*, 12 USCMA 479, 31 CMR 65 (1961).

<sup>182</sup> Paras. 75c, 146, MCM, 1951.

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in *United States v. Franchia*<sup>183</sup> held that the extent to which the rules are relaxed rests in the sound discretion of the law officer. However, notwithstanding this liberal rule pertaining to the admission of evidence with a view to sentencing, if evidence admitted by the Government in connection with the sentence is improper, a reduction of the adjudged sentence by the convening authority may provide inadequate relief for the accused.<sup>184</sup> In three cases, the Court considered the use of "previous convictions" in conjunction with the adjudging of a sentence. In *United States v. Stanaway*,<sup>185</sup> the Government introduced evidence of a conviction for offenses committed subsequent to those which were presently being tried by the court. The Court found it prejudicial error to admit into evidence these convictions which did not qualify as "previous." It can also be error to exclude evidence of a "previous conviction" from the court. A previous conviction and punishment for the same offense by state authorities is a major circumstance meriting serious consideration in the court-martial's determination of an appropriate sentence. When such civilian punishment has been imposed, but the fact is kept from the court-martial, the sentence it adjudges may be unrealistic. A rehearing is the appropriate remedy.<sup>186</sup> Although previous convictions relating to offenses committed six years previous to the offenses charged and in a prior enlistment are inadmissible under paragraph 75b(2) of the Manual as proof of a prior conviction, *United States v. Plante*<sup>187</sup> held evidence of the conviction admissible as rebuttal to evidence of long and meritorious service offered by accused in mitigation.

General questions pertaining to instruction on the court's sentencing functions continued to draw the Court's attention. The Court held in *United States v. Forwerck*<sup>188</sup> that it is error for the law officer to incorporate by reference instructions which he had given in a prior case before the same court members. Forwerck and two co-accused were brought before a general court-martial but were not then arraigned and tried. Each was represented by

<sup>183</sup> 13 USCMA 315, 32 CMR 315 (1962).

<sup>184</sup> *United States v. Rivera*, 13 USCMA 30, 32 CMR 30 (1962).

<sup>185</sup> 12 USCMA 552, 12 CMR 138 (1961).

<sup>186</sup> *United States v. Rosenblatt*, 13 USCMA 28, 32 CMR 28 (1962).

<sup>187</sup> 13 USCMA 266, 32 CMR 266 (1962).

<sup>188</sup> 12 USCMA 540, 31 CMR 126 (1961). Judge Ferguson dissented primarily on the ground that the law officer's action "violated the positive command of Congress that each general court-martial shall keep a separate record of the proceeding of the trial of each case brought before it." The probability of other damaging instructions by the law officer failed to dispell possible prejudice.

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the same appointed defense counsel, and was present up to the point where the court personnel were sworn. Forwerck and Vazquez-Davilla<sup>189</sup> were then excused and the proceedings continued against the third accused. Later on that same day, Forwerck was again brought before the court. During his ensuing trial, the law officer asked the court to recall his instructions on the effect of a guilty plea, and those on sentence matters and extenuation and multiplicity. In the course of these directions, the law officer also advised that any sentence approved would require the concurrence of two-thirds of the eight members present, which would be six. Defense counsel did not object to the content or manner in which the instructions were given. The Court held this instructional procedure to be error, but the doctrine of waiver was held applicable under the particular circumstances in the *Forwerck* case inasmuch as no miscarriage of justice was found to have resulted. This absence of prejudice was held to be supported by a sentence of less than one fourth the impossible maximum and accused's plea of guilty, which obviated the need for instruction on the elements of the offense and other principles of law required by the Code.<sup>190</sup> Although the reference to the instructions on sentence in the case tried immediately before accused's is analogous to a closed conference between the law officer and court members, the inference of prejudice created thereby was rebutted by the law officer's repetition in a general way, of the content of the referenced instructions on voting procedure and mitigation.

In *United States v. Quesinberry*,<sup>191</sup> the president of a special court-martial, during deliberation on the sentence, reopened the court and requested that the trial counsel furnish him with information on the consequence of a man getting a bad conduct discharge. The president was given a general instruction on the effect that a bad conduct discharge has on the recipient's future and a chart that was several years old which set out some of the consequences of a bad conduct discharge. Though additional and more current information regarding the bad conduct discharge was requested by the court, the trial counsel stated that he was not prepared to oblige the court any further. Prior to closing the

<sup>189</sup> See *United States v. Nossavage*, 12 USCMA 549, 31 CMR 135 (1961); *United States v. Vazquez-Davilla*, 12 USCMA 550, 31 CMR 136 (1961); *United States v. Thomas*, 12 USCMA 550, 31 CMR 136 (1961); and *United States v. Napier*, 12 USCMA 552, 31 CMR 138 (1961), which follow *Forwerck* on the issue of incorporating instructions of the law officer given in a prior trial.

<sup>190</sup> Article 51(c), UCMJ, 10 U.S.C. § 851(c) (1958).

<sup>191</sup> 12 USCMA 609, 31 CMR 195 (1962).

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court again, the president instructed the court as suggested by counsel. A bad conduct discharge was adjudged and accused alleged that trial counsel's action prevented the court from utilizing sentence information they were entitled to have. In holding that this court-martial was not entitled to be informed of the specific consequences of a bad conduct discharge, Judge Ferguson stated:

In sum, the rule which is applicable here is simply that precept which commands courts-martial to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.

To hold otherwise would mean that presidents and law officers would be required to deliver an unending catalogue of administrative information to court members.<sup>192</sup>

Moreover, the chart and instructional advice suggested by counsel and adopted by the president were so phrased, said the Court, as to inform the court of the general consequences of a bad conduct discharge. It may be noted that inasmuch as the trial counsel in *Quesinberry* actually furnished the court with more than the standard instruction and information on the effect of a punitive discharge, the Court, as Judge Kilday implies in his concurring opinion, may under other facts find it necessary that at least as much or perhaps more of the particular consequences of a punitive separation than are noted in a standard instruction be brought to the court's attention, if requested.

Under the usual circumstances, when a punitive discharge is included in the maximum punishment which may be adjudged, the law officer, if asked by a court member if the court has the power to suspend that sentence to avoid prejudicial error, need instruct that it cannot. If court members knew the court could not suspend a discharge they may well not adjudge a sentence which includes that punishment.<sup>193</sup> In *United States v. Smith*,<sup>194</sup> a sentence including a bad conduct discharge was submitted to a general court-martial for a rehearing and the law officer refused to answer a court member's question regarding the power of the court to suspend its sentence upon the continued good performance of the accused. Though the Court felt that the question of error in this refusal to answer might be moot inasmuch as the accused was in fact sentenced to a bad conduct discharge, it was held that any prejudice resulting from the improper refusal to

<sup>192</sup> *Id.* at 512, 31 CMR at 198.

<sup>193</sup> *United States v. Samuels*, 10 USCMA 206, 27 CMR 280 (1959).

<sup>194</sup> 12 USCMA 595, 31 CMR 181 (1961).

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advise the court that it could not suspend a punitive discharge was avoided. The absence of prejudice rested on the fact that the instructions given by the law officer, in addition to informing the court that the maximum sentence that could be given would include bad conduct discharge, also advised the court of a number of less severe punishments that could be adjudged *in lieu* of a bad conduct discharge. Moreover, the court made no attempt to adjudge a less severe sentence which omitted a discharge or to include a provision for the suspension of the discharge adjudged.

### C. ARGUMENTS ON THE SENTENCE

Several of the cases heard during the term dealt with arguments by counsel pertaining to the sentence, and in two such cases, reference to the type court conducting the trial was considered improper. In response to evidence in mitigation and extenuation presented before a special court-martial that accused was an average man and sailor and a very good worker, it is error for trial counsel to imply by his rebuttal argument that defense counsel presented *no* evidence in mitigation and that since the charge against accused had been referred to trial by special court-martial he received all the consideration to which he was entitled at the hand of the convening authority because the offense charged was punishable by punishment far in excess of that which could be adjudged by a special court-martial. The Court in *United States v. Boese*<sup>185</sup> considered such arguments by trial counsel improper and grossly misleading, in the first place because of the reference to a maximum sentence in excess of that which a special court-martial may adjudge which might fairly be said to incline the sentencing court to abandon its own discretion in favor of the action taken by the convening authority in referring the case to an inferior court for trial, and more particularly by counsel's contention that matters in mitigation were limited to a demonstration that accused had performed his duties in an extraordinary manner or was possessed of an above average record. Together, the two prongs of trial counsel's argument improperly left the court with the inference that mitigation was neither needed in the special court-martial case nor presented by his counsel. The Court in *Boese, supra*, observed that the court had adjudged the maximum sentence and concluded that the corrective action taken by the supervisory authority and board of review did not remove the harm brought about by the misleading instructions and assure

<sup>185</sup> 13 USCMA 131, 32 CMR 131 (1962).

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a full measure of justice to accused. In *United States v. Williams*,<sup>196</sup> trial counsel, in response to defense counsel's argument that the case should have been referred to a lower level court, stated that the Government in referring the case to a general court-martial thought that it was a serious matter and felt that when all the facts were adjudged an adequate sentence would be returned. The Court found that the tenuous implication of command influence in counsel's statement and such risk as it entailed, was removed by the law officer's emphatic instructions that it was for the court-martial to determine the sentence. Where the principal tenor of a misleading and improper argument by trial counsel that exceeds the bounds of fair comment is the adjudication of a punitive discharge, the effect of such error may be purged by eliminating that discharge from the sentence.

### D. MULTIPLICITY

The offenses of larceny, based on accused's theft of certain goods from their owner, are separate offenses for punishment purposes, from further charges of larceny based on the pawning of the property by the accused on the same day and obtaining money from the pawnbroker on the false pretence that he was the owner of the property.<sup>197</sup>

## VII. POST TRIAL REVIEW

### A. COMMUTATION<sup>198</sup>

In the course of the last term, the Court has continued to set out guidelines suggesting some of the limits on the power of a convening authority or board of review to commute or "adjust" a court-martial sentence, and at the same time to evaluate a few more sentence combinations purporting to be lesser included within a punitive discharge. In *United States v. Johnson*,<sup>199</sup> the convening authority was of the opinion that accused had demonstrated his unsuitability for retention in the Army, and on his Staff Judge Advocate's recommendation and with the express approval of the accused, he "commuted" the adjudged sentence of total forfeitures of all pay and allowances and confinement at

<sup>196</sup> 13 USCMA 208, 32 CMR 208 (1962).

<sup>197</sup> *United States v. Weaver*, 13 USCMA 147, 32 CMR 147 (1962).

<sup>198</sup> For a survey of this topic, see U.S. Dep't of Army, Pamphlet No. 27-101-98, p. 3 (1962) (Judge Advocate Legal Service).

<sup>199</sup> 12 USCMA 640, 31 CMR 226 (1962).

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hard labor for one year to a bad conduct discharge. The board of review held the convening authority's "commutation" was illegal in that it increased the severity of the sentence. In examining the power to commute, Judge Ferguson, speaking for a unanimous Court, described several restrictions on the exercise of commutation placed in issue by *Johnson*, reiterated previously noted restrictions on the practice, and clarified a prior opinion on the subject. On this latter point, Judge Ferguson stated that the view expressed in *United States v. Christensen*,<sup>200</sup> with respect to the dependent relationship of commutation and accused's desires, must be considered those of only the author judge, and that the consent or desires of the accused are immaterial to the question of whether the convening authority may commute a court-martial sentence. Three limitations on the power which the Court noted with reference to the circumstances in the *Johnson* case were: (1) the changed punishment must be one which could have been legally adjudged by the court-martial, (2) the changed punishment must be one which is of a lesser degree of severity than that adjudged, and (3) the nature of the punishment may not be changed merely because that sought to be approved is administratively more convenient than that imposed by the court-martial. The Court concluded that *Johnson's* adjudged punishment was found appropriate by the convening authority, but changed because it was considered more convenient to separate accused punitively than to lessen the severity of his sentence as could have been accomplished had it been reduced in kind or to effect it as adjudged.

With specific reference to the question of whether a sentence to confinement and forfeiture may be commuted to a bad conduct discharge, the Court in *Johnson* agreed with the board of review's rationale that to so act would circumvent Title 10, United States Code, section 3811, which unequivocally prohibits the discharge of members of the Army except as prescribed by the Secretary of the Army or by a sentence of general or special court-martial, the only sort of separations which may form a part of military sentences. ". . . [I]n order to be a valid penalty the sentence itself must expressly include direction of the discharge. . . . Unlike the death penalty . . . a sentence to confinement at hard labor and forfeiture does not, by implication, include a punitive discharge to which the penalty might be reduced."<sup>201</sup> In addition, it was

<sup>200</sup> 12 USCMA 393, 30 CMR 593 (1961).

<sup>201</sup> 12 USCMA at 645, 31 CMR at 231 (emphasis added).

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held that to permit a sentence of confinement to be changed to a punitive discharge, would increase the severity of the sentence. Judge Ferguson pointed out that there is rehabilitative and restoration potential in a sentence of confinement, which when compared with the social and economic stigma of a punitive discharge indicates that punitive discharges are not *lesser* included in confinement and forfeitures. A general indication of the Court's view of the commutation of court-martial sentences as expressed in the *Johnson* case is illustrated by the following portions of that opinion:

First, and most importantly, we have consistently emphasized that we here deal with the power of the convening authority and the board of review to make a determination regarding the appropriateness of a particular sentence with due regard to the accused and the crimes of which he has been convicted. Congress did not think it wise to attach labels to this process, for attempts so to classify changes in sentences tend to bring into play technical niceties and narrowly based distinctions which are completely at odds with the legislative intent to have the sentence reassessed at various levels until it fits the particular offender. In short, Congress desired intermediate appellate authorities to look again at the penalty adjudged and *reduce the severity of its impact until it was deemed appropriate.*

\* \* \* \* \*

. . . [I]f the change in form of penalty is to be equally damaging, it would follow that there was no need to alter the sentence, for that adjudged would logically be as appropriate as that sought to be imposed on appeal.<sup>202</sup>

In *United States v. Rodriguez-Garcia*,<sup>203</sup> the Court reviewed the actions of a convening authority who substituted a suspended bad conduct discharge for a sentence to one year's confinement and partial forfeitures, and like the purported substitution of a dishonorable discharge for a year's confinement and partial forfeitures considered in *United States v. Fredenburg*,<sup>204</sup> these attempts to change the adjudged sentence were held unauthorized on the rationale employed in *Johnson, supra*.

An issue concerning the effective dates of the confinement and forfeiture included in a "changed" sentence was presented to the Court in *United States v. Prow*<sup>205</sup> in conjunction with the challenged validity of the sentence which had been changed by the board of review from a bad conduct discharge to confinement at hard labor for three months and forfeitures of \$30.00 per month

<sup>202</sup> *Id.* at 643, 31 CMR at 229.

<sup>203</sup> 12 USCMA 647, 31 CMR 233 (1962).

<sup>204</sup> 12 USCMA 646, 31 CMR 232 (1962).

<sup>205</sup> 13 USCMA 63, 32 CMR 63 (1962).

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for a like period. The Court approved the change to confinement at hard labor as a less severe punishment. Further it held that, while on its face Article 57 of the Code,<sup>206</sup> in providing that "confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial," superficially appears inapplicable to a sentence "changed" to include confinement, the "generating source" of the action of the board of review is the court-martial sentence. Accordingly, the board of review was justified in making the period of confinement substituted for the discharge relate back to the date sentence was adjudged. On this same basis, the Court found that the forfeiture portion of a "changed" sentence may be ordered to take effect as of the date of the convening authority's action.<sup>207</sup>

### B. STAFF JUDGE ADVOCATE POST TRIAL REVIEW AND ACTION OF CONVENING AUTHORITY

It has previously been held that a convening authority who grants immunity to a witness is thereafter disqualified from acting on the case because he is required to pass on the credibility and weight of the testimony of the witness to whom he gave immunity.<sup>208</sup> For the same reasons, a staff judge advocate whose participation in the decision to grant a witness immunity identifies him with the transaction to the extent of his interviewing the witness regarding the effect of a grant of immunity and drafting the grant for the signature of the convening authority, he is disqualified from participating in the post trial review.<sup>209</sup> In contrast, though the staff judge advocate has expressed disagreement with the recommendation of the Article 32 investigating officer in his pre-trial advice to the convening authority, this, in the absence of bias or fraud, does not disqualify the legal officer from participating in the post trial review.<sup>210</sup> In *United States v. Christopher*,<sup>211</sup> the Court weighed the effects of comments contained in the post trial review and concluded "it would be much the preferred practice to afford accused persons the opportunity to explain or rebut unfavorable comments of whatever sort,<sup>212</sup> but since the legal officer's comments on the review were with regard to the accused's lack of maturity and the necessary correction which others had to make in

<sup>206</sup> 10 U.S.C. § 857 (1958).

<sup>207</sup> 13 USCMA at 65, 32 CMR at 65.

<sup>208</sup> *United States v. White*, 10 USCMA 63, 27 CMR 137 (1958).

<sup>209</sup> *United States v. Cash*, 12 USCMA 708, 31 CMR 294 (1962).

<sup>210</sup> *United States v. Rowe*, 13 USCMA 302, 32 CMR 302 (1962).

<sup>211</sup> 13 USCMA 231, 32 CMR 231 (1962).

<sup>212</sup> *Id.* at 237, 32 CMR at 237.

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his work, rather than to prior offenses, the risk of any prejudice was too insubstantial for reversal. In a related case considered by the Court it was again questioned that the staff judge advocate had maintained the prerequisite impartiality with regard to his post trial review of the case. There in *United States v. Guinn*,<sup>213</sup> the Staff Judge Advocate had commented that initially the accused must be considered to be non-restorable. This portion of the review was immediately followed by advice to the convening authority which clearly informed him of his power and responsibilities concerning the sentence. The court emphasized that a post trial review is properly considered as a whole and on so doing it becomes apparent that the Staff Judge Advocate was doing no more than expressing an opinion that Guinn should not then be restored to duty, and the legal officer was entitled to express that view. Looking at the entire review, the Court concluded that there was no fair risk that the convening authority was led to believe himself bound to accept the legal advisor's opinions.

The actions and comments of the convening authority were, on two particular occasions, subjected to critical comment and examination by the Court. If there was any doubt before, the Court has now made clear that the convening authority need keep his personal feelings regarding judicial procedures, which he may consider undesirable or a waste of time, from the trial court members. In *United States v. Kentner*,<sup>214</sup> when a rehearing was ordered, the general court-martial authority in his action referring the case to trial commented on the fact that the rehearing was being ordered because prejudicial error had been caused by a court member other than the president of the special court, who had consulted a handbook of court-martial law during the trial. In pertinent part, the convening authority's action also stated: "Whatever feelings the Supervisory Authority may have in regard to the inconsequentialities of the act of the member reading the handbook [and the Supervisory Authority does have strong feelings], the fact remains that the Court of Military Appeals has spoken and the Supervisory Authority is bound by the mandate of its decision."<sup>215</sup> During a pretrial briefing at which accused and his counsel were not present, this action of the convening authority was brought to the attention of a majority of the court members. In holding that the remarks in the action were improper as well as prejudicial, the Court had the following to say about the administration of the court-martial system:

<sup>213</sup> 12 USCMA 632, 31 CMR 218 (1962).

<sup>214</sup> 12 USCMA 667, 31 CMR 253 (1962).

<sup>215</sup> *Id.* at 669, 31 CMR at 255.

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. . . [T]he feeling the supervisory authority might have as to the "inconsequentialities" involved in decisions of this Court are as unimportant in the pan of the scales of justice as the views the members of this Court may entertain as to the strategy and tactics of one exercising Naval command. We do not question the privilege of such individuals to disagree with us but, regardless of whether it be so intended, it is clear that expression or communication of these feelings may not be permitted to deprive an accused of a fair hearing.

Under all the circumstances, we conclude there is a fair risk that the president might have been influenced by the improper remark to minimize the question of the accused's guilt or innocence—as to which supervisory authority intimated there was no doubt—and concentrate solely on *pro forma* observance of the condemned "inconsequentialities" of the law.<sup>216</sup>

### C. APPELLATE REVIEW

#### 1. Review by Board of Review

*United States v. Thomas*<sup>217</sup> submitted to the Court a certification presenting the Government's argument that the board of review possessed authority to consider the accused's mental responsibility only if the board first determined that he was mentally capable at the time of appellate review. The board of review, after reviewing the case record obtained post trial evidence indicating accused's mental incompetency, and, in considering the original issue of insanity, did not first consider his competency to assist in his defense at appellate review. The Court held that the reviewing power of the board is not so limited as the Government contended. A board of review is a higher authority within the meaning of paragraph 124 of the Manual and has the jurisdiction and authority to consider and take appropriate action on the issue of insanity. While a trial *de novo* before the board is not contemplated, consideration of insanity is given a "preferred rating." The Court determined that it is proper for a board of review to consider whether the issue of the accused's mental responsibility at the time of the offense is raised by the data before it, and to take appropriate action without first making a decision as to his mental competency to stand trial or to assist in appellate review. The board should not have dismissed the charges, however, since the issue of sanity was here a new question of fact going to the merits of the case and it had not been submitted to the trial court for consideration. On remand, the Government conceded the accused's insanity and the board again dismissed the charges on review.<sup>218</sup>

<sup>216</sup> *Id.* at 669-70, 31 CMR at 255-56.

<sup>217</sup> 13 USCMA 163, 32 CMR 163 (1962).

<sup>218</sup> CM 406421, *Thomas* (Aug. 15, 1962).

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Pursuant to a prior review of the case, the Court had remanded the record of trial in *United States v. Hardy*<sup>219</sup> to the board of review for further inquiry into the accused's contention that he was deprived of an impartial post trial review. The extent of the inquiry was to obtain an unsworn statement from the Staff Judge Advocate and an affidavit from his assistant, both to the effect that the review was independent and impartial. The Court was of the impression that its remand would be followed by the taking of testimony from certain necessary witnesses. Accused complained that *sub rosa* proceedings were employed in obtaining the affidavits and statement and that he had no opportunity to question the witnesses. The Court was of the opinion that the board erred in their disposition of the Court's remand of the case. The accused's claim of bias created a controversy of fact and it was therefore error for the board to fail to furnish the accused an opportunity to question the witnesses. The fact that the accused failed to submit evidence contradicting the affidavit and unsworn statement did not relieve the board of its responsibilities.

While in *Hardy* the board was unduly reluctant to employ its fact finding powers, the Court in *United States v. Reid*<sup>220</sup> found cause to point out limitations on the board's powers. The first of these pertained to the jurisdiction of the Court of Military Appeals. The board of review had reduced a sentence that included a bad conduct discharge, partial forfeitures, and confinement at hard labor for six months, to one including confinement for six months and partial forfeitures. The Government argued that the Court lacked jurisdiction to hear the case in view of the reduction of the sentence by the board of review to a level which would not originally have required the board to examine it under Article 66 of the Code.<sup>221</sup> In response, Judge Ferguson, speaking for the Court, said that Article 67 of the Code<sup>222</sup> empowers the Court to grant a petition for review for good cause shown in all cases reviewed by a board of review except those referred to the board under Article 69<sup>223</sup> by The Judge Advocate General. A board of review cannot, in a *nunc pro tunc* fashion, defeat further appellate review by approving a penalty which would have required only that the record be examined by The Judge Advocate General. In return-

<sup>219</sup> 12 USCMA 518, 31 CMR 99 (1961). See 11 USCMA 521, 29 CMR 337 (1960), for the Court's prior remand of *Hardy*.

<sup>220</sup> 12 USCMA 497, 31 CMR 83 (1961).

<sup>221</sup> 10 U.S.C. § 866 (1958).

<sup>222</sup> 10 U.S.C. § 867 (1958).

<sup>223</sup> 10 U.S.C. § 869 (1958).

ing this record to the board of review, Judge Ferguson stated further that inasmuch as the board had originally found the evidence insufficient to establish the single overt act alleged in a specification of conspiracy, the board of review could not be permitted to substitute a new overt act to save the affected allegation of conspiracy against the accused.

The official acts of board of review members, like those of other persons engaged in the administration of military justice, may be invalidated if it appears an erroneous idea or sentiment influenced their official decision.<sup>224</sup> But, if a board member ascribes a personal and not purely professional interest in an appellate case to defense counsel, this alone is not demonstrative of sufficient injudiciousness to disqualify the member from consideration of the appeal on the merits.<sup>225</sup>

## 2. Review in the Court of Military Appeals

In *United States v. Bull*,<sup>226</sup> the Court was again given opportunity to determine the effect of an honorable discharge executed during the course of the appellate proceedings. Speaking for a unanimous Court, Judge Ferguson stated that an honorable discharge executed during the pendency of a case on appeal does not abate the proceedings. "Nothing in *United States v. Loughery*<sup>227</sup> . . . is inconsistent with the earlier position of the Court. We do not deem the present case a propitious occasion for re-examining the question. . . ." <sup>228</sup> Speaking with reference to limitations on its own powers, the Court acknowledged that the powers sounding in the nature of commutation held by the convening authority and board of review were denied the Court of Military Appeals, and observed further in *United States v. Christopher*<sup>229</sup> that, while it had not thought of any wholesale review of sentences, the Court would follow that prerogative it concluded had been vested in the Court from the inception of the Uniform Code to examine both the legality of an accused's punishment and, as a matter of law

<sup>224</sup> *United States v. Plummer*, 7 USCMA 630, 23 CMR 94 (1957).

<sup>225</sup> *United States v. Erb*, 12 USCMA 524, 31 CMR 110 (1961).

<sup>226</sup> 12 USCMA 514, 31 CMR 100 (1961).

<sup>227</sup> 12 USCMA 260, 30 CMR 260 (1961). Here the Court split three ways when considering the issue and effect of an "intervening honorable separation." Judge Ferguson would have dismissed the charges because of error in the record; Chief Judge Quinn felt the proceeding had been abated; and Judge Latimer would dismiss the petition being of the view that accused was bound by the mutual agreement resulting in the administrative discharge.

<sup>228</sup> 12 USCMA at 515, 31 CMR at 101.

<sup>229</sup> 13 USCMA 231, 32 CMR 231 (1962).

## SURVEY OF MILITARY JUSTICE

only, its appropriateness. In determining whether in a given case, inappropriateness exists, the Court in *Christopher* stated that it will proceed in a fashion identical to its procedure in determining the sufficiency of the evidence as a matter of law. In concluding on this issue, Judge Kilday stated:

We hasten to emphasize that we should not be considered as abrogating to ourselves, under the guise of a legal label, the power to determine or pass on factual questions of sentence appropriateness.

We next proceed to determine whether the action of the board of review in approving the sentence<sup>230</sup> was arbitrary, capricious, or one which no reasonable person would have taken. If any one thereof be present, the action taken by the board of review would be inappropriate as a matter of law, and this Court may so determine.<sup>231</sup>

Finally, in *United States v. Exposito*,<sup>232</sup> Judge Kilday, speaking for the Court, gave support to the "cumulative error" rule and reversed a conviction of wrongful appropriation and ordered the charges dismissed because the record was replete with errors, both substantive and procedural, one of which was highly prejudicial to the accused.

### VIII. APPENDIX—WORK OF THE COURT

The statistics in Tables I and II are the official statistics compiled by the Clerk's Office, United States Court of Military Appeals, pursuant to the provisions of Article 67(g), Uniform Code of Military Justice. The statistics in Tables III through VI inclusive were informally compiled by the authors and are, thus, unofficial.

*Table I. Status of Cases Docketed*

Total by Services	Total as of June 30, 1960	July 1, 1960 to June 30, 1961	July 1, 1961 to June 30, 1962	Total as of June 30, 1962a
<i>Petitions (Art. 67(b)(3)):</i>				
Army.....	8,099	371	431	8,901
Navy.....	2,745	330	323	3,398
Air Force.....	3,196	252	193	3,641
Coast Guard.....	39	1	1	41
Total.....	14,079	954	948	15,981

<sup>230</sup> The board of review affirmed the lesser included offense of the charge of larceny but it found that the sentence adjudged for the larceny to be appropriate in the circumstances of the case. The Government argued that the penalty imposed was a question of fact and therefore not reviewable by the Court.

<sup>231</sup> 13 USCMA at 236, 32 CMR at 236.

<sup>232</sup> 13 USCMA 169, 32 CMR 169 (1962).

# MILITARY LAW REVIEW

Table I. Status of Cases Docketed—Continued

Total by Services	Total as of June 30, 1960	July 1, 1960 to June 30, 1961	July 1, 1961 to June 30, 1962	Total as of June 30, 1962a
<i>Certificates (Art. 67(b)(2)):</i>				
Army.....	111	11	7	129
Navy.....	174	7	6	187
Air Force.....	43	6	4	53
Coast Guard.....	6	0	0	6
Total.....	334	24	17	375
<i>Mandatory (Art. 67(b)(1)):</i>				
Army.....	31	0	0	31
Navy.....	3	0	0	3
Air Force.....	2	1	0	3
Coast Guard.....	0	0	0	0
Total.....	36	1	0	37 <sup>b</sup>
Total cases docketed...	14,449	979	965	16,393

a While this supplement covers the 1961 Court Term, the Clerk's Office, USCMA, maintains statistics on a fiscal year basis only.

b 2 flag officer cases: 1 Army and 1 Navy.

c 16,131 cases actually assigned docket numbers. 110 cases counted as both Petitions and Certificates. 5 cases Certified twice. 137 cases submitted as Petitions twice. 2 Mandatory cases filed twice. 6 Mandatory cases filed as Petitions after second Board of Review Opinion. 2 cases submitted as Petitions for the third time.

Table II. Court Action

	Total as of June 30, 1960	July 1, 1960 to June 30, 1961	July 1, 1961 to June 30, 1962	Total as of June 30, 1962
<i>Petitions (Art. 67(b)(3)):</i>				
Granted.....	1,442	114	101	1,657
Denied.....	12,212	842	799	13,853
Denied by				
Memorandum Opinion.....	2	0	0	2
Dismissed.....	9	1	2	12
Withdrawn.....	299	8	14	321
Disposed of on Motion to Dismiss:				
With Opinion.....	7	1	0	8
Without Opinion.....	36	2	1	39
Disposed of by Order setting aside findings and sentence.....	3	0	0	3
Remanded to Board of Review.....	115	23	5	143
Court action due (30 days) <sup>d</sup> .....	77	57	88	88
Awaiting briefs <sup>d</sup> .....	19	25	25	25

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*Table II. Court Action—Continued*

	Total as of June 30, 1960	July 1, 1960 to June 30, 1961	July 1, 1961 to June 30, 1962	Total as of June 30, 1962
<i>Certificates (Art. 67(b)(2)):</i>				
Opinions rendered	311	37	16	364
Opinions pending <sup>d</sup>	10	2	3	3
Withdrawn	6	0	1	7
Remanded	1	0	1	2
Set for hearing <sup>d</sup>	0	0	0	0
Ready for hearing <sup>d</sup>	1	1	0	0
Awaiting briefs <sup>d</sup>	6	1	0	0
<i>Mandatory (Art. 67(b)(1)):</i>				
Opinions rendered	35	1	1	37
Opinions pending <sup>d</sup>	1	0	0	0
Remanded	1	0	0	1
Awaiting briefs <sup>d</sup>	0	1	0	0
<i>Opinions rendered:</i>				
Petitions	1,228	91	95	1,414
Motions to Dismiss	10	1	0	11
Motion to Stay				
Proceedings	1	0	0	1
Per Curiam grants	22	4	1	27
Certificates	272	34	15	321
Certificates and Petitions	37	3	1	41
Mandatory	35	1	1	37
Remanded	2	0	0	2
Petition for a New Trial	1	0	1	2
Petition for				
Reconsideration of				
Petition for New Trial	1	0	0	1
Motion to Reopen	1	0	0	1
Total	1,610	134	114	1,858e
<i>Completed cases:</i>				
Petitions denied	12,212	842	799	18,853
Petitions dismissed	9	1	2	12
Petitions withdrawn	299	8	14	321
Certificates withdrawn	6	0	1	7
Opinions rendered	1,603	133	114	1,850
Disposed of on motion				
to dismiss:				
With opinion	7	1	0	8
Without opinion	36	2	1	39
Disposed of by Order				
setting aside findings				
and sentence	3	0	0	3
Remanded to Board				
of Review	115	23	6	144
Total	14,290	1,010	937	16,237

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Table II. Court Action—Continued

	Pending completion as of—		
	June 30, 1960	June 30, 1961	June 30, 1962
<i>Pending cases:</i>			
Opinions pending.....	38	16	19
Set for hearing .....	1	0	0
Ready for hearing .....	0	1	0
Petitions granted—awaiting briefs ..	9	17	14
Petitions—Court action due 30 days..	77	57	88
Petitions—awaiting briefs .....	19	25	25
Certificates—awaiting briefs.....	6	1	0
Mandatory—awaiting briefs .....	0	1	0
<b>Total .....</b>	<b>150</b>	<b>118</b>	<b>146</b>

d As of June 30, 1960, 1961, and 1962.

e 1,568 cases were disposed of by 1,841 published Opinions. 101 opinions were rendered in cases involving 60 Army officers, 21 Air Force officers, 14 Navy officers, 3 Marine Corps officers, 2 Coast Guard officers, and 1 West Point Cadet. In addition 19 opinions were rendered in cases involving 20 civilians. The remainder concerned enlisted personnel.

Table III. Sources of Cases Disposed of by Published Opinions<sup>f</sup>

	Army	Navy	Air Force	Coast Guard	Total
Petition.....	44	36	19 <sup>g</sup>	1	100
Certification .....	7	6	4	0	17
Mandatory Review.....	0	0	1	0	1
<b>Total.....</b>	<b>51</b>	<b>42</b>	<b>24</b>	<b>1</b>	<b>118</b>

f Covers the period of the supplement, 20 October 1961 to 21 September 1962 (the entire October 1961 term); figures cover only published opinions.

g Includes one petition for new trial.

Table IV. Disposition of Cases Through Published Opinions<sup>h</sup>

	Affirmed	Aff in Part Rev in Part	Reversed	Remanded	Dismissed	Total
Petition.....	50	3	46	0	0	99
Certification.....	7	1	9	0	0	17
Mandatory Review...	0	0	1	0	0	1
<b>Total.....</b>	<b>57</b>	<b>4</b>	<b>56</b>	<b>0</b>	<b>0</b>	<b>117<sup>i</sup></b>

h Period Covered: 20 October 1961 to 21 September 1962; figures include only published opinions.

i Does not include one petition for new trial.

## SURVEY OF MILITARY JUSTICE

*Table V. Reversals of Special Court-Martial Cases Versus General Court-Martial Cases Considered by the Court<sup>j</sup>*

	Special (%)	General (%)	Total (%)
Army-----	k	19 (37%)	19 (37%)
Navy-----	18 (69%)	7 (42.5%)	25 (60%)
Air Force-----	1 (50%)	9 (43%)	10 (43%)

<sup>j</sup> Period Covered: 20 October 1961-21 September 1962; figures cover only published opinions; the purpose of this chart is to compare special court-martial cases with general court-martial cases with respect to the incidence of error found by the Court of Military Appeals. Accordingly, the figures in this chart do not include cases in which the Court of Military Appeals, although reversing board of review decisions, upheld the convictions.

<sup>k</sup> Not utilized at the present time (AR 22-146).

*Table VI. Action of Individual Judges<sup>l</sup>*

	Quinn	Ferguson	Kilday	Total
Wrote opinion of Court-----	40	36	32	108
Concur with opinion of Court-----	50	40	72	162
Concur with separate opinion-----	3	0	2	5
Concur in result-----	3	4	1	8
Concur in part/dissent in part-----	1	3	0	4
Dissent-----	11	25	0	36
Total-----	108 <sup>m</sup>	108 <sup>m</sup>	107 <sup>m</sup>	323

<sup>l</sup> Period covered: 20 October 1961 to 21 September 1962

<sup>m</sup> Figures do not include 10 per curiam opinions; figures cover only published opinions. Judge Kilday did not participate in one opinion.



## COMMENTS

**RELIANCE UPON INTERNATIONAL CUSTOM AND GENERAL PRINCIPLES IN THE GROWTH OF SPACE LAW.\*** It is rather easy in the field of space exploration and related space law to swing either to starry-eyed thinking or to debunking conscientious efforts to cope with future problems in space. Sometimes indeed we become so hard-headed as to be able to see few, if any legal problems in space. But practical legal problems will arise in and related to space to which we lawyers will have to devote our patient and intensive attention if the rule of law, on which mankind's hopes for peace and progress largely depend, is everywhere to be achieved.<sup>1</sup>

We know already the pervasive influence of space activity upon our times. We have discerned its impact upon national security and national prestige and upon the economies of the nations working in or ambitious to work in space; the effect of activities in space upon communications and electronics; upon methods and curricula in education; upon learning in the fields of metallurgy, medicine, fuels, thermals, solid-state physics, cryogenics and magneto-hydrodynamics. The results are to be found not only in new knowledge but also in new scientific, commercial and social vocabularies; novel language forms and usages; new techniques for mapping and weather forecasting; unique domestic, corporate and industrial relationships; new systems of global communications, and legal arrangements for bringing their fruits to the task of promoting man's progress; changes in population movements and urban development; and even new light on religion.

It is significant too that lawyers are meeting concurrently with their scientific and technological colleagues and that the Colloquium on the Law of Outer Space is held in conjunction with meetings at which such matters as astrodynamics and celestial

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\* This article was adapted from a paper delivered at the XIIIth International Astronautical Congress in Varna, Bulgaria, on September 25, 1962. 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.

<sup>1</sup> President Kennedy at Rice University, Houston, Texas, said on September 12, 1962: "... [T]he eyes of the world now look into space—to the moon and the planets beyond—and we have vowed that we shall not see it governed by a hostile flag of conquest, but by a banner of freedom and peace." *New York Times*, Sept. 13, 1962, p. 16, col. 5.

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mechanics, lunar and planetary exploration, bioastronautics and communication and space vehicles are treated.

On September 25, 1961, President Kennedy, speaking to the United Nations General Assembly, stated:

We must create even as we destroy—creating world-wide law and law enforcement as we outlaw world-wide war and weapons . . . For peace is not solely a matter of military or technical problems; it is primarily a problem of politics and people. And, unless man can match his strides in weaponry and technology with equal strides in social and political development, our great strength, like that of the dinosaur, will become incapable of proper control, and, like the dinosaur, vanish from the earth.<sup>2</sup>

But while lawyers have a role to play in this, they must not become too ambitious or take too much upon themselves. Though sometimes, especially in these days of frustration at man's seeming failure to achieve a peaceful world,<sup>3</sup> lawyers must recall that law and lawyers and judges and courts are not the only organs functioning to protect international societal values. Just as Justice Felix Frankfurter, in his last major opinion reminded us that ". . . there is not under our Constitution a judicial remedy for every political mischief,"<sup>4</sup> it must be recognized that there will always be lapses or deficiencies in any regime of international law designed by men to cope effectively and peacefully with political mischief.

Moreover, even when we find in the American Constitution, or the laws made pursuant to it, words promising solutions to specific problems, we must oftentimes look beyond the words to life and the experience of men and states to breathe meaning into the legislation or the written opinions of our common law courts.<sup>5</sup> So too, in the international field, formal written charters, conventions, treaties, and agreements cannot be relied upon too heavily. This is especially so when their words, upon being translated into the diverse languages of many nations, embrace concepts flowing from native experience developed through several centuries, and inevitably yield varying interpretations and consequences.

<sup>2</sup> 45 Dep't of State Bull. 622 (1961).

<sup>3</sup> See Lippmann, *The Frustration of Our Times*, 108 Cong. Rec. A 89 (daily ed. Jan. 11, 1962).

<sup>4</sup> *Baker v. Carr*, 369 U.S. 186, 270 (1962) (dissenting opinion).

<sup>5</sup> On this subject Justice Frankfurter has written, "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States v. Monia*, 317 U.S. 409, 431 (1943).

## RELIANCE UPON CUSTOM IN SPACE LAW

Even in these days in which some mastery in the arts of drafting and expression have been achieved, such conventions are not creations of infallible, unambiguous and perpetual wisdom or divine revelations. Appreciating these things, the quest for codification of rules and law to be applicable to outer space activities should not be too hasty.

The non-existence of such formal agreements does not mean that "there is no body of generally accepted space law," or that, in the premises, "the cosmos bears some resemblance to a jungle."<sup>6</sup> The fact is that the imagined vacuum is well filled by international experience and custom and by general principles of internationally accepted law. There are guidelines and limits, firmly based upon international law, standardizing what nations may and may not do vis-à-vis each other in space.

### I. USAGES AND CONDUCT OF NATIONS

Historically, the law of nations, which is regarded by states as binding them in their relations with one another in a legally ordered society of states,<sup>7</sup> is to be deduced, first, from the general principles of right and justice or jurisprudence; secondly, from the customary observances and conduct of civilized nations; and, thirdly, from the conventional law.<sup>8</sup> As Mr. Justice Gray stated in *Hilton v. Guyot*,<sup>9</sup> "The most certain guide . . . is a treaty. . . . But when . . . there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is. . . . In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists

<sup>6</sup> *New York Times*, Jan. 1, 1961, p. 6-E, col. 2; *id.*, April 17, 1961, p. 28, col. 2; *id.*, July 12, 1962, p. 28, col. 1.

<sup>7</sup> See Brierly, *The Basis of Obligation in International Law and other Papers* 21 (1958). The principal function of traditional international law in the 19th Century was to define and sanction fundamental individualistic rights of sovereign states which were conceived in political rather than legal terms and included the rights of existence, self-preservation, equality, commercial intercourse and good name and reputation. 1 Oppenheim 259 (8th ed. Lauterpacht, 1955). International law did not, however, treat with such matters as economic and financial policy, forms of government, disarmament, colonial expansion or independence—matters which then belonged to the "reserved domain of sovereign discretion" but which are now proper subjects of the expanding international law. Jennings, *The Progress of International Law* 3-5 (1960).

<sup>8</sup> *United States v. The La Jeune Eugenie*, 26 Fed. Cas. 832 (No. 15,551) (C.C.D. Mass. 1822); *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *Hilton v. Guyot*, 159 U.S. 113, 163-164, 214-215 (1895). *The Paquette Habana*, 175 U.S. 677 (1900). See also Kaplan & Katzenbach, *The Political Foundations of International Law* 8-9, 17-19, 26-28 (1961).

<sup>9</sup> 159 U.S. 113 (1895).

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and commentators, and from the acts and usages of civilized nations."<sup>10</sup>

The usages and conduct of civilized nations operating in outer space in the space age must not only be considered in the absence of written law and treaties but also before the possible contents of written laws and treaties can be known.

Lawyers know, as Justice Holmes taught us, that the "life of the law has not been logic; it has been experience," reflecting "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious."<sup>11</sup> To paraphrase, law, including international law, embodies the story of mankind's development through many centuries and cannot be treated as if it contained only the axioms and corollaries of a book of mathematics. "In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."<sup>12</sup>

Order does in fact exist in the international political system. Authoritative rules of substance and process are available. They are the offspring of the genuine interests of all nations in promoting their own self defense and endurance, "the first necessity of the State,"<sup>13</sup> and in restraining certain conduct on the part of other states, which threaten their survival, growth, greatness and dignity. Nations are, in consequence, not free to disregard international prescriptions. Every state is in a measure dependent upon preserving, not only the general structure of inter-

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<sup>10</sup> *Id.* at 163. Mr. Justice Gray summarized the matter in *The Paquete Habana* in the following words: ". . . Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the words of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." 175 U.S. 677, 700 (1900).

<sup>11</sup> Holmes, *The Common Law* 1-2 (1881).

<sup>12</sup> *Ibid.* Fenwick's characterization of international law as "mortgaged to its past" epitomizes the matter. Fenwick, *International Law* 3 (3d ed. 1948).

<sup>13</sup> Maine, *Popular Government* 61 (1885).

## RELIANCE UPON CUSTOM IN SPACE LAW

national law, but also the validity of just principles in international law, such as those concerned with sovereignty, self defense, and the binding effect of formal treaties and conventions. Even in the absence of such formal agreements, the conduct of states, customary and usual in matters international, are impressive models and norms for other nations seeking to avoid war and chaos.

### II. DEVELOPMENTS TO DATE

Such general structure of international legal arrangements and conduct has already established principles and rules for orderly activity in space by member states of international society.

Some years ago many lawyer-scholars believed there was an urgent requirement for a definition of outer space. The splendid work of Messrs. Cooper,<sup>14</sup> Haley,<sup>15</sup> Jenks,<sup>16</sup> Hogan,<sup>17</sup> and Horsford,<sup>18</sup> among others, is well known. It is unnecessary to review here the literature and positions defined and held from time to time on this subject.<sup>19</sup> However, no agreement or formal delimitations of space boundaries resulted. The boundary question was found to be practicably and intellectually insoluble.<sup>20</sup> No con-

<sup>14</sup> E.g., Cooper, *High Altitude Flight and National Sovereignty*, in Legis. Ref. Serv., Library of Congress, *Legal Problems of Space Exploration—A Symposium*, S. Doc. No. 26, 87th Cong., 1st Sess. 1 (1961) (hereinafter cited as Symposium, *supra* note 14); *id.*, *Legal Problems of Upper Space*, 23 J. Air L. & Com. 308 (1956); *id.*, *Missiles and Satellites: The Law and Our National Policy*, 44 A.B.A.J. 317 (1958).

<sup>15</sup> E.g., Haley, *The Law of Space and Outer Space*, 33 So. Cal. L. Rev. 370 (1960); *id.*, *Survey of Legal Opinions on Extraterrestrial Jurisdiction*, Symposium, *supra* note 14, at 719 (1958); *id.*, *Space Law and Metalaw Jurisdiction Defined*, 23 J. Air L. & Com. 296 (1957).

<sup>16</sup> E.g., Jenks, *International Law and Activities in Space*, Symposium, *supra* note 14, at 33 (1956).

<sup>17</sup> Hogan, *Legal Terminology for the Upper Regions of the Atmosphere and for the Space Beyond the Atmosphere*, Symposium, *supra* note 14, at 129 (1957).

<sup>18</sup> Horsford, *Principles of International Law in Space Flight*, 5 St. Louis U.L.J. 70 (1958); *id.*, *The Law of Space*, Symposium, *supra* note 14, at 20 (1955).

<sup>19</sup> See Katzenbach & Lipson, American Bar Foundation Report to the National Aeronautics and Space Administration on the Law of Outer Space 11-13 (1960), reprinted in Symposium, *supra* note 14, at 779. Mr. Haley apparently continues to espouse the Von Karman jurisdictional line, Letter, *New York Times*, Feb. 18, 1961, p. 18, col. 7-8, though Professor Cooper has retreated somewhat from his earlier postulations. See, e.g., Cooper, *Fundamental Questions of Outer Space Law*, Symposium, *supra* note 14, at 764 (1960).

<sup>20</sup> Kaplan & Katzenbach, *op. cit. supra* note 8, at 156-157 (1961); Katzenbach & Lipson, *op. cit. supra* note 19.

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vention defines space or space boundaries, but who would question that Gagarin, Titov, Shepherd, Grissom, Glenn Carpenter, Schirra, Nikolayev and Popovich operated in space, while high powered and high flying jets, even at over 13 miles altitude, are within airspace subject to sovereignty?<sup>21</sup> Who does not recognize and treat the 1959 Soviet landing on the moon or the 1962 American Mariner flight to Venus as spatial or celestial body efforts rather than pertaining to aeronautics and airspace? The absence of international agreements as to what nations mean by space and their work therein has not adversely affected these efforts.<sup>22</sup>

In like manner, those nations operating in space, during the five years of the space age, have established that space is open to all nations possessing the ambition and resources—human and material—to enter and operate in it for peaceful purposes.<sup>23</sup> Neither the Soviet Union nor the United States at any time requested permission from any other nation to launch and orbit spacecraft or presumed to object to the satellite or manned flights in space sponsored by the other. Nor has any other nation, over whose lands these vehicles and persons have time and again traversed, objected. The custom of nations has declared outer space and celestial bodies to be free for the use of all states.<sup>24</sup>

Similarly, the circumstances and events attending the Soviet Union's landing "pennants with the Arms of the Soviet Union and an inscription 'the Union of the Soviet Socialist Republic,' " on the moon on September 13, 1959, support the accepted practice and principle that no claims to exclusive occupation or appro-

<sup>21</sup> See events incident to the Summit Conference, *Hearings Before the Senate Committee on Foreign Relations*, 86th Cong., 2d Sess. (1960); 42 Dept of State Bull. 816-818, 851-853, 900, 905 (1960); 43 *id.* 276-277, 350, 361 (1960).

<sup>22</sup> This is not to deprecate the valuable precursive work of the scholars and experts, some of whom are named, who greatly aided our thinking on the question.

<sup>23</sup> On September 5, 1962, Deputy Secretary of Defense Roswell L. Gilpatric said: "The United States believes that it is highly desirable for its own security and for the security of the world that the arms race should not be extended into outer space and we are seeking in every feasible way to achieve that purpose.

"Today there is no doubt that either the United States or the Soviet Union could place thermonuclear weapons in orbit, but such an action is just not a rational military strategy for either side for the foreseeable future.

"We have no program to place any weapons of mass destruction into orbit. An arms race in space will not contribute to our security. I can think of no greater stimulus for a Soviet thermonuclear arms effort in space than a United States commitment to such a program. This we will not do." *New York Times*, Sept. 12, 1962, p. 13, col. 1.

<sup>24</sup> *But see* Jessup & Taubenfeld, *Controls for Outer Space* 257-266 (1959).

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priation of celestial bodies are to be made or, if made, will be recognizable.<sup>25</sup>

The resolution of the United Nations General Assembly, adopted on December 20, 1961, simply restated what experience and practice taught when it declared:

The General Assembly . . . Commends to States for their guidance in the exploration and use of outer space the following principles:

(a) International Law, including the Charter of the United Nations, applies to outer space and celestial bodies;

(b) Outer space and celestial bodies are free for exploration and use by all States in conformity with international law and are not subject to national appropriation . . . .<sup>26</sup>

### III. FUTURE DEVELOPMENT

No one will seriously question the progress which has been made in space law notwithstanding the cautious and wary approach of states to enter into written agreements on the subject. There is no anarchy, whether viewed as an absence of law or as a disorderly condition of affairs, in space. Custom and practice, as well as the generally accepted principles of right and justice, have, to date, been adequate to satisfy the legal needs of those operating there. These sources, moreover, have supplied valuable flexibility which will continue to be requisite to further advances in this unconventional environment.

International lawyers of the future also will, no doubt, find it desirable from time to time to modify and adapt recognized formulae, custom and practice, whether or not contained in treaties, to accommodate and facilitate the growth and progress of nations and mankind in outer space. It bears reiteration that, while lawyers have an interest in excluding obstructions or barriers which might hinder scientific progress and activity in space, reliance upon definitive agreements on principles is not the only

<sup>25</sup> For a fuller discussion of this matter, see Jaffe, *International Law and Space Exploration*, 6 St. Louis U.L.J. 68 (1960). *But see* Note, *National Sovereignty of Outer Space*, 74 Harv. L. Rev. 1154, 1168 (1961). The argument that practice or usage ripens into custom only when repeated or continued, Kelsen, *Principles of International Law* 307 (1952), should not be strictly construed with respect to space activity, where some occurrences, such as unmanned or manned orbits, are repeated while some, such as the moonshot are unrepeatable. The character of the effort and its distinctive incidents, when analyzed, support the rule in the absence of repetition or continuation. See Westlake, *International Law* 16 (1904): "[I]t is enough to show that the general consensus of opinion . . . is in favor of the rule."

<sup>26</sup> U.N. Gen. Ass. Off. Rec. 16th Sess., Supp. No. 17 (A/5100, pp. 6-7) (Res. No. 1721) (1961). 46 Dep't of State Bull. 186-186 (1962); 56 Am. J. Int'l L. 946-947 (1962).

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method to accomplish this. Accordingly, hasty attempts to incorporate and integrate ideas and aspirations in conventions should be avoided. Rather, lawyers should wait for the scientists and technicians to point up the necessitous situation or to call upon them as the need exists.

It does not seem likely that if, in September 1957, the international lawyers had sat down to write a comprehensive code of space law they would have promoted as effectively the efficient progress of the technicians and astronauts which has been achieved in the absence of such code, treaty or restatement of international law in space or the celestial bodies.

We shall be working and, pressing forward, advancing in space for a long time to come. We do not now know what will be accomplished. We can be sure though that there will be new, even now unimagined, situations, problems and emphases of concern to lawyers which cannot reliably be predicted or defined. We must guard against prematurely believing that solutions for all problems have been reached. Especially in the endeavors of nations in space, where even the facts of our problems are in the unplumbed future, caution should be exercised in seeking to state definitive rules in plenary conventions. It should also be appreciated that merely setting them up in conventions or international agreements does not promote their workability and adaptability and progress in space.<sup>27</sup> Indeed adverse consequences may accrue therefrom. In the meantime, we have much in accepted international law to guide us.<sup>28</sup>

### IV. GUIDES FOR DEVELOPMENT

This is not to say that all of the existing bodies of law should be applied automatically and without modification wherever possible. The law of the open seas or the law of claims to newly

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<sup>27</sup> Statistics also should give us pause. From 1919 to the present time, approximately 5,000 multi- and bi-partite international instruments were concluded. 1 Hudson, *International Legislation* xix-xxxvi (1950). The suspenseful state of peace and uncertainty in other phases of international relations in the face of this spate of agreements points up the limitations of such agreements.

<sup>28</sup> See Restatement, *Foreign Relations Law of the United States*, approved May 1962. The Restatement includes the general rules of international law applicable to the United States in its international commerce with other states. The rules are stated not only from the official view of the United States but also as prediction of what an international court would hold in relevant situations. The Restatement, accordingly, reflects the consensus of the international community. Restatement, *Foreign Relations Law of the United States* (Tent. Draft), in 55 *Am. J. Int'l L.* 428 (1961).

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discovered lands or Antarctica are not *ipso jure* to be applied or followed in matters of space. Some of the rules applicable on earth may not be applicable to space and even the principles applicable on earth are not the last and best products.<sup>29</sup> The demise of the "usque ad coelum" formula and the efforts to revise and codify the law of the sea are in point. The "usque ad coelum" view did not survive serious thought following the launchings by the Soviet Union and the United States of the first artificial satellites.<sup>30</sup> And the law of the sea, which was not much affected by conventions, treaties, and other formalizations of international law,<sup>31</sup> has, notwithstanding extensive study, debate, drafting and entry into formal agreements of late, not yielded fruitful and significant advances.<sup>32</sup>

Professor S. V. Molodtsov of the USSR also has alerted lawyers on this score. "The mechanical transfer of the regime of the open seas to outer space," he wrote, "is incorrect. It is possible to borrow some principles, some individual rules of sea law, for example, the rule about the exclusive jurisdiction of the flag state over its ships. . . . But on the whole, the regime of the open seas must not be carried over to outer space, because in the open seas there exists the practice of using the space of the open seas for military purposes."<sup>33</sup>

### A. GOALS OF SPACE EXPLORATION

Rather, consideration should be given to what mankind and nations are seeking in space. It is assuredly not disputation or

<sup>29</sup> See, for amplification of this point, Jaffe, *Some Considerations in the International Law and Politics of Space*, 5 St. Louis U.L.J. 375 (1959), and authorities cited therein.

<sup>30</sup> Klein, *Cujus Est Solum—Quousque Tandem*, 26 J. Air L. & Com. 237 (1959); Anderson, *Some Aspects of Airspace Trespass*, 27 J. Air L. & Com. 341 (1960). See *United States v. Causby*, 328 U.S. 256, 261 (1946): ". . . [T]hat doctrine has no place in the modern world" (Douglas, J.); *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

<sup>31</sup> McDougal & Burke, *Crisis in the Law of the Sea: Community Perspectives Versus National Egoism*, 67 Yale L.J. 560 (1958).

<sup>32</sup> See 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); Jessup *The United Nations' Conference on Law of the Sea*, 59 Colum. L. Rev. 234 (1959); Jessup, *The Law of the Sea Around Us*, 55 Am. J. Int'l L. 104 (1961); McDougal, Burke & Vlasic, *The Maintenance of Public Order at Sea and the Nationality of Ships*, 54 Am. J. Int'l L. 25 (1960); Bowatt, *The Second United Nations' Conference on the Law of the Sea*, 9 Int'l & Comp. L.Q. 415, 432-435 (1960); Hydeman & Berman, *International Control of Nuclear Maritime Activities* 237 (1960); McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 Yale L.J. 648, 660 (1955); *United States v. Louisiana*, 363 U.S. 1 (1960).

<sup>33</sup> Molodtsov, *The International Legal Regime of the Open Seas and the Continental Shelf* 185 (1961).

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war, or even the establishment of a legal regime. It is the increase of learning and skill in the newly opened milieu which can be promoted only in peace with the widest possible latitude to those states operating in space. The legal regime should, so far as possible, be responsive to the necessities of those states in promoting the full use of their resources and talents in space. The rules in and for space need not depend upon and reflect man's unhappy experience on earth but should seek to develop afresh flexible arrangements which will not impede man's attainment of his legitimate peaceful goals.<sup>34</sup>

No formal declaration of this desire, such as the General Assembly's Resolution of December 1961, is needed to proclaim "the common interest of mankind in furthering the peaceful uses of outer space and the urgent need to strengthen international cooperation in this important field" or that "the exploration and use of outer space should be only for the betterment of mankind and for the benefit of states irrespective of the stage of their economic or scientific development."<sup>35</sup> Experience has made these principles plain, notwithstanding isolated expressions of inconsistent views.<sup>36</sup>

Given these goals, formally or informally expressed, international law and practice do furnish aids to their achievement. Just as the basis for freedom of space was found in the unprotected passage of the Soviet Union's and the United States' artificial and manned spacecraft over the territories of all nations of the world,<sup>37</sup> the rule, established by experience, that no nation presumes to assert the right to shoot down foreign aircraft over the high seas,<sup>38</sup> except in the legitimate exercise of the right of self defense, may be said to have yielded a comparable rule in the

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<sup>34</sup> ". . . [S]pace can be explored and mastered without feeding the fires of war, without repeating the mistakes that man has made in extending his writ around this globe of ours. There is no strife, no prejudice, no national conflict in outer space. Its hazards are hostile to us all. Its conquest deserves the best of all mankind and its opportunity for peaceful cooperation may never come again." President Kennedy, *supra* note 1, p. 16, col. 6. See note 23 *supra*.

<sup>35</sup> U.N. Gen. Assembly, *supra* note 26.

<sup>36</sup> The force of such declarations, as in the instance of the unprotected orbits which are regarded as establishing freedom for all nations in space, are brought into question somewhat by insinuations of inconsistent policies. See Crane, *Soviet Attitude Toward International Space Law*, 56 Am. J. Int'l L. 685, 686, 690-691, 710-723 (1962).

<sup>37</sup> Lissitzyn, *Some Legal Implications of the U-2 and RB 47 Incidents*, 46 Am. J. Int'l L. 135 (1962).

<sup>38</sup> *Id.* at 140.

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field of outer space and spacecraft.<sup>39</sup> The drafting and adoption of a comprehensive code of space law would not seem to be required to secure these rules.

These basic principles of international law, the openness of space to all, the right to conduct peaceful flights and exploration in outer space, and the disclaimer of basis for claims to lunar or celestial surfaces, are, in my view, sufficient for the time being to permit maximum exploitation of space for peaceful purposes.<sup>40</sup>

### B. MACHINERY OF THE UNITED NATIONS

Nor should we overlook the extant principles and machinery, set up in the United Nations Charter, which can be employed in appropriate cases for resolution of disputed matters arising in space.<sup>41</sup> Examples are paragraphs 3 and 4 of Article 2 of the Charter which require all members to settle their disputes by peaceful means, to act in such manner that international peace, security, and justice are not jeopardized, and to refrain from the threat or use of force against other states, except, pursuant to the rights of self defense set forth in Article 51. It should be recognized that there is agreement on broad principles and to stand aside to allow the details and particular applications to be worked out on opportune occasions when additional relevant

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<sup>39</sup> Crane, *supra* note 36, at 698. But Dr. G. A. Zadorozhny has stated, ". . . individual states should have sovereign rights over their satellites, space ships, and extraterrestrial installations, unless international agreements are concluded in each individual case" (emphasis supplied). Zadorozhny, *Basic Questions of Space Law*, reported in *Stuttgarter Zeitung*, Nov. 11, 1960, p. 4, col. 2.

<sup>40</sup> Other areas susceptible to agreement include registration, rescue and liability. The United Nations Resolution of December 1961, *supra* note 26, calls upon states "launching objects into orbit or beyond" promptly to furnish information thereon to the Secretary General. Motivated by pride and interest in prestige, successful launchings would, without such provision, be reported by the launching state. Under the terms of the Resolution, however, unsuccessful launchings need not, and possibly would not, be registered. See *New York Times*, Sept. 9, 1962, p. E-3, col. 1. The problem of rescue, with its humanitarian overtones, could well be dealt with by a United Nations resolution, for example, or by statements of leaders of governments, rather than by a negotiated agreement. On the subject of liability for damage from space operations or on the duties and rights of persons in space *inter se*, see Simeone, *Private Rights and Space Activity*, 6 *St. Louis U.L.J.* 50, 57-65 (1960); *Id.*, *Space—A Legal Vacuum*, *Mil. L. Rev.*, April 1962, p. 43, 50.

<sup>41</sup> The development of the United Nations and its adaptability to changing international societal needs, illustrated by the shift of initiative and influence from the Security Council to the General Assembly and the development of the office of the Secretary General or Acting Secretary General, is an earnest of increased capacity to accommodate peaceful progress in outer space. See Jennings, *op. cit. supra* note 7, at 37.

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facts will be known. Pending that, the lawyers of the world should continue their studies, meetings and discussions to seek to ascertain and formulate additional rules and principles on which agreement is forthcoming or on which doubt, uncertainty or disagreement on the detailed application of the principles appears.<sup>42</sup>

At the same time unreasonable demands on international law should not be made. International law cannot be expected to resolve the great issues on earth that have the potential to produce all-out war and should not be disparaged because of its limited capability or inability to resolve such overwhelming issues.<sup>43</sup> So too in space activity we should not seek comprehensive and decisive coverage of all situations and problems.

This position is, of course, opposed by some who have faithfully and beneficially studied the subject. It is characterized as "temporizing" by very respectable authorities who, for example, go so far as to argue that this approach is "potentially the direct path to the inferno of a space free-for-all . . . (meaning) a surrender on . . . peace in space (and) that space use will be a new cause as well as a new avenue of war."<sup>44</sup> However, assuming that the space powers desire to seek progress with order and peace in space, it is submitted that it is not inevitable that space activity, in the absence of negotiated formal agreements, will result in conflict. Without such desire, or even in the face of it, the attempt to solve hypothetical legal problems in space before they arise, relying

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<sup>42</sup> See Hurst, *International Law, The Collected Papers of Sir Cecil Hurst*, 132-133 (1950). In this connection, the recent announcement that fellowships for studies on the legal aspects of space activities have been awarded by the American Society of International Law under a study program financed by the Ford Foundation is welcome. See 56 *Am. J. Int'l L.* 790 (1962).

<sup>43</sup> Jessup, *The Use of International Law* (1959).

<sup>44</sup> Taubenfeld, *A Regime for Outer Space*, 56 *Nw. U.L. Rev.* 129, 144 (1961). But Professor Taubenfeld recognizes that there are difficulties of a political character in such matters as the boundary between airspace and outer space and the need to consider "scientific reasonableness" and "political reasonableness" in dealing with the definition of space (*Id.* at 145), as well as the inherent constraints flowing from the political facts of international life which make success of negotiations, looking to formal agreements between space-engaged nations, improbable even as general disarmament negotiations are "ill starred" (*Id.* at 149). Moreover, he states that "delicate security considerations . . . make the international solution of even the less significant problems of space penetration quite difficult" and that a solution to the problem of assuring peaceful uses of space, being inextricably bound up with the problem of peace on earth, would require "a world confederation with a monopoly of force, including complete control over the member state's space- and air-going missile capacity" as a long-run solution (*Id.* at 163-164). It would, in my view, be premature to resort to this "politically possible partial space regime," as Professor Taubenfeld characterizes it.

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on incomplete and inadequate knowledge, can only tend to promote confusion and conflict.<sup>45</sup>

It also has to be recognized that even successful efforts resulting in integrated international agreements covering rights, duties, liabilities, and immunities of nations in space, no matter how definitive, cannot for long stand alone. Reference should be made to the recent Advisory Opinion of the International Court of Justice, on the obligations of members of the United Nations to pay expenses of its peace-keeping forces. In that case the question submitted for the review and the opinion of the Court was merely the identification of "the expenses of the organization."<sup>46</sup> In resolving what at first blush seems a simple issue involving interpretation of some 69 words, the Court required some 70,000 words for the controlling opinion and the separate concurring and dissenting opinions.<sup>47</sup> The point is that even a formal comprehensive agreement is no panacea and cannot, standing alone, be relied upon to cope with dynamic realities.<sup>48</sup> Nor is the integrated agreement a substitute for customary relevant practice on general principles, such as, for example, those treating with the privilege of self-defense. Such principles are available for application, when relevant, to situations arising even in outer space.

In view of these considerations, it is submitted that, in the matter of the international law of space, we cannot realistically,

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<sup>45</sup> Professor Taubenfeld concedes: "It is true that many of the legal problems of space should be solved as they arise, for we lack much necessary knowledge about the space environment, but this can surely be accomplished most effectively within an intelligently organized cooperative space regime. Indeed, it is a handy rule for political affairs that technical problems such as the development of the rules of the road, should be allowed to ripen (though probably not until after the first collision has occurred), but that the political institutions for settling them should be developed before the political situation is allowed to rot." Taubenfeld, *supra* note 44, at 166.

<sup>46</sup> Art. 17 of the Charter of the United Nations reads:

"1. The General Assembly shall consider and approve the budget of organization.

"2. *The expenses of the Organization* shall be borne by the Members as apportioned by the General Assembly.

"3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned" (emphasis supplied).

<sup>47</sup> New York Times, July 21, 1962, p. 2, col. 1.

<sup>48</sup> Mr. Harold Nicholson, a veteran member of Parliament and the British diplomatic service, commenting on the U.N. Charter has written: "In many ways it is an honest and competent document. Yet the gap which has been created between reality and unreality constitutes a serious menace. Nicholson, *Diplomacy Then and Now*, 40 Foreign Affairs 39, 48 (1961).

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and therefore should not, look for insurance policies covering future conduct of nations in outer space. We should rather be conscious of inherent limitations upon the usefulness of such definitive contracts respecting outer space,<sup>49</sup> and realize that the absence of such agreements may indeed, at least for the time being, constitute the healthier situation.<sup>50</sup> After all, it is society's advancement which we seek to facilitate and promote and not governments' needs. The distinction is an important one. Thomas Paine, the great American revolutionary, first pointed it up when he wrote in his immortal *Common Sense*:

Some writers have so confounded society with government, as to leave little or no distinction between them; whereas they are not only different, but have different origins. Society is produced by our wants and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices. The one encourages intercourse, the other creates distinctions. The first is a patron, the last a punisher.

Society in every state is a blessing, but government, even in its best state, is but a necessary evil. . . . [W]ere the impulses of conscience clear, uniform and irresistibly obeyed, man would need no other law-giver; but that not being the case, he finds it necessary to surrender up a part of his property to furnish means for the protection of the rest.<sup>51</sup>

MORTON S. JAFFE\*

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<sup>49</sup> The problem of disputes, litigation and jurisdiction of the International Court of Justice, and enforcement of its decrees should be noted. The reservation of jurisdiction of domestic matters by certain states, together with its contemporary reciprocity features, even in the face of treaties, makes advances in the international law of space by resort to that vehicle, difficult. Efforts need to be made by those interested in the advance of international law generally to promote adjudication of disputes by the International Court, for "there can be no true rule of law in international or any other society unless it is possible for a party to a dispute to get a court to find what the law is in relation to that dispute." Jennings, *op. cit. supra* note 7, at 47. It may be observed further in this connection, that the teaching of history is that when adjudications have been forthcoming, their execution has almost invariably followed. ". . . [O]f the several hundreds of Awards or Judgments made in the last century or so, the ones in which execution has been resisted can be numbered on the fingers of one hand." *Id.* at 23.

<sup>50</sup> Katzenbach & Lipson, *op. cit. supra* note 19, at 14, 63.

<sup>51</sup> 1 Complete Writings of Thomas Paine 4-5 (Foner ed. 1945).

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## TRAVEL ORDERS: A MOVE TOO SOON CAN BE COSTLY.\*

An Air Force doctor and an Army lieutenant colonel recently and rather dramatically learned the importance of properly ascertaining the rules governing the payment of travel allowances. The facts involved are stated in the following accounts from the *Army Times*:

### ASK PAYMENT, GETS BILL FOR \$163

A former Air Force doctor asked the Comptroller General to authorize a refund for shipment of his household goods from Alaska to California and wound up in debt to the tune of \$163.

The officer was slated to leave Alaska in December 1956 for McChord [Air Force Base in Washington] . . . to be processed for separation. His family and household goods left in August. He was paid for shipment of his goods only to McChord and not to his home in Baldwin Park, California. The Comptroller [General] said regulations allow payment only to a port of debarkation when dependents leave an overseas area before their sponsors receive their own travel orders.

"Since your dependents did not travel and your household effects were not shipped from the port of debarkation to your home incident to the orders directing your return to the United States . . . but were already at your home, having arrived there prior to any orders authorizing such transportation, there is no legal basis for the payment of your claim," the Comptroller said.

Almost as an afterthought, the Comptroller said that records showed that the officer received \$163.68 in mileage for his dependents' travel from McChord to Baldwin Park. No such payment was authorized because it took place beyond the port of debarkation. The Comptroller [General] told the man to expect a statement of indebtedness to Uncle Sam totaling \$163.68.

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### A MOVE "TOO SOON" IS COSTLY

The Comptroller General has turned down a bid by an Army man for refund of dependent travel expenses and dislocation allowance because his family moved too soon.

Lieutenant Colonel Joseph F. Schultz's orders called for a 30-day delay enroute before he headed to Vietnam for an unaccompanied tour. He and his family left Fort Eustis, Virginia, for Pittsburgh, Pennsylvania. During the leave Schultz was hospitalized, his orders were cancelled, and he was reassigned to Eustis.

Schultz claimed the Army owed him for (1) his dependents' travel expenses from Eustis to Pittsburgh and back to Eustis, (2) his travel to Pittsburgh and return, and (3) a dislocation allowance.

Comptroller Joseph Campbell held that leaves are for the convenience of members but that departure from a duty station is not required until

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

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the minimum time it takes to get to a new station. Had Schultz and his family not moved until later, Campbell said the orders would have been cancelled officially before any move was made.

According to regulations, Schultz's travel was considered unnecessary, Campbell indicated.<sup>1</sup>

Although the rules applied by the Comptroller General in deciding the two cases reported by the *Army Times* are not new, the publicity given these and similar cases indicates that these rules are not well-known. As what happened to the two individuals involved in these cases could happen to any member of the uniformed services, an examination of these perplexing problems seems warranted.

Experience indicates that where the "rules of the game" are known, losses sustained as a result of risks knowingly undertaken are usually accepted with the stoicism of a professional gambler. On the other hand, the mental anguish and feeling of frustration frequently experienced as the result of the application of complex and detailed rules of Government administration—which rules are often either not known to the "victim" or are misinterpreted by him—is saddening to behold. It should be noted, however, that the material loss will be the same in both cases.

### I. TRAVEL AND TRANSPORTATION ALLOWANCES IN GENERAL

Under regulations prescribed by the Secretaries concerned, a member of a uniformed service<sup>2</sup> is entitled to travel and transportation allowances for travel performed or to be performed *under orders*—

- (1) upon a permanent change of station;
- (2) on temporary duty away from his permanent station;
- (3) from home to his first duty station; and
- (4) from his last duty station to his home.<sup>3</sup>

While travel and transportation allowances may be paid in ad-

<sup>1</sup> *Army Times*, Nov. 10, 1962, p. 42.

<sup>2</sup> The term "uniformed service" means one of the following: Army, Navy, Air Force, Marine Corps, Coast Guard, Coast and Geodetic Survey, Public Health Service. Accordingly, the "Secretaries concerned" are the Secretaries of the Army, the Navy, the Air Force, the Treasury, Commerce, and Health, Education, and Welfare. The Secretaries concerned have collaborated in publishing the Joint Travel Regulations (hereafter referred to and cited as JTR), which govern in great detail, entitlement to travel and transportation allowances.

<sup>3</sup> 37 U.S.C. § 404(a) (Supp. IV, 1962) (emphasis supplied). Unless otherwise indicated, references to Title 37, United States Code, are to that title as codified by the Act of September 7, 1962, 76 Stat. 451.

vance, if the contemplated travel is not performed they must be refunded to the Government. The single exception to this rule is that "the travel and transportation allowances authorized . . . may be paid on the member's separation from the service or release from active duty, whether or not he performs the travel involved."<sup>4</sup>

Although many varied and complex problems are encountered daily in the administration of laws and regulations pertaining to travel and transportation allowances, this discussion will be limited to a consideration of two situations which often result in severe personal hardship to seemingly blameless individuals, namely (1) where travel is performed prior to the issuance of orders, and (2) where orders are revoked or amended after some or all of the travel has been performed. The travel and transportation allowances usually involved are: (1) monetary allowance for a member's travel, (2) monetary allowance for travel of a member's dependents, (3) shipment of household goods at Government expense, and (4) dislocation allowance.

## II. TRAVEL PERFORMED PRIOR TO ISSUANCE OF ORDERS

With certain exceptions to be discussed later, reimbursement for travel is not authorized when travel is performed in anticipation of or prior to receipt of orders.<sup>5</sup> This rule can be easily illustrated by a few hypothetical cases.

*Case 1.* Captain A, a member of the Judge Advocate General's Corps, was stationed at Fort Sam Houston, Texas. He and his wife resided at San Antonio, Texas. In June 1961, Captain A's wife traveled from San Antonio to visit her parents at Charlottesville, Virginia. In July 1961 orders were issued transferring Captain A to Charlottesville, Virginia, for duty with the staff and faculty of The Judge Advocate General's School. Captain A's wife did not return to San Antonio, but remained in Charlottesville.

In this case Captain A would not be entitled to a travel allowance for his wife's travel from San Antonio to Charlottesville, as she performed this travel prior to the issuance of the orders effecting her husband's transfer. Had Captain A's wife returned to San Antonio the allowance would have been payable for her further travel back to Charlottesville.<sup>6</sup>

<sup>4</sup> 37 U.S.C. § 404(f) (Supp. IV, 1962).

<sup>5</sup> Joint Travel Regs. for the Uniformed Services, Change No. 106, para. 3000-2 (July 1, 1961) (hereinafter cited as JTR, para. \_\_\_).

<sup>6</sup> JTR, Change No. 108, para. 7056 (Oct. 1, 1961).

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*Case 2.* Assume the facts of Case 1 except that Captain A's wife is visiting her parents at Washington, D.C., rather than at Charlottesville.

Captain A would be entitled to an allowance for his wife's travel from Washington to Charlottesville, as only that portion of the travel was performed after the issuance of orders.<sup>7</sup>

*Case 3.* Captain B was stationed at Washington, D.C. When he received orders to Charlottesville, Virginia, his wife was visiting her parents at San Antonio, Texas.

Captain B is entitled to travel allowance for his wife for the distance from Washington, D.C., to Charlottesville, Virginia, only.<sup>8</sup>

The above cases illustrate the general rule that travel allowances are not authorized where the travel is performed prior to the issuance of travel orders. To this rule there are exceptions.

A member may be reimbursed for travel of his dependents performed prior to the issuance of travel orders if the voucher is supported by a certificate of the commanding officer, or his designated representative, of the headquarters issuing the orders that the member was advised prior to the issuance of change-of-station orders that such orders would be issued.<sup>9</sup>

As a second exception to the general rule, it is provided in Title 37, United States Code, § 406(e) that—

When orders directing a change of permanent station for the member concerned have not been issued, or when they have been issued but cannot be used as authority for the transportation of his dependents, baggage, and household effects, the Secretaries concerned may authorize the movement of the dependents, baggage, and household effects and prescribe transportation in kind, reimbursement therefor, or a monetary allowance in place thereof . . . This subsection may be used only under unusual or emergency circumstances, including those in which—

(1) the member is performing duty at a place designated by the Secretary concerned as being within a zone from which dependents should be evacuated;

(2) orders which direct the member's travel in connection with temporary duty do not provide for return to the permanent station or do not specify or imply any limit to the period of absence from his permanent station; or

(3) the member is serving on permanent duty at a station outside the United States, in Hawaii or Alaska, or on sea duty.

<sup>7</sup> JTR, Change No. 108, para. 7058 (Oct. 1, 1961).

<sup>8</sup> *Ibid.* Although the travel from San Antonio to Charlottesville was performed after orders were issued, in no event may the entitlement exceed the distance from the old permanent station to the new permanent station.

<sup>9</sup> JTR, Change No. 108, para. 7000-9 (Oct. 1, 1961).

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It was pursuant to this statutory exception that the Air Force doctor referred to in the *Army Times'* story claimed reimbursement.

An examination of the decision of the Comptroller General in the case reported reveals the facts set forth below.<sup>10</sup>

The claimant was an Air Force officer stationed in Alaska. By special orders issued June 6, 1956, by the claimant's parent unit, advance return of the claimant's dependents from Alaska was authorized, as was shipment of his household goods. The orders specifically provided, however, that transportation beyond McChord Air Force Base, State of Washington, [place of entry] was not authorized prior to return of the claimant to the United States under permanent change of station orders. Pursuant to those orders, the claimant's dependents departed Alaska on August 1, 1956, arrived at McChord Air Force Base on August 2, 1956, and then proceeded to Baldwin Park, California, arriving there on August 6, 1956. His household goods were transported from Anchorage, Alaska, to Baldwin Park, California, during September 1956, by commercial carrier.

By special orders issued December 10, 1956, the claimant was transferred to Norton Air Force Base, California, for processing and release from the service. Thereafter the claimant requested reimbursement for transportation of his household goods from Seattle, Washington, (port of debarkation) to his home in Baldwin Park, California. (His household goods had been moved from Alaska to Seattle at Government expense, and, as will be discussed later, he had received travel allowances for the entire distance traveled by his dependents.)

Initially, the Comptroller General noted the statutory authority for the payment of travel and transportation allowances upon the advance return of dependents from overseas areas.<sup>11</sup> However, the Comptroller General also stated that those "provisions are not self-executing, however, but require the issuance of regulations by the Secretaries of the services concerned." Regulations then in effect provided for transportation of dependents and household goods, in cases of advance return, only to the port of debarkation.<sup>12</sup>

Accordingly, the Comptroller General denied the claim for reimbursement for shipment of claimant's household goods beyond Seattle, Washington, saying:

<sup>10</sup> Ma. Comp. Gen. B-149770 (Oct. 15, 1962).

<sup>11</sup> 37 U.S.C. § 406(e) (Supp. IV, 1962).

<sup>12</sup> JTR, paras. 7009-3, 8010-2. The regulations currently in effect (para. 7009-3, Change No. 109 (Nov. 1, 1961) and para. 8301, Change No. 108 (Oct. 1, 1961)) do not limit travel and transportation to the port of debarkation.

## MILITARY LAW REVIEW

The above regulatory provisions, promulgated pursuant to statutory authority, have the force and effect of law and we may make no exception to such provisions in the settlement of claims by our office. The plain terms of these provisions have consistently been held as limiting reimbursement for transportation of dependents and household effects beyond the port of debarkation to expenses incurred for such travel and transportation performed *after* issuance of permanent change of station orders to the member. Therefore, even though orders were subsequently issued on December 10, 1956, thereafter authorizing the transportation of your dependents and household effects to your home, such orders afford no basis for allowing reimbursement for the transportation which had already taken place.<sup>13</sup>

To compound (in the eyes of the claimant) the injury, the Comptroller General concluded his decision as follows:

Although, as stated above, there was no authority for transportation of your dependents at Government expenses beyond the port of debarkation, the record shows that by voucher dated January 30, 1957, you were paid mileage in the amount of \$183.68 for your dependents' travel from McChord Air Force Base, Washington, to Baldwin Park, California. Thus, the amount of such payment will be included in a revised and complete statement of your indebtedness to the United States which will be furnished you by our Claims Division.<sup>14</sup>

### III. THE EFFECTIVE DATE OF TRAVEL ORDERS

Probably the most important single provision of the Joint Travel Regulations is a seemingly innocuous subparagraph contained in paragraph 3003, *Types of Orders*, which reads as follows:

b. *Effective Date.* The effective date of orders is the date of the member's relief (detachment) from the old station; except:

- (1) When leave or delay prior to reporting to the new station is authorized in the orders or the member is granted additional travel time to permit travel by a specific mode of transportation, the amount of such leave, delay, or additional travel time will be added to the date of relief (detachment) to determine the effective date.
- (2) When the orders involve temporary duty at one or more places en route to a permanent duty station in a nonrestricted area, the effective date, for the purpose of dependent travel and shipment of household goods, is the date of relief (detachment) from the last temporary duty station, plus leave, delay, or additional travel time allowed for travel by a specific mode of transportation, authorized to be taken after such detachment; or
- (3) When the orders involve temporary duty at one or more places en route to a permanent duty station in a restricted area, the effective date, for the purpose of dependent travel and ship-

<sup>13</sup> Ms. Comp. Gen. B-149770, *supra* note 10, at p. 3.

<sup>14</sup> *Ibid.*

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ment of household goods, is the date of relief (detachment) from the permanent duty station plus leave, delay, or additional travel time allowed for travel by a specific mode of transportation, authorized to be taken prior to the member's reporting to the first temporary duty station.

If all authorized leave, delay, or additional travel time is not utilized, only that amount actually utilized will be considered in determining the effective date of orders.<sup>15</sup>

These are some of the "rules of the game," the significance of which is usually learned too late, for the lesson is frequently the incident giving rise to their application. These are the rules which operated to the financial detriment of Lieutenant Colonel Schultz and many others before him.

The Comptroller General has consistently held that no travel is required in connection with a permanent change of station until the date the member must depart his old station in order to report to his new station on the date specified in his travel orders.<sup>16</sup> In such cases the travel time required is computed on the basis of "ordinary means of transportation (rail unless otherwise specified)."<sup>17</sup> These decisions of the Comptroller General have resulted in that part of the Joint Travel Regulations which defines the term "effective date of orders."<sup>18</sup> As travel and transportation allowances are only payable for travel performed or to be performed "under orders,"<sup>19</sup> that is, *required* to be performed, the revocation or amendment of travel orders *prior to their effective date* may result in the member concerned being required to bear the expense of travel performed prior to such revocation or amendment. The application of these rules is illustrated by the following examples.

*Case 4.* Captain A was directed to proceed on permanent change of station from Washington, D.C., to Fort Sam Houston, Texas, to report thereat not later than June 3, 1962. Rail travel time from Washington to San Antonio is three days. Captain A departed Washington by rail on June 1, 1962, and reported to Fort Sam Houston on June 3, 1962. On June 2, 1962, Captain A's orders were revoked. Learning of the revocation on his arrival at Fort Sam Houston, Captain A returned to Washington.

<sup>15</sup> JTR, Change No. 106, para. 3003-1b (July 1, 1961). The term "restricted area" means a place where dependents are not permitted.

<sup>16</sup> 36 Comp. Gen. 257 (1956); 33 Comp. Gen. 289 (1954); 31 Comp. Gen. 156 (1951); 18 Comp. Gen. 536 (1938); 8 Comp. Gen. 524 (1929); 2 Comp. Gen. 638, 642 (1928); Ms. Comp. Gen. B-149242 (Sept. 25, 1962).

<sup>17</sup> 33 Comp. Gen. 289 (1954).

<sup>18</sup> Note 15 *supra*.

<sup>19</sup> 37 U.S.C. § 404(a) (Supp. IV, 1962).

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As there was no leave, delay or additional travel time involved, the effective date of Captain A's orders was June 1, 1962.<sup>20</sup> As his orders were revoked *after* their effective date, Captain A is entitled to travel allowances for his travel from Washington to San Antonio and return.<sup>21</sup>

*Case 5.* Captain A was directed to proceed on permanent change of station from Washington, D.C., to Fort Sam Houston, Texas, to report thereat not later than June 25, 1962. His orders authorized him to travel by privately owned vehicle. The travel time by train to Fort Sam Houston is three days, while the travel time by automobile is five days. Captain A departed Washington on June 20, 1962, and drove to San Antonio, reporting to Fort Sam Houston on June 25, 1962. On June 21, Captain A's travel orders were revoked. Learning of the revocation on his arrival at Fort Sam Houston, Captain A drove back to Washington.

Captain A is not entitled to travel allowances for the trip from Washington to San Antonio and return. To compute the effective date of Captain A's orders, the number of days of additional travel time allowed him to travel by privately owned vehicle (2 days) must be added to the date of departure (June 20). The effective date of Captain A's orders was, therefore, June 22. As his orders were revoked on June 21, prior to their effective date, he would have received notice of the revocation but for the fact that he departed his station prior to the effective date for his own convenience.

*Case 6.*<sup>22</sup> By orders dated January 23, 1952, Sergeant B was transferred from Fort Dix, New Jersey, to Camp Stoneman, California, for further movement overseas. The orders authorized 13 days' delay en route to count as leave plus 12 days' travel time to permit travel by privately owned automobile, and directed him to report to Camp Stoneman on February 20, 1952.

Sergeant B departed Fort Dix on January 26, 1952, and reported to Camp Stoneman on February 20, 1952. His wife departed Fort Dix on January 26 and traveled to Minnesota.

By orders dated February 13, 1952, Sergeant B's name was deleted from the original travel orders. Sergeant B thereupon returned to Fort Dix, as did his wife.

Sergeant B was held not to be entitled to any travel allowances for any of the travel performed by him and his wife. Using, as did

<sup>20</sup> Note 15 *supra*.

<sup>21</sup> JTR, Change No. 116, para. 4156, Case 4 (July 1, 1962).

<sup>22</sup> The facts of this case are taken from 33 Comp. Gen. 289 (1954).

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the Comptroller General, a rail travel time of four days in this case, the effective date of Sergeant B's orders may be computed as follows: to the date of departure (January 26), add the number of days' leave taken (13) and the number of days' additional travel time allowed to permit travel by automobile (8). Thus, the effective date of Sergeant B's orders was February 16. As stated by the Comptroller General:

Since Sergeant P would not have been required to depart Fort Dix by rail until February 16, 1952, in order to report to Camp Stoneman on February 20, 1952, and since his original orders were canceled by orders issued on February 18, 1952, at Fort Dix, there was no authority for payment of travel allowances for travel performed by him and his wife.<sup>23</sup>

It should be noted that the decisions of the Comptroller General in this area of travel allowances are not founded on the rules concerning the effective date of orders as set forth in the Joint Travel Regulations.<sup>24</sup> To the contrary, the rules contained in the regulations are derived from the prior decisions of the Comptroller General. Accordingly, when it was proposed that the regulations be amended to provide that the "effective date of orders . . . is the date the member departs from the old permanent duty station, regardless of any leave, delay, or temporary duty authorized or directed en route," the Comptroller General stated that such an amendment would go "beyond the scope of the applicable statute and, if promulgated, would be invalid."<sup>25</sup>

The significance of the effective date of travel orders is not limited to cases wherein travel orders have been amended or revoked, but is felt throughout the entire field of travel and transportation allowances. Here, stated briefly, are some of the more important rules involving the effective date of travel orders:

(1) *Shipment of Household Goods.* In connection with a temporary or permanent change of station, a member of a uniformed service is entitled to shipment of his household goods at Government expense.<sup>26</sup> Detailed regulations implementing the statutory authorization are contained in the Joint Travel Regulations.<sup>27</sup>

As household goods must be packed and shipped prior to the effective date of orders to arrive at the new station concurrently with the member, the member is protected from financial loss in the event orders are amended or revoked. In this connection, the regulations provide:

<sup>23</sup> 33 Comp. Gen. at 291.

<sup>24</sup> Note 15 *supra*.

<sup>25</sup> 36 Comp. Gen. 257, 259 (1956).

<sup>26</sup> 37 U.S.C. § 406(b) (Supp. IV, 1962).

<sup>27</sup> JTR, ch. 8.

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Shipment of household goods made after receipt of competent change-of-station orders, but before the effective date thereof, will be forwarded or returned to proper destination at Government expense in case such orders are subsequently amended or cancelled, provided such shipment is made in the best foreseeable interest of the Government and the member.<sup>28</sup>

However, the effective date of travel orders is important in determining what articles may be shipped as household goods. Excluded from the definition of household goods are:

[A]rticles acquired after the effective date of change-of-station orders, except that household goods include otherwise proper articles purchased in the United States, when shipped overseas after approval by the service of which the owner is a member.<sup>29</sup>

(2) *Dislocation Allowance.* With certain exceptions not here material, a member of a uniformed service whose dependents make an authorized move in connection with his permanent change of station is entitled to a dislocation allowance equal to his basic allowance for quarters for one month.<sup>30</sup> The amount payable is an amount equal to the member's quarters allowance for one month on the effective date of his permanent change of station orders.<sup>31</sup> Accordingly, if a member is promoted while he is en route, but before the effective date of his travel orders, he will be paid a dislocation allowance based on the quarters allowance of the grade to which promoted.

(3) *Allowances for Dependents' Travel.* For a member to be entitled to reimbursement for travel of dependents on permanent change of station, the dependency must exist on the effective date of the travel orders,<sup>32</sup> and the dependent must not be a member of a uniformed service on active duty on the effective date of such orders.<sup>33</sup> Furthermore, as the amount of travel allowances for dependents' travel varies with the ages of the dependents,<sup>34</sup> the effective date of the travel orders is important in determining the amount of allowances payable.<sup>35</sup>

<sup>28</sup> JTR, Change No. 113, para. 8014 (April 1, 1962).

<sup>29</sup> JTR, Change No. 108, para. 8000-2 (Item 10) (Oct. 1, 1961).

<sup>30</sup> 37 U.S.C. § 407 (Supp. IV, 1962).

<sup>31</sup> JTR, Change No. 113, para. 9001 (April 1, 1962).

<sup>32</sup> JTR, Change No. 108, para. 7000 (Item 10) (Oct. 1, 1961).

<sup>33</sup> *Id.*, Item 7.

<sup>34</sup> JTR, Change No. 116, para. 7003-2 (July 1, 1962).

<sup>35</sup> JTR, Change No. 91, para. 7087-2 (April 1, 1960). The effective date of orders is not the sole factor to be considered here. The regulations set forth four rules which take into account when the travel is actually performed in relation to the effective date of orders; e.g., if the travel is completed prior to the effective date of orders, entitlement will be based on the attained ages on the date of completion of travel.

## IV. PROPOSED LEGISLATION

Included in the Department of Defense legislative program for the 87th Congress were two proposals directly related to the problems discussed herein. Department of Defense Proposal Number 87-50, entitled "Career Compensation Act, Amend Sec. 303(c) to Permit Advance Movement of Dependents and Effects," was forwarded to the Bureau of the Budget on August 24, 1962, and Department of Defense Proposal Number 87-176, entitled "Travel and Transportation Allowances, Authorize Payment Upon Change of PCS Orders," was sent to the Bureau of the Budget on July 27, 1962.<sup>36</sup> As both of these proposals will undoubtedly be presented to the 88th Congress, their examination here is warranted.

A. DOD PROPOSAL NUMBER 87-50<sup>37</sup>

The purpose of this proposed legislation is to permit the Secretaries concerned to authorize by appropriate regulations the advance return of dependents, household goods and privately owned vehicles of military members from overseas areas to locations in the United States, and to authorize return transportation to the United States of unmarried children of a member who became 21 years of age while the member is assigned on duty overseas.

As noted previously,<sup>38</sup> the present statutory authorization for advance return of dependents and effects from overseas areas requires that unusual or emergency circumstances exist. As the phrase "unusual or emergency circumstances" is not deemed sufficiently broad to cover all cases wherein advance return of dependents and effects may be essential from the standpoint of the morale and welfare of members and their dependents, this limitation has been found undesirable and too restrictive to meet the needs of the services. Other aspects of the proposed bill are self-explanatory.

If enacted, the proposed bill will amend section 406(e) of Title 37, United States Code, by adding the following provision thereto:

<sup>36</sup> Sec'y of Army, Final Report on the Status of the Department of Defense Legislative Program for the 87th Congress (October 1962). (Ed. note—Dep't of Defense Proposals Nos. 87-50 and 87-176 have, subsequent to the writing of this comment, been substantially incorporated into the military pay bill now under consideration by the House Armed Services Committee. H.R. 4696, 88th Cong., 1st Sess. (1963).)

<sup>37</sup> The discussion of this proposed bill is substantially as contained in the letter from the Secretary of the Army forwarding to the Speaker of the House of Representatives a draft of the legislative proposal. Such so-called "Speaker Letters" are prepared for each DOD proposal, with an identical letter being sent in each case to the President of the Senate.

<sup>38</sup> 37 U.S.C. § 406(e) (Supp. IV, 1962), and note 12, *supra*.

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With respect to members serving outside the continental United States or in Alaska, the Secretaries concerned may, in advance of the movement of the member on a change of permanent station, authorize transportation in kind for dependents or reimbursement therefor, or a monetary allowance in lieu of such transportation in kind . . . ; in connection with such advance movement, transportation . . . of baggage and household effects . . . ; and transportation . . . of one motor vehicle . . . from stations outside the continental United States or in Alaska to appropriate locations in the continental United States or its possessions, but not more than one return trip; when such advance movement is determined by the Secretary concerned to be in the best interests of the member or dependent and the Government. The advance movement of a privately owned motor vehicle under this subsection precludes the later movement of another motor vehicle . . . upon the member being ordered to a new permanent duty station in the United States. Transportation of household effects from nontemporary storage to a designated place in the United States is authorized upon the advance return of dependents. For the purpose of entitlement to return transportation of dependents to the United States or its possessions under this subsection, unmarried children who were furnished transportation in kind to the member's permanent duty station outside the continental United States or in Alaska, or for whom the member was entitled to reimbursement therefor, or to a monetary allowance in lieu of such transportation in kind, and who became twenty-one years of age while the member was so serving, shall be considered as dependents.<sup>39</sup>

### B. DOD PROPOSAL NUMBER 87-176<sup>40</sup>

The purpose of this proposed legislation is to authorize the payment of travel and transportation allowances to a member for travel performed by him or his dependents under permanent change of station orders that are modified or revoked.

As hereinbefore noted, the result of pertinent decisions of the Comptroller General is to require a member either to delay the movement of himself and his dependents until the date they must depart in order to reach his new station at the required time (computed by rail travel time), or to assume the risk that his orders may be modified before their effective date. Although this risk is statistically small, the possible financial loss to an individual could cause serious hardship.

Taking leave between permanent stations affords advantages both to the member and to the Government. The member is enabled to travel leisurely with his family, visit relatives and obtain quarters at his new station. The Government is benefited by the member taking care of all such personal matters during this

<sup>39</sup> Dep't of Defense, Legislative Proposal No. 87-50 (1962). See note 37 *supra*.

<sup>40</sup> The discussion of this proposed bill is substantially as contained in the letter from the Secretary of the Air Force forwarding to the Speaker of the House of Representatives a draft of the legislative proposal.

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period of leave, thereby enabling him to devote his full time to his duties almost upon reporting.

The proposed bill is retroactive to 1 October 1949, and all persons who, since that date, have incurred additional expenses for travel and transportation as a result of modification or revocation of permanent change of station orders would be reimbursed. Those affected by the retroactive provision of the bill will have a period of one year from the date of enactment of the bill in which to file claims.

If enacted, the proposed bill will amend section 253 of Title 37, United States Code, by adding the following:

(i) Under uniform regulations prescribed by the Secretaries concerned, a member of a uniformed service shall be entitled to travel and transportation allowances under subsection (a), and to transportation of his dependents and baggage and household effects under subsection (c), for travel performed under orders that direct him to make a permanent change of station and that are (1) cancelled, revoked, or modified directing his return to the station from which he was being transferred or (2) modified to direct him to make a different permanent change of station.<sup>41</sup>

Section 2 of the proposed bill contains the retroactive provisions referred to above.

## V. CONCLUSIONS

The field of travel and transportation allowances is fraught with legal pitfalls into which the uninitiated may fall to his financial detriment. A few of these troublesome areas have been briefly outlined herein.

It is not contended that a member should be reimbursed for travel performed prior to the issuance of orders. The rare instances when such reimbursement would be proper are provided for by statute (unusual or emergency circumstances) and by regulations (member officially notified that orders would be issued). However, in the matter of advance return of dependents from overseas areas, it is obviously undesirable to have one agency (the service concerned) make the initial determination that justifying circumstances exist, and another agency (the General Accounting Office) be empowered to overrule that initial determination, with resulting financial loss to the service member. Department of Defense Proposal Number 87-50 will put final authority in this re-

<sup>41</sup> Dep't of Defense, Legislative Proposal No. 87-176 (1962). See note 40 *supra*.

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gard in the Secretaries concerned, subject, of course, to review by the Comptroller General for possible abuse of discretion. This proposed legislation will undoubtedly be presented to the 88th Congress, and should receive enthusiastic support.

Department of Defense Proposal Number 87-176 has the simple effect of permitting a member to take leave en route to his new permanent station, or to depart a few days early to permit travel by privately owned vehicles, without subjecting himself to the risk of suffering severe financial loss in the event his orders are amended or revoked prior to their effective date. Such leave or additional travel time is not only desirable from a morale standpoint, but is usually considered to be a necessity. This proposed legislation also will be presented to the 88th Congress. It is considered to be highly desirable legislation, and in the minds of those who have suffered under the prevailing rules it will undoubtedly be classified as "humane" legislation. It should receive the support of all concerned.

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