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Articles

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HEADQUARTERS, DEPARTMENT OF THE ARMY

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PREFACE

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MILITARY LAW REVIEW—VOL. 51

PROCEDURAL RIGHTS OF THE MILITARY ACCUSED: ADVANTAGES OVER A CIVILIAN DEFENDANT*

By Lieutenant Homer E. Moyer, Jr.**

The author compares the military and civilian procedure at several stages in the criminal process; interrogation of suspects, pretrial investigation, discovery, speedy trial, right to counsel, witnesses, self-incrimination, deferment of confinement, appellate review, and concludes that military defendants have many advantages over civilians. The charges of command influence often levelled at the military are examined in detail.

I. INTRODUCTION

The Supreme Court recently decided in *O'Callahan v. Parker*[1] that the military lacks jurisdiction to try servicemen for crimes that are not "service-connected.)" Justice Douglas, in rendering the majority opinion, was highly critical of military justice and criminal procedures in the court-martial system, which he characterized as "a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants. . . ."[2] The opinion further added that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law . . . . A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while the military trial is marked by the age-old manifest destiny of retributive

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[1] 395 U.S. 258 (1969).

[2] *Id.* at 272.

[3] *Id.* at 265.

justice."[4] The Court then quoted approvingly: "'None of the travesties of justice perpetuated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice.' -- "[5] The indictment of military justice was unmistakable; the portrait was of an institutionalized system of quasi-courts before which an accused is systematically deprived of fundamental rights. The recurrent implication was that any accused would eagerly seek to escape military jurisdiction for the comparative haven of a civilian trial.

Within 30 days after *O'Callahan,* The Judge Advocate General of the Army received a letter from a serviceman tried and convicted in a civilian court for manslaughter. The crime was committed on a military reservation. The letter complained of the conduct of the writer's civilian trial including the denial of counsel, military or otherwise, and expressed bitterness that the military had not been able to take jurisdiction of the offense.[6] The letter was, of course, a plea from one incarcerated man and, to be sure, some accused servicemen have sought to bar the exercise of military jurisdiction on the basis of *O'Callahan.*[7] Nonetheless, the petition of this ex-serviceman and his dissatisfaction with his civilian trial may more truly reflect the realities of a thorough comparison of military and civilian criminal procedure than do the broad assertions of Mr. Justice Douglas.*

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[4] *Id.* at 265–66.

[5] *Id.* at 266 (quoting Glasser, ***Justice*** *and Captain Levy,* 12 COLUMN. F. 46, 49 (1969)).

[6] Letter to The Judge Advocate General of the Army, 30 June 1969, on file in the Military Justice Division of the Office of The Judge Advocate General of the Army.

[7] The issue has most commonly been raised, however, in cases before the Court of Military Appeals and the courts of military review when convictions are undergoing the ordinary course of review. As of 6 October 1969, the Court of Military Appeals had denied, without prejudice, fire petitions for writs of habeas corpus on the *O'Callahan* issue. One writ of prohibition had been granted in Fleiner v. Koch, 19 U.S.C.M.A. —, 41 C.M.R. — (7 Oct. 1969), in which a military accused was about to be tried for two **sex** offenses, one of which allegedly occurred off base with a civilian. A petition for writ of habeas corpus was granted in Silvero v. Chief of Naval Air Basic Training, 302 F. Supp. 646 (N.D. Fla. 1969) *appeal docketed,* No. **28,** 419, 6th Cir., 11 Sept. 1969 (sodomy case).

[8] The author does not disagree with the holding of *O'Callahan* on its particular facts. The validity of the sweeping language in the opinion, however, is quite relevant to cases yet undecided and the ultimate scope of the *O'Callahan* rule. The broad language of the opinion leaves substantial flexibility, and the opinion is equally susceptible to quite narrow and quite expansive interpretations.

II. INTERROGATION OF SUSPECTS

The point at which the criminal suspect is first confronted with the criminal process (when he is first approached by law enforcement officials) is a logical place to begin consideration of a military suspect's rights and to observe how they compare with those of his civilian counterpart. The rules which must be observed when police question a civilian suspect were fashioned by the Supreme Court decisions in *Escobedo* v. *Illinois*[9] and *Miranda* v. *Arizona*.[10] Opposition to these decisions was outspoken and bitter, and predictions were common that law enforcement would be hopelessly disrupted.[11] The 1964 holding in *Escobedo* that a suspect under interrogation be allowed to consult with his attorney if he so desires had widespread impact in civilian jurisdictions.[12] In the military, however, this historic decision occasioned little comment and no change in procedures since the rule of *Escobedo* had been standard military practice for seven years.[13] Indeed, the appellate defense counsel, who successfully argued *Escobedo* before the Supreme Court, was a former military lawyer, and he sought simply to obtain for his client the same rights accorded his clients in the military.[14]

Two years after *Escobedo*, the Supreme Court decision in *Mirnnda* enumerated the specific elements of a warning that must be given to a suspect prior to custodial interrogation.[15] Before *Miranda*, specific advice of rights was foreign to civilian jurisdictions, and admissibility of confessions turned upon application of

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[9] **378** U.S. **478 (1964).**

[10] **384** U.S. **436 (1966).**

[11] See, e.g., Symposium — The Supreme Court and the Police; **1966, 57** J. CRIM. L.C. & P.S. **237–312, 377–425 (1966)**; Inbau, *Misconception Regarding Lawlessness and Law Enforcement,* **35** TENN. L. REV. **571 (1968).**

[12] *See, e.g.*, Powell, *An Urgent Need: More Effective Criminal Justice,* **51** A.B.A.J. **437, 439 (1965).**

[13] In United States v. Gunnels, 8 U.S.C.M.A. 130, **23** C.M.R. **354 (1957),** the oourt found prejudicial error when a suspect, who was released upon request during interrogation, was denied advice by the staff judge advocate from whom he sought assistance. Four months later in United States **v.** Rose, 8 **U.S.C.M.A. 441, 24 C.M.R. 251** (1957), the court held inadmissible a confession obtained after a suspect requested, during interrogation, to consult his attorney and government agents refused his request, advising him that he had no right to consult with an attorney. *See also* Hansen, *Miranda and the Military Development of a Constitutional Right,* **42** MIL. L. REV. **55, 60** n. **34 (1968)** [hereinafter cited as Hansen].

[14] Barry L. Kroll, Esq., counsel for Petitioner, Escobedo **v.** Illinois, **378** U.S. **478 (1964).**

[15] **384 U.S. at 467–73.**

the subjective test of voluntariness.[16] Military practice, however, had been governed by article 31 of the Uniform Code of Military Justice (UCMJ), which required that any suspect must be advised prior to questioning as to the offenses which he is suspected to have committed, that he has a right to remain silent, and that anything he says may be used against him at trial."[17] It is instructive to note that this was the military practice for 18 years before there emerged an equivalent civilian rule, a rule that was judicially imposed upon a vocally resistant civilian sector. The experience of the military, in fact, was cited by the Supreme Court in *Miranda* as an indication of the feasibility of a requirement of specific warnings.[18]

The *Miranda* decision, however, did include one requirement not covered by article 31 of the UCMJ, the requirement that prior to custodial interrogation the suspect be advised of his right to have counsel present. In *United States v. Tempia*,[19] the United States Court of Military Appeals considered the applicability of this requirement and held that the rule of *Miranda* was fully applicable to the military. The decision was held retroactive to the date of *Miranda*.[20] However, *Tempia* did not relieve military interrogators of the requirement that preinterrogation advice must conform to the statutory requirements of article 31 as well as the constitutional mandates of *Miranda* and *Tempia*. This factor has resulted in the formulation of a warning that is in

[16] *Id.* at 502 (dissenting opinion) (citing Haynes v. Washington, *373* U.S. 503, 514 (1963)).

[17] 10 U.S.C. § 831(b) (1964) (art. 31 of the Uniform Code of Military Justice) [hereinafter cited as UCMJ] provides: "No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial."

[18] 384 U.S. at 489 (citing 10 U.S.C§ 831(b) (1964)).

[19] 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

[20] *Id.* at 251.

several respects broader than that given a civilian suspect.[21] Article 31 advice must be given before an official may interrogate, or request any statement," a threshold which includes many situations that do not constitute custodial interrogation.[23] As a matter of practice, the full warning, including right to counsel, is given at that time." Article 31 requires that the suspect be advised of the offenses of which he is suspected, a procedure that favors a suspect who has committed several offenses and that allows him to judge better how to respond to interrogation.[25] Furthermore, the strictures of article 31 apply not only to police officers, but include private persons gathering evidence for the prosecution and persons exercising disciplinary authority over the accused at the time of questioning.[26] Finally, *Miranda* requires 'chat a suspect be advised that counsel will be provided for him if he cannot afford one; in the military every suspect is afforded a military lawyer free of charge and is specifically so advised." He is further told that he may have civilian counsel present, obtained at his own expense.[28]

Furthermore, significant developments have taken place in the

[21] The sample acknowledgment of rights form issued by the U.S. Navy, for example, includes the following:

(1) I am suspected of having committed the following offense(s) [blank] ;

(2) I have the right to remain silent;

(3) Any statement I make may be used as evidence against me in trial by court-martial;

(4) I have the right to consult with a lawyer prior to any questioning. This lawyer may be a civilian lawyer retained by me at my own expense; or, if I wish, Navy or Marine Corps authority will appoint a military lawyer to act as my counsel without cost to me;

(5) I have the right to have such retained civilian lawyer or appointed military lawyer present during this interview.

Navy JXG Notice 5800 app. 1–k (18 July 1969).

[22] 10 U.S.C. § 831(b) ('1964) (art. 31(b) of the UCMJ).

[23] *See, e.g.*, United States v. Sonder, 11 U.S.C.M.A. 59, 28 C.M.R. 283 (1959) ; Hansen, *supra* note 13, *at* 64 n. 52; Quinn, *Some Comparisons Between Courts-Martial and Civilian Practice,* 15 U.C.L.A.L. REV. 1240, 1243–45 (1968).

[24] Dep't of the Army Message No 812214, *reprinted in* 67–9 JALS 6 (1967) ; Hansen, *supra* note 13, at 64 & n. 51. *See also* note 21 *supra.*

[25] Note 22 *supra.*

[26] 10 U.S.C. § 831(b) (1964) (art. 31 of the UCMJ) reads in part: "No person subject to this chapter. . . ." The Court of Military Appeals has construed this phase to exclude those persons acting in a purely private capacity. *See* Quinn, *supra* note 23.

[27] *See* note 21 *supra.*

[28] *Id.*

civilian sector subsequent to *Escobedo* and *Miranda*. Civilian opposition to these decisions has culminated in title II of the Omnibus Crime Control and Safe Streets Act of 1968." This legislation purports to override the constitutional requirements of these decisions, and the Department of Justice has begun to rely upon this statute in certain federal cases. Even if this legislation survives judicial scrutiny on constitutional grounds, however, military practices will be unaffected since article **31** will remain in effect. The requirements of *Mirnnda* and *Tempia* have also been given independent existence by incorporation into the *Manual for Courts-Martial*[31] which will not be affected by the viability of the Omnibus Crime Control and Safe Streets Act.

III. PRETRIAL INVESTIGATION

For a civilian accused of a serious crime, another early stage in the criminal process at which his rights and status may be affected is the grand jury investigation, or some other similar statutory procedure. The Supreme Court's holding in *O'Callahan* was based, in part, on the deprivation of the accused serviceman's right to indictment by grand jury.. This rationale becomes somewhat suspect when the rights of an accused before a grand jury

[29] Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501 (Supp. IV, 1969) reads in part: **"[A]** confession. . . shall be admissible in evidence if it is voluntarily given." This section then mentions five factors to consider in determining voluntariness, including the elements of the warning required by *Miranda*. The section continues: "The presence or absence **of** any of the above mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

[30] Washington Post, 1 Aug. 1969, at *26,* col 3.

[31] MANUAL FOR COURTS-MARTIAL, **UNITED** STATES, 1969 (Rev. ed.), ¶ 140*a* [hereinafter cited as MANUAL].

[32] 395 U.S. at **262.**

are compared with those given a military accused at an article 32 investigation, the analogous military procedure.'"

Both federal and state grand jury proceedings to determine whether to return an indictment are commonly *ex parte* proceedings which are carefully kept secret.'" In federal grand juries, disclosure of the proceedings of a grand jury has been severely limited by Supreme Court decisions which have limited the judicial discretion that may be exercised under rule 6(c) of the Federal Rules of Criminal Procedure." Inspection of portions of grand jury minutes is contingent upon a showing of "particularized need," a carefully delineated criterion." Indeed, a federal defendant could not even examine his own testimony before a grand jury prior to 1966, when rule 16(a)(3) became effective.[37]

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[33] MANUAL, *supra* note 31 at ¶ 34. This investigation is used for all general courts-martial (the only courts-martial that can adjudge confinement for more than six months) as well as for cases that are dropped from general to special courts-martial.
10 U.S.C. § 832 (1964) (art. 32 of the UCMJ) reads in part: **"Art. 32. Investigation**

"(a) No charge or specification may he referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should he made of the case in the interest of justice and discipline.

"(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall he given to the accused."

[34] FED. R. CRIM. P. 6(e). *See* Dennis V. United States, 384 U.S. 855 (1966); Levine v. United States, 362 U.S. 610 (1960); United States v. Proctor & Gamble Co., 356 U.S. 677 ('1958); 1 ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 6:118 (1966); Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1964); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962) [hereinafter cited as Sherry].

[35] Pittsburgh Plate Glass Co. v. United States 360 U.S. 395 (1959); United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958).

[36] Cases cited note 35 *supra;* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[37] *See, e.g.*, United States v. Johnson, 215 F. Supp. 300 (D. Md. 1963).

Even now, a defendant's request is at the discretion of the judge and extends only to "relevant. . . recorded testimony."[38]

In many of the states, inspection of any grand jury testimony is specifically prohibited or is precluded by state statutes requiring that all grand jury proceedings must be kept secret.[39] Indeed, in some states disclosure of grand jury proceedings has been made a penal offense.[40] In other states disclosure depends on the particular facts of each case." Even in those few states which have express provisions for obtaining copies of transcripts of grand jury hearings, accessibility has been judically narrowed.[42]

The long-standing practice of secrecy has allowed exclusion of the accused from the grand jury proceedings." Concomitantly, the accused is denied the right to counsel at the proceedings." By his absence he is likewise precluded from the opportunity to confront and cross-examine witnesses, to present evidence in his own behalf, or even to speak for himself.[45] The accused is not even entitled to know the procedures of the body that indicts him.[46] The loss of the right to assistance of counsel is also shared by witnesses who are called to testify and are later indicted themselves, partially on the basis of their own remarks."

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[38] Fed. R. Crim. P. 16(a) (construed in United States v. Jones, 374 F.2d 414 (2d Cir. 1967)).

[39] *Srr* Note, *Discovery By A Criminal Defendant of His Own Grand-Jury Testimony*, 68 COLUM. L. REV'. 311, 322 n.66, 323 n.68 (1968) [hereinafter cited as *Discovery*] which cites statutes and related cases in Arkansas, Indiana, New Mexico, Ohio, Pennsylvania, Texas, and Wisconsin, and statutes requiring participants to keep grand jury proceedings secret in the states of Colorado, Georgia, Idaho, Kansas, Mississippi, Nebraska, Sew Hampshire, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, and Wyoming.

[40] *See e.g.*, TEX. CODE CRIM. PROC ANN. art 20.02 (1965).

[41] *Discovery*, *supra* note 39, at 321 n.65, which cites statues and cases in Arizona, Connecticut, Massachusetts, Oregon, Vermont, and Washington.

[42] ***See generally Discovery,*** *szcpra* note 39, at 317.

[43] FED. R. CRIM. P. 6(d) ***See*** United States v. Eskow, 279 F. Supp. 556 (S.D.N.Y. 1968); United States **v.** Rosen, 269 F. Supp. 942 (S.D.N.Y. 1966); United States v. Elksnis, 259 F. Supp. 236 (S.D.N.Y. 1966) *See also* notes **34,** 39 *supra.*

[44] ***In re*** Weiss. **279** F. Supp. **857** (S.D.N.Y. 1967): United States ***ex rel.*** Wheeler **v.** Flood, 269 F. Supp. 194 (E.D.N.Y. 1967); United States **v.** Kane, 243 F. Supp. 746 (S.D.S.Y. 1965).

[45] United States v. Sculby, 225 F.2d 113 (2d Cir.), ***cert. denied,*** 350 U.S. 897 (1955). ***See*** ORFIELD, *supra* note **34,** at § 6.75,

[46] United States v. Brumfield, 85 F. Supp. 696, 705 (W.D. La. 1949).

[47] ***See generally*** Meshbesher, ***Right to Counsel Before Grand Jury, 41*** F.R.D. 189, 191 (1966) {hereinafter cited as Meshbesher); Annot., 38 A.L.R.2d 225 (1954). For a case holding that an accused must have counsel at a grand jury proceeding see Jones **v.** United States, 342 F.2d 863, 867–68 **(D.C.**Cir. 1964).

Moreover, the value of a grand jury proceeding as a pretrial screening device if further diminished by the fact that in most states the use of the grand jury is strictly circumscribed. The rule has long been that indictment by grand jury is not an element of fourteenth amendment due process, and that states are required only to provide some alternative procedure to ensure justice and fair play.'* In Minnesota, for example, grand juries are used for offenses punishable by at least ten years confinement.= In other states they are required only for capital cases, and in six other states they are never required." Several other states have provisions under which grand juries are discretionary only.[52] Accordingly, if a serviceman is tried in a state court (and this, rather than trial in federal court, is most common) his right to indictment by grand jury would actually exist in only some states. Where it does exist, it has the characteristics previously described.

In the military there is no grand jury proceeding since the fifth amendment expressly exempts military cases from the requirement of grand juries.[53] Before a military suspect may be tried before a general court-martial, however, he must be given an article **32** investigation." By this procedure, an accused is formally notified of the charges that are about to be investigated, of the identity of the accuser, and of the witnesses expected to be called." The accused is entitled to be present throughout the proceedings and has the right to be represented by appointed military lawyer counsel or, if he prefers, by civilian counsel of his own choice.[56] He may cross-examine all witnesses under oath, may

[48] Hurtado v. California, 110 U.S. 516 (1884).

[49] *See* Spain, *The Grand* Jury, *Past and Present: A* Survey, *2* AM. CRIM L.Q. 119, app. 126 (1964) [hereinafter cited as Spain].

[50] *Id.*

[51] *Id.* Grand juries are required only in capital cases in Connecticut, Florida, and Louisiana. They are never required in Idaho, Indiana, Kansas, Montana, Nebraska, and Washington.

[52] *Id.* Arizona, California, Colorado, Maryland, Michigan, Missouri, Nevada, New Mexico, Oklahoma, South Dakota, Utah, and Wyoming.

[53] U.S. CONST. amend. V, reads, in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . ."
See *Ex parte* Milligan, 71 U.S. (4 Wall.) **2, 123, 137** (1866); Dynes v. Hoover, 61 U.S. (20 **How.)** 65, **78-79** (1858).

[54] Note **33** *supra.*

[55] **Note 33** *supra;* United States **v.** De Lauder, 8 U.S.C.M.A. **656 25** C.M.R. 160 **(1958).**

[56] Note **33** *supra;* United States **v.** Tomaszewski, 8 U.S.C.M.A. **266, 24** C.M.R. 76 (1957) (requiring presence of lawyer counsel).

call witnesses in his own behalf, and may present evidence in defense, extenuation, or mitigation." If charges are forwarded following the investigation, the accused is provided with a copy of the formal investigation report including statements of all testimony taken plus all other material considered by the investigation officer.[58]

There are further differences between the civilian grand jury proceeding and the article **32** investigation. If a grand jury declines to indict an accused, the charges are dismissed.[59] **A** pretrial investigating officer, however, only recommends in favor of or against referral to trial, and it is possible for a convening authority, after consulting with his staff judge advocate, to refer charges despite a contrary recommendation." On the other hand, the attorney who develops the evidence against the accused before a grand jury is often the prosecutor at trial, whereas the pretrial investigating officer is automatically disqualified from being trial counsel for the government." Also article **32** investigations are used for more types of cases than are grand juries. In all federal cases and in the majority of states that use grand juries, they are employed only when the offense is a felony (usually an offense punishable by more than one year's confinement). In the military, however, an article **32** investigation is conducted prior to every case in which more than six months confinement might be adjudged.[62]

Consideration of these factors has prompted federal courts to comment favorably on **a** suspect's rights at an article **32** investigation when compared with those of a person under grand jury investigation.[63] Even the harshest critics of military justice have

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[57] Note **33** *supra.*

[58] ***Id.***

[59] FED. R. CRIM. P. 6(f).

[60] MANUAL, *supra* note 31, at ¶ 35. Under federal rule 6(f) at least 12 jurors must concur in the grand jury determination, but under the MANUAL the recommendation in the pretrial investigation report is based on the judgment of one individual.

[61] 10 U.S.C. § 827 (Supp. IV, 1969) (art. 27 of the UCMJ); MANUAL, *supra* note 31, at ¶ 61e.

[62] More than six months confinement can be adjudged only by a general court-martial for which an investigation under article 32 of the UCMJ is a prerequisite. ***See*** note 33 *supra.*

[63] ***See*** Talbott v. United States *ex rel.* Toth, 215 F.2d 22, 28 (D.C. Cir. 1954), *rev'd sub nom*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); Murphy, ***The*** *Formal Pretrial Investigation*, 12 MIL. L. REV. 1 (1961). For a discussion of the military's resistance to proposals that the article 32 investigation be eliminated see Murphy, note 63, at 1–2.

acknowledged the superiority of article 32 investigations." By contrast, substantial criticism has been directed at grand jury proceedings in recent years, even to the point of suggesting their complete abolition.[65] Accordingly, little support can be found for the notion that conferring the right to a grand jury in lieu of the right to an article 32 investigation could result in some advantage to an accused serviceman.

IV. DISCOVERY

Omitted from almost all critical commentaries on military justice is a comparison of military and civilian pretrial discovery rights. Presumably, the reason for not dealing with this particular area is because military practice is far more liberal than federal or state civilian practice. Although discovery is not a right of constitutional dimensions, it is perhaps the greatest practical advantage the accused has in preparing for trial and may have the greatest impact on the outcome of a trial. Accordingly, criminal discovery in civilian systems has been the subject of extensive and outspoken criticism.[66]

Under the Federal Rules of Criminal Procedure, which are substantially more progressive than procedural rules of most states,[67] criminal discovery rights are at best limited. In federal court effective discovery may take the form of disclosure of grand

[64] Sherman, *Military Injustice,* CASE & COM., July–August 1968 at 44.

[65] Antell, *The Modern Grand Jury: Benighted Supergovernment,* 51 A.B.A.J. 153 (1965); Coates, *Grand Jury: The Prosecutors Puppet. Wasteful Nonsense of Criminal Jurisprudence,* 33 PA. B. ASS'N Q. 311 (1962); Meshbesher, *supra* note 47, Sherry, *supra* note 34; Watts, *Grand Jury, Sleeping Watchdog or Expensive Antique?* 37 N.C.L. REV. 290 (1959); Younger, *The Grand Jury Under Attack,* 104 PA. L. REV. 429, 432 (1955); Note *Should The Grand Jury System Be Abolished?* 45 KY. L. REV. 151 (1956).

[66] *See, e.g.,* State v. Johnson, 28 N.J. 133, 14'5 A.2d 313 (1958); State v. Tune, 13 N.J. 203, 98 A. 2d 881 (1953); FRANK, COURTS ON TRIAL 99 (1949); Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?,* 1963 WASH. U.L.Q. 279; Everett, *Discovery in Criminal Cases—In Search of a Standard,* 1964 DUKE L.J. 477; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149, 1172–98 (1960); Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice,* 42 NEB. L. REV. 127 (1962); Pye, *The Defendant's Case for More Liberal Discovery,* 33 F.R.D. 82 (1963). For discussions of the English model see Goldstein, *supra* at 1183 n.112.

[67] *Compare* Fletcher, *Pretrial Discovery in State Criminal Cases,* 12 STAN. L. REV. 293 (1960), *with Symposium — Discovery in Federal Criminal Cases,* 33 F.R.D. 47 (1963 [and] text accompanying notes 68–80 *infra. But see* Louisell, *Criminal Discovery: Real Dilemma or Apparent?,* 49 CAL. L. REV. 56 (1961) (enactments of California) [hereinafter cited as Louisell],

jury proceedings (rule 6(e)), inspection of records (rule 16), and subpoenas (rule 17(c)).[68] The limitations in obtaining transcripts of grand jury proceedings, which have been previously discussed, result in little discovery value for the accused.[69] Rule 17(c) has often been resorted to as a limited form of discovery; however, it only applies to real and documentary evidence and to items that are known to the defense." Furthermore, such a subpoena is, with exceptions only in rare cases, returnable on, rather than prior to, the day of trial."

The discovery practice of rule 16 was first broadened judicially by the Supreme Court in *Unit d States v. Jencks*[72] which required the government to produce for inspection documents in the government's possession about which government witnesses had testified. Although this case on its facts only extended to the production of documents on the day of trial, its holding was promptly neutralized in part by the Jencks Act, enacted by Congress later that year.[73] This rule was amended, however, in 1966, and the amendment greatly liberalized the discovery rights of the accused..' Citing extensive literature on the subject, the Advisory Committee on the Federal Rules of Criminal Procedure notes that the rule has expanded the scope of discovery but has sought to avoid its abuses.[75] Thus, this very significant advance-

[68] FED. R. CRIM. P. 6(e), 16 17(c).

[69] *See* pp. nn. **34–42** and accompanying text, *supra*.

[70] FED. R. CRIM. P. 17(c) (applies to "books, papers, documents or other objects. , . . .") (construed in United States v. Smith, 209 F. Supp. 907 (E.D. Ill. 1962).

[71] United States v. Ferguson, **243** F. Supp. **237** (D.D.C. 1965); United States v. Wortman, **26** F.R.D. **183** (E.D. Ill. 1960); United States v. Gogel, 19 F.R.D. 107 (S.D.K.Y. 1956).

[72] 353 U.S. 657 (1957).

[73] Jencks Act, 18 **U.S.C.** § 3500 (1964) (originally enacted as Act of **2** Sept. 1957, ch. **223, § 3500,** 71 Stat. 595).

[74] Prior to 1966 FED. R. CRIM. P. 16 gave the trial court discretion *to* allow the defendant to examine impounded documents belonging to him and objects and documents confiscated from third persons. The amended rule allows the accused to examine written or recorded statements made by him, medical and scientific test results, and his own recorded testimony before a grand jury. He may further examine real and documentary evidence upon **a** showing of materiality to the preparation of his defense and that the request is rea onable. FED. R. CRIM. P. 16, 17(c).

[75] FED. R. CRIM. P. 16 (notes of Advisory Committee on Rules).

ment still has notable limitations and represents far from unlimited discovery." An accused must still demonstrate a particularized need, such as for the testimony of other witnesses before a grand jury." The right of the accused is not absolute, but discretion remains in the trial court.[78] Also, by its terms the rule causes the accused to subject himself to discovery by taking advantage of the rule, and production by the government may be made contingent upon reciprocal disclosure by the accused." Additionally, the accused is still not given a list of witnesses to be called and real evidence to be introduced."

Discovery practice before most state courts is even more restrictive, although a few states have enacted liberal provisions.[81] An example of common usage is the Commonwealth of Massachusetts where a defendant has no right to a transcript of the evidence offered before a grand jury that indicted him.[82] For a defendant charged with murder, there is no requirement that the indictment state the means by which the murder was allegedly committed,[83] and under Massachusetts case law a bill of particulars may be obtained only for the purpose of clarifying ambiguities in the indictment." Neither does the Massachusetts defendant have the right to inspect real evidence prior to the trial itself" or to obtain a copy of a confession allegedly made by him.[86]

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[76] United States v. Fratello, 44 F.R.D. 444 (S.D.N.Y. 1968); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 233 (1964); Comment, *Criminal Procedure — Disclosure of Prosecutor's Evidence — Disclosure of Favorable and Material Evidence Required Although Procurable By Diligent Defense Counsel*, 42 N.Y.U.L. REV. 764, 771 n. 51 (1967).

[77] United States v. Tanner, 279 F. Supp. 457, 472–73 (N.D. Ill. 1967).

[78] Meyer v. United States, 396 F.2d 279 (8th Cir. 1968); Hemphill v. United States, 392 F.2d 45 (6th Cir. 1968).

[79] FED. R. CRIM. P. 16(c). The rule provides that when a court grants the defense's request for discovery, it may condition that grant on reciprocal disclosure to the prosecution.

[80] 18 U.S.C. § 3500(a) (1964). In capital cases the accused must be given a list of witnesses, but only three days prior to trial. *See* Traynor, *supra* note 76, at 233 & n.27. *Cf.* WASH REV. CODE § 10.37.030 (1951).

[81] Fletcher, *supra* note 67; Louisell, *supra* note 67; Traynor, *supra* note 76, at 231, 243. *But see* Louisell, *supra* note 67, at 59 (discussion of California procedures); Comment, *Discovery in California Criminal Cases: Its Importance and Its Pitfalls*, 38 *So.* CAL. L. REV. 251 (1965).

[82] Commonwealth v. Ries, 337 Mass. 565, 150 N.E.2d 527 (1958); Commonwealth v. Giacomazza, 311 Mass. 456, 42 N.E.2d 506 (1942).

[83] Commonwealth v. Jordan, 207 Mass. 259, 93 N.E. 809 (1911).

[84] Commonwealth v. White, ------ Mass. ------, 232 N.E.2d 335 (1967).

[85] Commonwealth v. Noxon, 319 Mass. 495, 66 N.E.2d 506 (1942).

[86] Commonwealth v. Chapin, 333 Mass. 610, 132 N.E.2d 386 (1956); Commonwealth v. Giacomazza, 311 Mass. 456, 42 N.E.2d 506 (1942).

By contrast, the pretrial discovery rights of a serviceman are almost without restriction. Military discovery approximates that of the English system and embodies almost all of the procedures widely urged by commentators.[87] The article 32 pretrial investigation obviously operates as an effective discovery device in all general courts-martial: the government puts on much of its case, real and documentary evidence is produced, and government witnesses are examined and cross-examined under oath.[88] In all cases, including those in which an article 32 investigation is not held, the accused has other expansive discovery prerogatives. At an early stage of the proceeding the defense is provided with a list of all personnel who are to serve as members of the court, all witnesses to be called, and all real and documentary evidence to be produced.[89] The accused is given the opportunity to interview each witness prior to trial,[90] and if a surprise witness appears at trial, the trial may be interrupted to allow the defense the opportunity to interview the unexpected witness.[91] The accused may examine all real and documentary evidence which the government possesses and intends to use at trial.[92] He is further privileged to inspect the entire case file,[93] statements of the interviewed witnesses, and even the original investigative report itself.[94] These rights are in marked contrast to civilian procedures. One civilian trial lawyer experienced at trying cases in both civilian and military courts has characterized military pretrial discovery as a defense counsel's dream. "He can literally empty the prosecution's briefcase."[95]

V. SPEEDY TRIAL

A serviceman's right to a speedy trial is secured not only by the sixth amendment but by article 10 of the UCMJ which states:

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87 Note 66 *supra*.

88 Note 33 *supra*.

89 MANUAL, *supra* note 31, at ¶ 44h.

90 United States v. Strong, 16 U.S.C.M.A. 43, 36 C.M.R. 199 (1966).

91 MANUAL, *supra* note 31, at ¶ 44h. The military accused must be formally served with a charge sheet which must contain the list of government witnesses to be called. MANUAL, *supra* note 31, at app. 5.

92 MANUAL, *supra* note 31, at ¶¶ 34d, 115c.

93 West, *The Significance of the Jencks Act in Military Law*, 30 MIL. L. REV. 83, 85–86 (1965).

94 MANUAL, *supra* note 31, at ¶ 44h.

95 Address by Edward Bellen, Esq., 20th Annual Belli Seminar, 26 July 1969.

> When a person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."[97]

Even more specific requirements are imposed on the commanding officer by article **33,** which provides that when an accused is held for trial by a general court-martial the commanding officer shall forward the charges and the investigation and allied papers to the convening authority within eight days after the accused is arrested." If this is not practicable, the delay must be explained in writing by the commanding officer, and this may become an issue on appeal." A willful violation of either of these articles constitutes a penal offense under the UCMJ."

These statutory requirements have been vitalized by decisions of the Court of Military Appeals. The court has held, for example, that for purposes of speedy trial, these statutory provisions apply to an accused who is restricted to the limits of the base as well as to one who is incarcerated.[100] In cases in which the total time elapsed might not warrant dismissing charges for lack of speedy trial, violation of the two statutory provisions has alone moved the court to dismiss all charges and specifications.[101] Furthermore, excessive delays in the appellate process have also been grounds for dismissal of all charges and specifications.[102] Of particular relevance is that the cases in which speedy trial issues have been litigated before the Court of Military Appeals have most commonly involved delays of between three and five months, including pretrial investigations and delays required to

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[97] 10 U.S.C. § 810; (1964) (art, 10 of the UC'MJ). It should be noted that in the military the equivalent to civilian "arrest" is "apprehension," and "arrest" is pretrial restraint in the form of restriction to certain specified limits. 10 U.S.C. § 809(a) (1964) (art. 9(a) of the UCMJ); MANUAL, *supra* note 31, at ¶34c.

[98] 10 U.S.C. § 833 (1964) (art. 33 of the UCMJ). Statutory time limits from commitment to information or indictment are commonly by the end of the next or second term of court. *See* Note, *The Right to a Speedy Criminal* ***Trial,*** 57 COLUM. L. REV. 846,851 n.34 (1967) [hereinafter cited as *Speedy Trial].*

[99] 10 U.S.C. § 833 (1964) (art. 33 of the UCMJ); note 103 *infra.*

[100] 10 U.S.C. § 898 (1964) (art. 98 of the UCMJ).

[101] United States v. Smith, 17 U.S.C.M.A. **427,** 38 C.M.R. 225 (1968); United States v. Williams, 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967).

[102] United **States** v. Goode, 17 U.S.C.M.A. 584, 38 C.M.R. 382 (1968).

United States v. Tucker, 9 U.S.C.M.A. 587, **26** C.M.R. 367 (1958).

reach and obtain witnesses.[103] This is consistent with the maximum time lapse from arrest to trial recommended by the President's Commission on Law Enforcement and Administration of Justice.[104]

By comparison, speedy trial protection offered a civilian is feeble. In federal court, an accused's right to speedy trial is guaranteed by the sixth amendment and by rule 48(b) of the Federal Rules of Criminal Procedure. This rule provides for dismissal of indictment, information, or complaint in cases of unnecessary delay.[105] As applied by federal courts, however, these protections have had little meaning for the individual accused. *United States v. Patrisso,*[106] for example, was decided on 30 January 1958. The defendants had been arrested in May and June of 1953. In the four and a half year interim a grand jury returned an indictment, the case was placed on the calendar, removed from the calendar, and ultimately replaced on the calendar. On the date of the decision, the case was still awaiting assignment of a judge.[107] The court denied the motion to dismiss for lack of a speedy trial although the motion had been made on two prior occasions, relevant witnesses had died or were missing, and a corporation involved in the case had since dissolved.[108]

In *United States v. Cohen,*[109] a mail fraud case, over three years elapsed between commission of the offense and the filing of the indictment, and then five more years passed before trial.

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[103] *See, e.g.*, United States v. Goode, 17 U.S.C.M.A. 584, 38 C.M.R. 382 (1968) (122 days); United States v. Parish, 17 U.S.C.M.A. 411, 38 C.M.R. 209 (1468) (50 days from arrest to service of charges, 134 days total delay); United States v. Brown, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959) (108 days); United States v. Callahan, 10 U.S.C.M.A. 156, 27 C.M.R. 230 (1959) (140 days).

[104] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967) (recommended maximum time lapse of four months between arrest and trial in felony cases).

[105] FED. R. CRIM. P. 48(b). This is contrary to the American Bar Association's (ABA) minimum standards for speedy trial which proposes that speedy trial time limits "should be expressed by rule or statute in terms of days or months running from a specified event." ABA PROJECT ON MINIMUM STANDARDS FCR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL 14 (Tentative Draft, 1967) [hereinafter cited as ABA SPEEDY TRIAL STANDARDS].

[106] 21 F.R.D. 363 (S.D.N.Y. 1958).

[107] *Id.* The case developed as follows: (1) arrests, May and June, 1953; (2) removed from calendar, 24 Nov. 1954; (3) placed back on calendar, 8 March 1957; and (4) still awaiting trial 30 Jan. 1958.

[108] United States v. Patrisso, 21 F.R.D. 363, 367 (S.D.N.Y. 1958).

[109] 37 F.R.D. *26* (1965).

[110] *Id.* at 27.

The court denied a motion to dismiss for lack of a speedy trial holding that no prejudice had been shown.[110] In one case in which a speedy trial motion was granted following an eight year delay, the court very carefully distinguished another decision denying such a motion where the indictment was "only four and a half years old at the time it was brought to trial. . . ."[111] These cases, which are only examples, do not have even the remotest parallels in military justice.

In March of 1967, the Supreme Court first held the sixth amendment speedy trial provision applicable to the states."[112] Most states, however, have speedy trial provisions in their state constitutions, often supplemented by statutes requiring action in a particular number of days.[113] Nonetheless, civilian defendants often are subjected to lengthy pretrial delays."[114] Furthermore, many of these state provisions have been eroded by a variety of judicial qualifications: No violation of right unless laches on the part of the state;[115] presumption that all continuances are lawful;[116] burden on the accused to demonstrate fault of the state;[117] and liberal continuances for "good cause."[118] Even more important are common rulings that the accused must demand trial in addition to a timely motion to dismiss,[119] and that a violation of the right to speedy trial neither requires dismissal of charges nor

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[111] United States v. [illegible]on, 183 F. Supp. 451, 543 (S.D.N.Y. 1960), *distinguishing* United States ex rel. Kaye, 251 F.2d 87, *cert. denied*, 356 U.S. 919 (1958).

[112] Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

[113] *See, e.g.*, collection of statutes in ABA SPEEDY TRIAL STANDARDS, *supra* note 105, at 14–16; *Speedy Trial*, *supra* note 97, 847 nn. 7 & 8.

[114] *See e.g.*, Dagley v. State, 394 S.W. 2d 179 (Tex. Crim. 1965). The defendant was indicted on 20 July 1960, for an offense she allegedly committed on 3 March 1960. More than three years elapsed between that date and the date her case was ultimately tried (21 March 1963). During that time defendant spent more than 26 months in jail. Her appeal claiming denial of her constitutional right to a speedy trial was denied by Texas Court of Criminal Appeals on 23 June 1965, more than two years after her trial, and more than five years after the offense was allegedly committed.

[115] Pickle v. Bliss, 418 P.2d 69, 72 (Okla. Crim. 1966); *Ex parte* Meadows, 71 Okla. Crim. 353, 112 P.2d 419 (1941).

[116] State v. Davidson, 78 Idaho 553, 565, 309 P.2d 211, 219 (1957).

[117] State v. Hollars, 266 N.C. 45, 52, 145 S.E.2d 309, 314 (1965); *Ex parte* Meadows, 71 Okla. Crim. 353, 112 P.2d 419 (1941).

[118] *Speedy Trial*, *supra* note 97, at 855 n.61. *See also* Annot., 57 A.L.R.2d 302 (1958); Annot., 129 A.L.R. 572 (1940).

[119] *Speedy Trial*, *supra* note 97, at 853 n.47. *See also* Annot., 57 A.L.R.2d 302, 326 (1958); Annot., 129 A.L.R. 572, 587 (1940). The ABA recommends the elimination of this requirement. ABA SPEEDY TRIAL STANDARDS, *supra* note 105, at 17.

bars retrial on the same charges.[120] Not one of these circumstances exists in the military."'

VI. RIGHT TO COUNSEL

In *Gideon v. Wainwright,'"* the Supreme Court held the sixth amendment right to counsel applicable to a felony trial in a state court.'-' The Court has further ruled that right to counsel applies at times other than during the trial itself, such as during custodial interrogation and at other proceedings that are considered "critical stages" of the criminal process.'-' In these cases the Court has held that counsel must be appointed for an indigent suspect or accused.'" In federal courts counsel must be appointed whenever the accused "is unable to obtain counsel," even if he is not indigent.'"

The right to counsel at courts-martial, which has been the subject of some criticism," has been significantly expanded by the Military Justice Act of 1968. Qualified counsel has long been provided under the UCMJ at general courts-martial, the only courts-martial at which an accused may be sentenced to longer

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[120] *Speedy Trial, supra* note *97,* at 859 & nn. 86 & *87.* Some states do not consider dismissal for lack of speedy trial a bar tu a later trial and other states hold it to be a bar only in misdemeanor cases.

[121] Note 103 *supra.*

[122] 372 U.S. 335, 342 (1963).

[123] *Id.* at 336. Gideon was charged with the noncapital felony of breaking and entering. In James **v.** Headley, 410 F.2d *325* (5th Cir. 1969), the court held that in state trials the sixth and fourteenth amendments guaranteed an accused the right to counsel in any case in which there was a risk of imprisonment or which involved moral turpitude.

[124] Mempa **v.** Rhay, 389 U.S. **128** (1967) (post trial probation revocation hearings) ; United States v. Wade, 388 U.S. 218 (1967) (lineups) ; Miranda **v.** Arizona, 384 U.S. 436 (1966) (pretrial situations) ; Escobedo v. Illinois, **378** U.S. 478 (1964); Massiah v. United States, *377* U.S. 201 (1964).

[125] *Id.*

[126] **FED.** R. CRIM. P. 44(a). This rule was amended on 1 July 1966, expanding its scope to petty offenses triable in district courts and to defendants unable to obtain counsel for reasons other than indigency.

than six months confinement.[128] Now a military accused will be represented by lawyer counsel at almost all special courts-martial.'" Under no circumstances may an accused be sentenced to a punitive discharge unless he is represented by lawyer counsel.[130] Furthermore, in special courts-martial the accused must always be afforded the opportunity to be represented by lawyer counsel even in cases in which a discharge may not be adjudged, except when qualified counsel cannot be obtained because of "physical conditions and military exigencies."'" This exception has been narrowly defined in the *Manual for Courts-Martial* and

[127] *See* Sherman, *Military Injustice*, THE NEW REPUBLIC, 9 March 1968, at 21 [hereinafter cited as Sherman]. In this article, published prior to the effective date of the Military Justice Act, the author decries the fact that lawyer counsel were not required in special courts-martial even though specia! courts-martial accounted for approximately two-thirds of the 60,000 yearly courts-martial and such courts are empowered to adjudge bad conduct discharges as well as up to six months confinement. Even at that time, however, this raw statistic was substantially misleading. In fiscal year 1967 there were in the Army, Air Force, Navy, and Marine Corps a total of 84,764 courts-martial of which 54,129 mere special courts-martial. However, fewer than 1,000 of this number resulted in discharges without representation by lawyer counsel and, of the 1,000 all but approximately 50 were the result of guilty pleas. Thus, although there mere instances of discharge where there was no lawyer defense counsel, that problem was not of the magnitude implied by the author's remarks. ***See*** ANNUAL REPORT OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND GENERAL COUNSEL OF THE DEP'T OF TRANSPORTATION 1 Jan. 1967–31 Dec. 1967). Statistics for fiscal year 1967, on file in Promulgation and Statistical Section, Office of the Judge Advocate General of the Navy, Washington, D.C.

In all Air Force special courts-martial, the accused was represented by lawyer counsel as a matter of policy. In the Army punitive discharges were never adjudged at special courts-martial, as a matter of policy. In Navy and Marine Corps special courts-martial, the accused was represented by certified lawyer counsel in 60.7 percent of the cases and in special courts-martial resulting in a punitive discharge, the percentage was 69.1 percent. Survey of Officer-Lawyer Participation in Special Courts-Martial, 1 Sept. 1967 to 29 Feb. 1968, on file in Military Justice Division, Office of the Judge Advocate General of the Navy, Washington, D.C.

[128] 10 U.S.C. § 827(b) (Supp. IV, 1969) (art. 27(b) of the UGMJ) (qualifications of counsel); 10 U.S.C. §§ 818, 819 (Supp. IV, 1969) (arts. 18, 19 of the UCMJ) (jurisdiction of general and special courts-martial).

[129] *Id.* Special courts-martial may adjudge sentences up to six months confinement, forfeiture of two-thirds pay for six months, and a bad conduct discharge. Accordingly, minor offenses are commonly tried before special courts-martial while the equivalent of civilian felonies are customarily tried before general courts-martial.

[130] 10 U.S.C. § 819 (Supp. IV, 1969) (art. 19 of the UCMJ) (includes right to counsel under the jurisdictional requirements of special courts-martial).

[131] 10 U.S.C. § 827(c) (Supp. IV, 1969) (art. 27(c) of the UCMJ).

further limited by service regulations.[132] As a result, a military accused should have the opportunity to be represented by lawyer counsel in all special and general courts-martial within the continental United States, and only in rare instances abroad may the special court-martial exception be successfully invoked.

Two significant differences exist between this right to counsel in the military and the constitutional requirements in state trials as announced in *Gideon v. Wainwright*. First, qualified military lawyer counsel is appointed free of charge for an accused, regardless of his financial condition.[133] If an accused obtains individual counsel at his own expense he may still retain his detailed lawyer defense counsel to serve as associate counsel.[134] Secondly, whereas *Gideon* applies only to felonies, the military right to counsel applies as well to misdemeanors triable by special courts-martial.[135]

Moreover, the new Act gives the serviceman an additional right which effectively enlarges his right to counsel. An accused is now given an absolute right to refuse summary court-martial, even if he has previously refused nonjudicial punishment.[136] The result of this new prerogative is that a serviceman may effectively demand trial by special court-martial with all attendant rights, including the right to appointment of lawyer counsel without

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[132] The statutory exception, "unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies," has been narrowly implemented by the drafters of the MANUAL. Regarding "physical conditions and military exigencies," the MANUAL at ¶ 6c, states that they "may exist under rare circumstances, such as on an isolated ship on the high seas or in a unit in an inaccessible area, provided compelling reasons exist why trial must be held at that time and at that place. Mere inconvenience does not constitute a physical condition or military exigency and does not excuse failure to extend to an accused the right to qualified counsel."

In addition to this demanding standard, Air Force regulations require the detailing of qualified lawyer counsel at all special courts-martial. See AIR FORCE MILITARY JUSTICE GUIDE ¶¶ 3–6b (1969). Army Regulations require the presence of lawyer defense counsel in all cases in the continental United States when the accused so requests. Army Reg. 27–10, para 2–14d.

[133] 10 U.S.C. § 827(b), (c) (Supp. IV, 1969) (art. 27(b), (c) of the UCMJ); MANUAL, *supra* note 31, at ¶ 6. *Cf.* note 126 *supra.*

[134] MANUAL, *supra* note 31, at ¶ 48*a*.

[135] Note 129 *supra.*

[136] 10 U.S.C. § 820 (Supp. IV, 1969) (art. 20 of the UCMJ); MANUAL, *supra* note 31, at ¶ 16a. However, if the maximum punishment for the offenses with which he is charged is greater than the jurisdictional maximum of the summary court-martial, the accused may subject himself to greater punishment by his refusal.

charge.[137] This is without regard to the degree of the offense charged. An equivalent civilian procedure would allow a civilian charged with littering or for a traffic violation to demand a full trial with representation by court appointed counsel.

Right to counsel at preliminary stages, specifically the article 32 investigation, has previously been discussed,[138] as has right to counsel during custodial interrogation."@Beyond these instances, however, every accused is provided lawyer counsel, appointed free of charge, when his case is reviewed by a court of military review.[140] Since review is mandatory for any case in which the approved sentence includes confinement for one year or a punitive discharge, an accused in every such case is entitled to appellate lawyer counsel.[141]

VII. WITNESSES

O'Callahan v. Parker criticizes military justice on the basis of limited access of the defense to witnesses, stating that "compulsory process for obtaining evidence and witnesses is, to a significant extent, dependent upon the approval of the prosecution."[142] Indeed, this one circumstance was cited in support of the statement that "substantially different rules of evidence and procedure apply in military trials."[143] Different procedures do exist for obtaining military witnesses; however, most of these procedures confer on the accused adrantages that a civilian accused lacks.

First, it has long been established that a military accused is entitled as a matter of right to the personal appearance at trial of all material witnesses,[144] and he cannot be forced to accept stipulations or depositions in lieu of their presence.[145] Denial of

[137] The only qualification to this right is that although any person may refuse summary court-martial, Congress left unchanged the provision that a person "attached to or embarked in a vessel" may not refuse nonjudicial punishment. 10 U.S.C. § 815 (Supp. IV, 1969) (art. 15 of the UCMJ); MANUAL, *supra* note 31, at ¶ 132.

[138] Note 33 *supra*.

[139] Note 20 *supra*.

[140] Note 183 *infra*.

[141] Note 180 *infra*.

[142] O'Callahan v. Parker, 395 U.S. 258, 264 n.4 (1969).

[143] *Id.* at 264.

[144] 10 U.S.C. § 846 (1964) (art. 46 of the UCMJ); MANUAL, *supra* note 31, at ¶ 115. *See* United States v. Sweeney, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964); United States v. Thornton, 8 U.S.C.M.A. 446, 24 C.M.R. 256 (1957); United States v. Hawkins, 6 U.S.C.M.A. 135, 19 C.M.R. 261 (1965).

[145] United States v. Thornton, 8 U.S.C.M.A. 446, 449, 24 C.M.R. 256, 259 (1957).

an accused's request for a material witness constitutes prejudicial error,[146] and this is an issue reviewable on appeal.'" These rights are not diluted because the request must be forwarded to the trial counsel. If counsel disagree as to the materiality of testimony of requested witnesses, the matter is referred to the convening authority for decision or, if the request is made or renewed at trial, to the independent military judge.'" Once the request is made, the government counsel must assume the responsibility of ensuring the presence of these witnesses at trial, a responsibility which includes the time-consuming duties of issuing subpoenas, originating correspondence, securing necessary travel orders, and obtaining accounting data for expenses of each witness.[149]

As to the witnesses whom the accused may call, his prerogatives are broad. He may call witnesses to testify only at the presentencing stage at trial,'" or he may call persons to be used only as character witnesses.[151] His right similarly extends to the calling of expert witnesses for the defense.'" This latitude is particularly significant in light of one further circumstance that greatly enhances the availability of defense witnesses. For each defense witness all expenses, including costs of service of process, travel expenses, food and lodging allowance, daily attendance fee and expert witness fees are borne by the government.[153] This is without regard to the indigency of the accused, the number of witnesses, or the travel distances involved. Finally, the subpoena power available to a military accused is not limited by state boundaries. Whereas an accused in state court may be unable to obtain witnesses from beyond the state's jurisdiction, subpoena power of a court-martial runs to "any part of the United States, or the Territories, Commonwealths, and possessions."[154]

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[146] *Id.* at 450, 24 C.M.R. at 260. In United States v. Sweeney, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964), denial of the accused's request to call a character witness was held prejudicial error.

[147] United States v. Thornton, 8 U.S.C.M.A. 446, 449, 24 C.M.R. 256, 259 (1957) (citing Meeks v. United States, 179 F.2d 319 (9th Cir. 1950)).

[148] MANUAL, *supra* note 31, at ¶ 115.

[149] *Id.*

[150] *Id.* at ¶ 75*c*.

[151] *Id.* at ¶ 138*f*(2).

[152] MANUAL, *supra* note 31, at ¶ 116; MANUAL OF THE JUDGE ADVOCATE GENERAL OF THE NAVY § 0138j [hereinafter cited as NAVY JAG MANUAL].

[153] MANUAL, *supra* note 31, at ¶ 115.

[154] 10 U.S.C. § 846 (1964) (art. 46 of the UCMJ).

An example may best illustrate the benefit of these rights. In a recent case (in which the author was assistant defense counsel) the defense called ten witnesses to testify solely on the character of the accused."' These witnesses, both military and civilian, were flown to trial in Washington, D.C., from such places as Santa Barbara, California; London, England; and Rota, Spain. **All** expenses were paid by the government, and defense counsel were required only to furnish a "request" with name and location and the required summarized showing of materiality.'"

Considering that all expenses are borne by the government, the requirement of a showing of materiality is not unreasonable, for the opportunity for defense counsel to use "requests" for harassment purposes is apparent. Moreover, the requirement of a showing of materiality is not unique to the military. One need look no further than the Federal Rules of Criminal Procedure for a similar requirement. In those situations under rule 17(b) when the government bears the expense of calling defense witnesses,[157] the defense is required to demonstrate that the presence of the witness "is necessary to an adequate defense."[158]

VIII. SELF-INCRIMINATION

The fifth amendment guarantee that no person shall be "compelled in any criminal case to be a witness against himself" has been construed by the Supreme Court to extend beyond mere verbal utterances. The Court, for example, has held unconstitutional a federal law requiring members of the Communist Party to register when such registration might force an individual to disclose information tending to incriminate himself.[159] Similarly, tax requirements and gun registration requirements that would require an individual to furnish incriminating information have

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[155] United States v. Morgan, NCM 69 2934 (tried April 8–11, 14–17, 1969 at Headquarters, Naval District, Washington, D.C.).

[156] MANUAL, *supra* note 31, at ¶ 115*a*.

[157] **FED.** R. CRIM. P. 17(b). The Government bears these expenses only for "defendants unable to pay."

[158] *Id.* This rule, in its recently amended form, requires simply that the accused demonstrate that a witness is necessary to an adequate defense. Prior to 1 July 1966, a request by an indigent defendant for the court to issue a subpoena had to be supported by an affidavit indicating the expected testimony, plus a showing "that the evidence of the witness is material to the defense, that the defendant *cannot safely* go *to trial without the witness,* and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness." (Emphasis added). *But see* note 150 *supra.*

[159] Albertson v. Subversive Activities Control Bd., **382** U.S. **70** (1965).

been held violative of the fifth amendment.[160] However, the Court has also held that this constitutional provision does not preclude compelling a criminal suspect to speak for voice identification purposes or to furnish handwriting exemplars.[161] Seither has the Court held the extraction of blood samples from a suspect to be a fifth amendment violation, since such a taking is not a "testimonial utterance."[162]

In contrast to the civilian accused, the serviceman is protected from compulsory self-incrimination not only by the fifth amendment but by article 31 of the UCMJ.[163] Article 31(b) specifically provides that no suspect may be asked for "any statement" without being informed of his rights, including his right not to furnish such "statement"[164] The United States Court of Military Appeals has held that compelling a suspect to speak for voice identification[165] or requiring him to furnish handwriting exemplars[166] violates article 31, which the court notes is broader than the fifth amendment.[167] In a similar manner, requiring a suspect to furnish a urine specimen[168] or to submit to a blood alcohol test[169] has been held to violate a serviceman's privilege against self-incrimination.

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[160] Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Marchetti v. United States, 390 U.S. 39 (1968).

[161] Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplars); United States v. Wade, 388 U.S. 218 (1967) (voice identification).

[162] Schmerber v. California, 384 U. S. 757, 764 (1966).

[163] 10 U.S.C. § 831 (1964) (art. 31 of the UCMJ).

[164] *Id.* at § 831(b): "So persons subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial."

[165] United States v. Mewborn, 17 U.S.C.M.A. 431, 38 C.M.R. 229 (1968).

[166] United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967), *rejecting as not controlling* Gilbert v. California, 388 U.S. 263 (1967); United States v. Minnifield, 9 U.S.C.M.A. 373, 26 C.M.R. 153 (1958).

[167] United State.; v. White, 17 U.S.C.M.A. 211, 216 38 C.M.R. 9, 14 (1967); United States v. Musguire, 9 U.S.C.M.A. 67, 68. 25 C.M.R. 329, 330 (1968).

[168] United States v. McClung, 11 U.S.C.M.A. 754, 29 C.M.R. 570 (1960) (accused in semiconscious state); United States v. Forslund, 10 U.S.C.M.A. 8, 27 C.M.R. 82 (1958) (by direct order); United States v. Jordan, 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957) (by direct order).

[169] United States v. Musguire, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1938).

IX. DEFERMENT OF CONFINEMENT

New provisions regarding release from confinement pending appeal were enacted by the Military Justice Act of 1968.[170] The military has long had provisions regulating release from confinement prior to trial, provisions generally similar to civilian standards except that servicemen are always released on their own recognizance without the posting of bond."' The military, however, had not had a procedure analogous to civilian release on bail pending appeal, and courts-martial were expressly excluded from the Bail Reform Act.'" This absence of statutory guidance was a particular problem since every criminal accused receives automatic appellate review." Although the *Manual for Courts-Martial* implied such discretion, article 57 of the UCMJ provided that the period of confinement would run from the date adjudged.[174] A commanding officer could not exercise discretion to defer confinement without thereby reducing the accused's sentence.

Under the UCMJ as amended, however, a commanding officer is permitted to defer the service of confinement pending appellate review.'" This power is fully discretionary in the officer to whom application is made.[176] When deferment is granted, however, the accused is not required to post any financial bond but is, just as prior to trial, released on his own recognizance."'

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[170] 10 U.S.C. § 857 (Supp. IV, 1969) (art. 57 of the UCMJ).

[171] Dep't of Defense Instruction No. 1325.4 (7 Oct. 1968) provides that confinement shall not be imposed pending trial unless deemed necessary to insure the presence of the accused at the trial, or because of the seriousness of the offense charged . . . or the presence of factors making it probable that failure to confine would endanger life or property.

[172] 18 U.S.C. § 3568 (Supp. IV, 1969). See S. Rep. No. 760, 89th Cong., 1st Sess. (1965); H.R. Rep. No. 1541, 89th Cong., 2d Sess. (1966).

[173] Note 178 *infra*. Constitutional questions were not involved since right to post-trial bail pending appellate review is a statutory right rather than one of constitutional stature. ***See*** Levy v. Resor, 17 U.S.C.M.A. 135, 138, 37 **C.M.R.** 399, 402 (1967), and authorities cited therein.

[174] 10 U.S.C. § 857 (Supp. IV, 1969) (art. 57 of the UCMJ); MANUAL, *supra* note 31, at ¶ 21d.

[175] 10 U.S.C. § 857 (Supp. IV, 1969) (art. 57 of the UCMJ); MANUAL, *supra* note 31, at ¶ 88*f*.

[176] *Id.* The only intimation of standards to be used is found in paragraph *88f* which states: "Deferment should not be granted, for example, when the accused may be a danger to the community or when the likelihood exists that he may repeat the offense or flee to avoid service of his sentence." The question remains whether abuse of discretion can exist in light of the open-ended statutory provisions.

[177] Note 171 *supra*.

X. APPELLATE REVIEW

The system of appellate review in the military is unique. First, every accused convicted at trial by special court-martial or by general court-martial is entitled to automatic appellate review on at least two levels.[178] In the least serious of these cases—special courts-martial in which the sentence adjudged does not include a punitive discharge—the case must be reviewed by the convening authority and by a military lawyer.[179] If the sentence includes a punitive discharge, automatic review must include review by an officer exercising general court-martial jurisdiction upon the written advice of his staff judge advocate and by a court of military review.[180] Requirements for the contents of the staff judge advocate review are explicit and preclude processing the cases perfunctorily. The written review must include "a summary of the evidence. . . , [the staff judge advocate's] opinion as to the adequacy and weight of the evidence and the effect of any error or irregularity respecting the proceedings, a specific recommendation as to the action to be taken [and] reasons for both the opinion and the recommendation. . . ."[181] Following the action of the general court-martial authority, the case is automatically reviewed by a court of military review.[182] Before this three judge appellate court the accused is entitled to have his case briefed and argued by qualified lawyer counsel, appointed free of charge.[183]

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[178] 10 U.S.C. §§ 860, 861, (1964) (arts. 60, 61 of the UCMJ); 10 U.S.C. §§ 865–67, 869 (Supp. IV, 1969) (arts. 65–67, 69 of the UCMJ); MANUAL, *supra* note 31, at §§ 84–91, 94–103. See note 179 *infra*.

[179] 10 U.S.C. § 65(c) (Supp. IV, 1969) (art. 65(c) of the UCMJ). In special courts-martial convened by an officer who does not exercise general court-martial jurisdiction, the case must be reviewed by the "supervisiory authority" as well as by the convening authority. The supervisory authority is an officer exercising jurisdiction high in the chain of command. Review by him is required by the MANUAL at ¶¶ 91*b*(2), 94*a*. When, on the other hand, a special court-martial is convened by an officer exercising general court-martial jurisdiction, approval by that officer and review by a judge advocate satisfy the requirements of the UCMJ and the MANUAL. The Navy has promulgated regulations, however, which provide that in such a case the action of the convening authority does not constitute supervisory authority action, thereby requiring review higher in the chain of command. NAVY JAG MANUAL § 0125*a*(3) (rev. 18 July 1969, JAG Note 5800).

[180] 10 U.S.C. § 865(b) (Supp. IV, 1969) (art. 65(b) of the UCMJ); 10 U.S.C. § 861 (1964) (art. 61 of the UCMJ).

[181] Manual, supra note 31, at ¶ 85*b*. *See* United States v. Fields, 9 U.S.C.M.A. 70, 25 C.M.R. 332 (1958). Note the elaborate requirements contained in the DEP'T OF THE AIR FORCE MILITARY JUSTICE GUIDE, AIR FORCE MANUAL 111–1, at $ 7–3 (17 July 1969).

[182] 10 U.S.C. § 866(b) (Supp. IV, 1969) (art. 66(b) of the UCMJ); MANUAL, *supra* note 31, at ¶ 100. Automatic review is required even when the punitive discharge is suspended. On the 12-judge United States Navy Court of Military Review, for example, there are three civilians.

[183] MANUAL, *supra* note 31, at ¶¶ 102*a*, *b*.

For general courts-martial automatic review is even more thorough. When the sentence adjudged does not include a punitive discharge, the case is reviewed by the convening authority with the advice of the staff judge advocate's review.[184] The case is then referred for review to the office of The Judge Advocate General, which may refer the case to the court of military review.[185] If the sentence includes a punitive discharge, the case is referred directly to the court of military review.[186] If the accused is a general or flag officer, or if the approved sentence extends to death, the case must be reviewed by the United States Court of Military Appeals and cannot be executed until approved by the President.[187] This court, located in Washington, D.C., consists of three civilian judges appointed by the President upon the advice and consent of the Senate.[188]

These are the layers of review that the accused receives automatically as a matter of right. He is not required to file notice of appeal, to pay a filing fee, or a transcript fee, to submit an assignment of errors, or to retain counsel.[189] Beyond these automatic reviews the accused may pursue other avenues of relief by his own action. The Military Justice Act amended article 69 of the UCMJ to allow a person whose case has not been reviewed by a court of military review to petition The Judge Advocate General for relief.[190] This provision eliminates the possibility that a court-martial can be finally reviewed in the field without recourse to further examination by an authority other than the command concerned.[191]

An accused may also petition The Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court.[192] Under the recent amendments to this article, the time limit for such action was extended to two years and the

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184 10 U.S.C. § 861 (1964) (art. 61 of the UCMJ); MANUAL, *supra* note 31, at ¶¶ 84–86.

185 10 U.S.C. § 869 (Supp. IV, 1969) (art. 69 of the UCMJ).

186 10 U.S.C. §§ 865 (b), 866(b) (Supp. IV, 1969) (arts. 65(b), 66(b) of the UCMJ).

187 10 U.S.C. § 867(b) (1) (Supp. IV, 1969) (art. 76(b) (1) of the UCMJ); MANUAL, *szcpra* note 31, at ¶ 101.

188 10 U.S.C. § 867(a) (1) (Supp. IV, 1969) (art. 76(a) (1) of the UCMJ).

189 Note 178 *supra*.

190 10 U.S.C. § 869 (Supp. IV, 1969) (art. 69 of the UCMJ).

191 *Id.* This review is by persons who are in no way related to the convening authority. Petition is freely allowed since a ground on which it may be based is "error prejudicial to the substantial rights of the accused." This provision thwarts attempts by convening authorities to preclude further review by oommuting a punitive discharge to, for example, six months confinement.

192 10 U.S.C. § 873 (Supp. IV, 1969) (art. 73 of the UCMJ).

right was extended to minor offenses.[193] In cases that are reviewed by a court of military review, the accused may further petition for review by the United States Court of Military Appeals.'" Here, as before the court of military review, the accused is furnished qualified legal counsel free of charge.'"

Furthermore, the accused may seek clemency action by the Secretary of his service.[196] In the Navy, for example, this clemency authority is vested in The Judge Advocate General and in the Naval Clemency and Parole Board.'" If his sentence includes a punitive discharge, the accused may be able to seek review from a discharge review board.'" Each service also has a board €or the correction of military records, which may act "to correct an error or remove an injustice."'" Finally, the accused may always seek further remedy in federal courts, including the United States Court of Claims.''

It is not only this panoply of remedies that distinguishes military appellate review.'" Two other characteristics mark it as a system uniquely advantageous to the accused. The first is the standard of proof that is required on appeal. Every reviewing authority up through the court of military review must be con-

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[193] *Id. See* S. Rep. No, 1601, 90th Cong., 2d Sess. 15 (1968).

[194] 10 U.S.C. § 867(b) (3) (Supp. IV, 1969) (art. 67(b) **(3)** of the UCMJ); MANUAL, *supra* note 31, at ¶ 101.

[195] Note 183 *supra*. It should be noted that appellate defense counsel is different from trial defense counsel. He consequently has complete freedom with issues, even including raising inadequacy of representation at trial. In United States v. Horne, 9 U.S.C.M.A. 601, 26 C.M.R. 381 (1958), the court held that failure of trial defense counsel to raise the defense of entrapment constituted ineffective assistance of counsel and therefore denied the accused due process.

[196] 10 U.S.C. § 874 (1964) (art. 74 of the UCMJ).

[197] NAVY JAG MANUAL § 0219c; Secretary of the Navy Instruction 58'15.3 **(22** Aug. 1968).

[198] 10 U.S.C. § 1553 (1964). This provision does not apply to punitive discharges adjudged at general courts-martial.

[199] 10 U.S.C. § 1552 (1964). ***See, e.g.***, Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965); Peterson v. United States, 292 F.2d 892 (Ct. Cl. 1961).

[200] ***See, e.g.***, O'Callahan v. Parker, 395 U.S. 258 (1969).

[201] Certain remedies, such as the discharge review boards and boards for correction of military records, are administrative rather than appellate remedies.

vinced of the guilt of the accused beyond a reasonablt doubt." Each reviewing authority must weigh fully the evidence, decide controverted issues of fact, and judge the credibility of witnesses just as the triers of fact do at trial.'" In the military it is reversible error for the staff judge advocate to advise the convening authority that the record of trial is "legally sufficient to support the findings of guilty and the sentence."" Such a review is legally inadequate if it fails to state that the staff judge advocate is convinced of the accused's guilt beyond a reasonable doubt. The convening authority himself must be likewise convinced.'" In exercising this function reviewing authorities may rely on matters outside the record of trial to disapprove findings or sentence, but not to support affirmance.[206] Finally, except for the appeal of questions of law certified from a court of military review to the Court of Military Appeals, review can work only in favor of the accused. The government may not appeal even a question of law to the court of military review, for example, and each higher reviewing authority is bound by any mitigation in findings and sentence made by the authority preceding him."'

Secondly, apart from the unique standards applicable on review, military appellate review includes provisions for appellate review of sentences. Military reviewing authorities review the appropriateness of the sentence and both intermediate reviewing authorities,[208] and the courts of military review[209] have absolute

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[202] ***See*** United States v. Xrthur, 9 U.S.C.M.A. 81, **25** C.M.R. 343 (1958); United States v. Acker, 9 U.S.C.M.A. 80, 25 C.M.R. 342 (1958); **MANUAL,** *supra* note 31, at ¶¶ 86*b*(1)(c), 100*a*. For general courts-martial not reviewed by a court of military review, however, the standards to be applied are unclear. Article 69 speaks not of "review" but of ''examination," and no standards are prescribed. 10 U.S.C. § 869 (Supp. IV, 1969) (art. 69 of the UCMJ). Similarly, action taken under amended article 69 is taken according to standards determined *by* the Office of The Judge Advocate General. The Court of Military Appeals rules only on questions of law. ***See*** United States v. Baldwin, 17 U.S.C.M.A. 72, 37 C.M.R. 336 (1967)

[203] **MANUAL,** *supra* note 31, at ¶¶ 86*b*, 100*a*. See United States v. Grice, 8 U.S.C.M.A. 166, 23 C.M.R. 390 (1957); United States v. Johnson, 8 U.S.C.M.A. 173, 23 C.M.R. 397 (1937); United States v. Massey, 5 U.S.C.M.A. 514, 18 C.M.R. 138 (1955).

[204] United States v. Arthur, 9 U.S.C.M.A. 81, 25 C.M.R. 343 (1958), and authorities cited therein.

[205] *Id.*

[206] United States v. Duffy, *2* U.S.C.M.A. 20, **11** C.M.R. 20 (1953).

[207] United States v. Christopher, 13 U.S.C.M.A. 61, 30 C.M.R. 61 (1960).

[208] Under 10 U.S.C. § 867(b)*(2)* (Supp. IV, 1969) (art. 67(b)(2) of the UCMJ), **a** Judge Advocate General may certify an issue to the Court of Military Appeals. ***See*** **MANUAL,** *supra* note 31, at ¶ 100*a*.

[209] United States v. Caid, 13 U.S.C.M.A. 348, 32 C.M.R. 348 (1962).

discretion to reduce the sentence adjudged at trial. A convening authority may never increase the sentence adjudged at trial, but he may reduce the sentence, suspend the sentence, or substitute a different, less severe form of sentence.[210] A reviewing authority may act on the sentence because of error at trial or any other reason he considers appropriate."' Furthermore, any reviewing authority may order a rehearing on the sentence alone.'"

Appellate review of sentences is a current issue in civilian jurisdictions. In 1967 the American Bar Association (ABA) published its proposed standards for appellate review of sentence:' Military sentence review procedures, which have been in effect since the enactment of the UCMJ in 1950, are virtually duplicated by those standards.'" In civilian courts, however, the ABA committee notes that "[t]he only [sentence review] available in many jurisdictions at present is resort to the executive."'' Furthermore, appellate review of sentences "is realistically available in every serious case [in] something on the order of fifteen [states]."[216] In federal courts, appellate review of sentences has been eliminated even though it did once exist."'

The ABA committee observes in its report that one of the chief virtues of appellate sentence review is the protection it provides against the occasionally excessive sentence."' This can perhaps best be illustrated by two recent cases, one military, one civilian. In a recent court-martial at the Presidio in San Francisco, an Army private was convicted of mutiny in violation of article **94** of the UCRIJ for incidents which occurred while he was con-

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[210] MANUAL, *supra* note 31, at ¶ 88.

[211] *Id. See* notes 29, 80 *supra.*

[212] MANUAL, *supra* note 31, at ¶ 92*a*. ***See,*** *e.g.*, United States v. Zunino, 15 U.S.C.M.A. 179, 35 **C.M.R.** 151 (1964).

[213] **ABA** PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JYSTICE, STANDARDS RELATISG TO APPELLATE REVIEW OF SENTENCES (Tent. Draft, 1967) [hereinafter cited as ABA STANDARDS FOR SENTENCE REVIEW].

[214] *Id.* One difference was that a majority of the committee felt that the limitation on sentence review should not be in excess of one year sentences. *Id.* at *20.* In the military, review occurs for every special and general court-martial regardless of the extent of sentence. Also, in the ABA Project, sentence review is tied to review of conviction, nhereas review of both are automatic and separable in the military.

[215] *Id.* at 2.

[216] *Id.* at 13.

[217] *Id.* at **14** (citing United States **v.** Martell, *335* F. 2d 764, 767–68 (4th Cir. 1964); United States v. Rosenberg, 195 F. 2d 583, 604–07 (2d Cir. 1952)).

[218] ABA STANDARDS FOR SENTENCE REVIEW, *supra* note **213,** at 6, 21–25, 130.

fined in the Presidio stockade. For his acts he was sentenced by the court to 15 years confinement, total forfeitures of pay, and a dishonorable discharge. When the case was reviewed by the convening authority, the confinement was reduced to seven years. Subsequently, The Judge Advocate General exercised clemency action, reducing confinement to two years. The case was then reviewed by the court of military review, the appellate stage of automatic review at which the accused is entitled to be represented by appellate defense counsel appointed free of charge. This court reevaluated the evidence and found it factually insufficient to support a charge of mutiny. Instead, the court found the accused guilty of the lesser included offense of wilful disobedience. It reduced the confinement to one year, and reduced the character of the discharge to a bad conduct discharge.[219]

At about the same time as that court-martial a civilian accused was brought to trial in state court in the Commonwealth of Virginia for possession of "in excess of" 25 grains of marijuana. He was convicted by a jury. This was his first offense. He was sentenced on 21 February 1969 to 20 years confinement and a $2,000 fine.[220] In Virginia, however, this accused has no automatic appellate review, and no provision exists for independent review of the sentence.[221]

Despite the military's elaborate appellate structure, some critics of military justice continue to assert that it provides inadequate and ineffective review.[222] This assertion is dramatically belied by the results of such review. Taking as an example all Navy and Marine Corps general courts-martial during the fiscal year 1967, the sentence adjudged at trial was reduced on review in more than 87 percent of the cases.[223] For special courts-martial at which a punitive discharge was adjudged, 78 percent of the sentences were reduced on appeal.[224]

Authoritative observers have recognized the advantages of military appellate review. In 1963 the Attorney General's Committee on Poverty and the Administration of Justice observed:

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[219] United States **v.** Sood, 42 C.M.R. —— (1970), *as* ***digested*** *in* 70–9 JALS 12.

[220] Commonwealth **v.** Whitehead (Hustings Ct., Richmond, Va., 21 Feb. 1969).

[221] VA. CODE ANN. §§ 19.1–282, 286 (1950).

[222] ***See,*** *e.g.*, Sherman, *supra* note 127, at 22.

[223] Statistics for fiscal year 1967, on file in the Promulgation and Statistical Section, Office of the Judge Advocate General of the Navy, Washington, D.C.

[224] *Id.*

> [T]he military experience demonstrates the essential fact that free access to appellate review is an indispensable feature of an enlightened system of crimina: justice,..[T]he experience gained . . . in [the] administration of military justice should be consulted in every serious consideration of new appeals procedures in the civil courts.[225]

Military appellate review was held up for civilian systems to emulate long before 1963. In 1919 the distinguished John Henry Wigmore stated the following:

> In federal military justice . . . every convicted man . . . obtains an appellate scrutiny; and this he obtains without any cost, paying no counsel fer and no transcription expense. This is an ideal of which civilian justice has been dreaming ever since Magna Carta. Coniplete justice of the poor man is still a dream in our civilian courts. In the military courts, it is already a fact. It costs not a cent. It does not even need a motion in court. It is automatic. Here is an object lesson for civilian justice.[226]

SI. *CO*MMAND INFLUENCE

A charge invariably made by critics of military justice is the prevalence of command influence, the domination and control of courts-martial by the commanding officer."' Most of these assertions are to the effect that the convening authority's position in the command structure anti his superiority in rank over other persons involved in the process enable him to influence its operation.[228] By its very nature the subject does not lend itself to documentation. Accordingly, one problem with the charge of command influence is that it can be glibly made and is difficult to refute definitively. Moreover, any discussion of the absence or presence of command influence is susceptible to expansive generalizations that can be neither documented nor disproved. This topic will be discussed here by examining each of the circumstances which critics claim give rise to command influence. For each such circumstance, the vulnerability of the structure of the system to command influence, as well as other factors relevant to the actual exercise of command influence, will be examined.

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[225] REPORT OF THE ATTORNEY GENERAL'S COMM. *OS* POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 116–17 (1963).

[226] Address by John H. Wigmore, Maryland Bar Association, 28 June 1919, in Wigmore, *Lessons From Military Justice*, 4 J. AM. JUD. SOC'Y 151, 153 (1921).

[227] *E.g.*, Sherman, *supra* note 127, at 21. "Command influence is the most serious threat to justice in the military." *Id.*

[228] Note 229 *infra*.

The standard allegation of command influence is that the convening authority decides whether to bring charges, appoints the judge, both the prosecutor and the defense counsel, the court members, and reviews the case.'?' Considering each of these factors in sequence, the first relates to the convening authority's responsibility to refer cases to courts-martial.'" He does this by endorsing the charge sheet, an act by which the convening authority refers a case to a summary, special, or general court-martial.[231] The convening authority is precluded from even this function, however, when he signs and swears to the charges, directs that charges nominally be signed and sworn to by another, grants immunity to a prosecution witness, or has other than an official interest in the case.[232] Accordingly, when a convening authority, on the basis of the seriousness of the charges, "refers" a case to trial he is performing an administrative duty parallel to the civilian practice of referring a case to trial. Other command responsibilities of the convening authority, including efficient utilization of manpower and budgeting, militate against his abusing prosecutorial discretion. In many ways abuse is more likely to occur in civilian jurisdictions where grand juries are not required or may be dispensed with, where prosecutors have control over investigative agencies, and where a prosecutor's retention of his elected office may be facilitated by a prosecutorial crusade. Finally, the mere presence of a case before a court-martial implies nothing that is not implied by the presence of any case in court. If, then, the convening authority's function of referring a case to trial is a facet of command influence, it can be so only because of its exercise in conjunction with some other function, for referral itself is a common practice in all courts.

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[229] *E.g.*, Sherman, *supra* note **127,** at **21.** "Courts-martial are the responsibility of the commander, and so every trial is, in a sense, a test of his disciplinary policies. The commander is in complete control of the machinery; he decides whether to bring charges, he appoints the court (similar to a civilian jury), the officer (judge), the trial counsel (prosecutor), and the defense counsel from among his junior officers and he reviews the sentence with the power to reduce or waive it. It is a little like having a district attorney act as grand jury, select the judge, both attorneys and the jury from his staff, and then review the sentence on appeal. The Code, in an attempt to preserve a fair trial, forbids commanders from influencing the action of a court-martial, but the possibility that a junior officer can banish the influence of his commander (who rates him and controls his assignments) is about as likely as a senator not being influenced by accepting large gifts."

[230] **MANUAL,** *supra* note 31, at ¶ 33*j*.

[231] ***Id.*** at **app. 5.**

Secondly, critics commonly state that the convening authority "appoints" the military judge, a statement from which one might infer that the convening authority shops about for a judge suitable for his purposes and then names him to the court. The structure of the independent judiciary — now required by statute[233] — precludes this possibility by the elaborate insulation now afforded judges of the independent judiciary. All military judges of general courts-martial are officers assigned to the judiciary, a command separated both geographically and structurally from the convening authority and responsible only to the Judge Advocate General. When a command convenes a general court-martial, a military judge is provided for it by the head of the judiciary activity. The name of this judge is listed on the convening order, formerly known as the "appointing order,"[234] which the convening authority signs. In this manner the convening authority "appoints" the military judge. Moreover, the efficiency or fitness reports of these judges are prepared not by convening authorities but by the head of the centrally located independent judiciary activity. This activity is completely divorced from the convening authority's chain of command, and the military judge may even be superior in rank to the convening authority.[235] Military judges presiding over special courts-martial may be either judges from the judiciary or judge advocates qualified to serve as military judges only in special courts-martial. These latter officers must be certified as qualified by the Judge Advocate General; judge advocates not so qualified are ineligible to serve as military judges. Assignment of these judges is commonly an act by the staff judge advocate, and it is to this officer, not the convening authority, that the judge is immediately responsible. Although in these cases the convening authority may be the staff judge advo-

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[232] Such a person is defined by the UCMJ as an "accuser." 10 U.S.C. § 801 (9) (1964) (art. 1(9) of the UCMJ). No accuser may convene a general, special, or summary court-martial. MANUAL, *supra* note 31, at ¶ 5*a* (3). Regarding grants of immunity see *e.g.*, NAVY JAG MANUAL § 0112b (rev. 18 July 1969, JAG Note 5800).

[233] 10 U.S.C. § 826 (Supp. IV, 1969) (art. 26 of the UCMJ).

[234] The appointing order is known as the convening order. MANUAL, supra note 31, at ¶ 36. This order lists the military judge, court members, and counsel.

[235] While many military judges are colonel and captains, Navy special court-martial convening authorities include "all commanders and commanding officers of units and activities of the Navy, except inactive training Naval Reserve units . . . all administrative officers. U.S. Naval Shipyards . . . [and] all directors, Navy Recruiting, Navy Recruiting Areas," officers who may be of lower rank. NAVY JAG MANUAL §0103b.

cate's commanding officer, the *Manual for Courts-Martial* specifically prohibits the convening authority from either preparing or reviewing any fitness or efficiency reports of a military judge relating to his performance as military judge."

The convening authority is similarly removed from the selection of counsel. Using the Navy as an example, the increased counsel requirements created by the Military Justice Act of 1968 have been met by establishing "law centers."[237] Under this program, commands within a given district obtain necessary counsel by requesting them from the law center, essentially a regional legal office at which many judge advocates, formerly stationed at individual commands, are now assigned. For trial the convening authority requests the necessary number of attorneys who are, in turn, furnished by the law center. The convening authority may learn the identity of these officers for the first time when he signs the prepared convening order. It should further be remembered that in addition to detailed defense counsel, the accused may still request a particular military counsel or may retain civilian counsel. Finally, several factors bear on the notion that counsel, even detailed counsel, could be pressured by the convening authority. Counsel at trial are generally young officers, and among this group only some[238] aspire to legal careers in the military. Thus, the vast majority do not have career interest which could be the subject of pressure. Even more important to any defense counsel, however, are the ethical considerations which every attorney owes to his client.[239]

The selection of the court members is frequently cited as a source of command influence.[240] Apart from the fact that the selection of court members is commonly an administrative act that transpires in the legal office, the Court of Military Appeals has been quick to invalidate trials in which there existed even the

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[236] MANUAL, *supra* note 31, at ¶ 38e. 10 U.S.C. § 826(c) (Supp. IV, 1969) (art. 26(c) of the UCMJ) precludes this in the case of a general court-martial military judge. However, the analogous provision for part-time military judges for special courts-martial was inserted in the MANUAL by the joint service committee which drafted the revised MANUAL in 1969.

[237] Office of Naval Operations Intruction 5800.6 (18 June 1969).

[238] Using the Navy as an example, retention (defined as the fulfillment of obligated service plus at least two years) of judge advocates entering the Navy in 1959, 1960, and 1961 was 11.1 percent. Twenty-one of 189 attorneys were retained.

[239] Every Judge Advocate General Corps officer must be a member of a state bar and the canons of ethics apply to military lawyers as they apply to any other group of attorneys.

[240] Sherman, *supra* note 229.

appearance of command control over court members.[241] The court has strictly limited the types of contracts the convening authority may have with members.

Furthermore, the UCMJ has several provisions to protect the interests of an accused who is dissatisfied with the members of his court. In addition to a peremptory challenge, the accused has an unlimited number of challenges for cause.[242] In the military, defense counsel has access to background information of members which may facilitate *voir dire* to determine a basis for challenge. The accused may demand that at least one-third of the court membership be enlisted men.[243] But most importantly, under the Military Justice Act he can waive all the members and elect to be tried by a military judge.[244] This request by the accused, in contrast to the similar procedure in federal courts,[245] is not subject to veto by the prosecution.[246]

Finally, the possibility of command influence is asserted because the convening authority reviews the case.[247] Clearly, the status of the accused cannot be worsened by the convening authority's review, for his review can only result in approval of the action of the court or action in favor of the accused.[248] Thus the only argument that the convening authority's review reflects command influence could be that since the convening authority refers the charges to trial, his review will be perfunctory and will fail to take appropriate action with regard to error committed at trial. Even if statistics supported this contention, the only prejudice to the accused would be that this automatic review, to

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[241] United States v. Clayton, 17 U.S.C.M.A. 248, 38 C.M.R. 46 (1967); United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967); United States v. Wright, 17 U.S.C.M.A. 100, 37 C.M.R. 374 (1967); United States v. McCann, 8 U.S.C.M.A. 675, 25 C.M.R. 179 (1955); United States v. Littrice, 3 U.S.C.M.A. 487, 13 C.M.R. 43 (1953); United States v. Guest, 3 U.S.C.M.A. 147, 11 C.M.R. 147 (1953).

[242] 10 U.S.C. § 841 (Supp. IV, 1969) (art. 41 of the UCMJ).

[243] 10 U.S.C. § 825(c)(1) (Supp. IV, 1969) (art. 25(c)(1) of the UCMJ).

[244] 10 U.S.C. § 816(1)(b). (Supp. IV, 1969) (art. 16(1)(b) of the UCMJ). The accused may make such a request after learning the identity of the military judge and after an opportunity to consult with counsel. MANUAL, *szcpra* note 31, at ¶ 4*a*. In the first two months under the Military Justice Act, over 60 percent of all general and special courts-martial were tried by a military judge alone. Navy JAG, Off The Record Issue No. 44, 23 Oct. 1969.

[245] FED. R. CRIM. P. 23a.

[246] *See* S. Rep. No. 1601, 90th Cong., 2d Sess. 4 (1968) (discussion of reasons underlying this distinction).

[247] *See* Sherman, *szcpra* note 229.

[248] Note 178 *supra*.

which he would not be entitled in most civilian courts, was not productive. However, statistics tend to refute this contention.[249] More important to the accused, however, and more pertinent to the command influence claim is the fact that in no court-martial is review by the convening authority the final recourse for the accused. In all serious cases further review is automatic,[250] and even in minor cases additional remedies are available."[251]

In light of the foregoing considerations, there is little value to claims of command influence that rely on a recitation of what the convening authority "does." without attemping to analyze further what impact upon the judicial process is thereby created.[252] Similarly, a discussion which fails to examine the question in light of the Military Justice Act is outdated. Perhaps the best indication of the dubious validity of the speculative claims, however, is found in the actual statistics of disposition of cases at trial. **A** comparison with similar statistics for federal district courts is instructive. In federal district courts during the fiscal year ending June **30, 1967, 27,073** criminal defendants were convicted and sentenced while **1,128** were acquitted, for an acquittal rate of just under four percent.[253] On the other hand, of all the

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[249] Note **223** *supra.*

[250] Notes **180–83,** 186 *supra.*

[251] Notes 190, 191 *supra.*

[252] Ironically, critics rarely mention the one procedure by which, in the opinion of the author, the process is mast susceptible to command influence. Article 62(a) of the UCMJ provides that when a specification has been dismissed on a motion "and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration . . . any further appropriate action." Paragraph 67f of the MANUAL further provides that when such a disagreement involves a "question of law," the military judge or president will "accede to the view of the convening authority.'' The decisions of the Navy Court of Military Review have been split on whether the military judge must accede to the convening authority under article 62(a) of the UCMJ. ***See*** United States v. Krieger, NCM 69 088 **(23** June 1969); United States v. Kmiec, NCM 69 0259 **(23** July 1969). Although the issue has been present in cases considered by the Court of Military Appeals, it has not been ruled upon. ***See, e.g.,*** Fleiner v. Koch, 19 U.S.C.M.A. —, 41 C.M.R. — **(7** Oct. 1969). Although this action is subject to appellate review, it is an intrusion into the trial procedure by the convening authority that is in contrast to the otherwise elaborate precautions to isolate procedure from him. It is especially anomalous in light of the newly secured independence of military judges.

[253] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS, table D7 (1967). The column of that chart labelled "dismissed" corresponds to those servicemen whose cases were, as a result of the investigation under article **32** of the UCMJ, either disposed of at a lesser court-martial or nonjudicial punishment, dismissed altogether, or withdrawn in order to take administrative action instead.

Army, Navy, and Air Force general courts-martial during the first half of calendar year 1968, there were **1,475** convictions and **131** acquittals, for an acquittal rate of eight and one-tenth percent. Of these courts-martial, **733** involved unauthorized absences, routine offenses for which there is no civilian counterpart and rarely a defense.'" If these cases are removed from consideration, the acquittal rate is **15** percent.[255] Thus, the notion that prevailing command influence results in an oppressive succession of court-martial convictions is—at least in serious cases—emphatically belied by the statistics.

XII. CONCLUSION

Against the backdrop of a pervasively unpopular war and a controversial conscription system, broad criticism of military institutions has had a receptive audience. Some critics of military justice have been unrestrained in their denunciations. **A** complete appraisal of military justice, however, fails to support either glib caricatures or broad condemnations. For example, it is a semantic sleight of hand to proclaim that "military law has always **been** and continues to be primarily an instrument of discipline, not justice."'" To the extent that "discipline" is intended to mean the trial, the conviction, and the sentence of a person determined to have violated a penal statute, it is an objective of civilian as well as military law, and it implements the fundamental purposes of the criminal law. It is an objective consistent with justice. To the extent, however, that "discipline" is intended to mean the wrongful conviction and punishment of innocent persons or the disregard of their constitutional and statutory rights, it is an assertion that is not supported by the facts.

Regrettably, such unbridled criticism of military criminal procedure detracts from those proposals which do have merit. One area in which reform is badly needed, in the opinion of the author, has to do, not with military justice, but with administrative discharge procedures. The undesirable discharge, for example, may attach a stigma fully as punitive as a discharge

[254] Statistics for the first half of calendar year 1968, on file in Promulgation and Statistical Section, Office of the Judge Advocate General of the Navy, Washington, D.C. One statistical factor that should be noted is that Air Force and Army statistics were based on the number of defendants (1395), while Navy statistics were based on the number of charges (211).

[255] *Id.*

[256] Glasser, *Justice and Captain* Levy, 12 COLCM. F. 46, 49 (1969).

adjudged by court sentence, but it is currently issued under procedures which are far less protective than those accorded an accused at trial by court-martial."[257] Similarly, the question of the limits of free speech in the military is a legitimate and difficult issue. It is, however, largely a constitutional issue and the legal balance between the military's interest in discipline and the individual serviceman's right to free expression will be definitively established only by further judicial decisions.[258] Finally, there is no doubt that military justice can be improved, as can any system of justice. Despite the recent legislation, the possibility of further specific reforms should be explored.[259] To this end, responsible criticism is a valuable stimulant, for change comes with as much difficulty in military institutions as in civilian ones.

The most common failing of military justice critics, however, is the failure to relate military justice to existing civilian judicial systems. No one has touted military justice as the paragon of judicial systems. It is clearly relevant, however, to consider the military system in light of existing systems in civilian jurisdictions, jurisdictions in which military defendants would otherwise be tried. A thorough, current comparison with these systems indi-

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[257] *Id.*

[258] United States Court of Military Appeals cases on free speech are few. *See, e.g.*, United States v. Howe, 17 U.S.C.M.A. 165 37 C.M.R. 429 (1967); United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

[259] In the opinion of the author, the following areas deserve consideration. After a transition period with the present Code, the exceptions of "physical conditions and military exigencies" relevant to the assignment of counsel and military judges might be eliminated. 10 U.S.C. § 819 (Supp. IV, 1969) (art. 19 of the UCMJ); 10 U.S.C. § 827(b) (1964) (art. 27(b) of the UCMJ). This change would be far less disruptive than those of the Military Justice Act of 1968 and problems concomitant with the present system may he eliminated. For example, the fact/law distinction now important in special courts-martial without a military judge. MANUAL, *supra* note 31, at ¶ *57b*. Sentencing by a military judge, even in cases with court members, could be considered, as well as increasing the judge's authority to suspend sentence.

With regard to the selection of court members, objections of critics could be rendered moot by a simple procedure whereby court members are selected by lot in the presence of counsel or some disinterested third party. Similar procedure could be used for selection of enlisted men if requested by the accused.

The independence of the courts of military review could be further strengthened by providing judges with tenure or a fixed term of service. Consistent with their responsibilities would be provisions, statutory or otherwise, for the assignment of law clerks from among the ranks of junior judge advocates.

Verbatim records in minor as well as serious cases would facilitate thorough review. For suggested procedural revisions see note 252 *supra*.

cates that in numerous ways military justice is clearly superior. Significant advances in criminal justice could be made in many civilian jurisdictions by the adoption of enlightened procedures that have long been a part of military justice. Stated differently: If the characteristics of today's military justice system represent the "civilianization" of military courts, one can only expectantly await the "civilianization" of civilian courts.

O'CALLAHAN V. PARKER: COURT-MARTIAL JURISDICTION, "SERVICE CONNECTION," CONFUSION, AND THE SERVICEMAN*

By Paul Jackson Rice**

The controversial O'Callahan case turns on the tension between the constitutional rights to grand and petit juries and the congressional power "to make rules for the regulation" of the armed forces. The result of the case is simple in theory but in practice is hard to justify and apply. This article evaluates the majority and minority opinions of the Supreme Court, criticizing the majority opinion for disturbing precedent, historical inaccuracies, vagueness, and failure to consider the needs of military discipline and other practical effects of the decision. The problems of applying O'Callahan have evoked a number of interpretations and approaches from the Judges of the Court of Military Appeals. These approaches are analyzed as they apply to the factors of "service connection" and other problems: place of the crime, extraterritorial application, drugs, petty offenses, crimes against other service members, crimes involving abuse of military status, officer status, the role of the uniform, retroactivity, and jurisdiction over civilians in time of war.

I. INTRODUCTION

In 1962, Chief Justice Earl Warren presented the third James Madison Lecture at New York University Law Center, entitled "The Bill of Rights and the Military."[1] He considered the topic

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

one of increasing importance due to changing domestic and world conditions, resulting in a large standing army. His purpose was to examine the troublesome problem of the "role to be assigned the military in a democratic society. . . ."[2] He noted that our Government has been one of "traditional subordination of military to civil power," and that "with minor exceptions, military men throughout our history have not only recognized and accepted this relationship in the spirit of the Constitution, but that they have also cheerfully cooperated in pursuing it."[3]

The Chief Justice discussed the role of the Court in determining conflicts between the Bill of Rights and military necessity, dividing the areas of conflict into three broad categories. Only the first category is appropriate for comment here. That is that the role of the Court is most limited when the militsry is dealing with its own personnel, The Court has never waivered from its holding that it lacked jurisdiction to review, by certiorari, decisions of military courts.[4] When the Court has released prisoners convicted by court-martial, it has based its action upon lack of military jurisdiction over the person, applying the term "jurisdiction" in its narrowest sense. The reason for the "hands-off" attitude rests on strong, indisputable historical support. "[T]he tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel."[5]

The comments of the Chief Justice were almost indisputable at the time they were made.[6] And, although the period since the lecture has been termed by some as the "criminal law revolution," nothing has occurred in the field of military law to prepare the court-martial system for the shock of *O'Callahan v. Parker*.[7] Therein, the retiring Chief Justice would be part of a majority of the Court, which would place a firm grip by the judiciary upon the previously termed "hands-off" category.

The incident occurred approximately thirteen years prior to the decision. On the night of 20 July 1956, Army Sergeant James F. O'Callahan and his roommate and friend, Charles Redden, left

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[2] *Id.* at 182.

[3] *Id.* at 186.

[4] *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1863).

[5] Warren, *supra* note 1, at 187.

[6] One article challenging the military's authority was Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960).

[7] O'Callahan v. Parker, 395 U.S. 258 (1969).

their duty station at Fort Shafter, Oahu, Territory of Hawaii, with an evening pass. The two, dressed in civilian clothes, had a few beers in a Honolulu hotel bar. Later that night, they made their way to a balcony on the fourth floor of the residential part of the hotel. From the balcony, they could see a girl sleeping in an adjacent bedroom. O'Callahan suggested that they enter the room and one of them could hold the girl, while the other had intercourse with her. Redden refused to participate and departed. O'Callahan then forced his way into the room and seized the fourteen year-old girl. His sexual attack upon the girl was unsuccessful, in that she struggled free from his restraints and screamed for assistance. Immediately after the screaming of the victim, O'Callahan was observed jumping from one balcony ledge to another, until he reached ground level. He was apprehended on the grounds by a hotel security guard, who observed him wearing a tee shirt, with his belt loose and his trousers open. O'Callahan's shirt was found in the victim's room. Later, he was returned to military authority, and after interrogation, made a confession.

He was charged by the military with attempted rape,*housebreaking," and assault with intent to commit rape.[10] A general court-martial tried O'Callahan and found him guilty as charged. He was sentenced to be dishonorably discharged from the Army, to forfeit all pay and allowances, and to be confined at hard labor for ten years. His conviction was affirmed by an Army board of review, and the United States Court of Military Appeals denied his petition for review."

In April 1966," O'Callahan petitioned the United States District Court for the Middle District of Pennsylvania for a writ of ,habeas corpus alleging, *inter alia*, that the court-martial had no jurisdiction to try him for a non-military offense commited off-post while on leave.[13] The District Court refused to consider that

[8] UNIFORM CODE OF MILITARY JUSTICE art. 80, 10 U.S.C. §§ 800–940 (Supp. IV, 1969) [hereinafter called the Code and cited as UCMJ].

[9] UCMJ art. 130.

[10] UCMJ art. 134.

[11] United States v. O'Callahan, 7 U.S.C.M.A. 800 (1957).

[12] O'Callahan was sentenced in 1936, paroled in 1960, and returned to confinement in 1962, as a parole violator. *See* O'Callahan v. Attorney General, 230 F. Supp. 766 (D. Mass. 1964).

[13] The other allegations unsuccessfully raised in the writ were: (1) that his confession, which had been admitted in evidence without objection, had been obtained by use of coercion; (2) that testimony by use of written interrogatories had been admitted into evidence, violating his sixth amendment right to confrontation of witnesses; (3) that his conviction by two-thirds vote rather than by unanimity violated his constitutional right to trial by jury.

issue, because O'Callahan had obtained an unfavorable ruling that same year from the Federal District Court of Massachusetts where he previously had been confined." The United States Court of Appeals for the Third Circuit affirmed the decision of the lower court without discussion of the question.[15] On certiorari, the United States Supreme Court reversed the lower courts, holding that the crimes of which O'Callahan was charged were not "service connected" and, therefore, not triable by court-martial.'"

The grant of certiorari had been limited to the one question upon which the Court reversed:

> Does a court-martial, held under the Articles of War, Tit. 10 U.S.C. § 801 ***et seq.,*** have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?"

Justice Douglas, delivering the opinion of the majority," concluded that O'Callahan could not be tried by court-martial because his crimes were not "service connected.'' Douglas stated that "not even the remotest" connection existed in *O'Callahan.*[19] At the time of the offense O'Callahan was off-duty, off-post, in civilian clothing, committing a "civilian" offense of no military significance, against a civilian victim. In establishing no service connection, the majority further noted that these were peacetime offenses "committed within our territorial limits, not an occupied zone of a foreign country.""

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[14] United States *ex rel.* O'Callahan v. Parker, 256 F. Supp. 679 (M.D. Pa. 1966). 28 U.S.C. § 2244 (1964) permits, in part, a district judge to refuse to entertain an application for a writ of habeas corpus where a prior application on the same grounds has been denied pursuant to a judgment of a court of the United States. Chief Judge Wyzanski denied the Massachusetts writ of habeas corpus stating: "[T]here is no merit in plaintiff's position, which conflicts with an unbroken line of contrary authority." O'Callahan **v.** Chief United States Marshal, 293 F. Supp. 441, **442** (D. Mass 1966).

[15] United States *ex rel.* O'Callahan v. Parker, 330 F.2d 360 (3d Cir. 1968). Judge Hastie relied upon Thompson v. Willingham, 318 F.2d 657 (3d Cir. 1963), in determining that the court-martial had jurisdiction. Thompson alleged that a military court had no jurisdiction over him for a capital offense in time of peace.

[16] O'Callahan v. Parker, 395 U.S. **258** (1969).

[17] 395 U.S. at 261. The Code replaced the Articles of War in 1951. Act of *5* May 1950, ch. 169, 64 Stat. 107.

[18] Chief Justice Warren and Justices Brennan, Marshall and Black joined with Douglas in the five to three decision.

[19] **395** U.S. at **273.**

[20] ***Id.*** at **273–74.**

The majority brushed aside the Government's contention that status as a member of the Armed Forces grants military jurisdiction, stating:

> [T]hat is merely the beginning of the inquiry, not its end. "Status" is necessary for jurisdiction; but it does not follow that ascertainment of "status" completes the inquiry, regardless of nature, time, and place of the offense."

Before going further, it is necessary to set forth those provisions of the Constitution which have established and developed the system of military justice. Article I, section 8, clause 14, grants to Congress the power "[t]o make Rules for the Government land Regulation of the land and naval Forces, . . ." and clause 18, the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." The fifth amendment acknowledges that a system establishing military discipline requires elimination of certain procedural protections:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .[22]

Other provisions of the Constitution necessary for an examination of this case are article III, section 2,[23] and the sixth amendment.[24] The majority noted that constitutional civil rights were at stake in *O'Callahan*, and that in order to protect those civil rights, the power of Congress to make rules for the government and regulation of the land and naval forces must be "exercised in harmony with express guarantees of the Bill of Rights."[25]

The majority begins its decision by comparing military tribunals with civilian courts, more specifically federal courts; and concludes that military courts are not entitled "to rank along with

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[21] *Id.* at 267.

[22] By implication, there is no right to a trial by jury in a court-martial. *See* note 81 *infra* and accompanying text.

[23] "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

[24] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

[25] 395 U.S. at 273.

Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty, or property."[26] The Court quotes from *Toth v. Quarles*,[27] in which reference is made to the fact that federal judges are appointed for life, and that their salaries may not be diminished; while their military equivalent do not have such constitutional protections and are subject to the "will of the executive department which appoints, supervises and ultimately controls them."[28] The Court frowned on the military system in which an agreement by two-thirds of the court-martial officers will result in a finding of guilty as compared with the civilian court system in which a unanimous decision by a layman jury is required for a finding of guilty. Justice Douglas staked that the court-martial convening authority, who appoints the members of the court-martial and counsel for both sides, usually has direct command authority over them, and such authority is pervasive in military law.[29]

After reducing the court-mastial to the lowest stratum of jurisprudence, the majority briefly noted its previous decisions, which limited military jurisdiction, by exluding from it discharged soldiers,[30] civilian dependents,[31] and employees accompanying the Armed Forces overseas.[32] Then, the Court added historical support for the position that soldiers should not be court-martialed for civilian offenses, by alluding to the practice of military law in England prior to the American Revolution and early American practice.

Once the majority established that "[a] court-martial is not yet an independent instrument of justice, . . ."[33] and that Anglo-American history supported the proposition that a soldier could not be tried by court-martial for civilian type offenses, the weighing of the expressed grant of power to Congress, as opposed to the expressed guarantees of the Bill of Rights to individuals, no longer presented a problem. The conclusion of the Court naturally followed that a soldier's

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[26] *Id.* at 262.

[27] 350 U.S. 11 (1955).

[28] *Id.* at 17.

[29] 395 U.S. at 264.

[30] Toth v. Quarles, 350 U.S. 11 (1955).

[31] Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957).

[32] McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960).

[33] 395 U.S. at 265.

> crime to be under military jurisdiction must be service-connected, lest "cases arising in the land and naval forces or in the militia, when in actual service in time of war or public danger," as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers.[34]

Justice Harlan, joined by Justices Stewart and White, strongly dissented. Justice Harlan asserted that the majority had usurped power granted to Congress by the Constitution to determine the "appropriate subject-matter jurisdiction of courts-martial."[35] He noted that the Court's interpretaion is inconsisent with all previous comments on clause 14.[36] His examination of the historical support, relied upon by the majority, caused him to conclude that "English constitutional history provides scant support . . .," and "pertinent American history" is "quite the contrary."[37] He objected to a balancing of interests when all previous interpretations by the Court had been consistent on clause 14. But if the majority insisted on balancing governmental interests, then Justice Harlan submitted that the interests on both sides should be examined. This was not done. Lastly, the dissent pointed out the confusing state in which the decision has left both Congress and the military by not explaining the scope of "service-connected" crimes. "Absolutely nothing in the language, history, or logic of the Constitution justifies this uneasy state of affairs which the Court has today created."[38]

It is the purpose of this article to examine the relevant historical military law, the decision itself, and the development of the "service connection" concept as interpreted by the military and federal courts in its first year of life.

II. HISTORICAL CONSIDERATIONS

A. ENGLISH HISTORY (THE CROWN AND PARLIAMENT)

As noted earlier, Justice Douglas found support for his opinion in the law of England prior to the American Revolution, and in American history. He referred to the abuses of court-martial power as "an important grievance of the parliamentary forces in

[34] *Id.* at 272–73.
[35] *Id.* at 276.
[36] *Id.* at 275.
[37] *Id.* at 276.
[38] *Id.* at 284.

the English constitutional crises of the 17th Century," finally resulting in Parliament's, and not the Crown's, holding the power to define court-martial jurisdiction." Douglas insisted that the 17th Century conflict was not merely a struggle over which organ of government had jurisdiction, but "involved substantive disapproval of the general use of military courts for trial of ordinary crimes."[39] He acknowledged that the Mutiny Act of 1720[41] allowed courts-martial of common law felonies, but treated the Act as an exception to the British rule "at the time of the American Revolution that a soldier could not be tried by court-martial for a civilian offense committed in Britain."[42]

For centuries prior to the first Mutiny Act of 1689, the Crown by special commission empowered the leaders of the armies (constable and marshal) with martial law. The power was plenary and the punishment eternally final. As noted by one historian,

> [W]e find very terrible powers of summary justice granted to the constable. In 1462 Edward IV empowers him to proceed in all crimes of treason "summarily and plainly, without noise or show of judgement on simple inspecticn of fact . . ." They show something like a contempt for law—the constable is to exercise powers of almost unlimited extent, all statutes, ordinances, acts anti restrictions to the contrary notwithstanding.[43]

In 1627, Parliament objected, *inter alia*, to the conduct of Charles I in issuing commissions for court-martial law against soldiers and mariners in time of peace, and adapted the Petition of Right of 1627.[44] Charles I agreed to their demands and revoked the commissions. However, after the Restoration, both Charles II and James II published articles of war for governing their troops, and in 1688, the Articles of War of James II provided for the court-martial of soldiers for common law crimes.[45]

With the coming of the English Revolution and William and Mary to the throne, the authority to control the Army was securely vested in Parliament by the Crown's acceptance of the Bill of Rights.[46] Even before the Bill of Rights, Parliament was

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[39] *Id.* at 268.
[40] *Id.*
[41] 7 Geo. 1, c.6.
[42] 396 U.S. at 269.
[43] F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 266–67 (1908). *See also* W. WINTHROP, MILITARY LAW AND PRECEDENTS 46–47 (2d ed. 1886, 1920 reprint).
[44] 3 Char. 1, c. 1.
[45] Duke and Vogel, *supra* note 6, at 442–43; Articles of War of James 11, Art. XVII (murder), Art. XVIII (robbery and theft), reprinted in WINTHROP 992.
[46] Duke and Vogel, *supra* note 6, at 443 n.41.

xequired to pass the first Mutiny Act[47] to deal with mutinous troops still favorable to the Stuarts. Under the Act, court-martial jurisdiction was limited to three offenses: mutiny, sedition and desertion; each punishable by death, or such other punishment as the court-martial may impose.[48] No one would argue that Parliament had set the limits of court-martial jurisdiction with the first Mutiny Act of 1689, because the evidence is to the contrary. In 1712, Parliament authorized the Crown to adopt articles of war providing for courts-martial of soldiers overseas in time of peace.[49] In 1718, Parliament authorized the Crown to prescribe articles of war which were to be operative within the Kingdom, as well as overseas.[50] Then, in section **46** of the Mutiny Act of 1720,[51] Parliament authorized the court-martialing of soldiers in Britain for common law felonies, if within eight days, the civilian authorities did not demand the turnover of the accused soldier to them for trial. In 1721, that section was changed so that court-martial jurisdiction did not include common law offenses committed in Britain.[52] The action of Parliament suggests nothing conclusive. In light of the continuing changes to the Mutiny Acts, it is suggested that Parliament determined the limits of jurisdiction based upon what was expedient at that time; and a restricting of jurisdictional limits merely reflected that the broader limits were no longer considered necessary.

If one attempts to conclude too much from 17th and early 18th Century English history, the presumptions and suggestions chew away at the factual fibers leaving holes. Certainly there was **a** dispute over which organ of government had jurisdiction over ithe Army; and further, there was a disapproval of military law, in that it was arbitrary and alien to established legal principles.[53]

But to go further is indeed dubious. Justice Harlan's approach to the period is quite convincing. He notes that "the King's asserted independent prerogative to try soldiers by court-martial in

[47] 1 W. and M., c. **5** (1689).

[48] WINTHROP 18–19, 920–30; F. MAITLAND, *supra* note 43, at 328–29.

[49] **Duke** and Vogel, *supra* note 6, at **444.**

[50] WINTHROP **20.**

[51] **7** Geo. 1, c. 6.

[52] F. WIENER, CIVILIANS UNDER MILITARY JUSTICE 14 (1967). No one has done more than venture a guess as to why the section was changed. *See* 395 U.S. at 269 n.11.

[53] "For martial law, which is built **upon** no settled principles, but is entirely arbitrary in its decisions, is . . . in truth and reality no law, but something indulged rather than allowed as a law." **1** BLACKSTONE, COMMENTARIES ON THE **LAWS** OF ENGLAND 413 (1915).

time of peace" was just one point of contention in the "long standing and multifaceted struggle for power between the military and the Crown on the one hand and Parliament on the other."[54] The harshness of military law made it understandable that when Parliament gained exclusive authority, they would use it sparingly.[55] Justice Harlan concluded by going only as far as history justifies, stating that the framers of the Constitution were influenced by the English struggle for power, and realized that control of the military must remain in the hands of the people, through their representatives, the Congress. That is the reason for the adoption of article I, section 8, clause **14.**

B. *EARLY AMERICAN PRACTICE*

Justice Douglas' statement that early American practice supports the majority opinion is without substance. He draws support for his statement from the Articles of War of 1776, enacted by the Continental Congress; the works of Colonel William Winthrop, a late 19th Century military historian; and the late date of 1916, when specific civilian offenses were first made punishable in peacetime courts-martial.[56] An examination of his authorities leads to an opposite conclusion.

Section X, article 1 of the 1776 Articles of War, to which Douglas referred, only required the accused soldier to be delivered to the civil magistrate for a civilian offense *after* a request had been made for his deliver~The section immediately

[54] 395 **U.S.** at **276.**

[55] *Id.*

[56] *Id.* at **271–72.**

[57] "When any officer or soldier shall be accused of a crime, or of having used violence, or committed any offense against the persons or property of the good people of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons accused shall belong, are hereby required upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavor to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing such person or persons so accused, in order to bring them to a trial. If any commanding officer or officers shall willfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered." Articles of War 1776, § X, art. 1, *reprinted in* WINTHROP 964–65.

preceding section X, article 1, assists in determining what course of action must be taken by an Army commander, when no such request for delivery of the accused is received from the civilian authorities. That section requires all commanding officers to insure disciplinary action is taken against his officers and men for various military and civilian type offenses; and should he fail to see that justice is done, then he must stand court-martial for the crime committed by his subordinate." In those cases where the civilian authorities did not request delivery of the accused, the commander would be in personal jeopardy if he did not take court-martial action, In civilian type crimes, he would charge the accused under. the general article, which allowed punishment for "[a]ll crimes not capital. . . ."[59] Surely an article requiring cooperation and delivery of an accused to civil authorities upon application did not limit court-martial jurisdiction when the civil application was not forthcoming. Historical evidence indicates that civilian offenses were tried by courts-martial.

In an appendix, the Government's brief listed over 100 instances where military punishment was recorded for nonmilitary crimes tried between 1775 and 1815.[60] Justice Douglas took the list to task asserting that "[i]n almost every case summarized, it appears that some special military interest existed."[61] He referred to crimes which were peculiarly military; "prosecutions for abusing military position"; crimes involving officers; and courts-martial held in wartime between 1773 and 1783, as having military significance.[62] He disqualified the rest of the cases which did not fall into one of the above categories by saying there were not sufficient facts presented to decide, or "perhaps" the case fell into the category designated as "abusing

[58] "Every officer commanding in quarters, garrison, or on a march, shall keep good order, and, to the utmost of his power, redress all such abuses or disorders which may be committed by any officer or soldier under his command; if, upon complaint made to him of officers or soldiers beating or otherwise ill-treating any person; or disturbing fairs or markets; of committing any kind of riots to the disquieting of the good people of the United States; he the said commander who shall refuse or omit to see justice is done on the offender or offenders, and reparation made to the party or parties injured, as far as part of the offender's pay shall enable him or them, shall, upon proof thereof, be punished, by a general court-martial, as if he himself had committed the crimes or disorders complained of." Articles of War 1776, § IX, art. 1, *reprinted in* WINTHROP 964.

[59] *See* note 70, *infra.*

[60] Brief for Respondent at 35-52, O'Callahan v. Parker, 395 U.S. 258 (1969).

[61] 395 U.S. at 270 n.14.

[62] *Id.*

military position."[63] Justice Douglas' pigeonhole approach to discredit the Government's list falls short of being persuasive. His assertion that "[i]n the 18th Century at least the 'honor' of an officer was thought to give a specific military connection to a crime"[64] is of little significance, when it is remembered that the examination of the cases is to determine the intent of the constitutional delegates in drafting article 1, section 8, clause 14. It is doubtful that the delegates intended one constitutional rule for officers and a different rule for enlisted men. Certain examples cannot be explained away by any of Douglas' categories. For example: (1) the charge of "killing a cow, stealing fowls, and stealing geese";[65] (2) "for stealing a horse from the Widow Duncan"; (3)[66] "for riotously beating a woman kept by him as a mistress";" (4) "beating a Mr. Williams an inhabitant living near this garrison";[67] and (5) "abusing arid using violence on Mrs. Cronkhyte, a citizen of the United States."[68]

It is interesting to observe that both Justice Douglas and Justice Harlan referred to the same pages from Colonel Winthrop's treatise to support exactly opposite conclusions on whether the "general article" took cognizance of civilian type crimes.'" It seems safe to say that Winthrop's comments on the topic were, at least to some readers, ambiguous. Colonel Winthrop stated that for a crime to be cognizable by a court-martial under the "genera! article," it "must have been committed under such circumstances as to have directly offended against the government discipline of the military state."" However, he later commented

[63] *Id.*
[64] *Id.*
[65] Brief for Respondent at 41, O'Callahan v. Parker, 395 U.S. 258 (1969).
[66] *Id.* at 43.
[67] *Id.*
[68] *Id.* at 49.
[69] *Id.* It is doubtful that Justice Douglas would find "service connection" today for many of the cases he summarily dismissed from the Government's list because of their "military significance." *E.g.*, "for absenting himself from Camp, without leave and Rioting at late hours in the town of Cincinnati . . . ." *Id.* at 43. The fact that a soldier was AWOL at the time he was arrested for being involved in a civil disturbance, in a town some distance from his post, would hardly be sufficient for a finding of "service connection" under present standards.
[70] 395 U.S. at 271, 278. The "general article" remained structurally consistent from 1775 to 1916: "All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion." Articles of War 1775, art. L, *reprinted in* WINTHROP 957.
[71] WINTHROP 723–24.

that the strict interpretation of the "general article" had not been observed in practice, and commanders generally sustained courts-martial for crimes committed against civilians; while civil courts did not want the cases." Colonel Winthrop might not have been in both camps had he had the benefit of the Supreme Court's comments on the "general article" in *Grafton v. United States:*

> The crimes referred to in [the general] article manifestly embrace those not capital, committed by officers or soldiers in violation of public law as enforced by the civil power. No crimes committed by officers or soldiers of the Army are excepted by the . . . article from the jurisdiction thus conferred upon courts-martial except those that are capital in nature . . . , [T]he jurisdiction of general courts-martial [is] . . . concurrent with that of the civil courts..

Regardless of which side of the argument is more convincing, it must be remembered that Winthrop was interpreting military law as it was at the time of his writing in the late 1800's, and not as it was when the country was founded.[74] Consequently, it is of little value in determining the practice at the time of the American Revolution.

Justice Douglas' assertion that specific civilian crimes were first legislated as peacetime military crimes in 1916 is incorrect. In 1800, Congress enacted the Articles for the Better Government of the Navy, which provided for the court-martial of certain civilian type offenses committed on shore.[75] The act provided that "[a]ll offenses committed by persons belonging to the navy while on shore shall be punished in the same manner as if they had been committed at sea."[76] Common law offenses punishable at sea included murder, embezzlement, and theft.[77] Such legislation for the Navy discredits any argument that Congress, by failing to legislate specific common law offenses into the Army

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[72] *Id.* at 725.

[73] 206 U.S. 333, 348 (1907) (dictum). Justice Harlan adopted the language for the dissent. See 395 U.S. at 279.

[74] Colonel Winthrop acknow-ledges that he was referring to the "now . . . accepted construction," and his authorities are more or less contemporary with his period. WINTHROP 723–24 & n. 88.

[75] Act of 23 Apr. 1800, ch. 33, 2 Stat. 45.

[76] Ch. 33, art. XVII, 2 Stat. 47.

[77] Art. XXI (murder), art. XXIV (embezzlement), art. XXVI (theft), 2 Stat. 48. *See* Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 13–15 (1958).

articles of war, was merely acknowledging their constitutional limitation. The divergent paths of Army and Navy court-martial jurisdiction, in that early period, was the "result of legislative choice and not of any want of constitutional power to adopt identical provisions for both services.'"[79]

The above examination of the early American practice disproves that history supports the majority opinion. But, as Justice Harlan so appropriately noted, even if the practice were to support the majority "it cannot be seriously argued as a general matter that the constitutional limits of congressional power are coterminous with the extent of its exercise in the late 18th and early 19th centuries."[80] Therefore, the majority must look elsewhere to find justification for *O'Callahan v. Parker.*

III. THE SUPREME COURT AND COURT-MARTIAL JURISDICTION

A. *A CASE OF FIRST IMPRESSION?*

Article I, section 8, clause 14, of the Constitution grants to Congress "the power to provide for the trial and punishment of military. . . offenses in a manner . . . practiced by civilized nations," and that power is not dependent upon or connected to article III of the Constitution.[80] The language of the fifth amendment explicitly excepts "cases arising in the land and naval forces" from the right to indictment by grand jury, and by implication, from the sixth amendment right to trial by jury.[81] The Supreme Court had consistently treated military status of the accused as sufficient connection to satisfy court-martial jurisdictional requirements. It is true that the particular issue in *O'Callahan* had never' been decided, but a reading of the opinions of the Court set out below, raises a strong presumption that the question was not considered worthy of presentment.

In *Ex parte* Milligan," the Supreme Court decided that a military commission had no jurisdiction to try a civilian citizen of the State of Indiana,, which was not invaded, nor engaged in re-

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[79] Brief for Respondent at 16, O'Callahan **v.** Parker, 395 U.S. 258 (1969).

[80] 395 U.S. at 280.

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

[81] Whelchel **v.** McDonald, 340 U.S. 122, **127** (1950); ***Ex parte*** Quirin, 317 U.S. 1, 40 (1942); ***Ex parte*** Milligan, 71 U.S. **(4** Wall.) **2,** 123, 138–39 (1866).

[82] 71 U.S. **(4** Wall.) **2** (1866).

bellion, while the federal courts were open and functioning. In comparing the constitutional guarantees of civilians as opposed to the military the Court stated:

> The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred hy the Constitution, Congress has declared the kinds, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts."

In *Coleman v. Tennessee,*[84] the Supreme Court determined that during the Civil War, a hostile state had no jurisdiction over a member of the occupying Army. In holding that the Army had exclusive jurisdiction the Court said:

> As Congress is expressly authorized by the Constitution "to raise and support armies," and "to make rules for the government and regulation of the land and naval forces," its control over the whole subject of the formation, organization, and government of the national armies, including therein the punishment of offenses committed by persons in the military service, would seem to be plenary.''

The previously mentioned comments on the "general article" in *Grafton* v. *United States*[86] result in a determination of military jurisdiction over **all** officers and soldiers for "all crimes not capital."

In *Ex parte Quirin,*[87] the Court affirmed the military trial of the defendants, who attempted sabotage in the United States in wartime. In examining the basis of military jurisdiction, the Court observed:

> The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, or such offenses [by non-members of the forces] against the law of war. Its objective was quite different — to authorize the trial by court martial of the members of our Armed

[83] *Id.* at **123.** The Government was asserting jurisdiction over Milligan under martial law, which may be imposed when the civil courts cannot function because of invasion, rebellion or some other disorder. ***See*** Everett, *Military Jurisdiction Over Civilians,* 1960 **DUKE** L.J. 366–67.

[84] 97 **U.S.** 509 (1878).

[85] *Id.* at 514.

[86] See text accompanying note **73,** ***supra.***

[87] 317 **U.S.** 1 **(1942).**

> Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law.[88]

Of all the cases examined, the language of the Court in the *Singleton* case[89] is the most precise in establishing military status as the complete jurisdictional test for members of the Armed Forces:

> The test for jurisdiction, it follows, is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term "land and naval Forces . . . ."[90]

Later, in rejecting the Government's position, the Court stated:

> Without contradiction, the materials furnished show that military jurisdiction has always been based on the "status" of the accused, rather than on the nature of the offense. To say that military jurisdiction "defies definition in terms of military 'status'" is to defy unambiguous language of Art. I, § 8, Cl. 14, as well as the historical background thereof and the precedents with reference thereto?'

A repudiation by the *O'Callahan* majority of the principle of law developed in the above-mentioned cases would have been more admirable than the insistence that *O'Callahan* is consistent with the earlier cases.'*

B. *THE EFFECT OF PREVIOUS LIMITING CASES*

Robinson O. Everett, in a recent article calling for the reversal of *O'Callahan* v. *Parker*, observed that "the majority opinion in O'Callahan must be viewed as a triumph of abstract concept over practical realities."[93] Previous decisions in the area of military jurisdiction also have had disturbing results.

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[88] *Id.* at 43. The military trial was conducted under the law of war, as distinguished from military law. ***See*** Everett, *supra* note 83, at 367–68.

[89] Kinsella **v.** United States *ex rel.* Singleton, 361 U.S. 234 (1960). The Court concluded that the military lacked jurisdiction to court-martial civilian dependents accompanying the Armed Forces overseas.

[90] *Id.* at 240–41.

[91] *Id.* at 243 (footnote omitted).

[92] *Compare* " 'Status' is necessary for jurisdiction; but it does not follow that ascertainment of 'status' completes the inquiry, regardless of the nature, time and place of the offense,'' 395 U.S. at 267, *with* text accompanying notes 90 and 91, *supra.*

[93] Everett, *O'Callahan v. Parker— Milestone or Millstone in Military Justice*, 1969 DUKE L.J. 853, 867.

In 1955, the Supreme Court held that article 3(a), Uniform Code of Military Justice," was unconstitutional, in that the military had no jurisdiction to court-martial a former service member for offenses committed on active duty after the accused had terminated his connection with the military.[95] The purpose of article 3(a) was to insure that servicemen, who committed serious crimes in an area beyond the jurisdiction of other U. S. courts and state courts, did not go without trial. The Court suggested, as an alternative, that Congress empower federal courts to try such cases, but Congress has not done so.[96]

The My Lai incident, in which American soldiers were accused of killing a large number of Vietnamese civilians, has come to the attention of the American public. Although the incident was alleged to have occurred in mid-March 1968, formal charges were not brought in the case until September 1969. At least 15 of the soldiers under investigation have been discharged from the Army, because the term of their obligated tour had expired." It seems clear that the discharged service members are beyond the reach of court-martial jurisdiction. So the position of the Court that the discharged soldier will be entitled to his constitutional right to trial by jury or there will be no trial will result in no trial.[98]

In 1957, *Reid v. Covert*[99] determined that the military could not court-martial civilian dependents, who were accompanying the Armed Forces overseas in peacetime, for capital offenses. In 1960, the *Singleton* case[100] extended the limitation to non-capital of-

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"Subject to the provisions of Article **43,** any person charged with having committed, while in the status in which he is subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said Status." Act of 5 May 1950, ch. 169, § **1,** 64 Stat. 108 (now UCMJ art. 3(a)).

[95] Toth **v.** Quarles, 350 U.S. 11 (1955).

[96] *Id.* at 21.

[97] The National Observer, 1 Dec. 1969.

[98] Members of the Armed Forces of the United States are immune from Vietnamese civil or criminal jurisdiction pursuant to international agreement. Mutual Defense Assistance with Indochina, 23 Dec. 1950, 3 U.S.T. 2766, T.I.X.S. No. 2447. It is possible that these men could be tried for violations of the law of war by a military commission. ***See*** Note, 56 U. VA. L. REV. 947 (1970).

[99] **354** U.S. 1 (1957).

[100] 361 U.S. 234 (1960).

fenses. *Grisham v. Hagan*[101] and *McElroy v. United States ex rel. Guagliardo*[102] similarly disposed of capital and non-capital offenses involving civilian employees for the Armed Forces overseas. All of the decisions relied upon Congress' lack of authority under article I, section 8, clause 14, to deprive civilians of their constitutional rights to indictment by grand jury and trial by jury. The ironical part of these decisions is that the Court did not insure the asserted constitutionad guarantees for civilian dependents and employees, but made them only amenable to the jurisdiction of the foreign country.[103] Under the present ruling, the civilian dependent or employee, who commits a crime in a foreign country, will be prosecuted in that country. The foreign court proceedings and language generally will be totally unfamiliar to the defendant. Should the defendant be sentenced to imprisonment, it will be in a foreign jail. Consequently, it might be said that *O'Callahan v. Parker* was not the first time that "abstract concept" was victorious over "practical realities."[104]

IV. COMMENTS OPPOSING THE *O'CALLAHAN* OPINION

The *O'Callahan* opinion is unsettling to say the very least. The system of military justice in the United States has been based upon an understanding that clause 14, and the exception in the fifth amendment, empowered Congress to establish discipline for members "in the land and naval forces." Military status was understood as the jurisdictional test and "[t]o say that military jurisdiction 'defies definition in terms of military status' is to defy unambiguous language of Art. I, § 8, Cl. 14. . . ."[105] It is submitted that when the Court decides to give a new interpretation to language which previously had been termed "unambiguous," there should be persuasive reasons for doing so.

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[101] **361** U.S. **278** (1960).

[102] 361 U.S. 281 (1960).

[103] The writer had the privilege of serving with the United States Army in the Federal Republic of Germany from 1966 to 1969. In his capacity as language trained legal liaison officer, he worked with the German prosecutors in the judicial areas of Ellwangen and Ulm. Although the German authorities had very little interest in crimes committed by United States civilian dependents and employees against other United States personnel and their property, they would prosecute the case.

[104] While it may be possible for Congress to create extraterritorial jurisdiction in the federal district courts to dispose of the above cases, the inability to return necessary witnesses on both sides for trial in the United States would frustrate the proceedings.

[105] Kinsella v. United States *ex rel.* Singleton, **361** U.S. **234, 243** (1960).

The majority relied heavily upon English history prior to the American Revolution, and the American practice at the time of the revolution. As noted earlier, neither is conclusive nor even persuasive. Another very evident tactic of the majority was to attack and discredit military justice. Justice Douglas referred to the system as "so called military justice."[106] He compared the civilian trial "held in an atmosphere conducive to the protection of individual rights,'' with the military trial "marked by the age old manifest destiny of retributive justice."[107] This unfairly presumes that military justice does not provide rehabilitative and deterrent functions, nor is retribution unique to the military.'[108] He condemns the entire court-martial institution as being "singularly inept in dealing with the nice subleties of constitutional law."[109]

In light of Justice Douglas' seemingly constant attack upon the court-martial system, one might wonder whether there is any justification for the system. The justifications are many. Justice Harlan said it best:

> The United States has a vital interest in creating and maintaining an armed force of honest, upright, and well-disciplined persons, and in preserving the reputation, morale, and integrity of the military services.[110]

The military has an interest in deterring the commission of crimes by soldiers regardless of where they are committed. It matters little to the morale of a unit, whether one of its members was caught stealing off post or on. Whenever civilian courts assume jurisdiction over a member of the military, that member becomes ineffective as a soldier until the conclusion of his case. If his unit or vessel is alerted and relocated, he will be left behind. However, in the military, disposition of cases is swifter, and many types of military punishment retain the soldier in a duty status, encouraging rehabilitation."[111] Civilian authorities will not return the accused to the military if the latter has no juris-

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[106] **395** U.S. at **266** n.7.

[107] ***Id.*** at **266.**

[108] **See** H. PACKARD, **THE LIMITS** OF CRIMINAL **SANCTION 36–39 (1968).**

[109] **395** U.S. at **265.**

[110] ***Id.*** at **281.**

[111] In each of the following punishments, the accused would be retained in **a** "present for duty" status: reprimand or admonishment; restriction; hard labor without confinement; forfeiture, fine or detention of pay; and reduction in rank. *See* **MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED** EDITION), para **126** [hereinafter called the Manual and cited as MCM].

diction. Consequently, the possibility of rehabilitation through the military will be lost.'"

The majority stressed the importance of the serviceman's right to indictment by grand jury and the jury trial. Indictment by grand jury is not a constitutional right which has been extended by the fourteenth amendment to state courts.[113] It has also been argued that the grand jury is not a benefit to the accused, but is an oppressive tool of the prosecutor.'" The proceedings are held in secrecy without the presence of the accused or his counsel. The same could not be said of the military equivalent, the article 32 investigation. Prior to each general court-martial a thorough and impartial investigation must be conducted.[115] The accused is entitled to be present and represented by an appointed military attorney and/or a civilian 'attorney of his own choice. The investigating officer must call all available witnesses and the accused is entitled to cross-examination.[116] Any attorney who has been frustrated in obtaining discovery in the state and federal courts can well appreciate such an investigation which unfolds the Government's entire case. Most state and federal prosecutors would grimace at the thought of having such an investigation. Should he choose to do so, the accused also may present witnesses, other evidence or testify himself.'" Generally, the only attorney present at the investigation is representing the accused. Any good advocate can appreciate such an advantage.

The benefit to an accused of a trial by a jury of his peers is unquestionable. However, is the accused in uniform a member of the community just outside the gate? In *Orloff v. Willoughby,* the Court acknowledged that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian."[117] The service member does not choose where he is

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[113] **Army** statistics for 1967 indicate that 83 per cent of serious offenses committed off post were retained by the civilian authorities. Brief for Respondent at *27* n.16, O'Callahan v. Parker., 395 U.S. 258 (1969). The other 15 per cent, with the best potential for rehabilitation, will be the ones affected by *O'Callahan.*

[114] Hurtado v. California, 110 U.S. 316 (1884).

[114] Antell, ***The*** *Modern Grand Jury: Benighted Supergovernment,* 51 A.B.A.J. 153 (1965).

[115] UCMJ art. 32. "It is not the function of the investigating officer to perfect a case against the accused, but to ascertain and impartially weigh *all* available facts in arriving at his conclusion." MCM, para 34 at 7–9.

[116] MCM, para 34 at 7–9.

[117] *Id.* at 7–10, 7–11.

[118] 354 U.S. 83, 94 (1958).

to be stationed. Many times the local civilian inhabitants may be antagonistic towards certain members of the military, who are stationed near their community, but come from other ethnic or racial groups. Here again the "abstract concept" is triumphant."'

The majority opinion was disappointing in its one-sided view of military justice. Senator Sam J. Ervin remarked to the Senate:

> I think it quite unfortunate that the majority opinion makes several disparaging references to military justice. By doing so, Justice Douglas has, in effect, tended to minimize the very significant advances and improvements in military justice that have been made in recent years . . .[120]

In many cases, the "improvements" are impressive when compared to the civilian court systems. Military police and criminal investigators were advising suspects of their right to remain silent and not to incriminate themselves long before *Miranda.*[121] The exclusionasy rule was being applied in search and seizure and wiretapping cases long before *Mapp v. Ohio,* and *Lee V. Florida* applied the rule to the state courts.[122] Before *Gideon V. Wainwright'"* required state courts to furnish counsel without charge for indigent defendants, the military was doing so without regard for financial status."' All servicemen convicted by general courts-martial are furnished a verbatim record of trial, regardless of financial ability.[125] But not until *Griffinv. Illinois*[126] were indi-

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[119] *See* note 93, *supra.*

[120] 115 CONG. REC. 17267 (1969), *reprinted in* 69–20 JALS 28, 30 (1969).

[121] *Compare* UCMJ art. 31, *with* Miranda v. Arizona, 385 U.S. 436 (1966). After *Miranda,* the Court of Military Appeals required all suspects to be advised of their right to free counsel at all custodial interrogations irrespective of their ability to hire counsel. United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). *See also* MCM, para. 31*b.*

[122] *Compare* MCM, para. 152, which has been substantially the same since 1951, *with* Mapp v. Ohio, *367* U.S. 643 (1961), *and* Lee v. Florida, 392 U.S. 378 (1968).

[123] 372 U.S. 335 (1963).

[124] See UCMJ art. 27; MCM, para. 48. One of the overlooked benefits of appointed military counsel is that he generally enters the case shortly after the commission of the offense. He is able to investigate while the evidence is still fresh. Memories fade. It has been observed that in the Cook County criminal court system, the public defender, who will defend the indigent accused, will not be appointed, nor his identity known, until after the accused has been arraigned and transferred to a felony trial court. It is not unusual for over 60 days to have passed between commission of the offense and arraignment. It is the opinion of the writer that with lack of discovery, such an unreasonable delay in the appointment of a public defender deprives the accused of his right to a fair trial.

[125] UCMJ art. 54(c).

[126] 351 U.S. 12 (1956).

gents in state courts entitled to a free copy of their transcript. The military appellate system has the power to review the appropriateness of the sentence, a power still unavailable in the federal courts and most state courts.'" Lastly, the military pretrial discovery procedure through the article **32** investigation is unique.[123]

Perhaps the most widely accepted dissatisfaction with the *O'Callahan* decision is its failure to explain what crimes are "service connected.'' If the facts are identical to *O'Callahan,* then there is no problem, but there are so many other possibilities. The Court noted O'Callahan was on leave or pass and was wearing civilian clothes. Could such factors be decisive? In the 18th century, crimes committed by officers had "military significance." What about today? What if a crime is committed on post, or near a post? What if unknown to the accused, the victim is a soldier. These are all practical questions which needed to be answered. Justice Harlan concluded by addressing himself to the same problem:

> Whatever role an *ad hoc* judicial approach may have in some areas of the law, the Congress and the military are at least entitled to know with some certainty the allowable scope of court-martial jurisdiction.[129]

Unfortunately, the confusion will have to be resolved on another day.

V. *O'CALLAHAN* PLUS ONE YEAR

A. *THE APPLICATION OF O'CALLAHAN*

Approximately three months after the *O'Callahan* decision, the Court of Military Appeals started the task of interpreting the decision and disposing of the multitude of uncertainties. With *United States v. Borys,*[130] the Court of Military Appeals gave its first indication as to how it would approach *O'Callahan.* The result was two-thirds mechanical and one-third acrimonious.

In 1965, Army Captain Stephen J. Borys mas tried and convicted by court-martial of the offenses of rape, robbery, sodomy, and attempted rape and sodomy."' Many of the facts were similar

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127 See UCMJ arts. 63, 64, 66.

128 ***See*** notes 115–17 *supra* and accompanying text.

129 395 U.S. at **284.**

130 18 U.S.C.M.A. 545, 40 C.M.R. *257* (1969).

131 UCMJ arts. 120, **122, 125,** 80.

to *O'Callahan.* In both cases the offenses occurred off-post, and 'the victims were female civilians. At the time of the offenses, both defendants were off-duty or on leave, and were dressed in civilian clothes. All the offenses committed were "civilian" crimes.'[132] The comparison with *O'Callahan* satisfied the majority that "service connection" was not present, and therefore the military had no right to court-martial Borys. The conviction was reversed and the charges ordered dismissed. Judge Ferguson, with Judge Darden concurring, wrote a brief opinion in which the *O'Callahan* principle was mechanically applied. Judge Ferguson saw no justification for distinguishing *O'Callahan,* where the crimes were committed on federal territory, from Borys, where the offenses occurred in the States of Georgia and South Carolina. The fact that both had civilian courts open and functioning, and that neither were armed camps or far-flung military outposts under Army control, satisfied the majority that the situations were indistinguishable:

> In sum, accused's military status was only a happenstance of chosen livelihood, . . . and none of his acts were "service connected" under any test or standard set out by the Supreme Court. In short, they, like O'Callahan's, were the very sort remanded to the appropriate civil jurisdiction in which indictment by grand jury and trial by petit jury could be afforded the defendant."[133]

Chief Judge Quinn wrote a scathing dissent, It appears, however, that he was able to separate his intense feeling about the *O'Callahan* decision and its author, from his analysis of the opinion.[134] He questioned the majority's approach to the decision, charging them with application of *O'Callahan* "by rote."[135] Chief Judge Quinn would hold that before the military could be precluded from trying its own personnel, the offense would have to be cognizable in the federal civilian courts, and further, the

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[132] In fact, the accused had been tried and acquitted in Aiken, South Carolina, of seven of the twelve offenses. ***See*** United States v. Borys, 39 C.M.R. 608, 611 (1968).

[133] 18 U.S.C.M.A. at **549,** 40 C.M.R. at **261.**

[134] Prior to examining O'Callahan, the Chief Judge stated that he disagreed with the opinion, but was "constrained to accept its premise and its conclusion . . . . *Id.* at 550. Concerning Justice Douglas he noted that he had "looked askance at what . . . [he regarded as the] incontinent disorder of some of [his] constitutional opinions . . . yet I believe that not even he would, by mere ***ipse dixit,*** deny Congress its power to govern the armed forces." *Id.* Later, after concluding his analysis, Chief Judge Quinn made reference to Justice Douglas' treatment of military justice as institutionalized injustice by citing such treatment as a "fossil-like canard." *Id.* at 559.

[135] ***Id.*** at *550.*

offense would have no military significance. The offenses committed by O'Callahan occurred in the Federal Territory of Hawaii, prior to statehood. He insists that the Supreme Court was merely stating that when Congress, through its power, has criminal jurisdiction over both civilians and military personnel, it cannot prescribe different forums of prosecution for disposing of the same misconduct, unless the service member's misconduct has military significance (service connection).

The Chief Judge stressed the fact that federal and state governments are separate sovereigns, each having the power to determine what action is criminal within their jurisdiction. Consequently, it should not follow that because a state criminal code has declared a particular act criminal, such declaration limits the power of Congress.[136] Chief Judge Quinn would not only hold that Borys' offenses were not "cognizable in a civilian court," because civilian court means federal civilian court, but further, that the crimes committed by Borys had military significance. He reasons that since Congress has the power to designate a particular act as criminal for the military forces, but not for the public in general, then that particular act must have inherent military significance of service connection. Congress' power to make rules for governing and regulating the armed forces should not be so restricted as to exclude federal protection of the civilian population from the military. Such a definition of "service connection" would enlarge the concept's jurisdictional limits to those in existence prior to *O'Callahan*. At that point, the Chief Judge appears to have joined Justice Harlan in dissenting from *O'Callahan*.

One week after *Borys*, the Court of Military Appeals set out the rudiments of the test which they would apply in examining *O'Callahan* cases. In order to conclude that a service member may

[136] Chief Judge Quinn examined the carnal knowledge (statutory rape) statutes in the State of Florida ("unmarried person, of previous chaste character . . . under the age of eighteen (18) years"), FLA. STAT. ANN. tit. **44,** § 794.05(1) (1961); and in the State of Hawaii ("with any female under the age of sixteen years"), HAWAII REV. STAT. tit. **38,** §768.62 (1955); *with* the military counterpart ("has not attained the age of sixteen years"), UCMJ art. 120(b). If the girl involved were fifteen and not of previously chaste character, the act would be cognizable in Hawaii and not in Florida. Chief Judge Quinn, following the majority's assumption that "cognizable in a civilian court" means either state or federal court, shows that the military would be able to court-martial the service member in Florida, but not Hawaii. This means that the ability of Congress to exercise its enumerated constitutional power over the Armed Forces, in fact, is controlled by each state's determination as to what acts are criminal in that state.

not be court-martialed for his misconduct, it must be determined: first, that the offense is cognizable in the state or federal civilian court; and, second, that the offense has no military significance or service connections.[137]

B. *THE DEVELOPMENT OF "SERVICE CONNECTION"*

As mentioned earlier, one of the obvious complaints with *O'Callahan* is its failure to define the allowable scope of court-martial jurisdiction. What is meant by "service connection?" This does not mean that every offense under the Uniform Code of Military Justice must be tested. There are many offenses that by their very nature are "service connected." No one would question the military's authority to court-martial a soldier for desertion, or willfully disobeying the lawful order of a superior commissioned officer."[138] The concern of the courts and this section is with those offenses in which the connection is not so patently clear.

Due to the fact that a service member must exhaust his military remedies before proceeding to the federal courts, it became apparent that the military appellate courts, and more specifically the Court of Military Appeals, would sketch the initial outline as to which offenses have service Connection. They wasted no time. As the following subsections will reflect, they relied heavily upon the precise language in *O'Callahan*. However, on occasion they may have read more into the language than was intended.

1. *The Location of the Offense.*

The Supreme Court said that O'Callahan's "offenses did not involve any question of . . . the security of a military post." What if the attack had happened on a military post? Would "status" plus the occurrence of the offense upon a military installation permit trial by court-martial? The Court of Military Appeals answered affirmatively. In each case where the service member's offense occurred on post, that factor has been determinative.

Henderson and Smith were both members of the Air Force stationed at Ramey Air Force Base. Both were court-martialed and convicted, in separate trials, of carnal knowledge with girls

[137] United States **v.** Beeker, 18 U.S.C.M.A. **563,** 40 C.M.R. **275 (1969).** Chief Judge Quinn applied the test for a unanimous court.

[138] UCMJ arts. *85,* 90. Of the *55* enumerated offenses set out in articles 80 through **134, 33** appear to be purely military in nature and thereby clear**ly** "service connected."

under the age of sixteen, who were the dependent daughters of fellow service members.[139] Henderson took a girl to his quarters off-post, while Smith took a girl to his quarters on-post. Henderson's conviction was reversed[140] while Smith's conviction was affirmed."[141] The Court acknowledged that the cases differed "in only one respect—the place where the offense occurred."[142] In another example, Army Private Daniel Crapo was convicted, *inter alia*, of robbery and attempted robbery.[143] Both victims were taxicab drivers, but one was attacked on a military reservation,[144] land the other in the City of Seattle, Washington. The conviction for attempted robbery in Seattle was reversed, while the robbery on the reservation was affirmed.[145]

The Court has concluded that regardless of the nature of the offense, if it occurred on a military installation, then the crime directly affects the security of the military post. With the responsibility of governing the installation should come the authority to carry out the responsibility. It is not difficult to imagine offenses which could occur on an installation without affecting the security of the military post."[146] However, just because the test is all encompassing at present, it does not mean that isolated excepions may not later come into existence when appropriate."[147] Whether a particular offense occurred on or off post is a question of fact, and when such questions go to the jurisdiction of the court-martial they must be decided by court members and not the

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[139] UCMJ art. 120(b) (statutory rape).

[140] United States v. Henderson, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969).

[141] United States v. Smith, 18 U.S.C.M.A. 609, 40 C.M.R. 321 (1969).

[142] *Id.* at 609.

[143] UCMJ arts. 122, 80.

[144] The driver was struck over the head on the reservation, but he was forced to drive off the reservation before Crapo took his money.

[145] United States v. Crapo, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969). Other cases reflecting similar instances are: United States v. Shockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969) (conviction as to sodomy committed *off* post reversed, while same offense committed on post affirmed); United States v. Williams, 18 U.S.C.M.A. 605, 40 C.M.R. 317 (1969) (two bad checks cashed on post "service connected," but third check given to civilian grocery store not).

[146] Examples would be the preparation of a fraudulent income tax form, or the forgery of a check to be cashed off the installation.

[147] In United States v. Castro, 18 U.S.C.M.A. 590, 40 C.M.R. 310 (1969), the Court of Military Appeals held that the court-martial did not have jurisdiction over an on-post concealed weapon offense, when the facts indicated that the bringing of the weapon onto post was not a voluntary act. Castro had been injured in a traffic accident off post and was transported to an Army hospital by military police. The weapon was discovered at the hospital.

military judge."* The beauty of the on post rule is its simplicity to apply. The Court would have to have been oblivious to its function not to know that military trial and lower appellate courts were waiting for guidelines to assist them in sorting out the *O'Callahan* puzzle. **A** vague, many factor approach would have left the lower courts in a continuing state of uncertainty."'

2. *Extraterritorial Application.*

As will soon become apparent, most of these subsections work major limitations upon the scope of *O'Callahan* v. *Parker.* The following is no exception.

If the military cannot court-martial a soldier for a non-service connected crime in the United States, why should they be able to do so when the same crime is committed in a friendly foreign country? The Court of Military Appeals answered the question in *United States* v. *Keaton.*[150] Airman Keaton was tried and convicted by general court-martial in the Republic of the Philippines for the crime of assault with intent to commit murder.'" His appeal relying on *O'Callahan* was rejected. The purpose of *O'Callahan* was to protect the constitutional privileges of indictment and trial by jury. "Constitutional protections of this nature are available only through the civil courts of the United States and only military courts are authorized to function within the Republic of the Philippines."'.' While acknowledging that some offenses committed abroad are triable in the federal civilian courts, the court stated, "the number and kind of offenses in which such action can be taken is limited . . . ."[153] The Court concluded that the Supreme Court did not intend to limit court-martial jurisdiction in friendly foreign countries, and in their opinion such unrestricted court-martial jurisdiction is a "valid exercise of constitutional authority," when Congress' power to make rules to govern and regulate the Armed Forces is read in conjunction with the '(necessary and proper" clause.[154] The practi-

[145] United States **v.** Ornelas, **2** U.S.C.M.A. 96, 6 C.M.R. 96 (1952).

[149] On 27 February 1970, the Supreme Court granted certiorari on the issue of whether *O'Callahan* will bar a court-martial for trying a soldier charged with committing rape and kidnapping against civilians on a military post. Relford **v.** Commandant, ***cert.*** *grunted,* 397 U.S. 934 (1970) (No. '1250).

[150] 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969).

[151] UCMJ art. 134.

[152] 19 U.S.C.M.A. at 67, 41 C.M.R. at **67.**

[153] ***Id.***

[154] ***Id.***

cal effect of a contrary ruling by the Court would have resulted in the foreign countries' assuming jurisdiction.[155]

3. *Drug Offenses.*

The Uniform Code of Military Justice punishes "wrongful possession, sale, transfer, use or introduction into a military unit, base, station, post, ship or aircraft" of habit forming drugs or marihuana.'" Dangerous drugs, such as certain depressants, stimulants and hallucinogenic drugs, are also forbidden by general regulation, violations of which are punishable under article 92.[157] In *United States v. Beeker,*[158] the Court of Military Appeals set out broad guidelines for the disposition of drug cases. The accused had been convicted of five marihuana offenses: **(1)** unlawful importation and **(2)** unlawful transportation, both in violation of **21** U.S.C. § 176(a); **(3)** wrongful possession on a military post; **(4)** wrongful use off post and *(5)* on post.[159] The court found military jurisdiction over **(4)** and (5) because use offenses were not cognizable in the federal or state (Texas) courts involved, but were prejudicial to the good order and discipline of the Armed Forces. On-post possession **(3)** was covered in sweeping language that possession or use of marihuana, on or off post, had singular military significance. The first two offenses concerning importation and transportation of marihuana were cognizable in the federal court and did not involve actual possession. The Court decided that the federal prohibition involved considerations different from Armed Forces regulation and held that the offenses were not triable by court-martial.

The general rule, that possession or use of marihuana on or off post is "service connected," has been extended to off post use of heroin and cocaine,'" possession of dangerous drugs,'" and transfer of drugs to another service member.'"[160] A conflict

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[155] The foreign court would not assume this task cheerfully, particularly in cases where they have no interest. The previously mentioned disadvantages concern ng dependents would also **he** present in these cases: See notes 103–04 and accompanying text, *supra.*

[156] *Cf.* MCM, para. 127*c.*

[157] "Any person subject to this chapter who—(1) violates or fails to obey any lawful general order or regulation . . . shall be punished as a court-martial may direct.'' UCMJ art. 92; **see** Army Reg. No. 600–50, para. 18.1 (Change No. 2, 15 May 1968).

[158] 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969).

[159] UCMJ art. 134.

[160] United States v. Boyd, 18 U.S.C.M.A. 581, 40 C.M.R. 293 (1969).

[161] United States v. Castro, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969).

[162] United States v. Rose, 19 U.S.C.M.A. 3, 41 C.M.R. 3 (1969).

has arisen as to whether off post possession of marihuana is "service connected." A federal district court in Rhode Island permanently enjoined a court-martial from prosecuting a marine for such an offense.[163] That court did not believe that *Noyd v. Bond*,[164] which required exhaustion of military remedies prior to federal court relief, was applicable when the issue went to the constitutional question of jurisdiction. The court worked its way through an *O'Callahan* analysis and found that the incident occurred off post with no military victim, in San Juan, Puerto Rico, which was not an armed camp and whose courts were open and functioning. The district court accepted *Beeker's* definition of the use of marihuana on and off post as being "service connected," but did not feel the *dictum* about off post possession was correct, because such did not undermine military authority. In *United States v. DeRonda*,[165] the Court of Military Appeals, citing only *Beeker*, affirmed a conviction for off post possession of marihuana. It appears that the Supreme Court will have to dispose of the off post possession problem.

4. *Petty Offenses.*

The import of the *O'Callahan* decision was that where "service connection" is absent in civilian type offenses, a service member cannot be deprived of his constitutional right to indictment by grand jury and trial by jury. However, the Supreme Court has long recognized that in the case of petty offenses, there is no constitutional guarantee to indictment or a jury trial."[166] Although the exact limits of what constitutes a petty offense are not certain, it appears that crimes carrying a maximum punishment of six months are petty offenses.[167]

In *United States* v. *Sharkey*,[168] the Court of Military Appeals applied the petty offense exception to *O'Callahan v. Parker*. The sole issue before the Court was whether the military had jurisdiction to court-martial a marine for the offense of drunk and disorderly conduct in uniform in a public place. The maximum punishment for the offense mas confinement at hard labor for six months and forfeiture of two-thirds pay per month for a like

163 Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969).

164 345 U.S. 683 (1969).

165 18 U.S.C.M.A. 575, 40 C.M.R. 287 (1969).

166 Duncan **v.** Louisiana, 391 U.S. 145 (1968); District of Columbia v. Clawans, 300 U.S. 617 (1937); ***Ex parte*** Wilson, 114 U.S. 417 (1885).

167 Duncan v. Louisiana, 391 U.S. 145, 159 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966).

168 19 U.S.C.M.A. 26, 41 C.M.R. **26** (1969).

period." After alluding to the petty offense exception, the Court noted that *O'Callahan* should be read "with an eye to the important constitutional protections which it sought to preserve," namely, the benefits of indictment and trial by jury.[169] Since the accused is not entitled to these constitutional rights in a civilian court, he is not deprived of them in a military trial. The Court also stressed the military need to dispose of petty charges expeditiously so that members of the force are available for military movement. Local procedures are "often slow and unwieldy . . . ."[170] The petty offense exception also has been observed by a federal district court.[171] The exception will exclude a large number of cases which otherwise would have caused a hindrance to military preparedness.

5. Crimes Against Another Serviceman.

In disposing of the list of cases cited in the appendix to the Government's brief, the majority distinguished a large number of them by saying: "Many are peculiarly military crimes—desertions, *assaults on* and *thefts from other soldiers*, stealing government property."[172] Later, in commenting on the early application of the "general article," the Court cited Winthrop:

> Thus such crimes as theft from or robbery of an officer, soldier, post trader, or camp follower; forgery of the name of an officer, and manslaughter, assault with intent to kill, mayhem, or battery, committed upon a military person; inasmuch as they directly affect military relations and prejudice military discipline, may properly be—as they frequently have been—the subject of charges under the present Article.[174]

It appeared that "service connection" could be found in certain crimes committed against another soldier. In *United States v. Rego*,[175] the Court of Military Appeals adopted the Court's language in affirming military jurisdiction over the off base offenses of housebreaking and larceny from a fellow airman.[176] In *Rego*, the victim and accused worked at the same air base in the same office, and through this association, the accused learned the victim would be away on the weekend of the crime. The court, citing

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169 MCM, para. 127*c*.
170 19 U.S.C.M.A. at 27, 41 C.M.R. at 27.
171 *Id.* at 28, 41 C.M.R. at 28.
172 *See* Diorio v. McBride, 306 F. Supp. 528 (N.D. Ala. 1969).
173 395 U.S. at 270 n.14 (emphasis added).
174 *Id.* at 274 n.19.
175 19 U.S.C.M.A. 9, 41 C.M.R. 9 (1969).
176 UCMJ arts. 130, 121.

the above quotes from *O'Callahan,* held the offenses were "peculiarly military crimes . . . ."[177] Judge Ferguson could not find '(service connection" and dissented. He asserted that "the offenses were not ,directed against [the victim] personally, and, therefore, did not affect him in the performance of his military duty."[178]

In upholding a later off post housebreaking offense, the Court decided it was not necessary for the accused to know the victim was in the military.[179] But, "service connection'' was held not to be present when the theft victim was a retired service member employed at a military base.[180] Robbery necessarily includes larceny, so it was not unexpected when the Court of Military Appeals made the natural extension of *Rego,* to include off post robbery, and conspiracy to commit robbery from military victims.[181] Judge Ferguson, still dissenting, had to abandon his ***Rego*** dissent, that the offenses were not directed against the victim personally; robbery being a very personal offense. He called the victim's military status a "mere happenstance."[182] However, it would appear that the military has a much greater interest in the offense, from the standpoint of morale and discipline, when the "mere happenstance" exists.

This general rule has been applied to offenses causing injury to fellow servicemen and appears to cover all offenses where the victim is military:

> [W]here an offense cognizable under the Code is perpetrated against the person or property of another serviceman, regardless of the circumstances, the offense is cognizable by court-martial.'"

6. Abusing Military Status.

In certain types of business transactions, the civilian community has learned to rely on the fact that an individual is a member of the Armed Forces. The business man knows that such an individual can always be located, and that the military system will encourage its members to pay just debts. Many times credit and

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[177] 19 U.S.C.M.A. at 9, 41 C.M.R. at 9.

[178] *Id.* at 10, 41 C.M.R. at 10.

[179] United States v. Camacho, 19 U.S.C.M.A. 11, 41 C.M.R. 11 (1969). The rule also was applied to automobiles in United States v. Cook, 19 U.S.C.M.A. 13, 41 C.M.R. 13 (1969).

[180] United States v. Armes, 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969).

[181] United States v. Plamondon, 19 U.S.C.M.A. *22,* 41 C.M.R. *22* (1969).

[182] '19U.S.C.M.A. at *25,* 41 C.M.R. at *25.*

[183] United States v. Everson, 19 U.S.C.M.A. 70, 71, 41 C.M.R. 70, 71 (1969). This case involved the off-post offenses of assault with a dangerous weapon and careless discharge of a firearm under circumstances such as to endanger human life. UGMJ arts. **128,** 134.

other privileges are granted to service members in reliance on their military status. The Court of Military Appeals has found "service connection" in cases where servicemen have abused their military status. In *United States v. Peak*,[184] the court upheld a conviction for wrongful appropriation of a motor vehicle."[185] The accused escaped from the post stockage and went to a used car lot in a neighboring community. He was dressed in a fatigue uniform and identified himself and his military unit to the salesman, He was permitted to take a car for a test drive, but never returned. With the following language, the Court established another area in which they would recognize "service connection":

> It appears that the accused's military standing facilitated his deception of the automobile salesman . . . . [The salesman] attributed some reliability to the accused as a result of the latter's identification by his military fatigues as a member of the armed forces. Such an abuse of a military status is likely to influence the estent of confidence by the public in members of the armed forces. We believe the impact of such abuse is direct and substantial enough to provide the requisite service-connection for the armed forces to exercise jurisdiction over the offense.[186]

A conviction for forgery of a United States treasury check at an off post service station was upheld, because the accused, who again had just escaped from confinement, told the service station manager that he had left his identification "at the base and was in a rush going on leave."[187] In *Cnited States v. Frazier*,[188] the accused stole a United States treasury check, forged an endorsement, and cashed it at a New York City bus terminal. He told the manager he ran out of cash and had no way to get back to base, and that a fellow soldier endorsed the check to him to cover a debt. The accused used his marine identification card to secure approval for the check. Again, the court held the accused had used his military standing to facilitate the deception, and, therefore, "service connection" was present. In still another forgery case, the court examined five checks, holding one service connected because it was cashed on a military installation, three service connected because the endorsements contained the accused's military address, and one not service connected because

184 19 U.S.C.M.A. 19, 41 C.M.R. 19 (1969).

185 UCMJ art. 121.

186 19 U.S.C.M.A. at **20–21,** 41 C.M.R. at 20–21.

187 United States v. Morisseau, 19 U.S.C.M.A. 17, 41 C.M.R. 17 (1969).

188 19 U.S.C.M.A. 40, **41** C.M.R. 40 (1969).

neither the instrument nor available evidence involved the use of military standing.'"

Probably the most persuasive case of this group is *United States v. Fryman*.[190] The accused, a marine private, registered in a hotel under a fictitious name, "wearing the uniform and insignia of a First Lieutenant, replete with service medals and ribbons."[191] After running up a **$203.13** expense bill, he advised the management that he was on temporary duty and had $600.00 in back pay due; and then left without paying. His conviction for wrongful and dishonorable failure to pay just debts[192] was unanimously affirmed. The Court stated it is "the positive misuse of the status to secure privileges or recognition not accorded others that causes the Armed Forces to have a substantial interest in punishing the abuse lest innocent members suffer."[193]

Judge Ferguson dissented in all of the above cases, except *Fryman*. He seems to be saying that discredit upon the Armed Forces is not in issue unless the offense falls under the general article. "Reliance on one's *status* as a serviceman is not an element of the offense of forgery. The matter is simply irrelevant to the charge."[194] However, in *O'Callahan*, the majority, in concluding no service connection, examined many factors that were not elements of the offenses in question. Using a hypothetical example, the fact that a soldier was driving a military vehicle in the performance of duty at the time he committed an offense of involuntary manslaughter would be sufficient for a finding of service connection, But evidence that the vehicle was military property, or that he was on duty, certainly is not an element of the offense of involuntary manslaughter.[195]

One matter that is disturbing in the above cases is the Court's failure to examine whether the victims' reliance was justifiable.

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189 Cnited States v. Hallahan, 19 U.S.C.M.A. 46, 41 C.M.R. 46 (1969). The printed matter on personalized checks (service number, military post office box) was held to cause sufficient reliance for service connection, and use of an on-base banking facility was held to affect the security of the base in bad check cases, UCMJ art. 123a. United States v. Peterson, 19 U.S.C.M.A. 319, 41 C.M.R. 319 (1970). Identification as service member, including use of service number, also has been held sufficient fo? service connection in **a** bad check case, United States v. Haagenson, 19 U.S.C.M.A. **332,** 41 C.M.R. **332** (1970).

190 19 U.S.C.M.A. 71, 41 C.M.R. 71 (1969).

191 *Id*. at 72, 41 C.M.R. at 72.

192 UCMJ art. 134.

193 19 U.S.C.M.A. at 73, 41 C.M.R. at 73.

194 United States v. Frazier, 19 U.S.C.M.A. 40, 42, 41 C.M.R. 40, 42 **(1969).**

195 UCMJ art. 119.

When the accused is dressed in a military uniform or presents military identification, there appears to be reasonable justification for relying on his status. But where the accused, dressed in civilian clothes, enters an off post service station and makes unsupported statements that he is in the military, as in *Morissenu.* it is submitted that the victim has no justification to rely on military standing.

7. *Officer v. Enlisted Man.*

As noted earlier, the *O'Callahan* majority referred to crimes committed by officers in the 18th century as having specific military connection.[196] This raised an implication that the same connection might exist today. Article **133** of the Code[197] punishes conduct unbecoming an officer and a gentleman. The idea that service connection can be based upon the rank of the service member has been rejected by the Court of Military Appeals. It should be remembered that Borys was an Army captain. The majority in *Borys* rejected the theory without comment. However, Chief Judge Quinn, who dissented in *Borys,* specifically rejected the implication that a crime by an officer may be service connected, while the same crime committed by an enlisted man would not be. "In this regard, I believe an officer 'is not clothed with any less constitutional . . . rights than is an enlisted person'."[198]

8. The Military Uniform.

In the *O'Callahan* opinion, the maiority mentioned that "petitioner and a friend left the post dressed in civilian clothes . . . ."[199] Whether the Court would have held differently had the petitioner been in uniform was not answered in the opinion. It is doubtful that such a factor would have deterred the majority.

In *United States* v. *Armes,*[200] the Court of Military Appeals decided that "the wearing of the fatigue uniform at the time of the arrest," and while stealing an automobile, "does not, under these circumstances confer jurisdiction on the court-martial."[201] Chief Judge Quinn dissented, asserting that the commission of a crime while in uniform brings discredit to the Armed Forces, irrespective of whether it is the fatigue (work) uniform or the

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196 See text accompanying note **64,** *supra.*

197 10 U.S.C. § 933 (1964).

198 18 U.S.C.M.A. at 550–51 & n.1, 40 C.M.R. at 262–63 n.1 (dissenting opinion) (footnotes omitted).

199 395 U.S. at 259.

200 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969).

201 *Id.* at 16, **41** C.M.R. at 16.

dress uniform.[202] However, the Court's position changes and service connection is present as soon as the wearing of the uniform constitutes an abuse of military status.[203]

C. *RETROACTIVITY OF O'CALLAHAN*

When students and authorities of military law speak of the disastrous effect *O'Callahan* may have upon the American system of military justice, they are more than likely referring to the possibility that *O'Cnllahan* might be given full retroactive application. Although the matter will be resolved by the Supreme Court," an interim decision has been presented by a divided Court of Military Appeals.[205] An examination of their decision will set out the alternatives available to the Supreme Court.

In 1967, Sergeant Mercer pleaded guilty to the rape of his eight-year-old stepdaughter, and the convening authority approved a sentence of dishonorable discharge, confinement at hard labor for ten years, total forfeitures, and reduction in grade. The proceedings became final in August 1968. His petition for reconsideration under *O'Callahan* was denied by the Court, holding: "[W]e propose to apply the decision . . . only to those convictions that were not final before June 2, 1969, the date of the *O'Callahan* decision..'"[206] The Court acknowledged that it had already given limited retroactive effect, by applying *O'Callahan* to cases subject to direct review on the date O'Callahan was decided."[207] Judge Darden, for the majority, noted that *O'Callahan* spoke in terms of jurisdiction, and that lack of subject matter jurisdiction voids a conviction." He queried as to whether couching a new standard "in the terms of jurisdiction" would "change the pronouncements in *Linkletter* v. *Walker*" . . . that the Con-

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[202] *Id.*

[203] **See** subsection **6,** *supra.*

[204] On **27** February 1970, the Supreme Court granted certiorari to determine whether *O'Callahan* should be applied retroactively. Relford **v.** Commandant, ***cert.*** *granted, 397* U.S. 934 (1970).

[205] Mercer **v.** Dillon, 19 U.S.C.M.A. **264,** 41 C.M.R. **264** (1970).

[206] **19** U.S.C.M.A. at **265, 41** C.M.R. at **265.**

[207] *Id,*

[208] *Id.*

[209] 381 U.S. **618** (1965). This ease denied retroactive application of the "exclusionary rule" to all state convictions which had become final prior to Mapp **v.** Ohio, **367** U.S. **643** (1961).

stitution neither prohibits nor requires retrospective effect."[210] *Linkletter* admitted that new laws were made by judges, and that "[t]he past cannot always be erased by a new judicial declaration."[211]

Noting that each case must be decided on its own merit, the Court set out the *Linkletter* test as it appeared in *Stovall* v. *Denno*,[212] enumerating the complex interests to be weighed:

> (a) The purpose to be served by the new standard; (b) The extent of the reliance of law enforcement authorities on the old standards; and (c) The effect on the administration of justice of a retroactive application of the new standard.[213]

The "purpose to be served" has been stated as the "[f]oremost among the factors. . . ."[214] The purpose of *O'Callahan* may have been to grant the right to indictment and jury trial to servicemen under certain conditions, or it may be resolved only by comparing the merits and reliability of the military trial system with the civilian system. Under either test the *O'Callahan* majority indicates that the civilian trial system is conducive to a fairer trial.

Nevertheless, it should be observed that on at least three occasions, the Supreme Court has disregarded this portion of the test when it did not like the retroactive result that would follow.[215] The majority in *Mercer* v. *Dillon* did not wish to reargue the merits of *O'Callahan,* but attempted to set the record straight as to a few points upon which Justice Douglas had relied. First, it is true that the military judges do not enjoy constitutional protection of tenure and salary, but neither do state judges. Second, while the military does not have a grand jury system, the article 32 investigation is comparable, if not superior,[216] and the federal right to grand jury indictment does not apply to states."[217] Finally, concerning the deficiencies of no civilian jury, and the lack of requirement for unanimous vote, the Court recommended:

> [T]hese charged deficiencies should be balanced [against] the possibility that the composition of a court-martial is for a member of the armed forces more nearly a jury of his peers than is a civilian panel in a State where the member may be involuntarily stationed.[218]

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210 **19 U.S.C.M.A.** at **266, 41 C.M.R.** at **266.**

211 **381** U.S. at **625.**

212 **388** U.S. **293 (1967).**

213 *Id.* at **297.**

214 Desist **v.** United States, **394** U.S. **244, 249 (1968).**

215 *See* Haddad, *"Retroactivity Should Be Rethought". A Call for the End of the Linkletter Doctrine,* 60 J. CRIM. L.C. & P.S. **417, 434–35 (1969).**

216 **See** text accompanying notes **113–17,** *supra.*

217 ***See*** note **113,** *supra.*

218 **19 U.S.C.M.A.** at **266, 41 C.M.R.** at 266.

While one might feel quite secure in condemning anything less than a required unanimous vote for a finding of guilty, it should be remembered that in civilian courts, it also takes a unanimous vote for a finding of not guilty. In a civilian jury, if the first vote should result seven to five for a finding of guilty, nothing has been determined. The discussion will continue until one side persuades the other, or the jury concludes it cannot arrive at a verdict. The final result may be a compromise, or a case of the strong outlasting the weak. Should one juror hold out for a finding of guilty, the accused cannot be acquitted. However, in a court-martial, if the vote is seven to five for a finding of guilty, the accused has been acquitted, The required two-thirds (eight members) necessary for a finding of guilty was not reached.[219] There is no requirement that the five must convince the seven of the innocence of the accused. There is no need for a compromise. A finding of not guilty will be announced.

The majority did not mention Justice Douglas' strongest argument against the military trial, command influence. Justice Douglas speaks of the "direct command authority" the commander has over the members who sit as the fact finders.[220] Since the Military Justice Act of 1968, the accused is entitled, pursuant to his written request and the consent of the military judge, to be tried before the military judge alone.[221] This allows the accused who does not feel he will receive a fair trial from the court members the opportunity to be tried by a military judge who is generally independent of the command structure.

The Court of Military Appeals decided the case by relying on the second and third factors of the *Linkletter* test.[222] However, before leaving the first factor, the language in *DeStefano* v. *Woods*[223] should be examined. There, the Supreme Court, in holding *Duncan* v. *Louisiana*[224] and *Bloom v. Illinois*[225] prospective only, noted that they would not assert that every criminal trial held before a judge "alone was unfair or that a defendant may

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[219] *See* UCMJ art. 52; MCM, para. 74. While it is true that a court member may call for a reconsideration of the vote, the same vote will result in the same conclusion.

[220] 395 U.S. at 264.

[221] UCMJ art. 16; MCM, para. 4.

[222] 19 U.S.C.M.A. at 266, 41 C.M.R. at 266.

[223] 392 U.S. 631 (1968).

[224] 391 U.S. 145 (1968).

[225] 391 U.S. 194 (1968).

never be as fairly treated by a judge as he would by by a jury."[226] The same statement could be made about trial by court-martial. It would be difficult to allege that a court-martial was unfair when its finding of guilty was based upon a plea of guilty.

The second consideration, of reliance by authorities on the old standard, weighs in favor of the Government. It appears that Congress, the military, and even the Supreme Court had accepted *status* as the jurisdictional test.". *DeStefano* required a good faith reliance by authorities upon past opinions of the court.[228] Irrespective of one's feelings about the need for *O'Callahan*, it would be difficult to argue bad faith on the part of Congress and the military.

The third consideration, the effect upon the administration of military justice, is most persuasive for holding the *O'Callahan* decision prospective only. As observed in *Mercer v. Dillon:*

> The practical effect of voiding earlier convictions will often be to grant immunity from prosecution as a result of State statutes of limitations having run, witnesses having been scattered, and memories having been taxed beyond permissible limits.[229]

Consideration of cases could go back to 1916, and it has been estimated that since that time, there have been over 4,000,000 court-martial convictions.[230] The Court advised that in fiscal year 1968, the Armed Forces conducted approximately 74,000 special and general courts-martial:

> If only the smallest fraction of these muds-martial and those conducted in the other years since **1916** involved an *O'Callahan* issue, it is an understatement that thousands of courts-martial would still be subject to review. The range of relief could be extensive, involving such actions as determinations by the military departments of whether the character of discharges must be changed, and consideration of retroactive entitlement to pay, retired pay, pensions, compensation, and other veterans benefits.[231]

The effect upon military justice would be almost insurmountable.

Judge Ferguson dissented. He thought the court should wait for the Supreme Court's pronouncement. He also opposed the *Link-*

'*'. **392 U.S.** at 634.

227 **See** text accompanying notes 89–92, ***supra.***

228 392 U.S. at **634.**

229 **19 U.S.C.M.A.** at **267, 41 C.M.R.** at **267.**

230 ***See*** Gosa v. Mayden, **305** F. Supp. **1186, 1187** (N.D. Fla. **1969).** The district court held that *O'Callahan* did not apply retroactively.

231 **19 U.S.C.M.A.** at **2'68, 41 C.M.R.** at **268.**

letter doctrine,[232] nor did he believe *Linkletter* should be applied to jurisdictional matters such as *O'Callahan*.[233] He further asserted that if *O'Callahan* were just a constitutional question of right to jury trial, as contended by the majority, then the prospective only holding in *DeStefano* would have precluded *O'Callahan* from being decided."[234] Finally, Judge Ferguson believed that legislative acts should be construed consistently from the time of their enactment. It appears at this point that he has gone full circle, and has returned to his rejection of the *Linkletter* prospective only doctrine."

In conclusion, it appears that *Linkletter* is broad enough to cover *O'Callahan* if the Supreme Court so chooses. If *Linkletter* is applied, the decision will probably rest on the comparative fairness of the military justice system with civilian courts. Should such a comparative approach be taken, it is hoped that the examination of the military justice system will be fairer than it was in *O'Callahan.*

D. *JURISDICTION OVER CIVILIANS "IN TIME OF WAR"*

It is unfortunate that a subject dealing with the war powers of this nation should be an appropriate subtopic for an article on *O'Callahan v. Parker*. The majority opinion specifically excluded the topic by saying: "Finally, we deal with peacetime offenses, not with authority stemming from the war power."[236] However, shortly after *O'Callahan* was decided, the Court of Appeals for the District of Columbia decided, in *Latney v. Ignatius*,[237] that article 2(10) of the Code, which grants military jurisdiction over civilians "in time of war . . . serving with or accompanying the armed forces in the field,'' did not include the defendant."

Latney was an able bodied seaman employed by the S. S. Amtract, an American owned oil tanker transporting fuel from Japan to the Armed Forces in the Republic of Vietnam. He was arrested for fatally stabbing a fellow seaman, while they were in a DaNang bar. After Latney was formally charged with premedi-

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232 For a critical analysis of Linkletter v. Walker, 381 U.S. 618 (1965), see Haddad, *supra* note 215.

233 19 U.S.C.M.A. at 271, 41 C.M.R. at 271.

234 *Id.* at 272, 41 C.M.R. at 272.

235 *But* see Cipriano v. City of Houma, 395 U.S. 701 (1969). A Louisiana law was declared unconstitutional, but given only prospective effect.

236 395 U.S. at 273.

237 416 F.2d 821 (D.C. Cir. 1969).

238 UCMJ art. 2(10).

tated murder,[239] he filed a petition for a writ of habeas corpus which finally was allowed by the Court of Appeals.

The Court of Appeals relied upon language from *O'Callahan:*

> We have held in a series of decisions that court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces at the times of both the offense and the trial . . . .
>
> These cases decide that courts-martial have no jurisdiction to try those who are not members of the Armed Forces no matter how intimate the connection between their offense and the concerns of military discipline.[240]

While acknowledging *O'Callahan* dealt with peacetime offenses within the United States territorial limits, the court still felt it was "fair to conclude that the spirit of O'Callahan, and of the other Supreme Court precedents there reviewed, precluded an expansive view of Art. 2(10)."[241] The Court assumed that an undeclared war, such as the Vietnam Conflict, invoked the war powers, but did not believe they should be expanded to reach a "civilian seaman, employed by a private shipping company . . . in [DaNang] port for a short period," with no other military association, for stabbing a fellow seaman in a civilian bar.[242]

There are three points that should be made concerning *Latney.* First, the cases cited in *O'Callahan*[243] and relied upon in *Lntney* do not justify the enlarged precept which removes all civilians in all cases from military jurisdiction. None of the cases dealt with the war powers. In fact, *Reid V. Covert*[244] acknowledged that the war powers are broad enough to gather civilians under military jurisdiction:

> We believe that **Art.** 2(10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of "in the field."[245]

Second, it'is hard to accept the factual circumstances in *Lcrtney* as an expanded view of article 2(10), when previous federal decisions have approved the court-martial of a civilian cook who

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[239] **UCMJ** art. 118.

[240] 416 F.2d at 822.

[241] *Id.* at 823.

[242] *Id.*

[243] McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States ex *rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 334 U.S. 1 (1937); Toth **v.** Quarles, 330 U.S. 11 (1935).

[244] **354 U.S.** 1 (1957).

[245] *Id.* at 34 n.16.

jumped ship before it left the United States,'" a civilian employee working with troops guarding the border between the United States and Mexico,[247] and even a civilian stenographer employed at Camp Jackson, South Carolina.[248] Third, the Court implied that under other circumstances a civilian employee could be subject to court-martial jurisdiction. The court did not explain what it meant by the "spirit of *O'Callahan*." Possibly it was referring to a concept limiting court-martial authority "to the least possible power adequate to the end proposed."?"' Latney's offense might not affect the ends of military morale, discipline or security.

All of the above, concerning the Vietnam Conflict, became academic when the Court of Military Appeals decided, in *United States* v. *Averette*,[250] that "the words 'in time of war' mean, for the purpose of Article 2(10) . . . a war formally declared by Congress."[251] This precludes the court-martial of any civilian under the present undeclared war.

Averette, a civilian employee of an Army contractor in the Republic of Vietnam, was convicted by general court-martial of conspiracy to commit larceny and attempted larceny of government property.'" His sentence, as approved, included confinement at hard labor for one year and a fine of $500.00. The majority opinion noted that in 1916 military jurisdiction over civilians was expanded to include civilians not covered in earlier articles of war, such as civilians in time of peace, and that the expansion is still present in articles 2(10) and 2(11) of the Code.'" Then the Court devoted the majority of its opinion to rejecting previous authorities. Those cases involving civilians did not occur in time

[246] McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943).

[247] *Ex parte* Jochem, 257 F. 200 (S.D. Tex. 1919).

[248] Hines v. Mikell, 259 F. 28 (4th Cir. 1919), ***cert.*** *denied,* **250** U.S. 645 (1920).

[249] 395 **U.S.** at 265.

[250] 19 U.S.C.M.A. 363, **41** C.M.R. 363 (1970).

[251] *Id.* at 365, 41 C.M.R. at 365.

[252] UCMJ arts. 81, 80.

[253] 19 U.S.C.M.A. at 364, **41** C.M.R. at 364. The value of citing the expansion fades when it is realized that article 2(11) was declared unconstitutional. McElroy **v.** United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Reid v. Covert, 354 U.S. 1 (1957). Only article 2(10) is in issue, and it appears no broader than the earlier articles of war. *Compare:* "All sutlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the Field, though no inlisted [sic] soldier . . . ." Articles of War 1776, article 23 (reprinted in WINTHROP 967), ***with:*** "In time of war, persons serving with or accompanying an armed force in the field. . . ." UCMJ art. 2(10).

[254] *See* **note** 243, ***supra.***

of declared war.[254] Those cases holding undeclared wars as "in time of war," did not involve civilians.'" Concerning *O'Callahan,* the Court correctly stated:

> We find nothing in that opinion that causes us to conclude a civilian accompanying the armed forces in the field in time of a declared war is invulnerable to trial by military courts.[256]

The Court distinguished *Latney* on its facts. Latney was a civilian seaman in port waiting for his ship to turn around, while Averette worked daily at a United States army installation with privileges similar to a service member. The conclusion of the Court, which required a formally declared war by Congress before the military may exercise jurisdiction over civilians, is based upon a belief that "the most recent guidance in the area from the Supreme Court [requires] a strict and literal construction of the phrase 'in time of war' . . . ."[257]

As mentioned earlier, *Reid v. Covert,*[258] which held that civilian dependents accompanying the Armed Forces overseas in time of peace were not triable by court-martial for capital offenses, was rejected by the majority opinion because the offense ocurred in peacetime. However, the Court in *Reid* did examine the Government's war powers and the language used would appear to cover undeclared wars as well as declared wars:

> In the face of an actively hostile enemy, military commander- necessarily have broad power over persons on the battlefront. From a time prior to the adoption of the Constitution the extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.[259]

Frederick B. Wiener, a noted military historian and author, who successfully argued *Reid v. Covert* before the Supreme Court, felt reasonably certain that civilians accompanying the Armed Forces in Vietnam were subject to court-martial jurisdiction.[26]

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[255] Montoya v. United States, 180 U.S. 261 **(1901);** Bas **v.** Tingy, **4** U.S. **(4** Dall.) **37** (1800); United States v. Anderson, **17** U.S.C.M.A. 588, **38** C.M.R. **386 (1968);** United States v. Shell, 7 U.S.C.M.A. 646, 23 C.M.R. 110 (1957) ; United States v. Sanders, 7 U.S.C.M.A. **21, 21** C.M.R. 147 **(1956)** ; United States **v.** Bancroft, **3** U.S.C.M.A. 3, **11** C.M.R. 3 **(1953);** Hamilton **v.** McClaughry, **136** F. **445 (D.** Kan. **1905).**

[256] **19** U.S.C.M.A. at **364, 41** C.M.R. at **364.** Please note that the statement would be just as accurate without the gratuitous insertion of the word "declared."

[257] **Id.** at **365, 41** C.M.R. at **365.**

[258] **354 U.S. 1 (1957).**

[259] **Id.** at 33.

[26] ***See*** Wiener, *Courts-Martial for Civilians Accompanying the Armed Forces in Vietnam,* 54 A.B.A.J. **24 (1968).**

What makes *United States v. Averette so* unexpected is that in 1968 the Court of Military Appeals, in *United States v. Anderson,* held the Vietnam Conflict constituted "in time of war" for certain portions of the Uniform Code of Military Justice."' While it is true that Anderson was a soldier while Averette was not, it seems inconsistent to hold that the Vietnam Conflict invokes the war powers for certain purposes, but not for others.

The majority opinion noted that Averette's offenses, as distinguished from Latney's, were cognizable in the Federal District Court. But it is apparent that the application of the opinion will not be limited to those offenses cognizable in the Federal District Court. Certain crimes may be committed by United States civilian employees in Vietnam with immunity from punishment.[262] It is submitted that such an unconscionable result will affect the morale and discipline of this country's fighting forces. One solution would be for Congress to redraft article 2(10) so that its content is subject to only one interpretation.

VI. CONCLUSION

The *O'Callahan* decision was a shock to both Congress and the Armed Forces, They had been laboring for many years under a different jurisdictional standard. When the Supreme Court decides that they must give a new interpretation to constitutional language, which previously has been termed "unambiguous," their justification should be clear and persuasive. The Court's English and Early American historical support is neither clear, nor persuasive. The Court's attack upon the present day military justice system was unfair. Should there be a need, *arguendo,* to limit the constitutionally-granted power of Congress over the military, in order to preserve other constitutional guarantees, careful consideration should be given to the strong and legitimate needs of the military to preserve discipline. This was not done.

The new jurisdictional standard of "service connection" was presented in such vague terms that its deficiencies are glaring. The Court of Military Appeals has accepted the task of 'defining "service connection," and pursued it vigorously. In the six months after they decided *United States v. Borys,*[263] 35 per cent

[261] 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968). The court held that the two year statute of limitations for absence without leave was not tolled because the Vietnam Conflict constituted "time of war."

[262] *See* note 98, *supra.*

[263] 18 U.S.C.M.A. 545, 40 C.M.R. 257 (1969).

of their decisions dealt with *O'Cnllnhan* and military jurisdiction. The Court of Military Appeals was created so that civilian judges could gain a full "understanding of the distinctive problems and legal tradition of the Armed Forces."[264] With this understanding, they have justifiably established liberal tests for determining "service connection."

It will be a substantially different Supreme Court that resolves the *O'Callahan* problems. Chief Justice Burger and Justice Blackmun have replaced Chief Justice Warren and Justice Fortas. Based upon the serious problems inherent in *O'Callahan* and the change in the membership of the Court, it would seem appropriate that *O'Callahan* be reexamined, with the hope that it is overruled, or, at the very least, limited in its effect.

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[264] Noyd **v.** Bond, 395 **U.S.** 683, 694 (1969).

PROSECUTION IN CIVIL COURTS OF MINOR OFFENSES COMMITTED ON MILITARY INSTALLATIONS*

By Captain Mitchell D. Franks**

Many sorts of minor offenses, such as traffic violations, which are committed on a military reservation may be handled by a United States Magistrate. This article summarizes and analyzes the problems which a magistrate may face in dealing with these offenses, including the different types of federal legislative jurisdiction over military pasts, the Assimilative Crimes Act, the authority of the post commander to issue bar orders, restrictions on personnel which can be used for law enforcement and prosecution, the changes wrought by the Federal Magistrates Act of 1968, and the effects of other federal legislation on trial by magistrates of service members. The author suggests reforms, including a traffic code for federal enclaves. Included as appendices are, inter alia, an example of the complicated jurisdiction created by complex land interests at one post, and a useful list of federal offenses triable before a federal magistrate.

I. INTRODUCTION

The procedures used in implementing civil-court prosecutions for minor offenses committed on military installations are found in a patchwork of statutes, regulations, and opinions. The overwhelming number of offenses committed on the reservation are traffic violations. However, other cases may involve hunting and

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fishing violations, trespass to property, or, as in one reported case, tampering with a government vehicle.'

This article will provide answers to the following questions: What is an exclusive federal jurisdiction? What is a petty offense? What is a minor offense? What is the authority of the United States Magistrate to try cases arising on an Army installation? What is the authority for military police to cite persons to appear before the magistrate? What is this agreement allowing a member of the Judge Advocate General's Corps to prosecute cases before the magistrate? What is the force and effect of post traffic regulations on non-military personnel? Is a trial by jury available? Must counsel be made available to the military accused in the civil court?

II. JURISDICTION OVER MILITARY RESERVATIONS

A. *TYPES*

Under the commissioner system individuals who committed petty offenses[2] on military reservations over which the United States exercised exclusive or concurrent legislation could be tried, with their consent, before a commissioner appointed by the United States District Court for the district in which the reservation was located.[3]

The term "exclusive legislative jurisdiction" has been defined as "the power to exercise exclusive jurisdiction granted to Congress by Article I, section 8, clause 17, of the Constitution,[4] and to the like power which may be acquired by the United States through cession by a state, or by a reservation made by the United

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[1] United States v. Jones, 141 F. Supp. 641 (E.D. Va. 1956).

[2] 18 U.S.C. § 1 (1961): "Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both, is a petty offense."

18 U.S.C. § 3401 (1964).

[4] U.S. CONST. art. I, § 8, cl. 17: "To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock yards, and other needful Buildings."

States in connection with the admission of a state into the Union." In the exercise of such power as to an area in a state the federal government theoretically displaces the state in which the area is contained of all its sovereign authority, executive and judicial as well as legislative.[5]

Concurrent legislative jurisdiction is applied in "those instances wherein the granting to the United States authority which would otherwise amount to exclusive legislative jurisdiction over an area the State coacerned has reserved to itself the right to exercise, by itself or concurrently with the United States, other authority constituting more than merely the right to serve civil ***or*** criminal process in the area.))'

In addition to exclusive and concurrent legislative jurisdiction there are two other types of jurisdiction which may be applicable to the reservation. These are "partial legislative jurisdiction" and "proprietarial interest only."

"Partial legislative jurisdiction" is applied in those instances where the federal government has been granted, for exercise by it over an area in a state, certain of the state's authority, but where the state concerned has reserved *to* itself the right to exercise, by itself or concurrently with the United States, other authority constituting more than the right to serve civil or criminal process in the area (*e.g.*, the right to tax private property).'

"Proprietarial interest only" is applied in those instances where the federal government has acquired some right or title to an area in a state but has not obtained any measure of the State's authority over the area. In applying this definition, recognition should be given to the fact that the United States, by virtue of its functions and powers under various provisions of the Constitution, has many powers and immunities with respect to areas in which it acquires an interest which are not possessed

[5] U.S. ATT'Y GEN., REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES. Pt. I, at 14 (1956) [hereinafter cited as REPORT]. This two part study is over 10 years old, but due to the paucity of legislation in this area it remains an excellent and current source of information. Part I was issued in 1956 and Part II followed in 1957. ***See*** *also* Army Reg. No. 405–20, para. 2*b*.

[6] (28 Jun. 1968) [hereinafter cited as AR 405–20].

[6] REPORT, Pt. I, at 15. **AR** 405–20, para, 2*c*.

[7] *Id.*, Pt. II, at 11.

by ordinary landholders.[8] In this regard it has been held that the power to make and enforce necessary rules and regulations for the management of federal property need not depend, constitutionally, on the acquisition by the federal government of legislative jurisdiction under article I, section 8, clause 17.[9] This decision was based upon the constitutional provision that "[t]he Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States."[10]

B. *ASPECTS OF JURISDICTION*

Notice should be taken of the fact that ownership and use of public lands by the federal government, without more, does not withdraw the lands from the jurisdiction of the state." Land acquired by the United States, but which is not subject to the exclusive legislative authority of the United States, remains subject to the jurisdiction of the state in matters not inconsistent with the free and exclusive use of the land for the purpose for which it was acquired.'. The "without more" referred to above usually entails the acquisition of land in one of the three methods already mentioned, *i.e.*, by the method provided for in the Constitution, cession by the state to the federal government, or by reservation. The acquisition of property by the United States by a means other than by these three methods will result in less than exclusive or concurrent legislative jurisdiction," but where the United States acquires land from a state for purposes specified in the Constitution with the state's consent, federal jurisdiction is exclusive in such areas for all purposes." Furthermore, whether the United States has acquired exclusive jurisdiction is a federal question.[15]

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[8] *Id.*

[9] United States **v.** Dreos, 156 F. Supp. 200 (D.Md. 1957).

[10] U.S. CONST. art. IV, § 3, cl. 2.

[11] Surplus Trading Co. v. Cook, 281 U.S. 647 (1930); Eminent Domain of States, 7 OP. ATT'Y GEN. 573 (1855).

[12] Johnson **v.** Morrill, 20 Cal.2d 446, 126 P.2d 873 (1942).

[13] ***See*** Paul **v.** United States, 371 U.S. 243 (1963); Johnson **v.** Morrill, 20 Cal.2d 446, 126 P.2d 873 (1942).

[14] Ryan **v.** State, 188 Wash. 115, 61 P.2d 1276 (1936), *aff'd* 302 U.S. 186 (1937).

[15] DeKalb County v. Henry C. Buck Co., 382 F.2d 992 (4th Cir. 1967); **Paul v.** United States, 371 **U.S.** 246 (1963).

It is apparent that the authority of the United States to exercise jurisdiction over its property has a strong constitutional foundation. In a landmark decision discussing this power the United States Supreme Court held long ago that the legislative power of Congress is exclusive over lands within a state purchased with its consent by the United States for a lawful purpose.[16] While occasionally a problem may arise concerning the proper acquisition of territory it is fairly well settled that the land secured for military installations was done so in a constitutionally proper manner.[17] Furthermore, where the United States acquires lands within a state any way other than by purchase with its consent, forts, arsenals, and other public buildings erected thereon for the use of the federal government, as instrumentalities for the execution of its powers, will be free from any such interferences and jurisdiction of the state as would destroy or impair their effective use for the purpose designed. But, when not used as such instrumentalities, the legislative powers of the state over the places acquired will be full and complete as over any other places within it limits.[18] It is now well established that a state in ceding jurisdiction to the United States may reserve to itself any powers within the ceded area which are not inconsistent with the performance of governmental functions.[19] It follows, therefore, that a state may retain jurisdiction over crimes committed within such areas which are not punishable under specific federal statute[20]. This bifurcated jurisdiction, so inherent in our federal system, gives rise to many of the problems arising on military installations.

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[16] Fort Leavenworth R.R. v. Lowe, 114 U.S. **525** (1885). ***See*** *also* United States v. Cornell, **25** F. Cas. **646** (No. 14,867) (C.C.D. R.I. 1819).

[17] **REPORT,** Pt. 11, at 81, n. 62. In Holt v. United States, 281 U.S. 245 (1910), the Supreme Court queried whether a de fac'to federal exercise of authority was not sufficient to establish its possession of exclusive jurisdiction, and in Colorado v. Toll, 268 U.S. 228 (1925), the Court remanded a case for ascertainment of further facts in absence of proof of a state cession of jurisdiction. On the basis of *Holt*, the court stated in Hudspeth **v.** United States, 223 F. 2d 848 (5th Cir. 1955), that if a place was sufficiently described the court would take judicial notice of facts which vest the United States with jurisdiction. ***See*** *also* Krull v. United States, **240** F. 2d 122 (5th Cir. 1957).

[18] Fort Leavenworth R.R. v. Lowe, 114 U.S. **525 (1885).**

[19] James **v.** Dravo Contracting Co., 302 U.S. 134 (1937).

[20] Bower v. Johnston, 306 U.S. 19 (1939).

III. APPLICATION OF THE LAW TO A FEDERAL ENCLAVE

A. *DETERMINING JURISDICTION*

In any factual situation involving a criminal offense suspected of having been committed on the federal reservation the first question which must be asked before determining which law, state or federal, applies is: Where did the act or acts constituting the offense occur? Normally the only requirement is for the local command representative to determine whether or not the act occurred in an area under exclusive federal jurisdiction. Often this requires a detailed study of the individual installation. Occasionally a question concerning jurisdiction over real property arises which cannot be answered at the local level. In that event assistance may be requested from the Lands Division, Office of The Judge Advocate General, Department of the Army. At Appendix A is an excellent example of a detailed analysis of the types of jurisdiction found on Army installations today.

B. *FEDERAL ENACTMENTS*

Having determined that the offense was committed on an installation under exclusive or concurrent jurisdiction, will the United States exercise jurisdiction over the offense? Consistent with that question is the one concerning the determination of which law was violated, *i.e.*, federal statutory law or the adopted provisions of the state law as federal substantive law? The search through the United States Code for the statute prohibiting a particular act or omission may be a laborious process. This is so as a result of the location in the Code of the many penal statutes. While most of the criminal statutes are found in title 18 of the Code a cursory glance at Appendix B will reveal that there are many penal sections in other titles. Once the search through the United States Code has been successful, the violator of that particular code section may be prosecuted as the statute may provide.

C. *ASSIMILATIVE CRIMES STATUTE*

In the event the search for a congressional enactment relating to a particular act is unsuccessful it may be possible to use the provisions of the Assimilative Crimes Act.[21] This statute provides

[21] 18 U.S.C. § 13 **(1964).** For a detailed examination of this statute, see Waller, *Assimilative Crimes* **Act,** *10* MIL. L. **REV.** 107 *(1958).*

for adopting state law for offenses committed on federal property under exclusive or concurrent jurisdiction which would be an offense under existing state law and for which Congress has provided no sanctions. Not *all* the state laws are made federal law by the act. There are several instances which will generally preclude the use of the state law as federal law. These include laws impossible of adoption, state administrative and regulatory requirements, and state law contrary to regulations and policies of the federal government [22] Whether a state law may be assimilated on a military reservation depends on the adaptability of the state law to the reservation.[23] As a general rule, a state law not in conflict with an Army regulation is susceptible of assimilation." Normally, Army regulations are declarative of federal policy and have the effect of law so that where there is an inconsistency between federal policy as expressed in Army regulations and state law, there would be no assimilation of the state law.[25] As the statute is inoperative where there is a federal statute defining a certain offense,[26] before using state law it must be determined that Congress has not preempted the field."

Results of the survey questionnaire (Appendix C) concur with the conclusion of the Attorney General's Interdepartmental Committee for the Study of Jurisdiction Within the States which stated: "The overwhelming majority of offenses committed by civilians on areas under the exclusive criminal jurisdiction of the United States are petty misdemeanors (*e.g.*, traffic violations, drunkenness). . . ."[28] By far the most common cited offenses on military reservations today are the traffic offenses." A study of

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[22] See the discussion of these points in U.S. DEP'T OF ARMY, PAMPHLET NO. 27-164, MILITARY RESERVATIONS 64-65 (1965) [hereinafter cited as DA Pam 27-164].

[23] JAGA 1964/4031, 12 Jun. 1964.

[24] *Id.*

[25] *Id. See also* Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944).

[26] United States v. Press Publishing Co., 219 U.S. 1 (1911).

[27] For a recent case examining whether Congress had preempted the field to the exclusion of the use of state narcotic statutes in courts-martial, see United States v. Shell, 37 C.M.R. 962 (A.B.R. 1967).

[28] REPORT, Pt. II, at 135.

[29] The questions found at Appendix C were sent to 92 Army installations in CONUS, Alaska, and Hawaii. A total of 54 usable replies were received. In no instance was the reply to question No. 16 other than traffic offenses. Further, the lowest percentage cited in answer to this question was 75 percent. These replies substantiate the figures found in *Hearings on the United States Commissioner System before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. of the Judiciary*, 89th Cong., 1st Sess., Pt. 11, at 101-105 (1965) [hereinafter cited as *Hearings on the Commissioner System*].

the offenses listed in Appendix B will fail to disclose any congressional enactment relating 'to traffic regulations on federal property, yet this remains the number one problem for effective post law enforcement. It has been seen that the Assimilative Crimes Statute is limited to offenses committed under the jurisdiction and control of the United States and adopts as the law of the United States the laws of the states in which places are situated as to such offenses not made penal by federal law.[30] One federal judge had made the following statement in reference to the Assimilative Crimes Statute:

> The policy of Title 18, U.S.C. § 13 is to afford people on Federal enclaves the same protection that they would be afforded in the surrounding territory. People need protection from intoxicated drivers just as much on federal roads as they do on state highmays. It is patent that the state law would apply to Federal roads; if they were under the State's jurisdiction. Sound reason and public policy require the application of the law against driving while under the influence of intoxicating liquor to Federal roads.[31]

Prosecutions under the provisions of a particular criminal section of the state statute are not to enforce the laws of the state but to enforce federal law.[32] Thus, in the absence of federal statutory enactment and absent some countervailing federal regulation or policy the state traffic laws must be adopted if there is to be any valid traffic code on the installation.[33] It should be noted at this point that some criminal statutes cannot be adopted. Usually this results from the statute requiring some implementing act by state officials to be fully effective. The Judge Advocate General is of the opinion, however, that state laws which define an offense and the punishment for its commission are assimilated

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[30] Franklin **v.** United States, 216 U.S. 559 (1910); Western Union Tel. Co. **v.** Chiles, 214 U.S. 274 (1909).

[31] United States v. Barner, 195 F. Supp. 103, 108 (N.D. Cal. 1961). In this case the accused was charged with driving under the influence of intoxicating liquor upon a highway within McClellan AFB, California, a military reservation under exclusive federal jurisdiction in violation of the California Vehicle Code Drunk Driving Statute. The accused argued that there are no public highways within McClellan AFB as they are not open to the public nor are they "publicly maintained." The court found that "publicly maintained" can mean but one thing and that in an exclusive federal jurisdiction it is maintenance by the federal government. This being the case the court found the roadways to be public highways and adapted the above Vehicle Code section.

[32] Puerto Rico v. Shell Co., 302 U.S. 253 (1937).

[33] **JAGA** 1964/4031, 12 Jun. 1964, and cases cited therein; JAGA 1959/3702, 11 May 1959. See the discussion of the jurisdictional law on military reservations applicable to traffic cases in JAGA 1969/4181, 25 Jul. 1969.

even if ministerial administrative actions are required to implement the law.[34] This is a departure from previous opinions which concluded that statutes requiring an implementing act could not be assimilated for the reason that the federal government was not equipped to carry out such administrative functions.[35] The new opinion appears to be more enlightened and forward looking than its predecessors. Although the opinion states that it is a generalization of the law, and that a definitive determination of whether a particular traffic offense is assimilated can only be made by a court of competent jurisdiction, nevertheless it provides certain usable guidelines.

A statute which requires a commission or other regulatory body to establish traffic regulations cannot be assimilated as this is a legislative not a ministerial function. Simultaneously, if the statute authorizes the commission or regulatory body "to fix a speed limit that varies from the statutory speed limit, an order, rule, or regulation promulgated pursuant to that statutory authority cannot be assimilated into the Federal law, as the administrative action is a *legislative* rather than a *ministerial* act." (Emphasis added.) The fact that the installation commander performs the ministerial administrative act (erect stop sign, post speed limit sign, etc.), rather than a state official probably would not defeat assimilation. Care must be taken that the local command move cautiously, to include consulting the appropriate United States Attorney, before performing the ministerial acts necessary to assimilate the law. If the act cannot be assimilated, the post would be left without the means to punish many of the wrongful acts committed by a civilian offender. While post commanders may properly issue traffic regulations by virtue of their general duty and authority to administer all affairs in connection with the military reservation and to safeguard the public interests in every particular therein, a violation of such regulations by a person not subject to military law is not a federal offense within the purview of the Assimilative Crimes Act."

Just as an installation commander has no authority to make a valid penal law applicable to civilians, he also has no authority to order civilians on the post into temporary detention in the

[34] JAGA 1969/4557, 1 Oct. 1969.

[35] JAGA 1952/5531, 1 Jul. 1952. This principle was recently restated by The Judge Advocate General in discussing a case arising out of Redstone Arsenal. JAGA 1967/4325, 29 Sep. 1967.

[36] SAGA 1959/5681, 3 Aug. 1959; JAGA 1959/3702, 11 May 1959; JAGA 1955/1736, 9 Mar. 1955.

post stockade or other post facility pending appearance before a United States magistrate or federal district court for trial.[37] The prohibition against punishing civilians for violations of post regulations has not been limited to that level. The Secretary of the Army does not have authority to promulgate penal lams effective over civilians.'* This statement is based in part on the decision of the United States Supreme Court in *United States V. Eaton,*[39] which held:

> Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law, but it does not follow that a thing required by law as to make the neglect to do the thing a criminal offense in a civilian, when a statute does not distinctly make the neglect in question a criminal offense.

Having determined that violation of a post regulation will not support a citation to the U. S. Magistrate and that a Secretary of a Department has no inherent authority to promulgate penal regulations it becomes increasingly apparent that the magistrate must look to the Assimilative Crimes Statue for any jurisdiction he may have over the minor offenders.

D. *AUTHORITY TO EXCLUDE INDIVIDUALS FROM THE MILITARY RESERVATION*

The post commander need not be so restricted as he has yet another weapon in his arsenal of dealing with those persons who violate his regulations.'" Title 18, United States Code **§ 1382,** provides:

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[37] **JAGA** 1953/8634, 12 Nov. **1953.**

[38] JAGA 1963/3678, 8 Mar. 1963 (63 JXLS 125/11). In that opinion the following statement was made: "The most effective method of making the violation of a post traffic regulation by a civilian a misdemeanor is for Congress to amend Title 18 of the United States Code."

[39] 144 U.S. 677 (1892).

[40] In this regard the Act violated must be clearly and specifically enunciated in the regulation or run the risk of being unenforrrable. See United States v. Bradley, 418 F.2d G88 (4th Cir. 1969), in which a Fort Bragg post regulation was held not *to* cover the distribution of handbills advocating opposition to the war in Vietnam and freedom of speech for soldiers. This deficiency cited in the Bradley case has probably been cured by Army Reg. No 210-10 (30 Sep. 1968).

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station or installation, for any purpose prohibited by law or lawful regulation; or whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof shall be fined not more than $500 or imprisoned not more than six months, or both."

Thus, a post commander may exclude persons not subject to military law for violation of his regulations or for other reasonable cause. A close reading of the above statute would indicate that to insure total legality the order not to reenter should be issued or signed by the commander, *i.e.*, this duty should not be delegated." Army regulations[43] provide that, in view of this statute, persons not subject to military law who are found within the limits of military reservations in the act of committing a breach of regulations may be removed therefrom upon orders from the commanding officer and ordered not to reenter. The law has repeatedly recognized the authority of an installation commander to exclude civilians from an installation as evidenced by opinions from the Office of The Judge Advocate General." The basis of this authority is the responsibility of the installation commander to safeguard the interest of the Government and the welfare of military personnel on the installation.[45] It is within the discretion of the commander to determine whether the exclusion or admission of persons is consistent with the proper administration on that installation, subject to the limitation that it may not be exercised arbitrarily." Using this inherent authority,

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[41] See the analysis of this statute in Lloyd, *Unlawful Entry and Re-Entry Into Military Reservations in Violation of 18 U.S.C. 1.382,* 1969 (unpublished thesis in the library of The Judge Advocate General's School, U.S. Army).

[42] *See* United States v. Ramirez Seizo, 281 F. Supp. 708 (D. P.R. 1968), in which the court dismissed the charge because there was no proof that the Area Engineer of the Army Corps of Engineers, who issued the bar order, was the person in charge of the installation from which the defendant had been barred.

[43] Army Reg. No. 633–1, para. 8c (13 Sep. 1962) [hereinafter cited as AR 633–1]. This regulation is authorized by 32 C.F.R. § 503.1 (1970), and 10 U.S.C. §§ 3012(e) and (g) (1964).

[44] JAGA 1964/4478, 21 Aug. 1964; JAGA 1956/8970, 27 Dec. 1956; JAGA 1955/4601, 9 May 1955.

[45] JAGA 1966/4013, 8 Jun. 1966; JAGA 1956/8907, 27 Dec. 1956.

[46] JAGA 1966/4013, 8 Jun. 1966, *citing* SPJGR 1944/3086, 23 May 1944.

having once excluded an individual from the installation, if that person reenters the installation this reentry will constitute a violation of that law and subject him to trial."

IV. LAW ENFORCEMENT ON THE ENCLAVE

A. *USE OF LOCAL POLICE OFFICIAL*

The policing of federal exclusive jurisdiction areas must be accomplished by federal officials, *i.e.*, General Services Administration police, military police, United States marshals, etc.; and an offer of a municipality to police a portion of a road on such an area could not be accepted by the federal official in charge of the area, as police protection by a municipality to such an area would be inconsistent with federal exclusive jurisdiction." This policy has been somewhat modified by a recent opinion of The Judge Advocate General of the Army which stated:

> If local police were to enter military reservations subject to exclusive jurisdiction there are two methods by which they could enforce the laws thereon; (1) if deputized by the Federal Government to enforce Federal laws within such exclusive jurisdiction areas (Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States, Part II, p. 109, fn 9), or *(2)* if, acting as private citizens make "civilian arrests" (See DA Pam 27-164, para. 11.3 and 11.4).[49]

B. *AUTHORITY OF GENERAL SERVICES ADMINISTRATION*

The police function authorized under the provisions of 40 U.S.C. § 318 (1964) is vested only in the General Services Administration. However, The Judge Advocate General has advised that with regard to property over which the United States has exclusive or concurrent jurisdiction, the police function may be delegated under the provisions of 40 U.S.C. § 486(e) to the Department of the Army, and, as a ministerial task, subdelegated to subordinate commands (in this case Army Map Service) to allow

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[47] For a recent case of a prosecution involving a trespass on a military reservation under **18 U.S.C. § 1382,** see Weissman v. United States, **387 F.2d 271 (10th** Cir. **1967).**

[48] **JAG 680.2,** 7 Jun. **1938. See also JAGA** 1948/9016, 23 Dec. **1948; JAGA 1948/8751, 7** Dec. **1948.**

[49] **JAGA** 1968/3638, **26** Mar. **1968.**

them to institute their own system of traffic control and property protection."

The Act of 1 June 1948 (62 Stat. 281) provides that the Administrator of General Services has authority to appoint uniformed guards as special police for the protection of federal property under *his* jurisdiction over which the United States has acquired exclusive or concurrent criminal jurisdiction. These special police have power to enforce the laws enacted for the protection of persons and property and to enforce any rules and regulation made and promulgated by the Administrator or such duly authorized officials of the Aministration for the property under their jurisdiction."

Congress has authorized the Administrator to make all needful rules and regulations and, even more important, to annex to these rules and regulations such reasonable penalties as will insure their enforcement.[52] However, the maximum punishment authorized under the l a for violation of any rule or regulation promulgated is a $50 fine or imprisonment for not more than **30** days, or both.

As noted above The Judge Advocate General has opined that the authority of the Administrator may be delegated under 40 U.S.C. § 486(e) to the Secretary of the Army. It would appear that under the provisions of 40 U.S.C. § 418(b) the Administrator may, upon application of the head of a department, detail his special police to and extend to property under exclusive or concurrent jurisdiction the application of any such rules and regulations. Thus, it becomes a question of which method will be utilized to extend to military reservations the protection Congress has given to certain property under the General Services Administration. Either method utilized opens itself to possible challenge as to its legality. An amendment to the Code giving to the head of each department the same authority as that possessed by the General Services Administration should solve most of the problems involving minor offenses, especially traffic offenses. In addition, it should vitiate most of the problems raised

[50] **JAGA** 1967/4100, **25** Jul. 1967.

[51] 40 U.S.C. § 318 (1964).

[52] 40 U.S.C. § 318a (1964).

[53] 40 U.S.C. § 318c (1964). The authority of the GSA was upheld in a rare case involving a parking violation which went all the way **up** to the United States Court of Appeals. United States v. Murray, 352 F.2d 397 (4th Cir. 1965).

by the use of civilian guards not under the General Services Administration.[54]

C. *POSSE COMITATUS* ACT

A law enforcement function involving military personnel, *i.e.*, normally military police, must be operable within the framework of the prohibitions found in the so-called Posse Comitatus Act.[55] It should be noted that military police are not vested with the rights and duties of civilian police officers," and the prohibitions of the Posse Comitatus Act historically have been strictly construed." Of course, the utilization of military personnel is not prohibited where a military purpose requires using them" and the common lam right to make citizens arrest is enunciated by Army regulation." Caution should be used before relying on the citizens arrest principle as the law varies from state to state. A detailed examination into the local law relating to such an arrest is mandatory before its use.

V. UNITED STATES COMMISSIONER""

A. *STATUTORY PROVISIONS*

Individuals who committed petty offenses on military reservations over which the United States exercises exclusive or concurrent jurisdiction could be tried, with their consent, before com-

[54] See DA PAM. 27–164 at 87 for a discussion on the use of civilian guards.

[55] 18 U.S.C. § 1385 (1964). This provision reads: "Use of Army and Air Force as Posse Comitatus. Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

[56] JAG 680.2, 5 Sep. 1941.

[57] JAGA 1963/3905, 25 Apr. 1963, and cases cited therein.

[58] JAGA 1969/4557, 1 Oct. 1969; JAGA 1959/1745, 16 Feb. 1959.

[59] Army Reg. No. 633–1, para. *Sa* (13 Sep. 1962). See DA PAM. 27–164 at 86–87 for a discussion of this principle as it relates to the military reservation.

[60] The discussion of the U.S. commissioner which follows has been placed in a historical context although, at the time of writing, while the Federal Magistrates Act provides for the abolition of the commissioners, there is a transition period which does not terminate until: (1) the first United States Magistrate assumes office within a judicial district, or ('2) 17 Oct. 1971, whichever date is earlier. See fn. 111, *infra*.

missioners appointed by the United States district court for the district in which the reservation is located. By its own terms, 18 U.S.C. § 3401 was inapplicable to the District of Columbia.

Under the provisions of 18 U.S.C. § 3401, a U.S. Commissioner had trial jurisdiction — as distinguished from his jurisdiction as a committing officer — only if:

(1) He had been specifically designated for those purposes by the district judge;

(2) The offense was a petty offense within the meaning of 18 U.S.C. § 3401;

(3) The offense was committed in any place "over which the Congress has exclusive power to legislate or over which the United States has concurrent jurisdiction."[61]

While the title of "United States Commissioner" is no older than the Act of 1896 (29 Stat. 184), the Act of 1842 (5 Stat. 516) had provisions giving the "commissioners of the Circuit Court" the powers of a justice of peace. Therefore, for many purposes "The United States Commissioner is a justice of the peace of the United States."[62] About the United States Commissioner the following has been said: "Commissioners are not judges nor is there such a thing as a 'United States Commissioners Court' but it is not unusual to find frequent reference to a commissioner as a 'Quasi-judicial officer' or as 'almost but not quite a judicial officer'."[63] Under whatever label one desires to place the commissioner, it was at this level of the federal judicial system that the civilian petty offender first had contact. The majority of the respondents to the questionnaire (Appendix C) indicated that there was some working arrangement with the U.S. Commissioner whose jurisdiction encompassed their installation. As often as not the commissioner held his hearings on post (usually in the building housing the staff judge advocate), and he frequently had administrative assistance from the judge advocate's office. The policy of providing the Commissioner with a hearing room and with administrative assistance were factors cited by many judge advocates as the most persuasive factors in inducing the commissioner to hold his hearings on post. As a

[61] JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES, MANUAL FOR UNITED STATES COMMISSIONERS (Director of Administrative Office of United States Courts Rev. 1948).

[62] United States v. Maresca, 266 F. 713 (S.D.N.Y. 1920). This case contains an excellent summary of the history of the United States Commissioners. *See also* United States v. Allred, 155 U.S. 591, 594–95 (1895).

[63] Halfer, *The United States Commissioner — A Little Known Component of the Federal Judicial System*, 52 KY. L.J. 396 (1964).

result of having the hearings on post there were fewer man-hours lost to the Government by those civilian land military personnel who are cited to the commissioner. While there may be an inconvenience to those civilians who were not government employees, but who must appear before the commissioner, the manifest benefits of the system accruing to the Government were such as to justify its continued use. Essentially the same procedure will, no doubt, be followed with the magistrate.

B. *PROSECUTION BEFORE COMMISSIONERS ON MILITARY RESERVATIONS*

Army Regulation 632–380[64] provided for "the means provided by law to facilitate the trial before civil authorities of individuals who commit petty offenses on certain military reservations."[65] Paragraph 5 authorized the prosecution of a case involving a *petty* offense by qualified Army officers where no representative of the Department of Justice is available. Paragraph 6 described ithe criteria which *should* be met in appointing Army personnel as prosecutors before the commissioner. Paragraph 7 dictated the duties required of the Army prosecutor in preparing complaints against the offender.

In 1962 the propriety of using Army personnel to prosecute cases before commissioners was questioned by Nicholas Katzenbach. then Deputy Attorney General, in a letter to The Judge Advocate General. The Justice Department was concerned about the application of 10 U.S.C. § 3544b (Regular Army commissioned officer holding a civil office) to these Army prosecutors. The Justice Department was concerned that the using of Army personnel as prosecutors was a usurpation of a function of that department. Also they inquired about the apparent lack of authority for this practice and the lack of any delegation of Department of Justice functions to the Army. Citing two old opinions of the Attorney General,[66] The Judge Advocate General stated that "duties performed by military personnel, which otherwise would be civil in nature, are not in contravention of the law

[64] Former Army Reg. No. 632–380 (18 Jun. 1961) [hereinafter cited as **AR** 632–380].

[65] *Id.*, para. 1.

[66] 20 OP ATT'Y GEN. 604 **(1893)**; 16 OP ATT'Y GEN. 499 (1880).

under consideration when they are performed as military duties rather than in compliance with the demands of a civil office.""

In that same opinion reference was made to the Justice Department approval in **1942** of a draft War Department circular,[68] which had been submitted to the Justice Department for review. This circular was the predecessor of AR **632–380** and contained essentially the same requirements as the present regulation. In addition, it provided that the word "information" appearing in Rule 1, *Rules of Procedure and Practice for the Trial of Cases Before Commissioners*,[69] was "to be used in its broad sense and was intended to include 'complaints' as well."[70] This result was reached after the War Department, acting through The Judge Advocate General, persuaded the Justice Department to request the Supreme Court to amend the above rules to allow Army personnel to prosecute cases before the commissioner.'' This was considered necessary in light of the doubt existing in the Office of The Judge Advocate General as to the authority of anyone, other than a United States Attorney or his representative, to conduct (such prosecutions in view of the use of the word "information," which historically required it to be filed by a public prosecutor.[72]

Representatives of the Justice Department discussed the possibility of an amendment of the Rules with the Director, Administrative Office, United States Courts, who in turn conferred with Justice Roberts, the drafter of the rule in question.[73] Justice Roberts advised that the word "information" appearing in the rule was used in its broad sense and was intended to include "complaint" and that, therefore, it mas contemplated that such prosecutions would be permitted upon complaints as well as upon informations." Based upon this informal construction of the rule by the Justice of the Supreme Court, the Department of Justice interposed no objection to the use of Army officers to conduct

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[67] JAGA 1962/3636, 23 Mar. 1962.

[68] War Dep't Cir. No. 37, 5 Feh. 1942.

[69] 18 U.S.C. App. (1964) [hereinafter cited as *Rules]*.

[70] JAG 000.51, 7 Jan. 1942 (1942/72).

[71] JAG 000.51, 19 Dec. 1941.

[72] United States **v.** Stone, 8 F. **732** (C.C. Tenn. 1881); Confiscation Cases, 74 U.S.(7 Wall.) 454, 462 (1869).

[73] JAG 000.51, 19 Dec. 1941. The information contained in this letter to the Adjutant General mas confirmed in a personal interview on 27 Nov. 1968 with Mr. Marvin H. Helter of the Criminal Division, Department of Justice. Mr. Helter was one of the Justice Department representatives who had attempted to secure the amendment to the *Rules.*

[74] JAG 000.51, 19 Dec. 1941.

prosecutions when no representative of the Department of Justice was available. Opinion was expressed that such procedure could safely be employed without danger of successful attack.." In this regard, the original regulation promulgated in 1942 and each succeeding regulation down to and including AR 27–44[76] have styled the action taken under the regulations a "complaint," rather than an information.

The assistance rendered by the military to the commissioner was, on occasion, the subject of an inquiry concerning certain practices. For example, the designation of military personnel to accept cash appearance bonds on behalf of the commissioner violated the Posse Comitatus Act." This prohibition would not preclude designation of civilian personnel for such purposes:' It has been stated that service of process is not a function of military authorities.[79] While military police may properly issue traffic violation reports, it was in violation of the Posse Comitatus Act to use them for service of process for the United States Commissioner.[80] The same result will pertain to magistrates." However, the fact that a traffic ticket, in addition to stating the offense, notified the recipient to report to the Cnited States Commissioner was not legally objectionable.[82]

C. LACK OF A TRIAL BY JURY

There was no provision for a jury trial before the commissioner in the trial of petty offenses."' A discussion of the constitutionality of trial of petty offenders without a jury is made in the

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[75] *Id.*

[76] Army Reg. No. 27-44, 17 Apr. 1969 [hereinafter cited as AR 27–44]. This regulation superseded AR 632–380 and is intended to provide for a continuation of the same practices before the United States Magistrate.

[77] JAGA 1961/4870, 2 Aug. 1961.

[78] *Id.*

[79] JAGA 1955/2305, 25 Feb. 1955.

[80] JAGA 1955/8172, 24 Oct. 1953; JAGA 1955/5523, 30 Jun. 1955.

[81] JAGA 1969/4557, 1 Oct. 1969.

[82] JAGA 1962/4354, 6 Aug. 1963. For a discussion of the forfeiture of collateral system authorized by Rule 8, *Federal Rules of Procedure for United States Magistrates*, see pp. 108–09, *infra*.

[83] Rule 2, *Rules:* "The trial shall be conducted as are trials of criminal cases in the district court by a district judge in a criminal case where a jury is waived." See the discussion of this point in Frank v. United States, 395 U.S. 147 (1969).

excellent article by Frankfurter and Corcoran." Even though Frankfurter and Corcoran conclude that historically petty offenses have been tried without a jury,[85] and that review by the district court[86] satisfies the U.S. Constitution, article 111, Congress nevertheless in enacting the predecessor of 18 U.S.C. § 3401[87] gave the defendant appearing before a commissioner the right to a trial by a judge in the district court and the right to a trial by jury before that judge.[88] Only upon receiving a signed waiver of trial by the district court could the commissioner try the case,[89] provided he had been duly designated by the court to try petty offenders." It was recognized long ago by the Army that while 18 U.S.C. § **3401** provides for the appointment of United States Commissioners, there was nothing contained therein which makes the appointment or designation of commissioners thereunder mandatory on the United States district courts.[91] The responses to the questionnaire indicate that *generally* the district courts had designated and appointed U.S. Commissioners for areas surrounding a military installation and that the working arrangements with the commissioner were satisfactory. Problems were noted in some areas in dealing with commissioners who refused to handle traffic cases arising on the military installation or who

[84] Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty* of *Trial by Jury*, 39 HARV. L. REV. 917 (1926). *But see* Fyre, *Petty Offenders Have No Peers, 26* U. CHI. L. REV. 245 (1959).

[85] This view was upheld by the U.S. Supreme Court in District of Columbia **v.** Clawans, 300 U.S. 617 (1938). There the Court held that a petty offense is not criminal within the meaning of the sixth amendment. ***See also*** Duncan **v.** Louisiana, 391 U.S. 145 (1967); Cheff v. Schnackenburg, 384 U.S. 377 (1966).

[86] Rule **4, *Rules.***

[87] Act of 9 Oct. 1940, ch. 785, 54 Stat. 1058.

[88] Prior to the passage of this act, United States Commissioners had been provided with jurisdiction to try persons for misdemeanors committed in national parks. All of the acts conveying jurisdiction to commissioners for acts committed in national parks failed to provide any right of election between trial before a commissioner and trial before the district court. As they were passed during the period 1894–1946, they appear,to indicate a clear intention by the Congress to make offenses in the national parks immediate, inexpensive, and in an inferior tribunal, so that the district court is not engaged in the performance of police court functions. The legislative history of the Act of 9 Oct. 1940, which confers jurisdiction on U.S. Commissioners to try petty offenses committed on the federal reservation, does not indicate why that act did not follow, in substance, the acts which had been passed concerning the national parks. CSJAGA 1949/1915, 12 Apr. 1949.

[89] **18** U.S.C. § 3401(b) (1964).

[90] 18 U.S.C. § 3401(a) (1964).

[91] **SPJGJ** 1942/4890 **A,** 19 ***Oct.*** 1942.

refused to hear a case not investigated by federal agents (FBI, etc., who normally will not investigate petty offenses).

Use of the U.S. Commissioner by the local installation often left much to be desired. In those areas where there was an active commissioner the commander had a powerful ally in his law enforcement efforts, but in other areas the commander was left without recourse to a federal court and had to rely on administrative remedies (18 U.S.C. § **1382)** or disciplinary action against civilian employees to control the petty offender on the reservation. The problems which currently exist under the commissioner's system have been greatly affected by the passage of the Federal Magistrates Act."

VI. FEDERAL MAGISTRATES ACT

The Federal Magistrates Act makes some sweeping changes in the law as it pertains to trial of an accused who commits an offense on a military reservation. First of all, the Act expands the magistrate's jurisdiction in two ways: It removes the federal enclave limitation in the present law and it gives the magistrate jurisdiction over many offenses currently characterized as misdemeanor~. While the removal of the enclave limitation is unimportant to those installations which possess either exclusive or concurrent jurisdiction, the Act may be helpful to the installations and activities under the jurisdiction of the state. It was possible under the prior system that an offense would be a violation of both state and federal law, but due to the type of jurisdiction over the installation the U.S. Commissioner would have no authority to try the case. Under the new Act, should the state authorities refuse to try the case, it might be referred to the magistrate who, under his expanded jurisdiction, could decide to hear it. Of course, the violation could not he an offense assimilated under 18 C.S.C. § **13,** as property upon which the offense was committed is not under the jurisdiction of the United States."

The second expansion of jurisdiction is more relevant to the military installation. **A** significant change in the amendment to

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[92] Pub. L. *So.* 90–578, **82** Stat. 1107 (1968), codified at 28 U.S. ch. **43,** and 18 U.S.C. ch. 219 (Supp. IV, 1969) [hereinafter cited as **ACT].**

[93] *Hearings on S. 3475 Before the Subcomm. on the Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 89th Cong., 2d Sess. (1966); *Hearings on S. 945 Before the Subcomm. on the Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 90th **Cong.,** 1st Sess. at 16 (1967) [hereinafter cited as *Senate Hearings].*

[94] *See* note *30, supra.*

18 U.S.C. § 3401[95] is inclusion of the term "minor offenses," which is defined as "misdemeanors punishable under the laws of the United States, the penalty of which does not exceed imprisonment for a period of one year, or a fine of not more than $1,000, or both. . . ."[96] A quick reading of the Federal Magistrates Act would appear to make the requirement for a definition of petty offenses under 18 U.S.C. § 1 unnecessary although the Act does not specifically amend that code section. Nevertheless, closer examination reveals that there will still be those offenses in the U.S. Code which because of their punishment limitations will be petty offenses. In addition, the Act continues to attempt to avoid the constitutional issue of trial by jury for those petty offenses. Nevertheless, trial of offenders by the magistrate will be the trial of minor offenders rather than the trial of petty offenders. The Act continues to allow an accused brought before the magistrate to demand trial before a federal district court with a trial by jury before that court. This was done for the purpose of avoiding the constitutional issue of trial by jury when a crime reaches a certain level of seriousness.'- The memorandum prepared to accompany the draft legislation made the following comment:

> In commissioner trials that we have observed, this right to elect trial before the district court, and the fact that a jury would be available in district court, were clearly brought home to defendants in the commissioner's oral statement, and the commissioner further insisted that the defendant read the consent carefully before signing it. It seems clear, therefore, that any Constitutional objections to the commissioner's jurisdiction are cured by knowing waiver. By carrying this procedure over into an expanded minor offense jurisdiction for magistrates, the draft bill similarly obviates Constitutional problems.[98]

A contrary position was initially expounded by the Justice Department in a statement prepared by Assistant Attorney General Fred M. Vinson, Jr., which was submitted to the subcommittee during the hearings on the draft bill. Mr. Vinson's statement concluded that the bill established the magistrates as "judges," who do not meet the requirements in article III of the Constitution (life tenure and undiminishable salaries). Further, the attempted cure of these defects by having the accused execute a

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[95] Act, tit, III § 302.

[96] *Id.*

[97] *Senate Hearings* 16, 35.

[98] *Id.*

waiver would amount to a nullity, as it would be concerned with "subject matter jurisdiction," which cannot be waived inasmuch as the guarantee of a trial by an article III "judge" cannot be waived by an individual defendant,"

Subsequent to the testimony of Mr. Vinson a study of these arguments was made by the staff of the subcommittee, wherein it was concluded that the Act was fully constitutional."" The probability of a constitutional attack on this point was recognized by the Congress, which included a "severability clause'' to protect the remainder of the Act in the event of a successful constitutional challenge.[101]

However, the objective of curing the massive defects in the commissioner system (most of which are beyond the scope of this paper) was obviously considered more important than the possibility of such an attack. The issue is a viable one, and the magistrate's increased jurisdiction will no doubt result in a challenge to this jurisdiction. Thus, it may be that the reasoning of Frankfurter and Corcoran,[102] and the Supreme Court's decisions[103] for denying a trial by jury for a "petty offense," will not prevail against the fundamental constitutional right of trial by an article III judge'" and a jury[105] for a misdemeanor as a "minor offense."[106] Indeed, the U.S. Supreme Court has held[107] that "the possibility of a one-year sentence is enough in itself to require the opportunity for a jury trial" and "that no offense can be deemed 'petty' for purpose of the right to trial by jury where imprisonment for more than six months is authorized." Under the Federal Magistrates Act, as under the commissioner system, the accused must specifically waive the right to trial by jury while giving his consent to being tried by the magistrate. The specific use of the word "opportunity" would appear, sub silentio, to approve of the procedure set forth in the magistrate system for electing or waiving trial by jury.

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[99] *Senate Hearings* 129. This same objection was voiced several times during the hearings. See the dissenting views of Congressman William T. Cahill (R., N.J., Member of the House Committee on the Judiciary), 1968 U.S. CODE CONG. & AD. NEWS 5898.

[100] *Senate Hearings* 246–56.

[101] **ACT,** tit. V, § 591.

[102] See note 84, *supra.*

[103] See note 85, *supra.*

[104] U. S. CONST. art. III, § 1.

[105] U.S. CONST. amend. VI.

[106] For a discussicn of objections on constitutional grounds dealing with increased petty offense jurisdiction, see Doub and Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality,* 107 U. PA. L. REV. 443 (1939).

[107] Baldwin v. Bradley, U.S. (1970); 38 LW 4554 (23 Jun. 1970).

Should that portion of the Federal Magistrates Act which provides for trial of minor offenses[108] be subject to a successful attack and such a trial declared invalid, the use of the severability clause'" to save the remainder of the act would leave the federal system totally dependent upon the district courts to try minor offenders. This assumes the provisions of the act have become totally effective in all judicial districts. If the attack takes place prior to the complete abolition of commissioners it is possible for there to be continuation of that system in the unaffected districts until at least 17 October 1971.[110] Imagine the back-log of cases which would result in the district courts if they were the only courts which could hear cases involving minor offenses. Of course, any such back-log would be exacerbated by a delay on the part of Congress in taking action to remedy such a dilemma.

Another of the changes made by the new act was the including of a provision for the trial proceedings "to be taken down by a court reporter or recorded by suitable sound recording equipment."'" There is no requirement for a transcript of the proceeding to be made in the absence of an appeal to the district court. In the event of an appeal by an indigent accused a **copy** shall be made available to him.[112] Under the commissioner system when an appeal was taken the rules[113] required that the commissioner forward his docket entries to the clerk of the district court and that the docket need only contain a summary of the proceedings.[114] Making the trial proceedings of the magistrate a matter of record could conceivably increase the review burden of the district court by increasing the number of appeals taken to that court. This is especially true in those cases involving misdemeanors which, under the provisions of the Criminal Justice Act of 1964,[115] require representation "for defendants charged with felonies and misdemeanors other than petty offenses."[116] Indeed,

[108] ACT, tit. 111, § 302.

[109] ACT, tit. V, § 501.

[110] ACT, tit. IV, § 402(a). This section requires that the provisions of the Act will become effective "on or after (1) the date on which the first United States Magistrate assumes office within such judicial district . . . or (2) the third anniversary of the date of enactment of this Act, whichever date is earlier."

[111] ACT, tit, 111, § 302a (18 U.S.C. § 3401(3) (Supp IV, 1969)).

[112] *Id.*

[113] Rule 1, *Rules.*

[114] Rule 3, *Rules.*

[115] 18 U.S.C. § 3006A (1964).

[116] *Id.*

the dichotomy between petty offenses, for which no attorney need be appointed for indigents, and misdemeanors, which require the appointment of counsel, have been preserved under the Act.'" It is not inconceivable that the appeals from trials for petty offenses will not even remotely approach those appeals from trials of misdemeanors. Of course, Congress could decide to repeal 18 U.S.C. § 3006A but this is an extremely unlikely occurrence,

The right of the magistrate, with the approval of a judge of the district court, to direct the probation service of the court to conduct a pre-sentence investigation and to report to the magistrate is another of the innovations not found in the commissioner system.[118] This will enable the magistrate to determine the most appropriate sentence to be imposed upon an accused. Judically applied, this section should not be the subject of a legal controversy.

Rule 8, *Federal Rules of Procedure for United States Magistrates,"*~provides for the forfeiture of collateral in lieu of appearance before the magistrate. This system is designed to eliminate the expense of hearing each and every offense triable by a magistrate. It has been installed in several pilot districts and has been declared extremely successful.[120] The Judge Advocate General has held that there is no legal objection to the implementation of this system on military reservations.[121] Under the system a military policeman, upon observing an offense, would serve the alleged offender with a "Violation Notice." The notice informs the alleged offender that he violated a law of the US. which is described therein and informs him how he must respond to the notice. He may be ordered to appear if the offense is serious enough to warrant a mandatory appearance before the magistrate. Offenses requiring a mandatory appearance are determined by local court rules. Alternatively, he may be given the option of either asking for a hearing on the merits of the charge or disposing of the violation through the mails by paying the fine indicated on the ticket. The notice warns the offender

[117] 18 U.S.C. § 3006A requires the U.S. Commissioner or the court to advise the defendant that he has a right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel the U.S. Commissioner or the court, if satisfied after appropriate inquiry that the defendant is finanoially unable to obtain counsel, shall appoint counsel to represent him.

[118] ACT, tit. 111, § 302, codified at 18 U.S.C. § 3401(c) (Supp. IV, 1969).

[119] 18 U.S.C. App. (1969 Supp.).

[120] *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT OF THE COMMITTEE TO IMPLEMENT THE FEDERAL MAGISTRATES ACT (1970).

[121] JAGA 1969/4557, 1 Oct. 1969.

that "THIS PAYMENT WILL SIGNIFY THAT YOU DO NOT CONTEST THIS CHARGE NOR REQUEST A COURT HEARING." In addition, a pre-addressed envelope attached to the ticket advises the alleged offender that a failure to respond to the instructions on the ticket within seven days may result in the service of a summons or warrant ordering his appearance in court. The service of a "notice" by a military policeman would not violate the provisions of the Posse Comitatus Act.[122] The fact that notice gives the alleged offender the option of asking for a hearing or mailing in a fine, even though the payment of a fine is tantamount to a plea of guilty, is not legally objectionable. This result is based on the concept that traffic violations occurring on a military reservation are so intimately connected with safety, welfare, good order, and discipline that a paramount military purpose is served by the enforcement of traffic laws and regulations.[123]

VII. THE MAGISTRATES ACT AND THE MILITARY

What, then, will be the effect of the Federal Magistrates Act upon the military installation? One of the first effects may be the increased difficulty in persuading the magistrate to handle the innumerable cases arising on the installation. For all of its anachronisms, under the fee system of compensating commissioners, each case involving a traffic offense, regardless of its outcome, meant a fee to the commissioner. The Act provides the magistrate with a salary which may result in his desire to handle matters more important than these "petty offenses."

A. *NECESSARY CHANGES RESULTING FROM THE ACT*

It is doubtful that the 1941–1942 agreement between the Justice Department and the War Department concerning the use of qualified Army officers to prosecute petty offenders can be extended successfully to misdemeanor proceedings before the magistrate. It is questionable whether this is desirable in light of the requirement of the Act that all magistrates and deputy magistrates be members of the bar.[124] It would appear that the need for

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[122] *Id.*

[123] See JAGA 1969/4663, 1 Dec. 1969.

[124] ACT, tit. I, § 631(b)(1). However, see the "grandfather clause" in tit. IV, § 401.

legally trained personnel to assist lay commissioners has been obviated by that requirement. If the basis for an Army officer to sign a complaint necessary for trial before the commissioner has been obviated, is it not now necessary, in the absence of an indictment by a federal grand jury, for the U.S. Attorney to initiate the action before the magistrate? It would appear that such is the case, as Senator Tydings in his statement at the hearings before the Subcommittee of the Judiciary Committee of the House stated, that "any case would have to be tried either on an indictment or information."[125] There is nothing in the hearings or legislative history which would indicate that Congress had any knowledge of the agreement between the Justice Department and Department of Defense concerning the use of Army personnel as prosecutors. The practice of using qualified Army personnel to prosecute cases before the magistrate should be established by something more definitive than a 27-year-old agreement which is not clearly enunciated, but the result, inferentially, of letters and memoranda between the two departments. One way of clarifying this would be to amend the new rules which were prescribed by the Supreme Court as required by Pub. L. 90–578 title III, § 302 (18 U.S.C. § 3402).[126] Proposed amendments are set forth at Appendices D and E.

B. *THE MILITARY MEMBER AS AN INDIGENT ACCUSED*

While it was not normally the practice to cite military personnel to the U.S. Commissioner for offenses committed on post some installations did follow this practice so that in a given case, *i.e.*, waiver of trial by federal court coupled with a not guilty plea, it was possible for a military member to be prosecuted by a judge advocate or other legally qualified Army officer. More often than not this is done without benefit of defense counsel. Under the commissioner system, as discussed above, the offense must have been committed on the federal reservation. However, *under the increased territorial minor offense jurisdiction of the* Magistrate's Act it would be possible for a military member to be cited for offenses occurring off the installation, although he may not be prosecuted by an Army officer."[127] As seen above it

[125] *Hearings on S. 945 Before Subcomm. No. 4 of the House Comm. of the Judiciary, 90th Cong.*, 2d Sess., ser. 14 at 17 (1968) [hereinafter cited as *House Hearings*].

[126] FED. R.P. FOR U.S. MAGISTRATES.

[127] Army Reg. No. 27–44, para. 7 (17 Apr. 1969).

is indeed questionable whether this duty to the magistrate could be continued without the type of amendments found at Appendices D and E.

In this regard there is an additional problem for military members. The provisions of 18 U.S.C. § 3006A may not be extended to the military member, as it might be successfully argued that he is not indigent and counsel could be denied him.[128] The language of 18 U.S.C. § 3006A(a), however, states that an accused will be assigned counsel when he is "financially unable to obtain an adequate defense." A recent study[129] of the Criminal Justice Act found that "a defendant should be eligible under the Act when the value of his present net assets and the value of his income expected prior to the anticipated date of trial are insufficient — after he has provided himself and his dependents with the necessities of life — to permit him to retain a qualified lawyer, obtain release on bond and pay other expenses necessary for an adequate defense at the rates generally charged for that offense in that district." It is not known at what level the military member, applying the above definition, would cease to be classified as indigent but it appears reasonable to assume that the enlisted grades E–1 through E–4 would certainly be appointed counsel. Indeed, "the predominant attitude and practice on the question of eligibility for the benefits of the act is one of great leniency, resolving all questions in favor of the defendant."[130] In view of the above it would appear that certain members of the military establishment would qualify as indigents and would be appointed counsel.

C. LEGAL ASSISTANCE TO AN ACCUSED MILITARY MEMBER

What, then should be the advice given to the military person who comes in for legal assistance, who can ill afford to hire a civilian attorney, and who faces an offense with a maximum punishment of a $1,000 fine and imprisonment for one year or both? Should he be advised at all in light of 18 U.S.C. § 205?[131]

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[125] Of course, there is no case on point, but see 18 U.S.C.A. § 3006A (1964), and cases cited thereunder.

[129] Oaks, *Improving the Criminal Justice Act,* 55 A.B.A.J. 217, 219 (1969).

[130] *Id.*

[131] This section provides, generally, for the prohibition against officers and employees assisting anyone, other than in the proper discharge of his duties, in the prosecution of a claim against the Government and from assisting anyone in any matter in which the United States is a party or has a direct and substantial interest.

Should he be advised to waive his right to trial by federal district court with a jury while submitting himself to action before the magistrate without benefit of counsel? Should he be advised not to waive trial before such a court in the hope his case will be nol prossed? It would appear that 18 U.S.C. § 205 might prohibit assistance in this area. It is concluded, however, that any advice given by the legal assistance officer would be protected by the attorney-client relationship and would be given "in the proper discharge of his duties."

Assuming that the provisions of 18 U.S.C. § 205 are inapplicable the facts of each case must be carefully analyzed to determine the proper advice. If the practice of defendants appearing before the magistrate is to demand trial before the district court, a few executed periods of confinement, or large fines imposed by the court, might be utilized in an effort to combat such action.

In enacting the Federal Magistrates Act it was the intent of Congress to relieve the already overburdened federal district court from trying petty offenses in an "undesirable police court atmosphere,"[132] to avoid the practice of "downgrading" offenses so that they come within the commissioner's jurisdiction,[133] and to eliminate the habit of nol prossing minor offenses triable "only in the district court already deep in civil and criminal back-logs."[134] There is no indication that these undesirable aspects will be remedied by the Federal Magistrates Act. The requirement for counsel under 18 U.S.C. § 3006A, coupled with the already crowded court calendar, will probably require a continuation of the same evils, The Committee to Implement the Criminal Justice Act has recommended[135] that when a defendant charged with a minor offense, other than a petty offense, waives a trial in the district court and appears before the magistrate, he shall again advise the defendant of right to counsel and appoint counsel for him if satisfied that the defendant is financially unable to obtain counsel.

VII. CONCLUSIONS AND RECOMMENDATIONS

Response to the questionnaire has revealed that there is no uniformity among the various posts, camps, and stations in deal-

[132] *House Hearings* at 71.

[133] *Id.* This intention has apparently not been altogether successful. The practice of downgrading offenses is still prevalent in some districts. See Report of the Committee To Implement the Federal Magistrates Act (1970) (available from the Administrative Office of the United States Courts).

[134] *Id.*

[135] REPORTING OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 35 (1970).

ing with the mino offender. At some installations the cooperation received by the local command from the U.S. Attorney and the local commissioner is outstanding. At others the commander is left with no such assistance and must resort to administrative action in an attempt to exercise effective disciplinary measures.

Where cooperation exists, under the commissioner system there had evolved a working arrangement between the command and the commissioner which, in spite of the prohibitions of the Posse Comitatus Act and the provisions of 18 U.S.C. § 205, has proved relatively satisfactory. It is hoped that this same cooperation will be found in the magistrate system. Of course, no commander or Army prosecutor likes to see a felony or misdemeanor "downgraded" by the U.S. Attorney to bring that offense within the jurisdiction of the magistrate. Nevertheless, the clogged district courts and long delays in prosecution in those courts make this the most expedient manner of disposing of the case. The courts will remain as clogged under that Act as under the commissioner system. Who will say that those felonies and misdemeanors previously the subject of a (''downgrading'' will not continue to be relabeled petty or minor offenses. Under this Act the rationale for such action may be the desire to eliminate the appointment of counsel, or an attempt to relieve the district courts of their heavy criminal caseload.

The use of qualified Army officers to prosecute minor offenses should be balanced by the use of qualified Army officers as defense counsel where there is a military accused who is charged with committing an offense on the military reservation. See Appendix E for proposed amendment to the Rules. In this regard the addition to Army Regulation No. **27–40'"** proposed by The Judge Advocate General's Ad Hoc Committee on Legal Services should not be adopted. This proposal would restrict military counsel to matters within the jurisdiction of the Department of the Army and, if adopted, could lead to the prosecution of a military member by a qualified Army officer while denying that member legal representation.

The granting to state authorities of civil and criminal. jurisdiction through the process of retroceding jurisdiction to them is another means of approaching the problem. This is a laborious and cumbersome approach, which necessarily requires the approval of the state. It should be noted that once this process is complete there is no doubt as to which law to apply. This proce-

[136] 25 May 1967.

dure would be in keeping with current [illegible]y policy[137] of not accepting exclusive jurisdiction and disposal of exclusive jurisdiction wherever practical. The Secretary of the Army has the authority to initiate action to retrocede jurisdiction[138] and the exercise of this authority has been approved by Congress, usually over highway property, to retrocede jurisdiction contiguous to or part of several Army installations.[139] It would appear that the best approach would be to establish concurrent jurisdiction, so that the command has both state and federal law from which to dram in disposing of cases involving minor offenders. This would eliminate the need to use the Assimilative Crimes Act to make a state law applicable to the federal system.

Another of the means which can be, and where possible should be, utilized is the availability of the powers of the General Services Administrator to prescribe and enforce rules relating to certain federal property. Care must be taken when using this approach that the rules must be prominently displayed. **A** better approach would be for Congress to amend the Act of 1 June **1948** (40 U.S.C. § 318) to permit the head of a department or agency to possess and exercise authority similar to that of the General Services Administrator. In this regard, some consideration should be given to increasing the penalty for violating such rules to conform with the philosophy of the Federal Magistrates Act.

A great many of the problems relating to traffic offenses on the military installation could be solved by the adoption by Congress of a Uniform Traffic Code which would be applicable to federal property and which would provide penalties, to be enforced by the magistrate, for the violation of this code. This would certainly give the local commander the authority he urgently needs to combat the traffic offenses.

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[137] **Army** Reg. No. 405–20, para. *7* **(28** Jun. 1968).

[138] 10 **U.S.C.**§ 4777 (1964). ***See*** *also* **AR** 405–20, para. *7.*

[139] Fort Devens: Act of 23 May 1950, ch. 194, 64 Stat. 187; Act of 15 Jun. 1955, ch. 141, 69 Stat, 132. Vancouver, Wash.: Act of 30 Jul. 1941, ch. 330, 55 Stat. 608. Fort Bragg: Act of 15 Apr. 1952, 66 Stat. 60; Act of 13 Jun. 1935, 69 Stat. 132. Fort Sill: Act of 27 May 1953, ch. 75, 67 Stat. 39. Fort Belvoir: Act of 27 May 1953, ch. 72, 67 Stat. 37. ***See*** *also* REPORT OF HEARINGS BEFORE A SUBCOMM. OF THE SENATE COMM. ON THE ARMED FORCES, 83d Cong., 2d *Sess.* at 1–5 (1954) (title Miscellaneous Bills including S. 2689).

APPENDIX A

This material was forwarded in response to the questionnaire found at appendix C. It is an excellent study of the types of jurisdiction found at Fort Hood, Texas. This very detailed study was prepared by the Office of the Staff Judge Advocate, Headquarters III Corps, and Fort Hood, Texas 76544.

REAL ESTATE AND JURISDICTION AT FORT HOOD

A. Jurisdiction.

1. The site for Fort Hood (then Camp Hood) was selected in **1941.** The original land was acquired essentially in three parcels, the first in **1942** and the other two ("Replacement Center" and "Southern Extension") in **1943** . , . . Nine other parcels of land were also obtained by Camp Hood in this period, but they are quite small and not contiguous to the main Camp Hood area . . . . Camp Hood was formally opened as a military installation on **18** September **1942.**

2. The land for Camp Hood was acquired by **498** outright purchases, one judgment in condemnation, and **67** judgments on declaration of taking. The original acquisition, including the **169.34** acres comprising the nine non-contiguous parcels noted in paragraph A.1., above, consisted of some **160,000** acres of land.[1]

3. A total of **2,501.49** acres of this original acquisition were subsequently disposed of by Camp Hood prior to the **1950** cession of exclusive jurisdiction over Fort Hood by the State of Texas. . . :

a. **1944—2.50** acres were revested in the former owners.
b. **1945—14.70** acres were disposed of by quit-claim deed.
c. **1945—717.84** acres were transferred to FFMC.
d. **1947—1,766.45** acres were transferred to WAA. This left some **157,500** acres remaining as the property of Camp Hood.

4. Within the main Camp Hood area, there are several small pieces of property which were apparently never acquired by the

[1] According to the map . . . [omitted], the three parcels comprising the original Camp Hood proper contained a total of 159,868.746 acres (Replacement Center = 34,909.622; Camp Hood = 104,225.050; and Southern Extension = 20,734.074). Adding the 169.34 acres comprising parcels **4–12** . . . (figure obtained from acreages listed in Deed Cession, 6 September 1950), the total acquisition would have been 160,038.380 acres. On the other hand, the map . . . indicates that the total acreage of the twelve parcels was 161,875.77 acres (161,786.46 acres in fee simple and 89.31 acres in some lesser interest). The discrepancy existing between these two maps is unexplained.

federal government. In parcels 1 and 2 there are the following such areas located in disparate portions of the parcel:

a. Pleasant Grove Cemetery—2 acres (parcel 1);

b. Walker Cemetery—.5 acres (parcel 2);

c. Private property—35.47 acres (parcel 2);

d. Private property—33.31 acres (parcel 2);

e. Private property—4.34 acres (parcel 2).

It is possible that these pieces of land have since been acquired by the federal government through the process of adverse possession (1943–1968). On the other hand, it is doubtful that Fort Hood's prescriptive use of this property has satisfied the requirement of "adversity," for it has consistently been recognized that this land is not owned by Fort Hood.'

5. In parcel 3 there are also several small pieces of unacquired property: three cemeteries of undetermined acreage. . . . There is a higher degree of likelihood that this property has been acquired by the federal government through adverse possession, but this is also not free of doubt.[3]

6. Also never acquired by the federal government and lying within the original Camp Hood area are. . . :

a. The land or right of way of the Gulf, Colorado and Santa Fe Railway;

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[2] See map . . . [omitted]; 1st Indorsement, dated 6 December 1949, to a letter from Chief, Realty Requirements Division, DA, to Division Engineer, Southwest Division, Corps of Engineers, Dallas, Texas, dated 28 November 1949 (copy retained in Office of SJA, III Corps, Fort Hood); Deed of Cession, 6 September 1950. In relation to the Walker Cemetery, see a Memo for Record, dated 2 April 1965, in the files of the Office of the SJA, III Corps, Fort Hood.

[3] The only recognition of the lack of ownership of this land which I found was Inclosure 3 [omitted] itself, dated 9 December 1966. On the other hand, the Deed of Cession, dated 6 September 1950, gives a perimeter description of the land in parcel 3, . . . and does not except the pieces described in paragraph A.5., *infra*. Furthermore, . . . [omitted inclosures] themselves do not reflect the existence of any unowned land in parcel 3. On the other hand, the failure of . . . [omitted inclosures] to recognize the lack of ownership is probably due to the fact that they appear to have been keyed to the Deed of Cession and therefore concerned with jurisdiction, not ownership (see para. A.8., *infra*).

b. The land or right of way of Texas State Highway # 190;[4]

c. The land or right of way of Texas State Highway # **36.** No pretensions have ever been made that these parcels are owned by the federal government and, therefore, the federal government clearly has no proprietarial interests in this land.

7. On 17 January 1947 a request was made by Major General L. S. Hobbs, CG, Camp Hood, to acquire exclusive legislative jurisdiction over Camp Hood.[5] On 15 April 1950, Camp Hood was made a permanent station as Fort Hood, and, on 6 September 1950, the State of Texas ceded exclusive legislative jurisdiction[6] over 157,588.023 acres of land comprising Camp Hood proper and the nine non-contiguous parcels of land mentioned in paragraph A.1., above.[7]

8. The Deed of Cession specifically excluded the land described in paragraph A.4., above. Therefore, even if, as suggested above, the federal government has acquired ownership of this land by adverse possession, it has no legislative jurisdiction over it. On the other hand, the land described in paragraph A.5., above, was included in the Deed of Cession. Consequently, even if the federal government has not acquired this land by adverse possession, it still possesses exclusive legislative jurisdiction over it.

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[4] Note that the map at Inclosure 1 [omitted] reflects a location of Texas State Highway # 190 different from that reflected in Inclosures *2* and **2A** [both omitted] and, in fact, different from its actual present location. Inclosure **2,** however, explains this discrepancy by illustrating that the highway was at some time relocated to its present location. This leaves unexplained how the land over which old 190 passed was acquired and how the land over which new 190 passes failed to be acquired. Either Inclosure **1** [omitted] is incorrect and the highway had been relocated prior to the **1942** acquisitions or the highway was relocated after the 1942 acquisitions and, subsequent to such event, an exchange of properties was made between Fort Hood and the State of Texas.

[5] Letter retained in files of Office of the SJA, III Corps, Fort Hood.

[6] **A** copy of the Deed of Cession is retained in the Office of the SJA, III Corps, Fort Hood.

[7] This figure does not conform to what either of the figures noted in footnote **1,** above, minus the acreage disposed of prior to the Deed of Cession (see paragraph A.3., *infra*), would indicate should have been the amount of land over which exclusive jurisdiction was ceded . . . , Again, the discrepancies are unexplained. Adding, however, the 169.34 acres comprising parcels 4–12, Inclosure **2** [omitted], to the total acreage depicted in map at Inclosure 2A [omitted] as comprising parcels 1–3 (157,400 acres), yields a figure . . . [which] is much closer to the figure found in the Deed of Cession and the . . . discrepancy is probably explained by the fact that the figures in Inclosure 2A are apparently rounded off.

9. Furthermore, the Deed of Cession did not include the land occupied by Texas State Highways # 190 and # 36 and the Gulf, Colorado and Santa Fe Railway.[8] Therefore, since the federal government also does not own this land, it has neither legislative jurisdiction over nor proprietarial interests in any of this property.

10. The only exception to the cession of exclusive jurisdiction is the retention by the State of Texas of its right to serve process, criminal and civil, anywhere within the reservation. The cession of jurisdiction itself is unlimited "as long as the same remains the property of the United States of America."

11. Since the cession of jurisdiction in 1950, the Department of the Army, acting through the Secretary of Health, Education and Welfare, on 17 March 1966, has conveyed 1038 acres on the south side of Texas State Highway # 190 to the Central Texas Union Junior College District, Killeen, Texas . . . . This act also automatically retroceded legislative jurisdiction over the land to the State of Texas. The deed to the college gave the college a fee simple subject to a right of entry for condition broken, the conditions being that:

a. The property must be used for educational purposes for the next 20 years.

b. The grantee may not sell, mortgage or otherwise encumber it within the next 20 years without the written permission of the Secretary of HEW.

c. No person shall be excluded from the college's facilities on the grounds of race, color or national origin.

The right of entry relating to the first two conditions is extinguished 21 years from the date of conveyance (17 March 1987), but there is no termination period for the right relating to the third condition.[9]

12. There is presently contemplated a conveyance of three more parcels of land to the Central Texas Union Junior College. . .:

a. 42.25 acres on the western edge of the present land owned by CTC;

b. 34.23 acres on the eastern edge of the present land owned by CTC;

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[8] The two highways are not included by virtue of their being omitted from the perimeter descriptions of the various parcels of land which border on them, The railway, on the other hand, was specifically excluded by the terms of the **Deed.**

[9–11] [footnotes omitted].

c. 687.33 acres lying between the north edge of Texas State Highway # 190 and the south edge of the Gulf, Colorado and Santa Fe Railway.

This transfer, if done, will probably be accomplished in the same manner as the prior conveyance with the exception that the land north of Texas State Highway # 190 will carry the additional condition that it be used exclusively for agricultural research.

13. In 1956 parcels 5–12 . . . (see para. A.1., above), were conveyed to the Bell County Water Control and Improvement District Number 1, with a consequent retrocession of legislative jurisdiction to the State of Texas.[10] These parcels originally contained a number of water wells and a water filtration plant which were utilized to supply water for Fort Hood and are no longer necessary.

14. On 10 May 1968, 14.2 acres of parcel 4 . . . were sold to the Bell County Water Control and Improvement District Number 1, Texas, again with a consequent retrocession of legislative jurisdiction to the State of Texas." The remainder of the parcel is a sewage disposal plant and is still owned by Fort Hood.

15. On 10 December 1948, an additional 1,666 acres (including 252 acres comprising the so-called "Manhattan District"), located in what is now the southwest corner of Killeen Base, was acquired by the Armed Forces Special Weapons Project, Department of Defense . . . ." The manner of acquisition (purchase or condemnation) is unknown. On 4 August 1951, this land, was transferred from the Department of Defense to Fort Hood, Department of the Army.[13] Inclosure 3 indicates that one small piece of land included in this parcel was never acquired by the federal government. This presently belongs to an individual named Mashburn who maintains his private residence thereon."

16. In 1954, 49,578.72 acres of land lying east of the boundaries (then) of Fort Hood were acquired in two parcels, one lying north of Cowhouse Creek and one lying south thereof . . . . This land was acquired by purchase and judgment on declaration of taking.[15] Also acquired at this time were approximately 4,500

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[12] See Real Estate Document 4785, dated 10 December 1948, noted in files of the Directorate of Engineering, Fort Hood, and an opinion, dated 16 December 1966, rendered by the District Engineers, Fort Worth, Texas, a copy of which is retained in the files of the Office of the SJA, III Corps, Fort Hood.

[13] [Authorities cited in note 12, *supra.]*

[14] Information contained in the files of the Post Engineer, Killeen Base.

[15] See letter from Assistant District Engineer, Fort Worth, Corps of Engineers, to CG, Fort Hood, dated 28 February 1956, retained in the files of the Office of the SJA, III Corps, Fort Hood.

acres of land in the northwest corner of the post . . . The manner of this acquisition (purchase, condemnation, etc.) is unknown.

17. A request for the acquisition of exclusive jurisdiction by the federal government over the land described in paragraphs A.15. and A.16., above, was first made on 24 June 1955. This request was finally denied in 1959 by the Deputy Chief of Staff for Logistics, DA.[16] The result is that the federal government presently exercises no legislative jurisdiction over these four parcels of land acquired by Fort Hood since the Deed of Cession in 1950. (Opinion of The Judge Advocate General, JAGR 1962/2353.)

18. On 19 July 1955, US. Army Corps of Engineers granted to Fort Hood a use permit for 9,260 acres of land and water in the Belton Reservoir Project . . . for five years beginning 15 July 1955." The land for the project was acquired in 1954 by the federal government pursuant to Public Law 525, Chapter 595, 79th Congress, 24 July 1926, 60 Stat. 649. The jurisdictional status of this land is not clear, but there is nothing in the files of this office to indicate that the federal government, through the U.S. Army Corps of Engineers, has anything other than merely a proprietarial interest in the area.[18]

19. The use permit was renewed on 15 July 1960 and again on 15 July 1965;[19] its present term extends to 14 July 1970. The terms of the present permit are essentially as follows:

a. Area # 1 (3,180 acres) extending from the east boundary of the reservation to Owl Creek—may be used for military training purposes, except that the general public must be permitted access for recreational purposes within the 200 foot strip of land extending west from the water's edge.

b. Areas # 2 and # 3 (6,080 acres) consisting of the western arm of the reservoir and the eastern arm of Cowhouse Creek—may be used for military training purposes and, above elevation 569 feet, for military recreational purposes, but, except for 110 acres in the westernmost portion, the general public must be permitted access for recreational purposes to the land and water area lying below elevation 605 feet.

Fort Hood does maintain recreational facilities in this area and the Military Police do patrol it. State and local civilian authorities also maintain law enforcement capabilities (especially in re-

[16] A copy of the request is retained in the files of the Office of the SJA, III Corps, Fort Hood, and mention of the denial of the request is made in several pieces of correspondence located in those files.

17-22 [footnotes omitted].

lation to the Texas fish and game laws) in the area. Finally, the Secretary of the Army has issued regulations concerning the public use of the reservoir area (Title 36, Chapter III, Part 311) pursuant to Sec. 4, 58 Stat. 889; 16 U.S.C. 460d, as amended by the Flood Control Act of 1954 (68 Stat. 889); 16 U.S.C. 460d, as amended by the Flood Control Act of 1954 (68 Stat. 1266).[20]

20. On 29 October 1953, FUSA was granted a permit by the Board of Water Engineers, State of Texas, for 10,000 acre-feet of annual water storage space in the Belton Reservoir for use by Fort Hood." Pursuant to Public Law 780, 83d Congress, 3 September 1954 (68 Stat. 1259), this was increased to 12,000 acre-feet on 27 October 1954." These permits presently provide the source of the water supply for most of Fort Hood.[23]

21. The files of the Directorate of Engineering, Fort Hood, document many other interests in land which Fort Hood has acquired, but which are not sufficiently significant to detail here, for example:

a. A perpetual easement from the City of Killeen, Texas, dated 15 June 1967, to construct and maintain a water main through portions of the city;

b. A perpetual easement from the Gulf, Colorado and Santa Fe Railway Company, dated 18 March 1947, to construct and maintain a gas pipeline under its right of way;

c. A one-year aircraft clearance easement from Robert L. Bigham, commencing 1 July 1968, over 6.48 acres near the LVOR site, Tract 100–1.

22. Fort Hood has granted a number of partial interests in its property to other parties throughout the years. The most significant of these is a 50-year use permit, dated 7 October 1953, for 8,859.37 acres of land south of Texas State Highway # 190[24]

[23] By contract DA-41-443-eng-4801, dated 24 February 1956, and contract DA-41-093-AIV-1146, dated 26 September 1955, with supplemental agreements 1–6, the Department of the Army granted a 50-year lease to the Bell County Water Control and Improvement District No. 1, pursuant to Act of Congress, 5 August 1947 (61 Stat. 774; 10 U.S.C. 1270), over property owned by and permitted to Fort Hood to be used as water treatment facilities and transmission facilities for the handling of the water to which Fort Hcod is entitled from the Belton Reservoir. (Leases are retained in the files of the Office of the SJA, III *Corps*, Fort Hood.) The perimeter of such property is not ascertainable from the leases because they only give a tract by tract description; no maps are apparently available at Fort Hood.

[24] Copy of the permit is retained in the files of the Directorate of Engineering, Fort Hood. The land area covered by this permit has been altered several times since the execution of the basic permit in 1953. The most recent change, bringing the figure to 8,859.37 acres, is contained in Amendment No. 4, dated 8 December 1965.

from Fort Hood to Killeen Base (now under the jurisdiction of Field Command, DASA, Sandia Base, Albuquerque, New Mexico) . . . . Killeen Base also holds a 5-year perrnit from Fort Hood, commencing 1 August 1968, for the use of 18.61 acres for housing . . . and a 5-year permit, commencing 16 April 1964, for the use of 4.9 acres for an underground signal cable . . . .[25]

23. On 18 January 1952, Fort Hood leased a parcel of land near the cantonment area (then) for 75 years to Walker Village, Inc., a private Delaware corporation. This was for the construction of Wherry housing under the authority of the act of August 5, 1947 (10 U.S.C. 1270) and Title VIII of the National Act, as amended (12 U.S.C. 1748–1728h). On 1 February 1958, however, the leasehold interest was reacquired by Fort Hood through a declaration of taking pursuant to Public Law 1020, 84th Congress.%

24. Several other leases such as that described in paragraph A23 above, are still in effect at Fort Hood." These, however, relate to the construction of Capehart Housing (as opposed to Wherry Housing) pursuant to Section 805 of the National Housing Act as amended by Section 401 of the Housing Amendments of 1955 (69 Stat. 631):

a. Chaffee Village

(1) 55 year lease of Mortgage Area 3A and 3B (1958) to Fort Hood Housing Corp No. 3, Delaware, . . . commencing 10 October 1958;

(2) 55 year lease of Mortgage Area 4 (1958) to Fort Hood Housing Corp. No. 4 Delaware, . . . commencing 10 October 1958;

(3) 55 year lease of Mortgage Area 5A and 5B (1958) to Fort Hood Housing Corp. No. 5, Delaware, . . . commencing 10 October 1958.

b. Old Wainwright Heights

(1) 55 year lease of Mortgage Area 1A (1958) to Fort Hood Housing Corp. No. 1, Delaware, . . . commencing 10 October 1958;

(2) 55 year lease of Mortgage Area 2 (1958) to Fort Hood Housing Corp. No. 2, Delaware, . . . commencing 10 October 1958.

c. New Wainwright Heights—55 year lease of Mortgage Area 1D (1958) to Fort Hood Housing Corp. No. 1, Delaware, . . . commencing 10 October 1958.

d. Montague Village—55 year lease of 32.06 acres to Kilray Housing, Inc., Delaware, commencing 19 December 1956 (part

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25-36 [footnotes omitted].

of this land is included in the permit for housing to Killeen Base (see para. a **22,** above).

e. Patton Park

(1) 55 year lease of Mortgage Area 1B, 1C, and 1E (1958) to Fort Hood Housing Corp. No. 1, Delaware, . . . commencing 10 October 1958;

(2) 55 year lease of Mortgage Area **1** (1960) to Fort Hood Housing Corp. No. 6, Delaware, . . . commencing 15 September 1960.

f. Pershing Park

(1) 55 year lease of Mortgage Area 2 (1960) to Fort Hood Housing Corp. No. 7, Delaware, . . . commencing 15 September 1960;

(2) 55 year lease of Mortgage Area **3** (1960) to Fort Hood Housing Corp. No. 8, Delaware, . . . commencing 15 September 1960;

(3) 55 year lease of Mortgage Area 4 (1960) to Fort Hood Housing Corp. No. 9, Delaware, . . . commencing 15 September 1960;

(4) 55 year lease of Mortgage Area 5 (1960) to Fort Hood Housing Corp. No. 10, Delaware, . . . commencing **15** September 1960.

None of these leases involve a retrocession of legislative jurisdiction to the State of Texas.

25. On 16 December 1948, the Secretary of the Army granted to the State of Texas as easement of **22** feet by 3.7 miles for the expansion of Texas State Highway # **36** as it runs from 18th Street, North Fort Hood, to the eastern boundary of the reservation . . . .[28] The easement was apparently granted in perpetuity, subject to a right of entry for condition broken, the conditions being:

a. That there be no abandonment;

b. That there be no nonuse for two consecutive years.

Furthermore, on 30 June 1959, a drainage easement was granted to the State of Texas adjacent to the other end of Texas State Highway # 36 extending to the western boundary of North Fort Hood . . . .[29] Similar easements for drainage, widening and relocation exist for Texas State Highway # 190 and Texas Farm to Market Roads # 184 and 440.[30]

26. Presently, the granting of an easement to the State of Texas over 343 acres is contemplated for the relocation and widening of Texas State Highway # 190 . . . . The purpose of the project is the conversion of the highway into one which qualifies *for* the Interstate Highway System. If the conveyance is accom-

plished, it will be accompanied by a retrocession of legislative jurisdiction over the right of way,[31] which is not the case with the easements described in para. A.25, above.

27. On 13 March 1954, Fort Hood granted to the Central Texas Cattlemen's Association, a Texas corporation composed of former owners of Fort Hood land, a 5-year grazing lease for 110,000 acres of land on Fort Hood north of the Gulf, Colorado and Santa Fe Railway.[32] On 27 December 1955, a supplemental agreement was signed adding the 56,200 acres of land around the Belton Reservoir which Fort Hood had acquired outright (see para. A.16., above) and the land it had leased from the U.S. Army Corps of Engineers (see para. A.18., above).[33] Then, on 15 February 1957, a second supplemental agreement was signed adding 2,000 acres lying north of Texas State Highway # 36.[34] This lease was renewed on 13 March 1959 and again on 13 March 1964 (Contract DA-41-443-eng-7488).[35] It presently covers 166,450 acres of land, including 6,930 acres under use permit in the Belton Reservoir Project . . . . Basically, the lease provides that the Association may graze its cattle in exchange for limiting the cattle population, policing the reservation of unauthorized livestock, and constructing and maintaining boundary fences. No retrocession of jurisdiction is involved.

28. There are four other similar grazing leases outstanding relating to reservation property:"

a. Contract DACA63-1-68-0261—for **5** years, commencing **1** February 1968, to J. Patrick Hencerling, for the 930 acres of land between the north edge of Texas State Highway # 190 and the south edge of the Gulf, Colorado and Santa Fe Railway. . . ;

b. Contract DA-41-443-eng-8224—for 5 years, commencing 16 August 1965, to the Bell Cattle Company, for 7,700 acres in the southern tip of the reservation, located below the Gray Army Airfield. . .;

c. Contract DA-41-443-eng-8528—for 5 years, commencing 5 February 1966, to H. A. Davidson, for 35.85 acres north of the Leon River in North Fort Hood . . .;

d. Contract DACA63-1-67-0284—for **5** years commencing **20** February **1967** to Roy Evetts for 24.0 acres in North Fort Hood north of Texas State Highway # **36** . . . .

29. This office possesses correspondence dated 15 July 1954 from Fort Hood to the Commanding General, Fourth United States Army, recommending approval of a request by a Mr. Pat Baugh for a formal easement over a 50 foot strip of land which he had been prescriptively using for the past 15 years. There is

no indication of the location of this land or of the result of the recommendation. On the other hand, the Post Engineer, Killeen Base, indicates that there is an easement outstanding to a Mr. Mashburn leading to the piece of private property in the southwest corner of Killeen Base described in paragraph A.15., above. (This may be the easement discussed in the 15 July 1954 correspondence.)

30. A few of the declarations of taking for the property acquired in 1954 in the Belton Lake area have been examined and they state that land was taken subject to all existing easements for highways, pipelines, etc. This indicates that much of the land comprising Fort Hood is probably subject to various types of easements and other lesser corporeal rights which existed at the time of the respective parcels' acquisition.

31. At various times, limited permits have been granted to individuals to enter the reservation and conduct archeological and geological research ....

32. A number of other limited easements are recorded in the files of the Directorate of Engineering, Fort Hood, but are not significant enough to detail here, for example:

a. A 20-year lease over .53 acres in the cantonment area to the Fort Hood National Bank, commencing 21 June 1965;

b. A 5-year permit over 1,640 acres in west central Fort Hood (DZ Antelope) and extreme south Fort Hood (DZ Mayberry) to the Department of the Air Force for drop zones, commencing 1 August 1965;

c. A 5-year lease over 15 acres in extreme North Fort Hood to the Heart O'Texas Boy Scout Council, commencing 1 May 1966.

33. Finally, Fort Hood maintains operational and accountability control over a number of other interests in land located in the FUSA area, but which are not contiguous or integral to Fort Hood. The files of the Directorate of Engineering, Fort Hood, document all these interests, among which are:

a. A perpetual license from the City of Duncanville, Texas, to install and maintain a VHF Tower Antenna Cable at the Duncanville Nike Site DF-30, dated 14 September 1967;

b. A one-year lease from Airhaven, Inc., Dallas, Texas, over 300 square feet of office space, 2,000 square feet of hangar space, and 6,000 square feet of ramp and tie-down space at the Redbird Airport, Dallas, Texas, commencing 1 July 1968.

APPENDIX B

Offenses under the Federal Magistrates Act prepared for the Senate Subcommittee on Improvements in Judicial Machinery by the Library of Congress, Legislative Reference Service (Grover S. Williams, Legislative Attorney, American Law Division, March 4, 1966; *revised* by E. Jeremy Hutton, American Law Division, July 22, 1966). Listed in Hearings before the Subcommittee on the Judiciary United States Senate, 89th Congress, 2d Session at 299–305.

2 U.S.C. § 192: ([Congress] Refusal of witnesses to testify or produce papers).

2 U.S.C. § 252: ([Federal Corrupt Practices] General penalties for violations).

5 U.S.C. § *50:* (Disposition of moneys accruing from lapsed salaries or unused appropriations for salaries).

7 U.S.C. § 60: ([Cotton standards] Penalties for violations).

7. U.S.C. § *85:* ([Grain standards] Penalties for violations).

7 U.S.C. § 86: ([Department of Agriculture] Penalty for interference with execution of official duties).

7 U.S.C. § 135f(a), (b): ([Insecticides] Penalties (for violations)).

7 U.S.C. § 150gg: ([Plant Pests] Penalty [violations and altering and defacing documents]).

7 U.S.C. § 163: ([Nursery stock and other plants and plant products] Violations: forgery, alterations, etc., of certificates; punishment, proof of violations by common carrier).

7 U.S.C. § 207(h): ([Stockyards and 'Stockyard Dealers] Schedule of rates; filing and exhibition; change in rates; suspension; penalties).

7 U.S.C. § 282: ([Honeybees] Punishment for unlawful importation).

7 U.S.C. § 472: ([Cotton Statistics and Estimates] Information furnished of confidential character; penalty for divulging information).

7 U.S.C. § 473: ([Cotton Statistics and Estimates] Persons required to furnish information; request; failure to furnish; false information).

7 U.S.C. § 473c–2: ([Cotton Statistics and Estimates] Offenses in relation to sampling of cotton for classification).

7 U.S.C. § 503: ([Tobacco Statistics] Reports necessity; by whom made, penalties).

7 U.S.C. § 511k: ([Tobacco control] penalties).

7 U.S.C. § 620: (Falsely ascribing deductions or charges to taxes; penalty).

7 U.S.C. 953: ([Peanut Statistics] Reports; by whom made; penalties).

7 U.S.C. § 1156: ([Excise taxes with respect to sugar] Duty to furnish information; penalty).

7 U.S.C. § 1596: ([Foreign Commerce] Penalties [As applied to first violation only; penalty of up to $2,000, thereafter]).

7 **U.S.C.** § 1642(c): ([Stabilization of International Wheat Market] Penalty for violation),

8 U.S.C. § 339: (Contracting to supply cooly labor).

8 U.S.C. § 1284(a): (Control of alien crewman-Penalties for failure),

8 U.S.C. § 1286: (Discharge of alien crewman; penalties).

8 U.S.C. § 1306(a): ([Aliens] Willful failure to register).

8 U.S.C. § 1306(c): ([Aliens] Fraudulent statements).

8 U.S.C. § 1321: ([Aliens] Prevention of unauthorized landing of aliens; failure to report; penalties).

8 U.S.C. § 1323: (Unlawful bringing of aliens into U.S.).

13 U.S.C. § 221(b): ([Census] refusal or neglect to answer questions; false answers).

13 U.S.C. § 222: ([Census] Giving suggestions or information with intent to cause inaccurate enumeration of population).

13 U.S.C. § 224: ([Census] Failure to answer questions affecting companies, businesses, religious bodies, and other organizations, false answers; [As applied only to failure to answer; willfully false answer has fine of up to $10,0001).

14 U.S.C. § 639: (Penalty for unauthorized use of words "Coast Guard").

15 U.S.C. § 78u: ([Securities and Exchange] Investigations: injunctions and prosecution of offenses).

15 **U.S.C.** § 79r(d): ([Public Utility Holding Comp.] . . . Penalty for refusal to testify).

15 U.S.C. § 80b: ([Investment Advisers] investigations, etc., penalties).

15 U.S.C § 1212: ([Household Refrigerators] violations; misdemeanor; penalties).

15 U.S.C. § 1233: ([Disclosure of Automobile Information] Violations and penalties).

15 U.S.C. § 1302: ([Brake Fluid Regulation] Prohibited Acts; penalties).

15 U.S.C. § 1322: ([Seat Belt Regulations] Prohibited Acts; penalties).

16 U.S.C. § **146:** ([Wind Cave National Park] Offenses).

16 U.S.C. § **413:** ([National Military Parks] Offenses relating to structures and vegetation),

16 U.S.C. § 666a: ([Game, fur-bearing animals and fish] penalties).

16 U.S.C. § 772e: ([Northern Pacific Halibut Act of 1937] penalties and forfeitures).

16 U.S.C. § 776c: ([Sockeye or Pink Salmon Fishing] penalties and forfeitures).

16 U.S.C. § 957(e): ([Tuna conventions] violations; fines and forfeitures [as applied only to first violations; **$5,000** penalty for subsequent violations]).

17 U.S.C. § **18:** ([Copyright] Making false affidavit).

17 U.S.C. § **104:** ([Copyright] Willful infringement for profit).

18 U.S.C. § **3:** (Accessory after the fact [depends on crime involved]),

18 U.S.C. § 35(a): (Aircraft and Motor Vehicles — importing or conveying false information).

18 U.S.C. § **210:** (Offer to procure appointive public office).

18 U.S.C. § **211:** (Acceptance or solicitation to obtain appointive public office).

18 U.S.C. § **217:** (Acceptance of consideration for adjustment of farm indebtedness).

18 U.S.C. § **242:** (Deprivation of rights under color of law).

18 U.S.C. § **288:** (False claims for postal losses [for claims $100 or over]).

18 U.S.C. § **291:** (Purchase of claims for fees by court officials).

18 U.S.C. § **371:** (Conspiracy to commit offense or to defraud U.S.) [if the offense, the commission of which is the object of the conspiracy, is a misdemeanor, otherwise, maximum fine may be as much as $10,0001.

18 U.S.C. § **402:** (Contempts constituting crimes).

18 U.S.C. § **435:** (U.S. employee making contracts in excess of specific appropriation).

18 U.S.C. § **438:** (Whoever receives money contrary to **25** U.S.C. § **81, 82,** for Indian contracts generally).

18 U.S.C. § **441:** ([Illegal acts, etc.] relating to Postal Supply contracts).

18 U.S.C. § **442:** ([Illegal interest in] Printing contracts).

18 U.S.C. § **480:** (Possessing counterfeit foreign obligations or securities).

18 U.S.C. § 483: (Uttering counterfeit foreign banknotes).
18 U.S.C. § 491: (Tokens or paper used as money).
18 U.S.C. § 492: ([Custody or control] Forfeiture of counterfeit paraphernalia),
18 U.S.C. § 594: (Intimidation of voters),
18 U.S.C. § 595: (Interference by administrative employees of Federal, State, or territorial Governments).
18 U.S.C. § 596: (Polling armed forces).
18 U.S.C. § 597: ([Offers or makes] expenditures to influence voting),
18 U.S.C. § 598: ([Elections] coercion by means of relief appropriations) [But if vialation willful, penalty up to $10,000, with as much as 2 years imprisonment].
18 U.S.C. § 599: (Promise of appointment by candidate [for elective office] [if not willful]).
18 U.S.C. § 600: (Promise of employment or other benefit for political activity),
18 U.S.C. § 601: (Deprivation of employment or other benefit for political activity).
18 U.S.C. § 604: (Solicitation from persons on relief [for political activity]).
18 U.S.C. § 605: (Disclosure of names of persons on relief).
18 U.S.C. § 612: (Public or distribution of political statements [without certain information]).
18 U.S.C. § 641: ([Embezzlement, etc.] Public money, property, or records (if not in excess of $100)).
18 U.S.C. § 643: ([Embezzlement] Accounting generally for public money [if does not exceed $100]).
18 U.S.C. § 644: ([Embezzlement] Banker receiving unauthorized deposit of public money [if not in excess of $100]).
18 U.S.C. § 645: ([Embezzlement] Court officers generally [if amount does not exceed $1001).
18 U.S.C § 646: ([Embezzlement] Court officers depositing registry moneys [if amount does not exceed $1001).
18 U.S.C. § 647: ([Embezzlement] Receiving loan from court officer [if amount does not exceed $1001).
18 U.S.C. § 648: ([Embezzlement] Custodians, generally, misusing public funds [if amount does not exceed $1001).
18 U.S.C. § 649: ([Embezzlement] Custodians failing to deposit moneys [if amount does not exceed $1001).
18 U.S.C. § 650: ([Embezzlement] Depositories failing to safeguard deposits [if amount does not exceed $1001).
18 U.S.C. § 651: (Disbursing officer falsely certifying full payment [if amount does not exceed $100]).

18 U.S.C. § 652: (Disbursing officer paying lesser in lieu of lawful amount [if amount does not exceed $100]).

18 U.S.C. § 653: (Disbursing officer misusing public fund [if amount does not exceed $100]).

18 U.S.C § 654: (Officer or employee of U.S. converting property of another [if does not exceed $100]).

18 U.S.C. § 655: (Theft by bank examiner [if amount does not exceed $100]).

18 U.S.C. § 656: (Theft, embezzlement, or misapplication by bank officer or employee [if amount does not exceed $1001).

18 U.S.C. § 657: ([Embezzlement] Lending, credit, and insurance institutions [if amount does not exceed $100]).

18 U.S.C. § 658: ([Fraud, etc.] Property mortgaged or pledged to farm credit agencies [if amount does not exceed $100]).

18 U.S.C. § 659: ([Embezzlement, etc.] Interstate or foreign baggage express or freight [if amount does not exceed $100]).

18 U.S.C. § 661: ([Steals, etc., personal property of another] within special maritime and territorial jurisdiction [if value does not exceed $1001).

18 U.S.C. § 662: (Receiving stolen property within special maritime and territorial jurisdiction [if property does not exceed $100]).

18 U.S.C. § 709: (False advertising or misuse of names to indicate Federal agency).

18 U.S.C § 712: (Misuse of names by collecting agencies or private detective agencies to indicate Federal Agency).

18 U.S.C. § 751: (a), (b)([Escape] Prisoners in custody of institution or officer [if held on misdemeanor]).

18 U.S.C.' § 752: (a), (b) (Instigating or assisting escape from Federal officers [if held on charge of misdemeanor]).

18 U.S.C. § 754: (Rescue of body of executed offender).

18 U.S.C. § 755: (Officer [negligently] permitting escape).

18 U.S.C. § 756: ([Aids or entices escape of] Internee of belligerent nation).

18 U.S.C. § 795: (Photographing and sketching defense installations).

18 U.S.C. § 796: (Use of aircraft for photographing defense installations).

18 U.S.C. § 797: (Publication and sale of photographs of defense installations).

18 U.S.C. § 832: (Transportation of explosives, radioactive materials, etrologic agents, and other dangerous articles [if no death or bodily injury]).

18 U.S.C. § 833: ([Unlawful] Marking of packages containing explosive and dangerous articles [if no death or bodily injury]).

18 U.S.C. § 834: ([Violation of] Regulations by ICC [relating to explosives, etc., if no death or bodily injury results]).

18 U.S.C. § 836: (Transportation of fireworks into State prohibiting sale or use).

18 U.S.C. § 837: (Explosives; illegal use or possession; and threat or false information concerning attempts to damage or destroy real or personal property by fire or explosives [if no personal injury]).

18 U.S.C. § 872: (Extortion by officers or employees of U.S. [if amount does not exceed $1001).

18 U.S.C. § 961: ([Aids, etc.] Strengthening armed vessel of foreign nation).

18 U.S.C. § 1003: ([Fraudulent, etc.] Demands against the U.S. [if amount does not exceed $1001).

18 U.S.C. § 1009: (Rumors regarding Federal Savings and Loan Insurance Corporation).

18 U.S.C. § 1012: ([False, etc.] Public Housing Administration transactions).

18 U.S.C. § 1013: ([False, etc.] Farm loan bonds and credit bank debentures).

18 U.S.C. § 1018: ([False statement, etc.] Official certificates or writings).

18 U.S.C. § 1025: (False pretenses on high seas and other waters [if mount does not exceed $100]).

18 U.S.C. § 1026: ([False statement, etc.] Compromise, adjustment and cancellation of farm indebtedness).

18 U.S.C. § 1083: ([Gambling] Transportation between shore and ship).

18 U.S.C. § 1154: ([First offense] Intoxicants dispensed in Indian country).

18 U.S.C. § 1163: (Embezzlement and theft from Indian tribal organizations [if amount does not exceed $100]).

18 U.S.C. § 1262: (Transportation [liquor, etc.] into State prohibiting sale.

18 U.S.C. § 1263: ([Misrepresented, etc.] marks and labels on packages [liquor]).

18 U.S.C. § 1264: ([Unlawful] Delivery to consignee [liquor]).

18 U.S.C. § 1303: (Postmaster or employee as lottery agent).

18 U.S.C. § 1304: (Broadcasting lottery information).

18 U.S.C. § 1361: ([Malicious mischief] Government property or contracts [if damage does not exceed $100]).

18 U.S.C. § 1384: (Prostitution near military and naval establishments).

18 U.S.C. § 1501: (Assault on process server).

18 U.S.C. § 1504: (Influencing juror by writing).

18 U.S.C. § 1508: (Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting).

18 U.S.C. § 1509: (Obstruction of court orders).

18 U.S.C. § 1541: ([Passports and visas] Issuance without authority).

18 U.S.C. § 1700: (Desertion of mails).

18 U.S.C. § 1703(b): (Delay or destruction of mail or newspapers [employee permit]).

18 U.S.C. § 1707: (Theft of property used by postal service [if value does not exceed $1001).

18 U.S.C. § 1710: ([Postal Service] Theft of newspapers).

18 U.S.C.. § 1711: (Misappropriation of Postal funds [if value does not exceed $1001).

18 U.S.C. § 1716: ([Poet Service, Certain] Injurious articles as non-mailable [without intent to kill]).

18 U.S.C. § 1718: ([Postal Service] Libelous matters on wrappers or envelopes).

18 U.S.C. § 1720: ([Misuse of—if not postal employee] Cancelled stamps and envelopes).

18 U.S.C. § 1721: (Sale or pledge of stamps).

18 U.S.C. § 1733: ([Postal Service] Affidavits relating to second class mail).

18 U.S.C. § 1761: ([Unlawful] Transportation or importation [Prison made goods]).

18 U.S.C. § 1762: ([Prison made goods] marking packages).

18 U.S.C. § 1821: ([Unlawful] Transportation of dentures).

18 U.S.C. § 1851: ([Public Lands] Coal depredations).

18 U.S.C. § 1852: ([Public Lands] Timber removed or transported).

18 U.S.C. § 1853: ([Public Lands] Trees cut or injured).

18 U.S.C. § 1854: ([Public Lands] Trees boxed for pitch or turpentine).

18 U.S.C. 1857: ([Public Lands] Fences destroyed; livestock entering).

18 U.S.C. § 1860: ([Public Lands] Bids at land sales).

18 U.S.C § 1861: ([Public Lands] Deception of prospective purchasers)

18 U.S.C. **§ 1905:** ([Public employees] Disclosure of confidential information generally).

18 U.S.C. **§ 1913:** (Lobbying with appropriated moneys)

18 U.S.C. **§ 1991:** (Entering train to commit [certain] crimes).

18 U.S.C. **§ 2075:** (Officer failing to make returns or reports).

18 U.S.C. **§ 2076:** ([Failing to make reports] Clerk of US. District Court).

18 U.S.C. **§ 2113(b):** (Bank robbery and incidental crimes [if does not exceed $100]).

18 U.S.C. **§ 2194:** (Shanghaiing sailors).

18 U.S.C. **§ 2196:** (Drunkenness or neglect of duty by seamen).

18 U.S.C. **§ 2198:** (Seduction of female passenger [vessels]).

18 U.S.C. **§ 2199:** (Stowaways on vessels or aircraft).

18 U.S.C. **§ 2234:** (Authority exceeded in executing warrant).

18 U.S.C. **§ 2235:** (Search warrant procured maliciously).

18 U.S.C. **§ 2236:** (Searches without warrant).

18 U.S.C. **§ 2277:** (Explosives or dangerous weapons aboard vessels).

18 U.S.C. **§ 2278:** (Explosives on vessels carrying steerage passengers).

18 U.S.C. **§ 2318:** (Transportation, sale, or receipt of phonograph records bearing forged or counterfeit labels).

19 U.S.C. **§ 81s:** ([Customs Duties] offenses).

19 U.S.C. **§ 1341**(b): ([Tariff Commission, interference] penalty).

19 U.S.C. **§ 1436:** (Failure to report or enter vessel; additional penalty where vessel carrying nonimportable goods or liquor).

19 U.S.C. **§ 1497:** ([Customs] Examination of baggage; penalties [equal to value]).

19 U.S.C. **§ 1595a:** ([Customs] penalty for aiding unlawful importation [set at value of goods]).

21 U.S.C. **§ 63:** ([Filled milk] penalty for violations of law).

21 U.S.C. **§ 122:** ([Livestock-diseases] offense; penalty).

21 U.S.C. **§ 134e:** ([Livestock-diseases-regulations] penalties).

21 U.S.C. **§ 158:** ([Viruses, serums, etc.] offenses, punishment).

21 U.S.C. § 333: ([Food and Drugs] penalties [only on first confiction]).

26 U.S.C. § 5603(b): ([Income Taxation, etc.] failure to keep certain records).

26 U.S.C. 5606: (Penalty relating to containers of distilled spirits),

26 U.S.C. § 5661(b): (Penalty and forfeiture for violation of laws, regulations relating to wine, other offenses).

26 U.S.C. § 5662: (Penalty for alteration of Wine labels).

26 U.S.C. § 5692: (Penalty for failure of brewer to comply with requirements and to keep records and file returns).

26 U.S.C. § 5674: (Penalty for unlawful removal of beer).

26 U.S.C. § 5676(1), (2): (Penalties relating to beer stamps).

26 U.S.C. § 5681(a): ([Liquors] Failure to post required sign).

26 U.S.C. § 5681(b): ([Liquors] Posting or displaying false sign).

26 U.S.C. § 5681(c): ([Liquors] Premises where no sign is placed or kept).

26 U.S.C. § 5683: (Penalty and forfeiture for removal of liquors under improper brands).

26 U.S.C. § 5687: ([Liquors] Penalty for offenses not specifically covered).

26 U.S.C. § 5762(b): ([Tobacco] other offenses).

26 U.S.C. § 7204: ([Taxation] Fraudulent statement or failure to make statement to employees).

26 U.S.C. § 7205: ([Taxation] Fraudulent withholding exemption certificate or failure to supply information).

26 U.S.C. § 7207: ([Taxation] Fraudulent returns, statements, or other documents).

26 U.S.C. § 7209: ([Taxation] Unauthorized use or sale of stamps).

26 U.S.C. § 7210: ([Taxation] Failure to obey summons).

26 U.S.C. § 7211: ([Taxation] False statements to purchasers or lessees relating to tax).

26 U.S.C. § 7213(a), (b), (c): ([Taxation] Unauthorized disclosure of information).

26 U.S.C. § 7214(b): ([Taxation] Interest of IRC officer or employee in tobacco or liquor production).

26 U.S.C. § 7236: ([Filled cheese] false branding, sale, packaging, or stamping in violation of law).

26 U.S.C. § 7241: (Penalty for fraudulent equalization tax certificates).

26 U.S.C. § 7261: (Representation that retailers' excise tax is excluded from price of article).

26 U.S.C. § 7265(c): (Other offenses relating to oleomargarine or adulterated butter operations).

26 U.S.C. § 7266(a), (2), (3), (b): (Offenses relating to filled cheese).

26 U.S.C. § 7274: (Offenses relating to white phosphorus matches).

27 U.S.C. § 207: ([Intoxicating Liquors] Penalties).

27 U.S.C. § 208(d): ([Intoxicating Liquors—interlocking directorates] penalty).

29 U.S.C. § 530: ([Labor] Deprivation of rights by violence; penalty).

30 U.S.C. § 480(d): ([Mine safety] penalty for violations for refusal to admit inspecting official).

33. U.S.C. § 421: (Deposit of refuse, etc.; in Lake Michigan near Chicago).

33 U.S.C. § 443: (Permit for dumping; penalty for taking or towing boat or scow without permit).

33 U.S.C. § 447: (Bribery of inspector; penalty).

33 U.S.C. § 506: ([Tolls] hearings to determine reasonableness; attendance of witnesses; punishment for failure to attend).

33 U.S.C. § 507: ([Navigation] Failure to obey order prescribing toll; punishment).

33 U.S.C. § 931: ([Longshoremen's and Harbor Workers' Compensation] Penalty for misrepresentation).

33 U.S.C. § 938: ([Longshoremen's and Harbor Workers' Compensation] Penalty for failure to secure payment of compensation).

33 U.S.C. § 1008: ([Oil record book; entries; penalties]).

36 U.S.C. § 181: ([Service Flags and lapel buttons] approval by Secretary of Defense; license to manufacture and sell; penalties).

36 U.S.C. § 379: ([U.S. Olympic Committee] Penalty for fraudulent pretense of membership or use of insignia).

38 U.S.C. § 787(a): ([U.S. Government Life Insurance] Penalties [only as applied to conspiracy for fraudulent application or claim; false swearing carries fine of up to $5,000 with possible two year imprisonment]).

40 U.S.C. § 332: ([Hours of Labor on Public Works] Violations; penalties).

42 U.S.C. § 262: ([Public Health] Regulation of biological products, penalties for offenses):

42 U.S.C. § 271(a): ([Public Health] Penalties for violation of quarantine laws).

42 U.S.C. § 468: ([Social Security Act] Penalties).

42 U.S.C. § 1307: ([Social Security Act] Penalty for fraud).

42 U.S.C. § 1368: ([Unemployment Compensation for Federal Employees] Penalties).

42 U.S.C. § 1400f: ([Temporary Unemployment Compensation Program] false statements on representations; penalties).

42 U.S.C. § 1400s: ([Social Security—Extended Program for 1961-1962] false statements on representations; penalties).

42 U.S.C. § 1422: ([Public Housing Administration] Penalties; applicability of general penal statutes concerning money).

42 U.S.C. § 1713: ([Compensation for injury, death, or detention of employees of contractors with the U.S. outside the U.S] Fraud; penalties),

42 U.S.C. § 1714: ([Compensation for injury, death, or detention of employee of contractors with the US. outside the U.S] Legal services).

42 U.S.C. § 1974: ([Federal Election Records] penalty for violation),

42 U.S.C. § 2000e-5: ([Equal Employment Opportunity] Enforcement provisions; penalties).

42 U.S.C. § 2000e-8: ([Equal Employment Opportunity] Prohibited disclosures; penalties).

42 U.S.C. § 2278a: ([Atomic Energy Act] Trespass upon Commission installations; issuance and posting of regulations; penalties for violations [with respect to non-enclosed installations only; fine of up to $5,000 if trespass on property enclosed by a fence, wall, etc.]).

42 U.S.C. § 2278b: ([Atomic Energy Act] Photographing, etc., of Commission Installations; penalty).

43 U.S.C. § 1064: ([Unlawful inclosures or occupancy; obstructing settlement or transit] violations of chapter; punishment).

45 U.S.C. § 60: (Railroads, liability for injuries to employees; Penalty for suppression of voluntary information incident to accidents).

45 U.S.C. § 66: ([Railroads-eight hour day] Penalty for violations).

46 U.S.C. § 58: ([Shipping] Penalty for misconduct by officers).

46 U.S.C. § 85g: ([Shipping, load lines] Penalties for violations [except for obliterating ship markings where possible $2,000 fine]).

46 U.S.C. § 88g: ([Shipping, load lines for vessels engaged in coast-wide trade] penalties for violations [except for obliterating ship markings where penalty same as in 85g]).

46 U.S.C. § 156a: (Transportation of animals by vessels carrying steerage passengers).

46 U.S.C. § 158: (Boarding vessel on arrival; passenger lists).

46 U.S.C. § 161: (Vessel carrying emigrant passengers to foreign countries withholding clearance papers).

46 U.S.C. § 251: ([Vessels in domestic commerce] penalties [fish]).

46 U.S.C. § 316: (Towing U.S. vessels; fines and penalties).

46 U.S.C. § 390d: ([Small passenger-carrying vessels] violations; penalties).

46 U.S.C. § 391a(7): ([Vessels; inspection records, etc.] penalties).

46 U.S.C. § 471: ([Shipping] Punishment for failure to keep watchmen).

46 U.S.C. § 481(c): ([Shipping regulation on life-saving, etc.] penalty for [certain] violations).

46 U.S.C. § 701: ([Merchant seamen] various offenses; penalties [except for assault of officer or mate, etc., where there is possible two year imprisonment]).

46 U.S.C. § 820: ([Shipping Act, false, etc.] Reports by carriers required).

46 U.S.C. § 1224: ([Shipping] Collusion with respect to bidding).

47 U.S.C. § 13: ([Communications] Violations; punishments).

47 U.S.C. § 506: ([Wire and Radio] Coercive practices; penalties).

49 U.S.C. § 322: ([Interstate Commerce Act, Part 11, Motor Carriers] Unlawful operations [with respect to unjust discrimination, only first offense; subsequent offenses may incur *$2,000* fine]).

49 U.S.C. § 917(a): ([Interstate Commerce Act, Part 111, Water Carriers] Unlawful acts and penalties).

49 U.S.C. § 1021(a), (e), (f): ([Interstate Commerce Act, Part IV; Freight Forwarders] Unlawful Acts and penalties).

49 **U.S.C.** § 1472(a), (l), (m): ([Federal Aviation Program] Criminal penalties, generally).

50 U.S.C. App. **473:** ([Department of Defense] Regulations governing liquor sales; penalties).

50 U.S.C. App. 530: ([Eviction or distress during military service; stay; penalty for noncompliance).

50 U.S.C. App. **535:** ([Soldiers' and Sailors' Civil Relief Act] Protection of assignor of life insurance policy; enforcement of storage liens; penalties).

50 U.S.C. App. **783:** ([Defense, installations, etc., photographing, &.] Penalties for violations).

50 U.S.C. App. 2165: ([Defense Production Act] Persons disqualified for employment; penalties).

50 U.S.C. App. **2284:** ([Civil Defense] Identity insignia; manufacture, possession, or wearing; penalties.

APPENDIX C

QUESTIONS

1. What type of jurisdiction exists on your installation: *i.e.*, exclusive federal, concurrent legislative, partial legislative, or proprietarial interest only?

2. How was the land comprising the installation, including subinstallations if any, acquired: *i.e.*, purchase, condemnation, reservation from the public domain, transfer from another department, or donation?

3. If jurisdiction over the installation or any part of it was originally ceded to the U.S. by the state, what restrictions were placed upon this transfer? (Right to serve civil and/or criminal process, enforce state laws, etc.)

4. Are there easements, leases, or rights of way existing on your installation: *i.e.*, highways, schools, etc.? If so, who exercises jurisdiction over these areas and by what arrangement is it exercised?

5. Are the installation boundaries clearly defined and marked? If so, by what means: *i.e.*, fence, signs, etc.?

6. Is your installation classified as a highly critical installation?

7. What type of traffic regulations are in existence at your installation? By whom were they issued and how were they made applicable to your installation?

8. Who enforces the traffic regulations? (Military Police, state law enforcement officials, combination of both.)

9. Are civilians who commit minor offenses on the installation cited to a state or federal court? What is the level of that court?

10. If civilian offenders are cited to a federal magistrate (ex-US. Commissioners) how is this accomplished? (Summons, letter from the Magistrate, traffic ticket, or other means.)

11. Do Judge Advocates assist in the prosecution of civilians before Magistrates? If so:

a. do they prosecute all cases cited on the installation? If not all cases, what percentage would you estimate they do prosecute?

b. what title is given the Judge Advocate who prosecutes the cases?

c. what authority did you use in allowing use of Judge Advocates to prosecute cases in the Magistrate's court?

12. Does the Federal Magistrate hold court on the installation?

a, Does the court convene during normal duty hours?

b. To what degree does assistance to the Magistrate detract from mur normal office work?

13. What sanctions does your installation or command impose upon civilian employees for minor offenses committed on the reservation?

14. What are the major administrative problems encountered in disposing of cases involving minor offenses?

15. Has your command had occasion to exclude anyone from the installation under the provisions of **18 U.S.C. § 1382?** If so, how was this accomplished, and was there any subsequent action resulting from the exclusion?

16. What is the major source of minor offenses committed on your installation? What percentage of the cases result from this source?

17. If the jurisdiction of your installation is exclusively federal, have you considered ceding jurisdidion to the state? Have **any** steps been taken to accomplish this action?

18. If the issue of ceding jurisdiction to the state was considered and rejected by your command, what were some of the major factors in reaching that decision?

APPENDIX D

PROPOSED AMENDMENTS OF ARMY REGULATION NO. 27–44

Proposed Amendment
AR 27-44

Army Regulation

Headquarters
Department of the Army
No. 37-44 Washington, D. C., January 1971

8. Designation of Army Officers to Conduct Prosecutions and Defense. *a.* If the United States attorney for the judicial district(s) in which the military reservation is situated, shall have advised the commanding officer that no representative of the Department of Justice is available to conduct prosecutions of minor offenses, the commanding officer will designate one or more officers of his command, or make arrangements for the designation of one or more officers stationed on the reservation, to conduct such prosecutions. Officers of the Judge Advocate General's Corps should be utilized for this purpose, if available, but officers of other branches of service possessing the requisite legal knowledge as set forth in article 27(b)(1), Uniform Code of Military Justice may be so designated.

b. In all cases involving a military member the commanding officer of the military installation shall appoint, or cause to be appointed, an officer possessing the qualifications described in *a* above to act as counsel for such member at any proceedings before the magistrate.

APPENDIX E

Proposed amendment to the Rules of Procedure and Practice for the Trial of Cases Before Magistrates and for Taking and Heaning of Appeals to the District Courts of the United States prescribed pursuant to the Act of 17 October 1968.

TRIAL

The date of trial shall be fixed at such a time as will afford the defendant a reasonable opportunity for preparation of his case. The magistrate shall specifically inquire into the matter of counsel for the defendant and, in appropriate cases, appoint counsel for the defendant as required by law. If the United States Attorney for the judicial district within which the Magistrate sits shall have advised the District Court that no representative of the Department of Justice is available to conduct prosecutions of minor offenses, the court may accept as prosecutors such legally qualified officers or employees of the United States Government as may be designated by the head of a department or agency. In addition, a legally qualified officer or employee may, if otherwise acting in the proper discharge of his official duties, act without compensation as attorney for any person who is a defendant in a case before the magistrate.

The trial shall be conducted as are trials of criminal cases in the District Court by a District judge in a criminal case where a jury is waived.

DRUG ABUSE*

By Major Charles G. Hoff, Jr.**

This article contains an extensive historical development of federal and military law governing the use and abuse of narcotics, marihuana, and other dangerous drugs. The author stresses the legislative overreaction to drug abuse, particularly concerning marihuana, and concludes that a shift in concern, from a law enforcement approach to a medical approach, is in order.

I. INTRODUCTION

Say all you want about the physical harmlessness of Marijuana, its mental effects seem to be almost always incompatible with our kind of progressive, technological civilization. Almost every engineering student I've known who started using grass regularly soon switched to a liberal-arts college, where he took up philosophy and Oriental Mysticism and—in many cases—gdt hooked on ithe Chinese *I Ching* bit, Hindu reincarnation philosophy, American Indian prophesies and visions or some such harmless, charming but worthwhile nonsense. Pot smokers don't become vicious, depraved dope fiends, but they certainly will not contribute anything toward beating the Russians in the space race, curing cancer, or advancing science and industry in any ways.

Jim Wilson
Newark, New Jersey

. . . .

I am a Captain in the U.S. Army, stationed in Vietnam, and I have acute conscience problems about marijuana use among my troops. John Steinbeck IV probably wasn't exaggerating when he said 75 percent of the soldiers here smoke grass; in my company I would sat the figure closer to 100 percent. Yet I have never ordered a man arrested for this offense. Why should I put a blot on the permanent record of a brave fighting man just because he amuses himself, during his brief respites from battle, with a harmless herb?

(Name withheld by request)
APO San Francisco,
California'

*This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Seventeenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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[1] PLAYBOY, Sep. 1968, at 224.

The purpose of this article is to give to the military lawyer some perspective concerning drug abuse, to present some of the issues that the various disciplines have raised, and to attempt to predict responses.

The topic of drug abuse concerns an enormous area, of conduct, which has received increased attention and intensified study. For instance, by 1967, over two thousand papers were written on LSD,[1] a drug that did not awaken much controversy about its possible abuse until 1962.[3] All know from daily experience that there is a growing public concern about the abuse of drugs on college campuses,[4] and the problem is well recognized by the Department of Defense.[5]

In order to explore the significance of what is accepted as a growing social phenomenon, an understanding of the history of the better known drugs, their properties and uses is necessary. Moreover, a chronological investigation of the historical response of the federal government in legislation to meet the problems of drug abuse is Considered essential. It will be helpful in this exploration to refer to the climate of opinion of the medical and sociological disciplines as well as the lawmakers, law enforcers, and the public. Military customs, laws, and regulations will be considered and juxtaposed.

Because of increasing conflict in nearly every aspect of the nature of marihuana and the Constitutional issues being raised with regard to its use and abuse, it will be treated as a separate topic, for emphasis. Then, some contemporary issues and problems dealing with the administration of justice and related affairs in the area of drug abuse will be raised and explored.

Three terminologies are employed in the consideration of definitions and concepts of drug abuse. The first is legal, or what the statutes and the courts have to say. The second is medical

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[2] B. BARBER, DRUGS AND SOCIETY 169 (1967) [hereinafter cited as BARBER].

[3] Wakefield, ***The Hallucinogens: A Reporter's Objective View,*** in LSD, THE CONSCIOUSNESS EXPANDING DRUG 49 (D. Solomon ed. 1964).

[4] ***See, e.g.,*** Hite, ***Drug Use at University: Three Years Behind Nation,*** The Cavalier Daily (University of Virginia, Charlottesville), 4 Nov. 1968, at 1, col. 1; ***id.,*** 8 Nov. 1968, at 1, col. 1; ***id.,*** 18 Nov. 1968, at 2, col. 1.

[5] Memorandum from Alfred B. Fitt, Assistant Secretary of Defense (Manpower) for Deputy Undersecretaries of the Military Departments (Manpower), 25 Oct. 1967.

and medically oriented. The third is the argot of the drug abuser and his environment."

It is to the second category, the medical and medically oriented terminology, that we look for some basic definitions and concepts. Regarding addiction and habituation, the Expert Committee of the World Health Organization provides the following:[7]

Drug *Addiction* is a state of periodic or chronic intoxication produced by the repeated consumption of a drug (natural or synthetic). Its characteristics include:

(1) an overpowering desire or need (compulsion) to continue taking the drug and to obtain it by any means;[8]

(2) a tendency to increase the dose;

(3) a psychic (psychological) and generally a physical dependence on the effects of the drug;

(4) an effect detrimental to the individual and society.

Drug *habituation* (habit) is a condition resulting from the repeated administration of a drug. Its characteristics include:

(1) a desire (but not a compulsion) to continue taking the drug for the sense of improved well-being that it engenders;

(2) little or no tendency to increase the dose;

(3) some degree of psychic dependence on the effect of the drug, but absence of physical dependence and hence of an abstinence syndrome;

(4) a detrimental effect, if any, primarily on the individual.

Tolerance is a declining effect of the same dose of a drug when it is administered repeatedly over a period of time. Thus it is necessary to increase the dose to obtain the original degree of effect." *Physical dependence* refers to an altered physiological

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[6] Unless otherwise noted, these terms, within quotation marks, will come from *A Glossary of Terms Commonly Used by Underworld Addicts*, in D. MAURER & V. VOGEL, NARCOTICS AND NARCOTIC ADDICTION 289–329 (2d ed. 1962) [hereinafter cited as MAURER & VOGEL].

[7] THE PRESIDENT'S ADVISORY COMM'N ON NARCOTIC AND DRUG ABUSE, FINAL REPORT 101 (1963).

[8] Some authorities take issue with the wording "to obtain it by any means" because of the rarity of the commission of violent crimes to obtain drugs by addicts. D. MAURER & VOGEL, NARCOTICS AND NARCOTIC ADDICTION 31–32 (2d ed. 1962).

[9] It is significant that not all addicting drugs produce physical dependence, *e.g.*, cocaine. MAURER & VOGEL 31.

[10] A. NOYES & L. KOLB, MODERN CLINICAL PSYCHIATRY 473 (6th ed. 1963) [hereinafter cited as NOYES & KOLB].

state brought about by repeated ingestion or administnation of a drug in order to prevent the appearance of a characteristic illness called an *abstinence syndrome."* The symptoms of the abstinence syndrome are produced by the withdrawal of the drug, and are referred to as withdrawal illness or withdrawal symptoms."

Drug abuse may be defined as "when an individual takes psychotoxic drugs[13] under any of the following circumstances:

(a) in amounts sufficient to create a hazard to his own health or to the safety of the community; or

(b) when he obtains drugs through illicit channels; or

(c) when he takes drugs on his own initiative rather than on the basis of professional advice."

A *narcotic* is a drug that produces narcosis, a condition of analgesia accompanied by stupor.[15] *Dangerous drugs* are, commonly, the three classes of non-narcotic drugs that are habit forming or have a potential for abuse because of their depressant, stimulant, or hallucinogenic effect."

The following section is concerned with the major drugs of abuse, their origins, medical properties, and consequences. Marihuana is reserved as a separate topic. Following this general, medically oriented discussion is a treatment of the legal history of the major drugs of abuse."

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[11] Id.

[12] MAURER & VOGEL 84-87.

[13] A psychotoxic drug in any chemical substance capable of adducing mental effects which lead to abnormal (mind poisoning) effects. PRESIDENT'S ADVISORY COMM'N ON NARCOTIC AND DRUG ABUSE, FINAL REPORT 1 (1963).

[14] *Id.* at 2.

[15] L. GOODMAN & A. GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 20 (2d ed. 1955) [hereinafter cited as GOODMAN & GILMAN].

[16] PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 4 (1967).

[17] Some footnotes contained herein, especially referring to problems, such as campus drug abuse; subjective experiences, such as with LSD; and treatment or maintenance, such as with methadone, should be considered illustrative only. For the reader interested in more in-depth presentation, a copy of the unabridged thesis is available on loan from The Judge Advocate General's School.

11. MAJOR DRUGS OF ABUSE

A. *NARCOTICS AND COCAINE*

1. *The Opiates.*

> And the wild regrets, and the bloody sweats,
> None knew so well as I:
> For he who lives more lives than me,
> More deaths than one must die.
>
> Oscar Wilde
> Ballad of Reading Gaol
> Part 11, Stanza 37

If your good friend came to you one day, in all seriousness, and confided his first encounter with heroin as his most exquisite experience, filled with terrific delight, and a degree of euphoria probably unequaled in human experience, how would you react? That is the way it has been described."

Opiates are sedative drugs derived from opium or made synthetically with opium-like characteristics.[18] Crude *opium* is derived from the poppy, *Papaver somniferum;* the plant juice from the lanced ripe poppy is collected and dried." Opium production was a well-known art as early as 7000 B.C. It was used medicinally by the Egyptians, Persians and Greeks. The Arabs are thought to have introduced it into China by the 9th Century. Its widespread use as a drug of addiction is attributed to its importation from India by the East India Company." Ingestion was usually oral and in combination with other substances. By the end of the 18th century it was widely hailed (and widely abused) in the American Colonies. The Chinese brought opium for smoking to California where it became relatively popular by the last quarter of the 19th century." Today, crude opium is used as the source material for the production of morphine, heroin, and codeine, its narcotic alkaloids." There are over twenty of the opium alkaloids, but only morphine, codeine, and papervine have wide clinical use."

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[18] MAURER & VOGEL 40, 75, 79; GOODMAN & GILMAN 248–44.

[19] MAURER & VOGEL 53.

[20] Eddy, ***The History*** of ***the Development of Narcotics,*** in 31 LAW AND CONTEMP. PROB. 3 (1957) [hereinafter cited as Eddy].

[21] MAURER & VOGEL 5.

[22] ***Id.***

[23] Id. at 57.

[24] GOODMAN & GILMAN 217.

In 1805,"the German chemist, William A. Serturner, discovered ***morphine,*** and it was used at first to cure and treat opium addiction." Morphine has a specific pain relieving action on the central nervous system and is considered valuable because it relieves suffering which often cannot be treated by removing the cause. It should not be used as a sedative, but only for the relief of pain which cannot be controlled by other medication." In the normal individual it causes only relief of pain with occasional side effects of nausea and vomiting; however, in addiction-prone individuals, there is a positive pleasure sensation, or euphoria." The narcotic alkaloids of opium head the list of drugs to which addiction occurs, and this fact is a major consideration in their therapeutic use. Moreover, there is no set time required for addiction."

Good health and productive work are not incompatible with morphine addiction. Aside from defective personality factors, addicts ds not differ from the rest of the population with respect to intelligence, physical fitness or the incidence of psychosis." The pharmacological effects of morphine are not the cause of the ill-health, crime, degeneracy and low standard of living of most addicts; these are considered to be results of the sacrifice of money, social position, food, and self-respect in order to obtain the drug.[31]

This article does not explore the environment of the addict. The use and addiction by different social groups at different times under differing circumstances, however, makes it desirable to think in terms of a number of different social patterns and problems.[32] The availability of the drug, the opportunity for initiation to its usage, and the individual predisposition to continue its usage are determined by a complex interaction of dynamic cultural and familial forces.[33] Addiction may come about through association with those who abuse drugs, similar to drinking and smoking. There is evidence of deliberate efforts by addicts and peddlers to recruit new members,[34] but the aggressive ped-

[25] MAURER & VOGEL 5.
[26] PREFACE TO A. LINDESMITH, THE ADDICT AND THE LAW at xi (1965).
[27] MAURER & VOGEL 60–61.
[28] *Id.*
[29] GOODMAN & GILMAN 241–42.
[30] *Id.* at 242.
[31] GOODMAN & GILMAN 244.
[32] BARBER 137.
[33] NOYES & KOLB 474.
[34] *But* 888 W. ELDRIDGE, NARCOTICS AND THE LAW 28–29 (2d ed. 1967).

dler who "hooks" innocents against their will or knowledge is a myth."

As has been noted, some individuals are considered to be addiction-prone. Persons who are essentially neurotic or unstable are good candidates." The psychotic is also predisposed.[37] Some observers consider that initiation to drug abuse takes a daring and defiant attitude (when not related to medical addiction) that appeals to the adolescent and immature; those who become addicted to narcotics are, for the most part, antisocial personalities." They find in drugs "a release from tension felt as a restless need for pleasurable or exotic sensations and the satisfaction of a longing for artificial elation or peace."" But even the antisocial personality deserves dispassionate consideration. The following, referring to the drug addict, would appear to be overstatements: "He is a thief, a burglar or robber; if a woman, a prostitute or shoplifter. The person is generally a criminal or on the road to criminality before he becomes addicted."[40]

An essential feature of the opiate addict's behavior is that when physical dependence is established, he begins taking his drug to avoid the unpleasant reactions that occur when he stops. Thus, as in the case of morphine addiction, he feels "normal."[41] Most lawyers have read or heard of the frightening consequences of "withdrawal," the results of the abstinence syndrome. These symptoms are largely dependent upon the length of time of addiction and the kind and amount of drugs used. Their intensity is greatest in the cases of heroin, morphine and opium; discomfiture is less severe when withdrawing from codeine and demerol.[42] The symptoms include:"

(1) uncontrollable yawning; profuse sweating;

(2) watering of the eyes and running from the nose;

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[35] **Blum & Braunstein,** *Mind Altering Drugs and Dangerous Behavior: Narcotics,* **in PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 52 (1967).**

[36] **C. TOWNES, HABITS THAT HANDICAP 56 (1920).**

[37] **NOYES & KOLB 474.**

[38] *Id.*

[39] *Id.* **at 475.**

[40] **H. ANSLINGER & W. TOMPKINS, THE TRAFFIC IN NARCOTICS 170 (1953). Mr. Anslinger was the Commissioner, Federal Bureau of Narcotics, from 1930 to 1962.**

[41] **PREFACE TO A. LINDESMITH, THE ADDICT AND THE LAW at x (1965).**

[42] **T. BROWN, THE ENIGMA OF DRUG ADDICTION 72 (1961).**

[43] *Id.*

(3) dilation of pupils;

(4) gooseflesh (the skin resembles that of a plucked turkey; hence the origin of the phrase "cold turkey");"

(5) restlessness (turning from side to side and curling into a ball; covering up with blankets, etc.);

(6) cramps in the legs and abdomen; twitching of muscles (thus, "kicking" the "habit");[45]

(7) gagging, retching, vomiting, and diarrhea;

(8) sleeplessness and loss of appetite.

These effects may be substantially ameliorated by controlled medical techniques such as have been employed in the United States Public Health Service Hospitals for addicts. There, the drug methadone hydrochloride (trade name, Methadone) is used. Methadone was developed in Germany during World War II, and although it is also addicting its general effects are slower and persist longer. Its abstinence syndrome is slower to develop and is milder in severity. Thus, it is substituted for other opiates, with a resulting milder withdrawal of its own.[46] But whatever the technique, Morpheus exacts a high price for his pleasures.

Codeine was first isolated from opium in 1832. As a medicament it is used for less severe pain than morphine is employed for, and fur the suppression of coughs. Its effects are similar to morphine but it is about one-sixteenth as strong. There is no significant contraband in codeine other than what is diverted from medical channels.[47] Very large quantities are necessary to support a full-fledged codeine habit.[48] Codeine addicts are usually persons who originally received the drug for clinical purposes. Addiction to this expensive, mildly euphoric drug is considered rare."[49]

Heroin, the most common narcotic drug of the opiate series, was first produced in, Germany in 1898, land was promoted as a cure for morphine addiction. It is about twice as potent as morphine and has been banned from medical use in the United States since 1925 because of its dangerous addiction liability."[50] As has been noted, the morphine addict usually takes his daily

[44] GOODMAN & GILMAN 245.

[45] Winick, *Narcotic Addiction and Its Treatment,* in 31 LAW AND CONTEMP. PROB. 19 (1957) [hereinafter cited as Winick].

[46] MAURER & VOGEL 69.

[47] *Id* at 65.

[48] *Id.*

[49] GOODMAN & GILMAN 242.

[50] MAURER & VOGEL 62-63.

requirement in order to keep "normal," but the heroin addict continues his drug rather for its euphoric excitation, including the absence of unpleasant side effects, such as vomiting and constipation." The following quotation is especially appropriate to this drug addiction:

> The hypodermic needle often provides a kind of sexual play, with the addict inserting the needle into his vein, waiting for the blood to m e up, injecting a small amount of heroin as he forces the blood back by letting up his pressure on the hypodermic. He may do this several times before injecting the rest of the contents of the hypodermic needle into the vein.[52]

The name "heroin" was merely a tradename.[53]

Three other drugs bear mentioning. *Dilaudid* has the same general actions and uses of morphine and is prepared from morphine. It was first produced in Germany in 1923 and hailed as a non-addicting substitute for morphine." Although it is highly Effective in the relief of pain, it is also, along with heroin and morphine, the quickest in addiction liability." ***Methadone*** produces greater somnolence and inactivity than morphine, with less irritability and a less severe abstinence syndrome.[56] ***Meperedine,*** also known as ***Demerol*** and ***Dolantin,*** was discovered in the 1930's and was the first wholly synthetic pain-relieving drug with an activity comparable practically to that of morphine. It was not controlled in the United States until 1944 because there were no means of bringing about control of a substance not derived from the natural sources specifically named under the previous narcotic law. Because, until about 1939, it was thought by doctors to be relatively safe, *i.e.,* non-addicting, many of the medical profession became addicted to it also."

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[51] GOODMAN & GILMAN 238–39.

[52] Winick 20. "The pleasure that [the addiction prone person] receives from this initial contact [with an opiate] ***he does not forget,*** and even though he may not continue with the use of drugs at that time, he reverts to them on the strength of his memory of the initially pleasurable experience." MAURER & VOGEL 74 (emphasis added). Perhaps one can appreciate the decision which the potential addict must make when confronted with the choice of drugs in relation to the distress of withdrawal, and why, when made, the decision is so often related in terms of the choice of heroin.

[53] C. TOWNES, HABITS THAT HANDICAP 44 (11920).

[54] MAURER & VOGEL 63-64.

[55] *Id.* at 72.

[56] GOODMAN & GILMAN 272.

[57] Eddy 5.

2. *Cocaine.*

Cocaine hydrochloride was first prepared from the leaves of a bush, *Erythroxylon coca*, of Brazilian origin, in **1844.** It is a local anesthetic and a strong stimulant of the central nervous system." In addiction-prone individuals it may produce an intense feeling of euphoria, frequently followed by strong feelings of anxiety or fear, with hallucinations and paranoid delusions.[59] Addicts have been known to carry and employ weapons." Cocaine has been depicted as turning men into satyrs, lusting blood fiends, and murderers." Addicts frequently mix cocaine and heroin to produce the most desirable effects of each, while counteracting the undesirable results of cocaine. This is the "speedball."[62]

While it may produce no withdrawal symptoms, its continued use causes mental deterioration, digestive disorders, nausea, emaciation, sleeplessness, and tremors.[63]

It is of interest that the name of the popular beverage, Coca-Cola, relates to its formula, which contains a cocaine-removed extract of coca leaves as flavoring."

3. *Exempt Preparations.*

The Federal law has provided exemptions from the general application for certain preparations, chiefly cough syrups and the like. However, they are rigidly controlled. *Paregoric* is an exempt drug because it has less than the maximum amount of opiate permitted by law. It is used to relieve gastro-intestinal distress, especially diarrhea, in infants." The elixir of terpin hydrate and codeine, a cough syrup, is another example of an exempt preparation." In sufficient quantities, nonetheless, by ingestion of this

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[58] MAURER & VOGEL 115.

[59] *Id.* at 116.

[60] GOODMAN & GILMAN 353.

[61] C. TOWNES, HABITS THAT HANDICAP 62 (1920). Thus, before cocaine came under federal control in **1922,** a spokesman of the times wrote: "So when an overseer in the South will deliberately include cocaine in the rationing of his Negro laborers in order to speed them up to meet emergency demands, it is high time that more adaquate legislation restricting the use of cocaine should be effected than obtains under the present hemiplegic Federal Narcotic Laws." *Id.* at *65.*

[62] T. BROWN, THE ENIGMA OF DRUG ADDICTION 23–24 (1961).

[63] GOODMAN & GILMAN 363.

[64] MAURER & VOGEL 117.

[65] *Id.* at **59.**

[66] *Id.* at **65.**

cough syrup an addiction may be established and maintained." Occasionally, a paregoric addict is discovered. His daily dose may reach a quart.[68]

B. *DANGEROUS DRUGS*

1. *Barbiturates.*

Barbiturates are sleep-producing drugs derived from barbituric acid. The first hypnotic barbiturate was made in 1882 under the name, Barbital." When used properly, they are not dangerous. They are frequently prescribed for nervousness, emotional anxiety, and tension; they are also used widely in anesthesia." Morphine addicts may use them when unable to obtain morphine, or to intensify the effects of morphine." **Also,** they may be abused by alcoholics and insomniacs."

Taken in very large quantities, barbiturates do not produce sleep, but rather intoxication, resembling alcoholic intoxication, with symptoms of drowsiness,, confusion, muscular uncoordination land inarticulacy.[75] When the drug is stopped, especially if abruptly, serious withdrawal symptoms arise and convulsions, delirium, hallucinatioas, and even death may occur.[76] The withdrawal syndrome usually presents a more severe condition than does withdrawal from opiates. Between twelve to sixteen hours the addict seems to improve. After this come anxiety, tremors, weakness, nausea and insomnia. From 36 to 72 hours there are usually convulsions, resembling epileptic seizures. The symptoms usually subside within about ten days, with weakness for some weeks."

Barbiturates are sold under numerous trade names, including Luminal (phenobarbital), Seconal ("red birds"), Nembutal ("yellow jackets"), Amytal and Tuinal ("blue heavens").[78]

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[67] *Id.* at 65–66.
[68] GOODMAN & GILMAN 243.
[69] MAURER & VOGEL 90.
[70] *Id.* at 91.
[71] GOODMAN & GILMAN 127.
[72] *Id.* at 134.
[73] NOYES & KOLB 154.
[74] *Id.*
[75] MAURER & VOGEL 94, 109.
[76] GOODMAN & GILMAN 151–52.
[77] MAURER & VOGEL 110–11.
[78] T. BROWN, THE ENIGMA OF DRUG ADDICTION 28 (1961).

2. *Amphetamine.*

The initial investigations on amphetamine were reported in 1930.[79] Amphetamine is the official name for benzedrine sulfate; it has a direct stimulating effect on the central nervous system and a local effect on nasal mucous membrane. Its general effects are noted as a feeling of well-being and confidence, some heightening of alertness and initiative, the total effect of which is to reduce or prevent sleepiness and fatigue to some extent." There is evidence that amphetamines do enhance performance in permitting the expenditure of greater amounts of energy than normal; delaying fatigue or restoring normal performance after fatigue; and offsetting boredom. This is of interest to the military in that under emergency conditions sustained or improved performance could make the difference between the success or failure of vital missions."

When taken in larger than therapeutic doses amphetamine causes intoxication, but this results in the stimulation and anxiety effects of cocaine, which act as a deterrent to its continued use.[82] Amphetamine may cause agitation, auditory and visual hallucinations, and paranoid delusions." Although it produces no addiction or withdrawal symptoms, as with the opiates,[84] a tolerance may be acquired."

As a medicament, amphetamine is used in the treatment of narcolepsy, parkinsonism, obesity, and some psychogenic disorders.[86] Because it seems to make time go faster, it is a favorite of prisoners and persons involuntarily in military service.[87]

3. *Hallucinogens.*

There are three alkaloids, related to one another in chemical structure, that merit discussion under this topic. They are mescaline, which comes from the peyote cactus, psilocybin from mushrooms, and d-lysergic acid diethylamide (LSD) from ergot, a fungus that grows on rye.[88] These drugs are called "hallucino-

[79] GOODMAN & GILMAN 516.

[80] MAURER & VOGEL 118–19.

[81] STANFORD RESEARCH INSTITUTE, DRUG ENHANCEMENT OF PERFORMANCE IV–1 (1960) (project conducted for the Office of Naval Research, Department of the Navy).

[82] MAURER & VOGEL 122.

[83] GOODMAN & GILMAN 524.

[84] *Id.*

[85] NOYES & KOLB 159.

[86] GOODMAN & GILMAN 525.

[87] MAURER & VOGEL 121.

[88] BARBER 170.

gens" because they produce changes in perception and the ego, causing what appear to be hallucinations. They are also called "psychotomimetic" because although they sometimes cause psychosis, they more often produce effects that resemble (or mimic) psychosis.[89] In 1961 the word "psychedelics" was coined, meaning "mind manifestors."[90]

Mescaline is found in the button-like growths of the peyote, a small spineless cactus, *Lophophora Williamsii,* indigenous to northern Mexico and southern Texas. Ingestion of these buttons will cause, after several hours, hallucinations and delusions of perception, taste, and odor. Frequent preliminary effects are nausea and vomiting. Its consumption has been closely associated with religious rites and rituals of the Mexican Indians from Aztec times. It is also used by some tribes of American Indians in this fashion."

Psilocybin is derived from the mushroom indigenous to Mexico, *Psilocybe Mexicnna,* and began to promote scientific attention in 1953, although it had been providing the natives with visions for more than four centuries.[92] *LSD* was first synthesized in 1938 but its peculiar mental effects were not discovered until 1943, when Albert Hoffman, a chemist working at Sandoz Pharmaceuticals in Basel, Switzerland, accidentally absorbed some of it and took the first "trip."" Beaause it is now rather commonly adjudged that the subjective effects of mescaline, psilocybin and LSD are similar, equivalent, or indistinguishable," these drugs will be discussed together.

Unpleasant symptoms of nausea and a variety of other sensations may follow ingestion. The pupils are always dilated and tremor and dry mouth are common." The first characteristic change in behavior is change in mood. Noted are extreme emotion with uncontrollable laughing or crying. Subjectively perceptual changes occur, particularly distortions and hallucinations in the visual sphere.[96]

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[89] ***Id.*** at 171.

[90] Osmond, *Pharmacology: The Manipulation of the Mind,* in LSD, THE CONSCIOUSNESS EXPANDING DRUG 27 (D. Solomon ed. 1964).

[91] MAURER & VOGEL 123–26.

[92] Wakefield, *The Hallucinogens: A Reporter's Objective View,* in LSD, THE CONSCIOUSNESS EXPANDING DRUG 41 (D. Solomon ***ed.*** 1964) [hereinafter cited as Wakefield].

[93] Jarvick, *The Behavorial* ***Effects*** *of Psychotogens,* in LSD, MAN & SOCIETY 187–88 (DeBold & Leaf ed. 1967) [hereinafter cited as Jarvick].

[94] Unger, *Mescaline,* LSD, *Psilocybin and Personality Change,* in LSD, THE CONSCIOUSNESS EXPANDING DRUG 201–02 (D. Solomon ***ed.*** 1964).

[95] Jarvick 188.

[96] *Id.* at 189.

A common reaction is called synesthesia, a blending of sense perceptions. Thus, the subject will often feel that he can smell the music he is listening to, or hear the sound of color, or touch the texture of an odor.[97] The intellectual processes, finally, become impaired, resulting in confusion, inappropriateness of action, and difficulty in thinking.[98]

LSD is rated 100 times as powerful as psilocybin and 7,000 times as powerful as mescaline. 1/200,000 of an ounce of LSD should react in about 20 to 30 minutes after ingestion, with a drug experience of usually eight to ten hours. Mescaline begins to react in about two hours and lasts as long as LSD. Psilocybin has the reaction time of LSD and usually lasts about five to six hours."

There is considerable evidence that for some individuals LSD and related substances can produce serious untoward psychological effects.[100] LSD is not an approved drug and its uses can only be considered to be experimental."[101] These drugs may have use in altering man's reactions to his environment; for example, during isolation in space."[102] Continued controlled experimentation and evaluation are expected to proceed.

4. *Hydrocarbons.*

Inhalation of certain hydrocarbons (volatile intoxicants) such as antifreeze, paint thinner, and industrial solvents can produce intoxicating and euphoric effects.[103] In this category of abusers falls the "glue sniffer." "Overriding any pleasure that abusers may derive from such activities is the fact that the halogenated

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[97] BARBER 169.

[98] Jarvick 189. The variety of subjective experiences cannot adequately be described. The author's bibliography suggests two things from the first-hand accounts: all subjective experiences are ***exceedingly serious matters;*** there is only a slight equation with euphoria; also, it would appear that there is some relationship between the user's egocentristic qualities and values and how well he relates to the experience. Because of their uniqueness, it has been suggested that there is no legal framework in which psychedelic drugs can smoothly fit. ***See*** Note, ***LSD: A Challenge to American Drug Law Philosophy,*** **19 U. FLA. L. REV. 311 (1966).**

[99] Wakefield **46.**

[100] **L. GOODMAN & A. GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 208** (36 ed. **1965)** [hereinafter cited as **GOODMAN & GILMAN** 3d]. The possibility that these drugs also cause physiological, ***i.e.,*** chromosomal damage, has been discredited because of poorly controlled scientific conditions. ***See*** Note, ***Hallucinogens, 68*** **COLUM. L. REV. 581 (1968).**

[101] **GOODMAN & GILMAN** 3d **207.**

[102] **STANFORD RESEARCH INSTITUTE, DRUG ENHANCEMENT OF PERFORMANCE 1–29** (1960).

[103] **GOODMAN & GILMAN 3d 301.**

hydrocarbon solvents have marked toxicity and cause serious damage to the kidney and the central nervous system."[104]

Although adults have been reported to be participants in this rather bizarre form of sensory indulgence,[105] most identified sniffers are male children in urban areas, of a median age of about 13.[106] Presently, intoxicant sniffing is considered, in itself, rare, and no special cause for alarm.[107]

III. HISTORICAL DEVELOPMENT OF THE FEDERAL LAW OF NARCOTICS AND COCAINE

A. *PRE-LEGISLATION PERIOD*

Until the turn of the 20th century, the use of opium and its derivatives was generally less offensive to Anglo-American public morals than the smoking of cigarettes.[108] Estimates of the number of opiate addicts in the United States ranged from 100,000 to 1,000,000."[109]

In the 19th century, all social classes in the United States took opiates in freely available patent medicines, and some members of all classes became addicted."[110] Addiction was treated as a special medical problem and came to be recognized in the early part of the century as there began to appear literary accounts of strange and uncontrollable experiences with opium. For example, in 1821, "Confessions of an Opium Eater," by Thomas de Quincey, was published and was widely read. The medical community became increasingly aware of the chemical and medicinal nature of opium and its potentially harmful consequences.

The hypodermic syringe was invented in 1853 and was used to a great extent in the Civil War. Unfortunately, many veterans had become medically addicted to certain of the opiates, and

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[104] **Id.**

[105] **Blum & Funkhouser-Balbaky, Mind *Altering Drugs and Dangerous Behavior: Dangerous Drugs*, in PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 36 (1967) ("young adult 'swingers' and the 'gay crowd'" as well as anesthesiologists, sniffing nitrious oxide).**

[106] **Id.**

[107] **Id. at 37.**

[108] **King, *Narcotic Drug Laws and Enforcement Policies*, 31 LAW AND CONTEMP. PROB. 113 (1967) [hereinafter cited as King].**

[109] **MAURER & VOGEL 7.**

[110] **The following account was taken from BARBER 137 and A. LINDESMITH, THE ADDICT AND THE LAW 127 (1966).**

morphine and the hypodermic syringe became manifestations of the "army disease," as veterans employed them. The "army disease" was apparently derived from what was known as the "soldier's disease," or dysentary, which was common during the war, and which was "treated" by use of the opiates.

Following the war, the use of narcotics and addiction became associated with various criminal elements, especially in the west, as well as with therapeutic uses. Thus, an equation between gamblers, illegal Chinese immigrants, prostitutes and narcotics addiction was made. It should be noted, however, that there was no significant illicit narcotic traffic, the number of addicts in jails and prisons was negligible, and the matter of drug addiction was a problem mainly in a numerical and personal sense. Moreover, the problem was exacerbated in the late 19th century and early 20th century by the failure of the medical teachers and textbook writers fully to appreciate the insidious danger of narcotics abuse."[111]

B. *THE NARCOTIC DRUGS IMPORT AND EXPORT ACT*

On 9 February 1909, the Congress, noting that the State Department had been receiving various reports showing an alarming increase in the opium smoking habit in the United States and throughout the world, passed what was to be known by amendment in 1922 as the Narcotic Drugs Import and Export Act."[112]

The Act made it unlawful to import into the United States any opium or derivative thereof except for medial purposes only. Anyone receiving, concealing, buying, selling, or in any manner facilitating transportation of any opium, knowing it to have been imported contrary to law would be fined not less than $50 and not more than $5,000 and could be imprisoned for not more than two years. Showing possession or prior possession of such opium or preparation or derivative thereof would be sufficient evidence to authorize conviction unless the defendant could explain the possession to the satisfaction of the jury.

C. THE HARRISON ANTI-NARCOTIC ACT

After 23 January 1912, when the United States became a signatory to the Hague International Opium Convention, we under-

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111 W. ELDRIDGE, NARCOTICS AND THE LAW 5 (2d ed. 1967).

112 Act of 9 Feb. 1909, ch. 100, 35 Stat. 615 (found in scattered sections of 21 U.S.C.).

took to control the domestic sale, use, and transfer of opium and coca products in an effort to encourage countries that were producers to join in restricting supplies in the world market.[113] During hearings, it was opined that opium, morphine, coca leaves and cocaine had been rashly placed on the market for "anyone who desires them or who desires to trade on the addiction of his fellow creatures to them."[114] The house Committee reporting cited alarming statistics and concluded: "We are an opium consuming nation today."[115]

The Harrison Anti-Narcotic Act[116] was passed in 1914, as a revenue-raising measure rather than under the commerce clause of the Constitution.[117] It provided that every person who "produces, manufactures, eompounds, deals in, dispenses, sells, distributes or gives away opium or coca leaves or any compound, salt, derivative, or preparation thereof'' must register with the district collector of internal revenue and pay a special tax of $1.00 annually. The commissioner would provide blank forms for transfers of such drugs. Both the transferror and the transferee must keep a copy of the executed order form for two years after the transaction, readily accessible to inspection. The act does not apply to physicians, dentists, and veterinary surgeons who dispense or distribute in the course of professional practice, and their patients, except that records of amounts, dates, names, and addresses for two years must be kept when not in the course of personal attendance.'" It is unlawful to obtain by

[113] HOUSE COMM. ON WAYS AND MEANS, TRAFFIC IN OPIUM, H.R. REP. NO. 23, 63d Cong., 1st Sess. 1 (1413).

[114] *Id.* at 2.

[115] *Id.*

[116] Act of 17 Dec. 1914, ch. 1, 38 Stat. 785 (found in scattered sections of 26 U.S.C.).

[117] The conclusions of the Congress at the time are expressed in the committee report of a related act: "This argument [that the federal government should directly prohibit the manufacture of smoking opium within the United States], though plausible, is of course outside the question as the Federal Government may only secure the prohibition sought by an exercise of its taxing power." H.R. REP. NO. 22, 63d Cong., 1st Sess. 2 (1913).

[118] The legislative history of the act, which is vaguely enlightening as to Congressional intent, provides its only ripple regarding "personal attendance." The Senate proposed an amendment providing, in this connection, that a drug must be dispensed in good faith and not for the purpose of avoiding the act. The Senate receded from the amendment at the Conference Committee. 52 CONG. REC. 98 (1914). However, good faith with regard t~ prescribing was required by the act. SENATE COMM. ON FINANCE, REGISTRATION OF PERSONS DEALING IN OPIUM, S. REP. NO. 258, 63d Cong., 2d Sess. 2 (1914); CONFERENCE REPORT, TRAFFIC IN OPIUM, H.R. REP. No. 1196, 63d Cong., 2d Sess. 1 (1914).

means of the order forms any of the drugs for any purpose other than use, sale, or distribution in the conduct of a lawful business in such drugs, or in the legitimate professional practice, Fines of not more than $2,000 or imprisonment for not more than five years, or both, were provided as penalties for violations of the act.

Earlier in 1914, Congress had included within the purview of the 1909 act, cocaine or any salt, derivative, or preparation of cocaine, as well as opium.[119]

D. *PROSECUTIONS UNDER THE ACTS*

After the Harrison Act was passed, a no-man's land developed, as the addict began to feel the effects of his new status. Since possession of narcotics was presumed to be illegal under the 1909 statute unless the defendant could successfully rebut by showing that they had not been imported illegally, the Harrison Act was designed to affect the domestic market of legally imported or manufactured drugs to which the addict had legal access. Thus, it came to be that the only authorized source that the addict could turn to was the medical profession. As this had never been the ease before, in the view of one commentator, the Harrison Act, which seemed, on its face, to be designed to bring the traffic into observable and controllable channels, was to be used, rather, to repress all non-medical use of narcotics and thus to transform a large group of hitherto law-abiding citizens into felons.'"

After World War I, the public's attention to the narcotics abuse problem was again focused. Charged with enforcement of the Harrison Act, the Narcotics Division of the Treasury Department began with the premise that narcotics addiction is a criminal problem rather than a socio-medical problem, and began to prosecute physicians for writing opiate prescriptions for addicts.'" A series of cases realigned the medical profession. The Supreme Court held in *Webb v. United States*[122] that issuing an order for morphine to an addict, not in the course of professional treatment in attempted cure, but for the purpose of providing morphine sufficient to keep him confortable by maintaining his

[119] Act of 17 Jan. 1914, ch. 9, 38 Stat. 275 (found in scattered sections of 21 U.S.C.).

[120] King 116–17.

[121] BARBER 145.

[122] 249 U.S. 96 *(1918).*

customary use, was not included within the exemption for the doctor-patient situation. In *Jin Fuey Moy* v. *United States,*[123] the Court held that the phrases "to a patient" land "in the course of his professional practice only" were intended to 'confine the immunity of a registered physician in dispensing narcotic drugs under the act, and a doctor could not legitimately prescribe drugs "to cater to the appetite or satisfy the craving of one addicted to the use of the drug."[124] These are somewhat unfortunate cases, as they probably reflect practices that only a minute portion of the medical profession ascribed to. In *Webb,* there was flagrant abuse by the doctor; he had indiscriminately sold thousands of prescriptions for 50 cents apiece. The practice in the *Jin Fuey Moy* case was to sell, also indiscriminately, prescriptions for morphine by the gram, at $1.00 per gram.

In *United States v. Behrman,*[125] where a doctor had prescribed 150 grains of heroin, 360 grams of morphine, and 210 grams of cocaine to a known addict to use as he saw fit, the Government drafted the indictment so as to omit any accusation of bad faith; thus, its validity depended on a holding that prescribing drugs for an addict was a crime, regardless of the intent of the physician.'[126] The Supreme Court ruled that the indictment was valid."[127] Again, the facts were unfortunate, but doctors took heed, for if the question of their good faith and fair medical standards was to be eliminated, they logically would avoid the risk of prescribing for addicts under any circumstances.

In 1925, a unanimous Supreme Court clarified the issues to protect obvious good faith of dispensing physicians and the fact that addicts may be proper patients for dispensing drugs. Thus, in *Linder* v. *United States,*[128] the Court stated:

> [The act] says nothing of "addicts" and does not undertake to prescribe methods for their medical treatment. They are diseased and proper subjects for such treatment, and we cannot possibly conclude that a physician acted improperly or unwisely or for other than medical purpose solely because he had dispensed to one of them, in the ordinary course and in *good* faith, four small tablets of morphine or cocaine for relief of conditions incident to addiction.[129]

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123 254 U.S. 189 (1920).
124 *Id.* at 194.
125 258 U.S. 280 ('1922).
126 *See* King 121.
127 258 U.S. 280, 288–89 (1922).
128 268 U.S. 5 (1925).
129 *Id.* at 18.

But it was too late, and the medical profession demurred. It is enough that extraordinary patience and understanding are required of the doctor who would seek to treat an addict, because of the addict's low social status, his lack of funds and the fact that he is a difficult and troublesome person;[130] most doctors simply stopped having anything to do with addicts because of fear of prosecution.[131] Moreover, the Federal Bureau of Narcotics curiously ignored the wording in *Linder* and still paraphrased the 'discredited language in the holding in *Webb* in the narcotics regulations.[132]

Without medical sources to turn to for his addiction the addict thus became the willing victim of the illicit peddler and an unwanted burden upon law enforcement agencies. The addict was to be known as a "dope fiend," a criminal, a degenerate, and an enemy of society.[133]

E. *AMENDMENTS OF 1922*

In **1922,** by amendment to the Act of 1909,[134] it was provided that the term "narcotic drug" means "opium, coca leaves, cocaine, or any salt, derivative or preparation of opium, coca leaves, or cocaine." The punishments of fine and forfeiture were phrased in the alternative, rather than conjunctively under the old law,[135] but provided for imprisonment of not more than 10 years. There is no explanation for why the maximum punishment was increased from two to ten years.

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[130] A. LINDESMITH, THE ADDICT AND THE LAW 13 (1965) [hereinafter cited as LINDESMITH].

[131] LINDESMITH 7.

[132] The regulation provides, in pertinent part: "An order purporting to be a prescription issued to an addict or habitual user of narcotics, not in the course of professional treatment but for the purpose of providing the user with narcotics sufficient to keep him comfortable by maintaining his customary use is not a prescription . . . [and is in violation of the] law pertaining to narcotic drugs." 26 C.F.R. § 151.392 (1968). This is still a question of good faith, it may be argued, but what of the doctor who provides the user with narcotics in the course of professional treatment when the amount is *incidentally* sufficient to keep the addict comfortable? Does not good faith then become superfluous?

Query: If, under the holding in Robinson **v.** California, **370** U.S. 660 (1962), a narcotics addict may not be punished for his status as an addict, *i.e.,* the status of addiction is not a crime, cannot it also be argued that prescribing for the maintenance of that status, whether in good faith *or not,* is likewise not a crime?

[133] BARBER 145.

[134] Act of 26 May 1922, ch. 202, 42 Stat. 596 (found in scattered sections of 21 U.S.C.).

[135] **HOUSE** COMM. ON WAYS AND MEANS, IMPORTATION AND EXPORTATION OF NARCOTIC DRUGS, H.R. REP. No. 852, 67th Cong., 2d Sess. 9 **(1922).**

F. *THE "BOGGS LAW" (1951)*

After the start of World War 11, the incidence of addiction became minimal: Young men were recruited and international smuggling was disrupted.'" But after the war arrest rates increased and so did the involvement of young persons. Thus, the reaction to a deteriorating situation was a call for increased punishments.'" This approach of attack upon the effects rather than the cause of a problem has been assailed as particularly unfortunate in dealing with drug abuse, since "[t]he efforts of a concerned public should be directed toward erasing the class values which applaud anti-social behavior in certain strata of the social structure."[138]

In 1951, a Special Senate Committee on Organized Crime dwelt upon three areas regarding narcotics abuse.[139] First, there were more young addicts than before. It was found that at the United States Public Health Service Hospital in Lexington, Kentucky, in 1946 three per cent of the patient addicts were below age 21. In 1951 the percentage had climbed to 18; of these, nearly three-fourths had no record of criminality or delinquency prior to addiction.'" Second, "The committee believes that casting the shadow of deep penalties over the path of the dope peddler will do much to deter him."[141] Third, some control over sentencing by the judiciary was necessary: "A judge passing on an individual case is often tempted to be lenient, but if he appreciates the true relationship between the case before him and the over-all aspects of the drug evil, he will be more likely to mete out the punishment that is deserved."[142] These sentiments were also held by the House, where it was considered that more severe sentences would remove addicts from active participation

[136] PREFACE TO LINDESMITH at viii.

[137] *Id.*

[138] W. ELDRIDCE, NARCOTICS AND THE LAW 29 (2d ed. 1967).

[139] FINAL REPORT OF THE SPECIAL SENATE COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, S. REP. No. 725, 82d Cong., 1st Sess. (1951).

[140] *Id.* at 27. The Lexington hospital and a similar hospital in Fort Worth, Texas, were authorized in 1929, and exist solely for the treatment and cure of federally convicted narcotic drug addicts and those who voluntarily submit themselves for treatment. H. ANSLINGLER & W. TOMPKINS, THE TRAFFIC IN NARCOTICS 122–23 (11953).

[141] FINAL REPORT OF THE SPECIAL SENATE COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, S. REP. NO. 725, 82d Cong., 1st Sess. 35 (1951).

[142] *Id.*

in the drug traffic,"*and also that where federal judges had the 'reputation in the country for imposing severe sentences for narcotics violations the drug traffic was practically nonexistent.'"

A Senate committee reported favorably on a House bill to change the punishment provisions, introduced by Representative Boggs of Louisiana, and stated: "The percentage of persons receiving sentences of five years or more for violations of the narcotics law is less than the percentage of persons receiving similar sentences for violation of the counterfeiting and white-slave-traffic laws."[145] Quoting from a memorandum prepared by the Bureau of Narcotics, the Senate Report stated: "The opiates and cocaine are poisons which slowly destroy the physical being. *Most people reserve a particular horror and antipathy for the prisoner.* There is no reason why the narcotic peddler should be excluded from this feeling."[146]

The legislation was dramatic. The amendment"' not only increased the punishments for narcotic violations under the acts of 1909, 1914, and 1937,[148] but it made them uniform. It also provided for mandatory minimum imprisonment sentences. While the maximum fine was $2,000 in all cases, first offenders were to receive imprisonment of *not less than* two nor more than five years; for second offenses, not less than five nor more than ten years; and for third and subsequent offenses, not less than ten nor more than twenty years. For second and subsequent offenses no probation and no suspension of sentence could be given.

G. THE NARCOTIC CONTROL ACT

At the urging of the House of Delegates of the American Bar Association by resolution in February 1955 "to undertake a reexamination of the Harrison Act, its amendments, and related enforcement and treatment policies,"[149] the Senate authorized a subcommittee of the Senate Judiciary Committee to make such a study. The subcommittee conducted hearings all over the country; from June 1955 through November 1955, heard 345 witnesses;

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[143] HOUSE COMM. ON WAYS AND MEANS, INCREASED PENALTIES FOR NARCOTIC AND MARIHUANA LAW VIOLATIONS, H.R. REP. No. 635, 82d Cong., 1st Sess. 1 (1951.)

[144] Id. at 4.

[145] SENATE COMM. ON FINANCE, INCREASED PENALTIES FOR NARCOTIC AND MARIHUANA LAW VIOLATIONS, S. REP. No. 1051, 82d Cong., 1st Sass. 3 (1951).

[146] Id. at 4 (emphasis added). Query: Does this approach, equating the predator with the prey, belie the original approach of punishing the prey?

[147] Act of 2 Nov. 1951, ch. 66, 65 Stat. 767 (found in scattered sections of 21, 26 U.S.C.).

[148] See text accompanying notes 257–260, *infra.*

[149] *Proceedings of the House of Delegates, 80* A.B.A. REP. 408 (1955).

took 8,667 pages of testimony — ten volumes, including exhibits; and issued a nine-page report.[150] Whereas the House report that accompanied the legislation that emanated from the hearings stated, "The Boggs Law (PL 255 of the 82d Cong.) of 1951 . . . has been largely responsible for turning the rising tide of illicit narcotics and marihuana traffic and addiction,"[151] the Senate report noted that the illicit traffic in drugs in the United States had trebled since World War II:[152] "[W]here penalties are more severe, and strictly enforced, the incidence of both addiction and narcotics offenses has decreased proportionately."[153]

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[150] SENATE COMM. ON THE JUDICIARY, THE ILLICIT NARCOTICS TRAFFIC, S. REP. No. 1440, 84th Cong., 2d Sess. (1956).

[151] HOUSE COMM. ON WAYS AND MEANS, NARCOTIC CONTROL ACT OF 1956, H.R. REP. No. 2388, 84th Cong., 2d Sess. 8 (1956). It is of interest that Representative Boggs was the chairman of this committee also.

[152] SENATE COMM. ON THE JUDICIARY, THE ILLICIT NARCOTICS TRAFFIC, S. REP. No. 1440, 84th Cong., 2d Sess. 2 (1956).

[153] *Id.* at 6. In November 1955 the subcommittee heard testimony concerning narcotic violations punishment and the practice of trying offenders under state laws in Ohio when apprehended by federal agents rather than under more lenient (1951) federal laws. Inserted in the record was the newspaper account of a shocked defendant who was convicted on two counts each for possession for sale of narcotics and sale of narcotics to two federal agents. The banner read, "Dope Peddler Here Gets 40–80 Year Sentence," and the article concluded: "Jones, frowning and uneasy, testified yesterday morning that he had been an addict since he was 15 years old. He denied he sold heroin to anyone." ***Hearings on S. 37'60 Before the Subcom. on Improvements in the Federal Criminal Code of the Senate Comm. on the Judiciary***, 84th Cong., 1st Sess. 4682–84 (1955). Not treated in this article are the laws of the various states. All of the states have enacted anti-narcotic legislation, and forty-eight have adopted the UNIFORM NARCOTIC DRUG ACT, 9B UNIFORM LAWS ANNOTATED 274 (Supp. 1964), or some form thereof. After the 1951 legislation, most states enacted "Little Boggs Laws," severely increasing punishments; however, there is no uniformity in punishment for narcotic offenses under state laws. For an appendix for comparative references, see W. ELDRIDGE, NARCOTICS AND THE LAW 170 (2d ed. 1967).

Concerning the declaration of the referenced narcotics offender, *i.e.*, "He denied he sold heroin to anyone," in United States v. Freeman, 357 F. 2d 660 (2d Cir. 1966), the Second Circuit rejected the M'Naughten and, to some degree, the Durham rules of insanity and the "irresistable influence" test, in holding that when the defendant, a narcotics addict, sold narcotics to federal agents, his actions should have been determined, as to whether it was a criminal offense in accordance with substantially the following rule: A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of laws. Prevailing counsel in that case has written a provocative article on the equation of this rule With *all* acts of addition. Morris, ***Can We Punish for the Acta of Addiction?,*** 54 **A.B.A.J.** 1081 (1968). ***See also*** Bowman, ***Narcotic Addiction and Criminal Responsibility Under Durham,*** 53 GEO. L.J. 1017 (1965).

The House committee agreed,-noting that 80 per cent of the violators apprehended and convicted were first offenders. Since this was interpreted to mean that persons having a previous narcotic or marihuana law violation conviction "have moved into the background and recruited young hoodlums as peddlers," it was considered that first offender traffickers should be made ineligible for probation.'"

The Senate subcommittee advanced some interesting philosophy, adopted by the committee, concerning the addict: "The subcommittee is convinced that crime in the United States would be substantially reduced if drug addicts were taken off the streets and placed in appropriate institutions for treatment or detention."'" Since it is common knowledge that there is an overwhelming rate of recidivism among addicts, the next statement becomes the more ominous: "Less than 20% of the known addicts are now confined. It is inevitable that these contagious problems will increase from year to year unless other known addicts are removed from society for treatment and, *in the event that treatment fails, placed in a quarantine type of confinement or isolation.*"[155]

The Narcotic Control Act of 1956,[157] further amended the basic 1909, 1914, and 1937 acts, as amended; increased the maximum fines for all offenses to $20,000: and provided imprisonment for sale, transfer, or smuggling of, 5 to 20 years for first offenders, and 10 to 40 years for second and subsequent offenses.'" The minimum sentence for sale or transfer by one 18 or over to one under age 18 is 10 years, with a maximum of life imprisonment, unless the drug is heroin, in which case the court may impose life imprisonment, or the jury may direct the sentence of death. While probation for first offender possessors is allowed, probation, suspension of sentence and parole are prohibited for traffikers.

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[154] HOUSE COMM. ON WAYS AND MEANS, NARCOTIC CONTROL ACT OF 1956, H.R. REP No. 2388, 84th Cong., 2d Sess. 11 (1956).

[155] SENATE COMM. ON THE JUDICIARY, THE ILLICIT NARCOTICS TRAFFIC, S. REP. No. 1440, 84th Cong., 2d Sess. 3 (1956). Eight years later, the United States Supreme Court would renounce the notion that a narcotics addict could be punished for his status as a narcotics addict. Robinson v. California, 370 U.S. 660 (1962).

[156] SENATE COMM. ON THE JUDICIARY, THE ILLICIT NARCOTICS TRAFFIC, S. REP. No. 1440, 84th Cong., 2d Sess. 3 (1956) (emphasis added).

[157] Act of 18 Jul. 1956, ch. 629, tit. I, 70 Stat, 567 (found in scattered sections of 8, 21, 26 U.S.C.; codified in scattered sections of 18 U.S.C.). *Compare with* OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, 18 U.S.C. § 3731 et *seq.* (Supp. IV. 1969).

IV. DEVELOPMENT OF THE MILITARY LAW OF HABIT FORMING NARCOTIC DRUGS AND MARIHUANA

The original Articles of War were enacted by the Second Continental Congress on 30 June 1775,[157] and have been periodically revised in the form of codes since that time. Not until the revision effective in 1917 were habit forming narcotic drugs specifically addressed[158] and their unauthorized introduction and use specifically prohibited. Drunkenness, coupled with some type of conduct, has traditionally been recognized as a military offense, however,[159] and Professor Winthrop noted that it was not essential that drunkenness be caused by spiritous beverages, but would include "opium or other intoxicating drug or thing."[160] The defense of incapacitation through ingestion of spirits or drugs taken as prescribed by a medical officer or physician was recognized.[163]

Wrongful possession of habit forming drugs was prohibited in 1918[164] and military courts applied the maximum penalty for introduction of drugs for purposes other than sale as the maximum permissible punishment for wrongful possession.[165]

During World War II, the use, possession, and introduction of marihuana was prosecuted as a drug offense even though its status as a "habit forming drug" was questioned. The emphasis of the cases was that marihuana produced a "deleterious effect upon human conduct and behavior" inconsistent with the "requirements of military efficiency and discipline."[166] By 1949 marihuana offenses were specifically included in the Code,[167] and when the *Uniform Code of Military Justice* was enacted in 1950,[168] the

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158 The punishments for marihuana offenses were similarly increased. *See* text accompanying note 263, *infra.*

159 W. WINTHROP, MILITARY LAW AND PRECEDENTS 21 (2d ed. 1896, 1920 reprint).

160 Manual for Courts-Martial, United States Army, 1917, paras. 349, 446.

161 W. WINTHROP, MILITARY LAW AND PRECEDENTS 717, 718, 722, 728 (2d ed. 1896, 1920 reprint).

162 *Id.* at 613.

163 *Id.* at 614.

164 Gen. Orders No. 25, Dep't of War (11 Mar. 1918).

165 United States v. Fong, 42 B.R. 267 (A.B.R. 1944), *cited in* DIG. OPS. JAG 1912–1940 § 454(73) (1923).

166 United States v. Ellington, 32 B.R. 391 (A.B.R. 1944); United States v. Barreto, 3 B.R. (E.T.O.) 137 (A.B.R. 1948).

167 Manual for Courts-Martial, United States Army, 1949, para. 117*c*.

168 Act of 5 May 1950, ch. 169, 64 Stat. 107.

practice of providing different maximum sentences for different types of drug offenses was discontinued. Although the sample specifications in the Manual related only to wrongful use or possession,'" the traditional charge of wrongful introduction was sustained,'" as well as charges of sale'" and transfer.'"

Under the present Manual, the maximum punishment and confinement for marihuana offenses is dishonorable discharge and confinement for five years; for habit forming narcotic drug offenses it is dishonorable discharge and confinement for ten years.'"

V. HISTORICAL DEVELOPMENT OF THE FEDERAL AND MILITARY LAW OF DANGEROUS DRUGS

A. *LABELING AND DISPENSING LEGISLATION*

Abuse of dangerous drugs was first considered by Congress in 1951 when it became evident that there was a need to protect the public against abuses in the 'labeling and dispensing of drugs, both prescription and over the counter.[174] Accordingly, the Durham-Humphrey amendments to the Food, Drug and Cosmetic Act[175] were passed, prohibiting dispensing without a prescription by a licensed practitioner of drugs which require supervision by a practitioner of their use.[176]

B. *THE DRUG ABUSE CONTROL AMENDMENTS OF 1965*

Not until 1962 was much attention given to the phenomenon of a growing incidence in dangerous drug abuse by users that was, in turn, reflected by amazing statistical estimates of diver-

Manual for Courts-Martial, United States, 1951, app. 6c.

170 United States v. Jones, 2 U.S.C.M.A. 80, 6 C.M.R. 80 (1952).

171 United States v. Simmons, 19 C.M.R. 640 (A.B.R. 1955).

172 United States v. Blair, 10 U.S.C.M.A. 1961, 27 C.M.R. 235 (1959).

173 MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 127c. It should be noted that habit-forming *non*-narcotic drugs are not specifically included under the present Manual proscriptions.

174 SENATE COMM. ON LABOR AND PUBLIC WELFARE, DRUGS AND DEVICES —LABELING OR PACKAGING, S. REP. No. 946, 82d Cong., 1st Sess. 1 (1951).

175 Act of 25 Jun. 1938, ch. 675, 52 Stat, 1040 (found in scattered sections of 21 U.S.C.).

176 21 U.S.C. §§ 333, 352, 353, 355 (1964).

sions of drugs from legal into illicit channels. President Kennedy appointed a commission to study the entire problem and the final report of the President's Advisory Commission on Narcotic and Drug Abuse was forwarded to the President on 1 November 1963.'"

The President's Commission stated: "As to the abuse of dangerous drugs almost nothing is known of its incidence or geographical distribution."'[177] Nonetheless, the Commission recognized that it had become a serious national problem[179] and recommended that all non-narcotic drugs capable of producing serious psychotoxic effects[180] when abused be brought under strict control by federal statute.'"

Legislation {designedto provide federal regulation of the manufacture, sale and distribution of certain dangerous drugs had already been proposed. Hearings had revealed that over nine billion barbiturate and amphetamine tablets were produced annually in the United States; and over half of these, it was estimated, were distributed through illicit channels, at prodigious profits.[182] It was found that drug abuse contributes to juvenile delinquency, the rising crime rate, and the rising accidents on the highways.'" Considerable evidence was found of smuggling, loose security precautions, and lack of self regulation on the parts of manufacturers and distributors.'"

The Drug Abuse Control Amendments of 1965 define "depressant or stimulant" drugs as barbiturates and amphetamines, and their components,[185] including any drug which contains any quantity of substance which the Secretary of the Department of Health,

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[177] PRESIDENT'S ADVISORY COMM'N REPORT ON NARCOTIC AND DRUG ABUSE (1963) [hereinafter cited as PRESIDENT'S COMMISSION].

[178] Id. at 22.

[179] *Id.* at 1.

[180] See note 13, *supra.*

[181] PRESIDENT'S COMMISSION 43.

[182] SENATE COMM. ON LABOR AND PUBLIC WELFARE, DRUG ABUSE CONTROL AMENDMENTS OF 1965, S. REP. NO. 337, 89th Cong., 1st Sess. 1 (1965).

[183] *Id.*

[184] HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, DRUG ABUSE CONTROL AMENDMENTS OF 1965, H.R. REP. No. 130, 89th Cong., 1st Sess. 2 (1965).

[185] Federal Food, Drug, and Cosmetic Act § 201, 21 U.S.C. § 321(v)(1)(2) (Supp. IV, 1969).

Education and Welfare by regulation[186] designates as having a potential for abuse because of its depressant or stimulant effect on the central nervous system, or because of its hallucinatory effect, excluding hard narcotics and marihuana.[187]

The amendments prohibit the manufacturing, compounding, or processing of any stimulant or depressant drug except for certain legitimate categories.[188] The possession of any stimulant or depressant drug was prohibited *except* for personal use or use by a member of one's household, or for administration to an animal owned by one or by a member of one's household.[189]

The amendments required an initial inventory and then accurate and complete records to be kept by each person included in the chain of ,distribution from the basic manufacturer to, *but not including,* the ultimate consumer., Licensed practitioners are exempted from record keeping requirements in the course of their professional practice except for those who are regularly engaged in dispensing depressant and stimulant drugs for a fee.'"

Violations were punished by misdemeanor imprisonment of not more than one year or a fine of not more than $1,000, or both. For subsequent offenses, authorized was imprisonment of not more than three years or a fine of not more than $10,000, or both. Persons 18 years old or over who sold, delivered, or otherwise disposed of any depressant or stimulant drug to one under 21 years of age could receive imprisonment of not more than two years and a fine of not more than $5,000; for subsequent offenses in this category, imprisonment of not more than six years and a fine of not more than $15,000 was authorized.'"

C. AMENDMENTS OF 1968

In 1968 Congress re-examined the problem of dangerous drug abuse an'd the Senate was apprised that "widespread diversions are continuing, and dthough there appears to have been a decline recently in illegal use of LSD, the abuse of other halluci-

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[186] 21 C.F.R. §§ 166.9–.19 (1968).

[187] Federal Food, **Drug,** and Cosmetic **Act** § 201, **21** U.S.C. § 321(v)(3) **(Supp.** IV, 1969).

[188] *Id.* § **511(a),** 21 U.S.C. § **360a(a) (Supp.** IV, 1969).

[189] *Id.* § 511(c), Pub. L. 89–74, 79 Stat. **229** (1965), *as amended,* 21 U.S.C. § 360a(c)(1), **(2) (Supp.** IV, 1969).

[190] ***Id.*** **§** 511(d)(3), 21 U.S.C. § 360a(d) **(3) (Supp.** IV, 1969).

[191] ***Id.*** **§** 303, Pub. L. 89–74, 79 Stat. 233, ***as amended,*** 21 U.S.C. § 333(a), (b) **(Supp.** IV, 1969).

nogenic drugs appears to be increasing."[192] The House Committee, quoting from a recent publication of the Medical Society of the County of New York, relayed the dangers of LSD:

> (1) prolonged psychosis; (2) Acting out of character disorders and homosexual impulses; (3) suicidal inclination; (4) aotivation of previously latent psychosis; and (5) reappearance of the drug's effects weeks or even months after use. It was reported that between March and December of 1965 a total of 65 persons suffering from acute psychosis induced by LSD were admitted to Bellevue Hospital in New York.[193]

In considering the problem, two schools of thought were recognized: the physicians, who felt that possession for personal use should be controlled through educational programs without making it criminal, and the law enforcement officers, who favored prohibiting possession. The physicians reasoned that "adverse effects, particularly on the young, of arrest and prosecution with the possibility of consequent records, overweigh the adverse effects of drug abuse."[194] The position of the law enforcement officials was that prohibition of the possession of unauthorized dangerous drugs would act as a deterrent, that penalties for possession would serve greatly to aid in law enforcement by facilitating the arrests of traffickers, and that the prohibition would counter the feeling among some young people that abuse of dangerous drugs is not detrimental to them.[195]

In recommending legislation, the committee felt that it had struck a balance:

> The committee has prescribed penalties for possession, both as an aid to law enforcement and for its deterrent effect; however, the committee has added to the protection of the Brooklyn Plan,[196] the Juvenile Offenders Act,[197] and the Federal Youth Corrections Act[198] further protection designed to minimize the long-term adverse consequences upon a youth of a conviction of a violation of the prohibition against possession of dangerous drugs."[199]

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[192] SENATE COMM. ON LABOR AND PUBLIC WORKS, DRUGS—LSD—PENALTIES, S. REP. No. 1609, 90th Cong., 2d Sess. 2 (1968) [hereinafter cited as SENATE REPORT].

[193] HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, DRUGS—LSD—PENALTIES, H.R. REP. NO. 1546, 90th Cong., 2d Sess. 5–6 (1968).

[194] SENATE REPORT 4.

[195] *Id.*

[196] The Brooklyn Plan is a Department of Justice administrative system whereby the U.S. Attorney may, before or after arrest, call juvenile offenders and parents or guardians to his office and hold arrest or prosecution at discretion if it appears that the purpose of the law might thereby be better served. *Id* at 5.

[197] 42 U.S.C. §§ 2541–546 (1964).

[198] 18 U.S.C. §§ 5005–026 (1964).

[199] SENATE REPORT 6.

The 1968 amendments specifically include "lysergic acid diethylamide."[200] The possession for personal use, or use by member of one's household, etc., portion was superseded to prohibit the possession of any depressant or stimulant drug for sale, delivery **or** other disposal to another,"[201] ***or otherwise to possess*** any such drug unless it was obtained directly or pursuant to a valid prescription from a licensed practitioner in the course of professional practice.[202] The punishments were revised to include the possibility of sentences of not more than three years' imprisonment and a fine of $10,000 for first offense violations when commission of the offense was with the intent to defraud or mislead.[203] For sale, delivery, or disposal to another, imprisonment for not more than five years and a fine of $10,000 was authorized.[204] Increased punishment for the offense of selling, delivering, or otherwise disposing of any stimulant or depressant drug by one over 18 to one under **21** was authorized to include imprisonment for not more than 10 years and a fine of $15,000 for first offenses, and not more than 15 years and $20,000 for subsequent offenses.[205] Finally, the simple possession violation retained punishment of imprisonment for not more than one year or a fine of not more than $1,000 or both, but after ***two*** convictions ***for*** simple possession, authorized imprisonment for not more than three years and a fine of $10,000."[206]

The "further protection" that the legislation provides is that for simple possession first offenders the court may suspend sentence and place the offender on probation for up to a year. At any time before the year is up the offender may be unconditionally discharged from probation and the conviction automatically set aside. Furthermore, the same treatment would be accorded at the end of a year if parole is not violated; in either case the offender will be issued a certificate from the court to that effect."[207]

The committee admitted that the bill "as reported allows the Government to seek felony convictions for illegal possession or

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[200] FEDERAL FOOD, DRUG, AND COSMETIC ACT § 201(v)(3), 21 U.S.C. § 321(v)(3), (Supp. IV, 1969).

[201] *Id.* § 511(c), 21 **U.S.C.** § 360a(c)(1) (Supp. IV, 1969), *formerly* 79 Stat. 226 (1965).

[202] *Id.* § 511(c), 21 U.S.C. § 360a(c)(2) (Supp. IV, 1969), *formerly* 79 Stat. 229 (1965).

[203] *Id.* § 303, 21 U.S.C. § 333(2) (Supp. IV, 1969).

[204] *Id.* § 303, 21 U.S.C. § 333(b)(1) (Supp. IV, 1969).

[205] Id. § 303, 21 U.S.C. § 333(b)(2) (Supp. IV, 1969).

[206] Id. § 303, 21 U.S.C. § 333(b)(3)(A) (Supp. IV, 1969); *see* H.R. REP. No. 1968, 90th Cong., 2d Sess. 1 (1968).

[207] Federal Food, Drug, and Cosmetic Act § 303, 21 U.S.C. § 333(b)(3)(B) (Supp. IV, 1969).

illegal transfer of drugs that might involve no more than the disposal of a single amphetamine or barbiturate pill by one person to another," and the danger lying therein, but weighed it against the contention of the Department of Justice[208] that a differentiation between penalties for commercial and noncommercial transfers would create insurmountable problems in certain cases.*"The committee emphatically pronounced that it was the intent of Congress that occasional transfers between otherwise law abiding citizens should not be made the subject of punishment, and noted:

> Particularly with respect to the college student example, testimony Wore Congress reflects concern among educators and social scientists that the indiscriminate enforcement of excessively severe drug laws increases disrespect for the law on the part of young people and tends to alienate them from society. In view of the fact that estimates of student use and experimentation with drugs runs as high as 35 percent, the enforcement of the law looms large in the future of millions of American youth.[210]

D. *MILITARY PROSECUTIONS*

The prosecution of the abuse of dangerous drugs as defined in the Drug Abuse Control Amendments is a new concept in military jurisprudence. In one of the earliest cases, an Air Force board of review sustained a conviction for the possession of amphetamines."' The charge was based upon the crimes and offenses not capital clause of article **134,** *Uniform Code* of *Military Justice,* as a violation of the Assimilative Crimes Act,[212] in that the accused violated the law of California by wrongfully possessing amphetamines.

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[208] The President's Reorganization Plan No. 1 of 1968, submitted to Congress on 7 February 1968, transferred the functions of the Bureau of Narcotics from the Treasury Department to the Attorney General and the functions of the Secretary of Health, Education, and Welfare Bureau of Drug Abuse Contnol under the Drug Abuse Control Amendments (except for the functions of regulating the counterfeiting of those drugs which are not controlled "depressant or stimulant" drugs) to the Attorney General. Established in the Department of Justice was a new agency to take over those functions, known as the Bureau of Narcotics and Dangerous Drugs. H. R. Doc. No. 249, 90th Cong., 2d Sess. (1968).

[209] SENATE REPORT 6.

[210] *Id.* at 7.

[211] United States v. Shell, 37 C.M.R. 962 (A.F.B.R. 1967).

[212] 18 U.S.C. § 13 (1964).

In *United States* v. *Turner*,[213] the United States Court of Military Appeals rendered a decision concerning the matter of equating dangerous drugs with habit forming narcotic drugs and marihuana. The accused was charged under articles **92** and **134,** pleaded guilty, and was convicted of six specifications involving possession, use, transfer, and sale of capsules of seconal, the trade name for a depressant drug. The sentence was reduced in accordance with a pretrial agreement. At the trial, all parties agreed that because of multiplicity, the maximum confinement allowable was **13** years, and the members of the court-martial were so instructed. Upon review, the staff legal officer disagreed on the basis that seconal is not a "habit forming narcotic drug or marihuana'' under paragraph 213*a* of the Manual and thus each specification under article **134** alleged a simple disorder, punishable by confinement for not more than four months instead of five years, as for narcotic drugs under paragraph 127*c*. The board of review found that while seconal is not a narcotic, it is a habit forming drug closely related to narcotics and marihuana and thus offenses were punishable by confinement for five years. The Judge Advocate General of the Navy certified the question of appropriateness of the sentence to the Court of Military Appeals.

The Court found the interpretations of all were incorrect. The Drug Abuse Control Amendments of **1965** and the Dangerous Drug Act for the District of Columbia"[214] "created a *new offense* involving the misuse and abuse of certain dangerous drugs," stated the Court,[215] and paragraph 213*a* of the Manual, its legal and legislative basis, and the sample specification in appendix 6*c* all referred to "possession or use of *habit-forming narcotics drugs or marihuana. . . .*"[216] The fact that the word "narcotic" does not follow "habit-forming" in the table of maximum punishments is not an indication that *all* drug offenses are to be similarly classified and punished.[217] The table of maximum punishments (which refers to "Drugs, habit forming, or marihuana, wrongful possession or use") is "merely a convenient means of identifying the offense and in 'case of discrepancy be

[213] **18 U.S.C.M.A.** 55, **39 C.M.R.** 55 (1968).
[214] D.C. **CODE ANN.** §§ 33–701—33–712 **(1956).**
[215] **U.S.C.M.A. 55, 57, 39 C.M.R. 55,** 57 (1968).
[216] *Id.*
[217] *Id.* **at** 58, **39 C.M.R.** at 58 (1968).

tween a heading or description of an offense in the table and any other part of the manual such other part shall be controlling'," the Court reminded, citing paragraph 127*c*.[218]

The Court held that seconal is not a drug within the meaning of the charged offenses and is not subject to the five-year punishment under the table of maximum punishments. Instead, paragraph 213*c*, which includes under article 134 "those acts or omissions, not made punishable by another article, which are denounced as crimes or offenses by enactments of Congress or under the authority of Congress and made triable in the Federal civil courts," applies. The Court then found that for first offenses under the District of Columbia Code the punishment authorized is imprisonment for not more than one year and a fine of from $100 to $1000,[219] and imprisonment for not more than one year and a fine of $1000 under the Drug Abuse Control Amendments.[220] The choice is guided by paragraph 127*c*, which provides that the punishment then authorized is that under the United States Code or the Code of the District of Columbia, whichever prescribed punishment is lesser. The Court then concluded that the accused had obviously been misled as to the maximum imposable sentence in his case, that his plea of guilty under the circumstances was improvident, and remanded the case.

In *Menat*,[221] an Air Force board of review considered whether the following specification stated an offense:

> In that . . . , did . . . wrongfully sniff glue, such conduct being to the prejudice of good order and discipline in the Armed Forces.

The board held that it did not, as neither the Code, the 1951 Manual, nor Air Force Regulation No. 35-6, 14 May 1968, prohibiting abuses of dangerous drugs, prohibits "glue sniffing." Thus, the board held, it is the effect of intoxication rather than the use of the intoxicating agent which is the essential offense of "glue sniffing," and that condition must be pleaded in the specification.

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[218] *Id.*

[219] D.C. CODE ANN? § 33–708 (1956). No distinction is made between types of offenses; however, for second and subsequent offenses the authorized punishment is imprisonment for not more than 10 years and a fine of not less than $500 nor more than $5,000. *Id.* The definitions of dangerous drugs in this 1956 enactment were followed almost entirely in the Drug Abuse Control Amendments of 1965. see D.C. CODE ANN. § 33–701 (1956).

[220] The Court failed to acknowledge the scheme of punishments provided by the Amendments effective 24 October 1968. See text accompanying notes 202–206, *supra*.

[221] United States v. Menat, No. 5–22618 (A.F.B.R. 11 Oct. 1968).

In early 1968, the Department of Defense, in an effort to curb illegal or improper use of drugs by members of the armed forces, directed each military department to assist in the development of informational and educational materials, review existing programs, recommend new policies and prepare evaluations.[222] Each military department was directed to develop additional procedures to control smuggling and illicit trafficking, and to issue or revise regulations to carry out the program.

Perhaps anticipating the need, a change to Army Regulation 600–50[223] was promulgated on 8 January 1968. It prohibits the use, sale, transfer, and introduction of depressant, stimulant, and hallucinogenic drugs except for authorized medical purposes and defines them in the same way as the Drug Abuse Control Amendments, *i.e.,* barbiturates and amphetamines, and their components; LSD; and any substance designated by the Secretary of Health, Education, and Welfare, the Attorney General of the United States, or their designees, as habit forming, abuse prone, or hallucinogenic, because of stimulant or depressant effects on the central nervous system. Also, service members must keep authorized drugs obtained by prescription in the original container in which delivered.

VI. MARIHUANA

A. *GENERAL*

La cucaracha, la cucaracha
Ya no quiere caminar,
Porque no tiene, porque la falta
Marihuana que fumar.[224]

A very old plant, known as Indian hemp, has been the source of pleasure for millions of people for thousands of years. In its more esthetic form it was described in a pharmacy book written by the Chinese Emperor Shen Nung, about 2737 B.C.[225] It was

[222] Dep't of Defense Directive No, 1300.1 (2 Feb. 1968).

[223] Army Reg. No. 600–50, para. 18.1 (now Change No. 4, 18 Aug. 1969).

[224] (The little cockroach, the little cockroach
Just doesn't want to travel on,
Because he's craving, to smoke a reefer,
But marihuana he has none.)
Mexican folk song of unknown origin. (Translation license supplied.)

[225] Taylor, *The Pleasant Assassin: The Story of Marihuana,* in THE MARIHUANA PAPERS 35 (D. Solomon ed. 1968) [hereinafter cited as Taylor].

of commercial value for hundreds of years in the manufacture of rope, twine, and textiles, although it has been largely superseded by synthetics for these uses. Indian hemp is a weed-like annual plant, reaching heights of from one to twenty feet, depending on the soil."[226] Cultivated for its fiber, it was one of the earliest crops in the American Colonies and was reported as early as 1632."[227] It was christened as *Cannabis sativa* by Linnaeus, in 1753.[228]

Cannabis indica is the scientific name for the flowering tops of the female plant which produce a resinous exudate, from which cannabinol is extracted."[229] The power of the active ingredients of the plant varies with the purity of the extraction and the best known, in descending order of effects produced upon ingestion, are hashish, charas, ganja, bhang, and marihuana.[230] There are hundreds of other terms for hemp in all languages, of course, but marihuana, the resin content of which is lowest, is best known in America."[231] The drug does have some antibacterial activity but at present there are no well-substantiated indications for its therapeutic use."[232] Its social uses are more well defined, it being estimated that its ingestion in one form or another is carried on by two to four hundred million people throughout the world."[233]

The following discussion will be limited to marihuana, the dried, crumpled stems, leaves and seed pods of the plant, used in smoking as is fairly commonly known by all, and accepted by many. It must be acknowledged that the effects to be described are greatly heightened with the use of the purer forms. As will be noted, it seems logical that the majority of marihuana users would likely avoid the purer forms.* It has been stated that

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[226] MAURER & VOGEL 103.

[227] *Id.* at 105.

[228] Taylor 32.

[229] MAURER & VOGEL 103–05.

[230] Taylor 39. The word "marihuana" *is* said to be a corruption of the Portuguese word, "mariguango," meaning intoxicant. GOODMAN & GILMAN 170.

[231] Taylor 39.

[232] GOODMAN & GILMAN 3d 300.

[233] MAURER & VOGEL 113; Taylor 43.

[234] See text accompanying notes 247–250, *infra.*

"hashish compared with marihuana is like pure alcohol and beer."[235]

When marihuana is smoked, its effects occur within a few minutes and the duration of the effects is relatively short.[236] There are no lasting ill effects even from the *acute* use of marihuana and no fatalities have ever been reported.[237] The number of cigarettes smoked to produce the desired effect depends on the purity of the substance. The most common reaction is a dreamy state of altered consciousness in which ideas seem disconnected, uncontrollable, and freely flowing."[238] Time and space perceptions are altered or distorted.[239] There is a feeling of extreme well being, exhibaration, and inner-joyousness.[240] According to the personality of the user and the setting, reactions vary, but inhibitions are lessened and personality is released although not changed."[241] "When alone, the subject is inclined to be quiet land drowsy; when in company, garrulousness and hilarity are the usual picture."[242] Thus, the effects are in a general way comparable to the effects of alcohol.[243]

Ingestion on marihuana causes a strong increase in appetite,"

[235] LINDESMITH 224. "It is difficult not to be struck by the remarkable similarity between the description of the behavioral and subjective effects of large doses of cannabis and similar descriptions of the psychotogenics such as LSD, mescaline, and psylocibin. This is especially true, when the more potent synthetics are used rather than marihuana itself." Goodman & Gilman, *supra* note 232. The synthetic equivalent of Cannabis indica is called pyrahexyl compound. MAURER & VOGEL 108.

[236] GOODMAN & GILMAN 3d 300.

[237] *Id.* (emphasis added).

[238] *Id.*

[239] *Id.;* LINDESMITH 223.

[240] GOODMAN & GILMAN 3d **300;** LINDESMITH 233.

[241] MAURER & VOGEL 242.

[242] GOODMAN & GILMAN 3d 300.

[243] LINDESMITH 223; MAURER & VOGEL 112.

[244] Allentuck & Bowman, *Psychiatric Aspects of Marihuana Intoxication,* in THE MARIHUANA PAPERS 413 (D. Soloman ed. 1968) [hereinafter cited as Allentuck & Bowman]; *Mayor's Committee on Marihuana (New York City), The Marihuana Problem in the City of New York: Sociological, Medical, Psychological and Pharmacological Studies, 1944;* in THE MARIHUANA PAPERS, *supra* at 408 [hereinafter cited as La Guardia Report]. The La Guardia Report, a thorough, in-depth study covering nearly six years, is almost universally considered authoritative by commentators and writers on marihuana. Significantly excluded from this group was the Federal Bureau of Narcotics; the Commissioner, Mr. Anslinger, vehemently assaulted and discredited many of the scientific conclusions therein. *See, e.g.,* LINDESMITH 235–37; *cf.* W. ELDRIDGE, NARCOTICS AND THE LAW 37-48, 80 (2d *ed.* 1967). However, the findings of the La Guardia Report have been corroborated over the past two decades. Murphy, *The Cannabis Habit: A Review of Recent .Psychiatric Literature,* 16 U.N. BULL. ON NARCOTICS 5 (1963).

has some diuretic effects," and nausea, vomiting, and occasional diarrhea have been noted.[246] While euphoria is the most common state achieved by use, anxiety may also be produced."' This phenomenon in its most pronounced form is in relation to the strength of the dosage used and the personality of the user. Thus it is possible for marihuana to precipitate a transient psychosis." "Pot" smokers seem to appreciate this hazard and soon learn to achieve an optimum "high" and desist from further usage.[249] "Cannabis permits a dependable controlled usage that is very difficult if not impossible with LSD and mescaline."[250]

B. THE CALL FOR REGULATION

Whereas simple habituation"' may attach to the use of marihuana, it is not addicting."' This fact was apparently not readily appreciated, as, starting in the early 1930's, the Federal Bureau of Narcotics began condemning the use for pleasurable purposes of the dried crumpled stems, leaves and seed pods of Indian hemp.

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[245] La Guardia Report 320.

[246] GOODMAN & GILMAN, *supra* note **232.**

[247] La Guardia Report **318, 331;** Burroughs, *Points* **of** *Distinction Between Sedatives and Consciousness Expanding Drugs,* in THE MARIHUANA PAPERS, *supra* note **244** at **446.**

[248] GOODMAN & GILMAN **3d** 300; McGlothin, *Cannabis: A Reference,* in THE MARIHUANA PAPERS, *supra* note **244,** at **469;** *accord,* Allentuck & Bowman **413** (psychosis in unstable, disorganized personalties). *Contra,* Murphy, *The Cannabis Habit: A Review of Recent Psychiatric Literature,* 16 U.N. BULL. ON NARCOTICS **13, 19–20 (1963)** (neither marihuana nor alcohol causes neurotic or psychotic illness).

[249] La Guardia Report **323,384,410;** GOODMAN & GILMAN 3d **300.**

[250] McGlothin, *Cannabis: A Reference,* in THE MARIHUANA PAPERS, *supra* note **244,** at **458.**

[251] See definitions in text accompanying **note 7,** *supra.*

[252] PREFACE TO LINDESMITH at ix; MAURER & VOGEL **111;** La Guardia Report **295–96, 397–98.**

The intensity of the views of Mr. Anslinger, the Commissioner, was probably not justified,[253] although there is no reason to doubt his good faith in seeking to curb what he considered to be "always an abuse and a vice."" Nonetheless, Indian hemp began to be equated with vicious crime; it was characterized as the stepping stone toward the lair of the "dope fiend"; and, indeed, was being called a narcotic.[255] Soon, many states began adopting laws against the amsumption of marihuana, and full cooperation in drafting and publicity was given to public and private organs alike by the Bureau.[256]

C. THE MARIHUANA TAX ACT

In 1937, the House Committee on Ways and Means, after directing hearings on marihuana, concluded that the federal taxing power should be employed to raise revenue from the marihuana drug traffic and "to discourage the widespread use of the drug by smokers and drug addicts.""' Noting that in 1935, 195 tons of marihuana destined for illicit use were seized and destroyed by state authorities under state laws, the Committee considered the effects of the drug:

> Under the influence of this drug the will is destroyed and all power of directing and controlling thought is lost. Inhibitions are released. As a result of these effects, it appeared from testimony produced at the hearings that many violent crimes have been and axe being committed by persons under the influence of this drug.

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[253] According to Mr. Anslinger: "It undermines its victims and degrades them mentally, morally, and physically. There is complete unpredictability with effects that may range fnom intense intoxication, having fits, criminal assaults, and stupefaction." H. ANSLINCER & J. TOMPKINS, THE TRAFFIC IN NARCOTICS 21 (1953).

[254] *Id.*

[255] An "educational campaign" poster of the day, officially welcomed and encouraged by the Bureau states: "Beware! Young and Old—People in All Walks of Life! This marihuana cigarette [picture] may be handed to you by the *friendly stranger.* It contains the Killer Drug 'marihuana'—a powerful narcotic in which lurks murder! Insanity! Death! WARNING! Dope Peddlers are shrewd! They may put some of this drug in the [picture of a teapot] or in the cocktail or in the tobacco cigarette." THE MARIHUANA PAPERS, *supra* note 244, at 497.

[256] For an interesting account of the campaign, see Becker, *Marihuana: A Sociological Overview,* in THE MARIHUANA PAPERS, *supra* note 244 at 94.

[257] HOUSE COMM. ON WAYS AND MEANS, THE MARIHUANA TAXING BILL, H.R. REP. NO. 792, 75th Cong., 1st Sess. 1 (1937).

> Not only is marihuana used by hardened criminals to steel them to commit violent crimes, but it is also being placed in the hands of high-school children in the form of marihuana cigarettes by unscrupulous peddlers. Cases were cited at the hearings of school children who have been driven to mime and insanity through the use of this drug. Its continued use results many times in impotency and insanity.[258]

The Senate Report adopted the House Report and offered nothing further.[259]

The Marihuana Tax Act of 1937[260] defines marihuana, and in structure is very similar to the Harrison Act, as it became refined. Anyone who deals with marihuana in any of the ways also provided in the Harrison Act must first register with the district collector and pay a special registration tax. Transfers of marihuana may be made only pursuant to written orders on forms bought from the collector. The same procedures in the Harrison Act relating to physicians, dentists, and veterinary surgeons apply. Transfer taxes are $1.00 per ounce for those who have registered, and $100.00 per ounce for those who have not. Proof of payment of the tax is evidenced by appropriate stamps affixed by the collector to the original order form. If any person possessing marihuana fails after reasonable notice and demand by the collector to produce his order form, it will be presumptive evidence of guilt of improper possession and also liability for payment of the tax. The penalties for violations of the act were a fine of not more than $2,000 and imprisonment for not more than five years.

D. PUNISHMENTS: 1951, 1956

As has been noted,[261] in 1951, the penalties for violations of the act were made uniform with the penalties for narcotic drugs violations, and were increased to imprisonment for five years, for first offenses; 5–10 years, for second offenses; and 10–20 years, for third and subsequent offenses. No probation or suspension of sentence would be given for second and subsequent

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[258] *Id.* at 1.

[259] SENATE COMMITTEE ON FINANCE, MARIHUANA TAXING BILL, S. REP. No. 900, 75th Cong., 1st Sess. (1937).

[260] Act of 2 Aug. 1937, ch. 553, 50 Stat. 551 (found in scattered sections of 26 U.S.C.).

[261] See text accompanying notes 147-148, *supra*.

offenses.[262] An equation of marihuana with narcotics for punishment purposes was thus legally effected.

The punishment for narcotics and marihuana offenses was again dramatically increased in 1956.[263] Maximum fines were increased to $20,000 in all cases, and for violations of the transfer tax provisions mandatory minimum sentences of two, five, and ten years were provided for first, second, and subsequent offenders, with maximum sentences set at ten, twenty, and forty years, respectively. For sale, smuggling, or other transfer of marihuana the punishments were the same as for narcotics, *viz.*, first offenders receive *5–20* years; subsequent offenders receive 10–40 years. Life imprisonment and death were not authorized punishments; however, the sale or transfer of marihuana by a person 18 or older to one under 18 was punishable by 10–40 years. Probation for first offender possessors was allowed, but probation, suspension of sentence, and parole were prohibited for all other offenders.

There is evidence that the Senate Judiciary Subcommittee which conducted hearings in 1955,[264] before it recommended the legislation which included the last noted provisions, may have had some preconceptions of marihuana. During the first day of the hearings, the following colloquy between Senator Welker, of the subcommittee, and Commissioner Anslinger took place:

> Senator WELKER: Mr. Commissioner, my concluding question with respect to marihuana: Is or is it not a faot (thatthe marihuana user has been responsible for many of our most sadistic, terrible crimes in this nation, such as slayings, sadistic slayings, and matters of that kind?
>
> Mr. ANSLINGER: There have been instances of that, Senator. We had some rather tragic Occurrences by users of manihuana. It does not follow that all crimes can be traced to marihuana. There have been many brutal crimes traced to marihuana, but I would not say that it is the controlling factor in the commission of crimes.
>
> Senator WELKER: I will grant you that it is not the controlling faotor, but is it a fact that your investigation shows that many of the most sadistic, terrible crimes, solved or unsolved, we can trace directly to the marihuana user?
>
> Mr. ANSLINGER: **You** are correct in many cases, Senator Welker.

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262 *Id.*

263 NARCOTIC CONTROL ACT OF 1956, ch. 629, tit. I, 70 Stat. 567 (found in scattered sections of 8, 21, 26 U.S.C.; codified in scattered sections of 18 U.S.C.). See text accompanying note 157 *supra.*

264 *See* text accompanying notes 149–150 *supra.*

Senator WELKER: In other words, it builds up a false sort of feeling on the part of the user that he has no inhibitions against doling anything; am I correct?

Mr. ANSLINGER : He is completely irresponsible.

Senator WELKER: Thank you, Commissioner.[265]

E. *THE GREAT DEBATE*

1. *Parties and Issues.*

Just as there are two schools of thought pertaining to dangerous drugs, *viz.,* law enforcement officials and the medical, scientific and sociological disciplines, these two schools are similarly aligned with regard to marihuana. It is clear that the position of the law enforcement group is that the use of marihuana is productive of crime and that it leads to the use of narcotic drugs, principally heroin.[266] Moreover, there is more uniformity among the law enforcement group than the other group.

With regard to marihuana being productive of crime, the non-law enforcement authorities find that it is a matter of degree. As has been noted, the effects of marihuana are in many respects similar to alcohol in that it produces intoxicating effects.[267] Thus, one commentator has stated: There is no evidence that it produces crime, leads to disease, produces significant mental or moral injuries, or even leads to excess any more than alcohol does."[268]

The fact is that most habitual users suffer from basic personality defects as those of the alcoholic.[269] "Marihuana tends to release personality, not to change it; whatever you were before

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[265] *Hearings on S.* 3760 *Before the Subcomm. on Improvements in the Federal Criminal Code of the Senate Comm. on the Judiciary,* 84th Cong., 1st Sess. 18 (1955).

[266] *See, e.g.,* Miller, *Marihuana: The Law and Its Enforcement,* 3 SUFF. L. REV. 80 (1968); *cf.,* Murray, *Psychology and the Drug Addict,* 12 CATH. L. REV. 98 (1966).

[267] LINDESMITH 223; MAURER & VOGEL 112; Allentuck & Bowman 415; Blum & Funkhouser-Balbaky, *Mind Altering Drugs and Dangerous Behavior: Dangerous Drugs,* in PRESIDENT'S COMM'N ON LAW ENFORCEMENTS AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 22 (1967) [hereinafter cited as Blum Report].

[268] LINDESMITH 226; *accord,* LaGuardia Report 297, 307, 404; NOYES & KOLB, *supra* note 10, at 480 (use does not lead to criminal habits); Allentuck & Bowman 416 (use does not of itself give rise to antisocial behavior); MAURER & VOGEL 242 (no causal relation between marihuana and violent crime); Blum Report 25 (no reliable evidence marihuana "causes" crime); Murphy, *The Cannabis Habit: Review of Recent Psychiatric Literature,* 16 U.N. BULL. ON NARCOTICS 16 (1963) (negative relationship with crime and use of marihuana).

[269] MAURER & VOGEL 242.

you smoke marihuana, the drug will only make you more so."[270] From the medical authoritative commentators: "There seems to be a growing agreement in the medical community that marihuana does not cause criminal behavior, juvenile delinquency, sexual excitement, or addiction. Therefore, while attempts to limit its use are appropriate, the hazards of use should not be exaggerated."[271]

The non-law enforcement authorities do not agree on the relationship between the use of marihuana and the use of narcotics. If there is a genuine progression from marihuana to heroin, for instance, then it would naturally follow that the use of marihuana may indeed be productive of the types of crimes committed by narcotics users to feed their habits. These crimes are almost invariably non-violent.[272] One view of the relationship is that marihuana habituation does not lead to the use of morphine, heroin, cocaine, or alcohol, and that the associated use of marihuana and narcotic drugs is rare.[273] Other authorities describe the use of marihuana as characteristically the first step to heroin addiction, especially among youngsters."[274] There is probably some truth to both positions, depending upon the individual user's psychological makeup and the environment. No progression equation can be made as a general rule, however:

> Case history material suggests that many identified heroin users have had earlier experiences with marihuana, but their "natural history" is also likely to include even earlier illicit use of cigarettes and alcohol. The evidence from our college students and utopiate and news articles is clear that many persons not in hemin-risk neighborhoods who experiment with marihuana do not "progress" to "hard" narcotics.[275]

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[270] *Id.*

[271] GOODMAN & GILMAN 3d 300.

[272] MAURER & VOGEL 234. There is no significant evidence that crimes of any sort are committed by opiate and barbiturate users while under the influence of their drugs because the effects of opiates are euphoric and the effects of barbiturates are stupefying and incapacitating. *Id.* This is in contrast to the alcoholic: "The alcoholic gets drunk, comes home, and beats his wife, but the opiate addict gets high, comes home, and his wife beats him." *Id.*

[273] GOODMAN & GILMAN 174; *accord*, La Guardia Report 307; Allentuck & Bowman 416.

[274] MAURER & VOGEL 113, 245.

[275] Blum Report 24.

2. The Plea for Judicial Review.

Considering that no natural or inevitable progression from marihuana to narcotics can be demonstrated, and drawing upon the foregoing authorities who suggest that at its *worst* the inhalation of "pot" is no worse than the ingestion of alcohol, which is well known to be addicting and physiologically harmful, legal commentators have pointed out that perhaps the judicial branch should act in the default of the legislative branch and declare the proscriptions of marihuana use unconstitutional.[276] Generally, several cases have provoked the commentators. With salient portions they are briefly reviewed, as follows:

In 1963, the Supreme Court, in the case of *Sherbert v. Verner*,[277] considered the concept of the necessity foz finding a "compelling state interest" before individual freedoms could be abridged by the state. Here, a Seventh Day Adventist was discharged from employment for refusal to work on Saturday, her Sabbath Day, and was refused unemployment compensation by the South Carolina Employment Security Commission because of her refusal, which had caused other employers not to hire her. The Commission found her disqualified for unemployment compensation because of her failure to accept suitable work. The Supreme Court held that this restricted the free exercise of her religion and found no "compelling state interest"[278] in enforcing the eligibility provisions that justified substantial infringement of her first amendment right. The Court said "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'."[279]

The Supreme Court discussed the concept of rational classification of acts with regard to the equal protection guarantees of the fourteenth amendment in *Skinner* v. *Oklahoma*" and

[276] For a more comprehensive analysis of the arguments to be presented, and from which the author has drawn, see Boyko & Rotberg, *Constitutional Objections to California's Marihuana Possession Statute*, *14 U.C.L.A.L. REV.* **773** (1967) ; Comment, *Substantive Due Process and Felony Treatment of Pot Smokers: The Current Conflict*, **2 GA. L. REV. 247** (1968); **Note,** *Marihuana Laws: A Need for Reform*, **22 ARK. L. REV.** 359 (1968). *See also* Oteri & Silverglate, *The Pursuit* of *Pleasure: Constitutional Dimensions of the Marihuana Problem*, 3 **SUFF. L. REV.** 55 (1968); Comment, *Marihuana and the* **Law:** *The Contitutional Challenge to Marihuana Laws in Light of the Social Aspects of Marihuana Use*, 13 **VILL. L. REV.** 851 (1968).

[277] 374 U.S. 398 (1963).

[278] *Id.* at 406.

[279] *Id.*, *citing* Thomas v. Collins, **323 U.S.** 516 (1945).

[280] 316 U.S. **535 (1942).**

McLaughlin v. Florida."' In *Skinner,* the Oklahoma Habitual Criminal Sterilization Act defined habitual criminals as persons convicted two or more times for crimes amounting to felonies involving moral turpitude and included larceny and larceny by fraud but expressly exempted embezzlement. This meant that under the act a chicken thief could be sterilized but an embezzler could not. The Court held that since the nature of the two crimes is intrinsically the same, and punishable in the same manner, there was a violation of the equal protection clause of the fourteenth amendment. The Court stated: "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[282] In *McLaughlin,* the Court struck down, for lack of rational classification, a Florida statute which made it a criminal offense for a white person and Negro of opposite sexes, not married to each other, to habitually live in and occupy in the nighttime the same room. The procedure for arriving at the decision was stated thusly:

> Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among members of the class defined by the legislature. The courts must reach and determine the question whether the classifications drawn in a state are reasonable in the light of its purpose—and in this case, whether there is an arbitrary and invidious discrimination between those classes covered by Florida's cohabitation law and those excluded.[283]

Since the statute did not prohibit similar cohabitation between members of the same race it was stricken for lack of rational classification.

In *Griswold* v. *Connecticut,*[284] the Supreme Court held that a state statute which makes it a criminal offense for a married couple to use contraceptives is invalid as violating their right of privacy. Two important notions were recognized by the Court. The first, which was obviously obscurely defined, is that there

[281] **379 U.S.** 184 **(1964).**
[282] **316** U.S. **535, 541 (1942).**
[283] **379 U.S. 184, 191 (1964).**
[284] **331** U.S. **470 (1965).**

are constitutionally protected "zones of privacy"[285] which may not be penetrated by the state. Secondly, the Court applied the rule of *NAACP* v. *Alabama,* 377 US. 288, **307,** that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[286]

It is, of course, difficult to consider these cases in any context unrelated to highly charged areas of religious, racial and procreational freedoms. However, the legal commentators assert that the principles these cases announce are just as valid in the area of private marihuana indulgence within the ordinary framework of the law.

The commentators urge that in the light of today's knowledge and scientific approach, the main reasons for suppression of the possession and use of marihuana, *viz.,* indirect suppression of addictive drugs and prevention of crime, are not—and never have been, for that matter—valid. Moreover, marihuana at its *worst* is no more dangerous than alcohol, and the failure to include alcohol within the statutory scheme of narcotics does not satisfy the equal protection standards in *Skinner* and *McLaughlin.* The burden of proof is on the Government not only to present evidence for justification of the exclusion of alcohol from the class of illicit narcotics, but to supply an adequate compelling state interest in violating the zone of privacy that would allow unabused private enjoyment of marihuana or to give it a more rational classification along with alcohol.

In this connection, it is pointed out that when the state imposes sanctions against individual choice some societal interests must be found to outweigh the initial interest in individual freedom of action. We cannot afford to treat individual freedoms lightly. The prohibition of the use of marihuana must reflect more than a popular distaste of middle class morality; it must

[285] A recent "zone" recognized by the Supreme Court is the right to possession of obscene material in the privacy of one's home. In invalidating a Georgia statute prohibiting private possession of obscene matter, the Court said: "Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits." Stanley v. Georgia, **394 U.S.** 557, **567 (1969).** The Court added, however, that this holding does not apply to the power to make possession of other items such as narcotics, firearms, or stolen goods a crime. **Id.** at **568.**

[286] **381** U.S. **470, 485 (1965).**

reflect the suppression of real dangers, and the considerations defining criminal conduct must be reflected in rational classifications. There is insufficient scientific evidence to suppress the simple use and possession of marihuana. Accordingly, it should be reclassified and placed in its rational category along with alcohol, our most regulated drug. The statutes controlling marihuana trafficking are adequate to prevent serious misuses, but legislative and police intrusions upon private use of marihuana are not justified.

> Judicial review of the factual premises of marihuana legislation is needed not because marihuana is necessary to modern life but because the legislatures have defaulted in their duty to avoid irrational considerations in defining criminal conduct. Private vice may be marihuana's only dispensation. For better or worse, however, we long ago made the choice to strike a balance between repression and protection of our vices. That balance should be accorded to the user of marihuana, just as it has been restored to the consumer of alcohol.[287]

In 1965, at the International Bridge in Laredo, Texas, federal agents discovered less than one-half ounce of marihuana on the floor and in the glove compartment of a car driven by Professor Timothy Leary. For his offenses, he was fined $30,000 and was sentenced, tentatively, to imprisonment for 30 years.[288] The Supreme Court agreed to adjudicate two issues: (1) whether a conviction for failure to comply with the transfer tax provisions of the law violated Leary's right against self-incrimination and (2) whether due process had been denied by the presumption that possession is sufficient evidence that Leary had knowledge that the marihuana was illegally imported or brought into the United States. The Court held for the appellant on the first count, finding a "real and appreciable'' hazard of self-incrimination because registration would subject him to prosecution under

[287] Boyko & Rotberg, *Constitutional Objections to California's Marihuana Possession Statute,* 14 U.C.L.A.L. REV. 773, 795 (1967).

[288] Leary v. United States, 385 F.2d 851 (5th Cdr. 1967), *rehearing denied,* 392 F.2d 220 *cert. granted,* 392 U.S. 903 *(1968).*

federal and state laws." Regarding the second issue, the Court announced the rule that "a criminal statutory presumption must be regarded as 'irnational' or 'arbitrary,' and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[290] Did Leary *know,* more likely than not, that the marihuana was imported or brought into the United States illegally? The Court said, "We find it impossible to make such a determination,"[291] and reversed the conviction.

F. *MILITARY OFFENSES*

The use, possession, land introduction of marihuana has been prosecuted as a military offense since about the time of federal legislation." While a dishonorable discharge has always been included as authorized punishment, sentences to confinement never did exceed one or two years[293] until the enactment of the Uniform Code of Military Justice in 1950, when the authorized maximum punishment to confinement was increased to five years,[294] as is authorized today."

For the benefit of the lay reader, it should be noted that Congress has provided in all of the punitive articles of the Uni-

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[289] Leary v. United States, 395 U.S. 6, 18 (1969). The Court bottomed the judgment on similar holdings in Marchetti v. United States, 39 U.S. 39 (1968) (statute requiring registration and payment of occupational tax on wagers invalidated as directed to a select group inherently suspect of criminal activities); Grosso v. United States, 390 U.S. 62 (1968) (statute required registration and imposed excise tax on proceeds from wagering); land Haynes v. United States, 390 US. 85 (1968) (prosecution for possession of unregistered weapon under National Firearms Ast, 26 U.S.C. § 5851 (1967)). *See* Sobeloff, ***The Marihuana Tax Act,*** 3 SUFF. L. REV. 101 (1968); Comment, ***The Marihuana Tax*** *and* ***the Privilege Against Self-Incrimination,*** 117 U. PA. L. REV. 432 (1968).

[290] Leary v. United States, 395 U.S. 6, 37 (1969). *See* 48 TEXAS L. REV. 493 (1970), wherein the case is made for retaining the former "rational connection" test for presumptions enunciated in Tot v. United States, 319 U.S. 463 (1943).

[291] Leary v. United *States,* 395 U.S. 6, 52 (1969).

[292] *See* text accompanying notes 165–166, *supra.*

[293] Marihuana offenses received specific treatment in the table of maximum punishments for the first time in 11949. *See* Manual for Courts-Martial, United States Army, 1949, para. 117*c.*

[294] Manual for Courts-Martial, United States, 1951, para. 127*c.*

[295] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev, ed.), para. 127*c.*

form Code of Military Justice, except in the cases of major crimes, where the punishmenit of death may be authorized or directed, genenally, for punishment "as a court-martial may direct,"[296] or, as in the case of narcotics and marihuana offenses, punishment "at the discretion of that court."[297] The Executive Order prescribing the particular Manual for Courts-Martial then provides the appropriate authorized maximum punishment for each offense. Courts-martial may adjudge *any* sentence, within jurisdictional limitations not pertinent here, *up to* the maximum sentence. There are no mandatory minimum sentences for narcotics or marihuana offenses as are found in the federal scheme. Without doubt, the military approach is humane, responsive, responsible, and adaptable, in comparison with the federal system.

VII. SELECTED AREAS OF INTEREST TO MILITARY LAWYERS

> It is becoming ever more impartant that the law be worthy of respect.[298]

A. *STATISTICS*

1. *The American Public.*

There are no available reliable statistics on the actual incidence of drug abuse in the United States. Its incidence is indicated largely by the number of convictions for one form of drug abuse or another. Even so, what has been made available to the federal authorities has been submitted on a voluntary basis. With regard to active opiate addicts, the Bureau of Narcotics provided a system for voluntary reporting by state and local authorities, but many of these agencies and many health and medical agencies have not participated.'" There are no statistics on how many

[296] UNIFORM CODE OF MILITARY JUSTICE art. 133.

[297] UNIFORM CODE OF MILITARY JUSTICE art. 134.

[298] Address by Professor Louis B. Schwartz, The Judge Advocate General's Conference, Charlottesville, Virginia, 9 October 1968. Professor Schwartz, Benjamin Franklin Professor of Law, University of Pennsysvania, is the Chairman of the President's Commission on Recodification of Title 18, United States Code. In his address, he equated "respect" with law that is "systematic, complete, and rational."

[299] PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 2 (1967) [hereinafter cited as TASK FORCE REPORT].

turn to narcotics for the first time each year.[300] In fact, there is a general consensus among criminologists about the unreliability of statistics on all types of crime."[301]

Regarding dangerous drugs, little is known, other than that their consumption has increased alarmingly and that there have been huge diversions into illicit channels.[302] The hallucinogens are not available for legitimate distribution to the public.[303] The actual prevalence of use of marihuana in the population is unknown, land data are considered unreliable because of rapid changes among types of users.[304] Our experts continue to increase their estimates dramatically, in the millions.[305]

Noting that only a federal health agency could promote full cooperation from state and local health, welfare, and medical sources, the President's Advisory Commission on Narcotic and Drug Abuse of **1963** recommended that the Secretary of Health, Education, and Welfare establish a cooperative national reporting system to "collect, collate, and analyze data on all forms of narcotic and drug abuse so as to obtain an accurate assessment of the problem."[306] This key recommendation was not followed, and there remains a lamentable lack of information, even on the progress of treated addicts land their percentage of relapses.[307]

2. *The Military Services.*

In 1967, the Assistant Secretary of Defense (Manpower) appointed a Department of Defense Task Force on Narcotic and Drug Abuse, to "address the use of marihuana and its relation to the broad problem of drug traffic, including all drugs having

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300 PRESIDENT'S COMMISSION **22.**

301 BARBER 133.

302 ***See*** text accompanying notes 1821184, ***supra.***

303 TASK FORCE REPORT **7.**

304 Blum Report **24.**

305 Dr. Stanley F. Yolles, former Director, National Institute of Mental Health, estimated in 1968 that four to five million persons in the United States have **used** marihuana at least once. ***Hearings Before the Subcomm. on Public Health and Welfare*** of ***the House Comm. on Interstate and Foreign Commerce,*** 90th Cong., 2d Sess. 177 (1968). **A** year later, he said, **"A** ***con***servative estimate of the number of persons in the United States, both juvenile and adult, who have used marihuana, at least once, is about 8 million and may be as high as 12 million people." ***Hearings Before the Subcomm. to Investigate Juvenile Delinquency*** of ***the Senate Comm. on the Judiciary,*** 91st Cong., 1st Sess. **267** (1969).

306 PRESIDENT'S COMMISSION **29.**

307 W. ELDRIDGE, NARCOTICS AND THE LAW **29 (2d** ed. 1967).

significant impact on the Armed Forces."[308] The Task Force has functioned on a continuing basis. Reports by the various Departments are made periodically, as required. The following statistics give an overview of the situation, based upon service-wide investigations of drug abuse cases:[309]

CASES INVESTIGATED

HARD NARCOTICS	*World-wide*	*Vietnam*	*Conus*
CY 1965	269	3	70*
CY 1966	521	39	275
CY 1967	573	89	274
CY 1968	940	132	608
CY 1969	1,871	243	1,479
MARIHUANA			
CY 1965	522	43	284*
CY 1966	3,096	503	1,892
CY 1967	5,536	1,267	3,493
CY 1968	11,507	3,225	6,335
CY 1969	19,139	6,490	8,809
DANGEROUS DRUGS			
CY 1965	153	1*	126*
CY 1966	917	20	648
CY 1967	1,532	34	1,144
CY 1968	1,594	103	1,078
CY 1969	3,357	833	1,849

*Navy and Marine Corps figures not available.

RATES PER THOUSAND

HARD NARCOTICS	*World-wide*	*Vietnam*	*Conus*
CY 1965	.10	.03	#
CY 1966	.16	.14	.13
CY 1967	.17	.19	.13
CY 1968	.32	.32	.41
CY 1969	.67	.59	.89
MARIHUANA			
CY 1965	.19	.49	#
CY 1966	.98	1.80	.89
CY 1967	1.63	2.69	1.62
CY 1968	4.84	7.99	4.65
CY 1969	7.60	14.77	6.21

Complete statistics not available.

[308] Memorandum from Alfred B. Fitt, Assistant Secretary of Defense (Manpower) for Deputy Undersecretaries of the Military Departments (Manpower), 25 Oct. 1967.

[309] "Cases" do not indicate the number of people involved in each. Statistics obtained from the Task Force, which has breakouts of this and related information.

DANGEROUS DRUGS	*World-wide*	*Vietnam*	*Conus*
CY 1965	.06	#	#
CY 1966	.29	.07	.31
CY 1967	.45	.07	.54
CY 1968	.50	.20	.69
CY 1969	1.21	.78	1.21

Complete statistics not available.

The following table represents a yearly total of inductees rejected for drug abuse during the period 1964–1969:

PERSONS DISQUALWIED FROM THE ARMED FORCES FOB DRUG ABUSE CY 1964–1969

CY 1964	391
CY 1965	631
CY 1966	834
CY 1967	1,064
CY 1968	1,624
CY 1969	2,633

The major drug of abuse, which is not treated in the foregoing statistics, undoubtedly continues to be alcohol.

B. *OTHER DIRECTIONS: NARCOTICS ABUSE*

1. *General.*

It is difficult to justify the course of action Congress has taken in legislation with regard to punishment of narcotics addicts. There is, indeed, some room for the charge of overreaction when juxtaposing the more rational, measured response of the military.

While acknowledging the fact that narcotics addiction is a disease, Congress has unfortunately by legislation isolated a group of citizens with the result that many have become felons. At the same time, the Government has failed to find a way effectively to rehabilitate these pitiful unfortunates. The efforts of the Public Health Service Hospitals in Lexington and Fort Worth have been notable failures.[310] The response of consistently increasing punishment and considering "isolating" and "quarantining" drug addicts if they cannot be cured portends the "final

[310] BARBER 155; *accord*, PRESIDENT'S COMMISSION 53 (no accepted satisfactory course of treatment has yet been accomplished); *cf.* Lang, *The President's Crime Commission Task Force Report on Narcotics and Drug Abuse: A Critique of the Apologia*, 48 N. DAME L. REV. 847 (1967).

solution" approach, a result no one could seriously consider appropriate.

There is a need to re-examine the premise that controlled maintenance of an addict is "immoral" and thus illegal. It must be recognized that the crime of use of narcotics is a unique crime involving a unique intent and one totally unrelated to the concept of *mens rea.* The addict knows that he will be "punished" if he does *not* commit his "crime"; moreover, without "cure" he is the protagonist of compulsion.

2. *Civil Approaches and Recommendations.*

a. Controlled maintenance. Within hours after the arrest of the first four pharmacists and six physicians on 8 April 1919, hundreds of addicts who had been deprived of their sources in New York City beseiged the Health Department for relief; the next day, the first clinic was opened to supply these needs."' On government initiative, about 40 similar clinics were set up, not intended as a means of curing addiction, but as emergency devices to prevent exploitation of addicts by drug peddlers."' The clinics were closed in **1923** for a variety of reasons, the actual one probably being poor administration, although it has been "observed" that legal administration of drugs did not abolish contraband drug traffic and that the clinics were based "on the false premise that addicts are better off with drugs and that rehabilitation efforts are futile."""[311]

There is basis in fact that controlled maintenance is possible. "There is a recognition by the British medical community that there is such a thing as a stabilized addict, *i.e.,* patients who can maintain otherwise relatively normal lives while being given an appropriate dose which may be increased over the years."[314] The addict simply goes to a doctor, confides in him, and is cared for. There is no social disgrace and no criminality; there is little expenditure of public funds, no large bureaucracy, and no self-perpetuating narcotic subculture.[315] There are no current figures, but there are estimated to be less than 600 addicts in England.[316]

[311] Howe, ***An*** *Alternative Solution. to the Narcotics Problem,* in LAW AND CONTEMP. PROB. 139, at 132 (1957).

[312] LINDESMITH 140.

[313] MAURER & VOGEL 8.

[314] GOODMAN & GILMAN 3d 308.

[315] LINDESMITH 169.

[316] *Id.* at 166. This raises an interesting element. There appears to be a **marked** difference in the susceptibility of the population to addiction between the United States and England, which is considered cultural. *See* MAURER & VOGEL 226; PRESIDENT'S COMMISSION 59.

The President's Advisory Commission on Narcotic and Drug Abuse of 1963 made a significant recommendation that has not been specifically followed, but appears to be increasingly acknowledged. The Commission recommended "that federal regulations be amended to reflect the general principle that the definition of narcotic drugs and legitimate medical treatment of a narcotic addict are primarily to be determined by the medical profession."[317]

The Commission also stated that it strongly believed "that properly designed experiments should be initiated to explore whether ambulatory clinics for the dispensing of maintenance doses to addicts are feasible."[318]

In 1965 Dr. Vincent P. Dole and Dr. Marie Nyswander, while treating a group of high-dosage heroin mainliners, all of whom had histories of failures with withdrawal treatment, accidentally discovered the process of substituting methadone"'"for heroin.[320] It was found that oral administration of high dosages of methadone effectively blocked their heroin "hunger,"[321] *i.e.*, induced a cross tolerance so that even a massive "mainline fix" of heroin would have no effect. Thereafter, addicted as surely to methadone as, formerly, to heroin, the addict could be restored to a socially acceptable and useful status, receiving daily maintenance doses. The reports of their successes continue,[322] and while there has been some mild skepticism in medical circles,[323] it has been confidently predicted that methadone will be substituted for heroin in about one-half of all addict cases within five to ten years, under government supervision."

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317 PRESIDENT'S COMMISSION *57.*

318 *Id.* at **58.**

319 See **text** accompanying notes **46, 56,** ***supra.***

320 BARBER **156.**

321 ***Id.***

322 TIME, 17 Jan. 1969, at *70; **see** also,* Carter, ***Methadone "Miracle" Hailed by Addicts,*** The Washington Post, **4** Mar. 1969, § C, at **1, col.** 2; Gay, *Drug* ***Addicts in*** *Baltimore* ***Seek Aid Here,*** The Evening Star (Washington, D.C.), **22** Jun. 1970, § B, at **1,** col. **5.**

323 Cole, *Report* ***on the Treatment*** *of Drug* ***Addiction,*** in TASK FORCE REPORT 299, at 141, wherein he states, "As managed by Dole and Nyswander, their program has a certain missionary zeal and espirit de corps which may be partially responsible for their claims of almost universal success."

324 Interview with Michael P. Rosenthal, Professor of Law, The University of Texas, in Austin, Texas, 31 Dec. 1968. Professor Rosenthal was a consultant to the President's Commission on Law Enforcement and Justice, and was referred to by Professor Schwartz as "the best informed man in the country [on narcotics and drug abuse law, and who] is engaged in a study for us." Letter from Professor Louis B. Schwartz to the author, 16 **Dec. 1968.**

b. Criminal punishment. If we can expect meaningful medical reentry into the problem of narcotic addiction[325] can we also hope for rational re-evaluation of the laws providing stringent mandatory minimum sentences and denial of suspended sentences, parole, and probation?

In 1956, Governor Robert J. Meyner vetoed proposed legislation providing for mandatory minimum sentences for narcotics offenses in New Jersey, pointing out that where the punishment provided is shocking, officials charged with executing the laws will avoid the legislative mandate; prosecutors will be reluctant to prosecute; grand juries will not indict; petit juries will not convict; judges will invent fictions, thus weakening the law for later criminals; defendants will necessarily defend; potential informers will not inform; and, where suspension is allowed for first offender6 but the mandatory minimum does not fit the crime, judges will suspend the whole sentence; and in sum, justice to the individual is not effected.[326]

The 1963 President's Commission recommended that discretion in sentencing be returned to the courts and, regarding the adverse results of the present scheme, said: "They have made rehabilitation of the convicted narcotics offender virtually impossible . . . there is little incentive for rehabilitation where there is no hope of parole . . . moreover, parole would provide for extensive supervision of the narcotic abuser following his release from prison."[327]

It is well known by law enforcement officials that the top members of the criminal cartels do not handle and probably never see a shipment of heroin; they are protected by a code of silence that meets with swift retribution when violated.[328] It is only the street peddlers, who are often addicts themselves, and the addicts that these laws are reaching. When a higher member of the heirarchy is apprehended and convicted, there is no reason to believe that the bench would abdicate its responsibility for tailoring the punishment to fit the crime.

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[325] Professor Rosenthal characterizes a now almost traditional reluctance on the pant of the medical professionals to become involved as showing signs of encouragement; moreover, the traditional position of the Federal Bureau of Narcotics has been considerably ameliorated, recently. Interview, *supra* note 324.

[326] State of New Jersey, Executive Dep't, Assembly Bill No. 488, Veto Message of Gov. R. J. Meyner, p. 3 (mimeographed, 28 Jun. 1956), *quoted* in LINDESMITH 29–32.

[327] PRESIDENT'S COMMISSION 40.

[328] TASK FORCE REPORT 7.

The President's Commission of Law Enforcement and Administration of Justice of 1967 also recommended that discretion in sentencing be returned to the courts[329] and, further, that additional Bureau of Narcotics personnel be authorized to "be used to design and execute a long-range intelligence effort aimed at the upper echelons of the illicit drug traffic."[330]

3. The Military Approach.

The military framework for dealing with narcotics offenders is considered adequate. Concerning addiction, its treatment, and rehabilitation, the following Department of Defense policy is stated: "It is not within the mission of the Military Departments to provide definitive medical care to members on active duty requiring prolonged hospitalization who are unlikely to return to duty."[331] Moreover, for members who clearly demonstrate that they are unqualified for retention, administrative discharge by reason of unfitness is authorized."[332]

Military lawyers would do well to keep this policy in mind when advising commanders on whether to prefer charges at all for acts of addiction. Unless a highly aggravated crime has been perpetrated, it would appear preferable to explore rehabilitation potential of the offender with a view toward possible administrative separation from the service.

C. OTHER DIRECTIONS: DANGEROUS DRUG ABUSE

1. ***A Military Offense.***

As has been noted, the use, sale, transfer, or introduction of dangerous drugs except for authorized medical purposes is prohibited by Army Regulation.[333]

Three questions are raised by this new offense, punishable as a violation of a lawful general regulation. They concern the rationale of the proscription, the element of knowledge, and the punishment for its commission.

a. Rationale of the proscription. The Drug Abuse Control Amendments of 1965 did not attempt to regulate simple possession and use by the ultimate consumer, but sought to stem the diversion of dangerous drugs into illicit channels. Thus, all con-

[329] *Id.* at 12.

[330] *Id. at* 9.

[331] Dep't of Defense Directive No. 1332.18, sec. V.E.1 (9 Sep. 1968).

[332] Dep't of Defense Directive No. 1332.14, sec. V.A., VII.I.3 (20 Dec. 1965).

[333] See text accompanying notes 222–223, *supra.*

cerned with manufacture and distribution were held to stock maintenance and record accountability in order to control legitimate distribution."[334] Making crimes of conduct such as self-medication was considered questionable, since it is (1) widespread; (2) although undesirable, not a significant deviation from what is normal in our society; (3) difficult to enforce; (4) likely to make criminals out of too many people; moreover, such a proscription (5) would not benefit the user; (6) might not be taken seriously; and (7) could revive many of the old problems associated with prohibition.[335]

Nonetheless, because of the pressure of law enforcement agencies, in 1968 simple possession and use without proper authority was prohibited in order to ease the burdens of law enforcement officers in apprehending traffickers.[336] Congress did specifically and emphatically indicate that that was the overriding reason for the 1968 amendments and that incidental transfers between otherwise law abiding citizens should not be made the subject of prosecution.[337]

The Military Departments should state the same policy. We already have a punishment scheme designed to act upon the possessor or user who as a *result* of such use and possession incapacitates himself or otherwise hinders the military mission. We must be as cautious with the careers of our military personnel as we are with the careers of the youth in the general society.

b. The element of knowledge. It is important to distinguish the knowledge requirements of the military offense. While there is no requirement that knowledge of a general regulation be alleged or proved,[338] just as with use or possession of marihuana or a habit-forming narcotic drug, if the issue of innocence (*e.g.*, lack of knowledge) of possession or use is raised, a showing of knowledge becomes a requirement of proof.[339]

c. *Punishment for the offense.* What is the punishment authorized for this offense? As was discussed, the Court of Military Appeals held in *United States v. Turner*[340] that the punishment under article 134 of the Code for misuse or abuse of dan-

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[334] *See* text accompanying notes 185-190, *supra.*

[335] Rosenthal, *Dangerous Drug Legislation in the United States: Recommendations and Comments,* 45 TEXAS L. REV. 1037, 1101–103 (1967).

[336] *Cf.* text accompanying notes 195-210, *supra.*

[337] *Id.*

[338] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 92.

[339] *Id.* paras. 154*a*(4), 213*b*.

[340] 18 U.S.C.M.A. 55, 39 C.M.R. 55 (1968).

gerous drugs was not provided for specifically in the Code or Manual, and that the punishment authorized was that provided under the United States Code or the Code of the District of Columbia, whichever is lesser.[341]

What if the offense is charged as violation of a lawful general regulation, under article 92(1) of the Code? In 1969 a Court of Military Review, in *Watson*,[342] considered two specifications under article 92 for possession and sale of amphetamine. The accused argued that had he been charged under article 134 the maximum punishment allowed would be one year confinement for each specification instead of two years confinement for each specification under article 92, and this was a manifest injustice. The court dismissed accused's contention, holding that it was not the choice of the accused but that of the Government to decide under which article to prosecute, and the maximum punishment for violation of a lawful general regulation is two years confinement for each offense."[343]

It is submitted that the maximum punishment is *not* two years confinement in all cases and may be less, applying the new "footnote 5," which provides, in pertinent part:

> This punishment does not apply in the following cases: (1) If in the absence of the order or regulation which was violated or not obeyed the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed in this table.[344]

Thus, the confinement authorized for an accused found drunk on duty, such intoxication being caused by a dangerous drug,[345] would not be more than nine months.[346] With respect to ordinary intoxication offenses, the maximum confinement authorized would be not more than three months in all cases, except when occurring in command, quarters, station, or camp, when it would

[341] *See* text accompanying notes 213–220, *supra*.

[342] United States v. Watson, 40 C.M.R. 571 (A.B.R. 17 Feb. 11969).

[343] The same panel of the Court of Military Review restated this position in a later case, holding that the similarity of the article 134 offense would not limit the maximum for the article 92 violation. However, on further appeal the Court of Military Appeals refused to pass on the issue, reversing the case with regard to the charges on the basis of no probable cause shown for the search that uncovered the dangerous drugs. United States v. Ellwood, 19 U.S.C.M.A. 376, 41 C.M.R. 376 (1970).

[344] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 127*c*.

[345] *Id.* para. 191.

[346] *Id.* para. 127*c*.

be one month;"[347] and in none of these simple cases would a punitive discharge be authorized."[348]

It is indeed paradoxical to state that if one abuses dangerous drugs he should make certain that if apprehended for their illegal use he should be "high" in order to avoid a heavier possible punishment upon conviction. But such would appear to be the case, anticipating that the offense would be charged under article 92.

This anomaly was brought about by the efforts of the drafters of the 1969 Manual to reword "footnote 5" in order to eliminate the "gravamen of the offense" approach heretofore used by the Court of Military Appeals.[349] It is apparent that the Court's approach would solve the problem presented here. However, it would also appear that since the maximum punishment far possession, use, transfer and sale of dangerous drugs is now recognized as an offense under article **134,** the punishment applicable under that article, *viz.*, one year confinement, should be applicable in all cases charged under article **92.** Considering the basic approach, this would merely be applying the maximum punishment prescribed for another offense which is closely related to the one set out as a violation of article **92;** and although it could be a more severe punishment under article 134 than specifically prescribed otherwise in the table of maximum punishments it might be justified in the interest of uniformity.

In either case, it is submitted that there is excessive ambiguity for these considerations. If the Court of Military Appeals does not choose to change its precedents and retains the "gravamen of the offense" approach, the juridical options are too many for more than ad hoc settlement. Clearly, this would be a faulty jurisprudential approach for it would again, paradoxically, make these determinations solely, in effect, for the court of last resort. On the other hand, applying the new "footnote 5" in the context of drug abuses under article **134** might require too much

[347] *Id.*

[348] *Id.*

[349] "The footnote becomes much more sensible if interpreted to require a comparison of the gravamen of the offense set out in the specifications with the charge it is laid under and other articles under which it might have been laid." United States v. Buckmiller, 1 U.S.C.M.A. 504, 506, 4 C.M.R. 96, 98 (1952); *accord,* United States v. Showalter, 15 U.S.C.M.A. 410, 35 C.M.R. 382 (1965) United States v. Porter, 11 U.S.C.M.A. 170, 28 C.M.R. 394 (1960); United States v. Alberico, 7 U.S.C.M.A. 757, 23 C.M.R. 221 (1957); see Analysis of Contents, Manual for Courts-Martial, United States, 1968, para. 127*c* (draft),

language straining to get around the words "prescribed in this table"[350] and could also set unworthy precedent.

d. Recommendation. Since "footnote 5" does not apply to article 134, because of the sentencing disparities pointed out, and since *Turner* uniformly covers the field, it is recommended that paragraph 18.1 of Army Regulation No. 600–50 be rescinded.

2. *Other Possibilities.*

It is the opinion of Professor Rosenthal that the present federal punishments authorized for simple use, possession and transfer not related to trafficking of dangerous drugs are too severe and khat it would be preferable to make these prohibitions *civil* violations carrying no possibility of deprivation of liberty.[351] He envisions a system of punishment by fines for "infractions," *i.e.*, first offenses which would not be recorded, second offenses would be classified as petty misdemeanors, and third and subsequent offenses would be misdemeanors only.[352] Previously, Professor Rosenthal favored no punishment at all for these offenses,'" however, he now considers it appropriate because there has been a tremendous rise in the incidence of use, and users are also selling or giving drugs away.[354]

D. *OTHER DIRECTIONS: MARIHUANA ABUSE*

> As a lieutenant colonel in the U.S. Army, I recently witnessed the court-martial of several enlisted men, who each received two years in prison and bad conduct discharges. Their only mime was smoking marijuana.
>
> To speak out againwt this travesty of justice would jeopardize my own career, but I wish good luck to PLAYBOY and to others who are fighting creeping Big Brotherism in America.
>
> (Name and address withheld by request)[355]

It is clear that the only thing that marihuana has had in common with narcotics is the punishment provided by Congress

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[350] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (Rev. ed.), para. 127*c*.

[351] Rosenthal 1121.

[352] Interview, *supra* note 324.

[353] Rosenthal, *Proposals for Dangerous Drug Legislation*, in PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 106 (1967) [hereinafter cited as Rosenthal, TFR].

[354] Interview, *supra* note 324.

[355] Playboy, Sep. 1968, at 224.

for its possession, use, and transfer. There is no reasonable justification for continuing these punishments, and indications grow daily that sweeping revisions will occur. Parole rights for federal marihuana violators have already been restored.[356]

It cannot realistically be expected that the Supreme Court is going to step in and, even temporarily, "legalize" marihuana through the process of judicial review. Contrary to the impressions of some, this was not the result of the holding in *Leary v. United States.*[357]

The President's 1963 Commission began laying the groundwork for amelioration of the marihuana laws when it declared "This commission makes a flat distinction between the two drugs and believes that the unlawful sale or possession of marihuana is a less serious offense than the unlawful sale or possession of an opiate."[358] Professor Rosenthal recommended to the President's 1967 Commission the following:

> 1. Both the Federal Government and the Stakes should regulate marihuana like other dangerous drugs rather than like narcotics. The Federal Government should regulate it under the Drug Abuse Control Amendments, and the States should control it under dangerous drug laws essentially based on the Federal amendments and the proposals herein.
>
> 2. Neither use nor simple possession of marihuana should be the subject of criminal prohibition by either the Federal Government or the States. Even if marihuana is not to be regulated under the Federal drug abuse control amendments, possession with intent to sell or otherwise dispose of it should be a federal cnime, but 26 U.S.C., section 4744(a), prohibiting obtaining or otherwise acquiring the drug without paying the transfer tax and providing that proof of possession coupled with failure after reasonable demand to produce a written order is "presumptive evidence of guilt," should be repealed.
>
> 3. Both Federal and State penalties for offenses relating to marihuana should be the same as penalties for offenses relating to other dangerous drugs. Existing mandatory minimum penalties and restrictions on probation, suspended sentences and young adult treatment should be repealed.[359]

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[356] Act of 8 Nov. 1966, Pub. L. No. 89–793, tit. V, § 502, 80 Stat. 1449.

[357] 395 U.S. 6 (1969). The presumption of illegal importation was not disturbed by the Court. Thus, federal prosecutions will continue if it is found "more likely than not" that a defendant knew that the substance was illegally imported. Otherwise, the federal authorities will merely relinquish jurisdiction to the states, all of which have simply made possession of marihuana a crime. It should also be noted that the Supreme Court remained receptive with regard to making possession of marihuana a crime, stating, "We are constrained to add that nothing in what we hold today implies any constitutional disability in Congress to deal with marihuana traffic by other means." Leary v. United States, 395 U.S. 6, 53 (1969).

[358] PRESIDENT'S COMMISSION 42.

[359] Rosenthal, supra note 353, at 126.

The Commission merely responded by noting that "with the possible exception of the 1944 La Guardia report,[360] no careful and detailed analysis of the American experience seems to have been attempted," and recommended that "The National Institute of Mental Health should devise and execute a plan of research to be carried on both on an intramural and extramural basis, covering all aspects of marihuana use."[361]

Such a plan is indeed proceeding. In March 1968, the former Director of the National Institute of Mental Health stated that studies of marihuana, to be conducted through 1970, would cost approximately $5.25 million, and estimated that "about two million high school and college students *questioned* have had some experience with marihuana."[362]

Professor Rosenthal has receded from his position that neither the use nor simple possession of marihuana should be prosecuted.[363] He now views the matter similarly to use and simple possession of dangerous drugs.[364]

It may be that, one day, "pot" will be legalized to some degree, but it is presently doubtful.[365] The military services should

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[360] *see* note 244, *supra*.

[361] TASK FORCE REPORT 14.

[362] Statement by Stanley F. Yolles, M.D., before the Subcommittee on Juvenile Delinquency of the Committee on the Judiciary, the U.S. Senate, 6 Mar. 1968, at 13 (emphasis added). Dr. Yolles also pointed out that the surveys showed that 50 per cent of those who have tried marihuana experienced *no* effects. He stated: "This finding may be a function of at least four factors: (1) the agent may not have been potent, (2) frequently effects are seen only after repeated use, (3) the expectation of the user has a significant effect on what he experiences, (4) the social setting in which use takes place has an effect on the response." *Id.* For a recent account of the same phenomenon, see TIME, 20 Dec. 1968, at 53. *See also Kalb, Marihuana Research: "Grass" Takes Science Trip,* The Sunday Stair (Washington, D.C.), 12 Jul. 1970, § A, at 1, col. 6.

[363] Interview, *supra* note 324.

[364] *Id.; see* text accompanying notes 351–354, *supra*. At the interview Professor Rosenthal stated that in this area he had also revised his thinking because of new evidence of organized criminal intervention.

[365] There are treaty considerations, now. On 8 May 1967, the Senate consented to a Multilateral Single Convention on Narcotic Drugs, which for the first time brings marihuana under international control. [1967] U.S.T. 1407, T.I.A.S. No. 6298, 50 U.N.T.S. 204. See Rosenthal, *Dangerous Drug Legislation in the United States: Recommendations and Comments,* 45 TEXAS L. REV. 1037, 1121, n.424 (11967). Professor Rosenthal believes that the treaty would not prohibit legalization of marihuana for personal use only. Rosenthal, *A Plea for Amelioration of the Marihuana Laws,* 47 TEXAS L. REV. 1359, 1373, n.58 (1969). The Nixon administration has sponsored legislation that would directly prohibit simple possession of marihuana. *See* S. 2637, 91st Cong., 1st Sess. (1969); S. 2657, 91st Cong., 1st Sess. § 8 (1969).

heed the possibility of legalized "pot," however. We need to re-examine the concepts of "military custom" and "conduct prejudicial to good order and discipline" in a rapidly changing world.

In the July 1943 issue of "Military Surgeon," the editor, Colonel John M. Phalen, addressed "The Marihuana Bugaboo," as follows:

> The smoking of the leaves, flowers, and seeds of *Cannabis sativa* is no more harmful than the smoking of tobacco or mullein or sumac leaves. . . . The legislation in relation to marihuana was ill-advised. . . it branded as a menace and a crime a matter of trivial importance. . . . It is hoped that no witch hunt will be instituted in the military service over a problem that does not exist.[866]

If simple possession and use of pot is legalized, the Military Departments may have to make some concessions. An exploration of permissible use based upon time and geographical considerations should be undertaken. For instance, use should not be condoned while the person has duties to perform; this would be industry's approach, as well. Nevertheless, there would be no reason based upon good order and discipline for prohibiting use while the member is on pass or leave, unless, as within a war zone, he would be subject to immediate recall. Moreover, use would be restricted, possibly excluding weekends, while members are in the attendance at service schools, or are hospitalized.

State laws would have to be considered, as, although it would be expected that the states would follow federal leadership in receding from a punitive position on simple possession and use of marihuana, such need not necessarily be the case. In states which continued to prohibit marihuana use and possession, for off post violations the state courts would have exclusive jurisdiction. In the meantime, it is recommended that action be taken to reduce the authorized punishment for possession of marihuana to not more than one year, recognizing marihuana as merely a dangerous drug, in accord with the holding in *Turner*;[867] and that greater emphasis be placed on separation from the service in all cases by non-punitive administrative discharges.

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[866] Lindesmith, *The Marihuana Problem: Myth or Reality?*, in THE MARIHUANA PAPERS 58 (D. Solomon ed. 1968). This quotation is included, not necessarily for authority, but in deference to the climate of medical opinion at the time. Cf. text accompanying note 271, *supra*.

[867] See text accompanying notes 213–220, *supra*.

VIII. CONCLUSION

If the opiates are drugs of retreat, the dangerous drugs are drugs of rebellion, directed toward a dynamic, impersonal society with a dallar-oriented technology and constantly changing concepts of time, space, communications, achievement, and cybernetics. The facts must be recognized that we are a drug-oriented society, and that drug abuse is a relative concept. It is the role of the military lawyer to recognize these facts and to educate the commander.

Let us temper our thinking and our judgments with concern over the basic question to be answered: Whether, in response to a rising trend in the use of drugs, we are going to keep creating new classes of criminals? We should also ponder and consider that the young drug takers of today will also be among the guardians of tomorrow's morality and values.

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[368] On 3 November 1970, the Washington, D.C. ***Evening Star*** announced a new Department of Defense policy towards military drug users. Evening Star, 3 Nov. **1970,** at A1, cols. **1–2,** and **A6,** col. **4.** Although prosecutions are not ruled out, the emphasis is placed on medical treatment and rehabilitation for drug users who voluntarily **seek** treatment. **A** medical opinion **must** be gotten before disciplinary action is taken. Also, the duties of former LSD users may be restricted because of the recurring hallucinations caused by the drug. Finally, the number of personnel dealing with drug problems is to be increased and educational programs concerning drug abuse are to be stepped up.

CONSPIRACY*

By Major Malcolm T. Yawn**

This article examines the federal and military conspiracy statutes and case law. Within this framework, the author analyzes the elements of the offense: agreement, specific intent, and overt act; also the problems which arise when one conspirator is convicted and another acquitted; the special rules of evidence used in conspiracy cases; the problems of joint trials; and the rules for determining when a person has withdrawn from a conspiracy. The author notes that conspiracy practice somewhat favors the prosecution, and cautions prosecutors and judges to be alert for misuses of conspiracy charges.

I. INTRODUCTION

Conspiracy is "the darling of the modern prosecutor's nursery,"[1] and has attracted the comments and criticisms of many legal writers.[2] It has no doubt become a very important weapon in prosecuting criminal actions where more than one person is involved. Its use has led the late Mr. Justice Jackson in a concurring opinion in *Krulewitch v. United States*[3] to say:

> The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

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1 Harrison v. United States, 7 F.2d 59, 263 (2d Cir. 1925).

2 *See*, e.g., Arens, *Conspiracy Revisited*, 3 BUFFALO L. REV. 242 (1953); Goldstein, *The Krulewitch Warning: Guilt by Association*, 54 GEO. L. J. 133 (1965); Klein, *Conspiracy — The Prosecutor's Darling*, 24 BROOKLYN L. REV. 1 (1957); Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159 (1954); Pollack, *Common Law Conspiracy*, 35 GEO. L. J. 328 (1947); Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922); *Comment, Developments in the Law — Criminal Conspiracy*, 72 HARV. L. REV. 920 (1969).

3 336 U.S. 440 (1949).

> The modern crime of conspiracy is so vague that it almost defies definition. . . .
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> . . . .
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> . . . [T]he conspiracy doctrine will incriminate persons on the fringe of offending who would not be guilty of aiding and abetting or of becoming an accessory. . . .
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> . . . .
>
> When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed.
>
> . . . .
>
> A codefendant in a Conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on i'ts Own merits in the minds of jurors who are ready to believe that birds of a feather have flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into amusing or contradicting each other, they convict each other.[4]

The Government earned Justice Jackson's warning in this case when it presented evidence of a statement made by the accused's co-conspirator to a witness more than six weeks after the object of the conspiracy had been accomplished. This separate concurrence by Justice Jackson was later cited with approval by the United States Supreme Court in a unanimous decision in *Grunewald v. United States*,[5] and by the United States Court of Military Appeals in *United States v. Beverly*:[6]

> We cannot leave this matter without expressing our concern over the fact that we have noticed an increasing trend in the military to charge, in addition to the substantive offense, the crime of conspiracy where two or more accused are believed to have committed an offense in concert. . . .

[4] *Id.* at 445–54. *See also* Sayre, *Criminal Conspiracy*, 35 HARV. *L.* REV. 393 (1922), wherein he stated: "A doctrine so vague in its outlines and uncertain in its fundamental nature as a criminal conspiracy lends no strength to the law; it is a veritable quicksand of shifting opinion and ill-considered thought."

[5] 353 U.S. 391 (1957). The court also warned it "will view with disfavor attempts to broaden the already pervasive and widesweeping nets of conspiracy prasecutions." *Id.* at 404.

[6] 14 U.S.C.M.A. 468, 34 C.M.R. 248 (1964).

. . . .

In a well reasoned and well documented opinion, he [Justice Jackson] severely critizes attempts to imply, presume or construct a conspiracy, except as one may be found from the evidence. . . .

. . . We believe the military would be well advised to heed the comments of the eminent jurist and especially his closing sentence. "Few instruments of injustice can equal that of implied or constructive crimes. The most odious of all oppressions are those which mask as justice."[7]

Additionally, most of the criminal law casebooks published since *Krulewitch* have contained citations and verbatim restatements of Justice Jackson's comments.*

This article will briefly examine the crime of criminal conspiracy as a violation of the *Uniform Code of Military Justice.*[9] Since there has not been a great number of conspiracy cases decided by the United States Court of Military Appeals, considerable emphasis is placed upon federal decisions in this area. Although the general federal conspiracy statute" and the military conspiracy statute" are not worded exactly the same, they are near enough alike to consider federal treatment of the crime in this article.

II. GENERAL

The law of criminal conspiracy makes each conspirator responsible for any criminal act committed by any other conspirator, so long as it is within the scope of the agreement, even if there is no personal participation or assistance in the commission of the prohibited act.[12] Additionally, conspiracy to commit an offense

[7] *Id.* at 473, 34 C.M.R. at 253.

[8] Goldstein, *The Krulewitch Warning: Guilt by Association,* 54 GEO. L. J. 133, 134 (1965).

[9] 10 U.S.C. §§ 801–940 (1964) [hereinafter called the Code and cited as UCMJ].

[10] 18 U.S.C. 371 (1964): "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

[11] UCMJ art. 81: "Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an aot to effect the object of the conspiracy, be punished as a court-martial may direct."

[12] *E.g.,* Nye & Nissen v. United States, 336 U.S. 613 (1949); Pinkerton v. United States, 328 US. 640 (1946); United States v. Rhodes, 11 U.S.C.-M.A. 735, 29 C.M.R. 55r (1960).

and the offense itself are separate crimes, and the accused may be punished for both.[13] Acquittal of either the conspiracy or the substantive crime does not bar prosecution for the other, because conspiracy is "separate and distinct" from the crime contemplated and the offenses do not merge."

Conspiracy is an offense at common law, guilt being incurred by the agreement itself, there being no necessity for an overt act to complete the crime.[15] It should be noted that there is no federal common law of crimes; an offense is not punishable in United States courts unless allowed by a specific act of Congress. The courts will turn to the common law, however, for general guidance and definition of terms. Most federal courts, including the United States Court of Military Appeals, do just that.'"

111. ELEMENTS OF THE OFFENSE

The offense of conspiracy in violation of Article 81 of the Code results when there is an agreement between two or more persons to commit an offense under the Code and one or more of these persons does some act to effect the object of that agreement. There are other criminal conspiracies denounced by the United States Code that do not require an overt act." and they should be charged in the military under Article **134** of the Code.

A. *THE AGREEMENT*

If there is no agreement, of course, there is no conspiracy, for the agreement is the essence of the offense. It is one of its elements'* and must be pleaded and proved. One is liable in con-

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[13] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969 (REVISED EDITION), para. 160 [hereinafter called the Manual and cited as MCM, 1969 (Rev.)] ; United States v. Hayhurst, 39 C.M.R. 882 (1968).

[14] *E.g.*, Sealfon v. United States, 332 U.S. 575 (1948); United States v. Yarborough, 1 U.S.C.M.A. 678, 5 C.M.R. 106 (1952); United States v. Gionfriddo, 39 C.M.R. 602 (1968).

[15] R. PERKINS, CRIMINAL LAW 528–31 (1957); see ***generally*** Pollack, ***Common Law*** *Conspiracy*, 35 GEO. L. J. 328 (1947).

[16] *E.g.*, Hyde v. United States, 225 U.S. 347, 36546 (1911); United States v. Kidd, 13 U.S.C.M.A. 184, 187, 32 C.M.R. 184, 187 (1962).

[17] *E.g.*, 18 U.S.C. § 241 (1964) (conspiracy against **rights** of citizens); § 372 (conspiracy to impede or injure officer); § 2384 (seditious conspiracy).

[18] MCM, 1969 (Rev.), para. 160.

spiracy only for what he agrees to,[19] thus the prosecution must show that there was knowledge of the unlawful design on the part of the person charged, and that he affirmatively intended to associate himself with it:

> It is true that at times courts have spoken as though, if A. makes a criminal agreement with B., he becomes a party to any conspiracy into which B. may enter, or may have entered, with third persons. This is of course an error: the scope of the agreement actually made always measures the conspiracy, and the fact that B. engages in a conspiracy with others is as irrelevant as that he engages in any other crime. It is *true* that a party to a conspiracy need not know the identity, or even the number of his confederates; when he embarks on a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them. Nevertheless, he must be aware of those purposes, must accept them and their implications, if he is to be charged with what others do in execution of them.[20]

There is 'little disagreement among the courts and among legal writers that this is the law of conspiracy: one will not be held liable for a criminal conspiracy if the prosecution fails to prove he agreed to do the criminal act alleged. The problem involved, inevertheless, in any study of conspiracy, is to determine how much evidence is necessary in order to show that the accused agreed to do the criminal act.

Since conspirators are not apt to reduce their agreement to writing, direct proof of it is seldom available. The agreement may be, and usually is, proved by circumstantial evidence, and courts have fashioned various rules to assist the prosecutor in proving a very difficult point in issue. Initially, the agreement may be a tacit one," the law not requiring proof of a "formal" agreement." "Such an agreement may be inferred from the facts

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[19] *E.g.*, United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965). *See also* Roberts v. United States, 416 F.2d 1216, 1220 (5th Cir. 1969): "It is elementary that neither association with conspirators nor knowledge of illegal activity constitute proof of participation in a conspiracy."

[20] United States v. Audolschek, 102 F.2d 503, 507 (2d Cir. 1944) (L. Hand, J.).

[21] **MCM,** 1969 (Rev.), para. 140*b*.

[22] "The agreement in a conspiracy need not be in any particular form nor manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to acoomplish the object of the conspiracy, and this may be shown by the conduct of the parties, The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play." MCM, 1969 (Rev.), para. 160.

appearing in the evidence."[23] Furthermore, there is not even any necessity that all of the conspirators be acquainted with each other.[24] This rule was apparently developed to take care of those conspiracies which have become so large and secretive that some people involved in carrying out its objectives may never have met nor communicated with everyone who is involved.[25]

Additionally, one does not have to be in on a conspiracy from the beginning in order to be held liable. He may join it "at any time in its progress and be held responsible for all that may be or has been done."[26] It should be noted here, however, that insofar as the original conspirators are concerned, their taking in of a new partner does not create a new conspiracy, so long as the basic criminal undertaking remains the same."

It has been held that "once the existence of a conspiracy is established, slight evidence may be sufficient to connect a defendant with it."[27] This holding did affirm, however, that the evidence must establish a case from which the jury could find the defendant guilty beyond reasonable doubt. In spite of an occasional case upholding a conspiracy conviction where proof of

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[23] United States v. Cudia, 346 F.2d 227, 230–31 (7th Cir.), *cert. denied, 382* U.S. 955 (1965); *see also* United States v. Chambers, 382 F.2d 910 (6th Cir. 1967); United States v. Anderson, 352 F.2d 500 (6th Cir. 1965), *cert. denied,* 384 U.S. 955 (1966).

[24] *E.g.*, United States v. Battaglia, 394 F.2d 304 (7th Cir. 1968); United States v. Aiken, 373 F.2d 294 (2d Cir.), *cert. denied,* 389 U.S. 833 (1967); Sigers v. United States, 321 F.2d 843 (5th Cir. 1963); United States v. Rhodes, 11 U.S.C.M.A. 735, 29 C.M.R. 651 (1960); United States v. McCauley, 30 C.M.R. 687 (1960), *aff'd,* 12 U.S.C.M.A. 455, 31 C.M.R. 41 (1961).

[25] *E.g.*, Hernandez v. United States, 300 F.2d 114, 122 (9th Cir. 1962); United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd,* 341 U.S. 494 (1951); Marino v. United States, 91 F.2d 691 (9th Cir. 1937), *cert. denied,* 302 U.S. 764 (1938); United States v. Rhodes, 11 U.S.C.M.A. 735, 29 C.M.R. 551 (1960).

[26] United States v. Manton, 107 F.2d 834, 848 (2d Cir. 1938); *see also* United States v. Lester, 282 F.2d 750 (3d Cir. 1960), *cert. denied,* 364 U.S. 937 (1961); United States v. Knight, 416 F.2d 1181 (9th Cir. 1969); Nelson v. United States, 415 F.2d 483 (5th Cir. 1969); United States v. Cerrito, 413 F.2d 1270 (7th Cir. 1969); United States v. McCauley, 30 C.M.R. 687 (1960), *aff'd,* 12 U.S.C.M.A. 455, 31 C.M.R. 41 (1961). So if A joins a going conspiracy, he is liable for prosecution at the time he joins, even though the overt act has already been committed.

[27] "In the situation where a conspiracy has been formed, the joinder thereof by a new member does not create a new conspiracy, [and] does not change the status of the other conspirators. . . ." Marino v. United States, 91 F.2d 691, 696 (9th Cir. 1937), *cert. denied,* 302 U.S. 764 (1938).

[28] United States v. Chambers, 382 F.2d 910, 913 (6th Cir. 1967); see also United States v. Knight, 416 F.2d 1181 (9th Cir. 1969).

the agreement seems relatively meager; it still must be proved beyond reasonable doubt. The courts cannot be expected to ignore the evidence at hand, and if it shows that the crime was committed in such a way that there had to be some agreement or concert of action, then the agreement will be found.

> A conspiracy is an offense which is usually established by a great number of disconnected circumstances which, when taken together, throw light on whether the accused have an understanding or are in common agreement. . . . The agreement is generally a matter of inference, deduced from the acts of the persons accused. . . .[30]

Thus, in *United States v. Amedoe*,[31] *A*, *M* and *R* were convicted of conspiracy to transport a stolen automobile in interstate commerce when there was no evidence introduced at the trial that *A* knew either of the other two, or that they knew him. The evidence did show that *A* stole the automobile in New York, put New Jersey license plates on it, parked it in a lot in New York, and delivered the parking ticket to an unidentified person in a tavern in New York. Later, *M* and *R* delivered the automobile to a buyer in New Jersey. The facts and circumstances in this case satisfied the court that there was an agreement.

If the agreement is to commit more than one crime, there is still only one conspiracy,[32] as if *A* and *B* make an agreement to commit a burglary and a rape, there is only one conspiracy. The United States Supreme Court applied this rule in *Braverman v. United States*[33] in overturning a conviction on several counts of an indictment, each charging conspiracy to violate a different provision of the Internal Revenue Law, when the evidence showed but one agreement:

> Whether the object of a single agrement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than

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[29] ***See,*** *e.g.*, United States v. Carlucci, 288 F.2d 691 (3d Cir.), *cert.* ***denied,*** 366 U.S. 961 (1961) (where G was convicted of conspiracy to export firearms stolen from the federal government primarily upon evidence that the burlap bags used to wrap the weapons were purchased by G, and that G had had a longtime association with two other conspirators).

[30] United States **v.** Glasser, 116 F.2d 690, 699–700 (7th Cir. 1940), *rev'd on* ***other*** *grounds as to* ***one*** *of three defendants,* 315 U.S. 60 (1942).

[31] 277 F.2d 375 (3d Cir. 1960).

[32] *E.g.*, Braverman v. United States, 317 U.S. 49 (1942); United States v. Fisher, 16 U.S.C.M.A. **78,** 36 C.M.R. 234 (1966); United States v. Kidd, 13 U.S.C.M.A. 184, 32 C.M.R. 184 (1962).

[33] 317 U.S. 49 (1942).

[34] ***Id.*** at 53.

B. *INTENT*

In the majority of prosecutions the law is most concerned with the act that has been committed. The intent, of course, is a factor that must be established before the accused may be held criminally responsible for the act, but the act is the crime. Conversely, criminal conspiracy is primarily concerned with the intent element," and this becomes apparent when one considers the nature of the crime. There is certainly a danger to society when one person harbors an intent to commit a crime, and the danger is increased when two people have the same intent. But no crime is committed unless these two people get together and form some sort of confederation, or partnership, for accomplishing their criminal purpose. It is this confederacy of criminal purpose that increases the danger to society to such an extent that it becomes a crime, because this combination is considerably more difficult to control than the efforts of a single wrongdoer:

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendening it difficult of detection, requiring more time for its discovery, and adding to the importance of punishment when discovered.[36]

It appears, then, that it is the danger of the "combined intent'' with which criminal prosecution of conspiracies primarily deals.

In his casebook on Criminal Law, Rollin Perkins states: "Conspiracy is one of those crimes requiring a so-called 'specific intent'."[37] To establish a criminal conspiracy the Government must not only prove an agreement—and that the accused specifically intended to enter into the agreement"—but also prove that the

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[35] *See generally* Harno, *Intent in Criminal Conspiracy,* 89 U. PA. L. REV. 624 (1941).

[36] Pinkerton v. United States, 328 U.S. 640, 644 (1946), *quoting* United States v. Rabinowich, 238 U.S. 78, 88 (1914).

[37] *R. Perkins, Criminal Law,* 544 (1957); *see also* Goldstein, *The Krulewitch Warning: Guilt by Association,* 54 GEO. L. J. 133 (1965): "Criminal conspiracy involves more than general *mens rea:* it requires specific intent. The conspirator must (1) intend to combine with others for (2) an intended unlawful purpose. . . ." *Id.* at 142–43.

[38] Rent v. United States, 209 F.2d 893 (15th Cir. 1954), *quoting* Macreath v. United States, 103 F.2d 495, 496 (5th Cir. 1939): "To support the charge of conspiracy, the intent to conspire' must be shown." *Id.* at 896.

"combined intent'' flowing from that agreement was criminal and specific. For example, if *A* and *B* hold a grudge against *C* and agree to do him some harm, but have not yet decided what to do or how to do it, then no crime has been committed. Although the combined intent is criminal, it is not specific.

There are two intents in a conspiracy: an intent to agree and an intent to do some criminal act; and if the object of the conspiracy requires specific intent, the prosecution must also show this: "[C] onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself."[39] So if *A* and *B* are charged with conspiracy to assault a superior commissioned officer, the prosecution must show that they knew the intended victim was a superior commissioned officer." This point was well illustrated in *Jefferson* v. *United States,"* where the defendant was charged with conspiracy to deal in illegally imported drugs, knowing them to have been illegally imported. In this case, the trial judge instructed the jury that if any of the alleged conspirators had knowledge that the drugs had been imported contrary to law, such knowledge was to be imputed to the other defendants. In holding this instruction to be prejudically defective and reversing the case, the court stated:

> Since [the] substantive offense of dealing with such drugs . . . requires proof of specific knowledge by the defendant that the drug was illegally imported, the same specific knowledge is also an essential element of the conspimcy to commit such substantive offenses.'?

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[39] Ingram v. United States, 360 U.S. 672, 678 (1959), *quoting with approval from Comment, Developments in the Law-Criminal Conspiracy,* 72 HARV. L. REV. 920, 939 (1959). In *Ingram,* the convictions of two alleged conspirators for conspiracy to evade and defeat payment of federal taxes imposed on lottery operations were reversed when the evidence showed they were not personally liable for the tax and there was no evidence that they knew the tax had not been paid by those who did owe it. *Accord,* United States v. Chaise, 372 F.2d 453 (4th Cir.), *cert denied,* 387 U.S. 907 (1967); Jefferson v. United States, 340 F.2d 193 (9th Cir), *cert. denied,* 381 U.S. 928 (1965); United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

[40] It would appear, however, from the holding in Nassif v. United States, 370 F.2d 147 (8th Cir. 1966), *discussed in the text accompanying note 45 infra,* that if *A's* and *B's* scheme were broad enough, the prosecution might not be required to prove such know-ledge.

[41] **340** F.2d 193 (9th Cir. 1965).

[42] *Id.* **at 197.**

Also, in *United States* v. *Bufaline,*[43] in reversing a conviction of conspiracy to commit perjury and obstruct justice by giving false and evasive testimony, the court said:

> Evidence of the same intent or knowledge would be required to convict conspirators as to convict those charged with the substantive offense. . . . Thus, even had the government proved that an agreement had been entered into, it would further have to prove that the conspirators intended to lie under oath or that they envisaged proceedings where they would be called upon to testify under oath.[44]

One may not escape guilt, however, by ignoring the natural consequences of his agreement and intended crime, and courts have been known to imply the necessary intent when the scheme was broad enough. This was done in *Nassif v. Cnited States*[45] where the charge was conspiracy to steal goods out of interstate commerce. While holding that knowledge of the interstate character of the goods constitutes a prerequisite of proof, the court further held that where the scheme is to steal goods wherever they may be found, and in fact, goods are stolen from interstate commerce, then the scope of the conspiracy can be broad enough to imply the necessary intent.'"[46]

C. *THE OVERT ACT*

Conspiracy is punishable under Article 81 of the Code only "if one or more the the conspirators does an act to effect the object of the conspiracy."[47] There is no requirement that the overt act itself be a crime. It may, in fact, be a relatively minor

[43] 285 F.2d 408 (2d Cir. 1960).

[44] *Id.* at 416. This case arose from an investigation of the so-called "Appalachin Meeting" which took place in upstate New York in 1957. Twenty seven defendants were charged and twenty convicted.

[45] 370 F.2d 147 (8th Cir. 1966).

[46] In this case, the following instruction given by the trial judge was approved: "[I]f the alleged agreement between the parties, which allegedly constituted the conspiracy was so broad that it encompassed a plan to steal merchandise wherever available, or wherever located, and so broad that it would include goods in interstate commerce, then if the agreement has been established beyond a reasonable doubt by the evidence, you may find that one of the objects of the conspiracy was to steal merchandise from interstate commerce." *Id.* at **153.**

[47] The general federal conspiracy statute, 18 U.S.C. § 371 (1964), also requires an overt act.

act," so long as it is "a manifestation that the conspiracy is being executed."[48]

There is a difference in the overt act required in a criminal attempt charge and that necessary to support a criminal conspiracy. In the attempt case, the overt act must go beyond mere preparation," but in a conspiracy, the act 'does not have to advance the criminal purpose to any dangerous degree toward completion. It may be merely "one step in the direction of carrying it out."[49] Justice Holmes in *Hyde* v. *United States*" noted the difference in the two overt act requirements:

> But combination, intention, and overt act may all be present without amounting to a criminal attempt,—as if all that were done should be an agrement to kill a man 50 miles away, and the purchase of a pistol for that purpose. There must be a dangerous proximity to success. But when that exists, the overt act is the essence of the offense. On the other hand, the essence of the conspiracy is being combined for an unlawful purpose; and if an overt act is required, it does not matter how mote the act may be from accomplishing the purpose, if done to effect it; khat is, I suppose, in furtherance of it in any degree."

The United States Court of Military Appeals has addressed itself to the consideration of what constitutes an overt act in a case involving conspiracy to commit larceny[54] where the overt act alleged was that one of the conspirators "did procure a crowbar with which to break and enter the Ship's Store." Rejecting the accused's contention that this alleged no more than preparation and was not directed toward the completion of the act, the court held that the allegation was sufficient, saying: "The overt act need not itself be a crime; on the contrary, it can be an entirely innocent act, . . . All that is required is that the overt act be

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[48] *E.g.*, Braverman v. United States, 317 U.S. 49 (1942); United States v. Choat, 17 U.S.C.M.A. 187, 21 C.M.R. 313 (1956). It can be an entirely innocent act. *Id.* at 191, 21 C.M.R. at 317. *See also* 15A C.J.S. *Conspiracy* § 88(b) (1967): "It is not necessary that the overt act or acts should appear on their face to have been acts which would have necessarily aided in the commission of the crime."

[49] MCM, 1969 (Rev.), para. 160.

[50] MCM, 1969 (Rev.), para. 159.

[51] In Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968), the following instruction was approved: "The crime of conspiracy is committed as soon as the conspiracy is formed, and at least one overt act, that is, at least one step in the direction of carrying it out is performed by one of the members of the conspiracy." *Id.* at 988.

[52] 225 U.S. 347 (1911).

[53] *Id.* at 387.

[54] United States v. Choat, 17 U.S.C.M.A. 187, 21 C.M.R. 313 (1956).

a 'manifestation that the conspiracy be at work'."[55] The conviction was upheld when the court concluded that the court-martial could have found from the evidence that the procurement of the crowbar was a manifestation of the conspiracy alleged.

The overt act must be some act other than the act of agreeing. It must be something more than evidence of the agreement or of the conspiracy and must be separate and entirely apart from it." In *United States v. Kauffman,*[57] involving an alleged conspiracy to deliver national defense information to representatives of East Germany, one overt act alleged was that the accused received and accepted the name and address of "Klara Weiss." When the evidence showed that this took place at the time the alleged agreement was formed and was the address through which the information was to be communicated, the court held that this was part of the agreement, not separate from it, and was insufficient to constitute an overt act in furtherance of the alleged agreement.

The reason for this rule, as applied in *Kauffman,* should be apparent. If the overt act could be part of the agreement, and not separate and apart from it, then there would be no need for requiring an overt act in criminal conspiracies. The usually announced function of the overt act is simply to show that the conspiracy is at work, "and is neither a project still resting in the minds of the conspirators nor a fully completed operation no longer in existence."[58] If the prosecution were allowed to prove, as overt acts, things that were really part of the agreement, there would be no showing that the conspiracy was at work and not still resting in the minds of the conspirators.

Acts committed after the termination of the conspiracy will not, of course, qualify as an overt act, because once the conspiracy has ended, no acts by any of the parties involved will be done to effect the object of the conspiracy, nor will they show that the conspiracy is still at work. The conspiracy is not necessarily ended, however, when the substantive offense has been committed, and overt acts have been found after property was stolen when the conspirators were attempting to dispose of or

[55] *Id.* at 191, 21 C.M.R. at 317.
[56] MCM, 1969 (Rev.), para. 160.
[57] 14 U.S.C.M.A. 283, 34 C.M.R. 63 (1963).
[58] Yates v. United States, 354 U.S. 298, 334 (1956).

hide the fruits of their crime." In this regard, probably the best description of when a conspiracy ends is contained in ***McDonald*** v. ***United States:"***

> Whenever the unlawful object of the conspiracy has reaohed that stage of consumption, whereat the several conspirators having taken in spendable foam their several agreed parts of the spoils, may go their several ways, without the necessity of further acts or consultations, about the conspiracy, with each other or among themselves, the conspiracy has ended?'

The requirement that an overt act be proved in a criminal conspiracy charge has in reality not materially increased the difficulty of obtaining a conviction.[62] Any act, if done to effect the object or purpose of the conspiracy is sufficient, and "the courts somehow discover an overt act in the slightest action on the part of the conspirators."'" Attending a lawful meeting," making a telephone call," and an interview in a lawyer's office" have all been found to be overt acts. The accused does not have to commit the act himself or know when it is committed to be held liable.'" But the act must be committed by one of his eo-conspirators and cannot be committed by an innocent party. The language of the statutes indicate this," and this rule was held to be applicable in ***Herman*** v. ***United States.***[69] ***In*** this case, conspiracy by four persons to ship goods in interstate commerce, the overt act alleged was that S and R received the goods. When they were found not guilty of the conspiracy, the Court of Appeals dismissed guilty findings against the other two alleged conspira-

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[59] *E.g.*, Bellande v. United States, 25 F.2d 1 (5th Cir.), ***cert. denied,*** 277 U.S. 607 (1928) (where two defendants on the day of the robbery committed an overt act by removing stolen mail bags from a spot where they had been hidden); United States v. Calvino, 37 C.M.R. 730 (1967) (where one accused met and guided a truck containing the stolen property into an alley).

[60] 89 F.2d 128 (8th Cir.), ***cert. denied,*** 301 U.S. 697 (1937).

[61] ***Id.*** at 134.

[62] An interesting thing to note here is that conspiracy to kill the President or Vice President of the United States, in violation of 18 U.S.C. § 1751 (1964), requires an overt act, whereas conspiracy to defraud the Tennessee Valley Authority, in violation of 18 U.S.C. § 831(t) (1964), does not. Surely Congress did not, by requiring no overt act in the T.V.A. conspiracy, intend that it be easier to prove than the other.

[63] Pollack, ***Common Law Conspiracy,*** 35 GEO. L. J. 328,338 (1947).

[64] Yates v. United States, 354 U.S. 298 (1956).

[65] Smith v. United States, 92 F.2d 460 (9th Cir. 1937).

[66] Kaplan v. United States, 7 F.2d 594 (2d Cir.), ***cert. denied,*** 269 U.S. 582 (1925).

[67] MCM, 1969 (Rev.), para. 160; United States v. Rhodes, 11 U.S.C.M.A. 735, 29 C.M.R. 551 (1960).

[68] ***See, e.g.,*** 18 U.S.C. § 371 (1964), and UCMJ art. 81.

[69] 289 F.2d 362 (5th Cir. 1961).

tors, holding that even though the alleged act might have occurred, it was not done by one of the conspirators.

As a matter of practice, it really does not make much difference whether the particular statute under which one is prosecuted requires an overt act or not. Overt acts are usually alleged and proved even when not required," and "few conspiracy indictments seem to be brought until after a substantive offense has been committed."[70] The reason for alleging overt acts when not required appears to be threefold: **(1)** to bring the conspiracy within the statute of limitations, **(2)** to show that the conspiracy is still in effect, and **(3)** in federal prosecutions, to lay the basis for venue. It is submitted here that if there is just a bare agreement, with no overt act, the police will have a hard time finding out anything about the planned crime; and even if they do, perhaps through a conspirator who has changed his mind, no arrests will be made until some act is done to further the conspiracy. And even though the conspiracy involved may not require the proof of an overt act, the prosecution should allege at least one. Moreover, the allegation of only one overt act will not prevent the prosecution from proving many, because the Government is not limited to the overt acts pleaded, but may introduce evidence of any act of the conspirators, during the conspiracy, for the purpose of proving it.[72]

Some recent decisions have gone one step further than this; they hold that the Government is not only free to introduce evidence of overt acts not pleaded but may also, in effect, substitute proof of an unalleged act for one alleged. In *Brulay v. United States*[73] a conviction was upheld on proof of an overt act not alleged in the indictment, the court finding that there was not a fatal variance and that no substantial rights of the

[70] *See, e.g.*, Ewing v. United States, 386 F.2d 10 (9th Cir. 1967); *cert. denied,* 390 U.S. 991 (1968); Leyvas v. United States, 371 F.2d 714 (9th Cir. 1967); United States v. Armore, 363 F.2d 385 (2d Cir.), *cert. denied,* 385 U.S. 957 (1966).

[71] Comment, *Development in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 949 (1959).

[72] *E.g.*, Reese v. United States, 353 F.2d 732 (5th Cir. 1965); Finley v. United States, 271 F.2d 777 (5th Cir. 1959); *cert. denied,* 362 U.S. 979 (1960); Kolbrenner v. United States, 11 F.2d 764 (5th Cir.), *cert. denied,* 271 U.S. 677 (1926). Conversely, the prosecution is not required to prove all the overt acts it has alleged. United States v. Fellabaum, 408 F.2d 220 (7th Cir. 1969).

[73] 383 F.2d 345 (9th Cir.), *cert. denied,* 389 U.S. 986 (1967).

[74] In this case the charge was conspiracy to smuggle amphetamine tablets with two overt acts alleged: (1) that Brulay, on 7 January 1966, left his residence in an automobile, and (2) that he transported the tablets, on 26 January 1966, from his garage to another place. The act proved was that, on 28 January 1966, he drove an automobile containing the tablets.

accused were affected;" and in ***United States*** v. ***Armone***[75] the opinion was expressed that the substitution of proof of an unalleged overt act for one alleged is not a fatal variance, and at most justifies a request for continuance because of surprise.[76]

The United States Court of Military Appeals, in ***United States*** v. ***Reid,"*** reversed a conspiracy conviction for failure of proof of the alleged overt act and refused the Government's suggestion that the case be returned to the board of review for the possible substitution of another overt act, saying that the same overt act alleged must be proved. One authority cited for this conclusion was **a** case which has now been overruled.[78] In ***Reid,*** the charge was conspiracy to sell promotion examinations, the alleged overt act being the selling of the examinations. When the board of review found there was no sale, the Court reversed, not discussing variance.

It is suggested that the better method of handling variances between acts alleged and those proved is to consider if the variance has prejudiced the accused. In ***Strauss*** v. ***United States***,[79] in a charge of conspiracy to transfer and conceal assets of a bankrupt corporation, the overt act alleged was that G wrote checks to B for $80,225.69 between 8 November 1957 and 27 March 1958. The proof was, however, that the checks were drawn between 2 June 1957 and 29 August 1957 and totaled $86,879.91. In affirming the conviction, the court stated: "We do not believe that this variance in proof under the circumstances prejudiced appellant . . . . Substantial similarity between the facts alleged in the overt act and those proved is all that is required."[80] Variances between the allegations and the proof do not generally require reversal When the accused has not been misled to the extent that he has been unable to prepare for trial, and he is fully protected against another prosecution for the same offense.[81] This rule is sound and justified and should be applicable in proving an overt act as well as proving any other fact alleged.

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[75] 363 F.2d 385 (2d Cir.), ***cert. denied,*** 385 US. 957 (1966).

[76] This same opinion had been expressed by the court earlier in United States v. Negro, 164 F.2d 168 (2d Cir. 1947). It is suggested that in neither case was it necessary for the court to express this opinion, in view of the fact that both cases charged violations of 21 U.S.C. § 174, which does not require proof of an overt act.

[77] 12 U.S.C.M.A. 497, 31 C.M.R. 83 (1961).

[78] Fredricks v. United States, 292 F. 856 (9th Cir. 1923), *overruled in* Brulay v. United States, 383 F.2d 345 (9th Cir), ***cert. denied,*** 389 U.S. 986 (1967).

[79] 311 F.2d 926 (5th Cir.), ***cert. denied,*** 373 U.S. 910 (1963).

[80] ***Id.*** at 932.

[81] ***See, e.g.,*** United States v. Hopf, 1 U.S.C.M.A. 584, 5 C.M.R. 12 (1952).

IV. PERSONS LIABLE

"A conspiracy is a partnership in criminal purposes,"" and as in any other partnership, there must be more than one partner. Consequently, one cannot be convicted of a criminal conspiracy unless it is shown that there was someone else who entered into the agreement with him," and that this other person had the mental capacity to make such an agreement.[84] Also there can be no conspiracy with a government informer who merely feigns participation and secretly intends to frustrate the conspiracy.[85] To put it briefly, "A person cannot conspire with himself."[86]

This rule is rather plainly stated in the Manual," and is simply a restatement of the law as viewed by the United States Court of Military Appeals. As was stated by the Court in *United States* v. *Kidd:"*

> It seems equally clear that in Federal law, the *acquittal on the merits* or discharge under circumstances amounting to acquittal, of the one remaining co-conspirator, or all of the other alleged conspirators, results in the acquittal of the remaining one. The restrictive nature of the rule should be emphasized. The acquittal must be on the merits land not a mere termination of prosecution not amounting to an acquittal. Further it must be an acquittal of all the other alleged conspirators; if there be an allegation of unknown conspirators or other unacquitted alleged co-conspirators and evidence to show a combination with them, the rules does not apply.[89]

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[82] United States v. Kissell, 218 U.S. 601, 608 (1910) (Holmes, J.).

[83] *E.g.*, Romontio v. United States, 400 F.2d 618 (10th Cir. 1968); United States v. Fisher, 16 U.S.C.M.A. 78, 36 C.M.R. 234 (1966); United States v. Kidd, 13 U.S.C.M.A. 184, 32 C.M.R. 184, 32 C.M.R. 184, (1962); United States v. Nathan, 12 U.S.C.M.A. 398, 30 C.M.R. 398 (1961).

[84] *See* 2 F. WHARTON, CRIMINAL LAW § 1657 (12th ed. 1932): "Certainly if one defendant is incompetent to conspire, no one can be convicted of conspiracy with him alone." See also United States v. Cascio, 16 C.M.R. 799 (1954), for an interesting discussion of this issue.

[85] *E.g.*, Sears v. United States, 343 F.2d 139 (5th Cir. 1965); United States v. Labossiere, 13 U.S.C.M.A. 337, 32 C.M.R. 337 (1962).

[86] United States v. Kidd, 13 U.S.C.M.A. 184, 188, 32 C.M.R. 184, 188 (1962); Unfted States v. Nathan, 12 U.S.C.M.A. 398, 30 C.M.R. 398 (1961).

[87] "If all persons with whom the accused is alleged to have conspired are tried and found not guilty of the same conspiracy, the accused cannot properly be convicted of that conspiracy. If after the trial and conviction of the accused all the persons with whom he was alleged to have conspired have been found not guilty, the conviction of the accused may not stand. The accused may properly be convioted of oonspiracy, however, if the evidence establishes that a conspiracy existed between the accused and other alleged conspirators, named or described in the specification, who have not been and or not later tried and acquitted." MCM, 1969 (Rev.), para. 160.

[88] 13 U.S.C.M.A. 184, 32 C.M.R. 184 (1962).

[89] *Id.* at 188, 32 C.M.R. at 188. The court concluded by saying: "There is a striking unanimity in the Federal courts on this question. . . If there be conflict in the Federal cases they have not been brought to our attention nor have we discovered the same."

In this case, Kidd was charged with conspiring with one Wright to commit extortion. Wright was also charged with the conspiracy, but different overt acts were alleged. The Court was not deterred in its holding, however, since there was only one conspiracy, a single agreement to commit all the overt acts.[90] Moreover, when Kidd was convicted, Wright had not yet been tried, his acquittal coming later, but the Court declined to make any distinction that would depend upon the order in which the accused were tried." Judge Quinn, in a concurring opinion, concluded, "In view of the judicial determination that Wright did not conspire with the accused, the conspiracy charge, which alleges an agreement only between Wright and the accused becomes a legal impossibility.'"[91]

It is not necessary to prosecute all the conspirators, however. Had Wright never been tried, Kidd's conviction would have been valid, because one is not immune from prosecution if his co-conspirators escape. Even if one's co-conspirator is immune from prosecution,[93] the remaining one will not be excused. If the law were otherwise, the military would, in many instances, be prohibited from prosecuting a conspiracy case when the only remaining co-conspirator was discharged from the service" or was dead. Moreover, one may be convicted of conspiracy to commit an offense for which he, himself, could not be charged,[95] or which is impossible of commission."

The acquittal of all the other defendants charged with the accused will not establish his innocence if there are others alleged to be his co-conspirators,[97] even if the others are alleged as per-

[90] The same result was reached in United States v. Fisher, 16 U.S.C. M.A. 78, 36 C.M.R. 234 (1966).

[91] *See also* United States v. Fisher, 16 U.S.C.M.A. 78, 36 C.M.R. 234 (1966).

[92] United States v. Kidd, 13 U.S.C.M.A. 184, 193, 32 C.M.R. 184, 193 (1962).

[93] As in Farnsworth v. Zerbst, 98 F.2d 541 (5th Cir. 1938), *cert. denied,* 307 U.S. 642 (1939), where the accused's co-conspirator has diplomatic immunity.

[94] *See* MCM, 1969 (Rev.), para. 11, concerning termination of jurisdiction because of discharge.

[95] *See, e.g.*, United States v. Johnson, 28 C.M.R. 629 (1959), where a Navy board of review affirmed a conviction of a marine sergeant conspiring to maim himself by having a friend sever his thumb with an axe.

[96] United States v. Thomas, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962), where two sailors were convicted of conspiracy to commit rape when the victim was dead. The sailors were under the impression she was merely drunk and passed out.

[97] *See, e.g.*, Jenkins v. United States, 263 F.2d 710 (5th Cir. 1958).

sons unknown,[98] presuming, of course, that the evidence shows these others were part of the conspiracy. If there are no others alleged as co-conspirators, even though the evidence at trial shows there were such others, the acquittal of the accused's alleged co-conspirators will result in his acquittal.[99]

What all of this means in actual practice can best be illustrated by an example. Suppose *A*, *B*, and C are parties to a conspiracy, and suppose further that *A* and *B* are charged with the conspiracy, but *C* is not charged, though he is alleged to be a co-conspirator. An acquittal of *A* will have no effect upon *B*'s conviction if the evidence at *B*'s trial showed that C was a party to the conspiracy; and the same result would apply if *C* were unknown but was alleged as a person unknown. If, however, C was not alleged to be one of the conspirators, an acquittal of *A* would result in *B*'s acquittal, even if the evidence at *B*'s trial showed that C was a party.

As was discussed earlier in this article, the thing that makes conspiracy punishable as a crime is the increased danger to society that results from group action, or a "combined intent." Yet there are offenses which require a "combined intent," Which cannot be committed except by two people. Some offenses falling into this category are: adultery, bigamy, incest, dueling, receiving stolen goods, prohibited sale of contraband, and bribery. Since the concert of action in these cases does not increase the danger to society, it has generally been held that the agreement between the parties involved to commit these crimes does not constitute a conspiracy.'" The addition of a third party to this agreement, however, does constitute a conspiracy.

At common law, husband and wife were one and could not be guilty of conspiracy.'" This apparently remained the rule, at least in federal courts,'" until the United States Supreme Court decided *United States v. Dege*,[103] where it was held error to dis-

[98] *E.g.*, Cross v. United States, 393 F.2d 360 (8th Cir. 1968); Rosencrans v. United States, 378 F.2d 561 (5th Cir. 1967).

[99] *E.g.*, United States v. Fisher, 16 U.S.C.M.A. 78, 36 C.M.R. 234 (1966).

[100] R. PERKINS, CRIMINAL LAW 535 (1957). *See also* United States v. Yarborough, 1 U.S.C.M.A. 678, 5 C.M.R. 106 (1952).

[101] *Id.* at 797.

[102] *See Developments in the Law— Criminal Conspiracy*, 72 HARV. L. REV. 920, 949–51 (1959).

[103] 364 U.S. 51 (1960).

miss an indictment of a husband and wife for conspiring with each other to bring goods illicitly into the United States with intent to defraud.'"

V. EVIDENTIARY CONSIDERATIONS

As an exception to the hearsay rule,[106]

> [A] statement, including non-verbal conduct amounting to a statement, made by one conspirator during the conspiracy and in pursuance of it is admissible in evidence for the purpose of proving the truth of the matters stated against those of his co-conspirators who were parties to the conspiracy at the time the statement was made or who became parties to the conspiracy thereafter.'"

This exception to the hearsay rule appears to hinge on the principles of agency,[107] the view being that since the conspirators are partners in a criminal enterprise, they should be held responsible for the acts and declarations of their partners so long as it is directed toward accomplishing the criminal purpose. Judge Learned Hand has said in this regard:

> When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made "a partnership in crime." What one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all.[108]

This agency principle of conspiracy makes an accused subject to liability for many acts and declarations by his co-conspirators,

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[104] Mr. Justice Frankfurter said for the majority: "Such an immunity to husband and wife as a pair of conspirators would have to attribute to Congress one of two assumptions: either that responsibility of husband and wife for joint participation in a criminal enterprise would make for marital disharmony, or that a wife would be presumed to act under the coercive influence of her husband and, therefore, cannot be a willing participant. The former assumption is unnourished by sense; the latter implies a view of American womanhood offensive to the ethos of our society." *Id.* at 52–53.

[105] MCM, 1969 (Rev.), para. 139.

[106] MCM, 1969 (Rev.), para. 140*b*.

[107] WHARTON, *supra* note 84 at § 699. *But see* Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159, 1166 (1954), where it is suggested that the reason for allowing this exception to the hearsay rule is not on the principles of agency: "The reason is simple: there is great probative need for such testimony. Conspiracy is a hard thing to prove. The substantive law of conspiracy has vastly expanded. This created a tension solved by relaxation in the law of evidence. Conspirator's declarations are admitted out of necessity."

[108] Van Riper v. United States, 13 F.2d 961, 967 (2d Cir.), *cert. denied*, 273 U.S. 702 (1926).

even though he may have been completely unaware of them or their conduct.

In determining the admissibility of evidence in conspiracy trials, courts have shown 'a lenient attitude toward the prosecution and have allowed juries to oonvict on an extremely low minimum of evidence."[109] The apparent reason for this is that conspiracy is hard to prove. The prosecutor's job in a conspiracy trial is primarily to prove a meeting of the minds, an agreement, and conspirators are seldom thoughtful enough to reduce the agreement to a writing. "Conspirators do not go out upon the public highways and proclaim their purpose; their methods are devious, hidden, secret and clandestine."[110]

The United States Supreme Court has stated:

> Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the convictim of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating **proof** with pleading would became insuperable and conspirators would go free by their very ingenuity."[111]

In order for these statements or acts of one's co-conspirators to be admissible, however, they must be made during the conspiracy and in furtherance of it. A conspiracy begins with an [agreementand statements of a onspirator made before the agreement is reached are inadmissible hearsay."[112] Since the illegal agree-

[109] Note, 62 HARV. L. REV. 276, 278 (1949); see also Comment, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 984, (1959): "The courts have established less stringent standards of relevance for the admission of circumstantial evidence in conspiracy trials than for other crimes." *See generally* Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159 (1954)'

[110] Radin v. United States, T89 F. 568, 570 (2d Cir.), *cert. denied*, 220 U.S. 623 (1911); Marrash v. United States, 168 F. 225, 229 (2d Cir. 1909). This is not always true, however. In reviewing convictions for conspiracy to violate the Selective Service Act, 50 U.S.C. App. § 462(a) (1964), the First Circuit stated: "As the defendants point out, most conspiracies are secret. *To* argue from this, however, that illegality presupposes secrecy is to confuse means with ends. Illegality normally seeks cover, but conspirators may act openly or not, as best suits their purpose. Here the defendants' primary object was publicity, and their conduct was designedly open." United States v. Spock, 416 F.2d 165, 169 (1st Cir. 1969.)

[111] Blumenthal v. United States, 332 U.S. 539, 557 (1947).

[112] ***See,*** *e.g.*, Collenger v. United States, 50 F.2d 345 (7th Cir.), *cert.* denied, 284 U.S. 654 (1931): "It is elementary that a statement of a conspirator, in order to bind the co-conspirator, must be a statement not made in the formation of the conspiracy, but after the conspiracy is formed, and in furtherance of its objectives." Id. at 348.

ment is in the future, such declarations are merely predictions and are not accurate enough to be relevant. In ***United States v. LaBossiere,***[113] in a case involving conspiracy to commit larceny, four soldiers who became government informers and were not part of the comspiracy, were allowed to testify, over objection, that the accused's alleged co-conspirator, Taylor, had approached them about a plan to enter into a supply yard and steal certain government property. Taylor told them that the accused was one of his confederates. A meeting was later held and the details worked out that evening. In reversing the case, the United States Court of Military Appeals stated:

> In sum, then, we necessarily find, under the circumstances here depicted, that Taylor's conversations with Hubbard, Hoffman, Potter, and Meekins—apart from those made at the evening meeting—constituted declarations made in forming the charged conspiracy rather than during its actual existence and were, as defense contended at the trial, inadmissible hearsay.[114]

Declarations made after the conspiracy has ended are not admissible, either. Presumably, the termination of the conspiracy ends the agency relationship that authorized considering acts and statements of co-conspirators in the first place. Moreover, if the conspiracy has ended, one's statements could not be "in furtherance of it." As stated by the United States Supreme Court:

> There can be no furtherance of a conspiracy that has ended. Therefore, the declarations of a conspirator do nut bind the co-conspirator if made after the conspiracy has ended. This is the teaching of Krulewitch v. United States, **336** U.S. 440, **93** L. sd., **790, 69** S. ct. **716,** and Fiswick **v.** United States, 329 U.S. **211, 91** L. ***ed.,* 196, 67** S. Ct. **224,** both **supra.**[115]

Efforts are sometimes made by prosecutors to admit post conspiratorial statements under the theory that there was a subsidiary conspiracy to conceal the primary conspiracy. In ***Krulewitch*** v. ***United States,"***[116] an admission made by one conspirator more than one month after the alleged conspiracy had ended was admitted on the theory that the implied subsidiary conspiracy to conceal the main conspiracy was a part of the main conspiracy. The Supreme Court rejected this, holding that once the purpose of the primary conspiracy has been attained, these statements of the alleged co-conspirators are not admissible.

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[113] **13** U.S.C.M.A. **337, 32** C.M.R. **337 (1962).**

[114] *Id.* at **340, 32** C.M.R. **at 340.**

[115] Lutwak v. United States, **344** U.S. **604,** 617–18 **(1953).**

[116] **336** U.S. **440 (1949).**

In *Grunewald* v. *United States*[117] the same result was reached in a case involving conspiracy to "fix" certain tax cases when the Government intruduced evidence concerning the subsequent activities of the conspirators to conceal some of the irregularities in the disposition of the tax cases, and hearsay declarations of the co-conspirators. The Court said in this case:

> [T]he acts of covering up can by themselves indicate nothing more than the conspirators do not wish to be apprehended—a concomitant, certainly, of every crime since Cain attempted to conceal the murder of Abel from the Lord."[118]

The Court explained its ruling, however, by stating:

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime."[119]

The United States Court of Military Appeals has faced this problem in several cases,[120] but *United States v. Beverly*[121] and *United States v. Salisbury*[122] are probably the most noteworthy. Both cases involved a completed larceny, and in both cases the conspiracy was completed. In *Salisbury,* evidence concerning acts of two of the accused's eo-conspirators in preparing a false document showing a transfer of the stolen property and the sudden "discovery" of the proper sum of money to account for the missing property was admitted. In *Beverly* testimony was allowed at the trial from a third party that he assisted the two accused in moving the stolen property from one hiding place to another, and that they told him they had stolen the property in concert with another person.

These cases may, at first hand, appear to be difficult to distinguish, in that the court approved the admission of the evidence in *Salisbury* but did not approve it in *Beverly.* But a distinction must be made between the "acts" of a co-conspirator, land the "statements" of a co-conspirator. The evidence allowed

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117 353 U.S. 391 (1957).

118 Grunewald v. United States, 363 U.S. 391, 406 (1957).

119 *Id.* at 405.

120 *E.g.*, United States v. Beverly, 14 U.S.C.M.A. 468, 34 C.M.R. 248 (1964); United States v. Salisbury, 14 U.S.C.M.A. 171, 33 C.M.R. 383 (1963); United States v. Miasel, 8 U.S.C.M.A. 374, 24 C.M.R. 184 (1957).

121 14 U.S.C.M.A. 468, 34 C.M.R. 248 (1964).

122 14 U.S.C.M.A. 171, 33 C.M.R. 383 (1963).

in *Salisbury* was the **"acts"** of co-conspirators and not statements. "Acts . . . which are not intended to be a means of expression and which are relevant to prove the existence of a conspiracy may be received in evidence without regard to whether the combination was ended prior to their commission."[123] Such acts, of course, so long as they are not intended to be means of expression, are not covered by the rule against hearsay, anyhow, because these acts are not hearsay. Relevancy is the only consideration.

> Here the acts of [the co-conspirators] during the attempt to resolve the shortage were highly relevant to establish the nature of their combination and, as such, were admissible in evidence without regard to whether the conspiracy had terminated.[124]

This same distinction has been made by the United States Supreme Court.'"

In ***Beverly,*** it was not the "acts" of a co-conspirator, but his "statements" which the court disapproved of. The testimony of the third party about what the two accused told him was clearly hearsay; since it was given after the alleged conspiracy had terminated, it was admissible only against the party who made the statement, and could not be used against his alleged co-conspirator.

The existence of a conspiracy may not be established solely by evidence of hearsay declarations of an alleged co-conspirator.'" Although the trial judge has a great deal of discretion in allowing evidence to be introduced out of sequence,"' the general rule is that each accused must be connected with the alleged conspiracy by evidence independent of the statements of eo-conspirators before these statements are admissible against him.'" In other words, when there is enough evidence in the record to establish the aonspiracy, evidence of what one conspirator said, during the conspiracy and in furtherance of it, is admissible against the other conspirator.

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[123] ***Id.*** at 174, 33 C.M.R. at 386.

[124] United States v. Salisbury, 14 U.S.C.M.A. 171, 175, 33 C.M.R. 383, 387 (1963).

[125] Lutwak **v.** United States, 344 U.S. 604 (1953) (conispiracy to defraud the federal government by contracting sham marriages and arranging the illegal entry of alien "war brides.'' Evidence of uncontested divorces and separation of the couples after the conspiracy had terminated was allowed).

[126] ***E.g.,*** Tripp **v.** United States, 295 F.2d 418 (10th Cir. 1961).

[127] ***E.g.,*** United States v. Halpin, 374 F.2d 493 (7th Cir.), ***cert. denied,*** 386 U.S. 1032 (1967); Parks **v.** United States, 368 F.2d 781 (5th Cir. 1966).

[128] ***E.g.,*** White ***v.*** United States, 394 F.2d 49 (9th Cir. 1968); United States v. Battaglia, 394 F.2d 304 (7th Cir. 1968); Cane v. United States, 390 F.2d 58 (8th Cir.), ***cert. denied,*** 392 US. 906 (1968).

> [S]uch declarations are admissible over the objection of an alleged co-conspirator, who was not presented when they were made, only if there is proof *aliunde* that he is connected with the conspiracy ... otherwise hearsay would lift itself by its own bootstrap to the level of competent evidence.[129]

In determining the admissibility of statements of co-conspirators, it is the trial judge who determines if there is enough evidence in the record to show that the conspiracy existed and whether the statement was made in pursuance of it. One federal decision has indicated that the trial judge should then instruct the jury that they can consider such statements of a co-conspirator only if they initially find beyond a reasonable doubt that a conspiracy existed.[130] The weight of authority seems to be otherwise,[131] however, and no cases have been found holding it error for the judge to refuse such an instruction.

The first detailed discussion of this point in the federal cases was by Judge Learned Hand in *United States v. Dennis.*[132] In this case the trial judge did issue such a limiting instruction, and in commenting upon this, Judge Hand said:

> It is difficult to see what value the declarations could have as proof of the conspiracy, if More wing them ithe jury had to be satisfied that the declarant and the accused were engaged in the conspiracy charged. . . . The law is indeed not wholly clear as to who must decide whether such a declaration may be used; but we think that the better doctrine is that the judge is always to decide as concededly he generally must, any issues of fact on which the competence of evidence depends, and that, if he decides it to be competent, he is to leave it to the jury to use like any other evidence without instructing them to consider it as proof only if they have decided a preliminary issue which alone makes it competent. Indeed, it is a practical impossibility for layman, and for that matter for mast judges, to keep their minds in the isolated compartments that this requires.[133]

Judge Hand's comments were dicta, but the issue was squarely faced in *Carbo v. United States*[134] where some underworld figures

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[129] Glasser v. United States, 315 U.S. 60, 74–75 (1942).

[130] United States v. Kahn, 381 F.2d 824 (7th Cir.), *cert. denied,* 389 U.S. 1015 (1967).

[131] *See* United States v. Ragland, 375 F.2d 471 (2d Cir. 1967), *cert. denied,* 390 U.S. 925 (1968); United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), *aff'd,* 385 U.S. 293 (1966); Orser v. United States, 362 F.2d 580 (5th Cir. 1966); Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), *cert. denied,* 377 U.S. 953 (1964).

[132] 183 F.2d 201 (2d Cir. 1950), *aff'd,* 341 U.S. 494 (1951).

[133] *Id.* at 230–31.

[134] 314 F.2d 718 (9th Cir. 1963), *cert. denied,* 377 U.S. 953 (1964).

were charged with conspiracy to commit extortion and the interstate transmission of threats to secure managerial control of Don Jordan, a welterweight fighter. A substantial part of the proof consisted of hearsay testimony about what various of the co-conspirators had said about their fellow conspirators, and the accused requested a limiting instruction concerning this testimony.[135] In affirming the trial judge's refusal to give the limiting instruction, the court, in a well reasoned opinion, said:

> The situation is rendered confusing by the fact that the admissibility of this evidence . . . depends upon a disputed preliminary question of fact which coincides with the ultimate jury question of the merits. The declarations are admissible against the defendants if they are co-conspirators. If they are co-conspirators they are guilty. The problem presented to us is whether the preliminary question . . . is to be resolved by the jury or by the judge. . . . [I]f by independent evidence the defendant's position as a co-conspirator is to be established by the jury upon their judgement beyond a reasonable doubt, there is no occasion to resort to the declarations at all. The district court in effect will have told the jury, "You may not consider this evidence unless you first find the defendant guilty.". . . [T]o accept the problem as one of admissibility of evidence is to recognize that the declarations, if admissible, shall be considered by the jury in reaching its determination upon the issue of innocence or guilt. It will not do to tell the jury that it must reach its determination first.'"

The court further held that giving the question to the jury to be decided on the basis of a prima facie case rather than beyond reasonable doubt would not be the answer, because it might cause confusion:

> The jury is already concerned with the evidence weighing standards involved in proof beyond a reasonable doubt. To expect them not only to compartmentalize the evidence, separating that produced by the declamations from all other, but as well to apply to the independent evidence the entirely different evidence weighing standards required of a prima facie case, is to expect the impossible."[136]

VI. JOINT TRIALS

Conspiracy is a joint offense in that it "is one committed by two or more persons acting together in pursuance of a common

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[135] The requested instruction was, "If you do not find, on independent proof, that a conspiracy existed and the absent defendant knowingly participated in the conspiracy . . . all such evidence must be ignored as to him." *Id.* at 735. It should be noted that this requested instruction did not require belief beyond a reasonable doubt.

[136] *Id.* at 736.

[137] *Id.* at 737.

intent."[138] Thus the Government may charge the participants jointly, and "the advantage of a joint charge is that all the accused will be tried at one trial, thereby saving time, labor, and expense. . . . [But] this must be weighed against the possible unfairness to the accused which may result if their defenses are inconsistent or antagonistic.'"[139] The advantage in this situation is generally for the prosecution and not for the defense, since the fate of the accused may very well depend upon his ability to disassociate himself from his alleged co-conspirators rather than upon the merits of his own aase. It would seem therefore that the defense should normally **seek** a severance.[140] The assertion has been made, in fact, that: "In every case where there are multiple defendants, a motion for severance and separate trial as to each defendant should be made."[141]

The accused has no absolute right to have his case tried separately, however, and whether a severance should be granted is within the discretion of the trial judge."[142] "It is well settled that such motions [to sever] are addressed to the sound discretion of the trial judge and his decision thereon will not be reversed in the absence of an affirmative showing of an abuse of discretion."[143] Typical reasons given by courts for being reluctant to grant severances in oonspiracy trials are:

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[138] MCM, 1969 (Rev.), para. 26*d*.

[139] *Id*. ***See*** *also* Fed. R. Crim. P. 8(b) and 14.

[140] ***See*** MCM, 1969 (Rev.), para. 69d: "The motion should be granted in any case if good cause is shown; but when the essence of the offense is a combination between the parties—conspiracy, for instance—the law officer or special court-martial may properly be more exacting than in other cases as to whether the facts established in support of the motion constitute good cause."

[141] SAN DIEGO, HANDBOOK ON CRIMINAL PROCEDURE IN THE U.S. DISTRICT CURT §7.1, FEDERAL DEFENDER'S PROGRAM (1967).

[142] *E.g*., Schaffer v. United States, 362 U.S. 511 (1960); United States **v.** Kahn, 381 F.2d 824 (7th Cir.), ***cert.*** denied, 389 U.S. 1015 (1967); Cnited States v. Godel, 361 F.2d 21 (4th Cir.), cert. denied, 385 U.S. 838 (1966); United States v. Evans, **1** U.S.C.M.A. 541, **4** C.M.R. 133 (1952).

[143] United States v. Barrow, 363 F.2d 62, 67 (3d Cir. 1966), ***cert.*** denied, 385 U.S. 1001 (1967). See *also* United States v. Vida, 370 F.2d 739 (6th Cir.), ***cert.*** denied, 387 U.S. 910 (1967) (no abuse found even when some accused have a larger share in the scheme's illegality); United States v. Abrams, 357 F.2d 539 (2d Cir.), cert. denied, 384 U.S. 1001 (1966) (discretion should not be interfered with where the charge against all defendants may be proved by same evidence and results from same series of acts); United States v. Payne, 12 U.S.C.M.A. 455, 31 C.M.R. 41 (1961).

> [T]he number of participants in a criminal conspinacy is not a matter of 6he prosecutor's choosing. If those who oonspire to violate the law dislike a trial with so many defendants, they should reduce the scope of their conspiracy and lessen the field of its operation, or better 'still, abandon the enterprise before they enter upon it.[144]

and:

> A man takes some risk in choosing his associates and, if he is hailed into court with them, must ordinarily rely on the fairness and ability of the jury to **separate** the sheep from the goats.[145]

The United States Court of Military Appeals announced the rule in one of their early cases that the bare assertion of prejudice will not suffice as a basis for severance. *United States* v. *Evans*[146] was a joint trial for rape where the defense moved for a severance contending that there were antagonistic defenses between the two accused, and declined to specify where the defenses were antagonistic. In affirming the law officer's refusal to sever the trial, the court said:

> Whew . . . a joint offense is charged, a jdnt trial is customary and proper practice. . . . In such a situation separate trial is a privilege, not a right. . . . The burden rests on him who seeks severance to show the risks of prejudice to his defense through joint trial. As a privilege, too, it is a matter resting largely within the discretion of the trial judge.'"

Starting with the premise, then, that the burden is upon him seeking severance to show "good cause" for it, some examination of the cases is necessary in order to determine what is "good cause" and what is not. The United States Court of Military Appeals has held in two cases that it was not error to try an accused in a joint trial with a co-accused who pleaded guilty.'"[147]

The Manual mentions three of the more common grounds **for** granting a motion to sever: **(1)** that one accused desires to use the testimony of another accused in his defense; **(2)** that some of the accused have antagonistic defenses; and **(3)** that evidence as to one accused will prejudice the defense of another.[149]

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[144] Capriola v. United States, 61 F.2d 5, 13 (7th Cir. 1932), ***cert. denied, 287*** U.S. 671 (1933).

[145] United States v. Fradkin, 81 F.2d 56, 59 **(2d** Cir. 1935), ***cert. denied,*** 297 U.S. 270 (1936).

[146] 1 U.S.C.M.A. 541, 4 C.M.R. 133 (1952).

[147] ***Id.*** at 136–36. ***See*** *also* United States v. Kahn, 366 F.2d 259 (2d Cir.), ***cert. denied,*** 385 U.S. 948 (1966).

[148] United States v. Oliver, 14 U.S.C.M.A. 192, 33 C.M.R. 404 (1963); United States v. Baca, 14 U.S.C.M.A. 76, 33 C.M.R. 288 (1963).

[149] MCM, 1969 (Rev.), para. 69*d*.

The first ground mentioned above, that the accused desires to use the testimony of another accused in his defense, was successfully asserted in ***United States*** v. ***Echeles.***[150] The charges were for suborning perjury and conspiracy to do so, and the facts giving rise to the indidment arose in a previous case where E, a lawyer, represented ***A*** in a narcotics case. In the trial of the prior case, *C* and *S* gave false alibi testimony that ***A*** was somewhere else when the offense was committed. In rebuttal, the Government called *C* who admitted the falsity of his testimony and said that "the lawyer" had told him to do it. ***A*** then testified that the whole thing was his idea and that his lawyer, *E*, had nothing to do with it. At the trial of the conspiracy case, a joint trial of *E*, ***A***, and C, ***E*** moved for a severance claiming that he would be prejudiced by not being allowed to call ***A*** as a witness on his behalf. It was held to be error for the trial judge not to grant a severance in this case, since the court could see the obvious importance of *A*'s testimony and could also see what this testimony would be.

The holding in this case should be compared, however, with that in ***United States*** *v.* ***Kahn,***[151] where an opposite result was reached, and ***Echeles*** was, in effect, limited to its facts, which indicated that ***A*** would have testified and what that testimony would have been. Absent such a showing, severance will not be granted.[152]

In regard to the second common ground mentioned in the Manual for granting a motion to sever, that of antagonistic defenses among accused, no case has been found where a trial judge's ruling in denying severance on this ground alone was held to be improper. The United States Court of Military Ap-

[150] 352 F.2d 892 (7th Cir. 1965).

[151] 381 F.2d 824 (7th Cir.), ***cert. denied,*** 389 U.S. 1015 (1967).

[152] United States v. Kahn, 336 F.2d 259 (2d Cir.), ***cert. denied,*** 385 U.S. 948 (1966). "Kahn and Schawartzberg contend that the denial of their motions for severance unfairly restricted their right to. call witnesses. Their position appears to be that their joint trial made it less likely that Schawartzberg would give exculpatory evidence for Kahn, since at a joint trial, if Schawartzberg testified at all, he would waive the right not to answer questions about the crime charged . . . whereas at a separate trial of Kahn, Schawartzberg could have testified in her behalf while refusing to answer questions which incriminated him. This possibility, standing by itself, did not make the denial of a motion for severance erroneous . . . at least in the absence of anything in this record indioating that the codefendent would have given exculpatory evidence." ***Id.*** at 263–64 (citations omitted).

[153] United States v. Oliver, 14 U.S.C.M.A. 192, 33 C.M.R. 404 (1963).

peals has noted that antagonistic defenses among co-accused are not uncommon and has held that the existence of a conflict does not require granting a severance.'" It would seem that the assignment of separate defense counsel for each accused would obviate the necessity for separate trials in most cases of this type. However, there is authority to the effect that, if the interests of the co-accused conflict to the point that the attorney for one accused must comment on the silence of the other accused, a severance should be granted.'"

In ***DeLuna v. United States,'"*** a narcotics case where DeLuna and Gomez were occupants of a car from which police saw narcotics being thrown, Gomez testified he was innocent and knew nothing about the narcotics. He said that DeLuna gave him the package to throw out the window when he saw the police and that he did so, not knowing what the package contained. DeLuna did not testify. In his argument to the jury, Gomez's attorney stressed the point that DeLuna had been unwilling to take the stand and that an honest man would not have been afraid to testify. Gomez was found not guilty and DeLuna, guilty. In reversing the conviction of DeLuna, and holding that the trial judge commited error in not granting a motion to sever, the court said: "If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately."'"

The holding in ***DeLuna*** sets forth an interesting proposition of law and, if followed, would provide a valuable weapon in the hands of an accused who desired to be tried separately from his co-accused. Other circuit courts have not followed ***DeLuna,*** however; the general reason given is that a lawyer representing one defendant has no more right to comment on the silence of a co-defendant than does the prosecution, and the trial judge should not allow it."' Most of these holdings indicate that if an accused can show "real prejudice" by not being allowed to comment on the silence of a co-accused, then a severance might be proper, but none of these holdings found such prejudice.

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154 DeLuna **v.** United States, **308** F.2d **140** (5th Cir. **1962).**

155 ***Id.***

156 ***Id.*** at **140.**

157 *E.g.,* United States v. Battaglia, **394** F.2d **304 (7th** Cir. 1968); United States **v.** Kahn, **381** F.2d **824** (7th Cir.), ***cert. denied,*** **389** U.S. **1015** (1967); United States **v.** McKinney, **379** F.2d **259** (6th Cir. 1967); Kolod **v.** United States, **371** F.2d **983** (10th Cir.), ***cert. denied,*** **389** U.S. **834 (1967);** Hayes **v.** United States, **329** F.2d 209 (8th Cir.), ***cert. denied,*** 377 U.S. **980 (1964).**

The third ground, mentioned in the Manual, for granting a motion to sever, that evidence as to one accused will prejudice the defense of another, has resulted in the greatest recent change in the law. In *Bruton v. United States,*[158] the Supreme Court held that it was error to use, in a joint trial, the confession of one accused if it inculpates another accused. In this case, *B* and *E* were tried jointly for robbery, and a witness testified that *E* orally confessed to him that *E* and *B* committed the robbery. Under the authority of *Delli Paoli v. United States,*[159] this testimony was allowed, with an instruction by the trial judge that it was competent evidence against *E* only and must be disregarded in determining *B*'s guilt or innocence. In overruling *Delli Paoli,* the court rejected the proposition that the jury could be relied upon to ignore *E*'s confession when considering the case against *B,* and held that the admission of this confession violated *B*'s "right of cross-examination secured by the confrontation clause of the Sixth Amendment."[160] In *Roberts* v. *Russell,*[161] a habeas oorpus proceeding attacking a robbery conviction in a state court on the ground that an extrajudicial confession of a eo-defendant inculpating the accused was admitted in evidence at their joint trial, the court took *Bruton* one step further and held that it was to be applied retroactively.

The United States Court of Military Appeals has indicated that they will follow *Bruton,* properly limited, however, to finding error only when the alleged co-conspirator does not testify and is not available for cross-examination.[162] It is apparent then that in any joint offense, including conspiracy, if one of the accused has confessed, and his confession implicates another accused, the Government must either grant a severance or not use the confession. It should be noted, however, that the holding in *Bruton* has only to do with extrajudicial statements of one accused that *are not* admissible against the other accused, and has no effect upon the use of such statements when they *are* admissible against the other accused. Therefore, since the out-of-court statements of one conspirator, made during the life of the

[158] 391 U.S. 123 (1968).

[159] 352 U.S. 232 (1957).

[160] Bruton v. United States, 391 U.S. 123, 126 (1968).

[161] 392 U.S. 293 (1968).

[162] United States v. Gooding, 18 U.S.C.M.A. 188, 39 C.M.R. 188 (1969). Similar limitations of *Bruton* are found in Roberts v. United States, 416 F.2d 1216 (5th Cir. 1969); and United States v. Marine, 413 F.2d 214 (7th Cir. 1969).

conspiracy and in furtherance of it, are admissible against the other conspirator under a well recognized exception to the hearsay rule, the holding in *Bruton* will have no effect on the use of such statements."

In *United States* v. ***Kahn***[163] there is an excellent summary of the law on joint trials of conspirators. In this case, the court said, in affirming the lower court's denial of severance:

> Severance of offenses and defendants is discretionary with the trial court. . . . Of course, such discretion is subject to correction if abused. . . . Generally, where the indictment charges a conspiracy . . . the rule is that persons jointly indicted should be tried together , . . [and] severance should not be granted except for the most cogent reasons. . . . Not to be forgotten among the considerations affecting the exercise of the trial court's discretion is the possible prejudice to the Government which might result from a 'separate trial.[165]

> Thus . . . it is necessary to determine whether a joint trial infringes a defendant's right to a fundamentally fair trial. . . . This determination is made by asking whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to each defendant.[166]

In military practice, an enlisted accused may always obtain a trial separate from his co-accused by simply requesting that enlisted persons be appointed to serve on his court,[167] presuming, of course, the other accused do not do likewise. It is sometimes forgotten, however, that the Government has a legitimate interest in having eo-conspirators tried jointly. It is certainly less expensive and less burdensome on the courts to try all conspirators in one trial. Additionally, multiple trials may cause witnesses to be less willing to testify, knowing they will be required to appear in several different trials. Finally, separate trials are more inclined to result in inconsistent verdicts, necessitating a reversal of a previous, and otherwise proper, conviction."

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163 "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence . . . the problem arising only because the statement was . , . admissible against the declarant Evans. . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the confrontation clause." Bruton v. United States, 391 U.S. 123, 128 (1968).

164 381 F.2d 824 (7th Cir.), ***cert. denied,*** 389 U.S. *1015* (1967).

165 ***Id.*** at 838.

166 ***Id.*** at 839.

167 UCMJ art. 25(c)(1); MCM, 1969 (Rev.), para. 36c(2).

168 ***See, e.g.,*** United States v. Kidd, 13 U.S.C.M.A. 184, 32 C.M.R. 184 (1962).

VII. WITHDRAWAL

"If a party to a conspiracy abandons or withdraws from the agreement to commit the offense before the commission of an overt act by any conspirator, he is not guilty of conspiracy under Article 81."[169] Very few would quarrel with the above statement as being a fair pronouncement of the law, particularly in view of the fact that an overt act is required before there has been a violation of article 81 of the Code. However, if one is prosecuted under a statute not requiring an overt act for the crime to be completed, it would seem that withdrawal after the agreement was struck would not prevent the accused from being found guilty of conspiracy, for in this instance, there would be a violation when the agreement was made.[170] Once the crime is committed, withdrawal or abandonment will not erase the crime.

Withdrawal will aid the accused in other ways, however, for when he successfully withdraws, the statute of limitations will begin to run in his favor."[171] Additionally, since his withdrawal ends the conspiracy insofar as he is concerned, later statements and acts by his former co-conspirators will not be admissible against him,"[172] for they would not be made or done in furtherance of a conspiracy in which he was involved.

Suppose *A* is a member of a criminal conspiracy and desires to end his relationship with it. What must he do?

> An effective withdrawal or abandonment must consist of affirmative conduct which is wholly inconsistent with adherence to 'the unlawful agreement and which shows that the party has severed all connections with the conspiracy.[173]

Thus, mere inaction on the part of *A* will not be an effective withdrawal. This rule was first announced and explained by the United States Supreme Court in *Hyde v. United States,*[174] where the Court pointed out that there was a difference between a conspiracy having a distinct period of accomplishment and one that is to be continuous. In holding if the conspiracy continues, the relationship of the conspirators also continues, the Court stated:

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169 MCM, 1969 (Rev.), para. 160.

170 *See* Crear v. United States, 261 Fed. 257 (5th Cir. 1919).

171 *E.g.*, Grunewald v. United States, 353 U.S. 391 (1957); Fiswick v. United Stakes, 329 U.S. 211 (1946); Hyde v. United States, 225 U.S. 347 (1912).

172 MCM, 1969 (Rev.), para. 160.

173 *Id.*

174 225 U.S. 347 (1912).

> This view does not, as it is contended, take the defense of the statute of limitations from conspiracies. It allows it to all, but makes its application different. Nor does it take from a conspirator the power to withdraw from the execution of the offense or to avert a continuing criminality. It requires affirmative action, but certainly this is no hardship. Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow *or* defeat the purpose he is in no situation to claim the delay of the law. . . . [A]s he has started evil forces he must withdraw his support from them or incur the guilt of their continuance. Until he does withdraw there is conscious offending. . . .[175]

The kind of "affirmative action" that will be enough to constitute a withdrawal is not clear from the few federal decisions on the subject. It is clear, however, that the imprisonment of a conspirator does not necessarily show his withdrawal.[176] In *United States* v. *Agueci,*[177] where a continuing conspiracy to violate federal narcotics laws was charged, the fads showed that one of the alleged conspirators, Valachi, surrendered himself to the United States attorney on another charge and was jailed. Valachi claimed that this was a withdrawal on his part, and that as a result, statements of alleged co-conspirators made after his surrender were not admissible against him and he should have been granted a severance. In rejecting Valachi's assertion, the court held:

> The law is clear . . . that while arrest or incarceration *may* constitute a withdrawal from a conspiracy, it does not follow that in every instance it *must.* . . . Here, not only was there no conclusive evidence of' [Valachi's] affirmative withdrawal from the conspiracy . . . but there was positive evidence that [Valachi] had in fact designated . . . others to look after his interest in the conspiracy after his incarceration. Since [Valachi] was to get a share in the profits made on sales by these co-conspirators, there is little question but that he continued to have a stake in the success of the venture.[178]

This holding, like most other decisions on this issue,[179] did not specify what acts of the accused were necessary to constitute a

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[175] *Id.* at 369–70.

[176] *E.g.,* United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), *cert. denied,* 379 U.S. 960 (1965); United States v. Agueci, 310 F.2d 817 (2d Cir. 1962), *cert. denied,* 372 U.S. 959 (1963); Poliafico v. United States, 237 F.2d 97 (6th Cir. 1956), *cert. denied,* 352 U.S. 1025 (1957).

[177] 310 F. 2d 817 (2d Cir. 1962), *cert. denied,* 372 U.S. 959 (1963).

[178] *Id.* at 839.

[179] *E.g.,* United States v. Chester, 407 F.2d 53 (3d Cir. 1969); United States v. Kelly, 38 C.M.R. 722 (1967).

withdrawal, but dismissed the issue on the ground that there was no showing of a withdrawal. Implicit in this decision also is the proposition that the defendant has the burden of establishing his withdrawal from the conspiracy.[180]

By entering into a conspiracy and agreeing to carry on some course of criminal conduct with others, the accused has indicated to his fellow conspirators, and led them to believe, that they have his allegiance and they can depend upon him to continue the criminal plan. It would seem, therefore, that an accused may not successfully withdraw from a conspiracy unless he notifies his cohorts and lets them know they can no longer depend upon his assistance. "It is fair to say . . . that the most commonly accepted test of abandonment by an individual . . . is his giving of notice to the other conspirators that he no longer intends to take part in the scheme."[181] This may be more difficult to do than one would think if the conspiracy involved was so vast that the accused was acquainted with only some of the alleged conspirators. No federal decision has been found directly on point on this issue, indicating how far the accused must go in notifying his co-conspirators. It would appear to be sufficient, however, if "the defendant reasonably expected his withdmwal to be communicated to the rest of his associates by those whom he informed; to require him personally to contact all members seems too harsh."[182]

Giving of notice to fellow oonspirators was held not to be sufficient to constitute a withdrawal in *Eldridge v. United States*.[183] This case involved a charge of conspinacy to embezzle money and make false entries to conceal the embezzlement. Eldridge testified that he notified his co-conspirators that he was through and would have nothing further to do with the shortage. The embezzlement and concealment was continued by the others, and more than three years later, all were indicted. Eldridge then

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[180] *See also* United States **v.** Borelli, 336 F.2d 376, 388 (2d Cir. 1964); United States **v.** Cianchetti, 315 F.2d 584, 589 (2d Cir. 1963); United States **v.** Dubrin, 93 F.2d 499, 504 (2d Cir. 1937), *cert. denied,* 303 U.S. 646 (1938).

[181] Wechsler, Jones, and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code*, 61 COLUMBIA L. REV. 957, 1015 (1961); *see also* Comment, *Developments in the Law — Criminal Conspiracy*, 72 HARV. L. REV. 920, 958 (1959).

[182] Comment, *Developments in the Law — Criminal Conspiracy,* 72 HARV. L. REV. 920, 968 (1959).

[183] 62 F.2d 499 (10th Cir. 1932).

claimed that he had effectively withdrawn from the conspiracy, so the statue of limitations had run in his favor. The trial judge submitted to the jury the question of Eldridge's withdrawal from the conspiracy as far as participation in further embezzlements was concerned, but would not submit the question of withdrawal from the conspiracy to falsify the books in order to conceal the embezzlement. In affirming the conviction, the court held that, in this case, notification was not enough. For his withdmwal to be effective, Eldridge would have had to persuade his fellow conspirators to cease concealing their crime, in other words, expose the crime:

> A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step *on* the fuse. The first abstraction from this bank set in motion a chain of inescapable consequences, if the conspiracy was to succeed. To withdraw, the chain must be interrupted; and that is not done by advising his associates to confess. Eldridge must have known that his associates must continue to conceal the shortages unless they, too, were willing to confess and take the consequences. . . . We hold therefore, that Eldridge did not manifest an intent, in the conversation with his confederate, that the shortage should be revealed and their crime confessed; but if he did so intend, a manifestation of that laudable purpose to his co-conspirator was not an effective method of disclosure of an adequate confession of guilt.[184]

So in addition to notifying his confederates, as Eldridge did in this case, he should also have confessed his crime, in order to withdraw effectively from the conspiracy to conceal the embezzlement. This seems to be an extremely harsh rule, not designed to encourage a withdrawal from a conspiracy.

The Model Penal Code gives the accused an option as to how to terminate a conspiracy by abandoning it. He may either advise "those with whom he conspired of his abandonment or [inform] the law enforcement authorities of the existence of the conspiracy and of his participation therein."[185] This appears to be the proper recognition of the defense of withdrawal or abandonment.'*

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[184] *Id.* at 451–52.

[185] MODEL PENAL CODE § 503(7) (Tent. Draft, 1962).

[186] It should be noted here that the term "withdrawal" and "abandonment" has been used interchangeably. There appears to be no distinction made by the courts between these terms, and MCM, 1969 (Rev.), para. 160, certainly makes none.

The issue of withdrawal from a criminal conspiracy has not been directly faced by the United States Court of Military Appeals. In *United States v. Miasel,*[187] however, the court discussed withdrawal in affirming a board of review decision that had reversed a finding of guilty of assault with intent to commit sodomy. The evidence in this case showed that the accused had acted in concert with others pursuant to a common plan or enterprise, but had terminated his participation in the group's conduct before any sodomy was committed. It was held to be error for evidence of the sodomy to be admitted against the accused. In discussing withdrawal, the court held that the rules of admissibility of evidence against co-actors are substantially the same as those involving eo-conspirators, And once a conspiracy has ended, either through accomplishment of the objective or withdrawal, subsequent acts or statements of one of the conspirators are admissible only against him and not against a party who has withdrawn. Therefore, the Court held, the board was correct in holding that admissibility of the acts of sodomy by the accused's co-actors, committed after he had withdrawn, was prejudicial error.

The court did not spend much time discussing what "affirmative acts" on the part of the accused were necessary in order for them to constitute a withdrawal, the Court accepting the board's determination of fact that the accused had withdrawn. The Court did state, however: 'A withdrawal from a oonspiracy may be shown by any evidence indicating conduct 'wholly inconsistent with the theory of continuing adherence' . . . . [I]n order to withdraw from a conspiracy 'affirmative action is required'."[188]

VIII. CONCLUSION

It cannot be successfully denied that the law of criminal conspiracy does contain features that give the prosecution an undue advantage over the defense. The warning in *Krulewitch* by the late Mr. Justice Jackson has served to alert jurists to the dangers involved, however; and the Supreme Court's holding in *Bruton* has removed one of the prosecution's greatest advantages. As was discussed earlier in this article, the United States Court of Military Appeals has aligned itself with the Jackson warning in *Krulewitch* and is following the holding in *Bruton.*

[187] 8 U.S.C.M.A. 374, 24 C.M.R. 184 (1957).
[188] *Id.* at 378–79, 24 C.M.R. at 188–89.

The danger presented to society by the combination of two or more persons for some criminal purpose cannot be ignored, but the existence of such a danger does not justify the improper use of a charge of criminal conspiracy. It is therefore incumbent upon all judge advocates, particularly prosecutors and judges, to be alert to the possible misuses of criminal conspiracy charges. Only in this way may justice result for both society and the accused.

COMMENTS

THE LOYALTY ACTION IN THE ARMY*

The Army personnel security program is now over twenty-one years old. Its standards have been the subject of much controversy and litigation as they strike a balance between first and fifth amendment rights and the military need to control internal subversion. Within this background, the author examines the loyalty statutes, regulations, procedures and questionnaires, the functions of JAGC officers, and the rights of an individual whose loyalty is questioned.

I. INTRODUCTION

Publication of the latest revision of *Army Regulation No. (AR) 604–10*[1] provides a basis for reexamination of the law and precedents relevant to the proper operation of the military personnel security program in the Army. While the new regulation makes few subsbantive changes, it revises the procedures employed in adjudicating personnel security cases. It is not the intent of this article simply to discuss procedures; rather, it is intended to provide a basis for understanding the substantive grounds on which a loyalty action can be taken within the Army and to set forth some of the problems encountered. It will be noted that many opinions of The Judge Advocate General cited in this article are classified, as these opinions were rendered in the context of specific cases. However, it is hoped that these cases are accurately cited for the propositions for which they stand.

The Army's loyalty program has evolved over the past twenty-one years from a rather summary one to a highly involved process, requiring considerable time and as many as twenty-six separate steps.[2] These procedures have existed in substantially their present form since 1956.[3] The question of subversion within

*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.

[1] 17 Sep. 1969 [hereinafter cited as AR 604–10].

[2] *See* former Special Reg. No. 600–220–1 (10 Nov. 1948) [hereinafter cited as SR]; SR 6010–220–1 (19 Jan. 1950); SR 600–220–1 (6 Dec. 1950); SR 600–220–1 (18 Jun. 1954); AR 604–10 (29 Jul. 1955); AR 604–10 (15 May 1857); AR 604–10 **(4 Nov.** 1959).

[3] *See* former **AR** 604–10 (29 Jul. 1955) (Change No. 2, 12 Jun. 1956).

the Army was brought to public focus by Senator Joseph McCarthy,[4] and his investigation into this question played a considerable part in the public hearings that led to his downfall.[5] That the problem of disloyalty within the ranks is a very small one is reflected by the fact that only two members of the Army were eliminated pursuant to *AR 604–10* in 1968, and two were eliminated in 1969. When it is considered that the Army is 1.5 million men strong, this figure becomes all the more remarkable. Nevertheless, many thousand personnel security investigations are conducted by the Army every year,[6] so *AR 604–10* retains its vitality despite the small number of disloyal members and potential members of the Army that are unearthed. For this reason, an intensive examination of the law applicable to the personnel security program is warranted.

II. PROCEDURES EMPLOYED

Before examining the law pertaining to disloyalty as it applies to the Army, a short outline of the Army's personnel security program in operation should be sketched. The Army presumes that any individual's acceptance or retention is clearly consistent with the interests of national security.[7] However, where this is not the case, the individual must be rejected or discharged. The following procedures are employed in making this determination.

Every registrant for induction is required, prior to induction, to execute two forms. Applicants for enlistment or appointment are also required to complete these forms.[8] One of these forms,

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[4] Sen. McCarthy's only significant discovery within the Army was Major Irving Peress, who was identified before his subcommittee as being a member of the Communist Party. ***Hearings on Communist Infiltration in the Army Pursuant to S. Res. 189 Before the Pemanent Subcomm. on Investigations, Senate Comm. on Government Operations,*** 83rd Cong., 2d Sess. (1954) [hereinafter cited as Hearings].

[5] It will be recalled that the Army-McCarthy hearings cummenced after the Army charged that Senator McCarthy was trying to get special favors for Private G. David Schine, and Senator McCarthy countercharged that the Army's charges were an attempt to force him to abandon his investigation into subversion within the Army. ***See Hearings : Special Investigation on Charges and Countercharges Involving: Secretary of the Army Robert T. Stevens, John G. Adams, H. Struve Hensel; and Senator Joe McCarthy, Roy M. Cohn, and Francis P. Carr.***

[6] According to the Assistant Chief of Staff for Intelligence, Department of the Army, 12,176 personnel security investigations were conducted during 1968.

[7] AR 604-10, para. 2-1.

[8] ***See generally*** AR 604-10, ch. 3.

Department of Defense Form 98, is the Armed Forces Security Questionnaire. This questionnaire contains a list of the organizations on the Attorney General's list of subversive organizations. The individual is required to read this form and to answer a number of questions contained therein.[9] The only basis for refusal is a claim of fifth amendment privilege against self-incrimination.[10] The other form, *DD Form* 398, is a statement of personal history, and it asks questions simikr to, but slightly broader than, those asked on the Armed Forces Security Questionnaire.[11]

[9] These questions include the following:

"a. Are you now a member of any of the organizations, groups *or* movements listed?

"b. Have you ever been a member of any of the organizations, groups, or movements listed?

"c. Are you now employed by any of the organizations, groups, or movements listed?

"d. Have you ever been employed by any of the organizations, groups, or movements listed?

"e. Have you ever attended any meeting of any of the organizations, groups, or movements listed?

"f. Have you ever attended any social gathering of any of the organizations, groups, or movements listed?

"g. Have you ever attended any gathering of any kind sponsored by any of the organizations, groups, or movements listed?

"h. Have you ever prepared material for publication by any of the organizations, groups, or movements listed?

"i. Have you ever corresponded with any of the organizations, groups, or movements listed or with any publication thereof?

"j. Have you ever contributed money to any of the organizations, groups, or movements listed?

"k. Have you ever contributed services to any of the organizations, groups, or movements listed?

"1. Have you ever subscribed to any publication of any of the organizations, groups, or movements listed?

"m. Have you ever been employed by a foreign government or any agency thereof?

"n. Are you now a member of the Communist Party of any foreign country?

"o. Have you ever been a member of the Communist Party of any foreign country?

"p. Have you ever been the subject of a loyalty or security hearing?

"q. Are you now or have you ever been a member of any organization, association, movement, group or combination of persons not *on* the Attorney General's list which advocates the overthrow of our constitutional form of government, or which has adopted the policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means?"

[10] JAGA 1969/4006, 11 Jun. 1969; JAGA 1968/4809, 27 Nov. 1968.

[11] These questions include the following:

A registrant for induction who qualifies either form by listing membership in an organization listed on the Attorney General's list or who states that he is a communist is not inducted until an investigation is conducted.'* An individual who qualifies either form during the enlistment or appointment process is not enlisted or appointed until an investigation is conducted, and an individual who refuses to complete either form in its entirety is ineligible for enlistment or appointment.[13] A registrant who refuses to complete either form or who qualifies either form by listing membership in an organization not cited by the Attorney General is nevertheless inducted but is prevented from being awarded a security clearance until such time as an investigation is conducted."

All investigations within the United States are conducted by the US. Army Intelligence Command.[15] If the investigation de-

"Are you now or have you ever been a member of the Communist Party U.S.A. or any communist organization anywhere?

"Are you now or have you ever been a member of a facist organization?

"Are you now or have you ever been a member of any organization, association, movement, group, or combination of persons which advocates the overthrow of our constitutional form of government, or which has adopted the policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means?

"Are you now or have you ever been affiliated or associated with any organization of the type described above as an agent, official, or employee?

"Are you now associating with, or have you associated with any individuals, including relatives, who you know or have reason to believe, are or have been members of any of the organizations identified above?

"Have you ever engaged in any of the following activities of any organization of the type described above: contribution(s) to, attendance at or participation in any organizational, social, or other activities of said organizations or of any projects sponsored by them: the sale, gift, or distribution of any written, printed, or other matter, prepared, reproduced, or published by them or any of their agents or instrumentalities?"

[12] **AR** 604–10, para. 3–3.

[13] *Id.*, para. **3–2.**

[14] *Id.*, para. 3–3b. Prior to 9 November 1967, para. 18, former AR 604–10 (5 Nov. 1959), provided that no registrant qualifying or refusing to complete DD Form 98 or DD Form 398 would be inducted until his case were resolved. However, on that date the referenced provision was changed in the manner indicated in the text accompanying this footnote. Dep't of Army Message No. (DM) 839487 (9 Nov. 1967); DM 843510 (12 Dec. 1967). Even though these message changes were effective as changes to the regulation, the absence of regular publication led many persons to believe that the regulations had not been changed and that the Army was erroneously inducting people despite their refusal to complete either form.

[15] **AR** 604–10, para. 4–5.

velops credible derogatory information pertaining to a member of the Army, the appropriate major commander is notified so that flagging action can be taken.[16] Completed investigations are forwarded to the appropriate major commander (in the case of members of the Army) or to the U.S. Army Personnel Security Group (USAPSG)." In cases received by major commands, that office is responsible for recommending either initiation of an elimination action or favorable closing. In either case, the recommendation is forwarded to USAPSG for approval; a major commander is not permitted to close a case without the approval of USAPSG.[18] If USAPSG feels that insufficient derogatory information exists upon which to proceed, it may either request additional investigation or it may close the case favorably.[19] If, however, USAPSG feels that the information developed by the investigation will support rejection or elimination on loyalty grounds, the case is forwarded to the Office of The Judge Advocate General (TJAG).[20]

It is the responsibility of TJAG to determine whether, from a legal standpoint, the case will support rejection or elimination. This determination is based on both the information contained in the investigation and the legal considerations outlined later in this article. If The Judge Advocate General determines that the drafting of allegations is warranted, he prepares the allegations to be used, and the case is forwarded to the Office of Personnel Operations (OPO). If he determines that allegations cannot be prepared and that further investigation will not disclose information upon which action can be taken, the case is returned to USAPSG for favorable closure.[21] Upon receipt of a case from TJAG in which allegations have been prepared, it is the responsibility of OPO to determine whether the loyalty action should be formally opened as a Headquarters, Department of the Army, action, whether the individual should be rejected or eliminated on grounds other than loyalty, or whether the case should be

[16] *Id.* Flagging action is an action taken to preclude favorable personnel actions, such as promotion or transfer, while an investigation is pending. Army Reg. No. 600–31 (27 Jul. 1967).

[17] **AR** 604–10, para. 4–5.

[18] *Id.*, para. **4–4.** Under previous procedure, the major commander was permitted to close the case without USAPSG's approval. See former **AR** 604–10, para. 27*c* (Change No. 1, 28 Dec. 1959).

[19] AR 604–10, para. 5–1.

[20] *Id.*, para. **5–3.**

[21] ***Id.***

closed.[23] If OPO formally opens a loyalty action, the allegations prepared by TJAG are dispatched to the responded. He is %hereafter given four options: **(1)** he can request an appearance before a field board of inquiry; **(2)** he can attempt to rebut the allegations by letter (if he is not a member of the Army); **(3)** he can request discharge in lieu of further proceedings (if he is a member of the Army); or **(4)** he can stand mute, in which case the action is processed without further referral to him."

Assuming the respondent requests an appearance before a field board of inquiry, such a board is appointed by the appropriate commander exercising general court-martial jurisdiction. and a non-voting security adviser is appointed." The major commander supplies an attorney-adviser without vote.[25] The attorney-adviser, who is a field grade officer of the Judge Advocate General's Corps, performs the function normally performed by the recorder, in that he presents the Government's case and provides legal advice to the board upon request.[26] The security adviser advises the board on the significance of alleged subversive activity and of the limitations contained in investigative data." The respondent is supplied with military legal counsel of his choice if reasonably available and is entitled to civilian counsel at his own expense.[28] The board holds a hearing at which the respondent is given access to all unclassified records and is afforded an opportunity to present evidence in his own behalf." The board's determination in the case is an advisory one; it cannot close a case favorably, and it cannot bind higher authority in the event of adverse recommendations." The recommendations of the field board of inquiry are forwarded to the Army Security Review Board, which is a board constituted in the Office of the Secretary

[23] *Id.*, para. **5–5.** In the Oases involving registrants in medical, dental, and allied health specialist categories, the case is referred to a Security Screening Board prior to referral to OPO. This additional step is inserted for the reason that it is required by DOD Directive No. 5210.9, 19 Jun. **1956.** The Security Screening Board previously considered all cases in which The Judge Advocate General drafted allegations (former **AR** 604–10, para. **34 (4** Nov. **1959))**; however, use of this adjudicative body did, not in practice provide additional substantive safeguards, so its jurisdiction has been limited as far as possible.

[24] **AR** 604–10, para. 5–6.

[25] *Id.*, paras. **6–2, 63***d.*

[26] *Id.*, para. 6–3*c.*

[27] *Id.*, para. 6–4.

[28] *Id.*, para. 6–3*d.*

[29] *Id.*, para. 5–6*c*(2).

[30] *Id.*, para. 6–6*c.*

[31] *Id.*, para. **6–7.**

of the Army.[31] The respondent is given a transcript and a copy of the findings and recommendations of the field board of inquiry and is permitted to submit a brief in his own behalf before the Army Security Review Board.[32] The Army Security Review Board also performs an advisory function; it makes recommendations for final action to the Secretary of the Army." The case is considered in toto by the Secretary of the Army or his designee, and final action is taken by order of the Secretary of the Army.[34]

JII. THE LOYALTY STANDARD

Before proceeding into the substantive basis for the taking of a loyalty action, it is necessary first to expose the essential nature of the military personnel security program, and this must be done by examining the true meaning of the standard for acceptance or retention established by the regulation. The standard for acceptance or retention of an individual in the Army set forth in *AR 604–10, i.e.,* that it be clearly consistent with the interests of national security,'' is taken from the standard applied under the Federal Employee Security Program.[36] Although this standard would at first glance appear to permit the rejection or separation of any individual who is or could be a "security risk," it is in fact not nearly so broad. To understand the limitations on the standard set forth in the regulation, it is necessary to understand its history.

The federal employee loyalty program was established in 1947 by ***Executive Order No. 9835.***[37] Under this program, the stand-

[31] *Id.,* para. 7–1.

[32] *Id.,* para. 6–7.

[33] *Id.,* para. 7–2.

[34] *Id.,* para. 7–3.

[35] *Id.,* para. 2–1.

[36] Exec. Order No. 10450, § 2, 3 C.F.R. 936 (Supp. 1953).

[37] Exec. Order No, 9835, 3 C.F.R. 627 (Supp. 1947). The operation of the Truman loyalty program is described in Richardson, *The Federal Employee Loyalty Program,* 51 COLUM. L. REV. 546 (1951). Prior to creation of this program, control of disloyal persons in government was attempted through enactment of provisions in applicable appropriation acts which prohibited payment of wages to government personnel who advocated or who were members of organizations which advocated the violent overthrow of the Government, and made criminal the acceptance of such wages by such persons. *See,* e.g., Military Appropriation Act of 1942, ch. 262, § 10, 55 Stat. 393; this provision last appeared in Department of Defense Appropriation Act of 1956, ch. 432, § 718, 68 Stat. 353. A similar provision contained in section 304 of the Urgent Deficiency Appropriation Act of

ard employed in determining whether an employee should be separated was whether reasonable grounds existed for belief that the person involved was disloyal to the Government of the United States.[38] On 28 April 1951, this standard was amended. The new standard was whether, on all the evidence, there existed reasonable doubt as to the loyalty of the person involved to the Government of the United States." To assist in making the loyalty determination, a number of criteria were prescribed." The cri-

1943, ch. 218, 57 Stat. 431, which denied federal wages to three named federal employees, was held unconstitutional as constituting a bill of attainder in United States v. Lovett, 328 U.S. 303 (1946). The technique of denial of wages is no longer used; however, denial of retired pay is still authorized in certain cases pursuant to the so-called "Hiss Act," 5 U.S.C. §§ 8311–322 (Supp. IV, 1969). In place of denial of wages, Congress has provided that an individual may not hold or accept a position in the Government of the United States or of the District of Columbia if he advocates the overthrow of our constitutional form of government, or is a member of an organization that he knows advocates the overthrow, and has provided that a violation of that prohibition is punishable by a fine of not more than $1,000, imprisonment for not more than a year and a day, or both. Act of 9 Aug. 1955, codified in 5 U.S.C. § 7311 and 18 U.S.C. § 1918 (1964). This statute has been held unconstitutional. Stewart v. Washington, 301 F. Supp. 610 (D.D.C. 1969); Haskett v. Washington, 294 F. Supp. 912 (D.D.C. 1968). The Judge Advocate General had opined that this statute applied to members of the Army on active duty and retired Regular Army commissioned and warrant officers (JAGA 1955/7975, 11 Oct. 1955). Another applicable statute, section 5(a) of the Subversive Activities Control Act of 1950, ch. 1024, tit. I, 64 Stat. 992, *as amended,* 50 U.S.C. § 784(a) (Supp. IV, 1969), made it unlawful for a member of an organization which he knew had been finally ordered to register with the Subversive Activities Control Board to hold nonelective office or employment under the United States. This provision was held by The Judge Advocate General to apply to the Army (JAGA 1950/5948, 3 Oct. 1950); however, it was held unconstitutional in United States v. Robel, 389 U.S. 258 (1967), insofar as it pertained to employment in defense facilities. There is no doubt that, based upon *Robel,* the bar to government employment is unconstitutional as well. This statute was amended by section 4 of the Act of 2 January 1968, Pub. L. No. 90–237, 81 Stat. 765, *codified at* 50 U.S.C. § 784(a) (Supp. IV, 1969), in an attempt to eliminate the deficiency found by the Supreme Court in *Robel;* whether Congress succeeded in doing so is open to question.

[38] Exec. Order No. 9835, *supra* note 37, at Part V, para, 1.

[39] Exec. Order No. 10241, 3 C.F.R. 749 (Supp. 1951).

[40] These criteria included sabotage or espionage; knowing association with spies and saboteurs; treason or sedition or advocacy thereof; advocacy of revolution or force or violence to alter the constitutional form of government of the United States; intentional unauthorized disclosure of confidential documents obtained as a result of employment in circumstances indicating disloyalty; attempting to perform duty so as to serve another government in preference to the United States; and membership in or affiliation or sympathetic association with an organization designated as subversive by the Attorney General.

teria prescribed in 1947 are essentially those in present use.

The loyalty standard was again changed in 1953 by *EO 10450*.[41] This standard is, as noted earlier, that the individual's employment be clearly consistent with the interests of national security. Accompanying this change to the standard were several other changes important to its application. Under *EO 9835*, separation from employment on loyalty grounds was preceded by consideration of the case by a Loyalty Review Board, established in the Office of the Civil Service Commission.[42] *EO 10450* abolished the Loyalty Review Board, but provided in its place that any person removed pursuant to the Executive Order could be reemployed upon the determination of the agency head concerned.[43] The most important change, however, was the addition of "suitability" criteria to be considered in making the determination of whether the individual should be accepted or retrained.[44] By adding suitability criteria tot the loyalty criteria, the loyalty program became a "security risk" program, permitting the agency head to determine whether, in light of the position to be held, the individual concerned should hold the position from the standpoint of national security.[45] The Executive Order continued to require thak

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Exec. Order No. 10450, *supra* note 36.

Exec. Order No. 9835, *supra* note 37, Part 11, para. 3. See Peters v. Hobby, 349 U.S. 331 (1955), concerning the powers of the Loyalty Review Board. Although Peters leveled a broad challenge to the constitutionality of the federal employee loyalty program, the Supreme Court avoided the constitutional questions by limiting its opinion to a finding that **Exec.** Order No. 9835, *supra* note 37, did not authorize the Loyalty Review Board to review findings in cases in which it was determined at agency level that the employee should be retained. Peters was twice considered by agency boards and he was twice found eligible for retention. Nevertheless, the Loyalty Review Board conducted a "post audit" of the agency board's determination. It held a de novo hearing into Peters' case, and found the existence of reasonable doubt as to his loyalty to the Government of the United States. He was hereupon debarred from federal employment.

Exec. Order No. 10450, *supra* note 36, §§ 7, 11.

These "suitability" criteria include behavior indicating that the individual is not reliable or trustworthy; misrepresentations, falsifications and omissions of material fact; criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct; habitual use of intoxicants to excess, drug addiction, or sexual perversion; illnesses affecting judgement or reliability; refusal to testify before a congressional committee relative to loyalty matters; and other facts indicating that the individual may be subjected to coercion or pressure to cause him to act contrary to the best interests of national security. Exec. Order No. 10450, *supra* note 36, § 8(a).

REPORT OF THE COMM'N ON GOVERNMENT SECURITY 41-46 (1957). That the concept of "security risk" can be carried to extreme is illustrated by Lerner v. Casey, 357 U.S. 468 (1958), where a subway conductor in New York City was found to constitute such a risk under state law.

all disloyal persons be removed from government employment, regardless of the nature of their positions."

The military personnel security program was not established pursuant to the aforementioned Executive Order, but rather was established in its present form by ***Department of Defense Directive*** *No.* ***(DOD) 5210.9,*** *7* April 1954, where the Secretary of Defense acted as the agent of the Commander in Chief." ***DOD 5210.9,*** 19 June 1956, in creating the present framework for the military personnel security program, adopted the civilian security standard, but departed from the Executive Order (and thus the civilian program) in several respects. First, it created three loyalty criteria not found in tole Executive Order: knowing participation in the public activities of a subversive organization, sympathetic association with members of subversive organizations, and close continuing association with persons engaged in certain subversive activities." Second, and most important, it separated the "suitability" criteria from the "loyalty" criteria and required that appropriate suitability regulations be employed in separating members on the basis of conduct not falling within the loyalty criteria.[48] Thus, while a "national security'' standard is employed in the military personnel security program, the procedures outlined in ***AR*** *604–10* may be used *only* if the case involves an individual's loyalty to the Government of the United States."

IV. CONSTITUTIONAL CONSIDERATIONS

Disloyalty is a state of mind. It is personal and subjective. Therefore, if a loyalty action is to be taken, it is necessary to establish objectively a subjective matter, *i.e.,* the individual's thought process. Additionally, the Supreme Court has indicated that only an individual's actions, and not his beliefs, are the

[46] Cole v. Young, 351 **U.S.** 536 (1956).

[47] REPORT OF THE COMM'N ON GOVERNMENT SECURITY 115–118 (1957). Prim to promulgation of the original Department of Defense Directive, the Army's loyalty program was based upon a jdnt agreement of the Secretaries of the **armed** forces, dated 26 October 1948. See also JAGA 1959/5779, 6 Aug. 1959.

[48] Dep't of Defense Directive No. 5210.9, § VIII. **C. 2.** g–1, 19 Jun. 1956 [hereinafter cited as DOD Dir. 5210.91.

[49] DOD Dir. 5210.9, § VIII. **C. 3.**

[50] JAGA 1969/6, 19 Feb. 1969. AR 604–10, para. 2-4, provides that the regulation is to be used only when the loyalty criteria are involved to the extent that national security is Ute primary consideration *and* that action under other regulations or the UNIFORM CODE OF MILITARY JUSTICE is inappropriate or has proven unsuccessful.

legitimate concern of government.[51] Thus, although the inquiry in a loyalty action is as to the individual's mental state, the loyalty action itself must be taken on the basis of the individual's actions.

Whether the armed forces are bound to apply Supreme Court decisions made in the context of civilian employment to cases involving military members is an open question. Due to the lack of judicial guidance in this area, however, the Army has taken the position that these cases will be followed, despite the reduced application of such first amendment guarantees in freedom of speech, association, and assembly to members of the armed forces."

V. ACTIVITIES EVINCING DISLOYALTY

The types of activities discussed in this section are those set forth in paragraph 2–3 of *AR 604–10.* In considering the discussion which follows, it is essential to note that, by the terms of the regulation, the criteria of paragraph 2–3 are not grounds for rejection or elimination; they are grounds solely for *investigation.* The ground for rejection or elimination is that the individual's acceptance or retention is not clearly consistent with the interest of national security.

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[51] Schneider v. Smith, 390 U.S. 17 (1968). A contrary opinion was expressed at an earlier time by the Supreme Court in American Communications Ass'n v. Douds, 339 U.S. 382 (1950), wherein the opinion of the Court indicated that refusal to execute a non-Communist affidavit that included disavowal of belief in the overthrow of the Government by force by union officials would constitute a valid basis for denying the union the right to avail itself of the services of the National Labor Relations Board. It is significant to note that this opinion represented the views of only three justices, three justices dissenting on this point and three not taking part in the consideration of the case. Thus this view constituted neither that of a majority of the justices hearing the case nor that of a majority of the bench, so the significance of ***Douds*** for the proposition that a loyalty action could be taken solely on the basis of beliefs was dubious at best. Later decisions of the Court (*e.g.*, Shelton v. Tucker, 360 U.S. 479 (1960); Schneider v. Smith, ***supra),*** indicate that the earlier view expressed in ***Douds*** probably no longer represents the law. *But* see Connell v. Higginbotham, 305 F. Supp. 445 (M.D. Fla. 1969), *probable juris. noted,* 39 U.S.L.W. 3006 (14 Jul. 1970).

[52] **JAGA** 1969/10, 14 Mar. 1969.

[53] United States v. Mowe, 17 U.S.C.M.A. 195, 37 C.M.R. 429 (1967); United States v. Amick, 40 C.M.R. 720 (A.C.M.R. 1969); United States v. Bell, 40 C.M.R. 807 (A.C.M.R. 1969).

A. *ADVOCACY OF THE VIOLENT OVERTHROW OF THE GOVERNMENT*

The Smith Act (18 U.S.C. § 2385 (1964)) establishes advocacy of the overthrow of the Government by force or violence as a criminal offense. Although advocacy of the overthrow is a form of speech and would appear to be protected by the first amendment, the Supreme Court has held that Congress has the lawful power to restrict this form of speech." Nevertheless, in order that advocacy of the violent overthrow be punishable, the Su-

[54] In order to uphold the "advocacy clause" of the Smith Act over first amendment challenge, the Court had to overcome the rather strict view of the so-called "clear and present danger" test previously applied. This test was first formulated in Schenck v. United States, 249 U.S. 17 (1919), as follows: "[T]he character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." 249 U.S. 52.

The *Dennis* court reformulated the test and stated that "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F.2d at 212. We adopt this statement of the rule." Dennis v. United States, *supra,* at 510. Thus, the *Dennis* court in effect read the "present" out of "clear and present danger," justifying its position by stating: "Obviously, the words cannot mean that before the Government may'act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required." *Id.* at 509. This relaxed view of the clear and present danger test allowed the Court to uphold the Smith Act. However, this view of the concept of clear and present danger as justifying an intrusion into the exercise of first amendment rights has been recently rejected in part in. Brandenburg v. Ohio, 395 U.S. 444 (1469). In this case, the Supreme Court held the Ohio criminal syndicalism act unconstitutional, stating that a legislature can impose criminal sanctions upon speech only where the speech was directed to inciting imminent unlawful action and was likely to produce such action. Despite this reemphasis on the "present" of "clear and present danger," the Court curiously found that the Smith Act was nevertheless constitutional under its new test, even though the Court in Yates v. United States, 354 U.S. 298 (1957), had held that advocacy of *(Le.,* incitement to) *future* action would be sufficient to sustain a conviction. In view of this confusion over the true meaning of *Brandenburg,* the most that can be concluded is that Whitney v. California, 274 U.S. 357 (1927), is no longer the law, a result which was previously forecast in Harris v. Younger, 281 F. Supp. 507 (N.D. Cal. 1967).

preme Court has held it necessary that the speaker advocate to others that they act, presently or in the future, to overthrow the Government by force." Thus, personal belief in the efficacy of violent overthrow, discussion with others of the merits of a philosophy that dictates the overthrow, and teaching of such doctrine do not constitute criminally punishable advocacy of the overthrow of the Government. The Supreme Court has indicated that the only form of advocacy that may constitute a constitutionally sustainable basis for separating a public employee from service on the basis of disloyalty is that form of advocacy that could be lawfully punished under the Smith Act." Therefore, The Judge Advocate General has taken the position thah paragraph 2–3(3), *AR 604–10,* which establishes advocacy of the violent overthrow as a criterion to be used in gauging disloyalty, can be used as a legally sustainable basis for rejection or elimination from the Army on loyalty grounds only when credible evidence indicates that the individual concerned has advocated to others that they act, presently or in the future, to effectuate the violent overthrow of the Government.[57]

B. *ORGANIZATIONAL ACTIVITIES*

Paragraph 2–3 (4) of *AR 604–10* sets forth membership in or affiliation or sympathetic associahion with a foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, fascist, communist, or subversive, or which has adopted, or shows a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution, or which seeks to alter the form

[55] Yates v. United Stakes, 354 U.S. 298 (1957).

[56] In Keyishian v. Board of Regents, 385 U.S. 589 (1967), two provisions of the New York Education Law and the New York Civil Service Law were held unconstitutional. The sections in part disqualified from the stake civil service and prohibited the employment in the state educational system of any person who advocated the overthrow of government by force, violence, or any unlawful means, or published material advocating such overthrow, or organized or joined any society or group of persons advocating such doctrine. The Court held the statute unconstitutional because of its overbroad scope. In so holding, the Court compared the statute in question to 18 U.S.C. § 2385 (1964), using the latter as an illustration of the *constitutional* limit to which expression could be curtailed under the first amendment, and it cited ***Yates*** in support of its proposition. Thus, the Court in effect held that advocacy of the overthrow could be considered a legitimate ground for discharge from state employment only if it were of the nature delineated by ***Yates.***

[57] JAGA 1968/4668, 27 Oct. 1968.

of government of the United States by unconstitutional means, as another criterion to be considered in administering the military personnel security program. Subparagraphs 2–3(7)–(9) of *AR 604–10* prescribe participation in the public activities of such organizations as other criteria to be used in gauging disloyalty. In order to determine the forms of organizational activity that form a valid basis for the taking of a loyalty action, it is first necessary to examine the types of organization the affiliation with which may be proscribed.

The organization must be considered subversive, which must be determined on the basis of the circumstances involved. Citation of an organization as subversive by the Attorney General of the United States is considered to constitute ***prima facie*** evidence of the subversive nature of the organization." The organization's ultimate goal must be an unlawful one, *i.e.,* to overthrow the established government by force or to forcibly deny others their constitutional rights." It must maintain a stable membership of sufficient size to move substantially, in the absence of interference, toward accomplishing its ultimate, unlawful goal." If the organization is a front for another organization whose subversive character is established, the front must be controlled and dominated by the parent organization." The organization must have an existence that is independent of individual personalities, *i.e.,* the organization must not be the creature of one man.[62] If the organization is divided into chapters or similar units, the particular unit under consideration must be an integral part of the national organization, following its directives and policies."

Although, as noted earlier, ***AR 604–10*** prescribes membership in, affiliation with, participation in the public activities of, or sympathetic association with a subversive organization as criteria meriting investigation, the actual organizational affiliations which constitute substantive bases for rejection or elimination are few. Applying the test established fur public employees by the Su-

[59] **AR 604–10,** subpara. 2–3(4). The problems associated with the Attorney General's list are well illustrated by the six opinions written in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

[60] AR 604–10, subpara. 2–3(4), quoting from Exec. Order No. 9835, *supra* note 37, at Part 111, para. 3.

[61] JAGA 1968/173, 19 Jun. 1968; JAGA 1967/426, 29 Dec. 1967.

[62] JAGA 1967/426, *supra* note 60.

[63] JAGA 19681173, *supra* note 60.

[64] JAGA 1966/460, 30 Jan. 1967.

preme 'Court, The Judge Advocate General has opined that the *only* form of organizational affiliation constituting a legally sustainable basis for rejection or elimination on loyalty grounds is *active, knowing membership* in the organization accompanied by *specific intent* to aid the organization in the accomplishment of its unlawful ultimate goal." Naked membership, or knowing but

[64] In 1952 the Supreme Court held unconstitutional a state loyalty oath law that denied public employment to all persons who were members of subversive organizations, holding that the statute made no distinction between innocent and knowing membership, thereby raising a conclusive presumption of disloyalty. Wieman v Updegraff, 344 U.S. 183 (1952). Twelve years later, the Court decided that knowing membership alone was an insufficient indicator of disloyalty. In Baggett v. Bullitt, 377 U.S. 360 (1964), the Court held unconstitutional a loyalty oath law proscribing knowing membership in a subversive organization because it prohibited not only subversive aotivity, but "guiltless knowing behavior" as well.

The Court defined "guiltless knowing behavior" in Aptheker v. Secretary of State, 378 U.S. 500 (1964). *Aptheker* found unconstitutional section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. § 785 (1964), which provided that it was unlawful for a member of a Communist organization to apply for a passport. The Court decided that the statute unnecessarily restricted the fifth amendment right to liberty to travel (*see* Kent v. Dulles, 357 U.S. 116 (1958)), by denying passports to members of subversive organizations who nonetheless had no *specific intent* to further the organization's *unlawful* goals. Thus, "guiltless knowing behavior" is knowing membership *unaccompanied* by specific intent to further unlawful objectives, and such behavior is constitutionally protected. Although the *Aptheker* decision rested upon the fifth amendment and dealt with passports, the Court employed broad language suggesting that its rationale was equally applicable to the first amendment. In Elfbrandt v. Russell, 384 U.S. 11 (1966), the Court adopted specific intent to further the organization's unlawful aims as an element necessary to a finding that an individual's knowing membership in a subversive Organization constituted activity not protected under the first amendment, and found a loyalty oath law which did not include ithe requirement of specific intent to be unconstitutionally overbroad. Requiring evidence of specific intent impliedly requires evidence of *unlawful* activity as well, for specific intent is difficult to gauge objectively, so participation in unlawful activities is the best indicator of specific intent to accomplish unlawful aims. The *Elfbrandt* 'Court impliedly recognized the necessity that evidence of unlawful activity exist.

Elfbrandt raised many questions in the mind of some writers as to its full scope, since it appeared to disregard certain older opinions of the Court (*e.g.*, Adler v. Board of Education, 342 U.S. 485 (1982); Garner v. Board of Public Works, 341 U.S. 716 (1951); Gerende v. Board of 'Supervisors, 341 U.S. 56 (1951)). Further, the decision did not appear adequately to consider the distinction between restrictions on employment and prosecutions for perjury for false completion of a loyalty oath (*see* Dombrowski v. Pfister, 380 U.S. 479 (1965) concerning the effect on exercise of first amendment rights of a threat of criminal prosecution for their exercise). Additionally, the case did not appear to consider adequately the nature of the state's interest in protecting itself against "subversive" persons. *See* Israel, *Elfbrandt* v. *Russell: The Demise of the Oath?*, 1966 SUP. CT. REV. 193 Most of them ambiguities were resolved in Keyishian v. Board of Regents, 385 U.S. 589 (1967). *Keyishian* made it clear that a state could

passive membership, are insufficient to constitute bases for rejection or elimination for the reason that the joining of any organization formed for the purpose of advancement of ideas by an individual not possessing military status would involve a constitutionally-protected exercise of freedom of association.[65] To go beyond the realm of freedom of association and into the realm of activities which can be lawfully restricted and which serve to evince an individual's disloyalty requires more than a showing of knowing membership, *i.e.,* awareness of the organization's unlawful goals. To say that a knowing member of an organization who ascribes to its lawful, but not to its unlawful, goals is disloyal because he is a knowing member of such an organization is to create a conclusive and irrebutitable presumption of disloyalty." Thus, since disloyalty is ultimately a state of mind, the element distinguishing activities in subversive organizations which are constitutionally protected from those indicating disloyalty are those indicating the element of specific intent to further the organization's unlawful goals, the fruition of which would result in the destruction of American constitutional government." This form of membership is the same form of membership that can

deny employment on loyalty grounds only if the individual had engaged in activities specifically delineated by *Elfbrandt. See* Comment, **43** IND. L.J. 462, **470** (1968). Public employment can therefore be denied to members of subversive organizations only if the member in question knows of the organization's unlawful goals and specifically intends to aid in their accomplishment.

[65] Keyishian **v.** Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966). *Elfbrandt, Keyishian,* and *Baggett* form the basis for a number of cases holding state loyalty oath laws unconstitutional. *See, e.g.,* Gallagher **v.** Smiley, 270 F. Supp. 86 (D. Colo. 1967) ; Georgia Conference of American Association of University Professors v. Board of Regents, 246 F. Supp. 553 (N.D. Ga. 1965).

[66] The dangers inherent in classing guiltless along with willful behavior are well illustrated in the opinion of Justice Douglas in Elfbrandt v. Russell : "Nothing in the oath, the statutory gloss, or the construction of the oath and statutes given by the Arizona Supreme Court purports to exclude association by one who does not subscribe to the organization's unlawful ends. Here as in *Baggett* v. *Bullitt, supra,* the 'hazard of being prosecuted for knowing but guiltless behavior' . . . is a reality. People often label as 'communist' ideas which they oppose; and they make up our juries. '[P]rosecutors too are human.' *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287. Would a teacher be safe and secure in going to a Pugwash Conference? Would it be legal to join a seminary group predominantly Communist and therefore subject to control by those who are said to believe in the overthrow of the government by force and violence? Juries might convict though the teacher did not subscribe to the wrongful aims of the organization." 384 U.S. at 16–17.

[67] Keyishian **v.** Board of Regents, 385 U.S. 589 (11967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Aptheker v. Secretary of State, 378 **U.S.** 500 (1964).

be lawfully punished under the so-called "membership clause" of the Smith Act (18 U.S.C. § 2385).[68]

Rejection or elimination on the basis of "sympathetic association" with a subversive organization is no longer legally sustainable." The Supreme Court has indicated that the constitutional freedom of association protects the association with *any* organization formed for the advancement of ideas.[70] Because the association is protected, the acts against which governmenit can protect itself are absent.

[68] Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961); Haskett v. Washington, 294 F. Supp. 912 (D.D.C. 1968) (concurring opinion of Wright, J.); Israel, *supra* note 64, at 226–27. The analysis used above has been succinctly restated in the following manner: "The implicit assumption in the first amendment association cases, therefore, is that the organization constitutes a clear and present danger of a substantive evil of legitimate legislative interest. Should the court decide that the organization's conduct does not satisfy this test, the judicial inquiry would never reach the free association issue. If a particular organization constitutes a clear land present danger, however, it must then be determined whether an individual's conduct arising from his association may be regulated. In other words, even though the organization is found to constitute a clear and present danger, the individual's association therewith may be constitutionally innocent, and therefore immune from governmental interference." Note, 57 CALIF. L. REV. 240, 244 (1969).

[69] JAGA 1969/82, 30 Apr. 1969, relying on *Elfbrandt, Robel,* and *Schneider v. Smith,* 390 U.S. 17 (1968). *Schneider* involved the validity of Presidential regulations implementing the Magnuson Act, 50 U.S.C. § 191(b) (1964), which authorized the President to establish a port security program to protect merchant vessels against sabotage and subversive acts by merchant seamen. The President, in promulgating implementing regulations, created a comprehensive personnel security program that, in addition to authorizing detailed inquiries into individuals' backgrounds and beliefs, created as a ground for denial of a license to serve as a seaman on merchant vessels "membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons designated by the Attorney General pursuant to Executive Order 10450, as amended." The Court held that Congress had intended to authorize the President to protect merchant vessels only against subversive acts and not to weed out ideological strays in the maritime industry. The Court held that Congress had not intended to authorize the President to interfere with the exercise of first amendment freedoms, for such an authorization would have raised grave constitutional questions of the type presented in Shelton v. Tucker, 360 U.S. 479 (1960). In *Shelton,* an Arkansas law requiring teachers to file affidavits listing all membership affiliations over a period of five years was held unconstitutional, on the ground that the Government's admitted interest in the activities of its employees did not permit it to use unbridled methods which served to stifle freedom of association. The language of the majority opinion in *Schneider* leaves no doubt that had Congress in fact authorized the port security program employed by the President, the Court would have found *Shelton* squarely on point.

[70] Schneider v. Smith, *390* U.S. 17 (1968).

It is essential to reemphasize that although disloyalty is a state of mind, government has no power to control the minds of its citizens. For this reason, evidence of activities which are the product of the state of mind is necessary to the taking of a loyalty action." Though the inquiry is as to the individual's thoughts, the governmental action is taken on the basis of his acts.

C. ASSOCIATION WITH INDIVIDUALS

Subparagraphs 2–3(11) and (12) of *AR 604–10* prescribe close, continuing association with an individual as a crikerion used in gauging subversive activity. It is believed that the constitutional freedom of association which prevents the taking of a loyalty action based upon "sympathetic association" with subversive organizations also prevents the taking of the action based upon close, continuing association with individuals." The taking of a loyalty action may not be based on the fact of association alone; evidence of activity is required.

Paragraph 2–3(10) of *AR 604–10* prescribes sympathetic association with a member of a subversive organization as another criterion to be used in gauging subversive activity. According to the regulation, the individual must sympathize with the subversive beliefs or activities of his associate.[73] As noted earlier," a loyalty action may not be taken on the basis of beliefs alone even though disloyalty is a state of mind; a loyalty action can be taken only on the basis of activities evincing the state of mind. Therefore, mere sympathy with an individual's beliefs cannot be considered a legally sustainable basis for rejection or elimination. However, it is believed that if the individual is not only aware of the subversive activities of the disloyal associate but acts with specific intent to aid the associate in the accomplishment of the associate's unlawful goal, a valid loyalty action would lie.[75] In

[71] See discussion accompanying note 51, *supra.*

[72] JAGA 1969/82, *supra* note 69.

[73] AR 604–10, para. 2–3(2).

[74] See discussion accompanying note 51, *supra.*

[75] JAGA 1969/82, *supra* note 69.

such a case, the action would be taken not because of the association but because of the acts which are the known and intended result of the association.'*

VI. THE SECURITY QUESTIONNAIRE

Refusal to complete the Armed Forces Security Questionnaire (*DD Form 98)* in its entirety constitutes an invocation of the constitutional privilege against self-incrimination and is not a basis for the taking of a loyalty action." For this reason, allegations of refusal to complete these forms are not prepared by The Judge Advocate General." However, refusal to complete these forms is a legally sustainable reason for declaring an individual ineligible for a security clearance.[79] Such an action constitutes a favorable closing of the case."

VII. VITALITY OF THE LOYALTY CRITERIA

It is evident from the foregoing discussion that the large majority of the criteria contained in paragraph 2-3 of *AR 604–10* do not constitute bases for rejection or elimination of an individual from the Army on loyalty grounds. The criteria were initially established at a time when considerable fear of communist infiltration of the federal government was extant and had a valid basis in the decisional law then in effect.[81] The consider-

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[77] *Id.* It is recognized that this formulation has no exact basis in decisional law. Rather, it is an amalgamation of principles gleaned from *Elfbrandt, Keyishian* and *Schneider,* which may or may not withstand constitutional challenge. The formulation reflects what is broadly termed "subversion"; however, as anyone who has wrestled with that term can attest, "subversion" is incapable of a legal definition, as it encompasses both lawful and unlawful action calculated to undermine and eventually destroy a government. For this reason, the individual's own actions must be tied to those of another whose disloyalty is clear, as in that way the legally impossible concept of subversion can be discarded in favor of the somewhat less impossible, but 'nonetheless universally accepted theory of conspiracy.

[78] JAGA 1956/18, 24 Jan. 1956. *See also* Uniformed Sanitation Men's Association v. Commissioner of Sanitation, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Slochower v. Board of Higher Education, 350 U.S. 551 (1956).

[79] JAGA 1969/90, 7 Apr. 1969.

[80] AR 604–10, para. 3–3d.

[81] JAGA 1968/406, 20 Dec. 1968.

[82] Wieman v. Updegraff, 344 U.S. 183 (1952); Adler v. Board of Education, 342 U.S. 485 (1952); Garner v. Board of Public Works, 341 U.S. 716 (1951); Gerende v. Board of Supervisors, 341 U.S. 56 (1951); American Communications Association v. Douds, 339 U.S. 382 (1950); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court,* 341 U.S. 918 (1951).

able growth in the constitutional law of loyalty since the establishment of the present military personnel security program is evident from the foregoing discdssion. This is not to say the criteria are without value, however. As *AR 604–10* itself states, the criteria are bases for investigation; the existence of information falling within the loyalty criteria is not a bar to acceptance or retention of an individual. The determination required under *AR 604–10* is that the individual's acceptance or retention in the Army is or is not clearly consistent with the interests of national security. The criteria are therefore valuable for **(1)** investigating an individual's background to determine whether a legally sustainable basis for rejection or elimination on loyalty grounds exists; **(2)** indiaating, together with evidence falling within those criteria that in fact constitute substantive bases for rejection or elimination, a pattern of conduct reflecting disloyalty; and **(3)** indicating, in the absence of such evidence, that the individual is untrustworthy and should not be permitted to hold a security clearance."

VIII. MISCELLANEOUS PROBLEMS

A. *CONFRONTATION OF WITNESSES*

Perhaps the most troublesome aspect of the military personnel security program is the fact that its operation is predicated on information which is normally obtained from faceless informants. The Supreme Court has several times been called upon to decide the question of whether use of information supplied by informants in a government loyalty or security program was unconstitutional per se, and the Court has persistently refused to answer the question. The closest it has come to deciding the issue is *Greene v. McElroy*.[83] In *Greene,* a challenge was leveled at the Department of Defense industrial security program based upon the claim that the revocation of Greene's security clearance, resulting in his loss of employment as an aeronautical engineer with a civilian defense contractor, deprived him of due process of law. Although the opinion of the Court discussed with some eloquence the high value placed upon the right to confront adverse wit-

[82] JAGA 1969/82, *supra* note 69. *See generally* Nelson *v.* County of Los Angeles, 362 U.S. 1 (1960); Lerner **v.** Casey, 357 U.S. 468 (1958); Beilan v. Board of Public Education, 357 U.S. 399 (1958).

[83] 360 U.S. 474 (1959). Cases in which the Supreme Court has specifically declined to answer the constitutional question include Vitarelli **v.** Seaton, 359 U.S. 535 (1959); Harmon **v.** Brucker, 355 U.S. 579 (1957); and Peters **v.** Hobby, 349 U.S. 331 (1955).

nesses," the Court did not decide whether a denial of this right in a security clearance revocation procedure was per se unconstitutional. Rather, it rested its holding upon the fact that neither Congress nor the President had specifically authorized the Department of Defense to deny employees of defense contractors the right to confrontation in security clearance revocation proceedings. Other than *Greene,* the closest that can be found to a Supreme Court ruling on the issue of confrontation of witnesses in loyalty proceedings is its affirmance without opinion (by an equally divided court) of *Bailey v. Richardson."* Bailey represented the first direct challenge to the loyalty prognam created under *Executive Order* 9835. The Court of Appeals for the District of Columbia, in a long opinion written over a sharp dissent, concluded that although the dismissal of a federal employee without affording that employee the opportunity to confront her accusers might be startling or even shocking, it was not unconstitutional.[86]

[84] "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of that action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . , but also in all types of cases where administrative and regulatory actions were under scrutiny.'' Greene v. McElroy, 360 U.S. 474, 496–97 (1959).

[85] **341** U.S. 918 (1951), *affirming* **182** F.2d **46** (D.C. Cir. 1950).

[86] Three substantive constitutional challenges were leveled at the loyalty proceeding held in Miss Bailey's case. First, it was alleged that she was denied the right to confront her accusers in violation of the sixth amendment. The court disposed of this allegation by stating that the sixth amendment applied only in cases involving "punishment," and that dismissal of a public employee was not punishment. Next, it was claimed that the dismissal was a violation of the due process clause of the fifth amendment. The court disposed of this contention by stating first that loss of government employment involved not life, nor liberty, nor property. The court further stated that dismissal from public employment without a judicial hearing was not constitutionally proscribed, as qualification for government service is a matter within the purview of the Executive. Finally, Miss Bailey claimed that the dismissal impinged her first amendment rights to freedom of speech and assembly. This contention was rather cavalierly dismissed with the observation that "[t]he situation of a Government employee is not different in this respect from that of private employees. A newspaper editor has a constitutional right to speak and write as he pleases. But the Constitution does not guarantee him a place in the columns of a publisher with whose political views he does not agree." **182** F.2d at 60.

Drawing a distinction between ***Bailey*** and ***Greene*** may at first seem impossible, but further examination reveals that the difference in result lies in what was then considered to be the nature of governmental employment. While ***Greene*** represented an intrusion by government into the private employment relationship by forcing termination of that relationship, ***Bailey*** represented an illustration of the philosophy that public employment was not a right, but was subject to certain reasonable restrictions on activity. Thus, under this philosophy, while government could never interfere with a private citizen's political activities, it could limit those activities on the part of federal employees.[87] It is safe to say that this restrictive view of the nature of governmental employment is no longer accepted by the Supreme Court, for it has recently stated that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.""[88]

Nevertheless, the rejection of this theory does not resolve the issue of denial of confrontation of witnesses in the context of the Army proceeding. If anything, it would appear that the issue is stronger as applied to the armed forces than it is to the public employment relationship for the reason that, in addition to severance from military status, discharge from the armed forces involves issuance of a certificate which not only characterizes that service but which is also the basis for statutory benefits." This special disability was recognized by the Court of Appeals for the District of Columbia in ***Bland v. Connally.***[90] In that case, Bland, an inactive naval reservist, was discharged from the Navy under other than honorable conditions after attempting, without success, to answer before a field board allegations that he had been a member of the Communist Party from **1947** to 1950. The ***Bland*** court applied the form of analysis used in ***Greene*** and concluded first that the Secretary of the Navy had no specific statutory authority to award a discharge under other than honorable

[87] See, *e.g.*, United Public Workers **v.** Mitchell, **330** U.S. 75 **(1947).**

[88] Keyishian v. Board of Regents, **385 U.S.** 605–06 (1967).

[89] 10 **U.S.C.** § 1168(a) (1964) provides: **"A** member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, **are** ready for delivery to him or his next of kin or legal representative." See U.S. DEP'T OF ARMY, GTA No. 21–2–1, June 1969, which is a chart setting forth all federal benefits (well over thirty) dependent in one respect **or** another upon a member's character of separation from an armed force.

[90] 293 F.2d 852 (D.C. Cir. 1961).

conditions premised upon associations or through use of secret evidence. The court thereupon stated that the issue was therefore not whether the Navy had the power to discharge its members, but whether it had the power to punish through the award of an adverse discharge. The court concluded that the Navy had been given no express statutory authority to issue such a discharge, and held that a discharge under other than honorable conditions could not be awarded to Bland under existing law based upon use of secret evidence."

The Army has officially taken a narrow interpretation of ***Bland.*** The ***Bland*** court repeatedly emphasized the lack of power to label Bland's discharge *from* ***the inactive naval reserve;*** applying this qualifying language to its fullest extent, the Army has taken the position that the ***Bland*** rule does not apply except in the cases of members of the inactive reserve.[92] The reason for this restriction on interpretation can be found in ***Brown v. Gamage." In*** that case, Gamage, a Regular Air Force lieutenant colonel, was separated from the Air Force pursuant to chapter 860 of title **10,** United States Code, which permits separation of Regular Air Force officers for moral **or** professional dereliction. Gamage was accused of falsifying weather reports. Four of the

[91] The court's rationale is certainly a strained one. Congress never specifically authorized such a procedure because Congress has always considered administrative discharge procedures to be internal matters of the armed forces. Thus, Congress has, with the exception of enactment of detailed provisions concerning separation of officers of the Regular Army, the Regular Air Force, and the Regular Coast Guard ***(see*** 10 U.S.C. chs. 359, **360,** 859, 860 (1964); 14 U.S.C. ch. **11,** subch. E. (1964)), provided extremely broad grants of authority to the Secretaries of the armed forces to determine the procedures surrounding administrative discharges. For example, 10 U.S.C. § 1169 (1964) provides only that "[n]o regular enlisted member of an armed force may be discharged before his term of service expires, except

"(1) as prescribed by the Secretary concerned;

"(2) by sentence of a general or special court martial; or

"(3) as otherwise provided by law."

Thus, the ***Bland*** court appears to have applied the ***Greene*** rationale to the military loyalty proceeding without considering the nature of military administrative discharges. Nevertheless, had the ***Bland*** court wished to find an expression of congressional policy, it could have done so by examining 10 U.S.C. §§ *3795* and 8795 (1964). These statutes outline the rights and procedures employed in the separation of officers of the Regular Army and Regular Air Force, respectively, for moral or professional dereliction or in the interests of national security, and they specifically authorize the Secretary to withhold records from the respondent in the interests of national security. They were enacted in 1960 (Act of 12 Jul. 1960, Pub. L. No. 86–616, **74** Stat. 389), one year prior to the ***Bland*** opinion.

[92] JAGA 1961/5670, 7 Dec. 1961.

[93] **377** F.2d 154 **(D.C.** Cir. 1967), ***cert denied,*** 389 U.S. 858 (1968).

five witnesses against him were not members of the active Air Force; the fifth was stationed in England at the time the proceeding against Gamage was held. These witnesses submitted *ex parte* statements; however, Gamage was unable to compel them to appear before the board of inquiry in his case, and he accordingly claimed that he was denied an opportunity to confront and cross-examine his accusers. The Court of Appeals for the District of Columbia reversed a District Court decision in Gamage's favor and ordered the suit dismissed. The court emphasized that the constitutional right to confrontation of witnesses applies only in criminal cases, and that in cases of separation of Regular Air Force officers Congress had guaranteed only a fair and impartial hearing and had not provided the board of inquiry with subpoena power to ensure the appearance of witnesses." Although the eourt appears to have rested its' reversal on the fact that Gamage could have requested the assistance of the Air Force in the taking of depositions from the absent witnesses and failed to, it appears also to place considerable weight upon the fact that Congress specifically guaranteed a fair hearing but just as clearly did not guarantee the right to confrontation nor provide the subpoena power by which such a guarantee would be enforced. The court appears to have been concerned that a holding that confrontation of witnesses before an administrative discharge board was a constitutiinal necessity would serve to emasculate the elaborate administrative discharge system created by ithe armed forces in the absence of all but the most general enabling legislation. For this same reason, the armed forces have been understandably reluctant to apply *Bland* to its fullest, for *Bland* has implications going far beyond the loyalty action.

It must be concluded that whether confrontation of witnesses is a *constitutional* necessity in the loyalty elimination proceeding in the Army has not been decided by any court." Neither *Green*,

[94] *See* 10 U.S.C. § 8792 (1464). It should be noted that two bills are presently pending before Congress which both guarantee members subject to certain elimination proceedings the right to confront adverse witnesses and extend subpoena power to administrative discharge hearing boards. *See generally* H.R. 943, 91st Cong., 1st Sess. (1969) (introduced by Hon. Charles E. Bennett), and S. 1266, 91st Cong., 1st Sess. (1969) (introduced by Hon. Sam J. Ervin, Jr.).

[95] The issue of denial of confrontation in federal loyalty proceedings is not likely to arise in the future except in the context of the armed forces. On 18 November 1965, the Chairman of the Civil Service Commission, at the direction of the President, advised all federal agencies that information supplied by confidential informants should not be used in employee discharge proceedings under Exec. Order No. 10450, *supra* note 36. To date the Department of Defense has not incorporated this instruction in the directive

Bland, nor *Brown* address this fundamental issue. While the *Bland* argument, that Congress has not given the armed forces the specific power to effect a discharge based upon secret evidence, would appear to have relevance to the military personnel security program, it must be considered in the light of *Brown* and the evident reluctance of that court to destroy the administrative discharge system, and in the light of *Bailey,* which, despite its age and the fact that it was affirmed without opinion by an equally divided Supreme Court, has not been overruled.

B. *CHARACTER OF DISCHARGE*

Another difficult problem posed by the elimination procedure established in *AR 604–10* concerns the type of discharge to be awarded in the event a member of the Army is eliminated thereunder. Any discussion of this problem must of necessity revolve around the Supreme Court decision of *Harmon v. Brucker.*[96] In that case Harmon was awarded less than an honorable discharge based upon pre-service activity. Harmon contended that the Secretary of the Army acted in excess of his powers; the Government contended that the determination of character of discharge rested solely within the purview of the Secretary of the Army and could not be reviewed by the Court, The Supreme Court, in a per curiam opinion, rejected the Government's argument and accepted the plaintiff's. The Court held first that a court could examine the Secretary's aat to determine if he exceeded his statutory powers, and then held that the statutes then applicable" required that the discharge issued by the Secretary characterize the service rendered during the period covered by the discharge on the basis of the member's record of service. Thus, as Harmon's discharge was characterized on the basis of pre-service activity, it was void.

The first significant case to construe *Harmon* is *Davis v. Stahr.*[98] Davis, an inactive Army reservist, was awarded an un-

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pertaining to the civilian employee security program, *see* DOD Dir. 5210.7, 2 Sep. 1966 (Change No. 4, 6 May 1969). As far back as 1957 the Wright Commission had recommended that confrontation of witnesses be provided in loyalty proceedings to the maximum extent possible, consistent with the protection of national security. *See* REPORT OF THE COMM'N ON GOVERNMENT SECURITY 140–44 (1957).

[96] *355* U.S. 579 (1958).

[97] Act of 4 Jan. 1920, § 1, subch. 11, 41 Stat. 809 (repealed by the Act of 2 Jan. 1968, Pub. L. No. 90–235, 81 Stat, 757); Act of 22 Jun. 1944, 10 U.S.C. § 1553 (1964).

[98] 293 F.2d 860 (D.C. Cir. 1961). As an alternate basis for its decision the *Davis* court applied the rationale used in *Bland,* which was decided by the same court on the same day.

desirable discharge based upon pre-service activity in the Communist Party which he did not disclose on his Armed Forces Security Questionnaire (DD *Form 98)* prior to induction. The court held that under the *Hamon* rule, Davis' failure to disclose his pre-service association with the Communist Party was irrelevant to the type of discharge he would be awarded for the reason that the conduct itself would be irrelevant to the discharge to which Davis would be entitled. This assertion appears to be clearly erroneous. The information Which Davis withheld was vital to a determination of whether he was eligible for retention in the Army. The intentional withholding of information which, if disclosed, would have required Davis' rejection from the Army pursuant to *AR 604–10* amounted to a procurement of his induction by fraud. As sudh, the continued withholding of this information *subsequent* to induction amounted to a continuing fraud upon the Army which most certainly reflected derogatorily upon the character of service rendered by him.

A recent case of significant import is *Kennedy v. Secretary* of *the Navy."* In that case Kennedy, an officer in the inactive Naval Reserve, was separated in 1952 under other than honorable conditions by reason of doubt cast upon his loyalty to the United States as evidenced by his membership in, attendance at meetings of, and contributions to the Communist Party. The case is factually distinguishable from *Hamon* in khat Kennedy's activities took place while he was a member of the Naval Reserve. The court stated, however, that "these activities were not reflected in the record of his naval service and there is no finding that they affected the quality of that service."[100] The court pointed out that the Navy made no finding of disloyalty and noted that Kennedy's associations left no discernible impact upon the service rendered or in the records of that service, The *Kennedy* court appears to hold, therefore, that character of discharge depends solely upon performance of *military duties.* This narrow construction of the *Harmon* rule undermines the very reason for which a discharge characterization is made, for the discharge for reasons not related to military proficiency is not permitted to reflect the reason for which it is awarded.

An alternate construction of *Kennedy* may be attempted. It is possible to construe the opinion as meaning that the basis for discharge may serve as the basis for the adverse characterization

[99] 401 F.2d 990 (D.C. Cir. 1968).

[100] *Id.* at 991–92.

only when that basis appears in the service record. If this construction is adopted, the issue of activities which may serve as the basis for adverse characterization when the characterization is not based upon the performance of military duties is dependenit upon what records pertaining to an individual are considered to constitute the "service record." Certainly, to limit the service record to the information contained in the enlisted or officer qualification record, or the military personnel records jacket, is to remove other official records, such as court-martial records, security dossiers (these being the primary records used in loyalty elimination proceedings) and other such important records from consideration. It is difficult to believe that the court meant to make discharge characterization dependent upon which file contains the information supplying the basis for discharge. If the concept of "service record" is taken to mean "all records pertaining to an individual's period of service," however, then the *Kennedy* rationale would appear to make sense except for the fact that, as applied to the case at hand, the award of a discharge under other than honorable conditions to Mr. Kennedy would appear to have been warranted (assuming that the information pertaining to Kennedy's activities was contained in *a* record maintained by the Navy on 'him). Due to these conflicting interpretations, it is not possible to divine the true meaning of the *Kennedy* opinion. Future judicial guidance will be required.

Assuming that *Kennedy* has the second meaning outlined above, the question arises as to what in-service activities may be considered as a basis for adverse disuharge characterization in the loyalty proceeding under *AR 604–10.* In this area judicial guidance is totally lacking. The Judge Advocate General has filled this void, and has opined that the only activities which may form a basis for an adverse characterization are those that would not be protected by the first amendmenit freedoms of speech, association, and assembly if the individual were a civilian employee.'"* As the loyalty action itself cannot be taken merely on the basis of constitutionally protected exercises of these rights, it follows that the discharge for disloyalty should not be characterized solely upon such an exercise.

IX. CONCLUSION

The courts have recognized that the armed forces have the power to reject or separate disloyal individuals.[102] Having under-

* **JAGA 1969/6,** *supra* **note 50.**

[102] **Bland** *v.* **Connally,** ***supra*** **note 91; Kennedy v. Secretary, 401 F.2d** 990 (D.C. Cir. 1968). ***See also*** **Van Bourg v. Nitze, 388 F.2d 557** {D.C. Cir. 1967); **Davis v. Stahr, 293 F.2d** 860 (D.C. **Cir.** 1961).

taken to apply the Supreme Court's mandates in the field of civilian employees to the military personnel security program, the Army recognizes that, in view of the freedoms of speedh and association,[103] the associations which can constitute the basis for the taking of a loyalty action are few, and the proscriptions must be narrowly drawn.[104] The Army has recognized that government may restrict freedom of association through the loyalty action only to the extent necessary to protect itself from those who would destroy it.[105] The broad latitude accorded this freedom must be constantly remembered during the adjudicative process, for the Government has the burden of establishing that an individual is disloyal,'" and a governmental process which brands an individual as being disloyal in the absence of evidence of disloyalty deprives the individual of due process of law in contravention of the fifth amendment.[107] A clear appreciation of this consideration should serve to insure that the loyalty action is never taken improperly.

CAPTAIN DAVID W. SCHOENBERG*

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[103] Shelton **v.** Tucker, 360 U.S. 479 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

[104] United States v. Robel, 389 U.S. 258 (1967); Whitehill v. Elkins, 389 **U.S.** 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Dombrowski **v.** Pfister, 380 U.S. 479 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

[105] Annot., 19 L. ED. 2d 1333 (1968); Note, *Loyalty Oaths,* **77 YALE** L.J. 739 (1968).

[106] Speiser **v.** Randall, 357 U.S. 513 (1958).

[107] Comment, 43 IND. L.J. 462, 463 (1968); *cf.* Heckler v. Shepard, **243** F. Supp. 841 (D. Idaho 1965).

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